

17/84

IN THE PRIVY COUNCIL

No. 32 of 1983

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
 YEE CHIN TEO
 CHAK SHING MAK

First Appellant
Second Appellant
Third Appellant

- and -

THE ATTORNEY GENERAL OF HONG KONG

Respondent

RECORD OF PROCEEDINGS

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

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RECORD OF PROCEEDINGS

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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
YEE CHIN TEO
CHAK SHING MAK

First Appellant
Second Appellant
Third Appellant

- and -

THE ATTORNEY GENERAL OF HONG KONG

Respondent

10

RECORD OF PROCEEDINGS

No. 1

Summons against Gammon (Hong Kong) Limited

Case No. S25059
Pol. No.
(ss. 8 and 71)

In the Magistrates'
Court

No. 1

Summons against
Gammon (Hong
Kong) Limited

8.10.81

Summons to the defendant upon information

IN THE MAGISTRATES COURT AT HONG KONG

IN THE CASE IN WHICH THE Queen by -

20 Christopher Hughes RILEY, Government)
Building Surveyor, Buildings Ordinance)
Office, Public Works Department,) Informant
Garden Road, Hong Kong)

and

Gammon (Hong Kong) Limited of)
Hopewell Centre, 33rd floor, 183) Defendant
Queen's Road East, Hong Kong)

To the said defendant

30 INFORMATION having been laid before the undersigned,
a magistrate of the said Colony, for that you on divers
dates between the 31st day of January 1980, and the 9th
day of April 1981, at Queen's Road Central, Hong Kong

In the Magistrates' Court

No. 1

Summons against Gammon (Hong Kong) Limited

8.10.81

continued

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.

These are, therefore, to command you, in Her Majesty's name to be and appear on Wednesday 2.15 P.M. on 11 NOV. 1981, at the said court, before such magistrate as may then be there, to answer to the said information, and to be further dealt with according to law.

10

Dated 8 OCT 1981.

L.S.

C. J. PERRIOR

Magistrate

Date of receipt of information for Summons
8 OCT 1981.

No. 2

Summons against Gammon (Hong Kong) Limited

8.10.81

No. 2

Summons against Gammon (Hong Kong) Limited

Case No. S25060
Pol. No.
(ss. 8 and 71)

20

Summons to the defendant upon information
IN THE MAGISTRATES COURT AT HONG KONG

IN THE CASE IN WHICH THE Queen by -

Christopher Hughes RILEY, Government)
Building Surveyor, Buildings Ordinance)
Office, Public Works Department,) Informant
Garden Road, Hong Kong)

30

and

Gammon (Hong Kong) Limited)
33rd floor, Hopewell Centre, 183) Defendant
Queen's Road East, Hong Kong)

To the said defendant

10 INFORMATION having been laid before the undersigned, a magistrate of the said Colony, for that you on divers dates between the 31st day of January 1980, and the 9th 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.

20 These are, therefore, to command you, in Her Majesty's name to be and appear on Wednesday 2.15 P.M. on 11 NOV. 1981, at the said Court, before such magistrate as may then be there, to answer to the said information, and to be further dealt with according to law.

Dated 8 OCT 1981.

L.S.

C.J. PERRIOR
Magistrate

Date of receipt of information for Summons
8 OCT 1981.

No. 3

Summons against Yee Chin Teo

Case No.S25064
Pol. No.
(ss. 8 and 71)

30 Summons to the defendant upon information

IN THE MAGISTRATES COURT AT HONG KONG

IN THE CASE IN WHICH THE Queen by -

Christopher Hughes RILEY, Government)
Building Surveyor, Buildings Ordinance)
Office, Public Works Department,) Informant
Garden Road, Hong Kong)

and

In the Magistrates' Court

No. 2

Summons against
Gammon (Hong
Kong) Limited

8.10.81

continued

No. 3,

Summons against
Yee Chin Teo

8.10.81

In the Magistrates' Court Y. C. Teo, 175-180 Gloucester Road, Flat 180/13 Hong Kong) Defendant

No. 3 To the said defendant

Summons against Yee Chin Teo 8.10.81 continued

INFORMATION having been laid before the undersigned, a magistrate of the said Colony, for that you on divers dates between the 31st day of January 1980, and the 9th 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.

