Labour Department (Headquarters) **勞工處（總處）**

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鄭女士：

根據香港法例第 59 章第 7 條而提出的決議案

二零零三年七月二十四日有關上述決議案的來信，已經收悉。現就信中提及的各項問題作出下述澄清。

第 44 條

在一宗上訴案件（香港特別行政區訴 Lam Geotechnics Limited，高院裁判法院上訴案件 2000 年第 379 號）中，原訟法庭的裁決顯示：

(a) 《建築地盤（安全）規例》（下稱「規例」）第 44 條「至令處長滿意」一語的意思有欠明確，未有完全清楚界定規例所列的罪行元素；以及

(b) 該規例第 44 條超越了《工廠及工業經營條例》所賦予勞工處處長的權力。

由於上述的裁決，政府認爲第 44 條因其有關部分（即第 44(1)條）涉及超越法定權限而須作出修訂，以確保有關規管罪行的條文可予執行。

《工廠及工業經營規例》第 24 條

本條文訂明：「在每間應呈報工場內—

(a) 所有平台、樓面的坑槽及孔洞以及其他可對人構成危險的地方；及

(b) 所有盛載有滾燙、腐蝕性或有毒液體的器皿，

須加以安全圍封，高度不少於 900 毫米，或以其他使處長感到滿意的方式加以防護。」這條文與《建築地盤(安全)規例》第 44 條不同之處，在於條文訂有明確的措施，即「加以安全圍封，高度不少於 900 毫米」。

在律政司訴 Chiu Chun Ho(刑事上訴案件 1983 年第 925 號)一案中，法院裁定《建築地盤(安全)規例》第 45 條只訂立了一種罪行，條文中「或以其他使處長感到滿意的方式加以防護」的附加字句，並沒有訂立其他罪行。根據這項判決，我們認爲在《工廠及工業經營規例》第 24 條中，「或以其他使處長感到滿意的方式加以防護」一句可解釋爲一項抗辯條文，而第 24 條所訂立的罪行，是指未有爲該條文所述的各處地方加以安全圍封至不少於 900 毫米的高度。現隨函附上該案的判決書，以供參考。

其他法例條文

此外，你的來信夾附了法例一覽表，列出各項載有「至令」某執法機構「滿意」字句的法例。關於這點，我們會把貝珊法官對香港特別行政區訴 Lam Geotechnics Limited （高院裁判法院上訴案件 2000 年第 379 號）一案所作的裁決，通知各有關的執法機構。

勞工處處長
（曹承顯　　代行）

二零零三年七月二十九日

IN THE HIGH COURT

Criminal Appeal
No. 925 of 1983

BETWEEN

The Attorney General — Appellant

and

CHIU Chun-hoo — Respondent

Coram : Hon. Cons, J.A. in Court, sitting as an additional Judge of the High Court.

Date of hearing : 12th August, 1983.

Date of delivery of judgment : 7th September, 1983.

J U D G M E N T

The respondent to this appeal is the proprietor of a company which specializes in the erection and maintenance of neon signs. In the course of his business he despatched, on the 15th December last year, two of his workers to inspect a sign above the Hua Chiao Commercial Bank at 413 King's Road, Hong Kong. The sign was of the usual kind which bears illuminated characters mounted on a frame, and looking down from above would have been only 0.3 metres wide. It was horizontal rather than vertical, extending for almost 5 metres over King's Road and at a considerable height.

When the two workers climbed up to the sign they found that some of the characters and the peripheral light were not working. In order to rectify the fault it was necessary to get to a transformer situated in the upper part of the sign about two-thirds of the way out. It could only be reached by clambering along the top of the sign. One of the workers attempted to do so but as he made his way out the iron bracket holding the sign to the wall of the adjoining building proved insufficient to bear the extra weight. The sign drooped down, shooting the worker off into King's Road below. He was dead by the time he arrived at hospital.

The respondent was charged with an offence contrary to Regulation 45 of the Construction Sites (Safety) Regulations. This reads as follows :-

> "45. The contractor responsible for a construction site shall ensure that -
>
> (a) every working platform from which a workman or other person lawfully on the platform is liable to fall a distance of more than 6 feet 6 inches;
>
> (b) every opening in floors; and
>
> (c) every other place liable to be dangerous to persons;
>
> is securely fenced to a height of not less than 3 feet or otherwise protected to the satisfaction of the Commissioner."

