

HONG KONG / JUDGMENT

# HKSAR v. GAMMON CONSTRUCTION LTD AND OTHERS

## COURT

Court of First Instance

## DECIDED

11 May 2007

## CASE / FILE NUMBER

HCMA541/2006

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bjbj HCMA541/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.541 OF  
2006 (ON APPEAL FROM TWS 20890 20892 OF 2005)

BETWEEN HKSAR Respondent and gammon construction limited 1st Appellant VSL HONG KONG  
LIMITED 2nd Appellant GAMMON MANAGEMENT SERVICES LTD 3rd Appellant

Before : Deputy High Court Judge D. Pang in Court Date of Hearing : 20 April 2007 Date of  
Judgment : 11 May 2007

## J U D G M E N T

AUTONUMOUT The appellants were each convicted after trial of one count of failing to ensure that mechanical equipment was operated by trained and competent workmen contrary to sections 45(1), 68(1)(a) and 68(2)(b) of the Construction Sites (Safety) Regulations made under the Factories and Industrial Undertakings Ordinance, Cap.

59. They were each sentenced to a fine of \$30,000. They appeal against the convictions. The Summonses AUTONUMOUT Though charged in their different capacities a contractor responsible for a mechanical equipment in the case of the 1st appellant and the contractor who had direct control over the construction work which involved the use of a mechanical equipment in the case of the 2nd and the 3rd appellants the substance of each of the summonses against them were identical On 12 June 2005, being \_\_\_\_, namely segment carrier no. E09 at Pier 4, did fail to ensure that when the mechanical equipment was used on the construction site at Hong Kong Shenzhen Western Corridor (Contract No. HY/2002/21), it

was not operated by a workman who was trained and competent to operate it.

## Background

AUTONUMOUT The 1st appellant was a partner in a joint venture responsible for Contract No. HY/2002/21. Together, the 2nd and 3rd appellants were a subcontractor responsible for the erection work of a bridge involved. AUTONUMOUT The segment carrier is a 48 wheel trailer designed to convey pre cast concrete bridge segments. It is 9 metres long, 4 metres wide and propelled by a 3 metre power unit at the back. On the trailer is a large detachable structure called the chair which acts as rest for the bridge segments. When not loaded, the whole machine is no taller than 1.5 metres. It travels at human walking speed and is operated by a control panel linked to the power unit by a 3 metre cord. AUTONUMOUT On 12 June 2005, a workman at Pier 4 got caught up in an accident while the segment carrier was in movement. It took place while another workman Rana Chandra Parkas (PW1) was its operator. He received his training from one Mr Yung, the plant engineer (PW2). Subsequently, an occupational safety officer of the Labour Department (PW3) visited the site and another occupational safety officer (PW4) gave expert opinion on the matter. AUTONUMOUT In short, the prosecution say it is unsafe for the segment carrier to be operated by a single person, and in training and/or permitting PW1 to operate it on his own the appellants were guilty of the index offences. AUTONUMOUT On the magistrate's direction, no evidence on the accident was admitted at trial. The appellants gave no evidence and did not call any witnesses. But it is obvious that they contended :

- (a) their instructors on how to operate the carrier were all properly trained by the manufacturer ( Nicholas );
  - (b) in turn, and with the help of a distributor ( Kanson ), all their operators were properly trained by these instructors;
  - (c) as an operator, PW1 was competent; and
  - (d) various steps had been taken to ensure safe operation of the segment carrier in question.
- The Magistrate's Findings AUTONUMOUT In the end, the magistrate convicted all the appellants. This is what he found in the Statement of Findings Consideration of the evidence etc
17. I have considered all the testimony and exhibits, including defence exhibit. I have considered all cross-examinations on the witnesses and submissions by the Defence. Actually, the case can be disposed of on common ground evidence, which after careful consideration, I ruled to be the facts of the case. Defective training
18. The carrier is a big machine that moves back and forward. It is powerful. It is to move big cement structure (segment of a bridge). Anybody trapped or bumped when it moves could easily suffer serious bodily injury. Safety precaution is obviously necessary. Sufficient and right training for the operator is important.

19. Contractors must consult the makers and the distributors of the carrier, other experienced user companies in the industry, overseas or local. However, the contractors cannot just blindly follow the instructions manual, the consulted opinions and the makers/distributors trainings. The contractors still have to exercise caution and common sense.
20. It is obvious that, apart from checking clearance around and beneath the carrier at the beginning of each resumed work, it is necessary to have also an assistant to help the operator when the carrier is in motion.
21. The carrier itself is big. It involves too many affectable areas when it moves. One pair of eyes is not safe enough for constant monitoring. There should be, among other things, another pair of eyes to watch it where the operator was focusing on somewhere else or just to watch the blind spots.
22. The training in the case was defective. The training was wrong, because it gave a wrong concept to the operators (including PW1). PW1 should never be operating this carrier all by himself. He needs an assistant to help him out.
23. His taught reliance on his own eyes was wrong from the start and throughout his work. That should have been clear to any safety officers, persons in the business or just average adult citizens who had seen how it moves. This, I rule does not need an expert to tell.
24. Because the companies have not applied their mind sufficiently to the safety problems while the carrier moves, the training concept was wrong. The wrong concept (only one pair of eyes) hampered the training. Accordingly, the trained product (the trainees) are incompetent for the job.
25. There is common knowledge by the workers that nobody could get closed to the carrier when it is in motion or could sit on the seats. However, that is not enough. The open comfortable seat is an irresistible temptation to some tired or worn out workers. The seat is like candy temptations to kids. While the contractors are not required to baby-sit the workers or to provide for sloppy/insane workers, the seat temptation in this case is simply human nature, something the contractors should have guarded against because it is reasonably foreseeable.
26. Because of the above reasoning, the common ground testimony and evidence (which I rule to be the facts of the case), I find that the training was defective. The operators (including PW1) were not properly trained. They were not competent for the job. The three defendants failed to ensure the otherwise. Accordingly, I rule that all elements of the three summonses are proved by the prosecution beyond reasonable doubt. All three companies are convicted as charged. Reasonable practicality
27. It is reasonably practicable to provide one assistant to the operator, but it is not provided, to watch the blind spots. It is just a matter of costs. Accident could happen to the driver's seat at the front where if a nearby worker managed to sit on the chair without PW1 noticing, or somebody was squatting closed to or in between the wheels for whatever reason, when PW1

was working and was focusing on the back. This worker might well be crushed when the carrier moves or retreats. This danger can never be under-estimated as the carrier moves in the construction site where there are inevitably workers and materials around. The carrier obvious design of 2 seats

28. In addition, the Court has an observation. There were two seats in its original design. They were there when it was shipped to Hong Kong. The seat at the front could never be meant to be seated by the operator, or else the carrier could never move. The control panel cord was not long enough. Of course, a seat is supposed to be seated by a human, and in a construction site, a worker.
29. This design contemplates two workers on a carrier when it moves or operates. This is the only necessary irresistible reasonable inference. Because of two seats, two workers were contemplated. One worker being the operator, and the other, necessarily an assistant.  
Alternative basis to convict
35. Apart from the above, the training was tainted with communication problem. It is PW2's truthful belief that all the Nepalese trainees could manage English. That was why interpretation was not provided, and obviously no interpretation time was allowed in the lesson.
36. But, in fact, PW1 could not understand all the English instructions in the training. He had to rely on a Nepalese worker to explain to him sometimes. And inevitably, during this translation time, instructions were missed out by PW1 and the helping Nepalese worker. This makes the training more congested. Naturally, it is harder for PW1 and the translator to catch up with the continuing instructions. This was highly undesirable. Something intended to be taught inevitably were missed out by them both. This way rendered the training defective too. Accordingly, the less-instructed PW1 and the helping Nepalese worker were not competent. This Appeal AUTONUMOUT The appellants have against these convictions advanced three grounds. Ground AUTONUMOUT This ground alleges that the magistrate had confused the issues whether an operator was trained and competent and whether a safe system of work was enforced. AUTONUMOUT Having heard arguments, I am satisfied that this ground is substantiated. AUTONUMOUT For a start, there is no licensing system or any legal requirement about who can or cannot operate a segment carrier. There are no guidelines by the labour or any government departments on what constitutes adequate training. This may not however come as any surprise because notwithstanding its considerable size, the carrier does little more than just go forward and backward, at a very slow speed. All the suggestions are that it is easy to operate. AUTONUMOUT Second, the unchallenged evidence of PW2 is that both Nicholas and Kansen were of the stance that the carrier is a one man operation. This is what they would tell their clients. Contrast that with PW3 and 4 whose evidence is that there are blind spots, particularly at the front (i.e. opposite end to where the operator stands) but which is a problem to long vehicles of any description. If the Labour Department is right then any container truck driver who is not trained to have an attendant to look out for him in reversing his vehicle should be stripped

of his licence. AUTONUMOUT Third, PW3 and 4 also referred to the seat the one that constitutes an irresistible temptation according to the magistrate (paragraph 25 of the Statement of Findings). Since it is up at the front, it is out of sight of the operator, who may drop the chair, reverse the trailer and therefore hit the head of whoever is sitting there against the chair. That is their evidence. What that proposition fails to take into account however is that operators are obliged to walk round the carrier once before moving it, and that warning lights would be flashing once the carrier is in motion. The operators in this case also knew that no one was allowed to sit on those seats and that no workmen were to go near the carrier while it was in motion. Those were the site rules. If that is not enough to chase unwanted passengers away, it cannot be said to have anything to do with the training or competence of the operator. AUTONUMOUT Whether or not there was any wrongdoing on the appellants part, the prosecution had brought the wrong charge, and the magistrate was misled. That is my judgment. Ground AUTONUMOUT Ground 2 attacks the validity of every facet of the magistrate's reasoning. AUTONUMOUT I am afraid it is all made out as well. AUTONUMOUT I have already alluded to the lack of complexity in operating the segment carrier, and some of the site rules that afforded extra protection to the workers. I should add that, as another safety precaution, the carrier is allowed to move forward only when it is unloaded (when its height of 1.5 metres would not cause any serious obstruction to the operator's view from the back) and only in reverse towards the direction of the power unit when it is loaded (when there would be no obstruction of view at all). The other thing is that the cord of the control panel is long enough for the operator to constantly check on the sides. All in all, I really do not see how before it becomes safe, the operator must have an assistant. AUTONUMOUT The magistrate mentioned reasonable practicability (paragraph 27 of the Statement of Findings), but it is strictly irrelevant. True, the appellants had in the course of the trial tried to show that they had taken various steps to ensure safety, but only to establish the context in which PW1's operation of the segment carrier was to be considered, not unlike what I have done in paragraph 14 above. It has nothing to do with the offence. Nor is it applicable as a statutory defence. AUTONUMOUT Regarding the design of the two seats (paragraph 28 of the Statement of Findings), the magistrate's logic strikes me as fundamentally flawed. If the presence of these seats gave rise to the irresistible inference that he suggested, it should also give rise to the irresistible inference that the operator and his assistant should be seated. Why else should there be seats which are for sitting? But this cannot be because the operator will be facing the back when the carrier is going forward. With both the operator and his assistant seated, there will also be no one to check on the sides. In any event, the magistrate's logic is directly contradicted by the manufacturer's instruction that no one including the operator should sit on those seats. Finally, this point about the seats was never raised at trial. Counsel never had the opportunity to deal with it. That in itself is an irredeemable irregularity. AUTONUMOUT The magistrate also argued that PW1's training was tainted with communication problem his alternative basis to convict (paragraph 35 of the Statement of Findings). To this, the appellants certainly have a lot to say, not least about how unfairly the magistrate had allegedly summarized this part of the evidence in the Statement of Findings. For me, I will simply say it was not the prosecution

case that PW1 had missed anything. It is not for the magistrate to convict on this basis without warning. In any event, it is unclear which part or parts of the training PW1 is supposed to have missed. If that is impossible to itemize then I do not know how anyone can conclude that his training was defective. If 50 is the passing mark, anyone scoring 50 and above is qualified. One cannot say that because you fall short of 100, you must have missed something and are incompetent. Ground 3 AUTONUMOUT This ground alleges that the magistrate had descended into the arena and taken over the prosecution by questioning PW2 in an aggressive manner. AUTONUMOUT Without going into the detail, it has been shown to me that the magistrate had asked a total of 120 non ambiguity clarifying questions, as compared to 40 by prosecuting counsel. In the least, it suggests a pronounced lack of judicial restraint.

JUDGMENT

AUTONUMOUT The appeal is allowed. The convictions of all the appellants are quashed; their sentences set aside. ( D. Pang ) Deputy High Court Judge Ms Lily Ho, SGC of Department of Justice, for HKSAR Ms Phillis L.P. Loh, instructed by Messrs Deacons, for the 1st, 2nd and 3rd Appellants 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 m\_IP ^in\ HfBw@b HfBw & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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