Chua Kim Leng Timothy v Public Prosecutor
[2004] SGHC 74

Case Number : MA 206/2003

Decision Date : 14 April 2004

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Davinder Singh SC and Tey Tsun Hang (Drew and Napier LLC) for appellant; Christopher Ong Siu Jin (Deputy Public Prosecutor) for respondent

Parties : Chua Kim Leng Timothy — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Whether district judge failed to appreciate that sentencing norm for such corruption offences is imposition of fine

Criminal Procedure and Sentencing – Sentencing – Principles – Corruption offences – Whether district judge erred in departing from general principle that giver of gratification bears equal culpability to that of receiver – Whether district judge erred in not giving due consideration to fact that offences took place in commercial context – Whether district judge failed to appreciate true nature of public interest at stake

14 April 2004

Yong Pung How CJ:

1 This was an appeal against the decision of District Judge Jasvender Kaur. The appellant, Chua Kim Leng Timothy ("Chua"), was convicted on a total of ten charges under s 6(b) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA"). Another 76 charges were taken into consideration for the purpose of sentencing.

2 All 86 charges related to bribes paid to bunker surveyors for overlooking short deliveries of fuel oil and/or deliberate short pumping and/or provision of a lower and cheaper grade of fuel oil to vessels than that which was contracted for. Chua was sentenced to three months' imprisonment and a fine of $50,000 (in default five months' imprisonment) on each of seven of the ten charges. On each of the remaining three charges, Chua was sentenced to one month's imprisonment and a fine of $20,000 (in default two months' imprisonment). The sentences imposed in respect of three of the charges were ordered to run consecutively. In total, Chua was sentenced to ten months' imprisonment and fined $410,000. He paid the fine and appealed against the sentence of ten months' imprisonment. At the end of the hearing, I dismissed the appeal. I now give my reasons.

Facts

3 In 1998, Chua incorporated Navi Marine Services Pte Ltd ("Navi Marine") to deal mainly with ship bunkering. Navi Marine's clients were bunker traders who acted as brokers or middlemen for shipowners or charterers of vessels that required refuelling. The shipowners or charterers would approach a bunker trader to source for a fuel oil supplier. The bunker traders would obtain quotations on the price of the required grade of fuel oil and select a company to supply the fuel. Navi Marine was one such supplier. The shipowner or charterer would then pay the bunker trader who would in turn pay Navi Marine.

4 To assist in this process of bunkering, Navi Marine employed programmers to take charge of co-ordinating the loading of fuel oil from suppliers and its supply to vessels. Bunker clerks were also employed to be present on board Navi Marine's barges. Their duty was to ensure that the correct

quantity and quality of bunkers was delivered to a vessel and to prepare the requisite documentation.

5 During the actual bunkering process, the bunker supplier's representative and the vessel's representative would be present. Navi Marine, being the bunker supplier, would have its bunker clerk on board its barge as its representative. The chief engineer of the vessel would usually be the vessel's representative. At times, a bunker surveyor would be engaged by the vessel owner or charterer to check and certify that the correct quantity and quality of fuel oil was supplied during the bunker transfer. It was in the context of such a process that Chua managed to commit the bribery offences.

Techniques that aided the commission of the bribery offences

6 There were three methods which supported the system of bribes paid out by Chua: (a) the "buy-back" scheme, (b) short supply to vessels and (c) provision of a lower grade of fuel oil.

Buy-back

7 This was an arrangement by which the chief engineer of a vessel colluded with Navi Marine to receive less fuel oil than was reflected in the contract for which the vessel owner or charterer was invoiced. The chief engineer would be paid for the amount that was not delivered. The chief engineer would inform the bunker clerk of the quantity of fuel oil (and the price per metric tonne, usually well below the market price) that he wanted to sell back to Navi Marine. The bunker clerk would then inform the programmer on duty, who would in turn decide on whether the chief engineer's "offer" should be accepted. These programmers were *empowered by Chua* to make such decisions. Notably, Chua had capped the price of the buy-backs at US$45 per metric tonne. As such, if the chief engineer asked for a higher price, the programmer on duty would seek Chua's approval before executing the buy-back.

Short supply to vessels

8 This was a process by which the bunker clerks used various methods to cheat customers by deliberately short supplying fuel oil to the vessels. The short supply generally took place without the knowledge of the chief engineer and was termed as "gains" in Navi Marine. *Chua would instruct* his bunker clerks to make as many "gains" as possible, and would query and scold the bunker clerks if few "gains" were made in a month. The bunker clerks received an incentive payment for the "gains" they made.

