

HONG KONG / JUDGMENT

R. v. LAI CHI KEUNG

COURT

Court of First Instance

DECIDED

14 November 1996

CASE / FILE NUMBER

HCMA1039/1996

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bjbj IN THE SUPREME COURT OF HONG KONG (Appellate Jurisdiction) MAGISTRACY APPEAL
NO. 1039 OF 1996 (On appeal from Case No. NKC 2215 of 1996)

BETWEEN THE QUEEN Respondent and LAI CHI KEUNG Appellant

Coram: Hon Mr Justice Yeung, in Court Date of hearing: 14th November 1996 Date of judgment:
14th November 1996

J U D G M E N T

The Appellant, LAI Chi-keung, was charged with: (A) charge of failing to provide a specimen of breath for a screening breath test and (B) charge of dumping rubbish in a public place. He was convicted of both charges and he now seeks leave to appeal against the convictions. The Appellant was found inside a private car, GM 9782, at about 7 am on 29 February 1996. He sat in the driver s seat with the safety belt fastened. The car was then stationary about 1 metre from the kerb with the front wheel on a pedestrian zebra crossing. The engine was running and the headlights were on. The Appellant was described as slumping in the driver s seat, having rolled forward towards the left. His eyes were closed. A party of police officers approached him. He was asked to produce his driving licence and identity card. He had difficulty in complying with the instructions. When he was ordered to alight, he was found to be unsteady on his feet and, according to the police officer, a strong odour of alcoholic beverage was smelt on his breath. He was suspected to be drunk and he was told that the police suspected him to be in charge of a motor vehicle while his alcoholic concentration was above the prescribed limit. The Appellant then opened the boot of the car and then removed a packet of cigars from a stock in a plastic bag inside. He then ripped off the plastic covering of the cigars and then dropped it onto the ground. He was told to pick it up. The Appellant ignored the request and said in Cantonese: Charge me or

words to that effect. A trained breath screening device operator arrived and the Appellant was requested to take a screening breath test. At that time the Appellant had requested for medical attention, claiming that he was suffering from heart-attack. As a result an ambulance also arrived. The ambulancemen having examined him and found him not to be in a fit condition to take the test. He was then escorted to the Accident and Emergency Department of the Princess Margaret Hospital. There he was examined by a doctor. The doctor, having examined the Appellant, apparently had no objection to him providing screen breath specimen and blood specimens for analysis. The Appellant was then asked four times to provide breath specimen for analysis and he was warned that failure to do so would result in his being prosecuted. The Appellant on each of those four occasions refused to comply with the request. The prosecution case as outlined above was in fact not challenged. In fact, certain admitted facts have been produced under s.65(c) of the Criminal Procedure Ordinance right at the commencement of the trial before the magistrate. In the course of the evidence of the prosecution witnesses, further evidence pertaining to the behaviour of the Appellant also emerged. There was suggestion that the appellant was aggressive and was rolling around on the ground. He claimed of assault by the police and he claimed to be suffering from a heart-attack. The police officer said he did not believe that the appellant was suffering from a heart-attack. He was simply drunk. Their evidence was attacked on the basis that there were discrepancies. It was suggested that the learned magistrate had failed to properly evaluate those evidence. When the police officers said the Appellant was almost uncontrollably drunk and that his smell of alcohol was so strong that it hit the officer in the face, whereas the doctor who examined him subsequently at the hospital seemed to suggest that the Appellant was sober. Quite apart from the fact that those witnesses were observing the Appellant at different times, with a period of about one hour in between, it was not surprising that different witnesses may form different opinions from the observation of a person in different circumstances. Such matters, in my view, did not affect the learned magistrate's finding that those witnesses were truthful witnesses. In any event, in the light of the admitted facts under s.65(c) of the Criminal Procedure Ordinance, those alleged discrepancies on the evidence of the prosecution witnesses were of, in my view, little significance. It had been admitted that the Appellant was suspected to be under the influence of alcohol when he was in charge of a motor vehicle. It was also admitted that he refused on four separate occasions to comply with the request to provide a specimen of breath for the screening breath test. The only issue, in my view, is whether he had any reasonable excuse for failing to provide such breath specimen as requested by the officer. Before the learned magistrate, the Appellant did not give evidence, but he called a Dr TONG to give evidence on his behalf. Based on the information supplied to Dr TONG, that the Appellant was having chest pains and was diagnosed to be suffering from some ailment at the material time, Dr TONG came to the conclusion that his condition was not ideal to provide breath test and that it would be better for him to be undisturbed and to have bed rest first. Dr TONG admitted that the Appellant was never under his care and his view was based on information supplied to him by the solicitor acting for the Appellant. In fact, the only information he had was the suggestion by the Appellant to the government doctor at the material time that he had chest pain. On the other hand, it was admitted the doctor on duty at the Accident and Emergency Department of Princess Margaret

