Dong Guitian v Public Prosecutor
[2004] SGHC 92

Case Number : MA 130/2003

Decision Date : 06 May 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Nai Thiam Siew Patrick and Loh Kia Meng (AbrahamLow LLC) for appellant; Amarjit Singh (Deputy Public Prosecutor) for respondent

Parties : Dong Guitian — Public Prosecutor

Criminal Law – Offences – Property – Cheating – Accused dishonestly inducing Ministry of Manpower officer into approving Prior Approval applications for recruitment of foreign workers – Section 420 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Appeal – Finding by trial judge that accused had requisite mens rea to cheat – Whether trial judge attached undue weight to testimonies of accomplices implicating accused – Approach of appellate court

Criminal Procedure and Sentencing – Impeachment – Whether accused's credit impeached by previous inconsistent statement – Section 157(c) Evidence Act (Cap 97, 1997 Rev Ed)

Criminal Procedure and Sentencing – Impeachment – Whether accused's credit impeached by previous inconsistent statement – s 157(c) Evidence Act (Cap 97, 1997 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Appeals – Deception perpetrated against government department – Whether principle of deterrence dominant consideration – Whether sentence manifestly excessive

Criminal Procedure and Sentencing – Sentencing – Principles – Whether application of principle of parity of sentence with other accomplices appropriate

6 May 2004

Yong Pung How CJ:

1 This was an appeal against the decision of District Judge Victor Yeo Khee Eng, who convicted the appellant on two counts of cheating and dishonestly inducing a delivery of property, an offence punishable under s 420 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC"). The appellant was sentenced to six months' imprisonment on each charge and the two sentences were ordered to run concurrently. The present appeal was brought against conviction and sentence. At the end of the hearing before me, I dismissed both appeals. I now give my reasons.

Background facts

2 The appellant is a Chinese national and a Singapore Permanent Resident. At all material times, he was a director of Happy Millennium Pte Ltd ("Happy Millennium"), a construction company. The other two directors of Happy Millennium were the nominees of one Neo Hong Lee ("Neo") and one Tan Thye Kwang ("Tan") respectively. Tan was a previous employer of the appellant. Although Tan was neither a director nor shareholder of Happy Millennium, he had a part to play in the control and management of the company.

3 On 6 September 2000, the appellant submitted two applications on behalf of Happy Millennium to the Ministry of Manpower ("MOM") to obtain Prior Approval ("PA") for the recruitment of

20 and 120 workers respectively from the People's Republic of China ("PRC"). Happy Millennium submitted the applications in its alleged capacity as a sub-contractor of Sunway Juarasama Sdn Bhd ("Sunway") in respect of a project secured by Sunway to construct two secondary schools for the Ministry of Education. As the main contractor of the building project, Sunway had been granted a Man-Year Entitlement ("MYE") by MOM entitling it and/or its sub-contractor(s) to employ up to a certain number of foreign workers to work on the said project. (Sub-contractors obtain MYE allocation from the main contractors as only the latter may apply for MYE.)

4 In support of the PA applications, the appellant submitted, among others, a sub-contract agreement between Happy Millennium and Sunway dated 24 May 2000 ("the Sub-Contract Agreement"). The applications were processed by Yee Chin Fen ("Yee"), a Construction Permit Officer at the MOM. Yee granted the two applications on 14 and 15 September 2000 respectively. In the court below, Yee testified that he would not have approved the PA applications if he had known that Happy Millennium had no intention of carrying out the Sub-Contract Agreement with Sunway.

The Prosecution's case

5 It was the Prosecution's case that the appellant was fully aware, at the time he submitted the two applications to MOM, that Happy Millennium was not planning to fulfil the sub-contract with Sunway to build the secondary schools. The applications for PA were in fact a scam ("the MYE scam") devised by the appellant and three others, namely, Neo, Tan and one Kiw Chiee Mun ("Kiw"), to make quick gains by exploiting Sunway's quota for foreign workers. By making false representations to the effect that there had been a legitimate allocation of Sunway's MYE to Happy Millennium, the appellant played a part in the dishonest procurement of the PA to employ the PRC workers. Those involved in the scam consequently made illegal profits by charging the workers commissions for bringing them into Singapore.

