Public Prosecutor v Ong Phee Hoon James
[2000] SGHC 116

Case Number : MA 179/1999

Decision Date : 26 June 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Ang Sin Teck (Raja Loo & Chandra) for the appellant; Jennifer Marie and Christopher Tang (Deputy Public Prosecutor) for the respondent

Parties : Public Prosecutor — Ong Phee Hoon James

Criminal Procedure and Sentencing – Identification parade – Breach of procedural requirements of identification parade – Whether identification evidence inadmissible – Whether weight of identification evidence affected

Criminal Procedure and Sentencing – Impeachment – Inconsistencies between court testimony and earlier police statements – Whether impeachment should be based on inconsistencies

Evidence – Witnesses – Failure to call unavailable witness – Whether adverse inference can be drawn

Evidence – Admissibility of evidence – Weight of evidence – Breach of procedural requirements of identification parade – Whether identification evidence not inadmissible – Weight of identification evidence affected

Evidence – Witnesses – Impeachment – Inconsistencies between court testimony and earlier police statements – Whether impeachment should be based on inconsistencies

Immigration – Harbouring – immigration offenders – Meaning of "harbour" – Whether leasing of premises to immigration offenders constituted harbouring

Immigration – Harbouring – immigration offenders – Whether presumption of mens rea rebutted – s 57(7) Immigration Act (Cap 133, 1997 Rev Ed)

Immigration – Harbouring – immigration offenders – Whether vicarious criminal liability can be imposed for unknown illegal sub-tenants

: The appellant, Ong Phee Hoon James, was charged with five counts of having harboured illegal immigration offenders under s 57(1)(d) of the Immigration Act. He was tried and convicted in the district court on all five charges. The district judge Zainol Abeedin Hussin (`the judge`) sentenced the appellant to eight months` imprisonment on each charge. Two of the five sentences were ordered to run consecutively while the remaining three terms were ordered to run concurrently. Consequently, a term of 16 months` imprisonment was imposed on the appellant.

The charges read :

> *DAC 015275/99 - the first charge*
>
> *You, Ong Phee Hoon James @ Wang Pi Yun male/58 yrs NRIC No S0293287/C are charged that you between the month of July 1998 and 13 October 1998, at No 200 Jalan Sultan [num]15-06, Textile Centre, Singapore, did harbour one Mostaffa, a Bangladeshi national (male 23 years), a person who acted in contravention of s 6(1)(c) of the Immigration Act (Cap 133), by entering Singapore without being in possession of a valid visit pass, whom you had reasonable grounds for believing to be a person who has acted in contravention*

of s 6(1)(c) of the Immigration Act, and you have thereby committed an offence under s 57(1)(d) of the Immigration Act, punishable under s 57(1)(ii) of the said Act.

DAC 015276/99 - the second charge

You, Ong Phee Hoon James @ Wang Pi Yun male/58 yrs NRIC No S0293287/C are charged that you between the month of July 1998 and 13 October 1998, at No 200 Jalan Sultan [num]15-06, Textile Centre, Singapore, did harbour one Baskar Khan, a Bangladeshi national (male 20 years), a person who acted in contravention of s 6(1)(c) of the Immigration Act (Cap 133), by entering Singapore without being in possession of a valid visit pass, whom you had reasonable grounds for believing to be a person who has acted in contravention of s 6(1)(c) of the Immigration Act, and you have thereby committed an offence under s 57(1)(d) of the Immigration Act, punishable under s 57(1)(ii) of the said Act.

DAC 015277/99 - the third charge

You, Ong Phee Hoon James @ Wang Pi Yun male/58 yrs NRIC No S0293287/C are charged that you between the month of July 1998 and 13 October 1998, at No 200 Jalan Sultan [num]15-06, Textile Centre, Singapore, did harbour one Miras, a Bangladeshi national (male 30 years), a person who acted in contravention of s 6(1)(c) of the Immigration Act (Cap 133), by entering Singapore without being in possession of a valid visit pass, whom you had reasonable grounds for believing to be a person who has acted in contravention of s 6(1)(c) of the Immigration Act, and you have thereby committed an offence under s 57(1)(d) of the Immigration Act, punishable under s 57(1)(ii) of the said Act.

