

HONG KONG / JUDGMENT

HKSAR v. FUNG WAI KWAN

COURT

Court of First Instance

DECIDED

24 October 2007

CASE / FILE NUMBER

HCMA521/2007

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bjbj HCMA521/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 521 OF 2007 (ON APPEAL FROM KCS28708 & KCS28709 OF 2006)

BETWEEN HKSAR Respondent and FUNG WAI KWAN (pellant was convicted after trial of two counts of exporting textiles otherwise than under and in accordance with an export licence, contrary to sections 6D(1) and 6D(3) of the Import and Export Ordinance (Cap. 60). He was sentenced to the fines of \$42,000 and \$24,000 respectively. He appeals against those convictions. The summonses AUTONUMOUT The first summons KCS28708/2006 read as follows [Fung Wai Kwan] on or about 11 November 2004, in Hong Kong, exported textiles, being a prohibited article specified in the second column of Part I of the Second Schedule to the Import and Export (General) Regulations, Cap. 60, to a country specified in the third column of that Schedule, otherwise than under and in accordance with an export licence issued by the Director of Trade, in that [Fung Wai Kwan] exported 27,000 ladies 100% cotton knitted briefs to Sweden under Export Licence No. HKSE4-M602108 when the said textiles were not covered by a valid Certificate of Hong Kong Origin. AUTONUMOUT Save for the details (24,000 ladies cotton knitted briefs exported to France under Export Licence HKFR4 3602280 on 29 November 2004) the second summons KCS28709/2006 was identical.

Background

AUTONUMOUT The background to this case was well summed up by the magistrate. I quote from paragraph 4 of her statement of findings

4. It was admitted between the parties under s. 65C of the Criminal Procedure Ordinance, Cap. 221, as set out in Exhibit P80, that (in summary) :
 - (a) The Defendant was the owner of one Top Regent Trading Company (Top Regent);

- (b) Under the provisions of the World Trade Organisation Agreement on Textiles and Clothing, prior to 1 January 2005, exports of most Hong Kong textile products to the European Union () were subject to quantitative restrictions;
 - (c) Export licences were issued by the Trade and Industry Department () against valid export quotas to cover the export of textile products of Hong Kong Origin;
 - (d) In addition to the export licences, the textile products exported to the EU must also be covered by Certificates of Hong Kong Origin issued by the TID or one of the five Government Approved Certification Organisations (GACO);
 - (e) In November 2004, the TID received from Top Regent (being the exporter) two applications for export licences covering respectively 27,000 and 24,000 ladies 100% cotton knitted briefs (textile products) for export to Sweden and France (EU member states);
 - (f) As stipulated in the Notice to Exporters, all shipments to the EU must be covered by valid Certificate of Hong Kong Origin. On the basis of the declarations made by Top Regent, two export licences numbered HKSE4-M602108 and HKFR4-3602280 were issued to Top Regent in respect of the textile products. Issue at trial AUTONUMOUT The contention between the parties was simple
5. The Prosecution case was very briefly that the textiles products were not covered by valid Certificates of Hong Kong Origin (Exhibits P35 and P46) The Defendant s case was one of honest belief or reasonable excuse that there was no reason to suspect that the said Certificates of Hong Kong Origin purportedly issued by the Hong Kong General Chamber of Commerce (HKGCC) were anything but genuine. AUTONUMOUT In terms of evidence
 6. PW1 was a senior manager of the HKGCC. He told the court that his duties included receiving and approving applications for Certificates of Hong Kong Origin. He said once an application for a Certificate of Hong Kong Origin was approved by the HKGCC, a photocopy of such Certificate would then be made for filing purposes.
 7. In or about September 2006, the officers of Customs & Excise Department came to the HKGCC to investigate the genuineness of the two Certificates of Hong Kong Origin (Exhibits P35 & P46). In doing so, PW1 checked against the computer and filing systems of the HKGCC to verify the certificate numbers therein. As a result, PW1 found there were no records of the said Certificates of Hong Kong Origin. PW1 further said the signatures as shown at the bottom of the said two Certificates of Hong Kong Origin did not seem to be put on by his approved officers of the HKGCC.
 8. PW1 said he also checked over the genuineness of the application forms allegedly for the said Certificates of Hong Kong Origin (Exhibits P54 and P55). Again PW1 could not find those application forms from the records kept by the HKGCC. PW1 told the court that the HKGCC would keep the records of the paper form applications for 25 months. If the applications were electronic ones, the records of such would be kept in the computer indefinitely. PW1 confirmed that officers of the HKGCC were incapable of amending and deleting the records

of such in the computer system. PW1 further confirmed that the computer system of the HKGCC which was connected to that of the TID, had been functioning properly at the time when the investigation was made. Hence, PW1 concluded that the said Certificates of Hong Kong Origin (Exhibits P35 & P46) were false. ...

19. The Defendant elected to remain silent The Defendant called one defence witness Miss So (DW1) to give evidence on his behalf.
20. DW1 told the court that she had worked as the shipping clerk of Top Regent from 2003 to January 2005. The sole proprietor of Top Regent was the Defendant who took over the company from Fung Wai Lit (defendant s father) in March
2004. DW1 said the Defendant only went back to Top Regent if there were any documents for him to sign.
21. DW1 said she had been responsible for all matters that had led to the issue of the Certificates of Hong Kong Origin in this case and she had also been responsible for all contractual matters in this case between [Nga Chi Garment Factory] and Top Regent. Through the introduction of [one Tam Wing Chuen], Top Regent entered into two contracts with Swedish and French buyers respectively It was Tam s suggestion that the goods were to be manufactured by Nga Chi. DW1 regarded Tam as a middleman who introduced orders for Top Regent.
22. DW1 obtained the particulars of the two export licences from Tam. After completing the application forms for Certificates of Hong Kong Origin as much as she could DW1 handed over the said forms to Tam. She left the production notification number blank as she did not know it at the time. Later Tam submitted to her the photocopies of the Certificates of Hong Kong Origin and six Production Notifications. In respect of the photocopies of the Certificates of Hong Kong Origin which were obtained from Tam, DW1 said that at the time she did look at them and she found nothing suspicious about the contents therein. She thought that they were genuine and she never suspected that they were false.
23. DW1 said all the goods in question were successfully exported to Sweden and France already. Payments of the goods had been made by the Swedish and French buyers and there was no complaints from them. She identified Exhibits P32 and P44 as payments subsequently made by Top Regent to Nga Chi who issued receipts of such payments The magistrate s findings AUTONUMOUT In the end, the magistrate adjudged that the appellant had failed to invoke the defence in AG v. Fong Chin Yue (1995) 1 HKCLR
193. No negative finding was however made in respect of DW1 as a witness. Precautionary measures were identified that DW1 could but did not take and the omission was attributed to the appellant. This appeal AUTONUMOUT A number of grounds have been filed in support of this appeal. Only one requires my attention. AUTONUMOUT Ground 14 alleges that there was insufficient evidence to find that the appellant had exported the textiles. AUTONUMOUT The argument goes as follows. AUTONUMOUT According to section 2 of the Import and

Export Ordinance, export means to take, or cause to be taken, out of Hong Kong . Since Top Regent was not the shipping company the party that took the textiles physically out of Hong Kong, the appellant must be shown to have caused the textiles to be so taken.

AUTONUMOUT Looking at the papers properly admitted, however, there was not a single document that pertained to the transactions that bore the appellant s signature. All the necessary declarations had his brother (the magistrate said father) as declarant. The business registration also shows the appellant assumed proprietorship of the firm in February 2004, nine months before the index offences. This and the evidence of DW1, disassociating the appellant from the firm s daily operation and was not disbelieved by the magistrate, support the view that the appellant was but an absent owner. AUTONUMOUT In reply, government counsel emphasizes two points. AUTONUMOUT First, the appellant was on record the firm s only proprietor. Second, in a letter prepared by the appellant s solicitors, a formal admission was made that when his brother signed the offending documents, he signed with the appellant s due authorization (page 145 of the bundle).

Analysis

AUTONUMOUT In my judgment, the admission just mentioned must be given its wider meaning. The penultimate paragraph of the same letter obliges such a conclusion Last but not least, Top Regent was a family business and Mr. Fung Wai Kwan, although being the sole proprietor of the company, was not directly involved in the daily operation of the business of the company. He would come back to the company when required e.g. to sign documents. However, as he was often away from Hong Kong, his brother was authorized to sign documents on behalf of the company. For reasons aforesaid, he did not consider it useful to attend an interview at [the Customs and Excise Department] Alternatively, the benefit of any ambiguity must go to the appellant. AUTONUMOUT Second, as conceded by government counsel, no provision is made for vicarious liability under the Import and Export Ordinance, at least not for the index offence. AUTONUMOUT That being the situation, the case of R. v. Wong Tak Choy [1994] 2 HKCLR 194, helpfully provided by the appellant s counsel, becomes relevant. Litton JA, as he then was, had this to say (at page 199) The general principle of our criminal law can hardly be in doubt. A man is not liable to be charged criminally for the act of his servant unless a particular statute imposed this liability upon him by express terms or by implication : see for instance Collins, J. in *Hardcastle v. Bielby* [1892] 1 QB 709 at 712. The Import and Export (General) Regulations do not by express terms make an employer liable for his servant s act of taking articles out of Hong Kong, contrary to the provisions of the Export Licence unless he has caused the servant to do so. The effect of the verb to cause in the context of the Import and Export Regulations has been exhaustively analysed by the Privy Council in *Attorney General v. Tse Hung-lit* [1986] 3 WLR

320. There the Privy Council expressly approved of a passage in the judgment of the High Court of Australia in *O Sullivan v. Truth and Sportmans Ltd* (1957) 96 CLR 220 at 228 where the High Court was dealing with the offence of causing a newspaper to be offered for sale containing certain prohibited matters. The passage is in these terms [The expression to cause] should be interpreted as confined to cases where the prohibited act is done on the

actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act will ensue. Obviously when it comes to offences created by statute, the general principle of law that an employer is not made criminally responsible for the acts of his servant may be displaced. In order to guard against the happening of a prohibited act, a statute can impose liability upon an employer even though he does not know of and is not a party to the act done by the servant. The question in this case is Do the Import and Export (General) Regulations go this far? In my judgment the analysis is not advanced by saying that regulations 3 and 4 create strict liability. Assumed they do that was common ground in Attorney General v. Tse Hung-lit (see p.325G). All that means is that a person can be guilty of taking an article, such as textiles, to another country otherwise than in accordance with an export licence without criminal intent. For instance, he may not realise that the article was prohibited, or may have thought that the export licence covered the article exported, he is still guilty. To say that a person can be criminally liable under regulations 3 and 4 without criminal intent does not answer the question in this case Who caused the prohibited act? AUTONUMOUT Applying the above ratio, and asking the same question, there seems to me to be just one answer in this present matter. There was insufficient evidence to conclude that the appellant had caused the export. It cannot be shown that he contemplated or desired it. AUTONUMOUT If anyone thinks that this result would enable individuals to elude responsibility, my view is that, in any one case, someone somehow will come within the full force of the law. Nor can I imagine minions fronting up knowingly for their masters in any sizeable scale. AUTONUMOUT In a case provided by government counsel, action was indeed taken against the actual causer of the export (the manager) and not the owner (although she was the sole proprietor of the exporting company), and the conviction was upheld : HKSAR v. Wan Leung Kei, HCMA1172/2004. AUTONUMOUT Finally, the fact that this point was never raised at trial does not make it less valid.

Judgment

AUTONUMOUT The appeal is allowed. The convictions are quashed and the sentences set aside. (D. Pang) Deputy High Court Judge Ms Wong Sze Lai Lily, SGC of Department of Justice, for HKSAR Mr Leo Remedios and Mr Frederick H.F. Chan, instructed by Messrs Bernard Wong & Co., for the Appellant 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 &`#\$ m_IP m_IP m_IP m_IP m_IP m_IP m_IP 2_'C T_T\ 2_'C T_T\ & 6" ABC.dot setup Microsoft Word 9.0 Y4\ Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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