Ong Boon Kheng v Public Prosecutor
[2008] SGHC 199

Case Number : Cr M 26/2008

Decision Date : 07 November 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Michael Khoo SC and Josephine Low (Michael Khoo & Partners) for the applicant; Lau Wing Yum and David Chew Siong Tai (Deputy Public Prosecutors) for the respondent

Parties : Ong Boon Kheng — Public Prosecutor

Criminal Procedure and Sentencing

7 November 2008

Tay Yong Kwang:

1 By this application, the applicant seeks an order that the following six questions of law be reserved for the decision of the Court of Appeal pursuant to s 60 of the Supreme Court of Judicature Act ("SCJA") (Cap 322, 2007 Rev Ed):

> 1 Whether, under the provisions of section 180(h) and (i) of the Criminal Procedure code (Cap 68) ("CPC") where the totality of the prosecution evidence consists of different versions on an essential ingredient of the charge, the trial judge has to first amend the charge before calling on the accused to enter on his defence to the charge and/or to afford the accused an opportunity to recall prosecution witnesses under section 167 of the CPC?
>
> 2 Whether, in a prosecution where an accused is charged for the offence of consenting to the commission by a company of making a misleading statement under section 331(1) of the Securities & Futures Act (Cap.289), where the company has not been prosecuted for the predicate offence and/or tried jointly with the accused, the trial judge must be satisfied at the close of the prosecution case that the predicate offence by the company has been established by the prosecution beyond reasonable doubt?
>
> 3 Whether the test propounded by the Privy Council in *Haw Tua Tau v PP* [1981] 2 MLJ 149 merely requires a trial judge, at the close of the prosecution case to make only a "minimum evaluation" or "minimum assessment" of the prosecution evidence to determine whether the prosecution has established a case against the accused which if unrebutted would warrant the conviction of the accused under section 180 (f) of the CPC?
>
> 4 If the Answer to Question 3 is Yes, whether the "minimum evaluation" or "minimum assessment" of the prosecution evidence entails the court having to find the necessary minimum evidence at the close of the prosecution case to support each and every ingredient of the charge?
>
> 5 Whether a trial judge is compelled or obliged to draw an adverse inference as to the guilt of the accused if he elects not to give evidence when called upon to do so under section 180(k) of the CPC?

6 Whether there would be a miscarriage of justice if a trial judge finds an accused person guilty on a charge different from that which the accused has been charged with, without first amending the charge on the basis of disputed evidence despite being invited by the prosecution and defence to amend the charge?

2 The applicant was convicted on four charges under the Securities and Futures Act (Cap 289, 2002 Rev Ed) by Specialist District Judge Tan Cheng Han ("the DJ") after a trial in the Subordinate Courts. The charges were as follows:

FIRST CHARGE (Amended)

You, ONG BOON KHENG, are charged that you, on or about 24 July 2003, in Singapore, as Chief Executive Officer of Informatics Holdings Ltd ("Informatics"), a company listed on the Mainboard of the Singapore Exchange Securities Trading Ltd, which committed an offence of making a statement, namely, Informatics' unaudited first quarter financial statement for the period ended 30 June 2003, released via MASNET on 24 July 2003, that was misleading in a material particular, to wit, the net profit before tax was overstated by about $5.452 million, and was likely to induce other persons to purchase certain securities, namely, Informatics shares, when at the time Informatics made the statement, it ought reasonably to have known that the statement was misleading in a material particular, consented to the commission of the above offence, and you have thereby committed an offence under Section 331(1) read with Section 199(b)(ii) punishable under Section 204(1) of the Securities & Futures Act (Chapter 289, 2002 Revised Edition).

SECOND CHARGE (Amended)

You, ONG BOON KHENG, are charged that you, on or about 29 October 2003, in Singapore, as Chief Executive Officer of Informatics Holdings Ltd ("Informatics"), a company listed on the Mainboard of the Singapore Exchange Securities Trading Ltd, which committed an offence of making a statement, namely, Informatics' unaudited second quarter financial statement for the period ended 30 September 2003, released via MASNET on 29 October 2003, that was misleading in a material particular, to wit, the net profit before tax was overstated by about $8.78 million, and was likely to induce other persons to purchase certain securities, namely, Informatics shares, when at the time Informatics made the statement, it ought reasonably to have known that the statement was misleading in a material particular, consented to the commission of the above offence, and you have thereby committed an offence under Section 331(1) read with Section 199(b)(ii) punishable under Section 204(1) of the Securities & Futures Act (Chapter 289, 2002 Revised Edition).

THIRD CHARGE (Amended)

You, ONG BOON KHENG, are charged that you, on or about 19 January 2004, in Singapore, as Chief Executive Officer of Informatics Holdings Ltd ("Informatics"), a company listed on the Mainboard of the Singapore Exchange Securities Trading Ltd, which committed an offence of making a statement, namely, Informatics' unaudited third quarter financial statement for the period ended 31 December 2003, released via MASNET on 19 January 2004, that was misleading in a material particular, to wit, the net profit before tax was overstated by about $1.54 million, and was likely to have the effect of stabilising the market price of certain securities, namely, Informatics shares, when at the time Informatics made the statement, it ought reasonably to have known that the statement was misleading in a material particular, consented to the commission of the above offence, and you have thereby committed an offence under Section 331(1) read with Section 199(c)(ii) punishable under Section 204(1) of the Securities &

Futures Act (Chapter 289, 2002 Revised Edition).

FOURTH CHARGE

You, ONG BOON KHENG, are charged that you, on or about 14 April 2004, in Singapore, as Chief Executive Officer of Informatics Holdings Ltd ("Informatics"), a company listed on the Mainboard of the Singapore Exchange Securities Trading Ltd, with intent to deceive, knowingly and wilfully permitted the making of a misleading statement, to wit, a profit warning statement issued by Informatics via MASNET on 14 April 2004 stating,

i. 'The overstatement of revenue and profit was discovered in the course of closing the books for the year ended 31 March 2004 and the year end audit'; and

ii. 'The directors and senior management of Informatics were not aware of the overstatement of revenue and profit at the time of the announcement of the unaudited results for the period ended 31 December 2003',

to a securities exchange, namely, the said Singapore Exchange Securities Trading Ltd, relating to the affairs of Informatics Holding Ltd, and you have thereby committed an offence punishable under Section 330 of the Securities & Futures Act (Chapter 289, 2002 Revised Edition).

3 The factual background to these charges is set out very briefly here. For its financial year ("FY") 2004, Informatics Holdings Limited ("the company") recognised revenue from various sources which resulted in inflated amounts of revenue announced on MASNET in the first three quarters of that FY. On 14 April 2004, the company issued a profit warning on MASNET, the material terms of which are set out in the fourth charge above. The trading of the company's shares was suspended for 3 weeks after the profit warning. The applicant was at the material times the Chief Executive Officer of the company.

4 The prosecution led evidence pertaining to the four charges. At the close of the prosecution's case, there were discrepancies in the amounts of overstatement alleged in the first three charges. The applicant submitted that it was not the duty of the defence to explain the discrepancies. The applicant argued that the Court of Appeal in *Ng Theng Shuang v PP* [1995] 2 SLR 36 did not reflect correctly the test in the Privy Council decision of *Haw Tua Tau v PP* [1980-1981] SLR 73 ("*Haw Tua Tau*") and invited the DJ to re-visit the "minimum evaluation of the evidence" test mentioned in the Court of Appeal's judgment (at page 41). The applicant also argued that the prosecution had to prove beyond reasonable doubt the predicate offences of the company alleged in the first three charges at the close of the prosecution's case.

5 The DJ applied the test laid down in *Haw Tua Tau* as expounded by subsequent local case law and called upon the applicant to enter on his defence in respect of all 4 charges. The applicant elected not to testify and not to call any witnesses on his behalf. After due consideration of the evidence and the submissions, the DJ found the applicant guilty and convicted him on all four charges (see the grounds of decision at [2008] SGDC 3). However, in respect of the second and third charges, the DJ came to the conclusion that the respective amounts of overstatement were lower than the figures stated in those charges. The DJ accepted the evidence of the prosecution witness from Price Waterhouse Coopers and found that the amounts should be $6.18m for the second charge and $1.24m for the third charge. The DJ added (see [88] of his grounds of decision):

Since it is not in dispute that I have the power to amend the charges at any time before the conclusion of the trial, and it was clear what the amounts relied on by the prosecution were, I

> cannot see any injustice to the accused and I would amend the charges accordingly (if necessary) so that the alleged overstatement in the 2nd charge reads "$6.18 million" and the alleged overstatement in the 3rd charge reads "$1.24 million". By any account, these are substantial amounts.

