Ang Jwee Herng v Public Prosecutor
[2001] SGHC 73

Case Number : MA 336/2000

Decision Date : 16 April 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Davinder Singh SC and Wendell Wong (Drew & Napier) for the appellant; Jennifer Marie and Toh Yung Cheong (Deputy Public Prosecutors) for the respondent

Parties : Ang Jwee Herng — Public Prosecutor

Criminal Procedure and Sentencing – Benchmark sentences – harbouring illegal immigrants – Whether sentence of nine months' imprisonment on each charge manifestly excessive

Criminal Procedure and Sentencing – Identification parade – Whether necessary to have conducted identification parade – Effect of failure to conduct identification parade – Quality and assessment of identification evidence – Whether failure to conduct identification parade diminished probative value of identification evidence given by witnesses

Immigration – Harbouring – Whether appellant had knowledge of presence of immigration offenders – Whether fact of harbouring proven beyond reasonable doubt – s 57(1)(d) Immigration Act (Cap 133, 1997 Ed)

Evidence – Witnesses – Circumstances in which adverse inference will be drawn for failure to call material witness – Whether failure of prosecution to call material witness in present case warranted drawing of adverse inference – s 116 illustration (g) Evidence Act (Cap 97, 1997 Ed)

: The appellant was charged with three counts of harbouring an illegal immigrant during the period between October 1999 and 16 February 2000 pursuant to s 57(1)(d) of the Immigration Act (Cap 133, 1997 Ed). At the end of the trial, district judge Valerie Thean convicted him of all three charges and sentenced him to nine months` imprisonment on each charge. Two of the sentences were ordered to run consecutively, making the total length of imprisonment 18 months. He appealed against both his conviction and sentence. At the end of the hearing before me, I dismissed the appeal and now give my reasons.

Background facts

On 16 February 2000, just slightly after midnight, a police raid was conducted at 725A Havelock Road (`the Premises`). A total of 21 Bangladeshi nationals were found on the Premises, with 18 of them subsequently ascertained to be immigration offenders.

The appellant and his wife were found to be the registered proprietors of the Premises, which was part of a shophouse that also comprised the units 725 and 725B Havelock Road, which were similarly owned by the appellant and his wife.

At the material time, 725 Havelock Road, which was located on the ground floor, was rented out to a teochew porridge business known as Henry Teochew Porridge, while 725B was unoccupied.

The prosecution`s case

The mainstay of the prosecution`s case rested on the evidence of the three Bangladeshi nationals

who were the respective subjects of the three charges proffered against the appellant. All three were also part of the 18 immigration offenders arrested on the Premises during the police raid.

ALI (PW6)

Ali testified that he stayed at the Premises from October 1999 right up to the day of the police raid on 16 February 2000. He said that one Majibur, a fellow Bangladeshi national, was in charge of the Premises and had told him that he had to pay a monthly rent of $130 which Majibur would then pay to the owner of the Premises. Ali said that he had seen the owner of the house, whom he identified in court to be the appellant, on three separate occasions. The first occasion was on 5 October 1999 when the appellant and Majibur came to the Premises together at around 9pm. Ali was asked by Majibur to pay the rent as the owner of the house was there. Ali then gave $130 to Majibur who in turn handed the money over to the appellant. He did not however speak to the appellant for Majibur told him that that was unnecessary and that Ali should speak to Majibur if there was anything he needed.

The second occasion was a month later on 5 November 1999, when the appellant and Majibur again came to the Premises together at around 9pm. Ali together with another 15 others who were then watching television on the Premises were asked to pay up the rent, which they did to Majibur who again handed the moneys to the appellant. On this and the first occasion, the appellant remained at the brightly-lit Premises for around ten to 15 minutes and Ali had a good look at him. He was certain that the person in the dock was the same man who had come to the Premises with Majibur.

The third and final occasion was on 5 December 1999 when Ali met Majibur and the appellant at a park situated close to the Premises at around 10pm in the evening. Majibur again asked him to pay up the rent which he did before leaving. He did not know however what Majibur did with the money on this occasion.

ALAM (PW7)

Alam`s evidence echoed that of Ali`s in most material respects. In particular, he testified that he stayed at the Premises for about three and a half months before his arrest on 16 February 2000. One Majibur, he said, was in charge of the Premises, and Alam paid him a monthly rental of $130. He was quick to point out however that Majibur was not the owner of the Premises.

Alam testified that he saw the owner of the Premises, whom he identified in court to be the appellant, on one occasion. It was around 8 or 9pm in the evening and the appellant had come up to the Premises with Majibur. All the occupants present, which numbered some eight to ten Bangladeshi nationals, were then asked to pay up their rent. Subsequently, Majibur went into one of the rooms and took out some moneys from a drawer which he handed over to the appellant, who left after accepting the cash. When queried about this, Majibur replied that the appellant was the owner and landlord of the Premises who had come to collect the rent.

Like Ali, Alam asserted that the Premises were brightly lit and that he was able to observe the appellant for a good few minutes. He was certain that the man in the dock was the same person who had come to the Premises with Majibur. The appellant did not however ask him anything at any time nor did he speak to anyone else on the Premises.

During cross-examination, Alam explained that he normally paid his rent to Majibur on the fifth or sixth of each month, which rent Majibur said he would then pay over to the owner of the Premises.

MILON (PW8)

Milon gave evidence that he stayed at the Premises after his arrival in Singapore on 25 December 1999. Majibur had brought him there. Majibur also told him that the monthly rent was $120, which Milon subsequently paid to him.

Milon testified that he had never seen the owner of the Premises. He knew however that Majibur was not the owner but that the latter was only in charge of the Premises and collecting the rent. He had further been told by Majibur that the Premises belonged to a Chinese man to whom Majibur had to pay over the rental moneys.

Under cross-examination, Milon averred that Majibur would normally collect the rents from the Bangladeshi occupants some two or three times before the tenth of each month.

SIRJIT DASLAL MOHAN DAS (PW14)

The prosecution also called one Sirjit to testify. He was not however one of the 18 immigration offenders found on the Premises during the raid on 16 February 2000.

Sirjit, also a Bangladeshi national, testified that he never stayed at the Premises. During the relevant time, he resided at quarters provided by his company in Clementi. This was corroborated by Lim Kok Hua (PW10), a director of the company which employed Sirjit.

Sirjit gave evidence that he went to the Premises once to visit his uncle but the latter was not in. As he was coming down the stairs, he met two other Bangladeshis. He asked them where the coffeeshop was to which they replied that there was none. They then asked him to accompany them instead and told him that they would bring him to a coffeeshop. He followed them into a car which was parked on a nearby road, and the driver of which was a Chinese man. Sirjit entered the car as the two Bangladeshis told him that they would take him to a coffeeshop. The Chinese man then drove the men to an office building. At the office, he saw several other Bangladeshis. The Chinese man asked for Sirjit`s work permit and assured him that he had nothing to worry about as the man was a Singaporean. In consequence, Sirjit handed over a laminated photocopy of his work permit to the Chinese man, who further instructed him to sign some documents which he did. Sirjit alleged however that he did not know what he was signing and that he merely did as he was told because the Chinese man said that he was Singaporean and a `boss`.

In cross-examination, Sirjit testified that the above events occurred sometime in February 2000. He explained that he agreed to get into the car with three complete strangers because, aside from the driver, the rest of the party were all Bangladeshis, and thus his own people whom he trusted. He also averred that he did not leave or attempt to leave as the driver told him that he would take him to a coffeeshop later. His photocopied work permit was returned to him and he was dropped off at an MRT station after the men left the office building that morning.

KAREN TAN (PW2)

Another witness called by the prosecution was one Karen Tan (`Karen`), a secretary in the law firm of Lee Bon Leong & Partners (`the firm`). Karen gave evidence that the appellant was a client of the firm. On 3 February 2000, the appellant came to the firm to see Karen`s boss, Mr Lee Bon Leong. After the meeting, Mr Lee instructed Karen to prepare a tenancy agreement in respect of the Premises based on the instructions which the appellant had given him. In particular, the tenancy agreement was to state that it was made between the appellant as landlord, and six Bangladeshis

whose names were written on a piece of paper which Mr Lee had handed to Karen as the tenants. According to the appellant`s instruction, the agreement should further state that the tenancy was to commence on 1 February 2000.

On 8 February 2000, the appellant came to the firm again, this time together with five Bangladeshi nationals. He instructed Karen to delete one of the names in her prepared draft of the tenancy agreement, and to replace three of them, making the total number of tenants now five instead of six as was the case under his previous instruction. Karen then obtained the photocopied work permits of the three Bangladeshi nationals whose names were used as replacements in the tenancy agreement and made copies of them before returning them to the men. Thereafter the appellant and the five Bangladeshi nationals signed the tenancy agreement. The appellant`s wife, the co-owner of the Premises came down around two days later to sign the document as well. The tenancy agreement (`P5`) was eventually dated 18 February 2000 as stamp duty was only cleared on that day.

At the end of the prosecution`s case, the court found that a prima facie case had been made out and, after administering the standard allocution, the appellant was called upon to enter on his defence. The appellant elected to give evidence.

The defence

The appellant`s defence, in essence, was a complete denial of any knowledge of Ali, Alam and Milon being on the Premises.

The appellant was a 51-year-old businessman dealing in the wholesale seafood business. He purchased 725, 725A and 725B Havelock Road in September 1998. At the time of the purchase, Unit 725 was occupied by Henry Teochew Porridge. After the purchase, Henry Teochew Porridge negotiated a fresh tenancy with the appellant commencing from 1 December 1998 and ending on 30 November 2000. This agreement was prepared by Lee Bon Leong & Partners. Unit 725B meanwhile was vacant at all material times.

With regard to Unit 725A, ie the Premises, the appellant testified that one Saidur Rahman (`Rahman`) had lived there originally and that the appellant had seen him on the Premises when he went to inspect it before purchasing it. After the purchase, Rahman approached him and told him that he wanted to rent the Premises at the same rate of $1,800 which he had been paying previously. He agreed. A tenancy agreement was subsequently drawn up by the appellant`s wife and son in respect of the tenancy to Rahman (`the Rahman tenancy`) and was based on the tenancy agreement between Henry Teochew Porridge and the previous owner with slight modifications. Rahman also gave the appellant his original work permit and other documents which the latter photocopied and returned to him. These photocopies which were admitted into evidence showed a work permit which bore the name `Saidur Rahman` and had an expiration date of 3 November 1999.

The appellant alleged further that Rahman always paid his rent to him directly in cash. He himself would visit the Premises about once or twice a month during the period of Rahman`s tenancy. He either collected the rent at the Premises itself or at a nearby coffeestall or park. He denied seeing Rahman collect rent from anyone else on the Premises. He did however get to know one Abdul Mazid (`Mazid`) through Rahman, whom he said was Rahman`s friend who was sometimes at the Premises when he went there to collect rent.

A few days before the expiry of Rahman`s tenancy, Rahman called the appellant to tell him that he did not wish to extend and asked him to come and collect the keys. On 30 November 2000, he went

to the Premises and collected the keys as previously arranged. He noticed while he was there that the Premises were comparatively dirty but denied seeing anyone else there.

The appellant did not change the locks to the Premises after Rahman left. As he would rent out the property again soon, he figured that he would change the locks only when the new tenant moved in. He put up a notice downstairs advertising the Premises for let.

