CACC 48/2015

**IN THE HIGH COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

# **COURT OF APPEAL**

CRIMINAL APPEAL NO. 48 OF 2015

(ON APPEAL FROM HCCC NO. 87 OF 2014)

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BETWEEN

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| HKSAR | Respondent |
| and |  |
| WUN SHU FAI  (尹樹輝) | Applicant |

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Before : Hon Lunn VP, Cheung and Poon JJA in Court

Dates of Hearing : 26 January and 7 March 2017

Date of Judgment : 7 March 2017

Date of Reasons for Judgment : 16 March 2017

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|  | REASONS FOR JUDGMENT |  |

Hon Lunn VP (giving the Reasons for Judgment of the Court) :

The applicant sought leave to appeal against his conviction on 20 January 2015, after trial by Toh J and a jury, of a single count of conspiracy to throw corrosive fluid, namely sulphuric acid, with intent to do grievous bodily harm to Mr Neil Mitchell, contrary to sections 159A and 159C of the Crimes Ordinance, Cap. 200 and section 29(c) of the Offences against the Person Ordinance, Cap. 212. On 7 March 2017, we allowed the appeal, quashed the applicant’s conviction and ordered a retrial on the same count. We said that we would give our reasons in due course. That, we do now.

The Particulars of Offence averred that on or about 27 October 2009 the applicant conspired with Tang Chong Hou, alias Hou Chai, Ma Shun Yick, Jacky (PW2), Kay Sik Hong, Billy (PW3) and Lai Kwok Leung, alias Ah Ki unlawfully and maliciously to carry out the attack.

*Notices of Motion*

By way of Notices of Motion, the applicant sought to put before the Court three affidavits of Mr Eric Cheung, solicitor advocate who appeared for the applicant, dated 12 September and 4 November 2016 and 23 January 2017. Exhibited to those affidavits, *inter alia*, were extracts of material disclosed by the prosecution to the defence after the conclusion of the trial.

For his part, by a Notice of Motion, Mr Ned Lai, who appeared for the respondent alone on 26 January 2017, sought to put before the Court four affirmations, two from police officers [[1]](#footnote-1) and two from Public Prosecutors. Mr Cheung Man Kwan, Bobby a Senior Public Prosecutor, was involved in the preparation of the case for trial in the period from 6 November 2013 to 7 October 2014, whereas Ms Go Hong Hong, Lisa was junior counsel for the prosecution to Mr Simon Tam SC in the trial of the applicant. The two police officers had each been the officer-in-charge of the case at different times in the overall period 22 December 2013 up to the hearing of the appeal. There being no objection by the parties, and the Court being satisfied that it was appropriate to do so, we received all of that evidence.

At the conclusion of the hearing on 26 January 2017, the Court directed the respondent to file further affirmations, so as to inform the Court fully in respect of the steps taken by the Department of Justice and the Hong Kong Police with regard to the disclosure of unused material to the defence. By a Notice of Motion filed with the Court on 17 February 2017, Ms Anna Lai SC, now leading Mr Lai, sought to put before the Court five additional affirmations: second affirmations of the two Public Prosecutors and of Senior Inspector Lee, together with affirmations of two Senior Law Clerks of the Department of Justice.[[2]](#footnote-2) There being no objection by the parties, and the Court being satisfied that it was appropriate to do so, we received that evidence.

An affidavit by Mr John McNamara, counsel for the applicant at trial, as directed by the Court, was filed with the Court on 27 January 2017. The affidavit merely reflected a letter, dated 24 January 2017, written by Mr McNamara to the applicant’s solicitors in which he addressed the ambit of material disclosed to the defence by the prosecution at trial. He said that material, not disclosed to the defence at trial, included: the affirmation of Jacky Ma dated 9 August 2012; letters from Billy Kay to police officers, whilst the former was in custody; Police Investigation Reports, detailing visits to Jacky Ma and Billy Kay, whilst they were in custody, from police officers. He asserted that if the material had been disclosed to the defence prior to the trial that he would “…have used them extensively in cross examination of Jacky Ma and Billy Kay.”

*The background*

The prosecution arose out of an attack with sulphuric acid outside the District Court Building on 27 October 2009 on Mr Mitchell, a barrister appearing for the prosecution in the trial of Kong Hon Yui, Kevin [[3]](#footnote-3), in the District Court. As a result, Mr Mitchell sustained injuries. Kong Hon Yui, Kevin was not prosecuted for the offence of conspiring to throw corrosive fluid with intent to do grievous bodily harm to Mr Mitchell.[[4]](#footnote-4)

On 21 December 2009, Billy Kay was arrested. The applicant and Jacky Ma were arrested on 22 December 2009.[[5]](#footnote-5) In April 2010, the applicant was released from custody[[6]](#footnote-6). On 29 October 2010, Jacky Ma pleaded guilty in the Magistracy to a charge of conspiring to throw corrosive fluid with intent to do grievous bodily harm to Mr Mitchell. On 15 February 2011, Billy Kay pleaded guilty on arraignment in the Court of First Instance to a count alleging the same offence in a separate indictment. On 1 April 2011, each of them was sentenced to 11 years’ imprisonment by Beeson J.[[7]](#footnote-7)

On 12 November 2013, the applicant was re-arrested and charged with conspiring to throw corrosive fluid at Mr Mitchell with intent to do him grievous bodily harm. On 8 January 2015, the applicant’s trial commenced before Toh J.

*The trial*

*The prosecution case*

It was the prosecution case that Tang Chong Hou threw corrosive fluid at Mr Mitchell, whilst the other co-conspirators, including the applicant, were in the immediate vicinity of the District Court Building assisting Tang.

Mr Mitchell testified that, at about 1:05 p.m. on 27 October 2009, he walked out of the District Court towards Harbour Road. Having walked down the steps and having reached the pavement, a man ran up to him from behind and threw a liquid from a paper cup onto his face. He felt a burning sensation. Whilst he was wiping the substance from his face, a second man ran up from behind and also threw liquid over him, most of which landed on his jacket.[[8]](#footnote-8) He estimated that there was a gap of around 10 to 20 seconds between the first and second attacks [[9]](#footnote-9). He did not see the faces of the two attackers [[10]](#footnote-10).

Billy Kay testified that he had been recruited in the middle of October 2009 by Lai Kwok Leung for a promised reward of $30,000 to carry out an attack on a person connected with a court case. Although at first he was told that the intended target was a woman, later he was told that the intended target was an expatriate man. On 20 October 2009, he went to the 9th floor of the District Court, where he saw Mr Mitchell conducting the trial of Kong Hon Yui. During a break in the proceedings, the latter came up to him and urged him to act quickly, otherwise he would go to jail. Subsequently, he decided not to carry out the attack himself, but contacted Jacky Ma who agreed to find a replacement attacker.

