

# LAW OF EVIDENCE IN HONG KONG

SECOND EDITION

Simon So



PRINT + PROVIEW EBOOK

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**SWEET & MAXWELL**

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it is not the only reasonable inference to draw; and that another inference one might reasonably draw is that ....]"

#### (d) Factual evidence v opinion evidence

A witness is generally only allowed to give evidence regarding matters within his knowledge. However, this is subject to several exceptions.<sup>33</sup>

First, where the witness is qualified to express a credible opinion or belief on questions regarding the identity of things or persons, or the genuineness of handwriting.<sup>34</sup>

Second, where expert evidence is concerned. It was held in *R v Turner*<sup>35</sup> that such evidence was admissible to assist the court where the information was likely to go beyond the judge's or jury's knowledge and experience. As that case explained, "opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgments".<sup>36</sup> Nevertheless, there are limitations to the admissibility of expert evidence. In *R v Turner*, since the defendant's veracity and the likelihood of having been provoked were matters within the competence and experience of a jury, the psychiatric evidence was held to be rightly excluded.<sup>37</sup>

In *HKSAR v Tang Yuk Wah*,<sup>38</sup> on the issue of memory impairment, the majority of the CA refused expert evidence as to the defendant's state of mind. The psychiatrist's opinion was based mainly on the defendant's assertion of having an alcohol and drug abuse problem, but there was no evidence of a long history of abuse. This is because the defendant had been in custody for two years before the trial and had been unable to abuse alcohol or drugs, thus there was simply no evidence to support the contention that the defendant suffered from memory impairment.<sup>39</sup>

The facts upon which an expert relies to give his opinion must be made known. Hence, in *R v Tai Muk Kwai*,<sup>40</sup> it was held that the court could not be deprived of the opportunity of seeing the materials that provided the basic data underlying the opinion contained within a certificate of a government chemist.<sup>41</sup>

When addressing issues that are in contention, an expert is not allowed to rely on another expert's opinion to support his own. In *HKSAR v Nancy Ann Kissel*,<sup>42</sup> Young VP held that where an opinion by an expert was based on the reports of others and if the reports could not be proven by other evidence, then whether the reports are described as irrelevant, or having no weight, the better approach is to exclude those reports as evidence to avoid the danger that they may unduly influence the jury.<sup>43</sup>

#### (e) Oral evidence v documentary evidence

Section 3 of the Interpretation and General Clauses Ordinance (Cap.1) defines a document as "any publication and any matter written, expressed or described upon any

<sup>33</sup> See Chapter 11: Opinion Evidence.  
<sup>34</sup> *R v Silverlock* [1894] 2 QB 766; *Wu Kui Chuen v R* [1961] HKLR 171.  
<sup>35</sup> [1975] QB 834, 841; *R v Chan Hon Wai* (HCMA 340/1993, 28 June 1993).  
<sup>36</sup> *Ibid.*, 841.  
<sup>37</sup> *Ibid.*, 842.  
<sup>38</sup> [2007] 3 HKLRD 320.  
<sup>39</sup> *Ibid.*, [70]-[77] (Barnes J, Stuart-Moore VP agreeing).  
<sup>40</sup> [1960] HKC 655.  
<sup>41</sup> *Ibid.*, 660.  
<sup>42</sup> [2014] 1 HKLRD 460.  
<sup>43</sup> *Ibid.*, [142].

substance by means of letters, characters, figures or marks, or by more than one of these means". At common law, an arguably circular definition was adopted in *R v Daye* — any written thing capable of being evidence is properly described as a document and it is immaterial on what the writing may be inscribed.<sup>44</sup> Audio tape recordings<sup>45</sup> and television films are also considered documents under this definition.<sup>46</sup>

A document may be tendered as "real evidence" if it could be demonstrated that the witness was either the author of it, had possession or control of it, received it, or was properly connected with it in some other way.<sup>47</sup> This, however, means that the document *itself* is admitted, not the truth of its contents. In *HKSAR v Chan Sau Hing*, the connection between the defendant and the document was established by evidence that the defendant had been present in premises in which fraud had been practiced and that the fraudsters would leave documents for inducing the victims to part with their money.<sup>48</sup>

## 4. ASSESSMENT OF EVIDENCE

Upon the assessment of evidence, the fact-finding tribunal (which would be either the judge or the jury, depending on the court in which the case was tried) would find what happened at the material time. In reaching a conclusion, the fact-finding tribunal would have to assess and weigh the available evidence before it as it deems fit.

Whilst the Hong Kong legal system (which models its English counterpart) provides an appeal mechanism, appealing is not a means for litigants to re-litigate fact-finding issues. This section deals with how trial courts *should have* performed the fact-finding exercise and how the appellate court would handle an appeal disputing the fact found by the court below.

### (a) Approach in criminal appellate courts

#### (i) Magistracy appeals as rehearing of the case

An appeal against the determination of a Magistrate goes to the CFI which will either be dealt with by way of "alternative procedure" or "case stated". The English Divisional Court in *R v Hereford Magistrates' Court, ex p Rowlands* explained which route an appellant should adopt when he is aggrieved by the decision of a Magistrate:<sup>49</sup>

- (1) where the complaint is that the Magistrate made an error of fact or an error of fact *together with* an error of law, the appellant should appeal by way of "alternative procedure"; and
- (2) where the complaint is that the Magistrate made an error of law *only* or that he has acted in excess of his jurisdiction, the appellant should appeal by way of "case stated".

<sup>44</sup> [1908] 2 KB 333, 340.

<sup>45</sup> *R v Stevenson* [1971] 1 WLR 1.

<sup>46</sup> *Senior v Holdsworth, ex p Independent Television News Ltd* [1976] QB 23.

<sup>47</sup> *R v Horne* [1992] Crim LR 304; *HKSAR v Chan Sau Hing* (CACC 211/2011, 13 November 2002).

<sup>48</sup> (CACC 211/2011, 13 November 2002) [19].

<sup>49</sup> [1998] QB 110.

Given this section deals with how an appellate court deals with an error of fact, it shall only explore how the CFI hears an appeal by way of "alternative procedure".

Section 133 of the MO stipulates that an appeal by way of "alternative procedure" is conducted by way of rehearing on the evidence before the trial court supplemented by further evidence that the appellate court might admit under its statutory power to do so. Nevertheless, a rehearing is *not* a re-trial. The principle of rehearing is well-founded and recognised in *Chou Shih Bin v HKSAR*.<sup>50</sup> The CFA held that when it comes to a fact-finding decision, the CFI would recognise that it did not enjoy the advantage which the Magistrate enjoyed having received the evidence first-hand. Even so, it will not fail to quash a conviction that it considers unsafe by way of rehearing.<sup>51</sup>

McWalters J in *HKSAR v Ip Chin Kei* gave another detailed explanation of this principle.<sup>52</sup> His Lordship summarised how a Magistracy appeal should be conducted:<sup>53</sup>

- (1) An appeal under s.113 of the MO is conducted by way of rehearing on the evidence before the trial court supplemented by further evidence that the appellate court might admit under its statutory power to do so.
- (2) The grounds of appeal will inform the appellate court of the 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.
- (3) 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 wrong.<sup>54</sup>
- (4) An error by the Magistrate, especially an error constituting a material irregularity, may lead to the appellate court allowing the appeal and quashing the conviction.
- (5) The test in determining whether an error by the Magistrate should lead to the appeal being allowed and the conviction being quashed is whether it is just for such an order to be made.
- (6) 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. Unless the appellate court is satisfied that the guilt of the appellant has been proven beyond a reasonable doubt on the evidence adduced by the prosecution, the appeal must be allowed.

1.043 The Court of Final Appeal had re-considered *Ip Chin Kei* in *HKSAR v Hui Lai Ki*.<sup>55</sup> Whilst endorsing that McWalters J's judgment in *Ip Chin Kei* helpfully summarised the law in rehearing, the Court of Final Appeal emphasised that it remains the duty of the appellate court to come to its "own conclusion on disputed issues of fact or law". The Court of Final Appeal held that it is *incorrect* for the appellate court to only depart from the magistrate's finding of fact when the appellate court considered that the finding was "plainly wrong". Fok PJ (where all members of the court agreeing) held:

<sup>50</sup> (2005) 8 HKCFAR 70 (Bokhary PJ).

<sup>51</sup> *Ibid.*, 78.

<sup>52</sup> [2012] 4 HKLRD 383.

<sup>53</sup> *Ibid.*, [65].

<sup>54</sup> See [1.043] where the Court of Final Appeal held such proposition to be incorrect in *Hui Lai Ki* [2024] HKCFA 7.

<sup>55</sup> (2024) 27 HKCFAR 265.

"There is no here 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]

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.

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."

1.044 Although the judge has to bear in mind that he does not enjoy the advantage of receiving the evidence first-hand, he can make his independent judgment regarding the evidence.<sup>56</sup> In other words, the judge has to assess the evidence and come to his conclusion as to whether the evidence proves the elements of the offence beyond a reasonable doubt.<sup>57</sup> Errors of law could also be addressed in the re-hearing and may lead to the quashing of the conviction.<sup>58</sup>

1.045 Whilst a Magistrate may deliver an oral verdict, it is insufficient for him to say in his oral verdict that he has considered the evidence or he has found the defendant guilty beyond reasonable doubt. The oral verdict should indicate the main points of reasoning of the Magistrate, as well as the considerations given to the law and evidence relevant to the case. In *HKSAR v Lee Siu Wo*,<sup>59</sup> DHCJ Toh quoted *HKSAR v Sin Chi Yin*:<sup>60</sup>

<sup>56</sup> *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70, 77 and 78.

<sup>57</sup> *HKSAR v Ip Chin Kay* [2012] 4 HKLRD 383, 392.

<sup>58</sup> *Ibid.*, 397 and 398.

<sup>59</sup> [2002] 3 HKLRD 283, 285.

<sup>60</sup> (HCMA 511/1998, 31 December 1998) (KK Pang J).

"I am aware of the workload in the Magisterial Courts and it would be unrealistic to suggest that their oral reasons should take the form of a carefully prepared written judgment. But good sense and practice requires that the important legal and evidential features of the case should at least be covered by the magistrate in note form, albeit orally. Having said that, over-generalised statements such as 'I have warned myself of all necessary warnings as required by law' or in the absence of specific references, phrases such as 'I have considered all the evidence before me' are, in my view, inadequate."

Magistrates have also been criticised for delivering their oral findings, then later supplementing or correcting them in their statement of findings.<sup>61</sup> As noted by Beeson J:<sup>62</sup>

"Whilst in rare instances it may be necessary or justifiable for a magistrate to deliver full oral findings and later to supplement or correct them in a statement of findings eg to avoid possible confusion on appeal, the practice is neither recommended nor desirable."

Similarly, *HKSAR v CKS*<sup>63</sup> held that a professional judge (a Magistrate or a District Judge) was under a duty to analyse material points of evidence and give adequate reasons for any conclusion or decision. In performing his fact-finding function, the judge had to evaluate the evidence in dispute. Merely reciting a witness's testimony and stating that the witness was found to be truthful was not evaluation.<sup>64</sup> Barnes J summarised this duty as follows:<sup>65</sup>

"The gist is that whether the reasons given are adequate is to be judged according to the purpose for which the duty to give reasons is imposed. Adequate reasons help develop the correct decision-making process, thereby enhancing the acceptability of decisions to the public. It serves the interests of the parties, who are given an explanation of the outcome. It also serves the interests of the public by facilitating supervision by the appellate court."

Although a District Judge sits alone, it is presumed that the judge is professional. It may be the case that it is preferable for him to set out the necessary elements of an offence in the reasons, yet failure to do so does not undermine the conviction.<sup>66</sup>

"Where the judge is a professional judge sitting alone, however, it can be assumed, unless there are indications to the contrary, that the judge is well aware of the elements of the offence charged and that the reasons, pointing to where the evidence is accepted or rejected, are directed to those elements."

Similarly, the absence of any reference to the usual corroborative warning in the reasons for the verdict is not fatal. As held in *HKSAR v Kwok Kau Kan*, a professional judge

<sup>61</sup> *HKSAR v Pang Byron* [2013] 3 HKLRD 228, 238.

<sup>62</sup> *Ibid.*, 238.

<sup>63</sup> [2012] 3 HKLRD 588.

<sup>64</sup> *Ibid.*, [30]-[34].

<sup>65</sup> *Ibid.*, [34].

<sup>66</sup> *HKSAR v Kwok Chi Wah* [1991] 1 HKLRD 481.

was expected to have applied the correct law and procedure, unless it was clearly shown to the contrary. The important thing was whether he had indeed exercised caution in approaching the uncorroborated evidence of the victim.<sup>67</sup>

Most recently, in *HKSAR v Lam Hin Fai*,<sup>68</sup> Jeremy Poon J reiterated the above principles (quoting Yeung JA in *HKSAR v LKS*<sup>69</sup>):

"The applicable legal principle is that where the judge is a professional judge sitting alone, it can be assumed unless there are clear indications to the contrary, that the judge is well aware of the elements of the offence charged: see *HKSAR v Kwok Chi Wah*; and *Li Defan v HKSAR*."

In *HKSAR v LKS*, Yeung JA restated:<sup>70</sup>

"[40] Generally, a judge does not need to say in his judgment that he has reminded and directed himself in questions of law. The judge is a professional judge. The CA must assume that the judge is aware of the relevant legal principles and acts accordingly, especially the fundamental principle that each offence must be dealt with independently. The law does not require the trial judge of a criminal case to describe in detail in his judgment the relevant legal principles and his thought process in making his decisions ...

[41] In *R v Chan Shiu Sing* [1980] HKLR 310, the CA held that there is no need for a District Judge in a criminal case to expressly indicate that he has reminded himself of certain fundamental legal principles, eg the burden of proof and the standard of proof, etc.

[42] Unless there is material showing that a trial judge errs in points of law, a trial judge not listing the relevant legal principles in his judgment cannot amount to a valid ground of appeal against conviction. ..."<sup>71</sup>

#### (ii) *Court of Appeal hearing appeals from the District Court and the Court of First Instance*

Within the accusatorial (or adversarial) system of the common law trial, the role of the judge is a referee to ensure both parties acted fairly. Examination-in-chief and cross-examination are conducted by advocates with substantial autonomy (subject to the relevant rules). That said, at times, it may be necessary for the judge to intervene in the questioning to clarify matters. This is an important power that must be exercised carefully to avoid giving the impression that the judge is "entering into the arena", which

<sup>67</sup> [2000] 2 HKLRD 1, 13, [2000] 1 HKC 789, 802.

<sup>68</sup> [2016] 2 HKLRD 1227.

<sup>69</sup> (CACC 78/2008, 23 February 2009).

<sup>70</sup> *Ibid.*

<sup>71</sup> The Chinese original reads: 「一般而言，法官無需在判案書內列明他有就法律問題提醒及指引自己，法官是職業法官，上訴法庭必須假設法官知悉有關法律原則，特別是每項控罪須分別處理的基本原則，並根據該原則行事。法律並無規定刑事案件的主審法官必需在其判案書內詳細列出有關的法律原則及法官作出裁決時的心理歷程。...在 *R v Chan Shiu-sing* [1980] HKLR 310 案，上訴法庭裁定區域法院法官無需在刑事案件明確表示有向自己提醒一些基本的法律原則，例如舉證責任和舉證標準等。除非有資料顯示主審法官在法律觀點上犯了錯，否則主審法官沒有在判案書內列出有關的法律原則不能構成要求推翻定罪決定的有效上訴理由。」

could constitute a ground of appeal as it may obstruct a party's proper presentation of its case. The issue of the dividing line between permissible and impermissible judicial intervention was addressed in the oft-quoted judgment by Lord Parker CJ in *R v Hamilton*:<sup>72</sup>

"Of course it has been recognised always that it was wrong for a judge to descend into the arena and give the impression of acting as advocate. Not only is it wrong but very often a judge can do more harm than leaving it to an experienced counsel. Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be ..."

In *R v Yeung Mau Lam*, Power JA set out five applicable principles. These are as follows:<sup>73</sup>

- (1) The number of interruptions alone is not decisive.
- (2) The quantity and quality of the interruptions must be looked at as factors which react upon each other.
- (3) Actual bias on the part of the judge need not be established, it is enough if by his conduct he would be thought by the informed bystander to be taking over the conduct of the case from the prosecution.
- (4) Where a judge sits without a jury, the appellate court must ask itself whether a person listening to the case would justifiably have had the impression that the judge had by his questions entered the arena.
- (5) The ultimate question for the consideration of an appellate court is whether the judge's conduct was such that it would have caused an informed bystander listening to the case to say that the defendant had not had a fair trial.

As Denning LJ noted in *Jones v National Coal Board*,<sup>74</sup> questions must, where necessary, be asked to clear up points which have been overlooked or left obscure. The judge should also discourage repetition and intervene to ensure that he follows the points being made by advocates. Power JA added that:<sup>75</sup>

"it is the duty of the judge to ensure, at all times, that he understands the evidence of the witnesses and that the witnesses make responsive answers to the questions asked. We further observe that while it is desirable that judicial questioning comes either at the end of cross-examination or, preferably, at the end of re-examination, there may well be circumstances in particular trials which make it proper for the judge to intervene by asking questions at much earlier stages."

Therefore, the mere volume of interventions is not decisive, though a large number will put the court on notice.<sup>76</sup>

<sup>72</sup> Cited with approval in *HKSAR v Hui Po Keung* (CACC 240/2011, 29 November 2012).

<sup>73</sup> [1991] 2 HKLR 468, 469.

<sup>74</sup> [1957] 2 QB 55 (Denning LJ).

<sup>75</sup> *R v Yeung Mau Lam* [1991] 2 HKLR 468, 474.

<sup>76</sup> *R v Matthews* (1984) 78 Cr App R 23.

In light of the number of cases accusing trial judges of "entering into the arena", McMahon J highlighted trial judges' case management role in *HKSAR v Sin Ying Yi*:<sup>77</sup>

"This challenge to the Judge's handling of this case is illustrative we think of a malaise in the conduct of complex, and indeed other, cases, which makes a false assumption about a judge's role. Judges are not there to flow with whatever tide is created by the approach adopted by counsel. To the contrary, the managerial flow of a case is in the judge's hands, not counsel's. It is a judge's positive duty to manage trials. His function is to adjudicate cases and that means adjudication upon evidence properly and efficiently presented. If that requires vigorous management, then he must manage vigorously. And if counsel, whether for the prosecution or the defence, are not presenting their respective cases in an intelligible and economical manner, the judge must ensure that they do so. Firm skilled management by the court is not inconsistent with the interests of a defendant for no one is hereby advocating the exclusion of relevant evidence, or the inclusion against him of inadmissible evidence, or the use of a biased procedure. Not only did the Judge in the present case not err in his approach or intervene inappropriately, he performed the judicial task in a complex commercial crime case in precisely the way it should be performed."

In that case, it was held that the large number of interventions made by the trial judge had largely been caused by the prosecution's unsatisfactory conduct of its case and that there was no interference with the defence case especially because the interventions mostly occurred during the pre-trial review procedure and the first prosecution witness's examination-in-chief.<sup>78</sup>

In *HKSAR v Tai Chiu Tak*,<sup>79</sup> Yuen JA accepted the guidance in *Sin Ying Yi*, reiterating that the trial judge cannot only focus on the efficiency of the trial. The proper course of action is to, in the absence of the jury and witnesses, warn the counsel about the time and against digression.<sup>80</sup> The recent case of *HKSAR v Lau Hong*<sup>81</sup> is an example where the defendant successfully appealed against a conviction for the possession of imitation firearm on the ground that the Magistrate had "entered into the arena", and successfully opposed the re-trial application.

