IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 193

Magistrate's Appeal No 9202 of 2015

Between

Karthigeyan M Kailasam

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

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Introduction

1 The central issue that arose in this appeal against sentence was the extent to which s 301 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC 2012") permits the court to bypass the general rule that a court is *functus officio* once sentence has been passed. This necessitated consideration of the ambit of an "error" within the meaning of s 301 of the CPC 2012.

Background

2 The appellant had pleaded guilty to and was convicted by a District Judge on 23 October 2015 in respect of four charges under s 175A of the Casino Control Act (Cap 33A, 2007 Rev Ed) ("CCA"). With the appellant's consent, another 146 charges under s 13(2)(*b*) of the National Registration Act

(Cap 201, 1992 Rev Ed) and 134 charges under s 175A of the CCA were taken into consideration for the purpose of sentence.

3 Before the District Judge, the prosecution submitted that fines of at least $3,000 for each proceeded charge would be appropriate. The appellant, who was represented, asked for the "minimum fine" to be imposed. The District Judge imposed a fine of $3,000 (in default three weeks' imprisonment) per proceeded charge, bringing the total sentence to $12,000 fine (in default 12 weeks' imprisonment). The fines were paid in full.

4 The case was scheduled for a further mention on 26 October 2015 on account of the prosecution having brought an application under s 301 of the CPC 2012 seeking a "correction" of the District Judge's sentence. This was a Monday, the next working day after 23 October 2015 when the appellant was sentenced. The application was made on the basis that the District Judge ought to have considered the appellant to be a potential candidate for a Mandatory Treatment Order ("MTO") as he had been diagnosed to have been suffering from "pathological gambling", a compulsive disorder. The appellant had raised the issue of his gambling disorder on 23 October 2015 in putting forward his mitigation plea. The prosecution had however submitted then that there was no direct causal link between his condition and the commission of the offences.

5 In the event, on 26 October 2015, the prosecution withdrew their application seeking a correction of the District Judge's sentence pursuant to s 301 of the CPC 2012. The appellant subsequently filed an appeal against sentence. At the hearing of the appeal on 6 May 2016, I agreed with the parties' views that there were grounds to consider calling for a pre-sentence report to assess the appellant's suitability to undergo an MTO ("the MTO

Suitability Report"). Accordingly, I adjourned the hearing pending receipt of the MTO Suitability Report.

6 Upon receipt and perusal of the MTO Suitability Report prepared by the appointed psychiatrist (Dr Guo Song), I resumed hearing the matter on 17 August 2016. In the event, I allowed the appeal and in doing so, I made some brief observations on the applicability of s 301 of the CPC 2012. In these grounds of decision, I shall focus only on that part of the prosecution's written submissions at [30] to [32] which dealt with s 301 of the CPC 2012. Specifically, this is in relation to their submission at [32] that "the appropriateness of an MTO Suitability Report was not considered at the 23 October 2015 hearing even though it was a relevant sentencing option" and that this therefore would constitute "a sufficient basis for the District Judge to consider the matter pursuant to section 301 of the CPC".

Effect of s 301 of the CPC 2012

7 The general principle is that the court is *functus officio* after sentence is pronounced. This essentially operates to ensure that there is finality and certainty in the proceedings once sentence has been passed. Leaving aside the prospect of a successful appeal against sentence or a revision of the sentence, s 301(1) of the CPC 2012 creates an exception to that rule and confers on the court the power to alter its judgment in two situations: (a) where there has been a clerical error; or (b) where there has been "any other error", which includes an error in the exercise of its sentencing powers. Clerical errors may be rectified *at any time* whereas "any other error" cannot be rectified beyond the next working day after the delivery of the judgment. Section 301(2) goes on to clarify that any error resulting from a sentence imposed by a court which

it subsequently views as being too harsh or too lenient is not such an error within the meaning in s 301(1).

8 Section 301 of the CPC 2012 has its origins in s 217(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985") which provided:

> A *clerical error* may be rectified at any time and *any other mistake* may be rectified at any time before the court rises for the day.
>
> [emphasis added]

9 In their submissions, the prosecution relied on the broad definition of the words "any other mistake" that was set out in *Public Prosecutor v Oh Hu Sung* [2003] 4 SLR(R) 541 ("*Oh Hu Sung*"). In that case, Yong Pung How CJ held that "any other mistake" in s 217(2) was to be construed expansively and encompassed more than mere clerical errors for otherwise the first limb of the subsection (which refers to clerical errors) would be otiose (at [27]). "Any other mistake" included not only mistakes by the court, but also unilateral mistakes by the parties. It covered both errors of law and errors of fact. However, in the interest of finality of proceedings, Yong CJ stressed that s 217(2) would only apply if the mistake was obvious to the court or admitted by all parties (at [28]). I pause here to note that this expansive definition of the term "any other mistake" could conceivably cover the present situation since the "mistake" in question (that an MTO was the more appropriate punishment) was one which both the prosecution and the defence apparently felt ought to be corrected.

10 There are a few pertinent points to note. *First*, although the word "mistake" (in s 217(2) of the CPC 1985) was replaced with "error" in the CPC 2012, this does not substantively alter the scope of the provision. *Second*, "an error in the exercise of [the court's] sentencing powers" was included in

s 301(1) of the CPC 2012 to legislatively bring such errors within its ambit. This is consistent with the illustrations (c) and (d) to s 301(1) of the CPC 2012. *Third,* the broad definition of "any other mistake" that was laid down in *Oh Hu Sung* has been circumscribed by s 301(2) of the CPC 2012 which clarifies that any error resulting from a sentence imposed by a court which it subsequently views as being too harsh or too lenient is not an error within the meaning of s 301(1). In other words, the court's power to rectify errors in its judgment under s 301(1) of the CPC cannot be invoked even if (a) it is obvious to the court that the sentence passed was too harsh or too lenient; *or* (b) the prosecution and the defence agree that the sentence imposed is too harsh or too lenient.

No "error" within the meaning of s 301 of the CPC 2012

11 The prosecution maintained at [30] to [32] of their written submissions on appeal that the District Judge ought to have acted pursuant to s 301 of the CPC 2012. With respect, this submission was misconceived for reasons I will set out below. I took the view that the District Judge had rightly opined that he was *functus officio* after having sentenced the appellant and that s 301(2) could not operate to permit him to bypass the *functus officio* rule in the instant case.

12 To begin with, the District Judge apparently saw no error in his sentence which merited correction through the invocation of s 301 of the CPC 2012. If it was felt that he was wrong in this regard, the proper course would have been to lodge an appeal against sentence. This was precisely what was done in the present case, but only after the abortive attempt to resort to s 301 of the CPC 2012.

13 There was another clear indicator that this was not a case involving any "error" in the sentence that could be corrected under s 301 of the CPC. The

appellant was initially prepared to accept that fines were a suitable and acceptable punishment. In all likelihood, this reflected an agreement as part of the plea negotiations with the prosecution, and he duly paid the fines. The submissions tendered by the prosecution before the District Judge requesting a correction of his sentence would suggest that the parties had reassessed their positions post-sentence and had mutually arrived at a completely different understanding, *ie*, that fines were rather less appropriate (or more harsh) than originally thought. In response to my queries, the prosecution explained that they had changed their position after reconsidering the matter.

14 In this connection, the observations of CJ Sundaresh Menon in *Janardana Jayasankarr v Public Prosecutor* [2016] SGHC 161 are instructive. There, the prosecution sought a significantly lower imprisonment sentence before the District Judge who imposed a sentence that was significantly higher instead. The offender appealed against his sentence. On appeal, the prosecution changed their sentencing position and endeavoured to defend the decision of the District Judge by pointing to other sentencing precedents where similar or more onerous sentences had been imposed.

15 In that context, in dismissing the appeal, CJ Menon commented in his *ex tempore* judgment that while the prosecution was entitled to change their sentencing position to serve the public interest, their reasons for changing their position in a material way should be articulated and explained (at [24]–[25]). As I see it, this is because the prosecution is presumed to act in the public interest *at all times*. The constitutional duty of the Attorney-General *qua* Public Prosecutor to exercise his discretion in good faith and to advance the public interest was reiterated by Chan Seng Onn J in *Public Prosecutor v Lim Choon Teck* [2015] 5 SLR 1395 at [76]-[78]. Chan J cited the following

observations of the Court of Appeal in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [53]:

> The Attorney-General is the custodian of the prosecutorial power. He uses it to enforce the criminal law not for its own sake, but for the greater good of society, *ie*, to maintain law and order as well as to uphold the rule of law. …

16 In *Ramalingam* at [47], the Court of Appeal observed that a presumption of legality and good faith attaches to the acts of public officials. The public interest must in my view also necessarily require the prosecution to afford careful consideration to each case as far as possible to ensure that it assists the court fully and fairly in the decision-making process, in helping the court to arrive at the correct outcome. This applies to all cases prosecuted, whether at first instance or at the appellate level.

17 The prosecution's submissions before me were ostensibly directed towards seeking the court's reconsideration as to whether an MTO was a "relevant" or more "appropriate" sentencing option that had not been considered by the District Judge. Even if the District Judge had been prepared to accept that there was an "error" in his sentence, the submissions were in substance plainly aimed at seeking a less harsh sentence for the appellant. Section 301 of the CPC 2012 clearly cannot apply even though the parties had made the application within the next working day (*viz*, 26 October 2015 in the present case). The imposition of a $12,000 fine was well within the District Judge's sentencing powers. His sentence did not reflect any palpably erroneous or mistaken exercise of sentencing powers in the circumstances given the parties' submissions and the material placed before him on 23 October 2015.

18 More fundamentally, as is made clear by s 301(2), any perceived "error" resulting from a sentence imposed by a court which it (or the parties) might view with the benefit of hindsight as being too harsh or too lenient is not an error within the meaning of s 301(1). If the parties should change their positions subsequently and choose to view the fines through different lenses as being too harsh and inappropriate, the proper course is to file an appeal against sentence on the ground that the sentence is manifestly excessive. In this regard, I concurred with the District Judge's reasoning as set out at [47] – [49] of his grounds of decision ("GD") which are reported as *Public Prosecutor v Karthigeyan M Kailasam* [2015] SGDC 312.

19 Nevertheless, I noted that the District Judge appeared to have unquestioningly accepted the prosecution's submission in relation to the lack of any "direct causal link" between the appellant's condition and the commission of the offences. This aspect received no attention in his GD beyond a passing reference at [19]. It is apt in this context to refer to CJ Menon's recent reminder that sentencing is a matter that lies exclusively within the prerogative of sentencing courts (*K Saravanan Kuppusamy v Public Prosecutor* [2016] SGHC 166 ("*Saravanan*") at [6]). While sentencing courts are greatly assisted by submissions from the parties, it is nevertheless incumbent on the sentencing court to evaluate the cogency of the respective positions that are taken. For its part, the prosecution is obliged to place the relevant materials before the court to enable it to come to its own conclusion as to what the just sentence should be (*Saravanan* at [8]).

20 At the end of the day, there is a clear public interest in ensuring that appropriate decisions are made and the right sentences are passed at first instance, just as there is a public interest in finality in proceedings which should not be lightly disturbed except on appeal, or in appropriate cases,

through invoking the court's revisionary jurisdiction or through the use of s 301 of the CPC 2012 where circumstances permit. Erroneous decisions made at first instance can of course be set right on appeal or on revision, but not all such instances of error will be the subject-matter of appeal or revision. It is therefore crucial that the first instance courts are properly assisted to the fullest possible extent in order to arrive at the right conclusions.

21 Balancing the relevant considerations, the primary consideration in the present case was the public interest in ensuring that a just outcome was achieved. The appropriate means of achieving this was not through s 301 of the CPC 2012 but by way of an appeal against sentence, since there was no "error" within the meaning of s 301 of the CPC 2012.

Conclusion

22 In the prosecution's written submissions on appeal, there was a tacit acknowledgment (at [26]) that greater care and diligence in the discharge of their duties should have been exercised at the outset. Having regard to the public interest, it is imperative not only to assist the court to arrive at the right outcome, but to endeavour to ensure as far as possible that this is done at first instance.

23 When the appeal came before me on 6 May 2016, the parties were in agreement that the appellant should be favourably considered for an MTO. The appellant was found to be suitable to undergo an MTO. It was clear that the appellant's gambling disorder did have a relevant and proximate causal link to the offences in question, all of which involved succumbing to his gambling addiction. As such, I accepted the recommendation of the appointed psychiatrist as set out at [12] of the MTO Suitability Report. I was satisfied that having regard to the circumstances, including the nature of the offence

and the character of the offender, it would be expedient to make an MTO requiring the appellant to undergo psychiatric treatment. The appellant confirmed that he was prepared to comply with the conditions if an MTO were to be ordered and he was informed of the consequences of breaching the MTO.

24 The appeal was thus allowed and the appellant was ordered to undergo 12 months MTO. I ordered him to present himself at the National Addictions Management Service ("NAMS") clinic at least once a month over the next 12 months for treatment and to abide by the NAMS doctor's treatment recommendations. In addition, I ordered the fines he had paid to be refunded in full.

See Kee Oon
Judicial Commissioner

Amarjit Singh s/o Hari Singh and Javern Sim (Gloria James-Civetta & Co) for the appellant;
Ang Siok Chen and Leong Wing Tuck (Attorney-General's Chambers) for the respondent.
