Public Prosecutor v Hardave Singh s/o Gurcharan Singh
[2003] SGHC 237

Case Number : Cr Rev 11/2003

Decision Date : 14 October 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Christopher Ong Siu Jin (Deputy Public Prosecutor) for the petitioner; Vasantha Kumar (Vas Kumar and Co) for the respondent

Parties : Public Prosecutor — Hardave Singh s/o Gurcharan Singh

Criminal Procedure and Sentencing – Revision of proceedings – Governing principles – Requirement of some form of serious injustice caused – Conviction and sentence based upon the wrong charge – Whether there was serious injustice as a result – s 268 Criminal Procedure Code (Cap 68)

Criminal Procedure and Sentencing – Revision of proceedings – Power to alter the finding of trial judge – Power to amend material errors in charge to reflect the offence – Power to convict on amended charge and pronounce fresh sentence – Whether such powers to be exercised – ss 162, 256, 268 & 396 Criminal Procedure Code (Cap 68)

1 The respondent pleaded guilty in the subordinate courts to a total of three offences, which comprised two counts of trafficking in controlled drugs pursuant to s 5 of the Misuse of Drugs Act (Cap 185) ('MDA') and one count of consumption of a controlled drug pursuant to s 8 of the MDA. He was convicted and sentenced by District Judge Emily Wilfred ('the district judge') to a total of 15 years' imprisonment and 15 strokes of the cane. The respondent appealed against his sentence but this was superseded by an application for criminal revision (CR 11/2003) filed by the district judge pursuant to s 268 of the Criminal Procedure Code (Cap 68) ('CPC'). The application for criminal revision related to the conviction of the respondent upon a wrong charge. I granted the application for criminal revision and set aside the conviction and sentence on the wrong charge. I amended the charge accordingly, then convicted and sentenced the respondent on the charge as amended. I now give my reasons.

Background

2 The first charge dated 27 February 2003 ('the unamended first charge') upon which the respondent was convicted and sentenced was the subject matter of the application for criminal revision brought by the district judge. The charge concerned s 5 of the MDA. It charged that the respondent:

> …did jointly traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act, Cap 185, to wit, by having in your possession for the purpose of trafficking, four (04) blocks of vegetable matters weighing approximately *300 grams*, believed to contain cannabis, without authorization under the said Act or the Regulations made thereunder, … thereby committed an offence under Section 5(1)(a) read with Section 5(2) of the Misuse of Drugs Act, Cap 185 and Section 34 of the Penal Code, Cap 224 and punishable under Section 33 of the aforsaid Act. [Emphasis added]

The district judge convicted the respondent on the unamended first charge and sentenced him to 14 years' imprisonment and 10 strokes of the cane. She also convicted him on a second charge for the possession and consumption of controlled drugs pursuant to s 8 of the MDA and a third charge for trafficking in controlled drugs pursuant to s 5 of the MDA. The sentences imposed for the second and third charges were one year's imprisonment and five years' imprisonment with five strokes of the cane respectively. Four other charges for offences under the MDA were taken into consideration with the

consent of the respondent by the district judge for the purposes of sentencing. The district judge ordered the terms of imprisonment in respect of the first and second charges to run consecutively, and the term of imprisonment in respect of the third charge to run concurrently for a total of 15 years' imprisonment and 15 strokes of the cane.

3 The respondent had earlier tendered to this Court an amended first charge dated 2 May 2003 ('the amended first charge') in support of the now superseded appeal against sentence, which charged that the respondent:

> …did jointly traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act, Cap 185, to wit, by having in your possession for the purpose of trafficking, two (02) blocks containing *50.29 grams* of vegetable matter which was analysed and found to be cannabis, without authorization under the said Act or the Regulations made thereunder, …thereby committed an offence under Section 5(1)(a) read with Section 5(2) of the Misuse of Drugs Act, Cap 185 and Section 34 of the Penal Code, Cap 224 and punishable under Section 33 of the aforsaid Act. [Emphasis added]

This amended first charge dated 2 May 2003 was the charge given to the interpreter to be read to the respondent by the Deputy Public Prosecutor ('the DPP') on the first day of the hearing below on 23 June 2003. The respondent proceeded to plead guilty to the amended first charge as it was read to him.

