Abu Syeed Chowdhury v Public Prosecutor
[2002] SGHC 14

Case Number : MA 312/2001

Decision Date : 28 January 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : SK Kumar (SK Kumar & Associates) for the appellant; Peter Koy (Deputy Public Prosecutor) for the respondent

Parties : Abu Syeed Chowdhury — Public Prosecutor

Immigration – Control of admission – Immigration offences – Making false statement to obtain employment pass – Whether imprisonment or fine – ss 57(1)(k) & 57(1)(iv) Immigration Act (Cap 133, 1997 Ed)

Criminal Procedure and Sentencing – Sentencing – Applicable norm – Relevant considerations – Deterrence – Whether substantive custodial sentence should be applicable norm – Mitigation – Whether offender's personal circumstances justifies reduction in sentence – ss 57(1)(k) & 57(1)(iv) Immigration Act (Cap 133, 1997 Ed)

Judgment

GROUNDS OF DECISION

The appellant, Abu Syeed Chowdhury, was charged with three counts of obtaining an employment pass by making a false statement, punishable under s 57(1)(k) read with s 57(1)(iv) of the Immigration Act (Cap 133) ('the Act'). He consented to have two similar charges taken into consideration for the purposes of sentencing. All five charges related to a false declaration in his applications regarding his employment pass, which stated that he held a Bachelor of Science degree, a statement which he knew to be false.

2 The appellant was sentenced by district judge See Kee Onn to four weeks' imprisonment on each of the three charges, with two sentences to run consecutively. I dismissed his appeal against the sentences and enhanced them to a term of two months' imprisonment on each charge, with two sentences to run consecutively, for a total of four months' imprisonment. I now give my reasons.

The facts

3 The appellant, a 34 year old Bangladeshi national, was granted an employment pass to work in Singapore on 17 April 1996. From 17 April 1996 to 15 April 1998, he worked as a purchasing officer in Arc Marine Pte Ltd. From 1998 to 2001, he worked at Unimarine Shipping Services Pte Ltd ('Unimarine'), first as a purchasing officer, and later as a purchasing manager from 1 January 2000.

4 During this five year period, the appellant made five applications to either apply for or renew his employment pass. These applications formed the subject matter of the charges under s 57(1)(k). The offence under s 57(1)(k), read together with s 57(1)(iv), states as follows:

> Any person who …by making a false statement obtains or attempts to obtain an entry or re-entry permit, pass or certificate for himself or for any other person … shall be guilty of an offence and - … shall be liable on conviction to a fine not exceeding $4,000 or to imprisonment for a term not exceeding 12 months or to

both …

5 The five charges against the appellant cover the period from 1997 to 2001 and were nearly similar in content. It suffices to relate the first of the charges proceeded with, which stated:

> You … are charged that you applied for renewal of an Employment Pass in Form 8R, which application was received by the Employment Pass Department on 23.2.1999, to work for Unimarine Shipping Services Pte Ltd (RCB No.: 199201449N) as a Purchasing Officer, for which an Employment Pass was issued on 27.4.1999, on the basis of your declaration in the application form that you graduated from University of Dhaka with a Bachelor of Science, a statement which you declared to be true to the best of your knowledge, when the application form contained facts which you knew to be false. You have thereby committed an offence under Section 57(1)(k), of the Immigration Act (Cap 133) and punishable under Section 57(1)(iv) of the said Act.

6 The other two charges to which the appellant pleaded guilty related to similar applications to renew his employment pass, made on 1 March 2000 and 3 March 2001 respectively. In a similar vein, the two charges taken into consideration averred to similar applications made on 22 February 1997 and 15 April 1998.

7 The common thread in these applications was the appellant's false declaration that he had graduated from the University of Dhaka in 1986 with a Bachelor of Science degree. Each application was supported by a copy of a forged graduation certificate to this effect. Verification from the University of Dhaka confirmed however that the certificate was bogus and that the appellant was not a graduate of the University. Nor, for that matter, did he hold the degree in question. He had in fact purchased the forged certificate in Indonesia sometime in 1988 or 1989, for the price of about US$100. In this manner, he had thereby induced the Employment Pass Department of the Ministry of Manpower to issue as well as renew his employment passes annually from 1997 to 2001.

The mitigation plea

8 In mitigation, the appellant pleaded several factors which can be succinctly stated as follows.

9 First, he claimed to be a victim of circumstance and poor advice. He had apparently paid a Bangladeshi agent US$3,000 to travel to Australia for employment, but was tricked and left stranded in Jakarta. Sometime in 1988 or 1989, he claimed to have met a second Bangladeshi agent, who took pity on him and offered to sell him the false degree certificate in order to obtain an employment pass in Singapore. This unnamed agent further provided him with the air fare to fly to Singapore.