10

Contrary to Section 40(2B)(b) of the Buildings Ordinance Cap. 123.

These are, therefore, to command you, in Her Majesty's name to be and appear on Wednesday 2.15 P.M. on 11 NOV. 1981, at the said Court, before such magistrate as may then be there, to answer to the said information, and to be further dealt with according to law.

20

Dated 8 OCT 1981.

L.S.

C. J. PERRIOR Magistrate

Date of receipt of information for Summons 8 OCT 1981.

No. 4

Summons against Chak Shing Mak 8.10.81

No. 4

Summons against Chak Shing Mak

Case No.S25065 Pol. No. (ss. 8 and 71)

30

Summons to the defendant upon information IN THE MAGISTRATES COURT AT HONG KONG IN THE CASE IN WHICH THE Queen by -

Christopher Hughes RILEY, Government)
Building Surveyor, Buildings Ordinance)
Office, Public Works Department,) Informant
Garden Road, Hong Kong)

In the Magistrates'
Court

No. 4

and

MAK Chak-shing, 80 Bonham Road,)
Flat B2, 21st floor, Hong Kong) Defendant

Summons against
Chak Shing Mak

8.10.81

To the said Defendant

continued

10 INFORMATION having been laid before the undersigned,
a magistrate of the said Colony, for that you on divers
dates between the 31st day of January 1980, and the 9th
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.

20 These are, therefore, to command you, in Her
Majesty's name to be and appear on Wednesday 2.15
P.M. on 11 NOV. 1981, at the said Court, before such
magistrate as may then be there, to answer to the said
information, and to be further dealt with according to
law.

Dated 8 OCT 1981.

L.S.

C.J. PERRIOR

Magistrate

Date of receipt of information for Summons
8 OCT 1981.

In the High Court

No. 5

Stated Case

No. 5

Stated Case

Criminal Appeal No.1033 of 1982

IN THE HIGH COURT OF HONG KONG
APPELLATE JURISDICTION

BETWEEN :

The Attorney General

Appellant

and

Gammon Hong Kong

Limited

Y.C. Teo

C.S. Mak

1st Respondent

2nd Respondent

3rd Respondent

10

This is a Case stated by the undersigned, a magistrate of the Colony of Hong Kong under the Magistrates Ordinance (Chapter 227) for the purpose of appeal to a judge of the High Court on questions of law which arose before me as hereinafter stated.

- (1) At the magistrates court in the said Colony, at Western District on the 14th day of May 1982, 4 informations preferred by Christopher Hughes Riley, Government Building Surveyor, Buildings Ordinance Office, Hong Kong Government on behalf of the Attorney General (hereinafter called the appellant) as follows :-

20

Firstly against Gammon Hong Kong Limited under Section 40(2A)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th of April 1981 being the Registered Contractor directly concerned with buildings 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, and also against Gammon Hong Kong Limited under Section 40(2B)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th of April 1981 being the Registered Contractor directly concerned with building works upon Marine

30

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.

In the High Court

No. 5

Stated Case

continued

10 Secondly against Y. C. Teo under Section 40(2B)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th of April 1981 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.

Thirdly against C.S. Mak under Section 40(2A)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th day of April 1981 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 were determined by me the said parties respectively being then present, and the said informations were dismissed by me.

(2) And whereas the appellant, being dissatisfied with my determination upon the hearing of the said informations and alleging himself to be aggrieved by such determination as being erroneous in point of law has, pursuant to Section 105 of the Magistrates Ordinance, duly applied to me in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid in order that he may appeal therefrom to a judge of the High Court.

30 (3) Now therefore I, the said Magistrate, in compliance with the said application and the provisions of the said Ordinance, do hereby state and sign the following case.

(4) Upon the hearing of the informations it was proved on the part of the appellant and I found as a fact that :-

40 (1) The First Respondent was the Registered Contractor in respect of Building Works being carried out on the 7th of April 1981 on the allotment referred to in the charge such allotment being referred to as the Edinburgh Tower Site.

