CACC 283/2015

**IN THE HIGH COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

# **COURT OF APPEAL**

CRIMINAL APPEAL NO. 283 OF 2015

(ON APPEAL FROM HCCC NO. 472 OF 2014)

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BETWEEN

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| HKSAR | Respondent |
| and |  |
| DON AMARASINGHALAGE DON CHANDRA JANAKA | Applicant |
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Before : Hon Lunn VP, Macrae and McWalters JJA in Court

Date of Hearing : 1 June 2016

Date of Judgment : 20 June 2016

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|  | J U D G M E N T |  |
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Hon Lunn VP (giving the Judgment of the Court) :

The applicant seeks leave to appeal against his conviction on 14 August 2015, after trial by Deputy High Court Judge Campbell-Moffat SC and a jury, of a count of unlawfully trafficking in a dangerous drug, namely 25.91 grammes of methamphetamine hydrochloride (‘Ice’) (Count 2) and a count of possession of dangerous drugs, namely, 1 gramme of ketamine and 0.03 gramme of a powder containing cocaine (Count 3), contrary to section 4(1)(a) and (3) and section 8(1)(a) and (2) of the Dangerous Drugs Ordinance, Cap. 134 respectively. Also, the applicant seeks leave to appeal against the sentence of 7 years and 9 months’ imprisonment imposed in respect of Count 2. By verdict of the jury, the applicant was acquitted of a count of possession of arms without a licence, namely a stunning device, contrary to section 13(1) and (2) of the Firearms and Ammunition Ordinance, Cap. 238 (Count 1).

The prosecution case

On 8 May 2014, police officers executed a search warrant on a hut on the rooftop of Hing Wah Building in Hung Hom. After having knocked on the door to the hut announcing that they were police officers, after a delay of about one minute the applicant opened the door and police officers entered the premises. They found the applicant and a female present. A subsequent search of her revealed that she had cannabis hidden in her underpants.

A search of the premises revealed the items the subject of the three counts, namely a stun gun, four re-sealable plastic bags containing the dangerous drugs, together with an electronic scale and a number of empty re-sealable plastic bags, openly displayed on a shelf in the room. Having been arrested and cautioned, the applicant remained silent.

Mr Kalamulla (PW3) testified that he allowed the applicant, an asylum seeker, to live in the room without the payment of rent. The applicant helped him out with odd jobs and made contributions to the utility bills. That arrangement had come to an end, the applicant was to move out on the day that the police searched the premises.

The total value of the Ice was HK$11,103, the ketamine HK$149 and the cocaine HK$29 [[1]](#footnote-1).

The defence case

The applicant gave evidence, testifying that he was an asylum seeker. Having arrived in Hong Kong he met a Pakistani man and his sister, who had a young child. They abused drugs. As a result, the applicant took care of the child. Initially, the child lived with the applicant in premises in Lantau, paid for by the International Social Service. Then, he moved into the rooftop hut in 2013. However, he stayed there only occasionally. Rather, he used it to store his belongings.

Then, the Pakistani man was arrested, after which his sister had given him a blue bag with their belongings, which the applicant had stored in the rooftop hut. However, subsequently the sister was also arrested. As a result, he took the child to live with its natural father. When the Pakistani man was released, he and his girlfriend stayed with the applicant in Mr Kalamulla’s absence. However, on Mr Kalamulla’s return, they were asked to leave.

Two days before his arrest, the applicant had moved some of the items from the blue bag to a red suitcase, during which exercise he found the electronic scale, plastic bags and the cannabis. He took the cannabis for his own use.

On 8 May 2014, the applicant had called the Pakistani man, asking him to pick up his belongings, which had been left in the corridor of the premises. At 11 p.m. that night, they met up and consumed Ice for the whole night, after which they went back to the premises together. In the applicant’s room, the Pakistani man told the applicant he wanted to leave a brown plastic bag with him, which he would pick up later together with his other belongings. The applicant then put the bag on the table. They spoke to Mr Kalamulla for a while, and the Pakistani man left. The police arrived a few hours later. Before the police entered the room, the applicant had given the cannabis to his girlfriend.

