Tuen Huan Rui Mary v Public Prosecutor
[2003] SGHC 157

Case Number : MA 107/2002

Decision Date : 17 July 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Chandra Mohan K Nair (Tan Rajah & Cheah) for the appellant; Eddy Tham and Edwin San (Deputy Public Prosecutors) for the respondent

Parties : Tuen Huan Rui Mary — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Criminal breach of trust – Relevance of value of property misappropriated

Criminal Procedure and Sentencing – Sentencing – Appeals – Whether sentence imposed by trial judge was manifestly excessive

Criminal Procedure and Sentencing – Appeal – Findings of fact by trial judge – Treatment by appellate court

1 This was an appeal against the decision of district judge Malcolm BH Tan when he convicted the appellant on two counts of criminal breach of trust, an offence punishable under s 406 of the Penal Code (Cap 224). The appellant was sentenced to 27 months imprisonment on each charge and the two sentences were ordered to run concurrently. The present appeal was brought against conviction and sentence. At the end of the hearing before me, I dismissed the appeal against conviction and allowed the appeal against sentence. I now give my reasons.

Charges

2 The charges against the appellant read as follows:

(a) DAC 19413/2002

> You, Tuen Huan Rui Mary, are charged that you on or about the 21st day of July 1999, in Singapore, being entrusted with certain property, to wit, a Post Office Savings Bank cash cheque, number 511446, dated 21 July 1999 and issued by Png Beng Hong for an amount of $30,000, committed criminal breach of trust of the said property, by en-cashing the said cheque and using the proceeds for your personal use, and that you have thereby committed an offence punishable under section 406 of the Penal Code, Chapter 224.

(b) DAC 13414/2002

> You, Tuen Huan Rui Mary, are charged that you on or about the 21st day of July 1999, in Singapore, being entrusted with certain property, to wit, a Development Bank of Singapore cash cheque, number 396566, dated 21 July 1999 and issued by Png Beng Hong for an amount of $20,000, committed criminal breach of trust of the said property, by en-cashing the said cheque and using the proceeds for your personal use, and that you have thereby committed an offence punishable under section 406 of the Penal Code, Chapter 224.

Background facts

3 In April or May 1999, the appellant befriended Png Beng Hong, also known as Cecilia Goh

('Cecilia'), the Managing Director of Vibration and Sound Services & Sales Pte Ltd ('Vibration Pte Ltd'), after the appellant had made a 'cold call' to Cecilia's office. The appellant, who at the material time was the director of two companies which provided ISO certification consultancy services, offered her services to Cecilia and was subsequently engaged as a consultant to help Vibration Pte Ltd obtain ISO 9000 certification. In late May 1999, the appellant introduced Cecilia to her then boyfriend, one Tan Kah Miang ('Tan').

4 It was undisputed that the appellant encashed two cash cheques issued by Cecilia. On 21 July 1999, the first cheque, a Post Office Savings Bank cheque, number 511446 ('the POSB cheque'), in the amount of $30,000, was encashed. The second cheque, a Development Bank of Singapore cash cheque ('the DBS cheque'), number 396566, in the amount of $20,000, was encashed the following morning.

5 Neither the appellant nor Tan were able to open trading accounts to trade on the Singapore Stock Exchange, as the appellant's trading accounts had previously been made delinquent by Kim Eng Securities and Tan was a bankrupt.

Prosecution's version of the facts

6 Cecilia testified that she had issued the two cheques to the appellant to partly settle share trading losses in her Kim Eng Securities trading account ('the Kim Eng account'). Cecilia had issued cash cheques so that the appellant could encash them immediately and settle the losses with Kim Eng. This was a matter of some urgency as a delay in payment would result in Cecilia's account being made delinquent such that she would no longer be able to trade on the Singapore Stock Exchange.

7 Cecilia testified that, following from her introduction to Tan, which had been initiated by the appellant in late May 1999, a share-trading agreement was agreed upon between Cecilia, Tan and the appellant. Under this agreement, Cecilia was to open trading accounts and provide the investment capital of $400,000. Profits were to be shared, with Cecilia receiving half the profits. The appellant and Tan were entitled to the other half of the profits. The parties also agreed that if any losses were incurred, these would be borne by the appellant and Tan.

8 Pursuant to this agreement, the appellant brought Cecilia to open a number of trading accounts, including the Kim Eng account. While at Kim Eng, the appellant instructed a remisier, one Daniel Ng Kok Kheng ('Daniel Ng'), to send her daily summaries of the trading activity in Cecilia's account. Daniel Ng was also informed that one 'Onn' (later established to be Tan) would do the trading for the account.

9 On 20 July 1999, Daniel Ng faxed a print-out to Cecilia seeking settlement of her share trading losses on the Kim Eng account which amounted to $124,725.74. Cecilia turned to the appellant to settle the losses but the latter failed to do so. Cecilia then made partial payment amounting to $58,295.44 as she feared that her account would be made delinquent if the losses were not settled expediently. When Cecilia asked the appellant to settle the remainder, the appellant claimed that she was financially 'tight' and unable to make payment. The appellant asked Cecilia for an advance to settle the losses and instructed her to issue cash cheques to expedite payment to Kim Eng. The appellant reassured Cecilia that she would handle the matter and that Daniel was a good friend of hers.

10 In accordance with the appellant's instructions, Cecilia issued the POSB cheque and the DBS cheque. On the morning of 21 July 1999, the appellant went to Cecilia's office and collected the two cheques. Cecilia gave the appellant clear and specific instructions that she was to immediately settle

the losses in the Kim Eng account with the two cheques. The appellant said she would do so and left with the cheques.

11 A few days later, Cecilia received a demand for payment from Kim Eng Securities and thus discovered that the appellant had not settled the losses. Cecilia's attempts to contact the appellant were fruitless and she did not see the appellant again until after the appellant's arrest.

Appellant's version of the facts

12 At the trial below, the appellant denied all involvement in or knowledge of the share trading agreement, which she contended had been between Tan and Cecilia only. While admitting that she had encashed the two cheques, the appellant denied that Cecilia had given the cheques to her. Instead, the appellant's version of events was that Tan had given her the two cheques on different days – the POSB cheque on 21 July 1999 and the DBS cheque on 22 July 1999. Each time the appellant had followed Tan's instructions to encash the cheques and hand the proceeds to him. Each time the appellant handed the proceeds to Tan, he had issued a receipt to reflect this ('the receipts').

13 Tan corroborated the appellant's version of events, testifying that the appellant had not been aware of the share trading agreement. He disagreed with Cecilia's account of the terms of the agreement, claiming that it was agreed that any profits would be shared equally but that any losses would be borne by Cecilia alone. Related to this, Tan claimed that the two cheques were issued by Cecilia to pay him his share of the profits from the agreement. He testified that he had given the appellant the POSB cheque on 21 July 1999 and the DBS cheque on 22 July 1999. She had returned the proceeds to him and he had given the appellant two receipts.

14 The appellant also called one Lim Poh Lye ('Lim'), a friend of Tan's, who testified that he saw Tan give the appellant a cheque on 21 July 1999.

The decision of the district judge

15 The district judge found that the appellant had been actively involved in the share trading agreement. The district judge viewed the two receipts with suspicion and noted that there was ample opportunity for concoction as no mention of these receipts had been made in the statements given by Tan or the appellant to the Commercial Affairs Department ('CAD'). The district judge noted that the receipts had only been produced after the trial had commenced and that Tan had been on the run until he was arrested in October 2001, in the midst of the trial.

16 The district judge also rejected Tan's version of the share trading agreement as being 'ludicrous'. The district judge found that, while it was agreed that Cecilia would share any profits made with Tan and the appellant, share trading losses were to be borne by Tan and the appellant only.

17 The district judge found that the credit of both Tan and the appellant was impeached. In contrast, the district judge found that the prosecution witnesses were truthful witnesses and accepted Cecilia's version of the facts as credible and truthful. He found that Cecilia had entrusted the two cheques to the appellant to pay for the losses in the Kim Eng account and that the proceeds had not been so applied. He therefore convicted the appellant on both charges.

The appeal against conviction

18 Counsel for the appellant advanced two main grounds of appeal:

(1) that the district judge erred in finding that the appellant was involved in the share trading agreement; and

(2) that the district judge erred in rejecting the appellant's version of events.

19 I shall now deal with these arguments in turn.

Whether the district judge erred in finding that the appellant was involved in the share trading agreement

20 Counsel for the appellant submitted that the share trading agreement was between Cecilia and Tan only, and that the appellant was not involved in the share trading agreement. Counsel submitted that the appellant did not know about the share trading agreement. While it was not denied that the appellant had been present when Cecilia went to open the Kim Eng account, counsel drew the court's attention to the appellant's testimony that she had only gone to open the Kim Eng account at Cecilia's request and that she had agreed to go with Cecilia 'as a courtesy'. The appellant argued that she had no knowledge of share trading and had in fact 'learnt something that day' about opening trading accounts.

21 At the trial below, the district judge rejected these arguments. The district judge noted the evidence of Daniel Ng who observed that it was the appellant who did most of the talking when Cecilia and the appellant met with him to open the account. The district judge also relied on Daniel Ng's evidence that he had been instructed by the appellant to send daily summaries of the trading activity in Cecilia's account to the appellant's home by fax. The district judge also considered a fax from Mees Pierson to Cecilia dated 4 June 1999. The appellant had made annotations on the fax and had performed calculations in her own handwriting to calculate the amount of profit which would have been made had Cecilia's shares in City Developments Limited been sold off that day.

22 It is settled law that an appellate court should be slow to disturb a district judge's findings of fact unless they are plainly wrong or against the weight of evidence. In ***Public Prosecutor v Azman bin Abdullah*****[1998] 2 SLR 704 at p 710**, I made the following observations:

> It is well-settled law that in any appeal against a finding of fact, an appellate court will generally defer to the conclusion of the district judge who has had the opportunity to see and assess the credibility of the witnesses. An appellate court, if it wishes to reverse the district judge`s decision, must not merely entertain doubts whether the decision is right but must be convinced that it is wrong.

23 Having perused the evidence that was before the court, I was of the opinion that the district judge's findings were amply supported by the evidence. It was clear from Daniel Ng's evidence that the appellant took an active involvement in Cecilia's share trading activities. The appellant's version of facts and her claim that she did not know about the share trading agreement sat most uncomfortably with the fact that she asked for daily summaries to be sent to her. It was clear from the fax from Mees Pierson and from her handwritten calculations on this fax that the appellant had a keen personal interest in Cecilia's share trading activities. It simply made no sense for the appellant to take such a keen interest in Cecilia's share trading portfolio if she did not stand to gain from this.

24 I therefore declined to reverse the district judge's finding that the appellant had been involved at the share trading agreement.

Whether the district judge erred in rejecting the appellant's version of events

25 The appellant's second set of sub-contentions related to the district judge's rejection of the appellant's version of how she came to be in possession of the cheques issued by Cecilia. In support of counsel's submission that the district judge erred in preferring the prosecution's version of the facts over that of the appellant, counsel contended that the district judge erred in finding that the appellant's credit was impeached. Counsel also urged the court to find that the district judge had erred by not placing due weight on the evidence of Tan and Lim which supported the appellant's defence. Finally, counsel sought to cast doubt on the veracity of the prosecution's version of events by arguing that there had been no urgency to pay Kim Eng on 20 July 1999 and that it was not necessary for Cecilia to issue cash cheques since she could have just paid Kim Eng directly, without going through the appellant.

26 I now turn to each of these sub-contentions in turn.

Whether the district judge erred in finding that the appellant's credit was impeached

27 The district judge found that the appellant's credit was impeached in respect of her evidence of what she did with the proceeds after encashing the two cheques. The district judge found that there were material discrepancies relating to the appellant's handling of the proceeds between the appellant's evidence in court and a statement given by her to the CAD on 2 March 2001. In court, the appellant testified that Tan had handed her the two cheques and that she had returned the proceeds to him in exchange for two receipts. However, in her statement to the CAD, the appellant stated that she had spent the $20,000 and that Tan had paid her the $30,000 in partial settlement of his debts to her.

28 Counsel for the appellant, while accepting that the discrepancy was material, argued that the district judge should not have held that the appellant's credit was impeached as the appellant was distraught when she made her statement to the CAD and therefore had not carefully read through the statement on the day she made it.

29 I was of the view that the district judge did not err in finding that the appellant's credit was impeached, as the reasons given by the appellant to explain the discrepancies were grossly inadequate. At the trial below, the appellant had asserted that she had given her statement 'irresponsibly' and had therefore said that she had spent the money even though this was not the case. Her explanation before the district judge was that she had just 'read past' the statement when asked to check it because she was in a hurry. I was thoroughly unconvinced by counsel's attempts to explain away the discrepancy and I was of the view that the appellant's contention on appeal that she had been distraught while making the statement was yet another lame excuse by the appellant in an attempt to belatedly justify her version of the facts. In light of the appellant's failure to afford any reasonable explanation for the discrepancy, I found that the district judge was correct in finding that the appellant's credit was impeached.

Whether the district judge erred in not placing weight on the evidence of Tan

30 Counsel for the appellant argued that the district judge should have placed more weight on Tan's evidence. Tan's evidence supported the appellant's version of the facts, since Tan's evidence was that he received the cheques from Cecilia. Tan also testified that he had passed the cheques to the appellant, who encashed them for him, and that the appellant had returned the proceeds to him in exchange for the two receipts which he issued.

31 I could find no fault with the district judge's finding that Tan was a most unreliable and untrustworthy witness. The district judge noted that, in court, Tan appeared to be making things up as he went along and would get extremely agitated when confronted with absurdities in his evidence or with his own inconsistent testimony.

32 Similarly, the district judge's finding that Tan's credit was impeached could not be faulted. The district judge rightly took account of numerous discrepancies in Tan's evidence. One clear example of this is Tan's differing accounts of how he passed the POSB cheque to the appellant. In Tan's statement to the CAD of 3 October 2001, Tan stated that he gave the appellant the POSB cheque at his office. However, in court, Tan testified that he had telephoned the appellant from his office and had gone to the ground floor at Republic Plaza to hand her the cheque after she had telephoned him upon her arrival at Republic Plaza. Tan further testified that no one had been present when he handed the appellant the cheque. Tan later provided a third version of the collection, claiming that he was on the ground floor of Republic Plaza smoking a cigarette with Lim. He then telephoned the appellant and she collected the cheque from him at the ground floor 15 minutes later, while Lim was still present.

33 I also noted that the names which Tan provided for the friend who had purportedly witnessed him handing the cheque to the appellant differed in his accounts in court from that in his CAD statement of 21 September 2001. In court, Tan referred to the friend as 'Ah Lee', 'Simon', 'Ah Lim', 'Tua Pui' and 'Ah Kok', while in his statement, he stated that his friend's name was 'Ah Chew' and that his friend lived in Bendemeer. Tan's attempt to explain away the discrepancy by telling the court that his friend had many nicknames failed in light of Lim's testimony that he was not known as 'Ah Chew' or 'Chew', and that he had never lived in the Bendemeer area.

Whether the district judge erred in not placing weight on the evidence of Lim

34 Counsel for the appellant submitted that the district judge had erred by not placing more weight on Lim's evidence that he had witnessed Tan giving the appellant the POSB cheque.

35 I saw no reason to disturb the district judge's finding that little weight should be placed on Lim's evidence. The district judge found that there were serious doubts as to whether Lim's testimony was truthful. In coming to this finding, the district judge observed from Lim's demeanour in court that 'he did not appear… to be the sharpest knife in the drawer'. As I noted in *Jimina Jacee d/o C D Athananasius v Public Prosecutor* [2000] 1 SLR 205, due weight should be accorded to the district judge`s assessment of the veracity or credibility of the witness, given that he had the benefit of observing the demeanour of the particular witness. Further, I noted that the district judge had clearly considered the totality of the evidence, including Lim's testimony that he had never been known as 'Ah Chew' which was the name provided by Tan in his CAD statement of 21 September 2001, in finding that Lim's evidence was unlikely to be truthful.

Whether the district judge erred in failing to consider that there was no urgency to pay Kim Eng and that there was no need for Cecilia to issue cash cheques

36 Counsel for the appellant submitted that the prosecution's version of the facts should be disbelieved because it made no sense for Cecilia to have issued cash cheques in light of the fact that she could have just paid Kim Eng directly. Related to this, counsel argued before me that there had been no urgency in paying Kim Eng and therefore there had been absolutely no necessity for Cecilia to issue cash cheques.

37 I did not agree with counsel's submissions. It was evident that Cecilia had perceived that

there was some urgency in settling the losses in the Kim Eng account as she was anxious that any failure to do so would result in her account being made delinquent. It was also clear from the evidence that on 20 July 1999, one day before the POSB cheque was encashed by the appellant, Daniel Ng faxed to Cecilia a print-out reflecting share trading losses amounting to $124,725.74. Cecilia's use of cash cheques can easily be explained by the fact that she did not have enough cash on hand to fully settle the losses in the Kim Eng account. After Cecilia had made the first payment of $58,295.44, she was only able to cough up a further $50,000, even though the losses stood at over $66,000. The appellant had assured Cecilia that she would handle things with Kim Eng and that the appellant had the ability to ensure that Cecilia's account would not be suspended or made delinquent since the appellant was good friends with Daniel Ng.

38 In light of my observations earlier, I was of the view that the totality of the evidence showed that the appellant's defence could not be believed and that the district judge was correct in preferring the prosecution's version of the facts.

39 Having reviewed all the evidence and considered counsel's submissions on appeal, I saw no reason for me to conclude that the district judge erred in convicting the appellant on both charges against her. The district judge's findings were neither against the weight of the evidence nor unsupportable. In the result, I dismissed the appellant's appeal against conviction. I now turn to the appeal against sentence.

The appeal against sentence

40 Counsel for the appellant contended that the sentence imposed by the district judge was manifestly excessive in light of the district judge's failure to consider certain mitigating factors and the fact that the sentence imposed was out of line with previous similar cases.

Mitigating factors

41 Counsel for the appellant drew the court's attention to a number of mitigating factors which he felt were not adequately considered by the district judge.

First offender

42 Counsel for the appellant averred that the district judge did not take due account of the fact that the appellant was a first offender. While an offender's clean record is generally accepted as having some mitigating value, I recently held in *Chen Weixiong Jerriek v Public Prosecutor* [2003] SGHC 103 that it is the prerogative of the court to refuse to consider as a first time offender anyone who has been charged with multiple offences, even if he has no prior convictions.

43 In any case, even if the appellant were to be regarded as a first offender, the absence of antecedents had to be weighed in the balance against other considerations, the most crucial of which was the public interest: *Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor* [2002] 1 SLR 314. I was of the view that the appellant's previously unblemished record carried very little weight in light of the need to ensure that avaricious and unscrupulous tricksters like the appellant were prevented from preying on the innocent and were duly punished for their misdeeds.

Restitution

44 I was similarly unmoved by counsel's submission that partial restitution had been made. Counsel submitted that out of the $50,000 that was misappropriated by the appellant, a sum of

$21,028.90 was paid by the appellant into Cecilia's DBS Securities account to account of share trading losses incurred therein. This could hardly be considered as restitution since, under the terms of the share trading agreement, any losses were to have been borne by the appellant and Tan.

Appellant's age

45 Counsel also drew the court's attention to the fact that the appellant was 53 years old and was 'not physically or mentally equipped to enter the prison system'. It is established law that there is no general rule mandating the giving of a discount for a person of advanced years: *Krishan Chand v Public Prosecutor* [1995] 2 SLR 291. As for the appellant's ability to cope in prison in light of her physical condition, I made clear in *Public Prosecutor v Ong Ker Seng* [2001] 4 SLR 180 that ill health is not a mitigating factor save in the most exceptional circumstances. I was of the opinion that there was nothing particularly exceptional on the facts of this case which would warrant considering the appellant's age or health as mitigating factors.

Aggravating factors

46 Indeed, I noted that there were significant aggravating factors in this case. I disagreed with counsel's submissions that the district judge had erred in finding that the appellant's behaviour in the trial below was an aggravating factor. It is established law that an accused person's bad behaviour in court can be considered an aggravating factor. As I noted in *Zeng Guo Yuan v Public Prosecutor* [1997] 3 SLR 321:

> Certainly an accused is entitled to raise any type of defence necessary to his case, a scandalous – or even vexatious – defence notwithstanding. The scandalous nature of a defence nevertheless, cannot be an unqualified excuse for an unbridled performance in the courtroom.

47 I was of the view that the appellant had shown an exceptional contempt for the proceedings at the trial below. The appellant continually badgered Cecilia during cross-examination and refused to answer direct questions from the court on the relevancy of her cross-examination tactics. The appellant continually accused the court interpreter of not interpreting Tan's evidence correctly and even resorted to questioning Tan in Mandarin at some points because she disagreed with the translation. On several occasions, she refused to allow the interpreter to translate Tan's evidence and translated it herself, resulting in the district judge having great difficulty hearing Tan's answers. The appellant even had the audacity to accuse the district judge of bias or prejudice against her. She accused the court of refusing to look at her documents and of allowing the DPP to bring in evidence which were 'all lies'.

48 I took the view that the appellant's behaviour in court was sufficiently serious to warrant it being taken into account as an aggravating factor.

Whether the sentence was out of line with previous similar cases

49 In support of the appellant's contention that the sentence imposed was manifestly excessive, counsel for the appellant cited *Phua Mong Seng @ Pan Mao Sheng Richard v Public Prosecutor,* MA 263/2002, DAC 55471-02/2000, DC, an unreported judgment dated 12 December 2001. In *Phua Mong Seng*, the accused was sentenced to six months imprisonment for misappropriating $30,000. Counsel pointed out that this sum was equal to the larger sum misappropriated in respect of the two charges faced by the appellant and that there were aggravating factors in *Phua Mong Seng*, including the fact that the accused had fabricated evidence.

50 Counsel also cited *Mak Tuck Chee v Public Prosecutor*, MA 159/2002, DAC 3261/2002, DC, unreported judgment dated 5 July 2002, where the accused was sentenced to five months imprisonment for misappropriating a sum of $27,707. In sentencing the accused, the district judge noted that there were significant mitigating factors, including the fact that the accused was a first offender, had pleaded guilty and had made full restitution. The district judge noted that, in the absence of these factors, the appropriate sentence would have been between nine to 12 months imprisonment.

Principles of sentencing

51 The principle of proportionality in sentencing in respect of criminal breach of trust cases was discussed by Chan Sek Keong J (as he then was) in *Wong Kai Chuen Philip v Public Prosecutor* [1990] SLR 1011:

> In an offence of criminal breach of trust, it was a matter of common sense that, all things being equal, the larger the amount dishonestly misappropriated the greater the culpability of the offender and the more severe the sentence of the court.

52 This passage must be read together with *Amir Hamzah bin Berang Kutty v Public Prosecutor* [2003] 1 SLR 617, where I held that in sentencing accused persons on charges of criminal breach of trust, the court's discretion is never restricted by the amount involved and each case must be looked at on its own facts. The value of property is not the sole factor in determining the sentence.

53 It is well-settled, on the authority of *Tan Koon Swan v Public Prosecutor* [1986] SLR 126, that one of the grounds on which an appellate court may interfere in a sentence imposed by a lower court is if it is satisfied that the sentence imposed was manifestly excessive.

54 Besides considering the cases cited by counsel, I also took into account *Ang Chee Huat v Public Prosecutor*, MA 48/96/01, DC, an unreported judgment dated 5 May 1996, where the misappropriated sum (approximately $333,000) was over ten times the amount in the more serious charge faced by the appellant. The accused in *Ang Chee Huat* did not make any restitution and had claimed trial, but was sentenced to a term of imprisonment of 33 months, a mere five months more than the appellant's sentence.

55 After considering *Ang Chee Huat* and the cases cited by counsel, I was drawn to conclude that the sentence of 27 months imprisonment in respect of each charge was manifestly excessive and that a more appropriate sentence was 15 months imprisonment in respect of each charge. In light of the appellant's atrocious behaviour in court and the severity of her offences, I ordered the sentences to run consecutively, for a total sentence of 30 months imprisonment. I was of the view that the sentence of 30 months imprisonment would not offend the totality principle, in light of the overall gravity of the appellant's criminal conduct and the numerous aggravating factors in this case.

Appeal against conviction dismissed; appeal against sentence allowed.