Aw Bock Eng v Public Prosecutor
[2007] SGHC 136

Case Number	: MA 249/2006
Decision Date	: 24 August 2007
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: S K Kumar and Udeh Chandran (S K Kumar & Associates) for the appellant; David Khoo Deputy Public Prosecutor (Attorney-General's Chambers) for the respondent
Parties	: Aw Bock Eng — Public Prosecutor

24 August 2007

Tay Yong Kwang J:

Introduction

1 This is an appeal against the decision of District Judge Terence Chua ("the DJ") in *PP v Aw Bock Eng* [2007] SGDC 88 (hereafter referred to as the "GD"). The appellant was convicted and sentenced on the following two charges:

> The First Charge
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> You, Aw Bock Eng, Male, 45 yrs
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> NRIC No S 1425258D
>
> are charged that you on 28th March 2006, at about 03.21 pm, at the Woodlands Checkpoint, Singapore, did use motor car SBZ 8581K as a public service vehicle without there being in force in respect of the said motor car, a valid public service licence granted under the provision of Part V of the Road Traffic Act, Chapter 276, authorising the use of the said motor car as a public service vehicle, and you have thereby committed an offence under Section 101(1) and punishable under Section 101(2) of the said Road Traffic Act, Chapter 276.
>
> The Second Charge
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> You, Aw Bock Eng, Male 45 years
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> NRIC No S1425258D
>
> are charged that you on the 28th March 2006, at about 03.21 pm along Woodlands Checkpoint, Singapore, did use motor car SBZ 8581K whilst there was not in force in relation to the use of the said vehicle a policy of insurance in respect to third party risks which complies with the requirements of the Motor Vehicles (Third Party Risks and Compensation) Act, and you have thereby committed an offence under Section 3(1) and punishable under Section 3(2) of the said Act, Chapter 189.

2 The punishment provided for the first charge (by s 101(2) of the Road Traffic Act)("RTA") is a

fine of up to $3,000 or imprisonment of up to 6 months or both while the punishment for the second charge provided by s 3(2) of the Motor Vehicles (Third Party Risks and Compensation) Act ("MVA") is a fine not exceeding $1,000 or imprisonment not exceeding 3 months or both. In addition, s 3(3) of the MVA states that a person convicted of an offence under that section shall be disqualified for holding or obtaining a licence under the RTA for a period of 12 months from the date of the conviction (unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification). The DJ sentenced the appellant to a $2,500 fine in respect of the first charge and a $800 fine in respect of the second charge and disqualified him from holding or obtaining a driving licence for all classes of vehicles for 12 months. The vehicle was also ordered to be forfeited pursuant to section 101(7) of the RTA.

3 The appellant indicated in his petition of appeal that he was challenging both the conviction and sentence imposed by the DJ but focused solely on the appeal against conviction in the written submissions and at the hearing before me. I dismissed the appeal and now give my reasons.

Factual background

4 On 27 March 2006, the appellant drove two ladies from China, Lu Huihua ("Lu") and Xu Fu Er, ("Xu") in the said motor car, a black Mercedes Benz E200, from Singapore to Malaysia. It was established that the ladies handed $150 to the appellant before they entered Malaysia but the parties disagreed as to the purpose of the payment. The prosecution contended that the appellant asked for this sum as a fee to ferry the ladies to Malaysia and back while counsel for the appellant argued that the money was given to the appellant for Lu's and Xu's expenses in Malaysia. That night, Lu and Xu stayed in a hotel in Malaysia while the accused returned to Singapore. The next day, the appellant drove to Malaysia again in order to bring the ladies back to Singapore. During their re-entry at Woodlands Checkpoint, the Immigration and Checkpoints Authority ("ICA") discovered that Lu had previously entered Singapore using another name "Xu Huihua".

5 When interviewed by the ICA officers, Lu admitted that she had previously been arrested for immigration offences in Singapore. In addition, she allegedly told them that the purpose of her leaving and re-entering Singapore was to extend her social visit pass in Singapore and that the appellant had provided transport for that purpose. These were recorded in the statement given voluntarily by Lu to the ICA officers on 29 March 2006 (exhibit "P5"). Xu was also interviewed at the checkpoint but was not charged eventually.

