Tan Eng Hong *v* Attorney-General
[2011] SGHC 56

Case Number : Originating Summons No 994 of 2010 (Registrar's Appeal No 488 of 2010)

Decision Date : 15 March 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : M Ravi (LF Violet Netto) for the plaintiff; Aedit Abdullah, Mohamed Faizal and Gail Wong (Attorney-General Chambers) for the defendant

Parties : Tan Eng Hong — Attorney-General

Civil Procedure – Striking Out

Constitutional Law – Fundamental Liberties

15 March 2011 Judgment reserved

Lai Siu Chiu J :

Introduction

1 This was an appeal by way of Registrar's Appeal No 488 of 2010 ("the Appeal") against the decision of the Assistant Registrar ("the AR"), who had struck out the Originating Summons No 994 of 2010 ("the OS") filed by Tan Eng Hong ("Tan") on the application of the Attorney-General ("the AG").

2 Tan had been jointly charged with another person in District Arrest Case No 41402 of 2010 ("DAC 41402/2010") for an offence under s 377A ("the charge") of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). Tan subsequently filed the OS on 24 September 2010 under O 15 r 16 of the Rules of Court (Cap 322, R 5 2006 Rev Ed) ("the Rules") to challenge the constitutionality of s 377A under the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") as follows:

(a) Section 377A of the Penal Code was inconsistent with Article 9 of the Constitution and was therefore void by virtue of Article 4 of the Constitution ("Art 4");

(b) Section 377A was inconsistent with Articles 12 and 14 of the Constitution ("Art 12 and 14") and was therefore void by virtue of Art 4.

(c) For those reasons, the charge brought against Tan under s 377A was void.

3 On 15 October 2010, during a pre-trial conference at the Subordinate Courts, state counsel for the AG informed Tan that the charge against him had been amended to one under s 294(a) of the Penal Code ("the amended charge"). The AG then applied under Summons No 5063 of 2010 ("the striking-out application") pursuant to O 18 r 19 of the Rules to strike out the OS. The AR granted the striking-out application on 7 December 2010 resulting in this Appeal. A week later, Tan pleaded guilty to the amended charge. He was convicted and fined $3,000.

The issues

4 In order to determine if the AR's decision was correct, the court needs to look at the applicable principles in three areas of law *viz*:

(a) striking out;

(b) *locus standi* and

(c) the requirements for the granting of declaratory relief.

5 In brief, pleadings can be struck out under O 18 r 19 of the Rules on the ground that: (i) it discloses no reasonable cause of action; (ii) it is scandalous, frivolous or vexatious; (iii) it may prejudice, embarrass or delay the fair trial of the action; or (iv) it is otherwise an abuse of the process of the Court. The burden is on the applicant to prove a very clear case that one of the grounds in O 18 r 19 applies (*per AG of Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274) as can be seen from the following cases:

(a) An action may be struck out under the "no reasonable cause of action" ground as being without legal basis where an aggrieved party is unable to establish *locus standi* (see *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287.

(b) According to Yong Pung How CJ in *Goh Koon Suan v Heng Gek Kiau* [1990] 2 SLR(R) 705 at [15], an action is clearly vexatious in the following situations:

> ...when the party bringing it is not acting *bona fide*, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result.

In *Chee Siok Chin & Ors v Minister for Home Affairs & Anor* [2006] 1 SLR(R) 582 at [33] ("*Chee Siok Chin*"), V K Rajah J elaborated on the "frivolous and vexatious" ground:

> Proceedings are frivolous when they are deemed to waste the court's time, and are determined to be incapable of legally sustainable and reasoned argument. Proceedings are vexatious when they are shown to be *without foundation* and/or where they *cannot possibly succeed* and/or where an action is brought only for annoyance or to gain some fanciful advantage. [emphasis in original]

(c) Rajah J in *Chee Siok Chin* also classified the abuse of process ground into four categories (at [34]):

> (i) proceedings which involve a deception on the court…;
>
> (ii) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
>
> (iii) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
>
> (iv) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

6 If a court cannot grant a party declaratory relief, it is arguable that the case is frivolous and vexatious, since it would have no practical value. To decide whether it can indeed do so, the court

should consider the requirements for the granting of declaratory relief. In *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 at [14] ("*Karaha Bodas*"), Judith Prakash J summarised them as follows:

> …
>
> (a) the court must have jurisdiction and power to award the remedy;
>
> (b) the matter must be justiciable in the court;
>
> (c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;
>
> (d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;
>
> (e) any person whose interests might be affected by the declaration should be before the court; and
>
> (f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is sought so that the court's determination would have the effect of laying such doubts to rest.
>
> ...

