Tan Eng Chye v The Director of Prisons (No 2)
[2004] SGHC 196

Case Number : OS 32/2004, NM 18/2004

Decision Date : 06 September 2004

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tan Gee Tuan (Gee Tuan and Khin Wai) and A Rajandran (A Rajandran Joseph and Nayar) for applicant; Leong Kwang Ian (Attorney-General's Chambers) for respondent

Parties : Tan Eng Chye — The Director of Prisons

Administrative Law – Judicial review – Applicant pleading guilty to charge of robbery – Applicant informing court of his Marfan's Syndrome – Medical officer certifying applicant fit for caning – Applicant sentenced to caning – Whether medical officer's decision amenable to judicial review

Criminal Procedure and Sentencing – Sentencing – Forms of punishment – Caning – Whether individual's fitness to undergo caning should be considered before or after sentencing – Section 232(1) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

6 September 2004 Judgment reserved.

Choo Han Teck J:

1 This was an application for an order of *certiorari* to quash the certification of a prison medical officer, Dr Ooi Poh Hin. Dr Ooi had certified that the applicant was fit to receive the punishment of caning imposed by a district court judge. The facts giving rise to the application are as follows. On 15 October 2003 the applicant, aged 22, pleaded guilty to a charge of robbery punishable under s 392 of the Penal Code (Cap 224, 1985 Rev Ed), for robbing a man of his gold chain and handphone, and having put the man in fear of hurt in the course of the robbery. This offence carried a mandatory sentence of not less than 12 strokes of the cane. In the course of the oral mitigation plea, counsel for the applicant told the court that the applicant had Marfan's Syndrome (sometimes referred to as "the Marfan syndrome"), and further directed that a medical report be produced to determine whether the applicant was fit for caning. A medical officer of the Queenstown Remand Prison, Dr Ooi Poh Hin, examined the applicant and produced a report dated 16 October 2004. The terse report merely stated that the doctor had examined the applicant on 16 October and that the applicant was found fit for caning. The district court judge stated at [17] of his grounds of judgment (see [2003] SGDC 284) that:

> It was not clear from the Mitigation Plea what Marfan Syndrome is, but the following posting on the web-site of the US National Marfan Organisation (*http://www.marfan.org*) states that –
>
> ***What is the Marfan syndrome?***
>
> The Marfan syndrome is a heritable disorder of the connective tissue that affects many organ systems, including skeleton, lungs, eyes, heart and blood vessels. The condition affects both men and women of any race or ethnic group. It is estimated that at least 200,000 people in the United States have the Marfan syndrome or a related connective tissue disorder.

What medical problems are associated with the Marfan syndrome?

1. The Cardiovascular System

The most serious problems associated with the Marfan syndrome involve the cardiovascular system. The two leaflets of the mitral valve may billow backwards when the heart contracts (mitral valve prolapse). This can lead to leakage of the mitral valve or irregular heart rhythm.

In addition, the aorta, the main artery carrying blood away from the heart, is generally wider and more fragile in patients with the Marfan syndrome. This widening is progressive and can cause leakage of the aortic valve or tears (dissection) in the aorta wall. When the aorta becomes greatly widened, or tears, surgical repair is necessary.

2. The Skeleton

Skeletal manifestations common in people with the Marfan syndrome include curvature of the spine (scoliosis), abnormally shaped chest (pectus deformity), loose jointedness and disproportionate growth usually, but not always, resulting in tall stature.

2. The Eyes

People with the Marfan syndrome are often near-sighted (myopic). In addition, about 50 percent have dislocation of the ocular lens.

2 On 29 October, the district court judge sentenced the applicant to four years and six months' imprisonment and 12 strokes of the cane. In his grounds, the district court judge, after noting the Internet description of Marfan's Syndrome, stated (at [17]):

> Although this appears to be a medical problem that can seriously affect a person's health, there was nothing in the materials before me which showed that the accused was so affected. Therefore, while I accepted that the accused had a medical problem, as well as psychiatric and behavioural problems, these were of limited mitigating value.

On 31 October 2004 the applicant filed a Notice of Appeal against the sentence imposed by the District Court.