6 Neo and Tan, who had pleaded guilty to charges punishable under s 417 of the PC for their involvement in the MYE scam, testified for the Prosecution. They gave evidence that sometime in March 2000, they learned from Kiw, an employee of Sunway, that Sunway had won a contract from MOE to build two schools at Punggol and Sembawang. Since they wanted to take on the sub-contract projects, Neo, Tan and the appellant decided to use Happy Millennium to make a bid at $13m. While Neo was the party principally involved in the calculation of the pricing of the bid, everyone involved, including the appellant, knew of the offer price and agreed to the submission of the tender.

7 Sometime in April 2000, the parties realised that the bid submitted was too low and that Happy Millennium would sustain financial losses if they continued with the project. Hence, they abandoned their original plan to acquire the sub-contract projects, and came up with a scam involving the purchase of the MYE from Sunway at $1,000 per worker. Based on the understanding that they would charge each worker $2,000 for the successful PA application, the parties agreed that out of the $1,000 profit remaining after paying Sunway, the appellant would receive $150. Neo and Tan would get the remaining $850 after deducting all necessary expenses. Neo and Tan maintained that the appellant was present at this discussion, and that he readily consented to take part in the MYE scam.

8 Neo and Tan then met up with Kiw to discuss the under-quotation and their plans to buy the MYE. They explained to Kiw that even though Happy Millennium was unable to continue with the project, they wished to keep the MYE. A few days after the meeting, Sunway agreed to the MYE scam. Neo and Tan testified that the appellant's main responsibility in the entire scam was to collect the money from the foreign workers and to oversee their operations and deployment.

9 Both Neo and Tan were unequivocal in their evidence that the appellant knew that Happy Millennium had no intention of executing the contract with Sunway and that the Sub-Contract Agreement entered into between the two companies was merely to facilitate the PA applications. The appellant had signed the Sub-Contract Agreement wholly conscious of its purpose and content.

10 Neo and Kiw further attested to the appellant's involvement in the ensuing fabrication of letters designed to cover up the MYE scam. When the President and the Managing Director of the Sunway Group arrived in Singapore sometime in February or March 2002, the gang produced several letters which falsely stated that there had been a dispute between Happy Millennium and Sunway, and that the contract between the two companies was eventually terminated for this reason. According to Neo, the contents of the letters were duly explained to the appellant before he signed them on behalf of Happy Millennium.

The Defence

11 The appellant's defence at the trial below was essentially one of bare denial of his participation in, or knowledge of, the MYE scam. He maintained that he had no role in the management of Happy Millennium. He also claimed that he was never involved in the discussions leading to the tender of the sub-contract projects and the subsequent purchase of the MYE from Sunway. In respect of the PA applications, he also refuted any intention to cheat on his part, claiming that he did not know that the supporting documents accompanying the applications were false.

12 The appellant did not dispute that he had signed the PA application forms and the Sub-Contract Agreement. However, he averred that he had signed them without knowing what they were. Being a Chinese national, he could neither read nor write English. As the appellant looked up to Tan as the boss of Happy Millennium, he had simply complied with Tan's instructions that he sign the documents. Tan never informed him that the application forms were in any way connected with the Sub-Contract Agreement. Additionally, with respect to the letters fabricated to cover up the MYE scam, the appellant maintained that Neo had likewise asked him to sign the letters without providing any explanations as to their content.

The decision of the court below

13 The trial judge highlighted the following ingredients of the offence under s 420 of the PC, as elaborated in *Gunasegeran s/o Pavadaisamy v PP* [1997] 3 SLR 969 and affirmed in *Chua Kian Kok v PP* [1999] 2 SLR 542:

(a) the victim must be deceived;

(b) there must have been an inducement such that the victim delivered any property to any person;

(c) this inducement must lead to the delivery of the property; and

(d) there must be a dishonest or fraudulent intention on the part of the appellant to induce the victim to deliver the property.

In the trial below, the only element in dispute was (d), the *mens rea* of the appellant: whether the appellant had the requisite fraudulent or dishonest intention to deceive Yee when he submitted the applications to obtain the PA for recruitment of the Chinese foreign workers. To resolve this issue, the trial judge had to determine whether the appellant knew of and agreed to participate in the MYE

scam, and whether he was aware that the supporting documents submitted to MOM, as well as the declarations in the application forms, were false. The Prosecution's case therefore turned primarily on the evidence of Neo, Tan and Kiw.