DAC 015278/99 - the fourth charge

You, Ong Phee Hoon James @ Wang Pi Yun male/58 yrs NRIC No S0293287/C are charged that you between the month of July 1998 and 13 October 1998, at No 200 Jalan Sultan [num]15-06, Textile Centre, Singapore, did harbour one Md Kalum, a Bangladeshi national (male 26 years), a person who acted in contravention of s 6(1)(c) of the Immigration Act (Cap 133), by entering Singapore without being in possession of a valid visit pass, whom you had reasonable grounds for believing to be a person who has acted in contravention of s 6(1)(c) of the Immigration Act, and you have thereby committed an offence under s 57(1)(d) of the Immigration Act, punishable under s 57(1)(ii) of the said Act.

DAC 015279/99 - the fifth charge

You, Ong Phee Hoon James @ Wang Pi Yun male/58 yrs NRIC No S0293287/C are charged that you between the month of July 1998 and 13 October 1998, at No 200 Jalan Sultan [num]15-06, Textile Centre, Singapore, did harbour one Zakirul Islam, a Bangladeshi national (male 20 years), a person who acted in contravention of s 6(1)(c) of the Immigration Act (Cap 133), by entering Singapore without being in possession of a valid visit pass, whom you had reasonable grounds for believing to be a person who has acted in contravention of s 6(1)(c) of the Immigration Act, and you have thereby committed an offence under s 57(1)(d) of the Immigration Act, punishable under s 57(1)(ii) of

the said Act.

On 1 October 1998, the appellant leased the premises at No 200 Jalan Sultan [num]15-06, Textile Centre, Singapore (`the premises`) to a Bangladeshi national by the name of Ansar. The appellant and one Chua Guan Chye (`Chua`) had jointly purchased the premises as an investment.

At various times between July and October 1998, the five persons named in the five charges, namely Mostaffa (PW6), Baskar Khan (PW2), Miras (PW5), Md Kalum (PW3) and Zakirul Islam (PW4), were brought to the premises to stay. Each of them was told that the appellant was the owner of the premises and that they had to obtain his permission to stay at the premises. They were also informed that the rental of $150 per month was payable on the fifth day of every month.

At the trial, these five persons informed the court that they had been introduced to the appellant who had, in turn, granted them permission to stay at the premises. Thereafter, they stayed at the premises and paid the monthly rental to the appellant through various intermediaries.

On 13 October 1998, the police raided the premises and arrested 21 Bangladeshi nationals including the five illegal immigrants named in the charges. All five persons were illegal immigrants in that they had contravened s 6(1) of the Immigration Act. Section 6(1) provides:

> *No person, other than a citizen of Singapore, shall enter or attempt to enter Singapore unless -*
>
> *(a) he is in possession of a valid entry permit or re-entry permit lawfully issued to him under section 10 or 11;*
>
> *(b) his name is endorsed upon a valid entry permit or re-entry permit in accordance with section 12, and he is in the company of the holder of that permit;*
>
> *(c) he is in possession of a valid pass lawfully issued to him to enter Singapore; or*
>
> *(d) he is exempted from this section by an order made under section 56.*

All of them had been charged and convicted for their illegal presence in Singapore. They were each sentenced to one month`s imprisonment and four strokes of the cane.

The defence

In his defence, the appellant stated that he had never seen any of the five illegal immigrants before. He claimed that in early 1998, he and Chua had rented the premises out to one Faruk. Faruk had agreed to pay a monthly rental of $1,850. A tenancy agreement dated 1 March 1998 was signed. In the course of Faruk`s occupation of the premises, Chua collected rent from him on about five occasions. Payment for the rest of the period was given to the appellant. Faruk stayed at the premises from March until September or October 1998 although he had agreed to stay for a year. The

appellant stated that he was unaware of anyone other than Faruk and one Sony (a witness to the tenancy agreement) staying at the premises during Faruk`s tenancy.

In any event, the appellant contended that he had exercised due diligence in ascertaining that Faruk was not an illegal immigrant. He stated that he had checked Faruk`s passport and had noted that it bore a stamp indicating Faruk`s entry into Singapore sometime in late February 1998. The appellant had also asked for Faruk`s work permit but was told by the latter that he did not have one as he was a businessman. The appellant also asked for and was shown Sony`s passport. The details of Sony`s work permit were recorded next to Sony`s signature in the tenancy agreement. As a precaution, the appellant inserted a clause into the tenancy agreement requiring the tenant to ensure that no illegal immigrant visited or stayed at the premises. There was also a clause forbidding the tenant to assign, sublet or part with possession of the premises.

