Bander Yahya A Alzahrani
v
Public Prosecutor

[2017] SGHC 287

High Court — Criminal Motion No 47 of 2017
Steven Chong JA
3 November 2017

Criminal Procedure and Sentencing — Criminal references — Stay of execution

9 November 2017

Steven Chong JA:

1 This was an application by Bander Yahya A Alzahrani ("the Applicant") for a stay of execution on his "conviction and sentence" pending the hearing and final disposal of a separate criminal motion in which he applied for leave under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to refer three questions to the Court of Appeal ("the Leave Application"). The Applicant was convicted of three charges under ss 354A(1) and 352 of the Penal Code (Cap 224, 2008 Rev Ed) and sentenced to a total of 26 months and one week's imprisonment and four strokes of the cane. His appeal against the conviction and sentence was dismissed. At the time of the filing of the present application, he had already begun serving his imprisonment sentence.

2 The present application raised an interesting issue of law as to whether the court had the power to order a stay of execution of sentence pending the determination of a leave application to bring a criminal reference, in circumstances where an accused person had already commenced serving his sentence. I will address this issue in the course of this judgment.

Background and procedural history

3 The Applicant was a Saudi Arabian diplomat who was in Singapore on holiday at the time of the offences. The victim was a 20-year-old Guest Relations Officer at the Shangri-La Rasa Sentosa Resort and Spa. The Applicant faced two charges under s 354A(1) of the Penal Code for outrage of modesty while wrongfully restraining the victim, and one charge under s 352 of the same for using criminal force on the victim. The offences took place while the victim was showing the Applicant around a suite at the hotel. The Applicant claimed trial to the charges against him. At the end of the trial, the District Judge ("the DJ") convicted him of the charges and sentenced him to a total of 26 months and one week's imprisonment and four strokes of the cane.

4 The Applicant appealed against both his conviction and sentence. This led to Magistrate's Appeal No 9033 of 2017, which came before me on 21 July 2017. I affirmed the conviction and sentence imposed by the DJ. Subsequently, the Applicant, through his counsel, made three applications to defer the commencement of his sentence:

> (a) At the end of the hearing of the appeal on 21 July 2017, the Applicant's counsel orally applied for the sentence to be deferred so that the Applicant could attend to his personal affairs. I granted a one-week deferment of sentence and ordered that he commence his sentence on 28 July 2017.

(b) On 27 July 2017, one day before the Applicant was due to commence his sentence, his counsel wrote in to court requesting for a further deferment of sentence until 11 August 2017 so that the Applicant could see his family and settle some personal affairs. I granted this second application and ordered that he start his sentence on 11 August 2017.

(c) On 10 August 2017, again one day before the Applicant was supposed to begin his sentence, his counsel submitted a further request for a third deferment of sentence on the basis that he would be filing a criminal motion for leave to refer questions of law to the Court of Appeal. His counsel also requested for the Notes of Evidence of the hearing of the appeal on an expedited basis. I rejected this third application for deferment of sentence and ordered that he begin serving his sentence on 11 August 2017. The Applicant duly began serving his sentence on that day.

5 On 18 August 2017, the Applicant filed the Leave Application seeking leave to refer the following three questions to the Court of Appeal:

> **Question 1**
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> How does the Court deal with the question of law of public interest which arises when the solicitor having conduct of the hearing in a criminal case puts to a witness his instructions and later informs the Court that he had erred as those were not his instructions as well as informing the Court that he had erred in his instructions in what he told the Court in a previous Court appearance for application to leave jurisdiction?
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> **Question 2**
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> Is there a need for expert evidence to assist the Court in determining the state of mind of the Complainant, a point of law of public interest, in an outraging molesting case where the Complainant asserts that she was confused, blank and did not know what she was doing and was on "auto-pilot" mode as an

> explanation of her seemingly normal behaviour after the alleged offences were committed?
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> **Question 3**
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> Could the Judge as a matter of law of public interest accept the evidence of the Complainant on her state of mind without expert evidence asserting that she was confused, blank and did not know what she was doing and was on "auto-pilot" mode?