3 However, on 12 April 2004 the applicant applied before the High Court and sought leave under O 53 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) to issue an application for an order of *certiorari* to quash the medical report of Dr Ooi Poh Hin dated 16 October 2004. The High Court (see [2004] 2 SLR 640) granted the application and the relevant parts of the grounds of decision are set out as follows:

> 18 The argument is that the report dated 16 October 2003 will not be used as the basis for proceeding with the caning. At the time scheduled for caning, another certificate must be issued before caning is carried out.
>
> 19 That is correct, but it does not address the applicant's concern over the medical assessment process. The provision does not require the medical officer to put up a report, only to issue a certificate that the offender is in a fit state of health to undergo caning. That is only to be done on the day of caning, and there is no provision for the certificate to be disclosed to the offender.

20 There is no assurance that the evaluation will be more thorough than the one carried out on 16 October 2003. If it is not, the applicant has a ground for complaint and redress.

21 Is it premature for him to seek redress now? When the respondent calls his action premature, that presupposes that there is a later, more appropriate time to do that. When I asked when that would be, there was no answer.

22 As the certification is to be done at the time of caning, how will the offender be able to seek redress after the certificate is issued, and before the caning is administered? If he is already caned by the time his application can be heard, it is too late to obtain the redress he seeks.

23 The argument that the application is premature, and should not be made until it is too late to prevent the risks of permanent and unintended injury, is self-defeating.

24 I suggested to counsel that the basic issue is the thoroughness of the medical assessment. The applicant's concern is that he should not to be caned [*sic*] unless the medical risks and implications are considered more thoroughly than they were on 16 October 2003. If it can be arranged for a medical officer knowledgeable in Marfan Syndrome to examine him and his medical records and assess whether he is able to receive caning, then that would remove the basis of the complaint. When I asked if the respondent would agree to that, the suggestion was not taken up.

4 Before me, Mr Leong Kwang Ian, counsel for the respondent, advanced the same arguments that he made in the hearing at the leave stage, and Mr Rajandran, counsel for the applicant, likewise, made the same arguments, but this time both parties referred to various affidavits that were not previously used. Mr Leong referred to an affidavit of Dr Ooi Poh Hin dated 16 August 2004 and an affidavit of Dr Naranjan Singh of the same date. Counsel also relied on an affidavit of Terence Goh, the head of Operations Control of the Singapore Prisons Department. The applicant, in turn, referred to his affidavit dated 23 August 2004. For the purposes of the application for leave, the applicant relied on an affidavit of a general practitioner, Dr Paul Ho, dated 12 January 2004, and an ophthalmologist, Dr Lim Tock Han of the Tan Tock Seng Hospital dated 9 January 2004. Counsel for the applicant also referred to a medical report by a Dr C Sivathasan dated 16 January 2004. This medical report was not submitted by way of an affidavit and was handed to the judge during the application for leave. It is appropriate at this stage to deal with Dr Sivathasan's medical report as well as the medical literature obtained by the district court judge through the Internet, in respect of which the High Court (see [3] *supra*) made the following comment at [8] in regard to the dredging of Internet information:

> The district judge's initiative is commendable, but it is not a substitute for a proper medical report *because he still did not get answers to the second and third questions*. [emphasis added]

5 Dr Sivathasan's medical report is not evidence. If a medical report is deemed sufficiently important and the party concerned wishes to rely on it, it is incumbent upon that party to produce it as he would any other evidence, namely, by calling the maker on oath or affirmation, whether to give oral evidence in the witness box, or where the case permits, by way of an affidavit. There is no evidence properly adduced to show that Dr Sivathasan was in fact a doctor, or that the said report was made by him. A witness who is competent, compellable, and not excused under any statutory exemption (such as the exceptions to the direct evidence rule) cannot avoid being tested for lying under oath simply by not taking the oath. In respect of the use of the Internet information, that too was of no greater use than Dr Sivathasan's medical report for similar reasons. The comment made in the previous hearing implied that had the district court judge found the answers to the second and

