Public Prosecutor v Choong Kian Haw
[2002] SGHC 211

Case Number : MA 128/2002

Decision Date : 13 September 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Ivan Chua Boon Chew (Deputy Public Prosecutor) for the appellant; Felicia Ng (Piah Tan & Partners) for the respondent

Parties : Public Prosecutor — Choong Kian Haw

Criminal Procedure and Sentencing – Sentencing – Bankruptcy offences – Undischarged bankrupt leaving jurisdiction without previous permission of Official Assignee – Whether custodial sentence the norm for such offences – Burden in offender to show exceptional circumstances warranting sentence of only a fine – s 131(1)(b) Bankruptcy Act (Cap 20, 2000 Ed)

Criminal Procedure and Sentencing – Sentencing – Bankruptcy offences – Whether imposition of a fine appropriate – Whether any usual tariff sentence in respect of amount of fine – s 131(1)(b) Bankruptcy Act (Cap 20, 2000 Ed)

Insolvency Law – Bankruptcy – Bankrupt's duties and liabilities – Undischarged bankrupt leaving jurisdiction on 44 occasions without prior permission of Official Assignee – Whether bankrupt's conduct amounts to reckless, blatant and deliberate disregard of the law – Whether duty imposed on bankrupt delegable – s 131(1)(b) Bankruptcy Act (Cap 20, 2000 Ed)

Judgment

GROUNDS OF DECISION

This was an appeal by the Public Prosecutor against the sentence imposed by Magistrate Chong Kah Wei on the accused, Choong Kian Haw ('Choong'), in Official Assignee Summons 95 of 2002. The magistrate accepted Choong's plea of guilt and found him guilty of three charges under s 131(1)(b) of the Bankruptcy Act, Cap 20, for leaving Singapore without the previous permission of the Official Assignee although he was an undischarged bankrupt. The offence is punishable under s 131(2) of the Bankruptcy Act with a maximum fine of $10,000 or a term of imprisonment not exceeding two years or both. The magistrate imposed the maximum fine of $10,000 for each charge, amounting to a total of $30,000, on Choong, but did not commit him to prison.

Undisputed facts

2 Prior to his bankruptcy, Choong was a fairly successful businessman who ran his own family's business. However, the company he ran became insolvent due to the economic crisis in Asia in 1998 and some mistaken business decisions. Choong was made a bankrupt on 19 March 1999 as he had given personal guarantees for loans granted to his company.

3 On 1 June 1999, Choong found gainful employment with HIN Investments Pte. Ltd. ('HIN Investments') as an executive officer. His duties involved a considerable amount of traveling out of Singapore. The purpose of the trips was to make contacts and forge ties with existing and prospective overseas partners so as to secure deals with them and also to survey overseas markets.

4 Choong knew that it was an offence to leave Singapore without the previous permission of the Official Assignee. On 13 April 1999, he acknowledged receipt of the Bankruptcy Information Sheets which informed him of this offence. Furthermore, as he had committed the offence on numerous

occasions, the Official Assignee sent him a formal warning on 23 September 1999. He was informed that he would be prosecuted if he continued to commit this offence.

5 Choong sought the Official Assignee's permission to go on work-related travel thrice and permission was granted on two occasions. On the first application, he obtained permission to travel for fifteen weeks from 23 September 1999 to 31 December 1999. However, on his second application in January 2000, he failed because a GIRO deduction for one of the monthly installments that he had to make pursuant to an arrangement to repay his creditors had failed. Choong promptly took steps to make the necessary payment. In March 2000, he made a further application which was also successful. He was permitted to travel abroad for a further six months from 29 March 2000 to 28 September 2000.

