Vignes s/o Mourthi v Public Prosecutor (No 3)
[2003] SGCA 42

Case Number : Cr App 12/2003

Decision Date : 13 October 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Mr M Ravi (M Ravi and Co) for appellant; Bala Reddy and Edwin San (Deputy Public Prosecutors) for respondent

Parties : Vignes s/o Mourthi — Public Prosecutor

Criminal Procedure and Sentencing – Court of Appeal – Criminal jurisdiction – Application for leave to grant applicant re -trial – Leave to stay sentence of death pending re-trial – Whether Court of Appeal has jurisdiction to allow another appeal after appeal against conviction heard and dismissed – Function of Court of Appeal – Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

Criminal Procedure and Sentencing – Court of Appeal – Criminal jurisdiction – Whether need for different coram to be convened to hear second appeal before Court of Appeal – Burden on appellant to show strong reasons why permanent members of Court of Appeal would be unable to act objectively in matter

Delivered by Yong Pung How CJ

1 This was an appeal by Vignes s/o Mourthi against the decision of Lai Kew Chai J in Criminal Motion No 17 of 2003.

Facts

2 In Criminal Case No 25 of 2002, Tay Yong Kwang J found Vignes s/o Mourthi guilty of drug trafficking, an offence under s 5 of the Misuse of Drugs Act (Cap 185), and punishable under s 33 of the said Act. The mandatory death sentence was passed. The Court of Appeal, in Criminal Appeal No 13 of 2002, upheld Tay J's decision. The President dismissed Vignes' petition for clemency. Mr M Ravi, an advocate and solicitor, was instructed on 10 September 2003 by Vignes' father to apply on behalf of Vignes for an order 'that leave be granted to the applicant to order that there be a re-trial of the applicant and that the sentence of death passed on him be stayed pending re-trial.' This made up the substance of Criminal Motion No 16 of 2003 which was argued before Woo Bih Li J on 12 September 2003. Woo J dismissed the application. Mr Ravi then applied for a second Criminal Motion which was heard by Lai Kew Chai J. The arguments made at this second Criminal Motion (ie Criminal Motion No 17 of 2003) were similar to those made in the first one. Lai Kew Chai J duly dismissed the second application. Mr Ravi then filed a notice of appeal. This was filed at 4.30pm on 24 September 2003. As the sentence of death was to be carried out at 6.00am in the morning of 26 September 2003, coram of three judges was convened and the appeal was heard the next afternoon of 25 September 2003.

3 In both the Criminal Motions, Mr Ravi attempted to persuade the court that a re-trial was in order for two reasons: a) that Tay J was wrong to allow a conversation between Vignes and a Central Narcotics Bureau Officer, recorded in the latter's field book, to be admitted as evidence and b) that Tay J had failed to accord Vignes the opportunity to engage a counsel of his own choice.

The law

4 In *Abdullah bin A Rahman v PP* [1994] 3 SLR 129, the appellant sought to adduce fresh evidence by means of Criminal Motion No 13 of 1994 after the Court of Appeal had dismissed his

appeal in Criminal Appeal No 4 of 1993. The facts were these. Abdullah bin A Rahman (the applicant) was charged with abetting one Rashid in trafficking 76.3g of diamorphine. Both were jointly tried, convicted and sentenced to death. Their appeals to the Court of Appeal were dismissed, as were their petitions for clemency. Three days before they were due to be executed, Rashid informed the applicant that his statement to the CNB, as well as his evidence given at trial, both of which implicated the applicant, were fabricated. The applicant immediately informed his counsel who took out an application to adduce Rashid's retraction as fresh evidence. Counsel also sought leave to make further submissions on s 30 of the Evidence Act (Cap 97). The Court of Appeal was clear in its ruling that where it (ie the Court of Appeal) had heard and disposed of an appeal, as it had previously done in the applicant's case, it was *functus officio* in so far as that appeal was concerned. Of great importance was the fact that the Court of Appeal explained that there was no express provision which afforded the Court of Appeal the jurisdiction to hear fresh evidence. Therefore, it had no ambit to re-open the case after it had heard and disposed of the appeal. The crucial point in the *Abdullah bin A Rahman* decision was the fact that the Court of Appeal had tested all the different statutory mechanisms which could, potentially, have provided the Court of Appeal with re-opening power after disposal of the appeal. However, the Court of Appeal found that none of these potential mechanisms were intended for that purpose. The court held:

> Mr Suppiah (counsel for the applicant) was not alleging any lack of due process or irregularity in the criminal proceedings which culminated in the dismissal of the applicant's appeal on 9 November 1993. Rather, he conceded that he was asking this court to assume jurisdiction to re-open the appeal after it had already been heard and disposed of. He began by referring us to s 55(1) of the Supreme Court Judicature Act (Cap 322) ('the Act') which read as follows:
>
> In dealing with *any* appeal, the Court of Appeal may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court. (Emphasis added).
>
> Mr Suppiah argued that the word 'any' before the word 'appeal' in the section should be given a liberal interpretation so as to embrace any matter before this court, including this criminal motion, provided justice so demands. In his submission, although s 55 is to be found in Part V of the Act (entitled 'Criminal Jurisdiction of the Court of Appeal'), the use of the words 'any' did not limit the workings of that section to Part V. Additionally, he argued that the provision which bestowed jurisdiction upon the Court of Appeal to hear further appeals, as well as for appeals disposed of to be reopened, was s 29A(4) contained in Part IV of the Act which reads as follows:
>
> The Court of Appeal shall for the purposes of and subject to the provisions of this Act, have full power to determine *any* question necessary for the purpose of doing justice in *any* case before the Court. (Emphasis added).
>
> Mr Suppiah contended that the reference in s 29A(4) to the determination of 'any question' by this court in 'any case' was a general provision which allowed the Court of Appeal to do justice in any situation and was not confined to appeals alone (…) The Court of Appeal of Singapore is a creature of legislation and its jurisdiction must necessarily be defined solely by and limited to the provisions of the Act. In this regard, the relevant provisions of the Act are to be found in ss 29A(2), 44, 59 and 60.

The Court then went on to cite these provisions and discussed the ambit of each. It then went on to explain why none of these empowering provisions gave the Court of Appeal, as a creature, the ability to re-open a case after it had been disposed of. This point was best illustrated by the following paragraph in the judgment of the Court of Appeal:

> Where, however, the Court of Appeal has heard and disposed of an appeal, as it has in this on 9 November 1993, it is *functus officio* in so far as that appeal is concerned. There is no express provision which affords the Court of Appeal the jurisdiction to hear fresh evidence, thereby re-opening the case *after* it has heard and disposed of the appeal. We are unable to agree with Mr Suppiah's submission that this enabling provision can be found in ss 29A(4) or 55(1).

5 Once the Court of Appeal is *functus officio*, the case cannot be re-opened. The Court of Appeal stressed this point in the *Abdullah bin A Rahman* case:

> The main function of the Court of Appeal as set out by the jurisdictional provisions of the Supreme Court Judicature Act is a supervisory one, to review and correct the decisions of the lower courts; with the additional function of determining questions of law of public importance. Parliament has not defined the function of the Court of Appeal so as to maintain continuous supervision over convicted persons or to act after the event because of a change of circumstance. That being so, we would clearly be acting *ultra vires* the Act to assume jurisdiction in the present case…Even if we were unable to assume jurisdiction on the matter, Mr Suppiah urged us to make a recommendation to the President for clemency as was done in *Kuruma v The Queen*, *Mohamad Kunjo s/o Ramalan v PP* and *Ong Ah Chuan v PP*. However, those were cases wherein the Privy Council after hearing the matter on appeal, saw fit on the merits to make a recommendation to the executive. In the present case, where we were unable to assume jurisdiction on the matter, and were thereby not going into the merits of the case and hearing fresh evidence, we were unable to see what sort of recommendation we could possibly make.

6 The case of *Lim Choon Chye v PP* [1994] 3 SLR 135 further substantiated the ruling above. The facts of the case were as follows. The applicant was convicted in the High Court of drug trafficking and was sentenced to death. His appeal against conviction and sentence was dismissed by the Court of Appeal. The applicant then filed a Criminal Motion seeking leave to adduce fresh evidence in relation to his case. However, s 55 of the Supreme Court of Judicature Act (Cap 322), which empowers the Court of Appeal to hear additional evidence, clearly envisions the reception of the new evidence at the hearing of an appeal, at a stage before any decision has been pronounced. The primary question which arose for the Court of Appeal, in hearing the application, concerned the jurisdiction of the court to allow the introduction of fresh evidence in relation to an appeal already disposed of. The Court of Appeal ruled that, in regard to the application before it, the court could not claim for itself jurisdiction to allow yet another appeal against conviction in a case where an appeal had already been heard and dismissed. Karthigesu JA, who delivered the judgment of the court, stated that it was not Parliament's intention to allow an appellant an indefinitely extended right of appeal in the sense of being able to pursue a second appeal even after his first had been *duly heard and dismissed*. The Court of Appeal ruled:

> As a matter of procedure, once the Court of Appeal has rendered judgment in an appeal heard by it, it is *functus officio* so far as that appeal is concerned.

Nonetheless, counsel for the applicant in *Lim Choon Chye v PP* advanced the unique argument that the Supreme Court of Judicature Act itself did not explicitly state the number of appeals that could be brought by a single appellant. The Court of Appeal dismissed this argument by ruling that no legal basis existed for construing the word 'appeal' to mean 'more than one appeal' in the context of the Act. This was best summarised in the following statement of Karthigesu JA:

> …accordingly this court could not claim for itself jurisdiction to allow yet another appeal against conviction in a case where an appeal has already been heard and dismissed.

