Public Prosecutor v Sundaraju s/o Munusamy
[2002] SGHC 158

Case Number : MA 16/2002

Decision Date : 23 July 2002

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Lee Lit Cheng (Deputy Public Prosecutor) for the appellant; David Rasif (David Rasif & Partners) for the respondent

Parties : Public Prosecutor — Sundaraju s/o Munusamy

Criminal Law – Offences – Finding accused armed with dangerous instrument – Whether necessary to show evidence suggesting commission or imminent commission of offence – s 22(1)(a) Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Ed)

Criminal Procedure and Sentencing – Appeal – Acquittal – Defence making submission of no case to answer at close of prosecution's case – Magistrate acquitting accused without calling him to enter his defence – Applicable principles at close of prosecution's case in determining whether prima facie case made out – Whether necessary for prosecution to satisfy judge that accused guilty beyond reasonable doubt at this stage – Whether magistrate should have called for accused to enter his defence – s 189(1) Criminal Procedure Code (Cap 68)

Words and Phrases – 'Armed with' a dangerous or offensive offence – s 22(1)(a) Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Ed)

JUDGMENT

GROUNDS OF DECISION

This was an appeal by the prosecution against a decision of a magistrate in the subordinate courts, who acquitted the accused without calling for his defence. I allowed the appeal and ordered the case to be remitted back to the court below for the defence to be called. I now give my reasons for my decision.

2 The charge against the accused was as follows:

> You, Sundaraju s/o Munusamy, Male 33 years, NRIC S6810332J, are charged that you on the 19th day of August 2001 at or about 3.14 am, along Perak Road, Singapore, which is a public place, was found armed with a dangerous instrument, to wit, a 15 cm long screwdriver, without lawful purpose and you have thereby committed an offence, punishable under section 22(1)(a) of the Miscellaneous Offences (Public Order and Nuisance) Act, Chapter 184.

3 Sections 22(1), (2) and (3) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184) (the 'Act') read as follows:

> 22. —(1) Any person who is found —
>
> (a) armed with any dangerous or offensive instrument without lawful authority or a lawful purpose;

…

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years; and any instrument or article found in the possession of that person shall be forfeited.

(2) In any prosecution for an offence under subsection (1) (a), it shall be sufficient for the prosecution to allege and prove that the accused was found to be armed with any dangerous or offensive instrument and the onus shall then be upon the accused to show that he had lawful authority or a lawful purpose to be so armed.

(3) An instrument shall be presumed to be carried with lawful authority if it is carried —

(a) by any member of the Singapore Armed Forces, the Singapore Police Force, the Singapore Civil Defence Force, the Commercial and Industrial Security Corporation or of any visiting force lawfully present in Singapore under the provisions of any law relating to visiting forces; or

(b) by any person as part of his official or ceremonial dress on any official or ceremonial occasion.

4 At the close of the prosecution's case, defence counsel made a submission of no case to answer. The magistrate agreed with the defence that the evidence adduced by the prosecution was not sufficient to make out a prima facie case against the accused and consequently acquitted the accused without calling for his defence. The prosecution appealed against the acquittal.

The principles to be applied at the close of the prosecution's case in determining whether a prima facie case has been made out

5 Section 189(1) of the Criminal Procedure Code (Cap 68) provides as follows:

When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.

6 It is clear from the above provision that the condition precedent to the judge calling for the defence is the establishment by the prosecution of a case against the accused which, if unrebutted, would warrant the conviction of the accused. In relation to this precondition, Lord Diplock in *Haw Tua Tau v PP* [1980-1981] SLR 73 at pp 79 and 80 laid down the following principles, which have been adopted in *Tan Siew Chay v PP* [1993] 2 SLR 14 at 38:

The crucial words [in s 189(1)] are the words 'if unrebutted', which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of

> primary facts and it is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by s [189(1)], the court must act on the following presumptions: (a) that the evidence on the primary facts is true, unless it is so

inherently incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation.

7 In determining whether the prosecution has made out a prima facie case which would justify a conviction if not contradicted, it has been clearly held in *Haw Tua Tau* that the judge must consider whether there is some evidence, which is not inherently incredible and which, if he were to accept it as accurate, would establish each essential element of the alleged offence. If such evidence as respects any of those essential elements is lacking, only then will he be justified in finding that 'no case against the accused has been made out which if unrebutted would warrant his conviction' within the meaning of s 189(1). If the judge finds that each essential element has been established, he must call upon the accused to enter upon his defence.

