Public Prosecutor v Nurashikin Binte Ahmad Borhan
[2002] SGHC 242

Case Number : MA No 15 of 2002

Decision Date : 16 October 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Hui Choon Kuen (Deputy Public Prosecutor) for the appellant; Respondent in person

Parties : —

Criminal Procedure and Sentencing – Sentencing – Appropriate sentence under s 380 Penal Code (Cap 224, 1985 Rev Ed)

Evidence – Witnesses – Credibility – Inconsistencies in testimony and demeanour in court – Whether trial judge right to consider prosecution witness not to be a credible witness

Evidence – Witnesses – Examination – When party can cross-examine own witness – Evidence Act (Cap 97, 1997 Rev Ed) s 156

Evidence – Witnesses – Failure to call material witness – Whether adverse inference should be drawn – Evidence Act (Cap 97, 1997 Rev Ed) s 116 illustration (g)

Judgment

GROUNDS OF DECISION

The Charge

This was an appeal by the prosecution against the decision of district judge Wong Choon Ning. At the conclusion of the trial, she acquitted the respondent of the following charge:

> You, Nurashikin Binte Ahmad Borhan, NRIC No: S 8200294/D are charged that you, on the 17th of October 2001 at or about 2:30 pm, at 'Chamelon' store located at No 1 Jurong West Central 2 #03-06, Singapore, a place used for the custody of property, did commit theft of the following items:
>
> > i 1 Rhomlon Eyebrow Pencil valued at $2.20
> >
> > ii 1 Fuso Eyeliner valued at $7.50
>
> with a total value of $9.70, in the possession of the manager of the said 'Chamelon' store, Cheng Siong May and you have hereby committed an offence punishable under Section 380 of the Penal Code, Chapter 224.

2 Section 380 of the Penal Code reads as follows:

Whoever commits theft in any building, tent or vessel, which building, tent, or vessel is used as a human

dwelling, or for the custody of property, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to a fine.

The prosecution's version of events

3 The prosecution called only one witness, Loke Poh Yeng (PW 2) who was working as a sales assistant in the store at the material time. PW 2 testified that she saw the respondent and her friend, one Nor Natasha binte Ibrahim ("Natasha") browsing at the eyeshadows at one of the shelves. The respondent was holding a paper bag. PW 2 was then standing at a spot 2.3 metres away. At that time, PW 2 was able to see only the respondent's side profile while Natasha had her back turned towards PW 2. Natasha was standing between PW 2 and the respondent.

4 PW 2 gave evidence that she saw the respondent select an eyebrow pencil and a liquid eyeliner (the items mentioned in the charge) from the shelf. The respondent did not place those items back on the shelf. Instead, she held on to those items and walked together with Natasha down the aisle, along the same row of shelves. According to PW 2, Natasha did not touch or select those items while she walked away from the shelf. When the two of them reached the end of that row of shelves, they made a U-turn around it to the other side of the shelf and walked up the aisle in PW 2's direction. The respondent and Natasha then stopped to browse at some combs.

5 PW 2 then noticed that the respondent no longer had the eyebrow pencil and liquid eyeliner in her hand after she made the U-turn. Suspecting that the respondent might have stolen the items, PW 2 told her colleague ("Yi Zhu") to help her keep watch over the respondent. At the combs section, the respondent selected a comb and paid for it at the cashier's counter. After payment, the respondent and Natasha left the store, whereupon they were promptly detained by PW 2 and Yi Zhu.

6 The respondent permitted PW2 and Yi Zhu to check her paper bag and they found the two items in the bag. The bag also contained a hair dryer. When asked as to whether she had paid for the items, the respondent indicated that they might have dropped into her bag.

The respondent's version of events

7 The respondent did not dispute that she was browsing at the two items and that those items were subsequently found in the paper bag she was holding. She however denied knowledge as to how the items came to be found in her bag. She testified that she had placed the items back onto the shelf when she moved away from that shelf. She offered the explanation that the items could have dropped into the bag or someone could have put them into the bag without her knowledge. According to her, the bag belonged to Natasha and she was only helping Natasha carry it. She further asserted that she was stopped and searched outside the shop not by PW 2, but by another salesgirl.

The decision below

8 The judge rejected PW 2's evidence that the respondent had held on to the two items as she was leaving the shelf where those items were located. The judge also rejected PW 2's evidence that Natasha had not held on to those items. The relevance of these was that, if Natasha was the one holding on to the items as the respondent and her left the shelf, a reasonable inference might be drawn that it was Natasha, and not the respondent, who had put the items in the bag. PW 2's evidence was rejected for two main reasons.

9 First, the accuracy of PW 2's observations might have been affected by her shortsightedness (she was not wearing glasses that day) and the fact that the shop was crowded on that day.

Secondly, the judge did not find PW 2 to be a credible witness based on her demeanour in court and the inconsistencies in her evidence.

10 At the conclusion of the trial, the judge found that on the cumulative effect of all the evidence adduced before the court, the prosecution had not proven beyond a reasonable doubt that it was the respondent, and not some other person, who had taken and placed the two items in the bag. She acquitted the respondent.

The appeal

11 Three main issues were raised in this appeal. First, whether the judge had erred in concluding that PW 2 was not a credible witness. Secondly, whether the judge had erred in concluding that the prosecution had failed to prove its case beyond a reasonable doubt. Thirdly, if the appeal was allowed, what would be the appropriate sentence to impose on the respondent.

PW 2's credibility

12 The judge found PW 2 not to be a credible witness based mainly on her demeanour in court and the inconsistencies in her evidence. It is settled law that due weight should be accorded to the trial judge's assessment of the veracity or credibility of the witness, given that she had the benefit of observing the demeanour of the particular witness: *Jimina Jacee d/o CD Athananasius v PP* [2000] 1 SLR 205.

13 The inconsistencies in PW 2's evidence related to whether, and when, PW 2 had actually seen the respondent place the items in the paper bag. In the initial part of her examination-in-chief, PW 2 testified that the respondent had put the two items into the paper bag when she and Natasha made the U-turn. Subsequently, she changed her testimony and said that the respondent had deposited them into the bag when she was selecting the comb. However when the prosecution invited her to mark on the sketch the position where the respondent put the items into her bag, she changed her testimony yet again and admitted that she had not seen the respondent put the items into her bag, but had merely noticed that the respondent was no longer holding the items after the U-turn and this aroused her suspicions. Nevertheless, at a later stage during further cross-examination, PW 2 once again stated that she had seen the respondent 'take' the items.

14 The prosecution attempted to offer various explanations for the inconsistencies. They need not be repeated here but suffice to say that I did not find them convincing. It was clear from PW 2's testimony that she plainly could not make up her mind as to whether she had actually seen the respondent place the items in her bag. In my opinion, the judge was entitled to find PW 2 not to be a credible witness.

15 The prosecution further submitted that, even if PW 2 was not a credible witness, the judge had erred in law in rejecting the bulk of her evidence. Reliance was placed on *Loganatha Venkatesan & Ors v PP* [2000] 3 SLR 677 where the court stated at 56:

It is important to bear in mind that an impeachment of the witness's credit does not automatically lead to a total rejection of his evidence.

The court must carefully scrutinize the whole of the evidence to determine which aspect might be true and which aspect should be disregarded…Thus, regardless of whether his credit is impeached, the duty of the court remains, that is, to evaluate the evidence in its entirety to determine which aspect to believe [Emphasis added].

I did not accept the prosecution's submission on this point. The judge in the present case certainly did not automatically reject the whole of PW 2's evidence. In fact she had carefully weighed all the circumstances in deciding which aspects of PW 2's evidence to accept and which aspects to reject. Hence the judge accepted PW 2's evidence that she was present when the respondent and Natasha were subsequently stopped while leaving the store. However, she found herself unable to accept PW 2's evidence that it was the respondent, and not Natasha, who was holding on to the two items while they were moving away together from the shelf where those items were kept. I could find nothing wrong in her approach. It is trite law that an appellate court should be slow to overturn findings of fact made by a trial judge unless they can be shown to be plainly wrong or reached against the weight of the evidence: *Soh Yang Tick v Public Prosecutor* [1998] 2 SLR 42 at 35. The judge's finding of fact in this case clearly could not be said to fall within those categories.

16 It was important, however, to note that, even though the judge rejected PW 2's evidence, she did not go the other way and accept the respondent's evidence to the contrary that she had put the items back before she left the shelf. Instead she held, and justifiably so, that on the available evidence she was not prepared to draw any conclusion either way whether the respondent or Natasha was holding on to those items when they left the shelf. The next issue was then, whether on the remaining evidence the prosecution had proven its case against the respondent beyond a reasonable doubt.

Whether the prosecution had proven its case beyond a reasonable doubt

17 Only two material facts were established at the conclusion of the trial. First, the respondent, with her friend Natasha, was browsing at the two items. Secondly, the same two items were subsequently found in a bag the respondent was holding as she was leaving the store. The trial court could not conclude on the evidence whether the respondent or Natasha had held on to those items while they were moving away from the shelf. There was also no conclusion as to whether the respondent or someone else had put the items in the bag. The prosecution's case therefore relied entirely on circumstantial evidence.

1 8 *Ang Sunny v PP* [1966] 2 MLJ 95 laid down the test that when the prosecution is relying entirely on circumstantial evidence, the effect of all such evidence must lead the court "inevitable and inexorably" to one conclusion only: that it is the accused who committed the offence. There have been suggestions that *Sunny Ang* laid down a higher standard of proof for cases where prosecution evidence is wholly circumstantial. Such notion was however dispelled in *PP v Oh Laye Koh* [1994] 2 SLR 385 where the court stated that the same principle of guilt beyond reasonable doubt applies equally to cases where the prosecution evidence is wholly circumstantial as it does to those where direct evidence is adduced. In applying the principle of guilt beyond reasonable doubt, the court is concerned with whether there is any other reasonably possible conclusion other than that the accused had committed the offence. The court is not concerned with "fanciful possibilities": *Nadasan Chandra Secharan v PP* [1997] 1 SLR 723 at 89. Lord Denning stated the position succinctly in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373:

> If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

19 Applying the principles elucidated above to the present facts, it appeared to me that the success of this appeal hinged on whether there could be any other reasonable explanation as to how the same two items that the respondent was browsing ended up in the bag she was holding, other than that she had put them there herself. In my opinion, there was none.

20 There are only three logical possibilities as to how those items came to be in the bag. First, the two items dropped into the bag by accident. Second, someone else had placed the items in her bag. Third, the respondent herself had placed the items in the bag.

21 The respondent based her defence on both the first and second possibilities. The first possibility is clearly fanciful and not in the least probable. I have examined the exhibits with care and found it incredible that the same two items which the respondent was browsing could somehow end up neatly in her bag by accident.

22 The second possibility, if taken to mean that some passer-by in the shop with no connection at all to the respondent put the items in the bag, is also incredible as a bare assertion. The respondent did not adduce any evidence to support her claim. It is not in the least probable from common experience that strangers go round framing one another while shopping in stores. Otherwise, anyone caught with unpaid items in their bag could simply deny involvement by pointing their fingers at some unspecified strangers.

23 If the second possibility is taken to mean that Natasha was the one who placed the items in the bag, then it is perplexing why she did not call Natasha as a witness even though the prosecution offered Natasha as a defence witness. Natasha was clearly crucial to the respondent's defence and she could have called Natasha as a witness and then applied to the court to cross-examine her under s 156 of the Evidence Act, Cap 97, to establish that she was the one who had actually placed the items in the bag. Although cross-examination of one's own witness is generally undertaken when the witness unexpectedly alters his account on the stand to the detriment of the party who called him, the broad terms of s 156 clearly allow other situations where one's own witness can be cross-examined. Section 156 reads as follows:

> The court may, ***in its discretion***, permit the person who calls a witness to put any questions put to him which might be put in cross-examination by the adverse parties [Emphasis added].

Butterworths' Annotated Statutes of Singapore

(Evidence, Volume 5) commented on the section as follows:

> A witness is generally called by a party to give evidence which supports the latter's case. However, there may be circumstances in which the witness must be asked questions which characterise cross-examination. ***For example, a party may wish to call a witness who might have been called by the opposing party, but was not, so that he may elicit favourable evidence (normally admissions) through the use of leading questions*** [Emphasis added].

This describes the situation in the present case where Natasha might have been called as a prosecution witness but was not, and so it was open to the respondent to cross-examine her to elicit favourable evidence.

24 In my opinion, the respondent's failure to call Natasha to the stand should have resulted in an adverse inference being drawn against her under Illustration (g) to s 116 of the Evidence Act. I do not mean to suggest that a defendant's failure to call a material witness will always result in an adverse inference being drawn against him. Illustration (g) to s 116 provides that:

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

As apparent from the wording of the provision, it allows, but does not compel, the court to draw adverse inferences even if available evidence is not produced in court. In fact, the general rule is that the burden lies on the prosecution to prove its case and no adverse inference can be drawn against the defence if it chooses not to call any witness: *Goh Ah Yew v PP* [1949] 15 MLJ 150 and *Abu Bakar v R* [1963] 1 MLJ 288. There is however an important qualification to this general rule: if the prosecution has made out a complete case against the defendant and yet the defence has failed to call a material witness when calling such a witness is the *only way* to rebut the prosecution's case, Illustration (g) to s 116 of the Evidence Act then allows the court to draw an adverse inference against the defendant: *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 and *Mohamed Abdullah s/o Abdul Razak v PP* [2000] 2 SLR 789. This is based on the commonsense notion that if the only way for the defence to rebut the prosecution's case is to call a particular witness, then her failure to do so naturally raises the inference that even that witness's evidence will be unfavourable to her.

25 This was exactly the case in the present appeal. The circumstantial evidence adduced by the prosecution was strong enough to amount to a complete case against the respondent. The respondent had no other available means of rebutting the prosecution's strong circumstantial evidence against her except through calling Natasha to the stand. Yet she failed to do so without good reasons. Natasha was clearly an available witness. In fact, she was in court during the trial hearing. In such circumstances, the judge should have drawn an adverse inference against the respondent under Illustration (g) to s 116 of the Evidence Act that Natasha's evidence would be unfavourable to her.

26 Hence, only the third possibility, namely that the respondent herself had placed the items in the bag, remained a reasonable explanation of how those items came to be found there. From the above analysis, I concluded that the judge was wrong to rule that the prosecution had not proven its case beyond a reasonable doubt. The only explanation as to how the very same items the respondent was browsing ended up in the bag was a bare claim that they had accidentally dropped in there, or that someone had placed them there. She had available in her means to call a witness to substantiate these bare claims, but she failed to do so. Such claims may of course in appropriate cases rebut the prosecution's case if supported by evidence; but without such evidence, they remain only fanciful possibilities. Otherwise anyone who goes shopping with a friend, and when found with unpaid items which she was seen to be browsing earlier, can simply wriggle out of the situation by asserting a bald claim that someone else has framed her, or that the items have accidentally dropped into her bag. Such a scenario will have negative policy implications. It will mean that no store is given effective legal protection against theft unless the offender is caught in the act of stealing. For the foregoing reasons, I allowed the appeal and convicted the respondent under s 380 of the Penal Code.

Sentencing

27 I was originally minded to order a pre-sentence probation report and adjourn the issue of sentence to another day in view of the fact that the stolen items were of low value and had already been recovered, and that the respondent was a minor at the time the offence was committed. In such circumstances, a probation order under s 5(1) of the Probation of Offenders Act, Cap 252, might be more appropriate than a custodial sentence.

28 However, I was informed by the prosecution during the hearing that the respondent had committed the present offence while she was already under probation awarded for a conviction under s 381 of the Penal Code. She clearly had not learnt her lesson and I took the view that a probation order would no longer be appropriate.

29 Under s 380 of the Penal Code, anyone convicted under the section *"shall be punished* with

imprisonment for a term which may extend to 7 years, and *shall also be liable* to a fine". In *PP v Lee Soon Lee Vincent* [1998] 3 SLR 552, I referred to *Ng Chwee Puan v R* [1953] MLJ 86 and decided that the phrase 'shall be liable' (as opposed to 'shall be punished') contained no obligation or mandatory connotation. Hence, while a sentence of imprisonment under s 380 is mandatory, imposition of a fine is discretionary. Taking into account all the circumstances of this case, I sentenced the respondent to two weeks' imprisonment.

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore