

HONG KONG / JUDGMENT

HKSAR v. LEUNG SUK BING AND ANOTHER

COURT

Court of First Instance

DECIDED

14 March 2007

CASE / FILE NUMBER

HCMA1125/2006

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bjbj an appeal against conviction by two appellants of managing a vice establishment. The prosecution allege that the two appellants were employed at a night club in Tsim Sha Tsui East as "mama sans" and that they supplied prostitutes to two undercover police officers. The prosecution case, in short, was that the premises were wholly or mainly kept for arranging prostitutes and that the hostesses employed there would be bought out from the club and would go to nearby premises for such purposes.

2. There were the usual disputes about the facts but what was not in dispute and what was common ground was this: that there were 36 hostesses at the club and there were 26 "mama sans" of whom these two appellants today were numbered. The manager of the premises was called to give evidence and he described without challenge and consistent with common sense, the management structure of the premises. He was the manager himself and, under him, there were day and night managers, an administrative staff and a public relations staff. Then there came the "mama sans", then the hostesses, and then various cleaners and the like.
3. One of the main arguments at the trial was whether or not the premises were kept wholly or mainly for the prohibited purposes. It seems to me, from the material I have, that no one addressed their minds as to whether these two "mama sans" in these particular circumstances were managers and whilst it was open for the magistrate to find that they managed the individual vice transactions, no one addressed their mind to the issue of whether or not they were managing the premises as a whole.
4. The law has long been settled that managing in this context means exercising operational control over the operation of the vice establishment. You only have to pause for a moment to consider one night club having 26 managers to realise the absurdity of the assertion. You just have to suppose that one of them proposed they shut early one night, or something like that, and whether that management decision could have been carried. Of course, it would not have been. The manager at the premises and his two assistant managers - the day and

the night man - were the people who were managing the operation, who controlled the night club and that is completely clear on the evidence.

5. Of course, one can find cases where people described as "mama sans" in small establishments with only a few girls and just one "mama san" have been found to have been managers or persons assisting in the management but those are very different sets of circumstances to these.
6. Looking at the evidence and material available to me, there is no prospect that the ingredient of proving these ladies to be managers of the vice establishment could be established.
7. The parties have not come prepared to argue about management. They have come to argue about "wholly" or "mainly". Ms Leung for the respondent had the adjournment that she asked for to consider the position and she came back and manfully tried to fight her corner, but with scant material. Before we adjourned, there was talk of whether or not there could be an amendment to assisting in the management here but no such application was eventually made and I believe that recognised what had arisen in discussion between bench and bar - that my view was that this could not be a case of assisting in the management, but if I was wrong in that, it would have been unfair to allow such an amendment at this stage when, in effect, no one had directed their mind or the evidence thus far to the issue.
8. I am not going to express any opinion - because it has not been argued before me - on whether or not the evidence did support the finding that these premises were wholly or mainly used for the prohibited purposes but what I will remark is you cannot take the tests and the inferences that arose in cases of small or little premises with just a few girls in it and one person who is the usher or the "mama san" and take those considerations and apply them to a different set of circumstances. If there is going to be a prosecution of premises like this, prosecutors have got to think what it is they have to prove in relation to this sort of premises.
9. It is not the case I have a doubt about whether or not these ladies were managers. My view is the evidence establishes for sure that they were not managers and, accordingly, the conviction must be quashed and sentences set aside. (Discussion re costs) Application is made for costs here and below. It is an application I shall grant. The usual rule is that costs follow the event and I can see no reason why that should not happen here. The only possible reason is that the defence did not take the point below in the Magistrates Court. On the other hand, no one else saw it there. The case proceeded on different ground and everyone overlooked it. Since everyone overlooked it, it would seem to me to be hard not to follow the usual rule because of a mistake that was shared by everyone. If it had been entirely the fault of the defence, that might have been otherwise, but it was not. Costs for the appeal and below to the appellants to be taxed if not agreed. (P Line) Deputy High Court Judge Ms Rosaline Leung, Senior Government Counsel, of the Department of Justice, for the Respondent Mr Thomas P S Iu, and Mr Patrick K Y Tam, instructed by Martin Law & Co., for

the 1st and 2nd Appellants PAGE PAGE CRT35/14.3.2007/MMcG HCMA1125/2006/Reasons for
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