Re Lasry Lex QC
[2003] SGHC 287

Case Number : OM 26/2003

Decision Date : 20 November 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Joseph Theseira and Tito Isaac (Naidu Mohan & Theseira) for the applicant; Han Ming Kuang for Attorney-General and Public Prosecutor; Laurence Goh Eng Yau for the Law Society of Singapore

Parties : —

Res Judicata – Matters which could and should reasonably have been raised in earlier proceedings – Whether res judicata applicable when constitutional argument could and should have been raised in previous application

Legal Profession – Admission – Ad hoc – Whether special reasons exist to admit – Whether exercise of judicial discretion in applicant's favour justifiable – Section 21 Legal Profession Act (Cap 161, 2001 Rev Ed)

1 This is an application under s 21 of the Legal Profession Act, Cap 161 by Mr Lex Lasry, a Queen's Counsel from Australia, for an *ad hoc* admission to appear as counsel on behalf of the accused Mr Nguyen Tuong Van in Criminal Case PI No 211 of 2002. Mr Nguyen was charged with a capital offence under The Misuse Of Drugs Act, Cap 185. He was arrested at the Changi International Airport on 12 December 2002 and found to be in possession of 396.2g of heroin. Mr Nguyen is an Australian citizen and his family instructed Mr Lasry QC to represent him at trial. Justice Tay Yong Kwang heard an application by Mr Lasry QC by way of Originating Motion No 7 of 2003 on 22 April 2003 for leave to be admitted to represent Mr Nguyen at his trial. Justice Tay dismissed that application. There was no written grounds in respect of that decision, but Mr Lasry QC deposed in his affidavit supporting this present application that the court (Justice Tay) was of the view that what was to be done by him (Mr Lasry QC) 'as a member of the Australian team could be done in Australia and relayed to [his Singapore counsel] to conduct the trial'. I agree with that view entirely.

2 Mr Lasry QC now seeks leave before me 'to make a new application, namely to be admitted on an *ad hoc* basis solely for the purpose of arguing a pre-trial argument'. The object of the application was to ask for the trial 'to be permanently stayed or indefinitely postponed' on the ground that the only punishment should Mr Nguyen be found guilty, is death, and that that punishment is unconstitutional. He says that the arguments are 'complex and raise fundamental issues about the mandatory death penalty'. Relying on what was said in *Re Caplan Jonathan Michael QC* [1998] 1 SLR 432, Mr Lasry QC deposed that Mr Nguyen's case is not just a case on the particular set of facts, but 'broader and more fundamental issues' are being raised such that it conforms to the test of 'special reasons' for the admission of a QC. The three stage-test under the *Caplan* ruling appears to have been applied when Mr Lasry QC made his first application before Justice Tay, as he himself conceded that the matters under the first application 'had been resolved'. He thus made this application strictly on the basis of the 'special reasons' test in criminal cases, namely that there is a constitutional point concerning the mandatory nature of the death penalty.

3 An applicant is entitled to appeal to the Court of Appeal when his application has been dismissed. But he may not make a second application before another judge because the matter is *res judicata,* any such application really is not a new application but, in fact, an old one. Mr Lasry QC attempts to overcome this by predicating his second application as 'a pre-trial legal argument'. This is not very accurate because there is no special and distinct application for the purposes of making

