Viswanathan Ramachandran v Public Prosecutor
[2003] SGHC 183

Case Number : MA 231/2002

Decision Date : 26 August 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : K Shanmugam SC and K Muralidharan Pillai (Allen & Gledhill) for appellant; Christopher Ong Siu Jin (Deputy Public Prosecutor) for respondent

Parties : Viswanathan Ramachandran — Public Prosecutor

Criminal Law – Offences – Property – Criminal breach of trust – Property misappropriated not property entrusted – Entrustment of property not the same as entrustment of proceeds of sale of the property under s 405 Penal Code (Cap 224, 1985 Rev Ed)

Criminal Procedure and Sentencing – Appeal – Findings of fact by trial judge – Approach to be taken by appellate court where there are inconsistencies in evidence

Criminal Procedure and Sentencing – Charge – Amendment – Relevant considerations by appellate court when amending charge

Criminal Procedure and Sentencing – Sentencing – Whether sentence manifestly inadequate – s 409 Penal Code (Cap 224, 1985 Rev Ed)

Evidence – Witnesses – Impeaching witnesses' credibility – Witness convicted in earlier case – Whether appellate court should impeach credibility of witness where trial judge has not merely because witness has lied in earlier case

1 The appellant faced one charge of criminal breach of trust as an agent and one charge of simple criminal breach of trust in the subordinate courts. The first charge read:

> That the accused sometime at end June or early July 2001, being a director of Heraeus Pte Ltd (HSL) and being entrusted by HSL with 1050 kg of Indium metal, committed criminal breach of trust in respect of the said property by dishonestly misappropriating 100 kg of the Indium metal worth at least US$9,000 for his own use and thereby committed an offence punishable under Section 409 of the Penal Code, Cap 224.

while the second charge read:

> That the accused on or about 21 November 2000, being entrusted by WC Heraues Gmbh with a sputtering machine valued at S$277,376, committed criminal breach of trust in respect of the said machine, by selling the said machine and then dishonestly misappropriating the proceeds of the sale amounting to US$35,000 and thereby committed an offence punishable under Section 406 of the Penal Code,Cap 224.

2 The appellant was convicted on both charges and sentenced to terms of imprisonment of nine months and 18 months respectively. Both sentences were to be served concurrently. The appellant appealed against his conviction and the Public Prosecutor filed an appeal against the sentence imposed on the first charge. I dismissed the appellant's appeal and allowed the Public Prosecutor's appeal against sentence. I enhanced the appellant's sentence on the first charge to 15 months' imprisonment (to be served concurrently with the sentence imposed in respect of the second charge). I now give my reasons.

The facts

3 This appeal dealt with the misappropriation of two different properties: Indium metal and the proceeds of sale of a sputtering machine. Both of these properties were owned by WC Heraeus Gmbh ("WCHG") or its subsidiaries. In 1995, the appellant was employed by Heraeus Precision Engineering ("HPE"), a wholly owned subsidiary of WCHG. He had been employed to start up the target division of HPE from scratch. Targets are specialised metallic plates used in the manufacture of magnetic disk drives. By all accounts, he was successful and he had developed it into a $40 million business. The appellant reported directly to Dr Ritzert, the Managing Director of WCHG.

4 In 2000, HPE was sold to Jade Precision Engineering Pte Ltd ("Jade"). However, the target division was specifically hived off from the sale and it was transferred to Heraeus Pte Ltd ("HSL"), also a wholly owned subsidiary of WCHG. The appellant was transferred along with the division. He continued to report to Dr Ritzert. Calvin Lim, HSL's managing director, did not play any part in supervising or directing him.

5 On 1 May 2001, the appellant was appointed as a director of HSL. This arrangement continued until 4 July 2001 when the appellant's services were terminated under a consolidation operation at HSL (a matter unrelated to the present charges).

6 During his employment, the appellant was responsible for the sales and marketing of targets in the region. He had authorised the acquisition and payment of some 1050 kg of Indium metal. This Indium metal was used in the production of targets. The Indium metal was delivered to HSL prior to the appellant's termination. Some of this Indium metal was subsequently found to be missing and the appellant was charged under the first charge with misappropriating 100 kg of the Indium metal.

