

When a search of a mobile phone or device by the Hong Kong Police is lawful



This update is about the recent important Court of Appeal decision in SHAM WING KAN v COMMISSIONER OF POLICE [2020] HKCA 186 which considered the Hong Kong Police's power to search the contents of a mobile phone or device ("**mobile**") without a search warrant when exercising a general power of arrest under section 50(6) of the Police Force Ordinance ("**PFO**")¹.

In reaching its decision the Court of Appeal has attempted to strike a balance between privacy interests and legitimate law enforcement objectives. As explained below, it was held that the Police should in most cases obtain a search warrant before they proceeded to search an arrested person's mobile.

Context

We all carry powerful mobiles these days and searches of them raise significant privacy concerns because of the:

- (i) Vast amount and unique nature of personal information stored in them;
- (ii) Ability to access via them information which is stored in the "cloud"; and
- (iii) Portability and accessibility of such information.

As a result of the above, the potential for an invasion of a person's privacy where mobiles are concerned could be even higher than the privacy interests engaged from a search conducted by the Police of a person's home.

Background facts

The Civil Human Rights Front has been organizing an annual march on 1 July on Hong Kong Island for many years. Sham Wing Kan took part in organizing the one held on 1 July 2014. He was arrested a few days thereafter for suspected offences committed in connection with the march and upon his arrest various mobile phones were seized from him.

Court of First Instance ("CFI")

The above led to proceedings in the CFI. Au J. (as he was then) held that section 50(6) PFO allowed searches of mobiles seized on arrest when exigent circumstances existed. The Judge stated these circumstances: (i) are to prevent an imminent threat to safety of the public or Police officers; (ii) are to prevent imminent loss or destruction of evidence; or (iii) would lead to the discovery of evidence in an extremely urgent and vulnerable situation.

The Court of Appeal

Wanting unrestricted access to search mobiles the Police appealed the CFI's decision.

¹ Section 50(6) PFO provides:

'Where any person is apprehended by a police officer it shall be lawful for such officer to search for and take possession of any newspaper, book or other document or any portion or extract therefrom and any other article or chattel which may be found on his person ... which the said officer may reasonably suspect to be of value ... to the investigation of any offence'

The Police argued when someone was lawfully arrested that the power to conduct a search of them and all material in their possession was a power incidental to an arrest in all circumstances and all cases as a matter of common law so the right to search a mobile existed at all times and not just in an emergency situation as the CFI had held earlier.

To support their arguments the Police stated delays to obtain a search warrant to review a mobile may compromise their ability to follow up leads which could be identified from information obtained from the search: particularly because modern technology means that there is often a very short window after someone's arrest before their mobile automatically locks.

The point was raised that the law should recognize new challenges presented by the use of mobiles as instruments of crime and therefore the legitimate needs of all law enforcement officers to be able to combat such crime by searches of mobiles.

Scope of Police's power

While numerous arguments for unrestricted searches were made, the Court of Appeal was however concerned to protect a suspect against the risk of a wholesale invasion of their privacy.

There would be little to stop this from happening if the search of a mobile was constrained only by the requirements that the arrest be lawful, that the search be truly incidental to it and reasonably conducted.

Balancing the privacy rights protected by Article 14² of the Bill of Rights and Article 30³ of the Basic Law, the Court of Appeal held the power to search a mobile seized on a person's arrest can be exercised by the Police if:

- (i) It is pursuant to a search warrant obtained under section 50(7) PFO; or
- (ii) The search happens when it is not reasonably practicable to obtain a warrant beforehand and the Police officer concerned must also have a reasonable basis for having to conduct the search on an immediate basis, namely it being necessary:
 - (a) for the investigation of the offence for which the person's involvement was suspected, including the preservation of information or evidence connected with such offences; or
 - (b) for the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the Police officers at the scene);
- (iii) For a warrantless search conducted under (ii) above, other than a cursory examination for filtering purposes, the Court of Appeal held the scope of any detailed examination of the mobile should be limited to items relevant to objectives set out in sub-paragraph (ii)(b): so for safety reasons; and
- (iv) A Police officer should make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the search and a copy of the written record should be supplied forthwith to the arrested person.

² The provision states: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...'.

³ The provision states: 'The freedom of privacy of communication of Hong Kong residents shall be protected by law...'.

The Court of Appeal further stated:

- A Magistrate does not have the power to compel a person to give the Police the password to unlock their mobile. Further, the refusal to give such a password to the Police when asked would not constitute an offence of obstruction of a Police officer in the due execution of their duty⁴.
- A Magistrate may issue a search warrant under section 50(7) PFO to authorize the search of the digital contents of a mobile by adopting a purposive construction to the PFO so that the search of such device is a “*place*” and the data on it are “*documents*” and therefore falling validly within the section.
- Warrantless searches of mobiles in accordance with the above provisions were not dependent on the seriousness of the offence concerned.
- Once a warrantless search had been conducted on a mobile, it then became a matter for the Court to make a valued judgment as to whether or not the decision to search satisfied the requirements in sub-paragraphs (ii) and (iii) above but nonetheless operated on the individual concerned with oppressive unfairness that was not proportionate to achieving the legitimate aims of the Police.

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⁴ Compare this with the Securities and Futures Commission’s power to compel someone to provide information to them such as the passwords for mobile devices; see our earlier Regulatory Update issued on 2 April 2020.