Teo Chu Ha *v* Public Prosecutor
[2013] SGHC 179

Case Number : Magistrate's Appeal No. 279/2012/02

Decision Date : 18 September 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Bachoo Mohan Singh (Veritas Law Corporation) for the appellant; Alan Loh and Edward Ti for the Public Prosecutor.

Parties : Teo Chu Ha — Public Prosecutor

Criminal Law – Corruption – Prevent of Corruption Act

18 September 2013 Judgment reserved.

Choo Han Teck J:

1 The appellant was a Senior Director of Logistics at Seagate technology International ("Seagate") at the material time. He has since been dismissed from Seagate's employment. His present appeal is against conviction and sentence for 12 charges of corruption under s 6(a) of the Prevention of Corruption Act (Cap 241, Rev Ed 1993) ("PCA") for having received a reward for assisting Biforst Singapore Pte Ltd ("Biforst") to secure contracts to provide trucking services from Seagate.

2 The usual case of corruption involves a taking of gratification by the accused. This was an unusual case; instead of a straightforward taking of Biforst shares (the subject of the first charge), the appellant paid $6,000 for these shares. The appellant was then given 22.5% of the profits in regular pay-outs from 2006 to 2010 which the defence alleges represented dividends for his share in Biforst. These 11 payments are now also the subject of scrutiny in the second to twelfth charges. Because of the unusual nature of this case, I directed that the parties file and exchange further submissions on whether it was normal for gratification to take the form of shares in a company which the accused person pays for and what the significance was of the transfer of shares to an unknown nominee of the appellant's. Having had the benefit of submissions from both sides, I now deliver my decision.

3 The opportunity for the incorporation of Biforst as a small private limited company came in August 2004, when Seagate's existing trucking contract for the long haul trucking route between Singapore and Malaysia expired. Seagate wanted to award the contracts to two different vendors. Richland Logistics Services Pte Ltd ("Richland") was the incumbent, and the point person for Richland in its Seagate trucking contracts had been one Tan Ah Kwee ("Ah Kwee"). Ah Kwee fell out with Richland management before the expiry of the Seagate contracts and left to set up his own company. He was, however, prevented from bidding for the new Seagate contracts because of a restraint of trade clause in his employment contract. Two of Ah Kwee's men, Koh Han Lee ("Koh") and Ng Kok Seng ("Ng"), also left Richland for Ah Kwee's company. Both Ng and Koh were instrumental in setting up Biforst and after Biforst's incorporation, worked for both Ah Kwee's company and Biforst with Ah Kwee's full knowledge. The incumbents thus became three: Ah Kwee's company, Biforst, and the original Richland. Biforst was incorporated on 10 September 2004, just before the tender for Seagate's trucking contract started. The tender closed on 7 October 2004.

4 Prior to Biforst's incorporation, Yap Chin Guan ("Yap"), also an ex-employee of Richland, approached the appellant to sell his new transport management system. The appellant was not interested. The appellant was, however, interested to discuss the potential incorporation of a new company to take over the Seagate contracts from Richland; he wanted to get rid of Richland as the middleman in the trucking operations and to deal directly with the transport providers (represented by Ah Kwee). The trial judge ("the judge") found that it was Yap and the appellant who had come up with the plan to incorporate Biforst and use Biforst to tender for the Seagate contracts, with the instrumental involvement of Koh and Ng. The appellant asked Yap for a share in Biforst and it was agreed that 20,000 shares would be issued to the appellant via a nominee, Ms Choo Ah Moi Winnie, upon payment by the appellant of $6,000. The appellant paid for the shares by cheque on 29 September 2004 and the shares were transferred to the appellant's nominee on 20 December 2004. The appellant, in contravention of Seagate's conflict of interest policy, did not disclose his beneficial interest in Biforst to Seagate.

