

Arjun Upadhya v Public Prosecutor
[2010] SGHC 260

Case Number : Magistrate's Appeal No 4 of 2010; Criminal Motion No 29 of 2010
Decision Date : 30 August 2010
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Lim Kim Hong (Kim & Co) for the appellant; Tan Kiat Pheng and Gay Hui Yi (Attorney-General's Chambers) for the respondent.
Parties : Arjun Upadhya — Public Prosecutor

Criminal Procedure and Sentencing

30 August 2010

Judgment reserved.

Tay Yong Kwang J:

Introduction

1 This is an appeal by Arjun Upadhya (“the appellant”) against his conviction by a district judge (“the DJ”) under section 19(1)(c) of the Public Entertainment and Meetings Act (Cap 257, 2001 Rev Ed) (“the Act”) for four breaches of Licensing Condition No 21 (“LC 21”) of the “Licensing Conditions for Nightclubs, Cabarets, Discotheques, Bars, Lounges and other Public Houses” (“the Licensing Conditions”). There is also an application by the appellant by way of a criminal motion (“the Criminal Motion”) to file and proceed on a Supplementary Petition of Appeal.

Background facts

2 The facts of the present matter are relatively straightforward. The appellant is the owner and licensee of “JV Club” (“the Licensed Premises”). On 9 September 2009, a raid was conducted at the Licensed Premises and the police found four Filipina nationals working there. These four females sold drinks to patrons and were paid commissions based on the number of drinks they sold. They did not possess any work permit or employment pass.

3 The appellant also allowed the four females to provide companionship to the patrons by chit chatting and drinking with them. He had not obtained the approval of the licensing officer to have hostesses in the Licensed Premises.

4 The appellant was charged with eight counts of violating section 19(1)(c) of the Act. Section 19(1)(c) of the Act provides that “[a]ny person who provides or assists in providing any public entertainment... in contravention of any condition of a licence... shall be guilty of an offence”. The punishment prescribed is a fine not exceeding \$10,000. Of these eight charges, four related to the breach of Licensing Condition No 5 (“LC 5”) of the Licensing Conditions, while the remaining four charges pertained to the breach of LC 21. The breach of LC 5 was in relation to his employment of the four Filipina nationals as hostesses when they did not have a valid work permit (“Employment Charges”). LC 5 provides that “[t]he licensee shall not employ any foreigner in the licensed premises unless the foreigner is the holder of valid work permit or employment pass”. The breach of LC 21 was in relation to permitting the same four Filipina nationals to perform the duties of a hostess without

approval from the Licensing Officer ("Deployment Charges"). LC 21 states that "Unless approved by the Licensing Officer in writing, the licensee shall not permit any person in the licensed premises to perform the duties of a hostess".

5 The appellant pleaded guilty to the four Employment Charges and was convicted accordingly. However, he claimed trial to the four Deployment Charges. The DJ found him guilty and convicted him on the Deployment Charges as well. She then sentenced him to pay a fine of \$2,000 (in default two weeks' imprisonment) for each of the four Employment Charges and the four Deployment Charges, making a total fine of \$16,000. The fines have been paid. This appeal concerns only the conviction on the four Deployment Charges.

6 The trial proceeded on the facts as outlined in the agreed statement of facts. During the trial, the appellant's previous counsel made submissions on the basis of double jeopardy, maintaining that the doctrine of *autrefois convict* applied. He argued that the prosecution was precluded from proceeding against the appellant in respect of the LC 21 breaches as he had already been convicted of employing the four Filipina nationals without a valid work permit in breach of LC 5 and the LC 21 breaches were based on the same set of facts. The prosecution however argued that although the Employment Charges and Deployment Charges arose from the same circumstances, the charges pertained to two separate types of offences. The first was the offence of employing foreign nationals without a valid work permit. The second was the offence of deploying those nationals to perform the duties of a hostess without obtaining approval. Both the acts of employment and acts of deployment resulted in breaches of different and distinct Licensing Conditions.

The DJ's decision

7 As mentioned above, the DJ convicted the appellant on all four Deployment Charges and sentenced him to pay a fine of \$2,000 per charge with a default imprisonment of two weeks in respect of each charge. The DJ agreed with the prosecution that employing the four Filipina nationals without a valid work permit was a distinct offence from deploying them to perform the duties of a hostess without obtaining approval. She also took the view that the same set of circumstances could give rise to breaches of two distinct and separate licensing conditions and hence two separate offences and that when such a situation occurred, the prosecution was not precluded from proceeding against the offender in respect of both offences. On the facts, since a breach of LC 5 was distinct from a breach of LC 21, the appellant could be charged and convicted for breaching LC 21 even though he had pleaded guilty to breaching LC 5. It was also on this reasoning that she rejected the arguments of the appellant's previous counsel in respect of the applicability of the doctrine of *autrefois convict* to the facts of this case. The doctrine of *autrefois convict* prohibits a person from being tried for an offence in respect of which he had previously been convicted.

