

Public Prosecutor v Kuah Kok Choon
[2000] SGHC 244

Case Number : MA 85/2000
Decision Date : 23 November 2000
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Hamidul Haq and Thong Chee Kun (Deputy Public Prosecutor) for the Public Prosecutor; N Sreenivasan (Derrick Ravi Partnership) for the accused
Parties : Public Prosecutor — Kuah Kok Choon

Criminal Procedure and Sentencing – Sentencing – Deterrent Sentence Possession of scheduled species without import permit – Whether deterrent sentence appropriate

Statutory Interpretation – Construction of statute – Possession of scheduled species without requisite import permit – Whether prosecution has burden of proving when birds imported – Whether elements of charge proved – Whether forfeiture should be ordered – s 4(2) Endangered Species (Import and Export) Act (Cap 92A)

: This was an appeal against the decision of district judge S Thyagarajan, who acquitted Kuah Kok Choon (‘Kuah’) of a charge under s 4(2) of the Endangered Species (Import and Export) Act (Cap 92A) (‘the Act’) for possession of two Lear’s Macaws without a requisite permit. Despite the acquittal, the district judge ordered the two Lear’s Macaws to be forfeited under s 13(2)(b) of the Act. The prosecution appealed against Kuah’s acquittal while Kuah appealed against the order of forfeiture. I allowed the prosecution’s appeal against Kuah’s acquittal and dismissed Kuah’s appeal against the forfeiture of the two birds. I now give my reasons.

The facts

On 18 July 1996, one Dr Leong Hon Keong of the Primary Production Department (‘PPD’) spotted the two Lear’s Macaws in a large cage by the window on the first floor of 99 Rangoon Road.

On 20 July 1996 at about 9.30am, the PPD conducted a surprise inspection at 99 Rangoon Road. When their officers arrived at the premises, the two Lear’s Macaws were in the same position as when they were spotted two days earlier by Dr Leong. Kuah was not home but his father, Kuah Thian Swee, was. He came out to speak to the officers. At about the same time, the officers observed the cage housing the Lear’s Macaws on the first floor being moved and brought away from the window into the building.

The officers wanted to conduct the inspection immediately but Kuah’s father asked that they wait until he had spoken to Kuah. He contacted Kuah by telephone. Dr Leong also spoke to Kuah and was asked to wait until Kuah contacted his lawyer. The officers waited for about half an hour.

At about 10am, an officer who was stationed by the road informed Dr Leong that the birds were no longer visible from the road. The officers then insisted on inspecting the first floor immediately. They found that the birds were no longer in the cage. The officers searched the premises and found the two Lear’s Macaws in a room on the first floor. One of them was hidden in a green sports bag with brown trimmings while the other was in a pink and white cloth bag. Both birds were seized.

The charge

The charge brought against Kuah read as follows:

You, Kuah Kok Choon, male / 24 years old NRIC No S7410016-C are charged that you, on 20 July 1996, at about 9.30am at 99 Rangoon Road, Singapore, did have in your possession two Lear`s Macaws (Anodorhynchus Leari), a scheduled species under the Endangered Species (Import and Export) Act (Cap 92A), which were imported without a permit issued by the Director of Primary Production, and you have thereby committed an offence under s 4(2) and punishable under s 4(3) of the said Act.

Decision of the trial judge

At the trial below, the following points were not disputed: (a) that Kuah was in possession of the two Lear`s Macaws; (b) that Lear`s Macaws are a scheduled species under the Act; (c) that Lear`s Macaws are not indigenous to Singapore and it was highly unlikely that the two in question were bred in Singapore; and (d) that no permit has ever been issued under the Act for the import of Lear`s Macaws into Singapore.

The defence`s case was simply that Kuah bought the Lear`s Macaws before the Act came into force. This meant that they could not have been imported in contravention of the Act and therefore that the elements of the charge had not been proven by the prosecution.

Both the district judge and the prosecution in the court below accepted this defence as legitimate. For want of other supporting evidence, the prosecution sought to prove that the Lear`s Macaws were imported into Singapore after 17 March 1989, the date the Act came into force, by adducing evidence to establish the age of the birds. If the birds were younger than eight years of age in 1998 when they were examined, then the inference would be that they were imported after the Act came into force in 1989.

Therefore, the main issue in the trial revolved around establishing the age of the two Lear`s Macaws. Both sides called upon experts to advance arguments on their behalf. The expert who testified for the prosecution was one Carlos Yamashita. He is a field biologist who has done extensive research on Lear`s Macaws. He examined the two Lear`s Macaws in question and estimated that they were less than five years of age. He reached this conclusion based purely on the method of external morphology. The expert witness for the defence was one Dr Gerry M Dorrestein. Although not an expert on Lear`s Macaws, he is well versed in avian matters, as evidenced by his extensive curriculum vitae. The purpose for which he was called as a witness was to dispute the methodology used by Mr Yamashita to age the birds. The crux of his testimony was that it was not scientifically proven that the age of a Lear`s Macaw could be accurately determined by external morphology.

The district judge upheld the defence`s main objection raised to the prosecution`s expert testimony, that is, over Mr Yamashita`s methodology. The evidence showed that there is no scientific method of using external morphology to determine a Lear`s Macaws age and thus his conclusions were considered to be unreliable. Since the prosecution had not adduced other sufficiently strong evidence as to how, when or by whom the two Lear`s Macaws were allegedly illegally imported into Singapore, Kuah was acquitted of the charge.

After the acquittal, the prosecution asked the court to nonetheless order the forfeiture of the two

Lear's Macaws. The district judge exercised his discretion to do so and ordered that the two Lear's Macaws be forfeited to the Director-General, Agri-food and Veterinary services pursuant to s 13(2)(b) of the Act.

The Act

At this point, it would be convenient to set out the relevant provisions of the Act. Section 4 reads as follows:

(1) No person shall import, export, re-export or introduce from the sea any scheduled species without a permit.

(2) No person shall have in his possession, under his control, sell, offer or expose for sale, or display to the public any scheduled species which has been imported or introduced from the sea in contravention of subsection (1).

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding one year or to both and, in the case of a second or subsequent conviction, to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding one year or to both.

The appeal against acquittal

Having perused s 4(2) of the Act, it was clear to me that, for the charge to be made out in this case, the prosecution needed to prove three elements, namely (i) possession; (ii) the two Lear's Macaws in possession were a scheduled species; and (iii) they must have been imported in contravention of subsection (1).

It was not disputed by either side that Lear's Macaws are a scheduled species under the Act and that the two in question were in Kuah's possession. It was the third element that caused great confusion both at the trial below and at the appeal. The defence alleged that the third element had not been made out because the prosecution could not prove that the two Lear's Macaws had been imported **after** the Act came into force and thus could not show that the import was in contravention of sub-s (1).

Section 4(1) of the Act states that '(n)o person shall import, export, re-export or introduce from the sea any scheduled species **without a permit**.' The correct way to construe the third element of s 4(2) is simply to substitute the language of sub-s (1) into sub-s (2). When this is done, s 4(2) will read: (n)o person shall have in his possession, ... any scheduled species which has been imported ... without a permit.'

When construed in this way, it becomes clear that all the elements of the charge, including the third element, were made out in this case, as they were undisputed by the defence in the first place. The defence never disputed that no permit had been issued for the import of the two Lear's Macaws since the PPD had never issued a permit under the Act for the import of Lear's Macaws into Singapore.

The prosecution committed a grave error by conceding at the trial below that it had the burden to prove that the Lear's Macaws were imported after the Act came into force. A plain reading of the relevant provisions of the Act shows that for the charge under s 4(2) to be made out, there is never a requirement for the prosecution to show **when** the birds were imported. To impute such a burden on the prosecution would be to impose requirements that were plainly not stated in the legislation. The trial judge was clearly misled by this concession of the prosecution, which led to his misinterpretation of the law.

I must emphasise that the charge here pertained to possession rather than to import. As long as possession of a scheduled species, on a date after the Act came into effect, is proved, the offence is made out if there has been no requisite import permit. The date of possession must be after the Act has come into force, but the date of import is irrelevant for a charge under s 4(2). Where any person chooses to possess, have under his control, sell, offer or expose for sale, or display to the public any scheduled species, the onus is on that person to check and ensure that proper import permits have been obtained for the particular scheduled species. If import permits have not been obtained, then the onus is again on that person to seek an exemption from the Director-General under s 18 of the Act.

Returning to the facts of the case, it was not disputed that Kuah possessed the two Lear's Macaws, which are a scheduled species under the Act, and that no import permit had been granted for these two birds. This being the case, the charge was already made out and the roundabout route that the prosecution chose to prove their case was utterly unnecessary. The great emphasis on expert evidence, to prove the age of the birds, during the lengthy trial was totally irrelevant since the charge had already been proven.

Once the charge is made out, the burden then shifts on to the defence to either dispute possession or that the animal in possession was not a scheduled species, or to argue that import permits were issued or that an exemption applied. None of these elements were made out by the defence in this case. Indeed, the defence conceded that the three elements of the offence were present.

Therefore, since the charge was made out and no defence was raised to disprove any element of the offence, I accordingly allowed the prosecution's appeal against acquittal and convicted Kuah of the offence as charged.

The appeal against forfeiture

The provisions in the Act which provide for forfeiture are found in s 13, the relevant portions of which read as follows:

(1) Upon the conviction of any person for an offence under s 4 or 4A, the scheduled species in respect of which the offence was committed and any other thing seized under s 9(4)(b), (c) or (d) shall, without further order, be forfeited to the Director-General.

(2) Where a person who is prosecuted for an offence under s 4 or 4A is acquitted or given a discharge, conditional or otherwise, the court may order the scheduled species in respect of which the prosecution was brought and any other thing seized under s 9(4)(b), (c) or (d) -

(a) to be released to the person from whom they were seized or to the owner thereof; or

(b) to be forfeited to the Director-General.

Having acquitted Kuah, the district judge then exercised his discretion and ordered the two Lear's Macaws to be forfeited to the Director-General under s 13(2)(b). However, since I allowed the prosecution's appeal and convicted Kuah, forfeiture of the two Lear's Macaws to the Director-General was no longer discretionary because it became automatic by virtue of s 13(1). As such, I dismissed Kuah's appeal against the forfeiture of the two Lear's Macaws.

The appropriate sentence

I next proceeded to consider the appropriate sentence to impose on Kuah. The relevant sentencing provision is found in s 4(3) of the Act, which provides that on conviction, the accused may be sentenced to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding one year or to both and, in the case of a second or subsequent conviction, to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding one year or to both.

The prosecution submitted that Kuah had several antecedents and this was certainly not his first offence. In 1994, he was convicted in Perth, Western Australia for an unauthorised import of six exotic parrots into Australia. In November 1995, he was fined for attempting to smuggle three birds and one squirrel into Singapore in contravention of s 9(2) of the Wild Animals and Birds Act (Cap 351). In 1996, Kuah was caught by a customs officer in Paris, en route from Brazil to Singapore, transporting two Lear's Macaws in a duffel bag without any import or export documents. He was subsequently charged and convicted of an offence under the Penal Code (Cap 224) in 1999 for obtaining from Singapore, and using as genuine, a forged PPD import permit to obtain the release of two Lear's Macaws which had been seized by the French customs. Finally, Kuah had previously pleaded guilty in 1997 to three charges relating to the possession of illegally acquired gibbons, which were seized from his premises in a raid in July 1996.

With such a long list of antecedents, the prosecution urged the court to impose a deterrent sentence. It submitted that such a sentence would also serve to deter like-minded people from committing similar crimes.

On the other hand, counsel for Kuah urged me to consider that Kuah was only 22 years of age at the date of the offence in 1996. He argued that Kuah's conviction in relation to the possession of gibbons was part of the same transaction as this present offence, as the gibbons were seized at around the same time as the two Lear's Macaws. He further submitted that Kuah's offences were all committed in the period of 1995-1996, when he was just a young boy who had gone overboard. Finally, he submitted that the forfeiture of the birds was already a penalty and therefore his client should not be punished any further.

The offence committed in the present instance is not a minor one. The two Lear's Macaws are undoubtedly valuable and worth a lot. This is because Lear's Macaws are extremely endangered, with a population of only 130 in the wild in Brazil and on the brink of extinction. They are indigenous only to Brazil. I had no doubt that Kuah was aware of the need to preserve these species. He was obviously not an amateur bird collector who happened to chance upon the two Lear's Macaws at a

bird shop and bought them, being unaware that they were extremely endangered. On the contrary, he had an extensive knowledge of birds, having had papers published in international journals concerning aviculture and ornithology, and having set up his own breeding farm. In addition, he had 600 to 800 birds at his residence in July 1996 at the time of the raid. However, a perusal of his antecedents made me think that he was more concerned with the trading of birds than with their welfare. He had attempted to smuggle various animals through various countries, with no regard for the preservation and protection of these animals.

In Singapore, the Act was enacted to give effect to the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which Singapore has ratified. The main purpose of CITES is to protect certain species of wild fauna and flora against over-exploitation through international trade. I was of the opinion that a deterrent sentence had to be imposed to reflect how seriously Singapore regards its obligations under CITES. Singapore has committed itself to co-operating with other countries to preserve their endangered species and Kuah`s actions went against the spirit of this co-operation.

Therefore, I felt that youth was no excuse for Kuah`s contravention of the Act. He was clearly cognisant of his actions and committed crimes of a similar nature repeatedly without any semblance of repentance. His antecedents and his experience with birds left me in no doubt that he was knowingly in possession of the two Lear`s Macaws without the requisite import permits. I was of the opinion that a fine would be grossly inadequate in the circumstances. The maximum fine would hardly have any punitive effect whatsoever since one Lear`s Macaw alone could be worth more than \$10,000. Therefore, to underline the seriousness of the offence, I imposed the maximum sentence of one year`s imprisonment and a fine of \$10,000, with six months` imprisonment in default thereof.

Outcome:

Appeal against acquittal allowed; appeal against forfeiture dismissed.

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