Tan Eng Chye v The Director of Prisons
[2004] SGHC 77

Case Number : OS 32/2004

Decision Date : 17 April 2004

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Tan Gee Tuan (Gee Tuan and Khin Wai) and A Rajandran (A Rajandran Joseph and Nayar) for applicant; Leong Kwang Ian and Vinod Sabnani (Attorney-General's Chambers) for respondent

Parties : Tan Eng Chye — The Director of Prisons

Administrative Law – Remedies – Certiorari – Whether grounds for judicial review exist – Whether leave to apply for order of certiorari should be granted

Criminal Procedure and Sentencing – Sentencing – Forms of punishment – Caning – Thoroughness of medical assessment required prior to administering sentence – Section 232(1) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

17 April 2004

Kan Ting Chiu J:

1 This is an application for leave to apply for an order of *certiorari*. The applicant is Tan Eng Chye and the respondent is the Director of Prisons.

2 The applicant pleaded guilty to a charge of robbery under s 392 of the Penal Code (Cap 224, 1985 Rev Ed). Before sentence was passed on him, the district judge was informed that the applicant suffered from Marfan Syndrome, a congenital condition which affects the heart, eyes and other parts of the body. That was discovered when he went for pre-enlistment screening for National Service on September 2000, and he was medically downgraded and placed in a service vocation.

3 As the punishment under s 392 includes caning, the district judge was concerned whether caning should be ordered. He postponed sentence for a "[m]edical report on whether accused is fit for caning" to be produced to him.

4 In compliance with the order, the applicant was seen by Dr Ooi Poh Hin, Medical Officer, Queenstown Remand Prison, who put up a report dated 16 October 2003 that:

> I have examined the [accused] today.
>
> He is fit for caning.

The report does not state whether Dr Ooi had referred to any previous medical records, or even whether he had addressed his mind to the applicant's condition of Marfan Syndrome.

5 Apparently, the district judge did not find the report useful, as he did not refer to it in his grounds of decision after he sentenced the appellant to imprisonment of four years and six months and 12 strokes of the cane.[1] He stated:

> It was not clear from the Mitigation Plea what Marfan Syndrome is, but the following posting on the web-site of the US National Marfan Organisation (*www.marfan.org*) states that –

What is the Marfan syndrome?

The Marfan syndrome is a heritable disorder of the connective tissue that affects many organ systems, including the skeleton, lungs, eyes, heart and blood vessels. The condition affects both men and women of any race or ethnic group. It is estimated that at least 200,000 people in the United States have the Marfan syndrome or a related connective tissue disorder.

What medical problems are associated with the Marfan syndrome?

1. The Cardiovascular System

The most serious problems associated with the Marfan syndrome involve the cardiovascular system. The two leaflets of the mitral valve may billow backwards when the heart contracts (mitral valve prolapse). This can lead to leakage of the mitral valve or irregular heart rhythm.

In addition, the aorta, the main artery carrying blood away from the heart, is generally wider and more fragile in patients with the Marfan syndrome. This widening is progressive and can cause leakage of the aortic valve or tears (dissection) in the aorta wall. When the aorta becomes greatly widened, or tears, surgical repair is necessary.

2. The Skeleton

Skeletal manifestations common in people with the Marfan syndrome include curvature of the spine (scoliosis), abnormally shaped chest (pectus deformity), loose jointedness and disproportionate growth usually, but not always, resulting in tall stature.

3. The Eyes

People with the Marfan syndrome are often near-sighted (myopic). In addition, about 50 percent have dislocation of the ocular lens.

Although this appears to be a medical problem that can seriously affect a person's health, there was nothing in the materials before me which showed that the accused was so affected. Therefore, while I accepted that the accused had a medical problem, as well as psychiatric and behavioural problems, these were of limited mitigating value. Similarly, while the surrender of the accused, his co-operation in the investigations, and his admission of guilt were also mitigating factors, not much weight could be given to them because he was known to the victim, and his identity was established very early.

6 I surmise that the district judge called for the medical report because he wanted to know about Marfan Syndrome, the severity of the applicant's condition, and the effects caning could have on him.

7 Dr Ooi's report did not give him the necessary information as it made no reference to Marfan Syndrome or its effects. The district judge had to obtain information from the Internet instead.

8 The district judge's initiative is commendable, but it is not a substitute for a proper medical report because he still did not get answers to the second and third questions.

9 I feel that the district judge should have asked for another examination and report. If there

were doubts whether the applicant should be caned, they could not have been removed by Dr Ooi's report or the information obtained from the Internet.

