District Court of Singapore

Public Prosecutor v Phillip Morris Singapore Private Limited - [2011] SGDC 376 (9 November 2011)

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Suit No: HSA 347 of 2010, Magistrate's Appeal No. 205/2011/01
Decision Date: 9 November 2011
Court: District Court
Coram: Low Wee Ping
Counsel: Mr. Terence Seah and Ms Christine Ong (M/s Shook Lin & Bok) for the prosecution. Mr. Hamidul Haq, Mr. Thong Chee Kun and Ms Sheila Ng (M/s Rajah and Tann) for the defence.

Judgment

9 November 2011

District Judge Low Wee Ping:

The complainant

1 The complainant was the Health Sciences Authority of Singapore (HSA).

The accused

2 The accused was a registered company, Phillip Morris Singapore Private Limited (PMS). PMS' business was in the distribution of tobacco products. It had an "Import and Wholesale Licence" issued under the Smoking (Control of Advertisements and Sale of Tobacco) Act, Chapter 309.

The prosecutors

3 Mr. Terence Seah and Ms Christine Ong, advocates and solicitors from M/s Shook Lin & Bok, conducted the prosecution, on behalf of HSA.

Defence counsel

4 Mr. Hamidul Haq, Mr. Thong Chee Kun and Ms Sheila Ng, from M/s Rajah and Tann, were the defence counsel.

The charge

5 HSA preferred the following charge against PMS:-

HSA 347/2010 (exhibit C1):-

"You, Phillip Morris Singapore Pte Ltd ….. are charged that you, on 24 September 2009 and 25 September 2009, in a tent located in the outdoor car park of St. James Power Station, 3 Sentosa Gateway, Singapore, published an advertisement which depicted brand names relating to tobacco products, to wit, the display of 5 cigarette packets, namely "Marlboro", "Marlboro Lights", "Marlboro Lights Menthol", "Marlboro Menthol" and "Marlboro Ice Mint", in a cigarette packet display case on a temporary bar counter, at the above-mentioned location, and you have thereby committed an offence under Section 3(1)(c)(ii) of the Smoking (Control of Advertisements and Sale of Tobacco) Act, Chapter 309 (2003 Revised Edition), and this is punishable under Section 3(1) of the Act".

Pleaded not guilty

6 PMS pleaded not guilty to the charge. It claimed to be tried.

Prosecution's witnesses

7 The prosecution called the following 6 witnesses:-

(a) PW1 – Mr. Jason Yeoh – HSA's senior regulatory inspector;

(b) PW2 – Mr. Muhd Asri Bin Abdul Wahid – HSA's enforcement officer;

(c) PW3 – Mr. Lee Hong Suk – PMS' sales and distribution manager;

(d) PW4 – Mr. Heng Zi Jun – PMS' trade marketing executive;

(e) PW5 – Mr. Andrew Ing - St. James Pte Ltd's chief operating officer; and

(f) PW6 – Mr. Tang Mong Shin - ID+A Pte Ltd's design manager.

Prosecution's case

8 The prosecution's case, in summary, is in the following paragraphs.

9 On 1 October 2007, The St. James Pte Ltd (SJ) and PMS entered into a written agreement (2007 Agreement) (exhibit P8). In the 2007 Agreement, SJ granted to PMS an "exclusive merchandising right". Specifically, it gave PMS the right to install and place several cigarette display and dispensing cases in SJ's several outlets at St. James Power Station. PMS used these cigarette display and dispensing cases to display PMS' cigarette packets. These display cases could also be used as "cigarette dispensing units" (CDUs). In consideration, PMS agreed to pay SJ a "merchandising fee".

10 Around February or March 2009, SJ's chief operating officer, Mr. Andrew Ing (PW5), approached PMS. He requested PMS to "work together" and "help" SJ organise an outdoor event (F1 Event) at St. James Power Station. This event was to be held in conjunction with the 2009 Singapore Formula One Grand Prix in September 2009.

11 In March or April 2009, planning for the F1 Event started. SJ's and PMS' staff held several discussions. SJ was represented principally by Mr. Andrew Ing (PW5). PMS was represented principally by Mr. Heng Zi Jun (PW4). He was PMS' then trade marketing executive.

12 Subsequently, there were also at least two “planning sessions”. Two of these were in March and June 2009.

13 On 1 September 2009, SJ and PMS entered into a “Supplementary Agreement” (2009 SA) (exhibit P7). In the 2009 SA, SJ granted PMS an “additional merchandising right”. Specifically, it gave PMS the right to install and place a new CDU (exhibit P2) at St. James Power Station, during the F1 Event. This new CDU was the subject-matter of the charge against PMS. PMS also intended to use this new CDU to display PMS’ cigarette packets, like the other CDUs already installed at SJ’s other outlets. The new CDU could also be used to dispense PMS’ cigarette packets. It was specially designed for this F1 Event. In consideration, PMS agreed to pay SJ an “additional merchandising fee” of $105,000.

14 On 24 September 2009, Mr. Heng Zi Jun (PW4) received delivery of the empty new CDU. He instructed the contractor to place the empty new CDU at a temporary bar counter. The temporary bar counter was in a tent. The tent was located at the outdoor car-park of St. James Power Station. This tent was specially erected for the F1 Event. It also contained a “Smoking Lounge” and a “VIP Area” (exhibit P4).

15 On 24 September 2009, at about 6.00pm or 7.00 pm, Mr. Heng Zi Jun (PW4) placed 5 of packets of “Marlboro” cigarettes in the new CDU.

16 On 24 and 25 September 2009, the new CDU, with the 5 packets of “Marlboro” cigarettes in it, remained at the above place.

17 On 25 September 2009, at about 10.45 pm, Mr. Jason Yeoh (PW1), HSA’s senior regulatory officer, seized the new CDU with the 5 packets of “Marlboro” cigarette in it. The place where the new CDU was placed had not been approved by HSA for the display and sale of tobacco products.

18 Therefore, on 24 and 25 September 2009, at the tent located at the outdoor car-park of St. James Power Station, PMS had “published an advertisement (the new CDU) which depicted brand names relating to tobacco products”, and had “thereby committed an offence under Section 3(1)(c)(ii) of the Smoking (Control of Advertisements and Sale of Tobacco) Act (Cap 309) (2003 Revised Edition) (Smoking Act)”.

Defence called

19 At the close of the prosecution’s case, defence counsel, Mr. Hamidul Haq submitted that there was no case to answer. I found that the prosecution had made out a prima facie case against the accused on the charge. I called PMS to enter upon its defence. PMS elected to give evidence.

Defence’s witness

20 PMS called its general manager, Mr. Martin Inkster (DW1), as its only witness.

Defence’s case

21 The defence’s case, in summary, was as follows:-.

(a) Section 3(1)(c)(ii) of the Smoking Act did not create a “strict liability” offence;

(b) The new CDU (exhibit P2) was not an advertisement;

(c) PMS had a statutory defence under s 4 of the Smoking Act; and

(d) PMS had a defence of “mistake of fact believing himself to be justified by law”, under s 79 of the Penal Code (Cap 224).

Acquitted

22 I found PMS not guilty. I ordered that it be granted a discharge amounting to an acquittal.

Notice of appeal

23 On 25 August 2011, the deputy public prosecutor filed a notice of appeal against the order of acquittal.

24 I now give the reasons for my decision.

The statutory provisions

Meaning of “advertisement”?

25 Section 2 of the Smoking Act states as follows:-

“ *Interpretation*

2 In this Act, unless the context otherwise requires —

“advertisement” ***includes any*** notice, circular, pamphlet, brochure, programme, price-list, label, wrapper or other document and any announcement, notification or ***intimation to*** th ***e public or any section*** th ***ereof or to any person or persons made*** —

(*a*) orally or in writing;

(*b*) ***by means*** of any poster, placard, notice *or* ***other document affixed*** , posted up or displayed on any wall, billboard or hoarding or ***on any other object or thing*** ;

(*c*) by means of producing or transmitting sound or light and whether for aural or visual reception or both;

(*d*) by means of any writing on any vehicle, ashtray, calendar, cigarette-lighter, clock or any other object or thing; ***or***

(*e*) ***in any other manner whatsoever*** ;”.

(The prosecution’s case was based on the above words as highlighted in ***bold*** and in ***italics*** .)

Th e offence

26 Section 3 of the same Smoking Act states as follows:-

“ *Prohibition on advertisements relating to tobacco products*

3 (1)Except as provided in subsection (2) or section 22, ***any person who publishes or causes to be published or takes part in*** th ***e publication of any advertisement*** —

(*a*) containing any express or implied inducement, suggestion or request to purchase or to use any tobacco product;

(*b*) relating to any tobacco product or its use in terms which are calculated, expressly or impliedly, to lead to, induce, urge, promote or encourage the use of the tobacco product; or

(*c*) ***which*** mentions, illustrates or ***depicts*** —

(i) the name or trade name of any person associated or concerned with the manufacture, distribution or marketing of any tobacco product;

(ii) ***a bra nd name of or trade mark relating to any tobacco product*** ; or

(iii) any pictorial device commonly associated with a brand name of or trade mark relating to any tobacco product,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 6 months or to both and, in the case of a second or subsequent conviction, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 12 months or to both".

(The prosecution's case was based on the above words as highlighted in ***bold*** and in ***italics*** .)

The key issues

27 There were 5 key issues raised in this trial. They were:-

(a) Did s 3(1)(c)(ii) of the Smoking Act create a strict liability offence?

(b) Even if s 3(1)(c)(ii) of the Smoking Act had created a strict liability offence - was the defence of "reasonable care" available to PMS?

(c) Whether the new CDU was an "advertisement" within the meaning of the Smoking Act?

(d) Did PMS have a statutory defence under s 4 of the Smoking Act?

(e) Did PMS have a defence of "mistake of fact believing himself to be justified by law", under s 79 of the Penal Code (Cap 224)?

Did s 3(1)(c)(ii) of the Smoking Act create a strict liability offence?

Applicable legal principles

28 I applied the case of *Tan Cheng Kwee v Public Prosecutor* [2002] 2 SLR(R) 122. The then Yong Pung How CJ stated at paragraph 13:-

"13 There is a presumption of law that *mens rea* is a necessary ingredient of any statutory provision that creates an offence: *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; *Lim Chin Aik v R* [1963] MLJ 50 ; *PP v Phua Keng Tong* [1985-1986] SLR(R) 545 . *Th is presumption, however, can be rebutted by th e clear language of th e st atute, or by necessary implication, al th ough it is not sufficient if th e provision merely lacks terms th at are commonly associated wi th mens rea.* Where an examination of the language of the statute does not assist, the court will have to look at all the relevant circumstances to determine the true intention of Parliament. Such considerations include the nature of the crime, the punishment prescribed, the absence of social obloquy, the particular mischief and the field of activity in which the crime occurred.

14 *It is well known that the presumption of mens rea is often displaced in situations where the statutory offence in question pertains to issues of social concern. This is especially so in cases of public safety where the prohibited act is not one which the public can easily protect itself against through its own vigilance.* In *Lim Chin Aik v R* ([13] supra at 52), Lord Evershed made the following observation:

Where the subject matter of the statute is the regulation for the public welfare of a particular activity ... it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea* ".

Has th e presumption of mens rea been rebutted by th e clear language of s 3 of th e Smoking Act?

29 The prosecution had preferred the charge against PMS specifically under s 3(1)(c)(ii) of the Smoking Act. PMS was not charged under the preceding two sub-sections of s 3(1)(a) or s 3(1)(b) of the Act. The prosecution submitted that, therefore, s 3(1)(c)(ii) must be construed, in contra-distinction, to the two preceding sub-sections (a) and (b). I agreed. In contrast to s 3(1)(c)(ii) - s 3(1)(a) requires that the offender had published an advertisement " *containing any express or implied inducement, suggestion or request to purchase or to smoke any tobacco product* ". Also in contrast to s 3(1)(c)(ii) - s 3(1)(b) requires that the offender had published an advertisement " *which are calculated, expressly or impliedly, to lead to, induce, urge, promote or encourage the use of any tobacco product for the purpose of smoking* ".

30 In my view, from a plain reading of the two preceding sub-sections 3(1)(a) and s 3(1)(b), an offence under these two sub-sections requires proof of *mens rea* . However, on a plain reading of the relevant s 3(1)(c)(ii), and more significantly, reading it in contra-distinction to its two preceding sub-sections (a) and (b) - an offence under s 3(1)(c)(ii) did not require proof of *mens rea* . It therefore created a strict liability offence.

Did s 3(1)(c)(ii) of the Smokng Act "pertain to issues of social concern or cases of public safety where the prohibited act is not one which the public can easily protect itself against through its own vigilance"?

31 The preamble to the Smoking Act states:-

"An Act to prohibit advertisements relating to smoking, to control the use of tobacco products by young persons, to control the sale, packaging and trade description of tobacco products and for matters connected therewith."

32 In 1970, the then Minister for Culture, Mr. Jek Yuen Thong, in moving for the second reading of the "Prohibition on Advertisements Relating to Smoking" Bill, stated:-

"There is now adequate medical knowledge of the effects of nicotine on health to arouse worldwide concern over the hazards of cigarette smoking.

We in Singapore are attempting to build a healthy and rugged society. We are sparing no effort to create a clean and pollution-free environment for our people. It would be logically odd if, after all the trouble we have one through to ensure a clean environment, we ignore the hazards of cigarette smoking and thus fail to safeguard the health of our community, particularly that of the young who form the bulk of our population.

The Minister for Health will explain later in more detail how smoking can cause harm to the health of a

person. But, briefly, I was told that nicotine, which is the most important ingredient in tobacco, once left loose into a person's system stimulates and depresses the nerves.

The smoker's blood pressure goes up and his heart rate increases. Research has established that cigarette smoking is the main cause of lung cancer. A host of other diseases are also known to be caused by cigarette smoking -- chronic bronchitis, peptic ulcers, high blood pressure, heart diseases and what have you. It has been statistically proved that where all other things are equal, a non-smoker enjoys a longer life-span than a smoker.

Recently, by the passing of the Prohibition of Smoking in Certain Places Bill, we have tried to "purify" cinemas, theatres and other specific public places so that the enjoyment of the many will not be marred by the few who are smokers.

We must safeguard our young population against persistent advertising by cigarette and advertising firms inducing people to smoke and to try new brands of cigarettes, often on the untrue but persuasive assumptions and implications that people must get the "taste", that cigarettes are equated with success in life, that smoking is one of the best things in life, that smoking certain brands of cigarettes is synonymous with social exclusiveness and prestige, and other equally misleading slogans. Such blandishments, if not checked in time, can induce many of our young people to take up smoking in order to belong to the in-group. The first false step often results in the young person becoming a habitual smoker.

The case against cigarette advertising, irrespective of what benefits cigarette smoking itself may bring to any particular person or groups of persons, is overwhelmingly strong. We cannot stop anyone from smoking. But we can and we must stop the use of our mass media to glorify smoking”

33 Reading the above statement, it was obvious to me that the Smoking Act generally, and s 3(1)(c)(ii) specifically, “pertain to issues of social concern or cases of public safety where the prohibited act is not one which the public can easily protect itself against through its own vigilance”. The statement raised the significant adverse effect of smoking on the health of Singaporeans. It also raised the issue of “persistent” advertising of tobacco products and their effect on Singaporeans, and especially on the young.

34 For all the above reasons - I found that s 3(1)(c)(ii) of the Act had created a strict liability offence.

Even if s 3(1)(c)(ii) of the Smoking Act had created a strict liability offence, was the defence of “reasonable care” available to PMS?

Applicable legal principles

35 In the same case of *Tan Cheng Kwee v Public Prosecutor* [2002] 2 SLR(R) 122, at paragraph 31, the High Court stated:-

“31 To reiterate, when a strict liability offence involved "causing" an act that was in itself unlawful, all the Prosecution needed to establish was the causal link, or *actus reus* . This involved showing that the accused had some form of control, direction and mandate over the person doing the unlawful act proper which the accused had exercised: *Shave v Rosner* [1954] 2 QB 113; [1954] 2 All ER 280; *Mcleod (or Houston) v Buchanan* [1940] 2 All ER 179. *Once this was proved, it would then become incumbent on the Defence to prove on a balance of probabilities that it had taken all reasonable care”.*

The facts

36 The facts of this case were generally not disputed. I found the facts as stated in the following

paragraphs.

37 On 1 October 2007, SJ and PMS entered into a written agreement (2007 Agreement) (exhibit P8). In the 2007 Agreement, SJ granted to PMS an "exclusive merchandising right". Specifically, it gave PMS the right to install and place several cigarette display and dispensing cases in SJ's several outlets at St. James Power Station. PMS would use these cigarette display and dispensing cases to display PMS' cigarette packets. These display cases could also be used as "cigarette dispensing units" (CDUs). In consideration, PMS agreed to pay SJ a "merchandising fee".

38 In the above 2007 Agreement, at clause 3, SJ also gave PMS the following "Outlet's Undertakings":-

"3.1 The Outlet hereby undertakes that it shall:

…….

(m) Comply fully with applicable laws, regulations, ordinances, and/or directives from relevant authorities prevailing from time to time.

(n) Obtain and maintain the requisite license(s) issued by the Singapore's Centre for Pharmaceutical Administration Tobacco regulation Unit to retail tobacco products ("License"). As at the date hereof, the Outlet warrants that it is in possession of a valid License."

39 On 18 August 2008, HSA issued a "License to Retail Tobacco Products" to SJ (exhibit D2). It was valid from 23 October 2008 to 22 October 2009. It was for the following "retail outlet named herein:

Boiler Room, The Lobby and Peppermint Park

3Sentosa Gateway

(Boiler Room, The Lobby and Peppermint Park)

Singapore 098544".

40 The following words were at the back of the above Retail License (exhibit D2):-

"Conditions of License to Retail Tobacco Products:-

……

iii Display for Sale - Licensees are to ensure that the tobacco products are displayed within their premises in a way that customers can only have access to the tobacco products through the assistance of an employee or the licensee."

41 The significance of the above condition, "Display for Sale", was that HSA had also permitted SJ to display the tobacco products it was selling. However, this was provided that the display was "within their premises in a way that customers can only have access to the tobacco products through the assistance of an employee or the licensee".

42 Around February or March 2009, SJ's chief operating officer, Mr. Andrew Ing (PW5), approached PMS. He requested PMS to "work together" and "help" SJ organise an outdoor event (F1 Event) at St. James Power Station. This event was to be held in conjunction with the 2009 Singapore Formula One Grand Prix in September 2009.

43 In March or April 2009, planning for the F1 Event started. SJ's and PMS' staff held several

discussions. SJ was represented principally by Mr. Andrew Ing (PW5). PMS was represented principally by Mr. Heng Zi Jun (PW4). He was PMS' then trade marketing executive.

44 Subsequently, there were at least two "planning sessions". Two of these were in March and June 2009.

45 Mr. Heng Zi Jun's (PW4) evidence, on the facts, was generally not disputed. In summary, Mr. Heng Zi Jun (PW4) testified as follows:-

(a) In the discussions between PMS and SJ, it was "envisaged" that cigarettes would be sold at the F1 Event;

(b) During his discussions with Mr. Andrew Ing (PW5), it was agreed that SJ's outlet "Peppermint Park" would be "hosting" the F1 Event;

(c) It was also agreed the outdoor car-park would be used for the F1 Event, so that the replica of F1 race-cars provided by PMS could be displayed there;

(d) There were at least two planning sessions in March and June 2009. In these planning sessions, SJ's Mr. Andrew Ing was reminded that SJ should have the requisite licenses for the F1 Event;

(e) It was agreed between PMS and SJ that the new CDU would be placed on the temporary bar-counter in the tent at the outdoor car-park;

(f) He signed the 2009 SA on behalf of PMS; and

(g) PMS would not have entered into such agreements with any retail outlet if the latter was not licensed to retail tobacco products.

46 Mr. Andrew Ing (PW5) was SJ's chief operating officer. His evidence, on the facts, was also generally not disputed. In summary, Mr. Andrew Ing (PW5) testified as follows:-

(a) He corroborated most of Mr. Heng Zi Jun's evidence;

(b) SJ, at all times, believed that their Retail License (exhibit D2), extended to and covered the F1 Event, including the outdoor car-park;

(c) During their planning and discussions with PMS, SJ did assure PMS that it had the requisite Retail License; and

(d) On 24 September 2009, he instructed that the stocks of cigarettes be kept, and the sales be done, at "Peppermint Park". However, it was for "fear of pilferages", rather than because SJ had realized that the F1 Event was not covered by a retail license. At that time, SJ still believed that its existing Retail License (exhibit D2) applied to its outdoor car-park.

47 On 1 September 2009, SJ and PMS entered into a "Supplementary Agreement" (2009 SA) (exhibit P7). In the 2009 SA, SJ granted PMS an "additional merchandising right". Specifically, it gave PMS the right to install and place a new CDU at St. James Power Station during the F1 Event. PMS would also use this new CDU to display PMS' cigarette packets. Similarly, the new CDU could also be used to dispense PMS' cigarette packets. This new CDU was specially designed for this F1 Event. In consideration, PMS agreed to pay SJ an "additional merchandising fee" of $105,000.

48 The above 2009 Supplementary Agreement, at clause 2, contained the following "St. James'

Undertaking":-

"2.1 Save for the following additional undertakings by St. James, the undertakings set out under clause 3.1 of the Original Agreement shall, as far as possible and to the extent relevant, be applicable to any cigarette dispensing unit (Appendix 2) or ….. as may be supplied by PMS to St. James at the Outlets during the Special Events: ……

49 On 24 September 2009, Mr. Heng Zi Jun (PW4) received delivery of the empty new CDU. He then instructed that the contractor to place the empty new CDU at a temporary bar counter. The temporary bar counter was in a tent. The tent was located at the outdoor car-park of St. James Power Station. This tent was specially erected for the F1 Event. It also contained a "Smoking Lounge" and a "VIP Area".

50 On 24 September 2009, at about 6.00 or 7.00 pm, Mr. Heng Zi Jun (PW4) placed 5 of packets of "Marlboro" cigarettes in the new CDU.

51 On 24 and 25 September 2009, the new CDU, with the 5 packets of "Marlboro" cigarettes in it, continued to be placed at the same location - that is, at the above temporary bar counter which was inside the tent that was located at the outdoor car-park of St. James Power Station.

52 On 25 September 2009, at about 10.45 pm, Mr. Jason Yeoh (PW1), HSA's senior regulatory officer, seized the new CDU with the 5 packets of "Marlboro" cigarette in it. HSA was of the view, that the location where the new CDU was placed - that is, the tent at the outdoor car-park of St. James Power Station - had not been approved by HSA for the display and sale of tobacco products.

On the above facts, did PMS exercise reasonable care?

53 Mr. Terence Seah, for the prosecution, submitted that not only had PMS not exercised care, PMS had been "reckless". Mr. Seah pointed out the PMS' Mr. Heng Zi Jun (PW4) had admitted in evidence that he did not check with the HSA's website to ascertain whether SJ had the requisite retail license for the F1 Event. He only did it after the event was over, Mr. Terence Seah emphasised. The thrust of the prosecution's submission was that PMS had relied "recklessly" on SJ to obtain or have the requisite retail license to sell and display tobacco products. PMS should have, on its own, ascertained that SJ had the requisite retail license, the prosecution reiterated. I did not agree.

54 A retail license is issued by HSA to a retailer. In this case, it was to SJ, not to PMS. The retail license authorised the retailer to display and sell tobacco products under specified conditions. The retail license did not apply to, or affect, a supplier or distributor of tobacco products. The latter, like PMS, would itself have been issued an "Import and Wholesale Licence" under the Smoking (Control of Advertisements and Sale of Tobacco) Act, Chapter 57. In my view, it would be unreasonable to impose the legal onus on a supplier or distributor of tobacco products, including PMS, to ascertain that a retailer which it was supplying tobacco products to had the requisite retail license. If that was required, HSA should, through a legislation or administrative directive, specify that legal onus. The onus could even be specified in the supplier's own Import and Wholesale License.

55 The common law defence of "reasonable care" requires the offender of a strict liability offence to prove, on a balance of probability, that he had exercised " *reasonable* " case. It is usually convenient to state, on hindsight, that a care should have been taken. The prosecution alleged that PMS had not exercised reasonable care because PMS' Mr. Heng Zi Jun (PW4) did not check with HSA's website to ascertain whether SJ had the retail license for the F1 Event. It was PMS' case, however, that PMS and even SJ, had, in good faith, thought that the existing Retail License (exhibit D2) issued to SJ, extended to and covered the F1 Event. In any case, as I have stated, that duty should not be imposed on a supplier or distributor of tobacco products, without a clear legal or regulatory basis.

56 I was satisfied that PMS had exercised reasonable care. In my judgment, it had:-

(a) Reminded SJ more than once, in its several discussions and planning with SJ, that it should have the requisite licenses for the F1 Event;

(b) Reminded SJ's senior executives, including SJ's chief operating officer, Mr. Andrew Ing (PW5) himself, of the above;

(c) Documented the installing and placing of all the CDUs, including the new CDU, in written agreements between SJ and PMS;

(d) Ensured, that in these written agreements, SJ provided the necessary undertakings that the requisite licenses would be obtained, and that the relevant laws and regulations would be complied with; and

(e) Ensured that SJ's obligations for the F1 Event were further documented in the 2009 Supplementary Agreement. PMS included a specific clause in this 2009 SA entitled "St. James' Undertaking". The clause specified that the all SJ' previous undertakings - to obtain and maintain a tobacco retail license and to comply with all regulations, laws and directives - also applied to the F1 Event.

57 For the above reasons, I found that, on the balance of probability, PMS had exercised reasonable care. Accordingly, I found PMS not guilty, and ordered that it be granted a discharge amounting to an acquittal.

Was the Cigarette Dispensing Unit (CDU) an "advertisement"?

58 Section 2 of the Smoking Act does not define "advertisement". It merely includes a number of objects, which if made by, again, a number of "means", would objectively be an "advertisement". It was so widely drafted that it encompasses "any intimation" made "by means of any other document … on any object". It also encompasses "any intimation" made "in any other manner whatsoever". This was precisely the prosecution's case.

59 Further, s 2 excludes the purpose, the intention, or the motivation behind such an "advertisement". Mr. Hamidul Haq, defence counsel, submitted strenuously and extensively that the CDU was not an advertisement as it was intended to be only a cigarette display and dispensing case. He also referred to several legislations from the United Kingdom and Australia to show how those legislations had been drafted. In summary, he submitted that the purpose for placing the new CDU at the F1 Event had to be considered. It was evident, he emphasized, that the new CDU was intended to be placed at the location only if SJ had the requisite retail license to sell tobacco products, and was not intended by PMS as an "advertisement". He submitted that "advertisement" should be given its ordinary meaning.

60 In my view, defence counsel's submission was not relevant to the present charge. I had already found that s 3(1)(c)(ii), which the prosecution had proceeded on, created a strict liability offence. Defence counsel's submission would have been relevant if the prosecution had proceeded on a charge under s 3(1)(a) or s 3(1)(b) of the Smoking Act. I reiterate paragraphs 29 and 30 above:-

"29 The prosecution had preferred the charge against PMS specifically under s 3(1)(c)(ii) of the Smoking Act. PMS was not charged under the preceding two sub-sections of s 3(1)(a) or s 3(1)(b) of the Act. The prosecution submitted that, therefore, s 3(1)(c)(ii) must be construed, in contra-distinction, to the two preceding sub-sections (a) and (b). I agreed. In contrast to s 3(1)(c)(ii) - s 3(1)(a) requires that the offender had published an advertisement " *containing any express or implied inducement, suggestion or request to purchase or to smoke any tobacco product* ". Also in contrast to s 3(1)(c)(ii) - s 3(1)(b) requires that the offender had published an advertisement " *which are calculated, expressly or impliedly,*

to lead to, induce, urge, promote or encourage the use of any tobacco product for the purpose of smoking ".

30 In my view, from a plain reading of the two preceding sub-sections 3(1)(a) and s 3(1)(b), an offence under these two sub-sections requires proof of *mens rea* . However, on a plain reading of the relevant s 3(1)(c)(ii), and more significantly, reading it in contra-distinction to its two preceding sub-sections (a) and (b) - an offence under s 3(1)(c)(ii) did not require proof of *mens rea* . It therefore created a strict liability offence."

61 In my view, for the above reasons, the new CDU with the 5 packets of PMS's cigarettes displayed was an advertisement within the meaning of the Smoking Act.

Did PMS have a statutory defence under s 4 of the Smoking Act?

62 The defence also submitted that it had a statutory defence under s 4 of the Smoking Act. Section 4 states as follows:-

" *Defence*

4 In any proceedings for a contravention of section 3, it shall be a defence for the person charged to prove that the advertisement to which the proceedings relate was published in such circumstances that he did not know *and* had no reason to believe that he was taking part in the publication of the advertisement."

63 In my view, the two conditions in s 4 of the Smoking Act are conjunctive. I agreed with the defence that PMS, in good faith, did not know that SJ did not have the requisite retail license. However, on the second condition, on the facts as I have found, it could not be stated that PMS had "no reason to believe that (it) was taking part in the publication of the advertisement".

64 It seemed to me that s 4 is curiously drafted. It could be logically and fairly intended that a statutory defence was available if the person could prove that - the advertisement was published in such circumstances that he did not know; and had no reason to believe that he was taking part in the publication of the advertisement " *in such circumstances".* Be that as it may, on the literal interpretation of s 4, on the facts as found, PMS knew that it was "taking part" in the publication of the new CDU.

65 For the above reasons, in my judgment, PMS did not have a statutory defence under s 4 of the Smoking Act.

Did PMS have a defence of "mistake of fact believing himself to be justified by law", under s 79 of the Penal Code (Cap 224)?

Th e applicable legal principles

66 I applied the judgment of the then Yong Pung How CJ in *Tan Kwee Wan Iris v PP* [1995] 1 SLR(R) 723 at 727:-

"16 As there is nothing in the Act which excludes the operation of s 79 of the Penal Code in respect of an offence under s 18(1)(*a*), it follows that the Prosecution's concession that the defence of mistake under s 79 is available to the appellant is rightly made. This is so even if the offence is one of strict liability for an offence of strict liability is simply one where the Prosecution need not show *mens rea* in respect of an element of *actus reus* . Unless it is clear that the Legislature in creating the offence intends to exclude the defence of mistake, I can see no basis for excluding it.

17 So far as the s 79 defence is concerned, s 107 of the Evidence Act still applies *and the burden is on the appellant to show on a balance of probabilities that she acted under a mistake and by reason of that she believed in good faith that she had a valid licence for the relevant period* . If she can show this, then she is entitled to be acquitted. *This is because if she had a valid licence, she was clearly justified by law in providing public entertainment. It follows that if by reason of a mistake of fact she believed in good faith that she had a licence, the defence is made out.*

18 On the evidence, I am satisfied that the appellant was mistaken as to the validity of the licence for the relevant period. ....

19 *However, it is not enough for the appellant to show that she was mistaken. She must also show that she believed in good faith that she had a valid licence for the relevant period. The test of whether a mistake was made in good faith is not whether the mistake was an easy one to make nor whether a reasonable person could make the mistake. The test is that laid down in s 52 of the Penal Code. The test is whether there was due care and attention.* The mistake may be a natural one to make and it may be one which reasonable persons often make. Nevertheless, the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention. Thus, it is not enough to show that the licensing officer or even the Prosecution made the same mistake. All that shows is that it was a reasonable mistake to make. In order to succeed, the appellant must still show that she exercised due care and attention. No doubt in many cases the fact that a reasonable person made the same mistake will go some way towards discharging the burden of showing due care and attention, but that is not the same thing”

67 I had already found that PMS had proven, on a balance of probability, that it had exercise reasonable care when it placed the new CDU in the tent at the St. James Power Station’s outdoor car-park. Similarly, I was of the view that PMS had “exercised due care and attention” when it played the new CDU at the location. It was not disputed by the prosecution, that the mistake that SJ and PMS had made, in thinking that its existing Retail License (exhibit D2) covered or extended to the F1 Event, had been made in good faith by them.

68 For these reasons, I found that PMS had a defence of “mistake of fact” under s 79 of the Penal Code (Cap 224).

Conclusion

69 For all the above reasons, I found PMS not guilty, and ordered that it be granted a discharge amounting to an acquittal.
