IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 133

Magistrate's Appeal No 9191 of 2016

Between

KAVITHA D/O MAILVAGANAM

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

Version No 2: 29 Oct 2020 (20:25 hrs)

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Kavitha d/o Mailvaganam
v
Public Prosecutor

[2017] SGHC 133

High Court — Magistrate's Appeal No 9191 of 2016
Chao Hick Tin JA
15 February 2017

31 May 2017

Chao Hick Tin JA:

Introduction

1 The role of an appellate court in an appeal against sentence is a delicate one. Sentences should not be disturbed merely because the appellate judge has a different personal view of what the "right" sentence ought to be. After all, sentencing is not a precise science. It is a complex discretionary process of determination. However, in circumstances where the sentencing judge is found to have made errors of principle, or to have wrongly appreciated the facts, the sentence imposed below should be scrutinised closely and the appellate court should, applying the correct legal principles, determine what the appropriate sentence ought to be on the facts of the case; and if that sentence differs from the sentence imposed by the court below, the appeal should be allowed.

2 In the present case, the appellant pleaded guilty to a charge of criminal breach of trust by a clerk or servant, an offence under s 408 of the Penal Code (Cap 224, 2008 Rev Ed), for misappropriating cash payments totalling $30,423.96 from the company where she was employed as a customer service officer. At first instance, the district judge ("DJ") sentenced her to nine months' imprisonment. However, as the prosecution accepted, there were several errors of principle made by the DJ in his assessment of the applicable sentencing considerations. Hence the threshold for appellate intervention was met. On that basis, I considered the matter afresh and reduced the appellant's sentence to seven months' imprisonment. I found that this was the appropriate sentence bearing in mind the full circumstances of the case, and after correcting the errors made by the court below.

Facts

3 At the material time, the appellant was a 44-year-old Singaporean female and was employed by JPB Maid Specialist ("JPB") as a customer service officer. In this role, she was tasked to collect payments made by customers and record them in JPB's internal accounting system.

4 Over the course of five months, between 1 June 2015 and 3 November 2015, the appellant dishonestly misappropriated $30,423.96 from cash payments received from 21 different customers by either recording in JPB's internal system a lower amount paid by the customers and misappropriating the difference, or recording other customers' payments made *via* cheque or NETS under the name of the cash-paying customers and misappropriating the entire cash payment. She had thereby committed the offence of criminal breach of trust by a clerk or servant, punishable under s 408 of the Penal Code. She

Version No 2: 29 Oct 2020 (20:25 hrs)

admitted to those facts and pleaded guilty to the offence. She also made partial restitution of $2,000 to JPB.

5 In her mitigation, the appellant claimed that she committed the offence not out of greed or for personal financial gain, but because she needed the moneys to pay off illegal moneylenders who were harassing her. According to her, in 2010, she had acted as a guarantor for a friend who had illegally borrowed money before going missing. She claimed that neither she nor her friend initially knew that the loan, which was for the sum of $5,000, was illegal as the lender misrepresented himself as a licensed moneylender. She only agreed to act as a guarantor for her friend's loan because she believed that her liability was solely for the principal loan amount and out of a misguided sense of loyalty to her friend. Subsequently, about five years later, the "loan shark" began to call her to demand repayment of the loan, together with interest. He demanded an exorbitant sum in excess of $50,000, and harassed her on a daily basis. The friend who borrowed the money had by then gone missing. The unlicensed moneylender also threated to burn down the appellant's house and workplace, and to harm her young son. He even sent her a photograph of her son, taken by the lender's associates, to show that the threat was serious and could easily be carried out.

6 In addition, the appellant highlighted her personal misfortune which was brought on as a result of the guarantee she gave to the lender and the criminal breach of trust which she committed to satisfy the guarantee. Her husband had left her because of the criminal charge, and she had to provide for both her son and her elderly mother. She was remorseful as evidenced by the fact that she had co-operated with the police, pleaded guilty and tried her best to make restitution.

Version No 2: 29 Oct 2020 (20:25 hrs)

7 In the court below, the prosecution did not dispute the facts pleaded by the appellant in mitigation. However, it was submitted that these facts carry little mitigating weight as this was not a "one-off" offence. It involved a series of transactions over a period of time which required meticulous planning. The prosecution also highlighted three aggravating factors. First, the manner of execution of the offence was premeditated. Second, the way in which the appellant "cooked the books" using other customers' cheques and NETS payments to cover up for cash payments made the offence difficult to detect. Third, a substantial amount of money was misappropriated over the course of five months.

