Selvarajan James v Public Prosecutor
[2000] SGHC 171

Case Number : MA 328/1999

Decision Date : 21 August 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : SK Kumar (SK Kumar and Associates) and Gurdaib Singh (Gurdaib Cheong & Partners) for the appellant; Jennifer Marie and Aedit Abdullah (Deputy Public Prosecutor) for the respondent

Parties : Selvarajan James — Public Prosecutor

Criminal Law – Abetment – Abetment of theft by aiding – Whether accused has requisite guilty knowledge

Criminal Procedure and Sentencing – Appeal – Adducing fresh evidence – Whether Prosecution under duty to disclose witnesses' statements to Defence – Whether court may direct Prosecution to disclose – Pre-conditions to grant of leave by court to adduce fresh evidence – Whether pre-conditions satisfied

Criminal Procedure and Sentencing – Sentencing – Whether sentence of 15 months excessive

Evidence – Weight of evidence – Weight to be attached to admissible statements compared to that on testimony in court – s 147(6) Evidence Act (Cap 97, 1997 Rev Ed)

: This was an appeal against the decision of district judge Suriakumari Sidambaram where she convicted the appellant of an offence under s 381 read with s 109 of the Penal Code (Cap 224) for abetting one Muthusamy Kanan (`Kanan`) in the commission of theft as a servant, in that he intentionally aided Kanan by arranging for a vehicle to transport stolen goods and assisting in getting a place to store such stolen goods until a buyer could be found. The appellant was sentenced to 15 months` imprisonment. The appellant appealed against his conviction and sentence. I dismissed the appeal and now give my reasons.

The charge

The re-amended charge against the appellant read as follows:

> *DAC 10988/99*
>
> *You, Selvarajan James, Male/40 years, NRIC No 1292197G, are charged that you, on 22 January 1998, at or about 7.30pm, at Thyssen Haniel Logistics Centre located at No 10 Changi South Street 2, Singapore, did abet one Muthusamy Kanan, employed in the capacity of a warehouse assistant with M/s Thyssen Haniel Logistics (S) Pte Ltd, in the commission of the offence of theft as a servant, in that you intentionally aided the said Muthusamy Kanan, to wit, by arranging for a vehicle to transport the stolen goods, to wit, three hundred pieces of Sanyo CL7-X6 cordless telephones valued at $97 each, amounting to a total value of $29,100, from the warehouse at the said Thyssen Haniel Logistics Centre and assisting in getting a place to keep the said goods in the interim until a buyer was found for the stolen goods, which offence was committed in consequence of your abetment and you have thereby committed an offence under s 381 read with s 109 of the Penal Code (Cap 224).*

The facts

Some time during the day on 22 January 1998, Kanan contacted the appellant and asked the appellant to assist in obtaining transport for some goods and in looking for a place to store the goods. The appellant managed to procure one `Singh` to provide the transport for Kanan. At about 7pm on 22 January 1998, the appellant and Singh arrived at Thyssen Haniel Logistics Centre (`THLC`), where Kanan was a warehouse assistant, in a white lorry.

The appellant introduced Singh to Kanan and Kanan then gave instructions for 60 cartons containing cordless telephones worth $29,100 to be loaded onto the lorry. Although the appellant claimed that he was sitting in the passenger seat during the loading process, the trial judge found on the evidence that it was the appellant and Singh who loaded the goods onto the lorry.

Singh asked Kanan for the delivery order or any other documents relating to the goods to be taken out of the warehouse but seemed to accept Kanan`s explanation that they were not required. The appellant never asked for any documents.

After the loading of the 60 cartons had been completed, Singh and the appellant tried to leave the premises in the lorry but the gate to the warehouse was closed. The security guard had been ordered not to let anybody leave the premises without the authorisation of the warehouse executive, one Lee Chen Seng Michael, who had been tipped off that Kanan was `up to something`. However, Kanan told the security guard that the people in the lorry were his friends who only came to `chit-chat` with him. The guard subsequently allowed the lorry to leave the premises.

The goods were brought to a shophouse in the Newton area and unloaded. In the meantime, the police were informed of the theft. Kanan then paged the appellant and told him that the police had arrived at THLC and to return the goods immediately. The appellant testified that, on being informed that the goods needed to be returned, Singh became very upset and refused to do so. Two taxis were therefore hired to transport the goods back to THLC.

The appellant rode in one of the taxis but alighted at Bedok, allegedly to attend to his son who was sick. However, the trial judge found from the evidence that he alighted in Bedok merely to return to his residence there. The 60 cartons of goods were returned in their entirety to THLC in the two taxis, unaccompanied by any passenger, at about 11.20pm on 22 January 1998.

Kanan gave the appellant`s pager number to the investigating officer, Insp Brian Stampe (the `IO`), who tried to contact the appellant but to no avail. The trial judge dismissed the appellant`s claims that he spoke to the IO and had made himself `contactable and available to go to the station any time` and instead accepted the IO`s evidence that the appellant never contacted him at all. The appellant remained at large until almost a year later, when he was arrested on 10 January 1999.

Kanan was charged under s 381 of the Penal Code (Cap 224) on 24 January 1998. He pleaded guilty to that charge and was sentenced to 24 months` imprisonment.

Decision of the trial judge

The only issue in question was whether the appellant had the requisite intention to aid Kanan in the commission of the offence. The appellant`s contention was that he had no knowledge that the goods

in question were stolen and that his role was merely to provide transport for Kanan.

The trial judge tested the appellant`s contention against the evidence adduced. Firstly, Kanan made two statements to the police (marked `P9` and `P10`) - one on 23 January 1998, the day after the offence was committed and another on 24 March 1999, after his conviction under s 381 of the Penal Code - stating categorically that the appellant knew that the goods in question were stolen goods. The voluntariness of these statements was not questioned. Although Kanan testified in court that the appellant did not know that the goods were stolen, the trial judge found Kanan`s two earlier statements, one of which was contemporaneous with the offence, to contain the truth and accepted that the appellant knew that the goods were stolen.

Further, even if Kanan had not expressly told the appellant that the goods were stolen, the trial judge felt that the appellant had at the very least wilfully shut his eyes to the theft. The lack of requisite documents, the large volume of goods and the fact that it was after office hours when the goods were loaded should have put the appellant on notice that all was not innocent. The appellant, however, did not make any enquiries at all.

The trial judge also scrutinised all the circumstantial evidence - (a) the fact that the appellant travelled with the transport to the warehouse and then to the place of storage and helped to load and unload the goods; (b) the fact that the appellant did not come forward and remained at large for almost a year, although he knew that the police were looking for him; and (c) the fact that the appellant felt the need to lie that he did not help to load the goods onto the lorry and about having to rush back to his sick son on the evening of 22 January 1998 - and came to the inevitable and inexorable conclusion that the appellant was an active participant and abetted in the offence he was charged with.

The trial judge noted that the sentence generally passed on a first offender who has stolen items worth about $10,000 is 12 months` imprisonment. The goods that were stolen in the present case were worth $29,100. The trial judge also took into account that the offence was committed deliberately and involved an element of abuse of trust. She was also informed that the accomplice, Kanan, had been sentenced to 24 months` imprisonment. As such, the trial judge felt that a sentence of 15 months` imprisonment would be appropriate in this present case to reflect the gravity of the offence and to serve as a deterrent both for the appellant and the public.

The appeal

The appellant appealed against his conviction and sentence. As against his conviction, the main grounds stated by the appellant in his petition of appeal were that, firstly, the trial judge erred by choosing to accept Kanan`s version of the facts as stated in his two statements to the police as opposed to his testimony in court; secondly, that the trial judge erred by placing too much emphasis on the fact that Kanan had pleaded guilty to the charge against him under s 381 of the Penal Code (Cap 224) and the fact that he admitted to the statement of facts with respect to that charge without any qualification; and finally, that the trial judge failed to consider all the evidence before her. As against his sentence, the appellant argued that the trial judge failed to take into account the mitigating factors and imposed an excessive sentence.

The motion to adduce additional evidence

In the course of preparing for the appeal, the appellant discovered that Kanan had in fact made a

total of three statements to the police. Only the two statements marked `P9` and `P10` were adduced during the trial in the lower court and the appellant was not aware of the existence of a third statement (the `third statement`) during the trial. This third statement was apparently exculpatory in nature. The appellant therefore applied by way of criminal motion for the court to order that the prosecution be directed to produce the third statement and for leave to adduce the third statement as fresh evidence.

The procedure for criminal discovery in Singapore is governed by the Criminal Procedure Code (Cap 68) (the `CPC`). The CPC does not impose on the prosecution an onerous duty of disclosure. This differs from the requirements in civil cases where extensive rules of discovery are provided for in the Rules of Court. For criminal cases, there is no requirement in the CPC for the prosecution to disclose witnesses` statements to the defence. In this case, the prosecution did not intend to rely on the third statement given by Kanan and was not compelled by law to disclose or produce the statement to the defence.

The present duty of disclosure on the part of the prosecution in criminal cases, as provided for in the CPC, is minimal. This position is not necessarily the most ideal and it has been argued on numerous occasions that more disclosure and early disclosure on the part of the prosecution are desirable to ensure that the accused knows the case that has to be met and as such would get a fairer trial. However, it is not for this court to impose such requirements on the prosecution. It is for Parliament to decide if it wants to enact these revisions when it updates the CPC and, until then, the court cannot direct the prosecution to produce witnesses` statements to the defence.

Even if the prosecution had voluntarily disclosed and produced the third statement to the appellant, the relevant principles had to be applied before the third statement could be adduced as fresh evidence during the appeal. The applicable provision in the CPC is s 257 (1) which reads as follows:

> *In dealing with any appeal under this Chapter the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken be a District Court or Magistrate`s Court.*

The three-fold test for when additional evidence is deemed to be `necessary` was set out in **Juma`at bin Samad v PP** [1993] 3 SLR 338 (and followed recently in the cases of **Chia Kah Boon v PP** [1999] 4 SLR 72 and **Lee Yuen Hong v PP** [2000] 2 SLR 339), which adopted the test in **Ladd v Marshall** [1954] 3 All ER 745:

> *first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.*

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial

Applying the first of the three conditions above to the present case, it was reasonable for the appellant not to have suspected that the third statement had been made because there was no evidence adduced to suggest that such a statement existed. Therefore the first condition was

satisfied.

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive

However, it was clear that the second condition was not satisfied. Although the trial judge did place some emphasis on Kanan`s two statements which implicated the appellant, she was prepared to convict the applicant on the strong circumstantial evidence alone. Section 116(g) of the Evidence Act (Cap 97) could be used to argue for the presumption that the third statement contained exculpatory statements that could have an important influence on the result of the case since the appellant contended that the prosecution was aware of the third statement during the trial but chose not to adduce it as evidence. Section 116(g) of the Evidence Act states that the court may presume that `evidence which could be and is not produced would if produced be unfavourable to the person who withholds it`. However, even if the third statement were adduced as evidence and found to be unfavourable to the prosecution, the strong circumstantial evidence pointing to the applicant`s knowledge that the goods were stolen suggested that the third statement would not have an important influence on the result of the case, and would not have been crucial to the proper determination of the case. Therefore the second condition was not satisfied.

(3) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible

Considering Kanan`s wavering testimony with respect to the applicant`s state of mind, I was of the opinion that, even if the third statement were admitted, minimal weight should be attached to it. After all, Kanan did make two inculpatory statements, one of which was made just the day after the offence. He then reversed his stance during the trial by testifying that the appellant did not know that the goods were stolen and claimed that he had lied in the two previous statements. The reasons he gave during the trial, to substantiate his claim that he lied in those two statements, were unconvincing and dismissed by the trial judge, who found that his previous two statements contained the truth. The third statement, which the appellant claimed to be exculpatory, could not be `such as is presumably to be believed` because Kanan`s credibility with respect to his statements regarding the applicant`s state of mind had been undermined by his wavering testimony. Therefore the third condition was also not satisfied.

For the reasons above, I denied the motion moved by the appellant. The court had no power in law to order the prosecution to produce Kanan`s third statement and, even if the third statement were in the appellant`s possession, the court would not have granted leave for such a statement to be adduced, as fresh evidence for the purposes of the appeal, as it would not have satisfied the test set out in ***Juma`at bin Samad v PP*** (supra).

Appeal against conviction

Whether the trial judge erred when she chose to place more credibility on Kanan`s two statements made to the police as opposed to his evidence in court

Kanan`s two statements were admitted as evidence under s 147(3) of the Evidence Act (Cap 97). Section 147(6) provides guidance as to the weight to be attached to such statements:

In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of this section regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

In the case of **PP v Tan Kim Seng Construction Pte Ltd & Anor** [1997] 3 SLR 158 , I said that, in addition to the above, other factors that will affect the weight accorded to such previous inconsistent statements are: (1) an explanation of the inconsistency, and why that statement is an inaccurate representation of the facts; (2) the context of the whole statement and the circumstances affecting its accuracy; and (3) the cogency and coherence of the facts to be relied upon.

This issue was further expounded by the Court of Appeal in **Chai Chien Wei Kelvin v PP** [1999] 1 SLR 25 where I said:

First, the contemporaneity of a statement with the occurrence or existence of the facts stated is important for it guards against inaccuracy, though the degree of contemporaneity required will vary with the facts in question. The recollection of the details of particular events, particularly where these occur quickly, is easily susceptible to error with time but the recollection of the existence of a relationship is not so malleable. Second, there can be little guidance on the possibility of misrepresentation by the maker of the statement but the court must be astute in spotting such instances. Third, in addition to the above matters, the weight to be accorded to a prior inconsistent statement will be affected materially by an explanation of the inconsistency and why that statement is an inaccurate representation of the facts. Fourth, regard should be had to the context of the statement. Subsection (6) does not restrict consideration to only the making of the statement but requires consideration of all the circumstances affecting its accuracy. Thus the court must consider the context of the inconsistent portions, which requires that the whole of the statement be examined. Reliance cannot be placed on a portion of the statement that is taken out of context. Finally, the cogency and coherence of the facts to be relied upon has to be noted. An ambivalent statement does not attract much weight.

Applying the above factors to Kanan`s statements P9 and P10, I noted that firstly, the first statement made by Kanan was contemporaneous with the offence, having been made on 23 January 1998, just a day after the offence. Secondly, Kanan`s explanation of the inconsistency and why these statements were an inaccurate representation of the facts was that his statements implicating the appellant were made because he was angry with the appellant for delaying the return of the goods and that, if not for this delay, he would not have to go to jail. I find Kanan`s explanation incredible because the second statement was made when Kanan had already been convicted and knew he had to go to jail. Furthermore, the trial judge noted that, with his previous convictions for property offences, Kanan could not have been so naÃ¯ve as to believe that he would be allowed to go free after stealing $29,100 worth of goods, just because the goods were returned. Both statements were made to police officers and Kanan did not dispute the voluntariness of the two statements, which were consistent with each other. In the first statement P10 recorded on 23 Janaury 1998, Kanan stated that he spoke to the appellant on the telephone and `I told him that I

could get some items and asked him if he could clear the items for me. He then said okay and told me to inform of when and where to pick up the items`. Then in the second statement P9, recorded when Kanan had already been convicted and was in prison, Kanan said that the appellant `knew that the items were stolen goods as I told him of the plan. He assured me that he has a buyer`. When I examined these statements, I did not detect any ambivalence on the part of Kanan when he was making these statements. Kanan was stating unequivocally that the appellant was aware that that the goods in question were stolen.

Having considered the above factors, I found that the trial judge was entitled to place more weight on Kanan`s two statements than on his testimony in court. I found that the trial judge scrutinised Kanan`s evidence with great care and tested it against the objective facts and evidence. She was mindful that Kanan was an accomplice but nevertheless found that Kanan`s evidence in his two statements was corroborated by the evidence given by the other prosecution witnesses and the other circumstantial evidence.

Whether the trial judge erred by placing too much emphasis on the fact that Kanan had pleaded guilty to the charge against him under s 381 of the Penal Code (Cap 224) and the fact that he admitted to the statement of facts with respect to that charge without any qualification

Kanan`s guilty plea and the fact that he had admitted to the statement of facts with respect to the charge against him (marked `P8`) without any qualification were factors that were taken into account by the trial judge in coming to the conclusion that Kanan`s two statements to the police contain the truth. The statement of facts detailed the appellant`s role in the theft and was consistent with the two statements made by Kanan. The statement of facts was not at any time challenged during the trial. These factors were taken into account as part of the totality of evidence against the appellant and I could see nothing to suggest that undue emphasis was placed by the trial judge on these factors. In my opinion, the appeal on this ground contained absolutely no merit.

Whether the trial judge failed to consider all the evidence before her

As regards Kanan`s evidence on the appellant`s state of mind, I applied the relevant principles above and concluded that the trial judge was entitled to place more weight on Kanan`s previous statements P9 and P10 than on his testimony in court.

As regards the appellant`s evidence, the trial judge chose to disbelieve the appellant`s contention that he did not know that the goods were stolen. The inference that the appellant had the relevant knowledge was supported by strong circumstantial evidence and inconsistent testimony from the appellant. The appellant claimed that he was not close to Kanan, yet he went to a great extent to help him. The appellant claimed that his role was simply to provide transport for Kanan, yet he travelled with the lorry to THLC and then to the place of storage, and also helped to load and unload the goods, which suggested active participation in the offence. Also, the appellant never made any enquiries about the goods despite circumstances that should have put him on notice that something was amiss, leading the trial judge to conclude that he must have at least shut his eyes to the offence. The appellant claimed that he had spoken to the IO and had made himself contactable by the police, yet he remained at large for almost a year and never came forward despite knowing that the police were looking for him. The appellant found it necessary to lie that he could not return to the THLC on the night of the offence because his son was sick but admitted on cross-examination that he never brought his son to the hospital that night. In fact, the IO testified that the appellant`s wife, who stayed with their son, said that she had not seen the appellant for some time, which led to the

inference that the appellant did not see his son that night. The IO`s testimony in this respect was not challenged by the defence.

It was held by the High Court in **Simon Joseph v PP** [1997] 3 SLR 196 that `an accused should not be convicted merely because his defence is tenuous or because a trial judge disbelieves his defence`. However, I was of the view that, in the present case, the trial judge had good reasons to disbelieve the appellant`s defence that he did not know that the goods were stolen because this conclusion was supported by Kanan`s statements and strong circumstantial evidence. In fact, even without having regard to Kanan`s statements, I was of the opinion that, taking into account the cumulative effect of the circumstantial evidence, it was not unreasonable for the trial judge to make the `irresistible inference` that the appellant had the requisite guilty knowledge, satisfying the test in **Ang Sunny v PP** SLR 67 ; [1966[rcub] 2 MLJ 195.

It is settled law that an appellate court should be slow to disturb a trial judge`s finding of fact when he has had the opportunity to assess the witnesses. Reference can be made to **PP v Victor Rajoo** [1995] 3 SLR 417 , where the Court of Appeal stated that :

> *The learned trial judge, who had had the benefit of seeing and hearing the complainant and the accused giving evidence made findings of fact based on the veracity and credibility of their respective evidence. Due regard must be given to the learned trial judge`s findings, and such findings should not be disturbed unless we are satisfied that he has clearly reached a wrong decision.*

Having examined the evidence, I can see no reason for me to conclude that the trial judge has clearly reached a wrong decision. The trial judge had the benefit of seeing and hearing the witnesses and after considering the totality of the evidence, she had `no doubt whatsoever` about the appellant`s guilt. I saw nothing to suggest that she failed to consider all the evidence before her. It is very clear to me that the appellant was no mere spectator as far as the theft was concerned and was indeed an active participant in the offence. I find his claim that he had no knowledge that the goods were stolen far-fetched.

For the reasons above, I upheld the trial judge`s decision and dismissed the appeal against the appellant`s conviction.

Appeal against sentence

The only mitigation factor put forward by the appellant was that the goods were returned and that the appellant did not derive any benefit from them. However, the evidence clearly showed that he only returned the goods on the instructions of Kanan when the police had already arrived at THLC, and not because he suffered from a guilty conscience or was filled with remorse. As such, I was of the view that the fact that the appellant arranged for the goods to be returned should not weigh heavily in his favour.

Taking into account the value of the goods stolen and the fact that Kanan received a sentence of 24 months` imprisonment, I found the sentence of 15 months` imprisonment not to be excessive and I saw no reason to interfere with the sentence imposed by the trial judge.

Grounds not stated in petition of appeal

I would like to address a final point. In the written submissions for the purposes of the appeal, the appellant raised new contentions that were not stated in his petition of appeal and were also not raised at the trial below. Also, these submissions containing contentions that had never been brought up before were submitted at a very late hour. The court frowns upon such behaviour exhibited by counsel. Any respondent before the court, be it the accused or the prosecution, deserves a fair chance to know the issues that are to be raised so that there will be ample time for him to prepare his case. Fresh allegations or contentions made at a very late hour are highly discouraged by the court.

In any event, I found that the fresh grounds of appeal stated in the written submissions of the appellant contained no merit whatsoever. Furthermore, counsel for the appellant chose not to argue these points before me in open court during the appeal. These contentions were baseless and did not affect the result of the appeal.

Conclusion

For the reasons stated above, I denied the criminal motion and dismissed the appeals against conviction and sentence.

Outcome:

Motion denied; appeal dismissed.

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