IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 200

Magistrate's Appeal No 9042 of 2022/01

Between

Lim Hong Boon

… *Appellant*

And

Public Prosecutor

… *Respondent*

BRIEF REMARKS

[Criminal Procedure and Sentencing — Sentencing — Principles]

TABLE OF CONTENTS

Lim Hong Boon
v
Public Prosecutor

[2022] SGHC 200

General Division of the High Court — Magistrate's Appeal No 9042 of 2022
Aedit Abdullah J
5 August 2022

23 August 2022 Judgment reserved.

Aedit Abdullah J:

1 The fraud perpetrated on many investors by Genneva Pte Ltd (the "Company"), caused a substantial degree of loss. Those who have been convicted of involvement in the crimes should be punished to a degree to deter similar fraud and visit substantial retribution on them for the wrongs committed. However, in calibrating the punishment, the sentence imposed must be proportionate and principled.

2 Here, the appellant, Lim Hong Boon, was not a mere functionary, carrying out menial or low-level tasks. He was not just a foot soldier, but neither was he the directing mind and will. The question in these brief remarks, concerning the appellant's appeal against sentence only, is where he lay on the spectrum.

3 Having considered the arguments, I have concluded that the sentence imposed below of 60 months' imprisonment was disproportionate to the circumstance and manifestly excessive. I thus allow the appeal, and substitute a sentence of 48 months' imprisonment in its stead.

Brief background

4 The appellant claimed trial to a single charge under s 340(5) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for knowingly being a party to the carrying on of the business of the Company, with intent to defraud creditors of the Company, for the period of 17 August 2012 to 30 September 2012. The Company is incorporated in Singapore and in the business of gold trading, in particular, gold-based investment schemes.[1] These schemes entailed the sale and buy-back of gold from customers at certain prices. Customers would receive discounts or pay-outs from the Company as part of their contract with the Company.[2] This was, however, an unsustainable business model that caused the Company to incur losses consistently.

5 Between 17 August 2012 and 30 September 2012, the Company carried out the Gold Inspection Exercise ("GI Exercise").[3] Customers who had purchased gold bars from the Company were informed to bring in their gold for inspection.[4] The gold was collected at the physical office of the Company. Assistant Group Management Consultants ("AGMCs") would be present to assist.[5] The gold was then handed over to the staff in the "office room" located

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1 Record of Appeal ("ROA"), Grounds of Decision ("GD") at [7] and [8], p 1798.

2 ROA, GD at [8] and [9], pp 1798 and 1799.

3 Respondent's Written Submissions dated 12 July 2022 ("RWS") at para 23.

4 RWS at para 24.

5 RWS at para 29.

in the premises of the Company, kept in either the "office room" or in a safe, and tracked on an Excel spreadsheet. Some days later, the customer would return to obtain their gold as well as a new contract on better terms than before.

6 In the period before customers returned for their gold, the Company had free use of the said gold: among other things, the gold would be sold to new customers for cash or given to customers who had previously brought in their gold.[6] By doing so, the Company used earlier batches of gold to generate cash while later batches of gold were returned to customers who provided gold previously.[7] This temporarily alleviated the Company's cash flow problems.

7 Between 17 August 2012 and 30 September 2012, the Company collected 3,664.415kg of gold from its customers. By September 2012, the Company started to default on the return of gold to customers. As of 30 September 2012, about 672.015kg of gold with a market value of $46.85m was owing to the customers.[8]

The decision below

8 The District Judge ("DJ") convicted the appellant under s 340(5) of the Companies Act and imposed a sentence of 60 months' imprisonment. The full grounds of decision are contained in *Public Prosecutor v Lim Hong Boon* [2022] SGDC 47 ("GD").

9 Before the DJ, the Prosecution sought a sentence of 68 months' imprisonment. The appellant was central to the running of the GI Exercise and

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6 RWS at para 31.

7 RWS at para 34.

8 RWS at para 35.

the "go to" person when there were queries. He was also responsible for the movement of gold in the "office room", and fully aware of the consequences of the GI Exercise. Given the amount of loss caused and the number of people deceived, deterrence was the dominant sentencing consideration. The Prosecution further emphasised that the appellant was as culpable as Kwok Fong Loong ("Kwok"), the General Manager of the Company, who had pleaded guilty to the same charge and received a sentence of 56 months' imprisonment. As the appellant claimed trial, an uplift in his sentence was warranted. The Prosecution also relied on *Phang Wah and others v Public Prosecutor* [2012] 1 SLR 646 ("*Phang Wah*").

10 The appellant, in turn, sought a sentence of a fine, and in the alternative, a term of imprisonment shorter than that imposed on Kwok. The appellant was a mere employee of the Company and was involved in the GI Exercise because of a request by Kwok. He was not a controlling mind and will of the company and did not play any part in formulating the GI Exercise. Instead, he was merely following instructions. The appellant also sought to distinguish *Phang Wah.*

11 The DJ imposed a sentence of 60 months' imprisonment. Deterrence was the dominant sentencing consideration due to the huge losses caused to large numbers of unsuspecting investors: GD at [150]. The DJ also relied on the observation in *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") that offences involving financial services and/or the integrity of the economic infrastructure warrant deterrent sentences. Here, the GI Exercise involved the trading of gold. Gold is both a valuable commodity and seen as a good store of value. Yet, because of the actions of the appellant and the Company, gold has become the very crisis for the victims: GD at [151]–[153].

12 The DJ found that the appellant was not a mere cog in the wheel but more of an axle or a lynchpin: GD at [181]. The appellant was vital to the GI Exercise: he oversaw the collection and movement of gold, and was fully aware of the consequences of the GI Exercise: GD at [150]. As compared to Kwok, who played a higher function and role in the Company, the DJ found the appellant to be less culpable: GD at [161]–[162].

13 In the DJ's assessment, a sentence of 48 months' imprisonment would be imposed had the appellant pleaded guilty at the earliest: GD at [179]. But as the appellant had chosen to claim trial, the significant mitigating factor of an early plea of guilt that was offered to Kwok would not apply. Considering that considerable state resources were expended (with over 17 witnesses testifying in the trial), an uplift of 12 months from the starting point sentence of 48 months was justified: GD at [183].

Summary of appellant's arguments

14 The appellant argues that the sentence imposed is manifestly excessive. First, the appellant was not in a role that was central or significant to the GI Exercise.[9] He was a mere employee in the Company who was tasked to assist Kwok.[10] While the appellant was in charge of receiving and processing the gold, he did so on the instructions of his employers and had little to no discretion in the process.[11] He was not responsible for the marketing of the GI Exercise to the Company's customers; he did not make any additional profits or commission from the GI Exercise; and he was not the controlling mind of the Company or

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9 Appellant's Written Submissions dated 12 July 2022 ("AWS") at para 35.

10 AWS at paras 25 and 26.

11 AWS at para 36.

the GI Exercise.[12] Second, the appellant submits that he is less culpable than Kwok and the offenders in *Phang Wah*. Correspondingly, a significantly lower sentence should be imposed.[13] Third, the appellant should not receive an uplift of 12 months for his decision to claim trial. He did so as he disagreed with the Prosecution's case that he was the Head of Transactions in the Company.[14] His conduct of his defence was also focused and expeditious.[15]

15 In oral submissions, the appellant sought a sentence of either a fine or a term of imprisonment no more than several months. The appellant emphasised that he was a mere employee who carried out the instructions of his superiors. It was thus unfair to visit the consequences of the GI Exercise upon him. The appellant further reiterated that he is less culpable than the offenders in *Phang Wah* and Kwok.

Summary of the respondent's arguments

16 The respondent maintains that the sentence imposed is not manifestly excessive. First, the appellant was in charge of a pivotal aspect of the GI Exercise. He was responsible for the collection and movement of gold, and he was fully aware of the problems and issues of the GI Exercise.[16] Even though he was a mere employee, he was high in the hierarchy of the Company as evinced by his direct contact with the directors of the Company.[17] Second, the DJ had properly calibrated the sentences of Kwok and the appellant. While the

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12 AWS at paras 17, 38 and 40.

13 AWS at paras 41–59.

14 AWS at para 60.

15 AWS at para 63.

16 RWS at para 55.

17 RWS at para 65.

DJ found Kwok to be more culpable than the appellant, the DJ correctly noted that Kwok, unlike the appellant, pleaded guilty.[18] Third, the appellant's decision to claim trial meant that he was not entitled to the sentencing discount that would have been applied to Kwok. Numerous witnesses were called to give evidence. These were resources that Kwok had saved through his plea of guilt, which warranted a sentencing discount.[19]

17 In oral submissions, the respondent highlighted the critical role played by the appellant in the "office room", which was the first point of contact in the GI Exercise where customers would lose control of their gold. The appellant was in charge of the "office room" and fully involved in the disposition of the gold. In particular, the appellant had direct access to the directors of the Company, in particular, one Ng Poh Wen ("Ng", styled "Datuk Ng"). The respondent also accepted that the appellant's culpability is lower than that of Kwok, and submitted that a sentence of 60 months' imprisonment is justified.

The decision

18 The sentence imposed below is manifestly excessive. It is set aside and substituted by a sentence of 48 months' imprisonment.

Findings going to sentencing

19 As this was sentencing after trial, the findings of the DJ determine the factual perimeters. For present purposes, these largely pertain to the role of the appellant in the Company and the GI Exercise.

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18 RWS at paras 75–78.

19 RWS at paras 85–90.

20 The DJ found that the appellant was the head of the Company's Transaction Department: GD at [132]. Further, the DJ noted that the appellant had access to Ng, which showed that the appellant can be reasonably expected to know that the Company was not engaged in any business activity that would generate sufficient revenue: GD at [126]. His access to Ng also meant that he was an employee with sufficient authority: GD at [135]. In the GI Exercise, the appellant played a central role as he controlled the movement of gold and gold redemptions: GD at [125]. He also knew that the gold surrendered was being sold, pawned or sent overseas, and was extensively involved in the activities of the GI Exercise contrary to his claims that he played a limited supervisory role: GD at [126] and [127]. In sum, the appellant was in the thick of the affairs relating to the GI Exercise: GD at [130].

Culpability

21 The sentence imposed on an offender involved in offences carried out by a group of people in a criminal enterprise, with a division of labour and responsibility, should generally reflect their level of involvement and knowledge. This is a relatively trite proposition of law, that an offender playing a more culpable role in a criminal enterprise should be dealt with more severely: *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [45].

22 The culpability of the appellant was not low. He had knowledge of the scale and objectives of the criminal enterprise taking place. His access to Ng and his overall familiarity with the operations of the Company was such that he should have known that the gold collected in the GI Exercise was not generating sufficient revenue to meet the Company's liabilities: GD at [126]. Numerous employees had also updated him on the delays in the return of the gold to

customers: GD at [120]. In this regard, the appellant's attempt to distance himself from the GI Exercise was squarely rejected: GD at [128]. This knowledge implicated the appellant in a substantial level of criminal responsibility: those who know of the extent of the criminality taking place, would also know of the harm being caused or threatened. The appellant would have or should have known of the impact on the customers as well as the loss and disruption that would result from the criminal activity he was involved in.

23 The appellant's actions in the GI Exercise and within the Company was an essential part of the GI exercise. He controlled the movement of the gold and gold redemptions, answered the queries of the staff in the "office room", and was involved in the sale, pawning or sending of the gold overseas: GD at [120], [125] and [126]. Without his participation, the offence and the harm stemming from the GI Exercise would not have been able to occur. But for his involvement, the siphoning of the gold bars would not have transpired. Someone had to carry out the tasks he was assigned or nothing would have happened. Put simply, the appellant was no passive participant in the GI Exercise. His involvement was neither minor nor accidental; on the contrary, he was instrumental to the GI Exercise.

24 The above means that the appellant could not possibly be determined to have such a low level of culpability that would point to a low sentence of a fine or a sentence of only several months' imprisonment, as sought by the appellant during oral submissions.

25 However, on the other hand, the appellant was not the directing mind and will or the formulator or instigator of the criminal enterprise. Culpability will be greater if the offender was responsible for developing or initiating the crime: *Amir Hamzah bin Berang Kuty v Public Prosecutor* [2003]

1 SLR(R) 617 at [58]. The GI Exercise was conceived by the Malaysian directors of the Company, who conveyed their instructions through the Group Management Consultants ("GMCs").

26 Culpability would also be greater if the offender were also able to exercise discretion or had some leeway in how the crime was to be perpetrated. Such discretion would normally carry with it the possibility of narrowing or enlarging the scope of harm, and thus should attract a more substantial sentence, than otherwise. This, however, was not the case. As observed by the DJ, the appellant was an employee acting on the instructions of Ng: GD at [161].

27 The appellant's culpability would also be lower than others involved at the higher level of the criminal enterprise because he derived limited benefits from his participation in the GI Exercise: *B Subramaniam a/l Banget Raman v Public Prosecutor* [2003] 4 SLR(R) 600 at [29]. His salary was only RM2,300 per month and there is no suggestion that he accrued any other benefits arising from his participation in the GI Exercise.

28 As against the appellant, Kwok had a different level of culpability. As the General Manager of the Company, Kwok played a greater role than the appellant. Kwok was involved in the signing off on the documents and circulars to GMCs and clients, and also dealt with the consultants of the Company: GD at [163]. Not only was the appellant not involved in these activities, but his participation in the GI Exercise was also, in part, due to a request of Kwok: GD at [161] and [162]. Contrastingly, there is no evidence of any kind to suggest that the appellant had involved any other persons in the GI Exercise.

Harm

29 The extent of the harm caused was indeed substantial. Through the GI Exercise, 3,664.415kg of gold was collected. From September onwards, the Company started to default on the return of gold to customers. As of 30 October 2012 (the last day of the GI Exercise before the authorities commenced investigation), about 672.015kg of gold with a market value of $47.85m was owing to customers. Massive loss was caused to a huge number of customers over a relatively short period of time. Deterrence is therefore a relevant consideration, and is required to prevent similar harm from being caused in the future.

30 Reference was made by the DJ to *Law Aik Meng* for the proposition that deterrence should feature heavily in the sentencing of the appellant, as the present offence involves financial services and affects the economic infrastructure of the nation: GD at [151]. That observation in *Law Aik Meng*, however, was in the context of false credit-card transactions. The harm that would result to the financial system, through loss of confidence in credit cards, would have been substantial: it thus acted as an additional factor pointing to the need for greater deterrence. However, the present situation is different: great harm was caused, and perhaps greater suspicion may attend similar gold investments in future (which is not actually a bad thing), but I am very doubtful that, in the absence of specific evidence, harm was caused to the confidence in the financial system.

Parity

31 Parity is to be aimed for, but in the present case the DJ unfortunately approached it in a way that gave rise to the inference that the appellant was penalised for claiming trial. As emphasised in many cases such as *Ng Kean*

Meng Terence v Public Prosecutor [2017] 2 SLR 449 at [40] ("*Ng Kean Meng*") as well as *Public Prosecutor v BLV* [2017] SGHC 154 at [135], an offender has the right to claim trial and should not be penalised for it. A person who pleads guilty conversely may be treated more leniently because the plea of guilt, especially if it is early, may indicate remorse and save resources: *Krishan Chand v Public Prosecutor* [1995] 1 SLR(R) 737 at [6]. As a matter of principle, the appropriate discount accorded to an offender who pleads guilty is a fact-sensitive matter depending on multiple factors: *Ng Kean Meng* at [71].

32 Here, Kwok pleaded guilty. To ensure parity between Kwok and the appellant, the appropriate course would have been to consider what sentence would likely have been imposed on an offender claiming trial in Kwok's situation. I am of the view that the sentence would have been in the region of 70 to 80 months' imprisonment. Not an insubstantial amount of resources would have been expended, in terms of the witnesses called (both lay and expert), in the hearing process. On the basis that the appellant is less culpable than Kwok, in the various ways outlined above, the DJ should have then adjusted the sentence of the appellant against the sentence that would have been imposed on Kwok had he claimed trial. To go about it in the converse, as the DJ had done so, conveys the misimpression that the appellant has been penalised for claiming trial.

Calibration of the sentence

33 In summary, a substantial sentence was called for given that the harm was significant, and deterrence required. The appellant's culpability was at a lower level than Kwok, and others who derived greater benefit and who were able to direct matters. On the facts, he was at the middle-level: it may be that the enterprise would not have been able to operate without his involvement, but

that would not be enough on its own to warrant a substantive sentence at the upper one-third of the prescribed sentencing range under s 340(5) of the Companies Act, closer to the maximum of seven years' imprisonment. Assessing the circumstances, the appropriate sentence should be above but closer to the half-way point of three and a half years' imprisonment, or 42 months. In making such calibration, I did not find that *Phang Wah* provided much assistance in respect of sentencing under s 340, because of the other offences proceeded with in that case.

34 In light of the above, I am of the view that the appropriate sentence is one of 48 months' imprisonment. Accordingly, the sentence below is set aside and substituted with imprisonment of 48 months. As for parity, the sentence in Kwok's case was not appealed, but the putative non-discounted sentence of 70 to 80 months would seem to be in line with the different circumstances between Kwok and the appellant here.

35 I would like to emphasise that the harm caused to the victims of the offence cannot be downplayed. The substitution of the sentence is to reflect the level of criminal responsibility that the appellant should bear for his role and his contribution to the criminal enterprise.

36 I will now hear parties on the commencement of sentence, and any other matters.

Aedit Abdullah
Judge of the High Court

Kesavan Nair (Bayfront Law LLC) for the appellant;
Hon Yi and Norman Yew (Attorney-General's Chambers) for the respondent.