The Criminal Motion

8 The appellant appealed against his conviction on the four Deployment Charges. In the original Petition of Appeal filed on 14 April 2010, the appellant's previous counsel raised the same defence and legal argument of double jeopardy as he did before the DJ. Sometime in May 2010, the appellant's present counsel, Ms Lim Kim Hong ("Ms Lim") took over conduct of the appeal. Ms Lim then filed the Criminal Motion in July 2010 for leave to file a Supplementary Petition of Appeal. In the Supplementary Petition of Appeal, the appellant abandoned his reliance on the defence of double jeopardy and sought to raise other defences and legal arguments. In particular, the Supplementary Petition of Appeal stated that the appellant was dissatisfied with the DJ's decision on the grounds that she did not consider, and if she did, did not consider sufficiently:

(a) the fact that the Employment Charges and the Deployment Charges related to the same breach, namely, that of the appellant employing foreign nationals to perform duties as hostesses;

(b) the fact that the opening words of LC 21(1), "Unless approved by the Licensing Officer", necessarily precluded LC 21 from applying to licensees whose employees did not hold a valid work permit or employment pass;

(c) the purposive interpretation of LC 21(1) and that adopting a literal interpretation of LC 21 would give rise to a manifestly unreasonable result in that a licensee could accumulate enough demerit points from one incident for his licence to be revoked; and

(d) the fact that preferring the Deployment Charges in addition to the Employment Charges did not promote Parliament's intentions in having the Licensing Conditions, resulting in unnecessary duplication of charges, undue financial hardship to the appellant and abuse of process.

9 The prosecution objected to the appellant's application to file and proceed on the Supplementary Petition of Appeal on the ground that he was in effect asking for an extension of time to file his Petition of Appeal, that he had sufficient time to prepare and file a full Petition of Appeal and that his delay in doing so was inexcusable. The prosecution also argued that there were no merits in the new grounds of appeal which would warrant the filing of the Supplementary Petition of Appeal.

10 I decided to grant leave to the appellant to proceed with the Supplementary Petition of Appeal. The arguments raised therein were not radically different from those submitted before the DJ and the prosecution was prepared to meet the reformulated arguments in any event.

The Appeal

The appellant's case

11 The gist of the appeal is that given the purposive interpretation of the Licensing Conditions and their objectives, it was inappropriate for the appellant to have been charged for breaching both LC 5 and LC 21 on the same set of facts. The appellant argued that a purposive rather than literal interpretation of the Licensing Conditions ought to be adopted so that Parliament's intentions could be given effect to. He submitted that the rationale behind instituting the demerit point system under the Act for breaches of the Licensing Conditions was to allow for the adoption of a graduated enforcement approach against infringers. Parliament intended first-time offenders to be merely "let off with a slap on the wrist, facing penalties such as having his operation hours curtailed, or requiring the licensee to put up a security deposit". [\[note: 11\]](#) Should the Licensing Conditions be read literally, a first-time offender could, because of convictions for double breaches of those conditions arising from the same set of facts, accumulate sufficient demerit points for his licence to be revoked. Such a result would be contrary to the graduated enforcement approach that Parliament intended to be in place. In contrast, a purposive interpretation of the Licensing Conditions would ensure that demerit points are meted out selectively, thereby giving first-time offenders ample warning before their licences are revoked. Such a system would further the purpose of the demerit point system.

12 The practical importance of the appellant's legal arguments is reflected in paragraphs 2(7) to (10) of his Skeletal Arguments reproduced below:

(7) The Court convicted the Appellant on the 4 Deployment Charges. As a result thereto, his previous clean record of 0 demerit points jumped to 33 demerit points under the Licensing Conditions as follows:-

| | | |
|------|--------------------------------------|---------------------------------|
| i. | Overcrowding charge | 6 demerit points |
| ii. | Failure to keep proper record charge | 3 demerit points |
| iii. | 4 Employment Charges (4x3) | 12 demerit points |
| iv. | 4 Deployment Charges (4x3) | 12 demerit points |
| | Total | <u>33 demerit points</u> |

(8) As a result of the demerit points which accrued beyond the maximum of 24, the Appellant was notified by a letter dated 6th May 2010 from the Police Licensing Division ["PLD"] that the [Public Entertainment] Licence will be cancelled with effect from 19th May 2010.

