THE RIGHT TO SPEEDY TRIAL

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THE UNIVERSITY
OF HONG KONG

Faculty of Law
Law Working Paper Series
Paper No 7
November 1992

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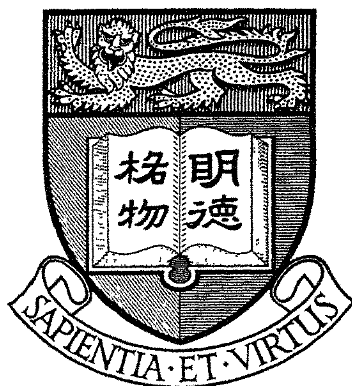

The Right to Speedy Trial

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The early phase of development of the case law relating to the Hong Kong Bill of Rights Ordinance was largely shaped by the successful challenge against statutory presumptions in the Court of Appeal's decision in *R v Sin Yau Ming*.[1] While the presumption of innocence in Article 11(1) of the Bill of Rights remains the most litigated provision so far, it does not take long for the Bill of Rights to exert its impact on another area of criminal justice, namely, undue delay under Article 11(2)(c). Indeed, the first case on undue delay arose before any presumption case. Just a month after the Bill of Rights came into effect, Mr. Justice Sears in *Re An Application for Bail Pending Trial*[2] expressed his concern about delay in the criminal justice system. He said:

> "The position in Hong Kong for criminal trials in the High Court should now be a matter of public anxiety. Delays of up to fifteen months from committal to trial are common. This may mean a person being kept in custody for eighteen months or so from arrest or even longer. I am informed that the sole reason for these long delays is the shortage of High Court judges. This situation is now serious, otherwise provisions in the Bill of Rights will be render

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1 [1992] 1 HKCLR 127.

2 (1991) HCt, MP No 1703 of 1991 (11 July 1991), still unreported For a commentary, see A Byrnes, "The Bill of Rights and Remand in Custody Pending Trial: A Warning Shot ?" [1991] 21 HKLJ 362.

> worthless. In the rapidly changing public awareness of democracy in Hong Kong, the Bill of Rights must be seen to be a protection, not only of an individual's rights but a public recognition that delays in the administration of justice must not be tolerated."

Nonetheless, the warning of Mr. Justice Sears has not been heeded until a District Judge ordered a permanent stay of prosecution in *R v Wong Chiu Yuen*[3] in January 1992. The defendant was charged with 8 counts of theft and related offences. The trial was adjourned three times, resulting in a delay of almost two and a half years. And yet the Crown was still not ready to proceed with the trial. The prosecution was stayed permanently. Since then the full thrust of the guarantee of the right to trial without unreasonable delay has been felt, as evidenced by the number of challenges since the beginning of 1992.[4]

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3 (1992) DCt, STDC No 44 of 1990 (8 January 1992), unreported.

4 See, for example, *Re Application for Bail Pending Trial* (1991) HCt, MP No 1703 of 1991 (11 July 1991, Sears J)(3 weeks pre-trial detention; likelihood of 15 months pre-trial delay; no violation of Art 5(3) at the time of hearing; bail refused); *R v Wong Chiu Yuen* (1992) DCt, STDC No 44 of 1990 (8 January 1992, Judge Caird) (theft and other related charges; 2 years and 5 months pre-trial delay; violation of Art 11(2)(c); permanent stay of prosecution); *R v Lam Tak Ming* (1991) DCt, DC Case No 271 of 1991 (6 November 1991, Judge Lugar-Mawson) (bribery and corruption charges; 3 years and 4 months pre-trial delay; no violation in view of the complexity of the case and that the defendant was not prejudiced in his conduct of the defence); *R v Tung Chi Hung* (1991) DCt, DC Case No 857 of 1991 (10 Dec 1991, Judge Lugar-Mawson) (Obtaining property by deception; over 2 years pre-trial delay; no violation of Art 11(2)(c) in the absence of any prejudice or deprivation of a fair trial); *R v Kwan Kwok Wah* (1992) DCt, DC Case No 26 of 1991 (19 February 1992, Judge Britton) (conspiracy to defraud; 2 years and 3 months pre-trial delay; no violation of Art 11(2)(c) in view of the complexity of the case); *R v William Hung* (1992) HCt, HC Case No 32 of 1991 (14 April 1992, Duffy J) (drug offences; 526 days pre-trial detention; institutional delay; trial lasted for 3 days; violation of Art 5(3), but no violation of Art 11(2)(c) as there could still be a fair trial); *R v Fung Shu Sing* (1992) DCt, DC Case No 777 of 1991 (14 May 1992, Judge Tyler) (corruption