8 It is well settled that at this stage the court need not be satisfied that the accused is guilty beyond a reasonable doubt. In the words of Lord Diplock in *Haw Tua Tau* (supra, at pp 78 and 80):

> Section [189(1)] states the conditions precedent to the right and duty of the judge of trial to call on the accused to enter on his defence…it does not place upon the court a positive obligation to make up its mind at that stage of proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.
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> …
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> … in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek v PP* [1970] 2 MLJ 283 there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the prosecution's case the evidence adduced has already satisfied the judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. But this can hardly have been what that court intended, for it ignores the presence in the section of the crucial words 'if unrebutted', to which in other passages the court refers, and it converts the hypothetical question of law which the judge has to ask himself at that stage of the proceeding: 'If I were to accept the prosecution's evidence as accurate would it establish the case against the accused beyond a reasonable doubt?' into an actual and quite different question of fact: 'Has the prosecution's evidence already done so?'…their Lordships consider this to be an incorrect statement of the effect of [s 189(1)].

The primary facts

9 On 19 August 2001 at about 3 am, Sergeant Ahmad Rithaudeen bin Mohamed ('Sgt Ahmad') and Corporal Jeffrey Ang Zhilong ('Cpl Ang') were on police patrol car duty when they received a message to proceed to Dunlop Street where a group of foreigners (according to Sgt Ahmad) or Indians (according to Cpl Ang) were fighting. A First Information Report stating that foreigners were fighting at Dunlop Street was tendered in evidence.

10 When Sgt Ahmad and Cpl Ang arrived at Dunlop Street, a group of more than 10 male Indians was seen at the junction of Perak Road and Mayo Street. According to Sgt Ahmad, the group appeared to be having an argument or a conversation, but Cpl Ang's evidence was that the persons in the group were "just gathering around". The crowd started to disperse upon seeing the patrol car. Another group consisting of less than five Indian men was then seen walking along Perak Road. Sgt Ahmad was not sure whether they were from the earlier group that had dispersed. He then decided to check on this second group of Indians and walked behind them.

11 When Sgt Ahmad was about 5 metres behind them, he saw one of them, who was later ascertained to be the accused, drop a black coloured object to the right side and it was stuck at the bottom end of the trousers that the accused was wearing. The accused was seen attempting to shake off the object. The accused did not turn around and continued walking ahead when Sgt Ahmad shouted at him to stop. When Sgt Ahmad caught up with him and questioned him about the object which had by that time fallen onto the ground, the accused denied that the object was his. The object was later ascertained to be a 15 cm long screwdriver. The other persons with whom the accused was seen together continued to walk away when the accused was stopped by Sgt Ahmad.

The appeal

12 The main issue to be decided in the present case was whether, assuming that the evidence adduced by the prosecution above was true and that there was nothing to displace reasonable inferences that could be drawn from the above primary facts, the prosecution had established a case against the accused which, if unrebutted, would warrant his conviction under s 22(1)(a) of the Act.

13 There are certain aspects of the magistrate's reasoning with which I did not entirely concur. In the court below, the magistrate drew a distinction between "found armed" and "armed with" and this can be seen from the following paragraphs of his grounds of decision:

> 10. To compound matters further, the opening limb of section 22(1) also requires that the accused be "found armed" with the dangerous weapon. In addition, in order for the prosecution to rely on the presumption under section 22(2), the prosecution must "allege and prove that the accused was found to be armed with any dangerous or offensive instrument".
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> …
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> 14. …The next issue then was whether from the existing evidence adduced by the prosecution, mainly the act of seeing the screwdriver sliding down from the accused's trousers and the accused's action in shaking it off from his trousers, the necessary inferences could be drawn to show

> that the accused was "found armed" with the screwdriver at the material time as required by the provision, and not merely "armed with" or "in possession of" the screwdriver.

14 The court below referred to the Canadian case of *R v Mitchell and Maclean* [1932] 1 W.W.R 657, in which the Saskatchewan Court of Appeal construed the word "found" in s 464(a) of the Canadian Criminal Code:

> By virtue of its presence and relationship, we think that ***the word "found" in sec 464 carries with it the implication that the person in possession of the instrument must be discovered with it in such a place as to afford ground for a reasonable opportunity to use it in the commission of a criminal offence. Thus the place, as well as the time of discovery, must tend to incriminate him.*** It is not enough that he may have a housebreaking instrument in those ordinary lawful haunts, such as home or office, where a man may keep such a thing without arousing suspicion of its use for a criminal purpose, other than such as may arise from its own unlawful character. To put it briefly, he must be discovered with it abroad. (Emphasis added)

15 It seems to me that the magistrate was rather influenced by the above passage from *Mitchell* and this can be seen from his decision:

> 15. …The arresting officers had…received a message that either a group of foreigners (per Sgt Ahmad) or Indians (per Cpl Ang) was fighting at Dunlop Street. Upon arrival at the scene, the officers saw a group of Indians dispersing. They then saw another group of Indians whom the accused was with walking past them…However, neither officer could confirm whether the group whom the accused was with originated from the earlier group that had dispersed. In fact, Sgt Ahmad's evidence was that the accused's group was walking behind the officers…The overall impression given by the officers was that the accused's group did not come from the earlier group that dispersed…***If it had been shown conclusively that the accused was from the group that dispersed, the inference that he was "armed" might have been stronger, that is, he might have been involved in the alleged fight***. (Emphasis added)

16 The magistrate's view that there might have been a stronger inference that the accused was "armed" if there were evidence of the accused having been involved in the alleged fight, implies that there has to be evidence of surrounding circumstances suggesting the commission (for instance, being involved in violence or robbery) or the imminent commission of an offence (for instance, the accused loitering near a car) before the accused can be said to be "armed with" a dangerous or offensive instrument. To impose such a requirement is tantamount to indirectly placing the burden on the prosecution to prove that the carrying of the instrument was related to the commission of any offence, or that the accused was armed with the instrument with some intent to commit an offence,

an element which Parliament has already removed from the provision in 1996. Section 22(1)(a) was amended in 1996 when the words "with intent to commit any offence" was substituted with the phrase "without lawful authority or a lawful purpose". The attention of this court was drawn to the speech of the Senior Parliamentary Secretary to the Minister for Home Affairs, Assoc Prof Ho Peng Kee, on 27 February 1996 in relation to the Miscellaneous Offences (Public Order and Nuisance) (Amendment) Bill:

> … under the existing section 22(1)(a), it is an offence for a person to be armed with a dangerous or offensive instrument ***with intent to commit an offence***. This requires the prosecution to prove not only that the person is armed with a dangerous or offensive instrument but also that he intended to commit an offence with it. Unless the accused admits it, it is impossible to prove his intent. ***To overcome this problem so as to facilitate prosecution***, clause 9 of the Bill seeks to create a new subsection (1A) to place on the accused the onus of proving that he has a lawful purpose to be armed with the dangerous or offensive instrument. (Emphasis added)

17 The next question is how should the words "armed with" be construed in the light of such considerations. Some guidance may be obtained from the Australian and English authorities. In *Rowe v Conti* [1958] VR 547, the defendant was charged under s 69(1) of the Police Offences Act 1957 which reads as follows:

> Every person committing any of the following offences shall be deemed an idle and disorderly person within this Part…
>
> (f) Every person found armed with any sword bludgeon or other offensive weapon or instrument: Provided that if such person being thereto required by the court gives to the satisfaction of the court a good account of his lawful means of support and assigns a valid and satisfactory reason for his being so armed he shall be deemed not to be guilty of such offence.

The police searched the defendant, Conti, outside a hotel and found that he was not in possession of a knife. They subsequently found a knife in his car which was in the back yard of the hotel. The Supreme Court of Victoria held that there was no case to answer on the ground that the defendant was not "found armed" within the meaning of s 69(1)(f). Gavan Duffy J said (at p 549):

> When Conti was searched by the police he was not "armed" in any sense. I do not say that a man must necessarily have the weapon in his hand to be armed with it, but he must have it immediately ready for use. The fact that he has in his vehicle a weapon with which he can arm himself in a few minutes is not enough.

18 The Supreme Court of Victoria in *Miller v Hrvojevic* [1972] VR 305 had also considered the meaning of "armed" in the context of s 6(1)(e) of the Vagrancy Act 1966 (at p 306):

> To be armed with a weapon means something more than to be in possession of it; the weapon must also be available for immediate use as a weapon. No doubt questions of fact and degree are involved. A man is armed with a pistol if he is wearing it in a holster, though perhaps not if it is in the boot of his car. It is not necessary for it to be in his hand for him to be armed with it. In the present case the knuckle duster was in the defendant's left-side trouser pocket, where it could easily and rapidly be slipped onto his hand. Accordingly, I think the evidence establishes that he was found armed with it.

Section 6(1)(e) of the Vagrancy Act, which is rather similar to s 22(1)(a) of the Act, provides as follows:

> Any person who –
>
> (e) is found armed with an offensive weapon or instrument unless such person gives to the court a valid and satisfactory reason for his being so armed;…shall be guilty of an offence.

