THE LAW SOCIETY OF HONG KONG 香港律師會

Consultation Paper on the Criminal Procedure (Amendment) Bill Law Society Submission

1. The Law Society provides this submission to respond to the Consultation Paper on the Criminal Procedure (Amendment) Bill by the Department of Justice ("DOJ").

2. The above amendment bill has not yet been put forward. The Consultation Paper is on the principles on the intended legislative amendments.

3. We were given the Consultation Paper on 12 January 2023. We were asked to respond in three weeks' time (with the Chinese New Year holidays straddling the second week of the consultation period). Given the importance of the subject matter, this extremely short period of time accorded for consultation is not helpful.

BACKGROUND

4. The DOJ is proposing amendments to the Criminal Procedure Ordinance Cap 221 in the wake of the Court of Appeal judgment in *Re Secretary for Justice's Reference Nos. 1- 3 of 2021* [2022] HKCA 1635 (the "Judgment"). In the Judgment, the Court of Appeal pointed out that

> *"147. Regrettably, each of the cases under consideration in these applications has resulted in a serious miscarriage of justice … in the sense that the judges concerned impermissibly usurped the function of each jury and incorrectly withdrew the cases before their respective juries could consider them. In the result, all of the defendants have been released and left the jurisdiction in the wake of acquittals being wrongly entered at the direction of the court concerned.*

148. Unfortunately, there does not seem to be any lawful mechanism whereby the prosecution can appeal a question of law in the present context, unless the defendant is acquitted (under section 81D of the Criminal Procedure Ordinance), or unless he has been discharged (under section 16 or 79G of the Criminal Procedure Ordinance or under section 22 of the Complex Commercial Crimes Ordinance, Cap 394). There is obviously considerable merit, therefore, in Hong Kong adopting a similar measure to that which operates in the United Kingdom. We would hope that these three cases demonstrate the urgent need for the statutory provisions to be reformed in this respect."

5. The problem that the Court of Appeal referred to in the Judgment arose from the rulings at the Court of First Instance ("CFI") on submissions of no case to answer (in all the three cases, as referred to in the Judgment).

6. The DOJ is proposing statutory procedures for the Prosecution to appeal against rulings of no case to answer by CFI judges. Our comments on these proposals are set out in the following paragraphs.

PURPOSE OF THE AMENDMENTS

7. We agree in principle that statutory provisions should be introduced for the Prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials, in order to address those concerns raised by the Court of Appeal in the Judgment and to prevent possible miscarriage of justice (§6, Consultation Paper).

8. We note that similar statutory rights to appeal are already provided for at the District Court and Magistrate Courts. At the District Court, the Prosecution can challenge a no case to answer ruling of a District Court judge by way of case stated under section 84 of the District Court Ordinance (Cap. 336). For cases in the Magistrates' Courts, the prosecution can challenge a magistrate's ruling of no case to answer either by way of a review under section 104 of the Magistrates Ordinance (Cap. 227), or an appeal by way of case stated under section 105 of that Ordinance (§17). Oddly there are no similar provisions for the CFI.

RIGHT OF APPEAL

9. The DOJ proposes to follow section 58 of the Criminal Justice Act 2003 of the UK ("the UK Act") to provide for a general right of appeal against the rulings made by a CFI judge in the following, i.e. those rulings that

   (a) relates to one or more offences included in the indictment; and

   (b) was made at any time until the start of the judge's summing-up.

   See § 11 of the Consultation Paper.

10. We have no comment on Limb (b) in the above, but for Limb (a), we do not understand the scenarios the DOJ envisages to be applicable, and the way the DOJ is to interpret the provision. If for example an accused is facing three counts of charges in his indictment, and if a CFI judge makes a ruling of no case to answer for one of the three charges, it is not clear from the proposal whether the Prosecution can appeal against that ruling and *at the same time* ask to suspend the trial of the remaining charges.

11. In respect of the above, we notice that the paper draws reference to various UK cases and makes averments to another limb (Limb (c), which states that the subject ruling of no case should have the effect of terminating the trial). The DOJ explained in the Consultation Paper that they are not asking to include that limb in this amendment exercise. While at this stage we have no comment on non-inclusion of that Limb (c) in the proposal, the language in Limb (c) suggests that the suspension of the trial must be *related only to the ruling of that particular charge of no case, leaving the trial of the other charges (if any) undisturbed.* Whether this is the case has not been made clear from the Consultation Paper itself.

12. Limb (a) in the above confuses the proposed regime.

13. Limb (a) also appears to be otiose because a ruling of no case must in any case be made in respect of the charges in the indictment. By making a reference to the UK Act, it is not clear to us what the DOJ is envisaging. A clarification would be helpful.

14. At the moment, we do *not* agree that when the Prosecution appeals against the ruling of no case on one charge, and when there are other charges on the indictment, the trial of all those other charges should be suspended.

LEAVE OF APPEAL

15. Under the proposal, the appeal "*may be brought only with the leave of the trial judge or the CA*" (§ 15). We have no comments on this proposal, save and except the following passing remarks, viz.

    (a) The process of seeking leave unavoidably adds length to the proceedings. This could be daunting to the accused - in particular with High Court trials, the accused could have already been remanded in correctional facilities. Lengthening the trial process lengthens the stay of the accused in the facilities. At the same time, we note the Consultation Paper is silent on the rights of the accused to bail pending appeal (see below).

    (b) There is no similar procedural requirement for leave for appeal at the District Court or the Magistrate Courts.

RULING TO BE HEARD TOGETHER

16. Paragraph 21 of the Consultation Paper sets out the following, viz.

    "the prosecution may at the same time nominates one or more other rulings which have been made by a judge(s) in relation to the trial on indictment and which relate to the offence(s) which are the subject of the appeal and the other ruling(s) will also be treated as the subject of the appeal."

17. What the DOJ is proposing in the above seems to be that if, apart from the ruling of no case, the CFI judge in the same case also makes a ruling on the other parts of the evidence (e.g. admissibility of a confession by the accused), and those other parts of evidence (the confession in this example) relate to or form part of the rulings on the no-case, then when the Prosecution is to appeal against the ruling of no-case, the Prosecution could at the same time also appeal against the ruling on the confession.

18. Upon the above understanding, we have reservations as to whether the Prosecution should have a carte blanc to revisit all the evidence thereby and relitigate all the rulings already made in favour of the accused. If the Prosecution is to argue that the judge has been wrong in the other rulings, the Prosecution must identify precisely how the other rulings are related to the subject appeal and fully justify their entitlements.

19. It is on the other hand not clear to us as to what would happen if under the above proposal the Prosecution succeeds in its appeal against no case. Would the Prosecution be allowed to re-call the other parts of the evidence and witnesses, on the basis of the above proposal that "the other rulings are also treated as subject of the appeal"?

20. Also, when part of the evidence is to be revisited upon success of the Prosecution's appeal of no-case, should the jury who have heard the evidence and/or submission be discharged? This proposal would make a jury trial to become difficult.

TIMING OF THE APPLICATION

21. We have no objection to the proposal to adopt the same restrictions on the timing of making an appeal under section 58(4) of the UK Act (§§ 22 and 23), i.e. *the prosecution may not appeal in respect of the ruling unless –*

(a) following the making of the ruling, it –

(i) informs the court that it intends to appeal, or
(ii) requests an adjournment to consider whether to appeal, and

(b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.

ACQUITTAL GUARANTEE

22. We have no objection to the arrangements under section 58(8), (9) and (12) of the UK Act be adopted in respect of an acquittal guarantee (§§ 24 – 26), i.e.

- the prosecutor must give the "acquittal guarantee" at or before informing the trial Court that it intends to appeal
- the acquittal guarantee will usually be given orally in Court when the parties are present
- where the prosecution has given the "acquittal guarantee", and either of the conditions mentioned in section 58(9) of the UK Act is fulfilled, the judge or the CA must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence

- the conditions mentioned in section 58(9) of the UK Act are that (a) leave to appeal to the CA is not obtained, and (b) the appeal is abandoned before it is determined by the CA.

SUSPENSION OF EFFECT OF RULING

23. We agree that when the Prosecution informs the judge of the intention to appeal, or requests an adjournment to consider an appeal, the judge's ruling of no case to answer is to have no effect and continues to be so whilst the appeal is pursued (§ 27).

24. We however ask that upon suspension of the above suspension, the appeal against the ruling of no case *must be* expedited (§ 31), as a matter of course and case management.

25. We would add that the DOJ should consider adding to the proposal a timetable on (a) DOJ's indication to appeal and (b) the accused's bail application (see below).

26. In setting out the above, the DOJ should bear in mind that upon suspension of the ruling, the trial has not been terminated, the jury has not been discharged, and they are waiting for the further conduct of the matter. We envisage that the suspension could be long, as (a) the hearing of the appeal on no-case has to be fixed in consultation with diaries of the teams of counsel and also (b) transcripts ought to be obtained for the appeal. Consulting and agreeing to diaries could be difficult, particularly when the trial involves more than one defendant. And the process obtaining transcripts could take a long period of time.

27. A long suspension of the ruling (say six months) would make the resumption of the trial (if so directed) difficult for jury, as the jury may find it difficult to remember the evidence adduced six months ago, and any submission/directions thereon. The trial could become a trial of memory and not of evidence. There is in addition a possibility that a jury may no longer be available upon the resumption of the trial six months later.

BAIL

28. There is no discussion in the Consultation Paper on the entitlements of the accused to bails and any bail applications upon the

Prosecution making an appeal against a ruling of no-case. The silence in the above is unwelcome.

29. We invite the DOJ to set out its position on bails when the Prosecution makes an appeals against ruling of no-case, including a deliberation on the following:

Bail Procedures

(a) Prima facie, when a ruling of no case is made in favour of the accused, the accused should be acquitted of the charge. Yet if the Prosecution appeals against the ruling, the accused should as a matter of rights be entitled to bail (unless the accused is a foreign national who may possibly abscond, in which event, specific (but not illusory) bail conditions should be considered and be imposed);

(b) Reference could be made to the current practices at the District Court: where an accused is acquitted on a no-case submission, and the Prosecution appeals, the Prosecution could ask to re-arrest the acquitted accused. The accused could then apply to the Court for bail. Similar protocol or arrangement could be adopted for the present proposal.

Standards for granting bail

(c) There should be a discussion on the standard for granting bail to the accused, i.e. whether the standard of granting bail to the accused should be the same standard as in routine cases, or whether a higher standard should be imposed.

30. The above should equally be applicable to national security cases, although for those cases, the standard and the procedure for granting bails (if relevant) should separately be governed by *the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (National Security Law).

COSTS

31. Paragraph 39 of the Paper states that in the UK

> *"… where the CA reverses or varies a ruling on an appeal …, it may make such order as to the costs to be paid by the defendant*" (emphasis supplied)

The DOJ proposes to adopt the above in the present amendment (§ 40).

32. This proposal is unfair to the accused; prima facie it aims to deter the accused from making a submission of no case. Whether an accused should make this submission is a matter of choice for the accused, based on inter alia the evidence and the legal advice the accused receives.

33. Furthermore, and as a matter of logics, there is no justification as to why the accused needs to bear the costs consequence for an error made by the judge in wrongly ruling in the accused's favour.

34. The DOJ should notice that, as a matter of practicality, many criminal cases in the High Court are legally-aided. For those legally-aided cases, any costs consequence intended to sanction an accused in making a submission of no-cases could only hit the Government's coffer. Apart from book entries, the Prosecution may not recover anything.

35. The situation in the UK (on which the present proposal is modelled on) may not be the same, as their criminal legal aid system is very different from ours. For Hong Kong, this proposal may not have the intended sanctioning effect. All in all, we object to this proposal.

36. On the other hand, if there are provisions on costs for the Prosecution, as a matter of fairness, there should also be specific provisions on costs of the accused. It has been said that "the principles on criminal costs are well-established. The general rule is that costs follow the event of an acquittal." See the judgment of the Court of Appeal in *HKSAR v Thapa Kamala* HCMA 366/2020.

<u>OTHER COMMENTS</u>

37. We agree to the proposal that the new appeal regime should provide for appeals against a ruling of no case to answer by CFI judges in criminal trials with or without a jury (§ 16) (the latter includes national security cases).

38. We agree that it is not necessary to apply the new appeal procedure to criminal trials in the District Court or the Magistrates' Courts (§ 17).

39. We have no objection to the proposal that the right of appeal should not be extended to a ruling that a jury should be discharged, or to a ruling that can be appealed to the CA by virtue of any other enactment (§13).

40. For the proposals on determination of appeals (§ 33-35) and reversal of Rulings (§36-37), we agree that the proposals could follow the UK Act.

41. We have no objections to those proposals on restrictions on reporting (§44) and enacting new subsidiary legislation for the new appeal regime (§45).

CONCLUSION

42. In conclusion, we reiterate that the lacuna identified by the Court of Appeal in the Judgment should be addressed by legislative amendments. There are already in existence similar provisions with the District Court and the Magistrates. Those should provide a useful reference to the DOJ in drawing up the amendments.

43. We note that in putting forward the above legislative proposals, the DOJ borrows quite extensively the provisions from the UK Act. Given the limited period of time that we are given, we have not had a comparative study on the UK Act. Nevertheless, as a quick comment, we notice that criminal litigation in the UK could be quite different from Hong Kong in various aspects. These differences are germane to the consideration of how the proposed amendments are to be drafted. For instance, the UK has a very different criminal legal aid system. Their criminal bench is larger than Hong Kong's. They may have quicker access to transcripts of hearings. They could have a larger pool for jury selection etc. These intrinsic differences should be borne in mind when legislative proposals are being considered and drafted.

The Law Society of Hong Kong
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