7 There is considerable overlap between the principles relating to striking-out and the granting of declaratory relief. In the light of this, this court will address the following issues:

(a) Does Tan have *locus standi*?

(b) Is there a real controversy?

(c) Is Tan's claim certain to fail?

(d) Does the court have jurisdiction to declare s 377A of the Penal Code unconstitutional in view of the fact Tan did not come to court by way of s 56A of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) ("the SCA")?

Locus Standi

The law on locus standi

8 In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27 ("*Lim Kit Siang*"), the majority of the Malaysian Supreme Court ruled that to possess *locus standi*, a plaintiff must show that he has a private right that has been infringed. If a public right is involved, he must show that he has suffered a peculiar damage as a result of the alleged public act and that he has a genuine private interest to protect or further. In *Lim Kit* Siang at p 21, the majority had followed *Boyce v Paddington Borough Council* [1903] 1 Ch 109, which the House of Lords accepted in *Gouriet v Union of Post Office Workers and Others* [1978] AC 435.

9 Tan had argued that where constitutionally guaranteed liberties are at stake, *locus standi* is established simply by showing sufficient interest rather than substantial interest. In support, his

counsel cited *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan*"). There, Karthigesu JA expounded:

> 13 If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it. The fact that the violation would also affect every other citizen should not detract from a citizen's interest in seeing that his constitutional rights are not violated. A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights.
>
> 14 There is thus no need for the appellants to show that they are office holders in IBSA or members thereof. Their right to challenge Order 405/1994 arises not from membership of any society. Their right arises from every citizen's right to profess, practise and propagate his religious beliefs. If there was a breach of Art 15, such a breach would affect the citizen *qua* citizen. If a citizen does not have *sufficient interest* to see that his constitutional rights are not violated, then it is hard to see who has.
>
> [emphasis added]

Colin Chan

10 Before applying the test to the case, one must first be clear as to the proposition that *Colin Chan* stands for. Contrary to the submissions of Tan's counsel, it is not immediately obvious from Karthigesu JA's passing reference to "sufficient interest", that he was articulating a test akin to its English counterpart. Academics Kevin Tan and Thio Li-Ann ("Tan and Thio") have gone even further than Tan's counsel. In *Constitutional Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2010) at p 551, they wrote, "Where constitutionally- guaranteed liberties are at stake, *locus standi* is established without the need to show sufficiency of interest" before making reference to *Colin Chan*.

11 A more defensible interpretation is that Karthigesu JA was simply treating constitutional rights as being vested in every citizen. He was not articulating a new test that specifically applied to constitutional rights. Instead, he simply preferred applying the "substantial interest" test instead of the "special damage" test that is used for public rights and had ruled that the former was satisfied in *Colin Chan*. This interpretation was supported by the Court of Appeal's decision in *Eng Foong Ho and Ors v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho*"). If *Colin Chan* had articulated a new *locus standi* requirement for constitutional rights, the Court of Appeal in *Eng Foong Ho* might have been expected to have made reference to it. That the Court of Appeal did not do so strongly suggests *Colin Chan* is no authority for Tan's proposition of a lower test of *locus standi* for constitutional rights. This is further supported by the Chief Justice's speech to students from the Singapore Management University (reproduced in the article *Judicial Review – From Angst to Empathy* (2010) 22 SAcLJ 469 ("SMU Lecture"), where Chan Sek Keong CJ noted at para 33:

> …In Singapore, although the courts appear to have accepted the same 'sufficient interest' test to determine whether leave for judicial review should be granted, that is not, in my view, also to say that our courts will apply the test with the same rigour as the UK courts.

