Public Prosecutor v Muhammad Noor Indra bin Hamzah
[2009] SGHC 186

Case Number : CR Rev 9/2009

Decision Date : 18 August 2009

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Francis Ng (Attorney-General's Chambers) for the petitioner; Tan Chee Meng SC and Josephine Choo (Wong Partnership) for the respondent

Parties : Public Prosecutor — Muhammad Noor Indra bin Hamzah

Criminal Law – Statutory offences – Misuse of Drugs Act (Cap 185, 2008 Rev Ed) – Juvenile Court making finding of guilt and ordering respondent to reside in approved school – Whether such finding of guilt constituted "previous conviction" under s 33A Misuse of Drugs Act

Criminal Procedure and Sentencing – Revision of proceedings – Ground for appeal existing but no appeal lodged and sentence already meted out – Whether High Court should exercise its discretionary powers to enhance sentence below under such circumstances

18 August 2009

Lee Seiu Kin J:

Introduction

1 This is an application by the Public Prosecutor for the exercise of the High Court's powers of revision under s 266 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed)("CPC") to examine the record of the District Court proceedings in DAC 33059 of 2008 ("DAC 33059"). The petitioner submitted that I should also exercise my powers under s 268 read with s 256(c) of the CPC to alter the sentence imposed on the respondent by District Judge Sarjit Singh ("the District Judge") on the ground that it was wrong in law. DAC 33059 pertained to an offence under s 8(b)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed)("MDA") and is punishable under s 33 of that Act. However if there are two previous convictions under s 8(b) of the MDA, s 33A(1)(b) would apply to impose a minimum imprisonment term of five years and caning of not less than three strokes and not more then six strokes of the cane. In 2001, the respondent had been brought before a Juvenile Court and charged under s 8(b)(ii) of the MDA for consumption of methamphetamine. The Juvenile Court had made a finding of guilt and ordered him to reside in an approved school for 32 months. The prosecution submitted to the District Judge that the Juvenile Court proceedings constituted a "previous conviction" under s 33A(1). However the District Judge disagreed and sentenced him under s 33 instead of s 33A. The question of law before me is whether the Juvenile Court proceedings constituted a "previous conviction" under s 33A of the MDA ("the Issue").

Background

2 The facts are as follows. On 10 September 2008, before District Judge Sarjit Singh ("the District Judge") in Subordinate Court No 4, the respondent pleaded guilty to five charges, namely DAC 31028, 32070, 33057, 33058 and 33059 of 2008. The respondent was convicted of the offences and consented to three other charges to be taken into consideration for the purpose of sentencing pursuant to s 178 of the CPC. The District Judge adjourned the case to 29 September 2008 for sentencing. However on that adjourned date, the District Judge required submissions on the Issue and

the prosecution requested an adjournment to check on the point. The matter was adjourned to 16 October 2008, but the prosecution was not ready to submit on that date and a further adjournment was granted, to 30 October 2008. On 30 October 2008, after the prosecution made its submissions, the District Judge adjourned the case for sentencing on 7 November 2008. However at that adjourned hearing, the prosecution applied for a further adjournment and the hearing was re-scheduled to 26 November 2008. But on 26 November 2008 the Criminal Legal Aid Scheme ("CLAS") of the Law Society had put in an application for adjournment so that it can consider assigning counsel to argue the Issue fully. The District Judge granted the application and adjourned the hearing to 19 December 2008. On that new date, CLAS instructed Ms Josephine Choo to act for the respondent and she made her submissions on the Issue to the District Judge. However Ms Choo requested an adjournment to consider the earlier submission of the prosecution which she had just received in order to make her reply. The District Judge adjourned the hearing to 16 January 2009. On that date, after both sides made further submissions, the District Judge made his ruling on the Issue. On 20 January 2009 the District Judge sentenced the respondent to various punishments on the five charges. In relation to DAC 33059, as he held that s 33A of the MDA was not applicable, he sentenced the respondent to three years' imprisonment under s 33 of the MDA, which had no provision for caning.

3 There was no appeal against the decision of the District Judge within the time fixed for appealing (or at all). The respondent had been in remand all the while and the sentence of caning imposed on him, a total of 12 strokes in relation to DAC 31028 and 32070 of 2008 was duly carried out. Had the respondent been sentenced under the provisions of s 33A of the MDA, he would have received at least another three strokes of the cane.

4 On 13 March 2009, some one and a half months after the District Judge had decided on the matter, the deputy public prosecutor ("Mr Ng") wrote to the Registrar of the Supreme Court and requested that DAC 33059 be placed before the High Court for the purpose of this criminal revision. On 30 April 2009 after hearing submissions from Mr Ng and from counsel for the respondent, Mr Tan, I reserved judgment on the determination of the Issue. However I was of the view that, even if I were to decide the Issue in accordance with the petitioner's position, I would not be inclined to disturb the sentence. My reasons for so doing are as follows.

5 The revisionary power of the High Court is vested by s 23 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) which provides as follows:

> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with the provisions of any written law for the time being in force relating to criminal procedure.

The relevant written law relating to criminal procedure is the CPC and s 266(1) thereof provides that the High Court "may call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of that subordinate court". If the High Court determines that any finding, sentence or order of the subordinate court is not correct, legal or improper, or any proceedings thereof is irregular, s 268(1) provides that the court may, "in its discretion exercise any of the powers conferred by sections 251, 255, 256 and 257". It should be noted that s 268(1) does not require the court to make an order on every occasion that it finds a defect in the finding, sentence or order of, or in the proceedings in, the subordinate court. It gives the court the discretion to act.

6 What, then, are the factors that the court takes into account in the exercise of this

discretion? In *Ang Poh Chuan v Public Prosecutor* [1996] 1 SLR 326, Yong Pung How CJ analysed the Indian authorities on the subject and held (at 330C) that for the court to be moved to act, "there must be some serious injustice". He further said (at 330C) that "generally it must be shown that there is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below". In the next paragraph, he said that it was clearly not the intention of the statute for the revisionary jurisdiction to be "little more than another form of appeal". More recently, in *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR 383, V K Rajah JA held (at [46] and [49]) as follows:

> 46 … The revisionary jurisdiction must not be exercised in such a way that a right of appeal may practically be given whenever such right is definitely excluded by the statutory provisions on criminal procedure (*per* Piggott J in the Allahabad High Court in *Ahsan-ullah Khan v Mansukh Ram* 1914 (36) ILR All 403 at 405). It is not the purpose of criminal revision to become a convenient form of "backdoor appeal" against conviction for accused persons who have pleaded guilty to the charges against them (*per* Yong Pung How CJ in *Teo Hee Heng v PP* [2000] 3 SLR 168 at [7]). The courts have therefore formulated certain principles to guide the prudent exercise of this extraordinary power.
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> …
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> 49 I agree with the cautious and limited exercise of the High Court's revisionary power as stated in [46]–[47] above. This extraordinary judicial power must not be regarded or exercised as an alternative appellate route (a point which I mentioned earlier at [46] above). However, it also has to be kept in mind that Parliament has conferred this power on the High Court so as to ensure that no potential cases of serious injustice are left without a meaningful remedy or real redress. A court would fail in its constitutional duty to oversee the administration of criminal justice if it remains impassive and unresponsive to what may objectively appear to be a potentially serious miscarriage of justice …

7 In exercising my discretion not to disturb the sentence, I took into consideration the fact that the ordinary manner in which the petitioner would have gone about this, if dissatisfied with the finding of the District Judge or the sentence, would be to lodge an appeal. Whatever may have been the reason, this was not done. The petitioner submitted that an appeal was not possible "since the extent or legality of the sentence imposed by the learned District Judge is not in issue". With respect, I see no merit in this submission. If the District Judge was wrong in not sentencing the respondent under s 33A instead of s 33, it certainly would have constituted ground for appeal. Further, this petition for criminal revision was made some one and a half months after the time limit for an appeal has expired. Even if I did not consider that this petition to exercise my revisionary power is tantamount to a back door appeal, the delay is certainly relevant. Indeed, by the time this petition came up before me, the sentence of caning had been carried out. If I were to enhance the sentence, the respondent would have been liable to a further round of caning for a further three strokes at the very least. Disturbing the sentence below would, in the circumstances, result in further injustice rather than ameliorating an injustice. As the primary objective of the petitioner was to settle the law on the Issue and it was not necessary to disturb the sentence below in order to do it, there was no good reason to interfere with the order of the District Judge.

The Issue

8 I turn now to consider the Issue. The respondent had been convicted in the District Court in October 2003 for consumption of methamphetamine under s 8(b) of the MDA and sentenced to three years' imprisonment. Two years earlier, in October 2001 when the respondent was 14 years old, he

was brought before a Juvenile Court and charged under s 8(b) of the MDA for consumption of methamphetamine. The Juvenile Court had made a finding of guilt and ordered him to reside in an approved school (the Singapore Boys' Home) for 32 months. The question is whether the Juvenile Court finding is a "previous conviction" for the purposes of s 33A(1) of the MDA whereupon, in combination with the 2003 District Court conviction, the respondent would have had two previous convictions and the sentence would have to be determined in accordance with s 33A of the MDA instead of s 33.

9 The relevant parts of s 33A are as follows:

> (1) Where a person who has not less than —
>
> …
>
> (b) 2 previous convictions for consumption of a specified drug under section 8(*b*);
>
> …
>
> is convicted of an offence under section 8(*b*) for consumption of a specified drug … he shall on conviction be punished with —
>
> (i) imprisonment for a term of not less than 5 years and not more than 7 years; and
>
> (ii) not less than 3 strokes and not more than 6 strokes of the cane.
>
> …
>
> (5) For the purposes of this section —
>
> (a) a conviction under section 8(b) by a court including a subordinate military court or the Military Court of Appeal constituted under the Singapore Armed Forces Act at —
>
> (i) any time on or after 1st October 1992 but before the relevant date for the consumption of a controlled drug which, on the date of any subsequent conviction, is specified in the Fourth Schedule; or
>
> (ii) any time on or after the relevant date for the consumption of a specified drug,
>
> shall be deemed to be a previous conviction for consumption of a specified drug under section 8(b);
>
> (b) a conviction under section 31(2) by a court including a subordinate military court or the Military Court of Appeal constituted under the Singapore Armed Forces Act at any time on or after 1st October 1992 shall be deemed to be a previous conviction for an offence of failure to provide a urine specimen under section 31(2) …

10 Save for s 33A(5), which is irrelevant for present purposes, s 33A and indeed the MDA is silent on what constitutes a "previous conviction", and specifically on whether a Juvenile Court finding of guilt constitutes a "previous conviction". It is therefore necessary to look at the Children and Young Persons Act (Cap 38, 2001 Rev Ed)("CYPA") whose purposes include the establishment of a separate regime for the sentencing and treatment of children and young persons. A "child" is defined in s 2 of the CYPA as a person who is below the age of 14 years and a "young person" as one who is 14 years

of age or above and below 16 years. The Juvenile Court is established under s 32 of the CYPA and its jurisdiction set out in s 33, of which subsection (1) provides that – subject to certain exceptions – no child or young person shall be charged with or tried for any offence by a court of summary jurisdiction except a Juvenile Court. The exceptions are found in subsection 2 (offences triable only in the High Court shall be tried there unless the Public Prosecutor applies to the Juvenile Court with the consent of the legal representative of the child or young person), subsection 3 (joint trial with a person who has attained the age of 16 years) and subsection 4 (where age is discovered in the course of proceedings). Section 35 places restrictions on the publication of proceedings in the Juvenile Court and prohibits disclosure of any information that may lead to the identification of the child or young person concerned in the proceedings. Section 37 limits the scope of punishment that may be imposed by a Juvenile Court: a child may not be sentenced to imprisonment and a young person may not be sentenced to imprisonment "unless the court certifies that he is of so unruly a character that he cannot be detained in a place of detention or approved school". Further, a Juvenile Court does not have power to sentence a child or young person to corporal punishment – only the High Court may do so; s 37(3). The following provisions are relevant to the determination of the Issue and I set them out in full below:

> **Removal of disqualification or disability on conviction**
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> 36. A conviction or finding of guilt of a child or young person shall be disregarded for the purposes of any Act under which any disqualification or disability is imposed upon convicted persons.
>
> **Words "conviction" and "sentence" not to be used**
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> 41. —(1) The words "conviction" and "sentence" shall cease to be used in relation to children and young persons dealt with by a Juvenile Court.
>
> (2) Any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child or young person, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order made upon such a finding, as the case may be.

11 I first consider s 41 of the CYPA. Subsection (1) thereof mandates that the terms "conviction" and "sentence" shall cease to be used in relation to children and young persons dealt with by a Juvenile Court. The intention behind this is clear from the Children and Young Persons Bill introduced on 16 February 1949 (Supplement No 9), in which the objects and reasons statement had the following in relation to cl 55 of the Bill which is the equivalent provision to s 41 of the CYPA:

> By clause 55 the terms "conviction" and "sentence" are no longer to be used in relation to children and young persons dealt with by Juvenile Courts, the expressions "finding of guilt" and "order made upon finding of guilt" are substituted for them.

12 It is apparent that the legislature intended that children and young persons who have been charged in a Juvenile Court and found guilty of an offence should not be stigmatised by having a conviction to his name or considered to have been sentenced for an office. That the legislature did not intend, in this section, to go further than that is seen in s 41(2), which provides that "[a]ny reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child or young person, be construed as including a reference to a person found guilty of an offence, a finding of guilt". Section 33A of the MDA is a written law which contains a reference to a person convicted of an offence. Section 41(2) would operate to construe such reference as including a reference to a finding of guilt in the Juvenile Court.

13 I turn to consider s 36 of the CYPA which provides that a finding of guilt of a child or young person "shall be disregarded for the purposes of any Act under which any disqualification or disability is imposed upon convicted persons". The question is whether s 33A of the MDA imposes a "disqualification or disability" upon convicted persons. The respondent submitted that the provision for enhanced punishment for repeat offenders in s 33A amounts to a "disqualification or disability imposed upon convicted persons" within the meaning of s 36 of the CYPA. The petitioner submitted that it is clearly not a "disqualification or disability".

14 It would be useful to consider situations which clearly fall within the contemplation of s 36 of the CYPA. Some legislation provide that a person who is convicted of an offence is disqualified from holding office, *eg* Art 45 of the Constitution of the Republic of Singapore (1999 Rev Ed) imposes a five year disqualification from being a Member of Parliament. Other legislation impose restrictions on employment, *eg* s 78(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) in relation to employment by a solicitor and s 59(1) of the Accountants Act (Cap 2, 2005 Rev Ed) in relation to employment by a public accountant. These situations are quite clearly a "disqualification or disability imposed upon convicted persons" and s 36 of the CYPA operates to remove the effect of those provisions in the case of a person who is the subject of a finding of guilt in a Juvenile Court.

15 It is not immediately obvious that a provision for enhanced punishment of repeat offenders such as s 33A of the MDA falls within the scope of the words "disqualification or disability". Insofar as the word "disqualification" is concerned, s 33A does not disqualify the person from anything. The next question is whether it imposes a "disability". The ordinary meaning of that word also does not suggest that it does. An examination of the earlier incarnation of the CYPA, namely the Children and Young Persons Ordinance 1949 ("the Ordinance") throws much illumination on the question. In the Ordinance, s 50 and s 55 are *in pari materia*, respectively, with s 36 and s 41 of the CYPA. The Ordinance contains a provision, s 72, of which there is no longer an equivalent in the CYPA, and which provides as follows:

> (1) Where a child or young person is found guilty of an offence and is released under a probation order, the finding of guilt for that offence shall be disregarded for the purposes of any written law by or under which any disqualification or disability is imposed upon persons found guilty, or by or under which provision is made for a different penalty in respect of a second or subsequent offence or in respect of an offence committed after a previous finding of guilt:
>
> > Provided that if the probationer is subsequently sentenced for the original offence, this section shall cease to apply in respect of that offence, and he shall be deemed, for the purpose of any such written law imposing a disqualification or disability, to have been found guilty on the date of sentence.
>
> (2) Where a person is released on probation without the Court having proceeded to a finding of guilt, and he is subsequently found guilty and sentenced for the original offence, then he shall be deemed, for the purpose of any written law by or under which any disqualification is imposed upon persons found guilty, or by or under which provision is made for a different penalty in respect of a second or subsequent offence or in respect of an offence committed after a previous finding of guilty, to have been found guilty on the date of such finding of guilt and sentence.
>
> [emphasis added]

16 It can be seen that under s 72 of the Ordinance, where probation is ordered, the offence is to be disregarded for the purposes of any written law that imposes:

(a) any disqualification or disability upon a person found guilty of an offence; and

(b) a different penalty for a repeat offender.

The words "different penalty in respect of a second or subsequent offence or in respect of an offence committed after a previous finding of guilt", which form limb (b) above, are not found in s 50 of the Ordinance. It is clear that the policy in the Ordinance is that, in relation to a person who has a finding of guilt made against him by a Juvenile Court, such finding of guilt shall be disregarded for the purposes of any written law under which any disqualification or disability is imposed (s 55 of the Ordinance), but if that person has been released under a probation order, such finding of guilt shall also be disregarded for the purposes of any written law which makes provision for a different penalty in respect of a repeat offender (s 72 of the Ordinance).

17 Section 72 was reincarnated in quite a different form in s 11 of the Probation of Offenders Act (Cap 252, 1985 Rev Ed)("POA"). Section 11 of the POA states as follows:

Effects of probation and discharge.

11.—(1) Subject as hereinafter provided, a conviction for an offence for which an order is made under this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act:

Provided that where an offender, being not less than 16 years of age at the time of his conviction for an offence for which he is placed on probation or conditionally discharged as aforesaid, is subsequently sentenced under this Act for that offence, this subsection shall cease to apply to the conviction.

(2) Without prejudice to subsection (1), the conviction of an offender who is placed on probation or discharged absolutely or conditionally as aforesaid shall in any event be disregarded for the purposes of any written law which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability.

(3) Subsections (1) and (2) shall not affect —

(a) any right of any such offender to appeal against his conviction, or to rely thereon in bar of any subsequent proceedings for the same offence; or

(b) the revesting or restoration of any property in consequence of any order made on the conviction of any such offender.

Under s 11 of the POA, a probation order will still have the same effect as s 72 of the Ordinance, although the manner in which s 11 is drafted could entail wider consequences.

18 I return to s 50 of the Ordinance. Unlike s 72 of the Ordinance, s 50 does not contain the second limb relating to "different penalty" for repeat offenders and in view of the clear dichotomy in s 72, the words "disqualification or disability" in s 50 cannot incorporate the meaning contained in the second limb of s 72. This position could not have been altered when s 50 of the Ordinance was re-enacted as s 36 of the CYPA in substantially the same terms. Accordingly, s 36 of the CYPA has no effect on any provision in any act that makes provision for a different penalty in respect of a second

or subsequent offence. Section 33A of the MDA is one such provision.

19 For these reasons, I hold that a finding of guilt made by a Juvenile Court is a conviction for the purposes of s 33A of the MDA. However, if the child or young person who is the subject of such a finding of guilt has been released under a probation order or had been discharged absolutely or conditionally, s 11 of the Probation of Offenders Act would operate to deem such finding of guilt not to be a conviction for the purposes of s 33A of the MDA.