

Gammon (Hong Kong) Limited  
Yee Chin Teo  
Chak Shing Mak

First Appellant  
Second Appellant  
Third Appellant

v.

The Attorney-General of Hong Kong

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY 1984

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON

LORD SCARMAN

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

*[Delivered by Lord Scarman]*

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This appeal is from a judgment of the Court of Appeal of Hong Kong allowing the appeal of the Attorney-General from the decision of the magistrate, whereby he dismissed charges brought against the three appellants in respect of alleged contraventions of the Buildings Ordinance: Revised Edition 1981. The issue in the appeal is whether the offences charged are offences of strict liability or require proof of *mens rea* as to their essential facts.

The first appellant, Gammon (Hong Kong) Ltd., ("the Company") is a contractor registered under the Ordinance and was carrying out building works at a site known as Marine Lot No. 3 Queen's Road Central, Hong Kong. The second and third appellants were employees of the company, being respectively the project manager and site agent for the works.

The appellants were charged under sub-sections (2A) and (2B) of section 40 of the Ordinance. It is necessary to set out in full the two sub-sections:-

"(2A) Any person for whom any building works, street works, lift works or escalator works are

being carried out and any authorized person, registered 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;

(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 3 years.

(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 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.

The company was charged with a material deviation from an approved plan in contravention of sub-section (2A)(b), and with carrying out works in a manner likely to cause risk of injury or damage in contravention of sub-section (2B)(b). The second and third appellants were charged under sub-section (2B)(b): it was charged against the second appellant that, being the company's manager, he carried out the works, and against the third appellant that he permitted the works to be carried out, in a manner likely to cause risk of injury or damage.

The appeal is by way of case stated. There was not, however, a full trial of the case in the magistrate's court. At the conclusion of the prosecution case the magistrate ruled that mens rea (knowledge, or "constructive knowledge") of all the facts was a necessary ingredient of the offences charged. The defence, thereafter, confined its evidence to the issue of knowledge, and did not develop its case on the other facts. Specifically, the defence led no evidence to counter the prosecution case that the deviation from the plan was a material deviation or that the manner in which the works were carried out did in truth create the likelihood of risk of injury or damage. Nor was the issue of "constructive knowledge" (i.e. recklessness or mere negligence) fully explored.

As a result of the course taken at trial the case stated sets out only the facts and assumptions upon which the magistrate, and later the Court of Appeal, decided one question of law namely:- are the offences charged offences of strict liability? Their Lordships think that the course taken at the magistrate's court was unfortunate: for it means that, whatever answer their Lordships give to the question of law, the case will have to go back to the magistrate for a full trial. The expense already incurred and the future expense of a second trial are too formidable to be viewed with equanimity even when the parties are as substantial as this company and the Crown.

The facts relevant to the issue can be very briefly summarised. The company had delegated the fulfilment of its obligations under the Ordinance on the site to the second and third appellants: it is accepted, therefore, that the company is vicariously responsible if either of them contravened or failed to comply with the provisions of the Ordinance. If either of them committed an offence in the course of his employment, the company has also offended and is liable to the penalties imposed by the Ordinance.

The offending act, which is the basis of all the charges, was the removal of part of the lateral support system on the site; a system which was required in the interest of safety by plans approved by the building authority. The removal was "a deviation of substance" from the plans: and it is to be assumed for the purpose of the appeal (for it is not admitted by the appellants) that the removal was likely to cause a risk of injury or damage. The magistrate was not satisfied on the evidence that either the second or third appellant (for whose acts and omissions the company would be criminally responsible) knew that the removal of part of the lateral support system constituted a material deviation from approved plans or that it was likely to cause a risk of any injury or damage. He, therefore, dismissed the charges. He

stated the following questions of law for the opinion of the court:-

"(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."

The Court of Appeal answered both questions in the negative and remitted the case to the magistrate.

#### The General Law

In *Sweet v. Parsley* [1970] A.C.132 at page 149 Lord Reid observed that:-

"...it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary."

The question in the appeal is whether the Ordinance, correctly interpreted, provides a sound reason for holding that the offences created by sub-section (2A)(b) and (2B)(b) of section 40 of the Ordinance are offences of strict liability. The Attorney-General of Hong Kong contends that it does; the appellants contend that it does not.

Before, however, one considers the Ordinance it is necessary to have clearly in mind the applicable principles of the criminal law. Three cases, all of them well known, bear directly on the issue. In *Sherras v. De Rutzen* [1895] 1 Q.B. 918 the Court had under consideration the prohibition contained in the Licensing Act 1872 upon the supply by a licensee of liquor to a police constable while on duty. The appellant's case was that he did not know and had no reason to believe that the constable was on duty. The Court quashed the conviction. Wright J., in the course of his judgment considered the classes of case in which the presumption of mens rea can be displaced in English law. He saw three principal classes of cases in which the presumption can be displaced: two of them are relevant to this appeal, namely:-

(1) Cases where the prohibited acts are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty; and

(2) cases of public nuisance.

