Chew Gim Ser v Public Prosecutor
[2004] SGHC 246

Case Number : Cr M 19/2004, MA 65/2004

Decision Date : 05 November 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Goh Aik Chew (Goh Aik Chew and Co) and Mimi Oh (Mimi Oh and Associates) for appellant; Imran bin Hamid (Deputy Public Prosecutor) for respondent

Parties : Chew Gim Ser — Public Prosecutor

Criminal Law – Statutory offences – Customs Act – Whether appellant concerned in importing cigarettes without paying customs duty and goods and services tax – Section 130(c) Customs Act (Cap 70, 2001 Rev Ed)

Criminal Procedure and Sentencing – Appeal – Adducing fresh evidence – Whether appellant satisfying conditions for adducing fresh evidence on appeal – Whether necessary in interests of justice to allow fresh evidence to be adduced

Criminal Procedure and Sentencing – Sentencing – Appeals – Whether sentences imposed excessive

Evidence – Witnesses – Attendance – Failure of appellant to call witnesses to support defence – Whether adverse inference correctly drawn against appellant – Section 116 Illus (g) Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Witnesses – Attendance – Prosecution failing to call witnesses resident abroad – Witnesses not relevant to Prosecution's case – Whether adverse inference should be drawn against Prosecution – Section 116 Illus (g) Evidence Act (Cap 97, 1997 Rev Ed)

5 November 2004

Yong Pung How CJ:

1 The appellant was convicted and sentenced on four charges in relation to the importation of cigarettes from Malaysia into Singapore without paying customs duty and goods and services tax ("GST"). In addition to appealing against conviction and sentence before this court, he filed a criminal motion seeking leave to adduce additional evidence on appeal. After hearing counsel for the appellant address the court at great length and with much effort, I dismissed the motion and the appeal against conviction, but allowed the appeal on sentence. I now set out my reasons.

The facts

2 At about 4.30am on 23 October 2003, officers from the Immigration & Checkpoints Authority based at the Tuas Checkpoint inspected a Malaysian-registered refrigerated lorry bearing licence plate no JFT 8795 ("the lorry"). The officers found, hidden amongst consignments of frozen fish, 250 cartons of 200 sticks (*ie* 50,000 sticks) of Marlboro brand cigarettes bearing Singapore Health Warnings ("the cigarettes"). The cigarettes weighed 48.47kg and were valued at $17,259.85. The unpaid customs duty on the cigarettes was assessed at $12,359.85, while the unpaid GST was assessed at $690.39.

3 The driver of the lorry, Khairu Nazri bin Husain ("Khairu"), was arrested, and he admitted to importing the cigarettes. He worked as a driver for Bintang Hikmat Sdn Bhd, a Malaysian company ("the company"). The appellant was a director of the company. Khairu's job was to deliver the fish

loaded on the lorry to two Singapore businesses, M/s Sin Lian Live Fish Supplier and M/s Gim Ser Live Supplier. The Singapore businesses shared the same address. Khairu was to hand over the fish to the appellant upon arrival. However, he did not have to load or unload the fish.

4 At about 2.00pm on the same day, customs officers searched the appellant's home in the presence of his wife. They found one unopened packet containing 20 sticks of duty-unpaid Marlboro cigarettes bearing Singapore Health Warnings, similar to those found on the lorry. The appellant was arrested later that day.

5 The appellant faced two charges each in respect of the cigarettes on the lorry and the packet of cigarettes at his home. The charges were as follows:

Charge	Provisions
DAC 52858/2003 ("the first charge")	Section 130(1)(c), punishable under s 130(1)(i) of the Customs Act (Cap 70, 2001 Rev Ed).
DAC 52859/2003 ("the second charge")	Section 130(1)(c), punishable under s 130(1)(i) of the Customs Act, read with ss 26 and 77 of the Goods and Services Tax Act (Cap 117A, 2001 Rev Ed), para 3 of the Goods and Services Tax (Application of Legislation relating to Customs and Excise Duties) Order (Cap 117A, O 4, 2001 Rev Ed) and para 2 of the Goods and Services Tax (Application of Customs Act) (Provisions on Trials, Proceedings, Offences and Penalties) Order (Cap 117A, O 5, 2001 Rev Ed).
DAC 52860/2003 ("the third charge")	Section 130(1)(a), punishable under s 130(1)(iii) of the Customs Act.
DAC 52861/2003 ("the fourth charge")	Section 130(1)(a), punishable under s 130(1)(iii) of the Customs Act, read with ss 26 and 77 of the Goods and Services Tax Act, para 3 of the Goods and Services Tax (Application of Legislation relating to Customs and Excise Duties) Order and para 2 of the Goods and Services Tax (Application of Customs Act) (Provisions on Trials, Proceedings, Offences and Penalties) Order.

