Lin Bin v Public Prosecutor
[2005] SGHC 213

Case Number : MA 76/2005

Decision Date : 11 November 2005

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Chung Ping Shen (H A and Chung Partnership) for the appellant; David Chew Siong Tai (Deputy Public Prosecutor) for the respondent

Parties : Lin Bin — Public Prosecutor

Criminal Law – Statutory offences – Appellant convicted of employment of immigration offender – Whether appellant's conviction should be overturned

Criminal Law – Employment of immigration offender – 'Employ' – Whether element of employment made out – Section 57(1)(e) Immigration Act (Cap 133, 1997 Rev Ed)

Criminal Law – Employment of immigration offender – Mens rea – Whether appellant knew or had reasonable grounds for believing worker was an immigration offender

Criminal Procedure and Sentencing – Appeal – Adducing fresh evidence – Whether additional evidence may be adduced – Test for adducing fresh evidence – Section 257(1) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Appellant convicted of employment of immigration offender – Whether sentence imposed manifestly inadequate – Whether factors considered by trial judge justify derogation from benchmark sentence

11 November 2005

Yong Pung How CJ:

1 The appellant, Lin Bin, was charged with employing a Chinese national in contravention of s 57(1)(*e*) of the Immigration Act (Cap 133, 1997 Rev Ed) ("the Act"). At the conclusion of the trial below, he was duly convicted and sentenced to nine months' imprisonment. He appealed against the conviction. I dismissed his appeal against conviction and enhanced his sentence to 12 months' imprisonment. I now set out my reasons.

Undisputed facts

2 The case against the appellant centred around his alleged illegal employment of one Chen Xue Hong ("Chen"), a Chinese national. Chen had arrived in Singapore on 22 October 2003 on a social visit pass and had failed to leave upon its expiry. On 28 October 2004, at about 10.00pm, he was arrested together with another Chinese national at Centrepoint when they attempted to exchange their work permits for security passes, ostensibly for the purpose of moving cabinets within the building. The security officer noted that something was amiss with the aforesaid work permits and consequently informed the police.

3 The police found in Chen's possession a work permit, a Safety Orientation Course (Construction) certificate ("SOC certificate") and a National Library Building project gate pass, all in the name of "Zheng Ze He", an alias used to avoid detection. During the ensuing investigations, it was discovered that Chen had been employed by the appellant while illegally in Singapore. Chen was subsequently convicted for overstaying and fraudulent possession of documents, and sentenced to

seven months' imprisonment and four strokes of the cane.

The Prosecution's case

4 The Prosecution's primary witness was Chen, who testified that the appellant had employed him on three different occasions: first, at a condominium project near Bukit Batok MRT station for two days sometime between April and June 2004 ("the Hillview Regency Project"); second, at a high-rise residential project near Sentosa for about two months between June and August 2004 ("the Harbourfront Project"); and third, at the National Library Building project from late-August 2004 until Chen's arrest on 28 October 2004 ("the NLB Project").

5 The Prosecution also called three other witnesses, namely one Danny Tan Hee Meng ("Danny"), one Foo Sin Choy ("Foo") and one Senior Staff Sergeant Chris Tuen Chee Lim ("SSSgt Tuen").

6 Danny was an employee of the company that had been put in charge of carpentry works in the NLB Project and gave evidence regarding the appellant's involvement at the said project. According to Danny, the appellant had submitted the necessary work permit, SOC certificate, passport and photographs to him so as to facilitate the application for a gate pass for Chen to access the project's worksite. Danny also testified that he had, on two separate occasions, spotted the appellant talking to Chen at the NLB Project worksite.

7 Foo, meanwhile, had been hired by Danny's employer as a subcontractor for the same project and similarly testified about the appellant's involvement in Chen's employment there. Foo claimed that he learnt from a third party sometime in March 2004 that the appellant had many workers and was therefore interested in subcontracting work to the appellant. Whilst an agreement was not reached to that end, the appellant nonetheless agreed to supply two workers to assist in the NLB Project, one of whom was Chen, with Foo agreeing to pay the appellant $90 per day per worker in return for the provision of the workers' services.

8 The final prosecution witness, SSSgt Tuen, gave evidence that Chen was arrested on 28 October 2004 and that, after his arrest, he had claimed that his belongings were at the appellant's residence. Chen led the duty investigation officer to the appellant's flat but no such belongings were found.

The Defence's case

9 The appellant, who was unrepresented in the proceedings below, elected to give evidence in his defence. This was, in essence, a bare denial. He disavowed any knowledge of Chen, claiming instead that the prosecution witnesses had conspired to falsely implicate him in the matter.

10 He tried to discredit Chen's testimony by casting doubt on his ability to employ Chen on each of the alleged occasions. First, he testified that he only commenced work at the Hillview Regency Project in August 2004 and therefore could not have employed Chen at that site between April and June 2004. Second, while he was involved in a condominium project near the World Trade Centre area at about the same time as Chen's employment at the Harbourfront Project, his project was not a high-rise residential "villa" project, as Chen had described it. Third, in relation to Chen's employment at the NLB Project worksite, the appellant insisted that he was not involved in the project and had only been there twice, once to inspect it on Foo's request and once to discuss his potential involvement in the project as a subcontractor with Foo.

1 1 With regard to the testimonies of Foo and Danny, the appellant submitted that they had conspired to exonerate Foo. He testified that he had gotten to know Foo sometime in mid to end-August 2004 when Foo had asked him to assist in the Hillview Regency Project. The appellant suggested that Foo had attempted to implicate him due to a quarrel that the two parties had over Foo's "taking over" of part of the appellant's work at the Hillview Regency Project, a contract said to be worth hundreds of thousands of dollars. Foo denied that such an argument took place. The only allegation the appellant made to discredit Danny's testimony was that Danny was trying to protect Foo from prosecution since they were friends.

1 2 The appellant called one witness, one Wei Huo Jiu ("Wei"). Wei was one of the appellant's workers and testified that, from April to December 2004, the appellant did not have any projects besides the Hillview Regency Project and an unrelated project at Tanjong Rhu. However, Wei's evidence was inconclusive as he was not fully aware of the appellant's commitments (for example, he was oblivious to the appellant's work at the Harbourfront Project) and was in no position to confirm whether the appellant had employed Chen.

The decision below

13 The trial judge found that the Prosecution had proved beyond a reasonable doubt that the appellant did employ Chen and that he had the requisite *mens rea* in that he knew or had reason to believe that Chen was an immigration offender. In coming to such a conclusion, the trial judge, finding Foo, Danny and Chen to be worthy of belief, relied primarily on their testimonies, while rejecting the appellant's contention of a conspiracy between Danny and Foo. Accordingly, she convicted the appellant and sentenced him to nine months' imprisonment.

The appeal

14 The appellant challenged the findings made below on numerous grounds, centring primarily on the findings of fact of the trial judge and the inferences made therefrom. The three main issues before me in this appeal were as follows:

(a) whether the trial judge erred in making her numerous findings of fact, especially in the light of the self-interested nature of the prosecution witnesses' testimonies;

(b) whether the trial judge erred in drawing inferences adverse to the appellant in finding him to be Chen's employer in law and finding that he had the requisite *mens rea* for the offence; and

(c) whether new evidence in the possession of the appellant should be admitted to purportedly highlight the inconsistencies in the prosecution witnesses' testimonies and prove the appellant's innocence.

Each of these contentions will now be dealt with *seriatim*.

Whether the trial judge erred in making her findings of fact, especially given the self-interested nature of the prosecution witnesses' testimonies

15 The appellant submitted two contentions to suggest that the trial judge's acceptance of the evidence of the prosecution witnesses was against the weight of evidence: first, that the trial judge's conclusion was erroneous given various inconsistencies in the prosecution witnesses' statements and second, that the trial judge had not considered, or sufficiently considered, the self-interested nature

of these witnesses' evidence in the circumstances.

16 At the outset, it is important to reiterate the trite principle that an appellate court should not disturb the findings of fact of the court below unless they were clearly reached against the weight of evidence: *Lim Ah Poh v PP* [1992] 1 SLR 713. Therefore, where a trial judge has had to choose between differing versions of events and has assessed the credibility of the witnesses, the appellate court will take cognisance of the fact that it has not had the opportunity to either see or hear the witnesses: see *Yeo Chiang Chew v PP* [2003] 1 SLR 46. It is with the above principles in mind that I will now proceed to consider whether sufficient reason exists to overturn the decision below.

The inconsistencies in the Prosecution's evidence

17 I will begin my analysis with the two inconsistencies that the appellant suggests were not adequately considered by the trial judge: first, the inconsistent nature of Chen's testimony in initially describing the Harbourfront Project as a project to construct "44 blocks of villas" before backtracking and altering his testimony to that of a "villa" found in Block 44 and second, the discrepancies in Danny's and Chen's testimonies regarding when the NLB Project permanent entrance card was passed to the latter, with Danny testifying that the card was passed in Chen's presence at Bras Basah Complex while Chen was of the view that the pass was only handed to him at the NLB Project worksite. After careful scrutiny of the notes of evidence and a careful analysis of the trial judge's reasoning, I was of the considered opinion that, on the whole, neither allegation disclosed any error in the trial judge's findings of fact, let alone indicated that her findings of fact were clearly made against the weight of the evidence tendered.

18 First, Chen's reference in his examination-in-chief to the Harbourfront Project as "44 blocks of villas" appeared, in my view, to be no more than a mere misstatement devoid of any devious intention to mislead the court. Indeed, when the court sought clarification on this point, Chen was quick to highlight that his intention was not to suggest that the development consisted of 44 blocks:

> Ct: How many storeys were the buildings for the villa project near Sentosa?
>
> A: Block 44, nine storeys

1 9 A perusal of the notes of evidence also supported the view that the error was unintended. The fact that there were inconsistencies in Chen's examination-in-chief itself, where in one instance he called the Harbourfront Project "a 44 units of villa" and in another instance, "44 blocks of villa", in two *consecutive paragraphs* no less, highlighting that such inconsistency could not have been more than mere seconds apart, clearly indicated that such inconsistencies were only a product of bad or inaccurate phrasing. Further, the use of the word "villa" should not be taken literally – as Chen pointed out, he described it as such merely based on hearsay from other workers. Indeed, that the appellant did not see fit to press the matter on cross-examination constituted a strong indication that this was a last-ditch attempt to discredit Chen via the use of inconsequential semantics.

2 0 With regard to the appellant's contention that there were discrepancies in Chen's and Danny's testimonies as to when Chen's permanent entrance card was passed to him, nothing turned on such inconsistency. In any event, I was of the view that it was not unusual for inconsistencies to arise in evidence provided by either party's witnesses. As I noted in *Ng Kwee Leong v PP* [1998] 3 SLR 942 at [17] (approving *Chean Siong Guat v PP* [1969] 2 MLJ 63 at 63–64):

> Absolute truth is, I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common occurrence. *In weighing the testimony of*

witnesses, human fallibility in observation, retention and recollection are often recognised by the court. [emphasis added]

2 1 In the circumstances, such insignificant inconsistencies were to be expected. As the trial judge noted, more than six months had passed between the time the events in question took place and the trial – it was therefore plausible that parties may not be able to recollect, with accuracy, such non-material details.

22 All that the appellant had succeeded in showing, therefore, was the presence of minute inconsistencies in the prosecution witnesses' testimonies. On that basis, he implored me to exercise my discretion to overturn the trial judge's findings of fact. I saw no reason to do so. An appellant must be able to do more than merely highlight such inconsistencies before an appellate court would overturn such findings: see *Moganaruban s/o Subramaniam v PP* [2005] 4 SLR 121. On the facts above, I found that any inconsistencies highlighted by the appellant did not impinge upon the credibility of the evidence as a whole and that accordingly the trial judge was clearly entitled to accord little weight to them.

The self-interested nature of the prosecution witnesses' testimonies

23 I now proceed to consider the appellant's allegation that the trial judge had failed to consider the self-interest of the prosecution witnesses, namely Chen, Foo and Danny, in falsely implicating him. The appellant averred that Chen had a reason to lie as he might have wanted to obtain the wages owed by his actual employer and that the appellant's claim of a quarrel with Foo was not sufficiently considered by the trial judge in so far as it would highlight the self-interested nature of Foo's evidence.

2 4 I was of the view that the appellant's contention that Chen did not want to implicate his actual employer for fear of not recovering any outstanding wages was speculative and not borne out by the proceedings below. To begin with, there was no evidence to suggest that any such employer, should he even exist, would have owed Chen wages. In any event, as the trial judge rightly noted, to falsely implicate the appellant would be counter-productive, given that Chen would, in effect, be risking a further jail term for the provision of false evidence. In such circumstances, there would clearly be no incentive whatsoever for Chen to manufacture a false account of two earlier terms of employment and thus subject himself to more scrutiny than was strictly necessary to implicate the appellant.

25 Even if one were to believe the appellant, there was no logical explanation of how Chen could intuitively find his way to the appellant's residence after being arrested – neither the explanation proffered at trial that Chen must have obtained the address from county folks in China, nor the explanation offered in this appeal that Chen must have memorised the address from the appellant's letterhead, could be substantiated or accorded any notion of common sense.

26 Moving on to the appellant's allegation of a quarrel with Foo, I was in full agreement with the trial judge's view that no such quarrel took place. First, the appellant had admitted at trial that he suffered no financial loss whatsoever from the loss of the contract. There was, therefore, no reason for any form of heated argument to ensue should another party take over part of the contract, especially since the appellant readily admitted that it was his failure to provide manpower that led to such cancellation. Second, I was of the opinion that the evidence provided by the appellant itself appeared to militate against his contention. The fallacy of the appellant's submission was encapsulated by his testimony on the alleged "argument" at cross-examination:

Ct: So it was more like you scolding him rather than an argument?

A: I did not scold him.

Ct: So it was like a normal conversation?

A: Yes.

27 In the light of the above observations, there was no basis whatsoever for me to disagree with the trial judge's finding that no such quarrel took place.

28 In fact, upon a perusal of the notes of evidence, it was apparent to me that as between the appellant and Foo, if either party were to bear a grudge, it must be the appellant, as he readily admitted in his testimony during cross-examination:

Suggest: Even if the contract was taken over by Ah Tian [*ie*, Foo], you would be the one who was angry with Ah Tian and he would not be angry with you?

A: Agree.

Suggest: If anyone were to bear a grudge it would be you against Ah Tian and not the other way round?

A: Agree.

29 Given the appellant's admission that Foo would not even have borne a grudge against him, I was of the opinion that even if I were to accept that such a quarrel took place, which I did not, there would nonetheless have been no logical basis whatsoever to infer that Foo would have wanted to implicate the appellant.

30 In any case, when I considered carefully all the circumstances of this case, I was of the view that the evidence clearly supported the trial judge's finding. I was, for example, in complete agreement with the trial judge's observation that the probative value of the argument that the prosecution witnesses' testimonies could not be believed in the light of their self-interest was very much reduced by the non-self-serving nature of their testimonies. In particular, both Danny and Foo admitted that they had some role to play in Chen's employment, with the former admitting that he had assigned Chen work on a daily basis at the NLB Project (under the auspices of Foo's firm), while the latter admitted his role in computing the moneys due in return for Chen's services. Seen against such a backdrop, the trial judge was entitled to find their testimonies compelling and that the non-self-serving nature of their testimonies militated against any likelihood of fabrication.

3 1 In my view, the trial judge had carefully weighed the evidence and decided that the Prosecution had made out its case beyond a reasonable doubt. There was, therefore, no reason for me to question the validity of the trial judge's preference for the Prosecution's version of events to the appellant's. The Prosecution's version of events was gleaned from voluntary statements given by three separate parties and while minute inconsistencies subsisted, they were not fatal to a general sense of coherence and consistency that was nonetheless apparent. This was in stark contrast to the appellant's version of events, which, in my opinion, amounted to no more than baseless allegations and incredible explanations devoid of merit. I was therefore not only of the opinion that the trial judge did not make erroneous findings of fact but was in full agreement with her findings.

32 For the reasons articulated above, this limb of the appeal must fail.

Whether the trial judge erred in law in drawing inferences from the above findings of fact that the appellant was Chen's employer in law and that he had the requisite mens reafor the offence

33 I now move on to the second ground of the appeal. The argument under this rubric was two-fold: first, even if the court was minded to find that the appellant did "employ" Chen in the factual sense, the trial judge was mistaken in finding that he was Chen's employer in law and second, that she similarly erred in inferring that he had the requisite *mens rea* for the offence.

34 It warrants reminding that, unlike the requirement that the decision of the trial judge must be clearly wrong before an appellate court should reverse a finding of fact, an appellate court is as competent as the trial judge to draw the necessary inferences of fact from the circumstances of the case: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656. Therefore, should I have been of the view that the trial judge had made inappropriate or wrong inferences from the primary facts in this case, I would have been free to disagree with the inferences that were made and, accordingly, make appropriate findings thereon. Nonetheless, when I considered the evidence before me, I found myself of the firm conviction that the inferences made by the trial judge were not only appropriate, but constituted the only reasonable inferences that could be drawn from the circumstances.

3 5 I will first deal with the issue of whether Chen was "employed" by the appellant as a matter of law. The appellant contended that even if we were to accept the Prosecution's versions of events, given his bare involvement in procuring Chen's employment and the degree of control that Foo had exhibited over the course of employment, Foo, and not himself, was the employer of Chen in relation to the latter's employment at the NLB Project.

36 It has long been established that the degree of control exercised by a party represents an important indicator of the identity of the employer of the illegal worker: see *Lee Boon Leong Joseph v PP* [1997] 1 SLR 445. As such, there was some merit in the appellant's contention, given that Foo exhibited a considerable amount of control over Chen: he not only authorised Danny to countersign Chen's attendance records and computed the amounts due and owing to Chen, but it was clear that Chen was, for all intents and purposes, gainfully employed to perform work that was subcontracted out to him.

37 Nonetheless, it is trite that the degree of control exhibited by the alleged employer represents but one, albeit important, factor that needs to be considered in determining the existence of an employment relationship: see *Tamilkodi s/o Pompayan v PP* [1999] 1 SLR 702. Instead, in coming to such a determination, it is vital that the substance, and not the form, of the relationship between the parties concerned be considered: see *PP v Yap Baby* [1993] 3 SLR 633.

3 8 When I considered the substance of the relationship, I found myself in complete agreement with the trial judge's view that the evidence strongly supported the conclusion that the relationship between Chen and the appellant was one of employee-employer. Two factors were of especial importance. First, as the trial judge noted, when Chen was unavailable, it would be up to the appellant to find a substitute worker on Foo's behalf. Second, with regards to remuneration, Foo would not pass the amounts directly to Chen and instead paid the appellant who would, correspondingly, pay a certain proportion of it to Chen.

3 9 As I had noted in *Lee Boon Leong Joseph v PP* ([36] *supra*), where there is no scope for negotiation with regard to the amount of remuneration that an employee is given, and where a

middleman pays the salary of the worker out of such payments made by the alleged employer to the middleman, such manner of remuneration weighs heavily towards the conclusion that the middleman is the employer of the said worker. Indeed, this sentiment is further supported by my observations in *PP v Heng Siak Kwang* [1996] 2 SLR 274 at 280, [36], as follows:

> If an employer merely paid the foreman a lump sum for the workers, and left it to him to decide how much to pay the workers and how many workers to employ, it is a strong indication that the foreman was a sub-contractor if the foreman was permitted to keep the excess. This suggests that it was the 'foreman' who employed the workers.

40 It was therefore my opinion that the facts here render this a quintessential case in which to apply the above reasoning. From the evidence, not only had the appellant paid Chen's wages, but he was allowed to independently decide the quantum of such remuneration and to retain any excess moneys passed to him by Foo. In the light of these circumstances, I was of the view that, although there were some indicators that tended to lead to the conclusion that Foo was Chen's employer, the cumulative evidence very much supported the trial judge's finding that Chen was employed by the appellant for the purposes of s 57(1)(*e*) of the Act.

41 I now advance to consider the second limb pursued under this ground, namely the appellant's contention that he did not have the requisite *mens rea* for the offence. The law on this point is clear – the Prosecution need only establish that the appellant knew or had reasonable grounds to believe that Chen was an immigration offender: see *Assathamby s/o Karupiah v PP* [1998] 2 SLR 744.

42 On the facts here, it appeared to me to be an irresistible inference that the appellant was, at the very least, wilfully shutting his eyes to the obvious. The appellant was present when Exhs P3 and P5 were provided to Chen. As he has had the opportunity to peruse Chen's passport, he would surely have been aware of Chen's status as a Chinese national and the discrepancies that were inherent from the documents. Yet, it was clear that the appellant never undertook any due diligence exercise whatsoever – no checks were made as to Chen's status during his term of employment, nor was any verification of his details made against those found in his passport. As there were patently clear grounds for such suspicion, the requisite *mens rea* for the offence was clearly established.

43 Based on the foregoing, I found that both inferences made by the trial judge were appropriate and that this ground of appeal must, also, necessarily fail.

Whether the new evidence highlighted the appellant's innocence and corroborated the inconsistencies in the prosecution witnesses' testimonies

44 Counsel for the appellant then contended that his client possessed additional documentary evidence, obtained after the trial judge's decision, which he submitted would prove the existence of the appellant's argument with Foo as well as highlight the improbabilities of the Prosecution's case. He therefore sought leave to adduce the documentary evidence consisting of the following:

(a) a copy of the letterhead of the appellant's business firm;

(b) a copy of an agreement and a letter evidencing the contractual relations between Koyo Corporation Pte Ltd and the appellant;

(c) a copy of a letter from Shimizu Corporation to the appellant;

(d) copies of timecards and a list of workers in relation to the appellant's work at the

Harbourfront Project;

(e) copies of Chen's identification documents; and

(f) a copy of a police report filed by the appellant detailing the purported fact that his car broke down at Changi Airport.

4 5 As a preliminary point, it was, in my opinion, unfortunate that counsel for the appellant had failed to apply for leave to adduce these documents via the filing of a criminal motion. In the absence of such a motion, the court, unfortunately, not only fails to receive proper notice of what is being requested of it but, more importantly, is left in the dark as to the nature of the documents and the manner in which the alleged matters would be proved until the hearing itself.

46 Nonetheless, to ensure that no injustice would be perpetuated, I allowed the making of oral representations as to the reasons for which I should exercise my discretion under s 257(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") to allow such fresh evidence. Section 257(1) of the CPC reads:

In dealing with any appeal under this Chapter the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a trial Court or Magistrate's Court.

47 I was nonetheless aware that my discretion to allow the new evidence should, consistent with s 257(1) of the CPC, only be exercised in situations where the new evidence was necessary. The principles with respect to the determination of what is necessary under s 257(1) of the CPC were laid down in *Juma'at bin Samad v PP*[1993] 3 SLR 338 and consists of the following three limbs:

(a) non-availability: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) relevance: the evidence must be such that if given at trial, would probably have an important influence on the result of the case; and

(c) reliability: the evidence must be apparently credible although it need not be incontrovertible.

4 8 I would also hasten to add that in exceptional circumstances, the court might be minded to allow fresh evidence to be adduced, notwithstanding its availability at trial, if it can be shown that a miscarriage of justice would otherwise ensue. Nonetheless, the circumstances under which such evidence would be allowed are extremely limited: *Tan Sai Tiang v PP* [2000] 1 SLR 439.

49 Upon hearing the appellant's representations, I was of the view that the said evidence was of no probative value and consequently refused leave to adduce the evidence. I will now highlight how I arrived at such a determination.

50 With respect to the first limb of the test, it was clear to me that the evidence was, with any diligence, obtainable for use at trial. Counsel for the appellant suggested that there were two reasons for the non-adduction: first, the appellant was unrepresented at the trial below and was, thus, unaware of the implications of the failure to adduce such evidence, and second, the documents were in his car, which had broken down in Changi Airport seven days *prior* to the day he was due in court to face the charge. As evidence of this, counsel for the appellant introduced a police report made by

the appellant evidencing the same.

51 Neither contention, in my opinion, was of any merit. First, the contention that the appellant was unaware of the implications of the absence of such documents was inconsistent with his attempted rebuttal of the Prosecution's case in the court below in suggesting that its case must fail for lack of documentary proof. It was inconceivable that the appellant would have been able to appreciate the importance of documents to the Prosecution's case, but not its effect on his own. In any event, even if I were to accept that contention, I was not prepared to condone the practice of facilitating the adduction of fresh evidence on appeal and, *ipso facto*, remedy an appellant's mistakes on the sole basis of his imprudence of not engaging the services of competent legal counsel with due haste.

52 Second, the appellant suggested that he could not have retrieved the documents prior to trial as his car had broken down at Changi Airport. Even if I were to accept his testimony uncritically, there were seven days between the discovery that the car had broken down and the date of incarceration – surely the fact that the car had broken down did not militate against the use of alternative transport to obtain the evidence, especially given its purported evidential value.

5 3 While the above would suffice to dispose of this particular point, I would hasten to add, in the interest of completeness, that no injustice would be occasioned by my refusal to grant leave to adduce the documents. Indeed, upon a close examination of the documentary evidence sought to be adduced, the only evidence which assists the appellant in any way are the copies of the timecards and the list of workers in relation to the Harbourfront Project. Nonetheless, I was of the opinion that, at its highest, all it showed was the bare possibility of minute inconsistencies in Chen's testimony *vis-à-vis* the exact dates on which he was employed for each of the three occasions. This would, in no way, impinge on the fact that such employment had been undertaken. In the light of the widely-drafted charge, which did not provide reference to specific dates *vis-à-vis* each term of employment, proving minute inaccuracies in the dates of employment, *per se*, would not have had an influential effect on the outcome of the appellant's case and served to cast no doubt whatsoever on the soundness of the trial judge's decision.

54 I was therefore of the opinion that there would be no miscarriage of justice in refusing the admission of the evidence. On the contrary, the evidence, if accepted, may well have led to an unjust result based on unverified documents of questionable reliability that had yet to have the benefit of being tested at trial. As such evidence must surely have been obtainable with reasonable diligence and as no injustice would result from the refusal to grant leave here, I was of the opinion that the new documentary evidence was unnecessary for the purposes of the appeal and, accordingly, refused leave to adduce such evidence.

55 Based on the foregoing, and having reviewed the reasoning of the trial judge and considered the appellant's contentions on appeal, I was of the opinion that the Prosecution had succeeded in establishing all the elements of the charge beyond reasonable doubt and I upheld the conviction.

Sentence

56 Although the appellant did not appeal against his sentence, I found the trial judge's sentence to be inadequate and ordered that the term of imprisonment be enhanced to 12 months. I now explain my reasons for doing so.

5 7 At the outset, it is important to highlight that even in instances where an appellate court is of the opinion that there is no sufficient ground in interfering with the conclusion of the court below,

it nonetheless retains discretion under s 256(*b*)(ii) of the CPC to enhance the sentence of the appellant where it deems it necessary. That being said, it has long been accepted that such discretion should not be exercised unless the appellate court is satisfied that the sentence imposed was the result of an error of fact or principle, or was manifestly excessive or inadequate: see *Yeo Kwan Wee Kenneth v PP* [2004] 2 SLR 45.

58 In the circumstances, I found the sentence to be manifestly inadequate and consequently saw no reason for the trial judge not to have sentenced the appellant to the benchmark sentence of 12 months' imprisonment that should normally be accorded under s 57(1)(ii) of the Immigration Act: see *Soh Lip Hwa v PP* [2001] 4 SLR 198. In doing so, I noted that the trial judge had placed reliance primarily on three factors when considering an appropriate sentence: the appellant's status as a first-time offender, the fact that he had employed Chen for (only) four to five months and the fact that he was the sole breadwinner with school-going children to support. None of these, in my view, justified derogation from the benchmark sentence in the circumstances before me.

59 For example, while it is trite that being a first-time offender is a valid mitigating circumstance in *most* instances, the probative value of this factor must be carefully weighed against other factors, the most fundamental of which is that of the public interest: see *Sim Gek Yong v PP* [1995] 1 SLR 537. In the light of the compelling needs of public interest that necessitate the deterrence of like-minded parties from providing employment to immigration offenders, and the serious nature of immigration offences (see *Lim Gim Chong v PP* [1994] 1 SLR 825), it would be inappropriate to accord significant weight to the lack of antecedents when considering the appropriate custodial sentence.

60 I was also of the opinion that the other factors were of no merit and should not have been taken into account in sentencing. To begin with, no weight should be given to the fact that the appellant was the sole breadwinner and had two school-going children to support. As I had noted in *Lim Choon Kang v PP* [1993] 3 SLR 927 and *Leaw Siat Chong v PP* [2002] 1 SLR 63, to provide any weight to a fortuitous mitigating factor such as hardship caused to the family occasioned by imprisonment would be to invite a travesty of justice. I was similarly not inclined to agree that the length of employment in the circumstances constituted a valid mitigating factor. It has long been accepted that no weight should be provided to the duration of employment as a mitigating factor in immigration-based offences: see *PP v Chia Kang Meng* Magistrate's Appeal No 71 of 2001. In the light of my explicit reiteration of that very point in *Leaw Siat Chong v PP*, there should be little doubt that the term of illegal employment, however short, would not constitute a valid mitigating factor.

Conclusion

61 For the reasons above, I dismissed the appeal against conviction and enhanced the sentence from nine to twelve months' imprisonment.