10 Secondly, he pleaded that he had lived as a virtuous, law-abiding and productive resident in Singapore. He had paid all his taxes and had never given trouble to the authorities. His employers considered him an employee of high calibre and wrote testimonials in his favour. Notably, his present employer also stood as his bailor for the present charges. He also pleaded that he did not cynically extract the full benefits of his deception – for example, he did not purchase an HDB flat, nor did he enjoy medical benefits at a subsidized rate. He also claimed to be a 'pious and devout resident' who rendered both time and money to charitable organisations.

11 Thirdly, he asked for recognition to be given to his full co-operation with the authorities. Upon commencement of investigations, he had admitted to his wrongdoing and subsequently pleaded guilty

in court.

12 Finally, he pleaded for leniency on the basis that he was married with two young and dependent children. He claimed to have come from a well-respected family in Bangladesh dealing in the clothing business, and submitted that a custodial sentence would ruin his family reputation as well as his personal life.

The decision below

13 The judge in arriving at his decision considered that there was a patent and inexplicable disparity in sentencing precedents at the district courts. Turning to the available appellate decisions for guidance, he found the facts of *Rivera Eleazar P v PP* (MA 308 of 1997, unreported) directly applicable to the present case and sentenced the appellant accordingly. Significantly, he also expressed the opinion that a custodial sentence should be the norm for an offence under s 57(1)(k), and that a fine should only be granted under exceptional circumstances.

The appeal

14 Counsel for the appellant, Mr S K Kumar, submitted that a blanket custodial sentence should not be applied to this particular offence. He argued that to adopt such a 'benchmark' would unnecessarily fetter the discretion of the judge under s 57(1)(iv) to impose either a fine or a custodial sentence. He further contended that, given the various mitigation factors in this particular case, the discretion of the court should be exercised in favour of a fine only.

15 At the outset, I dispensed with Mr Kumar's concern about the undesirability of a 'benchmark' tariff as opposed to absolute sentencing discretion. This was simplistic argument which missed the point of a 'benchmark' tariff. A 'benchmark' is a sentencing norm prevailing on the mind of every judge, ensuring consistency and therefore fairness in a criminal justice system. It is not cast in stone, nor does it represent an abdication of the judicial prerogative to tailor criminal sanctions to the individual offender. It instead provides the focal point against which sentences in subsequent cases, with differing degrees of criminal culpability, can be accurately determined. A good 'benchmark' decision therefore lays down carefully the parameters of its reasoning in order to allow future judges to determine what falls within the scope of the 'norm', and what exceptional situations justify departure from it.

16 Having perused the authorities on s 57(1)(k), I found it unfortunate that some of the preceding cases in the district courts were inconsistent and could not provide a clear sentencing regime for this area of law. For example, in cases with materially similar facts, the punishments given in the lower courts varied between fines and custodial sentences. Moreover, although five cases have come up for consideration on appeal, they unfortunately did not merit written decisions, and therefore lacked prescriptive force. I was therefore grateful to the learned district judge for grasping the nettle and bringing this issue to the forefront. The time is ripe for a robust reassessment of the applicable sentencing principles and to set a firm benchmark for cases of false representation punishable under s 57(1)(iv).

The sentencing precedents relating to s 57(1)(k) offences

17 In this regard, I shall first review the five Magistrate's Appeal cases which have come before this

court. To my mind they illustrate a clear sentencing principle which will be evident upon a comparison of their facts.

18 In two of the five cases, the appellate court decided that fines were sufficient punishment. In *Goh Chuay Fern v PP* (MA 344 of 1999, unreported), the appellant falsely declared in her application for an entry permit that she had never been convicted in a court of law in any country. She had, however, been previously convicted for an offence of theft-in-dwelling. She pleaded guilty to one charge under s 57(1)(k) of the Act, and on appeal successfully reduced the initial sentence of six weeks' imprisonment to a fine of $1,000 in default one month's imprisonment.

19 In *Ng Kar Weng v PP* (MA 300 of 1997, unreported), the appellant attempted to obtain an entry permit for his wife, a Chinese national. He had made a false statement in the application that she had not previously been convicted in a court of law in any country. In fact, she had been convicted and fined previously in Singapore for working illegally while on a social visit pass. He pleaded guilty and was sentenced to imprisonment for two months. On appeal, the sentence was reduced to a fine of $2,500 in default two months' imprisonment.

