Ow Yew Beng v Public Prosecutor
[2002] SGHC 301

Case Number : MA No 30 of 2002

Decision Date : 12 December 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Irving Choh Thian Chee (CTLC Law Corporation) for the appellant; David Chew Siong Tai (Deputy Public Prosecutor) for the respondent

Parties : —

Criminal Law – Property – Receiving stolen property – Test for dishonesty – s 411 read with s 24 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Property – Receiving stolen property – Test for "reason to believe" property to be stolen – s 411 Penal Code (Cap 224, 1985 Rev Ed)

Judgment

GROUNDS OF DECISION

The charge

This was an appeal from the judgment of district judge Wong Pui Kay. The appellant claimed trial to 44 charges under s 411 of the Penal Code (Cap 224) for dishonestly retaining cheques which he had reason to believe were stolen from Welgoal Singapore Pte Ltd ('Welgoal'). The offence is punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

2 Section 411 of the Penal Code reads as follows:

> Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both; and if the stolen property is a motor vehicle or any component part of a motor vehicle as defined in section 379A shall be punished with imprisonment for a term of not less than 6 months and not more than 5 years and shall also be liable to fine.

3 The appellant was convicted on 22 December 2001 on the first 40 charges and sentenced to a total of 44 months imprisonment. He was acquitted of the remaining four charges on the ground that the prosecution had failed to adduce sufficient evidence to prove its case against him beyond a reasonable doubt. The appellant appealed against both conviction and sentence.

Undisputed facts

4 The appellant's wife, Ms Tho Bee Choo ('DW 2') worked as an Assistant Sales Manager at Welgoal. Welgoal's director, Chen Tsu Wang ('PW 2') testified that the nature of his job required him to travel overseas on a frequent basis. For business efficiency, he would pre-sign some 'blank' cheques before his overseas trips and entrust them to DW 2 so that she could make payments on Welgoal's behalf.

5 DW 2 however used these pre-signed cheques to issue cash cheques as well as cheques payable to herself and to the appellant, using some of the proceeds for her own purposes and also to repay the appellant's debts. Her wrongdoings were subsequently discovered and she was sentenced

to a six-year imprisonment term upon conviction on three charges of criminal breach of trust as a servant under s 408 of the Penal Code for an aggregate sum exceeding $ 1 million. She was still serving the sentence at the time of hearing of the present appeal.

6 The charges in the present appeal concerned 40 such pre-signed cheques which DW 2 had instructed the appellant to cash over a 16-month period from June 1998 to October 1999. Twenty-seven of these were cash cheques, 12 were made out to the appellant and one was made out to DW 2 or to 'bearer'. Some of these cheques were in US dollars while the rest were in Singapore dollars. When converted to Singapore dollars, the cheques made out to the appellant were worth around $ 78,431 while the value of all the cheques which the appellant cashed was around $ 270,000. It was not disputed that the appellant had no business dealings with Welgoal that might have justified Welgoal in making such payments to the appellant.

7 The appellant conceded in the court below that the physical elements of the offence were present, namely that he, by accepting the cheques from DW 2 and cashing them, had retained stolen property in the form of those cheques and their proceeds. However, the appellant argued that the mental elements of the offence were absent in that he was, firstly, not dishonest and secondly, had no reason to believe that the cheques were stolen from Welgoal. The judge held however that the requisite mental elements were present and convicted him.

Issues arising on appeal

8 The appellant relied on several grounds in his appeal. Some of them overlapped and could be summarised into three broad grounds, namely,

> (a) The judge had erred in rejecting the defence submission of no case to answer at the close of the prosecution's case and calling for the defence.
>
> (b) The judge had erred in holding that on the totality of the evidence the prosecution had established its case beyond a reasonable doubt.
>
> (c) The sentences imposed were manifestly excessive.

Was there a case to answer at the end of the prosecution's case?

9 Since the presence of the physical elements of the offence was not disputed, the issue here was whether there was *prima facie* evidence that the appellant had been dishonest and had reason to believe that those cheques were stolen property: *Haw Tua Tau v PP* [1980-1981] SLR 73

10 'Reason to believe' was defined in *Koh Hak Boon & Ors v PP* [1993] 3 SLR 427 as involving a lesser degree of conviction than certainty but a higher one than speculation. The test is whether a reasonable person, in the position of the appellant (i.e. including his knowledge and experience), would have thought it *probable* that the property he retains is stolen property. It is irrelevant whether the appellant himself actually thought it probable: his state of mind is only relevant to the 'knowing' limb (which the present charges did not rely on) and not to the 'reason to believe' limb in s 411. The test of 'reason to believe' is hence objective but conducted from the vantage point of someone with the appellant's knowledge and experience.

11 'Dishonestly' is defined in s 24 of the Penal code as:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.

Section 411, read with s 24, clearly envisages that an individual can be dishonest, ie having an intention to cause wrongful gain or loss even though he has no actual knowledge, but only reason to believe that the property was stolen. It can hence be inferred that 'dishonesty' in the context of s 411 is not restricted to mean an intention to cause gain or loss which the appellant *knows* to be wrongful. Otherwise, dishonesty could never be found if an accused merely has reason to believe, but not knowledge, that the property was stolen since, without such knowledge, he could not have known that the gain or loss was wrongful. Logically, dishonestly under s 411 would have to bear the broader meaning of an intention to cause gain or loss which the accused *either knows or has reason to believe* was wrongful.

12 Ordinarily, the two mental elements of 'dishonesty' and 'knowing or having reason to believe that the property was stolen' go together. A person who retains property knowing it to be stolen would naturally possess an intention to cause gain or loss which he knows to be wrongful. Similarly, a person who retains property which he has reason to believe is stolen would normally also have an intention to cause gain or loss which he has reason to believe is wrongful. There may however be some situations when these mental elements are not co-extensive. For instance, if a person's purpose of retention is to hand the property (which he knows or has reason to believe is stolen) to the police for investigations, then he is not dishonest since he has no intention to cause any wrongful loss or gain to anyone at all. On the present facts, however, it was not disputed that the appellant handed the cash not to the police but to his wife (who used them for her own purposes and to repay the appellant's debts). This appeal therefore fell under the majority of cases where 'dishonesty' and 'reason to believe' go together. There was therefore no need to discuss the two mental elements separately. If it was found that the appellant had reason to believe that the cheques were stolen, a finding of dishonesty would follow.

13 Hence the main issue in this appeal was only whether the appellant had reason to believe that the cheques were stolen; and for the purpose of this particular ground of appeal, whether there was *prima facie* evidence to that effect. *Haw Tua Tau & Anor v PP* [1980-1981] SLR 73 established the proposition that at the end of the prosecution's case, the court assumes that (i) all evidence of primary facts is true unless it is inherently incredible; and (ii) there will be nothing to displace inferences as to further facts or the state of mind of the accused which can reasonably be drawn from the primary facts in the absence of any further explanation. Taking the primary facts together with any inferences that could reasonably be drawn, the court then considers whether a case has been made out against the accused, which if unrebutted would warrant his conviction.

14 In my opinion, the test was amply satisfied in this case. The primary facts adduced by the prosecution at the end of its case were as follows:

> (i) The appellant knew that the Director of Welgoal had entrusted DW 2 with pre-signed cheques;
>
> (ii) Over a 16-month period, the appellant had, on DW 2's instructions, cashed 40 such cheques worth about $ 270,000. Most of them were cash cheques but a significant proportion was made out to the appellant. The cash were then handed over by him to DW 2;

(iii) DW 2 was only earning $1,990 a month as an employee of Welgoal at the relevant time. She managed however to lend money to the appellant well beyond what her salary allowed;

(iv) According to PW 2's evidence, the appellant had no business dealings with Welgoal that would have justified Welgoal in issuing cheques of such amounts in favour of the appellant.

15 It was clear that the 'reason to believe' element under s 411 was *prima facie* established in this case. Simply by putting (ii), (iii) and (iv) together, any reasonable person in A's position would think it probable that the cheques were stolen taking into account that (a) the cheques were made out in favour of the appellant when he had no dealings with Welgoal to warrant such payment; and (b) DW 2's sudden ability to lend the appellant substantial sums of money at the same time that the proceeds from the cheques were handed over to her. The appellant did attempt to provide explanations to displace such an inference but it is trite law that the court does not consider such evidence at the close of the prosecution's case. This falls to be considered only at the end of the trial. There was hence no merit in this ground of appeal.

Did the prosecution establish its case beyond a reasonable doubt?

16 In his defence, the appellant put forward several explanations as to why he would have no reason to believe that the cheques were stolen. The main ones were summarised as follows:

(i) Initially the appellant did sense something amiss and asked DW 2 why she wanted him to cash all those cheques. DW 2 replied that she needed to pay cash for Welgoal's expenses such as employees' salaries and petty cash. After a while, he thought that this was Welgoal's company practice and did not enquire further.

(ii) He was also afraid of DW 2 as she had always been an independent woman and she was also the one calling the shots because she earned more than him. Hence he did not dare to enquire further as to the purpose of those cheques or defy her instructions to cash those cheques.

(iii) Some of the cheques were issued in the appellant's name because they were supposedly meant to reimburse him for money he had lent to Welgoal. Although there was no evidence on how much he had actually lent to Welgoal, the appellant admitted that the money he had lent was only a small portion of the amounts paid out in his favour. He explained that the excess cash were either reimbursed to DW 2 (in cases where DW 2 had used her own money first to make payments on behalf of Welgoal) or were used to pay directly to Welgoal's creditors.

(iv) According to the appellant, he did not use a single cent which did not belong to him. All the proceeds from the cash

cheques were returned to DW 2; while the proceeds from the cheques issued in his favour were also returned to DW 2, after deducting the amount he had lent to Welgoal.

17 These explanations taken on their own might perhaps raise a reasonable doubt as to whether the appellant had reason to believe that the cheques were stolen. However, further evidence emerged in the course of the defence that should also be taken into account, namely,

(i) The appellant was aware that DW 2 was spending extravagantly during that period. She bought, amongst other things, an expensive Rolex watch and an executive condominium worth around $600,000, with an up-front payment of more than $200,000. Her salary of $1,990 a month would not have enabled her to live such a lifestyle. Nevertheless the appellant purportedly found nothing amiss as she told him that she had won top '4 D' prizes several times during the 16- month period and that she had borrowed money from her family and friends. The appellant however was unable to tell the court the winning numbers, the number of times or the amounts that DW 2 had won.

(ii) The appellant also owed debts of between $10,000 and $20,000 during that period. He further admitted to borrowing about the same amount of money from DW 2 during that period. He again felt nothing amiss as to how DW 2 managed to find such money as he claimed that he believed her explanation that she had got loans from her relatives and friends.

(iii) The circumstances in which the cheques were issued contained several oddities. Many of the cheques were issued at dates close to one another. Sometimes, two cheques would be issued, one a cash cheque and another a cheque payable in the appellant's name; but both bearing the same date. If the latter cheque was indeed meant to reimburse the appellant (as the appellant claimed), then logically DW 2 should simply have stated only the amount due to the appellant as reimbursement in that cheque and put the remaining sum in the cash cheque. Instead, the cheques payable to his name would invariably be worth far more than what he lent to Welgoal.

18 Clearly, the court would take into account all the facts that the appellant was confronted with during the period in applying the test of whether a reasonable person in his position would have thought it probable that the cheques were stolen. In my opinion, the test was satisfied here. DW 2's explanation that the cash was meant for company expenses and for reimbursements to herself might have sounded believable when taken on its own. However, against the whole backdrop of facts, particularly the peculiar methods by which the cheques were issued and the large amounts of money that DW 2 suddenly possessed during the period, it became quite incredible that a reasonable person could not place the facts together and reason that the cheques were stolen. Further, the explanation supposedly given by DW 2 for her sudden wealth, namely that she had won the *top three* 4-D prizes

several times within a 16-month period, while not inherently impossible, was certainly improbable enough to further alert the appellant to the fact that the cheques were stolen. It was this entire mosaic of odd coincidences and occurrences that would have led a reasonable man to think that the cheques were probably stolen. It should again be reiterated in applying the *Koh Hak Boon* test that the court assumes the *position* of the individual (including his knowledge and experience), but *reasons* from that position like an objective reasonable man: *Koh Hak Boon v PP* at p 430G.

19 The appellant however argued that the *position* he was found in, namely a family setting in which he trusted his wife, DW 2, and in which she had the final say in matters, should displace the finding that he had reason to believe that the cheques were stolen. This was however unconvincing. First, there did not appear to be much trust between the parties. The evidence was that the relationship was one in which DW 2 did not seem to tell the appellant anything of any importance. She did not even reveal to him how much money she supposedly won from '4D' and the appellant admitted that 'even when she [was] overseas with her friends, [he happened] to be the last one to know'. It was incredible that such a marital relationship could be characterised as one of trust before the court. Secondly, the appellant's supposed fear of DW 2 was irrelevant. Fear might have discouraged him from acting against DW 2's instructions to avoid being scolded by her, but I did not think that his thinking skills were thereby paralysed - and it is how a reasonable person would think when faced with a certain set of facts that lies at the crux of the *Koh Hak Boon* test.

20 For the foregoing reasons, the appellant's appeal against conviction was dismissed.

Appeal against sentence

21 The judge sentenced the appellant to a total of 42 months imprisonment with four charges running consecutively and the aggregate sentence for these four charges to run concurrently with the rest. In sentencing the appellant, the judge took into account the following aggravating factors: (a) the appellant was not a passive bystander but actively participated in the scheme by helping his wife cash 40 cheques on numerous occasions; (b) the substantial sums of money involved in the offence; and (c) the evidence that part of the money was used to repay the appellant's debts. The prosecution further submitted that no restitution of the sums had been made to Welgoal. In mitigation, the judge considered the appellant's previous clean record.

22 In my opinion, the sentences imposed were not manifestly excessive. The key consideration here was the application of the 'totality principle', i.e. whether the overall punishment meted out for the multiple charges was proportional to the overall gravity of his conduct, taking into account the circumstances in which he committed the offence and his previous records: *Maideen Pillay v PP* [1996] 1 SLR 161. In view of the aggravating factors mentioned by the judge and the prosecution, especially the fact that more than 40 offences were committed over a 16-month period when the appellant had ample opportunities to pull himself out of this mess, the sentences imposed were certainly proportional to the gravity of his crime. For the foregoing reasons, the appellant's appeal against sentence was dismissed.

23 Counsel for the appellant applied to the court during the hearing to defer the commencement of the sentence for a few days on the ground that the appellant was the sole breadwinner for his aged mother and two-year old son. His wife was still serving a six-year term and might be released on 1 1 November 2002 on the work release prison scheme. He would therefore require more time to arrange alternative sources of income for his family. I was not convinced by his reasons. The appellant certainly had more than sufficient time to make arrangements for his family considering that more than ten months had intervened between his conviction in the court below and the present hearing. No reason was tendered as to why he had been unable to make suitable arrangements during

that period. Accordingly the appellant's application to defer commencement of sentence was also dismissed.

Sgd:

YONG PUNG HOW

Chief Justice