Public Prosecutor *v* Ong Gim Hoo
[2014] SGHC 60

Case Number : Criminal Revision No 3 of 2014

Decision Date : 04 April 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tan Yanying (Attorney-General's Chambers) for the applicant; Patrick Chin (Chin Patrick & Co) for the respondent.

Parties : Public Prosecutor — Ong Gim Hoo

Criminal Law – Statutory offences – Customs Act

Criminal Procedure and Sentencing – Revision of proceedings

4 April 2014 Judgment Reserved.

Choo Han Teck J:

1 The respondent in this Criminal Revision was charged with four charges (DAC 31609 of 2013 to DAC 31612 of 2013) for offences under the Customs Act (Cap 70, 2004 Rev Ed) ("CA"). Proceedings with respect to these four charges are currently underway before the State Courts. The respondent is currently on bail, and his matter is scheduled for a Pre-Trial Conference on 28 March 2014.

2 The applicant brings this Criminal Revision, however, to "amend two convictions" recorded against the respondent in 2012. For the purpose of this judgment, when I use the term "amend convictions" I refer to the process of setting aside a recorded conviction, framing an altered charge, and subsequently convicting the individual on the altered charge. I will discuss the complexities inherent in such a process below at [4]. In 2012, the respondent pleaded guilty to two charges of "[o]ffences in relation to possession, storage, conveying and harbouring of goods" under s 128I of the CA. These were charges DAC 33656/2012 and DAC 33689/2012. I set out the charges below to show the exact amendment sought. The first charge, DAC 33656/2012, read:

> You, ***ONG GIM HOO*** **, [xxx], Male, 61 Years Old, DOB: 02/10/1950, SINGAPOREAN**,
>
> are charged that you, on or about the 14th day of September 2012, at about 2.20pm, at Motorcycle Lot 28, Infront of Block 124 Ang Mo Kio Ave 6, Singapore, were concerned in dealing with uncustomed goods, to wit, 1packet x 1 stick, 15 packets x 20 sticks of Malboro Brand and 4 packets x 16 sticks of Gudang Garam Surya Kretek duty unpaid cigarettes, weighing **0.429** kilogrammes, on which excise duty of **$151.01** was not paid, with intent to defraud the Government of the excise duty thereon, and you have thereby committed an offence under section 128I(b) of the Customs Act, Cap 70, punishable under Section 128(L)(2) of the same Act. [*sic*]

The second charge, DAC 33689/2012, read:

> You, ***ONG GIM HOO*** **, [xxx], Male, 61 Years Old, DOB: 02/10/1950, SINGAPOREAN**,

are charged that you, on or about the 14th day of September 2012, at about 2.20pm, at Motorcycle Lot 28, Infront of Block 124 Ang Mo Kio Ave 6, Singapore, were concerned in dealing with uncustomed goods, to wit, 1packet x 1 stick, 15 packets x 20 sticks of Malboro Brand and 4 packets x 16 sticks of Gudang Garam Surya Kretek duty unpaid cigarettes, weighing **0.429** kilogrammes, valued at **S$197.91** , on which the Goods And Services Tax of **$13.85** , was not paid, with intent to defraud the Government of the tax thereon, and you have thereby, by virtue of section 27 and 77 of the Goods and Services Tax Act (Cap 117A), paragraph 3 of Goods and Services Tax (Application of Legislation Relating to Customs & Excise Duties) Order (Cap 117A, Order 4) and paragraph 2 of the Goods and Services (Application of Customs Act) (Provisions on Trials, Proceedings, Offences and Penalties) Order (Cap 117A, Order 5), committed an offence under section 128I(b) of the Customs Act punishable under section 128L(2) of the same Act. [*sic*]

3 The respondent should have been charged under s 128I(1)(*b*), but the offence in the charge was framed instead as s 128I(b). The Customs Act that was in force at the time the offence was committed, 14 September 2012, labelled the offence as s 128I(1)(*b*). The applicant seeks to amend these previous convictions so that the respondent will be liable for the enhanced punishment prescribed in s 128L(5) if convicted on any of the present four charges which he faces. I dismiss the application for the reasons which I shall subsequently elaborate on. I first highlight the procedure behind Criminal Revision before discussing relevant cases on "amending convictions".

4 The relevant statutory provision for Criminal Revision is found in s 401 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). As the convictions sought to be revised in this case involved charges that were laid after 31 August 2012, the 2012 Revised Edition is the relevant edition of the Criminal Procedure Code that the court should be concerned with. Section 401 reads:

Powers of High Court on revision

401.—(1) On examining a record under revision in this Division, the High Court may direct the lower court to make further inquiry into a complaint which has been dismissed under section 152 or into the case of an accused who has been discharged.

(2) The High Court may in any case, the record of proceedings of which has been called for by itself or which otherwise comes to its knowledge, in its discretion exercise any of the powers given by sections 383, 389, 390 and 392.

(3) The High Court may not proceed under subsection (1) or (2) without first giving the parties adversely affected by the High Court so proceeding an opportunity of being heard either personally or by advocate.

(4) This section does not authorise the High Court to convert an acquittal into a conviction.

By s 401(2), the High Court may exercise the powers given by s 390 of the CPC during Criminal Revision. Of relevance to this application, the applicant asks this court to invoke three of its powers under s 390. These are

(i) first, to set aside the respondent's two 2012 convictions, notwithstanding that they arose from pleas of guilty, which is provided for in s 390(3)(*a*) of the CPC;

(ii) second, to frame two altered charges that correspond to DAC 33656/2012 and DAC 33689/2012, with the exception that "section 128I(b)" is changed to "section 128I(1)(*b*)" in

either charge, which is provided for in section 390(4) of the CPC; and

(iii) third, to *convict* the respondent on both altered charges.

5 It will be obvious that a leap between the applications in [4(ii)] and [4(iii)] was being attempted here. Although this court is indeed empowered to set aside previous convictions and frame altered charges, when altered charges are framed, the court *must* ask the respondent if he intends to offer a defence, as required under s 390(6). It is only where the respondent indicates that he does not intend to offer a defence, and if the court finds that there is sufficient evidence based on the records before it to convict, that the court can convict the respondent on the altered charges (see s 390(8)(*a*)). Another option available, after setting aside the previous conviction and framing the altered charges, is for the court to order the respondent to be tried on the altered charges (see s 390(8)(*b*)). Of course, complexities might arise should the respondent indicate that he wishes to offer a defence (see s 390(7)). As such, while the errors made in the framing of the charges in DAC 33656/2012 and DAC 33689/2012 may have been "technical" in nature, the process of "amending convictions" in Criminal Revision is far from a merely technical exercise.

6 To illustrate, should I wish to allow the application in this case, the respondent would be entitled to offer a defence. If he indicates that he wishes to do so, this Criminal Revision may lead to a full trial. It is not simply a case of "tweaking" the respondent's criminal record.

7 For clarity, I also wish to point out that once an accused person has been convicted on a charge, the charge is spent. In such cases where convictions have been recorded against an individual, the only procedure open to the High Court on Criminal Revision is what I have stated in [3] and [4]. It is practically and doctrinally impossible for the High Court to simply amend the charges from which the convictions arose.

8 Having discussed the complexities inherent in the process of "amending convictions", I come now to two recent decisions on point. These are *Bhavashbhai s/o Baboobhai v PP* [2014] SGHC 46 ("*Bhavashbhai*") and *PP v Shaik Alaudeen s/o Hasan Bashar* [2013] 2 SLR 538 ("*Shaik*"). Both cases involved applications to amend previous convictions. In *Bhavashbhai*, the application was brought by the accused. When he brought his application before me, he was facing ongoing proceedings in relation to a charge for consumption of a specified drug. In parlance familiar to the courts and parties in criminal proceedings alike, he was facing an "LT-2" charge. "LT" stands for "Long Term". If convicted, he faced a minimum of 7 years' imprisonment (see Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") s 33A(2)). An LT-2 conviction can only be recorded if the court is satisfied that the accused had, on record, a previous "LT-1" conviction. In *Bhavashbhai*, the applicant applied to the court to set aside – or amend – the LT-1 conviction he had on his criminal record, in a bid to escape conviction on the LT-2 charge he faced at the time of application. Counsel argued that the underlying LT-1 conviction should have been set aside, or amended, because it was erroneous. An LT-1 conviction can be recorded if the accused had, on record, not less than one previous admission to a drug rehabilitation centre and one previous conviction for consumption of a *specified* drug (see MDA s 33A(1)(*d*)). Counsel for the applicant argued that the previous conviction on which the LT-1 charge was premised was for consumption of a *controlled* drug. On that basis, counsel for the applicant sought to unravel the applicant's history of drug consumption. I held there that to allow the application would have been to allow the applicant to evade justice. I hence disallowed the application to amend the LT-1 conviction.

9 In *Shaik*, I dealt with an application brought by the prosecution. The accused there was facing six LT-1 charges in ongoing proceedings at the time of the application. In the midst of the proceedings, it was discovered that one of the accused's previous convictions for consumption of

morphine was worded as consumption of a *controlled* drug, when it should have been – as the prosecution argued – consumption of a *specified* drug. Had I allowed the application in that case, the accused would have been liable to punishment on the LT-1 scale (a minimum sentence of 5 years' imprisonment on each of the six charges) if convicted in the ongoing proceedings. I held, in that case, that to amend the accused's previous conviction would have been to his prejudice, and hence dismissed the application. The LT-1 charges were subsequently framed as charges of consumption of controlled drugs with enhanced punishment (attracting a lower minimum sentence of 3 years' imprisonment on each charge). The accused pleaded guilty to three of the charges as part of an offer by the prosecution (see *PP v Shaik Alaudeen s/o Hasan Bashar* [2013] SGDC 159).

10 Both *Shaik* and *Bhavashbhai* dealt with applications under the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985"). The Criminal Revision provisions in the CPC 1985, namely ss 256 and 269, generally corresponded to ss 390 and 401(2) of the CPC. More importantly, I find that the principles enunciated in the two cases continue to ring true, notwithstanding the differences in wording between the provisions of the CPC 1985 and the CPC. Sections 390 and 401(2) of the CPC provide the accused person a chance to defend himself against a newly framed charge. A revision should not be made when prejudice would be caused to the accused.

11 Had the accused in *Bhavashbhai* sought to peruse his criminal records in the midst of, or even prior to, his LT-2 proceedings, he would have understood that he had a recorded LT-1 conviction, and was hence liable to punishment on an LT-2 scale should he reoffend. Had he been troubled with the basis of the LT-1 conviction, namely the word "controlled" rather than "specified" in his previous conviction, he would have brought it up when convicted of the LT-1 offence. He did not. It hence cannot be said that he was caught by surprise when he then faced an LT-2 charge, and it cannot be said that prejudice would have been caused to him by refusing to amend, or set aside, the previous LT-1 conviction as he knew all along – and seemingly accepted – that he was liable to punishment on an LT-2 scale should he reoffend. In *Shaik*, if the accused were to peruse his criminal records before his LT-1 proceedings, he would not have thought that he was liable to be punished on an LT-1 scale. The LT-1 proceedings would have hence come as a surprise since his records would have revealed that he did not have the requisite convictions to make out an LT-1 charge. To amend his convictions retrospectively would have caused him prejudice. That said, there was nothing to prevent the trial judge, who dealt with the accused in *Shaik*, from recognising the previous conviction and, notwithstanding that it was for consumption of a controlled – and not specified – drug, impose a higher sentence on account of the accused's recidivism (albeit within the limits on sentence as mandated by statute).

12 In the present case, I dismiss the prosecution's application because I am of the view that it should not have been brought and not because I find that the respondent should not now be liable to enhanced punishment. I make no conclusive findings on the latter – his sentence is a matter for the trial judge to decide. I need only to point out that a person's liability to enhanced punishment under the CA depends on the person having been previously convicted of a "specified offence" (see s 128L(5)), which is defined in s 128L(7) as "an offence under section 128D, 128E, 128F, 128G, 128H, 128I, 128J or 128K". In this case, the respondent has, on record, at least two convictions for offences under s 128I, albeit worded in such a way that the requisite "(1)" is missing. Nevertheless, should the respondent have perused his criminal record prior to the ongoing proceedings for the four subsequent CA offences he is facing, he would likely have been aware that he would be liable to enhanced punishment under s 128L(5) should he reoffend.

13 I say this is not a case where an application to amend the respondent's previous convictions should be brought because a Criminal Revision in this case may lead to the complication of an otherwise simple matter. I acknowledge that the mistakes pointed out by the prosecution seem to be

of a technical nature. Just as the missing "(1)" was highlighted as an issue with each of the 2012 charges, so too was the fact that the "(b)" was not italicised – when it should have been. And that an outdated version of the Criminal Procedure Code was referred to in either charge. But should these matters render the corresponding 2012 convictions void and irrelevant for the purpose of enhanced sentencing? I think not. This is a different situation from *Shaik*. It is within the trial judge's powers in the ongoing proceedings, which the respondent faces, to determine whether the previous convictions should count for the purpose of enhanced sentencing in the present proceedings, not least given the wording of s 128L(7). If I should decide to set aside the convictions and charge the respondent on reframed charges, and he should decide to offer a defence, however, a disproportionate amount of resources may have to be expended to resolve the matter. The application is therefore dismissed.