IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 204

Magistrate's Appeal No 9040 of 2021/01

Between

Chua Ya Zi Sandy

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Sentencing] — [Principles for reducing sentence on account of hardship to family] — [Principles for reducing sentence on account of ill health] — [Whether lack of restitution aggravating]

Chua Ya Zi Sandy
v
Public Prosecutor

[2021] SGHC 204

General Division of the High Court — Magistrate's Appeal No 9040 of 2021/01
Sundaresh Menon CJ
26 August 2021

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Sundaresh Menon CJ:

1 The appellant, Sandy Chua Ya Zi (the "appellant"), is a 47-year-old female Singaporean who pleaded guilty to a single charge of criminal breach of trust by an employee, an offence under s 408 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"):

> You … are charged that you, between 1 September 2019 and 9 October 2019, at Universal Dining Singapore Tanglin Food Court located at 163 Tanglin Road #B1-17, Tanglin Mall, Singapore 247933, being employed by Select Group Pte Ltd ('the Company'), *to wit*, in the capacity of an Outlet Manager, and being entrusted in such capacity with property, *to wit*, cash amounting to S$41,319.90/- belonging to the Company, did dishonestly misappropriate the said property, and you have thereby committed an offence punishable under section 408 of the Penal Code (Cap 224, 2008 Rev Ed).

2 The learned District Judge (the "DJ") sentenced the appellant to 10 months' imprisonment. This is the appellant's appeal against the sentence that

was imposed. The appellant does not contend that the sentence imposed by the DJ was manifestly excessive. Rather, she primarily seeks mercy from the court either on the ground that she herself has some serious medical conditions and/or that she is the primary caregiver for her husband, who has poor vision and is unable to work, such that if she were incarcerated for any length of time it would jeopardise her ability to care for her husband.

3 The following key facts were admitted by the appellant without qualification in the statement of facts.

(a) The appellant worked as an outlet manager for a company that ran some food courts. Her responsibility was to ensure the smooth operation of some food and drink stalls at one such food court and in this capacity she was entrusted with money from two safes. One of these contained the daily cash proceeds from the stalls, which was kept in a safe box ("Sales Safe") until they were handed over to a security company. The other was a safe box which contained a cash float of $20,000 ("Float Safe"). The appellant alone had access to the Float Safe, while she shared access to the Sales Safe with the assistant manager.

(b) Over a period of about 5.5 weeks, the appellant dishonestly misappropriated a total of $41,319.90 from the two safes and spent all of it gambling at the casino in Resorts World Sentosa. No restitution has been made by the appellant.

4 The DJ took into account four main aggravating factors:

(a) a large amount of money was taken by the appellant without any restitution being made;

(b) the appellant's offending behaviour was not a one-off incident but a course of conduct committed on a number of separate occasions over a period of time;

(c) the appellant had committed the offences for her personal gain in that she misappropriated the money to feed her gambling habit; and

(d) the appellant was in a position of trust having exclusive or nearly exclusive access to the two safes (GD at [64] and [73(a)] to [73(d)]).

5 The DJ also accepted the following mitigating factors:

(a) the appellant had pleaded guilty at the earliest instance, and

(b) the appellant was a first offender with no criminal antecedents (GD at [65] and [73(e)]).

6 However, the DJ placed little mitigating weight on the appellant's "personal and family problems" (GD at [66]). As for the appellant's ill health, the DJ held that "there was no evidence to suggest that there was any causal link between [her] illnesses and her commissioning [*sic*] of the offences" (GD at [67]). The DJ was "confident that the Singapore Prison Services would have the necessary and proper medical facilities to deal [with] and take care of the [appellant's] medical conditions during the period of her incarceration" (GD at [69]). There were no "exceptional circumstances from which humanitarian consideration had arisen which outweighed public interest to warrant a discount in the [appellant's] sentence" so as to justify the court exercising judicial mercy in this case (GD at [70]).

