IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 225

Magistrate's Appeal No 9214 of 2016

Between

Heng Tze Yong

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] – [Sentencing] – [Appeals]

TABLE OF CONTENTS

Heng Tze Yong
v
Public Prosecutor

[2017] SGHC 225

High Court — Magistrate's Appeal No 9214 of 2016
Chao Hick Tin JA
8 March 2017

14 September 2017

Chao Hick Tin JA:

Introduction

1 The appellant, Heng Tze Yong ("the Appellant"), pleaded guilty before a district judge ("the DJ") to a single charge of corruptly giving gratification to agents contrary to section 6(*b*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the proceed charge"). He also consented to a similar charge being taken into consideration for the purposes of sentencing ("the TIC charge"). The Appellant was sentenced to five weeks' imprisonment by the DJ, whose grounds of decision can be found at *Public Prosecutor v Heng Tze Yong* [2016] SGDC 291 ("the GD"). The Appellant appealed against the DJ's decision, arguing that the sentence was manifestly excessive and that only a fine should have been imposed on him.

2 After hearing the parties, I allowed the Appellant's appeal. I set aside the term of imprisonment and substituted it with a fine of $35,000. I now give the grounds of my decision.

The facts

3 The Appellant was a director of ANM Services Pte Ltd ("ANM"), a company in the business of providing semiconductor engineering services. Such services included providing parts cleaning for the manufacture and repair of semiconductor assembly and testing equipment, and supplying High Efficiency Particle Arrester ("HEPA") filters.

4 The co-accused was one Ong Seng Wee ("Ben Ong"). Ben Ong was employed as a Facility Manager by Micron Semiconductor Asia Pte Ltd ("Micron"), a company in the business of producing semiconductors. Ben Ong's responsibilities with Micron included approving purchase orders for procurement of goods such as HEPA filters. He was not involved in Micron's parts cleaning contracts.

5 Sometime in 2012, the Appellant was introduced to Ben Ong, who was looking for suppliers to supply HEPA filters for Micron's clean rooms. In December 2012, through Ben Ong's influence, Micron awarded a contract for the supply of HEPA filters (worth S$7,920) to ANM. Subsequently, in March and April 2013, Micron awarded three contracts for parts cleaning services (worth a total of US$35,238) to ANM. Ben Ong was not involved in the award of these parts cleaning contracts.

6 Sometime in May 2013, Ben Ong requested a bribe of S$3,000 from the Appellant. In order not to sour the relationship with Ben Ong and to secure continued business from Micron with Ben Ong's assistance, the Appellant

complied with the request and made payment to Ben Ong about a week later. This bribe was the subject matter of the TIC charge.

7 In June 2013, through Ben Ong's influence, Micron awarded a contract for the supply of HEPA filters (worth S$28,380) to ANM. Separately, in July 2013, Micron awarded a contract for parts cleaning services (worth US$918) to ANM.

8 Sometime in August 2013, Ben Ong requested another bribe of S$7,000 from the Appellant in exchange for assisting ANM to secure business from Micron and as a reward for the contracts that had already been awarded for the supply of HEPA filters. Again, and for the same reasons, the Appellant complied with Ben Ong's request and made payment a week after Ben Ong's request. This second bribe was the subject matter of the proceeded charge.

9 Subsequently, in October and December 2013, through Ben Ong's influence, Micron awarded three contracts to ANM for the supply of HEPA filters (worth a total of S$67,980). Separately, on 11 September 2013, Micron also awarded to ANM a contract for parts cleaning services (worth US$1,530).

10 On 6 January 2015, Micron awarded another contract to ANM for the supply of HEPA filters (worth S$6,240). It was not clear from the Statement of Facts whether this contract was obtained though the influence of Ben Ong.[1] However, this last contract was cancelled by Micron when, on 9 January 2015, Micron's senior management learnt of the corrupt dealings between the Appellant and Ben Ong.

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[1] ROP at pp 9–10, para 11.

11 The criminal proceedings against Ben Ong were heard separately by another district judge. Ben Ong pleaded guilty to his corresponding charge in respect of the S$7,000 bribe that he received from the Appellant, and consented to having his corresponding charge in respect of the S$3,000 bribe taken into account for the purposes of sentencing. Ben Ong was sentenced to eight weeks' imprisonment for receiving the S$7,000 bribe. He also pleaded guilty to another charge of corruptly receiving S$10,000 as a gratification from another contractor, Thor Chi Tiong ("Thor"), for doing an act in relation to Micron's affairs, and was sentenced to ten weeks' imprisonment for that charge (see [13]–[16] below). The sentences were ordered to run concurrently, making a total of ten weeks' imprisonment.

