

HCMA225/2015

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

(Appellate Jurisdiction)

MAGISTRACY APPEAL NO 225 OF 2015  
(ON APPEAL FROM STCC 2613 OF 2014)

BETWEEN

HKSAR

Respondent

and

SHABBIR MUHAMMAD

1<sup>st</sup> Appellant

RIAZ AHSAN

2<sup>nd</sup> Appellant

Before : Hon P. Li J in Court

Date of Hearing : 18 May 2015

Date of Judgment : 22 September 2015

**J U D G M E N T**

1. The 1<sup>st</sup> appellant was an illegal immigrant.<sup>1</sup> He was convicted of ‘Taking employment while being an illegal immigrant’.<sup>2</sup>

<sup>1</sup> He was granted recognizance on 24/7/2009.

<sup>2</sup> Contrary to s 38AA(1)(a) and (2) of the Immigration Ordinance, Cap 115.

Mr Ho Chun-yiu, magistrate, sentenced him to 22 months and 1 week imprisonment.

2. The 2<sup>nd</sup> appellant was under a removal order issued on 30 September 2013<sup>3</sup>. He was convicted of ‘Taking employment while being a person in respect of whom a removal order is in force’.<sup>4</sup> Mr Ho Chun-yiu, magistrate, sentenced him to 22 months imprisonment.

3. They appealed against the convictions.

*The evidence*

4. At about 0245 on 24 June 2014, PW1 (PC 11115) saw a truck parked outside Hop Yik Plaza, Yuen Long. The driver was a Chinese male. The two appellants were at the back of the truck. The appellants conveyed a total of 39 boxes of vegetables from the truck to the outside of a nearby shop. The boxes were marked “Ho Kiu Vegetable and Fruits”.

5. The 1<sup>st</sup> appellant wore a black vest, a pair of black shorts and blue shoes. He was seen operating the tail board of the truck. The 2<sup>nd</sup> appellant was topless wearing silver color shorts and black waterproof boots. He was seen using a pallet truck to convey the boxes. They were subsequently arrested.

6. The 1<sup>st</sup> appellant admitted that he did convey the boxes of vegetable with the 2<sup>nd</sup> appellant to the shop. He explained that the boxes of vegetable were donated to the mosque for the ‘Ramadan’ which began

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<sup>3</sup> He was granted recognizance on 30/8/2007.

<sup>4</sup> Contrary to s 38AA(1)(a) and (2) of the Immigration Ordinance, Cap 115.

A on the date of the alleged offence. They and their friends pooled money  
B for the donation. He further explained that 25 boxes were for the mosque.  
C Four boxes were for themselves and co-tenants. The remaining 10 boxes  
D were for their friends. According to the 1<sup>st</sup> appellant, the 2<sup>nd</sup> appellant  
E initially wore a pair of new shoes but only changed to the waterproof boots  
F for loading the boxes. The police told the 2<sup>nd</sup> appellant to take off his  
upper garment.

G 7. The 2<sup>nd</sup> Appellant elected not to give evidence. The  
H magistrate indicated that no adverse inference would be drawn against  
I him.

J *The decision*

K 8. The magistrate pointed out that the prosecution witnesses  
L gave clear and accurate evidence. They were not shaken under  
M cross-examination. In fact, their evidence was not in great dispute. He  
accepted their evidence.

N 9. The magistrate rejected the evidence of the 1<sup>st</sup> appellant for  
O the following reasons:

P a The boxes of vegetables were ordered and conveyed to the  
Q shop at the early hours of the morning. It was strange.  
Even if they were needed before dawn as the 1<sup>st</sup> appellant  
R claimed, there was no reason to do it in the very last minute.

S b The Ramadan did not start on the 24 June 2014 as the  
T 1<sup>st</sup> appellant claimed.  
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c The 1<sup>st</sup> appellant knew nothing about the kinds, the price and the supplier of the vegetables. He did not know the contact of the truck driver.

d The mosque was at Tsuen Wan. There was no reason why the boxes of vegetables were not sent there directly.

e It was unreasonable for the 1<sup>st</sup> appellant to leave his recognizance paper at the passenger seat of the truck.

10. The magistrate pointed out that the 2<sup>nd</sup> appellant denied working in the record of interview. His version was not tested as he elected not to give evidence. The magistrate put no weight on it.

11. Given the prosecution evidence, the magistrate was sure that the appellants were employed to work there and then. He convicted them respectively.

*The grounds of appeal*

12. The appellants were unrepresented. They maintained that they did not work and were not satisfied with the magistrate's decision.

13. The magistrate had carefully analyzed the evidence. In paragraph 27 of the judgment, he pointed out the relevant evidence which supported the inference of guilt.

"...Not only did the defendants have access to the truck and to the goods on it; D1 was clearly permitted and knew how to operate the tail board of the truck, and D2 was clearly permitted and knew how to use the pallet truck to convey the boxes. D2 was also in clothing suitable for the kind of work or employment alleged. The boxes were conveyed to a place outside a shop which, although closed at that time, was obviously a place of

business. According to PW1 there were already other boxes there, and there were more boxes on the truck. The boxes conveyed had commercial markings on them. There was a driver for the truck at that time.”

14. The magistrate bore in mind that mere working at a place *per se* was not employment although, in the absence of evidence, one might draw the necessary inference.<sup>5</sup>

15. Mr Daryanani, Senior Public Prosecutor, pointed out that the magistrate had conducted private research about the date of the ‘Ramadan’. The magistrate took judicial notice that it was 28 or 29 June 2014. The magistrate discussed with counsel about the date shortly before he delivered the verdict.<sup>6</sup>

16. Mr Daryanani submitted that while the magistrate was entitled to take judicial notice, the better approach was to re-open the defence case to clarify the issue. He accepted that the date of ‘Ramadan’ was a relevant factor to the magistrate’s decision as the 1<sup>st</sup> appellant said it was 24 June 2014. However, given the strong evidence, the date of the ‘Ramadan’ could not realistically have affected the verdict.

17. The transcript showed that there was thorough discussion between the magistrate and both counsel as to the exact date of the ‘Ramadan’. Counsel for the appellants actually agreed that it should be 28<sup>th</sup> or 29<sup>th</sup> of June but people might start fasting a few days earlier.<sup>7</sup>

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<sup>5</sup> *R v Ip Po Fai*, HCMA 1201/1995.

<sup>6</sup> Appeal Bundle 152Q—156F.

<sup>7</sup> Appeal Bundle 154J—Q.

18. In my judgment, the magistrate was right to take judicial notice of the date of the ‘Ramadan’. This information could easily be found from authoritative sources. He was fair to disclose his finding to counsel and sought their assistance. Had it not been the agreement by counsel, the magistrate might have dealt with the issue in another way.

19. In fact, I agree with Mr Daryanani that this issue was not pivotal in the magistrate’s decision. There was ample evidence to support the irresistible inference against the appellants.

20. I am sure the conviction is safe. I dismiss the appeal from each appellant.

(Patrick Li)  
Judge of the Court of First Instance  
High Court

Mr Prakash L Daryanani, SPP of the Department of Justice, for HKSAR

The appellants are unrepresented