

17/84

IN THE PRIVY COUNCIL

No. 32 of 1983

ON APPEAL FROM THE COURT
OF APPEAL OF HONG KONG

BETWEEN:

GAMMON (HONG KONG) LIMITED

First Appellants

and

YEE CHIN TEO

Second Appellant

and

CHAK SHING MAK

Third Appellant

and

THE ATTORNEY GENERAL OF HONG KONG

Respondent

CASE FOR THE APPELLANTS

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1. This is an Appeal from a Judgment of the Court of Appeal of Hong Kong (Sir Alan Huggins V.P., Yang and Barker, J.J.A.) dated 11 February 1983 allowing the Respondent's Appeal by way of case stated from the Appellants' acquittals on 3 May 1982 in the Hong Kong Magistrates' Court (Mr S.A.N. Clay) and remitting the matter thereto.

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2. The issue on this Appeal is whether certain offences under the Buildings Ordinance of Hong Kong (Chap. 123 of the Revised Statutes, as amended) carrying maximum sentences of fines of \$250,000 and imprisonment for three years are

offences requiring proof of mens rea as to their essential ingredients or, as held by the Court of Appeal of Hong Kong, are offences imposing strict liability.

3. The First Appellants are a substantial company, at the material time wholly within the Jardine Matheson Group, engaged in the construction industry in Hong Kong (an industry in which capital expenditure on new buildings and on civil engineering projects in 1982 was 21,000 million Hong Kong dollars). The Second and Third Appellants were and are employees of the First Appellants.

4. The Appellants were respectively the registered contractor, the project manager and the site agent for the construction of the foundation of a building on a site in the Central District of Hong Kong. Following the collapse of part of a temporary lateral support system the Appellants were charged with certain offences under the Buildings Ordinance.

1 5. The First Appellants were charged in two informations with having:

1(30)-2(05) (a) on divers dates between the 31 day of January 1980 and the 9 day of April 1981 at Queen's Road Central, Hong Kong in this Colony, being the Registered Contractor directly concerned with building works upon Marine Lot No. 3 Queen's Road Central, Hong Kong carried out such works in a manner likely to cause risk of injury to any person or damage to any property. Contrary to Section 40(2B)(b) of the Buildings Ordinance Cap. 123.

(b) on divers dates between the 31 day of January 1980 and the 9 day of April 1981 at Queen's Road Central, Hong Kong in this Colony, being the Registered Contractor directly concerned with building works upon Marine Lot No. 3 Queen's Road Central, Hong Kong diverged or deviated in a material way from work shown in plans approved by the Building Authority under the Buildings Ordinance in respect of the lateral support system for the excavation works along the south western boundary of the aforementioned lot. Contrary to Section 40(2A)(b) of the Buildings Ordinance Cap. 123.

4(5-15) 6. The Second Appellant was charged in one information with having:

on divers dates between the 31 day of January 1980 and the 9 day of April 1981 at Queen's Road Central, Hong Kong in this Colony, being a manager of Gammon (Hong Kong) Limited which Company was directly concerned with building works upon Marine Lot No. 3 Queen's Road Central, Hong Kong carried out such works in a manner likely to cause risk of injury to any person or damage to any property. Contrary to Section 40(2B)(b) of the Buildings Ordinance Cap. 123.

7. The Third Appellant was charged in one information with having:

5(10) on divers dates between the 31 day of January 1980 and the 9 day of April 1981 at Queen's Road Central, Hong Kong in this Colony, being a person directly concerned with building works upon Marine Lot No. 3 Queen's Road Central, Hong Kong permitted such works to be carried out in a manner likely to cause risk of injury to any person or damage to any property. Contrary to Section 40(2B)(b) of the Buildings Ordinance Cap. 123.

8. Section 40(2A) of the Buildings Ordinance (under paragraph (b) of which the First Appellant was charged in one of the two informations) provides:

(2A) Any person for whom any building works, street works, lift works or escalator works are being carried out and any authorised person, registered structural engineer, registered contractor, registered lift contractor or registered escalator contractor directly concerned with any such works who -

- (a) permits or authorises to be incorporated in or used in the carrying out of any such works any materials which -
 - (i) are defective or do not comply with the provisions of this Ordinance;
 - (ii) have not been mixed, prepared, applied, used, erected, constructed, placed or fixed in manner required for such materials under this Ordinance;
- (b) diverges or deviates in any material way from any work shown in a plan approved by the Building Authority under this Ordinance; or
- (c) knowingly misrepresents a material fact in any plan, certificate, form or notice given to the Building Authority under this Ordinance

shall be guilty of an offence and shall be liable on conviction to a fine of \$250,000 and to imprisonment for three years. (underlining added)