Proceedings below

6 Lu took the stand as the prosecution's first witness and seemed reluctant, right from the start, to answer the questions posed. She claimed that her mind was a blank and that she could not remember the material events. In the premises, the prosecution applied to treat her as a hostile witness and to impeach her credit under s 157 of the Criminal Procedure Code (Cap 68). The DJ noted that there were material discrepancies between the statement ("P5") and her testimony in court and allowed the impeachment proceedings. In that statement, Lu stated that when the trip to Malaysia was arranged to enable her to obtain a fresh social visit pass, the appellant told her that she would have to pay him $150 when they returned to Singapore. On the outward journey, the appellant asked her for the money and she "paid to him S$150" in three $50 notes.

7 Lu was unable to explain these discrepancies and continued to maintain that she did not remember the details and/or did not understand what she had said earlier. During cross-examination, Lu was equally un-cooperative and hence the prosecution was allowed to substitute the statement made to the ICA officers in place of her testimony in court, by virtue of s. 147(3) of the Evidence Act

(Cap 97). The prosecution also called the ICA investigating officer involved to testify as to the recording process of this statement, although the appellant did not take issue with the voluntariness of the statement.

8 The appellant elected to testify when his defence was called upon. The crux of the appellant's case below was that he had driven the two ladies to Malaysia on the night of 27 March 2006 as a means to getting to know them better (particularly Xu whom he was interested in). He disagreed with the prosecution's version that he asked for the money as a "fee" and maintained that, in any event, it was for the ladies' expenses on the trip which was suggested by them. Before they embarked on their journey, the issue of expenses was discussed and he told Lu that the ladies would have to bear their own expenses for the visa into Malaysia and for their meals there. The two ladies gave him the $150 to exchange for Malaysian ringgit ("RM") which he did, utilising $136.98 to exchange for RM300 since the money changer only dealt in RM50 notes. He alleged that half of the amount was handed over to the Malaysian immigration officers although he paid only RM60 for the ladies' visas. Another RM40 was spent on a late dinner which ended at about midnight.

9 As the ladies wanted to spend the night in a hotel, he brought them to one. They invited him to stay but he declined as he had a meeting in Singapore the next day. However, he promised them that he would return to join them the next day if he had the time.

10 The next day, the appellant drove back to Malaysia at around noon, joined the ladies for a meal, went sightseeing and shopping with them and then headed back for Singapore with them at about 3pm. They were apprehended when they reached the Woodlands Checkpoint.

11 In cross-examination, the appellant admitted that he had driven female Chinese nationals to Malaysia before but only as a means to know them with the hope of starting a sexual relationship with them. However, he added that in doing so, he would not put himself in a position where he would be liable for an offence.

The DJ's decision

12 In his GD, the DJ began his analysis by discussing the presumption spelt out in s 130(a) of the RTA (see [16] below). He noted that there was sufficient groundwork on the facts to invoke the presumption. Specifically, the DJ relied on Lu's prior statement to the ICA ("P5"). This evidence, the DJ found, provided the foundation for the defence to be called as well as the groundwork for the presumption under s 130(a) of the RTA to be invoked. Having invoked the presumption, the DJ went on to consider if the appellant was able to rebut the presumption on a balance of probabilities. The DJ found that his testimony (in which he generally denied that he had asked for and had been given any payment for ferrying the ladies across Malaysia) was riddled with material contradictions and inconsistencies, particularly in relation to amounts of money exchanged and spent.

13 On the totality of the evidence therefore, the DJ found that the appellant had not succeeded in rebutting the presumption under s 130(a) on a balance of probabilities and found him guilty on the first charge (under s. 101 of the RTA). It necessarily followed from this, that at the time of the offence, the vehicle was not covered by insurance (since using the vehicle for "hire or reward" was prohibited by the insurance policy), leading to a conviction on the second charge under the MVA. The DJ imposed the fines (with default imprisonment terms) and made the disqualification and forfeiture orders accordingly. At the appeal before me, the fines had already been paid.

