Phua Mong Seng v Public Prosecutor
[2001] SGHC 336

Case Number : MA 134/2001

Decision Date : 12 November 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : S Kumar (SK Kumar & Associates) for the appellant; Daniel Yong (Deputy Public Prosecutor) for the respondent

Parties : Phua Mong Seng — Public Prosecutor

Criminal Law – Offences – Fraudulently inducing persons to invest money – Knowingly making misleading and false statements – Levels of mens rea – s 404(1)(a) Companies Act (Cap 50, 1994 Ed)

Criminal Procedure and Sentencing – Sentencing – Imprisonment of four months – Whether sentence manifestly excessive or inadequate – Existence of aggravating factors justifying enhancement of sentence

: The appellant, Phua Mong Seng (`Phua`), was tried and convicted in the district court on the following two charges:

> *First charge - DAC 55469/2000*
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> *You, PHUA MONG SENG [commat] PAN MAO SHENG RICHARD, are charged that you, sometime between April 1995 and June 1995, in Singapore, did by statements which you knew to be misleading, induce one Yin Chin Wah Peter to enter into an agreement with a view to subscribing for 300,000 shares in BTE Asia Pacific Pte Ltd, and you have thereby committed an offence punishable under section 404(1)(a) of the Companies Act, Chapter 50.*
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> *Second charge - DAC 55470/2000*
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> *You, PHUA MONG SENG [commat] PAN MAO SHENG RICHARD, are charged that you, sometime in January 1997, by statements which you knew to be false, induced one Lee Cheow Lee Vincent to enter into an agreement with a view to subscribing for 200,000 shares in Panatron Pte Ltd, and you have thereby committed an offence punishable under section 404(1)(a) of the Companies Act, Chapter 50.*

The relevant section, s 404(1)(a) of the Companies Act (Cap 50, 1994 Ed) (the `Act`), reads as follows:

> *(1) Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive or by any dishonest concealment of material facts or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person to enter into or offer to enter into -*
>
> *(a) any agreement for or with a view to acquiring, disposing of, subscribing in or*

underwriting marketable securities or lending or depositing money to or with any corporation; or

(b) ...

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $30,000 or to imprisonment for a term not exceeding 7 years or to both.

The district judge sentenced Phua to one month`s imprisonment on the first charge and to four months` imprisonment on the second charge. Both sentences were to run concurrently. Phua appealed only against his sentence. After hearing his appeal, I dismissed it. Further, I also enhanced his sentence to two months` imprisonment on the first charge and six months` imprisonment on the second charge, both to run concurrently. I set out below the reasons for my decision.

Facts relating to the first charge

Phua was the managing director of BTE Asia-Pacific Pte Ltd (`BTE AP`) and Panatron Pte Ltd (`Panatron`) and also the Chairman of Chemind Pte Ltd (`Chemind`). All were related companies. Both Yin Chin Wah Peter (`Yin`) and Lee Cheow Lee Vincent (`Lee`) used to be shareholders and also employees of Panatron until they resigned in August 1997. The charges of which Phua was convicted arose from the manner in which he had induced both Yin and Lee to invest in his companies.

Yin knew Phua as an ex-colleague in 1990 or 1991. After 18 months, Yin left the company to commence work at another company. In April 1995, Yin heard that Phua too had left the company and had set up his own business. When Yin called Phua to catch up with him, Phua invited Yin to his office.

When Yin met up with Phua for the first time after the phone call, they exchanged news about their work. Phua told Yin about his businesses and said that he had an `exclusive agency to distribute the Ball-Technic system in Singapore`. The Ball-Technic system was an automatic condenser cleaning system used for cleaning chiller tubes in large air-conditioning systems. Phua informed Yin that he already had a `large number of customers and orders` for the system. Specifically, Phua stated that he had 120 customers and 400 orders for the system.

