

HONG KONG / JUDGMENT

HKSAR v. CHAN KA MAN

COURT

Court of Appeal

DECIDED

31 May 2007

CASE / FILE NUMBER

CACC254/2005

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Before: Hon Stuart-Moore VP, Stock JA and Barnes J Date of Hearing: 24 April 2007 Date of Judgment: 31 May 2007 J U D G M E N T Stuart-Moore, VP (giving the judgment of the Court):

Background

The applicant was convicted on 24 May 2005 on two counts of indecent assault (counts 1 and 4), one count of attempted rape (count 2) and one count of rape (count 3) following a trial before Deputy High Court Judge Line and a jury. He now seeks leave to appeal against conviction on each of these counts. Originally, the applicant had faced nine counts in a trial before Nguyen J. At that trial he was acquitted on five counts of a similar kind and the matter with which we are presently concerned was, therefore, a retrial on the four counts on which the original jury convicted the applicant. Those convictions were overturned by this court on 7 January 2005 (see: HKSAR v Chan Ka-man [2005] 1 HKC 162). The previous acquittals on five counts form an important part of the grounds of appeal with which we are now concerned. Essentially, the principal ground criticised Judge Line for having disallowed evidence to be called which would have established the earlier acquittals and which, in turn, the defence intended to use for the purpose of undermining the complainant's credibility. Other closely related grounds amounted to a complaint that the judge failed to direct the jury in such a way that the series of nine sexual offences originally alleged by the complainant, to which defence counsel had referred in cross-examination, was subject to the qualification that so far as five of these allegations were concerned the applicant had been acquitted by the jury in the previous trial. Before we turn to the grounds of appeal in more detail, it is necessary to examine the facts. The facts The complainant was an Indonesian domestic helper. She was aged twenty-one at the time of these events. She alleged a series of acts, amounting to varying degrees of sexual misconduct on the applicant's part, which she said had occurred at the applicant's home in Tsuen Wan between July and September 2002. These acts were entirely denied by the applicant both in interview with the police and in his evidence at trial. The complainant came to Hong Kong in June 2002 and began

working for the applicant and his wife at their flat on 26 June 2002. The other member of the household was their son who was then five years old. At that time, the applicant was unemployed whereas his wife was working and, consequently, was often away from home. The complainant went to the police on 16 September 2002. Shortly afterwards, in the early hours of 17 September 2002, the applicant was arrested. Briefly, the allegation in the 1st count of indecent assault was that the applicant, while alone in the flat on 15 July 2002, told the complainant to give him a massage on his bed. When he complained that she was not doing this properly he purported to show her how it should be done by massaging her, having forced her to lie face down on the bed. The complainant struggled but, despite her attempts to resist what he was doing, the applicant managed, amongst other things, to insert a finger into her vagina and to fondle her breasts. Later, he made her kiss his body and lick his private parts. The incident ended when it was time for the applicant's son to be collected from school. The complainant was told by the applicant not to tell anyone what had happened or he would send her back to Indonesia. In this context, it is significant that the complainant had agreed to pay the agency which had sent her to Hong Kong the wages from her first five months in employment as well as her airfare. This was payable by her even if she lost her job before five months had elapsed. The complainant said it was because she owed this huge debt to her agency that she did not immediately report the applicant's misconduct. At a time soon after the first incident, the applicant was watching a pornographic film on the television when he allegedly called the complainant into the sitting room to give him a massage. As she was doing this, the applicant suddenly turned round and touched her breasts whereupon, hoping that it would remind the applicant that he was married, the complainant said she was afraid of her lady employer. She was ignored and the applicant pulled and dragged at the complainant's clothes until she was left naked after a struggle. She was then given the option of sexual intercourse or oral sex. Afraid of losing her virginity, the complainant opted for oral sex. When he ejaculated, she vomited and soon afterwards the applicant collected a condom from his bedroom which he put on. Although this incident was described in the 2nd count as attempted rape, the complainant testified that she believed the applicant then penetrated her despite her attempts to stop him. She was then threatened in a similar manner to the first time. The rape alleged in the 3rd count was described by the complainant as having taken place on 30 July 2002 after she had collected the applicant's son from school. The applicant scolded his son and sent him to his room and then scolded the complainant for not doing her job properly. When he demanded oral sex, she reminded him that the boy was in the house but the applicant insisted and told her that he had installed a hidden camera in the flat and would send a recording of the previous incidents to her parents if she refused. She then succumbed to his demand. The applicant left the room and returned with a condom. Again the applicant removed the complainant's clothes and then allegedly raped her. The 4th and final count related to an alleged indecent assault on 16 September 2002. With similar threats from the applicant as before she again gave in to the applicant's demand for oral sex. Again, the applicant ejaculated. Some of his semen went into her mouth and some onto her clothes. She threw up and the applicant gave her some paper tissues. The applicant also wiped himself with a tissue. The applicant told her to wash her clothes and to give back the tissue she had used. However, she only returned part of the tissue, keeping the rest concealed. In doing this, she said she was following the advice she had

