

Swee Lay Ching v Public Prosecutor
[2003] SGHC 149

Case Number : MA 6/2003
Decision Date : 14 July 2003
Tribunal/Court : High Court
Coram : Yong Pung How CJ
Counsel Name(s) : S G Kannan (Tan Leroy & Kannan) for the appellant; Leroy Tan (Tan Leroy & Kannan) for the appellant; Amarjit Singh (Deputy Public Prosecutor) for the respondent
Parties : Swee Lay Ching — Public Prosecutor

Evidence – Principles – Findings of fact by trial judge – Approach of appellate court

Immigration – Employment – Illegal foreign worker – Whether presence and control over worker essential for liability under s 57(1)(e) Immigration Act (Cap 133, 1997 Rev Ed)

1 This was an appeal by the accused, Swee Lay Ching ('Swee') against his conviction by district judge Lee Poh Choo who found him guilty of one charge under s 57(1)(e) of the Immigration Act, Cap 133 ('the Act'), for employing Hu Shu Ting ('Hu') who had been convicted of a charge of entering Singapore illegally, as his stall assistant from March 2001 to 3 June 2002, at a chicken rice stall styled 'Fu Tian Qi' Chicken Rice Stall ('the stall') located at Block 293, Yishun, #01-237. Swee was sentenced to 12 months' imprisonment on the charge against him.

The evidence presented and the decision below

2 The arresting officers, Cpl Tan Kim Chuan ('Cpl Tan')(PW 1) and Sgt Brian Ong ('Sgt Ong')(PW 2) gave evidence on behalf of the prosecution. They testified that they were part of a police team that proceeded to the stall at about 3:25 p.m. on 3 June 2002 . There, they kept observation for five minutes. Cpl Tan saw Lee Lim Geok ('Lee') working inside the stall while Hu was packing chicken rice. She then handed the packets to three customers and collected money from them. Sgt Ong also observed Hu packing chicken rice for a female customer. Subsequently, Cpl Tan moved in to check the identities of Lee and Hu. He established that Lee had a valid work permit to work at the stall but Hu did not have any travel documents or a valid work permit. Consequently, he arrested her. Sgt Ong took photographs of the scene that formed the album of photos marked P 4.1 to P 4.5. At the time of the arrest, the owner of the stall, Swee, was not present at the scene.

3 Two customers of the stall, Kat Mok Hang ('Kat')(PW 3) and S/Sgt Low Jing Huar ('S/Sgt Low')(PW 4) testified for the prosecution. Kat gave evidence that he frequented the stall. Initially, he stated that no one worked at the stall apart from Swee and another elderly man. However, as his examination-in-chief proceeded, he identified a young Chinese man called "Ah Hian" and a "plump lady" as workers at the stall. As for Hu, Kat said that he had seen her eating and drinking at the coffee shop before but he had not seen her at the stall. He claimed that he did not pay attention to what she did and that he did not speak to her.

4 S/Sgt Low testified that Hu usually served him when he patronised the stall. She did this by taking his order, handing his food to him and collecting the money. On other occasions, he had seen her standing in front of the stall but he did not notice what she was doing there. S/Sgt Low testified that Swee would be at the stall from time to time but he had not seen Swee speaking to Hu before. Finally, S/Sgt Low told the court that he was not involved in the police investigations relating to Swee's case.

5 Hu (PW 5) was the next witness for the prosecution. When asked why she was arrested, she shook her head. She claimed that she was not doing anything when she was arrested and that she could not recognise the place where she was arrested (as represented by the photographs taken by Sgt Ong, i.e. P 4.1 to P 4.5). According to her, the police did not ask her what she was doing at the coffee shop when they interviewed her and she did not tell the police what she was doing there either. As a result of Hu's clear reluctance to answer the questions posed to her by the prosecution, the prosecution applied successfully under s 156 of the Evidence Act to cross-examine her.

6 During the prosecution's cross-examination, Hu maintained her refusal to answer the prosecution's questions based on the statement that she gave the police dated 4 June 2002 (P6). In the main, she said that she kept crying throughout the interview with the police and therefore she could not recall anything she told them or what they said to her. She claimed that she did not think that she told the police that Swee was her boss or that she worked at the stall. With respect to her evidence about Swee in court, she gave contradictory answers, for example, at N/E 29:

Q: Put: In fact when shown the photo, you told the police that the person in the photo was one known to you as "lao ban".

A: No. I did not tell the police. I said I did not know him.

Q: Do you recognize the Accused?

(Puts on spectacles)

A: I have seen him but I do not know what he was doing.

Q: Where have you seen him?

A: I did not see him.

Q: Few seconds ago, you said you have seen him?

A: No. I did not say that.

Q: Where have you seen him?

A: Perhaps at the coffee shop

Q: Did you ever approach him for a job?

A: Yes. I went there to find job. Who is the Accused?

