Public Prosecutor *v* Adith s/o Sarvotham
[2014] SGHC 103

Case Number : Magistrate's Appeal No 302 of 2013

Decision Date : 27 May 2014

Tribunal/Court : High Court

Coram : Sundaresh Menon CJ

Counsel Name(s) : Ong Luan Tze and Low Chun Yee (Attorney-General's Chambers) for the Prosecution; Randhawa Ravinderpal Singh s/o Savinder Singh Randhawa (Kalco Law LLC) for the respondent.

Parties : Public Prosecutor — Adith s/o Sarvotham

Criminal Procedure and Sentencing – Sentencing – Young offenders

27 May 2014

Sundaresh Menon CJ:

Introduction

1 This was an appeal brought by the Public Prosecutor against the decision of the District Judge i n *Public Prosecutor v Adith s/o Sarvotham* [2013] SGDC 389. Adith s/o Sarvotham ("the Respondent") pleaded guilty to three charges under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") and was sentenced to a term of probation. Four other charges under the MDA were taken into consideration. The Prosecution brought the present appeal on the ground that the sentence of probation was wrong in principle.

2 The Respondent was convicted of the following charges:

Charge (DAC No)	**MDA Section**	**Offence**	**Punishment**
DAC 15168/2013	Section 10	Cultivation of cannabis plants	Minimum: 3 years imprisonment or $5,000 fine or both Maximum: 20 years imprisonment or $40,000 fine or both
DAC 15171/2013	Section 8(*b*)(ii) punishable under s 33	Consumption of a cannabinol derivative	Maximum: 10 years imprisonment or $20,000 fine or both
DAC 24697/2013	Section 5(1)(*a*) punishable under s 5(2)	Trafficking of diamorphine	Minimum: 5 years and 5 strokes Maximum: 20 years and 15 strokes

3 The following charges were taken into consideration during sentencing:

Charge (DAC No)	MDA Section	Offence	Punishment
DAC 15169/2013	Section 8(*a*) punishable under s 33	Possession of cannabis	Maximum: 10 years imprisonment or $20,000 fine or both
DAC 15170/2013	Section 8(*a*) punishable under s 33	Possession of cannabis	Maximum: 10 years imprisonment or $20,000 fine or both
DAC 15172/2013	Section 9 punishable under s 33	Possession of utensils for drug taking	Maximum: 3 years imprisonment or $10,000 fine or both
DAC 19271/2013	Section 8(*b*)(ii) punishable under s 33	Consumption of a cannabinol derivative	Maximum: 10 years imprisonment or $20,000 fine or both

Background facts

4 The Respondent was 17 years of age when he was convicted of these offences.

5 On 15 January 2013 at about 11.20pm, the Respondent was arrested outside his flat by Central Narcotics Bureau officers. He was searched and various drug exhibits belonging to him were recovered. The flat at which he was residing was also searched. More drug exhibits were seized, including two potted plants which were later analysed and found to be cannabis plants. The Respondent admitted to owning the cannabis plants and consuming cannabis. He had started cultivating the plants in December 2012 and had watered them once every two days. The Respondent was subsequently released on bail.

6 On 26 April 2013 at about 7.55pm, whilst the Respondent was out on bail, police officers conducted a spot check on him at the Singapore Shopping Centre. The officers found in the Respondent's possession four blue straws containing a powdery substance. This was subsequently analysed and found to contain 0.06g of diamorphine. The Respondent admitted to ownership and possession of the diamorphine. He stated that he had obtained it from one "Sha Boy" and was told by him to sell one straw at a price of $20. The Respondent was on the way to meet one "Jayin" for this purpose when he was arrested.

The proceedings below

7 At the hearing below on 10 September 2013, the District Judge called for both probation and reformative training pre-sentence reports. The matter was then adjourned for sentencing. On 4 October 2013, the probation and reformative training reports ("the PR" and "the RT Report" respectively) were furnished to the court. At the end of the hearing, the District Judge directed the probation officer to prepare a supplementary probation report ("the SPR") in order to enable him to evaluate whether a period of hostel residence would be a more suitable option.

8 The PR initially recommended that the Respondent be placed on 27 months' split probation with six months of electronic tagging, 200 hours of community service, regular urine tests and a bond for good behaviour. The SPR contained a revised recommendation of 30 months' split probation (12 months of intensive probation and 18 months of supervised probation) with an additional period of voluntary residence at a residential facility for 12 months. The other recommended conditions were not altered. The RT Report found the Respondent physically and mentally fit for reformative training. It was also noted that in the course of the training, the Respondent would be exposed to courses

that would address his attitudes and upgrade his educational level.

