Nicholas Kenneth v Public Prosecutor
[2002] SGHC 279

Case Number : MA No 210 & 211 of 2002

Decision Date : 22 November 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Appellant in person; Lee Yee Leng Eugene (Deputy Public Prosecutor) for the respondent

Parties : —

Criminal Procedure and Sentencing – Sentencing – Appropriate length of preventive detention

Criminal Procedure and Sentencing – Sentencing – Power of court in deciding commencement of subsequent sentence of preventive detention when an accused is undergoing a sentence of preventive detention – Criminal Procedure Code (Cap 68, 1985 Rev Ed) ss 12(2), 234(1)

Statutory Interpretation – Construction of statute – Purposive approach – Interpretation Act (Cap 1, 1997 Rev Ed) s 9A(1)

Judgment

GROUNDS OF DECISION

Introduction

The appellant, Kenneth Nicholas ('Kenneth') faced a total of seven charges for a variety of offences before the district courts. In DAC No 15228 of 2002 & 4 ors, he pleaded guilty to four charges and agreed to have the fifth charge taken into consideration before district judge Audrey Lim. In DAC No 15227 of 2002 & anor, he pleaded guilty to a further two offences before district judge Mavis Chionh. On the morning of 12 August 2002, he was sentenced by district judge Lim to 20 years' preventive detention and a total of 12 strokes for the offences in DAC No 15228. Later that afternoon, district judge Chionh ordered that Kenneth serve a sentence of 20 years' preventive detention and suffer three strokes of the cane for the offences in DAC No 15227. The district judge also ordered that both terms of preventive detention imposed by district judge Lim and by herself should run from the date of the sentences. This meant that Kenneth would effectively serve a total of 20 years' preventive detention. Kenneth, being dissatisfied with the decisions in DAC No 15228 and DAC No 15227 appealed against the sentences in both cases.

Undisputed facts

2 In DAC No 15228, Kenneth was charged with five offences. The first charge alleged that he had kidnapped N, a nine-year old girl, at about 10:30 pm on 22 May 2001, an offence punishable under s 363 of the Penal Code (Cap 224). By the second charge, he was accused of using criminal force with intent to outrage N's modesty, by touching her chest region including her breast with his hand, contrary to s 354. By the third charge, Kenneth was accused of another offence under s 363 for kidnapping Q, a five-year old girl, on 20 December 2001, at about 10:30 pm. Fourthly, he was charged with using criminal force with intent to outrage her modesty, by inserting his finger to her vulva and causing fear of instant hurt to Q, an offence punishable under s 354A(2)(b) of the Penal Code. Kenneth pleaded guilty to all of these offences. Finally, he also consented to having the fifth charge brought against him taken into consideration. That charge alleged that he voluntarily caused hurt to Q by slapping her on the face, an offence punishable under s 323 of the Penal Code.

3 In her grounds of decision, district judge Lim set out the facts relating to the four charges which Kenneth pleaded guilty to as follows:

The statement of facts for the first and second charges

4 On 22 May 2001, at about 10.00 p.m., [N] had left her flat to go to the provision shop to buy some bread. As she was leaving the shop and walking home, Kenneth approached her and told her that he had arranged with her father for her to follow him. [N] agreed as she was unaware that Kenneth had deceived her and was abducting her. They walked towards the bus stop and boarded a bus. Whilst in the bus, Kenneth used his hand to touch her chest and breast. She felt uneasy and tried to move away but failed. During the journey, he also gave her a few tablets to consume. She felt drowsy and passed out. When she regained consciousness, she found herself stranded at MacRitchie Reservoir. A passer-by found her and alerted the police. Kenneth was subsequently arrested on 27 December 2001.

The statement of facts for the third and fourth charges

5 On 20 December 2001, [Q]'s mother was selling durians at a makeshift stall at Redhill Close. [Q] and her elder sister played in the vicinity whilst accompanying their mother. Subsequently [Q] became separated from her elder sister and was left alone. At about 10.30 p.m., Kenneth approached her and forced her to follow him, carrying her on his shoulders. She cried for help but to no avail. Kenneth brought her to Redhill MRT station and boarded the MRT to Pasir Ris where he brought her to his home. He made [Q] lie beside him on the bed, removed her clothes, fondled her groin area and inserted his finger to her vulva. He then masturbated himself and ejaculated in her presence. The next morning, he brought her to the MRT station and they took the MRT to Redhill, where they alighted. He then left her by herself and disappeared. [Q] walked to the hawker centre in the vicinity of Redhill Close and a stranger brought her home.

4 In DAC No 15227, Kenneth pleaded guilty to kidnapping Z, a seven-year old girl, on 25 December 2001, at about 1 am, contrary to s 363 of the Penal Code. District judge Chionh set out the facts relating to this offence, in her judgment, as follows:

> 3 …..The victim, [Z], is 7 years old. On 24 December 2001, she was at Singapore General Hospital (SGH) with [Z's father] and other family members. They were visiting the victim's grandmother who was then warded in Ward 46. At about 11 pm that day, the victim and her father fell asleep on the couch at the visitors' waiting area outside Ward 46.
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> 4 At about 1 am on 25 December 2001, the accused came to Ward 46. He carried the victim out of the ward and took her home in a taxi. Once home, he took her into his room where she fell asleep on his bed, next to him.
>
> 5 Sometime later that morning, the accused brought the victim back to SGH in another taxi. The victim subsequently met her father in the vicinity where she was dropped off by the accused.

5 Kenneth also pleaded guilty to a charge of having two prohibited publications, a "Playboy" magazine and a "Penthouse" magazine, in his possession, contrary to s 6(2) of the Undesirable Publications Act. The police found the magazines in his house when they searched it on 29 December 2001.

6 The facts relating to all the offences that Kenneth was charged with were not in dispute. For the purposes of these appeals, I adopted the facts as set out in the judgments of both the district judges.

The decisions below

7 Both of the district judges found that Kenneth was a great danger to society at large. Consequently, they were of the view that the maximum period of preventive detention, ie 20 years, was the appropriate sentence in their respective cases.

8 District judge Lim reasoned, in her grounds of decision, as follows:

> … It is clear from Kenneth's antecedents that he is indeed a menace to society. Now 49 years old, his criminal career began in 1972 and he has chalked up a total of 19 offences, not including the present offences before me.
>
> 10 Indeed his history of kidnapping and molesting young children is very disturbing. His first offence for outraging modesty began in 1980, and in 1986 he had already garnered a string of kidnapping offences with outraging of modesty and criminal intimidation. He repeated his criminal acts again when he was dealt with for another string of offences in 1993 for outraging the modesty of children under the age of 14 and was sentenced to eight years' preventive detention and eight strokes of the cane. Shortly after his release from preventive detention, he committed similar offences again, which formed the charges before me….It is clear that the previous term of preventive detention had not deterred him from repeating such heinous activities and he continues to pose a grave threat and danger to the public at large, especially to young children. Indeed, the preventive detention report also found Kenneth to be at high risk of sexual offending.

9 District judge Chionh gave the following reasons for sentencing Kenneth to a period of 20 years' preventive detention. In her judgment:

> 15 In the present case, apart from the accused's plea of guilt, there were no mitigating factors. The alleged misery of his childhood as well as his emotional and mental problems did not hold any real mitigatory value. Moreover, any mitigatory value due to his plea of guilt was far outweighed by the element of public interest. Having considered the accused's previous record as well as the facts of the present offences, I was of the view that he was a menace to society. The preventive detention report, which found the accused to be at high risk of sexual re-offending, confirmed my view. Indeed from the report, it was clear that the accused lacked any sort of remorse or insight insofar as his criminal activities were concerned:

> according to the prison psychiatrist, he attempted to minimise the consequences of his actions, and instead, blamed "alcohol and his hallucinations".
>
> 16 In short, preventive detention was plainly called for in the interest of protecting the public – and especially young females – from the accused. Bearing in mind the fact that the accused committed the present offences shortly after his release from eight years' preventive detention, I decided that the maximum period of preventive detention was warranted.

10 Furthermore, district judge Chionh ordered that the sentence which she imposed on Kenneth commence on the same day as the sentence imposed by district judge Lim, ie 12 August 2002.

11 Kenneth was sentenced to three strokes of the cane for each of the four charges before district judge Lim to reflect the severity of the offences which he committed. District judge Chionh also sentenced Kenneth to three strokes of the cane on the kidnapping charge before her for the same reason.

The appeal

12 Kenneth appealed against the sentences of preventive detention meted out to him in both cases. He claimed that he was remorseful and promised not to re-offend. Furthermore, he asked the Court to consider his appeal favourably because of his age, the fact that he was doing church work and as his family needed him.

13 The prosecution submitted that the total sentence of 20 years' preventive detention and 15 strokes of the cane imposed by the district judges was not manifestly excessive, taking into account the aggravating manner in which the offences were committed, Kenneth's previous antecedents, his propensity to commit sexual offences against young and vulnerable girls and the need to protect the general public from such a menace to society.

The law

14 At the outset, it was necessary to consider a novel point of law that was raised as a result of the factual matrix of these appeals. Kenneth had been sentenced by district judge Lim to 20 years' preventive detention on 12 August 2002 which ran from the date of the order. Thus, he was already undergoing a sentence of preventive detention when he appeared before district judge Chionh later in the same day. She decided that, in such circumstances, the court had to order that the two sentences of preventive detention that were meted out to Kenneth must run concurrently. The issue that had to be decided was whether the court was limited to ordering that a subsequent sentence of preventive detention should run concurrently with the other sentence of preventive detention that the accused was undergoing.

15 The only provision in the Criminal Procedure Code (CPC) that deals with the commencement of subsequent sentences when the accused is serving another sentence is s 234(1). Thus, it was necessary to construe the ambit of this section to resolve the issue before me. It reads:

> When a person who is an escaped convict or is undergoing a *sentence of imprisonment* is sentenced to imprisonment

> the latter sentence of imprisonment shall commence either immediately or at the expiration of the imprisonment to which he was previously sentenced as the court awarding the sentence directs. (my emphasis)

16 The principles governing the interpretation of statutes are as follows: s 9A(1) of the Interpretation Act makes it imperative that the court adopts a purposive construction of a provision, and not merely a literal interpretation. That section reads:

> In the interpretation of a provision of written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

17 In *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201, I delivered the judgment of the Constitution of the Republic of Singapore Tribunal and elaborated on how statutory interpretation should be carried out, in the following words, at p 210:

> It is well established …that a purposive interpretation should be adopted in interpreting the Constitution to give effect to the intent and will of Parliament. The principle to be applied is that the words of the Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: EA Driedger, *Construction of Statutes* (2nd Ed, 1983) p 87

18 The court also decided that, by s 9A(1) of the Interpretation Act, a purposive construction of a statutory provision should be adopted over a literal interpretation that does not support the purpose and object of the written law, even if the wording of the statute is not ambiguous or inconsistent. At p 211 of my judgment, I quoted with approval the following judgment of Dawson J in *Mills v Meeking* (1990) 169 CLR 214:

> …. the approach required by s 35 [which corresponds with s 9A(1)] needs no ambiguity or inconsistency; *it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction*. Reference to the purposes may reveal that the draftsman had inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. (my emphasis)

This approach has been followed in numerous local cases, notably, the decisions of the Court of Appeal in *L & W Holdings Pte. Ltd. v Management Corporation Strata Title Plan No 1601* [1997] 3 SLR 905 and of the High Court in *PP v Knight Glenn Jeyasingam* [1999] 2 SLR 499.

19 Bearing these principles in mind, I considered the construction of s 234(1) of the CPC. In my view, on a literal reading of the subsection, s 234(1) does not apply when the accused is a person

undergoing a sentence of preventive detention as it only refers to offenders who are undergoing a "sentence of imprisonment". A sentence of preventive detention is not a "sentence of imprisonment", even though persons sentenced to preventive detention are often, in practice, detained in prison. In *Yusoff bin Hassan & Ors v PP* [1992] 2 SLR 1032, I drew a distinction between the two sentencing options for the following reasons: first, s 12(2) of the CPC, the provision which empowers the court to order a sentence of preventive detention states that such sentences are passed "in lieu of any sentence of imprisonment"; secondly, there are different rules relating to the nature and termination of custody for sentences of imprisonment and preventive detention. Sentences of imprisonment are governed by the Prisons Act and its regulations, while sentences of preventive detention are governed by the Criminal Procedure (Corrective Training and Preventive Detention) Rules. There is usually a one-third period of remission for sentences of imprisonment, but not for terms of preventive detention. Consequently, a literal reading of s 234(1) would mean that the court is not empowered to order that a sentence of preventive detention should start at the expiration of another such sentence that the accused is undergoing.

20 Hence, the literal reading of s 234(1) reveals that the draftsman had overlooked the provision of rules to deal with the issue of when a subsequent sentence of preventive detention should commence if the accused is already serving another sentence of preventive detention. Section 12(2) of the CPC is also silent on this issue. It states that the court may order a term of preventive detention of not more than 20 years in one trial but does not deal with a situation where there are two separate trials in which sentences of preventive detention are warranted. Furthermore, an examination of the rest of the CPC showed that there are no specific provisions addressing this issue.

21 In these circumstances, it was my duty to consider the purpose of s 234(1) in the context of the CPC as a whole to determine if there was more than one possible construction of the section and, if so, to repair the defect in drafting. By s 234(1), the court is given an option to order that an offender effectively serve out the entire length of imprisonment over and above another sentence that he is serving if such a sentence is warranted in the circumstances of a subsequent trial. In my view, the intention of Parliament in passing s 234(1), was to ensure that the courts have the power to ensure that the aggregate sentence that is imposed on an offender through multiple trials is reflective of the seriousness of the offences that formed the basis of subsequent trials when an offender is already serving a sentence. In other words, I took the opinion that Parliament did not intend to tie the hands of the court, such that it can *never* order consecutive sentences of preventive detention in whatever circumstances, even if a longer aggregate sentence is necessary, to reflect the extent to which an offender is a menace to society and the severity of the offences which formed the basis of the subsequent trial. Accordingly, a construction of s 234(1) that fulfils the intention of Parliament is that the section applies equally to offenders who are serving a sentence of imprisonment or preventive detention so that the court has the same options in determining the commencement of subsequent sentences in both cases.

22 By s 9A(1) of the Interpretation Act, it was necessary for me to adopt the purposive construction of s 234(1) over the literal interpretation of the subsection, which does not promote the objects of the subsection. The purposive construction of s 234(1) is consistent with logic, the intention of Parliament and the context of the words in s 234(1). On the other hand, the literal interpretation of s 234(1) restricts the court's options in sentencing and leads to an absurd result. An illustration of the absurdity which may arise from a literal reading of s 234(1) is this: A person, who has a history of committing sexual offences, has been tried, convicted and sentenced to preventive detention of 15 years for three offences of outrage of modesty. He has just started serving his sentence when the police subsequently discover that he was responsible for a string of serious sexual offences, for example rape. He is convicted for the subsequent offences, which of themselves warrant the maximum sentence of preventive detention of 20 years. By a literal reading of s 234(1),

the court does not have the power to order that the latter sentence run after the expiration of the first sentence and it is effectively limited to ordering slightly more than an additional five years of preventive detention. Such a sentence does not truly reflect the extent to which the offender is a menace to the public, based on the convictions in the subsequent trial. The offender effectively obtains a "discount" on the actual period of preventive detention that he would otherwise have to serve on the facts of the second trial, on account of the fact that he is already undergoing preventive detention.

23 At this juncture, I turned to consider the counter arguments which may be raised against the purposive interpretation of s 234(1). I noted that, although district judge Chionh ruled that she was not empowered to order that the sentence which she imposed on Kenneth run at the expiration of the sentence of preventive detention he was undergoing, she did not give reasons to support her decision. Nevertheless, I found that there were two potential sources of concern in adopting the purposive interpretation of s 234(1). First, that the courts would be empowered by a purposive reading of the subsection to impose longer aggregate sentences of preventive detention in excess of 20 years and that such sentences, which have never been imposed previously, may be too crushing. Secondly, another concern was that strategic decisions as to whether a string of offences should be prosecuted in a joint trial or separate trials, which should not affect sentencing, would influence the maximum aggregate sentence of preventive detention that a court can order. This is an incidental result of the purposive interpretation of s 234(1) which empowers the court to order an aggregate sentence that far exceeds the maximum limit of 20 years that can be imposed in a joint trial, if the prosecution of the offences are heard in separate trials.

24 I was of the view that these concerns should not prevent me from adopting the interpretation of s 234(1) that fulfills the intention of Parliament due to the supremacy of s 9A(1) of the Interpretation Act. In any case, the concerns did not detract from the need for the courts to have the power to order that sentences of preventive detention meted out in separate cases run consecutively, so that it may be exercised in cases which warrant it. The concerns actually relate to the consequences of the potential wrongful exercise of such a power and not its existence. However, the potential harm that may occur in the exercise of the power cannot be a good reason for the total rejection of this power. The solution should be a careful application of the power to the facts, such that consecutive sentences of preventive detention are only imposed in appropriate cases. Undoubtedly, in the exercise of their powers, the courts would apply caution and balance sentencing objectives to ensure that the aggregate sentence passed is not any more or less than a sentence that is reflective of the extent to which the offender is a menace to society.

25 Insofar as the concerns stemmed from the notion that the courts should not be empowered to sentence offenders to an aggregate term of preventive detention in excess of 20 years, they must be rejected as such a notion is without legal premise. Section 12(2) does state that the maximum sentence in *one trial* is 20 years. The power to impose an aggregate sentence of more than 20 years when there are multiple sentences of preventive detention ordered in *separate trials* is in no way inconsistent with the CPC.

26 In conclusion, it was my duty to "repair the omission" which resulted from the draftsman's failure to provide rules for the commencement of subsequent sentences of preventive detention when an offender is already serving a sentence of preventive detention. I adopted the purposive interpretation of s 234 of the CPC and ruled that the section also applies to persons who are undergoing a sentence of preventive detention. Accordingly, a court that is faced with sentencing an offender who is already undergoing a sentence of preventive detention has the same options as if the offender is undergoing a sentence of imprisonment, i.e. it can order that the subsequent period of preventive detention commence on the date of the judgment or at the expiry of the earlier sentence

of preventive detention. In exercising its powers, the court would only order that sentences of preventive detention run consecutively if it was necessary to reflect the extent to which he is a threat to the community.

The appropriate sentence in this case

27 Kenneth started his life of crime in 1972 when he was about 19 years old. He had a disturbing history of kidnapping and molesting young children. In 1980, he was first convicted of and fined for one charge of outrage of modesty. Subsequently, in 1986, he was convicted of two charges of kidnapping, with a further charge taken into consideration, one charge of outrage of modesty and one charge of criminal intimidation, with another taken into consideration. A total sentence of 12 months' imprisonment was imposed on him. After his release, he did not keep away from his criminal activities for long. In 1993, he was hauled back to court to face eight counts of outraging the modesty of a child under the age of 14, contrary to s 354A(2)(B) of the Penal Code. He was convicted on four of the charges and the rest of the charges were taken into consideration. At that stage, he had already qualified for a sentence of preventive detention as he was found to be a menace to society and the judge imposed a sentence of eight years' preventive detention on him, in addition to eight strokes of the cane.

28 The period of incarceration for preventive detention obviously did nothing to deter him from committing his most recent string of similar offences which formed the basis of the present charges against him. Barely two months after his release from preventive detention in March 2001, Kenneth struck again by kidnapping and molesting N. In December 2001, he repeated his abominable pattern of crime by kidnapping and molesting yet another two young and vulnerable girls, Q and Z just days apart from each other. Kenneth's record of kidnapping and outraging the modesty of young and vulnerable victims was the clearest illustration of his recalcitrant nature.

29 The preventive detention report and the various medical reports on him also supported the conclusion that Kenneth was incorrigible. In the preventive detention report, he was found to have a high risk of sexual re-offending. In the medical reports, the doctors concluded that he had "an abnormal sexual drive directed at pre-adolescent girls" and he suffered from "deviant sexual behaviour". In the latest report dated 16 May 2002 by a psychiatrist on Kenneth, he was described as a person who "never got his act together as an adult and was a "basket case" collecting psychiatric and social disabilities….".

30 Kenneth's repeated re-offending showed that he was beyond redemption. He was completely unable to exert any form of self-control over his sexual behaviour. Such a failure would invariably find expression in the heinous crimes of kidnapping and molesting young girls. Undoubtedly, he posed a great threat to society, particularly as his targets were young girls who were unable to fend for themselves. His crimes had already caused many families and young girls to suffer a great deal of trauma. As he demonstrated no ability to control himself, it was necessary to sentence him to a suitably long period of preventive detention to take him out of circulation for as long as it was necessary for the protection of society.

31 Both district judges Lim and Chionh decided that the offences that Kenneth had committed and which formed the basis of the charges before them individually warranted the imposition of the maximum sentence of 20 years' preventive detention.

32 Kenneth submitted that this Court should consider the following factors, ie his age; the hardship that his family would suffer due to his incarceration; his church work; his claims of remorse and his promise that he would not re-offend. After considering Kenneth's numerous antecedents and

his medical reports, I was unconvinced that he would not re-offend or that he felt genuine remorse about his crimes. In any case, in meting out sentences of preventive detention, the primary consideration is the need to put away persons who are deemed to be a menace to society for the safety of the community at large: *Yusoff bin Hassan & 4 Ors v PP.* Consequently, in light of the manifest need to protect the public from him, the factors mentioned by Kenneth could not be used to reduce the terms of preventive detention that were imposed on him.

33 After a review of all the relevant facts in relation to MA 211 of 2002 and the reasons given by district judge Lim in imposing 20 years' preventive detention on Kenneth, I ruled that the district judge had ample reasons to support her decision, that he was such a menace to society that he should be locked away for 20 years in preventive detention, and I upheld her decision.

34 However, I did not agree with district judge Chionh's decision to sentence Kenneth to 20 years' preventive detention that would run concurrently with his earlier sentence, such that he would effectively serve only 20 years' preventive detention. By the offences that Kenneth pleaded guilty to in the first trial, his conduct already warranted a maximum term of 20 years' preventive detention. Over and above those offences, he kidnapped another young and vulnerable victim, Z, which proved that he was such a great menace to the public that he should be locked away for more than the 20 years in aggregate for the community's protection. This was particularly because Kenneth was only 49 years old at the time of these appeals. An aggregate sentence of only 20 years would mean that he would be released when he is 69, an age when he would still be capable of harming more victims. Accordingly, I ordered that the sentence imposed on Kenneth for MA 210 of 2002 would commence only at the expiration of the sentence of 20 years' preventive detention that he was undergoing. However, I reduced the sentence that he must serve for the offences in DAC 15227 to ten years since he had only been found guilty of one more offence of kidnapping. This meant that the aggregate sentence of preventive detention that Kenneth must serve would be 30 years and that he would be taken out of circulation until he is 79 years old with a probably reduced libido.

Conclusion

35 For the above reasons, I dismissed the appeal in MA 211 of 2002. However, I allowed the appeal in MA 210 of 2002 and reduced the term of preventive detention imposed on Kenneth from 20 years to ten years. Furthermore, I ordered that the sentence of ten years' preventive detention would only commence on the expiration of the sentence in MA 211 of 2002, ie the aggregate period of preventive detention would be 30 years. I also ordered that the sentences of three and twelve strokes of the cane in MA 210 and MA 211 of 2002 respectively, were to remain.

Sgd:

YONG PUNG HOW

Chief Justice

Republic of Singapore