Awtar Singh s/o Margar Singh v Public Prosecutor
[2000] SGHC 133

Case Number : MA 323/1999

Decision Date : 08 July 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : R Palakrishnan and R Thrumurgan (Palakrishnan & Partners) for the appellant; Christopher Tang (Deputy Public Prosecutor) for the respondent

Parties : Awtar Singh s/o Margar Singh — Public Prosecutor

Evidence – Weight of evidence – Identification parade – Whether necessary to conduct identification parade – Whether failure to conduct parade affected probative value of identification evidence

Immigration – Harbouring – Immigration offenders – Abetment by intentionally aiding in harbouring of immigration offenders – Subletting to immigration offenders – Whether mens rea proved beyond reasonable doubt – Whether appellant knew or ought to have known sub-tenants' status as illegal immigrants

: ***Introduction***

This was an appeal against the decision of District Judge Valerie Thean who convicted the appellant of eight charges of abetment by intentionally aiding one `Anwar` in the harbouring of eight immigration offenders, by allowing him to sublet the premises at 154A Rangoon Road to the immigration offenders, an offence punishable under s 57(1)(ii) of the Immigration Act (Cap 133) read with s 109 of the Penal Code (Cap 224). The appellant was sentenced to eight months` imprisonment on each charge and the sentences on three of the charges were ordered to run consecutively. Hence, he faced a total of 24 months` imprisonment. He appealed against both his conviction and sentence. Having considered the submissions of the parties, I dismissed the appeal. I now set out my reasons.

The background

At all material times, the appellant was the joint owner of the premises at 154A Rangoon Road together with his sister-in-law. On 2 July 1998 at about 10am, the premises were raided by a party of police officers. The arresting officer was one Chan Chung Hwa (PW1) who gave evidence that there were 12 Bangladeshi nationals at the premises at the time of the raid and none of them could produce any valid travel document. They were subsequently placed under arrest. Amongst those arrested were the eight immigration offenders named in the charges against the appellant. They were Md Yasin (PW2), Habijul Islam (PW3), Md Anwar Hossain (PW4), Nittagopal (PW5), Md Hamid (PW6), Md Rahman (PW7), Ebadat Khan (PW8) and KH Azadur Rahman (PW9) (collectively referred to as the `immigration offenders`). Shortly after their arrest, they were charged and convicted of the offence of illegal entry into Singapore under s 6 of the Immigration Act in July 1998. They were each sentenced to one month`s imprisonment and four strokes of the cane.

The evidence of the prosecution

The immigration offenders had stayed at the premises for varying periods of time from March 1998 to June 1998 up to the date of their arrest on 2 July 1998. It was their evidence that Anwar had allowed

them to reside at the premises for a monthly rental ranging from $120 to $130. According to PW7, PW8 and PW9, Anwar agreed to let them clean the house to offset their monthly rent after they told him that they did not have enough money with them. All of them paid their rent to Anwar directly. They also gave evidence that Anwar made the decision to rent the premises to them without consulting anyone else. Throughout their stay at the premises, no one asked them about their immigration status at all.

Apart from PW9, the rest of the immigration offenders testified that they had seen the appellant at the premises on a number of occasions and that the appellant had never spoken to any of them. PW2 said that he had seen the appellant on two occasions. On the first occasion, the appellant was at the premises for about 15 minutes to examine a broken glass window. At that time, Anwar was at work and there were eight to ten persons at the premises. When Anwar returned home from work that day, he asked PW2 if anyone came to see the window. When PW2 answered in the affirmative, Anwar told him that that person was the owner of the premises. On the second occasion, the appellant collected rent from Anwar and there were about 20 to 25 people at the premises then. The appellant did not speak to him on both occasions.

PW3`s evidence was that the appellant came with a carpenter to fix a damaged door. They stayed for about an hour or two. There were about 20 persons at the premises. On another occasion, the appellant came and spoke to Anwar for approximately 15 minutes. The appellant did not speak to PW3.

PW4 also saw the appellant twice. He said that a fire once broke out at a storeroom within the premises. According to him, the appellant came to the premises that day and spoke to Anwar about how the fire occurred. He was there at about 11pm and he stayed for about an hour. There were 12 to 15 persons at the premises at that time. He also saw the appellant with Anwar when he was walking on Serangoon Road. Anwar was making a telephone call and the appellant was standing next to him. On both occasions, he was not introduced to the appellant.

Similarly, PW5 recounted two incidents where he saw the appellant. The first time was when the storeroom next to the kitchen caught fire. It was at about 9pm. He ran downstairs together with about 40 to 50 others who were at the house at that time because they were all afraid of further police investigations. When he was downstairs, he saw the appellant talking to Anwar. He did not speak to the appellant. The second occasion was at about 10am to 10.30am when the appellant came to check on the repairs required to be made as a result of the fire. At that time, PW5 was cooking in the kitchen. He was not introduced to the appellant and the appellant also did not speak to him.

