IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 80

Criminal Motion No 6 of 2020

Between

Yuen Ye Ming

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Criminal references] — [Extension of time]
[Criminal Procedure and Sentencing] — [Criminal references] — [Leave to refer questions of law of public interest]

Yuen Ye Ming
v
Public Prosecutor

[2020] SGCA 80

Court of Appeal — Criminal Motion No 6 of 2020
Sundaresh Menon CJ, Judith Prakash JA, Tay Yong Kwang JA
12 August 2020

19 August 2020

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

Introduction

1 The applicant, Yuen Ye Ming ("the Applicant") is a 31-year-old British national. He pleaded guilty in a District Court and was convicted on two separate occasions on two sets of offences under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") committed in 2016 and 2018. He was sentenced by the District Court to a total of 20 years' imprisonment and 25 strokes of the cane. By virtue of s 328 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the aggregate sentence of caning was capped at 24 strokes.

2 The Applicant appealed to the High Court against the sentences. On 5 November 2018, his appeal was dismissed (see *Yuen Ye Ming v Public Prosecutor* [2019] 5 SLR 225 ("*Yuen Ye Ming*")). The High Court Judge ("the Judge") upheld the District Court's decision that the Applicant was liable for

enhanced punishment under the MDA for his second set of offences. He also held that the Applicant's individual and global sentences were not manifestly excessive.

The Criminal Motions under s 397 of the CPC

3 On 22 February 2019, the Applicant filed Criminal Motion No 1 of 2019 ("CM 1/2019") to seek leave under s 397 of the CPC to refer to the Court of Appeal three questions of law of public interest relating to the MDA's enhanced punishment provisions. All three questions related to whether an offender could be convicted under the enhanced sentencing provisions in the MDA if the offender had not been sentenced yet for trafficking, consuming or possessing drugs. On 19 August 2019, this court delivered an oral judgment refusing the leave sought and dismissing CM 1/2019, essentially on the ground that the facts did not give rise to questions of law of public interest. The Applicant was represented by Mr Eugene Singarajah Thuraisingam ("Mr Thuraisingam") and two other lawyers in that application.

4 On 23 March 2020, some 13 months after filing CM 1/2019, the Applicant filed the present application, Criminal Motion No 6 of 2020, through Mr Ravi s/o Madasamy ("Mr Ravi") of Carson Law Chambers. In this application, the Applicant seeks an extension of time to apply to the Court of Appeal for leave to refer three questions of law of public interest. The three questions (collectively, "the Questions") and the background facts relating to the Applicant's convictions are set out later in our judgment.

Application for extension of time for a second application

5 We deal now with the application for extension of time. Section 397(3) of the CPC provides that an application to refer any question of law of public

interest that has arisen in a criminal matter determined by the High Court "shall be made within one month, or such longer time as the Court of Appeal may permit, of the determination of the matter to which it relates". The application before us was filed on 23 March 2020, more than 16 months after the Judge made his decision to dismiss the appeal from the District Court. We note that the Applicant's first application in CM 1/2019 was also filed out of time. In the present application, the Applicant urges this court to exercise its power under s 397(1) read with s 397(3) and s 380 of the CPC to grant him an extension of time. The grounds that he relies on are that he had "only recently secured the benefit of fresh legal advice, and the public interest in the issues raised" in the present application. He also asserted that his new lawyers have acted with all due dispatch to file the present application.

6 Section 380(1) of the CPC empowers an appellate court to permit an appeal against any judgment, sentence or order despite non-compliance with the provisions in the CPC. In the Applicant's written submissions, he referred to the present application as an appeal. This is obviously incorrect as an application for leave to refer questions of law of public interest is clearly not an appeal to the Court of Appeal and therefore s 380 does not apply to the present application. The application for extension of time should rightly be under s 397(3) of the CPC although the principles for such extension are similar to those which apply to s 380 of the CPC.

7 In considering whether to grant an extension of time, the court will have regard to matters such as the length of the delay in making the relevant application and the reasons given for the delay. Generally, the longer the delay, the greater will be the importance accorded to the accompanying explanation (*Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 at [65]–[66]).