12 In so far as the test of Tan and Thio may be taken as saying being a citizen in itself gives one *locus standi*, this should be rejected. Even Lord Denning, who attempted many times to liberalise the rules on locus standi in England, opined in *R. v Greater London Council Ex p Blackburn* [1976] 1 WLR 550 at 559 that *locus standi* should be denied to "mere busybodies". To allow people to challenge an allegedly unconstitutional law simply because they are citizens is undesirable for various reasons. First, priority should be given to parties with a genuine dispute. Second, as Salleh Abas LP

commented in *Lim Kit Siang* at p 25, a sufficiently robust threshold will ensure the courts do not adjudicate upon politically motivated litigation:

> …In my judgment, the court should be slow to respond to a politically motivated litigation unless the claimant can show that his private rights as a citizen are affected. Similar caution was expressed by Salmon LJ in Blackburn's case [1971] 1 WLR 1037 saying that he deprecated 'litigations the purpose of which is to influence political decisions'. Thus as a politician, the respondent's remedy in this matter does not lie with the court, but with Parliament and the electorate.

In *Australian Conservation Foundation Incorporated v Commonwealth of Australia and Others* (1980) 146 CLR 493 at 530, Gibbs J ruled:

> A belief, however strongly felt, that the law generally or a particular law should be observed or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.

Constitutional rights are not mere rhetoric for a low *locus standi* test of citizenship to apply.

1 3 *Colin Chan*, therefore, should not be seen as introducing a new test of *locus standi* for constitutional cases. Instead, it should be interpreted as merely saying that to satisfy the "substantial interest" test, a putative litigant has to allege a violation of his constitutional rights.

Are there constitutional rights at stake in order for Colin Chan to apply?

14 Regardless of which interpretation the court takes of *Colin Chan*, it will only be applicable if constitutional rights are involved. This necessitates investigating whether Arts 9, 12 and 14 of the Constitution are in issue.

15 Article 9(1) states: "No person shall be deprived of his life or personal liberty save in accordance with law." Article 9(1) is engaged only if expansive definitions are made of "life" and "personal liberty", such that a citizen has the liberty to lead his life as he pleases. However, our courts have eschewed such wide interpretations. For example, Choo Han Teck J in *Lo Pui Sang v Mamata Kapildev Dav and Ors (Horizon Partners Pte Ltd intervener)* [2008] 4 SLR(R) 754 at [6] ("*Lo Pui Sang*") said:

> …I do not think that the phrase 'personal liberty' in Art 9 was a reference to a right of personal liberty to contract. It has always been understood to refer only to the personal liberty of the person against unlawful incarceration or detention.

Therefore, Art 9 of the Constitution has not been triggered. It should be noted that *Lo Pui Sang* was overturned on appeal to the Court of Appeal. However, the Court of Appeal did not consider the constitutional issues that the High Court had considered, see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 at [53].

16 Article 12(1) reads:

> All persons are equal before the law and entitled to the equal protection of the law.

According to the Court of Appeal in *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [109]

(applying *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 at [70]), s 377A's differentiating measure would be consistent with Art 12(1) only if: (a) the classification was founded on an intelligible differentia; and (b) the differentia bears a rational relation to the object sought to be achieved by the law in question. On the arguments alone, this court is of the opinion that Tan's case does engage Art 12(1). Although s 377A is founded on an intelligible differentia (because it applies to sexually-active male homosexuals), it is arguable that there is no social objective that can be furthered by criminalising male but not female homosexual intercourse. Therefore, *Colin Chan* should apply.

17 Article 14 guarantees a citizen's freedom of speech, assembly and association. Although Tan referred to Art 14 in his Notice of Appeal, his counsel made no written submissions on this ground. Consequently, there is no necessity to address it here.

What constitutes an injury or violation of constitutional rights?

