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HCMA000379/2000

HCMA 379/2000

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO. HCMA 379 OF 2000

(ON APPEAL FROM WSS 13454 OF 1999)

BETWEEN

HKSAR Respondent

AND

LAM GEOTECHNICS LIMITED Appellant

Coram: Hon Beeson J in Court

Date of Hearing: 8 September 2000

Date of Handing Down Judgment: 20 November 2000

JUDGMENT

The Appellant company appeals against its conviction for a contravention of Section 44(1)(c) of the Construction Sites (Safety) Regulations (CS(S)R) made under the Factories and Industrial Undertakings Ordinance (FIUO), Cap. 59.

The particulars of the information were that the Appellant on 6 January 1999, being the contractor responsible for a machine, namely a drilling rig at Kong Sin Wan Reclaimed Area ... "did fail to ensure that every dangerous part of the machinery was securely fenced to the satisfaction of the Commissioner, such machinery not being in such a position or of such construction as to be as safe to every workman on the construction site as it would be if it were securely fenced."

There was no dispute about the facts of the case. The site was in an area being considered for the construction of a highway to link the northern shore and western shore of Hong Kong Island. The Appellant was engaged by the HKSAR Government to determine the alignment for part of the route. To carry out this task soil samples were required from areas along the route.

A labour sub-contractor (PW 3) working for the Appellant was with his employee (PW 4) using a drilling rig to obtain soil samples at the site. The Appellant owned the drilling rig which had a shaft which revolved at 1000 to 2000 revolutions per minute, with a guard to fence off the shaft. The guard did not provide complete fencing; a gap of about 24 cm was not covered. PW 4 was standing near the rig when he slipped, his clothing came into contact with the exposed part of the rotating shaft and his right arm was torn off.

Grounds of appeal

The main ground of appeal was that the Magistrate erred in law by ruling that Appellant had a case to answer, insofar as he held the words "shall ensure that ... every dangerous part of ... machinery for which he is responsible is securely fenced to the satisfaction of the Commissioner ...," in the subsidiary legislation on which the relevant criminal liability was founded, should be construed as affording a defence, which Appellant had the onus of establishing on a balance of probabilities.

The Appellant argued that the elements of the offence were incompletely defined by Regulation 44, because of ambiguity and uncertainty inherent in the words - "to the satisfaction of the Commissioner", which qualified the absolute obligation to ensure that dangerous parts of machinery were securely fenced. Further, persons, including the Appellant, who were required to regulate their conduct in accordance with Regulation 44, could not ascertain, unless and until a prosecution was instituted, what

fencing measures, falling short of complete observance of the unqualified obligation to ensure secure fencing, would satisfy the Commissioner.

The Appellant argued that the regulation was ultra vires enabling powers conferred on the Commissioner by the parent Ordinance, because by including the words "to the satisfaction of the Commissioner", it failed to prescribe with sufficient particularity the elements of a criminal offence, either the means of ensuring the safety of persons in industrial undertakings, or, the means of securing the removal of any danger or defects.

The elements of the offence were not sufficiently defined unless fencing criteria which would satisfy the Commissioner for the purposes of Regulation 44 were prescribed by law, or alternatively, if not prescribed by law, the Commissioner had previously taken sufficient steps to notify what his criteria were, either generally, or, at least, to the Appellant company.

The prosecution had to prove beyond reasonable doubt that the Appellant had failed to fence according to such criteria. Failure to fence to the satisfaction of the Commissioner could not be established simply by the Commissioner instituting a prosecution for contravention of Regulation 44. Counsel for the Appellant submitted that the charge should be struck out or, alternatively, that the court should find the prosecution had not established a prima facie case against the Appellant.

Ground 2

The second argument was that even if the Court decided the Magistrate rightly held Regulation 44 imposed an onus on the Appellant to show the Commissioner was satisfied with the fencing arrangements, the Appellant had discharged that onus. The Appellant relied on the arguments made to the Magistrate as to the correct approach to be adopted by the Court, in deciding whether the Commissioner has indicated expressly or impliedly that he is satisfied with fencing arrangements.

