B Subramaniam a/l Banget Raman v Public Prosecutor
[2003] SGHC 252

Case Number : MA 69/2003

Decision Date : 21 October 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : P E Ashokan and Gwenette Lee Vetuz (Khattar Wong & Partners) for the appellant; Edwin San (Deputy Public Prosecutor) for the respondent

Parties : B Subramaniam a/l Banget Raman — Public Prosecutor

Criminal Law – Statutory offences – Harbouring of illegal immigrant – Whether act of giving lift to immigration checkpoint amounted to assistance to evade apprehension – Immigration Act (Cap 133, 1997 Rev Ed)

Criminal Law – Statutory offences – Harbouring of illegal immigrant – Whether reasonable grounds to believe person to whom accused giving lift was illegal immigrant under Immigration Act (Cap 133, 1997 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Whether benchmark sentence of one year for harbouring illegal immigrant manifestly excessive in the circumstances – Whether accused less culpable as role was minor and did not profit from act – Whether reduced sentence sufficient to deter others from committing same act

Evidence – Proof of evidence – Presumptions – Accused remaining silent – Adverse inferences to be drawn

1 The appellant, B Subramaniam A/L Banget Raman ('Subramaniam') was convicted on one charge under s 57(1)(d) of the Immigration Act (Cap 133) for harbouring an illegal immigrant, one Manoharan Manimaran ('Manoharan'). He had conveyed Manoharan as a pillion rider on his motorcycle to Woodlands Immigration Checkpoint, despite having reasonable grounds to believe that Manoharan was an immigration offender. He was sentenced to 12 months' imprisonment.

2 Subramaniam appealed against his conviction. I dismissed his appeal against conviction but reduced his sentence of imprisonment to six months. I shall now state the reasons for my decision.

Background facts

3 Manoharan was an illegal immigrant who entered Malaysia and overstayed in Johore Bahru for about six years. He got to know Subramaniam during his stay in Malaysia. On or about 10 December 2002, he entered Singapore illegally by boat. Subramaniam lived in Johore Bahru and worked in a factory in Singapore. He would arrive for work on his motorcycle every morning and leave for Johore Bahru the same evening after work. On the evening of 23 December 2002, Manoharan and Subramaniam met up in Ang Mo Kio. It was undisputed that Manohran wanted a lift from Subramaniam to Johore Bahru and the latter had asked to see his passport.

4 Manoharan proceeded to show Subramaniam a Malaysian passport with the former's photo and the name 'Letchumanam A/L Angamuthoo' ('the passport'). There was also an entry stamp into Singapore dated 14 December 2002. Subramaniam then agreed to give Manoharan a lift on his motorcycle. They arrived at Woodlands Immigration Checkpoint after 9.00 p.m. The Immigration Officer on duty at the departure counter could not find any record in the computer registering the entry into Singapore of anyone by the name of 'Letchumanam A/L Angamuthoo'. Suspecting that the entry endorsement was forged and the photograph in the passport had been substituted, he referred

the case to the Duty Officer.

5 On 26 December 2002, Manoharan was convicted of entering Singapore without a valid pass, an offence under s 6(1)(c) of the Immigration Act. Subramaniam was then charged with harbouring Manoharan, an offence under s 57(1)(d) of the same Act.

The appeal

6 The elements of the offence that were in dispute in the appeal were:

(a) whether Subramaniam had reasons to believe that Manoharan was an immigration offender in Singapore;

(b) whether the act of conveying Manoharan to the immigration checkpoint constituted an act of assistance within the meaning of "harbouring" under s 57(1)(d) (read with s 2) of the Immigration Act; and

(c) whether Subramaniam was helping Manoharan evade apprehension by bringing him to the immigration checkpoint.

7 In light of the above issues, it was submitted on behalf of Subramaniam that the district judge below had erred in law or fact:

(a) in calling upon Subramaniam to enter his defence when the prosecution had failed to establish a prima facie case;

(b) in her treatment of the evidence of Manoharan; and

(c) in drawing an adverse inference against Subramaniam for electing to remain silent when called upon to enter his defence and in finding that the prosecution had proven its case beyond a reasonable doubt.

