STEPHENSON HARWOOD

Wei Tu China Association
罗夏信-伟途 联营

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HONG KONG COURT OF FINAL APPEAL AFFIRMS THE RIGHT OF SILENCE

INTRODUCTION

The right of silence in criminal proceedings is ingrained in the common law and given express protection in Article 11 of the Hong Kong Bill of Rights Ordinance where it is stated:

"(1) *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

(2) *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality – …*

(g) *not to be compelled to testify against himself or to confess guilt.*"

The above are part of the presumption of innocence which dictates the burden of proving guilt in criminal cases rests exclusively on the prosecution. Compelling an accused to testify in their own defence is inconsistent with that burden meaning a defendant is not required to give evidence or say anything against their own interest and a defendant can decline to be a witness against themself.

Such matters were recently considered by Hong Kong's Court of Final Appeal ("**CFA**") in *HKSAR v Huang Ruifang* [2026] HKCFA 3 where the Court took the opportunity to reaffirm that the right remains one of the core protections to Hong Kong defendants.

FACTS

Ms Huang was arrested in 2017 at Hong Kong International Airport upon arrival from Brazil in possession of two suitcases which contained nine cans of liquid cocaine. On arrest she asserted she did not know that she was carrying dangerous drugs. Ms Huang thought the cans contained acai juice, as they had been labeled and as she had been told by her acquaintance, for whom she was bringing the cans into Hong Kong.

During her trial, Ms Huang did not testify in her defence or call any witnesses. She was convicted by the jury and sentenced to 27 years 10 months imprisonment[1].

In his closing submissions, the prosecuting counsel said:

"*Now, remember suspicion is not enough. If you only suspect that the defendant had committed the crime that is not enough. You must give the benefit of the doubt to the defendant and you must acquit her. As the learned judge also said, the defendant needs not prove her innocence. She needs not prove anything. She needed not to give evidence. She needed not to call any defence witnesses and she only exercised her right not to give evidence and*

[1] This sentence was reduced on appeal to 25 years' imprisonment.

not to call any defence witnesses and no adverse inference can be drawn against her. The burden is all along on me, on the prosecution, ***but the fact remains the defendant did not give evidence****. …*

I did not have the opportunity to cross-examine the defendant. I cannot ask her any questions. *I did not because she elected not to give evidence and* ***I am unable to test her credibility to test whether she is an honest person, to test about her reliability, whether what she says would be reliable. I have no such opportunity.*** *But in any event, of course she had chosen to speak up in the video-recorded interview, but it is my position and it is my case that the defendant had not told you the truth and/or the whole truth about her story."*

*Ms Huang appealed alleging there was a miscarriage of justice as the comments were a breach of her right of silence and also section 54(1)(b) of the Criminal Procedure Ordinance ("***CPO***") which stipulates a failure of a defendant to give evidence "shall not be made the subject of* ***any comment*** *by the prosecution…".*

COURT OF APPEAL

The appeal was dismissed by a majority decision[2]. In the dissenting judgment Zervos JA stated that the closing remarks amounted to a comment on the failure of Ms Huang to give evidence (in breach of the CPO) implying she did not give evidence because she was guilty and that would have affected the jury.

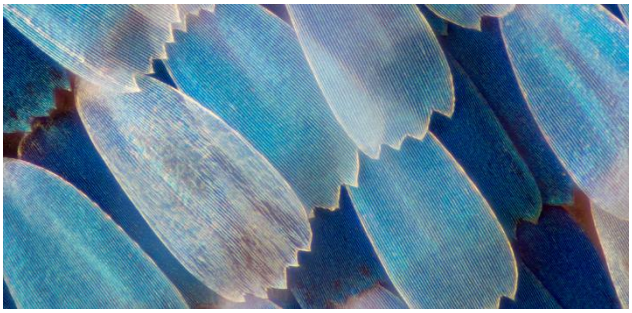
CFA

The CFA unanimously upheld Ms Huang's appeal, directing she be retried[3].

The CFA held that submissions by prosecution counsel that are restricted to pointing out the fact that statements made by a defendant out of Court (for example when arrested like with Ms Huang) were not made under oath nor subjected to cross-examination and while they were still evidence, they may therefore be considered to carry less weight than the evidence of a witness given under oath in Court. Comments along such lines, the CFA pointed out, will not be about the failure of a defendant to give evidence, so do not breach section 54(1)(b) of the CPO.

However, the CFA also pointed out when making such comments great care was needed not to link them with anything else which might suggest the defendant had a choice whether to testify and had chosen not to do so.

Applying the above to this matter, the CFA held that the prosecution's closing submissions went well beyond any question about the evidential weight of her statement to the Police and therefore breached the statutory prohibition in the CPO. This was therefore serious when the only issue in the trial concerned Ms Huang's credibility and the veracity of what she told the Police on her arrest.



The closing submissions not only drew direct attention to the fact that Ms Huang had a choice whether or not to testify and that she had chosen not to do so, but went much further (in particular the second set of remarks which are quoted above). The CFA held that it was inappropriate to suggest Ms Huang by choosing not to testify, had deprived the prosecutor of the chance of cross-examining her to show her Police statement was or may be false. The CFA stated that there may be many good reasons behind a decision not to testify and here by suggesting such decision had deprived the prosecutor the chance to cross-examine Ms Huang about her Police interview had shifted the burden of proof when in Hong Kong that burden remains at all times on the prosecution.

[2] See CACC 106/2022, Macrae VP, Zervos and M Poon JJA, 30 August 2024.

[3] When an irregularity in a trial has occurred but it is not material and no miscarriage occurred, section 83(1) CPO allows the Court of Appeal to still dismiss the appeal. In this matter the CFA considered exercising this power but held the irregularity that happened was a serious one and it declined to do so.

CONCLUSION

This is an important judgment. By it, the CFA has clearly emphasized that in Hong Kong the right to silence remains unqualified[4] at a trial and no adverse inference can be drawn and not even a comment can be made against a defendant for doing so.

CONTACT US

IAN CHILDS

Partner

+ 852 2533 2884
ian.childs
@stephensonharwood.com

CONRAD CHONG

Associate

+852 2533 2857
conrad.chong
@stephensonharwood.com

[4] This is not the situation elsewhere. For example in England and Wales, following the introduction of the Criminal Justice and Public Order Act 1994, inroads were made into the right to silence. Accordingly, failing to mention a specific circumstance which reasonably would be expected when being questioned by law enforcement can later on at trial if it's relied on lead to inferences being drawn.