Gan Hock Keong Winston v Public Prosecutor
[2002] SGHC 221

Case Number : MA 115/2002

Decision Date : 20 September 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Nai Thiam Siew Patrick (Abraham Low LLC) for the appellant; Ivan Chua Boon Chwee (Deputy Public Prosecutor) for the respondent

Parties : Gan Hock Keong Winston — Public Prosecutor

Courts and Jurisdiction – Appeals – Trial judge's findings of fact – Whether and when appellate court can interfere with such findings

Criminal Procedure and Sentencing – Sentencing – Whether and when appellate court can interfere with sentence below – Factors to consider – Whether sentence manifestly excessive

Evidence – Documentary evidence – Statements – Previous inconsistent statements - Impeachment of prosecution witnesses by prosecution – Whether prosecution can substitute oral testimonies for prior inconsistent statements – Whether trial judge can give due weight to such statements – s 147 Evidence Act (Cap 97, 1997 Ed)

Evidence – Witnesses – Impeaching witnesses' credibility – Oral testimonies of prosecution witnesses different from earlier statements – Whether trial judge under obligation to accept oral testimonies exculpating appellant – s 157 Evidence Act (Cap 97, 1997 Ed)

Judgment

GROUNDS OF DECISION

This was an appeal against conviction and sentence. The appellant claimed trial and was convicted on 26 March 2002 on the following charge:

> You, Gan Hock Keong Winston, are charged that you, from on or about 1 August 2001 to 15 August 2001 at Hainanese Boneless Chicken Rice Stall located at 30, Eunos Road 5, #01-101, Singapore 400030 did abet by intentionally aiding one Tan Hui Huang in the commission of the offence of employing a foreigner, namely Yap Chai Teck, without having obtained in respect of the said Yap Chai Teck a valid work permit allowing him to work for the said Tan Hui Huang, to wit, by arranging for the said foreigner to work at the said stall as a stall assistant and which offence was committed in consequence of your abetment and you have thereby committed an offence under section 5(1) read with section 23(1) of the Employment of Foreign Workers Act, Chapter 91A and punishable under section 5(6) of the same.
>
> And further, that you, prior to the commission of the above mentioned offence, were convicted on 23 March 1999 in Court 23 in the Subordinate Courts for two offences under section 5(1) of the Employment of Foreign Workers Act, Chapter 91A, which conviction had not been set aside, and

you are liable for enhanced punishment under section 5(6)(b)(i) of the same Act.

2 The appellant was the owner of one Jie Sheng Food Court of Blk 735, Pasir Ris Street 72, #01-298 ("Jie Sheng"). Since May 2001, one Yap Chai Teck ('Yap') had been working for him as a coffee shop assistant. Yap's work permit only allowed him to work for the appellant at Jie Sheng. On 15 August 2001, Yap was found working for one Tan Hui Huang ('Tan') at one Hainanese Boneless Chicken Rice located at Blk 30, Eunos Road 5, #01-101 ('the chicken rice stall') by officers from the Ministry of Manpower ('MOM'). Investigations revealed that Yap had been working there since 1 August 2001. Following his arrest, Yap was questioned by one Raymond Chui ('Chui'), an MOM investigating officer, and made the following statement:

> Last month … 'Wu Bai' (the appellant) has a friend by the name of 'Ah Huang' (Tan) who approached him at Jie Sheng Food Court and told 'Wu Bai' that he needed me to help out at the inspected premises (the chicken rice stall). *After discussion between 'Wu Bai' and 'Ah Huang' at Jie Sheng Food Court, both 'Wu Bai' and 'Ah Huang' approached me and together they told me to go over to the inspected premise on the 1st of August this year to help out*.
>
> I then asked 'Wu Bai' and 'Ah Huang' how much salary they will be paying me for helping out at the inspected premise. However, both 'Wu Bai' and 'Ah Huang' told me to go over and help out at the inspected premise first and they will then pay me my salary accordingly. But till date, I have not received any additional salary either from 'Wu Bai' or 'Ah Huang' for helping out at the inspected premise. *Both 'Wu Bai' and 'Ah Huang' then gave me the address of the inspected premise and told me to report for work on 1st August 2001 at 8am in the morning*.
>
> … *As 'Wu Bai' is my boss at Jie Sheng Food Court, I have no choice but to follow his instructions to work for 'Ah Huang' at the inspected premise*. (emphasis mine)

