

HONG KONG / JUDGMENT

HKSAR v. PARGAT SINGH

[2025] HKCFI 2931

COURT

Court of First Instance

DECIDED

3 April 2025

CASE / FILE NUMBER

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HCMA 387/2024

[2025] HKCFI 2931

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 387 OF 2024

(ON APPEAL FROM STCC 2763 OF 2024)

BETWEEN

HKSAR

Respondent

and

PARGAT SINGH

Appellant

Before: Deputy High Court Judge Yiu in Court

Date of Hearing: 3 April 2025

Date of Decision: 3 April 2025

JUDGMENT

The Appellant was convicted after trial for one count of “taking employment while being a person who remains in Hong Kong without the authority of the Director of Immigration after having landed in Hong Kong unlawfully”, contrary to section 38AA(1)(a) and 38AA(2) of the Immigration Ordinance, Cap. 115. The Appellant was sentenced to 22 months and 2 weeks’ imprisonment. The Appellant now appeals against conviction.

The Prosecution’s Case

As briefly summarised by the Respondent, the admitted facts were that the Immigration Department confirmed there was no arrival record of the Appellant. On 16 July 2024, the Appellant was a person remaining in Hong Kong without the authority of the Director of Immigration after having landed in Hong Kong unlawfully.

At around 8:45 am on 16 July 2024, PC26973 (“PW1”) arrived at the vicinity of Tung Choi Street and Nelson Street, Mong Kok (“the Location”) and conducted observation there.

At around 9:24 am on that day, the Appellant was arrested and cautioned by the police for the above charge, and on the same day, PC26080 (“PW2”) took a photo of the Appellant at the scene (as exhibit P2) and drew a sketch at the scene (as exhibit P3).

The Appellant has no previous conviction record in Hong Kong.

PW1’s evidence was that at about 8:45 am, he was in plain clothes arrived at the Location and conducted observation. He saw the Appellant pushing a trolley outside hawking stall B51 (“B51”) and going into the hawking stall. He further saw the Appellant picking up a metal rod from the ground, assembling and attaching some parts onto the metal rod, then putting down the same. The Appellant had repeated his actions. PW1 took the view that the Appellant was assembling a hawking stall. The observation was about one minute and PW1 had moved to a different position during his observation. PW1 said he had not lost any sight of the Appellant during his observation, and his view was not obstructed by traffic or people. The lighting was sufficient, and he then intercepted and arrested the Appellant.

PW2 also saw the Appellant’s hand “making a push gesture” on the trolley opposite stall B51. He also saw the Appellant crouching down to pick up metal rods from the ground, using his hands to assemble the metal rods and the hawking stall. During their observation, the Appellant did not wear any gloves, and no person was there to give him any instructions.

The Defence’s Case

The Appellant chose not to give evidence, nor call any defence witness.

Magistrate's Reasons for Verdict

Concerning the Defence's criticism against the evidence of the prosecution witnesses, the Magistrate found that, although PW1 had given inconsistent descriptions of the distance between him and the Appellant during his observation, PW1 explained that he had moved during observation. Therefore, the Magistrate considered it is reasonable and logical that the distance between the parties varied throughout the observation. But more importantly, there was no lost sight of the Appellant and the lighting was sufficient throughout the operation. Even if there was a difference in distance, it was only about five to six metres, so such inconsistency was insignificant and immaterial.

Secondly, concerning the testimony of PW1 and PW2 concerning the set-up process of the stall B51, PW1's account of the event was that the metal rods were on the ground, while it was PW2's version that the stall was partly built. The photo exhibit D2 showed the stall was only partly set up. The Magistrate considered that such discrepancy was immaterial as it was both witnesses' testimony that the stall was in the process of being set up.

They both claimed that they saw the Appellant picking up metal rods from the ground, assembling them and the hawking stall. It was not the Prosecution's case that the Appellant had touched the framework of the stall. So the Magistrate considered that the discrepancy was also immaterial.

Thirdly, concerning the challenge that PW2's view was blocked by the white canvas wall, it was his evidence that the Appellant was pushing a trolley and assembling metal rods when he first saw the Appellant and his view was only obstructed later on when he walked towards another person. So the Magistrate found the prosecution witnesses to be honest and reliable and accepted their evidence.

In reaching the decision to convict the Appellant, the Magistrate also stated that both prosecution witnesses had given inconsistent versions on the set-up process of the stall, but given the inconsistency of their evidence, with the benefit given to the Appellant, the Magistrate only accepted that the stall was in the process of being set up when the police officers intercepted the Appellant.

