

Press Summary_(English)

Press Summary_(Chinese)

FACC No. 7 of 2014

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 7 OF 2014 (CRIMINAL)
(ON APPEAL FROM CACC NO. 460 OF 2012)

BETWEEN

HKSAR	Respondent
and	
CHENG CHEE-TOCK THEODORE	Appellant
(成之德)	

Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ and Sir Anthony Mason NPJ

Date of Hearing: 2 June 2015

Date of Judgment: 25 June 2015

J U D G M E N T

Chief Justice Ma:

1. I agree with the judgment of Mr Justice Fok PJ and the orders contained therein.

Mr Justice Ribeiro PJ:

2. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Tang PJ:

3. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

4. The present case raises questions as to what happens to a pending criminal appeal to the Court of Final Appeal when the appellant dies before the appeal can be heard. Does the Court have jurisdiction to permit the appeal to continue? If so, what is the basis of that jurisdiction and how and in what circumstances should it be exercised? These questions arise on a summons issued by the appellant's widow and it would not normally be necessary for such an application to be addressed by a full five-member Court. The full Court has, however, heard this application because in answering the questions raised it is necessary to revisit *dicta* in a previous decision of the Court[1].

A. Background facts

5. On 4 October 2012, the appellant, Cheng Chee-tock Theodore, was convicted after trial[2] before HH Stanley Chan DJ of one count of conspiracy to defraud and sentenced, on 30 October 2012, to 5 months' imprisonment and to a disqualification order[3] for 3 years. He was released from prison on 7 February 2013 after serving his sentence. On 14 March 2014, the Court of Appeal[4] dismissed his application for leave to appeal against conviction and, on 12 June 2014, refused to certify that a point of law of great and general importance was involved in their decision.

6. On 11 April 2014, the appellant then applied to this Court for leave to appeal. On 4 August 2014, the Appeal Committee[5] granted leave to the appellant to appeal to the Court of Final Appeal on the grounds that (a) a point of law of great and general importance is involved in the decision of the Court of Appeal[6], and (b) it was reasonably arguable that substantial and grave injustice has been done.

7. The appeal was originally fixed to be heard on 26 February 2015. On 22 December 2014, however, the appellant passed away. The appellant's widow, Madam Leonora Yung, wishes to continue the appellant's appeal. On 14 January 2015, she took out a summons for leave to be made a party to the appeal and for the appeal to be carried on as if she had been substituted for the appellant. Directions were given[7] for the hearing of the summons and, pending its disposal, for the substantive appeal to be adjourned until further order[8]. Madam Yung has now been granted letters of administration in respect of the appellant's estate.

B. The parties' arguments and the issues arising

8. It was submitted on behalf of Madam Yung that there is jurisdiction to continue the appeal, either in the name of the appellant or in her name. It was her case that the Court has a discretion to permit an appeal to continue notwithstanding the death of the appellant and that, in the present case, there are special circumstances which justify the exercise of that discretion in favour of permitting the present appeal to continue.

9. For its part, the prosecution (respondent to the appeal) submitted that the appeal was personal to the appellant and that, upon his death, the appeal abated (i.e. terminated). It was further submitted that, having abated, there is no jurisdiction to continue with the appeal. Even if the appeal has not abated, the prosecution contended that an appeal requires a living appellant and that there is neither procedure nor power to make Madam Yung a party to the appeal, or to substitute Madam Yung for the appellant, or to continue the appeal on such terms as the Court thinks fit. Finally, it was submitted that, even if such procedure or power exists, this is not a case for the exercise of discretion in favour of Madam Yung's application.

10. In the circumstances, the following issues arise for determination on this application:

(1) Is there jurisdiction to continue a criminal appeal to this Court after an appellant's death and, if so, on what basis, or does the appeal simply abate? (The Jurisdiction Issue)

(2) If there is jurisdiction to continue, is it necessary to substitute a living party for a deceased appellant and, if so, what is the power and procedure by which the Court can do so? (The Substitution Issue)

(3) Assuming there is jurisdiction to continue the appeal, how is the Court's discretion to be exercised in the present case? (The Exercise of Discretion Issue)

11. It should be stressed at the outset that these issues are raised in the context of a criminal appeal to this Court. Different considerations may apply in respect of criminal appeals to the Court of Appeal or to the Court of First Instance and it should not be assumed that the answers in this judgment to the questions posed will apply in respect of criminal appeals to those courts^[9].

C. The Jurisdiction Issue

C.1 The appellate jurisdiction of the Court of Final Appeal

12. The Court of Final Appeal was established under Article 81 of the Basic Law of the Hong Kong Special Administrative Region. It sits at the apex of the court system in Hong Kong and exercises the power of final adjudication in accordance with Article 82 of the Basic Law. The Court's power of final adjudication is a power exercisable only on final appeal: *Solicitor v Law Society of Hong Kong & Secretary for Justice*^[10].

13. There is no inherent appellate jurisdiction. Instead, an appeal, whether to this Court or any intermediate court of appeal (be it the Court of Appeal or Court of First Instance), is a creature of statute[11]. In the case of the Court, the governing statute is the Hong Kong Court of Final Appeal Ordinance[12] and this regulates and limits appeals to the Court[13].