In the High Court

No. 5
Stated Case
continued

- (2) The Second Respondent was the Project Manager employed by the First Respondent in relation to the carrying out of the aforementioned works and it was his function in general terms to co-ordinate works on the site.
- (3) The Third Appellant was the site agent employed by the First Respondent in respect of the aforementioned works and it was his responsibility in general terms to co-ordinate the execution of the said works. 10
- (4) That the First Respondent had delegated its statutory duties and obligations in respect of the said works to the Second and Third Respondents.
- (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. to and approved by the Building Authority. 20
- (7) That up to the 7th 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 7th April 1981 a certain portion of the site would have become unsafe in engineering terms with water table at +4 P.D. 30
- (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 Respondents 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 40

approved in respect of those works by the Building Authority.

In the High Court

No. 5

Stated Case
continued

(12) That the Second and Third Respondents knew of the requirements of the plans approved by the Building Authority in relation to the relevant works.

10 (5) At the conclusion of the case for the prosecution I ruled that the mental element required to be proved to found a conviction in respect of each Respondent was

(a) In respect of the charges under Section 40(2A)(b) Cap. 123 of the B.O., that he had actual or constructive knowledge that the relevant works constituted a material divergence or deviation from approved plans.

20 (b) In respect of the charges under Section 40(2B)(b) Cap. 123 of the B.O., that he had actual or constructive knowledge that the relevant works caused the likelihood of a risk of injury to any person or damage to property.

It had been contended by the Respondents that this was the standard of knowledge required, and by the Appellants that proof of such knowledge was not essential.

(6) Evidence was then called for the defence, which was directed primarily to the issue of knowledge. The question of safety and risk of damage or injury was less fully canvassed before me by way of evidence or argument.

30 (7) At the end of the case I dismissed the charges against the Second and Third Respondents because I was not satisfied that the required knowledge had been proved.

I also dismissed the charges against the First Respondent as it was only through the state of mind and actions of the Second and Third Respondents that the prosecution sought to affix the First Respondent with criminal responsibility.

(8) The questions of law arising on the above statement for the opinion of this Court therefore are :-

In the High Court

No. 5
Stated Case
continued

(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 intended to deviate or diverge 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.

10

(Sd.) S.A.M. CLAY

(8) The questions of law arising on the above statement for the opinion of this Court therefore are :-

(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 ~~intended to~~ deviate or diverge 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 risk of injury to any person or damage to property.

30

(Sd.) S.A.M. CLAY

Paragraph 8(1) Amended 5th January, 1982.

(Sd.) S.A.M. CLAY

(S.A.M. Clay)

No. 6

Order referring Appeal to the Full Court

In the Supreme
Court

No. 6

Order referring
Appeal to Full
Court

IN THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

CRIMINAL APPEAL NO. 1033 OF 1982

WHEREAS in the interest of public, I refer this matter for hearing by Court of Appeal on dates to be fixed.

(Sd.) R.G. PENLINGTON

10

Judge of the High Court.

In the Court of
Appeal

No. 7

Judgment of the
Court of Appeal

11.2.83

No. 7

Judgment of the Court of Appeal

IN THE COURT OF APPEAL, HONG KONG

Coram: Sir Alan Huggins, V.-P., Yang & Barker, JJ.A.

Sir Alan Huggins, V.-P. :

The judgment I am about to read is the judgment of the court.

The Respondents were respectively the registered contractor, the project manager and the site agent for building works on a site in the central district. The 2nd and 3rd Respondents were employed by the 1st Respondent. All were prosecuted in the magistrates' court and were acquitted. The Crown appeals by way of Case Stated.

10

The Case indicates the charges against the contractor in the following terms :

"under Section 40(2A)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th of April 1981 being the Registered Contractor directly concerned with buildings work 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":

20

"under Section 40(2B)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th of April 1981 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."

30

The charge against the project manager is said to have been one

"under Section 40(2B)(b) of the Buildings Ordinance

Cap. 123 alleging that on or about the 7th of April 1981 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."