6 The first and second charges concerned the cigarettes found in the appellant's home, while the third and fourth were in respect of the cigarettes in the lorry. The appellant pleaded guilty to the

first and second charges but claimed trial to the third and fourth charges. Prior to the appellant's trial, Khairu had been sentenced to nine months' imprisonment on one charge of being concerned in the importation of the cigarettes without paying customs duty, which was also the basis for the third charge. Another charge concerning unpaid GST was taken into consideration.

The Prosecution's case

7 Khairu, the sole prosecution witness, testified that the company employed two drivers, him and one Muniandy s/o T M Rajoo ("Muniandy"), also known as Raja. The two of them would usually enter Singapore together, taking turns to drive from Johor Baru. On 23 October 2003, the appellant's elder brother, Chew Gim Hock ("Gim Hock"), assigned Khairu to drive the lorry to Singapore. Muniandy was then under a one-month prohibition from entering Singapore beginning from 25 September 2003. Gim Hock instructed Khairu to deliver the goods in some red containers on the lorry to the appellant. Khairu peeped into the lorry and saw, underneath the fish, boxes wrapped in black plastic inside the red containers, but he did not check the boxes. Muniandy told him that the boxes contained uncustomed cigarettes. Khairu then spoke to Gim Hock, who told him that he would get a commission for making the delivery. However, Gim Hock did not tell him the amount of commission that would be paid, as the commission was payable only upon successful delivery and Gim Hock had not calculated the amount yet. Gim Hock also informed him that the appellant kept records of the goods.

8 Khairu admitted that he did not know who the owner of the cigarettes was. He also testified that the appellant was not present when Gim Hock gave him the instructions to deliver the cigarettes to the appellant, and that he did not meet with the appellant on 23 October 2003.

The defence

9 At the close of the Prosecution's case, defence counsel submitted that there was no case to answer, as the appellant was in Singapore and did not know what had transpired in Johor Baru. However, the learned District Judge Mrs Emily Wilfred decided that the Prosecution had established a *prima facie* case.

10 The appellant initially testified that Gim Hock, who was not a director or manager of the company, was in charge of the company's employees in Johor Baru who were engaged in the "killing" of fish. However, he later said that Gim Hock was responsible for the company's operations in Johor Baru, while he was responsible for the operations in Singapore. He had spoken to Gim Hock over the telephone on 22 October 2003, but only to inform Gim Hock of the quantity of fish he wanted delivered the next day. On 23 October 2003, he did not speak to Gim Hock. His younger brother, Chew Cheng Huay ("Cheng Huay"), informed him that the fish had not yet arrived at the Singapore factory. He went to the Tuas Customs Checkpoint at about 6.00am to make enquiries, and found out that the lorry had been detained because it had been used for transporting contraband. He then proceeded to the Jurong Fishing Port to purchase alternative supplies of fish and distributed the fish to his customers. He found customs officers waiting for him when he returned to his office at around 2.00pm, who questioned him about the cigarettes.

11 As for the packet of Marlboro cigarettes found at his home, the appellant explained that he had found the packet in his small lorry, and had decided to take it home with him. However, he did not explain how the packet came to be in the small lorry.

The decision below

12 The learned district judge found Khairu to be a truthful and candid witness who did not

embellish his testimony to make his story more convincing. Although defence counsel suggested that Khairu had wrongfully implicated the appellant because he begrudged the appellant for not helping him out after his arrest, the judge was satisfied that Khairu had been forthright and did not have a vendetta against the appellant.

13 On the other hand, the appellant was not a truthful witness. He had chopped and changed his evidence in the course of his testimony. He was evasive when asked about Gim Hock's role in the company and the company's operations in Johor Baru. He did not produce any witness to corroborate his testimony on the company's organisation. In contrast, Khairu had testified that he received instructions from both Gim Hock and the appellant, and was unable to confirm that Gim Hock was indeed the company's manager in Johor Baru. The judge concluded that the shifts in the appellant's evidence were because he wanted to distance himself from the Johor Baru operations and avoid incriminating himself, and found that he was overall in charge of the company's operations in Singapore and Johor Baru.