When Faruk gave up the tenancy, he introduced one Ansar to take over the premises on the same terms. Another agreement (exh P-6) was entered into with Ansar. Ansar moved into the premises on 1 October 1998. Subsequently, the appellant heard that police raided the premises on 13 October 1998.

The decision below

The judge found the appellant guilty as charged.

Identification of the appellant

The judge rejected the appellant`s defence that he had not seen any of the five illegal immigrants before. This was because the five illegal immigrants had no difficulty identifying the appellant as the owner of the premises. They claimed that they had each been introduced to the appellant when they were brought to the premises to stay.

Due diligence

The judge also did not accept the appellant`s claim that he had exercised due diligence in a manner that would afford him a defence to the offence under s 57(1)(d) of the Immigration Act with which he was charged. Section 57(1)(d) of the Immigration Act provides:

> *(1) Any person who -*
>
> *...*
>
> *(d) harbours any person who has acted in contravention of the provisions of this Act or the regulations;*
>
> *...*
>
> *shall be guilty of an offence ...*

Section 57(9) of the same Act provides:

> *In any proceedings for an offence under subsection (1)(d) or (e), it shall not be a defence for the defendant to prove that the person harboured or employed by him was in possession of a pass or permit issued to the person under the Act or the Regulations unless the defendant further proves that he had exercised due diligence to ascertain that the pass or permit was at the material time valid under this Act or the regulations.*

Section 57(10) (as it was before the amendment that came into effect on 5 October 1998) provides:

> *For the purposes of subsection (9) a defendant shall not be deemed to have exercised due diligence unless he had personally checked the passport or other travel documents of the person whom he had harboured or employed and had reasonable ground to believe that -*
>
> *(a) the person harboured or employed by him had, at the material time, in force a pass or permit issued under this Act or the regulations; and*
>
> *(b) where such person is the holder of a valid pass, that person had, at the material time, in force a work permit under the Employment of Foreign Workers Act (Cap 91A) or had obtained the written consent of the Controller to work in Singapore.*

Although the appellant did take precautions to ensure that Faruk, Sony, Ansar and two of Ansar`s uncles were not illegal immigrants, these steps were not relevant as the appellant was charged with harbouring other persons, those other persons being the five illegal immigrants named in the charges. There was no evidence that the appellant had personally checked the passport of Mostaffa, Baskar Khan, Miras, Md Kalum or Zakirul Islam. Further, the appellant did not claim that he had reasonable grounds to believe that these five individuals each had a valid pass or permit that was issued under the Immigration Act or regulations. Accordingly, the judge did not think that the appellant had a valid defence in this regard.

In any event, the judge did not think that the precautionary steps taken by the appellant in relation to Faruk and Ansar were sufficient to constitute due diligence under s 57(9) of the Immigration Act. According to Chua, Faruk only had a 14-day pass. This would have been apparent to the appellant if he had checked Faruk`s travel document. In any case, there was no evidence that the appellant had re-checked Faruk`s passport after the expiry of the 14-day pass.

Although the appellant claimed to have checked Ansar`s passport and work permit and obtained photocopies of the same, the judge was not persuaded that the steps taken in relation to Ansar constituted due diligence on the appellant`s part. First, there was no indication in the passport that Ansar had entered Singapore legally. Secondly, the signature at page 3 of it did not tally with Ansar`s signature in his tenancy agreement. Further, the evidence did not indicate that the appellant had ascertained that Ansar had entered and remained in Singapore legally.

The judge went further and held that the appellant knew or had reasonable grounds to believe that Faruk and Ansar were illegal immigrants. Even if Faruk and Ansar had sub-let the premises to the five illegal immigrants without the knowledge of the appellant, the appellant should not be absolved from liablity for harbouring the sub-tenants of the premises. The judge derived support for his conclusion in

this regard from the decision of the Chief Justice in **Lim Dee Chew v PP** [1997] 3 SLR 956 (` ***Lim Dee Chew*** `). It was stated in that case that:

> *[W]here the owner rented his premises to an illegal immigrant who in turn rented out rooms in the premises without informing the owner ... it must surely follow that the owner should be held to be the harbourer of all of them. The owner would not be allowed to hide behind his initial illegal act to avoid liability for all the other illegal immigrants, regardless of his lack of knowledge or consent. Only if he had initially rented the premises to a person who was in Singapore legally, would he not be liable under the Act if the lawful tenant in turn rented the premises to illegal immigrants without his knowledge or consent.*

On the basis of the above passage, the judge held that the appellant was vicariously liable for harbouring the five illegal immigrants.

