Cigar Affair v Public Prosecutor
[2005] SGHC 109

Case Number : Cr M 3/2005

Decision Date : 01 July 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Kirpal Singh (Kirpal and Associates) for the applicant; Christina Koh (Deputy Public Prosecutor) for the respondent

Parties : Cigar Affair — Public Prosecutor

Criminal Procedure and Sentencing – Criminal references – Application for questions to be reserved for determination of Court of Appeal – Whether questions amounting to questions of law of public interest or so exceptional that reference to Court of Appeal justified – Sections 60(1), 60(5) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

1 July 2005

Woo Bih Li J:

Background

1 This was a motion by the applicant, Cigar Affair, for various questions of law alleged to be of public importance to be reserved for the determination of the Court of Appeal pursuant to s 60 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"). The motion arose from my decision in Criminal Motion No 23 of 2004 ("No 23") in which I dismissed Cigar Affair's application to quash a search warrant which had been issued and executed against it in respect of suspected offences under s 49 of the Trade Marks Act (Cap 332, 1999 Rev Ed) ("TMA").

2 The detailed facts and my reasons for No 23 are set out in my grounds of decision for that case. Briefly, Cigar Affair was in the business of dealing in cigars and other tobacco products. As a result of certain emails sent by Cigar Affair to others, the suspicions of The Pacific Cigar Company (Singapore) Pte Ltd ("PCC Singapore") were aroused as regards the infringement of two trade marks with the name "COHIBA" which belonged to Corporacion Habanos SA ("Habanos"). PCC Singapore was acting under a power of attorney from Habanos and had engaged private investigators to make a trap purchase from a shop operated by Cigar Affair. Consequently, a complaint was filed which led to the issue and execution of a search warrant authorising the seizure of any Cohiba cigars, any item or document bearing either of the trade marks and any document which referred to the trade marks and which was evidence that an offence under s 49 had been committed. Consequently, Cigar Affair applied to quash the search warrant and, as I have mentioned, I dismissed the application.

Questions posed by Cigar Affair

3 The questions for determination as framed by Mr Kirpal Singh, counsel for Cigar Affair, were as follows:

> Question 1
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> Whether the form and procedure for bringing a matter of the Subordinate Courts for review to the High Court in the exercise of powers under Sections 266, 267 and 268 of the Criminal Procedure Code should be by way of a Criminal Petition to the High Court or by way of a Criminal Motion to

the High Court?

Question 2

Whether it was necessary to aver to or refer to within a Complaint filed in the Subordinate Court pursuant to Section 53A of the Trade Marks Act [Cap. 332] (hereafter "TMA") the mental element under Section 49 of the TMA prior to the issuance to a Search Warrant from the Subordinate Courts as is the case under Complaints filed under Section 136 of the Copyright Act [Cap 63]?

Question 3

Whether the scope of a Search Warrant issued from the Subordinate Courts pursuant to a Complaint filed in the Subordinate Court under Section 53A of the TMA should be confined or restricted to only the goods as set out and complained of as part of the "information given" under Section 53A(3)(a) of the TMA in the Complaint or also to goods upon which no information had been given?

Question 4

Whether the scope of a Search Warrant issued from the Subordinate Courts pursuant to a Complaint filed in the Subordinate Court under Section 53A of the TMA should be confined or restricted to only the document(s) or class of documents as set out and complained of as part of the "information given" under Section 53A(3)(c) of the TMA in the Complaint or to any document(s) regardless of whether information as to the documents had been tendered to Court within the Complaint?

Question 5

Whether there is any mechanism or procedure in determining the scope and/or relevancy of the documents being seized within the scope of a Search Warrant issued from the Subordinate Courts pursuant to a Complaint filed in the Subordinate Court under Section 53A(3)(c) of the TMA so as to prevent abuse and/or wrongful disclosure of confidential and/or sensitive information which is irrelevant to the subject matter of the Complaint and/or Search Warrants?

Question 6

Whether costs should be ordered against a respondent party who seeks to review the decision of the Subordinate Courts in exercise of its criminal jurisdiction pursuant to powers under Sections 266, 267 and 268 of the Criminal Procedure Code?

The court's decision and reasons

4 The relevant parts of s 60 SCJA are ss 60(1) and 60(5) which state:

60.—(1) When a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, the Judge may on the application of any party, and shall on the application of the Public Prosecutor, reserve for the decision of the Court of Appeal any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case.

(5) For the purposes of this section, any question of law which the Public Prosecutor applies

to be reserved or regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest.