7 Finally, the DJ noted from the sentencing precedents tendered by both parties that the sentencing range for a first-time offender who had committed

criminal breach of trust as an employee for sums involving $30,000 to $50,000 would be in the range of between 9 and 15 months' imprisonment (GD at [71]). Having considered the foregoing factors and the sentencing precedents, the DJ sentenced the appellant to 10 months' imprisonment (GD at [79]).

8 In my judgment, this was a fair assessment of the aggravating and mitigating circumstances in this case; it also correctly identified the sentencing range for a case such as the present. I make one observation on the question of restitution. This can be relevant from a number of perspectives. Restitution may be relevant because it reduces the harm suffered by the victim; or it may evidence genuine remorse on the part of the offender. The lack of restitution would typically be a neutral factor, save in the case of an offender who fails to make restitution despite having the means to do so. Such an offender would seem intent on benefiting from his crime and this would often, if not invariably, be an aggravating factor: see for instance the observations of Tay Yong Kwang J (as he then was) in *Goldring, Timothy Nicholas v Public Prosecutor and other appeals* [2015] 4 SLR 742 at [102].

9 The precedents show that the DJ did not err when he observed that the sentencing range for a first-time offender who had committed an offence under s 408 for sums involving $30,000 to $50,000 would be in the range of between 9 and 15 months' imprisonment (GD at [71]). In the circumstances, the indicative starting point in this case, based on precedents involving first-time offenders misappropriating similar values of property, should be at least 9 months' imprisonment.

(a) The indicative starting point in this case should only be slightly lower than the sentence of 10 months' imprisonment imposed for the 5th

and 6th charges each in *Chong Kum Heng v Public Prosecutor* [2020] 4 SLR 1056 (which involved $54,000 and $49,000 respectively).

(b) The indicative starting point in this case should be higher than the sentence of 7 months' imprisonment imposed in *Kavitha d/o Mailvaganam v Public Prosecutor* [2017] 4 SLR 1349 ("*Kavitha*"), since the quantum involved in that case was only $30,423.96.

(c) There is also *Gopalakrishnan Vanitha v Public Prosecutor* [1999] 3 SLR(R) 310 ("*Gopalakrishnan*"), which is a dated precedent when the maximum custodial sentence under s 408 (7 years' imprisonment) was less than half of what it is today (15 years). Even then, the offender in *Gopalakrishnan* was sentenced to a global sentence of 18 months' imprisonment for misappropriating a total of $53,923.02.

10 Next, I consider the applicable sentencing principles. On this, I think deterrence is the principal consideration. This is well established in the precedents: see, *Tan Kim Hock Anthony v Public Prosecutor and another appeal* [2014] 2 SLR 795 at [43]; *Public Prosecutor v Lam Leng Hung and other appeals* [2017] 4 SLR 474 at [380] and [397].

11 I next turn to the specific points that were raised by the appellant in this appeal. The focus of the appellant's submission before me is the potential impact a long custodial sentence might have on her husband, as she would be unable to take care of him during the time of her incarceration. While I sympathise with the appellant, it has long been held at least since *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 ("*Jenny Lai*") at [10]–[11] (per Yong Pung How CJ) that, except in "some very exceptional or extreme", "very rare" circumstances, hardship to the offender's family has very little, if any, mitigating value. This principle has been consistently reaffirmed by our courts:

see, *Public Prosecutor v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 ("*Liton*") at [98] (per Andrew Phang JCA, delivering the Court of Appeal's Grounds of Decision); *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 ("*Vasentha*") at [75] (per Sundaresh Menon CJ, describing the threshold as "a very high one"); *Public Prosecutor v Yue Mun Yew Gary* [2013] 1 SLR 39 ("*Gary Yue*") at [67] to [68] (per Quentin Loh J (as he then was)); *Public Prosecutor v Osi Maria Elenora Protacio* [2016] SGHC 78 ("*Osi Maria*") at [8] (per Chan Seng Onn J, further reasoning that "[o]ne cannot modify a sentence merely because the family will suffer").

12 A review of the caselaw shows just how "rare" and "exceptional" the circumstances would have to be for hardship to the family to be given any mitigating weight.

(a) In *Liton*, the Court of Appeal rejected the respondent's submission that his elder sister's husband in Bangladesh was paralysed and depended on him for support (at [98]).

(b) In *Vasentha*, the appellant's submission that she had three young children to care for because her husband was in prison was not given mitigating weight by the court (at [84]).

(c) In *Gary Yue*, the appellant (who was unmarried and lived with his 72-year-old father) submitted that he was the sole breadwinner of his family and needed to take care of his aged father who was recently diagnosed with a blood disorder. This submission was not accepted by Loh J (as he then was) (at [69]).

(d) In *Osi Maria*, the District Judge had taken into account the fact that the accused "committed the offences because of financial problems

> and that she ha[d] to look after her daughter" in imposing a fine of $4,000 on the accused for a charge under s 406 (with another s 406 charge being taken into consideration for sentencing): *Public Prosecutor v Osi Maria Elenora Protacio* [2016] SGDC 5 at [4]. On appeal, Chan J allowed the Prosecution's appeal and enhanced the sentence to 15 weeks' imprisonment. In doing so, Chan J reaffirmed *Jenny Lai* and held that the accused's circumstances did not suffice to meet the test of "rare" and "very exceptional or extreme circumstances" for them to be given any mitigating weight (*Osi Maria* at [8]).

13 The present appellant's circumstances are no more exceptional than those in *Liton*, *Vasentha*, *Gary Yue*, and *Osi Maria*. As such, the potential hardship that might be occasioned to the appellant's husband and father do not justify departing from what would otherwise be an appropriate sentence.

14 Finally, I also agree with the Prosecution's written submission that the appellant's claim that she no longer has employment prospects does not provide a basis for a reduced sentence. As was noted in *Gary Yue* at [67], the fact that an offender's "career or job prospects might be ruined by his conviction is but a natural consequence of his own acts and ought to be given little or no weight in mitigation." As such, the appellant's submissions on these factors are not meritorious.

15 The same is true of the appellant's own medical conditions. In the final analysis, the appellant was seeking to invoke the doctrine of judicial mercy. The conceptual basis of the doctrine of judicial mercy has been explained with characteristic clarity by Chao Hick Tin JA (as he then was) in *Chew Soo Chun v Public Prosecutor and another appeal* [2016] 2 SLR 78 at [21]–[27]. The DJ reproduced the extract from Chao JA's judgment in his Grounds of Decision

and I do not propose to do the same here. But there are at least three key propositions that can be drawn from that extract, as follows.

(a) While judicial mercy is rooted in the considerations of humanity, it is an exceptional judicial response. It seeks to express society's sympathetic reaction to the particular plight of the offender.

(b) However, the court must be vigilant in guarding against the danger that what is an exceptional jurisdiction becomes an unprincipled one. If the court moderates punishment on an unprincipled basis it may either endorse the view that ill health or personal hardship is a licence to offend or may shield an offender from the due consequences of her actions and this can give rise to the real danger of disparate and uneven sentencing, which ultimately works injustice.

(c) The right balance is struck by limiting the invocation of judicial mercy to situations where the humanitarian considerations truly outweigh the public interest in punishing the offender for what she has done wrong. In this context, the court should not, on account of the offender's difficult circumstances, lose sight of the important public interest in and societal benefits to be had from denouncing crime, safeguarding and protecting society from crime and ultimately in seeking the rehabilitation of offenders through the imposition of suitable punishment. Hence, the cases where judicial mercy can be invoked will be truly exceptional.

16 These principles explain why, although I may be sympathetic to the appellant's situation in terms of her own poor medical health or the difficult circumstances that her actions have exposed her husband to, the present circumstances do not justify my deviating from what would otherwise be an appropriate sentence. I am satisfied that the DJ's sentence was neither wrong in principle nor manifestly excessive and I therefore dismiss the appeal.

Sundaresh Menon
Chief Justice

The appellant in person;
Charis Low and Bryan Joel Lim (Attorney-General's Chambers) for the respondent.