Rupchand Bhojwani Sunil v Public Prosecutor
[2004] SGHC 17

Case Number : MA 184/2003

Decision Date : 03 February 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Peter Keith Fernando (Leo Fernando) for appellant; James E Lee (Deputy Public Prosecutor) for respondent

Parties : Rupchand Bhojwani Sunil — Public Prosecutor

Criminal Procedure and Sentencing – Mitigation – Whether judge must consider all mitigating factors not pleaded by accused or appellant

Criminal Procedure and Sentencing – Sentencing – Principles – Offence of cheating where amount involved large – Whether custodial sentence necessary – When fine appropriate

Criminal Procedure and Sentencing – Sentencing – Principles – Offences involving misuse of Internet – Factors to be considered when imposing sentence

3 February 2004

Yong Pung How CJ:

1 This was an appeal from the decision of the district judge when she convicted the appellant on four charges. Of these four charges, one charge related to an offence of cheating, punishable under s 417 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"). The other three charges related to the appellant's failure to submit changes of particulars to the Registrar of Companies and Businesses, as required under s 12(1) of the Business Registration Act (Cap 32, 2001 Rev Ed) ("BRA") (an offence punishable under s 23(b) BRA). Additionally, two charges for a breach of s 12(1) BRA were taken into consideration and one charge for an offence of cheating punishable under s 420 PC was withdrawn. The appellant was granted a discharge amounting to an acquittal on this withdrawn charge. The appellant was sentenced to 12 months' imprisonment and forfeiture of his computer in relation to the cheating charge and fined $4,000 for each of the three BRA charges, in default of which four weeks' imprisonment per charge would be imposed. The appellant appealed only against the imprisonment sentence imposed in respect of the cheating charge. At the end of the hearing, I allowed the appeal and reduced the term of imprisonment to six months. I now give my reasons.

The facts

2 The appellant ("Sunil") had downloaded the website of Power & Motion Control Pte Ltd ("PMC") onto his own website, EconSingapore. This was a fact unknown to PMC and the victim, one Kevyan-Alf, a managing director of M/s Kevyan-Alf & Co, a company based in Tehran, Iran. Sometime in December 2002, Kevyan-Alf placed an order for Vickers Cartridge Kits through the website of PMC. However, Sunil was able to access Kevyan-Alf's order form. He used the particulars from Kevyan-Alf's order form to correspond with Kevyan-Alf. Sunil falsely represented to Kevyan-Alf that his company, the fictitious Universal Computers, was an agent of the sole distributor of Vickers products in Singapore and that he would be able to supply the Vickers Cartridge Kits for the sum of US$42,000 (equivalent to S$73,428.60).

3 Kevyan-Alf agreed to Sunil's representation and transferred the sum of US$42,000 to Sunil's Standard Chartered Foreign Currency Account *via* telegraphic transfer. However, Sunil did not deliver

the Vickers Cartridge Kits.

4 Sunil's scam was discovered and he was charged for committing an offence of cheating. Sunil pleaded guilty to the charge at an open court hearing before the district judge on 8 October 2003. He entered a plea in mitigation on 10 October 2003. The mitigation focused on the fact that Sunil had made full restitution prior to pleading guilty, had pleaded guilty and was a first offender. The Prosecution, however, contended that the amount of money involved was large, that the victim was a foreigner and that a sophisticated scheme was employed.

The decision below

5 The district judge imposed the maximum imprisonment sentence of 12 months under s 417 PC. In deciding on the sentence, the district judge took three factors into account. First, she agreed that Sunil had employed a sophisticated scheme that involved a degree of planning and information technology ("IT") skill to commit the offence. This, the district judge found, was an aggravating factor.

6 Second, the district judge noted that the amount involved was large. In this regard, she noted that the larger the amount dishonestly misappropriated, the greater the culpability of the offender and the more severe the sentence of the court. She relied on the holding in the case of *Wong Kai Chuen Philip v PP* [1990] SLR 1011 in arriving at this conclusion.

7 Third, and, as the district judge emphasised, most importantly, the offence involved the misuse of the Internet environment. The district judge expressed concern that the Internet was a particularly open and vulnerable platform where crimes were easy to commit, but their detection and investigation difficult. The district judge referred to the case of *Tay Kim Kuan v PP* [2001] 3 SLR 567 when she made this point.

8 Additionally, the district judge emphasised that commerce on the Internet required special protection as a growing and lucrative medium of business. She opined that as Singapore developed as a global commercial centre, it was vital that the e-commerce environment was kept secure and that breaches were viewed with seriousness. In respect of this point, the district judge relied on *dicta* in *PP v Muhammad Nuzaihan bin Kamal Luddin* [2000] 1 SLR 34. That case involved a young respondent who had hacked into computer systems. In emphasising the need for a sentence that reflected the objective of general deterrence, I had stated in that case that the anti-social conduct displayed by the respondent in *Muhammad Nuzaihan* not only undermined public and international confidence in the commercial integrity and viability of our computer systems, but also gravely compromised Singapore's efforts to position itself as a global e-commerce hub. The district judge censured Sunil's conduct in this regard, and emphasised that he had damaged the reputation and standing of PMC by his deception.

9 Finally, the district judge stated that the mitigating factors brought up by Sunil had to be balanced against considerations of public interest. She stated that public interest, in this case, involved the need to deter other like-minded individuals who may be tempted to subvert the e-commerce environment. Additionally, there was a need to signal to the international commercial community that the Internet environment was an important medium for business, the safety and security of which was jealously guarded by the local courts. In this regard, the district judge held that the maximum imprisonment sentence of 12 months was necessary and sentenced Sunil accordingly.

10 In imposing this maximum sentence, the district judge relied on the judgment in *Sim Gek Yong*

v PP [1995] 1 SLR 537. There, I had stated that the court ought to impose a maximum sentence whenever the nature of the offence and the circumstances so warranted it, as opposed to restricting such sentences to the "worst case imaginable". In this respect, a range of conduct had to be identified and the maximum sentence would be imposed on the most serious instances of the offence in question.

Sunil's appeal against sentence

11 Essentially, Sunil made several points in contending that the sentence imposed was manifestly excessive. He appealed for the imprisonment sentence of 12 months to be substituted with a fine, or in the alternative, with a short custodial sentence and a fine. I observed each of Sunil's arguments and dealt with them accordingly.

Argument 1: Sunil had made full restitution, showing remorse.

Argument 2: This was a one-off offence and not a series of offences in which a public institution had been deceived.

Argument 3: Sunil had no antecedents.

12 Here, Sunil argued that the district judge had not fully appreciated or given sufficient consideration to the various mitigating factors he had raised at trial. However, I noted that the district judge had indeed taken into account the fact that Sunil had made full restitution, had no antecedents and had pleaded guilty at the first opportunity. The district judge had also emphasised that such mitigating factors were to be balanced against considerations of public interest.

13 It is true that from the district judge's grounds of decision alone, it was difficult to identify the weight that had been attached to the fact that Sunil had made full restitution and had no antecedents. The district judge had mentioned these mitigating factors in passing when she balanced them against the specified considerations of public interest. To that extent, the grounds of decision were not highly elaborate. However, a lack of elaboration, without more, did not mean that the district judge had not considered these mitigating factors when arriving at her decision. To that extent, I disagreed with Sunil's suggestions.

14 As for the point that the offence was one-off and that a public institution was not deceived, the trial notes of evidence and the written plea in mitigation (prepared for the trial) did not indicate that this point was brought up at the time of the trial. As such, Sunil's argument that the district judge did not give this point sufficient consideration was not tenable. Instead, I found that the district judge had probably already given sufficient consideration to this fact among others when she engaged in the balancing exercise between the mitigating factors pleaded and the specified public interest considerations.

15 At this juncture, it is necessary to understand that it would not be plausible to expect a judge to lay out every possible mitigating factor on the facts, especially where these factors were not argued by an appellant (or an accused for that matter). This would be tantamount to expecting a judge to function as defence counsel for a represented accused. Accordingly, I rejected Sunil's arguments in this regard.

Argument 4: The district judge had placed undue reliance on the fact that the offence "was a fairly sophisticated one which took a degree of planning and IT skill". This was a case of simple deception and nothing more.

Argument 5: The district judge had placed too much emphasis on the fact that the offence involved the misuse of the Internet environment.

Argument 6: Although the offence was committed by the misuse of the Internet, the nature of the offence committed by its misuse was not one in which detection and investigation were difficult.

Argument 7: The district judge had misapplied the dicta in the cases of Tay Kim Kuan and Muhammad Nuzaihan bin Kamal Luddin.

16 I have provided a summary of the appellant's next four arguments in the headings above. When I considered these arguments in total, I found that Sunil had a credible case. It is true that a substantial part of the district judge's decision revolved around her opinion on the manner in which the cheating offence took place – the district judge had placed heavy emphasis on the fact that this case involved the misuse of the Internet environment. However, on the facts, I found that this case was essentially one of cheating *simpliciter* in accordance with the meaning of cheating as attributed to it in s 415 PC.

17 It was clear that Sunil had used the information he had gathered from Kevyan-Alf's order form (submitted to the PMC website) in order to cheat Kevyan-Alf. There was evidence that there was further correspondence between Sunil and Kevyan-Alf before the telegraphic transfer of the US$42,000. At most, Sunil's act of downloading the PMC website into his own website was incidental to the commission of the offence of cheating, as opposed to being a substantial aspect of the offence itself. There was no evidence to show that Sunil had downloaded the PMC website in order to cheat Kevyan-Alf.

18 It is probable, however, that Sunil had performed the initial download with an intention to commit some form of offence at some later point. However, the Prosecution did not prove this. In fact, the charge itself did not state the fact of misuse of the Internet environment or the downloading of the PMC website in its particularisation of the offence committed. I replicate the charge below:

> DAC 043538/2003:
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> You, Rupchand Bhojwani Sunil M/45 yrs old NRIC No: S2170627-B date of birth: 9-6-1958 are charged that you, sometime in the month of December 2002, in Singapore and elsewhere, did cheat one Kevyan-Alf, a Managing Director of M/s Kevyan-Alf & Co, a company based in Tehran, Iran into believing that you are able to supply his company with new genuine Vickers Cartridge Kits, when you knew it was not true, and by such manner of deception, you dishonestly induced the said Kevyan-Alf to remit a sum of USD$42,000 (equivalent to Singapore Dollar $73,428.60) by means of telegraphic transfer to your Standard Chartered Foreign Currency Account, at No: 370 Alexandra Road, Singapore, which the said Kevyan-Alf would not have done had he not been so deceived and you have thereby committed an offence of cheating punishable under Section 417 of the Penal Code, Chapter 224.

20 Additionally, I was unable to entirely agree with the district judge's opinion on the level of sophistication of the Internet misuse involved. There was no evidence that there was a high level of IT skill and planning involved behind the downloading of the PMC website. Without more, I could not conclude that Sunil's act was as sophisticated as the district judge had made it out to be.

21 Further, the district judge's opinion on the difficulty of detection and investigation resulting

from Internet misuse was not a crucial point to a decision on the charge. At most, difficulty in detection and investigation could be an aggravating factor against an accused. However, in this case, as Sunil had argued, the offence was one of simple deception. Detection and investigation would therefore not have been as difficult as made out by the district judge because Sunil had actually communicated directly with Kevyan-Alf.

22 Sunil had also argued that the district judge had misapplied the *dicta* in the cases of *Tay Kim Kuan* and *Muhammad Nuzaihan bin Kamal Luddin*. Although I disagreed that there was misapplication of *dicta* on the part of the district judge, I found that she had overstated the point regarding Internet misuse. Although the district judge's application of the *dicta* with regard to a general issue of Internet misuse was accurate, the *reasoning* behind the decision in *Tay Kim Kuan* and *Muhammad Nuzaihan bin Kamal Luddin* may not have been applicable on the facts of this appeal.

2 3 *Tay Kim Kuan* involved an appellant who had sexual intercourse with an underaged girl whom he had met over the Internet. There, a deterrent sentence was imposed on the appellant. Although that case involved a misuse of Internet resources in the commission of a crime, the reasoning behind the deterrent sentence there was the protection of the young and gullible from the perils of the Internet, in the form of unscrupulous people who hid their true identities and remained faceless while boldly preying on such young people.

24 This was not the prevailing concern in the present appeal. Although, on the facts, a misuse of the Internet environment had occurred, the concerns here were different from those in *Tay Kim Kuan*. This appeal involved an offence of cheating and not of sex abuse facilitated by Internet use. As such, the reasoning in *Tay Kim Kuan* ran at a tangent to that in this appeal. Although some of the *Tay Kim Kuan* issues involving Internet abuse was useful in order to understand the stance courts would take in pure Internet misuse cases, this same stance should not be applied *carte blanche* in every instance where an Internet or computer resource is misused, without first looking at the role such misuse played in the commission of the offence in question. In this appeal, the role of such misuse was peripheral. As such, the reasoning in *Tay Kim Kuan* cannot be applied directly to the set of facts in this appeal.

25 Likewise, the case of *Muhammad Nuzaihan bin Kamal Luddin* involved a breach of ss 3(1), 5(1) and 6(1)(a) of the Computer Misuse Act (Cap 50A, 1998 Rev Ed). The offences committed by the respondent in that case involved unauthorised access to computer materials, unauthorised modification of the contents of a computer and unauthorised access to a computer service. A comparison of the facts of *Muhammad Nuzaihan bin Kamal Luddin* and the current appeal clearly disclosed a large disparity in the nature of the offences committed. *Muhammad Nuzaihan bin Kamal Luddin* involved pure computer misuse, as opposed to the cheating offence in this appeal.

26 As such, I found that the district judge, although not wrong in emphasising the need to control Internet misuse by imposing deterrent sentences in the appropriate cases, had over-emphasised the fact of Internet misuse in this instance. Therefore, the reasoning process towards her decision adopted conclusions and considerations from cases that were not directly applicable here. As a result, her decision did not take into account the fact that this was a case of pure cheating, with the slight involvement of Internet misuse along the way. As such, I found that although the district judge was correct in convicting Sunil on the charge, she had imposed a sentence that was manifestly excessive.

27 Having found that there were sufficient reasons for me to alter the sentence that had been imposed on Sunil, I also noted that Sunil had pleaded for the 12-month imprisonment sentence to be substituted with a fine. I could not allow this plea. In some cases, a particular sentence is deemed

appropriate in order to relay a particular message. To state the obvious, a sentence should never relay a message that would suggest that it would be worthwhile to commit a crime. For instance, such a situation could arise if the punishment imposed were not sufficient in its severity to deter future similar offences.

28 Likewise, when a court is faced with a charge of cheating involving a sum of money akin to that in this appeal, it has to impose a sentence that has the potential to deter future similar offences. In that respect, a fine, though appropriate in other situations, would not have a deterrent effect in cases that are similar to this appeal. A potential offender should never be afforded the opportunity to ponder that he could cheat others of large sums of money and still "get away lightly" by being fined up to only a certain statutory limit. The criminal law should never become a "business" of sorts.

29 At this juncture, I felt it would be useful to refer to the case of *Lim Choon Kang v PP* [1993] 3 SLR 927. That case involved cheating on a company share transaction. In that case, I rejected the appellant's plea for a fine instead of a custodial sentence and mentioned the following at 928–929:

> In my view, fines instead of custodial sentences can be imposed where the amounts involved are not of great magnitude or consequence, but when the operation smacks of something on a considerable scale, a custodial sentence must necessarily follow. … I think it should also be remembered that prosecutions for such offences normally take place in the district courts in which a district judge's power to fine is presently limited to only $10,000. People who are minded to commit such offences of multiple share applications on a substantial scale must be discouraged from thinking that, if they are caught, they can simply surrender their ill-gotten gains and the worst that will then happen to them will be a fine of $10,000. For them, there must now be a custodial sentence.

30 I think the reasoning in *Lim Choon Kang* would apply in this appeal as well. As such, I felt that it was appropriate for a custodial sentence to be imposed on Sunil. I was left to decide on the length of this term of imprisonment. For the reasons I have stated, I found that a 12-month imprisonment sentence was manifestly excessive. As such, having regard to the circumstances in this case, especially the sum of money involved and the manner in which the offence was committed, I found that an imprisonment sentence of six months would be more appropriate.

31 I accordingly allowed the appeal on sentence and reduced the term of imprisonment from 12 months to six months. Sunil also requested for this imprisonment term of six months to commence after the Chinese New Year holidays. He mentioned that his wife was Chinese and that he wished to be with his family during the festive holidays. I saw no adverse reasons to disallow him some time with his family. I extended his bail and allowed the sentence to commence on 26 January 2004.

Appeal against sentence allowed. Sentence reduced to six months.