CACC 62/2019
[2022] HKCA 1073

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CRIMINAL APPEAL NO 62 OF 2019

(ON APPEAL FROM HCCC NO 156 OF 2018)

BETWEEN

HKSAR — Respondent

and

Fung Hoi Yeung (馮海洋) — Applicant

Before: Hon Macrae VP, Zervos JA and M Poon JA in Court
Date of Hearing: 31 May 2022
Date of Judgment: 31 May 2022
Date of Reasons for Judgment: 29 July 2022

R E A S O N S F O R J U D G M E N T

The Court:

1. The applicant was convicted, on 18 January 2019, of a single offence of rape before Campbell-Moffat J ("the judge") and a jury and subsequently sentenced to 10 years' imprisonment. He duly appealed against both his conviction and sentence. On 31 May 2022, we granted his application for leave to appeal against conviction and allowed his

appeal, as a result of which it did not become necessary to hear his appeal against sentence. These are our reasons for allowing the appeal against conviction.

The prosecution case

2. The alleged victim of the offence, whom we shall refer to as Ms X, was a domestic helper, who had been employed by the applicant's mother but assigned to work at both her and the applicant's adjacent premises in Tin Tsz Estate, Tin Shui Wai, New Territories. She was a 25-year-old married woman with a young daughter, who had arrived by herself from Indonesia on 16 October 2017 in order to work in Hong Kong for the first time.

3. Ms X testified that at about 3 am on 21 October 2017, at which time her female employer was not at home, the applicant knocked on her bedroom door. When she answered the door, she saw the applicant, smiling and dressed in a white shirt and red-chequered boxer shorts. He said something to her, which she did not understand. Ms X then walked past him to go to the toilet and when she came back, the applicant was still standing by the doorway to her room. The applicant suddenly held her hands and pulled her towards him. Speaking in her own language, Ms X asked what he was doing, at which the applicant pushed her onto her bed and lay on top of her. He then put his hand underneath her night clothes and touched her breasts, while kissing her on the mouth. She tried to shout out, but his hand covered her mouth.

4. The applicant then put his fingers into her vagina, while guiding her hand to his exposed and erect penis. Having pulled down her pyjama pants and underwear, he removed his red-chequered boxer shorts and entered her with his penis. Ms X protested, saying "No" and "Don't", while slapping his face and pulling his hair, but he continued until he ejaculated. She was not sure if he had ejaculated inside her, but some of his semen was deposited on her thigh. The applicant then got up and replaced his red-chequered boxer shorts. Ms X slapped the applicant again before he left the room, whereupon Ms X immediately locked her door.

5. Since her night clothes and bed sheet were stained with semen and blood, she removed her clothing, using her underpants to wipe her body. She then texted a fellow Indonesian woman Minarsih (known as "Mina"), who was a staff member at her employment agency, saying "Sister Mina, please help me.". This message, which was sent via WhatsApp at 4:05 am, was followed by a series of follow-up messages repeating her pleas for help, as well as replies from Minarsih, until 11:10 am the same day.

6. Since the contents of Ms X's mobile telephone have a bearing on the grounds of appeal advanced in this case, we should here point out that Ms X's telephone and some of the messages between Ms X and Minarsih that morning were the subject of formal Admitted Facts under section 65C of the Criminal Procedure Ordinance, Cap 221 in the following terms:

> "2. Exhibit P24 (with battery (Exhibit P25) and 2 SIM Cards (Exhibits P26 and P27) installed) is the mobile phone used by (Ms X) at the times material to this case.
>
> 3. Exhibit P37 is an album containing 9 photographs taken by DSPC 240 LAM Wai-tak ("DSPC 240) at 21:55 hours on 21st October 2017 in Yuen Long Police Station. The photographs depicted the WhatsApp messages contained in P24 sent to and received from Indonesian female MINARSIH between 04:05 hours and 11:10 hours on the same day. Exhibit P37A is the certified English Translation of the text messages as shown in P37.
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> 4. Exhibit P39 is an album containing 9 photographs taken by DSPC 240 at 21:00 hours on 21st October 2017 in Yuen Long Police Station. The photographs depicted the WhatsApp messages contained in the mobile phone of MINARSIH sent to and received from (Ms X) between 04:05 hours and 11:10 hours on the same day. The messages contained therein are identical to the messages contained in Exhibit P37."

7. Later that morning at about 7:00 am, Ms X heard the applicant leaving the premises; accordingly, she left her room to have a shower and wash her underwear. She kept her night clothes and her bed sheet in a plastic bag.

8. Subsequently, at about 11 am, Minarsih called another Indonesian woman, who reported Ms X's complaint to the police.

9. Later in the day, Dr Kwok Ka-ki, a forensic pathologist, conducted a physical examination of Ms X at the request of the police and found that her private parts had a recent injury in the form of an abrasion with contact bleeding, consistent with having been caused during sexual intercourse within a day or so, as described by Ms X. The applicant's semen and DNA were also found on the night clothes and bedsheet of Ms X.

Defence case

10. The applicant elected to give evidence and called his mother as a defence witness. His case was that no sexual intercourse had taken place between himself and Ms X at all. It was contended that Ms X had made up a false story against the applicant because she wished to get out of her employment contract and obtain a severance payment in the process. On the day in question, the applicant had merely knocked on the door to tell Ms X to make some congee for his baby daughter, after which he had left.

11. An explanation was canvassed by the applicant as to how his semen might have come to be on Ms X's night clothes. He said he had had a "wet dream" and left his soiled red-chequered boxer shorts in a blue linen basket in the bathroom on the morning of 20 October 2017 for Ms X to wash. The contention was that Ms X had taken advantage of the situation to wet and rub the semen from his boxer shorts onto her own clothes. Ms X denied the suggestion when it was put to her. Another possibility suggested was that the applicant's semen could have found its way onto Ms X's night clothes and bedsheet from his red-chequered boxer shorts through contact transfer because of lax police procedures during the seizure of the exhibits and investigation. Furthermore, the applicant's mother gave evidence that Ms X had been menstruating on 18 October 2017, which was suggested might have accounted for the presence of blood.

Admissibility of the photograph of the red-chequered boxer shorts on Ms X's telephone

12. Given the nature of the applicant's case, there was one particular piece of evidence, which to the defence was of considerable importance. And it is the admissibility of this piece of evidence and the way it was treated by the judge that has given rise to this appeal. The evidence in question concerned a photograph stored in Ms X's telephone depicting a pair of red-chequered boxer shorts lying on top of a computer keyboard on a desk in a room.

