Balasundaram s/o Suppiah v Public Prosecutor
[2003] SGHC 182

Case Number : MA 109/2003

Decision Date : 25 August 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Appellant in person; Christopher Ong Siu Jin (Deputy Public Prosecutor) for the respondent

Parties : Balasundaram s/o Suppiah — Public Prosecutor

Criminal Procedure and Sentencing – Appeal – Whether judge's findings against weight of evidence – Principles applicable in appeal against findings of fact – Reversal of trial judge's decision only where appellate court convinced of wrong decision

Criminal Procedure and Sentencing – Sentencing – Criminal breach of trust – Criminal breach of trust by a servant – Aggravating circumstances

Criminal Procedure and Sentencing – Sentencing – Criminal breach of trust – Criminal breach of trust by a servant – Relevance of value of property misappropriated

Evidence – Witnesses – Inconsistencies in testimony – Inconsistencies minor in nature or related to minor issues Whether evidence in respect of key issues undermined – Whether court entitled to accept one part of testimony and reject other part

The appellant was convicted in the district court of an offence under s 408 of the Penal Code (Cap 224) and sentenced to 20 months' imprisonment, to commence upon the expiry of the sentence he is presently serving. He appealed against both his conviction and sentence. I dismissed both appeals, and enhanced the sentence to 36 months' imprisonment, to commence upon the expiry of the sentence he is presently serving. I now give my reasons.

Preliminary issue

2 The appellant was charged as follows:

> You, … are charged that … on the 27th day of September 2000 at Block 2 Geylang Serai, #01-32, Singapore, being employed as a general manager of Seven Entertainment & Café Pte Ltd, and in such capacity entrusted with certain property, to wit, cash of $7,000, committed criminal breach of trust with respect to the said property by dishonestly converting it to your own use, and thereby committed an offence punishable under s 408 of the Penal Code.

3 The appellant was originally charged under s 409 of the Penal Code, which involves the offence of criminal breach of trust by an agent. However, the trial judge found on the evidence that the appellant was not an agent of Seven Entertainment & Café Pte Ltd ("Seven Entertainment"), but merely an employee. She amended the charge accordingly, and the respondent did not take issue with this finding and the amendment.

Background facts

4 In May 2000, the appellant, who was running a coffee stall at Mohamed Sultan Road, decided to take over an existing pub at 16 Mohamed Sultan Road. The new club was to be called 'Club 7', and the company Seven Entertainment was incorporated on 13 June 2000. As he had little in the way of financial resources, the appellant approached his brother, Elangovan, as well as Goh Boon Leong

("Goh") and Ng Kim Wah ("Ng") to become shareholders. Goh and Ng were approached in August 2000, and both agreed to invest. Goh was to hold 20% of the shares in Seven Entertainment, while Ng and Elangovan would hold 40% each.

5 Club 7 opened for business on 7 September 2000. As Seven Entertainment held a public house first class liquor licence, it had to pay a 1% cess tax on the monthly sales of food and beverages. Therefore, on 26 September 2000, the appellant went to the Inland Revenue Authority of Singapore ("IRAS") to apply for cess registration. IRAS issued the approval letter on the same day, subject to the payment of a $7,000 security deposit made payable to the Singapore Tourism Board.

Prosecution's case

6 It was the prosecution's case that when Ng was informed of the need to pay the security deposit on 27 September 2000, he instructed his cashier Chew Kooi Choon Christine ("Christine"), to pass $7,000 cash to the appellant atNg's goldsmith shop Kedai Emas Kampung Melayu ("Kedai Emas") at Block 2 Geylang Serai #01-32 on the same day. He also asked Loh Poh Chwee Dick ("Dick"), who was in charge of the renovations of Club 7, and with whom he had previous business dealings, to drive the appellant from Club 7 to Kedai Emas, and then to IRAS to make the payment. However, the appellant did not use the cash to pay the security deposit. Instead, he converted the money to his own use, paying $4,758.01 to Hong Leong Finance Limited to settle the arrears on his car (which was in his brother's name, but of which he had primary use) which had been repossessed, and keeping the rest. When questioned by Dick, Christine and Ng, the appellant lied and said that the security deposit had been paid, but that there was no receipt because IRAS would send one by post later.