Hospital, having examined the Appellant, raised no objection that specimens could be properly obtained from the Appellant. Section 39E of the Road Traffic Ordinance deals with protection for hospital patients. Sub-section 4 specifically provides that a medical practitioner can object to the taking of breath specimen from a patient if it would be prejudicial to the proper care and treatment of the patient. Before the appellant was asked for breath specimen, he had been examined and treated. He had had rest. More importantly consent had been obtained from the doctor in charge of the appellant to take breath specimen from the appellant. For the purpose of the present appeal, I am prepared to proceed on the basis that the Appellant was suffering from a minor heart attack and that he was in some discomfort due to chest pain. In my view, feeling discomfort per se cannot be a valid reasonable excuse for failure to comply with the request for a breath sample. One must not ignore that the purpose of the legislation in question was to prevent people from driving while under the influence of alcohol. Very often breath samples need to be taken from people who are in some stage of physical discomfort, perhaps after a traffic accident or in cases when they were suspected to be drunk. In fact, it was precisely for those reasons that breath sample needed to be taken. In my view, physical discomfort, in the light of the purpose of legislation in question, cannot be a reasonable excuse unless such physical discomfort render it impossible to have a proper breath sample taken or that the taking of samples would adversely affect the well-being of the person involved. Unless the courts adopt such an attitude, people who appear to be drunk and therefore in some physical discomfort can always raise this as a reason for not complying with the request to supply breath samples. The Appellant might be in some form of discomfort due to chest pain, but he was clearly conscious. He was able to respond to the questions put to him by Dr TONG, he was able to complain to one of the officers that there was abuse of police force. He was able to say at some stage words to the effect: t bother me, I m not giving blood sample or breath test sample. There was nothing to suggest that the condition of the Appellant at the material time was such that taking a breath sample from him was not possible. There is no evidence to show that the taking of breath sample would in any way adversely affect his well-being at the material time. The doctor was clearly of the view that the taking of the breath sample would not be prejudicial to the proper care and treatment of the patient. Dr TONG said his condition could possibly be brought about by alcohol but he had clearly come to the conclusion that the Appellant s condition was not such that it was inappropriate to take a breath sample from him. I should think with the co-operation of the Appellant, taking a breath sample should be relatively simple and quick. I do not wish to speculate as to why the Appellant chose not to co-operate with the police in giving a breath sample. Maybe he thought that he had not been fairly and properly dealt with by the police officers earlier on. He could take his grievances elsewhere but that could not be a reasonable excuse in failing to comply with the 4 requests made of him to provide breath samples. It was suggested the Appellant had not been told that he was thought to be in a fit condition to give breath sample. Such question may have assisted the doctor in deciding whether breath sample should be taken from the Appellant at the material time. The doctor must be allowed to rely on his judgment and observation. The background and the evidence of this case, in my view, do not support any suggestion that the Appellant had any reasonable excuse to refuse to give a breath sample when he was requested to do so by the officer. It was suggested that the defence witness, Dr TONG s evidence, in the form of a statement had

not been included in the appeal bundle. Whether it was an administrative error, I know not. But the learned magistrate had clearly made reference to such statement before reaching the decision as he did. The absence of such statement, particularly in the light of its contents, from the appeal bundle, in my view, cannot be fatal. On the evidence, there is no reasonable excuse for the Appellant to refuse to provide a breath sample and in my view, he was rightly convicted by the learned magistrate on the (A) charge. As far as the (B) charge is concerned, it was submitted that the plastic covering of the cigar that the Appellant dropped was not rubbish within the contemplation of s.4(1) of the Summary Offences Ordinance. And that drop could not be construed as meaning throw or . I found such submission astonishing. English is not my mother tongue but I have no difficulty in concluding that when a person discard some cigar plastic covering, such plastic covering is indeed rubbish, being waste material or useless material or useless matter. I also have no difficulty in concluding that by dropping such rubbish and refusing to pick it up, after being warned, his conduct can be properly perceived as a deliberate act of throwing or laying. Of course, there was this further evidence from an officer that the Appellant actually threw the plastic covering onto the ground. The learned magistrate was entitled to conclude that on the evidence before him that the Appellant had, in fact, committed the offence of throwing or laying rubbish. The Appellant has been properly convicted on both the (A) and (B) charges, the appeal is therefore dismissed. (W YEUNG) Judge of the High Court Mr D G Saw, Senior Assistant Crown Prosecutor, for Crown Mr Christopher Grounds (Ng & Lam), for Appellant I/we certify that to the best of my ability and skill, the foregoing is a true transcript of the tape recording taken of the above proceedings. Dated the 20th day of November 1996 HB/14.11.96 PAGE MA1039/96/JUDGMENT & 6" IN THE SUPREME COURT OF HONG KONG Judiciary Administrator Normal Administrator Microsoft Word 8.0 JPMU IN THE SUPREME COURT OF HONG KONG Title _PID_GUID Microsoft Word Document MSWordDoc Word.Document.8

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