14 Having considered the evidence carefully, the trial judge found the testimonies of the three material witnesses to be largely consistent and convincing. He also found that they were all credible witnesses. They did not shy away from admitting to their own involvement in the MYE scam, and they did not attempt to exaggerate or embellish their evidence to unduly implicate the appellant. The trial judge therefore accepted the evidence of Neo, Tan and Kiw that the appellant was present at the relevant discussions, and that he willingly agreed to participate in the MYE scam. The trial judge also found that Happy Millennium had no intention of carrying out the sub-contract with Sunway, and that the appellant was conscious of this fact when he signed and subsequently submitted the PA applications to the MOM.

15 In contrast to his observations regarding Neo, Tan and Kiw, the trial judge found the appellant to be an unreliable witness who was all too eager to dissociate himself from Happy Millennium and the entire Sunway project. The trial judge was unconvinced by the appellant's attempts to portray himself as a naïve and ignorant person, a "mere pawn" who had blindly followed Tan's instructions. The appellant had a degree in construction, and had been working in Singapore's construction industry since 1993. He started as a foreman in one of Tan's construction companies and eventually worked his way up to become a director and/or shareholder in several construction-related companies, including Happy Millennium. In view of these facts, the trial judge rejected the appellant's claim that he was totally unaware of the Sunway project and that he did not know what the PA applications were for.

16 Thus, having regard to the overwhelming evidence adduced by the Prosecution and his finding that the appellant was an untruthful witness, the trial judge rejected the appellant's defence of denial.

17 While the trial judge was of the view that this was sufficient to convict the appellant, he nevertheless went on to consider if the appellant's credit was impeached under s 157(c) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). The Prosecution sought to impeach the appellant's credibility with a previously inconsistent statement recorded on 26 July 2002 ("the statement") by the investigating officer, Senior Station Inspector Lim Chin Hau ("SSI Lim"). When the appellant challenged the voluntariness of the statement on the basis that there had been inducement, threat and promise, coupled with oppression, the trial judge conducted a *voir dire* to determine its admissibility.

Trial within a trial – admissibility of the statement recorded on 26 July 2002

18 The crux of the appellant's evidence was that he did not make the statement. SSI Lim had only asked him to sign the first and last page of a pre-typed statement, informing him that its contents were identical to that of an earlier statement recorded on 24 July 2002. In addition, SSI Lim did not explain the contents of the statement to the appellant. The appellant claimed that SSI Lim assured him that the statement would not affect him as the Corrupt Practices Investigation Bureau ("CPIB") was only planning to go after Tan. When SSI Lim subsequently threatened to detain him for a further 48 hours and to beat him up if he did not sign the statement, the appellant did as he was told, as he feared a repeat of an incident that had occurred a few days earlier. The appellant claimed that he had been punched on the chest by one SSI Ng Sheng on 23 July 2002, as a result of which he became unconscious and had to be hospitalised at Singapore General Hospital ("SGH").

19 SSI Lim testified that he did not threaten the appellant or make any promises to him at any time during the recording of the statement. Further, the appellant did not make any complaints nor voice any dissatisfaction with his interpretation. After he had explained the statement to the appellant, the appellant examined the statement very carefully before signing on every page to indicate that he had given the statement.

20 SSI Ng Sheng also denied punching the appellant during interrogation. When the appellant suddenly complained of a heart problem and began trembling, he immediately arranged for the appellant to be sent to SGH to receive medical treatment.

21 At the end of the *voir dire*, the trial judge was satisfied that the appellant had made the statement voluntarily. Having heard the evidence of all relevant parties, including the evidence of one Dr Lim Yong Hwa that there was nothing in the clinical notes to suggest that the appellant had sustained any physical injuries, the trial judge was of the opinion that the appellant's allegations were completely unjustified. Accordingly, he admitted the statement as evidence.

Impeachment of the appellant's credit under s 157(c) of the EA

22 Having ruled the statement as admissible, the trial judge proceeded to find that the appellant's credit had been impeached under s 157(c) of the EA. The judge noted that the statement materially contradicted the appellant's repeated denials in court. The statement, which was largely consistent with the testimonies of Neo and Tan, indisputably pointed to the appellant's involvement in the MYE scam. As the appellant could offer no satisfactory explanations for the contradictions, the trial judge held that the appellant's credit had been impeached by his previous inconsistent statement.

23 As the trial judge was satisfied that the Prosecution had proven its case beyond a reasonable doubt, he accordingly convicted the appellant of the offences for which he was charged.

The appeal against conviction

24 Counsel for the appellant advanced two main grounds of appeal:

(a) that the trial judge had erred in preferring the evidence of the Prosecution's witnesses over the appellant's; and

(b) that the trial judge had erred in finding that the appellant's credit had been impeached.

25 I shall now deal with these arguments in turn.

Whether the trial judge had erred in preferring the evidence of the Prosecution's witnesses over the appellant's

26 The thrust of the appeal was that the trial judge had erred in preferring the evidence of the Prosecution's witnesses over the appellant's on the material aspects of the case. In particular, counsel for the appellant maintained that the trial judge had erred in finding that the appellant had the requisite *mens rea* to cheat under s 420 of the PC. This submission was essentially an attack on the trial judge's findings of fact, which were in turn based on his assessment of the witnesses' credibility.

27 It is trite law that an appellate court will be slow to disturb a lower court's findings of fact

unless they are plainly wrong or against the weight of the evidence. This is because the appellate court does not have the advantage of hearing the witnesses and observing their demeanour in court: *Lim Ah Poh v PP* [1992] 1 SLR 713, *Yap Giau Beng Terence v PP* [1998] 3 SLR 656. An appellate court may reverse such findings only if it is convinced that the findings were wrong, and not merely because it entertains doubts as to whether the decision was right: *PP v Azman bin Abdullah* [1998] 2 SLR 704.

28 Hence, given the well-established principles above, the appellant was faced with the uphill task of convincing me that the trial judge's findings ought to be overturned.

29 Counsel for the appellant contended that the trial judge had erred in giving undue weight to the evidence of Neo, Tan and Kiw, who were all accomplices in the MYE scam. As they were the main perpetrators of the offence, counsel maintained that the trial judge should have been more alert to the perils of accepting their testimonies in court.

30 I was of the view that this argument was without merit. It was clear that the trial judge, mindful of the fact that he was dealing with the evidence of accomplices, had scrutinised their evidence with great care and circumspection. He had specifically directed his mind to illustration (b) to s 116 of the EA, which provides that the court may presume that an accomplice is unworthy of credit and that his evidence needs to be treated with caution. Even with this statutory caveat in mind, the trial judge believed the evidence of Tan, Kiw and Neo, whose evidence was on the whole consistent and cogent. Furthermore, at the time they testified for the Prosecution, both Neo and Tan had already pleaded guilty to the lesser charge of cheating punishable under s 417 of the PC, and were already serving their sentences of imprisonment. They therefore had little or no motive to falsely implicate the appellant. As for Kiw, he was not even an accused person when he gave evidence in court. More importantly, the witnesses were candid about the extent of their own involvement in the scam and did not try to overstate the appellant's role to unjustifiably implicate him.

31 On the other hand, the appellant severely injured his credibility when he made unsubstantiated allegations against all the prosecution witnesses to support his bare denial that he had absolutely no knowledge of the MYE scam at the material time. The appellant also damaged his credibility when he lied about matters that were inconsequential to proving the charges against him, but were nonetheless important in assessing his honesty and credibility. For instance, the appellant persistently and unreasonably lied that he had not attempted to leave Singapore without CPIB's permission before the trial, despite being faced with overwhelming evidence demonstrating otherwise. In light of these factors, I was of the view that the trial judge was entitled to find that the appellant was not a credible witness, and to consequently dismiss his defence of denial.

32 In the circumstances, I was of the opinion that the trial judge was justified in accepting the evidence of Neo, Tan and Kiw to arrive at the conclusion that the appellant had the requisite dishonest intention to deceive Yee into approving the PA applications.

Whether the trial judge had erred in finding that the appellant's credit had been impeached

33 Counsel for the appellant submitted that the trial judge had erred in finding that the appellant's credit had been impeached under s 157(c) of the EA. According to counsel, the trial judge had attached undue weight to the appellant's previous inconsistent statement by failing to consider the exculpatory statements within.

34 There are two points to be made in respect of this ground of appeal. First, the trial judge did not have to rely only on the impeachment exercise to convict the appellant. As the trial judge noted,

the Prosecution's evidence, as well as his finding that the appellant was an untruthful witness, were sufficient to demonstrate that the Prosecution had proved its case beyond a reasonable doubt. His observation that the appellant's credit had been impeached merely confirmed his opinion that the appellant's defence could not be believed. Having affirmed his findings in the proceeding below, I concurred with the trial judge that he was entitled to convict the appellant without having to impeach the appellant's credit. Thus, even if the appellant could prove that the trial judge had erred in exercising his discretion under s 147(3) of the EA, this would provide little assistance to the appellant.

35 Second, there was no doubt that the contradictions in the appellant's statement were material, as they went to the heart of the appellant's defence. Given that the appellant could provide absolutely no credible explanations for the glaring contradictions, I was of the view that the trial judge was fully justified in finding that the appellant's credit had been impeached.

36 For the foregoing reasons, I was satisfied that the elements of the offence under s 420 of the PC were fully made out. I therefore dismissed the appellant's appeal against his conviction.

The appeal against sentence

37 Counsel for the appellant maintained that the sentence of six months' imprisonment on each charge was manifestly excessive, in view of the trial judge's failure to take due account of all the mitigating factors in the appellant's favour.

38 In particular, counsel sought to impress upon the court the undue hardship that the appellant's family would suffer as a result of his imprisonment. It is settled law that any hardship caused to the offender's family arising from his imprisonment has little mitigating value save in exceptional or extreme circumstances: *Ng Chiew Kiat v PP* [2000] 1 SLR 370. It is an inevitable consequence occasioned by the offender's own criminal conduct and cannot have any significant bearing on what would otherwise be the appropriate sentence: *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305. In this case, the appellant has failed to bring to my attention any exceptional circumstances which would warrant a departure from established principles.

39 Counsel also averred that the trial judge had failed to adequately consider the fact that the appellant was a first-time offender, and that the appellant had made significant contributions towards promoting Singapore as an investment centre for Chinese companies. I did not agree with counsel's submissions. It was evident that the trial judge had given due consideration and had accorded the proper weight to each of these factors. In any event, I was of the view that any mitigating value afforded by these considerations was far outweighed by the aggravating factors present in this case.

40 As rightly pointed out by the trial judge, the principle of deterrence ought to be a dominant consideration in this case, as the deception had been perpetrated against a Government department responsible for controlling the recruitment of foreign labour in Singapore. I noted in *Lim Mong Hong v PP* [2003] 3 SLR 88 that the courts generally adopt a harsh approach in cheating cases when the victim is a Government department or agency. This is done not out of cronyism, but rather to safeguard our national resources: *Xia Qin Lai v PP* [1999] 4 SLR 343. Counsel for the appellant maintained that the case of *Lim Mong Hong* should not be relied on as a justification for giving the appellant a harsher sentence, as the Government department in question here (*ie* MOM) did not in fact suffer any financial loss. On the particular circumstances of this case, there was no doubt in my mind that from a public policy point of view, the appellant's argument in this regard had to fail. It was true that MOM had not suffered any immediate and tangible financial loss. However, there was no denying that the appellant's act of deception had frustrated the intention of the Singapore

Government to effectively regulate and monitor the recruitment of foreign labour in Singapore. In light of these facts, I was of the opinion that the trial judge could not be faulted for taking this aggravating factor into account in meting out the proper sentence.

41 Finally, I was not convinced by counsel's argument that in view of the relatively minor role the appellant had played in the scam and the smaller amount of profit he earned *vis-à-vis* the other accomplices, the appellant ought to be given the same or a lighter sentence than Neo or Tan. First, the two accomplices had pleaded guilty to a lesser charge of cheating punishable under s 417 of the PC for which the punishment is a maximum term of imprisonment of only one year and/or fine. Additionally, apart from the sentences of four months' imprisonment each, both Neo and Tan were also ordered to pay substantial fines. Therefore, I was of the view that parity of sentence with Neo and Tan was not appropriate in the appellant's circumstances. Second, as the trial judge noted, the principle of parity in sentencing was not an overriding consideration: *PP v Ng Tai Tee Janet* [2001] 1 SLR 343. Given that the court is not fettered by a sentence imposed on an accomplice by another court which can rightly be regarded as inadequate (see *Yong Siew Soon v PP* [1992] 2 SLR 933), there was no justifiable reason for the appellant to benefit from what was considered to be a lenient sentence against Neo and Tan.

42 In the result, having considered all the circumstances of the case, I dismissed the appeal and upheld the sentence imposed by the trial judge.

Appeals against conviction and sentence dismissed.