

HONG KONG / JUDGMENT

HKSAR v. SUN KAM SING STEPHEN

COURT

Court of First Instance

DECIDED

12 July 2007

CASE / FILE NUMBER

HCMA27/2007

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Before: The Honourable Mrs Justice V. Bokhary in Court Date of Hearing: 12 July 2007 Date of Judgment: 12 July 2007

J U D G M E N T

The Appellant was convicted after trial before William Lam, Esq. in the Magistrate s Court at Eastern on an information that he, being a competent examiner having carried out a test, inspection or examination required by the Factories and Industrial Undertakings (Lifting Appliances and Lifting Gear) Regulations, Cap. 59, on 4 November 2005 did deliver to the owner of a crane, a false certificate or make a false report which was to [his] knowledge false as to a material particular, namely that the automatic safe load indicator was in good working order , contrary to reg. 21(2) of these regulations. He now appeals against conviction. In the part of the certificate issued by him where he was required to state whether the crane s automatic safe load indicator (ASLI) was in good working order, the Appellant stated that it was. During a routine examination conducted on 20 January 2006, in other words about 2 months after the Appellant s certificate, it was discovered that the crane did not have an ASLI. The Magistrate rejected the Appellant s evidence that he believed that the crane had an ASLI. He was satisfied beyond reasonable doubt that the crane did not have an ASLI, that the Appellant knew that and that the certificate was to the Appellant s knowledge false in a material particular where it stated that the crane s ASLI was in good working order. Ten perfected grounds of appeal had been filed on the Appellant s behalf. They read as follows : The learned Magistrate erred in that:

- (1) Having found that the prosecution witnesses were honest and reliable, he nevertheless rejected all of their evidence which supported the Appellant.

- (2) He disbelieved the evidence of the Appellant when it was in no way contradicted by the prosecution evidence.
- (3) Insofar as he was permitted to do so, he wrongly found that the Appellant had contradicted himself when giving an explanation for his refusal to answer a question in his Record of Interview.
- (4) He ignored the admitted fact that on a weekly basis, competent persons had certified that an ASLI was present.
- (5) He misunderstood :
 - (i) the evidence of the Appellant and PW3 as to the nature and extent of the test on 4 November 2005; (ii) the evidence concerning the cut-off and the ASLI tests; (iii) the evidence concerning the nature of the certification that the ASLI was in good working order; (iv) the nature of the assurance given to the Appellant by PW3 that everything was in working order ;
 - (v) the Appellant s case which was that he believed that the ASLI was present on 4 November 2005, but did not (nor could he) know how it came to be missing on 20 January 2006.
- (6) He drew an adverse inference against the Appellant for presenting post facto illustrations of the tests (D4) when they were clearly made for the express purpose of explaining the procedure of the inspection to the Court.
- (7) He wrongly found that D4 was contradicted by other evidence, without indicating what that other evidence was, and when there was no such evidence.
- (8) He drew an adverse inference against the Appellant from the fact that the words In Good Working Order had been typed on Form 3, when the Appellant had never been questioned about this matter and had not had an opportunity to explain it.
- (9) He appears to have convicted the Appellant on the basis of vicarious liability, a basis which was not open to him.
- (10) He failed to take into account that the certification by the Appellant in Form 3 was to the effect that the machinery had been tested and examined in accordance with the First Schedule to the Ordinance, which Schedule did not include the ASLI. I have of course given careful consideration to the arguments advanced by counsel for the Appellant but my reasons can be expressed fairly briefly, ground by ground. As to Ground 1, it is true that the Magistrate said that the prosecution witnesses were honest and reliable. But their evidence did not preclude a conviction. In order to see things in their proper context, it is to be noted that what the Magistrate said about PW3 includes that he was the Appellant team-mate and had every motive to side with him when he agreed with Exh. [D4]. The Magistrate referred to D3 but it is obvious and accepted by both sides that it should be D4. As to Ground 2, disbelieving the Appellant s evidence was not conditional upon it being contradicted by the prosecution s direct evidence. The Magistrate saw and heard the Appellant s evidence, and it

was his task to consider such evidence in the context of all the circumstances of the case. As to Ground 3, the Magistrate merely observed that, whereas the Appellant said in court that he declined to answer at the interview because he was not ready to answer until he had done more checking, he had not given that reason at the interview for not answering. As to Ground 4, I see no basis to say that the Magistrate had ignored any relevant evidence. Ground 5 asserts that the Magistrate misunderstood the matters listed in that ground. I see no basis to say that the Magistrate had misunderstood those matters. As to Ground 6, I see no basis for saying that the Magistrate drew an adverse inference as asserted in that ground. The Magistrate decided the case not on any such inference but on the whole of the circumstances as he weighed them. As to Ground 7, the Magistrate was no more bound to accept the Appellant's diagrams than he was bound to accept the Appellant's evidence. And as to Ground 8, the Magistrate did not decide the case on any such inference but, as I have already said, on the whole of the circumstances as he weighed them. I see no basis to say that the Magistrate convicted the Appellant on the basis of vicarious liability, which is what Ground 9 asserts. Finally I come to Ground 10. The prosecution says that an ASLI is an accessory of the crane as a device fitted to it, and is within the First Schedule. In any event, the certificate makes express reference to the crane's ASLI. It was submitted on the Appellant's behalf that there was no evidence on which the Magistrate could find that the Appellant knew that his certificate was false. There was in my view circumstances from which the Magistrate could come to that conclusion as a matter of inference upon a proper approach to circumstantial evidence. In my judgment, all the grounds of appeal fail, and I dismiss the appeal. (V. Bokhary) Judge of the Court of First Instance High Court Mr Clive Grossman, SC, instructed by Messrs Yaddy Cheung & Co, for the Appellant Mr Joseph Wong, SGC of the 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\$&H HCMA.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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