

HONG KONG / JUDGMENT

TING JAMES HENRY v. HKSAR

COURT

Court of Final Appeal

DECIDED

14 December 2007

CASE / FILE NUMBER

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bjbj IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FINAL APPEAL NO. 4 of 2007 (CRIMINAL) (On appeal from CACc No. 318 of 2005)

Between : TING JAMES HENRY Appellant

- and - HONG KONG SPECIAL ADMINISTRATIVE REGION Respondent

Court : Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Woolf NPJ Date of Judgment : 14 December 2007 J U D G M E N T O N C O S T S Chief Justice Li : At the end of the judgment dealing with the appeal against the order for a retrial, we dealt with all questions on costs other than the appellant's costs at the trial. Paragraph 60 of that judgment states: the appellant should be awarded the costs of this appeal, the costs of the application to the Appeal Committee for leave to appeal and the costs of the application to the Court of Appeal for certification. The Court of Appeal had refused to award costs of the trial in the appellant's favour. The parties should submit written submissions within 28 days on the question of costs of the trial. We did not deal with the costs of the trial notwithstanding that the appellant had already addressed the question of his trial costs in his Supplemental Case, so as to enable the parties to make any further submissions to take account of the views expressed by this Court in its judgment on the appeal. The appellant and the respondent have now delivered further submissions on the remaining issue as to costs. The respondent submits that the Court has no jurisdiction to award the costs in question since leave to appeal was not sought nor granted against the Court of Appeal's refusal to award the appellant his trial costs. We do not accept that submission. The Court has power to deal with those costs as a matter consequential upon allowing the appeal against the Court of Appeal's order for a retrial by virtue of s.17(1) of the Hong Kong Court of Final Appeal Ordinance, Cap.

484. That section provides that this Court may make such order in the matter, including any order as to costs as it thinks fit . Exercise of the power in criminal proceedings is largely governed by the Costs in Criminal Cases Ordinance, Cap. 492 (the Ordinance). The

appellant submits that he should be awarded all his trial costs. However, on an appeal to this Court, this Court will only rarely interfere with a decision as to costs of a lower court and then only when it is satisfied that the court below (whether the trial court or the Court of Appeal) has not complied with the principles that are applicable to the award of the costs in issue. In this case, there was no question of the trial judge awarding the appellant the costs of trial. This is because he had been convicted by the jury at the trial and it is a precondition to an award of costs in favour of a defendant that he is acquitted or partially acquitted, that is on a particular count in the indictment (see ss 5 and 6 of the Ordinance). In the Court of Appeal, the respondent conceded that the appellant should have the costs of the appeal but opposed the appellant being granted the costs of the trial. The costs of the trial were dealt with by the Court of Appeal in its decision on an application by the appellant for a certificate that the Court of Appeal's decision involved points of general importance. The application for the grant of the certificate was refused by the Court of Appeal in a judgment by Tang VP that gave the Court of Appeal's reasons for its decision to refuse costs. The judgment recites that it is the normal rule that an award of costs in a defendant's favour follows an acquittal unless there are positive reasons to the contrary. Such reasons include: (a) an accused's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is; or (b) there was ample evidence to convict but the accused was acquitted on a technicality which had no merit. *R v. Kwok Moon-yan and Anor* [1989] 2 HKLR 396. The Court of Appeal also cited *R v. Man Wai-keung (No.2)* [1992] 2 HKCLR 207. In that case when delivering the judgment of the court, Silke VP said at p.214: Whether or not a successful appellant who has been ordered to be retried will get his costs, or any portion of them, of the process which has gone before that decision was made will, of course, lie for the unfettered discretion of this court applying the principles which Kwok Moon-yan attempted to set out. The fact that a retrial has been ordered and the reasons for the making of such an order will be additional factors to be considered in the exercise of that discretion. Reference was also made to *Tong Cun Lin v. HKSAR* (1999) 2 HKCFAR 531 in which, in a court presided over by Li CJ, Litton PJ gave a judgment that set out the governing principle. This principle included the fact that a defendant who is acquitted should normally be compensated out of public revenue for the costs incurred in defending those charges. But, as Litton PJ went on to make clear, this general rule, does not mean that a defendant cannot be deprived of all or part of his costs, due to his conduct generally so long as such conduct is relevant to the charges he faced (see p.535). Further it follows that, generally speaking, the conduct most relevant to the matters under consideration must be the defendant's conduct during the investigation and at the trial. To this Litton PJ adds: Wrapped up with this is the strength of the case against the defendant and the circumstances under which he came to be acquitted: These too are relevant to the exercise of the discretion to deprive him of his costs, so long as the judge is not, indirectly, thereby punishing him by taking a view of the facts palpably different from that taken by the jury and reflected in the not-guilty verdict. Returning to the judgment, Tang VP then sets out the three matters on which the respondent relies for opposing an order for costs of the trial in favour of the appellant, two of which are (the third not being relevant): the Respondent

