CAAR 1/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

APPLICATION FOR REVIEW NO. 1 OF 2015

(On Appeal From District Court Criminal Case No. 514 of 2015)

BETWEEN

SECRETARY FOR JUSTICE	Appellant
and	
WADE, IAN FRANCIS	Respondent

Before: Hon Lunn VP, Macrae and McWaltersJJA in Court

Date of Hearing: 27 January 2016

Date of Judgment: 5 February 2016

J U D G M E N T

Hon Lunn VP (giving the Judgment of the Court) :

1. With the leave of Cheung CJHC, granted on 26 October 2015, the Secretary for Justice appeals the sentences imposed on the respondent on 2 October 2015 by District Court Judge Woodcock in the District Court following the respondent's pleas of guilty to a charge of dangerous driving, contrary to section 37(1) of the Road Traffic Ordinance ("the Ordinance"), Cap. 374 (Charge 1) and a charge of driving an unlicensed vehicle, contrary to section 52(1)(a) and (10)(a) of the Ordinance (Charge 2). In respect of Charge 1, the respondent was sentenced to a fine of $30,000; ordered to be disqualified from driving for 18 months and to attend a driving improvement course. He was fined $3,000 in respect of Charge 2.

The facts

2. Between about 20:05 and 20:40 hours on 5 December 2014, the respondent was the driver of a private motor car with registration number 1FW 5445, which was involved in collisions with four other vehicles at four different places, namely in Electric Road, Java Road and twice in Tai Tam Road.

The collision with the first vehicle

3. At around 20:05 hours, the nearside front of the respondent's car collided with the rear offside of a stationary light goods vehicle, registration number PU 957, in the first lane of the two lanes of the carriageway of Electric Road, causing the light goods vehicle some damage. The respondent's vehicle was travelling at about 20-30 km/h. The respondent did not stop his vehicle, but drove on chased by the driver of the light goods vehicle.

The collisions with the second vehicle

4. After the respondent's vehicle had travelled forward for around 230 metres, it stopped behind another stationary private vehicle, registration number TB 6197, on the 1st lane beside the pavement near 18 Java Road, which was a one-way two-lane carriageway. The driver of the light goods vehicle, PU 957, stopped behind the respondent's vehicle, alighted and approached the respondent, who remained in the driver's seat. The respondent did not appear to be sober. After exchanging a few words with the driver of PU 957, the respondent drove forward causing the nearside front of his car to collide with the rear offside of the parked motor car causing it damage. The respondent then reversed his vehicle, after which he drove forward again. Once again he collided with the other motor car in the same fashion. Then, he drove off. The driver of the light goods vehicle made a report to the police.

5. Subsequently, the driver of another vehicle saw the respondent's motor car stationary at a set of traffic lights at the junction of the exit road from the Eastern Corridor and Chai Wan Road. When the light displayed green the respondent drove forward slowly at between 15 and 20 km/h, occasionally crossing into the second carriageway. Then, the respondent's vehicle was driven at about 15-20 km/h in an 'S' shape manner in Tai Tam Road on the 1st right lane. On some occasions, the respondent's vehicle crossed the continuous double white lines onto the opposite lane against traffic flow.

The collisions with the third vehicle

6. At around 20:25 hours, the offside right front of the respondent's vehicle crossed the continuous double white lines into the opposite lane, where the respondent's vehicle came

into contact with the right lower leg of the driver of a motorcycle, registration number RX 243, which was stationary in the opposite lane. The rider of the motorcycle jumped off the motorcycle as the offside front of the respondent's vehicle collided with the motorcycle, causing it to topple over to the ground. The rider of the motorcycle found the respondent unresponsive to his questions and smelling of alcohol. Although he asked the respondent to remain at the scene whilst he made a report to the police, the respondent drove off, again colliding with the motorcycle causing it damage.