18 Since Art 12 was involved, *Colin Chan* applied. Tan needed to show he had suffered an injury or violation of his constitutional rights. The AG had argued that with the charge being dropped, Tan was unable to prove his case. This was a mistaken view. While the act of prosecution itself can be a violation of one's constitutional rights, it does not follow that a violation cannot occur without a prosecution. Karthigesu JA made this abundantly clear in *Colin Chan* at [13], "A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights".

19 There were two ways Tan's constitutional rights may arguably have been violated. First, the presence of an unconstitutional law on the statute books may suffice. The AG had sought to distinguish *Colin Chan* on the basis that the parties' rights there were violated by the ban on certain materials, as opposed to prosecution. The underlying premise – that the violation must come from a physical act – was refuted by Karthigesu JA's following dicta in *Colin Chan* at [19]:

> Although we agree with the learned judge that the constitutional rights to freedom of religion and expression would give the appellants *locus standi*, we are not able to agree with her that the fact that the appellants were facing prosecution for being in possession of prohibited publications under the Undesirable Publications Act also gives them *locus standi*. We think that this is an irrelevant consideration in an application for leave to issue *certiorari* proceedings.

20 The spectre of future prosecution was the second way Tan's rights could be said to have been infringed. This argument was accepted by the High Court of Australia in *Croome and another v State of Tasmania* (1997) 142 ALR 397 at 402 and the Hong Kong Court of Appeal in *Leung T C William Roy v Secretary for Justice* [2006] HKLRD 211 at [29] ("*Leung T C William Roy*"), cases cited by Tan's counsel. Therefore, Tan's claim should not be struck out on the ground that he lacked *locus standi* although it can be on other grounds dealt with below.

21 In this court's view, *Colin Chan* did not introduce a new test for the litigation of constitutional rights. Nevertheless, it is arguable on the facts that Tan's constitutional rights may have been violated. Consequently, he had satisfied the "substantial interest" test for *locus standi*.

Real Controversy requirement

Applicable law

22 Lord Dunedin in *The Russian Commercial & Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438, stated the following at 448:

> …The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> …

23 In *Lim Kit Siang* at p 27, Abdul Hamid CJ explained the requirement's rationale as being rooted in the common law's adversarial system:

> …Self-interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. If the motivation of self-interest is non-existent so that the ensuing dispute is not with respect to contested rights and obligations of the parties themselves, then the assurance of diligent preparation and argument cannot exist….

The decision

24 It is for the reason that there was no real controversy in issue here that this court affirms the decision made below and upholds the striking-out order.

25 There was no real controversy here because while there were specific facts involving specific parties, the facts were merely hypothetical. Granted, there were identifiable parties with the "motivation of self-interest" to make the diligent preparation identified by Abdul Hamid CJ as being essential to the adversarial trial. This however is insufficient. In *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR(R) 80 at [60], Yong Pung How CJ held:

> The primary consideration in this appeal is whether there is a real contest of the legal rights. The editors of Zamir and Woolf have identified one rationale for the reluctance of the courts to deal with theoretical issues - that it distracts the courts from deciding real, subsisting problems. A stronger reason is that if there is in fact no real issue subsisting, then the matter would not be *res judicata*, nor the issue merged in judgment. In that event, it would be open for the issue to be reopened again and again. The need for the existence of a contested dispute is to ensure that there is finality in the court's judgments as well.

26 Tan had relied on *Leung T C William Roy* to support his argument. There, the Hong Kong Court of Appeal (at [28]) accepted there could be adjudication on hypothetical facts, but only in exceptional cases. The AG sought to distinguish this case on the basis that it revolved around the International Covenant on Civil and Political Rights, which Hong Kong has incorporated into its laws. The treaty has no force of law in Singapore. There are other reasons not to follow the case:

> (a) The Hong Kong court's criterion of "exceptional cases" was vague. There is a danger that constitutional challenges may be brought willy-nilly and accepted blindly under this amorphous phrase. Of course, this may be negated if there are principled ways to carving out an exception. However, an exceptional case, by nature, cannot be defined in order to provide guidance by precedent.
>
> (b) The Hong Kong court reasoned that access to justice can only be gained by the applicant breaking the law. It referred to the opinion of Advocate-General Jacobs in *Union de Pequenos Agricultores v Council of the European Union* [2003] QB 893 at [43]:
>
> > ... Individuals clearly cannot be required to breach the law in order to gain access to justice.

In Singapore, it is arguable that individuals are not compelled to resort to such extremes. They can request the President to refer the issue to the Constitutional Tribunal under Art 100 of the Constitution. As there is an established procedure through which guidance may be obtained in the absence of specific facts, there is no reason to relax the "real controversy" requirement in order to avoid the situation where individuals break the law in order to obtain standing. It should be noted, however, that Chan CJ's extra-judicial view was that Art 100 of the Constitution was not intended to apply to hypothetical disputes (SMU Lecture). The basis for his view was that Art 100 was enacted in 1994 to deal with a specific dispute between organs of state. The following portion of his speech merits quotation (SMU Lecture at para 4):

> …Article 100 was enacted for the purpose of resolving actual and potential disputes of a similar nature between constitutional organs, and not to obtain advisory opinions on hypothetical cases from the courts…

(c) Further, there was nothing at stake for Tan. It bears remembering that Tan had already pleaded guilty and had been convicted under s 294 of the Penal Code. In bringing the OS, he stood to benefit from a judicial declaration that s 377A is unconstitutional while suffering no prejudice, leaving aside the matter of costs. This arguably goes against the spirit of the adversarial process where the parties' conduct is conditioned by the possibility of gain and/or loss.

27 Given that the charge was dropped, there are no subsisting facts upon which there can be *res judicata*. Hence, it may be argued that Tan's claim has no real practical value and should therefore be struck out.

Certainty of failure

Applicable law

28 The Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1997] 3 SLR(R) 649 at [21] emphasised that a high threshold of failure must be met before it would strike out a claim:

> …As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out...

29 Similarly, in *The Tokai Maru* [1998] 2 SLR(R) 646 at [44], the Court of Appeal held:

> …A reasonable defence means one which has some chance of success when only the allegations in the pleadings are considered: *per* Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, cited with approval by Rubin J in *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1995] 3 SLR(R) 334 . The hearing of the application should not therefore involve a minute examination of the documents or the facts of the case in order to see whether there is a reasonable defence. To do that is to usurp the position of the trial judge and the result is a trial in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way (see *Wenlock v Moloney* [1965] 2 All ER 871). The mere fact that the defence is weak and not likely to succeed is no ground for striking it out, so long as the pleadings raise some question to be decided by the court (see *Attorney-General of The Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274). In short, the defence has to be obviously unsustainable on its face to justify an application to strike out.

Legal analysis

30 Having a high threshold is consistent with the rationale of the striking-out procedure, that is to filter out claims where no further investigation could provide any appreciable assistance to the task of reaching a correct outcome. However, this case does not fall within the category. Tan's case was not completely without merit, especially on the ground of Art 12. Furthermore, his case raised many novel issues that deserved more detailed treatment, for example:

(a) whether an unconstitutional law in itself can constitute an injury or violation to one's constitutional rights; and

(b) whether Art 14 can encompass a right to express one's homosexual sexual orientation.

31 The AG had submitted that Tan was certain to fail given that he had no *locus standi* to seek a declaration that s 377A of the Penal Code contravened the Constitution. This argument was dealt with under the issue of *locus standi*. Here, the issue is whether the case is so weak, as gleaned from the pleadings, that it should be struck out because the result is a foregone conclusion. This threshold has not been satisfied.

