Ng Kim Han and Others v Public Prosecutor
[2001] SGHC 42

Case Number : Cr Rev 23/2000

Decision Date : 08 March 2001

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Jimmy Yim SC and Suresh Divyanathan (Drew & Napier) for the petitioners; Hay Hung Chun (Deputy Public Prosecutor) for the respondent

Parties : Ng Kim Han — Public Prosecutor

Criminal Procedure and Sentencing – Revision of proceedings – Serious injustice warranting exercise of powers of revision – Conviction despite absence of essential element of offence – Effect of petitioners' plea of guilty – Effect of petitioners' failure to engage legal representation – Effect of three-month delay in filing petition

: ***The facts***

On 13 November 1999, at about 8.20pm, officers from the Gambling Suppression Branch of the Criminal Investigation Department conducted a raid on a factory at 31 Sungei Kadut Street 4 (`the Premises`). Inside, they found eight persons gathering around a table, engaged in a game of ***pai kow*** . The raiding party arrested all eight persons in the office.

One of the eight persons arrested was one Chua Seong Soi (`Chua`), who was the tenant of the Premises. He was charged, under s 4(1)(b) of the Common Gaming Houses Act (Cap 49) (`the Act`), with having permitted the Premises to be used as a common gaming house. The seven other persons who were arrested on the Premises were jointly charged, under s 7 of the Act, with gaming in a common gaming house. The charge against the seven persons read as follows:

> *You ...*
>
> *are charged that you on the 13th of November 1999, at about 8.20pm, at No: 31 Sungei Kadut Street 4, office at the ground floor, Singapore, which is used as a common gaming house, did play a game of chance, to wit, "Pai Kow" by using domino tiles and cash as stakes, and you have thereby committed an offence punishable under Section 7 of the Common Gaming Houses Act, Cap 49.*

These seven persons were the petitioners in the present proceedings.

On 15 November 1999, the petitioners pleaded guilty to the charge. Each of them was accordingly convicted and sentenced to a fine of $1,000, in default two weeks` imprisonment. Chua, on the other hand, claimed trial.

Chua was found guilty by the magistrate`s court on 15 May 2000, and sentenced to two months` imprisonment and a $20,000 fine. He appealed to the High Court. The appeal was allowed by me on 19 September 2000. In reversing Chua`s conviction, I found that the Premises were not used ***primarily*** for gaming, and so did not fall within the definition of the term `common gaming house` as defined by the Act (see **Chua Seong Soi v PP** [2000] 4 SLR 313 at pp 325-326):

> *39[emsp]The law is clear. In order for premises to be `habitually` used for*

> *gaming within the meaning of the second limb of the definition of the term `common gaming house`, they must be used **primarily** for gaming ... In the present case, it seemed that the trial judge below did not fully appreciate the purport and extent of the limitation. The evidence showed that the premises were primarily used for the businesses of two live and substantial companies. The gaming that occurred on the premises, if it could even be deemed to have been frequent at all, was only incidental (see **R v Li Kim Poat & Anor** [1933] MLJ 164 [1933] SSLR 129) to the business conducted on the premises. The premises could not have been said to be used primarily for gaming. [Emphasis is added.]*

As a result of Chua`s acquittal, the petitioners filed a petition for criminal revision on 23 December 2000. By it, they sought a reversal of their convictions, a removal of the criminal record against each of them and the return of the fines that they had paid.

The appeal

(a)[emsp]When criminal revision is generally allowed

The principles to be borne in mind in the exercise of this power have been reiterated several times by the authorities. Oft quoted is the following passage from the case of **Ang Poh Chuan v PP** [1996] 1 SLR 326 at p 330:

> *Thus various phrases may be used to identify the circumstances which would attract the exercise of the revisionary jurisdiction, but they all share the common denominator that there must be some serious injustice. Of course there cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. But generally it must be shown that there is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below.*

An example of when the power of revision was exercised is the case of **Abdul Aziz bin Ahtam v PP** [1997] 2 SLR 96 . In that case, the petitioner was tried in the District Court, together with one Goh and one Teo, on a charge of having cannabis in his possession for the purpose of trafficking, in furtherance of the common intention of all three of them. It was the defence of both Goh and the petitioner that Teo was the culpable party, and that they had no connection with Teo`s activities. Both Goh and the petitioner were convicted after a trial. Goh proceeded with an appeal to the High Court, but the petitioner withdrew his own appeal. Subsequently, Goh`s appeal was allowed, as it was found that the prosecution`s evidence did not support the charge against him. The petitioner in that case thereupon filed a petition for criminal revision, wherein he relied upon the same grounds on which Goh`s appeal had been allowed. In dealing with the petition, I held (at 102D):

> *For present purposes, it would suffice to note that the petitioner would have reasonably and justifiably expected that the legal reasoning adopted in Goh`s case would also apply to him as regards the question whether he was in possession of drugs.*

Pausing here for a moment and reverting to the facts of the instant petition, I would like to re-iterate that the same approach applies here. The legal reasoning used in ***Chua*** `s case (supra) for ascertaining whether the Premises were a common gaming house must necessarily apply equally in the case of the petitioners.