13. Ms X was cross-examined by Mr Chan Pak-kong, defence counsel at trial, about the occasion she had taken a shower in the bathroom at around 7:00 am on 21 October 2017. She maintained that she "only saw" the red-chequered boxer shorts on the rim of the blue linen basket in the bathroom, but she "did not do anything" with them and at no stage did she "move it or touch it", nor had she ever taken them to another place[1]. She also accepted that no other person had used her mobile telephone, Exhibit P24, that morning. Having established these answers, defence counsel then referred Ms X to a photograph of her telephone. It is important to understand, in view of how things developed, that the actual item shown to the witness (referred to as "MFI 5A") was in fact a photograph of someone's hand enfolding Ms X's telephone with a photograph displayed on the telephone itself of the red-chequered boxer shorts lying on a computer keyboard. The telephone itself with the actual photograph displayed, was never shown to the witness. We are now informed that the telephone and its battery had been separated as

[1] AB, pp 261Q-262D.

prosecution exhibits and the battery was not charged; hence the actual telephone could not be activated so as to display the photograph in question. Nevertheless, no issue is taken at this appeal that the photograph of the red-chequered boxer shorts was in fact stored in Ms X's telephone.

14. However, before the matter could be further explored by defence counsel, the judge intervened to ask counsel not to say anything about the contents of the photograph but first to establish that the telephone belonged to Ms X. This the witness duly confirmed, although she added somewhat gratuitously and rather obscurely, "I don't know it was there"[2]. She was never able to explain what the "it" in her answer referred to, because the judge immediately told her, "We'll get to other questions in a moment", before asking her again whether it was her telephone; which the witness again confirmed[3].

15. Defence counsel then asked Ms X if the telephone had been operating normally[4]. However, the judge again intervened to say, somewhat curiously, that the witness could not answer this question because she would not know[5]. The judge then, for the first (but not the last) time, made mention of "section 22" (by which it became clear she meant section 22A) of the Evidence Ordinance, Cap 8 ("section 22A"), indicating her view that the witness was "not going to satisfy" the section[6]; and asked counsel to first ask the witness if she accepted that she took the photograph on the telephone[7]. Counsel accordingly asked Ms X, "do you

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2 AB, pp 265S-266C.
3 AB, p 266D-E.
4 AB, p 266I.
5 AB, p 266J-L.
6 AB, p 266M-N.
7 AB, p 266N-Q.

recognise the photograph as shown before you?"; to which the witness answered "Yes"[8]. The following exchange then took place between defence counsel, the witness and the judge[9]:

Q.	Do you know who took this photograph?
COURT:	I think the question was, who took the photograph first? Who took it? Who took the photograph?
A.	I don't know who took that photo, but I …
COURT:	I don't want any more than that for a minute. … So did you take the photograph?
A.	No, I only took photo…
INTERPRETER:	Do you want…
COURT:	No, I don't. I just wanted – so she's just saying no, she didn't take the photograph. All right.
A.	No."

The jury were then asked by the judge to leave court.

16. There then followed a lengthy exchange between the judge and defence counsel, which established that what was being shown to the witness (and there has never been any dispute about this) was a photograph of somebody holding Ms X's telephone, on which was displayed a photograph of some red-chequered boxer shorts on a computer keyboard. The judge, however, was of the firm view that "… no one who is an expert can say how that photo came to be on the phone … at what stage it came to be on the phone because the date could mean anything"[10]. When

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8 AB, p 267G-K.
9 AB, p 267L-S.
10 AB, p 272H-J.

counsel explained that the date of the WhatsApp image appeared on the image, the judge retorted[11]:

> "COURT: Well, I don't know if it's WhatsApp. Although it says WhatsApp images at the bottom, you don't know if that's an immediate WhatsApp image, if it's a WhatsApp image that's been sent. You don't know, do you? Because we don't have an expert telling us that, do we?
>
> MR CHAN: There is no expert, yes.
>
> COURT: So you can't prove – you can't adduce this admissibly, can you, given that she's now said, 'It's not mine. It's not my photograph, I didn't take it.'
>
> ……
>
> You want to say, 'You took this on 21st,' but she's now said, 'No, I didn't take it,' and you can't prove she did. So you can't contradict her with it, can you? And then you'd have to go away and, in your case, you'd have to admit it and then make something of it. But you can't do it through her because she's just refused it. And you've put it to her…
>
> Now, you can put to her, if you want, 'I'm putting to you that you took this photograph,' but I'm not letting the photograph in front of the jury until such time as I'm confident … that you would be able to adduce it admissibly to the extent that I would accept that it falls within the Evidence Ordinance. … And that, I think, is your overwhelming problem, seeing as you haven't done it in advance."

17. Defence counsel then made clear that he wished to put to Ms X that she had in fact taken the photograph on her telephone, to which the judge responded, "She will say no"[12]. The judge went on to tell defence counsel that, in relation to the photograph of the red-chequered

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[11] AB, pp 272N-273N.
[12] AB p 273P-S

boxer shorts, "you can't get this in… So I'm not letting you get it in through the backdoor"[13]. She then advised counsel as follows[14]:

> "COURT: So it would be better to take this (MFI 5A) away altogether now and simply move on. But I'm concerned that in moving on to put your case you are going to ask a question that suggests that there is a pair of boxer shorts on her phone."

18. It is worth pointing out at this stage that it was never the defence case that Ms X took the photograph of someone holding her telephone depicting the red-chequered boxer shorts on the computer keyboard: however, it was the defence case that Ms X took the actual photograph of the boxer shorts displayed on her telephone. That is an important distinction and would help to explain the witness's apparently contradictory answers. Had the witness been allowed to give her answers instead of counsel being stopped and the witness cut off, on the basis of some perceived infringement of the Evidence Ordinance, the evidence might have become clearer and more precise. Instead, the judge was insistent that the witness would deny taking the photograph of the red-chequered boxer shorts on her telephone, when all she had in fact denied was taking the photograph of the telephone being held by an unknown person displaying the photograph of the red-chequered boxer shorts, and decided that, absent a certificate under section 22A, the photograph was inadmissible.

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[13] AB, p 274H-J.
[14] AB, pp 275T-276A.

The prosecution position on admissibility

19. The other aspect of this unfortunate episode was that, from the time of the judge's first intervention up to the time she made her views known about admissibility, not a single word was ever invited from prosecuting counsel at trial, Mr Bernard Chung. It will be remembered that there were already admitted facts about a number of WhatsApp messages, including photographs, from Ms X's telephone, so the prosecution must have known that the photograph of the red-chequered boxer shorts was indeed stored in Ms X's telephone and, as we shall see, prosecuting counsel was later to concede that the photograph of the red-chequered boxer shorts was a piece of "real" evidence, which was indeed "relevant"[15]. If that was his view, it is a great pity that he did not come to the aid of defence counsel in those circumstances and disabuse the judge of her not only premature, but ultimately errant, views on admissibility. Instead, he initially fell in with the judge's view[16]:

> "COURT: Yes. Mr Chung, am I wrong? Is my instinct wrong? Do you disagree with me?
>
> MR CHUNG: I think what your Ladyship just said is exactly on the point, not just the photo not being admissible, any reference to it would also link up…
>
> COURT: Yes. It would just…
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> MR CHUNG: …in a jury trial.
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> COURT: Yes.
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> MR CHUNG: That must be avoided.
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> COURT: Yes.
>
> ……

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[15] AB, p 325Q-S.
[16] AB, p 279H-P.

