Ezmiwardi bin Kanan *v* Public Prosecutor
[2012] SGHC 44

Case Number : Magistrate's Appeal No 401 of 2010/01-03

Decision Date : 05 March 2012

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Zero Geraldo Mario Nalpon (Nalpon & Company) for the appellant; Leong Wing Tuck and Ng Yiwen (Attorney-General's Chambers) for the respondent.

Parties : Ezmiwardi bin Kanan — Public Prosecutor

Criminal law

5 March 2012

Lee Seiu Kin J:

1 The appellant claimed trial at the District Court to two charges of criminal breach of trust. The trial took 22 days. On 27 October 2010, he was convicted of the first charge and fined $6,000. He appealed against the conviction, and the Prosecution appealed against the sentence. The district judge acquitted the appellant of the second charge, a decision which the Prosecution appealed.

2 The facts of this appeal were tangled and it was easy to lose sight of what was important. The length of the trial and the muddled manner of prosecution did not help. But once the core issues were identified, it was clear to me that the appellant had to be acquitted of any criminal wrongdoing.

The factual background

3 The complainant owned a Hyundai Matrix ("the Car"). He had bought it with a bank loan, of which about $42,000 remained unpaid. Buying the car was a poor investment decision, as the value of the Car was now only slightly more than $26,400. This value was the combined total of the value of the body (or export value) and the paper value (the Preferential Additional Registration Fee ("PARF") and Certificate of Entitlement ("COE") rebates).

4 Undeterred, the complainant wanted a new car – a Honda Fit. The appellant, a car salesman, agreed to buy the Car from the complainant for $29,200. The understanding was that the complainant would then buy a new Honda Fit from appellant for $58,800. On 24 May 2008, the complainant delivered the Car to the appellant.

5 But the unpaid loan on the Car had to be repaid. Since the value of the outstanding loan (about $42,000) was more than the agreed sale price of the car ($29,200), the complainant agreed to pay the difference of about $13,000 to the appellant. If all went well, the appellant would, upon receipt of the $13,000, redeem the car loan and sell the new Honda Fit to the complainant (taking into account the $29,200 credit for the Car).

6 Things did not go so well. The appellant sold the Car on 28 May 2008 to a re-exporter and received $4,000 for the body. The complainant paid some sums of money to the appellant, yet the car loan was never redeemed. Accordingly, the Car was not de-registered at the material time.

Meanwhile, since PARF and COE rebates are paid only upon de-registration, the paper value of the Car declined as time passed. Interest on the unpaid loan also accrued. The bank began waving the threat of bankruptcy. Amidst this financially harrowing time, the complainant made a police report on 28 January 2009. He complained that he had transferred the Car to the appellant and given him certain sums of money, but the appellant had failed to perform his end of the bargain. This complaint led to the appellant's prosecution for criminal breach of trust.

The central question

7 The first charge read:

> ... that you, sometime on 24.5.2008 ... being entrusted with [a Hyundai Matrix belonging to the complainant], did commit criminal breach of trust by dishonestly converting to your own use, the said property, to wit, by selling the said motorcar to a car exporter ... for $4,000 and retaining the proceeds of sale, and you have thereby committed an offence punishable under section 406 of the Penal Code, Chapter 224.

The appellant was convicted by the district judge on this charge. This charge related to the appellant's taking delivery of the Car and his subsequent sale of it to the re-exporter.

8 The second charge read:

> ... that you, sometime on or about 22 June 2008 ... being entrusted with property, namely cash amounting to S$6,412 belonging to [the complainant] ... did dishonestly misappropriate the said property, and you have thereby committed criminal breach of trust in respect of the said property, which offence is punishable under Section 406 of the Penal Code, Chapter 224.

The appellant was acquitted of this charge. This charge related to money which the complainant allegedly paid to the appellant, for the purpose of redeeming the car loan.

9 The link between the two charges was provided by the appellant's defence. Stripped to its essentials, the appellant's position was this: contrary to their agreement, the complainant had not given him the $13,000 needed to redeem the car loan. Accordingly, he had never been in a position to complete his part of the transaction. It followed that any form of criminal wrongdoing in relation to the facts of the first charge would depend in part on the facts of the second charge – to the extent that the alleged payment of $6,412 made up the $13,000 paid to the appellant for him to redeem the car loan.