8 It was also disclosed that the appellant had related antecedents. She had been convicted of theft offences in 1994, for which she received a fine, and in 2001, for which she was given a global sentence of three months' imprisonment. Given these factors, the prosecution submitted that an imprisonment term of between 10 and 12 months would be an appropriate sentence in this case. It relied on various sentencing precedents which indicated that imprisonment terms ranging from 10 to 14 months have been imposed in cases involving criminal breach of trust by a clerk or servant of amounts between $32,000 and $47,000.

The decision below

9 The DJ, in his grounds of decision ("GD"), noted that the sum misappropriated by the appellant was significant, and that she had plainly siphoned away the moneys of her employer over the course of five months. He opined that this *modus operandi* overweighed her main mitigation plea that she had not committed the offence out of greed or for personal gain (at [15]).

Version No 2: 29 Oct 2020 (20:25 hrs)

10 He also held that the appellant "was placed in a high position of trust in the victim company because she was a customer service officer" who was entrusted to collect cash payments from customers and record truthfully the amounts collected (at [17]). Notably, he assessed that "the key aggravating factor in this case was that the [appellant] already had several criminal records for having committed theft" at the ages of 22 and 30. He went on, at [19] of the GD, to reason as follows: "Despite these worrying criminal records, and the imprisonment sentence that she had received before, the [appellant] was undeterred. She had once again resorted to dishonest means *for a financial gain*" [emphasis added]. He thus took the view that the principle of specific deterrence should be a paramount consideration in sentencing the appellant.

11 The DJ accepted that the sentencing precedents cited by the prosecution indicated that offenders who misappropriated amounts similar to that in this case can expect to be sentenced to 10 to 14 months' imprisonment. After taking into account the appellant's plea of guilt and the partial restitution which she made, he sentenced her to nine months' imprisonment.

Law on appellate intervention in an appeal against sentence

12 Before I proceed to discuss my decision, it is important to clearly set out the law on appellate intervention on sentence. The starting principle, which is well-established, is that an appellate court has only a limited scope to intervene when reappraising sentences imposed by a court at first instance. This is because sentencing is largely a matter of judicial discretion and requires a fine balancing of myriad considerations (*Public Prosecutor v Mohammed Liton Mohammed Syeed Malik* [2008] 1 SLR(R) 601 ("*Mohammed Liton*") at [81]).

13 Having said that, an appellate court will not hesitate to interfere with the sentence imposed by a court below when one or more of the following

Version No 2: 29 Oct 2020 (20:25 hrs)

disjunctive conditions are satisfied (see *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [14]):

(a) the sentencing judge had made the wrong decision as to the proper factual matrix for sentence;

(b) the sentencing judge had erred in appreciating the material before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive, or manifestly inadequate.

14 Most often, the appellant would seek to persuade the court that the sentence imposed on him was *manifestly* excessive or inadequate. In such cases, it has been rightly noted that this condition would only be satisfied where the sentence imposed requires substantial alterations rather than minute corrections to remedy the injustice (*Public Prosecutor v Siew Boon Loong* [2005] 1 SLR(R) 611 at [22]).

15 However, in cases where there was a failure by the sentencing judge to appreciate the facts placed before him or where the sentencing judge's exercise of his discretion was contrary to principle and/or law, then the appellate court must reconsider the sentence imposed below. The court must determine the matter afresh on the basis of the correct facts and/or principles and, if a higher or lower sentence is more appropriate, then the appeal ought to be allowed. This approach is justified as it ensures that serious errors in appreciation by the court below, whether as to the facts or the applicable sentencing principles, are properly remedied. In such cases, it would be improper for deference to be

Version No 2: 29 Oct 2020 (20:25 hrs)

granted to the sentencing judge's exercise of discretion which *ex hypothesi* would have been flawed.

16 The following observations made by V K Rajah J in *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [14] (cited in *Mohammed Liton* at [84]) are instructive:

> The mere fact that an appellate court would have awarded a higher or lower sentence than the trial judge is not sufficient to compel the exercise of its appellate powers, *unless it is coupled with a failure by the trial judge to appreciate the facts placed before him or where the trial judge's exercise of his sentencing discretion was contrary to principle and/or law.*
>
> [emphasis added]

This *dicta*, which explains what is meant by a sentence that is manifestly excessive or inadequate, necessarily implies that a more rigorous approach to appellate intervention, as set out in the previous paragraph, must be adopted in cases where there is an error on the part of the sentencing judge in appreciating the facts or the applicable principles in relation to the sentence which he had imposed.

