

Yong Vui Kong v Public Prosecutor
[2009] SGHC 274

Case Number : Cr M 41/2009
Decision Date : 03 December 2009
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : M Ravi (L F Violet Netto) for the applicant; Jaswant Singh and Edwin San (Deputy Public Prosecutors) for the respondent
Parties : Yong Vui Kong — Public Prosecutor

Criminal Procedure and Sentencing

3 December 2009

Woo Bih Li J:

1 In Criminal Case No 26 of 2008, Yong Vui Kong (“Yong”) was charged in the High Court (“HC”) with trafficking in 47.27g of a controlled drug, namely diamorphine, an offence under s 5(1)(a) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) (“the MDA”). After a trial, Yong was convicted on 14 November 2008 and sentenced to suffer death.

2 Yong filed an appeal in Criminal Appeal No 13 of 2008. However, his then counsel, Mr Kelvin Lim subsequently stated in a letter dated 23 April 2009 to the Registrar of the Supreme Court of Singapore (“the Registrar”) that he was instructed to apply for leave to withdraw the appeal. On 29 April 2009, the Court of Appeal (“CA”) affirmed the decision of the court below after receiving confirmation that Yong was withdrawing his appeal.

3 Mr M Ravi, counsel for Yong, said he had been instructed by Yong’s brother Yong Yun Leong (“Yun Leong”) to act for Yong. Mr Ravi requested to interview Yong in prison and eventually received permission to interview Yong on 2 December 2009.

4 In the meantime, the President of the Republic of Singapore (“the President”) declined Yong’s clemency petition on 20 November 2009. According to Mr Ravi, this decision was conveyed to Mr Lim who in turn conveyed the information to Yun Leong on 23 November 2009.

5 Apparently, information was also given that Yong was due to be executed on 4 December 2009.

6 As a matter of urgency, Mr Ravi filed Criminal Motion No 41 of 2009 (“CM 41/2009”) to, essentially, challenge the constitutionality of capital punishment under the MDA.

7 Although the heading of the Notice of Motion filed in CM 41/2009 referred to the CA, the opening paragraph of the substance referred to a petition “before the Justices of the HIGH COURT...”.

8 CM 41/2009 was fixed for hearing before me on 2 December 2009 as a matter of urgency. On that day, Mr Ravi intimated at the outset that he considered the hearing before me to be before the HC and that CM 41/2009 should be heard by the CA and not the HC. He also accepted that the application ought to have a first prayer for extension of time to appeal to the CA (since the initial appeal had been withdrawn). The application, as it stood, did not have that prayer.

9 In view of the imminent date of execution, Mr Ravi urged me to grant a stay of execution pending the hearing of the application by the CA.

10 Mr Jaswant Singh for the prosecution submitted that I had no jurisdiction to grant a stay of execution. He cited my previous decision in *Vignes s/o Mourthi v PP* (No 2) [2003] 4 SLR 300 ("*Vignes s/o Mourthi No 2*") as authority for that proposition.

11 He also submitted that there were only two avenues available to Yong. First, Yong could seek a stay of execution from the President pursuant to Art 22(P)(1)(b) of the Constitution of the Republic of Singapore ("the Constitution") or, secondly, Yong could apply for the stay of execution when his application for extension of time to appeal was heard by the CA. Mr Singh's submission therefore appeared to accept that the CA has jurisdiction to order a stay of execution pending the hearing of the application for an extension of time to appeal.

12 Before I address the submissions, I would like to set out briefly the process of appeal.

13 Under s 45(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), every notice of appeal to the CA shall be filed with the Registrar within 14 days after the date on which the decision appealed against was given.

14 Under s 46(1) SCJA, the trial judge shall record in writing the grounds of his decision, if he has not already written a judgment, when a notice of appeal is filed. Such a written judgment or grounds of decision shall form part of the record of proceedings.

15 Under s 46(2) SCJA, the Registrar shall thereafter cause to be served a notice that a copy of the record of proceedings is available.

16 Under s 47(1) SCJA, the appellant is to file a petition of appeal and five copies thereof addressed to the CA within ten days after service of the said notice from the Registrar.

17 Section 50 SCJA deals with the extension of time for any period of time prescribed by ss 45 or 47 and s 51 deals with a stay of execution. They state:

50. The Court of Appeal may, in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for that purpose, extend any period of time prescribed by section 45 or 47.

51. —(1) Except in the cases mentioned in subsection (4), no appeal shall operate as a stay of execution.

(2) The trial court or the Court of Appeal may stay execution on any judgment, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction or sentence as to the court may seem reasonable.

(3) ...

(4) In the case of a conviction involving sentence of death or corporal punishment —

(a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal may be given under section 45, or any extension of time which may be permitted under section 50; and

(b) if notice is so given, the sentence shall not be executed until after the determination of the appeal.

18 Section 51(2) is not free from difficulties.

19 It states that “the trial court or the CA” may stay execution. In my view, there is a difference between a reference to the trial court and a reference to the HC in the SCJA. The two are not synonymous. In the present case, I was not the trial court as Yong was convicted by another judge.

20 Fortunately for Yong, there is another enabling provision. This is found in s 251 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (“CPC”). It states:

251 No appeal shall operate as a stay of execution, but the courts below and the High Court may stay execution on any judgment, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the court seem reasonable.

21 As can be seen, s 251 CPC is similar to s 51(1) and (2) SCJA but s 251 CPC enables “the courts below and the HC” to stay execution. The latter is not confined to the trial court as in s 51(2) SCJA. Accordingly, I was of the view that *prima facie* I had jurisdiction to grant a stay of execution under s 251 CPC.

22 However, there was another question to my mind although it was not raised by either counsel. Both s 51(2) SCJA and s 251 CPC refer to a stay of execution “pending appeal”. Literally speaking,

there was no pending appeal since the extension of time had not yet been granted. Nevertheless, I was of the view that a purposive construction would mean that a pending application for extension of time to appeal does come within the meaning of a pending appeal under both s 51(2) SCJA and s 251 CPC.

23 Accordingly, I was of the view that the two avenues mentioned by Mr Singh were not the only avenues available to Yong and that the HC has jurisdiction to grant a stay of execution.

24 I reached the above view even though I was aware that it is arguable that in the circumstances of this case, the CA has no jurisdiction to grant an extension of time under s 50 SCJA because this is not a situation where Yong is debarred from appealing "by reason of his not having observed some formality or some requirement" of the SCJA. He had observed the requirements but had chosen not to proceed with his earlier appeal. On the other hand, there might be another source for the CA's jurisdiction to grant an extension of time to appeal, if it was minded to grant such an extension. Those considerations were to be decided by the CA and did not mean that I had no jurisdiction to grant a stay of execution.

25 As for *Vignes s/o Mourthi No 2*, the facts there were different. There, the accused's appeal had been heard and dismissed by the CA. He was applying to the HC to order a re-trial by the trial court and to order a stay of execution on the death sentence pending the re-trial. As his appeal had been dismissed by the CA after it had heard the appeal, there was therefore no question of an application for an extension of time to file an appeal.

26 Mr Singh also made another point. He submitted that if a stay of execution was granted now, it would then allow an accused person to circumvent the clemency process. On the other hand, Mr Ravi relied on *Thomas v Baptiste* [2000] 2 AC 1 to argue that the executive should not carry out an execution before an appeal is heard. He also referred to *Ong Ah Chuan v PP* [1981] AC 648 for the proposition that a condemned man has the right to the protection of the law under Art 9 of the Constitution.

27 I did not think that there was any quarrel with the general propositions which Mr Ravi was relying upon. The point which Mr Singh was making was that Yong had voluntarily given up his right to an appeal and to any protection of law arising from an appeal.

28 In any event, it seemed to me that Mr Singh's submission about the circumvention of the clemency process went to the merits of the application of the stay rather than the jurisdiction to grant the stay. As this was the first case before the court of an accused person seeking to appeal after he had withdrawn his appeal and his petition for clemency had been declined and since the refusal to grant a stay might render a successful application for extension of time to appeal nugatory, I was of the view that the only appropriate course of action was to grant a stay of execution pending a decision by the CA which I did.

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