HCMA 685/2013 AND HCMA 425/2014

HCMA 685 /2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MAGISTRACY APPEAL NO 685 OF 2013

(ON APPEAL FROM KCCC NO 4933 OF 2012)

BETWEEN

HKSAR	Respondent
and	
HARJANI, KISHORE MOHANLAL	Appellant

HCMA 425 /2014

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

MAGISTRACY APPEAL NO 425 OF 2014

(ON APPEAL FROM KCCC NO 4933 OF 2012)

BETWEEN

HKSAR	Respondent
and	
MARK RICHARD CHARLTON SUTHERLAND	Appellant

Before: Hon Lunn VP, Macrae JA and Pang JA in Court

Dates of Hearing: 22-24 June and 12 July 2016

Date of Judgment: 15 May 2017

J U D G M E N T

Hon Macrae JA (giving the Judgment of the Court):

Introduction

1. Following a 19-day trial before then deputy magistrate Mr Lee Siu Ho in the Kowloon City Magistracy, the appellant in HCMA 685/2013 (hereinafter described as "the defendant") was convicted on 30 September 2013 of one charge of indecent assault in that, on 29 August 2012, inside House 2 of Golden Gate Cinema at Harbour City in Canton Road, Kowloon ("House 2"), he indecently assaulted a Ms Lo (hereinafter described as "PW1"). He was sentenced to a term of 14 days' imprisonment. His counsel at that trial, Mr Mark Sutherland (hereinafter described as "MS") was, on 30 June 2014, following a hearing before the same magistrate on 22 and 23 April 2014, made the subject of a wasted costs order under section 18 of the Costs in Criminal Cases Ordinance, Cap 492 ("the CCCO") in connection with his conduct during the trial and ordered to pay wasted costs of HK$180,000. MS is the appellant in HCMA 425/2014.

2. The defendant initially appealed against both conviction and sentence by way of Forms 101 and 102 respectively, which were filed on 30 September 2013. He was granted bail pending appeal by the magistrate on the same day. He later abandoned his appeal against sentence (only) on 20 March 2015, which was accordingly marked dismissed on 26 March 2015.

3. MS appealed against the wasted costs order made against him by way of a Notice of Appeal filed on 21 July 2014.

4. Originally, both sets of appeals were scheduled to be heard before Zervos J sitting in the Court of First Instance of the High Court. However, on 27 July 2015, Zervos J reserved the two sets of appeals to the Court of Appeal under the provisions of section 118(1)(d) of the Magistrates Ordinance, Cap 227, on the grounds that the issues and matters which need to be addressed in relation to the conduct of counsel during the trial process, and the impact such conduct may have on a defendant's right to a fair trial, were of such a nature and seriousness as to warrant the determination of the Court of Appeal.

Jurisdiction

5. Of our own motion, we raised a jurisdictional point at the outset of the appeal hearing before us as to whether MS's appeal against the wasted costs order under section 19 of the CCCO could be referred to, and determined by, this Court where, by virtue of section 19(3), an appeal against such an order made by a magistrate "shall lie to the Court of First Instance". Having heard argument from the parties concerned, we were satisfied that this Court did have power to entertain such a referral under section 113(1) of the Magistrates Ordinance, which provides that

> "Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge."

6. Adopting "a purposive interpretation" of section 113(1), so that the language of the statute "is construed, having regard to its context and purpose"[1], we were satisfied that MS was a "person aggrieved by… an[y] order… in connection with an[y] offence", to which offence he "did not plead guilty or admit the truth of the information or complaint". Once such an appeal was engaged under section 113(1) of the Magistrates Ordinance, the judge was entitled to refer the appeal to this Court under section 118(1)(d).

7. Were it otherwise, any related costs appeal could not follow the referral of the substantive appeal where, as here, the costs appeal is inextricably bound up with the conduct of counsel in the substantive appeal. The divorcing of the two hearings, requiring separate hearings in different courts, would hardly be conducive to a regime designed to proscribe the wasting of costs. As Mr Graham Harris SC, with him Mr Benson Tsoi, on behalf of MS, observed in written submissions on the issue[2]:

> "The order of Zervos J was made after consultation with the parties. The purpose of the order was to enable the hearing of both appeals to take place in the most cost-effective, efficient and expeditious manner, which will assist the Court and save time."

8. Accordingly, we were satisfied that the interests of justice required that we construe section 19 of the CCCO purposively as interacting with, and not overriding, section 113 of the Magistrates Ordinance; and that, as Mr Gerard McCoy SC, with him Ms Chrystal Choy, on behalf of the defendant, put it, the right of appeal under section 19 is but "an exemplar of the plenitude of section 113(1)"[3].

9. Having accepted jurisdiction in respect of both matters, we turn, therefore, to a consideration of the two appeals before us, dealing first, with the defendant's substantive appeal against conviction; and secondly, with the appeal by MS against the wasted costs order.

The appeal by the defendant against conviction (HCMA 685/2013)

The prosecution case

10. PW1 was a 41-year-old secretary. On the night in question, she went alone to the Golden Gate Cinema in Harbour City to see a film scheduled to be shown at the 9:30 pm sitting. When she initially took her seat in House 2, there was no one seated on either side of her. However, after the film had commenced, she noticed, at about 10:15 pm, that a male person came to sit in the seat immediately to her right.

11. After a short while, she felt something in contact with her right forearm. She looked down and found that it was the left forearm of the male sitting to her right. At that time, her right forearm was not placed on the right armrest. She turned to look at the male, who was looking at the screen while his left forearm continued to remain in contact with her right forearm. She then sat up and placed a cardigan over the right side of her upper body. At that stage, their two forearms were no longer in contact.

12. A little over two minutes later, PW1 felt an itchy sensation over the outer to middle part of her right thigh. She did not immediately look down since she was concentrating on the film. However, when she felt the itchy sensation persisting and beginning to move upwards, she looked down and saw the left hand of the same male resting on the middle of her right thigh, about 7 inches from her knee. That part of her thigh was at the time covered by her skirt.

13. PW1 immediately turned to look at the face of the male. This time, she found that he was also looking at her, with the palm of his left hand still resting on her right thigh. PW1 then lifted up his hand.

14. PW1 walked indignantly to the row in front of where she had been sitting and, on seeing that the male was a foreigner, pointed at him while scolding him in English using the word “Shit!” The foreign male remained seated, looking at her. PW1 then left House 2 for the foyer of the cinema, where she called for help. When a young man appeared from behind the snack bar, PW1 complained that she had been indecently assaulted. At this juncture, a foreign male emerged from House 2 and when he saw PW1, he said in English: “I’m sorry.” PW1 reacted angrily by pointing at the foreign male and responding, also in English: “You no need to say sorry if you not touch me here.”

15. The young staff member, who became PW7 at trial, then went to find the manager. In due course, he returned with another member of staff. The more senior of the two, PW6 at trial, then asked what had happened. PW1 explained that the foreign male had touched her thigh and that she wanted the police to be called. The foreign male then said

in English: "Sorry, maybe I am too sleepy." PW1 refuted that suggestion. When the foreign male walked to the back of House 2 of the cinema and attempted to leave through the exit, PW1 urged the two staff members not to let him go. PW7 then followed the foreign male and later returned with him to the cinema foyer. In the meantime, PW1 made a report to the police herself.

16. The arresting officer, PW5 at trial, duly arrived and found PW1, PW6 and the defendant in the foyer of the cinema. PW5 identified himself to them and ascertained the defendant's identity in English. After making due enquiry with PW1, PW5 declared arrest on the defendant for the offence of indecent assault. He was later brought back to the police station, where he was served with a Pol 1123 form (which the defendant signed), before a body search was conducted on him. On the defendant's person, PW5 found a cinema ticket for the seat to the immediate right of PW1[4].

17. In a record of interview conducted under caution a week later, the defendant said[5]:

> "On 29-8-2012, when I was watching the movie in Multiplex, the person sitting in row "P" in front of me was tall and it was obstructing me from watching the movie. Hence I was moving on the left and right to see the movie on the screen. While doing so, my left hand and elbow slipped and fell on the left side and hit the lady sitting next to me by mistake. Hence I told her that I am extremely sorry for what happened."

18. The lawfulness of the arrest, the record of interview, as well as the Pol 1123 form and the defendant's cinema ticket, all became the subject of challenges as to admissibility, which were dealt with by way of the alternative procedure and eventually resolved in favour of the prosecution.

The defence case

19. The defendant did not avail himself of his right to give evidence on either the special or general issues.

20. However, on the general issue, the defendant called a solicitor's clerk to produce an album of photographs taken inside House 2 by the witness.

21. From the way in which the defence case was put to the prosecution witnesses, the defence case appears to have been that:-

(a) The touching of PW1's forearm was accidental;

(b) The touching of PW1's thigh was accidental and lasted no more than 1

second;

(c) The foreign male said "Sorry" to PW1 immediately after the touching of the thigh;

(d) The allegation that the foreign male had touched her forearm and thigh with a view to indecently assaulting her was fabricated by PW1;

(e) The foreign male sitting to her right had walked out of House 2 before PW1 did; and

(f) When outside House 2, the foreign male on five or six occasions said words to PW1 to the effect: "I am sorry, it was an accident".

To all of these propositions, PW1 disagreed; save for the fact that the foreign male had indeed said "Sorry" to her outside House 2.

Issues at trial

22. The matters at issue at trial, therefore, would seem to have been:-

(a) The credibility and reliability of PW1;

(b) Identity, and whether the person sitting to the right of PW1 was the defendant;

(c) Whether there was an assault;

(d) Whether the assault, if there was one, was intentional; and

(e) Whether the intentional assault, if there was one, was an indecent one.

Magistrate's finding of facts

23. On the questions of the credibility and reliability of PW1, the magistrate found that PW1 had emerged unscathed from cross-examination on the core events inside the cinema. Having carefully considered her evidence in the round in the light of other evidence, the magistrate found PW1 to be an honest, credible and reliable witness and he did not believe that she had fabricated or exaggerated the forearm or the thigh incidents.

24. The magistrate thereby accepted the essentials of the prosecution case as to what had happened on the day in question. From the evidence of what PW1 said she saw, the fact that the defendant had said "Sorry" to PW1 at the lobby, the admission in the record of interview and the defendant's possession of the cinema ticket, the magistrate was sure that the defendant was the person sitting in the seat to the right of PW1.

25. From PW1's evidence as well as the record of interview, the magistrate found that there had clearly been a (non-consensual) assault, in which the defendant touched PW1's thigh.

26. Having rejected the exculpatory part of the record of interview, the magistrate considered that in view of the touching of the thigh following the forearm contact, the moving of the defendant's hand across PW1's thigh, the fact that the defendant's eyes were at all relevant times wide open, the continued contact of the defendant's left palm with PW1's right thigh, even after PW1's visual confrontation with the defendant, and the lack of apology while both of them were still inside House 2, the touch could not have been an accident or resulted from the defendant being sleepy or tired. Consequently, the magistrate found that the assault was deliberate and intentional.

27. Having so found, the magistrate determined that a right-minded person would regard the assault and its overall circumstances as indecent, and that the defendant had assaulted PW1 knowing that a right-minded person would regard his actions as such. He concluded that the defendant thereby had the requisite intent when he intentionally indecently assaulted PW1's thigh.

Defendant's perfected grounds of appeal

28. Although no less than eight grounds of appeal against conviction have been advanced on behalf of the defendant, some of them are, with respect, better characterised as particulars rather than substantive grounds of appeal. Looking at them in the context of the written and oral submissions made on behalf of the defendant, there seem to us to be two substantive grounds of appeal advanced before this Court. The first complaint is that the defendant was deprived of a fair trial by the deliberate misconduct of his counsel throughout the trial, which amounted to an abuse of the process of the court. The particulars of such misconduct include the cross-examination of witnesses and the advancing of submissions which were, *inter alia*, irrelevant and unnecessary, repetitive and prolix, and irresponsible and improper (Ground 1). The second complaint is that the defendant was deprived of a fair trial when his counsel, MS, deliberately conducted the trial otherwise than in accordance with the defendant's instructions, whilst leading the court to believe that he was in fact acting upon instructions, thus creating an inevitable and presumptive bias against the defendant by the court (Ground 2).

29. It seems to us that recast and analysed in this way, Ground 1 is a complaint about the general competence of counsel by virtue of his misconduct in a number of areas during the trial and the effect of that misconduct on the fairness of the trial, while Ground 2 is

more particularly concerned with the failure of the professional duty of counsel and its suggested effect on the court. There is, of course, an element of overlap, for allegations of incompetence, misconduct and failure of professional duty are undoubtedly interrelated. Furthermore, if there were an inevitable and presumptive bias against the defendant arising from the way in which the defendant's counsel conducted his defence, the same could also be said to have affected the fairness of the trial. If counsel was incompetent in the way he conducted himself in cross-examination and in advancing various applications and submissions, that may also have affected the way the court looked at the cogency and validity of the defence. However, given the breadth of this appeal and the sheer volume of material which we have had to survey (amounting to some 2181 pages of transcript of proceedings alone, although there has been sub-pagination to include numerous other pages within the numbering), we shall examine the complaints refashioned in the way we have set out, which seem to us more precise, structured and consonant with the oral submissions advanced.

The defendant's instructions

30. Before addressing these grounds, as reformulated, it is important to understand the instructions, which it is common ground, and MS acknowledges, he had received from his client. To that end, the defendant has waived privilege for the purpose of these proceedings and it is not in dispute that the defendant's formal instructions to MS were given in the form of a written statement in the following terms[6]:

> "i) I entered the Cinema in 28, Canton Road at around 10:00 pm and sat down on my seat.
>
> ii) After sitting for about 15 minutes at my seat, my elbow and hand slipped from the seat and fell on the left side and hit the lady sitting next to me. I told sorry to her for the same.
>
> iii) She showed some resentment and then changed her seat and went to sit on the forward row seat.
>
> iv) In the meantime after watching the movie for 18 minutes, I realised that I had seen the same movie one week earlier in the Multiplex cinema next to star ferry. Hence I was not keen to continue watching the movie again.
>
> v) Hence, I got up from my seat, and decided to leave the hall immediately.
>
> vi) The same lady who was sitting next to me 2 minutes earlier also followed me when I was leaving the hall and reported to the staff of the cinema not to allow me to leave the cinema till she talked to me. I told lady sorry again many many times outside the hall where she wanted to talk to me. I told the lady again that I am sorry for slipping of my hand, then she suddenly got angry and called police.
>
> vii) I was also uncomfortable due to strong Aircon in the theatre and wanted to go to wash room before leaving the cinema, and I did went (sic) to wash room. But still the lady asked the cinema staff to follow me and not to allow me to leave the cinema after going to the wash room.
>
> viii) The slip of the hand was accidental and surely not intentional. Hence, I have not pleaded guilty to the police charge of "Indecent Assault" under section 122(1) Cap 200."

31. Two things are immediately apparent from these written instructions. First, there was no issue, so far as the defendant was concerned, as to identity: the defendant clearly accepted that he was the one whose hand had come into contact with the lady sitting immediately to his left; and that she was the one who had then left House 2, made a report to cinema staff and summoned the police, leading to his arrest. Secondly, the defendant's case was unequivocal that there had been contact between his arm and the lady in question but that it was accidental or inadvertent.

32. There was nothing ambiguous or unclear about the applicant's case. Such instructions are, in the experience of all members of this Court, commonplace and routinely advanced in certain types of indecent assault allegation where the complainant and defendant happen to be sitting next to each other, whether on a bus, a train, a tram, a ferry or in a cinema. Sometimes such defences succeed: sometimes they do not. But where such a case comes down essentially to the word of the complainant against the word of the defendant, we cannot see how the issue could justify more than 2 working days to resolve. Indeed, 2 working days (10 and 11 June 2013) was the time estimate for this trial endorsed in writing by both parties, including MS on behalf of the defendant, at the 1st pre-trial review hearing on 11 March 2013. That time estimate was confirmed, again by both parties, including MS on behalf of the defendant, at the 2nd pre-trial review hearing on 15 April 2013. Yet, the trial proper, which began on 10 June 2013, lasted 19 days spanning 3½ months, not including the two earlier pre-trial review hearings and excluding the subsequent 3 days of hearing in respect of the wasted costs application.

33. To help us understand how it was that a simple, straightforward 2-day case in the magistracy became a leviathan of a trial, Mr McCoy has taken us in painstaking but appropriate detail through the entire record of the proceedings in order to establish his complaints in respect of both grounds of appeal, as we have reformulated them.

34. In order to give some system to our consideration of this matter, we shall deal, firstly, with Ground 1 and, secondly, with Ground 2 (as recast), accepting that there will be an inevitable overlap and sometimes repetition of content and context. In respect of Ground 1, we shall first examine counsel's cross-examination and treatment of PW1 and other witnesses, then the submissions which were advanced before the court by the defendant's counsel and, finally, with other matters relevant to the complaint under this head. We shall then examine Ground 2 in order to determine whether MS did or did not conduct the trial in accordance with his instructions and, if he did not, the effects of his so doing on the court and the fairness of the trial.

35. In approaching our task, we shall consider the proceedings on each day of the hearing

of the trial proper from its commencement to its conclusion with the verdict and sentence. To that end, the following table explains which calendar date corresponds to which day of the trial:

Day 1	10 June 2013
Day 2	11 June 2013
Day 3	18 June 2013
Day 4	19 June 2013
Day 5	26 June 2013
Day 6	2 July 2013
Day 7	3 July 2013
Day 8	4 July 2013
Day 9	5 July 2013
Day 10	9 July 2013
Day 11	10 July 2013
Day 12	11 July 2013
Day 13	5 August 2013
Day 14	6 August 2013
Day 15	15 August 2013
Day 16	19 August 2013
Day 17	20 August 2013
Day 18	21 August 2013
Day 19	30 September 2013

(It should be noted that we have excluded from this table 14 August 2013 as a hearing day, since a No 8 typhoon signal prevented the court from sitting at all on that day, but we have included 15, 19 and 20 August, on which the court was scheduled to sit, and did sit, although MS did not appear, since he was appearing in a trial in the District Court, which had itself overrun. Accordingly, the defendant's instructing solicitor appeared in lieu of MS, although nothing was ultimately achieved to further the course of the trial on any of the three days concerned).

Deliberate misconduct/abuse of the process of the court (Ground 1)

10 June 2013 (Day 1)

36. PW1 began her evidence at about 10:50 am on 10 June 2013 and concluded her

evidence in chief at about 3:30 pm the same day. It should be noted that much of the afternoon session of the witness's examination-in-chief was taken up with an objection by MS to the formal identification by the witness of the defendant, and submissions thereon, as a result of which the magistrate did not permit her to make a dock identification. That ruling effectively brought examination-in-chief to an end, whereupon MS immediately began his cross-examination that same afternoon.

37. Indicating to the witness that he wished to ask "some general background questions"[7], MS first elicited that PW1 was a 40-year old single lady with a younger brother who was married[8]. He then established that she lived with her parents[9], had no boyfriend[10], had no South Asian male friends[11], that most of her friends were Chinese from Hong Kong[12] and that many of her female friends were married[13]. The witness was asked about her educational background[14], and whether she usually went to the cinema on her own[15]. When an objection was made by the court prosecutor, Mr Alan Yau, to the suggestion that if the witness had had a boyfriend, she would have gone to the cinema with him, MS withdrew the question[16].

38. MS then embarked on a discussion on the types of film the witness would normally go to see and the genre of the particular film she had gone to see that evening, which MS suggested was a "thriller"[17]. When the witness would not agree with that characterisation and was further unable to confirm that the film was 114 minutes in length[18], MS produced a DVD of the film in question, entitled "Red Lights", starring the actor Robert De Niro[19]. When the prosecutor queried the relevance of showing the DVD to the witness, MS responded[20]:

> "I think it's obvious, Sir. This is a film that was seen. I simply want to show it to the witness."

The magistrate then asked why it mattered[21], and what the relevance of the point was[22]. To that, MS indicated he would explain the relevance further but not in the presence of the witness[23]. When the magistrate explained to the witness that he would have to excuse her for a moment, she responded[24]:

> "It's annoying. Now it's not Robert De Niro who indecently assaulted me."

She then left court.

39. In the absence of the witness, MS sought to explain the relevance of the question as follows[25]:

> "It's quite clear that the witness is not answering my questions. I'm trying to ascertain if she can remember what this film was about. She said that the male arrived at 10:15, and that she was watching the movie from 9:40. She, therefore, watched it for 35 minutes. Nobody sat next to her, either to the left or the right. So, she was focusing on that film for 35 minutes. Now, 35

> minutes is approximately one-third of the total length of the movie, and the total length of the movie is written on the reverse of the DVD as being 114 minutes.
>
> So, I simply want to put to her this was the film festival, so she recognised it and, secondly, that it was about 114 minutes. So, for 30 per cent – 35 per cent of the time in the cinema there was nobody bothering her. She was on her own watching the movie. She must remember something. She says it wasn't a romantic movie, and other than that she's answering my questions in an evasive way.
>
> So, I want to find out has she genuinely had a memory lapse, which we can all do, or does she, in fact, know what this film was about for those first 35 minutes. But that's the simple point of my questioning."

The discussion continued for a further 6 pages of transcript, culminating in the magistrate allowing the question but emphasising that unnecessary cross-examination should be avoided, and that all cross-examination should be relevant to the issues in the case, with questions concerning credibility being kept within reasonable limits[26].

40. The witness returned to court and cross-examination resumed concerning the first 35 minutes of the film. The witness was unable to say how long the film was to last or what the first 35 minutes of the film were about. She answered at one point: "In fact, I'm sorry, I don't see the duration of the movie was related in any way with me being indecently assaulted"[27].

41. At 4:30 pm, the magistrate asked MS how much longer he expected to be in cross-examination of PW1, to which the answer came: "At least the whole of tomorrow morning…If not slightly longer"[28]. The magistrate then asked counsel what his position was on the admissibility of the alleged verbal attributed to his client and the record of interview[29]. MS indicated that while the defence would challenge the verbal, he would consider the record of interview overnight and, at the magistrate's insistence, give a concrete answer in the morning[30].

11 June 2013 (Day 2)

42. On the following morning, 11 June 2013, proceedings commenced with the magistrate returning to the question of what the defence position was in respect of the admissibility of the record of interview[31]. MS accordingly responded that the defence were not going to challenge the admissibility of the record of interview[32].

43. MS then made an application to play "the first few minutes of the DVD in court to the victim"[33]. When the magistrate asked why, MS replied[34]:

> "Yes. Well, the relevance and use is as follows. The witness still hasn't answered my question as to what type of film this is, and she's being evasive and she doesn't agree with me that it's a type of thriller. Well, I can say when I watched it last night that the opening scenes make it quite clear that it is a ghost

> – some sort of ghost or psychic movie with basically, four people sitting around a table, I think the word is "performing a séance" where they bring back spirits from the dead. So, it's clear to me that it is a type of ghost/horror story. It's certainly a thriller, and I want to put this to the witness by reference to what was actually shown in the film in the first few minutes, because it's very clear that that's what the film is about, and I just want to reinforce my proposition by showing her the first 10 minutes or so."

When the magistrate suggested that the playing of the movie did not go to the crux of the allegation of indecent assault, MS responded[35]:

> "No, but it shows what was going on in the background."

He added that the playing of the film would assist the court in determining the lighting conditions in the cinema at the time, particularly if the film was a thriller with dark scenes. However, he immediately withdrew that particular observation[36].

44. When the prosecutor made the rather obvious point that PW1 had already said she had no idea what she had seen of the film, and further objected to the showing of the film to witness[37], the magistrate asked MS to articulate the question he wished to ask[38]. Counsel replied that he wished to explore four matters with the witness concerning the film[39]: (i) that it was a thriller; (ii) that given the sound and special effects involved, it would have been impossible for her not to have had her attention caught by the film; (iii) that she would have been scared by what she saw; and (following a short 7-minute adjournment) he added (iv) whether there was enough light for the witness to see what was going on at the time she claimed she was indecently assaulted. The magistrate decided to permit the playing of 15 minutes of the film, but made it clear that he was confining counsel to the four questions he had articulated[40]. The witness was brought back into court and the first 15 minutes of the film duly played, commencing at 10:41 am[41], by which time the issue of the playing of the film had taken over an hour of debate in court, lasting some 22 pages of transcript.

45. PW1 then disagreed with the first three propositions that were put to her in cross-examination (namely (i), (ii), and (iii) *supra*). In view of an apparent technical problem in fast-forwarding the film to the 35-minute mark for the fourth matter to be explored, that question was deferred until the afternoon session, and MS was invited to deal with any other questions first.

46. It quickly became apparent that MS was not content with PW1's answers that the film was not a thriller, for he then put to her that the film was described on Wikipedia as

a "Spanish American thriller" and asked her what she had to say[42]. When the magistrate intervened and pointed out that questions about the nature of the film, which had now been played in open court, had already been asked and that counsel was effectively inviting the witness to comment on the opinion of the editor of Wikipedia, MS took issue with its characterisation as an "opinion"[43] and asked that the witness leave court again. That did not become necessary because, upon objection by the prosecutor, the magistrate disallowed the question[44].

47. MS then turned to another issue, which concerned cinema seats. When the witness said that the width of the armrest of her cinema chair on that night would not be more that 3 inches, she was asked by MS to measure precisely using a ruler the width of the chair on which she was sitting in the witness box[45]. Both counsel and the magistrate then examined the process of measurement but were unable to agree because of the slight curvature of the arm of the chair[46]. MS then asked for the ruler to measure the width of the defendant's forearm, which was then said to be 3 inches. When it was suggested that it would have been normal for her forearm and that of someone sitting next to her to have come into contact because of the narrow width of the armrest of the cinema chair, PW1 protested that she had never put her arm on the armrest, so there would not have been any contact[47].