7 In addition, HPE had a machine called the sputtering machine which was used in the production of magnetic thin films using platinum targets. After its purchase, the sputtering machine began to give problems to HPE and they had sold this sputtering machine on to WCHG. Dr Ritzert of WCHG had then given the appellant instructions to dispose of the sputtering machine by either scrapping or selling it. The appellant had then sold the machine to one Yeo Lik Sheng ("Yeo") who had then sold it to Glen Westwood, an employee of Oryx which was a competitor of HSL. This second sale was done without the knowledge of the appellant. The sale proceeds of US$35,000 were then sent to BGS Trading, a Canadian company. The sputtering machine and its sale proceeds formed the subject matter of the second charge.

Prosecution's evidence

8 The prosecution's case was relatively simple. With respect to the first charge, Ulrich Blankenstein ("Ulrich"), a manager at HSL, was informed by Amir Hamzah ("Amir"), a supervisor at HSL, pursuant to an audit, that 650 kg of Indium metal was missing in July 2001. Ulrich did not immediately investigate into the matter due to time and expense constraints. However, he had by December 2001 embarked on his own investigations and had learnt from Krishnamoorthy Ramesh ("Ramesh"), an accounts executive at HSL, that some of the Indium metal had been taken by the appellant.

9 After further questioning, Ulrich found out that Ramesh had, along with Perabu (an office assistant at HSL), Amir, Kumar (a delivery driver at HSL) and Thanabal (a storeman at HSL) packed at least four boxes each containing exactly 25 kg of Indium metal at the end of June 2001. They had then loaded the boxes onto the company's van. Ramesh had then driven the van and delivered the boxes of Indium metal to the appellant's residence at Tulip Gardens Condominium the day after. The

appellant had received the delivery personally.

10 In addition, the prosecution adduced evidence of emails retrieved from the appellant's computer showing that Spectromet Pte Ltd, a company owned by the appellant, had been selling Indium metal to one Echo Fang. Based on this evidence, the prosecution alleged that the appellant had misappropriated 100 kg of the Indium metal that had been entrusted to him.

11 As for the second charge, Ulrich had, in early July 2001, heard that the sputtering machine had been sold to Oryx, their competitor. Not surprisingly, he was not pleased. He questioned the appellant who denied selling the sputtering machine and instead stated that the sputtering machine had been scrapped and no monies received. Ulrich was placated by this explanation as he felt that, if Oryx had obtained the sputtering machine from a scrap dealer, then there was nothing that he could do. It was only later that Ulrich discovered that the sputtering machine had not been scrapped but had been sold.

12 The prosecution further called Chris Han, a former employee of HPE, who testified that he had assisted in arranging the sale of the sputtering machine to one Glenn. He had gotten Yeo, his wife's friend, to stand in as a buyer for the sputtering machine as he knew that the appellant would not sell the machine to Glenn. They did not inform the appellant that the actual buyer would be Glenn. The appellant provided them with an invoice which instructed them to direct the proceeds to BGS Trading. Chris questioned the appellant who told him that this was Heraeus' trading account (which it was not). The proceeds were accordingly wired out and the sputtering machine delivered. The prosecution thus alleged that the appellant had misappropriated the proceeds from the sputtering machine that had been entrusted to him.

Defence's evidence

13 The appellant was the only witness for the defence. In relation to the first charge, the appellant admitted that he had been entrusted with the Indium metal as a director of HSL. However, he denied misappropriating the Indium metal. In this respect, he admitted that Ramesh had delivered some boxes to his residence, but he claimed that these boxes contained books and not Indium metal. When he was then questioned as to the missing Indium metal, he accused Amir of having falsely accused him, noting in particular that Amir had, in an earlier case, been convicted of the theft of platinum targets Furthermore, Amir had, in that case, also falsely accused him of masterminding the theft. I am of course familiar with that case as Amir had appealed to this Honourable Court in *Amir Hamzah bin Berang Kuty v Public Prosecutor* [2003] 1 SLR 617 and I had dismissed his appeal against conviction. The appellant further explained that the Indium that Spectromet Pte Ltd had sold to Echo Fang had come from another company called Shanghai Shuanxie and was not HSL's missing Indium.