Impeachment of the appellant`s credit

In the course of the trial, the judge allowed the prosecution`s application to impeach the appellant`s credit on the basis of four inconsistencies which the judge regarded as material. In substance, the inconsistencies were as follows:

(a) In his statement to the police (exh P-10), the appellant admitted that he had never checked Faruk`s documents as Faruk had been introduced to him by a housing agent. In court, the appellant maintained that he had inspected Faruk`s passport.

(b) In P-10, the appellant stated that he had only checked a photocopy of Ansar`s passport. However, the appellant stated in court that he had checked the originals of both Ansar`s work permit and passport.

(c) In court, the appellant revealed in cross-examination that he did not know that Faruk was sharing the premises with other persons. He also said that when Faruk was the tenant, only Faruk and Sony would be staying at the premises. The appellant also stated that only Ansar and his two uncles would be staying at the premises when Ansar took over Faruk`s tenancy. This contradicted the following extract of the appellant`s statement in P-10 wherein he said:

> *Sometime [in] late January 98, [Faruk] spoke to me to enquire whether I have a flat to let. [Faruk] used to rent my wife`s flat at Tiong Poh road together with some other Bangladeshi nationals and the neighbours complained to the URA that they were dirty and cooking was smelly ... I asked Faruk how many people will be staying at No 200 Jalan Sultan [num]15-06 and he said that only seven to eight Bangladeshi nationals will be staying together with him there.*

(d) In P-10, the appellant stated that he had met Ansar when the latter accompanied Faruk on the first day of Faruk`s tenancy. In court, the appellant alleged that he only met Ansar for the first time in mid-September 1998.

The judge did not accept the appellant`s explanations for the above inconsistencies. Accordingly, he ruled that the appellant`s credit had been impeached.

Alibi witnesses

A number of the appellant`s relatives gave evidence in support of the appellant`s alibi that he was at a birthday party on 5 September 1998. According to the prosecution witnesses, the appellant was at the premises on the same day to collect the monthly rental from them.

The judge was not persuaded by this defence. First, all the alibi witnesses were related to the appellant. Secondly, the judge doubted their ability to recall some ten months after the event the fact that the appellant had left the party after 11pm. In any case, he did not think that the appellant`s presence at the premises on 5 September 1998 was a crucial fact as the prosecution witnesses had recognised him as the person to whom they paid the rent. Further, it was possible that the prosecution witnesses had genuinely made a mistake about the appellant having visited the premises on 5 September 1998. In addition, he did not rule out the possibility that the appellant might have visited the premises after the party on 5 September 1998.

Adverse inference

The judge also refused to draw an adverse inference against the prosecution for not calling Ansar as a witness. Ansar had been repatriated to Bangladesh on 14 October 1998 by the Immigration Department. There was no evidence of a sinister motive on the part of the prosecution.

For the above reasons, the judge convicted the appellant on all five charges.

The appeal

The appellant has appealed against the decision of the judge on the following grounds:

(a) the judge erred in law when he misinterpreted the word `harbour` in the context of the Immigration Act;

(b) he erred in finding that the appellant was vicariously liable for the acts of Faruk or Ansar;

(c) he erred in finding that the defence of due diligence was not established;

(d) he erred in concluding that the appellant`s credit had been impeached on the basis of inconsistencies that were minor;

(e) he erred in finding that the appellant had been properly identified when the circumstances indicated that he was wrongly and unfairly identified;

(f) he erred in rejecting the alibi defence;

(g) he erred in failing to draw an adverse inference against the prosecution for not calling Ansar as a witness.

The meaning of `harbour`

The appellant argued that `harbour` in the context of the Immigration Act meant the giving of secret refuge to an immigration offender and did not encompass the wider meaning of giving accommodation or providing a roof to immigration offenders, as contended by the respondent. Accordingly, the appellant stated that the leasing of premises to immigration offenders did not constitute `harbouring` under the said Act.

Section 2 of the Immigration Act defines `harbour` as `to give food or shelter, and includes the act of assisting a person in any way to evade apprehension`. The meaning of `shelter` in the context of the Immigration Act has been defined as `providing some form of habitation` (see **Lee Boon Leong Joseph v PP** [1997] 1 SLR 445).