14. Part III of the Ordinance (comprising sections 28 to 37) applies to appeals in any criminal cause or matter. Section 31 of the Ordinance limits the decisions which may be appealed to the Court and also regulates at whose instance an appeal may lie. The section provides:

“An appeal shall, at the discretion of the Court, lie to the Court in any criminal cause or matter, at the instance of any party to the proceedings, from

- (a) any final decision of the Court of Appeal;
- (b) any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal.”

15. Section 32 of the Ordinance provides for the need for leave, which is the means by which the Court exercises its discretion referred to in section 31 to entertain an appeal. Thus: no appeal shall be admitted unless leave to appeal has been granted by the Court (s.32(1)); leave shall not be granted unless the court from which the appeal lies has certified that a point of law of great and general importance is involved in the decision, or it is shown that substantial and grave injustice has been done (s.32(2)); and, if the court below declines to certify, the Court itself may do so and grant leave to appeal (s.32(3)).

16. Section 33(1) stipulates the requirement to make an application for leave to appeal within the time specified from the date of the final decision to be appealed from (or such time as the Court may extend (s.33(2)) and rules relating to such application are contained in Part II of the Hong Kong Court of Final Appeal Rules[14]. Section 33(3) is important to the context of the relevant provisions under consideration and provides:

“An appeal to the Court shall be treated as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of.”

17. Thus, a criminal appeal to the Court is an appeal from a final decision of an intermediate court of appeal, in respect of which the Court has granted leave to appeal upon the certification (either of the court below or the Court itself) that a point of law of great and general importance is involved or on the ground that it is reasonably arguable that substantial and grave injustice has been done. These thresholds are high thresholds for the grant of leave in keeping with the Court's primary role in the administration of criminal justice in this jurisdiction, namely to resolve real controversy on points of law of great and general importance[15]. This role, of hearing appeals only on points of law of the requisite degree of importance, is reflected also in the context of civil appeals by the recent abolition of "as of right" appeals to the Court[16]. However, neither the Ordinance nor the Rules deal expressly with the death of an appellant whilst a criminal appeal is pending.

C.2 Abatement of an appeal upon death in other jurisdictions

18. The respondent relies on a line of English authorities to support the proposition that, in the absence of statutory language to the contrary, a criminal appeal is personal to a convicted person and abates upon that person's death.

19. In *R v Jefferies*[17], the English Court of Appeal considered an application by the widow of a man who had given notice of application for leave to appeal to the Court of Appeal against his conviction and sentence to continue the appeal notwithstanding his death. Widgery LJ, giving the judgment of the court, said[18]:

“ Whatever may be the powers of courts exercising a jurisdiction that does not derive from statute, the powers of this court are derived from, and confined to, those given by the Criminal Appeal Act of 1907. We take it to be a general principle that whenever a party to proceedings dies, the proceedings must abate, unless his personal representatives both have an interest in the subject-matter and can by virtue of the express terms of a statute (or from rules of court made by virtue of jurisdiction given by a statute) take the appropriate steps to have themselves substituted for the deceased as a party to the proceedings.”

20. This statement of general principle in *Jefferies*, for which no authority was cited in support, was approved by the House of Lords in *R v Kearley (No.2)*[19]. In *Kearley*, a man was convicted and sentenced and had a confiscation order made against him. An appeal to the Court of Appeal against conviction was dismissed but, on further appeal, the House of Lords quashed the convictions on most counts and remitted to the Court of Appeal the issue of whether to set aside or vary the confiscation order. Before that remitter was heard, the man died and the question arose as to whether the Court of Appeal had jurisdiction to entertain the remitted proceedings. It was held that the right of appeal under Part I of the Criminal Appeal Act 1968 was personal to the convicted person and that proceedings abated on that person's death. In his speech, Lord Jauncey of Tullichettle said[20]:

“ My Lords, as a pure matter of construction untrammelled by authority I should have had little hesitation in concluding that a right of appeal to the Court of Appeal under Part I of the Act of 1968 was personal to the convicted person. Widgery L.J. with his far greater experience in these matters reached the same conclusion in *Reg. v. Jefferies* which fortifies me in the conclusion which I have reached. *Reg. v. Jefferies* has stood unchallenged for 26 years, has been accepted as an accurate statement of the law in *Reg. v. Maguire* [1992] Q.B. 936 , 945, accords entirely with the natural construction of the relevant sections and, in my view, accurately states the law. I therefore reject the argument that it should be overruled and would for the foregoing reasons dismiss the appeal and answer the certified question in the negative.”

21. It is to be noted, however, that the statutory appeal provisions engaged in both *Jefferies* and *Kearley* were expressed in terms of “a person convicted” having a right to appeal against his conviction[21]. These provisions were held, as a matter of construction, to give rise to a personal right on the part of the convicted person to appeal to the Court of Appeal.[22]

22. It was recognised that these decisions could result in hardship in some circumstances and, accordingly, by the Criminal Appeal Act 1995, section 44A has been introduced into the Criminal Appeal Act 1968 to expressly empower the Court of Appeal[23] to approve the bringing or continuation of an appeal on behalf of a deceased appellent.