At some time after 9:00 a.m. on 27 October 2009, by arrangement, he met Jacky Ma at a footbridge near Wanchai MTR Station. Then, the two of them went to a park next to a hotel, opposite the District Court, where Jacky Ma introduced him to Tang Chong Hou and the applicant, as the men who would carry out the attack on Billy Kay’s instructions. The applicant said that he was called ‘Ah Wai.’ After Jacky Ma had walked aside, he took the two men to a flower bed where he pointed out a bag, from which Tang Chong Hou took out a bottle from which he poured out some of the contents. Smoke was seen to rise. Then, he poured some of the liquid to a paper cup. Thereafter, the four men sat separately, but in the same immediate vicinity. At about 1:00 p.m., Mr Mitchell emerged from the District Court Building, followed by Lai Kwok Leung. The latter stopped next to them and confirmed that Mr Mitchell was the target. Tang Chong Hou went out to Mr Mitchell and threw the contents of the paper cup onto his face, after which he ran off. He saw the applicant walk up to Mr Mitchell, but he did not see what he did. For his part, he boarded a taxi with Jacky Ma and Lai Kwok Leung and left the scene of the attack.

Jacky Ma testified that on 23 October 2009 he had agreed to a request made of him by telephone by Billy Ma to recruit someone to attack a male expatriate with a liquid at the District Court for a reward of $30,000. As a result, he recruited Tang Chong Hou to the enterprise. It was agreed that they would meet Billy Kay at Wanchai MTR Station at 8:00 a.m. on 27 October 2009. At about 5:00 a.m. that morning Jacky Ma visited Tang Chong Hou’s home in Kwai Fong, where Tang Chong Hou told him that the applicant, who was also present and who was known to him as ‘Ah Sai’, was to act as a ‘Lan Pei’, whilst he threw the liquid over the target. He explained that the applicant’s role was to approach the victim after the attack purporting to assist him, but in reality with the purpose of hindering any pursuit of Tang Chong Hou.

Jacky Ma testified that at about 8:00 a.m. the three of them travelled by MTR to Wanchai MTR Station, where they parted company. For his part, he waited at the footbridge to meet Billy Kay, who was late for their prearranged meeting. Following Billy Kay’s arrival, the two of them walked to a park opposite the District Court, where he introduced Billy Kay to Tang Chong Hou and the applicant. Then, having moved aside from them, he noticed them pouring a black liquid, from which smoke was emitted, from a bottle into a paper cup. He was told that it was a mixture of paint and drain-cleaner. At about 1:00 p.m. he saw Tang Chong Hou approach Mr Mitchell, after the latter had walked out of the District Court entrance, and throw the contents of a cup over his face. Then, he saw the applicant approach Mr Mitchell and hold his arm. For his part, he joined Jacky Ma and Lai Kwok Leung in a taxi and they left together.

*The defence case*

The applicant testified in the defence case. He acknowledged that he was present outside the District Court at about 1:00 p.m. on 27 October 2009 when Mr Mitchell was attacked. He was not a party to that attack. He heard yelling and saw Mr Mitchell sitting on the ground. As he walked towards Mr Mitchell, the latter stood up. He asked him if he could help. He did not understand Mr Mitchell’s reply in English, but he saw that Mr Mitchell went into the District Court Building. For his part, he remained where he was. Later, he left by MTR.

The applicant explained that he had been at Tang Chong Hou’s home earlier that morning when Jacky Ma arrived. Tang Chong Hou and his brother ‘Ah Wai’ lived together. The applicant said that he had no money at all and he had gone to their home to seek repayment of debt of $800. He had accompanied Tang Chong Hou and ‘Ah Wai’ in their journey by MTR to District Court in Wanchai, having been told by the former that he was going to get the money to repay him. So, he was present at the scene of the attack by chance. He knew nothing of it in advance.

*Grounds of appeal against conviction*

By ground 1, Mr Eric Cheung, solicitor advocate for the applicant, submitted that before and at trial there had been material non‑disclosure by the prosecution in respect of three categories of documents, namely:

1. Jacky Ma’s affirmation dated 9 August 2012 filed with the Court in support of his application for leave to appeal against sentence out of time [[11]](#footnote-11);
2. letters written by Billy Kay to various police officers whilst he was in custody; and
3. various Police Investigation Reports and police notebooks, which recorded the fact of some visits by police officers to Jacky Ma and Billy Kay whilst they were detained in custody by the Correctional Services Department.

By ground 2, it was submitted that, having regard to the fact that the prosecution case relied on the testimony of two accomplices witnesses, there were “irregularities or unsatisfactory aspects” of the judge’s summing up which “created a lurking doubt”, so that the applicant’s conviction was unsafe and unsatisfactory. Given the fact that the appeal was successful on ground 1, it is not necessary to set out in any more detail the arguments advanced in ground 2.

*Jacky Ma’s affirmation*

Mr Cheung submitted that statements made by Jacky Ma in his affirmation were material on which counsel could have cross-examined him at trial on two issues, namely that he was motivated throughout by a desire to seek a reduction in the sentence imposed on him and was aware of the range of discounts afforded to the defendants for their assistance to the prosecution, in particular testifying at trial of others.

Mr Cheung invited the Court to note that in an attachment to Jacky Ma’s affirmation, he asserted, *inter alia* that:

“ During the hearing of this case, after I had pleaded guilty, the Prosecution made a request through Counsel… requesting me to be a tainted witness to testify against other defendants… *I was informed that my sentence would be greatly reduced*. However…the sentence reduction for being a tainted witness to testify against other defendants is not sufficient.” [Italics added.]

Of Jacky Ma’s knowledge of the range of discount to be afforded to those who were in the same circumstances in which he found himself, Mr Cheung invited the Court to note that Jacky Ma had stipulated a number of judgments of this Court, including one in which a discount of 50% had been afforded to a defendant who had pleaded guilty and testified against another defendant.

