

Case Summary

HKSAR v Lai Chee Ying (黎智英)

FAMP 1/2020; [2020] HKCFA 45; [2021] 1 HKC 344

(Appeal Committee of the Court of Final Appeal)

(Full text of the Appeal Committee's determination in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=132731&currpage=T)

Before: Ma CJ, Ribeiro and Cheung PJJ

Date of Hearing and Determination: 31 December 2020

Jurisdiction of CFA – leave to appeal – whether Judge's decision of bail review final as against prosecution

Effect of NSL 42(2) on bail – Judge's decision a question of law and final – question of great and general importance

Power to detain defendant pending hearing of appeal – application by prosecution – preservation of status quo ante

Background

1. The Respondent was refused bail by the Chief Magistrate with respect to the offence of “collusion with a foreign country or with external elements to endanger national security” under NSL 29(1)(4), as well as the offence of fraud. Upon his application for bail review pursuant to s. 9J of the Criminal Procedure Ordinance (Cap. 221), the CFI granted him bail subject to undertaking and bail conditions. The prosecution sought leave to appeal to the CFA and, if granted, an order that the Respondent be detained in custody pending determination of the appeal.

Major provision(s) and issue(s) under consideration

- NSL 42(2)
- Criminal Procedure Ordinance (Cap. 221) (“CPO”), ss. 9G(11), 9J and 9K
- Hong Kong Court of Final Appeal Ordinance (Cap. 484) (“HKCFAO”), ss. 31(b) and 35

2. The Appeal Committee of the CFA examined the following questions:

- (a) whether the CFA had jurisdiction under s. 31(b) of the HKCFAO to hear an appeal against a Judge’s grant of bail pursuant to s. 9J of the CPO (“Question 1”);
- (b) what was the correct interpretation of NSL 42(2) (“Question 2”); and
- (c) if leave to appeal was granted, whether the Respondent should be detained in custody pending determination of the appeal (“Question 3”).

Summary of the Court’s rulings

Question 1

3. The proposition which underlies Question 1, namely, that generally, the grant of bail by a Judge of the CFI was “a final decision *as against the prosecution*” falling within the CFA’s appellate jurisdiction under s. 31(b) of the HKCFAO was not reasonably arguable. This proposition was inconsistent with s. 9K of the CPO under which the original order granting bail was not final but could be revoked or varied, not just on the application of the accused, but also at the instance of the prosecution. While the CPO was silent as to any power to revoke bail, it was necessarily implicit in a power to grant bail that the court had a corresponding power to revoke it: *Chung Tse-ching v Commissioner of Correctional Services* [1988] 2 HKLR 389, at 392. (paras. 11-17)

Question 2

4. Question 2 raised questions of great and general importance as to the ambit and effect of NSL 42(2) which governed the granting of bail in cases involving acts endangering national security. It was reasonably arguable in the present case that the Judge might have erred in his construction or application of NSL 42(2) in adopting his approach to the grant of bail in light of the requirements thereof. (para. 20)

5. The question did involve an appeal from a final decision of the Judge at first instance. It did not involve an appeal against a bail decision after assessing the associated risks, but rather a decision on a question of law anterior to such considerations. The CFA had jurisdiction to entertain the appeal under s. 31(b) of the HKCFAO. (paras. 21 and 22)

6. The question was limited in nature. The CFA would determine the meaning of NSL 42(2) and, having done so, would decide whether the Judge had fallen into error in his approach to the grant of bail. If he made no error, the appeal would be dismissed and the Judge's order granting bail pending trial would be held to have been valid. If, on the other hand, the Judge was held to have fallen into error, the appeal would be allowed and his order set aside. In either case, the appeal would have been disposed of and it would fall outside the CFA's jurisdiction to deal with any outstanding or subsequent bail application. (para. 23)

Question 3

7. The Appeal Committee had jurisdiction to entertain an application by the prosecution for the Respondent to be held in custody pending determination of the appeal. The fact that s. 35 of the HKCFAO expressly authorised the prosecutor to apply to the Court of Appeal or the CFI for detention pending appeal where leave to appeal had been granted, necessarily implied that an application might be made to the Appeal Committee for such detention to be ordered. (paras. 27-29)

8. On balance, it would not be right in principle for the Appeal Committee to continue the Respondent's bail pending the appeal since

that would assume the validity of the Judge's order admitting the Respondent to bail which was the issue at the very heart of the pending appeal. Taking into account the concerns expressed by the prosecution which was to avoid possible irreparable prejudice to national security and the appeal being rendered nugatory, the status quo ante (involving the Respondent being remanded in custody pursuant to the order of the Chief Magistrate) ought to be maintained pending determination of the appeal, subject to the Appeal Committee giving directions for the appeal to be heard and determined with exceptional expedition. (paras. 30-31)

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