Public Prosecutor *v* Koh Peng Kiat and another Appeal
[2014] SGHC 174

Case Number	: Magistrate's Appeal No 144 of 2013/01/02
Decision Date	: 05 September 2014
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Francis Ng and Suhas Malhotra (Attorney-General's Chambers) for the Appellant in the appeal and for the Respondent in the cross appeal; Peter Ong Lip Cheng (Templars Law LLC) for the Respondent in the appeal and the Appellant in the cross appeal.
Parties	: Public Prosecutor — Koh Peng Kiat

Criminal law – Abetment

Criminal law – Statutory offences – Trade Marks Act

Criminal law – Statutory offences – Health Products Act

5 September 2014 Judgment reserved.

Choo Han Teck J:

1 These two magistrate's appeals arise from the District Court's decision in *PP v Koh Peng Kiat* [2013] SGDC 244. The first magistrate's appeal, MA 144 of 2013/01 is the Public Prosecutor's appeal against sentence. The second, MA 144 of 2013/02, is a cross appeal by Koh Peng Kiat against conviction. Koh is an Optometrist. He holds a Bachelor of Science in Optometry from the University of Cardiff and a Diploma in Optometry from the Singapore Polytechnic. He operates a business known as Eye Cottage Pte Ltd that sells glasses and contact lenses. The business has a branch each at Stirling Road, Purmei Road and Redhill Close.

2 After a ten day trial, the District Judge convicted Koh on 14 charges. The first two are charges under s 49(*c*) of the Trade Marks Act (Cap 332, 2005 Rev Ed) ("TMA") read with s 107(*c*) of the Penal Code (Cap 224, 2008 Rev Ed) for abetting by intentionally aiding persons to have in their possession for the purpose of trade, boxes of contact lenses to which the registered trade mark "FRESHLOOK COLORBLENDS" had been falsely applied. CIBA Vision is the registered proprietor of this trade mark. Section 49(*c*) of the TMA states:

> **Importing or selling, etc., goods with falsely applied trade mark**
>
> **49.** Any person who —
>
> …
>
> (*c*) has in his possession for the purpose of trade or manufacture,
>
> any goods to which a registered trade mark is falsely applied shall, unless he proves that —

(i) having taken all reasonable precautions against committing an offence under this section, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark and on demand made by or on behalf of the prosecution, he gave all the information in his power with respect to the persons from whom he obtained the goods; or

(ii) he had acted innocently,

be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 for each goods or thing to which the trade mark is falsely applied (but not exceeding in the aggregate $100,000) or to imprisonment for a term not exceeding 5 years or to both.

Section 107(*c*) of the Penal Code states:

Abetment of the doing of a thing

107. A person abets the doing of a thing who —

…

(*c*) intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 2. – Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission thereof, is said to aid the doing of that act.

[Explanation 1 and Illustration omitted]

Section 109 of the Penal Code provides as follows:

Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

[Explanation and Illustrations omitted]

3 The first charge alleges that Koh abetted the offence by intentionally aiding Neo Teck Soon to have in his possession for the purpose of trade 100 boxes of these counterfeit contact lenses. The second alleges that Koh abetted the offence by intentionally aiding Wong Chow Fatt to have in his possession for the purpose of trade 30 boxes of counterfeit contact lenses.

4 The remaining 12 charges are under s 16(1)(*b*) of the Health Products Act (Cap 122D, 2008 Rev Ed) ("HPA") for arranging to supply counterfeit contact lenses purporting to be Freshlook ColorBlends lenses. The relevant portions of s 16 of the HPA state:

Prohibition against supply of health products that are adulterated, counterfeits, etc.

16. —(1) No person shall supply, or procure or arrange for the supply of, any health product which is —

…

(*b*) a counterfeit health product;

…

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction —

…

(*b*) in the case of an offence under subsection (1)(*a*), (*b*) or (*c*), to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 3 years or to both.

