Gunalan s/o Govindarajoo v Public Prosecutor
[2000] SGHC 143

Case Number : Cr Rev 13/2000

Decision Date : 19 July 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : S Gogula Kannan (SK Kumar & Associates) for the petitioner; Jennifer Marie and Gilbert Koh (Deputy Public Prosecutor) for the respondent

Parties : Gunalan s/o Govindarajoo — Public Prosecutor

Criminal Procedure and Sentencing – Previous acquittals or convictions – Autrefois convict – Applicable principles – Whether previous breach proceedings concerned facts or offences substantially similar to subsequent criminal charges – Whether order made in breach proceedings amounted to conviction

Criminal Procedure and Sentencing – Sentencing – Abuse of process – Whether criminal proceedings following breach proceedings oppressive – Whether petitioner suffering prejudice from failure to stay breach proceedings

: This was a petition by a young person, as defined by the Children and Young Persons Act (Cap 38) (`CYPA`), for the court to exercise its power of revision to quash the finding of guilt or alter the order given in the court below on the ground of ***autrefois convict*** or abuse of process.

The facts

The petitioner was 15 years old at the time of the petition. He committed his first set of offences at age 13, and was found guilty of two counts of theft of motor cycle under s 379A of the Penal Code (Cap 224) and one count of fraudulent possession of helmet under s 35(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184) on 26 May 1998. Three further counts of theft of motor cycle were taken into consideration. For these offences, he was ordered to reside in an approved school, the Salvation Army Gracehaven (`Gracehaven`) for 24 months, commencing on 26 May 1998 (`the first order`).

The approved school regime provides a structured and disciplined environment for rehabilitation. Juveniles who are sent to an approved school generally have committed serious offences and exhibit a need for an institutional environment, whether because of problems at home, association with undesirable peers or active membership in secret societies.

There are presently five approved schools, which differ in the strictness of their regime and in the tightness of their security. At the more liberal end of the spectrum are two approved schools run by voluntary welfare organisations: Muhammadiyah Welfare Home and Gracehaven. Those who are sent to Gracehaven tend to be those who need institutional care but who do not have serious delinquent traits. Residents of Gracehaven are allowed to attend school and to work outside the home. After the first few months, home leave on the weekends is granted to those who show positive behaviour.

Further along the spectrum are two approved schools run by the Ministry of Community Development and Sports. They are the Toa Payoh Girls` Home and the Singapore Boys` Home (`SBH`). Juveniles who are sent to these homes tend to exhibit a greater degree of delinquency compared to those who are sent to Muhammadiyah Welfare Home or Gracehaven. The strictest regime and tightest security is found at the Reformative Training Center (`RTC`), run by the Prisons Department of the Ministry of

Home Affairs.

On 25 November 1999, the Superintendent of Gracehaven (`the superintendent`) instituted breach proceedings under s 44(2)(a) of the CYPA (`the breach proceedings`) against the petitioner. The provision states:

> *Where a Juvenile Court is satisfied, on the representations of the manager of a place of detention, an approved school or an approved home, that a person ordered to be detained in the place of detention, approved school or approved home is of so unruly a character that he cannot be so detained, the Court may -*
>
> *(a) order the person to be transferred to and detained in an approved school or in another approved school, as the case may be, which the Court considers more suitable for him and to be detained there for the whole or any part of the unexpired period of detention;*

The juvenile court called for a progress report. In the report, presented on 14 December 1999, the superintendent stated that while the petitioner behaved reasonably well under the supervision of the home, he had serious problems when outside home supervision. The latter occurred more often than desired in view of his frequent abscondence from the home, which in all totalled 71 days. While at large, the petitioner would associate freely with undesirable peers, staying overnight with them, smoking and loitering in the streets aimlessly, as well as engaging in sex with a female resident of the home. The superintendent was of the view that the petitioner would benefit from staying in a more regimented environment with closer supervision. The juvenile court accepted the recommendation and transferred the petitioner to SBH for the unexpired period of the first order.

On 27 January 2000, the petitioner was charged with three counts of carnal connection with a girl under 16 years (the female resident of the home), an offence under s 140(1)(i) of the Women`s Charter (Cap 353). Two further counts of s 140(1)(i) of the Women`s Charter were taken into consideration.

Decision of the juvenile court

At the carnal connection proceedings, the petitioner asked to be allowed to stay in SBH. The juvenile court exercised its power under s 44(1)(g) of the CYPA and ordered the petitioner to be sent to SBH for 24 months (`the second order`).

The petition

Subsequently, a petition was made to this court, asking it to exercise its power of revision to quash the finding of guilt made in respect of the carnal connection charges or alternatively to alter the second order by reducing the period of residence at SBH. Two arguments were canvassed in support of the petition: ***autrefois convict*** and abuse of process.

Autrefois convict

The petitioner`s chief argument was that of autrefois convict. This common law principle is enshrined in art 11(2) of the Constitution, which states:

> *A person who has been convicted or acquitted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was convicted or acquitted.*

The House of Lords had the opportunity to consider this doctrine in an extensive manner in **Connelly v DPP** [1964] AC 1254[1964] 2 All ER 401. In a much cited passage in ***Connelly*** at [1964] AC 1254, 1305; [1964] 2 All ER 401, 412, Lord Morris set out nine propositions which in his view `both principle and authority establish`. Of direct relevance to this case are the following:

> *(1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;*
>
> *(2) ...*
>
> *(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted;*
>
> *(4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offences charged or as to an offence of which, on the indictment, the accused could have been found guilty ...*

As Lord Bridge observed in **Lee Wee Harry v Law Society of Singapore** SLR 41 at p 47, in ***Connelly*** , Lord Devlin had a different view from Lord Morris. He took a stricter view of ***autrefois convict*** and said that for the doctrine to apply it must be the same offence in both fact and law, and not merely where the offences were substantially the same. His Lordship`s difficulty was with the idea that an offence may be substantially the same as another in its legal characteristics, since in his view legal characteristics are precise things and are either the same or not. Lord Bridge did not find it necessary in ***Lee Wee Harry*** to find which view was correct, and neither was it necessary here. Even on Lord Morris` more liberal test of substantial similarity of offence in both fact and law, the petitioner`s argument of ***autrefois convict*** failed.

The ***autrefois convict*** argument presented before me by counsel for petitioner rested on three propositions, of which the first two were crucial to the petitioner:

(a) the five instances of carnal connection with a girl under 16 years were included as elements of misconduct in the breach proceedings brought under s 44(2)(a) of the CYPA by the superintendent of Gracehaven;

(b) when the juvenile court adjudicated upon the breach proceedings and made an order to transfer

the petitioner to SBH for the unexpired period of the first order, the petitioner was duly convicted of the offences relating to carnal connection;

(c) the finding of guilt made at the carnal connection proceedings on 27 January 2000 amounted to a second conviction on substantially the same facts, thereby violating art 11(2) of the Constitution.

Proposition (a) misunderstood the representations made by the superintendent of Gracehaven at the breach proceedings. The petitioner`s sexual relationship with a resident of Gracehaven was mentioned twice in the progress report. In her report, the Senior Social Worker at Gracehaven commented that the petitioner`s abscondence was motivated by the desire to be with a female resident and to spend time with her. It was in the context of explaining the intensity of this relationship that the petitioner`s sexual relationship with that female resident was mentioned. The focus of concern was the petitioner`s abscondence and not the sexual relationship.

Similarly, when the superintendent noted in her report that the petitioner was having sex with a resident, this was mentioned in the context of things that the petitioner engaged in while at large. The concern was again with the petitioner`s abscondence: on the violence exhibited in forcing his way out and the activities engaged in while away from the home. From the superintendent`s statements, it was clear that her primary concern while the petitioner was at large was not the sexual relationship but the undesirable peer influence.

Thus, while it was true that the petitioner`s sexual relationship with a resident was mentioned at the breach proceedings, it was not presented as an element of misconduct to satisfy the unruly character requirement of s 44(2)(a). Instead it was mentioned to highlight to the juvenile court the frustrations and motivations that were affecting the petitioner, which led to what was of the utmost concern to the home: his frequent abscondence and the bad peer influence he was under while at large.

The misunderstanding reflected in proposition (a) was in large part due to a misunderstanding of the purpose of the breach proceedings. The breach proceedings are not an adjudication on the legality of the juvenile`s actions while at the home. They are for the juvenile court to transfer the juvenile to another approved school if the court is satisfied that this would be more suitable for the juvenile. Hence, the requirement to be satisfied under s 44(2)(a) is not proof of an offence, but merely that the juvenile is of so ***unruly a character that he cannot be detained*** at the original approved school. In the petitioner`s case, amongst other things, the lack of a secured compound and close supervision made Gracehaven unsuitable for a juvenile who was prone to running away.

Consequently, proposition (b) was also incorrect. When the juvenile court ordered that the petitioner be transferred to SBH for the unexpired period of the first order, the court was not adjudicating on the carnal connection offences, but on the ***continued suitability*** of Gracehaven as an institution of rehabilitation for the petitioner in relation to an approved school order made in respect of ***prior*** property offences. Therefore, the order sending the petitioner to SBH for the unexpired period of the first order in no sense amounted to a conviction.

The weight of caselaw supports the dismissal of the petitioner`s plea of of autrefois convict. In **Lim Keng Chia v PP** [1998] 1 SLR 686 , a decision of this court, the petitioner for revision had argued that a detention order made by the Director of the Central Narcotics Bureau (`CNB`) under s 37(2) of the Misuse of Drugs Act (Cap 185) barred a subsequent charge for consumption of a controlled drug in respect of the same incident. It was held that the detention order was not a conviction that would bar the subsequent charge. It was noted at [para] 14:

... all that was required for a detention order to be made against the petitioner

> *under s 37(2) of the Misuse of Drugs Act was that the Director of the CNB be satisfied that it was `necessary` for the petitioner to `undergo treatment or rehabilitation or both at an approved institution`. To paraphrase Abdoolcader J [in **Yeap Hock Seng v Minister for Home Affairs, Malaysia & Ors** [1975] 2 MLJ 279], in the making of the detention order, there was no question of any specific offence being identified as having been committed by the petitioner and certainly no question of the petitioner being tried on any particular charge. In short, I could see no basis for saying that the detention order made against the petitioner on 30 January 1996 amounted to a criminal conviction. In my view, therefore, the conviction sustained by the petitioner on 19 September 1997 could not be said to constitute an instance of `double jeopardy.*

Similarly in this case, there was no question of any specific offence being identified as having been committed by the petitioner at the breach proceedings. Nor was there any question of the petitioner being tried on any particular charge.

In the context of disciplinary proceedings, it was argued before a court of three judges in **Law Society of Singapore v Edmund Nathan** [1998] 3 SLR 414 that a finding by an inquiry committee of improper conduct by the respondent barred show cause proceedings against him concerning the same incident. The court held that the plea of ***autrefois convict*** did not apply because the finding by the inquiry committee did not amount to a conviction of the respondent. The judgment of the court was delivered by Karthigesu JA, who said at [para] 24:

> *most important of all the proceedings before the inquiry committee was not a trial. The respondent was not called upon to answer a specific charge. He was only called upon to explain his conduct in relation to the complaint made against him.*

Similarly in this case, the petitioner was not called upon to answer a specific charge. What the breach proceedings did involve was representations made by the manager of the approved school regarding the continued suitability of detaining the petitioner at the home.

In summary, the claim of ***autrefois convict*** failed because the breach proceedings did not concern facts or offences that were even substantially similar to that of the carnal connection proceedings on 27 January 2000, and because the breach proceedings did not involve the trial of a specific charge but the determination of the continued suitability of the petitioner at the home based on representations made by the manager of the home. The order sending the petitioner to SBH for the unexpired period of the first order was consequently merely a transfer order and did not amount to a conviction. The second order imposed on the petitioner therefore could not be said to be a second conviction on substantially the same facts or offence.

Abuse of process

The other argument raised by the petitioner was abuse of process. This was Lord Devlin`s alternative approach to ***autrefois convict*** in ***Connelly*** . Under this approach, the court has a discretionary power to quash or stay an indictment which to try would be oppressive to the accused.

The petitioner`s abuse of process argument was essentially built on two unrelated planks:

(a) that there was procedural irregularity in that the breach proceedings should only have commenced after or concurrently with the carnal connection proceedings;

(b) that the failure to stay the breach proceedings till after the carnal connection proceedings or to have it heard concurrently prejudiced the petitioner in his defence at the carnal connection proceedings.

The petitioner argued that there was procedural irregularity in having the breach proceedings commence before the carnal connection proceedings because this court had said in **Ng Kwok Fai v PP** [1996] 1 SLR 568 that it is desirable that an offender be dealt with at the same time for both the breach of the probation order and the subsequent offence.

Such an application of ***Ng Kwok Fai*** was totally out of context. That case involved the Probation of Offenders Act (Cap 252). Under s 7 of that Act, if the requirements of the probation order are breached, the court has the power to deal with the probationer as if it had just convicted him of the offence for which the probation order was made. In ***Ng Kwok Fai*** , the probation order was breached as a result of the probationer`s committal of a second offence. The probationer was sentenced to undergo reformative training for that second offence. At the subsequent breach proceedings for the probation order given for the first offence, the district judge sentenced the probationer to 18 months` imprisonment and six strokes of the cane, the sentence to begin after the completion of the reformative training. At the appeal against sentence, this court noted that a lengthy prison term and caning after the reformative training would run counter to what reformative training aimed to do. It was in this context that this court said that in order to avoid similar difficulties arising, the probationer should ideally be dealt with for his breach of probation order and his subsequent offence at the same time.

First of all, it should be noted that the dicta in ***Ng Kwok Fai*** was an expression of a desired situation. It was not stated that it was procedurally improper for breach of probation proceedings to be conducted after the proceedings for the subsequent offence. On the contrary, it was noted that this might be unavoidable under the regime laid out by the Probation of Offenders Act, in situations where the order for probation was made by a court other than a magistrate`s court. It was then suggested that in such a situation, the court, in dealing with the offender for the subsequent offence, should have regard to the fact that the offender would later have to be dealt with for the offence for which he had been given probation, as the sentence passed for the subsequent offence could restrict the type of sentence passed by the court dealing later with the breach of probation.

Second, the rationale for dealing with the probationer`s breach and the subsequent offence at the same time is to allow the judge to be cognisant of the potential sentence for the initial offence for which probation was given as well as the potential sentence for the subsequent offence, thereby ensuring that the sentences that are passed for both offences are not contrary to each other.

Such rationale is not applicable to s 44(2)(a) breach proceedings. This is because the extent of judicial discretion in breach proceedings under s 44(2)(a) of the CYPA is vastly different from the extent of judicial discretion in breach proceedings under s 7 of the Probation of Offenders Act. In the latter case, the judge is empowered to sentence the probationer afresh and hence draw on a variety of sentencing options. In the former case, the judge`s power is narrowly limited to transferring the juvenile to another approved school. He cannot extend the period of detention, nor can he make a different order. Consequently, even if breach proceedings under s 44(2)(a) of the CYPA are stayed until after the proceedings for the subsequent offence so that the judge is aware of the sentence for the second offence, he would still not be able to make much use of that knowledge since all he can do in respect of s 44(2)(a) breach proceedings is to decide whether to transfer the juvenile to

another approved school. There is therefore little utility from mandating that s 44(2)(a) breach proceedings be conducted concurrently with or after the subsequent offence proceedings, and there is nothing that makes it procedurally improper if the juvenile court does not do so.

The second plank of the petitioner`s abuse of process argument was that the failure to stay the breach proceedings till after the carnal connection proceedings or to have it heard concurrently prejudiced the petitioner in his defence at the carnal connection proceedings. This was because his admission to the breach at the breach proceedings ruled out the availability of the defence under s 140(5) of the Women`s Charter that there was reasonable cause to believe that the girl was above the age of 16 years.

I had several difficulties with this argument. One difficulty was the fact that, as mentioned, the breach proceedings did not focus on the petitioner`s carnal connection offences, but on his frequent absconding and his activities while at large. Therefore, while it was clear that when the petitioner admitted to the breach he was admitting to absconding for a total of 71 days, it was far more difficult to conclude from the court record that he was admitting to the sexual relationships. Moreover, all that was mentioned in the progress report was that the petitioner had sexual relationships with a female resident of the home. There was no indication of the female resident`s age, nor whether the petitioner knew what her age was. Therefore, even if there was an admission to sexual relationships, such an admission was confined to the fact of having sexual relationships alone and did not preclude a defence of reasonable belief that the girl was under 16 years of age. Finally, it was difficult to see how the alleged prejudice could take the form of ruling out a defence of reasonable cause of belief that the girl was over 16 years. Such a defence would have been extremely unrealistic for the petitioner in view of the fact that they were both residents in a home for juveniles and the fact that they knew each other very well.

In order for the court to quash the petitioner`s finding of guilt on the ground of abuse of process, the petitioner had to show that the bringing of the carnal connection proceedings against him was oppressive. This the petitioner tried to do unsuccessfully, by asserting procedural irregularity on the basis of a decision that was taken wholly out of context, and by asserting the suffering of prejudice which was not demonstrated.

Conclusion

In view of these reasons, the petition was dismissed. I should add that when the legal arguments are said and done, what lies at the heart of this matter is the boy and his future. At the breach proceedings, he expressed a desire to change. At the carnal connection proceedings, he expressed a desire to carry on staying in SBH. It is hoped that the engaging of a lawyer to make this petition has not created any sense of self-righteousness, false pride or increased rebelliousness. It would be sad if in the process of seeking the help of the law, that process diminished in any way the hope and desire to change.

Outcome:

Petition dismissed.