Therefore, Woo and Lai JJ were absolutely correct to rely on the above two cases to support their dismissals of the individual applications before them.

7 Lai J was correct to rely on the cases of *Lim Choon Chye v PP* and *Abdullah bin A Rahman v PP* to come to the conclusion that at the High Court he had no jurisdiction to order a re-trial and a stay of execution. The logical reason behind this stemmed from the fact that if, as decided by *Lim Choon Chye v PP* and *Abdullah bin Rahman v PP*, the Court of Appeal does not have jurisdiction to re-open cases which they have disposed, it must then follow that the High Court does not have jurisdiction to re-open cases decided by a court which is higher in the hierarchy than itself.

8 In the case of *Jabar v PP* [1995] 1 SLR 617 the Court of Appeal's focus was two-fold: a) whether it had the power to stay or commute a death sentence, and b) if it did, would excessive delay to the execution date amount to cruel and inhuman punishment such that a stay or commutation was justified. The Court of Appeal answered the first question in the negative. The Court of Appeal ruled:

> We are, however, of the view that once sentence is passed and the judicial process is concluded, the jurisdiction of the court ends. Once the Court of Appeal has disposed of the appeal against conviction and has confirmed the sentence of death, it is *functus officio* as far as the execution of the sentence is concerned. It is not possessed of power to order that the sentence of death be stayed or commuted to a sentence of life imprisonment, especially when the appellant was convicted of an offence which carried a mandatory sentence of death. The power of commutation or remittance of sentence lies only with the President, under s 8 of the Republic of Singapore Independence Act.

For completeness

9 The case of *Abdullah bin A Rahman* showed that where the court was convinced that it was unable to assume jurisdiction on the matter (as in this case), then the individual merits of the arguments, at the second appeal, need not be addressed. Nonetheless, for the sake of completeness and in light of the fact that the appellant was due to be executed the morning after the hearing, we analysed the appellant's arguments in great detail and were absolutely convinced that they lacked merit.

10 We read Mr Ravi's affidavit which listed his two arguments which he put forward in the Criminal Motions. The first argument was that Tay J was incorrect to allow the admission of a document which recorded a conversation between Vignes and a main prosecution witness – the latter was CNB Officer Sgt Rajkumar. This argument lacked merit. At the trial before Tay J defence counsel raised an issue with regard to the accuracy of this document, which was labelled exhibit P40. In particular, counsel at the trial stage argued that a comparison of handwriting in P40 with the handwriting in other documents and statements admitted as evidence showed that P40 was not written by Sgt Rajkumar. The argument which followed from this was that Sgt Rajkumar must have 'cooked up' the conversation between himself and Vignes when the latter was handing over the plastic bag full of drugs to him. To this argument, Tay J replied:

> I had no doubt that the documents, in particular exhibit P40, which incidentally was most damaging to B1 (Vignes), were genuine documents prepared by the officers in the way they had described in evidence.

Furthermore, our detailed study of the exhibits confirmed that the important points of the conversation between the appellant and the CNB officer, recorded in P40, had already been recorded

in exhibit PS10. There was no dispute that PS10 had been properly admitted. Thus, on a thorough study of the materials, Mr Ravi's first argument had no weight.

11 Mr Ravi's second argument was that Tay J had failed to accord the applicant an opportunity to engage another counsel when he asked to discharge his assigned counsel. In particular, the argument was that when Tay J refused to grant an adjournment of the trial to enable the applicant to appoint another counsel of his own choice, that this refusal contradicted the applicant's constitutional right under Article 9(3) of the Constitution. The Record of Proceedings on this was clear. Tay J asked Vignes whether he wanted to carry on with his counsel despite Vignes' expressed reservations about him halfway through the trial. Tay J gave Vignes a full opportunity to express his reservations about counsel. It was Vignes who decided to stay with counsel. This decision was checked again by Tay J before the trial was allowed to continue. Thus, Mr Ravi's second argument had no weight.

Coram

12 Mr M Ravi argued that because Chao Hick Tin JA and the Chief Justice were part of the coram which dismissed the appeal arising from Tay J's decision, then the only judge who was qualified to sit on the coram hearing this appeal was Tan Lee Meng J. We dismissed this argument.

13 Chao Hick Tin JA and the Chief Justice are the permanent members of the Court of Appeal. Unless strong reasons were shown why permanent members of this court would be unable to act objectively in the matter at hand, there would be no ground for them to disqualify themselves. The present matter was an appeal from the decision of Lai Kew Chai J and the question concerned the powers of the High Court to order a retrial of a case which had already run its full course, with the President turning down the petition for clemency. It was an entirely new point from that decided by this court in Criminal Appeal No 13 of 2002. Therefore, there was no reason why Chao Hick Tin JA and the Chief Justice had to disqualify themselves.

Appeal dismissed.