9. Section 40(2B) of the Buildings Ordinance (under paragraph (b) of which all the Appellants were charged) provides:

- (2B) Any person (whether or not an authorised person, a registered structural engineer or a registered contractor) directly concerned with any site formation works, piling works, foundation works or other form of building works who -
- (a) carries out or has carried out such works, or authorises or permits or has authorised or permitted such works to be carried out, in such manner that it causes injury to any person or damage to any property; or
 - (b) carries out or has carried out such works, or authorises or permits or has authorised or permitted such works to be carried out, in such

manner as is likely to cause a risk of injury to any person or damage to any property,

shall be guilty of an offence and shall be liable on conviction to a fine of \$250,000 and to imprisonment for 3 years. (underlining added)

10. The legislative history of the two offences (which history is relevant in the light of the Judgment of the Court of Appeal) is, in brief, as follows:

- (a) Section 27(2) of the Buildings Ordinance 1955 (No. 68 of 1955), made "the material divergence or deviation from work" shown in an approved plan, as well as certain other offences, punishable by a fine of \$2,000 and imprisonment for 6 months;
- (b) Section 40(2) of the Buildings Ordinance, Chapter 123 of the Laws of Hong Kong, Revised Edition, 1966, was in similar terms to Section 27(2) of the 1955 Ordinance;
- (c) By virtue of Section 5 of the Buildings (Amendments) (No.2) Ordinance 1972 (No. 71 of 1972), the Buildings Ordinance, Chapter 123 was amended inter alia in that the punishment for the offence of diverging or deviating was increased, along with certain other offences, to one of a fine of \$50,000 and 2 years' imprisonment (the punishment for certain other offences remaining unaffected);

(d) Also by virtue of Section 5 it was made for the first time an offence punishable with a fine of \$50,000 and imprisonment for two years for:

"any person being an authorised architect or registered contractor [amended in 1974 to include "an authorised person" and "registered structural engineer"] directly concerned with building works who carries out such works, or authorises or permits such works to be carried out, in such a manner, as, in the opinion of the Building Authority, will cause, or will be likely to cause, a risk of injury to any person or damage to any property";

(e) By virtue of Section 3 of the Buildings (Amendment) Ordinance 1979, (No. 24 of 1979), the Buildings Ordinance, Chapter 123, was amended as follows:

- (i) the penalty for the two offences was increased, along with some others, to a fine of \$250,000 and 3 years' imprisonment;
- (ii) the words "in the opinion of the Building Authority" in the 1972 offence were deleted; and
- (iii) that offence was extended so that it could be committed by any person directly concerned with building works.

11. The Appellants pleaded not guilty to the four charges against them.

12. During the trial the prosecution proved to the satisfaction of the Learned Magistrate that the First Appellant "had delegated its statutory duties and obligations in respect of the said works" to the Second and Third Appellants and further proved (inter alia):

8(12)

8(15)

"(5) That all the charges related to the erection and maintenance of a temporary lateral support

system the function of which was to support the sides of the site.

- (6) That all plans and calculations in respect of the aforementioned lateral support system had been prepared and submitted by P. & T. [Palmer and Turner the "Authorised Person" for the contract] to and approved by the Building Authority.
- (7) That up to the 7 April various additional works were carried out to the lateral support system.
- (8) That as a result of the removal of part of the lateral support system on or about 7 April 1981 a certain portion of the site would have become unsafe in engineering terms with a water table at +4 P.D.
- (9) That as a result of the action referred to in paragraph 8 there was a risk of injury to person or damage to property if the water level exceeded +4 P.D.
- (10) That [the Second and Third Appellants] knew of the relevant work referred to in paragraph 8 and had either carried out or permitted the work to be carried out.
- (11) That the work referred to in paragraph 8 constituted a deviation of substance from plans approved in respect of those works by the Building Authority.
- (12) That [the Second and Third Appellants] knew of the requirements of the plans approved by the Building Authority in relation to the relevant works".

13. At the conclusion of the case for the Prosecution, the Learned Magistrate ruled, contrary to the submissions of the Prosecution, that:

- (a) in respect of the charge against the First Appellant under Section 40(2A)(b), the Prosecution had to prove "actual or constructive knowledge that the relevant works constituted a material divergence or deviation from approved plans"
- (b) in respect of the charges against all the Appellants under Section 40(2B)(b) the Prosecution had to prove "actual or constructive knowledge that the relevant

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9(17)

works caused the likelihood of a risk of injury to any person or damage to property".

9 (25) 14. Following the ruling, evidence was called for the Defence directed primarily to the issue of knowledge. At the conclusion of the case the Learned Magistrate acquitted
9 (30) the Appellants on the grounds that the required knowledge had not been proved.

