IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 66

Criminal Reference No 2 of 2017

Between

Muhammad Nur bin Abdullah

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Criminal references]

[Criminal Procedure and Sentencing] — [Sentencing] — [Forms of punishment]

Muhammad Nur bin Abdullah
v
Public Prosecutor

[2017] SGCA 66

Court of Appeal — Criminal Reference No 2 of 2017
Andrew Phang Boon Leong JA, Judith Prakash JA, and Tay Yong Kwang JA
20 March; 9 May; 6 September 2017

28 November 2017

Tay Yong Kwang JA (delivering the grounds of decision of the court):

Introduction

1 Criminal Reference No 2 of 2017 was an application by Muhammad Nur bin Abdullah ("the applicant"), a male now aged 24,[1] to refer a question of law of public interest to the Court of Appeal. The question of law is set out below.

2 On 9 May 2017, we granted the applicant leave pursuant to s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") to refer the following question of law to the Court of Appeal:[2]

> Whether an accused person who was below 21 years old at the time of conviction and granted probation; and who subsequently breach the said probation can be sentenced to

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[1] ROP Vol 1 at pp 4, 5.

[2] ROP Vol 2 at p 604.

> serve Reformative Training pursuant to section 305 of the Criminal Procedure Code although the accused person is above 21 years old at the time he is being dealt with by the Court for breach of the said probation under section 9(5) of the Probation of Offenders Act?

3 After hearing the parties, we answered "no" to the above question. We now set out the detailed reasons for this determination.

The relevant factual background

4 The applicant was born on 22 June 1993.[3] On 13 June 2013, when he was almost 20 years old, he pleaded guilty in the District Court to one drug trafficking charge involving methamphetamine under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). We will refer to this drug trafficking charge as "the Original Offence".[4] On 14 August 2013, the District Judge placed the applicant on 36 months' probation with certain conditions attached.[5]

5 The applicant breached his probation order by committing fresh offences within a year of the probation order.[6] He drove a car rented by his friend without the friend's consent and without a valid driving licence or insurance. Through his careless driving, the car collided into another car. He then fled the scene of the accident. He was eventually arrested and on 11 November 2014, pleaded guilty to five motor vehicle related charges. Two other charges were taken into consideration for the purpose of sentencing.[7] For these offences, he

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[3] Applicant's skeletal arguments at p 2 (para 2).

[4] *Public Prosecutor v Muhammad Nur Bin Abdullah* [2016] SGDC 246 ("the District Court's Judgment") at [1].

[5] The District Court's Judgment at [2].

[6] The District Court's Judgment at [3].

[7] The District Court's Judgment at [4].

was convicted and fined a total of $3,600 and disqualified from driving for 18 months.[8]

6 On 8 December 2014, breach action was taken out against him for committing these offences while on probation.[9] On 9 January 2015, the District Judge decided that the probation would continue.[10] The applicant was already over 21 years old at that time.[11]

7 The applicant, however, breached his probation a second time when he committed a series of 12 offences between February and March 2016.[12] These included theft of motorcycles and motor vehicle parts and theft in a dwelling house. On 26 July 2016, he pleaded guilty and was convicted on six charges, with six other charges taken into consideration for the purpose of sentencing.[13] The applicant was 23 years old at the time he was convicted on this set of offences.[14] On 26 July 2016, he was sentenced to 15 months' imprisonment, ordered to pay a $5,000 fine and disqualified from driving for 18 months after his release from prison.[15]

8 Breach action was again initiated against the applicant ("the Second Breach Action"). On 9 September 2016, the District Judge sentenced him to undergo reformative training after calling for and considering a report on his

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[8] The District Court's Judgment at [4].

[9] The District Court's Judgment at [4].

[10] The District Court's Judgment at [4].

[11] The District Court's Judgment at [4].

[12] The District Court's Judgment at [5].

[13] The District Court's Judgment at [5].

[14] The District Court's Judgment at [9(vii)].

