

Rathinam Ramesh v Public Prosecutor
[2009] SGHC 264

Case Number : MA 73/2009
Decision Date : 24 November 2009
Tribunal/Court : High Court
Coram : Chao Hick Tin JA
Counsel Name(s) : S Skandarajah (S Skandarajah & Co) for the appellant; Tan Boon Khai (Attorney-General's Chambers) for the respondent
Parties : Rathinam Ramesh — Public Prosecutor
Criminal Law – Sentencing

24 November 2009

Chao Hick Tin JA (delivering the grounds of decision of the court):

1 This was an appeal against sentence. The appellant was charged with distributing 257 DVDs containing 646 films without a valid certificate approving the exhibition of the films, an offence under s 21(1)(b) punishable under s 21(1)(ii) of the Films Act (Cap 107, 1998 Rev Ed) (“the Films Act”). He pleaded guilty and was sentenced by the District Judge (“the DJ”) to eight weeks’ imprisonment with effect from 12 March 2009. At the conclusion of the hearing, I allowed the appeal of the appellant and substituted the eight week imprisonment term with a fine of \$40,000. I now give my reasons.

Facts

2 The appellant was an unmarried 29 year old male who claimed to be the sole breadwinner in his family. This was his first offence. He worked as a technician with a local company called Soil and Foundation (Pte) Ltd.

3 On 22 June 2008 at or about 9.35 pm, a police officer on anti-crime round duties in the vicinity of Race Course Road spotted the appellant standing with some 257 DVDs placed on the floor in front of him. The officer, having observed that the appellant was beckoning to passers-by to buy the DVDs on display, duly arrested him. The 257 DVDs were seized and found to contain 646 films without valid certificates.

4 On 16 January 2009, the appellant pleaded guilty in the district court to the following charge:

You, Rathinam Ramesh, male/29 years, are charged that you on or about 22 June 2008, at about 9.35pm, at Race Course Road, Singapore, did distribute 257 DVDs containing 646 films without a valid certificate approving the exhibition of the said films, and you have thereby committed an offence under section 21(1)(b) and punishable under section 21(1)(ii) of the Films Act Cap 107.

5 The appellant explained, in mitigation, that on 22 June 2008 he was approached by a Malaysian Indian asking if he wanted to make some extra money by selling Tamil films recorded on DVDs. The appellant asked the Malaysian if it was illegal to sell the DVDs and was informed that it was not illegal because they did not infringe any copyright laws. He also claimed to have been made to understand that the films did not require any approval. Thus, in agreeing to undertake the task, he did not think

that he would be doing anything wrong.

Sentencing considerations of the DJ

6 The prescribed punishment for an offence under s 21(1)(b) of the Films Act provided for under section 21(1)(ii) of the Films Act is a fine of not less than \$500 for each film distributed, up to a maximum of \$40,000, or to imprisonment for a term not exceeding six months or to both

7 In sentencing the appellant, while the DJ took into account the fact that the appellant did not distribute obscene films but only uncertified films, she noted that, pursuant to *PP v Md Hapiz bin Tahir* [2007] SGDC 40 ("*Md Hapiz*"), the control of film distribution under the Films Act was clearly intended to maintain public order and morality through the mechanism of certifying films. The introduction of the mechanism for certification of films clearly indicated that the Legislature intended that control be exercised in relation to the distribution of films. Accordingly, deterrence would be a relevant sentencing consideration (at [15] of *PP v Rathinam Ramesh* [2009] SGMC 8 ("the GD")) for such an offence.

8 While noting that the appellant had pleaded guilty at the earliest opportunity and cooperated with the police, she did not consider relevant the fact that the appellant harboured the mistaken belief that the films did not require a valid certificate as told to him by his Malaysian supplier (at [27] – [28] of the GD). Furthermore, the DJ felt that the appellant's culpability was greater than those charged for attempted distribution of uncensored films because he was convicted of *actual* distribution. With those considerations in mind, she sentenced the appellant to 8 weeks' imprisonment.

Submissions of the parties

9 Before me on the hearing of the appeal, the appellant relied on the cases of *PP v V Vimala Devi* (PS 1055-57/08) and *Tong Chin Siang v PP* (MA 31/2000) in which fines were imposed instead of a custodial sentence. In *PP v V Vimala Devi*, the offender was charged with attempting to distribute 3,503 DVDs containing 7,612 uncertified films. Upon conviction, the maximum fine of \$40,000 was imposed. The appellant argued that the number of DVDs and films in this case were far less than that in *PP v V Vimala Devi* and so did not warrant a custodial sentence. Moreover, counsel for the appellant also emphasized to me that what the appellant had done was to distribute uncertified films, not obscene films. Thus he should not be given a custodial sentence. The sentencing precedents of other cases involving distribution of obscene films (where custodial sentences were imposed) were hardly appropriate for the purposes of determining the proper sentence for the present case.

10 On the other hand, the prosecution brought to my attention the cases of *Md Hapiz, Mohd Ariffin Bin Mohamad v PP* (MA 29/2001/01), *Goh Yi Hong v PP* (MA 86/2000/01) and *Tan Kim Bee v PP* (MA 267/1999/01) in which custodial sentences were imposed for violations of s 21(1)(ii) of the Films Act. However, all these cases, with the exception of *Md Hapiz*, involved *inter alia*, the distribution of obscene films. In the case of *Md Hapiz*, where no obscene films were involved and the offender was given a custodial sentence, the offender was convicted not only for the attempted distribution of 1119 DVDs containing films without valid certificates, but also for possession of DVDs and DVD-ROMs which infringed copyright (*ie*, pirated software) for the purposes of trade.

Appellate jurisdiction on sentencing

11 An appellate court does not have unrestricted scope to disturb the sentence imposed by a lower court. It may only interfere in certain specified circumstances. This is because sentencing is invariably a matter of judgment and discretion. Thus the appellate court should accord due deference

to the discretion of the lower court. The principle that an appellate court has only limited scope of intervention has been established in numerous cases. For present purposes, I need only refer to the case of *PP v Cheong Hock Lai* [2004] 3 SLR 203 at [26] where Yong Pung How CJ pronounced that an appellate court could interfere with the sentence of a lower court if it was satisfied that

- (a) the trial judge had made the wrong decision as to the proper factual matrix for sentence;
- (b) the trial 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, as the case may be.

Error in the conviction

12 I should, at this juncture, state that, during the course of the hearing of the appeal, I indicated to both counsel that the appellant should not have been convicted of the charge as framed. This was because the charge stated that the appellant “did distribute 257 DVDs containing 646 films without a valid certificate”. However, what the agreed facts showed was that the appellant was “attempting” to sell the 257 DVDs. At the time when the police officer arrested the appellant, the 257 DVDs were still placed on the ground and therefore in the latter’s possession. The DVDs were seized by the police officer when the appellant was placed under arrest. It was not as if the appellants had sold the DVDs and handed the DVDs to third parties and the police had retrieved them from those third parties. What the agreed facts amounted to was that the appellant was attempting to sell, and thus attempting to distribute, the DVDs. So he should only be convicted of the offence of attempting to distribute the DVDs. It is true that at the time of his arrest the sum of \$417 was found on him. There was no evidence as to how he obtained that sum. There was certainly no evidence that the police officer saw him selling any DVDs to a buyer. In any event, and more importantly, the charge related to the 257 DVDs which were still in his possession and had yet to be sold.

My decision

13 In the light of my opinion above (at [\[12\]](#)) that the appellant should only be convicted on the charge of attempting to distribute uncertified films, and bearing in mind that the DJ thought that the appellant’s culpability was greater because he was convicted on a charge of having distributed uncertified films, this in itself would be a sufficient basis for me to disturb the sentence imposed by the DJ.

14 Furthermore, the precedents cited to me in support of the sentence imposed by the DJ all concerned situations in which the offender, in addition to distributing films without the valid certification, also engaged in the distribution of either obscene films or films which infringed copyright. An example would be *Md Hapiz*. Therefore, these precedents would not be directly applicable to the present case. The only offence committed by the appellant was in failing to obtain certification for

the films before attempting to distribute them. None of the films he attempted to distribute were obscene nor was it alleged that they infringed any copyright.

15 I agreed with the DJ, as well as the views expressed in *Md Hapiz*, that the control of film distribution under the Films Act was for the purpose of maintaining public order and morality. Under the Films Act, any person carrying on the business of importing, making, distributing or exhibiting films is required to obtain a valid licence and every film in the possession of a person must be submitted to a Board of Film Censors ("BFC") for approval and certification. While I also agreed that deterrence should be a relevant sentencing consideration, I did not read *Md Hapiz* to imply that a custodial sentence was the only means by which such deterrence could be imposed.

16 What made this case different from the precedents cited by the prosecution was the absence of obscene materials; neither did the contents in *any* of the DVDs which the appellant was distributing violate the copyright of another. In essence, the only harm caused by the appellant in what he was doing was the failure to obtain certification of the films from the BFC before attempting to sell them. There was nothing subversive or obscene in those uncertified films. Thus, what the appellant did clearly did not undermine public order to the same extent as would be the case if the films had contained subversive or obscene materials. It could be viewed as a regulatory offence. It certainly did not undermine public morality. Having said that, I am in no way suggesting that the appellant had done no wrong. He had infringed s 21(1)(b) of the Films Act for which he must be punished. Here, I would underscore the fact that the appellant engaged in the selling of the DVDs, which contained uncertified films, in order to make some money. He should be punished in a manner which was not disproportionate to the offence and which would have an impact on him as well as on others who might be thinking of making some money through such activities. In passing, I should mention a point in favour of the appellant - he had fully co-operated with the police and had pleaded guilty, thus saving considerable judicial time.

Conclusion

17 The main object of the Films Act is clearly to protect public order and morality. But public order and morality was not threatened here. As stated in [\[12\]](#) above, the appellant should have been convicted of an offence of attempting to distribute rather than for having distributed the uncertified films. As the DJ herself noted, the former offence was less culpable than the latter. Moreover, the offence committed by the appellant was not one of those that required great effort to uncover. He was clearly trying to sell his wares in the open. The mere failure to obtain certification for the films in itself, in the circumstances of this case, would not warrant the imposition of a custodial sentence. In the result, I allowed the appeal and ordered that the original sentence of eight weeks' imprisonment be substituted with a fine of \$40,000, and in default, eight weeks' imprisonment. In my opinion, a fine of \$40,000, which was the maximum fine imposable, would be more than adequate to serve as a deterrent to the appellant, as well as to those who might be minded to engage in similar activities. This would signal to those people that such illegal activities do not pay.

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