14 The judge also found that the appellant was concerned in the importation of the cigarettes. The appellant had testified that he was in charge of the company's operations in Singapore. Khairu and the appellant had both testified that the drivers were not involved in the loading and unloading of the fish. The cigarettes were found on the company's lorry. The appellant had called Gim Hock the day before the lorry was seized. He went to Tuas Checkpoint to make enquiries about the lorry, but did not subsequently check with Gim Hock what had been loaded onto the lorry.

15 Further, the learned judge drew an adverse inference against the appellant under Illus (g) to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) that the evidence of his brothers and employees, who were not called as witnesses, would have been unfavourable. His defence was a bare denial riddled with inconsistencies and contradictions on material aspects relating to the management of the company. He remained silent about material facts, failing to explain how the packet of Marlboro cigarettes came to be found in his small lorry. He did not furnish any information on the two Singapore businesses, one of which bore his name. No witnesses were called who could substantiate his evidence, and the appellant did not explain why this was the case.

16 The appellant was convicted on the third and fourth charges and pleaded guilty to the first and second charges. On the issue of sentencing, defence counsel asked the court to impose a custodial sentence instead of a fine, and urged the imposition of the same sentence as Khairu of nine months' imprisonment. The judge sentenced the appellant to:

(a) 12 months' imprisonment on the third charge;

(b) three months' imprisonment on the fourth charge; and

(c) one month's imprisonment each on the first and second charges.

The sentences for the third and fourth charges were ordered to run consecutively for a total of 15 months' imprisonment.

The proceedings before this court

17 I will first deal with Criminal Motion No 19 of 2004, in which the appellant sought leave to adduce additional evidence on appeal, before dealing with the appeals proper.

Motion to adduce additional evidence

18 The appellant sought to adduce a statutory declaration made by Muniandy in June 2004, after the appellant's trial had concluded in April 2004.

19 In his supporting affidavit, the appellant asserted that Khairu only referred briefly to Muniandy in the course of his examination at trial. The Prosecution did not call Muniandy to testify, and Muniandy was not said to have any knowledge of material facts. The appellant alleged that consequently it did not occur to him then that Muniandy was a potentially important witness.

20 Prior to the appellant's trial, his younger brother, Cheng Huay, had been charged in November 2003 under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) with offering, together with Muniandy, RM50,000 to Khairu through Khairu's wife, Faizah binti Kadir ("Faizah"). The money was allegedly offered to persuade Khairu to accept full criminal liability for smuggling the cigarettes. In connection with this charge, Cheng Huay's counsel, who was also the appellant's counsel before me, interviewed the company's employees at its premises in Kota Tinggi in May 2004. It was allegedly discovered at this time that Muniandy possessed intimate knowledge of the circumstances that led to the arrests and convictions of Khairu and the appellant.

21 In his statutory declaration, Muniandy stated that he had noticed Khairu stopping along the way to deliver boxes to various persons after entering Singapore. When questioned, Khairu admitted to smuggling cigarettes, and offered Muniandy an equal partnership in the operation, which Muniandy accepted. The smuggling took place without the knowledge of their employers. After the fish had been loaded onto the lorry, they would stop at Khairu's home first and load up cigarettes before heading for Singapore. He had left for his home in Batu Pahat in the evening of 22 October 2003, and found out about Khairu's arrest later by telephone from Faizah. Muniandy declared that he was willing to attend court and give evidence, even though he was aware that he would almost certainly be charged and punished for his part in smuggling the cigarettes. Nevertheless, he felt bad about wrongly implicating the appellant and Cheng Huay, as well as causing the company to incur additional expense in hiring another driver and refrigerated lorry.

The applicable principles

22 The conditions that have to be satisfied before leave is granted to adduce additional evidence on appeal are set out in *Ladd v Marshall* [1954] 1 WLR 1489, namely:

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

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

(c) reliability – it must be apparently credible, although it need not be incontrovertible.

23 This framework has been adopted and applied in numerous criminal cases such as *Juma'at bin Samad v PP* [1993] 3 SLR 338, *Chan Chun Yee v PP* [1998] 3 SLR 638 and *Annis bin Abdullah v PP* [2004] 2 SLR 93.

