Chia Sze Chang v Public Prosecutor
[2002] SGHC 232

Case Number : MA 175/2002

Decision Date : 08 October 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : SS Dhillon and Sarbrinder Singh (Dhillon Dendroff & Partners) for the appellant; Winston Cheng Howe Ming (Deputy Public Prosecutor) for the respondent

Parties : Chia Sze Chang — Public Prosecutor

Public Entertainment – Licensing – Breaches of licence condition – Singers employed in appellant's lounge found sitting and chatting with customers – Women not registered with lounge found serving drinks to customers – Appeal against trial judge's findings of fact – Whether appellate court to disturb such findings – Prosecution not calling singers or women serving drinks as witnesses – Whether to draw adverse inference – Whether appellant satisfied licensing condition – s 19(1)(c) Public Entertainments and Meetings Act (Cap 257, 2001 Ed)

Public Entertainment – Licensing – Appeal against conviction – District judge imposing $27,000 fine on appellant – Appellant previously fined for similar breaches and paying the fines – Need for heavy fine as deterrent for other licensees

Judgment

GROUNDS OF DECISION

On 23 December 2001 at 12.50am the police conducted a raid on Tiananmen KTV & Lounge Pte Ltd, situated at No. 407 Havelock Road. Chia Sze Chang, the appellant, was a co-owner of the entertainment establishment at this time. Due to three breaches of the Public Entertainment and Meetings Act (Cap 257) s 19(1)(c), the appellant was charged on three counts.

2 The first charge, was that the appellant had failed to ensure that the singers did not sit with the customers.

3 The second and third charges, was that the appellant had failed to ensure that the customers would only be served drinks by persons who were listed on the establishment's register.

4 The appellant was convicted on all three charges. District Judge Kow Keng Siong imposed a fine of $9,000, in default two months imprisonment, on each charge. The total fine was therefore $27,000 which the appellant has since paid.

5 The appellant appealed against conviction.

Facts as to the first charge

6 The following were the facts as found by the trial judge.

7 Staff Sgt Wong Vee Kong, the prosecution's first witness, entered the Tiananmen KTV & Lounge at 12.50am on 23 December 2001. He was in plain clothes and was accompanied by a group of officers, also in plain clothes. Due to his seniority, Staff Sgt Wong led the group. Staff Sgt Wong surveyed the premises and spotted some goings-on in KTV room 18, where he observed a woman dancing with a customer. He also observed that two more women were chatting and sitting with some

other customers in the same room. These observations prompted Staff Sgt Wong's to enter the room whereupon he identified himself as a police officer. In the course of his questioning and the subsequent arrests, Staff Sgt Wong identified the two women who were sitting with the customers as Liu Hong Lian (Liu) and Zhang Chong Ling (Zhang). It was undisputed that these two women were employed as singers by the appellant. The Licensing Conditions for Nightclubs/Cocktail Lounges/Discotheques/Restaurants states that :

> The licensee shall ensure that the singers do not sit or dance with the customers.

As against the dancer, Gao Hong Mei, no subsequent action was taken as Staff Sgt Wong was satisfied that she was brought in as a guest.

The appellant's challenge on conviction under the first charge

8 The appellant disputed the trial judge's finding that Zhang and Liu were sitting with the customers, but did not provide any evidence to persuade this court to disregard trial judge's findings on this matter. The district judge stated at pages 11 and 12 of his grounds of decision:

> In the present case, if Staff Sgt Wong's evidence is believed, the ingredients of [the first charge] would have been satisfied. Having carefully considered the matter, I found Staff Sgt Wong to be a reliable witness and that it is inconceivable that he could have been mistaken about seeing Liu and Zhang.

There was nothing in the appellant's submission nor in anything the trial judge said on this matter that could persuade this court to alter the trial judge's findings. In *Ang Jwee Herng v PP* [2001] 2 SLR 474 I re-stated the following principle:

> It is settled law that an appellate court will be slow to overturn findings of fact by the trial judge especially when an assessment of the credibility and veracity of the witness has been made.

This principle has been used in a whole host of case law - *Shamsul bin Abdullah v PP* MA145/2002; *Lim Ah Poh v PP* [1992] 1 SLR 713 at 719; *Teo Keng Pong v PP* [1996] 3 SLR 329 at 342; *Ng Soo Hin v PP* [1994] 1 SLR 105; *Sundara Moorthy Lankatharan v PP* [1997] 3 SLR 464.

