CACC 142/2018

[2021] HKCA 99

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

CRIMINAL APPEAL NO 142 OF 2018

(ON APPEAL FROM HCCC 333 OF 2017)

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BETWEEN

HKSAR Respondent

and

YIU CHI MING (姚智銘) Appellant

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Before: Hon Macrae VP, McWalters & Zervos JJA in Court

Date of Hearing: 13 November 2020

Date of Judgment: 26 January 2021

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J U D G M E N T

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Hon McWalters JA (giving the judgment of the court):

1. The appellant pleaded not guilty to trafficking in a dangerous drug, namely 173.9 grammes of a solid containing 160.4 grammes of cocaine, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134. He was tried in the Court of First Instance before Deputy High Court Judge Stuart-Moore (“the judge”) together with a jury. He was convicted and sentenced to 10 years and 9 months’ imprisonment.
2. Subsequently, the appellant filed a Notice of Application for Leave to Appeal (“Form XI”) against his conviction and at the hearing of his application he was granted leave to appeal and an Appeal Aid Certificate[[1]](#footnote-1).
3. At the conclusion of his appeal, we reserved our judgment. This is our judgment.

The prosecution case

1. In the late afternoon on 5 January 2017, the police intercepted the appellant as he was opening the driver’s door of a Toyota private car with a car key, outside his home at No 2A, Nai Chung Village, Ma On Shan. At the time of his interception his girlfriend (“DW2”) was close by. The police officers searched the appellant’s person, and later his home, but nothing incriminating was found.
2. When officers searched the car they found the cocaine particularised in the charge in two locations within the car. One amount of cocaine was found inside the glove box between the front seats, and it was contained in 96 small packets inside a transparent resealable plastic bag. The other amount, consisting of 6 packets, together with several resealable transparent bags and an electronic scale, was found inside a red plastic bag lying on the floor behind the front passenger seat. The estimated value of the cocaine was HK$157,901.
3. When arrested and cautioned at the scene by PC 13875 (“PW1”) for the offence of trafficking in a dangerous drug, the appellant allegedly replied in Punti:

“My father is suffering from cancer; that’s why I dragged C Chai (transliteration) for someone to earn just a little money. Give (me) a chance, Ah SIR.”[[2]](#footnote-2)

The appellant denied making this admission and claimed it was a police fabrication. In this judgment we shall refer to this admission as the crime-scene admission.

1. This alleged crime-scene admission was contemporaneously recorded in PW1’s notebook and the appellant countersigned beneath it and also signed a declaration that the post-record of his caution statement was true and that it had been made of his own free will. In respect of the post-recording of this alleged false admission in PW1’s notebook the appellant claimed that he signed against it only because of the inducements and threats by the police that if he co-operated with them his girlfriend would not be arrested and charged.
2. Later, a video record of interview (“VRI”) was conducted with the appellant in which he made admissions to trafficking in the cocaine by acknowledging and supplementing his earlier crime-scene admission. He said he met one “Kit Chai” in a bar in Tsim Sha Tsui and he agreed with this person that in return for a reward he would deliver the cocaine. Kit Chai gave him the keys to the car containing the cocaine after leaving the car outside his home. However, he did not know who owned the car.
3. In his subsequent trial testimony, the appellant claimed that the incriminating answers that he gave in his VRI were the result of police coaching and that he only agreed to make these statements because of similar inducements and threats concerning his girlfriend.
4. A fingerprint impression was lifted by the police from the rear-view mirror inside the car, which upon comparison matched the appellant’s right thumb print. It was not in dispute that the car was registered to a person by the name of Wong On Chun. This person was not called by the prosecution at the appellant’s trial.
5. A *voire dire* was held to determine the admissibility ofboth the post-record of the crime-scene admission and the VRI, at the end of which they were ruled admissible by the judge. The allegations in respect of the admissions were then repeated in the trial.

The defence case

1. The appellant elected to give evidence and called one witness, his girlfriend (“DW2”). In his evidence he said the car belonged to his friend, Wong On Chun, and he allowed Wong to park it outside his home free-of-charge on 4 January. Wong had left the car key with the appellant so that he could move the car away if there were complaints from neighbours. He said he had travelled in this car as a passenger many times before his arrest.
2. He said that on 5 January he was going to the car in order to retrieve an ATM card for Wong and DW2 was with him. At that time he had on him what was referred to as a “body bag” containing HK$28,720 cash which was money he had earned by working at a seafood stall at Lei Yue Mun.
3. He said that when he was intercepted by the police the car key was snatched from his hand and he and DW2 were taken back to his home, which was searched, and this was followed by the search of the car. When questioned by the police officers about the cocaine in the car, he denied knowing of its presence and was eager to give the police officers information on Wong. However, he said the officers were not interested in hearing about Wong at all and instead took him to a van parked nearby. In the van he was told that if he admitted the offence, DW2 would be released uncharged and the money in his bag would be returned to her.
4. Subsequently, in the police station, the appellant agreed to sign in PW1’s notebook. In respect of his VRI, he said he was coached by the police as to the answers he should give and was specifically warned not to mention Wong. After the VRI was concluded, the appellant said he was allowed to pass the HK$28,720 cash and his bank cards to DW2 in a plastic bag.
5. In her evidence, DW2 said she had stopped seeing the appellant since his arrest. She recalled on 5 January a group of officers rushed towards the appellant as they were leaving the building where they lived. The police interrogated her, searched her bag and took away her mobile phone. This was at about 3 pm. She was kept downstairs for about 10 minutes and then taken to the flat whilst it was being searched. At this time she was handcuffed. The appellant was already there and she said that he saw that she was handcuffed and she heard him tell the police that he would admit everything and then they should let her go. The appellant was later taken downstairs and 10 minutes after that DW2 said she was also taken downstairs. She said she saw the appellant being taken to the van.
6. She was later taken to the police station and was told that she would be released after the appellant had completed his VRI. Her mobile phone and ID card, a plastic bag containing the money and two bank cards of the appellant, and a ATM card belonging to Wong were all returned to her upon her release, which was 8 hours after their arrest.

The appellant’s grounds of appeal

1. Mr David Boyton, who appeared for the appellant both at trial and on appeal, relies on two grounds of appeal in his Perfected Grounds of Appeal.
2. In the first ground of appeal he contends that the judge erred by failing to direct the jury on circumstantial evidence and inferential reasoning in terms of Direction 21.3 of the Specimen Directions in Jury Trials. Mr Boyton refers to the prosecution opening and closing speeches and submits that the prosecution sought the appellant’s conviction on the basis of both the disputed admissions of the appellant as well as the circumstantial evidence. That being so, he argues, the question arose of whether a direction on inferences was required. In support of this proposition he relied on the judgment of the Court of Final Appeal in *Tang Kwok Wah v HKSAR*[[3]](#footnote-3).
3. Mr Boyton submitted that the prejudice from failing to give the inferential direction arises in two ways. Firstly, the jury might reason that knowledge of the cocaine in the car meant the appellant was trafficking in it.
4. Secondly, apart from the admissions, the primary facts in the present case, by themselves, may not have been sufficient to secure a conviction. Accordingly, a proper direction on circumstantial evidence and inferential reasoning was required.
5. In the second ground of appeal, Mr Boyton complains that the judge erred by failing to give a full and proper *Mushtaq* direction concerning the appellant’s crime-scene admissions and in his VRI in accordance with Direction 39.1 of the Specimen Directions in Jury Trials. Mr Boyton refers to the judgment of the Court of Appeal in *HKSAR v Yeung Chun Hin*[[4]](#footnote-4)*,* where Macrae VP emphasized the need, when giving the jury a *Mushtaq* direction, to adopt a step-by-step, structured approach, warning that a departure from the terms of the Specimen Direction is a “particularly unwise course”[[5]](#footnote-5). It was also said by Macrae VP that given the importance of the admissions to the prosecution case, the applicant in that case would have been entitled to expect that “the jury would receive from the Judge the full and emphatic terms of the relevant Specimen Direction”[[6]](#footnote-6).
6. In the present case Mr Boyton argues that the trial judge did not convey all the elements of the direction required, nor was it in the structure recommended by the Hong Kong Judicial Institute.
7. Mr Boyton complains that the judge’s direction in relation to both the appellant’s crime-scene admission and the VRI primarily focused on assessing the credibility of the police witnesses rather than the reliability of the admissions. As a consequence, the judge’s direction “comes across as a comment on a submission from the Defence Counsel, rather than a point of law”[[7]](#footnote-7).
8. Secondly, in respect of the disputed crime-scene admission, Mr Boyton complained that the judge did not specifically direct the jury that if they were not sure that the appellant made the oral admission, then they must ignore it. Also, the judge failed to tell the jury that if they were satisfied that the answers were in fact given but were given, or may have been given, because of the inducements and threats by the police, then they should ignore them altogether.
9. By reason of the two grounds of appeal, individually or cumulatively, Mr Boyton submits that the appellant’s conviction is unsafe and unsatisfactory.

The respondent’s submissions

1. Ms Christal Chan, for the respondent, submits in reply to the first ground of appeal that, notwithstanding that the judge did not give any direction on inferential reasoning, his directions were proper and sufficient in a case like the present where the primary facts were simple and straightforward. Ms Chan further submits that the present case falls within that category of case where it is unnecessary for the judge to direct the jury on inferential reasoning.
2. In reply to the second ground of appeal, Ms Chan accepts that a *Mushtaq* direction in terms of Specimen Direction 39.1 was called for in the present case. Although the judge did not direct the jury strictly in the form of Specimen Direction 39.1, she argues that, nevertheless, all the elements of the *Mushtaq* direction had been fully conveyed to the jury.

Discussion

The first ground of appeal: non-direction on circumstantial evidence and inferential reasoning

1. This ground of appeal relies on what Mr Boyton asserts was, in effect, an invitation by Mr John Marray, counsel for the prosecution at trial, to the jury to convict the appellant on circumstantial evidence should they find themselves unable to rely on the appellant’s admissions. He relies on comments by Mr Marray in his opening and closing addresses as supporting his contention that the prosecution was seeking a conviction on this alternative basis.
2. In his opening address Mr Marray said:

“… Members of the jury, in this case, apart from the admissions to support the case of trafficking, the prosecution would also rely on the evidence that the drugs were found inside the vehicle to which he had the keys and to which he was trying to open at the time he was intercepted by the police.

In fact, one of his fingerprints was found on the rear mirror inside the vehicle. So the prosecution says that this evidence supports the case that bearing in mind that the drugs were inside the vehicle to which he had the keys, that they were in his possession, and that he had knowledge of them. You can see that the drugs were placed, in many ways, quite openly inside the vehicle. They are not hidden, so anybody getting into that vehicle would have seen the red bag, or would have seen the items which were in the compartment in the front of the car.

So the prosecution say there can be no doubt that the defendant was in possession of these drugs and he had those drugs for the purpose of trafficking, and in fact that is what he actually admitted to. Taking into account the high value of the drugs and the quantity of the drugs, the prosecution say that the only possible inference could be is that he had those drugs not to take himself, but to be trafficked in. So, members of the jury, that is an outline of the prosecution case.”[[8]](#footnote-8)

1. In his closing address Mr Marray said:

“But even apart from the admissions, there is a lot of evidence against the defendant in this case. First of all, that car, which could be seen in the photographs at item number 8, had drugs stored in the vehicle in two separate places. In the compartment, as shown in photograph number 9 and in the red bag behind the front passenger seat, as shown in photograph number 11.

That vehicle was parked outside the defendant’s home. He had the key to the vehicle. He was apprehended as he was opening the vehicle. Members of the jury, would it make sense for anybody to lend somebody a car that was full of drugs? No. The defendant must have known about those drugs.

And it’s quite clear from the quantity of drugs involved and from the fact that there are so many different packages and some of them were very small packages, that that drug was going to be distributed to somebody else; perhaps a sale, or perhaps further down the line. But it’s quite clear that these drugs were for trafficking. And from the circumstances the defendant must have known, even without the admission, that those drugs were in the car and that he was trafficking in those drugs.”[[9]](#footnote-9)

1. What is significant in respect of these comments is the absence of a clear expression by Mr Marray of an alternative case and a clear invitation by him to the jury to convict on the circumstantial evidence alone.
2. Clearly, Mr Marray was duty-bound to refer in his closing speech to the other evidence but, in our view, his comments in respect of this other evidence are more in the nature of it being supportive of the admissions rather than as constituting an alternative basis for conviction independent of the admissions.
3. Mr Boyton, in his closing address, treated the prosecution case as being wholly, and solely, dependent upon the admissions. He commenced his speech by saying:

“Members of the jury, there is only one issue for you to consider really, one issue. Whether the defendant made those admissions because he was forced to confess. If, members of the jury, you think he was forced to make those admissions or you know he was forced to make those admissions, then ultimately you have to say those confessions and admissions cannot be true and prosecution case cannot stand on its own feet and you must acquit. You must acquit him of this charge.”[[10]](#footnote-10)

1. It is clear from the summing-up that the judge also understood the prosecution to be presenting a case wholly dependent upon the admissions. In summarizing the defence case the judge said:

“ And so it is that when the interview took place in the video‑recording room, he made a confession which was the confession he had been asked to make by the police who had given him advance notice of the questions he would be asked so that he was told what answers he should give, and what Mr Boyton has just argued to you just a few minutes ago is that if the confession and all the other stuff is, as it were, a false confession, but made under threat and inducement, so that is why he did it, you cannot trust the police an inch. *That is what they are saying. And if you cannot trust the police, you throw this case out and that is the end of it, because if the evidence that they have given is false, making him come up with a false confession to an offence he never committed, well, then, of course, he must be acquitted; found not guilty. And that is not just if it was the case, but if it may be the case, you would also find him not guilty, because if it may be the case, anything might have happened. You have to be sure that the police have played the investigation straight and have told you the truth,* …”[[11]](#footnote-11) (Emphasis added.)

1. What the judge said in the italicised passage represents, we have no doubt, a judicial endorsement of the defence position.[[12]](#footnote-12) Furthermore, when the judge referred to the other evidence he, likewise, never suggested that it could be an alternative stand-alone basis for convicting the appellant. For example, he said:

“And you know, of course, that in this particular case it is not just the confession which is alleged to have been made by the defendant. It is the fact that he had the key to the car which had the drugs in it; the fact that there was 157, nearly $158,000 worth of drugs openly in the car, not somewhere that he would not have spotted them if he had been in the car, said to have been lent to him or left by a friend of his who lived in Sham Shui Po.”[[13]](#footnote-13)

Like the words employed by Mr Marray, this is the language of there being other evidence to support the confession, not the language of there being other evidence independent of the confession which could provide the jury with an alternative basis for conviction.

1. It is clear to us that Mr Marray was not putting forward an alternative basis for conviction, consisting of the circumstantial evidence only. It is equally clear to us that neither Mr Boyton nor the judge thought that was the case. In these circumstances, we do not see that there was any risk that the jury, without any encouragement or invitation from the judge, would, on their own initiative, convict on such an alternative basis. We reject the first ground of appeal.

The second ground of appeal: the Mushtaq direction

1. Before analysing the directions given by the judge it is necessary to understand first, the context in which the directions were to be given; and second, the elements of the *Mushtaq* direction which a judge is obliged to convey to the jury.
2. The context is that there are two sets of admissions, both of which are alleged to be tainted by police impropriety and one of which was alleged to have not been made. In respect of the first, the crime-scene admission, the appellant denied making the statement attributed to him and so the jury had to be told that they must first decide whether this admission was, in fact, made. If they were of the view that this admission was not made, or may have not been made, then they should ignore it. Only if they were sure that it was made was there any need for them to go on to consider the circumstances in which it was made. These circumstances, of course, included the allegations of the defence which would deprive the admissions of their asserted voluntary character.
3. To give further context to the issue before us, we should point out that an accused will first challenge the admissibility of admissions attributed to him by seeking a ruling from the court in a *voire dire* usually on the basis that the admissions were involuntary or that they would result in unfairness to the accused if admitted into evidence. Notwithstanding that the admissions have been ruled admissible, the accused can still relitigate in front of the jury the circumstances in which the admissions were made in order to show that they were not voluntary or reliable.
4. Given the way the defence was conducted at trial, the present case called for a *Mushtaq* direction to be given to the jury, as the respondent rightly concedes. Although the judge had the direction in mind[[14]](#footnote-14), the appellant contends that he erred by not giving it in the exact terms of Specimen Direction 39.1, thereby failing to convey all the elements of such a direction. The argument of the respondent, on the other hand, is that the judge in fact conveyed all those elements, albeit in his own words and perhaps not in the structured way that is set out in the Specimen Direction. The judge’s direction may not be desirable, but it was not erroneous.
5. Thus, in the present case the question is really about whether the direction given by the judge contains all that is required by law and does so in a way that would clearly convey to the jury the key message of the *Mushtaq* direction. In determining this issue it is appropriate to commence by analysing the case law on the *Mushtaq* direction, and then examining the Specimen Direction and, finally, the judge’s direction. We shall then be in a position to say whether, and if so to what extent, the judge’s direction has fallen short of what is required.
6. As Specimen Directions are not law and do not possess any legal authority until approved by an appellate court it is appropriate to start our consideration of this issue by an examination of the law. Though stating the obvious, it needs to be emphasized that we are concerned only with the law of Hong Kong, and not the law of England and Wales. The reason this needs to be emphasized is because the *Mushtaq* direction is concerned with the way a jury should be directed in respect of admissions by an accused whose voluntariness are the subject of challenge. In Hong Kong the law in this area is common law; in England it is now regulated by statute.

The English law

1. The English statutory provision is section 76(2) of the *Police and Criminal Evidence Act 1984* (“PACE”), which provides:

“(1) In any proceedings a confession made by an accused person may be given in evidence against him insofar as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except insofar as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.”

1. “Oppression” is inclusively defined in sub-section (8) as:

“(8) In this section ‘oppression’ includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).”

1. In “Blackstone’s Criminal Practice 2021” the following comment on section 76(2) is made:

“In *Fulling* [1987] QB 426, the Court of Appeal held (without referring to the PACE 1984, s. 76(8)) that the 1984 Act does not follow the wording of earlier rules or decisions, nor is it expressed to be a consolidating Act. It is a codifying Act, in the interpretation of which the proper course is to start by ascertaining the natural meaning of the language used, uninfluenced by any considerations derived from the previous state of the law. It was further stated that much of the sort of treatment which would have fallen within the wider definition of oppression at common law will now fall to be dealt with under the ‘reliability’ head of exclusion.”[[15]](#footnote-15)

1. In respect of sub-section (2)(b), “the ‘reliability’ head of exclusion”, the English courts have not concerned themselves with whether the *actual* confession being challenged is unreliable but whether what is alleged to have taken place in respect of it was likely to render *any* confession unreliable. Blackstone’s comment on sub-section (2)(b) is as follows:

“The PACE 1984 requires the trial judge to consider a hypothetical question: not whether *this* confession is unreliable, but whether *any* confession which the accused might make in consequence of what was said or done was likely to be rendered unreliable. The purport of this provision was considered in *Re Proulx* [2001] 1 All ER 57, where Mance LJ stated (at [46]):

The test in s. 76 cannot be satisfied by postulating some entirely different confession. There is also no likelihood that anything said or done would have induced any other confession. The word ‘any’ must thus, I think, be understood as indicating ‘any such’ or ‘such a’ confession as the applicant made. The abstract element involved also reflects the fact that the test is not whether the actual confession was untruthful or inaccurate. It is whether whatever was said or done was, in the circumstances existing as at the time of the confession, *likely* to have rendered such a confession unreliable, whether or not it may be seen subsequently – with hindsight and in the light of all the material available at trial – that it did or did not actually do so.

Thus the court must consider whether what happened was likely in the circumstances to induce *an* unreliable confession to the offence in question, and to ignore any evidence suggesting that the *actual* confession was reliable.”[[16]](#footnote-16)

1. Correlating section 76(2)(a) to the common law would appear to be simple enough for it invokes the concepts of voluntariness and oppression and perhaps focusses primarily on improper conduct by law enforcement officers. The common law concept of voluntariness was summarised by Li CJ in giving a judgment in the Court of Final Appeal, with which the other members of the court agreed, in *Secretary for Justice v Lam Tat Ming & Anor*[[17]](#footnote-17). At page 177E-J, he said:

“ The prosecution must establish that the statement made is a voluntary statement in the sense that it has not been obtained from the accused either by fear of prejudice or hope of advantage excited or held out by a person in authority or by oppression. See *Ibrahim v R* [1914] AC 599 at p.609; *DPP v Ping Lin* [1976] AC 574 at pp.597G–598A, 600D–F, where Lord Hailsham read the word ‘exercised’ in Lord Sumner’s classic test in *Ibrahim v R* to mean ‘excited’ and also added oppression to that test; *R v Lam Yip Ying* [1984] HKLR 419. Oppression in this context is conduct by a person in authority which tends to sap and does sap the will of the accused so that he makes the statement. See *R v Prager (No 2)* [1972] 1 WLR 260; *Li Wai Fat & Others v R* [1977] HKLR 531.

Further, a statement signed by the accused as a result of a fraudulent misrepresentation made by a person in authority as to the character of the document is involuntary. See *Ajodha v Trinidad and Tobago* [1982] AC 204 at p.221F–G where a police officer had falsely informed the accused that he was signing a document of an entirely different character from that which he did sign.

In relation to the person in authority, it is important that the accused actually perceives the person in question to be a person in authority. See *Deokinanan v The Queen* [1969] 1 AC 20.”

The court also has a residual discretion to exclude a voluntary admission if it would result in unfairness to the accused.[[18]](#footnote-18)

1. Section 76(2)(b) of PACE, however, refers to things said or done “likely … to render unreliable” the confession being challenged. “Unreliable” was construed by the English Court of Appeal in *Crampton* and it said:

“The word ‘unreliable’, in our judgment, means ‘cannot be relied upon as being the truth.’ What the provision of subsection 2(b) is concerned with is the nature and quality of the words spoken or the things done by the police which are likely to, in the circumstances existing at the time render the confession unreliable in the sense that it is not true.” [[19]](#footnote-19)

1. Thus, it would appear that in terms of the common law approach to the treatment of admissions by an accused the section 76(2)(b) provision is concerned with conduct broader than the concept of oppression which could impact upon any confession in the adverse way stated by section 76(2)(b), ie by making it likely that any confession is rendered unreliable. Being conduct, whether improper or not, that is broader than oppression, it presumably could extend to conduct that may be outside the common law concept of voluntariness.
2. But, again it must be emphasised, under PACE the confession does not have to be proven to be, in fact, unreliable as to its truth, only that things were said or done which, in the circumstances existing at the time, rendered *any* confession likely to be unreliable or untrue. This would suggest that section 76(2)(b) is concerned with the issue of the voluntariness of the confession in a broader sense than section 76(2)(a) and perhaps also the common law.
3. The purpose of this necessarily limited consideration of the English law that has developed in respect of section 76(2) is to demonstrate that a body of case law has developed in England and Wales in relation to the construction of the section. This is particularly important in respect of section 76(2)(b) for if the English law on this provision has become part of Hong Kong law then, arguably, it may be an extension of the common law concept of voluntariness.

R v Mushtaq[[20]](#footnote-20)

1. And then came the judgment of the House of Lords in *R v Mushtaq*. We shall not discuss it in any great detail as that has been done by the Court of Final Appeal in *HKSAR v Pang Hiu San*[[21]](#footnote-21)*.* Suffice it to say that the judgment of the majority, given by Lord Rodger of Earlsferry, was summarised in the headnote in the language of section 76(2). Holding (1) reads:

**“Held,** (1) (per Lord Steyn, Lord Phillips of Worth Matravers MR and Lord Rodger of Earlsferry), that the rule against admitting a confession which was not made voluntarily was based not only upon its potential unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance attached in a civilised society to proper behaviour by the police towards those in their custody; that since section 76(2) of the 1984 Act was based upon all those considerations it was inconsistent with the purpose of that provision that the jury should rely on a confession which was not made voluntarily; that therefore the logic of section 76(2) required that the jury should be directed that if they considered that the confession was, or may have been, obtained by *oppression or any other improper conduct*[[22]](#footnote-22) they should disregard it; and that, accordingly, the judge had misdirected the jury (post, paras 1, 27, 45-48 ).” (Emphasis added.)

1. This holding reflects the fact that the majority simply said that they would answer the certified question in the affirmative and the certified question was drafted as follows:

“Whether, in view of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a Judge, who has ruled pursuant to [s 76(2) of the Police and Criminal Evidence Act 1984](https://login.westlawasia.com/maf/app/document?src=doc&maintain-toc-node=true&linktype=ref&&context=&crumb-action=replace&docguid=I752235A1E44A11DA8D70A0E70A78ED65) that evidence of the alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have been so obtained, they must disregard it.”[[23]](#footnote-23)

1. Notwithstanding that the question is drafted in the language of an English statutory provision in PACE, and that the holding is similarly drafted, no attempt has been made by a Hong Kong court to “translate” the *Mushtaq* principle into the language of the common law. Nevertheless, the two key principles of *Mushtaq* are readily apparent. The first key principle is that both the common law and human rights law require that the jury be told that if they found that any confession made by an accused was or may have been obtained in circumstances of involuntariness, oppression *or in consequence of anything said or done which was likely to render any confession unreliable[[24]](#footnote-24)* then they must disregard it. The second key principle is that the jury must clearly understand that they must disregard such a confession even if they are sure it is true.

HKSAR v Pang Hiu San

1. In its judgment in *Pang Hiu San* the Court of Final Appeal demonstrated quite clearly that they were aware that *Mushtaq* was concerned with section 76(2) of PACE and that similar legislation did not exist in Hong Kong but nevertheless said that the *Mushtaq* direction, unmodified, in its terms, represented the common law for Hong Kong. It said:

“**The position now to apply in Hong Kong**

52. In Hong Kong we do not have the equivalent of s.76(2) of the PACE. But, when commenting on the principles relating to voluntariness, Li CJ said:

The underlying rationale is based both on the need to ensure the reliability of confessions as well as the right of silence…The right of silence is deeply rooted in the common law.

53. However, we have the equivalent of art.6(1) in art.10 of the Hong Kong Bill of Rights.

54. In our opinion, *Chan Wei Keung v R* should no longer be followed in Hong Kong and the common law is as stated in *R v Mushtaq* and *Wizzard v The Queen*. It follows that in our respectful view the Court of Appeal in *HKSAR v Ho Wing To (No 2)* and the Judicial Institute were right in adopting the *Mushtaq* direction.”[[25]](#footnote-25)

1. For the purpose of this appeal it is not necessary for us to delve further into the language of the *Mushtaq* direction and the meaning that should be given to the words “likely to render unreliable” as the meaning that should be given to those words is not relevant to the resolution of this ground of appeal. What is at issue is whether the judge, by his directions, sufficiently conveyed those two key principles of the *Mushtaq* direction which we have earlier identified. In this respect, we note that in *Yeung Chun Hin*[[26]](#footnote-26)the Court of Appeal, though warning of the dangers associated with departing from the progressive step-by-step approach set out in the Specimen Direction, did not say that any such departure would necessarily be fatal.
2. In *Benjamin and Ganga v The State of Trinidad and Tobago*[[27]](#footnote-27) the Judicial Committee of the Privy Council was faced with a similar argument. This case is also interesting because the judgment of the Committee, delivered by Lord Kerr, rejected that part of the earlier Privy Council judgment of *Barry Wizzard v The Queen*[[28]](#footnote-28), where it was said that an alleged fabricated confession did not require a *Mushtaq* direction. In so ruling, Lord Kerr aligned English law with existing Hong Kong law. The following excerpt from the judgment of Lord Kerr informs the approach that we now take to the resolution of the appellant’s ground of appeal:

“17. …But both issues (viz whether the appellants made the statements and whether they were induced by oppression) remained live before the jury. The claim that the statements had not been made does not extinguish as an issue which the jury had to decide, whether, if they had been made and were true, they had been procured by violence. A *Mushtaq* direction was therefore required. The question is whether the judge’s charge to the jury contained the elements of such a direction.

18. The judge gave the following instruction to the jury:

‘The question for you to ask is whether you believe that either of the accused was forced in any way to dictate any statement or to sign any statement. If you believe that they were forced, or you think that they may have been forced in some way to sign the statement then you would have to disregard the statement. It is only if you are sure that the statement was given in the circumstances as related by the witnesses for the State, then you are to accept that the statement was made and then proceed to consider whether the statement was true.’

19. This direction effectively removed from the range of options available to the jury that they could act on the statements if they considered that they had been signed (or might have been signed) as a result of improper conduct on the part of the police, even if they believed the statements to be true. These instructions to the jury therefore contained all the necessary elements of a *Mushtaq* direction. The appellants’ argument on this ground fails.”[[29]](#footnote-29)

1. As it is accepted by the parties that in the present case the judge purported to follow Specimen Direction 39.1, it is appropriate to start with a consideration of it.
2. Specimen Direction 39.1 reads as follows:

“There have been produced records of certain interviews which the police say they conducted with the defendant. The prosecution assert that [although you should not accept everything said by the defendant to the police as accurate] nonetheless the interviews contain admissions by the defendant that *(state the essence of the admissions)* and the prosecution further contend that those admissions are true.

The defendant’s case is that [he made none of those admissions and that they were fabricated by the police {but that to the extent that he is said to have adopted the admissions by appending his signature to those documents he was forced to do so; that the signatures are therefore worthless; and that the admissions are untrue}] [although he made the confession it is not true].

In deciding whether you can safely rely upon the admissions, you must decide two issues:

1. Did the defendant in fact make the admissions? If you are not sure that he did, you must ignore them. If however you are sure he did, then:

2. Are you sure that the admissions are true? In addressing that issue (whether the admissions / answers were true) decide whether they were, or may have been, made or given as a result of [oppression] [something said or done which was likely to render them unreliable]. If you conclude that the admissions / answers were or may have been obtained by (identifying the person or persons in authority) as a result of [oppression] [something said or done which was likely to render them unreliable] then you must disregard the admissions / answers.

In this case, the defendant alleges that (summarise the allegation). If you conclude that that allegation is or may be correct and that the admissions / answers were or may have been obtained as a result of that conduct, then you must disregard the admissions / answers.

If, however, you are sure that the defendant made the admissions and that they were not obtained in that way, you must nonetheless decide whether you are sure that the admissions are true. If, for whatever reason, you are not sure that the admissions are true, you must disregard them. If on the other hand, you are sure that they are true, you may rely on them*. (Remind the jury of any specific weaknesses in the confession evidence which may reflect on its reliability.)*”

1. As can be seen, the Specimen Direction employs a two issue approach for the jury to adopt in their application of the direction. The two issues for the jury to resolve are:

1) did the defendant make the admissions; and

2) are the admissions true.

1. At first glance it would appear that the Specimen Direction assumes that the *Mushtaq* message is bound up in the second issue of whether the admissions are true, implying that is the only relevance of the defence allegations of oppression. Such a view reflects the pre-*Mushtaq* legal position but not the position as established by *Mushtaq.* This point was made by the Court of Final Appeal in *Pang Hiu San* when it said:

“47. …On the voir dire the court is not concerned with the reliability of the confession. A true but involuntary confession may not be admitted. After the voir dire, the issue of the voluntariness of the statement may be repeated before the jury. With respect, we cannot agree with Basto v The Queen that voluntariness is only concerned with admissibility. The jury is as much concerned with the voluntariness of the confession as the judge. Though, prior to R v Mushtaq, only as far as its voluntariness might affect reliability.”[[30]](#footnote-30)

1. Linking the voluntariness of the confession to the issue of its truth creates the risk that the jury might conclude that the confession was true, and thereafter act upon it, even though they are persuaded that the allegations of the defence that the confession was oppressively obtained are or may be correct. That is precisely the form of reasoning that the *Mushtaq* direction is designed to prevent. To say that *Mushtaq* requires the jury to be directed that if they find the defence allegations of oppression are or may be true then they must disregard the confession addresses only one half of the dual purposes the *Mushtaq* decision. It ignores the very important other purpose that the direction exists to serve, namely, preventing the danger of the jury impermissibly thinking that they can act on an oppressively obtained confession if they conclude that the confession is, nevertheless, true. The importance of preventing this type of reasoning from occurring was highlighted by the Court of Final Appeal in *Pang Hiu San* when it said:

“37. The judge had directed the jury that if they are sure that the accused had made the statement and that it was true they may rely on it:

… even if it was or may have been made as a result of oppression or other improper circumstances.

38. Hence, Lord Rodger of Earlsferry pointed out in his judgment (which had the concurrence of Lord Steyn and Lord Phillips) it was important to note that:

the Crown’s contention is that in cases where the jury have rightly concluded that the confession was obtained by oppression or other improper means, they are to be told that they can still rely on it if they think that it is true.

39. This stark statement lays bare the importance of the issue. In our respectful view, the majorityin *R v Mushtaq* provided the only acceptable answer.”[[31]](#footnote-31)

1. In respect of the Specimen Direction it is apparent from what the Court of Final Appeal said in *Mushtaq* that the Judicial Studies Board[[32]](#footnote-32) amended the Direction in order to reflect the judgment in *Mushtaq*[[33]](#footnote-33). How this was done is made clear in the Note to the direction which states that it is the last two paragraphs of the Specimen Direction that are intended to implement the House of Lords’ judgment in *Mushtaq*. These last two paragraphs contain a three step approach to resolving the two issues of whether the defendant made the admissions and whether they are true. This three step approach, in effect, disentangles the *Mushtaq* message from the second issue. Thus the three steps become:

1) did the defendant make the admissions;

2) were the admissions made in circumstances of oppression; and

3) are the admissions true.

1. Under this three step formula the jury will only arrive at the third step if they are sure that the defendant made the admissions and that the admissions were not made in circumstances of oppression. We note that in the Hong Kong Judicial Institute’s 2020 update of the Specimen Directions the jury are directed to decide three issues which are identical to the three steps contained in the last two paragraphs of the 2013 Specimen Direction.[[34]](#footnote-34)
2. Unfortunately, given the way the 2013 Specimen Direction is drafted, the importance of the three step formula, especially in the way it clearly separates out the issue of the voluntariness of the admissions from the issue of their truth, may not always be fully appreciated.

The direction in the present case

1. We shall now turn to how the judge directed the jury. What he said was as follows:

“Now I want to say a word or two about the alleged confession of the defendant to the police. You have been provided with evidence which, if it was accepted, would amount to a complete confession to trafficking in cocaine, and that evidence is found in two places. First of all, the conversation at the side of the car between PC Fong and the defendant after the drugs has been found, and that is coupled with the recording in the policeman’s notebook and the defendant’s signature and his writing of a certificate which the police showed him to say that *the document was true*.

The second part of the confession evidence is from the video-recorded interview. The prosecution invited you to conclude that when the defendant admitted possessing cocaine with the intention of supplying it to others, *this was not just a confession on the interview which he was making in words, it was actually a true confession. That is the important thing: true.*

*In regard to the alleged admission*, what the law has to say about this is just this. You will first have to decide, with regard to PC Fong and his conversation with the defendant, if the admission was made at all. *Was it said; and if it was said, was it a true admission* that he was going to supply ‘C Chai’ (?) because his father was suffering from cancer and he needed the extra money; that sort of thing.

*The defendant’s case is that he did not say those words recorded in the officer’s notebook.* In fact, he told you that what he did was to volunteer the owner’s name and offered some information, and he only signed the notebook later, much later, at the police station, not in the van, because of inducements and threats which were made to him. *And so it is that the police evidence is criticised as being without any truthfulness whatever on the point.*

*As to the video-recorded interview*, you have actually seen the defendant saying the words that are recorded, *but again you will have to decide, in that case, whether he was making a true confession* to his role in this matter or were the answers merely the answers that he had been told by the police to make following what the defence allege was a prepared script of questions to which he was given the answers to supply in the course of the interview. Were these false answers given because of inducement and threat; and by that I mean, of course, that he would be able to see his girlfriend released without charge and he would get the money back – to his girlfriend, that is – if he confessed to the offence.

*And it is only if you are sure that the defendant, of his own free will, gave those answers in the interview that you could rely on the answers that are provided by him in the course of the interview. If you are sure that he was making a true confession, well, then, only then could you rely on that evidence.*”[[35]](#footnote-35) (Emphasis added.)

1. In the words of Lord Kerr in *Benjamin and Ganga*, does this direction effectively remove from the range of options available to the jury that they could act on the statements if they considered that they had been made, or might have been made, as a result of improper conduct on the part of the police, even if they believed the statements to be true.
2. It is quite clear that the judge reminded the jury of the requirement that before they could act on the crime-scene admission they had to find that the appellant actually made it. It is also clear that the judge directed the jury that they could rely on the appellant’s VRI answers only if they were sure that he gave those answers “of his own free will.”
3. The judge did not tell the jury to disregard the crime-scene admission if they found it was made and if they further found it was made under inducements and threats. Nor did he tell them that they could not act on any admission, even if they believed the admission was true, once they concluded that the admission was or may have been obtained as a result of police impropriety.
4. On its own, divorced from the context of the way this trial was conducted and the way the issues in it were presented to the jury, the directions of the judge would be a cause for concern and might have prompted us to answer Lord Kerr’s question in the negative. But that is not the way that judicial directions fall to be considered. Bringing realism to an analysis of judicial directions requires that they be considered as a whole and analysed in the context of the trial in which they were given.
5. That context was summarised by the judge at the beginning of his summing-up which we have quoted at [36] of this judgment and in footnote 12 to that paragraph. The position of the defence is apparent from the quote from Mr Boyton’s closing address that is set out in [34] of this judgment. One of the last comments of the judge in summarising the evidence was:

“If what the defendant says may be true – and Mr Boyton was correct in saying this – if it may be true, then you should find him not guilty.”[[36]](#footnote-36)

1. It is apparent that this was a trial which was prosecuted, defended and presented to the jury by the parties and the judge in stark, black and white terms; believe the police, then convict; disbelieve the police, or conclude that the allegations of the defence of police impropriety are or may be true, then acquit.
2. Placed in this context we are confident we can answer Lord Kerr’s question in the affirmative. In the particular circumstances of this trial there was no risk that the jury might be lured into the impermissible reasoning of acting upon any of the admissions they believed was true but in respect of which they concluded had, or might have, been obtained oppressively.

Disposition

1. For these reasons we are not persuaded that the appellant’s conviction is unsafe or unsatisfactory and we, therefore, dismiss his appeal.

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| --- | --- | --- |
| (Andrew Macrae) | (Ian McWalters) | (Kevin Zervos) |
| Vice-President | Justice of Appeal | Justice of Appeal |

Ms Christal Chan, ADPP (Ag), of Department of Justice, for the

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Mr David Boyton, instructed by Stevenson, Wong & Co, assigned

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1. [2019] HKCA 1244. [↑](#footnote-ref-1)
2. Appeal Bundle, page 42. [↑](#footnote-ref-2)
3. (2002) 5 HKCFAR 209 [↑](#footnote-ref-3)
4. [2018] 5 HKLRD 412 [↑](#footnote-ref-4)
5. Ibid, at page 420, [19]. [↑](#footnote-ref-5)
6. Ibid, at page 422, [30]. [↑](#footnote-ref-6)
7. Appellant’s Written Submissions, [22]. [↑](#footnote-ref-7)
8. Appeal Bundle, page 76G – P. [↑](#footnote-ref-8)
9. Appeal Bundle, page 65I - R. [↑](#footnote-ref-9)
10. Appeal Bundle, page 67E – H. [↑](#footnote-ref-10)
11. Appeal Bundle, page 2G – R. [↑](#footnote-ref-11)
12. The judge made a similar comment at page 13B-E of Appeal Bundle, saying:

    “Mr Boyton said in his speech yesterday afternoon, and I am not using his words exactly but I am paraphrasing what he was saying, if the police were up to dirty tricks here and a false confession was obtained, then the whole case against the defendant is in doubt, *and no doubt you would, in those circumstances, find the defendant not guilty because you cannot trust anything they have told you.*” (Emphasis added) [↑](#footnote-ref-12)
13. Appeal Bundle, page 8I-M. [↑](#footnote-ref-13)
14. Appeal Bundle, pages 11N – 13E. [↑](#footnote-ref-14)
15. At page 2991, [F18.11]. [↑](#footnote-ref-15)
16. Ibid, at pages 2993-2994 [F18.18]. [↑](#footnote-ref-16)
17. (2000) 3 HKCFAR 168 [↑](#footnote-ref-17)
18. See *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 173E-F, 183D, and 184C-E. The English statutory equivalent of the common law can be found in s 78 of PACE. [↑](#footnote-ref-18)
19. (1991) 92 Cr App R 369 at 372. [↑](#footnote-ref-19)
20. [2005] 1 WLR 1513. [↑](#footnote-ref-20)
21. (2014) 17 HKCFAR 545 [↑](#footnote-ref-21)
22. This phrase was used by Lord Rodger and Lord Carswell as a shorthand expression for the means described in 76(2)(a) and (b) of PACE. See [30] and [63] of the judgment. [↑](#footnote-ref-22)
23. Ibid, at 1517H, [5]. [↑](#footnote-ref-23)
24. These words are added to reflect the judgment of the Court of Final Appeal in *HKSAR v Pang Hiu San*. [↑](#footnote-ref-24)
25. (2014) 17 HKCFAR 545 at 563, [52] – 564, [54]. [↑](#footnote-ref-25)
26. [2018] 5 HKLRD 412 [↑](#footnote-ref-26)
27. [2012] UKPC 8 [↑](#footnote-ref-27)
28. [2007] UK PC 21 [↑](#footnote-ref-28)
29. *Benjamin and Ganga v The State of Trinidad and Tobago* [2012] UKPC 8 at [17]-[19]. [↑](#footnote-ref-29)
30. (2014) 17 HKCFAR 545, 562-563, [47]. [↑](#footnote-ref-30)
31. Ibid, at 559, [37] – [39]. [↑](#footnote-ref-31)
32. The Judicial Studies Board was the predecessor of The Hong Kong Judicial Institute. [↑](#footnote-ref-32)
33. See [54] of the Court of Final Appeal’s judgment in *HKSAR v Pang Hiu San*. [↑](#footnote-ref-33)
34. In the 2020 Specimen Direction 39.1 the second step is expressed as were the admissions made or given or may they have been made or given as a result of oppression or something said or done which may make it unsafe to rely on what was said. This direction appears to focus on the actual direction given and replaces the test of whether the admission is reliable with whether it is safe to rely on it. This appears to derive from section 76(2)(b) although it does not employ the same language of that section. [↑](#footnote-ref-34)
35. Appeal Bundle, page 11N – 13A. [↑](#footnote-ref-35)
36. Appeal Bundle, page 31K-L. [↑](#footnote-ref-36)