

HONG KONG / JUDGMENT

HKSAR v. CHENG WUI YIU

COURT

Court of Appeal

DECIDED

21 December 2007

CASE / FILE NUMBER

CACC532/2004

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bjbj 0-zC n nomacro Applicant

Before: Hon Stuart-Moore VP, Yeung JA and Suffiad J Dates of Hearing: 6 and 7 December 2007
Date of Judgment: 21 December 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP
(giving the judgment of the Court):

Background

On 8 December 2004, following a trial before Lunn J, the applicant was convicted by a jury of conspiracy to murder, contrary to section 5 of the Offences Against the Person Ordinance, Cap. 212 (count 1) and conspiracy to assist a person to retain the proceeds of an indictable offence, contrary to Common Law and section 25(1) and (5) of the Organized and Serious Crimes Ordinance, Cap. 455 (count 2). On the following day, the applicant was sentenced on the 1st count to life imprisonment and the judge ordered that he should serve, pursuant to section 67B of the Criminal Procedure Ordinance, Cap. 221, a minimum of term of 22 years. On the 2nd count, the applicant received a concurrent term of 5 years imprisonment. The applicant now seeks leave to appeal against conviction and sentence. The events with which we are concerned commenced over thirteen years ago and culminated in the murder of Tommy Chui To-yan (Tommy Chui) on or about 29 March 1995. The particulars of count 1 alleged that, between 1 August 1994 and 1 April 1995, the applicant conspired: with Cheung Wai-ming (Cheung), Cheng Hing (also known as Billy), Lee Yiu-man (also known as Ah Man), Wong Kwong-kai (also known as), Tin Sau-kwong () and other persons to murder Tommy Chui To-yan (Tommy Chui) in Singapore. In the 2nd count, the particulars alleged that the applicant and Chung Ping-shing (D2): conspired together and with Tin in Hong Kong, to be concerned in an arrangement whereby the retention or control by or on behalf of Cheung of Cheung s proceeds of an indictable offence was facilitated, knowing or having reasonable grounds to believe that Cheung was a person who [had] committed or [had] benefited from an indictable offence. The jury acquitted D2 on this count. In these proceedings, which have been substantially delayed by a number of adjournments at the applicant s request, we are now only concerned with one ground of appeal advanced by Mr Bruce

SC on the applicant's behalf. In essence, he submitted that the conviction of the applicant on each count was unsafe or unsatisfactory having regard to evidence of a conspiracy to pervert the course of justice in which Cheung Wai-ming (Cheung), the principal prosecution witness, was involved. This allegation only came to the notice of the prosecution and defence after the conclusion of the trial. The newly acquired evidence was said to come from two witnesses who were first brought to this court's attention on 2 August 2005. The matter was then adjourned and later set down for a two-day hearing on 18 and 19 July 2006 when Ng Wai-man (Ng), the main witness it had been intended to call for the applicant, failed to make an appearance. The matter was again adjourned. The next fixture date was 28 March 2007 but again the matter was adjourned at the defence request when it was clear that Ng would not attend on that day. Thereafter, the matter was duly set down for hearing on 6 and 7 December 2007 when, pursuant to the affirmations of two witnesses, Ng and Kay Sik-hong (Kay), it was originally intended that both should be called in support of the allegation against Cheung Wai-ming. Before going more deeply into the evidence which was eventually called on the applicant's behalf, it is convenient, firstly, to look at the nature of the prosecution's case in general terms. We shall then provide a detailed account of the fresh evidence which was before us *de bene esse* for the purpose of assessing its weight. Prosecution's case In 1993, the ICAC conducted an investigation into the illegal smuggling of cigarettes and the offering of bribes to customs officers involving, amongst others, Tin Sau-kwong () and Tommy Chui. In April 1993, Tommy Chui left Hong Kong and took up residence in Singapore. In March 1994, various people, including Tin, were arrested in Hong Kong by the ICAC. Tommy Chui, who was at that time still in Singapore, agreed to assist the ICAC and later provided them with witness statements. Charges were laid against Tin and others and committal proceedings, at which Tommy Chui was to have attended as a witness, were set down for 26 April 1995. However, on 1 April 1995, Tommy Chui's body was found in the sea near Clifford Pier in Singapore. He had been murdered. On 18 May 1994, Tin had a meeting with Tommy Chui's brother-in-law after which the brother-in-law flew to Singapore to search for Tommy Chui in order to warn him that he was in danger. He intended to advise Tommy Chui to hide in a foreign country and to instruct lawyers to withdraw his statements to the ICAC. Cheung was the prime witness for the prosecution at the trial of the applicant. Cheung testified that he, together with the applicant and Wong Kwong-kai (), Cheng Hing (Billy) and Lee Yiu-man (Ah Man) were all members of the Wo On Lok triad society. In late October 1994, the applicant approached Cheung for what was said to be assistance in the collection of a large debt from a Taiwanese man in Singapore. The plan for the debt collection was later altered, on the applicant's instructions, to the abduction of the Taiwanese man. Then, eventually, the plan was changed to one where the man would be killed. In response to these instructions, Cheung said that he flew to Singapore on six occasions between 27 October 1994 and 27 March 1995. The applicant made five trips to Singapore during the period of the conspiracy. On the last two trips, the applicant travelled to and from Singapore on the same day as Cheung. The return flight for the 4th trip, on 23 March 1995, also involved two other alleged conspirators, Ben and Billy. The 5th trip, on 27 March 1995, was also undertaken by the applicant accompanied by Ben and Billy as well as Cheung. All four of them, together with Ah Man and his girlfriend, returned to Hong Kong on 30 March 1995. During the latter part of the conspiracy, two or more of the five named conspirators, not including Tin,

