IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 192

Magistrate's Appeal No 9008 of 2016
Criminal Motion No 41 of 2016

Between

Koh Chee Tong

… *Appellant/Applicant*

And

Public Prosecutor

… *Respondent*

ORAL JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Forms of punishment]

[Criminal Procedure and Sentencing] — [Appeal] — [Adducing fresh evidence]

Koh Chee Tong
v
Public Prosecutor

[2016] SGHC 192

High Court — Magistrate's Appeal No 9008 of 2016 and Criminal Motion No 41 of 2016
See Kee Oon JC
22 July 2016

9 September 2016 Judgment reserved.

See Kee Oon JC:

Introduction

1 This is an appeal against a custodial sentence totalling 12 weeks' imprisonment for offences under s 3(1) of the Computer Misuse and Cybersecurity Act (Cap 50A, 2007 Rev Ed) ("the CMCA"). The appellant had pleaded guilty to four charges and he was sentenced by the learned district judge on 4 January 2016 to six weeks' imprisonment per charge, with two of the sentences ordered to run consecutively. Twenty other similar charges were taken into consideration for the purpose of sentencing.

2 The appellant was a bank compliance officer who obtained bank customer details and furnished them to unlicensed moneylenders to whom he owed substantial debts. He had taken loans from the unlicensed moneylenders allegedly because of his gambling habit. When he did not pay up, the unlicensed moneylenders started harassing him. He gave in to their demands and accessed the bank's customer database to forward the details of a number of customers to the unlicensed moneylenders. These acts of unauthorised access to the bank's computer system gave rise to the charges against him.

Criminal Motion 41 of 2016

3 Before addressing the appeal proper, I first deal with the threshold issue of whether the appellant's application in Criminal Motion 41 of 2016 ("CM 41/2016") for leave to admit various pieces of fresh evidence should be allowed. The test in *Ladd v Marshall* [1954] 1 WLR 1489 requires the court to be satisfied as to the non-availability, relevance and reliability of the evidence In the context of this case, the second requirement of relevance relates to whether the evidence would have had a material impact on the sentence.

4 I start with the report dated 4 March 2016 ("the report") that was jointly produced by Ms Elizabeth Pang ("Ms Pang"), a psychologist, and Dr Munidasa Winslow ("Dr Winslow"), a psychiatrist. The parties agree that this is the most significant piece of evidence out of those that the appellant seeks leave to admit.

5 I first address the issue of the availability of the report. It is not disputed that the appellant could have sought professional help to deal with his gambling habit but did not do so until after he had been sentenced. More importantly, he accepts that he could have procured an appropriate psychiatric report earlier if he had exercised some reasonable diligence. Taking into

consideration the observations of the High Court in *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 in relation to the question of the availability of the evidence, I am prepared to allow the appellant the benefit of doubt and accept his assertion that he might not have been adequately advised by his former counsel (or at least that he might have misunderstood counsel's advice) and hence did not produce before the district judge what might have been potentially relevant material for sentencing purposes.

6 Nevertheless, I am not persuaded that the condition of relevance is made out. Simply put, I am not satisfied that the report, if admitted, would have had an important influence on the result of the case.

7 The appellant's primary argument in this regard is that Dr Winslow and Ms Pang had stated in the report that his gambling disorder was "likely to have affected [his] judgment when he committed the offences in October and November 2013". He contends that this statement was essentially equivalent to finding a causal link or at least a contributory factor connecting his disorder to the commission of the offences. It should be borne in mind that such an expression of opinion is a matter of some subjectivity. Even if I accept that the appellant had a gambling disorder of considerable severity – and I will proceed on this basis for the analysis that follows – I am unable to accept the appellant's argument for two main reasons.

8 First, I do not accept that his gambling disorder had a direct causal link to his commission of the offences. The offences were not committed to facilitate or finance his gambling, but were motivated by self-preservation, to avoid further harassment from the unlicensed moneylenders. While it may be accepted that his gambling disorder may have caused him not to be able to resist gambling, and to that extent, caused him to incur gambling debts, we

should not lose sight of the fact that he had committed the offences in question to avoid further harassment. His actions, while possibly impulsive and ill-considered, still required conscious deliberation on his part. He may have felt pressured but it is clear that the *operative source* of the pressure was the harassment from the unlicensed moneylenders, and *not* his gambling disorder. Put another way, *but for* the harassment, the offences in question would not have come about. They would not have been committed if all we had before us was evidence of a gambling disorder without any evidence of involvement with unlicensed moneylenders and consequential harassment.

