

Khian Heng Construction (Pte) Ltd v Public Prosecutor
[2012] SGHC 141

Case Number : Magistrate's Appeal No 118 of 2011/01 (EMA 2 of 2009)
Decision Date : 11 July 2012
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Chia Kok Khun and Ho Diana Haven (Wee Swee Teow & Co) for the appellant;
Isaac Tito Shane and Wong Shoou-Huang Jonathan (Tito Isaac & Co LLP) for the respondent.
Parties : Khian Heng Construction (Pte) Ltd — Public Prosecutor

Criminal Procedure and Sentencing

11 July 2012

Judgment reserved.

Choo Han Teck J:

1 The appellant, Khian Heng Construction (Private) Ltd ("the appellant") was appointed by the Housing and Development Board ("HDB") as the main contractor to carry out lift upgrading works at Blocks 123, 129, 132 and 139, Simei Street 1 ("the Worksite"). The appellant sub-contracted the piling works to be carried out at the Worksite to CS Geotechnic Pte Ltd ("CS Geotechnic"). The appellant engaged Mr Tan Hock Guan, a licensed cable detector worker ("LCDW") ("LCDW Tan") to ascertain the presence of any underlying cables in the Worksite. This was a requirement by law. LCDW Tan detected high and low voltage electricity cables in the vicinity of Block 129 of the Worksite and prepared a drawing of the proposed trial trench to be dug by the appellant. The appellant dug its own trial holes, pursuant to the drawing, and only found a Singapore Cable Vision cable ("the SCV cable") at one of the trial holes. Having not found any high voltage electricity cables, the appellant authorised CS Geotechnic to carry out the piling works. In the course of carrying out the sub-contracted piling works, CS Geotechnic damaged a 22 kilovolt high voltage electricity cable ("the Cable"). The Cable was in the transmission network under the control of SP PowerGrid Ltd ("SPPG"). It was located at a depth of about 1.9m, near the SVC cable found by the appellant when it dug trial holes. No power outage was reported and the cost of repairing the Cable was \$4, 498.32 which was duly paid by the appellant. The appellant and CS Geotechnic were separately charged but jointly tried before the learned District Judge ("DJ"). The DJ convicted both, imposing a fine of \$100,000 on the appellant and \$30,000 on CS Geotechnic. CS Geotechnic did not appeal against the DJ's decision and this present appeal is limited to the appellant's conviction.

2 CS Geotechnic was charged under s 80(4)(a) of the Electricity Act (Cap 89A, 2002 Rev Ed) ("Electricity Act") for failing to comply with all reasonable requirements of SPPG to prevent damage to high voltage electricity cables. The appellant was charged by way of private prosecution (initiated by the Energy Market Authority) on 16 January 2009 under s 85(2) of the Electricity Act for suffering to be damaged a high voltage electricity cable on 11 November 2006 in the course of carrying out earthworks at Block 129 of the Worksite. Sections 85(2), 80(4) and 80(7) of the Electricity Act state as follows:

Damage to property of electricity licensee [the appellant's charge]

85.-(1) ...

(2) Notwithstanding subsection (1), any person who, in the course of carrying out any earthworks, damages or suffers to be damaged any high voltage electricity cable in the transmission network belonging to or under the management or control of an electricity licensee shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1 million or to imprisonment for a term not exceeding 5 years or to both.

Carrying out of earthworks within vicinity of high voltage electricity cable [CS Geotechnic's charge]

80.-(1) ...

[...]

(4) It shall be the duty of the person who carries out any earthworks referred to in subsection (1) —

(a) to comply with all reasonable requirements of the electricity licensee for the prevention of damage to the high voltage electricity cable;

(b) to ensure that reasonable precautions are taken when carrying out such earthworks to prevent any damage to the high voltage electricity cable; and

(c) to allow the electricity licensee reasonable access to the work site for the purpose of inspecting or taking any necessary measures to protect the high voltage electricity cable.

[...]

(7) Any person who contravenes subsection (1) or (4) 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.

The principal issue raised in this appeal was whether the appellant's charge was proper, namely that it was "in the course of carrying out any earthworks", an element of the charge preferred against it under s 85(2) of the Electricity Act. It was undisputed that it was CS Geotechnic and not the appellant who was carrying out piling works when the Cable was damaged. The Cable was not damaged when the appellant was digging trial holes. It cannot be said that the appellant had caused or suffered to be damaged a high voltage electricity cable "in the course of carrying out any earthworks".

3 The DJ observed that the phrase "in the course of carrying out any earthworks" was specifically introduced by Parliament in s 85(2) of the Electricity Act as the precursor to this provision, s 107(3) of the Public Utilities Act (Cap 261, 1996 Rev Ed) ("Public Utilities Act") did not contain this phrase. In relation to the word "earthworks", the DJ found that the appellant had carried out earthworks under s 2 of the Electricity Act when it dug trial holes at the piling locations. Section 2 of the Electricity Act defines "earthworks" as follows:

"earthworks" means —

(a) any act of excavating earth, rock or other material (by whatever means) in connection

with —

- (i) any work for or relating to the construction, reconstruction, extension, renovation, alteration, demolition or repair of any building, road, railway, bridge, viaduct, flyover, sewer or sewage works;
 - (ii) any work for or relating to the laying, inspecting, repairing or renewing of any main, pipe, cable, fitting or other apparatuses;
 - (iii) any soil investigation work; or
 - (iv) such other works as are usually undertaken by a person carrying on business as a contractor in the construction industry or as a professional civil or structural engineer;
- (b) any act of boring, dredging, jacking, levelling, piling or tunnelling on or under any premises or street by any mechanical means; or
- (c) the driving or sinking of any earth rod, casing or tube into the ground;

