**FACC No. 1 of 2020**

**[2020] HKCFA 29**

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 1 OF 2020 (CRIMINAL)**

(ON APPEAL FROM HCMA NOS. 381-399, 401-402, 404-405 AND 415 OF 2018 (CONSOLIDATED))

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BETWEEN

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| --- | --- | --- | --- | --- | --- | --- |
|  | | **HKSAR** | **Respondent** | | | |
|  | | **and** |  | | | |
|  | | **YUONG HO CHEUNG** | **1st Appellant (Appellant in**  **HCMA 381/2018)** | | | |
|  | | **YIP WAI MING** | **2nd Appellant (Appellant in**  **HCMA 382/2018)** | | | |
|  | | **YIP KA SHING** | | **3rd Appellant (Appellant in**  **HCMA 383/2018)** | | |
|  | **CHOW KWOK KWONG ALAN** | | | | | **4th Appellant (Appellant in**  **HCMA 384/2018)** |
|  | | **CHAN PAK KAY ANDREW** | | **5th Appellant (Appellant in**  **HCMA 385/2018)** | | |
|  | | **LAM YAN MING** | **6th Appellant (Appellant in**  **HCMA 386/2018)** | | | |
|  | | **WONG WAI KEUNG** | **7th Appellant (Appellant in**  **HCMA 387/2018)** | | | |
|  | | **TSANG KWOK MING** | **8th Appellant (Appellant in**  **HCMA 388/2018)** | | | |
|  | | **HUI KWOK WAI** | **9th Appellant (Appellant in**  **HCMA 389/2018)** | | | |
|  | | **LEE HING LUNG GARY** | **10th Appellant (Appellant in**  **HCMA 390/2018)** | | | |
|  | | **LAU KIN FUNG BOSCO** | **11th Appellant (Appellant in**  **HCMA 391/2018)** | | | |
|  | | **TSE KEE BO** | **12th Appellant (Appellant in**  **HCMA 392/2018)** | | | |
|  | | **TONG PO HIN** | **13th Appellant (Appellant in**  **HCMA 393/2018)** | | | |
|  | | **WONG SAI MING** | **14th Appellant (Appellant in**  **HCMA 394/2018)** | | | |
|  | | **LI SUI LEUNG** | **15th Appellant (Appellant in**  **HCMA 395/2018)** | | | |
|  | | **LEE KWOK LEUNG** | **16th Appellant (Appellant in**  **HCMA 396/2018)** | | | |
|  | | **CHUNG TZE CHUN IVAN** | **17th Appellant (Appellant in**  **HCMA 397/2018)** | | | |
|  | **CHEUNG YUK FUNG ADRAIN** | | | | **18th Appellant (Appellant in**  **HCMA 398/2018)** | |
|  | | **WONG SIU PONG** | **19th Appellant (Appellant in**  **HCMA 399/2018)** | | | |
|  | | **WONG TAK MING** | **20th Appellant (Appellant in**  **HCMA 401/2018)** | | | |
|  | | **KONG CHEUK LAI** | **21st Appellant (Appellant in**  **HCMA 402/2018)** | | | |
|  | | **FAN WING YAU** | **22nd Appellant (Appellant in**  **HCMA 404/2018)** | | | |
|  | | **LAM KIN FAT** | **23rd Appellant (Appellant in**  **HCMA 405/2018)** | | | |
|  | | **CHICK WAI HO** | **24th Appellant (Appellant in**  **HCMA 415/2018)** | | | |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Cheung PJ and  Lord Sumption NPJ |
| Date of Hearing: | 1 September 2020 |
| Date of Judgment: | 1 September 2020 |
| Date of Reasons for Judgment: | 23 September 2020 |

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|  | **REASONS FOR JUDGMENT** |  |

Chief Justice Ma:

1. I agree with the Reasons for Judgment of Mr Justice Fok PJ.

Mr Justice Ribeiro PJ:

1. I agree with the Reasons for Judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

***A. Introduction***

1. Over the past decade, a form of transport has developed in many cities around the world from the use of new computer and internet technologies, including mapping and payment software programmes, that enable drivers of cars and passengers to locate one another, whether or not through third parties, and to request, provide and pay for carriage through the medium of their smartphones. The question that arises in this appeal is whether, in this jurisdiction, drivers who carry passengers in this manner can be guilty of the offence of contravening s.52(3) of the Road Traffic Ordinance (Cap.374) (“the RTO”). On the facts of this case, for the reasons which follow, an affirmative answer must be given to that question. Consequently, at the hearing, after hearing counsel for the appellants, the Court dismissed the appeal for reasons to be given in due course. These are my reasons for dismissing the appeal.
2. By s.52(3) of the RTO, it is provided that:

“(3) No person shall—

(a) drive or use a motor vehicle; or

(b) suffer or permit a motor vehicle to be driven or used, for the carriage of passengers for hire or reward unless –

(i) the vehicle is licensed as a public bus, public light bus or taxi;

(ii) the vehicle is licensed as a private bus and the passengers are students, teachers or employees of an educational institution, disabled persons, or persons employed to assist disabled persons;

(iia) the vehicle is licensed as a private light bus and is used—

(A) as a school private light bus; or

(B) exclusively for the carriage of persons who are disabled persons and persons assisting them; or

(iii) a hire car permit is in force in respect of the vehicle.”

1. Contravention of the prohibition in s.52(3) is an offence under s.52(10) of the RTO which relevantly provides:

“(10) Any person who contravenes—

(a) this section, other than subsection (2) [concerning user of an unlicensed rickshaw], commits an offence and is liable in the case of a first conviction for that offence to a fine of $5,000 and to imprisonment for 3 months, and in the case of a second or subsequent conviction for that offence to a fine of $10,000 and to imprisonment for 6 months”.

