

Lee Siew Boon Winston v Public Prosecutor
[2015] SGCA 67

Case Number : Criminal Motion No 21 of 2015
Decision Date : 30 November 2015
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s) : N Sreenivasan SC, S Balamurugan and Lim Jie (Straits Law Practice LLC) for the applicant; and Kow Keng Siong, Sarah Shi and Sarah Ong (Attorney-General's Chambers) for the respondent.
Parties : LEE SIEW BOON WINSTON — PUBLIC PROSECUTOR

Criminal procedure and sentencing – criminal references

Criminal procedure and sentencing – disclosure

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2015\] 4 SLR 1184.](#)]

30 November 2015

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

1 On 28 March 2014, the applicant was convicted of two charges of using criminal force on the complainant, a 38-year-old female, with the intention to outrage her modesty, under s 354(1) of the Penal Code (Cap 224, 2008 Rev Ed). He was sentenced to an aggregate term of ten months' imprisonment. The district judge's decision is published as *Public Prosecutor v Winston Lee Siew Boon* [2014] SGDC 308. The applicant appealed against the district judge's decision, but his appeal against both his conviction and sentence was dismissed by Chan Seng Onn J in *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 ("*Lee Siew Boon Winston*"). One issue that arose during the trial and at the appeal was whether the Prosecution had a duty to disclose two statements of the complainant which had been recorded by the investigating officer.

2 In this criminal motion, the applicant applies for leave to refer the following questions of law to the Court of Appeal pursuant to s 397(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed):

Question 1

Whether the presumption of legality or regularity of acts done in relation to the exercise of prosecutorial power, expressed by this Honourable Court in ***Ramalingam Ravinthran v Attorney General*** [2012] 2 SLR 49 at [46]:

(a) Applies only to matters where the prosecution exercises constitutional or discretionary powers and not to matters relating to the conduct of a trial by the prosecution, in particular in relation to duties owed to the Court; or whether the presumption

(b) Also applies in relation to the prosecution's duty of disclosure under its ***Kadar*** obligations, and therefore the court proceeds on the assumption that that the prosecution has fulfilled its *Kadar* presumption, for the reasons set out [in the Judgment at [167]–[169]]?

Question 2

Arising from and considering the answer to Question 1, what is the threshold test such that the prosecution has to show compliance with its **Kadar** obligations? Is it "reasonable grounds for belief that the prosecution has failed to comply with its **Kadar** obligations" or "that there is some doubt, dispute or uncertainty as to whether the unused material in the possession of the prosecution is credible and/or relevant to the guilt or innocence of the accused"?

Question 3

(a) What are the considerations for requiring disclosure of the unused statement of the complainant?

(b) In cases involving rape and outrage of modesty generally, and in relation to the statements of the complainant in this case specifically, what are the considerations for requiring disclosure of the unused statement of the complainant?

(c) To what extent, if any, should the absence of corroboration and the need for the evidence of the complainant to be unusually convincing affect **Kadar** obligations requiring disclosure of the unused statement of the complainant?

3 Having heard the submissions of counsel for the applicant, Mr N Sreenivasan SC ("Mr Sreenivasan"), we dismissed the application.

4 At the outset, we should reiterate that in our system of criminal justice, there is only one tier of appeal. In this case, the applicant was convicted after trial; an appeal was subsequently filed and that was dismissed. The applicant has no further right to appeal. What is left is the criminal reference procedure, where one or more questions of law of public interest can be brought to the Court of Appeal, but only with leave.

5 There are clear limitations on the bringing of a criminal reference, and those limitations have been, and will continue to be, observed scrupulously so that our system of a single tier of appeal does not in substance become a system with two tiers of appeal. As this court observed in *Mohammad Faizal bin Sabtu and another matter v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*") at [21], "[t]o liberally construe s 397 so as to more freely allow a reference to the Court of Appeal would seriously undermine the system of one-tier appeal".

6 The aforementioned limitations are embodied in the four well-established conditions which must be satisfied before leave is granted to bring a criminal reference under s 397(1):

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

(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;

(c) third, the question of law must have arisen from the case which was before the High Court; and

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

(*Mohammad Faizal* at [15], citing *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 at [29])

7 Further, the court retains the discretion to refuse leave even where these conditions are satisfied, although strong and cogent grounds would have to be shown before the court exercises its discretion in this manner (*Mah Kiat Seng v Public Prosecutor* [2011] 3 SLR 859 at [13], cited with approval in *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 3 SLR 750 at [15]).

