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**Criminal Law – sufficiency of intention to cause grievous bodily harm as *mens rea* for murder – whether grievous bodily harm rule contravenes prohibition against arbitrary detention or imprisonment – whether mandatory life sentence for murder falls foul of Hong Kong's constitutional safeguards against arbitrary imprisonment, cruel, inhuman or degrading punishment – whether mandatory life sentence violated constitutional right to review by higher tribunal – (Hong Kong)**

C and W were involved in a robbery in which the victim, K, died. K was stabbed and tied up with a rope which bound his neck, wrists and legs. His death was found to have resulted, not from the knife wounds, but from ligature strangulation caused by the rope around his neck. C and W were charged jointly as principal offenders.

C pleaded guilty to robbery and admitted in evidence that he had tied up the victim to prevent him from getting away and taking revenge and that W had fainted and did not take part in tying up K. C however, denied that he had any intention to kill or cause grievous bodily harm. He wanted to plead guilty to manslaughter but the Prosecution refused to accept this plea.

W denied robbery and any participation in causing the victim's death. However, there was evidence, including his possession of the victim's property, blood stains and evidence of contact, which indicated that he had been involved in both the robbery and the events leading to the victim's death. He did not testify but relied on those parts of C's evidence which were favourable to him.

The trial judge directed in her summing up that a killing accompanied by an intention to cause grievous bodily harm constitutes murder. C and W were both convicted of robbery and murder and were sentenced to varying terms of imprisonment for the robbery and to life for the murder.

C and W appealed unsuccessfully to the Court of Appeal. They appealed with leave to the Appeal Committee on the basis of four certified questions of law, challenging the legal and

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## COMMONWEALTH

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constitutional validity of two aspects of the offence of murder, namely, an intention to cause grievous bodily harm as a sufficient form of *mens rea*; and life imprisonment as the mandatory penalty under section 2 of the Offences Against the Person Ordinance, Cap 212. Specifically, they challenged:

- 1) An intention to cause grievous bodily harm as sufficient *mens rea* for murder at common law;
- 2) The grievous bodily harm rule in that it contravenes the provisions of the Basic Law and the Bill of Rights which prohibit, among other things, arbitrary detention or imprisonment;
- 3) The mandatory term of life imprisonment for murder in that it falls foul of Hong Kong's constitutional safeguards against arbitrary imprisonment, cruel, inhuman or degrading punishment and inequality before the law;
- 4) Such mandatory sentence in that it violated their constitutional right to a review by a higher tribunal.

➔ **Held:**

1. *Grievous bodily harm and the mens rea of murder*

Criminal liability at common law usually requires proof of relevant prohibited conduct causing certain prohibited consequences (the *actus reus*), accompanied by a defined state of mind on the part of the accused in relation to that conduct and its consequences (the *mens rea*).

In the case of murder, the *actus reus* crucially involves causing the death of another person. Of course, if the accused intentionally causes that death, the *mens rea* requirement is satisfied. However, as the law stands, he may be convicted of murder without ever intending or foreseeing death as the consequence of his acts or omissions. It is sufficient if he intends to cause grievous bodily harm and death in fact results.

2. *The mens rea of murder historically*

The *mens rea* of murder (previously referred to as "malice aforethought" in line with Sir Edward Coke's definition of murder : 3 Inst 47) has not been confined to an intention to kill or to states of mind requiring foresight of death as a consequence. The acceptance, in modern law,

of an intention to cause grievous bodily harm as sufficient actually represents the culmination of a long process whereby the range of mental states capable of sustaining a murder conviction has been progressively and drastically narrowed down.

The present state of the law in respect to the *mens rea* of murder is as stated by the Privy Council in *Chan Wing-Siu v The Queen* [1985] 1 AC 168 as follows:

"In the common law of England, which for all purposes material to this case applies in Hong Kong, it is now settled by the decision of the House of Lords in *R v Cunningham* [1982] AC 566 that killing with the intention of inflicting on the victim grievous bodily harm - that is to say, really serious bodily harm - is murder." (at 174)

The *mens rea* of murder, both in Hong Kong and in England and Wales, is therefore now confined to two alternatives: an intention to kill or an intention to cause grievous bodily harm.

C and W tried to persuade the Court that it should, as a matter of common law, develop the *mens rea* of murder so as to require nothing less than an intention to kill or an intention to endanger life. Their Counsel relied on recent dicta from eminent judges expressing dissatisfaction with the grievous bodily harm rule, largely on the ground that it results in a lack of symmetry between the *mens rea* of murder and the *actus reus* element of causing death, particularly when contrasted with the *mens rea* requirements of attempted murder and murder as a secondary participant: particularly Lord Edmund-Davies in *R v Cunningham* (at 582); Lord Mustill in *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 at 250, 258-9; and Lord Steyn in *R v Powell* [1999] 1 AC 1 at 14-15; and in *R v Woollin* [1999] 1 AC 82 at 90.

However, notwithstanding their criticisms in these dicta, the same judges recognized that in the light of the authorities, the grievous bodily harm rule was settled law and that no further judicial narrowing of the *mens rea* requirement was permissible. As Lord Edmund-Davies put it in *R v Cunningham* (at 583), any such change must be left to the legislature "as the constitutional organ best fitted to weigh the relevant and opposing factors". This had been done recently, on three occasions, but it had left the rule on grievous bodily harm untouched.

Accordingly, the common law challenge to the grievous bodily harm rule failed.

### 3. *The constitutional challenge to the grievous bodily harm rule*

C and W argued that the grievous bodily harm rule infringed their constitutional rights as safeguarded by the Basic Law ("BL") and the Bill of Rights ("BOR") contained in the Hong Kong Bill of Rights Ordinance, Cap 383, namely:

- (a) protection against arbitrary detention or imprisonment under BL art 28 and BOR art 5(1);
- (b) equality before the law under BL art 25 and BOR art 10; and,
- (c) the presumption of innocence under BOR art 11.

As one of two independent heads of *mens rea* for the offence of murder, the grievous bodily harm rule does not give rise to any presumption, whether, for example, a presumption that the accused intended to kill or a presumption that he is guilty of murder. No presumption as to an intention to kill is necessary since proof of an intention to cause grievous bodily harm itself suffices. No presumption of guilt arises either, since such intention has to be proved and its proof does not of itself establish murder. All the elements of the offence are required to be established. The constitutionality of the grievous bodily harm rule therefore has nothing to do with the presumption of innocence and article 11 of the Bill of Rights was not engaged.

### 4. *Arbitrary imprisonment*

The Court was called upon to determine whether imprisonment of an offender following his conviction for murder on the basis of the grievous bodily harm rule (without any necessary reference to an intention to kill or to endanger life) amounts to arbitrary imprisonment.

Article 28 expressly provides a constitutional guarantee against arbitrary "imprisonment" and not just against arbitrary "arrest or detention" as in the case of BOR art 5(1). Plainly, "imprisonment" covers incarceration pursuant to a sentence lawfully imposed by a court after a criminal conviction. Moreover, article 28 prohibits not merely "unlawful" imprisonment but "arbitrary or unlawful" imprisonment. It envisages that a term of imprisonment lawfully ordered may nonetheless be "arbitrary". It follows that such arbitrariness may reside in the substantive rules of criminal liability whose breach led to the imprisonment ordered.

### 5. *The grievous bodily harm rule and the meaning of "arbitrary" in BL art 28*

The Human Rights Committee has interpreted the concept of arbitrariness broadly "to include elements of inappropriateness, injustice and lack of predictability". In *Neilsen v Attorney-General* [2001] 3 NZLR 433, the New Zealand Court of Appeal said that "whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."

Applying this formulation to the present case, the Court considered that a person convicted of murder under the rule is one who acts with the intention of causing someone really serious bodily harm and whose actions in the event cause another's death. A person who takes another's life in such circumstances brings to realisation the risk which is necessarily inherent in his conduct. There was nothing capricious or unreasonable in classing such conduct as murder as a matter of legal policy. A person may not subjectively intend or even foresee that he will cause death. He may desire to limit the consequences of his actions to the infliction of grievous bodily injury. However, as a matter of commonsense it is impossible to predict that the consequences of an intentional infliction of really serious bodily harm will necessarily be successfully limited and will not prove to be life-threatening.

Judges who have expressed a preference for abolishing the grievous bodily harm rule have nevertheless recognized that a contrary view is tenable.

Relying on dicta from the two Canadian cases of *R.v. Vaillancourt* [1987] 47 DLR (4th) 399 and *R. v. Martineau* [1990] 58 CCC (3d) 353, C and W argued that an asymmetrical *mens rea* for murder, meaning a mental state which does not involve contemplation of death as a consequence of the accused's conduct, offends principles of fundamental justice which would include a principle against arbitrary imprisonment, making the grievous bodily harm rule unconstitutional in Hong Kong.

The Court did not interpret the dicta of these cases to bear on the validity of the grievous bodily harm rule as a head of *mens rea* for murder. In its view, the Canadian Supreme

Court was examining the constitutional validity of the specific provisions of sections 212 and 213 of the Canadian Criminal Code, and an intention to cause grievous bodily harm does not feature as a category of *mens rea* in sections 212 or 213. The Canadian cases provide no basis for postulating that if, hypothetically, the grievous bodily harm rule had represented a point on the progression, it would have been considered unconstitutional. It was therefore incorrect to conclude that on the reasoning of these cases, the grievous bodily harm rule offends any principles of fundamental justice.

The challenges to the grievous bodily harm rule mounted at common law and on constitutional grounds both fail.

#### 6. *Mandatory life sentence*

The mandatory life sentence for murder is fixed by law under section 2 of the Offences Against the Person Ordinance. Being a sentence fixed by law in respect of an indictable offence, a mandatory life sentence cannot be appealed independently of an appeal against conviction: Criminal Procedure Ordinance, s 83G.

In essence, the appellants argue that the culpability of those convicted of murder varies greatly, ranging from mercy killing to contract or sadistic killing. Therefore, relying primarily on article 28 of the Basic Law, they contended that in depriving the judge of all sentencing discretion and compulsorily requiring the imposition of life imprisonment in all murder cases, whatever the degree of culpability of the individual involved, such imprisonment is arbitrary and unconstitutional.

An understanding of the history and framework within which the sentence for murder operates is important to an assessment of its constitutionality. Life sentences are prescribed by statute and can be reviewed by a statutory board set up for the purpose.

Deprivation of liberty can be attacked on the separate ground that it is unlawful. But where imprisonment is lawful, that is, where it is ordered pursuant to duly constituted laws, a high threshold must be crossed before those laws can be struck down on the basis that the imprisonment pursuant thereto is disproportionate. It must be sufficiently disproportionate to justify describing the law as "arbitrary" (a disproportion so great as to reduce the law virtually to something capricious, unreasoned or without reasonable cause.)

C and W contended that for s 2 of the Offences Against the Person Ordinance to require the court to impose the same sentence on the mercy killer as the contract or sadistic killer is to make compulsory a punishment that was grossly disproportionate and therefore arbitrary (as well as cruel, inhuman or degrading) in the case of an offender at the lower end of the culpability scale, such as the mercy killer. Accordingly, since cases with such an outcome were inevitable, the section was unconstitutional and must be struck down or at least "read down" to convert the mandatory sentence to one that is discretionary.

In Hong Kong, the law classifies as a murderer, someone who causes the death of another either intending to cause death or intending to inflict really serious bodily harm, subject to certain statutory exceptions which reduce the liability to manslaughter.

It remains the policy of the law, a policy that is quite constitutional, that in the absence of one of the statutory exceptions, a mercy killer should be held liable for murder. But whether persons such as mercy killers at the lower end of the culpability scale should or should not be classified as murderers is a question for the Legislature to decide. The mandatory life sentence performs deterrent and denunciatory functions in support of the existing policy of the law.

Taking into account the inherent and unique gravity of the offence and the sentencing objectives of a mandatory life sentence as a whole, the court could not accept that mandatory life imprisonment represents a manifestly disproportionate sentence so as to contravene article 28 of the Basic Law on the grounds of arbitrariness. The legislative judgment that the offence of murder, having regard to its gravity, calls for a sentence of mandatory life imprisonment, even allowing for the different circumstances in which it may be committed, is tenable and rational. As such it is a legislative judgment which this Court should respect.

#### 7. *"Cruel or unusual" or "cruel, inhuman or degrading punishment"*

Prohibitions of "cruel and unusual" or "cruel, inhuman or degrading" punishments were originally regarded as being directed against punishments which were cruel or degrading in their nature or in the manner or conditions in which they were imposed. However, it is now

clear that punishments which are not cruel but are "grossly disproportionate" fall also to be treated as within the prohibited class: see *R v Smith (Edward Dewey)*, Canadian Supreme Court; *Soering v UK* (1989) 11 EHRR 439; *State v Makwanyane* 1995 (3) SA 391, para 94); *Patrick Reyes v The Queen*, Privy Council Appeal No. 64 of 2001.

In the court's view, the threshold for establishing such disproportionality as would suffice to make a punishment which is prescribed by law cruel, inhuman or degrading (ie, "grossly disproportionate"), is either the same or higher than the threshold for arbitrariness ("manifestly disproportionate").

Accordingly, C and W's case based on BOR art 3 also failed.

#### 8. *Mandatory life imprisonment and BOR art 5(4)*

C and W also complained that the mandatory life sentence in Hong Kong contravenes BOR art 5(4) which provides:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

This article bore a close resemblance to ECHR art 5(4). In England and Wales, it has been said that the article can be engaged even in relation to detention pursuant to an order for imprisonment lawfully made by a court, but only in the special circumstances created by the tariff approach adopted in the United Kingdom.

In Hong Kong, however, there has never been a tariff and BOR art 5(4) is therefore not engaged in relation to prisoners serving mandatory life sentences. Detention of such prisoners is pursuant to the lawful order of the court made at the trial and on any subsequent appeal. Such proceedings satisfy the requirements of BOR art 5(4).

As the mandatory life sentence is a sentence fixed by law, there is no right of appeal solely against sentence: Criminal Procedure Ordinance, s 83G. But this produces no inconsistency with BOR art 11(4). What that article confers on persons who have been convicted of a crime is the safeguard of a second tier of judicial scrutiny. A convicted person is entitled to a review of his conviction and sentence by a higher tribunal with powers to

overturn them. A person convicted of murder and sentenced to mandatory life imprisonment is entitled to appeal to the Court of Appeal which may, on allowing the appeal, overturn the conviction and sentence. BOR art 11(4) does not confer a separate right to launch an appeal limited to an appeal against sentence so as to prohibit sentences fixed by law. The requirements of the article are therefore satisfied by the existing procedure for appeal to the Court of Appeal.

*Lau Cheong and Lau Wong v. HKSAR* [2002] HKCFA 18 (16 July 2002)

Source: [www.hkllii.org/cases/HKCFA/2002/18.html](http://www.hkllii.org/cases/HKCFA/2002/18.html)

#### **Criminal law - Indictment containing multiple counts of sexual offences with respect to one complainant - Verdicts of guilty on two counts and acquittals on the remaining counts - Whether verdicts unreasonable - Significance of acquittals when considering unreasonableness of guilty verdicts - Test for determination of unreasonableness of jury's verdict - Significance of disparities in evidence and failure of prosecution to call witness - Words and phrases - "unreasonable, or cannot be supported, having regard to the evidence" - (Australia)**

MFA was charged with nine offences of a sexual nature against a male complainant, LB, alleged to have been committed over a period between December 1993 and January 1998. Count 7 alleged that the MFA indecently assaulted the complainant. No further particulars were contained in the indictment. The complainant gave evidence that he and MA were alone in a caravan having a pillow fight on the bed when MFA joined them on the bed, and started touching their penis. He said that MFA put his hand down the inside of the front of his pants for several minutes. In Count 8 it was alleged that MFA had homosexual intercourse with the complainant, being a male between the ages of 10 and 18 years, without any further particulars. The complainant testified that, following the episode the subject of count 7, MFA fondled MA's penis, and asked them to suck his penis; they also did acts of fellatio upon MFA.

The Jury found MFA not guilty on Counts 1 to 6 and 9 and guilty on counts 7 and 8.

MFA was then sentenced to imprisonment for three years and six months, with a non-parole period of two years and six months, on count 8. On count 7, he was sentenced to a concurrent fixed term of two years and six months. Upon appeal, his sentence was reduced, but his convictions were upheld.

He appealed further to the High Court of Australia, on the ground that the verdicts of guilty on counts 7 and 8 were unreasonable and could not be supported having regard to the evidence and to the verdicts of not guilty on the other counts. He relied on section 6(1) of the Criminal Appeal Act 1912 (NSW) which provides that:

"The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal ..."

MFA relied on the inconsistencies between the evidence of the complainant and MA; and also on the contrast between the verdicts on counts 7 and 8 and those on the other counts.

The Court had to consider whether the Court of Criminal Appeal of New South Wales erred in the manner in which it dealt with a contention that, in a case of multiple counts, verdicts of guilty on two counts were unreasonable having regard to the evidence in relation to those counts and having regard to verdicts of not guilty on the remaining counts.

➤ **Held:** dismissing the appeal and affirming the decision of the Court of Appeal;

1. The Court agreed with the trial judge's remarks during sentencing that the most likely explanation of the differences in the verdicts handed down by the jury was that they took the view that, notwithstanding the fact that there were inconsistencies between the evidence of MA and the complainant in relation to counts 7 and 8, the evidence of MA was substantially supportive of the complainant, and that counts 7 and 8 were the only counts in which

the complainant's evidence was supported by another witness. In the case of the other counts, the evidence was insufficient and unsupported.

2. Where it is argued that the verdict of a jury is unreasonable, or cannot be supported, having regard to the evidence, the test to be applied is that stated in *M v The Queen* [1994] 181 CLR 487, accepted and applied in *Jones v The Queen* [1997] 191 CLR 439. In *M*, it was pointed out that it was once common for expressions such as "unsafe or unsatisfactory", or "unjust or unsafe", or "dangerous or unsafe" to be used in place of the language of section 6(1) of the Criminal Appeal Act, and corresponding statutes in other jurisdictions, and that such expressions might cover different parts of the statutory provision, referring, for example, either to a verdict that is unreasonable, or cannot be supported, having regard to the evidence, or to a miscarriage of justice because an accused has not had a fair trial according to law. The Court said in that case that:

"Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

The test, as formulated in *M*, should not be confused with the question whether a trial judge ought to have directed a verdict of not guilty. The difference between the function of an appellate court in reviewing the totality of the evidence at a trial in order to determine whether a verdict of guilty was unreasonable, and the function of a trial judge in considering whether as a matter of law there is evidence on which an accused could be convicted, was explained in *R v R* [1989] 18 NSWLR 74, and approved in *Doney v The Queen* [1990] 171 CLR 207.

"Bearing in mind that the appellant, in his evidence, completely denied any physical contact with the complainant of a kind that could possibly have had sexual overtones, the fact that MA gave evidence of extended sexual activity between the complainant and the appellant, activity in which MA himself participated, might well have been regarded as more significant than the differences between the complainant and MA as to precisely what was involved in that activity. In their assessment of the witnesses, which would have been

influenced by the witnesses' respective ages and degrees of maturity, the jury could reasonably have considered that MA provided strong support for the complainant's position on the fundamental point of conflict between the complainant and the appellant, and that the reliability of the complainant's evidence as to the detail of what occurred was not significantly diminished by the discrepancies between his evidence and that of MA."