PW6 said he saw the appellant once at the premises. It was about 9.30am to 10am. There were about eight to ten persons in the house. The appellant asked him to open the door. He subsequently saw the appellant cleaning up some broken window glass. The appellant did not speak to him or ask him any questions. He was informed by the other sub-tenants that the appellant was the owner of the premises.

PW7 said he saw the appellant on several occasions and he was told by Anwar that the appellant was the owner of the premises. He testified that the appellant would inspect the premises in the evenings and on one occasion, he was seen collecting a PUB bill and some money from Anwar. The appellant did not check on him or ask him any questions. The first time he saw the appellant was when he came to the premises at about 7pm or 8pm to collect rent from Anwar. He saw Anwar hand over an envelope to the appellant. The appellant was there for about 15 minutes to half an hour. The next time he saw the appellant was when the appellant went to the premises to inspect a faulty toilet

upon Anwar`s request. The appellant remained there for about 45 minutes. The third time was on the 7th or 8th of the following month when the appellant came to collect rent from Anwar. He stayed for about half an hour. On these occasions, there were about 25 to 40 persons at the premises when the appellant was there. He did not check the premises room by room and he also did not speak to anyone apart from Anwar.

PW8 also saw the appellant at the premises on several occasions in the evening. The appellant would be seen inspecting the premises with Anwar. Once, he saw Anwar hand him a PUB bill and an envelope containing money. He was later told by Anwar that the envelope contained rental collection from the sub-tenants and that the appellant was the owner of the premises. According to him, Anwar never introduced the appellant to anyone and the appellant also did not speak to him. The appellant, accompanied by Anwar, would check that things were orderly in the premises and would stay for about 15 to 20 minutes. He said that the appellant would visit the premises two or three times a week in the evening. About 30 to 35 people would be there on these occasions. The appellant would go to the toilet or the rooms but he would not talk to anyone.

PW9`s evidence was that he had never seen the appellant before. He said that on the average, there were about 30 to 35 persons at the premises.

All of them remained at the premises until the day of their arrest and they disagreed with the defence counsel that Anwar had asked them to vacate the premises soon after the fire.

Sergeant Lee Cher Kwang (PW10) was the investigating officer who interviewed the appellant and recorded two statements from him on 8 August 1998 and 2 February 1999. The appellant told him that he had leased the premises to one Md Shohel. When Md Shohel returned for Bangladesh for his wedding in March 1998, he put his brother Anwar in charge temporarily. The appellant gave him Anwar`s pager number. PW10 attempted paging Anwar but he did not get any response. He checked the number with Singtel and he was told that it belonged to Md Shohel. He then checked with the Ministry of Manpower and discovered that Md Shohel was a work permit holder whose permit had terminated in May 1998. He did not determine whether Md Shohel was still in Singapore because the appellant told him that it was Anwar who collected the rent. Furthermore, Md Shohel was not implicated by any of the witnesses.

The defence

The appellant was in the business of marketing and supplying curry powder and spices to wholesalers and retailers. The appellant admitted that he was the owner of the premises which were purchased in mid-1996 in both his and his sister-in-law`s names. The premises were originally rented to a construction firm to house their workers. Upon the termination of that tenancy, the appellant put up a signboard to advertise for new tenants. Md Shohel, a Bangladeshi national, telephoned the appellant indicating his interest in renting the premises. They met at a coffee shop along Serangoon Road together with the appellant`s wife, sister-in-law and mother-in-law. Md Shohel was accompanied by Anwar and another Bangladeshi. The appellant was introduced to Anwar as Md Shohel`s brother. It was agreed during this meeting that the tenancy was for one year commencing on 1 February 1997 at a monthly rental of $3,550. Md Shohel told him that his friends, who had entered Singapore legally, would be staying at the premises. As the apartment had six rooms, the appellant told him that he could allow up to 24 persons to stay there but he did not decide the rent for each individual sub-tenant. A formal tenancy agreement dated 28 January 1997 was entered into between the parties and cl 2(l) stated that Md Shohel `shall not allow overstayers or illegal workers into the demised premises`.

The appellant also told Md Shohel that he needed the particulars of the persons staying at the premises because he noticed that the government had been very strict on the harbouring of illegal immigrants. In mid-February 1997, Md Shohel gave him a list of 21 photocopied work permits belonging to the residents including himself. The appellant`s evidence was that he went to the premises and checked the names of all the sub-tenants against this list. They produced photocopies of their work permits as they said that the originals were kept by their employers. He used to conduct such checks two or three times a month.

