HCCC 98/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CRIMINAL CASE NO 98 OF 2013

HKSAR

v

HUI Rafael Junior also known
as HUI Si-yan Rafael (A1)

KWOK Ping-kwong, Thomas (A2)

CHAN Kui-yuen also known
as Thomas CHAN (A4)

KWAN Francis Hung-sang also known
as KWAN Francis (A5)

Before:	Hon Macrae JA
Date:	23 December 2014 at 10.39 am
Present:	Mr David Perry, QC, Mr Joseph Tse, SC, Ms Maggie Wong and Mr Carter CHIM, Counsel, on fiat, and Ms Winnie Ho, SADPP, for HKSAR Mr Edwin Choy, instructed by Tang, Lai & Leung, for the 1st accused Ms Clare Montgomery, QC, Mr Lawrence Lok, SC and Mr Benson Tsoi, instructed by Boase, Cohen & Collins, for the 2nd accused Mr Ian Winter, QC, Mr Bernard Chung, Mr Issac Chan, and Mr Adrian Wong, instructed by Tsang, Chan & Wong, for the 4th accused Mr Charles J Chan and Mr Billy Kwan, instructed by Simon Ho & Co, for the 5th accused
Offence:	(1),(6) & (8) Misconduct in Public Office (藉公職作出不當行為) (2), (3), (5) & (7) Conspiracy to commit misconduct in public office (串

謀犯藉公職作出不當行為)

(4) Furnishing false information (提供虛假資料)

Transcript of the Audio Recording
of the Sentence in the above Case

COURT: I will begin, if I may, by making some observations about this particular case, which I have now lived with as judge since the first application connected with these proceedings was made on 15 July last year.

Although preceded by several pre-trial applications, the trial proper started on 8 May 2014, more than seven months ago. The jury of nine heard evidence from more than 80 witnesses. My summing up alone took five days to complete. At one stage there were listed in front of me 21 counsel, five of them from the English Bar, and amongst the 21, no less than eight leading counsel.

As one might expect in such circumstances, the proceedings have been difficult, not only in terms of the evidence and the time it has taken, but in the multiplicity of issues which have been engaged and which I have been required to deal with during the trial process.

However, in all of that process, nothing has been more difficult than the sentencing of the defendants in front of me today. It is often said that sentencing is an art and not a science. If it were a science, it would no doubt be an easier exercise to conduct. But in truth, sentencing is one of the most difficult functions a judge can perform, particularly when dealing with offences where there are no guidelines beyond various expressions of judicial opinion in other cases dealing with the same offence, but with very different facts.

And it is particularly difficult when one is dealing with otherwise decent men, who are not young, but who have committed serious offences.

For the two facets of sentencing, the first, which requires a judge to exercise a public duty in dealing effectively and consistently with serious crimes, and the second, which requires him to mitigate the harsh effects of that sentence by acknowledging in an appropriate way the personal circumstances of the individual defendant, are not always an easy balance to achieve.

However, our system gives to the judge who has heard the evidence the unique discretion

to try, in a principled way, to effect that balance, even though the way he exercises that discretion will always provoke those who have not had the advantage of hearing the evidence to say that he has leant too far one way or too far the other.

Madam Interpreter, I notice you are not interpreting. I think given the public interest, if you have a script of what I am saying, I think I will ask you to translate paragraph by paragraph from where you are, in Cantonese, so that the court can hear. So perhaps you will start from the beginning.

I have been taken to guidelines in the United Kingdom, issued by the Sentencing Council in that jurisdiction, in relation to fraud, bribery, and money-laundering. They are helpful to some extent in identifying the various factors of culpability and harm which may be engaged in corruption offences, but the law of England is different. Their maximum sentences for such offences are different. Their experience of these offences is different. And Hong Kong has long developed its own approach and sentencing jurisprudence to this area of sentencing law.

The 1st defendant, Mr Rafael Hui, falls to be dealt with for five offences: count 5, of conspiracy to commit misconduct in public office contrary to common law; count 7, conspiracy to offer an advantage to a public servant contrary to section 4(1)(a) of the Prevention of Bribery Ordinance, Cap 201; and three counts of misconduct in public office contrary to common law, namely counts 1, 6 and 8.

The 2nd defendant, Mr Thomas Kwok Ping-kwong has been found guilty of count 5 alone.

The 4th defendant, Mr Thomas Chan Kui-yuen, and the 5th defendant, Mr Francis Kwan Hung-sang, fall to be dealt with for the two conspiracies of which they were found guilty, namely counts 5 and 7.

All of the defendants are currently in their 60s: Mr Hui, 66; Mr Kwok, 63; Mr Chan, 68; and Mr Kwan, 64. All are of unblemished character, and I accept that going to prison for the first time at this stage of their lives will be a particular hardship for all of them, no doubt exacerbated by the health issues which each of them has. And I wish to make it clear that I have borne in mind their ages when considering the appropriate sentences they must serve, in particular in the significance to be attached to their good characters.

I propose to deal with the 2nd defendant first, because in a sense, he is the most straightforward, given that he must be sentenced for one offence only, the maximum sentence prescribed by law being 7 years' imprisonment.

The first question which I must address is what the starting point should be for a single offence of conspiracy to commit misconduct in public office committed in the circumstances of this particular case. There is a compelling argument that the payment of an $8.5 million bribe by the instigator of the offence to the number 2 in government, made in a deliberately complex and intricate way, through various co conspirators, which then took months, if not years, to uncover and unravel, is an extremely serious example of the offence.

It should also be recognised that it is not the function of judges to use their imaginations to conjure up even worse examples of the offence with which they are dealing, but to consider the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type. Accordingly, there is a compelling argument that this offence merits a starting point at the maximum of 7 years' imprisonment.

I have considered this argument, but I am minded to agree with Ms Montgomery and with Mr Choy and Mr Winter that this is not a case for the adoption of the maximum sentence as a starting point. Serious though it is, given the high degree of trust placed in D1 by the government and people of Hong Kong when he was sworn in as Chief Secretary to the HKSAR government, the case against the 2nd defendant has never been that D1 as Chief Secretary in fact did anything specific or in fact did anything which he would not otherwise have done for the money which he received. The allegation has always been that the defendants conspired together for D1 to misconduct himself by being or remaining favourably disposed to Sun Hung Kai Properties or the other entities set out in the count.

I am not so naive as to suppose that just because no specific quid pro quo can be identified, there was not, in view of the sheer size of the payment, thereby created a relationship in which it would have been very easy for useful information about government thinking or policy to be communicated to somebody outside the government.

Nevertheless, I am prepared to proceed on the basis that the notion of a public official doing something favourable in return for a payment is at its most attenuated, to paraphrase McMullin J, as he then was, in Attorney-General v Chung Fat Ming (1978) HKLR 480 at page 488, in the context of an allegation of favourable disposition by being "kept sweet".

In my view, the appropriate starting point in this case for the instigator of an offence such as count 5, as averred by the prosecution, is one of 6 years' imprisonment. I am fortified in adopting that lower starting point by the fact that I also intend to pass upon the 2nd defendant a substantial fine which I deem necessary to deter others tempted to embark

upon a course of conduct which subverts the conduct of public officials.

The next question is to what extent that starting point is mitigated by the personal circumstances of the defendant. Anyone reading the bundle of testamentary documents produced by Ms Montgomery on behalf of Mr Thomas Kwok, or listening to Dr Choi or Ms Pullinger, could not fail to be moved by the genuineness of Mr Kwok's Christian faith and his compassion for those less fortunate than himself.

There is absolutely no doubt in my mind that you, Mr Kwok, are at heart a good man and a sincere one whose work and altruism have touched the lives of a great many people. Your good works over very many years have earned you a well deserved reputation as a genuinely motivated philanthropist, and not just someone who can afford to be generous. But what may not have been appreciated by the general public is the full extent of your altruism, which has extended, as some of the letters -- for example, that of Mr Lau Yuan Chuan -- reveal, beyond the churches and charities you support, beyond the staff of Sun Hung Kai, whom you might be expected to exhibit a special concern for when they're confronted by personal difficulties, to ordinary people caught up in personal tragedies with which they cannot cope. And all of these people say the same thing: that at no time have you looked for any recognition for the good you have done, and that you are at all times genuinely motivated by your faith.

In my judgment, if the mitigation of positive good character means anything, I must place these matters fully in the sentencing balance and give effect to them in a real way. I propose, therefore, to give you a 1 year reduction for mitigation from the starting point of 6 years. Were I to give you more than a 1 year reduction, I would be giving undue regard to your personal mitigation and run the risk of approaching your sentence as though you had pleaded guilty, which would not be a principled exercise of my sentencing discretion.

The sentence that I pass on you is, therefore, one of 5 years' imprisonment. I will also order that you pay a fine of $500,000, in default of which you will serve a further 1 year imprisonment.

I have no doubt that you will have learned from this experience, and you above all people will know that while there may be pain in the night, joy comes in the morning.

I accept Ms Montgomery's submissions in relation to disqualification. I shall order that you be disqualified under section 168D of the Companies Ordinance, Cap 32, from being a director of any company for a period of 5 years from today.

I turn next to the 4th defendant. He faces sentence for two offences: count 5 and count 7. In respect of count 5, I accept that the 4th defendant was not the instigator of the

payments and that he has been aptly described as a loyal, reliable servant of SHKP. Nevertheless, he was central to the intricacy of the scheme and central to the conspiracy.

I would, in his case, adopt a starting point for the 4th defendant in respect of count 5 of 5 years' imprisonment.

In respect of count 7, I do not, with respect, agree that the jury's verdict is inconsistent with my directions. Indeed, the verdict would seem to me to be a faithful application of the directions as to the separate consideration of verdicts and counts as between each alleged conspirator, and the standard of proof to be applied in relation to the issue of conspiracy.

Because of the issue of the $5 million bonus and/or the issue of the $7 million gratuitous payment, the jury may well have been unsure on the questions of how and when and who reimbursed the $12 million which had been transferred from Villalta Inc to Wedingley Ltd in Singapore on 9 November 2007, and to D5 11 days later, if indeed there was a reimbursement.

What the jury must clearly have been sure about is that the money did not come from Beijing, and that the Longally agreement was a sham. They would have been sure there was a conspiracy to bribe D1, of which D4, and, for that matter, D5, were a part. They were simply unsure how and when D4 got the money.

In any event, it is not my function to explain the jury's verdict, and this is neither the time nor the place to embark upon such an analysis. What I must do is honour that verdict and sentence accordingly. But I will make clear in sentencing that there is no suggestion that the 4th defendant was bribing D1 for his own personal benefit, divorced from the interests of SHKP, and the jury were specifically directed to that effect.

As to the question of concurrence of sentences between counts 5 and 7, I regret I cannot accept that the sentences should be wholly concurrent either. Indeed, the acquittal of the 2nd defendant on count 7 rather fortifies the notion that there were two distinct conspiracies.

In reality, the transfer of the $10.8 million payment in count 5 was effected by D4's company Villalta to D5 in June 2005. The transfer of $12 million in count 7 was effected by Villalta, via Wedingley Ltd, to D5 in November 2007, 2 years and 5 months later.

In my view, these were separate and distinct conspiracies in which a further substantial payment was made to D1 of $11.182 million after he stood down as Chief Secretary. D4 played the same central role in the conspiracy on count 7, but I would also accept that he

was not the instigator of the offence.

The maximum sentence under the Prevention of Bribery Ordinance is also 7 years' imprisonment. In my judgment, the starting point for this offence, bearing in mind his role in the conspiracy, should again be 5 years' imprisonment.

I have also been provided with several letters of recommendation concerning the 4th defendant. Clearly he is a loyal, competent and well-regarded director of SHKP, for whom he has worked for over 40 years.

Bearing in mind the principle of totality, I would ordinarily make 21 months of the sentence on count 7 consecutive to 5 years' imprisonment on count 5, thus making 6 years and 9 months' imprisonment, with the balance being concurrent with the sentence on count 5.

I shall, however, allow a reduction of 9 months for the 4th defendant's good character, which would bring the overall sentence down to 6 years' imprisonment. I shall achieve that objective by simply making 1 year of the sentence on count 7 consecutive to the sentence on count 5, the remaining term of count 7 being concurrent with the sentence on count 5.

In addition, I shall fine the defendant the sum of $500,000 in respect of count 7. There will be 1 year imprisonment in default of such payment.

I also agree with Mr Winter's submission in relation to disqualification. Accordingly, I further order that the 4th defendant be disqualified under section 168D of the Companies Ordinance from being a director of any company for a period of 6 years from today.

I turn next to the 5th defendant, who also faces sentence in respect of counts 5 and 7. It seems to me that the 5th defendant is in a somewhat different category from the others. He was not a member of SHKP or any of its subsidiaries, hence he was not identified in the particulars of either count as one to whom D1 was being favourably disposed in his representative capacity as a director of SHKP or its subsidiaries.

Nevertheless, it was because he was not connected with SHKP that he was useful in making the final secret payments to his old friend, D1. And for that part in the conspiracies, the evidence suggests that he was well rewarded. In fulfilling his role, he went to considerable lengths to diversify the payments to D1. He was therefore an important and trusted player in these conspiracies.

I would judge the starting point in his case, and given his role in the conspiracies, to be 4 years' imprisonment on each count.

Again, I am impressed by the letters which have been placed before me by Mr Chan on behalf of the 5th defendant. They tell of a genuine person, helpful and kind to those in need, and obviously knowledgeable and respected in financial circles.

I recall his evidence in the voir dire, at the beginning of this trial, and the impression he made on me at the time, which was of someone fundamentally decent who had become involved out of loyalty, and I dare say the lure of money, which he needed at the time, in something rather out of character and out of his league. Had it not been for his friendship with D1 and the rather exalted and beguiling names and positions of those involved in the first conspiracy, I doubt very much he would have become involved at all.

Many of the authors of the letters on his behalf talk of their surprise at his involvement in these offences, and how they seem out of character for the person they knew. And I would accept that characterisation. Nevertheless, he was an important player in both conspiracies who knew exactly what he was doing, and he was well rewarded for his part.

I would, in the normal course, have made 18 months of count 7 run consecutively to the sentence on count 5, making 5½ years' imprisonment. However, I shall give a further discount of 6 months' imprisonment for the defendant's good character, reducing the overall sentence to 5 years' imprisonment. Again, the most effective way of achieving my objective is to make 1 year of the sentence on count 7 consecutive to the sentence on count 5, with the remaining part of the sentence on count 7 being ordered to run concurrently.

I turn finally to the 1st defendant, Mr Rafael Hui. I can well remember the time when you, Mr Hui, were appointed Chief Secretary in 2005. Your appointment came to many people as a welcome breath of fresh air after some difficult times in our history. You were highly regarded, articulate, diplomatic, and obviously able. And had it not been for this case, you would probably have gone down in history as one of Hong Kong's finest Chief Secretaries in recent years.

Unfortunately, like all tragic characters, you had a flaw. Whether one uses the pejorative word "greed" or puts it more kindly, that you were blinded by the desire to sustain the high life to which you had become accustomed, it is quite clear to me that you were very adept at using your anticipated position to gain as much advantage for yourself, in breach of your duty and the trust placed in you by those who welcomed your appointment.

The evidence I have heard and read in this case has at times raised my eyebrows. There has been a perception for many years of a culture in Hong Kong of government and business leaders cosying up to one another. The press have an expression for it in

Cantonese, and regrettably this case will have done nothing to dispel that perception. It is vitally important in these times that Hong Kong's government and business community remain and are seen to remain corruption-free, particularly when the mainland is taking obvious and positive steps to eradicate the cancer of corruption in their own jurisdiction.

High-ranking officials in particular owe a duty not only to the government of Hong Kong but to the people of Hong Kong whom they represent, and who expect them to act in the public interest and not their own selfish interest.

The breach of that duty and trust is a significant aspect of your criminality in this case. Hong Kong has fought hard and long, since the 1970s, to rid itself of corruption. To know that the former number 2 in government had received bribes must be a deep disappointment to many people in Hong Kong. It is quite clear to me that you were one of the instigators, as well as the beneficiaries, of these conspiracies.

As such, the same starting point in respect of count 5, namely 6 years' imprisonment, will apply to you as it applied to Mr Kwok, although I have been tempted to adopt a higher starting point. In respect of count 7, the starting point after trial will also be 6 years' imprisonment.

For the offences of misconduct in public office, namely counts 1 and 6, I accept that they did not involve bribery or corruption but nor are they trivial offences. Conflicts of interest should be obvious to anyone in the higher echelons of government, and there are codes in place to cater for them, for reasons which are readily understandable.

The fact that you were repeatedly renewing loans on terms which other citizens could not have obtained, from a subsidiary of SHKP at a time, for example, when you were conducting official business with SHKP, only needs to be stated to see the problems which might have ensued if you had defaulted or if SHKP's subsidiary had called in the loan.

In my judgment, a sentence of 18 months' imprisonment on each of counts 1 and 6 would be appropriate after trial.

As for count 8, given that your misconduct in public office derived from the obvious concealment of the bribe in count 7, the appropriate starting point would be six years' imprisonment but that sentence will be made wholly concurrent with the sentence on count 7.

I cannot and do not ignore your significant contribution to the government of Hong Kong over 30 years of service. I also accept, because it is part of the recent history of Hong

Kong, that you are properly credited with resisting the attack on Hong Kong's currency and stock market in 1998 by what was then perceived to be unorthodox methods which the former Chief Secretary at the time, Donald Tsang, has attested to in his letter on your behalf.

In my judgment, notwithstanding the fact which you have accepted in evidence that you did not pay tax which you knew you should have paid, you are still entitled to the recognition you deserve for your good character and lifetime's work and achievement and I assess the discount in that regard at 9 months. Your sentence will therefore be as follows.

On count 5, there will be a sentence of 6 years' imprisonment.

On count 7, there will be a sentence of 6 years' imprisonment, 2 years of which would ordinarily run consecutively to the sentence on count 5, making 8 years' imprisonment.

The two sentences of 18 months' imprisonment on counts 1 and 6 will run concurrently with each other, but 3 months of the sentence on count 1 will run consecutively to the 8 years, making a notional sentence of 8 years, 3 months' imprisonment.

However, I will give you a discount of 9 months in respect of your good character, which brings the sentence down to 7½ years' imprisonment. I shall achieve the result I intend by making 1 year and 3 months of the sentence on count 7, instead of 2 years, consecutive to the sentence of 6 years on count 5, thus making 7 years and 3 months' imprisonment; and a further 3 months in respect of count 1, also consecutive to the 7 years and 3 months' imprisonment, making a total of 7½ years' imprisonment.

There will be an order under section 12(1) of the Prevention of Bribery Ordinance that you pay to the government of the HKSAR the sum of $11.182 million, which is the sum paid to you under count 7.

There will also be an order that D1[sic] and D4 each pay the costs of the prosecution in the sum of $12.5 million each.

If I may recapitulate, the sentences that I passed will in their total effect be as follows:

D1, 7½ years' imprisonment; D2, 5 years' imprisonment plus a fine of $500,000; D4, 6 years' imprisonment plus a fine of $500,000; D5, 5 years' imprisonment.

Finally, I wish to say this. It is very common to criticise a law enforcement authority for its handling of a long and difficult prosecution. This one has been second to none, in my experience of practising the law in Hong Kong for over 32 years, in its painstaking investigation, preparation and attention to detail. It has been thoroughly and sensitively

undertaken, and it is right that I should acknowledge a particular debt that is owed in this case by the people of Hong Kong for the way the ICAC and the prosecution have conducted themselves.

(Discussion between Court and Counsel)

COURT: Members of the press, I am correcting myself. He was

Financial Secretary. I knew as soon as I said it that it wasn't correct.