been given by a friend to collect evidence. Later, the complainant smuggled the used tissues and her wet clothes out of the flat in a rubbish bag. She telephoned her friend and duly made a report to the police which was recorded as having occurred at 11.18 pm that same day. In cross-examination, the complainant denied the suggestion that she had falsely accused the applicant because she disliked either the applicant himself or, alternatively, her job and was thereby hoping to find better employment elsewhere in Hong Kong. It was an admitted fact under section 65C of the Criminal Procedure Ordinance, Cap. 221, that the complainant had provided to the police two lumps of tissue paper (exhibit P25) and some wet clothing. These were subsequently tested for semen staining and compared with a DNA sample taken from the applicant. A Random Match Probability (RMP) test was later conducted. This was admitted to refer to the probability that a randomly selected person in the local Chinese population unrelated to the possible donor would have to the same DNA types of interest, or the same DNA typing. In the result, the DNA obtained from the semen on the tissue paper, exhibit P25, when compared to the applicant's DNA had an RMP of 1 in 28 billion. The judge's summary of the applicant's interviews with the police provides a convenient description of the account given by the applicant following his arrest at 12.20 am on 17 September 2002. We shall set out parts of this account taken from the judge's summary to the jury as the applicant chose not to testify in his own defence at trial. Amongst other things, the judge said: In the first interview, he agreed that it was he who instructed [the complainant] in her duties; that she did massage him, but only on his back, and with his wife's knowledge; that he did watch some Category 3 films, but he never asked her to watch them; that there were condoms in his home as his wife had missed a contraceptive injection for the month of August and his wife had purchased one packet then and that he had bought the second packet from his old home. He spoke about the events of 16 September saying that he dropped [the complainant] and his son back home sometime after 2 o'clock; that he went to do a delivery job and was back home sometime after 4 o'clock; that he had made a telephone call home and found out his son had spent a long time in the shower; that this made him angry and that he scolded [the complainant] over the telephone and continued to do so when he returned home; that he did not drive directly home but he drove by the Shing Mun Reservoir in order to calm down; that after eating a meal at home, he went on scolding his maid and ordered her to hand over \$450 to his son which he later returned to her; that he further told her off for dropping some chopsticks in the kitchen and that he then took a shower during which time she had left the flat, never to return. He said that he had rebuked her or told her off on many occasions and had been very fierce at times. He agreed to give a sample for investigation and he said that he did not know what evidence she had but it was the case that he had sex with his wife without using a condom and the tissues used after sex were thrown in the rubbish bin at his home. He also volunteered mention of the incident when he punished [the complainant] by making her stand. He said that he told her to stand and not lean on anything whilst he went off to sleep, adding that Whores out there in Mong Kok leant on things. He said that he had possibly gone a bit too far on several occasions. He said that the person in charge of the agency had telephoned him and asked him if he had interfered with [the complainant] and that he had no idea what was meant by that. The beginning of the second interview reveals the defendant saying that he had a good relationship with his wife, enjoying intercourse with her once or twice a week; that they did not usually use