In my opinion, the leasing of premises to immigration offenders constitutes the provision of shelter or habitation to such persons. The act of leasing is beyond doubt a positive act of providing shelter on the part of the landlord. Furthermore, the appellant had sufficient control over the rent (see ***Lim Dee Chew*** at [para] 34). The evidence showed that he dictated the amount of rent payable and collected rent from the five illegal immigrants named in the charges. Accordingly, there was no doubt that the appellant was the `harbourer` of the five illegal immigrants.

In any case, there is no support for the restricted definition of `harbour` advanced by the appellant. The appellant argued that the definition of `harbour` is confined to the giving of secret refuge to an immigration offender. Support for this position was derived from some English decisions which examined the type of conduct that would constitute the harbouring of prison escapees. In this specific context, Goff LJ in **Darch v Weight** [1984] 2 All ER 245 stated that there has to be a provision of shelter in the sense of ` ***providing a refuge for an escapee*** ` before there can be a conviction for the offence of knowingly harbouring a prison escapee under s 22(2) of the Criminal Justice Act 1961 [UK]. In my view, the appellant`s reliance on this case was unfounded. First, Goff LJ was referring to a specific provision of British legislation which dealt with the problem of prison escapees being sheltered and protected from the authorities by members of the public. That offence is rather different from, and in my view more severe than, harbouring illegal immigrants in the context of s 57(1)(d) of the Immigration Act. Secondly, the restricted definition of `harbour` advanced by Goff LJ was justified in the circumstances because s 22(2) of the Criminal Justice Act specifically targets any person who ` ***knowingly harbours*** ` a prison escapee. The presence of the term ` ***knowingly*** ` in s 22(2) (and its absence in s 57(1)(d) of the Immigration Act) called for a definition of `harbour` that included an intent to protect or afford clandestine refuge to prison escapees.

Accordingly, it was my opinion that the meaning of `harbour` that was advanced by the respondent and applied by the judge was correct.

Vicarious liability under Lim Dee Chew v PP

The appellants submitted that the judge erred when he concluded that, where an accused person knew or had reasonable grounds to believe that his tenants were illegal immigrants, he could not be relieved of liability for harbouring the sub-tenants who were also illegal immigrants The appellants stated that the judge did not pay sufficient attention to an earlier passage in ***Lim Dee Chew*** where it was stated that:

> *The person who provides the shelter or food (`the harbourer`) may not necessarily be the owner of the premises. In many cases the owner of the premises may rent out the premises to a tenant who in turn may rent it to a sub-tenant. If the sub-tenant turns out to be an illegal immigrant, it cannot be that in all cases the owner of the premises will be held as the person who*

> *harboured the illegal immigrant. In my opinion this would depend on the facts of each particular case and the agreement which the owner of the premises had with the tenant.*

The appellant submitted that the judge did not adequately consider the facts of the present case. Further, the appellant cast doubt on the passage referred to by the judge in ***Lim Dee Chew*** where it was suggested that criminal liability for harbouring sub-tenants could be pinned on a landlord or owner of property where the tenants were illegal immigrants even if the landlord or owner was not aware of the presence of the sub-tenants. For ease of reference, I will set out the passage again:

> *[W]here the owner rented his premises to an illegal immigrant who in turn rented out rooms in the premises without informing the owner ... it must surely follow that the owner should be held to be the harbourer of all of them. The owner would not be allowed to hide behind his initial illegal act to avoid liability for all the other illegal immigrants, regardless of his lack of knowledge or consent. Only if he had initially rented the premises to a person who was in Singapore legally, would he not be liable under the Act if the lawful tenant in turn rented the premises to illegal immigrants without his knowledge or consent.*

The appellants stated that such an approach was unfair as the offences with which the appellant was charged were offences with a clear mens rea element. Mens rea is presumed to be a necessary ingredient of an offence in the absence of clear words to the contrary (see **PP v Bridges Christopher** [1998] 1 SLR 162). Accordingly, the imposition of criminal liability in the vicarious manner contemplated by ***Lim Dee Chew*** was inconsistent with this maxim of criminal law.

It was my view that the judge did consider the facts of this particular case. He concluded that the appellant was guilty of harbouring the five illegal immigrants named in the charges. He rejected the appellant`s defence that he had never seen those five persons before. This defence was rightly rejected as the five illegal immigrants had no difficulty identifying the appellant in an identification parade and in court. Further, they gave a consistent description of the appellant in their evidence. There was also no reason for the five illegal immigrants to give evidence that would be detrimental to the appellant since they had been convicted by the time the appellant`s trial began. As stated earlier, there was no doubt that the actus reus of harbouring had been committed by the appellant.