7 In view of her testimony in court, the prosecution applied successfully to have her statement to the police, i.e. P6, admitted as evidence pursuant to s 147(3) of the Evidence Act. In that statement, she admitted that sometime in August 2001, she approached Swee for a job at the stall. He hired her as his stall assistant and her duties included washing the chickens in the morning and serving the customers. She received \$40 a day for her work and was paid weekly by Swee. He did not work at the stall but would come at night to close the stall and collect the earnings. Swee asked her for her work permit and passport a few days after she started working. She lied to him about why she did not have the documents and he did not pursue the matter.

8 During her cross-examination by the defence counsel, Hu denied being employed by Swee. She claimed that she was "forced" to give the statement, P6, to the police. She reiterated that she kept crying during the interview which took half an hour. She was very frightened and angry because one of the policemen in the interview room, whom she identified as S/Sgt Low, threatened that she would be imprisoned for a long time and claimed that she was lying. However, she also claimed that the other policeman who interviewed her and recorded her statement asked her not to be afraid or cry. The recorder also told her that she could get medical attention if she was unwell. According to her, she signed P6 without knowing its contents.

9 Finally, the prosecution called Ryan Ang ('Ang')(PW 6), the investigating officer who recorded P6. Ang has since resigned from the police force. His evidence was that he conducted the interview in Mandarin, a language which he was competent in and which Hu understood. No other officer interfered with the interview although the room was accessible to them. Hu initially denied working for Swee. He then told her that he was only interested in the truth and gave her time to think about what she wanted to say in the statement. Subsequently, he recorded her statement. He testified that P6 was given voluntarily and that Hu understood its contents before she signed it.

10 Swee (DW 1) was the only witness for the defence. He denied employing Hu as a worker at his stall. He claimed that the first time he saw Hu was in February or March 2002 when she patronised his stall. Subsequently, he noticed her selling lottery tickets twice or thrice a week. He spoke to her only once and that was when she asked him to employ her. He refused to do so because she could not produce her identity card and passport. This stance differed from his statement to the police taken on 5 June 2002 (P9) which he admitted was taken voluntarily. In that statement, he claimed that he did not know Hu's name and never spoke to her before. In court, he explained that it was not true that he did not speak to Hu at all but the discrepancy arose because of an error. According to him, the question posed to him during the investigation was whether he took the initiative to talk to Hu and he answered in the negative because it was Hu who initiated the conversation. The statement contained an error because the recorder recorded his statement as "I do not know her name and never spoke to her before". He agreed that he was given the opportunity to correct that error in his statement but he did not do so.

11 Swee's explanation for not entering his defence after he was charged and warned pursuant to s 122(6) of the Criminal Procedure Code ('CPC') was that he was worried that what he said could be erroneously recorded since he did not understand English.

12 In her grounds of decision, the district judge made the following assessment of the credibility of the witnesses before her: all the police officers, i.e. Cpl Tan, Sgt Ong, S/Sgt Low and Ang were reliable witnesses with no motives to lie. On the other hand, Kat was inconsistent and contradicted himself on the stand. She assessed Hu as a person who was "obviously a hostile and unreliable witness in court" on the basis of her conduct in court. She contradicted herself easily and constantly and she was not disturbed that her answers were illogical and unbelievable. Finally, Swee's credibility was impeached because his oral testimony was materially inconsistent with his prior statement to the police, P9.

13 The district judge found that Swee had employed Hu as his stall assistant knowing that she was an illegal immigrant and that the prosecution had proven its case against him beyond reasonable doubt. The two main reasons for her decision were: first, that the evidence of Cpl Tan, Sgt Ong and S/Sgt Low that Hu worked at the stall was reliable and the evidence of Hu, Kat and Swee to the contrary was not. Secondly, that since Hu's statement, P6, was made voluntarily, it recorded the truth, i.e. that she was employed by Swee to work as a stall assistant.

The appeal

14 On appeal, Swee's main contention was that the district judge erred in preferring the testimonies of Cpl Tan, Sgt Ong, S/Sgt Low and Ang over those of his, Kat and Hu, to arrive at the conclusion that he employed Hu as his stall assistant. The appeal was, in essence, an appeal against the district judge's findings of fact based on the credibility of the witnesses whom she had observed when giving evidence. Accordingly, the trite principle of law that an appellate court should not upset such findings of fact unless they were plainly against the weight of evidence applied: *PP v ABC* [2003] SGCA 14 at ¶ 19 and *Lim Ah Poh v Public Prosecutor* [1992] 1 SLR 713 at 719.

15 Before me, counsel for Swee, Mr. Kannan, argued that the district judge erred in rejecting Hu's testimony that she was forced into making P6 and consequently, in according full weight to the statement. He relied on the fact that Hu had initially made denials during the interview, but subsequently, confessed to being in the employ of Swee and contended that she changed her stance because of S/Sgt Low's threats and Ang's continued refusal to record any of her denials.

16 I was not persuaded by Mr. Kannan's arguments. While it was undisputed that Hu had initially denied working for Swee, there was no evidence to support the inference that something sinister had occurred in the interview room to cause her subsequent confession. In my view, the district judge correctly analysed that Hu's allegation that she was forced by Ang to make P6 was inconsistent with her own testimony that Ang told her, in the course of the interview, not to be afraid or cry and that she could get medical attention. In any case, it was clear from the notes of evidence that Hu's testimony was riddled with inconsistencies and that the district judge had ample grounds to find that she was not worthy of credit. The district judge had the advantage of observing Ang and S/Sgt Low at the witness stand and concluded that they were honest and had no motive to lie. She believed Ang's testimony that Hu understood the contents of P6 and gave it voluntarily, as well as S/Sgt Low's evidence that he was not involved in the investigations of Swee's case. I saw no reason to disturb her findings.

17 Apart from his submission on the weight which should be given to P6, Mr. Kannan also raised the following arguments in his written submissions:

(a) The evidence of the arresting officers, Cpl Tan and Sgt Ong, should be rejected as they had only kept observation for five minutes before moving in;

(b) The district judge erred in stating that S/Sgt Low saw Swee speaking to Hu before when the witness had testified to the converse;

(c) The evidence of Kat and Lee that Hu did not work at the stall was reliable and should be accepted;

(d) Swee's explanations as to the material discrepancy between his oral testimony and P9 and why he did not sign the cautioned statement should be believed;

(e) The prosecution failed to prove that Swee exercised control over Hu since he was not present at the time she was arrested.

18 I will only deal with each of these arguments briefly as, in my view, all of them merely reflected counsel's attempt to nit-pick at the judgment below and did not establish that the district judge's analysis of the evidence was clearly wrong.

19 The argument that the testimonies of the arresting officers should be rejected on the ground that they had only observed Hu for five minutes was clearly flawed. The short observation time did not detract from or diminish the reliability of their observation that Hu was serving customers at the stall, which was the crux of their evidence.

20 In relation to S/Sgt Low's evidence, Mr. Kannan had rightly pointed out that the district judge erred in stating that S/Sgt Low saw Swee speaking to Hu when he actually testified that he did *not* see the pair communicate with each other. However, the error was inconsequential. Counsel did not challenge the veracity of the material portion of S/Sgt Low's testimony that the district judge had relied on, i.e. that Hu served him when he patronised the stall.

21 I also rejected Mr. Kannan's argument that the evidence of Kat and Lee that Hu did not work at the stall, was reliable and should be accepted as the truth. In relation to Kat's evidence, the district judge rightly noted that he was inconsistent in his evidence. He had initially said that only Swee and an elderly man worked at the stall but subsequently, he identified a young Chinese man and a plump woman as workers at the stall. Furthermore, Kat claimed that he did not pay attention to what happened at the stall but was able to notice that the young Chinese man was not allowed to go out of the stall when he was working. Mr. Kannan argued that Kat's evidence should be accepted because he could identify the workers at the stall. This argument was illogical. The fact that Kat could identify *some* of the workers at the stall did not necessarily mean that he knew *all* the workers there, particularly since he conceded that he was "not paying attention". As for Lee's identification of Hu as a customer in court, that was not admissible evidence since he was not called as a witness at the trial below.

22 Mr. Kannan argued that Swee had a proper explanation for the discrepancy between his statement to the police, P9, and his oral testimony, i.e. that there was an error in the recording of the statement because Ang recorded the question posed to him as whether he had spoken to Hu before when the actual question posed was whether he had initiated a conversation with Hu before. In my opinion, the district judge rightly rejected this explanation because Swee was given an opportunity to amend the "error" but he did not do so. In addition, the district judge correctly reasoned that there was no reason for the investigating officer to be concerned with who initiated the conversation about employment when the crucial fact to be established was whether Swee spoke to Hu before.

23 Mr. Kannan's next argument was that the district judge erred when she did not accept Swee's explanation that he did not sign his statement pursuant to s 122(6) of the CPC because he was under an impression that doing so meant that he admitted to the charge. This argument was misconceived as the district judge did not make any findings about whether Swee's explanation was believable. She did not draw any adverse inferences pursuant to s 123(1) of the CPC for Swee's failure to set out an affirmative defence when he was charged and warned under s 122(6) of the CPC. In fact, she did not rely on the contents of the cautioned statement to arrive at her decision.

24 Finally, Mr. Kannan raised the argument that Swee was not present at the stall when Hu was arrested and that there was no evidence that he had control over her. I rejected this argument because presence and control are not essential for liability to be established under s 57(1)(e) of the Act. By that subsection, "any person who employs any person who has acted in contravention of section 6(1), 15 or 35 or the regulations ... shall be guilty of an offence..." The word "employ" is defined in s 2 of the Act as "to engage or use the service of any person, whether under a contract of service or otherwise, with or without remuneration." These two provisions make it clear that the prosecution only has to prove that Swee employed or used the services of Hu to make out the offence. Presence and control are merely indicators of employment and are not necessary to prove

employment.

Conclusion

25 The district judge's conclusion that Hu was employed by Swee as a stall assistant was amply supported by the evidence; in particular, by the evidence of the police officers that Hu served customers at the stall and by the statement made by Hu that she worked for Swee. Accordingly, I dismissed Swee's appeal and upheld his conviction and sentence.

Appeal dismissed.