Concerning the "employment", the legal principle and concept in *R v Ip Po Fai* HCMA 1201/1995, the Magistrate had also duly considered.

Concerning the Location, the Magistrate found that it was a licensed hawking pitch under the Public Health and Municipal Services Ordinance, Cap. 132. Along with the photos, exhibit D1 (1-5), the subject section of Tung Choi Street is demarcated by road markings, and there was a pillar marked with a hawking stall number next to each demarcated space.

So the only reasonable irresistible inference was that the subject location is a licensed hawking pitch. When both witnesses attended the scene, the stall was in the process of being set up. It was a licensed hawking pitch, had business operation, and was a private business.

It was also the evidence of the prosecution witnesses that the Appellant had picked up metal rods from the ground and assembled them. PW1 also claimed that the Appellant had repeated the steps. So in other words, the Appellant was in the process of assembling a hawking stall.

The Magistrate also considered the photos, exhibit D2, metal rods were used as a material to form the framework of the hawking stall. The Appellant's acts were directly closely connected to the setting up and to prepare it for business operation.

As the Appellant was a person remaining in Hong Kong without the authority of the Director of Immigration, it would be impossible for the government to grant him a hawking licence. The business must be owned by someone else.

The Magistrate also considered that a reasonable person unconnected to the hawking stall would not have performed such manual work to set up a hawking stall for others. A reasonable person would not assist others to perform their duties for no reason, and there was no evidence that the Appellant's acts were voluntary or performed the manual work out of a special relationship. The inference was that the Appellant would not have done the said acts in the absence of any employment relationship.

Although the Appellant had not used any gloves, there was no evidence which suggests that the gloves were necessary for setting up the hawking stall. Therefore, the absence of the gloves was not indicative. Given the Appellant's acts, he must be instructed on how to set up a hawking stall and to set up the stall before his opening hours.

The Magistrate considered all the evidence. The inference was that the Appellant took employment as an odd-job worker at the Location, and that was compelling. So that the irresistible inference could be drawn in the whole circumstances and the Appellant was convicted accordingly.

Grounds of Appeal

Mr Chan put forward the following grounds of appeal.

Ground 1, the Magistrate was wrong, or erred, in drawing the inference that the stall B51 at the Location was a licensed hawking pitch at the material time.

It is accepted that the learned Magistrate is entitled to conduct his own inquiry. However, the Magistrate failed to give an opportunity to the Defence to make any relevant submissions regarding the applicability of the said ordinance, Cap. 132 and 132AG. Even though the Magistrate considered that ordinance, but that ordinance was merely to permit the Director to allocate pitches. So by itself, it does not mean that all pitches at Tung Choi Street on that day must have been operating as a licensed hawking stall.

Furthermore, there was insufficient evidence to infer that B51 was actually operating as a licensed hawking stall because there had not been any business conducted, there was no evidence of business actually having been conducted thereon. The witnesses' evidence was only speculative in setting up the stall, and there had not been any advertisement signs, merchandise, or any paraphernalia inside the hawking stall.

Also, there was no evidence of any other hawker stall in the area being set up, and there has not been any evidence that anyone had been granted a licence in operating a licensed hawking stall on that occasion on that material day. So on an objective analysis, the purpose of what the Appellant was assembling at B51 was unclear.

On ground 2, the Magistrate was wrong or erred in drawing the irresistible inference that the Appellant was employed as an odd-job worker. The Magistrate made an overreaching conclusion that someone else must have owned the hawking stall. Particularly, there was no evidence of who was actually operating and using the structure thereon. There was no evidence to indicate to who was operating or using the half-structure.

Also, there was no evidence from any purported employer who had made any employment relationship with the Appellant. The Magistrate did not consider the reasonable inference that the Appellant could have been operating his own stall and/or business at that location. The fact that the Appellant cannot obtain a licence does not preclude him from attempting to set up the stall on his own.

On ground 3, the Magistrate gave insufficient weight to the inconsistency between the both prosecution witnesses' evidence, and there had not been sufficient weight given to the inaccurate sketch submitted to the court.

Mr Chan in his detailed written submissions stated the following, on ground 1, concerning the Magistrate, although applying the ordinance of Cap. 132, to consider that the Location was a hawker licence or hawking pitch, the Magistrate failed to allow the Defence to have an opportunity to make submissions on that applicability. So, that was a material irregularity, and it is also questionable whether the ordinance can be used to prove that the Location was a licensed hawking pitch, because that ordinance only provides the Authority may allocate pitches in the street.

The Appellant also submitted that the purpose and effect of the legislative provision is only to grant the government a legal basis for allocating pitches in the street instead of informing the court whether B51 was actually being granted a proper hawking licence on that material day. The provisions do not lead to the conclusion that B51 had actually been granted a hawking licence.

So the Appellant will be saying that there was no evidence concerning any hawking licence. There was no business registration certificate being adduced. Both prosecution witnesses' evidence was speculative in the observation that the Appellant was in the process of setting up the structure. There was no paraphernalia, goods for sale and advertisement signs commonly associated with the hawking business. There was no evidence to explain the nature of the

markings present on the road, nor for the purpose of the pillars and numbering of the pillars. So all in all, there was insufficient evidence to find that B51 was used as a licensed hawking pitch on that day.

On ground 2, the Appellant was saying that the Prosecution had chosen to proceed on the basis that the Appellant was an employee rather than establishing or joining any other business pursuant. The Appellant would suggest that the evidence also allowed the possibility of drawing the inference that the Appellant was only an independent contractor or even being hired to perform work there as an independent contractor.

The Appellant referred to the case of HKSAR v Chow Kin Cheung [2013] 1 HKC 246. In that case, the facts were that the appellant pointed to a wooden cabinet and the 1st defendant uploaded a wooden cabinet onto his trolley. They headed to a refuse collection depot where the wooden cabinet was unloaded. The appellant was seen to hand over \$60 to the 1st defendant. The appellant admitted that the 1st defendant was hired to move the cabinet for \$50 as he was not strong enough to move it himself.

In High Court, when considering the appeal, the appeal was allowed, and the conviction was quashed. The fundamental test to be applied was, “is the person who has engaged himself to perform these services performed them as a person in business on his own account?” The court considered it was not an irresistible inference that the relationship was one of employer-employee, rather than contractor.

When applying to the present case, the evidence plainly allowed the drawing of the inference that the Appellant was an independent contractor. The fact that the Appellant, when was seen setting up B51, does not distinguish whether the Appellant was an independent contractor, an employee or setting up his own business. The Appellant’s conduct can be consistent with all these three categories. There was no evidence that the works were repetitive, nor was there any evidence concerning the ownership, or anyone being granted a hawking licence, and there was no evidence of any remuneration or the basis of remuneration.

The Appellant suggested the situation of the present case is different from working in a restaurant or café, or undertaking manual labour. There was no evidence that the employer had provided any materials or tools to the Appellant, and there has not been any evidence of any control over the Appellant on that material day, and that the control is also not determinative. The fact that some degree of control does not transform the Appellant into an employee. The issuance of instructions does not transform any person, renovation worker, as an employee. So the Appellant would say that there was a crucial distinction which caused the charge against the Appellant as one of “taking employment”, as opposed to “establishing or joining a business”.

The Magistrate also erred in deciding that B51 must have been owned by someone else. Equally, no evidence to show the government had granted the licence. The Magistrate presupposes someone else must have obtained the licence there. The fact that the Appellant could not obtain a licence only means that if the Appellant owned and operated a business there, he would face criminal prosecution. So he was wrong to conclude that B51 must have been owned by someone else.

The Magistrate also erred in finding that someone must have given instructions to the Appellant to set up the stall, although there has not been any direct evidence of anyone giving the Appellant any working instructions. The nature of work, namely setting up the hawking stall, is also not a particularly difficult or complex task, so it is not inconsistent with the reasonable inference that the Appellant was establishing his own business instead of any employment relationship.

On ground 3, on the evidence of PW1 and PW2, PW1 saying that the hawking stall was just being started to be built, while PW2 saying that the hawking stall was partly built. Exhibit D2, the photo, depicts a structure vertically standing up, with a canvas appearing to be properly fixed on top, this clearly contradicts PW1's evidence. So it is inherently improbable that PW2's evidence, namely that the stall was partly built, if that was correct, it is inherently likely that B51 must have already been set up properly.

If the stall had already been set up by the time both prosecution witnesses first saw the Appellant, there would be reasonable doubt as to whether or not PW1 or PW2 could have seen the Appellant setting up the stall. So the reliability of the both witnesses' evidence is questionable.

Lastly, the Appellant was also saying that the Magistrate placed insufficient weight to the sketch, exhibit P3, which was inaccurately drawn and labelled. That would also affect the distance observed by both witnesses.

