

HONG KONG / JUDGMENT

HKSAR v. DOST MUHAMMAD

COURT

Court of First Instance

DECIDED

25 May 2007

CASE / FILE NUMBER

HCMA385/2007

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bjbj HCMA385/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 385 OF 2007 (ON APPEAL FROM TMCC 569 OF 2007)

BETWEEN HKSAR Respondent and DOST MUHAMMAD Appellant

Before : Deputy High Court Judge Longley in Court Date of Hearing : 25 May 2007 Date of Judgment : 25 May 2007

J U D G M E N T

AUTONUMOUT The appellant appeals against the sentence of a fine of \$2,000 and disqualification from holding or obtaining a driving licence for 12 months imposed upon him by Mr Kwok at Tuen Mun Magistrates Court on 9 February 2007 following his plea of guilty to a charge of permitting a motor vehicle to be used without third party insurance contrary to section 4(1) and (2), of the Motor Vehicles Insurance (Third Party Risks) Ordinance (the Ordinance), Cap.

272. The magistrate declined the appellant s application to review the sentence on 12 March 2007. AUTONUMOUT The facts which were admitted by the appellant were as follows. The appellant was employed as a professional driver by a Mr Tarar, the owner of the vehicle in question, a light goods vehicle. On the evening of 23 December 2006, a friend of the appellant came to his workplace and asked the appellant if he could borrow the vehicle in order to go to the market in order to do some shopping. The appellant telephoned Mr Tarar and asked his permission to lend the vehicle to his friend. Mr Tarar agreed subject to the appellant checking that his friend had a driving licence. The appellant had not seen his friend drive a vehicle before and simply asked his friend if he had a driving licence. The friend told him that he had and he let him borrow the vehicle. The appellant did not ask his

friend to produce the licence for inspection. It transpired that his friend had lied to him. He did not have a driving licence. Nevertheless, the friend went ahead and drove the vehicle and was stopped by the police. The insurance company confirmed that the insurance policy did not cover the vehicle whilst it was being driven by the friend if the friend did not have a driving licence. AUTONUMOUT The appellant has told the court that being a professional driver it is the period of disqualification about which he is concerned rather than the fine that was imposed. AUTONUMOUT Section 4 of the Motor Vehicles Insurance (Third Party Risks) Ordinance reads as follows

- (1) Subject to the provisions of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance. (2)(a) If a person acts in contravention of this section, he shall be liable to a fine of \$10000 and to imprisonment for 12 months, and a person convicted of an offence under this section shall (unless the court for special reasons thinks fit to order otherwise) be disqualified from holding or obtaining a licence to drive a motor vehicle for such period as the court may determine being not less than 12 months nor more than 3 years from the date of conviction. AUTONUMOUT Before the magistrate on the application for review the appellant produced long written submissions. He stated that he had been employed as a driver at a salary of \$7,000 per month before his disqualification. As a result of his disqualification he had lost his job. He was not fit for other work because of recurring pains from a kidney ailment. He has a clear criminal and traffic record. The disqualification had resulted in loss of his livelihood. Today he has told the court that if his licence is restored, Mr Tarar has agreed to re-employ him. AUTONUMOUT The issue therefore for the magistrate was whether there were special reasons for not imposing the otherwise mandatory disqualification provided by the Ordinance. AUTONUMOUT The magistrate approached the matter with great care. He rightly emphasized the rational behind the disqualification provisions for this sort of offence, and that special reasons must refer to the circumstances that are special to the facts which constitute the offence and do not refer to matters that are special to the offender himself. AUTONUMOUT In so far as the circumstances of the offence are concerned, he accepted that the appellant had, to a certain extent, been misled by (his friend) into believing that (his friend) had a driving licence but concluded that because the appellant simply relied on his friend's word that he had a driving licence rather than asking to inspect the licence, he had failed to establish special reasons. AUTONUMOUT The magistrate referred to the judgment of Jackson J in HKSAR v. Chan Ho Bun [2004] 1 HKLRD 876 where Jackson J upheld the magistrate's refusal to find special reasons. The magistrate in this case commented that the appellant had even less excuse than the offender in Chan Ho Bun. AUTONUMOUT Chan Ho Bun was, in my view, a case that was rather different from the present one. The defendant in that case had lent his car to a friend whom he had known for six to seven years and whom he knew drove and owned a vehicle. Unknown to him his friend had been disqualified from driving. The defendant had

simply assumed wrongly that his friend had a valid driving licence but had made no enquiries from him to confirm whether this assumption was true. Jackson J said this

8. Whilst it may be irksome, or perhaps in some circumstances embarrassing, for an owner to question his friend in order to ascertain if he had a current driving licence before giving him permission to borrow and drive his car, that he must do. Indeed that is the very least that he must do if he is to show that there is a special reason why he should not be disqualified in the event that his friend has, in fact, no driving licence. It seems to me that the seriousness of the offence and its possible consequences demand nothing less. A mere assumption, albeit reasonably founded as it was in this case, will not suffice. Jackson J was therefore dealing with a case where the defendant had not even asked whether his friend had a driving licence. This is not the situation in the present case. It is accepted that the appellant had asked his friend and his friend had actively misled him. AUTONUMOUT The magistrate referred to the appellant's failure to carry out his employer's instruction but the admitted facts do not state that the appellant's employer had stipulated that he should inspect his friend's licence, simply that he should ensure that his friend had a licence. Every case must be looked at on its own facts but in the case of a friend it might be understandable for a person to rely on their friend's assurance that they have a driving licence. AUTONUMOUT In the case of *Tam Wai Lun*, HCMA1001/1985, the defendant faced a similar charge of permitting the use of an uninsured vehicle. The defendant was being driven in his own car by a Mr Chan from whom he had previously bought the car. Unknown to him Mr Chan did not have a valid driving licence. The defendant had given evidence that he had been specifically told by Mr Chan that he had a valid driving licence and third party insurance. Bewley J said this The magistrate seems to have accepted this evidence, but took the view that the appellant should have taken steps to verify that Mr. Chan was insured. He decided that failure so to do meant that there were no special reasons for not disqualifying the appellant. The magistrate referred to *Wilkinson's Road Traffic Offences* 11th Ed. at page 665, on the question of knowledge and belief. He did not cite any particular case, but I can find no authority for the proposition that there can be no special reasons where a car owner fails to take steps to find out whether the driver is insured. On the contrary, several cases are cited in which special reasons were found where the defendant had been misled. Each case must be decided on its own facts. In my judgment this is a case where it is reasonable to take the view that the appellant was misled. The circumstances were such that he had grounds for believing, and did honestly believe, that Mr. Chan had a licence. Accordingly I find that there are special reasons for not disqualifying the appellant In my view the facts of *Tam Wai Lun* where the defendant was actively misled, are more similar to the present case to those in *Chan Ho Bun*. AUTONUMOUT The mere fact that a court finds there are circumstances which could amount to a special reason does not mean that it is bound not to disqualify. It must look at all the circumstances. In circumstances where a person is misled, those circumstances include whether it was reasonable to rely on the assurance of the person who misled him without making further enquiries. AUTONUMOUT In conclusion, despite the magistrate's careful analysis, I find that this is a case where there were circumstances that

could amount to a special reason for not ordering disqualification. In my view, it was reasonable for the appellant to rely on his friend s assurance and that the circumstances are such that disqualification should not be ordered. AUTONUMOUT allow the appeal to the extent of removing the order for disqualification. The fine still stands. (P.K.M. Longley) Deputy High Court Judge Ms Winnie Lam, GC of Department of Justice, for the Respondent Appellant in person, present PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V &`#\$ &`#\$ 4eg* oe/+ UE~f& 4eg* UE~f oe/+ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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