8 As stated above, there was a delay of more than 16 months in the filing of the present application. While the long delay is an impediment to the grant of extension of time, it may not necessarily be fatal by itself. However, it must be emphasised that the application for extension of time in this case was in respect of a second attempt to refer questions of law to the Court of Appeal after the first was dismissed. The Applicant's explanation is that he received new legal advice after CM 1/2019 was dismissed. He was represented by lawyers in CM 1/2019 and there is no assertion whatsoever that his previous counsel did not provide adequate legal advice and assistance. In this context, we refer to this court's decision in *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 (at [135]–[136]) on the high threshold required for a convicted person to make such an assertion against his previous counsel successfully. The court stated that the previous counsel's conduct of the case must be fairly capable of being described "as flagrant or egregious incompetence or indifference". Nothing of this nature has been alleged against the Applicant's previous counsel. Before us, Mr Ravi confirmed that he was not saying that Mr Thuraisingam was incompetent or ignorant. In the circumstances, there is no good reason to grant the Applicant an extension of time to file a second application under s 397 of the CPC.

9 In our view, to grant an extension of time in these circumstances would also result in an abuse of the s 397 CPC procedure. In *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 935 at [3], this court held that an applicant seeking leave to refer questions of law of public interest "cannot be allowed to drip-feed his questions through multiple applications of this nature. The principle of finality in the judicial process would be defeated if an accused person were allowed to spin out applications for leave to refer questions *ad infinitum*". In the present application, with the benefit of legal advice, the Applicant applied in

CM 1/2019 for leave to refer three legal questions on the enhanced punishment provisions in the MDA. Having failed in that first application, he is not entitled to return to court with a new lawyer with new questions. Otherwise, the legal process may never end or at least will go on for an unjustifiably long time because, with a bit of ingenuity, each successive new lawyer can easily craft some purported question of law for the Court of Appeal to consider.

Our decision on the extension of time

10 We therefore would not grant the extension of time sought for the filing of the present application. Nevertheless, we will discuss briefly the factual background out of which the Questions in the present application are said to arise and state our views on the Questions to show that they have no merit in any event.

Factual background of the Applicant's offences

11 On 5 August 2016, the Applicant was arrested for drug offences. After claiming trial initially, he pleaded guilty to four drug offences on 17 January 2018. This was the first of the two sets of offences mentioned in [1] above. Subsequently, the Prosecution applied for a discharge not amounting to an acquittal for one of these charges. The Applicant's case was adjourned for sentencing and the Applicant was released on bail. On 20 February 2018, about two weeks before he was due back in court, the Applicant was arrested a second time for drug trafficking activities. He eventually pleaded guilty to an additional four charges on 18 July 2018 and these formed the second set of offences referred to earlier. The Applicant agreed to have a total of 21 charges (from both sets of offences) taken into consideration for sentencing.

12 On 1 August 2018, the District Court sentenced the Applicant on both sets of offences. The District Court imposed the following sentences for the proceeded charges:

(a) Five years' imprisonment and five stokes of the cane for possession of not less than 15.47g of methamphetamine for the purpose of trafficking on 5 August 2016 ("Possession for Trafficking Charge").

(b) 12 months' imprisonment for consumption of methamphetamine on or about 5 August 2016.

(c) 12 months' imprisonment for possession of not less than 1.58g of methamphetamine on 5 August 2016.

(d) 12 years' imprisonment and ten strokes of the cane for possession of not less than 60.61g of cannabis for the purpose of trafficking on 20 February 2018.

(e) Two years and six months' imprisonment for possession of not less than 1.29g of methamphetamine on 20 February 2018.

(f) Three years' imprisonment for consumption of methamphetamine on or before 20 February 2018 ("Enhanced Consumption Charge").

(g) 12 years' imprisonment and ten strokes of the cane for trafficking in not less than 69.74g of cannabis on 16 February 2018 ("Enhanced Trafficking Charge").

13 The District Court ordered the sentences in [12](a), (f) and (g) above (the Possession for Trafficking, Enhanced Consumption and Enhanced

Trafficking Charges) to run consecutively for an aggregate sentence of 20 years' imprisonment and the number of strokes of the cane to be limited to the statutory maximum of 24.

14 On appeal to the High Court, the Applicant argued that the sentences imposed for his second set of offences were wrong in principle because he should not have been sentenced under the enhanced punishment provisions in the MDA. He also argued that his individual sentences had been incorrectly calibrated and that his global sentence was manifestly excessive. The Judge rejected all these arguments and dismissed the appeal. Ordinarily, therefore, this case should stop after the appeal to the High Court was dismissed as there is no further right of appeal.

