Public Prosecutor v Tsao Kok Wah
[2001] SGHC 27

Case Number : MA 282/2000

Decision Date : 08 February 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Jennifer Marie and Adriel Loh (Deputy Public Prosecutor) for the appellant; R Kalamohan (Kalamohan & Co) for the respondent

Parties : Public Prosecutor — Tsao Kok Wah

Criminal Procedure and Sentencing – Sentencing – Attempted house-breaking by night – Enhanced punishment of caning – Whether enhanced punishment applicable to attempt to commit offence – Whether distinction should be drawn between attempt and actual commission of offence -s 458A Penal Code (Cap 224)

Statutory Interpretation – Construction of statute – Penal statute – Whether provision ambiguous – Purposive approach – Intention of Parliament – s 9A Interpretation Act (Cap 1)

: This was an appeal by the prosecution against the sentence imposed by District Judge A Rahim Jalil on the respondent. Tsao had pleaded guilty to one charge of attempting to commit house-breaking by night with the intention of committing theft contrary to s 457 read with s 511 of the Penal Code (Cap 224) (`the Act`).

Tsao had also pleaded guilty to one charge of failing to present himself for a urine test contrary to a supervision order which is an offence under reg 15(3)(f) of the Misuse of Drugs (Approved Institutions and Treatment and Rehabilitation) Regulations 1976 and punishable under reg 15(6)(a). Two other similar charges under these Regulations were taken into consideration.

Tsao`s antecedents included a conviction under s 457 of the Act in 1990 and a conviction under s 454 in 1993. For the latter offence, he was sentenced to suffer the enhanced punishment of caning provided for under s 458A.

The judge sentenced Tsao to undergo six years` corrective training. He rejected the prosecution`s argument that s 458A applied here as well and that, therefore, caning should also be imposed. This was because the offence Tsao pleaded guilty to was an attempt to commit the offence under s 457, whereas s 458A states that the enhanced punishment of caning applies where a person commits an offence under s 457.

The prosecution appealed on the basis that the sentence was manifestly inadequate because the judge failed to impose the punishment of caning.

The issue

The issue here was whether or not s 458A applies where a person is convicted of having attempted to commit an offence under s 457 and, if so, whether or not Tsao was liable to the enhanced punishment of caning. The DPP submitted that there is no direct authority in the law reports which relates to this issue, and invited the court to set out the grounds of its decision to provide a useful precedent for the future.

The prosecution case

The prosecution submitted that a plain reading of s 458A showed that it applies. The charge states that Mr Tsao `committed an offence punishable under section 457 read with section 511`. There is no distinct offence of attempted house-breaking and so the offence was one under s 457, but read with another section. Therefore, Tsao committed an offence under s 457.

The next submission was that the Parliamentary intention behind s 458A (enacted in 1984) was that the enhanced punishment of caning should apply to an attempt as well as to a completed offence.

The prosecution therefore submitted that:

> *the words `commits an offence` under s 457 should not be strictly read to mean that that specific offence of s 457 must have been committed. But rather, it should be taken to mean* ***the commission of any offence of which the substantive provision is s 457****. (Italics in original.)*

The defence case

Counsel for Tsao, Mr R Kalamohan, argued that s 458A is at least ambiguous and, on established principles of statutory interpretation of penal provisions, any ambiguity should be resolved in favour of an accused person.

Secondly, Mr Kalamohan argued that the legislative intent behind s 458A was to impose caning only on professional and repeat offenders where there is a possibility of injury, assault, rape or death.

Finally, Mr Kalamohan pointed out that the Penal Code does not deal with attempts as severely as it does with completed offences. Section 511 of the Act does not allow any imprisonment term to exceed one-half of the longest term provided for the offence.

The district judge`s decision

The judge rejected the prosecutor`s submissions. First, he contended that a plain reading of s 458A required the offence under s 457 to have been committed and not merely to have been attempted.

Secondly, he contended that an attempt is not treated as severely as a completed offence. He referred to the punishment provision under s 511 and contended that this indicates that, when it comes to sentence, `the offender who attempts to commit an offence would receive a lesser sentence`.

Thirdly, he contended that a statute enacting an offence or imposing a penalty should be strictly construed and that a construction more favourable to the accused should be adopted to resolve any ambiguity in a penal provision.

Finally, the judge rejected the construction of s 458A made by the prosecutor because `[this] approach would run contrary to the settled rule of the construction of a penal provision`. The judge also disagreed that the parliamentary intention behind s 458A was as stated by the prosecutor, because the debates referred to `made no mention that the section would also apply to attempted

offences`. The judge also rejected the application of the principle in the case of **Richards v Macpherson** [1943] VLR 44 to this case. This was because that case dealt with the equivalent of s 109 of the Act which equates the sentence for an abettor with that for a principal offender. The same cannot be said for attempts. `On the contrary, s 511 specifically provides different punishments for each.`