In the Court of Appeal

No. 7

Judgment of the Court of Appeal

11.2.83

continued

That against the site agent is said to have been one

10 "under Section 40(2B)(b) of the Buildings Ordinance Cap. 123 alleging that on or about the 7th day of April 1981 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 It is far from clear what the facts found were and, as we understand it, counsel were not agreed as to what really did happen. The Case reveals that plans for a lateral support system were approved. Whether all or any of the work necessary to produce a system indicated by those plans was carried out does not appear. Some "additional works" to the system were carried out and then there was a "removal of part of the lateral support system". Whether that removal was confined to the additional works or confined to the approved works or included part or both is not stated. It is said that as a result of the removal a portion of the site "would have become unsafe in engineering terms with a water table at +4 P.D.". This suggests that at that time the water table had not reached +4 P.D. and that the site was not unsafe. Whether the water table later reached that level, or was likely to do so, we are not told, nor do we understand what is the difference between "unsafe" and "unsafe in engineering terms". For the purposes of this appeal we assume that the finding was that building works were carried out in such a manner as was likely to cause a risk of injury to a person or damage to property.

40 Paragraph (4)(11) of the Case then states a finding in these terms :

"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."

In the Court of
Appeal

—
No. 7

Judgment of the
Court of Appeal

11.2.83

continued

The only work referred to in "paragraph 8" - which we assume was intended to mean paragraph (4)(8) - was the removal work, which we take to be something different from "those works" in respect of which plans had been approved by the Building Authority, not only because of the change in the number of the noun but also because the only plans previously mentioned as having been so approved were plans of the lateral support system. The removal work could, therefore, not "constitute" a deviation (whether of substance or otherwise) from the plans approved, but might have resulted in such a deviation. We assume that that is what was meant. It would be a finding which, we understand, the Respondents would seek to challenge if the present appeal succeeds. 10

The issue which arises for our decision is whether any and, if so, what intention in each Respondent had to be proved by the prosecution in relation to the offences charged.

Although we have been referred to many cases, we think that the principles which we should apply are sufficiently stated in Sweet v Parsley 1970 A.C. 132. Lord Pearce said at p. 156E : 20

"The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law. And at common law mens rea is a necessary element in a crime. Since the Industrial Revolution the increasing complexity of life called into being new duties and crimes which took no account of intent. Those who undertake various industrial and 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 and those of their servants. But one must remember that normally mens rea is still an ingredient of any offence. Before the court will dispense with the necessity for mens rea it has to be satisfied that Parliament so intended. The mere absence of the word "knowingly" is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge." 30 40

To that should be added the words of Lord Diplock at p. 163F :

In the Court of Appeal

No. 7

Judgment of the Court of Appeal

11.2.83

continued

10 "But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see Lim Chin Aik v The Queen [1963] A.C. 160, 174)."

20 Although the absence of the word "knowingly" is never of itself enough justification for dispensing with the necessity for mens rea, Mr. Lucas nevertheless relied upon the absence of the word from paragraph (b) of ss. (2A) - not as, of itself, showing that it was unnecessary to prove that the Respondents knew there had been a material deviation but as distinguishing that paragraph from paragraph (c), where the presence of the word clearly excludes an innocent misrepresentation. Mr. Mathew contends that the absence of the word "knowingly" would not in any case have had the effect of excluding the element of knowledge altogether but only of transferring the burden of proof. He relied in Sherras v De Rutzen 1895 1 Q.B. 918, where Mr. Justice Day said at p. 921 :

30 "An argument has been based on the appearance of the word "knowingly" in sub-s. 1 of s. 16, and its omission in sub-s. 2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s. 1 it is for the prosecution to prove the knowledge, while in cases under sub-s. 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word "knowingly" in the one sub-section and its omission in the other."

40 We are not sure that we could accept this last argument, because there is a difference between a case where knowledge is not included as an element of an offence and a case where absence of knowledge is made a defence, so that the absence of the word "knowingly" from a provision creating an offence, if it has any effect at all, would seem to point towards an offence of the former kind. Therefore we would hold that the absence of the word from ss. (b) is a factor (albeit a minor

In the Court of
Appeal

—
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Judgment of the
Court of Appeal

11.2.83

continued

one) tending to indicate that knowledge is irrelevant. Moreover, in respect of offences created by other parts of s.40 the Legislature has been at pains to provide a defence which could only be appropriate if those offences at least were ones of strict liability. Thus under ss. (2AA) it is a defence if the person charged proves to the satisfaction of the court that he did not know, or could not reasonably have discovered, a contravention referred to in the charge, whilst ss. (7A) provides a joint owner of land, or a person who under the terms of a Crown lease is under an obligation to maintain land or a structure, with a defence where he is charged with failing to comply with an order made under the Ordinance and it can be shown that he was not personally served.

