Mah Kiat Seng *v* Public Prosecutor
[2011] SGCA 28

Case Number	: Criminal Motion No 7 of 2011
Decision Date	: 30 May 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Chao Hick Tin JA; V K Rajah JA
Counsel Name(s)	: The applicant in person; Mohamed Faizal and Lee Lit Cheng (Attorney-General's Chambers) for the respondent.
Parties	: Mah Kiat Seng — Public Prosecutor

Criminal Procedure and Sentencing

30 May 2011

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This was an application by the applicant, Mah Kiat Seng, ("MKS") , who appeared in person, for leave to refer a series of some 26 questions to the Court of Appeal pursuant to s 397 of the Criminal Procedure Code 2010 (Act 15 of 2010) ("s 397 CPC 2010"). As this application to court was made out of the prescribed time, MKS also prayed for an extension of time to make the application. In anticipation that his questions might not have been formulated correctly, he further asked that the court, if it thought it fit, to reframe those questions appropriately.

The background

2 The present application arose from MKS' conviction in the District Court of two charges under the Registration of Criminals Act (Cap 268, 1985 Rev Ed) ("RCA"). These charges were, respectively, for his refusal to provide a blood sample (contrary to s 13E(5)(a) of the RCA), and to have his finger impressions and photograph taken (contrary to s 13(2)(a) of the same Act). The District Judge's ("DJ") decision can be found at *PP v Mah Kiat Seng* [2010] SGDC 315 ("*PP v MKS (DC)*").

3 MKS appealed against the DJ's decision to the High Court in Magistrate's Appeal No 184 of 2010 ("MA 184/2010"). The appeal was partially allowed; Choo Han Teck J ("the Judge") allowed MKS' appeal in respect of his conviction vis-a-vis the failure to provide a blood sample but dismissed his appeal in respect of the refusal to have his finger impressions and photograph taken. The Judge's decision in MA 184/2010 can be found at *Mah Kiat Seng v Public Prosecutor* [2010] SGHC 320 ("*MKS v PP (MA)*").

4 MKS then applied to the High Court in Criminal Motion No 42 of 2010 ("CM 42/2010") to reserve 22 questions of law of public interest to the Court of Appeal under s 60(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("s 60 SCJA"). The Judge dismissed this application. Section 60 SCJA has since been repealed w.e.f. 1 January 2011 and replaced by s 397 CPC 2010. The Judge's decision in CM 42/2010 can be found at *Mah Kiat Seng v Public Prosecutor* [2011] SGHC 47 ("*MKS v PP (CM)*").

5 Dissatisfied with the Judge's decision not to reserve those questions of law which he contended were questions of public interest, MKS brought the present Motion ("the Motion") to obtain what he failed to obtain from the Judge. In the Motion, he listed 26 questions, of which 22 were *identical* to those which he raised before the Judge.

The decision below

6 The Judge found the 22 questions raised by MKS to be "rambling, repetitious" and was of the view that "many concerned not questions of law but fact". He summarised the nature of MSK's complaint to involve two aspects. The first was factual, *viz*, whether the police had requested that MKS provide his finger impressions and photograph. To this extent, the Judge was of the view that the long list of questions which MKS enunciated were in fact questions of fact and not questions of law of public interest, as MKS claimed that they were. The second aspect of MKS's complaint involved a question of law, which was whether the RCA "applied to compel a suspect as opposed to a convicted criminal". On this aspect, the Judge was of the view that s 8(a) of the RCA provided a clear and unequivocal answer to this question of law. Under s 8(a) of the RCA, "[a]ny authorised officer may take or cause to be taken the finger impressions and photographs of "any person under arrest" who is accused of any crime". As s 8(a) of the RCA expressly states that it applies to "any person under arrest", the Judge had little problem in answering the question of law posed to him in the affirmative. Accordingly, he found that there was no basis to reserve any questions to this Court for its determination and thus dismissed CM 42/2010.

Main issues before this Court

7 On the basis of the prayers set out in the Motion, the main issues which were presented to this court were, *inter alia*:

(a) Whether an extension of time to refer new and further questions of law of public interest to the Court of Appeal under s 397 CPC 2010 can and should be granted, given that the High Court had rejected an earlier application filed within time.

(b) Whether, should an extension of time to file an application under s 397 CPC 2010 be granted, leave to refer the questions as framed by MKS to this Court ought to be granted.

(c) Whether, should leave to refer the questions as framed by MKS not be granted, there are nonetheless issues of law of public interest such that the Court of Appeal should reframe the questions tendered by MKS to reflect those issues.

At the conclusion of the oral hearing before us, as MKS had not shown that there were in fact questions of law of public interest which ought to be reserved for the consideration of this Court, we dismissed the application. We now give our reasons for doing so.

8 The critical question of the application in the Motion relates to the issue as to whether, of the 26 questions listed, any of them are questions of law of public interest which ought to be reserved for the consideration of this Court. In his oral submission to us, we asked MKS to focus on this critical question. In these grounds, we do not wish to elaborate on the first issue listed at [7] above, as even if an extension of time was granted, MKS's application for leave to appeal would still not have succeeded in any event.

9 We thus turn to the second issue (see [7] above), on which we would make these observations. It would be noted that MKS made this application pursuant to s 397 CPC 2010 which

came into force on 1 January 2011 and superseded s 60 SCJA. While the substantive clause of s 397 CPC 2010 is largely similar to that of s 60 SCJA, an important difference between them is that under s 397 CPC 2010, it is the Court of Appeal, and not the High Court (as it was under s 60 of the SCJA), which assesses the question/s that the applicant seeks to refer to the Court of Appeal. In other words, previously such an application had to be made to the High Court which decision would be final. Now the application would have to be made directly to the Court of Appeal, which will decide whether there is such a question of law of public interest which it should address. However, we would underscore the fact that as the operative clause of the two provisions are identical (both visualised the reference to the Court of Appeal of only "any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case"), [note: 1] we see no reason why the principles established by case law under s 60 SCJA, as to how the court should exercise its discretion in granting leave, should not be of relevance to an application under the current s 397 CPC 2010.

10 MKS's application in CM 42/2010, made on 15 November 2010, under s 60 SCJA which was then in force, was turned down by the Judge on 10 February 2011. In the meantime, on 2 January 2011, s 397 CPC 2010 came into force and replaced s 60 SCJA. This Motion was his second attempt to have the alleged questions of law referred to the Court of Appeal. Was MKS entitled to do so? It seems to us that MKS was not entitled to make this application under s 397 CPC 2010 for two reasons. First, it would amount to an abuse of process, even though this application contains four more questions than the first. He should not be allowed a second bite of the cherry. Second, and more importantly, regulation 2 of the Criminal Procedure Code (Transitional Provisions – Further Proceedings and Joint Trials) Regulations 2011 ("CPC Transitional Regulations") provides:

> Where an accused has been charged for any offence before 2nd January 2011, any proceeding (which includes any pre-trial proceeding, trial, criminal motion, criminal appeal, criminal revision or criminal reference) in relation to that offence may be taken or continued, as the case may be, after that date and everything in relation thereto may be done in all respects on or after that date as if the Act had not been enacted.

The CPC Transitional Regulations were deemed under regulation 1 of the same to have come into operation on 2 January 2011. Thus, regulation 2, and in turn s 397 CPC 2010, would apply to anyone charged with an offence on and after 2 January 2011. In the present case, MKS was charged and convicted of the offence while s 60 SCJA was still in force.

11 However, notwithstanding our views on this procedural point, our decision to dismiss the application was also based on the critical issue that MKS had not shown that there was any legal question *of public interest* which ought to be referred to the Court of Appeal.

The law on reference of questions of law of public interest to the Court of Appeal

12 We now turn to consider the substantive issues of MKS's application. Section 397(1) CPC 2010 provides:

> When a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, and a party to the proceedings wishes to refer any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case, that party may apply to the Court of Appeal for leave to refer the question to the Court of Appeal.

Like s 60 SCJA, s 397(1) CPC prescribes four distinct requirements which must be satisfied before this

Court may grant leave to refer any questions of law of public interest for its further consideration. The four requirements, as confirmed and applied in *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 ("*BMS*") at [29], are as follows:

(a) there must be a question of *law*;

(b) the question of law must be *one of public interest* and not of mere personal importance to the parties alone;

(c) the question must have arisen in the matter dealt with by the High Court in the *exercise of its appellate or revisionary jurisdiction*; and

(d) the determination of the question by the High Court must have *affected the outcome* of the case.

[emphasis in original]

13 In considering these four requirements and deciding whether to grant leave to refer questions of law of public interest to the Court of Appeal under s 60 of the SCJA, the position has always been that the court's discretion in this respect would be exercised sparingly (see *BMS*, at [32], approving *Ng Ai Tiong v PP* [2000] 1 SLR(R) 490 at [10]). Further, *BMS* reiterated the position that the High Court judge hearing the s 60 application has the discretion to refuse to refer a question of law of public interest stated by the applicant, even if all the conditions thereof were satisfied (unless the question was raised by the Public Prosecutor). However, strong and cogent grounds had to exist before the High Court could refuse to refer a matter to the Court of Appeal if all the conditions were satisfied. There is nothing in the enactment of s 397 CPC 2010 which indicates that these approaches taken in relation to s 60 SCJA should not continue to apply *vis-a-vis* s 397 CPC 2010.

Application of the law to the Motion

14 We do not propose to set out all the 26 questions which MKS had identified. Many of the questions are repetitive in nature and merely restate identical or similar points. Some concerned sufficiency of evidence to convict under the RCA, and others were based on erroneous facts or a misunderstanding of the law. One question even queried if he could be convicted of his refusal to provide finger impressions or allow photographs to be taken when he was acquitted of the charge of failing to provide a blood sample. Obviously this query was stated only to be rejected. These aside, the other seeming questions of law may be grouped under three main sets: (a) questions 1 to 3 and 14; (b) questions 4 to 6, 19, and 20; and (c) questions 25 and 26. However, the threshold which MKS had failed to meet was the element of public interest.

15 The questions in set (a), *viz*, questions 1 to 3 and 14, concern the question of law which the Judge considered in CM 42/2010. This was "whether the Registration of Criminals Act (Cap 268, 1985 Rev Ed) applied to compel a suspect as opposed to a convicted criminal" (*MKS v PP (CM)*, at [5]). This question is easily answered, as the RCA provides a clear and unequivocal answer. Section 8, read with s 13 of the RCA, explicitly provides that the Act not only obliges a convicted person, but also a "person under arrest who is accused of a crime", to surrender his finger impressions and photographs when asked to do so.

16 The questions in set (b), *viz*, questions 4 to 6, 19 and 20, concern a construction of the words "finger impressions and photographs" (in s 8 RCA), "his photograph and his finger impressions" (in s 13 RCA) and/or any other such combination as used in the RCA. MKS appeared to be raising a question

as to what photographs or finger impressions must be given before a person to whom the RCA applies may be regarded as having discharged his duty under s 13 (read with s 8) of the RCA. In particular, he seemed to be asking whether the provision of a single thumb print and a single frontal photograph would suffice to discharge one's duty under that Act. While on the face of it, this set of questions does pose a question of law, its answer should be apparent from the objective of the RCA, which is to institute a registration system of criminals and related persons. Section 2 RCA defines "finger impression" to include "thumb impression and palmar impression". "Photograph" is also defined in the same section to include, in relation to a person, "the photograph of any distinguishing feature or mark on the body of that person". In s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed), it is stated that "words in the singular included the plural" and vice versa. In the light of these definitions, a police officer would be acting within his power to request MKS to allow photographs be taken of him and to obtain his finger impressions (which would include palmer impression). It is clear from the wording of s 8 read with s 13 RCA that persons who are under arrest and accused of a crime registrable under the RCA are under a duty to submit to the taking of their finger impressions and photographs when called upon do so. Police officers are empowered to take such number of photographs and finger impressions as are necessary for the criminal registration process. In this regard, we noted the safeguard prescribed in s 10 RCA, which requires the destruction of finger impressions and photographs of persons who are later acquitted or discharged of the crime alleged.

17 In relation to the facts of the case, the DJ found, as a matter of fact, that initially, MKS did consent to the taking of a *frontal view photograph of himself*, and also did not object to the taking of his *thumb impressions* (see *PP v MKS (DC)*, at [6] and [8]). However, these were taken for the purposes of verifying MKS's identity (see *PP v MKS (DC)*, at [40]). Later MKS was asked to have photographs taken of not only his frontal view but also his left and right profiles, as well as to have all of his finger impressions taken (not only his thumbs) including his palms and sides. He refused in spite of explanations by the police officers that the finger impressions and photographs were required as part of the criminal registration process under the RCA, with repeated warnings of the consequences of non-compliance. MKS's argument was that as he had already agreed to the taking of one frontal view photograph and provided his thumb impressions, that should constitute partial discharge of his statutory duty to provide finger impressions and photographs under ss 8 and 13 RCA. Accordingly, it was argued that he could not be found guilty of the offence of non-cooperation under those provisions. However, this assertion must be viewed in light of the evidence of the police officers who said that they had informed MKS that the initial thumb impressions and photograph had been procured for a different purpose to that in respect of which he had refused to cooperate.

18 However, while we recognise that construction of a statutory provision is a question of law, it does not follow that every such question of statutory construction is necessarily a question of law of *public interest*. If the construction that could be placed on a statutory provision is clear, it would not be in the public interest to reserve this legal question for the Court of Appeal as it would be a waste of the court's time: see *Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141-142. In the context of the present case, the answer to the question raised is quite clear having regard to the express previsions as well as the objects of the RCA, *ie*, to institute a registration system of criminals and related persons. It is clearly not of such complexity as to warrant a reference to this court. By way of information, it is to be noted that the established police practice is to require finger impressions from "each and every finger of both hands including thumb, palm and side impressions", as well as photographs of "frontal, left and right profiles" (see *PP v MKS (DC)*, at [40]).

19 Turning finally to the last set of questions, *viz*, questions 25 to 26, both questions concern issues which are settled and which could be answered by the application or extension of established principles of law and the application of statutory provisions which have been authoritatively construed by the court. *BMS* makes it clear at [37] that the "the mere construction of words in statutory

provisions in their application to the facts of a case does not satisfy the requirement of public interest". At the same paragraph, it was also said that s 60 of the SCJA:

> ... ought not be used to route to the Court of Appeal questions "which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts"

20 The fact that a question relates to a particular provision which has not been interpreted judicially does not, without more, render it to be of public interest; a new or novel question is not invariably a difficult or contentious question and will not always satisfy the public interest threshold (see *BMS* at [37], *Abdul Salam bin Mohamed Salleh v PP* [1990] 1 SLR(R) 198 at [30] and *Bachoo Mohan Singh v Public Prosecutor* [2009] 3 SLR(R) 1037 at [78]). We would further add that a question of law does not become one of public interest just because an applicant is vociferous in raising related issues on that question. To construe "public interest" in the manner in which MKS would like us to adopt, namely, in every case where a point of interpretation of a statutory provision arises, is to cast the net too wide. It would mean, more often than not, that there would be a second tier of appeal by way of reservation of questions of law. This would undoubtedly defeat the legislative purpose of s 60 SCJA that there should only be one level of appeal. Where an accused person is tried before a subordinate court, he has a right of appeal only to the High Court. He has no further right of appeal to the Court of Appeal. The process provided in s 60 SCJA, and now s 397 CPC 2010, is an exceptional measure to be resorted to only where a question of law of public interest arises. In this context, public interest must therefore mean more than just questions of law or questions of statutory interpretation. The legislature has in its wisdom refrained from defining it. Conflict of judicial decisions on the point would be such a case. At the very least, the point of law should be one of considerable difficulty or complexity, the determination of which affects the public interest rather than the narrow personal interest of an applicant who has been convicted of an offence.

Conclusion

21 In conclusion, we would state that while some of the questions raised may be questions of law, they are certainly not questions of law of public interest. MKS was in effect seeking, by the back-door, an appeal against the decision of the Judge. This we could not allow. Accordingly, we dismissed the Motion.

[note: 1] Section 397(1) CPC 2010 and s 60(1) SCJA.