In February 1998, the tenancy was extended for another year on the same terms. Again, the appellant asked for a list of sub-tenants residing in the premises. This list, which was tendered in court, also contained the photocopied work permits of 21 persons. In March 1998, Md Shohel told him that he was going back to Bangladesh for his wedding and that Anwar would take over the premises. According to the appellant, he used to go to the premises once a month with this list. He said that the checks became less frequent as everything was in order during his previous checks. He was unable to verify all the persons on the list because there was always less than 10 persons at the premises during his visits. He would however check the identities of the residents he saw and he found that the list was in order. He denied having seen any of the immigration offenders at the premises while he was there.

On 9 March 1998, a fire occurred at the spiral staircase for the fire escape found at the rear of the premises. The premises were not damaged. Subsequently, he received an enforcement notice from the Urban Redevelopment Authority (`URA`) dated 23 April 1998 directing him to discontinue the unauthorised use of the premises as workers` quarters. The appellant then informed Anwar that he would have to vacate the premises. Anwar told him that he required some time. The appellant`s wife then liaised with one Mr Yap from the URA requesting for more time to comply with the notice. The appellant told Anwar to leave by end of June. However, at the end of June, Anwar again said that he needed a few more weeks.

The appellant`s evidence was that from April to June 1998, he hardly went to the premises because he was busy dealing with the URA matter. Furthermore, he had already asked Anwar to vacate the premises. In mid-July, Anwar told him that there was a raid at the premises which resulted in the arrest of some of the residents when the appellant took possession of the premises. At the appellant`s request, Anwar cleaned up the premises and returned him the key. Anwar also asked for the return of a deposit but the appellant said that he would return it to Md Shohel. Thereafter, Anwar telephoned the appellant several times to ask for the deposit. At the end of July, PW10 visited the appellant and asked him to assist in the police investigations. After that, the appellant contacted Anwar and scolded him. Anwar hung up the phone on him and he never responded to the appellant`s paging anymore.

The appellant claimed that he would have chased Anwar out if he knew that he was leasing the premises to illegal immigrants. Further, he did not believe that the premises could accommodate 60 persons. As far as he was concerned, there should only be about 24 sub-tenants.

During cross-examination, he said that he saw Md Shohel`s passport and work permit at the time the tenancy agreement was signed and both were valid. He did not check Anwar`s particulars because Anwar was not going to reside at the premises. Md Shohel told him that his rent of $3,550 would be paid out of rental collected from his friends. As their friends obtained their salaries on 4th to 6th day of the month, he would be paid on 7th to 9th of each month. Since March 1998, he said that he had no fixed routine for checking on the premises. If he was near the premises, he would check. He estimated that he checked about twice a month.

He was also questioned about Md Shohel`s permit, which according to the list of photocopied permits, was due to expire on 19 November 1998 before the end of the second tenancy agreement. The appellant explained that Md Shohel had assured him that he would renew his work permit and if not, he would cancel the tenancy. In respect of the other work permits on the list which would expire sometime in 1998, his response was that if one of the sub-tenants were to leave, Md Shohel would replace him. He would also keep the appellant updated on the changes. When questioned further on how Md Shohel would update him, he did not reply but merely reiterated that everyone who stayed at the premises must have valid documents as required under the tenancy agreement.

The decision below

It was conceded that Anwar had harboured the immigration offenders. The main contention in the court below was whether the appellant had abetted Anwar to commit the offences of harbouring. The district judge held that the actus reus of the offence of abetment had been made out. The appellant had allowed Anwar to be in charge of the premises during the material times and he had permitted him to collect rent from the sub-tenants to pay the rent to him. He had further facilitated Anwar`s ability to harbour those immigration offenders by assisting him in the upkeep of the premises: he fixed a faulty window, door and toilet; and supervised the repair of fire damage on a spiral staircase outside.

With respect to the mens rea of the appellant, the district judge held that the presumption of knowledge under s 57(7) of the Immigration Act as well as the due diligence test under sub-ss 57(9) and (10) were inapplicable in this case. She was of the view that these provisions only applied to a person harbouring or employing the immigration offender but not to a person, such as the appellant, who had not been charged for either offences. Thus, the prosecution must show that the appellant intended to allow Anwar to harbour persons whom the appellant knew to be immigration offenders.

The district judge accepted the evidence of PW2 to PW8 that they were present when the appellant went to the premises to collect rent and to fix items or replace damaged equipment. She also accepted their evidence that the appellant did not address any queries to the residents at the premises. She did not believe the appellant that he had checked the faces of the persons at the premises against the list of photocopied work permits. She found his evidence to be wholly unbelievable because he could not furnish any details about the people he met except that they were on his list even though he had earlier claimed to be on such familiar terms with them that he could pick out any unfamiliar faces.