10 This is the applicant's complaint, that the report is inadequate. In an affidavit affirmed by the applicant's counsel, Tan Gee Tuan, in support of the application, she deposed that:

> 7 The Applicant has been assessed to suffer from the Marfan Syndrome and a person with such disability is likely to suffer serious injury affecting his heart, eyes, and skeletal structure. The fact that the Applicant suffers from the Marfan Syndrome is confirmed by the medical reports from the Ministry of Defence assessing the Applicant as such. …
>
> 8 Subsequent to the sentencing of the Applicant, the Applicant underwent further medical examination and the assessments made by the respective doctors are stated in the affidavits of Dr Paul Ho and Dr Lim Tock Han filed herewith. The further assessment shows that there is a real danger or risks of the Applicant suffering serious injury upon the infliction of caning. This is clearly contrary to the medical certification made by the Prisons Department.
>
> 9 An even more worrying consideration is the fact that it would appear that the medical examination and subsequent certification of the Applicant by the Prisons Department did not give full or sufficient assessment of the Marfan Syndrome and the ensuing risks and disabilities which could be inflicted by the caning.

11 Dr Paul Ho is a general practitioner in private practice. He saw the applicant on 10 November 2003 and found that he has classical Marfan Syndrome. Dr Ho was of the opinion that:

> [A]s he has the features of Marfan Syndrome he should not be caned as there are complications of lens dislocation, dissecting aneurysm and dislocation of joints and possible hernia presentation.
>
> The disabilities caused to such a patient can be permanent and irreversible and may also require surgical correction in future.

12 Dr Lim Tock Han is a consultant ophthalmologist and Head of the Department of Ophthalmology, Tan Tock Seng Hospital. He examined the applicant's eyes and stated in his report that:

> [T]he patient was also suspected to have glaucoma, as there was asymmetrical cup disc ratio of right 0.5 and left 0.7. Heidelberg retinal tomogram showed an abnormal left optic nerve head contour. Humphrey visual field (SITA standard, 24-2) did not reveal any significant visual field defect. Partial phasing was normal. Computerised tomogram of the optic nerves did not reveal any compressive lesion. The patient was diagnosed to be a glaucoma suspect. The patient will require close monitoring and may require anti-glaucoma therapy in the near future.
>
> Marfan's Syndrome is known to be associated with crystalline lens subluxation (in about 60%-80% of patients) and retinal detachment (in about 10% of patients). *Ocular trauma is known to cause lens subluxation and retinal detachment in a non-Marfan person. The risk is likely to be higher in a patient with Marfan's Syndrome who suffers from ocular trauma.* As to whether caning can precipitate these complications, it is unknown. However, *it would be important to avoid accidental ocular trauma during caning.* The patient will benefit from regular follow up in view of the possibility of such complications and in view of the suspicion of early glaucoma.
>
> [emphasis added]

13 The applicant subsequently obtained a report from a consultant cardiothoracic and vascular surgeon Dr C Sivathasan. Dr Sivathasan's report reads:

Re: Mr Tan Eng Chye (S81050301)

Marfan syndrome is a congenital condition which affects the following body systems:

1. Skeleton

a. Excessive loose joints

b. Spinal curvature abnormalities.

2. Eye

a. Short sightedness

b. Detachment of the retina

c. Left sublexation.

3. Cardiovascular

a. Mitral valve, abnormalities like prolapse, regurgitation and enlargement of mitral annulus

b. Aortic valve abnormalities like regurgitation, dilatation of aortic root

c. Aortic dissection.

4. Pulmonary

a. Spontaneous pneumothorax

b. Blebs in the lung.

5. Central Nervous System

a. Attention deficit disorder

b. Hyperactivity

c. Verbal performance discrepancy.

In the management of this congenital abnormality, the patient is advised to have restriction of "heavy activities like heavy weight lifting, contact sports and any exertion at maximal activity". (Heart Disease – A textbook of cardiovascular medicine 5th edition. Publisher W.B. Saunders Co., Editor Eugene Braunwald, pg 1672.)

I am of the opinion that in the light of the diagnosis of marfan syndrome for Mr Tan Eng Chye, *the act of canning* [*sic*] *can cause a sudden surge in blood pressure resulting in a potentially life threatening occurrence of aortic dissection.*

[emphasis added]

The application

14 The applicant applied for leave to apply for an order of *certiorari*. His application is made in compliance with O 53 r 1 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed). In compliance with the rule, the application was served on the Attorney-General's Chambers. Consequently, while the application is an *ex parte* originating summons, it was served, and State Counsel from the Chambers were accorded the right to be heard on behalf of the respondent. They attended before me, and opposed the granting of leave.

The respondent's objections

15 The respondent's objections are:

(a) The application is premature;

(b) The application can have no useful outcome;

(c) The application is improper; and

(d) No grounds exist to justify review.

I considered each of them.

Is the application premature?

16 This objection arises from s 232(1) of the Criminal Procedure Code (Cap 68):

> The punishment of caning shall not be inflicted unless a medical officer is present and certifies that the offender is in a fit state of health to undergo such punishment.

17 It was submitted that:

> The relevant time for determining the state of health of the offender is at the execution of the caning, and not before. The report of the medical officer dated 16 October 2003 is thus not the certification envisaged by section 232(1), and is of no legal effect. The entire premise of the application is therefore misconceived: there is no statutory decision for the court to review as no certification under section 232(1) has been made.

18 The argument is that the report dated 16 October 2003 will not be used as the basis for proceeding with the caning. At the time scheduled for caning, another certificate must be issued before caning is carried out.

19 That is correct, but it does not address the applicant's concern over the medical assessment process. The provision does not require the medical officer to put up a report, only to issue a certificate that the offender is in a fit state of health to undergo caning. That is only to be done on the day of caning, and there is no provision for the certificate to be disclosed to the offender.

20 There is no assurance that the evaluation will be more thorough than the one carried out on 16 October 2003. If it is not, the applicant has a ground for complaint and redress.

21 Is it premature for him to seek redress now? When the respondent calls his action premature, that presupposes that there is a later, more appropriate time to do that. When I asked when that would be, there was no answer.

22 As the certification is to be done at the time of caning, how will the offender be able to seek redress after the certificate is issued, and before the caning is administered? If he is already caned by the time his application can be heard, it is too late to obtain the redress he seeks.

23 The argument that the application is premature, and should not be made until it is too late to prevent the risks of permanent and unintended injury, is self-defeating.

24 I suggested to counsel that the basic issue is the thoroughness of the medical assessment. The applicant's concern is that he should not to be caned unless the medical risks and implications are considered more thoroughly than they were on 16 October 2003. If it can be arranged for a medical officer knowledgeable in Marfan Syndrome to examine him and his medical records and assess whether he is able to receive caning, then that would remove the basis of the complaint. When I asked if the respondent would agree to that, the suggestion was not taken up.

Can the application have any useful outcome?

25 I expect that in an application for an order of *certiorari*, the issues raised before me can be argued and considered fully by the court. At that stage the court can rule whether in a case of an offender with a known and potentially serious medical condition, a certificate in the form of the report of 16 October 2003 is sufficient, or whether a thorough examination and assessment should be done. Such a ruling could be a very real and useful outcome to the applicant, and I think to the respondent as well.

Is the application improper?

26 It is argued on behalf of the respondent that there is a procedural flaw in the application in that O 53 r 1(2) of the Rules of Court has not been complied with. The rule states that:

> An application for such leave must be made by ex parte originating summons and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by an affidavit, to be filed when the application is made, verifying the facts relied on.

and reliance was also placed on r 3(1) that:

> Subject to paragraph (2), no grounds shall be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in that statement.

27 As I have stated, the applicant's counsel, Tan Gee Tuan, had made an affidavit in support of the applicant on his behalf. The affidavit referred to all the matters mentioned in r 1(2) of the Rules of Court.

28 It was pointed out by Ms Tan that there is no prescribed form for the statement to be in. Her affidavit is a formal statement made on her affirmation. I do not see any procedural deficiency in that.

29 It was also submitted that because *certiorari* is a discretionary remedy, the application is also improper because there is a failure of "disclosure in the fullest confidence".

30 The complaint is that there was no support for Ms Tan's allegation that there is a real danger or risk of the applicant suffering serious injury if he is caned. Reference was also made to the grounds of decision where the district judge found that there was nothing before him which showed that the applicant was affected by the Marfan Syndrome.

31 This is a telling point. The district judge was in that state because he only had Dr Ooi's report before him. The medical findings which lead to the applicant being downgraded medically for National Service were not before him and Dr Ooi made no reference to them in his report. The reports of Dr Ho, Dr Lim and Dr Sivathasan were not before the district judge when he sentenced the applicant to caning. He was left to search for information on the condition on the Internet, which obviously would not refer to the applicant's individual condition.

32 The applicant now seeks a proper medical examination to be done before caning is administered, and to address the district judge's concern. The respondent should not be the one to levy criticism of failure of disclosure. In any event, I do not think that the applicant wants the reports of Drs Ho, Lim and Sivathasan to be the basis for exempting him from caning. That is beyond the scope of s 232(1) and the district judge's order. The reports were submitted to show that there is a serious question whether he should be caned which should be addressed properly before caning is administered.

Are there grounds to justify judicial review?

33 State counsel argued that:

> Even taking the Applicant's best case, there are no grounds for certiorari to be granted. The Applicant has not complained of any breach of the rules of natural justice, or that the medical officer acted *ultra vires*, or that his finding was unreasonable in the *Wednesbury* sense, or that there was any other procedural impropriety in the 'certification'. All that the Applicant can show is that two other doctors may have come to a different conclusion from that reached by the medical officer. In other words, the Applicant is asking this court to prefer one finding of fact and substitute its own findings for that of the prison medical officer.

34 There is an underlying unevenness in the position taken. Nothing was said to defend Dr Ooi's report. It was not suggested that the respondent maintains that an assessment arrived at without stating whether the subject's medical records has been referred to, and without stating that consideration has been given to the subject's known medical condition and the potentially serious effects that caning may have on him is a proper assessment.

35 If one is to suppose that Dr Ooi had not done either (and that supposition can be made from the face of the report) then there is a real basis to contend that the conclusion is unreasonable in the *Wednesbury* sense.

36 Counsel did not discuss the "unreasonableness in the *Wednesbury* sense", or the basis for submitting that there is no evidence of it.

37 The term *Wednesbury* unreasonableness originated from *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, where the English Court of Appeal considered the principles on which an executive act or decision can be subject to judicial review. Lord Greene MR made the ruling at 228 that:

> The exercise of such a discretion must be a real exercise of the discretion. *If, in the statute*

conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. [emphasis added]

38 Here the applicant is complaining that the medical assessment ought to have regard to his medical history and his known medical condition. It is clearly arguable that it is implied that his medical history and condition must be considered, and that an omission to do that amounts to *Wednesbury* unreasonableness.

39 The respondent also submitted that:

It is clear that the Applicant is merely seeking to forestall the execution of the sentence of caning. In this respect, the Court of Appeal has held that:

> The ex parte application for leave to apply for an order of mandamus, prohibition and certiorari under O 53 r 1 of our Rules of Court is intended to be a means of filtering out groundless or hopeless cases at an early stage, and its aim is to prevent a wasteful use of judicial time and to protect public bodies from harassment (whether intentional or otherwise) that might arise from a need to delay implementing decisions, where the legality of such decisions is being challenged.
>
> (per LP Thean JA in *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR 644, at paragraph 23)

This is not an appropriate case to grant leave to apply for certiorari as this application is clearly groundless.

40 The Court of Appeal in *Public Service Commission v Lai Swee Lin Linda* applied the test to the facts in that case and found that there was no proper issue involved. The court found that the respondent's complaint was a contractual dispute over the terms of her employment relating to probation and termination of service, and that the dispute was not susceptible to judicial review.

41 L P Thean JA cited with approval Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 642–643 that:

> The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

Review and conclusion

42 Under the law, an offender is to be caned for the offence he committed. But the law is not without compassion, and it provides that before anyone is caned, he is to undergo medical examination to ensure that he will not suffer serious unintended injuries. Only those found to be fit to

undergo caning will be caned. For those who are found not suitable the sentence of caning is not to be carried out.

43 The applicant has been sentenced to be caned. He has a medical condition. Caning may have serious effects on him. The district judge who convicted him was concerned and called for a medical report. One was produced to him, but it was clearly unsatisfactory. There is no indication that the medical officer had called for or considered the applicant's medical records. There is no indication that the medical officer made an assessment of the severity of the applicant's condition. Indeed, there is no indication whether any thought has been given to the effects that caning can have on the applicant who has Marfan Syndrome.

44 The applicant wants his condition to be given proper consideration. He produced medical reports of the effects that caning may have on him to show that there is substance in his concern.

45 The respondent's response is that the applicant does not have any recourse because there is to be another examination done before caning is administered, but it gives no assurance that the examination will be more thorough than the one done on 16 October 2003.

46 In these circumstances, there is a clear issue to be determined – whether the protection offered in s 232 of the Criminal Procedure Code is satisfied by that type of minimal certification, or whether it requires more to be done.

47 The respondent says that the applicant should be shut out and not allowed to proceed further on the ground that it is a groundless or hopeless case or a misguided or trivial complaint, and a waste of the court's time.

48 In *Lai Swee Lin Linda*'s case, the Court of Appeal adopted Lord Diplock's statement in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 409 that:

> For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, ie, that part of the common law that is given by lawyers the label of "the prerogative."

49 By this test, the medical assessment to be made in compliance with s 232(1) of the Criminal Procedure Code to ensure that an offender is sufficiently fit to be caned is susceptible to judicial review. The application is not groundless, hopeless, misguided, trivial, or a waste of time.

50 I therefore gave the applicant leave to proceed. The respondent still maintains that he should not be allowed to proceed, and has appealed against my order.

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[1]The applicant had appealed against the sentence, but had withdrawn the appeal.