condoms as they relied on contraceptive injections and repeating that his wife had missed the injection in or about August and repeating where the condoms had come from. He was asked when he had last had sexual intercourse with his wife. He said it was on Saturday, 14 September but that he did not complete the sexual intercourse as his wife felt pain and that he had thus gone into the sitting room and masturbated there. He was closely questioned about how he cleaned himself up, what he used to do so, and where he had got it from, and where he put it. You will remember that the defendant was then shown some exhibits in the videotaped interview and that he said that he wanted to mention that [the complainant] had lodged a complaint once before and he then spoke about the occasion in August when [the complainant] had claimed that he had thrown her out. He asked her to stand. He said that the agency had phoned him relating a complaint by [the complainant] that he had harassed her. When asked what the harassment was, he said he did not know and, in the same breath, mentioned her claim that he had thrown her out. The incident ended with an agreement, according to him, involving the agent to the effect that he, the defendant, would never harass her again and never scold her so loudly again. It is thus that the complaint he spoke of [the complainant] making does not appear to be of a sexual nature. Of course, [the complainant] never claimed to have made a complaint of a sexual nature at this time to the agency. The remaining matters in the second interview I shall point to are the claims the defendant made to the effect that [the complainant] was a poor worker who forgot things, knocked the fan over, poured water in the street, made mistakes, and had accidents all the time. He said that perhaps she could not put up with all the consequent scolding. In the two interviews, he denied any sexual activity with [the complainant]. He made no admissions. He confessed nothing. (Appeal bundle pp. 18-20) Although the applicant did not give evidence, his wife did so. She was able to say that she had seen nothing to indicate anything untoward in the relationship between the complainant and the applicant. She made reference to a small present which the complainant had given to the applicant on his birthday. She knew the applicant scolded the complainant but had done nothing about finding a replacement for her. More significantly, she described a happy sex life with the applicant and she confirmed the account he had given to police about the condoms which were kept at their home. She also spoke about the last time they had had sexual intercourse. This was, she said, on 14 September 2002, when she had experienced some pain as a result of which they had stopped halfway through. However, the details she gave in this respect materially differed from her witness statement made very soon after the event wherein she had stated that the last time she had had sex with her husband was around the 12th or 13th although she was unable to recall exactly. She had made no reference to any interruption caused by pain. The applicant's wife, in cross-examination, denied that she had made up a story to fit in with the account given by the applicant. Grounds of appeal When this application originally came before the court on 17 May 2006, the applicant was unrepresented. In a homemade ground of appeal, the applicant referred to the fact that at trial the jury had heard evidence from the complainant that there had been more sexual assaults on her than the four counts of the indictment which the Court of Appeal had ordered should be retried. There were at that time only very limited transcripts available but plainly this assertion was correct as, in the course of his summing up, the judge had stated that the complainant had said that, in all, there had been nine incidents between 15 July and 16 September 2002 when the defendant had sexually

molested her . As a result of this, further transcripts were ordered by this court and, later, a letter was sent to the Department of Legal Aid together with almost 200 pages of additional transcripts inviting a possible reconsideration of the original decision not to grant legal aid to the applicant. In due course, Mr Ross, who did not appear in the court below, was instructed and now appears on the applicant s behalf in these proceedings. His grounds of appeal reflect the concern we had earlier expressed at a time when we did not have the benefit of the further transcripts. The grounds read as follows:

1. The learned judge erred by
 - (a) directing the applicant not to adduce evidence of his acquittals of 4 sexual offences alleged by PW1 on her when, for the purpose of undermining PW1 s credibility, the applicant adduced in evidence details of those offences
 - (b) failing to secure to the applicant the full benefit of his acquittals by not directing the jury that
 - (i) the jury was bound to accept the verdict of the acquittals as the only possible view of the evidence relating to those 4 offences (ii) the applicant was to be taken to be entirely innocent of those 4 offences (iii) the jury that acquitted the applicant found that at least a reasonable doubt existed as to at least one element of each of those 4 offences. [Bundle pp. 14T, 461F, P, 517K-N, 535H-L]
2. The learned judge erred in failing to direct the jury that they could not rely on evidence of 4 sexual offences alleged by PW1 on her but not contained in the indictment as showing a propensity to commit 4 sexual offences for which the applicant was indicted and convicted
3. The learned judge erred in failing to direct the jury not to make use of the evidence of complaints by PW1 of 8 sexual offences as evidence of the facts complained of or as evidence to support the creditworthiness of PW1. [Bundle 12 O-13 A] Mr Ross explained that he had referred in ground 3 to eight sexual offences and in his earlier grounds to four acquittals because he thought that, strictly speaking, the jury had only heard evidence of four other offences in addition to those on the indictment before the jury. Whether or not that is so, the jury would have been well aware from trial defence counsel s cross-examination that he was talking about five offences and the judge, as we have said, later endorsed this in the summing up. Mr Ross view was that this was a matter of no consequence and we propose, therefore, to proceed on the basis that the jury were aware that the complainant had originally made five other complaints of either rape or indecent assault. Although in his written submissions Mr Ross went into considerable detail about the law relevant to the points he had raised, we do not feel that it is necessary in the present circumstances to deal with these submissions in any depth as the legal position in Hong Kong with which we are presently concerned is plain. It arises from the decision of the Court of Final Appeal in HKSAR v Wong Sau-ming [2003] 6 HKCFAR 135. Indeed, it is clear from the additional transcripts that the trial judge was well aware of the legal principles which were applicable and he spelt these out at the time he made the ruling which

prohibited counsel for the defence at trial from leading evidence about the fact that on five counts the applicant had been previously acquitted by a jury. Crucially, there was one matter which plainly stood out from the result in the earlier trial. This was that in the first trial the jury had neither implicitly nor explicitly disbelieved any part of the complainant's evidence. This is so because the same jury which had acquitted the applicant on five counts had convicted him on four others and all nine of the counts were dependent upon the word of the complainant. Implicitly, therefore, it seems that the jury in the earlier case was unsure about some of the allegations but sure about others. In *Wong Sau-ming*, the prosecution's case depended on the evidence of a police officer who alleged that he had found drugs on the appellant following a surveillance operation he had conducted with others. This evidence followed a very similar pattern to the testimony given at an unconnected trial also concerning trafficking in drugs, which was committed within weeks of *Wong Sau-ming*'s trafficking offence, where the same police officer stated that he found drugs on the defendant. Both cases were fought along similar lines and in both there was a denial of being in possession of the drugs allegedly found by the officer. In the magistrate's findings in the latter case, he stated that the prosecution's evidence gave rise to some dubious points in the case as the result of which he gave the defendant the benefit of the doubt and acquitted. At *Wong Sau-ming*'s trial in the High Court, the trial judge permitted cross-examination about what had happened in the case before the magistrate but his directions to the jury as to how they should approach this evidence were criticised on appeal. Li CJ, giving the majority judgment in the Court of Final Appeal in *Wong Sau-ming*, described the appeal as one which raised questions concerning the proper limits of cross-examination as to credit in a criminal trial. Turning to a situation giving rise to cross-examination about a previous acquittal, Li CJ said:

30. Where in the situation in question, it is sought to cross-examine a witness by reference to an acquittal in a previous case, two main difficulties arise. The first difficulty is the meaning to be attributed to the verdict of acquittal. Although in the situation in question, the prosecution's case in the previous case depended essentially on the evidence of the witness in question, the court would have been bound to acquit unless it was satisfied beyond reasonable doubt on the whole of the evidence that the defendant was guilty of the offence charged. In acquitting, the court may not have found that the witness had lied. Unless in acquitting, the court had found that the witness had lied (or, which amounts to the same thing, the court had disbelieved the witness), the acquittal could not properly be regarded as relevant to the veracity of the witness in the instant case. It would not have a sufficiently material impact on the court's assessment of his veracity.
31. Secondly, even where the acquittal in the previous case involved a finding that the witness in question had lied, that finding may have been in circumstances of such a different kind or may be so remote in time as to render it irrelevant in the instant case. Again, such a previous finding would not have a sufficiently material impact on the court's opinion on his veracity.

32. In principle, in order to satisfy the test of relevance, cross-examination as to credit on the ground of veracity by reference to an acquittal in an earlier case should only be permitted where the following threshold requirements are met: It must clearly be established that:
- (1) The verdict of acquittal in the previous case involved a finding by the court that the witness in question had lied (or which amounts to the same thing, that the court had disbelieved the witness); and
 - (2) The circumstances of the previous case are of such a kind when compared to those in the instant case and the previous finding is not so remote in time that the finding of lying in the previous case would materially affect the court's assessment of the witness's veracity in the instant case. Unless these requirements are satisfied, cross-examination by reference to the acquittal in the previous case should not be permitted.
33. Whether the first threshold requirement is met depends on an examination of the verdict of acquittal in the context of the issues in the earlier case. A jury verdict would ordinarily be a non-speaking verdict, so that the respective reasons of the several jurors leading to their unanimous or majority verdict cannot be ascertained. The verdict is opaque. That being so, it would only be in very exceptional circumstances that a jury verdict would be able to meet the first requirement; for example, where the jury expresses its view that the witness in question had lied in a rider to its verdict. Similar considerations may apply to a verdict of acquittal given by a judge sitting alone where no reasons or virtually no reasons are given. But where a judge sitting alone acquits and gives reasons, those reasons should be examined in the context of the issues to decide whether a finding was made that the witness in question had lied.
34. As to the second threshold requirement, assuming a previous finding of lying could be established, the circumstances of the previous case must be of such a kind when compared to those in the instant case and the previous finding must not be so remote in time that the previous finding would materially affect the court's assessment of the witness's veracity. Otherwise, the previous finding would not be relevant to the cross-examination as to credit.
35. In coming to a judgment, all the circumstances have to be considered. In considering whether the circumstances are of the kind referred to, all the circumstances of the two cases have to be considered. The circumstances to be examined cannot be exhaustively defined. They may include matters such as the nature and types of offences, the nature of prosecution's case, the modus operandi of the witness, and the allegations made against the witness by the defence. The question of remoteness or proximity in time has to be taken into account. In the event, the Court of Final Appeal held that the trial judge ought not to have allowed cross-examination of the police officer by reference to the acquittal resulting from the trial before the magistrate as the first threshold requirement had not been met. Before Judge Line made his ruling in the present case, he crystallised the position outlined by the defence. This had been that counsel wanted the jury to know that this was a retrial and for the jury to be fully acquainted with what had happened in the earlier trial including not only

the acquittals but the convictions also, by what majority the applicant had been convicted and the questions asked by the jury in the course of their deliberations. The judge observed that the applicant was wanting the jury to adopt the view that because those people [on the previous jury] did not act on [the complainant's] word, [they] should not act on her word. Although the applicant's counsel agreed that he was hoping to use the acquittals as a basis for suggesting that the complainant had been disbelieved in the previous trial, in fairness to him it must be added that he appreciated the weakness of his position in the light of the judgment in Wong Sau-ming. Plainly, as counsel recognised and accepted, the jury's verdicts in the earlier trial fell far short of material capable of satisfying the first threshold requirement because there was nothing to show that the complainant had lied in her earlier testimony. How then did any reference to nine allegations come to be before the jury? We shall deal with this, albeit briefly, in the context of the 2nd and 3rd grounds of appeal. It suffices to say at this stage that defence counsel chose, in spite of the judge's ruling, to make reference to all the offences which the complainant had originally alleged even though he was not able to refer to the acquittals. His justification was that if no less than nine separate offences were being alleged between 15 July and 16 September 2002, the jury might consider that the complainant would hardly have waited until mid-September before making any report to the police. In this sense, therefore, counsel was attempting to conduct what amounted to a greatly watered-down attack on the complainant's credibility. Mr Ross described trial counsel as having effectively had one arm tied behind his back as the result of the judge's ruling. He sought to distinguish the decision in Wong Sau-ming from the position which had arisen in these proceedings by submitting that the cross-examination in Wong Sau-ming's case involved no danger that the earlier allegations against the principal witness would raise allegations of bad character [against that appellant] because, in that case, the acquittal adduced in evidence had involved a defendant in another case altogether. Mr Ross argued that, in the present case, the allegations made by the complainant in the earlier trial were per se relevant because they also involved allegation[s] of sexual offences by the applicant while he employed [the complainant]. As these allegations were referred to by defence counsel in an endeavour to undermine the complainant's credibility and reflected on the applicant himself, Mr Ross contended that counsel should have been allowed to adduce evidence about the outcome of the other five allegations which did not feature on the jury's indictment. Trial defence counsel, it goes almost without saying, was well aware of the position he was in when, without warning, he embarked on cross-examination of the complainant about the nine incidents of which the complainant had originally complained. He was quickly stopped by prosecuting counsel and, in the jury's absence warned by the judge, of the fine line he was treading. Thereafter, on strict conditions, counsel was permitted to continue his cross-examination provided he made sure that, in keeping with the judge's ruling, he avoided any reference to the previous acquittals or to the earlier trial. Mr Ross further contended in his 1st ground of appeal, which we have set out in full already, that the jury was bound to accept the verdicts of the acquittals as the only possible view of the evidence relating to those [5] offences and that the applicant was to be taken to be entirely innocent of those [5] offences. He based this argument upon what

was said in *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458. There was, again, nothing new in this submission as it had been discussed in the court below. There, the judge had commented that *Sambasivam* had been qualified by the judgment given by the House of Lords in *R v Z* [2000] 2 AC 483, aptly remarking that the reasoning in *R v Z* is compelling, and it fits very happily with the approach in *Wong Sau-ming*. In short, it was stated by Lord MacDermott in *Sambasivan* (at page 479) that: The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. Rightly, the trial judge ruled that this was qualified by the House of Lords in *R v Z* where Lord Hutton stated (at page 504): I consider that provided that a defendant is not placed in double jeopardy evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted. Therefore I think that in the relevant passage of Lord MacDermott's judgment, at p. 479, the second sentence commencing To that it must be added requires the qualification which I have ventured to state. Reading from the headnote in *R v Terry* [2005] 3 WLR 379 where *R v Z* was applied, it was held, dismissing the appeal, that: an acquittal was not conclusive evidence of innocence except to the extent that the word innocent meant not guilty of the offence to which it related, nor did an acquittal mean that all relevant issues had been resolved in favour of a defendant; that if evidence was relevant and admissible, there was no reason for distinguishing between different types of evidence for that purpose; that the critical questions were whether the evidence in question, whatever its species, was admissible as relevant to an issue in the case and whether it was fair to admit it; that the double jeopardy rule was to be distinguished from the admissibility of evidence of facts alleged in respect of another charge notwithstanding that it resulted in an acquittal; and that, accordingly, the judge had been right in holding that the acquittals, though potentially relevant and admissible to the issues before the jury, did not oblige him to direct the jury in relation to those issues that they were conclusive evidence that the defendant had not committed the alleged offences to which they related (paras 43, 45, 46, 54-55). We do not consider it necessary to concern ourselves with further English decisions or to those from other common law jurisdictions to which Mr Ross also referred. We are satisfied that we are bound by the decision in *Wong Sau-ming* and that there is no logical or sensible distinction to be made between the situation which arose in that case when compared with the present. We should add, for the sake of completeness, that we were invited by counsel to await an English translation of the judgment in *HKSAR v Lau Tung-ping*, CACC 292/2005 in case this threw any additional light upon the matter. On 9 May 2007, we received the translation and, on 12 May 2007, Mr Ross provided us with further written argument as he had been invited to do. We have taken his further submission into account in coming to the conclusion that *Lau Tung-ping* provides us with no assistance. There, having been alerted to Li CJ's judgment in *Wong Sau-ming*, the trial judge had allowed cross-examination of a complainant about the appellant's acquittal on four counts at an earlier trial. Woo V-P, giving

