

Mohamed Hisham bin Sapandi v Public Prosecutor
[2011] SGHC 190

Case Number : Criminal Motion No 42 of 2011
Decision Date : 18 August 2011
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Ramesh Tiwary (Ramesh Tiwary) for the applicant; G Kannan and Sanjna Rai (Attorney-General's Chambers) for the respondent.
Parties : Mohamed Hisham bin Sapandi — Public Prosecutor

Criminal Procedure and Sentencing – Bail

18 August 2011

Choo Han Teck J:

1 The Applicant is awaiting trial in respect of eight charges under the Misuse of Drugs Act (Cap 185) (“MDA”) and three charges under the Moneylenders Act (Cap 188, 1985 Rev Ed.). He was denied bail in the Subordinate Court on the ground that he was charged for an offence punishable with a maximum sentence of 20 years imprisonment, and that the Subordinate Court has no jurisdiction to grant him bail by virtue of s 95(1)(a) Criminal Procedure Code 2010 (Act No 15 of 2010) (“CPC 2010”).

2 At the hearing of the criminal motion on 3 June 2011, I granted bail provisionally, pending further submissions by the parties on whether the Subordinate Court possessed the requisite jurisdiction to grant bail in this case. The main issue before me was the interpretation of s 95(1)(a). Section 95(1)(a) reads:

An accused shall not be released on bail or on personal bond if he is charged for an offence punishable with death, imprisonment for life or imprisonment for a term of 20 years or more.

Mr Tiwary, counsel for the Applicant, argued that offences punishable with “imprisonment for a term of 20 years or more” should only mean offences where the minimum sentence is 20 years imprisonment or more. Mr Kannan and Miss Sanjna Rai, the Deputy Public Prosecutors (“DPP”) submitted that s 95(1)(a) encompasses offences with maximum sentences of 20 years or more. The DPP also submitted that s 97(1) of the CPC 2010 allows the High Court an over-riding discretion to grant bail to the Applicant, as the High Court is not constrained by the limitations in s 95(1)(a).

3 There are accordingly, two questions before me:

(a) Whether the phrase “*imprisonment for a term of 20 years or more*” in s 95(1)(a) of CPC 2010 refers to offences with a maximum sentence of 20 years or more, or offences with a minimum sentence of 20 years or more.

(b) Whether the High Court has, under s 97(1) of CPC 2010, the over-riding discretion to grant

bail to the Applicant, as it is not constrained by the limitations in s 95(1)(a).

4 On the first question, I am of the view that the phrase "*offences punishable with imprisonment for a term of 20 years or more*" should be given its plain and literal meaning and thus refer only to offences with a minimum sentence of 20 years or more. That is to say that the starting point, not the ending point, is 20 years. The contrary interpretation – that it encompasses offences with a maximum sentence of 20 years imprisonment – offends a plain reading of the phrase as these offences are not punishable with imprisonment for a term of 20 years or more. Offenders in such cases are just liable to imprisonment for up to 20 years. I should reiterate the point here that bail has the role of preserving the "golden thread" in criminal law that a person is innocent until proven guilty, yet ensuring that the accused does not abscond before trial (*Abul Khabir Uddin Tohron Nisa v Public Prosecutor* [2006] SGHC 57 at [5]). It is not intended to be punitive and must not be so.

5 As a general rule, the **CPC 2010** allows **bail** to be offered as of right to the accused. **However, the discretion of the Subordinate Court to grant bail is removed altogether for the offences falling under s 95(1)(a). Only the High Court has the discretion to grant bail in respect of offences under this provision. So what does the phrase "*imprisonment for a term of 20 years or more*" mean?** The DPP argued that to interpret "*imprisonment for a term of 20 years or more*" as referring only to offences where the minimum sentence is 20 years or more renders the phrase nugatory. They submitted that since a survey of our penal legislation reveals that currently all the offences attracting minimum sentences of 20 years imprisonment or more are also punishable with a maximum sentence of life imprisonment, the phrase would be devoid of meaning unless it was taken to refer to offences with maximum sentences of 20 years or more.

6 Although the parliamentary debates (when this provision was amended) were not helpful on the interpretation of s 95(1)(a) of the CPC 2010, s 52(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the old CPC"), the predecessor section, is of some assistance. That section provides:

When any person accused of any non-bailable offence is arrested or detained without a warrant by a police officer or appears or is brought before a court, he may be released on bail by any police officer not below the rank of sergeant or by that court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

While the section was limited to instances where there were reasonable grounds for believing that an accused has been guilty of an offence punishable with death or imprisonment for life [see *Selvamsylvester v PP* [2005] 4 SLR(R) 409 ("*Selvamsylvester*")], the current version would require the question of bail to be decided as soon as an accused is charged. The DPP's interpretation will lead to further expansion of s 95(1)(a) beyond the intention of Parliament. The offences attracting a maximum sentence of 20 years imprisonment or more cover a wide sentencing range. For instance, despite having a maximum sentence of 20 years imprisonment, the offence of cultivating cannabis, opium or the coca plant under s 10 of the MDA has a minimum sentence of a fine. It will also mean that a person who is charged with cultivating a small amount of cannabis, and who may ultimately be sentenced to a fine, may not apply for bail before a Subordinate Court. Further, I am of the view that given that the other offences falling within s 95(1)(a) are those punishable with death or imprisonment for life, it is more reasonable to read that as referring only to offences where the minimum sentence is 20 years or more.

7 I now turn to the second question. A person accused of a non-bailable offence may be released on bail in accordance with s 93(1) of the CPC 2010:

Subject to section 95(1), if any person accused of any non-bailable offence is arrested or detained without warrant by a police officer, or appears or is brought before a court, he may be released on bail by a police officer of or above the rank of sergeant or by the court.

Section 93(1) is expressly stated to be subject to s 95(1). In contrast, s 97(1) of the CPC 2010, which sets out the High Court's powers to grant or vary bail, is not subject to s 95(1). Section 97(1) provides that:

Whether there is an appeal against conviction or not, the High Court may grant bail to any accused before it, release him on personal bond or vary the amount or conditions of the bail or personal bond required by a police officer or a Subordinate Court, and impose such other conditions for the bail or personal bond as it thinks fit.

Thus, the second question before this court was whether s 97(1) is subject to s 95(1)(a) such that the High Court has no power to grant bail to an accused that comes within s 95(1)(a), or whether s 97(1) is outside s 95(1)(a) such that the High Court's power to grant bail is not restrained by s 95(1)(a). In *Selvamsylvester*, the High Court considered the relationship between ss 352(1) and 354(1) of the old CPC, which are the predecessor provisions to ss 93(1) and 95 of the CPC 2010, and s 97(1) of the CPC 2010 respectively. Section 354(1) of the old CPC states that:

The High Court may, in any case whether there is an appeal on conviction or not, direct that any person shall be admitted to bail or that the bail required by a police officer or Magistrate's Court or District Court shall be reduced or increased.

In *Selvamsylvester*, Kan J expressed the view that a harmonious reading of ss 352(1) and 354(1) dictated that the latter should be read subject to the former, that is, s 352(1) circumscribed both the High Court's and the Subordinate Court's power to grant bail (at [8] and [9]). However, Kan J nonetheless held that the relationship between ss 352(1) and 354 was not conclusively settled and therefore dealt with the case on the assumption that the prohibition in s 352(1) against releasing certain accused persons on bail did not extend to the High Court (at [20]).

8 In contrast, the position taken by the Malaysian Courts is clear: the prohibition against granting bail in the Malaysian equivalent of s 352(1) applies only to the Subordinate Court and not also to the High Court (See *Re K S Menon* [1946] 1 MLJ 49; *PP v Shanmugam* [1971] 1 MLJ 283; *PP v Dato Balwant Singh* [2002] 4 MLJ 427). The same position has been taken in India (See *Nga San Htwa* (1927) I.L.R. 5 Ran 276; *King Emperor v Joglekar* AIR 1931 All 504; *Gurcharan Singh and others v State* [1978] SCC 41). Further, in Tan Yock Lin, *Criminal Procedure* (Butterworths, 2010), Chapter X, Professor Tan Yock Lin argues that s 351 of the old CPC (the predecessor to s 92 of the CPC 2010) and s 352 of the old CPC (the predecessor to ss 93 and 95 of the CPC 2010), dealing with bail in the case of bailable and non-bailable offences respectively, should apply only to the Subordinate Court and not to the High Court. He wrote that the consequences of construing these provisions to apply to the High Court would be awkward, if not absurd, for two reasons. First, (at para 602):

section 352 imposes a general prohibition on granting bail where the offence carries either the death penalty or life imprisonment. It would not be right to impose any such prohibition on the High Court's power to grant bail.

Second, (at para 603):

[t]he structure ... in which these bail provisions are found is further argument that the High Court's power to grant bail is outside these sections. Thus, section 352(4) and section 354(2)

cover essentially the same ground. The former states that: 'Any court may at any stage of any proceeding under this Code cause any person who has been released under [section 352] to be arrested and may commit him to custody.' The latter states that: 'The High Court may at any stage of any proceeding under this Code cause any person who has been released under [section 354] to be arrested and may commit him to custody.' If section 352(4) included the High Court, section 354(2) would be somewhat superfluous.

The language of ss 352(4) and 354(2) of the old CPC has largely been preserved in ss 93(5) and 97(2) of the CPC 2010 respectively. In support of Professor Tan's position, Professor Chandra Mohan has argued that the mention of the High Court in only s 354 and not ss 351 and 352 must be deliberate and hence subject to the *expressio unius est exclusio alterius* rule of interpretation (Chandra Mohan, "The High Court's Latest Bail Decision: Overdue for 50 Years?" Law Gazette, May 2006(5)). I am in full agreement with these views.

9 Apart from the above arguments against applying s 352 of the old CPC to the High Court, there are further reasons for not construing ss 93 and 95 of the CPC 2010 as applying to the High Court. Under the old CPC, if s 352(1) applies to the High Court, then the Subordinate Court and the High Court would not be able to grant bail only in the limited instances where there appear reasonable grounds for believing that an accused is guilty of an offence punishable with death or life imprisonment. The courts would continue to retain some measure of discretion in the determination of whether the "reasonable grounds" threshold is crossed. In contrast, the newly worded s 95(1)(a) of the CPC 2010 is such that if that provision also applies to the High Court, then bail would be totally prohibited once the Prosecution decides to charge an accused with an offence falling within s 95(1)(a), and the discretion of any court totally ousted. That cannot be the intention of Parliament because such a drastic change in the law will require clear and express Parliamentary language. Since s 93 provides that the court has power to grant bail save in the instances covered by s 95(1), there would have been no need for s 97(1) if the High Court's powers are also subject to s 95(1). Section 97(1), which states that "the High Court may grant bail to any accused before it", must mean what it says. It means that the High Court can grant bail even to accused persons charged with offences falling within s 95(1)(a).

10 For the above reasons, I am of the view that ss 93 and 95 of the CPC 2010 apply only to the Subordinate Court but not to the High Court. In the instant case, the learned DPP indicated that he had no objection if the terms of the provisional bail are extended. I thus ordered accordingly.

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