Kiew Ah Cheng David v Public Prosecutor
[2007] SGCA 2

Case Number : CCA 6/2006

Decision Date : 17 January 2007

Tribunal/Court : Court of Appeal

Coram : Choo Han Teck J; Kan Ting Chiu J; Andrew Phang Boon Leong JA

Counsel Name(s) : Peter Ezekiel (Phoeng & Co) for the appellant; Nor'ashikin Samdin and Vincent Leow (Deputy Public Prosecutors) for the respondent

Parties : Kiew Ah Cheng David — Public Prosecutor

Courts and Jurisdiction – Jurisdiction – Appellate – Whether Court of Appeal having jurisdiction to hear appeal against High Court's dismissal of criminal motion for extension of time to file notice and petition of appeal from magistrate's court

17 January 2007

Choo Han Teck J (delivering the grounds of decision of the court):

1 The appellant was convicted after trial in a Magistrate's Court on 13 June 2006 for an offence of driving a motor vehicle without due consideration to other road users, an offence under s 65 of the Road Traffic Act (Cap 276, 2004 Rev Ed). He was sentenced on the same day to a fine of $900 and disqualified from driving for a period of three months. On 22 June 2006, the appellant filed a notice of appeal against sentence only. The magistrate gave the grounds of his decision in writing together with the notes of evidence on 1 August 2006. Section 247(4) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") provides that a person who has filed a notice of appeal has to lodge a petition of appeal within ten days after the grounds of decision have been served on him. It was not disputed that the appellant ought to have filed a petition of appeal by 11 August 2006. He did not do so. Section 247(7) of the CPC provides that the appeal, notice of which was given by way of the notice of appeal, is deemed withdrawn. On 17 August 2006, the appellant applied by way of a criminal motion to the High Court (Criminal Motion No 22 of 2006) seeking an extension of time to file his notice of appeal against conviction (his initial notice was in respect of an appeal against sentence only), and an extension of time to file his petition of appeal against conviction.

2 Criminal Motion No 22 of 2006 was heard on 1 September 2006. The learned judge noted that the affidavit and supplementary affidavit filed on behalf of the appellant did not explain what merits the appellant believed he had in the appeal against conviction. Counsel for the appellant then asked for leave to file an affidavit on the merits of the appellant's appeal. The judge refused leave and dismissed the application for an extension of time. Although no written grounds were given, the notes of evidence sufficiently indicated the reasoning of the judge when he dismissed the application:

> I'm sympathetic to your plight Mr Ezekiel [counsel for the appellant] … but, as you know, at the end of the day, I think we have rules, we have procedures and there is the question of exercise of discretion which can't be whimsical, there are certain established authorities that guide the judge's discretion in matters of this sort. I'm afraid that in the circumstances, I have no alternative but to dismiss your motion.

The appellant thus appealed to this court against the decision of the learned judge in the Criminal Motion No 22 of 2006 proceedings, praying that the decision "be set aside and that such order may

be made thereon as justice may require".

3 The critical issue before us on appeal concerned the question of the jurisdiction of this court to hear an appeal of this nature. The powers of an appellate court are granted by statute. It derives no power save for those that are conferred on it by legislation. This basic principle had been reiterated on numerous occasions by this court: see *Wong Hong Toy v PP* [1984-1985] SLR 298 at 304, [16]; *Microsoft Corporation v SM Summit Holdings* [2000] 2 SLR 137 at [17]; and *Lim Choon Chye v PP* [1994] 3 SLR 135 at 139, [13]. It is necessary to begin by examining the provision by which the appellant brought his case before the High Court. The appellant stated in his motion in Criminal Motion No 22 of 2006 that the application was brought under s 250 of the CPC. Section 250 provides as follows:

> The High Court may, on the application of any person desirous of appealing who is debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the District Judge or to the Magistrate and to the parties as the Court considers desirable in order that substantial justice may be done in the matter.

The appellate criminal jurisdiction of this court is set out in s 29A of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) which provides in sub-s (2) that:

> The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.