6 When the DJ was asked by defence counsel subsequent to the delivery of judgment whether he would be amending those two charges to reflect the lower figures, the DJ said that if it was necessary to amend, then he should treat them as amended. However, he did not think that it was necessary to amend the charges as they stood. Defence counsel explained to the DJ that he was seeking clarification on whether the said charges were amended to the lower amounts for the purpose of the mitigation plea. The DJ then responded (at page 3556 of the record of appeal):

> For the purposes of the mitigation, I can confirm that the amounts in question are the lesser amounts and I have not found the original higher stated amounts to be established".

It appears from the record of proceedings therefore that the DJ did not amend the two charges in question.

7 After considering the submissions on sentence, the DJ sentenced the applicant to pay a fine of $140,000 (in default 4 months imprisonment) for each of the first three charges and a fine of $25,000 (in default 1 month imprisonment) for the fourth charge. Prosecution's costs were ordered in the amount of $45,412.33. The applicant duly paid the fines imposed and the costs ordered by the DJ.

8 The applicant then appealed against conviction in respect of all four charges in Magistrates' Appeal No. 151 of 2007 ("the MA"). No appeal was lodged in respect of sentence or costs. The appeal came up for hearing before me on 18 August 2008. After hearing the arguments, I made the following remarks in dismissing the appeal:

> Despite the very able submissions made by Mr Michael Khoo, SC on behalf of the appellant, I am afraid that I am of the view that the DJ was right to convict the appellant on the four charges. The only procedural flaw below was that the 2nd and 3rd charges were not formally amended in respect of the amounts and not re-read to the appellant. However, in the light of the issues raised by the defence at the trial, I am of the view that no miscarriage of justice has been occasioned by this omission. I will therefore dismiss the appeal against conviction.

As noted in the course of arguments, the thrust of the defence in respect of the first three charges was that there was no overstatement of revenue and profit by the company and that it had therefore not made any misleading statement. The lower amounts found by the DJ were still (in his words) "substantial amounts". Whether the amounts were found to be $6.18m and $1.24m respectively instead of the alleged $8.78m and $1.54m, the defence would have remained the same. The applicant was also aware of the different amounts adduced in evidence. It should be noted too that the first three charges alleged only approximate and not exact amounts, as indicated by the use of the word "about" and that the amounts in the two charges in issue were in fact lowered rather than increased. I therefore held that the said procedural flaw (see s 180(h) and (i) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)) ("CPC") did not occasion a failure of justice and did not justify the overturning of the convictions (see s 396 of the CPC). Where the fourth charge was concerned, the thrust of the defence was that the key prosecution witnesses had testified that the statement made by the company was not misleading and that the prosecution had therefore failed to make out a case which, if unrebutted, would warrant the applicant's conviction. This was essentially a finding of fact by the DJ. On all four charges, the DJ gave sound, detailed reasons for finding the applicant guilty and

I saw no reason to disagree with him.

9 Following the dismissal of the MA, the applicant took out this Criminal Motion as set out in [1] above.

10 Section 60 (1) and (5) of the SCJA state:

> (1) When a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, the Judge may on the application of any party, and shall on the application of the Public Prosecutor, reserve for the decision of the Court of Appeal any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case.
>
> …
>
> (5) For the purposes of this section, any question of law which the Public Prosecutor applies to be reserved or regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest.

It is not in dispute that to come within the ambit of this section, the applicant must satisfy the following conditions:

> (a) the questions must be questions of law and not of fact;
>
> (b) they must be of public interest and not merely of personal importance to the party involved;
>
> (c) they must have arisen in the matter under appeal to the High Court; and
>
> (d) the determination of such questions has affected the matter under appeal.

The applicant also accepts that since this application is not by the Public Prosecutor, the court retains the discretion whether or not to reserve any questions for the decision of the Court of Appeal, even if they satisfy all the conditions prescribed in s 60 SCJA (see, for instance, *Ong Beng Leong v PP* (No. 2) [2005] 2 SLR 247).

11 The applicant contends that the six questions posed (see [1] above) are undoubtedly questions of law and not of fact which were raised before the DJ and in the MA. The first four questions are connected in that they relate to the exercise of the trial judge's duty to evaluate the prosecution's evidence in relation to the burden of proof and the exercise of the court's powers at the close of the prosecution's case. They also concern the amendment of charges at the close of the prosecution's case, the application of the principles in *Haw Tua Tau* as developed in our local authorities and the burden of proof on an accused person. The applicant also submits that the fifth and sixth questions refer to the issue of drawing an adverse inference by reason only of the fact that an accused person has elected to call no evidence and to the amendment of charges before the court finds an accused guilty. It is said therefore that all six questions concern the construction and application of ss 163 to 167 and 180 of the CPC.

12 As I said at the conclusion of the hearing of this Criminal Motion:

> What this application seeks to do is to question the way established principles were applied by the DJ in this case. That, in essence, is an issue as to the merits. I have already expressed my

> agreement with the DJ's decision save for the procedural flaw acknowledged at the hearing of the appeal, which I have ruled did not occasion a failure of justice. That, of course, is the Court's assessment of the justice on the particular facts of a case. No new question of law arises. I therefore dismiss the Criminal Motion.

In my view, the applicant is merely seeking to re-argue his case before another forum under the guise of an application under s 60 SCJA.

13 Chan Sek Keong J (as he then was) in *Abdul Salam bin Mohamed Salleh v PP* [1990] SLR 301 at 311 B ("*Abdul Salam*") gave clear guidelines concerning the scope of s 60 SCJA (which was then worded slightly differently from the current version but not materially so for the present purpose):

> It is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts. Hence, Suffian ACJ's caution that the provision be used sparingly lest it be made use of as an appeal provision.

All the legal posers raised by the applicant can be answered by reference to case law and applying them to the facts of the case, as the DJ has done.

14 It takes only a little ingenuity to re-cast what is a straightforward, commonsensical application of principles of law to the relevant facts into an apparent legal conundrum which seemingly calls for determination by the highest court of the land. I cautioned against this where Constitutional law issues are concerned in the context of s 56A of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) in *Johari bin Kanadi and another v PP* [2008] 3 SLR 422 at [9]. I think the courts should be astute to sieve out appeals dressed in s 60 SCJA disguise.

15 As the questions of law posed in this application do not satisfy the criterion of public interest, I dismissed this Criminal Motion. The applicant has appealed to the Court of Appeal by way of Criminal Appeal No. 10 of 2008 against the dismissal.

16 As I understand it, no appeal lies against the High Court's refusal to reserve questions of law under s 60 SCJA. This is borne out by the then Court of Criminal Appeal's ("CCA") decision in *Wong Hong Toy and another v PP* [1986] 1 MLJ 453. In that case, the appellant appealed against the refusal of Wee Chong Jin CJ to reserve for the decision of the CCA nine questions of law which arose in the course of six Magistrates' Appeals from the subordinate courts heard by the said Chief Justice. The appeal turned on the statutory construction of the then s 44(1) of the SCJA which provided that:

> The [CCA] shall have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals may be brought.

The CCA held (at 457) that the refusal to reserve the questions of law was not a decision made in the exercise of the High Court's original criminal jurisdiction because it was a decision made after the conclusion of an appeal to the High Court in the exercise of its appellate criminal jurisdiction.

17 The appellants in that case then petitioned the Privy Council for special leave to appeal to the Privy Council (which was the highest appellate court before the Judicial Committee Act (Cap 148,

1985 Rev Ed) was repealed in 1994). Leave was refused on 6 March 1986 (see *Abdul Salam* at 306 I).

18 Although the SCJA has undergone changes since the decision of the CCA in that case, the present s 29A(2) is still materially the same as the former s 44(1). Section 29A(2) states:

> The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought

19 Similarly, although s 60 SCJA has also seen some changes (in 1998) since the CCA's decision, it is still essentially the same as the previous provision. As pointed out in *Ng Ai Tiong v PP* [2000] 2 SLR 358 at [8]:

> 8 … Although s 60 of the SCJA was repealed and re-enacted by the Supreme Court of Judicature (Amendment) Act 1998 (No 43 of 1998), it is obvious that the essence of s 60(1) has remained unchanged and therefore the principles laid down in the previous authorities should nevertheless remain applicable to the present case.

20 The legal position that no appeal lies against the High Court's refusal to reserve questions of law under s 60 SCJA was acknowledged by the Privy Council in *JB Jeyaretnam v Law Society of Singapore* [1988] 3 MLJ 425 at 432 D (left hand column).

21 Recently, the Court of Appeal held that a Criminal Motion heard by the High Court in respect of matters arising out of an ongoing trial in the Subordinate Courts is also not an exercise of original criminal jurisdiction within the meaning of s 29A of the SCJA but was instead an exercise of revisionary jurisdiction. Accordingly, there could be no appeal against the decision of the High Court in the Criminal Motion because the Court of Appeal did not have the requisite appellate jurisdiction to hear it (see *Ng Chye Huey and another v PP* [2007] 2 SLR 106 at [58] to [61]).

Copyright © Government of Singapore.