The applicant’s case was that the plastic bags, as well as the stun gun, had been taken from the brown plastic bag on the table. The scales and three packets of bags were in the red suitcase in the hallway. Having been taken to the corridor when his room was being searched, the applicant did not know how the items ended up on his shelf. He had never seen a stun gun, nor such a large quantity of drugs before. The applicant said he had told the police about the Pakistani man either in the premises or at the police station. He complained that the police had also failed to retrieve any CCTV evidence, which would have revealed that someone else had put the items in the applicant’s room.

The applicant’s friend, Mr Kashif, was called in the defence case. He said that he had seen the Pakistani man with the applicant in the early hours of the morning. Two days earlier, he had seen the Pakistani man in Chungking Mansion with something which flashed a light and gave off a sound of an electric shock.

The summing up

In a lengthy summing up, Deputy Judge Campbell-Moffat, as Campbell-Moffat J was then, suggested to the jury:[[2]](#footnote-2)

“ it may be that the crucial decision for you is whether the goods were on the shelf or not, and therefore it may affect everything, …”

Nevertheless, she went on to say “you look at each count individually against the background of all the evidence.”

In the context of the jury’s consideration of Count 1, in respect of the stun gun, the judge said:[[3]](#footnote-3)

“ So Count 1 is relatively simple, factually, was the stun gun on the shelf as the police officers described, or was it somewhere else and then placed there. Are the police telling the truth then about where they found the stun gun? If you are sure they are telling the truth, then the defendant is guilty but only if you are sure that he also knew what it was, and to decide that, you look at all the evidence…”

Of the dangerous drugs the subject of Count 2, in respect of which it was alleged that the applicant was trafficking unlawfully, the judge said:[[4]](#footnote-4)

“ So it must be that he possessed it. Was it on the shelf and he knew it was there, he possessed the dangerous drug? Did he know that what he possessed were dangerous drugs? Then, the bits that you need to think about slightly more, was he trafficking in it. And here, all you have to ask yourself is this: was he dealing with it, am I sure that he was going to cut it up, put it into little bags, weigh it, or was he keeping it for somebody else, was he going to supply it to others, because trafficking requires that element against the circumstances of this case.”

Of the 1 gramme of ketamine and the 0.03 grammes of a powder containing cocaine, in respect of which it was alleged by Count 3 that the applicant was in possession, the judge said:[[5]](#footnote-5)

“ If you are satisfied they were on that shelf and that he knew they were there and that he knew that they were dangerous drugs, that amounts to simple possession of dangerous drug.”

*Grounds of appeal against the conviction*

By ground 1 of the grounds of appeal against conviction Mr McGowan, who was counsel for the applicant at trial, submitted the jury’s verdict of not guilty on Count 1 and their verdicts of guilty on Counts 2 and 3 were perverse and logically inconsistent.

By ground 2, it was submitted that, having been informed by the jury that they were split 4:3, the judge erred in not informing the jury that it was permissible to disagree in that ratio and that it was not required that they remain together until they reached an acceptable verdict.

Mr McGowan submitted that the prosecution had invited the jury to conclude that the items, the subject of the three counts, were a ‘package’; the issue was whether or not the items were on the shelf when the police officers arrived. It was the prosecution case that the stun gun was used as a protective measure for the purpose of trafficking unlawfully in dangerous drugs.

*The submissions of the respondent*

In opposing the application for the grant of leave to appeal against conviction Mr Man, for the respondent, reminded the court that in advancing the ground that the verdicts were inconsistent, the burden was on the applicant to show not only that the verdicts were inconsistent but also that they were such as called for interference by this Court.[[6]](#footnote-6) He suggested that the verdicts were readily explicable. The judge directed the jury that it was an ingredient of the offence in Count 1 that the applicant knew that the object, which bore the inscription ‘Flashlight’ on its barrel, was in fact a stun gun. He suggested that, from its appearance, that was anything but obvious. By contrast, it was the evidence of the applicant that he was an abuser of dangerous drugs, including Ice.

