Kong See Chew v Public Prosecutor
[2001] SGHC 89

Case Number : MA 268/2000

Decision Date : 09 May 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Uthayasurian Sidambaram (Surian & Partners) for the appellant; Toh Yung Cheong (Deputy Public Prosecutor) for the respondent

Parties : Kong See Chew — Public Prosecutor

Immigration – Employment – Illegal foreign worker – Abetment – Manager charged with abetting registered proprietor of lounge in employing illegal foreign worker – Circumstantial evidence against manager – Manager claiming demotion and removal of authority to employ workers – Whether principal offence committed – Whether abetment charge can be preferred even if actus reus of principal offence not established – Whether prosecution established prima facie case at close of its case – Whether prosecution proved case beyond reasonable doubt at conclusion of trial – ss 5(1), 6, 23(1) Employment of Foreign Workers Act (Cap 91A, 1997 Ed)

Evidence – Proof of evidence – Standard of proof – Circumstantial evidence – Evidence against accused circumstantial in nature – Relevant test on whether prosecution established prima facie case – Whether circumstantial nature of evidence changes application of Haw Tua Tau test – Whether test in Ang Sunny v PP should be applied at close of prosecution's case or close of trial – Whether circumstantial nature of evidence prevents prosecution from proving case beyond reasonable doubt

: The appellant, Kong See Chew (`Chew`), was charged in the subordinate courts with abetting, by intentionally aiding, in the employment of an illegal foreign worker, contrary to s 5(1) of the Employment of Foreign Workers Act (Cap 91A, 1997 Ed) (`the Act`). Chew claimed trial and at the end of it, was found guilty and was convicted by the district judge. He was sentenced to one month`s imprisonment and ordered to pay a fine of 36 months` levy, in default one month`s imprisonment. He appealed against his conviction only. At the end of the hearing before me, I dismissed the appeal and now give my reasons.

The charge

The amended charge under which Chew was convicted was as follows:

> *that you from on or about Feb 98 to Aug 98 at M KTV Karaoke Lounge of 542-556 Geylang Road Singapore 389497 did abet one Chua Seng Kim (NRIC No. S1367531G) of 61B Jalan Tua Kong Singapore 457257 trading as M KTV Karaoke Lounge (RCB No. 49655500J) in the commission of the offence of employing a foreign worker, namely one Tye Soon Hin (MBIC No. 800425-02-5349), in that you had intentionally aided the said Chua Kim Seng trading as M KTV Karaoke Lounge to employ the said Tye Soon Hin contrary to section 5(1) of the Employment of Foreign Workers Act (Chapter 91A) (Revised Edition 1997) when the said Chua Seng Kim had not obtained in respect of the said Tye Soon Hin a valid work permit allowing the said foreigner to work for her, which offence was committed in consequence of the abetment and you have thereby committed an offence under section 5(1) read with section 23(1) of the Employment of Foreign Workers Act (Cap 91A) (Revised Edition 1997) and punishable under s 5(6) of the same Act.*

Background facts

On 10 November 1998, employment inspector Mohd Yusoff Johari from the Ministry of Manpower (`MOM`), together with some 30 officers, raided the M KTV Karaoke Lounge (`M KTV`). They found three Malaysian workers there who did not possess valid work permits. One of the three workers was Tye Soon Hin (`Tye`).

Further investigations later confirmed that, at the time of the raid, Tye was working at M KTV without a valid work permit. A search with the Registry of Companies and Businesses revealed that the registered proprietor of the business was a Chua Seng Kim (`Chua`). It was also established that Chew had been working as a manager at M KTV from around February 1994 to August 1998. At the time of the raid, Chew was no longer working at M KTV. Chew had previously, in 1997, been convicted on similar charges under s 5(1) of the Act.

The prosecution`s case

The prosecution`s case rested essentially on the evidence given by Tye and one James Wee Peo Cheng (`James`), who is a captain at M KTV.

(1) TYE`S EVIDENCE

Tye testified that he had been working as a waiter at M KTV from February 1998 till his arrest in November 1998. He admitted that he did not possess a valid work permit to work at M KTV. Sometime in early February 1998, he responded to a newspaper advertisement and went with a friend for a job interview at M KTV. When he arrived at M KTV for the interview, he was directed to a room. A captain of M KTV, Jeffrey, then spoke to him and gave him a form to fill in. Tye filled in the form with his personal particulars, including his name, nationality, marital status, Malaysian identification card number, passport number and Singapore address. He handed the completed form to Jeffrey. He then observed Jeffrey taking the form and going out of the room. Through the glass door of the room, he saw Jeffrey showing the form to Chew, who was just outside the room. Chew looked at the form and talked to Jeffrey for about five minutes. Although Tye was not able to hear what was being said between the two of them, he could clearly see that they were having a conversation. He had a clear view of Chew as the latter was only about 10ft away from him and the area was very brightly lit. After that, Jeffrey came back into the room and told him to start work the next day.

Tye gave evidence that his duties included serving liquor and collecting glasses. After he started working at M KTV, he found out that Chew was the sole manager of the lounge and he saw Chew every day while he was working there. There were about three to four captains at M KTV and he reported mainly to James. Jeffrey had left M KTV about two to three months after he started working there. Tye admitted that he came into contact more with the captains than with Chew. His work was supervised by the captain and it was the captain who told him his salary, the working hours, the uniforms he had to wear and the nature of his job.

However, Tye testified that Chew, as the manager, would still oversee his work and if he encountered any problems, he was to approach Chew, although the opportunity did not arise while he was working there. Further, it was Chew who mostly paid him his salary during the period from when he first started work till around June or July 1998. When Chew was not around and after he (Chew) left the employment of M KTV, Tye received his salary from one Tan Ai Ching, the cashier.

The evidence further showed that Tye was working at M KTV for intermittent periods and not for a continuous period. This was because he could remain in Singapore for only the length of his social pass, which was for 14 days at a time. Whenever his social pass expired, he would return to Malaysia to renew his social pass and then come back into Singapore again on the same day to continue his work at M KTV. There were occasions when he would be stopped by the immigration authorities from re-entering Singapore. At such times, he would call James, who was in charge of recording attendance, and inform the latter that he had been refused entry. Subsequently, once he was able to re-enter Singapore, he would return to work at M KTV without having to fill up the form again.

(2) JAMES`S EVIDENCE

James started working at M KTV from 1994 as a waiter. He later became a captain in 1998 and his duties included supervising the staff. He worked under Chew, who was the manager of M KTV. James`s evidence was that only the manager had the authority to employ workers for M KTV. The captains did not have such authority, even though they could interview the applicants first. Before a worker could be employed, the captains must first seek the manager`s permission. James said that Chew was the one who decided on the employment of foreign workers. However, he did not know if there was anyone else other than Chew who had the authority to engage workers. He also did not know if Chew still had the authority to employ workers after the latter was fined in 1997 for charges relating to the illegal employment of foreign workers.

James alluded to an established arrangement which Chew had with regards to the employment of foreign workers such as Tye. When these foreign workers had to return to Malaysia and were not able to return to Singapore immediately, they were required to inform either him or the manager (ie Chew) of the reason. If the reason was due to immigration problems, the worker would be allowed to continue working at M KTV once he regained entry into Singapore. If the foreign worker failed to inform James or Chew that he could not report for work, then the worker would be sacked. It was Chew who decided whether or not to allow the foreign worker to return to work at M KTV. This arrangement existed prior to Tye`s employment and it remained unchanged while Chew was the manager at M KTV. Chew also gave James instructions regarding the medical leave and off-days of the staff. James`s evidence was that these instructions were given both prior to and after Chew`s conviction in 1997.

(3) CHUA`S EVIDENCE

At the material time, Chua was the registered sole proprietor of M KTV. She was also called by the prosecution to give evidence. However, her evidence was contradictory and eventually, turned out to be largely unhelpful. Initially, she testified that she was the `boss` of M KTV and she had employed Chew to manage the lounge, giving him the authority to hire workers for the place. Halfway through her cross-examination, Chua contradicted her earlier testimony to say that she was only the proprietor in name and that it was actually her brother, Chua Tiong Tiong, who was running the business. She had allowed him to use her name as he had a previous conviction and could not register a business. Although she knew that Chew was the manager of M KTV, she did not have any personal knowledge of his job scope and his authority. Hence, she was not able to provide any useful information on whether Chew had the authority to employ workers for M KTV.

It appeared that her subsequent testimony was the truth, as it was verified by the evidence of the other witnesses. Tye said that he did not know who Chua was and had never seen her before. James`s evidence was that he knew that Chua Tiong Tiong was a boss at M KTV as he was handling the matters there. Chew himself confirmed that it was Chua Tiong Tiong who had employed him as

the manager of M KTV.

The defence

At the close of the prosecution`s case, the defence made a submission of no case to answer. The judge was satisfied that a prima facie case against Chew had been made out on the evidence and the defence was called.

Chew was the only witness called by the defence. He testified that he had worked at M KTV from February 1994 to August 1998. He was employed as the manager of M KTV and was put in charge of everything. During his employment with M KTV, there was only one manager for the lounge. Chew admitted that initially, he was given the authority to hire and recruit workers for M KTV. However, he denied that he still had such authority at the material time when M KTV employed Tye in 1998.

In 1997, Chew was convicted and fined for abetting in the illegal employment of foreign workers without work permits. Chew claimed that after this incident, sometime in August 1997, Chua Tiong Tiong demoted him from manager to entertaining customers only. He said that after the demotion, he was not allowed to take charge of anything else, including the `mummies`, the `ladies` and the waiters. Everybody at the lounge was aware of his demotion and knew that he no longer had the authority to hire workers. His responsibilities were thereafter taken over by James, Jeffrey and Tan Ai Ching, the cashier. Chew said that he was demoralised by the demotion and did not have the heart to continue working and hence was seldom at the lounge after that.

Chew sought to assert that he did not even know who Tye was and could not have approved Tye`s recruitment as he no longer had such authority after his demotion. He denied that he saw Tye when the latter was being interviewed by Jeffrey. He also insisted that he was never shown any application form by Jeffrey and he never spoke to Jeffrey about employing Tye.

The decision below

The district judge first dealt with the question of whether an abetment charge could be preferred against Chew since the principal offender, Chua, had stated that she was not the actual owner of M KTV. It was held that Chew could still be charged with abetment by intentional aiding even if the actus reus of the principal offence could not be established. This was through applying the principle laid down in **Chua Kian Kok v PP** [1999] 2 SLR 542 , which held that an abettor could, nonetheless, be liable even if the principal offence was not committed. In any event, it was found on the evidence that the principal offence had in fact been committed.

The judge went on to consider the testimonies of the various witnesses. She found Tye to be an honest and reliable witness. She accepted his evidence that at his job interview by Jeffrey, Chew had looked at his application form and had engaged in a short discussion with Jeffrey before he was informed that he could start work at M KTV. James was also found to be a credible witness and his testimony that only Chew had the authority to decide whether or not to employ a worker was accepted. The judge further accepted James`s explanation on the arrangement which Chew had with regard to the employment of foreign workers such as Tye, who was in Singapore only on a social pass. As for the evidence given by Chua, the judge chose to disregard most of it as she found that the parts relating to Chew`s authority to employ workers, were hearsay.

With respect to Chew, the judge found him to be an evasive and untruthful witness. She pointed out

the various inconsistencies in his testimony and rejected his claim that he did not have the authority to hire workers after his demotion in August 1997. The judge found on the evidence that Chew was in fact authorised to recruit workers for M KTV and he was the person who had approved the illegal employment of Tye. Satisfied that the offence had been committed by Chew, the judge sentenced him to a mandatory imprisonment term as his antecedents showed that he was a repeat offender.

The appeal

Dissatisfied with his conviction, Chew appealed against it. No appeal was raised against the sentence imposed on him.

Two main grounds of appeal were raised. Firstly, it was submitted that the judge erred in finding that the prosecution had established a prima facie case against Chew at the close of the prosecution`s case. Secondly, even if the judge was correct in calling for the defence, it was argued that she erred in finding at the conclusion of the trial that the prosecution had proved its case beyond a reasonable doubt.

(1) PRIMA FACIE CASE

Counsel for Chew, Mr Sidambaram, argued that there was no evidence that the principal offence was committed at all or that Tye had in fact been employed by Chua. In my view, this argument could not be substantiated at all. On the evidence, there could be no doubt that Tye was in fact employed to work at M KTV without a work permit. This was not disputed and was clearly established by Tye`s and James`s evidence. M KTV itself could not be named as the principal offender since it was only a business and did not have its own separate legal identity. It followed that the registered proprietor of the business, who was Chua, would naturally be a party named liable as the principal offender. This was also through the application of the presumption in s 6 of the Act, which applied to presume that the occupier of the premises employed the foreigner found at the premises. Tye was caught in the premises of M KTV and Chua, as the registered proprietor, would, for the purposes of the Act, fall within the definition of `occupier`. The presumption that was raised was not rebutted on the facts and the evidence showed that the principal offence had been committed by Chua trading as M KTV. I should highlight that the principal offender named in the charge was Chua, ***trading as M KTV*** , and not just Chua herself.

In any event, I agreed totally with the judge`s holding that an abetment charge could still be preferred against Chew even if the actus reus of the principal offence had not been established. In ***Chua Kian Kok*** (supra), I had held that for cases of abetment by intentional aiding, an abettor may be liable even though the principal offence was not committed. This point of law is well settled and has been applied in subsequent cases.

The next contention raised by Mr Sidambaram was that the prosecution`s evidence did not show that Chew had abetted, by intentionally aiding, in the illegal employment of Tye. None of the prosecution`s witnesses could say that Chew was the only person who had the authority to hire workers at that material time, or that he had the authority at all. It was highlighted that the evidence given by the investigating officer showed that the other persons from M KTV who were questioned had stated that they were employed by the captains, including Jeffrey.

Based on the evidence, I did not think that the above contention could be sustained. Tye gave a clear account of the events that took place when he went to M KTV for the job interview. He had seen Jeffrey showing Chew the application form which he (Tye) had filled in and he had observed

them talking to each other for about five minutes before Jeffrey informed him that he had been recruited. From the information Tye provided in the form, which included his nationality, it would have been apparent that he was a foreigner who required a work permit before he could work in Singapore. Tye`s evidence remained consistent throughout and his testimony could not be challenged even during the rigorous cross-examination he was subjected to. There was no question that he could have identified Chew wrongly since he saw Chew every day when he was working at M KTV. Although Tye`s work was mainly supervised by the captains and he hardly had any contact with Chew, it was evident that Chew remained the person who was overall in charge. Tye said that he was paid his salary by Chew most of the time, unless Chew was not around. Further, Tye testified that the staff would look for Chew if they encountered any problems, although the need did not arise for him while he was working there. This would not have been the case if Chew had not been in a position of authority at M KTV while Tye was working there.

Tye`s evidence was corroborated by that given by James. It was apparent from James`s testimony that, during the time Chew was employed at M KTV, he was the only manager of the lounge and no one other than the manager had the authority to employ workers. Chew had laid down an established arrangement for the employment of foreign workers like Tye who were in Singapore on social passes. It was Chew who had the authority to allow these workers to return to work at M KTV even after a prolonged absence due to immigration problems in returning to Singapore. Chew also gave instructions to the captains on matters relating to the leave and medical certificates of the workers. Mr Sidambaram sought to cast doubt on James`s evidence by highlighting that James could not say whether Jeffrey had any authority to engage workers and he did not know whether Chew still had the authority to engage workers after Chew was fined in 1997. I found this to be immaterial as it did not alter the fact that when James was asked about the arrangement and the instructions Chew had given him, he gave a firm response that there was no change in either even after Chew was fined in 1997. James could not have been confused about the period since he was very clear that the arrangements remained the same throughout Chew`s employment at M KTV, which ended only in August 1998. Coupled with the evidence given by Tye, the inference to be drawn in such circumstances was that Chew was the person in charge of the employment of workers until he left M KTV.

The judge found both Tye and James to be honest and credible witnesses and accepted their evidence. It is trite law that an appellate court will generally not overturn the trial judge`s findings of fact, especially when they turn on the judge`s assessment of the credibility and veracity of witnesses. In the present case, there were no grounds to doubt the correctness of the findings made by the judge. The circumstances did not show any motivation for the witnesses, especially Tye, to give false evidence to incriminate Chew. Having read their testimonies thoroughly, I also did not find any material discrepancy or contradiction which showed them to be unreliable witnesses.

As for the fact that there were other staff of M KTV who were investigated and had said that they were employed by the captains, this was plainly irrelevant to the present case. These other staff were never called to give evidence and in any case, such a fact did not mean that the captains were in fact the ones with authority to employ the workers. The captains were obviously authorised to interview the workers and may have been the only persons who spoke to them, thus easily creating the misimpression that they had the authority to employ, even though Chew may have been the only person who had such authority. It would have been erroneous to determine the question of who had the authority to employ workers just by looking at who had interviewed them.

It is well settled that the relevant test on whether the prosecution has established a prima facie case against an accused is that enunciated in **Haw Tua Tau v PP** [1980-1981] SLR 73 [1981] 2 MLJ 49 . Under the test, the question to be asked is whether there is some evidence, which is not inherently

incredible and which, if accepted to be accurate, would prove every essential element in the charge brought against the accused. It was argued that the judge erred in failing to direct her mind to the test and did not consider that the evidence adduced against the appellant was purely circumstantial in nature. I found this argument to be unmeritorious. It was apparent from the evidence given by Tye and James that a prima facie case had been established against Chew and the judge was correct in calling Chew to give his defence. It should be emphasised that there is no requirement for the court to state expressly to the parties that it is applying the test in ***Haw Tua Tau*** and explain how the test has been satisfied on the facts. As regards the fact that the evidence was circumstantial in nature, this did not change the application of the test and it was not at the stage of the close of the prosecution`s case that the court must be satisfied that the evidence led to the irresistible inference and conclusion that the accused committed the crime: see **Tan Siew Chay v PP** [1993] 2 SLR 14 . The test laid down in **Ang Sunny v PP** [1966] 2 MLJ 195 (Unreported) with respect to convictions based on circumstantial evidence should be applied only at the close of the trial and not at the stage of the close of the case for the prosecution.

(2) PROOF BEYOND REASONABLE DOUBT

In the second ground of appeal, Mr Sidambaram rehashed much of his earlier arguments and there is no need to reiterate my above findings. The main issue that remained to be dealt with related to the treatment of Chew`s evidence.

It was argued that Chew was consistent throughout in his testimony and the judge was wrong to have regarded it as contradictory. Looking at Chew`s evidence as a whole, I did not think that the judge`s decision to reject Chew`s explanations was one which could be faulted.

Chew claimed that after his conviction and fine in 1997 for a similar offence, he was demoted by Chua Tiong Tiong from a manager to being restricted to entertaining customers only. This fact was apparently known by everyone working at M KTV and Chew himself was thereafter seldom at the lounge as he no longer had the heart to work. All these allegations turned out to be clearly untrue. Tye was employed at M KTV from February 1998 onwards, after Chew`s alleged demotion. If Chew no longer had any powers to employ workers and the other staff of M KTV were aware of his demotion, then there would have been no need for Jeffrey to consult Chew and show him Tye`s application form. The fact that the decision to hire Tye was made only after Chew was shown the form and had a short discussion with Jeffrey, showed plainly that Chew`s permission had been sought. Furthermore, during Tye`s employment, he was told that Chew was the manager of the place and Tye was given the impression that Chew oversaw the work of the waiters in general. Tye also saw Chew every day while he was working at M KTV and this showed that Chew was often at the lounge, contrary to what was claimed. James also continued to treat Chew as the manager of M KTV and did not mention anywhere in his evidence that Chew was ever demoted after the 1997 conviction.

Chew was so eager to distance himself from any authority to employ workers, that he was not able to give any cogent evidence on who took over his duties after his alleged demotion. Initially, he was very quick to assert that James and Jeffrey took charge of hiring after he was demoted. However, he later said that he did not know who took over his duties. He then sought to cover up by saying that he assumed that James and Jeffrey had the authority. Chew was also not able to clearly explain whether he had paid salary to Tye. He first said that he could not recall but later said that he did not make any payments after his demotion. This could not be true since Tye said that he received his salary from Chew most of the time and this must have been after Chew`s supposed demotion had taken place. Mr Sidambaram sought to explain the discrepancies in Chew`s evidence by arguing that it was a misleading result of the words `paid` and `handed` being used interchangeably. I was not convinced that such was the cause of the inconsistency. Looking at the totality of the evidence, it

was hardly believable that Chew ever suffered a demotion at all when he continued to be called and regarded as the manager by the other staff, his salary was not reduced and his duties, at least with regards to Tye and James, seemed to have remained unchanged.

Finally, Mr Sidambaram contended that the judge erred in not drawing an adverse inference against the prosecution for failing to call Jeffrey and Chua Tiong Tiong to give evidence. It was argued that the failure by the prosecution left a serious gap in their case and raised a reasonable doubt on whether the offence had been committed by Chew. Though not explicitly stated as such, this argument appeared to be a reference to s 116 illustration (g) of the Evidence Act (Cap 97, 1997 Ed), which states:

> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.*
>
> *Illustrations*
>
> *The court may presume -*
>
> *...*
>
> *(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;*

The application of s 116 illustration (g) of the Evidence Act has been well settled by case law. The provision is not a mandatory one and does not impose on the court an obligation to make the presumption. To determine whether or not an adverse inference should be drawn, the court will consider all the circumstances, most importantly and particularly, the materiality of the witnesses not produced: see **Chua Keem Long v PP** [1996] 1 SLR 510 , later followed in **Lau Song Seng v PP** [1998] 1 SLR 663 . If the witnesses that were not called were not material or were dispensable and where the prosecution`s case has been sufficiently proved by other independent evidence, then no adverse inferences will be drawn against the prosecution for failing to call such witnesses: see **Lai Kam Loy v PP** [1994] 1 SLR 787 and **Satli bin Masot v PP** [1999] 2 SLR 637 . On the other hand, if the prosecution`s failure to call the witness amounted to a withholding of evidence from the accused or the court, then an adverse inference would be drawn against the prosecution: see **Yeo Choon Huat v PP** [1998] 1 SLR 217 .

Applying the law to the facts of the present case, the circumstances did not justify the drawing of any adverse inferences against the prosecution for not calling Jeffrey or Chua Tiong Tiong to give evidence. They were not indispensable witnesses and the prosecution`s case had already been sufficiently proved by other independent evidence. Indeed, it was Chew`s own evidence that Chua Tiong Tiong was the person who demoted him and removed his authority to employ workers. Thus, if anything, Chua Tiong Tiong would have been the best person to prove this for Chew`s defence and Chew should have been the party to call Chua Tiong Tiong to give evidence.

Conclusion

The evidence against Chew in this case was essentially circumstantial in nature and rested mainly on the oral testimonies of Tye and James. However, that did not prevent the prosecution from proving their case against Chew. Reading the evidence given by Tye and James together, it was apparent that Chew was the only person at M KTV, at the material time, who was authorised to employ workers. Given all the circumstances, I was not persuaded that the judge`s findings were reached against the weight of the evidence. On the contrary, I found that the sum total of the evidence led to the irresistible conclusion that Chew had committed the offence he was charged with. In the result, the decision below was affirmed and the appeal dismissed.

Outcome:

Appeal dismissed.