(3) In any proceedings for an offence under subsection (1), it shall be a defence for the accused to prove that —

(*a*) he —

(i) did not know;

(ii) had no reason to believe; and

(iii) could not, with reasonable diligence, have ascertained,

that the health product was in contravention of that subsection; and

(*b*) he had taken all such precautions and exercised all such due diligence as could reasonably be expected of him in the circumstances to ensure that the health product did not contravene that subsection.

5 The first 6 charges under s 16(1)(*b*) of the HPA allege that Koh arranged to supply Neo with a total of 100 pairs of counterfeit contact lenses. The other 6 allege that Koh had supplied Wong with a total of 30 pairs of counterfeit contact lenses. All 14 charges allege that the counterfeit contact lenses came from one Ah Seng, who has not been found.

6 Koh was fined $38,000 (in default 5 months and 18 months imprisonment). This is the sum total of the following:

(a) a $20,000 fine (in default 5 months imprisonment) for the first charge;

(b) a $6,000 fine (in default 6 weeks imprisonment) for the second charge;

(c) a $1,000 fine (in default 1 week imprisonment) for each of the twelve charges under s 16(1)(*b*) of the HPA.

7 I will first consider Koh's appeal against conviction. Koh's lawyer made the following arguments in respect of the first two charges:

(a) the offence under s 49(*c*) of the TMA is not strict in liability;

(b) these two charges do not stand as Neo and Wong were not in possession of counterfeit

lenses from Ah Seng;

(c) Koh did not abet by intentionally aiding Neo and Wong in committing an offence under s 49(*c*) of the TMA; and

(d) Koh has valid defences under provisos (i) and (ii) to s 49 of the TMA.

In respect of the remaining twelve charges under s 16(1)(*b*) of the HPA, Koh's lawyer submitted that: (1) the offence under s 16(1)(*b*) of the HPA is not strict in liability; and (2) there is insufficient evidence that Koh arranged for the supply of counterfeit contact lenses from Ah Seng to Neo and Wong.

8 In *Cigar Affair v Pacific Cigar Co* [2005] 3 SLR(R) 633, Woo J held that an offence under s 49 of the TMA may be established "without the *mens rea* and it is for the accused person to satisfy either of the [defences stated in the provisos to s 49 of the TMA]" (at [13]). The court there rejected the argument by the applicant that a person had to have the requisite *mens rea* before he could be guilty of an offence under s 49 of the TMA. I am in agreement with that view. Although there is a presumption that *mens rea* is a necessary ingredient of every statutory provision creating an offence, this presumption can be rebutted (*Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1 at 14; *PP v Teo Kwang Kiang* [1991] 2 SLR(R) 560). Section 49(*c*) of the TMA does not state that *mens rea* is an element of the offence; but rather, it provides that the accused has to prove that he has taken all reasonable precautions or that he had acted innocently. An accused can also argue that a general defence under Chapter IV of the Penal Code applies as those defences apply to other criminal statutes.

9 I reject the argument made by Koh's lawyer that the two charges under s 49(*c*) of the TMA do not stand as Neo and Wong were not in possession of counterfeit lenses from Ah Seng. Both Neo and Wong, who pleaded guilty earlier in separate criminal proceedings, both testified that they received the counterfeit contact lenses from Ah Seng, and that they sold it to other optical shops later on. But I accept the following arguments by Koh's lawyer: (1) Koh did not abet by intentionally aiding Neo and Wong in committing an offence under s 49(*c*) of the TMA; and (2) Koh has valid defences under provisos (i) and (ii) to s 49 of the TMA.

