

HONG KONG / JUDGMENT

HKSAR v. ZAHEER

[2024] HKCFI 3354

COURT

Court of First Instance

DECIDED

3 December 2024

CASE / FILE NUMBER

HCMA385/2023

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HCMA 385/2023

[2024] HKCFI 3354

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO 385 OF 2023

(ON APPEAL FROM TMS 157/2023, TMS 159/2023 and

TMCC 1178/2022)

BETWEEN

HKSAR

Respondent

and

ZAHEER

Appellant

Before: Hon Woodcock J in Court

Date of Hearing: 14 May 2024 and 4 September 2024

Date of Judgment: 3 December 2024

J U D G M E N T

The appellant was convicted after trial of three charges, namely, two relating to dealing with goods to which Dutiable Commodities Ordinance, namely 1000 liters and 665 liters of motor spirit and taking employment while being a person in respect of whom a removal order is in force. At the same time, he was convicted of two summonses contrary to the Dangerous Goods Ordinance and that is storing dangerous goods without complying with the packing, marking and labelling requirements as well as storing dangerous goods otherwise than under and in accordance with a licence. He now appeals against those convictions only.

The Prosecution's Case

There was no dispute and it was admitted that Customs and Excise officers were conducting an anti-illicit fuel operation on 12 July 2022 in Tuen Mun. Inside a fenced area and armed with a search warrant, they came across an illegal fuelling depot or station.

The illegal depot was covered by green canvas and the Prosecution case was that the appellant was intercepted coming out from under that covered area. A vehicle was parked next to the covered canvassed area. Inside that vehicle the customs officers found a Chinese male holding a plastic fuel hose. There was a large oil container holding 1000L of motor spirits as well as an electric pump with a hose and nozzle.

Under the green canvassed area customs officers found two large bulk containers filled with 665L of motor spirits, empty jerry cans, an electric pump with a plastic fuel hose, ejector and a meter connected to the bulk container. There was another electric pump with a meter attached as well as a Samsung mobile phone and a notebook with records of transactions both placed on top of the bulk container. There were also other containers and tools used in relation to pumping and fuelling. The customs officers found the electric pump and hose inside the vehicle connected to the bulk container inside the green canvassed area.

The appellant had \$20,000 in cash in a black shoulder bag he was carrying at the time he was intercepted. The appellant's left thumb print was found on the Samsung mobile phone found inside the green canvassed area on top of the bulk container. It was an admitted fact that the samples of motor spirit from both the vehicle and the bulk container under the green canvassed area contained light oil and was classified as class III dangerous goods under Dangerous Goods Regulations. The motor spirit seized was stored without any license granted by the director of fire services or otherwise under the Dangerous Goods Ordinance and they were not packed marked and labelled as required by the same regulations.

It was also an admitted fact that the appellant had a clear record the time of his trial and was a reconnaissance form eight holder and there was a removal order in force against him on the material day.

The prosecution called five customs officers to give evidence. PW1 was amongst the first batch of officers who arrived at the scene armed with a search warrant. When he entered the fenced in area he could smell motor spirits. He saw the vehicle parked next to the green canvassed area. He saw the trunk of the vehicle open and a man holding a plastic hose inside the trunk. He could hear that there was an electric power pump working at that time. This witness then saw the appellant push open some green canvas and come out of the green canvassed covered area. There was only one entrance and exit to this covered area. This witness found oil in a large container as well as a meter with readings shown on the meter. The meter measured how much oil was pumped. There was a hose connecting the container in the vehicle to the container inside the green canvassed area.

PW2 also saw the appellant come out from the green canvassed covered area and found a very strong smell of motor spirits as he approached the vehicle and the green canvassed area. He approached the appellant and moved him away. The appellant smelt strongly of petrol.

PW3 was the exhibits officer and he took photographs and drew a sketch. He found the mobile phone with the appellant's thumbprint on it next to and in contact with the notebook containing records of transactions of sales on top of the of motor spirits. He also found the money inside the appellant's cross body bag or cross shoulder bag. The last two witnesses assisted in guarding the appellant and the exhibits.