Mr Cheung invited the Court to note that in cross-examination Jacky Ma had testified that at the time that he agreed to be a witness against the applicant he was not aware that, in doing so, he could advance that fact in an appeal to seek a reduction in sentence.[[12]](#footnote-12) On the other hand, Jacky Ma acknowledged that he was aware of that fact at the time of his testimony. Further, in cross‑examination Jacky Ma had asserted that he had no idea what discount he could expect for giving evidence against the applicant.[[13]](#footnote-13)

*Billy Kay’s letters*

Of the letters written by Billy Kay to various police officers, whilst the former was in custody with the Correctional Services Department, Mr Cheung submitted that they revealed a number of matters relevant to his credibility in the trial of the applicant. First, a desperation in Billy Kay to obtain an immunity from prosecution [[14]](#footnote-14) and then, when those efforts came to naught, to obtain a reduction in sentence. Secondly, that Billy Kay had sought a ‘plea bargain’ with the prosecution, in which he would plead guilty only to a count of conspiring to pervert the course of justice and not to a count of a conspiracy to throw corrosive fluid on Mr Mitchell.[[15]](#footnote-15) Thirdly, that in his attempts to obtain a reduction in sentence, he asserted repeatedly that he had direct evidence against Kong Hon Yui [[16]](#footnote-16), whom he alleged to be the mastermind of the conspiracy.[[17]](#footnote-17)

In another letter, Billy Kay reaffirmed that he was able to give direct evidence against Kong Hon Yui.[[18]](#footnote-18) Having expressed concern that, given the delay in pursuing a prosecution against Kong Hon Yui, he might have completed his sentence before a trial commenced, Billy Kay asserted that, nevertheless, he would testify against Kong Hon Yui. Of that, he said “In return, I also hope the police can see that I am determined and give me some help in my appeal against sentence.” [[19]](#footnote-19)

*Visits by police officers to Billy Kay and Jacky Ma*

Mr Cheung submitted that the failure to disclose the Police Investigation Reports and related notebook entries of police officers in respect of visits primarily to Billy Kay, but also to Jacky Ma, was that Mr McNamara was unaware of statements made by Billy Kay and of documents provided to Billy Kay and Jacky Ma, which material was relevant to their credibility. He contended that it was a matter of incredibility that no more notebook entries had been made than those supplied to the defence after the trial and that such notebook entries that were supplied were not more detailed.

Mr Cheung invited the Court to note that the Police Investigation Reports reiterated the statements made in letters from Billy Kay to the police that he sought a plea bargain and the assistance of the police to obtain a lenient sentence.[[20]](#footnote-20) Also, it was apparent from the Police Investigation Report, dated 2 January 2015, that a mere six days before the applicant’s trial began, that Billy Kay and Jacky Ma had been provided with copies of their respective witness statements and transcripts of their respective video recorded interviews, receipt of which they had acknowledged.[[21]](#footnote-21) The Police Investigation Report stated that the material had been provided “…so that they can prepare for testifying in Court later.” Mr Cheung submitted that was relevant to the testimony of Billy Kay and Jacky Ma.

In his evidence, Billy Kay denied that prior to coming to court to testify he had read his non-prejudicial witness statement dated 24 March 2010.[[22]](#footnote-22) In his evidence, Jacky Ma said “I don’t have much recollection of that video recorded interview.” [[23]](#footnote-23) Given that both men had been provided respectively with those documents, amongst others, six days before the trial began, Mr Cheung submitted that Mr McNamara could have cross-examined them as to why they had not read that material, if it was available to them.

Furthermore, Mr Cheung invited the Court to note that, in cross-examination, Jacky Ma accepted that, prior to making his second non-prejudicial statement, dated 13 November 2014, he had not described the role of the applicant as being that of a ‘*lan pei*’, namely someone who would obstruct Mr Mitchell after the assault, to impede any pursuit by him of his assailant, but in a manner which suggested falsely that he was coming to the victim’s aid. In context, relevant to that evidence was the reference in a Police Investigation Report that, at his request, on 5 August 2014 Jacky Ma had been provided by Station Sergeant 1492, Leung Kwok Yin, with all three statements that he had made to the police.[[24]](#footnote-24) Also, relevant was the statement to Station Sergeant 1492, Leung Kwok Yin, attributed to Jacky Ma in the Police Investigation Report dated 28 October 2014, that he “…just hoped to attend court hearing as soon as possible, and then apply for a reduction in sentence again.” [[25]](#footnote-25) In combination, the information contained in the Police Investigation Reports permitted a line of cross-examination of Jacky Ma in which it could be suggested to him that he had invented the role of ‘*lan pei*’, which he attributed to the applicant, in order to obtain a further discount in sentence.

Finally, Mr Cheung invited the Court to note of the non-prejudicial statement made by Jacky Ma, dated 7 March 2011, that it was known now, from the recently disclosed notebook of Station Sergeant 19508, that he and another officer had interviewed Jacky Ma for about two hours on 4 March 2011.[[26]](#footnote-26) However, no detail whatsoever of the contents of that interview had been noted. Similarly, in the context of the non-prejudicial statement of Billy Kay dated 24 March 2010, it was known now, from the recently disclosed notebook of DPC 47077 that he met Billy Kay on 16 and 17 March 2010 for a total of about three and three‑quarter hours. Had that newly disclosed material being known to Mr McNamara, it permitted a line of cross-examination of Billy Kay and Jacky Ma of their respective motivation for giving evidence for the prosecution, which was relevant to their credibility. Also, it permitted consideration to be given to making enquiries of the two police officers in respect of the same issue.

In his written submissions Mr Cheung invited the Court to note the very detailed provisions that apply in respect of disclosure by the prosecution in England and Wales, pursuant to the Criminal Procedure and Investigations Act, 1996, the revised Code of Practice, issued in 2015, and the Attorney General’s Guidelines on Disclosure, issued in 2013.

*The respondent’s evidence*

*Affirmations*

In his affirmation, Chief Inspector Chan Shun Ching, Baron said that on and between 22 December 2013 and 15 September 2014 he was the officer-in-charge of the team in the Organized Crime and Triad Bureau responsible for the applicant’s case. On 28 January 2014, the List and Bundle of unused material had been served on the applicant in advance of his committal to the Court of First Instance from Eastern Magistracy. He said that, whilst he was the officer-in-charge of the applicant’s case, he had read the 12 letters from Billy Kay to various police officers dated on and between 9 January 2010 and 30 October 2013. Similarly, he had read the extracts of the Police Investigation Reports. He said that he had never received nor read the affirmation of Jacky Ma, dated 9 August 2012, which was filed with the Court in support of his application for leave to appeal against sentence, nor had he received or read the police notebook entries related to the visit of police officers to Jacky Ma and Billy Kay exhibited to Mr Cheung’s affidavit.

Chief Inspector Chan said of the contents of the letters written by Billy Kay to the police officers that they expressed “…his personal feelings and/or concerns of his welfare in prison without mentioning D (the applicant).” Of the fact that none of the letters were in the List or Bundles of unused material served in advance of the committal of the applicant, Chief Inspector Chan said “…since these letters are not relevant or possibly relevant to any issue in the case against D, items (2)-(13) were not included”. He said that he reached a similar conclusion in respect of the Police Investigation Reports.

Senior Inspector Lee Ming Kong said that from 5 October 2014 onwards he was the officer-in-charge of the team in the Organized Crime and Triad Bureau responsible for the applicant’s case. He said that he had read the same 12 letters written by Billy Kay to various police officers. On 26 January 2015, after the conclusion of the applicant’s trial, he had received an undated letter from Billy Kay. He said that he had read the extracts of the Police Investigation Reports.