He prefaced his judgment (page 921) by a statement of general principle:-

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

In *Lim Chin Aik v. The Queen* [1963] A.C. 160 the Judicial Committee accepted Wright J.'s formulation of principle as correct. But the Board warned (pages 172-173) that the adoption of the principle does not dispose of the question whether the presumption is displaced. For the difficulty of applying the principle remains. What should be the proper inferences to be drawn from the language of the statute under review? And what are the inferences to be drawn from the subject-matter with which the statute deals?

The Board went on to state an approach to these two questions which was later approved and accepted by the House of Lords in *Sweet v. Parsley*. The Board said, at page 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."

But the Board added at page 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."

However, in *Sweet v. Parsley* Lord Reid (page 149) refused to accept that in determining the question of mens rea or strict liability it is sufficient merely to have regard to the subject-matter of the

statute in construing the words of the provision creating the offence. Other considerations have to be borne in mind including the nature of the prohibited act: if it were "truly criminal", it would be necessary, for example, to consider whether the public interest really required that an innocent person should suffer in order that fewer guilty men might escape.

In the course of his speech in *Sweet v. Parsley* Lord Diplock addressed himself directly to the question which their Lordships have to consider in this appeal. He said (page 163E):-

"But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. 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)."

In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge):-

- (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence:
- (2) the presumption is particularly strong where the offence is "truly criminal" in character:
- (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute:
- (4) the only situation in which the presumption can be displaced is where the statute is

concerned with an issue of social concern. Public safety is such an issue.

- (5) Even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

#### The Ordinance

Their Lordships turn to consider the purpose and subject-matter of the Ordinance. Its overall purpose is clearly to regulate the planning, design and construction of the building works to which it relates in the interests of safety. It covers a field of activity where there is, especially in Hong Kong, a potential danger to public safety. And the activity which the Ordinance is intended to regulate is one in which citizens have a choice as to whether they participate or not. Part IV (section 40) of the Ordinance makes it very clear that the legislature intended that criminal sanctions for contraventions of the Ordinance should be a feature of its enforcement. But it is not to be supposed that the legislature intended that any of the offences created by the Ordinance should be offences of strict liability unless it is plain, from a consideration of the subject-matter of the Ordinance and of the wording of the particular provision creating the offence, that an object of the Ordinance, e.g. the promotion of greater vigilance by those having responsibility under the Ordinance, would be served by the imposition of strict liability.

The appellants submit that there is no necessity for strict liability in respect of any of the offences charged. Their first submission is that strict liability would not promote greater vigilance. If the persons charged had no knowledge of an essential fact, what could they have done to avoid its occurrence? Their second submission is more comprehensive. They submit that strict liability in respect of any offence created by the Ordinance would run counter to the structure and character of the Ordinance. The Ordinance, it is submitted, relies not on criminal liability but on the elaborate and stringent provisions for the registration of persons qualified to ensure that its requirements are met.

So far as the first submission is concerned, their Lordships are satisfied that strict liability would help to promote greater vigilance in the matters covered by the two offences with which this appeal is concerned (the material deviation under (2A)(b) and the risk of injury or damage under (2B)(b)). The

second submission is more formidable. Their Lordships however, reject it also. Their Lordships agree with the view expressed by the Court of Appeal as to the purpose and subject-matter of the Ordinance. The Court of Appeal saw no injustice in the imposition of heavy penalties for offences under the Ordinance "whether resulting from intentional infringement of the law, negligence, or incompetence". They made this powerful comment:-

"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 The Queen* [1963] A.C.160, 174)."

Important as are the provisions of the Ordinance for the registration, disqualification and discipline of persons qualified, authorised and registered to perform the duties and obligations required by the Ordinance, the legislature by enacting Part IV (section 40) of the Ordinance clearly took the view that criminal liability and punishment were needed as a deterrent against slipshod or incompetent supervision, control or execution of building works. The imposition of strict liability for some offences clearly would emphasise to those concerned the need for high standards of care in the supervision and execution of work. The view that their Lordships have reached, after the thorough review of the Ordinance and its history which Counsel undertook helpfully and with great assiduity in the course of their submissions, is that, where the Ordinance provides for an offence in terms which are silent or ambiguous as to the need for full mens rea covering all its essential ingredients, the wording of the particular provision must be carefully examined against the background and in the context of the Ordinance to determine whether it is necessary to



interpret the silence or resolve the ambiguity in favour of mens rea or of strict liability.

