Tan Beng Chua *v* Public Prosecutor
[2014] SGHC 130

Case Number : Magistrate's Appeal No 327 of 2013
Decision Date : 04 July 2014
Tribunal/Court : High Court
Coram : See Kee Oon JC
Counsel Name(s) : Bala Chandran s/o A Kandiah (Mallal & Namazie) for the Appellant; Suhas Malhotra and Mary Chong (Attorney-General's Chambers) for the Respondent.
Parties : Tan Beng Chua — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing

4 July 2014

See Kee Oon JC:

Introduction

1 This was an appeal brought by Tan Beng Chua ("the Appellant") against the decision of the District Judge in *Public Prosecutor v Tan Beng Chua* [2014] SGDC 22. The Appellant pleaded guilty to four charges under s 137(*a*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the Act") for making false statements to the Official Assignee ("the OA") and was sentenced to a total of four weeks' imprisonment. With the Appellant's consent, another ten related charges under the Act were taken into consideration for the purpose of sentencing. The Appellant brought the present appeal on the ground that the sentence imposed by the District Judge was manifestly excessive.

2 At the hearing before me on 23 May 2014, I dismissed the appeal. I now set out the full grounds for my decision.

Background facts

3 The Appellant was adjudged a bankrupt on 2 January 2004 and was still an undischarged bankrupt as at the date of the appeal hearing. One of his statutory obligations as a bankrupt was to submit an account of his income and expenses to the OA under s 82(1)(*a*) of the Act. If a material omission or a false statement was made on any of these statements, the Appellant would be guilty of an offence under s 137(*a*) of the Act.

4 In his written mitigation plea tendered to the court below, the Appellant stated that a few days after being declared a bankrupt, he received flyers in his mailbox offering services to complete and file his income and expenditure statements ("I&E Statements") on his behalf. The Appellant then contacted one "Eddie" from Guardian Consultants and engaged him to file his I&E Statements on his behalf electronically using the Appellant's SingPass. According to the Appellant, he did not receive copies of his I&E Statements from "Eddie". When his mother passed away on 23 January 2006, the Appellant claimed to have verbally informed "Eddie" of his mother's demise but "Eddie" could not recall whether he was so informed. [note: 1]

5 It was undisputed that all the Appellant's I&E Statements filed with the OA up to April 2010 had

consistently indicated that he was incurring a monthly sum of $1,200 on his mother's medical expenses. On 6 April 2010, the OA wrote to the Appellant and asked for documentary proof of these expenses which he had allegedly incurred on his mother. [note: 2] On 19 April 2010, the Appellant replied and informed the OA that his mother had in fact passed away in 2006. [note: 3]

6 Between 15 May 2006 and 16 February 2010, the Appellant submitted a total of 14 false I&E Statements to the OA. Each of these statements contained a false declaration that the Appellant had spent $1,200 per month in medical expenses on his mother. The 14 charges brought against the Appellant are summarised in the table below:

No	**Charge**	**Date of false statement**	**Period for which false statement was made**	**Proceed / Taken into consideration ("TIC")**
1	OAS-000080-MSC-2013	15 May 2006	February 2006 to April 2006	TIC
2	OAS-000081-MSC-2013	7 August 2006	May 2006 to July 2006	TIC
3	OAS-000082-MSC-2013	2 March 2007	November 2006 to January 2007	TIC
4	OAS-000083-MSC-2013	19 May 2007	February 2007 to April 2007	TIC
5	OAS-000084-MSC-2013	24 August 2007	May 2007 to July 2007	TIC
6	OAS-000085-MSC-2013	16 November 2007	August 2007 to October 2007	TIC
7	OAS-000086-MSC-2013	22 February 2008	November 2007 to January 2008	TIC
8	OAS-000087-MSC-2013	15 May 2008	February 2008 to April 2008	TIC
9	OAS-000088-MSC-2013	6 August 2008	May 2008 to July 2008	TIC
10	OAS-000089-MSC-2013	6 November 2008	August 2008 to October 2008	TIC
11	OAS-000090-MSC-2013	15 February 2009	November 2008 to January 2009	Proceed
12	OAS-000091-MSC-2013	5 May 2009	February 2009 to April 2009	Proceed
13	OAS-000092-MSC-2013	3 August 2009	May 2009 to July 2009	Proceed
14	OAS-000093-MSC-2013	16 February 2010	August 2009 to January 2010	Proceed

7 The Appellant also faced a separate set of ten charges for failing to account for and pay over various bonus payments from his employer under ss 82(1)(*a*) and 82(1)(*b*) of the Act. After he was charged in court, the Appellant paid a sum of $15,382.98 towards the bankruptcy estate. [note: 4] This sum represented only part of the total bonus payments he had received over the years which he had failed to account for. The District Judge granted a discharge amounting to an acquittal for these ten charges upon the OA's application to withdraw these charges after the Appellant had compounded these offences.

The decision below

8 The District Judge held that:

(a) The Appellant showed a "total disdain" for his obligations under the Act because he did not bother to check his I&E Statements that were filed with the OA when this could have been easily done (at [16]).

(b) The Appellant did not voluntarily inform the OA of the false medical claims. He first realised that false claims were being made for his mother's medical expenses in February 2010 but he kept quiet. He only informed the OA on 19 April 2010 after the OA asked for documentary proof of the medical expenses on 6 April 2010 (at [17]).

(c) The Appellant was not illiterate or ignorant. His attitude over his obligation to submit information to the OA demonstrated that he deliberately chose not to co-operate with the OA (at [18]).

9 The District Judge therefore sentenced the Appellant to two weeks' imprisonment on each of the four charges, with two sentences ordered to run consecutively. This amounted to a total of four weeks' imprisonment.

My decision on the appropriate sentence

10 In submitting that the sentence should be upheld, the Respondent argued that the general position was that custodial terms should generally be imposed on bankrupts who commit offences under the Act. *Public Prosecutor v Ong Ker Seng* [2001] 4 SLR 180 ("*Ong Ker Seng*") was cited in support of this contention. In that case, Yong Pung How CJ held (at [36]) that offences of obtaining credit without disclosure under s 141(1)(*a*) of the Act were more appropriately punished with imprisonment than with a fine. Yong CJ reasoned that if a fine was imposed, "either someone else would have to pay the fine on the offender's behalf (for which any punitive effect would clearly be diluted) or, alternatively, the fine would have to be derived from funds which should be available for creditors in the first place" (at [36]).

11 These observations were elaborated upon by Yong CJ in *Public Prosecutor v Choong Kian Haw* [2002] 2 SLR(R) 997 ("*Choong Kian Haw*") at [24]. He first affirmed that fines were in general not a suitable means of punishment since bankrupts would typically lack the means to pay for the fines themselves. Yong CJ went on to state that this general principle was not limited to offences committed under s 141(1)(*a*) but applied with equal force to the sentencing of bankrupts in general. Nevertheless, Yong CJ acknowledged that fines may be imposed in appropriate circumstances.

12 More recently, in *Ganesh s/o M Sinnathamby v PP* [2008] 1 SLR(R) 495 ("*Ganesh*"), the High

Court referred to Yong CJ's observations in *Choong Kian Haw* and observed that guidelines in past cases should be applied with due appreciation of the unique facts and circumstances of each individual case and that it was the duty of the court to tailor criminal sanctions to the individual offender (at [27]). In that case, it was of "crucial importance" (at [30]) that the offender was no longer an undischarged bankrupt at the time of his conviction and the court did not apply the general proposition in *Choong Kian Haw*. After considering the mitigating circumstances of the offences, the court substituted the original sentence of four weeks' imprisonment with a fine of $8,000.

13 Finally, in *Kalaiarasi d/o Marimuthu Innasimuthu v Public Prosecutor* [2012] 2 SLR 774 ("*Kalaiarasi*"), the High Court allowed the offender's appeal against her original sentence of eight weeks' imprisonment and ordered a conditional discharge for a period of 12 months. The District Court below in that case had relied on *Choong Kian Haw* and noted that there were no exceptional circumstances that warranted an imposition of a fine instead of a custodial term. In contrast, the High Court made no mention of the general proposition in *Choong Kian Haw* but instead placed considerable weight on: (a) the inordinate delay in prosecuting the offender which was solely caused by an oversight on the part of the prosecuting authorities; (b) the offender's gainful employment; and (c) the offender's lack of antecedents in coming to the conclusion that a discharge was more appropriate than an imprisonment term.

14 In the light of the recent decisions of *Ganesh* and *Kalaiarasi*, I undertook a closer scrutiny of the general proposition in *Choong Kian Haw*, *ie*, that fines are generally not a suitable means of punishment for bankruptcy offences since bankrupts would typically lack the means to pay for the fines themselves. In particular, I was concerned that although Yong CJ had recognised that fines could be imposed in appropriate circumstances for offences under the Act, the general proposition may have been understood over time to mean that custodial sentences will almost invariably be imposed for *all* bankruptcy offences. With respect, *Choong Kian Haw* should not be taken to have laid down a rigid and inflexible rule.

15 First, it is pertinent to note that the underlying assumption in *Choong Kian Haw* is that bankrupts do not have access to funds other than (a) donations from benevolent third parties; and/or (b) funds that are available for creditors. However, with respect, this assumption may not always hold true. Some bankrupts may have other legitimate sources of funds that may be used to pay a fine. These include CPF monies that a member is entitled to withdraw upon reaching 55 years of age (see s 78(2)(*d*) of the Act read with ss 15(2) and 24(2)(*c*) of the Central Provident Fund Act (Cap 36, 2013 Rev Ed)) and the sale proceeds of a Housing and Development Board flat (see s 78(2)(*d*) of the Act read with s 51(5) of the Housing and Development Act (Cap 129, 2004 Rev Ed)). Hence, the general proposition in *Choong Kian Haw* may have been misapplied somewhat to extend to every case irrespective of whether a bankrupt has legitimate sources of funds which are not available for distribution to creditors. In my opinion, there is no reason why in appropriate circumstances, such as where the nature of the bankruptcy offence itself is relatively minor and absent any aggravating features, a fine cannot be considered where a bankrupt has access to such sources of funds.

16 Secondly, a number of bankruptcy offences are compoundable (see Bankruptcy (Composition of Offences) Rules (Cap 20, R 5, 2010 Rev Ed) ("the Composition Rules")). These include leaving Singapore without the OA's permission under s 131(*b*) of the Act (this was the offence in *Choong Kian Haw* and *Ganesh*) and failing to file I&E Statements under s 82(1)(*a*) of the Act (this was the offence in *Kalaiarasi*). It should be noted that *Choong Kian Haw* was decided before the Composition Rules came into force on 24 October 2008. The general proposition in *Choong Kian Haw* should therefore be understood in the context where composition was not available under the then-prevailing regime of bankruptcy administration. I should add that an offence under s 137(*a*) of the Act is not compoundable, and a more serious view should generally be taken of an offence which might involve

active fraud, misrepresentation or misstatement. Having noted the above considerations, *Choong Kian Haw* nevertheless remains a useful starting point that can be applied with regard to the surrounding facts and circumstances of a particular case involving a bankruptcy offence. I would add that an offender does not have to go to the extent of showing that there are *exceptional* circumstances warranting a deviation from the imposition of a custodial sentence for bankruptcy offences. It should suffice if he can show that there are sufficiently strong mitigating circumstances which render the imposition of a custodial sentence inappropriate. With this in mind, I turn to examine the facts of the present case.

17 First, the Appellant's duty to file and submit I&E Statements to the OA was personal and non-delegable (see *Choong Kian Haw* at [17]). This duty is an important one as it ensures proper accountability by the bankrupt for the effective administration of his bankruptcy to the benefit of his creditors. On the facts, the Appellant chose to run the risk of delegating his obligation to file the statements to "Eddie" without bothering to check even once for six years or ask for copies of the statements for the purpose of verifying them. This demonstrates his blatant disregard for his obligations under the Act. I would add that the nature of the offence under s 137(*a*) of the Act involves the falsity or material omission of statements made to the OA and the fact that someone else submitted the statements on the Appellant's behalf does not detract from the falsity of the statements made every three months for a period of over six years.