6 The first question related to two incidents which occurred during the trial below. In the first incident, the Applicant's counsel had initially put to the victim that the Applicant had given the victim a "friendly hug", but later informed the DJ that there was no such hug and that he had misconstrued the Applicant's instructions. The second incident arose during a pre-trial application for the Applicant to leave jurisdiction. His counsel had informed the court that he had to accompany his wife and children to China when they had in fact already left Singapore by the time of the application. His counsel tried to take responsibility by stating that he was not aware of the change in circumstances. However, the DJ rejected his counsel's attempt to take responsibility for both incidents. The second and third questions related to the victim's evidence that she was "confused", "in a blank" and went on an "auto-pilot" mode after the incident. The DJ accepted her evidence without calling for any psychiatric evidence. She found that the victim was forthright and gave a coherent, compelling and credible account of the Applicant's acts.

7 The Leave Application has been fixed before the Court of Appeal on a date between 5 February 2018 and 13 February 2018.

The parties' arguments

8 In the present criminal motion, the Applicant sought a stay on his "conviction and sentence" pending the hearing and final disposal of the Leave Application. As the Applicant had been temporarily certified to be unfit for

caning, this application was essentially for a stay of his imprisonment sentence. In the supporting affidavit filed by the Applicant's new counsel, the main ground for the application was the concern that the Applicant might have to unnecessarily serve a substantial part of his imprisonment sentence in the event the Leave Application ultimately resulted in the conviction and sentence being set aside. In his submissions, he relied on s 383(1) read with s 401(2) of the CPC as well as *Rajendar Prasad Rai and another v Public Prosecutor and another matter* [2017] SGHC 187 ("*Rajendar*") to argue that the scope of the court's power to stay execution pending *appeal* under s 383(1) extended to *criminal reference* proceedings as well.

9 The Prosecution opposed the criminal motion. It contended that the court *did not have the jurisdiction* to stay the Applicant's sentence in the first place. In this regard, it asserted that s 383 of the CPC was inapplicable because it dealt with the stay of execution on a sentence pending *appeal*. The Prosecution also submitted that s 401(2) read with s 383 of the CPC was only applicable when the High Court invokes its revisionary powers to correct decisions of the State Courts, which was not the case here. As for the holding in *Rajendar*, it was confined to orders of the court which had *not yet been executed*. Instead, the Prosecution contended that the relevant provision was s 318 of the CPC, which empowers the court to direct a sentence of imprisonment to take effect on a date other than that on which it was passed. However, the Prosecution argued that s 318 was also only applicable if the accused person had not commenced serving his sentence. In the present case, the court had already exercised its power under s 318 on 21 July 2017 and 27 July 2017 when it granted the two deferments on the commencement of sentence at the Applicant's request. In any event, the Prosecution submitted that the Applicant had no reasonable prospect of succeeding in his criminal reference. Among other things, the Prosecution

claimed that the Leave Application was an "obvious backdoor appeal disguised as a criminal reference" and was an "unmeritorious" application even on a cursory examination of the questions raised.

My Decision

10 In light of the parties' arguments, there were two main issues that arose for determination: first, whether the court had the power to order a stay of proceedings pending a leave application to bring a criminal reference, in respect of a conviction for which an applicant had already commenced serving sentence; and second, if so, whether the power should be exercised in the present case.

Did the court have the power to order a stay of execution pending a leave application to bring a criminal reference, if an applicant had already started serving his sentence?

11 While the Applicant referred to a plethora of statutory provisions that purportedly grant the court the power to stay execution pending the determination of the Leave Application, in my view, the only relevant provision was s 383(1) of the CPC, which provides:

> **Stay of execution pending appeal**
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> **383.**—(1) An appeal shall not operate as a stay of execution, but the trial court and the appellate court may stay execution on any judgment, sentence or order pending appeal, on any terms as to security for the payment of money or the performance or non-performance of an act or the suffering of a punishment imposed by the judgment, sentence or order as to the court seem reasonable.

12 Section 383(1) of the CPC makes clear that the appellate court may order a stay of execution of sentence pending appeal. In this regard, the Applicant's reliance on s 401(2) of the CPC was superfluous: s 401(2) extends to the High

Court exercising its *revisionary* jurisdiction the power under s 383 of the CPC. But in the present case, the High Court was not exercising its revisionary but its *appellate* jurisdiction; as such, s 383(1) directly applied without the need to invoke s 401(2).

13 The next issue was whether s 383(1) extended to an application for a stay of execution pending a *criminal reference*, rather than an *appeal*. The answer was clearly in the affirmative in light of the decision of Sundaresh Menon CJ in *Rajendar*, in which he held (at [14]):

> …although s 383 on its terms applies only in the context of a pending *appeal* as opposed to a pending *criminal reference*, in my judgment **it is just that criminal reference proceedings fall within the ambit of the provision as well, since such proceedings can also result in the order of the court being revised.** To put it in another way, **it is within the power of the court to stay the orders that it has made pending a criminal reference pursuant to s 383.** It would be unjust if there were no mechanism for such orders to be stayed pending the disposal of the reference proceedings.
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> [emphasis in original in italics; emphasis added in bold]

14 I noted that in the present case, the Applicant was only seeking a stay of execution of his sentence pending the final determination of his *Leave Application*, rather than the conclusion of his *criminal reference*. In my assessment, given that the court had the power to stay execution of sentence pending the determination of a criminal reference, the court must *a fortori* have the power to do the same pending the conclusion of the Leave Application as well. For practical purposes, in the event that the Applicant's Leave Application is *allowed*, he may have to return to court to make a *further* application for a stay of execution pending the final determination of his criminal reference, unless the Court of Appeal orders his release on bail under s 397(4) of the CPC: see [22] below.

15 The Prosecution argued that *Rajendar* did not apply to the present case because the Applicant had already commenced serving his imprisonment sentence on 11 August 2017 (see [4(c)] above). This could be distinguished from the facts of *Rajendar* as the order of court in that case had not yet been executed. By contrast, "[b]oth logically and as a matter of law, it [was] no longer possible to stay the execution of the sentence of imprisonment [in the present case]". To put it another way, the Prosecution's argument, in essence, was that the power of the court to order a stay of execution of sentence *ceased* once the accused has commenced serving his sentence.

16 In my judgment, there was no principled basis for the ostensible difference in the court's power based on whether the order of court had been executed at the time of an application for stay of execution. This was so for a number of reasons. First, such a distinction was neither evident on the wording of s 383(1) of the CPC, nor in the holdings of *Rajendar* itself.

17 Second, to impose this precondition on the court's power to order a stay of execution would unduly prejudice an accused person who had started serving his sentence before filing an appeal or a criminal reference. This was especially so given that it is not uncommon for a sentence to be ordered to commence immediately upon the court's decision, or after a very short deferment. However, the court may only issue the full grounds of decision at a later date. Even if full grounds are not issued, the administrative process of extracting the Notes of Evidence of a hearing would take some time. The short time frame within which an accused person must begin serving his sentence should be contrasted to the longer time it usually takes for the full records or decision to be made available to the accused person. Yet, it is generally only upon a perusal of these documents that the accused person and/or his counsel can make a considered decision as to whether to file an appeal or to apply for leave to file a

criminal reference. In a not insignificant proportion of cases, by the time such a decision is made, the accused person would have begun serving his sentence. It would be manifestly unjust if, by virtue of the decision of the accused to commence his sentence alone, the court ceased to have the power to order a stay of execution. If that were the case, the accused would have to continue serving his sentence while awaiting his appeal or criminal reference, which may not be heard until many months later; in the meantime, he would have no recourse to apply for a stay of execution of his sentence.

18 Finally, to artificially restrict the court's power to cases in which the order of court had not been executed was also inconsistent with the *purpose* of a stay of execution. In *Public Prosecutor v Saiful Rizam bin Assim and other appeals* [2014] 2 SLR 495 at [44], Chao Hick Tin JA considered it critical for courts to avoid the "unfortunate situation" in which an offender would have already served his imprisonment term (or a good part of it) before an appeal against sentence was heard. Menon CJ opined in *Public Prosecutor v Adith s/o Sarvotham* [2014] 3 SLR 649 at [29] that the key concern was the interest of the accused person in retaining his freedom until his appeal against conviction or sentence had been resolved. On the reasoning of *Rajendar* at [14], these observations would similarly apply to a stay of execution pending a criminal reference, which might also result in the order of the court being revised. The Prosecution's position was that once a sentence had started, it was no longer *possible* to order a stay of execution of it. I failed to see why this would be the case. The objective of an application for a stay of execution of sentence is to suspend the order of court *before it is completed*; it is not necessarily only to prevent the order from taking effect before it begins. To use the present case as an illustration, the Applicant has only served about three months of his imprisonment term of 26 months and one week. There is still a substantial

period of incarceration left which may be the subject of a stay application. In fact, if the accused had already commenced serving his sentence, the concerns outlined earlier in this paragraph would apply with greater force, because it becomes even more imperative that he should not be made to continue serving any more of his sentence before a further determination which may result in that sentence being revised.