The decision below

12 At the court below, the DJ sentenced the Appellant to five weeks' imprisonment. The DJ found that the custodial threshold was crossed for the following reasons:

(a) The Appellant was a senior manager in ANM (the GD at [16]–[19]);

(b) A fine would not deter people like the Appellant from committing the offence, given that the value of the contract greatly exceeded the bribe amount (the GD at [22]);

(c) There was a need to protect the semiconductor manufacturing industry (even though the DJ considered the custodial threshold to have been crossed regardless of this point) (the GD at [23]);

(d) The total bribe involved amounting to S$10,000 in this case was not an insignificant amount (the GD at [33]); and

(e) The Appellant committed the offence twice (the GD at [37]).

Arguments on appeal

The Appellant's arguments

13 On appeal, counsel for the Appellant, Mr Sant Singh SC ("Mr Singh"), argued that the sentence imposed by the DJ was manifestly excessive. In particular, Mr Singh drew my attention to the sentence received by Thor, whom, as mentioned above at [11], was another contractor who had given Ben Ong a bribe of S$10,000. I now digress to summarise the facts of Thor's case.

14 Thor was a financer of Infinity Power Engineering Pte Ltd ("Infinity"). Infinity was originally awarded a sub-contract worth S$90,000 from Micron for the provision of electrical works required to transfer production equipment from Israel to Singapore. Subsequently, another company, RYB Engineering Pte Ltd ("RYB"), submitted a more competitive quotation for the works, causing Micron to cancel its sub-contract with Infinity and award it to RYB. Thor, along with another director of Infinity, then approached Ben Ong and asked him to influence Micron and the managing director of RYB to share the sub-contract with Infinity. This request was made with the understanding that Thor would reward Ben Ong if he acted as requested. Ben Ong then persuaded RYB to sub-contract half of its works to Infinity. In return, Thor rewarded Ben Ong with S$10,000.

15 Thor pleaded guilty to a single charge of corruptly giving gratification to agents contrary to section 6(*b*) of the Prevention of Corruption Act. The district judge sentenced Thor to six weeks' imprisonment: see *Public Prosecutor v Thor Chi Tiong* [2016] SGDC 167 ("*Thor (DC)*"). Pertinently, at the hearing below on the present case, the Prosecution relied on *Thor (DC)* to

argue that for consistency in sentencing, the Appellant should also receive an imprisonment term in the region of five weeks as "the [Appellant's] culpability is similar to [Thor's]".[2] This submission was accepted by the DJ, who referred to *Thor (DC)* at some length in the GD (at [37]), and found that "[i]t would appear that the [Appellant's] culpability is similar to [Thor's]". Accordingly, the DJ proceeded to sentence the Appellant to five weeks' imprisonment — a shorter term of imprisonment than that imposed on Thor in *Thor (DC)*.

16 After the DJ's decision was handed down in the present case, the decision in *Thor (DC)* was subsequently reversed by the High Court on appeal in Magistrate's Appeal No 9123 of 2016 ("*Thor (HC)*"). In *Thor (HC)*, Sundaresh Menon CJ set aside Thor's term of imprisonment, and substituted it with a fine of S$35,000. Mr Singh submitted that likewise, the custodial threshold was not crossed in the present case. I will discuss some of the similarities and differences between Thor's case and the present case at [41]–[43] and [46]–[47] below.

The Prosecution's arguments

17 The Prosecution, on the other hand, submitted that the sentence imposed by the DJ was not manifestly excessive, even in the light of the decision in *Thor (HC)*. The Prosecution highlighted, in particular, that:

(a) the Appellant gave bribes twice over a period of three months, while Thor's offence was a one-off incident; and

(b) That the Appellant's offence had a more direct impact on the semiconductor manufacturing industry than Thor's offence, and the

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[2] ROP at p 102.

semiconductor manufacturing industry was an important industry in Singapore that required especial protection against corruption.

18 The Prosecution submitted that because of the combination of these two factors and the fact that the Appellant was a senior manager of his company, the Appellant's case had crossed the custodial threshold.

My decision

The amount of gratification and the lack of real loss to Micron

19 In *Public Prosecutor v Syed Mostofa Romel* [2015] 3 SLR 1166 ("*Mostofa Romel*") at [26], Menon CJ set out, for convenient analysis, three broad and non-exhaustive categories of ways in which private sector corruption can take place. Parties were in agreement that the present case fell within the first category, which was described in *Mostofa Romel* (at [26(a)]) as follows:

> First, where the receiving party is paid to confer on the paying party a benefit that is within the receiving party's power to confer, without regard to whether the paying party ought properly to have received that benefit. This is typically done at the payer's behest.

