**FACC No. 13 of 2023**

**[2024] HKCFA 7**

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

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 13 OF 2023 (CRIMINAL)**

(ON APPEAL FROM HCMA NO. 21 OF 2022)

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BETWEEN

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|  | **HKSAR** | **Respondent** |
|  | **and** |  |
|  | **HUI LAI KI (許麗琪)** | **Appellant** |

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| Before: | Chief Justice Cheung, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Lam PJ and  Lord Collins of Mapesbury NPJ |
| Date of Hearing: | 28 February 2024 |
| Date of Judgment: | 3 April 2024 |

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|  | **JUDGMENT** |  |

Chief Justice Cheung:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Ribeiro PJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

A. Introduction

1. Part VII of the Magistrates Ordinance (Cap.227) (“the MO”) makes provisions for appeals from magistrates to a judge of the Court of First Instance. In particular, section 113 provides for a right of appeal for defendants convicted after trial before a magistrate. This appeal arises from such a case, involving the appellant’s conviction by a magistrate for theft,[[1]](#footnote-1) in which her appeal to a judge was dismissed.[[2]](#footnote-2)
2. The question of law for which leave to appeal was granted by the Appeal Committee[[3]](#footnote-3) is as follows:

“On an appeal to the Court of First Instance against conviction by a magistrate pursuant to section 113 of the Magistrates Ordinance, in what circumstances is the court bound to re-assess the evidence upon which the conviction was based and when is the court justified in overturning such conviction on the basis of its own view of the available evidence?”

1. Leave to appeal was also granted on the basis that substantial and grave injustice has been done. The two grounds on which leave to appeal was granted on this basis will be addressed further below.

A.1 The essential facts

1. The appellant was charged with theft[[4]](#footnote-4) of various items,[[5]](#footnote-5) with an aggregate price of HK$648.70, from a grocery shop called “Freshmart” located in the SOGO Department Store in Causeway Bay. At about 8.40pm on the evening of 14 July 2021, she was observed by a member of the shop’s security staff with those items in a shopping trolley. She pushed the trolley past the cashier in the shop and went to a separate bakery concession called DONQ. She selected and paid for some bread in DONQ and pushed the shopping trolley to an area opposite the cashier. She put the items from the trolley into her bags and left the shop without paying for them. She was then intercepted by the shop’s security staff.
2. After she was intercepted, the appellant said her mind was occupied and that she forgot to pay for the items. She told the same thing to the police shortly afterwards. When she was later interviewed at the police station under caution, the appellant said that she was in a rush to go home for dinner, that after she had paid for the bread she thought she had already paid for the items, that she forgot to pay due to momentary oversight and absent-mindedness and that she had no intention to steal the items.

1. The appellant testified before the magistrate. She was 41 years of age at the time of the trial and had no criminal record. She had a bachelor’s degree and had worked in her father’s company. After she married in 2011, she stopped working to become a housewife and mother. She looked after her 9-year-old daughter and 4-year-old son. Her husband was an IT manager and the main breadwinner of the family. On 12 July 2021, two days before her visit to the grocery shop, she had received her first dose of COVID-19 vaccine. This caused her muscle pain, fatigue and dizziness for the next few days, although none of the symptoms were serious. On 13 July 2021, she had attended her daughter’s school and was very unhappy to learn that her daughter would have to repeat a year as her grades were poor. In addition, her mother was admitted to the Hong Kong Sanatorium & Hospital for endoscopic bowel surgery on 13 July 2021 and discharged the following day. The appellant had gone shopping after helping her mother with her discharge from hospital. She testified that she did not pay for the items because there were too many things going on in her family and that caused her to forget to do so.

A.2 The magistrate’s findings

1. The magistrate did not believe the appellant’s testimony. He noted that she had not mentioned in her record of interview under caution that she was bothered by tiredness from her vaccination, or her daughter having to repeat a year in school, or her mother’s discharge from hospital after surgery. He considered that if these matters had really made her forget to pay, she would have mentioned them then.
2. On a consideration of the evidence including the CCTV footage of the incident, the magistrate found that the appellant misappropriated the items dishonestly and therefore convicted her of their theft. He sentenced her to 12 months’ probation for the offence.