Senior Inspector Lee said that he had never received nor read the affirmation of Jacky Ma, dated 9 August 2012, which was filed with the Court in support of his application for leave to appeal against sentence, nor had he received or read the police notebook entries related to the visit of police officers to Jacky Ma and Billy Kay exhibited to Mr Cheung’s affidavit.

Of the contents of the letters written by Billy Kay, Senior Inspector Lee said that he expressed “…his personal feelings and/or concerns of his welfare in prison without mentioning D (the applicant).” Of the fact that none of the 12 letters were included in the List or Bundles of unused material served on the applicant on 24 October 2014, Senior Inspector Lee said “… these letters are not relevant or possibly relevant to any issue in the case against D. Items (2)-(13) were not included”.

Senior Inspector Lee said that he reached a similar conclusion to Chief Inspector Chan in respect of the Police Investigation Reports, namely that they were “… not relevant or possibly relevant to any issue in the case against D, as they did not contain any details but just the time of visiting the prisoners.” As a result, they were not disclosed prior to the trial.

In his second affirmation, Senior Inspector Lee adduced into evidence receipts signed by Jacky Ma and Billy Kay, dated 2 January 2015, acknowledging receipt of various documents from PC 5467, including: (Jacky Ma’s) non-prejudicial statements dated 7 March 2011 and 13 November 2014, a transcription of a video record of interview conducted of him on 22 December 2009, documents related to an identification parade held on 12 April 2012 and various photographs; (Billy Kay’s) his non-prejudicial statement dated 24 March 2010, transcriptions of video recorded interviews conducted of him on 21, 22, 23 and 27 December 2009, his statement made under caution and various photographs.

Having noted that the receipts were made after the date on which unused material had been served on the defence, namely 28 January and 24 October 2014, Senior Inspector Lee said:

“ I was not aware that it was necessary to inform the prosecuting counsel on my receipt [of the two receipts] and it was required to be disclosed to the defence through prosecuting counsel before the trial commenced on 8 January 2015.”

Mr Cheung Man Kwan, Bobby said that he had been assigned to the case on 6 November 2013, at which time he was a member of an advisory team within the Department of Justice. On 29 October 2013, Mr Edward Brook, a colleague in the Department of Justice, had advised the police that the applicant be prosecuted in connection with the attack on Mr Mitchell and had directed that the police “put together… a bundle of unused materials which will be voluminous, for our perusal.” Mr Cheung said that whilst handling the case he had communications with the police officers by telephone, but he could no longer recall the contents of the conversations of which there were “no written records”. Also, he communicated with DSPC 51307 by ‘WhatsApp’, but those records were no longer available to him. In preparation for the committal of the applicant, Mr Cheung said that he held conferences with Detective Station Sergeant 1492 and DSPC 51307. In the course of those conferences, he gave instructions that the police prepare “…a list of unused materials to include not only the case papers concerning Kay Sik Hong and Ma Shun Yick, but also the case papers concerning other accomplices who were not testifying against the applicant.”

Mr Cheung said that, although on 7 January 2014 a colleague had provided him with a copy of the judgment of the Court of Appeal in the appeals against sentence of Jacky Ma and Billy Kay, it did not occur to him to make any enquiries to determine whether there existed any unused material which ought to be disclosed to the defence. He was not aware of the affirmation of Jacky Ma dated 9 August 2012.

Mr Cheung said that he had a meeting with police officers on 15 January 2014 at which, although he had made no written record and had no specific recollection, he believed that he approved the Index of Unused Material to be served on the defence before the committal proceedings. That document, together with the committal bundle, was served on the defence in late January 2014. The applicant was committed for trial in the Court of First Instance on 28 February 2014. On 1 March 2014, he directed the police to provide the Department of Justice with a full bundle of the material described in the List of unused material.

On 24 September 2014, the case was assigned to his colleagues Mr Simon Tam SC and Ms Lisa Go to prosecute at trial, as a result of which he passed on the case papers. Nevertheless, having received a letter, dated 30 September 2014, from the applicant’s then solicitors requesting the provision of material, some of which was clearly related to unused material, by a letter to the police officers handling the case, dated 7 October 2014, Mr Cheung attached the letter of 30 September 2014 together with his earlier requests of 1 March 2014, asking them to “…attend to outstanding matters”, and gave the following directions:

“ As I have stressed in (sic) earlier occasions (either to you or to your previous OC case) we have to ensure proper disclosure, particularly in this case where a number of other APs have already been dealt with by the courts in other criminal proceedings.”

In the result, the upshot of Mr Cheung’s evidence was summarised in his statement “…I did not see, nor was I informed of the existence of any of ” the letters written by Billy Kay to various police officers, the affirmation of Jacky Ma, the Police Investigation Reports and the police notebook entries in respect of visits to Billy Kay and Jacky Ma by police officers.

Ms Go said that she and Mr Simon Tam had been assigned as counsel to prosecute the case on 25 September 2014. She said that she could not recall when she received the case papers and the Bundle of unused material. She produced a receipt dated 24 October 2014 by which the applicant’s then solicitors acknowledged receipt, *inter-alia*, of a Bundle of unused material comprising 19 volumes. Although she said that she could not recall the exact conversation she had with police officers about the ambit of the Bundle of unused material, to the best of her recollection she was told that it contained all of the unused material possessed by the police at the time of service on the defence. She “vetted” the list of contents of the Bundle of unused material, but she could not remember if she had “vetted” the Bundle itself.

For her part, Ms Go said that she did not see/know of nor was she “…apprised of the existence of ” any of the letters written by Billy Kay to various police officers, the affirmation of Jacky Ma, the Police Investigation Reports and the police notebook entries in respect of visits to Billy Kay and Jacky Ma by police officers. Further, she said that to the best of her knowledge, Mr Simon Tam did not mention that he knew about or had been apprised of the existence of any of that material.

In her second affirmation, Ms Go said that she could not recall whether any Police Investigation Reports were included in the police files provided for her use for the purpose of trial. Of Jacky Ma’s affirmation in support of his application for leave to appeal against sentence, she said that whilst she was aware of the fact of his appeal she had not reviewed the appeal file nor had she been provided with a copy of the affirmation. It did not occur to her that it might contain material relevant to the applicant’s trial. Further, she was not aware of the prison visits to the two accomplices conducted by police officers. Finally, she said that Mr Simon Tam had been on sick leave and vacation leave since 6 February 2015.