9 Second, even if my view is erroneous and Dr Winslow and Ms Pang's statement could be interpreted to mean that the appellant's gambling disorder had a direct and proximate relationship to the commission of the offences, I am still not satisfied that the relevancy condition is met. It is important to note that Dr Winslow and Ms Pang went on to caveat in the same sentence of the report that the appellant "was aware of his actions" and "cogni[s]ant that what he did was wrong". This has two significant implications. First, to my mind, this must then mean that the appellant's judgment could not have been *materially* affected. Second, this must also mean that even if his gambling disorder had a direct impact on his decision-making in the commission of the offences, it did not seriously inhibit his ability to make proper choices or impair his ability to appreciate the nature and quality of his actions.

10 In *Public Prosecutor v Chong Hou En* [2015] 3 SLR 222 (at [23]), the High Court noted the Court of Appeal's observations in *Lim Ghim Peow v Public Prosecutor* [2014] 4 SLR 1287 (at [25]–[39]) and reiterated that where there is premeditation or a conscious choice to commit the offence, specific deterrence remains relevant notwithstanding the existence of a mental disorder. The fact that the appellant here knew what he was doing and that his

actions were wrong means that little or no mitigating weight can be placed on the fact that he was suffering from a gambling disorder. Thus, even if I take the appellant's case at its highest and read the statement in question in a way that is most beneficial to his case, the report would not have had a material impact on sentencing and thus does not meet the relevancy condition.

11 On a related note, I also agree with the Prosecution that given the serious nature of the offences and the need for general deterrence, the fact that the appellant had a gambling disorder would not have materially influenced the district judge's decision even if this information had been before her. The offences involved a clear breach of trust and a clear breach of the confidentiality of the banks' customers.

12 As for the remaining four pieces of evidence which the appellant seeks leave to adduce, I am also of the view that the second condition of relevance is not met as they would not have had a material impact on sentence. This would mean that the test for leave to be granted for them to be admitted is also not met, notwithstanding that I accept that at least two pieces of evidence, namely the text message that he received on 4 January 2016 and the police report that was made by his father on 6 May 2016, were not available at the time prior to sentencing.

13 The appellant's motion for leave to adduce fresh evidence in CM 41/2016 is therefore dismissed. I turn now to the appeal against sentence.

The appeal against sentence

14 The appellant had sought on appeal to be permitted to undergo a Mandatory Treatment Order or to be placed on probation. Looking at the circumstances of the case in totality, in particular the need for general

deterrence, it is clear that these are not suitable punishments. The appellant had exploited his position and breached the trust reposed in him by virtue of his capacity as a compliance officer at the bank, which gave him access to sensitive and confidential information of many bank account holders. The custodial threshold has clearly been crossed.

15 The predicament that the appellant found himself in – where he was harassed and threatened by the unlicensed moneylenders – may attract some sympathy, but it had ensued from his own gambling habits. Little mitigating weight can be placed on an offender's explanation that he had committed an offence to avoid harassment by unlicensed moneylenders from whom he had borrowed money to feed his gambling habits. Otherwise, as the court had recognised in *Public Prosecutor v Nelson Jeyaraj s/o Chandran* [2011] 2 SLR 1130 (at [56]), the inadvertent consequence could be to encourage the continued exploitation of easy prey.

16 The appellant raised other mitigating factors including the fact that he had quit his job soon after on his own accord. I recognise that he is remorseful and conscious of his wrongdoing and has sought to change his ways. I am also heartened to hear that he has not reoffended and appears to be seeking help to deal with his gambling disorder, and will urge him to continue doing so. The relevant considerations had already been taken into account by the district judge in arriving at the sentence, which in fact might have been higher had these considerations not been present.

Conclusion

17 I am satisfied that the global sentence of 12 weeks' imprisonment is not manifestly excessive. In the premises, the appeal is without merit and is dismissed.

See Kee Oon
Judicial Commissioner

Liang Hanwen Calvin (Tan Kok Quan Partnership) for the appellant;
April Phang Suet Fern, Ryan David Lim and Sanjiv Vaswani
(Attorney-General's Chambers) for the respondent.