COURT: Well, it's meaningless to have an Ordinance that tells you how to do it.

MR CHUNG: That's right. I agree with your observation."

The judge did invite the parties to take the matter up again on the following Monday if they thought it necessary[17], although by then the witness had in fact already concluded her evidence[18]. The jury were then called back into court for cross-examination of Ms X to be continued[19].

Further cross-examination by the defence

20. When cross-examination resumed, defence counsel put his case to Ms X as to how the applicant's semen came to be on her night clothes and bedsheet[20]:

"Q. Now, Madam, I put it to you that you had wet the defendant's red checkers boxers and transfer(ed) the semen or semen stains on the boxer(s) to the bedsheet, to your pink shorts and your pink T-shirt.

…

A. I did not transfer that and I was – I use my clothes for wiping.

Q. You used your clothes to wipe the semen or semen stains from the defendant's red checkers boxer(s), is that correct?

A. No."

Having put his case, it ought to have been obvious to everyone why defence counsel needed to cross-examine Ms X as to how it was that she had a photograph of a pair of red-chequered boxer shorts on her telephone.

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17 AB, p 279Q-R.
18 AB, p 294U.
19 AB, p 280C.
20 AB, p 281M-R.

Unfortunately, he was never allowed to ask the question and the witness was never required to answer. Neither MFI 5A nor the photograph of the red-chequered boxer shorts were ever mentioned again to the witness.

The issue of admissibility revisited

21. At 10:11 am on the following Monday, notwithstanding that Ms X had already completed her evidence the previous Friday, Mr Chan for the defence attempted to re-open the question of the admissibility of the photograph of the red-chequered boxer shorts, citing the decision of this Court in *HKSAR v Lee Chi Fai & Others*[21] in support of his application. Mr Chan explained that the question was whether the photograph was *prima facie* authentic, made out by evidence which defined and described its provenance and history[22]. What then followed were page after page of dialogue between the judge and defence counsel. Indeed, by lunchtime on the Monday, the discussion had still not concluded.

22. The judge's concerns about admissibility are by no means easy to follow. To his credit, Mr Chan tried with some persistence to argue that "for the admission of any photograph to be evidence, what we have to satisfy is the requirement that the photograph was – is relevant to the issue"[23]. The judge, however, countered the argument, equally persistently, by stressing that the photograph of the red-chequered boxer shorts could not satisfy the requirements of section 22A. Of the authority of *Lee Chi Fai & Others*, she said[24]:

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21 *HKSAR v Lee Chi Fai & Others* [2003] 3 HKLRD 751.
22 AB, p 298K-L.
23 AB, p 310L-M.
24 AB, p 315H-J.

> "… you're saying that is the authority for you to be able to circumvent Cap 8 and section 22A if you can show it is *prima facie* authentic. That's your point, isn't it?"

At one stage she seemed unconvinced by the judgment of Stuart-Moore JA (as he then was) in *Lee Chi Fai & Others*[25]:

> "Right. Well, where shall I go to this, what I would think was quite an extraordinary extension of my understanding of section 22A",

before repeating her view and asking counsel[26]:

> "… but I at the moment don't see how it is admissible. So does it go on to explain how section 22A does not come into play. Does he do that somewhere, Mr Chan?"

To which defence counsel answered "No".

23. When defence counsel reminded the court that it was Ms X's testimony that only she had used her mobile telephone on the morning of 21 October 2017[27], the judge retorted[28]:

> "Yes, but you can't prove that this phone took the photograph. You can't prove that actually because it could have come in on a – now, it maybe not probable, but you can't prove it because you didn't go to the bother of having an expert properly interrogate (*sic*) the phone. You want everybody to have a leap of faith and say because it's her phone, she must have taken the photograph and we all know that there's an awful lot of authority about that. That would mean, if you were correct, every time anybody wanted to use a phone in this court for evidence, every time we would be going, well, you can just assume it's her and it must have come in because she took it. We can't do that, can we? We have to have a provenance for it."

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25 AB, p 318J-K.
26 AB, p 318P-Q.
27 It was also an admitted fact that Ms X's mobile telephone was used by her "at the times material to this case": AB p 8, at [2].
28 AB, p 308I-O.

The judge finally explained[29]:

> "Now what we have is a mobile phone which is in evidence… physically as a real exhibit. The difficulty is that the mobile phone is akin to a computer… And therefore in the normal course if the prosecution wish to adduce this evidence and its contents, they would normally have to jump through the usual hurdles of having to say that the phone from the point of seizure… had not been tampered with and appeared to be working properly, etc. However, it is clear that there is a photograph on there. The difficulty that Mr Chan has on behalf of the defendant is that having put it to the witness, whose phone it eventually was, because it originally belonged to her husband, she denies taking the photograph. … She denied – in fact, in essence, she denied knowledge of the photographs, although it is a bit oblique. Because she didn't – she recognised the content, but not necessarily the fact of the photograph being on there because it wasn't explored further. So the photo could not – cannot go in through the prosecution, which would have been the easiest way to do it regardless of what then was to be made of it. Mr Chan now has the hurdle that he's got to actually have the photo before the court admissibly and then he has the issue of what (he) makes of it. …And I looked -- I was trying to analyse how that could be done. Even although it comes from a computer or a digital piece of technology, clearly there is a photograph. And so trying to balance the two sides, I cannot see how it is that if there can be an agreement between the parties, the fact of the photograph and the image of the photograph should not be admissible before the jury, given that it can be considered to be a real exhibit once produced and … in this day and age, so long as you know where it's come from, the provenance -- the digital provenance of it is known, then for that purpose and that purpose alone I cannot (see) a difficulty. The difficulty will be that without the agreement of the prosecution, you might have difficulty trying to get that in because you're going to then have to have somebody else come and give evidence saying, "I accessed the phone. I took a picture of what I saw on the phone. This is what I saw." So what I currently see as MFI-5A, I can see that, as a real exhibit, as a photograph of something on the phone. … But you couldn't be precluded from being able to use that or to adduce it in your case. However, that's where my analysis stops because there is no way that I can find which you could produce MFI-5B because that contains digital evidence. … You said at the beginning of your

[29] AB, pp 321C-322M.

> application that you cannot fall under 22, 22A, 22B. … There is no way you are able to fall within that."

