

HONG KONG / JUDGMENT

HKSAR v. HOWARD KENNETH MCCALL

COURT

Court of Appeal

DECIDED

14 November 2007

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bjbj CACC 81/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL criminal APPEAL NO. 81 OF 2006 (ON APPEAL FROM HCCC NO. 120 of 2005)

BETWEEN HKSAR Respondent and howard kenneth mccall macrobutton nomacro Applicant

Before: Hon Stuart-Moore VP, Yuen JA and Barnes J Date of Hearing: 26 October 2007 Date of Judgment: 14 November 2007 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court):

Background

The applicant was arraigned on two counts of trafficking in dangerous drugs, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134. On 13 February 2006, following a trial before Deputy High Court Judge Wright (as he then was), the jury convicted the applicant on the 1st count but acquitted him of the trafficking alleged in the 2nd count. However, by way of alternative, the applicant was convicted on the 2nd count of simple possession of some of the dangerous drugs itemised in that count which the applicant had admitted in evidence were for his own consumption. The applicant received consecutive prison sentences of 7 years and 18 months on counts 1 and 2 respectively when he appeared for sentence on 14 February 2006. The matter now comes before us as an application for leave to appeal against conviction on the 1st count alone. There was a separate application for leave to appeal against the overall length of sentence on both counts. The particulars of count 1 were that the applicant, on 28 October 2004, at Flat D, 5th Floor, Tung Hing Building, 129-135 Johnston Road, Wanchai: unlawfully trafficked in dangerous drugs, namely 16.29 grammes of a crystalline solid containing 16.17 grammes of methamphetamine hydrochloride; 3.14 grammes of a solid containing 1.65 grammes of cocaine; 26 tablets containing 0.37 gramme of N,N-dimethylamphetamine; 0.16 gramme of a solid containing tetramethoxyphenethylamine; 10.62 grammes of cannabis resin; 1.78 grammes of a

solid containing 0.018 gramme of tetrahydrocannabinol and 3.93 grammes of cannabis in herbal form. Although we are not directly concerned with the 2nd count, this was an allegation of a similar kind which related to the raid of a flat on 29 December 2004 at 164-176, Johnston Road, Wanchai, where the applicant was by then living on bail. In a helpful synopsis of the evidence given at trial, the judge's opening remarks in the summing up reminded the jury of the issues they had to decide. The judge said: Before I start on my directions and summing-up, let me try to reduce into a few words what this case, to me, seems to come down to so that you can understand the importance of the directions that I will be giving you. The prosecution says that on each of the dates referred to in the two counts, and in each of those separate premises, the accused was in possession of the dangerous drugs set out in the indictment and that he was in possession of them for the purposes of trafficking in them, or some of them. It is the accused's case that, in respect of the 1st count, he was not in possession of the packet of found just inside the front door of those premises and which is Exhibit 4 - and that is how I am going to refer to it - but that he was in possession of the remainder of the drugs found in the flat. He says also that he was in possession of some but not all of the dangerous drugs which are the subject of the 2nd count. However, in respect of all of the drugs of which he admits having been in possession, it is his case that they were either for his own consumption or, in respect of the 1st count, were drugs which had been left behind by other previous occupants of the flat which he simply had gathered together to dispose of. He says that he was not in possession of any of the drugs, or any portion of the drugs for the purpose of trafficking. So there you have the basis of the different cases presented by the prosecution and the defence. (Appeal bundle p. 1) Prosecution's case on the 1st count For the purposes of this application, we are almost entirely concerned with the facts relating to the applicant's arrest on the 1st count. Mr Simon Tam, for the respondent, summarised the evidence on this count with his customary attention to detail and Mr McGowan indicated that he did not take issue with any part of that summary. We propose, therefore, to adopt this in large measure as some of the grounds of appeal raised by Mr McGowan required a close analysis of the evidence. In essence, during the evening of 28 October 2004, police had been watching the applicant's flat and, just before those premises were raided, police positioned themselves ready to take action. Then, at about 9.28 p.m., PC 49115 (PW1) and PC 2379 (PW3) saw the applicant coming out of the flat to take the lift. Approximately two minutes later, the applicant was seen on his return emerging from the lift. He was accompanied on the 5th floor corridor by a Chinese male whose name was later found to be Chan Chun-fai (Chan). The two men were seen walking, one ahead of the other towards the entrance of the flat which the police officers had under observation. The flat was secured by a metal gate and a wooden door. The applicant opened the gate and the door to the flat with keys. PW1 saw the applicant entering the flat and, when Chan was about to close the door behind him, PW1 saw his colleagues running towards the flat to prevent him from doing so. PC 54882 (PW5) was called (at the request of the defence) to testify about what he saw happening when he and his colleagues rushed to the flat from the staircase where they had positioned themselves. At that time, PW5 was carrying a door battering-ram in his right hand and an iron crowbar in his left. PW5 said that with these heavy items in his hands he was not able to run at high speed. He was the third officer to reach the flat. He said that when he saw Chan, Chan was still outside the flat at the doorway and that when he reached Chan,

