Public Prosecutor v Sinsar Trading Pte Ltd
[2004] SGHC 137

Case Number : Cr Rev 9/2004, MA 7/2004

Decision Date : 24 June 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Goh Kok Yeow (De Souza Tay and Goh) for appellant; Benjamin Yim (Deputy Public Prosecutor) for respondent in the Magistrate's Appeal

Parties : Public Prosecutor — Sinsar Trading Pte Ltd

Criminal Procedure and Sentencing – Charge – Alteration – Substantive defects in charge – Whether appropriate for High Court to amend charge and convict on amended charge in light of application for criminal revision

Criminal Procedure and Sentencing – Revision of proceedings – Plea of guilty by letter – Maximum punishment for offence was imprisonment term of more than three months – Whether district judge erred in accepting plea of guilty by letter – Section 137(2) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Principles – Factors to be taken into account in sentencing – Whether facts of two cases sufficiently similar for there to be parity in sentencing – Offence under s 22(1) Environmental Pollution Control Act (Cap 94A, 2002 Rev Ed)

24 June 2004

Yong Pung How CJ:

1 This was a criminal revision filed by a district judge seeking to have this court set aside her conviction and sentence against Sinsar Trading Pte Ltd ("Sinsar") on the ground that she had exceeded her jurisdiction in accepting Sinsar's plea of guilty by letter. Sinsar also appealed against the fine of $15,000 meted out by the district judge. Both the criminal revision and the appeal were heard together before me. I allowed the criminal revision, and ordered the conviction and sentence to be set aside for a fresh plea to be taken on an appropriately amended charge. I will now give my reasons.

Facts

2 The National Environment Agency ("NEA") brought a departmental summons (NEA Summons No 54140 of 2003) against Sinsar on the following charge:

> You, Sinsar Trading Pte Ltd, 197702716K of Blk 150 South Bridge Rd #03-14 Fook Hai Bldg Singapore 058727 are charged that you, *on 05 Jun 2003* at about 11.00 am, at 150 South Bridge Road, *no person shall sell or offer for sale any hazardous substances unless he holds a licence granted by the director for such purpose* and you have thereby contravened section 22(1) of the Environmental Pollution Control Act 1999 and committed an offence under section 22(3) and punishable under section 27 of the aforesaid Act. [emphasis added]

3 The relevant sections of the Environmental Pollution Control Act (Cap 94A, 2002 Rev Ed) ("the Act") are as follows:

> **Application of this Part to hazardous substances**

21. This Part shall apply to the hazardous substances specified in the first column of Part I of the Second Schedule except where —

(a) they fall within the exclusion specified in the second column of that Part corresponding to those substances; or

(b) they are contained in any substance, preparation or product specified in Part II of that Schedule.

General prohibition with respect to importation and sale of hazardous substances

22.—(1) *No person shall import, possess for sale, sell or offer for sale any hazardous substance unless he holds a licence granted by the Director-General for such purpose.*

(2) Every licence granted to any person under this section shall not be transferable to any other person and no licence shall authorise the import, possession for sale, sale or offer for sale of any hazardous substance by any individual other than the individual named therein.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence.

Penalty for offences involving hazardous substances

27. Any person who is guilty of an offence under this Part, for which no penalty is expressly provided, shall be liable on conviction to a fine not exceeding $50,000 or to *imprisonment for a term not exceeding 2 years* or to both and, in the case of a continuing offence, to a further fine not exceeding $2,000 for every day or part thereof during which the offence continues after conviction. [emphasis added]

4 Under the Second Schedule of the Act, acetic acid is listed as the first hazardous substance on the list. There are two exclusions listed in the second column of the Second Schedule next to acetic acid, namely:

(a) substances containing not more than 80%, weight in weight, of acetic acid; and

(b) preparations and solutions for photographic use.