Put in positive terms, the conclusion of the Board is that it is consistent with the purpose of the Ordinance in its regulation of the works to which it applies that at least some of the criminal offences which it creates should be of strict liability. It is a statute the subject-matter of which may properly be described as "the regulation of a particular activity involving potential danger to public health [and] safety....in which citizens have a choice as to whether they participate or not" (Lord Diplock, *Sweet v. Parsley*, at page 163E). Whether, therefore, a particular provision of the statute creates an offence of full mens rea or of strict liability must depend upon the true meaning of the words of the particular provision construed with reference to its subject-matter and to the question whether strict liability in respect of all or any of the essential ingredients of the offence would promote the object of the provision.

Before leaving the consideration of the Ordinance as a whole their Lordships refer briefly to two decisions of the Hong Kong courts upon which the appellants placed some reliance. The earlier in date was a decision of Macfee J. on appeal from the magistrate. In *Attorney-General v. Chan Wing On* [1964] H.K.L.R. 491 Macfee J. dismissed an appeal by the Crown against the acquittal of an architect on a charge of using defective materials (section 27 (5) of the 1955 Ordinance, the predecessor of section 40(2A)(a)): the learned judge held that it was necessary to prove knowledge that defective materials were used. The second case was *Chung Yat v. The Queen* [1978] H.K.L.R. 355, in which it is clear that Leonard J. assumed that to establish offences (under the statutory provisions which preceded sub-sections (2A)(a) and (b)) of using defective materials and of deviation from plan it was necessary to prove knowledge that the materials were defective and that the deviations were material. It was, however, not contended otherwise by the Crown: all parties assumed that before a person could be convicted he "must be fixed with knowledge actual or constructive" that the defect existed and that the deviations were material, (page 359).

Their Lordships accept that these decisions support the view of the Ordinance (and of the offences charged in this case) for which the appellants contend. They were not, however, binding upon the Court of Appeal. In their Lordships' opinion the Court of Appeal was fully entitled to reject any guidance that there might be in these cases as to the true construction of the Ordinance, or its provisions. The Court of Appeal clearly preferred to

base their decision upon their own view as to the purpose of the Ordinance and as to the meaning of the particular provisions which the Court had to construe. Their Lordships have followed the same course. As will become clear, their Lordships agree with the Court of Appeal. To the extent (if at all) that these two cases point to a different conclusion from that reached by the Court of Appeal they must be held to be overruled.

#### Sub-sections (2A) and (2B)

Their Lordships now turn to consider the two sub-sections in detail and separately; for it does not follow that, if one sub-section should create an offence of strict liability, the other must also do so. But first a few observations on certain features common to both.

The first common feature is that both sub-sections have a characteristic of which Lord Reid spoke in *Sweet v. Parsley* (page 149B). The specific provisions sub-sections (2A)(b) and (2B)(b) belong to that:-

"....multitude of criminal enactments where the words of the Act simply make it an offence to do certain things but where everyone agrees that there cannot be a conviction without proof of mens rea in some form."

Each provision clearly requires a degree of mens rea, but each is silent as to whether it is required in respect of all the facts which together constitute the offence created. The issue here is, therefore, a narrow one. Does sub-section (2A)(b) require knowledge of the materiality of the deviation? Does sub-section (2B)(b) require knowledge of the likelihood of risk of injury or damage?

The second common feature is that each provision appears in a section which creates many other offences, the wording of some, though not all, of which clearly requires full mens rea.

A third common feature is that the maximum penalties for the offences which they create are heavy:- a fine of \$250,000 and imprisonment for three years. There is no doubt that the penalty indicates the seriousness with which the legislature viewed the offences.

The first of these features raises the determinative question in the appeal. Their Lordships will, therefore, consider it later in respect of each sub-section.

The second feature, in their Lordships' opinion, proves nothing. One would expect a wide range of

very different offences in a statute which establishes a comprehensive system of supervision and control over a great range of complicated works in diverse circumstances. And it can be said with equal force that a feature of section 40 is that in many cases where mens rea is required it expressly says so, and that, where a defence of reasonable excuse or lack of knowledge is to be available, it makes express provision to that end: examples may be seen in sub-sections (1B), (1C), (2A)(c), (2C), (6), (7) and (7A).

The severity of the maximum penalties is a more formidable point. But it has to be considered in the light of the Ordinance read as a whole. For reasons which their Lordships have already developed, there is nothing inconsistent with the purpose of the Ordinance in imposing severe penalties for offences of strict liability. The legislature could reasonably have intended severity to be a significant deterrent, bearing in mind the risks to public safety arising from some contraventions of the Ordinance. Their Lordships agree with the view on this point of the Court of Appeal. It must be crucially important that those who participate in or bear responsibility for the carrying out of works in a manner which complies with the requirements of the Ordinance should know that severe penalties await them in the event of any contravention or non-compliance with the Ordinance by themselves or by anyone over whom they are required to exercise supervision or control.