were living in a rented flat in Singapore. On the last trip made by the applicant and Cheung to Singapore, they were able to find out that Tommy Chui's wife was opening a business on 29 March 1995. They also managed to locate Tommy Chui having, prior to this, been unable to find him. Some of the conspirators, aside from their surveillance work, stole a car, altered its registration plates and bought other equipment in preparation for the fulfilment of the conspiracy. On the morning of 29 March 1995, at the carpark where Tommy Chui kept his Porsche, the applicant, Cheung, Billy, Ben and Ah Man, staged a collision between the car they had stolen and Tommy Chui's Porsche as he was attempting to drive it away. When Tommy Chui emerged from his car to remonstrate, Cheung grabbed him from behind. At that stage, the applicant allegedly applied chloroform, which had been brought from Hong Kong, to Tommy Chui's nose and mouth. He also assaulted Tommy Chui and poured some of the contents of the bottle of chloroform into his mouth. At some stage, adhesive tape was wrapped around Tommy Chui's head below the level of his eyes. He was taken to another carpark where his body was transferred into another car. Eventually, at around midnight, Tommy Chui's body was dumped in the harbour from a bridge. The five conspirators who had been physically involved in the murder, flew back to Hong Kong on the following day, 30 March 1995. When the Singapore police recovered Tommy Chui's body from the harbour on 1 April 2005, the body was found inside a canvas bag which had been inserted into another canvas bag. Three diving belts were found tied around the body having, respectively, four, five and six lead weights attached to them. Tommy Chui's face was wrapped with adhesive tape. At the carpark where he had been abducted, three keys to his home were found on a kerb near the parking space for his Porsche. The positioning of these three keys and the lead weights on the diving belts later attached to his body was described by a triad expert from the Hong Kong Police Force as signalling a triad killing for the betrayal of the brotherhood. On 3 April 1995, in a restaurant in Hong Kong when the applicant, D2 and Cheung were all present, D2 paid Cheung \$200,000 in \$1,000 banknotes at the applicant's direction. This was, according to Cheung, his reward for participating in the conspiracy. On 5 April 1995, the murder of Tommy Chui in Singapore was widely publicised in newspapers in Hong Kong. The five conspirators who had returned from Singapore met together. Cheung complained that he now realised for the first time that Tommy Chui was not Taiwanese as earlier described to him but was a witness who had been due to testify against Tin in Hong Kong. It was then agreed that they should leave Hong Kong. The applicant and Cheung took separate flights to Bangkok on 6 April 1995 whereas Ah Man, Ben and Billy flew to Thailand on the following day. On 30 April 1995, Cheung was arrested at the airport in Beijing and was soon afterwards handed back to the Hong Kong authorities. In 1998, he was duly charged with, and convicted after trial of, conspiracy to murder. He was sentenced to 27 years imprisonment. Meanwhile, the applicant was able to maintain his liberty until about June 2001 when he was convicted in the Foshan Intermediate People's Court of offences related to dangerous drugs. He was returned to Hong Kong by the Mainland authorities after he had completed his sentence on 6 August 2003. There was a considerable body of evidence which lent support to Cheung's testimony on peripheral issues. Amongst this evidence, there were admitted immigration movement records of the five alleged conspirators which tallied with Cheung's account of their various trips to Singapore and their departure for Thailand soon after the murder had been publicised in Hong Kong. In

addition, there were telephone records which were admitted to show relevant telephone contacts between Hong Kong and Singapore during the time that the five men were in Singapore engaged in the conspiracy. In addition, bank evidence demonstrated that money, withdrawn from Tin's account, was deposited into D2's account. Other evidence concerned the movement of the two vehicles involved in the staged collision in the carpark and two witnesses provided support for Cheung's evidence about the conspirators' presence in the Singapore flat at 55A Paterson Road. It was not disputed at trial that the applicant had lived there whilst in Singapore. Summing up The summing up contained comprehensive and accurate directions on the law and the judge reminded the jury of all the salient points in the evidence including the way the defence had been presented on the applicant's behalf. As the applicant did not testify, and no witnesses were called on his behalf, the defence case mainly consisted of an attack on Cheung's credibility. The judge dealt with Cheung's evidence in great detail, specifically drawing the jury's attention to the inconsistencies in his evidence and to his criminal convictions. The judge particularly reminded the jury of Cheung's admitted motive for giving evidence for the prosecution, namely, to obtain a reduction in his sentence and the jury were directed to bear in mind the special need for caution when examining and evaluating Cheung's evidence. The summing up was entirely fair and balanced and no criticism of any kind has been made of it. Ground of appeal The single ground of appeal raised by Mr Bruce is that having regard to evidence against Cheung which only came to light after the trial had ended, the conviction of the applicant on each charge should be regarded as unsafe or unsatisfactory. Affirmations in support of this ground were filed pursuant to a Notice of Motion, dated 25 November 2005, from Ng and Kay, both of whom were prison inmates at the time their affirmations were made and also as to the time relevant to the evidence they supplied. Mr Bruce sought to have all of this material admitted by us under the provisions of section 83V(1) and (2) of the Criminal Procedure Ordinance. Ng had been convicted of armed robbery and wounding and was sentenced (after an appeal) in about 1995 to 18 years imprisonment. His release date from prison was 24 December 2005. Kay pleaded guilty to various counts of robbery and possession of firearms and was sentenced on 23 May 1994 to a term of 20 years imprisonment. His date of release was 24 August 2007. Ng and Kay's affirmations were very similar in gist. Briefly, Ng stated that Cheung had proposed to him that he should falsely accuse Tin as a means of obtaining a reduction in his sentence. A similar proposal was made to Kay who also declined to adopt the suggestion. Originally, it was the intention to argue on the applicant's behalf that, if believed, these witnesses cast serious doubt on the integrity of Cheung's evidence against the applicant as Cheung had been exposed as someone prepared to invent evidence merely to gain favour with the authorities in order to obtain a reduced prison sentence for himself. Fresh evidence provisions The relevant provisions of Section 83V of the Criminal Procedure Ordinance under which it was intended to introduce the fresh evidence read as follows:

- (1) For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice

- (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;
 - (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court of Appeal whether or not he was called in those proceedings; and
 - (c) subject to subsection (3), receive the evidence, if tendered, of any witness.
- (2) Without prejudice to subsection (1), where evidence is tendered to the Court of Appeal thereunder the Court of Appeal shall, unless it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise its powers of receiving it if
- (a) it appears to it that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
 - (b) it is satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.
- (3) Subsection (1)(c) applies to any witness (including the appellant) who is a competent but not a compellable witness.
- (4) For the purposes of this Part, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice, order the examination of any witness whose attendance might be required under subsection (1)(b) to be conducted, in the manner provided by rules and orders made under section 9, before any judge or officer of the Court of Appeal or other person appointed by the Court of Appeal for the purpose, and allow the admission of any depositions so taken as evidence before the Court of Appeal. The criteria for the receipt of new evidence has been considered in a number of authorities, including *R v Parks* [1962] 46 Cr App R 29 as qualified in *Stafford & Luvaglio v DPP (No. 2)* [1974] AC 878 at 893A-C and 907A-E, as explained in *R v Pendleton* [2002] 1 Cr App R 34, 441 at 454 para. 19, *R v Hakala* [2002] EWCA Crim 730, para. 11, *R v Ishtiaq Ahmed* [2002] EWCA Crim 2781, para. 36, and *Dial & Anor v State of Trinidad and Tobago* [2005] 1 WLR 1660, paras. 31-32; and *R v Cheung Tse-pan & Anor* [1991] 2 HKLR 370 at 379G-382A. The law is well settled and was not disputed. In short, the conditions are that the new evidence:
- (i) was unavailable at the trial or a reasonable explanation for its non-production at the trial has been provided; (ii) must be relevant to the issues; (iii) is likely to be credible; and (iv) might have led to a different verdict so that the conviction is rendered unsafe or unsatisfactory. There are also other limitations regarding the receipt of the new evidence. In *R v Tam Chung-shing (No. 1)* [1989] 1 HKLR 42 at 47, Silke VP said: The court will not receive inadmissible evidence nor will it receive evidence under subsection (1) [of s 83V] if it is satisfied that it would not afford any ground for allowing the appeal or it is unlikely to be credible for there must be some curb on the reception of fresh evidence to avoid the

indefinite prolongation of the legal process: (R v Lattimore (1976) 62 Cr App R 53; R v Parkes (1962) 46 Cr App R 29; R v Stafford Luvaglio (No. 1) (1969) 53 Cr App R 1.) Whether the new evidence is relevant or not will normally depend on the issues before the jury but in the present context, as this was directed at undermining the credibility of the main witness for the prosecution, it was clearly relevant. Assistance as to how the court should evaluate fresh evidence in order to decide whether a jury might have arrived at a different verdict had they heard it, can be derived from paragraph 11 of Judge LJ's judgment in Hakala (above): The judgment in fresh evidence cases will inevitably therefore continue to focus on the facts before the trial jury, in order to ensure that the right question the safety, or otherwise, of the conviction is answered. It is integral to the process that if the fresh evidence is disputed, this court must decide whether and to what extent it should be accepted or rejected, and if it is to be accepted, to evaluate its importance, or otherwise, relative to the remaining material which was before the trial jury: hence the jury impact test. The fact that a court may need to hear the proposed evidence first before making a decision was considered by Rose LJ in R v Sales [2000] 2 Cr App R 431 at 438B-D where he said: Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief; and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. The proposed new evidence included an affirmation from the applicant in which he asserted that he did not know either Ng or Kay and had no knowledge of the letters sent by Ng to the Registrar while the trial was still in progress. We shall say more about this later, but the real issue on this ground of appeal, therefore, is whether the evidence which in due course was called on the applicant's behalf was credible and we heard the evidence *de bene esse* to enable an assessment to be made of it. Plainly, the success or otherwise of this single ground of appeal hinged on our assessment of the proposed new evidence. Ng Wai-man's written evidence Ng's evidence included the letters he had written which were addressed to the Registrar of the High Court. With reference to the High Court criminal case number 255/94 (HCCC 255/94) in which he was himself convicted, his identity card number and his prisoner number, P-151532, Ng wrote (as translated) in a letter dated 26 November 2004: Now here, I make a report in advance on a case of defeating the course of public justice (as false evidence of the case is being made, if a report is made to the police, it will not be accepted for the time being). I write to reflect (this) to you and to place the (information) of the whole course of the case of defeating the course of public justice in my file. By the time when I get the case number from the newspaper, I will inform the judge of the High Court so that the person who is maliciously accused will have a fair and just trial. I have previously reported three cases of defeating the course of public justice to you Registrar (please refer to HCCC 255/94; the reference of the three cases are HCCC 202/97, coroner court DI 16/99NT and HCCC 87 & 240/2001). This time, it is a case of defeating the course of public justice. The specific situations are as follows: On 1999-05-12, I was transferred by the Correctional Services Department (CSD) from Shek Pik to Dormitory J of Stanley and was assigned to

work at workshop A. During the period, I came to know an inmate Cheung Wai-ming (nickname: Ko Lo Ming). We talked something about the environment and livelihood of inmates in Shek Pik during casual chats. Cheung Wai-ming enquired of me about the situation of an inmate Tin Sau-kwong. (Cheung Wai-ming revealed to me that he and Tin Sau-kwong did not know each other). However, I have accidentally revealed to Cheung Wai-ming that Tin Sau-kwong had a twin-finger (because I was admitted to Shek Pik Hospital for one week and so knew the special feature of Tin Sau-kwong). Some while later, Cheung Wai-ming enquired of me about the case HCCC 202/97 in which I assisted the High Court by acting as a witness to uphold justice. (He enquired) whether the authority concerned had assisted me to apply for a reduced sentence. (I said that (I) would have to wait for the Long-term Prison Sentences Review Board to review the sentence in 2000 before it was known to what degree the sentence would be reduced. And photocopies of newspaper cuttings of HCCC 202/97 on reduced sentences given to those who made malicious accusations were shown to Cheung Wai-ming.) Cheung Wai-ming revealed to me that he used to be a staff member of the CSD and that during the several years of his employment, he did not ever hear any cases in which an inmate could obtain reduced sentence or could be discharged earlier. Cheung Wai-ming suggested to me a method with which reduced sentence could be obtained. It was to utilize the authority of the ICAC or to conspire with the ICAC to maliciously accuse a target person Tin Sau-kwong whom it disliked. Cheung Wai-ming said : I have asked a Vietnamese inmate to make some letters containing false information that would be used to utilize the ICAC. If you are interested, we cooperate. You contact the ICAC and say that Tin Sau-kwong has personally told you at Shek Pik that it is he (Tin Sau-kwong) who ordered Ko Lo Ming to go to Singapore to kill Tsui To-yan. After you give the statement, the ICAC will approach me to take a statement from me and I will admit everything that the person is killed by me and that it is under the direction of Tin Sau-kwong and that he is the boss in the background. And then, he will die and we will go back home. This is the fastest method. It will take a long time to [a]wait the Long-term Prison Sentences Review Board to make a review and it has not yet known whether a reduced sentence can be obtained or not. The assistance given to the ICAC can definitely secure a reduced sentence. Look at my case, Leung Sze-lai was beaten up seriously by me. He/She had this hatred in heart and went to the ICAC to give a statement containing false information, saying that I had personally admitted to him that (I) had gone to Singapore to kill Tsui To-yan. In fact, this is not true. The ICAC wanted me to die and accepted his false evidence. At some stage of the trial, some accomplice/s of my case was/were even released but I was found guilty and sentenced to 27 years imprisonment. Leung Sze-lai was charged for three rape and murder cases. As Leung Sze-lai was willing to give assistance to make me dead, the ICAC assisted Leung Sze-lai to make the sentence changed from life imprisonment to 12 years imprisonment. I know that the ICAC hated this person Tin Sau-kwong very much. We just copy the method by assisting them to make Tin Sau-kwong dead to help us obtain a reduced sentence. If you are interested to obtain a reduced sentence and to leave earlier, think about that. (I replied that (I) would think about that.) Sir, the above is the situation about the conspiracy to defeat the course of public justice. My discharge date will be 2005-12-26. So, I do not require any

advantage of reduced sentence. (I) only hope that TIN Sau-kwong, who was maliciously accused, can have a fair and just trial. (I) regret for any inconvenience caused. From Ng Wai-man Date 26-11-04 By the time when I get the case reference from the newspaper, I will inform you immediately. (I) will inform you the aforesaid incident. I beg you Registrar not to inform any other governmental prosecution department in order not to alarm anybody. (Emphasis added.) Pausing here, it has been confirmed that the Tsui To-yan mentioned in Ng s letter and in other statements made later referred to the same Tommy Chui, the victim of the conspiracy to murder with which we are presently concerned. In the context of the first letter written by Ng, it has to be remembered that the trial of the applicant in HCCC 43/2004 commenced on 1 November 2004 and concluded on 9 December 2004. This letter is recorded as having been received in the High Court Registry on 27 November 2004 but it was unfortunately not immediately passed onto the trial judge as should have happened. Mr Bruce accepted that this letter contained no case reference number relating to the applicant s trial and that it might have been difficult to recognise this letter as being written in relation to the applicant s case. Whether or not this is so, Mr Bruce made no criticism of this letter, or the second where a case reference was given, not being immediately referred to the trial judge. In our opinion, although the mistake which had occurred was an innocent one, these letters should have been referred to the trial judge straightaway so that he could decide upon the appropriate action to be taken. Ng s second letter to the Registrar was dated 3 December 2004 and (as translated) reads: I am Ng Wai-man, prisoner number P-151532, now serving an imprisonment sentence of 18 years at Stanley Prison. On 3-12-04, during an inspection by the Chief Superintendent of Stanley Prison, (I) reported a case of defeating the course of public justice (High Court ref. HCCC 43/04). As the trial of this case is still on-going now, I requested the department to inform the judge of the High Court. Now, I have been informed by the department that (I) have to write a letter personally to inform the judge (of the High Court). For this, (I) have put it in writing to inform the judge of the High Court again to request the suspension of the trial. I am willing to attend the court to give evidence and to tell (the court) the whole course of how Cheung Wai-ming conspired with me in mid-1999 and how (we) would utilize the power of the ICAC to fabricate evidence to maliciously accuse other people. My discharge date will be 2005-12-26. (I do not need any advantage of reduced sentence so that I have to fabricate evidence.) Report made by Ng Wai-man Date 3-12-04 (Emphasis added.) Again, as we have indicated, despite its receipt being acknowledged on 6 December 2004, the letter was unfortunately not referred to the trial judge as it should have been. In his third letter, dated 10 December 2004, after repeating his name, the High Court Criminal Case reference number and his prisoner number, P-151532, Ng stated: Your letter dated 2004-12-07 was received at 4 p.m. on 9th December. Now, in response to direction from you, (I) agree to have the matter concerned referred to the Legal Department for actions. Today, 2004-12-09, I got from the newspaper that the trial of the High Court Case HCCC 43/04 was concluded and that the jury, having been misled, found (the defendant of) the case guilty. I deeply regret for the judgment made. Regarding the amnesty granted by the prosecution to the tainted witness Cheung Wai-ming (nickname: Ko Lo Ming) in the matter of defeating the course of public justice, I applied to the CSD

(Stanley) on 16th or 17th April 2000 to request for making an affirmation to be submitted to and used in the court. I was also interviewed by a senior officer of the Department on 2000-04-18. It was recorded in the register of prisoners applications and requests of the department. I just uphold the justice and there is not any factor of advantage existing. I beg you to take actions immediately to stop the announcement of the verdict in order not to make it a wronged case. I regret for any inconvenience caused. Reported by Ng Wai-man Date 10-12-04 (Emphasis added.) To complete the picture, Ng eventually made a statement to the police on 22 April 2005 and two further statements on 10 May 2005, providing details about his allegations against Cheung. Ng's statement of 22 April 2005 gave details about a number of matters including why he was in prison, the duration of his term of imprisonment and his expected date of discharge. It also provided details about the three court cases in which he had provided information to the authorities, as follows:

- 4) Earlier, I reported three cases to the court, namely, first case HCCC 202/97: This is a trafficking in dangerous drug case. I can remember that while I was serving the sentence in Stanley Prison, I heard that somebody forged some false evidence relating to the aforesaid HCCC 202/97 case. So, I reported that to a staff member of CSD. I also went to give evidence in the court subsequently. Finally, the court acquitted the defendant. The second case is a suicide case, case number DI 16/99NT. I wrote a letter to the coroner court to say that I had seen that a person serving sentence at Stanley Prison committed suicide and died and that some staff member/s of the CSD wiped the body of this person dead of suicide at that time because some reasons for the suicide had been written on the body of this person. Finally, the judge of the coroner court informed me that what I had said had been told to the judge by some staff member of the CSD and so I was not called to the court as a witness. The third case is serialized HCCC 87 and 240/2001. This is a conspiracy to murder case because while I was serving my sentence, I heard that somebody forged some false evidence to accuse the suspect in the aforesaid HCCC 87 and 204/2001 case with a view to seeking a reduced sentence. After I knew that, I reported to the staff of CSD and wrote a letter to the judge. Finally, the two accused were not found guilty and halfway during the trial, the hearing was terminated because of insufficient evidence. I did not go to the court as a witness either. The letter concerned is kept in the High Court file HCCC 255/94. Ng then stated how, when in hospital in Pik Uk Prison in October 1997, he had come to know Tin who he said was responsible for distributing meals inside the hospital. He noted that Tin had a special feature of having six fingers on one of his hands. Ng learned subsequently from newspapers that Tin was involved in a cigarette smuggling case and was arrested by the ICAC in 1994. Ng said that he was transferred from Shek Pik Prison to Stanley Prison in mid 1999. He came to know Cheung, nicknamed Ko Lo Ming, who was sharing the same dormitory with him. Ng had earlier read in a newspaper that Cheung was involved in the same cigarette smuggling case as Tin and had been arrested by the ICAC in 1994. During casual talks, Cheung asked Ng if he had known Tin at Shek Pik Prison. Cheung said that he did not know Tin. Ng said in his statement to the police: At that time, I felt it very strange because I knew that Tin Sau-kwong and Cheung Wai-ming were both involved in the same case. So, I told Cheung Wai-ming that

Tin Sau-kwong had six fingers in one hand. (Emphasis added) Ng then stated that after he had written to the Long-Term Prison Sentences Review Board to request a review of his prison sentence because of his actions in HCCC 202/97, Cheung told him that he used to be a Correctional Services Department (CSD) staff member and during his several years of employment there he had not heard of any prisoner being able to obtain a reduced sentence by this means. This seems to have been a reference to there being no advantage in providing evidence for the defence as opposed to giving assistance to the prosecution. The rest of Ng's statement to the police related to how Cheung had advised him to frame Tin. This was in the following terms:

- 8) Cheung Wai-ming suggested to me a method with which I could be discharged earlier. It was to utilize the authority of the ICAC or to conspire with the ICAC to malicious[ly] accuse a target person Tin Sau-kwong whom the ICAC disliked. In the meantime, Cheung Wai-ming told me that he had asked several Vietnamese prisoners to make some letters containing false information. He did not tell me how many letters had been made. Neither did he reveal to me the contents of these letters containing false information or who made these letters. At that time, I did not know which Vietnamese prisoners they were (because in December 2004, when I read newspaper at Stanley Prison, I came to know that when Cheung Wai-ming testified against a man (name in romanization Cheng Wui-yiu) in the court, an inmate of the name Kay Sik-hong, prisoner number , said that he also knew that a Vietnam Ping also had a part in this case. However, I do not know this Vietnam Ping .) Cheung Wai-ming also said that those letters containing false information the Vietnamese inmates were asked to make would be used to utilize the ICAC. He told me that if I were interested to conspire with them to maliciously accuse Tin Sau-kwong, he would cooperate with me. Cheung Wai-ming also told me to tell the ICAC that Tin Sau-kwong had said personally to me at the Pik Uk Prison that Tin Sau-kwong had ordered Cheung Wai-ming, i.e. Ko Lo Ming, to go to Singapore to kill Tsui To-yan. After the ICAC had taken a statement from me, if the ICAC took a statement from Cheung Wai-ming, Cheung Wai-ming would admit that Tsui To-yan was killed by him, but it was Tin Sau-kwong who directed Cheung Wai-ming and that Tin Sau-kwong was the boss in the background. After that, Tin Sau-kwong would be prosecuted. And we would have reduced sentences and would be discharged earlier. This is the fastest way to secure a reduced sentence.
- 9) Furthermore, Cheung Wai-ming also told me that he was imprisoned because he had beaten Leung Sze-lai once and Leung Sze-lai kept this hatred in mind and gave a statement containing false information at the ICAC saying that Cheung Wai-ming had personally admitted to Leung Sze-lai that he had killed Tsui To-yan in Singapore. The Court accepted the testimony of Leung Sze-lai and sentenced Cheung Wai-ming to 27 years imprisonment. As Leung Sze-lai was charged for 3 rape and murder cases, it is believed that as he had assisted the ICAC to testify against Cheung Wai-ming, he should be sentenced for life imprisonment for the 3 rape and murder cases but was only awarded an imprisonment sentence of 12 years instead.

- 10) Cheung Wai-ming told me that he knew that the ICAC did not like Tin Sau-kwong, but he, i.e. Cheung Wai-ming, did not tell me why he knew that the ICAC did not like Tin Sau-kwong. Cheung Wai-ming asked me to join with him to act like what Leung Sze-lai did above to report to the ICAC and to give assistance to maliciously accuse Tin Sau-kwong and in doing so, the ICAC would apply for reduced sentences for us. He also asked me to think about his, i.e. Cheung Wai-ming's, suggestion to conspire together to maliciously accuse Tin Sau-kwong. I told him in reply that I would think about that. I did not say I accepted Cheung Wai-ming's suggestion.
- 11) In July 1999, I was transferred to Dormitory 2B, Stanley Prison to continue serving my sentence. And then, I did not see Cheung Wai-ming again. About that case that Cheung Wai-ming attempted to conspire with me to defeat the course of public justice, he only talked it with me once, i.e. as mentioned above. After that, Cheung Wai-ming did not talk the same sort of things with me again.
- 12) On 16th or 17th of April, 2000 (exact date cannot be remembered), I reported the above-mentioned case to the welfare officer of the CSD. However, as the case had not happened and the staff of the CSD asked me to make a report to the Police, I felt that the staff of the CSD did not believe me. So, I did not make a report to the Police.
- 13) Until November 2004, I read from a newspaper and came to know that Cheung Wai-ming had given evidence at the High Court to testify against another male (name in romanization: Cheng Wui-yiu) who was in the same case of Cheung Wai-ming and subsequently Cheng Wui-yiu was also found guilty by the court and sentenced to life imprisonment. I do not know what evidence Cheung Wai-ming gave at the court. I do not know Cheng Wui-yiu and have not seen him in person up to now. As Cheung Wai-ming had suggested earlier to me to conspire with me to maliciously accuse Tin Sau-kwong in order to apply for a reduced sentence, I then suspected that Cheung Wai-ming could have used the same method to maliciously accuse Cheng Wui-yiu. So, I raised this issue again to the court.
- 14) In late 2004, I sent a personal letter at Stanley Prison to Cheng Wui-yiu, saying that Cheung Wai-ming had previously attempted to conspire with me to maliciously accuse some people and if he requested me to go to the court to testify against Cheung Wai-ming that Cheung had previously attempted to conspire with me to maliciously accuse other people, I would attend the court to give evidence. However, up to now, Cheng Wui-yiu had not written back to me nor instructed anybody to contact me.
- 15) This time I provide the information to the Police, I mean to uphold justice. Now, I need not apply for a reduced sentence because I will be discharged on 2005-12-26. (Emphasis added.) Ng gave two statements to the police on 10 May 2005. In the first of these two statements, in response to the question why, when he had stated that in May 1999 Cheung had, in effect, conspired with him to pervert the course of justice, he had not reported the matter to the CSD at that time rather than waiting until 18 April 2000 to request the CSD to allow him to make an affirmation, Ng stated: Because in May 1999, when Cheung Wai-ming attempted to

conspire with me to maliciously accuse Tin Sau-kwong, he also demanded me to pay HK\$100,000 to him. The situation was that if I accepted and conspired with Cheung Wai-ming to maliciously accuse Tin Sau-kwong, I would have to pay HK\$20,000 to Cheung Wai-ming. Furthermore, after the ICAC took a statement from me, the Legal Department would issue a merit confirmation to me. After I received this merit confirmation, I would have to pay \$20,000 to Cheung Wai-ming. And in the end if I successfully obtained a reduced sentence, I would have to pay \$60,000 to Cheung Wai-ming. As I did not have \$100,000, I had to think about it and try raising money. Furthermore, I had requested the Long-term Prison Sentences Review Board to review my sentence, so, I did not have time and at that time I was thinking about the matter that Cheung Wai-ming requested me to pay \$100,000 to him and he would assist me to secure a reduced sentence. Until April 2000, I was unable to raise money and that I had finished the matter with the Long-term Prison Sentences Review Board and that Cheung Wai-ming did not contact me again for the aforesaid situation. So, on second thought, I told that to staff of the CSD and requested to make an affirmation. (Emphasis added.) Ng further stated that if he had agreed to do what Cheung had advised, he would have had to deposit the money required from him into the bank account of Mei Fung who was Cheung's girlfriend. However, he did not know her real name and he had lost her account number. Regarding how it had come about that he had earlier said that Kay had told him about the identity of Vietnam Ping, Ng stated that in fact Kay had not done this. He described how he was in Cell 36 of Dormitory 6, Stanley Prison, and Kay was in Cell 40 of the same block. He continued: One day (exact date cannot be remembered), while in my own cell, I heard that Kay Sik-hong said loudly to a person called Yim She (real name unknown) of 3rd floor about the matter that Cheung Wai-ming had maliciously accused other people (details of which cannot be remembered) and that Vietnam Ping also had a part in that. For this reason, I suspect that Vietnam Ping might have joined Cheung Wai-ming to maliciously accuse other people. The second of Ng's statements dated 10 May 2005 was about a prisoner nicknamed Lo YP or YP Tsai who, while being locked in the cell opposite to Ng's, scolded Ng loudly in foul language for turning in inmates without identifying the person to whom he was referring. Ng said that he then asked the police to assist him to apply to the CSD for a transfer to another cell with special protection. The written evidence of the applicant and others The applicant provided affirmations on 30 August and 1 September 2005. In the first of these, he stated that he did not know Ng, Vu Thanh Binh or Kay. According to him, he only found out about the existence of the letters written by Ng and the statements to the police made by Ng and Kay when he was informed by his counsel on the morning of the hearing which was due to take place before this court on 2 August 2005. He stated:

5. At my trial in the Court of First Instance the only direct evidence against me came from Cheung Wai Ming. My defence was that he was an unreliable witness and was giving false evidence with the sole motive of achieving a reduced sentence. I am advised by my legal advisor that if the abovementioned complaint letters had been made available during the trial my counsel would have developed a new line of cross-examination going directly to my defence. In addition, consideration would have been given to calling Ng Wai Man and Kay

Sik Hong as defence witnesses.

6. In the circumstances my interests have been severely prejudiced. I will seek to rely upon the information newly disclosed as new evidence in the adjourned appeal hearing. Curiously, in regard to the applicant's contention that he knew nothing about Ng's complaint letters to the Registrar or his statements to the police, we observed from Ng's statement to the police (at paragraph 14 of the statement made on 22 April 2005) that he had sent a personal letter to the applicant informing him, as might well be expected, of his ability to assist. The applicant made no reference to this at all when informing the court that he had no knowledge about this turn of events until he was told about it on 2 August 2005 by his counsel. The purpose of the applicant's second affirmation was simply to produce the letters and statements of Ng, Kay and others. Cheung also made an affirmation. In this, he set out his denial of any proposal or suggestion to Ng or Kay, or anyone else, to frame an innocent party on a criminal charge. Vu Thanh Binh's statement to the police, dated 13 May 2005, is also before us. He stated that he had been convicted of murder and sentenced to imprisonment for life in mid 1991. He denied having heard about a conspiracy to provide false evidence against another person and nobody had attempted to persuade him to give false evidence against someone else. He knew both Kay Sik-hong and Cheung Wai-ming and Cheung, in particular, had never asked him to provide false evidence against others. In an affirmation made by Ng Siu-kei, an ICAC senior investigator, on 30 September 2005, he stated that as one of those involved in the investigation into the conspiracy to murder Tommy Chui he had come into possession of the three letters sent to the Registrar by Ng after the conclusion of the applicant's trial. He said: The allegations made in the said letters against Cheung of having attempted to pervert the course of public justice have been investigated by the Police. The investigation by the Police has concluded and it was decided upon legal advice that no prosecution action should be taken against Cheung. This officer also commented on Ng's enquiry to the CSD about his desire to make an affirmation and the statement of Ko Kwok-kin about his having received Ng's request to make an affirmation on 18 April 2000. He stated: However, as revealed in a letter written by NG to the Registrar of the High Court on 18 January 2002, NG had in fact requested to make the affirmation on 18 April 2000 in respect of an allegation of Perverting the Course of Public Justice concerning another High Court case HCCC 87 and 240 of 2001, instead of the case against the Applicant. The letter dated 18 January 2002, written by Ng to the Registrar of the High Court was exhibited (NSK-2a). This reads: I, Ng Wai-man, High Court Criminal Case number HCCC 255/94 In respect of a case HCCC 87 & 240/01 which is being tried in the High Court, I learnt that the persons concerned in this case had wronged the defendant for conspiracy to pervert the course of public justice. (Before the occurrence of this case of conspiracy), I have already filed a report with the relevant governmental department(s) and the public officer(s) concerned. In the beginning of April 00, [I] made a report to Assistant Officer II Yu Hon-lun of the Correctional Services Department about a perverting the course of public justice incident that was about to occur. On 18.4.00, [I] applied to Ko Sir, Senior Officer (Welfare Section) of the Correctional Services Department requesting to make an affirmation to be produced as evidence at the

hearing of this case. On 12.7.01, [I] sent a letter to the Registrar of the High Court. On 31.7.01, [I] received a reply letter from the High Court that the Department of Justice had already been informed of the matter. On 31.8.01, the Police Headquarters sent officer(s) to take a statement [from me]. On 14.9.01, at noon, the Narcotics Bureau sent officer(s) to visit [me] and refused to take a statement from me. (saying that [it] offered no help to our case) On 14.12.01, [I] sent a letter to the Registrar of High Court requesting to testify in court and listing out in detail the above witnesses concerned. Please excuse me in case of any inconvenience caused. The letter, referred to as having been sent on 12 July 2001 in exhibit NSK-2a was one which in fact, it seems, was dated 26 July 2001. This was also exhibited (NSK-1a) and reads, so far as it is relevant: I am Ng Wai-man. My prisoner number is P151532. I am now serving my sentence in Stanley Prison. Concerning a case of perverting the course of public justice , I am now seeking advice from Your Lordship. The persons who had made that false report included the prisoners Ng Wai-man, P173729; Lau Shui-fu, P38970; Lau Ka-ming; and Tsang Chun-hei. The persons who had been framed up included Lau Kwok-hung, P113721; and Mak Kam-chuen, P40725. Lau Shui-fu requested me to conspire with him to pervert the course of public justice in order to obtain a chance of remission in return. Lau Shui-fu instructed me to contact prisoner Lau Ka-ming after I arrived at Block J, Stanley Prison, and to discuss with him on coordinating as far as possible with the action of the prisoner Ng Wai-man, P173729, in order to create some matching circumstantial evidence before making a report to the ICAC and Narcotics Bureau. So, we can avail the power and assistance of the departments mentioned above to obtain the remission, and to frame up Lau Kwok-hung, P113721; and Mak Kam-chuen, P4072(5) for abetting in the murder of prisoner Ng Wai-man, P173729 in order to create a chance of remission. As I do not know the number of that case, I now write to Your Lordship for you to inform the Police to send someone here to take a statement in order to let those who had been framed up have a fair trial. (Emphasis added) In due course, we shall return to this case (HCCC 87 and 240/2001), in which the applicant duly gave evidence for the defence, in the light of a letter he wrote afterwards to a friend which is revealing as to Ng s true motivation for his desire to give evidence in that trial. For reasons we shall come to next, there is no longer a need to set out in any great detail Kay s intended testimony. Opening and oral testimony of Ng Wai-man Mr Bruce opened the case for the applicant by saying that Ng had written the three letters in late 2004 to the Registrar of the High Court with reference to the fact that Cheung had once spoken to him in 1999 about giving false evidence against Tin who, it was said, the ICAC were keen to have convicted of the conspiracy to murder Tommy Chui. Ng was told that by this means he could obtain a shortened sentence for himself. Mr Bruce said that the information about Cheung remained dormant from 1999 until Ng became aware of the applicant s trial in 2004 through media reports and it was these which caused him to write to the Registrar. Mr Bruce then reminded us that, on 2 August 2005, when Mr Shaun Kelly was representing the applicant, the proceedings had to be adjourned at counsel s request. This was because counsel had only then been informed about the applicant complaint letters to the Registrar and the statements taken by the police investigating the contents of these three letters. The police had by this stage concluded that

no action would be taken against Cheung. The applicant was requested at that time to make an affirmation about his knowledge of the complaint letters and about Ng. He duly did so and in the applicant's affirmation, dated 30 August 2005, he repeated the statement he had made in court on 2 August 2005 that he had no knowledge of Ng, saying that he only knew of the existence of the complaint letters and the statements (taken by the police) when Mr Kelly informed the court in that morning. He added also that he had not heard of Vu Thanh Binh, who was mentioned indirectly in Ng's complaint letter dated 26 November 2004, or Kay, whose statement to the police contained similar allegations to those made by Ng and made direct reference to Vu Thanh Binh. The case, as Mr Bruce reminded us, was next listed for hearing on 18 July 2006 but Ng failed to attend. By this stage, he had been released from his lengthy prison sentence. The matter was next set down for hearing on 28 March 2007 but, a few days earlier, Ng had written to the applicant's solicitors stating that he was working in Macau on a probationary period of 6 months ending in July 2007, during which time was not allowed to take any leave. Ng's letter, dated 22 March 2007 (exhibit 2 in these proceedings), continued with an explanation about how it had been hard for him to find a job for a year but that recently he had been able to find a good employer running a business in Macau. He went on to say (in one of the two translations with which we have been provided) that he deeply [understood] the pain of being falsely accused as he had been serving his time many years in prison for nothing. He added that during his time in prison he had helped other prisoners fight for justice and that he even testified in court so that they could have a fair trial. He went on to assert that: On this occasion, I disclosed Cheung Wai-ming's unlawful acts because I was motivated by the desire to maintain justice. I am very eager to testify against him in court. Ng duly attended on 6 December 2007. However, we were informed by Mr Bruce that although Kay was also in attendance outside the courtroom, his instructions were not to call him. In regard to Kay, we merely observe that the evidence he had at an earlier stage been intended to give, contained in an affirmation dated 16 November 2005 in which he confirmed the contents of his written statement to the police on 25 April 2005, related to similar allegations against Cheung as those made by Ng. He had asserted, in essence, that Cheung had made an approach to him in 2003 to persuade him to give false evidence against Tin and he named Vu Thanh Binh (or Vietnam Binh) as also being involved. Kay had stated that he declined to become involved although he had been told that he might expect a reduction of sentence if he did so. In common, also, with the allegations made by Ng, Kay said that he did not know the applicant at all and that he had only heard about the applicant's trial because of reports he had read in the newspaper. In view of this, he came to believe that Cheung had framed the applicant and, as he put it in his statement: The purpose why I reported this case to the police this time is that I want to uphold justice. I do not need the police to apply to the court or other organisations for the reduction of my sentence for me because I will be discharged from prison on 15 September 2007. In view of the decision not to call Kay, Mr Bruce was left having to rely upon the evidence given by Ng. In short, Ng was called to say that Ng had, as Mr Bruce put it, been invited by Cheung to perjure himself by making a false allegation to the ICAC about Tin having confessed his complicity in Tommy Chui's murder. In return for giving evidence to

this effect Cheung told him that he could expect a reduction in sentence. Ng's evidence consisted of his oral testimony and an affirmation, made on 16 November 2005, in which he confirmed the contents of his complaint letters to the Registrar. In these letters which we have set out in full, we particularly observed that he had written about how he did not need any advantage of [a] reduced sentence and how he had just wanted to uphold justice. He had, in other words, nothing to gain by testifying and had no motive for doing so other than a desire to see justice done. This was reinforced, as he had stated in his complaint letters, by the fact that he had on at least two earlier occasions been prepared to give evidence in trials where, according to him, false allegations had been made by prosecution witnesses. Ng testified that he had on only one occasion in 1999 talked to Cheung on the subject of Tin about how a reduced sentence could be obtained by giving assistance to the ICAC by providing false evidence against Tin. Thereafter, Ng was transferred to a different prison and never saw Cheung again.

Assessment of Ng Wai-man In the evidence given by Ng, several matters are worthy of mention in relation to his credibility. Firstly, Ng said that he had been made aware of Tin's case and Cheung's connection with it through newspaper reports. Yet, when Cheung spoke to Ng, Cheung had told Ng that he did not know Tin which made Ng feel very strange. Why Cheung, who was then serving 27 years imprisonment for this conspiracy to murder, should have wanted to pretend that he did not know Tin or why Ng would have found this remotely credible is not something which has been explained. Secondly, when the police took a statement from Ng on 22 April 2005, Ng set out the circumstances of Cheung's alleged plot against Tin and he provided the police with a piece of information which, if true, might be regarded as giving some support for his account even if only as to its consistency. He stated: On 16th or 17th of April, 2000 (exact date cannot be remembered), I reported the above-mentioned case to the welfare officer of the CSD. However, as the case had not happened and the staff of CSD asked me to make a report to the police, I felt that the staff of the CSD did not believe me. So I did not make a report to the police. This revealed an extraordinary memory as to date on Ng's part. The information was checked and it revealed that on 18 April 2000 Ko Kwok-kin, a Senior Officer of the CSD, received a request from Ng to make an affirmation about a case of defeating the course of public justice. However, Ng was unwilling to reveal to him the details of anything he proposed to say by way of affirmation which left Mr Ko advising Ng that he could report the matter to the police. Mr Ko's statement to the police on 6 May 2005, in which he provided this information, took the matter no further in itself. However, the police investigation was thorough enough to have uncovered the letter dated 18 January 2002 written by the applicant to the Registrar of the High Court (exhibit NSK-2a). Its terms are set out earlier (see: paragraph REF _Ref185301213 \r \p \h 58 above). Ng's reference in the letter (NSK-2a) to Ko Sir, and the date when he spoke to him are clear enough. The letter plainly related to Ng's conversation with that CSD officer in regard to the consolidated High Court cases numbered HCCC 87/2001 and 240/2001 which bore no relationship with the present case (HCCC 43/2004) in any shape or form. Ng had made specific reference in his letter to the Registrar of the High Court dated 26 November 2004 to the much earlier case, numbered HCCC 87/2001 and HCCC 240/2001, so that there was no confusion in his mind about the various cases with which he had been concerned. In

spite of this, Ng testified that he had spoken to Ko Sir about the present case involving Cheung, adding that because Cheung Wai-ming used to be a staff member at CSD, he was afraid that if things were leaked it would cause [him] danger. It was suggested to Ng in cross-examination that he had been trying to make his story appear more credible by filling the gap of nearly five years between the alleged conversation with Cheung in 1999 and the complaint letters he wrote at the end of 2004 to the Registrar. Ng denied this but it is difficult to imagine that there can have been any other reason for this evidence having been given. The third matter of some importance arising from Ng's testimony was the reason Ng gave as to why he had taken so long to make a request on 18 April 2000 to make an affirmation (assuming that this had anything to do with the present case at all) when he had known about the plan to pervert the course of justice since 1999. Ng had given no explanation for this in his first statement to the police but in his second statement he was specifically asked why he had remained silent on the point for so long. His reply in that statement was of interest in two ways. The explanation he gave was that Cheung had demanded \$100,000, payable in three instalments. He said that he needed time to think about this and he had, until April 2000, been unable to raise money and his review of sentence with the Long-Term Prison Sentences Review Board had by then just been completed. If Ng's account about a demand for money was true, it seemed to us hard to imagine that Ng could have merely forgotten to mention this when he gave the details of his involvement in this case in his original statement to the police on 22 April 2005. However, more significantly, the explanation he gave amounted to a tacit confession that he had been prepared to consider giving false evidence against Tin but, because he was unable over the next two years to raise the money which would have enabled him to join the scheme, he had decided against it. This was, it hardly needs to be said, inconsistent with a person who had been put before us as someone only concerned with serving the interests of justice. In his oral testimony, Ng had described the alleged requirement that he should pay \$100,000 to Cheung before he would be permitted to join the scheme involving false evidence being given against Tin in return for a shortened sentence as being quite attractive to him. The fourth matter of significance arising from Ng's evidence related to a letter (exhibit 1) he had written to a person he knew as Fei Chan following the acquittal of Chow Sau-tai, who had been charged with trafficking in dangerous drugs in HCCC 202/1997 (the Chow Sau-tai case). This, again, was one of the cases to which Ng had referred in his letter dated 26 November 2004 to the Registrar of the High Court. Some of the background to Ng's involvement with the Chow Sau-tai case is set out in a statement he made to police on 28 October 1997 in which he stated that he had read in a newspaper about the case. He said I myself do not know Chow Sau-tai but, as he went on to say, he knew the three prosecution witnesses who were testifying against Chow Sau-tai and he named them. He had met them all in prison and he said: I know that some of them were not known to one another. He went on to say in his statement that he did not want to act as a prosecution witness or a defence witness but that he just wanted to be a neutral witness. It seems that Ng's evidence in that case carried weight as Chow Sau-tai (who Ng also knew as Long Hair) was acquitted. It is the letter he wrote to his friend Fei Chan which provides the real clues as to what had gone on at trial and we turn to this next.

The effect of Ng's letter to Fei Chan from prison, using a certain degree of code to hide its true meaning, was that Fei Chan should urgently contact two other friends he named to tell Cheung Tau Fat (Long Hair) that the prosecution had approached him to ask him to admit that he had given false evidence in court. He (Ng) would then be prosecuted for perverting the course of public justice and his term of imprisonment would be extended by a year at most. However, Long Hair would also be arrested and prosecuted and, if Ng was prepared to testify against him, Ng would then have his sentence halved by the court. Ng's letter to Fei Chan explained that he needed time to think before he could give an answer but he wanted Long Hair to be told and for Tai Ngan to put pressure on Long Hair. This was followed by a veiled threat that whether Long Hair ate congee or rice would depend on his response. The letter continued that the only money Long Hair might have left was the lump from court which, in his evidence before us, Ng said was a reference to the sum Chow Sau-tai (Long Hair) had been awarded in costs after his acquittal. As Ng expressed it in the letter, Ng would have something to eat no matter whether it is the grandpa or the grandma who dies. Ng's fertile imagination did not end there. The letter continued with a suggestion to Long Hair that he should himself sue Fei Lo who he identified in his oral evidence as the nickname of one of the prosecution witnesses who had testified for the prosecution against Chow Sau-tai). Ng suggested that Fei Lo, who had money, should be confronted and told that his sentence could be lengthened for giving false evidence if he did not agree to pay compensation. Ng said that people should know how to use the law and the law would then help them. In his evidence before us, Ng said that he was only talking about getting money for a lawyer to help with his appeal to have his sentence reduced. He agreed that he had made no reference to a lawyer but he indicated that the true meaning of the letter was that Long Hair should hire a lawyer for him. The contents of the letter (exhibit 1) provide a sinister insight into the complex workings of Ng's mind who we were left in no doubt is an utterly unscrupulous individual, prepared to adopt any means at his disposal to gain financial or other forms of advantage. Mr Bruce accepted that Ng had behaved disgracefully but he argued that it would be dangerous to say that he had tried to do so a second time, that is, by repeating similar conduct in the present case. Conclusion as to conviction There is no doubt in our minds that in these proceedings where, throughout his evidence, Ng was shown to be evasive in answering questions, Ng provided untruthful answers on most, if not all, of the material issues with which he dealt. At the conclusion of his evidence, Ng's credit stood at nil. Even on small issues such as the nature of his job, Ng gave contradictory replies which revealed him as someone who seemed incapable of speaking the truth. In such circumstances, we do not propose to admit Ng's evidence under the provisions of section 83V of the Criminal Procedure Ordinance. As Mr Bruce realistically conceded, the application for leave to appeal must, therefore, fail. In our judgment, the applicant's conviction was neither unsafe nor unsatisfactory. The application in this regard is dismissed. Sentence The applicant was not represented in his application for leave to appeal against sentence and he had no submissions to make. After the jury had announced the guilty verdicts on the two counts, the judge indicated to defence counsel at trial that he was considering passing a life sentence on the 1st count. As a result, counsel sought and

obtained an adjournment and, on the following day, he made lengthy submissions to the judge. Trial counsel's main contention was that it not appropriate to pass a life sentence as this would give rise to disparity between the applicant and Cheung who had, also after trial, received a sentence of 27 years imprisonment. In sentencing, the judge explained why he considered that a sentence of life imprisonment was appropriate. He referred to *R v Hodgson* [1968] 52 Cr App R 113 where the criteria for imposing a life sentence are set out:

1. Where the offence or offences are in themselves grave enough to require a very long sentence;
2. where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future;
3. where, if the offences are committed, the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence. The judge then referred to *R v Cheung Hing-biu* [1984] HKLR 87 where this court pointed out that it is not necessary for all the three criteria to be met. This view was also confirmed in *HKSAR v Cheung Lai-man* [2004] 2 HKLRD 473 at 485D. The circumstances of the murder conspiracy were exceptionally grave. This is reinforced by the fact that, prior to sentencing, defence counsel had informed the judge that there was nothing he was able to say in mitigation regarding the offence itself. The evidence clearly showed that the conspiracy involved a triad-style execution of a witness in order to prevent him from testifying in Hong Kong in respect of very serious criminal charges. The killing had been planned and prepared over a period of about five months leaving nothing to chance. The applicant was directly involved in the killing and the disposal of the body and, according to Cheung, the applicant had recruited him into the gang. Cheung also described the applicant as the person in charge of those involved in Singapore. As such, it was the applicant who paid for the air tickets to and from Singapore and who gave instructions to Cheung as to when he should travel to Singapore. He also directed D2 to pay Cheung his reward of \$200,000 for having taken a part in the killing of Tommy Chui. The killing of Tommy Chui with the intention that he should be prevented from giving evidence in the proceedings against Tin and others struck, in the words of the judge: at the very heart of the integrity of the criminal justice system of Hong Kong. With the display of the three keys on the kerb where the Porsche had been parked and the number of lead weights on the diving belts tied around Tommy Chui's body, this gruesome murder was intended to provide a public demonstration of a triad punishment of someone who had been disloyal to the brotherhood. In our judgment, the combination of these factors warranted a life sentence. As far as the argument in relation to disparity is concerned, the judge noted that there had been no direct evidence at Cheung's trial as to any physical involvement by Cheung in the abduction and killing of Tommy Chui. By contrast, at the applicant's trial, Cheung, as the key witness, had described in detail the acts and involvement of the applicant who physically abducted and killed Tommy Chui. It was in these circumstances that the judge passed a life sentence on the 1st count with a minimum term of 22 years. In our opinion, the sentences imposed on counts 1 and 2 were neither

wrong in principle nor manifestly excessive. The application in regard to sentence is dismissed. (M. Stuart-Moore) macrobutton nomacro Vice-President (W. Yeung) Justice of Appeal (A.R. Suffiad) Judge of the Court of First Instance Zervos SC, Ag. DDPP and Mr Martin Hui SGC, of the Department of Justice, for the Respondent Mr Andrew Bruce SC, instructed by Messrs Quan & Co, assigned by the Director of Legal Aid, for the Applicant PAGE - PAGE - A B C 1udk 1udk 1udk Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V PHbn i\$&`G J85 q \M68 O|=T B!B` ?txbTJ (~g| B!B` (~g O|=T ?txb Lphr], ^ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title ??-zC ??-zC ??-zC Microsoft Word Document MSWordDoc Word.Document.8

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