

CHAPTER 8

ORAL TESTIMONY OF WITNESSES

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I. PRELIMINARIES

A. SECURING ATTENDANCE OF WITNESSES, PRODUCTION OF DOCUMENTS, ETC.

(1) Witness orders in committal proceedings

Magistrates Ordinance (Cap 227), section 84.

84.—(1) At a preliminary inquiry the magistrate shall in respect of any witness examined by him, other than the accused and any witness of his merely to his character, make an order in the prescribed form requiring the witness to attend and give evidence at the trial of the accused before the Court of First Instance.

(2) Where it appears to the magistrate, after taking into account any representation made by the accused or the prosecutor, that the attendance of any witness at the trial is unnecessary on the ground that the evidence of that witness is unlikely to be required or is unlikely to be disputed—

- (a) any witness order to be made by the magistrate in the case of that witness shall be a conditional order, that is to say, an order in the prescribed form requiring the witness to attend the trial if notice in that behalf is given to him and not otherwise; and
- (b) if a witness order other than a conditional order has previously been made by the magistrate in the case of that witness, the magistrate shall direct that that order be treated as a conditional order.

(3) A magistrate—

- (a) on committing an accused for trial shall inform him—
 - (i) of his right to require the attendance at the trial of any witness in respect of whom a conditional witness order, or an order treated as a conditional witness order, has been made; and
 - (ii) that the accused should inform the Registrar not less than 10 days before the trial if he requires such a witness to attend; and
- (b) if he determines not to commit the accused for trial, shall cause notice to be given in the prescribed form to any witness in respect of whom a witness order has been made, informing the witness that he is no longer required to attend.

(4) In this section, "witness" includes a person whose written statement is admitted in evidence under section 81A.

Notes on section 84, Magistrates Ordinance

- 8-2 A summons obliges the witness not only to attend, but also to testify: *Chu Piu-wing v Att-Gen* [1984] HKLR 411, CA, concerned a *subpoena ad testificandum*, which was abolished in respect of criminal proceedings by s 38A of the Criminal Procedure Ordinance.
- Section 84 does not apply to the accused or any defence witness as to character only

Summons or warrant for witness

- 8-3 *Magistrates Ordinance (Cap 227), section 78*
- 78.—(1) If it is made to appear to a magistrate, by any credible witness, that any person is likely to give material evidence on the part of the prosecution the magistrate may enforce the attendance of such person in the manner provided in Part II for enforcing the attendance of a witness under the summary jurisdiction of such magistrate.
- (2) If, on the appearance of such person so summoned, he refuses to be examined upon oath concerning the matter of the charge, or refuses to take such oath or having taken such oath refuses to answer such questions concerning the premises as may then be put to him, the magistrate may, by warrant under his hand and seal, commit such person to prison there to remain and be imprisoned for 2 months, unless he shall in the meantime consent to be examined and to answer concerning the premises.

A magistrate may refuse to issue a witness summons unless he is satisfied that the evidence which the intended witness would give is material to the issues at trial and can be said to tend to support the case of the party seeking to call the witness; see *HKSAR v Au Kwok-kuen and Others* [2010] 3 HKLRD 371, (C1).

(2) Summons to witness to attend Court of First Instance or District Court

Criminal Procedure Ordinance (Cap 221), s 34

- 8-4 *Summons to witness to attend Court of First Instance or District Court*
- 34.—(1) For the purpose of any criminal proceedings before the court a summons requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons may be issued out of the court.
- (2) If any person in respect of whom a witness summons has been issued applies to the court out of which the summons was issued and satisfied it that it cannot give any material evidence or, as the case may be, produce any document or thing likely to be of material evidence the court may direct that the summons shall be of no effect.
- (3) Where on any such application a direction is given that a witness summons shall be of no effect, the person at whose instance the summons was issued may be ordered to pay the whole or any part of the costs of the application.
- (4) Any costs payable under such an order shall be taxed by the proper officer of the court and payment of those costs shall be enforceable in the same manner as an order for payment of costs made by the court in a civil case.
- (5) A witness summons shall continue to have effect until the conclusion of the proceedings at which the attendance of the witness is required.
- (6) In this section "court" includes the District Court.

Criminal Procedure Ordinance (Cap 221), s 35

- 8-5 *Witness to be notified of date of hearing in Court of First Instance*
- 35.—Where a person is the subject of a witness order and a date is set for the trial at which his attendance is required, the Registrar shall cause to be served upon him notice in writing of the date and time, and of the place, at which that person's attendance is required under the witness order.

(3) Summons to witness to attend magistrate court hearings

(a) Statute

Magistrates Ordinance (Cap 227), s 21

Provisions as to witnesses

21.—(1) If it is made to appear to a magistrate, by any credible person, that any person within Hong Kong is likely to give material evidence on behalf of the complainant or informant or defendant, the magistrate shall issue his summons to such person, under his hand and seal, requiring him to be and appear at—

- (a) such time and place as specified in the summons; and
- (b) such time and place as may be directed in such manner as is specified in the summons.

before a magistrate to testify what he knows concerning the matter of the complaint or information. (Amended 44 of 1962 section 2; 59 of 1994 sections 4 & 6)

(2) If any person so summoned refuses or neglects to appear as required by the summons and no just excuse is offered for such refusal or neglect, then after proof upon oath that the summons was served on such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and that a reasonable sum (where, in the opinion of the magistrate, necessary) was paid or tendered to him for his costs or expenses in that behalf, it shall be lawful for the magistrate before whom such person should have appeared to issue a warrant, under his hand and seal, to bring and have such person at a time and place to be therein mentioned before a magistrate—

- (a) to testify as aforesaid, unless the complaint or information has been dismissed; and
- (b) to show cause why he should not be punished under subsection (5) for his refusal or neglect so to appear.

(3) If the magistrate is satisfied, by evidence upon oath, that it is probable that such person will not attend to give evidence without being compelled to do so, then, instead of issuing a summons, it shall be lawful for him to issue his warrant in the first instance.

(4) If any person having come before a magistrate whether voluntarily or in obedience to a summons or having been brought before him by warrant or otherwise shall refuse to be sworn or having been sworn shall without just excuse refuse to answer such questions as shall be put to him concerning the premises, the magistrate may, by warrant under his hand and seal, order him to be imprisoned for 12 months unless he in the meantime shall consent to be sworn and to answer concerning the premises, or he may impose upon such person a fine not exceeding \$5,000.

(5) The magistrate before whom a person is brought pursuant to a warrant under subsection (2) may, unless such person satisfies the magistrate that he had reasonable cause for his refusal or neglect to appear as required by the summons, impose upon such person a fine not exceeding \$5,000 and order him to be imprisoned for a period not exceeding 12 months.

Notes on section 21, Magistrates Ordinance

The magistrate's power to summons a witness is deemed to include the power to summon and require a witness to produce to such magistrate, books, plans, papers, documents, articles, goods and things likely to be material evidence on the hearing of any charge, information or complaint: s 22.

(b) Grounds for setting aside witness summons

Power under section 34 of Criminal Procedure Ordinance

The court has an inherent power to refuse to issue a witness summons under s 34 of the Criminal Procedure Ordinance if it considers the prospective witness cannot give any material evidence: *R v Morley* [1988] 87 Cr App R 218 (CA), construing the equivalent English legislation. See also *Chu Piu-wing v Att-Gen* [1984] HKLR 411 where it was

held that the Supreme Court had an inherent power to prevent an abuse of its process, which extended to setting aside a *subpoena ad testificandum* where an undertaking had been given by the prosecution that it would not call that witness. The summons will be set aside if the judge considers that the request is 'irrelevant, fishing, speculative or oppressive'; such power of the court is to be exercised only sparingly: *Hsin Chong Construction Co Ltd v Kowloon Wharf & Godown Co Ltd* [1986] HKLR 987. However, it is not an abuse of process for the prosecution to call a witness whose testimony was wholly discredited in another trial: *R v Wong Muk Ping* [1985] 2 HKC 711.

Lack of particularity

- 8-9 In *R v Milner* (unrep., 5 July 1993, CCC (indictment no 921602) (HHJ Laughland QC)), it was held that a summons must specify the document or thing required to be produced with reasonable particularity. The document must be admissible and must either be individually identified or identified by reference to a class of documents or things by which criterion the recipient can know what obligation the court places on him. A summons is not a proper and effective order if it requires the recipient to make judgments, for example, of relevance or weight. It is only where there is a lawful and effective use of the limited powers under the legislation that any question of the consideration of particular documents in regard to public interest immunity falls to be considered.

Inadmissibility

- 8-10 A summons requiring the production of material that is not *prima facie* admissible is liable to be set aside: *R v Cheltenham JF, Ex p Secretary of State for Trade* [1977] 1 WLR 95, DC. The court quashed a summons served on an inspector appointed under s 165 of the Companies Act 1948 to produce transcripts of evidence and other materials obtained during the course of the investigation. The material was not *prima facie* admissible since it was required only for use in cross-examination to contradict statements a witness might make in reference to what he had said previously. *Per curiam*: even if the evidence was material, it should not be produced because the public interest in maintaining sources of information in respect of an inquiry of the kind carried out under section 165 would outweigh the private disadvantage of non-disclosure of the evidence. In *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208, Millett J dealt with an application by the liquidators of a company for directions concerning a witness summons under equivalent English legislation, with which they had been served requiring production of transcripts of interviews conducted on their behalf with various people, many of whom were to be called by the prosecution in the criminal proceedings. Although his Lordship reviewed the principles involved, his directions were confined to directing the liquidators to apply to the court to set aside the summons on the grounds that (a) the transcripts were not material evidence; and (b) public interest immunity attached thereto.

On the liquidators' application to the Central Criminal Court, Phillips J ruled that the summons should not be set aside: *R v Clowes* 95 Cr App R 440. His Lordship did not purport to depart from any of the principles in the *Cheltenham JF* case. However, he distinguished *Cheltenham JF*, (a) in relation to admissibility, on the ground that the transcripts fell within s 24 of the Criminal Justice Act 1988 (which makes admissible statements in documents created or received by a person in the course of a trade, business, profession or other occupation where the information was supplied by a person who had personal knowledge of the matters dealt with); (b) in relation to abuse of process, on the ground that he was satisfied that the transcripts were likely to contain material not disclosed in the witness statements or subsequent Department of Trade and Industry interviews of the witnesses, and that the defence was likely to want to put this material in evidence as part of their case, and, therefore, it was not just a disguised attempt at discovery for the purpose of digging up material for cross-examination; and (c) in relation to public interest immunity, his Lordship had balanced the competing considerations and concluded on the facts that the interests of justice demanded that the transcripts be disclosed.

In *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, the House of Lords was concerned with s 97(1) of the Magistrates' Courts Act 1980, which refers to the production "of any document or thing likely to be material evidence". It was held that s 97 contemplates the production of documents that are immediately admissible *per se* and not more; it may not be used to obtain discovery of documents that might, or might not, upon examination, prove to be admissible. The law relating to the production of documents by third parties was untouched by developments in the law relating to the prosecution's duty of disclosure. See also s 32 of the Criminal Procedure Ordinance (Cap 221). See further *R v H(L)* [1997] 1 Cr App R 176, Crown Court (Sedley J) (a summons cannot be used to compel production of documents merely because they are likely to afford or assist a relevant line of inquiry or challenge).

Immateriality

Evidence is material if it is relevant to an issue in the case: see *R v Reading Jf, Ex p Berkshire County Council* [1996] 1 Cr App R 239, DC. Where the recipient of a summons asserts the immateriality of the matter sought, the judge may either accept that assertion or look at the matter himself. The course to be adopted is a matter for his discretion: *R v W(G) and W(E)* [1997] 1 Cr App R 166, CA. If the claim that the matter was immaterial was suspect or implausible, the judge would no doubt look for himself. On the other hand, he might regard an assurance from an independent competent member of the Bar as sufficient reason for drawing the conclusion that the matter was irrelevant. In *R v H(L)*, above, Sedley J (sitting at first instance) said that a person applying to set aside a summons should "weed" the documents where they are copious to remove anything that is plainly incapable of having a bearing on the issues.

Public interest immunity

The recipient of a witness summons may object to the production of the matter sought on the grounds that public interest immunity attaches thereto: see *R v Milner* (above, §8-9); *R v Cheltenham Jf, Ex p Secretary of State for Trade* (above, §8-10); *R v Clowes* (above, §8-10); *R v K (Trevor Douglas)* 97 Cr App R 342, CA; and *R v W(G) and W(E)*, above, §8-11.

Where a claim to public interest immunity is made, it will be the duty of the judge to inspect the matter: *R v K (Trevor Douglas)*, above.

To determine whether a claim to public interest immunity should be upheld, a two stage test applies: (i) Does public interest immunity in principle attach to the matter in question? See §§12-33 *et seq.* below. (ii) If it does, should the claim thereto nevertheless be overridden in the interests of justice? This involves a balancing exercise (as in the case of a claim to public interest immunity made by the prosecution): see §§12-35 *et seq.* below.

As to whether there is an entitlement to make voluntary disclosure of matter to which public interest immunity attaches, or whether there is a duty to assert a claim thereto, see below, §12-43.

(c) Abolition of subpoena

Criminal Procedure Ordinance (Cap 221), s 38A

38A.—No subpoena *ad testificandum* or subpoena *duces tecum* shall issue after the commencement of Criminal Procedure (Miscellaneous Provisions) Ordinance 1981 (59 of 1981) in respect of any criminal proceedings for the purpose of which a witness summons may be issued.

Privilege of witnesses from arrest

A person subpoenaed as a witness, or in respect of whom a witness order has been made, either to prosecute or give evidence, enjoys a privilege from arrest on civil process whilst attending the court, not only on the day mentioned in the subpoena, etc, but

CHAPTER 25

FIREARMS AND OFFENSIVE WEAPONS

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I. FIREARMS

A. INTRODUCTION

Introduction

"The unlawful possession and use of firearms is generally recognised as a grave source of danger to society. The reasons are obvious. Firearms may be used to take life or cause serious injury. They are used to further the commission of other serious crimes. Often the victims will be those charged with the enforcement of the law or the protection of persons or property. In the conflicts which occur between competing criminal gangs, often related to the supply of drugs, the use and possession of firearms provoke an escalating spiral of violence. Where imitation firearms are involved, the risk of life and limb is absent, but such weapons can be and often are used to frighten and intimidate victims in order to reinforce unlawful demands. Such imitation weapons are often very hard to distinguish from the real thing—for practical purposes, impossible in the circumstances in which they are used—and the victim is usually as much frightened and intimidated as if a genuine firearm had been used. Such victims are often isolated and vulnerable. Sometimes the firearm involved, although genuine, has been disabled from firing, or cannot be fired for want of ammunition. In such cases again the risk to life and limb is absent, but the risk of use to frighten or intimidate remains, and the weapon may be used in earnest on another occasion [per Lord Bingham CJ in *R v Avis and Others* [1998] 1 Cr App R 420]."

The Firearms and Ammunition Ordinance (1997) repealed and replaced the Arms and Ammunition Ordinance (1981). Together with its subsidiary legislation, they control the possession, use, etc., of arms, ammunition and imitation firearms in Hong Kong.

B. GENERAL DEFINITIONS AND PRESUMPTIONS

Firearms and Ammunition Ordinance, section 2

In the Firearms and Ammunition Ordinance, unless the context otherwise requires, "arms" means:

- (a) any firearm;
- (b) an air rifle, air gun or air pistol from which any shot, bullet or missile can be discharged with a muzzle energy greater than two joules;

- (c) any portable device which is designed or adapted to stun or disable a person by means of an electric shock applied either with or without direct contact with that person;
- (d) any gun, pistol or other propelling or releasing instrument from or by which a projectile containing any gas or chemical could be discharged;
- (e) any weapon for the discharge of any noxious liquid, gas, powder or other similar thing (including an aerosol containing any noxious liquid, gas, powder or other similar thing which is not in general trade or domestic use in aerosol form);
- (f) any harpoon or spear gun, however powered;
- (g) any other thing declared by the Chief Executive in Council in regulations made under section 52 to be within the definition of "arms" for the purpose of this Ordinance;
- (h) a component part used or intended to be used for the discharge of a missile from any of the arms coming within the foregoing paragraphs, and any accessory to such arms designed or adapted to diminish the noise or flash caused by firing the same, but does not include—
 - (i) any "cartridge-operated fixing tool" as defined in regulations relating thereto made under the Factories and Industrial Undertakings Ordinance (Cap 59);
 - (ii) any slingshot, catapult, bow or other similar weapon, unless the same is included by virtue of regulations referred to in paragraph (g);

The Firearms and Ammunition (Declaration of Arms) Regulations made under section 52 of the Ordinance declares a crossbow with a draw weight of more than six kilograms to be within the definition of "arms" in the Ordinance.

Inclusionary provisions—section 2(4) and section 2(4A)

- 25-3 An article, which would otherwise be within the definition of "arms", is not to be excluded from that definition by reason only of the fact that it is defective or out of repair nor by the fact it has been modified and adapted so that it is (a) capable of firing but not capable of discharging a shot, bullet, missile or other ammunition; or (b) impracticable to restore it to working order; see section 2(4) and section 2(4A) of the Ordinance.

"A component part used or intended to be used ..."

- 25-4 A component within section 2(1)(h) means a part that operates in conjunction with other parts, so as in combination to make an effective entity. A magazine was held to be an integral part of a rifle and was a component part used, and intended to be used, for the discharge of a missile. The phrase is not to be interpreted too restrictively: *Att-Gen v Chan Ming-tim* [1990] 2 HKLR 690.

"Firearm"

- 25-5 "Firearm" means a lethal barrelled weapon of any description from which any shot, bullet or missile can be discharged.

Whether a weapon is a firearm is a question of fact. Accordingly the reported cases do not establish as a matter of law that a particular type of weapon is a firearm; see *Grace v DPP* [1989] Crim L R 365, DC, where the court declined to treat *Moore v Gooderham (post)* as authority for the proposition that all air guns are lethal weapons.

In ruling that a can marked "pepper gas" fell within the meaning of "arms", the Court of First Instance (Deputy High Court Judge Longley) in *HKSAR v Robert A. Pascual* (unrep., HCMA 59/2009, [2009] HKEC 1175) said:

"A court can draw inferences from all the evidence. While the noxious quality of the liquid could be proved by evidence of direct analysis the prosecution could also prove it by inference from all the circumstances."

"Lethal"

- 25-6 A lethal weapon is one which, when misused, is capable of causing injury from which death may result: *R v Thorpe* 85 Cr App R 107, CA, approving the test laid down in *Moore*

v Gooderham [1960] 1 WLR 1308, DC. If it is capable of causing more than trifling and trivial injury, it is capable of causing death if discharged point-blank into a vulnerable part of the body, such as an eye, and whether or not it was designed to cause injury is irrelevant: *Moore v Gooderham*, above.

“Barrelled”

See *R v Singh* [1989] Crim L R 724, CA, where there was an evidential dispute as to whether a flare launcher was barrelled.

“from which any ... missile can be discharged”

This phrase includes weapons which, although incapable of being fired, can be adapted or altered to discharge a missile: *R v Freeman*, 54 Cr App R 251, CA (starting pistol which could fire bullets if its barrel were drilled), following *Cafferata v Wilson* [1936] 3 All ER 149, DC.

To prove that a weapon is a firearm, it is essential to call evidence that it is one from which any missile can be discharged or which can be adapted to discharge any missile: *Grace v DPP*, above, where the conviction was quashed in the absence of evidence that an air rifle had been fired or was capable of being fired. Such evidence need not necessarily come from an expert—it could also come from somebody who had seen the weapon being fired or who was familiar with the weapon and could indicate that it did work and what its observed effect was when fired, *ibid.*, although the absence of any evidence as to its firing effect was not fatal to conviction in *Castle (J) v DPP, The Times*, 3 April 1998, DC.

“Ammunition”

“Ammunition” means:

- (a) ammunition for the arms coming within paragraphs (a), (b), (c), (d) and (g) of the definition of “arms”;
- (b) ammunition containing, or designed or adapted to contain, any noxious liquid, gas, powder or other similar thing coming within paragraph (e) of the definition of “arms”;
- (c) grenades, bombs and other like missiles (whether capable of use with arms or not), and fuses, percussion caps and priming caps therefor;
- (d) a “cartridge” as defined in regulations relating to cartridge-operated fixing tools made under the Factories and Industrial Undertakings Ordinance (Cap 59);
- (e) any thing declared by the Chief Executive in Council in regulations made under section 52 to be ammunition for the purposes of this Ordinance;
- (ea) a shot, bullet, missile or any other part of an article which constitutes ammunition under paragraph (a), (b), (c), (d) or (e);
- (f) any shell case or cartridge case,

but does not include—

- (i) a hand-grenade which can be used only for fire-fighting purposes;
- (ii) a shot, bullet, missile, used or empty shell case or cartridge case, or any other part of an article which constitutes ammunition under paragraphs (a), (b), (c), (d) or (e), which is used only as an article of personal, household, or office adornment,

unless the same is included by virtue of regulations referred to in paragraph (e).

Inclusionary Provisions—section 2(3), section 2(4) and section 2(4A)

An article, which would otherwise be within the definition of “ammunition”, is not to be excluded from that definition by reason only of the fact that it has been used or it does not for the time being contain any explosive, gas, or chemical: see section 2(3) of

the Ordinance. An article, which would otherwise be within the definition of "ammunition", is not to be excluded from that definition by reason only of the fact that it is defective or out of repair: see section 2(4) of the Ordinance. Similarly, an article which would otherwise be within the definition of "ammunition", is not to be excluded from that definition by reason only of the fact that it has been modified and adapted so that it is impractical to restore it to working order: see section 2(4A) of the Ordinance.

7-25 **"imitation firearm"**

25-11

"Imitation firearm" is defined in the Ordinance as any thing which has:

- (a) the appearance of being a firearm, but which is not within the definition of "firearm";
- (b) the appearance of being an air rifle, air gun or air pistol but which is not within paragraph (b) of the definition of "arms";
- (c) the appearance of being a grenade, but which is not within the definition of "ammunition".

The jury should be directed that they should consider whether the article had the appearance of being a firearm, an air rifle, etc, when the accused committed the relevant offence. In considering whether or not the article had such an appearance at that time, the jury are entitled to have regard to the evidence of any witnesses who actually saw the article at that time, together with their own observation of the thing itself (if it is available). The jury are not concerned with what the article looks like at any other time: see *R v Morris and King* 79 Cr App R 104, CA. In that case, two metal pipes bound together with tape and carried by a robber under his clothing so as to make them look like the barrel of a shotgun were held to be an imitation firearm.

"air gun"

25-12

"Air gun" includes a gun which uses a compressed gas or compressed gases as a propellant.

The word "includes" in the definition extends the meaning of the term beyond weapons where the propulsion is caused by, or derived from, the use of air.

"air pistol"

25-13

"Air pistol" includes a pistol which uses a compressed gas or compressed gases as a propellant.

The word "includes" in the definition extends the meaning of the term beyond weapons where the propulsion is caused by, or derived from, the use of air.

"air rifle"

25-14

"Air rifle" includes a rifle which uses a compressed gas or compressed gases as a propellant.

The word "includes" in the definition extends the meaning of the term beyond weapons where the propulsion is caused by, or derived from, the use of air.

"Commissioner"

25-15

"Commissioner" means the Commissioner of Police and, in relation to any particular power, function or duty of the Commissioner under this Ordinance, means a person having authority pursuant to section 50 to exercise or perform it.

"licence"

25-16

"Licence" means a dealer's licence or a licence for possession.

"licence for possession"

"Licence for possession" means, subject to section 2(4C), a licence granted under section 27(2) or 30(1) (a) or (b). 25-17

"dealer's licence"

"Dealer's licence" means, subject to section 2(4C), a licence granted under section 27(3) or 30(1) (b). 25-18

"deal in"

"Deal in" means: (a) to manufacture, store, sell, let on hire, part with possession of, supply, import, export, procure, purchase, take on hire, take possession of, transport, repair, test, prove or offer to do any of the foregoing; (b) to expose for sale or hire, or to have possession for storage, sale, hire, supply, transport, repairing, testing or proving. 25-19

Presumptions, section 24

20.—(1) Subject to subsections (2) and (3), any person who is in possession of an imitation firearm commits an offence and is liable to imprisonment for 2 years. 25-20

(2) Any person who, within 10 years of being convicted of an offence specified in the Schedule or of an offence under this Ordinance, commits an offence under subsection (1) is liable to imprisonment for 7 years.

(3) A person does not commit an offence under subsection (1) if he satisfies the magistrate that—

- (a) at the relevant time he was under the age of 15; or
- (b) he was in possession of the imitation firearm in his capacity as a person who deals in imitation firearms by way of trade or business, or as a servant of such a person carrying out his bona fide and lawful instructions; or
- (c) he was not in possession of the imitation firearm for a purpose dangerous to the public peace, or of committing an offence, or in circumstances likely to lead to—
 - (i) the commission of an offence; or
 - (ii) the possession of the imitation firearm for a purpose dangerous to the public peace, by himself or any other person. 25-22

Hisar v Lam Kwong Wai and Another; [2006] 3 HKLRD 808; (2006) 9 HKCFAR 574. The principal issue in this appeal is whether section 20(3)(c), by placing an onus on a defendant, is consistent with the presumption of innocence (which is protected by art 87(2) of Basic Law and art 11(1) of the Hong Kong Bill of Rights ("BOR") implementing art 14(2) of the International Covenant on Civil and Political Rights ("ICCPR"), as applied by art 39 of the Basic Law) and with the right to a fair trial (which is protected by art 87(2) of the Basic Law and art 10 of the BOR (art 14.1 of the ICCPR) as applied by art 39 of the Basic Law).

Section 20(1) of the Ordinance provides that a person who is in possession of an imitation firearm commits an offence punishable with imprisonment; yet section 20(3) goes on to provide that he does not commit an offence if he satisfies the court of one or more of the matters stated in the sub-section. Relying on section 20(3), the prosecution had led evidence to prove that the respondents were in possession of the imitation firearm for any of the purposes listed in section 20(3)(c).

The Court of Appeal (Stuart-Moore VP, Stock JA and Burrell J) resolved this issue by holding that there was inconsistency with the presumption of innocence and the right to a fair trial, so that section 20(1) when read with section 20(3)(c) was invalid and quashed their convictions. The prosecution appealed. 25-23

The Court of Final Appeal (per Sir Anthony Mason NPJ) in allowing the appeals, quashing the convictions and remitting the matters to the Court of Appeal to consider whether the proviso to section 83(1) of the Criminal Procedure Ordinance should be applied declared that: section 20(1), in conjunction with section 20(3)(c), should be

read and given effect as imposing on the defendant an "evidential burden" only as apposed to a "legal" or "persuasive" burden of proof. Earlier on in the judgment the Court of Final Appeal had stated:

"A reverse onus, which places an onus on the defendant to prove all or any of the elements of the offence, appears to be inconsistent with the presumption of innocence because it allows the defendant to be convicted on failing to discharge the reverse onus, even though the prosecution fails to prove all the elements of the offence beyond reasonable doubt. In the cases on reverse onus, a distinction has been drawn between the 'legal' or 'persuasive' burden of proof and what has been called the 'evidential' burden. The distinction is important because an evidential burden (which is not, strictly speaking, a burden of proof) is generally regarded as consistent with the presumption of innocence (*Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601, [2004] HKLRD 351 per Bokhary PJ and Lord Scott of Foscote NPJ; *R v Lambert* [2002] 2 AC 545 at 563G, per Lord Slynn of Hadley; 572D per Lord Steyn and 589B, per Lord Hope of Craighead; but cf. *Downey v The Queen* (1992) 90 DLR (4th) 449)".

- 24.—(1) Any person who is proved to have had in his physical possession—
- (a) anything containing arms or ammunition, or both;
 - (b) the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar containers containing arms or ammunition, or both, shall, until the contrary is proved, be presumed to have had the arms or ammunition, or both, as the case may be, in his possession.
- (2) Any person who is proved or presumed to have had arms or ammunition, or both, in his possession shall, until the contrary is proved, be presumed to have known the nature of such arms or ammunition, or both, as the case may be.
- (3) The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the arms or ammunition, or both, as the case may be. (Replaced 14 of 2000 section 12)

The wording of this section closely follows that of section 47 of the Dangerous Drugs Ordinance (Cap 134). It is submitted that the cases in relation to section 47 of the Dangerous Drugs Ordinance are relevant to the interpretation of this section. *Chou Shih Bin v HKSAR* [2005] 1 HKLRD 838. A Taiwanese Businessman was found to have an anti-riot handgun in a bag he presented for security screening prior to boarding a flight at Chek Lap Kok airport. In convicting the defendant of an offence contrary to section 13 of the Firearm and Ammunition Ordinance, the District Court judge relied on section 24 of the Ordinance. The Court of Final Appeal (per Bokhary PJ) in allowing the appeal on the "substantial and grave injustice ground" made references to section 24. Even though references to section 24 were *obita dicta*, this judgment should also now be read together with the more recent judgment of *HKSAR v Lam Kwong Wai* and another, above.

"Section 24 is a reverse-onus provision. Such a provision evokes consideration of the right to a fair trial and the presumption of innocence constitutionally guaranteed by arts 10 and 11 of the Bill of Rights as entrenched by art 39 of the Basic Law. In *Attorney General v Lee Kwong-tut* [1993] AC 951 at p 972F–G the Privy Council spoke of what would 'often be all that is required' when a reverse-onus provision is under constitutional challenge. As to this it was there said that '[t]he court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like'. Where a reverse-onus provision goes so far as to presume the very gravamen of the offence, its construction and constitutionality will come under very close scrutiny".

"In *Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601 we cited the decision of the House of Lords in *R v Lambert* [2002] 2 AC 545 and that of the Supreme Court of Canada in *Downey v R* (1992) 72 CCC (3d) 1. We said (at pp 618]–619A) that [a] shifting of the evidential burden only may be safe from a constitutional challenge even where a shifting of the legal burden itself would be vulnerable to such a challenge".

"If s 24 is struck down, then one would, as everyone did at the trial, simply ignore the section ..."