

Tan Thiam Wee v Public Prosecutor
[2012] SGHC 142

Case Number : Magistrate's Appeal No 282 of 2011
Decision Date : 11 July 2012
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Philip Jeyaretnam SC and Derek Kang Yu Hsien (Rodyk & Davidson LLP) for the appellant; David Chew and Serene Chew (Attorney-General's Chambers) for the respondent.
Parties : Tan Thiam Wee — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing

11 July 2012

Judgment reserved.

Lee Seiu Kin J:

Introduction

1 The appellant (“Tan”) pleaded guilty to 12 charges of cheating under s 420 of the Penal Code (Cap 224, 2008 Rev Ed) and agreed for 164 charges to be taken into consideration for sentencing. Each of the 12 charges involved sums ranging from \$36,380 to \$42,064.38; the total sum disbursed in the charges proceeded with was \$478,433.70. The total amount advanced by the bank in all 176 charges was \$2,622,508.12.

2 The district judge sentenced Tan to 15 months for each charge and ordered four of the sentences to run consecutively. This meant that Tan was sentenced to a total of 60 months’ imprisonment. Tan appealed on the grounds that the sentence was manifestly excessive and disproportionate to his overall culpability.

Background Facts

3 Tan managed the company Idealsoft Pte Ltd (“Idealsoft”), which was wholly owned by Ideal Millennium Holdings Pte Ltd, which was in turn wholly owned by Tan. Idealsoft had a factoring agreement with Overseas-Chinese Banking Corporation Limited (“OCBC Bank”), whereby it would submit invoices to OCBC Bank for advances of up to 85% of the face value indicated in the invoices. Under the factoring agreement, OCBC Bank would provide a period of 120 days for repayment, and was also entitled as assignee to recover the debt from Idealsoft’s customers directly.

4 Idealsoft was facing cashflow problems in late 2007, and in order to maintain the company’s working capital, Tan created false invoices and submitted them to OCBC Bank. He also created false delivery and purchase orders to support those invoices. The first false invoice was submitted on 5 September 2007, and the last was on 27 October 2008. Between 1 December 2008 and 19 May 2009, seven police reports were lodged against Idealsoft by its customers when they discovered the false invoices from the letters of demands sent by OCBC Bank for payment.

5 Although a total of \$2,622,508.12 was advanced by OCBC Bank for the 176 invoices submitted

under the factoring agreement, the bank's loss amounted to \$634,075.52. This was because a total of \$292,157.52 was recovered from Idealsoft's customers and a sum of \$1,696,275.08 was set-off from Idealsoft's current account with OCBC Bank. Details of the set-off were not given in the statement of facts, and it is not clear whether the sum of \$1,696,275.08 refers to sums recovered from Idealsoft's current account on a rolling basis from late 2007 to 2008 as the purported debts from the customers fell due, or whether it represented the sums remaining in Idealsoft's current account after the false invoices were discovered. Considering the circumstances of this case, it would be appropriate to consider that the total sum involved was \$634,075.52 as that was the net amount that OCBC Bank had been put at risk considering the assets of Idealsoft that the bank had recourse to, and it was the amount that OCBC Bank had actually lost.

Individual sentences for each charge

6 In *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 at [92], V K Rajah JA made the following observation on the approach to be taken in considering sentencing for multiple charges:

... Where multiple distinct offences have been committed, sentencing is a two-stage process. First, the sentence for each individual offence had to be determined. Second, the court has to determine whether the sentences for these multiple offences ought to run concurrently or consecutively and if consecutively, which combination of sentences ought to be made and whether the overall sentence properly comprehends the criminality of the multiple offender ...

7 Tan did not appeal against the individual sentences of 15 months for each s 420 charge involving sums ranging from \$36,380 to \$42,064.38. He only appealed on the grounds that ordering four sentences to run consecutively, resulting in a total period of imprisonment of five years, was manifestly excessive.

8 It is clear law, and indeed commonsense, that the primary consideration in cases involving multiple charges in circumstances such as the present case, is the totality of the sentence. While the fact that a person is facing multiple charges shows that he has repeatedly committed offences, a larger or smaller number of charges may be brought on the same facts and the actual number of charges eventually brought is a matter of circumstance and discretion.

9 This would be one of the reasons that the precedents show a wide range of sentences imposed for each offence in cases in which multiple charges were brought under s 420. The court below imposed 15 months' imprisonment for each charge, which involved sums ranging from \$36,380 to \$42,064.38. In *Public Prosecutor v Ng Lian Wah* [2005] SGDC 156, the accused was involved in a conspiracy to provide fictitious delivery orders to deceive a bank into disbursing trade financing. The accused claimed trial to four charges involving a total amount of \$911,495.13 and received nine months for each charge involving more than \$100,000. In *Public Prosecutor v Tan Hor Peow Victor* [2006] SGDC 148, sentences of 11 months were given for each charge for a conspiracy to cheat under s 420 involving sums of \$20,000 to \$40,000.

10 I therefore need not consider the adequacy or otherwise of the sentence of 15 months imposed on each charge and focus on the total sentence imposed in the context of the circumstances of the case.

Global sentence

11 The court below was of the view that there were three substantial aggravating factors in this case. Firstly, the appellant had meticulously planned to deceive OCBC Bank by capitalising on the

factoring agreement. Secondly, substantial amounts of money were involved and the offences were committed over a long period of time. Thirdly, the use of false invoices to induce financial institutions to provide credit undermined the confidence of the financial industry and adversely affects the economic infrastructure. I agree with the court below and would emphasise the third factor. Financial institutions form a key part of the economic system and any abuse results in a loss of confidence requiring additional safeguards to be taken. This will lead to increased costs which will be passed to all users of the system. Thus, not only do such crimes cause direct monetary loss to the financial institution concerned, the resultant loss of confidence and increase in compliance cost is borne by the community as a whole.

12 Therefore there is no doubt that the offences committed by the appellant merit a custodial sentence. The only issue is whether the sentence of five years' imprisonment is justified when compared with sentences imposed in similar cases.

13 The striking feature in this case, and one which the court below had not placed the appropriate weight on, is the intention of the appellant. His intention in committing the offences was not to defraud OCBC Bank of the sum in each transaction. He had carried out the fraud in the hope that it would tide him over a tight cash flow situation. He had every intention to repay OCBC Bank when, as he had hoped, the company's fortunes turned around. Unfortunately it did not, and he had to plug more and more leaks to his collapsing wall of debt as the company succumbed to the financial turmoil swirling around him. His motivation was to stave off what he thought was temporary insolvency so that his company could survive and his employees could remain in their jobs. I stress that to the extent that the court below considered that this factor does not relieve him of his culpability, it is absolutely correct. However this situation is vastly different from one where the perpetrator commits an offence for direct financial gain or to repay gambling debts. And it is to that category of cases that we must turn to compare against the sentence in the present case.

14 In *Public Prosecutor v Konduri Prakash Murthy* [2007] SGDC 146, the accused, a director and employee of a company, submitted documents for fictitious transactions to a bank. This induced the bank to pay out a total of US\$866,427 which he misappropriated and used to purchase residential properties and luxury goods. He was sentenced to a total of four and a half years' imprisonment.

15 In *Public Prosecutor v Lau Thuan Heng and another* [2012] SGDC 1, the accused, a property agent, devised a scheme whereby he induced a bank to lend money to his nominees on the basis of false income documents. In this manner he purchased 14 properties for which the bank disbursed loans totalling some \$11m. The accused derived a benefit of about \$1.2m from sub-sales of the properties. Upon discovery of the scam, the bank foreclosed on nine of the properties, out of which two were done at a loss, totalling \$170,000. However the quantum of loss was fortuitous as it depended on the direction of the property market; the losses could well have been higher. The relevant quantum would be the \$1.2m made by the accused. He was sentenced to a total of 36 months for these offences. He received another 24 months (ordered to run consecutively) for an offence of conspiring to cheat the Official Assignee in relation to his subsequent bankruptcy.

16 In light of the sentences in the two cases considered above, the total of five years' imprisonment imposed by the court below is manifestly excessive considering that in those cases the offences were committed out of greed whereas the appellant had committed the offence out of a desire to keep his company afloat and his employees in employment combined with misplaced optimism of an economic turnaround. The court below had failed to appreciate that the degree of malicious intent in the present case was much lower than in the two cases cited above. Furthermore, the transactions reflected in the invoices were not entirely fictional. The level of risk undertaken by the bank is arguably higher than the secured loan cases, given that Tan only had an expectation of

payment and not concrete realisable assets; however, the level of culpability must be lower than cases where the offender deceives the bank into disbursing loans with complete disregard of whether he will be in the position to repay the loans.

17 In my view, the appropriate sentence in this case, and one which affirms the seriousness of the offences but does not punish the appellant excessively in comparison with what the courts have imposed in more egregious cases, would be a total of 30 months. I therefore order that the second charge is to run consecutively with the first charge, and the remaining charges are to run concurrently.

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