IN THE SUPREME COURT OF HONG KONG
(Appellate Jurisdiction)
MAGISTRACY CRIMINAL APPEAL NO. 775 OF 1996

BETWEEN

THE QUEEN

and

TAI TONG LYCHEE VALLEY COMPANY LIMITED

Before: The Hon. Mr. Justice Leonard in Court
Date of Hearing: 17th December 1996
Date of Handing Down of Judgment: 13th January 1997

JUDGMENT

The appellant company was convicted by a magistrate after a trial on an information alleging that between 18th May 1995 and 25th September 1995 it failed to comply with a notice issued by the Director of Planning pursuant to section 23(1) of the Town Planning Ordinance Cap. 131 ("the Ordinance"). It now appeals against conviction and sentence.

A Appeal against conviction

Ground 1

The first ground of appeal is that the enforcement notice was a nullity. Section 23(1) of the Ordinance reads:

> "23. Enforcement on land within a development permission area.
>
> (1) Where there is or was unauthorised development, the Authority may, in a notice served on one or more of a land owner, an occupier or a person who is responsible for the unauthorised development -
>
> (a) specify the matters that constitute or constituted the unauthorised development; and
>
> (b) specify a date by which if the unauthorised development has not been discontinued, the Authority requires -
>
> (i) it to be discontinued; or
>
> (ii) permission for the development to be obtained under section 16."

The enforcement notice specified by way of recital the matters constituting the unauthorised development as engineering operations and the carrying out of development by the making of a material change in the use of the land. Particulars were given in Schedule 2 to the notice as follows:

i) site formation
ii) open storage
iii) vehicle parking.

As a result of a concession by the Crown on (i) above, the conviction was based on (ii) and (iii) only.

The operative part of the notice reads:

"NOTICE IS HEREBY GIVEN that the Authority, pursuant to section 23(1) of the Ordinance, requires that by 18th May 1995, the development shall be discontinued."

That is followed by a statement that:

> "In the event that this notice is not complied with, the person served commits an offence under section 23(6) of the Ordinance, and is liable to a fine of $100,000 and a fine of $10,000 for each day during which the offence is proved to have continued."

It is submitted on behalf of the appellant that the notice is defective in that it fails to mention the possibility of obtaining planning permission, which is provided for in section 23(1)(b) and gives the impression that the recipient's only way to avoid prosecution is to discontinue the use complained of.

This point was taken at the trial but the magistrate accepted the Crown's argument that the Ordinance did not require the alternative of obtaining planning permission to be mentioned and that in any event such (allegedly) unauthorised development could never be the subject of planning permission in terms of the draft Tai Tong Outline Zoning Plan. He went on to find that the appellant suffered no prejudice as on the evidence before him the officers of the appellant were aware of the procedure for applying for planning permission.

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

On the question of construction, I find that a notice purportedly issued under section 23(1) must set out the alternatives provided by sections 23(1)(b)(i) and (ii). Section 23(9)(d) provides that it is a defence to prove that permission was granted under section 16. It is implicit in section 23 that the recipient of the notice should be given a choice of discontinuing the use or of obtaining planning permission, The word ‘may’ in section 23(1) relates to the Authority’s discretion to serve a notice. When a decision to serve a notice is made, the only notice which may validly be served must deal with all the elements set out in subsections(a), (b)(i) and (b)(ii).

I am fortified in my view by the fact that the whole of Section 23, which I do not need to set out in full, is drafted with the alternative of planning permission in mind. Subsection (2) contemplates different dates being set for discontinuance and the obtaining of planning permission. Subsection (3) clearly assumes that a notice under subsection (1) will specify a date for the obtaining of planning permission, Subsection 4A speaks, in relation to a notice served under subsection (1), of planning permission being obtained.

A notice which fails to specify a date for obtaining planning permission is calculated to deceive the recipient as to his rights. I am told by counsel for the Crown that as a matter of practice, if the recipient of an enforcement notice applies for planning permission, no action will be taken against him until his application has been disposed of. Though that may entail some considerable delay in the enforcement proceedings it is the proper course to adopt but it would be wrong for the Director of Planning to omit any mention of the possibility of planning permission out of a desire to avoid giving to the recipient of an enforcement notice any encouragement to apply for planning permission.

On the first ground I would allow the appeal. The enforcement notice was not a notice which satisfied the requirements of section 23(1) and it is a nullity. It cannot be an offence to fail to comply with it.

I would add that it is not for the Director of Planning to usurp the function of the Town Planning Board by purporting to decide whether or not planning permission is likely to be granted and using that decision as a basis for including or omitting a requirement under section 23(1)(b). The notes which form part of the Draft Tai Tong Outline Zoning Plan contain in paragraph (ii) the following passage:

> "Notwithstanding that the use or development is not provided for in terms of the Plan, the Town Planning Board may grant, with or without conditions, or refuse to grant permission to the development."

The fact that a citizen in a particular case happens to know that he has a right to apply for planning permission does not save a defective notice and the magistrate was not entitled to take into account the state of knowledge of the recipient of the notice.

Ground 2

Open Storage

The Appellant contends that the term "open storage" (which is not defined), is ambiguous or too wide. It is pointed out that page 8 of the notes, headed "Open Storage" appears to indicate that "open storage/not elsewhere specified" is always permitted. It appears to me, however, that page 8 is intended to refer to land zoned "Open Storage" and the land in question is not so zoned.

The defence, so far as open storage was concerned, was that the containers found on the site were being used to store agricultural products, on agricultural land. Mr. Frederick NG Siu-cheung (PW3), a Senior Town Planner employed by the Hong Kong Government apparently takes the view that open storage is not permitted on agricultural land. In his view, it seems, what was being stored in the containers was irrelevant and there was no need to make a specific allegation in the notice as to what was being stored in them. I hold that the notice alleging open storage on what is conceded to be agricultural land was sufficient. The objection was clearly to the containers and some other articles which were standing on agricultural land where, according to the Crown, they ought not to be, whether or not they contained some agricultural produce.

Ground 3

The Appellant contends that on the aspect of open storage there was no evidence to support the conviction. The record shows that there was evidence of the storage of containers and lorry bodies on the land as well as other things.

Ground 4

It is submitted on behalf of the Appellant that the conviction on the basis of failing to discontinue “vehicle parking” was wrong in law in that the magistrate had failed to consider the defence that the Appellant had taken all reasonable steps in the circumstances to comply with the notice. Such a defence is provided by section 23(9)(a).

The magistrate evidently rejected a defence of temporary use and, looking at the evidence as a whole I find that he was entitled so to do. The final submission for the defence at the trial, however specifically referred to the defence of taking all reasonable steps, though the main line of defence

seems to have been that any use was temporary. Though he referred to and rejected an existing use argument, the magistrate did not refer at all to the "all reasonable steps" defence. He does say in his statement of findings at paragraph 4:

> "Other defence arguments: if I did not deal with these specifically it was because I found no merit in them."

That is not sufficient to dispose of an affirmative defence. Had I found for the Crown on the first ground I would have remitted the case to the magistrate so that he might deal specifically with the defence raised.

The enforcement notice having been a nullity, the conviction which depends upon it cannot stand. The appeal against conviction is allowed and the conviction is quashed. There will be an order that the fine and costs, if paid, be repaid to the appellant.

Appeal against Sentence

It is submitted that the sentence, a fine of $60,000 was manifestly excessive and wrong in principle. In case I am later held to be wrong in allowing the appeal against conviction, I will deal with the question of sentence.

A fine in this case cannot be wrong in principle. As to whether it is manifestly excessive, reference was made by counsel for the appellant to the case of R v Tang Ying Yip & Anor, [1995] 2 HKC 277 where two defendants were each fined $25,000 plus a daily fine of $100 for 147 days, a grand total of $39,700. A third defendant was fined $20,000.

At the time when that case was decided, the prescribed penalty under s23(6) was $100,000 and a daily fine of $10,000 per day.

On 30th June 1995 the maximum fine was raised from $100,000 to $500,000 and the daily fine from $10,000 to $50,000. The offence in question was found to have continued from 18th May 1995 to 25th September 1995 so it continued for some three months after the increase in the prescribed penalty. Though the appellant had a clear record I do not consider the fine imposed to be manifestly excessive and I would if necessary have dismissed the appeal against conviction.

(D.J. Leonard)
Judge of the High Court

Mr. Prakash Daryanani, C.C. for the Crown/Respondent.

Mr. Timothy Cheung & Ms. Terry S.C. Chan instructed by M/s. K.M. Lai & Li for the Appellant.