Ground 3

This ground, (which assumed that the Magistrate was right in law as to the burden cast on the Appellant) was that the Magistrate wrongly disallowed questions put by defence counsel when cross-examining

prosecution witnesses to elicit evidence about the past policy and practice of the Commissioner relating to fencing of drilling rigs which satisfied him. Defence counsel's attempts to adduce evidence to discharge the onus, had been impeded or prejudiced.

Consideration of Ground 1

Regulation 44

Regulation 44 of the CS(S)R, including the words "to the satisfaction of the Commissioner" derives from the Factories and Workshops Regulations, made under the Factories and Workshops Ordinance No. 18 of 1937, which came into force on 1 January 1938. The Ordinance appears to have followed the United Kingdom Factories Act 1937, although in simpler form.

The 1937 Hong Kong Regulations regarding the duty to provide protection from dangerous parts of machinery are expressed differently from their equivalents in the UK legislation.

Mr Collins, for the Appellant, contended that Regulation 44 is apparently the sole survivor of a style of legislative drafting and an administrative outlook from a period in the colonial era when, he opined, challenges to the vires of subsidiary legislation were rare, with the emphasis more on administrative control than on the observance of strict niceties of the law.

Regulations 13(a) & (b) of the 1937 Regulations follow closely sections 12 & 14 of the UK Factories Act 1937. The Appellant accepted the principle in **John Summers & Sons Ltd v. Frost** [1955] AC 740 that a provision which requires, for example "every dangerous part of any machinery should be securely fenced" imposes an absolute obligation which must be fulfilled, even if the practical consequence of so doing is that the machinery becomes commercially unusable.

However, the 1937 Regulations (Reg. 1) defined "securely fenced" to mean "securely fenced to the satisfaction of the Commissioner". It was submitted that that definition radically changes the character of the offences constituted by contraventions of Regulations 13(a), (b) and (g) of the 1937 Regulations and their contemporary legislative descendant, which is Regulation 44 of the CS(S)R.

Although the duty remains absolute, it is modified to the extent that the absolute obligation to fence is to be in a manner which meets the Commissioner's satisfaction. This requires, necessarily, that the measures, standards or criteria which would, or do, satisfy the Commissioner in respect of any particular circumstances coming within the ambit of the regulation, shall be made known before any prosecution for a contravention. If not, a person subject to the duty does not know what he must do to fulfil it and is unable to ensure he does not risk breaking the law.

The Appellant contended that if the Commissioner possesses and exercises a quasi-legislative power to determine by administrative decision what state of affairs amounts to the commission of a criminal offence, he can keep the elements of actus reus hidden. This gives him a dispensing power to decide, at his discretion, that a particular state of affairs is, or is not, a contravention of the regulation.

The Respondent argued, both at trial and on appeal, that by the actual decision to prosecute, the Commissioner, the prosecuting authority under the Ordinance, has given sufficient indication that the fencing is not to his satisfaction. The Appellant argued, in my view rightly, that such reasoning cannot be correct.

The Appellant submitted that the Commissioner must reveal in advance, not *ex post facto*, what does satisfy him; if not, the offence is tainted with uncertainty. Those who bear the duty thus risk criminal liability for what the Appellant termed "an indefinite spectrum of factual scenarios". The Appellant argued that Reg. 44 as a provision of subsidiary, not primary, legislation, was subject to the ultra vires doctrine.

Viewing comparable legislative provisions does not help decide the point as the words "to the satisfaction of the Commissioner" are used rarely. There do not appear to be any cases in which these words, in the context of Regulation 44, have been examined. At an earlier time, Regulation 45 of the CS(S)R provided that working platforms, openings in floors and "every other place liable to be dangerous to persons" should be "securely fenced to a height of not less than 3 feet, or otherwise protected to the satisfaction of the Commissioner."

In **Attorney General v. Chiu Chun-hoo**, Criminal Appeal No. 925 of 1983 (unreported), Cons JA held that this provision created one offence,

and not as was argued before him, two separate and distinct offences. All the prosecution had to do under Regulation 45 was prove that the place, being a place within the scope of the provision, was not securely fenced to a height of at least 3 feet. Whether the fencing was secure was a matter for the court to determine on the evidence. That provision thus set out clearly the criterion so those subject to it knew how to satisfy it.

