

HONG KONG / JUDGMENT

HKSAR v. WONG CHIU WAI

COURT

Court of First Instance

DECIDED

25 September 2007

CASE / FILE NUMBER

HCMA775/2007

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bjbj HCMA775/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO. 775 OF 2007 (ON APPEAL FROM STV 34 OF 2007)

BETWEEN HKSAR Respondent and WONG CHIU WAI (sgqIP) convicted after a trial in Shatin Magistracy of an offence of speeding in excess of 15 km/hr, contrary to section 41(1)(a) of the Road Traffic Ordinance, Cap. 374 (the Ordinance). He was fined \$450. AUTONUMOUT He now appeals that conviction on the general grounds contained in Form 101 of the Magistrates Ordinance. AUTONUMOUT The facts of the case were, as accepted by the magistrate, that the appellant drove his car along Castle Peak Road towards Yuen Long at a speed of 66 km/hr in a 50 km/hr limited zone. His speed was detected by a team of police using a laser gun and a roadblock. In that area road works were taking place; there had apparently been changes to the speed limit signs and some signs had been covered up. AUTONUMOUT At trial the appellant did not contest that he had been travelling at the speed asserted by the prosecution, but presented his case on the basis that because of misleading speed limit signs he reasonably believed that the speed limit upon the relevant stretch of road was 70 km/hr. AUTONUMOUT The magistrate considered this as a potential defence to a strict liability offence. Though the matter has not been fully argued before me, the appellant being unrepresented, I think he was right to do so and right also to proceed on the basis that it was up to the appellant to establish any such reasonable and mistaken belief on the balance of probabilities : see AG v. Fong Chin Yue [1995] 1 HKC 21, per Bokhary JA (as he then was). It may that in more recent cases in the United Kingdom courts have decided that such a defence can operate regardless of whether or not a defendant s mistaken belief was reasonable : see B (A Minor) v. DPP [2000] 2 AC HL and R. v. K [2002] 1 AC HL. But, in my view, there must in Hong Kong still be established such a reasonable basis for the defendant s belief for the reason that Fong Chin Yue is binding in this regard. For the same reason a defendant has the onus of establishing the defence on the balance of probabilities. It may also be that some overseas jurisdictions such as Australia and the United Kingdom have adopted the view that the burden of disproving the defence beyond reasonable doubt rests on the prosecution : see R. v. He Kaw The [1985] 157 CLR 523 and R. v. K (supra) and have decided that the defendant bears

the evidential burden only. But in Hong Kong the law is as stated in Fong Chiu Yue.

AUTONUMOUT In the present case the facts were as follows. AUTONUMOUT It was common ground, or at least uncontested by the prosecution, that the appellant had entered on to Castle Peak Road at a roundabout at Tsing Lung Tau and then proceeded towards Yuen Long. It was accepted by the prosecution that between that entry point and where the police had set up their laser gun there were no visible speed limit signs. The only visible speed limit sign was located further back along Castle Peak Road before the point when the appellant had entered it from Tsing Lung Tau. AUTONUMOUT The appellant in his evidence said that earlier in the evening he had driven along Castle Peak Road in the opposite direction, i.e. towards Tsuen Wan. Whilst doing so he had noticed displayed on the opposite side of the road a speed sign which showed a speed limit of 70 km/hr. He assumed therefore that the speed limit on the relevant side of the road was 70 km/hr. So when he returned later that evening, travelling in the lane towards Yuen Long he assumed the speed limit in that lane was 70 km/hr. AUTONUMOUT The magistrate in arriving at his verdict said this

28. I was satisfied that it was open to the appellant to prove on a balance of probabilities that he believed for good and sufficient reasons, albeit erroneously that he had complied with the speed limit in force And later
32. Whilst I had my reservations that the appellant saw this sign when travelling on the Tsuen Wan bound lane again I found I could not reject the appellant's evidence and proceeded on the basis that because he saw this sign when travelling on the opposite side of the road he believed the speed limit for that side of the road was 70KM an hour. AUTONUMOUT He had accordingly accepted the appellant's evidence as to him seeing, earlier in the evening, a speed limit sign displaying the speed limit of 70 km/hr on the Yuen Long bound lane of Castle Peak Road. It was the appellant's evidence that it was only the 70 km/hr limit sign that he had seen. He said he could see it from the opposite side of the road as the sign was displaced and not pointing away from him. That sign, on the basis of the evidence before the magistrate, was located at a position after the location of the laser gun. Precisely how far from the laser gun the sign was, was not clear. But common sense would suggest that, as it was between the laser gun and the police roadblock, it was not far. AUTONUMOUT The remaining issue before the magistrate, once he had accepted that the appellant believed that the speed limit at the point where he had been recorded as travelling at 66 km/hr by the laser gun was in fact 70 km/hr was simply whether the appellant's belief in that regard was based on reasonable grounds. The magistrate said in this regard concerning the appellant having seen the 70 km/hr speed sign
33. The question to determine therefore was whether this was good and sufficient reason, albeit mistakenly for believing the speed limit was 70KM an hour. In my view this was not good and sufficient reason for believing the speed limit was 70KM an hour for the following reasons : The appellant entered Castle Peak Road at the Tsing Lung Tau roundabout. From the roundabout to the laser gun, the only speed limit sign was covered, as shown in photograph 2, exhibit D2. The sign displaying both 50 and 70 was after the laser gun and

before the roadblock where the appellant was intercepted, some 2KM from the roundabout where the appellant entered Castle Peak Road. By virtue of section 40(1)(2) of the Road Traffic Ordinance, Chapter 374 unless the speed limit is by notice in the Gazette varied or declared to be a different speed the maximum speed at which a vehicle may be driven on any road shall be 50KM an hour. This is stated in the Road Users Code, which the appellant said in cross-examination he was aware of. AUTONUMOUT At trial the appellant produced a number of photographs taken by him at the scene shortly after he had been stopped at the roadblock. Those photographs show that in the vicinity of where he had been speeding all the speed limit signs, except a sign displaying both a 70 km/hr and a 50 km/hr speed limit, had been covered up. That seems to have been because, as I say, some roadwork was progressing in the vicinity and also perhaps because it was planned by the authorities to increase the speed limit in that area to 70 km/hr. AUTONUMOUT A number of the photographs taken by the appellant are of the sign which displayed both a 70 km/hr and a 50 km/hr speed limit. Those photographs show the 50 km/hr sign has apparently been pulled back or knocked away to reveal the 70 km/hr speed limit sign. In those photographs it is the 70 km/hr limit sign which remains firmly attached to the sign post whereas the 50 km/hr limit sign is bent back and appears damaged. AUTONUMOUT It seems to me, given that circumstance, that once it is accepted that the appellant had a belief that the speed limit was 70 km/hr, based on his earlier view of the 70 km/hr limit sign, then it is difficult to see how that belief, based as it was on a road sign, was not reasonable. In this I differ from the finding of the magistrate. AUTONUMOUT The sign itself was located in the vicinity of the laser gun, although after it. The appellant therefore had good reason to believe the speed limit for that particular stretch of road was 70 km/hr. AUTONUMOUT In my judgment there was on the evidence accepted by the magistrate a reasonable basis for the appellant's belief that the speed limit was 70 km/hr at the point he passed the laser gun. His appeal is allowed, his conviction is quashed and his sentence is set aside. (M.A. McMahon) Judge of the Court of First Instance, High Court Ms Polly Wan, SGC of the Department of Justice, for HKSAR The Appellant in person, present PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V & `#\$ & 6" ABC.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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