9 The three reasons given by the trial judge as to why he came to the conclusion that the two singers, Zhang and Liu, were sitting with the customers were sound. The trial judge stated that Staff Sgt Wong had enough observation time before entering room 18 to confirm that the women were sitting with the customers. Secondly, the trial judge stated there was not any evidence produced by the appellant to show that Staff Sgt Wong was less than diligent in his observation skills. The appellant's contention that Staff Sgt Wong was totally fixated on the dancer and not on the women sitting with the customers was totally speculative, and the trial judge was quite right to dispose of such a far-fetched theory. Thirdly, Staff Sgt Wong wasted no time in checking on the three women in room 18. During the checking, the two women who were sitting with the customers produced their professional visit passes .

10 The appellant did not dispute that Zhang and Liu were singers employed at his KTV Lounge.

For these reasons, there could be no dispute as to the trial judge's findings that these singers sat with the customers.

11 The appellant had a second argument which challenged his conviction under the first charge. He contended that the trial judge erred in law and in fact in finding that the unavailability of Liu and Zhang was not fatal to the prosecution's case.

12 Zhang and Liu returned to China before the start of the trial in the district court. The two of them had insisted on returning home. As the trial judge observed, the authorities in Singapore had no power to detain them as they were not immigration offenders.

13 The unavailability of Zhang and Liu as witnesses during the trial could not work to extinguish the appellant's culpability. The reason why the prosecution did not call Zhang and Liu was because had left the country and not because their presence as trial witnesses would jeopardise the prosecution's case. This was addressed by the trial judge and there was no reason to second-guess his application of the law on the matter.

14 No adverse inference could also be drawn against the prosecution under s 116 illustration (g) of the Evidence Act. I held in *R Yoganathan v PP* [1999] 4 SLR 264 at 278 that, although the prosecution did not call certain witnesses to give evidence and likewise declined to produce PW1 for further cross-examination at the close of its case, the presumption under s116 illustration (g) of the Evidence Act did not operate. This was because the witnesses who were not produced were not essential to the prosecution's case, and neither did the prosecution withhold evidence from the court or the appellant. Important for our purposes in this case was the fact that the adverse inference under s 116 illustration (g) of the Evidence Act is discretionary. Illustration (g) under s116 reads:

> ..... that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it

With the guidance of *R Yoganathan*, no adverse inference should be drawn from the fact that Zhang and Liu returned to China. No ill-motivation on the part of the prosecution can be latched onto the women's innocent desire to return home. I ruled in *Ang Jwee Herng* [2001] 2 SLR 474 that the prosecution has no obligation to call any particular witness, unless the failure to do so could be shown to be motivated by an intention to hinder or hamper the defence. This principle consolidated itself in the judgments in *Chua Keem Long v PP* [1996] 1 SLR 510 and *Roy S Selvarajah v PP* [1998] 3 SLR 517.

15 Of importance was the fact that the trial judge found Staff Sgt Wong a credible witness and that his testimony was sufficient to confirm that Zhang and Liu were sitting with the customers. For these reasons, the appellant's claim that there were insufficient witnesses must fail.

16 The appellant's third challenge to his conviction under the first charge was that the trial judge imposed on him too great a burden to ensure that his singers did not sit with customers. He listed out all the ways in which he tried to prevent his singers from sitting with customers. Amongst the 'preventive measures' he listed in his submission were :

a All employees must have a valid work permit

b No one below 18 years old is allowed into the lounge

c The staff is closely supervised by the 'Mummys' in the

lounge

d The singers employed are briefed and constantly reminded that they are not to sit with customers

e The singers are further briefed and reminded not even to mingle with customers, even in passageways or by any form of chit-chatting

The appellant further stated that he personally walked around the lounge to ensure that no conditions of the licence were breached. Thus, the appellant's argument was that, in light of all these preventive measures, he should be excused from liability since he fulfilled the condition 'the licensee *shall ensure* that the singers do not sit with the customers.' I found that the appellant did not reach the threshold needed to fulfil the '*shall ensure*' condition. It was my belief that the appellant knew of the goings-on in the KTV rooms but turned a blind eye to them. If the appellant said, as he did, that he regularly did his rounds to ensure that no breach took place, why did it only take a short while for Staff Sgt Wong to realise that there was a clear breach in room 18? Could it be that the breaches only occurred when the big boss was away? (in this case, the appellant was away from the lounge when the raid happened) – I did not think so. This was because the appellant had stated that he was not the only person who did the patrolling. The 'Mummys' or 'Mamasans' patrolled also. If the KTV rooms were brightly lit, the insides of which were able to be seen from the corridors, as has been deduced from the evidence, why would it be so difficult to ensure that no singer sat with a customer? The appellant and his 'Mummys' most certainly do do their rounds of patrol but turn a blind eye to the goings-on in the KTV rooms. I would say that he is guilty of Nelsonian knowledge – he knows the true facts of things but turns a blind eye to them as Lord Nelson did in putting his telescope to his blind eye and declaring, 'I see no ships, I see no ships.' The appellant was guilty of such knowledge – he knew of the trend of singers sitting with customers. At the time of the raid only 25 rooms were occupied. It was not difficult to ensure that singers did not sit with customers in 25 rooms, if the patrols are done diligently. Furthermore, the appellant stated in cross-examination that he had only 8 singers, and that he took just five to ten minutes to complete his patrol. There were only eight singers to keep an eye on. And the patrol only took five to ten minutes. How difficult could it be to keep the place in check? – Not difficult; if the intention is to keep the place in check. From what the appellant stated on his own accord, it is my view that he 'turned a blind eye' to what was really going on in the rooms. For this reason, the 'shall ensure' condition had not been met.

17 This was far from making liability, stemming from the breach of the licensing conditions, strict. Here, the appellant, although taking the preventive measures, did not possess the intention of stamping out the breaches of the conditions under the licence. The appellant had Nelsonian knowledge – he turned a blind eye. The preventive actions were not coupled with a genuine desire to prevent the breaches. This was where the appellant counsel's argument fell short.

18 Thus, the appellant's contention that he took all reasonable and necessary steps to prevent the breach from happening was off-tangent. What threw it off was his knowledge.

19 For these reasons, the appeal against conviction under the first charge was dismissed.

Facts as to the second and third charges

20 On the night of the raid, Narcotics Officer Gopinathan (NO Gopinathan) was instructed to enter KTV room 19. This he did. There were four male customers and two women in the room. NO Gopinathan identified himself and stated that he was in plain clothes. In his evidence, he stated that

the two women were sitting beside the male customers. After NO Gopinathan had done the initial investigation, he returned to Central Division. The two women in room 19 followed him. The case was then handed over to officer Adrian Oong Chun Chang. The two women, Li and Dong, requested to return to China. As they were not found to be immigration offenders, they were released.

21 It was the prosecution's case, which was agreed to by the trial judge, that these two women were the ones who were sitting and serving the four customers that night.

22 The issue here stemmed from the following condition which a licensee must fulfil. According to the 'Licensing Conditions for Nightclubs/Cocktail Lounges/Discotheques/Restaurants/Bars':

> The licensee shall ensure that only *registered* waitresses, bar-girls, and lounge-hostesses are permitted to serve customers.

Dong and Li were not registered and, on the strength of the prosecution witnesses, the trial judge found the appellant in breach of the above condition. The appellant contested this finding on several grounds.

The appellant's challenge on convictions under the second and third charge respectively

23 The appellant contended that the trial judge erred in law and in fact in finding that both Li and Dong had been sufficiently identified. The arrest report showed that, the two women were Dong and Li. As NO Gopinathan stated in his examination-in-chief:

> After I had finished, I handed over the particulars to one of the In-Charge and escorted the females to the holding area. We then went back to Central Division. *The two females from room 19 followed me*. Officer Adrian Oong Chun Chang lodged an arrest report. I gave the particulars to Oong who lodged the report. I verified the arrest report. (my emphasis)

There was hardly any slip in the correct identification of these two women, Dong and Li.

24 The appellant also contended that the trial judge erred in law and fact by accepting and giving too much weight to the evidence of Cheok Ah Lek (Cheok) and Liew Fatt Nien (Liew), who were two of the four customers in room 19 that night. Liew and Cheok were prosecution witnesses.

25 To this end, it is apt to re-emphasise the trial judge's own apprehensions toward Liew's testimony that Dong and Li were definitely the women in room 19. The trial judge's apprehension stemmed from the fact that Liew had confirmed the two women as the two women in room 19 a good six months after the raid. The important point here was that the trial judge did take this into consideration. It is apt to cite a key part of his ruling on this matter:

> I am of the view that ***even without Liew's identification evidence***, the identification of Li and Dong as the two women sitting with Cheok, Liew and their friends at the material time had been properly established….Staff Sgt Oong Chun Chang corroborated Narcotics Officer Gopinathan's evidence relating to the making of the arrest

> report (exhibit P10). According to the arrest report, (a) the two women arrested were Li Jin Hong and Dong Jing Yi, and (b) the two women were sitting together with Kwek Leng Kee (Kwek) and Ong Teng Koon (Ong) (the other two customers). During the trial, the defence did not challenge at all these aspects of the prosecution's case. (my emphasis)

This, the trial judge stated, was enough to overcome the few inconsistencies between the evidence of Liew, Cheok, and NO Gopinathan. There was nothing submitted which should prompt this Court to second-guess the learned judge's findings on the matter.

26 The appellant's third challenge as regards the second and third charges was that the trial judge erred in law and in fact in finding that the prosecution's failure to call Li and Dong, and Kwek and Ong (the other two customers) was not fatal to the prosecution's case.

27 The trial judge specifically tackled the issue of the absence of these four persons at trial. He stated, at para 44 of his grounds of decision:

> I am of the opinion that the fact that neither Li, Dong, Kwek, nor Ong gave evidence did not create a lacuna in the Prosecution's case as there was direct and credible evidence from other material witnesses.

With this statement in mind, the credibility of the material witnesses which included Narcotics Officer Gopinathan and customer Cheok ought not to be second-guessed by this Court.

28 The appellant's fourth challenge as regards the second and third charges was that the trial judge erred in law and in fact in finding that Li and Dong were serving customers and working in room 19. The issue here was that Li and Dong were not registered – there was no dispute as to this. Couple this fact with the following finding of the trial judge's and it was very difficult to allow such a claim by the appellant. At para 46 of his grounds of decision, the trial judge stated:

> There is clear evidence that Li and Dong were serving customers in KTV room 19. Both Cheok and Liew gave evidence that during their karaoke session, the women were (a) sitting with the customers, (b) pouring drinks for them, and (c) joining in the singing. Their evidence is corroborated by Narcotics Officer Gopinathan who testified that at the time of entering KTV room 19, he heard some loud music from the room. After entering, Narcotics Officer Gopinathan observed two women, later established to be Li and Dong, to be sitting with the customers and that there were some glasses and liquor bottles in the room.

The trial judge's reservation toward Liew's evidence was only limited to his identification evidence as regards Li and Dong. Quite simply, therefore, the women were not on the register but were pouring and serving the four men drinks.

29 But could Li and Dong have been guests of the men? – Or could the two women have entered the KTV lounge without the appellant's management knowing about it? However, it was clear that the

trial judge was satisfied with the fact that Li and Dong were not the guests of the four men, and there was no reason why this court should differ from this conclusion. What about the theory that Li and Dong could have slipped into the KTV Lounge? – The very testimony of the appellant closed the door on such an argument. The following verbatim, at page 47 of the notes of evidence (cross-examination of appellant), was telling:

> Q You have advised or alerted your reception staff to stop people from sneaking in to enjoy KTV facilities, at company's expense?
>
> A Yes. Instructions given to reception to ascertain whether person entering is a customer or otherwise.
>
> Q Often difficult to ensure no outsider enters KTV because you have only three reception staff?
>
> A Disagree.
>
> Q At anytime, how many receptionists on duty at the counter?
>
> A At least one.
>
> Q Staff at counter would be able to see who enters?
>
> A Normally, we would have a captain to entertain them. If the receptionist leads the customer to the rooms, the captain would be at the reception.

If the KTV Lounge was as tight in its procedure as to who was allowed in and who was not, as the appellant suggested in his testimony, how then could Li and Dong have slipped by the checks? The fact of the matter was that they did not even need to sneak in, as their presence was known to the management. To this end, I agreed with the trial judge's assessment, at para 52 of his grounds of decision, that:

> On the totality of the evidence, I find that Li and Dong had been permitted to serve at the Lounge by the appellant and his management.

To argue that Dong and Li were free-lance hostesses and should therefore not have to be registered in order to serve was to make a nonsense of the registering condition. The register exists to keep track of the employment arrangements in the lounge industry. If it were otherwise, there would only be a handful of registered servers and a whole host of free-lancers. For these reasons, this last contention of the appellant's must fail.

30 The appellant's record offered him no favours. He had been fined no less than six times for breach of the Public Entertainment and Meetings Act over a period of 12 years. The last sentence was passed on 5 November 2001 for providing public entertainment in contravention of a condition in a licence under s18(1)(c) of the Public Entertainment and Meetings Act. The fine of $8500 was paid in full, as were all his other fines. Separate from his breaches of the Public Entertainment Act was his selling of intoxicating liquor to under aged persons in a licensed premises – for which he was fined

$800 on 4 January 1990. Again, he paid this fine in full. We must stop these licensees from treating fines as part of their business losses. Such an attitude belittles the law. A heavy fine will wake up licensees in the same position as the appellant to the fact that fines too can be costly and, as a deterrent sentence, the $27,000 fine imposed by the district judge is a good start.

31 The appeal was dismissed.

Appeal dismissed

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore