Xu Zhaohe *v* Public Prosecutor
[2012] SGHC 124

Case Number	: Magistrate's Appeal No 34 of 2012
Decision Date	: 12 June 2012
Tribunal/Court	: High Court
Coram	: Chan Sek Keong CJ
Counsel Name(s)	: Anthony Lim Heng Yong and Awyong Leong Hwee (Anthony Law Corporation) for the appellant; Charlene Tay Chia (Attorney-General's Chambers) for the respondent.
Parties	: Xu Zhaohe — Public Prosecutor

Criminal Procedure and Sentencing

12 June 2012

Chan Sek Keong CJ:

Introduction

1 This was an appeal against a custodial sentence imposed for the offence under s 13(2)(*b*) of the National Registration Act (Cap 201, 1992 Rev Ed) ("the NRA") of using an identity card ("I/C") other than one's own without lawful authority or reasonable excuse (referred to hereafter as the "s 13(2)(*b*) NRA offence" for short). At the conclusion of the hearing of the appeal, I set aside the custodial sentence and substituted a fine of $3,000 on the grounds that the sentence of imprisonment was wrong in principle, inappropriate and manifestly excessive. I now give the detailed reasons for my decision.

Factual background

2 The appellant was the subject of a self-exclusion order applied for on his behalf by his son on 21 September 2010 as a result of his (*ie*, the appellant's) own fear that he would be unable to resist the temptation of gambling in a casino. About a year later, on 4 September 2011 at around 1.55am, the appellant was caught attempting to use his wife's I/C to enter the casino at Resorts World Sentosa. His wife had paid the $100 levy (applicable to Singapore citizens and Singapore permanent residents) to enter the casino and had gone out to use the toilet. Before doing so, she had (according to the Statement of Facts) handed her I/C to the appellant for safekeeping. The appellant decided to enter the casino with his wife's I/C, but encountered difficulties in scanning her I/C at the casino's gantry. A casino security officer went to assist him and discovered his unlawful act.

3 The appellant was charged with two offences in the District Court. He pleaded guilty to the two charges, and the district judge ("the DJ") sentenced him to two months' imprisonment for the first charge and a fine of $800 (with one week's imprisonment in default) for the second charge. The charges were for:

(a) a s 13(2)(*b*) NRA offence, specifically, making use of his wife's I/C without lawful authority (this was the first charge); and

(b) the offence (applicable only to Singapore citizens and Singapore permanent residents) under s 116(6) of the Casino Control Act (Cap 33A, 2007 Rev Ed) ("the CCA") read with s 511 of the Penal Code (Cap 224, 2008 Rev Ed) of attempting to enter a casino without paying the levy of $100 (this was the second charge).

4 The appellant appealed against the sentence imposed for the first charge. In giving his reasons for sentencing the appellant to imprisonment for this charge, the DJ said (see *Public Prosecutor v Xu Zhaohe* [2012] SGDC 60 ("the GD") at [14]):

> The possession of another person's [I/C] for an unlawful purpose is a serious offence. The gravity is clearly expressed in the case of PP v Tan Woon Kheng [2006] SGDC 184 where the court stated that "the [I/C] is a form of valuable security and is a highly prized item. Its value to criminal syndicates is immense. It confers rights and liabilities on the bearer. A person can use it to effect various transactions, such as to borrow money, to purchase goods, and the like on the basis that he is the person represented in the [I/C] and he is traceable. Proliferation of such illegal activities involving the use of [I/Cs] would cast a long shadow over the integrity of the entire [I/C] system."

In my view, the DJ's reliance on what was held in *Public Prosecutor v Tan Woon Kheng* [2006] SGDC 184 ("*Tan Woon Kheng*") was entirely out of context in the present case: the appellant was not a member of any criminal syndicate.

5 At [15] of the GD, the DJ referred to the facts and the manner in which the appellant had committed the offence, as well as the rationale for the $100 levy imposed under s 116 of the CCA on Singapore citizens and Singapore permanent residents entering a casino, *ie*, "to signal that gambling is an expense and not a means to make a living, and to discourage casual and impulse gambling" (see *Singapore Parliamentary Debates, Official Report* (22 November 2011) vol 88 *per* MG (NS) Chan Chun Sing, Acting Minister for Community Development, Youth and Sports). The DJ then said (at [16] of the GD):

> The facts in the present case would call for a deterrent sentence. The [appellant] was in fact served with a self-exclusion order by the National Council on Problem Gambling on the 21/9/2010. Notwithstanding the exclusion order, the [appellant] had attempted to use his wife's [I/C] to gain entry into the casino.

