Public Prosecutor v Henry John William and another appeal
[2002] SGHC 29

Case Number : Cr Rev 6/2002, MA 8/2002

Decision Date : 21 February 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Christopher Ong Siu Jin (Deputy Public Prosecutor) for the petitioner/respondent; The respondent/appellant in person

Parties : Public Prosecutor — Henry John William

Courts and Jurisdiction – Appeals – High Court's powers in exercise of appellate jurisdiction – Accused pleading guilty to defective charges – Whether High Court has power to amend defective charges

Criminal Procedure and Sentencing – Charge – Amendment – Charges alleging non-existent offences – Amendment of defective charges – Accused pleading guilty to defective charges – Whether appropriate case for court's exercise of revisionary power – ss 256 & 268 Criminal Procedure Code (Cap 68)

Criminal Procedure and Sentencing – Sentencing – Sentence of seven years' imprisonment and 18 strokes of cane – Bulk of sentence taken up by one conviction – Whether sentence manifestly excessive

: The appellant pleaded guilty in the district court to a total of seven offences, which comprised one count of robbery with hurt pursuant to s 394 of the Penal Code (Cap 224), one count of possession of an offensive weapon pursuant to s 6 of the Corrosive and Explosive Substances and Offensive Weapons Act (Cap 65), four counts connected with the sale of uncensored and obscene video compact discs (`VCDs`), which were brought variously under the Films Act (Cap 107, 1998 Ed), and one count of publicly exhibiting obscene VCD covers pursuant to s 292(a) of the Penal Code. The district judge sentenced the appellant to a total of seven years` imprisonment and 18 strokes of the cane. Subsequent to his conviction and sentencing, the Public Prosecutor brought an application for criminal revision pursuant to s 268 of the Criminal Procedure Code (Cap 68) (`CPC`), seeking the substitution of amended charges for two of the Films Act offences. At the same time, the appellant appealed against his sentence, contending that it was excessive and pleading for leniency. I granted the application for criminal revision and dismissed the appeal against sentence, and now give my reasons.

The application to amend the charges

The first charge, for which the Public Prosecutor sought amendment, concerned s 29(3) of the Films Act, and charged that the appellant:

> *... did have in [his] possession for the purposes of attempting to distribute 35 (thirty-five) video compact discs containing 35 (thirty-five) films, knowingly or having reasonable cause to believe that the film [sic] to be obscene ...*

This charge was erroneously worded, as the offence of possessing obscene films for the purposes of attempting to distribute them does not exist. As such, the Public Prosecutor applied for criminal revision pursuant to s 268 of the CPC, and requested that I exercise my powers under s 256 of the

CPC to amend the relevant portion of the charge to read:

> *... did have in your possession for the purpose of distribution 35 (thirty-five) video compact discs containing 35 obscene films, having reasonable cause to believe the films to be obscene ...*

and to convict the appellant on the amended charge.

The second charge had been brought under s 6(1)(a) of the Films Act, and charged that the appellant:

> *... did carry on a business of attempting to distribute 113 video compact discs containing 74 films, without a valid licence ...*

Again, the charge was flawed in that the offence in question was non-existent. The Public Prosecutor sought to replace the relevant portion with the following:

> *... did carry on the business of distributing video CDs containing films, without a valid licence ...*

Before me, the appellant raised no objection to the proposed amendments.

The law on amendment of charges

Section 268 of the CPC provides that the High Court may, in an application for criminal revision, exercise, inter alia, its powers under s 256 of the CPC. Section 256 in turn grants to the High Court wide powers in the exercise of its appellate jurisdiction. That such powers include the power to amend a charge and consequently convict an accused person on the amended charge was conclusively established by the Court of Appeal in **Garmaz s/o Pakhar v PP** [1996] 1 SLR 401 . This power has since been exercised on several occasions, most recently in cases such as **Loo Weng Fatt v PP** [2001] 3 SLR 313 and **Er Joo Nguang v PP** [2000] 2 SLR 645 .

The exercise of the power to amend is, however, subject to certain restrictions. In ***Garmaz s/o Pakhar*** (supra at p 410), the Court of Appeal noted with approval the following passage from the Malaysian case of **Sivalingam v PP** [1982] 2 MLJ 172 at 174 per Abdul Hamid FJ:

> *The requirement of ss 166 and 167 of the Criminal Procedure Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. Although therefore an appellate court is possessed of the power which it can lawfully exercise, it is equally essential that such power be exercised within the confines of the law. The question is to what extent and under what circumstances such power can be invoked. What is clear in our minds is, and we emphasise, that such power must be exercised under limited circumstances and with great caution subject to the restriction imposed by s 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.*

In **PP v Koon Seng Construction** [1996] 1 SLR 573 , I stated, in the context of an amendment to a charge on which the accused had pleaded guilty (at p 579):

> *The power of amendment is clearly not unfettered. It should be exercised sparingly, subject to careful observance of the safeguards against prejudice to the defence ... The court must be satisfied that the proceedings below would have taken the same course, and the evidence recorded would have been the same. The primary consideration is that the amendment will not cause any injustice, or affect the presentation of the evidence, in particular, the accused`s defence. These safeguards must be rigorously observed.*

Application to the present case

In **Ang Poh Chuan v PP** [1996] 1 SLR 326 , I laid out certain guidelines relating to the exercise of the High Court`s revisionary jurisdiction, viz (at p 330):

> *... various phrases may be used to identify the circumstances which would attract the exercise of the revisionary jurisdiction, but they all share the common denominator that there must be some serious injustice. Of course there cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. But 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.*

The present situation was clearly a proper case for the exercise of the revisionary power, in that the appellant had been convicted and sentenced for non-existent offences. However, I also had to consider whether the proper course for me to take was to amend the charges as requested by the Public Prosecutor, and thereafter convict the appellant on them. I was mindful that the cases in which the High Court exercised its power to amend charges largely related to situations where the charge was defective in that it did not disclose the commission of an offence, eg in **Ong Tiong Poh v PP** [1998] 2 SLR 853 , or where a new offence, made out on the facts, was substituted for an offence which was not made out on the facts, as in ***Loo Weng Fatt*** (supra). The situation before me, on the other hand, concerned the appellant pleading guilty to non-existent offences, and it was necessary to determine whether the High Court`s powers of amendment extended to such situations.

