FACC No. 10 of 2016

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 10 OF 2016 (CRIMINAL)**

(ON APPEAL FROM CACC NO 81 OF 2014)

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BETWEEN

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| **HKSAR** | **Respondent** |
| **and** |  |
| **ZHOU LIMEI（周禮梅）** | **Appellant** |

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| Before : | Mr Justice Ribeiro PJ, Mr Justice Tang PJ,  Mr Justice Fok PJ, Mr Justice Chan NPJ and  Lord Millett NPJ |
| Date of Hearing: | 13 January 2017 |
| Date of Judgment: | 16 February 2017 |

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**JUDGMENT**

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**Mr Justice Ribeiro PJ and Mr Justice Chan NPJ:**

1. This appeal raises questions concerning the proper approach to statements relied on by the prosecution as admissions made by a defendant where the statements are equivocal or ambiguous.

A. The relevant events

1. In the afternoon of 15 November 2012, the appellant arrived in Hong Kong from Kuala Lumpur. At the airport, an X-ray examination of her suitcase raised suspicions and a Customs Officer, Mr Chan Wai-kei, searched it in her presence. After emptying the suitcase and unzipping the lining, he found concealed within it two packets wrapped in cardboard, tinfoil and paper. He sliced open the tinfoil and some white powder fell out. A rapid test-tube test revealed that it was heroin.
2. At that point, having confirmed that the appellant understood the local dialect, Officer Chan arrested and cautioned her. In his testimony at the trial, he said that the appellant responded in Cantonese, saying: “This suitcase is not mine. It belongs to an African male called Ah Sam.” And when asked what the white powder was, she said in Cantonese: “我諗呢一啲係毒品啩”, translated as “I suppose this is dangerous drug”.
3. Later that day, Officer Chan prepared a post-record, accepted as accurate by the appellant, in which her response was stated to be: “我諗係毒品”, translated as “I think it is drug”. This differed from what the Officer stated at the trial in that the final particle “啩”[[1]](#footnote-1) was omitted, a matter to which we will return.
4. Some hours later, the appellant took part in a video-recorded interview in which she recounted in detail the circumstances leading to her arrival in Hong Kong with the suitcase. When she was asked why she had answered “我諗係毒品”, translated as “I think it is drug” as mentioned above, her explanation was as follows:

“Er, it was because, because, because those, those people were checking with a straw on the spot. He said er, it was positive. He said this was, was, was, was, was drug. Well, I, well, well, I myself was stupefied then. He said it was dangerous drug”.

1. She added:

“Mm, mm. It was because, it was because the officer on the spot took out, took out a few bottles. There was also, also some colour in there. There was some colour, or, or it could be seen that he was also there --- you, it was because you spoke Cantonese. I could also understand the Cantonese spoken by all of you.”

1. The appellant was charged with a single count of unlawful trafficking in 1.79 kilogrammes of a mixture containing 0.80 kilogrammes of heroin hydrochloride, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134.

B. The Trial Judge’s summing-up

1. At her trial, in a careful summing-up, Deputy High Court Judge A Wong[[2]](#footnote-2), told the jury that the most important factual issue in the case was whether the appellant knew of the existence of dangerous drugs in the suitcase and pointed out that the defence case was that she had no such knowledge.[[3]](#footnote-3)
2. He gave the jury a detailed summary of the evidence regarding the circumstances leading up to and surrounding the appellant’s arrest. This included evidence of the appellant’s background and her account of how she had met an African man in Guangzhou where she resided and owned three small shops selling cosmetic products; of how she was persuaded by him to go first to Nigeria and subsequently to Kuala Lumpur to bring back sample goods; of her having been given the suitcase containing such samples by another African man in Kuala Lumpur and how she landed in Hong Kong on the way back to the Mainland. An important part of the evidence related to the search of her suitcase, the discovery of the concealed packages, the testing of the white powder, her being cautioned and arrested, followed by the verbal exchanges between herself and Officer Chan, her acknowledgment of the accuracy of the post-record and the explanations given by her in the video-recorded interview.
3. As the Judge explained to the jury, the prosecution placed substantial reliance on the appellant’s answers as constituting a confession:

“[Officer Chan] told you, when he testified, that the defendant said, ‘I suppose this is dangerous drug’ - ‘我諗呢一啲係毒品啩’. Later, [Officer Chan] made a post-record of the statement made by the defendant. ... In this document, it was recorded that the defendant said, ‘I think it is drugs’ - ‘我諗係毒品’. The prosecution asks you to treat this as a confession of the defendant, that she knew the substance was dangerous drug, and asks you to give this confession full weight.”[[4]](#footnote-4)

1. His Lordship instructed the jury that they had accordingly to decide three matters:

“(1) what exactly did the defendant say; (2) what was the effect of her statement; and (3) is what she said true”.[[5]](#footnote-5)

1. The jury were told that, having decided what the appellant had actually said, when they came to consider the effect of her statement, they had to:

“... exercise care and examine whether it is a confession on the part of the defendant in the sense that she all along knew the substance was a dangerous drug or whether, having regard to the circumstances, in particular at that time - the substance in powder form had been found and a rapid test yielding a positive result of heroin had been conducted - whether it would have been possible that the defendant made the statement only as a response to her understanding of the finding of the test, only as a reaction to the situation rather than reflecting that she all along had the knowledge that the dangerous drug was inside her suitcase. [Recalling that defence counsel had pointed out that] ... when the defendant made the statement, the officer had already told her that she was arrested for an offence contrary to the Dangerous Drugs Ordinance.”[[6]](#footnote-6)

1. The jury were thus left to decide whether the appellant’s answers amounted to a confession that she had all along known of the drugs found in her suitcase. If the answer was “Yes”, they had to decide whether what she said was true and then decide, in the light of the whole of the evidence, whether she was guilty of trafficking.
2. The appellant was convicted on a five to two majority verdict.

C. The decision of the Court of Appeal[[7]](#footnote-7) and leave to appeal to this Court

1. The first two grounds of appeal advanced in the Court of Appeal are relevant for present purposes. They were that there had been a material irregularity in that the trial judge had erroneously failed to hold a *voir dire* to determine the admissibility of the appellant’s answers to Officer Chan and had wrongly left it to the jury to determine their legal effect when admissibility ought to have been a matter for the Judge.[[8]](#footnote-8) As Poon J,[[9]](#footnote-9) giving the judgment of the Court, noted, counsel then appearing for the appellant:

“... placed much emphasis on the Chinese word ‘啩’ used in the oral statement, which he said, indicated suspicion rather than knowledge on the applicant’s part. Thus what the applicant said orally, Mr Wong reasoned, did not amount to a confession.”[[10]](#footnote-10)

1. That argument was rejected, Poon J pointing out that:

“... the Judge’s directions to the jury...were:

(1) to have regard to the possibility that the statement was said in response to the positive result of the rapid test;

(2) the fact that Officer Chan told the applicant that she was arrested for an offence contrary to the Dangerous Drugs Ordinance;

(3) to take into account the explanation given in the VRI;

(4) to exercise care before treating the statement as a confession;

(5) only consider the third question (‘is what she said true?’) if they were sure that the applicant meant by her statement that she all along knew dangerous drug was contained in the Suitcase; and

(6) otherwise, they should ignore this evidence altogether.”[[11]](#footnote-11)

1. The Court of Appeal concluded that:

“... the way in which the Judge dealt with the oral statement and the post-record was entirely correct. It was plainly a matter for the jury to decide which version they accepted, and having made that decision, to give effect to the oral statement as they found to have been made by the applicant according to the natural meaning of the words used. Contrary to Mr Wong’s argument, no *voir dire* was required to deal with these matters which fell squarely within the province of the jury. There is no substance in Grounds 1 and 2.”[[12]](#footnote-12)

1. Leave to appeal to this Court was granted by the Appeal Committee[[13]](#footnote-13) on the basis that “it is reasonably arguable that a substantial and grave injustice arose from the appellant being treated as having made an admission regarding knowledge of the presence of dangerous drugs found on the search conducted on her baggage at the airport”.