3 Both Tan and the appellant were subsequently questioned by Chui. Tan made the following statement on 16 August 2001:

> The said 'Ah Mao' (Yap) is actually a work permit holder working as a coffee shop assistant at Jie Sheng Food Court at Blk 735 Pasir Ris. His boss there is known as Vincent (the appellant). I also know Vincent myself as I also have a chicken rice stall there. However, 'Ah Mao' also has the intention to quit his job as a coffee shop assistant selling drinks at Jie Sheng Food Court and as I also need him to help me out at the inspected premise to sell chicken rice.
>
> *I therefore discussed the matter with Vincent and we then told 'Ah Mao' to come over to help out at the inspected premise. Thus, Vincent knows that 'Ah Mao' is helping me*

> *out at the inspected premise since 01.08.2001, and Vincent agreed to let 'Ah Mao' help me out at the inspected premise*
>
> . (emphasis mine)

4 On 17 August 2001, the appellant made the following statement:

> *I therefore agreed to this matter of 'Ah Mao' (Yap) helping out at the inspected premise for 'Ah Huang' (Tan). Both 'Ah Huang' and myself then told 'Ah Mao' to go over and work as a stall assistant at the inspected premise since 01.08.2001 this year*
>
> . (emphasis mine)

5 Tan pleaded guilty on 31 January 2002 to a charge of employing Yap without a valid work permit, an offence under s 5(1) of the EFWA. He was fined $6,480.

6 The issue in the present case was whether the appellant had abetted Tan in the illegal employment of Yap by arranging for Yap to work at the chicken rice stall, knowing that Yap did not possess a valid work permit to be so employed. I noted that the content of the statements recorded between 15 and 17 August 2001 quite clearly implicated the appellant in this respect. In particular, that the appellant's own statement contained incriminatory material which showed that he had arranged for Yap's unlawful employment. It was not disputed that the statements were made voluntarily.

The trial below

7 During the trial, a very different version of events was narrated by all three men. Their oral testimony was that it was Tan alone who had arranged for Yap to work at the chicken rice stall, and that the appellant did not know that Yap was working there between 1 and 15 August 2001. The appellant was the sole defence witness, while Yap and Tan were among the witnesses called by the prosecution.

8 Yap's evidence in court was that the appellant was not involved in his decision to work at the chicken rice stall. He stated that it was Tan alone who had given him the address of the stall and had told him to work there. Yap initially stated in court that there was no discussion between Tan and the appellant concerning his employment at the chicken rice stall. However, on further questioning, he conceded that there had been a previous discussion between Tan and the appellant, but claimed that he did not know the contents of the discussion.

9 On cross-examination, Yap stated that he had told the appellant in mid-July 2001 that he intended to quit because the pay was too low. Yap said that the appellant gave him two weeks off from 1 to 16 August 2001 in order for him to consider whether he wished to continue working at Jie Sheng. His evidence was that the appellant did not know that he had been working in the chicken rice stall during those two weeks, and had in fact told him that his work permit would have to be cancelled if he intended to work somewhere else.

10 Tan's evidence in court was also that the appellant did not know that Yap had been working at the chicken rice stall from 1 to 15 August 2001. Tan admitted that he and the appellant had previously discussed the idea of Yap working in the chicken rice stall. Tan stated that the appellant

had said there would be no problems with the arrangement, as long as Tan informed him beforehand. Tan claimed that he did not tell the appellant that Yap was working at the chicken rice stall from 1 to 15 August 2001 because he was there on a trial basis, and Tan had not yet decided whether to formally employ him.

11 The appellant was the only witness for the defence. His evidence was that he had told Yap that if he intended to work anywhere else, he must have his work permit cancelled first. He had agreed to Yap's request for two weeks off in August 2001 as business was not good at that time and by giving Yap time off he would not need to pay his wages for those two weeks. He had spoken to Yap about the possibility of him working at the chicken rice stall, and had also discussed the possibility with Tan. However, he denied having actually directed Yap to work at the chicken rice stall.

12 All three men relied on the same explanation for the discrepancies between their oral testimonies and the contents of the previous statements: Chui – the MOM investigating officer – had failed to accurately record their statements. The defence alleged that the statements were inaccurately recorded on several grounds. First, Chui had only a C6 grade for his GCE 'AO' level Chinese. Since the questioning took place in Mandarin, Chui was not sufficiently proficient in the language and this caused the statements to be erroneously recorded. Second, Chui had refused to amend the statements even after being told that certain portions were inaccurate or untrue. Third, it was alleged that the statement made by Tan had not been interpreted to him in sufficient detail before he was asked to sign it.

The decision below

13 The appellant was convicted by district judge Hoo Sheau Peng on 26 March 2002. The district judge held that the version of events narrated by the three men in court was both unreliable and inconsistent, and that their previous inconsistent statements reflected the truth of what had happened. The district judge further held that unsatisfactory answers had been given when explaining the discrepancy between the evidence in court and the previous statements.

