Public Prosecutor *v* Fricker Oliver
[2010] SGDC 289

Case Number : District Arrest Case 24677 of 2010 & ors, Magistrate's Appeal 232 of 2010

Decision Date : 09 July 2010

Tribunal/Court : District Court

Coram : See Kee Oon

Counsel Name(s) : Sharon Lim, Ms Lee Lit Cheng and Mr Kevin Yong (DPPs) for the prosecution; Derek Kang (Rodyk & Davidson LLP) for the accused.

Parties : Public Prosecutor — Fricker Oliver

9 July 2010

Senior District Judge See Kee Oon:

The charges

1 The accused pleaded guilty to the following two charges:

(a) **DAC 24677/2010** – one count of vandalism (s 3 Vandalism Act (Cap 341)) by spraying paint on two Mass Rapid Transit ('MRT') train carriages. This is an offence punishable with a fine of up to $2,000 and/or imprisonment of up to 3 years. As paint was used, s 3 prescribes mandatory caning of a minimum of 3 strokes, up to a maximum of 8 strokes.

(b) **MAC 2548/2010** – one count of entering a protected place (s 5(1) r/w s 7 Protected Areas and Protected Places Act (Cap 256) involving entering the MRT Changi Depot located at 105 Changi Road. This is an offence punishable with a fine of up to $1,000 and/or imprisonment of up to 2 years.

2 The accused admitted a third charge in **DAC 24676/2010** under s 3 of the Vandalism Act involving cutting the fence of the MRT Changi Depot within which the vandalised trains were located. He consented to have this charge taken into consideration for the purpose of sentencing. All 3 charges were committed with an accomplice, one Lloyd Dane Alexander ('the accomplice'), in furtherance of their common intention.

3 Upon convicting the accused on his plea of guilt and before passing sentence, I had set out the main grounds for my decision orally. Several of the more pertinent issues were thus addressed in open court. The accused filed an appeal against the sentence on 2 July 2010, and the prosecution in turn filed an appeal against sentence on 5 July 2010. I now set out the full grounds of my decision. These grounds do not detract or depart from my oral grounds but serve to elaborate on the observations I had previously made.

Key facts

4 The facts in support of the charges are set out in the Statement of Facts ('SOF') which were admitted without qualification by the accused. I propose to only highlight a few salient facts. Together with the accomplice, he had cut the perimeter fence surrounding SMRT Ltd's ('SMRT') Changi Depot at around midnight on 17 May 2010. They then proceeded to vandalise two MRT train carriages with spray paint on both sides bearing the words 'McKoy Banos'.

5 The accused was working in Singapore from October 2008 to the time of the offences as an IT consultant. He became friends with the accomplice when they met in Australia in 1997. The accomplice was planning to travel to Singapore for 3 days from 15 May 2010 and had arranged to stay with the accused at his apartment at The Sail, located within the Central Business District. Prior to the commission of the offences, the accused and the accomplice had been in contact. The accomplice had made arrangements to purchase 'Ironlak' spray paint cans from a paint supplier in Singapore, whom he had contacted by email on 30 March 2010. On placing his order for the spray paint, the accomplice had also sent mentioned in his 13 May 2010 email to the paint supplier that he and the accused were planning to do some 'non-legal' things.

6 Just before collecting their spray paint cans in the afternoon of 16 May 2010, the accused was asked by the accomplice if spraying graffiti on trains was legal in Singapore. The accused replied that it was not. They then proceeded to take the MRT to survey the SMRT Changi Depot at about 5 pm. As it began to rain, they left for dinner at Lau Pa Sat in the Central Business District where they had some alcoholic drinks. They then returned to the accused's apartment nearby at The Sail to pick up a wire-cutter before proceeding to the SMRT Changi Depot to carry out their plan.

7 Upon their arrival at the SMRT Changi Depot perimeter, they passed by the crash gate which carried a large red sign clearly indicating that they were at a protected place and unauthorised entry was prohibited. They kept observation and then picked a suitable location to cut a 1 m by 0.5 m hole in the fence using the wire- cutter that the accused had brought along.

