Public Prosecutor v Koh Beng Oon
[2000] SGHC 262

Case Number : MA 78/2000

Decision Date : 01 December 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Wong Keen Onn, Ivan Chua Boon Chwee and Tai Wei Shyong (Deputy Public Prosecutor) for the appellant; Kasiviswanathan Shanmugam SC, Tan Chuan Thye and K Muralidharan Pillai (Allen & Gledhill) for the respondent

Parties : Public Prosecutor — Koh Beng Oon

Contract – Contractual terms – Parol evidence – Whether contemplation of parties should be considered – ss 3 & 94 Evidence Act

Credit and Security – Pledges and pawns – Whether pledge for contingent debt possible – Whether terms of pledge prohibit sub-pledge

Criminal Law – Offences – Property offences – Criminal breach of trust -Whether sub-pledging of vehicle documents amount to misappropriation – s 409 Penal Code

: This was an appeal against the decision of district judge Siva Shanmugam, where he acquitted the respondent, Koh Beng Oon (`Mr Koh`), of 12 charges of criminal breach of trust. The 12 charges are similar to one another. The first of them reads:

> *You, Koh Beng Oon, are charged that you, between 5 July 1999 and 7 July 1999, in Singapore, committed criminal breach of trust, in that you, whilst being the Managing Director of Auto Asia (S) Pte Ltd (`the Company`), and in the way of your business as an agent of the company being entrusted with dominion over property, namely, Preferential Additional Registration Fee Certificate for vehicle number SBH 1295T belonging to one Lie Halim@Freddy Tjoe, did dishonestly misappropriate the said property and you have thereby committed an offence punishable under s 409 of the Penal Code (Cap 224, 1985 Ed).*

The facts

Mr Koh was the managing director of Auto Asia (S) Pte Ltd (`Auto Asia`). The company was incorporated on 2 April 1991 and was involved in the business of selling cars. Mr Koh was the majority shareholder, holding 600,000 shares in the company. The remaining 450,000 shares were held by his wife, Mdm Constance Tan Gek Suan.

Sometime in early 1998, Auto Asia secured the exclusive right to sell Kia cars in Singapore. Actual sales began sometime around June 1998, and Auto Asia managed to sell about 130 cars by year-end. In January 1999, Auto Asia launched a sales promotion for Kia Mentor cars, priced at $59,900, inclusive of the Certificate of Entitlement (`COE`). The COE price for the relevant category of vehicle at that time was $34,508. A second promotion for Kia Mentor cars was launched in March 1999, at the price of $66,800.

A large number of orders were received pursuant to the promotions. All customers who placed an order with Auto Asia were required to pay a booking fee of $2,000 and a COE deposit of $8,000. Among these customers, were the 12 named in the charges. They did not pay the full $10,000 in

cash. Instead, they made a cash payment of between $2,000 to $5,000 for the booking fee and as partial payment for the COE deposit, and in addition, deposited either the log-card or the Preferential Additional Registration Fee (`PARF`) certificate for their existing vehicle with Auto Asia. The log-cards and PARF certificates will be referred to collectively as `the vehicle documents`. Each of these 12 customers signed the following form (`the form`):

> ***Re: Pledge of Vehicle Log-Card/Parf Cert as Part Payment for COE Bidding Deposit***
>
> *I, [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar], NRIC No [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] of [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] confirmed and agreed to pledge my used car/PARF cert number [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] log-card/PARF cert, NRIC, transfer and early settlement forms duly signed with AUTO ASIA (S) Pte Ltd as part of the COE deposit for the purchase of [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] unit of [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] under vehicle order agreement no. [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] for name [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] NRIC No [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] Upon successful COE bidding and time of registration, I shall allow Auto Asia (S) Pte Ltd to sell or scrap my car/PARF cert and to redeem the amount they have paid for the COE bidding. Also, I must settle all the balance payment before registration of the new vehicle. Failure to this Auto Asia (S) Pte Ltd have all rights to sell or scrap my car and to claim the difference on the full COE amount bidded and other miscellaneous cost incurred for the COE bidding and booking fee will be non-refundable. [NB: Original form was drafted in full caps.]*

The COE bidding process mentioned in the form, was introduced in May 1990 as a means of controlling the growth of vehicle population in Singapore. Under the COE system, a COE must be obtained through a process of competitive bidding before a vehicle can be registered. When making a bid, 50% of the bid amount is deducted from the applicant`s bank account as deposit for the application. This deposit is refunded if the bid is unsuccessful. The bidding is usually conducted by the Land Transport Authority (`LTA`) from the 1st to the 7th of each month. Bidding usually closes at 4pm on the 7th of the same month, whereupon the LTA will announce the lowest successful bid for each category. A successful bidder needs only pay the lowest successful price (`strike price`), and not the amount that was actually bid.

Auto Asia`s practice was to secure the COE for its customers, either by bidding for it on its own or through an agent. This required Auto Asia to pay the required COE deposit to the LTA. Auto Asia had since July 1994, obtained a COE financing facility from a finance company called DP Financial Associates Pte Ltd (`DP`). DP was the sole managing agent for Hitachi Leasing (S) Pte Ltd (`Hitachi Leasing`) in relation to loans provided by Hitachi Leasing. Under the facility, Auto Asia would submit a list of customers to DP for whom COEs were required, and Hitachi Leasing would extend the necessary funding for the COE deposits through DP.

Sometime in early July 1999, Mr Koh submitted to DP a list of 120 customers who needed COE bidding. The total amount of credit required for the bidding was $3,010,050. DP was initially willing to extend only $775,000. When Mr Koh asked DP for additional financing, they replied that they would do so only if Mr Koh could provide some security.

Consequently, on 5 July 1999, Mr Koh delivered to DP ten vehicle documents. Eight of these documents belonged to persons named in the charges. On the security of these documents, DP sent Mr Koh a cheque for $141,600 on 6 July 1999 made out in Mr Koh`s name.

On 7 July 1999, Mr Koh delivered another six vehicle documents to DP. Four of these documents belonged to persons named in the charges. DP granted further credit of $80,000 to Auto Asia on the security of these documents. Mr Koh requested DP to use this $80,000 to finance COE bidding for three persons.

In the July 1999 COE bidding exercise, DP bid for 58 COEs on behalf of Auto Asia at the bid price of $50,000. The strike price for that bidding exercise was $45,876. On 15 July 1999, the LTA issued 58 temporary COEs to DP. Auto Asia was unable to redeem the COEs from DP due to insufficient funds. Auto Asia has since August 1999, entered into receivership.

The prosecution brought forth 32 charges of criminal breach of trust and 15 charges of cheating against Mr Koh. At the trial, the prosecution proceeded with 12 charges of criminal breach of trust. The remaining charges were stood down pending the outcome of the trial.

Decision of the judge

At the end of the prosecution`s case, the judge found that a prima facie case had been made out in respect of all the charges, and called for the defence. Mr Koh elected not to give any evidence and did not call for any witnesses.

The judge found that the vehicle documents had been pledged and that there were no restrictions against a sub-pledge. There was consequently no misappropriation. Neither did the judge find any dishonest intent in Mr Koh`s conduct. The judge was also of the view that the circumstances of the case did not compel the drawing of an adverse inference against him under s 196(2) of the Criminal Procedure Code (Cap 68) (`CPC`). He was accordingly acquitted.

The appeal

Against this decision, the prosecution appealed. Section 409 of the Penal Code (Cap 224) provides that:

> *Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.*

Section 405 defines `criminal breach of trust` in the following way:

> *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or*

of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits `criminal breach of trust`.

An offence under s 409 of the Penal Code contains three elements. First, an entrustment of property. Second, misappropriation of the property entrusted. Third, misappropriation of that property with dishonest intent. The only elements in dispute were the second and third.

Misappropriation of property

The first issue in the appeal then was whether there was misappropriation of the vehicle documents. A key point of contention on this issue between Mr Wong, who appeared for the Public Prosecutor, and Mr Shanmugam SC, counsel for Mr Koh, was whether the deposit of the vehicle documents with Auto Asia amounted to a pledge, and if so, whether Mr Koh had the right to in turn sub-pledge these documents to DP. If as Mr Shanmugam contended, the deposit of vehicle documents with Auto Asia amounted to a pledge without any restrictions on a further sub-pledge, the element of misappropriation would not be satisfied.

Existence of a pledge

Mr Wong`s arguments on this issue were built around the fact that when the vehicle documents were handed over to Auto Asia, there was at the time no debt owing by the customers, since no COE had been successfully secured by Auto Asia on the customers` behalf. In his submission, there cannot be a pledge for a contingent debt.

In making this argument, he was met by a decision of the Supreme Court of Victoria in **Australia and New Zealand Banking Group Ltd v Curlett Cannon and Galbell Pty Ltd** (Unreported) where Ormiston J said at p 103 after a review of the authorities that:

... a pledge may be constituted by a security for a debt which shall or may arise in the future or which has arisen at a time other than that of the delivery.

Mr Wong sought to narrow the propositions laid down by this case, arguing that it was not authority for the proposition that there can be a pledge for a contingent debt, and that all that was decided was that where there is a pledge of a contingent debt, the time of reckoning of priorities may be taken as the time the goods were deposited, and not the time when the debt subsequently arose.

With respect to Mr Wong, my reading of ***Australia and New Zealand Banking Group v Curlett Cannon*** did not bear him out. In that case, the plaintiff bank had a registered mortgage over the assets of the debtor company Najee Nominees Pty Ltd (`Najee`). In March 1991, Najee defaulted and the bank appointed a receiver to take possession of the charged property. The receiver sought from the defendant customs agent release of three consignments of clothing. The customs agent refused, claiming that they had a right in priority by virtue of a pledge, which arose when the bills of lading for the consignments were delivered to them sometime in February 1991.

Although the bank`s registered mortgage had been granted on 3 September 1985, it was common

ground that the bank`s charge crystallised only upon the appointment of the receiver on 28 March 1991. It was also undisputed that the customs agent`s pledge, if it could be so characterised, would have priority since it came earlier in time. The bank sought to counter this by arguing that they had priority, because their charge had been registered for the purposes of the Corporations Law, while the customs agent`s right, which they argued was a registrable charge, had not been registered. Under the relevant law, the right would not be a registrable charge if it could be characterised as a pledge. Therefore, the nature of a pledge was very much at the heart of the decision, contrary to Mr Wong`s suggestion.

It was in this context that Ormiston J made his ruling. It was argued before him that each transaction did not constitute a pledge because no debt existed at the time the bills of lading were deposited; ***Australia and New Zealand Banking Group v Curlett Cannon*** at p 102. This was his response at p 103:

> *The wide class of obligation which can be secured by a pledge is later stated by Story J as follows (para 300) [from **The Law of Bailments** (1878) 9th Ed]:*
>
> *` **It may be delivered as security for a future debt or engagement**, as well as for a past debt; for one or for many debts and engagements; upon condition, or absolutely; for a limited time, or for an indefinite period. It matters not what is the nature of the debt or the engagement. The contract of pledge is not confined to an engagement for the payment of money; but it is susceptible of being applied to any other lawful contract whatever.`*
>
> *See to the same effect **Cotte on Mortgages**, op cit, Vol II p 1459, **Fisher and Lightwood**, op cit, p 108, and **Paton on Bailments** [1952] p 358.*
>
> ***These authorities sufficiently show that a pledge may be constituted by a security for a debt which shall or may arise in the future** or which has arisen at a time other than that of the delivery. [Emphasis added.]*

He went on at p 103 to apply this statement of law to the facts on hand:

> *Here, **when the bills of lading came into the hands of the customs agent, possession of the goods was constructively delivered to them for the purposes of a pledge** (as set out in cl 22) and there was either an immediate liability and debt created for services thereafter to be performed or, **at the least, as soon as those services were performed a debt would arise which was of a kind which would support a pledge. The fact that the bills were delivered before the debt arose could not deprive the customs agents of their agreed rights as pledgee**. [Emphasis added.]*

It is clear from the above that Ormiston J undertook a considered and extensive review of the authorities in arriving at his conclusion that there can be a pledge for a contingent debt. There seems little reason to disagree with this. The earliest statement of a pledge dates back three centuries, when Sir John Holt CJ said in **Coggs v Bernard** [1703] 2 Ld Raym 909 at 913 that:

> *... when goods or chattels are delivered to one another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge.*

As Professor Goode observed in ***Commercial Law*** (2nd Ed) at pp 643-644:

> *... in the early days of the common law, the taking of possession by the creditor was almost a* ***sine qua non*** *of a valid security interest ... With the development of documentary intangibles the scope of the pledge increased. It could now be applied not only to goods but also to documents of title to goods and to instruments embodying a money obligation. Further it was not necessary for the creditor to take or retain physical possession; it sufficed that he had constructive possession through a third party or even through the debtor himself, a particularly useful rule for banks financing the import of goods against a pledge of shipping documents, for these could safely be released to the buyer against a trust receipt.*

The scope of a pledge has therefore expanded through the centuries, thereby ensuring the retention of its utility as a security device with changing times. The underlying rationale for security interests such as pledges, as well as liens and mortgages, is to facilitate commerce, and if a pledge for a contingent debt can serve a useful commercial purpose, and there is no denying its utility in the COE bidding context for both Auto Asia and their customers, there seems no reason to unduly confine the pledge to being a security device for existing debts.

In any event, even if a pledge should be so confined, the vehicle documents, being deposited as security for the unpaid portion of the required COE deposit of $8,000 in cash, is a pledge for an existing debt. Thus, Mr Wong`s argument that there is no pledge for a contingent debt fell either way.

Right to sub-pledge

In the Court of Queen`s Bench`s decision in **Donald v Suckling** [1866] LR 1 QB 585, Mellor J had held that there is no authority for implying a general term against a sub-pledge to the extent of the pledgee`s interest, unless prohibited by an express term of the contract. Mr Wong therefore argued that even if there was a pledge, Mr Koh was prevented from sub-pledging the vehicle documents to DP because of the restrictive wording of the form. This point can be dealt with quickly. The form has been reproduced above at [para] 4. What Mr Wong relied on was the phrase towards the end of the form which states:

> *Upon successful COE bidding and time of registration, I shall allow Auto Asia (S) Pte Ltd to sell or scrap my car/PARF cert and to redeem the amount they have paid for the COE bidding.*

However, what this prohibits is the sale of the vehicle document before successful COE bidding and registration. It does not prohibit a sub-pledge of the vehicle document before the described event. Mr Wong`s reliance on **Jaswantrai v State of Bombay** (Unreported) was for this reason misplaced. In that case, it was clear from the cited portion of the agreement and from Sinha J`s explanation at p 581 that there were specific prohibitions in the agreement against dealing with the security until the occurrence of certain contingencies, namely, failure to maintain the proper margin or default in repayment. Since none of those contingencies had arisen, the pledgee bank had no right to deal with the securities by way of a pledge, sub-pledge or assignment. In sharp contrast with ***Jaswantrai v***

State of Bombay , the form does not contain any prohibition against sub-pledging.

Mr Wong`s response was to argue that, in any event, the court should not look only to the express wording of the form, but at the contemplation of the parties, and that both the customers and the sales staff were of the view that Auto Asia was not authorised to sub-pledge the vehicle documents. In this, however, he was confronted by ss 93 and 94 of the Evidence Act (Cap 97). Section 93 provides that:

> *When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document ... no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.*

Section 94 goes on to state:

> *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions ...*

None of the provisos to s 94 applied to the facts of this case. The application of s 94 has been considered by the Court of Appeal in **Ng Lay Choo Marion v Lok Lai Oi** [1995] 3 SLR 221 . There, the court held that where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible.

Mr Wong sought to strengthen his attempt to bring in parol evidence by arguing that the court should take a wide approach in criminal proceedings, and look beyond the true interpretation of the form from a commercial point of view, and look instead at what the parties understood as the terms of entrustment. I did not find this argument compelling. The purpose of the general rule against parol evidence is to ensure that there is at least some modicum of certainty in commercial transactions. Where criminal liability is involved, there is an even stronger argument that the legality of parties` actions must be based on what is certain, as set out in the document, as opposed to being based on the subjective intention of each party.

It is clear from the above that there was a pledge of the vehicle documents by the customers with Auto Asia, without any restriction on sub-pledging. Mr Koh therefore could not be said to be misappropriating the vehicle documents when he sub-pledged them to DP for financing. Having failed to establish a key element of the offence, the appeal fell on this ground alone.

Dishonest misappropriation

The second issue in this appeal, that of dishonest misappropriation, would have arisen only if there was, in the first place, misappropriation of the vehicle documents. Having found that there was no misappropriation, I did not find it necessary to go into the question of whether there was any dishonest misappropriation.

Conclusion

In light of the above reasons, I dismissed the appeal without calling on Mr Shanmugam to present the case for Mr Koh.

Outcome:

Appeal dismissed.