the judgment of this court, said (at para 19): Since Pang J permitted the cross-examination, the defence would be led to firmly believe that Pang J would continue to follow the guidelines in Wong Sau-ming by giving the jury a direction that the complainant was found to have lied, thus benefiting the applicant. If the case were not so conducted, the defence would most probably choose not to refer to the circumstances in the first to fourth counts so that the jury would not have knowledge of the allegations in those four counts and any possible prejudicial effects to the applicant could be avoided. It was because defence counsel had been misled, albeit inadvertently, about the approach which the trial judge had in mind when the judge allowed the cross-examination about the earlier acquittals, that the appeal in Lau Tung-ping was allowed. In the event, the judge declined to give a direction that the complainant had lied in the earlier trial. The court held that the cross-examination with specific reference to the acquittals should not have been allowed because the threshold requirements in Wong Sau-ming had not been satisfied. However, in spite of this, as the defence had not been alerted to the directions the judge was minded to give until after the complainant had been cross-examined about the acquittals, it was held that the presentation of the defence had been prejudiced. In effect, therefore, the court was saying that the defence might well have been conducted differently if there had been an indication from the judge about the approach he was intending to take earlier in the proceedings. In the present case, the position had been made abundantly clear by Judge Line and defence counsel was left under no misapprehension as to how far he could take his cross-examination. For the defence to have been permitted to lead evidence of the acquittals, as the trial judge had observed in the course of argument, is thus to do no more than lead evidence of [the previous jury s] opinion of the evidence before them. Such evidence of opinion is inadmissible . The position would doubtless have been different if the prosecution had had to rely on some or all of that evidence as part of the *res gestae* or, in other words, as part of the facts which was so closely connected to the issue before the jury that it was, for example, necessary for the purpose of giving a proper explanation for what occurred. Here, however, this was plainly not the situation. It follows, therefore, that we are in agreement with the judge s ruling at trial that evidence showing that the applicant had been acquitted on some of the counts in his earlier trial was inadmissible and could not be adduced. Accordingly, the 1st ground fails. The remaining criticisms of the judge s handling of the case, which are to be found in the 2nd and 3rd grounds of appeal, each relate to alleged failures on the judge s part to direct the jury about the approach they should take to the additional allegations made by the complainant which did not feature on the jury s indictment. These are matters we do not need to dwell upon in depth. Trial defence counsel had proceeded to ask a question in cross-examination of the complainant about a total of nine incidents when, very sensibly, prosecuting counsel had suggested that it might be an opportunity to take a break in the proceedings. The question had been asked without advance warning and prosecuting counsel had good reason to be concerned from the phraseology of defence counsel s question that the judge s ruling was about to be breached by reference, at least implicitly, to the acquittals in the earlier trial. Defence counsel assured the judge that he was merely concerned to show that the complainant s allegations were more in number than those

appearing on the jury's indictment and that the allegations as a whole were untrue as she did not have to wait to 16 September [to make her first complaint]. The judge referred to this in his summing up, commencing with the passage which led us originally to think that legal aid might be warranted because of the reference to nine incidents when the jury would normally only have been aware of the four on the indictment before them. The judge said: [The complainant] said that, in all, there had been nine incidents between 15 July and 16 September 2002 when the defendant had sexually molested her. It was pointed out to her, therefore, that there was ample reason and opportunity to complain to the police before 16 September. (Appeal bundle pp. 14-15) The directions which Mr Ross submitted should have been given to the effect that, having heard about additional allegations of sexual offences, the jury should have been told not to view this material as showing a propensity to commit such offences would, in the circumstances, have been meaningless and, probably also, counter-productive when it had been at the instigation of the defence that this material was before the jury at all. Ground 2 was misconceived. The 3rd ground, relating to the directions about the complaint made by the complainant to her friend, Siti, was unjustified. Mr Ross submitted that the judge had failed to direct the jury not to make use of the evidence of complaints by the complainant as evidence of the facts complained of or as evidence to support [her] creditworthiness. This is what the judge said: The fact that [the complainant] told Siti these things is part of her story. If she were to omit telling you this, it is possible you might doubt her story because she did not do something you would reasonably expect, in the circumstances, such as confide in her only friend in Hong Kong. However, the fact of her repeating her allegation does not make her any more believable, otherwise witnesses would be able to go round improving their standing by merely repeating to people that which they end up telling you, the jury. So the fact that she has said so before does not make her any more believable. It is what you make of her story now that matters. (Appeal bundle p.

- 13) (Emphasis added) In the circumstances of this case, the direction was, in our opinion, entirely appropriate. Ground 3 was bereft of merit.

Conclusion

The application is dismissed. (M. Stuart-Moore) Vice-President (Frank Stock) Justice of Appeal (Judianna Barnes) Judge of the Court of First Instance Mr Simon Tam, SGC, of the Department of Justice, for the Respondent. Mr Phillip Ross, instructed by Messrs Lo Wong & Tsui, assigned by Director of Legal Aid, for the Applicant. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F 1udk 1udk "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0("0) "0* "0+ "0, "0- i\$&`G Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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