The decision below

9 The District Judge held that:

(a) the principal consideration when sentencing a young offender is rehabilitation although this must be balanced against the interests of both general and specific deterrence;

(b) the findings and recommendations of the PR and SPR were to be preferred over the RT report because the latter only took into account a limited range of information, whereas the recommendations of the PR and SPR were more closely targeted at the root causes of the Respondent's offending behaviour and he could participate in specific programmes targeted at his reform and rehabilitation;

(c) it could not be in the public interest that every young drug offender be incarcerated and exposed to the negative influences of hardened criminals in the prison environment;

(d) the MDA did not specifically prohibit the court from placing a young drug trafficker on probation if the court found it appropriate to do so;

(e) the nature of the offence is only one of the many relevant factors which are taken into account in arriving at an appropriate sentence. The guiding principle in assessing the suitability of probation is the likelihood of success of the attempted rehabilitation;

(f) on balance, the Respondent had good prospects for rehabilitation and an intensive probation order together with the stringent conditions and rehabilitative programmes would not detract from the aim of both specific and general deterrence;

(g) the Respondent demonstrated genuine remorse by being co-operative during the social investigation process, abiding by time restrictions, ceasing to smoke, drink and consume drugs and acknowledging the severity of his offences; and

(h) there was no evidence that the Respondent had gone to the extent of trafficking drugs of substantial quantities; he had no intention of using the drugs from the cannabis plant for consumption or for sale and had intended to sell drugs only to one potential customer.

10 The District Judge therefore sentenced the Respondent to 36 months of probation with the following conditions:

(a) voluntary residence at a residential facility, The New Charis Mission ("TNCM"), for a period of 12 months;

(b) electronic tagging for six months upon discharge from TNCM;

(c) observance of a time restriction of 10pm to 6am unless otherwise varied by the Probation Services Branch, in accordance with the guidelines approved by the court;

(d) 240 hours of community service; and

(e) regular urine tests.

My decision

The appropriate sentence

11 It is uncontroversial that an appellate court should interfere with a sentence meted out by the trial judge only in limited circumstances. Specifically, it must be satisfied that:

(a) the trial judge had made the wrong decision as to the proper factual matrix for the sentence;

(b) the trial judge had erred in appreciating the material before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or manifestly inadequate.

See *PP v Kwong Kok Hing* [2008] 2 SLR(R) 684 ("*Kwong Kok Hing*") at [14].

12 The Prosecution's essential argument was that the sentence of probation imposed by the District Judge was wrong in principle or manifestly inadequate and that a sentence of reformative training should have been imposed instead.

13 There are four generally accepted principles of sentencing, namely, deterrence, retribution, prevention and rehabilitation. In any given factual matrix, the court should assess which of these considerations has or have the greatest relevance (see *Kwong Kok Hing* at [33]). Where serious offences have been committed by the accused person, the sentencing principle of deterrence comes to the fore. General deterrence "aims to educate and deter other like-minded members of the general public by making an example of a particular offender" (*PP v Law Aik Meng* [2007] 2 SLR(R) 814 at [24]) while specific deterrence "relates to the effect that punishment might have in persuading an accused to refrain from further unlawful conduct *by* the fashioning of an appropriate sentence that takes into account the nature of the offence and his peculiar disposition " [emphasis in original] (*PP v Loqmanul Hakim bin Buang* [2007] 4 SLR(R) 753 at [25]).

14 On the other hand, rehabilitation is generally the dominant sentencing consideration when deciding on an appropriate sentence for a young offender aged 21 years and below (see *PP v Mok Ping Wuen Maurice* [1998] 3 SLR(R) 439 at [21]). However, this consideration is usually outweighed by the need for punishment or deterrence where serious crimes such as drug trafficking have been committed (see *PP v Justin Heng Zheng Hao* [2012] SGDC 219 at [13] ("*Justin Heng*"). The District Court in *Justin Heng* took pains to emphasise that probation had been ordered in *PP v Wong Jiayi* [2003] SGDC 53 only because it was an exceptional case where the risk of re-offending was clearly low. Where the individual offender's capacity for rehabilitation is "demonstrably high", this could outweigh public policy concerns that are traditionally understood as militating against probation (*Justin Heng* at [15]).

15 Turning to the facts of the present case, the litany of serious offences that had been committed by the Respondent including trafficking, consumption, cultivation and possession of prohibited drugs would ordinarily have warranted a sentence of reformative training. Moreover, there were no unusual or exceptional circumstances that warranted a deviation from the imposition of reformative training.

