### **FAMC No. 4 of 2023**

[2024] HKCFA 19

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**MIsCELLANEOUS PROCEEDINGS nO. 4 OF 2023 (cRIMINAL)**

(ON APPLICATION FOR LEAVE TO APPEAL FROM

HCCC NO. 200 OF 2021)

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**BETWEEN**

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| **HKSAR** | **Respondent** |
| **and** |  |
| **CHEN FEN (陳奮)** | **Applicant** |

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| Appeal Committee: | Mr Justice Ribeiro PJ, Mr Justice Fok PJ and  Mr Justice Lam PJ |
| Date of Hearing and Determination:  Date of Reasons for Determination: | 5 July 2024  11 July 2024 |

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| **REASONS FOR DETERMINATION** |

**Appeal Committee:**

1. The applicant (“A”) was charged in the alternative with attempted rape and indecent assault. He was acquitted when the prosecution offered no evidence, but Mrs Justice Barnes refused him costs.[[1]](#footnote-1) He seeks leave to appeal against such refusal on the basis of substantial and grave injustice, raising two grounds, namely:
2. that Barnes J had made a mistake in finding that the prosecution had reason to believe that the complainant (“X”) would testify at the trial on the erroneous basis that X had appeared and given evidence at the preliminary inquiry, when she had not done so (“Ground 1”); and
3. that there was insufficient evidence that A had brought suspicion upon himself, the Judge having wrongly concluded that independent evidence relied upon by the prosecution supported the allegations made by X (“Ground 2”).
4. As to Ground 1, the prosecution accepts that Barnes J did in fact make the relevant error.[[2]](#footnote-2)
   1. X had not testified at the preliminary inquiry because of her psychiatric condition, said to involve post-traumatic stress. The psychiatrist was, however, hopeful that given sufficient time, X would be able to testify at the trial. That was why the prosecution sought adjournments of the trial, succeeding on the first application. But when the second application for an adjournment failed, it decided to offer no evidence, leading to A’s acquittal.
   2. The Judge’s error was of minor significance. Her Ladyship thought that the prosecution was justified in believing that X’s testimony would be available at the trial on the aforesaid mistaken understanding. However, medical opinion provided a separate basis (which eventually proved too optimistic) for supporting the belief that X would testify, justifying pursuit of the charges. Thus, the fact that the prosecution offered no evidence does not indicate that the case was baseless.
5. This leave application turns on Ground 2. The prosecution argues that there was ample independent evidence justifying the Judge’s view that A had brought suspicion on himself and so refusing him costs. That evidence may be summarised as follows:
   1. A and X had only met on the previous day. A invited her to the dinner where X got extremely drunk, as was apparent to everyone. She was plainly in a highly vulnerable state, having left her shoes, panties and a valuable watch in the restaurant’s toilet. A accompanied her back to her home in this drunken and vulnerable condition. He remained there for more than 30 minutes. When he arrived, CCTV footage in the lift lobby showed that his shirt was properly tucked in and buttoned up. But when he left, the footage showed that his shirt had become untucked, with some buttons undone. Two minutes after leaving, he sent a message to X saying “I am sorry/My apology today, please take care”.
   2. When she woke up the next morning, X was in distress, as her domestic helper witnessed. X believed that she had been raped and made a report to the police. She was medically examined that morning. Various bruises and abrasions were noted, the forensic pathologist commenting that such injuries could have been inflicted when the knees and legs were forcibly gripped. Forensic examination also found fibres from A’s jacket and/or trousers on X’s bra, and X’s saliva on both sleeves of A’s jacket.
6. In her witness statement, X alleged that when A sexually assaulted her, she kept saying to him “Let me go, let me go. Do you know who my father is? He’ll kill you when he returns.” She said that A replied to her in Putonghua saying: “I don’t care who your father is. I just want it now”. The evening after the incident, A sent X a message listing members of a committee and asking whether one of the persons named on the list was X’s father.
7. The principles as to costs where a defendant has been acquitted are well-established.[[3]](#footnote-3) Relevantly, for present purposes, the Court in *HKSAR v Chan Kam Ching (No 2)*,[[4]](#footnote-4) stated:

“Upon an acquittal, the court normally makes a costs order in favour of the accused unless there is a positive reason for departing from that rule. Most frequently, such a reason is found to exist where the accused has brought suspicion on himself or herself, leading to the prosecution. This may be due to that person’s conduct in the course of the investigation or during the trial, but the discretion is not bounded by any inflexible rule. Conduct of the accused prior to the investigation and trial stages, including conduct providing the setting for such charges, may have invited suspicion and so be taken into account in the exercise of the discretion.”

1. Thus, the test is whether the circumstances justify departing from the usual rule. In particular, in a case like the present, the question is whether, by his conduct, including conduct providing the setting for the charges, A invited suspicion on himself. It is important to note that the test is *not* whether the evidence would have been sufficient or probably sufficient to secure his conviction, but whether the circumstances raising the suspicion were enough to justify the Judge in exercising her discretion against granting him costs. The evidence outlined above provided an ample basis for the Judge’s view that A had indeed brought such suspicion upon himself.
2. It is also pertinent to note that, as the Appeal Committee pointed out in *Wong Tak Keung v HKSAR*:[[5]](#footnote-5)

“Within the framework of the relevant principles, costs are dealt with on the basis of a broad discretion. In the absence of any controversy over the principles that govern the award or refusal of costs, it would take rare and exceptional circumstances indeed to warrant an appeal to the Court of Final Appeal on costs alone.”

1. In our view, there is no reasonable basis on which the Court could be asked to interfere with the Judge’s exercise of discretion in refusing A his costs. Leave to appeal is therefore refused.

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| (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge | (M H Lam)  Permanent Judge |

Mr Melvin Ho, instructed by DLA Piper Hong Kong, for the Applicant

Mr Gary Leung, SADPP (Ag) of the Department of Justice, for the Respondent

1. [2022] HKCFI 3618. [↑](#footnote-ref-1)
2. *Ibid* at §§24-25. [↑](#footnote-ref-2)
3. Costs in Criminal Cases Ordinance (Cap 492), ss 4 and 5; *Tong Cun Lin v HKSAR* (1999) 2 HKCFAR 531; *Ting James Henry v HKSAR (No 2)* (2007) 10 HKCFAR 730; *SJ v Lam Chiu Fong* [2009] 2 HKLRD 484; *HKSAR v Chan Yau Hei* (FACC 3/2013, 20 May 2014); *HKSAR v Pang Hung Fai (No 2)* (2015) 18 HKCFAR 1; *HKSAR v Chan Kam Ching (No 2)* (2022) 25 HKCFAR 181. [↑](#footnote-ref-3)
4. (2022) 25 HKCFAR 181 at §8 (footnotes omitted). [↑](#footnote-ref-4)
5. FAMC 47/2005, 6 October 2005. [↑](#footnote-ref-5)