Issues raised at this appeal

14 The crux of the appellant's case, as distilled from the petition of appeal and written submissions was as follows. First, whether the necessary groundwork was present to justify invoking the presumption in s 130(a) of the RTA, and if so, whether the accused could satisfactorily rebut the said presumption. The second issue was whether a conviction on the second charge (driving without a valid insurance policy) follows as a necessary consequence from a conviction on the first charge.

15 In respect of the sentences meted out by the DJ, the appellant did not address the points raised in the petition of appeal in either his written submissions/further submissions or at the hearing itself. However, for the sake of completeness, I considered the merits of the grounds in the petition of appeal and provide my views herein.

My decision

16 Sections 2, 101 and 130(a) of the RTA provide as follows:

2(1) In this Act, unless the context otherwise requires –

"public service vehicle" means a vehicle used or kept for use for the carriage of passengers for hire or reward, other than a vehicle constructed for use on fixed rails or specially prepared ways;

…

101(1) Subject to the provisions of this Part, no person shall use a motor vehicle, or cause or permit a motor vehicle to be used, as a public service vehicle unless there is in force, in respect of the vehicle, a valid licence issued under this Part authorising such use, or otherwise than in accordance with the licence and any conditions attached thereto.

…

(7) Where it is proved to the satisfaction of a court before which the prosecution has been held that a motor vehicle seized under subsection (5) has been used in the commission of an offence under this section, the court shall, on the written application of the Public Prosecutor, make an order for the forfeiture of the motor vehicle, notwithstanding that no person may have been convicted of an offence.

…

130 In any proceedings for an offence under Part V, in so far as it may be necessary to establish the offence charged, it shall be presumed until the contrary is proved –

(a) that any conveyance of persons or goods in a motor vehicle was for hire or reward; …

17 Ong J in *Darus v PP* [1964] 1 MLJ 146 discussed s 144 of the Malaysian Road Traffic Ordinance 1958 (the equivalent of our s 130 RTA) in the following manner:

> It must be remembered that s 144 provides that "in so far as it may be necessary to establish the offence charged it shall be presumed etc." The words "in so far as it may be necessary" must have some meaning. Where circumstances render it neither just nor proper to raise the presumption, I do not think it can be said to be necessary or even expedient to do so. Hence it is not an absolute rule that the presumption must *ipso facto* arise every time "passengers are carried in a motor vehicle." Since passengers, in this age of motor transport, get into cars in an

infinite variety of circumstances, common sense must be the guide as to when the court should be asked to invoke this presumption. For this reason, I declared in *Gan Chye Huat* what I believed to be the guiding principle, that "there must at all times be adequate groundwork before applying the presumption" and not indiscriminately, as in that case.

Now, what is this groundwork? Groundwork means a basis. The basis of any criminal prosecution, of course, is investigation, which results in evidence being produced to the Court, evidence of a particular fact or facts from which an inference of guilt or innocence can be drawn. The truth about s. 144 is that the practical necessities of a trial have elevated a presumption of fact to the status of a presumption of law. Intrinsically, the presumption remains an inference from facts. Such being the case the circumstances under which passengers come to be carried on a vehicle becomes a vital subject of inquiry before any prosecution. By groundwork, I mean nothing more and nothing less than such investigation resulting in relevant evidence consistent with, not in rebuttal of the presumption."

18 On my part, I prefer to adopt the ordinary meaning and hold that the words "in so far as it may be necessary to establish the offence charged" mean that the presumed matters set out in s 130(a) to (f) come into operation where they are part of the elements required to be proved in any particular charge relating to an offence under Part V of the RTA. To "establish the offence charged", the prosecution naturally has to prove all the essential elements of that offence. The rebuttable statutory presumptions in s 130 assist the prosecution in this task. In the instant case, for example, so long as the prosecution has proved that there were passengers conveyed in the appellant's motor vehicle, the presumption is that such conveyance was for hire or reward and that the motor vehicle had therefore been used as a public service vehicle within the definition in s 2 of the RTA. It appears that "conveyance" in s 130(a) and "carriage" in s 2(1) bear the same meaning. Similarly, the prosecution would be able to rely on s 130(c) to assert that the motor vehicle in question "is not a vehicle in relation to which any licence under Part V has been granted". It then falls on the appellant to rebut these presumptions of fact on a balance of probabilities.

19 In this regard, I agree with the DJ that the appellant's testimony was so riddled with inconsistencies and contradictions in significant aspects as to make it unworthy of credit. Hence the appellant failed to discharge his burden of rebutting the presumption in s 130(a) on a balance of probabilities. In any event, the prosecution had adduced sufficient evidence (in the form of Lu's statement) to prove its case against the appellant.

20 The next issue concerns the meaning of the term "used or kept for use for the carriage of passengers for hire or reward", in particular, whether it encompasses a single occasion of conveyance of passengers as in the present case (although the appellant had stated in cross-examination at the trial (see page 83 of the notes of evidence) that he had driven several other Chinese nationals to Malaysia before, the prosecution did not wish to rely on this fact at the appeal). On this issue, counsel for the appellant referred to *Albert v Motor Insurer's Bureau* [1971] 2 All ER 1345 ("*Albert*"), where the House of Lords had to determine the meaning of the words "a vehicle in which passengers are carried for hire or reward" appearing in the proviso to s 203(4) of the English Road Traffic Act 1960, for the proposition that the words "carried for hire or reward" involve a systematic carrying of passengers going beyond the bounds of social kindness and which amounts to a predominantly business activity. For instance, Lord Donovan in that case said (at page 1352h):

The relevant words are an adjectival clause governing 'a vehicle'; and I construe them as pointing to the function or one of the functions which the vehicle is used to accomplish. And by this I mean not some fleeting use of the vehicle to carry a passenger on some isolated occasion even though it may be arranged at the outset that he shall contribute something towards the expense

but, on the contrary, some settled plan to carry passengers for reward which has been put into operation with a regularity and frequency (both actual and intended) which justifies the conclusion that this is one of the vehicle's normal functions.

21 However, Viscount Dilhorne (at pg 1356b of the report) said:

> I do not think that the use of the words 'in the case of a vehicle in which' instead of 'when' suffices to justify the conclusion that the vehicle must be one in which normally or habitually or as a matter of practice passengers are carried for hire or reward. If that had been the intention of Parliament it could easily have been made clear by the use of such words. A car in which there are passengers being carried for hire or reward is at that time a vehicle in which passengers are carried for hire or reward. I can see no valid reason for coming to a contrary conclusion. *The use of the car even on one isolated occasion for that purpose makes the car a vehicle in which passengers are carried for hire or reward*.
>
> (emphasis added)

At page 1361b, Viscount Dilhorne added:

> … On the other hand, if the driver of a car regularly takes passengers on journeys on the understanding that he will receive something for doing so, whether it be in cash or in some other form, the regularity of the operation may show that it had a business or commercial character. I think that there must be more than a mere social arrangement to make the use of the vehicle that of carrying for hire or reward. … If the driver of a car takes with him two strangers as passengers on the understanding that they will make a payment for the journey, the conclusion may be reached that they are being carried for hire or reward but such use of a car on one isolated occasion may not suffice to show that the operation was of a business or commercial character. … To constitute carriage for hire or reward, it is not, of course, necessary that payment is made before the journey. If there is an arrangement that payment will be made for that, it matters not when the payment is in fact made.

22 The opinions of the learned judges in *Albert* were delivered in this context. A man named Mr Quirk held himself out as ready and willing to carry fellow dockers to and from work in his car and did so carry them on many occasions over a period of about 8 years. It was a regular and understood arrangement that those who went with him should make a payment for their transport. As held by the trial judge in that case, Mr Quirk was running an unofficial taxi service, partly to help his friends and partly to finance his motoring expenses. Payment could be in cash or in kind (eg a pint of beer or a packet of cigarettes). On those facts, the House of Lords had no hesitation in finding that Mr Quirk was carrying for hire or reward the passengers who paid him and so was required to have in force a policy covering claims by passengers. The House of Lords was not dealing with a case involving an isolated instance of carrying passengers for hire or reward.

