Mustaza Bin Abdul Majid v Public Prosecutor
[2004] SGHC 18

Case Number : MA 133/2003

Decision Date : 04 February 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : S K Kumar (S K Kumar and Associates) for appellant; Edwin San (Deputy Public Prosecutor) for respondent

Parties : Mustaza Bin Abdul Majid — Public Prosecutor

Criminal Law – Property – Theft – Theft from building used as a dwelling-house or custody of property – Definition – Penal Code (Cap 224, 1985 Rev Ed)s 380

Criminal Law – Property – Theft – Ingredients – Taking without the consent of the person in possession – Whether taking was with the consent of the person in possession – Penal Code (Cap 224, 1985 Rev Ed)s 378

Criminal Law – Property – Theft – Ingredients – Dishonest intention to take property – Whether taking was with dishonest intent – Whether ability to pay has a bearing upon dishonest intention – Penal Code (Cap 224, 1985 Rev Ed)s 378

4 February 2004

Yong Pung How CJ:

1 This was an appeal against conviction for an offence under s 380 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC") by District Judge Doris Lai-Chia Lee Mui. The appellant was sentenced to three years' imprisonment at the end of the trial, and has now appealed against conviction alone. After hearing the submissions of counsel from both sides, I dismissed the appeal and now give my reasons.

The charge under s 380 of the PC

2 The charge against the appellant read:

> … that you, on or about the 27th day of January 2003, at about 8.45 pm, at Prime Supermarket located at Blk 823 Tampines Street 81, Singapore, a place used for the custody of property, did commit theft of one carton of 'Red Bull' valued at $21.60 from the possession of Mdm Neo Lay Wah, the Store Manager of Prime Supermarket and you have thereby committed an offence punishable under Section 380 of the Penal Code, Chapter 224.

3 Section 380 of the PC covers the offence of theft from a place used as a dwelling or from a place for keeping property, and provides for an enhanced imprisonment term of up to seven years. Prosecutions under this section are usually for shoplifting offences committed in supermarkets and shops. Theft *simpliciter* is defined in s 378 of the PC as:

> Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

4 The authors of *Mallal's Penal Law* (LexisNexis, 2002) at 659–660, [380.4] have set out the

ingredients required to constitute an offence under the Malaysian Penal Code equivalent of s 380 of the PC; they are *in pari materia*. I gratefully adopted their analysis of the elements needed:

(a) The property in question is movable property.

(b) The accused took such property out of the possession of another person.

(c) The taking was without the consent of the person in possession.

(d) There was some movement of the said property so as to constitute taking.

(e) There was a dishonest intention to take that property, meaning that the accused took such property with the intent to cause:

(i) wrongful loss to the person who has possession of the property; or

(ii) wrongful gain to himself.

(f) The property was at the time of the theft in a building, tent or vessel.

(g) Such building, tent or vessel was being used as a human dwelling or for the custody of property.

5 In the present appeal, it was not disputed that the appellant had taken a carton of 24 "Red Bull" canned drinks ("the carton") at Prime Supermarket ("the supermarket") on the day in question. Therefore only ingredients (c) and (d) from the list above were in dispute – whether the taking of the carton was with the consent of the proprietors of the supermarket, and if there was no consent, whether the appellant had taken it with a dishonest intention. Whether these two ingredients were made out in the case before me was tied to the question of whether the appellant was still within the premises of the supermarket when apprehended by security personnel.

The Prosecution's case

6 The Prosecution's case was simple and may be briefly stated. The appellant was observed by Mr Tan Yong Liang ("Tan"), a security officer with the supermarket, to be behaving suspiciously. Tan saw the appellant take the carton from the inside of the supermarket and place it on his right shoulder. The appellant then walked through the side door of the supermarket, past two cashier counters along the corridor outside ("the corridor") and headed towards the car park behind the supermarket. The appellant did not pay for the carton.

7 The premises of the supermarket were clearly considered by its proprietors to include the corridor, as this was where cashier counters were located and goods displayed for sale in wheeled trolleys and racks. These displays were occasionally re-arranged. A customer, according to Tan, would only be considered to have left the premises of the supermarket if he went beyond the last point where the goods were displayed along the corridor. However, Tan would only stop a customer who had not paid for an item from the store if he had moved some 15 to 30m from that point.

8 Tan stopped the appellant at a position near the car park behind the supermarket, which was quite a distance past the last point where goods were displayed on the day in question. He identified himself as a security officer of the supermarket and asked the appellant why he had not made payment for the carton. The appellant, in response, said that he had no money and threw the carton down. Tan then forcefully subdued the appellant and pinned him to the ground. Tan thereafter

detained him in the supermarket's office until the police were called to arrest the appellant.

The appellant's version

9 The appellant did not dispute that he had the carton with him at the material time but claimed that Tan had accosted him without legitimate reason as he was still within the premises of the supermarket, browsing along the corridor. Tan, without identifying himself, had grabbed him from behind, pinned him to the ground and proceeded to punch and kick him for no apparent reason.

10 The appellant claimed also that he had with him a rucksack slung on his back containing a fax machine, a pouch around his waist and a paper bag containing several items including his wallet. When Tan attacked him, his belongings were scattered on the ground. He claimed that he did not recover some of these items, including his wallet, after his arrest.

11 The appellant relied solely on the testimony of one Mohd Ridhwan bin Abu Bakar ("Ridhwan") to corroborate his version of events. The appellant had apparently met Ridhwan by chance for the first time approximately one month before the trial.

The decision below

12 The district judge preferred the Prosecution's version of events after considering the testimonies of the witnesses from both sides. She found the witnesses for the Defence, the appellant and Ridhwan, to be unreliable. As a result, the district judge was able to make the crucial finding of fact that the appellant was indeed apprehended by Tan outside the premises of the supermarket. The conviction of the appellant for the offence under s 380 of the PC stood upon this finding of fact, as it established that there was a taking of the carton without the consent of the person in possession of it, and that there was a dishonest intention on the appellant's part to take the carton. I shall now explain why this is so.

13 Theft, as defined in s 378 of the PC, requires a lack of consent on the part of the person whose movable property is dishonestly taken from his possession, before it can be fully constituted. Explanation 5 to s 378 of the PC states that such consent may be express or implied. In my view, a shopkeeper consents, at least impliedly, to his customers taking and holding on to any of the items in full view within the store while shopping. This is so, even if the customer is holding on to the item with the intention of stealing it, for the simple reason that theft is not an inchoate offence. *Mens rea* alone will not be sufficient, and the would-be shoplifter who desists after reconsideration will not be considered a thief.

14 Conversely, the proprietor or person in possession of a store or supermarket does not, in the ordinary course of business, consent to patrons taking merchandise out of the premises of the store without making payment. Such taking, coupled with dishonesty, would constitute theft and would be a clear case where consent would not exist. The finding that the appellant was apprehended outside the premises of the supermarket with the carton for which he had not paid would therefore establish this. There will be cases that are less straightforward, and these will turn on the existence of the shopkeeper's consent to the particular manner of taking by the accused and the individual facts. Suffice it to say that it is not my view that leaving the premises of the store without making payment for an item is *necessary* for theft to be committed, although it would certainly be sufficient.

15 The next ingredient in question, which becomes relevant only once the lack of consent is established, is the *mens rea* element of dishonest intention. I held in *Er Joo Nguang v PP* [2000] 2 SLR 645 at [39] that:

> The issue of dishonest intent has to be considered with reference to ss 23 and 24 of the Penal Code. Section 24 of the PC states that 'whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly'. According to s 23, 'wrongful gain' is gain, by unlawful means, of property to which the person gaining it is not legally entitled, and 'wrongful loss' is loss, by unlawful means, of property to which the person losing it is legally entitled. An accused person's dishonest intention cannot be directly proved, and has to be inferred from the conduct of the accused and also from the surrounding circumstances: see *Amritlal v Bajranglal* [1963] 2 Cri LJ 474 at p 475.

The Deputy Public Prosecutor ("DPP") submitted that the finding that the appellant had been stopped outside the premises of the supermarket after having taken the carton without payment, and therefore without legal entitlement, led obviously to the inference of a dishonest intention. I was of the view that this approach is defensible in so far as no legal defence was available to the appellant in light of my comments in *Er Joo Nguang*. No legal defence was raised at trial. The appellant's attempt to prove that he did have enough money on him to pay for the carton would not have assisted him much even if it had been accepted. The ability to pay does not, by itself, negative an intention to steal. Contrariwise, the finding made by the district judge that the appellant did not lose his wallet and he therefore never had enough money to pay for the carton quite clearly strengthens the inference that the appellant possessed the requisite dishonest intention.

