Public Prosecutor *v* Project Lifestyle Pte Ltd
[2015] SGHC 251

Case Number : Magistrate's Appeal No 83 of 2015

Decision Date : 25 September 2015

Tribunal/Court : High Court

Coram : See Kee Oon JC

Counsel Name(s) : Agnes Chan and Parvathi Menon (Attorney-General's Chambers) for the appellant; Irving Choh and Melissa Kor (Optimus Chambers LLC) for the respondent.

Parties : Public Prosecutor — Project Lifestyle Pte Ltd

Criminal Procedure and Sentencing – Sentencing – Statutory offences – Planning Act

25 September 2015 Judgment reserved.

See Kee Oon JC [delivering the oral judgment]:

1 The Respondent operates at 32 Kandahar Street under the business name of Witbier Café. The café is located within the Kampong Glam conservation area. The Respondent was charged with an offence under s 12(2) punishable under s 12(4) of the Planning Act (Cap 232, 1998 Rev Ed) ("the Act"). On pleading guilty to the offence, the Respondent was fined $20,000. The offence involved a material change of use of the premises from a restaurant to a bar (which also served food) without conservation permission, amounting to a 'development' within the meaning of s 3(1) of the Act. The prosecution has appealed against the sentence.

2 The DPP's submissions at first instance seeking a fine of $50,000 were broadly as follows:

(a) The need to deter unauthorised works in Singapore's conservation areas;

(b) The specific need to protect the Kampong Glam conservation area;

(c) The potential impact of the Respondent's unapproved use on cultural sensitivities;

(d) The Respondent's persistent offending and lack of remorse;

(e) The disgorgement of the Respondent's wrongful profits; and

(f) The need to consider the full spectrum of punishments enacted by Parliament.

3 On appeal, largely similar points were canvassed. I agree with the District Judge's reasoning at [28] of his Grounds of Decision ("GD"), reported as *Public Prosecutor v Project Lifestyle Pte Ltd* [2015] SGMC 15, *viz*, that unauthorised development of land by way of building works ought to be punished more severely than unauthorised development of land by way of change of use. In his words, "[t]his is simply because the first type of development of land usually results in permanent structural changes to the property that are not easily reversible."

4 I would also endorse [29] and [70] of the GD wherein the District Judge had set out the

starting range of punishments for "typical" or non-aggravated change of use, a fine of between $5,000 to $10,000 may be appropriate depending on the facts. Higher punishments may well be warranted depending on the extensiveness of the scope of works. The District Judge adopted this approach while observing at [28] and [40] that an offence within a conservation area *per se* should not be regarded as more serious than one not involving a conservation area. I do not differ from the District Judge's views on this in principle. The prosecution apparently took his observations to mean that he had adopted a "single sentencing framework that applies across the board" for all s 12 offences when this was clearly not so. Much would of course depend on the impact of the works on the character and appearance of the conservation area. In some instances, there may (or may not) also be considerable impact in a more subtle and perhaps less tangible form, materially affecting the character and ambience or overall "look and feel" of the area.

5 I turn next to outline some observations in relation to the prosecution's submissions below and on appeal seeking a fine of $50,000. This is equivalent to the fine imposed in *Public Prosecutor v CGH Development Pte Ltd* (UDC 01/2008, unreported) where substantial structural changes were made to a building located outside a conservation area. Various submissions were raised pertaining to the aggravating features to support a higher fine in the present case. But there are no relevant sentencing precedents involving similar factual scenarios to guide the court, and no systematic or objective method of computation that would lead one to arrive at the figure of $50,000.

6 I begin with the premise that a $20,000 fine is hardly trifling. On appeal, it must be shown that this was a manifestly inadequate sentence and that the District Judge was plainly wrong or had acted on the wrong principles. It is not sufficient of course to merely point to the fact that a $20,000 fine amounts to one-tenth of the maximum permissible fine of $200,000. By analogy, if a jail term of 2 years is imposed for an offence of criminal breach of trust by public servant or banker which can attract life imprisonment, it does not ineluctably mean that the 2-year sentence is manifestly inadequate.

7 Reference was made to *Public Prosecutor v Development 26 Pte Ltd* [2015] 1 SLR 309 ("*Development 26*"), a recent prosecution involving the wholesale demolition of a conserved building in Geylang Lorong 26. Various observations I made in that judgment are of general application and the District Judge rightly noted this at [32]–[35] of his GD. Insofar as his comments at [33] might possibly be taken to suggest that even a wholesale demolition of a conserved building would not ordinarily attract a fine of more than $6,000, it should be clear that that was not the *ratio decidendi*. I had emphasised in my judgment that the decision is not meant to set a benchmark for future application.

8 It bears repeating that my decision in *Development 26* turned heavily on the prosecution's conduct of the proceedings before the lower court as summarised at [40] of the judgment, *viz*, the skeletal (or non-existent) Statement of Facts "as per the charges"; lack of sentence submission or additional information; the decision to leave sentence to the court with only an indication of the 'usual sentence range' for such offences; and the failure to inform the court that the prosecution was the first of its kind. The upshot of *Development 26* is that higher penalties may be sought and justified for future prosecutions involving egregious breaches, where appropriate.

9 It is important to bear in mind that conservation is not merely aimed at preserving our historical and cultural heritage in the form of bricks and mortar. The focus has to be about "preserving certain characteristics and appearance of conservation areas" (see *Singapore Parliamentary Debates, Official Report* (17 February 1989) vol 52 at col 787 (Mr Peh Chin Hua, Member of Parliament for Jalan Besar))). In the present case, this would appear to be the first prosecution involving an unauthorised material change of use in the Kampong Glam conservation area. The nature of the change had clearly impacted the heritage character of the area, which is recognised for its rich historical and cultural

significance. There would also plausibly have been some disquiet given the close proximity to Malay-Muslim landmarks in the immediate vicinity. I accept that these are considerations for which there was ample justification to impose a sentence exceeding the "starting point" of $5,000 to $10,000 for "typical" or "non-aggravated" change of use cases.

10 The District Judge had noted the need for adequate deterrence of unauthorised works in conservation areas. He was conscious of various potential aggravating features. Among these was that cultural and religious sensitivities might be offended although there was no evidence tendered of actual impact on such sensitivities. He also recognised there was protraction of the offence. It would appear to me however that the District Judge ought to have placed considerably more emphasis on this latter consideration, being evidence of lack of remorse and a persistent (and continuing) breach. However the District Judge opined that he could not conclude beyond reasonable doubt that the Respondent was unremorseful. I would respectfully differ. In my view, there was cogent evidence to support the contention that the Respondent was hardly remorseful as the breach had in fact continued unabated for a substantial period. The Respondent did not face a separate charge of committing a continuing offence but given the facts before the court, there was evidence of such conduct and this ought to have been taken into account. Having said that, once this is weighed among the aggravating factors in respect of the present charge, it would stand to reason that it would not be correct to tender any further charge involving a continuing offence against the Respondent.

11 Central to the enquiry on appeal would be whether the District Judge had erred in his assessment of the impact of the change of use – did it materially affect the "characteristics or appearance" of the location? In this regard his reasoning at [48]–[50] of the GD requires closer scrutiny. He correctly noted that the sale of alcohol *per se* is not prohibited in the Kampong Glam conservation area; but it was self-evident that running the restaurant quite openly as a bar would at least have contributed to a material change in the "look and feel" of the area. It was not clear from the exhibits tendered by the defence that other establishments were apparently doing precisely the same thing along Kandahar Street. In any event, even if they were, this does not excuse the Respondent's breach or afford mitigation.

12 The District Judge also took the view that there was no evidence of any profits that needed to be disgorged and thus did not factor this aspect into consideration. It is true that no evidence was adduced in support of the prosecution's argument to disgorge profits. It would be necessary in my view to consider the strong likelihood that profits must have been obtained as a result of the Respondent's breach, by changing the business model to a bar and focusing on the sale of alcoholic drinks rather than food. But for the lure of prospective (and in all likelihood, actual) profits, it would be hard to see why the Respondent would have chosen to continue acting in breach and lapsing quickly into breach despite assurances to the URA of having taken steps to rectify its earlier violation in 2012. The background facts strongly suggest a calculated or cynical breach, possibly motivated by the hope that enforcement might not ensue or that any consequent sanctions might be worth their while. With the Respondent's conviction and sentence, a clear message would have been sent that such practices will not be tolerated and enforcement action will be taken to deal with similar breaches.

13 Ultimately the pivotal issue is whether the fine of $20,000 could be said to be manifestly inadequate or disproportionate to the Respondent's culpability in the round. I agree with the prosecution that a substantially higher fine is plainly warranted on the facts of the present case. I do not agree however that the District Judge had erred in each and every respect enumerated by the prosecution. In my assessment, the District Judge had given due regard to points (a) to (c) in the prosecution's list of sentencing factors as outlined above at [2], but ought to have accorded more

weight to points (d) and (e). In view of the seriousness of the Respondent's breach, the fine of $20,000 was manifestly inadequate.

14 I should make it clear that I am not inclined to peg the fine at $50,000 as suggested, given that there were neither structural or physical alterations or damage, nor any change in appearance to the conserved building itself. In such instances, a fine of $50,000 might well be an appropriate starting point for consideration, and may require upward adjustment taking into account other relevant considerations such as evidence of unlawful activities (such as gaming, vice or drug-related activities) taking place on the premises. In the present case, no evidence was put forth of any such activities, let alone any complaints of noise pollution or of drunken, disorderly or unruly behaviour.

15 As explained above, I take the view that the District Judge had not plainly erred in his consideration of all the enumerated sentencing factors. However I am persuaded that there are good grounds to calibrate the fine upwards having regard to the appropriate assessment and weight to be attached to the totality of the aggravating factors reflecting the Respondent's culpability. In particular, the Respondent's persistent and continued offending, lack of remorse and the need to disgorge profits should have been adequately assessed. The appeal is allowed and the Respondent is sentenced to a fine of $35,000.

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