[15] The District Court's Judgment at [6].

suitability for reformative training. In *Public Prosecutor v Muhammad Nur Bin Abdullah* [2016] SGDC 246 ("the District Court's Judgment"), the District Judge took into account the fact that the applicant was "under 21 years of age and eligible for RTC at the time of his conviction" on the Original Offence in 2013 (with "RTC" referring to reformative training centre).[16] The District Judge explained his decision further at [9(ix)] of the District Court's Judgment:

> I was unable to accept the Prosecution submission that the [accused person ("AP")] who is now 23 years of age and has served about 4 months' imprisonment for the fresh offences should be sentenced as an adult offender for the breach action for the drug trafficking offence in DAC 5600/2013 as he was under 21 years of age at the time of his conviction for this offence and s 305 of the Criminal Procedure Code (Cap 68) specifically allows a young offender to be sentenced to RTC if on the day of his conviction, he is of or above the age of 16 years but below the age of 21 years. In my view, the aforesaid Prosecution submission appears to be contrary to the legislative intent in s 305 of the Criminal Procedure Code as whether an offender is to be sentenced as a young offender eligible for RTC is to be based on his age on the date of conviction and not at the date of sentence. Based on the sentencing principles laid down by the High Court in *Ng Kwok Fai v PP*, it is legally permissible and no anomaly arose in the present case for this Court to sentence the AP to RTC for the breach action for the drug trafficking offence in DAC 5600/2013 even though the AP had earlier been sentenced to imprisonment for the fresh offences by a different court.

9 The Prosecution appealed to the High Court in Magistrate's Appeal No 63 of 2016/01 ("MA 63/2016/01") against the above decision of the District Court. It argued that the District Court erred in law[17] and in principle[18] in sentencing the applicant to reformative training when he was above 21 years old at the time of the Second Breach Action.

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[16] The District Court's Judgment at [9(vi)].

[17] Applicant's bundle of authorities for CA/CM 3/2017 at pp 145-153 (paras 18-32).

[18] Applicant's bundle of authorities for CA/CM 3/2017 at pp 153-161 (paras 33-54).

The decision of the High Court and the proceedings thereafter

10 The High Court Judge who heard MA 63/2016/01 agreed with the Prosecution that "the sentence imposed by the District Judge wrong in law and wrong in principle".[19] He held that having regard to s 9(5) of the Probation of Offenders Act (Cap 252, 1985 Rev Ed) ("the POA"), the sentence of reformative training was not available to the applicant because he was more than 21 years old at the time of sentencing under the POA.[20] He therefore allowed the Prosecution's appeal and imposed the minimum sentence of five years' imprisonment and five strokes of the cane for the Original Offence[21] to replace the sentence of reformative training ordered by the District Judge.[22] The High Court Judge also backdated the sentence to 9 September 2016 which was the date the applicant commenced his reformative training.[23]

11 The applicant subsequently applied for a stay of execution of the caning ordered by the High Court. This was granted by us on 20 March 2017.

12 On 9 May 2017, the application for leave to refer the question of law to the Court of Appeal was heard. We granted leave as we were of the view that the four conditions in s 397 of the Criminal Procedure Code were satisfied. In particular, the question of law affected the outcome of the case because the High Court Judge's finding that the applicable age was the age at the date of the breach action was one of the bases upon which he decided the appeal and the

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[19] Minute Sheet for HC/MA 63/2016/01 (3 March 2017) at p 1.

[20] Minute Sheet for HC/MA 63/2016/01 (3 March 2017) at p 1.

[21] Minute Sheet for HC/MA 63/2016/01 (3 March 2017) at p 1.

[22] Minute Sheet for HC/MA 63/2016/01 (3 March 2017) at p 1.

[23] Minute Sheet for HC/MA 63/2016/01 (3 March 2017) at p 1.

determination of that question affected the issue of whether reformative training was available as a sentencing option in the first place.

13 After granting the leave application, we directed the parties to address the following issue at the subsequent hearing on the merits of the application:

> Whether the relevant provisions in the CPC and the POA can be read as having the effect of taking the date of the breach proceedings back in time to the date of conviction or whether the provisions can be read as bringing the date of conviction forward in time to the date of the breach, therefore allowing the court to bear in mind what has happened in the meantime, namely that the offender has grown older and that he has committed further offences.

The relevant provisions

14 The provisions relevant to the present criminal reference were s 305(1)(*a*) of the CPC and s 9(5) of the POA ("the Relevant Provisions"). Section 305(1) of the CPC stipulates the age requirements that must be satisfied before an offender can be sentenced to undergo reformative training:

> (1) Where a person is convicted by a court of an offence punishable with imprisonment and that person is, on the day of his conviction —
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> (*a*) of or above the age of 16 years but below the age of 21 years; or
>
> (*b*) of or above the age of 14 years but below the age of 16 years and has, before that conviction, been dealt with by a court in connection with another offence and had, for that offence, been ordered to be sent to a juvenile rehabilitation centre established under section 64 of the Children and Young Persons Act (Cap. 38),
>
> the court may impose a sentence of reformative training in lieu of any other sentence if it is satisfied, having regard to his character, previous conduct and the circumstances of the offence, that to reform him and to prevent crime he should undergo a period of training in a reformative training centre.

In particular, s 305(1)(*a*) provides that an offender must be between 16 and 21 years old "on the day of his conviction" in order for him to be eligible for reformative training.

15 Section 9 of the POA is entitled "Commission of further offence". Section 9(5) provides:

> (5) Where it is proved to the satisfaction of the court by which a probation order or an order for conditional discharge was made that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period or during the period of conditional discharge, as the case may be, that court may deal with him, for the offence for which the order was made, in any manner in which that court could deal with him *if he had just been convicted* by that court of that offence. [emphasis added]

The parties' arguments

16 We will now summarise the parties' arguments in the hearing before us.

The applicant's submissions

17 The applicant's position was that the relevant provisions in the CPC and the POA should be read as having the effect of taking the date of breach proceedings back in time to the date of conviction to provide the court hearing the breach proceedings with the range of sentencing powers that existed at the date of conviction.[24] Section 305(1)(*a*) of the CPC provides that the court is empowered to order reformative training if the convicted person is above 16 years old but below 21 years old on "the day of his conviction".[25] The applicant argued that s 9(5) of the POA conferred the court hearing the breach proceedings

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[24] Applicant's skeletal arguments at p 5 (para 15).

[25] Applicant's skeletal arguments at p 6 (para 17).

with the same sentencing powers that the original court had at the date of conviction.[26]

18 The applicant also relied on the case of *Regina v Evans* [1963] 1 QB 979 ("*Evans*"). In that case, the English Court of Criminal Appeal held that the word "just" in the phrase "if it had just convicted him" did not mean that the court dealing with the breach proceedings had in fact just convicted the offender.[27] The applicant argued that *Evans* also stood for the proposition that the court dealing with the breach proceedings may consider all the circumstances and conditions which existed at the time it dealt with the offender. The fact that the offender may have become too old for reformative training would be just a fresh fact that the court may consider in deciding whether reformative training was still appropriate.[28]

19 The applicant further submitted that there was no policy reason to object to an offender being sentenced to undergo reformative training even though he was above 21 years old at the time of the breach proceedings.[29] In practice, in cases which do not involve breach proceedings, an offender could be sentenced to reformative training even though he is already above 21 years old at the time of sentence.[30] An offender who is recalled pursuant to reg 5(1) of the Criminal Procedure Code (Reformative Training) Regulations 2010 (S 802/2010) ("the RTR") could still serve reformative training even though he was above 21 years old at the time of recall.[31]

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[26] Applicant's skeletal arguments at p 13 (para 28).

[27] Applicant's skeletal arguments at p 17 (para 35).

[28] Applicant's skeletal arguments at p 18 (para 36).

[29] Applicant's skeletal arguments at p 19 (para 40).

[30] Applicant's skeletal arguments at p 19 (para 38).

The Prosecution's submissions

20 According to the Prosecution, the relevant provisions in the CPC and the POA could and should be read as bringing the date of conviction forward in time to the date of the breach, thereby allowing the court dealing with the breach proceedings to consider all the facts and circumstances leading up to the breach proceedings. It submitted that the court, having decided to deal with the applicant for the Original Offence, had to sentence him as if it had just convicted him and as he stood before the court at the time of the Second Breach Action. This meant that the court in the Second Breach Action had to view the applicant as a 23-year-old man who had been convicted of various offences during the period between the making of the probation order and the Second Breach Action. Reformative training was not available to the applicant as he was over the age of 21 at the time of the Second Breach Proceedings.[32] The Prosecution characterised this approach as the "Forward-looking Approach".[33]

21 The Prosecution characterised the alternative approach as the "Backward-looking Approach" in which the court in the breach proceedings was asked to tether its sentencing powers and its assessment of the applicant to the time when he was first convicted on the Original Offence.[34]

22 According to the Prosecution, the applicant's position was a variant of the Backward-looking Approach. While the applicant accepted that the court in the breach proceedings should deal with the offender based on the facts and

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[31] Applicant's skeletal arguments at p 19 (para 39).

[32] Respondent's submissions at p 3 (para 6).

[33] Respondent's submissions at p 3 (para 6).

[34] Respondent's submissions at p 4 (para 8)

circumstances existing at the time of the breach action, he anchored the court's sentencing powers to the "past time of conviction".[35]

23 The Prosecution rejected both the Backward-looking Approach and its narrower variant. It argued that the Forward-looking Approach should be adopted because it was supported by the plain and ordinary meaning of s 9(5) of the POA, promoted the legislative purpose of the POA[36] and was consistent with the objectives of the reformative training regime.[37]

The question before the court

24 The question before us was whether the Relevant Provisions provided the court with the power to sentence the applicant to reformative training even though he was above 21 years old on the date of the Second Breach Action. The answer turned on the meaning of the phrase "if he had just been convicted" in s 9(5) of the POA. While we accepted that in practice, offenders could be more than 21 years old when they were sentenced to reformative training, that was due to the fact that those offenders were convicted when they were just under 21 years old and by the time the pre-sentence reports were ready and they appeared in court again for sentencing, they had just turned 21 years old.

25 The applicant's situation was different. Although he was convicted on the Original Offence when he was under 21 years old, he breached his probation twice thereafter and was therefore subject to re-sentencing for his Original Offence under s 9(5) of the POA. The question therefore was whether the

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[35] Respondent's submissions at pp 41-42 (para 83).

[36] Respondent's submissions at p 5 (para 12).

[37] Respondent's submissions at p 6 (para 15).

"Forward-looking Approach" or the "Backward-looking Approach" should be used by the court to interpret the Relevant Provisions.

Our decision

26 In our judgment, the Forward-looking Approach, in which an offender's date of conviction on his original offence was brought forward to the date of the breach proceedings, was consistent with a plain and purposive reading of the Relevant Provisions. It was also the more logical approach.

27 Where an offender has breached his probation order, s 9(5) of the POA requires the court in the breach proceedings to deal with the offender for his original offence as "if he had just been convicted" on that offence, *ie*, convicted on the date of the breach proceedings. As s 305(1)(*a*) of the CPC determines the date of an offender's eligibility for reformative training as "the day of his conviction", an offender who is above 21 years old on the day of the breach proceedings does not qualify for and cannot be ordered to undergo reformative training.

28 The word "just" in the phrase "if he had just been convicted" in s 9(5) of the POA embodies the Forward-looking Approach as its effect is to bring the conviction forward in time so that the court in the breach proceedings is deemed to be the court that convicted the offender despite the fact that the offender had been convicted earlier by the original court. The Forward-looking Approach does not mean that the offender is actually convicted on the date of the breach proceedings. Instead, the court treats the offender as being notionally convicted on the date of breach proceedings for the purposes of re-sentencing him on that date. The deeming effect is necessary because the offender cannot be convicted a second time on the same offence. This means that in the present case, the date

of the applicant's Second Breach Action is treated as the notional date on which he was convicted on the Original Offence.