the pre-trial argument. The pre-trial argument as it appears here, is really a preliminary point to be argued before the trial judge. I will accept, however, that the point to be made is ideally taken as a preliminary point as opposed to leaving it as part of the final submission although the focus of the argument is on the sentence, which is normally the tail end of the trial. I see some merit in the preliminary nature of the argument in that the applicant is proposing that by the unconstitutionality of the sentence the entire offence is affected and thus the charge cannot properly be maintained from the outset. However, an application for leave to appear as counsel for the trial implicitly includes an application to argue that for one reason or another, the trial ought not proceed, whether for a time or indefinitely. That application had already been heard and dealt with. I do not think that Mr Lasry QC is entitled to detach, as it were, a portion of his previous application and submit it as a fresh and discrete one merely by giving details of a specific argument or a part of the defence. His objection to the trial on constitutional ground could and should have been made when his application was heard before Justice Tay but it was not, so the fact that it was an argument that was not actually advanced in the previous application does not mean that there is no issue estoppel and hence, the applicant is entitled to raise it afresh. In the strict sense of issue estoppel that may be true, but *res judicata* based on the principle of abuse of the court's process, is a doctrine of broader scope and application. It applies to matters that properly belong to the earlier proceedings and could reasonably have been raised there but were not. See *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 517, 528. Having expanded his case and argument in full for the general and comprehensive leave to conduct the trial, the applicant has taken his fill and thus this present application is merely a wan and hapless cry for alms on behalf of the accused. Although an accused in a capital case deserves all the sympathy and latitude that the court may reasonably provide, he cannot expect the court to revise an earlier decision from a court of co-ordinate jurisdiction on the same matter. On this ground alone the application ought to be dismissed.

4 I would nonetheless, for the sake of completeness, determine this application on its overall merits. I accept that Mr Lasry QC has the abilities, if not the credentials, of scholarship and research, as well as the experience to qualify for admission here on an *ad hoc* basis. Beyond this, nothing else that has been put forward on his behalf by Mr Joseph Theseira to support the application for the employment of a Queen's Counsel. Neither the fact that the accused is not a resident of Singapore, or that his family desires the services of a lawyer from his own jurisdiction is sufficient reason for granting leave. Other than the preliminary issue concerning the constitutional ground argument, the case does not appear to be unusually complex since no other matters were raised in the hearing before me. So I now come to the question of the constitutionality of capital offences in Singapore. Mr Han for the Attorney-General and Mr Goh for the Law Society dispute the defence contention that the constitutional argument is a novel one. They submitted that the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1980-1981] SLR 48 had already considered the issue. Mr Theseira argued that the point is novel because there the Privy Council had declined to give a direct opinion on it without the benefit of any opinion from the local judiciary on the point. Mr Theseira, therefore, hopes that Mr Lasry QC may be permitted to bridge that gap. But, even assuming that the point as explained by Mr Theseira, is a novel one, in my view, novelty alone is hardly a justifiable reason for admission. As to whether *Ong Ah Chuan* has any value after *Reyes v The Queen* [2002] 2 AC 235, that is a submission on the merits which is best left to the trial judge. For my part, I see no particular reason why this should necessitate the appearance of a Queen's Counsel at trial. The position of law that Mr Lasry QC has in mind is that the laws passed by the Singapore legislature, including the Constitution, must conform to international law. How he intends to support this thesis probably needs to be elaborated, but I shall not express my view as to whether his point is doomed from the start or one that is truly innovative and worthy of serious consideration. The constitutional argument may be an intriguing proposition, but that, as I have said, must be reserved to the pleasure of the trial judge.

5 Whatever the merits may be, the legal arguments concerning the constitution, *Ong Ah Chuan*, and *Reyes*, are points of law that can adequately be advanced by way of written submission tendered through Mr Nguyen's Singapore counsel. So, Mr Nguyen may be comforted to know that the points of law that Mr Lasry QC has in mind may still be advanced before the trial judge in this way. I appreciate that an audience can sometimes have a more positive impact on the judge than a stack of papers, and if the point to be made is arguably a complex one, then an audience is preferable, but this not a rigid or critical aspect for consideration. I cannot ignore Mr Lasry QC's previous application to appear in our court for leave to be admitted as an *ad hoc* counsel for the conduct of the trial (which would have given him the opportunity of advancing his constitutional arguments). I would take that into account in deciding whether to exercise my discretion favourably. It does not matter very much that he did not raise the constitutional point in his first application, because really, he ought to have done so.

6 I wish to record my appreciation to all counsel, and in particular to Mr Theseira and Mr Tito Isaac for the commendable, although belated effort. The generosity and goodwill of Mr Lasry QC to the accused, has earned him the admiration and respect of this court, but for the reasons I have given, his application must be, and is hereby, dismissed.