1. The appellants each faced a single charge of “driving a motor vehicle for the carriage of passengers for hire or reward without a hire car permit” contrary to s.52(3) and s.52(10) of the RTO.
2. On the relevant dates charged, the appellants each drove and carried passengers in a private car in the following circumstances. The passengers, 21 of whom were undercover police officers and three of whom were civilians, had each used the Uber App on their smartphones to request a ride from a specified location to another specified location. 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 and the passenger was notified by the Uber App of the amount paid. Although there was no direct evidence of the receipt by the appellants of any payments relating directly to the particular trips, there was some evidence of Uber paying remuneration to some of them. There was no hire car permit in force in respect of any of the motor vehicles driven by the appellants.
3. On 17 July 2018, the appellants were each convicted by a magistrate of the offence charged and sentenced to fines ranging from HK$3,000 to HK$4,500.[[1]](#footnote-1) On 13 September 2019, their appeals against conviction to the Court of First Instance were dismissed.[[2]](#footnote-2) On 29 November 2019, the judge refused to certify that points of law of great and general importance were involved in his judgment.[[3]](#footnote-3) On 20 March 2020, the Appeal Committee granted leave to appeal to the Court of Final Appeal on the following question of law:

“What, on the true construction of the Road Traffic Ordinance, Cap.374, are the elements of the s.52(3) offence with which the applicants were charged, and in particular, what is the proper construction of the phrase ‘for the carriage of passengers for hire or reward’ as used in that sub-section?” [[4]](#footnote-4)

***B. The legislative scheme***

1. The issue to be addressed in this judgment, as will be seen when the appellants’ case is discussed below, is one of statutory construction of s.52(3) of the RTO. It is therefore convenient to begin by setting out the legislative scheme in which that provision falls.

***B.1 Prohibition on certain types of user of vehicles***

1. As might be expected from its subject matter, the RTO is an ordinance of considerable breadth. Its long title states that it is “[t]o provide for the regulation of road traffic and the use of vehicles and roads (including private roads) and for other purposes connected therewith.” In addition to the principal ordinance, there are regulations in subsidiary legislation covering activities including the construction and maintenance of vehicles, driving licences, parking, public service vehicles, the registration and licensing of vehicles, safety equipment, traffic control and so forth.
2. Part 6 of the RTO is headed “Use, Sale and Hire of Vehicles” and s.52 is the first section in that part. The heading of s.52 itself is “Restriction on the use of vehicles” and it contains a series of prohibitions in respect of various types of vehicles and activities. The prohibitions apply unless the vehicles concerned have been properly licensed. Section 52 essentially imposes a licensing regime as its regulatory purpose.
   1. In *HKSAR v Cheung Wai Kwong*, the Court addressed the prohibition in s.52(1) and made certain observations about the legislative purpose of licensing under that provision.[[5]](#footnote-5)
   2. In this appeal, we are concerned with the prohibitions in s.52(3), namely on (a) the driving or use of a motor vehicle for the carriage of passengers for hire or reward, and (b) the suffering or permitting of a motor vehicle to be driven or used for the carriage of passengers for hire or reward, unless the vehicle is licensed as a public bus, public light bus or taxi (s.52(3)(i)), or is licensed as a private bus or private light bus and used for particular types of carriage (s.52(3)(ii) and (iia)), or is a private car and there is a hire car permit[[6]](#footnote-6) in force in respect of it (s.52(3)(iii)).
   3. It is relevant to note one of the other prohibitions in s.52, namely s.52(6) which provides that: “No person shall permit or suffer a motor vehicle which is licensed as a private car, private light bus or private bus to stand or ply for hire or reward.”
   4. As will be seen, these or similar prohibitions have been part of the road traffic legislation in Hong Kong for many years.

***B.2 The hire car permit regime***

1. Section 52(3) applies to motor vehicles, which, as defined,[[7]](#footnote-7) covers any mechanically propelled vehicle. The present case is concerned, within that definition, with private cars. The prohibition in s.52(3) does not apply to a private car in respect of which a hire car permit is in force.
2. The regulations concerning hire car permits are contained in Part III of the Road Traffic (Public Service Vehicles) Regulations (Cap.374D). A “hire car permit” is defined in reg. 13 as “a hire car permit referred to in regulation 14(1)” and the Commissioner for Transport is authorised under reg. 14(1) to issue, in respect of private cars, hire car permits for various types of services, including a private hire car service. The other hire car services, namely hotel, tour, airport or school hire car services are not relevant to the present case.
3. Restrictions on the issue of hire car permits and the considerations for their issue are contained in reg. 15. The matters to which the Commissioner for Transport may have regard to in determining whether to issue a hire car permit for a private hire car service include:

“(a) the extent to which the area from which the applicant proposes to operate the private hire car service is served by public transport;

(b) whether the applicant is able reasonably to demonstrate that a private hire car service is required in the area from which he proposes to operate; and

(c) whether the applicant has, in the area from which he proposes to operate the private hire car service, a place which, in the opinion of the Commissioner, is a suitable place to park the private car when it is available for hire.”[[8]](#footnote-8)

1. The Commissioner for Transport has power to limit the number of permits issued at any time for any type of hire car permit (reg. 19), fees are payable in respect of hire car permits (reg. 20) and provision is made for offences and penalties for breach of the conditions to which the hire car permit is subject (reg. 21), those conditions being set out in Schedule 3 (reg. 14(5)).

