

HONG KONG / JUDGMENT

HKSAR v. ISS EASTPOINT FACILITY SERVICES LTD

COURT

Court of First Instance

DECIDED

18 April 2007

CASE / FILE NUMBER

HCMA786/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCMA786/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.786 OF
2006 (ON APPEAL FROM TWS 1801 OF 2006)

BETWEEN HKSAR Respondent and ISS EASTPOINT FACILITY SERVICES LIMITED Appellant /n
gP

REASONS FOR JUDGMENT

AUTONUMOUT On 30 March 2007 I allowed the appeal against conviction and quashed the conviction and ordered that the fine of \$30,000, if paid, would have to be refunded to the appellant company. I said I would give my reasons for the decision on a later date and that I now do.

Background

AUTONUMOUT The appellant company was convicted by Deputy Magistrate So (as he then was) on 21 July 2006 at Tsuen Wan Magistrate s Court. The offence that the appellant was convicted of was that it failed to ensure the safety and health at work of its employees, in that it failed to provide a system of work in connection with the handling of refuse containers that were, so far as reasonably practicable, safe and without risk to health, contrary to sections 6(1), 6(2)(a) and 6(3) of the Occupational Safety and Health Ordinance, Cap.

509. It was fined \$30,000. The appellant appealed against the conviction. AUTONUMOUT On 23 August 2005, at Hutchison Logistics Centre, Terminal 4, 18 Container Port Road South, Kwai Chung, there was an accident in which a worker of the appellant died. The worker had

climbed onto the top of a refuse container then containing rubbish in the form of wooden crates which came to a height higher than the height of the refuse container and, for some reason not known, he fell down onto the ground and was killed. AUTONUMOUT As a result of investigations by the Labour Department, the appellant was prosecuted for the abovementioned offence. The evidence AUTONUMOUT The uncontested evidence was that the appellant was a company contracted to carry out cleansing services in the building which was an industrial building. The building was managed by a management company. The duties of the appellant were that their employees should clear the rubbish of the occupant of each floor which would be put inside a refuse container placed on each floor. The refuse container was placed inside the rubbish room. AUTONUMOUT On the third floor, however, the refuse container was placed not in the refuse room but in a car parking space on that floor. The reason for that was because that floor was occupied by Park n Shop Supermarket. Park n Shop required a compressor to be placed inside the rubbish room because the compressor was required to compress certain materials before being thrown away. When the refuse container was filled to capacity, the employees of the appellant would arrange for that container to be pulled to a place outside the building and the rubbish disposed of. When the rubbish was filled to the extent that the height of the rubbish was higher than the height of the container itself, the employees of the appellant would ask the employees of Parkn Shop to use a tractor like vehicle to reduce the height of the rubbish so that the height of the rubbish would not exceed that of the container itself. These tractors belonged to Parkn Shop and the appellant itself did not have any of its own tractors. The evidence was that whenever Parkn Shop was requested to ask one of its employees to use the tractor, it always complied and therefore there were no problems. The problem with the third floor was, however, that sometimes Parkn Shop would place some of its rubbish outside the refuse container or it would have crates of its goods placed on the two sides of the container thereby making it impossible or difficult for the tractor to approach the refuse container to try to reduce the height of the rubbish. AUTONUMOUT On the day of the accident, when the employees of the appellant found the situation of the rubbish exceeding the height of the container, the foreman asked one of his subordinates to go to Parkn Shop to ask an employee to use the tractor to reduce the height of the rubbish. When that employee was on her way to Parkn Shop, the deceased climbed on top of the refuse container and fell down and was killed. On that particular day, Parkn Shop had crates of its goods placed on at least one side of the refuse container. AUTONUMOUT After the first two witnesses for the prosecution, who were both employees of the appellant, gave evidence, it was clear that their evidence did not assist the prosecution s case. Their evidence was that the situation on that day was something that they did not see before. After they had completed their evidence and before the court rose, the magistrate had an exchange with prosecuting counsel. He pointed out that the two witnesses were prosecution witnesses and had not been declared hostile. He also pointed out to the prosecuting counsel that the prosecution expert, as the magistrate understood his evidence, would not be able to advance the prosecution case. The magistrate at first asked the counsel to speak to the expert to see if the expert could assist the prosecution case. When this was objected to by

the defence counsel, who was Ms Cheng now appearing for the appellant, that it would be unfair on the defence because the expert was in court listening to the exchange, the magistrate then suggested to the prosecuting counsel that he might see if another expert was available who could give some evidence on a ladder stand which was sometimes used by workers to clear the rubbish. This exchange led Ms Cheng to submit a ground of appeal which was that the magistrate had descended into the arena and had shown that he had lost his impartiality and was therefore acting in a manner which was biased against the appellant. AUTONUMOUT did not agree with that ground of appeal, and as I indicated to Ms Cheng during the hearing of the appeal, what the magistrate was doing was probably just indicating to prosecuting counsel that if no further evidence was to be called which would substantively assist the prosecution, he would have no choice but to dismiss the case. The trial had been set down for three days, and when the exchange took place it was at the end of the first day and, to my mind, it can be said that the magistrate was doing no more than indicating to the prosecuting counsel what was going through his mind. The law AUTONUMOUT It was accepted by both sides, and indeed by the magistrate, that the law governing the offence under consideration is that stated by the House of Lords in *Winter v. Cardiff Rural District Council* [1950] 1 AER

819. The House of Lords, in that case, decided that the duty to provide a safe system of working is not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. That duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case. It is always a question whether the negligence complained of is the failure of the employer to inaugurate and maintain a safe system or the casual departure from that system as the result of the negligence of an individual fellow workman. It did not mean, however, that the employer must decide on every detail of the system of work or mode of operation. Where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foremen or workmen on the spot. The reason for the appeal being allowed AUTONUMOUT The first basis upon which the magistrate convicted the appellant was that he found that once the rubbish container was moved from the rubbish room to the car parking space, there must have been a danger to the staff of the appellant because there might be goods placed beside the container thereby not allowing the tractor to get close to the container to clear away any rubbish which was higher than 1.8 metres which was the height of the container. The evidence of PW6, who was an employee of the management company, was only to the effect that some time he saw goods being placed on the two sides of the refuse container. This of course did not mean that when there were goods beside the container, that this came to the attention and knowledge of the appellant. It is also clear from the evidence that the goods placed next to and sometimes surrounding the container, belonged to Parkn Shop and could not have been the responsibility of the appellant. The appellant did not have any tractors. It was submitted

by Ms Cheng that the magistrate misunderstood the evidence and thought that the tractors were the responsibility of the appellant. AUTONUMOUT The magistrate was of the view that because the container had been moved there for one month, the appellant should have had precautions to prevent any of its workers being injured. That finding disregarded the evidence that what was placed outside the container on the day in question was not something which had been going on for a whole month. It also disregarded the evidence that the tractors could have been used to level the height of the rubbish. The evidence also was clear that when the deceased climbed on top of the refuse container, that was contrary to the instructions given by the appellant to all its employees, and when he did that it was something which he did of his own accord and without the instructions or approval of the foreman. The alternative basis for the conviction AUTONUMOUT The magistrate in the final paragraph of his Statement of Findings said that if there should be any doubt about the first basis for the conviction, then he would have no hesitation to use the second basis to convict the appellant. The first basis is what the magistrate hypothesised would have been the case if the container had rubbish or goods surrounding it thereby not allowing the tractors to be used to level the height of the rubbish. I have dealt with that in the previous paragraph. AUTONUMOUT The second basis related to the ladder stand. The ladder stand AUTONUMOUT The ladder stand was a stand made of metal with four steps and two barriers on either side of it for easy access. The ladder stand which was used by the workers did not belong to the appellant but to the management company. The evidence was that sometimes workers went on to the stand which would be pushed against the front of the refuse container to throw rubbish into the container. The stand itself was 1.1 metres in height while the front of the refuse container was 1.4 metres. AUTONUMOUT PW7, the prosecution expert, never mentioned in his written report that there was anything wrong with the ladder. When he gave evidence he said that the ladder would not be safe if it was put against the front of the container because the front of the container was 1.4 metres while the ladder was only 1.1 metres high, and therefore workers could fall into the container. He suggested that a barrier should be built at the front of the ladder. Ms Cheng suggested that the expert only gave this evidence because he had heard the magistrate's exchange with prosecuting counsel on the first day of the trial. His explanation for not mentioning this in his report was that he had not considered this initially and it only occurred to him after he had heard the witnesses evidence. AUTONUMOUT The expert and, if I may say so, the magistrate forgot that the ladder in fact played no part in the accident on the material day. The ladder was designed and owned by the management company. The magistrate found that the appellant had no procedures at all to deal with the question of whether the ladder stand was safe and stable. He found that whether the ladder was safe directly affected the safety and welfare of the workers. He said that the appellant should have bought the ladder for its use and should thereafter properly supervise and maintain its use. Alternatively he said that if the appellant wanted to make use of another company's equipment, such as the ladder stand, it should have procedures to cooperate with the owner of the ladder to ensure that the ladder would be safe and stable. AUTONUMOUT In accepting the recommendation of the expert that there should be a barrier at the front of the ladder to ensure that workers did not fall into the

container, the magistrate was disregarding the obvious which was that a barrier at the front of the ladder would have prevented any rubbish being thrown into the container by someone standing on the ladder, and it also meant that a worker standing on the ladder wanting to lift something heavy to throw it into the container would have to lift it above the barrier which would have added to the dangers that the worker would be exposed to.

AUTONUMOUT Neither the problem of the tractor not being capable of being used on the day in question nor any alleged defects with the ladder stand had anything whatsoever to do with the accident which led to the death of the deceased. The situation which prevailed on that day had not occurred on a regular basis and certainly had not been in place for about a month before the day of the accident. There was, to my mind, no basis whatsoever for the magistrate to find that the appellant had failed to provide the system of work in connection with the handling of the refuse containers which was safe and without risk to health.

AUTONUMOUT It was for those reasons that I allowed the appeal. (Peter Nguyen) Judge of the Court of First Instance High Court Miss Winnie Lam, GC of Department of Justice, for HKSAR Ms Flora Cheng Suk Yee, instructed by Messrs Clyde & Co. 1udk 1udk V t" (# t" (# & ` # \$ "@AB & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=56773

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-iss-eastpoint-facility-services-ltd-2007>

Prepared on 26 October 2026 · Esheria