19 When I queried the Prosecution during the hearing on why the court should cease to have the power to order a stay of execution once the accused has begun serving his sentence, the Prosecution pointed out that under s 397(4) of the CPC, it was the *Court of Appeal* that had the power to order a stay of execution during the Leave Application. Section 397(4) of the CPC states:

> **Reference to Court of Appeal of criminal matter determined by High Court in exercise of its appellate or revisionary jurisdiction**
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> **397.** —(4) In granting leave to refer any question of law of public interest under subsection (1), or where the Public Prosecutor refers any question of law of public interest under subsection (2), the Court of Appeal may reframe the question or questions to reflect the relevant issue of law of public interest, and *may make such orders as the Court of Appeal may see fit for the* arrest, custody or *release on bail of any party in the case.*
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> [emphasis added]

According to the Prosecution, the proper procedure was for the accused to seek a stay of execution (*ie*, a release on bail) before the *Court of Appeal* at the hearing of the leave application to bring a criminal reference. If he wished to expedite the process in which a stay of execution might be granted, he should write in to court to request that the hearing of the leave application be brought forward. If that avenue had not been exhausted, an application for stay of proceedings should not be brought before the *High Court*.

20 I was unable to accept this argument. Fundamentally, it still did not provide a principled explanation as to why the court's power *ceased* upon an applicant's decision to commence serving his sentence. The Prosecution's argument, taken to its logical conclusion, meant that by virtue of s 397(4), the High Court would not *at any point* have the power to order a stay of execution; instead, an accused person could only make such an application before the Court of Appeal during the leave application itself. But this would be inconsistent with the Prosecution's own position that the High Court *did* have the jurisdiction to stay proceedings *before* an accused commences serving his sentence.

21 Second, the fact that the Court of Appeal might have the power to order a stay of execution during a leave application (by releasing the applicant on bail) did not invariably oust the same power of the High Court which was evident from the language of s 383(1) itself (see [11] above). The concurrent powers of the High Court and the Court of Appeal in relation to criminal procedure is not uncommon; it is in fact evident in other parts of the CPC. For instance, both the High Court and the Court of Appeal can grant bail to the accused (see for example, ss 97, 298(11) and 397(4) of the CPC). Further, under s 356(1) of the CPC, both the High Court and the Court of Appeal may, in the exercise of its powers under Part XX of the CPC (in relation to appeals, points reserved, revisions and criminal motions), order costs to be paid by or to the parties it thinks fit.

22 In my view, the concurrent powers of the High Court and the Court of Appeal to order a stay of execution of sentence are envisaged to be utilised in different circumstances. When a leave application is pending, an accused person can apply to the High Court for a stay of execution under s 383(1) of the CPC in the meantime. To rely on the administrative process of requesting for his leave application to be brought forward is uncertain and the prospect of success

would depend largely on scheduling considerations which are beyond the accused's control. Subsequently, at the hearing of the leave application, the Court of Appeal can also order that the accused be released on bail under s 397(4) of the CPC, for example, if it decides to grant leave for the accused to bring a criminal reference, and is of the view that the sentence should be stayed until the conclusion of the criminal reference.

23 For these reasons, I was of the view that the court *did* have the power under s 383(1) of the CPC to order a stay of execution pending a leave application to bring a criminal reference. This power subsisted even if the accused person, such as the Applicant, had already commenced serving his sentence.

If the court has the power to order a stay of execution, should the court make such an order in the present case?

24 A court's decision on whether to exercise its power to order a stay of execution pending a criminal reference must turn on the facts and circumstances of each case. In *Ong Beng Leong v Public Prosecutor* [2005] 2 SLR(R) 247 ("*Ong Beng Leong*"), the accused filed a criminal motion for a stay of execution of his imprisonment term pending the extraction of the Notes of Evidence and the grounds of decision in order to "consider" making an application to file a criminal reference. Yong Pung How CJ held (at [3]):

> … before I could grant the applicant a further stay on his sentence, he had to make a *good arguable case that there were real questions of law of public interest* that warranted the Court of Appeal's intervention. I could not simply accept that he had a substantive case [for the criminal reference] and grant him a stay as a matter of course. *This would be a recipe for disaster, as every unsuccessful appellant would just need to make a similar application – however unmeritorious – to delay the commencement of his sentence.*
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> [emphasis added]

25 In my judgment, the assessment of whether there is a "good arguable case" that there are real questions of law of public interest should be done on a *prima facie* level. Otherwise, the court hearing the stay application would risk impermissibly usurping the function of the Court of Appeal, which is tasked to independently determine the Leave Application. If there is no "good arguable case" on a *prima facie* level, the criminal reference is less likely to succeed. The concern that there may be an "unfortunate situation" in which the accused has to unnecessarily serve a substantial part of his sentence may prove to be unfounded where there is no reasonable prospect of his sentence being revised.

26 A question of law must be of "sufficient generality embedded within a proposition" and also "[contain] normative force": see *Public Prosecutor v Teo Chu Ha* [2014] 4 SLR 600 at [31]. On any cursory examination, none of the questions that the Applicant sought to refer to the Court of Appeal could pass muster. Question 1 arose out of the precise factual matrix in the present case; it was not a question of law, let alone a question of law *of public interest*.

27 Questions 2 and 3 both related to whether expert evidence was required to assist the court in determining the state of mind of the victim. In the Applicant's Reply to the Prosecution's Submissions, he argued that the victim's explanation that she was functioning on "auto-pilot" mode after the offences amounted to a "mental state of automatism", and the court required the guidance of an expert to assess this issue. This contention was misconceived. The DJ had not made an assessment of the psychiatric condition of the victim. If she had, she would have impermissibly strayed into the realm of expert evidence. But in the present case, she had merely concluded that the victim's ostensibly normal behaviour after the alleged trauma of the offences did not affect her credibility or her recollection of the events. This finding was well within the province of the DJ's role. Furthermore, unlike the cases referred to by the Applicant's

counsel (such as *Bratty v Attorney-General for Northern Ireland* [1963] AC 386), this was not a case where the Applicant himself was alleging automatism *in his defence* (for example, he was not arguing that his acts were involuntary). Instead, it was the *victim* who testified that she was operating in an "auto-pilot" mode. This was not a term of art; it simply referred to the victim's ability to function normally notwithstanding the trauma she went through. The Applicant's counsel had at the trial below sought to discredit the victim's credibility by asserting that her ostensibly normal behaviour meant that the allegations against the Applicant were contrived and fabricated afterthoughts on her part. The DJ did not accept this argument and preferred the victim's evidence. This conclusion was a finding of fact and evidence and not a question of law.

28 In summary, the determination of each of the three questions ultimately depended on the facts of each case as well as the court's assessment of the evidence and the credibility of the witnesses. Put simply, each of the questions was necessarily a fact specific inquiry and did not give rise to any question of law. It was clear to me that on a cursory examination of the three questions raised, there was no good arguable case that there were real questions of law of public interest to be referred to the Court of Appeal, and consequently, there was little risk of irreparable prejudice to the Applicant if the stay of execution were not granted. I reiterate that I had only made this determination on a *prima facie* level. As I said to the Applicant's counsel during the hearing, he is at liberty to pursue the Leave Application before the Court of Appeal which will be making a separate assessment of the merits of the Leave Application.

29 Finally, I observed that the procedural history of this case suggested that the Applicant had been trying to delay his sentence for as long as he possibly could. Each of the three applications for a deferment of the start of his sentence

was made *the day before* he was due to begin serving his sentence. The present application to stay the execution of his sentence pending the Leave Application was his latest attempt to defer the serving of his sentence. This was the precise danger that Yong CJ warned against in *Ong Beng Leong*.

30 For these reasons, I dismissed the application.

Steven Chong
Judge of Appeal

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