third questions (*ie*, whether the applicant had Marfan's Syndrome and whether caning would be fatal to him) it would have been acceptable for him to rely on the Internet information. For reasons that are apparent, such evidence would be immaterial and irrelevant. However, one might wish to pause and reflect on the wisdom of a judge, especially when he is sitting at first instance, in conducting his private research in matters of fact or on law. First, there might be no verification of the sources. Internet notices can be posted by well-qualified persons or by charlatans alike. Secondly, even if they were posted by the most renowned source, that source must be made available to the parties for clarification or cross-examination. Thirdly, a court of first instance is essentially a finder of fact. If its findings are to be respected, to the extent that an appellate court would not readily disturb them, the trier of fact must steadfastly maintain the neutrality of his role. He ought not to put himself in any position where he might have to defend his own conduct, be it in the rightness or wrongness of his effort, or in the discoveries he made, or in adopting a position taken without giving an opportunity to the parties to address the court on the merits of that position. Fourthly, when a judge undertakes the responsibility of research, can he be excused for errors and omission, or is he bound to exercise the same degree of care as counsel undertaking research? If so, in discharging his responsibilities in research, would he have distracted himself from the actual task of judging?

6 I now revert to the application proper. From the submission of Mr Rajandran and the affidavit evidence before me, it appears that counsel had aptly summarised the basis for the application as follows:

> On the totality of the evidence before the court, there is still an inherent risk or real danger to be suffered by the applicant should he be caned and that in the circumstances, he should be spared the cane – to put the case of the applicant at its most basic level.

Section 232(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC") provides that the "punishment of caning shall not be inflicted unless a medical officer is present and certifies that the offender is in a fit state of health to undergo such punishment". It is not difficult to see that the punishment of caning is intended to achieve certain limited effects which do not include serious or permanent harm to the prisoner's health. For that reason, a medical officer is duty bound to certify that the prisoner is fit for caning. That duty has to be performed under the requirements of s 232(1) of the CPC. The medical examination of the appellant by Dr Ooi Poh Hin on 16 October 2003 was not made under s 232(1) of the CPC because it was conducted under an order of court prior to sentencing. Section 232 of the CPC envisaged a post-sentence examination. The position becomes even clearer when one refers to s 233 of the CPC which provides for the continued detention of the prisoner who has his caning wholly or partially stopped so that he might be brought back to the court for a revision of his sentence. Furthermore, the provision under which the applicant was to be sentenced in this case, carried a sentence of mandatory caning. In such cases, the court is bound to impose the requisite sentence of caning. Whether the applicant in this case is fit to receive the punishment is a matter for the medical officer attending under s 232(1) of the CPC to determine subsequently.

7 Against the background of these statutory provisions, it is apparent that the applicant's case that Dr Ooi Poh Hin's certification ought to be quashed because he did not take into account matters in the *Wednesbury* sense (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223), was misconceived. The making of this application indicated that the applicant had laboured under the mistaken belief that every act or conduct of a public servant is justiciable by way of a judicial review. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock held at 408 that:

> The subject matter of every judicial review is a decision made by some person (or body of

persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do so until there has been communicated to him some rational grounds for withdrawing it on which he had been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn …

Lord Diplock further amplified what he said above by holding that:

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences, mentioned in the preceding paragraph.

8 The report by Dr Ooi was obviously a "decision" but that alone did not make Dr Ooi a "decision maker" in the sense explained in the Lord Diplock judgment above. The district court judge, as I had said, was duty bound to impose the sentence of caning irrespective of what Dr Ooi might have said in his report. Dr Ooi was a public servant discharging what I might call a "non-decision making" duty in the Diplock sense. Further examples of non-decision making conduct include acts of police officers such as in the arrest of a person suspected of committing an offence. Such decisions of an arresting officer are not amenable to judicial review. The rights of the arrested person lie in the criminal, as well as civil, law – not in an administrative action. A public officer performing such duties cannot be made accountable by way of judicial review because the law would have provided avenues for redress in the case of any error or wrongdoing on the part of the public officer. Sometimes the redress might not be adequate or obtained in time but that does not detract from the schematic structure of the complainant's legal remedies. An arrested person might be freed or charged. If he is charged, he may defend himself at trial. If he is found guilty, he has his right of appeal. The arresting officer cannot be made to account for his action as to whether he had exercised *Wednesbury* reasonableness in deciding to arrest a suspect. Every public officer will have made numerous decisions on a daily basis. They cannot all be accountable for each and every one of those decisions in an administrative action, even if they affect another person or body of persons, otherwise the entire apparatus of public service might cease to function. Similarly, a medical officer performing his duty in determining whether a prisoner is fit for caning is not a "decision maker" in the Diplock sense. The substantive administrative action would have been the decision of the judge who ordered the caning. The remedy in the case of any dissatisfaction with that order lies in the appeal process. In the case of the medical officer reporting under a s 232 (1) situation, the substantive administrative action, or the Diplock "decision making" function, lies with the prison authority which may stop the caning. If it does not exercise that function, the remedy lies in an action against the prison authority for failing to discharge its statutory duty. For these reasons, the applicant had no merit in applying for leave to issue an application for an order of *certiorari*. Accordingly, this application before me must be dismissed.