48. The witness was then asked if she had ever flown on long haul flights in Economy Class and whether the size of a Cathay Pacific Economy Class seat was the same as the cinema seat in question.[48] She eventually confirmed when pressed, having already stated that she had no comment to make on the subject[49], that they were about the same size[50].

49. The lunchtime adjournment arrived and the magistrate asked MS if it would be possible to finish PW1's evidence that day, to which MS replied "Impossible"[51]. The magistrate then indicated that he would like some Admitted Facts concerning the record of interview to be signed before the "cautioning officer" was released[52]. The court then adjourned for lunch.

50. When the court reconvened in the afternoon, the magistrate asked whether the parties had agreed on the Admitted Facts relating to the record of interview[53]. MS told the magistrate that he wanted "to consider this very carefully before I agree to this Admitted Facts. Admitted Facts are serious matters and I want to consider it carefully before I agree how to deal (with) this"[54]. The magistrate then insisted that they be ready that day and afforded MS a 10-minute adjournment to speak to his client[55].

51. When the court resumed at 2:50 pm, MS informed the court as follows[56]:

> "The position is as follows. I'm trying to – I've analysed the legal effects of this document, and this is as follows. In my submission, the record of interview is inadmissible in evidence, and I'll explain why. The record of interview refers to an allegation involving this witness, … , who was allegedly sitting next to my client in a cinema. That's what the record of interview says. It sets out the allegation and then there is, basically, one paragraph by my client.
>
> Now, because she has failed to identify my client, this is hearsay. It's inadmissible. It's basically what the police officer in the record of interview is saying that this woman has said happened. That's hearsay and it's admissible (inadmissible?), ab initio. And, therefore, whether it's admitted under 65C or B or there's a voir dire, we don't need to consider that, it's an inadmissible document. And that is because the dock ID was disallowed and the witness has failed to identify my client as the person who allegedly touched her. So, therefore, this document cannot be admitted in evidence in court. It contains a hearsay allegation, and it would be most improper and unfair and highly prejudicial for it to be admitted in evidence. That's my analysis of the document."

The magistrate then reminded counsel that his instruction had been that there was no dispute as to the voluntariness of the record of interview and asked whether an Admitted Fact could be agreed, confined to the issue of voluntariness only, to which MS responded[57]:

> "No, no, because the document is hearsay, it contains hearsay. The statement is hearsay. The content of the statement, just as Wikipedia, the learned magistrate overruled me in terms of allowing me to put that document because it is hearsay. I was not allowed to put that. I accept that the video cover about the 114 minutes is hearsay."

52. PW1 was then recalled to the witness box at what would appear to have been shortly after 3 pm. MS began by suggesting to the witness that if she were to fall asleep in a cinema, her hands would not remain resting in her lap[58]. When the witness said she would not fall asleep in a cinema, she was asked to assume that she did[59]. The magistrate intervened, the prosecutor objected to the question and MS again invited the magistrate to ask the witness to leave court so he could explain the relevance of the question, which did not involve speculation for it was well known that people fell asleep in chairs[60]. It did not in the event become necessary for the witness to leave court because the magistrate permitted the question[61].

53. MS then asked PW1[62]:

> "When you sleep at night, Miss Lo, your hands move in different positions don't they, when you're asleep?"

To that proposition the witness answered[63]:

> "Not so."

MS persisted and, when the witness replied that she would be able to tell whether she had moved or not during sleep, the following exchange took place[64]:

> "Q. That wasn't my question, Miss Lo. Listen to the question again. I'm not going to stop, Miss Lo, till I get my answer. Rest assured. You are sound asleep for one hour, okay, in the chair, be

> it this chair, the cinema chair, or your armchair at home. You're sound asleep for one hour, fast asleep, okay, that's the scenario. Right?
>
> A. Right.
>
> Q. And then somebody prods you like this, "Oh, Miss Lo, wake up, time to go to work, wake up". At the moment you wake up, it is not possible for you to write down on a piece of paper every single bodily movement that took place in that one hour, is it?
>
> A. (Punti) …
>
> Q. Yes or no?
>
> A. I would not write that down, no.
>
> Q. That's not my question, it's not possible for you to write it down because you were fast asleep, yes or no? Yes or no, Miss Lo.
>
> A. Because I was asleep."

When the witness eventually disagreed with what was being put to her, and the magistrate asked counsel to move on to his next question, MS asked PW1[65]:

> "Q. Now, it's also possible, isn't it, that when you're asleep -- how long do you sleep for at night, Miss Lo, how many hours do you sleep, seven, eight, nine?"

When the magistrate queried the relevance of this question, MS again said he would explain its relevance in the absence of the witness, saying[66]:

> "I've not finished this line of questioning, I'm not satisfied with the responses."

The witness duly left court again at 3:32 pm.

54. When the magistrate asked for the relevance of the question to be explained to him, MS responded[67]:

> "And now I want to explore the matter further. I'm not satisfied with her second response, her answer, and I want to explore the matter in the context of someone sleeping overnight, whether they think they move or not, whether they can remember all the body movements the next morning. She doesn't – she's being incredibly evasive, and I'll be making this in closing submissions. She's a very evasive witness, and I think I'm entitled to explore the matter. She can't just simply say "not agree", I think I'm entitled to explore the matter further with some examples which go to her credibility. She can't just say "disagree"."

Following which, this exchange took place[68]:

> "COURT: If you are going to submit to me that the answer she just gave your last question, "disagree", is incredible, inherently improbable, implausible, or unreliable for any reason or by common experience of mankind, certainly you can address me in detail in closing submission and I will hear you.
>
> MS: Absolutely, yes. But this is another lie.
>
> COURT: But for how many hours she sleep in one single day, whether it be 5 hour, 12 hour, 3 hour, you have already your answer to one hour's sleep, and for which she had given you answer already.
>
> MS: Well, I want to see if the reason is the same, if she can't remember over a seven hour period, I want to see if she still disagrees with the proposition. It makes it even more incredible - even more absolutely nonsensical in terms of an answer.

> COURT: You have already asked for about one hour previous, and I have allowed you for -- I have already taken down four pages of notes on this line of questioning about her sleeping, and I have also …
>
> MS: I accept that, but the lack of credibility …
>
> COURT: I mean, you can address me in details on the answer whether they are credible, reliable. But for the moment, subject to your preservation I do not see how -- asking how many hours a day she's – when her sleep is going to help the matter or advance the matter further.
>
> MS: I'll explain further.
>
> COURT: Yes, yes.
>
> MS: If she sleeps for, say, seven hours a night, and she still maintains the position that the next morning she can't write down all of her bodily movements because she was fast asleep, and she disagrees with that proposition, it just enhances credibility issue. Secondly, if she sleep with anybody at night, on her evidence she sleeps like a robot, doesn't move.
>
> COURT: And you can comment these to me in due course.
>
> MS: Yes, if she sleeps with somebody at night, then maybe that person would move. Maybe in evidence she would accept that other people move when they sleep. They're a different condition. Some people perhaps don't move when they're asleep, but others do move a lot. I want to press this line of questioning.
>
> COURT: Again, this question goes to the credibility.
>
> MS: Yes, it's credibility.
>
> COURT: And you accepted earlier from me that there is a limit to credibility, how far you can go.
>
> MS: Yes, but this is highly relevant."

The argument continued, whereupon the magistrate disallowed the question and invited MS to move on, pointing out that the film had now reached the 35-minute mark. At that suggestion, MS retorted[69]:

> "I'd rather finish this line -- I have a lot more questions on the sleep issue. I've only been disallowed that one question about the hours overnight, I've got a lot more questions on the sleeping issue to ask this witness. So, I'd rather not interrupt the flow, if that's alright."

Notwithstanding the magistrate's concern about the repetition of matters that were not relevant, MS pursued the matter of PW1's and other people's sleeping patterns and their possible movements while asleep for a further 10 pages of transcript. Towards of the end of this section, counsel put again the question he had essentially asked 14 pages of transcript earlier[70]:

> "It is impossible for you to make record of every single bodily movement, yes or no, answer the question. Yes or no?"

In total, the questions concerning PW1's and other people's sleep patterns had taken up some 22 pages of transcript, lasting well over an hour by the time counsel finally moved on to ask about the film, which was again played in open court at 4:19 pm.

55. After the film had been played, the witness was asked about the 4-minute section

which occurred at the 35-minute mark[71]. Page after page of transcript was then taken up as to what she could or could not remember of the subject-matter of this section of the film, at the end of which the witness, we think with an inevitable and entirely justifiable sense of exasperation, said[72]:

> "... I understand that your Worship and you people are trying to help me, but why you people force me to watch that footage again? I understand that I should answer in yes or no, and I'm not throwing a temper, and at this moment I am calm - very calm. Instead of forcing me to watch the movie, why don't you ask me how it was when he indecently assaulted me and how I felt when I was being indecently assaulted? Now we're going round and round and wasting your time. I hope that I'm entitled to voice out my opinion. I'm not making up a story of me being indecently assaulted so that for the past 10 months I kept having nightmares about being indecently assaulted."

The court then wisely adjourned for a few minutes[73] and when proceedings resumed, the witness was asked if she could continue answering questions about the 4-minute section of the film[74], the time in court by then being after 5 pm. To this enquiry, the witness again said, somewhat obviously and understandably[75]:

> "I really understand it very well that you people still have questions for me. I also appreciate for your Worship's patience in listening to me, but I am really not throwing a temper here. I am really very calm and collected, but I'm thinking what's the point of forcing me to watch the movie. I felt that – what I felt when I was being indecently assaulted, I would have more profound recollection about how I felt when I was being indecently assaulted than about the movie, or what that movie is about or how the story developed is 10 months ago."

56. MS then asked the magistrate to direct the witness to bring to court the cardigan she had removed from her bag on the night in question, together with the bag itself[76]. When the magistrate queried what the point of asking her to bring the bag was, MS replied simply and without further explanation[77]:

> "I want to see it."

The magistrate subsequently ordered that PW1 should return to court for the resumption of the case on 18 June 2013, and that the witness should bring three items with her to court, namely "the cardigan, the see-through upper dress and the handbag"[78]. The court finally adjourned for the day at 5:50 pm.

18 June 2013 (Day 3)

57. The third day of the trial proper resumed at 9:57 am on 18 June 2016. The magistrate began proceedings by addressing MS as follows[79]:

> "I notice that you have already spent a total of three hours 20 minutes, in other words 200 minutes in total in actual questioning of PW1. That is exclusive … of the time we play the two portion of the DVD. That 200 minutes is exclusive of the time we spent in legal argument in the absence of PW1. On day one, you spent a total of 46 minutes in actual questioning about her background, her movie-seeing habit, whether the subject is a … thriller or ghost story, and whether she had her eyes focusing on the screen and whether she had any idea about the content of the movie, and so on … In the morning of day two, you spent one hour 20 minutes in

> actual questioning about the first 15 minute of the DVD footage on the three proposed question, and while the size of the seats in cinema in general about the subject seat inside the subject cinema, about the possibility of people coming into accidental contact with each other on the armrest, and so on and so on. And in the afternoon on day two you spent another 74 minute on generally of PW1's sleeping in the cinema, of moving your (her?) hand during the period she was asleep, and you asked her about the scenario of her sleeping on a chair, or lying down, and whether she'll make a record of her movement while she was asleep, or whether it is possible or impossible for she to make a record of all these movement, and you also ask about the four-minute footage, the second portion of the DVD footage and whether she had any recollection of similar footage on the night in question, and she answered about the fat woman, and also the card guessing game … That's the sort of things that the progress we have made as I have overviewed my notes, okay."

MS then asked[80]:

> "May I ask the message the learned magistrate is seeking to deliver, if any?"

To which question the magistrate responded that, while he understood counsel's entitlement to cross-examine a key prosecution witness, nevertheless[81]:

> "… as a professional counsel you are expected to exercise your professional judgment and discretion to make the best economical use of the time. And, of course, the time is not limitless, okay. There is a limit to the time. And we have already the … two-day estimate originally estimated by the parties for this trial in the two previous PTR. And I trust you would fully appreciate that the crux of the affairs focus on the five minute between the alleged forearm incident and the alleged thigh incident, that's a period of five minutes … And you already took 200 minutes - 40 times of that already, without going into that five minute by now … and I trust you would also reserve some time on cross-examining on that crucial five minute and events afterward, and of course you will also reserve some time for putting your case, if any, to PW1…"

58. To this attempt at judicial control of the proceedings, MS replied[82]:

> "MS: Yes, if I could just make one or two observations in reply for the record. With the very greatest of respect, I don't necessarily share the learned magistrate's view of this. If one looks at timing, my client has now been under the umbrella of this charge for 10 months. Now, mathematics is not my strong point, and I'm sure somebody could work out 10 months multiplied by how many minutes, and it will be tens and tens and thousands of minutes that my client has had to face this ridiculous charge and allegation that's been made against him. That's the point no. 1.
>
> Point no. 2, when the matter was set down for pre-trial review, we did not know whether this witness was going to be compliant or not. In the eight years I've been practising at the bar, I have never come across such an evasive witness in the whole of my practice. And I'm sorry, Sir, but it is my professional duty to do the best for my client. …
>
> Now, the 200-odd minutes the learned magistrate has mentioned, I don't have a precise detail of the timing, but with the greatest of respect those 200-odd minutes includes the literally probably not far off the 100 times the learned magistrate had to intervene and repeat my question.
>
> COURT: To assist you.
>
> MS: Of course to assist, which is very greatly appreciated, but that's not the defendant's fault that this victim is incredibly evasive and requires virtually every single question being re-put to her from the bench. That's not the defence fault. And, obviously, I'm very much aware of my duty, and I don't believe that any single question I've put to this victim is irrelevant, if not I wouldn't have put it. And I appreciate that it's my duty to put my case. But to be quite frank, I've hardly started. I've barely started the cross-examination. …
>
> *And I'm not going to stop just because it economic and because there are other cases waiting. That*'s too bad. The prosecution can withdraw the charges, and we'll all go home. No problem.

> But I'm not going to be subjected to a duty to act economically in the best interests of the economic use of time. My duty to my client overrides that. It's superior to that duty, I'm afraid." (Emphasis supplied)

We shall return to this view of counsel's duty (as italicised) in due course. For present purposes, the magistrate said he noted MS's response but would proceed with the trial[83]. PW1 was recalled to the witness box.

59. MS then yet again returned to the question of people falling asleep in cinemas and pointed out various reasons why someone might fall asleep in a cinema[84], just as one might "nod off" for various reasons on a long-haul flight[85]. When he asked whether it was possible for the hand of someone who had nodded off to sleep to slip over the side of the arm rest, the witness conceded the possibility[86]. The magistrate queried several times whether MS was asking about the conditions on the night in question, to which MS said he was only asking a general question[87]. The magistrate was evidently concerned by the general nature of the questions being asked that, following an objection by the prosecution[88], he asked for MS's response[89]. To that, MS said he would reply in the absence of the witness, as a result of which PW1 was again obliged to leave court[90].

60. When the magistrate queried the relevance of the question and suggested that it would be better to put a specific account of what actually happened on the night in question[91], MS declined and said he was "not yet ready to put the minutia of the defence case"[92]. When the magistrate persisted and said that MS could "go straight to the possibility on the night in question"[93], MS replied: "I don't wish to do that. I'm not ready…"[94]. Following further objection from the prosecution that MS's general questions should be limited, the magistrate told counsel that he should not lose sight of the specific circumstances and "the particular individuals involved in particular activities"[95]. The magistrate continued, in a passage which is also relevant to Ground 2[96]:

> "COURT: And I trust you have your instruction. And, of course, any suggestion put to a witness must be based on instruction. There are provisions in the Bar code … That we should not, as a barrister - professional barrister - should only put things to which we have the basis and including our instruction.
>
> MS: Absolutely. These are based on instructions, the general questions.
>
> COURT: Okay, I hope that is so, and I hope you are fully -- and I trust you are fully aware of your professional duty and professional conduct, and with the relevant provision of the Bar code.
>
> …
>
> MS: What I would say is I'm 100 per cent familiar with the provisions of the bar code."

PW1 was then recalled[97] and a further series of general hypothetical situations were put to the witness for comment, occupying some 13 pages of transcript. The court then broke

for a short adjournment and, in the absence of PW1, the magistrate asked MS[98]:

> "How many more questions about these kind of general scenario or general possibility before you move to the specific on the night in question. Could you give me some estimate?"

MS responded that he would be about 15 minutes and "[t]hen I move straight to the evening in question"[99].

61. At that point, the magistrate reiterated[100]:

> "… I have emphasised what is crucial is the actual specific circumstances prevailing in that seat and on that night and on the particular individual on the night in question. We are not dealing with a general academic question, we are dealing with a specific event which happened on a specific night to a particular individual."

PW1 was then recalled. Further general questions were asked of the witness and, upon MS indicating that he had no further general questions at that stage[101], the court adjourned at 12:19 pm[102].

62. It is worth noting that up until this stage on Day 3 of the trial proper, not a single question had been put to the witness in cross-examination as to what had actually happened in the cinema on the night in question.

63. When the court resumed at 12:44 pm, MS asked to inspect the three items the witness had previously been asked to bring to court[103]. He then asked if PW1 could measure her handbag[104]. When the magistrate suggested that MS should do the measuring himself, he took up a ruler and duly measured the bag's dimensions[105]. He then asked the witness the make of her handbag[106], suggesting it was by 'Coco'[107], but was told by the magistrate to ask in due course when cross-examination resumed. The court then adjourned until the afternoon[108].

64. Before cross-examination resumed in the afternoon at shortly after 2:30 pm, the magistrate was no doubt expecting, in the light of what he had been earlier told, that counsel would now be moving on to the particular events in question[109]:

> "Okay, let's continue with PW1, ask her back. We move on to the specific events on the night inside the cinema in question."

From his first few questions in cross-examination, MS appeared to be getting to the point. He established that on the day in question, the witness was wearing a black dress and a black see-through top with a ribbon at the front, while her cardigan was in her handbag. However, he then went on to ask if the witness had been wearing a hat or a scarf or shawl[110], and whether she was wearing tights or stockings and a black bra[111]. Picking up the witness's see-through top, MS suggested that it was made of very thin flimsy material, which, although it looked like silk, was in fact 100 per cent

polyester[112]. When he suggested that it looked "a bit like a silk-type material", the magistrate queried the relevance "of these questions" and was assured that the relevance would become evident in due course[113].

65. MS asked PW1 whether she agreed that the see-through top was attractive to the male eye, to which she said she would not speculate as to how people would react[114]. He then asked her if she "were happy with the outfit you were wearing?"[115]. Counsel duly asked for the item to be made an exhibit[116]. Turning to the dress, MS asked the witness the brand of the dress[117] and suggested that it was likewise thin and flimsy, and looked like silk or satin[118]. He then asked to see the dress, before putting to PW1 that the thickness of the dress was "about one or two millimetres"[119]. As he was holding it to indicate the part he was referring to, the witness asked[120]:

> "Is it enough with you toying with the dress?"

To which, MS responded to the witness[121]:

> "Excuse me? I'm doing my job, Ms Lo.
>
> …..
>
> I'm not toying with the dress."

66. MS continued over the next four pages of transcript to ask the witness about the minute thickness of various parts of the dress before suggesting that the dress had no lining[122]. The magistrate expressed the hope that the relevance of such "minute details of the clothing" would soon become apparent[123]. At that point, MS asked if the witness could drape the dress over her body, explaining that ideally he would have liked her to wear it, so that he "could ascertain exactly where the end of the dress approached her knees"[124]. When MS proposed that "obviously the best evidence, if Ms Lo is willing, would be for her to put the dress on and sit in the chair and show us exactly where the dress came down to. Because, of course, if she just places it in front of her body, it's potentially misleading"[125], the prosecutor drew to the court's attention that photographs of the witness sitting wearing the clothes concerned on the day in question had been taken by the prosecution and served on the defence before trial as unused material[126].

67. A further five pages of argument ensued between MS, the prosecutor and the court following the prosecutor's objection to the relevance of asking the witness to put on a dress in order to sit in a chair that was obviously different from the chair in the cinema. MS persisted, saying that the photographs were misleading[127], that "the best evidence rule would be for her to wear it"[128] and that even draping the dress over her body was

"still not good enough"[129]. Accordingly, he made a formal application that PW1 should wear the dress[130].

68. At that point, the magistrate asked the witness whether she would agree or not, to which she firmly responded "I object"[131]. The judge refused the application and told MS that he could pursue the matter by using the photographs[132]. Undaunted, MS immediately asked the witness to place the dress over her body[133]. The prosecutor duly objected, whereupon MS declared[134]:

> "I think the objection by the prosecution is totally unreasonable. We are conducting a criminal trial. There is no prejudice, inconvenience, whatsoever to this victim placing the dress in front of her body, and the prosecution is wasting time raising these objections."

The magistrate disallowed the defence question and ruled that "the matter can be pursued by using the photos provided to the defence with PW1 wearing the dress in question"[135]. At that point, MS complained that "the prosecution hasn't proven who took these photographs or who this person is, we don't know"[136], and suggested that the witness leave court so that he could address the magistrate. The witness duly left court yet again at 3:31 pm[137].

69. MS then addressed the magistrate as follows[138]:

> "Yes, the Bill of Rights, Basic Law, fundamental requirement that the defence has the right to put their case to a witness, and to properly prepare its case. What the prosecution is doing is boxing the defence into a corner. They've produced some photographs. ….
>
> These photographs are hearsay, at best. … I'm not going to rely upon some photographs about which …we know nothing of their veracity, their authenticity, their origin, who took them, et cetera, et cetera. It's not appropriate.
>
> And if one looks at the Basic Law and the Hong Kong Bill of Rights, the preparation of the defence case is fundamentally enshrined, and I'm very happy to come back on another day and to make detailed submissions about those matters if necessary. But I'm sure the court is well aware of those provisions.
>
> I fear that I am being prevented from exploring the best evidence in this case, by an objection from the prosecution, which is unreasonable and totally unnecessary, and delaying this process, delaying the court trial. …
>
> I accept that it's a skirt, I accept we're dealing with a female, I accept potentially it's sensitive. But so is a criminal conviction is equally if not more sensitive."

70. In further exchanges with the court as to why he had not raised the provenance of the photographs before, MS simply said that he was raising the matter now[139]. When the magistrate proposed that the remedy for any doubt that the photographs depicted PW1 rather than somebody else was to ask the witness if she was indeed the person wearing the dress in question, MS accepted that he could do so but the person to prove the photographs was the photographer who took them[140]. The argument continued and when the magistrate observed that it was a matter for counsel whether he wished to

explore the contents of the photographs, MS responded[141]:

> "Yes, I put on record that I'm being prevented from putting my case to the victim as a result of these rulings."

He then confirmed that he was asking magistrate to reopen his rulings in the light of his submissions and his objection to the veracity of the photographs[142]. Contending that the photographs were in fact "hearsay" evidence, he further invited the magistrate to reconsider his earlier ruling refusing to allow MS to ask the witness to place the dress over her body or to wear it[143].

71. The magistrate responded by making the rather obvious point[144]:

> "We need to know the issues, okay. You haven't put your case. I simply have no idea of your case, okay, …",

to which MS replied: "Not yet, no."

When the magistrate further pressed MS and queried[145]:

> "And I trust you have your instruction and you know the issues and you are going to put your case in due course".

To this, MS replied[146]: "Yes, absolutely."

Ultimately, after several pages of questioning of counsel by the court as to the relevance of his earlier cross-examination, in which he pointed out to MS that "we do not do things just for the sake of it"[147], and that all witnesses should be respected[148], the magistrate declined to reconsider his earlier rulings[149].

72. Inviting counsel to "pursue the matter with the photographs if you like"[150], MS nevertheless persisted[151]:

> "Yes, and what about asking the victim to place the dress in front of her."

After some wrangling as to whether he was inviting the court to reopen its decision on that matter as well, MS continued[152]:

> "I don't see the prejudice to this victim to place a dress on top of the dress she's wearing. And I'm amazed, absolutely amazed, that the prosecution would object to this. But as you said earlier, they're not bound by the Bar code. I am. So, I have to fight for my client."

PW1 was recalled into court at 4:30 pm. No further cross-examination took place that day and proceedings closed with her being asked to bring her cardigan and handbag back to court again the following day.

73. It is thus clear that nothing of any evidential value or significance had been achieved during the afternoon session at all and yet still, after 3 days of evidence, nothing had been

put to the witness in cross-examination as to what had actually happened in the cinema on the night in question.

19 June 2013 (Day 4)

74. Before the evidence resumed on the fourth day, the magistrate drew MS's attention to certain provisions of the Bar code of conduct. We repeat these exchanges in some detail, since these matters also engage Ground 2. The magistrate began by reminding MS that[153]:

> "…under the paragraph 131 of the Bar code that in all case it is the duty of a barrister to guard against being made the channel for question or statement which are only intent to insult or annoy either the witness or any other person or otherwise an abuse of the court's functions, and to exercise his own judgment both as to the substance and the form of the question put or the statement made. … And also paragraph 133, there must in all case use his best endeavour to avoid unnecessary expense or waste of the court's time. I'm afraid -- I trust you are well aware all of these provisions. … (MS interjected that he was aware of the Bar code) … And you have kept yourself reminded that you are subject to the Bar code. And I'm glad that you are well aware of that. And I trust that you would keep remind(ing) yourself that for the rest of the proceedings."

75. At that point, MS asked[154]:

> "Well, is the learned magistrate making an allegation that I've breached those provisions?"