In conclusion, the Appellant was saying that there had been three reasonable inferences to be drawn from the evidence. Firstly, the Appellant was an employee of another person. Secondly, the Appellant was simply an independent contractor being hired by another person. Or, thirdly, the Appellant was establishing his own business by setting up a hawking stall.

So all in all, the court could not draw the irresistible inference that the Appellant was an employee, as opposed to being an independent contractor or a person establishing his own business, the conviction is unsafe and unsatisfactory.

Respondent's Reply

On ground 1, the Magistrate referred to the Public Health and Municipal Services Ordinance, Cap. 132. He was simply taking judicial notice, relying on his personal and local knowledge that the Location was a licensed hawking pitch. The court may take judicial notice of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that the evidence of their existence is unnecessary. Local courts are not merely permitted to use their local knowledge, but are to be regarded as fulfilling a

constitutional function if they do so.

The Respondent submitted that the Magistrate was fully entitled to consider the relevant provisions, as well as the significant features of the location, including the road markings on the sections of that road, and also the pillars marked with the hawking stall number.

Now the Appellant challenged the purpose and effect of the legislative provision, but the Respondent would say that it was immaterial because the court's finding of fact was that the Appellant was setting up the hawking stall at the material time. So whether or not the Appellant was setting up the hawking stall at a permitted or licensed hawking pitch was neither here nor there.

The Respondent submitted that the court's determination of fact that the Appellant was assembling a hawking stall at the material time was not speculative, but based on the evidence of PW1 and PW2. PW1 saw the Appellant picking up the metal rods from the ground, assembling them, and PW2 also saw the Appellant crouching down to pick up metal rods from the ground and assembling them. So it was then accepted that both witnesses gave evidence that the Appellant was in the process of setting up a hawking stall.

The finding was not only based on the evidence of both prosecution witnesses, but also the photos adduced by the Defence, exhibit D1 (1-5), depicting the road markings and pillars marked with hawking stall numbers. The Magistrate was entitled to find that the Appellant was actually setting up a hawking stall, and even in the absence of evidence that no hawking licence, nor any business registration certificate had been adduced, given the facts that the Appellant was seen picking up and assembling metal rods, and that was about 8:45 am; and the location with the significant features identified with the boundaries, including the boundaries demarcated by road markings, the different sets of metal rods and canvas placed along the pavement. So, it was submitted that there was no merit in ground 1.

On ground 2, in the present case that the offence location was not a shop. That would be in contrast to the case submitted, Chow Kin Cheung. The nature of removing an unwanted wooden cabinet and bringing the same to a refuse collection depot was no doubt different from setting up a hawking stall.

To determine whether "employment" existed, the test of drawing of an inference was simple as suggested by the Respondent. Firstly, on the consideration of the particular location from the photos as shown, exhibit D1 (1-5), the subject section of Tung Choi Street is demarcated by road markings there, coupled with the pillar marked with hawking stall numbers and different sets of metal rods and canvas were placed along the pavement. From the photo, exhibit D2, it can also be seen that the metal rods were used to form the framework of the hawking stall.

The Respondent said that picking up and assembling of the metal rods was directly closely connected with setting up a hawking stall, and to prepare it for operation of business. In particular, that the Appellant elected not to give evidence, there was no evidence before the Magistrate that the metal rods handled by the Appellant were for the use of other purposes.

Whether the type of employment falls within the category of employment, the Respondent would say that they would expect to be used given the location and general circumstances of the case. A reasonable person, unconnected with the hawking stall, would not have performed such manual work to set up a hawking stall for others. And any reasonable person would not assist others to perform such labour work for no reason.

The Appellant elected not to give evidence. There was no evidence that the Appellant acted as a volunteer or out of any special reasons or relationship. The evidence was insufficient to support the irresistible inference that the Appellant could not have done such an act in the absence of employment relationship.

For the absence of gloves and/or anyone in the vicinity giving work instructions, that would be immaterial. Although there was no direct evidence showing the responsibility and obligation of employment, having considered all the evidence as a whole, the only reasonable irresistible inference was that the Appellant took employment as an odd-job worker at the Location, and there was no evidence that the Appellant was acting as an independent contractor.

On ground 3, the Magistrate had already carefully considered and analysed the evidence of the prosecution, of all the prosecution witnesses, including various points and allegations concerning the inconsistency of the testimony of both witnesses, but none of those matters cast any doubt on their credibility and reliability. In particular, even though there had been inconsistent versions of witnesses' evidence on the setting-up process, the Magistrate only accepted that the stall was in the process of being set up.

So given the nature and the simplicity of the case, the Respondent will say that the Magistrate was already fully satisfied there were no material inconsistencies and discrepancies in the prosecution's evidence. The Magistrate had already taken into account all the proper issues and correctly applied the relevant legal principles.

The Respondent would say that the Magistrate was correct in convicting the Appellant, and there had not been any error in relation to evidence on the finding of facts, thus the appeal against conviction should be dismissed.

Consideration

In the Court of Final Appeal case, *HKSAR v Hui Lai Ki* [2024] HKCFA 7, it was said that the Magistracy Appeal is conducted by way of rehearing on the evidence before the trial court. The judge must be satisfied that the Appellant's guilt has been proven beyond reasonable doubt on the evidence, failing which the appeal must be allowed. On such rehearing, if the judge comes to a different view on the evidence before the court, that itself is an error which justifies appellate intervention to reverse the decision of the Magistrate to convict.

The court recognised the appellate court conducting a rehearing would be subject to limitations arising from the fact that it does not have the advantage of receiving the witness evidence first-hand. Hence, it must exercise caution when considering findings of fact based on oral testimony. Yet, despite those limitations, it remains the duty the appellate court on an appeal by way of rehearing to come to its own conclusion on disputed issues of fact or law.

On ground 1, about the Magistrate considered and applied the Public Health and Municipal Services Ordinance, Cap. 132, to conclude that the Location was a licensed hawking pitch, but did not give an opportunity for the Appellant to query and reply, and that the ordinance only merely permitted the Director to allocate pitches, but that by itself did not mean all pitches at Tung Choi Street on the material day must have been operating a licensed hawking stall.

However, apart from taking judicial notice on the subject location, from the statements of findings, clearly, the Magistrate had also taken into account the photos D1 (1-5), the road markings, the pillars marked with hawking stall numbers next to each demarcated space. Therefore, the findings of the Location as a licensed hawking pitch cannot be faulted. But more importantly, in the present case, whether the Location was a permitted or licensed hawking pitch was really immaterial.

The crux of the case basically turns on the observation of PW1 and PW2 on the Appellant that he had been picking up metal rods from the ground and assembling them, and the Appellant had been repeatedly doing the same. The Appellant in that location assembling the metal rods for setting up the hawking stall was clearly without question from all the surrounding circumstances. Therefore, ground 1 fails.

On ground 2 complaining that the Magistrate was wrong in drawing irresistible inference that the Appellant was employed as an odd-job worker while it was equally possible that the Appellant was only an independent contractor hired by others to set up the stall or even just establishing his own business there. However, the Appellant did not give evidence. It was so speculative to suggest anyone would hire a person who was not even being permitted to work in Hong Kong, or that he can obtain a licence to operate the stall by himself.

As also thoroughly analysed by the Magistrate, a reasonable person unconnected to the hawking stall would not have performed such manual work to set up a hawking stall for others, nor would the Appellant assist others for no reason. In the absence of any evidence that the Appellant had acted as a volunteer of performing work out of special relationship, the only irresistible inference remains to be an employment relationship. Therefore, this ground also fails.

Lastly, on ground 3, on the discrepancy of evidence between PW1 and PW2, particularly whether the hawker stall was yet to be built or already partly built, likewise, the Magistrate had also considered and analysed such discrepancy, but considered that it was immaterial as both witnesses, in fact, when saying that what they saw was in the process of being set up, and they both saw the Appellant picking up metal rods from the ground and assembling them.

It was not the case where the Appellant had touched upon the framework of the stall. Their observation of the Appellant's acts was just consistent and supporting each other. Therefore, this ground also fails.

In fact, for rehearing purposes, taking into account the observations from both prosecution witnesses, the photos depicting the Location, D1 (1-5), and in the absence of any other contrary evidence from the Appellant, the only irresistible inference was that the Appellant was taking up employment to work there in setting up the hawking stall at the material time.

I am also satisfied that the prosecution had proven the Appellant's guilt beyond all reasonable doubt. Therefore, this appeal is dismissed accordingly.

(Frankie Yiu)

Deputy High Court Judge

Mr Kleon Chan, instructed by Chaudhry Solicitors, for the Appellant

Ms Laura Liu, SPP of the Department of Justice, for the Respondent

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