

Public Prosecutor v Kang Seong Yong
[2005] SGHC 29

Case Number : MA 134/2004
Decision Date : 02 February 2005
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Christopher Ong Siu Jin (Deputy Public Prosecutor) for the appellant; K Mathialahan (Guna and Associates) for the respondent
Parties : Public Prosecutor — Kang Seong Yong

Criminal Procedure and Sentencing – Sentencing – Appeals – Conviction of immigration offence involving making of false statement to obtain employment pass – Appeal by Public Prosecutor against sentence imposed on offender – Whether judge below justified in finding exceptional circumstances warranting departure from sentencing norm

Criminal Procedure and Sentencing – Sentencing – Conviction of immigration offence involving making of false statement to obtain employment pass – Appropriate sentence to be imposed – Factors to consider – Sections 57(1)(k), 57(1)(iv) Immigration Act (Cap 133, 1997 Rev Ed)

2 February 2005

Yong Pung How CJ:

1 The respondent, a South Korean national, pleaded guilty in the Subordinate Courts to two charges under s 57(1)(k) of the Immigration Act (Cap 133, 1997 Rev Ed) ("the Act"), punishable under s 57(1)(iv) of the Act. A third similar charge was taken into consideration for the purpose of sentencing. In brief, the first charge was for falsely stating in his employment pass application made on 1 June 2000 that he was a graduate from Korea University, which application was subsequently granted by the Ministry of Manpower ("the MOM"). The second charge was for repeating the same false statement in his application to renew the said employment pass on 8 June 2001. The charge taken into consideration pertained to a further renewal in June 2003.

2 Having heard the respondent's plea in mitigation and the appellant's submissions on sentence, the district judge sentenced the respondent to pay a fine of \$4,000 per charge, resulting in a cumulative fine of \$8,000 ([2004] SGDC 230). The Public Prosecutor appealed against the sentence on the ground that a custodial sentence was warranted in the circumstances. I allowed the appeal, and enhanced the sentence to one month's imprisonment on each charge, the sentences to run consecutively. I now give my reasons.

Background facts

3 The circumstances in which the offences took place were set out in the Statement of Facts, which the respondent admitted to without qualification. On or about 1 June 2000, the respondent submitted an application (Form 8) for an employment pass to the MOM to obtain an employment pass for him to work for Tat Onn Medical Hall Pte Ltd ("Tat Onn"). It was stated in the application that the respondent had graduated from Korea University with a Degree in Business Administration (Accounting). A university degree certificate was tendered in support of the application. On 21 July 2000, the MOM issued an employment pass to the respondent.

4 About a year later, on or about 8 June 2001, the respondent made an application for the renewal of the said employment pass. In the application, the respondent confirmed that the

information furnished in his original application remained unchanged.

5 However, subsequent verifications carried out by the MOM in June 2003 revealed that the Korea University degree certificate submitted was a forgery, and that the respondent was not on the university's register of graduates. In fact, the respondent's highest educational qualification was a Certificate of Pass from Seoul Metropolitan Office of Education (equivalent to a high school qualification or a pass in General Certificate of Education "A" Level examinations). The respondent admitted that he had tendered the forged university degree certificate in the knowledge that it would be difficult to obtain an employment pass with only high school qualifications.

6 The Statement of Facts further stated that academic qualifications are a key criterion considered by the MOM in processing an application. Hence, the issuing authorities of the MOM would not have granted the respondent an employment pass had they known that he had falsely stated his university qualifications, and that the degree certificate was forged.

7 In mitigation, counsel for the respondent informed the court that the respondent had left South Korea to work in Singapore in 2000. The respondent had submitted his high school certificate and the forged university degree to Tat Onn to improve his chances of obtaining the job of sales manager. A friend had misled him into thinking that it would be impossible to secure a job in Singapore without a degree. It was through this friend that he had managed to get hold of the forged certificate. Once he had secured the job, one of Tat Onn's staff assisted him in filling up the employment pass application form, as he could not read or write in English. The contents of the form were neither explained nor interpreted to him, and he had signed the form blindly.

8 After obtaining the employment pass, the respondent worked for Tat Onn from 2000 to 2003. His duties involved managing Tat Onn, and liaising with Korean tourists and travel agencies in Singapore and Korea to encourage Korean tourists to come to Singapore and purchase Tat Onn's products. He was paid a monthly salary of \$4,000.

9 Counsel stressed the fact that the respondent had contributed significantly to Tat Onn's business during his employment. Prior to his joining Tat Onn, the company was making great losses; after he joined, the company's sales turnover increased threefold from \$960,489 in 2000 to \$3,190,108.81 in 2002. Mr Ang Gim Chiew, a director of Tat Onn, confirmed that the respondent had played a central role in turning the company around. As Tat Onn's main business activity involved the sale of pharmaceutical products, herbs and traditional medicines to South Korean tourists, the respondent was a real asset to the company as he was knowledgeable about Tat Onn's products, had contacts within the Korean travel industry and enjoyed good rapport with them.

10 Counsel also averred that the respondent might still have succeeded in obtaining an employment pass even if he had just relied on his actual high school qualifications. Counsel pointed to the fact that there were other Koreans with similar qualifications working in Singapore on employment passes.

11 Finally, counsel submitted that if a custodial sentence were to be imposed on the respondent and he was repatriated, the respondent's family would face much hardship. The respondent would find it difficult to find a job in South Korea due to his age and the unfavourable economic situation in South Korea. Moreover, Tat Onn might face a substantial decline in the number of Korean "tourist-customers", as it relied heavily on the respondent to manage the company. Tat Onn might even cease its operations resulting in the loss of jobs for its employees. Thus, in view of the above mitigating factors, counsel urged the district judge to impose only a fine on the respondent.

12 In contrast, the Prosecution pushed for a custodial sentence to be imposed, in accordance with the sentencing norm enunciated by this court in *Abu Syeed Chowdhury v PP* [2002] 1 SLR 301 ("*Abu Syeed Chowdhury*"). The Prosecution averred that there were no exceptional circumstances in this case to justify the imposition of only a fine.

The decision of the judge below

13 The district judge found that there were exceptional circumstances on the facts to warrant a departure from the sentencing norm of custodial sentence laid down in *Abu Syeed Chowdhury*. In the event, he sentenced the respondent to pay the maximum fine of \$4,000 per charge, resulting in a cumulative fine of \$8,000.

The Prosecution's appeal against sentence

14 In *Abu Syeed Chowdhury*, I laid down the principle that where a false representation is made under the various limbs of s 57(1) of the Act that are punishable by s 57(1)(iv), a custodial sentence should be the norm and a fine should only be warranted under exceptional circumstances. I specified four sentencing guidelines that the courts should keep in mind in applying the sentencing norm. They are:

- (a) the materiality of the false representation on the mind of the decision-maker;
- (b) the nature and extent of the deception;
- (c) the consequences of the deception; and
- (d) the offender's personal mitigating factors.

15 The basis of the Prosecution's appeal was that the sentence was manifestly inadequate in view of the district judge's erroneous finding that there were exceptional circumstances on the facts to justify the imposition of a fine. In particular, the Prosecution maintained that the district judge erred in his analysis of the facts of the present case within the framework of the relevant considerations identified in *Abu Syeed Chowdhury*. Bearing in mind the principle enunciated in *Tan Koon Swan v PP* [1986] SLR 126 regarding the approach of appellate courts in dealing with an appeal against the sentence imposed by a lower court, I turned to consider the Prosecution's arguments.

Whether the district judge erred in his analysis of the facts within the framework of the considerations identified in Abu Syeed Chowdhury

16 It was not in dispute that the district judge had clearly applied his mind to the guidelines specified in *Abu Syeed Chowdhury* in sentencing the respondent. However, the Prosecution maintained that the district judge had erred in his analysis of the facts of the case within the said framework.

The materiality of the false representation

17 On the issue of the materiality of the respondent's false representation, the district judge agreed with the Prosecution that the forged degree certificate was material in inducing the relevant MOM officer to process the employment pass application. Despite this finding, however, the district judge went on to consider whether the respondent would nevertheless have been able to obtain an employment pass if he had not perpetrated his deception. In the district judge's view, this was a

pertinent consideration in assessing the materiality of the falsehood.

18 The district judge noted that other Korean nationals with only high school qualifications had managed to obtain employment passes to work in Singapore. In addition, the MOM's guidelines on employment pass applications indicated a range of different eligibility criteria that was not restricted to tertiary qualifications, depending on the type of employment pass applied for. Hence, there was no basis for the Prosecution's assertion that tertiary qualifications were "crucial" in order to work in Singapore. The district judge opined that the extent to which tertiary qualifications were material must depend on the circumstances of each particular case, as well as the class of employment pass application involved.

