IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 26

Criminal Motion No 20 of 2019

Between

Seah Lei Sie Linda

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal references] — [Leave to refer] — [Causation]

Seah Lei Sie Linda
v
Public Prosecutor

[2020] SGCA 26

Court of Appeal — Criminal Motion No 20 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
30 March 2020

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Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Background

1 The applicant, Seah Lei Sie Linda ("the Applicant"), was charged with voluntarily causing hurt to her domestic helper ("the Victim"), an offence under s 323 of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC"). Three of the six charges against the Applicant related to incidents where the Applicant had instructed the Victim to commit acts of self-harm by, amongst other things, pouring hot water onto herself. Before the District Judge, these three charges had been framed in terms of the Applicant having abetted the commission of these offences by instigating the Victim to voluntarily cause hurt to herself ("the Abetment charges"). Following the conclusion of the trial, the District Judge convicted the Applicant of all six charges, including the Abetment charges, and sentenced her to an aggregate term of imprisonment of 36 months and also ordered her to pay compensation of $11,800 to the Victim.

2 On appeal, the Judge considered that the Abetment charges had been inappropriately framed. He came to this view reasoning that because the act of harming oneself is not an offence and certainly not an offence under s 323 of the PC, it was not appropriate to frame the charge in terms that the Applicant had abetted an act, namely self-harm by the Victim, that is not itself an offence. In short, there ordinarily could not be an abetment offence if there was no primary offence to be abetted. The Judge was evidently satisfied that there was an offence here, save that it had not been framed properly. He therefore amended the Abetment charges in terms of the Applicant having voluntarily caused hurt to the Victim by instructing the latter to commit the acts of self-harm, removing all references to abetment. The Judge convicted the Applicant on the amended charges and imposed the same sentence as had been meted out by the District Judge.

3 In the present application, the Applicant seeks the leave of this court to refer the following questions which arise from the amendments made to the Abetment charges:

> (a) First, whether the offence of voluntarily causing hurt under s 323 of the PC can be committed by a person (the "first person") who instructs a second person to carry out acts which form the *actus reus* of the said offence, if such acts are carried out by the second person in consequence of the said instructions? ("the first question")
>
> (b) Second, if the answer to the first question is in the affirmative, whether the said offence under s 323 of the PC is made out if the second person has, in consequence of the first person's instructions, performed the said acts on himself? ("the second question")

(c) Third, if the answers to the first and second questions are in the affirmative, what is the threshold test for finding that the acts performed by the second person were performed as a consequence of the first person's instructions? ("the third question")

The parties' submissions

4 Both parties agree that four *cumulative* conditions must be satisfied before leave can be granted under s 397(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") (*Public Prosecutor v Li Weiming and others* [2014] 2 SLR 393 at [15]; *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 ("*Chew Eng Han*") at [41]):

(a) First, the reference to the Court of Appeal can be made only in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction ("the first condition").

(b) Second, the reference must relate to a question of law and that question of law must be a question of law of public interest ("the second condition").

(c) Third, the question of law must have arisen from the case which was before the High Court ("the third condition").

(d) Fourth, the determination of that question of law by the High Court must have affected the outcome of the case ("the fourth condition").

5 The Prosecution accepted that the first, third and fourth conditions are satisfied in the present application. Thus, the only issue in dispute was whether

the three questions also fulfil the second condition, which requires that the questions be questions of law of public interest.

6 Mr Adrian Wee ("Mr Wee") submitted on the Applicant's behalf that the second condition was satisfied because the three questions were "plainly questions of law", and they raised issues of public interest as they had wide-ranging and significant implications in respect of the *actus reus* of a number of offences, as well as the law on accessorial liability.

7 In her submissions, the learned Deputy Public Prosecutor, Ms Ang Feng Qian submitted that the questions raised were not of public interest, even assuming they were questions of law. She pointed to the fact that our courts have not hesitated in convicting offenders of the offence of causing hurt by instructing a victim to hurt himself. It followed from this that the answers to the first and second questions were settled and clearly in the affirmative. Additionally, the meaning of the critical word "cause" was wide enough to encompass situations where harm was caused to a victim by an offender instructing the victim to hurt himself. As for the third question, it was submitted that this is either a question of fact, or if it is a question of law, then it concerned the application of the well-established test of proof beyond reasonable doubt.

Applicable principles

8 We begin by summarising the principles set out in our decision in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*"). There, we referred to the oft-quoted decision of the Malaysian Federal Court in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139, where it was observed at 141 that, whether a question of law is a question of public interest would depend on

> … whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court … or is not free from difficulty or calls for discussion of alternate views. If the question is settled by the highest court or the general principles in determining the question are well settled and is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.

9 In this respect, as we observed in *Mohammad Faizal* at [20], a "question of law does not necessarily constitute a question of public interest just because it involves the construction or interpretation of a statutory provision which could also apply to other members of the public …. Again, neither is it so just because the point has serious consequence for the applicant personally or is novel".

10 We have reiterated, from time to time, the importance of taking steps to jealously guard the exercise of our discretion under s 397 of the CPC and of confining the grant of leave to the narrowly circumscribed class of cases where it is warranted. This is essential because otherwise, we would be undermining the system of a single tier of appeal, which is an entrenched feature of our criminal justice system, and this in turn would weigh against the important interest of finality in this context (*Mohammad Faizal* at [21] and [22]).

Our decision

11 In that light we turn to the present application and begin by stating that we accept that the questions raised relate generally to the issue of causation, namely whether the Applicant's act of instructing the Victim to harm herself can be said to have been an act that *caused* hurt to the Victim.

12 Causation can be a complicated question in terms of how one approaches both the legal test as well as the relevant factual inquiry. For example, in *R v Maybin* [2012] SCJ 24 ("*Maybin*"), the Supreme Court of Canada was

confronted with the issue of whether a bar bouncer's act of striking the deceased in the head after the accused persons had repeatedly punched the head of the same deceased person amounted to a *novus actus interveniens* that broke the chain of causation. In another case, the English House of Lords was tasked with determining whether an accused person who had prepared a syringe of heroin and handed it to the deceased, who died as a result of injecting himself with the syringe, could be said to have *caused* the death of the deceased person (see *R v Kennedy (No 2)* [2008] 1 AC 269).

13 But the *potential* complications which might arise from such an issue is *not* a reason to grant leave to refer *any* question that pertains to causation, if such difficult issues of causation do not arise before the court in the index case. Questions of concurrency in causation, which is what the Supreme Court of Canada had to deal with in *Maybin*, are almost invariably complex, both factually and legally, but this simply does not arise here. The reference mechanism cannot be used to deal with theoretical issues that are not engaged in the case at hand. On the contrary, it is only available to resolve a question of law of public interest that is directly engaged and likely to affect the analysis in the particular case at hand.

14 In our judgment, no difficulty or controversy arises on the facts of the present case. There is no question that the hurt inflicted on the Victim was intended by the Applicant, a fact which Mr Wee properly accepted. The only remaining question is the instrumentality by which she went about procuring the hurt. Had the Applicant poured the hot water on the Victim by herself, there would have been no issue of causation. Similarly, had the Applicant procured someone else to pour the hot water on the Victim, there would also be no question of causation as the Applicant would have been liable for abetting the offence by instigation. The analysis could not possibly differ simply because

the Victim, who was found to have no real choice in the matter, was instructed to inflict the harm onto herself. Ultimately, this was a case where the Applicant had procured the very end which she intended (hurt to the Victim) by making the Victim do something that secured the very objective which the Applicant wanted to achieve. Where, as is the case here, the Applicant instructed the Victim to cause hurt to herself, having every reason to believe that those instructions would be carried out because the Victim had no real choice to speak of, there can simply be no question or doubt that the Applicant *caused* the Victim's hurt, and consequently that the amended charges have been made out.

15 Indeed, the present case is directly aligned with the case of *Tay Wee Kiat and another v Public Prosecutor and another appeal* [2018] 4 SLR 131. There, the offenders were convicted of multiple offences arising from their mistreatment of a domestic helper. The first offender, Tay, was convicted of 12 charges of voluntarily causing hurt. Of the 12 charges, one charge involved an incident in which Tay had *instructed* the victim to stand on a stool whilst holding another stool above her head, and then forced a plastic bottle into her mouth. The conviction was upheld on appeal by a three-judge coram of the High Court.

16 This is also borne out by the language of s 39 of the PC, which reads:

> A person is said to *cause* an effect "voluntarily" when he *causes* it by means whereby he intended to *cause* it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it. [emphasis added]

17 Plainly, this covers the present situation: the relevant effect that was caused was the hurt to the Victim; the intended means employed was the instruction to the Victim to inflict that hurt onto herself, and the hurt that was inflicted in this way was precisely what had been intended by the Applicant or was, in any event, what the Applicant knew or had reason to believe would be

the likely consequence of her instructions because the Victim was in a position where, in truth, she had to comply with such instructions, no matter how cruel and inhumane they were.

18 Accordingly, we are satisfied that the answers to the first two questions are clearly and obviously "yes", and they present no difficulty such as to amount to questions of law of *public interest*. As to the third question, this is ultimately a question of fact that is derived from the application of one of the most basic evidentiary rules in our legal system. The threshold for finding that the acts performed by the second person were performed as a consequence of the first person's instructions is proof beyond a reasonable doubt, as is the case throughout the criminal law, and how that is applied in any given case gives rise to the primary findings of fact that are the basis upon which a court exercises its criminal jurisdiction. In that sense this is a question of fact because it is "confined or limited to the case at hand" (*Chew Eng Han* at [42]). Hence, the second condition is not satisfied as regards all three questions, and leave is therefore denied.

Unduly expansive view of causation

19 This is sufficient to dispose of the present application. However, in the course of dealing with the application, we considered the case of *Chua Chye Tiong v Public Prosecutor* [2004] 1 SLR(R) 22 ("*Chua Chye Tiong*"), in respect of which we think some clarification is warranted.

20 In *Chua Chye Tiong*, the offender was the manager of a branch outlet of a motorcar trading company, and he failed to take sufficient measures to prevent an unknown person from driving a de-registered car that was stationed at the offender's branch. Arising from his lax practices, the offender was charged and

convicted under the Road Traffic Act (Cap 276, 1997 Rev Ed) ("RTA 1997") for *causing* a vehicle to be used without a licence. In upholding his conviction, the High Court observed that the offender's "endorsement of the lax practice, which in turn led to the removal of the Car from the branch premises, would fall within the meaning of 'cause' as defined" in earlier cases (at [29]).

21 Respectfully, we think that this was an incorrect and unduly expansive view of causation. The *actus reus* of the offence in *Chua Chye Tiong* was the act of *causing* or permitting an unlicensed vehicle to be used (s 29(1) of the RTA 1997). In so far as the extract we have cited above suggests that the offender had *caused* the unlicensed vehicle to have been used because of his "endorsement of the lax practice", we do not think this can be correct. At best, the offender was negligent, or had "permitted" the unlicensed vehicle to be used, but this is quite different from *causing* something to happen. To cause something denotes an *active act* that is within the control of the causative actor; the omission in *Chua Chye Tiong* could not have been come within this definition.

22 Indeed, we think that the decision of *Shave v Rosner* [1954] 2 All ER 280 ("*Shave v Rosner*"), which was applied in Singapore in *Tan Cheng Kwee v Public Prosecutor* [2002] 2 SLR(R) 122 ("*Tan Cheng Kwee*"), ought to have applied to the offender in *Chua Chye Tiong*. In *Shave v Rosner*, Lord Goddard CJ held (at 282) that:

> … *"causes" involves a person, who has authority to do so, ordering or directing another person to use it.* If I allow a friend of mine to use my motor car, I am permitting him to use it. If I tell my chauffeur to bring my car round and drive me to the courts, I am causing the car to be used. [emphasis added]

23 On this basis, the court in *Tan Cheng Kwee* considered that causing an act "involved showing that the accused [person] had some form of control, direction and mandate over the person doing the unlawful act proper which the accused [person] had exercised" (*Tan Cheng Kwee* at [31]). Applying that test, the offender in *Tan Cheng Kwee* was found guilty of causing a vehicle exceeding four metres in height to be driven on public roads without the requisite permit, as he had *instructed* one of his company's drivers, over whom he exercised authority, to drive the vehicle in question.

24 In upholding the conviction against the offender in *Chua Chye Tiong*, the judge considered that the "references to the word[s] 'mandate' and 'control' in *Shave v Rosner* and *Tan Cheng Kwee* should not be restricted to a *verbal instruction* … It should be read widely to include the endorsement of a state of affairs that led to the wrongful use of a vehicle" [emphasis in original] (*Chua Chye Tiong* at [23]). For the reasons proferred at [21] above, we do not accept such an extended reading of causation. Had *Shave v Rosner* been applied in *Chua Chye Tiong*, the offender, who had provided no instructions, and who plainly had no "control, direction and mandate" over the unknown driver, could not be said to have *caused* the use of the unlicensed vehicle, though the conviction *might* nonetheless have stood, albeit on the basis that the offender had *permitted* the improper use of the vehicle (see *James & Son Ld v Smee and another matter* [1955] 1 QB 78 at 91 and *Sweet v Parsley* [1970] 1 AC 132 at 162E-F).

25 Having said that, we emphasise that this has no bearing on our analysis in this case, because *Chua Chye Tiong* had the effect of broadening the scope of causation. While we accept that was incorrect, without resorting to such extended definitions of causation, it is clear that the Applicant had, by her instructions, voluntarily caused hurt to the Victim for the reasons we have already canvassed (see [14]–[17] above).

26 There is a final point to be made. It is clear that causation can be part of the *actus reus* of an offence. When this is so, it is a necessary element for establishing the offender's liability. Causation may also arise in a broader context, for instance in an inquiry into the seriousness of a particular offence for the purpose of sentencing or in the context of an inquiry into damages that "flowed from or were caused by" a tortious act. It is critical not to conflate these two situations in which the question of causation may be engaged. Where causation is a necessary element of an offence, one should take a stricter view of it because of the penal consequences that flow upon finding a violation; whereas in other situations, it is largely a matter of policy preferences. *Chua Chye Tiong* was wrongly decided at least in part because of the failure to appreciate this distinction, and the failure to keep in mind this distinction may lead to reference being made to cases in other settings when this may not necessarily be instructive.

Conclusion

27 For these reasons, we dismiss the application. Accordingly, the stay of the Applicant's sentence is lifted, and the Applicant shall forthwith pay $11,800 to the Victim (in default six weeks' imprisonment). On the Applicant's application and having noted that the Prosecution is not objecting, we order that the commencement of the Applicant's sentence of 36 months' imprisonment is deferred to 9am on 30 April 2020.

Sundaresh Menon	Andrew Phang Boon Leong	Judith Prakash
Chief Justice	Judge of Appeal	Judge of Appeal

Wee Heng Yi Adrian and Rachel Soh (Characterist LLC) for the applicant;
Ang Feng Qian and Deborah Lee (Attorney-General's Chambers) for the respondent.