D. The applicable principles

1. The hearsay rule makes out-of-court statements inadmissible as evidence of any fact or opinion stated. But if such a statement[[14]](#footnote-14) constitutes an admission by the accused of some fact in issue, it is admissible in evidence against him as an exception to the hearsay rule.

D.1 Where not reasonably capable of being an admission

1. Where it is disputed whether a statement does or does not amount to an admission, the Judge must determine whether the statement is reasonably capable of being an admission of a relevant fact in issue. As pointed out by the Court of Appeal of Victoria in *Patrick v R*,[[15]](#footnote-15)a statement can only be an admission if the maker “intended by the admission to convey what the admission appears to assert”. If it is not capable of being an admission, then the statement is excluded. Thus, in *R v Schofield*,[[16]](#footnote-16) when the accused was charged by the police with stealing tarpaulin, he said: “Just my luck”. The magistrates were held to have wrongly treated this as an admission since it might well merely “be taken to be an expression of disappointment” on the defendant’s part at being charged with any offence.
2. To take another example, in *R v Toka*,[[17]](#footnote-17) the accused, who was suspected of murder, was asked by his partner “if he did it” and replied that he didn't want to discuss it until he had seen his lawyer. The Court rejected the suggestion that this was capable of being understood as an admission “that he had some guilty connection with the crime and needed legal advice”. It was an inference that the jury could not legitimately draw, especially given the defendant’s right of silence.
3. The context of the statement is obviously very important. In the New Brunswick case of *R v Taylor*,[[18]](#footnote-18) evidence was given by a police officer that the accused had said: “I feel like I’m going to jail”. This was excluded as inadmissible, William T Grant J pointing out that:

“It was not said in the context of any conversation but rather when Constable Lyons was seizing clothing from him, his striped shirt, his tee shirt, his jeans, his belt, his socks and his sneakers. In that context it was more likely, in my opinion, that he was verbalizing what was happening to him at that particular time rather than making an admission of guilt. In my view, then, the statement is innocuous and not probative of any fact in issue. I therefore find that it is irrelevant and inadmissible.”[[19]](#footnote-19)

1. Where the question arises as to whether a statement ought to be excluded as not reasonably capable of being an admission, it is obviously desirable that the issue be resolved in the absence of the jury.

D.2 Where reasonably capable of constituting an admission

D.2a The jury’s task and the directions required

1. Where an equivocal statement relied on by the prosecution is reasonably capable of being an admission, it is left to the jury to decide whether they are satisfied beyond reasonable doubt first, that the defendant did in fact make that statement; secondly, that it does in fact constitute an admission by the accused, probative of a fact in issue; and thirdly, that it is true.[[20]](#footnote-20) In leaving these questions to the jury, it may be necessary to permit evidence to be called to enable them to consider the whole of what transpired so as to place the statement in its proper context. This would require appropriate directions to be given as to how the evidence is to be used, guarding against potential dangers that may arise in the process.
2. *The Queen v Marcantelli*,[[21]](#footnote-21) where the defendant was convicted of indecently assaulting a female child aged four years and ten months, provides a good illustration. The child’s mother had complained to the police and recounted to an officer what the child had told her about the defendant’s acts. Giving evidence in court, the officer testified that he had informed the defendant of the allegations against him and that the defendant had replied: “Yes, that is correct”. In cross-examination, it was suggested to the officer that the answer “Yes, that is correct” meant only that it was correct that the child's mother had made an allegation against him of indecent assault, but did not mean that the appellant agreed with the allegation that he had committed an indecent assault. It was, as the Judge recognized, an equivocal answer which was reasonably capable of amounting to a confession by the defendant. It was therefore necessary for the jury to decide what meaning to give to it.
3. To enable them to do so, the Crown sought to elicit details of the mother's statement to the police which had thus been narrated to the appellant. After considering the proposed evidence in the absence of the jury, the Judge ruled that it was proper to let the whole conversation between the officer and the accused go to the jury so that they could properly consider what the answer meant. The report goes on to describe the evidence consequently given:

“The witness then deposed that he had read to the appellant quite a large section of the mother's statement in the course of which she had stated the child had told her in the presence of the appellant, that the appellant had been touching her bottom with his fingers and also that she had said ‘He kissed my bottom’; that the mother had said the appellant had denied it. The discussion with the accused was terminated by the detective alleging that in fact the appellant indecently assaulted her, told him that those were the allegations made by the mother of the girl, and ‘when I concluded that I informed him he had indecently assaulted the girl’. It was at that stage the accused replied ‘Yes, that is correct’.”[[22]](#footnote-22)

1. It was the Judge’s ruling that such evidence was admissible that the defendant challenged on appeal. Plainly, that evidence was necessary to place the defendant’s statement in its proper context. But it was equally obvious that a careful direction was required since the girl’s complaint as reported by her mother, if treated as evidence of the truth of her allegations, was inadmissible hearsay and potentially highly prejudicial to the defendant.
2. The New Zealand Court of Appeal upheld the Judge’s ruling:

“In our opinion the whole of what transpired at the interview ... was admissible and properly admitted for the purpose of enabling the jury to determine what the appellant had accepted as being correct. ... If an answer given amounts to an admission of the truth of the whole or a part of what is related in the complaint against him, it is admissible. If the answer be such as to be evidence from which an acknowledgment might be inferred, the whole of what transpired is properly admissible in order that the question whether or not and to what extent it constitutes an admission may be determined by the jury whose function it is to determine whether his words, action, conduct, or demeanour at the time amounted to an acceptance in whole or in part. The narration to which the answer is made is not admissible to prove the truth of what is narrated, and the jury must be directed as to the use they may properly make of it.”[[23]](#footnote-23)

1. The Court held that the Judge’s directions as to how the contextual evidence could be used were adequate, noting that the summing-up “strongly emphasised that the statements attributed to the child were not in themselves evidence at all, and could be regarded only if the appellant were found to have accepted the statements by the answer he made.”[[24]](#footnote-24)
2. As *The Queen v Marcantelli* shows, careful directions are required where a jury is asked to decide whether an equivocal statement is in fact an admission. They must clearly be told what their task is and instructed that if they have any reasonable doubt as to whether the statement was in fact made or whether it is an admission, that they should ignore it altogether. Where evidence which is otherwise inadmissible is allowed to be adduced to provide the context of the statement, the jury must be directed as to how they may or may not use such evidence. They must also be told that if they do find that it is an admission, they must decide whether they are satisfied beyond reasonable doubt that it is true in substance.
3. As Barwick CJ, Gibbs and Mason JJ stated in their joint judgment in *R v Burns*:[[25]](#footnote-25)

“It is clear and elementary law that once a confessional statement has been admitted into evidence its weight and probative value are matters for the jury. It is for the jury to determine whether the alleged confession was made and whether it was true in whole or in part. Unless the jury are satisfied that so much of a confession as tends to show the guilt of the accused was true they cannot treat it as a proof of guilt. However, a confessional statement may be only one piece of the evidence against the accused and the jury are entitled to consider all the relevant evidence together in deciding upon their verdict. The nature of the direction necessary to be given properly to instruct the jury as to the use of evidence of an alleged confession must depend on all the circumstances of the case.”

D.2b The use that can be made of the admission

1. The relevant fact in issue should be identified so that the jury know what it is the prosecution is seeking to prove that the defendant has admitted and so that they can focus on whether the defendant’s statement actually amounts to an admission of that fact (and not of some irrelevant fact). Thus, for instance, in *R (on the application of Wright) v Crown Prosecution Service*,[[26]](#footnote-26) the fact in issue was whether the mushrooms in the defendant’s possession were a Class A drug, namely psilocybin mushrooms (referred to as “magic mushrooms”). The prosecution had failed to adduce scientific evidence as to the type of mushroom in question and sought instead to rely on an alleged admission by the defendant. When interviewed, the defendant had admitted that he had wanted to find magic mushrooms but his statements were held to have fallen “a long way short of an admission that he had actually picked magic mushrooms”. It was an admission that did not relate to the fact in issue.
2. In this context, it should be borne in mind that admissions may be used to prove facts in issue which differ in their relative importance and probative value in relation to the outcome of the case. Thus, in *The Queen v Marcantelli*, a finding by the jury that the appellant had in fact agreed with the allegation that he had committed an indecent assault would be of great probative value, since it would amount to a finding that he had confessed to the crime. In other cases, an admission may be relied on only to establish a fact which is not decisive, concerning for instance the defendant’s or the complainant’s credibility or to prove a fact from which the jury might be invited to draw an inference bearing on the defendant’s guilt.
3. An instance where an admission was used to undermine the credibility of the defendant’s denials and to support the evidence of the complainant may be found in *AM v Western Australia*.[[27]](#footnote-27) The defendant was a bar manager and the complainant a girl just under 15 years of age who worked at the bar. She gave evidence that after the restaurant had closed one Friday night, leaving her and the defendant alone, he had given her two Southern Comforts and Coke and then, behind a dividing wall towards the front of the restaurant, he had forced sexual intercourse with her. The defendant denied this and testified that when the restaurant was closed, he was always accompanied by his wife or his mother or father. However, a witness testified that he and the defendant had subsequently had a conversation in which the witness said to the defendant:

“... ‘What's this I hear about you shagging young waitresses,’ or something along those lines, and he replied that, you know, a few beers and away you go sort of thing. Along those lines ... … I sort of asked him what had happened and he sort of said, ‘Behind the counter’.”[[28]](#footnote-28)

1. While such evidence did not identify the complainant or the time when sexual intercourse allegedly occurred, the Court of Appeal of Western Australia upheld the trial judge’s decision to admit it as capable of being a relevant admission. Steytler P held that:

“It amounted to evidence of admissions that were adverse to the appellant's case. The evidence, if accepted, established that the appellant had admitted that he had, on one occasion at least, been on his own with a waitress, who was not a family member, at the restaurant. It also established that the waitress had been young, that the appellant had sex with her after a couple of drinks and that the sex had taken place behind a counter (although the complainant described it as having been behind a dividing wall). Although falling well short of a confession that he had committed the offence charged, or any offence, the evidence had sufficient probative value to justify its admission.”[[29]](#footnote-29)

And Murray AJA stated:

“...it was by no means a confession that the appellant sexually penetrated the 14-year-old complainant in the restaurant on a night in about early October 2001 ... Much less was it a confession that sexual penetration, always denied by the appellant, occurred without the complainant's consent. ... The importance of the evidence was that it contradicted the appellant's denial, supported to some extent by the evidence of his mother, that any such activity, consensual or otherwise, involving the appellant and the complainant, or any other young waitress, in the restaurant, with or without consent, ever occurred. But its probative value was certainly limited in that way.”[[30]](#footnote-30)

1. *R v SJRC*,[[31]](#footnote-31) is an example ofa case where ambiguous statements were relied on as admissions permitting inferences adverse to the defendant to be drawn. He was charged with indecent assault and sexual intercourse without the complainant’s consent and the prosecution successfully argued that two text messages he had sent were capable of amounting to an admission that sexual acts had occurred between himself and the complainant on the day in question. The fact that the defendant was expressing regret in those messages was also capable of permitting an inference to be drawn that he knew that the complainant had not consented to the sexual acts.[[32]](#footnote-32)

D.2c Whether prejudicial effect outweighs probative value

1. As Li CJ noted in *Secretary for Justice v Lam Tat Ming*:[[33]](#footnote-33)

“The Judge has the overriding duty to ensure a fair trial for the accused according to law. For this purpose, he has what should be regarded as a single discretion to exclude admissible evidence, including a voluntary confession, whenever he considers it necessary to secure a fair trial for the accused.”

