

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MAGISTRACY APPEAL NO 371 OF 2014
(ON APPEAL FROM STCC 723 OF 2014)**

BETWEEN

HKSAR

Respondent

and

ARFAN ULLAH

Appellant

Before: Deputy High Court Judge S. D'Almada Remedios in Court

Dates of Hearing: 9 & 10 February 2015

Date of Judgment: 25 March 2015

J U D G M E N T

1. The appellant was convicted after trial of one count of 'taking employment while being a person who remains in Hong Kong without the authority of the Director of Immigration after having landed in Hong Kong unlawfully', contrary to s 38AA(1)(a) and 38AA(2) of the Immigration Ordinance, Cap 155. He now appeals against his conviction.

Background Facts of the Charges

2. The appellant is and was at all material times a holder of a recognizance form issued by the Immigration Department (commonly known as Form 8) which prohibited him from taking up any employment in Hong Kong, whether paid or unpaid.

The Prosecution Case

3. The Prosecution case was that on 26 February 2014 at around 5:30 pm at a take away shop known as “Sialkot Take Away” (“the Shop”) located at the Ground Floor, Chung King Mansion, Tsim Sha Tsui, the appellant served PW1, a Labour Inspector who disguised as a customer at the Shop, and collected payment from her.

4. When PW1 and two other colleagues arrived at the Shop, she saw the appellant standing behind the food cabinet/counter of the Shop. The appellant asked PW1 in Chinese “What do you want to eat?” The appellant and PW1 then had a conversation in simple English concerning the ordering of the food. The appellant took PW1’s order and allowed PW1 to obtain two cans of soft drinks from a fridge, reheated the food ordered by PW1, served the food to PW1 and collected payment from PW1 and gave her the change.

5. PW1 said the appellant was the only person serving her. She did not notice and she was not sure whether there was anyone else serving at the Shop at the material times. PW1 denied that she was served by someone other than the appellant. She denied that the appellant was present at the Shop as customer eating a meal. PW1 denied that the

appellant had left the Shop after his meal and she denied that he was brought back to the Shop by police officers afterwards.

6. PW2 was the police officer who intercepted the appellant inside the Shop, checked his identity and arrested him. PW2 agreed that there were other foreigners there and his colleagues helped to check their identity. PW2 denied that the appellant was intercepted 30 to 40 meters away from the Shop at the corner of another block of Chung King Mansion.

Defence Case

7. The appellant elected to give evidence and called 3 defence witnesses.

The appellant's evidence

8. The appellant testified that he resided at Block D of Chung King Mansion. The Shop in question was located at Block B. On that day, he went to the Shop at around 5:30 pm to have his meal. He ate there 5 to 6 times a week. It was Mr Rehman ("DW2") who served him the meal and collected payment from him. He saw DW2 working at the Shop a week before the arrest. After his meal, the appellant left the Shop and intended to go back home. At that time, he saw some Chinese customers and DW2 was having some conversations with them. On his way home, he was stopped from behind by some police officers at the corner near Block C. There he was asked to produce his identity document. After checking the appellant's identity, the police officers brought him back to the Shop. He saw police officers checking on DW2.

They asked DW2 if the appellant was working there and DW2 said no. The appellant was then brought back to the police station. He denied standing behind the counter and serving food. He said that it was DW2 who was standing there.

DW2's evidence

9. DW2 testified that he started working in the Shop on 16 February 2014. He said that the appellant was eating at the Shop and he himself was serving customers. After the appellant left, police officers arrived and checked his identity. He showed the police his Hong Kong Identity Card. At that time, the appellant had already left the Shop. Police then brought the appellant back to the Shop again. DW2 told the police that he was the only person working there. DW2 said he was the one who set the table for a group of Chinese ladies and served them. The food costs HK\$32.00 and they gave him HK\$50.00. He gave them the change.

DW3's evidence

10. DW3 was Mr Fahim Mehmood. He was also a Form 8 holder. He was at Chung King Mansion near the Shop at the material times. He knew DW2 and he saw the appellant often. He saw DW2 serving at the Shop on that day. He saw that there were police officers coming to the Shop and checking DW2's identity. There were other police officers coming from Block C of Chung King Mansion and they brought the appellant from Block C. He was right in the middle of Block B and Block C at the material times. When police officers arrived, it attracted a group of crowd. DW3 said he did try to tell the police that he

saw that the appellant was brought from outside the Shop but the police did not listen. DW3 confirmed that he did not know why the appellant was being arrested. He subsequently said he in fact went there to ask the police officer why the appellant was brought back to the Shop but the police did not reply.

DW4's evidence

11. DW4 was Mr Mahmood Arshad. He gave evidence to the effect that he saw DW2 being checked by the police inside the Shop when he wanted to buy food from the Shop and D was brought back to the restaurant by the police. He however confirmed during cross-examination and re-examination that he actually could not recall the incident happened on the material day.

Grounds of appeal

12. Mr Timothy Parker counsel for the appellant advanced three grounds of appeal. They were :-

- (i) The learned magistrate failed to evaluate each defence witness' testimony on its own merit;
- (ii) The learned magistrate erred in her finding that the testimony of the appellant and DW2 were contradictory; or alternatively, gave undue weight to the extent of any such contradiction; and

- (iii) The learned magistrate did not address the submission that the police did not record the appellant's full statement, and had warned him, on the threat of further detention, not to state during his cautioned interview where the police had intercepted him.

The magistrate's finding as to credibility

13. The magistrate carefully considered all the evidence of the prosecution witnesses. She accepted their evidence as truthful, reliable and credible. She observed that their evidence was consistent with each other in all material aspects.

14. The magistrate rejected the evidence of the appellant and the defence witnesses (DW's 2-4). She concluded that both the appellant and DW2's evidence contradicted one another as to certain particulars. She found DW3 to have internal discrepancies in his evidence. No weight was given to DW4's evidence.

15. The magistrate analysed the appellant's and DW2's evidence as follows¹:-

"17. For the Defendant and DW2, I do not accept their evidence. Their evidence was contradictory with each other :-

(i) The Defendant testified that when he was brought back to the Shop, the police were checking DW2. However, it was DW2's evidence that at the time when the police was checking his identity, the Defendant was not in the Shop. DW2 said at that time the Defendant had already left the Shop.

(ii) The Defendant also testified that when he was brought back to the Shop, he heard that the police asked DW2 if the

¹ statement of findings at §17

Defendant was working there and DW2 said no. The police also asked DW2 whether there was any CCTV at the Shop and DW2 said no. However, during cross-examination of DW2, he confirmed twice that at the scene, he did not know that the Defendant was suspected to be illegal worker of the Shop because the police only asked him how many people working there and he told the police that he was the only person working there.”

16. She rejected DW3’s evidence as he had changed his evidence. She said² :-

“18. During cross-examination, DW3 said that upon seeing the Defendant being brought back to the Shop, he tried to tell the police that he saw that the Defendant was brought from outside but the police did not reply. However, DW3 was challenged by the prosecution as to why he said so to the police when DW3 did not even know that the Defendant was being arrested for working illegally in the Shop. DW3 changed his evidence and claimed that he did not say so to the police. He said he went there to ask the police officer why the Defendant was brought back to the Shop and what was the reason for that. But the police did not reply.”

17. DW4 admitted that he did not have any particular recollection of the incident which happened 3 months prior accordingly the magistrate placed no weight on his evidence.

Discussion

18. Grounds 1 and 2 turned on the magistrate’s assessment of the appellant and defence witnesses’ credibility.

19. It was submitted by Mr Parker that the magistrate failed to consider each defence witnesses’ testimony on its own merits. His submissions were that the mere fact that two accounts of the same event

are different does not logically prove that both accounts must therefore be wrong. It proves only that, to the extent of inconsistency, at least one of them is wrong.

20. He submits that the magistrate was wrong to simply dismiss both sets of testimony because they were not identical. The magistrate failed to consider whether it might still be the case that one of them was telling the truth. In the circumstances that is a sufficient basis for quashing the conviction.

21. On ground 2 as to the contradictions of the appellant and DW2's evidence they were referred to in paragraph 17 of the statement of findings. The first contradiction identified was what was happening when the appellant was brought back to the shop by the police and the second contradiction was in regard to what each said the police had asked DW2.

22. Mr Parker submitted that there were in fact no contradictions in their evidence. As to the first contradiction³ the appellant and DW2 said the same things. The appellant said when he was brought back to the shop "I saw police was checking on Mr Rahman (DW2).... When they brought me back they have already checked the ID of Rahman..." DW2 evidence was that when the police checked his identity card the appellant was not present but then the police continued to make enquiries of him and the appellant was brought back into the restaurant.

² statement of findings §18

³ statement of findings §17(i)

23. The magistrate erroneously referred to an inconsistency⁴. A detailed reading of the transcript shows there was no inconsistency in their evidence. Both the appellant and DW2's evidence was that the appellant was not present when there was an identity card check of DW2.

24. Moving to the second inconsistency,⁵ this concerned what the appellant heard the police ask DW2 and what DW2 said the police asked him. Mr Parker submits that although the accounts given by the appellant and DW2 were not identical they are not of such an "enormously different tenor" to find that one or the other was lying. It was submitted that the meaning was the same in that DW2's answer that he was working at the shop alone necessarily involved a denial that the appellant was working there. Given the passage of time since the events in question there was only a difference of recollection.

25. There was a clear inconsistency between the appellant and DW2's evidence. According to the appellant the enquiry was directed at him, it was specific as to whether the appellant, worked there. The enquiry of DW2 was imprecise without any mention of the appellant but as to the number of people working there. The magistrate was correct to find there was an inconsistency in the evidence of the appellant and DW2. The appellant says DW2 was asked about the appellant whilst DW2 says he was not asked about the appellant.

26. The magistrate's phrase that she "did not accept the evidence of the appellant and DW2," was with respect indefinite. As part of her

⁴ statement of findings §17(i)

⁵ statement of findings §17(ii)

reasons for rejecting the evidence she made reference to the above contradictory evidence. She did not disbelieve the appellant and DW2 only because their evidence contradicted each other, she disbelieved both the appellant and DW2, individually, from her analysis of the evidence as a whole.

27. The issue was one of credibility of the witnesses at the trial. Credibility is a question of fact. In *HKSAR v Singh Balraj*⁶ the court stated :

“9. Quite often a magistrate’s decision turns entirely on the facts and depends *simply on whether he feels sure that* the account given by the prosecution’s witnesses is true while the account or *explanation put forward by the defence is false*, and on whether he regards the accused’s guilt as the only reasonable inference on the facts he finds proved beyond reasonable doubt. The present case is such a case. In such cases, magistrates sometimes do and sometimes do not recite the evidence and arguments at some length and set out their analysis of the same in some depth. It is impossible to lay down hard and fast rules as to when it is necessary or even desirable that they do so.

...

“14. Whether or not a prosecution witness’s evidence can be safely accepted or a defence witness’s evidence can be safely rejected *depends very often on the impression which the magistrate forms when seeing and hearing the witnesses*. Such an impression, which will naturally be formed in the context of the inherent probabilities, does not readily lend itself to being described in words.

.....

17. In my view, the Magistrate was entitled to feel sure, as he did, that the truth had been told by the prosecution witnesses and not the defence witnesses. I am unable to say that he insufficiently indicated why. In my view, he was entitled, on the facts he found proved beyond reasonable doubt, to take the view that the accused’s guilt

⁶ [2003] 2 HKC 621

was the only reasonable inference. I am unable to say that he insufficiently indicated why.”

28. The magistrate had the opportunity of seeing and hearing the witnesses’ of which I do not. The magistrate was entitled to feel sure that the truth had been told by the prosecution witnesses. Her assessment was that she believed PW1 when she said that the appellant had served PW1 in the restaurant and that another person did not serve her. She believed the appellant was intercepted by PW2 in the shop and not at another location. It follows, she rejected the account that the appellant was just eating there and that he was set him up. Even though this is a rehearing there is nothing on the papers to doubt her assessment on credibility. The reasons advanced by the appellant are not cogent reasons to do so.

29. There is no merit in the third ground of appeal. Mr Parker’s submission was that as the magistrate omitted the incident in her statement of findings it calls into doubt the magistrate’s assessment of the credibility of the defence witnesses in general.

30. The cautioned statement of the appellant had never been adduced by the prosecution as evidence incriminating the appellant. It was never produced as an exhibit at trial. There was no need for her to set this out in her decision. Not every point raised in the trial requires reciting.

Conclusion

31. In rejecting the appellant and the defence witnesses evidence the magistrate properly analyzed the appellant’s evidence and the defence

witnesses' evidence separately and individually on their own merits. Having considered the prosecution witnesses to be honest and reliable the magistrate rejected the evidence from the appellant and the defence witnesses' evidence and concluded that the appellant took employment at the shop as an odd job worker.

32. The conviction was based on the totality of the evidence; the magistrate had duly dealt with and assessed the issue of credibility. Accordingly, the appeal is dismissed.

(S. D' Almada Remedios)
Deputy High Court Judge

Mr Dominic Ngai, SPP of the Department of Justice, for the respondent

Mr Timothy Parker, instructed by Daly & Associates, for the appellant