

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 53

Criminal Motion No 3 of 2022

Between

Gaiyathiri d/o Murugayan

... Applicant

And

Public Prosecutor

... Respondent

JUDGMENT

[Criminal Procedure and Sentencing — Compensation and costs]

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Gaiyathiri d/o Murugayan

v

Public Prosecutor

[2022] SGCA 53

Court of Appeal — Criminal Motion No 3 of 2022

Andrew Phang Boon Leong JCA, Judith Prakash JCA and Steven Chong JCA
12 May 2022

15 July 2022

Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

1 At the hearing of Criminal Motion No 3 of 2022 (“CM 3”) on 4 May 2022, the respondent sought a personal costs against former counsel of the applicant, Mr Joseph Chen (“Mr Chen”), under whose watch CM 3 had been filed. In our *ex tempore* judgment dismissing CM 3 in its entirety (see *Gaiyathiri d/o Murugayan v Public Prosecutor* [2022] SGCA 38 (“the Judgment”)), we directed that both Mr Chen and the respondent tender written submissions on whether a personal costs order should be made against Mr Chen, and if so, the quantum of costs that are to be paid. After the parties’ written submissions were filed, we asked Mr Chen if he wished to make oral submissions before us. Mr Chen initially indicated that he wished to do so but later informed the court on 25 May 2022 that he was agreeable to us deciding the issue of a personal costs order without an oral hearing. In his correspondence to the court, Mr Chen also raised a few points that he urged us to consider, in

addition to his written submissions. The respondent subsequently also informed the court that it had no objection to Mr Chen's request and responded to Mr Chen's further points in its own correspondence to the court. Having carefully considered both the parties' written submissions and the arguments that they have canvassed in their subsequent correspondence to the court, we now deliver our decision.

2 We begin with the applicable legal principles. In determining whether it should exercise its powers to make personal costs orders against defence counsel, the court considers: (a) whether counsel has acted "improperly, unreasonably or negligently"; (b) if so, whether such conduct by counsel caused the other party to incur "unnecessary costs"; and (c) if so, whether it is "in all the circumstances just" to order counsel to compensate the other party for the whole or any part of the costs incurred (see the decision of this court in *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 ("*Syed Suhail*") at [19]). As this court also held in *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532, one situation where a personal costs order may be appropriate "is where the solicitor advances a wholly disingenuous case or files utterly ill-conceived applications even though the solicitor ought to have known better and advised his client against such a course of action" (at [67]). In our view, this is precisely what had occurred in the present case.

3 In particular, we agree with the respondent that Mr Chen's conduct of CM 3 has fallen short of what is expected of reasonable defence counsel, and would be regarded as improper according to the consensus of professional opinion. Mr Chen had failed in his duty to consider the merits of CM 3 and had facilitated the filing of CM 3 despite it being obviously bound to fail.

4 The part of CM 3 seeking discovery was patently unmeritorious. As we have explained in the Judgment (at [12]–[17]), there was no legal or factual basis on which we could have ordered disclosure of the materials sought by the applicant.

5 More critically, Mr Chen would have known that this part of CM 3 was bound to fail. None of the materials for which disclosure was sought was in the possession of the respondent. This was also the applicant’s own position – it is implicit in her supporting affidavit for CM 3 that she had recognised that most (if not all) of the materials for which disclosure was sought were in the possession of the Singapore Prison Service (“the SPS”). That alone would have made it clear to Mr Chen that this part of CM 3 was unsustainable since the respondent was the only other party to CM 3. Mr Chen now claims that it never occurred to him that requests for documents should have been made directly to the SPS and he had genuinely thought that the respondent could act as a conduit between the applicant and the SPS in facilitating these requests for documents. However, the prayers in CM 3 suggest otherwise. Prayer 2 (specifically seeking discovery of the applicant’s children’s medical records from their private paediatrician) is specifically directed at “the Prison Authorities” while prayer 1 (seeking discovery of all the other materials) states that the order therein is sought as against the respondent “and/or the Prison Authorities”. This demonstrates that Mr Chen had recognised the respondent and the SPS as being distinct entities. He must therefore also have recognised that any materials from the SPS would have to be obtained directly from it and not through the respondent, as he now claims. That is the only possible explanation for why he had found it necessary to specifically identify the SPS as the party against which the orders in prayers 1 and 2 of CM 3 were sought.

6 More specifically, we consider it likely that Mr Chen had given no consideration whatsoever to the merits or necessity of this part of CM 3 and had simply facilitated its filing at the applicant's instructions. For instance, although the applicant had access to her children's medical records from their private paediatrician (which she was able to annex to her reply affidavit for CM 3), CM 3 nevertheless sought disclosure of these records. According to an affidavit filed by the SPS on the respondent's behalf in CM 3, the SPS had facilitated the applicant's request for these medical records on 21 August 2021. The private paediatrician subsequently provided a reply with the applicant's children's medical reports on 5 October 2021, and the SPS then issued these reports to the applicant. Both the applicant and Mr Chen did not dispute this. All of this goes towards suggesting that Mr Chen had never once considered if discovery of all or any part of those materials sought had been necessary before CM 3 was filed on 25 January 2022. This is also symptomatic of how he had failed to make any assessment of the merits of CM 3 before invoking the court's processes.

7 The part of CM 3 relating to the application for leave to adduce a psychiatric report by Dr Jacob Rajesh ("Dr Rajesh") as further evidence is even more egregious. By way of context, for the purposes of the applicant's guilty plea, the Prosecution and Defence agreed that the psychiatric assessment by one Dr Derrick Yeo ("Dr Yeo") was to be taken as reflective of her mental state at the time she had committed the offences (see the Judgment at [2]). The applicant contends that in the alleged further report, Dr Rajesh sets out his disagreement with Dr Yeo's assessment of her psychiatric condition (see the Judgment at [4]). Leaving the merits of that application aside, which we have observed in the Judgment (at [22]) to be doubtful, it would have been clear to Mr Chen from the outset that this part of CM 3 was bound to fail because the alleged further report

by Dr Rajesh had not even been put before us and there was no basis on which we could have considered the application (see the Judgment at [21]).

8 In his written submissions urging us to not impose a personal costs order, Mr Chen asserts, for the first time, that the applicant's impecuniosity had prevented her from obtaining the alleged further report and putting it before the court for the purposes of CM 3, and that he too was in no financial position to assist the applicant on the same. This amounts to an implicit acceptance by Mr Chen that up until the hearing of CM 3 on 4 May 2022, the alleged further report was non-existent. By proceeding with this part of CM 3 in spite of the absence of the alleged further report, Mr Chen acted improperly and unreasonably. He encumbered the court with a hopeless application that was nothing but a waste of the court's time.

9 In any event, there is no evidence to support Mr Chen's assertion about the applicant's impecuniosity and the consequent difficulties she faced in obtaining the alleged further report. This point has been raised for the first time by Mr Chen, presumably for his own benefit. In fact, as early as October 2021, Mr Chen had informed the court that the applicant was seeking leave to adduce a further psychiatric report and that arrangements were being made to obtain such a report. Mr Chen never once thereafter informed the court that the applicant faced difficulty in obtaining the alleged further report. Even if Mr Chen's assertion about the applicant's impecuniosity were true, it can provide no excuse for his conduct. Mr Chen could (and should) have informed the court about the difficulty faced by the applicant and sought the necessary directions. In fact, if there were any truth in Mr Chen's assertion about the applicant's impecuniosity, he would have done a grave disservice to his then-client (the applicant) by failing to ensure that CM 3 only proceeded to hearing when the relevant documents had been obtained.

10 Mr Chen also claims that the part of CM 3 seeking a Newton Hearing was justified because the applicant had wanted to know if a Newton Hearing could be convened notwithstanding the agreement between the Prosecution and the Defence to adopt Dr Yeo’s assessment of her mental state for her guilty plea (see [7] above). However, given that the alleged further report by Dr Rajesh had not even been put before us, there could be no difference between Dr Yeo’s and Dr Rajesh’s assessment of the applicant’s mental state to speak of, and there was similarly no basis on which we could have considered the part of CM 3 seeking a Newton Hearing.

11 In both his written submissions and subsequent correspondence to the court, Mr Chen urges us to not impose a personal costs order because he had acted in good faith and genuinely believed that the reliefs prayed for in CM 3 would be granted. Mr Chen relies on the decision of this court in *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 (“*Abdul Kahar*”). In that case, the applicant, who had been convicted of drug trafficking and sentenced to death, applied for this court to reopen his concluded appeal, raising arguments relating to the constitutionality and interpretation of s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (“the MDA”). We found no merit in the application and dismissed it. In that case, we declined to make a personal costs order as sought by the Prosecution against counsel because we were of the view that counsel had believed in good faith (albeit mistakenly) that a challenge to the constitutionality of s 33B of the MDA was not bound to fail (at [69]–[70]). The applicant had initially wished to make a fresh application to the court on “psychiatric grounds” but counsel advised him that there was no merit in such an application. However, counsel thought that an issue which was not obviously bound to fail was that relating to the constitutionality of s 33B of the MDA. Nevertheless, he advised the applicant to appoint another lawyer to represent

him. Counsel only eventually acceded to representing the applicant after requests by the applicant's family, and also because the applicant was facing the death penalty.

12 As we have emphasised in *Syed Suhail* ([2] above), a mere good faith belief by counsel in the merits of the case, without reasonable basis, will not necessarily preclude a personal costs order from being made (at [47]). As we have also emphasised in *Syed Suhail*, our decision in *Abdul Kahar* does not stand for the proposition that a personal costs order will not be made against defence counsel whenever they have acted in good faith, because that would simply allow entirely negligent solicitors who genuinely believe their own faulty arguments to escape the consequences of their conduct (at [47]). In this judgment, we have also set out the facts in *Abdul Kahar* at some length to emphasise how fact-specific our decision in that case to not order personal costs against counsel had been. Although counsel's belief in the merits of a constitutional challenge to s 33B of the MDA had been misplaced, we were persuaded, given the circumstances in which he came to represent the applicant in the application, that he had acted in good faith.

13 In this case, a mere good faith belief by Mr Chen in the merits of CM 3 does not assist him because quite clearly, that belief had been held without reasonable basis. The circumstances of this case also do not lend the impression that Mr Chen had acted in good faith. This is because CM 3 had not merely been unmeritorious; it was entirely without basis and so Mr Chen must have known that it was nothing but a waste of the court's time. As explained in the Judgment, none of the materials for which disclosure had been sought was in the possession of the respondent, a position which Mr Chen must have been aware of (see the Judgment at [13]–[14]). We were also left with no option except to dismiss the application for leave to adduce further evidence because the alleged further

report by Dr Rajesh had not even been put before us (see the Judgment at [21]). We are therefore not persuaded that Mr Chen had acted in good faith in facilitating the filing of CM 3.

14 Finally, we address two other points which Mr Chen has urged us to consider in his subsequent correspondence to the court. First, he says that he had been helping the applicant “from a humanitarian perspective” and “from [the applicant’s] children’s point of view” because a custodial sentence of 30 years imposed on the applicant means that she could not be with them during their formative years. We do not see how this has any bearing on our decision to impose a personal costs order against Mr Chen. Whatever reasons counsel might have for taking on their client’s case, it does not excuse them from their duty as officers of the court to assess the merits of their client’s case before invoking the court’s processes (see the decision of this court in *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 at [87]). Indeed, if Mr Chen truly took up his appointment in order to help the applicant “from a humanitarian perspective”, then he should, all the more, have properly advised the applicant on the merits of CM 3 and ensure that the reliefs therein had been properly sought and that all relevant materials like the alleged further report had been put before the court for the hearing of CM 3; quite clearly, Mr Chen has not done any of that.

15 Second, Mr Chen raises a somewhat cryptic point that “the applicant cannot afford to pay the costs”. If what Mr Chen meant by this is that a personal costs order should not be made because of the applicant’s impecuniosity, then we have no hesitation to reject this point, because the costs order is made against Mr Chen *personally* and not the applicant. If what Mr Chen meant by this is that he only came to represent the applicant because of her impecuniosity, we do not see that it has much bearing on our decision to impose a personal costs order.

Even if Mr Chen came to represent the applicant out of goodwill, it does not excuse him from his duty as an officer of the court to consider the merits of the applicant's case before invoking the court's processes. It is one thing if counsel had considered the merits of his client's case and erred in his assessment (for example, like in *Abdul Kahar* ([11] above)) but quite another if counsel simply gave no such consideration to the case concerned at all (as appears to have been the case here).

16 For the foregoing reasons, we order Mr Chen to pay costs of \$3,000 (all-in) to the respondent. The usual consequential orders are to apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

The applicant (in person);
Mohamed Faizal SC, Senthilkumaran Sabapathy and Sean Teh
(Attorney-General's Chambers) for the respondent.