The court's jurisdiction to grant declaratory relief

Judicial power and jurisdiction

32 To grant declaratory relief, the courts have insisted that the declaration sought must be in relation to a vested right. Judith Prakash J held in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [25]:

> ... CPR Part 40.20 is the rule reflecting the English court's power to grant declaratory reliefs. This is a new rule and it replaced the old rule that was *in pari materia* with our O 15 r 16 which, as it may be recalled, reads:
>
> > No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations *o f right* whether or not any consequential relief is or could be claimed… [emphasis added]
>
> The new CPR Part 40.20 differs from the above provision in that it does not state that a declaration has to be "of right". In Singapore, the legislation concerning the power to grant declaratory reliefs still includes the requirement that the declaration be one of right. This restriction has been taken out of the English provisions and the English courts therefore, arguably, have more wide-ranging powers than we do. When Lord Diplock made his famous pronouncement in *Gouriet*, the legislation in force was identical to our O 15 r 16. That same identical provision was in force (and the exact wording was set out in the judgment) when Neill LJ held in *Meadows* that he was bound by Lord Diplock's holding. As a matter of construction of the court's powers, therefore, as far as the Singapore courts are concerned, the approach of Lord Diplock is as authoritative as it ever was. This approach was adopted by the local cases of *Salijah* ([14] *supra*) and *British & Malayan Trustees* ([21] *supra*) where the court agreed that a declaration should only be granted when it concerned the rights of the parties represented in the litigation. We found no compelling reason to change that position.

33 Selvam J explained the reason for this requirement in *Singapore Airlines Limited & Anor v The*

Inland Revenue Authority of Singapore & the Comptroller of Income Tax [1999] 2 SLR(R) 1097 at [23]:

> That provision [Rules of Court O 15 r 16] does not mean that declaratory orders can be sought by all and sundry irrespective of whether there was a justiciable issue between the parties. It can be sought only by persons who have a right to enforce against a defendant or by persons who say that he himself is not liable. It is not the function or purpose of the courts to render legal opinion to indirect parties.

34 This requirement has been satisfied on the facts since constitutional rights are vested in each person and those of Tan had been affected. The next step is to determine whether Tan had committed an abuse of process by not referring the constitutional issue to the High Court under s 56A of the SCA.

Was avoiding s 56A of the SCA an abuse of process?

35 This was the last ground of the AG's arguments that Tan's claim should be struck out as an abuse of process. Section 56A(1) of the SCA ("s 56A(1)") states:

> Where in any proceedings in a subordinate court a question arises as to the interpretation or effect of any provision of the Constitution, the court hearing the proceedings may stay the proceedings on such terms as may be just to await the decision of the question on the reference to the High Court.

36 Before proceeding further, it should be noted that (as the AG pointed out), s 56A had been repealed since 2 January 2011 (*vide* s 430 of the Criminal Procedure Code 2010 (Act No 15 of 2010) ("the CPC 2010") read with para 105(c) of the Sixth Schedule of the same Act and para 2 of the Criminal Procedure Code (Commencement) Notification 2010 (S776/2010)). The Criminal Procedure Code 2010 has an equivalent provision in s 395 of the CPC 2010. Section 56A is nevertheless applicable in the present case. The CPC 2010 has a transitional provision which is s 429 CPC 2010. Section 429(2) of the CPC 2010 provides as follows:

> (2) This Code shall not affect —
>
> (*a*) any inquiry, trial or other proceeding commenced or pending under the repealed Code before the appointed day, and every such inquiry, trial or other proceeding may be continued and everything in relation thereto may be done in all respects after that day as if this Code had not been enacted; and
>
> (*b*) any further proceedings which may be taken under the repealed Code in respect of any inquiry, trial or other proceeding which has commenced or is pending before the appointed day, and such further proceedings may be taken and everything in relation thereto may be done in all respects after that day as if this Code had not been enacted.

The "appointed day" referred to under s 429(2)(*a*) of the CPC 2010 is 2 January 2011 (see s 429(25), CPC 2010 read with para 2 of the Criminal Procedure Code (Commencement) Notification 2010 (S776/2010)). DAC 41402/2010 was commenced before 2 January 2011. Accordingly, the relevant provision for the court to consider is s 56A.