4 The DPP, however, did not tender the amended first charge to the district judge. The amended first charge was at no time in the court file before the district judge. As a result, the district judge wrongly understood the respondent to have pleaded guilty to the unamended first charge and convicted and sentenced him on it accordingly. The conviction of the respondent therefore related to a wrong charge.

5 The first simple but material difference between the unamended first charge and the amended first charge related to the quantity of controlled drugs reflected in the charge to be in the possession of the respondent for the purpose of trafficking. The other difference related to the quality of the controlled drugs said to be in the possession of the respondent for the purpose of trafficking. The first charge was for the possession for the purpose of trafficking of 'four (04) blocks of vegetable matters weighing *approximately 300* grams, *believed to contain cannabis*', whereas the amended first charge was for the possession for the purpose of trafficking of 'two (02) blocks containing *50.29* grams of vegetable matter *which was analysed and found to be cannabis*' [Emphases added]. The unamended first charge was obviously very vaguely worded.

6 It was undisputed before me that at the time of the respondent's guilty plea on 23 June 2003, it was the understanding of both the prosecution and the respondent that the respondent's guilty plea was to the amended first charge that referred to 50.29 grams of cannabis. It was also clear to me that the charge which the prosecution proceeded with against the respondent was the amended first charge, since it was the charge given to the interpreter by the DPP to be read out to the respondent on the first day of the trial.

7 Importantly, the evidence did not support the unamended first charge. The amalgamated statement of facts and the Health Sciences Authority's reports ('HSA reports') of the substances found in the possession of the respondent made reference to a quantity of 50.29 grams of cannabis in support the first charge proceeded against the respondent. There was no reference anywhere to four blocks of vegetable matters weighing 300 grams believed to be cannabis.

8 Counsel for the respondent subsequently discovered that the district judge had convicted the respondent on the unamended first charge and wrote in for clarification. The district judge duly called for a meeting with counsel in chambers. It was ascertained in chambers on 28 August 2003 that the unamended first charge was in fact a 'holding charge' preferred against the respondent upon his arrest pending the completion of investigations. Such charges are invariably amended upon the completion of investigations to reflect accurately the evidence that supports the charge to be actually proceeded with against the accused. This was in fact done in the present case on 2 May 2003. Unfortunately, the amended first charge did not find its way into the trial court file as the DPP did not tender it to the district judge on the first day of trial.

9 Following this meeting, the district judge made an application for criminal revision pursuant to s 268 of the CPC on 2 September 2003 to this Court. This application was supported by the Public Prosecutor, the petitioner here.

Criminal Revision

10 Following from the above, it was patently clear to me that the district judge convicted and sentenced the respondent on the wrong charge. The respondent should not have been convicted and sentenced on the unamended first charge for the following reasons:

(i) The conviction and sentence below were founded upon a wrong charge. The respondent had pleaded guilty to the amended first charge as read to him by the interpreter on 23 June 2003 at the hearing below, and *not to the charge he was subsequently convicted and sentenced upon*.

(ii) The prosecution had proceeded with the amended first charge against the respondent, and not the unamended first charge.

(iii) The prosecution had understood the respondent's plea of guilt to relate to the amended first charge as read out to the respondent on 23 June 2003.

(iv) The amalgamated statement of facts and the HSA reports did not support the quantity and quality of controlled drugs disclosed on the unamended first charge.

11 In contemplating whether to exercise the power of criminal revision in the present case, I took into account s 396 of the CPC. This section provides that no finding or sentence made by a court of competent jurisdiction shall be reversed or altered on account of any error or irregularity in the charge unless the error or irregularity has occasioned a failure of justice. I read this section together with s 162 of the CPC, which provides that no error in stating either the offence or the particulars required to be stated in the charge shall be regarded at any stage of the case as material unless the accused was in fact misled by that error.

12 Considering these two provisions in relation to the facts, it was clear to me that the charge upon which the district judge convicted and sentenced the respondent below had occasioned a failure of justice, for reasons that will follow, such that the finding and sentence of the district judge should be reversed. There was also no doubt in my mind that the differences between the unamended first charge and the amended first charge were material errors as the respondent was in fact misled into thinking that he was being convicted on the amended first charge. The discrepancies between the charges were not so minor such that they could rightly be regarded as immaterial, as was the case in *PP v Mohamed Noor bin Abdul Majeed* [2000] 3 SLR 17. Sections 396 and 162 of the CPC therefore presented no difficulty for the exercise of criminal revision here.

13 I went on to consider the law on the exercise of the revisionary jurisdiction of the High Court. I have held in *Ang Poh Chuan v PP* [1996] 1 SLR 326 and *PP v Koon Seng Construction Pte Ltd* [1996] 1 SLR 573 that the revisionary jurisdiction of the High Court exists to right serious injustice. As I have stated in *Ang Poh Chuan*, there is no precise definition of what constitutes serious injustice and a wide discretion is vested in the High Court, the exercise of which depends largely on the particular facts of the case. But 'generally it must be shown that there is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below'. This statement has been endorsed and applied in subsequent cases and the same principle was reiterated recently in *PP v Henry John William and another appeal* [2002] 1 SLR 290.

14 The present situation was clearly a proper case for the exercise of the revisionary power, as the respondent was convicted and sentenced upon a wrong charge which resulted in a failure of justice flowing from the material discrepancies between the unamended first charge and the amended first charge. This was notwithstanding the fact that the minimum and maximum sentences upon a conviction for either the amended first charge or the unamended first charge are the same – being five years' imprisonment and five strokes of the cane and 20 years' imprisonment and 15 strokes of the cane respectively pursuant to s 33 of the MDA.

15 This was because the primary consideration of the sentencing court in deciding an appropriate sentence for a drug trafficking offence is the quantity of drugs in the possession of the offender. The district judge referred to *Ang Soon Huat*, CC 34/87, an unreported judgment dated 2 November 1990, where the High Court stated that:

> …the gravity of the offence of drug trafficking lay not in the personal circumstances in which the offender committed the offence, like in many other offences, *but simply in the amount that was trafficked*…Therefore it must follow, that in the ordinary case where there are no exceptional circumstances affecting the offender's conduct, the sentence should be proportionate to the gravity of the offence, which is the quantity of the drugs that is being trafficked in.

The fact that the unamended first charge related to 300 grams of what was believed to be cannabis therefore weighed heavily on the mind of the district judge in sentencing the respondent to 14 years' imprisonment and 10 strokes of the cane. Such a sentence was in line with the existing sentencing benchmarks for such quantities of cannabis.

16 I was therefore not in doubt that had the correct charge bearing one-sixth of the quantity of cannabis been before the district judge, the sentence imposed upon the respondent below for that charge would have been substantially less. It was a manifest failure of justice, as such, to impose a sentence upon the respondent that he did not deserve based on a plea of guilt to a charge which he did not actually plead guilty to.

Powers of criminal revision

17 The relevant statutory provisions dealing with the revisionary powers of the High Court are s 23 of the Supreme Court of Judicature Act (Cap 322) and s 268 of the CPC. In particular, s 268 of the CPC reads as follows:

> (1) The High Court may in any case, the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge, in its discretion exercise any of the powers conferred by sections 251, 255, 256 and 257.
>
> (2) No order under this section shall be made to the prejudice of the accused unless he has had

an opportunity of being heard either personally or by advocate in his own defence.

(3) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

18 Having decided that the present case warranted an exercise of the revisionary jurisdiction, I moved on to correct the injustice which had arisen by exercising the powers under s 256 of the CPC given to me in the context of a criminal revision, which provides as follows:

At the hearing of the appeal the court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may –

(a) in an appeal from an order of acquittal, reverse the order and direct that further inquiry shall be made or that the accused shall be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction –

(i) …

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or enhance the sentence; or

(iii) …

19 It is a matter of logic, which I am now stating for the avoidance of doubt, that the exercise of these powers in the context of a criminal revision are not bound by the circumstances under which they would normally arise in the context of this Court's appellate jurisdiction. As such the powers granted to High Court under s 256(a) of the CPC here need not 'arise in an appeal from an order of acquittal', neither would the powers under s 256(b) only be exercisable 'in an appeal from a conviction'.

Altering the finding by amending the charge

20 Section 256 of the CPC grants the High Court wide powers in the exercise of its appellate jurisdiction. These powers include the power to amend a charge and consequently convict an accused person on the amended charge. This is clear from the cases of *Garmaz s/o Pakhar v PP* [1996] 1 SLR 401, *Loo Weng Fatt v PP* [2001] 3 SLR 313 and *Er Joo Nguang v PP* [2000] 2 SLR 645.

21 In its revisionary jurisdiction, the High Court also has the power to 'alter the finding' of the lower court by amending the charge and thereafter to convict an accused person on the amended charge without ordering a re-trial pursuant to s 256(b)(ii) of the CPC. This was my holding in *PP v Koon Seng Construction Pte Ltd* [1996] 1 SLR 573. The facts there were similar to the present case. In *Koon Seng Construction Pte Ltd*, the accused person had pleaded guilty to an offence different from that which both the prosecution and defence had intended to proceed under due to a clerical error. It was not disputed that the charge was wrongly presented and that the respondent had pleaded guilty to that charge by mistake. In that case the wrong charge disclosed a different offence from the actual offence committed, which resulted in a heavier sentence given to the accused by the magistrate. The finding that the respondent in *Koon Seng Construction Pte Ltd* was guilty of the offence under the wrong charge was therefore patently wrong and could not be permitted to stand and I set aside the

conviction and sentence which flowed from the mistaken plea of guilt. Likewise, the conviction and sentence imposed on the respondent in the present case must be set aside as the error in the charge resulted in a significantly heavier sentence being imposed on him below. Further, and significantly, the respondent here did not even mistakenly plead guilty to the wrong charge. He had entered a plea of guilt in relation to the amended charge that was read out to him on the understanding that that would be the charge he would be convicted and sentenced upon. It bears repeating that the conviction and sentence were founded upon a wrong charge, and therefore could not be allowed to stand.

22 Having set aside the conviction and sentence below on the wrong charge, I considered that this was a proper case for me to amend the charge as requested by the petitioner, and thereafter to convict and sentence the respondent on the amended charge. I held, in *Koon Seng Construction Pte Ltd*, that the revisionary capacity to 'alter the finding' pursuant to s 256(b)(ii) of the High Court included the power to correct errors in the charge. Indeed, the High Court should be able to amend the charge to reflect the fact that it has altered the finding of the lower court, such that the altered finding conforms with what the correct or appropriate charge should be, having regard to the evidence adduced. Since correcting the errors in the present charge did not require the introduction of an entirely different offence, amending the charge was a relatively straightforward exercise. Accordingly, I amended the charge in the presence of the respondent to read as it should have at trial, disclosing an offence of possession for the purposes of trafficking of 'two (2) blocks containing 50.29 grams of vegetable matter which was analysed and found to be cannabis' pursuant to s 5 of the MDA.

23 In amending the charge, I was mindful of the fact that the power of amendment to a charge is subject to restrictions in order to protect the interests of the accused. The case law is clear on this (see *Ng Ee v PP* [1941] MLJ 180, *Sivalingam v PP* [1968] 2 MLJ 172 as applied in *Koon Seng Construction Pte Ltd*). The power of amendment is not unfettered and should be exercised sparingly, subject to careful observance of the safeguards against prejudice to the defence. I was satisfied that the proceedings below would have taken the same course, and the evidence recorded would have been the same upon confirmation that the respondent would plead guilty to the amended charge. Although the amended charge was identical to the charge the respondent had intended to plead guilty to below, seeking such confirmation was important because a new and different charge is in the place of the unamended first charge. Upon the confirmation of the plea of guilt to the amended charge, I was further satisfied that no question of prejudice arose since the sentence for the charge in question would be dramatically reduced as a consequence of the amendment.

Conviction and sentence

24 Following from this plea of guilt, I convicted and pronounced a fresh sentence on the respondent upon the amended charge pursuant to s 256(a) of the CPC. Section 256(a) of the CPC allows the High Court, in the context of its appellate jurisdiction, to find the accused 'guilty and pass sentence on him according to law' in an appeal from an order of acquittal. These same powers are exercisable in the context of criminal revision pursuant to s 268 of the CPC. I now turn to the question of sentence.

25 I sentenced the respondent to six years' imprisonment and 10 strokes of the cane on the amended charge, having regard to the sentencing benchmarks for offences involving similar quantities of cannabis. Such a sentence was a proportionate response to the offence disclosed by the amended charge. I found no reason to disturb the district judge's ruling that the terms of imprisonment in respect of the first and second charges are to run consecutively, and the term of imprisonment in respect of the third charge to run concurrently. The total sentence the respondent would serve in respect of all three charges proceeded against him would therefore be seven years' imprisonment and

15 strokes of the cane.

26 In light of the foregoing, I granted the application for criminal revision, set aside the conviction and sentence below, amended the erroneous charge, and duly convicted the respondent on the amended charge before pronouncing a fresh sentence accordingly.

Application allowed.