24. She continued[30]:

> "If it is considered to be akin - the production of it off the phone -- akin to having a real exhibit, that's all you could do with it. Because you cannot say when it was made, or who it was made by. And you would be at risk of my direction to the jury in any event, which is, as with all telecommunications, even with the correct certificate from the prosecution or defence, you do not know which human being was actually accessing this. You do not know who actually took the photograph, how it came to be on the phone, how, if it was, it left the phone. You know nothing of that. And you may not speculate about it. All you know is simply that there appears to be a picture of some red boxer shorts. You don't even know if it's the same red boxer shorts. You just know, that is a photograph of some red boxer shorts. And I cannot see that you would be admissible he able to do anything other than that with it.
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> That's my thought process at the moment if it would be produced simply as showing that there was a photograph on this phone. Because I don't see how -- because you can't prove its admissibility in digital computerised form, you can't go further than that. That would be the difficulty and therefore you would be in other difficulty as to the speculation that you'd want or the conjecture, might be a better word, with what you want to seek to put it to. So that's as far as I got in my thought process on admissibility because I'm very conscious that I must not enter into the field of the jury in terms of being a judge of fact."

25. Inasmuch as we understand the judge's reasoning at all, she appears to have thought that the defence could only produce the photograph on the telephone if it complied with section 22A, so as to make it admissible. And, as she further made clear, if it was to be adduced as a real exhibit (even though the witness had already completed her evidence the previous week), she would give a direction to the jury not to speculate about the contents. The foundation for the judge's thinking seems to have

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[30] AB, pp 322T-323J.

been her understanding that the witness was saying she did not take the photograph of the red-chequered boxer shorts on her telephone. In fact, as even the judge observed, the question of whether Ms X took the photograph *on* her telephone rather than the photograph *of* the telephone with its screen display was never explored, despite the witness's rather ambivalent answers. But as, the above passages from the transcript make clear, that was because the judge would not allow it to be explored further. Consequently, it remains unclear whether Ms X was in fact denying taking the photograph of the red-chequered boxer shorts found on her telephone; or merely making the point that she did not take the photograph of someone holding her telephone with the boxer shorts displayed on her telephone, namely MFI 5A. This confusion was caused and exacerbated by the judge's refusal to allow a legitimate line of enquiry of Ms X.

26. The problem was unfortunately compounded by prosecuting counsel's somewhat compliant and extraordinary position which, when he was finally asked to state it, was[31]:

> "So it's my position, a piece of real exhibit as it is relevant, to a certain extent it's relevant because there is such a thing, it might affect the case, but the potential danger of unfairness to both sides actually and the effect on the jury is so -- prohibitively so low and prejudice so high that it is a situation whereby your Ladyship should exercise your discretion not to allow it to go in."

The first part of this submission seemed to accept that the photograph was a piece of real evidence, which was relevant to the case. The latter part, however, suggested that it was more prejudicial than probative and thereby inadmissible. We shall return to this submission in due course.

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[31] AB, p 325Q-S.

Grounds of appeal against conviction

27. Mr Eric Cheung, who now appears as solicitor-advocate for the applicant upon conviction, has argued two grounds of appeal: firstly, it is said that the photograph of some red-chequered boxer shorts found on Ms X's telephone not only cast doubt on her evidence but supported the defence case (Ground 1); secondly, there was a material irregularity in the trial when the judge refused to allow defence counsel to cross-examine Ms X on the said photograph (Ground 2).

28. On 20 April 2022, following the filing of the applicant's perfected grounds of appeal and written submissions, the Cyber Security and Technology Crime Bureau of the Hong Kong Police retrieved the red-chequered boxer shorts photograph and the WhatsApp message attaching the said photograph, together with its metadata, from Ms X's mobile telephone and provided the evidence to the applicant's solicitors. This new evidence shows that the photograph of the red-chequered boxer shorts was attached to a WhatsApp message, which was sent from Ms X's telephone to a person identified as "Anna topdragonagency" at 11:01 am on 21 October 2017. The significance of the time was that it would have been sent after the alleged rape but before the police arrived.

29. On 17 May 2022, by way of a notice of motion, the applicant applied for leave to adduce fresh evidence by way of affidavit of the senior partner of the applicant's firm of solicitors, Mr Ludwig Ng Siu Wing, attaching a bundle of correspondence between his firm and the Department of Justice, as well as the photograph of the red-chequered boxer shorts retrieved from Exhibit P24. Also sought to be adduced was

an affirmation of Ms Jeanie Fung, a research assistant with the Clinical Legal education office of the University of Hong Kong, suggesting that the photograph must have been taken with the WhatsApp camera function of the telephone and sent to the recipient rather than being taken by the telephone's normal camera function.

30. It was submitted that since Ms X's evidence had been that she was the only person using her telephone during the morning of 21 October 2017, the new evidence proved that contrary to her sworn evidence, it was she who had taken the photograph of the red-chequered boxer shorts and sent it from her telephone to another. Since the fresh evidence was credible, it ought to have been admissible at trial; it was relevant to an issue in the appeal; there was a reasonable explanation for the failure to adduce it in the court below because the judge had refused to admit it through her misunderstanding of the law; and the Court could be satisfied that it afforded a ground of appeal. Accordingly, it was in the interests of justice to admit the fresh evidence.

Respondent's reply

31. Ms Audrey Parwani, on behalf of the respondent, submitted the judge was correct that, with the lack of expert evidence, the provenance of the photograph of the red-chequered boxer shorts on the telephone was unclear, and that authenticity was in issue given Ms X's apparent denial that she took the photograph. Her position was that, in view of Ms X's answers in cross-examination, the issues of authenticity and provenance of the photograph in question had not disappeared.

Discussion

32. We should begin by laying down this marker for future argument. Although we invited both Mr Cheung and Ms Parwani to consider the issue of whether a photograph is to be regarded as documentary evidence within the meaning of section 22A, given that "Photographs and films are excluded from the definition of a 'statement' for the purposes of the (kindred) provisions relating to hearsay in (section 115(2) of the Criminal Justice Act, 2003) but are admissible at common law as a variety of real evidence"[32], neither sought, or was prepared, to argue the matter. We think it is arguable that a photograph (or film) is not "a *statement* contained in a *document* produced by a computer" for the purposes of section 22A, as the italicised terms are defined in section 46 of Part IV of the Evidence Ordinance; even though the term 'statement' is slightly more widely defined in the Evidence Ordinance than in the same provision in the United Kingdom. In the absence of argument, we were not prepared to find on this issue and have assumed, for present purposes, that photographs (and films) do come within the definition of section 22A, since the argument ultimately makes no difference to our resolution of this appeal.

33. We were prepared to admit all of the fresh evidence sought to be adduced. It is worth observing that even at trial, Mr Chan had explained to the court, without demur from prosecuting counsel, that he had understood from the prosecution "that if the photograph was in fact taken from the photograph stored in the victim's mobile phone they would

[32] See *Blackstone's Criminal Practice (2022)*, at [F8.61].

agree to the production of the photograph"[33]. Indeed, we question how the prosecution could not have known about the existence of the photograph of the red-chequered boxer shorts on Ms X's telephone, since they had chosen to include in the admitted facts several other screenshot messages and photographs from her telephone taken at the relevant time on 21 October 2017[34]. The prosecution may not necessarily have seen the significance of the photograph of the red-chequered boxer shorts, although that would be somewhat surprising given that the prosecution case was that semen from the applicant was found on a very similar pair of red-chequered boxer shorts. In any event, by the time of the trial, Ms X's telephone had been separated from its battery and rendered unusable.

