

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO 819 OF 2013

HKSAR

v

Lew Mon-hung

(Defendant)

Coram: Chief District Judge S. T. Poon

Date: 19 November 2013

Present: Mr Simon Tam, S.C. SADPP leading Mr Jonathan Lin SPP(Ag.), of the
Department of Justice, for HKSAR.

Mr Graham Harris, S.C. leading Mr Benson Tsoi instructed by Messrs
Raymond Kwong & Co for Defendant.

Offence: Doing acts tending and intended to pervert the course of public justice(作出多於一項傾向並意圖妨礙司法公正的作為)

Ruling on the application for a stay of proceedings

1. The Defendant is facing one count of doing acts tending and intended to pervert the course of public justice.
2. This is his application for a permanent stay of proceedings.
3. The Prosecution's case is that the Defendant, who was under investigation by the ICAC for another matter, sent 2 emails and letters to Mr Leung, the Chief Executive ("CE") and Mr Peh, the Commissioner of the ICAC ("Commissioner"), with a view to influence them to halt the ICAC's investigation against him.

4. The complaints of the Defendant, as I understood, is that:

- (a) the two alleged recipients of emails are top officials having high powers;
- (b) the Prosecution did not see fit to name them as prosecution witnesses;
- (c) no witness statements had been taken from them;
- (d) there was a delay of 20 days from the receipt of the emails by the CE to his referral of the matter to the Commissioner;
- (e) the CE should have referred the matter to the police rather than the Commissioner in that the Commissioner is himself a potential witness in this case;
- (f) the Commissioner has a conflict of interest in handling this case as he himself is a potential witness;
- (g) a few days before the CE's referral of the matter to the Commissioner, the subject emails had been released to the media and there was extensive coverage of the same;
- (h) the ICAC and the DOJ had failed to investigate sufficiently on the above matters; and
- (i) the ICAC and the DOJ extended undue privileges to the CE and the Commissioner in not naming them as witnesses to prevent them from being cross-examined at trial.

5. The Defence asked me to infer from the above that there was an abuse of power and unfairness and prejudice was caused to the Defendant which amounts to an abuse of the court's process.

6. Mr Graham Harris, SC, leading Mr Benson Tsoi, for the Defendant, put it in more refined terms in their written submission as follows:

“The Defence relies on three principal grounds to invite the court to stay the proceedings as an abuse of process :-

(1) There has been serious substantial and procedural irregularity in this case caused by an abuse of State power and/or abuse of position by these public officers because :- (a) high ranking public officials acted or conducted themselves inappropriately under a clear and proscribed conflict-of-interest; (b) there was a failure on the part of the law enforcement agency to conduct proper investigation into these officials in relation to their conduct and involvement in this case so as to ensure that the criminal justice process is not tainted or influenced by any abuse of power or any extra-legal factors; and (c) compliance with proper investigation procedures is the safeguard against collusion or abuse of power, but they have not been followed in this case. No contemporaneous or other records in relation to the communications

and involvement of Mr. CY Leung and Mr. Peh were made, which is highly irregular especially in the light of the fact that Mr. Peh himself is one of the most senior law enforcers in Hong Kong;

(2) These key individuals who were the alleged “victims” in this case have not provided any substantial information or witness statement. The law enforcement agency and the Prosecution clearly refrained from approaching these key individuals in order to prevent these individuals from becoming prosecution witnesses. There is no proper reason or justification for the Prosecution’s refusal or failure to call these individuals to explain the irregularities. The Prosecution’s refusal will only serve to prevent Mr. Leung and Mr. Peh from being exposed to cross-examination in relation to their conduct and involvement in this case, causing prejudice to the Defendant. This is a clear “oblique motive” and unfairly denies the Defendant’s right to confront his accuser(s) in a criminal case.

(3) There has been unusual leakage of incriminating materials to the press, the timing of which coincides with important events/actions taken by Mr. CY Leung / Mr. Peh in this case or by the law enforcement agency.”

7. The applicable principles regarding stay of proceedings are not in dispute. The leading authorities in Hong Kong are *HKSAR v LEE Ming Tee & anor*[\[1\]](#) and *HKSAR v Ng Chun To Raymond and Another*[\[2\]](#). Both sides relied on these cases in their submissions.

In *Ng Chun To*, Stock VP has this to say:[\[3\]](#)

“The circumstances in which, in the exercise of a court’s discretion, a stay of proceedings will be justified are exceptional...in exercise of its inherent power to prevent an abuse of its own process, the court has jurisdiction to stay criminal proceedings in two circumstances:

(1) Where, notwithstanding the remedial measures which are available to a court to ensure a fair trial, the circumstances are such that ‘a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process.’ That is because ‘the continuation of processes which will culminate in an unfair trial can be seen as a ‘misuse of the court process’ which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.’ The burden is on the accused to show on a balance of probabilities that no fair trial can be held. The basis upon which such applications tend to be mounted include delay, unfair methods of investigation, and pre-trial publicity; and

(2) In rare cases where, even though a fair trial is available, the court is prepared to grant a permanent stay because there has been an abuse of power of a kind that renders the trial of the accused an affront to the court’s sense of justice and propriety. An example is the refusal of a court to exercise jurisdiction over an accused who has been unlawfully abducted from another jurisdiction.”

8. Mr Harris expressed that he relies on both limbs in *Ng Chun To*.

9. In so far as the first limb is concerned, it is however not at all explicit in Mr Harris’s submission as to how it will render a fair trial being impossible.

10. After reciting the above principles of law in *Ng Chun To*, Mr Harris moves on to discuss the law on abuse of process, saying that there is an abuse of jurisdiction based on improper motive, and that there is substantial and procedural irregularity in this case. Nothing was mentioned about how all these may affect the trial of the Defendant in this matter.

11. Mr Harris explained that the improper motive he meant is the prosecution’s purpose not to cause embarrassment to the CE and the Commissioner in deciding not to call them

as witnesses and not to take statements from them. He said that where any steps in the criminal justice process was or could be seen to be partisan or influenced by any external or extra-legal factors because of the individuals involved may require the court to stay the proceedings as an abuse of process. He then sets out some paragraphs of the code of conduct for principal officials in Hong Kong particularly on prevention of conflict of interest. He submitted that the CE should not refer the email to the Commissioner “for follow up action” and the Commissioner should not take part in any investigation process as they are both potential witnesses having their private interest to serve. He also submitted that there was a delay on the part of the CE to report the matter to the Commissioner only on 29 January 2013, 20 days after the email was sent and when the matter was published by the press. He said the circumstances suggest that the report to the Commissioner was made with ulterior motive or purpose or at the very least extra-legal considerations which may amount to an abuse of criminal process.

12. Mr Harris said the CE should explain why he chose to report to the Commissioner but not the police and why there was a delay in reporting. He submitted that there ought to be communications between the CE and the Commissioner about this matter and the ICAC or prosecution should make enquiry about that.

13. Mr Harris submitted that the above are irregularities clearly adversely affect the fairness of the proceedings to the prejudice of the Defendant and that the criminal process in this case was clearly tainted with substantial and procedural irregularity amounting to an abuse of process.

14. Regarding the failure to call the CE and Commissioner as witnesses, whilst Mr Harris recognizes that there is no rule of law which compels the prosecution to call the complainant/victim to testify as a prosecution witness, he submitted that the prosecution demonstrated an “oblique motive” by refusing to ask them to explain their abuse of power or misconduct.

15. Lastly, on the point of adverse publicity, Mr Harris acknowledged that the jurisdiction to stay proceedings due to pre-trial publicity will be rarely exercised in a trial by a single professional judge. He asks that “if and to the extent that the court is satisfied that such adverse publicity and leakage renders a fair trial impossible, it is submitted that the court has a jurisdiction and duty to stay the proceedings as an abuse of process.” This is the only where the Defence mentioned about a fair trial being impossible.

Discussion

16. As noted from the above outline of Mr Harris’s submissions, although he expressly

relied on the principles set out in *Ng Chun To* and recited the two circumstances where the court has jurisdiction to stay the proceedings, he chose not to make his submission in the same sequence or in the light of the said principles.

17. Apart from making a bland query under the subject of adverse publicity, there is no attempt whatsoever by the Defence to address on how the alleged misconduct of the CE, the Commissioner, the Prosecution or the ICAC may result in an unfair trial against the Defendant.

18. The focus of Mr Harris's submission is on the alleged conflict of interest and misconduct on the part of the CE and the Commissioner and the alleged abuse of power. However, there is nothing from the Defence to substantiate their allegations. With respect, the complaints about the delay in reporting by the CE, his reporting to the Commissioner rather than the police, the alleged leakage of the emails to the media shortly before the reporting and no statements being taken from the two high rank officials, are in my views utterly insufficient for drawing any inference of impropriety.

19. The Defendant was already under investigation by the ICAC. There is nothing extraordinary for the CE to refer the matter to the ICAC rather than the police. Although the CE did not refer the emails right away, an interval of 20 days cannot be said to be a long delay and I am unable to envisage any prejudice that may be caused to the Defendant by such delay, or the failure to explain the delay. Regarding the alleged leakage of information to the press, it is not particularized and I can hardly deduce any hint of abuse merely from the leak.

20. As submitted by Mr Simon Tam SC, leading counsel for the DOJ, the probable issues at trial will be: (i) whether the Defendant had sent the said emails and letters to the CE and the Commissioner; (ii) if the Defendant had done so, whether his conduct had a tendency to pervert the course of public justice; and (iii) whether the Defendant intended to pervert the course of public justice by embarking on such conduct.

21. In my view, it is difficult to see how the conduct of the CE and the Commissioner subsequent to their receipts of the emails and letters could have bearings on the issues at trial. I have posed this question to Mr Harris at the hearing and with due respect, no satisfactory answer has been given from him.

22. The burden is on the Defence to show on a balance of probabilities that no fair trial can be held. However, what comes up from the Defence is merely a bare allegation of abuse. As I perceived, much of the Defendant's complaint is basically originated and derived from the Prosecution's decision not to call the CE and the Commissioner as

witnesses. As submitted by Mr Tam, the Prosecution is entitled to form the view that they have no material evidence to give in view of the relevant charge of this case. As apparent from the summary of facts prepared by the Prosecution, it would be unnecessary to call them to give evidence for the Prosecution to prove its case.

23. I have asked Mr Harris how the CE and the Commissioner may help the Defendant's case in giving evidence but again, no particulars can be given. Furthermore, there is no property in witnesses and the Defendant can apply to summons them as witnesses, should he consider that material evidence can be given from them. Mr Harris said this is unrealistic and the Defendant will not be able to cross-examine his own witnesses. I do not agree that it is unrealistic. It is only up to the Defendant's own choice, taking into account information privy to himself, whether to adopt such course. As to cross-examination, there is again no particulars given as to what aspect of evidence Mr Harris has in mind that can only be elicited by cross-examination, but not examination-in chief.

24. To conclude, the Defendant has simply failed to establish that a fair trial to the Defendant is impossible.

25. As mentioned above, there are still cases, albeit very rare, where the court would still stay the proceedings even a fair trial is possible. It is where there has been an abuse of power of a kind that renders the trial of the accused an affront to the court's sense of justice and propriety.

26. However, in *Ng Chun To*, the Court of Appeal added that, "the public interest lies in the guilt or innocence of the accused being fairly and openly determined at trial. For this to be displaced, powerful reasons must exist for concluding that such a trial, although fair, would nonetheless constitute an intolerable abuse of the court's process. The instances where such an argument has any prospect of success must necessarily be very rare."

27. This power to stay proceedings shall not be used for punitive or disciplinary functions: "The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct."

28. Here, as I have already intimated in the above passages, the alleged misconduct are wholly unsubstantiated. For conflict of interest, the Prosecution has indicated that the CE and the Commissioner are not involved in the investigating and prosecution process. There is nothing from the Defence to suggest the contrary.

29. The complaint against the ICAC and Prosecution not making proper investigation or enquiry against any inappropriate conduct of the CE and the Commissioner is misconceived. There is simply no apparent reason why they should form a suspicion of

misconduct or abuse.

30. I also see no reason why there should be written records of communications between the CE and the Commissioner during the time. Mr Harris referred to *Ng Chun To* where it was found that one of the aspects of proscribed conduct of the ICAC officers was that they concealed their misconduct by deliberately failing to make notes/records of the conversations they had with the witness. The situation here is totally different. The law enforcement agents usually have a duty to record their interviews with witnesses in an investigation. There is no such duty imposed on the CE or the Commissioner. Besides, as I said, there is no hint of misconduct as can be deduced from the circumstances that the CE or the Commissioner has to deliberately conceal.

31. Furthermore, Mr Harris made it clear at the hearing that there is no suggestion of dishonesty or bad faith on the part of the CE or the Commissioner. It is inconceivable what relevance the communications between the CE and the Commissioner can be of to the trial or to the present stay application.

32. Regarding the decision not to name the CE and the Commissioner as prosecution witnesses, there is no obligation on the prosecution to explain to the Defendant the reason behind the decision. Even if it can be established that the Prosecution's decision not to call the CE and the Commissioner to give evidence takes into account the possible embarrassment that may be caused to them. I do not view that it is sufficient to constitute an intolerable abuse of the court's process that justifies a stay of proceedings.

33. At the hearing, Mr Harris produced a copy of a letter dated 29 January 2013 (exhibit D-1), purportedly sent by the Defendant to the CE. In this letter the Defendant asked the CE why the CE has still not acknowledged the receipt of his emails while Mr Barry Cheung was in a position to release the emails to the press already. Mr Harris submitted that the CE has concealed the letter from the ICAC and an explanation ought to be given for the concealment. Although Mr Tam at the hearing admitted that the ICAC did not have this letter, by a subsequent letter dated 16 November 2013 to this court, Mr Tam informed that his admission was mistakenly made and the ICAC managed to locate in their possession this letter.

34. Although the confusion caused by the Prosecution is inexcusable, I do not see any reason to doubt that the letter has not been disclosed to the ICAC. There is simply no reason for any such concealment. The letter was written from the Defendant to the CE. If the purpose of any such concealment was to prejudice the Defendant. It would be doomed to failure.

35. In my judgment, the Defendant's application shall be dismissed and I so order.

(S.T. Poon)
Chief District Judge

[1] (2001) 4 HKCFAR 133

[2] [2013] 5 HKC 390

[3] At page 413, paragraph 84