23. The Canadian courts, in contrast, have taken a different approach to that in the English authorities referred to above. In *R v Smith*[24], the Canadian Supreme Court had to consider whether the Newfoundland and Labrador Court of Appeal was right to hold that an appeal could continue after the appellant's death. Binnie J held (at §20) that, when an appellant died, the court retained jurisdiction to proceed in the interests of justice, but that it was a jurisdiction that should be sparingly exercised. Although the statutory appeal provision in that case[25] was expressed in similar terms to the English provisions considered in *Jefferies* and *Kearley*, Binnie J (delivering the judgment of the court) construed it simply to mean that the court's jurisdiction had to be invoked by the convicted person when still alive but that, once invoked, the court retained jurisdiction notwithstanding the person's death. Of the relevant statutory appeal provision, he said (at §§21 and 23):

“This language presupposes that at the time of the filing of the notice of appeal, the person convicted is alive and thus competent to initiate the appeal. ... The continuing jurisdiction of the Court of Appeal in this case rested on the notice of appeal that was properly filed during Smith's lifetime.

...

An appellant thus exercises his or her 'personal right' to appeal when the notice of appeal is filed. The filing is the root of the appellate court's jurisdiction. Whether the court chooses to proceed with the appeal or not is a matter of discretion to be exercised according to the principles ... hereinafter discussed.”

24. The abatement principle is applied very differently in the United States, where, in cases of appeals as of right, the principle is applied to render all proceedings from the inception of the prosecution, including the conviction, void *ab initio*[26]. It is, however, not necessary to consider the relevant United States jurisprudence as it was not contended on behalf of Madam Yung that this approach should be adopted in Hong Kong.

C.3 *Hin Lin Yee v HKSAR*

25. On behalf of Madam Yung, Ms Wing Kay Po[27] submitted that in *Hin Lin Yee v HKSAR*[28] this Court has already held that there is jurisdiction to continue an appeal after the death of an appellant. In that case, a medical practitioner (D1) and his clinic assistant (D2) were appealing to this Court against their convictions, upheld on intermediate appeal, for certain statutory offences relating to the sale of drugs. However, after the appeal to this Court had been brought but before it could be heard, D2 died. Since D1 and D2 were jointly represented by counsel and solicitors, were advancing the same grounds of appeal and D1 was still alive at the time of the appeal, the Court permitted D2's appeal to proceed notwithstanding her death and without any directions substituting any party for D2. In the result, D1's appeal was dismissed unanimously and D2's appeal was dismissed by a majority.

26. There was no argument in *Hin Lin Yee* as to the effect of D2's death on her appeal. This is not surprising, given the identical interests of D1 and D2 in the appeal and the fact that D1's appeal would proceed in any event. Ribeiro PJ touched briefly on the position of D2 at the beginning of his judgment, saying:

“18. The first appellant is a medical practitioner. The second appellant, who unfortunately died recently, was his assistant at his clinic in Tung Chung. The Court will, at the request of her counsel, proceed in any event to deal with the second appellant's appeal with which it is seized.”

27. For his part, in his partly dissenting judgment, Bokhary PJ said this:

“2. What about the assistant? Tragically, she has passed away. That was after her appeal to this Court had been lodged. If a conviction is unjust, it is not rendered otherwise by an appellant's death. On a proper understanding of access to the courts under our constitutional arrangements, this Court has a discretion to entertain an appeal even though the appellant has died since it was launched. We can entertain the appeal if justice so demands. It can be justice to the reputation of the dead, to the feelings of the living, to the finances of the estate, to the purity of the law or to all or any of those interests. The finances of the estate are not involved in the present appeal. But all those other interests are. Combined they are involved in such a way and to such a degree as to make it just that the assistant's appeal be entertained despite her death. Of those other interests, the deceased's reputation is by no means the least important. Reputations last longer than life. Actual conviction is graver than mere defamation. And the judiciary's responsibility is greater, for convictions are by the judiciary.”

28. Since none of the other members of the Court dealt with the position of D2, the above paragraph in Bokhary PJ's judgment would appear to be the primary source of the first paragraph of the headnote in the Hong Kong Court of Final Appeal Reports, which reads:

“(1) An appellate court retained jurisdiction, to be exercised on a discretionary basis, to hear and determine an appeal against conviction and against pecuniary sentence. The right of appellate courts to correct potential injustice was immanent in the Basic Law and provided the necessary jurisdiction. (See paras.2, 18.)”

29. For the respondent, Mr Nicholas Cooney SC[29], submitted that this paragraph in the headnote of *Hin Lin Yee* is wrong and that the Court ought not to follow its decision to hear an appeal notwithstanding the death of an appellant. For her part, Ms Po submitted that *Hin Lin Yee*, being a decision of this Court, should not be departed from except in exceptional circumstances. She invited us to follow *Hin Lin Yee* in respect of the issue of jurisdiction to continue an appeal.

30. It is quite clear that the issue now under consideration was not argued or considered in detail in *Hin Lin Yee* and so it falls to be considered for the first time in this application. Since, for the reasons stated in Section C.1 above, the Court's appellate jurisdiction is statutory, the correct answer to the Jurisdiction Issue is a matter of construction of the relevant provisions of the Ordinance, principally section 31.

