

HONG KONG / JUDGMENT

HKSAR v. WONG CHUNG KIT

COURT

Court of First Instance

DECIDED

10 January 2007

CASE / FILE NUMBER

HCMA728/2006

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bjbj OTo) he Appellant was the employer of a person not lawfully employable, contrary to the Immigration Ordinance. The facts were these: that at 6.15 in the morning of 14 June of last year there were Immigration Officers watching a garbage truck arrive at some premises. It was driven by this Appellant. It had to reverse into the refuse station at the premises. What was observed was that another man got out. He was the 1st defendant at the trial, someone who was not lawfully employable in Hong Kong. He gave directions to the vehicle, helping it to reverse into the station. That person then went to the rear of the vehicle and by a combination of inferences, it is clear that he operated a button at the back to lower a platform in order to allow the garbage to be loaded. There were 15 garbage buckets, which had to be emptied into the truck, and the man acting like the driver's mate assisted repeatedly in bringing those full garbage buckets to the back of the truck. It was not in dispute in the case that the vehicle was hired by the Appellant and that he was in the business of refuse collection. It was how he made his living. Knowing those facts and seeing what had occurred, most bystanders would readily infer that those were two men engaged in refuse collection. Once their respective status was established, it would be an obvious inference that this Appellant employed the other man as a helper, in the absence of an explanation. An explanation was offered in evidence below when both the defendants gave evidence. The explanation was that the man who had been seen helping in the way I have described was, in fact, there because he was doing some sightseeing with the Appellant; that he was at a loose end with nothing much to do and so, introduced through some mutual friends, he was going to spend his time in Hong Kong seeing the sights from the elevated position as a passenger in a garbage truck. Given the time of day that this occurred and given the nature of the activity it is - I hope I will be excused for saying - a bit of a tall story and it is one that most tribunals would think hard before accepting. However, what really undoes the Appellant is this: that he was interviewed by the Immigration Officers and he said, against his own interest, that on the previous two days the same man had been out helping him in the way as occurred here, helping in the collection of garbage. In those circumstances, the explanation of sightseeing is one that a tribunal of fact would find very hard to accept and would readily dismiss. The magistrate dismissed it and I share his view; I dismiss it also. There were some disputed issues of fact as to what had occurred when the observation took place, perhaps the most significant of which was this Appellant told the magistrate that when he saw that his passenger was about to help him, he

told him it was not necessary because he knew he could not call upon his services and employ him as a helper.

10. The magistrate saw and heard the witnesses and he accepted the honesty and accuracy of the observing officer, who spoke of the repeated emptying of the garbage can. Very realistically, Mr MacKenzie Ross has not sought to attack that finding of fact.
11. One matter he did draw to my attention was the fact that the observing officer, when giving evidence said that other members of his team went to look for this garbage truck, acting on intelligence. The evidence came out in an answer that was not directed to eliciting it. However, Mr MacKenzie Ross says that it was prejudicial.
12. I would like to assure the Appellant that, in my judgment of his appeal today, that piece of evidence has been given no weight at all. Given the nature of these proceedings, being a rehearing on the evidence, (and I have a full transcript,) it cannot be argued that there has been a material irregularity and that the matter should be sent back for retrial.
13. The only other point to deal with is that the observing officer, when cross-examined, said that there was no evidence of any contract between the two men, obviously meaning a contract of employment. It is argued that that goes to support the defence case.
14. However, from the transcript one can see the re-examination which established what the witness meant by that was that he had found no written contract of employment. Employment of this type is of a nature where one would not expect a formal written contract, that goes with what I might describe as a full-time proper job. Obviously, if without a written contract of employment a man deliberately helps and acts as a vehicle attendant-cum-cleaning working, whether paid or not, on a basis that shows the two men are clearly working together and that one is the proprietor and the other the helper, employment is bound to be inferred.
15. Accordingly, on the evidence before me, I am sure that the conviction was a correct one and the appeal against it is dismissed. There is no appeal against the sentence of 10 weeks. (P Line) Deputy High Court Judge Representations: Mr Vincent Wong, Senior Government Counsel, of the Department of Justice, for the Respondent (HKSAR) Mr David MacKenzie Ross, instructed by Au Yeung, Cheng, Ho & Tin, for the Appellant PAGE - PAGE - CRT28/10.1.2007/DB HCMA728/2006/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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