It is common ground between the parties that the sign was a construction site within the definitions provided by Regulation 2(1) and Section 2(1) of the parent ordinance, Cap. 59. The magistrate took the same view. While I am willing to accept their joint conclusion for the purposes of this appeal I wish to emphasize that my acceptance does not necessarily indicate agreement. The point was not argued before me and I deliberately express no opinion.

The magistrate dismissed the information. He gave as his reasons :-

> "In terms of the regulation it was necessary to show that the 'other protection' was to the satisfaction of the Commissioner at the time of the alleged breach; his view that a platform was necessary to protect the signboard while it was under repair was a view reached after the accident as there was no evidence to show that he formed this opinion before the accident; the information therefore failed because this element of the offence had not been proved."

With every respect to the learned magistrate, in presupposing that Regulation 45 creates two separate and distinct offences, i.e. failure to fence and failure to provide other protection, he set off on the wrong tack. Possibly he was misled into that course, for he remarks "it was accepted by the appellant that although the charge was laid in the alternative, it was in fact the second limb of the regulation (i.e.

failing to protect to the satisfaction of the Commissioner) which was invoked". In my view Regulation 45 discloses only one offence. What it requires the contractor to do is to see that the various places mentioned therein are securely fenced to a height of not less than 3 feet. If the contractor does not do that he commits an offence by reason of Regulation 68(1). But he may nevertheless escape the consequences of Sec. 68(1) by showing that although he fenced to a lesser height or did something completely different, nevertheless, the Commissioner of Labour was satisfied with what had been done. That is the effect of the additional words "or otherwise protected to the satisfaction of the Commissioner". These words do not create a further offence which in itself may be charged against a contractor. All they do is to provide him with a possible means of escape from the liability that would otherwise fall upon him. There can, thus, be no question of the prosecution being required to prove "an element" of that further offence. The prosecution need only prove a failure to fence. Thereafter it is up to the contractor to show, if he can, that the Commissioner was satisfied by some other action on his part.

There can therefor be no possibility of the Commissioner's usurping the function of the court, as Mr. Chain for the respondent suggested, by deciding post facto whether an offence has or has not been committed. The offence will have been committed when the contractor assumes responsibility for the site and fails to put his fences in order, unless perchance by that time the Commissioner has already indicated, either generally or in particular, what other steps would meet his satisfaction. The Commissioner cannot, as it were, decriminalize the situation by subsequent indication of his views. These might of course influence the magistrate as to what sentence he should pass, or more probably, decide the Commissioner not to prosecute in the first instance.

It is the same misconception of two offences which, I think, has brought in the suggestion of "ultra vires". This point was not taken below, being introduced for the first time by the magistrate himself when in his judgment he "questioned whether the words 'or otherwise to the satisfaction of the Commissioner' in the regulation were intra vires Sec. 7(h) of the Ordinance". Regulation 45 is a

regulation commonly used by the Commissioner as a vehicle for prosecution and the comment of the magistrate, although obiter, has caused him considerable anxiety.

Sec. 7(1)(h) provides as follows :-

"7. (1) The Commissioner for Labour may in respect of industrial undertakings by regulation prescribe or provide for -

.....

(h) means of ensuring the safety of persons in industrial undertakings and of relieving persons suffering from the effects of accidents in industrial undertakings;"

In order to sustain the magistrate's doubts Mr. Chain relied upon the case of Utah Construction & Engineering Proverty Ltd. v. Janos Pataky[1]. With respect that case can easily be distinguished. It was a civil action brought for injury sustained from a rock fall in tunnelling operations, based on an alleged breach of statutory duty by the employer in that he had failed to comply with a regulation requiring "that every drive and tunnel shall be securely protected and made safe for the persons employed therein". The enabling legislation provided that regulations might be made inter alia relating to -

(1) "the manner of carrying out ..... excavation work"; and

(2) "safeguards and measures to be taken for securing the safety ..... of persons engaged in ..... excavation work".