A.3 The appeal to the Court of First Instance

1. On appeal to the Court of First Instance, it was contended on behalf of the appellant that the magistrate had erroneously rejected her evidence and had not adequately considered the CCTV footage of the incident and the evidence favourable to her.
2. The judge disagreed and held that the magistrate had fully taken into account all the matters relied upon by the appellant, including the CCTV footage, for saying that she had been distracted and forgot to pay for the items. He questioned whether the appellant was really in a rush to go home for dinner, since it was already after 7.30pm, the family’s usual dinner time, when she finished helping with her mother’s discharge from hospital, and that rather than going home immediately she went shopping until 8.40pm. The judge held that the magistrate’s ultimate rejection of the appellant’s explanation as to why she forgot to pay was “a conclusion he [i.e. the magistrate] could reach”.[[6]](#footnote-6)
3. The judge concluded his judgment as follows:

“This is an appeal purely on facts. The appellant put forward various points and hoped that I would change the verdict of the lower court, but as I have said many times, I would not intervene the findings on facts unless I am satisfied that the findings of the magistrate are plainly wrong, illogical, or inherently improbable.

None of the above-mentioned condition is in this case. There were insufficient grounds for appeal. The appeal is dismissed.”[[7]](#footnote-7)

A.4 The appeal to this Court

1. That part of the CFI Judgment quoted above gives rise to the question of law raised for the determination of the Court of Final Appeal in this appeal. In essence, the question is whether the judge applied the correct approach to the appeal before him.
2. The parties to this appeal answer that question differently. It is contended on behalf of the appellant that the judge’s approach was wrong and that, on an appeal under section 113 of the MO, he should have made his own assessment of the available evidence regardless of whether any specific error on the part of the magistrate was identified. It is further contended that a judge is justified in overturning a conviction if of the view, on the available evidence, that an appellant’s guilt has not been proved beyond reasonable doubt.[[8]](#footnote-8)
3. For the respondent, it is contended that, where the ground of appeal concerns a factual issue in relation to the sufficiency of evidence to support the guilt of an appellant, the appellate judge is bound to re-assess the relevant evidence to see whether an error was made by the magistrate. It is further contended that the judge is justified in overturning the conviction only on finding some material legal, factual or discretionary error made by the magistrate.[[9]](#footnote-9)
4. In addition, it is contended on behalf of the appellant that there has been substantial and grave injustice in that:
   1. The judge departed from an established norm by requiring an error to be identified before intervening on an appeal by way of a rehearing; and
   2. The appellant’s evidence was wrongly rejected on the basis of alleged inconsistencies.[[10]](#footnote-10)

B. The question of law

B.1 Appellate jurisdiction

1. As this Court has previously observed, courts do not have inherent appellate jurisdiction and appeals are creatures of statute: see *Solicitor v Law Society of Hong Kong & Secretary for Justice (Intervener)*[[11]](#footnote-11) and *HKSAR v Cheng Chee Tock Theodore*.[[12]](#footnote-12) The criminal jurisdiction of the Court of First Instance includes the appellate jurisdiction conferred on it by law: High Court Ordinance (Cap.4) section 12(3)(b).[[13]](#footnote-13) Section 113 of the MO is one such law, sub-section (1) of which provides that:

“Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge.”

1. Not all statutory appeal provisions are the same. There are different types of appeal, with different appellate processes involved in each. In their joint judgment in *Fox v Percy* (2003) 214 CLR 118, Gleeson CJ, Gummow J and Kirby J adopted the classification of Mason J (as he then was) in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 which distinguished between four categories of appeal, namely:

“(i) an appeal stricto sensu, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing de novo.”[[14]](#footnote-14)

1. The distinction between the different types of appeal is further elucidated in the judgment of Dawson J in the High Court of Australia in *Harris v Caladine* (1991) 172 CLR 84 (cited in this Court’s judgment in *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70 at [18]) in the following terms:

“A hearing de novo may be contrasted with an appeal stricto sensu and an appeal by way of rehearing. In an appeal stricto sensu the question is whether, upon the material before the tribunal below, the conclusion which was reached was correct. An appeal by way of rehearing involves the rehearing of the matter as at the date of the appeal, but upon the evidence called before the tribunal below, subject to a power to receive further evidence. On an appeal by way of rehearing the rights of the parties must be determined by reference to the circumstances, including the law, as they exist at the time of the rehearing. But an appeal by way of rehearing does not call for a fresh hearing as does a hearing de novo; the appeal court does not hear the witnesses again …”.[[15]](#footnote-15)