6 After March 2000, Choong had no further contact with the Official Assignee until January 2002, when his offences came to light. In the meantime, he continued to travel frequently, i.e. two or three times a month. The trips lasted from a few days to ten days and were for work related purposes. HIN Investments made the arrangements for his travels and undertook to keep track of the duration of the permission granted by the Official Assignee. However, both HIN Investments and Choong failed to take any steps to check that he was always traveling with permission. As such, after his permission to travel lapsed in September 2000, Choong did not seek further permission but made a total of 44 trips out of Singapore without permission.

7 In January 2002, Choong needed a new passport as all the pages in his existing passport had been used up. He went to the Singapore Immigration & Registration department where he was advised that he had to obtain the permission of the Official Assignee to do so. The offences which Choong committed were then discovered when he surrendered his existing passport to the officer at the Official Assignee's office to obtain permission to get a new passport.

8 The prosecution initially took out 50 charges against Choong for the offence of traveling out of Singapore without the previous permission of the Official Assignee. However, only three charges were eventually proceeded with, i.e. the 20th, 25th and 36th charges. 41 other charges were taken into account and six were withdrawn. With respect to the 20th charge, the subject matter was Choong's travel to the Philippines on 23 April 2001 where he attended an exhibition to source for new products. As for the 25th charge, Choong was charged with traveling to Australia on 3 June 2001 where he had gone to discuss the possibility of a joint venture with an Australian party. Lastly, on the 36th charge, the prosecution charged Choong for traveling to the UK on 21 September 2001 without permission. Choong had gone to the UK to discuss the possibility of obtaining a licence to operate a dry cleaning business in Singapore.

The decision below

9 Magistrate Chong convicted Choong on all three charges and sentenced him to the maximum fine of $10,000 per charge such that the total fine payable was $30,000.

10 The magistrate considered two competing public interest elements in sentencing, ie the need for specific and general deterrence against the commission of such offences and the need to encourage enterprise. He concluded that a custodial sentence was inappropriate in the present case because it would discourage risk-taking entrepreneurs such as Choong who traveled abroad in the course of helping his employer's business. Furthermore, he found that Choong had not committed the offence intentionally but through a negligent omission "contributed by the hectic pace of an entrepreneurial effort". The magistrate also did not think that it was necessary to impose a custodial

sentence on Choong to deter him as the magistrate warned him that he would be imprisoned if he committed the same offence again and this warning was a sufficient deterrent. He also made it clear that the sentence imposed was based on the unique facts of this case and would not send the wrong signals to other bankrupts. However, in arriving at the appropriate sentence, the magistrate placed little weight on Choong's ill health and his plea of guilt as he had been caught red-handed.

The appeal

11 The only issue in this appeal was whether the sentence imposed by the magistrate was manifestly inadequate.

12 The DPP contended that a custodial sentence should have been imposed. He had four main grounds of appeal. First, that the trial judge erred when he found that Choong had not committed the offence deliberately, recklessly or with blatant disregard for the obligations imposed on him to seek permission from the Official Assignee before leaving the jurisdiction. Secondly, that the magistrate failed to consider that the imposition of a fine would not have any punitive effect on Choong. Thirdly, that the sentence was out of line with sentencing precedents. Lastly, that the magistrate wrongly relied on the need to promote enterprise as a relevant policy consideration to reduce the sentence imposed on Choong.

Choong's mental state

13 The magistrate held that Choong had not traveled out of the jurisdiction without the permission of the Official Assignee deliberately, recklessly or with blatant disregard. He noted that Choong had made 44 such trips without permission and that this would *prima facie* qualify as a flagrant breach. However, he accepted Choong's explanation that he had merely overlooked the requirement to apply for permission after his existing permission lapsed. The magistrate noted that Choong had arranged for his employer to monitor the duration of his permissions and concluded that he was simply negligent in failing to check whether his employer had applied for permission on his behalf. He claimed that his conclusion was fortified by the following facts: First, there was no reason for Choong not to apply for permission deliberately. This was because he had been granted permission previously and was likely to succeed if he had made an application for permission to travel on the same basis as the previous successful applications, i.e. work-related traveling. Secondly, Choong did not attempt to conceal his travels from the Official Assignee. He voluntarily surrendered his passport with the incriminating evidence although it would have been so easy for him to hide this evidence. Lastly, the magistrate accepted that the frequency of Choong's work-related travel contributed to his inadvertent failure to check on his employer regarding extensions of the permission for him to travel.