I further held in ***Aziz bin Ahtam*** (supra at 102E):

> *I concurred with the DPP that Goh`s acquittal did not necessarily mean that the petitioner would also have to be acquitted. The question was whether there would be serious injustice if his conviction on the charge of drug trafficking were to remain, in the light of the outcome of Goh`s appeal.*

> *The petition in* ***Aziz bin Ahtam*** *was allowed, on the ground that the evidence adduced did not establish that the petitioner had the requisite mens rea for the offence.*

While there is no clear-cut test of what constitutes `serious injustice`, I believe that it cannot really be disputed, as seen from ***Aziz bin Ahtam*** (supra), that such injustice should be held to exist when a person has been convicted despite the obvious absence of an essential constituent of the offence concerned. Thus, petitions for criminal revision have been allowed in cases where the statement of facts do not disclose all the necessary elements of the offence, but where the petitioner pleads guilty anyway. See, for example, **Chen Hock Heng Textile Printing Pte Ltd v PP** [1996] 1 SLR 745 . I now turn to the facts of the present appeal.

(b)[emsp]Was a crucial element of the offence absent here?

It is well established that gaming per se is not an offence. As noted by Stevens J in **R v Fong Chong Cheng** [1930] SSLR 139 at p 145:

> *It has ... to be observed that in this Colony it is not illegal to play games of chance for money.*

Gaming, if it is to be an offence at all, must take place within a common gaming house. After my decision in ***Chua Seong Soi v PP*** (supra), I believe that there can really be no doubt that the Premises where the petitioners were arrested did not constitute a common gaming house. The petitioners were therefore convicted despite the absence of a fundamental element of the offence. At this point, it is worth setting out the statement of facts tendered at the hearing of the petitioners` case:

> *3 On 13.11.99 at about 8.20 p.m., acting on information received, Head GSB DSP Heng Hiang Hua and informant led a party of GSB officers from Gambling Suppression Branch raided [sic] No. 31 Sungei Kadut Street 4 for illegal gaming activities under the provisions of Common Gaming Houses Act, Chapter 49. At the ground floor office found a group of people gather [sic] and gambling inside. Proceeded in the office and managed to detain 8 persons as the other fled from the scene. The following exhibits were found and seized from the table:*

(a) Cash S$440/-; (S`pore dollars four hundreds forty)

(b) some domino tiles;

(c) some dices [sic];

(d) a pair of chopsticks;

(e) a piece of plastic sheet;

(f) a pager; and

(g) a small note book with entries.

4 A further search was conducted in the office, the following were recovered and seized:

(h) some packs of English playing cards;

(i) a box of domino tiles; and

(j) some colour chips.

Subsequently, all the accused persons were placed under arrest and brought to CID together with the seized exhibits for investigation.

As can be seen, the only part of the statement which was incriminating was that which stated that the Premises were used for `illegal gaming activities`. However, no further elaboration was given as to why the activities were illegal. Nothing was said about the Premises being used ***primarily*** for gaming. As such, the statement of facts did not contain any reference to the existence of the most crucial element of the offence, ie factors to indicate that the Premises were a common gaming house. I was therefore satisfied that on the facts of this case, an injustice existed which warranted the exercise of the powers of revision of this court.

Before me, it was argued by Mr Hay Hung Chun for the prosecution that the petition should nevertheless be disallowed. Much emphasis was placed on the fact that the petitioners pleaded guilty on their own accord.

It need hardly be stated that the fact that the petitioners pleaded guilty on their own accord cannot be a bar to the exercise of revisionary power. Rather, the fact that a plea of guilty has been entered will mean that the accused loses his right to appeal against conviction: see s 244 of the Criminal Procedure Code (Cap 68). In such a situation, an application by way of criminal revision will be the only means by which the accused can have a wrongful conviction set aside.

It also has to be borne in mind that the determination of whether certain premises do or do not amount to a common gaming house can involve a fair amount of legal analysis. As such, an admission by an accused to the premises being a common gaming house may not necessarily be conclusive. The fact that an accused has admitted to the premises being a common gaming house does not absolve the court of its duty to ascertain whether the premises do actually fall within the legal definition of a

common gaming house or not. I repeat what I said in ***Chua Seong Soi*** (supra at [para]31):

> *With respect, the plea of guilt by the other arrested persons did not in any way show that the premises were in fact a common gaming house.*

Mr Hay further contended that the decision in ***Chua Seong Soi*** (supra), to the effect that the Premises were not a common gaming house, should be confined to the particular evidence led in that case. I found this argument difficult to accept. The petitioners and Chua were gambling on the same Premises. They were all engaged with each other in the same game, and they were arrested at the same time. To deem the Premises to be a common gaming house now when they were expressly deemed to be otherwise in ***Chua*** `s case would create an inconsistency that cannot be justified.