My decision

17 In the present case, I noted from the GD of the DJ that he had made several errors both in appreciating the facts of the case as well as in determining the applicable sentencing principles. First, he failed to appreciate the relevance of the appellant's unchallenged assertion that she did not commit the offence out of greed or for personal financial gain. In fact, at one point in his GD, he suggested that she committed the offence "for a financial gain*"* (see [10] above). This was clearly not established on the material before him. While the *weight* to be given to this factor is an exercise of discretion, the DJ made an error of principle by failing to even appreciate that this was an important sentencing

Version No 2: 29 Oct 2020 (20:25 hrs)

consideration which was relevant in ascertaining the motive of the appellant and, in turn, her level of culpability.

18 Second, the DJ erred in finding that the appellant was in "a high position of trust". It is true that the quality and degree of trust reposed in the offender, including his position in the relevant establishment, is a factor to be taken into account when determining the sentence for an offence under s 408 of the Penal Code (*Wong Kai Chuen Philip v Public Prosecutor* [1990] 2 SLR(R) 361 at [25]). In the present case, however, the appellant was a customer service officer and there was no evidence to suggest that she was entrusted with any special level of responsibility in JPB or was in any elevated position of trust. Although her job scope as a customer service officer included having to collect payments made by customers and record them in JPB's internal accounting system, this was a role which would be given to any sales personnel within a company. In addition, the fact that the appellant had abused this responsibility was already reflected in the charge itself which was for committing criminal breach of trust *as a clerk or servant* – a more serious offence than a criminal breach of trust *simpliciter* (see *Lim Ying Ying Luciana v Public Prosecutor and another appeal* [2016] 4 SLR 1220 ("*Luciana Lim*") at [67]). Hence, the appellant's abuse of the trust reposed in her should not have been considered by the DJ as a separate aggravating factor.

19 Third, the DJ clearly erred in coming to the view that the appellant's antecedents were "the key aggravating factor in this case". I recognised that the appellant's past criminal convictions for theft were not irrelevant; they also involved dishonesty and misappropriation of property. However, those offences were committed some 15 and 22 years before her current offence. It is a well-established principle that the length of time that an offender has stayed clean must be taken into account when assessing the weight to be given to his

Version No 2: 29 Oct 2020 (20:25 hrs)

antecedents (*Public Prosecutor v NF* [2006] 4 SLR(R) 849 at [70]). When this period of time is substantial, and it is due to the offender's own efforts at rehabilitation, then only minimal weight ought to be given to his past offences when determining sentence. As put in Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) at para 21.202:

> It is obvious that the older a conviction becomes, the less relevance it has in predicting the offender's future conduct. An offender who has for a substantial period of his life since his last offence stayed clear from crime suggests that he is a reformed man, to be judged afresh.

In this case, the appellant was 44 years old at the time of the offence and had stayed away from crime for almost a third of her lifetime after her last conviction at the age of 30. Thus the DJ's assessment that her past criminal record was the paramount sentencing consideration in this case was an error of principle.

20 Given these errors, which the prosecution acknowledged in the course of oral arguments, the threshold for appellate intervention was met. I accordingly had to consider the matter afresh to determine the appropriate sentence in the light of the full circumstances of the case.

21 To begin with, it was undisputed that the sentence of nine months' imprisonment imposed by the court below was within the usual tariff for an offence under s 408 of the Penal Code given the amount of $30,423.96 which the appellant had misappropriated. In *Gopalakrishnan Vanitha v Public Prosecutor* [1999] 3 SLR(R) 310, for instance, the offender was a secretary who faced three charges of criminal breach of trust for misappropriating $11,369.73, $12,440 and $30,113.29, respectively. The offender, who claimed trial and made no restitution, was sentenced to six months' imprisonment on the first and second charges and 12 months' imprisonment on the third charge. Yong Pung How CJ upheld the sentences but observed that the usual sentences for the

Version No 2: 29 Oct 2020 (20:25 hrs)

amounts involved ranged from nine to 15 months' imprisonment. Hence the sentences imposed at first instance in fact "appeared to be inadequate" (at [35]). Nevertheless, he left them untouched as there was no appeal by the prosecution and the sentences were not manifestly excessive as claimed by the offender. More recently, in *Public Prosecutor v Quek Hui Peng Margaret* (DAC 32270/2011, unreported), the offender, an outlet manager, similarly recorded fictitious company expenses, inflated prices from cash sales receipts and left out cash sale receipts on daily account books to misappropriate the difference in cash, amounting to $32,681. She pleaded guilty to one charge under s 408 of the Penal Code and made partial restitution of $2,000. She was sentenced to 10 months' imprisonment.

22 Applying these precedents, and keeping in mind the premeditated manner of the appellant's offending but also her plea of guilt and the partial restitution which she made, I was of the view that the appropriate sentence for a *usual* offender in the appellant's position would be 10 months' imprisonment. Though the appellant had antecedents, for the reasons stated in [19] above, I did not think that they should carry any significant weight.

23 This brings me to the main factor which distinguishes the present case from the usual case of criminal breach of trust by a clerk or servant – the appellant's motivation for committing the offence. The relevance of an offender's motive in the sentencing process was considered in detail by the High Court in the recent case of *Luciana Lim*. In this regard, the following passage from the judgment of See Kee Oon JC (as he then was) bears citing in full (at [45]):

> It is a deeply intuitive feature of moral reasoning that it matters not just *what* offence was committed, but *why* it was done. Taking motives into account in the sentencing process allows the court to distinguish between the relative blameworthiness

Version No 2: 29 Oct 2020 (20:25 hrs)

> of individuals who might be liable for the same criminal offence. For example, the commission of an offence for personal gain has been held up as an aggravating factor (see *Vasentha d/o Joseph v PP* [2015] 5 SLR 122 at [51]), as has been the commission of an offence out of malice or spite (see *Lim Siong Khee v PP* [2001] 1 SLR(R) 631 at [21])), or an offence which is motivated by hostility towards a particular racial or religious group (see s 74(1) read with 74(4)(*b*) of the Penal Code). On the flipside, it has been recognised that "those motivated by fear will usually be found to be less blameworthy" (see *Zhao Zhipeng v PP* [2008] 4 SLR(R) 879 at [37] ("*Zhao Zhipeng*")) and in "exceptional" cases, the fact that the offence was motivated by a desire to satisfy a pressing financial need might also be considered a mitigating factor (see *Lai Oei Mui Jenny v PP* [1993] 2 SLR(R) 406 at [10]).
>
> [emphasis in original]

24 Incidentally, *Luciana Lim* also concerned criminal breach of trust by a clerk or servant who committed the offence due to harassment by unlicensed moneylenders rather than for pecuniary gain. The offender was a relationship manager at a company dealing in wine and spirits. Over a period of one and a half years, she placed a large number of fraudulent orders for expensive alcohol. She sold these goods, with a retail price of $6.4m, and retained the proceeds. Crucially, she derived no pecuniary benefit from the offence. She used the moneys to pay debts owed to illegal moneylenders, and committed the offences while labouring under significant pressure due to harassment by them. Coincidentally, just as in this case, the offender was not herself the borrower from the illegal moneylenders, but was a trusting friend who had agreed to stand as guarantor for a loan taken out by a former colleague. At first instance, the district court held that an appropriate starting point was a nine-year imprisonment term. The offender was given a one-third discount on account of the mitigating factors, particularly her reason for the commission of the offence and the fact that she had derived no pecuniary benefit from the crime. Hence, she was sentenced to only six years' imprisonment for the offence under s 408 of the Penal Code.

Version No 2: 29 Oct 2020 (20:25 hrs)

25 On appeal, the prosecution argued that the district court had given undue weight to the offender's absence of personal greed as a mitigating factor. Applying the principles set out above on the role of motive in sentencing, See JC held that an offender who *does not* commit criminal breach of trust for personal gain is less culpable, relatively speaking, than the median criminal breach of trust offender (at [56]). Hence, he agreed with the district court's assessment that the case was unusual and that the sentence could not readily be benchmarked against cases where the offender committed the crime for personal gain. The district court was entitled to find that the offender's culpability was significantly reduced and to afford her an appropriate sentencing discount (at [63]).

26 Applying the principles set out in *Luciana Lim*, with which I agree, it was apparent that the appellant's reason for committing the offence in this case, which was her fear arising from the threats made by the unlicensed moneylender, particularly in relation to her young son, was a less culpable motive which warranted the imposition of a lower sentence. No mother can accept any threat to the safety of her child and, understandably, a mother could act less than rationally to remove the threat. To put it in another way, the appellant was clearly less culpable than the offenders in the sentencing precedents which the prosecution had relied on. There was no indication that the offences in those cases had been committed for reasons other than greed and avarice. Thus it would be wrong to benchmark the appellant's sentence against those precedents.

27 Accordingly, and in line with the approach taken in *Luciana Lim*, I found that a reduction in sentence of three months' imprisonment from the starting point of 10 months' imprisonment was warranted. This resulted in a sentence of seven months' imprisonment. In my judgment, applying the correct legal

Version No 2: 29 Oct 2020 (20:25 hrs)

principles and having regard to all the pertinent circumstances of the case, this was the appropriate sentence.

Conclusion

28 For the above reasons, I allowed the appeal and reduced the appellant's sentence from nine months' to seven months' imprisonment.

Chao Hick Tin
Judge of Appeal

Cheryl Ng (Law Society of Singapore) for the appellant;
Joel Chen (Attorney-General's Chambers) for the respondent.

Version No 2: 29 Oct 2020 (20:25 hrs)