19 In the English case of *R v Jones (Keith Desmond*) [1987] 2 All ER 692, the appellant was convicted under s 86 of the Customs and Excise Management Act 1979, which makes it an offence to be "armed with any offensive weapon" while being concerned in smuggling. The appellant was the captain of a boat that was used to smuggle drugs into England. Customs and police officers boarded the boat and they found, apart from the drugs, two pistols in a locker in the wheel-house. The Court of Appeal dismissed the appeal against conviction and held that the expression "armed" involves either physically carrying arms, or it will involve proof that a defendant knows that they are immediately available. The court was also of the view that in considering s 86 of the 1979 Act, helpful guidance can be derived from the judgment of Scarman LJ in *R v Kelt* [1977] 3 All ER 1099, which was a case under s 18 of the Firearms Act 1968:

> Of course the classic case of having a gun with you is if you are carrying it. But even if you are not carrying it, you may yet have it with you, if it is immediately available to you. But if all that can be shown is possession in the sense that it is in your house or in a shed or somewhere you have ultimate control, that is not enough.

20 In my opinion, the expression "armed with a dangerous or offensive instrument" in the context of s 22(1)(a) of the Act should be construed to mean being in actual physical possession of the instrument (whether it is carried on the person or near to the person), which is immediately available and ready for use. The expression does not include a situation, for instance, where a person is away from his house or his car in which the instrument is found. That person cannot be said to be "armed with" the instrument, even though he may have control or dominion over it, as it is not available for immediate use. In not requiring the prosecution to prove that the accused has committed or will commit an offence, such a construction of the words "armed with" would be consistent with the intention of the amendment, which was to facilitate prosecution and enforcement of the law. This interpretation would also be in line with the purpose of s 22(1)(a), which is to prevent the use of dangerous or offensive instruments and to allow timely action to be taken to reduce any opportunity

to use such instruments.

21 Counsel for the accused contended that the prosecution's case fell short of even showing that the accused was in possession of the screwdriver, much less could the evidence show that he was armed with the screwdriver. Counsel relied on certain parts of the testimony of Sgt Ahmad in support of his submissions:

> Q: Put – you never saw this accused in possession of the screwdriver as you alleged?
>
> A: Yes, I didn't see he was in possession of the screwdriver.
>
> Q: Put – this accused was not armed with the screwdriver?
>
> A: He was not armed with the screwdriver.

22 Counsel also drew the attention of the court to Cpl Ang's evidence during cross-examination:

> Q: Do you agree that you cannot say what fell onto the ground on that night from this accused person?
>
> A: Yes.

23 Apart from Cpl Ang's testimony given during cross-examination, I also noted the evidence given by Cpl Ang during examination-in-chief and re-examination. During examination-in-chief, Cpl Ang testified that he saw the accused shake his leg and that a black object had landed near to the side of the road, but he could not see what the black object was at that time. He was able to ascertain that the black object was a screwdriver after he and Sgt Ahmad had caught up with the accused. In re-examination, Cpl Ang gave the following evidence:

> Q: You said you saw a black-coloured object fall from the accused?
>
> A: Yes.
>
> Q: Was it from his left or right hand side?
>
> A: Right hand side.
>
> Q: You later identified this screwdriver in court and it was the black coloured object?
>
> A: Yes.
>
> Q: How can you be so sure that this black object is the screwdriver?
>
> A: When I saw the black object falling off, I remembered the location where it landed.
>
> Q: You saw it landed and you remembered the location where it landed, what made you so sure that the screwdriver fell from the accused and not from anyone else?

A: I saw the black object falling and he was trying to shake it away.

I would also point out at this juncture that Sgt Ahmad had clearly testified in court that the accused had dropped the screwdriver to his right side, which fell along the seams of the trousers and got hooked at the bottom end of his trousers, and he had then attempted to shake it off his trousers.

24 In my view, an inference that the accused was "armed with a dangerous or offensive instrument" could reasonably be drawn from the evidence, there being no dispute that the screwdriver was such an instrument. I was therefore of the view that the prosecution had made out a case which, if unrebutted and uncontradicted, would warrant the conviction of the accused. In the circumstances, the magistrate should have called for the defence whereupon the burden would be on the accused to show that he had lawful purpose or lawful authority to be armed with the screwdriver.

Appeal allowed.

Case remitted back to court below for defence to be called.

Sgd:

YONG PUNG HOW

Chief Justice

Supreme Court, Singapore