Mr Hay nevertheless contended that the petitioners fully understood the nature of their charge. He invited me to infer that when the petitioners pleaded guilty, they must have been aware of certain facts of the case which would have brought the Premises within the ambit of the definition of the term `common gaming house`. This, argued Mr Hay, would provide sufficient justification for confining the decision in ***Chua Seong Soi*** (supra) to the evidence advanced in that case. I think that this argument needs to be approached from a reasonable man`s point of view. The GSB officers who raided the Premises had done so despite there being absolutely no evidence of the Premises having been used primarily for gaming. Notwithstanding the absence of any such evidence, the officers proceeded to arrest everybody in sight. It was thus plainly obvious that the GSB officers, despite their experience with and specialisation in cases involving gaming offences, were themselves unable to draw the line for ascertaining when premises can or cannot constitute a common gaming house. Even the trial court which subsequently convicted Chua could not, despite having the benefit of counsel`s assistance, correctly determine whether the Premises were a common gaming house. In stark contrast, these petitioners were laymen. They were not represented when they pleaded guilty. Prior to their pleading guilty, they did not have the benefit of legal arguments being canvassed on their behalf as to whether the Premises were a common gaming house. At Chua`s trial, some of the petitioners (who were called as witnesses for both the defence and the prosecution) testified that they thought they were pleading guilty to a charge of `gathering to gamble`, when no such offence existed in law (see ***Chua Seong Soi v PP*** , supra at [para]28). Standing back and looking at the overall picture, I feel considerable doubt as to whether the petitioners even knew just what a common gaming house is. Bearing in mind the ignorance displayed by all the parties towards the concept of the common gaming house, I think that Mr Hay`s argument reads too much into the petitioners` plea of guilt.

Finally, in a last bid to resist the petition, Mr Hay pointed out that the petitioners could have claimed trial and engaged counsel to defend themselves. However, for reasons known only to themselves, they chose not to do so and pleaded guilty instead. Now it would certainly be prudent for an accused person to first engage a lawyer to defend himself before going for trial. If it was within his means to do so but he nevertheless chose not to do so, and the trial judge convicted him, it would not lie in his mouth to complain on appeal that he was unrepresented below. However, the situation is somewhat different when the conviction was, as in the present case, based on a fundamental error of law. The accused`s folly in failing to obtain legal representation cannot make right what is manifestly wrong. As I remarked in the case of **Virgie Rizza V Leong v PP** (Unreported) :

> *16[emsp]... In **Packir Malim v PP** [1997] 3 SLR 429 , it was held that pleas of guilt by unrepresented persons are not more easily vitiated than those by represented persons. **Rajeevan Edakalavanand** (supra) suggests that an unrepresented accused`s plea of guilt will not be vitiated by his ignorance of*

> *possible defences. This does not mean that criminal revision is impossible whenever an accused has pleaded guilty from ignorance of law. The essential test for revision is simply whether there has been some serious injustice (**Ang Poh Chuan v PP** [1996] 1 SLR 326). An accused who unnecessarily pleads guilty has added to his own problems, but there is no reason for a court to uphold a conviction if it can be clearly demonstrated to be wrong in law or fact.*

(c)[emsp]Delay

In ***Ang Poh Chuan v PP*** (supra), the petitioner sought criminal revision of a decision of a subordinate court judge to forfeit his vehicle. However, he had waited eight months after the decision before making his petition. In addressing the delay, I held (at p 335F):

> *While, in a case of injustice generally, delay would not be material, it may indicate in some circumstances that there is in fact no injustice caused. On the instant facts, this court was of the view that the delay indicated that even if, contrary to what was discussed above, there was injustice, the force of that was seriously attenuated by the delay, such that no exercise of the discretion ought to be made in favour of the petitioner.*

In the present case, the petitioners pleaded guilty on 15 November 1999. However, the petition for criminal revision was filed only on 23 December 2000. Mr Hay thus argued that there was an unreasonable delay of more than a year. Nonetheless, I think that sight should not be lost of the fact that my judgment, setting out the reasons as to why the Premises were not a common gaming house, was delivered only on 26 September 2000. As such, the effective delay here amounted to no more than three months. I was not satisfied that this time span attenuated the injustice of the case to any appreciable extent.

Conclusion

It is perhaps apt at this juncture to repeat the caution which I sounded in the case of ***Ang Poh Chuan v PP*** (supra at p 331F):

> *Additionally, in the view of this court, the jurisdiction [to exercise criminal revision] ought not be exercised where any grievance allegedly suffered by the applicant arises out of a change in the law. If it were otherwise, then, notwithstanding the expiry of the appeal period, it would be open to persons to challenge decisions by way of revision.*

The High Court`s power of revision should not be exercised in such a manner that it paves the way for a flood of re-litigation every time the criminal law gets changed. That, however, was not the situation in the present case. ***Chua Seong Soi v PP*** (supra) did not change any law. Rather, all it did was to apply a test which has been in existence ever since the 1930 decision of Stevens J in ***R v Fong Chong Cheng*** (supra). After applying that test in the ***Chua Seong Soi*** case, I found that the Premises where Chua and the petitioners were arrested never constituted a common gaming house.

As such, the only conclusion that could be drawn was that the petitioners were convicted despite the absence of a crucial element of the offence. I therefore allowed the petition.

Outcome:

Petition allowed.