It was regrettable that the judge did not clearly address the issue of the mens rea of the appellant. He seemed to have assumed that it was sufficient that the appellant did not take any steps to check if the five persons named in the charge were legal entrants. It must be noted that the appellant is presumed to have ***knowingly*** harboured the five illegal immigrants named in the charges pursuant to s 57(7) of the Immigration Act which provides:

> *Where, in any proceedings for an offence under subsection (1)(d), it is proved that the defendant has given shelter to any person who has remained in Singapore unlawfully for a period exceeding 90 days after expiration of any pass issued to him or* ***who has entered Singapore in contravention of s5(1) or 6(1), it shall be presumed, until the contrary is proved, that the defendant has harboured him knowing him to be a person who has acted in contravention of the provisions of this Act or the regulations****. [Emphasis mine.]*

Accordingly, the judge should have asked himself if the evidence adduced by the appellant was sufficient to rebut the presumption of mens rea in s 57(7).

The case of **PP v Koo Pui Fong** [1996] 2 SLR 266 (` ***Koo Pui Fong*** `) provides some guidance as to what constitutes the requisite mens rea in the context of s 57(1)(e) of the Immigration Act which deals with the offence of employing illegal immigrants. I am of the view that the observations in ***Koo Pui Fong*** are equally relevant to the offence of harbouring illegal immigrants under s 57(1)(d). It was stated in ***Koo Pui Fong*** that:

> *it is wholly in keeping with common sense and the law to say that an accused knew of certain facts if he deliberately closed his eyes to the circumstances, his wilful blindness being evidence from which knowledge may be inferred.*

In my opinion, the presumption of mens rea in s 57(7) cannot be rebutted in this case. The evidence points to the conclusion that the appellant deliberately closed his eyes to circumstances which suggested that the five persons named in the charge were illegal immigrants. First, the appellant knew that the five persons were Bangladeshi nationals. He had seen them on more than one occasion and collected rent from them regularly. Secondly, Baskar Khan, Md Kalum and Miras gave evidence that the premises were occupied by 30 to 35 Bangladeshi nationals during their stay there and that there were about 25 mattresses scattered around the premises. In such circumstances, the appellant must have been suspicious as to the immigration status of these Bangladeshi nationals. Although he had more than one opportunity to check if they had valid passes or permits, the evidence did not indicate that the appellant took any steps to verify if the persons occupying his premises were legal entrants. Accordingly, it was my view that the appellant ` ***deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed*** ` (see **Westminster City Council v Croyalgrange Ltd** [1986] 83 Cr App R 155 at 164). Accordingly, I was of the view that the appellant had the necessary mens rea for the offence under s 57(1)(d) read with s 57(7) of the Immigration Act.

Nevertheless, the judge went on to find that even ***if the appellant was ignorant of the presence of the five illegal immigrants at his premises*** he would not be allowed to hide behind his initial illegal act (in harbouring the illegal tenants, Faruk and Ansar) to avoid liability for all the other illegal immigrant sub-tenants on the basis of ***Lim Dee Chew*** . It was clear that the judge considered the appellant`s vicarious criminal liability in this regard to be an alternative basis to found a conviction.

I would clarify the theory of vicarious criminal liability that was briefly touched upon in ***Lim Dee Chew*** . At first glance, the approach does appear to accord with the policy of ensuring that immigrants who enter Singapore illegally do not procure accommodation easily. It also deters property owners and landlords from adopting a lackadaisical attitude towards activities on their premises.

Having reconsidered the matter and with the benefit of detailed written submissions from both parties in this case, I do not think that it is acceptable to find an owner guilty of the crime of harbouring illegal immigrant ***sub-tenants*** when that owner was ***completely unaware*** of their presence. The fact that the owner may have been guilty of harbouring illegal immigrant ***tenants*** is a fact that relates to a separate and independent crime altogether. The imposition of criminal liability vicariously in the manner contemplated by the dictum in ***Lim Dee Chew*** would unfairly circumvent the mens rea requirement with respect to the illegal sub-tenants. As stated earlier, it is a fundamental tenet of criminal law that the mens rea is presumed to be a necessary ingredient of an offence in the absence of clear words to the contrary. I do recognise that an increasing number of statutory offences of

strict liability have been created for the purposes of promoting greater vigilance where an important social issue is involved. This trend is not confined to Singapore but can be discerned throughout the common law world. Nevertheless, the statutory offences set out in the Immigration Act are not expressly stated to be offences of strict liability. The presumptions in s 57 of the Immigration Act that allow the guilt of the accused to be presumed from certain facts simply facilitate the prosecution in establishing the guilt of accused persons. It is open to the accused to rebut these presumptions by adducing evidence of his ignorance or innocence. Accordingly, the mens rea requirement has not been dispensed with in the context of statutory offences under the Immigration Act. As I stated in ***Koo Pui Fong*** :

