Choy Tuck Sum v Public Prosecutor
[2000] SGHC 220

Case Number : MA 176/2000

Decision Date : 31 October 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Leonard Loo Peng Chee and David Ng Ser Chiang (Hoh & Partners) for the appellant; Hay Hung Chun (Deputy Public Prosecutor) for the respondent

Parties : Choy Tuck Sum — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Statutory interpretation – Abetment – Accused with prior conviction on principal offence convicted of abetment offence – Whether accused liable for enhanced punishment – ss 5(1), 5(6)(b) & 23(1) Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed)

Immigration – Employment – Foreign worker – Accused abetting offence of deploying foreign worker other than permitted by work permit – Whether abetment offence considered conviction of principal offence for sentencing – ss 5(1), 5(6)(b) & 23(1) Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed)

: This is an appeal against sentence only. The appellant had claimed trial and was convicted on 19 July 2000 on the following amended charge:

> *You, Choy Tuck Sum, are charged that you sometime between September 1998 to 23 December 1998, in Singapore, did abet Ng Yook Sing, in the commission of an offence of employing a foreign worker without a valid work permit, namely, one Mizan, to wit, you intentionally aided the said Ng Yook Sing to use the services of Mizan for his firm`s own work, when the said Ng Yook Sing had not obtained in respect of the said foreign worker a valid work permit allowing the foreign worker to work for him, which offence was committed in consequence of the abetment and you have thereby committed an offence under s 5(1) of the Employment of Foreign Workers Act (Cap 91A) read with s 23 of the said Act and punishable under s 5(6) of the Act.*

The appellant was at the material time a sole proprietor in the construction trade. Sometime in July 1997, the appellant had a construction project in Woodlands for which he supplied 13 of his foreign workers to one of his sub-contractors, Wei Lock, which was owned by one Ng Yook Sing. At around the same time, Wei Lock also had a contract to provide cleaners at the World Trade Centre (`WTC`). One of the 13 foreign workers, Mizan, was later deployed by Wei Lock to work as a cleaner at the WTC. This was even though Mizan`s work permit had allowed him to work only as a construction worker for the appellant. Under this arrangement, which the appellant was wholly aware of, Mizan`s wages were paid for by Wei Lock. On 23 December 1998, an inspection for illegal workers was conducted by officers from the Ministry of Manpower at the WTC and Mizan was one of the workers arrested for working without a valid work permit as provided for under s 12 of the Employment of Foreign Workers Act (`EFWA`) (Cap 91A).

`second or subsequent conviction`

In determining the sentence, the trial judge took into account the fact that the appellant had a previous conviction for an offence under s 5(1) of the EFWA in 1993, for which he was fined $9,600.

Section 5(6)(b) of the EFWA provides for enhanced punishment when the court is dealing with a second or subsequent conviction under s 5(1). The trial judge took the view that the present conviction on the abetment offence constituted a second conviction under s 5(1) EFWA for the appellant and therefore imposed the mandatory custodial sentence. The appellant was ordered to serve the minimum one month`s imprisonment and to pay a fine of $7,920.

The appellant has now appealed against the decision of the trial judge to impose the enhanced punishment, arguing that he should not have been regarded as a repeat offender under s 5(6)(b)(i) of the EFWA. At this juncture, it is perhaps useful to set out the provisions in the EFWA that are relevant for the purposes of this appeal.

> *Prohibition of employment of foreign worker without work permit*
>
> *5(1) No person shall employ a foreign worker unless he has obtained in respect of the foreign worker a valid work permit which allows the foreign worker to work for him.*
>
> *...*
>
> *5(6) Any person who fails to comply with or contravenes subsection (1) shall be guilty of an offence and shall -*
>
> *(a) be liable on conviction to a fine of an amount not less than 24 months` levy and not more than 48 months` levy or to imprisonment for a term not exceeding 12 months or to both; and*
>
> *(b)* ***on a second or subsequent conviction*** *, be punished -*
>
> *(i) in the case of an individual, with imprisonment for a term of not less than a month and not more than 12 months and shall also be liable to a fine of an amount of not less than 24 months` levy and not more than 48 months` levy;*
>
> *...*
>
> *Abetment*
>
> *23(1) Any person who abets the commission of an offence under this Act shall be guilty of the offence and shall be liable on conviction to be punished with the punishment provided for that offence.*

In the court below, the trial judge accepted the prosecution`s submission that due to the appellant`s previous conviction under s 5(1) EFWA, he should be sentenced as a second offender. In her reasoning, the trial judge stated:

> *The offence of abetment carries the same punishment as the substantive offence which is abetted. Abetment is therefore equally culpable as the substantive offence. On counsel`s argument, the enhanced punishment could*

never be attracted for an offence of abetment. To my mind, it was absurd to restrict the enhanced punishment only to the substantive offence when s 23(1) provides for the same punishment as the substantive offence and the mischief to be protected is identical.

Counsel for the appellant contended that the trial judge erred in law when she imposed the enhanced punishment on the appellant. Two main grounds of appeal have been advanced. First, in deciding that the offence of abetment is the same as the substantive offence under s 5(1) of the EFWA, the trial judge failed to recognise that an offence of abetment is a distinct offence from the substantive offence. In support of this contention, the case of **Ong Ah Yeo Yenna v PP** [1993] 2 SLR 73 was cited as authority. It is submitted that before the enhanced punishment provision in s 5(6)(b)(i) EFWA can apply, it must be shown that sub-s 5(1) was contravened and such contravention amounted to a second or subsequent conviction under s 5(1). Since the abetment offence committed in the present case was an offence under s 23(1) of the EFWA and not an offence under s 5(1), it could not be said that the appellant has contravened s 5(1) for a second time.

The second ground of appeal raised was that the trial judge erred in interpreting the statutory provisions concerned. Counsel argued that the trial judge failed to give effect to the literal meaning of the words in s 5(6)(b)(i). It was further argued that since the EFWA is a penal statute, the trial judge should have adopted the presumption of strict construction in favour of an accused person.

A distinct offence?

I will now consider the first ground of appeal raised by counsel for the appellant. I will first point out that, on the present facts, I do not think that the case of **Ong Ah Yeo Yenna v PP** [1993] 2 SLR 73 , is useful to the appellant. As noted by the trial judge, this case is clearly distinguishable. In the ***Ong Ah Yeo Yenna*** case, although I was similarly dealing with a situation of abetment by aiding, I was, however, considering a different question of whether an abettor could be convicted of abetting the offence even though the principal had not been tried for the substantive offence. I had held in that case that it was not necessary that the principal offender must have been convicted before the abettor could be convicted of abetting the offence, so long as the actus reus of the principal offence was shown to have been committed. This principle is certainly still valid but is not relevant for our present purposes, since here the court is not concerned with the question of the appellant`s liability or conviction but with the issue of what is the appropriate sentence to be imposed on him.

Counsel for the appellant argued that the trial judge`s decision showed that she had failed to realise that an abetment offence is a distinct offence from the principal offence that was abetted. I am unable to agree with such a contention. There is no doubt that, when the court is considering the liability and conviction of an accused for the commission of an offence, the offence of abetment is different and distinct from the principal offence. An abettor who commits the offence of abetment only cannot actually be said to have committed the substantive principal offence. However, in the present case, the issue is not on the appellant`s liability or whether or not he should be convicted. The appellant has already been convicted as an abettor and the question now is how, ***for the purposes of sentencing*** , the offence of abetment should be treated. In order to answer that, it is imperative to refer to the relevant statutory provisions in the EFWA.

The EFWA provides in s 23(1) for the offence of abetment. It states that `any person who abets the commission of ***an offence*** under this Act ***shall be guilty of the offence*** and shall be liable on conviction to be ***punished with the punishment provided for that offence*** ` (emphasis mine). It is

apparent from the words in the section that this is a general and all-encompassing provision that applies to all the sections in the EFWA that is liability-creating. It is not limited or restricted in its application to s 5(1) only. In my view, the literal meaning of s 23(1) is very clear from the plain and simple words used in the provision. The words `shall be guilty of the offence` make it obvious that a person who abets the commission of any offence under the EFWA will be considered as being guilty of the substantive principal offence. Hence, it should be noted that the charge under which the appellant was convicted states that he had committed an offence under s 5(1), read with s 23, and does not state that he had committed an offence under s 23(1). The distinction in such wording is important.

Counsel for the appellant tried to argue that the words `the offence` in s 23(1) refers to the offence of abetment. I am unable to accept such an interpretation because it is incongruent with the rest of the section and it also makes absurd the whole purpose behind the provision. The words `the offence` must mean the principal offence and not the offence of abetment. The second half of s 23(1) provides in no uncertain terms, that the punishment for the offence of abetment shall be the same as the punishment provided for the principal offence. This follows from the earlier part of the section, since it is precisely because the abettor will be considered to be guilty of the principal offence, that the punishment for the abettor shall be the same punishment as that provided for the principal offender.

Consistent with the above interpretation, is the fact that s 23(1) EFWA does not itself provide specifically for the punishment for an offence of abetment. This is because the appropriate punishment should be determined by referring to the respective section which provides for the principal offence, which in the present case is s 5(1). Therefore, if the principal offence committed had been an offence under, say s 22(1), instead, then the punishment for the abetment of such an offence would depend on what is provided for in s 22(1). To illustrate the point further, I will mention that s 22(1), unlike s 5(1), does not provide for enhanced punishment for subsequent convictions under the section. This means that if the appellant had a second or subsequent conviction under s 22(1), he would not be liable to any enhanced punishment because s 22(1) does not provide for it. The argument by the appellant`s counsel that the trial judge`s reasoning would have the effect that any second or subsequent conviction of any offence within the EFWA will attract enhanced punishment is therefore an absolutely erroneous one. In the context of the EFWA, whether or not there is enhanced punishment for subsequent convictions for offences under the EFWA must depend on the exact wording of the provision relating to the principal offence.

In reading the provisions in the EFWA, it is also important to bear in mind the policy considerations behind the introduction of the EFWA, which was enacted in 1990 to replace the repealed Regulation of Employment Act (Cap 127, 1970 Ed), which Parliament had found to be inadequate. In the parliamentary debates during the second reading of the Employment of Foreign Workers Bill on 4 October 1990, the Minister highlighted, at column 449, that:

> *To circumvent these controls, some employers have resorted to employing foreign workers illegally without work permits. With the enhancement of penalties under the Immigration Act, the illegal workers are now mostly foreigners with valid social visit passes but no work permits.* ***Some have valid work permits but are deployed illegally to other sectors or companies. Such illegal employment has to be checked as it undermines our economic strategy****.*
>
> *The Employment of Foreign Workers Bill seeks to repeal and re-enact with amendments the Regulation of Employment Act, which is the current legislation for regulating the employment of foreign workers.* ***The Bill provides enhanced***

***penalties and powers to enable the Ministry to deal more effectively with the problem of illegal foreign workers**. [Emphasis mine.]*

It is clear from the debates that the mischief which Parliament intended to deal with through the introduction of the EFWA and its enhanced penalties, was not confined to the employment of illegal foreign workers but extended also to illegal deployment of foreign workers who have valid work permits. This evidently encompasses the present situation, where a main contractor such as the appellant, abets in the illegal employment of a foreign worker by his sub-contractor, by allowing the illegal deployment of his own worker to his sub-contractor for work not covered under the valid work permit. In such circumstances, the abettor must be viewed as being just as culpable as the principal offender since the offence could not possibly have been committed had it not been for the aid provided by the abettor in supplying the foreign worker. If the argument advanced by the appellant`s counsel is accepted, it would mean that an abettor will not suffer from the enhanced punishment despite repeated convictions for abetting an offence under s 5(1). This is clearly against the intention of Parliament and would seriously undermine the efforts taken by the government to exercise stringent controls on the use of foreign labour in the local market.

Taking into consideration the mischief which the EFWA was intended to deal with and applying the literal meaning of the words in s 23(1), the appellant was evidently a second offender under s 5(1). The present conviction for abetting an offence under s 5(1) is, by virtue of the wording in s 23(1), regarded as an offence under s 5(1). Since the appellant already had a previous conviction under s 5(1), the present conviction must constitute his second conviction under the section. Such being the case, the enhanced punishment provided in s 5(6)(b)(i) must be applied and the mandatory custodial sentence be imposed. To put matters beyond any doubt, I shall further clarify that, if the situation had been the converse, i. e. if the first conviction was for the abetment of an offence under s 5(1) and the second conviction was for committing the substantive offence under s 5(1), the enhanced punishment would similarly be attracted.

Pausing here, it is necessary for me to emphasise that the above interpretation is particular to the provisions of the EFWA, which were specifically worded by Parliament in order to deal with the mischief behind the Act. To illustrate this point, the wording in s 23(1) of the EFWA can be contrasted with the general provisions on abetment in the Penal Code (Cap 224). Section 109 of the Penal Code provides that `whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence`. It should be noted immediately that this provision, as well as the other abetment provisions in the Penal Code, is unlike that of s 23(1) EFWA, in that it does not explicitly provide that the abettor will be treated as being guilty of the substantive offence. At a conceptual level and on the question of conviction, an abetment offence is certainly still distinct from the substantive principal offence. Therefore, the holding in this case should not be interpreted to mean that in all cases, an abetment offence would automatically be treated as being the same as the substantive principal offence. It also does not mean that a conviction for an abetment offence will always attract enhanced punishment once the accused person is shown to have a prior conviction for the principal offence abetted. As I mentioned earlier, whether or not enhanced punishment should be imposed would depend very much on the exact wording of the provisions dealing with the abetment offence and the substantive principal offence.

The effect of the wording of s 23(1) of the EFWA is largely for the purposes of sentencing. Thus, in my view, counsel for the appellant misinterpreted the trial judge`s statement that, `abetment is

therefore equally culpable as the substantive offence`. The trial judge had preceded this statement with the remark that the offence of abetment carries the same punishment as the substantive offence. Hence, what the trial judge actually meant was that, for the purposes of sentencing, the offence of abetment shall be treated in the same way as the substantive offence.

Rules of statutory interpretation

In the light of the above conclusions, I am of the opinion that there is no room for the application of the rules of statutory interpretation argued by counsel for the appellant. The literal meaning of s 23(1) and s 5(6)(b)(i) is clear and apparent from the words of the provisions and does not require the court to adopt any purposive approach whatsoever in interpreting them. In any case, I do not think that the adoption of a purposive approach towards reading the sections would have reached a different result from that which I have arrived at earlier. In addition, the presumption of construing penal provisions in favour of the accused is only applicable where there is some ambiguity or doubt over the interpretation or where there are two different reasonable constructions of the penal sections. This is not the case in the present appeal.

Conclusion

Whilst counsel for the appellant presented his arguments with diligence before this court, he failed to convince me that he was right on the facts and the law of this case. Given the wording of the provisions in the EFWA and the important policy considerations behind that statute, I am of the view that the sentence imposed by the trial judge was correct and therefore the appeal should be dismissed. Accordingly I so order.

Outcome:

Appeal dismissed.