14 The district judge also found no merit in the defence's allegations that the previous statements had been inaccurately recorded by the MOM officer Chui. She noted that Chui bore no grudge against the appellant, and had absolutely no reason to fabricate the contents of the recorded statements. She also noted that none of the three men had stated any difficulty in understanding Chui's questions or responses. He was therefore sufficiently proficient in Mandarin to record the statements made by the three men.

The Appeal

15 It is established law that an appellate court will not disturb findings of fact unless they are plainly wrong, or are clearly reached against the weight of the evidence. This was recently reiterated by this Court in *Teo Kian Leong v PP* [2002] 1 SLR 147, following the principle enunciated in cases such as *Lim Ah Poh v PP* [1992] 1 SLR 713, *Jimina Jacee d/o CD Athananasius v PP* [2000] 1 SLR 205 and *Ramis a/l Muniandy v PP* [2001] 3 SLR 534.

16 The grounds of judgement issued by the district judge set out her reasoning with great comprehensiveness and clarity, in accordance with the requirement laid down in *Kwan Peng Hong v PP* [2000] 4 SLR 96. I found no basis on which to fault her reasoning, and on the totality of the evidence I found that there was no reason to conclude that the findings made by the district judge were either wrong or against the weight of the evidence. I accordingly dismissed this appeal and now give my

reasons.

The oral testimony of the three men

17 The appellant argued that the district judge erred in law and fact when she ruled that the credit of Yap and Tan had been impeached. There was no merit to this assertion. It was clear from the grounds of judgement that the district judge had exhaustively assessed the evidence before concluding that Yap and Tan were not reliable witnesses. More importantly, the oral evidence given by both men in court was patently unreliable.

18 I turn first to consider Yap's evidence in court. He initially claimed that there was no discussion between Tan and the appellant. He then said that there had been a discussion, but that it took place a long time ago. Upon further questioning, he stated that he had no idea of the contents of the discussion. This was nothing more than a confused attempt to explain away the discrepancies in his own evidence. The contradictory nature of Yap's evidence was aptly summarised by the district judge: "If he had no idea of the contents of the discussion, why should Mr Yap know about and remember the event?" The district judge went so far as to call such evidence 'ridiculous', and I found this description both accurate and appropriate.

19 Turning now to Tan's evidence, it was clear that he was equally inconsistent in court. Tan had initially said that he would only employ Yap with the appellant's knowledge and permission. This was to prevent any awkwardness in his relationship as the appellant's tenant. Nevertheless, he claimed to have done exactly the opposite, and did indeed employ Yap behind the appellant's back. His only explanation for this startling change of heart was that Yap was working on some sort of "trial basis". In these circumstances, I found it hard to believe that Tan would allow Yap to work for him at the chicken rice stall – even on a so-called "trial basis" – without the appellant's knowledge and consent.

20 I noted that both Yap and Tan had incentives to alter their evidence in order to exonerate the appellant. At the time of the trial, Yap was still working as a coffee shop assistant for the appellant. As for Tan, he maintained a continuing business relationship with the appellant as his tenant at Jie Sheng. Tan even stated in court that he referred to the appellant as 'boss'.

21 The appellant suggested that the district judge should have accepted the exculpatory evidence of Yap and Tan because they were the prosecution's own witnesses. This argument was without merit, as it ignored the fact that the credit of both men had been impeached in the court below. The procedure for the impeachment of a witness' credit is laid out in s 157 of the Evidence Act (Cap 97), which states:

> The credit of a witness may be impeached in the following ways by the adverse party *or, with the consent of the court, by the party who calls him*:
>
> (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
>
> (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
>
> (d) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. (emphasis mine)

It can clearly be seen that the party who calls a witness is entitled to impeach the credit of that witness with the consent of the court. The appellant's suggestion that a trial judge is obliged to accept the exculpatory evidence of a prosecution witness is contrary to the unambiguous language of s 157 of the Evidence Act.

22 Turning now to the appellant's oral testimony, he admitted that he had previously discussed the possibility of Tan employing Yap to work at the chicken rice stall. However, he claimed that he had told Tan that Yap's work permit would have to be cancelled first. The appellant also claimed to have given Yap two weeks off from 1 to 16 August 2001 in order to give him some time to decide whether he wished to continue working at Jie Sheng. This was the appellant's explanation as to why Yap was not working at Jie Sheng from 1 August 2001 to the time when he was arrested by the MOM officers. He also maintained that he did not tell Yap to go and work at the chicken rice stall during this time.

23 The coincidental timing of this sequence of events was remarkable. It was on 15 August 2001 that Yap was discovered by MOM officers at the chicken rice stall. The appellant basically suggested that, had Yap not been discovered by the MOM officers, he would have reported back to work at Jie Sheng the very next day. In addition to this remarkable coincidence of timing, I do not find it believable that the appellant had not told Yap to work at the chicken rice stall. Yap was the appellant's employee, while Tan was the appellant's tenant. That both would contrive to go behind the appellant's back to do what he had expressly forbidden was simply unbelievable.

