

HONG KONG / JUDGMENT

HKSAR v. LING LAI HUNG

COURT

Court of First Instance

DECIDED

17 July 2007

CASE / FILE NUMBER

HCMA928/2006

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

bjbj HCMA 928/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 928 OF 2006 (ON APPEAL FROM TWMP 1463/2006)

BETWEEN HKSAR Respondent and LING LAI HUNG Appellant

Before: Deputy High Court Judge E Toh in Court Date of Hearing: 10 January 2007, 17 May 2007
Date of Judgment: 17 July 2007

J U D G M E N T

This is an appeal against a forfeiture order made by the learned Magistrate of, inter alia, a motor fishing vessel and about 65,000 litres of marked oil.

Background

The prosecution had charged four males, with being the master and crew members of the vessel, had attempted to export 64,500 litres of marked oil by using a vessel fitted with 8 oil tanks, two of them having been altered structurally and were in concealed compartments. These four men were arrested by Customs officers on 11 March 2006. The evidence from a ship s surveyor of the Marine Department was that there were electrical motor driven pumps as well as a submergible electrical pump inside the two concealed fuel tanks and that such pumping arrangements were abnormal for a fishing vessel as these were normally used by oil tankers. These four males were tried on one charge of attempting to export unmanifested cargo and one charge of making use of an altered structure of a vessel for the purpose of smuggling articles out of Hong Kong. They were acquitted after trial. The learned Magistrate had acquitted these four males on the ground that the prosecution had failed to prove that these four males had knowledge of the alleged

unmanifested cargo of marked oil and the altered structure. At the conclusion of the trial, the Commissioner of Customs and Excise applied for a forfeiture of the seized articles under section 28(1) of the Import and Export Ordinance, Cap. 60 on the basis that they were seized in connection with the contravention of the Ordinance and therefore liable to forfeiture under section 27(1) of the Ordinance. The Appellant (Claimant), an authorized representative of the registered owner of the vessel, was represented by counsel in the forfeiture proceedings. After a full hearing, the learned Magistrate was satisfied that: (1) the articles were seized in connection with the contravention of the provisions of the Import and Export Ordinance, Cap. 60 and that (2) the Claimant was not innocent. He therefore ordered forfeiture of the six items of articles that were applied for by the Commissioner of Customs and Excise.

Grounds of Appeal It is clear from the Statement of Findings that the learned Magistrate had accepted submissions on the law from counsel for the Appellant in relation to the correct legal principles to be applied for the purpose of the forfeiture proceedings. In *R v CEC Finance Limited* [1993] 2 HKCLR 134 at 138, Bokhary JA, as he then was, giving the judgment of the Court of Appeal held that: The discretion to order forfeiture being unfettered, the question whether or not to so order is to be approached from a neutral starting point, with both parties on a level playing field, so to speak, and each with the onus of proving on a balance of probabilities any fact which he or it asserts if that fact is not admitted by the opposite party. That is how the question is to be approached. I further adopt the words of Kaplan J : *R v Au Kwok-kwan* Magistracy Appeal No. 1099/90 where he said : In my judgment, the learned Magistrate was perfectly entitled to come to the view that forfeiture was appropriate because forfeiture can be, and is, ordered even though the owner of the goods has not committed a criminal offence. Nevertheless, owners of goods cannot wash their hands of the provisions of the Import & Export Ordinance. The forfeiture provisions are sure to underpin the legislation and if owners wish to avoid the risk of forfeiture, and the costs involved in trying to get goods back, they should take certain basic steps to ensure that the Ordinance is not breached by those to whom they have entitled the carriage of the goods. Counsel for the Appellant complained that the learned Magistrate had cast the burden of proof on the Appellant to prove his innocence. It is clear that the learned Magistrate had not misplaced the burden as he said in paragraphs 7 to 9 of the Statement of Findings: ,g-^ iQ'Y jKN@b v/f N ,g-^ N g gNOP N \r P N/f!q [hQ N P/f!q [hQ N NUOEQ N,g-^ \$R na@b g ,g-^ N@b g hQxeEQIQ d that the articles were liable to forfeiture under section 27 of the Import and Export Ordinance, Cap. 60. The learned Magistrate then considered whether the Claimant was able to prove on the balance of probabilities that he took basic steps to ensure that the Ordinance was not breached and at the end of the day found that the Claimant had not been able to do so. Admittedly, it was not desirable for the learned Magistrate to use the words [hQ N P/f!q in mind and was merely saying that the Claimant had not succeeded in proving on a balance of probabilities that they were not complicit in this. As the learned Magistrate correctly pointed out, the Claimant bears the responsibility as the owner of the boat to ensure that the boat was not altered in any way, to facilitate the commission of any offences. According to the principle laid down in the case of *AG v So Lo-kam* [1986] HKLR 564 at page 569:

- (5) Good faith, or innocence based on ignorance, does not entitle the claimant to have the article, vessel or vehicle restored to him. It is clear that the learned Magistrate had properly considered the law. I agree with Mr. Lo's submission that the case of HKSAR v Chan Sai tak & another [1998] 4 HKC 468 can be distinguished from the present case as the prosecution in that case had failed to provide the necessary proof that there was a contravention of the Import and Export Ordinance leading to the application for forfeiture. And what was decided in R v CEC Finance Limited (supra) is still good law as the case of CHAN Sai-tak & another (supra) was only a Court of First Instance judgment. I also agree with Mr Lo's submission that HKSAR v LAM Kwong-wai [2006] 3 HKLRD 808 is distinguishable from the present case because the present case concerns forfeiture of articles which is quasi-criminal in nature. There is no merit in Ground (2) of the grounds of appeal as the learned Magistrate had demonstrated very clearly in his Statement of Findings that he had come to his own findings of fact based on the evidence. It is complained by Mr Wong in Ground (3) that the learned Magistrate had failed to make a finding as to why the other items, apart from the vessel were liable to be forfeited. It is clear from the Statement of Findings that the learned Magistrate had considered that both the vessel and the other articles were in connection with the contravention of the Ordinance as so stated in paragraph 9 of the Statement of Findings. There is no merit in the appeal and the appeal is therefore dismissed. Subsequent to the hearing of the appeal, Mr Wong submitted the case of KOON Wing Yee v Insider Dealing Tribunal and another CACV 358/2005 which is a judgment delivered on the 30th May 2007. After reading the case, it is clear that the case was about an insider dealing enquiry which is completely different from the present case, and is not relevant to the present proceedings. (E Toh) Deputy High Court Judge Mr Philip Wong, instructed by Messrs Anthony Kwan & Co., for the Appellant Ms Laura Ng, GC of 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 F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&`G HCMA 928/2006 setup HCMA.dot setup Microsoft Word 9.0 HCMA 928/2006 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=57791

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/hksar-v-ling-lai-hung-2007>

Prepared on 28 October 2026 · Esheria