14 The DPP argued before me that the trial judge erred in finding that Choong had committed the offences negligently. He pointed out that Choong had committed such offences before and had been warned previously. Thus, he was well-aware of the requirement for permission to travel. In spite of his knowledge, Choong traveled 44 times out of Singapore without the previous permission of the Official Assignee. In addition, the DPP also contended that the magistrate erred in taking into consideration the fact that Choong had asked HIN Investments to keep track of his travels to conclude that Choong was merely negligent in failing to ensure that HIN Investments had actually obtained a valid permission for him to travel.

15 In defence, Counsel for Choong submitted that he had only negligently overlooked the requirement to obtain permission for his travels due to the frequency of the trips or, in the words of the magistrate, the "hectic pace of an entrepreneurial effort".

16 I accepted the arguments of the prosecution and found that the magistrate drew the wrong inference from the facts before him when he found that Choong had committed the offence negligently and not *recklessly*. Choong had admitted, in the Statement of Facts, that he had received the Bankruptcy Information Sheets which informed him that it was an offence to leave Singapore without the previous permission of the Official Assignee. Despite such a warning, he left Singapore without obtaining permission on "*numerous occasions*". As such, a second official warning was given to him, informing him that he would be prosecuted if he persisted in committing the offences. Choong was clearly apprised of the severity of the offences from his historical dealings with the Official Assignee. Despite this knowledge, Choong continued to travel out of Singapore without permission for a total of 44 times over a period of more than 15 months, from September 2000 to January 2002. In my view, the numerous times in which he committed the offence, knowing its severity, amounted to a blatant disregard for the law. Choong shut his eyes to the possible consequences arising from his failure to ensure that he had the relevant permission to travel. It was clearly not open to Choong to rely on the frequency of his trips to prove that he had negligently overlooked the requirement for permission.

17 I was also of the view that the magistrate's finding that Choong committed the offences negligently could not be supported by the two facts he relied on. First, that Choong made arrangements for his employer to monitor whether he had the permission to travel. I agreed with the DPP that the magistrate had effectively condoned the delegation of duties imposed on a bankrupt by the bankruptcy regime by finding Choong negligent since he had merely failed to check on HIN Investments. Such an approach is wrong because the duty imposed on a bankrupt to ensure that he does not breach any of the limitations imposed on him is personal and non-delegable. This is so that there is proper accountability by the bankrupt for the effective administration of his bankruptcy, to the benefit of his creditors.

18 Secondly, the fact that Choong had voluntarily surrendered his passport to the Official Assignee could not prove that Choong was innocent. The magistrate's reasoning that Choong could have easily hidden the incriminating evidence instead of surrendering it to the Official Assignee if he had indeed known that he committed the offence was highly speculative. In any case, I disagreed with the magistrate that it was easy to hide the incriminating evidence by claiming that the passport was lost since such an action involved committing the criminal offence of making a false police report to declare its loss.

19 In conclusion, the facts and evidence before me did not support the magistrate's conclusion that Choong committed the offences inadvertently. In my opinion, Choong committed the 44 offences blatantly, recklessly and deliberately.

The general suitability of a custodial sentence – sentencing precedents and policy

20 There are only two cases concerning sentencing for the offences of leaving Singapore without the permission of the Official Assignee for which written grounds are available, ie *Chong Fook Choy v PP* (MA 116/2000/01) and *Re Ho Kok Cheong* (RA 80/1995). The magistrate held that the sentencing guideline that could be derived from these cases was that a custodial sentence would be normally imposed only when the accused had deliberately, recklessly or blatantly disregarded the requirement to obtain the Official Assignee's permission to leave Singapore. At 26 of his grounds of decision, the magistrate stated that a fine of $5000 was the usual tariff sentence in cases where an offender pleads guilty to an offence under s 131(1)(b). As such, the magistrate held that a custodial sentence was inappropriate since Choong committed the offences negligently.