(9) By way of a letter dated 17th May 2010, the Appellant, through his present Counsel, appealed to the Minister of Home Affairs ("**Appeal to MHA found at "AU-1" [pp67-76]**"). As a result of the appeal, the PE Licence was not cancelled.

(10) By a letter dated 19th July 2010 from the MHA (**MHA 190710 letter found at "AU-1" [pp91-92]**), the Appellant was informed that the 12 demerit points awarded for the Deployment Charges will be withheld until the conclusion of the Magistrate's Appeal and in the meantime, for the 21 demerit points accumulated, the PE Licence will be suspended for one month.

13 The appellant further argued that on a purposive interpretation of LC 21, only licensees who failed to obtain approval for their *legally* employed employees to perform hostess duties would be caught by this condition. According to him, the opening words of LC 21(1), "Unless approved by the Licensing Officer", presuppose that the person for whom the licensee is seeking approval to perform hostess duties would be a person whom the licensing officer is "likely to consider" [\[note: 21\]](#) and that would mean a person who already holds a valid work permit or employment pass. It was a "factual and legal impossibility" that approval to perform hostess duties would be granted to a person who does not hold a work permit or employment pass to begin with. [\[note: 31\]](#) Accordingly, LC 21 only applies to licensees who permitted *legally* employed employees to perform hostess duties without written approval from the licensing officer. It does not apply to cases where the employees in question were *not legally* employed in the first place. In the latter situation, the appellant argued that only LC 5 is applicable.

The prosecution's case

14 The prosecution argued that it was clear that employing a foreigner without a valid work permit or employment pass and permitting a person to perform hostess duties were two entirely different matters. It gave the example of a licensee who permitted a foreign female prostitute to perform hostess duties in licensed premises without employing her. Under such circumstances, the licensee would be in breach of LC 21 but not LC 5. On the other hand, if a licensee employed a female foreign national without a valid work permit or employment pass to work as a beer promoter but did not allow her to perform hostess duties, the licensee would be in breach of LC 5 but not LC 21. On the facts, the prosecution submitted that the appellant engaged the four Filipina nationals to sell drinks to patrons when they did not possess valid work permits or employment passes. This was a breach of LC 5. Additionally, the prosecution submitted that the appellant also allowed them to provide

companionship to the patrons by chit chatting and drinking with them. This resulted in a breach of LC 21 as well. Accordingly, the appellant committed two offences. The first was an act of employment in breach of LC 5 while the second was an act of deployment in contravention of LC 21. The prosecution therefore submitted that two distinct licensing conditions were breached and that the Employment Charges and the Deployment Charges were distinct and separate from one another.

15 In respect of the appellant's interpretation of LC 21, the prosecution argued that this interpretation was fallacious because it would mean that licensees who permit foreigners who are not under their employment *and* who did not hold valid work permits or employment passes to perform hostess duties on their premises in exchange for money paid directly by the patrons to those foreigners would not be in breach of any licensing condition. LC 5 would not be applicable as these foreigners are not employed by the licensee. LC 21 would not apply too since LC 21 is said to cover only employees who are legally employed in the first place. Such a result would be contrary to the objective of safeguarding public morality and decency under LC 21.

My decision

16 Even though the Employment Charges and the Deployment Charges arose from the same set of facts and were for infringement of section 19(1)(c) of the Act, I am of the view that they did not constitute only one set of offences. Rather, they concerned breaches of two distinct licensing conditions which sought to achieve different objectives. The rationale behind LC 5, as the DJ rightly pointed out, is the need to control and regulate the employment of foreigners in Singapore. It is a licensing condition concerning *employment*. LC 21, on the other hand, targets activities within pubs and seeks to prevent the proliferation of vice activities in such places. Unlike LC 5, it is a licensing condition preventing certain acts of *deployment* unless approved by the licensing officer. From a plain reading of LC 5 and LC 21, it is clear that employing a foreigner without a valid work permit or employment pass (breach of LC 5) is distinct from allowing a person to perform hostess duties without official approval (breach of LC 21). Viewed in this light, the four Employment Charges which the appellant faced were in respect of offences distinct from those which gave rise to the four Deployment Charges. Accordingly, there is no duplication of charges when he was convicted on both the Employment Charges and the Deployment Charges.

17 The law does not prevent the same set of circumstances from giving rise to two separate breaches of the law and for the offender to be punished for both breaches. Section 170(1) and (2) of the Criminal Procedure Code ("CPC") (Cap 68, 1985 Rev Ed) provide:

(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of those offences.

So for example, where "A wrongfully strikes B with a cane, A may be separately charged with and convicted of offences under section 352 (using criminal force) and 323 (voluntarily causing hurt) of the Penal Code" (see illustration (g) of section 170(2) CPC). It is only when the elements of one offence *necessarily* encompasses the elements of another that the offender can be said to be doubly punished should he be charged and convicted for committing both those offences. For instance, a person who has inflicted "grievous hurt" on another, contrary to section 322 of the Penal Code ("PC") (Cap, 224, 2008 Rev Ed), must *a fortiori* also have committed an offence of causing "hurt" under

section 321 PC. Convicting him under both section 325 and section 323 would be punishing him twice for the same offence. This is not the situation here.

18 The appellant's interpretation of the interplay between LC 5 and LC 21 can only be valid if breaching one condition results in an offence which wholly encompasses the elements of an offence arising from breaching the other condition. However, the wordings of LC 5 and 21 indicate that a breach of LC 5 will not necessarily lead to a breach of LC 21 or *vice versa*. For example, a licensee who employs a Singaporean to perform the duties of a hostess without written approval would be in breach of LC 21 but not LC 5. Conversely, a licensee who employs a foreigner as a cook when he does not possess a valid work permit or employment pass would be in breach of LC 5 but not LC 21.

19 Ms Lim submitted that the phrase "Unless approved by the Licensing Officer in writing" must mean that licensees whose employees do not hold valid work permits or employment passes necessarily fall outside the ambit of LC 21 as the licensing officer would not consider or allow anyone without such permit or pass to perform hostess duties. Looking at LC 21 in its entirety, it is clear that a licensee would be in breach of this licensing condition so long as he permits any person to perform the duties of a hostess without the licensing officer's approval. The language of LC 21 does not stipulate or imply any condition precedent regarding the nationality or the employment status of the person in issue. Indeed, it does not make any reference to the issue of employment at all. The opening phrase is merely a requirement that licensees must obtain written approval from the licensing officer if they wish to permit any person, whether local or foreign, to perform hostess duties on licensed premises. If the subject is a foreigner to be employed by the licensee, then the licensee must *additionally* ensure that the foreigner holds a valid work permit or employment pass. This is borne out by the wording of LC 5 and LC 21. LC 21 uses the words "shall not permit *any person* in the licensed premises to perform the duties of a hostess" whereas LC 5 prohibits licensees from employing "*any foreigner* in the licensed premises unless the *foreigner* is the holder of a valid work permit or employment pass".

20 Ms Lim also submitted that the appellant ought not to have been convicted on the Deployment Charges because that conviction, together with his conviction on the Employment Charges, would attract sufficient demerit points for a first offender's licence to be revoked. She argued that such a result was manifestly unreasonable and contrary to Parliament's intention behind the implementation of the demerit point system as this was the first time that the appellant breached the Licensing Conditions. I am not persuaded by this argument as the manner in which the Licensing Conditions are to be interpreted cannot depend on whether a public entertainment licence would be cancelled or suspended as a result. What Ms Lim was in effect doing was to urge this court to interpret the Licensing Conditions in a way that would not lead to the revocation of her client's licence. However, the scope and application of the Licensing Conditions are dependent on the way the conditions are worded as well as their underlying objectives. Their ambit and applicability do not and cannot change according to whether the infringer's licence would be revoked as a result. Whether a licence would be revoked or suspended depends on how many and how serious the infringements are. If, as in this case, two Licensing Conditions are breached several times in one night, then even a first offender would stand to lose his public entertainment licence because of the sheer number of demerit points incurred as a result of the multiple infractions in a single episode. This is commonsensical and should surprise no one in the trade.

Conclusion

21 In the result, the appellant fails in his appeal. I therefore dismiss the appeal against the DJ's decision to convict him on the four Deployment Charges in addition to the four Employment Charges.

[\[note: 1\]](#) Appellant's Skeletal Arguments, dated 26 July 2010, at paragraph 4(2)(f).

[\[note: 2\]](#) Appellant's Skeletal Arguments, dated 26 July 2010, at para 4(3)(d).

[\[note: 3\]](#) Appellant's Skeletal Arguments, dated 26 July 2010, at para 4(3)(e).

Copyright © Government of Singapore.