Public Prosecutor *v* Shaik Alaudeen s/o Hasan Bashar
[2013] SGHC 44

Case Number	: Criminal Revision No 23 of 2012
Decision Date	: 21 February 2013
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Adrian Loo and Marcus Foo (Attorney-General's Chambers) for the applicant; S K Kumar (S K Kumar Law Practice LLP) for the respondent.
Parties	: Public Prosecutor — Shaik Alaudeen s/o Hasan Bashar

Criminal Procedure and Sentencing

21 February 2013 Judgment reserved.

Choo Han Teck J:

1 This is a petition for criminal revision brought by the Public Prosecutor to amend a charge under which the respondent was convicted and to record a conviction for the amended charge. The respondent was convicted of the following charge in DAC 15898/2002 (the "Original Charge") after pleading guilty on 10 May 2002:

> You
>
> **NAME: SHAIK ALAUDEEN S/O HASAN BASHAR**
>
> ... are charged that you, on the 24th day of March 2002, in Singapore, did *consume a controlled drug* specified in Class 'A' of The First Schedule of The Misuse of Drugs Act, Chapter 185, *to wit, Morphine*, without authorisation under the said Act or the Regulations made thereunder and you have thereby committed an offence under Section 8(b) and punishable under Section 33 of the Misuse of Drugs Act, Chapter 185.
>
> [emphasis added]

The respondent was sentenced to 18 months' imprisonment for the Original Charge and has served his sentence in full. The Public Prosecutor requested me to exercise my revisionary powers under s 268 read with s 256(b) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") to amend the Original Charge of consuming a *controlled* drug under s 8(b)(i) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA") to a charge of consuming a *specified* drug under s 8(b)(ii) of the MDA and to record a conviction on the amended charge. Section 8(b) of the MDA provides as follows:

> **8**. Except as authorised by this Act, it shall be an offence for a person to —
>
> ...
>
> (*b*) smoke, administer to himself or otherwise consume —

(i) a controlled drug, other than a specified drug; or

(ii) a specified drug.

At the date of the commission of the offence, 24 March 2002, morphine was classified as a specified drug.

2 The respondent is presently charged with six charges of consuming a specified drug under s 8(b)(ii) read with s 33A of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). Section 33A states:

> **33A**.—(1) Where a person who has not less than —
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> ...
>
> (d) one previous admission and one previous conviction for consumption of a specified drug under section 8(b);
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> ...
>
> is convicted of an offence under section 8(b) for consumption of a specified drug or an offence of failure to provide a urine specimen under section 31(2), he shall on conviction be punished with —
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> (i) imprisonment for a term of not less than 5 years and not more than 7 years; and
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> (ii) not less than 3 strokes and not more than 6 strokes of the cane.

The six pending charges are brought under s 33A(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) on the basis that the respondent had one previous drug rehabilitation centre admission for the consumption of morphine and one conviction under the Original Charge for consumption of a specified drug, *ie*, morphine.

3 The Deputy Public Prosecutor ("DPP") submitted that the conviction under the Original Charge was erroneous as the court had no jurisdiction under s 8(b)(i) to order a conviction for the offence of consumption of a controlled drug which is also classified as a specified drug. The DPP argued that the amendment of the Original Charge to one under s 8(b)(ii) is merely a technical one that would not prejudice the respondent. Counsel for the respondent contended that the amendment would prejudice the respondent as he would be liable as a repeat offender under s 33A(1) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), which attracts a more severe minimum sentence.

4 I agree with the DPP that the Original Charge was erroneously preferred against the respondent as there is no such offence in law. However, I cannot accede to the DPP's submission that prejudice should be assessed only with regard to the proceedings relating to the Original Charge and that no prejudice would be occasioned to the respondent should the Original Charge be amended to one of consumption of a specified drug. The DPP relied on *Garmaz s/o Pakhar v PP* [1996] 1 SLR(R) 95 ("*Garmaz*"), where the Court of Appeal held that the court could exercise its powers under s 256(b) of the CPC to amend a charge if the proceedings at trial would have taken the same course and the evidence recorded would have been substantially unchanged; the amendment would not prejudice the accused if these two tests were met. First, I do not find – based on the sparse evidence before me – that the two tests were self-evidently satisfied on the facts. The Prosecution cannot merely assert that there would be no prejudice to the respondent because the *actus reus* and *mens reas* under s 8(b)(i) and s 8(b)(ii) are identical. The respondent had pleaded guilty only to the precise charge

before him, *ie*, consumption of a controlled drug. I am not in the position to assume that he would have pleaded guilty to the amended charge and that the proposed amendment would therefore not be to his detriment. The Prosecution is not entitled to amend a charge after an accused has pleaded guilty and thereafter claim that there would in any event be no prejudice as the elements for the amended charge are similar, unless the accused has no objections.

5 Secondly, I do not think that *Garmaz* is authority for the proposition that the courts, in exercising its revisionary powers to amend a charge, ought *only* to consider the retrospective counterfactual of what would have happened at trial and disregard the potential prejudice in subsequent proceedings. *Garmaz* arose in the context of the court exercising its appellate jurisdiction and the inquiry was naturally confined to prejudice arising from the immediate proceedings. In contrast, the High Court's revisionary power is a broad discretionary one that is exercised when there is serious injustice that warrants intervention: see *Ang Poh Chuan v Public Prosecutor* [1995] 3 SLR(R) 929 at [17]. Prejudice is a proxy for assessing serious injustice and should not be construed narrowly or mechanistically, but in a practical way that takes into account the entire context of the exercise of the powers of revision. I am not persuaded by the DPP's circular argument that if the court were to consider prejudice in subsequent proceedings, the Prosecution would never be able to amend an erroneous charge where the result of the amendment would be to render the accused liable to enhanced punishment. The simple answer is that the Prosecution cannot insist as of right that the respondent bears the consequences of its own mistake unless the Prosecution is able to show that this mistake would amount to a serious injustice if left uncorrected. Adopting a broad approach to prejudice, it is plain that the sole object of this petition is to reflect a conviction under s 8(b)(ii) such that the respondent would be liable for an enhanced minimum sentence of five years on his pending charges. The intended effect is clearly to create prejudice to the respondent by placing him in a position where his potential legal liability is increased.

6 Section 268 of the CPC does not require me to make an order merely because there is a defect or error in a conviction recorded by the subordinate court. In the present case, the onus was on the DPP to satisfy me that there was some palpable wrong or injustice to the Prosecution that had to be remedied notwithstanding the prejudice that would be suffered by the respondent. The DPP did not explain why there was a miscarriage of justice or why the public interest in the administration of justice was undermined by the erroneous Original Charge, and could only point to the fact that it was "necessary" because the respondent was presently facing new charges under s 8(b)(ii) and the Original Charge should be substituted with one that accurately reflected the respondent's antecedent. It may well be necessary or desirable, but this does not mean that it reaches the threshold of serious injustice, and I would add that the trial judge for the pending charges is not precluded from taking into consideration the relevant nature of the Original Charge in sentencing even if the respondent does not fall within s 33A(1) of the MDA. Thus the DPP did not discharge the onus on him to show why this revision was necessary. Further, the respondent pleaded guilty to the Original Charge in 2002 and this petition for revision was brought ten years later. This is by any account an inordinate delay that weighs against the exercise of my discretion. I also do not think that the cases of *PP v Shah Irwan Bin Sulaiman* (CR No 11 of 2012) or *PP v Rudy Rendy bin Fadly* (CR No 21 of 2012) assist the Prosecution. In both cases, the respondents did not object to the criminal revision, and neither is a compelling precedent for the proposition that the amendment of an erroneous charge is always in the interests of justice. There is thus nothing exceptional in the circumstances that warrants the exercise of my revisionary powers.

7 For the foregoing reasons, I dismiss the petition.