Public Prosecutor v Ong Ker Seng
[2001] SGHC 263

Case Number : MA 14/2001

Decision Date : 12 September 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Chan Wang Ho (Deputy Public Prosecutor) for the appellant/respondent; Subhas Anandan and Anand Nalachandran (Harry Elias Partnership) for the respondent/appellant

Parties : Public Prosecutor — Ong Ker Seng

Criminal Law – Offences – Undischarged bankrupt obtaining loans without disclosing status to lender – When disclosure to be made – s 141(1)(a) Bankruptcy Act (Cap 20, 2000 Ed)

Criminal Procedure and Sentencing – Sentencing – Undischarged bankrupt obtaining loans without disclosing status to lender – Trial judge imposing fine – Respondent's employer paying the fine – Respondent repaying loans in full after conviction but before sentencing – Whether repayment of loans amounts to restitution – Validity of respondent's mitigating factors – Whether sentence manifestly inadequate – Aggravating factors – Whether custodial sentence more appropriate – ss 141(1)(a) & 146 Bankruptcy Act (Cap 20, 2000 Ed)

: The respondent was convicted by District Judge Yap Siew Yong on 13 January 2001 of two offences under s 141(1)(a) of the Bankruptcy Act (Cap 20, 2000 Ed) (`the Act`), for obtaining credit beyond $500, without informing the lender that he was (and remains) an undischarged bankrupt. The offence is punishable under s 146 of the Act with a fine not exceeding $10,000, or imprisonment for a term not exceeding three years, or both. In the court below, the respondent was sentenced to pay a fine of $10,000 on each charge, in default five months` imprisonment for each charge. The total fine was therefore $20,000, in default ten months` imprisonment. The fine was paid.

The prosecution appealed against the sentence on the ground that it was manifestly inadequate while the respondent cross-appealed against conviction. I dealt first with the respondent`s appeal against conviction. At the end of the hearing before me, I dismissed the respondent`s appeal against conviction and allowed the prosecution`s appeal on sentence. I now give my reasons.

The facts

At all material times, the respondent was employed as a legal officer with DP Financial Associates Pte Ltd (`DP Financial`), which acts as a managing agent for Hitachi Leasing (S) Pte Ltd (`Hitachi`).

The respondent was adjudicated a bankrupt on 24 April 1992 and was an undischarged bankrupt on two occasions when he obtained credit of more that $500 from one Law Ah Liak (`Mr Law`).

Sometime around February 1998, Mr Law had financial problems and needed to apply for a loan from Hitachi. On 18 February 1998, a mutual friend, one Chong Siong Fah (`Chong`) arranged for the respondent and Mr Law to meet in the coffee house of Phoenix Hotel to discuss a loan of $150,000 from Hitachi to Mr Law (`the Hitachi loan`). At the end of that meeting, Mr Law gave the respondent a private loan of $25,000 in the form of a cash cheque in the car park of Phoenix Hotel.

Subsequently, Mr Law applied to Hitachi for the $150,000 Hitachi loan using his car as security. His application was successful.

On 23 April 1998, Mr Law went to the premises of Hitachi to collect the cheque for the Hitachi loan. As DP Financial and Hitachi shared offices, he met the respondent in his office where the respondent obtained a further loan of $10,000 from him, in the form of two cash cheques of $5,000 each.

Incidentally, Mr Law was himself adjudicated a bankrupt on 30 April 1999.

After failing to get a satisfactory reply from the respondent on the return of the two loans, Mr Law complained to the Corrupt Practices Investigation Bureau (`CPIB`) on 18 September 1999.

Decision of the trial judge

The trial judge was of the view that in order to make out the offence under s 141(1)(a) of the Act, the prosecution must prove: that the respondent was an undischarged bankrupt at the time he obtained the credit; that the credit obtained was $500 or more; and that the respondent did not inform the person from whom he obtained credit that he was an undischarged bankrupt.

Conviction

It was undisputed that the respondent was an undischarged bankrupt at the time when he committed the offences. It was also undisputed that the act of obtaining a loan qualified as the obtaining of credit within the meaning of s 141(1)(a) of the Act.

Section 141(1)(a) of the Act is silent as to the relevant time when the bankrupt comes under a duty to inform the proposed lender of his insolvent status. The trial judge was of the view that the bankrupt should inform the proposed lender about his status in connection with his obtaining or applying for the credit in question. Accordingly, disclosure of the bankrupt`s status in a conversation or circumstances unrelated to his seeking credit (such as in situations outside the context of the loan discussion) cannot be regarded as compliance with s 141(1)(a) of the Act.

After evaluating the evidence given by witnesses from both sides, the trial judge found that Mr Law`s evidence was consistent and credible. On the other hand, she found the respondent to be inconsistent and unreliable, undeserving of credit as a witness.

The trial judge found that the meeting at Phoenix Hotel was in fact to discuss an exchange of favours: (1) the respondent was to support Mr Law`s application for the Hitachi loan, and (2) in return, Mr Law would privately lend the respondent the $25,000. The trial judge further found that when the respondent obtained this loan of $25,000, it was not necessary for him to induce Mr Law to make the loan by withholding disclosure of his bankruptcy as Mr Law was willing to lend him that sum, simply in return for the respondent`s expressed willingness to support his application for the Hitachi loan. In any case, the trial judge went on to find that Mr Law was never informed by either the respondent or Chong about the respondent`s status as an undischarged bankrupt.

On the second loan of $10,000, the trial judge believed Mr Law`s testimony that the cheque for the Hitachi loan was handed over to him in the office of the respondent and she disbelieved a defence witness, Ms Wan, who testified that the cheque was personally handed over to Mr Law in her office. In the trial judge`s words, the second loan was `crudely wrenched` out of Mr Law who never offered it willingly as a loan to the respondent.

The trial judge found that the prosecution had proven the two charges facing the respondent beyond reasonable doubt, and accordingly, the respondent was found guilty and convicted of both charges.

Sentencing

In his mitigation plea, the respondent submitted that he was undergoing financial hardship at the time of the offences. In particular, at the time he made the request to Mr Law for the second loan, he was being hounded by loansharks due to his previous borrowings from them and he also needed money urgently to assist in his nephew`s medical expenses in an intensive care unit at a hospital. Also, he was in poor health and had been under medication since his triple heart by-pass operation in April 1996.

In sentencing him, the district judge took into consideration the antecedents of the respondent. She noted that, as a former lawyer, the respondent should be well aware of his duties to disclose his bankruptcy when he obtained credit from Mr Law. She further noted that full restitution to Mr Law had been made by the time of sentencing and accepted the plea by the respondent that a non-custodial sentence was appropriate as his family was still relying on him for financial support. A total fine of $20,000 was ordered, in default ten months` imprisonment.

Appeal against conviction

CIRCUMSTANCES OF NOTIFICATION

The respondent contended that the trial judge erred in finding that a bankrupt`s insolvent status should be disclosed personally and directly just prior to obtaining credit from that person. The respondent also contended that the trial judge erred in finding that a bankrupt`s duty to disclose could not be discharged through an agent in any conversation some time prior to obtaining the credit.

I found the arguments of the respondent fallacious. Nowhere in the trial judge`s grounds of decision did she state that disclosure of a bankrupt`s status had to be done personally and directly just prior to obtaining credit from that person. The trial judge merely stated that as the ideal situation. Further, the trial judge clearly stated that a bankrupt can indeed instruct his agent to inform the person giving the credit of his bankrupt status. She made it clear, however, that the ultimate responsibility rests on the bankrupt and a bankrupt who chose to rely on an agent also bore the risk of the agent`s failure to carry out his instructions.

With regard to the proper time and context for a notification to be valid, the trial judge held that, even if Chong was indeed telling the truth when he said that Mr Law was informed by him in 1997 of the respondent`s bankruptcy, the respondent was still liable because the information was not given in the context of the respondent obtaining credit from Mr Law. The respondent, however, contended that the trial judge erred in this holding, contending instead that s 141(1)(a) of the Act leaves open the issue of the manner and form in which an undischarged bankrupt can inform the proposed lender. He argued that, as such, notification in any form and in any context should be deemed sufficient compliance with the Act.

I disagreed with both the respondent and the trial judge. The object of s 141(1)(a) of the Act is to protect innocent people from being misled by the bankrupt`s promise to pay. The onus, therefore,

should not be on lenders to remember if the person they are providing credit to is, or is not, a bankrupt. By virtue of s 141(1)(a) of the Act, the bankrupt has been specifically tasked with the duty to inform the proposed lender before obtaining credit. In **R v Zeitlin** [1932] 23 Cr App R 163 it was said that disclosure by the undischarged bankrupt need not be at the very moment when credit is obtained, provided it was made at a reasonable time before the transaction took place. As the court in **R v Duke of Leinster** [1924] 1 KB 311 said at p 316, `disclosure must be made in fact to the person giving the credit`. Hence, where notification of the bankrupt`s status has previously been conveyed by the bankrupt (or his agent) to the proposed lender, ***even*** in circumstances extending outside the context of the lending transaction, then disclosure has been made as a matter of fact, and no offence is committed. Where a bankrupt ***reasonably*** believes that the fact that he is an undischarged bankrupt continues to feature in the proposed lender`s mind when extending the credit, then there is no need to inform the lender again. Of course, in such a case, the bankrupt runs a great risk, in that the lender may subsequently accuse him of not previously declaring his insolvent status. To avoid doubt, I agreed with the trial judge that it is in the personal interest of the bankrupt to personally and directly inform the proposed lender of his status at the point when he obtains credit. Optimally, such matters should be properly documented.

CREDIBILITY OF WITNESSES

The respondent contended that the trial judge erred in accepting the evidence of Mr Law and in finding that Mr Law was a credible witness despite his evasive responses and discrepancies in evidence. The respondent also contended that the judge erred when she rejected his evidence and found that he was an inconsistent and unreliable witness.

In the present case, the critical finding of the trial judge was that Mr Law`s evidence was consistent and credible. It was obvious from the records that Mr Law`s version of events was able to withstand vigorous cross-examination by defence counsel. Even when the defence sought to impeach Mr Law by using statements made by him to the CPIB, the trial judge was able to rule that these statutory statements were not inconsistent with Mr Law`s testimony in court. I therefore agreed with the trial judge that Mr Law was telling the truth.

On the other hand, there were several material discrepancies between the respondent`s evidence in court and the statements given to the CPIB. For example, the respondent said that the meeting at Phoenix Hotel was only to discuss the private loan to him from Mr Law and there was no mention about Mr Law`s intended application for a loan from Hitachi. According to the respondent, he believed that, because Chong had spoken to Mr Law about his personal problems, Mr Law was willing to lend him $25,000 and even arrange a meeting to pass him money! It was apparent to anyone that such a story was highly suspect. It was extremely unlikely for financially strapped Mr Law to unconditionally extend such a large loan to the respondent without any clear benefit to himself. Furthermore, the respondent was not a person whom he knew well; even if I were to give the respondent the benefit of the doubt, at best, the respondent and Mr Law had had only one group dinner together in 1997. Hence, I agreed with the trial judge that the respondent`s evidence was not believable and he was on the whole unreliable and unworthy of credit as a witness.

The trial judge found that, when the respondent obtained the first loan of $25,000 from Mr Law, it was not necessary for him to induce Mr Law to lend him money by withholding disclosure of his bankruptcy status. This absence of motive did not assist the respondent much because Mr Law had testified convincingly in court that he did not know that the respondent was an undischarged bankrupt, and had he been aware of this, he would never have lent money to him.

The respondent also testified that on 23 April 1998 Mr Law offered the second loan of $10,000, again,

for altruistic reasons, in order for him to assist in his sick nephew`s medical bills. In the light of Mr Law`s financial difficulties at that time as well as the superficial relationship, if any, that existed between the two men, it was highly unlikely that Mr Law would offer loans to him without even getting a receipt for them. Consistent with Mr Law`s version of events, Mr Law would have had to be in dire straits to have been cornered into making these personal loans to the respondent.

Finally, bearing in mind the fact that the trial judge had the opportunity to assess the demeanour of the witnesses on the stand, I was of the view that the trial judge`s findings of fact were sound and should not be disturbed. In particular, I did not attempt to overturn the findings relating to the credibility of Mr Law and that of the respondent. In the light of **Tan Hung Yeoh v PP** [1999] 3 SLR 93 , I was reluctant to overturn findings so closely tied to the trial judge`s rulings on the evidence given by witnesses at trial. I agreed that the case against the respondent had been proven beyond a reasonable doubt. Accordingly, I dismissed the respondent`s appeal against conviction.

Appeal on sentence

MITIGATION

The role of the mitigation plea in the criminal justice process is to provide an opportunity for an offender to present factors personal to himself which tend to reduce the gravity of his offence and also assist the court in coming out with an appropriate sentence consistent with justice. A mitigating factor, however, should be something for which an offender can be `given credit` (**Krishan Chand v PP** [1995] 2 SLR 291).

In this case, I was not impressed with the mitigation plea put forward to the district judge below as many of those factors pleaded have already been rejected as mitigating factors by our courts. For instance, the respondent testified that he is suffering from ill-health. This was rejected as ill-health is not a mitigating factor except in the most exceptional cases when judicial mercy may be exercised. Next, the respondent pleaded that he was driven to commit the crime in his desperate bid to borrow money to repay loansharks who were hounding him. Again, this point would not assist him as the courts have long stated that, save in the most exceptional cases, financial difficulties may not be relied on during mitigation (**Sim Yeow Seng v PP** [1995] 3 SLR 44 and **Lai Oei Mui Jenny v PP** [1993] 3 SLR 305). The trial judge, however, seemed to have been swayed by the respondent`s submission that the second loan of $10,000 was procured to help pay for the medical expenses of his chronically-ill nephew in an ICU. While it may be tempting for a sentencing judge to accept such an argument, there was no persuasive evidence put forward to this court or to the court below to prove that the money was indeed put to such use. In any case, I did not think that a sentencing judge should readily accept such a plea since it might be easily abused and used as an excuse for criminals to harm others and commit crimes.

PARTIAL PAYMENT

The rationale behind the s 141(1)(a) Bankruptcy Act offence is that a person who has a track record of losing money extended by way of credit from other people has demonstrated his inability to manage his financial affairs. After being made insolvent, the bankrupt should not be left at liberty to freely obtain further credit and potentially lose more of an innocent lender`s money. One of the aims of creating the offence in s 141(1)(a) of the Act is to ensure that undischarged bankrupts inform proposed lenders of their status before credit is extended to them. In this case, the trial judge gave

credit for the respondent`s intention to repay Mr Law for the loans, as evidenced by the making of two payments to Hitachi on behalf of Mr Law, even before any complaint was made to the CPIB. She also took into consideration the fact that `full restitution` of the outstanding sum had been made to Mr Law by the time of sentencing.

While I agreed that the repayment of the loan is generally a relevant factor to be taken into account when sentencing for bankruptcy offences, it must be looked at in its proper context. The repayment of the loan here was unlike the act of restitution in cases where the gist of the offence was the deprivation of property. The wrong in the s 141(1)(a) Bankruptcy Act offence was well stated by the Cork Committee in the UK at Cmnd 8558, para 1844:

> *Logically, in our view, the wrong consists, not in the failure to pay the debt (which is a civil wrong), but in the deception practised on the creditor by obtaining credit from him knowing that he would not extend it if he knew the circumstances. Even where the bill is paid at once, the creditor was still put unjustifiably at risk.*

Since there was no allegation of any deprivation of property in this case, `restitution` was an inappropriate term. It goes without saying that the loan to the bankrupt had to be repaid at some point or else the bankrupt would further diminish his prospects for discharge in future. It follows that repayment of the loan by the bankrupt in these cases should not be regarded to be as strong a mitigating factor as restitution in deprivation of property cases.

On the other hand, there may be bankrupts who feel great remorse after committing the offence and try to find ways and means to quickly repay the lender. In deserving cases, the sentencing judge may (after bearing in mind that less credit should be given compared with restitution in deprivation of property cases) give appropriate credit to an offender who demonstrates his remorse, good character and potential for reform in such a manner.

On the facts of this case, I was hesitant to give much credit for the respondent`s full repayment of the loan for another reason. I noted that a cheque dated 29 December 2000 for the then outstanding sum of $20,623.61 was paid over only ***after*** the respondent was convicted on 16 December 2000, but ***before*** sentence was passed on 13 January 2001. In deprivation of property cases, where restitution is made in circumstances which may lead one to suspect that it was done in the hope of getting a lighter sentence, a sentencer will not give much credit for it (**Soong Hee Sin v PP** [2001] 2 SLR 253). As a matter of fact, in ***Soong*** `s case (supra at [para ]10) I said: `If anything, such mindset appeared to me to demonstrate calculated purposefulness rather than genuine remorse on the appellant`s part.` Similar principles should apply here as well. While full repayment of the loan was eventually made to Mr Law, the respondent should not be given full credit since the final repayment made to Mr Law was done under circumstances which led me to believe that it was made with calculated purposefulness in the hope of obtaining a lower sentence.

Final sentence

In offences of obtaining credit without disclosure, I agreed with the view expressed in **R v Schefelaar** [1939] SSLR 221 [1939] MLJ 45 that such offences are generally `more appropriately punished with imprisonment than with a fine`. In that case, McElwaine CJ said that, when faced with a heavy fine, it is improbable that a bankrupt would have sufficient funds to pay it. Hence, what is likely to follow in these cases is that either someone else would have to pay the fine on the offender`s behalf (for

which any punitive effect would clearly be diluted), or, alternatively, the fine would have to be derived from funds which should be available for creditors in the first place. As such, I decided that a custodial sentence was appropriate here. As a matter of fact, the fine imposed by the trial judge in the court below was indeed paid by the respondent`s employers.

In amending the sentence passed by the trial judge, I noted that there were a number of aggravating factors. The circumstances in which the respondent had obtained the loans were highly dishonest and were committed over an extended period of two months. During this period, the respondent knew full well what he was doing when he planned and committed the offences. The amount of credit obtained by the respondent was large, totalling $35,000. The victim, Mr Law, was already in financial difficulties when he was preyed upon by someone whom he thought was a senior member of a reputable financial institution. I further noted that the respondent had breached the trust and authority reposed in him by his employers when he `requested` the loans from Mr Law, utilising his position in Hitachi. Taking all these factors into consideration, I felt that a custodial sentence was necessary to reflect society`s abhorrence of such behaviour and also to serve as a general deterrent for like-minded bankrupts. Accordingly, I allowed the appeal on sentence and amended the sentence to three months` imprisonment on each charge. I ordered the sentences to run consecutively, making a total sentence of six months` imprisonment. The fine imposed by the trial judge was set aside and ordered to be refunded forthwith.

Outcome:

Appeal against conviction dismissed; appeal against sentence allowed.