My decision

6 With respect, I was unable to see why the facts of the present case called for a deterrent sentence. On the contrary, I thought this was the sort of case where a judge should have some understanding of the nature of the offence committed by the appellant and why he committed it. Granted, the appellant's offence had to do with the use of another person's I/C without lawful authority, which criminal act, the DJ held, would "cast a long shadow over the integrity of the entire [I/C] system" (see the GD at [14], quoting from *Tan Woon Kheng* at [15]) if it were to proliferate. Against this, however, it must be remembered that the appellant did not steal someone else's I/C to commit an offence which caused harm to another person or to the public. He merely used his wife's I/C, which she had delivered to him for temporary custody while she went to the toilet. The appellant used his wife's I/C to try to enter the casino because he obviously could not resist the temptation of entering a casino. There was no evidence that he wanted to get into the casino to gamble. It would be reasonable to infer that he wanted to enter the casino in order to gamble, but it might well have been the case that he only wanted to savour the ambience of a casino.

7 Although the mere use of another person's I/C without lawful authority or reasonable excuse is an offence under s 13(2)(*b*) of the NRA, the gravity of this offence must depend on the purpose for which the I/C is used, and the sentence imposed by the court must in turn reflect the gravity of the offence. One may misuse another person's I/C for all kinds of reasons and all kinds of purposes. The s 13(2)(*b*) NRA offence is an offence that takes its colour or moral culpability from the context in which the unlawful use of another person's I/C takes place. A teenager who uses her elder sister's I/C to enter a nightclub may have committed a s 13(2)(*b*) NRA offence, but a court would not sentence her to imprisonment even though she has misused another person's I/C. This is because the moral culpability involved in such a s 13(2)(*b*) NRA offence is slight. Such unlawful use of another person's I/C is of a totally different complexion from the scenario where a person steals someone else's I/C in order to enter premises to commit arson, or in order to enter a prohibited place to commit a terrorist act. The sentences imposed in these various scenarios should reflect the different degrees of moral culpability involved.

8 A review of some of the cases on s 13(2)(*b*) NRA offences shows the court's discerning approach in this area. In the case of *Public Prosecutor v Tan Wei Shin* [2010] SGDC 53 ("*Tan Wei Shin*"), the accused picked up another person's I/C. He went to a SingTel shop and used the stolen I/C to apply for a mobile phone plan in the victim's name. The idea was to obtain and then sell the free iPhone that came with the mobile phone plan. The accused was sentenced to four months' imprisonment by the District Court. The sentence was reduced to two months' imprisonment on appeal (see *Tan Wei Shin v Public Prosecutor* Magistrate's Appeal No 49 of 2010 (unreported)). The facts of *Badahul Zaman Bin Abu Bakar v Public Prosecutor* [2008] SGDC 353 ("*Badahul Zaman*") are similar to those in *Tan Wei Shin*. In *Badahul Zaman*, the accused used his former mother-in-law's I/C to apply for a SingTel mobile phone number and thereafter used the mobile phone number without paying the charges incurred. The accused was charged under s 13(2)(*b*) of the NRA for using his former mother-in-law's I/C without lawful authority, and also under s 43 of the Telecommunications Act (Cap 323, 2000 Rev Ed) for dishonestly using a telecommunication service with intent to avoid paying the applicable charges. The District Court sentenced the accused to three months' imprisonment for each charge. On appeal, both charges were substituted with cheating charges under s 420 of the Penal Code (Cap 224, 1985 Rev Ed), and the sentence for each charge was reduced to six weeks' imprisonment (see *Badahul Zaman Bin Abu Bakar v Public Prosecutor* Magistrate's Appeal No 266 of 2008 (unreported)). Finally, in *Cheong Siat Fong v Public Prosecutor* [2005] SGHC 176, the accused stole a blank DBS cheque and an I/C belonging to her friend. She forged a signature on the cheque and used it with the I/C to withdraw almost $40,000 from her friend's bank account. The District Court's sentence of three months' imprisonment for the s 13(2)(*b*) NRA offence was enhanced to 24 months' imprisonment on appeal.

