HONG KONG EVIDENCE CASEBOOK

Simon NM Young

BArtSc (McMaster), LLB (Toronto), LLM (Cantab)
Barrister and Solicitor (Ontario, Canada),
Barrister at Parkside Chambers (Hong Kong)
Associate Professor and Director,
Centre for Comparative and Public Law, Faculty of Law,
University of Hong Kong

and make them prostitutes, the different ways in which casual workers secure employment in Hong Kong, the geographical boundaries of Hong Kong, the premises under the control and management of the Housing Authority, and the fact that baldness of vehicle tires may be a source of danger. The list is by no means exhaustive. The common law, Ordinances and subsidiary legislation are also judicially noticed; for the latter two, see the Interpretation and General Clauses Ordinance (Cap 1), s11.

Presumptions

1–008 Statutory and common law presumptions generally allow the tribunal of fact to presume a fact until a party proves otherwise. Perhaps the most well-known common law presumption is the presumption of innocence applied in all criminal trials. Here are some other examples:

Dangerous Drugs Ordinance (Cap 134)

47. Presumption of possession and knowledge of dangerous drugs

(1) Any person who is proved to have had in his physical possession-

(a) anything containing or supporting a dangerous drug;

. . .

shall, until the contrary is proved, be presumed to have had such drug in his possession.

(2) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.

(3) The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the dangerous drug.

United Nations (Anti-Terrorism Measures) Ordinance (Cap 575)

4. Specification by Chief Executive of persons and property as terrorists, terrorist associates or terrorist property

(1) Where a person is designated by the Committee as a terrorist, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person.

. . .

(5) For the purposes of this Ordinance, it shall be presumed, in the absence of evidence to the contrary, that-

(a) a person specified in a notice under subsection (1) is a terrorist;

. . .

of the issue in question will be enough to discharge the evidential burden, at which point the opposing party would have a legal burden to disprove the issue raised.

Direct and Circumstantial Evidence

1–013 If a fact is disputed by the parties, it is said to be a fact in issue. How does one know when a fact is disputed by the parties? A general rule of thumb is to assume that if a case is going to trial, all facts are disputed unless the parties have expressly agreed otherwise. From the point of view of the trial judge, the most efficient and desirable trials are those in which the parties have already agreed on the disputed and non-disputed facts before the trial begins.

Admissible evidence can come in two forms, depending on how it is used to prove the fact in issue. Direct evidence is evidence whose substance is identical to the fact in issue. For example, if the fact in issue is whether X stabbed Y in the stomach, witness W who clearly saw X stab Y in the stomach has direct evidence on this factual issue. Circumstantial evidence is evidence that tends to prove the fact in issue but whose substance is not identical to the fact in issue. In other words, proof of the fact in issue is by way of inference. Take the same stabbing example again. If witness W only saw X holding a blood-dripping knife while standing next to the injured Y, W's evidence is circumstantial evidence from which an inference could be drawn that it was X who had stabbed Y.

When a case is said to be "entirely circumstantial", this means that there is no direct evidence being used to prove the material facts. There is no rule that prohibits an entirely circumstantial case from going forwards. Indeed, some circumstantial cases can provide very strong proof of the material facts, more so than a case involving only direct evidence. For example, eyewitnesses to a crime are known to be very unreliable if they did not already know the person they were identifying. Nevertheless, in criminal cases, courts have historically taken the attitude that in circumstantial cases, the jury should be given more instructions on how to apply the standard of proof to the circumstantial evidence. But sometimes providing too much instruction can be confusing. The challenge for the court in each case is to decide when and how much instruction should be given to the jury on applying the standard of proof to entirely circumstantial cases. The case below sets out the legal position in Hong Kong.

HKSAR v Dixon Tang Kwok Wah (2002) 5 HKCFAR 209, CFA

BOKHARY PJ:

1–014 *Introduction*

2. This appellant is a professional and family man of previous good character. He faced six counts: one of rape and five of indecent assault. The complainant is a woman who at the material time worked as one of the domestic

Witness: In science we have 99.999 per cent certainty. So, what I would say, it is with a high degree of certainty.
His Lordship: 99.999 per cent that it came from Michael Pringle?
Witness: Yes, my Lord."

Towards the end of her cross-examination the following exchange took place between her and the judge: 8–105

"Witness: You asked me, I can't recall the question – what came to my mind – 'Why not the degree of certainty with which I state something?'
His Lordship: With which you stated that it was his semen in Kevan Davidson's vagina?
Witness: Yes.
His Lordship: And you told me it was 99.999 per cent certainty?
Witness: No. I said to you I would have to say it is with a high degree of certainty.
His Lordship: Not 99.999 . . .
Witness: I said 99.999. In science we say 99.99999. It goes on. But we did not address the probability in this.
His Lordship: Should I qualify this 99.999 now?
Witness: Not in the context of which we spoke. It will still stand."

18. When he came to this point in his summing up the judge said that the readings on the D1S80 test and on the HLADQα test on the male fraction in the vaginal swab:

"would indicate that the spermatozoa in the vaginal cavity of the deceased woman came from the accused man, Pringle."

After referring to the readings which she had obtained on the HLADQα test from the female fraction he said:

"So, it is based upon these results that she comes to the conclusion that the spermatozoa there came from Pringle, that it, that Pringle had sexual intercourse with the deceased."

19. This conclusion was fallacious, as Phillips LJ explained in *R v Doheny* [1997] 1 Cr App R 369, 372–374. The fallacy is that which is known as "the prosecutor's fallacy", although – as their Lordships have said – it was not a fallacy that was propounded in this case by the prosecutor. It can be explained in this way. Let it be assumed that the evidence about the random 8–106

(4) Where, in accordance with subsection (3), a party considers that he is not obliged to comply with the requirements imposed by subsection (1) with regard to any evidence in relation to any other party, he shall give notice in writing to that party to the effect that the evidence is being withheld and the grounds therefor.

(5) A party who seeks to adduce expert evidence in any proceedings and who fails to comply with subsection (1) shall not adduce that evidence in those proceedings without the leave of the court.

(6) This section shall not have effect in relation to any proceedings in which a person has been committed for trial or ordered to be retried, or in which any charge or proceedings or action or matter has been transferred, before the date on which this section comes into force.

(7) In subsection (1), "document" (文件) includes, in addition to a document in writing-

(a) any map, plan, graph or drawing;
(b) any photograph;
(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
(d) any film (including microfilm), negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.

(8) In this section, "court" (法院、法庭) includes the District Court.

NOTES & QUESTIONS

8–115

1. Note that s65DA does not apply to proceedings in the magistrates' court. Should it?
2. If an accused sought the opinions of three experts, and two of the expert reports were favourable while the other was not, does s65DA require the disclosure of all three reports? What if the accused was only going to rely on the two favourable reports at trial?
3. When does notice have to be given to the other parties? Is one week before the trial sufficient?
4. What are the consequences of failing to give proper notice? On what grounds might a judge allow the evidence to be admitted even if there has not been proper compliance with the notice requirement?

43. Time for putting expert report in evidence (O38, r43)
Where a party to any cause or matter calls as a witness the maker of a report which has been disclosed in accordance with a direction given under rule 37, the report may be put in evidence at the commencement of the examination in chief of its maker or at such other time as the Court may direct.

44. Revocation and variation of directions (O38, r44)
Any direction given under this Part of this Order may on sufficient cause being shown be revoked or varied by a subsequent direction given at or before the trial of the cause or matter.

Final Report of the Working Party on Civil Justice Reform
Hong Kong: HKSAR Judiciary, 3 March 2004) [footnotes renumberd]

Section 20: Expert evidence

Proposals 38 to 40 8–119

Proposal 38
Provisions aimed at countering the inappropriate and excessive use of expert witnesses should be adopted, giving the court control of the scope and use of expert evidence to be adduced.

Interim Report paras 485-493, 518

591. The Interim Report identified two major problems concerning expert evidence in the existing civil justice system:

(a) the inappropriate or excessive use of experts, which increases costs, the duration of proceedings and their complexity; and,
(b) partisanship and a lack of independence amongst experts, devaluing their role in the judicial process.

592. *Proposal 38* seeks to address the first of these problems, canvassing the introduction of a rule along the lines of CPR 35.4 which would give the court a discretion to exclude proposed expert evidence. CPR 35.4 provides that "No party may call an expert or put in evidence an expert's report without the court's permission." 8–120