

Chapter 3

Cases of Public Interest or Concern



HKSAR v TSIM SUM KIT, ADA

(FACC No. 1 of 2024)

This case arose from a family dispute over the division of the estate of the Appellant's grandmother. On 26 June 2018, the Appellant (a former bodyguard) shot and killed two relatives (her aunt and uncle) and injured two others (her other aunt and uncle) with a pistol in Quarry Bay Park after a family lunch. She was charged with two counts of murder and two counts of shooting with intent to do grievous bodily harm.

The Court of First Instance

(HCCC 272/2019)

The Appellant was granted legal aid to defend her case. She elected not to testify and put forward the partial defence of "diminished responsibility" in respect of the murder charges, arguing that her mental conditions significantly impaired her responsibility for the killings.

Under section 3 of the Homicide Ordinance (Cap 339) (HO), a person shall not be convicted of murder if he/she was suffering from a mental condition that substantially impaired his/her responsibility for the act. Section 3(2) further states that it shall be the defendant's duty to establish proof of this partial defence. If successfully proved, the defendant will be convicted of manslaughter instead.

At trial, both the prosecution and the defence called expert psychiatric evidence regarding the Appellant's mental condition at the time of the offences. Senior

Counsel for the Appellant acknowledged that the law placed a legal burden on the Appellant to establish, on a balance of probabilities, that she was suffering from diminished responsibility. After a jury trial, the Appellant was convicted of all four charges. She was sentenced to life imprisonment for the murders and 18 years' imprisonment for the shooting offences.

The Court of Appeal ***(CACC 153/2021)***

The Appellant was granted legal aid in her appeal against conviction to the Court of Appeal (CA). Counsel (who did not appear for the Appellant at trial) for the Appellant argued, amongst other things, that the legal burden placed on the Appellant to prove diminished responsibility was an unfair and unjustified derogation of the presumption of innocence under Article 11(1) of the Hong Kong Bill of Rights and Article 87(2) of the Basic Law. In other words, the Appellant challenged the constitutionality of section 3(2) of the HO in placing the burden of proof on a defendant to prove the defence of diminished responsibility.

The CA ruled that the legal burden imposed by section 3(2) of the HO did not violate the presumption of innocence. Even if it did, it was a proportionate and justifiable derogation from that right. The Appellant's appeal was therefore dismissed by the CA.

Court of Final Appeal (FACC No.1 of 2024)

With the assistance of legal aid, the Appellant further appealed against her conviction to the Court of Final Appeal (CFA). On 18 December 2023, the Appeal Committee granted leave for the Appellant to appeal to CFA and certified the following question as involving a point of law of great and general importance:

"Does section 3(2) of the Homicide Ordinance unjustifiably derogate from the Appellant's right of presumption of innocence under Article 87(2) of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights, and if so, should section 3(2) be read down as imposing only an evidential burden?"

Having heard arguments from the parties, the CFA answered the above question in the negative, and unanimously dismissed the Appellant's appeal. In particular, the CFA held that:

1. The presumption of innocence reflects the fundamental common law rule that it is the prosecution which must prove the accused's guilt of the offence charged beyond reasonable doubt.
2. The presumption of innocence is only engaged where the reverse burden provision requires the defendant to disprove an essential ingredient of the offence charged, thus relieving the prosecution of the usual burden of proving that ingredient beyond reasonable doubt. This question is one of substance rather than form. The elements of the offence would be the logical starting point.

and focus when analysing whether the presumption of innocence is engaged and derogated from in any given case. It does not matter whether the essential ingredient is contained in the definition of the offence or is cast as a defence issue.

3. Applying these principles, it is concluded that section 3(2) of HO does not engage or derogate from the presumption of innocence. The question of diminished responsibility only arises after the prosecution has successfully proved that the defendant killed the victim unlawfully with the requisite intent. The partial defence does not affect the constituent elements of murder, but instead is an extenuating mitigating circumstance that operates to reduce the mandatory sentence for murder. Therefore, the defendant is not someone presumed innocent at the point of invoking the partial defence of diminished responsibility. He or she will already have had the benefit of the presumption of innocence requiring the prosecution to prove the elements of murder before seeking to establish the partial defence.
4. Further, section 3(2) of the HO has the legitimate aim of alleviating the prosecution from an unworkable burden arising from the practical difficulties of proving a matter so personal to the accused. This is rationally connected to the restriction imposed, is proportionate, and also strikes a fair balance between the individual's right to be presumed innocent and the societal benefits of the restriction. A number of factors also support this conclusion, namely: the intrinsically subjective nature of the defence; the fact mental disorders and their effects are not part of ordinary life experience of a jury; the fact an accused cannot be compelled to be subject to medical examination by the prosecution; and the disparity in the respective disclosure obligations of the prosecution and defence.

5. As such, CFA concludes that even if the presumption of innocence is engaged, the reverse onus placed by the partial defence of diminished responsibility is proportionate and therefore justified.

This case examines the standard of proof for the partial defence of "diminished responsibility" and clarifies its compatibility with the constitutionally guaranteed presumption of innocence. This will serve as a useful precedent for similar cases in the future.

Infinger Nick, Li Yik Ho v The Hong Kong Housing Authority

(FACV 2, 3 & 4/2024)

With the assistance of legal aid, the Applicants successfully challenged by way of judicial reviews, the policies of the Hong Kong Housing Authority (HA) for excluding same-sex couples from the eligibility criteria for rented public housing and for registering as an authorised occupant in a Home Ownership Scheme Unit and for the transfer of such unit without the payment of a premium (FACV 2 & 3/2024).

The Applicant, Mr. Li also challenged the Home Ownership Scheme policy in excluding same-sex couples from the definitions of "husband", "wife" and "valid marriage" under the Intestates' Estates Ordinance Cap 73 (IEO) and the Inheritance (Provision for Family and Dependants) Ordinance Cap 481 (IPO). The Secretary for Justice (SJ) was the Respondent in that challenge (FACV 4/2024).

In the three cases, the Applicants succeeded in the Court of First Instance (CFI) and upon HA's and SJ's respective appeals, at the Court of Appeal (CA). HA and SJ appealed to the Court of Final Appeal (CFA) respectively.

Background and Proceedings in the Courts Below

In the cases against HA, the Applicant, Mr. Nick Infinger married his husband in Canada in January 2018. With his husband as his only family member, he applied for a shared rented public housing flat. HA rejected his application under the public housing policy.

Another Applicant, Mr. Li Yik Ho married Mr. Ng Hon Lam Edgar in the United Kingdom in 2017. Mr. Ng purchased a flat under the Home Ownership Scheme in his own name, and wished to add Mr. Li as a registered occupant and joint owner without payment of a premium. These were not permitted under the Home Ownership Scheme policies, unlike for opposite-sex spouses.

The Applicants brought separate judicial reviews to challenge these policies (Mr. Li was substituted for Mr. Ng following his death to continue with the proceedings). The Courts below held that the policies discriminated against same-sex couples (lawfully married overseas) and were therefore unlawful and unconstitutional. HA appealed to CFA.

In the case against SJ, the Courts below agreed, and declared the challenged provisions unconstitutional for being discriminatory against same-sex couples lawfully married overseas. SJ appealed to CFA.

CFA's Determination (FACV 2 & 3/2024)

In CFA, HA argued that same-sex and opposite-sex married couples were not comparable in the rented public housing and Home Ownership Scheme context, as only opposite-sex married couples had reproductive capabilities and potential which supported the government's objective of promoting population growth.

CFA rejected this argument and stated that HA's primary objective was to meet the housing needs of the underprivileged. Even if HA policies were designed to support population growth, this only concerned whether the measures were justified, and

not whether same-sex and opposite-sex married couples were comparable. HA's own policies did not differentiate amongst opposite-sex married couples in terms of whether they had or were planning to have children, or were capable of having children; and had accepted familial relationships with no procreative potential for application purposes.

HA also sought to argue in CFA that Article 36 of the Basic Law was constitutionally entrenching pre-1997 social welfare rights, overriding the equality provisions in Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights. It therefore guaranteed opposite-sex married couples' pre-1997 exclusive entitlements to apply under the rented public housing policy and Home Ownership Scheme policies, and immunised the policies from the equality provisions. These entitlements would be diluted by allowing same-sex married couples to apply.

CFA rejected this argument, holding that Article 36 was not engaged. Opposite-sex married couples never had exclusive entitlements to apply. Their rights to apply were non-exclusive, and their applications joined the same queue as those based on other eligible familial relationships.

CFA further held that Article 36 does not displace the application of the equality provisions. HA's argument was not supported by an examination of the nature of social welfare benefits, the importance of the right to equality, the drafting history of Article 36, and the government's obligation to develop and improve the social welfare system under Article 145 of the Basic Law.

CFA held that opposite-sex couples' exclusive constitutional rights to marry and obtain the legal status of marriage under Article 37 of the Basic Law did not shield the rented public housing or Home Ownership Scheme policies from scrutiny under the equality provisions as the entitlements to apply under these policies did not go to the status of marriage itself.

It was not in dispute between parties in the CFA appeal that the aim of supporting traditional family founded on opposite-sex marriage (the said aim) was legitimate. CFA accepted that the said aim was rationally connected with HA policies.

However, CFA found that the challenged policies were disproportionate and unjustified. It was necessary for HA to show the impact these exclusionary policies had on promoting the said aim and waiting times. However, HA had not adduced any evidence or empirical study on the likely effect on supply and the potential impact on opposite-sex couples if HA policies were relaxed. CFA therefore had no basis to conclude that the policies were reasonably necessary to promote the said aim, or that some less restrictive policies, such as prioritising the applications of opposite-sex married couples with small children, whilst still allowing same-sex married couples to apply, could not be reasonably pursued.

CFA also found that HA's total lack of evidence made it impossible for the Court to conclude that a reasonable balance had been struck between the societal benefits of the challenged policies and the hardship caused to same-sex married couples by excluding them from rented public housing or the Home Ownership Scheme as couples.

Further, HA's argument based on coherence between its Home Ownership Scheme purchase policy and policies on addition of occupants and transfer of ownership did not carry much weight. CFA held that it could not be right that unless and until an applicant had the standing and practical reason to challenge all discriminatory aspects of a policy framework, no integral part of it could be separately challenged, no matter how seriously the applicant might be affected by it.

CFA unanimously dismissed HA's appeals.

(FACV 4/2024)

CFA first established what amounted to unlawful discrimination, that there must first be a measure encroaching on a person's constitutional rights. Then, to find out whether there was differential treatment between comparable parties. If there was, and such a differential treatment was based on a constitutionally protected ground (such as sexual orientation as in this case), then this would amount to discrimination. If the authority could not show that the differential treatment was justified, being rationally connected to a legitimate aim and proportionate to achieving that legitimate aim, the discrimination would be unlawful.

CFA took the view that whether treatment was relevantly different such as to require justification was always context-dependent. In the context of IEO and IPO, the preferential treatment accorded to the surviving spouse of the deceased stemmed from their close inter-personal relationship with the deceased.

CFA held that a valid foreign same-sex marriage, as that between Mr. Li and Mr. Ng, went beyond a mere relationship of cohabitation. Similar to a heterosexual marriage,

a valid foreign same-sex marriage was a public undertaking regulated by statute and contained the characteristics of publicity and exclusivity. A couple in a valid foreign same-sex marriage had a comparably close inter-personal relationship as a couple in a heterosexual marriage.

SJ identified the legitimate aim of the differential treatment as that of "having consistent and coherent definitions of 'valid marriage' across legislative schemes which touch on the subject of marriage", recognising the rights of surviving same-sex spouses under the IEO and IPO would undermine such coherence.

CFA rejected this alleged coherence as a legitimate aim and found that there was no coherent definition of "valid marriage", as reflected in the wider scope of the IEO and IPO to include foreign marriages not otherwise recognised in Hong Kong. After examining various pieces of legislation on marital and family life generally, CFA reached the conclusion that marriage is to be understood in line with their respective statutory purposes. In the context of the IEO and IPO, their respective purposes differed from other pieces of matrimonial legislation. It followed that the alleged coherence did not exist. Further, the statutory purposes of the IEO and IPO did not justify the exclusion of surviving spouses of foreign same-sex marriages from statutory entitlement as spouses.

CFA concluded that as the legitimate aim identified by SJ was not established, it followed that the differential treatment challenged by Mr. Li was not rationally connected with any purported legitimate aim. As no legitimate aim had been established, there was no need for CFA to answer whether the differential treatment was proportionate to the interference with the right to equality.

CFA unanimously dismissed SJ's appeal.