8 As mentioned, Mr Sreenivasan posed three questions of law which he contended should be answered. The first centres on whether the presumption of legality affirmed by this court in *Ramalingam Ravinthran v Attorney General* [2012] 2 SLR 49 ("*Ramalingam*") at [44] applies in the context of what was referred to as the "*Kadar* obligation of disclosure" (stemming from the decision of this court in *Muhammad Bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"). In our judgment, this does not raise a question of law of public interest. The presumption is a rebuttable presumption that stems from the fact that those holding public office are to be taken, in the first instance, to be acting lawfully (*Ramalingam* at [45]). Mr Sreenivasan submitted that this does not extend beyond the exercise of prosecutorial discretion to the conduct of a case before the court. But we see no basis to think that this is so. As was noted in *Ramalingam*:

(a) At [46], the presumption is justified in the case of the Public Prosecutor by virtue of his high constitutional office and hence the courts may presume that when he acts, he is doing so to vindicate the public interest. In our judgment, the underlying rationale for the presumption continues to apply beyond the initial decision to prosecute through to the actual conduct of the case in court. It is true that before the court, those conducting the prosecution are also officers of the court and for any failure in this regard, they may be held to account. But that is not an issue that has arisen in this case; and

(b) At [47], the presumption is not confined to those holding constitutional office but applies in a wider context.

9 This leads us to the second question, which centres on how the presumption of legality may be rebutted. Mr Sreenivasan contended that there was a difference between the contention advanced by the Defence that the presumption would be displaced by proving "some doubt, dispute or uncertainty" as to whether the unused material in the possession of the prosecution is credible and/or potentially relevant to the guilt or innocence of the accused so as to come within the ambit of the Prosecution's *Kadar* obligations, and on the other hand, the contention of the Prosecution which was that the Defence would have to show that there were "reasonable grounds" to think that the Prosecution had not discharged its *Kadar* obligations. In our judgment, and with great respect, this was a distinction without a difference.

10 The crux of the test was correctly stated by Chan J in *Lee Siew Boon Winston* at [175]:

If the court is satisfied that there exist reasonable grounds to believe that the Prosecution has in its possession material which should be disclosed, then the presumption is displaced and the Prosecution has to show or prove to the court that it has not in fact breached its *Kadar* obligation.

11 He then went on to summarise this, at [184(b)] of the same judgment, where he said:

This presumption will only be displaced if the court has sufficient reason to doubt that the Prosecution has complied with its *Kadar* obligation.

And as we observed to Mr Sreenivasan in the course of arguments, Chan J then explained “sufficient reason” in the following terms:

In this regard, once the Defence satisfies the court that there are reasonable grounds for belief that the Prosecution has failed to comply with its *Kadar* obligation, the court will look to the Prosecution to show that it has complied with its obligation.

12 In our judgment, this is a clear and correct statement of the position and there is no occasion for us to revisit this on the present occasion. Furthermore, as we pointed out to Mr Sreenivasan, this formulation strikes the appropriate balance in enabling disclosure to be sought in suitable cases without transforming the current system of disclosure of evidence that is embodied in the applicable legislation and the jurisprudence of this court.

13 The third question is put forward on the basis of the suggestion that a question of law of public interest arises in relation to the *application* of the test (whichever is thought to be the correct one) specifically in the context of sexual offences. In our judgment, every test that rests on objective criteria, such as the existence of reasonable grounds, will necessarily be contextual in its application. In other words, what is reasonable will necessarily depend on the context. There is no need, therefore, to add to the “reasonable grounds” formulation in the specific context of sexual offences.

14 It follows that there is no question of law of public interest raised in the questions posted by Mr Sreenivasan, and the second of the conditions that we have listed at [6] above has not been met. As we observed to Mr Sreenivasan in the course of his arguments, his real complaint seemed to us to be that the Judge had misapplied the test in this case. As to this, first, we observe that in the absence of a finding that there is a question of law of public importance, this is not a ground for us to allow a criminal reference. And second, while we do recognise the force of Mr Sreenivasan’s argument that in the context of a sexual offence where the outcome turns on which of two competing accounts is to be believed, the inclination should be to make any unused statements of the complainant available to the Defence, nonetheless, we are satisfied that on the facts of this case, there has been no miscarriage of justice. The applicant had volunteered a further statement to the police on 3 April 2012, which makes it clear that the applicant

- (a) admits that he examined the complainant;
- (b) admits that he had touched her breast;
- (c) admits that he may have touched her nipples;
- (d) expressed his willingness to apologise and make compensation; and
- (e) admits that he had done wrong.

The applicant did go on to say that this was unintentional. But, with respect, that seemed to us to be a self-serving attempt to mitigate the damaging nature of the admission contained in that statement. That statement was voluntarily proffered and no objection was taken to it being referred to in the courts below.

15 For these reasons, we dismiss the criminal motion. Mr Sreenivasan applied for bail to be extended until 4 January 2016 and the Prosecution had no objections to the application. Bail is therefore extended on the same terms and the applicant shall commence serving his sentence on 4 January 2016.

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