5 In *Abdul Salam Bin Mohamed Salleh v PP* [1991] SLR 235, the then Court of Criminal Appeal dealt with the then s 60 SCJA which was in similar terms as the current s 60 SCJA for present purposes. Chief Justice Yong Pung How delivered the judgment of the Court of Criminal Appeal. He said at 238–240, [10]–[14]:

> 10 Before dealing with the four questions, it would not be inappropriate for us to review the application for the reference itself, in view of the manner in which the application was argued and decided in the court below. The relevant provisions of s 60 of the SCJA are as follows:
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> > (1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Judge may on the application of any party and shall on the application of the Public Prosecutor reserve for the decision of the Court of Criminal Appeal any question of law of public interest which has arisen in the course of the appeal and the determination of which by the Judge has affected the event of the appeal.
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> > …
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> > (5) For the purposes of this section but without prejudice to the generality of its provisions —
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> > > (a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and
> > >
> > > (b) the reservation of a question of law for the consideration of the High Court under the provisions of any written law relating to criminal procedure or the exercise by the High Court of any power or revision under any such written law shall be deemed to be an appeal from a decision of a subordinate court in a criminal matter.
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> 11 It is clear from the terms of s 60 that the court has discretion whether or not to refer a question to the Court of Criminal Appeal when the application to the court is made by a party other than the public prosecutor, even if the question satisfies all the prescribed conditions. It is equally clear that the reference must be of a question of law of public interest, which has arisen in the course of the appeal, and the determination of which by the judge has affected the event of the appeal. The crucial condition in the present case was whether these were questions of law of public interest. There is a paucity of published authorities in Singapore on s 60, but in applying the section Singapore courts have always had regard to the authorities decided under the corresponding s 66 of the Malaysian Courts of Judicature Act 1964. In delivering an oral judgment on a reference to the Federal Court in *Tan Yin Yen v PP* [1973] 2 MLJ 143, Suffian ACJ said:
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> > It is to be observed that questions of law which may be referred to us under s 66 should not be questions that are of personal interest only to the accused or the public prosecutor, but should be questions that are of public interest, and it seems to us better if the High Court were to exercise their discretion under s 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.
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> …

13 Section 66 was considered at greater length in *Ragunathan v PR* [1982] 1 MLJ 139 in which Raja Azlan Shah ALP said on pp 141 and 142:

> But it is not sufficient that the question raised is a question of law. It must be a question of law of public interest. What is public interest must surely depend on the facts and circumstances of each case. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.
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> It was urged upon us that in at least two previous cases (see *PP v D'Fonseka* [1958] MLJ 102 and *Yap Ee Kong v PP* [1981] 1 MLJ 144) the applicants had successfully obtained a reference, and that we should follow those cases and determine the questions referred to us. It was further said that the questions are of general importance upon which further argument and a decision of this court would be to the public advantage (see *Buckle v Holmes* [1926] 2 KB 125). A short answer is that the two cases referred above involved misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views. There are no views about the present case.
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> …
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> But basically, we must consistently decline to receive and answer questions which, though they may be questions of law, are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject; see s 66(6)(a) Courts of Judicature Act 1964.

14 In *Nunis v PP* [1982] 2 MLJ 114, the Federal Court refused an application and Raja Azlan Shah CJ in delivering the judgment of the court said at p 118:

> For leave to be granted, it is necessary that the question posed is a question of law raised in the course of the appeal to the High Court and is of public interest. I have in delivering the judgment of this court in *Ragunathan v PR* [1982] 1 MLJ 139 dealt with the test for determining what amounts to a question meeting the requisite factors for the purposes of s 66 of the Courts of Judicature Act, and I made it clear that if it is a mere question of principles, which in the matter before us only involve the construction of certain words in a statutory provision in their application to the facts of the case, the question would not be a question of law of public interest.

6 Mr Singh relied on the decision of Yong CJ in *PP v Bridges Christopher* [1997] 2 SLR 217 for the principles of an application under s 60(1) SCJA. That was a case in which it was the Public Prosecutor who was applying under s 60 SCJA for various questions of law to be referred to the Court of Appeal. Those principles and other cases were referred to in the later case of *Ong Beng Leong v PP (No 2)* [2005] 2 SLR 247 ("*Ong Beng Leong*") which was also a decision by Yong CJ.

7 In *Ong Beng Leong*, the applicant had been convicted of ten charges of using false documents with intent to deceive his principal, which was an offence under s 6(c) of the Prevention

of Corruption Act (Cap 241, 1993 Rev Ed). His appeal to the High Court against conviction was dismissed although his sentence was reduced from six months' imprisonment to six weeks' imprisonment. He then filed a criminal motion for his sentence to be stayed pending a possible criminal reference to the Court of Appeal under s 60(1) SCJA. Yong CJ said at [3], [5] and [6]:

> I was well aware of the fact that the present motion was not an application under s 60 of the SCJA, but was merely a request for a stay pending a possible application under s 60. However, this did not mean that the merits of the anticipated application under s 60 were irrelevant to my decision in this case. …
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> 4 …
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> 5 The principles governing an application under s 60 of the SCJA are well established: see *Abdul Salam bin Mohamed Salleh v PP (No 2)* [1990] SLR 301; affirmed in [1991] SLR 235; *Chan Hiang Leng Colin v PP* [1995] 1 SLR 687; *PP v Bridges Christopher* [1998] 1 SLR 162. Before an application under s 60 will be allowed, the following requirements must be satisfied:
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> (a) there must be a question of law;
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> (b) the question of law must be one of public interest and not of mere personal importance to the parties alone;
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> (c) the question must have arisen in the matter dealt with by the High Court in the exercise of its appellate or revisionary jurisdiction; and
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> (d) the determination of the question by the High Court must have affected the outcome of the case.
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> 6 Whether a question of law is of public interest depends on the facts and circumstances of each case. Even if the above requirements are met, the court still retains a residual discretion to refuse an application made by any party other than the Public Prosecutor. I have repeatedly stressed that the discretion under s 60 of the SCJA must be exercised sparingly. As I explained in *Ng Ai Tiong v PP* [2000] 2 SLR 358 at [10]:
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> This is to give recognition and effect to Parliament's intention for the High Court to be the final appellate court for criminal cases commenced in the subordinate courts. The importance of maintaining finality in such proceedings must not be seen to be easily compromised through the use of such a statutory device. In *Abdul Salam bin Mohamed Salleh v PP* [1990] SLR 301, 311; [1990] 3 MLJ 275, 280, Chan Sek Keong J [as he then was] had cautioned aptly that:
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> > [Section 60, SCJA] is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts.
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> Hence it is imperative that s 60 of the SCJA is utilised only in exceptional cases so as to ensure that the proper purpose of the section is not abused to serve as a form of 'backdoor appeal'.

8 From the cases, the following principles were particularly relevant to Cigar Affair's

application:

(a) A question of law does not constitute a question of public interest just because it involves the construction or interpretation of a statutory provision which is likely to apply to other members of the public.

(b) The court still retains a discretion whether to refer the question of law to the Court of Appeal even if the requirements of s 60(1) SCJA are met, except when the application is made by the Public Prosecutor.

(c) Section 60(1) SCJA is to be used sparingly in exceptional cases and must not be used as a backdoor appeal.

Question 1 – "Whether the form and procedure for bringing a matter of the Subordinate Courts for review to the High Court in the exercise of powers under Sections 266, 267 and 268 of the Criminal Procedure Code should be by way of a Criminal Petition to the High Court or by way of a Criminal Motion to the High Court?"

9 Mr Singh submitted that although Rubin J had said in *Heng Lee Handbags Co Pte Ltd v PP* [1994] 2 SLR 760 ("*Heng Lee*") that the application for review should be by way of petition and not motion, Kan Ting Chiu JC (as he then was) had allowed a motion for review in *Lance Court Furnishings Pte Ltd v PP* [1993] 3 SLR 969 ("*Lance Court*"). He further submitted that Kan JC's decision on the merits was cited with approval in *SM Summit Holdings Ltd v PP* [1997] 3 SLR 922 ("*SM Summit*").

10 However, I noted that while it was true that Kan JC had allowed the substantive motion in *Lance Court*, the mode of the application was not in dispute in that case. Accordingly, there was nothing in *Lance Court*, which was a case before *Heng Lee*, that suggested that *Heng Lee* was wrongly decided on the point of the correct mode of the application. Likewise, there was nothing in *SM Summit* that suggested that *Heng Lee* was wrongly decided on the point. Therefore, in my view, Mr Singh was wrong to say that there were contradicting judicial authorities on the point.

11 In any event, I did not make any determination as to the correct mode of the application since, even if the mode should have been by way of petition, I was prepared to hear the substantive application. Even Mr Singh had to acknowledge this and, hence, there was no determination on this point which affected the outcome of No 23.

Question 2 – "Whether it was necessary to aver to or refer to within a Complaint filed in the Subordinate Court pursuant to Section 53A of the Trade Marks Act [Cap. 332] (hereafter "TMA") the mental element under Section 49 of the TMA prior to the issuance to a Search Warrant from the Subordinate Courts as is the case under Complaints filed under Section 136 of the Copyright Act [Cap 63]?"