This rapidly growing body of case law has clarified some of the legal issues. In this paper I will briefly review the relevant principles on undue delay,[5] and then highlight some of the problems raised by the case law. Before I go into the legal principles, a few general observations may be made. First, the success rate of challenge has not been high. A permanent stay of proceedings was ordered in only two cases.[6] This, however, should not be an indicator of the usefulness of the Bill of Rights, as the mere possibility of obtaining a stay and the amount of public discussion generated by delay in the criminal justice system have a far wider impact than these cases suggest.[7]

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and bribery charges; 3 years and 9 months pre-trial delay; no violation of Art 10 and 11(2)(c) and no abuse of process under common law in view of the complexity of the case, lack of prejudice and the possibility of a fair trial); and *R v Charles Cheung Wai Bun* (1992) HCt, HC No 160 of 1989 (16 June 1992, Duffy J) (conspiracy to defraud, 3 and a half years delay between charge and trial; 5 years delay between arrest and trial, and 10 years delay between date of offence and trial, permanent stay of proceedings).

5 For a general discussion of international case law on undue delay, see J Chan, "Undue Delay in Criminal Trials and the Bill of Rights" [1992] 22 HKLJ 2 and A Byrnes, "The Bill of Rights and Remand in Custody Pending Trial: A Warning Shot ?" supra, n 2.

6 *R v Wong Chiu Yuen*, supra, n 4, *R v Charles Cheung Wai Bun*, n 4. A permanent stay was also ordered in *R v Ng Kam-fuk* (1992) DCt, DC Case No 104 of 1992 (13 Oct 1992) on the ground that it was impossible for the defendant to have a fair trial because of a missing witness.

7 For an assessment of the impact of the Bill of Rights on the legislative process, see J Chan and Y Ghai, "A Comparative Perspective on the Bill of Rights", in J Chan and Y Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Singapore: Butterworths Asia, forthcoming), ch 1, and J Chan, "The Legal System", in J Cheng and P Kwong (eds), *The Other Hong Kong Report 1992* (Hong Kong: Chinese University Press, 1992), ch 3.

Secondly, most of these cases involve a delay of more than two years, and part of the delay occurred before the commencement of the Bill of Rights. The courts have suggested that pre-commencement delay is relevant in determining the overall delay,[8] but (without putting this too high) some allowance may be given for the administration's tardiness in responding to the demands of the Bill of Rights.[9]

Perhaps it should be clarified at this point that I am using the term undue delay in a very general sense. It could refer to at least two different situations. First, it refers to an unreasonably lengthy period of pre-trial detention. There may still be a fair trial in due course. Secondly, it refers to an unreasonably lengthy waiting period for the conclusion of the entire trial process, irrespective of whether the defendant is remanded in custody or not. Different considerations will apply under different situations.

A Factual Scenario

Let's consider a typical factual scenario. Mr Chan was arrested in connection with certain fraudulent offences. He was refused bail. Six months later he was charged with the offence of conspiracy to defraud. He was committed to trial three months later, and the trial date was fixed

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8 See, for example, *R v Wong Chiu Yuen*, supra, n 4, and *R v Lam Tak Ming*, supra, n 4.

9 *R v William Hung*, supra, n 4.

fifteen months away. In short, there is a period of two years between the date of arrest and the date of trial, or a period of one and a half year between the date of charge and the date of trial. What possible actions could he take ?

It seems the following actions are open to him:

(a) application for bail on the basis of Art 5(3): note that this article protects personal liberty, and no stay of proceedings could be granted under Art 5(3);[10]

(b) application for habeas corpus: this is useful if bail is refused by the High Court and he wishes to take the matter further to the Court of Appeal. While an appeal lies to the Court of Appeal upon a refusal to grant habeas corpus, the Court of Appeal has held that it has no jurisdiction to entertain an appeal against refusal to grant bail by the High Court.[11]

Besides, he can apply for a stay of proceedings on the basis of:

(a) Art 11(2)(c);

(b) Art 10;

(c) abuse of process under common law by reason of the delay.

I would concentrate on Art 11(2)(c) and abuse of process under common

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10 *R v William Hung*, supra, n 4.

11 *R v Sin Hoi* (1992) CA, Civ App No 34 of 1992 (5 March 1992), still unreported.

law in the remainder of this paper.

Factors in Determining the Reasonableness of Delay

It has been held that the factors to be taken into account in determining whether there is undue delay under Art 11(2)(c) of the Bill of Rights and the common law doctrine of abuse of process are the same.[12] They include:

(a) the length of the delay;

(b) the justification for the delay, such as the complexity of the case and the conduct of investigation;

(c) the conduct of the defendant, especially if there is any waiver of his rights;

(d) any prejudice to the defendant;

(e) the public interest, which means the community's interest in bringing the offenders to trial and in having criminal proceedings conducted in an efficient and fair manner.[13]

This list is not exhaustive. Not all factors are relevant at any one time; they have to be considered together with any other relevant circumstances.

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12 *R v Lam Tak Ming*, supra, n 4; *R v William Hung*, supra, n 4.

13 *R v William Hung*, ibid; *R v Charles Cheung*, supra, n 4.

The court has to balance all the factors in arriving at its decision.[14]

Common Law Abuse of Process and the Bill of Rights

While the factors to be considered under common law abuse of process are the same as that under Art 11(2)(c), there are, nonetheless, a few differences between the two causes of action:

(a) **Institutional delay**, meaning the delay occasioned by the lack of judicial resources, is a factor counting against the Crown as far as the Bill of Rights is concerned. Some allowance could be made if the delay is a temporary state of affairs. But if it becomes a structural problem, judicial intervention by ordering a stay is more likely.[15] A judge has pointed out that Hong Kong should not be compared with those jurisdictions where delay is expected.[16] In other words, the Government is under a positive duty to provide resources to ease the problem of delay. Institutional delay is normally not relevant under the common law abuse of process, which is only concerned with the conduct of the prosecution.

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[14] Ibid.

[15] *R v Lam Tak Ming*, supra, n 4; see also the articles by J Chan and A Byrnes, supra, n 5, and the references cited therein.

[16] *R v William Hung*, supra, n 4.

(b) **Prejudice.** It is necessary to show that the defendant has suffered some prejudice under the common law abuse of power as well as the Bill of Rights. Under common law the concept of prejudice is probably narrower in scope. There will be no abuse of process unless the defendant has been or will be prejudiced in the preparation or conduct of his defence by unjustifiable delay, that is, delay attributable to the fault of the prosecution, for example, delay not due to the complexity of the enquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service. The concept of prejudice for the purpose of Art 11(2)(c) probably has a wider ambit, although the exact content of prejudice is still a matter of conjecture. I will come back to this point later.

(c) **Burden of Proof.** Under common law, the burden of proof is on the defendant. He has to show, on a balance of probabilities, that (a) there has been an unjustifiable delay on the part of the prosecution; (b) the delay has produced prejudice and unfairness to him; and (c) such prejudice and unfairness is of such a nature that it is likely that it will adversely affect his right to a fair trial.[17] Under the Bill of Rights, the defendant has the burden to show, on a balance of probabilities, that there is a prima facie case of excessive delay. Then it is for the prosecution to show, also on a

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[17] *R v Norwich Crown Court, ex parte Belsham* [1992] 1 WLR 54, quoted by Judge Tyler in *R v Fung Shu Sing*, supra, n 4.

balance of probabilites, that the delay is justifiable, that the defendant has waived his right, and that the public interest should prevail over the private right of the defendant. Insofar as prejudice is concerned, the burden is on the defendant to show that the delay has caused prejudice to him, although prejudice could be presumed from the mere length of delay. Finally, the prosecution has the overall burden to satisfy the court, on a balance of probabilities, that notwithstanding the delay, the defendant has not been so prejudiced and that a fair trial can still be achieved.[18]

Some Problems Arising from the Case Law

(1) Giving Priority to Custody Cases

Once a defendant is refused bail, he may spend a lengthy period of time in custody pending trial. After the defendant is committed to trial, the trial is to be fixed by the clerk of the court. Given the current listing conditions, the trial may well be fixed at a date 12 to 15 months later. The defendant, who has been refused bail, may be unrepresented and does not know his legal right to make further applications for bail. If he is lucky enough to have legal representation, his busy lawyer may well forget his case until the trial is near. (After all, once bail is refused, there is little

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[18] *R v Fung Shu Sing*, supra, n 4.

chance of making another successful application within a short period of time in the absence of a material change of circumstances.) The committing magistrate, before whom the application for bail is made, is unlikely to know when the trial date is. The prosecution will understandably put aside the file for some time. Thus, everyone forgets about the defendant. It is in such circumstances that the defendant in *R v William Hung* spent 526 days in custody before trial. Mr. Justice Duffy made a strong remark that the system has failed to give priority to custody cases. It seems a better system would be that whenever a defendant is refused bail, a mechanism should exist whereby, upon committal, a return date shall be fixed within a period of not more than six months so as to enable a High Court judge to review the position on bail and expedite the trial if necessary at that point of time.[19] This may avoid the recurrence of a case like *R v William Hung*.

(2) Remedy

The remedies available include a stay of proceedings if there is undue delay, or an order to expedite the trial process if the delay is still within the reasonable limit, coupled with an order for bail or habeas corpus if

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[19] In England and Wales, there is a system whereby, upon committal, a return date within a specified period will be fixed, and if the trial cannot be fixed within that period, the defendant has to be released on bail, with or without conditions, pending trial. The burden of ensuring a return date within the specified period is on the Crown Solicitor: see M Sander, *Cases and Materials on the English Legal System* (London: Weidenfeld and Nicolson, 5th ed, 1988), at p 289.

appropriate. A stay of proceedings will only be granted in exceptional cases. In case a lower court refuses to proceed with the trial, an order of mandamus may lie. For example, in *R v Leong Chi Hung and Crawford McKee Esq*,[20] the defendant was charged with unlawful possession under the Summary Offences Ordinance. The same issue was raised in another earlier case, which has since been appealed to the High Court. As a result, the *Leong Chi Hung* case has been adjourned eight times pending the outcome of the decision of the High Court; the point was eventually decided by the High Court in *R v Lee Kwong Kut*[21] in June 1992. This is certainly an unsatifactory situation and an order of mandamus may be appropriate. The *Leong Chi Hung* case also reflects the need for a special procedure which can expedite the hearing of a test case which involves a legal point of great public interest so as not to sabotage the business of the lower courts.

Judicial review may be another possibility, although the High Court has held that it has no jurisidiction to review the decision of a District Court judge not to stay the prosecution.[22] The decision, with respect, is per incuriam and of doubtful authority.

There may, however, be situations where there is no remedy available. It

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20 (1992) HCt, MP No 832 of 1992.

21 (1992) HCt, Mag App No 90 of 1992 (18 June 1992), still unreported. The Crown has since then applied for leave to appeal to the Privy Council.

22 *R v Sin Hoi* (1992) CA, Civ App No 34 of 1992 (5 March 1992), still unreported.

is quite possible that there could be a period of undue delay at some stage of the investigation, but the overall delay is not so serious as to render a fair trial impossible. In *R v William Hung*, despite the very strong remarks made by the learned judge on the unnecessarily lengthy period of pre-trial detention and his finding of a violation of Art 5(3), the only remedy the defendant could get is to be released on bail after 526 days in custody. His application for a stay failed because it was still possible to have a fair trial. He did not get any compensation for the violation of Art 5(3). It is even doubtful whether the court has jurisdiction to grant him compensation. If the defendant is eventually convicted, a violation of his right to speedy trial may be compensated by a reduction in sentence, which is what happened eventually in *R v William Hung*.[23] Yet if the defendant is acquitted, it seems there is no available remedy. If the right to liberty and security of the person is not to be pious platitudes, it seems the award of compensation is just the very minimum remedy which should be available upon a finding of a violation of one's rights under the Bill of Rights. The possibility of an award of monetary compensation may also render judges more willing to find a violation, as judges may be reluctant, and for good reasons, to order a stay of prosecution if this is the only realistic remedy.

Another situation is that a defendant may be convicted, and the appeal is outstanding for an unreasonable period of time, because the transcript of the trial is not yet available, or because of insufficient judges in the Court

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[23] Supra, n 4.

of Appeal to deal with a heavy backlog of cases. A stay of proceedings is not appropriate here. Existing jurisdictional constraints may render it impossible for the court to grant any remedy. It is recommended that there should be a general power to grant such relief as is just and appropriate. The availability of a remedy less drastic than a stay of proceedings may encourage the judiciary to hold prosecuting authorities to a more stringent standard of diligence in the conduct of prosecution.

(3) Prejudice

While it is accepted that there must be some prejudice to the defendant before there is a violation of Art 11(2)(c), the scope or meaning of prejudice for this purpose is still unclear. In particular, the question is to what extent actual prejudice caused to the defendant which is short of adversely affecting his right to fair trial is relevant for the purpose of Art 11(2)(c).

Under common law it is necessary to prove that the defendant is prejudiced to the extent that his right to a fair trial is adversely affected before the court would hold that there is an abuse of process and order a stay of the prosecution. In the leading case of *R v Derby Justices ex parte Brookes*,[24] Sir Roger Ormrod stated:

> "The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either

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[24] (1985) 80 Cr App R 164, at 168

> (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the enquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service..... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law which involves fairness both to the defendant and the prosecution or as Lord Diplock said in *Sang* (1979) 69 Cr App R 282: '...the fairness of a trial... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted.'"

This paragraph has frequently been cited to support the proposition that prejudice in the sense that proof of the defendant's ability to conduct his defence being adversely affected is required to sustain a case of undue delay under the Bill of Rights. With respect, the requirement of prejudice to the defendant's ability to defend himself, and hence the impairment of his right to fair trial, in this paragraph refers to the exercise of the discretion whether to grant a permanent stay of proceedings, and not to a finding of whether the right to speedy trial has been affected.

Nonetheless, the courts seem to have been heavily influenced by the notion of prejudice under common law in interpreting Art 11(2)(c), and, as a result, while the courts accept that actual prejudice short of affecting the right to fair trial may be relevant in some cases, in practice no violation of Art 11(2)(c) has been found in the absence of prejudice in the sense of

adversely affecting the defendant's preparation or conduct of his defence.[25]

Extreme Prejudice

In *R v Tung Chi Hung*[26] there was a delay of over 2 years. Judge Lugar-Mawson commented that the investigation had been conducted in a "somewhat haphazard way with little real direction" and that the matter had been "inefficiently investigated". Nonetheless, he refused to stay the proceedings on the ground that the defendant has not been able to show any prejudice, particularly that he will be deprived of a fair trial as a result of the delay in bringing this matter to trial. He said, "I accept that any man facing a criminal charge suffers some prejudice in the sense of loss of self-esteem, worry and perhaps a loss of social relationships but there is no evidence here to suggest that those prejudices are extreme." Similarly, in *R v Lam Tak Ming*,[27] the same judge refers to the prejudice claimed by the defendants as "not unusual or particularly onerous". With respect, the terms "extreme prejudice", and "unusual and particularly onerous prejudice" may not be apprорrpriate. If they mean what they mean, that is, extreme or exceptional prejudice has to be shown, this may not be supported by international case law or comparable national law.

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25 See, for example, the judgment of Judge Lugar-Mawson in *R v Lam Tak Ming*, supra, n 4.

26 Supra, n 4

27 Supra, n 4.

General/specific prejudice

R v Lam Tak Ming[28] is also interesting in indicating what kind of "prejudice" is required for the purpose of Art 11(2)(c). In this case there was a delay of over 3 years. The defendant was suspended from his job after his arrest, and drew only half of his salary after he was charged. He alleged loss of promotion prospect, but there was no evidence that this was related to the delay. He also alleged a loss of opportunity to apply under the British Nationality Scheme; but again there was a lack of casual link. He further alleged that because of the uncertainty of the prosecution, he has delayed in having children. Judge Lugar-Mawson was not persuaded. He held that the prejudice suffered was not "unusual or particularly onerous and that much of the hardship was of their own making through their own inaction." If the defendant's claims could be substantiated, it would be interesting to see what the outcome would be. The general attitude of the judgment suggests a rather narrow interpretation of the concept of "prejudice", probably something reminiscent of the common law notion of prejudice.

In *R v William Hung*,[29] the defendant was remanded in custody for 527 days, whereas the trial lasted for only a few days. Despite the hardship caused to the defendant, Justice Duffy refused to grant a stay of

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[28] Ibid.

[29] Supra, n 4.

proceedings on the ground that it was still possible for the defendant to have a fair trial. While the decision is umimpeacheable, there is no discussion of the possibility that there was a violation of Art 11(2)(c), but the court nevertheless refused to exercise its discretion to grant a stay. As Art 11(2)(c) is an aspect of the right to fair trial, Justice Duffy held that the overriding test in determining whether there was a violation of Art 11(2)(c) was whether a fair trial could still be possible. He seems to suggest that notwithstanding some actual prejudice, so long as a fair trial is still possible, there cannot be a violation of Art 11(2)(c).

In contrast, in *R v Fung Shu Sing*,[30] Judge Tyler suggested that there are two types of prejudice: general prejudice and specific prejudice. General prejudice means that the accused can no longer or will not achieve a fair trial. Specific prejudice refers to actual prejudice, such as pre-trial custody becoming oppressive, specific anxiety or stress, or circumstances like the death of a witness that actually affect the accused's ability to properly defend himself. In some cases prejudice may be presumed, such as the case of very lengthy delays that cannot be justified for any reason. The learned judge referred to the decision of Justice Duffy in *R v William Hung* that the court might hold that there was no prejudice in the sense that a fair trial would still be possible nothwithstanding the proof of actual prejudice. Yet Judge Tyler went on to point out that the converse position was equally possible, namely, the court might hold that there was prejudice in the sense

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[30] Supra, n 4.

that a fair trial could no longer be possible even in the absence of evidence of specific or actual prejudice. It is not necessary for the defendant to prove actual prejudice.

The learned judge went on to state that the overriding test was whether a fair trial could still be achieved, or, as appropriate, whether the proceedings should be allowed to continue. In this particular case no prejudice, general or specific, was substantiated. However, if actual prejudice can be substantiated, the judgment seems to suggest that prejudice other than that affecting the prospect of a fair trial may be sufficient to support a finding of a violation of Art 11(2)(c).

In summary, the case law up to the present shows that the defendant has to show some prejudice. It may be general or specific. It is not necessary to show actual prejudice. In some cases prejudice can be presumed from the length of delay itself. The overriding consideration is whether a fair trial can be achieved. However, what factors could lead to this conclusion are still a matter of conjecture. On the one hand, it is said that depression anxiety, loss of friends, or loss of self-esteem are not sufficient.[31] There must be prejudice in the sense that the right to fair trial is hampered. On the other hand, it has been accepted that very lengthy periods of delay may give rise to a presumption, even an irrebutable one, of prejudice even in

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[31] *R v Lam Tak Ming*, supra, n 4.

the absence of any evidence that the defendant could not receive a fair trial.[32] There seems to be some logical inconsistency between these two positions.

The Concept of Prejudice Revisited

If a defendant can establish a prime facie case of delay, and the prosecution cannot provide any justification for the delay, it may be asked why the defendant has to show further that his ability to prepare or conduct his defence has been adversely affected by the delay before there can be a violation of Art 11(2)(c) ? It is submitted that the courts have taken an unduly restrictive interpretation of the requirement regarding the notion of "prejudice", which is inconsistent with international case law, and have given inadequate consideration to the various interests to be protected by Art 11(2)(c).

A few reasons can be put forward to justify a more liberal notion of prejudice. First, the more restrictive interpretation relies on the view that Art 11(2)(c) should be read in light of Art 10.[33] Therefore, it was argued that there should only be a violation of Art 11(2)(c) when there is a violation of the right to fair trial. With respect, this position does not sit well with international human rights law on this issue. While it is true that

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32 *Bell v DPP* [1985] 2 All ER 585.

33 See, for example, *R v Lam Tak Ming*, supra, n 4, and *R v William Hung*, supra, n 4.

Art 11(2)(c) is one aspect of the right to fair trial, it does not follow that Art 11(2)(c) cannot also have an independent existence. The Human Rights Committee has reminded us that the provisions of the International Covenant on Civil and Political Rights ("ICCPR") should not be construed as being dependent of one another. Each right is a free standing right. It is equally clear that there could be a violation of Art 10 without a violation of the various guarantees of Art 11: Art 11 does not exhaust the content of Art 10.[34] Accordingly, there is no reason why the reverse situation cannot hold true, that is, a violation of Art 11(2)(c) without a violation of Art 10. If this is accepted, which seems to have been so in a few local judgments, the insistence on impairment of the defendant's right to fair trial as a pre-requisite for a finding of violation of Art 11(2)(c) seems to have only a very tenuous basis.

Secondly, a narrow concept of prejudice is not supported by international human rights law. There are a large number of cases on delay from both the European Court of Human Rights and the Human Rights Committee. These decisions do not require proof of prejudice in the sense of adversely affecting the right to fair trial. These bodies are quite ready to find a violation in case of unjustifiable delay. Prejudice is a relevant, but not decisive, factor. Of course, the courts in these cases are not dealing with an application for stay of proceedings. They simply do not have the jurisdiction to do so. In most cases the proceedings have already been

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[34] General Comment 13[21], particularly para 5, in UN Doc, CCPR/C/21/Rev. 1, at p 13 (19 May 1989).

concluded at the domestic level by the time the case is brought before these bodies. The issue is whether there is a violation of the right to trial without undue delay, and if so, all they can grant is monetary compensation,[35] or even a finding to such effect only. Having excluded the question of stay from their consideration, the courts in these case have the benefit of focusing solely on the issue of a violation of substantive rights. The effect of these decisions is clearly that impairment of the right to fair trial is a relevant but not necessary factor in considering whether the right to speedy trial has been violated.[36]

Thirdly, there seems to be a confusion between rights and remedies. Case law under the common law notion of abuse of process is preoccupied with the application for a stay of prosecution. No doubt this is an exceptional remedy, and prejudice in the sense of impairment of the right to fair trial is certainly relevant in considering whether to exercise the discretionary power to grant a stay. However, the question of stay is one of remedy, and should not be confused with the earlier question of whether a right has been violated. The common law fails to draw a clear distinction between abuse of process and a stay of proceedings, partly because these two issues are inextricably related in practice. Unfortunately, in interpreting Art 11(2)(c) of the Bill of Rights, our courts seem to have been heavily

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35 The power to grant compensation has to be provided for by the relevant treaties, for an example, see Art 50 of the European Convention on Human Rights.

36 See *Pinkney v Canada*, infra, n 38; *Neumeister v Austria (No 1)* (1974) 1 EHRR 91; *Ringeisen v Austria* (1971) 1 EHRR 455; *Capuano v Italy* (1991) 13 EHRR 271.

influenced by the common law approach and have failed to draw a clear distinction between right and remedy.

In *R v Kwan Kwok Wah*[37] it was argued that Art 11(2)(c) broke new ground on the existing common law and that undue delay alone which did not necessarily cause prejudice would amount to a breach of the Bill of Rights. Judge Britton did not accept the argument. He held:

> "Art 11(2)(c) does not say that a person is entitled to be tried without any undue delay. The underlying and fundamental aim is to secure a fair trial for an accused person. It would be a surprising result of the Bill of Rights if the Crown were to be denied its right to have a case tried where there had been no overall undue delay and where it was possible for the defendant to have a fair trial simply because at some stage of the investigation there had been a period of undue delay."

With respect, this passage shows that, in coming to the conclusion that prejudice in the sense of adversely affecting the right to fair trial must be shown for the purpose of Art 11(2)(c), Judge Britton seemed to have mixed up the issue of remedy with the violation of the right to speedy trial. The learned judge, as shown by his last qualifying sentence, was troubled by the consequence of finding a violation and seemed to assume that a stay would automatically follow from a finding of violation.

In *R v William Hung* it was argued that prejudice was a relevant factor, but it was not necessary to show adverse impact on the right to a fair trial. Mr. Justice Duffy rejected the argument and held that actual prejudice

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[37] Supra.

might be present but still the court might hold that there was no prejudice in the sense that a fair trial would still be possible. While this statement is true, the learned judge did not explain why there cannot be a finding of a violation, upon proof of actual prejudice, even though no stay will be granted because a fair trial is still possible. It may be noted that the application in question is again a permanent stay of prosecution, and the judgment has not attempted to make any clear distinction between a violation of the right to speedy trial and the grant of stay of proceedings as a discretionary remedy.

Had a clear distinction been drawn between rights and remedy, and had there been available remedies other than a stay of proceedings, some of these cases may have been decided differently. In this respect the decisions from the European Court of Human Rights and the Human Rights Committee, which are not concerned with the issue of stay of proceedings, as opposed to the common law, are more illuminative.

Fourthly, our courts have given inadequate consideration to the values underlying the right to speedy trial. As pointed out in the leading Canadian cases of *R v Mills*[38] and *R v Askov*,[39] a criminal trial would have serious repercussions on the daily life of a defendant, whose family, work, and social relationships would all be adversely affected by an unduly prolonged

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[38] 20 DLR (4th) 161, 243.

[39] (1991) 74 DLR (4th) 355, 362.

trial. The right to speedy trial aims at minimizing such adverse impact. The concept of presumptive prejudice, which has been accepted by our courts, reinforces this concern. Thus, if the delay has reached a point that it causes severe hardship on the part of the defendant, there is no reason to further insist that his ability to properly defend himself must be impaired before a finding is made of a violation of the right to speedy trial.

In *Bell v DPP*,[40] the Privy Council, in construing the right to speedy trial under the Jamaican constitution, stated:

> "Prejudice, of course, should be assessed in the light of the interest of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last.... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past."

It is quite clear that the Privy Council, in identifying the interests involved in the right to speedy trial, accepted that a defendant may have his right violated without being hampered in his defence. Items (i) and (ii) deserve no less protection than item (iii). Unfortunately, in citing this decision, it seems our courts have given relatively less weight to the first two kinds of interest.

Finally, the insistence on a narrow concept of prejudice may produce very

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[40] [1985] 2 All ER 585

awkward results in some circumstances. For example, if an appeal against conviction has been outstanding for an unreasonable period of time, the defendant's right to fair trial is not likely to be affected.[41] The appeal is on a question of law. There is no problem of a lapse of memory on the part of witnesses, as evidence has already been given. A strict requirement of adverse prejudice to the defendant's right to fair trial in these circumstances might rule out the possibility of a violation of Art 11(2)(c), notwithstanding that there may be absolutely no justification for the delay in the appellate proceedings. It may also be noted that the Human Rights Committee has taken a liberal view in this regard in holding there was a violation of the right to speedy trial when the trial court failed to provide the transcripts of the trial, thereby delaying the appeal proceedings for three years, although the defendant was still entitled to a "fair trial" in a narrow sense before the appellate tribunal.[42]

Conclusion

In conclusion, it is submitted that a more liberal notion of prejudice than that so far adopted by the Hong Kong courts should be accepted. Prejudice short of actual impairment of the right to defend oneself should suffice for

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[41] It is clear that the right to speedy trial applies to appellate proceedings. It may also be noted that a stay of proceedings is just inappropriate in these circumstances, namely, delay in the appellate proceedings.

[42] *Pinkney v Canada*, Comm No 156/1983, *Selected Decisions*, Vol 2, p 183.

the purpose of a finding of a violation of the right to speedy trial. A conceptual distinction should be drawn between a violation of the right to speedy trial and the granting of stay, which is a discretionary remedy. Given the drastic nature of a stay of proceedings, it is understandable that judges would be reluctant to grant this remedy. There is also the public interest in bringing suspects to trial. However, to link up the grant of a stay of proceeding with a finding of a violation of the right to speedy trial would only result in judges being reluctant to find a violation of the right to speedy trial in the first place, thus defeating the purpose of the protection. It is suggested that the court should be empowered to grant monetary compensation for a violation of the right to speedy trial whenever it is just and appropriate to do so. Together with the possibility of a reduction of sentence in case the defendant is convicted, this would, hopefully, result in a more humane and sympathetic treatment of those who live in the shadow of the tremble and threat of criminal proceedings.

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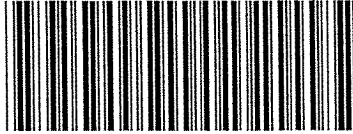

Published by the Faculty of Law
The University of Hong Kong

1992

HK$15.00