7 His actions were only discovered on 4 December 2000, when Christine spoke with Chew Woon Leong Stanley ("Stanley"), a tax officer with IRAS, and found out that the security deposit was still unpaid. She then informed Dick and Ng, and the latter reprimanded the appellant. The next day, Ng went down to IRAS with another of Club 7's employees, Manimaram S/O Devan, to meet Stanley and make the payment. The appellant went to IRAS on the same day, where Stanley testified that the appellant first tried to pay the deposit, and then later claimed to have handed it to an Indian IRAS officer on 27 September 2000. Ng decided not to report the incident to the police after the appellant asked him for a second chance, explaining that he was in great financial difficulty and needed the money. However, Goh became aware of the incident sometime in March or April 2002, after he took over as managing director of Seven Entertainment. Goh called the appellant and asked him to return the money. On 20 June 2002, as the appellant had still failed to pay up, Goh made a police report. The appellant was subsequently charged.

The defence

8 The appellant did not dispute that he received the $7,000 on 27 September 2000, nor that he did not use it to pay the security deposit. However, he claimed that the money was actually a personal loan from Ng. He alleged that Ng was an illegal moneylender who had previously extended two loans of $20,000 to him, and that he had informed Ng on 27 September 2000 that he urgently needed another $5,000 loan to pay off the arrears on his brother's car. Ng had then agreed to make available to him $12,000, of which $7,000 was to be used to pay the security deposit. However, when he arrived at Kedai Emas, he was informed by another cashier, Geng Poh Lian, that only $7,000 was available. As he was not able to contact Ng, he and Dick proceeded to IRAS where he was prepared to use the $7,000 to make payment. However, before he did so, he managed to contact

Ng, who agreed to allow him to treat the $7,000 as a personal loan instead.

9 On 8 April 2002, the Corrupt Practices Investigation Bureau ("CPIB") raided Club 7 and Club 3, another club with which Ng, Goh, Dick, Christine and the appellant were involved. The raid uncovered an offence of forgery of a public entertainment licence relating to the alteration of the occupancy load of Club 3, which the appellant initially admitted to. However, a month later, the appellant changed his story, alleging that Ng was the mastermind behind the forgery and that he was going to inform the CPIB of this, and of Ng's other illegal activities. The appellant claimed that the police report was part of a conspiracy by Ng, Goh, Dick and Christine to damage his credibility.

Decision of the court below

10 The district judge highlighted the following ingredients of the offence under s 408:

(a) the accused must be an employee;

(b) he must have been entrusted, in such capacity, with property; and

(c) he must have committed breach of trust in respect of such property.

The element in dispute here is (iii). While the prosecution argued that the $7,000 was entrusted to the appellant to pay for the security deposit, the appellant claimed that Ng later agreed to allow him to treat the $7,000 as a personal loan.

11 The district judge considered the evidence carefully and found the prosecution's case to be "compelling", placing particular importance on Stanley's evidence. She accepted the appellant's argument that the other prosecution witnesses were possibly interested parties with a motive to lie, given their involvement with Club 3 and the appellant's threats to expose Ng's illegal activities to the CPIB. Therefore, she rightly treated their evidence with "extreme caution", given the "real risk of collusion". However, Stanley was an independent witness whose evidence was extremely convincing, especially since he had written out a note of the events of 5 December 2000 the very next day, when everything was still fresh in his mind. His account of Christine's and Ng's surprise at discovering that the deposit was unpaid, and the appellant's actions at IRAS on 5 December 2000, supported the prosecution's case that the appellant had dishonestly converted the money for his own use, and later tried to cover it up.

12 Having convicted him under s 408, the district judge went on to sentence him to 20 months' imprisonment. Although she noted that the normal sentence for a first offender in cases involving such a small amount would be eight to nine months' imprisonment, she increased it to 20 months' imprisonment after taking into account his antecedents, his lack of remorse, the lack of any real mitigating factors and the "scheming manner" in which the appellant committed the offence.

The appeal

Appeal against conviction

13 The main thrust of the appellant's appeal was that the learned district judge had erred in preferring the prosecution's version of events over his own.

14 It is trite law that an appellate court, which does not have the advantage of hearing the witnesses and observing their demeanour, will not disturb a lower court's findings of fact unless they

are plainly wrong or against the weight of the evidence. In *Tuen Huan Rui Mary v PP* [2003] SGHC 157, I repeated the observations I had made earlier in *PP v Azman bin Abdullah* [1998] 2 SLR 704 at p 710:

> It is well-settled law that in any appeal against a finding of fact, an appellate court will generally defer to the conclusion of the district judge who has had the opportunity to see and assess the credibility of the witnesses. An appellate court, if it wishes to reverse the district judge's decision, must not merely entertain doubts about whether the decision is right but must be convinced that it is wrong.

15 The appellant highlighted three main weaknesses in the prosecution's case:

(a) the lapse of 22 months between the incident and the police report;

(b) Stanley's lack of credibility as a witness; and

(c) certain inconsistencies in the evidence of the prosecution's witnesses.

I shall now deal with each of these arguments in turn.

Lapse of 22 months

16 The district judge accepted that the lapse of 22 months was excessive. She rejected the prosecution witnesses' evidence that the delay was due to the fact that Goh only came to know about the events in March or April 2002. Goh had become a director of Seven Entertainment on 15 March 2001, and another Club 7 employee Irwan bin Ismail and Ng himself had both testified that Goh was always actively involved in the running of Club 7. Therefore, there was no reason for him to recheck the accounts for the year of 2000 in January 2002. Given the circumstances, I found that the district judge was justified in finding that the police report was lodged at the instigation of Ng, as a direct response to the appellant's threats to expose Ng to the CPIB. While this meant that the testimonies of those involved in the CPIB case should be treated with caution, it did not mean that their evidence had no probative force at all. In any case, the prosecution's case was supported by the evidence of Stanley, who was a credible and independent witness.

Stanley's lack of credibility

17 The appellant's attempts to undermine the credibility of Stanley consisted of nothing more than bare allegations. The appellant alleged that Stanley had attended several Club 7 functions as Ng's guest. However, he could not provide any evidence of such alleged connections between Stanley and Ng, and also admitted that he had no personal knowledge that Ng and Stanley had unofficial dealings. Before me, the appellant also alleged that Stanley may have been bribed by Ng. However, this new allegation was again completely unsubstantiated. Given the complete lack of basis for the appellant's wild allegations against Stanley, I found that the district judge was justified in finding Stanley to be a credible witness.

Inconsistencies in the evidence of the prosecution's witnesses

18 Also, while there were minor inconsistencies in the evidence of the prosecution witnesses, these were not fatal to the prosecution's case. Bearing in mind that almost two years have passed since the events occurred, it is understandable that the parties involved may not remember every

single detail perfectly: *PP v Gan Lim Soon* [1993] 3 SLR 261; *Sundara Moorthy Lankatharan v PP* [1997] 3 SLR 464; and *Hon Chi Wan Colman v PP* [2002] 3 SLR 558. Moreover, the points of divergence were irrelevant to the material elements of the charge, which was that the appellant had dishonestly converted the $7,000 which he was given to pay the security deposit for Seven Entertainment's cess application. It was beside the point that Christine could not remember how and when she first received the letter from IRAS that stated that the security deposit was payable. The appellant placed great emphasis on how Christine and Ng found out about the non-payment of the deposit, when this was really of no consequence to the prosecution's case. Whether Stanley called Christine or Christine called Stanley certainly did not give credence to his allegations of a conspiracy to frame him.

19 The appellant submitted that the district judge had "erred in law" by giving the prosecution witnesses the benefit of the doubt when the burden of proof was clearly on the prosecution to prove its case beyond a reasonable doubt. This argument is clearly without merit. The district judge was aware at all times of the burden and standard of proof required for a finding of guilt on a criminal charge. The existence of minor inconsistencies in the evidence of some of the prosecution's witnesses did not inexorably lead to the creation of reasonable doubt. The district judge was also perfectly entitled to disregard the discrepancies pointed out by the appellant for they were minor inconsistencies that did not detract from the value of the testimony of the prosecution witnesses: *Chean Siong Guat v PP* [1969] 2 MLJ 63; *PP v Kalpanath Singh* [1995] 3 SLR 564; and *Sundara Moorthy Lankatharan v PP* [1997] 3 SLR 464. In any case, the court is entitled, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other: *PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15; *Ng Kwee Leong v PP* [1998] 3 SLR 942; and *Hon Chi Wan Colman v PP* [2002] 3 SLR 558.

20 After carefully reviewing the Record of Proceedings, I found that the district judge's findings of fact were amply supported by the evidence. The version of events presented by the prosecution's witnesses was cogent and consistent in the material aspects of the prosecution's case. Stanley's testimony of the appellant's suspicious behaviour at IRAS on 5 December 2000 was especially important, given that he was an independent witness with no motive to embellish his evidence.

21 In contrast, I found the appellant's evidence completely unpersuasive. His insistence that Ng was an illegal moneylender did not aid him in proving that the $7,000 in this case was a loan. His story that Ng had agreed to loan him $5,000, then later refused to accept the excess $2,000 which the appellant claimed he offered to return, was simply implausible. At the end of the day, all the appellant could do was make completely baseless allegations against all the prosecution witnesses in a vain attempt to support his conspiracy theory. Besides his attempts to attack Stanley's credibility, he also claimed that the charge was originally framed under s 409 because Ng had connections with the police and had consulted a police officer in order to "secure the highest charge". This was, like most of his other allegations, not supported by a shred of evidence.

22 The appellant's vague and contradictory evidence in the district court surrounding the repayment of the alleged loan only served to further undermine his version of events. He initially claimed to have repaid the sum between December 2000 and January 2001, then later changed his mind and said he was unable to say exactly when he had repaid the loan. His claim that he did not know how much he had paid Ng in total, and that he had only paid whatever Ng had asked for, was simply incredible. The appellant was obviously astute, and given that he was "financially weak", would surely not have been so careless with any money he had.

23 Therefore, I found that the appellant was rightly convicted.

Appeal against sentence

24 For a s 408 offence, the maximum term of imprisonment is seven years. The district judge considered the case of *Sim Yeow Seng v PP* [1995] 3 SLR 44, where the accused, who had an antecedent for criminal breach of trust with another charge of cheating taken into consideration, pleaded guilty to a s 408 charge involving $7,777.27 and was sentenced to one year's imprisonment. After taking into account the appellant's more serious antecedents, his lack of remorse, the absence of any real mitigating factors and the manner in which he committed the offence, she sentenced him to 20 months' imprisonment.

25 I could not agree with this aspect of the trial judge's decision. It is true that in cases involving criminal breach of trust, the value of the property misappropriated is a relevant consideration: *Wong Kai Chuen Philip v PP* [1990] SLR 1011. However, the court's sentencing discretion is never restricted by the amount involved: *Amir Hamzah bin Berang Kuty v PP* [2003] 1 SLR 617. While past cases are no doubt helpful guidelines, care must be taken to avoid sacrificing justice at the altar of blind consistency. Each case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances: *Soong Hee Sin v PP* [2001] 2 SLR 253.

26 I noted that this particular case is striking for its lack of any mitigating circumstances whatsoever. The appellant does not have the benefit of a guilty plea. He has shown no remorse nor made any restitution. His claim that he is the sole breadwinner who needs to take care of his ill and aged parents cannot hold much weight, for it is settled law that any hardship caused to the offender's family as a result of the imprisonment of the offender has little mitigating value save in very exceptional or extreme circumstances: *Ng Chiew Kiat v PP* [2000] 1 SLR 370. This is an unavoidable consequence occasioned by the offender's own criminal conduct and should not affect what would otherwise be the proper sentence: *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305; *PP v Tan Fook Sum* [1999] 2 SLR 523; *PP v Yap Koon Mong* [1999] 4 SLR 257. The appellant has failed to point to any exceptional circumstances in this case to warrant a departure from this established principle.

27 In contrast, the list of aggravating factors here clearly justifies the imposition of a long deterrent sentence. The appellant has a long list of antecedents, most of which involve dishonesty. In March 1995, he was convicted of three charges of cheating under s 420 of the Penal Code, with six similar charges taken into consideration. In December 1995, he was convicted of giving false information under s 26(a) of the Prevention of Corruption Act (Cap 241). In May 2003, he was convicted of forgery for the purpose of cheating under s 468 of the Penal Code (although he is appealing against this conviction). He also had other prior convictions for careless driving and for providing public entertainment without a licence.

28 Besides his poor record, the circumstances of the present charge also show the appellant to be a shrewd and scheming rogue. He attempted to cover up the misappropriation of the money with a series of lies and deceptions. Even when discovered, he continued to concoct ever more elaborate stories designed to cover his tracks and cast the blame on others. Not only has he shown no remorse for his actions, he has also continued to make baseless allegations against all the prosecution witnesses, most notably against Stanley, who clearly has no personal interest in the case.

29 Taking into account all the aggravating factors, and the appellant's long list of antecedents, I was of the view that the sentence of 20 months' imprisonment was not only not manifestly excessive, but was instead manifestly inadequate.

Conclusion

30 For the reasons above, I dismissed the appeals against conviction and sentence, and enhanced the appellant's sentence to 36 months' imprisonment, to commence upon the expiry of the present sentence he is serving.

Appeals against conviction and sentence dismissed; sentence enhanced to 36 months' imprisonment, to commence upon expiry of the present sentence the appellant is serving.