C.4 Jurisdiction to continue a criminal appeal to this Court after death

31. Section 31 of the Ordinance gives a right to “any party to the proceedings” to appeal. In context, section 31 provides the first stage in engaging the jurisdiction of the Court to hear a final appeal in a criminal cause or matter. An appeal does not lie as of right but instead lies “at the discretion of the Court”. The right, therefore, given to any party to the proceedings, is to make an application for leave to appeal (pursuant to section 33 and subject to the rules governing such application in Part II of the Rules) and the Court will then determine whether to grant leave to bring a final appeal on the grounds specified in section 32. But, once that section 31 right is exercised, the appeal is treated as pending (s.33(3)).

32. In contrast to other statutory appeal provisions, e.g. section 82 of the Criminal Procedure Ordinance[30], section 31 is not expressed as a right of appeal limited to a convicted person since the right extends also to any party to the proceedings, including the Secretary for Justice. For this reason, *Jefferies*, *Kearley* and also *Smith* are distinguishable in this regard, as those cases concern appeal provisions personal to a convicted person.

33. There are further distinct features of a criminal appeal to this Court. First, such an appeal is a final appeal in a court hierarchy in which there will have already been one appeal to an intermediate court of appeal. Secondly, the appeal is one subject to the grant of leave by the Appeal Committee of the Court. Leave is only granted where there is a point of law of great and general importance or it is reasonably arguable that substantial and grave injustice has occurred. Where leave to appeal is granted, there is a strong public interest in such an appeal being heard, which interest goes beyond that of an individual appellant. These features were not present in *Jefferies*, *Kearley* or *Smith*, which were concerned with appeals to intermediate courts of appeal.

34. Accordingly, it is necessary to construe section 31 in its context within the scheme of the Ordinance and purposively having regard to the role of the Court as the final appellate court hearing appeals on important points of law. Doing so, I conclude that, once a party to the proceedings has invoked the jurisdiction of the Court under section 31 by making an application for leave to appeal pursuant to section 33, the Court retains jurisdiction to hear a final criminal appeal notwithstanding the subsequent death of a party (be he appellant or respondent to the appeal) and has a discretion whether to do so or not. Where a convicted person, whose appeal against conviction has been dismissed by the Court of Appeal, has invoked the right whilst he is alive and competent to institute an appeal by filing an application for leave to appeal, the Court retains jurisdiction to entertain the appeal even if the appellant thereafter dies. For this reason, it was clearly within the Court's jurisdiction to exercise its discretion to proceed to hear D2's appeal in *Hin Lin Yee*.

35. This construction of section 31, permitting an appeal to continue notwithstanding an appellant's death, is consistent with the Court's preparedness to hear a civil appeal having regard to the public importance of the matter despite the ultimate issue having become academic as between the parties[31].

36. I reach this conclusion on the Jurisdiction Issue as a matter of construction of the relevant statutory provisions in the Ordinance and not by reference to the constitutional arrangements regarding access to the courts. I do not, with respect, agree with the headnote in *Hin Lin Yee* insofar as it suggests that such jurisdiction is immanent[32] in the Basic Law or that this jurisdiction in respect of criminal appeals in this Court extends to any other appeal court. The constitutional arrangements are, of course, relevant to the context and purpose of the Ordinance and therefore to the construction of its provisions. However, jurisdiction to continue an appeal in this Court after the death of an appellant is to be found in the Ordinance alone, properly construed according to its context and purpose, and, as indicated above, this judgment only addresses criminal appeals to this Court. How this issue is to be resolved in respect of criminal appeals to intermediate courts of appeal will turn on the construction of different statutory provisions and remains to be dealt with on some other occasion. Similarly, whether there is jurisdiction (a) for the Secretary for Justice to commence a criminal appeal in this Court where an accused who has been acquitted on appeal dies before the application for leave to appeal is filed, or (b) for a criminal appeal to be commenced in this Court where the convicted person dies before invoking his right under section 31 by filing an application for leave to appeal, are questions not raised by the Jurisdiction Issue in the present case and I would leave them open to be dealt with when necessary.

37. Mr Cooney submitted that it would be “inconsistent and odd” if a right of appeal were to survive where an appellant died while appealing to this Court but to abate in the same situation in a pending appeal to the Court of Appeal. This, of course, assumes that an appeal to the Court of Appeal will abate on the appellant’s death, which may or may not be a correct assumption[33]. But, even on that assumption, I do not think it is either inconsistent or odd. The statutory appeal provisions applicable to appeals to the Court of Appeal and to this Court are different and they fall to be construed in the light of their own particular context and purpose which are quite different. This Court’s final appellate role is well-recognised[34] and its primary role to resolve real controversy on points of law of great and general importance is different to the function of an ordinary court of criminal appeal[35]. The retention of such jurisdiction even after an appellant has died is therefore far from odd. On the contrary, it would be odd if the Court did not retain that jurisdiction.

38. By whom and how the discretion is to be exercised will be addressed in Section E.1 below but it is first convenient to address the Substitution Issue.

D. The Substitution Issue

D.1 Is it necessary to substitute a living party for a deceased appellant?

39. In the case of a criminal appeal to this Court, neither the Ordinance nor the Rules contain express provisions requiring the substitution of a living party for a deceased party in order for a deceased appellant’s criminal appeal to continue.