1. In this jurisdiction, in his judgment in *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383 at [21] to [24] McWalters J (as he then was) expanded on the distinctions between the different forms of appeal and how each is determined. The position may be summarised thus:
   1. An appeal by hearing *de novo* is a retrial. As such, the trial magistrate’s statement of findings is therefore irrelevant. On an appeal in the nature of a retrial, live evidence is called, findings of fact made, credibility of witnesses determined and issues of law resolved, culminating in the determination of the guilt or innocence of the defendant by the appellate tribunal.
   2. An appeal by way of rehearing proceeds with the appeal being conducted on the transcript of evidence in the court below, sometimes supplemented by further evidence. This places some limitations on the appellate court’s ability to make findings of fact and determinations of witnesses’ credibility. The appellate court is also entitled to have regard to the magistrate’s statement of findings, which will inform it of what determinations were made by the magistrate regarding the credibility of witnesses and why they were made. Subject to those limitations, the appellate court in an appeal by way of rehearing must ultimately come to its own view on the guilt or innocence of the defendant.
   3. An appeal in the strict sense is quite different to either an appeal by hearing *de novo* or an appeal by way of rehearing. Such an appeal requires that an error be demonstrated before the appellate court can act. The appellate court acts as a court of error and can only substitute its findings for what the trial judge found if it is demonstrated that the trial judge erred.
2. It will be necessary to return to consider McWalters J’s judgment in *HKSAR v Ip Chin Kei* in greater detail later in this judgment. However, for present purposes, it is important to note the distinctions between these different types of appeals.

B.2 The nature of an appeal under MO section 113

1. Where a statute provides for an “appeal”, it is a matter of statutory interpretation to determine what meaning is to be borne by that term.[[16]](#footnote-16) In this jurisdiction, the Court of Final Appeal has held that an appeal under section 113 “is by way of rehearing on the evidence before the trial court supplemented by such further evidence as the intermediate appellate court may admit under its statutory power to do so”: *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70 at [19].
2. The Court arrived at this conclusion taking into account the fact that an appeal under section 113 allows the depositions before the magistrate to be admissible as evidence of the evidence given in the magistrate’s court (section 118(1)(a)), that it authorises the reception of fresh evidence (section 118(1)(b)), and that it empowers the judge on appeal to make whatever order the judge thinks just (section 119(1)(d)). These were said to be provisions of the sort that are “the *indicia* of an appeal by way of rehearing”.[[17]](#footnote-17)
3. In this respect, a section 113 appeal may be contrasted with a case stated appeal under section 105 of the MO, which is not an appeal by way of rehearing but instead is an appeal in the strict sense, i.e. “a review by the appellate court on the limited ground that there is an error of law or an excess of jurisdiction”: see *Li Man Wai v Secretary for Justice* (2003) 6 HKCFAR 466 at [18].
4. The statement of principle in *Chou Shih Bin v HKSAR* as to the appropriate approach to an appeal under section 113 has been described as “clearly established”: *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383 at [18]. Neither party to this appeal sought to suggest that *Chou Shih Bin v HKSAR* was wrong in its construction of the nature of an appeal under section 113. The difference between the parties concerns the principles and approach to be adopted by a judge of the Court of First Instance in determining an appeal by way of rehearing under that section.
5. It is recognised that a judge hearing an appeal from a magistrate by way of rehearing is subject to limitations arising from the fact that he or she does not have the advantage of receiving the evidence of witnesses at first-hand. This was noted by the Court in *Chou Shih Bin v HKSAR* at [19] and elaborated upon by McWalters J in *HKSAR v Ip Chin Kei* at [29]-[31]. The two limitations in an appeal by way of rehearing are, first, that the appellate court is dealing with the matter on the papers and so does not receive the evidence at first-hand and, secondly, that it does not usually conduct the rehearing on the whole of the evidence before the magistrate. Each of those limitations are proper reasons suggesting the need to exercise caution when considering findings of fact based on oral testimony and I would respectfully endorse the helpful discussion of each in McWalters J’s judgment in *HKSAR v Ip Chin Kei* at [32]-[35].
6. Notwithstanding those limitations, however, it remains the duty of the appellate court on an appeal by way of rehearing to come to its own conclusion on disputed issues of fact or law. This is clear from the judgment in *Chou Shih Bin v HKSAR* at [19] where Bokhary PJ (with whom the other members of the Court agreed) held:

“[The Deputy Judge] may not have appreciated that his jurisdiction was ‘at large’ and that, while he had to bear in mind that he did not enjoy the advantage of having received the evidence at first-hand, he was entitled, indeed bound, to come to his own conclusion about the appellant’s knowledge of the existence of the gun and cartridge in his bag when he presented it for security X-ray screening.”

1. In *Chou Shih Bin v HKSAR*, the critical issue concerned the defendant’s state of knowledge of the existence of a controlled firearm and ammunition in his luggage when seeking to board an aircraft. The magistrate had disbelieved the prosecution witness whose evidence was relied on to demonstrate the defendant knew the firearm and ammunition were in his bag but nevertheless convicted the defendant. On appeal, the judge took the view that the magistrate was entitled to convict by inferring knowledge from the circumstances. The Court of Final Appeal held that the judge had failed to discharge his duty to come to his own conclusion about the defendant’s state of knowledge. Since the Court of Final Appeal took the view the circumstances were inadequate to support an inference of guilty knowledge, the appeal was allowed and the conviction quashed.
2. The principle that a judge hearing an appeal from a magistrate under section 113 must come to his or her own conclusion on the rehearing is neatly encapsulated in *HKSAR v Ip Chin Kei* as follows:

“Absent the appellate court identifying any error by the Magistrate and absent any of the grounds of appeal succeeding, the appellate court must still perform its statutory duty of conducting a rehearing. This requires the appellate court to be satisfied that on the evidence adduced by the prosecution the guilt of the appellant has been proven beyond reasonable doubt, failing which the appeal must be allowed.”[[18]](#footnote-18)

B.3 Is an error required to be demonstrated on a rehearing?

1. In *HKSAR v Ip Chin Kei*, McWalters J carefully analysed the way in which the appellate duty under section 113 was to be performed, distinguishing between whether the complaint is that the magistrate erred in law rather than erred in fact. For present purposes, it is unnecessary to consider the discussion in that judgment of the position where the appellate court considers the magistrate has erred in law and the issue which McWalters J suggested might be addressed by the Court of Final Appeal on another occasion.[[19]](#footnote-19)
2. In relation to errors of fact, McWalters J considered the legal principles underlying the approach of an appellate court to reviewing findings on credibility by reference to two Court of Final Appeal decisions, namely *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336 and *HKSAR v Egan* (2010) 13 HKCFAR 314, and concluded that this laid down a “plainly wrong” test for interfering with such findings. This principle was stated by his Lordship as sub-paragraph (5) of his summary of the applicable principles (to which summary I will return later in this judgment) as follows:

“The appellate court will only depart from a magistrate’s finding of fact or determination of a witness’s credibility if satisfied that it is plainly wrong.”[[20]](#footnote-20)

1. For the following reasons, I do not consider that the “plainly wrong” test is the appropriate test for appellate interference with findings of fact or credibility on an appeal under section 113.
2. There is no *a priori* reason to adopt, in relation to a section 113 appeal challenging a finding of fact or credibility, the same test (as in *Ting Kwok Keung v Tam Dick Yuen*) that is applied by the Court of Appeal in its civil jurisdiction when hearing a civil appeal. All the more so, there is no reason to adopt the test (as in *HKSAR v Egan*) applied in respect of criminal appeals from the District Court to the Court of Appeal, which are not appeals by way of rehearing but are instead appeals in the strict sense. As a matter of jurisdiction, neither of those types of appeal is founded on section 113 and, with respect, I do not agree with the premise in *HKSAR v Ip Chin Kei* that:

“The nature of the rehearing conducted by the Court of Appeal in its civil jurisdiction and the nature of the rehearing of a Court of First Instance judge are, to all intents and purposes, the same.”[[21]](#footnote-21)

The nature and context of an appeal to the Court of Appeal in its civil jurisdiction is quite different to a magistracy appeal to a judge of the Court of First Instance, not least because the latter appeal arises in a criminal jurisdiction where the burden of proof of guilt is based on the more exacting beyond reasonable doubt standard.

1. More fundamentally, the “plainly wrong” test is inconsistent with the principle that it is the judge’s duty to come to his or her own conclusion on the question of whether an appellant’s guilt is proved beyond reasonable doubt on the evidence before the court on the appeal. That principle has been consistently applied by this Court in respect of final appeals from magistracy appeals under section 113 since *Chou Shih Bin v HKSAR* and it would represent a significant qualification of that principle to adopt the approach urged upon us by the respondent.
2. It is true, as the respondent points out, that there are decisions of this Court which appear to suggest that the identification of an error by the magistrate is necessary before an appeal against conviction will be allowed. The decisions relied upon are *HKSAR v Ching Kwok Yin* (2000) 3 HKCFAR 387 and *Ko Man Chun v HKSAR* (2010) 13 HKCFAR 123. In the latter case, the Court said:

“The test, as Sir Alan Huggins NPJ said in *Ching Kwok Yin v. HKSAR* (2000) 3 HKCFAR 387 at p.390H, is ‘whether there has been in the Magistrates’ Court an error which makes it just that the appeal should be allowed and the conviction set aside’. That goes to whether the conviction was inevitable so that the error was harmless.”[[22]](#footnote-22)

1. However, it is important to understand the context of the remarks in those cases. Both were cases in which it was contended there had been substantial and grave injustice. In each case, it was concluded that there had been a serious error and the Court of Final Appeal was considering whether the conviction could be upheld notwithstanding the error. Those cases were therefore considering the position from a wholly different perspective to that in which an appellant is seeking to quash a conviction simply on the basis that the evidence is insufficient to establish guilt beyond reasonable doubt. Neither case is authority for the proposition that to allow an appeal and quash a conviction there must be an error relating to a finding of fact or credibility in the “plainly wrong” sense argued by the respondent.
2. Nor is either case authority against the proposition that, on an appeal by way of rehearing, if the judge comes to a different view on the evidence before the court, that itself is not an error which may require the judge to reverse the decision of the magistrate to convict. In an appellate context, the meaning of the term “error” has been said to have no precise meaning and may amount to the satisfaction of the appellate judge that the trial judge was wrong and should be corrected: see *AG v Director of Public Prosecutions* [2015] NSWCA 218 per Basten JA at [34].[[23]](#footnote-23) Such error, in the broad sense of that word, suffices, in my view, to justify appellate intervention in an appeal under section 113.
3. Indeed, *Chou Shih Bin v HKSAR* itself provides such an example. The judge having failed to reach his own conclusion on the issue of knowledge, it fell to the Court of Final Appeal to do so. The Court concluded that the evidence was insufficient to establish knowledge beyond reasonable doubt[[24]](#footnote-24) and therefore allowed the appeal and quashed the conviction. That appellate conclusion, differing from the magistrate, was a sufficient error to justify a reversal of the decision to convict.
4. In its printed case, the respondent sought to support the contention that, on an appeal under section 113, a judge is limited to reversing a magistrate’s finding of fact on the basis of error by reference to a number of Australian decisions discussing appellate review, in particular where that review is by way of rehearing.[[25]](#footnote-25)
5. It is unnecessary to enter into any detailed discussion of those cases, none of which were addressed by either party in their oral submissions in this appeal. Each of the cases is distinguishable for one or more reasons. None of them addresses the scope of appellate review under section 113. Instead, the Australian decisions are each concerned with the particular statute giving rise to the appellate jurisdiction under consideration. In many of the cases cited, the decision under appeal was one of discretion, the nature of which decision necessarily involves different appellate principles. In short, none of the cases cited by the respondent supports a conclusion that, on an appeal under section 113, the judge can only reverse a finding of fact or credibility on a “plainly wrong” basis or quash an appeal on the basis of error otherwise than in the sense of the court forming a different view on the issue of whether the prosecution has discharged its burden of proving guilt beyond reasonable doubt.
6. In his oral submissions on behalf of the respondent, Mr Jonathan Man DDPP[[26]](#footnote-26) introduced a distinction (not referred to in the Respondent’s Printed Case) between a section 113 appeal where further evidence is admitted and such an appeal where no such evidence is admitted. It was submitted that, whilst it is not necessary to show an error before a judge could depart from a magistrate’s finding of fact in the former situation, it is in the latter. In my view, the distinction is one without any material difference and there is no principled basis for introducing a different approach to a section 113 appeal depending on whether a finding is challenged on the basis of additional evidence or not.