9 Compared with these cases, the custodial sentence imposed on the appellant in the present case was wrong in principle, inappropriate and manifestly excessive, having regard to the circumstances of the case and, in particular, the fact that the only reason why the appellant used his wife's I/C to try to enter the casino was because he could not do so with his own I/C due to the self-exclusion order in force against him. In order to assess the degree of culpability in such a case, it is first necessary to understand the role of self-exclusion orders in the statutory and regulatory framework.

10 A self-exclusion order is a species of exclusion order under the all-encompassing regulatory and enforcement framework of the CCA. Its main purpose is to enable persons who consider themselves vulnerable to the temptation of gambling, especially in casinos, to avoid financial harm to themselves (and, indirectly, their families) by voluntarily giving up their right (upon payment of the prescribed levy in the case of Singapore citizens and Singapore permanent residents) to enter casinos. Exclusion orders were created to supplement social safeguards, such as counselling hotlines and addiction

management services, that are meant to guard against the proliferation of gambling in casinos. The idea is that if those vulnerable to the temptation of gambling are barred from entering casinos, they cannot harm themselves and/or their families through gambling in casinos. There are five main types of exclusion orders, namely:

(a) exclusion orders issued by casino operators (see s 120 of the CCA);

(b) exclusion orders issued by the Casino Regulatory Authority of Singapore ("the Casino Regulatory Authority") (see s 121 of the CCA);

(c) exclusion orders issued by the Commissioner of Police (see s 122 of the CCA);

(d) family exclusion orders issued by the National Council on Problem Gambling ("the NCPG") (see s 159 of the CCA); and

(e) mandatory exclusion orders issued by the NCPG, which include self-exclusion orders (see s 165A(1)(*c*) of the CCA).

11 A self-exclusion order is essentially an exclusion order made pursuant to a voluntary application by a person to the NCPG for himself to be excluded from entering casinos (see s 165A(1)(*c*) of the CCA). An application for a self-exclusion order can be made quickly and conveniently over the Internet, and is meant to be a self-help remedy. Importantly, a self-exclusion order can be lifted with little fuss by the applicant himself. In this regard, s 165A(3) of the CCA provides:

> A person [who has applied for a self-exclusion order] shall be excluded from entering or remaining, or taking part in any gaming, on any casino premises *until such time as the person notifies the [NCPG]* in the prescribed form and manner *that he wishes to cease to be so excluded.* [emphasis added]

Unlike an application for a self-exclusion order, a notice to cease self-exclusion cannot at present be given to the NCPG via the Internet. Instead, such a notice can only be given to the NCPG by filling up a form available at its office (see r 21 of the Casino Control (Problem Gambling – Exclusion Orders) Rules 2008 (S 623/2008)). Clearly, the purpose of the prescribed procedures is to make it easy for people to exclude themselves from casinos, but less easy for them to reverse their decision to apply for self-exclusion.

12 To give exclusion orders bite, general enforcement measures are provided for in the CCA. A person who contravenes an exclusion order and enters a casino will forfeit all his winnings (see s 128 of the CCA). Casinos are also under an obligation to ensure that an excluded person (*ie*, a person barred from entering a casino by an exclusion order (see s 2(1) of the CCA)) does not enter their premises (see ss 126 and 127 of the CCA). It is pertinent that the CCA criminalises breaches of only those exclusion orders issued by the Casino Regulatory Authority and the Commissioner of Police (see s 125(2) of the CCA read with s 195 thereof). In other words, under the CCA, a breach of a self-exclusion order (or a family exclusion order) is *in itself* not a criminal offence. The non-criminalisation of breaches of self-exclusion orders was a deliberate policy decision. It is not a *lacuna* or gap in the legislation. The social safeguards implemented by the CCA were reviewed in 2009, and proposals to strengthen them further were tendered to Parliament on 15 September 2009. It is notable that none of the proposals was to criminalise breaches of self-exclusion orders (see *Singapore Parliamentary Debates, Official Report* (15 September 2009) vol 86 at cols 1501–1503).

