FACC No. 11 of 2009

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 11 OF 2009 (CRIMINAL)
(ON APPEAL FROM HCMA NO. 180 OF 2009)

Between:

HKSAR **Appellant**

- and -

HO YAU YIN (何鈾然) **Respondent**

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Mr Justice Mortimer NPJ

Hearing and Decision: 21 April 2010

Handing Down of Reasons: 30 April 2010

J U D G M E N T

Chief Justice Li :

1. In order to provide protection against secondhand smoking in indoor workplaces and public places, the Legislature made it a criminal offence to smoke or carry a lighted cigarette, cigar or pipe in no smoking areas. The no smoking areas designated by the legislation include an indoor area in any restaurant premises. The question arising in this appeal concerns the proper interpretation of the statutory definition of

"indoor". The answer to this question will provide guidance for the implementation of the statutory provisions.

2. At the conclusion of the hearing, the Court announced its decision to resolve the point of law in favour of the prosecution (the appellant) and to allow its appeal but without restoring the respondent's conviction and that reasons would be given later. This judgment contains our reasons.

The statutory provisions

3. The Smoking (Public Health) Ordinance, Cap 371 ("the Ordinance") makes it a criminal offence for any person "to smoke or carry a lighted cigarette, cigar or pipe in a no smoking area". Section 3(2). An indoor area in any restaurant premises is designated as a no smoking area. Section 3(1) and Part 1 of Schedule 2 item 19(e). Indoor is defined in s. 2 as follows:

> " 'Indoor' means –
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> (a) having a ceiling or roof, or a cover that functions (whether temporarily or permanently) as a ceiling or roof; and
>
> (b) enclosed (whether temporarily or permanently) at least up to 50% of the total area on all sides, except for any window or door, or any closeable opening that functions as a window or door."

The proceedings below

4. On 6 February 2009, the respondent was convicted after trial in the Tsuen Wan Magistrates' Courts (Deputy Special Magistrate Ms Liza Li) of the offence of carrying a lighted cigarette in a no smoking area. He was fined $1,000.

5. On appeal, on 9 October 2009, the Court of First Instance (Tong J) allowed the appeal and quashed the respondent's conviction. The Judge held : (1) The restaurant premises have to be enclosed at least up to 50% of the total area on each and every side in order to constitute "indoor" within the statutory definition. (2) But if this interpretation were wrong and that contended for by the prosecution is correct, the conviction was nevertheless unsafe.

6. On the prosecution's application, the Judge certified the following question of law:

> "whether the premises have to be enclosed at least up to 50% of the total area on each and every side in order to constitute 'indoor' under the definition of 'indoor' in section 2 … ".

On 3 December 2009, the Appeal Committee granted leave to appeal on this point of law.

The facts

7. On 14 February 2008, the respondent and his sister were sitting at a table at the premises of Fu Kee Congee and Noodle Restaurant ("the restaurant"), Sham Tseng. Each of them was holding a lighted cigarette.

8. The area in the restaurant where they were sitting was an extension of the main premises of the restaurant. It occupies an area extending outwards from the main premises up to the pavement. It is covered by a blue canopy which functioned as a roof. Plastic curtains were hung on three sides of the canopy, except the side adjoining the main premises. These curtains could be completely rolled up or unrolled to hang down to ground level.

9. The side of the extension fronting the pavement has an entrance with a door on its left portion, viewing it from the pavement, and there are flowerbeds to the right of the entrance.

10. The prosecution's case, based on the evidence of the tobacco control inspector who produced a sketch and photographs taken some time after the event, was that at the material time, the curtains on the left side of the extension (viewing it from the pavement) as well as those on the side fronting the pavement were rolled down. The prosecution did not suggest that the curtains on the right side of the extension were rolled down.

11. It was not disputed that the respondent was carrying a lighted cigarette at the time and that the curtains on the left side were rolled down. But the respondent put in issue the extent to which the curtains on the side fronting the pavement were rolled down. He put to the inspector in cross-examination that the curtains on the pavement side to the right of the entrance, where the flowerbeds were, were not rolled down. The inspector disagreed. The respondent, however, did not give evidence. The Magistrate found the inspector to be an honest and reliable witness.

Indoor

12. The extension is of course part of restaurant premises. The question is whether it is an indoor area. Paragraph (a) of the statutory definition is plainly satisfied. The extension had a cover that functioned, temporarily or permanently, as a ceiling or roof. The issue is whether the extension was within para (b) of the definition, that is, whether it was:

> "enclosed (whether temporarily or permanently) at least up to 50% of the total area on all sides, except for any window or door, or any closeable opening that functions as a window or door."

13. The Judge held that the premises have to be enclosed at least up to 50% of the total area on each and every side in order to constitute "indoor" within this definition. The prosecution contends that such an interpretation is wrong and that the definition of "indoor" means that at least 50% of the total area of all sides must be enclosed, irrespective of how the enclosed area is distributed among the various sides.

14. As the Court stated in *HKSAR v Cheung Kwun Yin* [2009] 6 HKC 22 at para 12:

> "The modern approach is to adopt a purposive interpretation. The statutory language is construed, having regard to its context and purpose. Words are given their natural and ordinary meaning unless the context or purpose points to a different meaning. Context and purpose are considered when interpreting the words used and not only when an ambiguity may be thought to arise."

15. The relevant statutory provisions prohibiting smoking in various areas were enacted by the Smoking (Public Health) (Amendment) Ordinance 2006 which commenced operation on 1 January 2007. In relation to restaurant premises, prior to its enactment, the former statute only required bigger restaurants to designate not less than one-third of its area as a no smoking area where smoking is prohibited[1]. The Administration considered that the former Ordinance had "failed to protect restaurant goers and employees from secondhand smoking

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[1] Section 3(1C) of the former Smoking (Public Health) Ordinance Cap 371 provided that restaurants with a seating capacity of over 200 persons "… shall designate not less than one-third of the area of such as a no smoking area."

because tobacco smoke can diffuse from smoking areas to no smoking areas"[2].

16. In moving the second reading of the Bill proposing the relevant provisions, the Administration stated in the Legislative Council that their purpose is to protect the public against secondhand smoking in indoor workplaces and public places[3]. The Bill originally proposed a definition of "indoor", para (b) of which refers to premises being "completely or substantially enclosed". But having regard to the preference for a mathematical approach expressed by legislators in the course of deliberations of the Bills Committee, para (b) of the present definition was eventually substituted. It must be said that the drafting of para (b) of the definition of indoor is far from satisfactory.

17. The word "enclosed", if used without any qualification, may connote in many contexts being surrounded on all sides. But the word "enclosed" is used in para (b) of the definition with qualification as part of the phrase "enclosed (whether temporarily or permanently) at least up to 50% of the total area on all sides". It is the phrase as a whole which has to be construed.

18. It may be argued that the use of the phrase "on all sides" rather than "of all sides" tends to support the Judge's conclusion. But this gives insufficient weight to the 50% applying to the "total" area on all sides. It would have been better for para (b) to have used the phrase "of all sides" rather than "on all sides". But construing the phrase in the light

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[2] See the Legislative Council Brief dated April 2005 prepared by the Health, Welfare and Food Bureau (File Ref: HWF CR 52/581/89 Pt.56) at para 5.

[3] Official Record of Proceedings of the Legislative Council for Wednesday, 11 May 2005, p.7161

of the context and purpose, there is no ambiguity in its meaning. Its natural and ordinary meaning is that for an area to be "indoor", at least 50% of the total area of all sides must be enclosed, irrespective of how the enclosed area is distributed among the various sides.

19. The context consisting of the state of the law at the time in relation to restaurant premises points to this interpretation. The allocation of one-third of the restaurant as a no smoking area was considered to be inadequate since smoke can diffuse to it from the other parts of the restaurant where smoking was allowed. This interpretation is also consistent with the purpose of the relevant provisions in providing more effective protection against secondhand smoking. The interpretation of "indoor" as involving enclosure of at least 50% of the total area of all sides would allow for a much greater degree of diffusion of smoke and so much greater protection against secondhand smoking as compared to the interpretation reached by the Judge which requires enclosure of at least 50% of each and every side before smoking is prohibited in the area concerned.

20. Two further points should be made on the interpretation of para (b) of the definition. First, the use of the words "up to" after "at least" is puzzling. Had the words "up to" stood alone without "at least", the definition would have made little sense. An area which is enclosed to the extent of say only 10% of the total area of all sides would then be an indoor area, as it would be enclosed "up to" 50%. The words "up to" were plainly not intended to introduce any qualification to "at least" and should be treated as surplusage. So para (b) should simply be read as "enclosed (whether temporarily or permanently) at least … 50% of the total area on all sides".

21. Secondly, the definition introduces an exception "for any window or door, or any closeable opening that functions as a window or door". The question is whether on a proper interpretation, the exception qualifies the total area or the enclosed area. If the former, the area of any window, door or closeable opening should be deducted from the total area. If the latter, it should be deducted from the enclosed area. As Mr Derek Chan, who appeared as Amicus Curiae, pointed out in the course of his able submissions, the rationale of the exception is that since the window, door or closeable opening may be opened at any time for the diffusion of smoke, it should not be treated as enclosed. Consistent with this rationale, the proper interpretation is that the exception qualifies the enclosed area and not the total area. The area of any window, door or closeable opening should therefore be deducted from the enclosed area. If what appears to be a window or door is not in fact capable of being opened, it should not be treated as a window or door for the purpose of the definition.

Answer

22. Accordingly, the answer to the certified question (at para 6) is in the negative.

Conviction

23. The Judge held that even if the interpretation contended for by the prosecution were the correct one, the conviction should nevertheless be quashed as it was unsafe. Having held in favour of the prosecution's interpretation, it is necessary to consider whether the conviction should be restored. Mr Robert Lee SC for the prosecution has not pressed for restoration. Mr Chan submits that it should not be restored.

24. First, Mr Chan submits that leave to appeal to the Court was granted only on the certified point of law and it is not open to the Court to restore the conviction. This submission must be rejected. It was implicit in the grant of leave to appeal that the appeal related to the quashing of the conviction and it is open to the Court on the appeal to set aside that quashing and restore the conviction. Further, in any event, on an appeal on a certified point of law, the Court has the jurisdiction to review findings of fact in exceptional cases when those findings are related to the certified point. See ***HKSAR v Lee Ming Tee*** (2001) 4 HKCFAR 133 at 188F. The certified question relates to the interpretation of the statutory test and the Judge's conclusion as to whether it was satisfied in the present case is related to that question.

25. Secondly, Mr Chan submits that the Judge's conclusion reached on a magisterial appeal which is by way of rehearing on the evidence before the trial court[4] should not be lightly disturbed. That is correct. But here, the Judge's conclusion was plainly wrong. The Magistrate convicted the respondent on the basis of the evidence of the inspector whom she found to be an honest and reliable witness. In coming to the view that the conviction was unsafe, the Judge criticized the sketch produced by the inspector, pointing to apparent discrepancies between it and the photographs produced by both parties, all of which were taken some time after the event. It may be doubted whether these criticisms were justified. But even on the assumption that they were, the Judge did not hold that having regard to them, the inspector's testimony should not have been accepted. In our view, the Judge's conclusion that the conviction was unsafe was not justified.

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[4] Section 113 of the Magistrates Ordinance, Cap. 227 and ***Chou Shih Bin v HKSAR*** (2005) 8 HKCFAR 70 at 78D.

Discretion

26. However, the Court has a discretion not to restore the conviction. See *HKSAR v Tse So So* (2007) 10 HKCFAR 368 at 385. In the present case, there are exceptional circumstances which justify such a course.

27. The appeal is concerned with a relatively new piece of legislation and has provided the Court with the opportunity to provide authoritative guidance on the statutory definition which was not well drafted. As a result of the appeal, the matter has been hanging over the respondent's head for a longer period than it would otherwise have done. Further, the respondent's sister was in a similar situation. She was charged with the same offence. But after the judgment of the Judge, the prosecution offered no evidence against her.

28. Accordingly, the Court allowed the appeal but without restoring the respondent's conviction.

(Andrew Li) Chief Justice	(Kemal Bokhary) Permanent Judge	(Patrick Chan) Permanent Judge

(R.A.V. Ribeiro) Permanent Judge	(Barry Mortimer) Non-Permanent Judge

Mr Robert S.K. Lee SC and Ms Irene Fan (of the Department of Justice) for the appellant

The respondent Mr Ho Yau Yin, in person, present

Mr Derek Chan, amicus curiae