B.4 Answering the question of law and revisiting Ip Chin Kei

1. It follows from the discussion above that, in answer to the question posed by the Appeal Committee, a judge hearing an appeal under section 113 of the MO is always obliged to re-assess the evidence upon which the conviction was based when rehearing the matter.
2. There are, however, limits to the extent of the rehearing. The evidence the judge will have to re-assess is not all of the evidence before the magistrate but rather “only so much of the evidence as the parties determine is necessary for them to discharge their respective burdens” and which has been included in the appeal bundle with the agreement of the Registrar in accordance with the relevant Practice Direction:[[27]](#footnote-27) see *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383 at [34]-[35]. It is therefore important that the parties properly prepare any section 113 appeal by arranging for the relevant transcripts of evidence to be placed before the judge.
3. In addition, the material before the judge will include the magistrate’s statement of findings[[28]](#footnote-28) and the grounds of appeal, the relevance of the latter being to inform the judge of the basis on which it is said the prosecution has not established guilt to the necessary criminal standard of proof: see *ibid.* at [63]-[64]. The appeal will focus on the specific alleged errors (in the broad sense described above) and will not be a re-litigation of the entire matter.
4. In conducting the rehearing, the judge will have to consider the evidence that has been placed before the court and reach his or her own conclusions on relevant issues. This may entail the judge considering findings made by the magistrate, whether of primary fact or inference, and reaching a different view. Naturally, in relation to primary facts, the judge will have regard to the customary caution to be exercised where there is any disadvantage in not seeing the witnesses first-hand, but otherwise he or she is duty bound to come to their own conclusion as to whether the guilt of the appellant has been proved beyond reasonable doubt.[[29]](#footnote-29)
5. Accordingly, omitting the proposition listed in sub-paragraph (5) of McWalters J’s succinct summary of the applicable principles in *HKSAR v Ip Chin Kei* at [65], I would adopt and reiterate those principles as follows:
   1. An appeal under section 113 of the MO is conducted by way of rehearing on the evidence before the trial court supplemented by such further evidence as the appellate court might admit under its statutory power to do so.
   2. Each party bears its respective burden – the appellant to uphold the appeal and the respondent to uphold the conviction – and the parties, subject to the overriding supervision of the Registrar, or ultimately the appellate judge, will determine the contents of the appeal bundle bearing in mind the burdens they have to discharge.
   3. The magistrate’s statement of findings will form part of the appeal bundle.
   4. The grounds of appeal will inform the appellate court of those areas where the appellant will seek to persuade the appellate court to depart from the magistrate on findings of fact or law when conducting the rehearing.
   5. Error by the magistrate, especially an error constituting a material irregularity, may lead to the appellate court allowing the appeal and quashing the conviction.
   6. The test in determining whether an error by the magistrate should lead to the appeal being allowed and the conviction quashed is whether it is just for such an order to be made.
   7. Absent the appellate court identifying any error by the magistrate and absent any of the grounds of appeal succeeding, the appellate court must still perform its statutory duty of conducting a rehearing. This requires the appellate court to be satisfied that on the evidence adduced by the prosecution the guilt of the appellant has been proven beyond reasonable doubt, failing which the appeal must be allowed.
6. Whether a judge has properly discharged the appellate duty of rehearing will be determined by reference to the judge’s reasons for his or her decision. This is a matter of substance rather than form. References in a judgment to the magistrate not being in error or plainly wrong will not necessarily lead to a conclusion that the judge applied an inappropriate standard of appellate review if it is clear that the judge has in fact conducted his or her own assessment of the adequacy of the evidence before the court to support the conviction. Ultimately, the judge may agree with the magistrate’s conclusion on a disputed issue of fact material to the conviction under appeal but it will not be sufficient for the judge simply to say that the magistrate’s finding was one the magistrate could make or one that was open to the magistrate. It must be clear that the judge has in fact conducted a rehearing and reached their own conclusion on the issue in question. If he or she does not share that conclusion, the judge is obliged to allow the appeal and quash the conviction on the basis that the prosecution will not have discharged its burden of proof.
7. It bears repeating, however, that any further appeal from a judge’s conclusion on a rehearing affirming a magistrate’s decision on a disputed issue of fact material to the conviction will be limited. Since appeals from a single judge on a magistracy appeal to the Court of Final Appeal do not operate to provide an opportunity to re-argue factual issues for a third time, leave to appeal will be available only on the basis of substantial and grave injustice. As has been stated previously, such leave will only be granted exceptionally: see *So Yiu Fung v HKSAR* (1999) 2 HKCFAR 539 at pp.541-542; *HKSAR v Sham Man Wai* (2014) 17 HKCFAR 825 at [7]-[8].

C. Applying the correct approach in this appeal

1. Applying the correct approach discussed above, it was incumbent on the judge in the present case to conduct a rehearing of the contested issue before him. That issue was whether the appellant dishonestly intended to misappropriate the items she was accused of shoplifting so that she had the requisite mental state for the offence. The issue was one of fact, although it was a matter of inference rather than primary fact.
2. The judge’s approach to this issue is set out above in Section A.3 of this judgment.
3. As will be apparent, his approach was not, with respect, a proper rehearing of the issue of fact concerning the appellant’s state of mind. It was inappropriate for the judge simply to say that finding of dishonesty was “a conclusion [the magistrate] could reach” and that he could only intervene if satisfied the finding was “plainly wrong, illogical, or inherently improbable”. If such error were involved, he would of course have had to reverse the finding of fact but on an appeal by way of rehearing that was the wrong test to apply. Instead, the judge’s duty was to come to his own conclusion about the appellant’s intention when leaving the grocery store without paying for the items in question. This required him to go on to weigh the relevant evidence before him and to reach his own view on that evidence as to whether an intention to steal was proved beyond reasonable doubt.