10 Therefore although framed as two isolated charges, in reality they were elements of one and the same transaction. Proceeding with two independent charges was unhelpful because it tended to gloss over the connexion between them. Neither did it assist the district judge to firmly grasp the central question.

11 To my mind, the appellant's criminal wrongdoing hinged on only one question: why had he not redeemed the outstanding car loan? It was accepted that the appellant did not credit the complainant with the $29,200 for the Car. If it had been so credited, clearly there would be no cause for any prosecution. The appellant said that he never credited the complainant because the bank loan was never redeemed (and so the car could not be de-registered). Why? Answering this question would decide the appeal.

12 The appellant accepted that he had a contractual duty to redeem the car loan. The

complainant also accepted that he had to top-up the difference of $13,000 before the appellant could redeem the loan. Hence it became very important to decide if the appellant had received the $13,000 from the complainant. If he had, then the appellant would have to explain why he nonetheless failed to redeem the car loan. But if not, the Prosecution's case would fail at the first hurdle.

Did the appellant receive the $13,000?

13 According to the appellant, he received $5,000 (in three instalments) before 24 May 2008, and one payment of $3,000 on 22 June 2008 – a total of only $8,000. The Prosecution's case was that the appellant had received $8,000 (in three instalments) before 24 May 2008, and a payment of $6,412 on 22 June 2008 – a total of roughly $14,000. No receipts had been issued for any of the payments.

14 The key document in the appellant's favour was the police report made by the complainant on 28 January 2009. In this report, the complainant was recorded as having said:

> On 24.05.2008 at about 3.00pm, I traded my old car, SFJ 4579Y (Hyundai Matrix) with Apex Global Trading via an agent, [the appellant], for a new car, SJF7946A (Honda Fit). *I paid him SGD8000.00 for the transaction.* [emphasis added]

Hence, the complainant himself had complained to the police months after the transaction went awry, that he had given only $8,000 to the appellant. This is very different from the $14,000 he alleged at the trial. This statement corroborated the appellant's story, which had been made before he knew of the contents of the police report.

15 This glaring discrepancy in the complainant's evidence was neither addressed by the district judge, nor addressed in the Prosecution's written submissions on appeal. When the complainant was confronted with the police report during cross-examination at the trial, he did not offer an explanation for the inconsistency. An explanation only surfaced during re-examination, when he blamed his forgetfulness and "muddled" state of mind.

16 A plea of forgetfulness is too glib an explanation on the present facts. When the complainant went to the police station more than seven months after the last payment to the appellant on 22 June 2008, the bank was threatening him with bankruptcy. The overriding question in his mind must have been why the appellant had not redeemed the car loan. The total payment to the appellant (for the purpose of redeeming that very loan) would have been foremost in the complainant's mind. Further, if he remembered paying the $8,000 (which, on his own testimony was made in three instalments), it is difficult to accept that he would have somehow forgotten about the most recent payment of $6,412, which was a substantial sum.

17 For this reason, the Prosecution has not proven beyond reasonable doubt that the appellant received the $13,000 needed to redeem the car loan. That being so, there is nothing about the appellant's subsequent sale of the car that the complainant can protest. *If* the appellant had credited the $29,200 to the complainant, it is irrelevant that he subsequently sold the car to a re-exporter. The appellant did *not* credit the complainant with $29,200. But why? The answer is that he was not given the $13,000 to redeem the car loan. It follows that the Prosecution has not proven any criminal wrongdoing.

Assuming that the appellant received $14,000

18 Even if I accepted that $14,000 had been paid to the appellant, there is another problem in the

Prosecution's case. The complainant did not, in the end, buy a new Honda Fit from the appellant. This is because the appellant could not provide one in the desired colour. Upon the appellant's recommendation, the complainant bought his new car from another company Apex Global.

19 The Prosecution accepted that on 11 June 2008, the appellant issued two cheques totalling $3,055.86 to Apex Global. This sum was to pay for the down-payment, insurance and first instalment on the complainant's new Honda Fit. Hence even if the appellant had initially received $14,000 from the complainant, there would *still* be a shortfall once the payment of $3,055.86 was taken into account. Hence no matter how one looked at the entire transaction, the appellant did not receive sufficient money from the complainant to redeem the car loan.

Conclusion

20 For the reasons given above, I allowed the appeal and acquitted the appellant. I also ordered the $6,000 fine to be refunded to him.