Application of the principles to the present case

24 I was of the opinion that the appellant in this case had failed to satisfy any of the three conditions set out above for the statutory declaration to be adduced as additional evidence on appeal.

Non-availability

25 The circumstances of this case did not support the appellant's argument that Muniandy's evidence, as embodied in the statutory declaration, could not have been obtained with reasonable diligence for use at his trial. There was nothing to suggest that Muniandy had left the employment of the company or otherwise could not be located after the appellant's arrest or before his trial. The wording of the appellant's affidavit suggested that Muniandy was still an employee of the company as at May 2004, since the appellant's counsel discovered Muniandy's evidence when interviewing the company's employees. Similarly, the wording of Muniandy's statutory declaration suggested that Muniandy was still an employee as at June 2004. It was therefore open to the appellant to locate Muniandy before his trial and persuade him to give exonerating evidence, as Cheng Huay had done. That the appellant's counsel "coincidentally" found out about Muniandy while enquiring into Cheng Huay's charge did not change the fact that Muniandy's evidence had been available for use at the appellant's trial.

26 It must have occurred to the appellant before his trial, in light of the circumstances, that Muniandy was potentially an important witness. Khairu usually entered Singapore together with Muniandy, but Khairu was arrested alone. The company employed no other drivers. It was pertinent to note also that Muniandy's one-month prohibition from entering Singapore would have ended shortly after the incident had taken place. This should have raised questions in the appellant's mind, even if he did not know the details of Muniandy's prohibition. There was no cause or need for the appellant to wait for the Prosecution to indicate at the trial that Muniandy might have useful evidence.

27 Contrary to the appellant's assertion that Muniandy was only mentioned in passing at trial, defence counsel had actually conducted a full and detailed cross-examination of Khairu on the subject. By that point, if not earlier, the importance of Muniandy as a witness should have been patently obvious to the appellant. But he did not pursue the matter further, and did not attempt to call Muniandy as a witness. No effort, let alone reasonable diligence, had been exerted by the appellant to obtain Muniandy's evidence.

28 Before me, counsel for the appellant used the colourful analogy that if a person did not know that there was treasure buried underneath his house, it could not be said that the treasure was available to him. However, it was more apt to describe the appellant in this case as a person who, aware or at least suspecting that there was treasure buried under his house, chose to do nothing until it was too late. That Muniandy's evidence was not available to him at trial could only be attributed to his decision not to pursue the matter.

Relevance

29 Muniandy's evidence would not have had an important influence on the outcome of the appellant's case. What was most striking about the statutory declaration was that while it described in some detail the surrounding circumstances, it was silent on the events of 23 October 2003. In Muniandy's own words, he had left for Batu Pahat the evening before, and heard about Khairu's arrest later on. He could therefore shed no light on what had transpired before Khairu left for Singapore. The statutory declaration also did not address or dispute Khairu's testimony that Muniandy was the one who told him that there were uncustomed cigarettes on the lorry. This cast some doubt on the version of events narrated in the statutory declaration. There was no explanation of how he and Khairu managed to make consistently timely deliveries to Singapore, despite having to detour to Khairu's house to load up cigarettes.

30 The Prosecution also pointed out that at trial, the court, on the application of defence

counsel, had ruled that Khairu's evidence in respect of previous acts of smuggling involving Muniandy was inadmissible. It was inconsistent for the appellant to now seek to adduce the statutory declaration, which also contained evidence of past acts of smuggling involving Muniandy and Khairu.

Reliability

31 It was stated in *Loh Khoon Hai v PP* [1996] 2 SLR 321 at 326, [17] that the standard to be met under the condition of reliability in *Ladd v Marshall* was a very high one. The appellant in this case did not meet the requisite standard. The statutory declaration was made in the context of enquiries made regarding Cheng Huay's corruption charge, in which Muniandy himself was implicated. Muniandy's expression of contrition at wrongly getting two persons, both of whom were his bosses, into trouble with the law, as well as harming the company financially, thus took on a different cast. It also came at an odd time. By the time he made the statutory declaration, some eight months had passed from the arrest of Khairu and the appellant, and both their trials were already concluded.

32 Muniandy in the statutory declaration fully exonerated the appellant, while effectively accusing Khairu of committing perjury when testifying at the appellant's trial. The grave implications of these one-sided allegations made it essential for Muniandy to be examined and, if necessary, challenged in court. But Muniandy could not be compelled to attend court in Singapore, since he was a Malaysian resident. His accusations and claims were being made from a distance in safety. Despite his declaration that he was prepared to come to court in Singapore and face the consequences, and the appellant's counsel stating that he would be called as a witness if the motion was allowed, it could not be assumed that he would in fact do so when the time comes. Not only would it be unsafe to accept Muniandy's evidence as it appears in the statutory declaration, the evidence would be inadmissible hearsay if he did not appear before the Singapore courts.

Whether the additional evidence is necessary in the interests of justice

33 In support of this ground, the appellant cited the case of *Chia Kah Boon v PP* [1999] 4 SLR 72. In that case, I said that where any of the three conditions for adducing additional evidence on appeal was not met, the additional evidence might be allowed in the most extraordinary circumstances, where such additional evidence was necessary in the interests of justice.

34 However, it must be emphasised, as I had stated in *Chan Chun Yee v PP* ([23] *supra*) at [10], that:

> This [exception] is a narrow exception and is warranted only by the most extenuating circumstances, which may include the fact that the offence is a serious one attracting grave consequences and the fact that the additional evidence sought to be adduced is highly cogent and pertinent and the strength of which renders the conviction unsafe.

This passage was also cited in *Chia Kah Boon v PP*.

35 Counsel for the appellant failed to show the existence of any extenuating circumstances in this case that would justify invoking this exception in the interests of justice. The evidence found in the statutory declaration was not sufficiently cogent and pertinent, and was not so strong as to render the appellant's conviction unsafe. In *Chia Kah Boon v PP*, only the condition of non-availability was not satisfied. Here, the statutory declaration did not satisfy any of the three conditions. To invoke the exception here would broaden the exception by such an extent as to engulf the general principle in *Ladd v Marshall*. Counsel's repeated assertions without more that the statutory declaration totally absolved the appellant, and that the appellant would go to jail unless the statutory declaration

was admitted, could not overcome the deficiencies in the evidence. That counsel admitted that this was his strongest point in favour of admitting the statutory declaration only demonstrated the weakness of his case.

36 Another argument raised by counsel for the appellant was that Muniandy recognised that he had given evidence that was detrimental to himself. It is relevant here to consider the case of *Tan Choon Chuar v PP* [1950] MLJ 200. The Court of Appeal of the Federation of Malaya there refused an application to call further evidence on appeal, where the further evidence comprised of statements taken after the appellants had been tried and convicted. If the statements were true, the appellants would have been wrongly convicted. However, the court reasoned that allowing the evidence would have required it to form some conclusion as to the guilt or innocence of the makers of the statements, in which event its finding would be prejudicial to the chances that the makers would have a fair trial. In the present instance, it must be considered also that Muniandy ultimately might not appear before the Singapore courts. As long as he did not come before the Singapore courts, he remained at liberty and could hardly be regarded as having acted to his detriment in making the statutory declaration.

37 For the reasons set out above, the criminal motion to adduce Muniandy's statutory declaration as additional evidence on appeal was dismissed.

Appeal against conviction and sentence

38 In his appeal against conviction on the third and fourth charges, the appellant recited a litany of complaints against Khairu, the Prosecution and the court below. He submitted that the Defence should not have been called because the Prosecution failed to make out a *prima facie* case against the appellant and adverse inferences were not drawn against the Prosecution. The court below erred in not applying the same level of scrutiny to the Prosecution as was applied to the appellant and in not requiring the Prosecution to produce necessary witnesses. The judge was wrong in drawing adverse inferences against the appellant for his failure to call witnesses. The appellant was convicted against the weight of the evidence, and the case against him was not made out.

No case to answer

39 The role of the trial court at the close of the Prosecution's case is clear. Following *Haw Tua Tau v PP* [1980–1981] SLR 73, the trial court has to consider whether there is some evidence before it that is not inherently incredible which, if accepted as accurate, would establish each element of the offence the accused is charged with. Only if such evidence is lacking is the court justified in finding that no case has been made out against the accused that, if unrebutted, would warrant his conviction.

40 The appellant feebly submitted that the learned judge was wrong to apply the test in *Haw Tua Tau v PP* at the close of the Prosecution's case. However, as the Prosecution pointed out, this was an attempt to revisit settled law in Singapore. The Court of Appeal in *Ng Theng Shuang v PP* [1995] 2 SLR 36 had made it clear that, even at that time, the test in *Haw Tua Tau v PP* had become too well-entrenched to bear re-examination. The appellant did not come close to forming a coherent argument why *Haw Tua Tau v PP* should no longer be followed.

41 The Prosecution's case relied primarily on Khairu's testimony. The judge expressly accepted Khairu's testimony after observing Khairu in court. Not having had the same opportunity to observe the witness, it is established law that the appellate court should be slow to disturb the judge's finding in this respect: *Lim Ah Poh v PP* [1992] 1 SLR 713, *Ameer Akbar v Abdul Hamid* [1997] 1 SLR 113. This

is especially the case where the findings are based on the trial judge's assessment of the credibility and veracity of the witness: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656.

42 There were no grounds for disturbing the judge's conclusion in this case. Khairu did not embellish or exaggerate his evidence, and did not concoct evidence about matters beyond his knowledge. He did not try to minimise his own culpability in that he was motivated by the commission Gim Hock had promised to pay him. He was forthright in agreeing with the suggestion by defence counsel that he was angry that the appellant and his family did not bail him out, but also made it clear that he did not consequently bear a grudge against and frame the appellant. Khairu's evidence was not so incredible and unreliable that the judge was wrong to have accepted it.

43 The judge had to consider whether the appellant was concerned in importing the cigarettes found on the lorry for the purposes of s 130(1)(a) of the Customs Act, which was the statutory basis of the third and fourth charges. Section 3 of the Customs Act defines "import" to mean "to bring or *cause to be brought* into the customs territory by any means from any place" [emphasis added]. It was clearly not necessary for the appellant to have personally brought the cigarettes into Singapore for him to be held criminally liable, so long as it could be shown that he had caused Khairu to bring the cigarettes into Singapore. In this respect, it must be emphasised that Khairu was instructed by Gim Hock to deliver the cigarettes to the appellant specifically. The company was a family concern, and the appellant was in charge of the Singapore factory. The company's resources were used in bringing the cigarettes into Singapore. It was clear that the appellant was involved in the importation of the cigarettes.

44 There is also the Malaysian case of *PP v Chua Yew Eng* [1968] 2 MLJ 108, where it was held that, in interpreting the phrase "concerned in" in relation to customs legislation prohibiting the importation of certain goods, a person who arranges for the import of such prohibited goods could be regarded as a person concerned in the offence. Ironically, the appellant had cited this case to support his argument that there was no case for him to answer at trial. With all due respect, it is difficult to see how this case supports his position. Indeed, I found it difficult generally to understand counsel's submissions on this issue. The Prosecution had made out its case at trial, and the judge was perfectly entitled to call on the appellant to enter his defence.

Adverse inferences against the Prosecution

45 The principles governing the drawing of adverse inferences against the Prosecution pursuant to Illus (g) to s 116 of the Evidence Act are summarised in *Khua Kian Keong v PP* [2003] 4 SLR 526. The trial court has the discretion whether or not to draw such inferences, and the appellate court has to evaluate if the trial judge had correctly exercised his discretion. It will be appropriate to draw adverse inferences against the Prosecution if the witness not offered is a material one, the Prosecution withheld evidence that it possessed and which was available, and where this was done with an ulterior motive to hinder or hamper the Defence.

46 The witnesses the Prosecution allegedly failed to call were obviously Muniandy and Gim Hock. However, both persons were resident in Malaysia and were not compellable as witnesses before the Singapore courts. In *PP v Tan Lay Heong* [1996] 2 SLR 150, I said that no adverse inferences could be drawn against the Prosecution where a witness was a foreign witness and not compellable to be called. The mere fact that the foreign witness was not before the court to give evidence was not sufficient basis to presume that his evidence would be unfavourable to the Prosecution.

47 In *Chua Keem Long v PP* [1996] 1 SLR 510, the Defence had argued that an adverse inference should be drawn against the Prosecution for its failure to call a particular witness. There, I

said at [73]:

> Such arguments are commonly made. Commonly too, such arguments are without merit. *The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case.* Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. *All the prosecution need do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt.* Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution. *Where the witnesses not produced are not material, no presumption operates against the prosecution* … [emphasis added]

Further, I said at [77]:

> The discretion conferred upon the prosecution cannot be fettered by any obligation to call a particular witness. What the prosecution has to do is to prove its case. It is not obliged to go out of its way to allow the defence any opportunity to test its evidence. It is not obliged to act for the defence. Only if there is an intention to hinder or hamper the defence would the possibility of a miscarriage of justice arise, requiring interference by the courts.

48 In this case, the Prosecution adduced and relied on Khairu's testimony to make its case. Khairu's involvement in the transaction made him a relevant and important witness to the Prosecution. The learned judge accepted Khairu's testimony after much scrutiny. In contrast, Muniandy and Gim Hock were not relevant witnesses to the Prosecution's case. There was no reason for the judge to draw adverse inferences against the Prosecution for not calling Muniandy and Gim Hock as prosecution witnesses. Further, there was no suggestion that the Prosecution had withheld any evidence from either person that was in its possession, and had done so to prevent the appellant from mounting an effective defence.

Conviction of the appellant

49 Contrary to his claims, the appellant failed to rebut the evidence led against him by the Prosecution. As noted by the judge, the appellant's evidence was a bare denial of involvement in the smuggling of the cigarettes. A bare denial hardly constituted a rebuttal.

50 The appellant's evidence at trial regarding the respective roles in the company of Gim Hock and himself was inconsistent. The evidence was clear that Gim Hock was not a director of the company. In his examination-in-chief, the appellant said Gim Hock was in charge of the workers who "kill" (*ie* process) the fish. But in cross-examination, he played up Gim Hock's role while simultaneously downplaying his own, dividing the overall responsibility for the company between Gim Hock in Johor Baru and himself in Singapore. This assertion was not supported by any evidence. He even impliedly shifted the blame to Gim Hock by suggesting that he did not really know about Gim Hock's activities in Johor Baru. The judge was therefore justified in finding that the appellant had chopped and changed his evidence, and the appellant did not show why this finding was wrong.

51 Gim Hock was a potentially helpful witness to the appellant. Yet, the appellant did not call Gim Hock as a witness, even though he described their relationship as cordial. The appellant's other brothers who were also involved in the company's business were similarly not called as witnesses. Only in his submissions to this court did the appellant finally disclose some details about the division of

the company's operations between his brothers and himself. This contrasted with his reticence and prevarication at trial. Even so, there was still a marked absence of detail and supporting evidence. Khairu's evidence that he was not sure about the actual role played by Gim Hock in Johor Baru was not addressed. The appellant also repeatedly referred to the company and its customers in a proprietary manner in his testimony, but withheld further information in this respect.

52 For the reasons above, the judge's finding that the appellant was in charge of the company's operations in both Singapore and Johor Baru could not be faulted, not when the appellant failed to adduce any evidence supporting his defence. The judge correctly drew an adverse inference against the appellant for failing to call his brothers and employees as witnesses to corroborate his evidence. The appellant offered no reasons at trial to explain why he did not call any witnesses when it was up to him to prove his defence, and none had been canvassed before me.

53 The appellant had made a telephone call to Gim Hock on 22 October 2003 to arrange for a delivery to be made to Singapore the next day. When Khairu was asked by Gim Hock to drive the lorry into Singapore, the lorry had already been loaded. This was to be expected, since the consistent evidence of Khairu and the appellant was that Khairu was not responsible for loading or unloading the lorry. In light of these circumstances, it was telling that the appellant did not attempt to contact Gim Hock to investigate why contraband was found on the lorry after being informed of the reason for the lorry's detention. Even if it were accepted that the appellant spent much of the time between 6.00am and 2.00pm on 23 October 2003 trying to secure alternative supplies to meet his customers' orders, the detention of the lorry was no small matter. The company stood to lose money on the perishable fish carried on the lorry. Worse still, the loss of the lorry would have seriously disrupted the company's operations and resulted in significant financial loss. Worst of all, there was the prospect of criminal liability. There was ample reason and opportunity for the appellant to call Gim Hock. That he did not do so spoke volumes. The judge therefore was justified in finding that the appellant was concerned in the importation of the cigarettes on the lorry.

54 The packet of Marlboro cigarettes found at the appellant's home, which was the subject matter of the first and second charges, connected the appellant to the cigarettes on the lorry. Indeed, it suggested that the appellant might have engaged in smuggling activities in the past. The packet was found at his home on 23 October 2003 even though he did not meet Khairu that day, so it had to have been brought there beforehand. He did not dispute that the packet was similar to those found on the lorry. The explanation he offered for how the packet came to be found at his home was incredible and contradictory. He testified that he smoked only Salem brand cigarettes, and had no intention of smoking the packet of Marlboro cigarettes. If so, why would he pick up the packet, which he supposedly found lying around in his small lorry, and take it home with him? He offered no explanation for this at all. The appellant's other story, that Gim Hock would leave behind one packet of Marlboro cigarettes on his occasional visits to Singapore, was equally difficult to accept.

55 The appeal against conviction was dismissed. The appellant failed to show why the judge's decision was unsound, and had done little to show why his version of events should be believed instead.

Sentencing

56 The appellant submitted that the imposition of terms of imprisonment on all four charges was not warranted in light of the authorities. Also, the terms imposed by the learned judge were manifestly excessive.

57 In *Moey Keng Kong v PP* [2001] 4 SLR 211, I set out the factors that were important in

determining the appropriate sentence in cases involving the importation of uncustomed goods, namely:

(a) the amount of duty evaded;

(b) the quantity of goods involved;

(c) repetition of the offence;

(d) whether the offender was acting on his own or was involved in a syndicated operation; and

(e) the role of the offender.

58 The appellant's defence counsel had asked the court below to impose a term of imprisonment similar to that imposed on Khairu. No mitigating factors were presented before the judge by defence counsel, and none were presented before me by the appellant's present counsel. The appellant had one previous conviction for reckless and dangerous driving in 1985.

59 The learned judge was correct in so far as the appellant was a bigger player in the scheme of things compared to Khairu, and so ought not to receive the same sentence as Khairu. Khairu was merely the deliveryman, and stood to gain, at most, the commission promised to him by Gim Hock. The appellant, on the other hand, stood to profit from the sale of the substantial quantity of smuggled cigarettes, on which he would have avoided paying a significant amount in customs duty and GST. He was specifically identified as the recipient of the cigarettes. He was in charge of the company's operations in Singapore and Johor Baru. The company's driver and lorry were used to transport the cigarettes.

60 Since Khairu received nine months' imprisonment for his part in the smuggling of the cigarettes, the appellant could not expect to escape a term of imprisonment of at least the same length. Nevertheless, I was of the view that imposing a substantial fine in addition to an appropriate term of imprisonment would have been adequate to reflect the appellant's greater culpability in this case. The appellant, being a reasonably successful businessman, certainly had the financial means to pay a substantial fine. I therefore allowed the appellant's appeal against sentence on the third charge, and substituted a term of nine months' imprisonment and a fine of $204,000 in default four months' imprisonment. Similarly, on the fourth charge, I allowed the appeal against sentence, and substituted a fine of $12,000 in default one month's imprisonment.

61 In respect of the first and second charges, the appellant submitted that the imposition of jail terms was excessive because he claimed that the customs authorities would not have bothered to collect customs duty and GST on one packet of cigarettes had he offered to pay, and that even if he were charged, the court would not have taken cognisance of such a minor offence. I must register my strong disapproval of these unfounded assertions, and I fail to see how this argument aids his case. However, I found that the sentences imposed in respect of these two charges were excessive, and substituted a fine of $3,000 in default two weeks' imprisonment for each charge.

62 Overall, I reduced the appellant's sentence from 15 months' imprisonment to nine months' imprisonment and added a fine of $222,000 in default six months' imprisonment.

Conclusion

63 As an aside, counsel for the appellant informed me prior to the hearing that this was his first appearance before me in his many years in practice. I allowed his many requests for the court's indulgence of his inexperience and inadequacies. Notwithstanding this, I noted that some of the language used in his submissions was excessive. A number of strongly worded and extravagant accusations had been directed at various parties connected with this case with little by way of supporting facts or coherent argument. That the appellant succeeded to some degree in his appeal should not be taken as the court condoning this manner of conducting court proceedings. With his long experience at the Bar, if not before this court, counsel should surely be familiar with the proper conduct of cases.

64 The appellant at the close of the trial asked for time to make the necessary arrangements for his family and business. I noted that six months had passed between the conclusion of the trial and the hearing before me, during which time the appellant had been out on bail. Nevertheless, I ordered that the commencement of the appellant's term of imprisonment be deferred by two weeks from the date of the hearing, and that bail be extended in the meantime.

Criminal motion and appeal against conviction on the third and fourth charges dismissed. Appeal on sentence allowed.