C.1 Conducting a proper rehearing

1. As in *Chou Shih Bin v HKSAR*, since the judge did not undertake that task, it falls to this Court to do so.
2. Here, the material facts were undisputed and unremarkable, being a common occurrence, namely a person shopping in a grocery shop or supermarket who put items from the shop into their shopping trolley and who then bagged the items and left without paying. In some cases, such a person will have taken the items with the dishonest intention not to pay for them. In others, the person will have simply forgotten to pay. That was the issue that was posed for the magistrate to decide on the evidence before him and for the judge to consider on the rehearing.
3. In this particular case, the appellant was a person of clear record, who had no apparent reason to engage in shoplifting. The store security staff said the appellant appeared nervous but that is not a feature of her behaviour displayed in the CCTV footage of the appellant. She is not seen looking around as if to see if she was being observed. She even took the trouble to wipe the outside of the yoghurt container before putting it in her trolley. In short, it is not clear one way or the other whether in acting in such a composed manner the appellant was just behaving naturally or playing to the camera.
4. When she was taken to the security room where the items were removed from her bags, she explained to the security staff that she was preoccupied and forgot to pay. That she did not immediately say she forgot to pay when she was intercepted is not particularly significant, since there is nothing to show that she was then made aware of any accusation against her, specifically that she had stolen anything.
5. The appellant passed the cashier in the grocery shop twice. The first time was when she saw the bakery and went to buy bread for her daughter, which she paid for. She then passed the cashier for a second time having just paid for the bread. At this point, she testified, she was preoccupied because of her reaction to her COVID-19 vaccination, her daughter’s poor school performance and her mother’s medical condition. She thought she had already paid and was in a hurry to go home given the hour.
6. The facts underlying the three reasons she gave for being preoccupied were agreed.[[30]](#footnote-30) The appellant’s explanation for not paying for the items is therefore supported by independent facts which might plausibly have constituted possible causes of distraction and absent mindedness that made her forget to pay. With respect to the magistrate, there was no inconsistency in her evidence. The reasoning that there was because she did not mention them in her police cautioned statement is questionable. She was emotional and crying during her interview, but that reaction could have been entirely consistent with an innocent person’s reaction to being arrested and accused of shoplifting. The fact that she did not mention her tiredness from the COVID-19 vaccination and the upset due to her daughter’s school results and her mother’s hospitalisation do not amount to inconsistencies. They were expanded explanations for her distraction and absent mindedness.
7. The reasons the appellant gave might have been true reasons for forgetting to pay. It is true that the magistrate said he disbelieved the appellant but there was no substantial reason to disbelieve her. Moreover, and importantly, it was never put to the appellant in cross-examination that the reasons proffered by her in her testimony for being distracted were inconsistent with her initial explanation. In the absence of such a challenge to her evidence, the magistrate was, for this further reason, not justified in concluding that she had been inconsistent.
8. All that being the case, there is, in my view, reasonable doubt as to whether the appellant intended to steal. The appellant’s evidence could be true and, if so, she did not have the requisite intention to commit the offence of theft. As such, I would give her the benefit of the doubt and, accordingly on a rehearing, would conclude that the prosecution has not discharged the burden of proving beyond reasonable doubt that the appellant is guilty of the offence charged.

C.2 Substantial and grave injustice

1. In light of the conclusion reached above that the appellant’s conviction cannot be sustained on a rehearing, it is unnecessary to deal at length with the contention that there has been substantial and grave injustice. It suffices to note that the judge’s failure to carry out a proper rehearing, as explained above, and the mistaken premise of the magistrate that the appellant’s evidence was inconsistent with her cautioned statement are two departures from accepted norms, namely (i) the duty to conduct a proper rehearing, and (ii) a misapprehension of the evidence, which resulted in substantial and grave injustice to the appellant. These departures from established norms would have led to the same result.

