

Tom-Reck Security Services Pte Ltd v Public Prosecutor
[2001] SGHC 32

Case Number : MA 141/2000
Decision Date : 19 February 2001
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : Kenneth Tan SC and Joseph Tan (Kenneth Tan Partnership) and VG Sambandan (Sambandan & Co) for the appellant; Hee Mee Lin (Deputy Public Prosecutor) for the respondent
Parties : Tom-Reck Security Services Pte Ltd — Public Prosecutor

Immigration – Employment – Illegal immigrant – Mens rea – Whether requisite mens rea established – s 57(1)(e) Immigration Act (Cap 133)

: This was an appeal by Tom-Reck Security Services Pte Ltd (‘Tom-Reck’), a company incorporated in Singapore, against a conviction in the magistrates’ court for the offence of employing a person who had entered Singapore in breach of s 6(1) of the Immigration Act (Cap 133). After hearing arguments presented by Tom-Reck’s counsel, Mr Kenneth Tan SC and the Deputy Public Prosecutor, I allowed the appeal. I now give my grounds.

At all material times, Tom-Reck conducted itself in the business of providing security services, which it is licensed to provide under s 6 of the Private Investigation and Security Agencies Act (Cap 249). To provide these services, Tom-Reck would recruit persons as security guards and assign them to work at its clients’ premises. In June 1998 Tom-Reck employed as a security guard an individual who identified himself as a Singapore citizen named Rajakumaran s/o Samasundaram. This individual was deployed to work at the premises of one of Tom-Reck’s clients, Hong Guan Technologies (S) Pte Ltd, at 39 Joo Koon Circle, Singapore.

As it turned out, the individual claiming to be ‘Rajakumaran’ was in fact an Indian national, Muthusamy Kennedy, who had entered Singapore illegally by hiding in a lorry. Kennedy had assumed Rajakumaran’s identity and was able to perpetuate the fraud by using Rajakumaran’s Singapore NRIC card and a forged Apple Computer company employee pass bearing his photograph. As a consequence of an enforcement raid carried out at 39 Joo Koon Circle on 29 January 1999, Kennedy was arrested and charged with illegal entry into Singapore under s 6(1) of the Immigration Act, and of possessing a Singapore identity card without lawful authority under s 13(2)(b) of the National Registration Act (Cap 201). He pleaded guilty to these charges and was sentenced to four weeks’ imprisonment and four strokes of the cane on the first charge and three months’ imprisonment on the second charge, with both custodial sentences to run concurrently.

Subsequent to Kennedy’s conviction, Tom-Reck was charged with committing an offence under s 57(1)(e) of the Immigration Act which provides that:

57(1) Any person who -

...

employs any person who has acted in contravention of section 6, 15 or 36 or the regulations;

...

shall be guilty of an offence.

Section 57(2A) in turn provides that where such an offence is committed by a body corporate, the penalty imposed shall be a fine in lieu of caning or imprisonment, for which the minimum and maximum fines are \$100,000 and \$200,000. Tom-Reck was convicted after trial and sentenced by the magistrate to a fine of \$120,000.

Elements constituting the offence

In order for an accused person to be convicted under s 57(1)(e), it is necessary for the prosecution to establish three elements. First, it must demonstrate an employer-employee relationship between the accused and a subject individual. Second, it must establish that the subject individual has acted in contravention of ss 6, 15 and 36 or the regulations made under the Immigration Act. Third, although it is not expressed within the statutory wording of the offence, the prosecution must show that the accused person possessed the requisite mens rea for the offence, ie actual or constructive knowledge that the subject individual had acted in contravention of those provisions. That the requirement of mens rea is inherent in the scheme of the Act was confirmed by the High Court in [Naranjan Singh s/o Ujagar Singh v PP \[1993\] 1 CLAS News 237](#). It was established in that case that constructive knowledge will be attributed to an employer where he has willfully shut his eyes to the legality of the subject individual's presence in Singapore. Mere negligence or recklessness is not a defence. However, the prosecution does not have to prove knowledge (whether actual or constructive) where the facts are such that knowledge is presumed under s 57(6), (7) or (8).

In the court below, the first and second elements were established as common ground. The trial therefore turned on the third element, knowledge.

Facts

In the magistrate's view, whether or not Tom-Reck possessed the necessary mens rea to justify a conviction turned on her appraisal of two conflicting accounts of the circumstances under which Kennedy came to be employed.

Prosecution's version

According to Kennedy, after entering Singapore illegally, he approached an agent, named Segar, to help him find work. He agreed to pay Segar RM500 for his help and for a Singapore identity card. In Kennedy's presence, Segar then telephoned Michael Tan Han Sing, an employee of Tom-Reck, and told him that there was an Indian national who wanted a job, and that he (Segar) had given him (Kennedy) an identity card. Kennedy then spoke to Michael Tan on the phone. Subsequently, Kennedy reported to Michael Tan at Tom-Reck's premises. Michael asked to see the identity card, which he examined and commented on, comparing the photograph to Kennedy, that it was 'not right'. However, he told Kennedy not to worry about it and that he would adjust it. Kennedy also showed Michael the Apple Computer pass bearing his photograph. Michael then gave Kennedy a form to complete, and instructed him to use the particulars found on the identity card supplied by Segar.

Michael then told Kennedy that he would be paid \$900 a month. He took a photograph of Kennedy and brought him to the premises of Hong Guan Technologies, where he was briefed on his duties by another Indian security guard, Prabhakaran, who was already employed there. As it turned out, Prabhakaran was also an illegal immigrant, and was subsequently arrested and charged. According to Kennedy, he contacted Michael to express concern. Michael reassured him that he would be safe as raids were only conducted during the day and Kennedy was working the night shift. Subsequently, however, owing to a labour shortage, Michael assigned Kennedy to work the day shift as well. It was during one such shift that Kennedy was arrested.

Defence`s version

According to Tom-Reck, Michael Tan had no actual or constructive knowledge that Kennedy was in fact an illegal immigrant. On the contrary, its evidence was that Kennedy had of his own accord attended Tom-Reck`s offices seeking employment, and that he had been processed through a standard recruiting procedure. The employees who participated in this procedure gave evidence in the court below to support Tom-Reck`s case.

Angela Tan Gek Eng, a clerk employed by Tom-Reck, gave evidence that it was she who first dealt with Kennedy. She questioned him on the particulars in the identity card, made a photocopy of it and gave him a job application form to complete. An important, but separate, part of the recruiting process related to the statutory requirement under s 14 of the Private Investigation and Security Agencies Act that no person shall be employed by a licensee (in this case, Tom-Reck) as a security guard until he has submitted to the licensing officer (defined in s 4 of the Act) a statement containing his personal particulars in the prescribed form. To comply with this requirement, Angela Tan took Kennedy`s photograph, which she used to prepare the statutory form (Form D) for submission to the licensing officer. The job application form and Form D were tendered in evidence to support Angela Tan`s testimony.

She then handed over the application form and photocopy of the identity card to Eric Goh, an Operations Executive employed by Tom-Reck, who gave evidence that he conducted a brief interview and offered Kennedy a salary of \$900 a month. It was only at this point that Kennedy was handed over to Michael Tan, an Assistant Operations Executive, whose evidence was that he conducted a further interview and decided to assign Kennedy to work at the premises of Hong Guan Technologies.

Magistrate`s findings on question of knowledge

Faced with these conflicting versions of the events that transpired, the magistrate elected to believe the prosecution`s evidence. She rejected the oral and documentary evidence that Kennedy had been subjected to the standard recruiting process, and found that Kennedy`s employment at Tom-Reck was the direct consequence of Michael Tan agreeing, upon Segar`s request, to employ an illegal immigrant. Holding that, through Michael Tan, Tom-Reck possessed actual knowledge of Kennedy`s status as an immigration offender, she found that the prosecution had established the elements of an offence under s 57(1)(e) of the Immigration Act and accordingly ordered a conviction and imposed the aforementioned fine of \$120,000.

The appeal

Tom-Reck`s appeal proceeded on two grounds. The first ground attacked the magistrate`s finding

that Michael Tan had actual knowledge that Kennedy was in fact an immigration offender. The second ground was based on a question of law, namely, whether, on the assumption that the magistrate was correct to believe Kennedy's evidence, Michael Tan's knowledge could be attributed to Tom-Reck under the legal doctrine governing the criminal liability of corporate entities. I propose to deal with the questions in reverse order.

Question of law: whether Michael Tan's knowledge could be attributed to Tom-Reck

Proceeding first on the basis that the magistrate did not err in finding that Michael Tan had actual knowledge that Kennedy was an immigration offender, it was still necessary, to warrant a conviction, that Michael Tan's knowledge be imputed to Tom-Reck. The question in what circumstances an employee's knowledge can be attributed to a corporation is not novel and has been considered both in England and Singapore. In **John Henshall (Quarries) Ltd v Harvey** [1965] 2 QB 233[1965] 1 All ER 725, QBD, the company was charged with aiding and abetting one H in operating a motor vehicle in excess of the permitted weight limits. The company owned a quarry and operated a weighbridge to weigh laden vehicles. The weighbridge operator by oversight permitted H, an independent contractor, to drive off even though his load was in excess of legal limits. In allowing the company's appeal against conviction, Lord Parker CJ expressed the view (at [1965] 2 QB 233, 241; [1965] 1 All ER 725, 729) that:

*there is fundamentally no difference between a master who is an individual and a master who is a limited company, save that in the case of a limited company their knowledge must be the knowledge of those whom, in the case of **HL Bolton (Engineering) Co Ltd v TJ Graham & Sons, Ltd** [1956] 3 All ER 624, Denning LJ referred to as the brains of the company. There is no doubt that there are many cases where somebody who is in the position of the brains - maybe a director, the managing director, the secretary or a responsible officer of the company - has knowledge, his knowledge has been held to be the knowledge of the company. It seems to me that that is a long way away from saying that a company is fixed with the knowledge of any servant. Again, to adopt the simile of Denning LJ the knowledge of the hands as opposed to the brain, is not imputed to the company merely because it is the servant's duty to perform that particular task.*

Both **John Henshall** and **HL Bolton (Engineering) Co Ltd v TJ Graham & Sons, Ltd** [1957] 1 QB 159[1956] 3 All ER 624 were referred to by the House of Lords in their decision in **Tesco Supermarkets v Nattrass** [1972] AC 153[1971] 2 All ER 127. Here, the company operated supermarkets and had been charged with an offence under the UK Trade Descriptions Act 1968 for leading a customer to believe that an item was being offered at a price lower than it actually was on sale for. This was due to an error by a stock assistant, who had placed the higher priced item under the sign advertising the lower priced item when the lower priced item had run out of stock. The shop manager failed to apprehend the situation. On the question of the criminal liability of a corporate entity, and specifically whether the employee's acts could be attributed to the company, Lord Reid expressed the view that:

A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an

embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. ***It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company`s servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.***
[Emphasis added.]

In so holding, the House of Lords rejected the reasoning adopted by the court below. The Divisional Court had advanced what Lord Reid referred to as a `theory of delegation` in order to justify the conviction. The Divisional Court reasoned that the managing directors had delegated their responsibilities to the shop managers who had failed in their duty, and that the actions of the shop managers were therefore attributable to the managing directors, and ergo, the company. In other words, where there is a proper delegation of duties and responsibilities by the managing directors to its subordinates, there exists, whether the behaviour of the subordinates is lawful or unlawful, a corresponding chain of imputed action and knowledge leading from those subordinates back up to the managing directors, and ergo, the company. In allowing the appeal, their Lordships expressed preference for a contrary approach. They held that the managing directors had established a system of control, and a departure from the general directions of the system was not a failing attributable to them. The appellants had, by establishing a system of control, qualified to raise the statutory defence of due diligence.

Thus, according to the reasoning advanced by Lord Reid in ***Tesco***, for a company to be liable by statutory prescription the person with the guilty knowledge or who performed the guilty acts must be regarded as `the company`. In such a case the liability is not vicarious, but primary, since the person in question is `an embodiment of the company`. In those instances, the company is liable whether the person who is the `embodiment of the company` acted within the scope of his authority or not. His transgressions are the company`s transgressions. Conversely, where a person is not regarded as `the company` but merely `as the company`s servant` then the company can only be liable if his acts are within the scope of a function of management properly delegated to him. If, as in ***Tesco***, the servant acts beyond the scope of his delegated function, there is no vicarious liability. See also ***P & O European Ferries (Dover) Ltd*** [1991] 93 Cr App R 72.

The position is the same in Singapore law. This passage from Lord Reid`s judgment was applied by Chan Seng Onn JC in ***RHB-Cathay Securities Pte Ltd v Ibrahim Khan and other actions*** [1999] 3 SLR 464. In ***RHB-Securities***, counsel had submitted that the company was guilty of a criminal offence because its agent was so guilty. The learned judicial commissioner held that the acts were not attributable to the company because the agent was a mere dealer`s representative and could not be the embodiment of the company. On a similar point, but without reference to ***Tesco***, it was held in ***Trade Facilities Pte Ltd & Ors v PP*** [1995] 2 SLR 475 that where `[t]he acts and intentions of a company`s managers can be attributed to that of the company`, the company can be liable to criminal prosecution.

Applying the principles established in the aforesaid decisions to the appeal before me, it was clear that Tom-Reck`s conviction could only be affirmed if Michael Tan could be considered the `living embodiment of the company` or if his acts were performed as part of a delegated function of management. I was of the view that neither situation was made out on the facts accepted by the magistrate in the court below.

First, there was very little evidence to support the proposition that Michael Tan was the 'living embodiment of the company'. It was submitted by the Deputy Public Prosecutor that Michael Tan's acts must be attributed to the company because he was given authority to participate in the hiring process and to pay salaries. However, this abbreviated scope of authority fell far short of constituting Michael Tan as the 'living embodiment of the company'. On the contrary, he was a new hiring. The evidence accepted by the magistrate was that he had joined Tom-Reck about a month before the incident in question. He was placed relatively low in the chain of command, as an Assistant Operations Executive, and was still under probation at the time Kennedy was employed. Consequently, he was a mere servant or agent of the company, which leads to the second line of inquiry: whether his acts were within the scope of a properly delegated function of management.

On that question it is clear that Tom-Reck's management did not delegate responsibility for investigating the immigration status of job applicants to its servants (specifically Michael Tan) *per se*. The responsibility was delegated to a system designed to ensure statutory compliance with the Private Investigations and Security Agencies Act. The need for a system was obvious: the magistrate had found that the appellants were processing as many as 50 job applications a day. If, as the magistrate found, Michael Tan opted to circumvent an established system, had colluded with Kennedy and a third party, Segar, to procure Kennedy's employment through the use of a Singapore identity card belonging to someone else, then he clearly was acting beyond the scope of his authority and was not performing a 'delegated function of management'. His failure to comply with the system did not implicate management unless the system was ineffective, which was not the prosecution's case.

Lastly, there was no evidence to suggest that Michael Tan's knowledge could be imputed to any officer in a position of management authority. The magistrate accepted that Chua Sui Phong, the appellant's managing director, had no personal knowledge of Kennedy's employment.

In the absence of any basis on which Michael Tan's knowledge could be attributed to Tom-Reck, I was of the view that they were entitled to an acquittal and ordered so accordingly. This is sufficient to dispose of the appeal. However, since it may be relevant to the question of Michael Tan's personal criminal liability under the Immigration Act, or potential civil liability between himself and the company, I think it is proper to set out my views on the magistrates' findings of fact.

Questions of fact: state of Michael Tan's knowledge

Mr Kenneth Tan submitted that the magistrate's finding on the question of Michael Tan's knowledge was against the weight of the evidence. Mr Tan advanced the following arguments in support of his contention that Kennedy's evidence was 'improbable, if not incredible':

(a) It was improbable that Michael Tan, who had only come into Tom-Reck's employ one month prior to Kennedy's job application, and who was still under probation (i) would deliberately bypass Tom-Reck's standard recruiting procedures and (ii) collude with Segar to equip Kennedy with a Singapore identity card and to misrepresent his identity to his employer and the licensing officer, thereby putting his job at risk.

(b) It was improbable that Michael Tan would have taken such action and exposed himself to criminal and civil liability without any benefit to himself. The magistrate had found that Michael Tan had gained nothing in this process.

(c) It was improbable, if Michael Tan had indeed acted entirely on his own and beyond the scope of his authority, that Angela Tan and Eric Goh would have given evidence to support his version of

events when it would have been far more convenient to them and Tom-Reck to disavow themselves of any association with Michael Tan's illicit activities. In any event, the documentary evidence suggested that the recruiting procedure had been complied with.

(d) It was improbable, if Michael Tan in fact knew that Kennedy was an immigration offender, that he would insist on Kennedy assuming responsibility for the day shift at 39 Joo Koon Circle when Prabhakaran had shortly before been arrested for an identical offence at the very same place.

(e) It was improbable that Michael Tan would have agreed to pay Kennedy a wage of \$900, which was the standard rate paid to a Singaporean security guard, to secure the services (and attendant risks) of an illegal immigrant, particularly at a time when the job market was poor, citing the dicta of Yong Pung How CJ in **Kuek Ah Lek v PP** [1995] 3 SLR 252, 260 that 'It was inconceivable that the appellant would take the risk of engaging an illegal worker and pay him the market rate for a legal one.'

In considering these arguments, it was necessary to bear in mind that predominantly all the evidence given at trial was oral in nature, and that the judge's observation of the witness's demeanour ought to be accorded paramount importance. Weighing against this was the consideration that there was no objectively independent evidence. The prosecution's main witness, Kennedy, had reason to lie because by asserting that he acted in collusion with Michael Tan to deceive Tom-Reck, he deflected (albeit with only partial success) exposure to a charge of cheating or civil liability for fraud. Similarly, the defence witnesses were employed by Tom-Reck both at the material time and at the time of the trial, though this concern was to some extent addressed by the argument that there was no good reason why the witnesses should collude to protect Michael Tan, who was, after all, a new employee under probation. One important witness who could have shed light on the case was Segar, who would have been able to confirm or deny Kennedy's allegation of collusion between himself and Michael Tan. However, the prosecution was unable to establish his identity or to locate him.

On 7 November 2000, Tom-Reck filed an application by way of CM 19/2000 to adduce fresh evidence in support of its case. What had transpired was that on 30 October 2000, subsequent to Tom-Reck's conviction in the magistrates' court, Kennedy, who had served his prison sentence and been released from jail, telephoned Tom-Reck's managing director, Chua Sui Phong, and offered to disappear from Singapore, so that he would not be able to assist in further proceedings against Tom-Reck, specifically, the appeal fixed on 7 November 2000, in exchange for \$30,000. Chua agreed to do so, but first reported the matter to the Corrupt Practices Investigation Bureau (CPIB). On 2 November 2000, Chua met Kennedy at the Burger King restaurant at the Concourse, Singapore, where he handed a cash cheque for that amount to Kennedy. Kennedy was thereupon arrested by CPIB officers lying in wait. On 4 November 2000, Kennedy pleaded guilty to a charge under s 5 of the Prevention of Corruption Act and was sentenced to six months' imprisonment. Tom-Reck sought to adduce evidence of these events to undermine Kennedy's credibility as the prosecution's key witness. I allowed the criminal motion, applying the principles set out in the English Court of Appeal's decision in **Ladd v Marshall** [1954] 3 All ER 745 and adopted by the Singapore High Court in **Juma'at bin Samad v PP** [1993] 3 SLR 338. See also **Tan Sai Siang v PP** [2000] 2 SLR 399. It was submitted on behalf of the prosecution that, even if the evidence satisfied these requirements, it was inadmissible hearsay. I did not agree with that contention: the statements made by Kennedy to Chua were not adduced to prove the truth of what Kennedy had said, but as statements of Kennedy's intention, and went directly to the question of his credibility as a witness.

Since the prosecution was not entitled to rely on the presumption under s 57(8), Tom-Reck only had to establish reasonable doubt on the issue of mens rea in order to justify an acquittal. In view of the arguments presented by Mr Kenneth Tan, and the fact that the magistrate rested her decision

entirely on the evidence of a witness whose credibility had been tarnished in light of the events transpiring just before the original hearing date of the appeal, I took the view that Tom-Reck was equally entitled to an acquittal on the grounds that Michael Tan lacked the necessary mens rea for the offence.

I therefore ordered that the conviction be reversed and the fine of \$120,000, which had already been paid, be refunded to Tom-Reck.

Outcome:

Appeal allowed.

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