3. In *MacKenzie v The Queen* [1996] 190 CLR 348, the Court stated a number of general propositions concerning the significance that may properly be attached to what is sometimes referred to as factual inconsistency between verdicts. In that respect, it is to be noted that, where an accused is charged with multiple offences, differences between the verdicts may not, in truth, involve inconsistencies even of a factual kind. In the present case, if there had been a verdict of guilty on count 2 and not guilty on count 3, where the charges were supported by substantially the same evidence, then there would have been factual, even though not technical or legal, inconsistency. However, the evidence in support of counts 7 and 8 was materially different from the evidence in relation to counts 1 to 6 and count 9. The complainant was, to a significant extent, supported by MA.

"Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that system. A number of features of that context were emphasised in *MacKenzie*. They include the following. First, as in the present case, where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count. This will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part. Secondly, emphasis will invariably be placed upon the onus of proof borne by the prosecution. In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members

of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others. Thirdly, there is the consideration stated by King CJ in *R v Kirkman* [1987] 44 SASR 591, and referred to in later cases: it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only. And there may be an interaction between this consideration and the two matters earlier discussed."

3. The test established by section 6(1) of the Criminal Appeal Act is unreasonableness, not inconsistency. There was in this case an obvious explanation of the differences between the verdicts on the various counts in the indictment. The jury might reasonably have considered that, notwithstanding the differences between the evidence of the complainant and MA, and making due allowance for the age of MA, and the possibility of some confusion on his part, the evidence of the complainant in relation to the occasion the subject of counts 7 and 8 gained significant support from the evidence of MA. There was no such support in relation to any of the other counts. In those circumstances, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on two counts notwithstanding their unwillingness to convict him on the others.

*MFA v The Queen* [2002] HCA 53.

### **Drug trafficking – reversal of onus of proof by court constituting a presumption adverse to accused – (Hong Kong)**

S and two other people were caught during a police raid on a residence. When searched, police found over 24g. of drugs, on his person. Paraphernalia associated with the taking of dangerous drugs was also found in the room. He said that he had bought the drugs for his personal consumption and had paid \$5,000 for them. The street value for the drugs was about \$12,000, but he contended that his bulk purchase enabled him to obtain a more favourable price. At trial, the judge rejected S's evidence.

He was convicted of trafficking in dangerous drugs. He appealed unsuccessfully to the Court of Appeal. He then appealed with leave to the Hong Kong Court of Final Appeal under the "substantial and grave injustice" limb of s.32(2) of the Hong Kong Court of Final Appeal Ordinance.

S's counsel argued that the trial judge was wrong when he said in delivering his reasons for convicting S, that:

"In conclusion I find that the Defendant's explanation, even according to the lower standard of proof in civil cases, was unbelievable. Hence, I do not accept his explanation."

He submitted that there being no presumption applicable, this ruling was plainly wrong, and constituted a departure from accepted norms such as to warrant an appeal to the Court of

Final Appeal on the "substantial and grave injustice" ground. The respondent, though conceding this to be so, invited the court to apply the proviso to that provision which would enable the Appeal Court to endorse the conviction.

➤ **Held:** allowing the appeal;

"Fundamental to the propriety of a conviction is the application of the correct onus and standard of proof. It is the right of every defendant to have his defence properly considered. No onus lies upon him to establish anything. He is entitled to acquittal if his evidence raises a reasonable doubt. [Respondent's counsel] contended that the defence evidence was so weak that, if the court had assessed that evidence in accordance with the correct onus and standard of proof, a conviction must inevitably have followed. But it is not possible to say that, had the learned trial judge assessed the defence evidence having regard to the correct onus and standard of proof, it may not have been sufficient to create a reasonable doubt as to the appellant's guilt. The onus having been reversed against the appellant by the trial judge, it is not appropriate to apply the proviso."

A substantial and grave injustice had been occasioned on S and the conviction for trafficking had to be quashed. It was substituted for a conviction for simple possession of drugs.

*Tsang Wai Man v. Hong Kong Special Administrative Region* FACC No. 4 of 2002.  
Source: [www.hklii.org](http://www.hklii.org)