(a) Whether the prosecution had established a prima facie case

8 The test set out in *Haw Tua Tau v PP* [1981] 2 MLJ 49 would have been satisfied if a prima facie case had been made out against Subramaniam, which, if unrebutted, would warrant his conviction. On the issue of *mens rea*, the prosecution submitted that a prima facie case had been made out on the basis that Manoharan had testified to having told Subramaniam that he was an Indian national who had entered Malaysia illegally and that he had obtained the passport, together with a Malaysian identity card, for a sum of S$2000. Furthermore, the passport and identity card were Malaysian ones, bearing the name "Letchumanan A/L Angamuthoo", whereas Subramaniam knew Manoharan only as "Maran". All these should have put Subramaniam on alert to the fact that the travel documents were likely to have been fake, and he would have had reasonable grounds to believe that Manoharan was an immigrant offender. It was clear to me that if all these evidence were left unrebutted, the *mens rea* of the offence would have been satisfied.

9 The *actus reus* of the offence, however, was a matter of much contention. The prosecution concurred with the district judge's holding that Subramaniam was "harbouring" Manhoaran as the definition of "harbour" under s 2 of the Immigration Act is very wide and includes the act of assisting a person in any way to evade apprehension. The district judge noted that the scheme was for Manoharan to leave and then re-enter Singapore under the assumed identity of "Letchumanan A/L

Angamuthoo", for the sole purpose of obtaining a social visit pass which would then allow him to remain in Singapore. As such, she was of the opinion that this amounted to helping Manoharan evade apprehension.

10 The defence, however, argued that there was no *actus reus* of assistance amounting to harbouring as the act by Subramaniam in giving Manoharan a lift to the immigration checkpoint constituted a "mere conveyance". The defence drew my attention to the fact that Subramaniam had dutifully stopped at the lawful exit point in Singapore to allow the immigration authorities to scrutinise the travel documents of Manoharan. He also did not produce the travel documents for the latter. Hence, the defence contended that the act of conveyance per se was a neutral one, similar to that of giving an illegal immigrant a lift from Serangoon Road to the race course on a weekend, and did not amount to assistance.

11 I was unable to accept this submission. An act of assistance can take many forms. A more subtle form would be to give an illegal immigrant a lift to the immigration checkpoint so that the latter could try to get pass the checkpoint by producing falsified documents. The Hollywood version would be to speed past the checkpoint without stopping, or to hide the passenger in a secret compartment of a car, in which cases falsified documents would be wholly unnecessary. Just because Subramaniam stopped at the immigration checkpoint to allow the authorities to check Manoharan's travel documents did not mean a lack of assistance. His assistance merely took the more subtle form. Neither did it help that Subramaniam did not produce the travel documents for the latter, since the prosecution's case was not that Subramaniam had assisted by falsifying the travel documents for Manoharan.

12 The contention that the act of giving an illegal immigrant a lift constituted a mere conveyance or a neutral act was similarly unacceptable. To give an illegal immigrant a lift to the immigration checkpoint is a totally different matter from bringing him to the race course. Where the destination is the immigration checkpoint and there is a danger that an immigration offender can get past without being detected, it is not too onerous for the law to expect the person giving the ride to check the status of his passenger, where there are reasons to believe that the passenger may be an immigration offender. It was therefore clear to me that the definition of "harbouring" under s 2 of the Immigration Act includes at least the act of giving a ride or a lift to an immigration checkpoint.

13 Next, the defence disputed the district judge's holding that Subramaniam's act was to enable Manoharan to evade apprehension. It was argued that by bringing Manoharan to the immigration checkpoint and stopping to allow the immigration authorities to check Manoharan's documents, Subramaniam was in fact assisting in his apprehension. Furthermore, in light of Manoharan's admission that he was leaving Singapore only to re-enter to get an extension visit pass, it was argued that the scheme, rather than to evade apprehension, was really to court apprehension.

14 This submission was obviously made only with the benefit of hindsight. At the point when they were at the immigration checkpoint, Manoharan probably thought it a really good idea, since he would not otherwise have implemented the scheme. If Manoharan had successfully got past the checkpoint, he would probably have been able to re-enter Singapore easily be getting an extension of his social visit pass and would have evaded apprehension later on in Singapore. Moreover, since he had tried using a false name to get past the checkpoint, that alone amounted to an attempt to evade apprehension, since he would certainly have been apprehended if he had no passport. It did not matter whether he tried to enter Singapore again later on. By bringing him to the checkpoint, Subramaniam was assisting Manoharan in putting that plan into action. It was akin to a driver bringing a robber to the scene of crime. If they caught by the watchman, the driver could not then turn around to say that by driving the robber to the watchman, he was really getting him arrested.

15 I therefore found that the *actus reus* of the offence was satisfied and, if the testimony of Manoharan was to be believed, the *mens rea* of the offence was also made out. The test in *Hwa Tua Tau* was clearly met as there was a prima facie case, which, if unrebutted, would lead to the conviction of Subramaniam. I thus dismissed this ground of appeal and held that the district judge was correct in calling upon Subramaniam to enter his defence.

(b) Whether Manoharan's testimony was reliable

16 The next ground of appeal was on the basis that Manoharan's testimony was unreliable. First, the defence argued that it was inherently incredible and irreconcilable for Manoharan to testify to having told Subramaniam that he had bought the Malaysian passport for S$2000, and yet say that Subramaniam was genuinely satisfied that the passport belonged to Manoharan. Moreover, if the purchase of the passport had been mentioned to Subramaniam, it would have been completely unnecessary for Subramaniam to call for and examine the passport (this was not disputed), since it would definitely have been forged in any case. Furthermore, the defence submitted that if Manoharan had testified to not daring to tell Subramaniam that the passport was not his for fear that the latter would refuse to bring him to Johore Bahru, he would be even less likely to tell him that he had bought the passport from an agent in Singapore for S$2,000.

17 All I could tell from the above submissions was that Manoharan's testimony was not at odds with the possibility that Subramaniam may have had a real belief that Manoharan was holding a genuine Malaysian passport, despite being told that it was purchased for S$2000. It appeared that even Manoharan himself did not seem to think that the revelation that he had purchased the passport for S$2000 would prompt Subramaniam into suspecting that the passport was fake. However, the test for the *mens rea* of harbouring was not a subjective one. As the district judge had put it, "any prudent man having such information as [Subramaniam] had about Manoharan, and looking at the passport, would suspect that something was amiss… [Subramaniam] had deliberately shut his eyes to the obvious and refrained from inquiring". It was this objective standard that he had failed. It was his duty to inquire further after being told that the passport was purchased for S$2000.

18 The defence also submitted that if Manoharan claimed not to have told his employer in Malaysia of his illegal status, it was highly improbable that he would reveal his status to Subramaniam, whom he had met only once or twice before. I could not accept this submission. It seemed logical that an illegal immigrant would want to hide the fact of his illegal status from his employer for fear of losing his job. On the other hand, though imprudent, it was less illogical for him to reveal it to a third party who would probably be unconcerned with his immigration status.

19 The defence further contended that the district judge had ignored Manoharan's lies in his testimony. It was pointed, for example, that Manoharan had said at one point that his agent will get him a forged passport and at another that he believed that the agent will get him a passport legally from the government department in Kuala Lumpur. After perusing the notes of evidence, I was unable to consider this contradiction to be a lie, since Manoharan was not cross-examined on the contradiction. There was no telling if what had conspired was that the agent had said at one point that he would get him a forged passport, and then later tried to comfort him by saying that the passport would be legal.

20 Another "lie" pointed out by the defence was Manoharan's own admission to having lied to the immigration officer that Subramaniam was his cousin. I did not think that this admission made Manoharan an unreliable witness, since lying to the immigration officer was one thing, lying in court whilst under oath was another. Moreover, the fact that Manoharan was willing to admit to having lied to the immigration officer was in fact an indication that he was probably being truthful in court.

21 As for the other inconsistencies in Manoharan's submissions, such as the exact date on which he had obtained the falsified travel documents and his inability to recall Manoharan's telephone numbers, they were minor in nature and did not relate to key issues. On the crucial issue of whether Subramaniam had reasons to believe that Manoharan was an immigration offender, the latter consistently maintained that he told Subramaniam that he was an Indian national, that Subramaniam knew him only as "Maran" and that he told Subramaniam that he had paid S$2000 for his passport. The inconsistencies did not undermine his clear and coherent evidence in respect of this key issue and the district court was thus entitled to accept his testimony regarding the latter: *Sundara Moorthy Lankatharan v PP* [1997] 3 SLR 464.

22 The defence also took issue with the district judge's finding that Manoharan had no reason to lie and fabricate evidence against Subramaniam. The defence claimed that there were no attributes of friendship in evidence between the two and that they were merely acquaintances. This matter did not appear to me to be of any consequence, since regardless of whether they were firm friends or mere acquaintances, the fact remained that there was no evidence of Manoharan bearing any grudges against Subramaniam. The trial judge had rightly found "no reason for Manoharan to lie and fabricate evidence against [Subramaniam]".

23 The trial judge, having the opportunity to observe the demeanour of Manoharan, had come to the conclusion that he was "coherent, reliable and consistent". I found no reason to disagree with her. I dismissed this ground of appeal and held that the district judge was within her right to find Manoharan a truthful witness.

(c) Whether adverse inference should be drawn against Subramaniam for remaining silent

24 After finding that a prima facie case had been established, the district judge called upon Subramaniam to enter his defence. Despite being reminded that his refusal to give evidence might lead the court to drawn adverse inference against him, he elected to remain silent and did not call any witnesses. The district judge therefore held that Subramaniam, "by electing to remain silent, has not provided an explanation to the charge nor contradicted prosecution's evidence." She then convicted him of the offence.

25 Since the testimony given by Manoharan pertaining to the *mens rea* of the offence, such as having told Subramaniam that he had paid S$2000 for the passport and so on, was a matter known only between the two, Subramaniam had jeopardised his own case by electing not to give evidence. The district judge was correct in drawing an adverse inference against Subramaniam, since his silence left the prosecution's evidence, which had clearly established all the elements of the offence of harbouring, uncontradicted. I also dismissed this ground of appeal and accordingly held that Subramaniam's conviction should stand.

The sentence

26 Subramaniam did not appeal against his sentence but under s 256(b)(ii) of the Criminal Procedure Code (Cap 68), the appellate court may, in an appeal from a conviction, reduce or enhance the sentence with or without altering the finding. I found that although the conviction should stand, the sentence ought to be reduced in the interests of justice.

27 The reasons for reducing the sentence pertains to Subramaniam's role in Manoharan's getaway scheme. I was of the opinion that Subramaniam had played only a minor role, contrary to what the district judge had held. I disagreed with the district judge's reasoning that Subramaniam must have played a major role since he was the only person to have assisted Manoharan in his

attempt to leave Singapore. The role of an accused depends on whether his act of assistance was instrumental in the success of the illegal immigrant's attempt to evade apprehension, and not whether he was the only one, or one of many, who assisted the illegal immigrant.

28 Subramaniam's act was not instrumental to the success of Manoharan's scheme and so he could not be said to have played a major role. He was merely giving Manoharan a lift to the immigration checkpoint as he himself was returning to Johore Bahru after work. If he had refused the lift, Manoharan could easily have taken a bus to Woodlands without much difficulty, as the bus fare was not prohibitive. I found this to be unlike the case of renting a flat to or employing an illegal immigrant. Without the flat or the job, the illegal immigrant would most likely be forced to return to his home country. It was also unlikely that someone else would employ or rent a flat to the illegal immigrant if the accused had not done so, whereas a bus driver or a taxi driver would most probably have given Manoharan a ride as long as he paid the fare.

29 The question of payment was also of direct relevance to Subramaniam's culpability. Manoharan had testified unequivocally to not having made any payment to Subramaniam for the lift to Johore Bahru. Neither was there any mention of payment earlier by him or Subramaniam. It was clear to me that Subramaniam did not profit from his act of giving Manoharan a lift, unlike in the case of an accused who profits from renting out his flat or employing an illegal immigrant at lower wages. In this respect, he was clearly less culpable and should be given a lighter sentence to reflect this difference in culpability. A lesser sentence would also be sufficient to deter anyone from carelessly giving another a free ride to the immigration checkpoints, since it does not even benefit oneself.

30 I noted that the benchmark sentence for an accused claiming trial for the offence of harbouring by providing food, shelter or job, is one year. I found Subramaniam's sentence of one year's imprisonment to be manifestly excessive in light of his lesser culpability. I thus reduced his sentence to six months' imprisonment, which is the statutory minimum penalty of imprisonment for the offence of harbouring.

Conclusion

31 For the above reasons, I found that the appeal against conviction could not be sustained and accordingly dismissed the appeal. However, I reduced the sentence from one year to six months' imprisonment.

Appeal against conviction dismissed. Sentence reduced to six months.