Soong Hee Sin v Public Prosecutor
[2001] SGHC 50

Case Number : MA 324/2000

Decision Date : 19 March 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Lim Kia Tong (Lim Kia Tong & Partners) for the appellant; Hay Hung Chun (Deputy Public Prosecutor) for the respondent

Parties : Soong Hee Sin — Public Prosecutor

Criminal Procedure and Sentencing – Appeal – Sentencing – Criminal breach of trust whilst employed as servant – Accused pleaded guilty and unrepresented – No restitution made of misappropriated moneys up to time of hearing – Whether duty on sentencing judge to inform accused about relevance of restitution as mitigating factor – s 408 Penal Code (Cap 224)

Criminal Procedure and Sentencing – Appeal – Whether sentence manifestly excessive – Considerations and mitigating factors – s 408 Penal Code (Cap 224)

: This was an appeal only on sentence. After hearing the appellant`s counsel and the DPP, I allowed the appeal and reduced the appellant`s sentence from 15 to nine months` imprisonment. I now give my reasons.

Salient facts

The appellant pleaded guilty in the court below to one charge of committing criminal breach of trust (`CBT`) of a sum of $10,485.22 while being employed as a servant under s 408 of the Penal Code (Cap 224).

The agreed statement of facts which the appellant admitted to without qualification revealed that he was employed as a sales representative of Chin Bee Trading between 30 November 1998 and 1 July 2000. During this time, he was entrusted with making sales of provisions and collecting cash from his erstwhile employer`s various customers. Between 31 January 2000 and 1 July 2000, he collected various sums of money totalling $10,485.22 from 21 of his then employer`s customers, but he failed to hand over the money to the company`s cashier as he should have done. He was arrested on 6 November 2000 on which occasion he promptly admitted to having misappropriated the money.

The appellant was unrepresented in the court below. In mitigation, he said that he was the sole breadwinner of his family and asked for leniency.

In sentencing the district judge took into account the appellant`s plea of guilt as well as his lack of antecedents. He noted, however, that no restitution had been made by the appellant nor did he indicate that he was able to make restitution. Upon a consideration of all the factors, the district judge sentenced him to 15 months` imprisonment.

The appeal

Before me, his counsel`s main grouse was the complaint that the district judge had not informed the appellant of the significance and relevance of restitution to his sentence. The argument ran that, as the appellant was unrepresented in the court below, it was the duty of the district judge to inform

the appellant of the role of restitution in sentencing, and then to ask if he intended to make such restitution. The district judge`s failure to instruct the appellant in this regard, counsel urged, rendered his consideration of the lack of restitution as a factor in passing sentence erroneous.

I found counsel`s arguments in this regard to be simply untenable. The contention that it was the duty of the district judge to educate the appellant of the manifold factors that play a part in the exercise of sentencing discretion strikes at the very root of the independence of the trial judge as an impartial umpire. I had declared this to be the position in **Rajeevan Edakalavan v PP** [1998] 1 SLR 815 , the pertinent facts of which were similar to those in the present case, and I reiterate the views I had stated therein that:

> *[i]t is not the duty of the judge to inform the accused of the defences or other options that may be open to him and advantageous to his case. That is the duty of the counsel who is appointed to defend him in court, if the accused so chooses to be represented. The onus does not shift to the judge (or the prosecution, for that matter) simply because the accused is unrepresented. That will be placing too onerous a burden on the judge. Furthermore, the judge will be performing two completely incompatible and irreconcilable roles - one as the adjudicator, the other as the de facto defence counsel. The judge`s position of impartiality and independence will be gravely undermined. There will evidently be a conflict of interest and an issue of bias ([para] 22).*

In my opinion, the above statement of the law applied with equal force to the present case. While ***Rajeevan*** `s case concerned the duty of a judge vis-.-vis unrepresented accused persons with respect to the substantive offence and thus the plea of guilt itself, there is nothing to prevent the same principles from being applied at the sentencing stage as well. The judge`s role, at any stage of the process, is always to serve as an independent and unbiased adjudicator, a role which he would be hard placed to discharge if he had to proffer or extend his own legal advice to either of the parties before the court. It is pertinent that justice not only be done, but be seen to be done and the latter I find would be impossible to achieve if judges were burdened with the added duty of advising accused persons of every possible defence strategy.

This view is supported by art 9(3) of the Constitution which states that every accused person has the right to consult and be defended by a legal practitioner of his choice. That an accused person chooses not to exercise this right cannot have the effect of shifting the burden of his defence onto the judge whose task can conflict with that of the defence. Indeed, this is precisely the reason why arguments that an accused person was ignorant of this or that point of law and thus prejudiced because he or she was unrepresented have not been well received in previous cases: see eg **Packir Malim v PP** [1997] 3 SLR 429 and **Virgie Rizza V Leong v PP** (Unreported) . If an accused person voluntarily chooses not to avail himself of his constitutional right to an advocate, it cannot be that the judge`s duty towards him then suddenly becomes more arduous than it would have been had counsel been appointed, for an unfair advantage would then accrue to accused persons who do not consult their own lawyers. Indeed, to accept counsel`s submissions in this case would create an incentive for accused persons not to instruct their own lawyers, knowing that they can depend on the judge for legal advice, with the latter`s failure to do so then amounting to easy grounds for an appeal. Further, there is the added difficulty of where one should draw the line should such a duty be held to exist for the question then arises as to how much and to what degree of detail of the law the judge should seek to impart to the accused before he may be said to have discharged his duty adequately. Certainly where the plea of guilt itself is concerned, the duty of the judge has always been to ensure that the plea is valid and unequivocal, that the accused understands the nature and consequences of his plea and that the accused intends to admit without qualification to the offence

alleged against him. But this duty on the part of the judge exists irrespective and regardless of whether or not the accused is represented and more importantly, does not impugn on the judge`s function as an objective referee. Simply to ensure that an accused person understands the nature and consequence of his plea or that the facts are admitted to without qualification do not carry any risk of unfairness or prejudice for the judge is there merely seeking to satisfy himself that all the elements of the charge have been made out. On the other hand the same cannot be said of the further duty to advise an accused person of possible defences or factors that play a part in sentencing for the danger of bias then becomes a very real possibility. As a result, such an extended duty ought not be held to exist concurrently, for the task of lending advice is one which has traditionally been and should rightfully be reserved for defence counsel alone. It is simply absurd to expect that a judge should in every case be burdened with the duty of ascertaining from the accused whether he would like to make restitution, and, if so, if he would like his sentencing to be adjourned until such further date that he has completed making his restitution! Indeed I find it exceedingly difficult, if not impossible, for a judge who had previously so advised an accused person to be perceived as having meted out a fair sentence when one is eventually passed.

In the light of the above reasons, I found that there was no duty on the district judge in this case to advise the appellant of the significance or relevance of restitution in sentencing. As such, the failure by the judge to do so did not vitiate the subsequent discretion exercised by him in passing sentence. In any event, the fact in this case remained that the appellant had, up to the time of the hearing in the court below, failed to make any restitution of the misappropriated moneys whatsoever. It will be recalled that he left the company`s employ on 1 July 2000 and was not arrested until more than four months later in November. Throughout this time, he failed to effect any restitution whether partial or full, as a result of which I could only infer that he felt little or no compunction or remorse for his misdeeds during that time. In **Krishan Chand v PP** [1995] 2 SLR 291 , it was said that the fact of restitution goes to some extent towards showing remorse, genuine good character and reformation on the part of the offender. Restitution made voluntarily before the commencement of criminal proceedings or in its earliest stages thus carries a higher mitigating value for it shows that the offender is genuinely sorry for his mistake. On the other hand, where the sole motive for restitution is the hope or expectation of obtaining a lighter punishment, then the fact of restitution must be of little mitigating value. As such, I found that, even if the district judge had asked the appellant in this case if he intended to make restitution and he had replied that he did, the reasons behind such a response would remain highly questionable. In my view, restitution as a mitigating factor is of decisive significance only when it is made voluntarily for only then would it be a display of true moral conscience on the part of the accused. As the DPP rightly pointed out, the best test of that genuine moral conscience occurs precisely when an accused is unrepresented for only then can the judge be absolutely certain that any restitution made was truly the result of unadulterated remorse on his part, rather than the contrived action of one previously advised on the law.

Counsel then sought to stress tirelessly before me the fact that his client had indeed made partial restitution of $5,000 to Chin Bee Trading since the time of his sentencing in the court below. A look at the documents tendered by counsel, however, revealed that such restitution was made only a week before the hearing of this appeal, which gave me much reason to query the motives behind it. In my view, little or no mitigating weight should be placed on the fact of this restitution as it was something which arose only after the end of the hearing in the court below, thus rendering it a form of fresh evidence for which leave of court was necessary in order for it to be introduced on appeal. As no motion was filed by counsel to obtain the requisite leave, I found that the evidence of the subsequent restitution made by the appellant was inadmissible. Even if I did admit it in any case, the view espoused above that little weight should be given to it as a mitigating factor applied with full force as it was patent that any restitution was made only and obviously on the advice of counsel, evidently in the hope of getting a lighter sentence on appeal. If anything, such mindset appeared to

me to demonstrate calculated purposefulness rather than genuine remorse on the appellant`s part. As such, little weight should be attributed to it as a mitigating factor. In the premises, I found that any intention at all by the appellant to make restitution, even if it did exist, existed only after he had instructed counsel in this appeal, and as such bore little consequence to his mitigation where his sentence was concerned.

Counsel next led me through a whole line of sentencing precedents and sought to draw from there some sort of mathematical formula from which the proper sentence in each case could be calculated with scientific accuracy. He cited, among others, the case of **Sim Yeow Seng v PP** [1995] 3 SLR 44 and made reference in particular to the following passage at p 46 of the judgment:

> *... [I]n the absence of aggravating circumstances, the usual punishment for a first offence under s 408 of the Penal Code, where the accused pleads guilty and where the sum involved lies between $5,000 and $10,000 is an imprisonment term of nine months coupled with a fine.*

He further quoted from the case of **Gopalakrishnan Vanitha v PP** [1999] 4 SLR 307 in which the amounts misappropriated were $11,369.73, $12,440 and $30,113.29 respectively and in which I had remarked that, for these amounts, the sentence ranged from nine to 15 months` imprisonment. As the amount misappropriated in the instant case was but a mere $485.22 above $10,000, counsel submitted that the range of sentence applicable to his client should be that for amounts below $10,000 as elucidated in ***Sim Yeow Seng*** , and not the higher spectrum of sentences reserved for amounts above $10,000.

With respect, I found counsel`s attempt to reduce the law of sentencing into a rigid and inflexible mathematical formula in which all sentences are deemed capable of being tabulated with absolute scientific precision to be highly unrealistic. If the appropriate sentence in each case was indeed nothing more than a computation of numbers and figures, then judges are better off delegating the task of sentencing to their secretaries and clerks who I venture to think are possibly more adept at these things than judges. In my view, the regime of sentencing is a matter of law which involves a hotchpotch of such varied and manifold factors that no two cases can ever be completely identical in this regard. While past cases are no doubt helpful and sometimes serve as critical guidelines for the sentencing court, that is also all that they are, ie mere guidelines only. This is especially so with regard to the unreported cases, in which the detailed facts and circumstances are hardly, if ever, disclosed with sufficient clarity to enable any intelligent comparison to be made. At the end of the day, every case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances, and counsel be kept constantly and keenly apprised of the fact that it is just not possible to categorise cases based simply on mere numerals and decimal points.

Having considered all the various factors in the present case, however, I agreed with counsel that the sentence of 15 months` imprisonment was indeed somewhat excessive. The mitigating factors present were not uncompelling. While no restitution was made by the appellant before he was sentenced, he did nevertheless readily admit to his offences when arrested, as well as indicate his intention to plead guilty right from the day of his first mention in court, thus saving the authorities much time and effort which would otherwise have been expended in further investigation and prosecution. The appellant`s plea of guilt in this case was also clearly not merely a tactical one for the moneys misappropriated in this case were in the form of cold cash as a result of which some measure of difficulty would predictably have been encountered by the prosecution in establishing the appellant`s guilt had he chosen to claim trial. At the same time, this was also not a case in which the appellant had been caught red-handed in which case his surrender would have been but a mere

recognition of the knowledge that the game was up. As such, I was inclined to the view that significant value ought to be placed on the plea of guilt in this case. Also of some mitigating worth was the appellant`s lack of antecedents. While the breach of trust in the present case concerned not one isolated incident but occurred 21 times over a period of five months, the amounts pilfered were not substantial. Admittedly, this was hardly a case in which the accused could be called a first offender, given that he had helped himself to the moneys 21 times. That this was the first time that he had been caught thus appeared to me to be the more accurate phrase to describe his situation instead. While I have no doubt that a recalcitrant offender who repeatedly commits the same offence over and over again in spite of his numerous previous convictions should be sentenced to the maximum punishment prescribed by law, even if the amounts or items stolen on each occasion were minuscule so as to take him out of circulation altogether, the present case was not one in which such drastic action was warranted on the facts. This was after all the appellant`s first and maiden conviction, if I may call it such, and while the total sum of $10,485.22 taken might have been an amount that a small enterprise like Chin Bee Trading could ill afford to lose, the amount was in objectivity an insubstantial one when compared generally with the other cases which have come before the court.

In **Teng Lai Soon v PP** (Unreported) , for example, three separate amounts of $33,112.86, $59,084.66 and $22,781.07 were misappropriated, yet the sentences imposed by the High Court were a mere 14 months` imprisonment on each of the three charges. In **Yeo Eng Wah Francis v PP** (Unreported) , cash of $116,671.40, more than ten times the amount involved in the present case, was misappropriated over a period of one year, for which the sentence imposed was 24 months` imprisonment. More recently is the case of ***Gopalakrishnan Vanitha v PP*** (supra), in which the amounts involved have already been set out above. In that case, no restitution was made by the accused who further claimed trial to all three charges against her. The sentence of six months` imprisonment on the two lesser amounts and 12 months` on the largest sum imposed by the trial court was left undisturbed by the High Court on appeal.

Also worthy of comparison is the case of **PP v Asok Kumar** [1999] 4 SLR 358 . Although the actual amount misappropriated in that case was never specifically ascertained by the court, it seemed clear that the figure fell plainly within the hundred thousand dollar range. In addition, the respondents in that case were also directors and thus fiduciaries who held executive positions vis-.-vis the victim company. Moreover, they had claimed trial to the charges against them, which charges were for the more serious offence of CBT by an agent under s 409 of the Penal Code, an offence whose maximum punishment of life imprisonment is significantly higher than the seven years` maximum prescribed under s 408. Despite the patently more aggravating circumstances, the High Court was nevertheless content to send the respondents to jail for but a mere 12 months only.

It was plain from a broad consideration of the above cases, albeit serving as mere guidelines only, that the sentence of 15 months` imprisonment imposed in the present case did nevertheless fall completely out of line with the sentencing precedents laid down previously. This was especially so when all the factors, ie the relatively insubstantial amount involved, the appellant`s plea of guilt, his lack of antecedents as well as his lack of seniority in the company, in this case were taken into account collectively. The DPP sought to impress upon me that the reason why the amounts pilfered were insubstantial in this case was because that was all that the appellant had access to in his capacity as a sales representative. With respect, I could not accept that argument for to do so would result in gross unfairness to the appellant, since the state had not produced any evidence to show that the appellant would have helped himself to any more moneys than he did had he been given access to them. Next, while I accepted that the appellant might have abused the trust reposed in him by his former employers in pocketing the moneys collected on their behalf, such abuse is a factor inherent in every offence of criminal breach of trust, the essence of which is characterised

precisely by the betrayal and disloyalty of one who has been entrusted with valuable property. As such, it is wrong to treat an abuse of trust as an aggravating factor in cases of criminal breach of trust. Likewise, s 408 of the Penal Code which prescribes for the more serious offence of CBT by a servant already carries with it a more severe maximum punishment than the offence of CBT ***simpliciter*** under s 406. As such, the fact that the accused facing a charge under s 408 was employed as a servant when committing the offence should not be regarded as a further aggravating factor against him.

In the light of the many strong mitigating factors highlighted above and the absence of any severely aggravating ones, I found that the sentence of 15 months` imprisonment imposed by the district judge was clearly not commensurate with those meted out in similar cases in the past. In the premises, I allowed the appeal and ordered that the sentence be reduced to nine months` imprisonment so as to ensure that it was congruent and consistent with current sentencing practice.

Outcome:

Appeal allowed.