Cons JA considered that the additional words "or otherwise to the satisfaction of the Commissioner" merely provided a Defendant with "a possible means of escape from the liability that would otherwise fall upon him". The prosecution had to prove the failure to fence to the requisite height, thereafter it was for the contractor to show, if he could, that the Commissioner was satisfied by some other action on his part.

A similar provision occurs in Regulation 24(a) of the Factories and Industrial Undertakings Regulations, also made under Cap. 59 (FIUO). In **R v. Meyer Aluminium Ltd** (1985) Magistracy Appeal No. 807 of 1984 (unreported) the meaning of the regulation was considered. An employee fell into an unfenced stairwell and was killed. There was evidence that the Commissioner's Inspectors had visited the site on earlier occasions but did not complain about the state of the stairwell. Leathlean J said "if the Appellant had succeeded in proving upon the balance of probability that the stairwell was protected to the satisfaction of the Commissioner it was entitled to be acquitted". That case was remitted to the Magistrate to make findings "whether the evidence that none of the inspections prior to the accident prompted any complaint by the Commissioner about the stairwell warrants the inference that the stairwell was protected to the satisfaction of the Commissioner".

Regulation 44 of the CS(S)R differs in structure. The duty is not laid down by reference to clearly specified criteria. There is no question of "or otherwise to the satisfaction of the Commissioner". The prosecution under Regulation 44 must prove all the elements of the offence. According to the Appellant, the provision does not cast a burden on a defendant to show on a balance of probabilities that the Commissioner was satisfied.

The application of the doctrine of ultra vires to Regulation 44.

The regulation-making power under which the CS(S)R were promulgated is conferred by section 7 of the FIUO on the Commissioner. By section

7(5) regulations made can provide that contravention of specified provisions shall be an offence and may provide penalties for those offences.

Mr Collins identified three regulation-making powers in section 7(1)(h)(i) and (o) as providing appropriate vires for Regulation 44. S. 7(1)(h) enables regulations to prescribe "means of ensuring safety of persons in industrial undertakings"; S. 7(1)(i) enables the prescription of "means of securing the removal of any danger or defect". S. 7(1)(o), which appears the most relevant, enables duties to be imposed on proprietors, contractors and persons employed.

Section 7(2) enables the Commissioner to make "special regulations" as appears to him to be reasonably practicable to meet the necessity of particular cases where he is satisfied that it is warranted. This power is expressed to be without prejudice to the generality of the power to make regulations under subsection (1). Section 7(2) is almost identical to section 60 of the Factories Act 1937, which conferred a similar power on the Secretary of State in the United Kingdom.

In **A-G v. Chiu Chun-hoo** (*supra*), Cons JA distinguished an authority on which the contractor in that case had sought to rely; the case of **Utah Construction & Engineering Property Ltd v. Janos Pataky** [1966] AC 629, an appeal from the Supreme Court of New South Wales to the Privy Council. That case held a regulation requiring that "every drive and tunnel should be securely protected and made safe for the persons employed therein" to be ultra vires.

The enabling powers in **Utah Construction** authorised regulations for the manner of carrying out excavation work and safeguards and measures to be taken to secure the safety of persons doing such work. The Privy Council struck down the regulation as being unjustified under either provision, as it did not empower the imposition of a duty on employers to make a tunnel or drive absolutely safe and secondly, because the regulation did not indicate what measures ought to be taken.

Cons JA distinguished Reg. 45 CS(S)R, which he was considering, from the defective regulation in **Utah Construction**, because it did not require the contractor to make the place absolutely safe, but only to meet the designated fencing criterion. "If he did that, he is immune from prosecution. He may instead, as already indicated, approach the

Commissioner for dispensation. But in either of the events *he will know what he has to do*." (**Attorney General v. Chiu Chun-hoo** @5) (emphasis supplied)

Mr Collins, submitted that under Regulation 44, the contractor does not know what to do and he should not be driven, as the Respondent suggested, to seek the Commissioner's approval every time he is in doubt about whether he has complied properly with the regulation.