*The respondent’s submissions*

At the hearing on 26 January 2017, Mr Ned Lai informed the Court that the respondent accepted responsibility for non-disclosure of the material about which complaint was made, but he invited the Court to reject the arguments advanced in ground 1. He submitted that the material “would not have shown or help to show that there was any significant discrepancy or inconsistency in the relevant testimony of ” Jacky Ma or Billy Kay. He contended that there was no real possibility that the jury would have arrived at a different verdict had the undisclosed unused material been available to the defence at trial.

In her submissions at the hearing of 7 March 2017, Ms Lai confirmed the respondent’s position that none of the material to which Mr Cheung referred had been disclosed to the defence by the prosecution and accepted that the material was such that it should have been disclosed to the defence. She acknowledged the responsibility of the respondent for the failure to disclose the unused material. However, she submitted that there was no evidence of bad faith on behalf by the police or the Department of Justice. Nevertheless, Ms Lai conceded that the appeal ought to be allowed on Ground 1.

In her written submissions, Ms Lai acknowledged “…the importance of full and timely disclosure as a pivotal safeguard for the right to fair trial enshrined in Article 87 of the Basic Law.” She accepted that guidance for an understanding of the ambit of the duties of the prosecution in respect of disclosure of unused material to the defence was to be found in the judgment of the Court of Final Appeal in *HKSAR v Lee Ming Tee*.[[27]](#footnote-27) She contended that a succinct exposition of the “… guiding principles on disclosure” was to be found in the ‘Prosecution Code’ [[28]](#footnote-28) and in its earlier predecessor ‘The Statement of Prosecution Policy and Practice’.[[29]](#footnote-29)

*Jacky Ma’s affirmation*

Of the failure to disclose Jacky Ma’s affirmation, Ms Lai acknowledged in her written submissions that counsel at the Department of Justice should have reviewed the relevant appeal files to look for disclosable material. Fault lay in “…an insufficient vigilance to the necessity of taking a proactive approach to ensure full and proper disclosure.” On the other hand, there was no evidence of bad faith.

*Billy Kay’s letters*

In her written submissions, Ms Lai acknowledged that the opinion of Chief Inspector Chan and Senior Inspector Lee that the material contained in the Police Investigation Reports and the police notebooks were not disclosable was erroneous. Nevertheless, she submitted that there was no evidence of bad faith. Also, she acknowledged that counsel at the Department of Justice “…could have been more vigilant and adopted a more proactive approach in scrutinising the material submitted by the police.”

*Visits by police officers to Jacky Ma and Billy Kay*

Ms Lai informed the Court that the respondent took “full responsibility” for the failure to disclose the fact of visits to Jacky Ma and Billy Kay whilst they were in custody and for the failure to disclose the matters that passed between them and the police.

Ms Lai characterised the failure of the police and counsel of the Department of Justice to observe the duty of disclosure as being an “…unfortunate isolated incident.” Nevertheless, she offered the apologies of the respondent to the Court and the applicant for those failures. She said that the Department of Justice had taken heed of the recent judgment of this Court in *HKSAR v Ip Tsz Yau*,[[30]](#footnote-30) in which observations were made as to the duty of disclosure and in which the applicant’s convictions had been quashed, in part as a consequence of a failure of that duty. The Director of Public Prosecutions personally was taking steps to review the guidelines on disclosure to ensure that all prosecutors “fully and properly discharge their duty of disclosure”.

In the result, in conceding that the appeal ought to be allowed on Ground 1, Ms Lai accepted that it was not an appropriate case in which to invite the Court to invoke the application of the proviso. However, Ms Lai asked the Court to order that the applicant be retried on the same count on a fresh indictment.

*A consideration of the submissions*

*The law: the prosecution’s duty of disclosure*

As Bokhary PJ observed in his judgment in the Court of Final Appeal in *Hall v HKSAR* “For the rationale, status, nature and scope of the prosecution’s duty of disclosure in Hong Kong, one needs only to consult the judgment which Sir Anthony Mason NPJ gave, and with which the other members of the Court agreed, in *HKSAR* *v Lee Ming Tee (No 1)* (2003) 6 HKCFAR 336.” [[31]](#footnote-31)

In his judgment in *HKSAR v Lee Ming Tee (No 1),* Sir Anthony Mason NPJ addressed the scope of the prosecution’s duty of disclosure:[[32]](#footnote-32)

“ The prosecution’s duty is to disclose to the defence relevant material (including information) which may undermine its case or advance the defence case. The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible: *Reg v. Preston* at 163-164, per Lord Mustill. And material which is not admissible may be relevant and useful for cross-examination of a prosecution witness on credit.

The *Melvin* categories may be accepted as a broad statement of what, on a sensible appraisal by the prosecutor, is subject to disclosure. The *Melvin* formulation and the recognition that the credibility of a prosecution witness is relevant for the purpose of the *Melvin* categories have the consequence that disclosable material relevant to the cross-examination of a prosecution witness cannot be restricted to the three instances of disclosable material relevant to the credibility of a prosecution witness sanctioned by authority and referred to by Steyn LJ in *Brown* [1994] 1 WLR at 1607A-C. It extends to other significant material which a reasonable jury could regard as tending to shake confidence in the credibility of the witness.”

Of the ambit of the term “prosecution”, Sir Anthony Mason NPJ said:[[33]](#footnote-33)

“ The duty rests with the prosecution or prosecuting counsel. The duty should be considered as one imposed upon the prosecution generally (so in this case it was the DOJ), though it is generally performed by counsel who is briefed and conducts the prosecution. It would be unduly restrictive to say that the duty is confined to prosecuting counsel. See *Reg v. Preston* at 152G‑H, per Lord Mustill.”

Of the extent of the duty, he said:[[34]](#footnote-34)

“ The prosecution’s duty is to disclose to the defence material (including information) in its possession or control. That will ordinarily include materials that have been gathered by the investigating agency (the police) and it is the responsibility of the prosecution to make the investigating agency aware of the need to make available all relevant materials. In this sense, the prosecutor’s duty is to disclose to the defence all relevant material in its possession or control and in the possession or control of the investigating agency.”

Of the duty and role of prosecution counsel, Sir Anthony Mason NPJ said:[[35]](#footnote-35)

“ *In order to ensure that all disclosable material is provided to the defence, prosecuting counsel should instruct investigating officers* and, where appropriate, witnesses *to bring to counsel’s attention any material that may be disclosable*. In other words, disclosable material known to a witness, including an expert witness, should be channelled through prosecuting counsel who should take appropriate steps to facilitate that happening.” [Italics Added.]

