

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CRI-2016-009-007564  
[2018] NZDC 1929**

**NEW ZEALAND POLICE**  
Prosecutor

v

**XU CAO**  
**SUYAN QI**  
Defendant

Hearing: 29 January 2018

Appearances: A Trinder for the Prosecutor  
P Doody for the Defendant Cao  
N Hansen for the Defendant Qi

Judgment: 7 February 2018

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**RESERVED JUDGMENT OF JUDGE D J L SAUNDERS**

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[1] On 11 February 2016, the defendant, Suyan Qi, was the driver of a tour bus in Te Anau which was stopped by Police as part of an operation to check on Transport Licencing matters.

[2] When spoken to by Senior Constable Haines the defendant produced a driver licence and log book in the name of [name deleted – the licence owner].

[3] Senior Constable Haines noted the photo on the driver licence did not appear to be the defendant and made further inquiries as to the identity of the driver.

[4] Upon checking the defendant's wallet, he located an I.D. in the name of Suyan Qi whereupon the defendant acknowledged that it was his name.

[5] A formal interview under caution subsequently took place in the presence of a Police Chinese Liaison officer.

[6] No issue has been raised about the admissibility of that interview and in the course of questioning the defendant was asked

Q. "Why did you supply a false driver licence?"

A. "Because I didn't have a P licence. This job can make more money than my other job.

[7] The defendant acknowledged he had been given the licence by [the licence owner] and had commenced tour bus driving on 5 February from Christchurch.

[8] The defendant acknowledged he was using his friends licence and log book which he had filled in and that the manager, Xu Cao, was aware that he was working in place of [the licence owner].

[9] The Police subsequently spoke to Mr Cao and a DVD interview was recorded in which Mr Cao, the manager of Alps Travel indicated that he knew [the licence holder] had not been the tour driver of the bus which was in fact being driven by the defendant Qi.

[10] Mr Cao was asked if he had arranged for [the licence holder] to leave his driver licence and log book in the bus for another individual to use.

[11] In answer to further questions Mr Cao acknowledged that he knew that the driver did not have a P endorsement and that he had told [the licence holder] to leave his licence and log book in the bus.

[12] Mr Cao knew the defendant Qi, as he had been a tour guide for more than a year.

[13] Towards the end of the interview the defendant Cao indicated he knew he was wrong "*I broke the law yes*".

[14] Against that background both defendants have been charged with offences as follows:

Suyan Qi

1. Drove a motor vehicle on a road namely Milford Road without an appropriate driver licence. Section 31(1)(a)(ii) Land Transport Act 1998.
2. Did make a false statement in a logbook. Section 79R(1)(b) Land Transport Act 1998
3. Being the driver of a vehicle to which section 30ZF of the Land Transport Act 1998 applied produced on demand by an enforcement officer a logbook that was false in a material particular. Section 79R(2)(b) Land Transport Act 1998.
4. With intent to obtain a pecuniary advantage dishonestly and without claim of right used a document namely a drivers licence. Section 228(b) Crimes Act 1961.

Xu Cao

1. Procured Suyan Qi to commit the offence of using a document namely a driver's licence in the name of [the licence holder] dishonestly and without claim of right and with intent to obtain a pecuniary advantage. Section 228(b) and section 66(1) Crimes Act 1961.
2. Caused to be made a false statement in a logbook. Section 79R(1)(B) Land Transport Act 1998.

[15] To the Land Transport Act charges brought against Suyan Qi guilty pleas were recorded on the day of the hearing.

[16] A not guilty plea has been maintained to the Crimes Act charge.

[17] Mr Cao has continued with a plea of not guilty to each charge.

[18] At the conclusion of the prosecution case Ms Hansen sought a dismissal for the charge laid under the Crimes Act against Mr Qi.

[19] A ruling was given by me that I was satisfied that on the test to be applied in respect of a no case to answer that the prosecution had established a prima face case and the defendant would be put to his election as to whether he wished to give evidence.

[20] In giving my ruling I indicated that I was satisfied that it could be held that the act of producing a licence that he knew to be false in the circumstances as he knew them to be, was an act of dishonesty which could be inferred to have occurred to obtain for himself a pecuniary advantage as interpreted by the Supreme Court in the case of *Hayes v Regina*<sup>1</sup>.

[21] Counsel indicated that her client did not desire to give or call evidence and submitted that on the test to now be applied of proof beyond reasonable doubt that the prosecution must fail for reasons already advanced at the end of the prosecution case.

[22] Mr Doody, on behalf of Mr Cao, indicated that he did not wish to call his client and relied on the legal submissions made in relation to lack of proof of either charge.

### **Analysis**

[23] The relevant part of Section 228 of the Crimes Act 1961 provides:

“Everyone is liable...who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration, -

(b) dishonestly and without claim of right, uses or attempts to use any document.

[24] The term “pecuniary advantage” has been fully discussed by the Supreme Court in the case of *Hayes v Regina*.

[25] At paragraph [16] of the judgement the Court held “The preferable construction treats the expression “pecuniary advantage” as meaning anything that enhances the accused financial position, It is that enhancement which constitutes the element of advantage.

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<sup>1</sup> *Hayes v Regina* SC 16/2007 [2008] NZSC 3

[26] The Court went on to say at Paragraph [17]

“As the Court of Appeal put it in *R v Thomas*<sup>2</sup>, a pecuniary advantage advances the economic interests of the recipient.”

[27] The prosecution argument is that by the defendant knowingly assuming the identity of the qualified driver [the licence holder] and producing his driver licence to an enforcement authority he was endeavouring to secure for himself an economic advantage of being able to carry out and be paid for his services as a tour bus driver when in fact he did not hold the requisite licence to do so.

[28] I do not agree with the defence submission that the prosecution are unable to establish a causative link between the production of the licence and a pecuniary advantage that is obtained by that.

[29] The second issue then is whether the prosecution can prove that when Suyan Qi did so he was acting dishonestly and without a claim of right.

[30] Dishonestly is defined in s 217 of the Crimes Act 1961 in these terms:

“dishonestly, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.”

[31] As discussed in *Hayes v Regina* at paragraph [34] the word “*belief*” is not accompanied by the word “*honest*”. The Court also noted “*that there is no suggestion that the belief has to be reasonable or based on reasonable grounds.*” It is the existence of the belief which matters not its reasonableness.

[32] In short, the Court must be satisfied as to what the accused did believe rather than if he had an honest belief.

[33] The Court must of course consider “claim of right”, and that term has its own definition in s 2 Crimes Act 1961.

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<sup>2</sup> *R v Thomas* C/A 71/00 7 June 2001.

[34] “Claim of right”, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed.

[35] Again, the Supreme Court in Hayes made observations that the belief does not have to be reasonable or based on reasonable grounds and nor did the legislation incorporate the word *belief* by reference to honesty.

[36] It was the view of the Supreme Court that s 228 Crimes Act 1961 does not require the use of a document to be “*objectively*” dishonest. It is the user’s state of mind which will determine whether his use was dishonest. (See paragraph [51] of Hayes judgment.)

[37] I am sure that when Senior Constable Haines spoke to the defendant and asked to see his driver licence that the defendant deliberately chose to produce a licence which he knew was not one that he was entitled to be using for tour driving.

[38] The actions of the defendant cannot be explained away as having occurred mistakenly. The answer to the question “*why did you supply the false driver licence?*” was clear. “*Because I did not have a P Licence. This job can make more money than my other job.*”

[39] I am satisfied that the defendant was acting dishonestly when he produced the licence of another qualified driver and endeavoured to pass himself off as [the licence holder].

[40] The prosecution has established that this action was without a claim of right and the purpose of the conduct was not only dishonest but designed to achieve an economic advantage for himself of being able to continue to earn remuneration as a tour bus driver.

[41] The elements of the charge under s 228(1)(b) are proven to the required standard of beyond reasonable doubt.

## Xu Cao

[42] The defendant has effectively been charged with the offence of procuring Suyan Qi to commit the offence under s 228(1)(b) as a party to the offence I have found proved against Mr Qi.

[43] There is a further charge of causing a false statement to be made in a log book. Under s 79R(1)(b) of the Land Transport Act 1998.

[44] Mr Cao at all material times was the manager of Alps Travel and was aware of the day to day operations of the company.

[45] In a recorded interview with Senior Constable Haines on 11 May 2016 in which a Chinese interpreter was available to assist the defendant, there were admissions made by Mr Cao that he was aware of Mr Qi undertaking the trip in the place of [the licence holder].

[46] Mr Cao was well aware of the need for drivers to have a P endorsement on their licence to enable them to drive a tour bus.

[47] The interview established that Mr Cao was aware that [the licence holder] had gone to Auckland for an emergency and that he had instructed [the licence holder] to leave his licence and log book in the bus for another driver to use. At page 19 of the transcript of interview the defendant Cao stated that "Oscar" is the tour guide... "I know he's a no P endorsement."

[48] I took that to be an admission that he knew the defendant Mr Qi was not authorised to drive a tour bus and the subsequent explanation confirmed that Mr Cao allowed Mr Wi to undertake the tour knowing he would use the licence issued to Mr Qi.

[49] The defendant at the end of the interview also acknowledged

"I know I'm wrong... and I will just ah any result I will just accept yeah. No nothing, because I'm wrong, I broke the tour law yes." (Paragraph [27] transcript).

[50] I am satisfied that the prosecution has proved that Mr Cao knew that Mr Qi did not have the appropriate driver licence to be driving the tour that commenced on 5 February and that as the operator's manager he actively encouraged and permitted Mr Qi to undertake the tour using [the licence holder]'s licence.

[51] Applying the same test referred to in relation to Mr Qi, I am sure that Mr Cao knew it was dishonest to be permitting Mr Qi to use the licence and log book be asked [the licence holder] to leave in the bus.

[52] There is no claim of right available and I am sure that Mr Cao was a party to the offence committed by Mr Qi under s 228(b).

[53] In relation to the log book offence I am not satisfied that the defendant Mr Cao can be held liable for the strict liability offence committed by Mr Qi in relation to the false statement made into the log book.

[54] Mr Cao was not aware of the driving times or details entered each day by Mr Qi as those details were still in the log book when the Police stopped the vehicle on 11 February.

[55] The charge is that between 6 and 11 February be caused to be made a false statement in a log book.

[56] The only falsity which Mr Cao could be said to have caused to have happened is the use of a log book in the name of [the licence holder]. The actual dates and times of driving were not known to Mr Cao and there is no evidence before me to show that any of those details are incorrect.

[57] The discussion which occurred in the interview does not assist me to find that the defendant caused any false statement to be made in the log book between the dates alleged.

[58] I have taken into account that Mr Cao knew that Mr Qi was intending to rely on the driver licence issued to his friend [the licence holder], however, that is a factor which relates to the procuring charge.



[59] In the circumstances outlined I dismiss the charge CRN: 16009013706.

[60] The charge under CRN: 16009010435 is proved and the defendant will appear for sentence on 9 February 2018 at 10:00am being the same date allocated to Mr Qi for disposition of his charges.

D L Saunders  
District Court Judge

Signed in Christchurch on \_\_\_\_\_ 2018 at \_\_\_\_\_ am/pm