Cons JA expressed doubt whether paragraph 7(1)(o) of FIUO took the Commissioner's powers any further than those granted to him by the remaining paragraphs of section 7(1). Mr Collins submitted that such doubt was well-founded, because section 7(1)(o) is an enabling power which must be regarded as ancillary to the specific enabling powers in paragraphs (a) to (n). Paragraph (p) which follows, is of a similar nature, generally carrying into effect the provisions of this Ordinance.

If that is so, Mr Collins suggests that the Commissioner is obliged to prescribe the means of ensuring safety, or of securing the removal of danger. Once he has done that, he may, under paragraph (o), make the provision of such means the subject of a duty. It is submitted that Regulation 44 of the CS(S)R is *ultra vires* the FIUO since it does not prescribe the means of securing safe fencing.

Having considered the arguments advanced I am satisfied that the elements of the offence purportedly set out in Regulation 44 are incompletely defined because of the uncertainly in the words "to the satisfaction of the Commissioner", which means that those who are required to regulate their conduct according to the regulation cannot ascertain, before a prosecution is brought, what fencing measures would satisfy the Commissioner.

I find that Regulation 44 is ultra vires the enabling powers conferred on the Commissioner of Labour by the Factories and Industrial Undertakings Ordinance, Cap 59. Accordingly the charge against the Appellant is struck out and the conviction quashed.

As I have allowed the appeal on Appellant's first ground, it is not strictly necessary that I go on to consider the other two grounds of appeal. However I think it helpful to consider and rule on them. For the second ground, I am satisfied that the Appellant had established, on the balance

of probabilities, from the evidence that was before the Magistrate, that the Commissioner had been satisfied with the guarding arrangements and the Appellant had succeeded in discharging the onus.

As what satisfies the Commissioner, must be something peculiarly within his own knowledge, it may be that he is satisfied at different times with different standards of protection. Counsel contended that as the standards under Regulation 44 are not prescribed by law, that was the effect of the words "to the satisfaction of the Commissioner". The Court had to take into account the objective effect of the promulgation of the Commissioner's standards, insofar as he regards them as acceptable. It is not only what the Commissioner or his agents say definitely, but also what they fail to say, especially where they have had a clear opportunity to comment on some particular standard. It is not enough, argues the Appellant, for the Commissioner to declare after a prosecution has been initiated what he says was the acceptable standard at the time of the alleged offence.

In the present case it is submitted that the evidence at trial showed the Labour Department had failed to make known any requirements, whether generally to the industry, or to this contractor. The Appellant had been using drilling rigs over a period of 25 years without having attracted any opprobrium from the Commissioner as to the method of use or site practices. No recommendations had been made to the Appellant, or to the industry to introduce, for example, telescopic guards which better protected the revolving shaft. The use of any form of guard was a comparatively recent practice; fixed guards had been used only for the last 10 years by Appellant and others in the industry. Despite what must have been dozens of visits by Occupational Safety Officers to construction sites where such rigs were operating, no cautions had been given, nor had prosecutions been instituted under Regulation 44.

The Court's attention was drawn to the evidence of various witnesses in this regard. PW 2, the Occupational Safety Officer had no special knowledge of drilling rigs, nor had he ever inspected one prior to this accident. He had received no specific instructions as to what constituted fencing "to the Commissioner's satisfaction". Appellant's counsel complained that his attempts to pursue this line of cross-examination were blocked by the Magistrate, after prosecuting counsel objected.

The proprietor of the sub-contracting company (PW 3) operating the rig, had had 10 years experience operating such rigs and had used this particular type for 1 1/2 years. He said the rig was normal as was the safety guard; other guards he encountered were of the same type. Labour Department inspectors inspecting the site had never examined the rig, or offered advice about related safety measures.

PW 5 was a Principal Safety Officer of the Labour Department. This witness recommended that the machine should be equipped with an adjustable guard, but that, suggested the Appellant, was with the benefit of hindsight. He did not say what the Commissioner's specific requirements were prior to the accident. He confirmed that until a few years ago adjustable guards on drilling rigs might not have been very common and were not common before the accident. He did not say that the Labour Department promoted the use of such guards before this accident. He confirmed that no relevant code of practice was promulgated by the Department and its only brochure about the guarding of machinery related to factory machinery. There were no specific written guide-lines, whether in the form of subsidiary legislation, codes of practice, or booklets, stating that drilling rigs should have adjustable guards, or indeed any guard.

