Ganesh s/o M Sinnathamby v Public Prosecutor
[2007] SGHC 189

Case Number : MA 58/2007

Decision Date : 02 November 2007

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Uthayasurian Sidambaram (Surian & Partners) for the appellant; Janet Wang (Attorney-General's Chambers) for the respondent

Parties : Ganesh s/o M Sinnathamby — Public Prosecutor

Insolvency Law – Bankruptcy – Offences – Leaving jurisdiction without prior permission of Official Assignee – Whether there was compulsory custodial sentence on bankrupts contravening travel restrictions – Whether fact that offender already discharged bankrupt when proceedings commenced against him warranting departure from normal sentencing tariff – Section 131(1)(b) Bankruptcy Act (Cap 20, 2000 Rev Ed)

2 November 2007

Lee Seiu Kin J:

1 The appellant pleaded guilty to three charges of leaving the jurisdiction without the prior permission of the official assignee ("OA") under s 131(1)(b) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("the Act"). After taking 52 similar charges into consideration, the district judge sentenced the appellant to four weeks' imprisonment on each charge, two of which were ordered to run consecutively, resulting in a total imprisonment term of eight weeks.

2 The current factual matrix is unprecedented as the appellant was at the time the proceedings were commenced against him, already a discharged bankrupt, as opposed to prior sentencing precedents which dealt with undischarged bankrupts.

3 The present appeal has been brought by the appellant against sentence on the basis that the district judge failed to consider that the appellant was a discharged bankrupt at the material time of the proceedings and that she had wrongly applied sentencing principles. The primary issue is whether the fact that the appellant is a discharged bankrupt amounts to an exceptional circumstance warranting deviation from a custodial sentence.

Summary of facts

4 The statement of facts tendered below was accepted by the appellant without qualification. The appellant admitted that he had left Singapore for India on three separate occasions, namely 3 May 2003, 27 December 2003 and 10 March 2004, for periods of between two and 16 days, without the permission of the OA which he was required to obtain. Several other trips were made to Malaysia and Indonesia, which formed the subject matter of the charges taken into consideration. The appellant did not dispute the fact that he knew that he needed the consent and permission of the OA before leaving the jurisdiction of Singapore.

5 In mitigation, counsel for the appellant submitted that his multiple trips to Malaysia and Indonesia were work-related. He was offered employment on a commission basis which required travel

to these countries at short notice. It was highlighted that the application to the OA at that time could not be done through the internet as it now can be. It entailed a waiting period of about two weeks. As the appellant was then in dire financial straits, he could not afford to give up his employment which was the only means of sustaining his extended family who were all dependent on him. In these circumstances, he travelled to Malaysia and Indonesia without obtaining the requisite permission.

6 However those charges were not proceeded with and were only taken into consideration for the purposes of sentencing in accordance with s 178 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). The prosecution proceeded on three charges which pertained to trips to India made by the appellant in May and December 2003 and March 2004. The appellant submitted that the first trip on 3 May 2003, which lasted for a period of about 15 days, was organized by his wife to fulfil a vow at a temple after her difficult childbirth and that the entire trip was financed and arranged by the wife's family. Being informed at short notice, he was unable to muster sufficient funds to pay the outstanding arrears at the time and made the decision to travel as he did not want to disrupt the plans made by his wife, whose child was sickly.

7 The second trip on 27 December 2003 spanned seven days and involved a pilgrimage trip to India for which he was designated group leader. He had contravened the travel requirements out of fear of embarrassment and ridicule of his peers as the group did not know of his bankruptcy status.

8 The final trip on 10 March 2004, which lasted for two days, was made at the request of a close friend to secure an affidavit from a witness in relation to a legal matter the friend was involved in. His assistance was required on an immediate basis and the appellant did not apply for permission due to the urgency of the matter. No debts were incurred for any of the three trips, as all expenses were borne by his travel companions.

9 Counsel for the appellant conceded that these grounds did not absolve the appellant from liability but nonetheless submitted that a fine would suffice given that a custodial sentence would disrupt the appellant's settled life and throw into disarray the stability he had built up over the two years since his discharge.

The decision below

10 In the proceedings below, the prosecution conceded that this was an unprecedented case and that they were unaware of the offences until the appellant was granted a discharge by the OA. I observed that the prosecution there had accepted that "a fine would be appropriate in the circumstances". While I accept that the district judge was not bound by this submission, it was clearly a relevant factor in the assessment of the sentence.

11 After hearing the submissions of both parties, the district judge concluded that the appellant's discharge did not amount to an exceptional circumstance which warranted a departure from the usual benchmarks of custodial sentences established in *PP v Choong Kian Haw* [2002] 4 SLR 776 ("*Choong Kian Haw's* case")(see *Public Prosecutor v Ganesh s/o M Sinnathamby* [2007] SGDC 95).

12 While the district judge considered (at [20]) that the imposition of fines on the appellant could, in light of his discharged status, achieve the desired punitive effect, she emphasized that the "accused had committed the said offences at the time when he was still an undischarged bankrupt, for which like-minded persons should be deterred from committing such offences in future" and also noted that the accused had not fully paid up the debt he owed.

13 Finally, the district judge held that the fact that a bankrupt was currently discharged would be a mitigating factor to be taken into account in that he was unlikely to commit such offences in the future. That said, she concluded that this would only go so far as to determine "the length of the custodial sentence to be imposed". For reasons that will be discussed below, this proposition necessitates further clarification.

The present appeal

Offences under s 131(2) of the Bankruptcy Act

14 As a starting point, it would be helpful to set the appropriate context for discussion by tracing the main features of the travel restrictions imposed by the present bankruptcy regime.

15 It is an offence to leave Singapore without the prior permission of the OA. Section 131(1)(b) of the Act provides that an undischarged bankrupt "shall not leave, remain or reside outside Singapore without the previous permission of the Official Assignee". Failure to comply with this provision attracts a criminal sanction of a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both (see s 131(2)).

16 It must be emphasised at the outset that our legislative regime provides for a broad spectrum of punishment, ranging from a fine to imprisonment for two years. A custodial sentence is not mandatory and there is clearly a judicial discretion to impose a fine in lieu of punishment. Within this statutory range, it is the duty of the court to determine the degree of severity of punishment to achieve the legislative objective in question.

17 This legislative objective was recently clarified by the Minister for Law, Professor S Jayakumar during the Parliamentary debates held on 16 July 2007 (vol 83) in relation to undischarged bankrupts leaving Singapore without permission as follows:

> The main purpose of requiring a bankrupt to seek the OA's permission for overseas travel is to help the OA in the administration of the bankruptcy estate, and to prevent the bankrupt from hiding income earned or disposing his assets overseas.

18 This accords with the *raison d'etre* of the offence then articulated by CJ Yong (as he then was) in the seminal case *Choong Kian Haw* (at [28]) as follows:

> The purpose of prohibiting an undischarged bankrupt from leaving the jurisdiction without the previous permission of the Official Assignee is to ensure that the Official Assignee can monitor the bankrupt's movements to properly administer his affairs for the benefit of his creditors. A bankrupt who goes overseas without permission would have opportunities to salt away his assets, earn income or acquire assets abroad without accounting for them to the detriment of his creditors, since the Official Assignee would not have the power to supervise his affairs. As such, it is necessary to treat every infraction of s 131(1)(b) seriously.

19 As is to be expected, not every infraction of s 131(1)(b) will result in prosecution. With more than 24,000 bankrupts, the OA must take a targeted approach. Factors to be considered in an assessment of whether to prosecute the errant bankrupt include, *inter alia*, whether the bankrupt has travelled without permission before, the length of stay overseas, whether he has been generally cooperative with the OA and whether he has committed other offences. In appropriate cases, the OA may issue a warning in lieu of prosecution.