40. In *Smith*, Binnie J considered that the deceased’s appeal became irregular upon his death because, as from that time, the appeal was in the name of a non-existent person and this irregularity ought to have been addressed by an application by the executor or personal representative of the deceased appellant to pursue the appeal in substitution for the deceased[36]. He considered that a live appellant was necessary for the appeal to be carried on and that the means for substitution of a live party for a deceased party was provided for in the relevant Newfoundland civil procedural rules which were applicable.[37]

41. In *Hin Lin Yee*, on the other hand, the need for substitution of a living party for D2 was not argued and, since there was an identity of D1 and D2's interests in the appeal to this Court and they were jointly represented by counsel and solicitors, it is understandable that the Court did not think it necessary to consider whether D2's appeal could or should properly proceed in the absence of another party in substitution for her. But there is no suggestion that the absence of such a party caused any prejudice to the case for the appellants or that for the respondent or led to any difficulties for the Court. On the particular facts of that case, the decision to allow D2's appeal to continue without a living appellant in substitution for her was a plainly correct decision.

42. As *Hin Lin Yee* shows, it is not always necessary that a living party be substituted for a deceased appellant in order for an appeal to be properly argued and determined by the Court. Instead, it will be a matter of discretion in any particular case whether the Court considers that substitution of a living party for the deceased appellant is appropriate when it is exercising its jurisdiction to permit the appeal to continue after the appellant's death.

D.2 The discretion whether to order substitution and, if so, by whom

43. It may well be that, save for the situation of a joint appeal with appellants having the same interests as in *Hin Lin Yee*, the Court will (subject to the issue of whether there is power to do so, addressed in Section D.3 below) usually exercise its discretion to order the substitution of a living party for the deceased appellant. In *Smith*, Binnie J identified^[38] two reasons of general application demonstrating why there is a need for a live appellant for the purposes of a criminal appeal, namely because the dead cannot give instructions and are no longer amenable to the direction of the court. The weight of these two factors will vary from case to case but they are certainly relevant to a consideration of how the discretion to permit an appeal to continue after an appellant's death might be exercised.

44. Similarly, the question of the identity of the person to be substituted is also a matter of discretion for the Court depending on the circumstances of the case. As the reasoning of Binnie J in *Smith* illustrates, the most natural choice of a party to substitute a deceased appellant may be the appellant's executor or personal representative. This is also supported by Widgery LJ's judgment in *Jefferies* in which the deceased appellant's personal representatives were identified as the party who might, depending on the existence of jurisdiction, be substituted for the deceased appellant. But it may not always be the case that, if there is to be substitution, it must be by the executor or personal representative of the deceased appellant.

45. In England, where the Criminal Appeal Act 1995 has added section 44A to the Criminal Appeal Act 1968, the Court of Appeal may approve the bringing of an appeal begun by a deceased person by that person's widow or widower, their personal representative or "any other person appearing to the Court of Appeal to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of a relevant appeal relating to him."^[39] The specific statutory provision therefore contemplates the pursuit of the appeal by a person not having a particular personal relationship to the deceased but rather having a substantial financial or other interest in the appeal.

46. Whilst there is no equivalent provision in the Ordinance or Rules, there may be circumstances in which a party other than the deceased appellant's executor or personal representative is the appropriate party to be substituted for the deceased appellant where the appeal is to be continued after the appellant's death.

D.3 The Court's power to order substitution

47. In the written submissions for Madam Yung, it was contended there are two sources of power to order substitution, namely (i) Rule 78 of the Rules^[40] and (ii) an appellate court's implied power, as explained in *Taylor v Lawrence*^[41], to regulate its own practice and procedure. In her oral submissions, Ms Po placed primary reliance on the Court's implied power rather than Rule 78.

48. Where a court derives its jurisdiction from a statute, it acquires by implication from the statute all powers necessary for the exercise of that jurisdiction: *HKSAR v Lam Kwong Wai & Another*[42]. The English Court of Appeal cases of *Taylor v Lawrence* and *G v Home Secretary*[43] similarly establish that, as a creature of statute, an appellate court has implied jurisdiction to regulate its practice and procedure which is ancillary to its statutory jurisdiction. Having decided that the Court has jurisdiction to hear an appeal notwithstanding an appellant's death after the lodging of an application for leave to appeal (see Section C.4 above), the Court's exercise of discretion to order substitution of a living party for the deceased appellant in order to achieve that purpose is plainly an exercise of implied power ancillary to the Court's statutory jurisdiction. Accordingly, if the Court considers that it should exercise its discretion to order the substitution of a living party for the deceased appellant, it undoubtedly has implied power to order the substitution of Madam Yung for her former husband.

49. It is therefore unnecessary to consider the other source of power relied upon in Madam Yung's written submissions, namely Rule 78 of the Rules. There may be difficulties in reliance on Rule 78 since that rule is expressed in general terms relating to the practice and procedure "in the Court" to be determined by the Chief Justice rather than that to be adopted in an individual case by the Court (whether the full Court or the Appeal Committee). However, as stated, it is not necessary to consider this rule in the present context.

E. The Exercise of Discretion Issue

E.1 The exercise of discretion in general

50. Like any other discretion of the Court, the discretion whether to continue an appeal after an appellant's death must be exercised on a principled basis. In *Smith*, Binnie J identified a number of factors that should be applied in the context of an appeal to a criminal court of appeal in Canada^[44]. His identification of those factors was necessarily influenced by the particular statutory provisions he was considering. In *Hin Lin Yee*, Bokhary PJ identified various factors that he considered might determine that justice demanded the continuation of an appeal. However, those factors were neither the subject of argument, nor were they endorsed by the other members of the Court, nor were they based on the proper jurisdictional basis of the discretion as identified above. It is therefore necessary to determine afresh the appropriate factors relevant to the exercise of the discretion.

51. Having regard, therefore, to the context and purpose of section 31 of the Ordinance (addressed in Section C above), the factors relevant to the exercise of the discretion to continue an appeal notwithstanding the death of an appellant will include the following:

(1) Whether leave to appeal has been or will be granted: The Court will be guided primarily by whether leave to appeal has been granted or, if leave has not yet been granted, by the basis on which leave to appeal is sought and the likelihood of such leave being granted. Where leave to appeal is sought on a point of law, this will probably be a critical factor in any given case since the grant of leave to appeal on that ground will serve to demonstrate the Appeal Committee's view that the appeal is of sufficient importance to be heard by the Court as the final appellate court in Hong Kong. Similarly, although not as critical as the point of law ground, the grant of leave to appeal on the basis of substantial and grave injustice will be a relevant factor, the weight of which will depend on the circumstances of the particular case.

(2) The existence of an applicant: The existence of a party who wishes the appellant's appeal to be continued and who makes an application for such continuation will usually be an essential requirement. It would be most unlikely that the Court would consider exercising the discretion to continue if there were no such party. Indeed, in the absence of such a party, the application of the provisions for dismissal of an appeal for non-prosecution^[45] (where leave has been granted) will probably result in the dismissal of the appeal.

(3) The continuation of the appeal on a proper adversarial basis: The Court will be concerned that the issues to be determined by it in any continued appeal are to be properly argued. The willingness of the party applying for the appeal to be continued to be substituted as appellant will be relevant in the event the Court considers such substitution to be necessary. Similarly, the Court will wish to be satisfied that the appeal will continue on a proper adversarial basis with appropriate legal representation to argue the appeal. It may wish to be satisfied that legal aid is available for the appellant's case or that the applicant is otherwise able to instruct legal representatives for the appeal. In cases of exceptional importance, the Court may see fit to appoint an *amicus curiae*.

(4) The interest of the applicant in the continuation of the appeal:
The reason why the party applying wishes the appeal to be continued will be relevant. The financial interest of an appellant's estate in the pending appeal may be relevant where the executors or personal representatives of the appellant apply for the appeal to be continued. If financial interest is relied upon, the nature of that interest and its amount will be relevant to the weight to be attached to this factor. Similarly, the applicant's interest in restoring the reputation of the appellant may be relevant but this will be a factor to which varying weight will attach: the graver the offence of which the appellant has been convicted, the more weight this factor will carry.

52. The above list of factors is not intended to be an exhaustive list of the relevant factors, nor is it intended to be applied as a checklist of factors that must be present in every case.

53. In the context of an appeal to this Court, the question whether to exercise the discretion to permit an appeal to continue notwithstanding the appellant's death may arise at different stages. This is because the jurisdiction will arise as soon as a living applicant makes an application for leave to appeal pursuant to section 33 of the Ordinance and if, unfortunately he should die, this may occur at any time thereafter (including before the Registrar has decided whether to issue a Rule 7 summons or before the Appeal Committee has considered any submissions served in response to such a summons or before the Appeal Committee has determined the application for leave to appeal). As provided in section 33(3), an appeal to the Court is treated as pending until any application for leave to appeal is disposed of.

54. For the reasons stated above, the grant of leave to appeal will likely be a critical factor. Given the importance of the grant of leave to the exercise of this discretion, where a putative appellant dies after filing his notice of application for leave to appeal but before that application is heard, the question of whether the appeal should be continued is one which should be decided by the Appeal Committee. Thus, if the Registrar is minded to issue a Rule 7 summons, he should direct the party applying for the appeal to be continued to show cause both as to why the application should not be dismissed and why, also, if the leave application is to be heard by the Appeal Committee, the appeal should be continued notwithstanding the putative appellant's death. The Appeal Committee will then decide both whether the application for leave to appeal should be heard and, if so, whether the applicant should be heard on behalf of the putative appellant. If the Registrar is not minded to issue a Rule 7 summons, the Appeal Committee will have to decide whether, if it is minded to grant leave to appeal, to exercise its discretion to allow the appeal to continue.

55. Similarly, if the appellant dies after leave to appeal has been granted, an application to continue the appeal, although one which a single permanent judge of the Court would have jurisdiction to determine^[46], should be heard by the Appeal Committee which, having granted leave, should have the opportunity to take the change of circumstances into account. For this reason, the summons seeking the continuation of the appeal should be made returnable before the Appeal Committee. The present application has been heard by the full Court for the particular reason explained above and, in future cases, it will not normally be necessary for a similar application to be heard by the full Court.