The appeal

16 This appeal, therefore, could only have succeeded if the appellant had convinced me that the finding of fact by the district judge that he was stopped outside the premises of the supermarket was wrong: *PP v Azman bin Abdullah* [1998] 2 SLR 704. It is trite law that an appellate court is reluctant to overturn a trial judge's finding of fact, especially where it hinges upon an assessment of the credibility and veracity of the witnesses, as it does here: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656. The appellate court does not have the advantages of seeing and hearing the witnesses and will defer to those findings: *Ameer Akbar v Abdul Hamid* [1997] 1 SLR 113, *Kong See Chew v PP* [2001] 3 SLR 94. The critical issue for the appellant was therefore whether the district judge was plainly wrong in her assessment of the witnesses: *Garmaz s/o Pakhar v PP* [1995] 3 SLR 701. The district judge had found the key prosecution witness to be a witness of truth. On the other hand, the appellant and Ridhwan were found to be unreliable witnesses.

The credibility of the key prosecution witness, Tan

17 Counsel for the appellant submitted that Tan had a motive to falsely implicate the appellant, and that the Prosecution thus bore the burden of disproving such motive. The case of *Khoo Kwoon Hain v PP* [1995] 2 SLR 767 was cited in support of this proposition. In *Khoo Kwoon Hain*, the appellant had been charged in the district court on two counts of aggravated outraging of modesty under s 354A(1) of the PC. In that case, all that was before the court was a bare allegation and a bare denial. The district judge relied upon the uncorroborated allegations of the complainant and convicted the appellant below. I was not satisfied that the complainant's evidence was unusually convincing and I allowed the appeal. I held at 781, [70] that:

> In my view, if a trial judge is going to rely on the fact that the complainant had no reason to falsely accuse the appellant, then this should be found as a fact based on credible evidence. There is no evidence at all on this. The burden of proving a lack of motive to falsely implicate the appellant is on the prosecution. Even though the prosecution was making a negative assertion, the burden of proof is still on it. It is not for the defendant to prove that the complainant had some reason to falsely accuse him. This is a fact that would be wholly within the complainant's

knowledge and nobody else's. The defence therefore cannot be expected to prove this. … It is precisely because there can well be reasons why a complainant would make false allegations against an accused that it is often unsafe to convict in cases of sexual offences where there is no independent evidence to corroborate the complainant's evidence.

Kwoo Kwoon Hain was a case concerning sexual offences where the court had little to go on apart from a bare allegation and a bare denial, and my comments there should be read in that context. The principles enunciated there, however, were relevant. In the present appeal, I had sufficient material before me highlighted by the Prosecution to consider the correctness of the district judge's finding of credibility.

18 The appellant claimed that Tan had assaulted him for no apparent reason on the day in question, and as a result he suffered injuries consistent with those detailed in the medical report admitted into evidence. The district judge had found, however, that any assault by Tan on the appellant was irrelevant to her acceptance of Tan as a credible witness. I was unable to agree with the district judge on this. If Tan had indeed assaulted the appellant without reason as alleged, then the very veracity and motivations of Tan's testimony would certainly have been in doubt and would have been relevant since Tan's testimony was the pillar of the conviction on the charge. However, I was not convinced that the district judge's assessment of credibility in relation to Tan was wrong.

19 The following question should have been posed. Were the injuries detailed in the medical report consistent with Tan's version of events? I answered this question in the positive. The minor injuries suffered by the appellant were very possibly sustained while Tan was forcibly detaining the appellant when he pinned the appellant to the ground. The district judge would therefore have been entitled to find that there was no unwarranted assault, and as such no motive for Tan to falsely implicate the appellant. Such a finding would have been an inference from the basic facts that the district judge could have made but did not. It is settled law, as I have held in cases such as *Soh Yang Tick v PP* [1998] 2 SLR 42, that as an appellate judge, I am fully competent and in as good a position as the district judge to draw the inference which I did.