he quickly put the tools he was carrying on the ground as he would need to have empty hands in case Chan tried to escape. His colleagues, PC 58338 and PC 52251, had entered the flat ahead of him. PW5 said that as he was kneeling down to put the things he was carrying on the ground, Chan tripped and fell. Chan then picked himself up. PW5 said he also quickly stood up, declared his police identity and showed Chan his warrant card. PW5 then made Chan squat down and he told Chan to stay where he was. After about one minute, PW5 said that he handed Chan over to PC 58338. We shall deal later with other aspects of PW5's evidence in the context of the 2nd ground of appeal. PW1 testified that when he reached the flat and entered it, he saw someone had been pushed against the wall and that someone else was squatting down. As far as he could recall, the applicant was standing. PW1 said he went further into the flat and established that nobody else was there. He said that the applicant and Chan were being physically held by his colleagues, the applicant in the living room while Chan was at the door into the flat which was still open. PW3 testified that when he arrived at a position somewhere in between the metal grille and the wooden door of the flat, his colleagues already had the applicant and Chan under their control. The applicant was about a metre away from the main entrance to the flat while Chan was at the entrance. PW3 saw a transparent plastic bag wrapped in tissue lying on the floor in between the applicant and Chan. In this bag, there was a single piece of crystalline solid (exhibit P4) which was subsequently found to contain 13.52 grammes of methamphetamine hydrochloride (). The applicant was then arrested for possession of dangerous drugs. He had the keys to the flat on him. It was an admitted fact that the applicant and his wife were the joint tenants of the flat. A subsequent search of the flat revealed that there were other types of dangerous drugs in the kitchen. Some of them were found inside two small black bags on top of a kitchen counter. Other drugs were found inside a small case and some cannabis was found in a small blue key case. These items were found in the pocket of a pair of trousers lying on top of the washing machine. The total amount of ice found in the kitchen weighed 2.65 grammes and the other drugs found there included cocaine, cannabis resin, herbal cannabis and the other substances described in the 1st count. Two electronic scales were found in the flat. Alongside one of the scales, the police found ninety resealable plastic bags. Significantly also, police found that two televisions in the flat were switched on. The one in the workroom showed a view of the corridor outside the flat and, in the peephole in the door to the flat, police found a camera which provided a view into this corridor. The other television was connected to the CCTV system of the building and showed the common areas of the building. Defence case on 1st count Mr Tam's summary of the defence evidence, which was accepted by Mr McGowan, we can again adopt in large measure. The applicant testified that he came from England to Hong Kong in 1994. A Hong Kong business venture with which he was associated for a time eventually failed. The lease on the flat at 129-135 Johnston Road was due to expire in August 2004 and, as the landlord had indicated to the applicant that he was not prepared to renew it, he knew that he was required to move out from there by 4 November 2004. Initially, he said, he had lived there with his wife and daughter but towards the end of 2003, after his relationship with his wife became strained, his wife and daughter had moved out of the flat. In early 2004, the applicant's Thai girlfriend moved into the flat. The applicant said that the 3-bedroom flat, measuring 500 to 600 square feet, also had other people staying in it from time to time. Sometimes groups of two, three or four friends known to

his Thai girlfriend would stay in one of the rooms and sometimes his own friends would come. The applicant said that he thought the majority of those people consumed drugs. The applicant stated that in October 2004 when he was arrested, he was living in the flat alone having split up with his Thai girlfriend about 2 or 3 weeks earlier. As to his drug habit, the applicant said that he first started to use drugs in the United Kingdom but he had begun to use ice when his business venture started to run into trouble as he found it helped him work long hours and it also alleviated the long-standing discomfort in his back. He became a regular user of ice, ecstasy and cannabis. As time went by, the applicant said he needed to increase the quantities of the drugs he consumed in order to achieve the same effect. The applicant told the jury that he had a previous conviction for possession of dangerous drugs in respect of which he was fined in 2003. In regard to the offence alleged in count 1, the applicant said he had started to pack up his possessions in the flat by late October in preparation for moving out. In the course of so doing, he had come across various packets of dangerous drugs as he emptied drawers and the like and he put these in the kitchen next to the bin. He said he had found them either on the day of his arrest or the day before. It was his intention, he stated, to dispose of them as he regarded them as rubbish and he claimed he had no intention of consuming them himself. He said that he could not be sure which packet of drugs belonged to him and which belonged to friends who had been staying at the flat although he was sure that 26 of the tablets did not belong to him. However, the applicant accepted that, as the sole tenant of the flat at the material time, he had technical control over, and custody of, all the drugs in the 1st count except the larger packet of ice (exhibit P4) of which he had no knowledge until after his arrest. He was prepared for this reason to accept responsibility for the possession of all the drugs he had found in his flat. The applicant said he knew Chan as Ah Fai . It was this person who had been supplying him with dangerous drugs. The applicant said he telephoned Chan on 28 October 2004 during the afternoon asking him to deliver a small amount of ice as he wanted to drugs. The applicant said he might have said to Chan over the phone bring a gramme round . The applicant said Chan had delivered drugs to the flat before and had weighed the drugs there. Later, when Chan arrived, he telephoned the applicant to say that he was downstairs. The applicant said that he left the flat and went downstairs to let Chan into the building and they then went back to the flat together. The applicant opened the gate and wooden door to the flat with his keys. Chan was behind him at the time. The applicant said that it was at this moment that six or seven people charged down the corridor. Somebody had an axe and there were a couple of metal bars being carried. Those people jammed the door open before Chan could close it and he said that they came through the doorway with such force that they sent him flying forwards with his hands spread out. After he had gone to the floor, somebody landed on his back and someone else was across his legs. The applicant said he was then manhandled into a standing position and he was arrested for the possession of dangerous drugs. A search of the flat then commenced while, according to him, he was handcuffed to a chair. The applicant's defence to the 1st count was that none of the dangerous drugs found in the flat were there for the purpose of trafficking and, as we have said in regard to Exhibit P4, the larger of two packets of ice in the flat, it was his case that he had not been aware of the existence of this item until after the police had arrested both himself and Chan. It may also have been of significance to the jury that, aside from the ice in exhibit P4, the applicant already had about 2 grammes of ice in

his flat which would have made it unlikely that he would have called up a supplier for more when evidence had been given that a user consumes approximately half a gramme a day. Grounds of appeal Mr McGowan advanced nine substantive grounds of appeal against conviction on the 1st count, submitting also that, in combination, these grounds rendered the applicant's conviction unsafe or unsatisfactory.

- (1) No prosecution of Chan In the 1st ground, Mr McGowan submitted that the prosecution's decision not to proceed against Chan had resulted in an unfair trial for the applicant. He pointed out, in this regard, that Chan had been previously convicted on three separate occasions of possession of dangerous drugs and he submitted that given the fact that the crystalline solid containing ice (exhibit P4) had been found not far from where Chan was arrested, it might well have been inferred by the jury that Chan had brought it to the premises. The judge directed the jury about their approach to the applicant's evidence in these terms: As you know, it is the accused's case, in respect of the 1st count, that he knew nothing about the large quantity of , Exhibit 4, found just inside the front door. But he accepted that he knew about the presence of the other drugs in the flat. In respect of the 2nd count, he told you that he knew about the presence of some of the drugs as they belonged to him and he had left them there. I will be dealing in detail with the accused's evidence as to his theory as to how Exhibit 4 came to be on the floor of the flat. Let me tell you now, to make it, I hope, easier for you to follow, that I will be telling you hereafter that if you accept his evidence, or if you are unsure that he had Exhibit 4 in the flat prior to the arrival of Chan, then you cannot find him, obviously, to have been in possession of that particular exhibit. (Appeal bundle p. 11) When the judge returned to this topic, he directed the jury in these terms: It is for you to decide how much weight, if any, to give to the accused's evidence. If you believe that the accused has told you the truth, then the prosecution has failed to achieve what it set out to achieve. It has failed to prove the case of trafficking to you and the accused is not guilty. In those circumstances, you must return a verdict of not guilty in respect of the charge of trafficking in drugs. Even if you think that the accused might or may be telling the truth, that means that you must necessarily have a doubt about the truth of the prosecution evidence. Again, in those circumstances, it is your duty to return a verdict of not guilty in respect of the charge of trafficking against the accused. However, if you decide, in respect of either count, that the accused is not guilty of trafficking, you must then go on to consider whether he is guilty of the lesser charge of possession of dangerous drugs. You must always remember that even if you were to decide that you did not believe what the accused told you, that would not relieve the prosecution of its burden of satisfying you, by evidence, so that you are sure that the accused is guilty of each charge he faces. I remind you that when you consider the evidence of the accused, even if you do not positively believe the evidence of the defence, you cannot find against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that particular issue. (Appeal bundle p. 41) After the jury had convicted the applicant on the 1st count, the judge made a specific enquiry of the lady who was the foreman of the jury, asking whether the conviction for trafficking in the 1st count covered all the drugs in the flat including exhibit P4. She replied .

In our opinion, no unfairness was caused to the applicant stemming from the decision not to proceed with a charge against Chan. Indeed, in some respects the applicant was better off without Chan being present at the trial as he was able to lay the blame for the ice on his friend without the danger of a cut-throat defence arising. In addition, we observe that the applicant was represented by experienced counsel at trial and, understandably, as we would have expected in these circumstances, he made no suggestion that a fair trial could not be conducted in Chan's absence. This ground fails.

- (2) The judge's summing up of the police evidence. In the 2nd ground, it was submitted that the judge erred in failing to remind the jury that PWs 1, 3 and 4 were not in fact amongst the group of four officers who entered the [applicant's] flat and thus could not have seen [Chan's] movement in reaction to the initial police entry actions. Mr McGowan laid emphasis on the fact that none of the officers had seen how the ice came to be in the area close to the front door, somewhere between where Chan and the applicant were arrested. He argued that if the prosecution's allegation was right and that, in reality, Chan had come to the flat to buy drugs from the applicant, it would have been unlikely that the applicant would have taken the ice downstairs with him when he went to bring Chan into the building. By the same token, it was submitted that the place where the ice was found (as seen in photographs 98 and 102 in Exhibit P145) was not a likely storage place when this was said to be worth about \$5,000. Hence, it was argued, the probability was that it was Chan himself who had brought the ice upstairs with him to sell some to the applicant. This argument formed the framework of Mr McGowan's submission that as PW1, PW3 and PW4 were not in the police party who had first gained entry, they were in no position to see what Chan had done. On the other hand, the officers who had first gone inside the flat were said to have been PCs 58338, 52251, and Sgt 2689, none of whom were called as witnesses, and PC 54882 (PW5) who was called by the prosecution to testify at the specific request of the defence. The evidence given by PW5 in-chief, essentially, was that he had seen Chan standing by the entrance doorway when he intercepted him and told him to squat down and that Chan duly did so. When PW5 was cross-examined, the evidence he gave was somewhat different, as the judge put it when summing up, and he went on to say: [PW5] said that he was unclear, when he dashed into the flat, whether Chan was in the process of closing the wooden door and that all he could remember was that Chan was at the entrance of the flat. He said that he immediately put his arm across him. He then went on to say that Chan was definitely outside the flat and disagreed that he was inside the flat, at the entrance, closing the door. You may think that this aspect of his evidence conflicts with that of his colleagues. He specifically disagreed that he had thrown himself at Chan. He disagreed that he and Chan had fallen to the floor just inside the flat. He was asked the same question on at least two occasions and maintained that answer. He was then shown his police notebook - you have a copy, Exhibit 147 - and referred to a particular passage in which he had recorded that he went forward to Chan to bring him under control and continued, during that time, I fell down to the floor with that man. It was at this stage that he told you that what he had meant by this entry was that he had knelt down so as to put down items that he had been carrying and that, for an

unexplained reason, Chan had suddenly fallen to the floor. When cross-examined further, he said that his notebook entry was correct in the sense that Chan had fallen down and not that he, PW5, had pushed him to the ground. He told you that he had been trying to describe Chan's fall to the floor, but reiterated that he, the witness, had not also fallen to the floor. He eventually agreed, in cross-examination, that his notebook entry was incorrect. When he was re-examined, he told you that he had made the entry in his notebook some three or four hours after the event. What he had been trying to say in his notebook was that he was kneeling down to place tools on to the floor as he needed to free his hands, and whilst he was doing this, putting down the tools, Chan fell down to the floor. Chan stood up again. PW5 immediately stood up. It was at this stage that he told Chan that he was a police officer and produced his warrant card, where-after he told Chan to squat. It is a matter for you, members of the jury, but you may wish to consider the apparent conflicts between his evidence-in-chief and cross-examination, as well as the apparent conflicts between his evidence-in-chief and his notebook entry. You have seen and heard him in court. It may be that you accept the explanation which he gave as to what he was seeking to convey in the entry which he made in his notebook and simply expressed himself inaccurately. You have a copy of that notebook and of course are entitled to look at that particular passage in the context of the entry as a whole. If you were to think his explanation to be plausible, then it may be that you regard his evidence as substantially consistent with the other police officers who testified. Conversely, if you were to find that you did not accept his explanation and that, in truth, he and Chan actually had fallen to the floor, it may be that you would regard this as being supportive of the evidence of the accused. (Appeal bundle pp. 23-24) With these discrepancies in the evidence given by PW5 in mind, Mr McGowan submitted that the judge, despite having commented on PW5's change of story, had not made it sufficiently clear to the jury that PW5's account was different to that given by the other officers who had all said that Chan had not been on the ground at all. We cannot agree with this submission. In our view, the judge had made it abundantly clear that if the jury rejected the evidence which PW5 had given and found that PW5 had fallen to the floor with Chan, they could accept this as supportive of the applicant's evidence whereas if PW5's explanation was accepted as to the discrepancy in his account, his evidence was substantially consistent with the other police officers. The issue had been put fairly and squarely to the jury and it was one which was pre-eminently for them to determine. This ground fails.

- (3) Prosecuting counsel's cross-examination The point raised in the 3rd ground is a short one and amounted to a submission that the judge had erred when allowing the prosecution to cross-examine the applicant as to whether he may, on previous unspecified occasions, have shared drugs socially with his friends and, further, failed to direct the jury adequately on how they should consider such questions in the light of his replies. Mr McGowan observed that nowhere in the applicant's evidence-in-chief had the applicant said that he had consumed his drugs with others or shared his stash of drugs with them. In cross-examination, however, prosecuting counsel had asked the applicant whether he had friends with whom he would, in the earlier days at his flat, consume drugs. The applicant had

replied occasionally . He also agreed that it was possible they would have shared some of the drugs in their possession. After defence counsel had objected to this line of questioning, the judge ruled in the jury's absence that such questions could properly be asked provided there was a very clear time-frame laid down . The judge added: but what concerns me, or where I do think there is substance in what Mr Stirling is saying is that you need to determine, if you want to pursue the line, a relationship between the sharing and those specific dates [on the indictment]. (Appeal bundle p. 129) After the jury had returned, counsel for the prosecution asked the applicant if he had used drugs in the flat with his friends shortly before the time of the police arrest . The applicant denied this, adding that he could not remember when he had ceased to do so. Mr McGowan submitted that the jury were never directed by the judge as to how this line of questioning, and the answers given by the applicant, should be approached by the jury, as no evidence was ever forthcoming to establish the time-frame during which the sharing of drugs had taken place. In our opinion, more has been made of this issue than it deserved. Prosecuting counsel was fully entitled to explore this line of questioning within the parameters set by the judge and, after the jury had returned to court, the applicant had not only denied using drugs with his friends shortly before 28 October 2004 but he had also denied a further suggestion that the drugs found in his flat were kept for the purpose of sharing amongst friends. We are satisfied not only as to the legitimacy of the questions the applicant was asked on this topic but also as to there having been no prejudice or unfairness created by the fact that they were asked. In any event, the judge went to some lengths to explain to the jury the importance of the rule that questions asked by counsel were not in themselves evidence of anything unless the witness adopted the suggestions which had been made.

- (4) References to the applicant's false passport The 4th ground consisted of a complaint that the judge ought to have directed the jury to ignore all references made by the applicant to false documents of identity which appeared in the applicant's records of interview (exhibits P69-72). However, this is not a matter which has ever been raised before. Defence counsel had presented the applicant's case by introducing the applicant's character, no doubt as part of a tactical gambit to emphasise the fact that the applicant was not trying to hide anything when the defence consisted of an open admission limited to the simple possession of all the drugs in the 1st count (except exhibit P4). It seems hardly surprising, in the circumstances, that no objection was taken to the passages in the interviews where reference had been made to a false passport and to the applicant's explanation for its possession. There is no substance in this ground.
- (5) Jury's approach to the applicant's interviews The 5th ground of appeal amounted to a criticism of the judge that he had failed to direct the jury adequately as to how they should approach the answers given by the applicant in his interviews which Mr McGowan rightly described as mixed statements . He submitted that it was not sufficient for the judge merely to have directed the jury that they were entitled to take into account what he [the applicant] said to the police . Mr McGowan argued that the jury should have been given a direction which would have had the effect of explaining to the jury the weight they might attach to the

incriminating parts of the interviews as opposed to the exculpatory answers given by the applicant. This criticism is without foundation and, in any event, how such directions might have helped the applicant it is difficult to understand. The purpose of a specific direction in regard to mixed statements (see: *R v Sharp* [1988] 1 WLR 7) is to cater for the situation where a defendant has not testified at trial but has given out-of-court replies which are a mixture of incriminating and exculpatory answers. In such circumstances, it is generally helpful for the jury to be given some guidance on the weight to be attached to such evidence. A direction of this kind is not appropriate where, as in the present case, a defendant has elected to give evidence. Mr McGowan apparently thought, from a reading of the judgments in *HKSAR v Wong Chi-wan* CACC 156/2005 and *HKSAR v Lo Wai-ming* CACC 530/2005, that such a direction would also be appropriate in cases where a defendant had testified. However, this is not correct. The concerns expressed by this court on the issue of mixed statements in those cases related to comments which were said to have amounted to material misdirections. In the present case, the judge had said all that he needed to say by leaving it to the jury to take into account the answers given by the applicant when they came to consider his evidence in the trial. This ground is misconceived.

- (6) Inferences The 6th ground of appeal was that the judge had: erred in directing the jury that amongst the evidence that they could use to draw the (irresistible) inference that the applicant possessed at least some of the drugs for trafficking was: -
- a) the variety of the dangerous drugs ;
 - b) that he was a tenant of the premises;
 - c) that he was occupying the premises alone at the time of the offence; and
 - d) that he had himself manufactured the hookah found in the premises. Mr McGowan conceded that some of the items found at the applicant's flat were capable of supporting an allegation of trafficking, including the total amount of ice which was found, the packing materials and the scales, but he submitted that no such inference could be drawn from other features of the evidence about which the judge reminded the jury when he dealt with the evidence from which an inference that the applicant was trafficking might be drawn. The judge's directions were as follows: You should be aware that it is not necessary for the prosecution to satisfy you on either count that the accused possessed for the purpose of trafficking each and every dangerous drug itemised in the respective counts. It may be that you conclude beyond reasonable doubt that the accused was in possession of a portion of the drugs for his own consumption and the remainder for the purpose of trafficking. In such an event, you will return a verdict of guilty to the count. The evidence in relation to the 1st count before you from which you could draw the inference is, firstly, the weight of , depending upon what you find in regard to Exhibit 4. If you find him to have been in possession of Exhibit 4, then you know that the weight of contained in the mixture is 16.17 grammes. If you find him not to have been in possession of that, then the weight of the alone is 2.65 grammes. Secondly, the variety of the dangerous drugs for, in either instance, there

was also a solid containing 1.65 grammes of cocaine, 10.62 grammes of cannabis resin, 3.9 grammes of herbal cannabis and various other small amounts of drugs. Thirdly, that the accused and his wife were the tenants of the premises. Fourthly, that the accused was occupying the premises alone at the time of the offence. Fifthly, that according to his own evidence, it was he who had manufactured the hookah found in the premises. Sixthly, the presence in the premises of the electronic scales, the resealable plastic bags and the glass items upon which traces of dangerous drugs were found. Finally, his own evidence that a number of people consumed dangerous drugs in that flat. If after taking all these things into account, you are satisfied beyond reasonable doubt that you can infer that the accused must have possessed the dangerous drugs for the purpose of trafficking in them, or some of them, and that there is no other realistic conclusion to be drawn from the evidence, that is why the accused possessed them, then you must draw the inference and find the accused guilty of trafficking. Before you draw the inference, you must be sure that it is the only inference, the irresistible inference which no reasonable person could fail to draw from the evidence. If you are uncertain about this in any way, then you must give the benefit of your doubt to the accused and acquit him of the offence of trafficking in dangerous drugs. (Appeal bundle pp. 13-14) As the judge had correctly indicated, some of the drugs in the applicant's admitted possession might well have been, and probably were, intended for personal consumption. However, the judge also helpfully drew together the evidence which, on the prosecution's case, was capable of leading to an inference of trafficking in some of the drugs. When he did so, there was no suggestion on his part that any single feature of the evidence taken in isolation was sufficient to establish trafficking and Mr McGowan's submission that the four factors he had criticised in this ground could have misled the jury into finding an irresistible inference of trafficking was, with respect, unrealistic. Curiously, in the list of matters given to the jury for their consideration of what, if any, inferences could be drawn, the judge had omitted to include the fact that a camera was attached to the applicant's front door which fed pictures of the corridor outside to the screen of one of the televisions in addition to a direct connection to the second television of pictures from the building's CCTV. With both televisions switched on, this might have been taken to be an indication that this was more in the nature of a trafficker's flat than a mere drug user's flat. On the other hand, it may be that as the judge dealt with the evidence about the camera and the televisions separately in his summing up he considered it unnecessary to make any further reference to this aspect when dealing with inferences that might be drawn. There was, in our view, no misdirection and this ground fails.

- (7) Irrelevant and prejudicial material introduced in evidence The 7th ground, put shortly, was that the prosecution caused to be exhibited a number of items (exhibits P58-64) about which there was no cross-examination and as to which there was no reference in the judge's summing up. Mr McGowan contended, therefore, that these exhibits were of no relevance to the case yet, as they were seen by the jury, they added prejudicial weight to the case against the applicant which far outweighed any probative value. There should, he argued, have been a direction to the jury to ignore these exhibits. Some of these items were plainly drug-related

such as the three plastic tubes (exhibit P60) and the nineteen glass tubes (exhibits P59 and P62). These were contained in a file (exhibit P58) and a wooden box (exhibit P61), respectively. The other two exhibits (exhibits P63 and P64) were small notebooks which contained some inoffensive words in Thai. As Mr Tam pointed out, not only did defence counsel not object to any of this material going before the jury but he would also probably have been anxious to have the notebooks seen by the jury in order to lend some credence to that part of the applicant's evidence in which he had stated that at one stage his Thai girlfriend had resided at the flat. This ground is without merit and, furthermore, as it could not possibly have affected the integrity of the conviction and afforded no real chance of success, it should not have been raised as a ground of appeal.

- (8) The judge's response to the jury's requests after their retirement The only matter about which we felt any real concern in this application was the topic raised in the 8th ground of appeal. This related to what was, on any view, an irregularity at trial. The sole question for our determination was whether it amounted to a material irregularity. Very soon after the jury retired to consider their verdicts, at about 3.11 pm on 13 February 2006, they requested in writing a copy of the relevant section of the Dangerous Drugs Ordinance for [their] reference and asked if they could have access to the audio-recording [of the summing up] if required. They were then provided with the relevant portion of the Ordinance but were denied access to the summing up. This occurred after counsel had left the court and at a time when they were not immediately on hand to be told about the jury's requests. However, at about 5.08 pm, the court reconvened for new jury bailiffs to be sworn in and for certain administrative matters connected with the catering arrangements to be explained to the jury. The jury left the courtroom at 5.10 pm after the judge had informed them that the court was available at any time if they had any questions or needed any assistance. Counsel then discussed with the judge the proposed timetable and there followed an exchange between defence counsel and the judge in these terms: Mr Stirling: The issue is at what stage, if at all, does your Lordship call the jury back to say, Look, you need rest, you need nourishment, resume tomorrow when you wake up. Court: Yes, well, that's what I was going to raise with you in -- I was going to tell you that I had one request from almost the moment you both walked out, needless to say, which was could they have a copy of the sections of the Dangerous Drugs Ordinance, which I have given to them. Mr Stirling: I am perfectly content with that, my Lord. I refer to it in my address. I quoted ... Court: Yes, it's difficult for them to remember what ... Mr Stirling: What trafficking means. Court: What trafficking means, so I gave them that. They asked if they could have access to a recording of my summing-up and [I] said no, but if they had any questions they could send me a ... Mr Stirling: They have to come back for clarification. Court: Come back to me. (Appeal bundle p. 141) Mr McGowan's complaints were twofold. In the first place, he submitted that the jury's request for the relevant part of the Ordinance was possibly an indication that they were experiencing some difficulty in understanding the meaning of trafficking, in which case a further direction should have been given. Secondly, despite defence counsel's acquiescence to what the judge had done, it was, Mr McGowan argued, a material irregularity to have failed to inform

counsel and to have provided a copy of Cap. 134 without further direction . In the context of these criticisms, it is not without importance that by the time the jury returned their verdicts at 8.23 pm, they had not asked for any further assistance from the judge. Mr Tam accepted that the procedure in *R v Gorman* [1987] 1 WLR 545 at 550 had not been followed by the judge. Lord Lane CJ expressed the proper procedure thus: it seems to us that certain propositions can now be set out as to what should be done by a judge who receives a communication from a jury which has retired to consider its verdict. First of all, if the communication raises something unconnected with the trial, for example a request that some message be sent to a relative of one of the jurors, it can simply be dealt with without any reference to counsel and without bringing the jury back to court. We have been helpfully referred to a decision of this court, *Reg. v. Connor*, *The Times*, 26 June 1985 where that very situation seems to have arisen. Secondly, in almost every other case a judge should state in open court the nature and content of the communication which he has received from the jury and, if he considers it helpful so to do, seek the assistance of counsel. This assistance will normally be sought before the jury is asked to return to court, and then, when the jury returns, the judge will deal with their communication. Exceptionally if, as in the present case, the communication from the jury contains information which the jury need not, and indeed should not, have imparted, such as details of voting figures, as we have called them, then, so far as possible the communication should be dealt with in the normal way, save that the judge should not disclose the detailed information which the jury ought not to have revealed. We may add, before parting with the case, that the object of these procedures, which should never be lost sight of, is this: first of all, to ensure that there is no suspicion of any private or secret communication between the court and jury, and secondly, to enable the judge to give proper and accurate assistance to the jury upon any matter of law or fact which is troubling them. If those principles are borne in mind, the judge will, one imagines, be able to avoid the danger of committing any material irregularity. Mr Tam submitted that the mistake which had been made in the present case was not such as to render the verdict on the 1st count unsafe. In particular, he argued, the undisclosed communication between the judge and the jury took place at a moment very soon after the jury's initial retirement to their room when they would barely have begun their deliberations. Once more, defence counsel had been informed of it over three hours before the jury eventually returned with their verdicts and, if he had wished the judge to do more, there was every opportunity for him to have said so. The fact that no issue was raised either by defence counsel or by the jury after they had been told that the court would be open at all times for them if they required assistance was, we considered, a powerful indication that the jury required no further assistance from the judge. Furthermore, given the timing of the two requests from the jury, it seemed fairly clear to us that the jury had simply been trying to find out if they were permitted to listen to the audiotape of the summing up if they felt the need later on in their deliberations to do so. The relevant section of the Dangerous Drugs Ordinance was obviously for their ease of reference and no more. Mr Tam reminded us of the way Lord Hobhouse and Lord Millett, in their dissenting opinion in *Ramstead v The Queen* [1999] 2 AC 92 at 108, expressed the matter touching upon the precise issue raised in

this ground of appeal. This was not controversial, and fell outside the realms of dissent, and was as follows: The Court of Appeal are required by statute to consider whether a miscarriage of justice has occurred. It is only irregularities which have led to a miscarriage of justice which permit the Court of Appeal to allow an appeal against conviction. Of course a conviction entered after an unfair trial will ordinarily involve a miscarriage of justice (or, in the English terminology, be unsafe). But in every case an exercise of evaluation has to be undertaken by the appellate court. The conduct of criminal trials cannot be categorised in black and white terms. The common place task of a criminal court of appeal is not to assess whether the criticisms which have been made of the trial are wholly without foundation (they may be) but whether they amount to an unfairness sufficiently substantial in the context of the trial as a whole to lead to the conclusion that there has been a miscarriage of justice (or that the verdict is unsafe). Not every summing up is impeccable: not every exercise of discretion is wholly beyond criticism. The judge has the conduct of the trial and the mere ability to criticise him no more invalidates the outcome than the ability to criticise the verdicts of the jury; it is still necessary to ask whether there has been a miscarriage of justice (or whether the verdict was unsafe). This equally applies to irregularities. They may be of a minor character or have a character of which a more serious view must be taken. Some irregularities may be so fundamental as necessarily to invalidate the verdict (as, for example, the improper acceptance of a verdict which is not unanimous). There can be no doubt, with respect, that this correctly expresses the approach to be taken by a Court of Appeal to irregularities which have occurred at the trial stage. Bearing in mind this approach, we are satisfied that the irregularity in the present case was not a material one although, of course, the judge should have waited for counsel to return before communicating with the jury in the way he did (see: HKSAR v Leung Wai-hung [2007] 1 HKC 481). From all the circumstances, including the terms and nature of the jury's requests, their timing and what followed when counsel were informed of what had taken place, we are satisfied that the mistake which the judge made in proceeding in the absence of counsel was not of a sufficiently substantial nature to lead to the conclusion that a miscarriage of justice may have occurred. The relevant section from the Ordinance which the jury was given could equally have been provided to them as part of the summing up and the fact that the jury did not return to court to ask for further assistance at any stage of their deliberations is a clear indication that they needed no further assistance in relation to the summing up. We should add, lastly, in this regard that it seems from Mr McGowan's written argument that he had been under the impression that the judge had provided the jury with a copy of the entire Dangerous Drugs Ordinance because he said so twice (in paragraphs 58 and 60 of his amended written argument). This assertion arose because, with respect, he had misread a memorandum which the judge's clerk had written to the Registrar of the High Court on 23 May 2007 in reply to enquiries which the applicant's solicitors were making. This is now a matter of no consequence as McGowan has readily accepted that the jury was not provided with the whole of the Ordinance.

- (9) Inconsistent verdicts We do not need to dwell on the last ground in any depth. This related to what Mr McGowan called the curiosity that despite the almost identical evidence on both counts of the indictment the jury accepted the applicant's evidence on count 2 while rejecting the defence on count 1. Mr McGowan pointed out that there had been no cross-examination on sharing dangerous drugs and reciprocity in regard to the 2nd count whereas there had been on the 1st count. This carried with it the suggestion that this may have been the reason for the conviction on one count but not the other. Nevertheless, as he frankly conceded, there were obviously matters for the jury to decide on the evidence given about each of the raids, separated as they were in time by two months. The jury's acquittal of the applicant on the 2nd count of trafficking did not, Mr Tam submitted, necessarily imply an acceptance of the applicant's account. It might equally have been that the jury were prepared to give the applicant the benefit of the doubt on the 2nd count having already convicted him of trafficking on the 1st count. This is plainly correct but, in any event, there were some differences in the evidence on these counts, not least the fact that whereas the applicant had rigged up rudimentary surveillance equipment of his own to the front door at his first flat, the second flat was not similarly equipped. We found no merit in the argument that there had been an inconsistency in the verdicts. Conclusion as to conviction on the 1st count Nothing raised in any of the grounds of appeal has caused us to regard the conviction on count 1 as unsafe or unsatisfactory but we shall grant leave to appeal having considered the arguments advanced in the 8th ground of appeal. Treating the hearing as the appeal, we dismiss the appeal against conviction. Sentence Mr McGowan informed us that he was not instructed to conduct the application for leave to appeal against sentence. Accordingly, the applicant made his own submissions which were largely concerned with the sentence on the 2nd count. Turning firstly, to the sentence on the 1st count of 7 years imprisonment, this was, in our view, appropriate for the reasons given by the judge when sentencing the applicant. The judge accepted that the trafficking would largely have consisted of supplying others with drugs for consumption on the applicant's own premises. However, the judge indicated that he took into account that a proportion of the ice, which formed the most serious element in the range of drugs in the applicant's possession, would have justified a sentence of about 7 years imprisonment if all of it had been intended for the purpose of trafficking. He accepted, however, that some of this ice was intended to be consumed by the applicant himself which led the judge to adopt a lower starting point. The judge then cited a passage from *HKSAR v Wong Suet-hau and Anor* [2002] 1 HKLRD 69 at 84 which states:
48. It has often been said that sentencing is an art. Judges are expected to use their experience, assisted by a large measure of common sense, to decide whether a distinction can properly be drawn between a trafficker who can genuinely advance mitigation that no profit motive was involved in the small supply of drugs to a friend, and others who carry a supply to give to their friends as and when the occasion may arise. In the former category, there might, for example, be the individual who purchases a small quantity of a dangerous drug for recreational use and gives part of it to his partner, who has previous experience of the drug, to consume at a social event. This plainly would fit, we suggest, into the lowest bracket of

sentence for trafficking. It is quite a different matter, taking the example in the latter category, for a trafficker, who sometimes uses drugs, to carry or store a supply of drugs to give to his friends or acquaintances as and when the occasion should arise. Firstly, it goes without saying that such traffickers pose exactly the same threat to society as people who peddle their drugs for gain. Either way, the drug abuser is supplied with drugs with the same potentially dangerous impact resulting from the supply. Secondly, the bulk of the drugs would, in such an example, almost certainly have been established to be intended for trafficking and, whilst the absence of a profit motive, inherently unlikely though this must be in such a scenario, might slightly reduce the trafficker's moral blameworthiness, we do not consider that this would provide mitigation justifying any specific discount.

