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

[2022] SGHC 71

Magistrate's Appeal No 9139 of 2021/01

Between

Er Meng Khim

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Law — Statutory offences — Employment of Foreign Manpower Act]
[Criminal Procedure and Sentencing — Sentencing — Section 22(1)(*d*) Employment of Foreign Manpower Act]

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Er Meng Khim
v
Public Prosecutor

[2022] SGHC 71

General Division of the High Court — Magistrate's Appeal No 9139 of 2021/01
Vincent Hoong J
31 March 2022

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Vincent Hoong J (delivering the judgment of the court *ex tempore*):

1 In the court below, the appellant claimed trial to three charges under s 22(1)(*d*) punishable under s 22(1)(ii) of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA"). Briefly, each charge corresponded to one incident of the appellant knowingly making a false statement to the Controller of Work Passes in the declaration forms submitted to the Work Pass Division ("WPD") of the Ministry of Manpower ("MOM"). The false statement was essentially that he would be employing a foreign employee, Qi Debing ("Qi"), as a construction site supervisor for Qi Construction Pte Ltd (which was thereafter known as Tong Sing Construction Pte Ltd with effect from 2 March 2015). When the appellant made these declarations, he knew that he did not have the intention of employing Qi in that capacity, accordingly the statements were false in a material particular. The

offences were committed on 12 June 2015, 20 March 2017 and 6 September 2017.

2 The District Judge ("DJ") convicted the appellant on all three charges and sentenced him to 11 weeks' imprisonment on each charge with two of the sentences to run consecutively resulting in a global sentence of 22 weeks' imprisonment. The DJ's grounds of decision are reported as *Public Prosecutor v Er Meng Khim* [2021] SGMC 63 ("GD"). He now appeals against his conviction and the sentence.

3 For the appellant's offences under s 22(1)(*d*) EFMA to be made out, two elements have to be proved:

> (a) whether the appellant's statements in the S Pass applications – that Qi was employed as a construction site supervisor – were false in a material particular; and
>
> (b) whether the appellant knew that the declarations were false in a material particular.

4 I am of the view that the DJ rightly arrived at the conclusion that: (a) the appellant's statements in the S Pass applications, *ie*, that Qi was employed by Tong Sing as a construction site supervisor were false in a material particular; and (b) the appellant knew that the declarations were false in that material particular.

5 I now set out the reasons for my decision.

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Whether the appellant's statements in the S Pass applications were false in a material particular

6 In my view, the DJ correctly found that Qi was the true boss of Tong Sing and not a "construction site supervisor" as declared by the appellant in the S Pass application forms. The appellant had repeated his position that Qi was the "true boss" of Tong Sing, multiple times in his investigative statements. In support of this, he also elaborated on Qi's responsibilities in Tong Sing, which included, recruitment, work allocation, payment of salaries of the workers, and all other administrative matters such as medical leave. I agree with the Prosecution that the appellant's belated attempt to explain these references away by stating that what he meant by "real boss" was that Qi "brought a contract for the company", and without such contracts, the company would not be able to survive, is a mere afterthought.

7 First, this was not raised at trial. Second, it clearly contradicts the plain meaning of the words "real owner" and "real boss" used by the appellant in his statements. The appellant's own testimony fortified this conclusion. Crucially, he admitted that the work Qi had done, *ie*, procuring business for the company and recruiting workers for the company, went beyond the scope of a site supervisor. The appellant's testimony painted a picture where Qi was given excessive liberty to manage and run the business of Tong Sing, way beyond the job scope of what would have been expected from a site supervisor (*eg*, the appellant created an OCBC corporate account and debit card which Qi was allowed to access, Qi paid out his own salary and salary to the workers of Tong Sing using pre-signed cheques by the appellant).

8 Additionally, the evidence of Tong Sing's workers demonstrated that there was only *one* boss – Qi. All four of the workers who testified during trial gave evidence that Qi was the person in charge of all matters relating to the

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management and operation of Tong Sing and its workers. Their evidence was independent and strongly corroborative of the position adopted by the appellant in his statements and in his testimony at trial. The appellant claims that Tong Sing had "about 20 local and foreign workers during 2017-2018" and the Ministry of Manpower ("MOM") had failed to interview any of the local staff to find out what their duty was and who allocated work to them. I agree with the Prosecution that there is no merit to this submission. This was the first time such a claim was presented to the court, and the appellant provided no objective evidence in support of this. Further, the evidential burden fell solely on the appellant to prove his claim that there were other employees of Tong Sing who could provide an alternative account of Qi's role. Yet, he elected not to call any Defence witnesses at trial.

9 Qi's statements to the MOM during the course of investigations also indicated that he was not simply a construction site supervisor. However, before I proceed to consider the content of Qi's statements, I pause first to address the appellant's objection to the admission of these statements. The appellant argues that the DJ had erred in admitting Qi's investigative statements under s 32(1)(*j*)(ii) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), as they were unreliable and the charges against the appellant were erroneously based on these untrue statements.[1] I am of the view that there is no force to his argument, and I wholly agree with the DJ's decision to admit Qi's statements (see GD at [33]–[37]). The appellant's submission that the MOM officers had in all likelihood actively avoided looking for Qi so as to admit his statements under s 32(1)(*j*)(ii) EA is both speculative and scandalous. In any event, IO William Wang had provided a clear account of the MOM's efforts to locate Qi prior to the

1 Appellant's submissions ("AS") at [11], [13], [19].

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appellant's trial. There is no evidence to evince any improper conduct on the part of the MOM officers.

10 Having formed the view that Qi's statements were not improperly admitted, I observe that Qi's statements were similarly materially corroborative of the fact that he was indeed the "real boss" of Tong Sing and not merely a construction site supervisor. Importantly, Qi confirmed that his role was to manage and run the business and that he was responsible for the selection and hiring of workers.

Whether the appellant knew that the declarations were false in a material particular

11 On this issue, the DJ correctly found that the appellant had the requisite knowledge that the declarations he made on the forms to the MOM's WPD were false. The appellant had clearly and unequivocally stated in his investigative statement (Exhibit P6) that: "At the point of time when I had pen [*sic*] my signature on this declaration form, I am fully aware that Qi Debing is not a Supervisor of the company but in fact he is the boss of the company." Notably, the appellant did not contest the admissibility or the reliability of his statements at trial.

12 The appellant's testimony also indicated that he knew Qi would be, and did in fact, execute duties that exceeded the scope of site supervisor (at least in relation to the second and third declarations).[2] Further, the appellant testified that he had "chosen the term supervisor rather than manager because if he had chosen manager it would mean that he had to apply for an Employment pass

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[2] Prosecution's submissions ("PS") at [78].

instead of a S-pass for Qi".[3] This shows that at the time of making the false declarations, the appellant had put thought into the specific particulars to be provided as to Qi's job description and had deliberately made a false declaration in order to secure an S Pass for Qi. In Qi's statements, he mentioned that the appellant knew that the reason why Qi was not registered as a director was because of his status a foreigner. He further admitted that both himself and the appellant were *aware* that they had falsely declared Qi's employment as a construction site supervisor, when in fact he was the boss running the operations of Tong Sing (Exhibit P7 at [9]). I find no reason to doubt the reliability of Qi's statement. As the Prosecution has pointed out, in assessing the evidence of an accomplice, "where the court did not discern any attempt by the accomplice materially to minimise his own involvement or exaggerate that of the accused", this would signify the reliability of the accomplice's evidence (*Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 at [61]).[4] Qi's candid admissions clearly demonstrated that he had made no attempt to minimise his own culpability or shift the blame to the appellant. His evidence was thus highly reliable.

13 Lastly, I observe that the appellant's submissions introduce a number of red herrings which seek to obfuscate the relevant issues. Some examples of these include:

a) The appellant submits that there was no appropriate section to declare that Qi was either the beneficial owner of the company or a director.[5] However, this in no way provided a defence for the appellant's false declaration that Qi was to be employed by Tong

3 GD at [25].

4 PS at [75].

5 AS at [30]–[32].

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Sing as a construction site supervisor. Whether or not there was an appropriate section to declare the above, the appellant had still provided a false declaration, which he knew to be false;

b) The appellant alleged that Qi had misappropriated more than $300,000 from Tong Sing in order to repay the debt incurred from gambling.[6] First, there was no evidence to support the appellant's allegation. Second, even if it were true, it was entirely irrelevant to the charges faced by the appellant;

c) The appellant claims that he had played an active role as director of Tong Sing.[7] As the DJ pointed out, the evidence he relies upon only goes to show that he became involved in matters related to Tong Sing after it became embroiled in a number of legal quandaries and was facing investigations by the MOM; and

d) The appellant further claims that he was ignorant of the conditions required for the issuance of an S Pass by the MOM. This was not a required element for the Prosecution to prove in relation to the charges faced by the appellant. What is material is that the appellant had *knowingly* provided a *false material particular.* The appellant's knowledge of the conditions required for the issuance of an S Pass, merely went towards sentencing – *ie*, the assessment of his culpability.

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6 AS at [37].

7 AS at [50].

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Sentence

14 I now turn to the sentence imposed by the court below. First, I am of the view that the appellant's submission for his custodial sentence to be substituted by a fine is clearly inappropriate given the starting point established in *Chiew Kok Chai* that a custodial sentence is typically warranted on account of general deterrence. Thus, the appellant's reliance on *Koh Yong Chiah v PP* [2017] 3 SLR 447 to argue that there was no appreciable harm in the present case is misguided. However, I agree with the appellant that caution should be exercised when relying on unreported decisions which the DJ did so in this case.

15 Nonetheless, in my view, the DJ correctly applied the sentencing framework for s 22(1)(*d*) EFMA offences set out in *Chiew Kok Chai v PP* [2019] SGHC 169. In this connection, he largely accepted the offence-specific factors raised by the Prosecution, namely:

a) **Materiality of the false representation on the mind of the decision-maker**: The appellant's falsehood was material as the S Pass would not have been granted if the true state of affairs had been known to the MOM.

b) **Nature and extent of the deception**: The appellant's deception was deliberate, consciously made, and meticulously planned. The deception lasted for 48 months, showing that such offences are difficult to detect. In this regard, I find the appellant's attempts to downplay his culpability in this respect disingenuous. The appellant and Qi had embarked on a well-thought arrangement for Tong Sing to be set up to allow Qi to run the business, with the appellant to serve as the token local director. In particular, I observe that in order to keep up the ruse, the appellant was the one who submitted the

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work pass application forms for the foreign workers hired by Qi, and he had also pre-signed on cheques for Qi to pay out the workers' salaries, in order to evade detection. There was clear premeditation and deliberation in the appellant's offending conduct.

c) **Specific role played by the offender**: The appellant was at all times fully aware that Qi had no intention to work as a construction site supervisor but nevertheless facilitated the deception by agreeing to act as a director of Tong Sing despite Qi exercising all executive power. In my view, the appellant's role was critical in the entire arrangement. For Tong Sing to be incorporated, a local director was required. The appellant had voluntarily taken on this role with the full knowledge that the administration and running of the company would be left to Qi, after obtaining an S Pass for him.

d) **Financial gain made by the offender**: The appellant had enjoyed monetary gain by obtaining a monthly stipend of $800 in exchange for his co-operation and the performance of simple administrative tasks. In this regard, the appellant counters that he did not make any financial gain from the offence, but in fact ended up incurring financial liabilities arising from Tong Sing's failure and Qi's actions, and that any financial gain was a result of the legitimate administrative work that he had done for Tong Sing. I agree with the Prosecution that the fact that the appellant ended up suffering losses from his involvement in Tong Sing *overall* is beside the point. The appellant's false declaration had enabled Qi to obtain his S Pass and thereafter run and manage Tong Sing for profit. The appellant had directly benefited from this arrangement in the form of his monthly remuneration. In fact, the appellant admitted in his statement

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(Exhibit P6) that he entered into this arrangement with Qi as "the school [he] was running was not doing well and [he] needed the money for [his] children to go [*sic*] school".

e) **The consequence of the deception**: The appellant had abused the work pass framework and helped Qi secure an unfair immigration advantage over other foreign workers since Qi would not have been able to run a construction company without resorting to deception. Further, the appellant's false statements also allowed Qi's wife to benefit, since she was able to secure a dependant pass contingent on the appellant's S-Pass.

16 Finally, the appellant's contention that the sentences for all three charges should run concurrently is legally impossible. This is because s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) requires that at least two sentences *must* run consecutively.

17 For these reasons, I dismiss the appellant's appeal against conviction and sentence.

Vincent Hoong
Judge of the High Court

Appellant in person;
David Koh and David Menon
(Attorney-General's Chambers) for the respondent.

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