Observations

Ambiguity and the construction of penal statutes

The answer to this conundrum lies in the correct interpretation of s 458A. The defence makes much of the rule that penal statutes ought to be construed strictly in favour of the accused in the case where the statute is ambiguous and two reasonable constructions are possible. Mr Kalamohan quoted Justice GP Singh who said, `[a] statute enacting an offence or imposing a penalty is strictly construed` (***Principles of Statutory Interpretation*** (7th Ed, 1999) at p 631). However, the author continued:

> *But this rule ... is now-a-days of a limited application; and speaking broadly, serves in the selection of one when two or more constructions are reasonably open. The rule exhibits a preference for the liberty of the subject and in a case of ambiguity enables the court to resolve the doubt in favour of the subject and against the Legislature which has failed to express itself clearly.*

The defence also relied on the case of **The Andara** [1978-1979] SLR 364 [1978] 2 MLJ 190 where it was held that a construction more favourable to the ship owners should be adopted to resolve any ambiguity in a penal provision. In a more recent case, **Teng Lang Khin v PP** [1995] 1 SLR 372 , it was likewise held that `the penal nature of s 101(2) [of the Road Traffic Act] required that [any] ambiguity be resolved in favour of the appellant`. Reliance was also placed on a dictum of Lord Esher MR in **Tuck & Sons v Priester** [1887] 19 QBD 629 at p 638:

> *If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.*

The first question then was whether or not there is an ambiguity in s 458A. Farnsworth explained what an ambiguity is by distinguishing it from the related concept of vagueness. He said:

> *According to this distinction, a word is vague to the extent that it defines `not a neatly bounded class but a distribution about a central norm`. Thus the word **green** is vague as it shades into yellow at the one extreme and into blue at the other, so that its applicability in marginal situations is uncertain. Ambiguity is an entirely distinct concept. A word may have two entirely different connotations, so that it may be at the same time both appropriate and inappropriate. Thus the word **light** is ambiguous when considered in the context of dark feathers. (**Word and Object**, 1960 at p 85, quoting W Quine.)*

It has been held that a document is not ambiguous just because a variety of definitions can be found in the lexicon; the intended meaning may be clear from the context (**Cincinnati Ins Co v Flanders Electric Motor Service Incorp** (Unreported)). Also, words are not necessarily ambiguous because courts in past cases have taken a different view of the words (**Graingrowers Warehouse Co v Central National Ins Co** (Unreported)). A fortiori a word is not necessarily ambiguous simply because the parties to the instant dispute have taken different views of the words (**Kane v Royal Ins Co of America** (Unreported) ; **Budd v P & O Steam Navigation Co Ltd** [1969] 2 Lloyd`s Rep 262).

In **Higgins v Dawson** [1902] AC 1 at p 10, Lord Davey said:

> *[a document] is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the courts might have felt in arriving judicially at the construction; it is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it.*

In my view the words in s 458A are not ambiguous. Therefore, the rule requiring a strict construction of penal statutes was not relevant. The real question that faced this court was whether to adopt a literal approach to interpretation and give effect to the plain meaning of the section or whether to adopt a purposive approach and endeavour to discover the parliamentary intention behind the section and give effect to it. The answer is clear. Section 9A of the Interpretation Act requires the latter approach. Furthermore, s 9A makes it clear that Parliament does not believe that statutory provisions alone are sufficient for courts to rely on. It expressly allows the use of extrinsic materials in the quest for the true meaning of statutory provisions.

Purposive interpretation

This approach is certainly apposite to this case. In **Diaz Priscilla v Diaz Angela** [1998] 1 SLR 361 , the Court of Appeal held that, in applying s 9A, there was no need for any ambiguity or inconsistency in the provision in question. The dictum of Dawson J in **Mills v Meeking** [1990] 169 CLR 214 at p 235 was approved of:

> *the approach required by s [9A(1)] needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done.*

Both the parties in this case dealt with the question of what exactly the intention of Parliament was. They both made reference to the record of the second reading of the Penal Code (Amendment) Bill which resulted in, inter alia, s 458A. They both relied on the paragraph entitled `Clauses 19 to 25: Housebreaking` at p 1870. In this appeal, the defence argued that `[t]he legislative intent of imposing caning is meant for professional and repeat offenders of housebreaking and where there is a possibility of injury, assault, rape or even death`. The prosecution, on the other hand, argued:

> *it is clear that the intent and purpose of the enactment under s 458A was one of deterrence. The additional punishment of caning that the court was empowered to impose in a subsequent offence was to be an additional deterrence. ... the need for deterrence is equally compelling in a case where the accused has tried but is unsuccessful in completing the task at hand ie housebreaking.*

It seemed from a reading of the paragraph that the amendment was introduced to deal more effectively with what was perceived as a particularly heinous offence; one which caused psychological harm and (potentially) serious physical harm as well. No doubt burglary is a serious offence. But can it be said that an attempt to burglarise is as serious and should therefore be treated in the same way? The paragraph itself makes no mention of attempts but the mischief it is aimed at is clear: the risks associated with house-breaking. The aim of the amendment was to prevent or minimise such mischief.

