Ng Ai Tiong v Public Prosecutor
[2000] SGHC 39

Case Number : Cr M 11/1999

Decision Date : 15 March 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : SK Kumar (SK Kumar & Associates) for the applicant; Wong Keen Onn and Lim Jit Hee David (Deputy Public Prosecutor) for the respondent

Parties : Ng Ai Tiong — Public Prosecutor

Criminal Procedure and Sentencing – Criminal references – Applicant applying for criminal motion – Applicant failing to state exact order sought – Whether failure a critical procedural error – Requirements to be satisfied – s 60 Supreme Court of Judicature Act (Cap 322)

Criminal Procedure and Sentencing – Criminal references – Application for criminal motion by party other than Public Prosecutor – Power of High Court in such situation – s 60 Supreme Court of Judicature Act (Cap 322)

Criminal Procedure and Sentencing – Sentencing – Plea in mitigation – Whether Court duty bound to invite accused to present mitigating plea – Whether court duty bound to defend or assist accused – Burden on defence at close of criminal matter

: This was a motion by the applicant, Ng Ai Tiong, purportedly made under s 60 of the Supreme Court of Judicature Act (Cap 322) (`SCJA`). The motion arose from my decision in MA 113/99 **PP v Ng Ai Tiong** [2000] 1 SLR 454 in which I allowed the prosecution`s appeal against the acquittal of the applicant by the trial judge. The applicant was convicted of an offence punishable under s 116 read with s 193 of the Penal Code (Cap 224) and was sentenced to a term of one year`s imprisonment.

The detailed facts of the case, and my determination thereon, are set out in my judgment in MA 113/99 and I do not propose to repeat them in full here. Briefly, the applicant was charged with the offence of abetting one Roger Ong Soon Chye (`Roger Ong`), by instigating him to commit an offence of giving false evidence in a stage of a judicial proceeding. The charge was brought against the applicant as a result of the statements made and questions asked by the applicant to Roger Ong during a short encounter that took place between them on the evening of 24 March 1999. At the district court level, the trial judge acquitted the applicant, having found that the element of `instigation` had not been established on the facts. The appeal by the Public Prosecutor came before me on 18 November 1999 and I allowed the appeal after hearing the arguments from both sides.

Procedural error in application

At the outset, I am compelled to point out a critical procedural error made by counsel for the applicant in bringing this motion. In the title of the motion paper filed, counsel for the applicant had stated that this motion was `in the matter of s 60 of the Supreme Court of Judicature Act (Cap 322)`. However, counsel failed to elaborate in his prayer what exactly was the court order that was being sought. What was stated in the prayer was merely the following: `... counsel for the applicant moves this Honourable Court for the following order`, which was then followed by four questions. But what is the court to order with respect to the four stated questions?

I was of course able to deduce that an application made pursuant to s 60 of the SCJA would be one seeking a reference to the Court of Appeal on certain questions of law arising from a criminal appeal

heard in the High Court. However, the request of the applicant for a specific order that the questions framed be reserved for determination by the Court of Appeal must still be clearly articulated in the prayer sought. It is a fundamental requirement in applications made to the court that the court receives proper notice of what exactly is being asked from it. This necessitates that counsel enunciates clearly in the relevant court papers, such as in the motion paper in this case, the precise order that is being requested.

In the present case, this basic requirement was evidently not satisfied. A careful perusal of both the motion paper as well as the notice of motion filed showed that nowhere in either of the documents was it stated that the applicant was seeking to refer the four questions to the Court of Appeal for consideration. This blatant oversight by counsel for the applicant would have been sufficient reason for me to dismiss this application. However, as no objections were raised by the prosecution on this matter, I decided to allow counsel the opportunity to canvass his arguments before me with respect to the motion brought.

Questions posed by the applicant

The following four questions were stated in the motion paper:

(1)	(a)	Whether the word `instigates` in s 107(a) of the Penal Code (Cap 224) requires the prosecution to show that `there had been active suggestion, support, stimulation or encouragement ...` [as pronounced in **PP v Lim Tee Hian** [1992] 1 SLR 45] or a `mere intention`.
	(b)	Whether the words `... thing ...` in s 107 and `... that thing ...` in s 107(a) of the Penal Code require the prosecution to show that at the time of the `instigation` the abetted knew or can be said to have reasonably known what `thing` the abettor was referring to at that point of time as opposed to what the abettor subsequently discerns.

	(c)	Whether, when the word `thing` in s 107 of the Penal Code as spoken or uttered or done by the abettor is capable in law of two interpretations, one legal and the other illegal, must the prosecution prove that the abettor was only referring to the `thing` illegal or is it sufficient for the prosecution to prove that the abetted understood or thought that it is an illegal thing. Additionally, whether the courts can or should scrutinise by an objective or subjective test the `thing` done, uttered or said by the abettor to determine its legality.
(2)		Whether the appellate court hearing an appeal from a district court can be said to have passed a sentence `... according to law ...` [as laid down in s 108(n)(ii) of the Criminal Procedure Code (Cap 68)] or `... save in accordance with law ...` [as required under art 9(1) of the Singapore Constitution] when it reverses the order of acquittal, and imposes a jail term of one year without hearing or affording an opportunity for counsel for the applicant or the applicant to tender the plea in mitigation.

Section 60, SCJA - Applicable principles

Before moving on to examine the principles of law relating to an application under s 60 of the SCJA, it is useful to first set out the relevant part of the section:

> *(1) When a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, the Judge may on the application of any party, and shall on the application of the Public Prosecutor, reserve for the decision of the Court of Appeal any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case.*

The law governing a s 60 application is well-established and the relevant principles have been extensively dealt with by our courts (see **Abdul Salam bin Mohamed Salleh v PP** [1990] SLR 301 [1990] 3 MLJ 275 , affirmed [1991] SLR 235; [1991] 3 MLJ 280; **Chan Hiang Leng Colin v PP** [1995]

1 SLR 687 ; **PP v Bridges Christopher** [1997] 2 SLR 217 and **Zeng Guoyuan v PP (No 2)** [1997] 3 SLR 883). Although s 60 of the SCJA was repealed and re-enacted by the Supreme Court of Judicature (Amendment) Act 1998 (No 43 of 1998), it is obvious that the essence of s 60(1) has remained unchanged and therefore the principles laid down in the previous authorities should nevertheless remain applicable to the present case.

The requirements which must be satisfied before a s 60 application can be allowed are set out clearly in the words of the section itself. These requirements can be summarised as follows:

(i) There must be a question of law.

(ii) This question of law must be one of public interest and not of mere personal importance to the parties alone.

(iii) The question must have arisen in the matter dealt with by the High Court in the exercise of its appellate or revisionary jurisdiction.

(iv) The determination of the question by the High Court must have affected the outcome of the case.

It should be borne in mind that where the application is brought by any party other than the Public Prosecutor, the power of the High Court under s 60 is discretionary in nature. This means that, even if all the above requirements have been satisfied, the court still retains the discretion to disallow a reference to the Court of Appeal.

The above listed conditions have been extensively interpreted and examined by previous local judicial authorities. In all these cases, it has been the common emphasis that the discretion under s 60, SCJA, must be exercised sparingly by the High Court. This is to give recognition and effect to Parliament`s intention for the High Court to be the final appellate court for criminal cases commenced in the subordinate courts. The importance of maintaining finality in such proceedings must not be seen to be easily compromised through the use of such a statutory device. In **Abdul Salam bin Mohamed Salleh v PP** [1990] SLR 301 , 311; [1990] 3 MLJ 275, 280, Chan Sek Keong J [as he then was] had cautioned aptly that:

> *[Section 60, SCJA] is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts.*

Hence, it is imperative that s 60 of the SCJA is utilised only in exceptional cases so as to ensure that the proper purpose of the section is not abused to serve as a form of `backdoor appeal`.

I now turn to consider the questions that were raised by the applicant.

Question (1)(a)

Question (1)(a) was an issue which never arose in the appeal. The test on what constitutes `instigation`, as set out in **PP v Lim Tee Hian** [1992] 1 SLR 45 , was the very test that I had followed and applied in deciding the appeal. The principle that there must be some `active

suggestion, support, stimulation or encouragement to make good the offence of abetment by instigation` was not disputed by either the prosecution or the defence (applicant). I had found on the facts of the case that the conduct of the applicant clearly went beyond `active suggestion` and there was no doubt that the element of `instigation` had been established according to the test laid down in ***PP v Lim Tee Hian*** (supra). This question clearly did not warrant reference to the Court of Appeal as there was no real issue of law arising from it.

Question (1)(b)

Although not expressed directly as such, question 1(b) was in fact a question that dealt with the requisite intention or knowledge of the person abetted and/or that of the abettor, which the prosecution must prove to establish abetment by instigation. This was an issue which I had already addressed and determined when deciding the appeal. In my judgment delivered for the appeal, it was unambiguously stated that it was not necessary for the prosecution to prove that the person abetted had the requisite knowledge or intention for the commission of the principal offence. Neither was it necessary for the abettor to express directly his criminal intention to the person abetted. As was pointed out in my earlier judgment, the answer to this issue could be found by a reference to the plain words of Explanation 3 of s 108 of the Penal Code (Cap 224).

Given the clear wording of the relevant portions of s 108, this was an issue which was free from difficulty or uncertainty and which could be determined by a straightforward application of the statutory provision. There was no reason for me to refer this question to the Court of Appeal for its consideration.

Question 1(c)

This question was rather confusing and it was unclear what the applicant meant exactly in asking `whether the word "***thing*** " in s 107 of the Penal Code as spoken or uttered or done by the abettor is capable in law of two interpretations, one legal and the other illegal`. No clarification was given as to what is the `legal` and `illegal` distinction that is being drawn. In any event, it should be apparent, through simple logical reasoning, that a person can only be guilty of abetment under s 107 of the Penal Code if he is abetting another to do a ` ***thing*** ` that is illegal and which would constitute an offence. A person cannot be guilty of abetment if he is `abetting` another to do a `thing` which is perfectly legal. Therefore, the word `thing` in s 107 must necessarily refer to an act which is illegal. Accordingly, there was no issue at all on the legality of the `thing` done, uttered or said by the abettor. For this reason, I was of the view that this question should not be reserved for the Court of Appeal`s consideration.

Question 2

What the applicant was seeking to suggest in asking this question was effectively that, before passing a sentence a court is duty bound to invite the convicted person to present his mitigating plea. Such a contention must be strenuously rejected. In any case being heard before the court, it is the defence counsel who has a duty to defend the accused, his client. The court has no duty to defend the accused and neither is it obliged to assist the accused in presenting his case. The authorities that were cited by counsel for the applicant were not relevant and in none of them was the proposition suggested by the applicant endorsed. At the conclusion of the hearing of a criminal matter, the impetus is upon the counsel for the accused to bring to the attention of the court all the

mitigating factors and circumstances.

In the present case, the question of mitigation did not arise at all in the course of the appeal. At the end of the hearing of the appeal, I had convicted the applicant of the charge proceeded against him. At that juncture, the prosecution had applied for an outstanding charge [DAC 28312/98] to be taken into consideration for the purposes of sentencing the applicant. The applicant`s consent for the outstanding charge to be considered was duly obtained and the charge was taken into account by the court in passing the sentence on the applicant. I will emphasize that at no point in time did the applicant or his counsel make any attempt to raise any mitigating circumstances in favour of the applicant. Neither was there any objection to the sentence imposed on the applicant. If counsel had required more time to receive further instructions before tendering a plea in mitigation, then such a request should have been made to the court. There was, however, no request at all to present any plea in mitigation on behalf of the applicant. I cannot see how this was a situation whereby the applicant was deprived of an opportunity to tender a mitigating plea. As this issue did not arise at all in the appeal, I decided not to refer it to the Court of Appeal.

Conclusion

After hearing the arguments tendered by counsel for the applicant, I was of the view that there was absolutely no merit in this criminal motion. Instead of focusing on the issues to be addressed in a s 60 application, counsel for the applicant had merely sought to argue the appeal against my decision in the Magistrate`s Appeal. I must reiterate here that the purpose of a criminal motion brought pursuant to s 60 of the SCJA is not to enable a party to bring a `backdoor appeal`. A party`s failure to lodge a notice of appeal within the requisite period does not allow him to then resort to s 60 as a means of bringing the matter further to the Court of Appeal. As the legal requirements of s 60, SCJA, had not been satisfied in the present case, I ordered the motion to be dismissed.

Outcome:

Motion dismissed.