D. Disposition of the appeal

1. For the reasons set out above, I would therefore allow the appeal and quash the appellant’s conviction.

Mr Justice Lam PJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Lord Collins of Mapesbury NPJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Chief Justice Cheung:

1. Accordingly, the appellant’s appeal is unanimously allowed and her conviction quashed.

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| (Andrew Cheung)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
| --- | --- |
| (M H Lam)  Permanent Judge | (Lord Collins of Mapesbury)  Non-Permanent Judge |

Mr Bruce Tse SC, Mr Adrian So and Ms Manalie Chan, instructed by A Lee & Partners, for the Appellant

Mr Jonathan Man DDPP and Ms Human Lam SPP, of the Department of Justice, for the Respondent

1. ESCC 1864/2021 before Deputy Magistrate Gary Chu Man-hon, Reasons for Verdict dated 25 November 2021. [↑](#footnote-ref-1)
2. HCMA 21/2022 before Andrew Chan J, Judgment dated 26 August 2022; [2022] HKCFI 2599 (“CFI Judgment”). [↑](#footnote-ref-2)
3. FAMC 38/2022 before Ribeiro Acting CJ, Fok PJ and Lam PJ, Determination dated 8 November 2023; [2023] HKCFA 35 (“Leave Determination”). [↑](#footnote-ref-3)
4. Contrary to section 9 of the Theft Ordinance (Cap.210). [↑](#footnote-ref-4)
5. Viz. one pack of chocolate cake, three packs of noodles, six packs of milk, one pack of grapes, one pack of vegetables and one pack of yoghurt. [↑](#footnote-ref-5)
6. CFI Judgment at [13]. [↑](#footnote-ref-6)
7. *Ibid.* at [14]-[15]. [↑](#footnote-ref-7)
8. The Amended Appellant’s Case at [61]. [↑](#footnote-ref-8)
9. Respondent’s Printed Case at [44]. [↑](#footnote-ref-9)
10. Leave Determination at [2]. [↑](#footnote-ref-10)
11. (2003) 6 HKCFAR 570 at [31]. [↑](#footnote-ref-11)
12. (2015) 18 HKCFAR 292 at [13]. [↑](#footnote-ref-12)
13. *HKSAR v Tin’s Label Factory Ltd* (2008) 11 HKCFAR 637 at [17]. [↑](#footnote-ref-13)
14. (2003) 214 CLR 118 at [20]. [↑](#footnote-ref-14)
15. (1991) 172 CLR 84 at p.125. [↑](#footnote-ref-15)
16. *Fox v Percy* (2003) 214 CLR 118 at [20]; *Reg. v Lam Kau* [1962] HKLR 234 at p.240. [↑](#footnote-ref-16)
17. (2005) 8 HKCFAR 70 at [17]. [↑](#footnote-ref-17)
18. [2012] 4 HKLRD 383 at [65(8)]; a principle affirmed in the Appeal Committee of this Court’s Reasons for Determination in *HKSAR v Finan Boris Anthony* (2020) 23 HKCFAR 220 at [16]. [↑](#footnote-ref-18)
19. [2012] 4 HKLRD 383 at [42]. [↑](#footnote-ref-19)
20. *Ibid.* at [65(5)]. [↑](#footnote-ref-20)
21. *Ibid.* at [47]. [↑](#footnote-ref-21)
22. (2010) 13 HKCFAR 123 at [8]. [↑](#footnote-ref-22)
23. See, similarly, *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 per Elias CJ at [16]; *Yusuke (David) Sena v New Zealand Police* [2019] NZSC 55 per Young J at [38]; and *McNab v Director of Public Prosecutions (NSW)* (2021) 293 A Crim R 463 per Bell P at [25]. [↑](#footnote-ref-23)
24. (2005) 8 HKCFAR 70 at [21]. [↑](#footnote-ref-24)
25. Respondent’s Printed Case at Section C4 and C5. These included: *CDJ v VAJ* (1998) 197 CLR 172; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; *Fox v Percy* (2003) 214 CLR 118; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; *R v Ford* (2009) 273 ALR 286; *Allesch v Maunz* (2000) 203 CLR 172; and *Mace v Murray* (1955) 92 CLR 370. [↑](#footnote-ref-25)
26. Appearing with Ms Human Lam, SPP. [↑](#footnote-ref-26)
27. Practice Direction 9.6 “Magistracy Appeals in the Court of First Instance” at [5]. [↑](#footnote-ref-27)
28. MO section 116(1); *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383 at [59]. [↑](#footnote-ref-28)
29. *HKSAR v Chow Yee-Nin* [2019] HKCFI 1107 and *HKSAR v Yeoh Poh Lean* [2022] HKCFI 1962 were cited as examples of magistracy appeals which were allowed, where the judge simply reached a different conclusion to the magistrate on the evidence without identifying any error on the part of the latter: Amended Appellant’s Case at [67]-[68]. [↑](#footnote-ref-29)
30. Admitted Facts (2) (adduced as P1(2)) dated 25 November 2021. [↑](#footnote-ref-30)