29 The same approach was adopted by the English Court of Criminal Appeal in *Evans*. The relevant portion of the decision in *Evans* is as follows (at 988–989):

> This court is of opinion that the fallacy in the argument set out above is that it disregards the presence of the word "just" in the phrase "if it had just convicted him." *The statute does not require the second court to put itself back in the position of the original court at the moment of conviction*; and although the statute says that the second court may deal with the offender in any manner in which it would deal with him if it had "just" convicted him, *that does not mean that the second court has in fact just convicted him; it has not.* The second court is dealing with an offender who, since his conviction, *may have reached an age when he qualifies for corrective training or preventive detention; he may have become too old for Borstal training*; and the court has the advantage of hearing how he has behaved himself since the probation order was first made. The second court must deal with the offender *in the light of all the circumstances and conditions which exist at the time when it deals with him*, not those which existed when he was first convicted, and among them is the circumstance that a valid order or valid orders made against him by the first court is or are still in existence. … [emphasis added]

The applicant found support for his position from the English court's observation that "if it has just convicted him…..does not mean that the second court has in fact just convicted him; it has not". This statement appears to suggest that the day of conviction should be taken as the day when an offender is convicted on his original offence and it is not brought forward to the day of the breach proceedings. However, a closer look at the above quoted passage reveals otherwise. The English court expressly noted that "[t]he statute does not require the second court to put itself back in the position of the original court at the moment of conviction". The natural consequence therefore is that the court

in the breach proceedings would also have to consider whether the offender has "reached an age" where he "may have become too old for Borstal training".

30 The Forward-looking Approach makes sense because the court in the breach proceedings is re-sentencing the applicant for breaching his probation. It would therefore need to be apprised of all the matters that had transpired since he was sentenced for the Original Offence. This would include matters favourable to the applicant, such as his good conduct and cooperation during probation (apart from the commission of further offences). At the same time, this approach would necessitate the consideration that the applicant had since turned 21 years old and was therefore ineligible for reformative training.

31 The Backward-looking Approach, however, requires the court to deal with the applicant as if the events that had transpired since the Original Offence did not take place. This would be highly artificial and would require the court to ignore the obvious fact that the applicant was now over 21 years old and that he had committed multiple further offences on several occasions after being placed on probation for the Original Offence.

32 The applicant suggested that a variant of the Backward-looking Approach should be adopted. He accepted that the court in the Second Breach Action should deal with him based on the facts and circumstances existing at the time of that breach action but argued that the court should treat his age as that on the date of first conviction on the Original Offence, *ie*, that he should be considered to be below 21 years old at the time of the Second Breach Action so that reformative training remained a sentencing option for him. In our opinion, there was simply no basis for such an unprincipled approach where the court would consider everything that had happened except the fact that the applicant was now older and more than 21 years in age.

33 Our interpretation of s 9(5) of the POA would apply also to s 7(2)(*a*) of the POA. Section 7(2)(*a*) of the POA applies to situations where an offender breaches his probation due to non-compliance with the requirements of his probation order (and not because of the commission of a further offence as in the case of s 9(5) of the POA). In such cases, the court in the breach proceedings would treat the offender as having been convicted notionally on the date of the breach proceedings for the purpose of determining how to deal with him for the original offence. However, the said section also provides alternatively that the court may order continuation of the probation order and impose a fine of up to $1,000 or order detention in prison for up to 14 days.

Consistent with parliamentary intent

34 The Forward-looking Approach is consistent with parliamentary intent as it promotes the object and purpose of s 9(5) of the POA and the reformative training regime. Section 9(5) of the POA deals specifically with reoffenders. While rehabilitation remains a relevant sentencing consideration, there is also a heightened need for deterrence when the court deals with an offender who reoffends while on probation (*Public Prosecutor v Koh Wen Jie Boaz* [2016] 1 SLR 334 at [59(a)]). The Forward-looking Approach promotes the objective of deterrence. This approach causes an offender to take into consideration the fact that he might be subject to a more severe punishment for his original offence once he is above 21 years old should he choose to reoffend whilst on probation.