Sub-section (2A).

This provision applies to building owners, authorised persons (i.e. architects, surveyors, structural engineers), registered structural engineers and registered contractors. It is thus confined to persons bearing responsibility for the decision to undertake works and for their supervision and control. There is plainly an element of mens rea in the offences it creates: the wording of sub-paragraphs (a) and (b) does not make clear how far mens rea extends: the wording of sub-paragraph (c) reveals an offence of full mens rea. The statutory predecessors to sub-paragraphs (a) and (b) were considered in the two Hong Kong cases *Chan Wing On* and *Chung Yat*, *supra*, which neither the Court of Appeal nor their Lordships have found helpful in determining this appeal.

The wording of sub-paragraph (b) clearly requires knowledge of the approved plan and of the fact of deviation. But in their Lordships' view it would be of little use in promoting public safety if it also required proof of knowledge of the materiality of the deviation. As it was put on behalf of the Attorney-General, if the offence requires knowledge of the

materiality of the deviation to be proved, the defendant is virtually judge in his own cause. The object of the provision is to assist in preventing material deviations from occurring. If a building owner, an authorised or a registered person is unaware of the materiality of the deviation which he authorises (and knowledge of the deviation is necessary), he plainly ought to be. He is made liable to criminal penalties because of the threat to public safety arising from material deviations from plans occurring within the sphere of his responsibility. The effectiveness of the Ordinance would be seriously weakened if it were open to such a person to plead ignorance of what was material. In the words already quoted of the Court of Appeal, "...it behoves the incompetent to stay away and the competent to conduct themselves with proper care".

Sub-section (2B).

The construction of (2B)(b) is more difficult, but their Lordships are satisfied that it imposes strict liability for substantially the same reasons as those which have led them to this conclusion in respect of sub-section (2A)(b). The offence created clearly requires a degree of mens rea. A person cannot carry out works or authorise or permit them to be carried out in a certain manner unless he knows the manner which he is employing, authorising, or permitting. The appellants laid great emphasis on the reference to "permitting" as an indication of full mens rea. They referred their Lordships to *James & Son Ltd v. Smee* [1955] 1 Q.B. 78. But their Lordships agree with the answer of the Court of Appeal to this point:-

"We would therefore hold 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 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."

Two further points were, however, developed by the appellants. The first was the wide range of the sub-section. It covers any person, (whether or not authorised or registered under the Ordinance) who is directly concerned with the works. Thus an unskilled labourer engaged in carrying out works on the site would be, it is said, criminally liable if he did something which was dangerous without knowing it. Their Lordships are by no means certain that a labourer on site could be described as a person directly concerned with the manner in which works are carried out on site: for he has no control. But, if

he is, it has to be shown under sub-paragraph (a) or (b) that he bears (or shares) responsibility for determining the manner in which the works are carried out. The purpose of the provision is to prevent persons who have the power of decision, whoever they may be, from choosing and putting into effect a manner of carrying out the works which is likely to cause risk. If a workman should take it upon himself to decide, for instance, to remove part of the necessary lateral support system of the site, there would be good reason for making him criminally responsible under the Ordinance if what he chose to do was likely to cause risk, whether he knew it or not; but it would have to be proved that the removal was his choice. The offence is not merely "carrying out works" but doing so in a certain manner. No offence can be committed save by one who bears (or shares) responsibility for deciding the manner in which the works are to be carried out.

Their Lordships find some support for their view that sub-section 2(B)(b) is an offence of strict liability in the wording of the offence created by 2(B)(a). The wording of (a) points to strict liability, once injury or damage has in fact been caused. Anyone who has carried out, authorised or permitted work to be carried out in a manner which has in fact caused injury or damage is caught.

#### Conclusion

For these reasons their Lordships conclude that to the extent indicated the offences charged against the appellants are of strict liability. Their Counsel did develop a detailed argument on the long history of the Buildings Ordinance beginning with its enactment in 1955 and continuing through many amendments until the present day. But there is nothing in the history to suggest any view of the Ordinance or the sub-sections under consideration other than that taken by the Court of Appeal and now adopted by their Lordships. The basic submission of the appellants was that the imposition of strict liability (to the extent analysed in the earlier part of this judgment) "could not in any way affect the observance of the law" (words taken from *Lim Chin Aik, supra* at page 175). Their Lordships reject the submission for the reasons which they have given.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The order of the Court of Appeal that the case be remitted to the magistrate stands. The appellants must pay the respondent's costs in the Court of Appeal and before the Board. The costs in the magistrate's court must be for the magistrate to decide upon conclusion of the further hearing in his court.