The appellant claimed that he never visited the Premises after 30 November 1999 all the way up to February 2000. While he did come by to pick up a cheque from Henry Teochew Porridge every month, he averred that he merely drove up and parked in front of the shophouse or a little distance away on each visit, and the proprietor of the porridge business would walk over and hand him the cheque. He thus never had occasion to step out of his car or walk into or around the Premises.

Sometime in the middle of January 2000, Mazid telephoned the appellant and subsequently met him for tea. On that occasion, Mazid told the appellant that he wanted to rent the Premises and asked for the rent to be reduced to $1,600. The appellant agreed but told him that formal documentation drawn up by a law firm had to be obtained. Mazid agreed. Subsequently, the appellant obtained from Mazid a work permit and other documents bearing Mazid`s name and photograph, took copies of them, and handed the copies to Lee Bon Leong & Partners. It later surfaced that Mazid intended to include co-tenants for the Premises. He thus gave the appellant several pieces of paper on which were written six names including his own and told the appellant that these were the other men who would be co-renting the Premises. When he got home, the appellant`s wife copied the names onto one piece of paper, and several days later, the appellant handed the paper containing the names to Mr Lee at his law firm. He told Mr Lee that he wanted to rent the Premises to the six Bangladeshi nationals listed on the piece of paper. In response, Mr Lee told the appellant to check and verify the particulars of the men and informed his secretary Karen to draw up the necessary agreement. Karen told the appellant to return with the men to sign the lease once it was ready.

Subsequently at the end of January 2000, Mazid arranged to meet the appellant again at a block of flats near the Premises. There, he handed $3,200 to the appellant, being one month`s rent and one month`s deposit. He also asked for the keys to the Premises as he wanted to carry out some minor renovations to it. The appellant agreed, but told him that while he could carry out the renovations, he could not yet live on the Premises.

The next time the appellant met Mazid was on 14 February 2000. He picked up Mazid and several others from Havelock Road and drove them to Mr Lee`s office. Mazid told him at this time that there would now only be five tenants including himself instead of six as before. He also changed several of the names previously supplied. At the office, the appellant claimed that all the men produced their original work permits when asked by Karen. Karen further read out the tenancy agreement to them and asked if they understood. The men nodded and subsequently signed the agreement, followed by the appellant who did the same.

The appellant disagreed with Ali`s evidence that he was at the Premises on 5 November, December 1999 and January 2000. He produced relevant extracts from his passport which showed that he was out of town on those dates. On 5 November 1999, he was in China for a fisheries exhibition. On 5 December 1999, he went to Batam by boat in the afternoon and only returned the next day, while on 5 January 2000, he went to Johor for the day and would have been too tired to visit the Premises when he returned in the evening.

In cross-examination, the appellant explained that the Rahman tenancy was not prepared by a lawyer as Rahman was already a former tenant of the Premises and, as such, he believed that the previous

owner would have checked his details. As such, a simple agreement was sufficient. He further claimed that Rahman`s work permit was cancelled on 5 September 2000 and that he had been repatriated to Bangladesh by the time of the trial. As for the rental moneys, it was always paid in cash and the appellant never banked the moneys into his bank account as it was a `thousand odd dollars only`. He also denied knowing Majibur.

The decision below

The district judge held that two things had to be shown before the appellant could be found guilty of the offence of harbouring under s 57(1)(d) of the Immigration Act. First, it had to be shown that the appellant harboured the men named in each of the charges against him, and second, that he had reasonable grounds for believing that they were immigration offenders.

Upon analysing the evidence before her, the district judge concluded that the above two elements had both been made out by the prosecution beyond all reasonable doubt, and convicted the appellant accordingly.

The appeal

The provisions in the Immigration Act which are relevant to this appeal provide as follows:

> *57(1) Any person who -*
>
> *(d) harbours any person who has acted in contravention of the provisions of this Act or the regulations;*
>
> *shall be guilty of an offence and -*
>
> *(ii) subject to subsection (1A), in the case of an offence under paragraph (b), (d) or (e), shall be punished with imprisonment for a term of not less than 6 months and not more than 2 years and shall also be liable to a fine not exceeding $6,000; ...*
>
> *(7) Where, in any proceedings for an offence under subsection (1)(d), it is proved that the defendant has given shelter to any person who has remained in Singapore unlawfully for a period exceeding 90 days after the expiration of any pass issued to him or who has entered Singapore in contravention of section 5(1) or 6(1), it shall be presumed, until the contrary is proved, that the defendant has harboured him knowing him to be a person who has acted in contravention of the provisions of this Act or the regulations.*

The term `harbour` in s 57(1)(d) is in turn defined in s 2 of the Act as meaning:

> *to give food or shelter, and includes the act of assisting a person in any way to evade apprehension.*

Before me, senior counsel for the appellant made no quarrel of the way in which the district judge had framed the issues in this case. His only argument was that the district judge had erred in her finding that the appellant had, as a matter of fact, harboured the three men. In support of his contention, senior counsel raised two main points. First, he stressed tirelessly on the prosecution`s failure to call Majibur as a witness, which failure he urged warranted the drawing of an adverse inference against the prosecution for their omission. Next, he contended that the identification evidence of the prosecution witnesses was weak, and should not thus have been relied on by the district judge. These two points taken together were, in counsel`s view, sufficient to create reasonable doubt in the prosecution`s case.

I shall consider each of these points in turn.

ADVERSE PRESUMPTION UNDER S 116 ILLUSTRATION (G) EVIDENCE ACT (CAP 97, 1997 ED)

Senior counsel for the appellant placed great emphasis on the district judge`s failure to draw an adverse inference against the prosecution for its failure to call Majibur as a witness, especially, he said, in light of the fact that there was no suggestion that the latter was unavailable as a witness. Counsel further pointed out that this case was distinguishable from several recent decisions involving similar factual scenarios. In particular, he drew my attention to the cases of **Awtar Singh s/o Margar Singh v PP** [2000] 3 SLR 439 and **PP v Ong Phee Hoon James** [2000] 3 SLR 293 . In the former, counsel asserted that the fact of harbouring by the agent or middleman had been conceded by the defence, and as such, the only issue in that case was the question whether or not the accused had abetted the agent. In the latter, it was explained that the agent had been repatriated and as such the prosecution could not be faulted for not calling him. None of these factors however were present in the case at hand.

In my view, counsel`s argument in the above regard can be dealt with briefly. It is not every failure by the prosecution to call a material witness that warrants the drawing of an adverse inference against them under s 116 illustration (g) of the Evidence Act. While I accepted that Majibur`s evidence, if called, would have been relevant and even helpful, the absence of it did not in my view have the effect of demolishing the prosecution`s case completely. There was uncontroverted evidence by Ali and Alam, which was believed by the trial judge, that they had seen the appellant on the Premises with Majibur. In addition, they also personally witnessed Majibur handing moneys to the appellant after collecting the rent from the occupants. Since criminal liability is not in any event grounded on the finding of an agency relationship between the appellant and Majibur and the crucial factor here is the appellant`s knowledge of the presence of the illegal immigrants, I was of the view that Ali and Alam`s evidence was on their own more than sufficient to sustain such a finding of knowledge on the appellant`s part.

In any event, it is well-established that an adverse inference would be drawn against the prosecution under s 116 illustration (g) only if it withheld certain evidence which it possessed and not merely on account of its failure to obtain certain evidence: see **Yeo Choon Huat v PP** [1998] 1 SLR 217 . In **Chua Keem Long v PP** [1996] 1 SLR 510 , I held that the prosecution has no obligation to call any particular witness, unless the failure to do so could be shown to be motivated by an intention to hinder or hamper the defence. I reiterated this point again in the subsequent case of **Roy S Selvarajah v PP** [1998] 3 SLR 517 in which it was said that, in the absence of an ulterior motive, there is no reason to draw adverse inferences against the prosecution for its failure to call witnesses. There was clearly no suggestion of any such ulterior motive on the prosecution`s part in this case. Nor was it alleged by senior counsel that the prosecution was deliberately attempting to hamper the defence by not calling Majibur. If anything, it appeared to me from a perusal of the Record of Proceedings that the prosecution was clearly not in possession of any particulars relating to Majibur

as all the prosecution witnesses testified that he did not live on the Premises, that they had no means of contacting him, and he had not in any case been found on the Premises during the police raid. There was thus nothing to show that the prosecution had intentionally withheld evidence from the appellant or the court, especially when it had from the start set out categorically the role that Majibur played in the case against the appellant. As such, I found that the trial judge was right in refusing to draw an adverse inference against the prosecution in this case.

In any case, it would not be surprising if Majibur, himself being clearly concerned in the whole scheme of harbouring, would have indeed given evidence unfavourable to the prosecution to protect himself if he had in fact been available and was called by the prosecution. In these circumstances, it would not be proper to draw an adverse inference against the prosecution for their failure to call a witness whom they knew would, for self-serving reasons, in all probability turn hostile on the stand.

IDENTIFICATION EVIDENCE

Senior counsel next attacked the failure by the police to conduct an identification parade for the prosecution witnesses. He argued that the dock identification of the appellant by the witnesses in court more than seven months after they were arrested and more than eight since they last saw him was unreliable and should not have been relied upon by the district judge.

This point was adequately dealt with in the case of ***Awtar Singh s/o Margar Singh*** (supra) wherein I had said at [para]35:

> *Whether it is necessary to conduct an identification parade depends on the circumstances of each case. Obviously, it would not be necessary when the accused person is arrested while committing the offence ... However, if the accused person is not known to the eyewitness, it may be prudent for the police to conduct an identification parade not only to ensure that the witness`s memory regarding the identity of the accused person is tested but also to ensure that the investigation is proceeding on the right track and that the person arrested is the real culprit.*

On the facts of the present case, it was clear that the appellant was not a complete stranger to Ali and Alam even if he had not been formally introduced to them nor they to him. What was important was that he had been seen on the brightly-lit Premises on more than one occasion, where he had remained for at least ten to 15 minutes on each visit, which by any objective standard is not an inconsiderable length of time. In the circumstances, the men were afforded ample opportunity to observe him which they did. As such, the failure to conduct an identification parade in this case did not diminish the probative value of the identification evidence given by Ali and Alam.

I was not persuaded that the present case was distinguishable from ***Awtar Singh*** (supra) simply because the number of witnesses identifying the accused was less here than it was in ***Awtar Singh*** . In that case, there were seven witnesses who positively identified the accused, and he had been seen by some of them at least two or three times a week, and on some occasions for as long as up to two hours. In my view, the determination of the reliability of identification evidence cannot be dependent solely on the number of witnesses making the identification for a single person is in many circumstances as capable as a dozen others of identifying a suspect accurately. The key is not the quantity of the evidence, but rather its quality that is relevant. If I were to accept senior counsel`s argument, then it would logically mean that a person could never be convicted on identification evidence alone if there was only one witness to the offence, which surely cannot be the case. In my opinion, a holistic approach has to be adopted in order to ascertain the reliability of the evidence

which has in turn to be assessed in the context of all the surrounding circumstances. To this end, the guidelines laid down in **R v Turnbull** [1977] QB 224 and followed in **Heng Aik Ren Thomas v PP** [1998] 3 SLR 465 are instructive. The non-exhaustive list of factors which the court would consider in determining the reliability of the identification evidence include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness saw the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. Having perused through the Record of Proceedings, I felt no hesitation in concluding that the identification evidence of Ali and Alam was cogent and indefeasible. I thus saw no reason to doubt their reliability.

THE OTHER EVIDENCE OF ALI AND ALAM

I move on next to consider the several other sub-arguments put forth by senior counsel. He contended that the district judge could not, on the one hand, accept the thrust of the evidence given by Ali and Alam that they had seen the appellant with Majibur on the Premises, and yet on the other hand disregard the inconsistency that the other evidence given by them raised vis-.-vis the objective facts before the court. In particular, counsel pointed out that while Ali had categorically asserted that he had seen the appellant at the Premises on 5 November, December 1999 and January 2000, the appellant was nevertheless able to provide undisputed documentary proof in the form of extracts from his passport which showed that he was out of town on those dates to contradict Ali`s testimony. In the light of this objective evidence, counsel argued that there was no basis for the district judge to find that Ali was a forthright witness or that his evidence was consistent and withstood cross-examination.

In my view, there was nothing to prevent the district judge from reaching the conclusion that she did. This was not a case where she was completely unaware of or oblivious to the inconsistencies in the prosecution witnesses` evidence. On the contrary, she was acutely aware of the contradictions, but having weighed them against the totality of the evidence, she found, as she was entitled to do, that the inconsistencies were not so material as to completely demolish the credibility of those witnesses. It is trite law after all that in weighing the evidence of witnesses, the court recognises and accepts that human fallibility in observation, retention and recollection is often-time inevitable. It does not mean however the whole of a witness` testimony should be rejected simply because certain parts of it may be technically inaccurate due to a genuine lapse of memory.

In any event, I was of the view in the present case that the discrepancy with respect to the 5 November 1999 sighting can be explained on the ground that Ali was honestly mistaken as to the exact date on which he had seen the appellant at the Premises. It appeared after all that the Bangladeshi nationals encountered some measure of difficulty in ascertaining the days and months according to the Gregorian calendar, their being more comfortable with going purely by the seasons. Hence it was not entirely inconceivable that Ali could have been legitimately mistaken in this respect. In my view, what was more important is the fact that Ali was certain that he had seen the appellant at the Premises with Majibur during the relevant months, and it was not fatal to the prosecution`s case that he was unable to accurately point out the exact date in those months when he saw the appellant. Further, paramount was the fact that the gist of the evidence given by Ali and Alam was clear and consistent. In particular, they were both able to identify and point to a common scheme or routine of things whereby Majibur would collect the rents from the occupants during the early part of each month, and pay it over to the appellant when he came several days later, sometime before the

tenth of the month. Whether or not that sometime occurred on or after the fifth, did not in my view render the evidence that the appellant was indeed seen on the Premises less credible or worthy of belief.

In any case I did not think that the appellant`s presence at the Premises on 5 November 1999 was a crucial fact given that both Ali and Alam had seen him on other occasions as well. While the appellant might have left for Bintan on 5 December 1999 and gone to Johor on 5 January 2000, the other two days when Ali alleged to have seen him on the Premises, there was nothing in the passport entries to show what time he had exited the country on those dates. As such, he could well have visited the Premises before or after leaving town. As for Alam, he could not categorically state the relevant date on which he saw the appellant due to his unfamiliarity with the Gregorian calendar but was nevertheless certain that he had seen the appellant on the Premises with Majibur at some point during his stay there. In my view, this was more than sufficient for the purposes of the case against the appellant.

The appellant`s own evidence itself lent some weight to the men`s testimony that they had seen him on the Premises. It will be recalled that he testified that he visited the Premises to collect rent from Rahman, and this practice continued right up till the expiry of Rahman`s tenancy at the end of November 1999. In addition, he also specifically went to the Premises on 30 November 1999 to collect the keys from Rahman and had occasion to walk through it at that time. Ali`s testimony meanwhile was that he had stayed at the Premises since October 1999, while Alam possibly since November 1999. As such, the appellant must have been aware of the presence of at least some Bangladeshi nationals on the Premises when he visited in November 1999. Alternatively, his whole claim of having gone there to collect rent from Rahman was in all probability nothing but pure fabrication on his part. I shall return to this point again later on in my judgment.

Senior counsel next contended that even if the evidence of Ali and Alam was reliable, the fact that they saw Majibur collecting moneys and handing it over to the appellant was not sufficient basis to conclude that Majibur was acting as the appellant`s agent in managing the Premises. It was further suggested that Majibur could well have been the head tenant who was merely paying over his own share of the rent to the appellant.

With respect, I found the above argument to be completely misconceived. In my view, the fact that there is a head tenant between the owner and the sub-tenant does not automatically absolve the owner from criminal liability if the sub-tenants are found to be illegal immigrants. In **Lim Dee Chew v PP** [1997] 3 SLR 956 , I said that whether or not an owner can be found liable in such a situation depends on the facts of each particular case and the agreement which the owner had with the head tenant. I clarified and expanded on this in ***PP v Ong Phee Hoon James*** (supra) wherein I held that liability is pivoted primarily on the knowledge of the owner. Hence, even accepting the defence`s submission in this case that Majibur was the head tenant while Ali, Alam and Milon merely the sub-tenants, it was plain that the defence, in making this submission, was impliedly accepting that the appellant was present at the Premises when he received the moneys from Majibur. This being the case, he must be taken to have been aware of the presence of the immigration offenders. Having acquiesced in their presence, it did not now lie in his mouth to contend that he had not, even if by his sheer inaction, harboured them. It would be inimical to the policy to curb illegal immigration if house owners were allowed to circumvent the strict requirements of the Immigration Act with impunity by hiding behind the fortuitous shield of protection inadvertently created by a head tenant, especially when the owner is plainly aware of the activities and goings-on in the premises. If this was tolerated, then a mockery would be made of the entire scheme of the immigration legislation as a pervasion of sham sub-tenancy arrangements results.

It was in any event irrelevant whether or not Majibur could be said to have been the appellant`s `agent` in managing the Premises in the strict sense of the word. The touchstone of criminal liability in every case is knowledge. Where it is clear, as was the case here, that the owner had actual knowledge of the presence of the sub-tenants and took no further step to ascertain their status, then he must clearly be taken to have done a positive act of giving shelter to them. One must be realistic in situations such as the present, where it was not merely one or two innocuous-looking sub-tenants whom the appellant saw on the Premises, in which case he might have been excused for failing to inquire further. Here, it was, according to Ali and Alam`s evidence, at least eight to 15 Bangladeshi nationals, whom it must have been obvious to the appellant to be foreigners, who were at the Premises at the times when the appellant visited. Surely any reasonable house owner would have had much cause and reason to question under these circumstances the immigration status of the men, especially in view of the constant and widespread media attention given to the very real and rampant problem of illegal immigrants in Singapore.

Furthermore, it was also not implausible to infer from the circumstances that the appellant clearly had control over the rent. According to the prosecution witnesses, all the men who had not already done so would be asked to pay up their rent whenever the appellant came to the Premises with Majibur. Thereafter, Majibur was seen handing over moneys to the appellant. Next it was also clear that the appellant had not completely relinquished control of the Premises which could be seen in the fact that the Bangladeshi tenants were highly respectful of him, turning off the television and generally stopping whatever they were doing the moment he arrived. In my view the ineluctable inference from all this, albeit circumstantial, evidence was that the appellant obviously had some sort of controlling influence over the occupancy and tenancy of the Premises. The district judge was thus not wrong in drawing the inference that the appellant had harboured the three men.

HEARSAY

Counsel next referred me to several portions of the prosecution witness` oral testimonies which he contended amounted to hearsay and as such should not have been admitted by the district judge. In relation to Ali, the impugned parts were:

> ***... Majibur told me how much to pay. He told me I had to pay to him and he would then pay the house owner ... Majibur ... told us to pay up our rent because the house owner was here ... We were then told to switch off the television as the house owner was here.***

With respect to Alam, the relevant portions read:

> ***... It was Majibur who told me accused was the landlord ... Majibur told me accused was house owner and that he had come to collect the rent.***

In my view, save for the statement by Alam ` ***It was Majibur who told me accused was the landlord*** `, the rest of the impugned portions were not hearsay. They were obviously not intended to be used by the prosecution to prove the truth of what was said, but merely the fact that they were said. Whether or not the man whom the witnesses saw with Majibur on the Premises and whom they subsequently identified to be the appellant was truly the owner of the Premises was clearly not proved nor was it intended to be proved by the witness` statements. All that the evidence showed, and was intended to show, was that the witnesses had seen a Chinese man with Majibur on the Premises whom they later identified to be the appellant. It was irrelevant what Majibur had told the

witnesses about the man since it was undisputed that the appellant, and hence the same man as it turned out, was the registered proprietor of the Premises, and thus the `house owner`.

With regard to the statement ` ***It was Majibur who told me accused was the landlord*** `, I was of the view that although technically it amounted to hearsay, it was nevertheless not admitted for the purpose of proving the truth of what was said. More precisely, it could not have been so admitted for that purpose since the question whether or not the man seen on the Premises with Majibur was or was not the landlord was a question of law which could only be determined by the court and not by Majibur, Alam or the appellant. In any event, the issue in this case was whether or not the appellant had harboured the immigration offenders and to this end it was irrelevant, following my recent decision in **Elizabeth Usha v PP** (Unreported) , whether or not the appellant was a landlord.

Having said the above, I was of the view in any case that the district judge clearly had not in her grounds of decision relied on any of the impugned portions of the prosecution witness` evidence. Even if she had, I agreed with the DPP that this was a case in which s 169 of the Evidence Act operated to render a reversal of the district judge`s decision unnecessary, since there was more than sufficient other evidence to justify it.

CREDIBILITY OF THE APPELLANT`S EVIDENCE

The next point raised by senior counsel was the argument that the trial judge`s adverse findings against the credibility of the appellant could not be supported on the evidence.

It is settled law that an appellate court will be slow to overturn findings of fact by the trial judge especially when an assessment of the credibility and veracity of the witnesses has been made. The only instance when such interference is warranted is where the assessment was plainly wrong or against the weight of the objective evidence before the court, or where the assessment was based not so much on observing the demeanour of the witnesses but on inferences drawn from his evidence: **Lim Ah Poh v PP** [1992] 1 SLR 713 and **PP v Choo Thiam Hock** [1994] 3 SLR 248 .

THE RAHMAN TENANCY

Counsel contended that there was an error in cross-referencing with respect to the Rahman tenancy and this error contributed to the district judge`s erroneous assessment of the appellant`s credibility. The district judge had said at [para]38 of her grounds of decision:

> *In his evidence, [the appellant] said that his agreement with Rahman was based upon the agreement with the teochew porridge business, hence there was no necessity to ask solicitors to draw up a new agreement. The teochew porridge business agreement was adduced in cross-examination by the prosecution, and was a completely different document from the agreement signed with Rahman.*

Senior counsel, on the other hand, pointed out that what the appellant had said was that the Rahman tenancy had been based on the agreement which the teochew porridge business had with ***the previous owner of the Premises*** , and not the fresh tenancy agreement which his client had entered into with Henry Teochew Porridge after purchasing the property in 1998 as the district judge had thought.

I accepted counsel`s clarification on this point and recognised that the district judge had indeed been mistaken when interpreting the appellant`s evidence in this regard. Nevertheless, serious doubts still

remained with respect to the remainder of the appellant`s evidence and I had no doubt that the district judge`s conclusions were influenced as much by these other factors as by the minor cross-referencing slip. First, I found it surprising that the appellant would bother to seek legal advice in preparing the fresh tenancy agreement with Henry Teochew Porridge, and yet not do so in respect of the Rahman tenancy, given that both leases were entered into within a space of less than two months from each other. When queried as to why he did not seek his lawyer`s assistance with regard to the Rahman tenancy, the appellant`s feeble explanation was that Rahman had been a former tenant of the Premises before, and as such, he did not think it was necessary to consult a lawyer. Indeed if this was true, then the same explanation ought to apply vis-.-vis Henry Teochew Porridge who had also been a former tenant of Unit 725. Yet the appellant saw it fit to consult a lawyer vis-.-vis the agreement with Henry Teochew Porridge. Next it was also curious why the Rahman tenancy should have been based on Henry Teochew Porridge`s tenancy agreement with the previous owner, and not Rahman`s own tenancy agreement with the previous owner, if indeed Rahman had been a former tenant as the appellant contended, or on Henry Teochew Porridge`s new tenancy agreement with the appellant which the latter had only lately instructed his lawyers to prepare just before signing with Rahman. It was moreover unhelpful to his cause that the appellant had not produced the alleged tenancy agreement between Henry Teochew Porridge and the previous owner to support his assertion that the Rahman tenancy had been drawn up based on that agreement.

When the above factors are taken into account collectively, it became plain to me that the district judge had more than ample reason to question the authenticity of the Rahman tenancy, and even the existence of Rahman himself. It will be seen that although the appellant had asserted unequivocally that Rahman only ended his tenancy on 30 November 1999, the photocopy of the work permit which bore the name `Saidur Rahman` that he produced expired nearly four weeks before that on 3 November 1999. The explanation by the appellant that Rahman subsequently obtained an extension of another two years appeared to my mind to be an afterthought on the appellant`s part, conjured up by him when he was hard put for a credible explanation following the DPP`s questions to that end. Likewise, the convenient excuse that Rahman could not be called to testify as his alleged extended work permit had been cancelled less than two months before the trial on 5 September 2000 provided much ground for suspecting his true existence. Indeed it would have been so easy for the appellant to have obtained written verification of such information from the Ministry of Manpower but he did not. It was further telling that both Ali and Alam who resided at the Premises before 30 November 1999 were not able to recognise Rahman from the photograph shown to them. As such, I was inclined towards agreeing with the district judge that the Rahman tenancy was most probably a sham document and Rahman a fictitious character wholly invented out of the appellant`s fertile imagination.

THE APPELLANT`S NEGLECT OF THE PREMISES

Counsel next contended that, in view of the fact that the year-end was the busiest period for the appellant`s wholesale seafood business, there was nothing astounding or incredible about him not devoting much time and effort in managing the Premises during that time. Moreover, the appellant was also a successful businessman whose rental income from the Premises was but a tiny fraction of his annual business turnover and, as such, it was not unusual for him to neglect the Premises completely for two or more months.

In my view, the appellant`s bare assertion of not visiting the Premises at all between December 1999 and February 2000 must be looked at in its larger context. Firstly, he was obviously not too busy to drop by Havelock Road to pick up his cheque from Henry Teochew Porridge during the relevant period. Next, he was certainly free enough to meet up with Mazid for tea to discuss the alleged intended tenancy agreement between them. These alone countered counsel`s suggestion that the appellant was too caught up in running his businesses to bother about his Havelock Rock property. Moreover,

with up to as many as thirty persons residing on the Premises at times, it was indeed strange that the appellant never noticed a single person going up or down the stairs leading to the Premises whenever he stopped by to pick up his cheque from Henry Teochew Porridge. It was further unusual that he never on these occasions bothered to check for mail sent to the Premises after Rahman left. Next, the appellant himself admitted that he did actually go up to the Premises on 30 November 1999 to pick up the keys from Rahman and performed a visual examination, albeit a cursory one, of the Premises at that time. It was thus incredible that the appellant could have missed seeing even one of the Bangladeshi nationals then, who on their evidence, had been living there since October. It was further amazing that the appellant would have readily agreed to lease the Premises to Mazid and five other strangers whose names had merely been scribbled on drips and drabs of paper when he barely knew the latter and only saw him around occasionally as a friend of Rahman`s. More incredible was the fact that the four or five men named by Mazid would actually agree to rent premises which they had not previously had a chance to view. Indeed I found it unbelievable that the appellant would not have thought of offering and did not offer to let the men view the Premises, given that it had been more than one and a half months since Rahman left by the time Mazid allegedly approached him and the fact that the appellant himself had noticed that the Premises were rather dirty when Rahman left.

The above circumstances taken in totality showed that it was inconceivable for the appellant not to have visited the Premises at all from the time of the expiry of Rahman`s tenancy to the day of the police raid on 16 February 2000.

THE TENANCY AGREEMENT WITH MAZID

Counsel also submitted that there was no reason why the appellant should have bothered to execute a formal lease in respect of Mazid and the four others named in P5 if he had hitherto already been harbouring immigration offenders at the Premises.

With respect, I think it was plain that the appellant did precisely what he did in order to `cover his tracks` should the law finally catch up with him. He carefully calculated the risks involved and probably figured, albeit erroneously as it turned out, that his chances of escaping criminal liability would be heightened if he was armed with a legal document in hand. Clearly the whole agreement with Mazid and the four others named in P5 was to my mind a sham as the appellant was content to change the number and names of the tenants at the last minute on the morning of the signing of the agreement itself. Next, while the fact that he had not checked the men`s particulars against their original documents but had instead relied solely on photocopies only might not have been directly relevant to the charges against him since the men named in the charges were not the same men named in P5, it went nevertheless towards showing that the appellant was obviously not interested in the true status of the persons named in P5, which in turn gave rise to the irresistible inference that P5 was not intended to be a genuine document to begin with. Contrary to counsel`s argument, I found that the appellant`s conduct in procuring P5 suggested quite clearly that he knew fully well of the activities that were going on at the Premises. Moreover, it was also amazing that the appellant was not in the least bit hesitant about letting Mazid have the keys to the Premises the moment the latter asked for them in order to carry out renovation works even before the formal commencement of the tenancy. The facts that no further question was asked of Mazid and that the appellant had not bothered to conduct an inventory of the items left on the Premises with his new prospective tenants before allowing them to move in, as any prudent landlord would have done, likewise cast grave doubts on the true nature of P5.

With respect to Sirjit`s evidence, I found that it was not so incredible or bizarre as senior counsel contended to be unworthy or incapable of belief. The fact was that Sirjit was an uneducated blue-collar worker in a foreign land whose main languages of communication were completely

incomprehensible to him. As such, when he was asked by two of his fellow countrymen to get into a car driven by a Chinese man, it was not surprising that he obeyed that instruction, seeing that it came from his compatriots. Similarly, it was hardly surprising that Sirjit signed on P5 which he did at Mr Lee`s office as he was merely following suit after his `own people`. Viewing the whole episode realistically, I did not find that his actions were in any way unusual, given the strong sense of natural camaraderie amongst many of these blue-collar foreign workers in Singapore, friendships between whom are often forged fast and easily.

THE CHARGE AGAINST MILON

Last but not least was the argument that there was no evidence to support the charge against Milon since Milon himself admitted that he never saw the appellant before, whether on the Premises or otherwise.

This point can also be dealt with swiftly. The evidence was clear that the appellant knew of the presence of at least some of the immigration offenders on the Premises. His acquiescence in this as well as his continued indulgence in allowing Majibur to bring more people to reside on the Premises without further question were on their own sufficient to found liability vis-.-vis Milon even if the appellant had never met him nor vice versa. Surely the scope of the appellant`s harbouring could not be confined only to those immigration offenders whom he happened to come across during his visits to the Premises, for liability vis-.-vis each individual `harbouree` cannot legitimately be grounded on such fortuity and arbitrariness.

Conclusion with respect to appeal against conviction

It appeared clear to me on the evidence that the appellant had indeed harboured the three men named in the charges against him. There was no reason why Ali and Alam would unfairly incriminate or wrongly accuse him as they had already finished serving their sentences by the time of the trial and did not appear to have stood to gain anything by testifying in the manner which they did. Moreover, it was also not suggested that the men had any axe to grind vis-.-vis the appellant nor was he able to point to one which may have led them to give unfavourable evidence against him. Next, I had no doubt that the appellant, a highly successful businessman despite his meagre qualifications on the academic front, was a shrewd and intelligent person who carefully calculated and weighed the risks involved before devising and engaging in this whole elaborate scheme to earn easy money from letting his property to illegal foreign workers. His purposiveness can be seen in the fact that he always worked through Majibur, and made it a point never to speak with or collect the rent directly from the illegal immigrants, obviously so as to maintain what appeared to him to be a legally acceptable distance from them. The fact that Unit 725B was never let out coupled with the weak economy following the aftermath of the Asian economic crisis probably also goes some way towards showing that the rental market at least for that type of dwelling in that area was somewhat in a slump at the time, leading the appellant to succumb to the temptation of leasing out the property to illegals, the very conduct which the immigration legislation was designed to stamp out.

Upon a review of all the evidence, I agreed with the district judge in her finding and dismissed the appeal against conviction accordingly.

SENTENCE

The appellant was sentenced to nine months` imprisonment on each of the three charges, with two of those sentences ordered to run consecutively, making a total of 18 months` imprisonment.

Senior counsel submitted in his skeletal arguments that the sentence imposed was manifestly excessive. He urged the court to take into account not only the lack of antecedents, but the fact that the appellant was a man of good character and standing, as evidenced by his long-standing involvement in community and grassroots service. In addition, he was also the main driving force behind the family business as a result of which his prolonged absence from the business would directly affect his family.

With respect, I could not agree with senior counsel that the sentence of nine months` imprisonment was manifestly excessive in the circumstances. Firstly, I had held only recently that the benchmark sentence for employing illegal immigrant workers is now one year, double that of the previously assumed tariff of six months: see ***Tan Soon Meng v PP*** , appeal withdrawn on 27 March 2001 and reported in ***The Straits Times*** , Wednesday, 28 March 2001. With the surge of illegal immigrant cases over the past year, I saw no reason why a lower benchmark ought to apply where the charge is one of harbouring rather than employing, given that the statutory minimum and maximum sentences for both offences are the same. As such, the sentence of nine months` imprisonment which is below the new tariff sentence could not be said to be manifestly excessive. Next, the argument that an offender`s family members will suffer if the offender is incarcerated for a longer term is one often put forth in vain by defence counsel. The reason, as I explained in **Lai Oei Mui Jenny v PP** [1993] 3 SLR 305 is simply because imprisonment of the sole breadwinner inevitably causes hardship to the family. If the courts were to take such hardship into account in determining the appropriate sentence, then any punishment meted out would not be accurately reflective of the gravity of the offence and circumstance of the offender himself, but tempered with considerations of the extent to which his family would be prejudiced by it. The crux of the matter is that part of the price to pay for committing a crime is the hardship that would unavoidably be caused to the offender`s family. To put it bluntly, the appellant should have thought hard about these consequences before committing the offences in question. It is now too late in the day for him to regret the inescapable hardship which his own foolishness and greed will cause to his wife and children. Finally, the fact that the appellant was actively engaged in grassroots activities showed that he was not just some ignoramus or simpleton who was genuinely unaware of the seriousness of his actions. On the contrary, he was clearly a man of considerable shrewdness, who knew not only how best to profit from his real property investment but was at the same time capable enough of crafting for himself what he must have thought was a sure-fire way to escape criminal liability by supplanting and paying a middleman to facilitate his dealings with the illegal immigrant tenants. In my view, such abominable behaviour should not be lightly condoned by the courts.

In view of the strong policy and legislative reasons behind the harsh sanctions prescribed for harbourers and employers of illegal immigrants, I found that a sentence of nine months` imprisonment on each charge was not manifestly excessive. I dismissed the appeal against sentence accordingly.

Outcome:

Appeal dismissed.