Of the concomitant duty to ascertain the existence of disclosable material, Sir Anthony Mason PJ said:[[36]](#footnote-36)

“ …the prosecution has a duty to ascertain and disclose to the defence relevant material (including information) in its possession or control and in the possession or control of the investigating agency (including the police)…”

*Accomplice prosecution witnesses*

It has been long-established that the prosecution’s duty of disclosure in respect of prosecution witnesses, who themselves are accomplices in the offence the subject of the trial, is of particular importance. In the judgment of this Court in the *Queen v Tsui Lai Ying*[[37]](#footnote-37), Silke VP addressed the issue, in the context of prosecution witnesses who had given evidence under immunity from prosecution:[[38]](#footnote-38)

“ It is clear beyond peradventure that in cases like this the accomplice is to be presented to the court warts and all. The defence is entitled to know everything about him, the terms of the immunity and any matters surrounding it which will affect credibility of his evidence.”

Similar considerations are relevant to cases in which accomplice witnesses gave evidence for the prosecution, albeit not under an immunity from prosecution, where there is a possibility that in so doing a reduction in sentence may be afforded to the accomplice either by an appellate court or the Chief Executive.

*Jacky Ma’s affirmation*

Jacky Ma’s affirmation in support of his application for leave to appeal against sentence out-of-time imposed on him on 1 April 2011 was filed with the Court on 9 August 2012. The affirmation did not address the issue of why the application was made out‑of‑time. Rather, it addressed two issues. First, it was contended that the judge had erred in stipulating a starting point for sentence of 18 years’ imprisonment. Secondly, it was submitted that the judge had afforded Jacky Ma an insufficient discount of sentence for “…being a tainted witness to testify against other defendants.” In that context, Jacky Ma said “Based on justice and my regret about committing the offence, I decided to be a tainted witness to testify against other defendants in the same case, and gave a detailed statement for this reason.” Given the chronology of events, no doubt the reference to the “detailed statement” was a reference to the non-prejudicial statement made by Jacky Ma on 7 March 2011.

In the affirmation, Jacky Ma made specific reference to a case in which, so it was asserted, Chan Ying Kin had pleaded guilty to what appears to have been a conspiracy to throw corrosive fluid over a victim, at the behest of a Triad leader against whom he testified and who was convicted and sentenced to 18 years’ imprisonment. It was noted that the defendant/prosecution witness had received a discount of 50% from the starting point of 12 years’ imprisonment.

On 11 April 2012, Jacky Ma had identified the applicant in an Identification Parade as Sai Fai. However, the applicant was not charged with the offence for which he stood trial until 12 November 2013. In a witness statement taken on the day of the Identification Parade, Jacky Ma said that Sai Fai was a man he met at the home of Tang Chong Hou on the morning of 27 October 2009 and with whom he and Tang travelled to the District Court where the attack on Mr Mitchell took place. In a non‑prejudicial statement, dated 7 March 2011, in their description of the overall events, Jacky Ma had described the role of Sai Fai, in particular of having gone up to Mr Mitchell after the attack.

Clearly, the affirmation permitted a line of cross-examination, by Mr McNamara of Jacky Ma, that he was motivated to secure a reduction in the sentence of imprisonment imposed on him on the basis that not only had he given a detailed statement to the police describing the conduct of other defendants but also he was prepared to testify against them, including the applicant. Also, it was relevant to the issue of whether or not he knew what range of discount to anticipate for having given evidence for the prosecution against an accomplice. In effect, he had asserted in his affirmation that a discount of 50% from starting point of the sentence was appropriate in circumstances where, having pleaded guilty, an accomplice gave evidence against an accomplice who was convicted after trial.

In cross-examination by Mr McNamara, Jacky Ma accepted that his application for leave to appeal against sentence out-of-time had been adjourned, on the application of his counsel, until after the trial of the applicant.[[39]](#footnote-39) Further, he accepted that the adjournment was granted so that he could give evidence in the trial of the applicant. Then, there ensued the following exchange between Mr McNamara and Jacky Ma:[[40]](#footnote-40)

“ Q. Now, you obviously expect to get a benefit, a reduction in the Court of Appeal as a result of having given evidence against the accused in this trial.

A. *You may say so*, but I want to clarify one thing first. I made an application for -- I asked for leave to appeal after I had already been sentenced. I appealed for leave to appeal out of time only more than a year after this. Since, well, it was over a year later before I made the application because I didn’t -- *I was not aware that implicating or giving evidence against Wun Shu-fai* could be used as a ground of appeal.

Q. But you now know that, don’t you?

A. Now I know that.” [Italics added.]

Subsequently, the following exchange ensued:

“ A. When I agreed to give evidence against Wun Shu-fai it was the time I had already pleaded guilty. The then prosecutor told me through my representing counsel and asked me whether I was willing to be a witness.

Q. Yes.

A. At that time it was on my mind that to do something to compensate the victim of this case. That’s why I agreed to be that witness and that was my intent to be a witness. Well, I only came to know in the prison after I had already served in there for over a year from others, from my friends in there, that this reason could be used as a ground of appeal.

Q. *How much time do you expect to get off for giving evidence against this man*?

A. *No idea*.

Q. Have you discussed that with your counsel?

A. Are you referring to my representing counsel for the appeal?

Q. Yes, Mr John Marray.

A. No, I didn’t.” [Italics added.]

Obviously, as Mr McNamara asserted, in effect, in his affirmation, the affirmation of Jacky Ma provided potentially fruitful lines of cross-examination to pursue with him at trial. Given that both Mr Cheung and Ms Go said that they were aware that Jacky Ma had made an application for leave to appeal against sentence and that they were obviously aware that he was an important accomplice witness in the prosecution case, it beggars belief that prosecuting counsel did not call for the appeal file to ensure that there was nothing that was disclosable to the defence in the prospective trial of the applicant. In making that observation, it is only fair to note that Ms Go was junior counsel to leading counsel in the immediate preparation for and conduct of the trial. No doubt, leading counsel had overall conduct of the case. As noted earlier we have received no evidence from him, for reasons of his ill‑health. Prosecutors have a duty to be proactive in discharging their duty that all disclosable material is disclosed to the defence, all the more so in a serious case involving an accomplice witness.

*Billy Kay’s letters to the police and visits by them to him and Jacky Ma*

No issue was taken with the evidence of Mr Cheung and Ms Go, confirmed by the evidence of the two police officers, that the former were never informed prior to or during the trial of the applicant that Billy Kay had written 12 letters to police officers involved in the prosecution of the applicant or that police officers had made 20 visits to Billy Kay and had visited Jacky Ma, whilst they were detained in the custody of the Correctional Services Department.

Given that Jacky Ma and Billy Kay were important accomplice witnesses in the prosecution case it was a serious error of judgment by the police officers involved not to have disclosed that material to counsel advising on the preparation of the case and to counsel assigned to prosecute the case. On the other hand, clearly this was not a decision to be left to a police officer, let alone to police officers in the investigation team.

