

Kim Gwang Seok v Public Prosecutor
[2012] SGHC 51

Case Number : Criminal Motion No. 88 of 2011/H
Decision Date : 09 March 2012
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Tito Isaac and Jonathan Wong (Tito Isaac & Co LLP) for the applicant; Gordon Oh, Jean Chan and Eunice Ng (Attorney-General's Chambers) for the Public Prosecutor.
Parties : Kim Gwang Seok — Public Prosecutor

Criminal Procedure – Trials

Evidence – Witnesses

9 March 2012

Tay Yong Kwang J:

1 This Criminal Motion seeks an order to allow five Korean nationals to testify via video-link from Korea for the accused, Kim Gwang Seok ("Kim") in his trial in Criminal Case No. 45 of 2011. The five Korean nationals are:

- (a) Lee Byeong Gyun;
- (b) Mdm Lee Myung Soon;
- (c) Ms Kwak Jisuk;
- (d) Ms Kwak Jihye; and
- (e) Mr Im Jongshin.

They shall be referred to witnesses (a) to (e) respectively.

2 Kim has been committed to stand trial with two others in the High Court for an offence under s 7 read with s 12 of the Misuse of Drugs Act (Cap 185) of engaging in a conspiracy to export not less than 1546.4 grammes of diamorphine from Singapore to Australia. Kim affirmed two affidavits to explain why he was applying for the aforesaid order.

3 Both the prosecution and the defence agreed that it is the Criminal Procedure Code (Cap 68, 1985 Ed) that applies to this case and not the Criminal Procedure Code (2010 Ed). The two editions will be referred to as the "old Criminal Procedure Code" and the "new Criminal Procedure Code" respectively.

The applicant's case

4 The charge alleges that the offence was committed on 30 August 2009. A Nepalese man delivered three pairs of shoes containing diamorphine to Kim and his two co-accused at the Golden Landmark Hotel in Victoria Street, Singapore. The three accused persons put on the shoes and left for Changi Airport Terminal 3 to board Singapore Airlines flight SQ 233 bound for Sydney, Australia.

5 The three accused persons were charged accordingly for engaging in a conspiracy to export not less than 1546.4 grammes of diamorphine from Singapore to Australia, an offence under s 7 read with s 12 of the Misuse of Drugs Act. It is an offence carrying capital punishment. The Nepalese man has been dealt with by the High Court. He pleaded guilty to a non-capital charge and was sentenced to 21 years' imprisonment and to 15 strokes of the cane. The trial of the three accused persons was scheduled to take place over two tranches of dates in February and March this year (since vacated as a result of the applicant's appeal against my decision here).

6 Kim's defence at the trial will be that he was asked by his friend, witness (a), to carry credit card computer chips in the shoes from Singapore to Australia and that both he and witness (a) believed that he would be carrying such chips in the shoes. Both of them did not know that the shoes contained diamorphine.

7 Witness (a) would testify for Kim on the matters stated in [\[6\]](#) above. Witness (b) would testify that she was aware that her daughters, witnesses (c) and (d), had previously carried or delivered computer chips at witness (a)'s request. Witnesses (c) and (d) would affirm that they had indeed done such acts. Witness (e) would testify that he too had carried or delivered computer chips at witness (a)'s request.

8 Witness (a) is presently in custody in a Korean prison undergoing investigations and possible prosecution in respect of various offences under Korean law. He is the brother of witness (b).

9 Witness (b), who is the mother of witnesses (c) and (d), lives outside of central Seoul in Korea and is employed on a full-time basis in a child care centre. She is unable to take leave from her work to attend the trial in Singapore. Further, she intends to remain in Korea for the next 3 to 6 months to look after her first grandchild who is expected to be delivered by witness (c) on 10 March 2012. She is not able to bear the costs of travelling to Singapore.

10 Witness (c) also lives outside of central Seoul. She is heavily pregnant and has been advised not to travel for several months and/or until she has fully recuperated from the delivery of her first child. She is also not able to bear the costs of travelling here.

11 Witness (d) also lives outside of central Seoul. She is a full-time teacher and is unable to take leave from her work to travel to Singapore for the trial. Like her mother and her sister, she is not able to bear the costs of travelling here.

