P Shanmugam v Public Prosecutor
[2000] SGHC 57

Case Number : MA 291/1999

Decision Date : 10 April 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Ramesh Tiwary (Leo Fernando) for the appellant; Toh Han Li (Deputy Public Prosecutor) for the respondent

Parties : P Shanmugam — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Conviction of 12 charges – Whether sentences should be consecutive or concurrent – Whether totality principle offended – s 18 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Immigration – Harbouring – Harbouring and employing immigration offenders – Mandatory caning or fine – ss 57(1)(d), 57(1)(e) & 57(1)(ii) Immigration Act (Cap 133, 1997 Rev Ed)

Statutory Interpretation – Construction of statute – Principles of interpretation – Whether caning or fine imposed in respect of each charge all charges under s 57(1)(e) – ss 57(1A) & 57(1B) Immigration Act (Cap 133, 1997 Rev Ed)

: In the District Court, the appellant faced 11 charges of harbouring and 11 charges of employing 11 immigration offenders in his restaurant under ss 57(1)(d) and 57(1)(e) of the Immigration Act (Cap 133) (the `Act`) respectively. The prosecution proceeded on, and the appellant pleaded guilty to, six charges of employing immigration offenders under s 57(1)(e), and six charges of harbouring them under s 57(1)(d) of the Act. The remaining ten charges were taken into consideration for the purpose of sentencing.

Section 57(1)(ii) of the Act provides that an offender under s 57(1)(d) or (e) shall, subject to s 57(1A), be punished with imprisonment for a term of not less than six months and shall also be liable to a fine not exceeding $6,000. The district judge sentenced the appellant to six months` imprisonment on each of the 12 charges to which the appellant pleaded guilty, with six of the sentences to run consecutively and six to run concurrently. In total, the appellant was sentenced to three years` imprisonment.

The appellant appealed against the total sentence imposed on the ground that it was manifestly excessive. I dismissed the appeal and affirmed the sentence imposed by the district judge. At the same time, pursuant to CR 7/2000 filed by the prosecution, I added to the appellant`s sentence a fine of $1,000 on each of the appellant`s six convictions of employing immigration offenders under s 57(1)(e) with one month`s imprisonment in default of each fine. I now give my reasons for making such an order.

The appeal

The appellant`s counsel submitted that the appellant`s total sentence of three years` imprisonment was manifestly excessive because it offended the totality principle recognised by the Court of Appeal in **Kanagasuntharam v PP** [1992] 1 SLR 81 . DA Thomas in ***Principles of Sentencing*** (2nd Ed) at pp 57-58 stated the totality principle as follows:

The many decisions of the court in which the totality principle has been applied

> *to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender `a crushing sentence` not in keeping with his records and prospects.*

The appellant`s counsel argued that the appellant`s sentence offended the totality principle because the maximum sentence which could have been imposed for an individual offence of which the appellant was convicted was two years` imprisonment, whereas the cumulative sentence imposed on the appellant was three years` imprisonment.

In this case, the appellant was convicted of 12 different charges under ss 57(1)(d) and 57(1)(e) of the Act. The district judge, in sentencing the appellant to six months` imprisonment on each charge, had given the appellant the minimum sentence prescribed for each conviction. The district judge ordered six of the sentences to run consecutively and six to run concurrently, resulting in a total cumulative sentence of three years` imprisonment.

To my mind, the appellant`s argument was misconceived. The Court of Appeal in ***Kanagasuntharam v PP*** (supra) held that the first limb of the totality principle has to be qualified by s 18 of the Criminal Procedure Code (Cap 68) (`CPC`), which provides that, where at one trial a person is convicted and sentenced to imprisonment for at least three distinct offences, the court shall order that the sentences for at least two of those offences shall run consecutively. In such a case, the sentencing court is invested with the direction as to which and how many of the sentences ought to run consecutively, and there is no absolute rule precluding the court from making more than two sentences consecutive: **Maideen Pillai v PP** [1996] 1 SLR 161 at 165. In the circumstances of the case, as the appellant`s convictions were for employing and harbouring six individual immigration offenders, the district judge had properly exercised his discretion in ordering six of the sentences to run consecutively. Moreover, where, as in this case, all the offences of which the offender is convicted are equally serious and attract the same penalty, there is no `most serious of the individual offences involved` in accordance with the formulation of the totality principle in DA Thomas`s ***Principle of Sentencing*** . The second limb of the totality principle was also not offended as a cumulative sentence of three years` imprisonment could hardly be considered a `crushing sentence` in the circumstances of the case. I was thus of the view that the appellant`s cumulative sentence did not violate either limb of the totality principle.

The criminal revision

In addition to affirming the sentence imposed by the district judge on the appellant, I also imposed a fine of $1,000 for each of the appellant`s six convictions under s 57(1)(e) of the Act. This was pursuant to CR 7/2000 filed by the prosecution. The ground for the criminal revision was that the district judge, in sentencing the appellant, had failed to impose a fine on the appellant in accordance with s 57(1B) of the Act. The learned judge had applied s 57(1A) of the Act, which states:

> *Where, in the case of any offence under subsection (1)(e), it is proved to the satisfaction of the court that the defendant has at the same time employed more than 5 immigration offenders, the defendant shall be punished, subject to section 231 of the Criminal Procedure Code (Cap 68), with caning in addition to the punishment prescribed for that offence.*

As the appellant is now 56 years old, under s 231 of the CPC, he cannot be punished with caning. The district judge recognised this fact but failed to apply s 57(1B) of the Act, which provides:

> *Where, by virtue of section 231 of the Criminal Procedure Code (Cap. 68), the defendant referred to in subsection (1A) is not punishable with caning, he shall, in lieu of caning, be punished with a fine not exceeding $10,000.*

Sections 57(1A) and 57(1B) of the Act are worded in mandatory terms and the court must impose a fine on the appellant under s 57(1B), in addition to his sentence of imprisonment under s 57(1)(ii). I imposed a fine of $1,000 for each of the appellant`s six convictions under s 57(1)(e), or in default of the fine, one month`s imprisonment. This meant that the appellant would have to pay a total fine of $6,000 or serve additional imprisonment of six months in default.

The appellant`s counsel, however, contended that the fine under s 57(1B) should not be imposed on the appellant for each individual offence under s 57(1)(e) but should be imposed as a global punishment for his cumulative offences under s 57(1)(e). The prosecution, however, argued that the fine should be imposed for each of the six charges under s 57(1)(e) on which the appellant was convicted.

Interpretation of ss 57(1A) and 57(1B) of the Act

The question of whether the fine imposed under s 57(1B) in lieu of caning applies to each individual offence or to the cumulative offences under s 57(1)(e) necessarily follows from whether s 57(1A) applies to individual or cumulative offences under s 57(1)(e). On the construction of statutory provisions, Elmer A Driedger, in ***Construction of Statutes*** (2nd Ed) at p 87, states:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

The words in s 57(1A), `... in the case of any offence under subsection 1(e) ...` and `... shall be punished ... with caning in addition to the ***punishment prescribed for that offence*** `, suggest that the additional punishment of caning should be imposed for each individual offence under s 57(1)(e). Section 57(1)(ii) prescribes a punishment of mandatory imprisonment for a term of not less than six months and not more than two years and a discretionary fine not exceeding $6,000 for each individual s 57(1)(e) offence. There is no prescribed punishment in respect of cumulative s 57(1)(e) offences. Thus, on a plain and ordinary reading, the caning under s 57(1A) should be imposed in addition to the prescribed punishment for each individual offence under s 57(1)(e) rather than in addition to the punishment for the cumulative offences. Section 57(1A) therefore does not appear to create a new offence but is merely a punishment enhancing provision.

In interpreting ss 57(1A) and 57(1B), Parliament`s intention in enacting these provisions is relevant. The legislative history of the provisions and the relevant parliamentary materials are useful in ascertaining such intention.

Mandatory caning for employers of more than five immigration offenders was first introduced in 1989 via Act No 34 of 1989. The original s 57(1A) of the Act read:

> *Where, in the case of any offence under subsection (1)(e), it is proved to the satisfaction of the court that the defendant has at the same time employed more than 5 persons with the actual knowledge that those persons have acted in contravention of section 6(1), 15 or 36, the defendant shall be punished, subject to section 231 of the Criminal Procedure Code, with caning in addition to the punishment prescribed for that offence.*

At the Second Reading of the Bill on 31 August 1989, the then Minister for Home Affairs (Prof S Jayakumar) stated (at col 513-514):

> *... there is still a hardcore group of employers who will continue to recruit and employ such immigration offenders.*
>
> *... Introducing caning for these employers should remove any incentive for this group to hire illegal immigrants and overstayers. It will effectively discourage more illegal immigrants from entering Singapore to seek work ...*
>
> *It is for these reasons, Sir, that the Government has decided to amend the Immigration Act to provide for:*
>
> *(a) mandatory caning for employers who employ more than 5 illegal workers and who had actual knowledge that they were illegal immigrants or overstayers; ...*
>
> *...*
>
> *... This latest amendment has been drafted carefully so that the caning applies only in the case of what I would describe as an aggravated offence ...*

In 1995, s 57(1A) was amended via Act No 41 of 1995 to remove the requirement of actual knowledge. At the Second Reading of the Bill on 1 November 1995, the then Minister for Home Affairs (Mr Wong Kan Seng) stated (at col 77-78):

> *... the penalty for employing more than five immigration offenders is enhanced. This is done through cl 6(b) of the Bill which seeks to re-enact s 57(1A) to remove the requirement that the prosecution must prove that the employer of more than five immigration offenders has `actual knowledge` of their immigration status before he can be caned for employing them. This is necessary because in practice, unless the employer admits that he knew of the status of the immigration offender, it is almost impossible to prove that the employer is aware of the immigration offender`s status. The penalty of caning should deter those employers who employ more than five immigration offenders.*

Section 57(1B) was introduced via Act No 34 of 1998. On the rationale for s 57(1B), the then Minister for Home Affairs (Mr Wong Kan Seng) said at the Second Reading of the Bill on 4 September 1998 (at col 933):

> *Currently, employers of more than five immigration offenders can be sentenced to between six months and two years` jail, fined not exceeding $6,000 and caned. Clause 11(c) of the Bill amends s 57(1B) of the Act to increase the maximum fine for employers of more than five immigration offenders who cannot be caned because they are females or more than 50 years old from $6,000 to $10,000.*

The rationale for s 57(1B), as gathered from the Minister`s speech, supports the interpretation that the fine thereunder should be imposed in respect of each individual offence and not in respect of the cumulative offences under s 57(1)(e). Where, as in the present case, an offender is convicted on multiple charges under s 57(1)(e) and has at the same time employed more than five immigration offenders, he is liable under s 57(1)(ii) to a discretionary fine of up to $6,000 on each charge as well as mandatory caning under s 57(1A). However, where the offender cannot be caned, it appears from the Minister`s speech that the purpose of s 57(1B) is to increase the maximum fine for the offender from $6,000 to $10,000. Under s 57(1)(ii), the maximum fine for each individual s 57(1)(e) offence is $6,000. Where the offender cannot be caned, the increased maximum fine of $10,000 should also apply to each individual s 57(1)(e) offence.

Another relevant consideration in the interpretation of ss 57(1A) and 57(1B) is the general principle that the sentence for an offence must be specific. Generally, if there are separate charges, a separate sentence should be passed on each charge: **Bujang Johny v PP** [1965] 1 MLJ 72 . The reason for this is that if separate sentences are not passed, the appellate court would be in a difficulty if the appellant was successful on some of the convictions: Tan Yock Lin, ***Criminal Procedure 2*** at p XVIII 3 at para [54]. In this instance, there was nothing to indicate that this general principle of sentencing should be departed from.

One objection against applying ss 57(1A) and s 57(1B) to each individual s 57(1)(e) offence is that the offender would be liable to a much heavier punishment than if just one sentence of caning or fine was imposed for cumulative s 57(1)(e) offences.

From a purposive and policy perspective, the rationale of ss 57(1A) and 57(1B) is to provide for strict penalties in dealing with offenders of immigration laws. Such policy and public interest is clear from the Minister`s speech at the Second Reading of the Immigration (Amendment) Bill on 4 September 1998 (col 930 and 932):

> *Singapore is a small country with limited resources. The presence of illegal immigrants will pose a serious social and security problem, and compromise the safety and security of Singaporeans. We have therefore taken, and will continue to take, a tough stand against all immigration offenders - be they illegal immigrants, their smugglers, overstayers, or the harbourers and employers of such people - especially given the current regional economic situation.*
>
> *...*
>
> *These enforcement measures must be backed up by tough laws and strict penalties for those who have committed offences ... the penalties for some offences need to be enhanced to enable us to effectively deal with the illegal*

immigrant problem ...

...

Employers of immigration offenders should also be severely dealt with. This is because if employers do not offer them jobs, illegal immigrants will not be attracted to come to Singapore.

Therefore, in line with the deterrent purpose of ss 57(1A) and 57(1B), employers of more than five immigration offenders at the same time should expect to face a harsh sentence for their aggravated offence. However, the court, in sentencing, has the discretion to vary the severity of the punishment imposed according to the circumstances of each case. In the case of s 57(1B), there is no minimum fine prescribed. As for s 57(1A), the maximum additional penalty is 24 strokes of caning. The prosecution may also in its discretion proceed on fewer s 57(1)(e) charges against the accused.

For the above reasons, I found that on a plain reading as well as a purposive interpretation of the provisions, ss 57(1A) and 57(1B) of the Act provide a punishment in addition to the sentence imposed on the appellant for each individual offence and not for his cumulative offences under s 57(1)(e). Therefore, in accordance with s 57(1B), I imposed a fine of $1,000 in addition to the appellant`s sentence of six months` imprisonment for each of his six offences under s 57(1)(e) with one month`s imprisonment in default of each fine.

Outcome:

Appeal dismissed; criminal revision allowed.