21 In my view, the magistrate was wrong in limiting the imposition of a custodial sentence only

to cases when the offences are committed deliberately, recklessly or with blatant disregard for the requirements under s 131(1)(b). *A fortiori*, I disagreed with his conclusion that a fine of $5000 is the usual tariff sentence for offenders who plead guilty to a charge under s 131(1)(b). The positions taken by the magistrate were certainly not supported by any authority. The cases of *Re Ho Kok Cheong* and *Chong Fok Choy v PP* did involve offenders who had deliberately, recklessly or blatantly breached the requirements to obtain permission. However, nothing in those cases suggested that custodial sentences should be imposed only if the offenders were reckless, or deliberately and blatantly broke the law. In fact, in the case of *Re Ho Kok Cheong*, Rubin J noted that in *all* of the 28 cases heard before his own case, a sentence of imprisonment was imposed on *every* offender who had been convicted of the offence of leaving the jurisdiction without the previous permission of the Official Assignee. The prosecution had also tendered a list of seven recent cases involving offences committed pursuant to section 131(1)(b). In all but one case, custodial sentences were imposed. As for the only case which did not attract a custodial sentence, the accused had left the jurisdiction without permission on only one occasion. Counsel for Choong failed to produce any other case to support her contention that a fine was generally the appropriate punishment. The authorities stood for the proposition that a custodial sentence was the norm for offences committed under s 131(1)(b).

22 The imposition of a fine as an exception is also consistent with the approach which I took in *PP v Ong Ker Seng* [2001] 4 SLR 180. In that case, the accused was convicted of two charges, under s 141(1)(a) of the Bankruptcy Act, of obtaining loans without informing the lender that he was a bankrupt. I expressed the opinion that such an offence would generally attract a custodial sentence. Fines were normally inappropriate because the funds to pay the fine would either come from a third party, diluting the punitive effect on the bankrupt, or from funds which should go to the unpaid creditors in the first place.

23 The magistrate reasoned that I did not lay down any definitive rule that a bankrupt ought to be punished with imprisonment in general but dealt only with offences under s 141(1)(a). He stated that the appropriate sentence should depend on the nature of the offence and the facts and circumstances of the case. Furthermore, he commented that one of the prescribed punishments for an offence under s 131(1)(b) was the imposition of a fine and therefore Parliament must have intended the imposition of fines instead of custodial sentences on bankrupts in appropriate cases.

24 The magistrate misread my decision in *PP v Ong Ker Seng*. In that case, I did not contradict the trite principles that fines may be imposed in appropriate circumstances. However, I stated my view that fines were, in general, not a suitable means of punishment since bankrupts would typically lack the means to pay for the fines themselves. If they had the funds to pay the fines, these monies should clearly be channeled instead to the unpaid creditors. If they lacked the funds and a third party paid for them, the punitive effect of the punishments is diminished. These concerns apply with equal force to the sentencing of bankrupts in general. They are not limited to offences committed under s 141(1)(a).

25 I was of the view that the case law clearly stood for the proposition that a custodial sentence would generally be imposed for the offence of leaving the jurisdiction without the previous permission of the Official Assignee. The burden was on the offender to show that there were such exceptional circumstances in his case that it warranted a deviation from the usual imposition of a custodial sentence. Choong failed to prove that his case was an exception warranting only a fine, as he had committed a grand total of 44 offences recklessly and blatantly.

