Public Prosecutor v Poh Kim Video Pte Ltd
[2003] SGHC 304

Case Number : MA 80/2003

Decision Date : 03 December 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Kirpal Singh (Kirpal and Associates) for appellant; Oommen Mathew and Serena Howe (Tan Peng Chin LLC) for respondent

Parties : Public Prosecutor — Poh Kim Video Pte Ltd

Criminal Law – Statutory offences – Copyright infringement pursuant to s 136(2) Copyright Act (Cap 63, 1999 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Appeals – Whether sentence imposed was manifestly inadequate

Criminal Procedure and Sentencing – Sentencing – Penalties – Definition of "article" under s 136(2) Copyright Act (Cap 63, 1999 Rev Ed)

Criminal Procedure and Sentencing – Sentencing – Whether advancement of unsuccessful defence at trial amounts to aggravating factor for purposes of sentencing

1 This was an appeal against the sentences imposed on the respondents, Poh Kim Video Pte Ltd ('Poh Kim Video'), in respect of five offences under s 136(2) of the Copyright Act (Cap 63, 1999 Rev Ed). At the end of the hearing before me, I dismissed the appeal and now give my reasons.

Background facts

2 Poh Kim Video engage in the sale of video cassettes, compact discs, laser discs, Video Compact Discs ('VCDs') and Digital Video Discs at 33 outlets in Singapore.

3 On 27 December 2001, private investigators were instructed by TS Laser Pte Ltd ('TS Laser') to conduct trap purchases of a Korean drama series known as 'Bad Friends' ('the drama series') from Poh Kim Video. One box set of the drama series, comprising 18 VCDs, was purchased in each of the Poh Kim Video outlets at Junction 8 Shopping Centre, Northpoint Shopping Centre, Century Square, Suntec City Mall and Centrepoint.

4 TS Laser then commenced a private prosecution against Poh Kim Video for breaches under s 136(2)(a) of the Copyright Act.

Charges

5 Five charges were preferred against Poh Kim Video. The first charge read as follows:

> You, POH KIM VIDEO PTE LTD, ROC No. 198401906E of 53 Kim Keat Road #03-03 Mun Hean Building Singapore 328823, are charged that you, on 27 December 2001 at 9 Bishan Place #04-05 Junction 8 Shopping Centre Singapore 579837, at a time when copyright subsists in the "BAD FRIENDS" series, did sell 18 VCDs of "BAD FRIENDS" VCDs which you knew or ought reasonably to know to be infringing copies of the "BAD FRIENDS" series and you have thereby committed an offence punishable under Section 136(2)(a) of the Copyright Act, Cap 63 (1999 Revised Edition).

6 Except for the addresses of the outlets at which the trap purchases were conducted, the

other four charges were similarly framed.

The prosecution's case

7 The prosecution's case at the trial below was that the copyright in the drama series was owned by MBC Production Co Pte Ltd ('MBC'), the broadcasting station in South Korea which produced the drama series. MBC had granted Hwa Yae Multimedia International Trading Company ('Hwa Yae'), a copyright agent based in Asia, the sole and exclusive rights in the series for the territory of Singapore for a period of three years commencing on 1 December 2001.

8 In turn, Hwa Yae sub-licensed these rights to TS Laser with effect from 1 December 2001. Thus, TS Laser owned the rights to distribute the drama series in Singapore as of 1 December 2001. The prosecution submitted that the five box sets sold by Poh Kim Video on 27 December 2001 were infringing copies of the drama series.

The defence

9 The crux of Poh Kim Video's defence was that the box sets of the drama series sold at their outlets with effect from 13 December 2001 were legitimate parallel imports from Hong Kong. The defence took the position that Poh Kim Corporation Pte Ltd ('Poh Kim Corporation'), a related company of Poh Kim Video, had acquired rights for the Hong Kong region from YSY Digital Entertainment Company Limited ('YSY Digital') as of 19 November 2001. Poh Kim Corporation had replicated the drama series and had then sold the manufactured box sets to Crest Ocean (Hong Kong) Limited ('Crest Ocean'), a related company of Poh Kim Video. Poh Kim Video had then ordered 1,000 box sets from Crest Ocean and these box sets were imported into Singapore.

The decision of the magistrate

10 The magistrate who heard the case rejected Poh Kim Video's defence of parallel import and held that this defence was 'a sham and an excuse'. While the magistrate found that MBC had granted a licence to Phoenix Satellite Television Co Limited ('Phoenix Satellite') for the Hong Kong region and Phoenix Satellite had in turn granted a distributorship licence to YSY Digital, the licence period ran from 1 January 2002 to 31 December 2004. Thus, in the month of December 2001, when the trap purchases were made, YSY Digital did not have authority to grant Poh Kim Corporation distribution rights for Hong Kong.

11 The magistrate found that the prosecution had proven that copyright for the drama series subsisted in favour of MBC and TS Laser. The five box sets were held to be infringing copies of the drama series as Poh Kim Video did not have rights in the drama series as of 27 December 2001 when the trap purchases were conducted. The magistrate further held that Poh Kim Video knew that the box sets were infringing copies.