12 Witness (e) lives and works in an area some 300km away from central Seoul. The defence counsel got his name after interviewing witness (a). He is not related to witness (a). He is similarly neither able to take leave of absence from his employment to travel here for the trial nor to bear the costs of doing so.

13 Without knowing exactly when and for how long the five witnesses would be required to testify at Kim's trial, their travel arrangements and absence from work could not be appropriately planned in advance without incurring unreasonable costs. Additional expenses would be incurred to arrange for them to travel and remain here for a longer period of time so as to avoid disrupting the trial. The expenses incurred in the defence would have to be borne by the Legal Assistance Scheme for Capital

Offences which is funding the defence or by Kim. All five witnesses, although unable to attend the trial here for the reasons set out above, are willing to testify for Kim from Seoul via video-link.

14 Although substantial costs would also be incurred even if the five witnesses were to testify via video-link from Korea due to the need to procure the technical facilities coupled with their domestic travel and accommodation expenses, the Ministry of Foreign Affairs and Trade of Korea has agreed to bear such costs. The said ministry will arrange for the witnesses to testify from a secure location within the ministry's premises and will provide a liaison officer to facilitate the arrangements with the Supreme Court's registry. The defence will also comply with any procedural directions by the court on the manner of obtaining the evidence of the five witnesses.

15 Counsel for Kim submitted that there are many good reasons why the application here should be granted. They are:

- (a) the intended evidence is clearly relevant and admissible under the Evidence Act (Cap 97, 1997 Rev Ed);
- (b) there is no express prohibition or statutory restriction on foreign witnesses being allowed to testify via video-link in criminal proceedings;
- (c) there would be unreasonable expense and delay in trying to bring the witnesses to Singapore to testify and, in the case of witness (a), it would be impossible to procure his presence here;
- (d) the prosecution would suffer no prejudice as the substance of the intended evidence of witnesses (b) to (e) was disclosed in Kim's affidavit supporting this application and the investigators had personally interviewed witness (a) in Bangkok and recorded statements from him;
- (e) the defence would be highly prejudiced if the vital testimony of the five witnesses could not be obtained;
- (f) the court has the inherent power to prevent injustice in criminal cases;
- (g) video-link evidence is accepted in civil proceedings;
- (h) the trial judge has absolute power to determine the weight to be given to the intended evidence;
- (i) there could be additional procedural safeguards, such as those prescribed in s 62A(3) of the Evidence Act and s 364(4)-(6) of the old Criminal Procedure Code, to prevent any unfairness to the prosecution or any other party;
- (j) allowing evidence via video-link would not be inconsistent with Parliament's concern that defence witnesses outside Singapore testifying via video-link would lie with impunity. According to the Korean Embassy, the five witnesses were the subject of investigations in Korea for suspected offences of credit card fraud arising from their travel and transportation of credit card computer chips and they have given statements to the Korean authorities. If they were to deviate or contradict their statements, they may be exposed to further investigations and possible prosecution for giving false evidence to the Korean authorities. In any event, they would be testifying about past incidents and would therefore have little incentive to lie;

(k) in an ongoing prosecution in Romania involving that country's former charge d'affaires, the Singapore authorities arranged for seven prosecution witnesses to testify via video-link from Singapore. This showed that the Singapore authorities considered such evidence was not less reliable than testimony given by witnesses present in court;

(l) video-link technology has vastly improved over the last 15 years such that the most minute detail of a person's facial or physical expression is clearly visible on the screen;

(m) our courts have recognised and accepted this technology, for instance, by initiating the Justice On Line system which has been used for pre-trial conferences in criminal cases;

(n) legislation in the United Kingdom, Australia, Canada and Malaysia have taken a progressive stance on video-link evidence. In Malaysia, s 272B of the Malaysian Criminal Procedure Code provides that "[n]otwithstanding any other provision of this Code or the Evidence Act 1950, a person, other than the accused, may, with leave of the court, give video or live evidence through a live video or live television link in any trial or inquiry, if it is expedient in the interest of justice to do so".

The prosecution's case

16 The prosecution's simple answer to the applicant's arguments was that the law of Singapore does not permit witnesses who are overseas to testify in criminal proceedings via video-link. The prosecution highlighted s 364A of the old Criminal Procedure Code, s 281 of the new Criminal Procedure Code and s 62A of the Evidence Act and the relevant Parliamentary debates relating to these sections. I will deal with these provisions in greater detail below.

17 The prosecution also submitted that there was no factual basis for this application to be granted. Kim asserted that witness (a) is presently detained in Korea and that he had been advised that the Korean authorities would not allow witness (a) to leave Korea. However, there was no evidence provided for this assertion and advice. There was also no mention of the period that witness (a) was expected to remain in detention there.

18 Kim also asserted that the other witnesses do not reside in Seoul but gave no further information as to where they could be located. There was no elaboration about the alleged substantial expenses that would have to be incurred to bring the Korean witnesses to Singapore for the trial.

19 As for the interview of witness (a) in Bangkok (see [\[15\]](#)(d) above), he was interviewed based on information provided by Kim and as part of the investigations. The Nepalese man (see [\[4\]](#) above) referred to a "Korean boss" in his statements but it was Kim's own belief that witness (a) was that boss. Witness (a)'s statements made to Korean Embassy officials and the Central Narcotics Bureau were hearsay and inadmissible. The intended evidence from witnesses (b) to (e) stating that they had acted as couriers of computer chips for witness (a) in the past was irrelevant to the trial and therefore inadmissible in any event.

20 In criminal proceedings, the paramount requirement in s 364A of the old Criminal Procedure Code is for an overseas witness to be present in Singapore to testify. Once his presence here is secured, the court may grant leave for that witness to testify via video-link under certain conditions. Even if the Korean witnesses are physically present in Singapore, the prosecution would not consent to have them testify via video-link as the statutory requirements are not satisfied in this case.

21 The prosecution contended that Kim's present application should be dismissed accordingly.

The decision of the court

22 As mentioned earlier, the trial here is governed by the old Criminal Procedure Code, s 364A of which provides:

364A – (1) Notwithstanding any other provision of this Act or the Evidence Act, a person in Singapore (other than the accused person) may, with leave of the court, give evidence through a live video or live television link in any trial, inquiry, appeal or other proceedings if –

- (a) the witness is below the age of 16 years;
 - (b) the offence charged is an offence specified in subsection (2);
 - (c) the court is satisfied that it is expedient in the interest of justice to do so;
 - (d) the Minister certifies that it is expedient in the public interest to do so.
- (2) The offences specified for the purposes of subsection (1)(b) are –
- (a) ...;
 - (b) ...;
 - (c) ...;
 - (d) ...; and
 - (e) such other offences as the Minister may, after consulting the Chief Justice, prescribe.
- (3) ...
- (4) The court may, in the exercise of its powers under subsection (1) or (3), make an order on any or all of the following matters:
- (a) the persons who may be present at the place where the witness is giving evidence;
 - (b) that a person be excluded from the place where the witness is giving evidence;
 - (c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;
 - (d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;
 - (e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;
 - (f) the stages in the proceedings during which a specified part of the order is to have effect;

- (g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and
 - (h) any other order which the court considers necessary in the interests of justice.
- (5) The court may revoke, suspend or vary an order made under this section if –
- (a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;
 - (b) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;
 - (c) it is necessary for the court to do so so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;
 - (d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or
 - (e) there has been a material change in the circumstances after the court has made an order.
- (6) The court shall not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.
- (7) ...
- (8) Evidence given by a witness through a live video or live television link by virtue of this section shall be deemed for the purposes of sections 193, 194, 195, 196, 205 and 209 of the Penal Code as having been given in the proceedings in which it is given.
- (9) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Act and the Evidence Act be deemed to be giving evidence in the presence of the court, the accused person or his advocate, as the case may be.
- (10) ...
- (11) ...

23 At the second reading of the Criminal Procedure Code (Amendment) Bill (which introduced s 364A) in Parliament on 1 November 1995, the Parliamentary Secretary to the Minister for Law said:

I should point out that this amendment does not provide for foreign witnesses to give evidence in Singapore via this procedure. Government is concerned that to allow witnesses outside the jurisdiction to give evidence would encourage the giving of false evidence exonerating accused persons. It would be difficult for the Attorney-General to prosecute such persons and it would hamper our enforcement effort against drug traffickers.

... We have studied similar legislation in foreign jurisdictions, eg, UK, Australia, New Zealand and

the US and incorporated useful features from these sources where appropriate.

The Bill was then passed without any amendment and s 364A was included in the old Criminal Procedure Code on 2 January 1996.

24 The clear words of s 364A, buttressed by the above statement in Parliament, show that only witnesses *in Singapore* may be permitted to testify via video-link if the prescribed conditions are met.

25 The essence of s 364A was left unchanged in the new Criminal Procedure Code, s 281(1) of which states:

Notwithstanding any provision of this Code or of any other written law, but subject to the provisions of this section, the court may allow the evidence of a person in Singapore (except the accused) to be given through a live video or live television link in any trial, inquiry, appeal or other proceedings if

- (a) the witness is below the age of 16 years;
- (b) the offence charged is an offence specified in subsection (2);
- (c) the court is satisfied that it is in the interests of justice to do so;
- (d) the Minister certifies that it is in the public interest to do so.

It is clear therefore that Parliament did not intend to change our law on video-link evidence even if other jurisdictions may have decided to widen the scope of such evidence. The position remains today that a witness in criminal proceedings has to be *in Singapore* before he/she can testify via video-link.

26 Section 62A(1) of the Evidence Act, which allows a witness outside Singapore to testify via video-link, is of no assistance here because it expressly confines its scope to non-criminal proceedings. It reads:

62A – (1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if –

- (a) the witness is below the age of 16 years;
- (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
- (c) the witness is outside Singapore; or
- (d) the court is satisfied that it is expedient in the interests of justice to do so.

There can be no doubt that the trial of Kim and his co-accused is a proceeding in a criminal matter and therefore is not within the purview of s 62A(1) of the Evidence Act.

27 Counsel for Kim argued that while the law allows a witness in Singapore to testify via video-link, it does not expressly prohibit all other cases not within its scope from utilising this procedure. In other words, there is no express provision in our law that states that no person outside Singapore shall

testify via video-link in criminal proceedings and, in such instances, the court retains the discretion whether to allow a witness outside Singapore to so testify.

28 I am unable to agree with this proposition. It would mean that every law that permits something to be done if certain conditions are met does not by implication prohibit that thing to be done if those conditions are not met. If defence counsel is correct, then where a law relating to a profession states that a person may practise such profession if he/she possesses certain qualifications, a person without those qualifications may nevertheless practise that profession so long as there is no express provision prohibiting him/her from doing so. To adopt such an approach would negate the purpose of that law, which is to govern that profession.

29 Of course, it is ultimately a question of statutory interpretation in each case whether something is permitted or is prohibited by law. In the case of s 364A of the old Criminal Procedure Code, it is clear to me that only witnesses in Singapore may testify via video-link in criminal proceedings and witnesses outside Singapore are not permitted to do so.

30 I now deal briefly with the non-legal issues in this application. As the trial has not commenced and I do not know what evidence will be adduced by the prosecution, I shall limit my comments on the relevance of the intended evidence to merely saying that it appears it may have some bearing on the issue of knowledge of the diamorphine in the shoes.

31 Where witnesses (b) to (e) are concerned, the personal and financial difficulties mentioned do not appear to be insuperable. There is time to seek the assistance of the Korean authorities to facilitate their leave from employment and their travel and accommodation here. In the case of witnesses (b) and (c), now that the trial has been postponed as a result of Kim's appeal to the Court of Appeal, the issues concerning witness (c)'s pregnancy and the post-natal matters could probably be resolved in the next few months. Where the financial issues are concerned, defence counsel could liaise with the registry of the Supreme Court.

32 In the case of witness (a), defence counsel will have to liaise with the Korean authorities as to whether and when he will be able to come to Singapore to testify at the trial.

33 The recent amendments to the Evidence Act made by the Evidence (Amendment) Bill (Bill no. 2/2012) took place after the hearing of this application. Whether the amendments will have any relevance for the trial here was therefore not canvassed before the court and I express no views on this.

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