Policy considerations

26 On the grounds mentioned above, the prosecution was entitled to succeed in this appeal.

However, I found it necessary to deal specifically with one part of the magistrate's reasoning. In concluding that Choong should not be given a custodial sentence, the magistrate was influenced by what he considered to be a key public policy consideration in the sentencing of offenders under the Bankruptcy Act, i.e. the promotion of enterprise. At 40 of his grounds of decision, he stated:

> … I was also conscious of the other public interest element of the new Bankruptcy Act, which was that of encouraging entrepreneurship. While encouraging entrepreneurship was an important public policy concern in 1995 when the new Bankruptcy Act was passed to make it easier for failed entrepreneurs to obtain discharges, it is an even more important and crucial concern in today's changed economic environment. The government has recently strongly encouraged Singaporeans to become entrepreneurs and to venture abroad. Entrepreneurship has been identified as an important engine of growth for the Singapore economy in this changed economic environment.

At 42, of his grounds, the magistrate then made the startling statement that the imposition of a custodial sentence on Choong would be overly harsh and would discourage risk-taking entrepreneurs which went against the national policy of promoting enterprise.

27 With respect, I could not understand the rationale for taking into consideration the need to promote enterprise in the sentencing of offenders. The promotion of enterprise in Singapore is important. However, it was clear from the debates on the reform to the bankruptcy regime on 25 August 1994, culminating with the passing of the new Bankruptcy Act that Parliament did not intend the promotion of enterprise to be at the expense of the need to protect the interests of creditors and society. At volume 63, column 399 of the parliamentary reports, the Minister for Law, Professor S. Jayakumar, stated the functions of the new Act, as follows:

> … to improve administration of the affairs of bankrupts and protect creditors' interests without stifling entrepreneurship. We will strike a balance between the interest of the debtor, the creditor and society.

Furthermore, at column 401 of the same report, the Minister stated that the Act would encourage enterprise through allowing the early discharge of bankrupts who became bankrupts due to business failure. Parliament's intention was to promote enterprise through such a mechanism, not through being more lenient towards bankrupts who broke the law while carrying on a business.

28 The purpose of prohibiting an undischarged bankrupt from leaving the jurisdiction without the previous permission of the Official Assignee is to ensure that the Official Assignee can monitor the bankrupt's movements to properly administer his affairs for the benefit of his creditors. A bankrupt who goes overseas without permission would have opportunities to salt away his assets, earn income or acquire assets abroad without accounting for them to the detriment of his creditors, since the Official Assignee would not have the power to supervise his affairs. As such, it is necessary to treat every infraction of section 131(1)(b) seriously.

29 In my view, there is no reason to treat preferentially offenders who commit an offence supposedly in the course of their business. Adopting such an approach would set a bad precedent and send the wrong signals to bankrupts that the law views such offenders more leniently. This is

manifestly contrary to Parliament's intention to protect the interests of creditors and improve the administration of the affairs of bankrupts. In any case, I do not see how an imposition of a custodial sentence for breaking the law by failing to seek permission would discourage enterprise. Bankrupts who have work-related reasons to travel need only take the extra step of applying for permission to carry on their businesses legitimately. If they fail to do so, they must be treated like any other offender. Such an approach will properly reflect the balance of the interests of the creditors, debtors and society. Accordingly, I rejected the magistrate's view that the promotion of enterprise should be a relevant policy consideration in sentencing bankrupts.

Conclusion

30 Choong committed the offences of leaving Singapore without the previous permission of the Official Assignee recklessly and blatantly a total of 44 times. On this ground alone, he deserved a custodial sentence. The imposition of a term of imprisonment was also consistent with the previous cases and policy considerations.

31 Accordingly, I allowed the appeal of the Public Prosecutor. I set aside the fines of $10,000 per charge for the three charges imposed by the magistrate and ordered that the fines which had already been paid into Court be paid over to the Official Assignee. I substituted the fines with a term of imprisonment of two months for each of the three charges. I ordered that all the terms of imprisonment should run consecutively. On an application by Counsel for Choong, I allowed the commencement of the period of imprisonment to be deferred to 10 September 2002. Bail was set at $10,000.

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore