

Sim Yeow Seng
v
Public Prosecutor

[1995] SGHC 140

High Court — Magistrate's Appeal No 336 of 1994
Yong Pung How CJ
25 April; 1 June 1995

Criminal Procedure and Sentencing — Mitigation — Offences committed to pay loan sharks — Whether such allegation possessing any mitigating value

Criminal Procedure and Sentencing — Sentencing — Benchmark sentence — Criminal breach of trust — Section 408 Penal Code (Cap 224, 1985 Rev Ed) — Previous convictions — Whether conviction for offence committed subsequent to offence before sentencing court was aggravating factor

Facts

The appellant pleaded guilty to an offence of criminal breach of trust under s 408 of the Penal Code (Cap 224, 1985 Rev Ed). In sentencing, the trial judge noted that the appellant had a previous conviction for criminal breach of trust, and sentenced him to one year's imprisonment. The appellant appealed, arguing that the trial judge should not have taken the previous conviction into account, as the previous conviction was in respect of an offence committed subsequent to the offence for which he was being sentenced. The appellant also argued that he should have been given a lighter sentence, as he had committed the offences to pay loan sharks.

Held, dismissing the appeal:

(1) A sentencing court should have regard to all of an accused person's antecedents up to the moment of sentencing because these antecedents reveal his character, his attitudes and the likelihood of rehabilitation. As long as the previous convictions were shown to exist, it did not matter whether they were in respect of offences committed before or subsequent to the offence for which the court was considering sentence: at [8].

(2) The appellant's previous conviction in this case could not give rise to any inference of defiant disregard of the law, since the offence for which he was being sentenced was the first in time to have been committed. However, the offence of criminal breach of trust involved dishonesty; and a record of repeated convictions for such an offence indicated a propensity to dishonest means of self-enrichment. All things being equal, the need to deter an accused from further gravitating towards such wrongdoing was basis enough for the sentencing court to enhance sentence to an appropriate degree; although, it should simultaneously be remembered that the accused was being punished solely for the offence before the court and any enhancement ought not to bring the sentence beyond the tariff applicable to the offence: at [9].

(3) The appellant's argument that he committed the offences in order to pay off loan sharks possessed little mitigating value. Financial difficulties cannot be relied upon in mitigation of an offence, except in the most exceptional or extreme of circumstances. Such circumstances did not exist in the appellant's case: at [10].

(4) Two other factors cancelled out the credit to be attributed to the appellant for pleading guilty on the day of the trial. First, the money the appellant had misappropriated was a significant sum for his employers and it reflected poorly on the appellant that he would so readily abuse the trust placed in him by his employers. Second, it was clear that the appellant suffered no compunction during the four years prior to his arrest, as after having misappropriated the money, he disappeared almost immediately and made no attempt to make amends for his actions during those four years: at [11].

Case(s) referred to

Lai Oei Mui Jenny v PP [1993] 2 SLR(R) 406; [1993] 3 SLR 305 (refd)

PP v Boon Kiah Kin [1993] 2 SLR(R) 26; [1993] 3 SLR 639 (refd)

R v Wilson [1965] VLR 199 (refd)

Legislation referred to

Penal Code (Cap 224, 1985 Rev Ed) s 408 (consd)

David Lee (Ang & Lee) for the appellant;

Chia Wee Kiat (Deputy Public Prosecutor) for the respondent.

1 June 1995

Yong Pung How CJ:

1 The appellant pleaded guilty in the District Court to the following charge:

You, Sim Yeow Seng, M/42 years, NRIC:S0026803H, are charged that you on or about 26 September 1990, at M/s Honest Manufactory at 11 Syed Alwi Road, Teck Heng Long Building #02-00, Singapore, being employed as a servant, to wit, a shipping clerk, and in such capacity were entrusted with dominion over certain property, to wit, a cash cheque for \$7,777.27, belonging to the said M/s Honest Manufactory, committed criminal breach of trust of the aforesaid cheque and you have thereby committed an offence punishable under s 408 of the Penal Code (Cap 224).

2 The district judge convicted the appellant upon his guilty plea and sentenced him to one year's imprisonment. The present appeal was brought against sentence.

The appeal

3 In passing sentence on the appellant, the district judge noted that in the absence of aggravating circumstances, the usual punishment for a first offence under s 408 of the Penal Code, where the accused pleads guilty and where the sum involved lies between \$5,000 and \$10,000, is an imprisonment term of nine months coupled with a fine. In the present case, however, although the appellant had pleaded guilty, the district judge pointed out that he also had on record a conviction sustained in 1993 for criminal breach of trust. On that occasion an additional charge of cheating under s 420 had been taken into consideration on that occasion and the eventual sentence had been a fine of \$5,000.

4 Having had regard to the appellant's 1993 conviction, the district judge held that a sentence of one year's imprisonment was appropriate. In his view:

Repeated acts of dishonesty for personal gain give rise to the implication that the person has a defect in character and a propensity for enrichment through illegal means. For such a person, it is the duty of the court to indicate strongly to him that his dishonest conduct is wrong and would be viewed with severity by the law and members of his community.

5 On appeal counsel for the appellant contended that the appellant's previous conviction should not have been taken into account during the sentencing process. That conviction, so counsel argued, had been in respect of an offence which had been committed only subsequent to the commission of the offence for which the appellant was being sentenced by the district judge. In counsel's submission, no authority existed to show that such prior convictions could be taken into account by a sentencing court.

6 In fact, the district judge referred in his grounds of decision to the case of *R v Wilson* [1965] VLR 199, in which existed a factual situation virtually identical with that found in the appellant's case. The accused in *R v Wilson* pleaded guilty to a charge of housebreaking and stealing. In between the commission of this particular crime and the passing of sentence, however, he had also committed (and been convicted of) other offences; and these other offences having been taken into account by the sentencing judge, a sentence of two years' imprisonment with hard labour was imposed. The accused applied for leave to appeal against this sentence, on the basis that the sentencing judge had erred in taking into consideration his previous convictions. Lowe J, in a dissenting judgment, held that since a judge must have regard to circumstances right up to the time he imposed sentence, it would be inconsistent and unreal to oblige him to ignore the fact of previous convictions when this was laid before him; and in this regard it mattered not that the previous convictions were in respect of offences committed subsequent to the offence for which sentence was being considered. In coming to this conclusion, Lowe J referred, *inter alia*, to the

following passage in *Halsbury's Laws of England* vol 9 (Butterworths, 2nd Ed) para 365:

The court, in fixing punishment, for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character, and any recommendations to mercy which the jury may have made.

7 The above reasoning was taken up by the Singapore High Court in *PP v Boon Kiah Kin* [1993] 2 SLR(R) 26. One of the issues in *PP v Boon Kiah Kin* was whether, in passing sentence for an offence, the sentencing court could consider the offender's previous convictions for similar offences if these previous convictions had been received only subsequent to the commission of the offence before the sentencing court. As the *coram* in *Boon Kiah Kin*'s case, I held that "all earlier offences of similar nature should be put before a sentencer, regardless of whether the convictions therefor were obtained before or after the commission of the offence for which the defendant is being sentenced". The sentencer then has the discretion, upon consideration of the defendant's antecedents, to enhance the sentence. In this conclusion I was fortified by the reasoning employed by Lowe J in *R v Wilson* and by the remarks of his brother judges in that case, which remarks made plain that had it not been for the presence of specific statutory provisions, they too would have been inclined towards his view.

8 Counsel in the present appeal submitted that *PP v Boon Kiah Kin* was no authority for the district judge's decision in this case. It was tirelessly pointed out to me by counsel that in *Boon Kiah Kin*, the previous convictions in question had been in respect of offences committed prior to the offence before the sentencing court; whereas in the appellant's case the previous conviction was sustained in respect of an offence committed subsequent to the commission of the offence before the sentencing court. I could not see, however, why this slight difference in the sequence of commission and conviction should obscure the direct relevance of *Boon Kiah Kin* to the present case. The rationale of *Boon Kiah Kin* and, indeed, of Lowe J's judgment in *R v Wilson* is that a sentencing court should have regard to all of the accused's antecedents up to the moment of sentencing because these antecedents reveal his character, his attitudes and the likelihood of rehabilitation. So long as previous convictions are shown to exist, therefore, it does not matter whether they were in respect of offences committed before or subsequent to the offence for which the court is considering sentence.

9 It is, of course, true, as the district judge noted, that the appellant's previous conviction in this case could not give rise to any inference of

defiant disregard of the law, since the offence for which the district judge was sentencing him was the first in time to have been committed. It is also true however – and this too was noted by the district judge – that the offence of criminal breach of trust necessarily involves dishonesty; and a record of repeated convictions for such an offence indicates a propensity to dishonest means of self-enrichment. All things being equal, the need to deter an accused from further gravitating towards such wrongdoing is basis enough for the sentencing court to enhance sentence to an appropriate degree; although, as I stated in *Boon Kiah Kin*, it should simultaneously be remembered that the accused is being punished solely for the offence before the court and any enhancement ought not to bring the sentence beyond the tariff applicable to the offence.

10 Another ground of appeal raised by counsel was the allegation that the appellant had committed both offences of criminal breach of trust in order to pay off loan sharks. I was disinclined to regard such an allegation as possessing any mitigating value. This court has said time and again that financial difficulties cannot be relied upon in mitigation of an offence save, possibly, in the most exceptional or extreme of circumstances (*Lai Oei Mui Jenny v PP* [1993] 2 SLR(R) 406); and, in the present instance, no evidence of exceptional or extreme circumstances was shown either to me or to the District Court.

11 Two other points about the appellant's case need to be touched on briefly. \$7,777.27 might not be an awesome sum but it was certainly money which a small business concern like M/s Honest Manufactory could ill afford to lose; and it speaks very poorly for the appellant that he was so ready to take advantage of the trust which led his employers to hand over a cash cheque to him. Having misappropriated the cheque, he vanished almost immediately and made no attempt to contact his erstwhile employers or to make restitution during the four years before his arrest. In short, it would seem that the appellant suffered no compunction during those four years; and, in the light of this, any credit attributed to him for pleading guilty on the day of the trial must surely be minimal.

12 For the foregoing reasons, I was of the view that no complaint could be found with the sentence of one year's imprisonment; and I accordingly dismissed the appeal.

Headnoted by Nathaniel Khng.