19 The district judge considered that the respondent might still have been able to obtain an employment pass if he had just relied on his actual educational qualifications. Presumably, the respondent would have had to apply under a different category of applications where the applicants would be assessed on other criteria, and where the respondent would have to compete with a wider pool of applicants. Nonetheless, this was clearly not a case where the respondent would *prima facie* have absolutely no prospect of securing an employment pass on his own merit. Therefore, on this basis, the district judge distinguished the present case from *Abu Syeed Chowdhury*, where the accused would not have been able to get hold of an employment pass in any event as he possessed no relevant qualifications or expertise. In contrast, the district judge drew parallels between the factual situation of the present case with those in *PP v Kim Jin Chul* (District Arrest Cases Nos 45371–2 of 2003, unreported) ("*Kim Jin Chul*"), *Lai Yu Jing v PP* [2003] SGDC 98 ("*Lai Yu Jing*") and *PP v Prasanna Ananthakrishnan* [2003] SGDC 204 (Magistrate's Appeal No 162 of 2005) ("*Prasanna*") wherein the respective s 57(1)(k) offenders received fines instead of custodial sentences. The district judge noted that in these three cases, the accused persons all possessed educational qualifications that might have allowed them to obtain employment passes, even though they were not holders of tertiary qualifications. In comparing the two sets of cases, the district judge opined that a relatively lower degree of culpability was involved in instances where the deception had been perpetrated to "fortify [the] chances of securing employment passes" (at [33]), as compared to situations where the accused persons had absolutely no possibility of obtaining an employment pass. In the district judge's view, this distinction was relevant in determining the materiality of the falsehood, and consequently, the respondent's deception was not sufficiently material to call for a custodial sentence.

20 Before me, the Prosecution contended that the district judge had erred in arriving at the above conclusion for the following reasons. Firstly, there was no evidence to support the district judge's finding that the respondent might have been able to obtain an employment pass in any event. The Prosecution stressed that no such admission was made by it or the MOM in the proceedings below. Secondly, the standard adopted by the district judge was impermissible, as it suggested that a deception as to an offender's educational qualifications would only be material if the offender had no educational qualifications whatsoever. The Prosecution submitted that the correct standard must instead be to consider what impact the deception had "on the mind of the decision-maker", which was the actual phrase used by this court in *Abu Syeed Chowdhury* (at [28]). Lastly, the Prosecution asserted that the respondent's case lacked the unique factual circumstances that were present in *Kim Jin Chul*, *Lai Yu Jing* and *Prasanna*, which rendered educational qualifications less material in these cases.

21 Having heard the parties' submissions, I was persuaded that there was merit to the Prosecution's contentions. While it is true that the four considerations laid down by this court in *Abu Syeed Chowdhury* are merely meant to provide the framework within which to arrive at the appropriate sentence in each case and are not exhaustive, I was of the view that the materiality of the false representation must be considered from the viewpoint of the decision-maker where s 57(1)

(k) offences are concerned. To do otherwise would be to introduce too much uncertainty, especially where, like in the instant case, there was no concrete evidence before the court to bear out the conclusion that the accused might have secured an employment pass without resorting to dishonesty. In this regard, I accepted the Prosecution's submission that such a conclusion was speculative, and thus, objectionable, given that it was the respondent's own wilful deception that had curtailed any further consideration of his qualifications by the MOM. As noted by the district judge, having accepted the respondent's representation in good faith, the MOM had not seen it necessary to carry out any further assessment as to the respondent's qualifications or eligibility. In my opinion, the consideration highlighted by the district judge as to whether the offender would have been able to secure an employment pass on his or her own merit, would only be relevant if the MOM officers were in fact apprised of the factual circumstances that rendered educational qualifications less material.

22 For instance, in *Kim Jin Chul* and *Lai Yu Jing*, the MOM had made express concessions that the offenders' false statements regarding their educational qualifications were less material, by reason of the specific circumstances that were known to them.

23 *Lai Yu Jing* concerned an accused who had come to Singapore on a social visit pass to look after her son who was studying here. Whilst in Singapore, she registered a company, designating herself as the Managing Director, and applied for an employment pass. In the application, she falsely declared that she had graduated with a Bachelor's degree from Xiang Teng University and submitted a forged degree certificate as proof. At first instance, she was sentenced to three weeks' imprisonment. On appeal, I set aside the sentence of imprisonment and imposed a fine of \$2,000 instead. In that case, the MOM had expressly acknowledged that in processing the application, it had taken into account, *inter alia*, the investment value of the company that she had incorporated in addition to her educational qualifications.

24 The MOM made a similar concession in *Kim Jin Chul*. In that case, the MOM conceded that the accused, who was also a Korean national facing similar charges as the respondent, had the necessary qualifications (a proficiency certificate from the Singapore Tourism Board) to obtain an employment pass to work as a tour guide. Consequently, Mr Kim was spared the custodial sentence and was instead sentenced to pay the maximum fine of \$4,000.

25 In contrast, in the present case, the MOM officials had expressly stated that they considered the respondent's academic qualifications to be a "key criterion", and had actually granted the employment pass on the basis of the respondent's supposed possession of a university degree. As recognised by the district judge, the forged degree certificate was clearly material in inducing the relevant MOM officers to process the employment pass application. In the circumstances, there was in my opinion no room for the argument that the respondent's deception was not material.

