Chua Chuan Heng Allan v Public Prosecutor
[2003] SGHC 105

Case Number : Cr Rev 6/2003

Decision Date : 05 May 2003

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Petitioner in person; David Chew Siong Tai (Deputy Public Prosecutor) for the respondent

Parties : Chua Chuan Heng Allan — Public Prosecutor

Criminal Procedure and Sentencing – Revision of proceedings – Sentence not backdated – Court not informed offender had been remanded – Whether offender entitled to backdating of sentence

Criminal Procedure and Sentencing – Sentencing – Date of commencement – Backdating – Applicable principles

Background

1 The petitioner ("Chua") and his wife were arrested by Central Narcotics Bureau ("CNB") officers on 13 January 1999. Both were subsequently charged with various offences under the Misuse of Drugs Act (Cap 185) ("MDA"). On 27 May 1999, Chua's wife pleaded guilty to four charges under the MDA.

2 On 29 June 1999, Chua pleaded guilty to two charges of trafficking under the MDA. The first charge was for trafficking in 14.89 grams of diamorphine, a class 'A' drug under the MDA and the second charge was for trafficking in 4.39 grams of diamorphine. Chua also pleaded guilty to one charge of possession of five tablets of nimetazepam, a class 'C' drug under the MDA.

3 Chua was sentenced to 20 years imprisonment and 15 strokes of the cane on the first trafficking charge, and to five years imprisonment and five strokes of the cane on the second trafficking charge. He was sentenced to six months imprisonment on the possession charge. The sentences on the trafficking charges were to run concurrently. In total, Chua was sentenced to an aggregate of 20 years and six months' imprisonment, and 20 strokes of the cane.

4 Chua was first charged in court on 15 January 1999 and was ordered to be kept in the custody of the CNB. When his case was further mentioned on 28 January 1999, he was ordered to be remanded at Queenstown Remand Prison. He remained at the prison until he pleaded guilty on 29 June 1999.

5 When Chua pleaded guilty before district judge Brenda Tan, the court was not informed that he had spent time at the CNB premises and in Queenstown Remand Prison. Chua was represented by counsel during the sentencing. A written mitigation was tendered before the district judge before the sentence was passed. The district judge ordered Chua's sentence to take effect from the date of sentencing, ie. 29 June 1999.

6 Chua did not file a notice of appeal against his sentence. Instead, he invited this court to exercise its revisionary powers, and asked that his custodial sentence be backdated to 15 January 1999, the date on which he was first ordered to remain in the CNB's custody. I rejected his petition, and now give my reasons.

Practice on backdating

7 Before turning to Chua's petition, I will set out the general principles which apply when the court decides to backdate a custodial sentence.

The court's power to backdate a custodial sentence is always discretionary

8 The general rule of sentencing is that every custodial sentence takes effect from the date on which it is passed. This is expressly provided for in s 223 of the Criminal Procedure Code (Cap 68) ("CPC"), which states:

> … every sentence of imprisonment to which section 221 or 222 apply shall take effect from the date on which it was passed, unless the court passing the sentence or when there has been an appeal the appellate court otherwise directs.

Thus, the court's power to backdate a custodial sentence is purely discretionary: *Sinniah Pillay v PP* [1992] 1 SLR 225. The backdating of a custodial sentence is an exception to the general rule of sentencing and is never available as of right.

The court is not obliged to exercise its discretion to backdate

9 It is settled law that the court is not obliged to backdate a sentence of imprisonment in any case. In *Mani Nedumaran v PP* [1998] 1 SLR 411, the court stated:

> [I]t is only fair that a court take into consideration any period spent in remand by an accused when contemplating the exercise of its discretion to backdate … *The above does not mean that a custodial sentence must invariably be backdated to the date when an accused was taken into remand*. [Emphasis added]

Thus, where the court knows that an offender has previously spent time in remand, it should take such a period into account, when it is deciding whether to backdate a custodial sentence. However, this does not oblige the court to backdate a custodial sentence in every case where an offender has already spent time in remand.

10 The fact that an offender has spent time in remand does not necessarily increase the likelihood that his sentence will be backdated. This is evidenced by the case of *PP v Wong Siu Fai* [2002] 3 SLR 276, where the offender pleaded guilty to having committed carnal intercourse against the order of nature on a five year old boy. In that case, the court refused to backdate the offender's custodial sentence because it was of the opinion that "the five months imprisonment already served should be part of the punishment given the circumstances of [the] case."

11 The sentencing judge is not obliged to launch into an inquiry to find out whether an offender has previously spent any time in remand. The law does not require the court to actively ferret out such information. It is the offender who seeks to rely on the fact that time was previously spent in remand – the onus of bringing such a fact to the court's attention must rest on him. It is pertinent that s 103(1) of the Evidence Act (Cap 97) states:

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

Factors which the court takes into account when deciding whether to backdate a custodial sentence

12 The court will take a variety of factors into account when deciding whether to exercise its discretion to backdate. In the cases of *Mani Nedumaran v PP* and *Sinnih Pillay v PP*, the court provided a list of relevant factors to be considered in this context. This list included the seriousness of the offence committed, the corresponding demands of public policy and the quantum of the maximum punishment prescribed for the offence.

13 However, the above list is not meant to be exhaustive. After all, the power to backdate is properly left to the discretion of the sentencing judge, based on the circumstances of every case.

A refusal to backdate a custodial sentence does not amount to an enhanced sentence

14 When the court backdates a custodial term, it effectively gives the offender a discount on his sentence: *Mani Nedumaran v PP*. However, case law has implied that, if the court refuses to backdate a custodial term, it effectively imposes an enhanced sentence on the offender. For example, the court stated in *Mani Nedumaran v PP*:

> Conversely, the court may, by refusing to backdate a custodial term, impose what amounts in effect to an *enhanced* sentence. [Emphasis added]

The idea that a non-backdated sentence is an "enhanced" sentence has caused some confusion. I take this opportunity to clarify the law in this respect.

15 The general rule encapsulated in s 223 of the CPC states that the standard sentence of imprisonment is one which takes effect from the date on which it is passed. Thus, it is misleading to refer to a custodial sentence which has not been backdated as "enhanced". The term "enhanced sentence" should be applied only to situations where the law expressly provides for harsher penalties than normal, such as where an offender's sentence is enhanced on appeal pursuant to s 256 of the CPC.

Only periods spent in remand will be taken into consideration for backdating

16 Only the time which an offender has spent in "remand" is relevant for the purpose of backdating a custodial sentence. For example, in *Tang Kin Seng v PP* [1997] 1 SLR 46, the time which an offender had spent on bail was irrelevant for backdating. In *Cheong Seok Leng v PP* [1988] SLR 565, the court held that time spent in a drug rehabilitation centre was not relevant for backdating because such centres were not gazetted as prisons. Drug rehabilitation centres have since been gazetted as prisons under the Declaration of Prisons (Consolidation) Notification (Cap 247, Section 3). However, the basic principle remains that only time spent in remand is relevant for the purpose of backdating a custodial sentence.

17 The court is also entitled to backdate a custodial sentence even if the period spent in remand exceeds the maximum term of imprisonment for that particular offence. In *Mani Nedumaran v PP*, the court held that there was nothing to prevent the backdating of a one month custodial sentence, even though the offender in that case had already spent four months in remand.

Section 234(1) of the CPC

18 For the sake of completeness, I note that that the court is not entitled to backdate the sentence of any offender who is an escaped convict or is undergoing a sentence of imprisonment. Section 234(1) of the CPC states:

When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment the latter sentence of imprisonment shall commence either immediately or at the expiration of the imprisonment to which he was previously sentenced as the court awarding the sentence directs.

The petition

19 I dismissed this petition because this was not a proper case for the exercise of the court's revisionary powers.

No serious injustice has been committed

20 It is settled law that the court will only exercise its revisionary powers when it is necessary to correct a serious injustice which is so palpably wrong that it strikes at the exercise of judicial power by the court below: *Ang Poh Chuan* [1996] 1 SLR 326. The court's revisionary jurisdiction is jealously guarded, and must not be misused to commence backdoor appeals: *Koh Thian Huat v PP* [2002] 3 SLR 28.

21 In his petition for revision, Chua highlighted certain factors in support of his plea for criminal revision. These factors are summarised below:

a) he readily admitted his guilt as a first-time offender;

b) he fully cooperated with the authorities;

c) he pleaded guilty at the first opportunity;

d) all the relevant facts were not before the trial judge;

e) he had been reformed and rehabilitated;

f) he wished to take care of his young son as his wife had recently committed suicide.

Of the six factors listed above, I found the first three to be wholly irrelevant for criminal revision. These factors did not give rise to any injustice. Having read through the written mitigation plea which was tendered below, I noted that these three factors had already been brought to the attention of the court before sentencing. The district judge must have already taken these factors into account, as Chua was given a very lenient sentence. He received the minimum sentence for the two trafficking charges, and a light sentence of six months imprisonment for the possession charge.

22 The fourth factor highlighted by Chua presumably referred to the fact that the district judge was not told that he had already spent time in remand. This really was the crux of the present petition. In my view, no injustice was caused by this omission. The onus was always on Chua to bring this fact to the court's attention. Even though he was represented by counsel during sentencing, his written mitigation made no reference to the time that he had spent in remand. The mere ineptitude of counsel does not create a 'serious injustice' warranting criminal revision.

23 The last two factors on Chua's list did not relate to criminal revision at all. Neither factor had caused any injustice during his hearing below. Such factors were perhaps relevant for a grant of remission under s 118 of the Prisons Regulations (Cap 247, section 84). Nevertheless, the remission of custodial sentences remains the responsibility of the prison's superintendent. It is not for this court to

usurp such responsibility.

Principle of consistency in sentencing

24 It was brought to my attention that the sentence imposed on Chua's wife was backdated to her date of remand on 15 January 1999.

25 In my opinion, no injustice was caused by this purported inconsistency. Consistency in sentencing is certainly desirable. However, the court in *PP v Ramlee* [1998] 3 SLR 539 also stressed that this principle is flexible and takes into account the circumstances of each case. In the persent case, Chua's wife did not face any trafficking charges, whereas Chua was convicted on two charges of trafficking. Chua's offences were more severe than his wife's, and there was no injustice in treating their sentences differently.

Time spent in the custody of the CNB is not 'remand'

26 Lastly, it was not possible for me to backdate Chua's sentence to 15 January 1999, which was the date from which he was ordered to remain in the custody of the CNB. Any time spent by Chua in the custody of the CNB did not qualify as time spent in remand, as the CNB premises were not gazetted as a prison. Even if I was minded to backdate Chua's custodial sentence, the earliest date from which his sentence could run was 29 January 1999.

Conclusion

27 There was no serious injustice in the present case. In fact, Chua was remarkably fortunate to have received his current sentence. Under the MDA, trafficking in more than 15 grams of diamorphine carries a mandatory death sentence. Chua's first charge was for trafficking in 14.89 grams of diamorphine. That is a difference of barely 0.1 grams. Not only did Chua receive the minimum sentence for his offence, he in fact narrowly escaped the death penalty by the very slimmest of margins.

28 For the reasons given above, I dismissed this petition.

Petition dismissed.