

HONG KONG / JUDGMENT

HKSAR v. MCKEEVER STEPHEN JAMES

COURT

Court of First Instance

DECIDED

23 January 2007

CASE / FILE NUMBER

HCMA794/2006

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bjbj HCMA794/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MAGISTRACY APPEAL NO. 794 OF 2006 (ON APPEAL FROM ESS 36043/2005 & 36044/2005)

BETWEEN HKSAR Respondent and MCKEEVER STEPHEN JAMES Appellant

Before: Deputy High Court Judge Line in Court Date of Hearing: 23 January 2007 Date of Judgment: 23 January 2007

J U D G M E N T

1. This is an appeal against convictions for careless driving and failing to stop after an accident.
2. The case for the prosecution at trial was that the Appellant had driven out onto Pok Fu Lam Road and that the front left side of his vehicle had clipped the side towards the back of the vehicle being driven along the road by PW1.
3. The evidence given by PW1 was that he heard a sound and that his car shook at the time and that a collision took place. The evidence given by the Appellant was that there had been a close shave at the time but there had been no collision. Thus the main issue in the case was, had there been contact between the two vehicles.
4. PW1 took the number of the Appellant's car and there is no issue that the Appellant was there driving the relevant car at the time and place.

5. What was suggested to PW1 was that he had been the subject of a previous hit-and-run, had been unable therefore to find someone to pay compensation, had realised there was a close shave between an expensive car being driven by a westerner and realised that he might, perhaps, be a suitable victim from whom he could extract compensation by falsely claiming that there had been a collision.
6. The Magistrate saw and heard both PW1 and the Appellant give evidence. He believed PW1. He disbelieved the Appellant. In many cases, one need say no more because the obvious point is to be made that the Magistrate saw and heard the witnesses.
7. There are three reasons why Mr Nicholas Yau brings this case on for appeal and I will deal with them. Firstly, he says that the damage that can be seen to the vehicle driven by PW1, and it is at photographs 17, 18 and 19, should have extended not just to in front of the rear wheel arch but right to the back of the vehicle because if there had been contact and PW1 was driving forwards you would expect the scratch to extend right to the back of his vehicle.
8. The point, I believe, is very easily disposed of by merely pointing out that some of the impact in the collision would have been directed against the side of PW1 s vehicle and all it had to do was displace it a very short distance to the side for the gap to open up between the two vehicles, thus explaining why the scratch did not extend the whole way.
9. There was cross-examination below (and I have got the transcript of all this,) where it was suggested that vehicles could not hop sideways because they had rubber tyres. Whatever PW1 may have thought about that as a proposition, it is what I think today that matters. The fact is if you apply sideways force to a moving vehicle that is going forwards, it could easily push the vehicle sideways a small amount. It does not have to swerve right off course to explain why a gap will open up, and it only has to open an inch or so between the two vehicles, to explain the extent of the damage.
10. Mr Lau, in effect, submitted that there has to be a huge impact in order to send the car, even a small bit, sideways off course. That is a proposition, I am afraid, I do not agree with.
11. Next was this: that samples of some paint were taken from PW1 s car and a sample was taken from the Appellant s car and they were matched up and compared by the Government Chemist. The conclusion was that, No paint agreeing with the controlled sample was found on the questioned sample of paint. Obviously, it is a good point for the Appellant to make. I describe it as a jury point and I do so because it highlights the fact that it is not a conclusive piece of evidence: the absence of evidence of connection is not evidence that there must have been no connection.
12. Mr Lau seeks to counter that by saying, well look, PW1 said there was some foreign-coloured paint on his vehicle. He says common sense would give rise to the inference that he would have pointed that out to the policeman and it is that piece of paint or area of paint that the policeman would have sampled in order to send off to the Government Chemist.

13. It was specifically suggested to PW1 that there had been, therefore, paint transfer. He said he was not sure about that. All he could say that there was some colour appearing on his vehicle that did not match, its outside colour . It was a silvery-coloured Toyota Lucida.
14. I have asked today whether there was any evidence called as to the nature and the extent of the sample taken and there is not any clear evidence of what was taken. There is no further evidence about the extent of material actually tested by the expert and there is no evidence about whether or not the outside silver colour of the Toyota driven by PW1 extended right through to its metal work. In other words, is there a different colour to be revealed if the outer is scratched off?
15. It is a point I bear in mind about the lack of transfer evidence but given the whole of the circumstances of the case, it is not one that raises any reasonable doubt in my mind as to the correctness of the convictions in this case for reasons that will become apparent in due course.
16. The third ground of appeal raised was a criticism of the motor vehicle examiner s conclusions. What he found significantly when the Appellant s car was examined sometime later in the following month after the accident, was that the nearside front lamp housing had been scratched, that the nearside front rim, wheel arch and bumper cover looked like they had been replaced and that the broken nearside head lamp housing mounting had been repaired by glue and nylon belts. It was that last matter, the repair to the head lamp housing, that the motor vehicle examiner said appeared to him to be recent. He was a man with 43 years relevant experience.
17. I have been taken through his cross-examination where it is pointed out to him that he could not be, in effect, 100 per cent sure that it was recent. I will construe his answers in the way that the Appellant s counsel wishes me to. It may be that he could not conclusively say for sure that it was a recent repair but into the scales goes the fact that this experienced motor vehicle examiner certainly had the opinion that it looked to him to be recent for the reasons he gave. It is a piece of evidence which, even if it falls short of proof beyond a reasonable doubt, is still there in the scales.
18. Let me turn now to what the Appellant s case was. He gave some detailed evidence about the event and he said it was a near miss only that had occurred and no collision. He said he went home that day, parked his car and when he came to it the next morning he found damage to its near side. What he then did was to telephone the police.
19. Now, this does not appear from the transcript I have or the statement of findings, but Mr Lau, counsel tells me, and he was counsel at trial, what the evidence had been, and I will proceed on that basis, namely that the Appellant had telephoned the police because he did not know how the damage had been caused but he thought it was a possibility that the close shave of the day before may explain the damage or it could have been explained by someone damaging his car overnight in the car park where he had parked it as the public had access to it.

20. It seems to me that the presence the next morning after the alleged collision of damage to the near side front was a very powerful piece of evidence supporting PW1. The fact that the Appellant himself contemplated that it was referable to the actions of the motor cars at the time of the alleged collision is of obvious significance.
21. In all the circumstances, therefore, on the evidence available to me, leaving aside the Magistrate's assessment of the credibility of the two relevant witnesses, the evidence demonstrates that the offence of careless driving is made out. I reject as unrealistic the assertions that PW1, driving along, sought to manufacture a false case in order falsely to claim compensation.
22. It goes without saying that if there was a collision in the circumstances where the Appellant pulled out onto the main road and struck the car driven by PW1, then the offence of careless driving would have been established and no one argues otherwise.
23. When it comes to the failure to stop, the question that arises is may it have been possible that the collision was so slight that the Appellant did not realise it? One only has to look at the damage caused to the vehicle in photographs 17, 18 and 19 to reject that as a possibility. There is no way that anyone driving a motor vehicle, even a large one such as this one was, (a Volvo XC90, I see from the photographs,) even driving a large vehicle like that, if there was contact sufficient to cause what one sees in the photographs, I have absolutely no doubt both drivers would have been aware that there had been a collision. Accordingly, the conviction for failing to stop is also a good one.
24. For the reasons I have given, the appeals against both convictions are dismissed. (P Line)
Deputy High Court Judge Representations: Mr Joseph Wong, Senior Government Counsel, of the Department of Justice, for the Respondent Mr Nicholas Y K Lau, instructed by Lam Pui King & Co., for the Appellant PAGE - PAGE - CRT3/23.1.2007/DB HCMA794/2006/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 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 Microsoft Word Document MSWordDoc Word.Document.8

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