Leng Kah Poh *v* Public Prosecutor
[2013] SGHC 180

Case Number	: Magistrate's Appeal No 50 of 2013/01-02
Decision Date	: 18 September 2013
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: S K Kumar (S K Kumar law Practice LLP) for the appellant; Sandy Baggett, Sherlyn Neo and Ang Feng Qian (Attorney-General's Chambers) for the Public Prosecutor.
Parties	: Leng Kah Poh — Public Prosecutor

Criminal Law – Corruption – Prevent of Corruption Act

18 September 2013 Judgment reserved.

Choo Han Teck J:

1 The appellant was the Food and Beverage ("F&B") Manager at IKANO Pte Ltd ("IKEA Singapore"), a Singapore company that operates the IKEA furniture stores in Singapore. His present appeal is against conviction and sentence for 80 charges of corruption under s 6(a) of the Prevention of Corruption Act (Cap 241, Rev Ed 1993) ("PCA") read with s 34 of the Penal Code (Cap 224, Rev Ed 2008) for having received a reward for awarding F&B supply contracts to AT35 Services ("AT35"), a sole proprietorship registered by Andrew Tee Fook Boon ("Andrew"), and Food Royale Trading ("FRT"), also run by Andrew.

2 Section 6(a) of the PCA reads as follows:

> Punishment for corrupt transactions with agents
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> 6. If —
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> (*a*) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification 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;
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> …
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> 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.

3 The charges of corruption concern IKEA Singapore's dealings with two companies, namely, AT35 and FRT. AT35 was a waste management company registered under Andrew's name. Andrew was approached by Gary Lim Kim Seng ("Gary") sometime in October 2002 to convert AT35 into a food supply business. Andrew met Gary and the appellant in a coffee shop in the Bishan area in October 2002 and a plan was devised to supply food to IKEA Singapore through AT35. Gary and

Andrew each contributed $30,000 in cash to start AT35's new food supply business but the appellant made no direct cash contribution. It was agreed that the appellant's contribution would be in the form of ploughing back $20,000 of his share of the initial profits into AT35 for its continued business. Andrew was the primary manager of AT35 and later, FRT. AT35 and FRT were the exclusive suppliers of chicken wings and dried food products to IKEA Singapore. Over a period of seven years, through AT35, Gary, Andrew and the appellant gained a profit of $6.9 million from the food supply contracts with IKEA Singapore. The appellant's one-third share of that profit was $2.3 million.

4 It was undisputed (both at trial and now on appeal) that AT35 had no other business or clients besides IKEA Singapore. Andrew had testified during trial that AT35 broke even and started making a profit in January 2003; a mere three months after it was set up. Business picked up when IKEA opened a second branch in the Tampines Area. Andrew and Gary set up a second company, FRT, under the name of one of Gary's employees, to supply dried goods to IKEA Singapore. AT35 then concentrated on supplying poultry products to IKEA Singapore. The modus operandi of AT35 and FRT was simple: they obtained food supplies from a food supplier with instructions for that supplier (Tenderfresh, in AT35's case) to package its products in unmarked clear plastic bags and sold these products on to IKEA Singapore at a marked up rate. This mark-up started out as a 10% mark-up (which the trial judge noted in his judgment was the norm in that industry) when AT35 first began its business but had become a 30-35% mark-up within a year of its commencement of operations. AT35 and FRT did not add value to its products. It merely transported the products straight from its supplier to IKEA Singapore. Where storage of items was necessary, AT35 stored the products in rented cold rooms in Jurong and Defu industrial estates. AT35 did not have any cold rooms or storage facilities of its own.

5 The appellant's role in this arrangement was also straightforward: he would give AT35 insider tips on how to make AT35's and FRT's products palatable to IKEA Singapore and he would exercise his influence to approve AT35 and FRT as the exclusive food suppliers of dried goods and chicken wings to IKEA Singapore. The District Judge ("the judge") found that a key part of the appellant's duties involved approving suppliers to IKEA Singapore. There was ample evidence to support this, in particular, from the appellant's supervising managers, who testified at the trial. I do not think the appellant's role is really the issue in the present appeal. The appellant has pointed to no evidence to controvert the judge's findings in this regard beyond pointing out that the appellant did not have the final say in the formal chain of command. The judge did consider the manner in which food suppliers were selected, and he believed the testimony of the appellant's supervising managers that in practice, it was the appellant who made the selections. Where the appellant was not directly responsible for the selection of the food supplier, there was also evidence that the appellant gave AT35 instructions on what it should do in order to ensure that it would be selected. I find that there is nothing wrong with the judge's findings in this respect and I see no reason to overturn his finding of those facts on appeal.