The Defence's Case

The appellant and his wife gave evidence in his trial. The defence did not challenge the fact that there was an illegal motor spirits fuelling depot or operation at that location. The defence did challenge the allegation that the appellant was part of the operation or working the operation. He was merely present and had entered the fenced in area to look for a friend.

The appellant had befriended a Chinese male who had previously taken him to that location in that fenced in area to wash his car. On the material day, he was there looking for his friend. He had lost the phone number of this friend and was there to locate him. He had that much money on him because he and his wife had borrowed \$15,000 from a Pakistani friend to pay for some hospital or medical expenses or treatment because she was pregnant at the time of these offences. In the end, they had not needed the money so his wife had asked him to return it to his Pakistani friend. The appellant said that friend lived near Tuen Mun hospital. He was on his way to later meet that friend when he was arrested.

When he arrived at the fenced in area, he went to use a toilet therein. Whilst he was in that fenced in area, some men alighted from a vehicle and asked him what he was doing there. These were customs officers he found out subsequently. He told them that he was looking for a friend. He had not been intercepted coming out from under the green canvassed covered area. He did not know what was under the canvas. He was handed that Samsung mobile and after grasping it, it was taken back. That Samsung mobile with his fingerprint on it did not belong to him. He had no mobile phone on him at the material time. The defence case was that he was framed.

The appellant's wife gave evidence and explained that she was pregnant at the material time and had wanted to do some tests which were not covered by the hospital authority. She borrowed \$15,000 from a Pakistani friend to conduct those tests in a private hospital. In the end she did not spend that money on tests and had asked the appellant on that day in question to take that money and return it. She had no idea where that Pakistani friend lived.

The Magistrate's Findings

The magistrate rejected the evidence of both the appellant and his wife. He found the evidence of all the prosecution witnesses, the Customs and Excise Officers credible and reliable. He found their evidence and the circumstantial evidence sufficient to enable him to draw the only reasonable inference that the appellant was employed to work and run the illegal motor spirits operation at the scene. Paragraph 39 of the Summary of Findings shows clearly what evidence the Magistrate relied on to draw that inference.

The magistrate found the prosecution had proved beyond reasonable doubt all the elements of each offence and both summonses.

Grounds of Appeal against Conviction

In Mr McGowan's Perfected Grounds of Appeal, he submitted that the magistrate failed to consider the inherent improbabilities on the prosecution's case. He failed to consider the discrepancies in the prosecution witnesses evidence which were sufficient to render their evidence unreliable. Lastly, the magistrate erred in his finding that what the appellant had said at arrest were "expressions of forgiveness" when they were in reality a concern for his other family responsibilities on that day.

The Respondent's Position

The respondent's position is that the credibility and reliability of the witnesses were assessed properly by the magistrate; he had the opportunity to watch them give live evidence. Nothing he said in his findings shows he made unreasonable or illogical or inherently improbable findings. The magistrate's advantage of observing and hearing the witness is impeachable unless he is shown to have misquoted or omitted or failed to consider any significant aspect of the evidence as well as made unreasonable or illogical findings.

The magistrate considered the appellant's clear record and good character. He properly considered the prosecution's burden and standard of proof. He gave reasons for rejecting the evidence of the appellant and his wife. He reminded himself that even if he did not accept the evidence from the defence, the prosecution still had the duty to prove the offences beyond reasonable doubt. There was nothing in this appeal to suggest these convictions were unsafe and unsatisfactory.

The Principles Governing the Magistrates Appeal

It is clearly established that a magistracy appeal is conducted by way of a rehearing on the evidence before the trial court.

This can be supplemented by such further evidence as the appellate court may admit within its statutory power.

Where findings of fact are based on oral testimony of witnesses, the appellate court would be subject to limitations and must exercise caution. The magistrate enjoyed the advantage of having seen and heard witnesses giving evidence, which the appellate court does not enjoy.

However, the appellate court must work with those limitations when undertaking its duty to rehear the trial to reach its own conclusion on disputed issues of fact or law. In this case, the evidence of the prosecution witnesses was materially challenged therefore, credibility was an issue.

If the appellate court is not satisfied on the evidence of the appellant's guilt beyond reasonable doubt, the appeal must be allowed. If the appellate court comes to a different view on that evidence, that justifies a decision to allow the appeal.

What this means is that the appellate court is required to consider and weigh all the available evidence, relevant evidence and reach its own conclusion as to whether the elements of charges are proved to the requisite standard, beyond reasonable doubt.

Considerations

Mr McGowan represented the appellant in this appeal and submitted that the prosecution's evidence did not show or prove the appellant was operating the machinery under the green canvassed area. Moreover, the fact that he did not speak Cantonese, was not wearing appropriate clothing that is clothing suitable for manual dirty work plus he had no key on his person to the fenced in area showed he was not working there operating the illegal fuel depot. Those facts mean it was inherently impossible he was working there.

It was disputed he was seen by prosecution witnesses coming out from under the green canvassed area. It was disputed that the money found in the appellant's cross body bag was counted by prosecution witnesses at the rear of the vehicle. PW4 and 5 gave evidence that they did not recollect seeing PW3 counting the money which is a material discrepancy ignored by the magistrate.

Another discrepancy was the fact that the witnesses said in the witness box that there was a strong smell of motor spirits or petrol but did not mention this fact in their statements. Moreover, there was no evidence that the tenant of this fenced in area was located or investigated. Mr McGowan submits these facts or points show the prosecution's evidence was insufficient to prove the elements of any offences beyond reasonable doubt.

However, having considered his submissions and the transcript, none of these points are material nor have any merit. None of the submissions relate to essential elements of the offences. There were no discrepancies or inconsistencies as such.

I agree with the respondent when he says there was no issue of inherent improbability in this trial. The magistrate found more than enough circumstantial evidence to draw the irresistible inference the appellant was operating the machinery in an illegal fuel depot.

The third ground that the magistrate failed to take into account what the appellant said at the scene which was consistent with what he said during his evidence. The magistrate failed to give sufficient weight to his explanation. It was submitted this could have cast doubt on the prosecution's case that the appellant was operating the illegal fuel depot.

Again, I agree with respondent where he refers to the magistrates findings and the magistrate specifically saying he did not attach any weight or any adverse inference against the appellant for what he said at the scene.

Conclusion

There is no doubt nor was there any challenge to the fact that the fuel was not stored according to regulations nor was it labelled or marked according to regulations. The question is whether the appellant was employed, whether paid or unpaid, as a worker in this illegal fuel depot.

I have considered the evidence of a person actually working at a place of employment would not necessarily support an irresistible inference of employment. In addition, the mere fact that a person is working for another does not necessarily mean per se there is a relationship of employment between the two.

However, in this case and agreeing with the magistrate, the evidence from the prosecution is more than sufficient circumstantial evidence to be able to draw the only reasonable inference that the appellant was working illegally.

I have considered there must be something more than an observation of somebody merely carrying out work in order for the prosecution to ask a court to draw the only reasonable or compelling inference that the appellant in question was an employee or employed, *HKSAR v Hari Arshdeep Singh*, HCMA 124/2019. Here, I am satisfied as was the magistrate, there is more.

I am satisfied the offences have been proven by the prosecution beyond reasonable doubt. The magistrate's findings and reasons given are more than valid; they are correct. In the circumstances, the magistrate was justified in convicting the appellant of all 3 charges and both summonses and I find no basis for disturbing those convictions. There is no merit in this appeal.

Therefore, the appeal against his convictions is dismissed.

(Amanda Jane Woodcock)

Judge of the Court of First Instance

High Court

Mr Tsang Ting Hang, Senior Public Prosecutor of Department of Justice, for the Respondent

Mr James McGowan, instructed by Choy Yung & Co, for the Appellant

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Prepared on 29 October 2026 · Esheria