Moey Keng Kong v Public Prosecutor
[2001] SGHC 236

Case Number : MA 143/2001

Decision Date : 27 August 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Raj Kumar (Raj Kumar & Rama) for the appellant; Jill Tan Li Ching (Deputy Public Prosecutor) for the respondent

Parties : Moey Keng Kong — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Circumstances in which appellate court can interfere with trial court's sentence – Appellant bringing goods into Singapore without paying customs duty and GST – Whether trial judge's benchmark in relation to customs duty and GST correct – Whether fines manifestly excessive – Relevant factors in determining appropriate sentence – ss 130(1)(i) & 130(1)(iii) Customs Act (Cap 70, 1997 Ed)

Revenue Law – Customs and excise – Forfeiture of vehicle – Appellant bringing goods into Singapore without paying customs duty and GST – Appellant using vehicle to convey goods – Whether relevant that goods for personal consumption – Whether forfeiture provision mandatory – s 123(2) Customs Act (Cap 70, 1997 Ed)

Words and Phrases – 'Used in the commission of the offence'- s 123(2) Customs Act (Cap 70, 1997 Ed)

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Introduction

The appellant, Moey Keng Kong aged 57 is employed as a consultant engineer. In May 2001 he was charged and convicted in the district court under s 130(1)(a) of the Customs Act (Cap 70, 1997 Ed) of two charges of importing into Singapore assorted brands of cigars and liquor without paying customs duty. He was also convicted under s 130(1)(a) of the Customs Act, read with s 26 and s 77 of the Goods and Services Tax Act (Cap 117A, 1997 Ed), for failing to pay the goods and services tax (`GST`) on those same dutiable goods. The district judge ordered a fine of a total of $8,751.60 for all four charges, in default eight months` imprisonment. He also ordered the forfeiture of the cigars, liquor and a pick-up, registration number TS 5619 (`the vehicle`) under s 123(2) of the Customs Act. The appellant has paid the fines less a rebate after serving two days default sentence. He then appealed against his sentence and the forfeiture of his vehicle. I dismissed the appeal and now give my reasons.

Brief facts

On 27 February 2001 at about 10.30pm, the appellant arrived at Woodlands Checkpoint. The checkpoint had a customs clearance system, which was divided into red and green car arrival channels. The red lanes were intended for cars with goods to declare whereas the green lanes were for cars with no goods to declare. The appellant drove his vehicle, a Thailand registered vehicle TS 5619, into green lane 3 where he was stopped by Senior Customs Officer Abdul Razak bin A Rahman (`SCO Abdul Razak`) for a routine check. SCO Abdul Razak checked the vehicle and found a black plastic bag containing one box `AR Rangoon` brand cigars and three boxes of `Asoka` cigars on the floorboard behind the front passenger seat. He then referred the appellant to his superior, Higher

Superintendent of Customs Sim Yong Khoon (`HSC Sim`). HSC Sim asked the appellant whether he had any more cigars in the pick-up. The appellant denied having any more, although he admitted that the boxes of cigars found in the vehicle belonged to him. He said that the cigars were for private consumption and for friends when they visited him.

HSC Sim then instructed SCO Abdul Razak to conduct a more thorough search of the pick-up. In this second search, SCO Abdul Razak found five more boxes of cigars inside the toolbox compartment of the pick-up. This was located beneath the floorboard at the back of the cabin. He also found one bottle of `Maharaja` brand liquor in a leather bag on the front passenger seat and three bottles of `Kao Liang Chiew` in the side pouches of a golf bag found in the back of the pick-up. The appellant admitted that all nine boxes of cigars and four bottles of liquor found in the vehicle belonged to him. He also accepted that the nine boxes of cigars weighed a total of 2.164kg. According to the computation that was submitted to the court, the total customs duty payable on the four bottles of liquor was $45.10 and the GST payable was only $1.98. The customs duty and GST on the nine boxes of cigars also came up to a relatively modest amount of $389.50 and $12.77 respectively.

A person who fails to pay the required customs duty and tax on imported goods will be punished under s 130(1)(iii) of the Customs Act if (1) he was a first-time offender, (2) the goods imported were `tobacco products` within the meaning of s 130(3) of the Act, and (3) the goods exceeded 2kg in weight. All these elements were satisfied on the present facts as the appellant was a first-time offender who had smuggled 2.164kg of cigars into Singapore. Hence in respect of the first and second charges of importing into Singapore cigars, without paying for the requisite customs duty and GST, the appellant was liable under s 130(1)(iii) of the Customs Act. Section 130(1)(iii) in full reads as follows:

> *where the goods consist wholly or partly of tobacco products and such tobacco products exceed 2 kilogrammes in weight - on the first conviction to both a fine of not less than 15 times the amount of the customs duty, excise duty or tax and not more than 20 times the amount of the customs duty, excise duty or tax or $10,000, whichever is the greater, or to imprisonment for a term not exceeding 3 years or to both.*

For the third and fourth charges of smuggling uncustomed liquor into Singapore, the appellant was punishable under s 130(1)(i) of the Customs Act to

> *a fine of not less than 10 times the amount of the customs duty, excise duty or tax or $5,000 whichever is the lesser amount, and of not more than 20 times the amount of the customs duty, excise duty or tax or $5,000 whichever is the greater amount ...*

In addition, the appellant would also be punishable, in the event of his non-payment of any of the fines imposed, with imprisonment for a term not exceeding the duration as laid down in s 119 of the Act in respect of each fine.

The judgment below

For the first and second charges (DAC 7974/2001 and DAC 7975/2001) the district judge ordered the appellant to pay a fine of approximately 20 times the amount of the customs duty and GST payable.

For the third and fourth charges (DAC 7976/2001 and DAC 7977/2001), the judge imposed a fine of 15 times the amount of customs duty and GST payable. He also ordered a default term of eight months` imprisonment. The fines were as follows:

Charge	Fines imposed
DAC 7974/2001	$389.50 x 20 [equals][ensp]$7,790.00
DAC 7975/2001	$12.77 x 20 [ensp][equals][ensp]$255.40
DAC 7976/2001	$45.10 x 15 [ensp][equals][ensp]$676.50
DAC 7977/2001	$1.98 x 15 [ensp][ensp][equals][ensp]$29.70

The vehicle that was used to transport the bottles of liquor and boxes of cigars was also ordered to be forfeited.

The appeal

The appellant appealed against the sentence passed by the district judge on the following grounds:

(1) The district judge erred in holding that the appropriate benchmark sentence was 20 times the duty payable for DAC 7974/2001 and DAC 7975/2001.

(2) The fines were manifestly excessive considering that the appellant had a clean record.

The appellant was also dissatisfied with the order of forfeiture of the goods and the vehicle and sought the release of the latter. However no substantive grounds were advanced by the appellant in this appeal, save that he had bought the goods for his own personal consumption and not for trade or business.

(1)BENCHMARK SENTENCE OF 20 TIMES THE TAX PAYABLE FOR DAC 7974/2001 AND DAC 7975/2001

As I have stated above, the amounts of customs duty and GST payable on the nine boxes of cigars were $389.50 and $12.77 respectively. It must be noted that, because of the relatively low amount of tax payable at the first instance, the statutory maximum of the fines payable is $10,000 and not the amount that is 20 times the customs duty or tax payable, ie $7,790. Hence applying s 130(1)(iii) of the Customs Act, the permissible range of fines that can be imposed by the court came to $5,842.50-$10,000 for the customs duty and $191.50-$10,000 for the GST. The judge applied the benchmark of 20 times the tax payable and fined the appellant $7,790 for the customs duty and $255.40 for the GST. I did not consider that the judge had erred in law in applying the benchmark of 20 times the tax payable. This plainly fell within the range of fines permitted by s 130(1)(iii) and was also consistent with the current sentencing practice of the subordinate courts.

(2) WHETHER THE FINES WERE `MANIFESTLY EXCESSIVE`

The nine boxes of cigars (DAC 7974/2001 and DAC 7975/2001)

The role of an appellate court when considering an appeal as to the sentence imposed by the trial court has been re-stated recently in **Chia Kim Heng Frederick v PP** [1992] 1 SLR 361 . The court can and will interfere if it is satisfied that (a) the sentencing judge has made a wrong decision as to the proper factual basis for sentence; (b) there has been an error on the part of the trial judge in appreciating the material placed before him; (c) the sentence was wrong in principle; and (d) the sentence imposed was manifestly excessive. In the present case, it was clear that the only question was whether the fines which had been imposed for the nine boxes of cigars and the four bottles of liquor were `manifestly excessive`.

Important factors in determining the appropriate sentence are the amount of duty evaded, the quantity of goods involved, repetition of the offence, whether the offender was acting on his own or was involved in a syndicated operation, and the role of the offender. Only the first two factors were relevant to us here. I noted that the appellant had `imported` only 2.164kg of cigars into Singapore. This was just slightly in excess of the `statutory limit` of two kilogrammes in s 130(1)(iii) of the Customs Act. Hence, in the absence of any other aggravating factors, the fact that a minimal amount of cigars was being imported should have entitled the appellant to the minimal sentence as prescribed by s 130(1)(iii).

Nevertheless it must be remembered that the fines under s 130(1)(i) and by extension s 130(1)(iii) are intended by Parliament to have a retributive and deterrent effect. See **Chia Kah Boon v PP** [1999] 4 SLR 72 . The fines imposed have to be fixed at a level which would be sufficiently high to achieve the dual objectives of deterrence, in terms of deterring both the appellant and other importers from evading customs duty and GST on imported goods in future, and retribution, in the sense of reflecting society`s abhorrence of the offence under s 130(1)(a) of the Customs Act.

With these factors in mind, I did not consider that the fines imposed were `manifestly excessive`. The fines of $7,790 for the customs duty and $255.40 for the GST were actually in the lower half of the permissible range as specified by s 130(1)(iii) of the Customs Act. The judge had also refrained from imposing the maximum sentence of $10,000 and/or a term of imprisonment of three years. The fact that the appellant was a first-time offender could have no additional mitigating effect as this factor had already been taken into consideration for sentencing under s 130(1)(iii) of the Customs Act. I was aware that in ***Chia Kah Boon v PP*** (supra) the fine was pegged at only five times the GST payable. However that case was distinguishable from the present because, whilst the individual fines imposed there were neither unreasonable nor excessive, the cumulative effect of all the fines imposed was crushing and violated the totality rule in sentencing. There is no such relevant consideration here. The appellant is employed as a consultant engineer and the total fines imposed of $8,751.60 was more than in keeping with his financial capability.

The four bottles of liquor (DAC 7976/2001 and DAC 7977/2001)

For the four bottles of liquor, the amount of customs duty and GST which the appellant ought to have paid was $45.10 and $1.98 respectively. Hence applying s 130(1)(i) of the Customs Act, the permissible range of fines that could be imposed by the court was $451-$5,000 for the customs duty and $19.80-$5,000 for the GST. The judge imposed fines of 15 times the amount of customs duty and GST payable. This worked out to be $676.50 and $29.70 respectively.

The appellant`s contention that the sentences imposed for the importation of the four bottles of liquor were `manifestly excessive` could not be made out. Similar considerations as stated above apply. The fines imposed were minimal. The benchmark of 15 times applied was also consistent with current subordinate courts` sentencing practice with the range of sentences currently being imposed as between 15 to 20 times the customs duty or tax leviable.

FORFEITURE OF THE VEHICLE TS 5619

I turned then to the last ground of appeal. The appellant urged the court to order the release of the forfeited vehicle on the basis that the goods conveyed in it were only meant for his personal consumption. The section governing forfeiture is s 123(2) of the Customs Act, which provides that:

> *An order for the forfeiture of goods shall be made if it is proved to the satisfaction of the court that an offence under this Act or any subsidiary legislation made thereunder has been committed and that the goods were the subject-matter of, or were used in the commission of, the offence, notwithstanding that no person may have been convicted of the offence.*

`Goods` is in turn defined in s 122(2) of the Customs Act to include `receptacles, packages, ***vehicles*** , vessels not exceeding 200 tons net registered tonnage and aircraft, other than aircraft engaged on international carriage` (emphasis is added).

It is clear from s 123(2) itself that forfeiture is mandatory once two elements are proved: (1) an offence under the Customs Act or any subsidiary legislation made thereunder has been committed, and (2) the goods `were used in the commission of the offence`. Goods will be `used in the commission of the offence` if they are `directly related and substantially connected` to the commission of the offence: **PP v Mayban Finance (Singapore)** [1998] 1 SLR 462 .

The weight of case law is also that there is no discretion within the courts to refuse any application for forfeiture. In **R v Ng Hee Weng** [1956] MLJ 85 , a case concerned with s 123 of the Customs Ordinance 1952 which was in pari materia with s 123 of our Customs Act, Good J said that:

> *If the matters specified therein [elements 1 and 2 above] are proved to the satisfaction of the Court, the Court must order forfeiture both of the goods which were the subject matter of the offence and also of the goods ... which were used in the commission of the offence ...*

The same point was reiterated in **PP v M/s Serve You Motor Services** [1996] 1 SLR 669 , a case relied upon by the public prosecutor where the High Court held that (at p 675):

> *Though a party may be innocent and have taken all necessary precautions, forfeiture will have to be ordered once it is clear that an offence had been committed. That may not be totally satisfactory, but the words of the provision are clear.*

Similar conclusions were also reached in **Public Finance v PP** [1997] 3 SLR 354 and **Bright Impex v PP** [1998] 3 SLR 405 .

The legislature has also clearly indicated that the use of the word `shall` in s 123(2) of the Customs Act is mandatory and not merely directory. During the Parliamentary debate on 5 February 1996, the Minister for Law Professor S Jayakumar expressly said that mandatory forfeiture provisions are necessary because the public interest requires effective enforcement of customs laws. The provisions on forfeiture are intended by Parliament to act as a strong deterrent against the smuggling of dutiable

goods which is viewed as a serious offence. It is also meant to target and `dry up` the means and resources by which smugglers carry out their illegal activities. Hence there can be no discretion within the courts to refuse forfeiture.

On the facts of this present appeal, it was undoubted that an offence under s 130(1)(a) of the Customs Act had been committed. It was also clear that the vehicle TS 5619 was `used in the commission of the offence` as it was used by the appellant to transport the nine boxes of uncustomed cigars and four bottles of uncustomed liquor all the way from Penang to Singapore. The appellant also made use of the hidden tool compartment of the vehicle to conceal a large portion of the uncustomed cigars to evade detection. Therefore both elements required for the operation of s 123(2) of the Customs Act were satisfied. The vehicle was also `goods` that can be forfeited as defined by s 123(2) of the Customs Act. It followed that the court must forfeit the vehicle in accordance with s 123(2) of the Act. The fact that the uncustomed goods conveyed were intended for the appellant`s personal consumption was irrelevant. The clear words of the Act must be applied and forfeiture must be ordered.

Conclusion

For all the above reasons, I dismissed the appeal.

Outcome:

Appeal dismissed.