5 The NEA first informed Sinsar that it had contravened s 22(1) of the Act by a letter dated 28 July 2003. The letter mentioned an officer's inspection of Sinsar's premises on 5 June 2003. During this inspection, the officer realised that Sinsar had purchased 523 drums, or 110mt, of glacial pure acetic acid from Times Chemicals Pte Ltd for re-export. Subsequently, a summons was sent to Sinsar on 20 August 2003. This summons was accompanied by a document entitled "Plea of Guilty by Letter" for Sinsar to plead guilty if it so wished.

6 Under s 137(2) of the Criminal Procedure Code ("CPC") (Cap 68, 1985 Rev Ed), an accused may plead guilty by way of letter under certain circumstances. Section 137(2) states:

Personal attendance of accused may be dispensed with.

137(2). In any case relating to an offence punishable by fine or *by imprisonment not exceeding 3 months* or by both and in which a Magistrate has issued a summons, an accused person desiring to plead guilty and be convicted and sentenced in his absence may appear by advocate, or may by letter addressed to the court plead guilty and submit to pay any fine which may be imposed in

respect of that offence, and the court may thereupon record a plea of guilty and convict him according to law, and may sentence him to a fine with or without a sentence of imprisonment in default of payment of the fine. [emphasis added]

7 Sinsar pleaded guilty by way of letter. In this letter, it stated two grounds for the judge to consider in mitigation:

(I) The physical handling/transportation of this cargo from Malaysia to Pasir Panjang Port (for export) were [*sic*] all done by our suppliers (who hold a valid licence to deal with such products). At no time were we physically involved with this cargo.

(II) The export permit for this cargo was approved by the Trade Development Board of Singapore.

8 The matter came up for hearing before the district judge during a night court session on 28 October 2003. The plea of guilty by letter was tendered by the prosecuting officer. Sinsar did not appear in court and it was not represented by counsel at the hearing. The district judge recorded the plea of guilty and imposed a fine of $15,000.

9 Subsequently, Sinsar engaged counsel. It obtained leave from the High Court on 9 January 2004 to file an appeal against the sentence out of time and the appeal against sentence was filed on the same day. The district judge issued her grounds of decision on 28 January 2004. In considering the sentence to be imposed, the district judge made the following observations ([2004] SGDC 54):

7 Against this background, I am of the opinion that the relevant factors to be taken into consideration for this offence would include the quantity of the substances involved (the larger, the more aggravating), the level of co-operation on the part of the defendant with the agency in relation to subsequently dealing with the hazardous substances in question, the type of hazardous substances involved and its relative danger to the environment, genuine oversight on the part of the defendant, and the presence or absence of previous convictions for similar offences. Turning to the facts of this case, it was not stated in the charge or in the defendant's letter pleading guilty to the offence the type or quantity of hazardous substances involved. I did however accept as a mitigating circumstance the fact that the defendant did not physically handle the cargo and it was physically handled all the way through to export by its Malaysian suppliers who were licensed to do so. I had to balance this against the legislative intention that the import and sale of such substances must be strictly regulated and that *all* potential importers and sellers at any stage of the transactions in such substances must be assessed by the relevant agencies before they are permitted to deal in these substances. I was however unable to give any weight to the fact that the Trade Development Board had approved the export permit for the cargo of hazardous substances as it did not address the main concern of the legislative provision under which the defendant was convicted. Even if the cargo was subsequently exported, its presence in the Singapore ports was a potential risk to our environment.

8 Taking into account the relevant mitigating factor, the fact that the defendant is a first offender and the maximum fine of $50,000 and/or 2 years' imprisonment for this offence, I was of the opinion that a fine of $15,000 was appropriate.

10 On 10 March 2004, the district judge filed this criminal revision to set aside her conviction and sentence on the ground that she had exceeded her jurisdiction under s 137(2) of the CPC.