The Questions as set out in the present application

15 Prayer 2 of the present application states the following:

> 2. For leave to refer the following questions of law of public interest to the Court of Appeal to state a case directly to the Court of Appeal on the following questions of law: -
>
> > d) Whether the offences of possession of a controlled drug and the simultaneous consumption of that same controlled drug is one incidence of criminal behaviour and should not incur double punishment.
> >
> > e) Whether a sentence of caning may be imposed as a concurrent sentence to another sentence of caning. The Applicant will invite the Court to review the case of ***Public Prosecutor v Chan Chuan [1991] SLR 335***, in which the High Court decided that sentences of caning could only be ordered to run consecutively.
> >
> > f) Whether, to the extend [*sic*] that the enhanced mandatory minimum sentence of caning in section 33(4A) of the Misuse of Drugs Act (Cap 185, 2008 Rev. Ed.) prevents a judge from considering the proportionality of the total number of strokes imposed

> on an offender sentenced to multiple offences, that restriction is –
>
> iii) A breach of the Applicant's common law right to a proportionate sentence.
>
> iv) Unlawful because it denies him (and other offenders similarly situated) equal protection of the law guaranteed by Article 12 of the Constitution.
>
> (For the avoidance of doubt, the Applicant does not challenge the lawfulness of mandatory minimum enhanced punishment in section 33(4A) *per se*. His contention is that, despite the mandatory minimum punishment of 10 strokes of the cane for repeat offenders contained in that section, a judge may still consider whether the total number of strokes imposed for more than one offence is proportionate to the offences and the offender's overall culpability.)

We shall refer to the questions at prayer 2(d), (e) and (f) as Questions 1, 2 and 3 respectively.

16 Before us, Mr Ravi sought to amend Question 3 by deleting the words "that the enhanced mandatory minimum sentence of caning in section 33(4A) of the [MDA]" and substituting in their place the words the "[CPC] and, in particular, section 306(1)". His explanation was that "[r]eference has been made to the penalty under the [MDA] because the CPC does not expressly prohibit a judge imposing concurrent sentences of caning. However, the Applicant would seek to amend this question to refer to provisions of the CPC, and in particular section 306(1)". We shall therefore consider Question 3 in its amended form.

Our decision on the Questions

17 Four cumulative conditions must be satisfied before leave can be granted under s 397 of the CPC (*Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 ("*Lam Leng Hung*") at [51]):

(a) 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) the reference must relate to a question of law of public interest;

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

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

Other than the first condition, we find that the Questions do not satisfy the above requirements.

Question 1

18 The Applicant must show that this is a question of law of public interest. As set out in this court's decision in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal CA*") at [19] (citing the Malaysian Federal Court decision in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141), the test for determining if a question of law is one of public interest is whether:

> *it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views.*
>
> [emphasis in original]

19 In our view, Question 1 is not an "open question" but a straightforward matter of statutory interpretation of s 8 of the MDA. A question of law is not one of public interest "just because it involves the construction or interpretation

of a statutory provision which could also apply to other members of the public" (*Mohammad Faizal CA* at [20]). Section 8 of the MDA states:

> **8.** Except as authorised by this Act, it shall be an offence for a person to —
>
> (*a*) have in his possession a controlled drug; or
>
> (*b*) smoke, administer to himself or otherwise consume —
>
> (i) a controlled drug, other than a specified drug; or
>
> (ii) a specified drug.

20 Section 8 clearly criminalises the acts of possession and consumption of controlled drugs as two distinct offences. This indicates that the offences are not a single incident of criminal behaviour but are concerned with protecting different legal interests. It follows that possession and consumption offences can carry separate punishments and that the imprisonment sentences imposed may run consecutively. It is therefore apparent that Question 1 is not a question of law of public interest.

21 Question 1 also fails to satisfy the remaining two conditions specified in *Lam Leng Hung*. This question was not part of the Applicant's case before the High Court. Moreover, the determination of Question 1 would make no difference to the outcome of the Applicant's case as he was not doubly charged and punished for the simultaneous possession and consumption of the same controlled drug. It was not as if he was charged for possession of the very same tablets which he had just consumed. If an accused possesses 100 tablets of a controlled drug and consumes five of them, it is completely lawful to charge him for having consumed that drug and for possessing 95 tablets of the same. If the possession of the 95 tablets was for the purpose of trafficking, then that elevates the charge to one under s 5 of the MDA. There was absolutely no issue

of double punishment on the facts. Accordingly, we would have refused leave to refer Question 1 even if the extension for time had been granted.

Question 2

22 Question 2 is also not a question of law of public interest. In *Mohammad Faizal CA* (at [22]), we held that "where the law has been authoritatively laid down and there is no conflict of authority, the court will, in the interests of finality, guard the exercise of its discretion [to grant leave] most jealously", referencing the decision in *M V Balakrishnan v Public Prosecutor* [1998] 2 SLR(R) 846. In this regard, the High Court's decision in *Public Prosecutor v Chan Chuan & another* [1991] 1 SLR(R) 14 ("*Chan Chuan*") states expressly that sentences of caning cannot be imposed as concurrent sentences. Punch Coomaraswamy J observed that the provisions in the then Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985") did not provide for such a possibility. He also placed emphasis on the language of s 230 of the CPC 1985, the substance of which is now embodied in s 328 of the CPC. The said s 230 provided that:

> When a person is convicted at one trial of any two or more distinct offences any two or more of which are legally punishable by caning the combined sentence of caning awarded by the court for any such offences shall not, anything in any Act to the contrary notwithstanding, exceed a total number of 24 strokes in the case of adults or 10 strokes in the case of youthful offenders.

