

HONG KONG / JUDGMENT

HKSAR v. LEUNG KA MING

COURT

Court of First Instance

DECIDED

20 March 2007

CASE / FILE NUMBER

HCMA912/2006

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bjbj HCMA912/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 912 OF 2006 (ON APPEAL FROM ESS 2955/2006, ESS 2957/2006, ESS 2958/2006)

BETWEEN HKSAR Respondent and LEUNG KA MING (ng an unregistered elevator vehicle, contrary to section 52(1)(a) of the Road Traffic Ordinance, driving without an appropriate licence, contrary to section 42(1) and careless driving, contrary to section 38(1).

2. The three summonses arose out of an incident that occurred on 4 August 2005 on a pavement on the South Horizons Estate on Ap Lei Chau. An 80-year old lady was on the pavement of one of the roads there. The Appellant was driving a mobile elevating work platform. It is a four wheeled machine. Attached to its platform is a boom, which will raise a cage so that men can carry out overhead work from it. It is illustrated in photographs that I have before me. The movement of the whole is controlled by the operator who operates it from within the cage, which is the part which can be lifted up and elevated. When it is moved along the ground, when it has to have its boom lowered, it means that the operator cannot see in front of his vehicle, there is a big blind spot.
3. At the time in question, the Appellant was moving the machine along the pavement and it struck and knocked over that 80-year old lady, such that she had to have both legs amputated. His liability under the three summons, for the purposes of this appeal hearing today, depends entirely on the resolution of one issue: namely, whether or not that machine was a vehicle, as defined in section 2 of the Road Traffic Ordinance. The relevant part of the definition reads as follows: Vehicle, means any vehicle whether or not mechanically propelled, which is constructed or adapted for use on roads. 4. Road itself is defined in the same section and it has the extended meaning, with which criminal lawyers are well acquainted. It excludes private roads. This road in question, and the pavement upon which the lady walked, which of course formed part of the road in the South Horizons Estate, was a private road. The operation of section 117 provides that there will be liability under the sections I have mentioned unless a statutory defence is proved and Section 120 provides a

defence if the private road is, in effect, on a construction site or an area wholly or mainly used for the carrying on of industry.

5. There is no dispute about the nature of the machine. It has big, hard, solid rubber wheels, electric engines that propel it in a forward direction at one of two set speeds, either very slow or at 5 kilometres an hour for the faster speed. The direction is controlled by use of a joystick. There is a buzzer that makes a noise as it goes along and there is a horn. You cannot brake the vehicle when it is in motion. As soon as the motive power is disengaged, a brake is applied automatically. It is absolutely clear that its primary purpose is not for use on a road in the normal accepted sense of moving people or goods about.
6. The law has been settled since *Lai Tung-sang* [1991] HKLR 100 that primary user is not the test. One has to look to see whether the machine in question was constructed for use on a road. No question of any adaptation arises in this case. In a nutshell, the arguments boil down to this: that this is so far removed from an ordinary vehicle, so the Appellant argues, that it is really a machine and not a vehicle. The Respondent says, no, it is absolutely obvious it is a vehicle. Look what it was doing at the time, it was using a road, it is a vehicle.
7. There is a ready attraction in the approach that starts by asking the question, well, was it in fact using a road? The answer to that, everyone agrees, is, yes, it was actually using this pavement at the time. The argument from the Respondent runs, well, it has not been adapted, because everyone agrees that is the case, for such use. Therefore, if it was using the road, it must have been constructed to enable it to do so. They say that the essence of a vehicle is a means in or by which someone travels or something is carried or conveyed and that the provision of wheels which can run on a road surface here, carrying its dedicated load of the platform and its boom, make this obviously a vehicle constructed in a way that it can use a road. So it was constructed for use on a road, never mind that its primary purpose was otherwise.
8. The Appellants argue that consideration of the idea of constructing a vehicle would incorporate something of the constructor's intent. Even if that be right, one asks the questions here, well, would not this constructor have foreseen that the vehicle may be used on a road? The answer to that seems to me, yes, even though it was not, of course, the primary intention.
9. More powerful, though, was the argument that ran that in considering what construction means here, you have got to give some weight to the purpose of the construction. The argument is put like this: that, of course, primary user cannot decide the matter but if the possible use of the road is so far removed from the purpose of the construction, then you could not say that the machine had been constructed for use on the road. That engages questions of fact and degree.
10. I will presume that the argument is right that purpose cannot be ignored totally for working out what construction means here. So I will look at fact and degree but when I do that, the fact and degree of its capacity to use a road as it was doing, as instanced in this case, is such

that it is a vehicle. I say that because its construction allows it to do its job and have movement in order to do its job of allowing a man to work at height above the ground. Its construction also allows for, and it seems to me is designed for, a limited movement between jobs. If the jobs are on separate sites a distance apart, then obviously a low loader is going to be used but what about the situation as arose here where the areas of its use, in this case car parks, are separated by roads? The vehicle is, in my judgment, constructed to make those short journeys.

11. In argument, we have discussed the sort of enterprises that may use these vehicles and it is institutions, such as universities and hospitals and the like that readily spring to mind that have property upon which there are separate buildings of a large nature which need these sorts of elevated hoists for their maintenance, where between the buildings in question, run roads. My finding here is that if you do look at the purpose of the construction and address fact and degree, then the degree of manoeuvrability of this machine is such that it is constructed for use on a road.
12. The third argument advanced by the Appellant was to say that capacity was different from construction. Of course, that is right but given what I have just announced as my finding about the construction of the machine being designed to move between jobs and therefore move across roads between jobs that are nearby, I am not going to confuse mere capacity to do something, ie, use a road, with constructing it for that purpose.
13. The fourth point was to do with capability. It is a reflection, perhaps, of the last point but what was argued is that the mere fact that a machine is capable of using a road should not be determinative. Again I will not confuse capability with constructed for the use on . I am conscious of what has been urged repeatedly by the Appellant that this machine lacks many of those features which one normally associates with a road-using vehicle. The fact is the definition is very wide and it does, in my judgment, catch this machine.
14. The Appellant drew to my attention the fact that a finding that this machine was a vehicle would have many mischievous results because it is said there are many such machines in Hong Kong and they have not been treated as vehicles. To start treating them as vehicles will cause problems as regards licensing of drivers, classification by the Customs, construction and use considerations and problems with movement permits, and the like, the short answer to which is that if it is legally a vehicle, it is legally a vehicle. However, it seemed to me that most of those mischiefs could be met by reclassification and certainly, when it comes to the owners of such machines, the practical impact would not open a floodgate of problems for them.
15. Leaving aside construction sites and industrial undertakings, which would not attract the prosecutions that have arisen in this case, it is only institutions such as universities and hospitals and the like that one can readily foresee as being affected by the treating of these machines as vehicles. At the end of the day, looking at the photographs of the scene in this case in South Horizons and looking at the machine going along the pavement, the public

does deserve to have engaged the safety considerations under the Road Traffic Legislation which are engaged if this machine is held to be a vehicle.

- 16. Accordingly, the appeal is dismissed. (Submissions by counsel)
- 17. I have considered costs, heard argument and there will be no order. (P Line) Deputy High Court Judge Representations: Ms Ada Chan, Senior Government Counsel (Ag.), of the Department of Justice, for the Respondent Mr Toby R.W. Jenkyn Jones, instructed by Cheng, Yeung & Co, for the Appellant PAGE - PAGE - CRT19/20.3.2007/DB HCMA912/2006/Reasons for Judgment 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 & `#\$ bZ < =RM/L\$t\ [g\k [g\k =RM/ Normal.dot setup Microsoft Word 9.0 judiciary Title ppo] ppo] ppo] Microsoft Word Document MSWordDoc Word.Document.8

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