Amazi bin Hawasi *v* Public Prosecutor
[2012] SGHC 164

Case Number : Special Case No 2 of 2012

Decision Date : 10 August 2012

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : S K Kumar (S K Kumar Law Practice LLP) for the petitioner; Tan Ken Hwee, Andre Jumabhoy, Kwek Chin Yong, Seraphina Fong and Jeremy Yeo Shenglong (Attorney-General's Chambers) for the respondent; Paul Ong Min-Tse as amicus curiae.

Parties : Amazi bin Hawasi — Public Prosecutor

Constitutional Law – Equal protection of the law

Constitutional Law – Executive

Constitutional Law – Judicial power

Constitutional Law – Legislature

Criminal Law – Statutory offences – Misuse of Drugs Act

Criminal Procedure and Sentencing – Sentencing

10 August 2012

Chan Sek Keong CJ:

Background

1 On 28 September 2011, Amazi bin Hawasi ("the Petitioner") was charged under s 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") with the consumption of morphine, an offence punishable under s 33A of the MDA due to his previous convictions for drug consumption offences (see [2] and [5] below). He was also charged with one count of possession of a controlled drug and one count of possession of drug paraphernalia under ss 8(*a*) and 9 respectively of the MDA. He pleaded guilty to the charges and was duly convicted on 8 February 2012, with another charge (relating to possession of drug paraphernalia under s 9 of the MDA) taken into consideration for the purposes of sentencing.

2 Prior to the commission of the aforesaid offences, the Petitioner had been convicted on 18 May 1998 and 2 January 2003 of the consumption of, respectively, morphine and cannabinol derivatives, both of which were then classified as "controlled" drugs. He was sentenced to 12 months' imprisonment upon the first conviction and eight years' corrective training upon the second conviction (these two convictions will hereafter be referred to collectively as "the Petitioner's previous convictions").

3 Prior to 20 July 1998, every proscribed drug under the then equivalent of the MDA (*viz*, the

Misuse of Drugs Act (Cap 185, 1997 Rev Ed) ("the MDA (1997 Rev Ed)")) was classified as a "controlled" drug. Parliament subsequently decided that in view of the extreme harmfulness of opiate drugs (*viz*, heroin, opium and morphine) and the prevalence of their abuse, they would be additionally classified as "specified" drugs (see *Singapore Parliamentary Debates, Official Report* (1 June 1998) vol 69 ("*Singapore Parliamentary Debates* vol 69") at cols 43–44 (Wong Kan Seng, Minister for Home Affairs)). Therefore, pursuant to the coming into force of the Misuse of Drugs (Amendment) Act 1998 (Act 20 of 1998) ("the 1998 Amendment Act") on 20 July 1998, morphine was reclassified as a "specified" drug in the Fourth Schedule to the MDA (1997 Rev Ed). Subsequently, cannabinol derivatives were also reclassified as "specified" drugs with the coming into force of the Misuse of Drugs Act (Amendment of Fourth Schedule) Order 2007 (GN No S 402/2007) on 1 August 2007.

4 Section 33A of the MDA (1997 Rev Ed), which is now s 33A of the MDA, was introduced via the 1998 Amendment Act to provide for "long-term imprisonment and caning for hardcore drug addicts" (see *Singapore Parliamentary Debates* vol 69 at col 42 (Wong Kan Seng, Minister for Home Affairs)). To achieve this objective, s 33A(1) of the MDA (1997 Rev Ed) provided for a minimum enhanced punishment of five years' imprisonment and three strokes of the cane in (*inter alia*) cases where the offender had had no fewer than two previous convictions for consumption of a specified drug under s 8(*b*) (see s 33A(1)(*b*) of the MDA (1997 Rev Ed)). The corresponding provisions in s 33A of the MDA now read as follows:

> **Punishment for repeat consumption of specified drugs**
>
> **33A.**—(1) Where a person who has had not less than —
>
> …
>
> (*b*) 2 previous convictions for consumption of a specified drug under section 8(*b*);
>
> …
>
> is convicted of an offence under section 8(*b*) for consumption of a specified drug or an offence of failure to provide a urine sample under section 31(2), he shall on conviction be punished with —
>
> (i) imprisonment for a term of not less than 5 years and not more than 7 years; and
>
> (ii) not less than 3 strokes and not more than 6 strokes of the cane.
>
> …
>
> (5) For the purposes of this section —
>
> (*a*) a conviction under section 8(*b*) by a court including a subordinate military court or the Military Court of Appeal constituted under the Singapore Armed Forces Act at —
>
> (i) any time on or after 1st October 1992 but before the relevant date for the consumption of a controlled drug which, on the date of any subsequent conviction, is specified in the Fourth Schedule; or
>
> (ii) any time on or after the relevant date for the consumption of a specified drug,
>
> shall be deemed to be a previous conviction for consumption of a specified drug under section 8(*b*);

…

(*d*) "relevant date" —

(i) in relation to a conviction … for consumption of diamorphine, morphine or opium, means 20th July 1998; and

(ii) in relation to a conviction … for consumption of any drug added to the Fourth Schedule after 20th July 1998, means the date on which the amendment to that Schedule for the inclusion of such drug commences.

5 As the Petitioner's previous convictions occurred after 1 October 1992, they were deemed to be convictions for consumption of "specified" drugs under s 33A(5)(*a*)(i) read with s 33A(5)(*d*) of the MDA. Accordingly, the Petitioner was liable to be sentenced to the minimum enhanced punishments prescribed in s 33A(1) of the MDA for the drug consumption offence which he was convicted of on 8 February 2012.

6 Prior to being sentenced, the Petitioner raised the issue of the constitutionality of s 33A(5)(*a*) of the MDA, arguing that it violated the principle of separation of powers embodied in the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution").

7 On 22 February 2012, the District Court referred the following question of law ("the Stated Question") for the High Court's determination:

> Does section 33A(5)(a) of the [MDA] violate the separation of powers embodied in the Constitution of the Republic of Singapore (1985 Rev Ed) in deeming a previous conviction for consumption of a controlled drug as a conviction for consumption of a specified drug, and thereby requiring the court to impose a mandatory minimum sentence as prescribed in section 33A(1) of the MDA?

8 Although the Stated Question referred only to s 33A(5)(*a*) of the MDA (which relates to previous convictions for the offence of drug consumption under s 8(*b*) of the MDA), the Petitioner also raised in his written submissions the same question of constitutionality in relation to s 33A(5)(*c*) of the MDA. Section 33A(5)(*c*) relates to admissions to a Drug Rehabilitation Centre ("DRC") under the orders of the Director of the Central Narcotics Bureau, and reads as follows:

> "admission" means an admission under section 34(2) to [a DRC] at —
>
> (i) any time on or after 1st October 1992 but before the relevant date [as defined in s 33A(5)(*d*) (reproduced earlier at [4] above)] for the consumption of a controlled drug which, on the date of any subsequent conviction, is specified in the Fourth Schedule; or
>
> (ii) any time on or after the relevant date for the consumption of a specified drug …

Although there is no express deeming clause in s 33A(5)(*c*), the Petitioner alleged that it likewise had a deeming effect in that a DRC admission was defined to include an admission for consumption of drugs which were previously "controlled" drugs (as opposed to "specified" drugs). As such, for completeness, I will deal with both ss 33A(5)(*a*) and 33A(5)(*c*) (collectively, "the impugned MDA deeming provisions") in these grounds of decision.

9 At the conclusion of the hearing of this Special Case, I answered the Stated Question in the negative, *ie*, the impugned MDA deeming provisions do not violate the principle of separation of powers embodied in the Singapore Constitution. I now give the reasons for my decision.

The Petitioner's arguments

10 The Petitioner argued that the impugned MDA deeming provisions violated the principle of separation of powers as they had the effect of changing the character of previous convictions and previous DRC admissions for consumption of *controlled* drugs into previous convictions and previous DRC admissions for consumption of *specified* drugs, and were thus a specific direction to the court to treat the former type of convictions and DRC admissions as being the same as the latter type of convictions and DRC admissions. This, it was argued, was not constitutionally permissible as it would interfere with prior court decisions and intrude into the judicial power. Counsel cited a number of cases concerning the US Constitution, which I will now discuss.

11 The Petitioner relied principally on the decision of the US Supreme Court in *United States v Klein* 80 US 128 (1871) ("*Klein*"). [note: 1] The other US case cited, *viz*, *Pennsylvania v Wheeling & Belmont Bridge Company* 59 US 421 (1855), is not relevant as it did not involve the principle of separation of powers.

1 2 *Klein* concerned several laws passed by the US Congress ("Congress") during the progress of the US Civil War (specifically, on 13 July 1861, 6 August 1861 and 17 July 1862) to regulate the subject of forfeiture, confiscation or appropriation to public use without compensation of private property, whether real or personal, of non-combatant enemies. In exercise of his powers under the law of 17 July 1862 ("the 17 July 1862 law"), the US President issued a proclamation on 8 December 1863 ("the 1863 Pardon Proclamation") granting a full pardon, with full restoration of rights of property (except as to slaves), to every person who agreed to take and subscribe to a prescribed oath of allegiance, and who henceforth kept the same inviolate. On 12 March 1863, Congress passed another law for the collection of abandoned property in insurrectionary districts within the US. This law ("the 12 March 1863 law") allowed any person to reclaim his property upon proof that he had not given aid or comfort to the enemy. One V F Wilson ("Wilson") satisfied the conditions under the 1863 Pardon Proclamation. Upon his death in 1865, his administrator ("Klein") filed a petition in the US Court of Claims under the 12 March 1863 law to recover certain cotton which Wilson had abandoned to US treasury agents and which the latter had sold. The 17 July 1862 law under which the US President issued the 1863 Pardon Proclamation was subsequently repealed on 21 January 1867.

13 The US Court of Claims held, on 26 May 1869, that Wilson had been entitled to receive the proceeds of sale of the cotton and ordered payment of US$125,000 to Klein as his administrator. The US government gave notice of appeal on 3 June 1869 and filed its appeal on 11 December 1869. Prior to the hearing of the appeal, a similar claim by one Padelford was decided by the US Court of Claims in Padelford's favour, and the US government likewise filed an appeal to the US Supreme Court. On 30 April 1870, the US Supreme Court dismissed the appeal relating to Padelford's claim (see *United States v Padelford* 9 Wallace 531 (1870)). Soon after this, Congress passed another law which came into force on 12 July 1870, to which was attached the following proviso ("the 1870 Proviso") (see *Klein* at 129):

> That no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; and that no such pardon or amnesty heretofore put in evidence on behalf of any claimant in that court be considered by it, or by the appellate court on appeal from said court, in

deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in the Court of Claims, or on appeal therefrom, … but that proof of loyalty [as prescribed in the 1870 Proviso] shall be made irrespective of the effective [*sic*] of any executive proclamation, pardon, amnesty, or other set of condonation or oblivion. And that, in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant on any other proof of loyalty than such as the [1870 Proviso] requires, this court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction;

And further, that whenever any pardon shall have heretofore been granted by the President to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the act of March 12th, 1863 [*ie*, the 12 March 1863 law], and such pardon shall recite, in substance, that such person took part in the late rebellion, or was guilty of any act of rebellion against, or disloyalty to, the United States, and such pardon shall have been accepted, in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and, on proof of such pardon and acceptance, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant …

14 The above words in the 1870 Proviso effectively nullified the effect of the 1863 Pardon Proclamation and the restoration of Wilson's property rights. The US Supreme Court held that the 1870 Proviso was unconstitutional on two separate grounds. The first ground was that the proviso, in directing that pardons should not be considered by the US Supreme Court and in denying the jurisdiction of the court, was (at 146–147):

… founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point, but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts, and thereupon to declare that its jurisdiction on appeal has ceased by dismissing the bill. *What is this but to prescribe a rule for the decision of a cause in a particular way?* …

…

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept separate. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that, in all cases other than those of original jurisdiction,

"the Supreme Court shall have appellate jurisdiction both as to law and fact, with such

exceptions and under such regulations as the Congress shall make."

> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.
>
> [emphasis added]

15 In short, the US Supreme Court found in *Klein* that Congress was effectively purporting to exercise the judicial power under the guise of legislation.

16 The second ground on which the US Supreme Court held the 1870 Proviso to be unconstitutional was that it breached the principle of separation of powers under the US Constitution as it infringed the constitutional power of the Executive to grant pardons. The court said at (148–149):

> It is the intention of the Constitution that each of the great coordinate departments of the government – the Legislative, the Executive, and the Judicial – shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned, and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.
>
> Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the [1870 Proviso]. The court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end.
>
> We think it unnecessary to enlarge. The simplest statement is the best.

Analysis of the Petitioner's arguments

17 In my view, *Klein* is not applicable to the impugned MDA deeming provisions for the simple reason that they do not have the legal effect which the Petitioner submits that they have. These provisions neither purport to change, nor have the effect of changing, the character and/or nature of previous convictions and previous DRC admissions for consumption of controlled drugs into previous convictions and previous DRC admissions for consumption of specified drugs. They do not annul the effects of a previous conviction and/or a previous DRC admission for drug consumption activities. The impugned MDA deeming provisions simply provide that previous convictions and previous DRC admissions for drug consumption activities are to be treated as aggravating factors for the purposes of determining whether the accused is subject to the enhanced punishment regime set out in s 33A of the MDA. In this regard, there is nothing in the Singapore Constitution that prohibits Parliament from legislatively prescribing conditions which, upon being satisfied, will trigger the application of minimum enhanced punishments (see the companion grounds of decision in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [40]–[42] and [44]–[45]).

18 In his submissions, the *amicus curiae* referred to the approach of the High Court of Australia in *The Queen v Humby, Ex parte Rooney* (1973) 129 CLR 231 and *Re Macks and Others, Ex parte Saint* (2000) 204 CLR 158, where certain deeming provisions in, respectively, the Matrimonial Causes Act 1971 (Cth) and the Federal Courts (State Jurisdiction) Act 1999 (SA and Qld) were held to be valid as they did not direct the court to treat invalid orders and ineffective judgments as valid. [note: 2] In contrast, in *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569 ("*Bainbridge*"), the Federal Court of Australia declared as unconstitutional Item 7 of Schedule 4 of the Migration Legislation Amendment Act (No 1 of 2008) (Cth) ("Item 7"), which directed the court to treat any transitional (permanent) visa issued by the Minister for Immigration and Citizenship under the Migration Act 1958 (Cth) ("the 1958 Act") as a visa which "had been granted" such that it could be cancelled under s 501 of that act if the visa holder did not pass a prescribed character test (*contra* the earlier ruling by the Australian Federal Court in *Sales v Minister for Immigration and Citizenship* (2008) 171 FCR 56 ("*Sales*") that a transitional (permanent) visa issued under the 1958 Act was not a visa which "had been granted" and thus could not be cancelled under s 501 of that Act). Buchanan J reasoned as follows (at [77] of *Bainbridge*):

> … Item 7 directs, notwithstanding: (i) that the analysis in *Sales* concluded otherwise; (ii) the binding force of *Sales* on single judges and federal magistrates; and (iii) the principle that comity would normally require other Full Courts of this Court to accept the analysis in *Sales* that, nevertheless, any such decision to cancel a [transitional (permanent)] visa be accepted as valid, and as always having been valid. Item 7 directs the opposite outcome from the conclusion in *Sales*, notwithstanding no other alteration in the matters which would arise for consideration by a court. A conclusion that a decision is (or decisions of a particular character are) invalid is a legal conclusion. A direction that any such decision be taken to be valid appears to be a direction about the outcome of an examination about validity or, perhaps, a direction not to examine the question. On either view, the legislative direction in Item 7 appears to intrude into the area of the exercise of judicial power reserved, by the Constitution, to the courts.

19 On the basis of the above-mentioned decisions (and also *Nicholas v The Queen* (1998) 193 CLR 173 and *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1 ("*Chu Kheng Lim*")), the *amicus curiae* submitted that while, pursuant to the principle of separation of powers, Parliament may not enact a deeming provision which directs the court as to the manner and outcome of the exercise of its judicial power, the impugned MDA deeming provisions do not have the effect of either:

> (a) converting a previous conviction and a previous DRC admission for consumption of a "controlled" drug into a previous conviction and a previous DRC admission for consumption of a "specified" drug (since the *underlying nature* of the drug which is now classified as a "specified" drug remains unchanged from when it was formerly classified as a "controlled" drug); or
>
> (b) directing the court to set aside, disregard, modify or make a finding of fact or law which would be inconsistent with a previous conviction for consumption of a "controlled" drug and/or to impose in its place a previous conviction for consumption of a "specified" drug.

20 The *amicus curiae* further submitted that in contrast to the impugned legislative provisions in *Klein*, *Chu Kheng Lim* and *Don John Francis Douglas Liyanage and Others v The Queen* [1967] 1 AC 259, the deeming clause in the impugned MDA deeming provisions: [note: 3]

> (1) is not intended to apply to any particular individual or individuals;

(2) is not intended to apply … specifically to any pending litigation or to deal exclusively with the issues in any pending litigation; and

(3) does not purport to create a new offence and/or impose any liability *ex post facto*, when no such offence or liability existed before.

21 In short, the *amicus curiae* submitted that the impugned MDA deeming provisions "[did] not purport to make any judicial determination legislatively". [note: 4]

Conclusion

22 In conclusion, it is evident that the impugned MDA deeming provisions neither seek to change the character and/or nature of earlier executive or judicial orders, nor interfere with the effects and legal rights consequent upon such orders. Instead, the only substantive effect of the impugned MDA deeming provisions is with regard to sentencing for *prospective* convictions. I therefore answered the Stated Question in the negative.

[note: 1] See the Petitioner's Submissions dated 26 April 2012 at para 21.

[note: 2] See the *Amicus Curiae*'s Submissions ("ACS") dated 30 April 2012 at paras 92–102.

[note: 3] See ACS dated 30 April 2012 at para 110.

[note: 4] See ACS dated 30 April 2012 at para 111.