

HONG KONG / JUDGMENT

HKSAR v. ALLIANCE ENGINEERING CO LTD

COURT

Court of First Instance

DECIDED

6 July 2007

CASE / FILE NUMBER

HCMA1154/2006

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bjbj HCMA1154/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 1154 OF 2006 (ON APPEAL FROM ESS4839/2006)

BETWEEN HKSAR Respondent and ALLIANCE ENGINEERING CO. LTD. Appellant (z gP n an information that alleged that the Appellant limited company was the contractor responsible for a construction site at a shop on the 1st Floor of Hutchison House, in Harcourt Road, in Central, saying that they failed to take all reasonable steps to ensure that a workman who was not wearing a suitable safety helmet did not remain on the site, contrary to Regulations 48(1)(b), 68(1)(a) and 68(2)(b) of the Construction Site Safety Regulations made under the Factories and Industrial Undertakings Ordinance, Cap.59. The issue was thus, really, a very simple one: had all reasonable steps been taken to ensure that a workman did not remain on the site without wearing a suitable safety helmet.

2. The trial lasted some four days. I note that with dismay. It seems to me that the first thing anyone would consider in seeking to find out what a reasonable step was to achieve the desired goal would be to consider whether or not there was a proper warning poster put up at the site. There was one at the site. It is Exhibit D2 in the case. It is a document that is headed in very large letters, Site Discipline and Safety Regulations. There then follows, and this is a document in Chinese characters with some translation that I have for the relevant part, printed rules about gambling, smoking, things like that on the site. Then about a third of the way down the poster there is a larger heading saying, Working on a height, special attention. Under that, in smaller characters, it says, While performing work on a height one should use suitable ladders or scaffold, should use safety gears and all tools and instruments being used in work progress should be carefully stored and remember to put on industrial safety helmet on construction sites. Those last words do not appear on the English translation of the Exhibit D2. Those last words have been agreed as being the proper translation by counsel who both read characters in this appeal before me.

3. The question, therefore, arises is that an adequate notice? The Magistrate found that it was not. I agree with the Magistrate's finding. We have all seen, having walked around Hong Kong, what the proper poster should be. You normally have a bright picture of a construction site yellow safety helmet and in big letters words to the effect that, This is a safety helmet area. No entry without a safety helmet. Safety helmets must be worn the whole time. The Appellant today contends that the written notice they rely on was a reasonable one. Frankly, I disagree. It was a simple, cheap, easy step to put up a proper poster right by where the workmen walked onto the site. That was not done. I judge it reasonable that it should have been done and, accordingly, the prosecution prove that the Appellant did not take all reasonable steps to ensure the required end.
4. I need say nothing further than that on the actual merits of the case. I will add this, though, that in my view the second reasonable thing a contractor would do in these circumstances would be to ensure that right by where workmen entered the premises, beneath or beside or adjacent to the sort of poster I have just described, there would be a receptacle which displayed the safety helmets on immediate view ready to be picked up and placed on the head. The evidence in this case is confused as to the exact location but it is common ground that it was somewhere in a passageway inside the premises where the work was going on. They were not right by the door. I think they should have been by the entrance door but that finding is not necessary to support the conviction in this case. That deals with the very simple issue that should have been at the centre of this case. Other points are taken.
5. Let me deal with this one: It is said that the work that was being undertaken in the size of premises we are concerned with in Hutchison House did not meet the statutory definition that would make the place a construction site. Section 2(1)(a) of the Ordinance, Cap.59, defines construction work and it means, The construction, erection, installation, reconstruction, repair, maintenance, (including redecoration and external cleaning) renewal, removal, alteration, improvement, dismantling or demolition of any structure or works specified in the Third Schedule.
6. The Third Schedule then sets out, at its first paragraph, these words, Any building, edifice, wall, and it then goes on to deal with other things. It is quite clear, in my judgment, that Hutchison House is a building or an edifice and the question, therefore, arises is whether or not what was going on there was construction work within those words I have just read out. The matter was dealt with by a written admission at the trial and it was made in these terms: The project included installation of air-conditioning system, drainage work and electrical work connected to the central system of the building, water leakage preventive work, painting and plastering work.

7. It seems to me that that description of the work being carried out amply meets and falls within words like, Improvement, maintenance (including redecoration), reconstruction, repair . At one stage, it seemed to me that the Appellants were suggesting that part of the building being subject to such matters would not engage the statutory definition, it would have to be the whole building that was, for instance, being maintained but when that assertion was examined, especially on a common sense basis, it was resiled from.
8. The submission the Appellant makes is simply this: That doing those works that were described in the admission would not meet the definition. I disagree. I think they meet it perfectly well; things like water preventive work clearly involve maintenance to a part of Hutchison House and such was clearly a construction site.
9. The final matter that was argued in support of this appeal against conviction is set out at ground 2 of the perfected grounds of appeal and it reads as follows: The learned Magistrate wrongly entered the arena of trial and created an impression of bias by asking an inordinate number of questions, by suggesting cases which had never been part of the prosecution cases and by advancing arguments which had never been relied upon by the prosecution both in the trial and in the cost application.
10. That is a serious allegation to make against a Magistrate, especially a Magistrate who enjoys the reputation this one did and who has long sat on the Bench. I want to say straightaway that there is a full transcript, we have been through it, and there is absolutely nothing in the allegation that her conduct created an impression of bias. She did ask questions and it is as well she did because, in fact, the questions she asked were some of the sensible ones that went to the material that helped both sides in the case. What happened was, at the end of a witness s evidence, she very politely would say, Do you mind if I clarify some matters? and then she asked, in a perfectly neutral way, a series of questions of the witnesses designed to elicit information that she had judged was important that she should know in order to decide the case fairly.
11. When I asked the counsel for the Appellant to take me to her best point anywhere in the transcript and show me something that suggested an impression of bias, she could not do it. All that it came down to, in the face of questions from me, was that she could point to the Magistrate asking questions. Her submission seemed to be that the mere asking of questions, neutrally phrased, demonstrated bias. That submission was wholly unrealistic and unsupported in the circumstances of this case. Whilst on her feet, counsel for the Appellant would say things like, Well, there was cross-examination of the witnesses by the Bench. My response was to say, Take me to it. Show me on the transcript. Again, she could not do it. All she found were mere polite requests for information. I made the point that if you took out the word, Court, and merely substituted and you could have had questions which would as easily have been seen as being a transcription of questions asked in evidence-in-chief.

12. This is the second case I have done this week where an identical allegation has been made against a Magistrate because they asked questions. In my judgment, members of the profession, taking these points, need to think very carefully about what they are doing. It is not our law, especially in these modern days of case management, that the Bench cannot ask questions. Obviously, it cannot involve itself in the trial in the way that demonstrates bias but it certainly can ask factual questions of which it wants to know the answer.
13. In fact, when I have dealt with the merits in this case and asked for help as to where on the transcript something relevant appears, as often as not counsel for the Appellant had to take me to the questions asked by the court. They were not questions that necessarily aided one side or the other. Indeed, she identified at page 40 of the transcript, a series of questions, which demonstrated help to the case that was being advanced by the defendant company below. Those questions there asked were not designed to help, they were merely designed to find out the relevant facts. The idea that a Magistrate must sit quietly, not ask questions, the answers to which he or she thinks are important to the resolutions of the case in front of him or her is, frankly, absurd. Appeals mounted on the basis merely from the fact that questions were asked, should not be. I have expressed myself in strong terms because I think it is about time somebody did.
14. Let me turn to the question of costs. This case took four days. One of the days resulted from having to recall a witness or the like, which was not the fault of the Appellant, so I will take it as a three-day hearing. The Magistrate prompted the prosecution below to apply for some costs. I am not surprised. I would have done exactly the same thing. In fact, the construction site point on the statutory interpretation arose from the defendant resiling from an admission that had earlier been made in the Magistrates Court. The Magistrate clearly took a dim view of the way the case had been defended and asked the prosecutor to consider the application for costs. I think that was a common sense course and one that should be taken more often. She only awarded two-days costs.
15. This matter is here afresh for my consideration and I do not see why the Appellant should not pay the three-days costs. I know it is not common in the Magistracy for convicted defendants to be charged costs but the fact is there is a general discretion given to the Bench by the Costs in Criminal Cases Ordinance and much of the time where petty crime is involved, with people who are not well off, or with people who are being sent to prison, applications for costs for those who lose their trials are not going to be made realistically. But in this area of practice in the Magistrates Court where limited companies are prosecuted for non-compliance with safety regulations in the carrying out of their commercial endeavours and they come to the court and make a simple case a long one, where public money is spent and they lose the issue, I can see no reason in justice why they should not pay the costs.
16. No good reason is advanced to me here, and Counsel for the Appellant, submitted little more than to say it is not usually done. The fact that it may not usually be done does not mean that I cannot exercise the general discretion I have on this appeal in considering the question of

costs below. I have. I can see no good reason why this limited company that did not take a very simple step of putting up the proper posters should not pay the costs of their prosecution. The order I make is a variation of the Magistrate s award of costs of two days to three. The result is not of great consequence because the costs were very fairly estimated at only \$4,000 per day. Instead of paying \$8,000 costs, the Appellant will pay \$12,000 costs. The appeal against conviction is dismissed. (Submissions by counsel)

17. Costs of appeal to be paid by the Appellant to be taxed if not agreed. (P Line) Deputy High Court Judge Mr Joseph Wong, Senior Government Counsel, of the Department of Justice, for the Respondent Ms Yanky Lam, instructed by Messrs Lau & Ngan, for the Appellant PAGE - PAGE CRT22/6.7.2007/DB HCMA1154/2006/Reasons for Judgment A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#\$ JUDGE.DOT setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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