The plaintiff's action failed. Their Lordships held that the regulation relied upon was invalid; it was not justified under either paragraph, firstly because neither empowered regulations to be made which would impose a duty upon the employers to make the tunnel or drive absolutely safe, and secondly because the regulation in itself did not indicate what measures ought to be taken, that being the intention of the enabling section. However Regulation 45 does not require the contractor to make the place absolutely safe. It requires him to fence to a height of not

(1) (1966) A.C. 629

less than three feet. If he does that he is immune from prosecution. He may instead, as already indicated, approach the Commissioner for dispensation. But in either event he will know what he has to do. Neither of the criticisms made in the Utah case has any application. In my view Regulation 45 is intra vires Section 7(h).

I should add that counsel for the appellant argued that the Commissioner could also derive authority from paragraph (o) of Sec. 7(1) which reads :-

> "(o) imposing duties on proprietors, contractors and persons employed;"

He emphasized the words "shall ensure" as evidence, in his suggestion, of the "duty" aspect of the regulation. Counsel for the respondent countered that then "mens rea" would enter into the question and the prosecution need to prove that the contractor was both aware of the danger and that his workers were subject to it. He conceded that otherwise the offence was properly treated as one of strict liability.

I find myself unable to accept the latter argument, although at the same time I must say that I have some doubt whether paragraph (o) takes the Commissioner's powers any further than those granted to him by the remaining paragraphs of Sec. 7(1).

I turn then to the question of whether the neon sign was "a place liable to be dangerous to persons", the aspect of Regulation 45 under which the respondent was actually charged.

For the respondent it was submitted that the phrase includes only those places which can in fact be made safe, - otherwise the legislatic could be given no reasonable meaning at all, - and that although the method suggested by the Commissioner, i.e. the erection of a working platform beneath the sign, would have protected the workers, it would not have made the place itself safe, it would only have made the process of repairing safe.

I accept the distinction but do not think it takes the matter any further. Regulation 45 is not concerned with safety as such, it is concerned with protection against falling off or into empty space, and undoubtedly it would be very easy to fall off the top of the sign, even without the collapse of the supporting bracket. King's Road was a long

way below so that serious injury at least must have been expected. Once therefore it was accepted that the sign came within the ambit of the regulation there could be in my judgment, only one conclusion. It was "a place liable to be dangerous". I see no reason why it should cease to be so merely because it was inconvenient, or even technically impossible, to comply with the law. That is no excuse. Some other method of performing the work should have been found, e.g. that suggested by the Commissioner, or approval obtained for some other form of protection.

It was canvassed in argument whether that other form had physically to form part of the premises to be protected. That could normally be expected, but does not seem to be required by the wording of the regulation. The emphasis however does seem to be on prevention rather than cure and possibly, for example, a safety net some distance below could not be taken to be within the contemplation of the regulation. It might be otherwise for a net immediately adjacent. Nevertheless I do not think that the erection of a platform beneath a dangerous place could properly be said to "protect" that place from accidental falls. Indeed it would itself require to be "protected" within the regulation. It must in each case, I suppose, be a question of degree, and it is a question which, for the reasons I have given, is unlikely to arise again in criminal proceedings.

This appeal has come to this court by way of case stated under Section 105 of the Magistrates Ordinance Cap. 227. I therefore set out now the formal questions posed by the magistrate and the answers thereto :-

"a. Whether or not I was correct in law in holding that the neon signboard was a 'place liable to be dangerous to persons' within the meaning of Regulation 45(c) of the Construction Sites (Safety) Regulations, Cap. 59?

Answer : Yes.

b. Whether or not the protection (other than by fence) contemplated by the said regulation may include a platform not physically part of the 'place'?

Answer : No.

c. (i) Is the provision in the said regulation : 'or otherwise to the satisfaction of the Commissioner' intra vires the Ordinance (Cap. 59) and valid?

Answer : Yes.

(ii) If the answer to (a) is yes, need it be proved to establish that a breach of that part of the regulation has occurred, that the Commissioner had decided, by the time of the alleged breach, what form of protection would satisfy him?

Answer : There can be no question of a breach of "that part" of the regulation.

(iii) If the answer to (ii) is yes, need it be proved that the Commissioner's decision was made known to the respondent?

Answer : This question does not arise."

(D. Cons)
Justice of Appeal

P.K.M. Longley, Crown Counsel for appellant.

Benjamin Chain (M/S King & Co.) for respondent.