16 There was certainly nothing remarkable or compelling about the level of familial support that would be available to the Respondent so as to justify maintaining an overriding focus on the

Respondent's rehabilitation despite the serious nature of the offences he had committed. The Respondent used to reside with his father, who was apparently a strict disciplinarian, from a young age until August 2012 [note: 1]. However, his father no longer resided in Singapore and was therefore no longer in any position to exert meaningful influence over the Respondent or to play a substantial role in his rehabilitation. As for the Respondent's mother, she had recently been sentenced to six months' imprisonment on 24 April 2013 for consuming marijuana. [note: 2] According to the PR, the mother did express her willingness to step up her supervision over the Respondent. However, it was also recognised that she had a lax parenting style and this coupled with her own disregard for the law rendered "her ability to effectively supervise [the Respondent] questionable". [note: 3] The Respondent's maternal uncle expressed his willingness to execute the Respondent's "good behaviour" bond and monitor his peer association and activities outside the home but it was not evident how effective this would prove to be.

17 Neither was there anything exceptional about the surrounding circumstances of this case or the degree of remorsefulness shown by the Respondent. The Respondent had committed a string of serious drug-related offences on two separate occasions. On 15 January 2013, he was arrested for cultivating cannabis plants, consuming a cannabinol derivative and possessing cannabis and utensils intended for the consumption of a controlled drug. Despite what might have been expected to be a daunting encounter with the face of the law, three months later, on 26 April 2013, while the Respondent was out on bail for the first set of offences, he was arrested and found to be trafficking diamorphine and consuming a cannabinol derivative. The Respondent was plainly undeterred and unremorseful after having been apprehended just a few months earlier. Indeed, he had gone on to commit further drug offences, including the more serious offence of trafficking which ordinarily attracts a mandatory imprisonment term of five years and five strokes (see above at [2]).

18 Further, the Respondent's propensity to consume cannabis was not something that was newly developed. According to the PR, the Respondent had been consuming cannabis four or five times a month when he was living in India from 2011 to August 2012. [note: 4] This rate of consumption increased to two or three times a week between August 2012 and January 2013 after he returned to Singapore. The Respondent said that he continued to consume cannabis while he was out on police bail ostensibly because he was upset after his mother had been incarcerated in April 2013. [note: 5] It was also stated in the PR that the Respondent "felt that he was not addicted to cannabis but enjoyed taking it as it helped him to relax". [note: 6] And by April 2013, as I have already noted, the Respondent had moved on to trafficking in drugs. According to the Statement of Facts, the Respondent had engaged in trafficking diamorphine because of the "prestige" he thought this would have brought him. [note: 7] He apparently felt that he would be seen as someone other drug users could turn to if they wanted drugs. [note: 8] This was a troubling descent to say the least.

19 None of this painted a picture of an offender who presented a compelling case for lenience, even when balanced against the remorse that the Respondent has expressed in more recent times for his actions. It was reported in the SPR that he had stopped smoking, consuming alcohol or abusing drugs since his release from remand on 7 October 2013. [note: 9] In addition, he had undertaken some 30.5 hours of volunteer work at the Sree Narayana Mission Home between 17 October 2013 and 25 October 2013. The Respondent also admitted himself into the residential programme at TNCM on 1 November 2013. In a letter dated 18 November 2013, the Executive Director of TNCM, Mr Don Wong Shyun Yann, reported that the Respondent had been observed to be responding well to the programme. Mr Wong also observed that the Respondent "shows a deep-seated determination to make up for lost time through his plans for further education". [note: 10] According to the

Respondent's uncle, the Respondent has ceased contact with his negative peers and has abided by the 9pm curfew imposed by the probation officer. [note: 11]

20 On the whole, despite the recent signs of improvement, which emerged at about the time of the sentencing hearing below, there was nothing exceptional about the facts presented which suggested that the Respondent's capacity for rehabilitation was so demonstrably high that a term of probation would be sufficient. I was therefore of the view that a sentence of reformative training would have been more appropriate and that the District Judge had been generous to the Respondent to the point of erring as a matter of law and principle in imposing a term of probation.

