

HONG KONG / JUDGMENT

HKSAR v. LAW LAM MAN

[2018] HKCFI 1337

COURT

Court of First Instance

DECIDED

4 June 2018

CASE / FILE NUMBER

HCMA136/2018

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bjbj ppellant

Before: Deputy High Court Judge V Bokhary in Court Date of Hearing: 1 June 2018 Date of Delivery of Judgment: 4 June 2018

JUDGMENT

The Appellant appeals against his conviction after trial in the Magistrates Court on a summons laid under section 4(28) of the Summary Offences Ordinance (Cap 228). Section 4(28) is directed against the conduct of [a]ny person who without lawful authority or excuse does any act whereby injury or obstruction, whether directly or consequentially, may accrue to a public place or to the shore of the sea, or to navigation, mooring or anchorage, transit or traffic . The particulars of offence are that at 4:57 pm on 11 July 2017 at the junction of Cheung Yip Street and Hoi Bun Road, Kowloon Bay, he without lawful authority or excuse did an act whereby obstruction whether directly or consequently might accrue to traffic at that junction. Two perfected grounds of appeal against conviction have been filed on the Appellant s behalf. Ground 1 is that [t]he Magistrate erred in finding that the Appellant bore the evidential burden in proving that there was a lawful excuse for the obstruction. Ground 2 is that [i]n considering whether the offence was proven against the Appellant, the Magistrate erred in failing to consider whether the Appellant s obstruction was without lawful excuse. At the trial, the following facts were admitted under section W1) was driving taxi TB2670 along the first lane of Kowloon Bay Hoi Bun Road towards the cruise terminal.

3. As the vehicles driven by the Defendant and PW1 got to the junction of Cheung Yip Street and Hoi Bun Road, argument ensued between the Defendant and PW1.
4. The Defendant then alighted his taxi and stood in front of TB2670.
5. SPC 46407 (PW3) arrived at the scene after the incident and drew a sketch of the scene (P1). The accuracy and chain of evidence are not disputed by the parties.

6. PW3 also took 13 photos at the scene (P2). The accuracy and chain of evidence are not disputed by the parties.
7. The Defendant has supplied the memory card of the car camera together with a CD as working copy (P3). The accuracy and chain of evidence are not disputed by the parties.
8. SPC 46407 took a cautioned statement (P4) with the Defendant on 18 July 2017. The accuracy and voluntariness of the statement are not disputed by the parties. There were two prosecution witnesses. The Appellant was the sole defence witness. The Magistrate's Statement of Findings contains the following summary of the evidence of the prosecution witnesses:
 5. Mr Tsang Tat Ming was called as PW1. He was the driver of the Taxi TB2670. He was lining up in the queue in Hoi Bun Road heading for joining the queue in Cheung Yip Street for fueling up in Sinopac Gas Station. Upon reaching the junction between the two roads, he had an argument with the appellant who was queuing in Cheung Yip Street. The appellant then alighted from his taxi and stood in front of his taxi for 2 to 3 minutes. PW1 had asked the appellant to go away but he didn
 - t. PW1 confirmed that the contents of the video footage was correctly revealing the facts of the case.
 6. During cross-examination, when he was asked to tell the situation about the reason why he did not move forward after the appellant gave him the way at the junction point at the outset, PW1 said that he had to check the traffic on his right. He was put that the appellant went to talk to him about collision, PW1 said that the appellant had never mentioned about collision. Anyway, he agreed that he was subsequently prosecuted for careless driving and the trial of the case would be started soon. PW1 also mentioned that initially, vehicles sounded horns because they stopped their taxis there, people even watched some time and the traffic was not resumed soon. Anyway, he agreed that vehicles could pass his taxi easily. PW1 agreed that he had several traffic convictions and fixed penalty offence records.
 7. PC 53087 was called as PW2. He said that when he arrived the scene at 5:20 p.m., he saw 2 taxis of this case. Taxi TB2670 was stopped as shown in exhibit P1. Taxi MM4989 was stopped behind TB2670. Due to the stopping of the 2 taxis, the traffic in Hoi Bun Road was very congested and it blocked the traffic to Cheung Yip Street from Hoi Bun Road. Vehicles could not make a left turn to Cheung Yip Street from Hoi Bun Road. Some drivers in Hoi Bun Road were seen driven straight ahead, entering the area of the yellow box in the junction as shown in exhibit P1 and made a left turn to Cheung Yip Street. It was a violation of traffic regulation for turning left in such a way.
 8. During cross-examination, PW2 agreed that he arrived scene 25 minutes after the subject incident was taken place. PW2 also agreed that left turn junction of Hoi Bun Road as revealed in exhibit D1(6) was indicated in exhibit P2(6) as well. During re-examination, PW2 said that there was only 1 lane in the abovementioned left turn junction, vehicle could not go

in like the car as revealed in exhibit D1(6). Anyway, at the material time, two taxis of this case were stopped there and blocked the traffic of Hoi Bun Road turning left to Cheung Yip Street, no vehicle could go in there like the car as revealed in the photo D1(6). As to the Appellant's evidence, it is summarised as follows in the Statement of Findings:

10. The appellant gave evidence. He said that car camera was installed in his taxi. The incident of this case was captured (Exhibit P3). He said that when he met PW1's taxi, he was driving along Cheung Yip Street. PW1 was driving along Hoi Bun Road. Upon reaching the junction between the roads, he had an argument with PW1. He stopped his taxi but PW1 moved forward and crashed his taxi. He then alighted from the taxi to check if there were crashes and damages in his taxi. Before he could walk to PW1's taxi, PW1's taxi moved forward and injured him. He stood in front of PW1's taxi and asked PW1 to call Police. However, PW1's taxi was kept moving. He said that other vehicles could pass taxis as revealed from the video.
11. During cross examination, the appellant said that he alighted from the taxi in order to check the nearside of his taxi. He found that there was no impact between the two taxis and he had sufficient space to walk through. After he checked his taxi, he was hit by PW1's taxi. He was injured. The Prosecutor put to the appellant that upon watching the video, he had no intention to return to the taxi after he had alighted from his taxi. The appellant replied that he had an intention to return to the taxi but when he was about to do so, PW1's taxi went over to him. The Magistrate referred to the criminal burden and standard of proof, evaluated the whole of the evidence in the case, accepted the evidence of the prosecution witnesses, rejected the Appellant's evidence, found that the incident occurred in the way described by the prosecution witnesses, found that the Appellant had no lawful authority to stand in front of PW1's taxi, and found that the prosecution had proved its case beyond reasonable doubt. After delivering a verdict convicting the Appellant, the Magistrate was informed that the Appellant had a clear record. Upon being so informed, the Magistrate adjourned to reconsider his verdict. When reconsidering his verdict, the Magistrate took the Appellant's clear record into account in the Appellant's favour both in respect of credibility and in respect of propensity. The verdict remained one of guilty. Ground 1 is based on the Magistrate having said this in paragraph 18 of his Statement of Findings: If Defence raised the defence of lawful authority or excuse, the burden of proof of defence was evidential burden. At the trial, prosecuting counsel (who does not appear in this case: *Tong Yiu Wah v HKSAR* (2007) 10 HKCFAR 324. The absence of lawful authority or excuse is an ingredient of the offence created by section 4(28) of the Summary Offences Ordinance, and the burden of proving the absence of lawful authority or excuse lies on the prosecution: *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137. So the Magistrate was mistaken in thinking that the Appellant bore an evidential burden to prove lawful authority or excuse. Did that mistake affect the result? In the present case, there was evidence on which the Magistrate was entitled to find, as he did, that the prosecution had proved beyond reasonable doubt that traffic at the junction concerned was blocked and therefore obstructed by the Appellant's conduct. An evidential burden such as the Magistrate mistakenly thought existed would mean no more than that there has to be sufficient evidence to raise an issue on lawful authority or excuse.

Once that issue is thus raised, the prosecution would bear the burden of proving the absence of lawful authority or excuse beyond reasonable doubt. The Magistrate's Statement of Findings shows that he found the absence of lawful authority or excuse proved beyond reasonable doubt by the prosecution. Subject to Ground 2, he was entitled to so find. Although the Magistrate did make the mistake referred to in Ground 1, that mistake did not affect the result. The Magistrate would have reached the same result even if he had not made that mistake. So Ground 1 does not provide a basis on which to disturb this conviction. Ground 2 is based on what the Magistrate said in para 27 of his Statement of Findings which reads: The appellant had no lawful authority or excuse to stand in front of PW1's taxi and blocked his way. The appellant alleged that he had been bumped by PW1's taxi. The court considered that if he had been bumped, it was happened after he had committed the subject offence. On the facts pertaining to Ground 2, counsel for the Appellant points to material on which the following might be said. PW1 began driving his taxi at the Appellant thereby pushing him backwards. PW1 had driven at the Appellant for 8 seconds before the Appellant said that he was calling the police. The Appellant did not have his phone with him and was afraid PW1 would leave the scene. PW1 was prosecuted for careless driving as a result of this incident, and that prosecution could only have been based on his driving at the Appellant. The Magistrate spoke in terms of if [the Appellant] had been bumped h;F+ h{` ) gdVu gdVu gd{`) h{` ) gdhD gdhD z m z` z zodbz !The use of the word causes me concern as to whether the evidence on this part of the case has been sufficiently sifted by the Magistrate. On that basis, I do not feel able to say with confidence that this conviction is safe. Ground 2 succeeds. The appeal is allowed to quash the conviction. As to whether to order an acquittal or to order a retrial, I will hear the prosecution on whether they seek a retrial, and if they do, I will hear both sides on whether I should order an acquittal or a retrial. [Arguments by counsel on retrial heard] In all the circumstances, I do not consider that a retrial should be ordered. I therefore decline to order a retrial. (V Bokhary) Deputy High Court Judge Mr Prakash L Daryanani, SPP of the Department of Justice, for the Respondent Mr Randy Shek, instructed by Director of Legal Aid, for the Appellant - PAGE * MERGEFORMAT - 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 F G H I J K L M N O P Q R S T U V 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 F G H I J K L M N O P Q R S T U V hY0x h"UV gdn9 gdhD hSyw hSyw hSyw gdn9 :pR, & # \$ & # \$ & # \$ [Content_Types].xml _rels/.rels theme/theme/ themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ !j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE\} theme/ theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/ themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> [Content_Types].xml dlyLho ;d]6 yJ.; _rels/.rels fLV:* }m@= T;GI b9`5 drs/e2oDoc.xml 4m1` s\ 9z8 `f&8 pyA) IIQ> jp#jWZCy7 #hWIP w-8:~ 2%wb~ drs/downrev.xmlL 6)i6E @*YS \DQ, [Content_Types].xmlPK _rels/.relsPK drs/e2oDoc.xmlPK drs/downrev.xmlPK

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