49. It has to be borne in mind that the evil behind all aspects of trafficking in drugs, which the courts have a duty to deter, is ultimately the supply of dangerous drugs to the public, whether or not this is done for financial gain. Looked at in another way, we believe that the major concern of the law-abiding community in Hong Kong, aware of the immense harm and suffering caused by drugs and by those who are engaged in trafficking them, is principally directed at the availability of drugs which traffickers make possible by their activities rather than the profits which traffickers are able to make from what they have done. By way of example, the parents whose son or daughter starts to abuse drugs are unlikely to have any particular interest in the trafficker's motive for supplying those drugs; it is the fact that their offspring has been supplied with the drugs which will, justifiably, be the object of their concern and it will be no consolation to such parents to be told that the supply came from a friend who had no financial motive when handing over the drugs.
50. The courts have a duty to keep these concerns uppermost in mind when deciding the appropriate level of sentence for drug traffickers, whether or not they have profited by their activity.
51. In our opinion, while some of the social or non-commercial trafficking cases involving small quantities of drugs can properly be regarded, when all the circumstances are examined, as falling into the lower end of the sentencing scale applicable to the dangerous drug in question, we are firmly of the view that this factor should not, in itself, provide a general basis for imposing a lighter sentence than would have been imposed for commercial trafficking. The friend who starts off or perpetuates another's abuse of drugs is as dangerous to the community as the commercial supplier of small quantities who will generally traffic in drugs with those already addicted. (Appeal bundle pp. 59-61) Having imposed a 7-year sentence on the 1st count of trafficking, the judge went on to impose 18 months consecutively for the possession of the much smaller quantity of drugs of which the applicant was convicted on the 2nd count. The quantity involved was 9.94 grammes of ice, the possession of which the applicant had admitted. The judge stated that it was an aggravating feature of the case that the applicant was on bail when he committed the second offence. He might also have added that there was, in all the circumstances, a high latent risk that others might be able to gain access to the drugs in the applicant's possession. On any

view, a consecutive term of 18 months on the 2nd count was justified after trial and, on the basis of the very similar circumstances to be found in HKSAR v Jarhia Kuldeep Singh, CACC 96/2006, no doubt a starting point after trial of up to 27 months could well have been justified. It is to be noted, however, that the judgment in that case was given on 15 September 2006, seven months after sentence was imposed in the matter presently before us, so that no criticism attaches to the judge for passing a sentence which might now be considered as being on the low side. However, the judge had seemingly overlooked the fact that the possession of the 9.94 grammes of ice of which the applicant was convicted in this count had never been an issue at trial. Count 2 had included all the ice found in the applicant's second flat, namely 17.18 grammes, but he was acquitted of the balance. We have accepted, for present purposes, that the applicant had, as he told us, been unaware that he could plead guilty to the possession of just those drugs which he admitted possessing. If he had realised, we have no doubt that he would have pleaded guilty because his evidence amounted to the clearest admission to the possession of some of the ice in the 2nd count but not all of it and he denied possession of all the other drugs found in his flat which were included in this count. When, in due course, the jury convicted the applicant only of the simple possession of the 9.94 grammes of ice he had admitted, we consider that the judge ought then to have dealt with the matter as if a guilty plea had been entered but, unfortunately, nothing was said by the judge to indicate that he did so. The judge took a starting point of 18 months imprisonment to take into account the aggravating feature that this was an offence committed on bail. He would otherwise, he said, have taken a starting point of 15 months. However, he made no reduction from this to reflect the applicant's admitted guilt to a part of the dangerous drugs in count 2. To this extent, we found merit in the sentence application. We shall, therefore, grant leave and, treating the hearing as the appeal, we shall as a matter of principle reduce the sentence on the 2nd count to 12 months imprisonment to give effect to the usual discount of a third which is given for a guilty plea. The sentence on the 2nd count must be served consecutively to the sentence of 7 years imprisonment on the 1st count. Accordingly, the appeal against sentence is allowed, to the extent that the overall sentence is reduced to 8 years imprisonment, a reduction of 6 months. (M. Stuart-Moore) macrobutton nomacro Vice-President (Maria Yuen) Justice of Appeal (J. Barnes) Judge of the Court of First Instance Mr Simon Tam, Ag SADPP, of the Department of Justice, for the Respondent. Mr James McGowan, instructed by Messrs Boase Cohen & Collins, assigned by Director of Legal Aid, for the macrobutton nomacro Applicant (re: conviction) The Applicant, in person (re: sentence) PAGE - 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 G H I J K L M N O P Q R S T U V 1udk 1udk 1udk G H I J K L M N O P 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 "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0("0) "0* "0+ "0, "0- "0. "0/ "00 "01 "02 "03 "04 "05 "06 "07 "08 "09 "0: "0; "0< "0= "0> "0? "0@ "0A "0B "0C "0D "0E "0F "0G "0H "0I "0J "0K "0L "0M "0N "0O "0P "0Q "0R i\$&`G k4u4" Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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