In my view, the intention of Parliament behind s 458A was to deter a subsequent attempt as much as a subsequent commission of an offence under s 454 or s 457. This was so because an attempt to break into a house would trigger the same insecurities and cause the same anxieties and fears in the occupants. Furthermore, a burglar who was caught attempting to break in by an occupant might be just as dangerous as one who had succeeded. If Parliament intended to prevent this harm when it was caused by the commission of the offence, it could be said to have intended to prevent this same harm when it was caused by an attempt to commit the offence.

There was another reason why no distinction should be drawn here between an attempt and the actual commission of the offence under s 457. It is usually purely fortuitous why an attempt was unsuccessful and, if the offender had his way, the offence would have been consummated. This was true of this case as well. Tsao certainly had the mens rea necessary for the offence - he intended to break into the clinic to steal. The fact that he was arrested just before he got in did not lessen his moral blameworthiness by one iota.

The modern law recognises that there is no distinction between the culpability of one who attempts to commit and one who succeeds in committing an offence. Once a man can be said to have `embarked on the crime proper` (**R v Gullefer** [1990] 3 All ER 882, followed in **Chua Kian Kok v PP** [1999] 2 SLR 542) he has committed the actus reus of attempting to commit the offence. If he has, at the same time, the intention to commit the offence, he also has the necessary mens rea (***Chua Kian Kok*** , supra). However, when a man has `embarked on the crime proper` with the intention of committing the crime, he is morally blameworthy whether or not he succeeds or is prevented from succeeding by some fortuitous event. As Clarkson put it:

> *One who tries to kill another or to cause other harm is in as much need of incapacitation and rehabilitation as one who succeeds ... from a retributivist standpoint the person who tries to commit a crime is just as blameworthy as he who succeeds. The difference between success and failure could be mere chance and the criminal law is not a lottery with liability dependent on `the invisible hand of Fate` (Schulhofer, 1974). (**Criminal Law in Singapore and Malaysia** [1989] at p 249.)*

Indeed, the English Criminal Attempts Act 1981 generally allows a court, upon a conviction of attempt, to impose any penalty that would be within its powers for the completed offence (s 4). Our

Penal Code provides that attempts should `be punished with such punishment as is provided for the offence (but subject to the proviso that imprisonment is limited to half the maximum allowed).

If one who attempts to commit and one who succeeds in committing an offence are equally blameworthy, they should be punished similarly. However, this is not the case in practice. Although the English Criminal Attempts Act allows the same punishment for inchoate and completed offences, `[i]n practice, the punishment for an attempt will generally be less than for the consummated crime ... Often the attempter receives a discount of 50 per cent or more` (Glanville Williams, ***Textbook of Criminal Law*** (2nd Ed, 1983)). Likewise, the proviso to s 511 limits any term of imprisonment to half the maximum allowed for the offence.

There is at least one good reason why an attempter should be punished less severely. It provides some inducement for such a one to desist before he brings about the harm he intends. This goes against the logic that it should make no difference whether a person is thwarted by the police or by his conscience of by a fear of a heavier penalty. He is punished because he has `embarked on the crime proper` with the intention of committing the crime. Therein lies the reprehensibility of his behaviour and it is no less reprehensible merely because he failed to succeed. However, as Professor Smith has pointed out, `[i]n some jurisdictions, logic has given way to policy and a defence of free and voluntary desistance is allowed` (***Smith & Hogan`s Criminal Law*** (9th Ed, 1999) at p 320). But the Professor continued, `[t]he principal argument in favour of a withdrawal defence is that it might induce the attempter to desist - but this seems unlikely. The existence of the defence would add to the problems of law enforcement authorities` (ibid).

In any event, to those who object that there must be a distinction between the sentence for an inchoate and a complete offence, if only to encourage offenders to desist before consummating the offence, it can be argued that s 458A merely requires caning as an additional punishment. The court is left with the discretion as to how many strokes to impose. Therefore, such concerns should not affect the interpretation of s 458A as applying to cases where a subsequent s 457 offence is attempted.

There is at least one more good reason for applying s 458A to attempts. If the law were otherwise, the police or the public would have to allow a known convicted burglar to succeed in breaking in and stealing before they arrested him in order to ensure that he would be liable for the enhanced punishment of caning. This certainly could not have been the intention of Parliament. Once a person has attempted to commit an offence, the police ought to be able to move swiftly to thwart the consummation of the offence unhindered by any fear that they would be thwarting at the same time the imposition of any enhanced punishment which the person would suffer if they allowed him to commit the offence before effecting an arrest.

Additionally, the prosecution drew attention to a very pertinent section of the Interpretation Act. Section 38 provides:

> *A provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself had been committed.*

Conclusion

Section 458A was clearly intended to be an enhanced punishment provision. It states that it applies in the case of a subsequent commission of an offence under s 457. However, for all the reasons above, it should equally apply in the case where a person attempts to commit a subsequent offence under s 457. Therefore, the appeal by the prosecution was allowed and an additional sentence of caning of six strokes was imposed on the respondent.

Outcome:

Appeal allowed.