13 Parliament's decision not to criminalise breaches of self-exclusion orders is, in my view, highly

material to the determination of the proper punishment in cases such as the present. The court must keep in mind the enforcement measures that have already been implemented in the CCA. Casinos are obliged to conduct stringent checks to ensure that excluded persons do not enter their premises. If the barriers erected by the casinos are impermeable to excluded persons, attempts to breach exclusion orders will necessarily be futile. In a sense, it is also just that casinos should bear the brunt of enforcing exclusion orders. In the event that an excluded person makes it past the barriers erected by a casino, all his winnings (if any) will be confiscated if he is discovered. The risk of confiscation severely decreases the incentive for an excluded person to attempt to enter a casino to gamble. If properly implemented, these two enforcement measures reduce the need to criminalise breaches of self-exclusion orders.

14 Criminalising breaches of self-exclusion orders will, in any event, lead to an absurd outcome. The result will be that an excluded person who has the foresight to apply to lift his self-exclusion order before going to a casino to gamble is not a criminal, but an excluded person who momentarily succumbs to temptation and enters a casino to gamble despite the self-exclusion order in force against him is. The essential state of mind in both cases is the same: the excluded person feels compelled to go to a casino to gamble. The mere fact that one excluded person has the foresight to plan ahead while the other lacks such foresight should not, in my view, be the determinant of whether a person who enters a casino to gamble is a criminal or an innocent. In the present case, s 13(2)(*b*) of the NRA is simply the formal avenue by which the appellant's act of unlawfully using his wife's I/C is criminalised. The substance of the appellant's offence is still essentially an attempt to breach a self-exclusion order.

15 Before this court, the Prosecution argued, unthinkingly, that the deterrent custodial sentence imposed by the DJ was appropriate *vis-à-vis* the appellant, presumably because he had used his wife's I/C to try to enter the casino, even though he had no antecedents. Deterrent sentencing should always be viewed in its proper context and used in appropriate circumstances. In my view, the present circumstances did not call for a deterrent sentence. Self-exclusion orders are meant to be a *self-help* remedy for those vulnerable to the temptation of gambling. Given that Parliament has decided not to criminalise breaches of self-exclusion orders, the courts should be cautious not to let deterrence undermine the self-help regime implemented by Parliament. Too harsh a punishment for an offence which consists, in essence, of breaching or attempting to breach a self-exclusion order will only dissuade those especially vulnerable to the temptation of gambling, who are not confident of resisting such temptation, from applying for a self-exclusion order in the first place. Furthermore, those who are more confident of their ability to resist the temptation of gambling may decide to take their chances with their willpower (*viz*, by not applying for a self-exclusion order) rather than needlessly run the risk of imprisonment (in the event that they apply for a self-exclusion order and are subsequently prosecuted for an offence which consists essentially of an actual or attempted breach of the self-exclusion order). Persons who are already subject to a self-exclusion order may now decide to lift the order rather than take the risk of being sent to prison if they were to succumb to their gambling compulsion and end up being prosecuted for what is, in essence, a breach or an attempted breach of the order.

16 On a related note, family exclusion orders (taken out by family members if certain conditions are met) are meant to be a non-adversarial means for families to help the problem gamblers in their midst. Deterrence should be sensitively applied in this context as well. Severe sentences for offences which consist essentially of breaching or attempting to breach a family exclusion order may inadvertently lead to greater internal conflict as the offenders concerned may blame their punishment on the family member who applied for the exclusion order. Severe sentences in this context may also have the result of deterring or disincentivising family members from applying for family exclusion orders – nobody wants to see a loved one in prison. Ultimately, as Parliament has recognised, the most

effective way of ensuring that exclusion orders are not breached is for casinos to ensure that an excluded person cannot get into their premises.

Conclusion

17 In the circumstances, since the rule of law must be upheld, I decided that a fine of $3,000 would be appropriate punishment in the present case. This was within the range of fines of $3,000 to $5,000 imposed by the District Courts on similar facts in *Public Prosecutor v Wong Yong Kheong* District Arrest Cases Nos 15412 and 15413 of 2011 (unreported) and *Public Prosecutor v Oh Choon Aik Philip and another* Magistrate's Arrest Cases Nos 7976 and 7978 of 2011 (unreported).