10

We were taken through the history of the Buildings Ordinance and it was pointed out that the provision which is now s. 40(2B) formerly made "the opinion of the Building Authority" the test of likelihood of risk. Mr. Lucas submits that it was improbable that the Legislature intended to substitute the opinion of the Defendant - which would be the effect of the construction contended for by the Respondents - and that the intention was clearly to substitute an objective test which would leave the matter for decision by the court.

20

Another factor in interpreting the legislation is the degree of punishment for the crimes created by the relevant sub-sections. Although the maximum sentence which may be imposed upon conviction is now in each case a fine of \$250,000 and imprisonment for three years, that represents a big increase since the date when the crimes were first created. Therefore, Mr. Lucas argues, one should not attach any weight to the present maximum, for the increase merely shows the Legislature's view of the seriousness of a previously existing crime and of the need to deter persons from committing such infringements. It would be no answer to that argument to suggest that the Legislature would be unlikely to permit long terms of imprisonment for an existing crime which it thought did not require mens rea: 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.

30

40

For our part we find any discussion of "social obloquy" unhelpful. The social conscience is notoriously elastic, ill-informed and pendulous. It can, in any event, be defined only by reference to the judge's own

conscience and 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. Any large scale building operation will almost inevitably produce circumstances in which a departure from the generally accepted standards (whether of work or materials) will be likely to cause danger. Indeed, the extent of the danger and of the damage which may be done will frequently be enormous. It therefore behoves the incompetent to stay away and the competent to conduct themselves with proper care. A building contractor who delegates his legal responsibilities to an agent can fairly be held liable if he appoints an agent who is incompetent or careless: he should regulate his business in such a way as to avoid, on the one hand, the appointment of incompetent agents and, on the other, the consequences of any carelessness by a competent agent. Only if he is made responsible for seeing that the statutory standards are maintained can the purpose of the legislation be attained and in such a case as this the presumption of strict liability displaces the ordinary presumption of mens rea: see Lim Chin-aik v Reg. 1963 A.C. 160, 174.

In the Court of Appeal

No. 7

Judgment of the Court of Appeal

11.2.83

continued

Our attention was drawn to two cases decided under the Buildings Ordinance. In Attorney General v Chan Wing-on 1964 H.K.L.R. 491 Mr. Justice Macfee allowed an appeal by an architect against his convictions on a charge of using defective materials and a charge of aiding and abetting a material divergence from work authorised by a permit issued under the Ordinance. As we read the judgment, Mr. Justice Macfee held in relation to the charge of using defective materials :

1. That an architect "used" defective materials only if they were used with his authority and that it was not necessary for him to have used them personally:
2. That the defective materials were not used with his authority simply because they were used in the construction of works for which he was the authorised architect:
3. That it was necessary to prove that the architect knew the materials used were defective. However, if he delegated his powers and duties in regard to the selection of materials the knowledge

In the Court of
Appeal

No. 7

Judgment of the
Court of Appeal

11.2.83

continued

of the delegate was the knowledge of the
principal:

4. That knowledge could not be inferred by virtue
of an assumption that the architect had per-
formed his statutory duties of supervision or
from his signature of an erroneous certificate
of satisfactory completion of the works in
accordance with approved plans: and

5. That the delegation to an assistant of the duty
to inspect the work did not constitute a delega-
tion of the architect's powers and duties in
regard to the selection of materials and,
therefore, he was not fixed with vicarious or
constructive knowledge of the defectiveness of
the materials used.

10

In relation to the charge of aiding and abetting a building
contractor in causing a material divergence from approved
work he held :

6. That it was necessary to prove a positive act
by the architect and it was not enough that he
failed to take precautions which would ensure
that there was no divergence:

20

7. That the issue of an erroneous certificate of
successful completion of the works was not
an aiding and abetting of any divergence from
the plans which had taken place: and

8. That in failing to perform his statutory duties
of inspection the architect was not "shutting
his eyes to the obvious" so as to fix him with
knowledge that the contractor had diverged from
the approved works.