The collision with the fourth vehicle

7. At 20:40 hours, the respondent's vehicle once again crossed the continuous double white lines in Tai Tam Road and, at a distance of about 450 metres from the earlier collision in Tai Tam Road and travelling at about 15-20 km/h, the front side of the respondent's motor car collided with the offside front of a stationary motor car, registration number KG 866. Then the respondent alighted from his vehicle and, having walked in an uncoordinated manner towards motor car KG 866, tried unsuccessfully to open the driver's door of the other vehicle KG 866, but in vain. Finally, the respondent returned to his vehicle where he failed in his attempt to restart the vehicle.

8. Shortly afterwards, following the arrival of police officers, an alcohol screening test was performed on the respondent at 21:26 hours. The respondent was found to have 85 micrograms of alcohol in 100 millilitres of his breath. Having been arrested, an evidential breath test was conducted on the respondent at Stanley Police Station at around 22:24 hours. The respondent was found to have 74 micrograms of alcohol in 100 millilitres of his breath.

9. It was found that the respondent's vehicle licence had expired on 1 April 2014.

Reasons for sentence

10. Of the damage resulting from the four collisions, in her reasons for sentence the judge said:

> " From the Facts and the photographs I have seen, the four vehicles were slightly damaged. Nobody suffered any injury…
>
> I do not have any details as to the extent of the damage or the cost of the damage from the Prosecution."

11. The judge noted that the respondent was a man of 75 years of age, who had lived in Hong Kong for 34 years. Further, she said that he had no criminal convictions and had only one road traffic offence, namely an offence in 2009. Of that, she said it had nothing to do with poor driving.

12. Of the respondent's character, she said:

> " Until now he has been a pillar of Hong Kong society. Not only is he heavily involved with the Red Cross, he is a vice patron of the Community Chest. He has been awarded a silver Bauhinia Star from the Hong Kong Government and received something equivalent from the Italian Government.
>
> …
>
> This is a fall from grace for a man who has prided himself on having an unblemished reputation. I am sure his embarrassment and anguish is acute and his remorse genuine."

13. Of the oral evidence and written report received by the court on behalf of the respondent of Professor Peter WH Lee, a consultant clinical psychologist, the judge determined his evidence to be "entirely independent". Of the respondent's professional and personal life, she said:

> " ..the defendant's professional life has been very successful, which sadly seems to have been to the detriment of his family life. From the report, the defendant told Professor Li (sic) that he was unaware of how unhappy his wife was until she began divorce proceedings in 2012. What then proceeded was an extremely acrimonious divorce. This took two years, and they were finally divorced in May 2014. He has told Professor Li that he was devastated then and is still now. Not long after divorce was finalised in 2014, he joined a blue chip company in Hong Kong in a very responsible and demanding role when, at 74 years old, he could have considered slowing down."

14. Of the chronology of events, the judge noted that the respondent committed the offences within six months of those significant events in his life in May 2014.

15. Of Professor Lee's opinion, and the conclusion that she drew from that opinion, the judge said:

> " Professor Li diagnosed the defendant with an adjustment disorder with depression. He was clearly not himself when he committed this offence…it is clear from the report and from mitigation that I have heard that there are reasons that it came to this for the defendant."

16. Of those reasons, the judge went on to note:

> " The report does emphasise how the defendant's health, both physically and mentally, had deteriorated over the last two years. From a physical point of view the defendant has even had to be hospitalised for symptoms that doctors do not seem to be able to treat. From a mental point of view, Professor Li is of the opinion the defendant does now have a very gloomy outlook on himself. He feels uncertain. He feels that this is now the beginning of the end for him and he is very vulnerable, intensely lonely, and regrets losing his entire family."

17. Of the connection between those circumstances and the commission of the offence, the judge said:

> " Professor Li explains how all these factors have culminated in not only a disorder, but leading up to this offence. At paragraph 68 of his report, Professor Li says: "Instead of wilfully tempting his luck with the law at the time of the offence, Mr Wade was simply so depleted physically, emotionally and psychologically that he lost his better judgment, resulting in having an unrealistically low sense of danger." "

18. In the result, the judge concluded:

> " This is not a case where the driver was young, reckless and irresponsible. This is a case where clearly, the defendant has acted out of character. There is a tangible history and tangible reasons that led to this offence. Professor Li is sure that the defendant was unaware at the time of his mental disorder and depression, and because he was unaware of it, he did not address it. He will address it now. Professor Li is also of the opinion that there is zero chance of the defendant reoffending; not only a driving offence, but any offence."

19. In referring to the authorities relevant to identifying the factors to be considered by a court in sentencing a defendant for dangerous driving, the judge adverted to the judgment of the Court of Appeal of England and Wales in *R v Cooksley* [1], observing that it identified the possible factors of aggravation in the commission of the offence. Also, she noted that the judgment of this Court in *Secretary for Justice v Poon Wing Kay* [2]enjoined judges sentencing in such cases to have regard to the, "…overall circumstances and the overall culpability of the offender. In assessing the overall seriousness of the crime, culpability is often the dominant factor..." Both of those judgments were concerned with sentencing in cases of causing death by dangerous driving.

20. Of the other authorities, to which she had been referred, the judge said:[3]

> " They are not of much assistance. The prosecution has referred me to HKSAR v Lam King Sing DCCC 190/2015. In that case, the defendant, after driving dangerously, went out of his way to attempt to pervert the course of justice, and deserved a custodial sentence. In the authority HKSAR v Ip Kwok Leung DCCC 24/2012, that driver drove dangerously after taking ketamine. Knowing he had consumed ketamine, he got behind the wheel of a car. He had a poor criminal record; was a drug addict and a drug trafficker. In another authority, HKSAR v Lee Chun Kit DCCC 820/2011, I sentenced that defendant to a term of imprisonment after he drove along the Tolo Highway chased by police in several vehicles and knocking a motorcyclist off his vehicle.
>
> In all those cases, those defendants did deserve custodial sentences."

21. In the result, the judge said:[4]

> " …the defendant does deserve to be blamed. He is responsible for his actions, and that is what culpability means. But here, I do see extenuating factors that could have led to this offence, and Professor Li, as an expert, is of the view that they did lead to this offence.
>
> I accept that the defendant was not even aware he was suffering not only physical ailments but mental health issues that led him not to be himself. I am sure if he was himself, he would not have driven home that evening after drinking."

22. In sentencing the respondent, the judge said:[5]

> " *Here I do accept mitigation put forward on your behalf*, and I am of the view that I can be merciful under all the circumstances. I do not find it necessary to consider a custodial sentence, nor, in that case, a suspended sentence. It is highly unusual not to consider a custodial sentence appropriate, but in this case, having considered what is said on your behalf and Professor Li's report, as well as the facts of the manner in which you drove dangerously, I can depart from the norm. [Italics added.]

The submissions of the Secretary for Justice

23. In his helpful written and oral submissions Mr Edmond Lee, for the Secretary for Justice, argued that the sentence imposed on the respondent for Charge 1 was wrong in principle and/or manifestly inadequate:

(a) The imposition of a pecuniary penalty only in respect of Charge 1 failed to sufficiently reflect the gravity of the offence and the culpability of the respondent having regard to:

(i) the proportion of alcohol in the respondent's breath was 3.36 times the legal limit;

(ii) the respondent drove erratically for a prolonged period of 35 minutes; and

(iii) the respondent failed to stop and drove away after three of the collisions.

(b) The judge erred in placing undue weight on the fact that throughout the respondent drove at a slow speed, there was no injury to the person and only minor damage was caused to property.

(c) The judge erred, in the context of sentencing for an offence of dangerous driving, in placing undue weight on the respondent's clear record and positive good character.

(d) The judge erred in failing to refer specifically to the statutory enhancement of sentence as stipulated in section 37 (2D) and (2E) of the Road Traffic Ordinance, Cap 374 [6].

The respondent's submissions

24. For the respondent, Mr Midgley accepted that Mr Lee, for the Secretary for Justice, had accurately summarised in bullet point form the mitigation advanced on behalf of the respondent:

" (a) The respondent was genuinely remorseful which was evidenced by his guilty pleas at the earliest opportunity.

(b) He has a clear record and positive good character.

(c) He was driving at a very slow speed and as a result, there was no personal injury and property damage was minimal; he was also willing to compensate the victims.

(d) The incident was a single fall from grace, he decided not to drive again and the chance of re-offending was nil.

(e) The respondent was under enormous stress during an acrimonious divorce proceeding in the last two years and he had 'Adjustment Disorder with Depressed Mood.'

> (f) Probation was unnecessary, community service was unsuitable because of the respondent's age and physical ailments; a suspended sentence would be a "tremendous burden"."

25. Mr Midgley invited the Court to note that it had not been referred to any authority in which the defendant had been given a custodial sentence in circumstances where he had pleaded guilty to a charge of dangerous driving in which no injury was caused.

A consideration of the submissions

26. The judge stated in terms that the alcohol level in the respondent's breath test was over the legal limit "at a Tier 3 level". [7] Clearly, the judge was aware that section 37 (2D) was operative, so that the maximum sentence was increased for the charge of drink-driving to 4½ years' imprisonment. It was not necessary for the judge to state specifically in her reasons for verdict that she was aware of that fact.

27. As noted earlier, the judge stated in general terms that she accepted the mitigation advanced on behalf of the respondent. She noted specifically that: his remorse was genuine;[8] not only did he have a clear record but his only driving infraction was, "nothing to do with poor driving" [9]; he was of positive good character;[10] he was not aware he was "suffering from mental health issues that led him not to be himself. I am sure that if he was himself, he would not have driven home that evening after drinking" [11]. Further, in stating that she had regard to the "manner in which you drove dangerously" [12], the judge was clearly referring to the slow speed at which the respondent was driving, together with the fact that only slight damage was caused to the vehicles; and that "nobody suffered any injury".[13]

28. In *Secretary for Justice v Poon Wing Kay* and *R v Cooksley*, this Court and the Court of Appeal of England and Wales respectively were dealing with cases of causing death by dangerous driving, rather than dangerous driving simplicter. In the latter case, in the judgment of the court, Lord Woolf CJ said:[14]

> " In view of the much heavier sentences which can be imposed where death results as compared with those cases where death does not result, *it is clear that Parliament regarded the consequences of dangerous driving as being a relevant sentencing consideration* so that if death does result this in itself can justify a heavier sentence than could be imposed for a case where death does not result." [Italics added.]

29. The maximum sentence for causing death by dangerous driving, provided by section 36(1) of the Ordinance, is 10 years' imprisonment, whereas the maximum sentence for dangerous driving, even in circumstances of aggravation as stipulated by section 37 (2D) and (2E), is 4½ years' imprisonment.

30. In the judgment of this Court in *Secretary for Justice v Poon Wing Kay*, Ma CJHC,

as Ma CJ was then, referred to the judgment of Lord Woolf CJ in *R v Cooksl*ey and said:[15]

> " While admittedly the sentencing guidelines for the offence of dangerous driving causing death in that case cannot be used in Hong Kong, not least because the maximum sentence in the United Kingdom for the offence was at the time of that case 10 years (now 14 years) rather than 5, a number of general principles found in the judgment of Lord Woolf CJ can be stated as being equally applicable in Hong Kong (we also add some observations of our own):
>
> (1) In most cases of dangerous driving, it will be obvious to the offender that his driving was dangerous and he therefore deserves to be punished accordingly: at p.45J (para.11). This is important to bear in mind because, while it may be true in some instances not to treat violators of traffic laws as true criminals, nevertheless for offences such as dangerous driving causing death, the offender may not necessarily be seen in quite such a benevolent light.
>
> (2) Where death results from dangerous driving, it is obvious that grave distress will be caused to the family of the deceased: at (p.668)p.46A (para.11). The impact on people's lives ought to be taken into account when sentencing.
>
> (3) It is important for courts to drive home the message that there may sometimes be extremely grave consequences flowing from acts of dangerous driving and it is therefore necessary to have in mind a deterrent effect when sentencing in many cases involving dangerous driving: at p.46C-E (para.11). A motor vehicle, many may often forget, when not driven to requisite standards, can kill or maim. The standards required by the law for motorists found in the road traffic legislation and elsewhere are there to ensure that all who can come into contact with motor vehicles (whether fellow motorists, passengers or pedestrians) are safe and that their lives are not endangered.
>
> (4) While a list can be drawn up of aggravating and mitigating factors, a sentencing court must however look at the overall circumstances and the overall culpability of the offender. In assessing the overall seriousness of a crime, culpability is often the dominant factor: at p.47B (para.14). It is not a case of counting the number of aggravating or mitigating factors and then arriving by mechanical means at the relevant sentence. Sentencing is not quite that exact an exercise and courts must be sufficiently nimble to take into account the overall picture in order to arrive at an appropriate sentence. In some cases, the fact that only some aggravating factors exist, but not others (such as in the present case), may still bring the case into a very serious category.
>
> (5) One major factor to be considered as an aggravating factor justifying a heavy sentence is where a person has driven with selfish disregard for the safety of other road users or of his passengers (or, we would add, of pedestrians) or with a degree of recklessness: at p.46F-D (para.12)."