23 In Coomaraswamy J's view (at [40]), "the sentences of caning are to be aggregated, provided that, in the case of an adult, the maximum of 24 strokes is not exceeded". In his opinion, where Parliament had provided for concurrence or merger with regard to sentences of imprisonment but was silent on caning except to impose a limit of 24 strokes, it could only mean that subject to the

specified maximum, the number of strokes for one offence shall be aggregated to the number of strokes for another (at [41]).

24 The question then is whether the decision in *Chan Chuan* is not free from difficulty or calls for the discussion of alternative views. The Applicant calls for a review of that High Court decision on the grounds that aggregated sentences of caning are contrary to the principle of proportionality and that the court has a common law power to order concurrent sentences of caning. He adds that the court also has a statutory power under s 6 of the CPC to adopt "such procedure as the justice of the case may require" barring any inconsistency with the CPC or such other law. This should include being able to impose concurrent sentences of caning where an offender's overall sentence is disproportionate.

25 In *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201, Sundaresh Menon CJ, sitting in the High Court in an appeal from the State Courts, held that the operation of the one-transaction rule is subject to the mandatory requirements in the CPC. The Chief Justice observed that unlike s 306(2) of the CPC, which expressly sanctions the imposition of concurrent sentences of imprisonment, there is no such provision "in relation to situations where the punishments are fines, which are thus inevitably cumulative. It is the same with caning, subject to the legislative limit of 24 strokes" (at [68]). The Court added at [80] that:

> To summarise, in my judgment, where an offender faces multiple fines, the one-transaction rule does not apply. However, any concern of unfairness arising from double or excessive punishment can be dealt with by the application of the totality principle, which allows for the adjustment of individual fines so that the cumulative fine is sufficient and proportionate to the offender's overall criminality. This, however, would be subject to any contrary statutory provisions having mandatory force.

26 Against this backdrop of consistent and established jurisprudence, we see no reason to revisit the High Court decision in *Chan Chuan*. To reiterate the reasoning of the High Court in that case, if Parliament had intended to make available the power to impose concurrent sentences of caning, this power would have been provided for as in the case of imprisonment terms. This view has been reflected clearly and consistently in the courts' sentencing practice and Parliament has not sought to change or to correct it by statutory amendment over these past decades although many major changes to the CPC have been made. Therefore, to invoke s 6 of the CPC for the purpose of introducing a non-statutory power relating to caning which Parliament has seen fit all these years not to incorporate into the CPC would be to contradict Parliament's intention. The principle of proportionality must take reference from the legislative intent of Parliament. Where Parliament has expressed its intention clearly in the form of mandatory caning or a mandatory number of strokes while setting only the specified limit of 24 strokes for adult offenders in s 328 of the CPC, it is impermissible for the court to qualify or even to nullify such intention by the subtle use of non-statutory powers in a supposed quest for proportionality.

27 However, Mr Ravi argued that although the Criminal Procedure Code (No 593 of 1999) (Malaysia) ("Malaysian CPC") is silent as to whether or not sentences of caning may be ordered to be concurrent, "in Malaysia sentences of caning are routinely ordered to run concurrently or are ordered to be 'non-cumulative'". He cited the decision of the Brunei Court of Appeal (Power, P; Mortimer, Davies, JJ.A) in *Azman Bin Morni v Public Prosecutor* [2009] MLJU 1616. In that case, the appellant pleaded guilty to nine separate offences which took place between July 2007 and February 2008. The Brunei Court of Appeal computed the total imprisonment term imposed by the trial court to be 58 months and the total number of strokes of the cane (or "whipping" as it is

referred to in that case) to be 12. This was on the basis that some of the "sentences" were ordered by the trial court to run concurrently because the total number of strokes would otherwise be 16. The Brunei Court of Appeal held that the trial court there was wrong in not giving the usual discount of one third for the appellant's guilty pleas. In the result, the Brunei Court of Appeal allowed the appeal by reducing the total imprisonment term to 38 months and the total number of strokes to four by ordering "all the sentences of whipping to be non cumulative".

