Summary of Judicial Decision

HKSAR v Yuong Ho Cheung & 23 others (collectively "the Appellants")
FACC 1/2020; [2020] HKCFA 29

Decision	**:**	**Final appeal against conviction dismissed**
Date of Hearing	**:**	**1 September 2020**
Date of Reasons for Judgement	**:**	**23 September 2020**

Background

1. The Appellants were Uber drivers. Upon passengers making requests on the Uber App, the Appellants respectively drove to the appointed places to pick up the passengers and then drove the passengers to their specified destinations. At the end of each trip, the fare was paid for by the passenger by a credit card transfer to an Uber entity. There was no hire car permit in force in respect of any of the motor vehicles driven by the Appellants. They were each charged with and convicted of "driving a motor vehicle for the carriage of passengers for hire or reward without a hire car permit", contrary to section 52(3) and section 52(10) of the Road Traffic Ordinance, Cap.374 ("RTO").

Issue in dispute

2. The issue on appeal was the statutory construction of section 52(3) of the RTO, and in particular, the proper construction of the phrase "for the carriage of passengers for hire or reward" as used in that sub-section.

Department of Justice's Summary of the Court's rulings

(full text of Court's judgement at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130996&QS=%2B&TP=JU*)

3. The Court observed that the context of section 52(3) suggests that the words "for hire or reward" are to be read as referring to the nature or circumstance of the carriage rather than requiring the direct agreement contended for by the Appellants. These words focus on the nature of the carriage of the passenger in the motor vehicle. The essential inquiry in most, if not, all cases is this: is the carriage of the passenger for hire or reward, whether by or from the passenger (the usual case) or someone else? (paragraph 36)

4. The Court held that since section 52(3) must include more than just the activity of plying for hire in the streets, the natural contextual meaning is

that it extends to cover commercial carriage services to passengers for payment which are operated by a business entity even where the individual drivers have no separate agreement with the passengers being carried. (paragraph 45)

5. An employed chauffeur who drives his employer's spouse or child in the course of his employment will not usually be carrying a passenger for hire or reward in the sense that phrase should be understood in section 52(3). This is because, although he is paid to carry the passengers, his carriage of the employer's spouse or child is a natural way of his employer using the car as a private car and not part of a separate business arrangement for carriage. (paragraph 47)

6. The "hire or reward" envisaged in section 52(3) is a business one. A carriage will be for hire or reward only where it constitutes "something more than a friendly arrangement". The transportation service provided through the Uber App had the clear character of a separate business arrangement for carriage and was not merely ancillary to some other form of employment as a driver. (paragraphs 48-49)

7. The Court further held that notwithstanding that smartphone applications enabling the Uber business model were not specifically in contemplation when the relevant statutory prohibition was enacted, the activities of the Appellants constituted "carriage of passengers for hire or reward" within the meaning of section 52(3) and well within the mischief that the statutory scheme seeks to address. (paragraph 55)

8. The Court summarized the *actus reus* of the offence under section 52(3) as:

   (a) a person has driven or used a motor vehicle, or suffered or permitted another to do so;

   (b) the driving or use of the vehicle has been for the purpose of carrying passengers for hire or reward in that the carriage is undertaken as a business or commercial arrangement whereby payment is made by the passenger or on his behalf (whether to the driver or some third party) and that payment is received (whether by the driver or some third party) in respect of the provision of the carriage in question.

   The terms "drive", "use", "suffer" or "permit" another to "drive" or "use" will have the same meanings as those terms were held to have in HKSAR v Cheung Wai Kwong (2017) 20 HKCFAR 524. (paragraphs 56-57)

9. In the present case, the Appellant drivers each drove a vehicle, in respect of which a hire car permit was not in force, for the carriage of passengers for hire or reward. It was sufficient that the carriage was undertaken as part

of the Uber ride service business and unnecessary that there be a direct contract between each driver and their respective passengers. (paragraph 58)

10. On the issue of *mens rea* of the offence, the Court observed that the Appellants had allowed the passengers, who were strangers, to get in their cars solely for the purpose of the car rides that were to be paid, and the Appellants must have known and intended that the journeys were to be paid. There was no hire car permit in force in respect of any of the vehicles driven by the Appellants at the time of the offences in question. In those circumstances, there can be no doubt that the offence was clearly established even if the presumption of *mens rea* in relation to the element of "for hire or reward" is not displaced. (paragraph 62)

Prosecutions Division
Department of Justice

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