20 In the remaining three appellate decisions, the court found it fit to impose a custodial sentence on the offenders. In *Li Hong Wei v PP* (MA 236 of 2001, unreported), the appellant, a Chinese national, had obtained a social visit pass by falsely declaring on her disembarkation form that she had never been prohibited from entering Singapore. In truth, she had been banned from re-entering Singapore after being convicted for illegally overstaying in 1997. She pleaded guilty, and was sentenced to two months' imprisonment. On appeal, her sentence of two months' imprisonment was affirmed.

21 In *Kesorn Yuangtan v PP* (MA 250 of 1999, unreported), the appellant, in her application to obtain an entry permit, had failed to declare that she faced a permanent ban from entering Singapore, following her arrest in 1992 for engaging in prostitution. Her sentence of two months' imprisonment was affirmed on appeal.

22 The final appellate case was *Rivera Eleazar P v PP* (MA 308 of 1997, unreported). This case was closest on point to the present facts and therefore most persuasive in authority. The appellant in this case was a 29 year-old Filipino national, who had bought a forged Bachelor of Science in Commerce (Marketing) degree certificate in 1993. He subsequently tendered it in his application for an employment pass in 1996 to work as a website engineer. In March 1997, he made the same false declaration in a second application for an employment pass to work as a managing director in his own company. In mitigation, he pleaded that he had married a Singaporean wife who was gainfully employed as a senior medical representative, and that they had two young children who were Singapore citizens. He was also the director and 25% shareholder of the company with a paid-up capital of $100,000. He pleaded guilty to one charge and was sentenced to two months' imprisonment. His appeal against sentence was subsequently dismissed.

23 The above cases provide a valuable insight into a key sentencing principle in offences under s57(1)(k), which is that the severity of the punishment depends on the nature and extent of the deceit employed by the applicant. In this regard, the act of tendering a forged certificate in *Rivera Eleazar* was the most culpable among the above instances of deception due its active and deliberate nature. There, as in the present case, the applicant had gone beyond making a false declaration. He had actively procured and submitted a forged certificate for the sole purpose of corroborating his falsehood, thereby boosting his chances of hoodwinking the authorities. Similarly, the offenders in *Li Hong Wei* and *Kesorn Yuangtan* merited custodial sentences because their false declarations were made in active defiance of an entrance ban by the immigration authorities. This was unlike the offenders in *Goh Chuay Fern* and *Ng Kar Weng*, who, although having made a false declaration on a

material fact, did not do so with the knowledge that they would be thwarting a previous adverse finding made against them by the immigration authorities.

24 Admittedly, the five appellate decisions cited above have limited prescriptive force as they do not set down a clear sentencing norm. Neither do they inform of the relevant sentencing principles applicable to an offence as wide in scope and as prevalent in practice as that under s 57(1)(k). It is therefore appropriate at this juncture to consider a clear re-statement of the sentencing regime that should apply to such cases.

The sentencing norm and principles for false representations under s 57

25 I turn first to legislative history to discern parliamentary intention behind the promulgation of the offence under s 57. Notably, the maximum punishment prescribed under s 57(1)(iv) was doubled by Parliament in amendments to the Act made in 1995, when the maximum fine was increased from $2,000 to $4,000, and the maximum term of imprisonment was increased from six months to 12 months. This was due to concern over the increase in offences of false representation under the Immigration Act, as represented by s 57(1)(f) to (l) and punishable under s 57(1)(iv). On 1 November 1995, the Minister for Home Affairs had this to say in Parliament, during the second reading of the Amendment Bill:

> Mr Speaker, Sir, we have also taken the opportunity to enhance the penalty under section 57(1)(iv) from a maximum fine of $2,000 to $4,000 and from six months' jail to one years' jail to deal with the increase in the number of offences of false representations under section 57(1)(f). The penalties for other offences listed under section 57(1)(iv) have also been raised to maintain parity with the new penalty under section 57(1)(f).

Parliament had therefore espoused its intention to take a tougher stand against such offenders, presumably to stem the tide of illegal immigrants awash on our shores in the wake of the regional economic downturn. It therefore behoves the judiciary to adopt a similar mindset when enforcing the law in immigration cases.