28 The Brunei Court of Appeal did not allude to any statutory or other basis for ordering the caning to be non-cumulative. As for the arguments, the Court merely stated that the appellant, who was not represented by counsel, contended that the total of 12 strokes was manifestly excessive having regard to his plea and the overall criminality of the case. The Court then held that the appellant was entitled to have the number of strokes considered in the same way as the imprisonment sentences (that is, a discount ought to have been given for the guilty pleas) and that the total sentence of 12 strokes was itself excessive having regard to sentences passed in other cases. We therefore do not think this case can assist the Applicant or influence the clear, consistent and reasoned jurisprudence and practice of our courts.

29 The Prosecution also highlighted two decisions in the Malaysian courts which showed that it was not correct to say that "sentences of caning are routinely ordered to run concurrently" there. In *Public Prosecutor v Peter Ting Chiong King* [1987] 1 MLJ 42, Chong Siew Fai J considered case authorities and the relevant provisions of the Malaysian CPC and concluded that the Sessions Court's order for two sentences of whipping to be concurrent was unauthorised by law. This decision was cited by Muniandy Kannyappan JC in *Osman bin Maimon v Public Prosecutor and another appeal* [2019] MLJU 1702

at [22] for the proposition that the law dictates that sentences of whipping are to be consecutive. Far from contradicting the jurisprudence and practice of our courts, these two decisions, which are more than three decades apart, show that the Malaysian courts hold the same view that caning cannot be ordered to be concurrent.

30 Further, Question 2 did not feature in the appeal before the Judge. In fact, the Judge did not have to consider the issue of caning at all. He stated that "I also do not address the issue of caning here. Owing to the number of charges faced by the [Applicant], the imposition of the mandatory minimum number of strokes would already result in 25 strokes", which was just above the limit set out in s 328 of the CPC (*Yuen Ye Ming* at [58]). The Applicant therefore cannot seek to raise the issue of caning for the first time in the present application since it did not arise from the case before the High Court.

31 For all the above reasons, we would have refused leave to refer Question 2 even if we had granted the extension of time.

Question 3

32 The Applicant submits that the first limb of Question 3 is a question of law of public interest as there is no judicial authority on the application of the totality principle where an offender is sentenced to mandatory minimum punishments and where the court has no power to impose concurrent sentences. Much of what we have stated in relation to Question 2 applies equally to Question 3. Even if we assume that there exists a "common law right to a proportionate sentence", as Question 3 claims, the totality principle is qualified by statutory provisions prescribing mandatory sentences, whether in type or in quantum, and the courts "must impose the legislatively-prescribed sentence on

an offender even if it offends the principle of proportionality" (*Mohammad Faizal bin Satu v Public Prosecutor* [2012] 4 SLR 947 at [60]). As stated further by Chan Sek Keong CJ in the High Court in the same case (also at [60]), the principle of proportionality has no application to the legislative power to prescribe punishments because if it were applicable, "then all mandatory fixed, maximum or minimum punishments would be unconstitutional as they can never be proportionate to the culpability of the offender in each and every case". This means that when Parliament decides that certain offences should carry mandatory sentences, it is not within the province of the courts to rule that those offences should not. Similarly, where Parliament has put in place maximum or minimum sentences, the courts must make their decisions within those limits and cannot ignore them on the basis of proportionality by holding that the maximum set is too low or that the minimum set is too high.

33 The second limb of Question 3 is also not a question of law of public interest. Article 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) provides that "[a]ll persons are equal before the law and entitled to equal protection of the law". This does not guarantee the equal treatment of all persons but rather, that all persons in like situations are to be treated alike (*Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [54]). The Applicant's punishment clearly does not contradict the Constitutional protection because every drug offender in a similar situation (or "other offenders similarly situated" as stated in Question 3) would be subject to the same mandatory provisions relating to caning so long as the statutory conditions in the MDA are met. We also do not see why setting a mandatory minimum number of strokes of the cane for certain categories of recalcitrant drug offenders would infringe Article 12. The categorisation uses intelligible differentiating factors (such as previous convictions) and these certainly also

have a rational relationship with the public interest objective of the MDA in curbing trafficking and the abuse of illegal drugs.

34 As in the case of Question 2, the issues in Question 3 were also not matters that arose in the appeal before the High Court. Therefore, we would have similarly refused leave to refer Question 3 even if we had granted the extension of time.

Conclusion

35 For all the reasons set out above, we dismissed the Applicant's present application in Criminal Motion No 6 of 2020.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

Ravi s/o Madasamy (Carson Law Chambers) for the applicant; and Ng Yiwen, Benedict Chan and Rimplejit Kaur (Attorney General's Chambers) for the respondent.