12 In sentencing Poh Kim Video, the magistrate made the following observations:

> …although there were 18 discs in each set, the evidence showed that the series was sold on a box set basis at a fixed price of $39.90 per box. I therefore declined to follow the prosecution's invitation to consider the number of films or episodes in each box when sentencing, because no evidence was led to show that the episodes were sold separately. For the purposes of sentencing under s 136(2) of the Copyright Act, I considered each box an article rather than each episode an article.

The magistrate took into account a number of mitigating factors and imposed a fine of $2,000 per charge, for a total fine of $10,000.

The appeal

13 TS Laser appealed against the sentence imposed by the magistrate on the ground that it was manifestly inadequate and advanced two main contentions on appeal.

14 First, TS Laser submitted that the magistrate had failed to take into account two aggravating factors which necessitated that a higher fine be imposed. The first aggravating factor was Poh Kim Video's abuse of the defence of parallel import at the trial below. This defence was said to be a mere sham as Poh Kim Video were aware that they had had no right to distribute the drama series in Singapore in December 2001. The second aggravating factor was the fact that Poh Kim Video's infringement of copyright was on a large scale.

15 Second, TS Laser contended that the magistrate erred in regarding each box set as an 'article' for the purposes of sentencing under s 136(2) of the Copyright Act. TS Laser was of the view that the correct approach would have been to regard each VCD as an 'article' and that Poh Kim Video should have been sentenced on the basis of 90 articles, instead of five articles.

16 I shall now deal with these arguments in turn.

Whether the magistrate erred in failing to take into account Poh Kim's abuse of the defence of parallel import

17 I was of the view that Poh Kim Video's advancement of the defence of parallel import at the trial below could not be regarded as an aggravating factor. It would be wrong to penalise Poh Kim Video for raising this defence because they had every right to do so. As I have previously held in cases such as *Zeng Guoyuan v PP* [1997] 3 SLR 321, while the scandalous or reprehensible conduct of one's defence may constitute an aggravating factor in certain cases, an accused is entitled to raise any type of defence necessary to his case, even if this defence is scandalous or vexatious in nature. In *Zeng Guoyuan*, I quoted with approval the following passage from Mohamed Azmi J's judgment in *Ahmad Shah bin Hashim v PP* [1980] 1 MLJ 77 at 86:

> It is my considered opinion that in a criminal trial an accused person is entitled to put up any type of defence that he thinks necessary and justified in order to raise a reasonable doubt in the prosecution case, and *the fact that such defence has not succeeded should not be taken against him in assessing sentence.* [Emphasis added]

18 I was of the view that the conduct of Poh Kim Video's defence could not be said to be scandalous. There was a marked disparity between the conduct of Poh Kim Video's defence and the facts of *Zeng Guoyuan*. In *Zeng Guoyuan*, the appellant displayed a wholly exceptional contempt for the court proceedings by badgering witnesses, insinuating that the judge was biased and refusing to answer direct questions from the court on the relevancy of his cross-examination tactics. In the present appeal, no such contempt was shown. Indeed, there were documents to show that Poh Kim Video had the rights to distribute the drama series for the Hong Kong region at least with effect from 1 January 2002. There was also evidence that Poh Kim Video had erroneously assumed that the licence period in fact commenced on 19 November 2001.

19 Further, Poh Kim Video were entirely justified in raising the issue of parallel import as the burden lies on the prosecution, in making out an offence under s 136(2) of the Copyright Act, to

prove that an imported article which is alleged to be an infringing article is not a legitimate parallel import: *Highway Video Pte Ltd v Public Prosecutor* [2002] 1 SLR 129 at 143.

Whether the magistrate failed to take into account the fact that Poh Kim's infringement was on a large scale

20 TS Laser submitted that the fact that Poh Kim Video owned a large number of retail outlets and sold infringing articles in these outlets was an aggravating factor for the purposes of sentencing. TS Laser were of the view that the magistrate had assumed that Poh Kim Video were 'honest businessmen' simply because they owned a large group of retail outlets.

21 I was unconvinced by TS Laser's arguments in this regard. It appeared to me that they had in fact misinterpreted the magistrate's observations on this point. Having perused the magistrate's grounds of decision closely, I saw no merit to TS Laser's contention that the magistrate regarded Poh Kim Video as honest purely on the basis that they owned a large retail chain. It was evident from the magistrate's grounds of decision that he simply drew a distinction between syndicated pirates engaged in large scale copyright infringement operations, on the one hand, and Poh Kim Video, which did in fact own the copyright for the series in Hong Kong with effect from 1 January 2002, on the other. The magistrate also rightly took into account the fact that the infringing period was brief and that with effect from 1 January 2002, Poh Kim Video could have legitimately imported the series from Hong Kong by parallel import.

22 In my view, the magistrate was correct in holding that the culpability of Poh Kim Video was lower than that of copyright pirates involved in syndicated operations. There was simply no basis on the present facts for holding that the size of Poh Kim Video's retail chain should be regarded as an aggravating factor and I declined to do so.

Whether the magistrate erred in regarding each box set as an 'article' for the purposes of sentencing under s 136(2) of the Copyright Act

23 The crux of TS Laser's appeal was that the magistrate had erred in regarding each box set as an 'article' for the purposes of sentencing under s 136(2) of the Copyright Act. TS Laser submitted that the magistrate was bound to regard each VCD in the box set as an 'article', since offenders have consistently been sentenced in relation to the number of infringing VCDs and not the number of box sets. TS Laser cited *Lim Tai Wah v Highway Video Pte Ltd*, MC, PSS 162/2001, an unreported decision dated 28 August 2001, to support this submission.

24 TS Laser further argued that, using this approach, the magistrate should have sentenced Poh Kim Video in respect of 18 articles for each of the five charges, which worked out to a total of 90 articles for the five charges. It was submitted that, on this basis, Poh Kim Video were only sentenced to a fine of approximately $111 per article which was manifestly inadequate in light of sentencing benchmarks which provide for a fine of between $400 and $600 per article.

25 As TS Laser's contentions centred on the magistrate's interpretation of s 136(2) of the Copyright Act, the relevant provision is set out below for convenient reference.

> Section 136(2) Copyright Act
>
> A person who at a time when copyright subsists in a work has in his possession or imports into Singapore any article which he knows, or ought reasonably to know, to be an infringing copy of the work for the purpose of —

(a) selling, letting for hire, or by way of trade offering or exposing for sale or hire, the article;

(b) distributing the article for the purpose of trade, or for any other purpose to an extent that will affect prejudicially the owner of the copyright in the work; or

(c) by way of trade exhibiting the article in public,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 for the article or for each article in respect of which the offence was committed or $100,000, whichever is the lower, or to imprisonment for a term not exceeding 5 years or to both.

26 While no definition of 'article' is provided in the Copyright Act, it was evident from a plain reading of s 136(2) that an 'article' is any 'infringing copy of the work'. Taking this into account, I was of the view that there is nothing in the Copyright Act that prevents the court from regarding a box set of a single drama series as an 'article' for the purposes of sentencing. I disagreed with TS Laser's contention that the court was bound to regard each VCD in the box set as an 'article'. In light of the legislature's decision not to provide a definition of 'article' in the Copyright Act, each case must be considered on its own facts. This is a sensible approach in light of present technology, and TS Laser's view that the court is obliged to regard each VCD as an 'article' in all cases was wholly untenable.

27 The fallacy of TS Laser's contention was evident when I considered that a single drama series could be released in different versions. One version of the drama series might consist of 18 VCDs while another version might split up the same drama series into only five VCDs. If each VCD were viewed as an 'article', then different fines would be imposed for the same offence of copyright infringement, depending wholly on the number of VCDs in the box set in question. For example, an offender would be sentenced in respect of 18 articles if the drama series happened to be split into 18 VCDs but only in respect of five articles if the drama series was reproduced on five VCDs. This has grave sentencing implications - if the drama series was reproduced on 18 VCDs, an offender would face a maximum fine of $100,000 pursuant to s 136(2), whereas the same drama series reproduced on five VCDs would only attract a maximum fine of $50,000. I was of the view that such a result would be incongruous and unsatisfactory.

28 Further, TS Laser's interpretation was problematic as it required the court to sentence offenders based on the number of infringing VCDs in all cases, regardless of the particular circumstances of each case. I was of the view that such an approach would be entirely inappropriate in copyright offences where two or more infringing works are captured on a single VCD. In such cases, the court would be bound to sentence the offender based on one article only and the maximum fine which could be imposed is $10,000. The court's hands should not be tied in such a manner, particularly since developments in digital technology have now made it possible for a single hard disk to contain hundreds of infringed works.

29 On the facts of the present appeal, I was of the view that the magistrate did not err in considering each box set as an 'article' when sentencing Poh Kim Video. The magistrate rightly took into account the fact that the drama series was sold as a box set at a fixed price of $39.90 per box set and that the individual VCDs were not sold separately. I rejected TS Laser's submission that 18 articles were set out in each of the five charges preferred against Poh Kim Video. I was of the view that there was nothing in the charges which would preclude the court from regarding each box set as an 'article' on the present facts.

Whether the sentence imposed was manifestly inadequate

30 Poh Kim Video were fined $2,000 per article. I noted that the courts have generally imposed sentences ranging from $400 to $600 per article in offences under s 136(2) of the Copyright Act: *Cherng Chiu Yung v Rahman bin Haji Omar*, MA16/97/01, an unreported judgment dated 25 February 1997, and *PP v Chew Alleng*, MA 248/1993/02, an unreported judgment dated 23 July 1997. In light of this, the fine imposed on Poh Kim Video could not be said to be manifestly inadequate.

31 I therefore dismissed the appeal and upheld the total fine of $10,000 imposed by the magistrate.

Appeal dismissed.