15. The questions put to the Court of Appeal of Hong Kong by the Learned Magistrate, as subsequently amended, were as follows:

10 (20) "(1) Whether I was correct in law in holding that in relation to a prosecution under Section 40(2A)(b) of the Buildings Ordinance Cap. 123 it is necessary for the prosecution to prove that a defendant knowingly or intentionally deviated or diverged in a material way from plans approved by the Building Authority.
(2) Whether I was correct in law in holding that in relation to a prosecution under Section 40(2B)(b) of the Buildings Ordinance Cap. 123 it is necessary for the prosecution to show that a defendant knowingly or intentionally caused the likelihood of risk of injury to any person or damage to property".

16. On 11 February 1983 the Court of Appeal of Hong Kong allowed the Respondent's Appeal in respect of all the Appellants, answered the two questions in the negative,
25 and remitted the matter to the Magistrates' Court. The Judgment of the Court was read by Sir Alan Huggins, V.P.

12 17. In its Judgment the Court of Appeal:
(a) said, with reference to the wording of Section
15 (45) 40(2A)(b) that the absence of the word "knowingly"

- 16(4) therein "is a factor (albeit a minor one) tending to indicate that knowledge is irrelevant" and compared the offences created by sub-sections (2A)(b) and (2B)(b) with those created by sub-sections (2AA) and (7A) which "provide a defence which would only be appropriate if those offences at least were ones of strict liability".
- 16(16) (b) noted that "the provision which is now Section 40(2B) formerly made 'the opinion of the Building Authority' the test of likelihood of risk" (see Section 5 of the Buildings (Amendments) (No. 2) Ordinance 1972 set out above in paragraph 10(d)) and referred to the Respondent's submission that it was improbable that the Legislature, in deleting the words, intended thereby to substitute the opinion of the Defendant.
- 16(30) (c) said that the present maximum penalty for the offences (\$250,000 fine and 3 years' imprisonment) "represents a big increase since the date when the crimes were first created", that
- 16(40) "the material time for ascertaining the legislative intention is the date of the creation of the crime and no subsequent misunderstanding as to the elements of the crime could alter its nature" and that:
- 17(1) "we see no injustice in the imposition of heavy penalties for crimes such as those with which we are concerned, whether resulting from intentional infringement of the law, negligence or incompetence".
- 17(5) (d) held that the purpose of the legislation was the avoidance of danger caused by a departure from
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generally accepted standards whether caused by incompetence or carelessness and that to achieve this "the presumption of strict liability displaces the ordinary presumption of mens rea:"

17(21)

(e) held, insofar as the Third Appellant was charged with "permitting" the works to be carried out in a manner likely to cause risk of injury, that that word did not:

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"by itself import mens rea in the sense of intention to cause a likelihood of risk of injury or knowledge that such likelihood would result but does require that the defendant shall have had a power to control whether the actus reus (the carrying out of the works in the manner in which in fact causes a likelihood of risk of injury) shall be committed or not".

18. The Appellants respectfully submit that the Court of Appeal erred in holding that the offences with which the Appellants were charged were offences of strict responsibility and thereby erred in allowing the Respondent's appeal and quashing the acquittals.

19. The imposition of strict responsibility would be contrary to justice and to established principles particularly in the light of the following:

(a) the maximum sentence for the offences is a fine of \$250,000 and 3 year's imprisonment,

(b) the offence created by Section 40(2B)(b) can be committed by any person from unskilled labourer through to managing director,

- (c) the offences may be committed by a registered contractor or an employee even though he is merely carrying out the instructions of an "authorised person" or "registered structural engineer".
- (R. v. TOLSON (1889) 23 Q.B.D. 168, at P.177; SHERRAS v. DE RUTZEN [1885] 1 Q.B. 918, at p.922; SWEET v. PARSLEY (1920) A.C. 132, H.L.(E) at p.149.

20. The Appellants further respectfully submit:

- (a) The Court of Appeal failed to follow the principles laid down in LIM CHIN AIK v. THE QUEEN [1963] A. C. 160, P.C. and SWEET v. PARSLEY loc. cit., H.L. (E) applied by the Court of Appeal of Hong Kong in R. v. HALIM SULMAN & ANOTHER [1977] H.K.L.R. 214 and wrongly failed to adopt two decisions of the High Court of Hong Kong in which equivalent sections in an earlier Buildings Ordinance had been construed as requiring mens rea, namely A.G. v. CHAN WING ON [1964] H.K.L.R. 491 and CHUNG YAT AND OTHERS v. THE QUEEN [1978] H.K.L.R. 355 (where the Prosecution did not argue that mens rea was not required).
- (b) The Court of Appeal erred in describing the present maximum penalty as representing "a big increase

16(30)

since the date when the crimes were first created", whereas in the case of the offence under Section 40(2B)(b) the penalty, when it was created, was 2 years' imprisonment. The Court further erred in disregarding the fact that, in 1964, prior to any increase in the penalty for the predecessor to Section 40(2A)(b), it had been held that a person could not be convicted of the offence under the then Buildings Ordinance of using defective materials unless he knew that the defective materials were used (A.G. v. CHAN WIN ON, (loc. cit.)). Moreover the Legislature when increasing the penalty would be deemed to know the law: such serious increases would be unlikely to have been enacted for offences not requiring mens rea.

- (c) Contrary to what the Court of appeal appears to have thought, the imposition of strict liability can result in the conviction of, and in the imposition of heavy penalties upon, not only those who intentionally infringe the law, the negligent and the incompetent, but also in the conviction and punishment of persons entirely innocent of fault. Nor generally can strict liability promote the observance of the regulations in the way suggested. Neither contractors nor employees who would be liable on strict liability principles are expected to check the design of works. In the light

of this and having regard further to the fact that "any person" directly concerned with building works can be convicted of the offence under Section 40(2B)(b), strict liability was not likely to have been intended. In the words of the Board in LIM CHIN AIK v. THE QUEEN (loc. cit.) at p.175:

"Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

Nor should the prosecution and sentencing of those not at fault be left to the discretion of respectively prosecutors and courts. In the words of Lord Reid (dissenting) in WARNER v. METROPOLITAN POLICE COMMISSIONER [1969] 2 A.C. 256, at p.278 H.L.(E.):

"I dissent emphatically from the view that Parliament can be supposed to have been of the opinion that it would be left to the discretion of the police not to prosecute, or that if there was a prosecution justice would be served by only a nominal penalty being imposed".

- (d) The offences created by Section 40(2A)(a) and (c) appears to require, clear proof of mens rea. It would be strange and illogical if s.s.(b) was interpreted differently. The fact that sub-sections

(a) and (c) require mens rea indicates that the Legislature did not consider that the safe construction of building works required the imposition of strict liability.

- 16(16) (e) In concluding that it was improbable that the Legislature in deleting the words "in the opinion of Building Authority" in the predecessor to Section 40(2B)(b) intended the opinion of the defendant to be substituted therefore, the Court of Appeal failed to distinguish between the various elements of the offence. After the amendment it was the task of the Court to decide as a matter of fact whether the carrying out of the work was or was likely to cause a risk of injury or damage, whereas, before the amendment, the opinion of the Building Authority was conclusive. The fact that the words were to be found in the Section and later were deleted does not assist in determining whether mens rea as to that element of the actus reus was or is now required.
- (f) The Court of Appeal in mistakenly concluding that so construing the Sections as to require mens rea would make the opinion of the defendant decisive and would result in the acquittal of contractors who employ careless, incompetent or unskilled persons apparently overlooked that, if mens rea were

required, proof that the defendant was reckless would be sufficient and that recklessness:

"includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was." (R. v. CALDWELL [1982] A.C. 341, at pp. 353-354, H.L.(E)).

- (g) Strict liability for these offences is not required in the light of commercial reality which requires contractors in a competitive market to seek to conduct their activities competently and efficiently.
- (h) Insofar as the Third Appellant is concerned, the word "permitted" in Section 40(2B)(b) imports a requirement of mens rea: JAMES & SON LTD v. SMEE [1955] 1 Q.B. 78 Div. Ct.; SWEET v. PARSLEY (loc. cit.) p. 162; Smith & Hogan, Criminal Law 5th Ed. pp. 112-114. This is yet another indication that the Legislature did not intend strict liability in respect of these offences.

21. The Appellants further submit that the following provisions of the Buildings Ordinance and of the Buildings (Administration) Regulations of Hong Kong (Cap. 123, 1974 Ed.), which establish detailed and wide ranging means of controlling construction work, indicate that there are

controls other than the imposition of strict liability operating to ensure a proper standard of work. The Ordinance requires every person for whom building works are to be carried out to appoint a "registered contractor" to carry out the work (Section 9). It further requires the appointment of an "authorised person" and, if the Building Authority so directs, a "registered structural engineer", both independent of the registered contractor, to supervise the registered contractor and to notify the Building Authority of any contravention of the Regulations (Section 4 and Part V of the Regulations). The Ordinance further provides a procedure under the control of the Building Authority for the inclusion on and removal from the list of registered contractors, authorised persons and registered structural engineers. Part II of the Ordinance sets out the various supervisory powers of the Building Authority before and during construction work. Thus a registered contractor may have to work, and in this case had to work, under the supervision of and accept instructions from three independent persons.

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22. On the 22 June 1983 your Majesty in Council granted the Appellants special leave to appeal.
23. The Appellants respectfully submit, for the reasons amongst others set out in paragraph 19, 20 and 21 herein that the Judgment of the Court of Appeal of Hong Kong was wrong and ought to be reversed, and this appeal ought to be allowed with costs.

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