In particular:

“The Judge may in his discretion exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.”[[34]](#footnote-34)

1. The circumstances may make it incumbent on the Judge to consider exercising that residual exclusionary discretion where the probative value of admitting an equivocal statement into evidence as an admission may be outweighed by its prejudicial effect. Thus, the statement in question may be so equivocal that it borders on being incapable of amounting to an admission, making its probative value so slender as to be outweighed by its prejudicial effect.[[35]](#footnote-35)
2. In some cases (of which *The Queen v Marcantelli*[[36]](#footnote-36) provides an illustration), the need to adduce evidence to enable the alleged admission to be assessed in its proper context may involve exposing the jury to highly prejudicial material. Having considered in the absence of the jury the extent to which such prejudice might effectively be dealt with by appropriate directions, the Judge might conclude that the probative value of the alleged admission is insufficient to justify putting the fairness of the trial at risk by introducing the prejudicial matter.
3. And in gauging the probative value of the alleged admission, its scope and relative importance should be borne in mind. As illustrated by *AM v Western Australia* and *R v SJRC*,[[37]](#footnote-37) it may, at one end of the spectrum, potentially constitute a full confession of guilt while, at the other end, it may merely provide corroborative evidence or supply one piece of evidence amongst others, permitting a relevant inference to be drawn.
4. Where the trial judge has exercised his or her discretion by declining to exclude the equivocal admission, the appellate court’s role is limited, as stated in the joint judgment in *Kissel v HKSAR*:[[38]](#footnote-38)

“The Judge’s decision not to exclude the relevant evidence as being disproportionately prejudicial involved the exercise of a judicial discretion which, as is well-established, will only be interfered with on appeal in limited circumstances. The principles are clearly stated in the joint judgment of Dixon, Evatt and McTiernan JJ in *House v The King[[39]](#footnote-39)* as follows:

‘The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.’”

1. But where the lower court ought to have, but failed to, exercise its discretion, the appellate tribunal may itself exercise the residual discretion.[[40]](#footnote-40)

D.2d The principles summarised

1. The aforesaid principles may be summarised as follows:
   1. Where the prosecution seeks to rely on an equivocal statement as an admission, the Judge should consider whether it is reasonably capable of constituting an admission probative of a relevant fact in issue.
   2. If it is so capable, subject to exercise of the court’s residual exclusionary discretion, it is admissible and should be left to the jury to decide if it does in fact constitute an admission, to be relied on as an exception to the hearsay rule. If it is not reasonably capable of being an admission, it is inadmissible.
   3. If the statement is left to the jury, they should be permitted to consider the whole of what transpired, placing the statement in context.
   4. The jury should be told that they can only rely on the statement against the defendant if they find beyond reasonable doubt:
      1. that the defendant in fact made the claimed admission;
      2. that, viewed in context, it was indeed intended to be an admission probative of a fact in issue; and
      3. that the substance of the admission is truthful.
   5. The judge should give appropriate directions as to how to deal with the statement, drawing attention to its ambiguity and other possible meanings and indicating any matters that the jury may take into account in deciding whether an admission was in fact intended. The judge should also give appropriate directions in respect of how any contextual evidence may or may not be used.
   6. The Judge should also identify for the jury, if they find that the statement is an admission, what its scope or limits are; ie, what it is that the defendant may be found to have admitted.
   7. Since an equivocal statement may have little probative value, the judge has to consider whether to exercise his discretion to exclude the statement on the ground that its probative value is outweighed by a risk of unfair prejudice. The more equivocal the statement, the less may be its probative value. Depending on its content and relevance, the fact in issue provable by the statement may be of greater or lesser probative value in relation to the offence as a whole. Evidence admitted to establish the statement’s context may be highly prejudicial.

***E. The principles applied to the present case***

1. The learned Judge’s direction to the jury was meticulous and fair. However, with respect, in our view, he erred in failing to consider whether, examined in its context, the defendant’s response to Officer Chan was reasonably capable of constituting an admission of the relevant fact in issue. Moreover, if the appellant’s response was to be treated as admissible, his Lordship erred in failing to consider whether its prejudicial effect was disproportionate to its probative value.