Provision of lower grade of fuel oil

9 The two common grades of marine fuel oil delivered to vessels were 380 CST and 180 CST. 180 CST was the lighter and more expensive of the two (costing US$3 to US$5 per metric tonne more than 380 CST). In his statement, Chua admitted that he instructed his bunker clerks to "pump a proportion of lower grade fuel of 380 CST for each ship whenever possible even when the requirement in the nomination form was of a higher grade such as 180 CST". Pursuant to such instructions, the bunker clerks would employ certain methods to avoid detection of the lower grade by the vessel's representative.

The payment of bribes to the bunker surveyors

10 In order to carry out these three schemes, a system was devised to bribe the bunker surveyors into overlooking certain lapses. For instance, to overlook the provision of a lower grade of

fuel oil, the bunker surveyors were paid $1.50 per metric tonne. To overlook the shortfall in fuel oil, as a result of a "buy-back", they were paid $10 per metric tonne. If a short delivery was made by the bunker clerk with the knowledge of the bunker surveyor, the bunker surveyor was paid a rate of between US$45 to US$60 per metric tonne for fuel oil and US$90 per metric tonne for diesel oil, calculated on 60% of the quantity short supplied. The remaining 40% would be treated as "gains" of Navi Marine. The programmers would then hand the bribe money to the bunker surveyors a few days or up to a week after the bunker supply, in the vicinity of the World Trade Centre.

The decision below

11 Essentially, the district judge observed that on all the charges, the facts indicated that the respective bunker surveyors were approached by the bunker clerks with promises of gratification in exchange for overlooking a "buy-back" and/or short delivery and/or provision of a lower grade of fuel oil. The district judge also noted that none of the bunker traders who were invoiced would have made the payment had they known that a poorer grade and a lesser quantity of fuel oil was supplied. Accordingly, the district judge convicted Chua on five charges for offences under the PCA. Chua then pleaded guilty to a further five similar charges.

12 As to sentence, the district judge took into account the fact that the other accused persons (63 bunker surveyors), who faced similar charges and had pleaded guilty, were all fined. She recognised that the general principle in such cases would be that the giver and receiver of the gratification were considered equally culpable. Therefore, sentences meted out should be similar in respect of both parties. However, the district judge observed that in some cases, the giver deserved more punishment: *Chua Tiong Tiong v PP* [2001] 3 SLR 425.

13 In this respect, she took into account the fact that it was Chua who had set in place a system of paying incentives to his bunker clerks to make "gains", in order to motivate them to obtain as much "gains" as possible through clandestine means. It was also Chua who had instructed his bunker clerks to deliver the cheaper and lower grade of fuel oil, 380 CST, in place of 180 CST. Thus, the district judge held that while the surveyors had succumbed to temptation when offered bribes to overlook Chua's schemes, it was plain that the person who had put the temptation in their minds was Chua, through his employees. She also held that it was Chua who stood to gain the most by short delivery. As such, the district judge found that Chua's culpability was greater than that of the receivers (bunker surveyors), and it was therefore reasonable to make a distinction in the respective sentences meted out to them.

14 The district judge then considered the issue of whether a fine or a custodial sentence should be imposed. She referred to *PP v Tan Fook Sum* [1999] 2 SLR 523 at [21], where it was held, following the view of Professor Tan Yock Lin in *Criminal Procedure* (LexisNexis, 1997) ch XVIII at para 852, that "only the public interest should affect the type of sentence to be imposed while only aggravating or mitigating circumstances affect the duration or severity of the sentence imposed". In light of this, the district judge observed that Chua's offence was tantamount to defrauding the charterers and owners of 86 vessels over a two-year period.

15 She considered the repercussions of such offences on Singapore's economy, Singapore being the world's busiest bunkering port with sales of more than 20 million tonnes of bunkers annually (*Business Times*, 20 June 2003). The district judge held that the unethical practices adopted by the accused had the effect of tarnishing Singapore's image as a port of quality bunkers. Therefore, a custodial term was warranted in view of the public interest and in order to send a signal that such unethical practices would not be tolerated.

16 The district judge then considered what the appropriate length of the sentence should be, taking into account the mitigating and aggravating factors. She considered the fact that Chua had accepted responsibility by pleading guilty and had consented to 76 similar charges being taken into consideration. She also noted that Chua had a clean record and that he had made some contributions to charity. However, she observed that it was plain that Chua had made significant profits by short delivering bunkers and was motivated by greed. The district judge balanced these various considerations before arriving at the overall sentence of ten months' imprisonment.

The appeal

17 Chua made several submissions in his appeal against the custodial sentence. As some of these submissions effectively overlap, I dealt with them under the following four headings:

(a) whether the district judge erred in departing from the general principle that the giver of gratification bears equal culpability to that of the receiver;

(b) whether the district judge erred in not paying due regard to the fact that these offences took place in a purely commercial context;

(c) whether the district judge failed to appreciate the true nature of the public interest at stake and what was necessary to address this interest; and

(d) whether the district judge failed to appreciate that the sentencing norm for such offences is to impose a fine.

Whether the district judge erred in departing from the general principle that the giver of gratification bears equal culpability to that of the receiver

18 Chua argued that the general principle enunciated in *Chua Tiong Tiong* could only be departed from when the giver of gratification intended to corrupt the establishment of law and order for his private gain, and/or gave or offered bribes to pervert the course of justice. In such instances, the culpability of the giver would be considered greater than that of the receiver, as the perversion of public interest is considered an aggravating factor. Chua claimed that the rationale for departing from the general principle was the need to uphold the integrity of the public service and the administration of justice. As such, Chua argued that departure from the general principle was warranted *only* in cases where this *particular* rationale would be served.

19 Chua therefore argued that since his role as a giver of gratification did not involve the corruption of a sector of the public service or disturb the administration of justice, the district judge should not have departed from the general principle of equal culpability between the giver and the receiver. He thus claimed that he should have been fined, just like the receivers of the gratification, instead of being subjected to a custodial sentence. This then would have reflected the equality in culpability between himself and the bunker surveyors.

20 I did not agree with Chua's argument. I found that Chua had overstated his point regarding the district judge's departure from the general principle. It was clear that the district judge had decided to depart from the general principle only because, on the facts, Chua's culpability was far greater than that of the receivers of gratification. Chua was the one who gained the most out of the bribery offences. He was also the one who had created situations that facilitated the offences. Further, it was Chua who had put the temptation to offend in the minds of the receivers. Looking at such findings, I was not surprised that the district judge had come to her decision.

21 In fact, in *Chua Tiong Tiong*, my decision to depart from the general principle was based on the greater *culpability* of the giver of gratification in that case, as opposed to the receiver. In determining the *extent* of culpability, then, the public service element was taken into account as an aggravating factor. All things being equal, the culpability of the giver over the receiver would be greater if the *purpose* for giving a bribe was the perversion of a public interest element *eg* a judicial proceeding.

22 As such, it is not simply the fact that a public interest element *exists* on the facts of a case that determines whether a court should depart from the general principle, but whether one party (giver or receiver) was more culpable than the other. In this sense, the district judge was correct in departing from the general principle regarding equal culpability (and consequently, parity in sentencing) because Chua was indeed far more culpable than the bunker surveyors.

Whether the district judge erred in not paying due regard to the fact that these offences took place in a purely commercial context

23 Chua relied on my decision in *PP v Chew Suang Heng* [2001] 1 SLR 692 at [9] to argue that "[g]enerally, corruption offences involving law enforcement officers or other public servants attract harsher penalties and custodial sentences as compared to similar offences committed in commercial dealings and in the private sector". In this respect, Chua claimed that in corruption cases, a custodial sentence was imposed as a norm *only* when the bribery of *government servants* was involved, and that corruption offences that occurred in the private sector generally attracted non-custodial sentences. Chua therefore argued that his custodial sentence should be substituted with a fine.

24 Here, Chua's argument again oversimplified the sentencing practices of the courts. Chua attempted to compartmentalise corruption offences into two categories – those committed by government servants and those committed by people in the private sector. While it was true that my holding in *Chew Suang Heng* pointed to harsher penalties for corruption offences where government servants were involved, this was not an indication that only government servants would be subject to custodial sentences. In a case where an offender in the private sector proved to be far more culpable than a corrupt government servant, having regard to *all* the considerations on the facts, a heavier sentence should be meted out to the private sector offender.

25 It was obvious to me that Chua's intention was to draw a clear distinction between the private sector offender and the corrupt government servant. In my opinion, no such *clear* distinction can be drawn nowadays. For instance, a worker in the private sector might be employed on a government tender to carry out what is essentially a government function. Where is the distinction here? If a corrupt practice occurs in such a situation, applying Chua's approach would be highly unsatisfactory. Under Chua's approach, courts would be forced to focus on the offender as either a private sector worker, or as someone carrying out a government function. Which focus courts take would then determine what type of penalty should be meted out. This cannot be the case. Chua had suggested too superficial, too artificial an approach that focused *only* on the offender's job, without taking into account the culpability of that offender.

26 Further, it was also apparent that Chua had attempted to apply, *carte blanche*, a principle from an earlier case to this appeal, without understanding the context in which that principle was enunciated. Such an approach cannot be encouraged. It must be remembered that every case is special on its facts. Likewise, a principle that has been expressed in a case must be interpreted in light of the facts of that case. Applying a principle by divorcing it from the context in which it was made is an attempt at placing a square peg in a round hole. There will not be a perfect fit. Similarly, this logic applies with regard to sentencing practices. In respect of this, I referred to a portion of my

holding in *Lim Choon Kang v PP* [1993] 3 SLR 927 at 928, [3] and [6]:

> For the appellant, it is contended that since 1989 a tariff of sentences has been established for these offences, in that the sentence has always been a fine, and in no case has a sentence of imprisonment been imposed.
>
> Sentences imposed in previous cases which are similar can always be referred to for guidance, so long as it is remembered that they have been based on the particular facts of their respective cases, and on what I might call the ground conditions and the climate of judicial opinion at the relevant times.

27 The facts of this appeal spoke for themselves. It was Chua who had set in motion the series of bribery offences over a two-year period. It was also Chua who had made the most gains out of these offences. Additionally, it was Chua who was far more culpable than the bunker surveyors. In the face of greater culpability, Chua was not in the position to argue that only a fine should have been imposed on him, as was done for the bunker surveyors. His argument that regard should be had to the commercial context in which the offences took place was, on its own, far too simplistic. Additionally, this selfsame argument drew an artificial distinction which I was unable to agree with. As such, I found that the district judge was correct in imposing a custodial sentence, considering the variety of factors at play.

Whether the district judge failed to appreciate the true nature of the public interest at stake and what was necessary to address this interest

28 Chua argued that the public interest in the context of the bunkering industry and the image of Singapore's port industry could have been sufficiently addressed by the imposition of fines. In this respect, Chua cited a *Business Times* article dated 3 February 2004 ("Singapore port shatters records") and a statement made on 26 September 2002 by the then Senior Minister of State (Transport and Information, Communications and the Arts) Mr Khaw Boon Wan to claim that fines had been imposed by the courts on offenders.

29 However, strangely, nowhere in the two referred materials was there any specific reference to an imposition of fines by a Singapore court. The *Business Times* article only stated that "more stringent quality checks and a new requirement for Custody Transfer Sampling for ship-to-ship transfer of bunkers and bunker tankers loading at terminals" would be taken by the Maritime Port Authority of Singapore. Similarly, in the Minister's statement, there was no reference of an imposition of fines, the statement only mentioning that "Singapore took a no-nonsense approach to corruption" and that "a number of bunker surveyors were prosecuted in court for taking bribes". Moreover, as I have already noted, the district judge was not wrong in imposing a custodial sentence on Chua despite the fact that the bunker surveyors had all been fined. On the facts, Chua was more culpable than the bunker surveyors in respect of the bribery offences and this warranted greater punishment.

30 Chua's arguments also failed to show why the district judge had not appreciated the true nature of the public interest at stake and what was necessary to address this interest. The only reference made by Chua to any part of the district judge's holding with regard to the issue of public interest was the fact that she had mentioned the preservation of Singapore's attractiveness as a leading bunkering port, and that she had recognised that malpractices gave rise to a risk that the integrity of the bunker trade in Singapore would be undermined. However, Chua only made this reference in passing and did not indicate how this showed that the district judge had failed to appreciate the nature of the public interest at stake. Accordingly, I saw no merit in Chua's argument and dismissed it.

Whether the district judge failed to appreciate that the sentencing norm for such offences is to impose a fine

31 Chua relied on various cases in support of his argument that the sentencing norm for such bribery offences is a fine and not a custodial sentence. For instance, in *PP v Lim Kim Huat*, District Arrest Case No 61355 of 2002, a bunker supplier pleaded guilty to a charge of corruptly giving a gratification of US$15,000 to the chief engineer of a vessel, resulting in a short supply of 400mt of marine fuel oil and 40mt of marine fuel gas. The bunker supplier was fined.

32 *Prima facie*, the facts in *Lim Kim Huat* seemed identical to the facts of this appeal. However, in *Lim Kim Huat*, the accused was fined because his culpability was considerably less than that of the receiver, as the solitary offence was committed at the instigation of the chief engineer of the vessel. This was a point that was already noted by the district judge. However, Chua seemed to have missed this crucial point.

33 In any case, Chua's sole reliance on a few cases where a corrupt individual was fined failed to take into account the fact that sentencing norms, though useful for guidance, are not immutable: *Lim Choon Kang*. At times, the *particular facts* of a case warrant the imposition of a different sentence from that observed in sentencing norms or benchmarks. Chua, however, insisted that a fine would be the only appropriate sentence in a case of this nature. This could not be so, as it would be tantamount to tying the court's hands to impose fines as a matter of course when it came to sentencing in bribery offences. This is an unnecessary fetter on the court's sentencing discretion.

34 The district judge's approach, on the other hand, is a more plausible one. The district judge, quoting the authors of *Sentencing Practice in the Subordinate Courts* (2nd Ed, 2003) at 74 stated ([2004] SGDC 2 at [67]) that:

> In determining whether the considerations of public interest called for the offence to be dealt with by a fine, a custodial sentence or some other sentencing option, the court would consider the nature and gravity of the offence; its immediate consequences; other general detrimental repercussions to the public and State; and the prevalence of the offence.

On the facts before her, the district judge was correct in her analysis of the issue of whether to impose only a fine or a custodial sentence. It was an accurate indication of the various factors that must be considered before any decision on sentencing is reached. This was, unlike Chua's contention, a clear sign that courts do not impose fines in bribery offences as a matter of course or only in adherence to some sentencing norm.

35 In addition, Chua also failed to take into account the fact that the type of sentence that is ultimately imposed would also be dependent on the need for that particular sentence to have a deterrent effect on future potential offenders. In this regard, I recalled my holding in *Rupchand Bhojwani Sunil v PP* [2004] 1 SLR 596. There, I held that where necessary, courts should impose a sentence that had the potential to deter future similar offences. I also held that a potential offender should never be afforded the opportunity to think that he could commit an offence and "still 'get away lightly' by being fined up to only a certain statutory limit" (at [28]).

36 On the facts of this appeal, the necessity to impose a sentence that would serve as a sufficient deterrent for future potential offenders was greater, considering the schemes employed by Chua and the manner in which he had conducted himself. In light of these factors, I found that the district judge was correct in preferring a custodial sentence over a fine, such sentence being sufficient to relay a strong message that, where necessary, courts will come down strongly against

bribery offences. Chua therefore failed to show why the sentencing norm in respect of bribery offences was the imposition of a fine or should even be *only* an imposition of a fine. After all, it cannot be forgotten that s 6(b) PCA provides for custodial sentences, as well as for the imposition of fines:

Punishment for corrupt transactions with agents.

6. If —

…

(b) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

…

he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

Consequently, Chua failed to show that the district judge erred in her decision.

Mitigation

37 In mitigation, Chua highlighted that he had an unblemished record, had made generous contributions to charitable causes, has two school-going daughters and that with a criminal conviction, he could not act as a director of a company for the next five years. He claimed that this last factor would prevent him from continuing to provide for his family, and for the educational and other needs of his two young daughters.

38 However, I observed that the mitigating factors relating to Chua's unblemished record and contributions to charity had already been taken into account by the district judge in sentencing. I saw no necessity therefore to reconsider these factors, knowing full well that they had already been dealt with effectively. With regard to the mitigating factor relating to Chua's school-going daughters, although this situation was unfortunate, this factor could not be considered as sufficient to cause the custodial sentence to be substituted with a fine. In any case, it is settled law that hardship caused to an appellant's family as a result of the imprisonment of the offender has little mitigating value: *Lai Oei Mui Jenny v PP* [1993] 3 SLR 305; *Tan Fook Sum* ([14] *supra*) . This mitigating factor therefore did not add much weight to Chua's argument that his custodial sentence should be substituted with a fine.

39 Chua's other contention related to his inability to be a director for the next five years as a result of his criminal conviction. This could not be considered a proper mitigating factor in the circumstances. If this fact was of such importance to Chua, he should not have even committed one such bribery offence in the first place, let alone a string of similar offences over two years. Chua's argument that this would then prevent him from providing for his family was essentially a repetition of his contention on the effect of the custodial sentence on his family. Such arguments held little weight and were not convincing enough to merit substituting the custodial sentence with a fine.

40 In all, I found that Chua failed to show why it was necessary for me to tamper with the

district judge's decision on sentencing. I was unable to agree with Chua's arguments on appeal and accordingly, I upheld the sentence that had been imposed by the district judge. Chua requested for time to commence the sentence on 23 March 2004 in order to settle some personal affairs. The Deputy Public Prosecutor did not object to Chua's request. I therefore saw no reason not to allow Chua his request.

Appeal against sentence dismissed.