

HONG KONG / JUDGMENT

HKSAR v. LAM SHING YIN

COURT

Court of First Instance

DECIDED

9 August 2007

CASE / FILE NUMBER

HCMA559/2007

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

bjbj

Before: The Honourable Mrs Justice V. Bokhary in Court Date of Hearing: 9 August 2007 Date of Judgment: 9 August 2007

J U D G M E N T

The Appellant was convicted after trial before JT Glass, Esq. in the Magistrate s Court at Tsuen Wan on two charges. Charge 1 was of carrying passengers for hire or reward when a hire car permit was not in force, contrary to s. 52(3)(a) (iii) and (10)(a) of the Road Traffic Ordinance, Cap. 374. Charge 2 was of using a vehicle without third party insurance, contrary to s. 4(1) and (2)(a) of the Motor Vehicle Insurance (Third Party Risks) Ordinance, Cap. 272. The Appellant now appeals against both convictions. In his Statement of Findings, the Magistrate set out the facts admitted by the prosecution and the defence under s. 65c of the Criminal Procedure Ordinance, Cap. 221, which included these:

- (1) On 14th January 2007, PW1 made a phone call to the defendant to book his vehicles from Ma On Shan to the Airport on 15th January 2007 as PW1 s girlfriend was going to take a flight to Canada for studying. At about 1100 hours on 15th January 2007, defendant drove a light goods vehicle (LGV) displaying registration mark MG1202 to the Monte Vista, Ma On Shan and picked up five passengers including PW1, PW1 s girlfriend, her mother and grandparents. At the time, PW1 s girlfriend was carrying two pieces of luggage containing her personal belongings. PW1 made an agreement with the defendant that the fare for taking them and the luggage to the Airport was \$170 plus toll fee for the tunnel and bridge. Around 1148 hours on the same day, the LGV arrived at the pick up/drop off area of Carpark No. 1, Hong Kong International Airport. At that time, PW2 and PW3 were conducting anti-illegal transport activities operation at the carpark in uniform. As PW2 and PW3 observed the defendant was driving the LGV and carrying five passengers with two pieces of luggage

only, they suspected the defendant was carrying passengers for hire or reward. PW2 and PW3 then approached the defendant and passengers and stopped them for enquiries. After enquiries, PW2 arrested the defendant for the above two offences and seized one piece of parking ticket (E1) from defendant which showed that the defendant's LGV entered the car park at 11:44 hours on 15th January 2007. Under caution (E2), the defendant stated that he did not know that it was illegal and he only got \$215 including tunnel and bridge fee to take the passengers and two pieces of luggage to the Airport. Defendant asked for a chance. A record of interview (E3) was taken from the defendant. Under caution, defendant said that PW1 has used his transport service before and admitted that he had picked up the five passengers and two pieces of luggage at Ma On Shan and conveyed them to the Airport. Defendant received \$215 from PW1 when the LGV arrived at the Carpark 1. PW2 drew a sketch (E4) of the scene while PW3 took photos (E5) and measured the two pieces of luggage, both were found to be 62 cm x 45 cm x 15 cm in size. Further enquiries revealed that the Transport Department confirmed that the motor vehicle displaying registration mark MG1202 was registered as a Light Goods Vehicle (E6) without any Hire Car Permit. The Sun Alliance & London Insurance plc confirmed that the Insurance Policy in respect of the LGV MG1202 would not operate when it was used for carriage of passengers for hire or reward (E7 & E8). The Magistrate summarised the defence case like this: The defence case for charge 1 was basically that the fee of \$170, plus tunnel and bridge disbursements, was primarily for the carriage of the two large suitcases and that the passengers were only secondary to that purpose in that they were to watch over the suitcases and to be transported as passengers rather than use a separate taxi. For charge 2, the defence asserted basically that the policy was valid because the luggage had been the prime purpose of the hire. It also submitted that the policy was valid when the insured's or authorised driver's business was the carrying of passengers for hire or reward, but then conceded that the insurance policy would not permit any illegal business to be carried on. The prosecution maintained basically for charge 1 that the fee charged was primarily for the carriage of the passengers, and that the carriage of the luggage was only secondary to that purpose. For charge 2, it asserted basically that the insurance policy had become invalid, as the defendant's carriage of passengers for hire or reward had made it invalid. The Appellant did not give evidence. He did however place reliance on the evidence of the customer, PW1. Ground 1 of the perfected grounds of appeal filed on the Appellant's behalf concerns the Magistrate's rejection of so much of PW1's evidence as supported the defence. This ground reads:

1. The Learned Trial Magistrate in his Reasons for Verdict misdirected himself on the evidence of PW1, the key prosecution witness who had been called by the Prosecution in support of its case against the Appellant, in particular, the Learned Trial Magistrate having rejected the evidence of PW1, stating at paragraph 7 of his Reasons for Verdict, at page 4 that:

7. I was not impressed with PW1, who was the customer who had hired the Defendant s LGV, and I did not believe he was being honest in his evidence. I therefore rejected his evidence except when it was part of the agreed evidence or it was evidence that was not in issue. wrongly and erroneously came to his own findings of fact as against the Appellant. These erroneous findings of fact were not supported by any or any proper evidence and directly conflicted with the key prosecution s witness of fact namely PW1 who stated inter alia;
- (a) that the two suitcases were too big for a taxi in PW1 s own judgment;
 - (b) that the purpose of PW1 calling the Appellant was the carriage of the two large suitcases;
 - (c) PW1 had stated that in his view, the goods occupied the whole of the goods compartment of the van; and further
 - (d) PW1 s evidence that the main purpose of the trip was to take the two suitcases. Further, the Learned Magistrate wrongly came to his own findings of fact which was not supported by PW1 s evidence namely;
 - (a) that PW1 had simply ordered the Defendant s/Appellant s LGV without specifying any purpose, as PW1 knew the LGV would take all his passengers and the two suitcases for the journey for the single hire fee [see: Learned Magistrate Reasons for Verdict paragraph 12, 1st sentence];
 - (b) that the Learned Magistrate found as a fact that PW1 had ordered the LGV because PW1 knew it was cheaper when compared with the cost of a taxi [see: Reasons for Verdict paragraph 12, last sentence].
 - (c) the Learned Magistrate disbelieved PW1 when PW1 said he did not know the true taxi fare [see: Learned Magistrate Reasons for Verdict paragraph 12, last sentence].
 - (d) Despite, PW1 s/the crucial prosecution witness of fact clear evidence to the contrary the Learned Magistrate found that PW1 was using the vehicle primarily for hire to the passengers and that PW1 expected it would carry their accompanying luggage [see: Learned Magistrate Reasons for Verdict paragraph 13]. To understand the Magistrate s approach and decide whether Ground 1 is good, it is necessary to consider the following part of his Statement of Findings:
7. I was not impressed with PW1, who was the customer who had hired the defendant s LGV, and I did not believe he was being honest in his evidence. I therefore rejected his evidence except when it was part of the agreed evidence or it was evidence that was not in issue.

8. PW1 said in his evidence that the two suitcases were too big for a taxi in his own judgment, even though he conceded that he had never tried to see whether they would fit into a taxi. He also said that the purpose of his telephone call to the defendant was for the carriage of those two large suitcases, after having initially said that he could not recall what he had said with regard to what the defendant would drive to the airport. He also said that all the passengers had gone on the journey to send his girlfriend off to another country.
9. I found the two suitcases belonged to the girlfriend only, and I further found that only one person would be necessary to guard them during the journey, if it was considered necessary. I noted in this respect that there was no evidence to show that the contents of the two suitcases were of unusually high value to demand extra supervision. PW1 also conceded that the grandparents had no connection with the two suitcases and that the reason they were carried on the vehicle was to see the girlfriend off at the airport.
10. I found that the suitcases were of normal travelling suitcase size that would fit into a taxi boot even if, as was often done, the boot lid had to be fixed down with an elastic claw.
11. I found that PW1 had used the defendant's service before and that the same two suitcases had been used for this trip between the two locations. PW1 initially said that he did not know the quantity of goods that were to be put into the cargo hold on this previous occasion, but then, after he was asked whether the goods occupied the whole goods compartment, said that they did. He then told the court that it was the same two suitcases that had been used on this trip. I rejected PW1's evidence upon the amount of space that the two suitcases had occupied and found that the two suitcases would not have taken up a very large portion of the LGV's cargo hold. I found the hold could hold many more suitcases of their size than just the two of them.
12. I believed from the evidence that PW1 had simply ordered the defendant's LGV without specifying any purpose, as he knew the LGV would take all his passengers and the two suitcases for the journey for the single hire fee. That, I found, explained why there was no request or expectation of further charges to be incurred for the journey. I also found that he ordered the LGV because he knew it was cheaper when compared with the cost of a taxi, and I disbelieved PW1 when he said he did not know the true taxi fare.
13. I also rejected PW1's evidence that the main purpose of the trip was to take the two suitcases, as I found that he was using the vehicle primarily for hire to the passengers and he expected it would carry their accompanying luggage. In my view, the Magistrate's approach was warranted by the circumstantial evidence. On the whole of the evidence before him, he was entitled to come to the findings that he did to convict. Ground 1 fails. Ground 2 reads:
 2. The Learned Trial Magistrate wrongly commented on the fact that the Appellant had remained silent at his trial hearing in saying that the Appellant's silence left the Learned Magistrate; without any explanation from the Appellant to undermine, contradict or explain the prosecution evidence against him, [see: Learned Trial Magistrate Reasons for Verdict ,

paragraph 18]. This direction by the Learned Magistrate was particularly erroneous in all the circumstances of this particular case, in view of the fact that the key and crucial witness of fact for the prosecution, PW1 had clearly stated in his evidence that the main purpose of the trip was to take the two suitcases which was consistent with the Appellant's suggested defence namely that the fee of \$170 plus tunnel and bridge disbursements, was primarily for the carriage of the two large suitcases and that the passengers were secondary to that purpose [see: Learned Magistrate Reasons for Verdict, paragraph 6]. It is necessary to look at the matter in context. The Magistrate said as follows:

18. The defendant elected to remain silent, and I reminded myself that this was his right and that I should not assume his guilt merely because he had so elected. However, his silence left me without any explanation from him to undermine, contradict or explain the prosecution evidence against him.
19. I found, at the end of the day, that the prosecution, standing on its own two feet, had proved beyond reasonable doubt that the defendant was guilty of both charges and I convicted him accordingly. In my view, the Magistrate did not misuse the Appellant's silence. Ground 2 also fails. Accordingly the appeal is dismissed. (V. Bokhary) Judge of the Court of First Instance High Court Mr William Allan, instructed by Messrs Paul Kwong & Co., for the Appellant Miss Olivia Tsang, of the Department of Justice, for the Respondent PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E 1udk 1udk i\$&H @d/Z o!@R< 5%4j 5%4j >~t6 HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong 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=58273

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-lam-shing-yin-2007>

Prepared on 26 October 2026 · Esheria