E.1 Not reasonably capable of being a relevant admission

1. The fact in issue which the prosecution sought to prove in reliance on the appellant’s response was that “she *all along* had the knowledge that the dangerous drug was inside her suitcase”.[[41]](#footnote-41) In considering whether the appellant’s response was reasonably capable of being an admission that she had such knowledge, the context in which her statement was made is all important. It was a response given after her suitcase had been searched in her presence, having been emptied of its contents and its lining having been unzipped to reveal the two packets concealed within; after one of the packets had been sliced open and white powder extruded; after the test-tube test had been conducted and the Customs Officers heard by the appellant to say that it was positive; and after Officer Chan had arrested and cautioned the appellant telling her that she was suspected of having committed an offence under the Dangerous Drugs Ordinance. Only then was she asked what the white powder was, and only then did she say: “我諗呢一啲係毒品啩”, translated as “I suppose this is dangerous drug”, or in the post-record version: “我諗係毒品”, translated as “I think it is drug”.
2. Although there is a material difference in the meaning of the two versions (dealt with below), given the abovementioned context of the appellant’s response, made only after the Customs Officers had graphically demonstrated to her that the substance was heroin, we do not consider her statement reasonably capable of being an admission that she knew “all along” that she was carrying dangerous drugs in her suitcase. This case is akin to *R v Taylor*,[[42]](#footnote-42) where it was held that the defendant’s statement: “I feel like I’m going to jail”, made when his clothing was being seized from him, could fairly only be understood as him “verbalizing what was happening to him at that particular time rather than making an admission of guilt”.
3. This conclusion is reinforced by the content of the appellant’s response in the version to which Officer Chan testified, namely, where the appellant said: “我諗呢一啲係毒品啩”, translated as “I suppose this is dangerous drug.” The addition in this version of the final particle “啩”significantly qualifies the preceding words, as pointed out in a linguistic study of how such Cantonese final particles are translated in bilingual court proceedings published by Ester Leung and John Gibbons:[[43]](#footnote-43)

“Usually 啩/gwa/ is used to signify a degree of uncertainty about a preceding utterance, which allows the speaker to be non-committal concerning what s/he has said. The speaker is indicating compliance in general but at the same time reflecting some reservation. This meaning resource may be important in the testimony of witnesses who wish to register their uncertainty about the propositional content, particularly when a counsel puts a proposition to them for confirmation.”

1. The injection of this sense of uncertainty and the indication that hers was a non-committal response by the addition of the “啩” final particle reinforces the conclusion that the appellant’s statement was not intended to be an admission that she knew “all along” that she had dangerous drugs in her suitcase.

E.2 Probative value outweighed by prejudicial effect

1. As indicated above, our view is that the appellant’s response is incapable of constituting an admission of the fact of knowledge sought to be proved by the prosecution. Even if one were to take a different view and treat her statement as possibly being capable of being understood as such an admission, it would, given its context – especially in the version with the final particle “啩” attached – be so equivocal and qualified that its probative value would be extremely limited and would plainly be outweighed by the risk of unfair prejudice which would flow from leaving it to the jury as a possible admission on her part.
2. The trial judge not having considered exercising his residual discretion, we consider that, in so far as necessary, this Court should itself exercise such discretion and exclude that statement.

F. Retrial

1. It was held in Lau Ka Yee v HKSAR,[[44]](#footnote-44) that a conviction which is based on an equivocal admission with no other evidence in support will be quashed. It cannot however be said that the present case is one where the prosecution is able to tender no other evidence in support of its case against the appellant. Accordingly, while we are of the view that her appeal should be allowed and the conviction quashed because her purported admission was erroneously left to the jury, we would order that there be a re-trial. That is a course which counsel appearing on her behalf accepted would be justified in the event that she was to succeed on this appeal.

**Mr Justice Tang PJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ and Mr Justice Chan NPJ.

**Mr Justice Fok PJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ and Mr Justice Chan NPJ.

**Lord Millett NPJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ and Mr Justice Chan NPJ.

**Mr Justice Ribeiro PJ:**

1. The appellant’s appeal is unanimously allowed.  We order that her conviction be quashed and that there be a retrial.

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| --- | --- | --- | --- | --- | --- |
| (RAV Ribeiro) | (Robert Tang) | | | | (Joseph Fok) |
| Permanent Judge | Permanent Judge | | | | Permanent Judge |
|  | |  | |  | | |
| (Patrick Chan)  Non-Permanent Judge | | | (Lord Millett) Non-Permanent Judge | | | |

Mr Shahmim K. Khattak and Ms Holly Cheng, instructed by Annie Leung & Co., for the Appellant

Ms Anna YK Lai SC, DDPP (Ag.), of the Department of Justice, for the Respondent

1. Phoneticized as “*gwaa3*”. [↑](#footnote-ref-1)
2. As Mr Justice A Wong then was. [↑](#footnote-ref-2)
3. Summing-up pp 2 and 3. [↑](#footnote-ref-3)
4. Summing-up p 12. [↑](#footnote-ref-4)
5. *Ibid*. [↑](#footnote-ref-5)
6. Summing-up pp 12 and 13. [↑](#footnote-ref-6)
7. Lunn VP, Poon and D Pang JJ, CACC 81/2014 (31 March 2015). [↑](#footnote-ref-7)
8. Court of Appeal §15(1) and (2). [↑](#footnote-ref-8)
9. As Poon JA then was. [↑](#footnote-ref-9)
10. Court of Appeal §16. [↑](#footnote-ref-10)
11. Court of Appeal §21. [↑](#footnote-ref-11)
12. Court of Appeal §22. [↑](#footnote-ref-12)
13. Ribeiro, Tang and Fok PJJ, FAMC 35 of 2015 (26 May 2016). [↑](#footnote-ref-13)
14. Here, “statement” is used to include conduct or a combination of words and conduct. [↑](#footnote-ref-14)
15. (2014) 42 VR 651 at 663. [↑](#footnote-ref-15)
16. (1917) 12 Cr App R 191. [↑](#footnote-ref-16)
17. (1994) 1 NZCrimC 275. [↑](#footnote-ref-17)
18. 2008 NBQB 340. [↑](#footnote-ref-18)
19. At §29. [↑](#footnote-ref-19)
20. *Choudhary v R* [2013] VSCA 325 at §50 (citing *R v MMJ* (2006) 166 A Crim R 501 at §70) and at §56. [↑](#footnote-ref-20)
21. [1962] NZLR 974. [↑](#footnote-ref-21)
22. At 977. [↑](#footnote-ref-22)
23. *Ibid*. [↑](#footnote-ref-23)
24. At 978. [↑](#footnote-ref-24)
25. (1975) 132 CLR 258 at 261. [↑](#footnote-ref-25)
26. [2015] EWHC 628 (Admin). [↑](#footnote-ref-26)
27. [2008] WASCA 196. [↑](#footnote-ref-27)
28. At §5. [↑](#footnote-ref-28)
29. At §14. [↑](#footnote-ref-29)
30. At §191 and §195. [↑](#footnote-ref-30)
31. [2007] NSWCCA 142. [↑](#footnote-ref-31)
32. At §30. [↑](#footnote-ref-32)
33. (2000) 3 HKCFAR 168 at 178-179. [↑](#footnote-ref-33)
34. At 179. [↑](#footnote-ref-34)
35. Lau Ka Yee v HKSAR (2004) 7 HKCFAR 510 at §53. [↑](#footnote-ref-35)
36. [1962] NZLR 974, discussed in Section D.2a above. [↑](#footnote-ref-36)
37. [2008] WASCA 196 and [2007] NSWCCA 142, discussed in Section D.2b above. [↑](#footnote-ref-37)
38. Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ (2010) 13 HKCFAR 27 at §120. [↑](#footnote-ref-38)
39. (1936) 55 CLR 499 at 504-505. [↑](#footnote-ref-39)
40. *R v Cook* (1959) 2 QB 340; *Wong Ching Chu v R* [1957] 2 HKLR 61. [↑](#footnote-ref-40)
41. Summing-up p 13. Italics supplied. [↑](#footnote-ref-41)
42. 2008 NBQB 340, discussed in Section D.1 above. [↑](#footnote-ref-42)
43. Ester Leung and John Gibbons, “*Interpreting Cantonese utterance-final particles in bilingual courtroom discourse”* in “Interpreting Chinese, Interpreting China”, Ed Robin Setton (John Benjamins Publishing company) at p 97. [↑](#footnote-ref-43)
44. (2004) 7 HKCFAR 510 at §53. [↑](#footnote-ref-44)