The distinction between an original and an appellate jurisdiction is not one that normally requires extensive elaboration. A court exercises original jurisdiction in all proceedings at first instance. A court exercises an appellate jurisdiction when it conducts proceedings arising from any decision of a court in the exercise of its original jurisdiction. It is only in the narrowest sense that the proceedings before the judge in Criminal Motion No 22 of 2006 can be regarded as proceedings by a judge exercising his original jurisdiction. That is plausible only because the application for an extension of time was a prayer first made before that court. It had not been adjudicated upon or made in any other court. Original jurisdiction is a legal term and the word "original" here does not refer only to a matter that originated from that court and had not arisen before any previous one.

4 Had the appellant lodged his appeal within the time provided by the CPC, his case would have been heard on its merits by the High Court and determined on its merits. Were it not for s 250 of the CPC, the appellant's notice of appeal would have been deemed withdrawn, and that too would have been the end of the matter. Section 250 is a provision that provides an opportunity to an appellant to recover from a technical knockout. It does so by requiring the appellant to persuade the High Court why it would be fair and just to permit him to continue the fight. The fight that was in issue in the present case was the charge under s 65 of the Road Traffic Act under which the appellant was convicted and wished to appeal. The proceedings of the court below in Criminal Motion No 22 of 2006 were, therefore, connected to the proceedings of the Magistrate's Court. In *Wong Hong Toy v PP* [1994] 2 SLR 396 ("*Wong Hong Toy (No 2)*") at 404–105, [31], Wee Chong Jin CJ held that the application before the High Court in that case was "so intertwined with the appeal that it cannot be logical to say that while the determination of the appeal is an exercise of its *appellate* criminal jurisdiction, the determination of the application is an exercise of the High Court's *original* jurisdiction" [emphasis in original]. We are mindful that in that case, the appellants appealed to the High Court against the conviction and sentence handed down by a District Court judge. The appellants applied

by criminal motion to the High Court for leave to appeal to the Court of Appeal on a point of law of public interest. The High Court refused to grant leave, and it was that application for leave that Wee CJ was referring to as being "intertwined with the appeal", which, in turn, was in respect of the conviction and sentence.

5 Although the High Court in *Wong Hong Toy (No 2)* had actually heard the appeal on its merits, and, in that sense, lay a stronger claim to be hearing the subsequent application for leave to this court as part of its appellate jurisdiction, we do not think that a distinction ought to be made in the present case where the appeal was not heard. The reason for that was, of course, the appellant's failure to comply with procedure; and not just any procedure, but the procedure for appeal to the High Court. The High Court was therefore asked to give leave to the appellant so that he might continue with an otherwise defunct appeal. We regard these circumstances as no different from those in *Wong Hong Toy (No 2)*. The application before the judge in Criminal Motion No 22 of 2006 was, to use Wee CJ's words, "intertwined with the appeal" and, as such, the judge in dismissing the appellant's application in Criminal Motion No 22 of 2006 was exercising an appellate jurisdiction. Consequently, that decision cannot be reviewed by this court on appeal.

6 By reason of the matters above, it was not necessary for this court to deal with the merits of the appeal against the judge's refusal to grant an extension of time to the appellant to file the requisite papers for appeal. We had, however, considered the implications of the judge's refusal, having noted that the appellant had not set out the reasons why he thought his appeal had merits, to grant leave to the appellant to file a further affidavit setting out the merits of his appeal. In order to do "substantial justice in the matter", the court hearing an application under s 250 of the CPC must, of course, first be apprised of the relevant facts. The judge would thus not be in that position unless he is *au fait* with the facts. And if he had noted that the facts were not made known to him, leave might be granted to the appellant to rectify that omission. The judge would not have been faulted had he done so. But, it does not follow that his refusal to grant leave for a further affidavit was wrong. It was within his powers to refuse leave in this case. The appellant had come to court to rectify an omission, and it might be too much to ask of the judge below to first grant him leave to rectify an omission upon an omission. But, as we have stated, this issue is an academic one. No one can claim to be exempt from procedure on account only of a claim that the "justice" of his case justified the snub; least of all one who has not explained why the merits of the case would have been in his favour.

7 For the reasons above, the appeal was dismissed.