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In Chung Yat v Reg. 1978 H.K.L.R. 355 the 4th
appellant was a limited liability company which undertook
building works, the 1st appellant and 3rd appellant were
directors of that company and the 2nd appellant was
employed by the company as a site foreman. Serious
flaws were discovered in the upper floors of a building
erected by the company. The 1st and 2nd appellants had
supervised the construction after the foundation stage.
The 3rd appellant did nothing after completion of the
foundation stage other than to sign some documents, which
included a completion certificate. A large number of

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charges had been laid against the appellants in respect of the use of defective materials and deviation from approved plans. In the course of his judgment Leonard J. (as he then was) said :

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continued

10 "It was not contended by the Crown before me that the offences created were absolute offences and all parties assumed that some form of mens rea was necessary for their commission i. e. before a person could be convicted he or it must be fixed with knowledge actual or constructive of the existence of the offensive material or other defect. That this was the intention of the Legislature generally in relation to the section, appears likely from section 40(5) which deals with the case of a person who "permits" the commission of an offence specified in the section. Section 40(6) of the Ordinance reads :-

20 "(6) Where an offence under this Ordinance has been committed by a body corporate, a partnership or association of persons unincorporated, any person who at the time of the commission of the offence was a director, manager, partner, secretary or other similar officer thereof, or was purporting to act in any such capacity, shall also be deemed guilty of such offence unless he proves that the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances."

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That this subsection, being only a "deeming section", cannot relieve the Crown from the obligation to prove every constituent ingredient of the offence is clear. Some form of guilty knowledge on the part of the limited company must be proved before it can be invoked against a director."

40 Having assumed that guilty knowledge was an essential ingredient he went on to hold that, where a limited liability company was charged, it was necessary to fix "the 'brains' of the limited company" with knowledge of the defects, deviations or divergences. (The quotation was a reference to the simile which Lord Denning, M.R. expressed in

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continued

It was submitted that these cases supported the Respondents' contentions that the offences charged in the present case were not offences of strict liability and that the company was not criminally responsible for the acts of the project manager and site agent - because, it was contended, they were not the brains of the company - whilst the project manager and the site agent were not themselves criminally liable because they did not know the manner in which the works were carried out was likely to cause risk of injury. It is further argued that, the statute having been substantially amended since these cases were decided, without any attempt to make it clear that strict liability was intended, this was an indication that the Legislature had intended that the offences be not offences of strict liability.

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For the reason already given in relation to the punishment argument we attach little weight to the last argument. What weigh more with us are the particular mischief sought to be prevented and the field of activity in which it occurs. Mr. Lucas submits that the object of the legislation can be achieved only if the work is undertaken on the site by competent persons acting competently and that, if a contractor is able to escape criminal liability by engaging unskilled employees, with limited authority, to do their incompetent best, that object would be defeated. He sought to draw a distinction between "absolute offences", of which a defendant can be convicted "although he takes no part in the actus reus", and "offences of strict liability", where the defendant does the actus reus without mens rea. This, he says, was a case of strict liability, and the Company is liable because its employees are liable. He gave as a comparable example of strict liability Cornish v Ferry Masters Ltd. 1975 R.T.R. 292, where a drum which had been stacked on a lorry fell off owing to an unexplained latent defect in a pallet on which it stood. The relevant regulation required the load to "be so secured . . . that danger is not likely to be caused". On an appeal against acquittal it was held that knowledge of the likelihood of danger was irrelevant; if the defect was such that danger existed as a matter of objective fact, both the driver and his employer, each of whom was a "user" of the vehicle, were liable. Lord Widgery, C.J. described the offence as "an absolute offence" and we confess that we think that phrase to be synonymous with "an offence of strict liability".