The question then remains as to whether the appellant can be said to have been in the course of carrying out any earthworks (all of which require an active act of excavating, boring, dredging, etc as defined in s 2), identified to be the digging of the trial holes, when the Cable was damaged by CS Geotechnic. Interpreting this phrase, the DJ accepted that a "plain and simple" reading should be adopted so as to ensure consistency with the natural and ordinary meaning of the phrase and to give effect to Parliament's will and intent. In interpreting the phrase "in the course of carrying out any earthworks", the DJ observed that it was to be read together with the phrase "suffered to be damaged". Notwithstanding the fact that the appellant did not directly cause any damage to the Cable, the DJ took the view that the appellant suffered to be damaged the high voltage electricity cable in the course of carrying out earthworks as "earthworks" must be viewed as a "continuum of activity" beginning with the digging of trial holes and ending with CS Geotechnic's piling works, the latter of which damaged the Cable. The DJ stated that it was "overly pedantic" to regard "earthworks" as merely the piling works. With respect, while digging trial holes can be regarded as "earthworks", as no damage can be said to have been caused or "suffered to be caused" to the Cable at the time the appellant was carrying out the earthworks, reading the two requirements together, I was not satisfied that the *actus reus* of the charge had been made out. First, to interpret the phrase "earthworks" as activity which includes all conduct of independent parties involved in any construction project from the commencement of the project to the moment of damage as one unbroken chain of events is to read the statutory provision too widely. If the DJ's construction of s 85(2) is correct, any party involved in undertaking "earthworks" until the moment of damage, a widely defined term under s 2 of the Electricity Act, notwithstanding their lack of involvement in or proximity to the actual damage would be held as liable as the party who directly damages the high voltage electricity cable. This interpretation of s 85(2) can only be justified in an agency context wherein the agent and principal are held to be equally liable. In fact, s 85(3) of the Electricity Act provides for precisely this situation:

Where an offence under subsection (2) is committed by any person acting as the agent or servant of another person, or being otherwise subject to the supervision or instructions of another person for the purposes of any employment in the course of which the offence was committed, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under that subsection in the same manner and to the same extent as if he had personally committed the offence unless he proves to the satisfaction of the court that the

offence was committed without his consent or connivance or that it was not attributable to any neglect on his part.

The DJ found CS Geotechnic to be an independent contractor. Thus contrary to his own finding, the DJ's interpretation of the phrase "in the course of carrying out any earthworks" resulted in both the appellant and its independent contractor CS Geotechnic being found (at the very least) equally liable for the damage to the Cable, in effect subsuming s 85(3) under s 85(2) of the Electricity Act. This result is particularly incongruous in the light of the fact that CS Geotechnic was not even charged under the same section as the appellant and was fined a substantially lower sum of \$30,000 under s 80(4) of the Electricity Act. Second, I am of the view that the insertion of the phrase "in the course of carrying out any earthworks" by Parliament was intended to narrow the ambit of this section and to impose a higher penalty (the precursor provision had a maximum fine of \$200,000) on individuals who actually cause damage to the high voltage electricity cables. By way of comparison, s 107(3) of the Public Utilities Act stated as follows ("precursor provision"):

Notwithstanding [Section 107(2)], any person who damages or suffers to be damaged any electricity cable in the transmission network belonging to or under the management or control of a public electricity licensee shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding 5 years or to both.

It is clear that if the appellant had been charged under the precursor provision, its act of instructing CS Geotechnic to commence piling works could have been said to have "suffered to be damaged" the Cable. Thus, if the phrase, "in the course of carrying out any earthworks" found in s 85(2) of the Electricity Act was interpreted to include a continuum of activity preceding any damage being caused to a high voltage electricity cable, it would render this phrase nugatory; causing a reversion to the wider ambit envisioned in the precursor provision. However, this is not to say that there is no provision applicable to the appellant's conduct. I am of the view that s 80(4) of the Electricity Act (the provision under which CS Geotechnic was charged and convicted) would have been a more appropriate provision applicable to the appellant's act, *ie* the failure to contact LCDW Tan to ensure that no further trial holes needed to be dug before piling works were commenced. In other words under s 80(4)(b) of the Electricity Act, it could have been argued that the appellant owed a duty to SPPG to take all reasonable precautions, which could have included contacting LCDW Tan to ensure that notwithstanding the signals he observed, that piling works could be safely commenced. On the other hand, in my view, s 85(2) of the Electricity Act was intended to apply to parties like CS Geotechnic. In my view, such a reading of the provisions is also consistent with the relative culpabilities of both parties and the distinct types of liability envisioned under ss 85(2), 85(3) and 80(4) of the Electricity Act.

4 I am not inclined to amend the appellant's charge for one under s 80(4) of the Electricity Act due to the substantial difference in the nature of the charges and the elements to be proven. As observed in *Garmaz s/o Pakhar and another v Public Prosecutor* [1996] 1 SLR(R) 95 at [29]:

The power that an appellate court has in amending a charge under s 256(b) of the CPC is not unlimited and obviously such power has to be exercised with great caution and not to the prejudice of the accused. The same tests laid down by Taylor J in *Lew Cheok Hin* and Cussen J in *Ng Ee* in substituting a conviction for the one under appeal are, subject to necessary modifications, appropriate and applicable to the exercise of the power of amendment of a charge. The purpose of these tests is to prevent any prejudice to the accused.

In any event, it was not argued by the Prosecution that such an amendment was necessary. Accordingly, I allow the appeal on conviction and the appellant is acquitted of the charge brought

against it. The fine is to be refunded to the appellant.

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