Given the fact that the two accomplices had made non-prejudicial witness statements, Billy Kay one and Jacky Ma two such statements, it was very likely that there had been contact between the police officers and the witnesses before and between the non-prejudicial witness statements. With respect, there was a failure by prosecution counsel to require specifically that the officer-in-charge of the case and the investigating officers obtain and produce to prosecution counsel all information and records of contact by police officers in the investigation team with Jacky Ma and Billy Kay after the completion of their video record of interview and prior to the commencement of trial. Such a requirement of the police officers and its response should have been made in writing and those records retained. Those matters are elementary. The absence of written records made by prosecution counsel of conferences and telephone conversations with police officers in the investigating team, the fact that communication was also made by WhatsApp, the records of which are not available, and paucity of records made by police officers of their meetings with the two accomplices whilst they were in custody evidence an indifference to creating records of steps taken in the preparation of the case. Regrettably, the egregious failures of disclosure in this most serious case are suggestive of a possible systemic failure.

It is necessary that the principles of disclosure, articulated in the Department of Justice’s ‘Prosecution’s Code’ are underpinned and given effect by a simple system in which prosecuting counsel give directions to investigating police officers in respect of areas of potential unused material, requiring confirmation as to whether or not such material does or does not exist. Such directions and responses ought to be in writing and retained. Thereby, an ‘audit trail’ is created, permitting counsel prosecuting the case to be fully informed of the steps taken to identify, retain and disclose unused material. Also, the issue of full and proper disclosure by the prosecution is a matter that, in appropriate cases, judges may wish to raise and examine in some detail in pre-trial reviews.[[41]](#footnote-41)

For the reasons submitted by Mr Cheung, we are satisfied that the material contained in the letters written by Billy Kay, in the context of the multiple visits made to him by police officers, the limited records of what he had to say to them reflected in the Police Investigation Reports and police notebooks were all matters that provided a potentially fruitful line of cross-examination of Billy Kay. Similarly, the fact that the two accomplice witnesses had been provided with their out-of-court statements and their non-prejudicial witness statements, in the days prior to the commencement of the trial, were matters that provided potentially fruitful lines of cross-examination of them.

*England and Wales*

It is to be noted that the Code of Practice, re-issued in 2015, was promulgated pursuant to section 23 of the Criminal Procedure and Investigations Act, 1996. Sections 21 and 27 of the Act provide, broadly speaking, that the common law rules as to disclosure and criminal investigations respectively shall not apply after the Act and the Code are brought into force. In Hong Kong, we have no such legislation.

In the judgment of the Divisional Court in *R* *(Ebrahim)* *v Feltham Magistrates’ Court*[[42]](#footnote-42) Brooke LJ observed the provisions of the Code “preserve and amplify common law rules which were described by the judges before the Code came into force.” [[43]](#footnote-43) That case was concerned with the duty of investigators to ascertain, obtain and retain CCTV, if relevant to a criminal investigation.

It is be noted that the Code of Practice was issued under Part II of the Act, namely in respect of ‘Criminal Investigations’. Paragraph 2.1 defines “material” as including “information and objects, which is obtained or inspected in the course of a criminal investigation and which may be relevant to the investigation.” Paragraph 4.4 provides “Where information which may be relevant is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time.” Obviously, those provisions resonate with the common law requirement that investigators ascertain, obtain and retain information as well as objects. It was a requirement that a record was made which was adequate to disclose the circumstances leading to the meetings between police officers and the two accomplices and the nub of what was said between them. That requirement did not dictate the making of witness statements or verbatim transcripts of what had been said. It may be that in his review of the disclosure guidelines, given the fact that Code preserves and amplifies the common law rules, the DPP will find the Code a useful point of reference.

*Conclusion*

For the reasons which we have set out, we were satisfied that Ms Lai’s concession that this Court ought to allow the appeal on Ground 1 was well made. Accordingly, treating the hearing of the application as the hearing of the appeal, we allowed the applicant’s appeal against conviction and quashed his conviction.

*Retrial*

Mr Cheung opposed an order for a retrial on two grounds. First, on the basis that a fair trial was not possible, given the absence of records of what transpired at meetings between police officers and Jacky Ma and Billy Kay. Secondly, on the basis of the lack of strength of the prosecution case.

In supporting her application for an order for a retrial, Ms Lai said that the prosecution had disclosed all the records relevant to those meetings of which they were aware. She said that importantly the identity of the police officers who had visited the two accomplice witnesses and on which occasions those visits had occurred was established. The police officers were available to be cross-examined at trial. Also, she said that the records of the Correctional Services Department of visits to the two accomplices, whilst they were held in their custody, could be obtained to confirm or call into question that evidence.

Of the strength of the prosecution case, Ms Lai invited the Court to note that the evidence of the two accomplices had been tested vigorously at trial, but nevertheless the jury had returned a unanimous verdict of guilty within 1½ hours of retiring to deliberate their verdict. Also, she acknowledged that the matters in issue in the trial were narrow. There was no dispute that the applicant was in the immediate vicinity of the attack on Mr Mitchell, having travelled there with Jacky Ma. What was in issue was why he was there and what he did. She submitted that whether or not the evidence of the two accomplices was to be accepted was very much a matter for a jury.

*Conclusion*

Of the fairness of a retrial, we were satisfied that the fact that there existed only very limited records of the conversations held by police officers and two accomplice witnesses was to be viewed in the context that the identity of those police officers was established. Witness statements could be taken from them and they could be made available for cross‑examination. Such disadvantage as there was to the defence arising from the absence of records of those conversations was a matter in respect of which a trial judge could give appropriate directions to the jury. The strength of the case was sufficient for it to be appropriate for it to be considered by a jury.

Accordingly, we ordered that the applicant be retried on a fresh indictment to be filed with the Court within 14 days and that the matter come before the Listing judge for the fixing of trial dates within 28 days of the judgment. Also, having regard to the passage of time since the commission of the offence and the fact that the applicant had been arrested first of all in December 2009, we ordered that the trial be expedited. Finally, having considered Mr Cheung’s application that the applicant be granted bail pending his retrial, nevertheless we were satisfied that it was appropriate that he be remanded in custody and we so ordered.