11 The Prosecution agreed with the district judge that the conviction and sentence should be

set aside. The Prosecution raised three grounds in support of its contention: (a) the charge had been defective; (b) there had been a procedural irregularity; and (c) a disparity in sentencing had arisen. It submitted that this court should quash the conviction, set aside the sentence and remit the case back to the subordinate courts for a fresh plea to be taken on a charge as appropriately amended. Counsel for Sinsar also agreed with the district judge that the conviction and sentence should be set aside. However, counsel went one step further by urging me to grant Sinsar a discharge amounting to an acquittal.

Issue before this court

12 The sole issue for my determination was whether the criminal revision should be allowed and, if it was allowed, the consequential order to be made.

General principles on criminal revision

13 In *Ang Poh Chuan v PP* [1996] 1 SLR 326, I cited Indian cases that discussed the general principles to be considered by the High Court when faced with an application for criminal revision and came to the following conclusion (at 330, [17]):

> Thus various phrases may be used to identify the circumstances which would attract the exercise of the revisionary jurisdiction, but they all share the common denominator that there must be some serious injustice. Of course there cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. But generally it must be shown that there is *something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below.* [emphasis added]

1 4 *Ng Kim Han v PP* [2001] 2 SLR 293 arose out of the arrest of seven persons and one Chua Seong Soi while playing a game of cards in a factory. All seven petitioners in that case were jointly charged, pleaded guilty and duly sentenced in the subordinate courts. Subsequently, I allowed Chua Seong Soi's appeal against his conviction (see *Chua Seong Soi v PP* [2000] 4 SLR 313) on the ground that the factory did not constitute a gaming house under the provisions of the Common Gaming House Act. Pursuant to that decision, the seven persons in *Ng Kim Han v PP* petitioned for a criminal revision of their conviction and sentence. I allowed the criminal revision and found that the petitioners had been convicted and sentenced even though a crucial element of their offence was absent. In coming to that decision, I observed at [10]:

> While there is no clear-cut test of what constitutes "serious injustice", I believe that it cannot really be disputed … that such injustice should be held to exist when a person has been convicted despite the obvious absence of an essential constituent of the offence concerned. Thus, *petitions for criminal revision have been allowed in cases where the statement of facts do not disclose all the necessary elements of the offence but where the petitioner pleads guilty anyway*. See, for example, *Chen Hock Heng Textile Printing Pte Ltd v PP* [1996] 1 SLR 745. [emphasis added]

15 Like the present case, *Chen Hock Heng Textile Printing Pte Ltd v PP* [1996] 1 SLR 745 involved a departmental prosecution. In that case, the appellant company pleaded guilty to a charge under s 5 of the Building Control Act (Cap 29, 1990 Rev Ed) ("BCA") and was sentenced to a total fine of $197,600. Section 5 of the BCA prohibits persons from carrying out building works without the approval of the Building Authority. However, the statement of facts revealed that the appellant company had merely allowed two sheds to remain erected at the front and side of the factory

premises.

16 In its appeal against sentence, counsel for the appellant contended that the facts stated in the statement of facts did not constitute any offence under the relevant statutory provisions. This was conceded by the Prosecution. I found that no offence could have been committed by the appellant since there was no allegation of building works being carried out by any person at all, much less the appellant, during the relevant period. I found that the facts of that case fell squarely within the situation contemplated in *Mok Swee Kok v PP* [1994] 3 SLR 140, and commented, at 749, [11], that:

> There can hardly be another case in which it is more "manifestly plain that the offence charged is nowhere disclosed in the statement of facts".

I then exercised the revisionary powers of the High Court to quash the conviction.

17 With these principles in mind, I will now turn to the detailed errors in the prosecution and sentencing of Sinsar in the court below.

Procedural irregularity

18 This formed the basis of the district judge's application for criminal revision. To my mind, it was the single most straightforward ground for allowing the criminal revision. Under s 137(2) of the CPC, an accused person may plead guilty by way of letter only if the offence is punishable by fine or by imprisonment not exceeding *three months* or by both. Section 27 of the Act, which stipulates the punishment for the offence with which Sinsar was charged, states that the maximum punishment for that offence is a fine of up to $50,000 or imprisonment of up to *two years* or both. In light of the maximum imprisonment term of two years under s 27 of the Act, which exceeds that prescribed under s 137(2) of the CPC, it was patently clear that the district judge had exceeded her jurisdiction in recording the plea of guilty by way of letter.

19 Be that as it may, it must be remembered that the procedural irregularity originated from the fact that the NEA sent the summons to Sinsar with a standard form letter to facilitate Sinsar to plead guilty by letter if it so wished. Since Sinsar could not have pleaded guilty by letter for the offence with which it was charged, I found that the NEA should not have attached the standard form letter in the first place. Much confusion could have been avoided if the standard form letter had not been sent. Surely it would have been reasonable for the NEA to check whether it was possible for Sinsar to plead guilty under the offence with which it was charged before attaching the standard form letter. Yet, it appeared to me that the NEA failed to perform the requisite checks.

Defective charge

20 The procedural irregularity was but the tip of the iceberg as far as errors in Sinsar's prosecution, conviction and sentence were concerned. The genesis of the errors in the prosecution of Sinsar could be traced to the blatantly defective charge. I noted with great surprise that the charge was so poorly drafted that it did not conform to basic rules of grammar. The words in the charge did not even form a proper sentence: see the emphasised words in the charge quoted at [2] above. It appeared to me that the words in the charge were merely copied and pasted from the words in s 22(1) of the Act: see the emphasised words in s 22(1) of the Act reproduced at [3] above. Apart from the obvious grammatical inaccuracies in the charge, I found that the charge was substantively defective on four grounds.

21 Firstly, the date of the offence reflected on the charge was erroneous. The charge stated that the offence was committed on 5 June 2002. However, that was the day the NEA officers inspected Sinsar's premises and found records of the export. The cargo clearance permits issued by the Trade Development Board showed that Sinsar had exported the 525 drums of acetic acid on 3 June 2002. This was confirmed by the affidavit of one Sulaiman bin Abdul Rahman, an NEA officer whose affidavit was procured by the Prosecution for the purposes of this criminal revision. In short, it appeared to me that NEA did not realise that the offence could have been committed when the drums of acetic acid were exported on 3 June 2002, and not on 5 June 2002 which was the date reflected on the charge.

22 Secondly, the charge did not specify the hazardous substance that Sinsar sold and the concentration of that substance. It is trite law that an accused person has to be given sufficient notice of the matter with which he is charged, in order to ensure that he is able to answer the charge. This is reinforced by s 159(1) of the CPC which states:

> The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or *the thing, if any,* in respect of which it was committed *as are reasonably sufficient to give the accused notice of the manner with which he is charged.* [emphasis added]

23 I have perused Part I of the Second Schedule to the Act. I found that there are 274 hazardous substances listed therein. Since it was not at all clear which of the 274 hazardous substances the charge was referring to, I failed to see how the summons could be said to have put Sinsar on notice of the manner with which it was charged. I noted, however, that the NEA did send a letter dated 28 July 2003 informing Sinsar about its officer's inspection of Sinsar's premises on 5 June 2003, and how that officer came to realise that the acetic acid had been re-exported. Be that as it may, it must be remembered that the summons was sent on 20 August 2003, almost one month after the letter. Under these circumstances, I found that the NEA should have restated the hazardous substance in the charge. The situation might have been different if the summons had been accompanied by the letter informing Sinsar of the circumstances surrounding the discovery of the offence. However, this was not the case here.

24 This omission to state the hazardous substance was compounded by the fact that the substance involved in this case was acetic acid which is not hazardous at all in low concentrations. In fact, vinegar used in cooking contains about 4–8% acetic acid. The materiality of the concentration of acetic acid can be gleaned from the Act itself. Section 21 of the Act states that Part VII of the Act only applies to substances listed in the first column of the Second Schedule except where they fall within the exclusions specified in the second column of that Schedule. For acetic acid, the Second Schedule states two exceptions, namely, substances containing not more than 80%, weight in weight, of acetic acid and preparations and solutions for photographic use. In light of this particular quirk of acetic acid, it was my opinion that not only should the prosecuting authority have named the substance, it should also have indicated the concentration of the acetic acid in the charge. Yet, it failed to do both.

25 Thirdly, the charge did not state the amount of acetic acid that Sinsar had re-exported. This omission was material because it would have affected the trial judge's ability to pass an appropriate sentence. Indeed, this omission, as well as the omission to state the type of hazardous substance involved, was noted by the district judge at [7] of her grounds of decision: see [9] above. I noted that the quantity was stated in NEA's letter of 28 July 2003 but, as I have pointed out above, this letter was sent to Sinsar almost one month before the summons.

26 Fourthly, the charge was ambiguous about the *actus reus* involved in the offence. It was unclear whether Sinsar was being charged for having sold the goods, or for having offered to sell the goods.

27 Quite apart from these four defects in the charge, I next had to determine whether I should amend the charge and convict Sinsar on an amended charge. In *Garmaz s/o Pakhar v PP* [1995] 3 SLR 701, I held that the High Court can amend the charge so long as the safeguards against prejudice are taken into account. Then, I made the following findings on the facts of that case at 723, [91]:

> I am satisfied that the amended charges can in no way prejudice the appellants' defence. The amendments only pertain to the form of the charges. It is clear that the proceedings in the trial would have taken the same course. The evidence recorded would have been the same. Accordingly, I see no difficulty in ordering the amendments. The appellants will stand convicted on the amended charges as I am satisfied that the case has been proved beyond reasonable doubt.

28 While I found that three of the four elements could have been amended without causing Sinsar much prejudice (*viz*, the date of the offence, the quantity of the hazardous substance, and the *actus reus*), I refrained from doing so because there was no reliable evidence before me with regard to the concentration of the substance. Without knowing the concentration, one could not amend the charge with certainty. The unique facts of the present case were such that it would be inappropriate for me to amend the charge. In any event, there was no need for me to amend the charge because, for reasons to be enunciated at [36] and [37] below, I found that a more prudent course would be to remit the case back to the subordinate courts for a fresh plea to be taken on an amended charge.

Disparity in sentencing

29 The above would have been more than sufficient to demonstrate that serious injustice would have been occasioned if Sinsar's conviction and sentence were allowed to stand. Nevertheless, for the sake of completeness, I wish to address the issue of disparity in sentencing.

30 It was undisputed that the Act is a relatively new Act, having been passed by Parliament only in 1999. Even the district judge noted this, and observed that there were no previous authorities on the appropriate sentence for this offence for her to rely on.

31 Bearing that in mind, I commend the district judge in considering a spectrum of relevant factors to take into consideration as she did at [7] of her grounds of decision: see [9] above. I agreed with her that the factors to be taken into account for an offence under s 22(1) of the Act would include:

(a) the quantity of the hazardous substance involved;

(b) the level of co-operation on the part of the defendant;

(c) the type of hazardous substance involved and its relative danger to the environment;

(d) whether there was genuine oversight on the part of the defendant; and

(e) whether there were previous convictions for similar offences.

32 Be that as it may, she appeared to have inadvertently overlooked the sentence she meted out for a similar offence under s 22 of the Act during the same night court session: *PP v Welcome Trading Pte Ltd* NEA Summons No 42529 of 2003. In that case, Welcome Trading Pte Ltd ("Welcome Trading") pleaded guilty to a charge under s 22 of the Act for export of hazardous substances. Welcome Trading had exported 120mt of sodium cyanide to a buyer in North Korea. Like Sinsar, Welcome Trading did not handle the goods; it merely purchased and re-exported them. From the documents that counsel adduced before me, it appeared that Welcome Trading's only contact with the goods was nominal. Like Sinsar, Welcome Trading was a first offender and had co-operated with NEA in its investigations. The only difference appeared to be that Welcome Trading was represented by counsel at the night court session whereas Sinsar was not. Welcome Trading was sentenced to a fine of $5,000 while Sinsar was given a $15,000 fine.

33 It is trite law that a sentencing judge has the discretion to look to the unique facts and circumstances to determine the appropriate sentence in each case: see *Soong Hee Sin v PP* [2001] 2 SLR 253. However, it is desirable to achieve some form of parity in sentencing for cases where the facts are similar. In *Teo Kian Leong v PP* [2002] 1 SLR 147, I stated at [44] that:

> While parity of sentencing is an important principle, this argument can only succeed if all the circumstances of the previous cases and the present one are identical or at least very similar.

34 While the present case and *PP v Welcome Trading Pte Ltd* may not be completely identical, there are certain striking similarities. The quantity of hazardous substances involved in both cases was similar: Sinsar exported 110mt whereas Welcome Trading exported 120mt. Both companies had little contact with the hazardous substances as they appeared to have bought them for direct re-export. Both Sinsar and Welcome Trading pleaded guilty. In light of these facts, I found that the similarities were simply too stark to warrant a disparity of some $10,000 in the fines meted out in the two cases. The disparate sentence was therefore yet another ground for allowing the criminal revision.

35 To my mind, this mistake occasioned by the district judge was an inadvertent oversight and nothing more. One must remember that the mistake arose in a night court session, where the turnover of cases is typically high and where a judicial officer is rarely given much time to ponder over the facts of each case before the next case comes before him or her. Under such conditions, one would not be entirely surprised if a very rare mistake like the present was to be occasioned. To err is human.

Appropriate order to be made

36 In light of the above, I found more than ample grounds for the criminal revision to be allowed. Unlike cases where an accused person seeks to retract his plea of guilt willy-nilly, there were simply too many errors in the prosecution, conviction and sentence for Sinsar's conviction and sentence to stand. Consequently, there was no doubt in my mind that Sinsar's conviction and sentence ought to be set aside.

37 It remained for me to determine the consequential orders to be made. Counsel for Sinsar submitted that there should be a discharge amounting to an acquittal. I found that that would be too indulgent a course of action to take. There was hardly any concrete evidence to convince me that Sinsar should have been let off scot-free. A more prudent course of action was to remit the case back to the subordinate courts and for a plea to be taken by Sinsar as and when the charge is appropriately amended by the Prosecution.

Appeal against sentence

38 As I had decided to allow the criminal revision and set aside the conviction and sentence, Sinsar's appeal against sentence became superfluous. Consequently, I deemed it to have been withdrawn.

Conclusion

39 There was no doubt in my mind that serious injustice would have been occasioned if Sinsar's conviction and sentence were allowed to stand. I therefore allowed the criminal revision, set aside the conviction and sentence meted out by the district judge and remitted the case back to the subordinate courts for a fresh plea to be taken on an appropriately amended charge.

40 It leaves me to say a few words about NEA's conduct of the present case. I am disappointed by the slipshod manner in which the prosecuting authority commenced this action against Sinsar. The charge was abysmally defective. Not only was the charge grammatically bad, it failed to state material facts in the charge and, even when it did so (*viz*, the date of the offence), it was inaccurate. To make matters worse, the poorly drafted charge was sent to Sinsar with a standard form letter to plead guilty by letter even though Sinsar could not have pleaded guilty by letter for the offence it was charged with. The entire case was put on a wrong footing right from the start. It is my fervent hope that the NEA and other departmental authorities will refrain from making such mistakes in future and be more careful in their conduct of departmental prosecutions. It is in the interest of justice to ensure that parties and the courts do not have to be put through the inconvenience of such faulty or procedurally-irregular prosecutions.

Criminal revision allowed, conviction and sentence set aside for a fresh plea to be taken on an appropriately amended charge. Appeal against sentence deemed withdrawn.