He continued[155]:

> "I don't believe any of my questions have fallen into these categories. In fact, none of them have. Eventually, the witness has answered all of my questions – eventually. … But also, Sir, I must emphasise in no uncertain terms that this is a prosecution that should never ever have been brought. It is a complete waste of government public funds, prosecuting this case. And, subsequently, I will be making detailed submissions as to this matter later on. … However, Sir, because the prosecution insist on bringing this case, I have to defend my client's interest to the nth degree. That's my job. That's my duty. … And I will not be subject to a professional negligence claim by my client later on. Sir, I'm doing my best for my client in his interest. That's (my) duty. I also have a duty to the court, and I'm aware of that duty, and I'm aware of the provisions that bind me."

The magistrate said he was glad to hear that MS was familiar with the provisions of the Bar code of conduct, because he was "still at a loss to understand the question in yesterday afternoon about the minute details of the clothing PW1 wore on the night in question"[156]. He went on[157]:

> "And you will recall that I asked I hoped that the relevancy of these questions will be evident soon, but up to this time I still have not seen the relevancy of these questions. We are not dealing with a case of forged trademarks. We are dealing with a case of indecent assault, and I trust you have your instruction, … you are aware of the issues, and you have not seen fit to disclose them to me."

76. This series of exchanges came to an end when MS indicated that, to save time in the calling of witnesses, the defence was in a position to admit the voluntariness of the record of interview, and to make an admitted fact as to what he actually said in that

interview[158]. He told the court he had drafted the admissions, which had not yet been shown to the prosecution, but would like 5 minutes in due course to confirm one matter with the defendant. PW1 was then recalled to resume her evidence[159].

77. MS began his cross-examination on the fourth day by referring the witness to the photographs taken by the police of her wearing the dress on the day in question. The purpose, it seems, was to establish to what point on her knees the dress came[160], and whether, in view of its silky texture, it had risen up her body when she sat down in the cinema seat[161]. He then asked whether her ticket for the cinema was an iPhone promotion[162], and whether she intended to go to see the film alone[163]. At that point, MS produced an album of 74 photographs taken by the defence of various aspects of the cinema in question. After some 13 pages of transcript, in which the provenance of the photographs was discussed, the prosecutor having evidently not seen the photographs before, the witness was finally asked to confirm the seat in which she was sitting[164]. She replied that if the photographs depicted the particular house in the cinema concerned, then photograph 28 would depict the seat in which she had sat[165]. The court then adjourned at 11:08 am.

78. The hearing resumed at 11:31 am with the prosecutor indicating that he had made some proposed amendments to MS's draft Admitted Facts[166]. The magistrate made clear that he needed to know at 2:30 pm the number of remaining witnesses to be called, and whether the record of interview was admitted or not[167]. PW1 was then recalled to the witness box, whereupon she declared almost immediately that she was "really tired for these few days"[168]. When, upon enquiry from the magistrate, she said she could continue for the time being, there followed some 19 pages of transcript in which the witness was asked questions by MS about the cinema seat based on the photographs and the figure sitting in a seat in those photographs. This series of questions covered such matters as: whether the arm rest between the seats was fixed or could move up and down[169]; whether the body posture of the man depicted in the photographs was the same as the man sitting next to her that night when he first sat down[170]; whether it was possible for two people sitting next to each other to have both put their arms on the arm rest[171]; and the dimensions of the seat in question[172].

79. Since the witness had all along made clear that her answers depended on the assumption that the photographs in fact depicted the cinema house and seat in question, the witness again emphasised[173]:

> "On the material cinema that you people speculate to be. It is not about the question is simple or not. I understand that you wanted me to answer simply "Yes" or "No"."

The magistrate intervened to request the witness to be patient and to reassure her that he was there to ensure that the question was clear and specific enough, whereupon MS said to PW1[174]:

> "Miss Lo, it might be more courteous if you were to address me as "counsel for the defence" as opposed to "you people". May I suggest that you use "counsel for the defence" when you referred to me, please. Do you understand? … Can you do that, please?"

To neither question was there an audible answer, although the judge did suggest to the witness that that was a reasonable request[175].

80. MS then resumed cross-examination, by reference to the defence photographs, about such issues as the height of the seat in which she was sitting, the width of the part on which she had placed her buttocks, and the length and width of the arm rest[176]. The magistrate intervened at one point to express the hope that the relevance of all these measurements would become clear in due course[177]. Cross-examination then moved on to another photograph depicting a woman sitting in the cinema seat said to be the one in which the witness had sat. Again, the magistrate intervened to point out that "what we are dealing is the actual circumstances prevailing on that night … according to the evidence already given by this witness", that hypothetical seating scenarios not suggested by the evidence were "not the main concern of the court" and to express the hope that he would soon see the relevance of the questions[178]. Shortly thereafter, MS's questioning on the photographs ended. He then asked the witness about her handbag and where she had placed it[179], whereupon the evidence in the morning session concluded. The magistrate again expressed the hope that the parties would reach an agreement on the Admitted Facts relating to the defendant's record of interview[180].

81. When proceedings resumed that afternoon, MS indicated to the court (following a short adjournment to explain the Admitted Facts to his client)[181]:

> "Yes, I've taken instructions, and my client's position is as follows, now we do not accept the voluntariness of the record of interview. … So we're challenging it. … They're my instructions."

Accordingly, he said, a voir dire would be required. Pausing here, it will be remembered that this position was a reversal of that indicated on 11 June 2013[182].

82. There then ensued discussion about the remaining timetable for the case, with the magistrate confirming that MS would need another whole day to cross-examine PW1[183]. The case was adjourned to allow the magistrate to discuss the question of

dates with the principal magistrate. When he returned and the court resumed, the question of dates was revisited. The decision was made that the case would be fixed for 7 more days, namely 26 June, 2 to 5 July and 9 to 10 July. When 11 July was canvassed as a further possible date, MS indicated that he was not free because of a personal matter in the morning of 11 July, while the prosecutor said he would not be in Hong Kong and all his tickets and hotel bookings had already been confirmed. The matter of dates concluded with the magistrate asking MS to "make the best use of the available time in line with your duty and if you achieve the matter in five sentence(s), don't do it in 10 or 15, okay? … And think before you ask. Do not cross-examine just for the sake of cross-examin(ing), okay"[184]. PW1 was then recalled.

83. MS then asked the witness how she was sitting in the cinema seat. This series of questions culminated in PW1 being asked by MS[185]:

> "Yes, Ms Lo, the amount of space that your body occupies on the seat today in court is approximately the same amount of space occupied by your body on the cinema seat on 29 July, that's correct, isn't it? 29 August."

When he went on to ask if she had gained or lost weight since 29 August[186], and was challenged by the magistrate as to relevance, MS explained and rephrased the question[187]:

> "The size of the part of your body that occupies the seat, in other words, your bottom, your buttocks, is the same size now as it was in August of last year, correct?"

The witness said that she was the same weight, whereupon MS put to her that the seat she was sitting on in court was approximately 18" wide and asked her to check with a ruler[188]. This led to the magistrate asking MS and the prosecutor to measure the witness's chair, which resulted in a measurement of 17.5 inches[189]. It was then put to the witness that "the space from the edge of the seat on your right-hand side to where – the middle of your thigh is, is about one inch?"[190].

84. When the magistrate queried the relevance of the question, the following exchange took place[191]:

> "MS: … I need to ask these questions, and I will then move to the incident in question. … I'm not disclosing the defence case at this stage. Some counsel will disclose a lot from day one."

MS then persisted with this line of cross-examination and asked the witness to use a ruler to measure the relevant distance. The magistrate requested the lady interpreter to assist the witness with the measurement, whereupon MS suggested that in order to ensure an accurate measurement with the flat of the ruler, the witness should sit on the ruler[192]. At this point, we think with complete justification, the witness protested[193]:

> "I think it's really insulting."

85. Without, it seems to us, the slightest regard for the witness's obvious feelings on the matter, MS pressed on, and was permitted to press on, with his request for the measurement in question and the witness was duly obliged to sit on the ruler and a measurement of 1½ inches taken of the desired space[194]. The witness was then asked to stand up and the ruler removed from beneath her[195]. Following this exercise, the witness was released for the day and told that, unless she heard from the court, she would only be required to resume her evidence on 10 July 2013[196].

86. At that point, the magistrate pressed MS for his assurance that when the case resumed he would deal with the incident in question. MS replied that he was now ready to cross-examine the witness upon her evidence-in-chief[197]. The magistrate again sought confirmation that MS was following his instructions and MS said that he was[198]. MS subsequently indicated that he would probably require another day in order to cross-examine PW1, but he was not going to be bound by that estimate[199].

87. When, at that point, the prosecutor informed the court that if the case could not be finished as scheduled, he would have to postpone his holiday and forfeit his deposit, MS said that "if we're still here on 11 July, something will have gone seriously wrong"[200]. He added that even if the prosecutor were to make himself available, he would not be available from 15 to 24 July because of a District Court engagement. The court then adjourned at 5:53 pm.

26 June 2013 (Day 5)

88. Proceedings on this day began with MS handing up his written objections to the record of interview, although not before some wrangling as to whether the written objections to the verbal at the scene and the record of interview should be handed up at the same time before the calling of the respective witnesses on each issue[201]. It will be remembered that the evidence of PW1 had been interrupted and other evidence, including in respect of a voir dire by way of alternative procedure, was to be called in her absence. Before commencing the evidence of the Hindi interpreter, Ms Susan Ravi Lulla ("PW2"), the magistrate pointed out to the parties that, since PW1 would only be called back to resume her evidence on 10 July, the whole of 11 July would also be required. Accordingly, he said[202]:

> "I'm afraid you need to give precedence to your professional duty, to return to this court for the whole day to …",

whereupon the following exchange between MS and the magistrate took place[203]:

> "MS: I can't, Sir; it's impossible. I just cannot do that.
>
> COURT: That is a personal engagement?
>
> MS: Yes, I simply cannot do that, I'm sorry. And I drew this to the court's attention when marking these dates, I cannot do that, I'm afraid.
>
> COURT: That is a personal matter. I trust you know that you have to give profession – precedent to your professional engagement as a barrister.
>
> MS: Well, in other words, would the learned magistrate allow me to come to court slightly later?
>
> COURT: No, I think you need to come back at 9.30 to …
>
> MS: Well, this is …
>
> COURT: … discharge your duty to your lay client as a professional.
>
> MS: I'm not available, Sir, I'm sorry. I have a private commitment that's been in my diary for a long, long time which I cannot move. And the learned magistrate accommodated me and I've made myself available on all the other dates and I do not think we will need that morning. I think enough days have been set down already and I'll be grateful if we could stick to what we have at the moment."

When the magistrate enquired as to what the personal matter was, MS replied[204]:

> "Yes, it's relating to my daughter, my four-year-old daughter, at her school, and it's been in my diary for months, and I cannot miss it."

This series of exchanges came to an end with the magistrate asking MS to call the school in order to try and move his appointment to another day[205], which MS said he would do[206]. The evidence of PW2 then commenced and was concluded within the morning.

89. PW2's evidence was followed by another interpreter, Mr Chan Pui Yu ("PW3"), and then by DPC 1582 ("PW4"). Shortly before PW4 entered the witness box at 12:18 pm, MS indicated that he had spoken to the principal of his daughter's school "and the good news is that I knew the time of the appointment but I thought it was going to be much longer. The time of the appointment is 8:30 and finishes at 9 sharp, so I am confident that I can be at the court by 9:45 and it may even be possible for me to be here at 9:30"[207].

90. PW4's evidence concluded in the afternoon. Prior to the evidence of PC 11781 ("PW5"), MS outlined his objections to the admissibility of the uncautioned verbal attributed to the applicant, after which he also indicated that the arrest of the applicant at the scene was in issue. When the magistrate sought to clarify the matter, MS reiterated "That appears to be my instructions, yes"[208]. PW5 then gave evidence, with proceedings concluding at 5 pm. The case was thus adjourned until 2 July 2013.

2 July 2013 (Day 6)

91. On 2 July 2013, PW5 concluded his evidence-in-chief in the course of the morning, whereupon MS commenced his cross-examination. At one point, MS asked the

officer[209]:

> "Now, it's correct, isn't it, that you – after you checked the lady's identity card, you didn't contact the Immigration Department to see if that was a validly issued identity card, did you?"

The magistrate asked MS[210]:

> "Is there any issue, Mr Sutherland, that the lady, she make enquiry, the defence is taking the position that the lady is not Ms Lo …? I really have to ask."

MS said he would explain the reason for the question in the absence of the witness. The officer was duly asked to leave court, which he did. The following exchange then took place[211]:

> "MS: Yes. The basic proposition is as follows. As I've said earlier, the identification by the police officer of the defendant is basically a backdoor identification by the victim and I won't repeat what I said earlier. That's right, the identification of the defendant by the victim is central to the prosecution case because, without it, they don't get past first base. So I'm entitled to put the prosecution to strict proof on the identification and all we have is a police officer said he looked at somebody's identity card, they said it was Miss Lo and he made no further checks with the Immigration Department or the police as to whether it was valid.
>
> How do we know it was her identity card? We don't. So I'm entitled to put these questions to test the prosecution case and the reason for that is because of the backdoor identification by the police officer of the defendant by reference to a female at the scene.
>
> COURT: Let me ask you this. If Miss Lo is to be further cross-examined -- she is going to come back to this court for you to cross-examine on the 10th, are you going to suggest to her that she never appear inside House 2 of that cinema on the night in question?
>
> MS: No.
>
> COURT: No? So there is no issue that she was there, am I right, even according to your instruction?
>
> MS: Yes, but I'm coming at this from …
>
> COURT: And you are not taking issue with this officer that the lady she – enquire was possibly not Miss Lo.
>
> MS: I'm not saying that. I'm simply putting the prosecution to strict proof and I'll be making submissions later that all we have is someone who said she was Miss Lo, showed the identity card it was Miss Lo. We've no proof. And I'm entitled to do that."

This submission, which we can only describe as extraordinary, as well as totally devoid of realism and common sense, went on for page after page with MS reiterating at one point that "this case is all about identification, effectively, as we've seen"[212], and with the magistrate repeating his adjuration to counsel "to concentrate on the real issue"[213], and not to "cross-examine just for the sake of cross-examining"[214].

92. Cross-examination eventually resumed and continued through to the conclusion of the witness's evidence. Mr Suen Hon Hei ("PW6"), a cinema executive responsible for the daily operation of the Golden Gateway cinema, was the next witness. His evidence had not concluded by time the court rose at 4:52 pm that day. However, before proceedings closed, MS indicated that there were further matters he wished to ask PW4 on

the general issue. The magistrate explained that the court had adopted the alternative procedure and cross-examination should have gone to both the special and general issues[215]. MS responded that he would have preferred PW1 to complete her evidence first[216]. The magistrate then asked MS to tell him "the precise point that you need to re-call (PW4)"[217], and "the precise point and the grounds in support thereof"[218]. The matter was left to be resolved on the following day after the conclusion of the current witness's evidence.

3 July 2013 (Day 7)

93. At 9:30 am on 3 July 2013, before PW6 resumed his evidence, MS made the following statement to the court[219]:

> "…I've considered the way this trial is progressing. I also bear in mind that duty that the court owes to my client to ensure that he has a fair trial and that he's not prejudiced in any way in the presentation and marshalling of the evidence so far. I also bear in mind my professional duty, under the Bar code, to act in my client's best interests.
>
> And the learned magistrate will recall that, in order to accommodate PW1, the victim, who allegedly claims that she would be fired if she gave evidence last week or this week, the learned magistrate accommodated her scheduling issues and directed that she continues to give evidence Monday, next week, I think 10 July was the date the learned magistrate specified on the basis that there would be interposed all the other prosecution witnesses, so far as possible and with the caveat that there would be, I believe the learned magistrate used the word, a "generous" or "flexible" approach to an application to recall on the basis that I haven't even yet put the case to PW1, I haven't finished going through all her evidence-in-chief and I haven't yet been through the three police statements with PW1.
>
> Now, the normal course would be for a victim or PW1 to finish her evidence in her entirety in order that whatever comes out in her testimony in cross-examination, if necessary, can then be put to the balance of the civilian and the police witnesses. That's the normal procedure.
>
> Now, I accept that the court may decide to depart from that normal procedure. However, it's become manifestly clear to me with the way this trial has gone that my client will be prejudiced if we continue with the current modus operandi. And I say that for the following reasons: firstly, we've had extremely late disclosure by the prosecution of a notebook with no explanation from the prosecution as to why that notebook wasn't served in full when we first requested it months and months ago, but that came towards the end of last week.
>
> ….
>
> Secondly, and I say this with the very greatest of respect, my application to recall the police officer (PW5) yesterday, the approach taken by the learned magistrate is to effectively micromanage the questions that I'm expected to put to that witness by way of a recall application. And I can see, or it's manifestly clear to me that the recall of any of these other witnesses will be handled in a similar manner whereby I'll have to justify or narrow down the precise point or question that the learned magistrate may allow me to put to those witnesses in a recall situation."

94. When the magistrate asked what kind of application, if any, MS was making[220], he answered[221]:

> "What I'm suggesting, in answer to the learned magistrate's question, is that we adjourn this matter now, we finish the cross-examination of the victim, hopefully, in the time that's been allotted next week, without interruption, without any other witnesses being interposed, and we then continue with the trial proper and I'm afforded an opportunity to cross-examine the remaining prosecution witnesses with the full knowledge in my mind of PW1's position about

> this case because, at the moment, it's becoming increasingly clear to me that I cannot discharge my professional duty to my client and be straitjacketed in terms of what I may or may not be allowed to ask these witnesses in a recall situation. It's too much speculation.
>
> The learned magistrate pointed out "Well, you have your instructions." Yes, I have my instructions and I've read the disclosure but what I don't have and what the court doesn't have is how this witness will respond to my cross-examination. We don't have that yet and that opens up a minefield of matters that I may or may not wish to put to the police and to the cinema staff.
>
> And I feel that the expediency and the convenience accorded to PW1, clearly, that decision was made, it's potentially at the expense of a fair trial to my client."

95. MS then advanced several authorities before the court, beginning with a recitation of Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance, Cap 383. He referred to these authorities for the propositions, amongst others, that it was wrong for a judge to descend into the arena, particularly where his interventions had made it impossible for counsel to do his or her duty in properly presenting the defence; and that the right of the accused to cross-examine prosecution witnesses without significant and unwarranted constraint was an essential component of the right to make a full answer in defence. He said[222]:

> "And again, I say, very respectfully, there have been a very large number of interventions from the Bench, admittedly, in some instances to clarify matters which, of course, it's appreciated and it's – there's no complaint about that. However, that has been an -- what I would say, a very large number of interruptions where I found it increasingly difficult for me to maintain the flow of my cross-examination. Effective cross-examination requires an uninterrupted flow and, at times, I felt that that has been denied."

He asked the court to "revert to the usual course of cross-examining of witnesses or the usual ordering of witnesses"[223].

96. In response, the prosecutor pointed out that both parties had agreed on 19 June 2013 that they should interpose the other civilian and police witnesses before recalling PW1 on 10 July[224]. MS then queried the possible prejudice that might be caused to the prosecution by his proposal[225], at which the prosecutor pointed out the problems occasioned for other prosecutions in the court, as well as the difficulties of further accommodating the prosecution witnesses in the present case[226]. To this answer, MS repeated the conception which appears to have underpinned MS's thinking throughout the trial, and to which we have said we will return in due course[227]:

> "Sir, with respect, none of those examples amount to prejudice. I'll say again, and perhaps the prosecution, given the fact that he's not a qualified barrister, he's not bound by the Bar code, and I didn't say that in any disrespectful sense, I say it because it's a fact, difficulty of arranging jobs, jobs being agreed in the coming two weeks, difficult to make further arrangement with the prosecution witnesses, too bad.
>
> *My client faces a custodial sentence and a criminal record, that is far more important than difficulty of arranging jobs. And his right to have a fair trial is sacrosanct in this regard*." (Emphasis supplied)

97. The argument continued for a further 12 pages of transcript, during which MS at one point reminded the court, as if it needed reminding, that it should "rest assured that I haven't even put the case to the prosecution witness yet, PW1"[228]. At 11:34 am, the magistrate disallowed the defence application. Some 2½ hours after the court had begun sitting that morning, PW6 returned to the witness box, his evidence continuing through to the luncheon adjournment.

98. Proceedings began in the afternoon session with MS declaring his intention of applying for a stay of proceedings. He said[229]:

> "Yes, Sir, before we continue, having considered the ruling made by the learned magistrate this morning in relation to my application to adjourn the case in order to follow the more usual course of examination of witnesses, with the greatest of respect to the ruling of the learned magistrate, I intend to bring a stay application to stay the proceedings in this case under the relevant practice direction.
>
> I think it's 9.7 if I am not mistaken, and that requires a written notice to be issued which I'm happy to handwrite the notice now or alternatively, I will fax it to the Department of Justice when I returned to my chambers after court's day and serve the copy on the court. And that will put an automatic stop on any future trial dates until my stay application has been listened to.
>
> Under the practice direction, written submissions and list of authorities must then be submitted two weeks before the date set to hear the stay application, prosecution then have seven days within which to respond and there is then a hearing date. They're my instructions and that's the application I intend to make. I just draw that to the court's attention."

99. When the magistrate pointed out that the practice direction catered for the situation when such an application was made prior to trial[230], MS responded that it also applied to applications for stay made during the currency of a trial, and that, in fairness to the prosecution, he "wouldn't want the practice direction timeline to be shortened in any way"[231]. PW6 was asked to wait outside court, and the hearing was adjourned briefly for the prosecution to seek preliminary instructions.

100. When the hearing resumed at 3:24 pm, the magistrate invited MS to explain briefly the grounds for his application, saying[232]:

> "I trust you have given some thought to the matter before you make such an application…",

an adjuration he repeated later three times[233]. He pointed out that two hours had already been spent that morning in dealing with the matter that was now being dressed up in a different form. Moreover, since no evidence was to be called, and given MS's seniority and familiarity with the legal principles governing stay applications, counsel could address him on the law that afternoon or, if not, then the following morning[234]. To that suggestion, MS replied[235]:

> "No, that's not possible…I don't believe that's fair. I'd like to hear from the prosecution as to what their…position is."

101. When the magistrate persisted that MS should make a start that afternoon[236], the following series of exchanges took place[237]:

> "MS: That's unsatisfactory. That's totally unsatisfactory, Sir, with respect. Regardless of my seniority or otherwise and knowledge of the law, a stay application is a serious matter. …
>
> And the practice direction is made with good reason. There's nothing in there that says those timelines don't apply to the stay application made during the trial.
>
> The reason for the timelines is to give the prosecution notice, 7-days notice, so they can be ready for it and to give counsel two weeks, counsel for the defence two weeks, to properly prepare a skeleton argument and make submissions. And I see it would be totally improper and unfair, and further unfairness and prejudice, if this application were to be made on no notice, effectively, the learned magistrate saying "Start it now" that that would be totally improper.
>
> I'll be deprived of any reasonable role proper opportunity to make submissions.
>
> …
>
> I mean it's absolutely trite law that one -- counsel must be given time, an opportunity to prepare for a stay application. It's a serious matter, it requires skeleton arguments and authorities.
>
> COURT: You can prepare overnight?
>
> MS: That's not enough time.
>
> COURT: And counsel is often required to prepare submission overnight and to take up authorities to assist court the next day, I mean that happens from time to time. I mean this is not, I believe, the only occasion. …
>
> …
>
> MS: What's the prejudice of following the practice direction? Is it Mr Yau's holiday. Is it the prosecution, in fact, they have to reshuffle their people? What's the reason? What is the prejudice? There is no prejudice.
>
> The way this trial is proceeding is based on expediency at the expense of justice in a fair trial.
>
> COURT: These are the submissions you have advanced to me this morning and I'm just thinking of how best to deal with your application for stay, given you indicated to me that you would like to make a stay application.
>
> MS: Yes. Well, I've never come across a stay application to be made (a) on the spot, or (b) with less than 24 hours notice. It's not proper. The practice direction is made with good reason."

In the event, MS agreed to continue with the cross-examination of PW6, pending the lodging of a formal notice of application for stay[238].

102. When the witness had left court for the day, MS indicated that he would be making written submissions, but that they would not be ready by the following day[239]. Further, it would be "most unfair" if defence counsel were to be required to make oral submissions without first seeing the prosecution's written skeleton submissions in response[240]. When the magistrate said he would be ready to hear the application by way of oral submissions the following morning[241], MS reiterated that he would be prejudiced without first seeing the prosecution's response to his skeleton submissions[242], and that he would "not be ready to file a skeleton argument, be it orally or in writing tomorrow morning. It's simply insufficient time"[243]. When the magistrate insisted that the trial would continue the following day, MS agreed to fax the document to the prosecution from

his Chambers as soon as it was ready[244]. The court rose at 4:54 pm.

4 July 2013 (Day 8)

103. At 9:30 am on 4 July 2013, MS confirmed that he had faxed a notice of application for stay to the prosecution[245]. However, no skeleton submissions in support of the application had yet been filed. After considerable argument as to the procedure to be followed, with MS insisting on sufficient time to prepare skeleton arguments, the magistrate ruled, at 10:56 am, that "skeleton arguments of the parties could be dispensed with and the parties could proceed straight to making legal submission to court in turn on the stay application"[246]. He stood the matter down until the following day, with the defence being required to make submissions in support of its application for stay at 9:30 am[247].

104. MS then voiced what he characterised as "practical difficulties"[248] with the magistrate's directions. He indicated that he would be preparing a skeleton argument with "voluminous authorities"[249]. He added[250]:

> "If I'm going to work all night, overnight, to meet this unreasonable deadline that's been set by the court, I want to know that Mr Yau is ready and roaring to go, shall we say, at 9:30, to respond, either him or his colleague from the DoJ. … Because, if not, I'm not prepared to make submissions within this timeframe because it's unreasonable. To give a party, basically, one day to make a skeleton argument with list of authorities and submissions, that is curtailing the normal practice by 20 days. It's not fair. And there is no prejudice to allowing me the weekend, at the very least, as part of the timeframe to prepare this."