E.2 The exercise of discretion in this case

56. In the present case, the Appeal Committee certified that a point of law of great and general importance was involved in the decision of the Court of Appeal and granted leave to appeal on that ground and also on the ground that it was reasonably arguable that substantial and grave injustice has been done in respect of the appellant. The appeal is therefore demonstrably of the requisite importance to be heard by the Court and, as indicated above, this is a critical factor supporting the exercise of discretion to permit the appeal to continue.

57. Madam Yung is a willing applicant and there is no reason to think her wish for the appeal to continue is anything but genuine. As the widow of the appellant, she has a substantive relational interest in the continuation of the appeal in order to overturn her former husband's conviction. The appellant was convicted of a serious criminal offence involving fraud, the gravity of which is reflected in the sentence of imprisonment imposed. Although the appellant fully served his sentence and his disqualification order became moot upon his death, the reputational harm due to his conviction remains.

58. In her application, Madam Yung asserted, as a ground for the exercise of discretion to permit her to continue the appeal, that the appellant's estate would most likely suffer "significant financial loss"[47]. She referred to three civil claims or potential claims against the appellant's estate in which his conviction is said to be relevant. The value of one of those claims is said to be HK\$6,580,000. The existence and viability of these claims against the estate was disputed by the respondent but it is unnecessary to resolve this dispute since this factor, of significant financial loss to the appellant's estate, must be discounted. This is because, in the Schedule of Assets and Liabilities of the appellant annexed to the Letters of Administration granted to Madam Yung, the appellant's estate is shown only to have assets of approximately HK\$60,000 so that, assuming the claims against it to be valid, the estate is technically insolvent. In any event, as against those assets of HK\$60,000, the schedule refers to liabilities in the form of legal costs due to the appellant's solicitors in the criminal proceedings giving rise to this appeal. Although no details are given, it is a safe assumption that such costs will have already exceeded the stated assets of the estate so that, on that basis also, the estate is insolvent.

59. Nevertheless, taking all the relevant factors into account, in particular the critical factor of the grant of leave to appeal, this is a case in which it would be appropriate to exercise the discretion to permit the appeal to continue notwithstanding the appellant's death.

60. In the present case, unless Madam Yung or some other natural person is substituted for the appellant, there would be no other party capable of giving instructions or of being amenable to the direction of the Court (in relation, for example, to an order for costs of the appeal). This suggests that it would be appropriate to order the substitution of some other party for the deceased appellant. As indicated above, the most natural person to substitute for a deceased appellant will usually be the appellant's executor or personal representative. Here, since (i) Madam Yung has now been granted letters of administration in respect of the appellant's estate, (ii) she wishes the appeal to be prosecuted and (iii) no other party has sought to be substituted or wishes to pursue the appeal on behalf of the deceased appellant, Madam Yung is the most obvious person to be substituted for the appellant. Moreover, she was represented in this application by the same counsel and solicitors who have been representing the appellant on his appeal to this Court. Preparation for the hearing of the appeal had already reached an advanced stage at the time of the appellant's death; the parties' printed cases for the appeal had already been filed and the appeal was ready to be heard. If Madam Yung were substituted for the appellant, there is no doubt that the appeal would proceed on a proper adversarial basis.

61. For these reasons, it would therefore be appropriate to make an order that she be substituted for the appellant and that the appeal be continued in her name in her capacity as the personal representative of the appellant's estate. The joinder of Madam Yung to the appeal in that capacity will enable the Court to consider, depending on the outcome of the appeal, its discretion in relation to costs as against the estate[48]. Although the argument that the estate has a financial interest in the continuation of the appeal has been discounted on the basis of the assets declared, this is not to be taken to preclude the prosecution proving that assets exist in the event this becomes relevant in the context of costs or otherwise.

F. Disposition

62. For the above reasons, I would exercise the Court's discretion in favour of Madam Yung and order, notwithstanding the death of the appellant, that:

(1) Madam Yung be made a party to the appeal in her capacity as the personal representative of the estate of Cheng Chee-tock Theodore in substitution for the appellant; and

(2) the appeal in FACC 7/2014 be continued in the name of Madam Yung in such capacity aforesaid.

63. Finally, I would direct that any arguments as regards the costs of this application be reserved to the hearing of the appeal.

Sir Anthony Mason NPJ:

64. I agree with the judgment of Mr Justice Fok PJ.

(Geoffrey Ma)
Chief Justice

(R A V Ribeiro)
Permanent Judge

(Robert Tang)
Permanent Judge

(Joseph Fok)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Ms Wing Kay Po, Ms Doris Li and Mr Newton Mak, instructed by Peter K.S. Chan & Co., for the Appellant and the Applicant

Mr Nicholas Cooney, SC, on fiat and Miss Jessie Sham, SPP (Ag) of the Department of Justice, for the Respondent

[1] *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142

[2] In DCCC 476/2011.

[3] Pursuant to s.168E of the Companies Ordinance (Cap.32).