18 Secondly, contrary to the assertions made by the Appellant, he did not inform the OA of the false expenses in his I&E Statements on his own accord. It was undisputed that the OA's query on 6 April 2010 led to eventual disclosure by the Appellant on 19 April 2010 of his mother's death. At that point, the Appellant must have known that he could not deceive the OA any further and there would have been no point claiming otherwise because the OA would have been able to ascertain the fact and date of his mother's death without much difficulty. Therefore, the Appellant's reply on 19 April 2010 can hardly be considered a *voluntary* admission of his breaches of duty. Further, as pointed out by the District Judge, the Appellant received copies of his I&E Statements sometime in February 2010 which contained the false expenses claims. However, the Appellant chose not to set the record straight with the OA immediately on these false claims but instead chose to keep quiet. He only admitted that his mother had already passed away after the OA wrote to him on 6 April 2010.

19 In my view, the Appellant's conduct demonstrated the lack of a genuine desire to cooperate fully with the OA. It was not consistent with the conduct of a person who was truly interested in ensuring that he would meet his statutory obligations.

20 Thirdly, the quantum of payments made by the Appellant towards the bankruptcy estate did not amount to a strong mitigating factor. The Appellant argued that he had paid a total of $58,418.48 in respect of the outstanding total admitted debt of $140,577.35, which is about 42% of the total debt. However, $15,382.98 of the amount paid towards the estate was only paid after the Appellant had been charged with failing to disclose several bonus payments which he had received from his employer (see above at [7]). This amount was only part of the total bonus payments he had received in any event. Therefore, the Appellant had really only paid $43,035.50 towards the bankruptcy estate voluntarily and this represents only approximately 30% of the total admitted debt that has been paid over a period of eight years. I recognise that this is not an insignificant amount and the Appellant did exhibit some level of co-operation with the OA through his regular monthly payments of $400 towards the bankruptcy estate. Nevertheless, the total amount paid towards the estate could very well have been much more if the Appellant had truthfully and fully declared the actual state of his financial affairs to the OA.

21 The Appellant concedes that the statements were false as there were no remaining medical

expenses after his mother's demise in January 2006. It remains unclear what he had actually used the funds for, or indeed whether he had expended them at all. He has merely suggested somewhat callously that on hindsight, he could simply have attributed the $1,200 claim in his I&E Statements to "other expenses".

22 Fourthly, the offences committed by the Appellant under s 137(*a*) of the Act are more serious than the offences committed in *Choong Kian Haw*, *Ganesh* and *Kalaiarasi*. This is reflected in the fact that the offence is not compoundable and the higher prescribed punishment of a maximum of three years' imprisonment or a $10,000 fine or both (see s 146 of the Act) as compared to the punishment in ss 82(2) and 131(2) of the Act where a maximum of two years imprisonment or a $10,000 fine or both is prescribed. However, I should state that this does not inexorably mean that all offences that are not compoundable will automatically result in a custodial term. Whether an offence is compoundable is but one factor that will be considered in the context of the facts and circumstances of each case.

23 Although the Appellant had sufficient CPF funds at his disposal to pay a fine, this did not lead to the conclusion that a custodial term would be inappropriate. In my judgment, a custodial term was warranted on the facts of this case given the aggravating features, primarily the number of false declarations, the protracted period in which these declarations were made and the substantial amount undeclared which could have otherwise gone towards the Appellant's creditors had he chosen to make the funds available. These facts suggest that the Appellant had little intention of cooperating fully with the OA in his bankruptcy administration. Rather, he had intended to avoid making more substantial repayments to the fullest extent possible. The amount falsely declared in monthly expenses, $1,200, was three times the amount of his monthly $400 contribution towards the bankruptcy estate.

24 The available sentencing precedents for such offences under s 137(*a*) of the Act indicate that short custodial terms ranging from two to four weeks have been imposed, but prosecutions for such cases do not appear to be commonplace. From the Respondent's submissions, it would appear that there were only four prosecutions for this offence in the preceding six years since 2008.

25 In my view, a short custodial term ranging from two to four weeks per charge may be considered as the starting point in sentencing, although a fine may be sufficient where the offence is a one-off instance and the offender has generally been cooperative in his bankruptcy administration.

Conclusion

26 In the circumstances, the Appellant could not be said to have been generally cooperative with the OA in the administration of his bankruptcy estate. There were no strong mitigating factors suggesting that the custodial term imposed by the District Judge was inappropriate.

27 For the reasons set out above, I dismissed the appeal.

[note: 1] Record of Proceedings ("ROP") at p 43.

[note: 2] ROP at p 44.

[note: 3] ROP at pp 66 to 67.

[note: 4] ROP at p 53.