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| --- | --- | --- |
| (Michael Lunn)  Vice President | (Peter Cheung)  Justice of Appeal | (Jeremy Poon)  Justice of Appeal |

Mr Ned Lai, SADPP (Ag.), of the Department of Justice, for the respondent on 26 January 2017

Ms Anna Lai, SC, DDPP(Ag.), Mr Ned Lai, SADPP (Ag.), Mr Ira Lui, SPP and Mr Andrew Li, SPP, of the Department of Justice, for the respondent on 7 March 2017

Mr Eric TM Cheung, solicitor advocate, of Messrs ONC Lawyers, assigned by Director of Legal Aid, for the applicant

1. Senior Inspector Lee Ming Kong and Chief Inspector Chan Shun Ching, Baron. [↑](#footnote-ref-1)
2. Wong Ching Man, Rossetti and Wu Lai King. [↑](#footnote-ref-2)
3. Appeal Bundle page 90 M-O; Kong was convicted after trial on two charges, namely conspiracy to defraud and conspiracy to deal with the proceeds of an indictable offence. [↑](#footnote-ref-3)
4. Appeal Bundle, page 26; Admitted Facts (IV), paragraph 9. [↑](#footnote-ref-4)
5. Appeal Bundle, page 15; Admitted Facts (I), paragraphs 27-29. [↑](#footnote-ref-5)
6. Appeal Bundle, page 25; Admitted Facts (IV), paragraph 4. [↑](#footnote-ref-6)
7. Appeal Bundle, pages 24-5; Admitted Facts (IV), paragraphs 2-3. [↑](#footnote-ref-7)
8. Appeal Bundle, page 86 E-I. [↑](#footnote-ref-8)
9. Appeal Bundle, page 91 N-O. [↑](#footnote-ref-9)
10. Appeal Bundle, page 91 G-M. [↑](#footnote-ref-10)
11. *HKSAR v Ma Shun Yick* (CACC 314/2012; unreported, 19 June 2015). [↑](#footnote-ref-11)
12. Appeal Bundle, page 117 B-F. [↑](#footnote-ref-12)
13. Appeal Bundle, page 117 R-S. [↑](#footnote-ref-13)
14. ETMC-18; letter dated 14 May 2010, page 41:

    “ However, after I met with Leung Sir in the afternoon of 13 May 2010, I have stated clearly that my defence lawyer will negotiate with the Department of Justice for me once more as to whether I could be given the status of an immunity witness. This is what I have been hoping for most ever since I was arrested and cooperated with the police…

    Because after I was arrested, the Police had said that as long as I fully cooperated and disclosed all the persons involved and their connections, (you) would ask for an immunity witness status for me as a first priority, is that right? However, it turned out that I became a tainted witness. This has made me very upset all along.” [↑](#footnote-ref-14)
15. ETMC-18; letter dated 24 November 2010, page 49:

    “ But I also hope that you could help me once more by persuading your supervisor to have mercy so that I would be charged with a lesser offence. Please help me to plead for leniency from the Department of Justice. *As long as the Police permits me to plead guilty to the second charge, perverting the course of justice, and not laying Charge 1 against me, I would be most grateful and faithfully testify against Kong Hon-yui and Lai Kwok Leung.*”[Italics added.] [↑](#footnote-ref-15)
16. ETMC-18; letter dated 28 October 2011, page 54:

    “ …my determination to assist the Prosecution to testify against Kong Hon-yui has never changed. I vow to guarantee that I can definitely identify Kong Hon-yui even if he has turned into ash. *I will not forget his tone and expression when he told me to take action quickly.*” [Italics added.] [↑](#footnote-ref-16)
17. ETMC-18; letter dated 28 October 2011, page 55:

    “ …when will I take part in identification and testify against the culprit behind the scene, Kong Hon-yui?” [↑](#footnote-ref-17)
18. ETMC-18; 27 July 2012, page 57:

    “ I wish to enquire that, concerning the principal offender in this case, Kong Hon-yui, I have still not yet heard about the prosecution of this mastermind. Is the prosecution of this principal offender abandoned? However, in this case, the principal offender, Kong Hon-yui, really personally told me to take action as soon as possible in the lobby of the District Court, and said that if I did not take action soon, he would be put behind bars. This is what I personally heard and saw." [↑](#footnote-ref-18)
19. ETMC-18; 27 July 2012, page 58. [↑](#footnote-ref-19)
20. ETMC-19; 30 December 2010, page 14:

    “ He (Billy Kay) stated that he would plead guilty to the first charge of ‘throwing corrosive fluid’ in the High Court PTR on 10 January 2011, and reiterated that he hoped to become a tainted witness in this case, and hoped that the police would help him to make a plea for leniency for him in the Court.” [↑](#footnote-ref-20)
21. ETMC-19; 2 January 2015, pages 32-3. [↑](#footnote-ref-21)
22. Appeal Bundle, page 187 A-F. [↑](#footnote-ref-22)
23. Appeal Bundle, page 131 P-Q. [↑](#footnote-ref-23)
24. ETMC-19; 5 August 2014, pages 29-30. [↑](#footnote-ref-24)
25. ETMC-19; 28 October 2014, page 31. [↑](#footnote-ref-25)
26. ETMC-22; 4 March 2011, page 3. [↑](#footnote-ref-26)
27. *HKSAR v Lee Ming Tee (No 1)* (2003) 6 HKCFAR 336. [↑](#footnote-ref-27)
28. ‘Prosecution Code’ (2013). [↑](#footnote-ref-28)
29. The Statement of Prosecution Policy and Practice (2009). [↑](#footnote-ref-29)
30. *HKSAR v Ip Tsz Yau* (CACC 199/2015; unreported, 26 January 2017). [↑](#footnote-ref-30)
31. *Hall v HKSAR* (2009) 12 HKCFAR 562, paragraph 2. [↑](#footnote-ref-31)
32. *HKSAR v Lee Ming Tee (No 1)* (2003) 6 HKCFAR 336, at paragraphs 170-1. [↑](#footnote-ref-32)
33. *HKSAR v Lee Ming Tee (No 1)*,paragraph 159. [↑](#footnote-ref-33)
34. *HKSAR v Lee Ming Tee (No 1)*, paragraph 161. [↑](#footnote-ref-34)
35. *HKSAR v Lee Ming Tee (No 1)*,paragraph 162. [↑](#footnote-ref-35)
36. *HKSAR v Lee Ming Tee (No 1)*,paragraph 168. [↑](#footnote-ref-36)
37. *Queen v Tsui Lai Ying* [1987] HKLR 857. [↑](#footnote-ref-37)
38. *Queen v Tsui Lai Ying*, page 873 A-B. [↑](#footnote-ref-38)
39. Appeal Bundle, pages 113 S-114B. Also, see the judgment of this court in *HKSAR v Ma Shun Yick* (CACC 314/2012; unreported, 19 June 2015). [↑](#footnote-ref-39)
40. Appeal Bundle, page 117 B-G. [↑](#footnote-ref-40)
41. Judicial Protocol on the Disclosure of Unused Material in Criminal Cases-Judiciary of England and Wales (2013). [↑](#footnote-ref-41)
42. *R (Ebrahim) v Feltham Magistrates’ Court* [2001] 1 WLR 1293. [↑](#footnote-ref-42)
43. *R (Ebrahim) v Feltham Magistrates’ Court*, paragraph 12. [↑](#footnote-ref-43)