6 Following a 25-day trial, the judge also found that the elements under s 6(a) of the PCA had been proved, *viz*, that the appellant had received gratification as an inducement or reward with a corrupt element and with corrupt intent; see *Kwang Boon Keong Peter v PP* [1998] 2 SLR(R) 211 at [32]. At issue in this appeal are the judge's findings in relation to the corrupt element of the transaction and the appellant's corrupt intent or guilty knowledge.

7 A corrupt element must be ascertained according to an "ordinary and objective standard"; see *Chan Wing Seng v PP* [1997] 1 SLR(R) 721 (at [25]) ("*Chan Wing Seng*"). The court should first ascertain that the accused had intended to do an act which was objectively corrupt and then it has to find that such intention tainted the transaction with a corrupt element, objectively ascertained. It is only after such an intention has been established that the court may go on to make a finding of the

accused's corrupt intent which is directed at whether the accused knew that what he was doing was, by that ordinary and objective standard, corrupt. In a tentative effort to define corruption, Yong Pung How CJ opined in *Chan Wing Seng* (at [26] and [27]):

> 26. I have been very hesitant to define what 'corrupt' means because the factual permutations of corruption can be endless. Any definition may thus unnecessarily circumscribe the effect of the section. However, as a starting point, it is useful to keep in view the natural and ordinary meaning of the word 'corrupt' as a working guide. In this regard, one of the meanings of 'corrupt' as given in The New Shorter Oxford Dictionary (1993 ed) is:
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> > Induce to act dishonestly or unfaithfully; bribe.
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> And, in further ascribing a meaning to 'corruption', it states:
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> > Perversion of a person's integrity in the performance of (esp. official or public) duty or work by bribery etc.
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> 27. The above is probably already what most laypersons understand by corruption. However, I stress once again that this is no more than a preliminary guide to what 'corrupt' means and is clearly not definitive or exhaustive. Each case must still be examined on its own facts.

8 The assumption is that there must be at least three parties for a transaction to be corrupt: there is the principal whose loss is at issue, the agent whose corrupt intention is at issue, and then there is the person or entity inducing the agent to act dishonestly or unfaithfully. The general structure of the act also assumes this multiplicity of parties. While s 6 of the PCA applies to the agent, s 5 of the PCA applies to the person or entity inducing the agent to act dishonestly or unfaithfully, whether he does so for his own benefit or for another person's benefit. Sections 5 and 6 thus complement each other by applying to the different wrongdoers in a corrupt transaction. While dishonesty is a basic element in the offence of corruption, it is not the only element. There is a range of offences under the Penal Code, including theft, cheating and criminal breach of trust, which are directed at punishing dishonesty. It is thus not sufficient for convicting someone under s 6(a) of the PCA to find that he had acted with a dishonest intent. There must have been an inducement for the appellant to act in the way he did by a third party seeking "to prevail on, make, cause, encourage (to do something)" (The Chambers Dictionary, Chambers Harrap Publishers Ltd 2011, 12th Ed). An agent who has acted with dishonest intent and interfered with the affairs of his principal but has not been induced to do so by a third party may be guilty of some other crime of dishonesty, but he is not guilty of corruption as defined under the PCA.

9 The judge proceeded on the basis that AT35 and FRT were separate legal entities managed by Andrew and, to a lesser extent, Gary, but not the appellant. The appellant was not a signatory on either of the bank accounts, neither was he a partner or director listed in the ACRA records. The judge thus found that the payments which the appellant received from AT35 were not his share of the profits, but payments or rewards in exchange for his showing favour to AT35 and FRT. The judge made these findings by looking at Andrew's and Gary's evidence and from their perspective.

10 However, beneath the form, the true nature of the arrangement between the parties shows a different relationship. It is important to consider the appellant's perspective as required in the test of a corrupt element; see *Yuen Chun Yii v Public Prosecutor* [1997] 2 SLR(R) 209 (at [94]). The question is not whether AT35 and FRT were separate entities from the appellant nor about who owned and managed the affairs of AT35 and FRT, but rather what the intention and scheme behind that act were. If the nature of the arrangements and scheme were such that the appellant was in fact the

master mind, or co-conspirator, then it can hardly be said that the appellant had been induced or bribed to do the allegedly corrupt acts.

11 The judge found that Andrew did not explicitly state the reason why the appellant was paid huge sums of money. I find that the reason for this was probably a simple one: Andrew was not the master mind of the scheme. Andrew admitted during his examination and cross-examination that he did not know the nature of Gary's relationship with the appellant. He was only introduced to the appellant in October 2002 about the time Gary tried to convince Andrew to convert AT35 from a waste management to a food supply company. Andrew's evidence is at most, of limited probative value as he had little knowledge of the ins and outs of the scheme hatched by the appellant and Gary. All Andrew knew was that the appellant was "a client" who guided AT35 and received a share of its profits.

12 The judge found, on the other hand, that there was "an understanding [between Gary and the appellant] that the [appellant] would be paid in order for AT35 to be given "business" by IKEA". The judge then concluded that a corrupt element could be inferred from this. With respect, I find that the judge's finding could equally support the conclusion that it was the appellant who had initiated this scheme, or that he had at least conspired with Gary to initiate and carry out the scheme. It is clear from the evidence that by the time Andrew entered the picture, Gary and the appellant had already come to some sort of understanding. The appellant gave evidence at trial that he had been discussing a splitting of the profits "from day 1" with Gary. I find that this was unlikely to have been a scheme hatched by Gary alone. This was an elaborate scheme which involved two different companies, both distanced from the appellant and (in the case of FRT) distanced from Gary himself, carrying out the specific business of supplying food to IKEA Singapore at a mark-up. The Public Prosecutor concedes, and the judge also found, that AT35 and FRT were effectively special purpose companies to carry out a scheme which would allow Gary, Andrew and the appellant to skim money off the top of food contracts with IKEA Singapore. Gary would have needed an insider in order to have embarked on such an ambitious, single purpose venture. The appellant was this insider. Whether it was the appellant or Gary who first mooted the idea is a matter of speculation and also irrelevant. The point is that Gary and the appellant had landed on the idea together and had decided that AT35 and later FRT were the vehicles by which their scheme could be carried out.

13 There is a reasonable chance that this was a situation where the appellant was effectively paying himself. At the very least, this was a conspiracy between the appellant and Gary, with Andrew as the operations arm. This would also explain why the payments were not straightforward payments to the appellant as in the typical corrupt arrangement but was structured as a profit-sharing scheme which indicated some element of equal ownership over that scheme. At best, the evidence that the appellant was not involved in the original scheme but was being induced to participate is ambiguous. The prosecution has not been proven beyond a reasonable doubt that there are three separate parties and that the appellant was being induced, as IKEA Singapore's agent, to act in a particular way in relation to his principal's affairs. Gary and the appellant made sure that the plan would not be traced back to them. A single proprietorship, AT35, was used and when FRT was established, it was registered in the name of Gary's employee. The formal arrangements which the scheme took cannot be taken to be an indication of the true nature of the understanding between the appellant, Gary, and (to a lesser extent) Andrew. I thus find that the judge's crucial finding of fact, *viz* that there was a corrupt element from the appellant having been induced to participate in the impugned arrangement rather than having come up with that arrangement by himself, was clearly wrong.

14 The reality was that the appellant came up with the arrangement, making use of his position within the principal, in order to earn secret profits which he shared with the partners he had brought in. This case thus has more parallels with *Regal (Hastings) Ltd v Gulliver and Others* [1967] 2 AC 134

than with the classic case of corruption. Broadening the scope of the offence of corruption to include cases such as these would mean that every time an employee or director gained secret profits by virtue of a conflict of interest he would have committed an offence under the PCA. The appellant might have committed some other offences or simply just a civil fraud, but I do not think that the PCA was intended to cover these sorts of circumstances. The charge before me (and the charge which the appellant defended himself against) is the charge of corruption namely, that he, as an agent of IKEA Singapore, had corruptly obtained a gratification as a reward for showing favours to IKEA Singapore's affairs. The prosecution must therefore satisfy the court that all the elements of corruption have been made out. I find that the crucial objective corrupt element of corruption, *viz* that the appellant was induced by another party to carry out the alleged acts against his principal, was not made out. The offence of corruption does not capture a situation like the present one where he created his own secret benefit and not that it was a gratification given to him as a reward. Whatever the appellant was guilty of; I find that it was not corruption under the PCA. In the circumstances, it is unnecessary to consider whether the appellant also had a corrupt intent or guilty knowledge.

15 It appears from the record that the Prosecution had not proven its case beyond a reasonable doubt. I accordingly allow the appeal and acquit the appellant of the charges under appeal. This does not, however, preclude IKEA Singapore from commencing a civil action against the appellant (or all three people involved in the scheme if necessary) for fraud or for breach of fiduciary duties in order to recover the sums taken from it. What the appellant did was wrong but it was not an offence of corruption under the PCA.

16 The case was argued before me on 16 August 2013 with both Mr Kumar and DPP Ms Baggett submitting full written submissions after which I reserved judgment. On 9 September 2013, Mr Kumar, without leave, submitted further written submissions. He called it "Further Submission (By Way of Clarifications)". Further submissions without leave of court will not be considered whatever subtitles counsel might present them under. The reason why leave is required must be obvious to a counsel with Mr Kumar's experience. Lawyers must be fully prepared for trial from start to end; and the trial ends with the closing submission or, as in this case, the submission on appeal. Submissions must be made one whole. There is no such thing as a submission by instalments.