The magistrate then declared that he had given his direction and he expected both parties to comply with it[251]. PW6 subsequently resumed his evidence, but was released when the case was adjourned at 11:33 am until the following day.

5 July 2013 (Day 9)

105. At the commencement of proceedings on 5 July 2013, Mr Angus Lee, a senior court prosecutor, appeared in court, informing the magistrate that he had been instructed to attend the hearing to listen to defence submissions on the application for stay and to do his best to assist the court[252]. MS thereupon sought to query whether Mr Lee was a qualified barrister or solicitor, and objected to him appearing[253]. The magistrate held that Mr Lee was entitled to appear, and that he expected his order to be complied with[254]. MS promptly renewed his objection to that procedure, which was overruled by the magistrate[255].

106. MS then complained about the abridgment of the 21-day time frame, to which he considered himself entitled in respect of the making of applications for stay[256]. When the magistrate asked MS to proceed with his submissions, MS retorted[257]:

> "Sir, if I may, I've – so far, in this trial, I've been the subject of incessant interruption from the bench. I should be pleased if, on this occasion, I could be allowed to make my submissions on an uninterrupted basis, so as not to interrupt the flow of what I'm seeking to say."

He then applied for the matter to be adjourned until the following Tuesday (9 July 2013) in order[258]:

> "… to make this application in a proper, measured and professional way instead of rushing it in the way that I've been compelled to do due to the unreasonable, in my view, abridgment of the time period."

The magistrate refused the application for the adjournment. When MS asked abruptly, and in our view insolently, "The reasons?", the magistrate simply repeated that he was refusing the application[259].

107. MS then announced that, although he had not prepared a list of authorities, he had assembled almost 40 cases, and he would be "taking the court through each one of them in great detail"[260]. When the magistrate voiced his concern about relevance, MS retorted somewhat petulantly[261]:

> "I'm not going to be stopped in making this application, as I have during the course of proceedings, so far. These are relevant materials. … I'm not going to be stopped on every single point, as I have, so far, in this trial."

108. MS then indicated that there were two further matters of prejudice arising from a failure to disclose by the prosecution which he wished to add to his application[262]. When the magistrate queried why these points were not made in the original application, MS said that they only occurred to him as he was "reviewing the files yesterday"[263], and that if he was not allowed to incorporate these grounds, he would "bring a further stay application on a future occasion to cover those matters"[264]. He reiterated[265]:

> "I have -- my job has been interrupted on an inordinate number of times from the Bench and I should be pleased, when I make this application, that I could be accorded the courtesy to make the application in the way I see fit."

109. In giving an overview of his application, MS indicated that he had[266]:

> "spoken to a number of senior counsel and I've also spoken to a number of senior juniors at the Bar in Hong Kong, and their view is that -- and I endorse this, is something which is so blindingly obvious, wouldn't necessarily have to have an authority on the basis that, on the whole, the normal procedure and rules of finishing the cross-examination of the main witness is respected."

He complained that, by accommodating PW1's concern that she would be fired from her job if she continued giving evidence the previous or the current week, the hands of the defence were tied[267]. In the course of further submissions in support of the application, MS reiterated that the prosecution were put to strict proof on the issue of identity[268].

110. Towards the end of the afternoon session, the magistrate raised the question of dates for the continuation of the trial. Making clear that he would abide by his promise to resume on 11 July, after MS's personal appointment in the morning, he indicated that the trial would resume on 29 July and continue uninterrupted, day by day, until the conclusion of trial[269]. Having said that it would be most unlikely that he would allow any further indulgence to either side, the following exchange then took place, which, in view of what was later said to explain these remarks, it is necessary to set out in full[270]:

> "MS: Well, I must then immediately put it on record that I'm on vacation for one month from 29 July -- sorry, from before then -- one moment. I'm away for four weeks on vacation, effectively, from the weekend of 27 July up until 25 August. And then I start with court appearances again on 26 August, etc. So I just wish to draw that to the court's attention.
>
> COURT: Okay, and the court's – the view is that, as I've just expressed, I – if the matter proceed, I'm not …
>
> MS: I'm not here, Sir. I won't be here. I will not be here. And I'm afraid that I've told that to other courts.
>
> COURT: All right, I …
>
> MS: I will not be here.
>
> COURT: And …
>
> MS: Now, if my client wishes to consider changing counsel, that would be a matter for him, but I would doubt it, given the fact we're halfway through. But I'm sorry, I'm not available. I have a family holiday.
>
> COURT: Again, the court makes the same point, that, if the matter proceed, I'm not …
>
> MS: Well, I won't be here, Sir. I'm sorry. I've put that on firm record: I'm not here. So, I'm afraid, with the greatest of respect, that the counsel's diary needs to be consulted.
>
> COURT: I'm …
>
> MS: And, again, I can't see what prejudice there is. What is the prejudice to the court or the prosecution if further days are required sometime in September? I can't see any prejudice, as long as we have a clear run in terms of the days that are required.
>
> COURT: You are -- I mean, one thing that comes to my mind that it cause the resolution of your client's case to be delayed.
>
> MS: Well, then, I can ask my client if he wishes to change his counsel for -- because I am away. No problem.
>
> COURT: That's, of course, the counsel choice is a matter entirely for your lay client, I mean, but …
>
> MS: But I will not be here. I can't be.
>
> COURT: And I have made my point and, of course, a professional engagement as a professional barrister …
>
> MS: Well, Sir, I'm sorry. I will not be here. I have flights arranged and I won't be here. It's not abnormal that counsel is away for some period of time over the summer. This is my annual leave.
>
> COURT: Equally, this court had made myself clear. I …
>
> MS: Well, is that an order? Because if it's an order, I'll have to return the brief. That's the issue. I would have to return the brief because I cannot fulfil – I cannot be here in the time period the learned magistrate is setting down."

111. When the magistrate pointed out that he had already granted considerable indulgence to counsel in respect of his other court commitments[271], MS retorted[272]:

> "Where counsel of choice is briefed in relation to a particular matter, due respect and consideration should be given to his diary."

When the magistrate went on to emphasise that he was not granting any further indulgence to either party and asked MS to carry on with the stay application[273], MS raised the prospect of a judicial review of the magistrate's decision[274]:

> "And I would also point out, Sir, that any decision of a magistrate's is judicially reviewable … including … fixing this case to continue in the full and expressed knowledge that I'm not here. That is not fair. … And I would be advising my client to seek a judicial review of such a decision … because I won't be here."

He reiterated that he was not prepared to forego his annual holiday[275].

112. MS then rounded on the prosecution for what he contended was the late service of documents and asked rhetorically[276]: "We have a civilised criminal justice system in Hong Kong, allegedly. Where is it?" Pointing out that if he had been prosecuting and come across something late, he would have at least apologised to the defence, he continued[277]:

> "And I expect the same treatment when my clients are prosecuted. I expect fairness, objectivity and propriety of treatment and that is not what we are receiving in this court. And I'm now hearing that my client will be deprived of his counsel of choice because the learned magistrate is indicating that you will proceed, regardless of my annual holiday plans. That's the latest prejudice that I've had. This is not -- I can't believe I'm hearing all of this."

MS then continued to ask for an adjournment[278]. The magistrate refused[279], whereupon MS produced to the court a bundle of 37 authorities[280], including copies of the Basic Law and the Hong Kong Bill of Rights, in connection with the stay application. MS's submissions continued for some 40 minutes until the end of the afternoon session, during which the first seven documents or authorities in the bundle were cited and referred to.

9 July 2013 (Day 10)

113. At 9:30 am on 9 July, Ms Vivian Chan SPP appeared in court, leading the existing court prosecutor, and explained to the magistrate that she was instructed to appear for the remainder of the defence application for stay[281]. MS immediately queried whether Ms Chan was a qualified barrister, given the fact that the stay application involved "sophisticated questions of law"[282]. When Ms Chan responded that she was a senior public prosecutor of more than 10 years' standing, MS persisted and asked whether she was a qualified barrister "because we're dealing with legal submissions, here"[283]. Ms

Chan explained that she was a qualified solicitor and that she was present in court because[284]:

> "the defence has been abusing the process in various ways. And that, in order for the court to take proper control of the proceedings and to stop further abuse and time-wasting, I would ask if I may be allowed to make brief submissions in advance of the defence's further submissions."

She indicated that she wanted 15 minutes to submit three authorities to the court so as "to stop, as soon as possible, further abuse of the court's proceedings and time-wasting of the precious court time and the taxpayers' money"[285].

114. MS objected to what he conceived to be an interruption of the stay application[286], whereupon Ms Chan responded[287]:

> "As your Worship had noticed, the problem arose on Friday (5 July), and it is now Tuesday (9 July). It is just the usual pattern of Mr. Sutherland. He always asks for adjournment, asks -- always asks the case to be stood down, and then he will come back with some new things and -- irrelevant and different things, different matters, and that is why the prosecution says that it is a continuous abuse of process. And the three cases I'm going to submit will be very helpful for this court to see how the court can have proper control of the proceedings. That is the usual pattern of my learned friend to abuse the court proceedings."

115. After a short adjournment, Ms Chan was duly permitted to make her submissions. She pointed out that the case was a very simple case of indecent assault, yet defence counsel had so far cross-examined PW1 for more than three and a half days. After the court had permitted various witnesses to be interposed, the defence had launched an "unfounded, groundless stay application"[288], which was "totally misconceived"[289]. Ms Chan complained that, to make matters worse, defence counsel had sought to[290]:

> "chuck in piles of 37 cases and authorities, allegedly in support of his application.
>
> A very quick look at all those authorities revealed that all, and all, of them, except one, probably, are not on the issue, not to the point, and none of those are in support of defence application.
>
> Probably, those authorities are submitted because they pop out during online research after typing in the words "abuse of process". That is just not acceptable.
>
> The way the defence counsel cross-examined PW1 and made the stay application clearly demonstrates that the defence is abusing the process and wasting court time as well as taxpayers' money, which should not be allowed to continue in the present form, to say the least.
>
> ….
>
> It is my submission that the defence should not be allowed to drag on unreasonably, to bully, at this court, to bombard the proceedings by piles of un-useful cases and authorities. This is just a very ordinarily indecent assault case with nothing unusual. The defence should make all his submission half time or at the end of the case, as he wishes, but not to present entirely unmeritorious applications in this fashion.
>
> And it does nothing to further the interests of the defendant, does nothing to further the interests of justice, the interests of the court and the interests of the community as a whole, (and) it should be stopped as soon as possible."

116. Ms Chan then referred in support of her submissions to the authorities of *Raymond Chen v HKSAR*[291]; *R v Kalia and others*[292]; and *R v B*[293].

117. In his response, MS refuted the suggestion that he had indulged in prolix cross-examination, and asserted again that the submission ignored the fact that the witness was difficult and evasive. In any event, Ms Chan's complaint was not relevant to the application for stay. He submitted that counsel should not be deterred from pursuing relevant questioning, which was "exactly what's happened in this case"[294].

118. The magistrate then directed that MS was required to finish his submissions in relation to the stay application by 1 o'clock that day, after which the prosecution would be heard in the afternoon, and the defence would be afforded the last word[295]. MS accordingly continued with his submissions and referred to a number of further authorities in his bundle. At one point, when the question of finding further witnesses was raised, the magistrate reiterated that the trial would resume on 29 July and continue uninterrupted. At that point, MS again retorted: "I will not be here"[296]; and that he would be away on his annual holiday for four weeks[297]. MS then continued going through the various authorities he had produced in support of his application for stay.

119. MS finished his submissions before the luncheon adjournment, whereupon Ms Chan began her reply. She finished after the luncheon adjournment, and MS duly made his submissions in response. At 3:44 pm, the magistrate delivered brief reasons refusing the application for stay[298].

120. The magistrate then indicated that the trial would continue on the following day with the cross-examination of PW1, who was scheduled to return to court to resume her evidence. He indicated that, in view of the time already spent in questioning PW1, he was considering imposing a time limit on cross-examination[299]. To that suggestion, MS said that "matters are outside my control to some extent"[300], and voiced his concern that "the defence mustn't be penalised by way of a chess clock"[301]. He assured the court that the next stage of cross-examination "relates to putting the case and taking the witness through various matters that happened on the evening in question based on her answers in-chief"[302]. The magistrate then asked about the topics which MS would cover in cross-examination, "so that the court can consider imposing a reasonable time limit on the matter"[303], mindful that matters could arise which might cause the court "to loosen up the chess boards, so to speak", so as to accommodate counsel[304]. MS agreed to consider the matter overnight[305].

121. The magistrate then turned to the remaining timetable. He told counsel that, having reviewed the court's diary with the principal magistrate, the case would have to continue

uninterrupted on a day-by-day basis from 14 August 2013, if it did not finish by 11 July[306]. He said[307]:

> "… I'm afraid that the court cannot accommodate either the diary or the personal engagement of either Mr Yau or Mr Sutherland starting from 14 August, onwards, and I hope that Mr Sutherland can abide by the honourable tradition of the Bar in putting the lay client interest before the personal engagement of a barrister and to give precedence to the interests of the lay client to have a trial resolved as soon as it reasonably can and, perhaps to take a shorter holiday for the year."

On the question of dates, MS responded[308]:

> "I'm not here in August and I've made that clear on a number of occasions and … My client is happy for me to fix or seek to fix a date with the court in consultation with the court's diary that matches my diary; in other words, a date in September when I'm free, as opposed to interrupting my vacation. My client has confirmed that he doesn't have a problem (with) my doing that."

At little later, he repeated[309]:

> "And I'm not able to be here. … That's it."

122. When the magistrate pointed out that it was undesirable from the point of view of the court, the witnesses or the defendant to have such a long period of time between the earlier and latter parts of the evidence[310], the following exchange took place[311]:

> "MS: Well, I've made the point, Sir. I cannot be here. I'm sorry, but my wife and family have made all the arrangements.
>
> COURT: And you could -- yourself can return earlier to Hong Kong …
>
> MS: I cannot.
>
> COURT: … and …
>
> MS: I cannot. I'm sorry, I've made the point.
>
> MS CHAN: Can I say a few words? Sir, I think the court …
>
> MS: This has nothing to do with the prosecution, frankly."

A little later, MS reiterated[312]: "I'm not available in August and I'm not prepared to cancel my vacation."

123. Having heard from both parties, the magistrate made an order that the case would resume on 14 August 2013 and continue uninterrupted on a day-by-day basis[313]. Before he could complete his sentence, the following exchange took place[314]:

> "MS: Sir, I'm not available. Thank you. I'm not available on those dates. I made that very clear. I'm sorry, I'm not available.
>
> COURT: Let me continue.
>
> MS: Thank you. I'm not available.
>
> COURT: Let me continue my words. I haven't finished with my words. Until this trial is concluded the court will not accommodate either the court prosecutor or defence counsel's diary

> or personal engagement. And, if Mr Sutherland remains the defence counsel on the record, he is required to attend on the 14th and onwards. And …
>
> MS: I will advise my client to launch a judicial review of your decision: it's unreasonable and its arbitrary. That's what I'll advise my client to do …
>
> COURT: Certainly, …
>
> MS: …under the circumstances."

The court then adjourned for the day at 4:21 pm.

10 July 2013 (Day 11)

124. Proceedings commenced, at 9:32 am on 10 July 2013, with the magistrate asking MS for the topics or issues on which PW1 was to be further cross-examined[315]. MS replied that cross-examination was flowing better than before and that "provided that the interventions from the Bench are limited in terms of asking the witness questions", he was confident that cross-examination of PW1 would finish within that day[316]. When the magistrate persisted in requesting to be enlightened on the areas to be covered in cross-examination with the witness, MS declined the invitation[317]. The magistrate then made clear that "the defence is required to finish the cross-examination by 3:30, and let there be no misunderstanding about the matter – that includes the time for defence to put their case"[318].

125. At that direction, MS immediately responded[319]:

> "Well, Sir, with the very greatest of respect, that is an arbitrary timeline and any timeline -- normally, timelines are not imposed in criminal cases. This is the first time I've seen it done, and, Sir, clearly any timeline has to be reasonable and based on assumptions, and if I find that this witness requires the learned magistrate to intervene on every single question, which has happened before and I can't put my case by 3:30, that is grossly, grossly unfair and improper. … And I will not be subject to these timelines."

The cross-examination of PW1 then resumed, with four hours stipulated by the magistrate for cross-examination[320].

126. MS then dealt in cross-examination with PW1's evidence about the incident on the night in question, and continued for some 65 pages of transcript, until cross-examination of the witness finally concluded at about 3:45 pm.

127. When the court prosecutor rose and began to ask his first question in re-examination, the following rather unnecessary and, again somewhat petulant, exchange occurred between MS and the court[321]:

> "MS: Sir, in the interest of fairness, of course, Mr Yau, no doubt, will be subject to the chess clock, presumably, in the interest of fairness so that the defence and the prosecution are treated fairly and equally.
>
> COURT: Chess clock was imposed on the defence because the defence has cross-examined this

> witness for three and a half days prior to today. Okay? We are still in the very beginning of re-examination by Mr Yau.
>
> MS: Well, I'll object. I'm afraid he must be subject to a chess clock. If not, it's not a level playing field.
>
> COURT: He …
>
> MS: Chess clocks apply both ways.
>
> COURT: He is entitled, am I right, Mr Sutherland, to re-examine on such matters touched upon in cross-examination? And the matters touched upon in cross-examination last over four and a half days.
>
> MS: He should be subject to a chess clock.
>
> COURT: But if he is …
>
> MS: If this court is going to treat defence and the prosecution fairly, he should be subject to some form of guillotine, as have I been.
>
> COURT: That's what you submit to me, right?
>
> MS: Yes, it is.
>
> COURT: Disallowed."

In the event, the court prosecutor concluded his re-examination of the witness in less than four pages of transcript. PW1 was then permitted to leave court, her evidence having finally concluded after some five days in the witness box.

128. The next witness to be called by the prosecution was PW7, a staff member of the Golden Gate cinema, who was tendered for cross-examination[322]. When his evidence had concluded, MS asked, in view of the progress being made, "whether there's any flexibility on the 14th (August) because, what it means is I will have to return from my vacation for the 14th and then go back again"[323]. The magistrate said he would not change the arrangement[324], whereupon MS said he would[325]:

> "be filing an official review application under section 104 of the Magistrates Ordinance within 14 days - I won't be filing it tomorrow; I'll be filing it after that - and I'll be putting forward the reasons why it is not proper to have ignored my unavailability when fixing the dates. So I'll be making a further application under section 104 and, of course, that is before the same magistrate who made the determination. I now have 13 days in which to do that, I believe."

At that, the magistrate repeated that the trial would resume on 14 August, if it could not be concluded on 11 July[326].

129. PW7 was briefly recalled at MS's request and his evidence duly completed. Proceedings were then adjourned at 5:04 pm until the following day.

11 July 2013 (Day 12)

130. On 11 July 2013, MS arrived at court following his private engagement at 9:49 am. He began by saying that he would not need the evidence of two police officers[327],

following which PW6 was recalled to the witness box for the resumption of cross-examination. At the conclusion of re-examination, the magistrate asked for the official English name of the cinema in question[328]. PW6 was then released.

131. The prosecution having closed its case on the special issues of admissibility, and the defence making no submission at that stage, the magistrate ruled a case to answer[329]. Thereafter, the defence declined to call any evidence on the special issues, whereupon both sides made submissions. The magistrate then ruled the defendant's record of interview, the Pol 1123 statement of PW4 and the cinema ticket all to be admissible[330]. The prosecution then formally closed its case[331].

132. The magistrate then noted that there was a difference between the English name of the cinema cited in the charge and the evidence, as well as a typographical error in PW1's English Christian name[332]. The prosecution duly applied to make the necessary amendments[333]. However, MS immediately objected to the amendment in these terms[334]:

> "Not at the end of the prosecution case, he can't do that. He's closed his case. It's too late. We've had all the witnesses."

When the magistrate pointed out that the inconsistency between the evidence and the charge was immaterial, MS argued that the location of the alleged indecent assault was material[335]. The magistrate ruled that the amendment should be made under section 27 of the Magistrates Ordinance, and the procedure prescribed by the section was duly adopted.

133. At that point, MS sought to reserve his position in relation to an application for the costs occasioned by the adjournment. When, however, the prosecution argued that the section made clear that the application should be made then and there[336], MS duly made an application for costs[337], which he assessed at HK$1,500 for the half an hour of wasted time occasioned by the application[338]. Having heard from the prosecution, the magistrate awarded costs of HK$1,500 to the defence[339].

134. A submission of no case to answer on the basis that there was no identification of the defendant was then made[340]. Having heard argument, the magistrate ruled a case to answer[341]. Thereupon, MS informed the court that the defendant would not be giving evidence[342]. However, since the prosecution had put the defence to strict proof of its photographs, MS indicated that he proposed to call a representative from his instructing solicitors who had taken the photographs in question. The court then rose for the luncheon adjournment.

135. In the afternoon, Mr Umran Shahzad (DW1), having been examined in chief by MS, was then cross-examined by the prosecutor. Mr McCoy has suggested of the cross-examination that ensued, and which occupies no less than 35 pages of transcript[343], that it deliberately "mimics the same bizarre cross-examination" conducted by MS of PW1[344]. The prosecutor asked DW1, for example, whether he was married and whether he had any brothers and sisters[345]. When MS objected to the question as "completely irrelevant"[346] and "ridiculous"[347], the court prosecutor pointed out that it was the same question MS had asked of PW1[348]. He continued to ask the witness when he had bought the camera, where he had bought the camera, what its brand and model number was, whether the lens was fixed to the body of the camera and whether it had a memory card, and, if so, what kind of memory card[349]. To these questions, MS again objected on the grounds of relevance[350]. The court prosecutor continued to ask the capacity of the memory card, whether the camera had any flash function, whether the camera had ever been taken back to the supplier for maintenance and why he had taken the first two photographs[351]. MS again complained that the questions were irrelevant[352]. When the court prosecutor continued by asking the difference between the fourth and fifth photographs[353], MS objected, saying: "Sir, this is ridiculous, I must object to this line of questioning. It is completely wasting the court's time, absolute waste of time"[354]. MS again objected to the waste of time when the court prosecutor went through the individual photographs[355].

136. When the witness was asked how many times he had been to the cinema house in question to see a film and whether, on those occasions he had been alone or in company, MS protested[356]:

> "This is completely irrelevant and it is wasting court time, and I reserve the defence position on costs … of this ridiculous line of cross-examination, which is not assisting the court in any way, shape or form …"

MS continued to question the relevance of cross-examination[357], and then further complained about the repetition of cross-examination[358].

137. We are not clear what the purpose behind many of the prosecutor's questions in cross-examination of this witness was, and we agree that most of them were not relevant. The exercise is nevertheless revealing of MS's reaction to them, given the catalogue of similarly irrelevant questions he had seen fit to ask PW1. It may be that that was the prosecutor's purpose. However, the questions should have been stopped by the magistrate. In the event, the witness's evidence was completed by the end of the afternoon sitting.

138. At that point, the magistrate reminded the parties that the case would resume on 14

August 2013, whereupon the following exchange took place[359]:

> "MS: Yes, as I said, I'm not here on 14 August.
>
> COURT: I have also made the point the court cannot accommodate either the diary or the personal engagement of either you or Mr Yau. We will resume on 14 August.
>
> MS: Yes, as I say, I'm not going to regurgitate the arguments but I am authorised to make a review application of your decision under section 104 and I'll be notifying you of that in writing. In particular, I'm of the view that the defence has not been treated fairly. Mr Yau has been allowed to go on holiday twice, in fact: he's going in early August and he's going tomorrow and he's very happy, no doubt.
>
> COURT: I am also …
>
> MS: You have single-handedly, Sir, ruined my holiday plans and those of my family. Ruined. So I will be reviewing the application by way of a section 104 review that I'm also authorised so to do.
>
> COURT: Very well.
>
> MS: And I'll expect full reasons and particulars as to why the defence has been treated unfairly in this regard because, in my respectful opinion, it's an indication of potential bias from the bench in favour of the prosecution. The defence has not been treated fairly. Mr Yau has been allowed to toddle off on his vacation twice, the defence has not, and …
>
> COURT: I think you …
>
> MS: …the learned magistrate fixed that date in the full prior knowledge that I was not available.
>
> COURT: Okay, I have heard you more than once on this protest and, also, your reminder (to) this court of the possible legal avenue open to the defendant.
>
> MS: Yes.
>
> COURT: Okay, I don't think I need to heard – hear that more. Okay.
>
> MS: Very well."

The court adjourned for the day at 4:40 pm until 14 August 2013 at 9:30 am. However, the matter was to come back before the court earlier than anticipated.

5 August 2013 (Day 13)

139. On 24 July 2013, the court received a faxed letter from MS applying for a review of the decision of 11 July to adjourn the case until 14 August 2013, under section 104 Magistrates Ordinance, Cap 228. Accordingly, the matter was brought up before the magistrate on 5 August at 2:30 pm, with both MS and, on this occasion, Mr Lee for the prosecution, present[360]. The magistrate immediately queried whether his decision as to sitting dates was a reviewable determination and invited submissions on the point[361]. Mr Lee made it clear that the prosecution's position was that the application should be refused since it was without merit, lacked jurisdiction and was an abuse of the process of the court[362].

140. MS then commenced his submissions, referring to a number of authorities. Mr Lee responded to the application and MS replied. Since he concluded his submissions shortly

before the end of the afternoon session, the magistrate adjourned his decision until the following day (6 August 2013) at 12 noon.

6 August 2013 (Day 14)

141. On 6 August 2013, the magistrate began by drawing two decisions of the Court of Final Appeal to the attention of the parties[363]. The arguments continued until the luncheon adjournment. Shortly before the court broke for the adjournment, and in respect of the remaining time needed for the application, MS said[364]:

> "I sincerely hope that it can be completed today because I have great difficulty in the next few days because of other cases, the other cases I'm briefed on in the District Court."

142. Soon after proceedings resumed in the afternoon, the following exchange took place[365]:

> "COURT: Let me recap because on the last occasion, Mr Lee was not here.
>
> MS: Yes.
>
> COURT: And I – on the 10th and 11th, you urged me to accommodate your diary to – for your annual holiday, …
>
> MS: Yes.
>
> COURT: … which at that time, you told me you intend to depart from Hong Kong between 26 July to 25 August, if I remember correctly, and you said to me that you would urge me to consider a date on or after 5 September, …
>
> MS: That's …
>
> COURT: … at that time.
>
> MS: … partially true, I never actually said I was departing Hong Kong. I never said to the court that I'm leaving Hong Kong, I'm on vacation …
>
> COURT: "On vacation".
>
> MS: … in Hong Kong.
>
> COURT: Okay.
>
> MS: I've never indicated that I'm travelling outside Hong Kong.
>
> COURT: Okay, perhaps I remember incorrectly."

The magistrate then asked MS to clarify whether he was still asking for a date in September "for accommodating your diary for your vacation in Hong Kong?"[366]. In response, MS said: "Yes, yes, exactly"[367].

143. The prosecutor was evidently not convinced by what he was hearing, and accordingly interjected as follows[368]:

> "MR LEE: I beg your pardon, Sir. Correct me if I'm wrong, … on the date when I was in court, when your Worship indicated 14 August, the trial date, I heard clearly Mr Sutherland saying that, "I will not be in Hong Kong", …

MS: No.

MR LEE: … twice.

MS: No, I said: "I'm not here", that's what I said.

MR LEE: Well, then …

MS: It doesn't mean "Hong Kong".

MR LEE: … I invite your Worship to play the video -- audio. I remember …

MS: This …

MR LEE: … categorically, I …

MS: This is totally unnecessary. What I said was: "I'm not here", in other words, I would not be able to be here in court, but to be honest, whether I'm in Hong Kong or whether I'm travelling outside of Hong Kong, it matters not for the purposes of this application, effectively, but I confirm I never said that I would be travelling outside Hong Kong, but even if the prosecution insist that that's the case, then I don't think it matters because the question is a vacation, and a vacation can be taken in Hong Kong or outside of Hong Kong, it doesn't matter for purposes of this …

COURT: Okay.

MS: … application.

COURT: For present purpose, I have no intention to explore the matter further, for present purpose.

MR LEE: Yes, Sir.

COURT: But -- okay, for the present review purpose, I don't intend to explore it further, okay?

MR LEE: Thank you, Sir.

MS: Yes, yes.

COURT: Just for the record, …

MS: Yes.

COURT: … for the present purpose.

MS: Yes.

COURT: I stress these words, okay, for the present purpose. Carry on Mr Sutherland.

MS: What other purposes would there be? I mean, it's an issue …

COURT: I have no intention for the moment, okay, …

MS: Yes.

MS: Right, well, I …

COURT: We are in a -- we -- okay.

MS: Yes, I better just clarify for the record, as the prosecution seems to have taken the point, I feel I should clarify the matter. I've never indicated to the court that I would be outside of Hong Kong. What I said was I would not be here, in other words I wouldn't be in Kowloon City Court. I apologise if the learned magistrate misunderstood that to be different, but that was the intention of my meaning at the time."

MS then continued with his application until its conclusion.

144. The magistrate delivered his ruling that same afternoon and refused the application

for review, considering that a decision to adjourn the case to a particular date was not a "determination" for the purposes of section 104 of the Magistrates Ordinance[369]. At the conclusion of the ruling, the prosecutor applied for the costs of the application for review but agreed to reserve his application until the conclusion of the case[370]. The case was then adjourned, as previously scheduled, until 14 August 2013.

14 August 2013[371]

145. The court was unable to sit on 14 August 2013 because of a No 8 typhoon signal, and the case was accordingly automatically adjourned until the following day.

15 August 2013 (Day 15)

146. On 15 August 2013, MS was absent. However, the defendant and his instructing solicitor were present. The magistrate announced that a faxed letter had been received from MS to the effect that he was engaged in a District Court trial. Given that there were a number of defendants involved in that case, MS's available dates for the continuation of the trial were said to be 26 and 27 September, and 2 and 3 October 2013[372]. The magistrate indicated that the case would proceed immediately after the conclusion of MS's District Court case[373]. However, before he adjourned the matter, he wished to know more precise details about the progress of the District Court case. Accordingly, the matter was adjourned until 19 August for the necessary information to be provided to the court[374].

19 August 2013 (Day 16)

147. The same instructing solicitor appeared on 19 August 2013 (Monday). The court announced that it had received another faxed letter from MS indicating that he was on the 23rd day of a District Court trial which had overrun, the trial having originally been estimated to run for only 8 days. However, the trial was expected to finish that day[375]. MS further indicated in the letter that "he would cancel his holiday" for this week in order to accommodate the trial[376], and requested that the trial resume on 21 August (Wednesday), so as to allow him to prepare his closing submission on 20 August[377]. The magistrate then stood the matter down for further enquiries of MS concerning his District Court trial to be made by the defendant's instructing solicitor[378]. Further enquiries having been made, the case was adjourned until 9:30 am on 20 August 2013[379].

20 August 2013 (Day 17)

148. On 20 August 2013, MS was again not present, the court having been advised that

he would be making his final submissions in the District Court that morning[380]. The magistrate said that he "had no choice but to stand … the matter down"[381]. The case was accordingly adjourned to await MS's appearance until 11 am[382]; then to 11:45 am[383]; then to 12:30 pm[384]; then to 2:30 pm[385]; then to 3:45 pm[386]; then to 4:30 pm[387]; and finally until 9:30 am on 21 August 2013[388]. MS did not appear at all on 20 August 2013.

21 August 2013 (Day 18)

149. MS did, however, re-appear at the trial at its resumption on 21 August 2013. DW1 in due course resumed his evidence and, following further examination-in-chief, cross-examination and re-examination, his evidence was concluded[389]. The defence case was formally closed, subject to a ruling on the admissibility of the defence photographs, Exh D4[390]. Following submissions as to admissibility, the magistrate ruled the photographs to be admissible[391]. The parties then made their closing submissions.

150. The prosecutor's closing address was short, spanning some 5 pages of transcript[392]. MS's closing submissions followed, spanning some 62 pages of transcript[393]. The case was then adjourned at 5:42 pm to 27 September 2013 for verdict and the prosecution's application for costs, consequent on the dismissal of the defendant's application for review[394].

30 September 2013 (Day 19)

151. For administrative reasons which it is not necessary to go into, the magistrate in fact pronounced his verdict in open court on 30 September 2013. Having convicted the defendant of the charge, mitigation was advanced by counsel and the defendant was then sentenced to 14 days' imprisonment, the magistrate giving contemporaneous reasons for his sentence[395].

152. At that point, Mr Lee, who was again appearing for the prosecution, applied for the costs of the entire trial, under section 11(1)(a) of the CCCO; and for a wasted costs order in respect of the application for stay and the application for review, under sections 17 and 18 of the same Ordinance[396]. At that point, MS interrupted, saying that he would vigorously oppose the applications and "possibly make a similar application against the prosecution for making this application"[397]. The magistrate in due course made directions in respect of the costs application, which was to be heard within one day on 16 December 2013[398]. He further granted the defendant bail pending his appeal[399]. The court rose at 5:20 pm.

153. There were then changes in representation. For reasons it is again not necessary to

go into, the costs applications were in fact dealt with on 22 and 23 April 2014. We shall return to those proceedings when we deal with MS's appeal in relation to the wasted costs order.

Consideration

Ground 1

154. Having traversed the transcript of evidence and proceedings in some detail, we now turn to the question of whether the defendant was deprived of a fair trial by the deliberate misconduct of his counsel in cross-examining witnesses and advancing submissions which were, *inter alia*, irrelevant and unnecessary, repetitive and prolix, and irresponsible and improper (Ground 1, as we have recast it).

155. In addressing that question, however, we should first make clear that we have not heard from MS as to why he conducted himself in the way that he did. Although present in court and fully represented throughout the entire hearing, he was not a party to the appeal against conviction and neither side has sought to place any explanation from MS in any form before us for the purposes of resolving the appeal by the defendant against his conviction. Nevertheless, we are fully able to make a judgment as to whether a particular appellant has received a fair trial by an examination of a transcript of the proceedings and what it objectively demonstrates. Indeed, that is an exercise this Court is routinely required to perform on appeal.

156. What we do have is a written apology tendered to this Court by Mr Harris, on behalf of MS in respect of the appeal by MS against the wasted costs order, which has, of course, been consolidated with the appeal by the defendant against his conviction and which we shall deal with in due course. The letter, signed by MS, is in the following terms:

> "I shall be pleased if this letter is placed before their Lordships for their respectful consideration.
>
> I acknowledge that certain of my observations to the Learned Magistrate during the trial were inexcusable - particularly those relating to the effect of his ruling on my holiday plans and those of my family. These were said "in the heat of the moment" at a time when I had not had a single break for *circa* two years; they were ill considered and were comments which should never have been made. I wish to express my profound regret for what I said and I apologise unreservedly.
>
> Equally, I accept that what may be perceived as suggested appeals and/or judicial reviews of the Learned Magistrate's decisions were improper and inappropriate. Again, I raised these matters "in the heat of the moment" without exercising proper control and self-restraint. No discourtesy, disrespect or offence was intended. I wish to express my profound regret and I apologise without reservation."

157. Whilst Mr Harris, on behalf of MS, made no concessions during his submissions on the wasted costs order in relation to the impropriety, nature or length of cross-examination

conducted in respect of PW1, he has accepted, in relation to the application for stay, that the list of 37 authorities tendered by MS in support of his application "could have been reduced, but the fact that the authorities supported what may be seen as accepted principles does not make them irrelevant"[400]; whereas in relation to the application for review, Mr Harris appeared to accept that, whilst the decision to adjourn may not have been reviewable and the grounds for making it were unjustified, the magistrate had nevertheless entertained it and treated it as if it were a valid application[401].

158. For his part, Mr Tam, for the respondent has made it clear that, save in respect of the complaint that MS was acting without, or contrary to, his instructions, he "entirely agrees with the criticisms made against MS by the defendant in relation to MS's serious misconduct during the course of the trial"[402]. His position was that MS's misconduct, although described as "thoroughly repulsive", did not deprive the defendant of a fair trial[403].

159. Secondly, we are also conscious that any exercise which seeks to traverse in detail the relevant parts of a transcript of trial running to 1865 pages (leaving aside the further 294 pages dealing with the application for a wasted costs order) runs the risk of accusations of selectivity in, or a lack of context in respect of, the passages cited. In that regard, we would point out that, in making good his appeal, Mr McCoy took us through the entire transcript of this case over some 3 days in open court; a transcript we had already been obliged to read in preparation for the appeal, and have since re-read for the purposes of delivering this judgment. We are confident that, whilst other passages might also have been referred to, those we have cited give an ample, accurate and balanced flavour of the proceedings for the purpose of determining the defendant's complaints in this appeal.

160. Thirdly, all of us recognise that every advocate, however able, occasionally has an "off day", regrets the way he or she has tackled a particular issue, cross-examined a witness, made a submission or spoken to the court. Things may be said in the heat of the moment, or without proper consideration, which are immediately regretted and soon forgotten as the trial process charts its inevitable course. There is, nevertheless, an obvious difference between mistakes which spring from a temporary lapse of judgment and a sustained course of conduct arising out of poor judgment or no judgment at all.

161. We have to say, with great regret, that we are in absolutely no doubt whatsoever that the defendant was not well served by his counsel at this trial.

162. It is clear, on MS's own concession before the magistrate, that it was not until the fifth day of PW1's testimony that he embarked upon putting his case to her and "taking

the witness through various matters that happened on the evening in question based on her answers in-chief"[404]. It seems to us, and we have had difficulty in avoiding the use of hyperbole, that most of the first four days of cross-examination of PW1 were taken up with page after page of obtuse, pointless and irrelevant cross-examination. Counsel's questions appeared to have no sensible direction or purpose whatsoever other than to badger or bully the witness and prolong her ordeal. It ought to have been obvious to counsel when PW1, a respectable and obviously intelligent woman, complained of her frustration, as well as her feelings of being insulted, by questions of no discernible consequence being repeatedly asked of her, that a more restrained, delicate and sensible approach, which would have been entirely consistent with his instructions, was required. Instead, she was met with an obdurate, relentless and remorseless cross-examination which displayed neither skill, restraint nor sensitivity, and which went on for days on end; despite the valiant efforts of the magistrate to control it.

163. It is one thing to ask general questions to set the scene: it is quite another to dwell for hour after hour on minute matters of detail, which are not material to the resolution of the charge and of no assistance in promoting the defence. It is one thing for a barrister to uphold the interests of his client without regard to his own interests: it is quite another to waste valuable court time with endless repetition of matters of no consequence, without the slightest discrimination or recognition of how they might sensibly advance his client's cause. It is one thing for a barrister to act fearlessly before the court: it is quite another to be obstinate and unyielding, still worse, impertinent and intemperate, in the face of the court's obvious and sincere attempts to keep the proceedings within the boundaries of relevance, propriety and time.

164. We say, with profound regret, that counsel's performance in this case was an egregious example of how cross-examination should not be conducted. Notwithstanding that one of the authorities brought to the attention of MS and the court by Ms Chan at the hearing of 9 July 2013 was *R v B*[405], it seems to have had little or no effect on counsel's subsequent conduct. In *R v B*[406], the Court of Appeal of England and Wales were concerned with the cross-examination by counsel of the complainant in a rape case. It is worth examining the facts of that case in some detail for the light it throws on the way the cross-examination in the present appeal may be looked at.

165. The first half hour of counsel's cross-examination of the complainant in *R v B*, which took from pages 26 to 38 of the court transcript, was concerned with general matters of evidence so as to set the scene. Of this part of counsel's cross-examination, the Court said, at para 8:

> "It was of course legitimate for counsel to ask a number of questions to set the scene but in our view the questioning that took place during the first period of the cross-examination went far beyond anything that could be said to be reasonably necessary to set the scene. Despite the protestations of Miss McIntosh in her submissions to us this morning, we are quite unpersuaded that many of the questions that she asked were of any relevance whatsoever to the issues that the jury had to decide."

Having given an example of counsel's cross-examination, the Court went on, at para 9:

> "Despite the judge's gentle pleas, Ms McIntosh continued to ask more background questions at pages 39 to 41 of the transcript. She finally got around to dealing with the events of Saturday, 5 April 2003 at page 41. There then followed a detailed cross-examination of the complainant about the events of that day, and in particular the allegations of rape. Counsel for the prosecution in her skeleton argument has described the cross-examination as to the allegations as "intense, detailed and repetitious". We think this is a fair assessment."

166. When the trial judge told counsel, at page 65 of the transcript, that she should finish her cross-examination within the next 10 minutes and, when 10 minutes had passed, that her time was up and that she should bring her cross-examination to an end, she did so, asking that it be recorded that she had been told to stop her cross-examination.

167. At the appeal before the Court of Appeal, the same counsel who had appeared at trial argued, also at para 9:

> "…that the judge prevented her from exercising her duty as defence counsel to cross-examine a prosecution witness in accordance with the principles stated by the Chairman of the Bar following *R v McFadden* 62 Cr App R 187 at 193, and in particular this:
>
> "It is the duty of counsel when defending an accused on a criminal charge to present to the court, fearlessly and without regard to his personal interests, the defence of that accused. It is not his function to determine the truth or falsity of that defence, nor should he permit his personal opinion of that defence to influence his conduct of it … This duty includes the clear presentation of the issues and the avoidance of waste of time, repetition and prolixity. In the conduct of every case counsel must be mindful of this public responsibility"."

168. The Court considered, however, at para's 10-11:

> "Miss McIntosh would emphasise the duty to present the defence fearlessly. That is obviously very important. But so too is the obligation to avoid wasted time, repetition and prolixity. It is no part of the duty of counsel to put every point of the defendant's case (however peripheral) to a witness or to embark on lengthy cross-examination on matters which are not really in issue. It is the duty of counsel to discriminate between important and relevant features of the defence which must be put to a witness and minor and/or unnecessary matters which do not need to be put – see *R v Kalia* 60 Cr App R 200 and at Archbold 8-113.
>
> We are in no doubt that this cross-examination was repetitious and prolix and that it did involve a good deal of wasted time. The issues in this case were within a narrow ambit. As we have said the only real issue was whether the complainant had consented to sexual intercourse with the appellant. Miss McIntosh spent far too much time in getting to this real issue. In our view the judge showed remarkable patience in forbearing to intervene until page 33 of the transcript and then again saying nothing until page 38. Miss McIntosh then tested the complainant's case and put the appellant's version of what happened in great detail and with some repetition

between pages 41 and 65. In our judgment the judge was quite right to intervene at page 65 and seek to bring the cross-examination to an end. It was clear that by this time Miss McIntosh had dealt with the central issue in the case and had now moved on to matters which were relatively unimportant. In these circumstances, the judge was right to take the view that Miss McIntosh should be given only a short further period in which to complete her cross-examination. We are not saying that it should become a routine feature of trial management that judges should impose time limits for evidence in chief or cross-examination of witnesses. If counsel perform their duty properly this should rarely be necessary. But where, as unfortunately happened in this case, counsel indulges in prolix and repetitious questioning, judges are fully entitled, and indeed we would say obliged, to impose reasonable time limits."

169. The Court concluded, at para 15:

"The need for fair but effective management of criminal trials has been increasingly recognised in recent years. The point was made very clearly by this court in *R v Chaaban* [2003] EWCA Crim 1012 and needs to be reinforced. Giving the judgment of the court in that case, Judge LJ said this:

> "35. We can now turn to the grounds of appeal arising from the judge's management of the case. The trial judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case. That obviously includes, but is not limited to, the interests of the defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness), to the jury, or if the jury has not been sworn, to jurors in waiting. Finally, the judge should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests.
>
> …
>
> 37. We must also consider whether the case was somehow rushed, a submission which gives this court the opportunity to highlight a significant recent change, perhaps less heralded than it might have been, that nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence.
>
> 38. In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary even handedness and flexibility as the interests of justice require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does. We find nothing in the criticisms of the way in which the judge dealt with the timetable, and nothing in the remaining complaints about his management of the case which would justify us interfering with the decisions made while exercising his discretion as the trial judge"."

170. We entirely endorse the remarks of the Court in *R v B* and in *R v Chaaban* as fully applicable to trials in Hong Kong. We further note, in the commentary to the report of *R v B* in the Criminal Law Review[407], that while some "might view the case with foreboding, treating it as an example of the judiciary's increasing powers and responsibilities of case management", it should "be viewed in less controversial terms", since[408]:

> "Trial judges' powers to restrict the scope, manner and the duration of cross-examination have long been recognised. This judicial power is mirrored by a professional obligation on counsel: as was noted in *Simmonds* (1967) 51 Cr App R 316 at 326 (approved in *Kalia*), it is no part of counsel's duty "to raise untenable points at length or to embark on lengthy cross-examination on matters that are not in truth in issue." See also the Bar Council statement of counsel's duties appended to the report of *McFadden* (1976) 62 Cr App R 187. In addition, the law of evidence imposes an obligation to ensure that questions put and evidence adduced is relevant. As one would expect, these safeguards against unnecessary or prolonged questioning are most stringently applied in the context of cross-examination of a vulnerable witness. On the facts, there is nothing to suggest that this case represents anything other than a straightforward application of these established principles."

171. In respect of the submissions advanced to the trial court by MS, most of them were unjustified, misconceived and, at times, nonsensical. We can see absolutely no sensible or legitimate purpose in producing and applying to play to the witness in open court any, let alone 15 minutes, of the DVD of the film "Red Lights", starring Robert De Niro. As PW1 correctly, if somewhat tartly, responded on being asked to leave court so that MS could explain the relevance of his application: "… it's not Robert De Niro who indecently assaulted me"[409].

172. If the witness was annoyed by this line of cross-examination, in our view quite justifiably, she clearly felt insulted by counsel's ensuing antics, which included what she regarded as MS "toying with the dress"[410] and requesting through the court that she should actually wear the dress[411], to which request she rightly took objection. Undaunted, MS then asked the court if PW1 might drape the dress over her body in the witness box. Notwithstanding the witness's obvious discomfort, and despite the prosecutor's entirely sensible suggestion that counsel might instead resort to photographs in the unused material taken by the police of the witness wearing the dress in a seated position to make his point, MS launched into a bizarre objection to the photographs as hearsay evidence, the provenance of which was unknown, and the production of which would somehow undermine the defendant's rights under the Hong Kong Bill of Rights and the Basic Law, culminating in the complaint that he was prevented from putting his case to PW1.

173. PW1's obvious sense of discomfort at the way she was being treated did not, unfortunately, end there. On the following day (19 June 2013), MS launched his enquiry into the relative size of the witness's buttocks as between the time of the incident and her giving evidence in the witness box[412], so as apparently to explore the distance between her thighs and the side of the cinema seat. As we have seen, this line of enquiry culminated in PW1 being asked to sit on a ruler. At that request, the witness protested that she thought the exercise was "really insulting"[413]. She was right: the questions should never have been asked and the exercise never permitted. Fortunately, perhaps, for

the witness, she was then released and other witnesses interposed before she resumed her evidence at a later date.

174. One of the witnesses subsequently interposed in PW1's absence from court was PW5, the arresting officer, who began his evidence on 26 June 2013. We have earlier referred to the objection taken by MS (on the second day of his evidence, 2 July 2013) to the officer giving the details of PW1's Identity Card, on the basis that no check had been made of the Immigration Department as to whether her Identity Card was valid[414]. We have already described this submission as wholly devoid of realism and common sense. It was, in our judgment, an absurd waste of court time resulting in an argument with the court that went on initially for 8 pages of transcript before resulting in the magistrate rightly disallowing any further questioning concerning the verification of the Identity Card[415]. During those exchanges the magistrate asked of MS the obvious questions as to whether the defence were suggesting that either the complainant was not PW1[416], or that the defendant was not arrested at the scene[417], while exhorting MS not to "cross-examine just for the sake of cross-examining"[418]. To both enquiries, the magistrate received the same answer from MS that he was entitled to put the prosecution to strict proof of identification. We have already observed at the outset that it was never the defendant's instructions to dispute anybody's identity.

175. Following the magistrate's ruling, MS promptly indicated that he would be asking the same question of the witness concerning the Identity Card of PW6, an executive for the cinema concerned who had been summoned to the scene by PW7[419]. Further argument on the subject ensued, after which the magistrate duly indicated that he would disallow that question as well[420]. PW5 was then recalled to the witness box. Even at that stage, MS was undaunted and the argument spluttered on for another few pages, during which MS complained about "constant interruption from the bench"[421], and how he felt inhibited from performing his duty by having his questions unfairly "put under the microscope"[422].

176. This whole episode well illustrates how it is the duty of the judge or magistrate, where the circumstances call for it, to "restrict the scope, manner and the duration of cross-examination" and to ensure that counsel proceeds with due expedition within the confines of the live issues at trial. If counsel indulges in prolix, repetitive, irrelevant or pointless cross-examination or submissions, he cannot complain if he is asked to justify himself and, where necessary, stopped. If he feels aggrieved by a ruling preventing him from carrying out what he conceives to be his duty, he may, if necessary, take the matter on appeal.

177. MS's obvious inability to accept rulings from the court is further exemplified by what happened next. Notwithstanding that he had agreed apparently on 19 June 2013 (the fourth day of PW1's appearance in the witness box) that her evidence should be resumed on 10 July 2013 and other witnesses interposed, since she was evidently encountering difficulties with her employer for being away from her work for so long, MS commenced proceedings on the 3 July 2013 by applying for an adjournment of the case in order to wait for PW1 to return to resume her evidence. The application was fortified by a complaint by MS that the court had attempted to "micro-manage"[423] his cross-examination, and that he felt "straightjacketed"[424] and prevented from effectively cross-examining by virtue of the large number of judicial interruptions[425]. The Hong Kong Bill of Rights was again referred to, together with authorities dealing, *inter alia*, with the impropriety of judges descending into the arena[426] who, by their interventions, made it impossible for counsel to do his duty[427].

178. Two hours later, which included a 40-minute adjournment to consider the application, the magistrate rightly refused the application, holding that the defendant could still have a fair trial with the present arrangement of interposing witnesses during PW1's absence, with the defence being at liberty to apply for the recall of a particular witness, if necessary; which application would be considered on a case by case basis[428]. PW6 then resumed his evidence and continued through to the luncheon adjournment.

179. We should make clear that we are not suggesting that counsel cannot change his mind, should he deem it necessary, and apply to a court to resume a particular order of witnesses, even where he has earlier agreed to a different procedure being adopted. Nor are we to be taken as saying that it is improper for counsel to draw any difficulties he conscientiously believes he is encountering to the attention of the court, if he thinks that the court has contributed to those difficulties by the number or nature of its interventions. How one goes about such a delicate task will depend on the particular skill of the advocate.

180. What we do firmly deprecate is the repeated refusal to accept judicial rulings in the course of a trial, or the cynical attempt to get round an inconvenient ruling by dressing it up in a different guise. That is precisely what happened next.

181. With PW6 about to resume his evidence in the afternoon session, MS declared that[429]:

> "having considered the ruling made by the learned magistrate this morning in relation to my application to adjourn the case in order to follow the more usual course of examination of witnesses, with the greatest respect to the ruling (of) the learned magistrate, I intend to bring a

> stay application to stay the proceedings in this case under the relevant practice direction".

MS's purpose in making the application was made entirely clear, for he went on[430]:

> "And that will put an automatic stop on any future trial dates until my stay application has been listened to."

He referred to the Practice Direction governing applications for stay, interpreting it as giving him the luxury of time to file written submissions and a list of authorities 14 days before the hearing, with the prosecution having 7 days thereafter to respond. He added[431]:

> "They're my instructions and that's the application I intend to make."

182. We have detailed what followed over the next few days earlier in our judgment. We do not intend to traverse the ensuing saga, which began with the announcement of an intended stay application at 2:34 pm on the afternoon of 3 July 2013 (Day 7, at page 906 of the transcript) and ended with the magistrate's ruling at 3:44 pm on 9 July 2013 (Day 10, at page 1190 of the transcript). True it is that not much was achieved on 4 July (Day 8), while other issues were also explored on 5 (Day 9) and 9 July (Day 10), when Mr Lee and Ms Chan respectively appeared to assist the prosecution in the morning of each day. Nevertheless, 3 court days were engaged by what we regard as the employment of a misconceived tactical device, namely an application for stay, which was plainly designed to achieve MS's thwarted objective of an adjournment of the proceedings until PW1 was ready to resume her evidence. It was a device that should never have been employed, nor conducted in the way that it was.

183. We should add that the challenging of Mr Lee and Ms Chan's credentials or qualifications in appearing for the prosecution in order to deal with the stay application, quite apart from the time it wasted, was offensive, unnecessary and unbecoming. It seems to us that the attack on Mr Lee was clearly designed to filibuster the hearing of the stay application.

184. Since the application for stay and the way it was handled was to be singled out as a particular instance justifying the making of the wasted costs order, it is worth mentioning Mr Harris's submissions on appeal in respect of the application. In his written submissions, he appeared to accept that the application for stay was misconceived, for he wrote[432]:

> "It is submitted in all the circumstances, (MS's) conduct at the stay application, which may point towards unreasonableness, negligence or even incompetence, but is not sufficient to constitute "serious misconduct" which requires something "much more than that"[433]."

Further, of the list of 37 authorities produced to the court by MS in support of his application, which incidentally did not include the seminal case on the topic, namely, *HKSAR v Lee Ming Tee & Another*[434], Mr Harris accepted[435]:

> "that the list could have been reduced, but the fact that the authorities supported what may be seen as accepted principles does not make them irrelevant. It is submitted that even the citing of irrelevant cases does not constitute serious misconduct."

185. What conceivable relevance there was to the production, for example, of a 54-page judgment from the Family Division of the Saskatchewan Queen's Bench[436], or of a 34-page ruling on a voir dire by a first instance judge in the Supreme Court of British Columbia[437], or of a 33-page judgment of the Supreme Court of the United Kingdom dealing with the principles engaged in ordering a retrial[438], we have been wholly unable to discern. Even Mr Harris concedes that of the 37 authorities produced, 12 were irrelevant. In trying to justify many of the rest, he must, with respect, have required all of his forensic ingenuity to bring them within the bounds of any relevance at all to the application that was being mounted. The most generous thing one could say is that a few of them dealt with trite principles of law.

186. In our judgment, the application for a stay should never have been mounted and appears to have been a desperate and, regrettably, petulant attempt to frustrate the proceedings, the application for an adjournment having earlier failed. It interrupted proceedings, wasted countless hours of court time and would have necessitated the magistrate having to peruse no less than 525 pages of almost entirely irrelevant or otiose authorities. Indeed, it is clear from the exchanges between the court and MS during submissions that the magistrate had indeed read the authorities. We agree with Mr McCoy that, ironically, the claim of abuse of process which was put forward to justify the application for stay was itself an abuse of process. And, as we have noted, it was expressly said to be undertaken on the defendant's instructions.

187. The attempt to get around an inconvenient ruling in a different guise by the employment of a wholly misconceived device was soon to be illustrated again. The magistrate had, as we have seen, indicated on 5 July 2013 that, following the adjournment of the case on 11 July 2013, it would resume on 29 July and continue uninterrupted on a day by day basis until conclusion[439]. MS immediately registered his protest that he was unavailable for four weeks from 27 July until 25 August because he was on what was described as "a family holiday", for which "flights have been arranged"[440]. When the magistrate made clear that he was not prepared to accommodate either party's convenience, MS declared that, if necessary, he "would be advising my client to seek a judicial review of such a decision"[441], on the basis that "any decision of a magistrate's

is judicially reviewable"[442].

188. The matter of the completion of the case was raised again in the afternoon of the next hearing day, 9 July 2013. The magistrate indicated that the court's diary could not, after all, accommodate the continuation of the case on 29 July 2013. Accordingly, if the case could not be concluded by 11 July 2013, it would resume without interruption on 14 August[443]. MS again asserted: "I'm not here in August and I've made that clear on a number of occasions…"[444]; and "my wife and family have made all the arrangements"[445]. In answer to the magistrate's query as to whether "you could – yourself can return earlier to Hong Kong"[446], MS responded twice: "I cannot"[447]; and further, "I'm not available in August and I'm not prepared to cancel my vacation"[448]. When the court maintained its decision to continue the trial on 14 August 2013, and daily thereafter, MS reiterated[449]:

> "MS: Sir, I'm not available. Thank you. I'm not available on those dates. I made that very clear. I'm sorry, I'm not available.
>
> COURT: Let me continue.
>
> MS: Thank you. I'm not available."

He went on to say that he would advise the defendant to launch a judicial review of the court's decision, which he regarded as "unreasonable and … arbitrary"[450].

189. At the end of proceedings on 11 July 2013, the magistrate adjourned the hearing, as he said he would, to 14 August 2013. At that point, MS again retorted: "I'm not here on 14 August"[451]. The court repeated that the case would resume on 14 August, at which MS made the astonishing outburst we have already seen[452]:

> "You have single-handedly, Sir, ruined my holiday plans and those of my family. Ruined. So I will be reviewing that application by way of section 104 review that I'm also authorised so to do.
>
> ….
>
> And I'll expect full reasons and particulars as to why the defence has been treated unfairly in this regard because, in my respectful opinion, it's an indication of potential bias from the bench in favour of the prosecution. The defence has not been treated fairly. Mr Yau has been allowed to toddle off on his vacation twice, the defence has not, and … . "

190. Having been alerted in that last statement to the possibility of an application for review under section 104 of the Magistrates Ordinance, the court, as we have observed, received a faxed letter from MS on 24 July 2013, duly making an application for review of the decision of 11 July to adjourn the case until 14 August 2013. The events which then unfolded have been detailed earlier in our judgment. In the event, the case was brought up and submissions heard on the matter from 2:32 to 4:34 pm in the afternoon of 5 August, and from 11:59 am to 1:01 pm and 2:28 to 3:39 pm on 6 August 2013. After

more than 4 hours of argument, the magistrate delivered his ruling on the application for review at 4:01 pm on 6 August 2013, effectively dismissing it for want of jurisdiction, given that the decision to adjourn to a particular date was not a "determination", within the meaning of section 104 of the Magistrates Ordinance.

191. Mr Harris appears to have accepted that "the decision to adjourn may not be reviewable and the grounds for the review application may not be justified"[453], but that "an application made *bona fide* (even if it was one that counsel "ought to have known (was) unarguable" as in *Tam*[454]) does not constitute serious misconduct"[455]. Regrettably, we have come to the same view expressed by Mr McCoy, that the application was wholly misconceived in law for want of jurisdiction, as counsel ought to have realised with elementary legal research[456]. In our judgment, the application for review of the magistrate's decision to adjourn the case to a particular date was entirely ill-conceived, should never have been made and constituted a further abuse of the process of the court.

192. We should say that while the application for an adjournment was clearly motivated for personal reasons, we are not prepared to go so far as to find, as both Mr McCoy and Mr Tam have encouraged us to do, that MS deliberately misled the court in relation to his claim that he would be absent from Hong Kong on a family holiday, for which flights had already been booked, at the time of the proposed adjourned hearing date. As we cautioned at the outset of our consideration of this matter, we have not heard from MS in this regard and, given the seriousness of such an allegation and its potential consequences for counsel, we do not think it appropriate to say anything further on this issue. This will no doubt be a matter which the Hong Kong Bar Council will wish to examine carefully and arrive at its own conclusion, having made due and appropriate enquiry.

193. Finally, in respect of Ground 1 (as recast), we deprecate in the strongest terms some of the intemperate and impertinent language that was employed by counsel in addressing the court. We have already said that we understand that things may sometimes be said to a court (or, sometimes, to a witness) in the heat of an argument, particularly when firm resistance is met, which are immediately regretted and just as quickly made the subject of an apology. However, to accuse the court to its face, for example, of bias[457], of being unfair[458], of making unreasonable and arbitrary decisions[459], of imposing unreasonable deadlines[460] and abridgments of time[461], of choosing expediency at the expense of justice and fairness[462], of making incessant[463] or inordinate[464] interruptions, to demand reasons from the court[465], and to refuse to accept the court's rulings or to yield to the court's directions[466], is unacceptable in any court of law in this jurisdiction. Nor is it proper to threaten the court during the currency of a trial with

wholly ill-conceived applications for stay[467] or judicial review[468], or section 104 applications for review of its decisions[469], for which the court is then bombarded with reams of irrelevant and ill-considered authorities[470].

194. It might be suggested that the magistrate himself was partly to blame for not exerting a stronger control over proceedings, and for allowing matters to get seriously out of hand. It is, in fact, Mr Harris's argument on the wasted costs order that before deciding whether there has been serious misconduct, one must have regard to the duty of the magistrate to regulate the trial. He submits that trial judges have a responsibility, independently of any objection being taken, to prevent prolix and unnecessary questioning being employed, and he relies on the statement of the House of Lords in *Randall v R* [2002] 1 WLR 2237, at 2242, that:

> "If counsel begin to misbehave, (the trial judge) must at once exert his authority to require the observance of accepted standards of conduct."

It is therefore contended that if the magistrate was of the view that counsel was misconducting himself, he should have intervened and stopped it. Consequently, it is unfair to allow counsel to continue acting in the same manner and then to punish him later by way of costs for serious misconduct.

195. We have examined this concern carefully, as well as the further suggestion that the magistrate had himself by his interventions contributed to the length of cross-examination and trial. There is some superficial force to the argument. Some judges and magistrates would have refused outright to allow certain of the more obviously absurd questions, submissions and applications mounted by MS in this case, even though we cannot imagine, given his track record throughout the trial, that it would have stopped MS arguing the propriety of the magistrate's decision. Other judges and magistrates might have adopted a perhaps more cautious approach in hearing something of counsel's questions or the argument to be advanced first before questioning their basis. In reality, one often does not know where the questions are leading and counsel is entrusted with a measure of leeway and discretion to develop his line of cross-examination. Similarly, one does not always know what an argument will be or how it will develop, particularly where, for example, there may have been private discussions or understandings about an issue between the defence and prosecution, or information contained in unused material which would not be known to the judge or magistrate, and counsel is trusted not to advance the ridiculous. Sometimes, it may well be prudent with an English-speaking witness for counsel to explain a genuine problem or meet an objection in the absence of that witness.

196. However, if counsel indulges in obviously irrelevant, unnecessary, repetitive or prolix cross-examination, if the witness is effectively being badgered or bullied or worn down by counsel, if counsel uses irresponsible or improper language to the witness or the court or makes ill-conceived or preposterous submissions and applications to the court, all of which were manifest in abundance in this case, he must expect to be stopped. In our judgment, the magistrate displayed considerable patience, accommodation, fairness and courtesy in the face of the most disgraceful and egregious display of conduct by defence counsel, over a protracted and sustained period, which any of us have ever encountered in any capacity in any jurisdiction before. It is an under-statement to say that the defendant was not well-served by MS's antics in this trial.

Conclusion (in respect of Ground 1)

197. In our judgment, the factual basis of the complaint in Ground 1 is clearly made out. We shall examine the consequences of that conclusion on the conviction when we have considered Ground 2, to which we now turn.

Ground 2

198. We noted at the outset that it was never the defendant's written instructions to dispute identity[471]. Nor was there any hint that identity might be an issue in the pre-trial review questionnaire, signed by MS on behalf of the defence on 8 March 2013. Yet, MS objected to a formal identification of the defendant by PW1[472], notwithstanding, which was not disputed, that they had had an altercation outside House 2 at which members of the cinema staff were present, and to which the police were eventually called, resulting in the defendant's arrest.

199. MS explained his position when directly asked by the magistrate if identity was in issue[473], as follows[474]:

> "Well, I think all I would say is if I may put it this way is that whether or not identity is in issue, the prosecution must prove their case, and they have to lay a sufficient foundation to enable a dock ID to be made, in any event. That's all I would say. And, so far, I don't believe that's been done."

Ultimately, having heard argument, the magistrate disallowed a dock identification, saying that a proper identification parade should have been held[475].

200. With respect to the magistrate, his ruling was wrong. In circumstances where the parties had met outside House 2, on which occasion PW1 had, in the presence of cinema personnel, accused the appellant of indecently assaulting her, for which he had tried to explain and apologise, following which the police had arrived and arrested the defendant, as a result of which both proceeded to the police station, a formal identification parade

would have been a futile exercise. No one ever suggested that the man who came out of the cinema, who was accused by PW1 of indecent assault and who was subsequently arrested in the presence of witnesses, was not the defendant, nor was that ever the defence. A dock identification should have been permitted.

201. We are not to be taken as saying that the defence are not entitled to take advantage of a lacuna in the evidence, such as, for example, the production of a crucial exhibit where there appears to have been a break in the chain of evidence. Nor would anyone argue against the proposition that it is for the prosecution to establish its case, and nor are we suggesting that the defence are expected to fill in any gaps in the prosecution case. However, it was obvious from the circumstances described by PW1 that the man she was accusing, who sought to explain his actions and apologise to her in the presence of both herself and witnesses over what must have been a considerable period of time, and who was subsequently questioned at the scene by the police and arrested, was none other than the defendant.

202. If counsel is going to take advantage of what he perceives to be a lacuna in the prosecution case, he must think carefully whether there is in reality any lacuna at all and, if the point is taken, how easily the prosecution might remedy the defect or repair the breach. He will ask himself whether, ultimately, his client's cause is likely to be advanced in any way by the use of such a tactic, or whether it might, in fact, impede his other instructions or detract from a perfectly good line of defence. And he will want to weigh carefully how, if he seizes on something that is ultimately shown to be a futile exercise, it might affect the way a judge or magistrate (or jury) will look upon his case. These considerations involve the exercise of judgment and discretion by counsel, both of which commodities appear to us to have been sadly lacking in this case.

203. In our judgment, had counsel stood back and asked himself whether this objection was either sensible, sustainable or realistic, given that his clear instructions were that something had gone on between the defendant and the witness, albeit that it was a misunderstanding, and given the interaction between the defendant, the witness, the cinema staff and the police outside House 2, during what must have been a face-to-face encounter lasting some considerable period of time, he would have realised that the objection to PW1 identifying the defendant (who did not dispute in his instructions that he was the man accused by PW1), was ultimately a hopeless cause and a complete waste of time.

204. Unfortunately, buoyed no doubt by the magistrate's incorrect ruling that PW1 was not permitted formally to identify the defendant in the dock, we think MS found himself

embarking on the pointless distraction of requiring the prosecution to prove the identity of the defendant (and, it would seem, thereby, the complainant), when that was never part of the defendant's instructions; which in turn drove him to objecting to the production of the cinema ticket seized from the defendant, presumably because it placed the defendant in the cinema at the relevant time in Seat Q03; and to challenging PW5's evidence as to the validity of PW1's Identity Card, which plainly established that she was the complainant at the scene. These were simply unrealistic and ultimately absurd positions for counsel to adopt.

205. This ill-considered attempt to exploit the issue of identification also explains the extraordinary change of mind on counsel's part resulting in the decision to challenge the defendant's record of interview, which essentially spelt out his defence and which, if it were or might have been true, would have resulted in the defendant's acquittal. MS no doubt felt that he had to challenge the record of interview because it placed his client inside House 2, in the seat next to the complainant, and confirmed his subsequent apology to her for any misunderstanding.

206. On 10 June 2013, when asked whether the admissibility of the defendant's record of interview was to be objected to, MS responded[476]:

> "At the moment, it is but I will reserve my position on that, if I may."

Later that same day, MS indicated, when further pressed on the issue by the magistrate[477]:

> "COURT: … And about the alleged verbal and the record of interview'
>
> MS: Yes, we will be challenging the verbal, the record of interview I will consider overnight and try and come to a conclusion on that as soon as possible.
>
> COURT: I think you need to give me a concrete answer …
>
> MS: Of course, yes, yes.
>
> COURT: … tomorrow at 9:30 whether you challenge the admissibility of the record of interview or not.
>
> MS: Very well. … I can do that."

207. On the following day, 11 June 2013, when asked again to state his position on the record of interview, MS replied[478]:

> "We're not going to challenge the admissibility of the record of interview. So, therefore, there will be no need to – for me to cross-examine the cautioning officer."

However, when a set of Admitted Facts was handed to MS following the luncheon adjournment, MS said that he wanted to consider the Admitted Facts "very carefully" before agreeing to them[479]. The magistrate, having rightly and wisely insisted that he

wanted the matter settled that day[480], adjourned the case briefly to allow MS to speak to the defendant. When the court resumed, in a passage we have already seen[481], MS maintained that the contents of the record of interview were hearsay and it would be "most improper and unfair and highly prejudicial for it to be admitted in evidence"[482].

208. It appears that there was a further attempt on 19 June 2013 by the prosecution to agree a formulation in respect of the voluntariness of the record of interview which would be acceptable to the defence, in an amended draft of the Admitted Facts[483]. MS requested, and was permitted, a brief adjournment to show that draft formulation to the defendant[484], following which he announced[485]:

> "Yes, I've taken instructions, and my client's position is as follows, now we do not accept the voluntariness of the record of interview."

That position pertained and the admissibility of the record of interview was duly determined by way of voir dire proceedings.

209. The suggestion that because the record of interview contained a hearsay allegation, it rendered the whole of the record of interview hearsay, unfair and inadmissible was, in our view, an extraordinary and bizarre proposition. Indeed, the putting of an allegation to a suspect for him or her to confirm or deny has been a commonplace and routine feature of police investigation in this jurisdiction for over a century. However, what concerns us is not simply the preposterous position MS adopted in respect of admissibility but the complete about turn he executed in the face of the magistrate's entirely appropriate attempts to get the defence to commit to a position, which ultimately resulted in objection being taken upon, it was said, the instructions of the defendant. We ask ourselves, as any counsel would want to ask himself, what was the magistrate to make of the shifting and contradictory position of the defence on a matter of such importance?

210. As we have also seen, the magistrate asked MS on numerous occasions to confirm that what he was doing was on the instructions of his client. On each occasion, he confirmed that it was. In particular, MS confirmed, when directly asked by the magistrate on 18 June 2016, that the extraordinary series of general questions, which had commenced on 10 June 2013, were being put on instructions[486]; at the end of the following day, 19 June 2013, MS again confirmed that he had instructions to ask further general questions about the layout and environment of the cinema[487].

211. On 26 June 2013, the magistrate asked MS whether PW5's arrest of the defendant was in issue. The exchange, which also involved the prosecutor, went as follows[488]:

> "COURT: Is … the arrest of the defendant by (PW5) at the scene disputed or not?

MS: Just one moment, Sir.

(Counsel takes instructions)

MS: Yes. If my friend the prosecutor just starts his examination-in-chief and, when we get to that stage, we will – I'll address the court, if necessary.

MR YAU: So, I take it will be challenged. Otherwise, I don't know how to start …

MS: *That's my instructions.*

MR YAU: … examination-in-chief.

COURT: That is in issue?

MS: Yes. At the moment.

COURT: The arrest of the defendant at the scene is in issue?

MS: *That appears to be my instructions, yes.*" (Emphasis supplied)

It is not, we think, difficult to imagine the magistrate's sense of exasperated incredulity when he asked the last question of counsel. The magistrate, of course, was not privy to the defendant's written instructions, which clearly recognised that he had been accused by PW1 in the presence of cinema staff of doing something inside House 2 which had angered her and prompted her to call the police, despite his apologies and explanation, resulting in his arrest. Yet, the magistrate was here being informed that MS was being instructed to dispute the defendant's arrest by PW5, in terms that presented the defendant as uncertain and vacillating on an issue which, according to his written instructions, cannot sensibly or realistically have been in dispute.

212. Later, on the occasion when MS rounded on the magistrate for "ruining" his and his family's holiday plans, he told the court that the application for review of his decision to adjourn the trial to 14 August 2013 had also been "authorised", presumably by his client[489]. We note, in this regard, that Mr Richard Donald, who was later to act for the defendant during the wasted costs application on 22 April 2014, told the court that the defendant "had no idea what a stay of proceedings was" and "no idea what a review was"[490]; although, as the magistrate rightly pointed out[491], the defendant knew of the court's listing difficulties and the fact that the trial had "already badly overrun" when he "authorised" the taking out of the application for review.

213. When we go back to the original set of the defendant's written instructions, we cannot escape the conclusion that the defendant's perfectly sensible and straightforward written instructions - whether the defence was accepted was another matter - were side-lined, ignored, or worse usurped, while his case was taken off by his counsel for days on end into an endless morass of irrelevant, inconsequential and ludicrous cross-examination of the complainant and other witnesses; all in the context of an apparent belief that the prosecution would somehow be unable to prove identity.

Conclusion (in respect of Ground 2)

214. In our judgment, the factual basis of Ground 2 (as reformulated) is also made out, inasmuch as we accept that MS deliberately conducted the trial otherwise than in accordance with the defendant's instructions, whilst leading the court to believe that he was in fact acting upon instructions.

215. However, we do not accept the further extension of Mr McCoy's argument that the consequences of this conduct created an inevitable and presumptive bias against the defendant on the part of the court; but nor do we think it necessary for Mr McCoy to go that far. Any independent observer sitting in the back of the court, watching and listening to these protracted proceedings and the exchanges between counsel and the magistrate over several months, could not have perceived the slightest hint of bias on the part of the magistrate towards the defendant or his case during the entirety of the trial. The magistrate behaved with commendable patience, forbearance and fairness; including at one stage granting the defendant costs incurred by an amendment of the charge. Many judges and magistrates would not have been so patient and accommodating in the face of counsel's conduct. Indeed, we are satisfied that the magistrate was wrong in ordering the prosecution to pay costs to the defendant in respect of such an insubstantial amendment of the charge, which can have caused no conceivable prejudice whatsoever to the defence. Since we can see absolutely no warrant for saying that there was any actual or perceived bias on the court's part, it seems to us a legal oxymoron that we should have to presume it.

216. Having found the factual bases of both grounds of appeal (as reformulated) made out, what then do we make in such circumstances of a conviction, about which no complaint is made by Mr McCoy as to its essential findings or reasoning? Mr Tam argues, with some force, that this is not a case where the advocate concerned failed to do something he should have done, such as challenge the voluntariness of a crucial document, as had happened, for example, in *Chong Ching Yuen v HKSAR*[492]. This was a case where counsel took every conceivable point imaginable, however bad. He argues that it is difficult in those circumstances to see why the applicant should be said not to have had a fair trial, particularly when the magistrate was unfailingly courteous, patient and accommodating, even when counsel was "impertinent and exceedingly difficult at various stages of the proceedings"[493]. Further, he reminded us of Bokhary PJ's warning in *Chong Ching Yuen v HKSAR*, in respect of arguments that a conviction has been brought about, or contributed to, by the actions of counsel, that[494]:

> "… it should be clearly understood that appellate courts will approach those situations with a sense of realism, and not in such a way as would put a premium on briefing incompetent

defence counsel at trial and then criticising them on appeal in the event of a conviction."

217. In our judgment, it would be unconscionable for us to allow this conviction to stand, given the bizarre and wholly unacceptable way the defendant's case was handled by his counsel before the magistrate. It is one thing to take every conceivable point, however bad, misguided and ill-judged, it is another to subvert one's clear instructions and abuse the processes of the court in so doing. The defence was actually very simple: yet like the Lernaean Hydra, it became a monster with many heads, and each time one was cut off, two would immediately grow in its place.

218. We have arrived at this conclusion with profound dismay because the magistrate's evaluation of evidence and reasons for convicting the defendant are in themselves unimpeachable, and we are acutely conscious that the defendant is the only beneficiary (albeit indirectly) of his counsel's antics. Conversely, the unfortunate complainant, who was subjected to counsel's extraordinary forensic machinations for days on end, had every right to expect that she would be treated respectfully and that justice would be done on the merits of the case according to law. From her perspective, justice has manifestly not been done to her. She could be forgiven for thinking that she has been sorely let down by the legal system; and by the legal profession in particular, which should play an integral and important part in ensuring that the system works properly, fairly and efficiently.

219. It is here that we should deal with a matter we earlier said we would return to[495], namely the notion expressed by MS on more than one occasion that his duty to his lay client overrode all other interests and any responsibility on his part to act in the best interests of court time. No one could argue against the accused's right to a fair trial. But there are other parties to court proceedings, whose interests also lie in the securing of a fair trial: in particular, the witnesses called by either side, the prosecution (which is charged with the public duty of bringing criminals to justice), and the community at large (whose interest is that justice should be done according to law, and without unnecessary delay). A court must balance these various interests in ensuring that the trial is fair.

220. The idea that defence counsel in a criminal trial has a right, or a duty, to indulge as he sees fit in prolix and pointless cross-examination, applications and submissions without regard to the time, convenience or interests of anyone else save his lay client's, and that such a right or duty trumps all other interests, is a misconception of which he should be firmly disabused.

221. Regrettably, the balance between the competing interests of the various parties was not struck in this case and the result was a trial that was unfair to all interested parties, did no credit whatsoever to the legal profession and ultimately damaged the reputation and

integrity of the legal system.

222. For the above reasons, we consider that the appeal must be allowed. Accordingly, we allow the appeal against conviction and set aside the sentence. We now turn to the appeal by MS against the wasted costs order made against him by the magistrate.

The appeal against the wasted costs order (HCMA 425/2014)

223. Following the conviction and sentence of the defendant, the prosecution made an application, on 22 and 23 April 2013, for a wasted costs order against MS under section 18 of the CCCO. In the alternative, the prosecution also applied for costs under section 11 of the CCCO against the defendant, who by that time was represented by new counsel, Mr Richard Donald, and a new firm of solicitors. Since no order was ultimately made in respect of the application under section 11, we do not propose to deal with it further, save to summarise Mr Donald's arguments as to why the defendant was blameless in incurring costs.

The prosecution's position on the section 18 application[496]

224. The prosecution based its application for wasted costs on MS's conduct in four respects:

(a) The defence had insisted on putting the prosecution to strict proof of identity, when it was unwarranted in the circumstances of the case;

(b) MS had made it difficult for PW1 to give her evidence, by protracted and irrelevant cross-examination aimed at exhausting her patience;

(c) A groundless and improper stay application had been made, with counsel, *inter alia*, making reference to voluminous and irrelevant authorities; and

(d) A wrongful and improper application for review under section 103 of the Magistrates Ordinance was made in order to accommodate counsel's personal convenience.

The prosecution relied on the same matters in its alternative application under section 11 of the CCCO[497].

225. It was submitted by the prosecution that MS, in cross-examining and making unmeritorious applications in the way that he did, had seriously and improperly misconducted himself. There had been improper time-wasting, the trial had been unnecessarily prolonged, and his conduct had amounted to an abuse of the process of the court[498]. It was said that as a result of MS's conduct, the trial had taken much longer

than the three days (at most) it should have taken and the prosecution had incurred unnecessary costs, which were particularised in an Amended Bill of Costs.

The defendant's position on the section 11 application[499]

226. In opposing the alternative costs application against the defendant, Mr Donald submitted that the defendant was simply following the advice of MS; that MS directed and prolonged the case as he saw and thought fit. In written submissions, Mr Donald averred[500]:

> "The defendant is very aggrieved by (MS), who simply dragged the case out for his own (advantage) as he has been paid on a daily basis. (MS) mislead the court when he applied to take his annual holidays, when in fact it is now clear that he has another case in the District Court. Again the defendant is completely blameless."

He argued that the case was simple and ordinarily should have taken one to two days to complete[501]; that the defendant was completely blameless as to what took place, and was "a victim"[502] of MS's conduct of the case.

227. We should say here that both Mr Tam and Mr McCoy have expressed themselves strongly in the course of argument about the real reason for MS's reluctance to appear at the resumed hearing on 14 August 2013 (and the earlier suggested date, 29 July 2013), and whether he had a family holiday at all, or was already booked to conduct another case in the District Court. We are not in a position, without hearing from MS himself, to determine this very serious allegation. We have not been informed as to when the trial in the District Court was fixed in counsel's diary, when the trial commenced, how many days it had been fixed for and how long it took. This will no doubt be a matter which the Hong Kong Bar Council will wish to examine carefully[503]. (We should say that there was a belated attempt by letter of 8 July 2016 from those instructing MS to place two chronologies before us for the purpose of this appeal, one of which dealt with MS's proposed holiday arrangements and made reference to certain personal emails. Since none of the emails referred to had been placed before the magistrate or before us, and given Mr Tam's objection to their admissibility in that form, Mr Harris was given a repeated opportunity to advance the material in compliance with section 118(1)(b) of the Magistrates Ordinance, by way of notice of motion and supporting affirmation. In the event, the matter was not taken further and the material was not adduced).

MS's position on the section 18 application[504]

228. At the hearing in respect of the application for a wasted costs order on 22 April 2014, MS was represented by Mr Grossman SC, with him Mr Robert Tibbo. It may be noted that Mr Grossman began by making an application for the magistrate to recuse

himself from hearing the application for a wasted costs order and that "another magistrate should have a look at what happened to see whether or not costs should be awarded"[505]. With respect to leading counsel in the court below, this was an ill-considered application, which in the circumstances was wholly devoid of merit. The magistrate rightly rejected the application, giving a full written judgment on the matter[506], and Mr Harris has wisely not seen fit to associate himself with that application.

229. The recusal application having been disposed of, Mr Grossman advanced the following submissions in opposing the application for a wasted costs order, *inter alia*:

(a) MS had a difficult brief because the defendant had given inconsistent explanations at the scene and during the record of interview. He was justified in putting (and it was the defendant's right to so put) the prosecution to strict proof on the issue of identity;

(b) The length of PW1's cross-examination was taken out of context: PW1 had been an evasive witness (the court having had to remind her of her duties as a witness); the court had interrupted her evidence on numerous occasions; the court allowed many questions after hearing submissions, during which time PW1 was excused from court for good reason; from the fact that the court did not stop MS's line of questions, it may be assumed that the court was satisfied they were permissible and relevant. In any event, mere prolixity or lengthy cross-examination would not justify a wasted costs order;

(c) The stay application had been prompted in part by the prosecution's failure to make full and timely disclosure. The court did not find the stay application entirely misconceived;

(d) When fixing a date for the resumption of the trial, the court did not accommodate MS's holiday schedule with his family. In refusing to review its decision on the matter, the court did not make a finding that the review application was wrongful and/or improper.

230. Mr Grossman submitted overall that the matters complained of did not amount to an abuse of process of the court by MS, or serious or improper conduct by him, let alone seriously improper conduct. Moreover, the quantum of costs alleged was excessive, unreasonable, disproportionate and punitive.

231. Finally, the court was reminded that it retained a discretion not to make a wasted

costs order, even if it found that wasted costs had been incurred. Further, that under section 18(3) of the CCCO, the court should "take into account the interest that there be fearless advocacy under the adversarial system of justice".

The court's approach to the section 18 application

232. The magistrate directed himself comprehensively by reference to relevant authority on the legal principles involved in the making of a wasted costs order[507]. He found that the jurisdiction to award wasted costs is founded on the breach of duty owed by a barrister *to the court* to perform his duty in promoting within his own sphere the cause of justice[508]. The proper conduct of litigation by the legal profession is essential to the administration of justice[509].

233. Whilst holding that an advocate enjoys privileges before the court, he also owes a duty to the court, for which he is bound by standards of professional conduct. This reflects the public interest in the administration of justice[510]. Whilst discharging his duties to his lay client, a barrister must not undermine or obstruct the administration of justice by the courts[511]. The magistrate referred in this connection to paragraph 6(b) of Bar code of conduct, which provides that it is the duty of every barrister not to engage in conduct which is prejudicial to the administration of justice[512].

234. Although expressed in terms which are compensatory, the wasted costs jurisdiction should also be regarded as punitive[513]. Its purpose is to punish the offending practitioner for his failure to fulfil his duty *to the court*[514]. In order to establish a breach of that duty, it was not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a barrister off the roll. Equally, mere mistake or error of judgment would not generally suffice[515].

235. The word "improper" in the definition of "wasted costs" in the CCCO covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or any other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. It also extends to any conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion, whether or not such conduct violates the letter of a professional code[516].

236. By the use of the words "seriously" and "serious" in the definition of "wasted costs" in the CCCO, a higher threshold is required under section 18 of the CCCO, when compared with its civil or United Kingdom counterparts.

237. A barrister is not to be held to have acted improperly simply because he acts for a

party who puts forward a defence which is plainly doomed to fail. But it is quite another thing for him to lend assistance to proceedings which are an abuse of the process of the court[517]. The essential point is that it is not errors of judgment which attract the exercise of the jurisdiction, but errors of a duty owed *to the court*[518].

238. Public policy requires any court considering making a wasted costs order to take into consideration that advocates should be free to conduct cases in court fearlessly under our adversarial system of justice[519]. Full allowance must also be made for an advocate's difficulties or limitations in court proceedings before a wasted costs order is made against him[520].

239. A wasted costs order against a barrister personally is a draconian order. It should only be made on the basis of a seriously improper act or omission, or serious misconduct, not mere lack of wisdom, discretion or valour[521].

240. The magistrate held that the courts should apply a 3-stage test in considering a wasted costs application: (1) Has the barrister of whom complaint is made acted seriously improperly or been guilty of serious misconduct?; (2) If so, did such conduct cause the applicant to incur unnecessary costs?; (3) If so, is it in all the circumstances just to order the barrister to compensate the applicant for the whole or any part of the relevant costs? In relation to stage (2), a causal link between the offending conduct and the extent of costs incurred or wasted must be established; while stage (3) involves an exercise of discretion[522].

241. The burden of proof rests on the applicant making the application for a wasted costs order[523]. The standard of proof is the civil standard, but the seriousness of the allegation should be taken into account, in the sense that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability[524].

242. The magistrate noted that the allegation of "improper" conduct was the most serious charge in the United Kingdom counterpart of the CCCO[525], whereas the CCCO employs the additional qualification of "seriously" and "serious" in the definition of "wasted costs".

Application of principles to the facts

243. Approaching the issue on the above basis, the magistrate found in favour of MS on the complaint that he had needlessly put the prosecution to strict proof of identity.

244. In respect of MS's cross-examination of PW1, the magistrate found that MS had asked or attempted to ask PW1 (only to be disallowed after making lengthy submissions[526]) "many irrelevant, remotely relevant, repetitive and/or general questions during the first 3 odd days of cross-examination"[527]; that, "as a result of such prolix and unnecessary cross-examination", PW1 became visibly annoyed, to such an extent that her patience was exhausted, which in turn led to occasional emotional outbursts on her part[528].

245. Against such a background, the magistrate said he "found it necessary from time to time to remind MS not to cross-examine unnecessarily or cross-examine for its own sake"[529], to point out the time that had already been spent by counsel and the limit to the court's time and, importantly, to remind counsel of his duties under the Bar code of conduct[530]. The magistrate found that MS had paid mere "lip service" to his duties under the Bar code and to the court[531]; that he paid no heed to the necessity for his questions or the time of the court[532], adopting an indifferent and irresponsible attitude to these matters[533]; and had by his questions improperly wasted the court's time[534]. He considered that the fact that the court did not stop such questioning was no excuse, since the court was not in possession of the defendant's instructions and, despite asking, was never told by MS what the issues were, before the case was eventually put on the fifth day of PW1's cross-examination[535]. With hindsight, the magistrate found that he had misplaced the reliance he had reposed in MS properly discharging his professional duty[536].

246. The magistrate was satisfied "that MS had conducted himself improperly at the trial by unnecessarily wasting the court's time with protracted and irrelevant cross-examination of PW1, no matter (whether) he aimed at exhausting PW1's patience or not"[537].

247. With regard to the stay application, the magistrate, whilst bearing in mind that the prosecution's failure to make full and timely disclosure was one of the grounds for making the original application, considered that the application was not "completely groundless", but thought it enjoyed no reasonable prospects of success given the formidable state of the authorities at the time[538]. However, he found that "MS's improper handling of (the) stay application … unnecessarily prolonged it and improperly wasted the court's time"[539]. In particular, despite refusing the application of 3 July 2013, following two hours of argument, which included reference to four irrelevant authorities, to adjourn the case until 10 July 2013, counsel chose to repeat the very same matters on 5 July as one of his grounds for the stay application[540]; on 4 July 2013, MS indulged in lengthy submissions insisting upon strict compliance with the practice direction timetable[541]; on 5 July, he produced no less than 37 authorities, which,

contrary to his assertions the day before, were irrelevant and/or not directly on point[542], without seeing fit to cite the two landmark decisions of the Hong Kong Court of Final Appeal on the matter; and on 5 July 2013, MS inappropriately objected to the appearance of a senior court prosecutor on the grounds that he was not legally qualified to deal with a stay application.

248. Accordingly, the magistrate found[543]:

> "… MS had again, I think, conducted (himself) improperly in the stay application by prolonging it unnecessarily and improperly wasting the court's time."

249. In respect of the application for review by MS under section 104 of the Magistrates Ordinance, the magistrate found it to be "wholly misconceived"[544], given, as had made clear in brief oral reasons[545], that the decision of 11 July 2013 was not a "determination" susceptible to review under section 104 of the Ordinance[546]. Besides, the application itself was "wholly without merit"[547], since the trial had "badly overrun its 2-day agreed trial estimate"[548], and the court had already made it clear on three separate occasions that it would not accommodate either party as to dates any further[549].

250. Accordingly, the magistrate found that the application for review was "a piece of avoidable satellite litigation for the mere convenience of counsel and his diary. It had nothing to do with the success of the trial (ie the guilt or innocence of the defendant) and it ought never to have been brought, and pursued, at all"[550]. The magistrate found that the time of the court had again been improperly wasted and the process of the court abused; and that MS had once again conducted himself improperly[551].

251. The magistrate concluded[552]:

> "Taking such complaints made out by the prosecution cumulatively, by cross-examining PW1 indifferently and unnecessarily, by handling (the) defence stay application with repetitive grounds, groundless "objection" to prosecutor and voluminous irrelevant authorities, and by pursuing (a) wholly unmeritorious and avoidable defence review application, MS had, I am satisfied, "seriously" abused the process of this court and had conducted himself "seriously" improperly at the trial."

252. The magistrate went on to summarise MS's conduct as follows[553]:

> "One instance after another, disregarding his professional duty under the Bar code and repeated reminders by this court, MS, had, I am satisfied, irresponsibly

> and improperly wasted the time of this court, unnecessarily prolonged the trial, including lending his assistance to satellite litigation for his own convenience after the trial had already badly overrun its agreed 2-day estimate (overran in no small measure partly due to his improper conducts in the first place). In so doing, MS had, I regret to conclude, "seriously" failed in his duty *to the court* to promote the cause of justice within his sphere by engaging in repeated conducts at the trial prejudicial to the administration of justice." (Original emphasis)

253. The magistrate was further satisfied as to the issue of causation, namely stage (2) of the 3-stage test he had addressed when considering a wasted costs application[554].

254. On the issue of quantum, the magistrate considered the prosecution's claim to be excessive and found instead the sum of $180,000 to be just and reasonable in the circumstances and properly attributable to MS's proven serious misconduct at trial[555].

255. Taking all the circumstances into consideration, "including the important public interest that there be fearless advocacy in our adversarial system of justice"[556], the magistrate considered it appropriate to order MS to compensate the prosecution in the amount of $180,000, which had been unnecessarily incurred[557].

256. Given his decision on the wasted costs application, the magistrate considered that there was no need for him to resolve the prosecution's application against the defendant under section 11 of the CCCO[558].

The appellant's position on the wasted costs order

257. In his written submissions, Mr Harris identified the issue before the Court to be whether the magistrate applied the correct test and threshold in concluding that MS had committed "serious misconduct" as a barrister in relation to his conduct at the trial[559]. As the argument developed before us, it became clear that Mr Harris took no issue with the principles distilled by the magistrate from the authorities in approaching applications for wasted costs in criminal cases. Rather, his complaint concerned the application of those principles to the conduct displayed in the present case and whether counsel's conduct met the high threshold necessary to justify such an order being made.

258. In relation to MS's cross-examination of PW1, Mr Harris submitted that the selection of 3 days as the appropriate limit of cross-examination could be said to be arbitrary, while the fact that it took longer did not make it "serious misconduct" on MS's part. He argued that an order for wasted costs must relate to specific dates and could not be transposed to other days where there was no criticism of counsel's misconduct. He further submitted that the magistrate had himself contributed to the length of the trial by

frequently seeking to clarify questions, by allowing other questions to be put after argument as to their relevance and by making comments that appeared to approve of counsel's general approach to the witness. If the magistrate was of the view that counsel was "seriously misconducting" himself, it was his duty to stop him. Having failed to do so, it was unfair to allow counsel to press on and then punish him later for "serious misconduct".

259. In respect of the stay application, Mr Harris submitted that the magistrate did not find the application completely groundless, although he found that it enjoyed no reasonable prospects of success. He argued that the hearings of 3 and 4 July 2013, for which there was no criticism of counsel at the time, should not be used as a basis for a costs order in relation to what followed on 5 and 9 July 2013; that there was no improper "repetition" of points in the stay application; and, in any event, the fact that the same issue was the subject of further submissions did not amount to serious misconduct. Of the 37 authorities cited by MS in the stay application, Mr Harris submitted that 25 could be said to be relevant; and the fact that the authorities supported what might be seen as accepted principles did not make them irrelevant. In any event, the citing of irrelevant cases did not constitute serious misconduct. Furthermore, Mr Harris pointed out that MS dealt with most of the authorities expeditiously.

260. As for the application for review under section 104 of the Magistrate's Ordinance, Mr Harris submitted that should his arguments have merit in respect of the cross-examination and stay components of the application, the Court should consider whether the complaint in relation to the review application standing alone would be sufficient to constitute serious impropriety, given the magistrate's approach to the cumulative nature of the misconduct. Further, Mr Harris submitted that the magistrate did not indicate at the time that the review application was wholly misconceived.

261. Finally, this Court was urged to consider whether MS's pursuit of the application for review was seriously improper, bearing in mind that:

(a) MS's view as to the nature of a determination was apparently influenced by his earlier success in a similar application before another court;

(b) The defendant was on bail;

(c) MS was acting *pro bono* in the application for review;

(d) The prosecution had closed their case by that stage;

(e) The date suggested by MS for the resumption of the trial was only some 3

weeks later than the date fixed by the magistrate;

(f) MS had made clear he would cancel his vacation, if the application was refused, in order to attend the hearing.

262. Finally, it was submitted that an application made in good faith (even if it was one that counsel ought to have known was unarguable) did not constitute serious misconduct.

The respondent's position on the wasted costs order

263. Mr Tam took issue with the notion that an advocate's motive or intention or good faith should be relevant to a consideration of whether conduct was to be regarded as "serious misconduct". The "prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument"[560], for example, did not depend on counsel's motive or intention. The focus should be on the consequences of the misconduct, not the motive behind it. An advocate may well think that he is justified in dealing with evidence or presenting arguments on his client's behalf in an extremely drawn out or prolix fashion. Nevertheless, "he must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time"[561].

264. In respect of MS's dealings with PW1, Mr Tam listed a large number of matters in cross-examination, which he characterised as "utterly outrageous and serious improper"[562], among them: the marital status of PW1's brother; the characterisation of the film in question and the Wikipedia description of the film; the playing of the film to the witness in open court; the witness's experience of economy class seats on Cathay Pacific aeroplanes; PW1's movie-going and sleeping patterns; whether she slept with anyone at night; whether she was wearing a bra; asking her to wear the dress and its brand, as well as the brand of her handbag; the size of her buttocks; the measurement of the empty space between her thighs and between her thighs and the side of the seat; etc.

265. Mr Tam took issue with the complaint that the award of wasted costs for the last two days of cross-examination of PW1 was arbitrary and submitted that, as a matter of expedience, the costs of the first 3 days of the trial proper had not been included in the bill of costs; a matter on which all parties to the application were aware.

266. He further expressed astonishment that the magistrate should now be blamed for somehow legitimising and prolonging the cross-examination of PW1, when he was not in possession of the defendant's instructions, nor was he told what the issues at trial were, despite asking; and when his attempts to regulate MS's conduct were simply ignored or attracted impertinent responses from counsel.

267. In respect of the application for stay, Mr Tam submitted that the fact that the application was made at all, and the way it was handled, amounted to serious misconduct. He pointed out that the application had come about shortly after MS had failed in his application to restore the order of calling witnesses; and suggested that the application had been motivated by MS's refusal to cooperate with the magistrate's reasonable request to be provided with the areas of cross-examination which might justify the recalling of a police witness. Mr Tam argued that the bringing of the stay application (together with his insistence that the magistrate should follow the timetable prescribed in Practice Direction 9.7) was motivated by MS's fixation in adjourning the case to suit his own purposes.

268. In relation to the application for review, Mr Tam submitted that the decision to adjourn to a particular date was clearly not reviewable and described the ostensible reason which lay behind it, namely to accommodate MS's holiday plans (later disclosed to be a vacation in Hong Kong) as "shocking"[563].

269. Mr Tam took a strong position (on which we have earlier touched[564]) in respect of MS's claim that he had already made flight arrangements and would not be in Hong Kong on the proposed adjourned date, describing it as "a blatant lie to the court", which not only could amount to a contempt of court but was also a "disgrace to the whole legal profession".[565]

270. In conclusion, Mr Tam urged the Court to dismiss the appeal by MS against the wasted costs order, with costs to the respondent.

Consideration

271. We have already described MS's cross-examination of PW1 earlier in our judgment, regrettably finding it necessary to resort to strong language, as, among other epithets, obtuse, pointless, irrelevant, ludicrous, badgering, bullying, obdurate, relentless, remorseless, indiscriminate, repetitious, prolix and displaying neither skill, restraint nor sensitivity; in short, an egregious example of how cross-examination should not be conducted. Given the scale and strength of those criticisms, we cannot accept the argument of Mr Harris that MS conducted himself in good faith. But even if we were to have accepted a measure of good faith (however misguided) on MS's part, it would not provide any justification for conduct as egregious as this.

272. We are nevertheless acutely aware of, and have borne in mind, Mr Harris's entirely proper and accurate characterisation of cross-examination as a unique, powerful and essential tool in the adversarial process and one of the fundamental guarantees of a fair

trial. We agree, in this respect, with his reference to *Osolin v R*, where the Supreme Court of Canada said of the function of cross-examination[566]:

> "Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence."

However, the undoubted importance to be attached to cross-examination is no justification whatsoever for the way it was employed in this case.

273. We respectfully endorse the speech of Viscount Sankey LC in the House of Lords in *Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd*[567], who referred to the earlier remarks of the Master of the Rolls in the judgment of the Court of Appeal, namely[568]:

> "There remains one feature of this case upon which, in association with my colleagues, I desire to make serious comment - that is the cross-examination to which the leading actors on either side, Mr Lehwess and Sir Herbert Austin, were subjected. Measured by the shorthand note, it appears that Mr Lehwess's examination occupied 80 pages; his cross-examination occupied 265. The examination of Sir Herbert Austin occupied 39 pages, and his cross-examination 148 pages. There is a tedious iteration in some of the questions asked, and prolonged emphasis is laid on some matters, trivial in relation to the main issues. Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness. We desire to say that in our opinion the cross-examination in the present case did not conform to the above conditions, and at times it failed to display that measure of courtesy to the witness which is by no means inconsistent with a skilful, yet powerful, cross-examination."

274. Of those remarks by the Court of Appeal, Viscount Sankey LC said[569]:

> "With that censure I agree, except that I cannot think it can be justly applied to the counsel who appeared on behalf of the plaintiffs or to any of the counsel who appeared at the bar of your Lordships' House. It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the Court are taking part in the great task of doing justice between man and man."

275. For our part, we entirely agree with the remarks of a distinguished Lord Chancellor of Great Britain, made more than 80 years ago. In the present case, we consider that the cross-examination of PW1 was not employed with the slightest discretion at all. As will be clear from our judgment dealing with the defendant's appeal against conviction, it provided little or no assistance to the defendant, to the court of trial or to us. And it was wholly devoid of any consideration for the unfortunate witness, who was kept in the witness box for days on end and shunted needlessly in and out of court, while counsel

indulged in his bizarre antics.

276. In relation to the applications for stay and review, we have already judged that they were each an abuse of the process of the court, which should never have been brought, let alone handled in the way they were. We do not accept that they were mounted in good faith: they were each designed to frustrate the proceedings, earlier applications for an adjournment having been correctly refused by the magistrate. The application for review was made purely for counsel's personal convenience.

277. As we have said, no issue is taken as to the principles distilled by the magistrate from the authorities governing an application for a wasted costs order in criminal cases. Rather, the appeal concerns the magistrate's application of those principles to the circumstances of this case and whether counsel's conduct, as identified by the magistrate, attained the necessary high threshold before a costs order could be made.

278. We respectfully agree with the magistrate's distillation of the legal principles applicable to an application for a wasted costs order. That analysis is a further demonstration of how careful, thorough and fair the magistrate was in dealing with the case before him. He was acutely aware of the high threshold which the prosecution had to attain before it could make good its claim for wasted costs, as well as the differences in the tests applicable in Hong Kong between the civil and criminal jurisdictions and between the relevant legislation in Hong Kong and the United Kingdom. It was with those considerations in mind that he modified the three-stage test approved in *Ridehalgh v Horsefield*[570] as it applies to the wasted costs jurisdiction in England, and the three questions posed by the Court of Final Appeal in *Ma So So v Chin Yuk Lun*[571], in relation to the civil jurisdiction arising under Order 62 rule 8 of the Rules of the High Court, Cap 4 (sub. leg.), so as to cater for the higher threshold that must be attained in the criminal courts of Hong Kong when applying the CCCO.

279. We do not accept that there was any error in either the magistrate's approach to the relevant legal principles or in his application of those principles to the circumstances pertaining in this case. We agree with his findings in that regard. We are of the decided opinion that if ever there was a need to make a substantial wasted costs order against counsel, this was the case. The evidence justifying its making is overwhelming. If there is to be any criticism of the magistrate's decision, it is that he erred on the side of generosity towards MS in the order that he made. It could, and in our judgment should, have been greater.

280. The appeal against the wasted costs order made against MS is dismissed.

Costs

281. Mr Tam applied for an order for costs in the respondent's favour in the event of MS's unsuccessful appeal against the imposition of the wasted costs order. In determining this issue, we have borne in mind the other costs orders made at the trial, one of which, of course, was the wasted costs order made against MS. We do not ignore, as we have already acknowledged the punitive element involved in such an order[572], inasmuch as, "[a]lthough it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the court"[573]. Furthermore, we are conscious that the order made by the magistrate to some extent broke new ground in the criminal jurisdiction of Hong Kong, for which it might be said that the issue invited consideration by this Court.

282. However, we have also held that if ever there was a case for making a substantial wasted costs order against counsel, this was such a case. In our judgment, there was no merit whatsoever in this appeal, in circumstances where the original order for wasted costs could, and should, have been greater. Yet, not only was the appeal mounted, it was persisted with, notwithstanding the damning and devastating nature of the complaints raised on appeal by leading counsel for the defendant, which have ultimately obliged us to allow his appeal.

283. We should point out that MS has sat through, and listened to, the entirety of the appeal presented by Mr McCoy on behalf of the defendant, whilst fully represented by solicitors and leading counsel. We do not see why the public purse should have to bear all of the costs of an appeal which had no merit to it whatsoever. Furthermore, any argument that the novelty of the order made it fit for consideration by this Court does not avail MS where his appeal is demonstrably without merit.

284. Accordingly, we shall accede to the application for costs made by the respondent against MS in respect of his unsuccessful appeal against the wasted costs order, but we shall limit such costs to those incurred on the final day of the 4-day hearing before us, namely 12 July 2016, including all necessary preparation by Mr Tam and his junior in respect of that appeal.

Orders

285. In summary and in conclusion, our orders are as follows:

(i) In HCMA 685/2013, the defendant's appeal against conviction is allowed, his conviction quashed and his sentence set aside;

(ii) In HCMA 425/2014, MS's appeal against the wasted costs order is dismissed;

(iii) There shall be an order *nisi* for the costs of HCMA 425/2014, limited to the hearing of 12 July 2016, including all necessary preparation therefor, to be taxed if not agreed. Any submissions in respect of the order *nisi* are to be filed with the Court within 14 days hereof;

(iv) There shall be a certificate for two counsel to the respondent.

286. Finally, in view of the findings and comments which this Court has felt compelled to make about the conduct of MS in the defendant's trial, and which have obliged us to allow the defendant's appeal against conviction, we order that a copy of this judgment and the relevant appeal papers pertaining to both appeals (including all 2181 pages of transcript) be served on the Bar Council, together with the various submissions of the parties at the appeal, for its consideration and such action as it deems necessary.

(Michael Lunn)	(Andrew Macrae)	(Derek Pang)
Vice-President	Justice of Appeal	Justice of Appeal

Mr William Tam SC, DDPP and Mr Franco Kuan SPP, of the Department of Justice, for the Respondent

Mr Gerard McCoy SC, Ms Nisha Mohamed (on 12 July 2016 only) and Ms Chrystal Choy, instructed by Christopher K Y Wong, for the Appellant in HCMA 685/2013

Mr Graham Harris SC, Mr Benson Tsoi and Ms Victoria Yue (on 12 July 2016 only), instructed by Mayer Brown JSM, for the Appellant in HCMA 425/2014

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[1] *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, at 574, para 12.

[2] Appellant's submissions on jurisdiction and transfer, para 9.

[3] Defendant's submissions on jurisdiction, para 14.

[4] AB pp 38-39, para 113: PW1's allocated seat for the showing of the film in question was 'Q02': the defendant's ticket in respect of the same performance was 'Q03'.

[5] AB p 68.

[6] AB p 1911.

[7] AB p 214H-I.

[8] AB p 214J-S.

[9] AB p 214U-V.

[10] AB p 214S-T.

[11] AB p 215C-F.

[12] AB p 215B-C.

[13] AB p 215H-I.

[14] AB pp 215N-216D.

[15] AB p 216K-L.

[16] AB pp 216L-217H.

[17] AB pp 217J-218D.

[18] AB p 221F-Q.

[19] AB p 221R.

[20] AB p 222J.

[21] AB p 222K.

[22] AB p 223D.

[23] AB p 223E-F.

[24] AB p 223J.

[25] AB pp 223R-224F.

[26] AB pp 230S-231F.

[27] AB p 232E-F.

[28] AB pp 237S-238A.

[29] AB p 239M-N.

[30] AB pp 239N-240P.

[31] AB p 245D-E.

[32] AB p 245F-G.

[33] AB p 247J-K.

[34] AB pp 247R-248B.

[35] AB p 249O-Q.

[36] AB p 250A-D.

[37] AB p 252T-U.

[38] AB p 253M.

[39] AB pp 254P-260H.

[40] AB p 267B-F.

[41] AB p 269L.

[42] AB p 287H.

[43] AB p 288D.

[44] AB p 289H-J.

[45] AB p 293D.

[46] AB pp 294P-295C.

[47] AB p 303H-L.

[48] AB p 305Q.

[49] AB p 306R.

[50] AB p 307T-U.

[51] AB pp 310U-311B.

[52] AB p 311M-O.

[53] AB p 312K.

[54] AB p 312N-P.

[55] AB p 313A-C.

[56] AB p 315D-M.

[57] AB p 318C-I.

[58] AB p 322R-S.

[59] AB p 323C-D.

[60] AB pp 323D-324B.

[61] AB p 324C.

[62] AB p 324P.

[63] AB p 324P.

[64] AB p 326M-T.

[65] AB p 328D.

[66] AB p 328H-L.

[67] AB p 329F-J.

[68] AB pp 329K-330N.

[69] AB p 334A-C.

[70] AB p 340C.

[71] AB pp 347A-348R.

[72] AB p 354L-P.

[73] AB p 355H-I.

[74] AB p 355N-O.

[75] AB p 356E-I.

[76] AB p 358E-O.

[77] AB p358T.

[78] AB p 361G.

[79] AB pp 362H-363A.

[80] AB p 363D.

[81] AB p 363J-S.

[82] AB pp 364B-365D.

[83] AB p 365D-E.

[84] AB p 367A-K.

[85] AB p 367L-N.

[86] AB p 367R-T.

[87] AB p 368A-K.

[88] AB p 370R-T.

[89] AB p 370U.

[90] AB p 371C-S.

[91] AB pp 372N-373B.

[92] AB p 373L.

[93] AB p 373T.

[94] AB p 373U.

[95] AB p 376I.

[96] AB pp376N-377G.

[97] AB p 377R.

[98] AB p 392G-H.

[99] AB p 392N.

[100] AB p 393G-I.

[101] AB p 400G.

[102] AB p 400R.

[103] AB p 401D-E.

[104] AB p 403C-D.

[105] AB p 403L-U.

[106] AB p 404C.

[107] AB p 404E.

[108] AB p 405J.

[109] AB p 406F-G.

[110] AB pp 406S-407L.

[111] AB p 407L-T.

[112] AB p 408F-H.

[113] AB p 408M-O.

[114] AB p 409A-B.

[115] AB p 409J.

[116] AB p 409P.

[117] AB p 410L-R.

[118] AB p 410S-U.

[119] AB p 411S-T.

[120] AB p 412J.

[121] AB p 412K-L.

[122] AB p 416I-J.

[123] AB p 416M.

[124] AB p 417A-C.

[125] AB p 417M-O.

[126] AB p 417P-Q.

[127] AB p 420K.

[128] AB p 421J.

[129] AB p 423I.

[130] AB p 423S.

[131] AB p 424J.

[132] AB p 424K-L.

[133] AB p 424O-P.

[134] AB p 425G-I.

[135] AB p 425J.

[136] AB p 425L.

[137] AB p 426B.

[138] AB pp 426C-427B.

[139] AB p 427H.

[140] AB p 429E-G.

[141] AB p 432A-B.

[142] AB p 432Q-R.

[143] AB p 433O-Q; p 434P.

[144] AB p 435N-O.

[145] AB p 436I.

[146] AB p 436J.

[147] AB p 442Q.

[148] AB p 442S.

[149] AB p 443P-R.

[150] AB p 444C.

[151] AB p 444D.

[152] AB p 445P-Q.

[153] AB p 450K-S.

[154] AB p 450T.

[155] AB p 451D-O.

[156] AB p 451Q-R.

[157] AB pp 451U-452C.

[158] AB p 454P-U.

[159] AB p 456F.

[160] AB p 458L-M.

[161] AB p 460H-I.

[162] AB p 461N-O.

[163] AB p 461Q.

[164] AB p 475K.

[165] AB p 476R.

[166] AB p 478E-

[167] AB pp 478K-479B.

[168] AB p 480E.

[169] AB pp 480T-485G.

[170] AB pp 487O-493C.

[171] AB pp 492P-493P.

[172] AB pp 496T-499Q.

[173] AB p 499R-S.

[174] AB p 500E-G.

[175] AB p 500G-H.

[176] AB pp 501T-507T.

[177] AB p 506O-Q.

[178] AB p 509C-N.

[179] AB pp 512E-513Q.

[180] AB p 515F-G.

[181] AB p 518F-K.

[182] AB p 245F-G; para 42 *supra*.

[183] AB p 519O-P.

[184] AB p 537N-Q.

[185] AB pp 549U-550A.

[186] AB p 550B-C.

[187] AB p 551G-H.

[188] AB p 553N-O.

[189] AB p 554M.

[190] AB pp 555U-556A.

[191] AB p 559A-C.

[192] AB p 564O.

[193] AB p 564P.

[194] AB pp 569H-570B.

[195] AB p 570C.

[196] AB p 573G-H.

[197] AB p 573J-P.

[198] AB p 575P-Q.

[199] AB p 577F.

[200] AB p 580D.

[201] AB pp 584I-587O.

[202] AB p 605F-G.

[203] AB p 605H-S.

[204] AB p 606M-N.

[205] AB pp 607J-608B.

[206] AB p 608C.

[207] AB p 644N-P.

[208] AB p 691C-L.

[209] AB p 757S-T.

[210] AB p 758A-B.

[211] AB pp 758H-759B.

[212] AB p 761F.

[213] AB p 762T.

[214] AB p 763E.

[215] AB pp 828R-829B.

[216] AB p 829F.

[217] AB p 829N.

[218] AB p 836H.

[219] AB pp 840S-842L.

[220] AB p 842P.

[221] AB pp 843R-844G.

[222] AB p 849Q-U.

[223] AB p 854C-D.

[224] AB p 856M-N.

[225] AB p 858K-P.

[226] AB pp 858P-859C.

[227] AB p 859E-J.

[228] AB p 866D.

[229] AB p 906A-J.

[230] AB p 908M.

[231] AB p 908N-U.

[232] AB p 913M-N.

[233] AB pp 916T; 918Q-R; 919C.

[234] AB p 918G-K.

[235] AB p 918J-L.

[236] AB p 918S.

[237] AB pp 919A-920J.

[238] AB p 923I-K.

[239] AB p 943T.

[240] AB p 944H-J.

[241] AB p 947F.

[242] AB p 947Q-R.

[243] AB p 948Q-R.

[244] AB p 951A-B.

[245] AB p 952-1O.

[246] AB p 952-27K-L.

[247] AB p 952-27N.

[248] AB p 952-28N.

[249] AB p 952-28N-R.

[250] AB p 952-29B-G.

[251] AB p 952-29H.

[252] AB p 960M-S.

[253] AB p 961A-F.

[254] AB pp 964T-965B.

[255] AB pp 966P-967A.

[256] AB p 967F-K.

[257] AB p 967O-Q.

[258] AB p 968E-F.

[259] AB p 969D-F.

[260] AB p 969M-N.

[261] AB pp 969S-970A.

[262] AB p 971F-I.

[263] AB p 971O.

[264] AB p 973M-P.

[265] AB pp 974T-975A.

[266] AB p 976J-M.

[267] AB p 977G-I.

[268] AB p 1017R.

[269] AB p 1062Q-R.

[270] AB pp 1062U-1064E.

[271] AB p 1064R.

[272] AB p 1065D-E.

[273]AB p 1065K-L.

[274] AB p 1065M-S.

[275] AB pp 1065U-1066B.

[276] AB p 1066I.

[277] AB p 1067C-F.

[278] AB p 1069Q-R.

[279] AB p 1069S.

[280] AB p 1069T.

[281] AB p 1093I-J.

[282] AB p 1093N-R.

[283] AB p 1094F.

[284] AB p 1094K-M.

[285] AB p 1095K-L.

[286] AB p 1098I-K.

[287] AB p 1099A-E.

[288] AB p 1101S.

[289] AB p 1101U.

[290] AB p 1102A-U.

[291] (2010) 13 HKCFAR 728.

[292] [1974] 60 Cr App R 200.

[293] [2006] Crim LR 54.

[294] AB pp 1106C-1107E.

[295] AB pp 1115D-1116C.

[296] AB p 1121P.

[297] AB p 1122H-L.

[298] AB p 1190G-S.

[299] AB p 1193E-G.

[300] AB p 1193H.

[301] AB p 1193H.

[302] AB p 1193I-J.

[303] AB p 1194K-M.

[304] AB pp 1194R- 1195D.

[305] AB p 1195F-K.

[306] AB pp 1196S-1197I.

[307] AB pp 1197U-1198C.

[308] AB p 1199A-G.

[309] AB pp 1199U-1200A.

[310] AB p 1200H-K.

[311] AB p 1200L-R.

[312] AB p 1201J.

[313] AB p 1202H-K.

[314] AB p 1202K-S.

[315] AB p 1205H-I.

[316] AB pp 1205M-1206F.

[317] AB p 1206M-O.

[318] AB p 1207J-K.

[319] AB p 1207N-Q.

[320] AB p 1207T.

[321] AB pp 1276Q-1277I.

[322] AB p 1283F.

[323] AB p 1298B-C.

[324] AB p 1298G.

[325] AB p 1298O-S.

[326] AB p 1299A-B.

[327] AB p 1314H-J.

[328] AB pp 1336I-1337E.

[329] AB p 1363H.

[330] AB p 1374E-M.

[331] AB p 1374N.

[332] AB p 1374P-S.

[333] AB p 1375A-B.

[334] AB p 1375C-D.

[335] AB p 1377A-U.

[336] AB p 1384N-O.

[337] AB p 1385K.

[338] AB p 1386P-Q.

[339] AB p 1389J-K.

[340] AB pp 1389U-1390B.

[341] AB p 1393M.

[342] AB p 1394R-S.

[343] AB pp 1416G-1452Q.

[344] Synopsis of transcript with key events, para 36.

[345] AB p 1417G-H.

[346] AB p 1417I.

[347] AB p 1417L.

[348] AB p 1417I-J.

[349] AB pp 1418A-1419C.

[350] AB p 1419C-H.

[351] AB pp 1420R-1422M.

[352] AB p 1422N-R.

[353] AB pp 1424S-1425E.

[354] AB p 1425F-G.

[355] AB p 1431G-K.

[356] AB p 1433H-J.

[357] AB p 1437E-G.

[358] AB p 1439M-O.

[359] AB pp 1458J-1459G.

[360] AB pp 1461-1516.

[361] AB pp 1465O-1466J.

[362] AB p 1468O-U.

[363] AB p 1517F-G.

[364] AB p 1540Q-S.

[365] AB pp 1544K-1545B.

[366] AB p 1546C-F.

[367] AB p 1546G.

[368] AB pp 1546J-1547U.

[369] AB pp 1570N-1571A.

[370] AB p 1574A-B.

[371] See para 35 *supra*.

[372] AB p 1589H-L.

[373] AB p 1590L-N.

[374] AB pp 1603R-1604N.

[375] AB p 1608F.

[376] AB p 1608K.

[377] AB p 1608M-N.

[378] AB p 1617B-C.

[379] AB p 1625D-O.

[380] AB p 1627M-P.

[381] AB p 1628A.

[382] AB p 1631H.

[383] AB p 1632U.

[384] AB p 1633T.

[385] AB p 1635Q.

[386] AB p 1640K.

[387] AB p 1644F.

[388] AB p 1648M.

[389] AB p 1706T.

[390] AB p 1707E-F.

[391] AB p 1724Q-R.

[392] AB pp 1725Q-1730O.

[393] AB pp 1730Q-1792L.

[394] AB p 1794N-Q.

[395] AB pp 1829J-1830N.

[396] AB pp 1833D-1835U.

[397] AB p 1836A-B.

[398] AB pp 1856S-1857K.

[399] AB p 1861H-J.

[400] Appellant's submissions on appeal against wasted costs order, para 41(2).

[401] Appellant's submissions on appeal against wasted costs order, para 44.

[402] Respondent's submissions on appeal against conviction and wasted costs order, para 6.

[403] Respondent's submissions on appeal against conviction and wasted costs order, para 8.

[404] AB p 1193I-J.

[405] AB pp 1104T-1105B.

[406] [2006] Crim LR 54; the full unreported judgment is *R v Ejaz B* [2005] EWCA Crim 805.

[407] *R v B* [2006] Crim LR 54.

[408] *ibid.*, at pp 55-56.

[409] AB p 223J.

[410] AB p 412J.

[411] AB p 423S.

[412] AB p 551G-H.

[413] AB p 564P.

[414] AB pp 757S-759B.

[415] AB p 765T-U.

[416] AB p 758A-B.

[417] AB p 764I-J.

[418] AB p 763E.

[419] AB p 766A-B.

[420] AB p 768S-T.

[421] AB p 770H.

[422] AB p 774K-L.

[423] AB p 842H-L.

[424] AB p 844A-B.

[425] AB p 849Q-U.

[426] AB p 847D-P.

[427] AB p 848P-Q.

[428] AB p 872E-I.

[429] AB p 906A-D.

[430] AB p 906F-G.

[431] AB p 906I.

[432] Appellant's submissions on appeal against wasted costs order, at para 42.

[433] The quoted words are taken from the judgment of the Court of Appeal in *HKSAR v Tam Yi Chun (No 2)* [2014] 4 HKLRD 27.

[434] [2001] 1 HKLRD 599.

[435] Appellant's submissions on appeal against wasted costs order, at para 41(2).

[436] *Bird v Bird* (2013) SKQB 157.

[437] *HMTQ v Russell et al* (1999) CanLII 5758 (BC SC).

[438] *R v Maxwell* [2011] 2 Cr App R 31.

[439] AB p 1062Q-T.

[440] AB pp 1062U-1064E.

[441] AB p 1065S.

[442] AB p 1065M-N.

[443] AB pp 1196J-1198C.

[444] AB p 1199A-B.

[445] AB p 1200L.

[446] AB p 1200M-N.

[447] AB p 1200N-P.

[448] AB p 1201J.

[449] AB p 1202K-N.

[450] AB p 1202Q-R.

[451] AB p 1458J-K.

[452] AB pp 1458Q-1459A.

[453] Appellant's submissions on appeal against wasted costs order, para 44.

[454] *HKSAR v Tam Yi Chun (No 2)* [2014] 4 HKLRD 27, at 31, para 6.

[455] Appellant's submissions on appeal against wasted costs order, para 45.

[456] Written submissions for the appellant (defendant) against conviction, para 33.

[457] AB p 1458T.

[458] AB p 1207P-Q; p 1458N-T.

[459] AB p 1202Q-R; p 1207N; p 1275L.

[460] AB p 952-29B, E; p 952-30C-E.

[461] AB p 968F, Q.

[462] AB p 920F; p 1067C-O.

[463] AB p 967O.

[464] AB p 974T.

[465] AB p 969E; p 1458S-T.

[466] AB pp 969S-970B.

[467] AB p 906A-O; pp 958T-959J; p 973M-P.

[468] AB p 1065M-T; p 1202Q-T.

[469] AB p 1458Q-R.

[470] In this regard, it has already been noted that this Court was presented with a letter of apology signed by MS, the full text of which is at para 156 *supra*, which included words to the following effect: "…I accept that what may be perceived as suggested appeals and/or judicial reviews of the Learned Magistrate's decisions were improper and inappropriate. Again, I raised these matters "in the heat of the moment" without exercising proper control and self-restraint. No discourtesy, disrespect or offence was intended. I wish to express my profound regret and I apologise without reservation."

[471] Para 31 *supra*.

[472] AB p 197A-B.

[473] AB p 199A-B.

[474] AB p 199C-E.

[475] AB p 213L-M.

[476] AB p 162P-R.

[477] AB p 239M-U.

[478] AB p 245F-G.

[479] AB p 312N-P.

[480] AB p 313A-B.

[481] Para 51 *supra*.

[482] AB p 315L-M.

[483] AB p 517A-C.

[484] AB p 517D-R.

[485] AB p 518F-G.

[486] AB p 376P-R.

[487] AB pp 574J-575Q.

[488] AB p 691A-L.

[489] AB p 1458Q-R.

[490] AB p 2028E.

[491] AB p 2170B-E.

[492] [2004] 2 HKLRD 681.

[493] Respondent's written submissions against conviction and wasted costs order, para 38.

[494] *ibid*., at 686F-G.

[495] Para's 58 and 96 *supra*.

[496] As summarised by the magistrate, at AB pp 2144G-2145G.

[497] AB p 2145E-G.

[498] AB p 2144Q-R.

[499] As summarised by the magistrate, at p 2145I-T.

[500] Written submissions of the defendant on the wasted costs application, AB p 1964-22 and 23, para 7.

[501] AB p 2028D.

[502] AB p 2028K.

[503] The Court is given to understand that the District Court trial in question was DCCC 280/2013 before HH Judge Longley, which was dealt with on appeal by this Court in *HKSAR v Sajid Mahmood* (unrep., CACC 333/2013, 2 March 2015).

[504] As summarised by the magistrate, at pp 2146K-2148P.

[505] AB p 1968G.

[506] AB pp 2137P-2138D; pp 2171D-2176O.

[507] AB pp 2139G-2143D.

[508] *Myers v Elman* [1940] AC 282, 319; *Ridehalgh v Horsefield* [1994] Ch 205, 227D; *Harley v McDonald* [2001] 2 AC 678, 701H-702B, 702F-G.

[509] *Ma So So v Chin Yuk Lun* (2004) 7 HKCFAR 300, 307H-I.

[510] *Medcalf v Mardell* [2003] 1 AC 120, 142D.

[511] *Yau Chiu Wah v Gold Chief Investment Ltd* [2003] 3 HKC 91, 101H-102E.

[512] Paragraph 7 of the Bar Code further provides: "Serious failure to comply with the duties set out in paragraph 6 shall be professional misconduct and, if so found by a Barristers Disciplinary Tribunal, shall render the barrister liable to be punished in

accordance with the provisions of the Legal Practitioners Ordinance, Cap 159."

[513] *Myers v Elman*, *supra*, 319; *Ma So So v Chin Yuk Lun*, *supra*, 309F-H.

[514] *Harley v McDonald*, *supra*, 703B-D.

[515] *Myers v Elman*, *supra*, 319; *Ridehalgh v Horsefield*, *supra*, 227D-E; *Harley v McDonald*, *supra*, 704H.

[516] *Ridehalgh v Horsefield*, *supra*, 232D-E.

[517] *Ridehalgh v Horsefield*, *supra*, 233F & 234D; *Medcalf v Mardell*, *supra*, 143H-144A.

[518] *Harley v McDonald*, *supra*, 706B, 708G-709B.

[519] *Medcalf v Mardell*, *supra*, 141E-142C. See also section 18(3) of the CCCO.

[520] *Ridehalgh v Horsefield*, *supra*, 235B-D, 236E-G.

[521] *HKSAR v Tang Ka Hung* [2010] 5 HKLRD 523, para 50.

[522] *Ridehalgh v Horsefield*, *supra*, 231F-G, 237F, 239E-F; *Ma So So v Chin Yuk Lun*, *supra*, 309C-E, 311G-H.

[523] *Ridehalgh v Horsefield*, *supra*, 239C; *Ma So So v Chin Yuk Lun*, *supra*, 313H.

[524] *Re P (A Barrister)* [2002] 1 Cr App R 19, para's 54 & 55.

[525] *Medcalf v Mardell*, *supra*, 138F-G.

[526] The magistrate's original emphasis, at AB p 2151K.

[527] AB p 2151K-L.

[528] AB p 2152L-N.

[529] AB p 2153D-E.

[530] AB p 2153E-G.

[531] AB p 2154A-B.

[532] AB p 2154C-D.

[533] AB p 2154D-E.

[534] AB p 2154H.

[535] AB p 2155D-I.

[536] AB p 2156K-M.

[537] AB pp 2158N-2159C.

[538] AB p 2159L-N.

[539] AB p 2159O-P.

[540] AB pp 2159Q-2160D.

[541] AB p 2160E-G.

[542] AB p 2160J-N.

[543] AB p 2161I-K.

[544] AB p 2161N.

[545] AB pp 1570M-1571A; *supra* at para 144.

[546] AB p 2161N-Q.

[547] AB p 2162C.

[548] AB p 2162H.

[549] AB p 2162H-L.

[550] AB p 2163J-M.

[551] AB p 2163M-O.

[552] AB p 2164A-F.

[553] AB p 2164G-N.

[554] AB pp 2164P-2165J.

[555] AB p 2168K-M.

[556] AB p 2168R.

[557] AB p 2168R-T.

[558] AB p 2169K-L.

[559] Appellant's submissions on appeal against wasted costs order, para 6.

[560] *Harley v McDonald*, *supra*, at 703E.

[561] *Medcalf v Mardell*, *supra*, at 142E, *per* Lord Hobhouse of Woodborough.

[562] Respondent's submissions on appeal against conviction and wasted costs order, para 17.

[563] Respondent's submissions on appeal against conviction and wasted costs order, para 32.

[564] Para 192 *supra*.

[565] Respondent's submissions on appeal against conviction and wasted costs order, para 34.

[566] *Osolin v R* (1993) 86 CCC (3d) 481, at 516-517.

[567] *Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd* [1935] AC 346.

[568] *ibid.*, at 359.

[569] *ibid.*, at 359-360.

[570] *Ridehalgh v Horsefield*, *supra*, at 231E-G; see also *Re P (A Barrister)*, *supra*, at para's 45 and 46.

[571] *Ma So So v Chin Yuk Lun*, *supra*, at 309B-E.

[572] *Harley v McDonald*, *supra*, at 703B-D; *Re P (A Barrister)*, *supra*, at para 47.

[573] *Harley v McDonald*, *supra*, at 703B.