26 For this reason, I intend to lay down a firm sentencing benchmark in order to send a strong message of deterrence to immigration offenders. Where a false representation is made under the various limbs of s 57(1) that are punishable by s 57(1)(iv), a custodial sentence should be the applicable norm, and a fine should only be warranted under exceptional circumstances. This is because a mere fine of up to $4,000 would be insufficient deterrence when weighed against the pecuniary benefits of working in Singapore. To some economic migrants, such a fine would merely represent a slap on the wrist, a cynically calculated cost of breaking the law for personal profit. I do not think that the immigration policies of a country, and the welfare of its citizen employees, should be held ransom by such profiteers. Accordingly, custodial sentences must be imposed to send out the firm signal that gaining entrance to Singapore by deception simply does not pay.

27 A benchmark is however imperfect without clear guidance as to its underlying sentencing principles. This guides the judge as to the length of the custodial sentence, as well as to the existence of special circumstances which exceptionally warrant a fine only. In this exercise, I do not find it useful to make tortuous distinctions between individual cases. Instead, the following four considerations should prevail on the judicial mind in applying the sentencing norm.

28 The first consideration should be the materiality of the false representation on the mind of the

decision-maker. The greater the impact of the falsehood in inducing the grant of the application, the more severe should be the sentence imposed. Conversely, a false declaration as to a fact which makes little difference to the application might exceptionally give grounds for leniency to be granted.

29 The next consideration would be the nature and extent of the deception, as discussed in the above authorities. An applicant who goes to greater lengths to deceive the authorities, or who acts in conscious defiance of the authorities, merits more severe punishment. Moreover, a deception which by nature is more difficult to detect, or which, as in the present case, is aided by the production of forged corroborating documents, should likewise deserve a heftier punishment. Offenders should not be allowed to exploit the evidential difficulties inherent in certain types of declarations, whose verification would otherwise take up valuable time and resources on the part of the immigration authority.

30 The third factor to take into consideration should be the consequences of the deception. In the present type of case, the court should consider whether the employer suffered any detriment as a result of the false declaration. Additionally, it should also consider the wider implications of the deception – whether, for example, the offender had effectively deprived a potentially better-qualified applicant of the job opportunity; or worse, put others at risk of adverse consequences by performing a job without the requisite skills.

31 The final factor to be considered relates to the personal mitigation factors applicable to the offender. In this regard, I would add the rider that little weight should be accorded to those hardships which arise only as a result of the offender's illegal entrance to the country. Often in such cases, the offender starts a family in Singapore, despite the knowledge of his illegal entry and the sufferings they would face if he were caught and punished. To that extent I would consider such hardships to be self-induced and carrying little mitigation value. He who lives on borrowed time cannot complain when the clock runs out.

The appropriate sentence

32 In the present case, a substantial custodial sentence is therefore appropriate, unless there exist exceptional circumstances which justify a departure from the norm. Applying the four sentencing considerations above, I found no reason to depart from this norm, for the following reasons.

33 The first is that the deception was clearly material. Put another way, but for the appellant's purported educational qualifications, the Employment Pass Department would not have granted him entry into Singapore. The next consideration I took into account was that the deception on the part of the appellant was conscious and deliberate. The forged certificate was obtained as early as 1988 or 1989, yet he had the presence of mind to retain it at least until 1996 to support his false declaration. In this light I found his account of being a victim of circumstance and of having been led astray by an unnamed agent to be highly dubious. This deception seemed to my mind to be a planned and conscious act, and was hardly the product of a moment of weakness. The third consideration related to the substantive consequences of the deception. While his employers were not prejudiced by the appellant's lack of qualifications, the fact remained that, by his deception, he had deprived a better-qualified candidate of entry into the country. Finally, I did not find the personal mitigation factors in this case exceptional enough to grant only a fine or a token custodial sentence. While his early plea of guilt had some mitigatory effect, I was not inclined to give it much weight, for the reason that the prosecution would have had no difficulty in proving the charge against him, per Chan Sek Keong J in *Wong Kai Chuen Philip v* PP [1991] 1 MLJ 321, 322-23; see also *Sim Gek Yong v PP* [1995] 1 SLR 537. The disruption to the appellant's family life was likewise not a good mitigating

factor, for, as mentioned above, he had brought the plight upon his family with full knowledge of the attendant risks. Balanced against these factors were the countervailing aggravations that the offence was motivated purely by personal benefit, and that it had involved a five year long period of deception, with every likelihood that the appellant would have made further false declarations had he not been caught.

34 Accordingly, having considered that a substantial custodial sentence was appropriate, I saw no reason to depart from the tariff of two months' imprisonment set out in *Rivera Eleazar P v PP*, whose facts were materially similar to the present appeal. I therefore enhanced the sentences to two months' imprisonment on each charge, with two of the sentences to run consecutively.

Appeal dismissed

Sgd:

Yong Pung How
Chief Justice

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