

Public Prosecutor v An Wei
[2014] SGDC 182

Case Number : NSS 384/2013

Decision Date : 22 May 2014

Tribunal/Court : District Court

Coram : Lim Tse Haw

Counsel Name(s) : DPP Asoka Markandu for the Prosecution; Mr Derek Kang for the Surety

Parties : Public Prosecutor — An Wei

22 May 2014

District Judge Lim Tse Haw:

On 19 Jun 2013, the Surety, An Wei (male of 50 years of age), a Singapore Citizen, stood bail for one Li Weiming, an accused person in DACs 26742/2012 to 26747/2012 (“the accused”) for a sum of \$600,000.

2 On 5 July 2013, the Surety was not able to contact the accused. The Surety filed a police report on 6 July 2013 on this fact. The accused subsequently failed to attend pre-trial conferences in respect of his criminal charges on 26 July 2013 and 20 August 2013. A warrant of arrest was issued by the court against the accused on 20 August 2013. The Surety was also ordered to explain why he should not pay the full amount of the bail bond.

3 Having considered the explanations by the Surety, the submissions from both the prosecution and counsel for the Surety, I ordered the Surety to pay a sum of **\$540,000** of the bail bond, with the remaining \$60,000 to be remitted to the Surety.

4 Being dissatisfied with the above order, the Surety has appealed against the same.

BACKGROUND FACTS

Charges faced by the Accused

5 The background facts leading to the Surety standing as the accused’s bailor were essentially not in dispute. The accused faced a total of 6 charges as follows:

i One (1) charge of engaging in a conspiracy with two others to falsify an invoice belonging to a company called Questzone Offshore Ltd (“Questzone”) with intend to defraud under section 477A read with section 109 of the Penal Code;

ii Five (5) charges of engaging in a conspiracy with the same two others (one of whom, Lim Ai Wah, was a director of Questzone) to remove from the jurisdiction properties which represented their benefits from the criminal conduct in the charge in (i) above under section 47(1)(b) of the Corruption, Drug Trafficking and other serious crimes (Confiscation of

6 Pursuant to the conspiracy, the accused forwarded a false invoice dated 15 July 2010 issued by Questzone to ZTE Corporation, a Chinese company in Shenzhen, China, seeking payment of US\$3.6 million to Questzone in relation to a project worth \$35 million which was awarded to ZTE Corporation in Papua New Guinea ("PNG") in 2010. The accused was the Chief Representative of ZTE Corporation in PNG in 2010 but was based in Singapore.

7 On or about 31 July 2010, pursuant to the false invoice, ZTE Corporation paid the US\$3.6 million to Questzone. The payment was effected through ZTE Corporation's Hong Kong subsidiary by telegraphic transfer to Questzone's Standard Chartered Bank account in Singapore. Subsequently, a total sum of US\$850,000 (which formed the subject matter of two of the charges under the CDSA) was transferred, by telegraphic transfer, from Questzone's Standard Chartered Bank account to a Hongkong Shanghai Banking Corporation bank account in Hong Kong belonging to the accused.

How the Surety became the Accused's bailor

8 The Surety is the Chief Technology Officer in charge of the Asia Pacific Marketing Centre in ZTE Singapore Pte Ltd ("ZTE Singapore"). ZTE Singapore is a company in Singapore whose headquarter is the Chinese company ZTE Corporation. According to the Surety, the accused was his colleague in ZTE Singapore. The accused was in the sales department while he was in the marketing department. If the accused needed support in his work, the accused would ask the Surety for help.

9 In early 2011, when the accused was only under investigation, the Surety bailed the accused out on police bail. At that time, the Surety remembered that the conditions of the police bail were to keep regular contact with the accused and to contact the Corrupt Practices Investigations Bureau (CPIB) if there was any problem. The Surety did not have to put up any money for the police bail and the accused's passport was impounded.

10 When the accused was charged in court in 2012, the accused was initially bailed out by his friend, one Ge Jian Ming for \$600,000 sometime in July 2012. His passport was also impounded. The events leading to the Surety replacing Ge Jian Ming as the accused's bailor, which were not in dispute, were helpfully summarised by the Prosecution in the Table set out below^[note: 1]:

Date	Event
.....
.....
27th April 2013	Accused communicated via email with Wang Keyou (ZTE Corporation's Director for Legal and Compliance based in Shenzhen) and copied Xu Fenglei (ZTE Singapore's Managing Director (MD)) and Zheng Bang (ZTE Corporation's Regional President for South East Asia) requesting the company to post bail on his behalf as his original bailor wanted to discharge himself. According to the accused, his original bailor needed the money for his cash flow and was unable to continue being his bailor
3rd May 2013	Wang Keyou sent an email to Zheng Bang and advised him on the request made by the accused for the company to post bail on his behalf as follows " <i>... according to what I know, the company does not have any existing policy on this issue. But from the cause of this case and the subsequent proceeding, bailing Li Weiming is in the interest of the company.</i> " (see TAB B ^[note: 2] - email XFL-002-003/4)
4th May 2013	Following the advice of Wang Keyou, Zheng Bang sent an email to Wang Keyou and Xu Fenglai directing the local ZTE Singapore office to discuss with a local lawyer about the company being involved. (see TAB B - email XFL-002-003/4)

30th to 3rd Jun 2013	<p>Various email exchanges between Wang Keyou and Li Yue (ZTE Corporation's Finance Manager) and Yang Liming (ZTE Corporation's Head of Finance) to determine how the bail monies should be accounted for in their budget.</p> <p>(see TAB C - emails marked as Annex G and H)</p>
1st Jun 2013	<p>The accused sent an email to Xu Fenglei (ZTE Singapore's MD) and copied Zheng Bang urging the company to find a colleague who was either Singaporean or a permanent resident to act as his bailor. He informed that the original bailor, one Ge Jian Ming was returning to China shortly and needed his monies.</p> <p>(see TAB B - email XFL-002-005)</p>
2nd Jun 2013	<p>Zheng Bang sent an email directing Xu Fenglai to arrange for a colleague with Singapore citizenship to take over as the bailor.</p> <p>(see TAB B - email XFL-002-005)</p>
3rd Jun 2013	<p>Lawyers acting for ZTE Singapore sent an email to Wang Keyou and the accused giving advice on the procedures for the substitution of bailor and the obligations of the bailor.</p> <p>The lawyers also attached a copy of a brochure that they had downloaded from the then Subordinate Courts website. Wang Keyou then forwarded the advice he had received from the lawyers to Xu Fenglai and Zheng Bang</p>
5th Jun 2013	<p>The accused sent an email to Xu Fenglai requesting Xu Fenglai's assistance to appoint a colleague from ZTE Singapore to act as his bailor.</p> <p>(see TAB B - email XFL-002-009)</p>
7th Jun 2013	<p>Zhang Yugang (Personal Assistant to Xu Fenglai, MD of ZTE Singapore) sent an email to Wang Keyou and the accused and informed that he had spoken to An Wei (the Surety) and that An Wei had agreed to act as the accused's bailor. Wang Keyou replied to the email and directed Zhang Yugang to forward the document prepared by the lawyers on the responsibilities of a bailor to An Wei.</p> <p>(see TAB B - email XFL-002-010 to 12)</p>
14th Jun 2013	<p>The lawyers acting for the accused wrote to the then Subordinate Court No.17 requesting for a change in the bailor and the hearing date was later fixed on 19th Jun 2013</p>
19 Jun 2013	<p>An Wei took over as bailor for the accused for the bail amount of \$600,000.</p>
21st Jun 2013	<p>ZTE Corporation's lawyer prepared a loan contract for An Wei which was never executed.</p> <p>(see TAB B - email AW-001-001 to 005)</p>
24th Jun 2013	<p>Email from An Wei to Zhang Yugang attempting to delegate his responsibilities as a bailor to someone from the company.</p> <p>(see TAB C - email marked as Annex P)</p>
26th Jun 2013 to 4th Jul 2013	<p>An Wei left on a business trip to Shenzhen, China. He did not contact the accused while he was overseas.</p>
5th Jul 2013	<p>Zhang Yugang tried to call the accused on his mobile phone several times but it was switched off; Zhang Yugang informed An Wei later that day that he was unable to contact the accused; An Wei then attempted to call the accused but cannot get through; later that night both An Wei and Zhang Yugang went to the accused's house together and found his back-pack and personal laptop missing. This was the first time An Wei had visited the accused's home.</p>
6th Jul 2013	<p>An Wei then sought advice from ZTE Corporation's lawyer who advised him to file a police report. An Wei subsequently filed the police report at Kampong Java NPC at around 1333hrs.</p> <p>(see TAB D)</p>

8th Jul 2013	Email reply from Wang Keyou to An Wei assuring him that if the bail money was forfeited due to the disappearance of the accused, then the company would not make him personally liable (see TAB C - email marked as Annex Q)
26th Jul 2013	Accused did not attend court
20th Aug 2013	Accused did not attend court
21st Aug 2013	Warrant of arrest issued against the accused
27th Aug 2013	Accused's employment pass terminated by ZTE Singapore
28th Aug 2013	Police Gazette issued against the accused
(Emphasis added)	

Prosecution's Submissions

11 The Prosecution relied on the case of *PP v Ram Ghanshamdas Mahtani* ^[note: 3], a judgment of Yong Pung How CJ to submit that the applicable principle governing the forfeiture of a bail bond when an accused person fails to surrender bail is that *"it is only in the most exceptional cases that the court will be prepared to modify the prima facie position, which is that the amount for which the person concerned has stood surety will forfeit in full"* ^[note: 4].

12 The Prosecution submitted that the full sum of the \$600,000 should be forfeited on the following grounds:

i The Surety had no vested interest to secure the appearance of the accused in court as the bail monies did not belong to him;

ii The Surety hardly knew the accused as a colleague and only agreed to act as his bailor when he was approached by ZTE's management to do so; ^[note: 5]

iii The Surety had failed to keep daily communication with the accused as required under section 104(1) of the Criminal Procedure Code (Cap 68, Revised Edition 2012) ("CPC 2012") after the accused was released into his custody on 19 June 2013. When the Surety travelled to Shenzhen from 26 Jun 2013 to 4 July 2013, he did not contact the accused at all but delegated this duty to Zhang Yugang, personal assistant to the Managing Director of ZTE Singapore. In fact, the first time that he had been to the accused's apartment was after the accused was not contactable, on 5 July 2013; ^[note: 6]

Submissions by Counsel for the Surety

13 Counsel for the Surety submitted that the Surety had made the following efforts to ensure that the accused would turn up in court:

i The Surety had been diligent in keeping in contact with the accused as they were colleagues. When the Surety had to travel for business from 26 Jun 2013 to 4 July 2013, he requested Zhang Yugang to help keep in contact with the accused, which the Surety was entitled to; ^[note: 7]

ii On 6 July 2013, the Surety made a police report on his failure to contact the accused; ^[note: 8]

iii The risk of the accused absconding was reduced as the accused's passport was impounded. If the accused intended to abscond, he could have done so much earlier when he was only under "police bail" for \$10,000 before he was charged in court. ^[note: 9]

iv The surety had taken a loan from ZTE Corporation to put up the bail monies of \$600,000. If the entire sum or a substantial sum of the \$600,000 is forfeited, the surety will face the possibility of legal action from ZTE Corporation for the recovery of the \$600,000, which may result in extreme financial hardship for the surety.^[note: 10]

14 Counsel submitted that a sum of \$200,000, i.e. one-third of the bail sum of \$600,000 should be forfeited in view of the above reasons.^[note: 11]

MY DECISION

15 It is settled law that when an accused fails to surrender to his bail, it is only in the most exceptional cases that the court will be prepared to modify the prima facie position, which is that the amount for which the person concerned has stood surety will be forfeit in full.^[note: 12] Both the Prosecution and Counsel for the Surety are agreeable on this.

16 Having heard the Surety's evidence on oath and having considered all the documents tendered by both the Prosecution and the Surety in this hearing, I was not persuaded that this was such an exceptional case that the prima facie position should be modified.

17 My reasons are as follows:

i Failure by the Surety to discharge his duties as a surety

18 The Surety in this case had failed to discharge his duties under section 104 of the CPC 2012 in failing to ensure that the accused attend court on 26 July 2013 and also to keep in daily communication with the accused.

19 On the duty to keep in daily communication with the accused, it was not open to the Surety to say that he had delegated this duty to his colleague Zhang Yugang to keep in daily communication with the accused. A surety's duties are personal to the surety. When he chose to delegate these duties, he ran the risk of being in breach of his duties under the section should the accused failed to attend court or when the person to whom he had delegated the responsibility failed to keep in daily communication with the accused. It was no excuse for the Surety to say that there was no point for him to personally keep in daily communication with the accused by phone when he was overseas as it was expensive to do so, and anyway he would not know if the accused was actually in Singapore or not even if he did so.^[note: 13] The Surety has no other alternative but to fulfil his duties. On the contrary, such attitude by the Surety showed how lightly the Surety had taken his responsibilities as a surety.

20 Further, no efforts were undertaken by the Surety to look for the accused after he was not contactable, apart from a visit to the accused's apartment on the same day. The Surety did not try to go to China, where the accused was from^[note: 14], to look him.

ii The bail money did not belong to the Surety

21 It was also clear to me that it was the company ZTE Singapore who provided the bail money to bail the accused out. The company only needed to look for an employee of the company who is a Singaporean and who was willing to stand bail for the accused to be the surety. Based on the sequence of events and the email exchanges, I was not persuaded that the company had any intention to ask the Surety to return any part of the bail money, should the bail money was forfeited by the court if the accused were to fail to attend court.

22 It was pertinent to note that the "Borrowing Voucher"^[note: 15], dated 17 June 2013 under which the disbursement of the \$600,000 to the Surety for the purpose of the bail was made, was approved by the management of ZTE Singapore even before any agreement was reached with the Surety as to the repayment terms of the alleged loan. The disbursement was also described in the voucher as "Expenses- legal fees-litigation fees" and not as a loan to the Surety.

23 It was also telling that up to the date of the hearing, no loan agreement was signed between the Surety and the company and no evidence was adduced by the Surety that the company has taken any legal action against him for the recovery of the alleged loan. Further, no evidence was adduced by the Surety from anyone from the company as regards the company's position on the alleged loan.

24 This finding was further reinforced by an email dated 8 July 2013 from Wang Keyou (Wang), ZTE Corporation's Director for Legal and Compliance to the Surety after the accused could not be contacted that "(a)bout the bail money, if it is because of Li (the accused)'s disappearance leading to the confiscation of the bail money, I believe that the company would not make you personally bear the full responsibilities of the money." [note: 16] Although Counsel for the Surety had argued that Wang, not being a staff of ZTE Singapore which provided the loan and not a member of the company's management, did not have the authority to give such assurance and was merely giving his personal opinion [note: 17], I was of the view that based on the email exchanges set out in the Table in paragraph 10 above, the staff in ZTE Singapore were clearly taking instructions from the staff of ZTE Corporation (including Wang), being the headquarter company of ZTE Singapore. In my view, the words of the Director for Legal and Compliance of the headquarter company must have carried much weight on behalf of ZTE Singapore and it would entirely be reasonable for the Surety to rely on such assurance.

iii The Surety was not the accused's nearest and dearest

25 It was also clear from the evidence of the Surety that he hardly knew the accused. The accused also did not ask the Surety to be his bailor in the first place. It was Zhang Yugang, personal assistant to Xu Fenglei, managing director of ZTE Singapore who had asked the Surety to be the bailor. [note: 18] Hence, in the present case, there was no real pull or effective force on the accused to attend court. The Surety was not someone who was the accused's nearest and dearest, to whom the accused would rather not subject undue pain and discomfort by attending court. [note: 19]

26 This was a bail bond for a very large sum of money: \$600,000, not \$6,000. It would indeed be surprising if the Surety were to readily agree to stand bail for someone whom he hardly knew for such a large sum of money without first getting some form of assurance that he would not be personally liable for the sum if the accused were to fail to attend court. Indeed, the Surety had taken the position *vis-a-vis* the company that he should not be liable to return any part of the bail money that was forfeited by the court to the company if the accused failed to attend court.

27 In an email to Zhang Yugang on the draft loan agreement for the \$600,000, the Surety had this to say: [note: 20]

".....

If the case is concluded smoothly and the bail is refunded by the Singapore court, I will be required to repay the monies to the company immediately, I can promise this.

*The problem is that **I will not be personally responsible for the losses caused to the company in the event that the monies are forfeited by the Singapore court, because the amount is huge.***

***Please add a clause to protect the borrower** , stating how to deal with the situation if the bail is forfeited and repayment cannot be made to the company.*

....."

(Emphasis added)

28 In fact, the Surety reiterated this position in court that he should not be held responsible for the amount forfeited by court when asked what he had in mind when he wrote the above reply to Zhang Yugang. [note: 21] It was telling that the company did not respond to the Surety's request and the loan document was never signed.

29 In Ram Ghanshamdas Mahtani's case ^[note: 22], Yong Pung How CJ agreed with and adopted the observations of Lord Widgery CJ in *R v Southampton Justices, ex parte Corker (1976) 120 SJ 214* on the real pull of bail as follows:

"The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort."

30 In the present case, none of the real pull or effective force of bail exists. The Surety was not the accused's nearest and dearest but a mere colleague. The bail money was not put up by the Surety but by the company ZTE Singapore Pte Ltd, who for all intents and purposes, did not evince any intention to make the Surety personally liable for any amount of the bail that the court may forfeit.

31 In the circumstances, I did not find this to be such an exceptional case that the prima facie position should be modified.

32 In deciding whether the full amount of the bail quantum should be forfeited, I have considered the following efforts made by the Surety to fulfil his responsibilities as such:

- i. He did keep in daily communication with the accused while he was in Singapore;
- ii He did go to the accused's apartment on the same day on 5 July 2013 to look for the accused when he was informed by Zhang Yugang that the accused was not contactable;
- iii He did make a police report on the disappearance of the accused on 6 July 2013, which was the very next day after he realised that the accused was not contactable.

33 In the circumstances, I was of the view that it would be appropriate to forfeit a sum of \$540,000, i.e. 90% of the bail amount. The balance sum of \$60,000 was to be remitted to the Surety.

34 The Surety, being dissatisfied with the above order, has lodged an appeal against the same.

[note: 1]See Prosecution's Submissions, paragraph 6 from pages 4 to 7

[note: 2]All references to the Tabs in the Table correspond to those found in the Prosecution's Submissions.

[note: 3]Tab F of the Prosecution's Submissions

[note: 4][2003] 1 SLR(R) 517 at [4]

[note: 5]Prosecution's Submissions, paragraph 12 at page 10

[note: 6]Prosecution's Submissions, paragraph 13(b) at page 10

[note: 7]Submissions by Counsel for the Surety (SCS), paragraph 12

[note: 8]SCS, paragraph 18

[note: 9]SCS, paragraph 24

[note: 10]SCS, paragraph 27

[note: 11]Counsel's oral submissions, Transcript on 13 March 2014, page 31 In 23 to In 32

[note: 12]Supra [4]

[note: 13]Transcript, Day 1 (10 February 2014), page 48 In 29 to page 49, In 10

[note: 14]Prosecution's Submissions, paragraph 2 at page 2

[note: 15]Exhibit XFL-001-001 in Tab B of the Prosecution's Submissions

[note: 16] Tab C, Annex Q of the Prosecution's Submissions

[note: 17] Transcript on 13 March 2014, page 19 ln 1 to ln 19

[note: 18] See events on 7 Jun 2013 summarized in the Table in paragraph 10 above.

[note: 19] *Supra*, [3], at 520- 521, paragraph 9.

[note: 20] See exhibit 'S2' tendered by Counsel for the Surety

[note: 21] Transcript, Day 1 (10 February 2014), page 21 ln 23 to page 22, ln 27

[note: 22] *Supra* [3] at paragraph 9

BACK TO TOP

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