TS Video and Laser Pte Ltd v Lim Chee Yong and another appeal
[2001] SGHC 341

Case Number : MA 246/2001, 249/2001

Decision Date : 19 November 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Kirpal Singh (Kirpal & Associates) for the appellants; Lee Teck Leng (Tan Peng Chin & Partners) for the respondent

Parties : TS Video and Laser Pte Ltd — Lim Chee Yong

Criminal Procedure and Sentencing – Trials – Application for discharge not amounting to acquittal – Whether initial presumption in favour of discharge not amounting to acquittal – Court's discretionary power to grant discharge amounting to acquittal exists – s 184(2) Criminal Procedure Code (Cap 68)

: The appellants in both appeals were charged in the court below on one count each of selling infringing copies of the Pokemon television series (`the Pokemon series`), and one count each of exposing the same for sale, in contravention of s 136(1)(b) of the Copyright Act (Cap 63, 1999 Ed). At the beginning of the trial in the court below, the respondent applied for, and obtained, a discharge not amounting to an acquittal. I dismissed the appeal against the trial judge`s decision, and now give my reasons.

The background

The respondent is a director of Poh Kim Video Pte Ltd (`Poh Kim`). Poh Kim is the sole agent of United Vision Media Pte Ltd (`UVM`), which holds the exclusive home video licence for Singapore in respect of video cassette and video compact disc versions of the Pokemon series. UVM`s interest in the Pokemon series is in turn derived from an exclusive licence granted to it by Medialink International Ltd (`Medialink`), a Hong Kong company.

The appellants, TS Video and Laser Pte Ltd (`TSV`) and TS Entertainment Pte Ltd (`TSE`) are related companies. On 5 May 2000, a trap purchase of one set of the Pokemon series was carried out pursuant to Poh Kim`s instructions at TSE`s premises at Suntec City Mall. Subsequently, a second trap purchase was carried out on 11 May 2000 at TSV`s premises at Jurong Point. Pursuant to the trap purchases, a search warrant was obtained and the premises of TSV and TSE were raided on 16 May 2000. A total of 22 sets of the Pokemon series were seized from TSV, and a further 18 sets from TSE (`the seized items`). The seized items, together with the two sets acquired earlier by trap purchase, formed the basis of the charge.

The trial below

The respondent obtained an authorisation from the Public Prosecutor, pursuant to s 336(4) and (7) of the Criminal Procedure Code (Cap 68) (`CPC`), to prosecute the appellants for copyright infringement. However, on the day of the trial, the respondent informed the court below that he had been unable to procure the attendance of the Japanese copyright owners. The reason given was that the Japanese copyright owners were currently entangled in a legal dispute with Medialink in Hong Kong and were reluctant to involve themselves in the proceedings below until the resolution of the Hong Kong dispute. The respondent estimated that the Hong Kong dispute would take approximately

six months to resolve, and applied for a discharge not amounting to an acquittal pursuant to s 184(2) of the CPC. This application was challenged by the appellants, who argued that they were entitled to a discharge amounting to an acquittal.

In granting the respondent`s application, the trial judge took the view that, although the delay in prosecution resulting from the unavailability of the Japanese copyright owners was not desirable, the indefinite apprehension of criminal proceedings was not a conclusive factor in determining whether to grant a discharge not amounting to an acquittal. As the charges faced by the appellants were serious charges, on matters relating to the public interest and public rights, and there were no improper motives behind the application, the delay in prosecution would not be unconscionable. The trial judge also noted that s 136(10) of the Copyright Act did not impose a time-bar to prosecution where the summons was issued more than six months after the commission of the offence, and only required the return of the seized articles.

The appeals

Before me, the appellants contended that they should have been granted a discharge amounting to an acquittal instead of a discharge not amounting to an acquittal. In so contending, they relied on four grounds: the locus standi of the respondent, the rationale for granting the application, lack of compliance with s 136(10) of the Copyright Act, and that the proceedings below were in fact de facto civil proceedings. Not only did I find that none of these grounds were relevant to the appeals, I also found that the appellant had fundamentally misunderstood the basis upon which a trial judge decides whether or not to grant a discharge not amounting to an acquittal.

THE LAW ON DISCHARGES NOT AMOUNTING TO ACQUITTALS

On when a discharge amounting to an acquittal or a discharge not amounting to an acquittal should be granted, s 184 of the CPC provides:

> *(1) At any stage of any summary trial before judgment has been delivered, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the defendant upon the charge and thereupon all proceedings on the charge against the defendant shall be stayed and he shall be discharged from and of the same.*
>
> *(2) Such discharge shall not amount to an acquittal unless the court so directs except in cases coming under section 177.*

This was interpreted by Lai Kew Chai J in **K Abdul Rasheed v PP** [1984-1985] SLR 561 [1985] 1 MLJ 193 at 195 as meaning that:

> *If an accused applies for a discharge amounting to an acquittal, a court must bear in mind that the legislature has ... set down the principle that the discharge `shall not` amount to an acquittal. There must be circumstances in the proceedings so far on record or the accused must show sufficient reasons to displace the principle that the discharge shall not amount to an acquittal.*

Lai J`s interpretation of s 184 has been accepted in several cases since, most recently by myself in **Ranjit Kaur d/o Awthar Singh v PP** [1999] 1 SLR 836 . The cases on s 184 further hold that, despite the imposition of an initial presumption in favour of a discharge not amounting to an acquittal, a trial judge has `an unfettered discretion to direct, in appropriate circumstances, that the discharge shall amount to an acquittal` - **Goh Cheng Chuan v PP** [1990] SLR 671 [1990] 3 MLJ 401 at 404. In exercising his discretion, the trial judge decides the matter on the merits, `with the court bearing in mind the public interest and the right of the individual` - ***K Abdul Rasheed*** (supra).

THE APPELLANTS` INTERPRETATION OF THE LAW

Despite it being made abundantly clear in the decided cases that there is an initial presumption in favour of a discharge not amounting to an acquittal, the appellants in their oral submissions nevertheless sought to argue that there was in fact no such presumption. In so contending, they relied on the following extract from Lai J`s judgment in ***K Abdul Rasheed*** (supra):

> *As I read the grounds of decision of the learned district judge, it was implicit that the practice of the court was to order a discharge not amounting to an acquittal if the prosecution indicated that it was not withdrawing the charge. If this was the practice, as I think it was, I have to say that it was clearly wrong ... a court has to act judicially and consider both the public interest and any unfairness to an accused person. A consideration of one aspect without the consideration of the other was not a proper exercise of the power ...*

Apart from flying in the face of established law, it was also clear to me that the suggested interpretation could not be supported once read in the context of the entirety of Lai J`s judgment. The above passage did not relate to the issue of an initial presumption in favour of a discharge not amounting to an acquittal, but related instead to the issue of the trial judge`s discretion. Lai J, far from stating that there was no initial presumption in favour of a discharge not amounting to an acquittal (a statement which would in any event contradict his own earlier statements in the same case), was merely warning trial judges against granting applications for discharges not amounting to acquittals as a matter of course, and neglecting to even consider the exercise of their discretion.

THE TRIAL JUDGE`S EXERCISE OF DISCRETION

It was clear to me that in the court below, the trial judge had very carefully weighed all the competing interests in play, and decided that the circumstances did not warrant the grant of a discharge amounting to an acquittal. This could be seen from his written grounds, where he took into account diverse factors such as the public interest in copyright offences, any delay in prosecution, and whether there was any improper motive in applying for the discharge. It was only after carrying out a balancing exercise that the trial judge made his decision.

I saw no reason to interfere with this decision. This was especially so given that the grounds of appeal did not disclose any error in the trial judge`s exercise of his discretion, much less any which were sufficient to warrant my overturning his decision.

GROUND 1: LOCUS STANDI OF THE RESPONDENT

The appellants noted that the respondent`s papers had not disclosed the exact identity of the Japanese copyright owners. Moreover, the reason for the Japanese copyright owner`s absence was that they were presently engaged in a dispute with Medialink. In light of the anonymity of the

Japanese copyright owners and the fact that the respondent`s rights in respect of the Pokemon series derived from the Japanese copyright owners via Medialink, the appellants contended that the respondent lacked the locus standi to bring the action.

I found this argument to be wholly irrelevant as the proceedings in question were criminal in nature, not civil proceedings in which the aggrieved party would have to show the chain of assignments and/or licences from the original copyright owners in order to prove its right to bring the action. The respondent`s participation was a result of an authorisation granted by the Public Prosecutor to the respondent`s counsel pursuant to s 336(4) and (7) of the CPC. The power to delegate prosecution is a matter of prosecutorial discretion which the court has no jurisdiction to intervene in - **PP v Mat Radi** [1982] 1 MLJ 221 . It followed that, once the Public Prosecutor decided to grant an authorisation to the respondent, no challenge to the respondent`s locus standi could be made.

GROUND 2: RATIONALE FOR GRANTING THE APPLICATION

The appellants also challenged the trial judge`s rationale for granting the application. First, they contended that the Japanese copyright owners were in actuality the true plaintiffs in the action, such that the situation facing the court below on the day of the trial was not that of a missing material witness, but that of a missing plaintiff, and one wilfully missing at that. On this point, I had found that the respondent was merely acting on behalf of the Public Prosecutor, and it followed from this finding that there was as such no justification whatsoever for considering the Japanese copyright owners to be the plaintiffs. Consequently, no issue of `missing plaintiff` arose.

Secondly, the appellants raised the issue of delay in prosecution. I had decided in **Arjan Singh v PP** [1993] 2 SLR 271 that the indefinite apprehension of criminal proceedings being recommenced is only a factor to be weighed in the balance with all the other circumstances of a case. It was clear to me that this issue had already been properly considered and disposed of by the trial judge. I further noted that the cases where a discharge amounting to an acquittal had been granted due to a missing material witness differed substantially from the proceedings below. For example, in ***K Abdul Rasheed*** (supra), one of the witnesses in question was dead and the other was a foreigner who was unavailable. In ***Goh Cheng Chuan*** (supra), the material witness could not be found although five years had elapsed and one of the complainants had died. By contrast, in the court below, the missing witnesses were well-known corporate entities and the delay in prosecution was estimated to be of only six months.

Thirdly, the appellants contended that grave injustice would be caused to them by allowing the respondent to continue the proceedings indefinitely. This stemmed from refusals by the appellants to pay their suppliers, and for the appellants` customers to pay them, following the seizures on 16 May 2000, and a debt recovery action which resulted therefrom. Apart from considering that this factor was completely irrelevant in light of the criminal nature of the proceedings below, I also found that the appellants appeared to have exaggerated the consequences of a discharge not amounting to an acquittal. As the appellants themselves admitted, the debt recovery action against them had been stayed pending the resolution of the proceedings below.

GROUND 3: BREACH OF S 136(10) OF THE COPYRIGHT ACT

The appellants` next argument was that, although s 136(10) of the Copyright Act is not a time-bar against prosecution, the seized items should nevertheless be returned to them as the respondent did not initiate proceedings against them within six months of the date of seizure. Although this was correct, I failed to see what aid this fact could give to the appellants` attempts to show that they should have been granted a discharge amounting to acquittal, as the seized items were not necessary

to the continuance of the proceedings below.

GROUND 4: NATURE OF THE PROCEEDINGS

Finally, the appellants argued that the proceedings below were `de facto civil proceedings`, relying on **SM Summit Holdings v PP** [1997] 3 SLR 922 , where I had stated:

> *The criminal process [in that case] was used to obtain evidence for pending civil proceedings; these were de facto civil proceedings.*

Since the Japanese copyright owners were allegedly the true plaintiffs, the proceedings below were `de facto civil proceedings` and a discharge amounting to acquittal was justified.

I found the above argument to be wholly in error, and ***SM Summit*** to be irrelevant to issues at hand. The application for search warrants in ***SM Summit*** had been treated as `de facto civil proceedings` as they had been utilised to obtain evidence for civil proceedings. As I have already stated elsewhere in this judgment, the court below was concerned with a criminal action, and there was hence no room for the principles in ***SM Summit*** to operate.

Conclusion

It followed from my findings on the grounds of appeal, as discussed above, that there was absolutely no reason to disturb the trial judge`s decision on the grant of a discharge not amounting to an acquittal, and consequently I dismissed the appeal.

Outcome:

Appeal dismissed.