20 Statistically, the number of bankrupts prosecuted for leaving Singapore without obtaining the OA's permission has been increasing. In 2006, 77 bankrupts were prosecuted for unauthorized travel, whereas the corresponding figures for 2005 and 2004 were 68 and 40 respectively. As for issued warnings in lieu of prosecution, the figures for the same three preceding years are 22, 21 and 6 respectively. Overall, however, the current system has worked well as the vast majority of bankrupts seek the requisite permission before they travel. In 2006, the OA received some 34,000 applications for permission to travel, of which about 90% were approved. Only about 0.4% of the total number of bankrupts are taken to task annually for unauthorized travel.

21 These statistics reflect the overall administrative efficiency of the bankruptcy travel restriction regime, reinforced in part by the broad powers conferred on the OA under s 116 of the Act to detain the passport of a bankrupt or issue a direction to the Commissioner of the Immigration and Checkpoints Authority to prevent the bankrupt from going overseas. These various methods of enforcement constitute the repertoire of tools available to the OA in the discharge of his duty to administer the estates of bankrupts. This in turn affects the appropriate penalty to be imposed for a failure to comply with those restrictions.

Sentencing tariff

22 In *Choong Kian Haw's* case, CJ Yong discussed the guidelines relating to offences under this section and clarified (at [24]-[25]) as follows:

> 24 The magistrate misread my decision in *PP v Ong Ker Seng (supra)*. In that case, I did not contradict the trite principles that fines may be imposed in appropriate circumstances. However, I stated my view that *fines were, in general, not a suitable means of punishment since bankrupts would typically lack the means to pay for the fines themselves. If they had the funds to pay the fines, these monies should clearly be channelled instead to the unpaid creditors. If they lacked the funds and a third party paid for them, the punitive effect of the punishments is diminished. These concerns apply with equal force to the sentencing of bankrupts in general.* They are not limited to offences committed under s 141(1)(a).
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> 25 I was of the view that the case law clearly stood for the proposition that *a custodial sentence would generally be imposed for the offence of leaving the jurisdiction without the previous permission of the Official Assignee. The burden was on the offender to show that there were such exceptional circumstances in his case that it warranted a deviation from the usual imposition of a custodial sentence* …
>
> [emphasis added]

23 The force of the argument, that the imposition of a fine would not be adequate punishment in the case of an undischarged bankrupt, is compelling. However it is not clear how a bankrupt would be able to get his hands on money to pay the fine except in cases where it is paid by family members or friends. Therefore, except where a third party is prepared to pay the fine, an undischarged bankrupt would invariably serve the imprisonment imposed in default of payment of the fine. Subsequent to *Choong Kian Haw's* case, the lower courts have tended to impose custodial sentences for such cases. Indeed, this sentencing trend was so prevalent that it was raised in Parliament on 2 March 2007 (at vol 82 col 2338) by Mr Inderjit Singh, whose comments were as follows:

> Sir, one particular example of how harsh the regime here is, is the case of bankrupts who leave Singapore … Many of these persons get hauled up before the courts and face criminal sanction under the Bankruptcy Act, section 131, where the Act punishes them with either a $10,000 fine

> or a jail term of two years. But unfortunately, we had a precedent set by the former Chief Justice where, under the case of Public Prosecutor *vs* [Chung Kian How], he decided that punishment for this offence should be a jail term. And subsequently, the Subordinate Courts are bound by this precedent. I am not a lawyer, but I think they are bound by this precedent set by the High Court.
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> I think the courts should not be playing the role of Parliament and I hope that the Minister can explain this. I suggest that the Minister look at Chapters 7 and 13 and also the harshness of this rule to be reduced.

24 Notably, the response by the Senior Minister of State for Law, Associate Professor Ho Peng Kee was couched in the following terms:

> [W]hy are they jailed? This is a court decision, but let me just say that they are not all jailed because, in fact, the Act allows for a person to be either jailed or fined. So I would say that we should leave it to the court to look at the facts and circumstances of the case because every case is unique – whether he has travelled before, how long he stays away, whether he is a cooperative bankrupt, whether he has other offences hanging over his head. That is why I think we should leave it to the court. My assurance to Mr Singh is that there are cases where the bankrupt is only fined and not jailed. So it is not mandatory jail.

25 Unfortunately, the foregoing exchange underscores a misconception that the case of *Choong Kian Haw* has unfairly imposed a sentencing "precedent" that compels the imposition of a custodial sentence on bankrupts who contravene travel restrictions under the Act. This is clearly not the case.

26 To begin with, it should be highlighted that CJ Yong prefaced his guidelines by stating in no uncertain terms that he "did not contradict the trite principles that fines may be imposed in appropriate circumstances" (above at [22]). On appeal, the prosecution tendered a list of cases in which fines were in fact imposed in cases where the accused had taken a small number of trips out of the jurisdiction. While the number of trips may be an important factor to be considered in determining the appropriate sentence (insofar as it reflects the degree of recalcitrance), it is undoubtedly not the sole factor.

27 On this note, I feel compelled to reiterate that whilst past cases serve as focal guidelines for the sentencing court, these "tariffs" should be applied with due appreciation of the unique facts and circumstances of each individual case (*Soong Hee Sin v PP* [2001] 2 SLR 253). It remains the duty of the court to remain apprised of all relevant factors and to seize the "judicial prerogative to tailor criminal sanctions to the individual offender" (*Syeed Chowdhury v PP* [2002] 1 SLR 301 at [15]).

28 Unfortunately, there has been, to date, no case where a discharged bankrupt has been convicted for a breach of the offence in the present case. This brings me to the central issue – whether the fact that the appellant had been discharged as a bankrupt constitutes an exceptional circumstance as encapsulated in *Choong Kian Haw's* case which would warrant a departure from the normal sentencing tariff. Alternatively, it can be viewed as a situation that brings the present case out of those precedents.

The appropriate sentence

29 In the context of our bankruptcy regime, it is essential that the court strives, in the words of the Minister for Law, Professor S Jayakumar at the Second Reading of the Bankruptcy Bill on 25 August 1994 to "strike a balance between the interest of the debtor, the creditor and society"

(see Parliamentary Reports vol 63, col 399).

30 Accordingly, of crucial importance to my assessment of the appropriate sentence to be imposed is the unprecedented fact that the appellant was, at the time of the conviction, no longer an undischarged bankrupt. In fact, the appellant's conviction occurred more than two and a half years after his discharge as the prosecution only initiated proceedings against him some two years after his discharge. The key difference in the present case is that a sentence of a fine would bite and the consideration in *Choong Kian Haw's* case, that a fine would in general not be a suitable punishment for undischarged bankrupts, would not be relevant here. That being the case, a consideration of the appropriate sentence to be imposed on the appellant would proceed from first principles and not with a blinkered reference to the custodial sentence imposed in *Choong Kian Haw's* case.

31 I therefore turn to consider the circumstances of the appellant's offences. I observed that the appellant had, since his discharge, secured some measure of stability in his life and was gainfully employed. The imposition of a custodial sentence would clearly disrupt his life and moreover, would serve no specific deterrent purpose given that there was no chance of him committing the same offence (as he was no longer a bankrupt). In mitigation, I further noted that he was remorseful and had pleaded guilty at the first available opportunity. He had also been diagnosed with heart problems and had made "unselfish contributions" to his church for the benefit of others.

32 Notwithstanding the foregoing, the harsh reality remained that the appellant had committed multiple offences which mandated a severe punishment signalling the court's disapproval of his quite blatant conduct. The fact that the accused was presently discharged should not detract from the fact that he had left the jurisdiction when he was still an undischarged bankrupt.

33 However, taking into consideration that the appellant had already secured discharge two and a half years ago, I was of the view that a fine would be sufficiently punitive as the fines would have to be paid out of his own pocket. However in view of the number of contraventions, it was my opinion that a heavy fine would be appropriate, one that was near the top end of the range.

Conclusion

34 For the reasons set out above, I ordered the district judge's original sentence of 4 weeks' imprisonment for each charge to be substituted with a fine of $8,000 (in default 4 weeks' imprisonment) for each of the three charges.