21 The District Judge placed considerable emphasis on the fact that when a court deals with a young offender, the paramount consideration is rehabilitation. As I have noted, this may be displaced where serious offences are involved. But aside from this, it was erroneous for the District Judge to regard a sentence of a term of reformative training as being inconsistent with the objective of rehabilitation. As compared to probation, reformative training functions "equally well to advance the dominant principle of rehabilitation" (see *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 ("*Al-Ansari*") at [65]). In a case such as the present where serious offences have been committed, a sentence of reformative training would be particularly appropriate because it would undoubtedly represent a better balance between the need for rehabilitation and deterrence (see *Al-Ansari* at [65] and *Public Prosecutor v Yusry Shah bin Jamal* [2008] 1 SLR(R) 487 at [12], [18] and [19]). Nonetheless, despite my serious misgivings over the sentence that was imposed by the District Judge, for the reasons that I shall come to below, I was persuaded not to allow the appeal.

The surrounding circumstances of the present appeal

22 Immediately after the sentence was imposed, the Prosecution made an oral application before the District Judge for a stay pending appeal but this application was dismissed by the judge without reasons. [note: 12] This was regrettable since it is not evident how the Respondent would have been prejudiced by the grant of a stay. Upon the stay application having been denied, the Respondent commenced serving his sentence with some urgency. By the time I heard the appeal:

(a) The Respondent had already served a period of almost six months at TNCM and had been substantially deprived of his liberty during this period;

(b) The Respondent was reported to have made moderate to good progress in that six month period; and

(c) The Respondent had already fulfilled the 240-hour community service order.

Aside from this, the Respondent had already served a period of 6 months in remand prior to his conviction.

23 This court has recently dealt with at least two cases in which similar situations had arisen. In *PP v Teo Ming Min* Magistrate's Appeal No 209 of 2012 (unreported) ("*Teo Ming Min*"), the respondent was sentenced to probation for a charge under s 324 of the Penal Code in the District Court. The Public Prosecutor appealed against the order of probation. When the appeal was heard, the respondent had already served nine weeks of probation and was reportedly performing well. According to the Prosecution, although V K Rajah JA was of the view that the respondent ought to have been sentenced to imprisonment, the order of probation was not set aside and the appeal was accordingly dismissed. [note: 13] Rajah JA evidently commented at the hearing that if the Public Prosecutor had

applied for a stay of the probation order, this might have prevented the situation from arising where, by the time of the appeal, the offender would already have served a significant portion of the original sentence imposed by the court at first instance. [note: 14]

24 More recently, in *Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] SGHC 12 ("*Saiful Rizam*"), the accused persons were sentenced to varying terms of imprisonment by the District Court for a number of theft and theft-related offences under the Penal Code. Chao Hick Tin JA observed that he would have sentenced the accused persons to reformative training had he been in the District Judge's position (at [26]). However, he declined to do so on appeal because the accused persons had already served a substantial part of their imprisonment terms. Chao JA was particularly troubled by the fact that imposing reformative training when a substantial part of the accused person's imprisonment term had already been served would have amounted to double punishment, because among other things the term of reformative training that is imposed cannot be adjusted or reduced to take into account the partially served term of imprisonment (at [43]).

25 These cases highlight the dilemma that confronts an appellate court when it is faced with an appeal brought by the Prosecution against the sentence imposed by the lower court in circumstances where that sentence has already been served in part. The difficulty is acute where the issue before the court is one of choosing between different types of sentences that cannot be reversed if it has already been served in whole or in part – such as between imprisonment and reformative training (as was the case in *Saiful Rizam*) or between probation and imprisonment or a term of reformative training as was the case in *Teo Ming Min* and in the present case. In such circumstances, it is generally not simply a matter of making an adjustment in the severity of a particular type of punishment such as adjusting the term of imprisonment. Rather, it is a question of choosing between types of sentences which may be different in nature and where because of the fact that the sentence originally imposed may already have been served in part, the appellate court would generally be reluctant to correct an error made by the lower court if to do so would result in prejudice to the offender. Of course, no such difficulty arises in the case of a fine that has been paid since this can be readily refunded. But the position is different where the offender has lost his liberty in the intervening period between the time the sentence is imposed and the time the appeal is heard.

26 This was the quandary in which I found myself. Although I considered that the District Judge had erred in imposing a term of probation, given the particular facts that I was faced with at the appeal hearing, I was satisfied that it would have been unfair to the Respondent to replace the existing sentence of probation with a term of reformative training.

27 In all the circumstances, I decided not to interfere with the sentence that had been imposed by the District Judge. As was the case in *Teo Ming Min* and *Saiful Rizam*, there would have been an element of double punishment here if I were to replace the existing probation term with an order for reformative training since the Respondent had already served a good part of his probation term and had completed his obligations under the community service order.

28 This situation could have been readily avoided if the District Judge had granted the stay sought by the Prosecution. Unlike the position in *Teo Ming Min* and *Saiful Rizam*, the Prosecution here did seek a stay, which as I have noted, was refused by the District Judge. As it is important to avoid a recurrence of such a situation in the future, I turn to examine the principles that should govern such stay applications.

Principles governing stay applications where the prosecution brings an appeal against sentence

29 Where a convicted person appeals against his conviction or sentence, the grant of a stay of execution pending appeal and the continuance of bail arrangements are fairly straightforward matters. The key concern is the interest of the accused person in retaining his freedom until his appeal against conviction or sentence has been resolved. Hence considerable emphasis is placed on factors that go towards the likelihood of absconding, including the accused person's flight risk, his ties with Singapore, and the character, means and standing of the accused person. Other factors that would be taken into account include the accused person's criminal record, the possibility of the accused person offending or reoffending whilst at liberty and whether the security imposed is sufficient to ensure the attendance of the accused person before the appellate court: see *Ralph v PP* [1971-1973] SLR(R) 365 at [6] and *Loh Kok Siew v PP* [2002] 2 SLR(R) 186 at [10].

30 But the setting is altogether different where the Prosecution is:

(a) appealing not against an acquittal (in which case the whole question of a stay would not generally arise at all) but against a sentence that entails some loss of liberty; and

(b) seeking a stay of execution to prevent the convicted person from commencing to serve his sentence before the hearing of the appeal,

so as to ensure that when the appellate court comes to consider the appropriate sentence its discretion is not curtailed or affected by the convicted person having already served the original sentence in part or worse, conceivably, in its entirety.

The proper approach

31 In such circumstances, the court hearing a stay application should primarily be concerned with ensuring that the Prosecution's appeal is not prejudiced while weighing this against the comparative prejudice, if any, that is suffered by the convicted person in having to await the outcome of the appeal before commencing his sentence. Prejudice in the latter context will not readily be apparent but I do not mean to shut the door to matters that might conceivably be raised. Any legitimate concern the offender might have should be weighed against the legitimate interest of the Prosecution in having the sentence reviewed and finally settled by the appellate court.

32 In these circumstances, in my judgment, the court determining such a stay application should weigh the following factors:

(a) the interests of a fair and just prosecution, including the interest of ensuring that the Prosecution's appeal against the sentence is not prejudiced;

(b) any comparative prejudice to the convicted person in having to await the outcome of the appeal before serving his sentence;

(c) the nature and gravity of the offence;

(d) the length of the term of imprisonment or probation in comparison with the length of time which it is likely to take for the appeal to be heard; and

(e) whether any possible prejudice to the convicted person can be ameliorated through simple measures such as requesting that the appeal be heard on an urgent basis.

33 It should be noted that if the trial court dismisses the stay application, as it did in this

instance, the Prosecution may yet seek a stay from the appellate court. Unfortunately, this was not done here. Section 383 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") provides that:

> **Stay of execution pending appeal**
>
> **383.**–(1) An appeal shall not operate as a stay of execution, but the trial court *and the appellate court* may stay execution on any judgment, sentence or order pending appeal, on any terms as to security for the payment of money or the performance or non-performance of an act or the suffering of a punishment imposed by the judgment, sentence or order as to the court seem reasonable.
>
> [emphasis added]

34 The simple point ultimately is that a trial court in such circumstances should hesitate before taking a course that is likely to prejudice the prospects of an appeal that is being pursued. Where it does take such a course, there is no reason why the appellate court should not be approached to consider the point afresh.

Conclusion

35 For the reasons set out above, I dismissed the appeal even though I considered that the District Judge had erred in the sentence imposed and in subsequently dismissing the stay application brought by the Prosecution.

36 The Respondent should consider himself extremely fortunate in the circumstances and at the conclusion of the appeal, I urged him to make the best of this opportunity and to turn over a new leaf.

[note: 1] Record of Proceedings ("ROP") at p 151.

[note: 2] ROP at p 151.

[note: 3] ROP at p 157.

[note: 4] ROP at p 153.

[note: 5] ROP at p 150.

[note: 6] ROP at p 155.

[note: 7] ROP at p 12.

[note: 8] ROP at p 12.

[note: 9] ROP at p 161.

[note: 10] ROP at p 166.

[note: 11] ROP at p 162.

[note: 12] ROP at p 34.

[note: 13] Prosecution's letter dated 22 April 2014 at para 3.

[note: 14] Prosecution's letter dated 22 April 2014 at para 3.