20 Save for this, the district judge had rightly taken all other relevant considerations into account, and these, taken with her observation of Tan's demeanour in court, were entirely sufficient in supporting her conclusion as to his credibility:

(a) Tan had 18 years of experience as the security guard of the supermarket and would have known that it would be wrong to accuse a customer of theft while the customer was still within the premises.

(b) It was crowded and there was no reason whatsoever for Tan to have disrupted the business of the supermarket without basis.

(c) Tan and the appellant were strangers who were not known to each other before the day in question.

The credibility of the appellant

21 The district judge gave her reasons for concluding that the appellant was not a truthful witness. She held that the appellant had conjured up a claim that he had other belongings, including a wallet containing $80 at the time of his detention by Tan, so as to support his contention that he had intended to pay for the drinks. The district judge was also clearly unimpressed with the fact that the appellant had faltered during cross-examination when questioned on the details of his personal

belongings that he had brought on the day itself. In particular, she justifiably found that the appellant, when trapped by his own conflicting answers, was being evasive when he simply said, "I forgot lah, so many things I forgot".

22 I found that the evidence, highlighted by the DPP, cast a sense that the defence of the appellant was a crafted afterthought. The appellant never mentioned, at the time of his arrest, any facts to support his defence at trial that Tan had accosted him for no reason and had implicated him falsely for theft. All he said at the point of his arrest was "Sir, I was drunk. I do not know what happened." Likewise, in his long statement, he states simply that "I have three children to feed. My wife is not working. I don't intend to actually steal the red bull. That's all." The appellant also did not make mention of his allegedly missing wallet and belongings until the day after his arrest.

23 I also found the appellant's version of his behaviour at the supermarket on the day of his arrest highly improbable. He was apparently still browsing at goods displayed in the corridor, carrying a rucksack containing a fax machine, a paper bag containing several electronic items *and* a whole carton of 24 canned drinks on his shoulder, when Tan attacked him. It was difficult to believe that a shopper would browse in a store carrying so many unwieldy items when he could have easily picked up the heavy items he intended to buy just before making payment at the cashier.

The credibility of Ridhwan

24 The district judge was of the view that Ridhwan, like the appellant, was an unreliable witness and she adverted to "a vast difference in their descriptions of the incident". The appellant had testified that Tan had pulled him down from his back, pinned him on the floor, and while his right cheek was on the floor, rained blows on him. This evidence is at odds with the version given by Ridhwan, which is that Tan was behind the appellant while the appellant was in a crouching position with both fists by the side of his head when Tan assaulted him. I took the point raised by counsel for the appellant that Tan and the appellant were not static and may not have maintained only one position from the beginning to the end of their struggle. However, this discrepancy was sufficient to support the district judge's finding of Ridhwan's lack of credibility. Again, I was mindful of the fact that I did not have the district judge's benefit of observing Ridhwan's demeanour in court.

25 There was another aspect of Ridhwan's testimony that gave rise to doubt. Ridhwan had stated in court that he had seen the incident only briefly and that he had walked away from the scene, as he was frightened. As such, I found it inconsistent with his firm assertion in court that he could recognise the appellant clearly by the pimples on his face and that he was absolutely certain of the position where Tan was supposedly seen assaulting the appellant.

26 Counsel for the appellant raised the case of *Browne v Dunn* (1893) 6 R 67, which was applied in *Arts Niche Cyber Distribution Pte Ltd v PP* [1999] 4 SLR 111. *Browne v Dunn* stands for the proposition that a witness's credibility should not be impeached without him being given the opportunity in cross-examination to explain his evidence. Any allegation that this principle was breached at trial was totally baseless, since Ridhwan was cross-examined by the DPP at trial. In particular, the question was put to him as to his very presence at the scene. The district judge legitimately discounted the weight of his evidence nevertheless, concluding on the facts that no weight was to be accorded to the fact that Ridhwan could pinpoint the position of the incident from the photographs already in the possession of the Defence.

27 The district judge was therefore fully entitled to prefer the Prosecution's version, and I declined to disturb the concomitant finding that the appellant was indeed apprehended outside the premises of the supermarket.

Conclusion

28 For the foregoing reasons, I dismissed the appeal against conviction.

Appeal against conviction dismissed.