She also found the appellant to be an `inconsistent and evasive witness`. She further held that the list of photocopied work permits was sought and obtained by the appellant merely as documentation to enable him to cover his tracks should he be caught as this was evident from the fact that he could not provide a satisfactory explanation on how Md Shohel would update him on any changes in the identities of the sub-tenants.

On the whole, she found that the appellant maintained a high degree of control over the premises. When he went to the premises, he saw a large number of sub-tenants. Even though he expected up to 24 sub-tenants, PW2 to PW8, who were on the premises were clearly not one of those workers found on his list. Yet, he was not curious about them and his main concern was just to collect his rent from Anwar. He had also lied on several material issues. On the evidence, she found that the appellant`s blindness to the sub-tenants` immigration status was `wilful and deliberate` and as such, it could be inferred from the facts that the appellant knew and consented to Anwar`s illegal activities.

With respect to the eighth charge in which the appellant was alleged to have abetted Anwar in harbouring PW9, the district judge held that the charge was made out even though PW9 never met the appellant. She held that the appellant`s assistance enabled Anwar to harbour all the offenders and not merely the individuals whom he chanced upon during his visits.

Appeal against conviction

The defence counsel submitted that the district judge had erred in finding that the immigration offenders were credible witnesses in view of the discrepancies in their evidence. Further, she had failed to appreciate the significance of the poor quality of identification evidence produced by the seven immigration offenders. It was also argued that the inferences she had drawn from the facts were least favourable to the appellant and were incorrect. He contended that the district judge had erred in finding that the requisite mens rea was made out.

Credibility of the prosecution witnesses

The defence counsel pointed out various discrepancies in the evidence of the prosecution witnesses, none of which I regarded as material discrepancies. As I stated in **Ng Kwee Leong v PP** [1998] 3 SLR 942 , discrepancies should be considered to be immaterial if they have no direct bearing on the facts in issue. In other words, they had nothing to do with the question whether it was the appellant who committed the offence. In my view, none of the discrepancies highlighted by the defence counsel were so serious as to justify the appellate court overturning the district judge`s assessment of their credibility, bearing in mind that she was in the best position to make that assessment as she was present throughout the trial when they gave their evidence.

However, I would briefly deal with two particular discrepancies relied on by the defence counsel. The first related to the fire incident. The defence counsel highlighted the fact that a fire took place at the premises on 9 March 1998 at about 8.23pm as evidenced in a Fire Report prepared by the Singapore Civil Defence. He argued that PW4 must have lied when he testified that he met the appellant at the premises on the day when there was a fire at the premises because he only arrived in Singapore on 30 March 1998, some three weeks after the fire took place. The same argument was raised against PW5 who also spoke of the fire when he only arrived in Singapore on 30 March 1998. His claim that the fire took place in April 1998 further cast doubt on his veracity.

To my mind, this line of attack was simply untenable. To begin with, the fire which took place on 9 March 1998 occurred at the spiral staircase located at the rear of the premises. By the appellant`s own admission, no damage was done to the premises that time as the fire took place outside. By contrast, PW4 and PW5 spoke of the storeroom ***within*** the premises which caught fire and, according to PW5, the storeroom was located next to the kitchen. It was entirely unclear to me whether the fire incident which took place on 9 March 1998 was the same one which was referred to by the witnesses. As this contention was never put to the witnesses and the evidence before me suggested that there could have been two separate fire incidents which occurred in the vicinity of the premises, I could not accept the defence counsel`s suggestion that PW4 and PW5 had lied in court.

The other discrepancy related to the disparity in the number of residents which the witnesses claimed to have resided at the premises during their stay. While the disparity in the figures was not minor, the discrepancy was nevertheless immaterial. Even if these discrepancies were specifically brought to the attention of the district judge, I had much doubt as to whether it was necessarily the case that she

would have disbelieved their evidence on the material issue of whether the appellant was aware of their residence in the premises. Moreover, the discrepancies could be explained on the ground that it was not easy to keep track of the exact number of residents at the premises given that most of them did not reside there on a permanent basis. Hence, it was not entirely inconceivable that they might be mistaken in this respect. The fact remained that their evidence on their encounters with the appellant at the premises was unshaken during cross-examination.

Hence, there was no basis for disturbing the district judge`s assessment of the credibility of the immigration offenders.

Identification evidence

The defence counsel argued that the police ought to have carried out an identification parade because there was an issue as to whether the appellant was the person whom PW2 to PW8 saw at the premises. After all, PW2 to PW8 were never introduced to the appellant. Since their evidence was in direct contradiction to that of the appellant`s who denied ever having seen them, an identification parade should have been conducted. Although this issue was not brought up in the court below by the defence counsel who conducted the trial, he submitted that a new point could be taken on appeal, if there was a risk of failure of justice.