Reliance on the previous statements

24 The appellant further argued that the district judge erred in law and fact in that she gave undue weight to the incriminating statements recorded by Chui. I found this argument to be similarly without merit. The prosecution applied under s 147(3) of the Evidence Act to substitute the previous inconsistent statements of the three men in light of the material inconsistencies in their oral testimony. I noted certain things about the recorded statements:

> a) The statements were contemporaneous. They were all recorded within three days of the raid at the Chicken Rice Stall. The facts were still unquestionably fresh in the minds of the three men.
>
> b) When making the statements, there was no reason for the men to misrepresent the facts in order to implicate the appellant. As outlined above, both Yap and Tan continued to have business dealings with him. It was in fact particularly damaging to the appellant's case that his **own** statement implicated him in a clear and unambiguous manner:
>
> *I therefore agreed to this matter of 'Ah Mao' helping out at*

> *the inspected premise for 'Ah Huang'. Both 'Ah Huang' and myself then told Ah Mao to go over and work as a stall assistant at the inspected premise since 01.08.2001 this year*
>
> .
>
> c) The explanation for the inconsistency in the previous statements was highly unconvincing. I found no merit in the allegation that the statements were not recorded accurately. The recording officer Chui did not bear any grudge against the appellant, and had no reason to fabricate evidence against him. Despite his C6 grade in GCE 'AO' level Chinese, none of the three men had any difficulty understanding the questions posed by Chui in Mandarin. Furthermore, both Tan and the appellant had made minor amendments to their statements before signing them, showing that they had taken the opportunity to amend any inaccuracies in their statements. And they did not amend t h e portions of their statements which had clearly incriminated the appellant.

25 I thus found that the district judge was acting in accordance with the principles outlined in s 147(6) of the Evidence Act, and further expounded upon in *Chai Chien Wei Kelvin v PP* [1999] 1 SLR 25*,* which govern when a previous inconsistent statement may be substituted as substantive evidence. The statements were contemporaneous, the makers had no reason to misrepresent the facts, and the explanations given for the discrepancies were reliable. I therefore dismissed the appeal, and upheld the appellant's conviction.

Appeal against sentence

26 The appellant had also appealed against the sentence imposed by the district judge. He relied on the case of *Choy Tuck Sum v PP* [2000] 4 SLR 665, where the accused was tried and convicted of abetment for the same offence under s 5(1) of the EFWA. The accused in that case was sentenced to one month's imprisonment and fined $7,920. On the authority of this case, the appellant argued that his sentence of two months was manifestly excessive.

27 Before I turn to *Choy Tuck Sum*, I wish to emphasise that sentencing in criminal cases is not a scientific procedure. One cannot simply look at the sentence passed in a previous case, and then conclude that the identical sentence should be passed in another case with similar facts. If sentencing were to be reduced to such a mathematical exercise, then this would severely hamper the trial judge's fundamental discretion to pass sentences in accordance with all the factors of a particular case.

28 I turn now to consider *Choy Tuck Sum*. In that case, the accused was a sole proprietor in the construction trade and had supplied one of his 13 workers to work as a cleaner in another premises. The appellant argued that he was less culpable than the accused in *Choy Tuck Sum's* case on the ground that he was not sub-contracting his worker to Tan. The appellant also claimed that the district judge failed to take into account the fact that he made no financial gain from his actions in the present case.

29 It is settled law that an appellate court will not generally interfere with the sentence passed

below unless there was some error of fact or principle, or the sentence was manifestly excessive or inadequate. This was clearly stated in *PP v Md Noor bin Abdul Majeed* [2000] 3 SLR 17*.*

30 I did not find the two months' imprisonment imposed by the district judge to be manifestly excessive. The district judge explained that the appellant was not any less culpable than the accused in *Choy Tuck Sum's* case. While the accused in *Choy Tuck Sum* only had one previous conviction under the EFWA, the appellant had two fairly recent convictions under the EFWA. The appellant's punishment was thus appropriately higher than that meted out in *Choy Tuck Sum's* case. Moreover, I found no merit in the appellant's argument that he had made no financial gain from his actions. After all, the district judge held that the appellant had knowingly entered into the arrangement with Tan and Yap because it had suited him not to pay Yap's wages during that two week period, as business was bad. In any case, it was clear from the case of *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305 that, while the lack of financial gain is a legitimate mitigating factor, it carries very little weight in court.

Conclusion

31 For the above reasons, the appeal against conviction and sentence was dismissed.

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore