Shapy Khan s/o Sher Khan v Public Prosecutor
[2003] SGHC 116

Case Number : MA 293/2002

Decision Date : 26 May 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Sant Singh (Sant Singh Partnership) for the appellant;; Foo Cheow Ming (Sant Singh Partnership) for the appellant;; Kan Shuk Weng (Deputy Public Prosecutor) for the respondent

Parties : Shapy Khan s/o Sher Khan — Public Prosecutor

Criminal Law – Property – Criminal breach of trust – Dealer committing criminal breach of trust by deliberately depositing cheque into wrong account – Penal Code (Cap 224, 1985 Rev Ed) s 409

Criminal Law – Statutory offences – Securities Industry Act – Whether dealer needs to gain benefit out of unauthorised trade for there to be deception – Securities Industry Act (Cap 289, 1985 Ed) s 102(b)

1 This was an appeal by Shapy Khan s/o Sher Khan (the appellant) against the decision of district judge Hoo Sheau Peng to convict him of two offences under s 102(b) of the Securities Industry Act (Cap 289) and s 409 of the Penal Code (Cap 224).

FACTS

2 The two charges mapped out the nature of the offences. They read as follows:

> First Charge
>
> You, Shapy Khan s/o Sher Khan (M/38 years), NRIC No. 1659943C, are charged that you, between 24 April 1997 and 16 May 1997, whilst being a dealer's representative with RHB-Cathay Securities Pte Ltd ('the company'), did directly in connection with the purchase and sale of securities for the account of one Yeo Woei Kuen, which trading account was maintained with the company, engage in a practice which operated as a fraud upon the company when you represented to the company that the transactions, particulars of which are annexed hereto and which form part of this charge, were for and on behalf of the said Yeo Woei Kuen, when they were in fact for your own interest, and you have thereby committed an offence under section 102(b) of the Securities Industry Act (Cap 289) punishable under section 104(a) of the Act.

The transactions particularized were the purchase and sale of shares in the Tekala, Ulbon and SP Setia counters.

> Second Charge
>
> You, Shapy Khan s/o Sher Khan (M/38years), NRIC No. 1659943C, are charged that you, on or about 24 April 1997, in Singapore, being an agent to wit, an institutional sales executive of RHB-Cathay Securities Pte Ltd ('the company'), and in such capacity being entrusted with dominion over the property, namely, a Development Bank of Singapore (DBS) cheque no. 394675 for the amount of $40,000 belonging to one Mok Weng Sun for payment into the trading account of the said Mok Weng Sun, account number 16/67/030717, which the said Mok Weng Sun held with the company, did dishonestly misappropriate the sum of $40,000 by depositing for your own benefit, the said cheque into the trading account of one Yeo Woei Kuen, account number 16/67/030305, which the said Yeo

Woei Kuen held with the company for the purpose of payment for losses which you had incurred in the purchase and sale of securities using the said Yeo Woei Kuen's trading account without his consent and you have thereby committed an offence punishable under section 409 of the Penal Code (Cap 224).

3 In 1997, the appellant was a dealer with RHB-Cathay Securities Pte Ltd (the company). He was given the portfolio of an institutional sales executive and his dealer code was '67'. Yeo Woei Kuen (Yeo) was the appellant's client. Yeo's trading account number was 16/67/030305. Mok Weng Sun (Mok) was another client of the appellant. Mok's trading account number was 16/67/030717. The appellant purchased and sold securities on behalf of Yeo and Mok, using their trading accounts. This was a happy arrangement until May 1997.

4 In April 1997, Mok's trading account generated substantial contra losses. As partial payment towards the losses in his account, Mok issued a DBS cheque for $40,000 on 24 April 1997. Mok handed the appellant the cheque on the same day.

5 When the appellant received the cheque, he wrote on its reverse side '67/30305 c-loss.' This represented a written instruction that the sum of $40,000 was to be used for payment towards contra losses in Yeo's account. This was clearly not intended by Mok. Mok had no idea that the appellant had made the $40,000 payment into the wrong account. On 8 May 1997, unbeknown to Mok, the sum of $40,000 was credited into Yeo's trading account.

6 The sum of $40,000 which was credited into Yeo's account went towards paying the contra losses arising from transactions in the Tekala and Ulbon counters. These transactions were conducted by the appellant. The contra losses stemming from these transactions amounted to $31,199.67. Thus, this made for a surplus of $8,800.33 ($40,000 - $31,199.67). On 13 May 1997, the company issued a cheque for the sum of $8,800.33 which was credited directly into Yeo's United Overseas Bank (UOB) account.

7 On 23 May 1997, a UOB cheque for $5,088.06 was issued by Yeo to pay the company to cover the contra losses arising from the purchase and sale of the SP Setia shares. There was a dispute between the parties as to why Yeo issued the cheque. It was the prosecution's case that even though Yeo did not authorise the sale and purchase of the SP Setia shares, he still paid for the contra losses arising therefrom because he (Yeo) was led by the appellant to believe that the initial $8,800.33 payment from the company to his UOB account was in fact an overpayment. Thus, in Yeo's mind, he was paying $5,088.06 out of an overpayment. Thus, a balance of about $3,700 ($8,800.33 - $5,088.06) remained with Yeo.

8 It was only in the year 2000 that Mok realised that his cheque of $40,000, which he issued in April 1997, had not been credited into his account. Mok came to this finding because the company had called him up to ask for payment. This explained the time lag.

THE DECISION BELOW

9 The district judge convicted the appellant of both charges.

10 As regards the first charge, the trial judge found that Yeo had not authorised the transactions which incurred a $31,199.67 loss in his trading account. The appellant had clearly not followed Yeo's instructions to only deal in CLOB (Malaysian shares listed in Singapore) and Singapore shares. It was clear that Yeo did not authorise the transactions in the Malaysian counters of Tekala, Ulbon and SP Setia. Yeo had confronted the appellant about these losses, and the latter promised to

resolve the matter. The trial judge was convinced of two things: a) that the appellant had sneakily traded on Yeo's account at counters which the latter objected to, and b) that the appellant had done this for his own benefit. Thus, there was more than sufficient evidence that the appellant had run foul of s 102(b) of the Securities Industry Act, punishable under s 104(a) of the same Act.

11 With regard to the second charge, the trial judge was convinced that the appellant deliberately deposited Mok's $40,000 into Yeo's trading account. This was done because the appellant had made losses on unauthorised trading which he conducted from Yeo's account – losses which Mok's $40,000 made good. The evidence of Mok, Yeo and the company's cashier pointed to the inescapable conclusion that the appellant had deliberately written the incorrect trading account number on the back of Mok's cheque. The trial judge concluded that the appellant had run foul of s 409 of the Penal Code. The appellant had committed criminal breach of trust in respect of Mok's $40,000.

12 The trial judge sentenced the appellant to four months' imprisonment as regards the first charge and eighteen months' imprisonment as regards the second charge. She ordered the sentences to run concurrently.

13 The appellant appealed against conviction and sentence.

THE LAW

14 With regard to the first charge and conviction, s 102(b) of the Securities Industry Act (SIA) states:

> It shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any securities to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Here, the key issue was whether the appellant had deceived Yeo by carrying out unauthorised trading from Yeo's trading account.

15 As regards the second charge, s 409 of the Penal Code states:

> Whoever, being in any manner entrusted with any dominion over property in the way of his business as […] an agent, commits criminal breach of trust in respect of that property shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to a fine.

Here, the key issue was whether the appellant had deliberately orchestrated the depositing of Mok's $40,000 into Yeo's account.

THE APPEAL

16 The appellant advanced eight grounds of appeal in respect of the first charge and three grounds of appeal in respect of the second charge. Where the grounds were repetitive, I addressed these grounds in a single argument.

Appeal In Respect Of The First Charge

17 Counsel for the appellant argued that the trial judge was incorrect to find that the appellant stood to benefit from the unauthorised trade conducted through the medium of Yeo's account.

Counsel further argued that the appellant had no way of withdrawing any profits from Yeo's account without first consulting Yeo for permission and that this was in line with the fact that the trade on the Tekala and Ulbon shares was not unauthorised. I dismissed this argument for the following reasons.

18 Firstly, the district judge addressed this argument and was convinced that the appellant had the ability to take benefit of unauthorised trading in Yeo's account. The district judge correctly stated:

> As for moving profits, if any, out of Mr Yeo's account, the appellant could have made the necessary arrangements. After all, it was possible to arrange for payment of the contra losses.

Nonetheless, the appellant argued that there was a difference between being able to arrange for contra losses to be paid and being able to withdraw profits from trading accounts. The appellant argued that he did not possess the ability to do the latter and therefore it was incorrect of the trial judge to find that he could benefit from the unauthorised trade conducted. Counsel for the appellant did raise an interesting point – there was certainly room for the argument that the appellant would have found it very difficult to arrange for transfers of profits from Yeo's account to himself. Nonetheless, I maintained that this argument be dismissed. In the case of *Teo Kian Leong v PP* [2002] 1 SLR 147 – a case which dealt with s 102(b) of the SIA – I stated:

> [The trial judge] was unmoved by the appellant's claim that he did not stand to profit from unauthorised trading as he could have engaged in such trading for a variety of reasons ranging from churning to generate commission, to secure a performance bonus or to pocketing profits after convincing clients to hand over the profits for trades done by 'mistake'.

This offered solid evidence that in the realm of securities trading, the dealer stands to gain a lot from unauthorised trading. Thus, contrary to what counsel for the appellant argued, there seemed to be a good amount of motive on the part of the appellant to trade without authorisation. Consequently, the argument that the appellant stood to gain nothing from any profits (if made) from unauthorised trading was a non-starter.

19 The second reason why I dismissed the appellant's argument was borne out of the need to challenge the appellant's argument in the reverse. To this end, I posed the following question: 'Must the appellant have benefited from the trading for him to have deceived Yeo for the purposes of s 102(b) of the SIA?' This question must be answered in the negative. 'Benefit' was not a necessary ingredient to find that 'deception' had taken place. Yeo had a reason for not wanting to trade in certain shares. He articulated this instruction to the appellant. The appellant disobeyed this instruction and sneakily traded in shares which Yeo, had he known, would have objected to. The deception took place when the appellant started the unauthorised trade. Deception had taken place regardless of whether any benefit was gained by the appellant. If 'benefit' was required to be an ingredient for 'deception', there would be a string of dealers coming to Court saying that there was no way they could have benefited from any profits made from unauthorised trade. The purpose of s 102(b) of the SIA is clear – to curb unauthorised trade by dealers. There is no mention that deception is contingent on a benefit being gained. The next logical question to ask was: 'Would this approach place too onerous a task on the defendant dealer to prove his innocence?' This question must be answered in the negative. This is because dealers have had room and will have room to argue that they were under the mistaken belief that the trade was actually authorised by their clients. Thus, the defence of mistake will still be open to the dealers. However, by the same token, once the dealer disobeyed his client's instructions and dabbled in unauthorised trade, and there was no proof that he had a genuine reason to be mistaken as regards the instruction given, the very act of unauthorised

trade crystallised culpability under s 102(b) of the SIA punishable under s 104(a) of the same Act.

20 The trial judge found that the appellant conducted trade on Yeo's account because his own three trading accounts (belonging to the appellant's two brothers and a friend) had incurred substantial losses and were nearing their trading limits. The appellant challenged this finding. In my opinion, the trial judge was correct in her finding. She stated:

> Turning to the appellant's version, the appellant claimed that he had three other accounts to use, and had no need to use Mr Yeo's trading account. In fact, he had no arrangement to use Mr Yeo's account, and would not be able to benefit from its use. However, it was clear that by April or May 1997, there were substantial losses in the three other accounts, and they were in trouble. There was good reason for the appellant to resort to using Mr Yeo's account.

The trial judge referred to the state of the appellant's three accounts only to further substantiate her finding that Yeo did not authorise the trade which resulted in losses in his (Yeo's) account. Why the appellant disobeyed Yeo's instruction not to trade on the Tekala and Ulbon shares was secondary.

21 The appellant argued that because Yeo did not protest against the unauthorised trade, when he found out that such trade had been conducted, showed that he in fact did authorise such trading. This argument was not valid. The district judge addressed this point at the court below. Drawing from the notes of evidence she gave reasons why Yeo did not raise his concerns formally with the company. To this end, she stated:

> Mr Yeo explained that at that time of the trades, he was more concerned that the contra losses be paid for, and that the appellant stopped using his trading account. The appellant had promised to do both. Indeed, true to the appellant's promise, Mr Yeo was not made to pay for the contra losses, and the appellant stopped using his trading account after the SP Setia transactions.

The appellant tried to paint the picture that Yeo was very passive as regards the losses in his account. This was far from the truth. From the notes of evidence and the trial judge's findings I was of the view that Yeo took active steps to limit further losses – he made certain that the appellant promised not to trade from his account again. His main concern was to have the losses paid for.

22 The appellant further argued that because the amount transacted was within Yeo's usual trading limits, this indicated that there was a good chance that Yeo authorised the transactions. I dismissed this argument because it was clear that there was a difference between trading limits (i.e. monetary limits) and trading boundaries (i.e. what shares the account holder gave the dealer authority to trade in). Just because the amount traded is within the usual monetary limit, did not indicate that what was being traded was authorised by the account holder. It was clear that when Yeo was talking of 'limits' he was talking of how much he was willing to invest in transactions and not what type of shares he was willing to transact in. This was made clear in the following exchange when Yeo was under cross-examination:

> Q: Tekala, Ulbon, SP Setia were Malaysian shares?
>
> A: Yes.
>
> Q: When you said the amount you traded was 10,000 – 15,000, did you mean 10,000 – 15,000 shares or money?
>
> A: $10,000 - $15,000.

Q: That's your capacity to pay?

A: Yes, usually I'd limit purchase to this size.

Q: Was there a limit placed by RHB on you?

A: Yes, I believe all houses had limits placed on customers.

It was clear that 'trading within a client's limit' did not indicate that what the dealer was trading in was authorised by the client.

23 Trying a different angle, the appellant argued that it was telling that Yeo could not recall certain details. For example, Yeo could not remember whether he had contacted the appellant about the unauthorised trades after the purchase of the Tekala and Ulbon shares. He also could not remember the appellant's explanation for doing so. The appellant hoped to cast doubt on Yeo's credibility as a witness. This point was addressed correctly by the trial judge. The trial judge stated:

> I appreciated that Mr Yeo was not able to remember these and other details. On a close review, they were not significant matters. As for the examples raised, Mr Yeo explained that he did not know when he contacted the appellant because the purchase of the Tekala shares took place on a Thursday, while the purchase of the Ulbon shares took place on Monday. By the time Mr Yeo received the contract note for the Tekala shares, the purchase of the Ulbon shares might have taken place. Mr Yeo was also able to recall two possible reasons given by the appellant for the appellant's use of his account, though he could not be sure what was said exactly. I found such explanations satisfactory.

In addition, the matters took place more than five years ago. In the case of *Ng Kwee Leong v PP* [1998] 3 SLR 942 I approved the following passage from *Chean Siong Guat v PP* [1969] 2 MLJ 63:

> In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court.

This has prompted the Courts to give due regard to the difficulty in recollection after a lapse of time. It was clear that Yeo did not authorise the transactions.

24 The appellant argued that the trial judge had given insufficient attention to the possibility that Yeo had turned against the appellant in order to avoid paying losses from transactions that Yeo had actually authorised. I disagreed with this argument. The trial judge had the opportunity to assess the veracity and credibility of the witnesses. She found Yeo to be a credible witness and his evidence cogent.

25 Counsel for the appellant argued that the case of *Lee Kwang Peng v PP* [1997] 3 SLR 278 worked to the benefit of the appellant. To this end, counsel argued that where the defendant has made an allegation that the complainant told a deliberate untruth, the prosecution must prove beyond all reasonable doubt that there was no real risk of collusion. It was beyond reasonable doubt that Yeo did not frame the appellant. First, the appellant's three personal accounts were in trouble and he needed a platform to trade in Tekala and Ulbon shares. Thus, he used Yeo's account to trade in these shares. Second, it was established by the prosecution and confirmed by the district judge that Yeo confronted the appellant about the losses made in his account. Yeo's main concern was that the losses be paid for and that the appellant cease trading through his account. Third, the district judge had assessed Yeo to be a credible witness and had found the appellant to be one of questionable credit.

26 The appellant argued that it was telling that Yeo did not contact the appellant as regards the remaining $3,700 in Yeo's UOB account. This $3,700 remained in Yeo's UOB account after he had paid the company $5,088.06 out of the $8,800.33 which he was led to believe was an overpayment. Taking the appellant's argument to its logical conclusion, it seemed that the appellant was trying to suggest that Yeo had actually authorised the trade and therefore thought nothing of keeping the surplus of $3,700. I disagreed with this argument. First, it should not have been a ground of appeal as regards the first charge. The subject matter of this argument pertained to the second charge. Second, the trial judge more than adequately addressed this point at trial below. She stated:

> With regards the balance of $3,700, Mr Yeo did not think he was accountable to the company for it. He tried, but failed to contact the appellant. There was no further evidence of his efforts. However, in the first place, Mr Yeo had expected the appellant to contact him. On the whole, I found Mr Yeo's [evidence] was not inconsistent with his allegations.

There was nothing at the appellate stage that prompted me to disturb the sound finding of the district judge.

27 For the reasons above I dismissed the appeal against conviction under the first charge.

Appeal In Respect Of The Second Charge

28 The appellant contended that the trial judge gave insufficient attention to the argument that Mok's cheque for $40,000 was banked into Yeo's account by mistake. It was clear that there was no mistake. The trial judge stated:

> With regards the defence that [the appellant] made an honest mistake when writing out the trading account number on the reverse side of the cheque, it did not accord with the surrounding circumstances. Mr Mok was a close friend, and was more active in trading than Mr Yeo. The two trading account numbers were also quite different. It should be noted that at that time, Mr Mok's account had substantial losses, and the appellant was chasing him for payment. In comparison, Mr Yeo's account had (comparatively) negligible contra losses, and the appellant was not chasing Mr Yeo for payment. Yet, the appellant would have the court believe that from his memory, he innocently recalled Mr Yeo's account number, and wrote it thinking it was Mr Mok's account number.

The trial judge was correct to find that the appellant had deliberately written Yeo's account number on the reverse side of Mok's $40,000 cheque. It was clear that this was not an honest mistake.

29 The appellant argued that the trial judge failed to consider the fact that the $40,000 was in fact credited to the company, albeit through the wrong account. I dismissed this argument. I was of the opinion that it made no difference that the ultimate recipient was the company since the real issue was who should bear the loss owed to the company? Quite clearly, the appellant ought to have borne the loss from unauthorised trading in Yeo's account. Yet, he used Mok's cheque to make good these losses. That was when the breach of trust occurred.

30 The appellant argued that the district judge was incorrect to find that Mok informed the appellant that the latter was to stop trading as soon as Mok's losses amounted to $50,000. The appellant cited two cases – *Kiew Foo Mui v PP* [1995] 3 MLJ 505 and *Loh Shak Mow v PP* [1986] SLR 358 – to substantiate the argument that this incorrect finding of fact was prejudicial to the appellant. I dismissed this argument. Culpability under s 409 of the Penal Code did not hinge on whether Mok authorised the appellant to trade past $50,000 worth of losses. Culpability under s 409 hinged on whether the appellant dishonestly misappropriated the cheque for $40,000. The appellant did not raise

any evidence to negate the sound finding at trial below that he deliberately wrote Yeo's trading account number on the reverse side of Mok's cheque. Consequently, the $40,000 was banked into Yeo's account which made good the losses which the appellant had incurred from unauthorised transactions using Yeo's account. Whether or not Mok had allowed the appellant to continue trading over a $50,000 loss in Mok's account was hardly relevant to the second charge.

31 Simply put, the appellant's defence at trial had too many holes in it. As the trial judge stated:

> In addition, the appellant's defence meant that many factors worked coincidentally against him. By right, someone should have clarified with him whether the cheque was to be paid towards Mr Yeo's account. However, no cashier or administration assistant did so. Further, the appellant was monitoring both the accounts, and had access to their records. However, he did not notice anything amiss. In particular, he did not question why Mr Yeo would have paid as much as $40,000 for his contra loss, resulting in a need for the company to pay him. He also did not notice that nothing had been credited into Mr Mok's account despite the cheque payment…I did not find him a credible witness, and found his defence ludicrous.

32 For these reasons, I dismissed the appeal against conviction as regards the second charge.

Sentence

33 The trial judge sentenced the appellant to four months' imprisonment as regards the first charge and eighteen months' imprisonment as regards the second charge. She ordered the sentences to run concurrently. In my view, the sentences passed were not manifestly excessive.

34 As regards the sentence passed for the first charge, the trial judge had taken into consideration the fact that the appellant had, in 1998, pleaded guilty to charges involving s 102(b) of the SIA punishable under s 104(a) of the same Act. It is clear from the grounds of decision that the trial judge addressed each mitigating factor and considered these factors when passing sentence. These mitigating factors included:

Mitigating Factors as regards First Charge:

Factor No	Explanation
1	The 1998 charges were, technically, not previous convictions

2	The present charges could have been dealt together with the earlier charges
3	The appellant was adjudged a bankrupt in 1999
4	The appellant had suffered much anguish, pain and suffering
5	The appellant had been dealt with already but was brought before the court again

35 For the first charge, the prescribed punishment was a fine of up to $50,000 or imprisonment of up to seven years or both. The trial judge stated that she would have imposed a fine of $50,000 but for the indication that the appellant was unable to pay a fine. Since the appellant was a bankrupt, the trial judge imposed an imprisonment term of four months which was on par with the 'in default' term imposed in 1998. This was a fair sentence.

36 As regards the sentence passed for the second charge, the district judge had correctly taken into consideration: a) the seriousness of the charge, b) the fact that the appellant abused a position of trust and c) the substantial amount of money involved. The 18 months' imprisonment given by the district judge for the offence under s 409 of the Penal Code was fair.

CONCLUSION

37 In light of the above reasons, I decided that the appeal be dismissed.

Appeal dismissed.