31. There is no dispute that the primary factor of aggravation in the commission of the offence lies in the fact that the respondent was driving his motor car with alcohol in his body not only over the legal limit but also no less than 3.36 times over the legal limit. Secondly, he was involved in collisions with four different vehicles at four separate locations. He collided with the vehicle the subject of the second collision on two separate occasions as he tried to drive forwards. On each of the first three collisions, having stopped at the scene of the collision, the respondent nevertheless drove on. After the collision with the third vehicle, during which his motor car came into contact with the leg of the rider of a motorcycle and knocked the motorcycle over, notwithstanding the motorcyclist's requests that he should not leave the scene whilst he made a report to the police, the respondent nevertheless drove away in his motor car. Thirdly, he persisted in driving in that manner for a prolonged period of about 35 minutes. The series of

collisions occurred as the respondent drove from Electric Road to Tai Tam Road: first in Electric Road; secondly, in Java Road; thirdly, in Tai Tam Road, about 3.5 km after its junction with Chai Wan Road; and, fourthly 450 metres farther into Tai Tam Road.

32. On the other hand, in assessing the culpability of the respondent, regard is to be had to the unusually slow speed at which he drove throughout the journey. Clearly, the descriptions of the speed of the respondent's motor car at about the time of the other respective collisions were estimates only by the other parties involved or witnesses. The estimate of speed of the respondent's motor car at the time of the collision with the first vehicle was 20 to 30 km/h. The second collision occurred when the respondent manoeuvred his stationary vehicle into the back of another stationary vehicle immediately in front. The respondent's motor car was estimated to be travelling at between 15 and 20 km/h for the third and fourth collisions.

33. As noted earlier, the judge said that she had been provided with no details of the damage or cost of repair to the four other vehicles involved in the collisions. However, having regard to the Summary of Facts and the photographs of those vehicles, she determined that the four vehicles were "slightly damaged". That is borne out by this Court's viewing of those photographs. Nevertheless, in the context of mitigation to the effect that the respondent had offered to pay for repairs to all the damage caused to the other vehicles, but that no response had been forthcoming, the judge observed that the damage to the bumper of the Mercedes-Benz motor car involved in the fourth collision would cost "quite a lot of money." At the hearing, the Court was informed that two of the four owners of the vehicles had no claim to make, whereas the other two owners were pursuing their claims through the respective insurance companies.

34. As noted earlier, in the judgment of this court in *Secretary for Justice v Poon Wing Kay*, the necessity for the imposition of a deterrent sentence in many cases of dangerous driving was affirmed.

35. Obviously, the consequences caused by dangerous driving are highly relevant. Death and serious injury caused by dangerous driving is to be visited by very different penalties to those imposed for dangerous driving simpliciter. But, dangerous driving itself must be deterred. A motor car is a dangerous machine to be used with care. Absent the consequence of death or serious bodily injury as a result of dangerous driving, nevertheless dangerous driving involves the taking of unacceptable risk. In the judgment of this Court in *HKSAR v Lam Siu Tong* [16], an application for the review of sentence imposed in respect of a conviction of causing death by dangerous driving, Ma CJHC said:[17]

> " Dangerous driving invariably involves taking a risk or risks whilst being in control of a potentially lethal machine. There is no acceptable excuse for dangerous driving…".

36. The respondent's driving was a persistent, prolonged course of very bad driving, which evinced a reckless, selfish disregard for the safety of other road users. With respect to the judge, she appears to have overlooked or, at least, failed to give appropriate weight to that factor in aggravation of the commission of the offence. It is what Ma CJHC had described in his judgment in *Secretary for Justice v Poon Wing Kay* as one "major factor to be considered as an aggravating factor".[18]

37. In the course of the interchange between the judge and Mr Midgley in mitigation, the latter made it clear that the burden of his submission was, "… to try and steer you away from a custodial sentence of any sort, be it suspended or otherwise." The judge agreed with Mr Midgley that the imposition of a Community Service Order was not an available option for sentence, given the respondent's age and physical ailments. It was in those circumstances that the judge said, "I do not find it necessary to consider a custodial sentence, nor, in that case, a suspended sentence." She acknowledged that it was "highly unusual not to consider a custodial sentence appropriate", adding that she could "depart from the norm" because of what was said about the respondent in Professor Lee's report and "…the manner in which you drove dangerously". It is to be noted that, in fining the respondent $30,000, the maximum fine which the judge was empowered to impose in the circumstances of the commission of this offence was $37,500.

38. With respect to the judge, we are satisfied that she fell into error in taking that course. The fact that the respondent drove his motor car whilst the alcohol level in his body was 3.36 times the legal limit, together with the fact of his persistent, prolonged reckless course of very bad driving required the judge to consider the imposition of a custodial sentence. In doing so, she was entitled to have regard to his clear record, his positive good character, his age and his previous good driving record.

39. In his oral submissions, Mr Lee contended that the imposition of a sentence of imprisonment was required. However, he conceded that in all the circumstances, including the unusual circumstances of the commission of the offence, the imposition of a shorter term of imprisonment or even a suspended sentence of imprisonment may be justified.

40. We are satisfied that if the judge had given proper regard to the overall culpability of the respondent she would have determined that the appropriate starting point to be taken for sentence for Charge 1 was 9 months' imprisonment.

41. In light of the respondent's plea of guilty, he was entitled to a discount of one-third

from that starting point. Accordingly, the appropriate sentence to be imposed on the respondent was 6 months' imprisonment.

42. Next, the judge was required to consider whether or not it was appropriate in the circumstances to impose a suspended sentence of imprisonment on the respondent. Section 109 B of the Criminal Procedure Ordinance, Cap. 221 empowers a court which imposes a sentence of imprisonment of not more than two years, save in respect of excepted offences[19], to order that the sentence shall not take effect, unless during a period of not less than one year nor more than three years from the order the defendant commits another offence punishable with imprisonment. There is no provision in that legislation that the order may only be made in exceptional circumstances. By contrast, in England and Wales section 5(1) of the Criminal Justice Act,1991 provided that a suspended sentence of imprisonment could only be imposed in "exceptional circumstances". Nevertheless, in Hong Kong the courts have identified various offences which are so serious that suspended sentences ought not to be imposed, other than in exceptional circumstances. [20]

43. The editors of 'Sentencing in Hong Kong'[21] state baldly: "The test which the courts apply in deciding whether or not to suspend a sentence is one of 'exceptional circumstances' ". The authorities relied on for that statement are judgments in two magisterial appeals [22] and a judgment of this Court. In the latter case, *HKSAR v Cheung Suet Ting*,[23] in refusing an application that the sentence of imprisonment ought to have been ordered to be suspended, the Court said: "It is well established that sentences of imprisonment should not be suspended unless exceptional circumstances exist." However, the context in which the Court made that observation was an appeal against a sentence of 12 months' imprisonment imposed in respect of the applicant's conviction after trial for an offence of conspiracy to defraud the Housing Department of over $423,000 over a period of 14 months. Clearly, the offence was serious and of a kind that resonated with the statement of Pickering JA in his judgment in the *Attorney General v Yu Kin Keung*, "…in the case of a carefully executed, deliberate, attempted fraud of this scale a suspended sentence, despite the respondent's clear record, is wrong in principle."

44. Similarly, in *HKSAR v Yuen Chi Ming*, in dismissing an appeal against a sentence of 6 months' imprisonment imposed on the appellant, following his plea of guilty to a charge of offering an advantage to a government officer, contrary to section 8(1) of the Prevention of Bribery Ordinance, Pang J determined that the magistrate, "was correct in concluding that there was no exceptional circumstances in the present case to justify his sentence which is other than an immediate custodial sentence" [24]. Again, the context in which the judge made that determination was his earlier statement that:[25]

> " There is a long list of authorities to the effect that a deterrent sentence of a substantial nature is to be imposed in offences involving the Prevention of Bribery Ordinance."

45. Finally, in *HKSAR v Leung Ping Nam*, Wright J allowed an appeal from a magistrate, who had sentenced the appellant, a Sergeant in the police force, after his conviction after trial to three sentences of imprisonment, and, having quashed those sentences imposed three sentences of 6 months' imprisonment suspended for a period of two years. In doing so, he observed that his view differed from that of the magistrate that no 'exceptional circumstances' were present. Again, the context of that statement was the fact that the appellant had been convicted of forgery and using a false instrument, contrary to sections 71 and 73 respectively of the Crimes Ordinance, Cap. 200. Those offences were committed as he committed the third offence, namely gaining access to a computer with a view to dishonest gain for himself. Wright J determined that the five year delay from the time of the commission of the offences to the date that proceedings were begun against the appellant, during which ICAC had decided to take no further action, was an extraordinary delay and constituted exceptional circumstances justifying a suspension of the sentence of imprisonment.

46. In the result, we are satisfied that the bald statement that the test for a court in deciding whether or not to suspend the sentence of imprisonment is one of 'exceptional circumstances' overstates the position in Hong Kong. That proposition is valid in respect of certain offences only, stipulated to be such by the courts. When dealing with other offences, the courts must have regard to all the circumstances of the commission of that offence and that of the defendant in determining whether or not it is appropriate to exercise its power to suspend the operation of the sentence of imprisonment.

47. It is to be noted that in construing the ambit of the phrase "in exceptional circumstances", in the context of the amendment to section 22 of the Powers of Criminal Courts Act, 1973 provided for by section 5 of the Criminal Justice Act, 1991, in the judgment of the Court of Appeal of England and Wales in *R v Lowery*, Wright J said:[26]

> " … the expression "the exceptional circumstances of the case" is of sufficiently wide construction so as to allow the court to take into account all relevant circumstances surrounding the offence, the offender and the background circumstances."

However, he went on to acknowledge that it was the plain legislative intent in England and Wales that the power of the courts to suspend the sentence of imprisonment "should be used far more sparingly than it has been in the past."

48. We are satisfied that in determining whether or not it is appropriate to suspend the sentence of imprisonment to be imposed on the respondent, notwithstanding the

aggravating factors in the commission of the offence identified earlier, regard is to be had also to the low speed at which the respondent drove, the absence of injury to anyone and to the relatively low level of damage caused to other vehicles. Also relevant, is the respondent's driving record, the fact that he is 75 years of age and of good character, not only by virtue of a clear criminal record but also of positive good character. Also, regard is to be had to the respondent's ill-health, both in respect of his diagnosed depression and his physical ailments.

49. In the result, we are satisfied that it is appropriate to exercise the discretion of the court to suspend the sentence of imprisonment to be imposed on the respondent.

Conclusion

50. We allow the appeal against sentence of the Secretary for Justice and order that, in addition to the orders made by the judge, a sentence of 6 months' imprisonment, suspended for two years, is imposed on the respondent in respect of Charge 1.

(Michael Lunn)	(Andrew Macrae)	(Ian McWalters)
Vice President	Justice of Appeal	Justice of Appeal

Mr Edmond Lee, SADPP, of the Department of Justice, for the appellant

Mr Jonathan Midgley, Solicitor Advocate of Haldanes, for the respondent

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[1] *R v Cooksley* [2003] 3 All ER 40.

[2] *Secretary for Justice v Poon Wing Kay* [2007] 1 HKLRD 660.

[3] Appeal bundle; page 72 E-N, paragraph 26.

[4] Appeal Bundle; pages 71 T - 72 D, paragraphs 24-5.

[5] Appeal Bundle; page 72 O-T, paragraph 28.

[6] (2D) If an offence under subsection (1) is committed in circumstances of aggravation, the maximum fine and term of imprisonment for the offence as set out in subsection (1), and the minimum disqualification periods for the offence as set out in subsections (2A) and (2B), are each increased by 50% …

(2E) A person commits an offence under subsection (1) in circumstances of aggravation if at the time of committing the offence—

(a) the proportion of alcohol in the person's breath, blood or urine is tier 3;"

Tier 3: if it exceeds "for breath, 66 micrograms of alcohol in 100 millilitres of breath"

[7] Appeal Bundle; page 69 D-E, paragraph 9.

[8] Appeal Bundle; page 69 R, paragraph 14.

[9] Appeal Bundle; page 699, paragraph 13.

[10] Appeal Bundle; page 69 J-M, paragraph 12.

[11] Appeal Bundle; page 72 C-D, paragraph 25.

[12] Appeal Bundle; page 725, paragraph 28.

[13] Appeal Bundle; page 69 F-G, paragraph 10.

[14] *R v Cooksley*; page 45 j-46 a; paragraph 11.

[15] *S.J. v Poon Wing Kay*; pages 667 H - 668 G, paragraph 10.

[16] *HKSAR v Lam Siu Tong* [2009] 5 HKLRD 601.

[17] *HKSAR v Lam Siu Tong*; page 609, paragraph 13(b).

[18] *Secretary for Justice v Poon Wing Kay*; page 668F, paragraph 10(5).

[19]

1. Manslaughter.

2. Rape or attempted rape.

3. Affray.

4. Any offence against section 4, 5 or 6 of the Dangerous Drugs Ordinance (Cap 134).

5. Any offence contrary to section 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 28, 29, 30, 36 or 42 of the offences against the Person Ordinance (Cap 212).

6. Any offence or attempted offence against section 122 of the Crimes Ordinance (Cap 200).

7. An offence under any section in Part III of the Firearms and Ammunition Ordinance (Cap 238).

8. Any offence against section 10 or 12 of the Theft Ordinance (Cap 210).

9. Any offence against section 33 of the Public Order Ordinance (Cap 245).

10. Any offence under section 4 or 10 of the Weapons Ordinance (Cap 217).

[20] *R v Lee Sui Luen* [1976] HKLR 34 at 36, in respect of an offence contrary to section 4 of the Prevention of Bribery Ordinance; *A-G v Wong Yuen Lam & Another* (CAAR 3/1986; unreported, 10 June 1986) in respect of an offence of the unlawful use of an instrument or other means to procure a miscarriage; *A-G v Lo Ching Fai* [1996] HKC 741 at 750, in respect of offences of burglary of domestic premises; *AG v Yu Kin Keung* [1976] HKLR 236 at 238, in respect of offences of endeavouring to obtain property upon forged documents.

[21] *Sentencing in Hong Kong*-Cross & Cheung;Seventh Edition, page 541.

[22] *HKSAR v Leung Ping Nam* [2007] 5 HKC 413; *HKSAR v Yuen Chi Ming* (HCMA 56/2001; unreported, 9 March 2001).

[23] *HKSAR v Cheung Suet Ting* [2010] 6 HKC 249.

[24] *HKSAR* v Yuen Chi Ming, page 6.

[25] *HKSAR v Yuen Chi Ming*, page 3.

[26] *R v Lowery* (1993) 14 Cr. App. R. (S) 485, at 489.