5 After the tender closed on 7 October 2004, a team of Seagate staff ("the tender team"), including the appellant, rated the different vendors and Richland, Biforst and Geodis Overseas Pte Ltd ("Geodis") rose to the top. Richland's services would cost $1,000 more per quarter than Biforst's, an amount which one of the tender team thought was "negligible". Concerns were raised about Biforst's suitability for the contract as it was a new company without the same credentials as Richland. The appellant assured the rest of the tender team that Biforst would be capable of taking up the Seagate contracts as it was essentially a "spin-off" company of Ah Kwee, with whom Seagate was familiar and who was, in turn, familiar with Seagate's trucking routes and requirements. Seagate's finance department also reviewed the papers and suggested an increased security deposit and/or an execution of a bank guarantee in order to address this concern. The tender team went with an increased security deposit of $200,000 (instead of the usual $100,000) and awarded the contract to Biforst and Geodis, both of whom submitted the lowest tenders. The judge found that the appellant had the power to influence, and did in fact influence, the selection process for awarding the Seagate contracts to Biforst. There was ample documentary evidence in the record to indicate that this was indeed true where the 2004 Seagate contract was concerned. I find that there was insufficient reason for me to disturb the finding of the judge in relation to the 2004 Seagate contract.

6 Biforst submitted successful bids in three further tender exercises in 2005, 2007 and 2010. Throughout the years 2004 to 2010, the appellant received regular pay outs from Biforst. Each pay-out corresponded to 22.5% of an amount withdrawn from Biforst's account and marked as "director's fees". This 22.5% constituted the initial 20,000 shares acquired on 20 December 2004 (see above at [4]) and an additional transfer (again to the appellant's nominee) of 2,500 shares on 1 June 2005. Two payments in 2006, three payments in 2007, three payments in 2008, one payment in 2009 and two payments in 2010 were the subject of the second to twelfth charges before the judge. It was the prosecution's case that these payments and the shares were given as gratification for the appellant's securing the Seagate contracts for Biforst, an act which was objectively corrupt and for which the appellant had a corrupt intent.

7 Section 6(a) of the PCA reads as follows:

> Punishment for corrupt transactions with agents
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> 6. If —
>
> (*a*) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification *as an inducement or reward* for

doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

…

he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

[emphasis added]

8 To my mind, the main issue in this appeal is the reason for the issue of shares and the 11 payments made. It is not corruption unless the purpose of or reason for the gratification was as a reward or as an inducement for the act done by the appellant in relation to his principal, Seagate. In other words, there must be a direct causal link between the alleged gratification and the alleged acts looked at from both the receiver's and the giver's perspectives. Thus, in *Yuen Chun Yii v Public Prosecutor* [1997] 2 SLR(R) 209 ("*Yuen Chun Yii*") and *Chan Wing Seng v PP* [1997] 1 SLR(R) 721 ("*Chan Wing Seng*"), the High Court found that it was not objectively corrupt for a "brother" to share his windfall in a show of generosity or for a grateful horse owner to reward his jockeys in his euphoria of having won his races. Yong Pung How CJ held in *Yuen Chun Yii* (at [95]) that although the payment was not unconnected to the recipient's assistance rendered to the giver, the recipient could show that the payment was a *bona fide* gift which he received without any ulterior motive. I would add that so long as the recipient can show that there was a reasonable doubt that the payment was not received with any ulterior motive, then the prosecution has failed to prove its case.

9 This applies *a fortiori* where the case involves not a gift, but a transaction for value. Where there has been a payment for shares, the usual inference is that those shares were transferred because they had been duly paid for and not for some other reason. It might be that where an accused had paid for shares, the transfer of those shares was intended as a reward for a corrupt act; and it might be that the purported payment was simply a sham to hide the true purpose of the transaction. However, it is for the prosecution to prove, beyond a reasonable doubt, that the payment was a sham and that the true purpose of the transaction was as a reward or inducement for the accused to act in the way he did. A court should be slow to find that a payment for shares was a sham or cover up, not only because of the prosecution's heavy burden of proof, but also because this requires the court to assess the value of the consideration given for the transfer of shares, a task that it cannot do without evidence.

10 The judge found (at [36] of his judgment) that Biforst was set up with the Seagate contracts in mind and that its incorporation was "inextricably tied to the upcoming tender of Seagate's trucking contract". He concluded from this that the "irresistible inference" was that the 20,000 shares were transferred to the appellant "on the understanding" that Biforst would get Seagate's business. In other words, the judge found that the 'buy-in' for the 20,000 shares was the $6,000 plus the assistance given for the procurement of the Seagate contracts. But what was the true reason that the shares were given? The prosecution did not argue, and the judge thus did not find that the $6,000 was insufficient consideration for the transfer of the shares or was merely paid to cover up the transaction's true purpose. The fact that the Seagate contracts were within the contemplation of the controlling minds of Biforst when it was incorporated bears only a weak correlation to the validity of the share transaction for value and to any explanation of the true purpose of that share transfer. The prosecution led no evidence here or in the trial below as to how much the shares transferred were worth. If, for example, the $6,000 paid for the shares was a gross undervalue, then it would have been possible to draw the inference that the shares had been transferred for an ulterior (and

more insidious) purpose. However, there was no evidence to show that the transaction of $6,000 for the 20,000 shares was anything but an ordinary share transaction. The circumstances surrounding Biforst's incorporation point to a conflict of interest if the appellant were to acquire shares in Biforst. This was potentially a breach of fiduciary duties or a potential breach of the appellant's employment agreement. I do not think, however, that this was enough to turn what would otherwise be an ordinary share transaction into a sham one. The prosecution has not proven its case beyond a reasonable doubt that the transfer of shares was for the purpose of inducing or rewarding the appellant to secure the Seagate contracts and not simply as consideration for the $6,000 paid by the appellant. There was, accordingly, no objective corrupt element in relation to the transfer of the shares.

11 I now turn to the 11 payments (constituting the second to twelfth charges) which were made between 2004 and 2010. The judge's grounds of decision did not specifically address any of these payments. I have already observed (above at [6]) that these payments corresponded to exactly 22.5% of the profits withdrawn for the directors. This corresponded to the appellant's 22.5% share in Biforst (as at 1 June 2005). The size of those pay outs (a total of $576,225 from 2006 to 2010), coupled with the circumstances in which they were paid (in an unmarked envelope hand delivered to the appellant and with the withdrawal marked as one for director's fees), made those payments look suspicious. However, the 11 payments did not correspond with the dates of the tenders for the Seagate contracts which the prosecution claimed that the appellant procured for Biforst. Biforst submitted and was awarded the tenders for Seagate contracts in three further exercises in 2005, 2007 and 2010.

12 The scoring for the 2005 tender and the decision to award it to Biforst was conducted on 31 May 2005. Unlike the share transfers, which were executed within a month of Biforst's being awarded the 2004 Seagate contract, the 2005 Seagate contract was awarded almost half a year before the first cash payment to the appellant in January 2006. The Prosecution gave no explanation as to why there was a delay and the judge did not make any finding on this. The defence, on the other hand, had a simple explanation: the regular payments over the period 2006 to 2010 represented dividends for the appellant's share of Biforst's profits. This would explain why the time between the alleged corrupt acts and each payment made were incongruous. No bids were submitted in 2006, yet a payment was made in September 2006 of $35,325.

13 The 2007 tender bids were assessed on 8 October 2007 and Biforst was selected for three out of the five routes they submitted bids for. There were three payments for 2007, all evenly spaced: $64,125 in January 2007, $45,000 June 2007, and $67,500 in December 2007. Again, the payments made do not correspond in time to the awarding of the tender to Biforst. Biforst eventually signed the 2007 Seagate contract on 15 November 2007. This is much closer in time to the December 2007 payment than the payments made in 2005. However, this did not explain the other payments or the fact that the December 2007 payment was not inconsistent (in terms of the amount paid) with the other two 2007 payments and paid out at a regular interval.

14 Five other payments were made between January 2007 and January 2010. No tenders were submitted during this period and thus these five payments could not possibly have been made as an inducement or a reward for the appellant's procuring a successful tender. Neither of the parties even mentioned when the 2010 tender was conducted. There was thus no evidence for me to go on to conclude that the September 2010 payment was causally related to any assistance rendered by the appellant in the 2010 tender exercise.

15 It will be apparent that the evidence does not show that the 11 payments in the 2nd to 12th charges were causally related to any assistance which the appellant may or may not have rendered

for the 2005, 2007 and 2010 tender bids. Given that there was no correspondence of time between these payments and the awarding of the Seagate tenders to Biforst, the prosecution must point to something else or, at least, provide a reason to show that these payments were given as a reward for or an inducement to the appellant to assist them in securing the Seagate contracts in those years. They have not done so. Hence these payments could not be said to be gratification for the alleged corrupt acts. The corrupt element in the 2nd to 12th charges was thus not proved.

16 It was thus not necessary for me to determine whether the appellant was actively involved in the 2005, 2007 and 2010 tenders, although I have my doubts that he did. The judge appeared to have accepted the appellant's involvement in these tenders (see [12] of the judgment). Curiously, however, the documentary evidence adduced by the prosecution of the appellant's involvement in the tenders related only to the 2004 tender, on which the judge based his decision. The prosecution must prove each and every charge it brings on a beyond reasonable doubt standard. In this case, the prosecution attempted to prove the first charge and then sought to extend the assumptions leading to that conviction to the other 11 charges. This did not discharge the prosecution's burden of proof, particularly since there were three other tender exercises which may have been different each time. The prosecution was not entitled, without more, to assume that the other tenders were identical to the one in 2004.

17 The judge found (at [47] of the judgment) that the nub of the case was the compromise of "the fairness of the tender process by [the appellant's] having beneficial interests in Biforst and taking part in the tender process without disclosing that he had an interest in the outcome". This was a fairly accurate description of the events. It was not, however, for the reasons stated above, a case of corruption but a case of conflict of interest.

18 The prosecution made much of the fact that the appellant's actions contravened Seagate's conflict of interest policy. It argued, citing *Chan Wing Seng*, that as part of the purpose of this policy was to prevent bribes, then a contravention of that policy must "invariably" lead to the conclusion that the appellant's actions were also objectively corrupt. In the first place, this would be inconsistent with *Chan Wing Seng*. In that case, the court had observed (at [66]) that if rules or laws governing the prevention of bribes were breached knowingly, then it would be easier for the court to infer a corrupt intent on the part of the appellant. The element of a corrupt intent or guilty knowledge becomes relevant only after an act has been found to be objectively corrupt. The observations of the court in *Chan Wing Seng* related to the probative value of a knowing breach of a rule in establishing the *mens rea* of an accused and cannot be employed to establish the *actus reus* or objective corrupt element of the offence, much less establish an "invariable" rule.

19 More importantly, the policy in question (and all policies or principles governing conflicts of interests) was a broad one directed at allowing "all employees to represent the company in a positive and ethical manner and to avoid activities which are in actual or potential conflict, or give the appearance of being in conflict, with legal and ethical principles or which are not in the best interests of the Company, its customers, or its suppliers". Prevention of bribery may be part of its purpose, but it was not just directed at the prevention of bribery. In all cases of corruption, the accused will be induced to and be rewarded for acting in a manner which conflicted or appeared to conflict with his principal's affairs. However, not all conflict situations would amount to corruption under the PCA. Corruption is a narrow subset of situations which involve a conflict of interest and is defined under the PCA. The inference that suspicious activities arising from a conflict of interest must be corrupt must be resisted. The elements of corruption and in particular, the purpose for which a payment or gratification was made, must be the test by which we measure whether an act was objectively corrupt or not.

20 I find that the purpose for the transfer of shares and the payments made are not causally related to the alleged assistance rendered by the appellant. It thus cannot be said that they were inducements to or rewards for the appellant's act(s). All 12 charges of corruption under s 6(a) of the PCA have not been made out. I accordingly allow the appellant's appeal and acquit him of the 12 charges of corruption.