

17/84

O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

GAMMON (HONG KONG) LIMITED      First Appellant  
YEE CHIN TEO                              Second Appellant  
CHAK SHING MAK                         Third Appellant

- and -

10 THE ATTORNEY GENERAL OF  
HONG KONG                              Respondent

CASE FOR THE RESPONDENT

Record

20 1. This is an appeal by special leave of the Judicial Committee granted on the 22nd day of June 1983 from a judgment of the Court of Appeal of Hong Kong (Sir Alan Huggins, V.P. Yang and Barker J.J.A.) dated the 11th day of February, 1983, allowing the Respondent's appeal by way of Case Stated from the Appellants' acquittals on the 14th day of May 1982 in the Hong Kong Magistrates' Court (Mr. S.A.M. Clay) and remitting the matter thereto.      p.12, l.1 -  
p.24, l.39  
p.6, l.1 -  
p.10, l.36  
p.25, l.1.1-26

2. The question for decision involves the construction and application of the Buildings Ordinance of Hong Kong, Cap. 123 of the Revised Statutes, as amended. In particular the issue of this appeal depends on the construction placed upon the following provisions of the Ordinance :

Section 40(2A) provides :

30 "(2A) Any person for whom any building works, street works, lift works or escalator works are being carried out and any authorized person, registered

Record

structural engineer, registered contractor, registered lift contractor or registered escalator contractor directly concerned with any such works who -

(a) permits or authorizes 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 the manner required for such materials under this Ordinance;

10

(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,

20

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

Section 40(2B) provides :

"(2B) Any person (whether or not an authorized 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 -

30

(a) carries out or has carried out such works, or authorizes or permits or has authorized 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 authorizes or permits or has authorized 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."

3. The questions put to the Court of Appeal by the learned Magistrate, as amended, were as follows :

p.10,l.1.17-36

10           "(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.

20           (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 a risk of injury to any person or damage to property."

The Court of Appeal answered both questions in the negative.

p.24,l.1.20-38

30           4. The Appellants were respectively the registered contractor, the project manager and the site agent for the construction 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 offences under the Buildings Ordinance of Hong Kong.

p.7, l.36 -  
p.9, l.6

5. The Appellants were charged as follows :

First Appellant

No.1 "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".

p.1, l.13 -  
p.2, l.18

Record

p. 2, 1.20 -  
p. 3, 1.25

No. 2 "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 works 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".

Second Appellant

10

p. 3, 1.27 -  
p. 4, 1.26

No. 3 "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".

Third Appellant

p. 4, 1.28 -  
p. 5, 1.29

No. 4 "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".

20

p. 1, 1.13 -  
p. 5, 1.29

The original informations for all four charges averred the offences were committed on divers dates between the 31st day of January 1980 and the 9th day of April 1981. They were subsequently amended so that the four charges averred the offences were committed on or about the 7th of April 1981.

p. 6, 1.27  
p. 6, 1.37  
p. 7, 1.6  
p. 7, 1.14

6. The Appellants' trial commenced at the Magistrates' Court on the 22nd of April 1982. At the conclusion of the case for the Prosecution the learned Magistrate ruled, contrary to the submissions of the Respondent, that :

30

p. 9,1.1.7-24

p. 9,1.1.22-24

(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 charge against all three Appellants under section 40(2B)(b), the

40

prosecution had to prove "actual or constructive knowledge that the relevant works caused the likelihood of a risk of injury to any person or damage to property".

7. Following this ruling, evidence was called for the defence, and at the conclusion of the case the learned Magistrate acquitted the Appellants on the grounds that the required knowledge had not been proved.

p. 9, l. 25  
p. 9, l. 1.30-37

10 8. The Respondent appealed by way of case stated. At the Respondent's application, and with the Appellants' support, the matter was reserved by Penlington J. for the consideration of the Court of Appeal. The appeal came before Sir Alan Huggins, V.P. Yang and Barker J.J.A. on the 11th day of January 1983.

p. 11

20 9. The Respondent's submission to the Court of Appeal, and the submission to be urged on This Honourable Board, is that the normal presumption, that mens rea is an essential ingredient, is displaced in the offences with which the Applicants were charged both by the words of the Ordinance creating those offences, and by the subject matter with which the particular subsections deal. In support of that submission it will be contended that :

30 (a) At common law, the offence of public nuisance is an offence where the normal presumption of mens rea is displaced. It is an offence to do an act not warranted by law, or omit to discharge a legal duty if the effect of that act or omission is to endanger the life, health, property, morals or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.

One category of the offence of public nuisance includes acts or omissions committed in proximity to the public highway thereby obstructing or endangering the public in its use or enjoyment of the highway.

40 The provisions in issue in this Appeal are akin to this category of nuisance, particularly in the unique circumstances of Hong Kong where, because of the shortage of land

Record

and consequent density of population, any dangerous building works, will almost inevitably be hazardous to the general public.

Sherras v. de Rutzen [1895] 1 QB 918.  
Lim Chin Aik v. Reginam [1963] A.C.160.  
Warner v. Metropolitan Police Commissioner [1969] 2 A.C. 256.  
Sweet v. Parsley [1970] A.C. 132.  
Alphacell Ltd. v. Woodward [1972] A.C.824. 10

- (b) Since the Industrial Revolution, the increasing complexity of life has called into being new duties and crimes which take no account of intent, and those who undertake industrial or other activities, especially where these affect the life and health of the citizen, may find themselves liable to statutory punishment, regardless of knowledge or intent, both in respect of their own acts or neglect or those of their servants. 20

The Legislature, with the public in mind, imposed duties by way of the provisions in issue, ss. 40(2A)(b) and 40(2B)(b), intending that they should operate in the same way.

Warner v. Metropolitan Police Commissioner

Sweet v. Parsley

Alphacell v. Woodward

- (c) The presumption of mens rea has been displaced in numerous statutory provisions concerned to protect the public welfare in the following amongst other fields: road traffic law, pollution control, the law governing sale of goods and drugs, financial control, control of drug abuse, and industrial legislation. 30

Reginam v. St. Margaret's Trust Ltd.  
[1958] 2 AER 289

Warner v. Metropolitan Police Commissioner

Tesco Supermarkets Ltd. v. Nattrass  
[1972] AC 153

Alphacell Ltd. v. Woodward 40

The provisions in issue in this Appeal are concerned to protect the public welfare by preventing faulty building and ensuring safe construction methods.

10 (d) Examination of the Ordinance as a whole reveals the Legislature's clear purpose is to ensure the sound planning and construction by safe methods of a very wide variety of building operations. That to achieve this aim the Ordinance places considerable emphasis on qualified personnel being used and the great part of building activity being under the scrutiny and control of the Building Authority. The controls are made effective, inter alia, by the creation of offences carrying heavy penalties which place especial emphasis on safety.

20 (e) In seeking the true construction to be placed upon a statutory provision the Court's first duty is to consider the words of the Ordinance; if they show a clear intention to create an absolute offence that is an end of the matter. The intention of the Legislature is expressed in the words of an enactment; the words must be looked at in order to see whether either expressly or by implication they displace the general rule or presumption that mens rea is a necessary prerequisite before guilt of an offence can be found. Particular words in a statute must be considered in their setting in the statute and having regard to all the provisions in the statute and to its declared or obvious purpose.

30

Warner v. Metropolitan Police Commissioner

Sweet v. Parsley

Alphacell Ltd. v. Woodward

40 Examination of the words employed to create the various offences within section 40 point clearly to the Legislature intending that the provisions of section 40(2A)(b) and section 40(2B)(b) be construed as offences of strict liability. When mens rea is required it is expressly stated or where a defence is

Record

available to an individual, this is similarly expressed in the terms of the provisions. Where neither is expressed neither is intended.

- (f) The offences that the Appellants faced are silent as to whether proof of mens rea is required. In particular the words in section 40(2B)(b) 'likely to cause a risk' should not be interpreted as 'likely to the defendant to cause a risk'.

10

Cornish v. Ferry Masters Ltd. [1975]  
R.T.R. 292.

- (g) If the prosecution was required to prove that a person knowingly diverged or deviated in any material way from the work shown in approved plans (section 40(2A)(b)) or that a person knew that works were carried out in such a manner as was likely to cause risk of injury to any person or damage to any property (section 40(2B)(b)) the Legislation would become ineffective because:

20

- (i) Incidents where a person intentionally or knowingly breached either provision would be comparatively rare. Most incidents involving a breach of either provision could be categorized as negligent or inadvertent.

Alphacell Ltd. v. Woodward

30

- (ii) Such knowledge would, in the construction activity envisaged by the Buildings Ordinance, be very difficult to prove. Knowledge in terms of offences under section 40(2B)(a) would effectively mean the creation of a provision very similar to that already existing in section 60(1) of the Crimes Ordinance, Cap.200 of the Laws of Hong Kong. (A provision corresponding to section 1 of the Criminal Damage Act of 1971).

40



Warner v. Metropolitan Police Com-  
missioner  
Sweet v. Parsley  
Alphacell Ltd. v. Woodward

- 10 (iii) The Ordinance contemplates most construction activity being carried out by corporations and the Legislative aim is to control companies and senior company officers. Should mens rea be inferred in these provisions the only way a company could be rendered liable is through showing fault in a significant corporate figure, who is 'the very embodiment of the company'. It is in the nature of the work that it will seldom be carried out by or under the immediate direction of such an individual.

Tesco Supermarkets Ltd. v. Natrass

- 20 (h) Construing the provisions in issue in this Appeal in such a way as to place potential defendants under strict liability will greatly assist in the enforcement of the aims of the Buildings Ordinance. Those upon whom the duties of care fall have considerable scope for promoting the observance of their statutory obligations.

Lim Chin Aik v. Reginam  
Sweet v. Parsley

- 30 (i) While the maximum penalties imposed by the provisions in issue in this Appeal are heavy they fairly reflect, taking account of conditions and building activity within Hong Kong, the extreme circumstances of damage, injury and danger consequent on a serious breach of either offence.

Reginam v. St. Margaret's Trust Ltd.  
Warner v. Metropolitan Police Commis-  
sioner  
40 Tesco Supermarkets Ltd. v. Natrass

- (j) Neither the decisions of the High Court in the Attorney General v. Chan Wing-on [1964]

Record

H.K.L.R. 491 nor that of the same Court in *Chung Yat and others v. Reginam* [1978] H.K.L.R. 355 are authority for the proposition that mens rea is an element of the offences created by sections 40(2A)(b) and 40(2B)(b).

- (k) The offence of 'permitting' in section 40(2B)(b) does not oblige the prosecution to prove a guilty mind in the way that the learned Magistrate ruled. If a man permits a thing to be done, it means that he gives permission for it to be done, and if a man gives permission for a thing to be done, he knows what is to be done and what is being done; that is knowledge of the manner in which the work was to be carried out, which in fact caused a risk of injury to any person or damage to any property. 10

*James & Son Ltd. v. Smee* [1955] 1 QB 78 20  
*Sweet v. Parsley*  
*Alphacell Ltd. v. Woodward*  
*Cornish v. Ferry Masters Ltd.*

10. The Appellants' principal submissions to the Court of Appeal were, in brief and inter alia, to the effect that :

- (a) Whenever legislation is silent as to whether mens rea is required then the legislation should be construed as requiring mens rea unless a clear intention to the contrary is shown; 30
- (b) That the Court of Appeal of Hong Kong in *Reginam v. Halim Sulman* and another [1977] HKLR 214 in deciding that an offence of being in possession of unlawfully altered travel documents required mens rea had held that in *Sweet v. Parsley* the House of Lords were actively discouraging any further expansion of strict liability;
- (c) Equivalent sections in an earlier Buildings Ordinance, now repealed and replaced, had been construed as requiring mens rea; *Attorney General v. Chan Wing-on* and 40

Chung Yat and others v. the Queen (where the prosecution did not argue that mens rea was not required);

(d) The fact that the offences created by section 40(2A) and (2B) carried a maximum term of imprisonment of three years showed they were truly criminal offences and not merely offences regulating public welfare and that, therefore, they should be construed as requiring mens rea, it would be unfair and unjust to make a person liable to such a severe sentence without any proof of mens rea being necessary;

(e) The third Appellant was charged with permitting works to be carried out in a manner likely to cause a risk of injury etc., that the expression 'permitting' is almost always construed as requiring mens rea.

11. On the 11th of February 1983 the Court of Appeal gave judgment allowing the Respondent's appeal, answering both the learned Magistrate's questions in the negative and remitting the matter to the learned Magistrate. The judgment of the Court was delivered by Sir Alan Huggins VP. The learned Judges initially described the circumstances out of which the appeal arose and observed that, while it was not clear what the facts found were, and counsel were not agreed as to what really did happen, the issue which arose for the Court's decision was whether any, and if so, what intention in each Respondent had to be proved in relation to the offences charged.

They thought the principles they should apply in answering this question were sufficiently stated in Sweet v. Parsley: Lord Pearce at P.156E, and Lord Diplock at P.163F.

The learned Judges considered that the absence of the word 'knowingly' in a statutory provision was never of itself justification for dispensing with the necessity of mens rea, but held that its absence was a minor factor tending to indicate knowledge was irrelevant. Moreover, in respect of other offences created by other parts of s.40 where the Legislature had been at pains to provide a defence, this would only be appropriate if those offences, sub-sections 40(2A)(b) and 40(2B)(b), were ones of strict liability.

p.12, l.1 -  
p.24, l.39  
  
p.25  
  
p.12, l.8 -  
p.14, l.17  
p.13,l.l.16-18  
  
p.14,l.l.15-17  
  
p.14,l.l.18-21  
  
p.14, l.22 -  
p.15, l.12  
  
p.15, l.13 -  
p.16, l.1  
  
p.16,l.l.2-14  
  
p.16, l.5

Record

p.16,l.1.15-35

The Court then considered the Respondent's submissions as regards the history of the Buildings Ordinance and the degree of punishment for the crimes created by the relevant subsections. The learned Judges considered that the material time for ascertaining legislative intent was at the date of the creation of the crime. They found any discussion of 'social obloquy' unhelpful and could see no injustice in the imposition of heavy penalties for the crimes with which the Court were concerned, whether resulting from intentional infringement, negligence or incompetence, because the potential for danger and damage was enormous.

10

p.16,l.1.35-42

p.16, l.43 -  
p.17, l.10

p.17,l.1.10-24

The learned Judges observed that the purpose of the legislation could only be attained if the building contractor were made responsible for the incompetence or carelessness of his delegates and agents. In such a case the ordinary presumption of mens rea is displaced by strict liability.

p.17, l.25 -  
p.20, l.17

p.20,l.1.18-20

The Court of Appeal then considered two earlier cases decided under the Buildings Ordinance, Attorney General v. Chan Wing-on, and Chung Yat v. Reginam, and whether these cases supported the Appellants' contentions. The learned Judges attached little weight to the argument that as the statute had been substantially amended since the cases were decided without any attempt to make it clear that strict liability was intended this was an indication that the Legislature intended the offences not be offences of strict liability. They placed some weight on the Respondent's submissions that, taking into account the particular mischief sought to be prevented and the field of activity in which it occurred, that requiring the prosecutor to prove mens rea would allow the contractor to escape criminal liability by engaging unskilled employees, with limited authority, to do their incompetent best.

20

p.20,l.1.20-47

p.20,l.1.22-28

30

p.21,l.1.1-11

p.21, l.11

As the learned Judges saw it unless the offences are ones of strict liability the employer is not made vicariously liable for his employees unless he is of such status that he is the alter ego of the employer.

40

p.21,l.1.12-17

p.21, l.17 -  
p.22, l.46

The judgment continued rejecting for the present case the distinction between statutory prohibitions and statutory duties. The learned Judges cited with approval the opinion of the Board in Lim

Chin-aik v. Reginam which drew the distinction between prohibitions that tended to ensure compliance and those which did not, where strict liability is not likely to be intended.

10 The Court then considered the Appellants' argument that as the Buildings Ordinance requires supervision by highly qualified professional persons, that, to make the appellants responsible for doing something which they did not know was likely, would be unjust and in no way affect observance of the law. Furthermore the tide of opinion was flowing against the recognition of absolute offences. These arguments were rejected as the learned Judges concluded that, while 'it is not enough to say that public interest is engaged', in looking at all the material factors it was not necessary to prove that an accused was consciously aware of divergence (section 40(2A)(b) or the risk of injury (section 40(2B)(b)).

p. 22, l. 47 -  
p. 23, l. 13

p. 23, l. 1.14-25  
p. 23, l. 1.14-16  
p. 23, l. 1.16-17  
p. 23, l. 1.17-25

20 The learned Judges took the view on the findings of fact before them that the third Appellant could never be guilty of 'permitting' something he had no power to prevent, but that had he had such a power it would have been no answer to the charge that he did not appreciate that risk of injury was likely to result therefrom. (James & Son Ltd. v. Smee). The Court held that the word 'permitting' in section 40(2B)(b) does not by itself import mens rea in the sense of intention to cause a likelihood of risk of injury or knowledge that such a likelihood would result but does require that the  
30 defendant shall have had a power to control whether the actus reus (the carrying out of the works in the manner which in fact causes a likelihood of risk of injury) shall be committed or not.

p. 23, l. 26 -  
p. 24, l. 3

p. 24, l. 1.3-19

p. 24, l. 1.5-7  
p. 24, l. 1.7-15

12. The Appellants petitioned Her Majesty in Council for special leave to appeal against the decision of the Hong Kong Court of Appeal. Special leave was granted on the 22nd day of June 1983.

p. 25

13. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

40

R E A S O N S

- (1) BECAUSE the Court of Appeal of Hong Kong rightly held upon a true construction of sections 40(2A)(b) and 40(2B)(b) of the

Record

Ordinance, looking at all the material factors, that it was not 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 (section 40(2A)(b)), nor was it necessary for the prosecution to show that a defendant knowingly or intentionally caused a likelihood of risk of injury to any person or damage to property. (Section 40(2B)(b)).

10

- (2) BECAUSE the Court of Appeal of Hong Kong rightly held on a true construction of section 40(2B)(b) of the Ordinance, looking at all the material factors, the offence of permitting works 'to be carried out in such a manner as is likely to cause a risk of injury to any person or damage to any property' does not import mens rea in the sense of intention to cause a likelihood of risk of injury or knowledge that such a likelihood would result.

20

MAX LUCAS, QC  
(Counsel for the Respondent)

No. 32 of 1983

IN THE PRIVY COUNCIL

---

ON APPEAL  
FROM THE COURT OF APPEAL OF  
HONG KONG

---

B E T W E E N :

GAMMON (HONG KONG) LIMITED  
First Appellant  
YEE CHIN TEO Second Appellant  
CHAK SHING MAK Third Appellant

- and -

THE ATTORNEY GENERAL OF HONG  
KONG Respondent

---

CASE FOR THE RESPONDENT

---

CHARLES RUSSELL & CO.  
Hale Court  
Lincoln's Inn  
London WC2A 3UL

Tel: 01 242 1031  
Ref: R/JA/18464

Solicitors for the Respondent