Although Mr Man acknowledged that the judge had never directed the jury in terms “However, if after full discussion you cannot reach agreement, you must say so”, nevertheless he submitted that in directing them that they were to inform the court if they were split 4:3 and they would receive further direction, the message contained in the omitted sentence was conveyed to the jury.

Mr Man submitted that the real issue was whether “there is a real danger that the jury were put under undue pressure to reach a verdict.” [[7]](#footnote-7) He invited the court to note that in its judgment in *Chan Kar Leung v HKSAR*[[8]](#footnote-8) the Court of Final Appeal had declined to quash the appellant’s conviction, in circumstances where the judge directed the jury in respect of their verdict that anything less than 7-2 would not be acceptable. The court was satisfied that there was no real danger that the jury had been given the impression “that they had to go on deliberating indefinitely.”

*A consideration of the submissions*

The trial before the jury had been a short trial, during which evidence had been adduced over three days and one hour. At the completion of evidence on 12 August 2015, counsel made their closing speeches and the judge began her summing up at about 12:30 p.m. Shortly before 4:00 p.m. the case before the jury was adjourned. The summing up resumed the following morning at 10:30 a.m. and the jury retired to consider their verdicts at 12:08 p.m. on 13 August 2015.

At the outset of her summing up on 12 August 2015 sensibly the judge had warned the jury of what might lie ahead the following day, when they retired to consider their verdicts:[[9]](#footnote-9)

“ I think it will be very sensible now for you to make plans for tomorrow. We have no idea how long you will take. My experience is, you think a jury will go out for maybe an hour to deliberate and two days later, they are still deliberating, or you think a jury will take days to deliberate and a couple of hours later, they come back. You never know what is going to happen, so make plans so that everybody knows it may be that you will not be back on time. It may very well be you will have a shorter day, I do not know, but just make plans for that, and for the fact that people cannot communicate with you at all during the time you are deliberating. So if you have children or husbands, wives, employers who are constantly checking up on what you are doing or want you back or there is something to be done, just let them know you will not have your mobile phones on you because they will be taken away during the time that you are deliberating.

But you will be given refreshments, you will be given meals; you will be looked after.”

Shortly before 4:25 p.m. the jury sent the judge a written note:

“ For Count 3 and Count 2 (possession of dangerous drug) (it) is 4 to 3, we cannot reach a verdict. Please kindly give some additional directions.”

At the conclusion of her summing up, the judge had directed the jury:[[10]](#footnote-10)

“ …each of you has taken an oath or an affirmation to return a verdict according to the evidence. This is a responsibility you must fulfil. Each of you takes into the jury box your individual experience of life and your individual wisdom. Your task is to pool that experience and wisdom. You do that by giving your views to each other and listening to each other and giving due consideration to the views of your fellow jury members. There must, of course, be discussion and debate between you, as a result of which, any one of you may be persuaded to accept a different view which you might not necessarily have held when you first go into the jury room. But of course, you must stay true to your oath or your affirmation to try to give a true verdict according to the evidence.”

Of the verdicts themselves, the judge directed the jury:[[11]](#footnote-11)

“ And you should, ladies and gentlemen, strive to reach a unanimous, all of you agreed, verdict, whether ‘guilty’ or ‘not guilty’ on each of the individual counts. If, however, you are unable to reach a unanimous verdict on which you are all agreed, then I am entitled in law to accept from you a verdict upon which at least five of you are agreed; in other words, a verdict of six to one, or five to two. *A verdict of four to three, either way, does not constitute a verdict and should that position arise, please inform the court with a written note of the fact that you are split, but please do not tell us what the numbers are, just the fact that you are split, and I will give you further directions.”* [Italics added.]

That direction resonates with the Specimen Direction of the Judicial Studies Board on unanimous majority verdicts, as quoted in the judgment of this Court in *HKSAR v Chan Ka Man* [[12]](#footnote-12), cited with approval in the judgment of Li CJ, with which judgment all the other judges agreed, in the Court of Final Appeal in *Tam King Hon v HKSAR*.[[13]](#footnote-13)

However, the judge went on to direct the jury:

“ But first and foremost, seven/nil. It can be, if you feel you have got to a stage where no one is going to move any more, no one is going to budge any more after you have discussed things, six/one, or five/two. A split of four/three, three/four, *and you do not feel you are moving forward*, then you must let me know.” [Italics added.]

The phrase, in the context of a 4:3 split of the jury “and you do not feel you are moving forward” finds no place in the Specimen Direction that it is suggested is given to the jury initially.

The direction referred to at paragraph 23 incorporates most, but not all, of the direction that Li CJ suggested was appropriate, albeit that he said:[[14]](#footnote-14)

“ Judges may of course choose such language as they think fit in formulating appropriate directions in accordance with this judgement.”

Singularly absent from the suggested direction was the final sentence:

“ If after full discussion you cannot reach agreement, you must say so.”

At no stage, did the judge give the jury that direction.

In discussions with counsel at 4:25 p.m., in the absence of the jury, the judge having responded affirmatively to Mr  McGowan’s suggestion that she enquire of the jury if she could assist them with any further direction, the following interchange ensued:[[15]](#footnote-15)

“ COURT: …that’s what we will need to do, I think, and then I will encourage them to debate and discuss and to listen to each other’s views and send them away.

MR WHITEHOUSE: Yes, my Lady, I don’t know whether you would tell them if they find it impossible to reach a verdict then they will not be...

COURT: No, I’m not going to do that, Mr Whitehouse, because I’ve been told not to.

MR WHITEHOUSE: Right.

COURT: Because I’ve been told to encourage them to debate...”

On the return of the jury, the judge directed them to further :[[16]](#footnote-16)

“ Before I direct you further, is there anything at all that I can do to help with the difficulty that you currently have in respect of your difference of opinion and the evidence? You cannot think of anything right at the moment. Think about that in a moment, all right.

I am going to ask you to give further consideration to your verdicts on Counts [3] and on Count 2, so the two drugs counts. I say that because that oath or affirmation that you took was an oath and affirmation for you to return a true verdict according to the evidence and it is a responsibility that you have to fulfil.

Each of you, as I said previously, does of course take your individual experience into the jury room so inevitably that individual experience colours what and how you perceive the evidence to be, which is why I said to you as well and I am going to say it again, that being a member of a jury is about giving your views but also listening to the views of others and, in listening to the views of others and being open-minded to the views of others you may change your view. That is why we have seven of you, so that you can discuss your views and listen to others.

And because you have taken that oath, and it is a heavy responsibility, I am going to ask you to consider further because the time you have taken is, although the matter is simple, is not sufficient yet. You must try to reach a verdict on which you are all unanimous by sharing your view.

You must try to do that, ladies and gentlemen, or if you cannot reach a verdict on which you are all unanimous, then perhaps you will be able to reach a verdict of at least six one or five two, but it is going to mean that you are going to have to talk to each other and listen to each other and accept that other people have a view, but of course you must true to your oath and your view as well on the evidence that you have heard.

So I am going to ask you to retire again and deliberate by discussing the matter further. If, when you do that you think there is anything about the problems you are having deliberating and discussing that I may be able to help you with, then send a note and I will try and help if I can. All right?”

Following the retirement of the jury the judge acknowledged affirmatively the suggestion of Mr Whitehouse, counsel for the prosecution, that the jury appeared to have reached a verdict on Count 1 and indicated that she was not minded to take that verdict separately. Then, further discussion ensued with counsel as to the way forward:[[17]](#footnote-17)

“ COURT: …I have not mentioned any sort of timescale to them because I think they do need to settle down and understand that they can’t hit the first brick wall and go, “This is too difficult.” That they do need to take their time.

MR WHITEHOUSE: Yes.

COURT: But as between us in terms of timescale, I haven’t actually come to a view yet. I’m minded - well, we’ll see how it goes - I’m minded to ask them to retire overnight at 7 o’clock. *I will not be allowing them to throw in the towel today*.

MR WHITEHOUSE: Yes.

COURT: *So they will go overnight if they cannot move from their current position*.

MR McGOWAN: Well, my Lady, there are certain appeal cases which deal with people who effectively feel they have to reach a verdict.

COURT: Yes, that’s it, yes.

MR McGOWAN: And I’m a bit apprehensive about -- about that if they can’t reach a verdict by 7 o’clock.

COURT: Well, the difficulty, there’s case law both ways, isn’t there? That’s why I was very careful about what I said...

MR McGOWAN: Yes.

COURT: ...in terms of. We don’t want to put pressure on people that they have to reach a verdict, that’s why I gave them no timescale, so the next time that I will call them back will be in order to send them away overnight for them to just take time out and breathe.” [Italics added.]

In response to Mr Whitehouse’s apparent concern at the jury being directed to retire overnight and in face of his observation “it is rather a simple case” the judge said:[[18]](#footnote-18)

“ (if?) we take a verdict and then I end up discharging a jury on the other two counts and we end up in a retrial, which is a public expense that is considerable and considerable pressure on the defendant as well to face a retrial, so, again, there’s issues, but if you want to urge a particular course on me and you want to talk to Mr McGowan first, please. I’m going to be here.”

At 7:33 p.m. the court reconvened, in the absence of the jury, and the judge informed counsel:[[19]](#footnote-19)

“ I’m now going to send them back out until 9:30 tomorrow morning.”

On their return to court, the judge gave the jury further directions:[[20]](#footnote-20)

“ Ladies and gentlemen, I know you’ve had some refreshment and a break of some sort. It is now 7.35. What I am going to do now is ask you to deliberate no longer for the evening because it is plenty late enough. You have been deliberating for a long time today already. And what will happen now is this, that you will be accommodated in the High Court building overnight in the jury suite, so you will be having to make I suspect yet more notes for messages to be sent to members of family or whoever else you need to contact.

You will be asked back into this courtroom tomorrow at half past 9 but you will be in the court building so there will not be any difficulty bringing you back here, and you will be provided with refreshments, obviously you will be provided with breakfast.

*Yes, it is very difficult, but this, as I said right at the beginning, is a public duty, and although it is a public duty for you and it is a great inconvenience, I know that*, it is the defendant’s life and liberty and what you do represents the common law of Hong Kong so it is really important we do it properly.

There can be absolutely no pressure upon you to come to a verdict, no pressure at all. It must be fairly done by reason of deliberations and if there comes a point in time when you feel that you really cannot agree all of you together or agree a unanimous verdict, then we will consider that tomorrow when that happens, but for now you will retire with the ushers and they will show you where you can go, and if you need to make any more messages to people then we will deal with that as well. Thank you very much.” [Italics added.]

The judge’s observation to the jury that “it is very difficult” is given context by the exchange that occurred after the jury had retired:[[21]](#footnote-21)

“ COURT: I think it’s me that’s not popular, Mr McGowan. At least I’m going to take the criticism, but, yes, that wasn’t received well, was it?

MR McGOWAN: No.

COURT: But nevertheless, as you said, it’s very important that they’re not under any pressure whatsoever.

MR WHITEHOUSE: Yes.

COURT: We won’t allow it to go on for too long tomorrow, but, again, it’s very important that they’re not under pressure, so what I think I’m minded to do tomorrow...

- is send them out at half past 9 and then perhaps leave it an hour or so and then have them back and say how are they doing?

MR McGOWAN: Yes.

COURT: And whether any progress has been made. I think that might be, without putting any pressure on them, to do that.

MR McGOWAN: Yes. I mean, sooner or later you’re going to have to ask if there’s actually any realistic possibility of them agreeing.

COURT: Yes, I am, but I’m very conscious of a myriad of decisions of various Courts of Appeal that all give you different advice on how to deal with it, and it is your client that comes first.”

In passing, the judge observed:[[22]](#footnote-22)

“ COURT: …so I think we’re just going to take a practical view tomorrow. *That’s a long time for a matter like this*.” [Italics added.]

At the hearing of the application there was no dispute that the judge’s direction to the jury that they were to remain in the court building overnight and they were to resume their deliberations the following morning met with a negative response from some of the jurors. As a result, with no opposition from Mr Man, for the respondent, we granted Mr McGowan’s application that we receive fresh evidence by way of an affirmation from his instructing solicitor addressing that issue.

Mr Ip Ka Tung, a partner of Ip Kwan & Co, affirmed that he had been present in court at the time that the jury were directed to retire overnight. He confirmed what Mr McGowan had told us from the Bar table, namely that in response to the judge’s direction the forelady of the jury struck her forehead with the palm of her hand in a gesture of apparent despair. Also, he recalled the other jurors evinced dissatisfaction with the direction which they had just received.

At the outset of proceedings at 9:30 a.m. on 14 August 2015, in the absence of the jury, the judge informed counsel:[[23]](#footnote-23)

“ COURT: …I’m still minded at the moment to have the ladies and gentlemen of the jury in, ask them to retire again and continue their deliberations without any pressure as to time.

….

MR WHITEHOUSE: ...it might be an idea to ask the jury if there is any -- any chance -- if they feel there is any chance of them reaching a verdict.

COURT: I have thought about that, Mr Whitehouse. I have decided that I don’t want to do that at half past 9 in the morning having them not deliberated since last night. I’m going to do it at some stage later this morning, have them back in if they don’t...

...and then ask them if there is any possibility at all that they may, if given further time, believe that they could come to a unanimous or a majority verdict.”

Subsequently, the following interchange ensued:[[24]](#footnote-24)

“ MR WHITEHOUSE: Yes. It was just a suggestion that they might be told that if there is no chance of them reaching a verdict they will be discharged and a new trial ordered.

COURT: No. No. I’ve read more than one case that says I’m not to do that, unfortunately, Mr Whitehouse.

MR WHITEHOUSE: Yes.

COURT: So at the moment, unless somebody provides me with something from the Court of Appeal here, which I struggled to find, that tells me that I should do that, I’m not going to do that. I am going to give them some time - I’m happy to hear you on how long - and then all I’m going to do is ask them whether they feel that it is possible, given more time, that they may reach either a unanimous or a majority verdict.”

Although the judge had adverted to having read judgments of the court addressing the issue with which the judge and counsel were grappling, she did not cite any such case and there was no discussion between the Bench and Bar of any of those judgments.

In the result, on their return to court, the judge gave the jury further directions:[[25]](#footnote-25)

“ Ladies and gentlemen of the jury, you have been asked to come back in but merely so that I convene you together formally and say now that we would like you now to retire once more to see if you can between you reach a verdict in which you are unanimously agreed or, failing that, a verdict of which at least five of you are agreed.

There is absolutely no pressure upon you whatsoever. Please see, now that you have had a night’s sleep and been apart from each other, if when you come together again you can have a further discussion and see if you can agree. Thank you very much.”

At 11:12 a.m. the jury returned a verdict of not guilty on Count 1, by a majority of 6:1, a verdict of guilty on Count 2, by a majority of 5:2 and guilty of Count 3, by a unanimous verdict.

It is clear from the judgment of Li CJ in *Tam King Hon v HKSAR* that a considerable degree of discretion is reposed in a trial judge in formulating the language by which the principles identified in that judgment are to be given by way of directions to a jury. Nevertheless, Li CJ noted of the provisions of the Jury Ordinance, Cap. 3:[[26]](#footnote-26)

“ Where a jury is split 4:3 either way, it would not constitute a valid verdict. The jury would be hung and would have to be discharged.”

Li CJ went on to cite with approval [[27]](#footnote-27), as being a sound view, a passage in the judgment of this Court delivered by Stock JA, as Stock NPJ was then, in *HKSAR v Chan Ka Man* in which he said, *inter alia*:[[28]](#footnote-28)

“ *There is no need to hide from the jury the fact that it is open to them, at the end of the day, to disagree*; which does not, however, preclude a judge from encouraging, though not improperly pressurizing, a jury to arrive at a unanimous or majority verdict.” [Italics added]

Of that provision, Li CJ went on to say:[[29]](#footnote-29)

“ At the stage of a summing up, at which time a jury has not begun to deliberate, it is usually not appropriate to refer to discharge of the jury in the event of a verdict of four to three. When a verdict of four to three does arise, the judge can then deal with the matter as may be considered appropriate in the circumstances.” [Italics added.]

It follows that a consideration of the circumstances obtaining in a particular case is of considerable importance. Obviously, a long trial involving a multi-handed and/or multi-count indictment may produce circumstances which are quite different from a short trial involving a single defendant on a single count. In the case of the applicant, as noted earlier, the evidence had lasted just over three days. The issues were relatively simple.

The jury had been deliberating for over four hours when they informed the court that they were split 4:3 and indicated that they sought additional directions in respect of Counts 2 and 3. It is readily apparent from the judge’s candid remarks to counsel in the absence of the jury that she had resolved by 4:30 p.m. that if, after further deliberations, the jury was not able to deliver verdicts by 7 p.m., the jury was not to be allowed “to throw in the towel today”. Rather, they were to be required to remain together overnight and to resume their deliberations the following day.

It may be that that determination is what persuaded the judge that it was not appropriate, even after the jury had retired for over seven hours, to enquire of them if they were of the view that if they were allowed further deliberation it was reasonably possible that they would be able to reach a verdict. Of course, that would have been an opportunity to direct the jury in the terms set out in the final sentence of the suggested direction of Li CJ, namely:

“ If after full discussion you cannot reach agreement you must say so.”

However, whatever may have been the merits of pursuing that course in the late afternoon and early evening of 13 August 2015, the adverse reaction of the jury to the judge’s direction that they were to remain together overnight and that they were to resume their deliberations the following morning was clearly a highly significant development in the particular circumstances relevant to a determination of the appropriate directions to be given to this jury.

We are satisfied that, if the judge was of the view that, having given the jury the direction that they were to cease their deliberations and resume them the following morning it was too late to make the enquiry of them noted earlier, it was necessary that the jury be told the following morning, before they retired to consider their verdicts that, if they were unable to reach verdicts which the court could receive, they “must say so.” Not to do so in the circumstances which pertained in this particular case was to risk placing them under unacceptable pressure to deliver a verdict that the court could accept. Also, it was an opportunity to inform them of the effect of section 27 of the Jury Ordinance, namely that if they “cannot agree upon a verdict” the court would discharge them.

*Conclusion*

In all the circumstances we are satisfied that we must allow the application for leave to appeal against conviction and quash the applicant’s conviction in respect of Count 2, where the verdict of the jury was by a majority of 5:2. By contrast, it is to be remembered that the jury’s verdict in respect of Count 3 was unanimous. In context of the allegation made in Count 3, namely that he was in unlawful possession of a minute amount of cocaine and a small amount of ketamine, it is be remembered that it was the appellant’s evidence that, together with others, he had consumed Ice for the whole of the night of 7/8 May 2014.[[30]](#footnote-30) Also, he testified that on the arrival of the police at the front door of the hut, he had given the cannabis found on his girlfriend for her to hide. The allegation in Count 2 of an unlawful trafficking in more than 25 grammes of Ice was quite different from the allegation of unlawful possession of a small amount of dangerous drugs in Count 3.

*Retrial*

Mr Man indicated that, if this court quashed the convictions of the applicant on Counts 2 and 3, nevertheless he would seek a retrial in respect of Count 2 only. Mr McGowan opposed the order of a retrial on that count. In doing so, he invited the court to note that the applicant had been in custody since his arrest on 8 May 2014, so that he had served a substantial part of the sentence of 7 years and 9 months’ imprisonment imposed on the applicant for Count 2. He pointed out that with an anticipated discount of one-third for good behaviour the applicant would have to serve 5 years and 2 months’ imprisonment only. Nevertheless, he acknowledged that the applicant had not served even half of the sentence of imprisonment that it was anticipated that he would have to serve for that offence.

In all circumstances, we are satisfied that it is appropriate that we order that the applicant be retried. Accordingly, we order that the applicant be retried on a fresh indictment of which Count 2 of the existing indictment is to be the only count, which indictment is to be filed with the court within 14 days. Furthermore, we order that the matter is to be listed before the Listing Judge for the fixing of trial dates within 28 days hereof.

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| (Michael Lunn)  Vice President | (Andrew Macrae)  Justice of Appeal | (Ian McWalters)  Justice of Appeal |

Mr Jonathan Man, SADPP, of the Department of Justice, for the respondent

Mr James McGowan, instructed by Ip, Kwan & Co., assigned by Director of Legal Aid, for the applicant (Conviction only)

1. Appeal Bundle; page 12, Admitted Facts - paragraph 6. [↑](#footnote-ref-1)
2. Appeal Bundle, page 63 L-M. [↑](#footnote-ref-2)
3. Appeal Bundle, page 63 B-F. [↑](#footnote-ref-3)
4. Appeal Bundle, page 64 D-I. [↑](#footnote-ref-4)
5. Appeal Bundle, page 66 N-P. [↑](#footnote-ref-5)
6. *HKSAR v Chau Shu Ho* [2005] 3 HKLRD 786, at paragraph 18. [↑](#footnote-ref-6)
7. *Cheung Chi Keung v HKSAR* (2009) 12 HKCFAR 502, at paragraph 16(c). [↑](#footnote-ref-7)
8. *Chan Kar Leung v HKSAR* (2006) 9 HKCFAR 827, at paragraph 7. [↑](#footnote-ref-8)
9. Appeal Bundle, page 16 G-Q. [↑](#footnote-ref-9)
10. Appeal Bundle, page 67 G-N. [↑](#footnote-ref-10)
11. Appeal Bundle, page 67 O - 68 D. [↑](#footnote-ref-11)
12. *HKSAR v Chan Ka Man* [2005] 1 HKC 162, paragraph 11. [↑](#footnote-ref-12)
13. *Tam King Hon v HKSAR* (2006) 9 HKCFAR 206, at paragraph 34. [↑](#footnote-ref-13)
14. *Tam King Hon v HKSAR*, at paragraph 29. [↑](#footnote-ref-14)
15. Appeal Bundle, page 71 A-G. [↑](#footnote-ref-15)
16. Appeal Bundle, page 71 M - I. [↑](#footnote-ref-16)
17. Appeal Bundle, page 72 S - 73 M. [↑](#footnote-ref-17)
18. Appeal Bundle, page 75 F-H. [↑](#footnote-ref-18)
19. Appeal Bundle, page 75 P-Q [↑](#footnote-ref-19)
20. Appeal Bundle, page 77 A-N. [↑](#footnote-ref-20)
21. Appeal Bundle, pages 77 O - 78 G. [↑](#footnote-ref-21)
22. Appeal Bundle, page 78 J. [↑](#footnote-ref-22)
23. Appeal Bundle, page 80 C-I. [↑](#footnote-ref-23)
24. Appeal Bundle, page 81 K-Q. [↑](#footnote-ref-24)
25. Appeal Bundle, page 83 P-T. [↑](#footnote-ref-25)
26. *Tam King Hon v HKSAR*, at paragraph 31. [↑](#footnote-ref-26)
27. *Tam King Hon v HKSAR*, at paragraph 34. [↑](#footnote-ref-27)
28. *HKSAR v Chan Ka Man* [2005] 1 HKC 162, at paragraph 11. [↑](#footnote-ref-28)
29. *Tam King Hon v HKSAR*, at paragraph 34. [↑](#footnote-ref-29)
30. Appeal Bundle, page 56 S-U. [↑](#footnote-ref-30)