Mathavakannan s/o Kalimuthu *v* Attorney-General
[2012] SGHC 39

Case Number : Originating Summons No 129 of 2012

Decision Date : 27 February 2012

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Subhas Anandan and Sunil Sudheesan (RHT Law LLP) for the plaintiff; Aedit Abdullah and Darryl Soh (Attorney-General's Chambers) for the defendant.

Parties : Mathavakannan s/o Kalimuthu — Attorney-General

Administrative Law – Constitutional Law

27 February 2012

Lee Seiu Kin J:

1 This matter commenced by way of a criminal motion (*viz* Criminal Motion No 81 of 2011), brought by Mathavakannan s/o Kalimuthu ("the Applicant") for the following orders or declarations:

> (1) that the decision by the Director of Prisons to hold that the Applicant's sentence of life imprisonment as commuted by the President equates to the imprisonment for the Applicant's remaining natural life is contrary to the Honourable Court of Appeal's pronouncement in *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 at 861;
>
> (2) that the law applicable on 26 May 1996 (the date of the Applicant's offence) applies to the Presidential clemency (to commute [the Applicant's] death sentence to one of life imprisonment) granted to the Applicant on 28 April 1998; and/or
>
> (3) that there may be such further or other relief as may be deemed just in the circumstances.
>
> [original emphasis omitted]

2 The issue arising in this matter concerns the interpretation of "life imprisonment" in the commutation order of 28 April 1998 made in exercise of the President's commutation powers under s 238 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") (see [19]-[21] below).

3 The Respondent raised a preliminary objection to the commencement of this action by way of a criminal motion. As the Applicant agreed to converting it to an originating summons ("OS"), I do not need to consider the merits of the mode of commencement. The Applicant made an oral application before me for the proceedings to be heard by way of an OS pursuant to O 5 r 14 read with O 15 r 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), with any documents to be regularised accordingly and I granted it. This matter was thus thereafter referred to as an OS, and the Applicant and Respondent were referred to as the "Plaintiff" and "Defendant" respectively.

4 Having read the submissions and heard the oral arguments put forward by both sides, I declared that the President's commutation order for the Plaintiff to be "imprisoned for life" referred to an imprisonment term of 20 years. I now render the grounds of my decision.

Facts

5 The Plaintiff, a Singaporean male currently 33 years of age, and two other accused persons were jointly charged for murder with common intention for an act committed on 26 May 1996. The Plaintiff was aged 18 years 16 days old at that time. On 27 November 1996, the three were tried and convicted in the High Court and were sentenced to suffer death (see *Public Prosecutor v Asogan Ramesh s/o Ramachandren & 2 others* [1997] SGHC 181). The Court of Appeal dismissed the appeal on 14 October 1997 (*Asogan Ramesh s/o Ramachandren and others v Public Prosecutor* [1997] 3 SLR(R) 201). Clemency petitions were thereafter filed by the three convicted persons, but only the Plaintiff's petition (filed on 13 January 1998) was granted.

6 On 28 April 1998, the President of the Republic of Singapore Mr Ong Teng Cheong ("President Ong") commuted the Plaintiff's sentence of death to a sentence of life imprisonment. The commutation order was phrased as follows:

> WHEREAS Mathavakannan K, having been tried at the High Court, Singapore, was on the 27 November 1996, in due form of law convicted of and sentenced to death for the commission of an offence of murder:
>
> AND WHEREAS I have, upon the advice of the Cabinet, decided in the exercise of my prerogative that the said sentence of death passed upon him be *commuted to a sentence of life imprisonment*:
>
> NOW, THEREFORE, I, ONG TENG CHEONG, President of the Republic of Singapore, in exercise of the powers conferred on me by section 238 of the Criminal Procedure Code, *do hereby commute the said sentence of death and order that the said Mathavakannan K be imprisoned for life*.
>
> GIVEN under my Hand and the Seal at the Istana, Singapore, this 28th day of April 1998.
>
> [emphasis added]

7 On 15 November 1999, the Singapore Prison Service ("Prisons") wrote to the Traffic Police telling the officer-in-charge that the Plaintiff had been serving life imprisonment in prison since 4 July 1996.

8 President Ong's term in office ended on 31 August 1999, and he passed away on 8 February 2002.

9 On 14 November 2002, Prisons wrote to the Singapore Armed Forces stating, *inter alia*, that the Plaintiff's tentative date of release was 28 August 2011.

10 On 13 September 2006 and 18 December 2006, two letters were written to Prisons requesting clarification of the Plaintiff's release date. On 28 December 2006, Prisons replied stating that President Ong had commuted the Plaintiff's death sentence to "natural life imprisonment". Counsel for the Plaintiff sought clarification from Prisons via a letter on 4 January 2007, and Prisons said that more time was required to look into the matter. On 5 March 2007, Prisons replied to the Plaintiff, stating that upon clarification with the Attorney-General's Chambers ("AGC"), the commutation of the Plaintiff's death sentence "by the President to life imprisonment should be construed as life imprisonment for his remaining natural life".

11 The Plaintiff's mother subsequently sent a letter to the Minister for Law on 26 October 2010.

Prisons responded on 3 December 2010, stating *inter alia* that the "commutation of death sentence to life imprisonment, effective on 28 April 1998, by the President should be construed as life imprisonment for his remaining natural life".

12 On 28 March 2011, counsel for the Plaintiff wrote in again to the AGC to restate the Plaintiff's case. The AGC replied on 28 July 2011, turning down the Plaintiff's request. The AGC further stated that the Plaintiff would be referred to the Life Imprisonment Review Board.

13 In the circumstances, the Plaintiff filed the present criminal motion (now OS – see [3] above), seeking a determination that the Plaintiff's sentence, commuted by President Ong to life imprisonment, is in effect for 20 years, consistent with the pronouncement of the Court of Appeal in *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 ("*Abdul Nasir*").

The pronouncement in *Abdul Nasir*

14 In *Abdul Nasir*, the Court of Appeal faced the issue of whether life imprisonment meant imprisonment for the remainder of a prisoner's natural life. Although s 45 of the Penal Code (Cap 224, 1985 Rev Ed) defined "life" as denoting the life of a human being, there was a practice that life imprisonment meant 20 years' imprisonment (see *Neo Man Lee v Public Prosecutor* [1991] 1 SLR(R) 918). Since 1954, Prisons had also regarded life imprisonment as meaning a term of 20 years' imprisonment with the possibility of remission. It should also be pointed out that s 57 of the Penal Code at that time provided that the term "imprisonment for life" is to be construed as the equivalent to imprisonment for 20 years in calculating the fractions of terms of punishment. In a landmark judgment considering the proper interpretation of "life imprisonment", the Court of Appeal held that "life imprisonment" ought to be accorded its natural and ordinary meaning, *viz* imprisonment for the duration of the prisoner's natural life (*Abdul Nasir* at [70]).

15 However, the Court of Appeal was mindful of Art 11 of the Constitution of the Republic of Singapore (1985 Rev Ed) ("the Singapore Constitution") which provided that no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed (*Abdul Nasir* at [49]). As such, the Court of Appeal emphasised the need to protect the legitimate expectations of individuals who arranged their affairs according to the expectation that "life imprisonment" would be interpreted as a term of 20 years (*ibid* at [56]). The Court of Appeal was careful to make its interpretation of life imprisonment *prospective*, in the following manner (*ibid* at [70]):

> For the reasons set out above, we concluded that the expression "life imprisonment" or "imprisonment for life" must mean imprisonment for the remaining natural life of the prisoner, unless the legislation has provided otherwise. This judicial pronouncement by us now shall have prospective effect, thereby affecting *only those offences which carry a life sentence committed after the date of delivery of this judgment. However, should the offence be committed before the date of delivery of this judgment, the old practice of 20 years imprisonment would continue to apply to these offenders.* [emphasis added]

16 In this regard, it should be noted that the judgment in *Abdul Nasir* was delivered on 20 August 1997 and the date of the offence committed by the Plaintiff was 26 May 1996.

Parties' arguments

17 Counsel for the Plaintiff raised four points in support of his contention that the Plaintiff's commuted sentence of life imprisonment should be interpreted as a term of 20 years' imprisonment, as

follows:

(a) First, he argued that it was clear from *Abdul Nasir* that for offences committed before the date of the judgment in *Abdul Nasir*, *ie* 20 August 1997, life imprisonment was consistently given the technical meaning of 20 years' imprisonment with the possibility of remission, and that the legitimate and reasonable expectations of the offender should be given due consideration when determining if the prospective approach should be applied. In this case, the Plaintiff's offence was committed before the date of the judgment in *Abdul Nasir*.

(b) Second, he pointed out that on 14 November 2002, Prisons stated that the Plaintiff's "tentative date of release is 28 August 2011".Prisons could only have stated this if it was of the opinion that life imprisonment meant 20 years' imprisonment and was subject to remission; that means that when Prisons applied its mind to President Ong's commutation order, it formed the view that life imprisonment meant 20 years with remission. This led the Plaintiff to believe for a period of almost eight years that he only had to serve 20 years' imprisonment with remission.

(c) Third, the AGC advises the Cabinet, which in turn advises the President to sign a clemency order. It was inconceivable that the AGC, which would have known about the decision in *Abdul Nasir*, would advise the Cabinet that President Ong could ignore *Abdul Nasir*'s ruling and apply the natural life interpretation retrospectively.

(d) Fourth, the Plaintiff had developed the impression that he was facing a 20-year imprisonment term with the prospects of remission should his behaviour remain good. According to counsel for the Plaintiff, the Plaintiff had the legitimate belief that life imprisonment meant 20 years, as bolstered by the various pronouncements by Prisons and the explicit words of the Court of Appeal that *Abdul Nasir* had no retrospective effect.

18 The Defendant took the position that it was inconclusive whether the Plaintiff's commuted sentence of life imprisonment should be interpreted as a term of 20 years' imprisonment, for the following reasons:

(a) First, it was possible that the Court of Appeal's prospective pronouncement in *Abdul Nasir* was not meant to apply to offences that carried the death penalty. Although the Court of Appeal initially remarked broadly that its decision would "affect only offences committed *after* the pronouncement" [emphasis in original] (*Abdul Nasir* at [66]), it subsequently stated that its judicial pronouncement shall affect "only those *offences which carry a life sentence* committed after the date of delivery of this judgment" [emphasis added] (*ibid* at [70]). The Defendant submitted that the Court of Appeal's intention from the plain and ordinary words could have been deliberate: it limited the impact of its pronouncement to the *class of offences* stated, *viz* offences which carried a life sentence. In the present case, the Plaintiff was charged with and convicted of murder with common intention, an offence that carried a mandatory death penalty by virtue of s 302 of the Penal Code. Accordingly, it was not an offence intended to come within the scope of the pronouncement.

(b) Second, it was possible that the Court of Appeal's prospective pronouncement was not meant to apply to commuted life sentences by the President. This argument was premised on the fact that in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*") at [74], the Court of Appeal remarked that the clemency power was a legal power of an extraordinary character, being an act of executive grace and not a legal right. In this regard, the interpretation of a life imprisonment sentence may not only be dependent on the date in which the offence was committed, but also on how the life imprisonment sentence was arrived at. Given the

extraordinary character of the clemency power, the interpretation ascribed to commuted life imprisonment sentences is arguably *sui generis*.

(c) Third, the arguments were equally weighed on the issue of whether the Plaintiff could have had any legitimate expectations of his sentence being construed as being an imprisonment term of 20 years since President Ong commuted his sentence after the decision in *Abdul Nasir*, because:

(i) Any claim to a legitimate expectation must be viewed against the background of the law as it stood at the date of the clemency petition. The clemency petition was filed on 13 January 1998, and therefore the relevant law was imprisonment for one's natural life as decided in *Abdul Nasir*. In this regard, the Defendant pointed out that a legitimate expectation could only arise on the basis of a lawful promise or practice (see *Regina v Secretary of State for Education and Employment*, *Ex parte Begbie* [2000] 1 WLR 1115 at 1125; *Rowland v Environment Agency* [2003] Ch 581 at [69], as approved by the English Court of Appeal in [2005] Ch 1 at [67]). Accordingly, the letter dated 14 November 2002 by Prisons to the Singapore Armed Forces did not create any legitimate expectations, as it would have been *ultra vires* for Prisons to make that representation in the first place.

(ii) It will also be erroneous to say that any claim to legitimate expectation in respect of a commuted sentence is to be viewed from the date the Plaintiff committed the offence, as there is no legal right to clemency.

(iii) However, the Defendant acknowledged that legitimate expectations could have arisen from the prospective pronouncement in *Abdul Nasir* – that once clemency was granted, and once the commuted sentence had been pronounced, there might have been legitimate expectations on what life imprisonment meant *vis-à-vis* the prospective pronouncement in *Abdul Nasir*, *viz* that life imprisonment sentences were to be construed as 20 years' imprisonment if the date of the offence was before the delivery of the judgment.

Decision

19 President Ong had commuted the Plaintiff's sentence under s 238 of the CPC, which reads as follows:

Power to commute punishment

238. The President, acting in accordance with section 8 of the Republic of Singapore Independence Act may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it:

(a) death;

(b) imprisonment;

(c) fine.

20 The basis for s 238 of the CPC was s 8 of the Republic of Singapore Independence Act (Act 9 of 1965, 1985 Rev Ed) ("RSIA"). For the avoidance of doubt, s 8 of the RSIA was subsequently incorporated verbatim into the 1999 Reprint of the Singapore Constitution as Art 22P (see *Yong Vui Kong* at [26] and [171], as well as *Halsbury's Laws of Singapore* vol 1 (LexisNexis, 2008 Reissue) at

para 10.843 n 1). However, as Art 22P of the Singapore Constitution only came into effect on 1 July 1999, at the time of making the commutation order in this case (*viz* 28 April 1998), President Ong was exercising power granted by s 238 of the CPC read with s 8 of the RSIA. Section 8 of the RSIA reads as follows:

> **Grant of pardon**
>
> 8.—(1) The President, as occasion shall arise, may, on the advice of the Cabinet —
>
> (a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;
>
> (b) grant to any offender convicted of any offence in any court in Singapore, *a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender*; or
>
> (c) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.
>
> (2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by subsection (1).
>
> [emphasis added]

21 It is clear from s 8(1)(b) of the RSIA that the power of clemency is untrammelled. The President, acting on the advice of the Cabinet, may, in the exercise of power under s 8 of the RSIA, grant a "pardon, free or subject to lawful conditions", or "any reprieve or respite, either indefinite or for such period as the President may think fit". This meant that the President was empowered to commute a capital sentence to, *inter alia*, an imprisonment term of *any* period. The President was not bound, when commuting a capital sentence, to impose "life imprisonment" in accordance with how that term was understood under the law at the time of the commutation; indeed, it was clearly open to the President to commute a capital sentence to a sentence *lower* than "life imprisonment" (regardless of whether it meant "natural life" or "20 years").

22 The question that arose for determination by this court was therefore the following: What did President Ong, acting on the advice of the Cabinet, intend when commuting the sentence of death imposed on the Plaintiff to an order that the Plaintiff be "imprisoned for life"?

23 It should be noted from the outset that the present OS *did not* require this court to question the merits of President Ong's commutation decision; instead, all that was required was this court's *interpretation* of President Ong's commutation order. Such interpretation of executive orders is within the province of this court. While not dealing directly with the interpretation of executive orders, support for the proposition just made may be found in the principles enunciated in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("*GCHQ*"), *Chng Suan Tze v Minister for*

Home Affairs and others and other appeals [1988] 2 SLR(R) 525 ("*Chng Suan Tze*") and *Yong Vui Kong*. In both *GCHQ* and *Chng Suan Tze*, the UK House of Lords and the Singapore Court of Appeal respectively held that while the executive was the sole judge of what action was necessary in the interests of national security, the courts were nonetheless empowered to determine whether a particular executive decision was in fact based on grounds of national security. Based on the same principles, the Court of Appeal recently held in *Yong Vui Kong* that while the merits of a clemency decision generally fall outside the purview of courts, the procedural safeguards *vis-à-vis* the exercise of clemency power were amenable to judicial review (*Yong Vui Kong* at [75]-[85]). Indeed, reasoning from the decision in *Yong Vui Kong*, it may be said that the logically prior step before a court is able to judicially review whether the requisite procedural safeguards have been complied with *vis-à-vis* the exercise of clemency power will probably involve an interpretation of the clemency order itself.

24 In the present case, President Ong could have meant one of two things when commuting the capital sentence to an order for the Plaintiff to be "imprisoned for life", *viz* either (a) that the Plaintiff would suffer imprisonment for 20 years under the pre-*Abdul Nasir* regime given, *inter alia*, that the offence was committed *before* the date of the *Abdul Nasir* judgment; or (b) that the Plaintiff would suffer imprisonment for the rest of his natural life under the *Abdul Nasir* regime given, *inter alia*, that the commutation took place *after* the *Abdul Nasir* judgment.

25 There is therefore an ambiguity over what exactly President Ong meant when he ordered that the Plaintiff be "imprisoned for life". Against the backdrop of such ambiguity, it was necessary for me to decide which of the two interpretations President Ong had intended. I should point out that the Defendant did not produce any evidence as to what President Ong had meant by the term "life imprisonment" when he made the commutation order.

26 As is evident from [17]-[18] above, the arguments supporting each of the two interpretations were finely balanced. This was acknowledged by the parties, and in particular, the Defendant. In my view, due to the significant change in the law as of the date of the *Abdul Nasir* decision, and the fact that it was unclear whether *Abdul Nasir* applied to a case such as the present, it is inconceivable that the legal advisors to President Ong and the Cabinet would not have recommended expressing the commutation order in clearer terms if it was intended for the Plaintiff to be imprisoned for the rest of his natural life. This was especially so given that the long established practice of interpreting "life imprisonment" as an imprisonment term of 20 years (see [14] above) was only changed eight months prior to President Ong's commutation order.

27 Furthermore, any interpretation of President Ong's commutation order ought also to be guided by the principle of strict construction, *viz* that penal statutes are to be strictly construed to lean in the accused's favour (*Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 ("*Low Kok Heng*") at [31], citing *Tuck & Sons v Priester* (1887) 19 QBD 629). The historical origins of this principle lay in English capital cases, where the construction of an ambiguous law *in favorem vitae* was regarded as a form of fairness to the individual (*Low Kok Heng* at [32]). It is clear that the principle of strict construction still exists in Singapore law today (*ibid* at [35]). I see no reason why this principle should not apply in the circumstances of the present case. Indeed, the construction of President Ong's commutation order *in favorem vitae* would – in line with the rationale for the principle of strict construction – constitute a form of fairness to the individual, especially in a case such as the present where there are serious implications on the Plaintiff's liberty depending on the particular interpretation taken and that he had, at least since 2002, been given indication that his capital sentence had in effect been commuted to 20 years' imprisonment (see [9] above).

28 For the reasons given above, I held that the proper interpretation of President Ong's order for the Plaintiff to be "imprisoned for life" was that it was to be for a term of imprisonment of 20 years.