14 As for the second charge, the appellant admitted that he had been entrusted with the sale of the sputtering machine and that he had sold the machine to Yeo. He however claimed that he had not misappropriated the proceeds as the proceeds were ultimately paid to Malaysian Sheet Glass ("MSG"), as secret commissions, in return for their help in procuring for HSL customers from HSL's competitors. He further alleged that this entire operation and payment had been done on the instructions of Dr Ritzert. He further explained that Dr Ritzert had instructed him to keep the entire matter secret and he had thus denied selling the sputtering machine to both Ulrich and the police.

The decision below

15 In relation to the first charge, the district judge accepted the evidence given by the

prosecution's witnesses that Amir, Ramesh, Humar and Perabu had on 31 June 2001 packed the Indium and that Ramesh had delivered the Indium to the appellant the next day. She rejected the appellant's defence, holding that it was neither substantiated nor put to Ramesh when he was on the stand. As such, she convicted him on the first charge and sentenced him to a term of imprisonment of nine months.

16 As for the second charge, the district judge noted that the appellant's defence of secret commissions was essentially a bare assertion as there was no supporting documentary evidence that showing that Dr Ritzert had approved of the payment. She also rejected his explanation as to his lies to Ulrich and the police. She further noted that, if his explanation was true, there was no reason why Dr Ritzert would have allowed a police report to be made in relation to the proceeds of sale. She thus convicted the appellant and sentenced him to a term of imprisonment of 18 months.

The appeal

17 In this appeal, the appellant raises two contentions. The first is that the second charge is fundamentally flawed and the appellant should thus be entitled to an acquittal on the charge. Secondly, the appellant challenges the findings of fact that the trial judge made in coming to her decision to convict him on both charges.

Charge is fundamentally flawed

18 In gist, the appellant argued that the second charge was fundamentally flawed because the property alleged to be misappropriated was not the property entrusted to the appellant. This contention was based upon a clear interpretation of s 405 of the Penal Code (Cap 224). For convenience, I set out the provision below:

> 405. **Whoever, being in any manner entrusted with property**, or with any dominion over property, **dishonestly misappropriates or converts to his own use that property**, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits "criminal breach of trust". [emphasis added]

19 I was of the opinion that the appellant's contention had much force. In this regard, I was guided by my earlier decision in *Carl Elias Moses v Public Prosecutor* [1995] 3 SLR 748 in which I had been faced with a similar situation. In *Carl Elias Moses*, the charge had similarly been for criminal breach of trust under section 406 of the Penal Code and the charge there stated:

> You, Carl Elias s/o Jack Moses Elias, NRIC No 1475884/D, are charged that you, on or about 23 October 1989, in Singapore, being **entrusted with property, namely, 2,000 Overseas Union Bank Warrant 1994** for the purpose of delivering these warrants on behalf of Trans-Pacific Credit Pte Ltd (`the company`) to DBS Securities Pte Ltd pursuant to a sale (per contract number 414270/501) of the said warrants, and thereafter to pay the proceeds of the said sale to the company, did **dishonestly misappropriate the said proceeds**, and you have thereby committed an offence punishable under s 406 of the Penal Code (Cap 224, 1985 Rev Ed).` [emphasis added]

> The fallacy in the prosecution`s reasoning, to my mind, lay in the assumption that, since shares and their sale proceeds both constituted `property` under s 405, they were therefore one and the same thing; and that accordingly a charge might specify that an accused had been entrusted with shares (`property`) but that he had dishonestly misappropriated the sale proceeds from those shares (`that

> property`). Not only did this assumption place a most ungrammatical construction upon s 405, it further demanded a leap in logic which was not warranted by the evidence… Of course, it might conceivably have been argued that a constructive trust was created over the sale proceeds the moment the appellant failed to have them credited to TPC. This, however, was never the prosecution`s case, either in the court below or upon appeal. Nor, regrettably, was there any formal application by the prosecution to amend the charges against the appellant.

21 As such, I was of the opinion that the second charge as it stood was fundamentally flawed as it envisioned the appellant being entrusted with the sputtering machine but misappropriating the proceeds of its sale. This was, as I had earlier stated, a fallacy as a property and its proceeds are not the same thing under s 405. As such, the appellant should never have been convicted on the second charge as the constituent elements of s 405 had not been met in the charge.

22 At this stage, the prosecution invited me to exercise my discretion to amend the charge. It is clear that the High Court in its appellate jurisdiction has the power to amend the charge. LP Thean JA, delivering the judgment of the Court of Appeal in *Garmaz s/o Pakhar & Anor v Public Prosecutor* [1996] 1 SLR 401, authoritatively stated that: -

> … it is inconceivable that it was the intention of the legislature that the High Court, in the exercise of its appellate jurisdiction, should not have the power to amend the charge preferred against the accused and set the record straight. A more purposive construction should in our view be adopted. We think that such power is by necessary implication implied in s 256(b).

23 This power is however not unlimited. It should only be exercised in very restricted circumstances. In such circumstances, the pivotal consideration is simple: the possibility of prejudice to the accused. This consideration is reflected in several ways. First, the Court should only exercise its discretion where it is clear from the nature of the offence and the notes of evidence that the proceedings at trial would have taken the same course and that the evidence recorded (especially that of the defence) would have been substantially unchanged: *Ng Ee v Public Prosecutor* [1941] 1 MLJ 180. Secondly, the amendment of the charge must not affect the accused's defence: *Lew Cheok Hin v Regina* [1956] 1 MLJ 131. Thirdly, the accused, as a result of the amendment of the charge, should not be prejudiced in terms of his sentence as a result of the amendment of the charge: *Public Prosecutor v Henry John William and another appeal* [2002] 1 SLR 290.

24 The reason for these safeguards is simple. I can put it no clearer than to cite the words of Norris R in *Lim Beh v Opium Farmer* (1842) 3 Ky 10:

> … If there by one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as he best may.

25 Thus any amendment to the charge especially at the appellate stage must bear witness to this fundamental purpose of the charge. In particular, the appellate court must hesitate before amending the charge because the accused would not have the opportunity to recall any witnesses or to call new witnesses in his defence.

26 With this consideration in mind, I turned to the appeal at hand. In my judgment, this was an appropriate case for the amendment of the charge from the entrustment of a sputtering machine to the entrustment of the proceeds of sale of the sputtering machine.

27 I was of the opinion that such an amendment would not have been prejudicial to the appellant as it was clear from all the evidence that the appellant had been entrusted not only with the sputtering machine but also with the proceeds of sale of the sputtering machine. This must be so because a person authorised to collect moneys on behalf of another must have been entrusted with the money once it is paid to him; thus it cannot make a difference that the additional step of selling the sputtering machine is added into the equation as beneficial interest in the proceeds would have passed immediately upon collection of the proceeds.

28 It is further clear that it was never in dispute that the appellant had been entrusted with both the sputtering machine and its proceeds. Indeed, the crux of the appellant's defence assumed that he had been entrusted with the proceeds because he would otherwise have been unable to pay those proceeds as secret commissions to MSG. As such, it could not be said that the amendment of the charge would have affected his defence. I would also add that the appellant would not be prejudiced in the sentencing as the quantum alleged to have been misappropriated remains the same. I will deal with this further when I turn to the appeal against sentence.

29 For the sake of completeness, I will also mention that this appeal is distinguishable from *Carl Elias Moses* insofar as the issue of entrustment of proceeds is concerned. In that case, I had noted that it was doubtful whether the sale proceeds could have been entrusted to the accused given the fact that he had only been entrusted with the shares to transport them to DBS Securities. There was no question of entrustment of proceeds there because as far as Trans-Pacific Credit Pte Ltd (which had entrusted the shares to the accused) was concerned, the proceeds were to have been paid directly by DBS Securities over to them. *Carl Elias Moses* was not a case of entrustment for the purposes of a sale, but rather entrustment for delivery. The fact that the delivery was made pursuant to a sale was merely incidental to the issue of entrustment of proceeds.

30 Accordingly, I amended the charge to read:

> That the accused on or about 21 November 2000, being entrusted by WC Heraeus GmbH with the proceeds from the sale of a sputtering machine amounting to US$35,000, committed criminal breach of trust in respect of the proceeds, by dishonestly misappropriating the proceeds and thereby committed an offence punishable under section 406 of the Penal Code, Cap 224.

31 I would only add that, in future, both the prosecution and trial judges alike must be more careful when dealing with cases of criminal breach of trust. The framing of a charge is of fundamental importance and affects the substance of the evidence given at the trial below. It would be most undesirable if an otherwise guilty party was to go free because of an avoidable failure to draft the charge correctly.

Challenges against the finding of facts

32 Counsel for the appellant most vigorously sought to persuade me that the trial judge had erred in accepting the evidence of the prosecution witnesses and rejecting the testimony of the appellant. In relation to the first charge, he pointed to the inconsistencies in the amount of Indium alleged to have been packed and loaded that emerged from the testimonies of Ramesh, Perabu, Kumar

and Amir. He also branded Amir's testimony as being completely unreliable as he was a liar and a cheat as evidenced by his earlier conviction.

33 In relation to the second charge, counsel for the appellant argued that the trial judge had erred in failing to accord sufficient weight to the evidence that showed that commissions had previously been paid to MSG and that Dr Ritzert had been aware of the practice of paying commissions.

34 I was of the opinion that these arguments were without merit. It is trite law that where the trial judge had made findings of fact, based on the credibility of the witnesses whom he has had the opportunity of observing and assessing, the appellant court would generally defer to the trial judge. Thus, the appellate court, if it wishes to overrule the trial judge, must not only entertain doubts as to whether the decision is right but must be convinced that the decision is wrong: *Public Prosecutor v Poh Oh Sim* [1990] SLR 1047. As such, having examined the evidence for myself, I was of the view that the trial judge's findings were neither against the weight of the evidence nor plainly wrong. It could not be said that the inferences that counsel for the appellant asked me to draw were irresistible.

35 In particular, it cannot be sufficient for an appellant to point to inconsistencies in the evidence. It must first be recognised that absolute truth is beyond human perception, even by honest and disinterested witnesses and due allowance must be given to human fallibility in retention and recollection: *Public Prosecutor v Kalpanath Singh* [1995] 3 SLR 564. This is particularly pertinent in this appeal given the routine nature of the activity (packing and delivery of goods) coupled with the passage of time (almost one year). Secondly, it must be recognised that such inconsistencies need not necessarily detract from the value of the testimony of the witnesses. Where the inconsistencies are trivial, they should be ignored. If however, the inconsistencies relate to a material point which would seriously affect the value of the testimony of the witnesses, then it would be imperative upon the trial judge to weigh the evidence carefully before coming to a decision: *Ng Kwee Leong v Public Prosecutor* [1998] 3 SLR 942. In this appeal, the inconsistencies that the appellant relies on cannot be said to be material. These inconsistencies only differ as to the number of boxes alleged to have been packed and loaded. It cannot be said, by any stretch of imagination, that this would mean that the Indium metal had never been packed nor delivered.

36 I would further add that it cannot be sufficient for an appellant to impeach the credibility of a witness by pointing to the fact that the witness had been found to have lied in an earlier case. While this is of course a strong factor pointing to the witness' propensity to lie, each case must be looked at individually. It would not be correct to fetter the discretion of a trial judge by referring him to the decisions of other judges in this respect. Each trial judge has the responsibility of deciding on his own accord whether to believe the witness. This responsibility cannot be delegated. Hence where the trial judge has decided after observing the witness, who may have in his demeanour, manner or expression left an impression that cannot be reproduced in the grounds of decision or notes of evidence, to believe in the credibility of that witness, it cannot be correct, without more, for the appellate court to overturn his decision merely because that witness has lied in other cases.

37 As such, I dismissed the appellant's appeal against conviction and also convicted him on the amended second charge.

Appeal as to sentence

38 The appellant had in his Notice of Appeal stated that he would be appealing both his conviction and the sentence imposed. He had however in his Petition of Appeal and written

submissions failed to address this issue. In court, I took the opportunity to clarify the matter and confirmed that he was not appealing against the sentence imposed. As such, I turned to the Public Prosecutor's appeal.

39 The prosecution stated that they were appealing only against the sentence imposed in the first charge. The first charge involved an offence under s 409 of the Penal Code which reads:

> 409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

40 I would first note that s 409 deals with the aggravated form of criminal breach of trust as the situation envisioned involves the offender ex hypothesi standing in a fiduciary type relationship with the victim. Indeed, the policy behind the sentencing in such a scenario is not so much the rehabilitation, retribution or incapacitation vis-à-vis the offender but rather deterrence: especially as a warning to the other members of that profession from similarly betraying the trust placed in them.

41 Secondly, this appeal involved aggravating circumstances as the appellant had abused his position as a director of the company (by instructing his employees to transport the Indium to his residence) and his entire defence was simply to allege that the prosecution's witnesses had taken the Indium.

42 Thirdly, the only mitigating factors in the appellant's favour were that he had no antecedents and that he suffers from chronic hypertension and diabetes. While the first factor is normally of some value, this must be weighed against the other aggravating factors present: *Wan Kim Hock v Public Prosecutor* [2003] 1 SLR 410. As for the second factor, I had little hesitation in dismissing it as our Courts have only looked to ill health as a mitigating factor in exceptional cases such as where the offender suffers from a terminal illness: *Public Prosecutor v Ong Ker Seng* [2001] 4 SLR 180.

43 I lastly turn to the precedent cases referred to me by the prosecution, in particular, *Sarjit Singh s/o Mehar Singh v Public Prosecutor* [2002] 4 SLR 762. Before I do so, I would highlight that the nature of sentencing involves such multifarious and diverse factors that no two cases can ever be identical. It is clear that any precedent cases can always be distinguishable on the facts. Despite all this, precedent cases are useful in serving as guidelines for the sentencing court. However, that is all that they are: guidelines. At the end of the day, every case turns on its own facts. The sentencing court must look to the facts of each case and decide on an appropriate sentence based on those facts.

44 In *Sarjit Singh,* the accused, an advocate and solicitor, was convicted after trial on a charge under s 409 for misappropriating client's funds amounting to $4,815.24. He had been sentenced to nine months' imprisonment and I had on appeal, enhanced his sentence to 36 months. The prosecution argued that the sentence of 36 months imposed in *Sarjit Singh* clearly illustrated the manifest inadequacy of the nine months sentence imposed on the appellant. It must however be noted that *Sarjit Singh* contained very strong aggravating circumstances. The accused there had not

only betrayed his duty as an advocate and solicitor but had in a mockery of the judicial system, faked the filing of a writ, the memorandum of appearance, receipts and bill of costs.

45 In the final analysis, I was of the view that the sentence imposed by the trial judge was manifestly inadequate given the seriousness of the offence. As such, I enhanced the sentence imposed on the first charge to a term of imprisonment of 15 months. I further ordered that a term of imprisonment of 18 months should be imposed on the amended second charge. These two sentences were to be served concurrently for a total term of imprisonment of 18 months.

Conclusion

46 This was a difficult case containing a convoluted factual matrix. I was grateful for the assistance of both counsel. At the end of the day, I was satisfied that the trial judge had not erred in convicting the appellant. Therefore, I dismissed the appellant's appeal after amending the second charge and allowed the prosecution's appeal as to sentence on the first charge.

Appellant's appeal dismissed after amending the second charge.

Public Prosecutor's appeal against sentence allowed.