The trial transcript shows this witness appeared reluctant, or unable, to explain what he understood by the words "to the satisfaction of the Commissioner".

The defence called as witness the Appellant's Safety Consultant, who produced inspectorate reports from the Labour Department for the period 1996 until 21 January 2000. None raised any complaint about rigs nor was any requirement for guards on drilling rigs noted. Only in January 2000, some 8 months after this accident, was the matter raised.

The Safety Consultant said that non-adjustable guards only became usual some five years before the accident, at the time of the airport construction. The Labour Department was not the motivating force for introducing such guards, rather it was an industry move towards greater safety. He confirmed there had been no complaint about the fixed guard, a standard type, fitted to this particular rig. This witness said that adjustable guards, were used very rarely, and were still uncommon even at the time of the trial.

Overall it appeared that before 6 January 1999, the fencing of drilling rigs was a matter for individual contractors. The requisite standards were not mentioned in inspectorate reports, at least in Appellant's case, nor had the Labour Department advised the industry generally about the need for guards.

I am satisfied from the evidence that if Regulation 44 did place an onus on the Appellant, that the Appellant had discharged it. Given that the Magistrate considered this onus was cast on the Appellant, it is unfortunate that he prevented the Appellant questioning witnesses on matters relevant to discharging it.

This leads to the Appellant's third ground of appeal, that, even if the Court holds the evidence does not go far enough to discharge the onus, the Appellant was prevented unfairly by the rulings of the Magistrate from placing relevant issues before the Court.

Appellant's counsel submitted that evidence of industry-wide practices and of the safety inspectorate's dealings over the years with the Appellant were relevant to discharging the onus, in particular the history of this drilling rig. The transcript shows that the Magistrate blocked questions about the purpose of routine visits by Inspectors and whether they provided advice to contractors; that he confined attempts to question PW 3 about inspection visits over his 10 years experience to the operation of that rig at the particular site; that he stopped questioning of the prosecution's expert witnesses about steps the Labour Department took to make known to contractors the standards that operators of machinery should observe; as well as questions about the number of drilling rigs Appellant operated and questions about inspectorate reports on the Appellant. The Magistrate did not appreciate that even though a report did not refer to a particular rig, the contents of the report might, nonetheless, be relevant to discharging the onus the Appellant bore.

The Magistrate unnecessarily restricted the Appellant in adducing the evidence necessary to satisfy the requirements of Regulation 44, as he himself had interpreted it. Once he had ruled that the Appellant bore the onus, it was incumbent on the Magistrate, subject to the usual rules of admissibility and relevance, to allow the Appellant to adduce evidence, to show the attitude of the Labour Department and the standards of the industry, both as known to the industry operators and also as promulgated,

if promulgated at all, by the Labour Department's Occupational Safety Inspectors. To confine witnesses to the specific drilling rig and to the particular site, when the Appellant had to show on a balance of probabilities, what satisfied the Commissioner in terms of Regulation 44, was unfairly restrictive.

Accordingly, I allow the appeal on the basis of the Appellant's first ground and conclude that Regulation 44 in its current form is ultra vires its enabling legislation. If that had not been so, the Appellant would have succeeded on the second ground of appeal as the evidence at trial showed that the Appellant had done all it could to establish on the balance of probabilities that the guard fencing was to the satisfaction of the Commissioner. For ground 3, the Magistrate wrongly restricted the Appellant from questioning on relevant matters, once he had ruled there was an onus on Appellant to show that the Commissioner had been satisfied. That could only be done by reviewing on a wide ambit industry practices and the Labour Department attitude as manifested over a period of time.

The fine paid by the Appellant is ordered to be returned.

(C-M Beeson)
Judge of the Court of First Instance

Representation:

Mr Henry Hung, GC, for the DPP

Mr James Collins, instructed by Messrs Liu Choi & Chan, for the Appellant