***B.3 Legislative history***

1. Since the parties each made submissions in their respective printed cases on the legislative history of the prohibition in s.52(3) and the hire car permit system, it is convenient now to set out some of the history.
2. There have been prohibitions on the carriage of passengers for hire or reward and on plying for hire for many years. These prohibitions date back as long ago as the Vehicles and Public Traffic Ordinance 1883,[[9]](#footnote-9) s.2 of which provided: “[n]o vehicle shall ply or be let for hire for the carriage of passengers, unless the owner thereof has obtained a licence for the same …”. That ordinance was replaced by the Vehicles and Traffic Regulation Ordinance 1912,[[10]](#footnote-10) which introduced a distinction between “private” and “public” vehicles. A “public vehicle”, as provided in s.2(h), included “every vehicle which plies for hire or is from time to time let out for hire or is intended to be let out for hire”.
3. The prohibitions on the carriage of passengers for hire or reward and on plying for hire continued to apply after 1912 in respect of private vehicles but were contained in various iterations of the subsidiary legislation rather than the principal ordinance. For example, the Road Traffic (Registration and Licensing of Vehicles) (Amendment) Regulations 1961[[11]](#footnote-11) provided, by reg. 26, that:

“(1) No person shall drive or use, or permit or suffer to be driven or used, any motor vehicle for a purpose other than that for which it is registered.

(2) No person shall drive, or use, or permit or suffer to be driven or used, for the carriage of passengers for hire or reward, any motor vehicle which is registered as a private car, as a private omnibus, as a goods vehicle or as a dual-purpose vehicle for use as a private car and as a goods vehicle.

(3) No person shall solicit, or attempt to solicit, any person for hire or reward to travel in any vehicle which is registered as a private car, as a private omnibus, as a goods vehicle or as a dual-purpose vehicle for use as a private car and as a goods vehicle.

(4) No person shall permit or suffer a motor vehicle which is registered as a private car or as a private omnibus to stand or ply for hire or reward.”

1. In 1977, significant amendments to the legislation were made by the Road Traffic (Amendment) (No.2) Ordinance 1977.[[12]](#footnote-12) These were introduced to address two mischiefs, namely (i) illegal public car hiring (colloquially known as “*hung pais*”) and (ii) illegal private car hiring (colloquially known as “*pak pais*”). This was achieved by:
   1. providing for a route to “reregister as a taxi a motor vehicle which immediately prior thereto was registered as a public car” upon payment of a premium;[[13]](#footnote-13)
   2. abolishing the former class of motor vehicles known as “public cars” by providing that the registration of a vehicle as a public car would cease to have effect from the expiry of the vehicle licence in force for that car at the commencement of the amending section;[[14]](#footnote-14) and
   3. introducing regulations under which the Commissioner for Transport might grant or cancel “permits authorizing the use of private cars for the carriage of passengers for hire or reward”.[[15]](#footnote-15)
2. Therefore, from the date of those amendments in 1977, public cars had to be re-registered as taxis, or they would become private cars when their then current vehicle licence expired, and private cars could carry passengers for hire or reward if authorised by a permit issued by the Commissioner for Transport.
3. Moving the second reading of the Road Traffic (Amendment) (No.2) Bill 1977, the Secretary for the Environment explained that:

“… this bill has four main purposes. First, it seeks to abolish the present category of public hire car and to provide for these cars to be converted to taxis on payment of a premium if their owners so wish. Secondly, it will provide for the issue of contract hire permits to owners of private cars who wish to operate hire services on a strictly controlled basis, or to public hire car owners who do not wish to convert their vehicles to taxis. …”[[16]](#footnote-16)

1. *Hung pais*, registered as “public cars”, were undesirable because, with red licence plates, they were well placed to impersonate taxis and to enjoy the privileges of being a taxi without having to observe the same controls and costs. As the Secretary explained:

“… these cars are distinguishable by the fact that they carry a red number plate. But many of them are painted to resemble taxis and carry some form of meter. Although they are intended to be hired by pre-arranged contract only and it is illegal for them to ply for hire on the streets as if they were taxis, the great majority of them do act as if they were taxis for at least a part of the day. Not being taxis, however, they charge what fares they like and pick and choose the journeys they are willing to undertake. Nevertheless, the public are encouraged to support the illegal operations of these vehicles, partly because they look like taxis and partly because of the shortage of legal taxis in relation to the demand.

At present there are more than 1,300 of these public hire cars and it is obviously wrong that the majority of them should continue to be permitted to ply for hire as taxis, without having paid the proper premium for the privilege and without being subject to the controls which are placed on taxi operators, including the carrying of the appropriate insurance for the protection of passengers. Nevertheless, the success of these illegal operations demonstrates a real public demand for the services which they provide. Having reviewed the situation, therefore, the Government has decided that public hire car operators should be given the opportunity to convert their vehicles to taxis on payment of a premium …”.[[17]](#footnote-17)

1. Similar reasoning also applied to *pak pais* offering themselves for hire. In the same speech, the Secretary stated:

“I turn now, Sir, to a further type of illegal operation which it is intended, by this bill, to bring under control. I refer here to the socalled [(sic)] ‘pak pai’ or private car offering itself for hire. While many pak pais perform a useful social function by providing personalized transport on a regular basis between homes, offices and schools, often operating from a particular building or block of flats, others function almost wholly as pirate taxis by plying for hire on the streets. None of them are effectively under any form of control as regards their mode of operation, the mechanical state of their vehicle or the insurance they carry for the protection of their passengers.

Clause 3 of the bill seeks to regularize this situation by providing for the issue by the Commissioner for Transport of contract hire car permits. If this bill is passed into law, draft regulations laying down conditions for the issue of these permits will subsequently be put to the Governor in Council to be made. What is intended, however, is that, for a fee of $500 per annum, or $175 for four months, a private car owner, whose vehicle has been inspected and found to be mechanically sound and who is fully insured against third party risks, can be issued with a contract hire car permit. The conditions of the permit will be that the vehicle should only be operated from a designated address, that it should have no distinctive markings and that its permit should be displayed but not be visible from outside the vehicle. The object of these last two conditions will be to discourage the driver from plying for hire and the public from hailing the car on the street. Public hire car operators who do not opt to convert to taxis will also be eligible to apply for contract hire car permits. I should add that, in certain cases, for instance cars run by hotels to provide a service for their guests, the Commissioner for Transport will be empowered to permit distinctive markings to be used, as these would not mislead the general public into trying to hail the car.

…

Sir, if this bill is enacted it will, I hope, bring a much needed measure of control and regulation to the operation of hire cars and the taxi trade, to the benefit of the legitimate operators themselves as well as to the general public who make use of their services.”[[18]](#footnote-18)

1. The hire car permit regime therefore introduced a distinction between legitimate and illegitimate *pak pais*, that is those with, and those without, a hire car permit. This distinction is important because it underlies the subsequent enactment of regulations to refine the regime.
2. The statutory regime for hire car permits was introduced by amendments to subsidiary legislation. By the Road Traffic (Registration and Licensing of Vehicles) (Amendment) Regulations 1977,[[19]](#footnote-19) a new Part IIA (consisting of regulations 29B, 29C and 29D) was added to those regulations which provided for the issue of hire car permits by application, and upon payment of the prescribed fee, to the Commissioner for Transport. There was also added to those regulations a prohibition in these terms:

“(2A) No person shall drive or use, or suffer or permit to be driven or used, any motor vehicle which is registered as a private car for the carriage of passengers for hire or reward unless there is in force in respect of that vehicle a hire car permit issued under regulation 29C.”

1. The Road Traffic (Registration and Licensing of Vehicles) Regulations were then amended in 1981[[20]](#footnote-20) to include more detailed provisions for hire car permits. These included the introduction of separate types of hire car services for hotel, tour, airport, school and private hire car services. Restrictions on the issue of hire car permits and the considerations for their issue were contained in regulation 29D. In respect of hire car permits for a private hire car service, regulation 29D(5) provided:

“A hire car permit for a private hire car service may only be issued to the registered owner of the private car and, in determining whether to issue such a hire car permit, the Commissioner may have regard to, amongst other matters –

(a) the extent to which the area from which the applicant proposes to operate the private hire car service is served by public transport;

(b) whether the applicant is able reasonably to demonstrate that a private hire car service is required in the area from which he proposes to operate; and

(c) whether the applicant has, in the area from which he proposes to operate the private hire car service, a place which, in the opinion of the Commissioner, is a suitable place to park the private car when it is available for hire.”

1. In moving the second reading of the Road Traffic (Amendment) Bill 1981, the Secretary for the Environment re-stated the objective of the hire car permit regime and explained:

“The purpose of this Bill is to augment and clarify the provisions for the issue of contract hire car permits which were included in the amendments to the Road Traffic Ordinance enacted in June 1977. The intention behind those amendments was to provide existing pak pai operators with the general opportunity to legalize their operations. This Bill, by spelling out the proposed arrangements for the issue of permits, seeks to provide safeguards for the contract hire care scheme when it is brought fully into effect to ensure that this original purpose is maintained.

…

Here I must emphasize again that the primary objective of the scheme, in accordance with the intentions of previous legislation, is to provide an opportunity for existing and *bona fide* pak pai operators to legalize their business under certain controlled conditions. The operators concerned would be well advised to avail themselves of this opportunity because, thereafter, all illegal carrying without a contract hire car permit and all plying and soliciting for hire or reward by vehicles other than taxis will be subject to stiffer legal sanctions, such as the impounding of vehicles and the suspension of vehicle licences, in addition to the existing penalties of a $1,000 fine and imprisonment for three months for a first offence and six months for subsequent convictions. …”.[[21]](#footnote-21)

1. In 1982, a general revision of the Road Traffic Ordinance and its subsidiary legislation was carried out in response to the fragmentary structure of the old legislation which was considered to have become “unnecessarily complicated, confusing and cumbersome.”[[22]](#footnote-22) This led to the enactment of the current RTO.

***C. The appellants’ contentions on this appeal***

1. The appellants challenge their convictions on the basis that, on the facts found, the offence in s.52(3) of the RTO was not established. Essentially, the contention advanced on behalf of the appellants by Mr Jonathan Caplan QC[[23]](#footnote-23) is that, on its true construction, the phrase “for the carriage of passengers for hire or reward” in s.52(3) requires that, for the offence to be proved against them, each of the appellant drivers had to be shown to be driving for the purpose of fulfilling a direct agreement for carriage between themselves and the passenger carried from which each driver was to be rewarded.
2. The magistrate[[24]](#footnote-24) and the judge[[25]](#footnote-25) below both rejected this contention and, in this Court, Mr William Tam SC,[[26]](#footnote-26) for the respondent, submitted that they were correct to do so.
3. In this Court, the appellants advanced four bases for such a construction of s.52(3): (i) the wording of s.52(3) of the RTO; (ii) the legislative purpose of the provision; (iii) previous case law; and (iv) the technological advances since the enactment of the provision.

***D. The proper construction of “for the carriage of passengers for hire or reward” in s.52(3)***

1. It is now long-established in Hong Kong that the exercise of statutory construction involves “an integrated consideration of text, context and purpose”[[27]](#footnote-27) of the provision to be construed. The context of a statutory provision includes other provisions of the statute itself and, in seeking to ascertain its purpose, a statement made by the responsible official of the Government in relation to the bill in the Legislative Council may, sometimes, be used.[[28]](#footnote-28)
2. Applying those principles of statutory construction, and for the reasons that follow, I would reject the appellants’ construction of s.52(3), namely that the phrase “for the carriage of passengers for hire or reward” requires a direct agreement for carriage between the driver and passenger concerned. Whether considered individually or cumulatively, the bases advanced by the appellants do not provide a sound support for their construction of s.52(3).

***D.1 The wording of s.52(3)***

1. In the printed Case for the Appellants, it was contended[[29]](#footnote-29) that the use of the connecting word “for” twice in the phrase “for the carriage of passengers for hire or reward” in s.52(3) links the “hire or reward” and the “carriage of passengers”, therefore requiring a direct causative link between (i) the defendant’s act of driving, (ii) his carriage of passengers, and (iii) his reward “that is to be derived directly from that singular act of driving passengers”. He must, it was submitted, be driving for the sole purpose of the carriage of passengers for reward and “the offence is proven only if the Appellants were driving for the sole purpose of fulfilling a direct agreement for carriage between himself and the passenger (i.e. *for* the carriage of passengers) *from which* he was to be rewarded (i.e. *for* hire or reward)”.[[30]](#footnote-30)
2. Whilst there can be little doubt that s.52(3) requires there to be a link between the carriage of passengers and the hire or reward, it does not follow that the link must take the form of a single bipartite contract between the driver and his passenger. On the contrary, such a construction of s.52(3) would make no sense in the context of the driver of a public bus or public light bus (s.52(3)(i)), since the contract for the carriage would be between the passenger and the bus company; similarly, for a private bus (s.52(3)(ii)) or private light bus (s.52(3)(iia)). In addition, it would not sit with the distinction between the persons who drive the motor vehicle and the persons who use, suffer or permit the vehicle to be driven. Those words (“use”, “suffer or permit”) indicate that someone other than the driver may be involved in the carriage.
3. The context of s.52(3) therefore 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?
4. To illustrate this, one may take the example, put to counsel for the appellants by Lord Sumption NPJ at the hearing, of a taxi company that operates a fleet of 20 taxis and which takes telephone bookings for carriage from members of the public. If a caller telephoned and ordered a taxi to collect them (or their child) from their home and to drive them to a given destination on the basis that payment would be made to the taxi company by cash tendered at the end of the journey to the driver as the company’s agent, there is no reason why, as a matter of the language, the driver would not be properly described as driving the vehicle for the carriage of passengers for hire or reward.

***D.2 The legislative purpose of s.52(3)***

1. The appellants also contended in their printed case[[31]](#footnote-31) that the legislative purpose of s.52(3) was to prevent all cars, other than taxis, from plying for hire on the streets and that the abolition of “public hire cars” as a class of vehicle was to stop them plying for hire on the streets as if they were taxis. This mischief was also the reason for the controls imposed over *pak pais* by the introduction of the hire car permit regime.
2. It was further contended that, adopting a purposive approach, s.52(3) must be construed restrictively otherwise a driver under an extraneous contract, such as a chauffeur driving under an employment contract, would also be caught when carrying his employer’s friends of family or his employer’s employees or work associates. It was clearly not the intention of the legislature, the appellants contended, to target this sort of normal business or economic activity.[[32]](#footnote-32)
3. That the legislative purpose of s.52(3) is limited solely to a prohibition on plying for hire is, however, too narrow a description of the legislative purpose of s.52(3). I have already touched on this in Sections B.2 and B.3 above.
4. There are clearly multiple legislative purposes served by the RTO and its various provisions. In *Cheung Wai Kwong*, where the Court was concerned with the prohibition in s.52(1) of the RTO on the use of a vehicle unless registered and licensed, the legislative purposes were identified as including revenue generation, administrative regulation and road safety.[[33]](#footnote-33) The prohibitions in s.52(3) on the carriage of passengers for hire or reward unless a relevant licence or hire car permit is in force for the vehicle in question also serve those same legislative purposes. There is also an additional legislative purpose of s.52(3), read in the context of the RTO as a whole, which is the regulation of transport services businesses provided by a range of vehicles, including buses, taxis and private cars.
5. In this regard, it is relevant to note that there are various statutory provisions regulating such transport services businesses. Thus:
   1. Public service vehicles are defined in s.2 of the RTO as “any motor vehicle registered as a public bus, public light bus or taxi, or as a private car in respect of which a hire car permit is in force” and such vehicles are subject to regulations for their licensing and operations in the Public Bus Services Ordinance (Cap.230), Public Bus Services Regulations (Cap.230A), and Road Traffic (Public Service Vehicles) Regulations (Cap.374D).
   2. Taxis are subject to the requirement of a taxi licence (RTO, ss.22(1) and 25), and licensing and public safety requirements, namely:
      1. the requirement in Part III of the Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap.374A) that the taxi pass a vehicle examination every year for the licence to be renewed;
      2. the provision that a person cannot obtain a taxi driving licence unless he has at least three years’ driving experience and does not have any serious driving conviction within the previous five years (Road Traffic (Driving Licences) Regulations, Cap.374B, reg. 8), and the requirement that he be tested on his familiarity with the taxi regulations and local places and routes (Cap.374B, reg. 33 and Schedule 8); and
      3. the requirements that taxis take the most direct practicable route and charge a fare according to a prescribed schedule of fares (Cap.374D, regs. 37(d) and 47); the fare must be calculated by taximeter, to be tested every six months (Cap.374A, reg. 44(1)).
   3. Public buses are operated under franchises granted under s.5 of the Public Bus Services Ordinance (Cap.230), which requires that: the franchisee must provide a proper and efficient service (s.12) and comply with the condition of the franchise (s.5(3)(c)); the bus service may only operate on specified routes (s.11) and its operation is subject to controls over matters such as fares, routes and frequency (ss.13-16A).
   4. Non-franchised public buses and public light buses are operated under passenger service licences granted under s.27 of the RTO and the Road Traffic (Public Service Vehicles) Regulations (Cap.374D), Part II, pursuant to which:
      1. each passenger service licence is granted at a fee payable to the Government (Cap.374D, reg. 10) and is valid for no more than five years (Cap.374D, reg. 6);
      2. the issue and renewal of passenger service licences are subject to policy considerations such as road traffic conditions and operator’s standard of service (Cap.374, s.28); and
      3. conditions may be imposed on passenger service licences regarding the use of vehicles, such as the number or type of vehicles, the areas and routes, stopping and pick-up points, fares to be charged and frequency and period of service (Cap.374, s.29(1)(b)).
   5. Public buses and public light buses are subject to detailed requirements regarding:
      1. their construction and maintenance (Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap.374A), Part III);
      2. the picking up and setting down of passengers (Cap.374D, reg. 33);
      3. the cleanliness and conduct of drivers and passengers (Cap.374D, regs. 44-46); and
      4. the need for an applicant for a driving licence for a public light bus to complete a pre-service course (Cap.374B, reg. 8A).
   6. Hire car permits are issued only if the Commissioner for Transport is satisfied that the requisite policy of insurance and vehicle licence are in force and that the type of hire car service is reasonably required (Cap.374D, reg. 14(3)). In determining whether to issue a hire car permit, the Commissioner will have regard to the various matters stipulated in relation to each type of hire car service (Cap.374D, reg. 15). The matters relevant to the issue of a hire car permit for a private hire car service are those specified in reg. 15(5) (set out at [14] above). The respondent informed the Court that there are currently 1,040 private hire car permits in force, as against 18,163 taxis currently in operation in Hong Kong.[[34]](#footnote-34)
6. The various regulations referred to in the preceding paragraph demonstrate clearly that vehicular passenger carriage in Hong Kong is intended to be operated on a strictly controlled basis. A comprehensive statutory regime has been established for the regulation and control of the operational standards, safety and quality of the various services in question. These regulations form part of the context and purpose in which s.52(3) is to be construed. As the Court noted in *HKSAR v Ho Loy*,[[35]](#footnote-35) where the issue concerned regulations requiring compliance with a traffic sign, there is an important public interest in the statutory purpose of RTO provisions concerning the maintenance of road safety.[[36]](#footnote-36) This public interest is also engaged in relation to the provision of passenger transport services.
7. That the legislative purpose of the hire car permit regime is not limited to private vehicles plying for hire on the streets is also reinforced by reference to the Secretary for the Environment’s speech moving the second reading of the Road Traffic (Amendment) Bill 1981 (set out at [27] above), in particular his reference to the fact that, after the implementation of the scheme under which *pak pai* operators could legalise their businesses under “controlled conditions”:

“… all illegal carrying without a contract hire car permit ***and*** all plying and soliciting for hire or reward by vehicles other than taxis will be subject to stiffer legal sanctions”. (Emphasis added)

1. In any event, that the provisions of s.52(3) are not limited to the *pak pai* plying for hire on the streets is also demonstrated by the use of the prohibition against certain vehicles standing or plying for hire or reward in s.52(6). If s.52(3) were limited to the situation of a private hire car that was plying for hire or reward on the streets, there would be no need specifically to include a redundant prohibition of that activity in s.52(6). It must be assumed that the legislature intended a distinction between the two types of carriage activities in the two sub-sections. Since s.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.
2. The appellants made the point[[37]](#footnote-37) that there is no complaint here about the appellants not having valid third party insurance or their vehicles not being mechanically sound. Whilst this may be so, it does not detract from the lack of supervision of the mechanical soundness of their vehicles as compared with taxis. Nor does it necessarily mean that the more expensive third party insurance for commercial carriage, as opposed to domestic carriage, will have been arranged.
3. The appellants’ argument (see [39] above) that the construction of s.52(3) must be interpreted restrictively or else the offence could be committed by employed chauffeurs carrying passengers for their employers is unconvincing. There will, of course, be cases which raise a legitimate question as to whether a driver is using a vehicle for the carriage of passengers for hire or reward. 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 s.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.
4. The hire or reward arrangement envisaged in s.52(3) is a business one. In this context, it is useful to refer to the House of Lords’ decision in *Albert v Motor Insurers’ Bureau*.[[38]](#footnote-38) Although the issue in that case concerned whether a particular arrangement was carriage that required the driver to have compulsory third party insurance, the ratio of the decision was that “‘a vehicle in which passengers are carried for hire or reward’ meant a vehicle used for the systematic carrying of passengers for reward, not necessarily on a contractual basis, going beyond the bounds of mere social kindness and amounting to a business activity”.[[39]](#footnote-39) The point is perhaps most helpfully expressed by Lord Pearson in his speech where he said:

“One cannot fail to observe that a private motor car has passenger seats. The owner-driver of a private motor car can very easily be helpful and obliging to friends and acquaintances by giving them lifts in his car. He may himself like to have company on his journeys, but still he is conferring a favour. The passengers may, especially when this happens frequently, think it fitting that they should in return for the favour confer some benefit on the owner-driver. Many co-operative or reciprocal arrangements, which are natural uses of a private motor car, were suggested in the course of the argument. For instance, A and B may for their weekly game of golf travel to the golf course in A’s car driven by A, and B make his contribution by paying for A’s lunch or green fee or for the petrol that is bought on the journey. Mothers of children going to the same school may take turns at driving the children to and from the school. A party of men living in the same village and going to work in a city may take turns at driving the party in their respective cars. So long as such arrangements do not acquire the character of business arrangements they should be regarded as natural ways of using a private car as such and should not be regarded as involving the carriage of passengers for hire or reward.”[[40]](#footnote-40)

1. Carriage will be for hire or reward, therefore, only where it constitutes “something more than a friendly arrangement such as was found to exist in *Coward’s Case*”.[[41]](#footnote-41) The example of the employed chauffeur carrying passengers at the direction of his employer for his private purposes (which is not the case before us) can therefore be contrasted with the present case, where the appellants were providing a service to the public of on demand pick up of passengers and carriage to a destination of their choice, in return for payment from Uber for that carriage. This transportation service 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.

***D.3 The case law argument***

1. The appellants cited two cases concerning prosecutions of *pak pai* drivers as being consistent with their construction of s.52(3). These were *Kwong Pak-yam v The Queen*[[42]](#footnote-42) and *Ngai Kam-chung v The Queen*.[[43]](#footnote-43)
2. Those were cases of drivers who solicited passengers and carried them from one point to another in return for payment of a fare. They were held to have carried the passengers for reward. The cases were therefore both cases of bipartite direct contracts between the passengers and the drivers. The comments of Huggins J (as he then was) relied upon by the appellants as to the need for a contract between the driver and his passenger were case specific and, since he was not deciding the issue based on the facts of the present appeals, do not lend support to the appellants’ construction of s.52(3). He was certainly not purporting to construe s.52(3) as only being applicable in a bipartite direct contractual situation.

***D.4 The new technology contention***

1. The appellants contended that the business model of the Uber App was not in the contemplation of the legislature when enacting s.52(3), so it cannot have been the legislative intent to criminalise the conduct leading to the charges against the appellants. Reliance was placed on the case of *Transport for London v Uber London Ltd*[[44]](#footnote-44) in support of the contention that an updating interpretation of s.52(3) to take into account this new technology was not warranted.
2. Whilst it may be true to say that the Uber App was not in the specific contemplation of the legislature in 1982, it does not follow that the activity in which the appellants were engaged was not part of the mischief which the provisions of the RTO were intended to address. Since the offence also catches the user of a vehicle, as distinct from its driver, as well as anyone who suffers or permits it to be driven for the carriage of passengers for hire or reward, it does not follow that, if a *pak pai* driver had used a third party dispatcher to receive requests for rides and to act as an accounting middleman in the commercial arrangement, that such activity would not have been within the mischief of the offence. On the contrary, there is no obvious reason why that activity would not have been within the prohibition.
3. The *Transport for London* case is distinguishable. The issue there concerned the meaning of the word “taximeter” in s.11 of the Private Hire Vehicles (London) Act 1998 and the question was whether the Uber smartphone application provided to drivers that enabled information to be relayed to a server to calculate a fare was a taximeter within that provision. It was held that the essence of a taximeter was a device for calculating fares whereas the smartphone was a device for recording time and distance and not for calculating the fare. Accordingly, a smartphone was not a taximeter.
4. Instead, the present case raises the question of whether, merely because the Uber platform was used by passengers to request the appellants to pick them up and to give them the destination to which they wished to be carried, in return for a payment by the passenger to Uber and by Uber to the appellants, this falls outside the legislative intent of s.52(3) because that platform did not exist in 1982. For the reasons set out above, there is no good reason to hold that it does. This is simply an application of the principle that a statute is “always speaking”: see *HKSAR v Wong Yuk Man* (2012) 15 HKCFAR 712 at [27] and *R (Quintavalle) v Health Secretary* [2003] 2 AC 687 per Lord Bingham at [9]-[10]. It is also an example of the situation described by Lord Jowitt LC in *Joyce v Director of Public Prosecutions* [1946] AC 347 at p.366: “[i]t is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.” 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 s.52(3) and well within the mischief that the statutory scheme seeks to address.

***E. The elements of the offence under s.52(3) clearly established here***

***E.1 The actus reus of the offence***

1. Taking the above legislative purpose and context into account, the offence under s.52(3) is made out where it is established, to the requisite standard of proof, that:
   1. a person has driven or used a motor vehicle, or suffered or permitted another to do so;
   2. 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.
2. In relation to sub-paragraph (1) of the preceding paragraph, 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 *Cheung Wai Kwong*: at [26]-[29] for “drive”; at [30]-[34] for “use”, but subject to [35]-[37] in relation to vicarious user; and at [45] in relation to “suffer” or “permit”.
3. 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.

***E.2 The mens rea of the offence***

1. The respondent accepted[[45]](#footnote-45) that it is necessary for the prosecution to prove that the person charged has driven or used the vehicle “for the carriage of passengers” with knowledge, intention or recklessness, i.e. with full *mens rea*.
2. However, in relation to the element of the offence that the carriage of passengers be “for hire or reward”, the respondent contended[[46]](#footnote-46) that the presumption of *mens rea* has been displaced and that, instead, the offence is in the third alternative of cases described in *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at [96]. The respondent therefore contended that the prosecution is not obliged to prove the accused’s knowledge, intention or recklessness in relation to the carriage of passengers being “for hire or reward” but he will have a good defence if he can prove on the balance of probabilities that the prohibited act was done in the honest and reasonable belief that the circumstances were such that, if true, he would not be guilty of the offence.
3. This point is not open to the respondent on this appeal. The magistrate ruled against the prosecution on its submission that the offence was one of strict liability.[[47]](#footnote-47) As the judge pointed out, if the respondent had wanted to appeal against that ruling, it should have appealed by way of case stated. In any event, the judge agreed with the magistrate and rejected the prosecution contention that the offence under s.52(3) was one of strict liability.[[48]](#footnote-48)
4. In the present case, the magistrate drew as inferences based on his findings of primary fact 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.[[49]](#footnote-49) It was also an agreed fact that 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 offence was clearly established even if the presumption of *mens rea* in relation to the element of “for hire or reward” is not displaced.

***F. Disposition***

1. The proper construction of the phrase “for the carriage of passengers for hire or reward” is as set out above and, applying that construction to the facts of the present case, the appeal was accordingly dismissed.
2. This appeal concerned the ambit of the prohibition in s.52(3) of the RTO which is a pure question of law. Whether ride hailing services should be permitted to operate in Hong Kong, on the other hand, is a question of transport policy, not a question of law, and is not a matter for the Court to determine.

Mr Justice Cheung PJ:

1. I agree with the Reasons for Judgment of Mr Justice Fok PJ.

Lord Sumption NPJ:

1. I agree with the Reasons for Judgment of Mr Justice Fok PJ.

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| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
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| (Andrew Cheung)  Permanent Judge | (Lord Sumption)  Non-Permanent Judge |

Mr Jonathan Caplan QC, Mr Derek Chan SC and Ms Katrina KW Lee, instructed by Haldanes, for the Appellants

Mr William Tam SC, DDPP, Mr Marcus Lee SPP and Ms Cherry Chong PP, of the Department of Justice, for the Respondent

1. KCCC 3412-3430, 3432, 3496, 3969, 3971/2017 & 502/2018, [2018] HKMagC 3, Statement of Findings dated 8 August 2018 (Mr Joseph To, Magistrate). [↑](#footnote-ref-1)
2. HCMA 381-399, 401, 402, 404, 405 & 415/2018 (consolidated), [2019] HKCFI 2280, Judgment dated 13 September 2019 (Alex Lee J). [↑](#footnote-ref-2)
3. [2019] HKCFI 2899, Ruling dated 29 November 2019. [↑](#footnote-ref-3)
4. FAMC 58/2019, [2020] HKCFA 10, Determination dated 20 March 2020 (Ma CJ, Ribeiro & Cheung PJJ) at [4]. [↑](#footnote-ref-4)
5. (2017) 20 HKCFAR 524 at [20]. [↑](#footnote-ref-5)
6. RTO s.2 defines “hire car permit” as “a permit issued in accordance with this Ordinance authorizing the use of a private car for the carriage of passengers for hire or reward”. [↑](#footnote-ref-6)
7. RTO s.2. [↑](#footnote-ref-7)
8. (Cap.374D), reg. 15(5). [↑](#footnote-ref-8)
9. Ord. No. 5 of 1883. [↑](#footnote-ref-9)
10. Ord. No. 40 of 1912. [↑](#footnote-ref-10)
11. Made under the Road Traffic Ordinance 1957 (Ord. No. 39 of 1957). [↑](#footnote-ref-11)
12. Ord. No. 45 of 1977. [↑](#footnote-ref-12)
13. Road Traffic Ordinance (Cap.220) (“Cap.220”), s.4A. [↑](#footnote-ref-13)
14. Cap.220, s.4A(5). [↑](#footnote-ref-14)
15. Cap.220, s.3(1)(ga). [↑](#footnote-ref-15)
16. Legislative Council Official Report of Proceedings, 1 June 1977, p.966. [↑](#footnote-ref-16)
17. *Ibid.* [↑](#footnote-ref-17)
18. *Ibid.* pp.967-968. [↑](#footnote-ref-18)
19. L.N. 161 of 1977. [↑](#footnote-ref-19)
20. Road Traffic (Registration and Licensing of Vehicles) (Amendment) Regulations 1981 (L.N. 111 of 1981). [↑](#footnote-ref-20)
21. Legislative Council Official Report of Proceedings, 11 February 1981, pp.407-408. [↑](#footnote-ref-21)
22. Legislative Council Official Report of Proceedings, 28 July 1982, p.1107. [↑](#footnote-ref-22)
23. Appearing with Mr Derek Chan SC and Ms Katrina K.W. Lee. [↑](#footnote-ref-23)
24. Statement of Findings at [192]. [↑](#footnote-ref-24)
25. CFI Judgment at [65]-[67]. [↑](#footnote-ref-25)
26. Deputy Director of Public Prosecutions, appearing with Mr Marcus Lee, Senior Public Prosecutor, and Ms Cherry Chong, Public Prosecutor. [↑](#footnote-ref-26)
27. *HKSAR v Chui Shu Shing* (2017) 20 HKCFAR 333 at [42] (French NPJ). [↑](#footnote-ref-27)
28. *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at [13]-[14] (Li CJ). [↑](#footnote-ref-28)
29. At [29]-[31]. [↑](#footnote-ref-29)
30. Case for the Appellants at [31] (italics in original). [↑](#footnote-ref-30)
31. At [27] and [34]. [↑](#footnote-ref-31)
32. Case for the Appellants at [32]-[33]. [↑](#footnote-ref-32)
33. (2017) 20 HKCFAR 524 at [20]. [↑](#footnote-ref-33)
34. Case for the Respondent at [33]. [↑](#footnote-ref-34)
35. (2016) 19 HKCFAR 110. [↑](#footnote-ref-35)
36. *Ibid.* at [20]. [↑](#footnote-ref-36)
37. Case for the Appellants at [28]. [↑](#footnote-ref-37)
38. [1972] AC 301. [↑](#footnote-ref-38)
39. *Ibid.* at p.302B. [↑](#footnote-ref-39)
40. *Ibid.* at pp.332F-333A. [↑](#footnote-ref-40)
41. *Kwong Pak-yam v The Queen* [1965] HKLR 931 at p.936 (referring to *Coward v Motor Insurers’ Bureau* [1963] 1 QB 259). [↑](#footnote-ref-41)
42. [1965] HKLR 931. [↑](#footnote-ref-42)
43. [1965] HKLR 941. [↑](#footnote-ref-43)
44. [2015] EWHC 2918 (Admin), [2016] RTR 12 per Ouseley J at [39]. [↑](#footnote-ref-44)
45. Case for the Respondent at [58]. [↑](#footnote-ref-45)
46. *Ibid.* at [61]. [↑](#footnote-ref-46)
47. Statement of Findings at [172]-[185]. [↑](#footnote-ref-47)
48. CFI Judgment at [88]-[95]. [↑](#footnote-ref-48)
49. Statement of Findings at [191]. [↑](#footnote-ref-49)