

HONG KONG / JUDGMENT

HKSAR v. LEE TAI LUNG

COURT

Court of First Instance

DECIDED

12 September 2007

CASE / FILE NUMBER

HCMA334/2007

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bjbj HCMA 334/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 334 OF 2007 (ON APPEAL FROM KCCC 6490/2006)

BETWEEN HKSAR Respondent and LEE TAI LUNG Appellant

Before: Hon Fung J in Court Date of Hearing: 5 September 2007 Date of Judgment: 12 September 2007

J U D G M E N T

The appellant Lee Tai-lung (D2) was convicted after trial before a magistrate of careless driving (charge 2), and attempting to pervert the course of justice by falsely representing to the police that he was the passenger of the car involved in an accident (charge 3). The appellant Tsang Kar-shing Douglas (D1) was convicted of attempting to pervert the course of justice by falsely representing to the police that he was the driver of the car (charge 1). D1 is now deceased and no step has been taken after the filing of the Notice of Appeal. The appeal by D1 is therefore dismissed. Prosecution case On 26 May 2006 at 2:50 a.m., Mr. Yuen Wai Hung (PW1) was driving his taxi along Mody Road. Weather was fine, visibility and lighting condition were good. Suddenly, the taxi was hit from behind. PW1 alighted and saw the private car which hit his taxi had crashed into a flowerbed. He saw 2 males alighting from the private car and there was nobody else on board the car. PW1 said the one alighting from the driver's seat was bespectacled, thin build and slightly taller, roughly speaking 5 ft. 6 in.; the other alighting from the front passenger seat was fat and slighter shorter, in the region of 5 ft. 5 in. He never lost sight of the 2 males until the police arrived. He told the police who the driver was and who the passenger was. PW1 said he did not see anyone trying to escape from the private car, and denied that he had ever

told the police that a third person had escaped. PC48655 (PW2) arrived and spoke to D1 and D2 first. There was nobody else in the vicinity. PW2 checked their identity cards. D1 was fatter and D2 was thinner and wearing glasses. D1 said he was the driver, and D2 said he was the passenger. D2's lips were bleeding, and D1 had no injury. D2 smelt strongly of alcohol. PW2 then walked over to PW1. PW2 said PW1 pointed D2 out as the driver, describing him as the thin one with glasses, and the fat one as the one getting out of the passenger's seat. PW2 said 2 other private cars arrived and 6 males alighted. Someone asked for the taxi driver and they approached PW1. PW2 called for reinforcement and stopped the males from approaching PW1. PW2 then noticed D2 was missing. PW2 arrested D1 for perverting the course of justice. Under caution, D1 alleged that there were 2 persons on board the taxi and they swapped their position, and the taxi driver had left the scene. PC 51657 (PW3) was tendered for cross-examination. He said PW1 told him that a male person alighted from the private car and actually escaped from the scene and that was why PW1 called the police. That was just before PW1 was taken to hospital. PC 23275 (PW4) took some photographs. They showed some stains on the offside front and rear seats of the private car. PW4 said he was not sure if they were blood stains but could be so. The private car belonged to a friend of D2. D1's case D1 gave evidence. He said he left a night club together with D2 and a friend Ma Li at about 3 am. He was the driver, Ma Li was in the front passenger seat, and D2 was in the rear. He was driving because D2 was drunk. On the accident, D1 said the taxi was driving slowly. Then he said: I was driving the car. Abruptly, the taxi made a turn to arrive out there and I failed to brake in time. Then I rammed against the rear of the taxi. He was asked what the taxi did and said: At that stage, it was moving very slowly on that spot. Well, it was in front of me. I did not see it clearly. D1 said the car got out of hand and he rammed against the flowerbed. D1 said he rammed into the rear of the taxi because it was small hours and he used to wake up very early. He could not determine how slow the taxi was. He made a mistake of judgment and thought he would not rammed into the taxi. D1 said D2 and Ma Li alighted, then Ma Li left the scene in less than 3 minutes to get assistance. But he did not see Ma Li returning with the other 2 cars. D1 said the stains on the driver seat and the rear offside (i.e. right) passenger seat were blood stains. D2's case D2 elected not to give evidence. He called Mr. Raymond Wong (DW1), manager of the night club. DW1 said he helped D2 to the car as D2 was looking very unsteady. There were 3 persons on board, and D2 sat in the rear. Later, Ma Li returned to the club and said Ah Kar rammed against something, and about 6 customers went outside with Ma Li. Magistrate's reasons The magistrate noted discrepancies between the evidence of PW1 and of PW2 and PW3:

- (1) PW1 said D2 was wearing a jacket when he indicated him to PW2, but PW2 said D2 was wearing a light shirt at the time;
- (2) PW1 said D2 was slightly taller than D1 but they were of similar heights;
- (3) PW1 said both wore light shirts, yet D1 wore a blue shirt;
- (4) PW1 denied telling PW3 he saw someone escaping from the scene. The magistrate considered the evidence of PW3 carefully in view of the defence case that a third man, Ma Li was sitting in the front passenger's seat. The magistrate said PW3 made no contemporaneous record of his conversation with PW1 and made his witness statement

about 6 months later. PW3 made the mistake that he was the only photographer at scene, but agreed that some photographs were not taken by him. PW3 did not follow up with PW1 as to where the alleged escaping person was in the car, or where he had escaped to. There was no suggestion that PW1 had told PW2 of any escaping person when PW2 was making the initial detailed enquiries. It was clear that by the time PW3 spoke to PW1, D2 had left the scene. The magistrate accepted PW1's evidence on the matter, and found that PW3 had either wrongly recalled or confused on what PW1 had told him. The magistrate said he did not consider the bloodstains advance either the prosecution or the defence case. He noted the position of the stains, and D1 said D2 and him were standing at the offside of the car and he was trying to clean D2 up. The magistrate found PW1 to be a reliable and credible witness and he gave accurate evidence as to what he saw after the accident. The magistrate was sure that D2 was the driver and D1 was in the front passenger seat. He was sure that if there had been a third man on board the private car, he did not sit in the front passenger's seat and did not remain at scene for 3 minutes after the accident. The magistrate found that D1's account of the evidence was extremely vague. The sketch plan showed the scene was a piece of straight wide road. D1 initially said the taxi made an abrupt turn, then he said the taxi was in front and he did not see it clearly and he had just misjudged the speed of the taxi and rammed into it. D1 had told the police that PW1 was not the taxi driver but a passenger. This was neither put to PW1 in cross-examination, nor mentioned by himself in-chief. The magistrate considered the vague account of the accident by D1 and there was no apparent reason why the private car was driven at speed straight into the back of the taxi which was driving slowly along a wide road. He did not believe the evidence of D1. The magistrate also found DW1 to be lying or mistaken. He never made any record of the incident and never spoken to anyone about the incident, and was only asked to give evidence. The magistrate also took into account the circumstances that D2 left the scene while his identity card was held by PW2, and he was the one who borrowed the car and the owner did not know D1. The magistrate was sure of the guilt of D1 and D2 on the evidence of PW1 and PW2 and the circumstantial evidence. Grounds of appeal Mr. McGowen, for the appellant, filed 10 substantive grounds in the perfected grounds of appeal, and one supplementary ground. They may be summarized as follows:

- (1) The magistrate erred in failing to appreciate the discrepancy of PW1's evidence that the driver was slightly taller than the passenger;
- (2) The magistrate erred in preventing defence counsel from asking PW1 which of the defendants he considered shorter;
- (3) The magistrate failed to consider the actual geographical positions of the 2 vehicles and what had transpired when assessing the identification of D2 as the driver;
- (4) The appellant did not receive a fair trial as his trial counsel did not lead the evidence that PW1 failed to identify D2 at an identification parade held on 23 June 2006;
- (5) PW2's evidence that PW1 identified D2 as the driver should not have been admitted;

- (6) The magistrate erred in his determination that the circumstances of the collision were such that a driver of D1's experience, with some drink taken, could not have been the driver.
- (7) The magistrate's disbelief of D1, particular that he was the driver, did not necessarily mean that D2 was the driver;
- (8) The magistrate erred in finding D2 as the driver given his acceptance that there might well have been a third man on board;
- (9) The magistrate erred in finding DW1 was either lying or mistaken;
- (10) The magistrate erred in rejecting the bloodstains as supporting the defence case;
- (11) The magistrate failed to direct himself that he should consider the cases of D1 and D2 separately, and all the indications were to the contrary. Fresh evidence The appellant applied for leave to adduce fresh evidence that PW1 failed to identify D2 at an identification parade on 23 June 2006. This fact is uncontrovertible. Mr. McGowen is not relying on any ground of incompetence of trial counsel. The ground is that there has been substantial miscarriage of justice in that the said evidence, if believed, would demonstrate the identification of D2 as the driver by PW1 is unsafe and unsatisfactory. Consideration Mr. McGowen accepted that the manner of driving of the private car is careless, the issue being who was the driver at the material time. Before I delve into the individual grounds of appeal, I wish to take a global view of the matter. The key issue at trial was identification of the driver, which also depended on the credibility of PW1. PW1's evidence was that he saw only 2 persons alight from the private car, the thin bespectacled one from the driver seat, and the fat one from the front passenger seat. PW2 said there were only 2 persons at scene when PW1 told him the above identification. Identity check revealed that the thin bespectacled person was D2, and the fat one was D1. Hence, the basis of the identification was not of facial recognition, but on the distinguishing features, body built and spectacles, between the two. Mr. McGowen submitted that if there were doubt as to the number of persons present in the vehicle, it would affect: (1) the credibility of PW1; and (2) the identification of the driver. I shall now deal with the grounds of appeal in what I perceived to be a convenient order. Ground 8 Mr. McGowen submitted that the magistrate referred to the possibility of a third person in the car, hence, there is a possibility that Ma Li was driving. Firstly, Mr. McGowen overlooked the point that it was never the defence case that Ma Li was the driver. Secondly, the magistrate's comment that even if there had been a third man on board the private car, he was sure that person did not sit in the front passenger's seat was simply another way of saying that he accepted PW1's evidence that there were 2 persons in the private car, one alighting from the driver's seat, and one from the front passenger's seat, and none of them was Ma Li. Hence, whether there was a third person before PW1 made any observation is not relevant to the issue of identification, subject of course to the acceptance of PW1's evidence that there were only 2 persons. As to whether PW1 only saw 2 persons, Mr. McGowen criticised the magistrate in rejecting the evidence of PW3 that PW1 had told him that one person actually escaped. That person might well have been Ma Li. Mr.

McGowen also pointed out that under cross-examination, PW1 said he did not know how many were in the car at the time of the collision. PW1 did say he saw only 2 persons ever since he looked at the car, and he kept an eye on them until the police arrived. PW1 denied ever telling PW1 a person had escaped or was trying to leave. The magistrate rejected PW3's evidence as he made no contemporaneous record and his witness statement was made months later, and he had made errors in other parts of his evidence. There was no investigation by PW2 or PW3 of the position in the car and where about of the third person. I see no error if the magistrate so rejected PW3's evidence. Mr. McGowen submitted that it would be odd for the 2 carload of persons arriving at the scene given there is no evidence that D1 or D2 had talked on the mobile phone. Be that as it may, the arrival of the other persons is not at odds with there being no third person in the car as observed by PW1. Once the magistrate accepted PW1's evidence that he only ever saw 2 persons alight from the vehicle, one from the driver's seat and one from the front passenger seat, then logically, the dichotomy based on body build and spectacles is good identification. Ground 1 PW1 said the heights of the 2 persons were only rough estimates. The difference is only that of an inch. It turned out that D1 and D2 were of similar height, and it was not the case that PW1 got them mixed up the other way round. In any case, the relevant distinguishing features between the 2 persons were the body build and spectacles, which PW2 said were the attributes given to him when PW1 pointed the 2 persons out. Mr. McGowen was asked whether the magistrate should have taken heed only of the estimates of height and ignore the body build and spectacles, and he quite properly conceded not. Mr. McGowen also mentioned that while PW1 said D2 was wearing a jacket while PW2 said D2 was wearing a shirt. Again, this is not material in view of the dichotomy based body build and spectacles. And whether PW3 approached PW1 or D1 and D2 first is also neither here nor there. Ground 2 Although the magistrate stopped questioning by D2's counsel of the heights of the 2 persons, those questions were asked by D1's counsel. Also bearing in mind the basis of identification, there is no unfairness to D2. Ground 3 Mr. McGowen submitted that PW1 was observing the private car from 20 metres away, facing the nearside (i.e. passenger side) of the private car at an angle. His neck was sprained and he might have been shocked by the accident. While PW1 could well see the front passenger alighting, all he could see was another person alighting from the driver's side. PW1 might have assumed that any person alighting from the driver's side was alighting from the driver's seat. The magistrate had given himself the usual warning in dealing with the identification evidence. Further, PW1's evidence was that the thin bespectacled person alighted from the driver's seat and not merely the driver's side. Mr. McGowen agreed that PW1 was not cross-examined on his observation. The private car was a saloon car and not a van. The vehicle would not have blocked the view of the person alighting. There is no basis to say that all PW1 had seen was some one alighting from the driver's side and he assumed the person alighted from the driver's seat. Ground 5 Mr. McGowen pointed out that the identification by PW1 to PW2 that D2 was the driver was not within the hearing and probably not within the sight of D2. The evidence should not have been led or should have been disregarded. Mr. McGowen referred to *The King v. Christie* [1914] AC 545 for his proposition. In *Christie*, the accused was charged with indecent assault

of a boy (Butcher). A constable (Crooks) went to the field where he saw number of people including the accused, the boy and her mother. The mother made a complaint to the constable that the accused had assaulted her son. The boy said That is the man, mum. The constable, standing close to the accused asked Which man? The boy went up to the accused, touched him on his sleeve and said That is the man . Then the constable asked the boy What did he do to you? In reply, the boy made a statement giving full particulars of the offence charged, and the accused replied I am innocent. At the trial, the boy gave unsworn evidence under the Children Act 1908. He described what was done to him, and identified the accused as the person who had done it. But the boy did not give evidence of any previous identification of the accused by him, nor refer to any statement previously made by him in the presence of the accused. The constable gave that evidence and the response of the accused. The accused was convicted. The conviction was quashed by the Court of Appeal, holding that the statement of the boy was inadmissible. The Director of Public Prosecutions appealed to the House of Lords. Before the House, the questions of law were: (1) whether a certain statement made by the boy in the presence and hearing of the accused and a constable was properly admitted in evidence; (2) whether the trial judge misdirected the jury in telling them that the statement so made by the boy was material evidence implicating the accused in corroboration of the boy s evidence at trial. The Attorney-General contended that the entire statement of the boy was admissible on each of four separate grounds:

- (1) As part of the act of identification, or explanatory of it;
- (2) As a statement made in the presence of the prisoner in circumstances calling for some denial or explanation from him, the truth of which he admitted by his conduct and demeanour;
- (3) As proof of consistency of the boy s conduct before he was examined with his testimony given at the trial;
- (4) As part of the *res gestae*. Their Lordships found that it was not convenient to discuss Ground (3) at the appeal, and it is not relevant for our present purpose. Ground (4) is also not relevant. As to Ground (1), no objection was raised by counsel for the respondent/accused to the admission of the first part of the statement, viz. That is the man , implying the accused was the man designated by the boy as the person committing the offence, but the additional words, describing the various acts done by the accused, were objected to. Lord Atkinson (Lord Parker concurring) said (at p.553) that That s the man and the touching of the sleeve of the accused by the boy was admissible as part of the very act of identification. The further statement only amplified what is implied by the words That s the man plus the act of touching him, and the entire statement was admissible to expand and express in words what was implied, even though the boy was not asked at trial anything about the former identification. On the other hand, Lord Moulton said (at p. 558) he had great difficulty in seeing how the evidence was admissible on the ground that it was part of the evidence of identification. To prove identification of the accused by a person, it is necessary to call that

person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the accused, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would be to use secondary evidence where primary evidence was obtainable, and is contrary to the spirit of the English rules of evidence. The principle does not depend on the youth of the person making the statement. Viscount Haldane LC shared the doubt expressed by Lord Moulton on the admissibility of the statement in question as evidence of identification. His Lordship said (at pp. 550-1) that the boy gave evidence at the trial, and if his evidence was required for the identification of the accused, that evidence ought to have been his direct evidence in the witness box and not evidence of what he said elsewhere. If the boy had been asked if he had identified the accused in the filed as the man who assaulted him, and answered affirmatively, then that fact might be proved by the constable and the mother who saw the identification. Lord Reading (Lord Dunedin concurring) said (at p. 563) that if the prosecution require the evidence as part of the act of identification it should have been given by the boy before the prosecution closed their case. It would be a dangerous extension of the law regulating the admissibility of evidence if proof were allowed of statement made, narrating or describing the events constituting the offence, on the ground that they form part of or explain the act of identification, more particularly, when such evidence is not necessary to prove the act, and is not given by the person who made the statement. As to Ground (2), Lord Atkinson (Lord Parker concurring) said (at pp. 554-5) that the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them. If at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, the judge can instruct the jury to disregard the statement entirely. Lord Moulton said (at p. 559) that statement of communication made to the opposite party, provided it is relevant to the issue, is admissible in both criminal and civil law. If the accused admits the charge the evidence is obviously relevant. If he does not admit it, it may or may not be relevant. The only evidence for or against the accused is his behaviour in response to the charge, but there is no justification

for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. There is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt. But the evidential value of the behaviour of the accused where he denies the charge is very small either for or against him, whereas the effect on the mind of the jury of the accused being publicly or repeated charged to his face with the crime might seriously prejudice the fairness of his trial. Therefore, the judge would in most cases be acting in accordance with the best tradition of our criminal procedure if he exercised the influence which he rightly possess over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have little or no evidential value. Lord Reading (Lord Dunedin concurring) said (at pp. 563-4) that a statement made in the presence of one of the parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. Equally, such a statement made in the presence of the accused may be given in evidence against him at his trial. The principles of the law of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to civil action. In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from which the jury could infer such an acknowledgment, or if he acknowledged its truth, he accepted it as his statement of the facts. At the end of the day, notwithstanding the ruling that the statement was admissible, the appeal was dismissed on misdirection. In the present case, both PW1 and PW2 had given direct evidence of identification against D2 at trial. PW1 gave evidence of distinguishing features of D1 and D2, and their respective roles, completed by verification on identity card check by PW2. It is analogous to the situation envisaged by Viscount Haldane in *Christie*. Moreover, the prosecution never sought to elicit any evidence of reaction of D2 to any statement made in his presence and hearing. Hence, the fact that D2 did not hear what PW1 said to PW2 on identification is neither here nor there. Hence, *Christie* is of no assistance to D2. Ground 4 On the reception of fresh evidence on appeal, s. 83V(2) of the Criminal Procedure Ordinance (Cap. 221) provides that:

- (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- 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 it is satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it. (3) In *Chan Tung-cheung v. HKSAR* [1998] 1 HKLRD 36 (CFA), Litton NPJ giving the determination of the Appeal Committee said at p. 38H: The first matter an appellate court must determine in an application to adduce fresh evidence was whether the evidence if received would afford any ground for allowing the appeal. If this condition is not satisfied it will not be necessary for the court to consider the other matters In *R v. Tam Chung-shing* [1989] 1 HKLR 42, 47H, Silke VP said that: the court will not receive inadmissible evidence nor will it receive evidence under sub-section (1) 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 legal process. The applicant also needs to give reasonable explanation for the failure to adduce the evidence at trial (see *HKSAR v. Cheng Sui-wa* [2003] 4 HKC 571 per Stock JA (as he then was)). Mr. McGowen submitted that as the appeal from a magistrate to a judge of the Court of First Instance is by way of rehearing, the fresh evidence should be received if it is something that the magistrate ought to have been made aware of. Trial counsel Mr. Khosa filed an affidavit explaining his decision in not adducing the evidence at trial was because he failed to appreciate its significance on the identification of the appellant as the driver and considered it was irrelevant to the issue. With respect, I agree with trial counsel that the non-identification at the parade is irrelevant. The basis of identification was not facial recognition, but the body build and spectacles between only 2 persons present. By the same token the lack of dock identification is also neither here nor there. Hence, the application for the receipt of fresh evidence is refused. Ground 6 The magistrate rejected the evidence of D1 that he was the driver. The magistrate took into D1's vague and inconsistent account of the course of the accident, and his forgetfulness that allegation that the taxi driver had left. The magistrate also said that given the driving experience of the D1, he did not believe the accident would have occurred in the manner described. It is a finding open to any reasonable tribunal of fact. I see nothing untoward about it. Ground 7 Mr. McGowen's submission that the rejection of D1 being the driver did not mean D2 was the driver was premised on the assumption of the possibility that Ma Li was the driver. As said before, it was never the defence case that Ma Li was the driver. As to the suggestion that Ma Li was the front passenger, the magistrate accepted PW1's evidence that there were only 2 persons alighting from the front of the vehicle, which finding was reasonably open. Hence, in the circumstances of this case, the rejection that D1 was the driver meant that D2 was the driver. Ground 9 Mr. McGowen submitted that the magistrate did not find any fault or inconsistencies in DW1's evidence, save concluding that he was

either lying or mistaken. Mr. McGowen referred to HKSAR v. Wong Lap-chi HCMA 325/1999 where Gall J said: Where the evidence of an appellant in a court below and that of a witness or witnesses he called are attacked but remained intact, and where there are no inherent contradictions or inconsistencies either within that evidence or between the witnesses, it seems to me incumbent to some degree upon the learned magistrate in his findings to give some reason what that evidence does not cast a doubt upon the evidence for the prosecution. In HKSAR v. Choi Gin-ngon & ors. [1998] 1 HKLRD 902, Mayo JA (as he then was) cited R v. R.E. Low per Blair-Kerr J on the duty of a District Judge: But it must be remembered that the District Judge is himself the jury. He has heard the whole of the evidence and is not duty bound to set down precisely what he accepts, what he rejects and what weight he attaches to every piece of evidence, or the arguments of counsel on the evidence, or the whole of the workings of his mind in arriving at his conclusion. Of course, to the extent to which he chooses to discuss the evidence, to that extent does he disclose how the mind of the jury was working; and an appellate court is therefore in a stronger position to review his conclusions than it is in regard to a jury verdict. But an appellate court would not, except in the most exceptional circumstances, interfere with a finding which depended on the credibility of a witness; and, when the District Judge draws inferences of fact, which inferences depend not only on an examination of documents and fact which are not in dispute but also depend partly on the credibility of witnesses and facts which were very much in dispute, then I think an appellate court should act with the greatest caution before interfering with the District Judge's finding if, having regard to the whole of the evidence, such findings appear reasonable. It is always difficult to lay down rules as to how a judge or magistrate sitting alone should approach credibility of the witnesses, as each case must be looked at in all its circumstances, save that having regard to the whole of the evidence an appellate court may see fit to interfere when the finding is plainly wrong. The magistrate noted that DW1 was only asked to give evidence a few days before trial, and he made no record of the incident 7 months ago. In any event, DW1 was giving evidence in support of D2, and by the same token, D1. The magistrate had heard D1 and found vagueness and inconsistencies in his evidence. The magistrate was entitled to take into account all the circumstances in assessing the evidence of DW1. I do not see anything wrong with the magistrate's finding to warrant any interference. Ground 10 Whether the bloodstains belonged to Ma Li was raised. The evidence was that D2 was bleeding, and D1 was not. Even if there were a Ma Li at some stage, there is no evidence that he was bleeding, not to mention that it was never the defence case that Ma Li was driving. Mr. McGowen asked if the bloodstains belonged to D2, why would they be on the rear passenger seat? But equally, why would they be on the driver's seat? Hence, the magistrate was right that the bloodstains did not advance either the prosecution nor the defence case. Ground 11 The magistrate did not expressly give the separate consideration direction in relation to the 2 defendants and the charges. But in the context of the present case, the 2 defendant's roles were antithesis of each other, and the evidence were admissible against both of them. Hence, I do not see any irregularity.

Conclusion

In the premises, the appeal by D2 is dismissed. (B Fung) Judge of the Court of First Instance High Court Mr Michael Wong, Government Counsel, for the Respondent Mr James McGowan, instructed by Messrs Tang, Wong & Cheung, for the Appellant 1udk 1udk 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 i\$&`G ,wC= ,wC= L`|* hcma.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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