Whether it is necessary to conduct an identification parade depends on the circumstances of each case. Obviously, it would not be necessary when the accused person is arrested while committing the offence. In **Maidin Pitchay & Anor v PP** [1968] 1 MLJ 82 , the first appellant was convicted for using a car as a public service vehicle without a valid licence. He was detained by the police while he was driving the car. MacIntyre J held that an identification parade was not necessary in such a case because there was no question of mistaken identity as he was detained while in the act of conveying the passengers. However, if the accused person is not known to the eyewitness, it may be prudent for the police to conduct an identification parade not only to ensure that the witness`s memory regarding the identity of the accused person is tested but also to ensure that the investigation is proceeding on the right track and that the person arrested is the real culprit. In **PP v Sarjeet Singh & Anor** [1994] 2 MLJ 290 , the respondents were tried for robbing a taxi driver. The identification evidence of the taxi driver was found to be wholly unsatisfactory. No identification parade was conducted even though the alleged incident took place in the dark and there was no evidence that the taxi driver knew his assailants prior to the robbery. In fact, he was not asked by the prosecuting officer to identify his assailants in court on the day of the hearing. The court was of the view that an identification parade ought to have been conducted. Abdul Malik Ishak JC explained at p 294:

> *In my judgment, the necessity of holding an identification parade can only arise where the accused persons are not previously known to the witnesses (see **Mehtab Singh & Ors v State of Madhya Pradesh** [1975] AIR 274). It follows, therefore, that where the accused persons are already known to the witnesses, the question of identification parade does not arise. Here, there was no evidence that the taxi driver knew the trio prior to the robbery. Therefore, the police should have conducted an identification parade and the failure to organize one gives rise to the lurking suspicion that if conducted, the taxi driver could not identify the trio.*

The learned judge went on to say that the failure to hold an identification parade in such a case would not invariably vitiate the trial but it would be `undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification`. In that case, the acquittal

of the respondents was affirmed after having regard to the above and the fact that a material prosecution witness was found to be an unreliable witness.

The appellant here was not a complete stranger to the witnesses even though he had not been formally introduced to them. He had been seen at the premises on a number of occasions and he had stayed there for a certain period of time during each visit, thus giving the witnesses ample opportunity to observe him. While the failure to conduct an identification parade may in certain circumstances render the identification evidence of the eyewitness suspect, I was of the view that in the circumstances of this case, the failure to do so did not adversely affect the probative value of their evidence on this identification issue.

Ultimately, the quality of their identification evidence ought to be assessed in accordance with the guidelines laid down in **R v Turnbull** [1977] QB 224 which were adopted by the Court of Appeal in **Heng Aik Ren Thomas v PP** [1998] 3 SLR 465 . The more material question here was whether the identification evidence was of good quality, taking into account the circumstances in which the identification by the witness was made. In deciding whether the identification evidence is good, a non-exhaustive list of factors to be considered would include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness saw the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. Having perused the record of proceedings below, I found nothing which seriously cast doubt on the reliability of their identification evidence. The defence counsel was unable to convince me otherwise, especially since the evidence of PW2 to PW8 that they saw the appellant at the premises was not challenged at trial at all.

Incorrect inferences drawn

The defence counsel argued that the district judge`s finding that the appellant was an `evasive and inconsistent` witness was based on incorrect inferences drawn from the evidence. In particular, he contended that the district judge had erred in holding that the list of 21 photocopied work permits was obtained merely as documentation to enable the appellant to cover his tracks; that he had lied in court about not having seen PW2 to PW8 at the premises; and that he had lied about offering to set up a meeting between PW10 and Anwar.

It is settled law that a court will be slow to overturn the trial judge`s findings especially when the trial judge has made an assessment of the credibility and veracity of the witness, unless it can be shown that his assessment was plainly wrong or against the weight of the evidence before him: **Lim Ah Poh v PP** [1992] 1 SLR 713 . If however the trial judge`s assessment of a witness`s credibility was based not so much on his demeanour as a witness but on inferences drawn from the content of his evidence, in such cases, the appellate court is in as good a position as the trial court to assess the same material: **PP v Choo Thiam Hock & Ors** [1994] 3 SLR 248 .

(a) List of photocopied work permits

With respect to the first allegation, the district judge relied on two main factors to reach her finding that the list was a sham documentation. She found it strange that the appellant did not think it remiss of Md Shohel to give him a list of only 21 persons when he expected 24 persons to reside at

the premises. Further, she thought it was suspicious that the appellant could not furnish any evidence on how Md Shohel would `update` him on the changes to the list of residents. The defence counsel argued that the difference in the number was meagre. Further, the appellant did not adduce any evidence to show how an update of the work permits would take place because none of the work permits had expired at the date of the raid on 2 July 1998.

With due respect to the district judge, it did not appear from the records that the appellant expected exactly 24 sub-tenants at the premises. His evidence was that Md Shohel could keep up to 24 sub-tenants at the premises and, in his statement, he said that he was told by Md Shohel that the latter would be putting up about 20 Bangladeshi nationals at the premises. As such, there was nothing exceptionally strange about the list of photocopied work permits which would have aroused the appellant`s suspicions. However, it appeared to me that her finding on the true nature the list was largely influenced by the appellant`s response during cross-examination. When asked to elaborate on how Md Shohel would update him, he merely stated `whoever stays there must have valid documents - there is a clause in the tenancy agreement`. Thus, it was never his position that no update was necessary, as presently alleged by the defence counsel. If it was the case that Md Shohel never got an opportunity to update the appellant on the changes, he could have easily alluded to that fact during the cross-examination. However, he did not do so. His answer strongly suggested that he was not expecting any updates from Md Shohel. In view of this, I would be most hesitant to say that the district judge`s finding on the nature of this list was plainly wrong.

(b) Finding that the appellant lied about not having seen PW2 to PW8

In relation to the district judge`s finding that the appellant had lied about not having seen PW2 to PW8, the defence counsel submitted that it had always been the position of the defence that the appellant had not seen those immigration offenders. This was evident from his statement to the police. Thus, contrary to what the district judge observed, the appellant did not `suddenly` contend in his examination-in-chief that he did not see them at the premises. He further argued that the failure on the part of the prosecution to put, or at least suggest, to the appellant that he indeed saw the immigration offenders amounted to an implied acceptance of the appellant`s evidence, based on the rule in **Browne v Dunn** [1893] 6 R 67.

While it is true that it was the appellant`s stand throughout the trial that he had never seen the immigration offenders, I was of the view that the prosecution`s failure put the question to the appellant did not in the circumstances amount to an admission that what the appellant said was true. The rule in ***Browne v Dunn*** is stated in ***Cross and Tapper on Evidence*** (9th Ed, 1999) at p 292 as this: any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief, but it is not an inflexible rule. In **Liza bte Ismail v PP** [1997] 2 SLR 454 , I said that the rule in ***Browne v Dunn*** is a flexible rule of practice, intended to ensure procedural fairness in litigation. The following rationale for the rule which was enunciated by Hunt J in **Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation** [1983] 1 NSWLR 1 at p 23 was also endorsed:

> *Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based.*

Bearing in mind the above rationale, I did not find it strictly necessary for the prosecution to put to the appellant that he saw the immigration offenders during his visits. It was apparent to the appellant what the prosecution`s case was and it was that the immigration offenders saw him at the premises collecting rent and performing various other tasks pertaining to the upkeep of the premises. His defence was a complete denial that he had ever seen these immigration offenders. That being the case, in my view, it could not be said that the failure to put the question to the appellant resulted in any procedural unfairness to him, in the sense that he had been deprived of an opportunity to explain his evidence which would amount to nothing more than another denial that he had not seen them before.

(c) Finding that the appellant had lied about setting up a meeting between PW10 and Anwar

The defence counsel argued that the district judge should not have found that the appellant had lied about offering to set up a meeting between Anwar and PW10 simply on the ground that it was a bare allegation which was not put to PW10. I agreed with the defence counsel that it would appear to be rather harsh for the district judge to make such a finding based solely on that ground. After all, this was not a material issue and the matter was also not pursued by the prosecution during cross-examination. To give the benefit of the doubt to the appellant, I was of the view that her finding on this point was not supported by the evidence.

(d) Whether her findings on credibility ought to be disturbed

However, it is important to not lose sight of the fact that the evidence must still be viewed in its totality. The question was whether the district judge`s finding that the appellant was not a credible witness was clearly against the weight of the evidence and was unsupportable. While there were certain inferences which were not warranted on the evidence, there were other factors which the district judge took into account in support of her assessment of the appellant`s credibility which led to her ultimate rejection of his evidence. For instance, she found that the appellant had initially attempted to dissociate himself from Anwar by claiming that he only met him in March 1998 but he subsequently had to concede during cross-examination that he had known him since 1997. Further, his claim that he had personally checked the faces of the sub-tenants at the premises against the photocopied work permits, and that he knew most of them, was proven to be unsubstantiated. Having the benefit of observing his demeanour in court, the district judge found him to be an evasive and inconsistent witness. In the absence of evidence which would clearly contradict her evaluation, I declined to overturn her findings on the credibility of the various witnesses.

Whether the appellant possessed the necessary mens rea

I now move on to what I considered to be the crux of the appeal: whether the prosecution had proven the elements of the offence of abetment beyond reasonable doubt. It was clear on the facts of this case that the appellant had intentionally facilitated Anwar in his harbouring activities by giving him access to the premises and permitting him to sublet the same to others. However, the giving of aid by itself does not constitute the offence of abetment by intentional aiding. The prosecution must also prove that the appellant knew the circumstances constituting the crime when he voluntarily did an act of positive assistance: **PP v Datuk Tan Cheng Swee** [1979] 1 MLJ 166 and **Roy S Selvarajah v PP** [1998] 3 SLR 517 . Thus, the prosecution bears the burden of proving that the appellant had knowingly facilitated Anwar in his harbouring activities. The presumption of knowledge under s 57(7) of the Immigration Act does not apply even though the immigration offenders had entered Singapore

illegally contrary to s 6 of the Immigration Act, because the appellant was not charged for ***harbouring*** them. On the same basis, the parties also accepted the district judge`s ruling that s 57(9) does not impose any duty of due diligence on the appellant who was being charged as an abettor and not a harbourer. Presumably, the prosecution proceeded on abetment charges instead of harbouring charges because there was a lack of evidence to show that the appellant had control over the rent payable by the sub-tenants. As I noted in **Lim Dee Chew v PP** [1997] 3 SLR 956 , the extent of control exercised by the owner over the premises, in particular, the rent payable under the sub-tenancy is one of the key factors to consider in deciding whether he had harboured the sub-tenants directly. If the tenant could negotiate for the rental from the sub-tenants, free from interference from the owner, the tenant would be the one who had harboured the illegal sub-tenants and not the owner. Here, even though the appellant retained a fair amount of control over the premises, there was no evidence to suggest that he had direct control over the sub-tenants. In fact, the evidence of the prosecution witnesses was that Anwar had never consulted anyone before renting the premises to them and he appeared to have full autonomy in deciding who to sublet the premises to.

In cases where the prosecution has successfully invoked the presumption of knowledge under the Immigration Act, the burden is placed on the accused person to disprove such knowledge by showing that he had exercised due diligence in ascertaining the immigration status of the persons whom he had either harboured or employed. If the accused person had not exercised due diligence in verifying the immigration status of the immigration offenders, in most cases, he would not be able to rebut the presumption of knowledge and he would be ***presumed*** to know that they were immigration offenders even though it could not always be said that he actually possessed the knowledge of this fact. It has often been said that `a wilful shutting of the eyes or, at the very least, negligence` is never sufficient to rebut the presumption of knowledge: **Lim Gim Chong v PP** [1994] 1 SLR 825 and ***Lim Dee Chew*** v PP (supra). In these two cases, the accused person either did not take sufficient steps or took no steps at all to verify the immigration status of the immigration offenders.

However, in a case such as the present one, where the prosecution does not have the benefit of any presumption of knowledge, it bears the burden of proving the ***mens rea*** of the appellant beyond reasonable doubt. To do so, it would not be sufficient to establish that the appellant had not conducted the due diligence checks. The prosecution must show that the circumstances of the case are such that he ought to have made the enquiries and by not doing so, he could be said to have `wilfully shut his eyes to the obvious` that Anwar was harbouring illegal immigrants. In other words, the appellant must be shown to know or ought to have known that the sub-tenants at the premises were illegal immigrants.

The test of knowledge has been comprehensively defined in a number of cases: **PP v Koo Pui Fong** [1996] 2 SLR 266 ; **Chiaw Wai Onn v PP** [1997] 3 SLR 445 and **Nomura Taiji & Ors v PP** [1998] 2 SLR 173 . The upshot of these cases is that actual knowledge of certain facts can be inferred from the evidence that the defendant had deliberately or wilfully shut his eyes to the obvious or that he had refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed. Where the facts obviously pointed to one result, and the accused must have appreciated it but shut his eyes to the truth, then together with the other evidence adduced, it could have formed a very compelling part of the evidence to infer the requisite guilty knowledge: ***Chiaw Wai Onn v PP*** . However, it has to be remembered that there is a vast difference between a state of mind which consists of deliberately shutting the eyes to the obvious, the result of which a person does not care to have, and a state of mind which is merely neglecting to make inquiries which a reasonable and prudent man would make: ***PP v Koo Pui Fong*** .

The defence counsel argued that there must be something which had aroused the appellant`s

suspicion as to the immigration status of the residents at the premises. He argued that in cases where the accused person asked for the immigration offender`s passport or work permit but the latter did not produce the document, the accused person would be said to have wilfully shut his eyes to the obvious, if he did not pursue the matter any further. In this case, he submitted that there was no ground for such suspicion.

I disagreed with his contention. It could not be the case that suspicious circumstances would only arise if the accused person sought verification from the immigration offender but the latter was not forthcoming in complying with the request. Such circumstances would likely be construed as wilful blindness on the part of the accused person in the absence of evidence explaining why he did not pursue the matter any further. However, I could imagine other circumstances where it would be patently obvious to the accused person that something was amiss and that the persons he had provided accommodation to, or in this case allowed accommodation to be provided to, could be or were immigration offenders. In my judgment, whether it is appropriate to infer that the accused person knew about the immigration status of the residents would depend on the circumstances of each case.

Based on the findings of fact made below, I now turn to the question of whether the appellant knew that Anwar was harbouring immigration offenders. The appellant allowed his premises to be sublet to others and he knew from Md Shohel that the premises would be sublet to Bangladeshi nationals. As such, in my view, the fact that he saw Bangladeshi residents at his premises during his visits would not strike him as something odd. However, I noted from the evidence of PW7 and PW8 that there were more than 21 persons in the premises during the appellant`s visits. PW 7 said that there were 25 to 40 persons at the premises and PW8 gave evidence that there were 30 to 35 persons during those occasions. Throughout the trial, the appellant had placed a lot of reliance on his list of legal workers furnished by Md Shohel. Even assuming that it was not a sham document, this list only contained names of 21 sub-tenants. More importantly, it was also the evidence of the appellant that he had told Md Shohel that the maximum number of sub-tenants in his premises should be 24 because of the size of his premises. Thus, by his own admission, he did not expect more than 24 sub-tenants. During some of his visits, it must be obvious to him that the premises were occupied by more than the permitted number of sub-tenants. Yet, the appellant did not make any enquiries with anyone in spite of the obvious inconsistency in the number of sub-tenants and the evidence showed that he was not the least bit curious about them. In my view, his conduct went beyond mere negligence in failing to make enquiries. It seemed to me that he had refrained from inquiry because he suspected the truth but did not want his suspicion confirmed.

Even though he had obtained the list of residents from Md Shohel to allegedly assure himself that the sub-tenants were legal workers, the evidence showed that he had never made use of this list to verify the identities of the residents at the premises. On the contrary, he did not appear to be interested in the sub-tenants who stayed at his premises. I entirely agreed with the district judge that his conduct was consistent with a person who had obtained the documentation as means to cover his tracks should he get caught and not as a genuine attempt to ascertain the immigration status of his sub-tenants. To me, this crucial finding strongly suggested that the appellant knew about the harbouring activities carried out at his premises.

Having considered the totality of the circumstances, I was satisfied on the evidence that the appellant either knew or was at the very least deliberately and wilfully blind to the immigration status of the sub-tenants and the fact that Anwar was using his premises to harbour immigration offenders. Thus, the prosecution had proven beyond reasonable doubt that the appellant had knowingly abetted Anwar by intentionally aiding him in his harbouring activities. I would add that the same analysis applied in relation to the charge of abetment in the harbouring of PW9 who had never met the

appellant. As long as he knew that Anwar was using his premises to harbour immigration offenders and he continued to allow Anwar to have access to his premises in furtherance of that illegal purpose, that would be sufficient to constitute the offence of abetment by intentional aiding even though the appellant had not met PW9. It was clear to me that the scope of his abetment was not confined to those immigration offenders he came across during his visits to the premises.

The defence counsel argued that it would be inherently improbable that the appellant knew about the immigration status of the immigration offenders because he would have taken more drastic action to vacate them from the premises after he received the enforcement notice from the URA. I found this argument rather speculative. This was not the case where the appellant remained nonchalant after receiving the enforcement notice. He did take immediate action by asking Anwar to vacate the premises in order to comply with the notice. The delay of a few months was a result of Anwar asking for more time to vacate. While it could be said that a more prudent person in the shoes of the appellant might have exhibited a greater sense of urgency in clearing out the premises to prevent detection by the authorities, I was not persuaded by the submission that the mere failure to do so must necessarily mean that the appellant was free of all guilty knowledge.

Having reviewed the evidence and the submissions, I agreed with the district judge`s findings that the appellant possessed the requisite mens rea to constitute the offence.

Appeal against sentence

In mitigation, the defence counsel submitted that the appellant was a first offender and that he had been a responsible citizen all throughout his life. He also argued that the appellant`s monthly rental earnings remained constant regardless of the number of sub-tenants. Further, the appellant was only an abettor and not a direct harbourer.

Under s 109 of the Penal Code, an abettor would be liable for the same punishment as the principal offender. As such, it was not a mitigating factor that the appellant was an abettor and not a direct harbourer. The mere fact that his rental income did not fluctuate proportionately with the number of sub-tenants did not lessen his culpability in any way. In the court below, the district judge had taken into account the relevant mitigating factors, including the fact that he was a first time offender. Having regard to all the circumstances of the case, I found that the sentences meted out by the district judge were not manifestly excessive.

Conclusion

For the foregoing reasons, I dismissed the appeal.

Outcome:

Appeal dismissed.