10 The Prosecution says Koh is guilty of abetting by intentional aiding as he put both Neo and Wong in contact with Ah Seng and told them of the business opportunity to buy contact lenses from Ah Seng. In respect of Wong, Koh even allowed one of his shops to be used to store the counterfeit contact lenses that were later collected by Wong. But this is insufficient to amount to abetment by intentional aiding. Koh might have facilitated the commission of the offences by Ah Seng, there is no evidence that he knew that the contact lenses in question were counterfeit. There are two conflicting authorities from India on whether an accused must have knowledge to be convicted of a charge of abetment. The Bombay High Court in *State of Maharashtra v Abdul Aziz AIR* 1962 Bom 243 held an accused can be convicted for abetment in absence of knowledge on his part. The Supreme Court of India in *Kartar Singh v State of Punjab* (1994) 3 SCC 569 ("*Kartar Singh*") held otherwise. I am not bound by either of these decisions, but I am prepared to follow *Kartar Singh* and the commentary in *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) at [34.23] by Stanley Yeo, Neil Morgan and Chan Wing Cheong:

> It is submitted that abetment in all cases should require proof of an intention or knowledge on the part of the abettor that the offence will be committed even if the main offence itself does not require it. The minimum requirement of knowledge is also found in s 113 of the Penal Code where the fault element of the abettor is satisfied by proof of an intention or knowledge that the

offence will be committed. This will ensure that the scope of liability for abetment will be limited to those who are most culpable. Take for example D who is charged for instigating A to sell food that is unfit for human consumption. D should only be held liable for the offence if he or she, at the minimum, knew that the food was indeed unfit for human consumption.

11 Koh also raised a valid defence under proviso (i) to s 49 of the TMA. There are three elements in the defence under proviso (i) to s 49 of the TMA. They are: (1) the accused had taken all reasonable precautions against committing an offence under s 49 of the TMA; (2) that at the time of the alleged offence, the accused had no reason to suspect the genuineness of the mark; and (3) that on demand by or on behalf of the Prosecution, the accused gave all the information in his power with respect to the persons from whom he obtained the goods or things (*Trade Facilities Pte Ltd and others v PP* [1995] 2 SLR(R) 7 ("*Trade Facilities*") at [59]). The third element is not relevant here as there was no such demand for information made by or on behalf of the Prosecution (*PP v Tan Lay Heong and another* [1996] 1 SLR(R) 504 ("*Tan Lay Heong*") at [58]). (1) and (2) are distinct elements, but they are inextricably connected and must be read conjunctively (*Tan Lay Heong* at [67] – [68]). The High Court in *Tan Lay Heong* held (at [68]):

> Thus, if there is initially reason to suspect the genuineness of the mark, more precautions will be required, so much so that after the necessary precautions have been taken, there must no longer be any reason to suspect its genuineness.

Determining whether (1) and (2) are proved is a question of fact to be decided having regard to all the circumstances of the case (*Tan Lay Heong* at [69]).

12 The District Judge took into account two main considerations in finding that the defence under proviso (i) to s 49 of the TMA is not satisfied:

(a) Koh only had a short period of acquaintance with Ah Seng and did not know much about him. As an optometrist, Koh is expected to ascertain the source of the contact lenses and should have checked with CIBA Vision (at [26]); and

(b) The price of the contact lenses purchased from Ah Seng (at $8 per box in the case of Wong and $10 per box in the case of Neo) were well below the market price of $22 per box. Even during promotions, the price of one box contact lenses is still above $10 (at [27]).

On appeal, the Prosecution submits the following: (1) Koh "must have known that Ah Seng, someone whom he admitted to having met only once and who was selling contact lenses at very cheap prices, was probably not getting his stock from Ciba Vision"; and (2) "under such circumstances, [Koh] ought at the very least to have made enquiries with CIBA Vision about the contact lenses that Ah Seng was peddling for sale instead of linking him up with Wong and Neo".

13 With respect, I do not agree with the reasons given by the District Judge. I am of the view that it is unsafe to convict Koh on the evidence before the court. Koh may have known Ah Seng for only a short period and knew little of his background, but there was no reason for Koh to suspect that the contact lenses were counterfeit and thereby contact CIBA Vision. Nor can it be the case, in the absence of evidence of a market practice, that optometrists are expected to check all purchases of contact lenses with registered proprietors. It is not useful to set a base price to determine whether the contact lenses are counterfeit. This is because prices of contact lenses vary and large discounts are given for bulk purchases. The prosecution's witnesses, who are in the contact lenses industry, gave evidence to that effect. PW3 (Mr Ng Cheng Peow) said he bought contact lenses for as cheap as $12 per box before even though the market price is $22 per box. PW1 (Ms Goh Pek Joo) testified

that she bought contact lenses at $13 per box. PW14 (Ms Angelina Wee Hwee Lin) said she bought contact lenses for $13.20 per box. Even so, such evidence is anecdotal and can hardly be representative.

14 Proviso (ii) to s 49 of the TMA was not addressed by the District Judge, nor raised by the defence in the District Court. On appeal, it was raised by parties, though not comprehensively. The only decision cited by the parties is *Trade Facilities* (see above: [11]). But that decision is of limited assistance. It held that the circumstances indicating a defence under proviso (i) to s 49 of the TMA may be used (under proviso (ii)), and that additional facts can turn an incomplete defence under proviso (i) into a defence under proviso (ii) (at [92]). The court in *Trade Facilities* did not say what those additional facts were, save for one: an accused can be said to have "acted innocently" if he does not take all reasonable precautions because none could be taken (at [93]). According to the court, the fact pattern in *R v S Ebata* [1938] MLJ 46 ("*S Ebata*") is an example on point. In *S Ebata*, the appellant, an importer of socks, was charged for under s 12 of the Merchandise Marks Ordinance (the precursor to s 49 of the TMA) for importing socks with a counterfeit trade mark. The court found that no reasonable precautions could be taken as the appellant could not check the goods until he accepted delivery of the goods by handing in the bill of lading. But by accepting the delivery of the goods, the offence of importing would be complete. In the absence of comprehensive submissions and in the light of my finding that a defence under proviso (i) to s 49 of the TMA is made out, I need not consider whether the defence under proviso (ii) is made out.

15 I now consider the 12 charges under s 16(1)(*b*) of the HPA. Unlike s 49 of the TMA, there are no cases on point for s 16(1)(*b*) of the HPA. An offence under s 16(1)(*b*) of the HPA is also strict in liability. The wording of s 16(1)(*b*) of the HPA does not provide for *mens rea* as an element of an offence under s 16(1)(*b*) of the HPA. The accused has to avail himself of either of the defences provided under s 16(3) of the HPA. I do not accept the Prosecution's submission that Parliament intended s 16(1)(*b*) of the HPA to be strict in liability. The Prosecution relies on the following statements made by the Minister for Health, Mr Khaw Boon Wan, to contend that Parliament intended an offence under s 16(1)(*b*) of the HPA to be strict in liability. During the Second Reading of the Health Products Bill (Bill No 3 of 2007) (*Singapore Parliamentary Debates, Official Report* (12 February 2007) vol 82 at cols 1262 – 1296), the Minister said:

> There is a need to regulate some of these new [health] products to protect public safety. First, we need to prohibit such products from containing harmful substances, at the very least. Second, we need to evaluate the more complicated health products for their quality and effectiveness. Third, we need an effective post-marketing surveillance programme to detect any problems early. But we need to regulate them in a practical manner given the wide diversity and different risk profile.

The Minister also specifically singled-out counterfeit products as being particularly dangerous:

> Items like counterfeit medicines, which might not contain the essential life-saving drugs they are supposed to contain, or traditional medicines that have been adulterated with potent drugs, are especially dangerous. They threaten public health, and we have singled them out to make clear that we take such offences seriously.

16 These statements only go as far as to state that the HPA seeks to establish a regulatory framework for the regulation of health products to safeguard public health and safety. They do not demonstrate a legislative intent in making an offence under s 16(1)(*b*) of the HPA strict in liability.

17 I find that it is unsafe to convict Koh for the twelve charges under s 16(1)(*b*) of the HPA. This

is because the District Judge convicted Koh after rejecting his defence for the same reasons he did for the first two charges of abetment by intentional aiding. Those reasons, as I have explained, do not adequately prove the prosecution's case.

18 Accordingly, I allow the cross appeal against conviction. As the convictions for the fourteen charges do not stand, I need not deal with the appeal by the Public Prosecutor against sentence. The prosecution's appeal is therefore dismissed.