34. Plainly, the photograph was relevant to an issue: indeed, it was highly relevant to the defence case as put to the witness, whatever one may think of the merits and likelihood of that case. Had prosecuting counsel been encouraged by the judge to assist the defence in accessing the telephone and, if necessary, agreeing to the existence of the photograph in question, instead of being deterred and discouraged by the judge's views on admissibility and the need to apply section 22A, this matter could have been easily resolved so as to canvass it with the witness at trial and we would not have been confronted with this ground of appeal.

35. However, we must address the question of admissibility because the judge appears to have been labouring under a fundamental misunderstanding of the law in relation to the nature and application of section 22A (assuming that it even applies to photographs and films[35]).

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33 AB, pp 332T-333A.
34 AB, pp 8-9, at [3] and [4].
35 See [32] *supra*.

Unfortunately, it was this misunderstanding which led her to take the case off in a wholly unwarranted direction and ultimately to prevent the defence from adducing evidence, which was obviously an important part of their case, and which they were perfectly entitled to adduce.

36. It is important to understand that section 22A is an exception to the common law rule against the admission of hearsay evidence and provides for the admissibility of a statement contained in a document produced by a computer in any criminal proceedings as *prima facie* evidence of any fact stated in it. There are two requirements: the first is that only direct oral evidence of that fact would be admissible in those proceedings (subsection (1)(a)); the second is that the conditions in subsection (2) are satisfied in relation to the statement and the computer (subsection (1)(b)).

37. The complete section provides as follows:

> "22A. **Documentary evidence in criminal proceedings from computer records**
>
> (1) Subject to this section and section 22B, a statement contained in a document produced by a computer shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if—
>
> (a) direct oral evidence of that fact would be admissible in those proceedings; and
>
> (b) it is shown that the conditions in subsection (2) are satisfied in relation to the statement and computer in question.
>
> (2) The conditions referred to in subsection (1)(b) are—
>
> (a) that the computer was used to store, process or retrieve information for the

purposes of any activities carried on by any body or individual;

(b) that the information contained in the statement reproduces or is derived from information supplied to the computer in the course of those activities; and

(c) that while the computer was so used in the course of those activities—

(i) appropriate measures were in force for preventing unauthorized interference with the computer; and

(ii) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.

(3) Notwithstanding subsection (1), a statement contained in a document produced by a computer used over any period to store, process or retrieve information for the purposes of any activities (***the relevant activities***) carried on over that period shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if—

(a) direct oral evidence of that fact would be admissible in those proceedings;

(b) it is shown that no person (other than a person charged with an offence to which such statement relates) who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities—

(i) can be found; or

(ii) if such a person is found, is willing and able to give evidence relating to the operation of the computer during that period;

(c) the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information; and

(d) at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents,

but a statement contained in any such document which is tendered in evidence in criminal proceedings by or on behalf of any person charged with an offence to which such statement relates shall not be admissible under this subsection if that person occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities.

(4) Where over a period the function of storing, processing or retrieving information for the purposes of any activities carried on over that period was performed by computer, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose whether by one or more persons or bodies during that period shall be treated for the purposes of this section as constituting a single computer.

(5) Subject to subsection (6), in any criminal proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate—

(a) identifying the document containing the statement and describing the manner in which it was produced, and explaining, so far as may be relevant in the proceedings, the nature and contents of the document;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall, on its production without further proof, be admitted in those proceedings as prima facie evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(6) Unless the court otherwise orders, a certificate shall not be admitted in evidence under subsection (5) unless 14 days' notice in writing of the intention to tender such certificate in evidence, together with a copy thereof and of the statement to which it relates, has been served—

(a) where the certificate is tendered by the prosecution, on the defendant (or, if more than one, on each defendant) or his solicitor;

(b) where the certificate is tendered by a defendant, on the Secretary for Justice,

but nothing in this subsection shall affect the admissibility of a certificate in respect of which notice has not been served in accordance with the

requirements of this subsection if no person entitled to be so served objects to its being so admitted.

(7) Notwithstanding subsection (5), a court may (except where subsection (3) applies) require oral evidence to be given of any of the matters mentioned in subsection (5).

(8) Any person who in a certificate tendered in evidence under subsection (5) makes a statement which he knows to be false or does not believe to be true shall be guilty of an offence and shall be liable on conviction to a fine at level 5 and to imprisonment for 2 years.

(9) For the purposes of this section—

(a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored, processed or retrieved for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(10) The Criminal Procedure Rules Committee constituted under section 9 of the Criminal Procedure Ordinance (Cap. 221) may make rules with respect to the procedure to be followed under this section.

(11) Nothing in this section affects the admissibility of a document produced by a computer where the

document is tendered otherwise than for the purpose of proving a fact stated in it.

(12) Subject to subsection (4), in this section ***computer*** (電腦) means any device for storing, processing or retrieving information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

(13) The Legislative Council may by resolution amend subsection (12) so as to make it cover devices performing functions of a similar character to the functions performed by the devices mentioned in that subsection."

38. Section 22B(4) of the Evidence Ordinance prescribes that 'document' and 'statement' in section 22A have the same meanings as in Part IV of the Ordinance. Section 46 of Part IV defines 'document' and statement as follows:

"**document** (文件) means anything in which information of any description is recorded;

…

statement (陳述) means any representation of fact or opinion however made."

39. In any given case where a computer generated document is adduced as evidence, the question may arise whether the rule against hearsay is engaged. However, such issue will depend on whether the computer generated document is tendered for the purpose of proving the truth of any fact (or facts) asserted in the document. The rule against hearsay will not be engaged, and hence section 22A will have no application, if the computer generated document is tendered otherwise than for the purpose of proving a fact stated in it (subsection (11)).

40. Even in circumstances where section 22A applies but is not satisfied, a computer generated document may be admissible as real evidence and, accordingly, no hearsay issue arises: see *Phipson on Evidence (20th Ed.)*, [28-28 to 30].

41. The defence case was that there was, stored on Ms X's telephone, a photograph of some red-chequered boxer shorts lying on top of a computer keyboard inside a room. Accordingly, defence counsel was clearly entitled to ask her whether there was in fact such a photograph on her telephone. If, instead of a telephone, Ms X had had a purse or a photograph album in her possession, it would have been entirely open to defence counsel to ask if she had such a photograph in her purse or photograph album, assuming that it was first established that it was her purse or her photograph album. The photograph would have been real evidence and it was perfectly proper for the defence (or prosecution) to explore as a fact whether she had such a photograph in her possession; and if so, whether she had taken it.

42. At this stage of the proceedings, the only issues were relevance and authenticity. It was held by this Court in *Lee Chi Fai & Others*, which authority, it may be noted, is also cited in *Phipson on Evidence (20th Ed.)*[36], following the decision of the Court of Appeal of Northern Ireland in *R v Murphy*[37], in respect of video recordings (to which the same principles would apply for photographs), that[38]:

> "The proper approach to be adopted for admitting evidence in the form of tape recordings, was for the judge to ask first, whether it was relevant. If so, then the question was whether it

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36 *Phipson on Evidence (20th Ed.)*, at [41-09, footnote 90].
37 *R v Murphy* [1990] NI 306.
38 *Lee Chi Fai & others*, headnote (1).

> was *prima facie* authentic, made out by evidence which defined and described the provenance and history of the recordings up to the moment of production in court. If it was *prima facie* authentic, then it was admissible. Any attack thereafter could only go to weight, which might embrace further enquiries into its authenticity, its provenance and history, whether it was an original, and if not, how it came to be copied. It was then for the jury to decide whether its authenticity was beyond doubt and if its contents proved or added to the proof of guilt beyond reasonable doubt…"

It was clearly this passage and principle that defence counsel had in mind when he addressed the judge on admissibility[39].

43. In *HKSAR v Wong Cho Shing & Others*[40], this Court applied *Lee Chi Fai & Others* and said of this passage[41]:

> "However, we would respectfully suggest that the better and more logical way of putting the approach to admissibility so as to avoid the perception of circularity, since relevance depends on authenticity which depends on relevance, is summed up in *R v Quinn*[42], a later decision of the Court of Appeal of Northern Ireland which applied *Murphy*, namely:
>
> > 'The first step is to determine whether the material shown on video would, if authentic, be relevant.'"

44. The defence were seeking to use a particular image on Ms X's telephone to challenge her evidence that she had only seen the red-chequered boxer shorts in the laundry basket but had not handled or moved them. If the defence wished to refer the witness to a particular photograph on her telephone, all they needed to do was establish its relevance (which even prosecuting counsel had conceded at trial) and its *prima facie* authenticity. Ms X had confirmed in evidence that the mobile

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39 See [21] *supra*; AB, p 298K-L.
40 *HKSAR v Wong Cho Shing & Ors* [2019] 4 HKC 401.
41 *Ibid.*, at [80].
42 *R v Quinn* [2011] NICA 19, at [12].

telephone in question was her mobile telephone[43]; and, in any event, it was an admitted fact that Exhibit P24 was "the mobile phone used by (Ms X) at all times material to this case"[44]. The fact that the image was stored on a telephone which Ms X accepted was hers would have been sufficient at that stage to establish its admissibility, and no question of section 22A arose.

45. Accordingly, the defence were perfectly entitled to ask why such a photograph, depicting a pair of red-chequered boxer shorts, should have been on her telephone; whether she had taken the photograph and sent it to anyone by way of the WhatsApp messaging system; when she had sent it; and why. Again, no issue of hearsay was raised by any of these inquiries and, consequently, section 22A was not engaged.

46. There should in fact have been no dispute that there was an image of a pair of red-chequered boxer shorts on a computer keyboard in the WhatsApp function of Ms X's mobile telephone. Nor should there have been any issue that the image was recorded as having been sent to "Anna topdragonagency" on 21 October 2017: the existence of this message has since been confirmed to the Court by the respondent. As we have observed, the fact of other images and messages, and the times they were sent and received and by whom, had been adduced into evidence by way of admitted facts[45] and were not in dispute.

47. The true scope and purpose of section 22A has in fact been fully explained and well-settled by the Court of Final Appeal in *HKSAR v*

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43 AB, pp 265T-266B.
44 AB, p 8, at [2].
45 AB, pp 8 at [3] to 9, at [4].

Lau Shing Chung Simon[46], so it is somewhat surprising that no reference was made to this authority by anyone at trial once the judge had raised the issue of its application. The relevant part of the judgment of Stock NPJ, who gave the judgment of the Court, deserves setting out in full for the clarity of its exposition:

> "23. Section 22A provides an exception to the common law rule against the admission of hearsay evidence. The common law rule renders evidence of an out-of-court assertion inadmissible where the evidence is tendered to prove the truth of the assertion; but where a statement contained in a document produced by a computer is tendered as evidence of the truth of facts stated in the document, it is admissible for that purpose provided that the conditions stipulated by s.22A(2) are met. Fulfilment of the conditions is not required in the case of a computer-produced document tendered otherwise than as evidence that a statement in it was true. That this is so is evident from the phrase "as *prima facie* evidence of any facts stated therein" in sub-s.(1) and from the terms of sub-s.(11). This analysis of the effect of s.22A and of the circumstances in which it is operative accords with the analysis of ss.22 and 22A of the Evidence Ordinance in *Secretary for Justice v Lui Kin Hong*[47].
>
> 24. Since s.22A applies as an exception to the common law rule against the admission of hearsay evidence, the question which first arises is whether the common law rule was engaged in this case. We are satisfied that it was not. The applicant did not seek to rely upon the messages as evidence of the truth of any facts stated in them. Instead he relied on the messages to show that the statements in them were made and, thereby, the effect on his state of mind when he used violence on the occasion of the alleged offence.
>
> 25. If we take as an example the message which read: "When you push her, pay attention to me", the appellant wished to adduce that in evidence to show that the statement had been made by Ms Yau and that, in reliance upon it and other matters, he, rightly or wrongly, but nonetheless honestly, believed that he had Ms Yau's consent to use limited violence upon her whenever she appeared to him to be "possessed". On his view of it, the

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46 *HKSAR v Lau Shing Chung Simon* (2015) 18 HKCFAR 50.
47 *Secretary for Justice v Lui Kin Hong* (1999) 2 HKCFAR 510.

statement amounted to a request as to the future and there was no assertion of fact in it upon the truth of which he sought to rely.

26. It follows that in finding that the records were inadmissible as infringing the common law rule against hearsay and that their admissibility depended upon compliance with the conditions stipulated by s.22A(2) of the Evidence Ordinance, the Magistrate erred.

27. The error illustrates an occasional misapprehension as to the ambit of the rule against hearsay testimony. The misapprehension is that the rule always forbids evidence of what somebody has declared, orally or in writing, out of court. That is not the rule.[48] The rule is that, subject to certain common law and statutory exceptions:

> … an oral or written assertion, express or implied, other than one made by a person in giving evidence in court proceedings is inadmissible *as evidence of any fact or opinion so asserted*.[49] (Emphasis added.)

28. The reach of the rule may more readily be understood if the rationale for it were better appreciated. The rationale is a concern for the probative value of out-of-court statements. Sometimes the circumstances in which an out-of-court declaration is made are deemed to confer sufficient inherent reliability as to render the declaration admissible to prove the truth of what is declared[50] and it is upon that reasoning that the common law and statutory exceptions are based. In other circumstances, however, the probative value of evidence of a fact in issue is said to be materially undermined where it cannot be tested by cross-examination and it is the inability to cross-examine the declarant to test the accuracy of his out-of-court statement that lies at the heart of the general rule.

29. The reason for the rule was stated by Lord Normand in *Teper v R:*

> It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light, which his demeanour would throw on his testimony, is lost.[51]

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48 See *Kamleh v The Queen* (2005) 79 ALJR 541, at 544.
49 *Oei Hengky Wiryo v HKSAR (No 2*) (2007) 10 HKCFAR 98, at [35].
50 For example, dying declarations or statements against interest.
51 *Teper v R* [1952] AC 480, at 486.

> 30. From that rationale flows the principle against proving facts asserted by someone other than a person who testifies. But where a witness merely asserts that a statement has been made by another and thereby seeks to prove no more than that the statement was made, the witness is testifying as to a fact of which he can directly speak and about which he can be tested, in precisely the same way as he can speak and be tested as to something which he says that he himself has observed.
>
> 31. Therefore, as McHugh NPJ explained in *Oei Hengky Wiryo v HKSAR (No 2):*[52]
>
> > To determine whether the hearsay rule has been breached, it is necessary to determine the purpose for which evidence of an out-of-court statement is tendered. An out-of-court statement made in the absence of a party is not necessarily inadmissible. As long as its contents are not relied on to prove a fact recited or asserted, it will be admissible if it tends to prove a fact in issue or a fact relevant to a fact in issue.
>
> 32. The same principles apply to the production of a document in so far as the document expressly or impliedly makes a statement or statements. "The hearsay rule never makes a document as such inadmissible. It is only inadmissible for a particular purpose, namely, as evidence that a statement which [it] contains is true. If it is relevant to an issue in some other way, it is admissible for that purpose": *per* Lord Hoffmann NPJ in *Secretary for Justice v Lui Kin Hong*.[53]
>
> 33. In this case, had the question been addressed, namely, for what purpose or to prove what fact were the records tendered, the error as to their admissibility would, we suggest, have been avoided."

48. To paraphrase Stock NPJ in the last paragraph of the above passage, if we ask for what purpose, or to prove what fact, was MFI 5A tendered, the answer would surely be in order to ask Ms X whether she had a photograph on her telephone of some red-chequered boxer shorts lying on a computer keyboard, why it was there, why she should have sent that photograph to another person, and when she did so; given her evidence that

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52 *Oei Hengky Wiryo*, at [39].

53 *Secretary for Justice v Lui Kin Hong*, at 526.

she had never touched the applicant's red-chequered boxer shorts in the linen basket. We do not see how section 22A, assuming it was even applicable, was conceivably engaged by this line of enquiry.

49. Unfortunately, as often happens when a judge enters the arena prematurely and without a proper grasp of the applicable law, a correct interpretation of the evidence or a full appreciation of the issues which are sought to be established by counsel, the case was taken off in a direction it never needed to go. As we have pointed out, the photograph shown to Ms X was MFI 5A, a photograph of someone holding her telephone, which at the time was displaying another photograph of some red-chequered boxer shorts lying on top of a computer keyboard in a room. The witness was handed MFI 5A and asked if she knew who took the photograph, whereupon the judge intervened to repeat the question, which drew the answer, "I don't know who took that photo, *but I* ...". The judge immediately cut her off and asked, "So did you take the photograph?", which merely added to the ambiguity and confusion, since she never made clear whether she was talking about MFI 5A or the photograph displayed on her telephone. To this question, the witness answered "No, *I only took photo*..." and was again not allowed to finish her answer or explain what photograph she had taken. Despite the fact that the witness was obviously twice about to clarify something, the judge then immediately summarised her understanding of Ms X's evidence on the point as follows: "…so she's just saying no, she didn't take the photograph. All right"[54]. With respect, it was not clear which photograph was actually being referred to, or what the witness was intending to say. What happened thereafter all

[54] AB, p 267R.

derived from the judge's misapprehension of this somewhat unsatisfactory and truncated evidence.

50. Although the witness was never allowed to complete her answers, it seems rather obvious that she was endeavouring to explain that she did not take the photograph of someone holding her telephone but had only taken the photograph displayed on the telephone itself. Had that been her evidence, as we think may well have been the case, not merely from the terms of her twice interrupted answers but from the fresh evidence now sought to be introduced (with which the respondent takes no issue as matters of fact), there would have been no need at all for the judge's intervention, and certainly no necessity for the pages of argument which followed; because section 22A would in the circumstances have been completely irrelevant.

51. We would remind judges of the wisdom of Lord Chancellor Bacon that "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal", cited by Denning LJ (as he then was) in *Jones v National Coal Board*[55]; an authority that was similarly concerned with judicial intervention that prevented a party from properly putting their case.

52. Ultimately, the fact that the witness took the photograph of the red-chequered boxer shorts may or may not have helped the defence, except that defence counsel would then, of course, have been able to ask why the boxer shorts were not in the linen basket when Ms X had earlier said she had not touched them; for which the witness may have had a

[55] *Jones v National Coal Board* [1957] 2 QB 55, at 64.

perfectly credible answer. That perceived inconsistency was, of course, one of the purposes of this line of cross-examination. However, it was more than that: establishing that the witness had touched the red-chequered boxer shorts was an important stepping stone to the defence case put in cross-examination that Ms X had taken hold of the boxer shorts and rubbed the applicant's semen onto her own clothing and bedsheet. We will never know why there was a pair of red-chequered boxer shorts stored on Ms X's telephone because defence counsel was never allowed to ask the question. As a result, the applicant was never able to fully put his case.

53. But even if the witness had said she did not take the photograph of the red-chequered boxer shorts, she could still have been asked if she could explain why the image should have been on her telephone. Only if there had been some issue over the authenticity of the image, on which the defence were relying to establish that it showed the boxer shorts in question, would section 22A have needed to be engaged, assuming it was applicable[56]. Had that been the case, which defence counsel clearly had not anticipated from his discussions with prosecuting counsel, the judge could have easily adjourned the case, this whole issue having only surfaced at about 3:30 pm on a Friday afternoon, for the defence to seek to comply with section 22A; or better still, to have agreed an admitted fact with the prosecution, since, as we have said, the prosecution ought to have known that the photograph in question had been found on Ms X's telephone. We cannot conceive of any prosecutor resisting such an approach, especially when the parties had already agreed to a raft of other messages and photographs taken from the same telephone.

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[56] See [32] *supra*.

54. As for prosecuting counsel's position at trial, we do not understand it. Having conceded that the existence of the photograph of the red-chequered boxer shorts on Ms X's telephone was real evidence and that it was relevant, he then seemed to argue that its production was more prejudicial than probative. We ask how it could conceivably have been prejudicial to the defence, who were seeking to adduce the evidence in support of a vital allegation in the applicant's case. As for any prejudice to the prosecution, Ms X may well have had a perfectly plausible explanation for the photograph on her telephone. Even if she did not, the issue was one of credibility which was hardly the end of the prosecution case. Unfortunately, the witness was never allowed to explain the photograph, which plainly prejudiced the effective presentation of the applicant's case before the jury.

55. The applicant was entitled to cross-examine Ms X in respect of her mobile telephone and the messages it contained. Section 22A did not, in our judgment, apply. It was, therefore, with respect, wrong for the judge to prevent defence counsel from cross-examining Ms X on this matter. The only circumstances in which section 22A might conceivably have arisen is if the witness had contended that the image of the red-chequered boxer shorts was not in fact on her telephone or was nothing to do with her; the implication being that it had been deliberately put into her telephone by someone else at some stage without her knowledge.

56. Even when a point is reached where the rule against hearsay is engaged, the court may give a party the opportunity to satisfy the requirements of section 22A and, if necessary, waive the notice and service requirements as provided in the section: see subsection (6). However, the

judge believed that section 22A had to be satisfied but refused to consider any remedial measures to address the issue, even though there was no dispute that the telephone belonged to Ms X; and when other images and messages it contained had been accepted to be relevant and authentic.

57. We are bound to say we think it regrettable that the judge handled this matter in the way that she did. Not only was her perception of the evidence inaccurate and premature, since she did not allow it to develop properly when the witness clearly wanted to explain something in relation to the photographs, but her understanding of the law and its application was unfortunately incorrect and misapplied.

58. We would remind judges to be cautious of when and how they intervene during proceedings, particularly during the evidence of a vital witness. In *R v Hulusi & Purvis*[57], the Court identified the types of intervention which might lead to the unsettling of a conviction[58]:

> "It is now well established how, when complaints of this kind are made about the conduct of a trial judge, this Court should approach the questions which have to be resolved. There have been a number of judgments. The leading one is that of Lord Parker CJ in the case of *Hamilton*, which was dealt with in this Court on June 9, 1969. This case has never been reported in any of the well-known series of Law Reports. Fortunately the problems which arise in this case were anticipated by the Registrar and counsel for the appellants was provided with a transcript of Lord Parker's judgment. The kernel of the judgment is in these terms: 'The second and the real ground for the appeal in the present case concerns these interventions. Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. Not only is it wrong but very often a judge can do more harm than leaving it to experienced counsel. Whether his interventions in any case give ground for quashing a conviction

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57 *R v Hulusi & Purvis* (1974) 58 Cr App R 378.
58 *Ibid.*, at 381-382.

> is not only a matter of degree, but depends to what the interventions are directed and what their effect may be. Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really threefold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury and you, the members of the jury, must disregard anything that I, the judge, may have said with which you disagree. The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.'"

Hulusi & Purvis, and *R v Hamilton*[59] which it applied, were approved by this Court in *R v Tam Chi-pang and Others*[60] and, more recently, in *HKSAR v Lai Oi Yan*[61].

59. We regard the complaint in the case before us as coming within the second of Lord Parker's classifications in *Hamilton*, because the judge's intervention in fact rendered it impossible for the defence to put before the jury a vital piece of admissible evidence, the significance of which ought to have been obvious to everyone, particularly when defence counsel put his case to Ms X that she had wet the applicant's red-chequered boxer shorts and transferred semen from them to her clothing and bedsheet.

60. However, we think the judge's interventions also engaged the third of Lord Parker's classifications because the applicant, who was later to give evidence before the jury, was effectively prevented from showing

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59 *R v Hamilton* (1969) Crim LR 486.
60 *R v Tam Chi-pang* [1986] 1122, at 1127.
61 *HKSAR v Lai Oi Yan* [2016] 3 HKLRD 273, at [69].

that somehow the red-chequered boxer shorts had gone from the blue linen basket in the bathroom to the computer keyboard as revealed by a photograph found in Ms X's possession. Indeed, we think the applicant may well have been able to say, particularly if he only possessed one pair of red-chequered boxer shorts, that the boxer shorts in question and the ones depicted on her telephone were one and the same; in which case authenticity should have been even less of an issue. He would also have been able to identify the computer keyboard and the room in which the photograph was taken. In *Wong Cho Shing & Ors*, for example, the witness Tsang was able to identify himself in the open source photographs and video recordings, as a result of which the Court held that "Tsang's evidence, standing alone, would have been capable, if believed, of establishing a *prima facie* basis of authenticity for the photographs and video recordings"[62].

61. We are satisfied on the principles stated above that the conviction must be set aside as unsafe and unsatisfactory because defence counsel, despite his valiant efforts to put a piece of relevant and admissible evidence, which was vital to the proper presentation of his case, to Ms X, was prevented from doing so by the judge, who held a misguided belief that section 22A had to be complied with before it could be admitted, when the provision was simply not relevant or applicable; certainly not at that stage of proceedings, if ever.

62. However, we must emphatically take issue with the allegation made by Mr Cheung and Mr Ng in their letter to the Department of Justice dated 7 March 2022, that the mere existence of the photograph of the

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[62] *Wong Cho Shing & Ors*, at [96].

red-chequered boxer shorts on her telephone suggests that Ms X may have perjured herself. With respect, Ms X was evidently doing her best to clarify the position when confronted with MFI 5A, something which she had never seen before, but, unfortunately, she was never allowed to do so. Had she been permitted to explain and distinguish, as it seems to us she was trying to do, between the photograph *of* the telephone and the photograph *on* the telephone, we think this matter would never have culminated in a ground of appeal. Unfortunately, the whole issue became mired in a swamp of irrelevant and unnecessary legal argument at the judge's behest.

Conclusion

63. The conviction is accordingly quashed and the sentence set aside. Given the seriousness of this offence, involving an allegation of rape by someone in a position of trust, we invited the prosecution to make submissions on the question of retrial. However, we were informed by Ms Parwani that Ms X has already returned to Indonesia and no application for a retrial was made by the respondent. Accordingly, we made no order as to retrial.

64. We should nevertheless state that it is a matter of great regret that this trial was not properly conducted and resolved in accordance with the law. Ms X had a clear interest, as an alleged victim of serious crime, in seeing that justice was done. Justice required, among other things, that the defendant be permitted to present his case fully and fairly before the jury so that there could be a final adjudication as to whether he was guilty or not guilty of the crime alleged upon a consideration of all relevant and

admissible evidence. Neither Ms X nor the applicant have been well served by the exercise of justice displayed in this case. Nor have the public, who are entitled to expect serious criminal cases to be conducted in accordance with a correct appreciation and application of the law; and to have confidence that prosecutors, who are ministers of justice, are likewise familiar with the relevant law, so as to be in a position to correct judges when it becomes necessary.

(Andrew Macrae)	(Kevin Zervos)	(Maggie Poon)
Vice President	Justice of Appeal	Justice of Appeal

Ms Audrey Parwani SPP, of the Department of Justice, for the Respondent

Mr Eric Cheung, solicitor advocate and Mr Gordon Chan, instructed by ONC Lawyers, for the Applicant (re: Conviction)

Mr H Y Wong, instructed by Ong & Chung, assigned by the Director of Legal Aid, for the Applicant (re: Sentence)