

HONG KONG / JUDGMENT

HKSAR v. TSE SO SO

COURT

Court of Final Appeal

DECIDED

17 July 2007

CASE / FILE NUMBER

FACC1/2007

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj FACC No. 1 of 2007 IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION FINAL APPEAL NO. 1 OF 2007 (criminal) (ON APPEAL FROM HCMA No. 282 of 2006)

Between: HKSAR Appellant

- and - TSE SO SO Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Sir Noel Power NPJ and Sir Anthony Mason NPJ Date of Hearing: 3 July 2007 Date of Judgment: 17 July 2007

J U D G M E N T

Mr Justice Bokhary PJ: I agree with the judgment of Mr Justice Ribeiro PJ. Mr Justice Chan PJ: I agree with the judgment of Mr Justice Ribeiro PJ. Mr Justice Ribeiro PJ: This appeal concerns the power of a magistrate, other than the trial magistrate, to amend an information. A. The charges brought against the respondent The respondent is a registered medical practitioner. In May 2004, she was operating a clinic in Yuen Long. As a person authorized to be in possession of and to supply dangerous drugs under the Dangerous Drugs Ordinance, Cap 134, she was obliged by regulation 5 of the Dangerous Drugs Regulations to keep a register in which true particulars of every quantity of the drugs obtained and supplied by her had to be entered. On 3 May 2004, officers from the Department of Health conducted an inspection of the respondent's dangerous drug registers and the stocks of drugs to which they related. They found, in respect of nine different drugs, that the quantities in stock as counted by them did not tally with the balances stated in the registers. The registers and drugs were seized, with the latter sent to the Government Chemist who later certified their quantities by his count. Contravention of the duty to make the necessary entries in the registers is an offence punishable by a fine of \$450,000 and

imprisonment for three years. It is a summary offence and is subject to a time-limit of six months for the laying of an information. That time-limit was met in the present case, nine informations (one relating to each drug concerned) having been laid on 28 October 2004. They were all in the same form and originally stated as follows: Information has been laid THAT YOU on 3 May 2004 at about 12 noon at [the clinic's address], being a person authorized by the Dangerous Drugs Ordinance, Cap. 134, to supply a dangerous drug, failed to enter in a register kept in accordance with regulations 5 and 6 of the Dangerous Drugs Regulations, Cap. 134, in chronological sequence in the form specified in the First Schedule of the said Regulations true particulars with respect to every quantity of a dangerous drug namely [particulars of the drug in question], supplied by you whether to persons within or outside Hong Kong. A delay then occurred apparently because errors were detected in the initial counting of the drugs. A recount was performed on 5 May 2005 and again on 13 May 2005. When the matter came on for trial on 3 October 2005, the prosecution sought, without objection, to amend the information to insert the words obtained by you, and/or before supplied by you. The trial was then adjourned for reasons unrelated to the amendments. The reason for the amendment is obvious. As indicated above, the informant's case that there had been a failure to make the required entries was based on showing that a discrepancy existed between the balances shown in the register and the quantities actually held in stock. Such a discrepancy indicates that the register is inaccurate but it does not show that there was a failure accurately to record the quantities supplied by the respondent (as originally particularised in the information), as opposed to inaccuracies in recording the quantities obtained or in respect of both the quantities obtained and supplied. The amendment therefore sought to particularise the failure to make the necessary entries on the basis of either or both sources of inaccuracy.

B. The Magistrate's decision The trial eventually commenced on 1 December 2005 before the magistrate, Mr Colin Mackintosh (as H H Judge Mackintosh then was). He was not the magistrate who had amended the informations in October. Objection was taken to his jurisdiction on the ground that the amendments made represented the laying of new informations which were time-barred. That argument was rejected. The magistrate, citing *Poon Chau-cheong v Secretary for Justice*, held that the amendments were merely to the particulars of the offence charged and were in any event not time-barred since they arose from the same facts and were to be treated as relating back to the time when the original informations were laid within the time-limit. Leaving aside the point concerning section 27 and the adjudicating magistrate discussed below, that ruling was plainly correct. Although Mr Ching Y Wong SC sought to resurrect the rejected argument before this Court, it is unsustainable and requires no further discussion in this judgment. The respondent was convicted on all nine charges and fined \$12,000 on each of them, making a total fine of \$108,000.

C. The Judge's decision The respondent's appeal against conviction came before Deputy High Court Judge Barnes (as Barnes J then was). The argument which succeeded was founded on section 27 of the Magistrates Ordinance (the Ordinance) which provides:

- (1) Where it appears to the adjudicating magistrate that there is-
- (a) a defect in the substance or form of any complaint, information or summons; or

- (b) a variance between the complaint, information or summons and the evidence adduced in support of it, he shall, subject to subsection (2)-
- (i) amend the complaint, information or summons if he is satisfied that no injustice would be caused by that amendment; or (ii) dismiss the complaint, information or summons.
- (2) The adjudicating magistrate shall amend the complaint, information or summons where-
 - (a) the defect or variance mentioned in subsection (1) is not material; or
 - (b) any injustice which might otherwise be caused by an amendment would be cured by an order as to costs, an adjournment or leave to recall and further examine witnesses or call other witnesses.
- (3) Following an amendment to a complaint, information or summons, the adjudicating magistrate shall-
 - (a) read and explain the amended complaint, information or summons to the defendant;
 - (b) give leave to the parties to call or recall and further examine such witnesses as may be reasonably required by a party having regard to the nature of the amendment;
 - (c) grant such adjournment as may be reasonably necessary to enable the parties to call or recall witnesses and to prepare their cases;
 - (d) if he thinks fit, make an order that the complainant or informant shall pay to the defendant such costs, not exceeding \$5000, as may be occasioned by the amendment; and
 - (e) give judgment upon the substantial merits and facts of the case as proved before him, having regard to the offence charged in the complaint, information or summons as amended: Provided that, if the amendment is made after the case for the complainant or informant is closed, no further evidence may be called by the complainant or informant other than evidence that would, apart from this section, be admissible in rebuttal.
- (4) In this section, amend includes the substitution of another offence in place of that alleged in the complaint, information or summons. The reasoning which found favour with the Judge and which is supported by Mr Wong SC may be summarised as follows: The only power to amend an information is to be found in section
- 27. Magistrates possess no inherent power to amend. Section 27 gives that power only to the adjudicating magistrate, which should be construed to mean the magistrate who is to hear the evidence and determine whether the defendant is guilty or not. Here, although the magistrate who allowed the amendment had been scheduled to try the case, it turned out that some other magistrate was to assume the role of adjudicating magistrate. It follows that the purported amendment was not made by the adjudicating magistrate and so not made under section 27. Moreover, it was not made on either of the grounds mentioned in section 27. It did not cure any defect in the original information but merely added two modes of committing the offence to the one alleged. Nor could the amendment have come within the

second limb of section 27 since no evidence had yet been called. The prosecution was therefore in effect seeking to withdraw the original informations and to substitute new ones. But such new informations were time-barred by section 26 of the Ordinance and could not found the magistrate's jurisdiction to try the case. So the appeal had to be allowed. D. The implications It is quite understandable that the Judge arrived at the foregoing conclusion. However, it is a conclusion which gives rise to significant concerns. An information states the charge on which the defendant is to be tried. But it commonly occurs that prior to the trial, the prosecution realises that it needs to be amended either because it is defective in form or substance or because the evidence to be called, while disclosing a relevant criminal offence, will not make out the offence as particularised in the information. The present case is such an instance. One would expect that in such circumstances, an application should be made to amend in advance of the trial, giving notice in good time of what the prosecution's case will actually be and enabling the parties to prepare for the real issues and to avoid misdirected efforts and wasted costs. Mr Kevin Zervos SC informs us that such a practice has regularly been adopted in the magistrates' courts. The judgment precludes such a pre-trial exercise. Moreover, the reasoning adopted led the Judge to conclude that the pre-trial amendment amounted to the substitution of time-barred informations which the court had no jurisdiction to try. Yet the reasoning adopted proceeds on the footing that the adjudicating magistrate could have effected exactly the same amendments if application had been made to him instead. If the trial had proceeded on the basis of the unamended informations, the section 27 conditions would undoubtedly have been triggered. The evidence, focusing on the discrepancy between the balances stated in the registers and the actual stocks of drugs, would have been seen to be at variance with the incompletely particularised charges in the unamended informations. The effect of the judgment is therefore to require the prosecution to press on with a trial on a charge known to be inadequately formulated, waiting for the section 27 grounds to be made out in the course of the trial before applying to the adjudicating magistrate to make the necessary amendment. At that stage, there would in many cases be an increased risk that an amendment might cause injustice. Evidence relevant to the amended charges might not have been preserved. Material witnesses might have become unavailable. The earlier course of the trial might have placed difficulties in the way of a fair trial on the amended charges. So an amendment which would readily have been permitted if sought before trial might have to be refused at the later point in time. And if the amendment were made at that later stage, it may have to be on terms that further witnesses be called and existing witnesses recalled, that an adjournment be granted for preparation of the altered case and that a sum of costs be paid to the defendant, as envisaged in section 27(3). These undesirable consequences are, in practical terms, entirely avoidable. Yet they follow from the construction given to section 27. The question for this Court is whether that construction is correct. E. The purpose of section 27 The purpose of section 27 is apparent from its structure and content. Subsection (1) imposes a duty on the adjudicating magistrate either to amend the information or to dismiss it if there is a defect in its substance or form, or a variance between it and the evidence adduced. Subsection (2) requires him to give priority to amendment over dismissal.

Amendment is made mandatory (and dismissal therefore not an option) where the defect or variance is not material or, more importantly, where the amendment causes no injustice or where any potential injustice would be cured by an order as to costs, an adjournment or leave to recall and further examine witnesses or call other witnesses Subsection (3) puts in place certain procedural safeguards where an amendment is made, reflecting those referred to in subsection (2). After giving effect to such safeguards, subsection (3) requires the adjudicating magistrate to give judgment upon the substantial merits and facts of the case as proved before him, having regard to the offence charged in the ... information ... as amended . The proviso to subsection (3) and the provisions of subsection (4) make it clear that the power to amend is very wide indeed. It is expressly exercisable after the case for the informant has been closed and includes the substitution of another offence in place of that alleged in the information. As Litton JA (as he then was) stated in *Jetex HVAC Equipments Ltd v Commissioner for Labour*: The whole tenor of the statute is to ensure that cases tried summarily in the magistrates courts should proceed expeditiously and unencumbered by technicalities. Section 27 (the current version having been enacted in 1987) has many forebears, both in Hong Kong and in England and Wales, to which the courts have attributed the aforesaid legislative purpose. Thus, referring to the 1972 version of section 27, the immediate predecessor of the current provision, McMullin J (distinguishing its role from that played by a provision dealing with alternative verdicts) stated: ... section 27 of the Magistrates Ordinance is intended to deal with the quite different situation which arises when, in the course of a trial, some formal defect in the information, summons or complaint is detected or some turn in the evidence shows a substantial variation from the particulars charged which, if not attended to, might result in the dismissal of the case notwithstanding that it disclosed an offence of the kind charged. In these circumstances it is just - and the law so provides - that the magistrate should see to it that a justified complaint should not fail by careless omission or technical default. In restricting the power to amend with the result that the case had to be dismissed without consideration of the merits, the construction adopted in the court below sits uncomfortably with the manifest purpose of section 27. F. Section 27 in the context of a six-month time-limit When construing section 27, the six-month time-limit for the laying of informations imposed by section 26 of the Ordinance should also be borne in mind. In a passage endorsed by this Court, May J stated: In my view the six months limitation provision in the 1952 Act is to ensure that summary offences are charged and tried as soon as reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by the magistrates courts throughout the country of the summary offences brought before them to be tried. It is in this context that their power to permit the amendment of an information, referred to by Lord Widgery CJ, is to be exercised; it must be exercised judicially; it must be exercised so as to do justice between the parties. A construction of section 27 which precludes applications for amendment until the case is brought on for trial and then makes it likely that the trial has to be adjourned is at odds with the legislative policy reflected in section 26. G. The proper construction of section 27 I turn then to the content of section 27. I agree with the Judge that

the words adjudicating magistrate refer to the magistrate who has conduct of the trial and who is to determine whether or not the defendant is guilty. However, with respect, I cannot agree with the construction of section 27 adopted. It wrongly attributes to that provision the effect of confining the power of amendment to the adjudicating magistrate, to be exercised only in the circumstances addressed in that section, and erroneously takes it to exclude a power to amend in any other circumstances. That is not the purpose or effect of section 27. Section 27 is not a power-conferring section. It does not seek to regulate the power to amend informations in general. What it addresses is how amendments must be dealt with by a magistrate conducting the trial in the event that he perceives a defect of form or substance in the information or a variance between its terms and the evidence adduced. The section operates to impose on him a duty in such circumstances to favour amendment over dismissal and to proceed to a judgment on the substantial merits. It stipulates that the amendment route must be followed provided that (with the procedural safeguards) no injustice is caused. Section 27 is, in other words, a provision dealing with how an assumed power of amendment is to be exercised in the particular circumstances there contemplated.

H. Amendment as an implied ancillary power Section 27 therefore cannot be construed as confining the power of amendment to the adjudicating magistrate. But on what legal basis is one able to conclude that other magistrates have the power to amend, exercisable before commencement of the trial? In my view, a general power to amend exists as an implied ancillary power necessary for the effective exercise by magistrates of their summary jurisdiction. The Judge expressed the view that magistrates do not have inherent jurisdiction or power to amend: their power to amend comes from statutory provisions. Taking inherent to include implied in this context, I am with respect unable to agree. It is certainly not the case that magistrates courts cannot in law possess implied powers of the type mentioned. Thus, in *Yeung Siu Keung v HKSAR*, this Court held that a magistrate has an implied power to stay a driving disqualification order pending completion of a review process. Chief Justice Li described the test for the existence of such a power as follows: ... the test is whether such a power is necessary in the sense of reasonably required for the effective exercise of the statutory jurisdiction expressly conferred on the magistrate to review his own decision. And in *Yeung Chun Pong v Secretary for Justice*, Sir Anthony Mason NPJ examined the power of magistrates to stay proceedings for abuse of process, which he described as in a state of evolutionary development. His Lordship concluded that: The law has now developed to the point that it should be acknowledged in Hong Kong that examining magistrates possess implied power to stay proceedings to prevent an abuse of their own process, limited though the exercise of the power may be. This implied power is an instance of the general proposition that every court has implied power to protect the integrity of its own process. The general proposition referred to had been recognized, for instance, in *Connelly v DPP*, where Lord Morris of Borth-y-Gest stated: There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. His

Lordship added: The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. The New Zealand Supreme Court recently stated the principle along similar lines, focusing on courts having a statutory jurisdiction: The ancillary inherent powers of Courts to regulate their own procedure arise equally in relation to their statutory and common law substantive jurisdictions. Courts which do not possess an inherent substantive jurisdiction (as is the case where their substantive powers are entirely statutory) nevertheless have inherent or implied procedural powers necessary to enable them to give effect to their statutory substantive jurisdiction. A general power to amend a defective information so as to ensure that the charges to be faced by the defendant at the trial are accurately stated is necessary to enable magistrates effectively to exercise their summary jurisdiction and to safeguard the defendant from prejudice. It may therefore properly be implied as a necessary ancillary power. The existence of such a power is entirely consistent with and, indeed, presupposed by section 27. In imposing a duty on the adjudicating magistrate to make amendments in the circumstances specified, it assumes the existence of a general power to amend. It is in effect saying to the adjudicating magistrate: There exists a power to amend informations which you must exercise in the circumstances and subject to the conditions referred to in section 27 . I. Existence of the power consistent with the Indictment Rules The conclusion that a magistrate, other than the adjudicating magistrate, has power to effect amendments prior to the trial is consistent with Rule 3 of the Indictment Rules which is made applicable *mutatis mutandis* to informations by sections 10(4) and 33(a) of the Ordinance. Rule 3(1) requires every indictment to contain such particulars as may be necessary for giving reasonable information as to the nature of the charge and rule 3(3) empowers a judge to order further particulars of an offence stated in an indictment to be delivered in any case in which he deems it expedient to do so. As previously noted, the amendment in the present case was made with a view to providing further particulars in support of the offence charged. Such particulars could have been ordered under Rule 3(3), applied *mutatis mutandis*, by any magistrate (and not just the adjudicating magistrate) who would effectively be requiring amendment of the information. J. Existence of the power consistent with authority No authorities have been found which specifically address the principal issue raised in the present appeal. However, there are authoritative decisions where the courts have proceeded on the basis that amendment to an information does not have to be made by the adjudicating magistrate but can be effected beforehand by another tribunal. In *Fai Ma Trading Co Ltd v L S Lai* (Industry Officer) the Court of Appeal had to consider how a court hearing an appeal from a magistrate's decision should approach the power to amend the information. Section 119(d) of the Ordinance provides that the appellate judge: ... may by his order confirm, reverse or vary the magistrate's decision or may direct that the case shall be heard *de novo* by a magistrate or may remit the matter with his opinion thereon to a magistrate, or may make such other order in the matter as he thinks just, and by such order exercise any power which the magistrate might have exercised ... On its face, therefore, the appellate judge is empowered by section 119(d) to exercise the power of amendment given

by section 27. And since he would be stepping into the shoes of the adjudicating magistrate, no difficulty of the sort encountered in the present case would arise. However, if the appellate judge were simply to amend the charge and convict on the amended charge, injustice might well be caused to the defendant. This was pointed out by Silke VP as follows: ... the Courts in England have firmly set their faces against an amendment by an appellate court. The reasoning is simple: if an appellate court were to amend, and by so doing uphold the conviction, then a defendant would stand convicted upon a charge or information on which he has not stood trial - unless, of course, the amendment had the effect of substituting a lesser offence which was encompassed in the matter before the trial court and one that court was empowered, on the facts before it, to come to conviction. The solution to that problem arrived at by the Court of Appeal is of present relevance. Kempster JA stated it as follows: The Judge has power to amend the informations after reversing the magistrate's decisions so long as he also directs that the amended informations be heard de novo by a magistrate. This was echoed by Silke VP and Penlington JA. The result was therefore that for the purposes of the trial de novo, there would be a new adjudicating magistrate who would try the case on an information which had been previously amended, but not by his own order and not pursuant to section 27. Evidently no one considered such an amendment to pose any jurisdictional problems for the trial de novo. A very similar situation arose for consideration by this Court in *Poon Chau Cheong v Secretary for Justice*. It involved the exercise of the power of amendment by a magistrate in the course of reviewing her own decision under section 104 of the Ordinance. That provision also empowers a magistrate holding a review to direct that the case be tried de novo by a different magistrate where the interests of justice so require. Lord Cooke of Thorndon NPJ held that a power to amend the charge fell within the scope of section 104. Where that power was exercised, his Lordship also considered that it would be appropriate to order a trial de novo by a different magistrate: In the present case the Magistrate has granted a review and has embarked on the review to the extent of setting aside the acquittal, amending the charge and obtaining a plea to it. She has yet to decide whether she will rehear the case wholly or in part or whether in the interests of justice the case should be reheard before another magistrate. If the case is to proceed, the defence has applied for a full rehearing before another magistrate. It will be understandable if, to avoid any appearance of injustice, the original Magistrate accedes to that application. Among other things this would enable the defence to cross-examine more extensively on the question of a loan; it has been suggested that at the original trial the cross-examination was limited because counsel concentrated on excluding the ingredient of inducement. Lord Cooke added: ...upon the review the original magistrate has already re-opened the case to the extent of setting aside the dismissal of the original information, amending the charge by substitution and taking the defendant's plea to the amended charge. These steps cannot be treated as precluding her from considering the defendant's application for a full rehearing before another magistrate : to hold otherwise would be to place an oppressive and impractical interpretation on ss 104 and 27. But, if a full rehearing is ordered, it will be desirable for the magistrate presiding at the rehearing to have the amended information

read again to the defendant, and to give the defendant a further opportunity of pleading to it. Again, it was not suggested that any jurisdictional difficulties might arise because the reviewing magistrate had amended the information which was to be adjudicated upon de novo by a different magistrate. Indeed, Lord Cooke considered that precluding such a course of action would be to place an oppressive and impractical interpretation on ss 104 and 27 . K. Adjudicating magistrate as any magistrate seised of the case The Court was invited by the appellant to interpret adjudicating magistrate widely so as to include any magistrate who is required to handle any aspect of the case, including any procedural matter or application or issue raised before him to decide. That suggestion has the attraction of simplicity but is not one I am able to accept. Section 27 must be read as a whole. It sets out a series of steps (discussed in Section E above) which must be taken where it appears to the magistrate that there is a defect or variance referred to in subsection (1). If an amendment is made, subsection (3) prescribes the procedures that must then be followed. It envisages steps taken in the course of a trial: the recall and further examination of witnesses, an adjournment to permit preparation of the amended case and the payment of costs occasioned by the amendment. This is underlined by the proviso which addresses the consequences of amending after close of the informant's case. Accordingly, reading section 27 as a whole, adjudicating magistrate must, in my judgment, be taken to mean the magistrate who hears and determines the case. Indeed, it would make little sense to apply the mandatory provisions of section 27 to magistrates when entertaining applications for amendment prior to trial. L. Conclusion as to the power to amend For the foregoing reasons, it is my view that the amendments to the informations in the present case were validly made and that the trial was conducted within jurisdiction. The appeal must accordingly be allowed. M. The convictions In seeking leave to bring this appeal, Mr Cheung Wai-sun, counsel then appearing for the Government, made it plain that its main concern was to obtain this Court's ruling on a point of law having extensive importance for the practice of the magistrates' courts. He acknowledged that it would be open to the Court to stop short of restoring the respondent's convictions if it were to grant leave and eventually to allow the appeal. While Mr Zervos SC accepts that the Court has a discretion to refrain from restoring the convictions, he submits that they should nevertheless be restored. The circumstances of the present case are quite exceptional. The respondent has now had to live with this prosecution for over three years. It is not suggested that the offences represent anything more than poor office management on her part. Much of the unusually long delay in the proceedings was due to the informant's own miscounting of the drugs and the need for a re-count which took place just over a year after the initial inspection was carried out. The fact that the prosecution has been hanging over the respondent's head for such a long time has clearly taken a heavy toll on her medical practice, professional status and financial resources. In all the circumstances, I would consider it disproportionate now to restore the convictions quashed in November last year. The Government's purpose would be achieved and justice would be served if the appeal were simply to be allowed without restoration of the convictions or re-imposition of the fines. I would so order. Sir Noel Power NPJ: I agree with the judgment of Mr Justice Ribeiro PJ. Sir Anthony Mason NPJ: I agree with the judgment of

Mr Justice Ribeiro PJ. Mr Justice Bokhary PJ: The Court unanimously declares the law to be as stated in the judgment of Mr Justice Ribeiro PJ and allows the appeal without restoration of the convictions. (Kemal Bokhary) (Patrick Chan) (R A V Ribeiro) Permanent Judge Permanent Judge Permanent Judge (Sir Noel Power) (Sir Anthony Mason) Non-Permanent Judge Non-Permanent Judge Mr Kevin P. Zervos SC and Mr Isaac S.L. Tam (of the Department of Justice) for the appellant Mr Ching Y. Wong SC and Ms Tanya Chan (instructed by Messrs Li, Wong & Lam) for the respondent Reg 5(7) of the said Regulations. Magistrates Ordinance, Cap 227, section 26. Transcript of Ruling,

(2000) 3 HKCFAR 121 at 131-132. Appearing with Ms Tanya Chan for the respondent.

Judgment

21.

Judgment

32.

Judgment

33.

Judgment

34 and 35.

Judgment

36. Appearing with Mr Isaac Tam for the appellant. Presumably, even if the magistrate who amends the information at a pre-trial stage turns out to be the magistrate given conduct of the trial, he could not be said to have been acting as the adjudicating magistrate as defined in the judgment when dealing with the amendment. Section 27(1)(i). Section 27(2)(b).

[1995] 2 HKLR 24. Although a dictum in Litton JA s judgment has been disapproved of in Secretary for Justice v Yau Yuk Lung Zigo, FACC 12/2006, a judgment handed down on the same day as the present judgment, the substance of Litton JA s judgment, including the sentence quoted, is unaffected. In Hughes and Jeavons v R [1949] HKLR 318, Williams J traced similar provisions back to section 21 of the Magistrates Ordinance 1932 as amended by Ord No 24 of 1949 which stated: Whenever in the opinion of a Magistrate there is a defect of substance or there has been any such variance as aforesaid he shall make the necessary amendment in the complaint, information or summons and shall read and explain the same to the defendant. The current English provision is in the Magistrates Courts Act 1980, section 123, which re-enacts Magistrates Courts Act 1952, s 100. It provides:

- (1) No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint. (2) If it appears to a magistrates court that any variance between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance, the court shall, on the application of the defendant, adjourned the hearing. The 1972 version provided inter alia as follows:
- (1) No objection shall be taken or allowed to any complaint, information or summons for any alleged defect therein in substance or in form, or for any variance between such complaint, information or summons and the evidence adduced in support thereof, and the adjudicating magistrate shall in all cases give judgment upon the substantial merits and facts of the case as proved before him, and convict the defendant of the offence with which he was charged with such variation as has been warranted by the evidence ... (2) Whenever in the opinion of the magistrate there is a defect of substance or there has been any such variance as aforesaid he shall make the necessary amendment in the complaint, information or summons and shall read and explain the same to the defendant. It then proceeds to deal with procedural safeguards where amendment is made. Criminal Procedure Ordinance, Cap 221, section 51(2). R v Kwok Hung [1978] HKLR 173 at 181. In Poon Chau Cheong v Secretary for Justice (2000) 3 HKCFAR 121 at 131. R v Newcastle-upon-Tyne Justices, ex parte John Bryce (Contractors) Ltd [1976] 2 All ER 611 at 614.

Judgment

21.

(2006) 9 HKCFAR 144. Ibid, at 158, 39. (Unreported) FACC 3 of 2006, 13 November 2006. Ibid, 33. Ibid, 40.

[1964] AC 1254. Ibid, at 1301. Ibid, at 1301-1302. Zaoui v AG [2005] 1 NZLR 577 at 644. Cap 221.

[1989] 1 HKLR 582. Ibid at 593. Ibid at 592. Ibid at 594. Ibid at 595.

(2000) 3 HKCFAR 121. Section 104(7): If the magistrate upon the review decides that the case is one which should be re-opened and wholly re-heard and if he is of the opinion that in the interests of justice the case should be re-heard by another magistrate, it shall be lawful for some other magistrate to re-hear and determine the case accordingly. Ibid at 130. Ibid at 133. By virtue of section 17 of the Hong Kong Court of Final Appeal Ordinance, Cap 484. PAGE X (# X (# X !0 X !0 X !0 X !0 X !0 [!0 [!0 [!0 [!0 V` ]#& 0B(\$ GF@% bt 0 roL& uAQN V.IT ,.5X jM[& :%6] \$/h& t|u& U)gy GF@% V.IT U)gy bt 0 ,.5X V`]# 0B(\$:%6] :%6] :%6] :%6] cfastyle.DOT setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=57762

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-tse-so-so-2007>

Prepared on 28 October 2026 · Esheria