> *[the] mens rea remains an essential component of every offence under s 57(1), but need not be proved in the specific instances set out in ss 57(6) to (8) in which the offender is presumed to have the necessary mens rea.*

If the passage in ***Lim Dee Chew*** on vicarious criminal liability were to be treated as if it were a legislative provision prescribing a statutory offence, a landlord or owner may be found guilty of harbouring illegal immigrants even though he was totally ignorant of their existence. Such an approach effectively does away with the mens rea requirement. If such a drastic move is thought to be the best way to deal with the situation where an illegal immigrant tenant sub-lets the premises to other illegal immigrants without the knowledge of the landlord or owner, it is my view that Parliamentary intervention is necessary. In the absence of unambiguous legislation to that effect, I do not think that the dictum in ***Lim Dee Chew*** should be regarded as providing for the establishment of a criminal offence in a manner not contemplated by the Immigration Act.

Identification of the appellant

The appellant submitted that he had been wrongly identified by the five illegal immigrants. He stated that the identification parade that was formed operated unfairly against him. According to the appellant, Investigating Officer Sharon Teo (PW1) did not conduct a proper identification parade. All she did was to ask the five illegal immigrants to identify the owner of the premises by presenting Chua and the appellant before them. The appellant submitted that this casual `face-to-face` approach was not a proper identification parade. Further, there was no evidence to indicate that the appellant and Chua were of the same height, age or general appearance.

On the other hand, the respondent stated that there were no material discrepancies between the identification evidence of the five illegal immigrants and their descriptions of the appellant when they were asked to describe him during cross-examination. Baskar Khan said that `Mr Ong` wore a shirt and pants and a pair of glasses on 5 September 1998 when he came to the premises. Mohd Kalum said that `Mr Ong` was about 58 years old, wore glasses, was taller than himself and was of medium build. He also said that `Mr Ong` wore a white shirt and long pants on 5 September 1998. Zakirul Islam said that `Mr Ong` was an `aged person` of medium build who wore glasses. He also said that `Mr Ong` wore a long sleeved shirt and long pants on 5 September 1998. Miras said that `Mr Ong` wore glasses, a pair of long pants, a shirt and a sweater on 5 September 1998. Finally, Mostaffa said that on the occasions that he saw `Mr Ong`, he wore a long sleeved shirt, a tie, pants and glasses. It is noted that Mostaffa could not recognise the appellant as `Mr Ong` on 6 March 1999 at the police station. The respondent argued that this factor was not significant as he stated in court that he was sure that the person in the dock (the appellant) was `Mr Ong`.

According to the respondent, the fact that a formal identification parade was not carried out to

identify the appellant did not vitiate the identification evidence of these prosecution witnesses because there was no reason to doubt or impugn their identification evidence. Their evidence in relation to other issues were consistent. These issues included the number of occupants at the premises, the number of mattresses in the premises and the place where the key to the grille of the flat was kept. Further, all of the five illegal immigrants had been convicted and sentenced for contravening the Immigration Act by the time of the appellant`s trial. They had no reason to concoct a story to the detriment of the appellant. Thus, there was no reason to disbelieve their identification evidence.

Where the reliability of identification evidence is involved, the ***Turnbull*** guidelines laid down by Lord Widgery in **R v Turnbull** [1977] QB 224 and adopted by the Court of Appeal in **Heng Aik Ren Thomas v PP** [1998] 3 SLR 465 are instructive. The guidelines are as follows:

(a) the first question that a judge should ask is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence;

(b) if so, the second question should be whether the identification evidence is of good quality, having regard to the circumstances in which the identification by the witness was made;

(c) where the quality of the identification evidence is poor, the judge should ask if there is any other evidence that supports the correctness of the identification. If there is no other supporting evidence of the identification, the judge should be mindful that a conviction which relies on such poor identification evidence would be unsafe.

