Biplob Hossain Younus Akan and others *v* Public Prosecutor and another matter [2011] SGHC 34

Case Number	: Magistrate's Appeal Nos 333, 334, 335 and 336 of 2010; Criminal Motion No 49 of 2010
Decision Date	: 17 February 2011
Tribunal/Court	: High Court
Coram	: V K Rajah JA
Counsel Name(s)	: Appellants in person; Kan Shuk Weng (Attorney-General's Chambers) for the respondent.
Parties	: Biplob Hossain Younus Akan and others — Public Prosecutor

Criminal Procedure and Sentencing

17 February 2011

V K Rajah JA:

Introduction

1 These grounds of decision arise from four appeals which were consolidated for hearing. The four appellants are Bangladeshi nationals. In the district court, each of them faced two related charges. The first charge was under s 128I(*b*) of the Customs Act (Cap 70, 2004 Rev Ed) ("Customs Act"), read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and punishable under s 128L(4) of the Customs Act. The second charge was under the ss 26 and 77 of the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed) ("Goods and Services Tax Act"), read with the relevant subsidiary legislation. Both charges related to one incident of retrieving and packing cigarettes which were uncustomed.

2 The prosecution in the district court was conducted by a senior superintendent of Singapore Customs. The appellants pleaded guilty to the Customs Act charge on the basis of the following joint statement of facts prepared by an officer from the Special Investigations Branch of Singapore Customs. It reads in full as follows:

> The accused are B1) Md Bodiuzzaman Palash Md Saydul Huge [sic], male Bangladeshi, aged 26yrs, Fin No: [XXX], DOB: 07/06/1984,
>
> B2) Mohammad Azizur Rahaman Kalu Matubbor, male Bangladeshi, aged 24yrs, Fin No: [XXX] DOB: 10/02/1986,
>
> B3) Goutam Halder Late Janardhan Halder, male Bangladeshi, aged 2lyrs, Fin No: [XXX], DOB: 15/03/1989,
>
> B4) Biplob Hossain Younus Akan, male Bangladeshi, aged 35yrs, Fin No: [XXX], 02/04/1975.
>
> 2 On 6 August 2010 at about 9.20pm, the accused B1, B2, B3 and B4 were arrested at the vicinity of No. 8 Defu Lane 1, Singapore, for being concerned in dealing with uncustomed goods (cigarettes) with common intention.

Facts pertaining to the 1st charge

3 On 6 August 2010 from 6.00pm onwards, customs officers kept observation at the vicinity of No. 8 Defu Lane 1, Singapore to look out for contraband cigarettes smuggling activities.

4 On 6 August 2010 at about 9.20pm, officers sighted the accused B1, B2, B3 and B4 inside the unit of No. 8 Defu Lane 1. The accused persons were seen to be retrieving cartons of cigarettes hidden inside a pallet of rubber sheets, which was placed inside the unit. There were also another 5 pallets of rubber sheets placed outside the unit. Suspecting that the cigarettes which the four accused were retrieving from the pallet of rubber sheets inside the unit to be duty unpaid cigarettes, officers entered the unit and declared office. During the check in the presence of the accused, a total of 3549 cartons x 200 sticks of Texas 5 brand duty unpaid cigarettes were found in two pallets of rubber sheets outside the unit, 1 pallet of rubber sheet inside the unit, and inside packed boxes inside the unit. All the accused were placed under arrest. The cigarettes and 6 pallets of rubber sheet were seized.

5 Investigations revealed that all the accused would be paid $30 - $40 by a male Chinese named Tang Mui Teck (Dealt with separately) to retrieve and pack the cigarettes into boxes from the 6 pallets of rubber sheets.

6 ***The accused were aware that the excise duty had not been paid on all the seized cigarettes*** .

7 The excise duty leviable on the cigarettes weighing a total of 709.8kg in the 1st charge is **$249,849.60** .

[emphasis in bold and underline in original, emphasis added in bold italics]

The district judge recorded their pleas and convicted them accordingly. The charge under the Goods and Services Tax Act was taken into consideration for the purposes of sentencing. After considering their pleas of mitigation, the district judge sentenced each of the appellants to 24 months' imprisonment: see his grounds of decision in *Public Prosecutor v Biplob Hossain Younus Akan and ors* [2010] SGDC 396.

The course of the appeal

3 The case initially came before me as only appeals against sentence by the four appellants. However, when I first reviewed the appellants' joint statement of facts (set out above) for the purpose of the appeals against sentence, I was concerned that there appeared to be nothing in it to show that the appellants had the requisite *mens rea* at the material time for the Customs Act charge to which they had pleaded guilty. During the appeal, I was further troubled to hear the appellants claim, rather animatedly, that they were unaware that they were dealing with uncustomed cigarettes at the time of the offence. This undoubtedly qualified their pleas of guilt. I conveyed to the deputy public prosecutor, Ms Kan Shuk Weng ("Ms Kan"), my concerns about the sufficiency of the statement of facts. For good measure, I also directed Ms Kan to produce evidence showing how the appellants came to know that they were dealing with uncustomed cigarettes. As pointed out in *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383 ("*Yunani*") at [56], if the evidence before a reviewing court raised serious doubts as to the guilt of an accused person who had pleaded guilty, this would warrant the exercise of the court's revisionary powers in setting aside the plea of guilt. The appeal was adjourned for a week so that Ms Kan could attend to my queries.

4 Ms Kan duly filed a criminal motion to adduce several affidavits. The relevant affidavits were from (a) the customs officers who interviewed the appellants, and who deposed that the appellants gave affirmative answers when asked if they knew that the cigarettes were uncustomed; (b) the interpreter assisting the customs officers, who deposed that she translated their questions accurately; and (c) the interpreter assisting the district court, who deposed that she did not pressure the appellants to plead guilty. I noted that the contents of these affidavits did not directly address my concern that the appellants only appeared to have learnt that they were handling uncustomed cigarettes after they were apprehended. Ms Kan candidly accepted this void in the Prosecution's case when I raised this with her. Ms Kan also informed me that the principal offenders in the incident, one Tang Mui Teck (who recruited the appellants to pack the uncustomed cigarettes) and one Voon Qing Lai, had confirmed in further statements *that they did not inform the appellants that the cigarettes were uncustomed*. While these statements were not produced, this additional information fortified my concerns about the Prosecution's original assertion in relation to the appellants' requisite *mens rea*.

5 Ms Kan also addressed me on the sufficiency of the appellants' statement of facts. After hearing Ms Kan, I was satisfied that the appellants' statement of facts, and their pleas of guilt founded thereon, was deficient at law. I therefore exercised my powers of revision to set aside their convictions and sentences and remitted the matter back to the district court for fresh pleas to be taken. I now give the reasons for my decision, together with some observations on matters that require further consideration.

The statement of facts

6 Under s 180(*b*) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), the only duty laid upon a magistrate's court or a district court before whom a plea of guilt is made is to ascertain that the accused person understands the nature and consequences of his plea and intends to admit without qualification the offence alleged against him. However, as L P Thean J observed in *Chota bin Abdul Razak v Public Prosecutor* [1991] 1 SLR(R) 501 at [11], a practice had developed in which, before a plea of guilt by the accused is accepted by the court, a statement of facts setting out the circumstances in which the offence is alleged to have been committed is read to the accused by the Prosecution and the accused is required to admit such statement. In Thean J's view, the statement of facts enables a court to fulfil its duty under s 180(*b*). Thean J's observations were approved by a five-member Court of Appeal in *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR(R) 134 at [14], who went on to hold that:

> [I]n our judgment, the recording of a statement of facts by the court following an accused's plea of guilt, which began as a matter of practice *which evolved primarily as a means of assisting judges to determine the appropriate sentence*, *has evolved into a legal duty on the court to record a statement of facts and to scrutinise the statement of facts for the explicit purpose of ensuring that all the elements of the charge are made out therein*. [emphasis added]

7 In his treatise on criminal procedure, Professor Tan Yock Lin describes the legal requirement for a statement of facts as "a salutary rule" in furtherance of the trial judge's duty "*to protect the accused from himself*" [emphasis mine]: see Tan Yock Lin, *Criminal Procedure vol 2* (LexisNexis, 2010) at XV[951].

8 I respectfully agree, and would add the following:

(a) The requirement for a statement of facts which sufficiently discloses the elements of the charge is a freestanding imperative requirement. The marrow of due process requires the court to be absolutely satisfied that there is congruence between the accused person's plea of guilt and

an actual offence being made out.

(b) Following from (a), the court should always evaluate a statement of facts with fresh lenses, without being influenced by the fact that the accused person has pleaded guilty to the charge. There is no presumption that a statement of facts will contain the elements of the charge.

(c) As it is an agreed document between the parties, the contents of the statement of facts can ordinarily be taken at face value, and the task of the court will usually be to decide whether the contents make out the offence charged. In this, the court should be very slow to draw inferences to supply any deficiencies in the contents of the statement of facts.

(d) However, it will not always be the case that the contents of the statement of facts can be taken at face value. There may be internal inconsistencies or contradictions in the contents. The contents may be inherently doubtful or incredulous, or otherwise call for further explanation or inquiry. Further, the accused person may not always be in a position to understand what he has apparently agreed to. The court should be alert to these and other situations where there is reason to doubt what is said in the statement of facts and or if it is incomplete.

(e) If the court entertains any doubt as to the sufficiency of the statement of facts, it should decline to record the plea of guilt and explain the reasons to the parties. If they are agreeable, the parties can then amend the statement of facts, and if the court is satisfied that the amended statement of facts make out the charged offence, it can proceed to record the plea of guilt. Otherwise, the matter should proceed to trial. Needless to say, no pressure should be exerted on an accused person to agree to amend a deficient statement of facts.

(f) The need for a careful scrutiny is especially important in cases (such as the present) where the accused persons are unrepresented, do not understand English, and/or might not grasp the finer legal points involved. In such cases, the court should satisfy itself that the accused person understands the ingredients of the offence. If an accused person is under a misapprehension as to the offence to which he is pleading guilty, this may be a ground for setting aside the plea on appeal or revision.

(g) As a practical matter, the statement of facts should be drawn up by those skilled in the preparation of evidence and knowledgeable about the legal ingredients that are needed to constitute the relevant offence, and not by investigators who may not appreciate the finer legal points.

(h) The use of "template" statement of facts for common offences should be eschewed. Every statement must be customised to the facts of each case.

To put things in perspective, I should say that, if the Prosecution has satisfied itself that an offence has been made out beyond reasonable doubt before bringing a charge, the preparation of an adequate statement of facts would hardly be a difficult task.

9 I should also point out, parenthetically, that the statement of facts is also an important part of the sentencing process. As a general rule, with regard to the particulars of the offence, parties should not stray too far from the statement of facts in making their submissions on sentence, unless they are prepared to prove what they say in a *Newton* hearing.

10 In this case, the appellants were charged under s 128I(*b*) of the Customs Act, which provides

as follows:

> **Offences in relation to possession, storage, conveying and harbouring of goods**
>
> **128I**. Any person who —
>
> …
>
> (*b*) is in any way concerned in conveying, removing, depositing or dealing with any dutiable, uncustomed or prohibited goods with intent to defraud the Government of any customs duty or excise duty thereon, or to evade any of the provisions of this Act; or
>
> …
>
> shall be guilty of an offence.
>
> [emphasis in bold in original]

It is plain that the offence is one which requires a *mens rea*, *viz*, the intent to defraud the Government of any customs duty or excise duty thereon, or to evade any of the provisions of the Customs Act. It also goes without saying that the *mens rea* must be contemporaneous with the *actus reus*. This was not disputed by Ms Kan.

11 Unfortunately, the requirement for contemporaneity between the *mens rea* and the *actus reus* appears to have been overlooked in this case. The statement of facts, which was drawn up by an officer of the Special Investigations Branch of Singapore Customs, contained nothing which showed that the appellants had the requisite *mens rea* at the material time (*ie*, when they were handling the cigarettes). The bare statement of knowledge in para 6 of the appellants' joint statement of facts was insufficient by itself as what was required was knowledge *at the material time*. It is clear that the appellants were hired as manual labour, and there is no basis for me to infer that they were told by those who hired them that the cigarettes were uncustomed. (Indeed, according to what Ms Kan informed the court, the appellants seemed not to have been told that the cigarettes were uncustomed: above at [4]. But for the avoidance of doubt, I should say that my decision was based solely on the deficiency in the statement of facts.)

12 There was also an exchange between Ms Kan and the court on the presumption of knowledge found in s 128L(6) of the Customs Act. Ms Kan submitted that by virtue of s 128L(6) of the Customs Act, the appellants are presumed to have knowledge that the cigarettes were uncustomed until the contrary is proved. Section 128L(6) provides as follows:

> (6) In any prosecution against a person for committing, attempting or abetting an offence under sections 128D to 128K, any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods to the knowledge of the person, *unless the contrary is proved by the person*. [emphasis added]

In fairness to Ms Kan, I ought to point out that this discussion was not directed specifically at the assessment of the statement of facts in question. However, I should state, for the avoidance of doubt, that evidential presumptions are inapplicable in assessing the sufficiency of a statement of facts. As the proviso to s 180(*b*) of the Criminal Procedure Code makes clear, the court must, before it records a plea of guilt, be satisfied that the accused person intends to admit without qualification the offence alleged against him. This would not be the case if the accused admits to a statement of

facts which is inherently deficient and requires the application of an evidential presumption before the offence can be said to have been made out.

13 The appellants' pleas of guilt were therefore deficient at law and should not have been accepted by the district judge. This was a sufficient ground for the pleas to be set aside, and, I should add, set aside *ex debito justitiae*. I accordingly made no order on the Prosecution's motion to adduce further evidence. I likewise make no comment on the merits of the Prosecution's case beyond what is said here.

Conclusion

14 After setting aside the appellants' pleas of guilt, I ordered the matter to be remitted to the district court for fresh pleas to be taken. I requested the ranking Prisons officer escorting the appellants to assist them in contacting the relevant legal aid body. Given that the appellants had already been incarcerated for about three months (including the period they were remanded) when they came before me, I also indicated in my minutes that the subordinate courts should arrange for a trial as soon as possible if the appellants elect to claim trial.

15 For completeness, I should record here that pursuant to an application by the customs prosecutor to withdraw all charges against the appellants, all four appellants were given a discharge amounting to an acquittal on 13 December 2010 when they were produced in the district court.

Observations on sentence

16 Given the course which the appeals had taken, I did not have to deal with the questions of sentence on which the appeals had initially come before me. However, I would like to make some brief observations on what appears to be the questionable sentencing practice for similar offences.

17 On a review of the cases, it appears that considerable weight is given to the amount of custom or excise duty evaded. This would be an eminently sensible approach to take towards those offenders who stand to benefit directly from the amount of duty evaded. In contrast, it is not obvious that the same approach is appropriate in cases where the offenders are only involved in a menial or otherwise minor role and do not stand to benefit directly in any meaningful way from the amount of duty evaded.

18 In a related vein, it also appears that significant weight is ordinarily placed on the fact that an accused person acted as part of a group. Here I would like to stress that there are group offences and there are group offences. And within each group of offenders there might well be varying degrees of culpability. It would be incorrect to invariably assume that a person who offends as part of a group is always more culpable than another person who offends on his own. Each case must turn on a close examination of its facts, for which a bland recitation of general principles is no substitute.

19 There is to-date no reasoned decision of the High Court which examines the appropriate sentencing approach and tariffs for this genre of cases. The case relied upon by the district judge, *Moey Keng Kong v Public Prosecutor* [2001] 2 SLR(R) 867, concerned an accused person acting alone. A review should be undertaken in an appropriate case. In the meantime, perhaps the subordinate courts should view the existing sentencing precedents dealing with those having subsidiary roles in offences involving uncustomed goods with some caution. It seems to me that the sentence of 24 months' imprisonment imposed by the district judge on each of the appellants, who stood only to receive $30 to $40 for their efforts, was wholly disproportionate to their actual culpability even if they were guilty as charged. This is especially so considering that Voon Qing Lai, the mastermind who

stood to benefit substantially from this offending episode, was sentenced to 30 months' imprisonment under section 128(L)(4) of the Customs Act.

20 Smugglers, and members of their syndicates, should of course receive adequately deterrent sentences for their offending conduct. But this does not mean that ordinary sentencing precepts, such as proportionality, do not continue to apply in assessing the appropriate sentences to be meted out to them.