23 It was therefore no surprise that KC Vohrah J in *Abu Samah bin Rahmat v Talasco Insurance Sdn Bhd* [2000] 1 MLJ 27, ("*Abu Samah*") fully aware of and having discussed and accepted the test in *Albert* relating to "hire or reward", could nevertheless say:

> Counsel for the plaintiff had argued that one single hiring does not constitute hiring within the meaning of the clause in the insurance policy. I disagree. If there is a definite finding of hiring in the sense of a legally binding contract by the parties then it is caught by the limitations clause. The clause reads:

…

The policy does not cover use for hire or reward.

24 Having considered the above authorities, I am not persuaded that a single occasion of carriage of passengers cannot amount to the vehicle having been "used … for the carriage of passengers for hire or reward" (see the definition of "public service vehicle" in s 2 of the RTA at [16]). Such an interpretation certainly does no violence to the ordinary meaning of the words in issue and, in my opinion, accords with legislative intent as well. Policy considerations point towards the inclusion of a single occasion of such carriage because the safety of passengers is involved, whether for one trip or many. The vehicle concerned must therefore be properly licensed as a public service vehicle before it can undertake such carriage. For instance, s 102(2) of the RTA provides that the Registrar of Vehicles shall not issue a public service vehicle licence in respect of any vehicle which does not comply with requirements pertaining to its construction, fitness and equipment. As the cases illustrate, it is the nature of the carriage of passengers that is crucial to this inquiry. The carriage of the passengers must have a commercial, business-like flavour, going beyond social arrangements and kindness. The inquiry whether it is so becomes a question of fact in each case. I do accept that the hire or reward need not necessarily be on cash terms and could encompass payment in kind. On the facts of the present case, I have no doubt that it was a commercial arrangement even though the appellant was performing this service part-time and even if it was his first time. The acts of ferrying Lu and Xu from Singapore and back constituted the use of the appellant's Mercedes Benz for the carriage of passengers for hire or reward, thereby rendering it a public service vehicle.

25 Next, moving on to counsel for the appellant's alternative submission that the term "business" in *Albert* indicated that there had to be a system of continuity in the carriage of passengers for it to be caught by the prohibition in the RTA. Counsel drew an analogy with cases interpreting the term "business" in the context of the Moneylenders Act (Cap 188), particularly the case of *Ng Kum Peng v Public Prosecutor* [1995] 3 SLR 231. In that case, Yong Pung How CJ said (at 238):

> The requirement of system and continuity … is used to distinguish the business of moneylending from the lending of money occasionally. Several isolated instances of money-lending would not be sufficient to bring the moneylender within the ambit of the prohibition. As noted by Chan Sek Keong J (as he then was) in *Subramaniam*, what is prohibited by the Act is not moneylending but the business of moneylending.

26 In *Shekhar a/l Subramaniam v PP* [1997] 1 SLR 744, Yong Pung How CJ rejected attempts, similar to that by counsel for the appellant in the instant case, to juxtapose the definition of "business" in the context of the Moneylenders Act to other statutory regimes. He observed pertinently at [10] to [12]:

> 10 The definition accorded to "business" in *Ng*'s case was plainly intended to be applicable to the context of the Moneylenders Act; and nowhere in the judgment was there a suggestion that this definition of 'business' should apply to some other scenario.
>
> 11 Indeed, in the present case, there were good reasons why it should not be applicable. So far as the Moneylenders Act is concerned, one of its main aims is to eradicate organised moneylending. This has to be distinguished from the occasional loans: hence, the requirement of system and continuity in an accused's loan transactions before he may be said to be carrying on the 'business' of money-lending.
>
> 12 The same considerations do not prevail in respect of the Immigration Act. This Act seeks

> inter alia to deny entry into Singapore to persons falling within any 'prohibited class'; and to punish persons who succeed in illegally gaining entry as well as those who assist them. Such assistance may be rendered on a 'one-off' basis; or it may be part of a long-standing routine; the former is no less inimical to our strict immigration policies than is the latter. In short, there is no reason why the Act should only catch out persons who render assistance to prohibited immigrants on a long-standing basis; and no reason, therefore, to say that an offence under s. 57(1)(c) is established only where an accused has undertaken the conveyance of prohibited immigrants into Singapore with some degree of 'system and continuity'.

The above observations are equally apposite in the present context and serve to dispose of counsel's alternative contention.

27 I next consider the issue whether a conviction on the second charge necessarily followed from a conviction on the first charge. Counsel for the appellant cited *Abu Samah* to support his contention that carriage of passengers, particularly on a single occasion, could not amount to " use for hire or reward". Following from this, counsel submitted that the insurance policy was still valid because the carriage would not fall within its limitation clause excluding cover for "use for hire or reward" and, accordingly, the second charge was not made out. A closer scrutiny of *Abu Samah* would indicate that counsel's reliance on this case was wholly misconceived. As pointed out at [23] above, this case, contrary to the appellant's submission, supports the proposition that a single incident could amount to "use for hire or reward" if the transaction is of a business or commercial nature. However, on the facts of *Abu Samah*, KC Vohrah J found that the magistrate at the trial below did not make a finding that the "coffee money" paid for the use of the car had an element of business about it, such that it was caught by the prohibition against "use for hire or reward". As a result, the facts there fell within the ambit of the insurance policy and the defendant insurance company was held not to be entitled to repudiate the claim.

28 Exhibit P6, the appellant's certificate of insurance in respect of the Mercedes Benz in question, allowed "use for social domestic and pleasure purposes" although it also provided that it did not cover "use for hire or reward". Counsel for the appellant contended that the ferrying of the two ladies was a combination of purposes – for pleasure as well as for hire or reward. The appellant was in fact mixing business with pleasure. It was not a purely commercial undertaking because he was also interested in the ladies, particularly Xu. Since there was duality of purpose, it was argued that driving the ladies into and out of Malaysia did not take the journeys out of the coverage of the insurance policy.

29 In my view, even if such duality of purpose existed, it still meant that one concurrent purpose was excluded from the scope of the insurance policy and that the appellant was not covered by insurance in so far as that purpose was concerned. This case did not concern his use of the vehicle for any pleasure purposes – it was only in relation to him using the vehicle as a public service vehicle and for that, he was not covered by insurance. In the same vein, a taxi would not cease to be used for hire simply because its driver derives great pleasure while chatting with his fare during the journey. The position would have been no different if the appellant had ferried Lu and Xu commercially while also ferrying a good friend to Malaysia socially, perhaps in order to do some shopping with him there. He would still be guilty of having used the vehicle as a public service vehicle in respect of Lu and Xu but not where his good friend was concerned.

30 I was therefore of the opinion that the appellant was correctly convicted on both charges by the DJ on the facts and in law.

The Sentences

31 Counsel for the appellant did not argue (in his written submissions or at the oral hearing) on the sentences meted out and the orders of disqualification and forfeiture made by the DJ. However, at paragraph 15 of the petition of appeal, it was stated that the DJ erred in law and fact when he imposed a 12-month disqualification period in respect of the second charge "when there were special reasons surrounding the manner in which the offence had come about". In addition, paragraph 5 of the petition of appeal stated that the appellant was appealing against the forfeiture order as well. I shall therefore deal with them briefly for the sake of completeness.

32 Section 3(3) of the MVA provides that a person convicted of an offence under that section shall be disqualified from holding or obtaining a licence under the RTA for a period of 12 months from the date of the conviction (unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification). In relation to the disqualification order, counsel for the appellant has not demonstrated (before me and at the trial below) any special circumstances to warrant exercise of the court's discretion not to order the disqualification mandated by the MVA. The case of *M V Balakrishnan v PP* [1998] SGHC 416 established that circumstances peculiar to the offender (as distinguished from the offence) do not qualify as "special reasons". Moreover, the appellant had a previous conviction in 1982 for using a motor vehicle without valid insurance. The disqualification order would therefore be entirely justified in the circumstances.

33 In respect of the forfeiture order, counsel for the appellant urged the DJ in mitigation not to order forfeiture as the appellant needed the vehicle for his work as a construction supervisor. Section 101(7) of the RTA (see [16] above) provides for mandatory forfeiture of the vehicle used in the commission of an offence under s 101 upon the written application of the Public Prosecutor. Such application was tendered by the prosecution to the DJ. The DJ was therefore correct in making the order and in holding that he had no discretion in the matter.

Conclusion

34 For the reasons set out above, the appeal against conviction and sentence was dismissed.