

HONG KONG / JUDGMENT

HKSAR v. HIP HING CONSTRUCTION CO. LTD.

COURT

Court of First Instance

DECIDED

22 August 2001

CASE / FILE NUMBER

HCMA509/2001

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bjbjU HCMA 509/2001 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 509 OF 2001 (ON APPEAL FROM
SPS 545/2001)

BETWEEN HKSAR Respondent and HIP HING CONSTRUCTION COMPANY LIMITED Appellant

Before: Hon Jackson J in Court Date of Hearing: 22 August 2001 Date of Delivery of Judgment: 22
August 2001 Date of Handing Down Reasons: 24 August 2001

J U D G M E N T

On 12 April of this year the Appellant was found guilty after trial of an offence committed on 8 August 2000 of failing to take adequate steps to prevent a person falling from a height of 2 metres or more contrary to Regulation 38B(1) of the Construction Sites (Safety) Regulations made under the Factories and Industrial Undertakings Ordinance (Cap 59). It was fined \$20,000. The Appellant appeals against that conviction and upon the following sole ground:- There was a material irregularity during the course of the trial in that the learned Magistrate failed to consider properly, or at all, the statutory defence to an offence under Regulation 38B(1) of the Construction Sites (Safety) Regulations, (the Regulations), which is provided by Regulation 38H(1) of the same. That was a consideration to which the learned Magistrate should, on the evidence, have addressed himself and one to which he was referred by both the prosecuting officer and defence counsel in the course of their final submissions. In the premises the Appellant submits the conviction to be unsafe. I heard this appeal on Wednesday of this week and I allowed it, quashing the conviction, setting aside the fine and directing that the case should be remitted for

retrial. These are my reasons for that decision. I set out the relevant parts of Regulations 38B and 38H hereunder:- 38B. Prevention of falls

- (1) Subject to paragraphs (2), (3) and (4), the contractor responsible for any construction site shall take adequate steps to prevent any person on the site from falling from a height () coverings for openings;
 - (d) gangways and runs. (3) (4)
 - (5) For the avoidance of doubt it is hereby declared that paragraph (2) [does] not prejudice the generality of paragraph (1).
- 38H. Defences to regulations 38B(1) and 38C
- (1) It shall be a defence for a contractor charged with an offence under regulation 38B(1) to show
 - (a) that in all the circumstances of the case, it was impracticable to comply with all or any of the requirements of that regulation;
 - (b) that
 - (i) the contractor provided suitable and adequate safety nets and safety belts in lieu of complying with those requirements; or (ii) in all the circumstances of the case, it was impracticable to provide such safety nets and the contractor provided suitable and adequate safety belts in lieu of complying with those requirements; and
 - (c) that all reasonably practicable steps were taken to ensure the proper use of the safety belts by the persons to whom they were provided.
 - (2) Safety nets shall not be considered as suitable and adequate for the purpose of paragraph (1) unless they are
 - (a) of such design and so constructed; and
 - (b) so erected, maintained and kept in such positions, as to be effective to protect persons carrying on at a height the work to which the nets relate, to protect persons using any access to or egress from the part of the construction site where that work is being done and to prevent as far as practicable injury to persons falling onto them.
 - (3) Safety belts shall not be considered as suitable and adequate for the purpose of paragraph (1) unless they
 - (a) are attached continuously to a suitable and secure anchorage;
 - (b) have suitable fittings therefor; and

- (c) are of such a design and so constructed and maintained as to prevent injury to persons using them in the event of a fall. I also set out here Regulation 38I (which is a regulation sometimes overlooked) as follows:- 38I. Duty to wear safety belt Every person working on a construction site who has been provided with a safety belt shall wear it and keep it attached to a secure anchorage whenever the use of the belt is necessary for his own or any other person's safety. The facts which led to this prosecution were as follows:-
- (a) On 8 August 2000 an occupational safety officer (who was the sole prosecution witness at trial) visited a construction site in Choi Hung Road in Kowloon where the Appellant was the main contractor.
- (b) He noticed a worker at that site working on the construction of a metal canopy which was about 5 metres above the ground and which was attached to the wall of a building.
- (c) He also noticed that there were some voids or openings in two sections of the canopy (which he photographed and which photographs were adduced into evidence at the trial) and inter alia he formed the view that there was a risk of the worker falling through those voids. and (d) The worker was not wearing an attached safety belt and there was no ladder, scaffolding or platform allowing access to or egress from the canopy. I just pause here to say, because it seems to me to be important, that there were voids or gaps in the structure because it was incomplete. The worker concerned was filling them in with metal sheets as he went along on the canopy to complete its construction: that was his job. And it was part of the defence case that it was impracticable for him to somehow temporarily cover over the voids or openings with some material because that would inevitably prevent him from doing what he was supposed to be doing and it was also impracticable to construct a platform from which to do the work. If that was indeed so and it was for the Appellant to prove it on the balance of probabilities then Regulation 38H(1)(a) had been met in relation to Regulations 38B(2)(a) and (c) but, in the absence of evidence, Regulations 38H(1)(b) and (c) and (2) and (3) had not. It is a fact, as can be seen from the transcript, that both the prosecutor and Mr Richmond (counsel for the Appellant at the trial and on this appeal) referred the learned deputy magistrate to the defence provided by Regulation 38H albeit only in passing. The prosecutor sought merely to say that such defence had not been made out by the Appellant because the worker concerned was not wearing a safety belt at the material time. Mr Richmond referred to it only in relation to practical steps which had been taken by the Appellant and made no further mention of it. He devoted his argument to the relevance, as he saw it, of the case of Paul Y ITC Construction Limited [1998] 3 HKC and the question of a defence of reasonable and mistaken belief which is of course a different matter altogether. At no stage did Mr Richmond say to the learned deputy magistrate that the Appellant was seeking to rely on the statutory defence and, as I say, he simply did not address the learned deputy magistrate upon the matter except in an oblique and unsatisfactory way. If the appellant was indeed seeking to rely upon and to prove the statutory defence provided by Regulation 38H it was or so it seems to me (if only as a matter of common sense) incumbent upon it or upon its counsel not only to say so in specific terms, but also to adduce evidence dealing with each

section and sub-section of that regulation. That simply was not done and it does not sit well with me for Mr Richmond now to criticise the learned deputy magistrate for not evaluating or seeking to evaluate evidence upon a defence which he had not said that he was relying on and which was in any event either incomplete or had not been put forward at all. All of that said I have to ask myself whether the learned deputy magistrate was obliged in his statement of findings to deal with the statutory defence if only because it had been mentioned. The fact is that the learned deputy magistrate made no reference to it whatsoever and I confess that in the circumstances that was hardly surprising. He simply concluded and (leaving aside for the moment the question of the statutory defence) he was perfectly entitled to conclude that a safe platform of some sort was required; that the canopy structure itself was not such a platform and that therefore the Appellant was guilty of the offence. That the learned deputy magistrate's attention had not been properly drawn to Regulation 38H and its significance to this case rather than he had been led away from it is apparent when one considers the reasons given by him as to why the canopy itself was not a safe platform. He said in terms that it was because it did not fall into the precise definition of a working platform which is set out in the third schedule to the Regulations. What he said was this and I quote from paragraphs 12, 13, 14 and 15 of his statement of findings:- 12. I accept that Regulation 38B is a strict liability offence. Regulation 38B(1) requires the contractor responsible for any construction site to take adequate steps to prevent any person on the site from falling from a height of 2 metres or above. Under Regulation 38B(2), for the purpose of 38B(1) adequate steps shall include one or more of, inter alia, working platforms and coverings for openings.

13. Regulation 38B(4) provided that, Every working platform provided for the purpose of 38B(1) shall comply with the provisions of the Third Schedule applicable to it. Under paragraph 2 of the Third Schedule, every working platform shall be closely boarded or planked unless, inter alia, that the the boards or planks of which are so secured as to prevent their moving and so placed that the space between adjacent boards or planks does not exceed 25 millimetres . 14. If the canopy itself were to be regarded as a working platform, it is clear in the evidence that it would not satisfy the requirement under Regulation 38B(4) and the Third Schedule.
15. It is clear in the evidence, in particular photographs produced by PW-1, that there was also no guard-rails, barriers, toe-boards, fences, gangways and runs as listed under Regulation 38B(2). The only measure employed by the Defendant when DW-2 was working on the canopy was the provision of a safety belt and the instructions to use it which is far below the standard required under Regulation 38B. The point is that some evidence was given to the effect that it was impractical and unnecessary to use a platform other than the canopy itself provided that an attached safety belt was used and if that was right or may have been right then the question of a 3rd schedule working platform simply did not arise by reason of Regulation 38H and its alternative requirements. In my view what was required during the trial was emphasis to be laid upon that Regulation both in evidence and in submissions so that the learned deputy magistrate was made fully aware that the Appellant was seeking to rely upon it, and that was not done. In the course of his argument before me Mr Richmond

has sought, inter alia, to rely upon 2 passages from Archbold's Criminal Pleading Evidence and Practice (2001 Edition) at 7-60 and 7-65. In essence the former states that a trial judge sitting with a jury must consider whether the evidence raises any possible defence to the charge, regardless of whether the defendant has raised the point and if it does he must direct the jury on it. The latter states that where a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing up, it is in general impossible to say that the conviction is secure. Mr Richmond has also referred me to a short passage from the judgment of Keith JA in *The HKSAR v Goh Swee Yan Aryelina Crim. Appeal 491 of 1999* which reads as follows:- a judge trying a case with a jury is obliged to leave for the jury's consideration all possible defences which are realistically raised by the evidence, even if a particular line of defence is not being relied upon. Similarly a judge sitting alone should consider all possible defences which are realistically raised by the evidence, even if no reliance is being placed on a particular line of defence. I would just add this:- that whilst a judge sitting with a jury must put an available defence before that jury, even if it is not relied upon by the defence (because of inadvertence, incompetence or for purely tactical reasons), there is no duty to leave to the jury a defence which has not been put and which is fanciful or speculative. In his very helpful submissions Mr Lee for the Respondent argued that given the way in which the Appellant's case was put before the learned deputy magistrate there was no obligation upon him to deal with a Regulation 38H defence because on the evidence there was no proper evidential basis for such a defence. With respect that is not wholly correct for, in my view, whilst there was arguably such a basis it was incomplete. Mr Lee went on to say however that should I allow this appeal on the ground put forward by the Appellant it would be in the interests of justice that there should be a retrial during the course of which the Appellant could, if it so wishes, fully and properly (and not partially or in passing) put the statutory defence before the magistrate concerned and, in the full knowledge of what that defence is, the magistrate could deal with it. Whilst given the particular circumstances of the trial and the manner in which the statutory defence was referred to by both the prosecution and the defence I have very considerable sympathy with the learned deputy magistrate who was led in many directions but not to the real point, it was my view that this appeal must be allowed. Having heard counsel on the matter I ordered that the case be remitted for retrial in the magistrates court. (C G Jackson) Judge of the Court of First Instance High Court Mr Edmond Lee, Government Counsel, for the Respondent Mr Martyn Richmond, instructed by Messrs W K To & Co., for the Appellant - PAGE - & 6" HCPI No Alice LH Yu HCMA.dot Sharon LY Shum Microsoft Word 9.0 HCPI No Title Microsoft Word Document MSWordDoc Word.Document.8

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