

28 June 2010

Item V – Trial in the District Court

Submissions of the Hong Kong Bar Association

1. The Bar Association's comments relate to jury trials in Hong Kong and their possible extension to the District Court.

Jury trials and the common law

2. The right to trial by jury is deeply embedded in the common law. The continued existence of the common law in Hong Kong is guaranteed under Article 8 of the Basic Law.

3. In England, trial by jury can be traced back to at least the Charter of 1215 which provided for trial by one's equals. By the 14th century it was seen as an "ancient" right. Later, when British settlements were established in parts of the world, trial by jury in criminal matters was claimed as a "birthright and inheritance" under the common law and an institution to be established and safeguarded to the extent that local circumstances would permit.¹ This common law right may be abrogated or limited by legislation.²

Importance of jury trial

4. Madam Justice L'Heureux-Dube of the Supreme Court of Canada, summarized the rationale of the jury:³

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the

¹ *Kingswell v R* (1985) CLR 264, per Deane J, para 49

² In the UK, under sections 44-46 of the Criminal Justice Act 2003, the prosecution may apply for the trial of an indictable offence to be tried by a judge alone if there is a real and present danger of jury intimidation.

³ *R v Sherratt* [1991] 1 SCR 509, 523

jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

5. Lord Devlin described trial by jury as “*the lamp that shows that freedom lives*”, and listed five advantages of trial by jury over trial by judge alone:⁴

(1) Juries are superior to judges in assessing defence points: “*the hope of the defence very often lies in impalpabilities – the willingness to make allowances for muddle-headedness, illogicalities, and unreasonableness – impalpabilities that are less appealing to the legal mind than to the lay*”,⁵ and, “[I]t is an essential part of the system that the law should recognize that there are cases in which such factors should be dominating”,⁶

(2) Juries are superior to judges in assessing credibility;⁷

(3) Juries are better able to see the justice of a case, as opposed to the judge who is sworn to strictly follow the law;⁸

(4) Trial by jury helps to ensure the independence and quality of judges;⁹

(5) Trial by jury gives protection against laws which ordinary men may regard as harsh and oppressive.¹⁰

6. In the High Court of Australia case of *AK v The State of Western Australia*,¹¹ Heydon J discussed the consequences of the differences between judge and jury: trial by jury is by a tribunal who have to do justice in only a few cases in their lives, whereas trial by judge alone is by a tribunal consisting of one person who is not

⁴ Lord Devlin, *Trial by Jury*, (1966), 120

⁵ Above, 122

⁶ Above, 123

⁷ Above, 149

⁸ Above, 154

⁹ Above, 158-159

¹⁰ Above, 160

¹¹ (2008) 232 CLR 438, per Heydon, para 101

randomly selected from society and who must do justice in hundreds or thousands of cases. The repetitive cases which a judge hears can breed a perception that a judge may fail to pay close attention to the details of a particular case. He added:

The perception is not so much that the judge may assume that the police always get the right man, but that once the prosecution has tendered enough evidence to make out a case to answer, the possible answers to that case which may be derived from the prosecution evidence and any evidence which the defence calls are not attended to sufficiently closely, because the judge has rejected those explanations in so many earlier cases. The perception is likely to be that when it comes to criminal defences, judges feel that they have heard it all before...and there is no new thing under the sun....Where trial is by jury, these perceptions do not matter: for factual findings are for the jury alone...

Hong Kong

7. In Hong Kong there is no right to trial by jury,¹² nor is there any mechanism that an accused can elect to be tried of an indictable offence by judge and jury. Article 86 of the Basic Law only guarantees that, *"The principle of trial by jury previously practiced in Hong Kong shall be maintained"*. The International Covenant on Civil and Political Rights ("ICCPR") does not provide for a right to trial by jury. Consequently, Hong Kong's Bill of Rights Ordinance, which incorporates the ICCPR, does not include such a right.

8. Generally, summary offences are tried in the Magistrates Court (they may also be tried in the District Court with indictable offences). All indictable offences (ie the more serious offences) are tried in the District Court by a judge alone or the Court of First Instance by a judge and jury. There are indictable offences which may be tried summarily in the Magistrates Court, or they may be tried in the District Court or in the Court of First Instance: s 14A(4) Criminal Procedure Ordinance (Cap 221). These are called electable offences.

¹² *Chiang Lily v Secretary for Justice*, FAMC 64 and 65/2009 (26 March 2010), per Li CJ, para 9

9. The decision where an indictable offence is to be tried lies solely with the prosecution.¹³ A judicial review challenging the prosecution's decision to have an indictable offence tried in the District Court instead of a trial in the Court of First Instance by judge and jury, was unsuccessful.¹⁴

10. The Department of Justice's Statement of Prosecution Policy and Practice **[Appendix 1]** at Chapter 14 discusses the prosecution's policy for the choice of trial venue. The likely sentence an accused may receive if convicted is an important factor in choosing venue of trial.

England and Wales

11. In England and Wales there is no constitutional right to a trial by jury; however, a trial by jury is considered a "right" available to an accused unless that right is amended or circumscribed by express legislation.¹⁵ Indictable offences are tried by judge and jury. But in exceptional circumstances, where there is a real danger of jury tampering, indictable offences may be tried by a judge alone.¹⁶

Australia

12. Section 80 of the Australian Constitution provides for a trial by jury for any Commonwealth indictable offence.

13. In the State of New South Wales indictable offences are tried by judge and jury. However, the accused may elect to be tried by judge alone and the DPP must consent.¹⁷ The DPP's Guidelines **[Appendix 2]** state that trials where community values are important, such as reasonableness, provocation, dishonesty, indecency, or where there are substantial issues of credit, then they should be heard by a jury.

¹³ *Chiang Lily v Secretary for Justice*, HCAL 42 and 107/2008, para 1

¹⁴ *Chiang Lily v Secretary for Justice*, HCAL 42 and 107/2008; appeal dismissed, [2009] 6 HKC 234; application for leave to appeal to the Court of Final Appeal dismissed, FAMC 64 and 65/2009 (26 March 2010)

¹⁵ *R v Twomey and Ors* [2009] 2 Cr App R, para 10

¹⁶ Sections 44-46, Criminal Justice Act 2003

¹⁷ Section 132, Criminal Procedure Act 1986

14. The DPP's Guidelines set out detailed criteria to be applied when consenting for a trial to be heard by judge alone, and emphasizes the importance of jury trials and the circumstances where a jury trial is more suitable.

Canada

15. In Canada, s11(f) of the Canadian Charter of Rights and Freedoms gives an accused the right to trial by jury where the charge carries a penalty of 5 years or more imprisonment. Trials of indictable offences are normally tried by a judge and jury, but an accused may elect to be tried by judge alone (in the Supreme Court or Court of Queen's Bench), or in the provincial court by judge alone.¹⁸

New Zealand

16. Section 24(e) of New Zealand's Bill of Rights Act guarantees that any person charged with an offence shall have the right to a trial by jury if the penalty for the offence includes imprisonment for more than 3 months (the only exception is an offence tried before a military tribunal).

Singapore

17. There are no jury trials in Singapore.

Conclusion

18. Blackstone, in his *Commentaries*,¹⁹ regarded the jury as the bulwark of liberty and spoke about the danger of juries falling into disuse if the executive arranges - for the sake of convenience or efficiency, for trials to be heard by other tribunals (ie judge alone):

"And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet it be again remembered,

¹⁸ Section 561, Criminal Code of Canada

¹⁹ *Commentaries* (1769), Book IV, 344

that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, although begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern” (emphasis in original)

19. The danger which Blackstone identified almost 240 years ago of jury trials falling into disuse because they were not convenient, is present today in Hong Kong where the prosecution alone decides whether an accused is tried by a judge and jury or by judge alone.

20. In particular cases it may not be convenient or advantageous for the prosecution to choose jury trials. But if jury trials are not to fall into disuse, then the circumstances when jury trials must be held or when an accused is to have a say in the mode of his or her trial must be guaranteed by legislation.

21. The Bar Association supports the Legislative Council to consider how jury trials in the Court of First Instance can be more widely used, and provided for and guaranteed in legislation. It further recommends that the Legislative Council study the introduction of jury trials in the District Court. The cost of jury trials in the District Court would not necessarily be more expensive than judge alone trials. Given the importance of jury trials, cost cannot be a primary consideration.

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Department of Justice's Code for Prosecutors, Hong Kong

14. *The Mode of Trial*

14.1 For most offences which are triable in the Magistrates Court, the maximum sentence upon conviction is 2 years' imprisonment. In the District Court, the maximum sentence upon conviction is 7 years' imprisonment. In the Court of First Instance, the maximum sentence upon conviction is that prescribed by law, including, for some offences, life imprisonment. In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors. Matters such as the length of trial or the possibility of a guilty plea are not usually relevant.

14.2 Although it is the prerogative of the prosecution to select the venue for trial, *'the venue selected should be appropriate'* (*HKSAR v Tai Chi-wah and Another* CACC 497 of 2006). In *HKSAR v Kwok Chi-kwai and Another* CACC 12 of 2005, the Court of Appeal observed:

"These applicants for leave to appeal against conviction were tried in the High Court, a choice of venue that surprises us given that it was a complicated conspiracy to defraud in respect of which there was never a prospect of a sentence exceeding the maximum term that District Court judges are entitled to impose."

14.3 In the selection of venue, the prosecutor should have regard to those offences which must in law be tried in the Magistrates Court, as they are purely summary, and to those which must be tried on indictment, such as murder and rape, and to those which are triable either way. Purely summary offences may be tried together with indictable offences in the District Court, but not in the Court of First Instance.

14.4 In deciding whether a case should be tried in the Court of First Instance or the District Court, the prosecutor is entitled to consider the possibility of an enhanced sentence being imposed upon conviction in accordance with section 27 of the Organized and Serious Crimes Ordinance, Chapter 455. An enhanced sentence may be appropriate if the offence is an organized crime, but also in other circumstances, as where significant harm has been caused or where the offence is prevalent. The Magistrates Court lacks the jurisdiction to enhance a sentence in this way.

Jury trials in New South Wales, Australia

DPP's Guidelines

Judge Alone Trials

An accused person may elect to be tried by a judge alone, subject to the consent of the Director or his delegate (see section 132 of the *Criminal Procedure Act 1986*.)

Each case is to be considered on its merits. There is no presumption in favour of consent. It should be borne in mind that the community has a role to play in the administration of justice by serving as jurors and those expectations and contributions are not lightly to be disregarded. Consent is not to be given where the principal motivation appears to be "judge shopping". Consent is not to be given where the election has not been made in accordance with section 132(4) of the *Criminal Procedure Act 1986* (see *R v Coles* (1993) 31 NSW LR 550).

Predictions of the likelihood of conviction by either jury or judge alone or of a jury disagreement are not to be considered.

The principal consideration is the achieving of justice by the fairest and most expeditious means available. Trials in which judgment is required on issues raising community values – for example: reasonableness, provocation, dishonesty, indecency, substantial impairment under section 23A of the *Crimes Act 1900* – or in which the cases are wholly circumstantial or in which there are substantial issues of credit should ordinarily be heard by a jury.

Cases which may be better suited to jury trial include those where the interests of the alleged victim require a decision by representatives of the community.

Cases which may be better suited to trial by judge alone include cases where:

- the evidence is of a technical nature, or where the main issues arise (in cases other than substantial impairment under section 23A of the *Crimes Act 1900*) out of expert opinions (including medical experts);
- there are likely to be lengthy arguments over the admissibility of evidence in the course of the trial;
- there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause;
- the only issue is a matter of law;
- the offence is of a trivial or technical nature;
- witnesses or the accused person/s may so conduct themselves as to cause a jury trial to abort; and/or

- significant hurt or embarrassment to any alleged victim may thereby be reduced.

The power to consent has been delegated by the Director to all Crown Prosecutors and Trial Advocates. Where uncertainty exists as to whether or not to consent, reference should be made to the Director or a Deputy Director, the Senior Crown Prosecutor or a Deputy Senior Crown Prosecutor.