9 Mr Rajandran submitted that the crucial point in this application lay in Dr Ooi's failure to take into account the real possibility that caning the applicant would be "potentially dangerous to [him]." It has to be noted, however, that the question whether the applicant was, in fact, suffering from Marfan's Syndrome was not fully addressed before me. Dr Paul Ho, the general practitioner who examined the applicant on 10 November 2003 (after the applicant had been sentenced) reported that the applicant "has the features of Marfan's Syndrome" but he did not explain which features and the degree in which they had manifested in the applicant. Dr Lim Tock Han, the ophthalmologist, reported that the applicant had features "suggestive of Marfan's Syndrome" and was, in his opinion, a "glaucoma suspect". Dr Ooi himself did not diagnose the applicant to have Marfan's Syndrome, but noted that the applicant's medical record in the army indicated that he had. That record was only indicative of the applicant's medical history. For the purposes of s 232 of the CPC, it would be incumbent upon the examining doctor to make an independent finding. On the available evidence, it would be fair to conclude that there were indications that the applicant might indeed have Marfan's Syndrome, but that is not the relevant issue. Mr Rajandran further argued that the point that we had to address was whether Dr Ooi was aware of the possibility that the applicant had Marfan's Syndrome, and if so, whether the doctor took that into account. From his affidavit, Dr Ooi noted that the medical record from the Singapore Armed Forces referred to the medical downgrading of the applicant because of Marfan's Syndrome. Dr Ooi then went on to say that he did not think caning would affect the applicant, and that in any event, there would be another medical examination before the caning could take place.

10 Whether or not there was, in fact, a correct diagnosis of Marfan's Syndrome would not be crucial in a case for judicial review. However, it would be relevant to know whether the doctor had taken that possibility into account. Ultimately, this was not a judicial review case at all. Whether Dr Ooi was right or wrong in his diagnosis of the applicant, and whether he had taken the possibility of Marfan's Syndrome into account, was not a relevant issue because the district court judge was bound to pass the sentence of mandatory caning in any event. The *Wednesbury* reasonableness principle, though clearly irrelevant, had been the subject of reference at many points in this case. And at the application for leave stage, the court formed the view that a failure to consider the applicant's medical record would amount to *Wednesbury* unreasonableness. The court then cited Lord Greene MR's judgment from the case from which we received the eponym *Wednesbury* reasonableness – *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* (see [7] *supra*) at 228:

> The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

The High Court at the leave stage in the present matter (see [3] *supra*) then stated (at [38]) that:

> Here the applicant is complaining that the medical assessment ought to have regard to his medical history and his known medical condition. It is clearly arguable that it is implied that his medical history and condition must be considered, and that an omission to do that amounts to *Wednesbury* unreasonableness.

11 If the district court judge had rejected the report and decided not to impose caning, the Prosecution would have rightly appealed against that decision. Likewise, had the judge accepted the report as he might have done (he could have ignored it altogether), the applicant's recourse would

have been to appeal on the ground that the judge should not have acted on a flawed report. Of course, given the law as I have stated above, such an appeal would be doomed to fail since the district court judge did not have a discretion not to impose the punishment of caning. The applicant cannot hope to recover a lost cause by attacking the secondary source. If that were allowed, a party who is unhappy with a trial judge's judgment, but who has no valid grounds of appeal, may be tempted to attack the evidence of witnesses such as the psychiatric expert, the prison doctor, the doctors examining the accused in a pre-statement medical examination and so on, on the basis that they had not taken various matters into account and, therefore, acted unreasonably in the *Wednesbury* sense. For the reasons above, I am of the opinion that it would be a pointless and unwarranted exercise to proceed to ask here, whether Dr Ooi had acted reasonably in the *Wednesbury* sense.

Application dismissed.