20 In relation to this category of offences, Menon CJ held (at [27]]) that "whether the custodial threshold is crossed will depend on the facts".

21 Earlier in the judgment, Menon CJ also provided the following guidance (at [20]):

> Where private sector agents are concerned, offences which register a lower level of culpability *can* be dealt with by the imposition of fines. Such cases are *generally* those ***where the amount of gratification is below $30,000 and where there is no real detriment to the interests of the principal*** … That, however, does not give rise to or support a presumption in favour of non-custodial sentences whenever private sector corruption is concerned. Indeed, it is critical in this context to

> be sensitive to the specific *nature* of corruption that one is concerned with.
>
> [emphasis added in bold italics]

22 It seemed to me that the foregoing passage from *Mostofa Romel* was applicably to the present case: The amount of gratification involved was substantially under S$30,000, and there was no real detriment to the interests of Micron.

23 The DJ had addressed the issue of the amount of gratification in the following manner. After quoting from the same passage from *Mostofa Romel* (as reproduced at [21] above), the DJ surmised that: "[t]he High Court did not hold that such cases that involve less than $30,000 *should* attract only a fine. All the circumstances must be considered, and the amount of the bribe is ***just one of the factors*** to consider" [emphasis added in bold italics] (the GD at [33]).

24 The DJ was right in observing that there was no rule that cases involving bribes less than S$30,000 should only attract a fine. However, I had some reservations about his statement that the amount of gratification was "*just* one of the factors" [emphasis added] to be considered. This statement suggested that the amount of gratification was a factor of ordinary weight, when it was in fact an important factor. As VK Rajah JA held in *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217 ("*Ang Seng Thor*") at [64]:

> The District Court in *Yeoh Hock Lam* attempted (at [24]) to suggest a specific amount of gratification (*viz*, $30,000) below which the custody threshold would generally not be breached. On my part, I do not think the factual complexities of the sentencing process permit such a precise figure to be provided. However, *I agree that the amount of gratification is an important factor in determining whether the sentence should be custodial or not* as it has a *correlation with the harm caused by an offence* (see [46] above) and the *potential need to deter the creation of a*

> *corrupt business culture at the highest levels of commerce* (see [42] above). [emphasis added]

25 The amount of gratification involved remains an important factor in determining the proper sentence for corruption offences. The reasons for regarding this factor as important, which are summarised in the passage above, remained relevant: the amount of gratification still correlates with the harm caused by the bribe and the need to deter the creation of a corrupt business culture at the highest level of commerce. Additionally, there is nothing in *Mostofa Romel* to suggest that the amount of gratification is no longer an important factor. In fact, this factor is expressly referred to in the judgment, including in the passage reproduced above at [21] above (see also *Mostofa Romel* at [23]). In my view, it is a matter of justice and common sense that the amount involved would be an important factor.

26 Accordingly, it appeared to me that the DJ had erred in placing insufficient weight on this important factor, which in the present case militated against an imprisonment term being imposed.

27 In respect of the detriment suffered by Micron, the Prosecution submitted that the corrupt transactions deprived Micron of the opportunity to consider quotations from ANM's competitors, and therefore the Appellant could not prove that ANM had provided the most competitively priced HEPA filters for Micron.[3]

28 In my view, however, this submission was not quite on point. The fact remained that there was no allegation of any real loss suffered by Micron. For example, there was no claims that the HEPA filters were over-priced or did not

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[3] Prosecution's submissions at paras 73–75.

work. Furthermore, there was a pre-existing business relationship between ANM and Micron that was independent of the corrupt transactions. ANM had been awarded a contract for the supply of HEPA filters even before the corrupt transactions took place, and ANM was awarded the contracts for providing parts cleaning services without Ben Ong's influence (see [4]–[9] above). These facts indicated that Micron was generally satisfied with the products and services provided by ANM, and did not suffer any real loss.

29 Therefore, the two factors highlighted by Menon CJ (see [21] above), *ie*, the amount of gratification and the presence of detriment to the principal, indicated that the present case had not crossed the custodial threshold. I turn now to consider the other factors in this case.

The Appellant did not initiate the bribes

30 The role played by an offender in a corrupt transaction is clearly a factor to be considered in determining an offender's culpability. This is also a factor that the DJ appeared to have given insufficient weight to when sentencing the Appellant.

31 The DJ rightly held that "a giver is not less culpable simply because he faced commercial pressure from the receiver to give bribes" (the GD at [29]). For this proposition, the DJ relied on the following passages from *Ang Seng Thor* (at [50]–[51]):

> 50 Having addressed the areas where the District Judge's sentencing approach were wrong in principle, I turned to his findings on the relevant facts. The first set of findings concerned Ang's level of culpability in the offences. The District Judge made two findings relevant to culpability. The first of these was that the particular roles played by Ang in the Seagate Charge and the Infineon Charge pointed to a low level of culpability (see [9] above).

> 51 I did not agree with this finding. With respect to the Seagate Charge, one ought to note that Ang was the only person from AEM involved in the decision to give the bribe. *He took the initiative to contact Ho to accede to the latter's request for kickbacks. While there may have been an element of commercial pressure involved … I did not think that this pressure was sufficient to substantially reduce Ang's culpability.* After all, it is part of the normal cut and thrust of business that clients or suppliers often threaten to take their business elsewhere in order to extract favourable concessions. The situation was not at all comparable with, for instance, that in *Zhao Zhipeng*. There, *mitigation was granted because the offending football player, a foreigner, was found to have accepted bribes under the "dominion" of his team manager, on whom he was largely or entirely dependent for his livelihood in Singapore, and in circumstances where the offender was far away from his support network of friends and family* (see *Zhao Zhipeng* at [38]–[39]).
>
> [emphasis added]

32 I agreed with the DJ's findings (the GD at [30]–[31]) that the commercial pressure exerted in the present case did not rise to the level where it could be considered to be a substantial mitigating factor. However, this did not mean that, in the absence of sufficient pressure, the fact that an offender did not initiate the bribe was to be ignored altogether in arriving at a sentencing decision. In this regard, the following pronouncement from Menon CJ in *Mostofa Romel* (at [31]) was instructive:

> I should stress that *these three categories are meant only as analytical tools* for the very many factual scenarios in which corruption may manifest itself. These categories are not watertight; they shade into one another. They are also not intended to be determinative of any case. Instead, they serve as a reminder that sentencing, especially in the context of corruption, is an intensely factual exercise. *The court must correctly locate the facts of the case, including the circumstances of the offender that is before it within the continuum of the facts in previously decided cases before coming to a conclusion as to the appropriate sentence.* [emphasis added]

33 In determining where within the *Mostofa Romel* framework the present case should be placed, it was germane to recall that with regard to the first

category of cases, Menon CJ had observed that the bribes were typically given "at the payer's behest" (see [19] above). This point was reiterated in *Thor (MA)* (in the minute sheet at p 6) as follows:

> It was common ground, and in fact the Judge himself said, that the present case falls within the first category. And *I pause to observe that a feature of the first category is that it is usually initiated by the payer. Despite this*, in *Mostofa Romel*, I had said that *there is no presumption that the custodial threshold would apply* - that must depend on the circumstances. [emphasis added]

34 Given that there was no presumption that a giver of bribe would necessarily cross the custodial threshold *despite* usually being the initiator of the bribe, it must follow that where a payer did not initiate the bribe, this fact would all the more suggest that a fine should suffice. As a matter of logic and good sense, there must be some difference in terms of culpability between a giver who initiated the corrupt transaction and a giver who merely succumbed to the solicitation and pressure of the recipient.

35 It was not disputed that the Appellant had not initiated the bribes. However, the Prosecution had urged me to place some significance on the fact that the Appellant had been advised by his friend (prior to the payment of the S$3,000 bribe) to report the matter to the relevant authorities and the Appellant did not take that advice.[4]

36 In my view, however, this was hardly an aggravating factor. This incident merely showed that the Appellant knew that it would be wrong of him to accede to the bribe request of Ben Ong. I strongly believed that the friend's advice only conveyed what the Appellant had already known: that corruption in Singapore is illegal and that if one received a request for bribes, one should

[4] ROP at pp 284–285.

report it to the relevant authorities. This was and is common knowledge in Singapore, where "our national character has come to be defined … by an utter intolerance for corruption" (*Mostofa Romel* at [13]). Almost all offenders in corruption cases would have known that they were breaking the law when they gave or received bribes. The fault with the Appellant was not being strong enough to resist the corrupt pressures exerted by Ben Ong.

37 Therefore, under the analytical framework set out in *Mostofa Romel*, the fact that the Appellant did not initiate the bribes was a factor that would lend support to the view that the custodial threshold had not been crossed.

The aggravating factors in the present case

38 I turn now to consider the aggravating factors in the present case that the Prosecution highlight (see [17]–[18] above), namely, that the offences took place in the context of an important industry, that the Appellant was a senior manager of his company and had committed two offences over a period of three months.

The purported need to protect the semiconductor industry

39 The law was clear that any corrupt act which would occasion a loss of confidence in a strategic industry was an aggravating factor that often, but not always, justifies a custodial sentence (*Ang Seng Thor* at [34]).

40 I accepted that the semiconductor industry was indeed a strategic industry. In parliamentary debates last year, Mr S Iswaran (Ministry for Trade and Industry) recognised the importance of the semiconductor industry in Singapore when he said the following (see *Singapore Parliamentary Debates, Official Report* (10 October 2016) vol 94 at page 30):

> In recent times, Members would have read about the commitment by Micron, which has a substantial investment in *semi-conductor manufacturing in the wafer fabrication sector, which is an important part of our electronics cluster in Singapore*. [emphasis added]

41 However, I was not persuaded that the transactions in this case had sufficient nexus with the semiconductor industry, such that a stiffer sentence was required to prevent a loss of confidence in the industry. This aggravating factor would not be triggered simply because a transaction was somewhat related to the semiconductor industry. Thor's case also involved a sub-contract that originated from Micron, and involved works necessary for the transfer of production equipment for the semiconductor industry (see [14] above). Despite these facts, Menon CJ held in *Thor (MA)* (in the minute sheet at p 6) that the case did not involve any strategic setting or undertaking or enterprise.

42 The Prosecution submitted that the Appellant's offences had a more direct impact on the semiconductor industry than Thor's case because that case related only to works necessary for the *transfer* of production equipment,[5] whereas in the present case, the HEPA filters were themselves necessary for the production of semiconductors. As stated in the Statement of Facts, HEPA filters "were required to filter the air for [Micron's] clean rooms which were used to manufacture semiconductors".[6]

43 I considered the Appellant's offences to have limited nexus to the semiconductor industry. It seemed to me that both the HEPA filters and the parts cleaning services provided by ANM were at least one step removed from the production of semiconductors itself. No doubt these goods and services were

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5 Prosecution's submissions at para 93.

6 ROP at p 7.

necessary for Micron to produce semiconductors, but the same could be said for the electrical works provided in Thor's case. In addition, no evidence was adduced to shed light on the relative importance of HEPA filters and parts cleaning services to the semiconductor industry. For example, there was no evidence as to whether these goods and services constituted a significant part of the costs of producing semiconductors. Therefore, in the circumstances, I was unable to accord this purported aggravating factor any significant weight.

The Appellant's two offences and his senior position in ANM

44 With regards to the remaining two aggravating factors, *ie*, that the Appellant had committed two offences over a period of three months and had held a senior position in ANM, I accepted that these factors were present and should be given due weight.

45 Nevertheless, taking a holistic assessment of the Appellant's case, and keeping in mind the amount of gratification, the absence of real loss to Micron and the fact that the Appellant had not initiated the bribes (as discussed at [8]–[37] above), I was of the view that the culpability of the Appellant was not so high as to have crossed the custodial threshold.

The appropriate quantum of the fine

46 As I viewed it, the Appellant's culpability was broadly similar to that of Thor, bearing in mind the following similarities:

(a) The total amount of gratification was S$10,000 (though it should be noted that the amount involved in the proceeded charge was only S$7,000); and

(b) The bribes were paid to the same recipient, *ie*, Ben Ong; and

(c) No detriment was suffered by the principal, *ie*, Micron was the principal in both cases; and

(d) The offenders in both cases held senior positions in their respective companies, *ie*, ANM and Infinity.

47 There were some differences between the two cases. For example, the Appellant had committed two offences (compared to Thor's single offence), while Thor had initiated his offence while the Appellant had not. On the whole, in my judgment, both the Appellant and Thor were of similar culpability. Accordingly, it was appropriate to impose on the Appellant the same fine of S$35,000 that was imposed on Thor.

Conclusion

48 For the reasons above, I found the sentence of five weeks' imprisonment imposed by the DJ to be manifestly excessive. I therefore ordered the imprisonment term be set aside, and substituted it with a fine of S$35,000.

Chao Hick Tin
Judge of Appeal

Sant Singh *SC*, Teo Jun Wei Andre and Yap En Li (Tan Rajah & Cheah) – instructed by Tan Hee Jeok (Tan See Swan & Co) for the appellant;
Norman Yew and Tan Khiat Peng (Attorney-General's Chambers) for the respondent.