signing the documents which are the subject of the charges; (ii) the transaction being fabricated and supported by false documents; Tang VP then indicates that the Court of Appeal believed the evidence showed quite clearly and accepted to be so by the jury, that the purchase of shares was a fiction and that the documents mentioned in the counts of the indictment were fabricated to create an appearance of genuineness. He and the other members of the Court of Appeal, regarded those matters as sound reasons for refusing the applicant his costs of the trial. The applicant's conduct had brought grave suspicion on himself. And the Court of Appeal therefore refused a costs order in respect of the trial. Mr Alun Jones QC, on behalf of the appellant, disputes the correctness of the Court of Appeal's approach. Firstly, he submits that bringing suspicion on himself refers to a conduct to the appellant during the investigation and trial and not to his conduct which the prosecution said is evidence of the elements of the offences (para.81 of the Supplemental Case for the appellant). In support of this contention, the respondent relies on the case of Tsang Wai Ping v. HKSAR (2005) 8 HKCFAR 80 and the judgment of Sir Gerard Brennan NPJ in that case where he said:

27. The discretion is to be exercised having regard to the defendant's conduct during the investigation and at the trial but the judge must not take a view of the facts palpably different from that taken by the jury. The appellant also relies on a principle to be derived from the authorities that where a conviction is overturned, the presumption of innocence will revive and the Court of Appeal should avoid making comments which impliedly suggest that the defendant is guilty of the offence in considering whether to award costs. In support of this submission, he relies upon the Practice Direction (Costs: Criminal Proceedings) [2004] 2 All ER 1070 issued by the then Lord Chief Justice who gave guidance to the courts in England and Wales on awarding costs which includes a passage: The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified. It may often be the case that a defendant's conduct during the investigation and at the trial is such that it brings suspicion on himself, providing a ground for refusing him costs. Such conduct has been described as most relevant to the discretionary exercise. However, it is incorrect to suggest (and the authorities give no warrant for suggesting) that a defendant can only be regarded as having brought suspicion on himself by virtue of his conduct during the investigation or at trial and not otherwise. The discretion is not bounded by any such inflexible rule. By his conduct prior to the investigation and trial stages, including conduct which formed part of the setting for the charges laid against him, the defendant may plainly have brought suspicion upon himself. There is no reason to ignore such conduct in the exercise of the court's discretion on costs following an acquittal on the charges laid, provided always that the discretion is not exercised so as to undermine the presumption of innocence, and in particular, provided that its exercise does not involve the court in adopting a position at variance with the defendant's acquittal by the tribunal of fact. In our judgment, we stated that the jury had clearly found, as the Court of Appeal also made clear, that the appellant had been dishonest in a way

relevant to the counts charged. The Court of Appeal's decision to overturn the convictions was not, in any way, inconsistent with the jury having so found. The convictions were only set aside because the Court of Appeal considered there had been a misdirection. A misdirection which was not inconsistent with the finding of dishonesty. This is not a case which, in Sir Gerard Brennan NPJ's words, the Court of Appeal were taking a view of the facts palpably different from that taken by the jury. On the contrary the reasoning of the Court of Appeal involves that court taking the same view of the facts as the jury. Nor in our judgment does the decision of the Court of Appeal involve any contravention of the presumption of innocence or Art.11 of the Hong Kong Bill of Rights. The appellant is, and is entitled to be regarded as being not guilty of the counts on which he was found guilty despite the verdict of the jury. However, this does not mean that he was not dishonest in the way relied upon by the prosecution. The issue of dishonesty or not, was clearly left to the jury and was separate and distinct from the misdirection which was the foundation of the Court of Appeal's decision to overturn the convictions. We agree with the Court of Appeal that the appellant's dishonest conduct that was proved at the trial justifies his not being awarded the costs of the trial. If his convictions had not been set aside, there would have been no possibility of the appellant being awarded the costs of his trial. The convictions were only set aside because in the view of the Court of Appeal, a mistaken approach by the judge resulted in a misdirection. The history of this case before the lower courts may be unusual, but for the reasons we have identified, far from it being our view that the Court of Appeal were not entitled to refuse the appellant his costs, we agree with their decision to refuse him his costs. (Andrew Li) (Kemal Bokhary) (Patrick Chan) Chief Justice Permanent Judge Permanent Judge (RAV Ribeiro) (Lord Woolf) Permanent Judge Non-Permanent Judge Written submissions by Mr Alun Jones QC and Ms Maggie Wong (instructed by Messrs Chong & Partners) for the appellant Written submissions by Mr IC McWalters SC and Mr Michael Wong (of the Department of Justice) for the respondent

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