I should add that I was uncomfortable with the fact that a proper identification parade was not carried out in this case. In particular, I was disturbed by the fact that the appellant was not lined-up with several other persons of his age-group and race (see **Chan Sin v PP** [1949] MLJ 106). I understand that the practice in relation to identification parades is to include at least eight persons, other than the suspect, in the line-up. This was clearly not done in the present case. Having expressed my concerns, I must also add that a breach of the procedural requirements in the conduct of an identification parade does not automatically render the identification evidence inadmissible. Such deficiencies may affect the weight to be attached to the identification evidence. However, if there is evidence of bad faith or a deliberate flouting of procedural requirements, the identification parade will probably not be upheld (see **Thirumalai Kumar v PP** [1997] 3 SLR 434).

In my opinion, the casual `face-to-face` manner in which the identification of the appellant was carried out was improper. Accordingly, the weight that should be attached to the identification evidence of the five illegal immigrants should be minimal. However, this did not render the conviction of the appellant by the judge unsafe. In my view, the case against the appellant did not rest entirely on the identification evidence. The evidence of the five illegal immigrants in court was that a `Mr Ong` who wore glasses, a shirt and long pants had visited the premises before to collect the rent. They knew him as the landlord of the premises. Their evidence about the premises was consistent in other respects. There were other factors that suggested that `Mr Ong` was the appellant. First, the only other candidate for `Mr Ong` was Chua, who had purchased the premises jointly with the appellant. There was no evidence to suggest that any of the five illegal immigrants had seen Chua or were confused as to the appearances of the two men. Secondly, the name `Mr Ong` had a clear connection with the appellant. The inference seemed to be that the `Mr Ong` described by the five illegal immigrants was the appellant.

For the above reasons, I was of the view that the poor quality of the identification evidence did not render the conviction of the appellant unsafe.

Due diligence

The judge took pains to examine the precautionary steps taken by the appellant with respect to Faruk and Ansar. He found that the appellant did not exercise due diligence in this regard, and consequently held that the appellant knew or had reasonable ground to believe that Faruk and Ansar were illegal immigrants. On the basis of the dictum in ***Lim Dee Chew*** , the appellant could therefore not escape criminal liability for harbouring the five illegal immigrants to whom Faruk and Ansar had sub-let the premises. I have concluded that the dictum in ***Lim Dee Chew*** should not be followed. Accordingly, I do not think it is necessary to examine whether the judge was right in his finding that the appellant did not exercise due diligence in relation to Faruk and Ansar.

Impeachment of the appellant`s credit

I agreed with the judge that the inconsistencies between the appellant`s testimony in court and the contents of his statement to the police were such that they cast considerable doubt on his reliability as a witness.

Although the inconsistencies might appear insignificant when considered individually, as a whole they suggested that the appellant was trying to paint a different picture of his attitude towards Faruk and Ansar in court. He tried to convey the impression that he was unaware of Faruk`s intention to rent out the premises to other Bangladeshi nationals in court, when his statement to the police indicated that he knew about Faruk`s sub-letting plans. I also shared the judge`s doubts as regards the steps taken by the appellant in checking the particulars of Faruk and Ansar. I was not satisfied that the appellant was being truthful when he claimed to have checked the relevant documents of these two persons.

There was no suggestion that the appellant`s statement to the police was involuntary. Further, the explanations offered by the appellant were highly unsatisfactory. He simply asserted that he was mistaken when he gave the statement to the police. In view of the above, I saw no reason to disturb the judge`s finding that the appellant`s credit had been impeached.

Alibi witnesses

In my opinion, the judge was correct in rejecting the appellant`s alibi defence. It must be stated that appellate intervention is warranted in limited circumstances, given the numerous findings of fact made by the judge in relation to the alibi witnesses. In any case, I saw no reason to depart from the judge`s conclusion. I agreed with his decision that the appellant`s presence on 5 September 1998 was not a crucial fact since the five illegal immigrants all claimed to have seen him on other occasions (ie when they were first brought to the flat). In any event, it was not impossible that the appellant may have visited the premises after the alleged birthday party. Accordingly, the judge`s finding should be upheld.

Adverse inference

I do not propose to deal with this ground in detail. Suffice it to say that I agreed with the judge that it was not proper to draw an adverse inference against the prosecution for not calling Ansar. Ansar

was unavailable as a witness as he had been repatriated to Bangladesh. There was nothing to suggest that the prosecution had an ulterior motive for witholding the evidence of Ansar.

Conclusion

In view of the reasons given above, it was my view that the appeal against the conviction should be dismissed.

Outcome:

Appeal dismissed.