In ***Koon Seng Construction*** (supra), I approved the exercise of the power of amendment in a situation where the accused person, due to a clerical error, pleaded guilty to an offence different from that which both prosecution and defence had intended to proceed under. In making my decision, I took the view that such situations were analogous to those where the High Court substitutes the charge and convicts the accused on the substituted charge. As I noted then (at p 579):

> *Substituting a charge necessarily involves amending the charge to introduce different terms. Whether the amendment introduces an entirely different offence section or not, a new and different charge is in place. The necessity to observe the safeguards against prejudice operates to ensure that the substituted charge does not stray beyond the limits imposed by ss 173 to 175 CPC. In other words, an amendment to introduce a substituted charge should*

be no different in effect from a substituted conviction.

Following from the above, I had no hesitation in deciding that the power of amendment extended to the present situation. In any event, it was patently clear to me that the defects in the charges in question arose from a failure to conform the wording in the charges to the wording of the statute. As such, apart from viewing this particular application to amend the charge as analogous to a substituted conviction, I was also of the view that it was analogous to those situations where the charge failed to disclose the necessary elements of the offence. Finally, I took note of the decision in the Malaysian case of **Siah Ik Kow v PP** [1968] 2 MLJ 217 , in which the court amended the original charge, which referred to a non-existent offence, and substituted the correct offence.

Having decided that the present case was a proper one for the exercise of the power of amendment, I considered whether the exercise would cause the appellant any injustice. I concluded that it would not. Apart from the fact that the appellant, when given the opportunity to object to the proposed amendments, stated that he had no such objections, I was also satisfied that the course of the proceedings in the court below would not have taken a different turn had the charges been correctly drawn up in the first place. The two offences to which the charges related were clearly made out on the facts, the appellant having been caught red-handed. They were also complete offences, such that there had been no need to charge the appellant with attempt in the first place. Furthermore, I was mindful that the appellant had also pleaded guilty to a second, correctly worded charge, relating to a separate incident, which had also been brought under s 29(3) of the Films Act.

Finally, I was satisfied that the appellant would not be prejudiced in terms of his sentence if I granted the application. The appellant had been sentenced to terms of imprisonment ranging from one month`s to six months` imprisonment for the four Films Act offences and the one related charge brought under the Penal Code of exhibiting obscene VCD covers. These sentences were ordered to run concurrently, such that the appellant only faced six months` imprisonment for all five offences. Of the two defective charges, the appellant was sentenced on the one brought under s 6(1)(a) of the Films Act to three months` imprisonment, such that the punishment for that offence would have been subsumed under the term of six months` imprisonment. As to the charge brought under s 29(3) of the Films Act, although the appellant was sentenced on it to six months` imprisonment, the appellant had also been sentenced to six months` imprisonment on the second, correctly worded charge under s 29(3). As such, the cumulative term of six months` imprisonment which the appellant received for the five VCD-related offences was not attributable solely to the defective charge brought under s 29(3).

In light of the foregoing, I granted the application for criminal revision, amended the two defective charges, and duly convicted the appellant on them.

The appeal against sentence

The only grounds cited by the appellant for his appeal against sentence were a plea for leniency and the contention that the sentence was too heavy. In respect of the plea for leniency, I had little hesitation in dismissing it. Taking into account the appellant`s numerous criminal antecedents and the serious nature of the charges he was sentenced for in the court below, I concluded that it was not appropriate for me to exercise leniency in the present case.

As for the contention that the sentence was too heavy, I noted that the sentence of seven years` imprisonment and 18 strokes of the cane had been imposed in respect of seven offences. The bulk of

the sentences was accounted for by the conviction for robbery with hurt, for which the appellant was sentenced to six years` imprisonment and 12 strokes of the cane. The conviction for possession of an offensive weapon accounted for the remaining six strokes of the cane, and six months` imprisonment. The remaining six months` imprisonment related to four Films Act offences and the conviction for exhibiting obscene VCD covers, for which, as noted above, the appellant had been given varying sentences of one month`s to six months` imprisonment.

I found no cause for complaint in the individual sentences imposed. The minimum mandatory sentence for robbery with hurt under s 394 of the Penal Code is five years` imprisonment and 12 strokes of the cane. As for possession of an offensive weapon, the sentence of six months` imprisonment was well below the maximum sentence of three years` imprisonment, and the six strokes of the cane were mandatory. Finally, as to the five offences relating to the VCDs, the sentence was clearly not manifestly excessive as, individually, they fell far short of the maximum term for these offences ***and*** the district judge allowed them to all run concurrently.

Neither did I find that the total sentence of seven years` imprisonment and 18 strokes of the cane to be manifestly excessive. As I had already noted, the bulk of the sentences was taken up by the sentence for robbery with hurt. I found that the additional one year`s imprisonment and six strokes of the cane was reasonable considering that it was meant to account for the remaining six offences, and was not in any way manifestly excessive.

As such, I dismissed the appeal against sentence.

Outcome:

Application allowed; appeal dismissed.