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As we see it, there are two issues in cases of this kind. The first is whether the person who physically does the act is liable regardless of his knowledge of the danger. The second is whether that person's employer is vicariously liable for the act of the employee. The answer to the second question is dependent upon the first to this extent, that if the offence is one of strict liability then the employer is always liable, because the employee is his agent, whereas, if an offence is not one of strict liability, the employer has mens rea only if the employee is of such a status that he is the alter ego of the employer.

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continued

Whether an offence is one of strict liability may depend upon the further question whether the statute lays down a prohibition or imposes a duty to perform some act: see Harding v Price 1948 1 K.B. 695. In the present case there are implied prohibitions and the distinction is irrelevant. On the other hand there is importance in the distinction drawn in Lim Chin-aik v Reg. (supra) between cases where there is a prohibition and where punishment of breaches of prohibition would tend to ensure compliance and cases where to treat the prohibition as absolute would not ensure compliance. Thus it was held that a breach of an order prohibiting entry into Singapore was punishable only if the person concerned was aware of the order. Lord Evershed, delivering the opinion of the Board, said at p. 174 :

"Where the subject-matter of the statute is the regulation for the public welfare of a particular activity - statutes regulating the sale of food and drink are to be found among the earliest examples - it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea. Thus sellers of meat may be made responsible for seeing that the meat is fit for human consumption and it is no answer for them to say that they were not aware that it was polluted. If that were a satisfactory answer, then as Kennedy L. J. pointed out in Hobbs v Winchester Corporation (1910) 2 K.B. 471; 26 T.L.R. 557, C.A., the distribution of bad meat (and its far-reaching consequences)

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continued

would not be effectively prevented. So a publican may be made responsible for observing the condition of his customers: Cundy v Le Cocq L.R. 13 Q.B.D. 207.

But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in Reynolds v G. H. Austin & Sons Ltd. (1951) 2 KB 135; (1951) 1 T. L.R. 614; (1951) 1 All E.R. 606, D.C. and James & Sons Ltd. v Smee (1955) 1 Q.B. 78; (1954) 3 W.L.R. 631; (1954) 3 All E.R. 273, D.C. Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy L.J. in Hobbs v Winchester Corporation, (1910) 2 K.B. 471, and of Donovan J. in Reg. v St. Margaret's Trust Ltd. (1958) 1 W.L.R. 522; (1958) 2 All E.R. 289, C.C.A. But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. 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."

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Mr. Mathew has argued that the present case is in a

different class from those in which strict liability has been enforced, because the Buildings Ordinance requires supervision by various highly qualified professional persons, so that to make the Respondents responsible for doing something which they did not know was likely to cause danger would be unjust and not in any way affect the observance of the law. He suggests, moreover, that the tide of opinion is flowing against the recognition of absolute offences (Reg. v Sheppard 1981 A.C. 394) and that the small number of prosecutions brought under the Buildings Ordinance is an indication that strict liability is unnecessary to obtain compliance with the law.

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Court of Appeal

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continued

We accept that "it is not enough to say that public interest is engaged" (Reg. v City of Sault Ste Marie (1978) 85 D.L.R. 161, 171) but, looking at all the material factors, we are persuaded that once it is established that a defendant has in fact diverged from work shown in plans or has carried out work, or permitted work to be carried out, in a manner which in fact is likely to cause risk of injury it is not necessary to prove that the defendant was consciously aware of the divergence or of the risk of injury. It follows that on the findings assumed the 1st and 2nd Respondents were guilty of the offences charged.

A further matter has been argued in respect of the 3rd Respondent and is said to be relevant because he was in a subordinate position and because he was charged with "permitting" the works to be carried out in a manner likely to cause risk of injury. Whereas the 2nd Respondent's function was in general terms "to co-ordinate works on the site", that of the 3rd Respondent was "to co-ordinate the execution of the said works". We understand that to mean that the 2nd Respondent had authority to decide how the work should be done but that the 3rd Respondent had no such authority, he being concerned merely with the timing of the various operations controlled by the 2nd Respondent. It does not appear from the Case Stated that it was the timing of the works which caused the risk of injury but rather that it was the nature of the work, which was not under the control of the 3rd Respondent. Accordingly it is submitted, that he could not be guilty of the offence charged. Whether or not an offence requires proof of mens rea, it seems to us that a defendant can never be guilty of permitting something which he had no power to prevent. Thus, if the 3rd Defendant had no authority to decide that the

