CACC 333/2018

[2020] HKCA 53

**in the high court of the**

**hong kong special administrative region**

**court of appeal**

criminal appeal no 333 of 2018

(on appeal from DCCC NO 619 of 2017)

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###### BETWEEN

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| HKSAR | | | Appellant |
| and | | |  |
| Rahman Md Sheikh Mojibur (艾力) | | | Respondent |
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Before: Hon Macrae VP, Yuen JA and McWalters JA in Court

Date of Hearing: 26 November 2019

Date of Judgment: 13 January 2020

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| J U D G M E N T |

Hon Macrae VP (giving the Judgment of the Court):

1. The respondent faced a single charge of dealing with property known or believed to represent proceeds of an indictable offence, namely the whole or part of a total sum of $1,350,503.74, contrary to section 25(1) and (3) of the Organized and Serious Crimes Ordinance, Cap 455. After a trial in the District Court before Deputy Judge CH Li (“the judge”), at which the respondent was represented by counsel assigned by the Director of Legal Aid, the respondent was, on 19 ‍October 2018, acquitted of the charge. As a result, his counsel applied for the costs of the trial, which included the respondent’s contribution to Legal Aid in the sum of $110,000, as well as the legal costs incurred in his previous appearances before the magistrates’ court. The application was opposed by the prosecution.
2. On 31 October 2018, the judge ordered that costs should be awarded to the respondent, to be taxed if not agreed; and that his own **‍**costs **‍**should be taxed in accordance with the Legal Aid Regulations (“the **‍**costs ‍order”).
3. By way of a Notice of Appeal filed on 16 November 2018, the appellant appealed against the costs order, pursuant to section 19 of the Costs in Criminal Cases Ordinance, Cap 492. On 26 November 2019, having heard argument from the parties, we reserved our decision.

The prosecution case

1. The prosecution case was largely agreed by way of Admitted Facts. Those Facts established, *inter alia*, that:
   1. On 7 April 2014, the respondent opened a bank account with HSBC (“the account”), of which he remained the holder and sole signatory until 19 May 2015[[1]](#footnote-1).
   2. Between 7 April 2014 and 19 May 2015, the account showed 100 deposits in a total sum $1,350,503.74 going into the account (the **‍**average monthly deposit during the period being $96,464), as well as 160 **‍**withdrawals during the same period in a total sum of $1,043,576 coming out of the account[[2]](#footnote-2).
   3. On 19 May 2015, the respondent was arrested at his home, where the police seized a bank card used **‍**in **‍**conjunction with the account and 16 **‍**remittance **‍**slips **‍**– 13 of which were found on his person, and 3 in the premises – totalling $540,068, which had been exchanged for RMB433,700 and remitted to the Mainland to four named persons[[3]](#footnote-3).
   4. The respondent was at the time a casual transportation worker earning a monthly salary of $15,000[[4]](#footnote-4), and had never filed any tax return in Hong Kong[[5]](#footnote-5). His wife was employed by several companies and her total salary for the entire period from 1 April 2012 to 31 **‍**March **‍**2015 was $345,417[[6]](#footnote-6).
2. At trial, the prosecution called two witnesses (PW1 and PW2) who worked at two different money exchange shops. They confirmed that the respondent had personally made the 16 remittances described at paragraph 4(iii) above.
3. Before turning to the defence case, it is relevant to note that the respondent’s answers under caution in his video-recorded interviews (“VRI”) were not relied upon at trial, prosecuting counsel having informed the judge that the respondent had exercised his right to remain silent under caution[[7]](#footnote-7). Accordingly, the defence case was not disclosed, or even hinted at, until after the judge had ruled that there was a case to answer.

The defence case

1. The respondent gave evidence to explain the source of his income, which explanation could not have been divined from the admitted facts. He said that in 2012 or 2013, he was awarded $50,000 as damages in a court action[[8]](#footnote-8). Having further obtained a loan of US$20,000 from a **‍**friend, he began running a profitable business in Hong Kong selling second **‍**hand mobile telephones and accessories, which he collected and imported from the Mainland himself. He produced his travel movement records between 7 March and 22 **‍**November 2014 to show that he had travelled to the Mainland on numerous occasions, as well as various invoices relating to his trading of mobile telephones. He further claimed that the remittances to the Mainland were connected with his purchase of second hand mobile telephones and accessories. He also said that he had some income from gambling.
2. The respondent further called his wife (“DW2”) and her friend (“DW3”) to give evidence to support his version of events. Consistent with the respondent’s claim, DW2 said that the respondent had borrowed US$20,000 from a friend, and that he liked to gamble. DW3 was able to confirm that the respondent was indeed running a second hand mobile telephone business because the two of them had had previous business dealings with each other.

The judge’s findings

1. In his Reasons for Verdict, the judge said it was “hard to reject” the defence’s evidence since the trading documents produced by the respondent and his travel movement records supported his version of events[[9]](#footnote-9). The judge found no evidence to support the allegation that the setting up of the respondent’s business was a cover-up to hide his illegal dealings, or that “these deposits were from any other source, be it legitimate or illegitimate, other than the account of events given by the defendant”[[10]](#footnote-10).

The application for costs

1. The defence application for costs was made on the following bases:
2. The respondent did not bring any suspicion upon himself. In particular, the prosecution had never relied at any stage on his VRI[[11]](#footnote-11).
3. The conduct of the respondent was reasonable throughout the trial and it was his right to remain silent and refuse to explain himself at the investigation stage[[12]](#footnote-12).
4. The business of the respondent, albeit run on a cash basis, was a legitimate one[[13]](#footnote-13).
5. In resisting the application, prosecuting counsel contended that the respondent had evidently been running an illegal business, since there was no business registration certificate, nor were there any proper books of accounts[[14]](#footnote-14). He submitted that had there been any such evidence[[15]](#footnote-15):

“…it would have led the police to a chain of inquiry as to whether or not the defendant was running a business. So my argument is that running a cash business cross-border without any legally compliant books and records is in fact bringing suspicion on himself, and I would point out that the business documents that were provided in court, that was the first time the prosecution knew anything of this. So obviously the defendant has a right of silence but what (he) does not have a right to do is to fail to keep properly compliant records which could have led the police on an inquiry which would have shown the business and therefore obviated this prosecution.”

1. The judge reminded himself of the legal principles in relation to applications for the costs of a trial where the defendant is acquitted. In particular, he noted that a defendant is entitled to costs unless it can be said that he has brought suspicions upon himself, or his conduct has misled the prosecution into thinking that the case against him was stronger than it was[[16]](#footnote-16). In granting the application, the judge held that the respondent in the present circumstances was entitled to exercise his right of silence and had no positive duty to provide an innocent explanation to the police[[17]](#footnote-17).

Grounds of appeal

1. In the Notice of Appeal, Ms Vinci Lam (with her Ms **‍**Hermina **‍**Ng), for the appellant, complained, firstly, that the judge should not have awarded the costs of the trial to the respondent because:
2. The respondent had, by his conduct which formed the subject matter of the charge, brought suspicion on himself; and
3. The respondent, having chosen to inform the police in his VRI about his occupation and salary but refused to answer questions relevant to the subject matter of the charge when given the occasion to do so at the investigative stage, only proffered an explanation for his conduct after a case to answer had been found by the judge, thereby (i) misleading the prosecution into thinking that the prosecution case against him was stronger than it was, and/or (ii) neglecting to bring forward a good and valid explanation to the charge at an early and appropriate stage.

Further, or in the alternative, complaint is made that the judge wrongly exercised his discretion in awarding the costs of the trial to the respondent.

1. Ms Lam laid emphasis on the fact that the respondent had brought suspicion on himself because the unexplained and unusual fund flow of the account was a matter known only to himself, which cried out for an explanation. She submitted that whilst it was the right of the respondent to remain silent on the issue, the consequence of the exercise of such right in the present circumstances (without at least presenting the prosecution with the defence exhibits beforehand) was that he should be deprived of his costs.

Respondent’s submissions

1. Mr Kay Chan, counsel for the respondent both here and below, submitted that the illegality of the respondent’s business had not been made part of the prosecution case[[18]](#footnote-18), and the appellant was not, therefore, entitled to make use of it as the basis for resisting an application for costs[[19]](#footnote-19). He placed particular emphasis and importance on the respondent’s constitutional right of silence, of which the respondent was entitled to avail himself at all stages of the trial. It was submitted that this Court should not overturn the costs order by having regard now to the contents of the respondent’s VRI, which were not placed before the court below during the costs application, or at trial[[20]](#footnote-20).

Consideration

1. As we have pointed out, the respondent did not respond in his VRI with “total silence” when interviewed by the police, as had been asserted to the judge by prosecuting counsel[[21]](#footnote-21). When asked about his job and income, the respondent did in fact provide answers, which were incorporated in the Admitted Facts at trial. In particular, it was an Admitted Fact that[[22]](#footnote-22):

“The Defendant’s primary monthly salary was about HK$15,000 per month earned through his labour as a transportation worker and that such work was offered to him on a casual basis only.”

However, he chose, as was his right, not to answer any further questions as to the flow of funds through his account, or about the remittance slips to the four individuals in the Mainland.

1. It seems to us that whether the respondent had told the police about his job and income in his VRI, or whether it was an Admitted Fact, the admission would reasonably have led the prosecution to think that he could not possibly explain the comparatively large sums of money going through his account, which represented more than 6 times his earnings as a casual labourer. The police knew absolutely nothing about his mobile telephone business, whether it was legal or illegal, and no documents relating to this business had been found at his home when searched.
2. The respondent was, of course, perfectly entitled not to say anything about his funds and sources of income. The fact that the police might have been suspicious that he chose to answer some questions about his work, but refused to answer the more difficult ones about the large amount of funds going through his account, cannot be relied upon to advance a submission that he thereby brought suspicion upon himself and/or that he misled the prosecution to think that the case against him was stronger than it was. To be fair to Ms Lam, that is not how she is putting her argument.
3. Her submission is that the prosecution would have been led by these admissions to believe that the applicant’s primary source of funds was a relatively small monthly income, which could not conceivably explain the large sums of money passing through his account. Moreover, the monies flowing out of his account as remittances to four beneficiaries in the Mainland can have had nothing to do with his income as a casual transportation worker.
4. As the Court of Final Appeal in *Ting James Henry v HKSAR (No 2)*[[23]](#footnote-23) reminded us, conduct prior to the investigation may be relevant to the discretionary exercise in respect of applications for costs upon an acquittal:

“provided always that the discretion is not exercised so as to undermine the presumption of innocence, and in particular, provided that its exercise does not involve the court in adopting a position at variance with the defendant’s acquittal by the tribunal of fact”.

The same *caveat* would apply equally to conduct relied on at the investigative and trial stages.

1. This principle was helpfully explained and amplified by Cheung J (as Cheung PJ then was) in *Cheng Kam Kuen v HKSAR*[[24]](#footnote-24):

“30. …The constitutional right of silence, enshrined in article 11(2)(g) of the Hong Kong Bill of Rights contained in the Hong Kong Bill of Rights Ordinance (Cap 383), which is itself entrenched by article 39 of the Basic Law, is essentially concerned with an accused’s innocence or guilt. One could certainly argue that the possibility of an accused being deprived of costs by reason of his silence or non-disclosure may have the effect of putting undue pressure on him not to exercise his right to silence, thereby indirectly diluting that right and adversely affecting his position on innocence or guilt - the very object of protection of the right of silence in the first place. I can see the force of the argument.

31. Countering this are several considerations: the suggested connection is an indirect one; the direct point in question is costs, not guilt or innocence, and when legal aid is widely available, concern during the investigation/pre-trial stage about recovery of costs in future is in all likelihood more imaginary than real; what is in issue is payment of costs out of the public revenue to the accused, not payment of costs by him to anybody; there is no right or entitlement to costs, which is a discretionary benefit created by statute which does not see fit to exclude – at least not expressly - non-disclosure in the exercise of the right of silence from the discretionary considerations that may be taken into account; and that in an appropriate case the exercise of the right may be taken into account is not tantamount to an automatic refusal of costs - rather the fact that the non-disclosure was the result of the exercise of the accused’s constitutional right of silence must be firmly borne in mind and given due weight in the weighing exercise (*Ling*[[25]](#footnote-25) at pp 387-388).”

1. It seems to us that the respondent’s right of silence at the investigative stage about his other sources of income remains perfectly intact. But that does not mean that he cannot be deprived of his costs if he chooses to exercise that right. In any event, the argument that his right to silence should not be compromised is somewhat attenuated because, as we have noted, the applicant was not completely silent when he was interviewed: he chose to present part of the story, which would have plainly led (or misled) the prosecution into thinking that there was no other source of income to explain the not inconsiderable funds being received into and passing out of his account.
2. As the Court of Final Appeal explained in *Tong Cun Lin v HKSAR*[[26]](#footnote-26):

“What then are the governing principles? When a defendant has been brought to trial upon particular charges and is then found not guilty it is clearly right that he should normally be compensated out of the public revenue for the costs incurred in defending those charges. In considering whether, despite this general rule, he should be deprived of all or part of his costs, the judge exercising the discretion must obviously look to his conduct generally, so long as such conduct is relevant to the charges he faced. This cannot be confined to any particular period of time. Since, however, the discretion is being exercised in the context of an *acquittal* - the averments constituting the charges having been found by the jury as *not* **‍**amounting to the crimes alleged - it follows that, generally speaking, the conduct most relevant to the matters under consideration must be the defendant’s conduct during the investigation and at the trial: *How he first responded to the investigators, the answers he gave when confronted with the accusations, the consistency of those answers with his subsequent defence, etc.* Wrapped up with this is the strength of the case against the defendant and the circumstances under which he came to be acquitted: These too are relevant to the exercise of the discretion to deprive him of his costs, so long as the judge is not, indirectly, thereby punishing him by taking a view of the facts palpably different from that taken by the jury and reflected in the not-guilty verdict. The person in the best position to weigh those matters is clearly the judge himself.” (Emphasis supplied)

1. We have been focussing on the respondent’s half-truth about his job and income. But what of his decision not to disclose the fact of his occupation and earnings in his second-hand mobile telephone business at all? On that matter, the Court in *R v Kwok Moon-yan & Another*[[27]](#footnote-27) held:

“The manner in which an appellant originally meets the charge will be a factor. We are aware that in *R v Lee Tsat-pin* Crim App No 315 of 1985 (unreported) the Court took the view that the non-advancing of an explanation to the investigating authority did not fall within the rubric of bringing suspicion or misleading. We entirely accept that the principle that no man should become his own betrayer must remain inviolate. But we do not think this to mean that, if an appellant had a good and valid explanation which he neglected to bring forward at an early and appropriate moment this should not be a factor in considering his contribution to the prosecution bringing the charge in the first place.”

The principles discussed in *Kwok Moon-yan & Another* relevant to the exercise of discretion have been approved by the Court of Final Appeal in *Hui Yui Sang v HKSAR*[[28]](#footnote-28).

1. Again, we must emphasise that a defendant is perfectly entitled not to answer questions or disclose his defence to the investigating authorities. That is his right. But if he chooses to exercise it, it does not mean that he cannot be deprived of costs if he had a perfectly good defence but chose not to give the slightest hint as to its existence, as happened in the present case. After all, it is possible that had the respondent disclosed his business dealings and the documentary evidence in support of them, the prosecution might have considered that they did not have enough evidence to proceed; in which case, the costs which were occasioned to the public and his own purse would have been saved. As it was, the judge accepted that “without telling the police that the defendant was engaged in second hand mobile phone trading (it) would be impossible for the police to know of this fact”[[29]](#footnote-29).
2. It is here that we should deal with Mr Chan’s argument that there may have been a good reason for the applicant not to disclose his mobile telephone business dealings, since to have done so would have run the risk of admitting that he had failed to pay income tax and/or committed the regulatory offence of not having a valid business registration certificate. The notion that a defendant may properly make a claim for reimbursement from public funds despite not disclosing that he had been cheating the Inland Revenue Department does not sound a very equitable one, even in a criminal context where the scales are necessarily tilted in favour of the defence. Be that as it may, the fact that such a defendant chooses to remain silent does not mean that he is entitled to recover his costs if, as a result of his silence (or, in this case, partial silence), he brings suspicion on himself and/or misleads the prosecution into thinking the case against him is stronger than it is. Whether or not the defendant brings suspicion on himself and/or results in the prosecution being misled does not logically depend on the defendant’s state of mind.
3. In our judgment, the exercise of the judge’s discretion in the present case miscarried. The respondent had chosen to answer certain questions in interview, which were then incorporated in Admitted Facts at trial. What the respondent did tell the police would have led them to believe, erroneously as it subsequently turned out, that there could be no conceivable explanation for the large sums of money going through his account. As for his mobile telephone business, the judge accepted that it was “impossible” for the police to have known about it: not only were no documents found at his home which so much as hinted at such a business, but the respondent’s answers in his interview were a misleading half-truth, suggesting that he was *primarily* employed as a casual transportation worker earning about $15,000 per month.
4. We were not impressed by the argument that because prosecuting counsel chose not to rely on the respondent’s VRI in resisting costs before the judge, this Court is thereby prevented from looking at his answers during interview. Any material which realistically explains why the prosecution took the view it did about the viability and strength of its case against a defendant may be relevant to the exercise of a judge’s discretion, whether or not it is put before the judge at trial by way of evidence; and whether or not it is strictly admissible as such. In any event, as we have already pointed out, there was no issue as to the admissibility of the VRI, the relevant parts of which were incorporated in the Admitted Facts.
5. The application must be allowed. The costs order of the judge is accordingly set aside.

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| (Andrew Macrae)  Vice President | (Maria Yuen)  Justice of Appeal | (Ian McWalters)  Justice of Appeal |

Ms Vinci Lam DDPP (Ag) and Ms Hermina Ng SPP, of the Department of Justice, for the Appellant

Mr Kay K W Chan, instructed by Choy Yung & Co, assigned by the Director of Legal Aid, for the Respondent

1. Admitted Facts, para 1. [↑](#footnote-ref-1)
2. Admitted Facts, paras 2-3. [↑](#footnote-ref-2)
3. Admitted Facts, para 5. [↑](#footnote-ref-3)
4. Admitted Facts, para 6. [↑](#footnote-ref-4)
5. Admitted Facts, para 7. [↑](#footnote-ref-5)
6. Admitted Facts, para 8. [↑](#footnote-ref-6)
7. Transcript Bundle, p 4L-O. Prosecuting counsel told the judge that the respondent’s response under caution was “just total silence”. This was not correct: he had in fact given some answers to questions under caution in his VRI. [↑](#footnote-ref-7)
8. Transcript Bundle, p 17J. [↑](#footnote-ref-8)
9. Reasons for Verdict, para 10. [↑](#footnote-ref-9)
10. Reasons for Verdict, para 12. [↑](#footnote-ref-10)
11. Transcript Bundle, p 2R-S. [↑](#footnote-ref-11)
12. Transcript Bundle, pp 2S-3A. [↑](#footnote-ref-12)
13. Transcript Bundle, p 3C. [↑](#footnote-ref-13)
14. Transcript Bundle, p 3F-H. [↑](#footnote-ref-14)
15. Transcript Bundle, p 3N-R. [↑](#footnote-ref-15)
16. Transcript Bundle, p 8D-G. [↑](#footnote-ref-16)
17. Transcript Bundle, pp 8T-9A. [↑](#footnote-ref-17)
18. Respondent’s submissions, para 19a. [↑](#footnote-ref-18)
19. Respondent’s submissions, para 29. [↑](#footnote-ref-19)
20. Respondent’s submissions, para 31. [↑](#footnote-ref-20)
21. See footnote 7 *supra*. [↑](#footnote-ref-21)
22. Admitted Facts, para 6. [↑](#footnote-ref-22)
23. *Ting James Henry v HKSAR (No 2)* (2007) 10 HKCFAR 730, at 735E-F. [↑](#footnote-ref-23)
24. *Cheng Kam Kuen v HKSAR* (Unrep., HCAL 92/2004, 17 May 2005), at paras 30-31. [↑](#footnote-ref-24)
25. *R v Ling* (1996) 90 A Crim R 376. [↑](#footnote-ref-25)
26. *Tong Cun Lin v HKSAR* (1999) 2 HKCFAR 531, at 535D-H. [↑](#footnote-ref-26)
27. *R v Kwok Moon-yan & Another* [1989] 2 HKLR 396, at 401C-E. [↑](#footnote-ref-27)
28. *Hui Yui Sang v HKSAR* (2006) 9 HKCFAR 308, at 314E-F. [↑](#footnote-ref-28)
29. Transcript Bundle, p 41N-O. [↑](#footnote-ref-29)