Yin was under the impression that Phua and his company, Panatron, had spent a lot of time and effort in marketing the system. Yin was impressed as Panatron had been started only in May 1994 and the large number of customers showed that Phua was able, within a short time, to bring a product into the market and make a big success of it. When Yin mentioned that he was also looking out for business opportunities, Phua asked whether he was interested to invest in Phua`s company in view of the `very good potential of the Ball-Technic system`. Phua also told Yin that he himself had invested $400,000 in the business and was looking for `marketing people with a technical background to invest in the company and be employed by the company`. Yin said that he would consider this.

A few days later, Yin met up with Phua again and this time, Phua produced written material regarding the Ball-Technic business. The write-up, produced on the letterhead of Panatron and dated 10 January 1995, stated inter alia that Panatron had been appointed exclusive agent of the Israeli

principal, Ball Tech Energy Ltd, to promote the sales of the Ball-Technic system in Singapore. In addition to setting out the objectives and sales targets, the write-up stated this:

> *Presently our client list consists of 160 customers and more than 400 chillers. Some of the customers are well-known organizations such as Thomson Plaza, Meridien Hotel, Changi International Airport, Ministry of Defence, Singapore General Hospital and National University of Singapore.*

When Yin took a look at the write-up, its contents appeared to confirm what Phua had previously verbally represented about the business. Phua reiterated that he had invested $400,000 of his own resources into the Ball-Technic business. Based on the information disclosed by Phua, Yin felt that he too could commit to the Ball-Technic business. The fact that even an `experienced marketing person` like Phua could display such a level of commitment to the business was a good sign. Yin`s understanding was that he would be purchasing shares in a new company to be set up for this business. When Yin told Phua that he was willing to take up 300,000 shares at $1 per share, Phua said that Yin would have to take up the shares at a premium of 25% because of the fact that the business would be profitable in 1995 and because of the money already spent to market the product.

Yin eventually agreed to invest the sum of $300,000 at a premium of 25%. He understood that his investment would take the form of a purchase of shares in another company separate from Panatron and that the Israeli principals, Ball Tech Energy Ltd of Israel, might later take up equity in this company. Yin then resigned from his job to take up employment in relation to the Ball-Technic business.

Yin began his new employment on 1 June 1995 at Panatron since the new company, BTE Asia Pacific Pte Ltd (`BTE AP`) was not incorporated until 28 August 1995. After starting work at Panatron, Yin began looking through the existing marketing materials for the Ball-Technic system, speaking to existing personnel and visiting locations where the Ball-Technic product was said to be installed. He discovered that, contrary to what Phua had told him, there was in reality no `120 customers` and no `orders for 400 chillers`. Most of the organisations identified as `customers` in the write-up shown to Yin at his second meeting with Phua had not in fact bought the Ball-Technic system. Apart from two or three organisations which had installed the system, there remained only a list of `potential customers` to whom the marketing personnel had spoken. Had Yin known that there were in fact no `120 customers` or `orders for 400 chillers`, he would not have agreed in the first place to invest in the company to be set up for marketing the Ball-Technic system.

After his startling discovery, Yin spoke to Phua, who suggested that Yin take up shares in Panatron instead of in BTE AP. By then, Yin had decided that the Ball-Technic business, contrary to what Phua had made it out to be, was not worth much if anything at all. At the end of June 1995, Yin agreed to Phua`s suggestion about switching his investment to Panatron as Panatron was involved in other businesses as well and an investment in Panatron might still be viable.

From 4 July 1995 to 21 July 1997, Yin paid up a total of $300,000 in the form of seven cheques made payable to Panatron. However, when he received the agreement for the subscription of shares in Panatron in August 1997, he did not sign it as he found that the terms regarding payment of premiums was different from what he had originally agreed with Phua. On 26 August 1997, Yin resigned from his role as a Director of BTE AP. By then, he had also discovered that Phua`s claims about having invested $400,000 in the Ball-Technic business were untrue and Phua`s investment was in fact only $270,000.

Facts relating to the second charge

In relation to the second charge, Lee testified about how he was also induced by Phua`s misrepresentations to invest in his company, Panatron. Lee knew Phua as Lee`s brother was married to Phua`s sister. They had little contact until 10 April 1996, when Phua contacted Lee. Lee was then working as a consultant at the Enterprise Promotion Centre (`EPC`), which specialised in helping small and medium enterprises to draw up business plans. Phua had contacted Lee to find out what assistance the EPC or the Economic Development Board could give his business.