8 After the accused and his accomplice entered the SMRT premises through the hole in the fence, they moved to the 2 nearest train carriages and began spraying graffiti on either side of these carriages. The accused worked on one side while the accomplice worked on the other. The accomplices took some photographs of the spray-painted train carriages and they then managed to leave the premises undetected through the gap in the fence. The accused discarded the wire cutter in a drain along the way after leaving the scene.

9 Upon returning to the accused's apartment, the accomplice showed the accused the photographs he had taken of the spray-painted carriages. The accused went to work in the morning of 17 May 2010. The next day, the duo left for a pre-arranged holiday in Hong Kong.

Aggravating Factors

10 The accused claimed to have been 'extremely nervous' (ref. para 18 of the written mitigation) as they set out to commit the offences, but in all likelihood this was because he knew that he would be breaking the law. It is clear that he and his accomplice knew precisely what they wanted to do and had acted methodically under cover of darkness to achieve their objective.

11 The offences were planned and carefully executed. These were not impulsive displays of youthful bravado. They were committed by a 32 year-old software consultant who was in Singapore ostensibly for employment purposes, with full consciousness that what he was doing was illegal. He had spent a significant enough time of 17 months working here. In the words of the DPP, was not an 'impressionable and rash young person who is unaware of Singapore's strict stance against vandalism'.

12 The perimeter fence surrounding the premises proved to be no deterrent for the accused and his accomplice. They were clearly intent on committing the offence even if it meant having to cut the fence in order to gain entry into protected premises. This was an obvious aggravating factor. It further demonstrated the detailed planning that was involved. It is not open to the accused to suggest that the trespass was minimal and 'merely a means to an end' when the end itself was an illegal one. It could also not be said that there was no ill intention or malice involved when the accused's sole object of trespassing into a protected place was to commit another criminal offence.

13 I accepted the prosecution's submission that a deterrent sentence was called for, not merely because graffiti is considered a serious offence under our laws. The accused brazenly and deliberately chose to break the law and to break into a protected place in order to do so. There was an obvious and serious security breach with a man-sized hole in the perimeter fence posing a clear security risk. A firm stand was thus warranted.

14 The chief aggravating factors I took into account were as outlined above. I will elaborate below on various related aspects having regard to the defence submissions.

Non-mitigating factors

15 Counsel had submitted at the outset that graffiti in Singapore is not illegal per se. This statement is only partially accurate; it conveniently glosses over the fact that graffiti remains illegal under the Vandalism Act, whether it is on public or private property. It is only lawful under limited circumstances eg. where it is done in designated areas such as the Youth Park or in the rather more unlikely scenario where property owners consent to have graffiti painted on their premises. Otherwise it is an uninvited and unmitigated nuisance and a highly anti-social act which the law does not condone.

16 The fact that there are lawful outlets for graffiti artists does not make the offence committed by the accused (with full knowledge of its illegal nature) any less blameworthy or entitle him to a lighter sentence. As far as unlawful graffiti is concerned, the relatively low incidence of such graffiti in Singapore attests to the effectiveness of a 'zero-tolerance' approach.

17 The incident has reinforced the need for vigilance and adequate security measures to be in place, particularly in locations which are declared to be protected areas and places. Nevertheless it cannot be suggested that the accused went about his activities with any noble aims to highlight SMRT's potential security lapses. As this was raised by counsel as a relevant factor in sentencing, I must emphasise in particular that the 'positives' that counsel alluded to in para 59 of the written mitigation plea were not intended by the accused.

18 With respect, it would be wholly inappropriate to accord any mitigating value to his having allegedly 'exposed' the vulnerabilities in SMRT's security arrangements. If this were to be accepted, taking this argument to its logical conclusion, it would mean that persons found guilty of committing housebreaking and theft should be given credit in the form of a sentencing 'discount', on account of their victims' home security lapses having been exploited and of these victims thus being compelled to take steps to remedy these lapses. In my view, this cannot be so. These were unintended consequences for which no credit in sentencing ought to be given.

19 The accused would also not deserve any credit for his audacity or opportunism, even if he had seen that SMRT's security measures were lax and could be breached. He may well have believed that they were committing the offences 'for fun' but I would reiterate that this was calculated criminal conduct, not a mere schoolboy's prank. The offences were not trifling. In any case, the accused was not a juvenile. He was fully conscious of the illegal nature of the acts and he must be prepared for the consequences that follow.

20 It was also no excuse for him to claim that his 'slightly inebriated' state had emboldened him to do what he might not ordinarily have done. Intoxication is neither a general defence nor a general mitigating factor. Indeed, as noted by V K Rajah JA in *Wong Hoi Len v PP* [2009] 1 SLR(R) 115 (at para 26):

> The fact that the appellant was somewhat inebriated during the incident does not, from any objective point of view, diminish his culpability for the incident. Those who drink, unless they can invoke the defence of intoxication as narrowly defined in the Penal Code, must assume the full consequences of any legal transgressions.

21 Rajah JA further opined that 'a sentencing judge should *ordinarily* take into account an offender's intoxication as an aggravating consideration', and the offender should take full responsibility for his subsequent offending.

22 The accused may have committed a one-off offence in Singapore but it was clear that he was no amateur. He evidently took pride in his endeavours. From the photographs exhibited in court, the graffiti was fairly elaborate and apparently well-executed enough to appear to some observers, including SMRT staff, to have been part of an advertising campaign. These were

hardly haphazard or slapdash efforts.

23 I make no comment on the artistic merit or quality of his handiwork. I would only say that it was inconceivable that the end result was incidental. This could not have been the unsophisticated work of two drunk men acting out of character. Had the graffiti been offensive, obscene or inflammatory in nature, then this would have been an aggravating factor instead. On the facts, the artistic merit (or lack of it) and the nature of the graffiti was not relevant for sentencing purposes. It carried no weight in mitigation.

24 I should also emphasise that I did not accept counsel's submission that there was no detailed planning involved. Counsel had suggested that the accused had only agreed at a late juncture to carry out the plan on the accomplice's instigation, possibly only after imbibing a few drinks on the night of 16 May 2010 and while not thinking rationally. This could not have been the case.

25 The uncontroverted facts spoke for themselves. All the indications pointed to the existence of an agreed plan to commit the offences. Even accepting the defence submission that the accused did not know of the accomplice's prior email communication with the paint supplier, the plan must have crystallised at the latest when they went together to collect the 'Ironlak' spray paint. They then proceeded with their pre-dusk survey at the site, and subsequently went ahead to commit the offences. There may have been some cajoling on the part of the accomplice at some point, but the accused had gamely gone along with the plan.

26 In my view, there was nothing spontaneous in the chain of events and their conduct as revealed in the SOF. Somewhere along the way, the plan also involved the procurement of a wire-cutter, presumably by the accused. Other than there being a prearranged plan, there could be no other reasonable explanation why an IT consultant holding a respectable day job at a software company would conveniently possess (let alone need) a wire-cutter in his downtown apartment.

27 In any event, the accused did not proffer any explanation for possessing a wire-cutter which was resilient enough to enable them to cut through a fence. He clearly had nothing exculpatory to say in this regard. He had no further use for the wire-cutter in any event. He discarded it in a drain after committing the offences. The empty spray paint cans were also disposed of as they had already served their purpose.

28 If this had simply been an impromptu indulgence in a mindless graffiti spree, there would have been no need for a careful survey of the SMRT Changi depot beforehand. More importantly, both the accused and his accomplice appeared to know precisely what they had to do and how to do it. They had equipped themselves appropriately and coordinated their actions coolly and efficiently to effect their unlawful entry and carry out their handiwork. They did not need to linger – according to counsel, the offences were committed within 15 minutes (see para 58 of the written mitigation).

29 The plain facts bore stark testimony to the existence of a prearranged plan. A fence was cut to allow two men to gain unauthorised entry into a protected place. Two train carriages were vandalised with colourful paintwork. All this in a matter of 15 minutes. They took photographs of their handiwork and then left Singapore for Hong Kong on 18 May 2010 for a planned holiday together.

Mitigating factors

30 The accused had chosen to plead guilty early and accept full responsibility for his actions. It was a one-off offence and he is probably unlikely to reoffend if he should return to Singapore in future. Moreover it was evident that he had been fully cooperative in the investigations. As counsel rightly noted, without his assistance, it would probably not have been possible to piece together much of the SOF, in particular the detailed narrative of what transpired on 16 to 17 May 2010.

31 It was nevertheless not specified whether the accused had voluntarily surrendered to the authorities and confessed his role in the offences. As neither the prosecution nor the defence had made any mention of this, I was left to infer that he had most probably not voluntarily surrendered. This would otherwise have been a compelling point in mitigation.

32 Whatever his real motivations, it was also clear that there was no evidence of any other sinister agenda. The actual damage itself to the property was not irreparable but the not insubstantial cost of rectifying the cut fence and removal of the paint must be considered as well. To his credit, he had indicated that he was prepared to make full reparation. This may have been at least partially motivated by the hope of obtaining a lighter sentence but I would not dismiss its mitigating value outright.

33 The points outlined at paragraphs 30 to 32 above were all valid points in mitigation which I had taken into account. There was at the least a show of basic remorse in his cooperation with the investigations and his eventual decision to plead guilty and make restitution. I therefore respectfully disagreed with the prosecution's assertion that there was a *complete* lack of any significant mitigating factors.

Whether the 'one transaction' rule applied

34 Contrary to the defence submission, I did not see why this would be an appropriate case for the application of the 'one transaction' rule and for the sentences to run concurrently. In ordering consecutive imprisonment terms, I had not explained my basis for rejecting this submission. This issue warrants a full explanation of my reasons.

35 Counsel had strenuously argued that the Court of Appeal decision in *V Murugesan v PP* [2006] 1 SLR(R) 388 had defined the 'one transaction' rule as being one of broad and liberal application, extending to a scenario where separate and distinct offences of abduction and rape were deemed to be within the rule for sentencing purposes. With respect, I did not agree that the rule had been redefined to such an extent. The established principles laid down by the Court of Appeal in *Kanagasuntharam v PP* [1991] 2 SLR(R) 874 (at para 5) continue to apply:

> Where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive. The difficulty, of course, is with the question of what constitutes one transaction and this question is necessarily one of fact depending on all the circumstances of the case.

36 The Court of Appeal had further emphasised in *PP v Fernandez Joseph Ferdinent* [2007] 4 SLR(R) 1 that the 'one transaction' rule, tempered by s 18 of the Criminal Procedure Code (Cap 68), does not apply where the offences committed are distinct. In any event, in *V Murugesan*, the Court of Appeal had recognised that there was justification for the sentences to run concurrently. This turned on the Court's view that the totality principle had not been adequately considered by the trial judge, whose aggregate sentence resulted in a term of 21 years' imprisonment when the maximum sentence for rape would have been 20 years' imprisonment.

37 Further, the facts in *V Murugesan* merit careful consideration. The abduction occurred when the victim, who had just alighted from a taxi in a tipsy state, was dragged by the accused and his accomplice from the void deck of Block 715 Woodlands Drive 70 into a refuse room at the same block. The accused then raped her. Although there were two distinct offences, the Court of Appeal opined that these were clearly connected and were one transaction. The abduction was for the purpose of raping the victim and was thus 'part and parcel of the rape' (at para 35).

38 What was also clear was that the abduction need not have been a necessary precursor to the rape. Put another way, the accused could have committed the rape without first abducting the victim. To avoid being in full public view, the victim was forcibly dragged into the refuse room from the void deck. Hence it was all 'part and parcel of the rape'.

39 In the present case, the offences the accused had pleaded guilty to were clearly distinct. The first offence (unlawful entry into the SMRT Changi Depot) which he had pleaded guilty to was a necessary precursor of the second (ie. vandalism). It would have been physically impossible for the accused to commit the second offence had he not committed the first. Although broadly speaking it could be said that the first offence was part and parcel of the second, this went further than merely facilitating the commission of the second offence. It was a *planned* break-in, without which the second offence would have been impossible.

40 In precedents where the 'one transaction' rule has been held to apply, the offences in question were almost invariably committed spontaneously, without formal planning or premeditation. Thus they were appropriately characterised as having 'flowed' in the course of a single transaction. In *V Murugesan's* case, the Court of Appeal had also acknowledged (at para 35)

that 'the "one transaction rule" is not a rigid rule and should be applied sensibly'. It is essentially a restatement of the totality principle, to ensure appropriate aggregate custodial sentences are passed. The court retains the overall discretion to determine whether the various sentences passed ought to be consecutive or concurrent.

41 These views were amplified by the Honourable the Chief Justice Chan Sek Keong recently in *PP v Firdaus bin Abdullah* [2010] SGHC 86. Reiterating his observations in *PP v Lee Cheow Loong Charles* [2008] 4 SLR(R) 961, Chan CJ noted in *Firdaus bin Abdullah* thus (at para 24):

> [E]ach of those groups of offences were distinct and separate, both factually and conceptually, from the other groups of offences, because each group was in itself serious, and more importantly did not necessarily or inevitably flow from the other groups of offences. There was present an element of control with respect to some of the offences which were committed serially and were committed separately from the others. Thus, there was no basis for the application of the 'one transaction' rule in such a situation.

42 The above observations were apposite. The accused in the present case had been convicted in respect of two distinct offences under separate pieces of legislation, each serving different objectives. Each of the offences was serious in itself. Critically, the second offence did not 'necessarily or inevitably flow' from the first; if it could be said to 'flow' at all, it was only because it was consciously intended to be so. There was a conscious plan, or 'element of control', in that the initial offence(s) would have to be committed in order that the second could come to pass. The second offence would have been a physical impossibility unless the initial two offences, including the unlawful entry offence, had been committed first as a *sine qua non*.

43 Adopting the Honourable the Chief Justice's reasoning in *Firdaus bin Abdullah* (at para 36), the accused need not have committed the second offence if he did not want to commit it. The pivotal point was that the offences were *planned* to take place sequentially. Hence there was every justification for me to exercise my discretion to order the sentences to run consecutively, bearing in mind that the aggregate sentence should not be crushing or disproportionate to the gravity of the offences.

Conclusion

44 Although sentencing precedents were placed before me for consideration, it bears repeating that each case turns on its particular facts. The precedents cited, including *Fay Michael Peter v PP* [1994] 1 SLR(R) 1063 which involved a string of graffiti and mischief offences, were of limited help.

45 The present case was probably *sui generis*. As far as I was aware, this was the first known conviction of an accused who had deliberately set out to cut a fence surrounding a protected place in order to vandalise property. Having regard also to the serious breach of security and the accompanying risks occasioned, a firm and unequivocal approach was necessary to deal with such offences.

46 I agreed with the prosecution's submission that general deterrence should be considered in sentencing. The offences committed by the accused were plain and blatant acts of vandalism in wilful defiance of the law. They had created palpable tension and unease in the community over the adequacy of security at other protected places as well as key installations. Our laws apply with equal force to all and the courts' sentencing policies reflect this consistent approach. The accused was therefore sentenced as follows:

(a) DAC 24677/2010 – 3 months' imprisonment and 3 strokes of the cane (being the mandatory minimum caning prescribed);

(b) MAC 2548/2010 – 2 months' imprisonment.

47 Bearing in mind the aggravating factors, and to ensure the sentence was a sufficient deterrent, I ordered the imprisonment terms to run consecutively. The total sentence was 5 months' imprisonment and 3 strokes of the cane. I understand that the accused has declined to ask for bail pending appeal and is presently serving sentence.

48 The mandatory sentence of caning would act as a strong deterrent in itself. This was recognized in *Fay Michael Peter's* case, where the aggregate sentence was 4 months' imprisonment and 6 strokes of the cane (subsequently reduced to 4 strokes), in spite of the comparatively large number of offences involved and the pattern of offending behaviour.

49 The prosecution had subsequently also filed an appeal against sentence. The aggregate sentence would suffice in my view to serve the needs of deterrence, while giving due weight to the mitigating factors. But for the accused's early plea of guilt, his cooperation and readiness to make reparations, I would have considered an aggregate sentence in the range of 6 to 7 months' imprisonment.

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