In *HKSAR v Cheung Kam Shing*,<sup>82</sup> the CA summarised the principles as to how would the appellate court consider whether the summing-up of a trial judge is fair and balanced:<sup>83</sup>

"All defendants in a criminal case should be entitled a fair trial. This court has repeatedly emphasised that regardless of how strong the prosecution evidence were, or how weak or unpersuasive the defendant's defence or evidence were,

<sup>77</sup> [2008] 3 HKLRD 352, [42].

<sup>78</sup> *Ibid.*, [39].

<sup>79</sup> (CACC 214/2011, 4 October 2013).

<sup>80</sup> *Ibid.*, [44].

<sup>81</sup> [2019] HKCFI 1613.

<sup>82</sup> (張金城) (Transliteration) [2019] HKCA 8 (Chinese Judgment, Yeung CJHC Ag, Jeremy Poon and Derek Pang JJA). Affirmed in *HKSAR v Wong Wal Sun* (黃維新) (Transliteration) [2019] HKCA 147 (Chinese Judgment, Yeung CJHC Ag, Peter Cheung and Derek Pang JJA).

<sup>83</sup> *Ibid.*, [43]-[48].

the defendant should still not be deprived of his opportunity to be fairly tried (see *HKSAR v Zhu Jinni* [2012] 4 HKLRD 444 and *HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447 etc).

A trial judge should not express strong views over disputed issues so as to avoid a bystander having the impression that he wanted the jury to accept his view or that he is making another closing speech for the prosecution.

A trial judge should also not criticise the defence case too severely, as this would be in effect amount to a usurpation of the function of the jury and leaving the jury with little real choice than to comply with what are obviously the judge's views or wishes (see *Hong Tsz Yin*, supra and *Mears v The Queen* (1993) 97 Cr App R 239 etc).

Yet, a trial judge is absolutely entitled to comment upon the evidence of the prosecution and the defence. As long as those comments are reasonable and balanced, despite being adverse to the defendant, they would not form the basis of a ground of appeal against the conviction.

Sometimes, the evidence put forward by a party might be so implausible such that when a judge summarises and repeats those evidences, those comments would seem to be adverse or even unfair to the party calling those evidences. Yet, those comments might not necessarily be unfair; rather, it is just that those evidences are simply unconvincing. Even the comments have been fair and balanced, those evidences would nonetheless objectively be adverse to that party. In those circumstances, one cannot say those comments by the judge are prejudicial and hence he is deprived of a fair trial. This court must emphasise that the trial judge has no duty to conceal or improve the weaknesses inherent in the defence case (see *Hong Tsz Yin* [71]).

This court must also point out that when considering whether a trial judge's summing up is balanced and whether the trial is fair, the court must look at the entire summing-up and consider what impression it gives overall. (see *HKSAR v Umali* [2011] 3 HKLRD 55 [14(e)]".<sup>84</sup>

<sup>84</sup> The Chinese original reads: 「在任何刑事案件的被告人都應獲得公平審訊。本庭亦多次強調不論控方的證據多麼強而有力，亦不論辯方的抗辯理由及證據是多麼薄弱和不具說服力，被告人都不應被剝奪他應獲得的公平審訊機會(見香港特別行政區訴朱金妮 [2012] 4 HKLRD 444及HKSAR v Hong Tsz Yin [2011] 5 HKLRD 447等案)。主審法官不應就具爭議的事實議題過份表達強烈的意見，避免他人覺得法官指示陪審團要接納他的看法或令人覺得他是作出另一篇的控方結案陳詞。主審法官亦不應對辯方的案情批評得太過不留餘地，否則會侵蝕陪審團就事實裁決應有的自主空間(見上述Hong Tsz Yin及Mears v The Queen (1993) 97 Cr App R 239等案)。但主審法官絕對有權就控辯雙方的證據作出評論。只要評論是合理及持平的，法官就證據作出對被告人不利的評論本身不構成推翻定罪的理由。有些時候，由於一方的證據及/或說法不合信或不合理，法官覆述該些證據及/或說法及就該些證據及/或說法作出評論時，會顯得對該方不利，亦可能會被視為對該方不公平。但事實上，法官的評論並非不公平，只是有關的證據及/或說法不具說服力，而就該些證據及/或說法作出的評論，即使合理，客觀而言亦可能會對提出該些證據及/或說法的一方造成不利的後果。在上述情況下，強稱因為法官的評論對被告人不利，而令未能得到公平審訊的說法是不能成立的。本庭必須強調，法庭是沒有責任去隱瞞或修飾辯方案情或說法的弱點(見上述 Hong Tsz Yin案判案書第71段)。本庭亦要指出主審法官對陪審團的指引是否持平，審訊是否公平，必須根據原審法官對陪審團的整體指引作出，而重點是整體指引給人的印象和觀感(見HKSAR v Umali [2011] 3 HKLRD 55案判案書第14(e)段)。」

In a simplistic form, the CA in *HKSAR v Tam Chu Kwong*, upon an extensive review of English and Hong Kong authorities, summarised the law into six principles. These are presented below:<sup>85</sup> 1.060

- (1) However flimsy and incredible the defence case may be, the defendant is nevertheless entitled to a fair trial. For such entitlement to be seen in a trial before a judge and a jury, the judge's summing-up must be unbiased and without influencing the jury in making their independent judgment on factual issues (*HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447, [63]; *HKSAR v Zhu Jinni* [2012] 4 HKLRD 451, [40]).
- (2) A judge is entitled to express his views on factual issues in his summing-up including those of the defence case provided that they are presented in a restrained manner and not so vigorous as to give an impression that he is instructing the jury to accept his personal views. Also, a "summing-up" should not give an impression that it was another closing speech for the prosecution (*HKSAR v Zhu Jinni* [2012] 4 HKLRD 451, [30] and *HKSAR v Yeung Chor Ming* [2004] 1 HKLRD 136, [39]).
- (3) No defendant has the right to demand the judge to conceal in his "summing-up" the weaknesses and deficiencies of the defence case. However, if the comments made by the judge are so weighted against the defence case, the jury would be left with little choice other than to comply with the judge's views (*HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 447, [71] and the judgment of the Privy Council in *Mears v The Queen* (1993) 97 Cr App R 239, [72]).
- (4) What the judge says to the jury carries more weight than what counsel says in a closing address and the judge's "summing-up" is the last word the jury hears before they retire. As such, the judge must be very careful in making comments on the defence case (*Liu Ping Keung v HKSAR* (2005) 8 HKCFAR 52, [24] and [26]).
- (5) Ultimately, whether a "summing-up", when reading as a whole, is balanced is a matter of impression and feel (*HKSAR v Umali* [2011] 3 HKLRD 55, [14(e)] and *HKSAR v Hong Tsz Yin* [2011] 5 HKLRD 477, [66]).
- (6) A "summing-up" which is unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury (*HKSAR v Umali* [2011] 3 HKLRD 55, [14(d)]).

Recently in *HKSAR v Lo Kin Sun*,<sup>86</sup> the Court of Final Appeal applied the relevant principles where the defendant was unrepresented. Where the defendant was unrepresented, it was incumbent on the trial magistrate to assist him in the conduct of his defence, conduct the trial fairly and impartially and not lose the appearance of neutrality in the dispute, and also address and explain material inconsistencies in the evidence of the prosecution witnesses. In that case, the trial magistrate's omission to 1.061

<sup>85</sup> [2017] 3 HKLRD 445 (Chinese Judgment), [2017] 3 HKLRD 458 (English Translation) [25]. The same has been approved in *HKSAR v Lai King Hin* (黎景軒) (Transliteration) (CACC 244/2017, 2 November 2018) (M Poon J) (giving the judgment of the court).  
<sup>86</sup> (2021) 24 HKCFAR 11.

put the various inconsistencies in the prosecution witness's evidence put the defendant in substantial disadvantage. Combined with the tenor and number of questions put to the defendant himself, on the whole the defendant was denied a fair trial.

(b) *Approach in civil appellate courts*

Similar to the criminal appellate courts, civil appellate courts are generally reluctant to engage in a fact-intensive review of the evidence. This section briefly discusses the approaches adopted in appeals from Masters' decisions and appeals in the CA.

(i) *Hearing de novo in appeals from Masters' decisions*

Subject to O.5 r.6 and O.12 r.1 of the RHC, an appeal from decisions of Masters shall be heard by a Judge in chambers.<sup>87</sup> Such appeals are conducted by way of an actual hearing *de novo* of the application. The judge will treat the matter as though it came before him for the first time.<sup>88</sup>

The judge in chambers is in no way fettered by the Master's previous exercising of discretion. However, a judge hearing an appeal from a Master is entitled, if he thinks fit, to adopt the Master's reasoning in his judgment without setting out the reasoning himself. This does not mean the judge has failed to exercise the discretion conferred on him.<sup>89</sup> In *Ip Yin Ping v Ip Anne*, the court held:<sup>90</sup>

- (1) No matter whether the matter comes before the court by way of appeal or a fresh/renewed application, the court has to exercise its discretion unfettered by the decision of the Master.
- (2) At the same time, the court is entitled to give whatever weight it deems appropriate to the decision of the Master.
- (3) If the court deems fit, it may adopt the reasoning of the Master.
- (4) It follows from (1) that the court should exercise its discretion by reference to all relevant facts and circumstances of the case as it is rather than confining itself to facts and circumstances of the case as it was before the Master.
- (5) It would be more appropriate to lodge an appeal against the decision of the Master rather than making a fresh application.

(ii) *Appeals in the Court of Appeal*

Civil appeals in the CA are extensively addressed in O.59 of the RHC. For present purposes, only the treatment of evidence and factual questions will be briefly discussed here.

In appeals against decisions of factual questions, the burden of showing the CA that the trial judge was wrong as to the facts lies on the appellant. It is trite law that the trial judge can see the demeanour of the witnesses and can "estimate their intelligence, position and character in a way not open to the courts who deal with later stages of the case".<sup>91</sup>

<sup>87</sup> RHC O.58 r.1(1).

<sup>88</sup> *Litton VP in Kilkenny Ltd v AG* [1996] 1 HKC 30, 37; *Kung Wong Sau Hin v CP Lin* [1988] 2 HKLR 209.

<sup>89</sup> *Ip Yin Ping v Ip Anne* (HCMP 1840/2002, 20 January 2003).

<sup>90</sup> (HCMP 1840/2002, 20 January 2003) [10].

<sup>91</sup> *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323, 325.

In *Ting Kwok Keung v Tam Dick Yuen*,<sup>92</sup> Bokhary PJ considered when an appellate court could properly disturb findings of fact made by a trial judge. First, his Lordship held that one should not overstate the judge's advantage in being able to "observe the demeanour" of witnesses:<sup>93</sup>

"It is common to speak of a trial's judge's advantage of having 'seen and heard' the witnesses. I have no quarrel with that way of putting it. But it may be preferable to speak instead of a trial judge's advantage of having received the evidence at first-hand. There would appear to be two reasons why. First, it is as well to guard against giving the impression that no blind or deaf person can ever constitute an effective tribunal of fact. Secondly, the words 'seen and heard' are perhaps capable of giving an exaggerated impression of the role which demeanour plays in the resolution of disputes of fact ...

Having said that about demeanour, I should make it clear that I accept that trial judges are entitled to take demeanour into account when assessing testimony. In life what really happened is not always what afterwards seems objectively probable. So demeanour has a role to play. Of course trial judges must bear in mind that demeanour can be deceptive and is, therefore, to be approached with care. In general, I would trust them to do that. Unless good reason to think otherwise appears, trial judges should be taken to have considered demeanour with caution, doing so only in the context of such inherent probabilities as may exist and the whole of the evidence."

Second, his Lordship held that the question for the CA was whether, even though it did not enjoy the advantages enjoyed by the trial judge who received the evidence first-hand, it was nevertheless satisfied that his conclusion on the facts was "plainly wrong". The CA should intervene if it is so satisfied but should defer to the trial judge's conclusion even if doubts existed as to its correctness if it is not so satisfied.<sup>94</sup>

The Privy Council (*Bahamasair v Messier Dowty*) recently had the opportunity to review what approach an appellate court should take when challenging a fact-finding decision of the lower court.<sup>95</sup> Lord Kerr, giving the judgment of the court, quoted Lord Reed's judgment in *McGraddie v McGraddie*,<sup>96</sup> and said:

"Lord Reed then considered foreign jurisprudence on the subject in [3] and [4] of his judgment as follows:

- [3] The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas*, that the trial judge is in a privileged

<sup>92</sup> (2002) 5 HKCFAR 336.

<sup>93</sup> *Ibid.*, [36]–[37].

<sup>94</sup> *Ibid.*, [42]. See, eg, *Wong Tang Keung v Lee Wai Engineering Co Ltd* [2013] 4 HKLRD 150; *Re Silver Bell Uniform Ltd* [2012] 1 HKLRD 719; *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383.

<sup>95</sup> [2018] UKPC 25, [2019] 1 All ER 285.

<sup>96</sup> [2013] UKSC 58, [2013] 1 WLR 2477.

position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574–575:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' ... rather than a 'tryout on the road.'... For these reasons, review of factual findings under the clearly erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

Similar observations were made by Lord Wilson JSC in *In re B (A Child)* [2013] 1 WLR 1911, [53]].

- [4] Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, [14]:

The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidences. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

As a general rule, thus, the principles would be those stated in the *Privy Council Practice* (to which Lord Kerr and the rest of the court affirmed unanimously):<sup>97</sup>

- (1) Any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position and in particular, the extent to which he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to

<sup>97</sup> *Bahamasair v MessierDowty* [2018] UKPC 25, [2019] 1 All ER 285, [36].

interfere (*Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, [2016] 1 BCLC 26, [5]).

- (2) Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination (*Anderson v City of Bessemer*, cited by Lord Reed in [3] of *McGraddie*).
- (3) The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene". The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent improbability." Where one or more of these features is not present, then the argument in favour of restraint is reduced ([8] of *Central Bank of Ecuador*).

### 1. INTRODUCTION

2.001

This chapter deals with the burden and standard of proof in civil and criminal trials. It starts with discussing the conceptual differences between "burden of proof" and "standard of proof", as well as "legal burden" and "evidential burden". Conventional texts usually discuss the burden and standard of proof under different headings. Nonetheless, it would be immensely difficult to consider "burden of proof" and "standard of proof" in vacuum given that the two concepts inevitably go hand-in-hand despite being two discrete and distinct legal concepts. As such, instead of considering the two concepts separately, this chapter explores these two concepts jointly but in different contexts — burden and standard of proof in a criminal trial and that in a civil trial.

#### (a) Burden of proof and standard of proof

2.002

Put in simplest terms, the burden of proof refers to which party has to bring in evidence to prove a proposition whereas the standard of proof regulates how much evidence would be required before a fact-finding tribunal to consider a proposition proved. Due to the inherent epistemological difficulties in seeking the absolute truth, the standard refers essentially to the degree of probability to which facts must be proved to be true.<sup>1</sup>

#### (b) Legal burden and evidential burden

2.003

"Burden of Proof" refers to the party responsible for calling evidence and to prove to the satisfaction of the tribunal the truthfulness of the assertion. One shall appreciate that there are two separate and distinct classes of burden — "legal burden" and "evidential burden".

2.004

Legal burden, which is sometimes referred interchangeably as the "persuasive burden", refers to the responsibility which a party is responsible to persuade the tribunal of fact at the end of the case that its stance is true. Strictly and literally construed, the legal burden is a burden of proof (whilst evidential burden is not).

2.005

Evidential burden, on the other hand, refers to the responsibility that a party has to call sufficient evidence for the other side to answer to the proposition which the evidence purports to support. This is sometimes phrased as "the duty of passing the judge" which means the party must adduce sufficient evidence so that the issue would be left for determination by the fact-finding tribunal.

## 2. BURDEN AND STANDARD OF PROOF IN CRIMINAL TRIALS

### (a) General principles

2.006

The general principle in a criminal trial is that the prosecution has to bear the burden of proof in proving all the elements of an offence. The legal burden is ultimately a burden of proof and the prosecution, in effect, has to do the following two things:

<sup>1</sup> I Dennis, *The Law of Evidence* (6th ed, Sweet & Maxwell) 448.

- (1) to prove that all the elements of crime exist; and
- (2) to disprove and dispel all defences raised by the defendant.

Further, at the close of the prosecution case, the prosecution also has to discharge its evidential burden in proving a *prima facie* case. Failing to do so, a trial judge is entitled to rule that the defendant has no case to answer.

This general principle is subjected to exceptions. When a defendant relies on some specific defences, the onus of proving *the defence* (*cf* the charge) would be shifted to the defendant. That said, the ultimate burden of proof *still* rests on the prosecution, and has successfully raised the defence.

Insofar as the standard of proof is concerned, the general principle is that:

- (1) If the legal burden rests on the prosecution, then the prosecution has to prove *beyond a reasonable doubt: Woolmington v DPP*.<sup>2</sup>
- (2) If the legal burden rests on the defence, then the defence only has to prove on a balance of probabilities: *R v Carr-Briant*.<sup>3</sup>

### (b) Prosecution's burden

The importance English law places on the presumption of innocence and the prosecution's burden of proof can be traced back to the famous maxim of William Blackstone, a celebrated Jurist, in 1765, that "[i]t is better than ten guilty persons escape than that one innocent suffer".<sup>4</sup> This reflects the view that the societal harm of a wrongful conviction is much greater than that of a wrongful acquittal. The status of fundamental human rights has been accorded to the presumption of innocence and prosecution's burden of proof.<sup>5</sup> The heavy social stigma and negative publicity attached to a public trial and conviction justify the state in giving an account to fully justify why the accused deserves such punishment. In order words, the state is being called to "account" for the severe accusations.<sup>6</sup> Vis-à-vis the accused, the state has significantly more resources in criminal investigation and tendering evidence. Accordingly, the issue of who should bear the burden of proof must be "taken seriously".<sup>7</sup>

To enshrine these cardinal principles in criminal law, the prosecution has to overcome two thresholds:

- (1) At the close of the prosecution case, the prosecution has to satisfy an evidential burden by proving the existence of all the elements of the offence. That standard is one on *prima facie* case.<sup>8</sup>

<sup>2</sup> [1935] AC 462. See also *Mancini v DPP* [1972] AC 1, 11 (Lord Simon).  
<sup>3</sup> [1943] KB 607.  
<sup>4</sup> W Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1769, 1979) Vol 4, 352.  
<sup>5</sup> HL Ho, "The Presumption of Innocence as a Human Right" in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights* (Oxford University Press, 2012) 259.  
<sup>6</sup> A Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge, 2017).  
<sup>7</sup> P Roberts, "Taking the Burden of Proof Seriously" [1995] Crim LR 783.  
<sup>8</sup> It is a basic trial procedure and the defendant's legal right that after the close of the prosecution case, the defendant has a chance to make no case to answer submissions: *HKSAR v leung Ka Lum* (梁嘉霖) (*Chinese transliteration*) [2023] HKCFI 2657, [10] (Joseph Yau J). In that case, the trial magistrate immediately ruled a case to answer

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