The nature and extent of the deception

26 In assessing the nature and extent of the respondent's deception, the district judge made two main observations. Firstly, the district judge noted that the respondent could not read or write in English, and that he had not prepared the application forms himself. Thus, the judge opined that to a limited extent, the respondent was less culpable than the accused persons in *Lai Yu Jing* and *Prasanna*, who had no apparent language difficulties and had been personally responsible for the procurement and submission of their forms. Secondly, the district judge observed that while there was no denying that the respondent had perpetuated his deception on the MOM through the subsequent renewal applications, there was no reason why the MOM officials could not have acted more "expeditiously and proactively" to prevent these occurrences, especially since the authenticity of the degree certificate could have been verified with little effort prior to the granting of the employment

pass application.

27 Having perused the evidence that was before me, I was of the opinion that the district judge had given undue weight to the respondent's apparent "language difficulties". As the Prosecution pointed out, the respondent had knowingly obtained the false degree certificate in order to secure employment in Singapore. Furthermore, he was clearly aware that he was relying on the forged document to support his employment pass application. In the circumstances, I was unable to agree with the district judge that the respondent could be said to be less blameworthy than the accused persons in *Lai Yu Jing* and *Prasanna*.

28 As regards the district judge's observation that the MOM could have acted more expeditiously in uncovering the deception, the Prosecution contended that the district judge was wholly incorrect in placing any blame on the MOM for not having detected the respondent's false representation earlier. The Prosecution submitted that any efforts to verify the respondent's educational qualifications must be viewed in the context of the many thousands of similar applications that the MOM receives annually. At the hearing before me, the Deputy Public Prosecutor produced evidence to show that the MOM had processed, on the average, about 140,000 applications each year since 2002.

29 I did not think it necessary for me to delve into the issue of whether the MOM could have been more efficient in verifying the information furnished by the respondent. It was sufficient for me to note that the MOM's failure to verify the respondent's representation earlier in no way exonerated his conduct. As the district judge observed, the respondent had persisted with his deception in applying to extend the employment pass, and had chosen not to come clean despite having had the opportunities to do so. There was in essence nothing on the facts to condone or excuse his behaviour.

The consequences of the respondent's deception

30 The district judge noted that Tat Onn had not suffered any detriment as a result of employing the respondent. In fact, the respondent had been, by all accounts, an asset to the company. Under the respondent's management, Tat Onn's business flourished and the sales turnover had increased by more than threefold. Furthermore, the respondent had not deprived a potentially better-qualified applicant of a job opportunity. The respondent had special knowledge and contacts relevant to the position, and there was no suggestion that similarly-qualified persons would be readily available. The respondent had also not put anyone at risk by performing the job without the requisite skills.

31 On appeal, the Prosecution averred that the district judge had erred in placing undue importance on the respondent's subsequent contributions to Tat Onn, and cautioned that an over-emphasis on the offender's actual performance at work might give rise to an unwelcome perception that, when making a false representation in an employment pass application, the ends could justify the means. This might embolden like-minded persons to "try their luck", in the hope that they might be treated more leniently if they "made good" despite any deceptions in their employment pass applications.

32 In my opinion, the Prosecution had raised a legitimate concern regarding the dangers of conveying the wrong message to potential offenders that positive performance at work will afford them a ground for leniency. I was of the view that, while the respondent's subsequent contributions to his employer were undeniable, this fact alone was insufficient to surmount the high threshold of showing exceptional circumstances. Where there are no other redeeming factors, an offender's

subsequent stellar performance at work can only go towards reducing the length of the imprisonment term that the court would impose on him. It cannot, by itself, justify the imposition of only a fine. Any other conclusion would be inconsistent with the strong public policy interest in deterring offences punishable under s 57(1)(iv) of the Act. For these reasons, I could not endorse the district judge's finding that there were exceptional circumstances on the facts to warrant a departure from the sentencing norm.

Personal mitigating factors

33 The district judge took into account, *inter alia*, the respondent's general good character, and the contributions he had made to the Korean community in Singapore. I was of the opinion that these factors were not so exceptional as to justify a departure from the sentencing norm. In addition, as I had stated in *Abu Syeed Chowdhury*, any economic hardship that the respondent's family might suffer from his imprisonment and repatriation had little mitigating value, as such consequences were brought about by his own dishonesty.

Conclusion

34 In light of my finding that the district judge had erred in finding exceptional circumstances justifying the imposition of only a fine, I allowed the Prosecution's appeal, and enhanced the sentence to one month's imprisonment on each charge, resulting in a cumulative sentence of two months' imprisonment. In arriving at this conclusion, I gave due consideration to all the circumstances of the case, including the respondent's substantial contributions to Tat Onn's business and reputation during his employment. This accounted for the lower sentence imposed on the respondent *vis-à-vis* the accused in *Abu Syeed Chowdhury*. I also ordered that the \$8,000 fine that the respondent had paid be returned to him.

Appeal allowed.

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