In late May 1996, Phua visited Lee at home and spoke about his investments in China. Phua also gave Lee a copy of a simple budget for Panatron, which showed confirmed and projected sales of about $3m with a year-end profit of about $160,000. Phua asked Lee if he was keen to invest in Panatron. However, Lee was then more interested in hearing about Phua`s projects in China.

On 3 June 1996, Phua returned to Lee`s place with a draft agreement for the subscription of shares in Panatron and a copy of a financial statement for Chemind Pte Ltd (`Chemind`) dated 3 June 1996. Phua told Lee that Chemind was a wholly-owned subsidiary of Panatron and said that Lee should consider investing in Panatron as Chemind, a wholly-owned subsidiary of Panatron, had tremendous potential and would eventually be a very profitable business. From the financial statement, it appeared to Lee that Chemind was indeed doing very well for a company that had just started. Phua further informed Lee that as Chemind was a new company, it did not have its own accounts and that since Chemind was a wholly-owned subsidiary of Panatron, it was better to invest in Panatron. Although Lee was impressed with the performance of the business, he told Phua that he would consider the matter.

Subsequently, Lee was asked by his sister-in-law (Phua`s sister) to help Phua look for an investor. Lee met with Phua on 16 October and was handed another financial statement for Chemind dated 16 October 1996. The financial statement again showed very impressive performance for Chemind`s business. When Lee asked to see the latest management accounts and annual accounts, he was told that Panatron`s annual accounts were under audit, that Panatron had no management accounts and that Chemind, still being in its first year of operation, had no annual accounts. However, Phua assured Lee that Chemind`s financial statement reflected as closely as possible Panatron`s performance.

Although Lee at that point in time did not wish to invest in local companies, he agreed to help Phua find investors. Lee found a potential investor in a company called Yong Nam Engineering & Construction Pte Ltd (`Yong Nam`), which he had come to know in the course of his work at the EPC. On 9 November 1996, when Lee informed Phua of the potential investor, he was shown another financial statement for Chemind dated 9 November 1996. This financial statement again showed very good profits. On the basis of the financial statement and a volume projection, Lee assisted Phua in preparing an assumption balance sheet to be presented to Yong Nam.

Although the negotiations between Phua and Yong Nam culminated in a memorandum of understanding being executed on 10 December 1996, the investment plans were aborted sometime in January 1997. Thereafter, on 20 January 1997, Phua requested another meeting with Lee. At the meeting, Phua handed Lee another financial statement for Chemind dated 20 January 1997. This financial statement showed that Chemind was making a profit of over 200% for the year 1996. Phua said that Panatron`s group of companies was making good profits and he did not wish for Yong Nam to have a stake in them as he had plans to list the companies in a couple of years. Again he made his offer to Lee to join Panatron as well as to take up equity in the company. He also added that Lee should pay a premium for his shares since the Panatron group of companies was doing very well. Phua further claimed to

have invested more then half a million dollars into the business.

After all that Phua had said and done, Lee was impressed both with the profitability of the business and with Phua`s apparent commitment to it. Lee agreed that he would subscribe for 10% of Panatron`s issued share capital. On 30 January 1997, Lee signed an agreement to subscribe for shares in Panatron and an agreement to be employed in Panatron as Senior Vice-President. Lee`s understanding was that he would be the company`s new financial controller. The share subscription agreement stated that Lee was subscribing for 10% of Panatron`s shares (200,000 shares) at $1 par value per share with a premium of 35%. The total price he had to pay was thus $270,000. Before he signed the agreements, Phua again showed him an amended financial statement for Chemind which showed even higher profits. After signing the agreement, Lee paid up almost $200,000 for the shares between February and June 1997.