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continued

works were to be carried out in a particular manner, he did not permit the work to be carried out in that manner even though, had he so permitted, it would have been no answer to the charge that he did not appreciate that risk of injury was likely to result therefrom. That seems to us to follow from the decision in James & Sons Ltd. v Smee 1955 1 Q.B. 78. We would therefore hold that the word "permitting" in s. 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 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 which in fact causes a likelihood of risk of injury) shall be committed or not. Indeed, referring to an intention to permit the actus reus without knowledge of the likelihood of risk of injury as "mens rea" is only to invite misunderstanding. This further issue, however, is not one which was raised by the Case as it has been stated.

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The questions put to us (as amended) are in these terms :

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"(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."

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Our answers are :

1. No.
2. No.

11th February 1983.

No. 8

Memorandum of Court of Appeal which Records
that the Matter was referred back to the Magis-
trates Court

In the Court of
Appeal

No. 8

Memorandum of
Court of Appeal
which Records
that the Matter
was referred
back to the
Magistrates Court

11.2.83

M E M O

From Registrar, Supreme
Court

To First Clerk,
Western Magis-
tracy

Ref. Cr.App.1033/82

Tel.No. 5-264780

Your Rf.

10 Date 11th February, 1983

dated

Re: Criminal Appeal No. 1033 of 1982
A.G. v. GAMMON HONG KONG LTD.
and 2 others
(Appeal by way of case stated
from WS 25059 - 65 of 1982)

The Court of Appeal this morning delivered judgment
in the appeal above-mentioned. The answers of the Court
to the questions posed are (1) No and
(2) No

20 2. The Court of Appeal also remitted the case to the
Magistrate.

(Sd.) K.K. LEUNG
p. Registrar

CERTIFIED TRUE COPY

(Sd.)

Magistrates' Clerk,
Western Magistracy.

In the Privy
Council

No. 9

Order Granting
Special Leave
to Appeal to
Her Majesty
in Council

22.6.83

No. 9

Order Granting Special Leave to Appeal to Her
Majesty in Council

AT THE COURT AT BUCKINGHAM PALACE

The 22nd day of June 1983

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY
IN COUNCIL

WHEREAS there was this day read at the Board a
report from the Judicial Committee of the Privy Council dated 10
the 23rd day of May 1983 in the words following viz :-

"WHEREAS by virtue of His late Majesty King
Edward the Seventh's Order in Council of the 18th
day of October 1909 there was referred unto this
Committee a humble Petition of (1) Gammon (Hong
Kong) Limited (2) Yee Chin Teo and (3) Chak Shing
Mak in the matter of an Appeal from the Court of
Appeal of Hong Kong between the Petitioners and
The Attorney General Respondent setting forth that
the Petitioners pray for special leave to appeal from 20
a Judgment of the Court of Appeal of Hong Kong
dated 11th February 1983 allowing an Appeal by the
Respondent against the Petitioners' acquittals in the
Magistrates' Court of offences under the Buildings
Ordinance: And humbly praying Your Majesty in
Council to grant the Petitioners special leave to
appeal against the Judgment of the Court of Appeal
of Hong Kong dated 11th February 1983 and for
further relief:

"THE LORDS OF THE COMMITTEE in 30
obedience to His late Majesty's said Order in
Council have taken the matter of the said humble
Petition into consideration and having heard Counsel
in support thereof and in opposition thereto Their
Lordships do this day agree humbly to report to
Your Majesty as their opinion that special leave
ought to be granted to the Petitioners to enter and
prosecute their appeal against the Judgment of the
Court of Appeal of Hong Kong dated 11th February
1983: 40

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon depositing in the Registry of the Privy Council the sum of £5,000 as security for costs."

In the Privy
Council

—
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Special Leave
to Appeal to
Her Majesty
in Council

22.6.83

continued

10 HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor or Officer administering the Government of Hong Kong and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

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
YEE CHIN TEO
CHAK SHING MAK

First Appellant
Second Appellant
Third Appellant

- - and -

THE ATTORNEY GENERAL OF HONG KONG

Respondent

RECORD OF PROCEEDINGS

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