[4] Stock VP, Lunn JA and Barnes J (CACC 460/2012)

[5] Ma CJ, Ribeiro & Tang PJJ (FAMC 23/2014)

[6] *Viz.*, “Where an asset is sold by a company (X Co) to a listed issuer (Y Co), do the ‘panoply of the rights of shareholders, including that in respect of the receipt of dividends’, either individually or cumulatively, constitute an interest in the assets of X Co which is sufficient to render any acquisition of any of those assets by Y Co a ‘transaction’ between A and Y Co such that the transaction is a “connected transaction” within the meaning of Rule 14A.13(1)(a) of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (“the Listing Rules”), if A is a ‘connected person’ to Y Co within the meaning of Rule 14A.11(1) of the Listing Rules?”

[7] By Ribeiro PJ, on 23 January 2015.

[8] On 23 February 2015, Madam Yung applied to amend her summons to seek an order that the appeal be continued on such terms as the Court thinks fit. Although initially opposed by the respondent, Mr Nicholas Cooney SC, leading counsel for the respondent, indicated at the outset of the hearing that the respondent did not object to the amendment to the summons.

[9] For this reason, the letter to the Registrar from Mr Cooney, received after the conclusion of the hearing, drawing the Court’s attention to instances in which the Court of Appeal has treated an appeal as abated upon death was not relevant.

[10] (2003) 6 HKCFAR 570 at §29

[11] *Ibid.* at §31

[12] (Cap.484) (“the Ordinance”)

[13] *Solicitor v Law Society of Hong Kong & Secretary for Justice (supra)* at §35

[14] (Cap.484A) (“the Rules”)

[15] *So Yiu Fung v HKSAR* (1999) 2 HKCFAR 539 at pp.541I-542B & p.543E-H.

[16] Administration of Justice (Miscellaneous Provisions) Ordinance 2014, s.8

[17] [1969] 1 QB 120

[18] At p.124B-D

[19] [1994] 2 AC 414

[20] At p.422F-G

[21] In *Jefferies*, s.3 of the Criminal Appeal Act 1907 (“A person convicted on indictment may appeal under this Act to the Court of Appeal ... (a) against his conviction...”); in *Kearley*, s.1(1) of the Criminal Appeal Act 1968 (“... a person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction ...”).

[22] A different conclusion was reached in *R v. Maguire* [1992] QB 936, where the English Court of Appeal construed section 17 of the Criminal Appeal Act 1968 as permitting the case of a deceased person to be referred to the court by the Home Secretary and that, after referral, it was to be treated as an appeal by that person (see p.947D).

[23] By section 44A(2)(b), this power also applies in respect of appeals to the UK Supreme Court.

[24] [2004] 1 SCR 385

[25] *Criminal Code*, RSC 1985, c.C-46, s.675(1): “[a] person who is convicted ... may appeal to the court of appeal ... against his conviction”.

[26] *Durham v United States*, 401 US 481 (1971); the position appears to be different for appeals heard on a discretionary basis (where the appeal abates but the conviction is left intact), see *Dove v United States*, 423 US 325 (1976).

[27] Leading Ms Doris Li and Mr Newton Mak

[28] (2010) 13 HKCFAR 142

[29] Leading Miss Jessie Sham, SPP (Ag)

[30] (Cap.221), governing criminal appeals to the Court of Appeal, which provides: “A person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction.”

[31] See e.g. *Secretary for Security v Sakthivel Prabakar* (2003) 6 HKCFAR 397 at §42.

[32] Existing or operating within; inherent.

[33] Any inconsistency or oddity would be removed if the relevant statutory provisions governing intermediate appeals were to be construed in a manner similar to section 31 of the Ordinance. As indicated above, this is an open question not addressed on this appeal but this result is one which the reasoning in *Smith* supports.

[34] *Solicitor v Law Society of Hong Kong & Secretary for Justice (supra)*

[35] *So Yiu Fung v HKSAR (supra)*

[36] At §26

[37] At §§27-29

[38] At §26

[39] Criminal Appeal Act 1968, section 44A(1) and (3). Section 44A(1) provides: “(1) Where a person has died – (a) any relevant appeal which might have been begun by him had he remained alive may be begun by a person approved by the Court of Appeal; ...”; and section 44A(3) provides: “(3)Approval for the purposes of this section may only be given to –

(a) the widow or widower of the dead person;

(b) a person who is the personal representative (within the meaning of section 55(1)(xi) of the Administration of Estates Act 1925) of the dead person; or

(c) any other person appearing to the Court of Appeal to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of a relevant appeal relating to him.”

[40] This provides: “In any matter not provided for in these Rules, the practice and procedure in the Court shall be such as may be decided by the Chief Justice who may, if he thinks fit, be guided by the practice and procedure of the High Court.”

[41] [2003] QB 528, per Lord Woolf CJ at §§17, 26 & 50

[42] (2006) 9 HKCFAR 574 at §§67 to 71, esp. at §69

[43] [2004] 1 WLR 1349, per Lord Phillips of Worth Matravers at §13

[44] At §50

[45] In Rule 18 of the Rules.

[46] See section 46(2); such decision of a single permanent judge being subject to review by the Appeal Committee under section 46(3).

[47] Applicant’s Affirmation, 20.1.15, §9

[48] Recently discussed in *HKSAR v Wong Tak Keung* (FACC 8/2014), Judgment on Costs, 20 April 2015.