After Lee had started work at Panatron on 2 May 1997, he found out that all was not well within the company. Despite being the financial controller, he was denied access to many documents and accounts. When he finally gained access to Panatron`s and Chemind`s financial statements for up to 31 December 1996 and the books of account, he discovered that, contrary to what Phua had represented, the whole group of companies was in fact making losses. There were glaring differences between the figures shown in the financial and accounting documents and those shown in the Chemind financial statements shown to Lee by Phua prior to Lee`s investment. Lee also discovered that Chemind was not a wholly-owned subsidiary of Panatron as Phua had told him; there was a minority shareholder called Liap Huat Construction. Further, Phua had not invested more than half a million dollars in the business as he had claimed; his investment did not amount to more than $170,000.

In May 1997, Lee made another discovery. Despite the payments they had made for their shares in Panatron, neither he nor Yin was listed in the company`s share register as a shareholder. Lee resigned from Panatron on 20 August 1997.

Lee`s position was that he would not have invested in Panatron had he known that Phua`s representations about Chemind`s profits were untrue. Although the financial statements shown to him related to Chemind, Phua had repeatedly told him that Chemind`s performance reflected that of Panatron.

The appeal

The district judge convicted Phua based on the above facts tendered as evidence by the prosecution. Phua did not appeal against his conviction but only against his sentence.

The main ground for Phua`s appeal was that the appropriate sentence in his case would have been a fine instead of imprisonment. In particular, counsel cited as a precedent the case of ***Simon Rozario v PP*** (MA 110/2001; DAC 45824/2001). In that case, the appellant was charged under s 404(1) of the Act with recklessly making a false statement and inducing one Mr Chen to invest a sum of $100,000. Although the district judge in that case came to the conclusion that the accused was `not so much being reckless in making the misrepresentation about profits but rather he was dishonest in that he had deliberately sought to mislead and induce Chen to invest`, he imposed a fine of $20,000 on the appellant.

It should be noted, however, that even within s 404(1) of the Act, there may be different levels of mens rea involved. For example, knowingly making a false or misleading statement would constitute a

more culpable offence than recklessly making such a statement and thus, the former offence should attract a harsher penalty than the latter. In the case of ***Simon Rozario v PP*** (supra), although the district judge found that the appellant had been dishonest, he also commented that the appellant was `fortunate that the prosecution had seen it fit to proceed on the less culpable reckless limb of a Companies Act charge having regard to [his] findings of dishonesty on [the appellant`s] part`. Thus, the appellant in that case was ultimately convicted on a charge of `recklessly` making a false statement, resulting in a heavy fine.

The present case presents a different situation. Here, the facts of the case clearly show that Phua had been dishonest in making the misrepresentations to Yin and in showing Lee the false financial statements so as to induce them to invest huge sums of money in his companies. Unlike the appellant in ***Simon Rozario v PP*** (supra), Phua was charged with knowingly making the misleading and false statements. Phua had intentionally made those statements which were calculated to induce Yin and Lee to invest in his companies, thereby benefiting himself at their expense. The district judge was thus of the view that a short custodial sentence was warranted for each of the charges he was convicted of.

Having regard to the facts of the case, I had no doubt that a fine would clearly be inadequate punishment for Phua. Further, I was of the view that the one month`s imprisonment and four months` imprisonment imposed by the district judge on Phua`s first charge and second charge respectively were manifestly inadequate.

There were obvious and serious aggravating factors in this case. Phua`s whole series of actions and misrepresentations were clearly calculated to give Yin and Lee the false impression that his companies were doing extremely well and were profitable when they were in fact making losses. For his personal gain, Phua had dishonestly induced Yin and Lee to invest huge sums of money in his companies, thereby causing Yin and Lee much loss. Phua had also abused his position as a friend and relative of Yin and Lee respectively, taking deliberate advantage of their relationship and their trust in him.

On the whole, the circumstances in this case warranted a heavier sentence than that imposed by the district judge. I therefore enhanced the sentence on the first charge from one to two months` imprisonment and the sentence on the second charge from four to six months` imprisonment with both sentences to run concurrently. The enhanced sentence would be more commensurate with the level of dishonesty involved in Phua`s offences and the seriousness of the consequences thereof.

Outcome:

Appeal dismissed; sentence enhanced.