35 We accept that there could be offenders who, having been convicted shortly before they turn 21 years old, cross that age by the time they are sentenced to undergo reformative training. The reformative training regime, however, already contemplates the possibility of individuals above 21 years old

undergoing reformative training. The reformative training regime bifurcates the conviction and the sentencing of the offender. The law requires an offender's eligibility for reformative training to be determined on the "day of his conviction" (s 305(1) of the CPC). It also requires the court to call for a report to determine the offender's suitability for reformative training before ordering him to undergo such (s 305(3) of the CPC). Therefore, there will be offenders who were slightly below 21 in age when convicted but who were slightly above 21 years old at the date of sentencing. Further, the minimum period of reformative training is 18 months and the entire period could extend to 36 months (reg 3 of the RTR). Therefore, an individual who is sentenced to undergo reformative training just before he turns 21 could be close to 24 by the time he is released. The fact that there could be offenders above 21 years old undergoing reformative training was alluded to by Parliament when reformative training was first introduced into Singapore. It was recognised that "[p]risoners do not remain tidily in one age group during the period of their sentences" (*Singapore Parliamentary Debates, Official Report* (5 December 1956) vol 2 at col 1069 (W. A. C. Goode, Chief Secretary)).

36 The Backward-looking Approach and the narrower variant advocated by the applicant, however, have the potential of introducing a pool of offenders that could be much older than the existing mix. The law states that a probation order can extend up to three years (s 5(1) of the POA). An offender who is placed on the full period of probation before he turns 21 years old may breach his probation by reoffending before he turns 24 years old. Under the Backward-looking Approach, he would still be eligible for reformative training. Assuming he breaches his probation order and then absconds for a few years before he is arrested, he would be significantly older by the time of his breach action. The applicant is presently 24 years old but, as can be seen from this discussion, the

Backward-looking Approach could result in offenders who are significantly older than that being eligible for and entering the reformative training regime. That would be contrary to the scheme of reformative training in Singapore. Of course, the counter-argument would be that although the much older offender is still eligible for reformative training, his age could be considered an impediment which makes him unsuitable for reformative training. Nevertheless, we think the Forward-looking Approach accords with both a plain and a purposive reading of the Relevant Provisions.

Application to the facts

37 Based on the Forward-looking Approach, the applicant, having crossed the age of 21 on the date of the Second Breach Action, would be ineligible for reformative training. However, even if reformative training was available as a sentencing option, in view of the multiple offences that he had committed, not once but twice while on probation, he should not be sentenced to undergo reformative training. The applicant's multiple offences were not just regulatory offences. They fell clearly within the realm of intentional criminal action affecting others. They showed his recalcitrant nature and his attitude towards the court's efforts to accord him an opportunity to make things right without having to spend time in prison and to suffer caning for the Original Offence.

38 Therefore, even if reformative training was an available sentencing option, it would be wrong in principle to sentence the applicant to undergo reformative training. He was given two chances at probation for a serious offence carrying mandatory minimum sentences and had scorned them by committing multiple further offences each time. He will therefore have to bear the consequences of his actions and have to undergo imprisonment as well as caning as ordered by the High Court Judge in MA 63/2016/01. Accordingly, we

lifted the stay of execution of caning granted by us on 20 March 2017 (see [11] above).

Conclusion

39 For the above reasons, we answered the question of law set out at [2] above in the negative. The applicant was not eligible for reformative training at the time of the Second Breach Proceedings because he had crossed the age of 21. Even if he was eligible, sentencing him to undergo reformative training in his circumstances would be wrong in principle.

Andrew Phang Boon Leong	Judith Prakash	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge of Appeal

Tan Hee Joek (Tan See Swan & Co) for the applicant;
Mavis Chionh *SC*, Wong Woon Kwong, Randeep Singh, and Eugene Sng (Attorney-General's Chambers) for the respondent.