37 Returning to the issue of whether avoidance of s 56A is an abuse of process, four questions should be considered. The first one is whether s 56A even applies in the first place. In *Ng Chye Huey*

and another v Public Prosecutor [2007] 2 SLR(R) 106 the court held:

> 17 ...These jurisdictional rules are essential to the orderly conduct of litigation in our courts. Without a sufficiently clear delineation of the respective spheres of dominion of each level of our hierarchy of our courts, chaos would inevitably result as parties seek, willy-nilly and solely for their own advantage, to bring their applications before different levels of court in an instrumental, haphazard and legally unprincipled fashion
>
> 57 ...Litigants should not be allowed the luxury of 'switching' their cases between the criminal and civil realms with complete impunity. To allow parties to successfully mount such arguments would encourage future resort of unorthodox and objectionable manoeuvres in the hope of circumventing onerous procedural requirements...

Tan had argued that s 56A did not apply because there were no existing criminal proceedings in place. That argument can be countered by the fact that criminal proceedings were ongoing at the time Tan applied to challenge the constitutionality of s 377A. Therefore, s 56A did apply.

38 Second, even if s 56A applied, was it exclusive? In other words, was it the only means by which a constitutional question may be raised in Subordinate Court proceedings? There is no clear evidence that Parliament's intention was for s 56A to be the exclusive mode for raising constitutional questions arising in the course of criminal proceedings in the Subordinate Courts. When debating the Subordinate Courts (Amendment) Bill, Singapore Parliamentary Debates, Official Report (13 April 1993) Vol 61 at column 132, Professor S Jayakumar had commented:

> Finally, Sir, clause 22 empowers a Subordinate Court to refer any constitutional issue arising in an action before it to the High Court for determination. This is only right because a Subordinate Court is not the appropriate forum to determine such an issue. Provision is made for the Attorney-General to be heard on any such issue.

Yong Pung How CJ noted in *Chan Hiang Leng Colin and Others v Public Prosecutor* [1994] 3 SLR(R) 209 at [8]:

> A crucial aspect of this case was the fact that the lower court was a Subordinate Court and this court was of course now sitting as an appellate court. The jurisdiction of the District Court was limited, as there was no provision in the Subordinate Courts Act (Cap 321) which was equivalent to para 1 of the First Schedule to the Supreme Court of Judicature Act (Cap 322) ("SCJA") which conferred upon the High Court the power of judicial review. As such, the District Court could not have determined the constitutional issues raised.

Professor Jayakumar and Yong CJ's words only go to show why it is necessary to make a constitutional reference – because the Subordinate Courts lack the jurisdiction to adjudicate upon such matters. There was no mention that the reference procedure is exclusive.

39 Then again, despite there being no clear evidence, it is arguable that a purposive reading of s 56A and its related case-law indicates an exclusive regime. Tay Yong Kwang J ruled in *Johari bin Kanadi and another v Public Prosecutor* [2008] 3 SLR(R) 422 at [9] that:

> …This discretion, properly exercised after judicial consideration of the merits of the application, will prevent unnecessary delay and possible abuse every time a party in the proceedings purports to raise an issue of constitutional interpretation and effect.

40 This purported role of the Subordinate Courts as the gatekeeper for constitutional issues arising in its proceedings would be rendered nugatory if the s 56A regime was not mandatory and exclusive.

41 The third question is even if s 56A is exclusive, was Tan's error in not making a s 56A application remediable? On the one hand, O 2 r 1(3) of the Rules provides that the court is not to set aside an originating process merely on the basis that it was not the proper one. On the other hand, an approach which is too relaxed may incentivise parties to "take their chances" and not make an application under s 56A first.

42 On the whole, it is more likely that s 56A was meant as an exclusive regime. However, it cannot be said that it is a "very clear case" that this is so. Given that a "very clear case" is a requirement for striking-out, the striking-out application cannot be granted on this ground.

Conclusion

43 Having reviewed the law and the applicable principles, this court is of the view that Tan undoubtedly had *locus standi* to raise a constitutional issue as he had satisfied the "substantial interest" test in *Colin Chan*. It was also not clear on the state of the law as of 24 September 2010 that Tan must apply under s 56A of the SCA to bring his case to court. What he failed to prove was that there was a real controversy in issue as the charge had been withdrawn. Consequently, the Appeal is dismissed on this ground with costs to the AG.

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