12 On Question 2, Mr Singh relied on *Lance Court* just as he did in No 23. He reiterated that *Lance Court* had been cited with approval in *SM Summit* but I noted that *SM Summit* did not cite *Lance Court* for the proposition that a complainant has to show that the other party knew or ought reasonably to have known of the infringement of copyright. In any event, as I said in my grounds for No 23, s 49 TMA was in different terms. If s 49 TMA were to have the same mental element as was required for s 136 of the Copyright Act (Cap 63, 1999 Rev Ed), it would not have been worded so differently. Indeed, Mr Singh had not advanced any submission based on the terms of s 49 TMA itself. He was simply adopting an interpretation based on a different provision in a different statute without more.

13 Mr Singh also submitted that there was no other prior authority on the interpretation of s 49 TMA. In my view, that was neither here nor there. If his submission were correct, it would mean that each time a provision is interpreted by the High Court for the first time in the exercise of its appellate or revisionary jurisdiction in a criminal matter, this would qualify for a reference to the Court of Appeal under s 60(1) SCJA.

14 In my view, Question 2 was not a question of law which was of public interest. Also, there was nothing exceptional about it to justify a reference to the Court of Appeal.

Question 3 – "Whether the scope of a Search Warrant issued from the Subordinate Courts pursuant to a Complaint filed in the Subordinate Court under Section 53A of the TMA should be confined or restricted to only the goods as set out and complained of as part of the "information given" under Section 53A(3)(a) of the TMA in the Complaint or also to goods upon which no information had been given?"

15 Mr Singh's argument was that only one limited edition of Cohiba cigars had been purchased by operatives during an investigation and so the search warrant should have been limited to that edition only. However, the facts showed that Cigar Affair had more than that one limited edition for sale or in its possession for the purpose of trade and the complaint was not limited to the limited edition that was purchased. This was a finding of fact by me and did not involve a question of law. Indeed, as I said in my grounds for No 23, it was not disputed that the court had the power to issue a search warrant for any general category of goods.

Question 4 – "Whether the scope of a Search Warrant issued from the Subordinate Courts pursuant to a Complaint filed in the Subordinate Court under Section 53A of the TMA should be confined or restricted to only the document(s) or class of documents as set out and complained of as part of the "information given" under Section 53A(3)(c) of the TMA in the Complaint or to any document(s) regardless of whether information as to the documents had been tendered to Court within the Complaint?"

16 In No 23, Mr Singh's argument was that documents to be seized must be confined to documents which were the subject of an offence, *ie*, they must contain the infringing mark. According to him, documents which were merely evidence of an offence could not be seized.

17 Although Question 4 appeared to be a different point from that advocated by Mr Singh in No 23, his written submission for the s 60 SCJA application demonstrated that he was making the same point as he did in No 23 and relying yet again on *Lance Court* and *SM Summit*, notwithstanding an amendment to the TMA which introduced a new s 53A TMA. I do not propose to repeat what I said in my grounds for No 23 about the new s 53A TMA. In particular, the terms of s 53A(3) were clear and Mr Singh had not and did not advance any submission based on the terms of s 53A(3) itself. He was again simply adopting an interpretation based on a different provision in a different statute, *ie*, s 62 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC").

18 Mr Singh also reiterated his reliance on *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* 33 IPR 82 ("*Mobil*") for Question 4 but *Mobil* has nothing to do with the power to seize documents which are evidence of an offence.

19 It was clear to me that Question 4 was not a question of law of public interest. Also, there was nothing exceptional about it to justify a reference to the Court of Appeal.

Question 5 – "Whether there is any mechanism or procedure in determining the scope and/or

relevancy of the documents being seized within the scope of a Search Warrant issued from the Subordinate Courts pursuant to a Complaint filed in the Subordinate Court under Section 53A(3)(c) of the TMA so as to prevent abuse and/or wrongful disclosure of confidential and/or sensitive information which is irrelevant to the subject matter of the Complaint and/or Search Warrants?"

20 I have set out in my Grounds of Decision for No 23 the concerns raised by Mr Singh regarding the seizure of documents containing sensitive information. While the concerns were legitimate, they did not persuade me to set aside the search warrant in respect of documents seized for the reasons I stated there. I also suggested there that the solicitors for the respective parties should in the first instance try and resolve problems which may arise.

21 In any event, it was obvious that s 53A(3)(c) TMA did not contain any mechanism or procedure to prevent abuse or wrongful disclosure of confidential or sensitive information. What Mr Singh was seeking was for the Court of Appeal to set out some guidelines on the exercise of a search warrant but that was not a question of law. If needs be, there may have to be some rule or regulation under the TMA or practice directions to guide solicitors and parties but that is another matter. In the first instance, common sense and a practical approach should solve many of the problems arising but, of course, where one or both sides want to be difficult, then the problems become magnified.

Question 6 – "Whether costs should be ordered against a respondent party who seeks to review the decision of the Subordinate Courts in exercise of its criminal jurisdiction pursuant to powers under Sections 266, 267 and 268 of the Criminal Procedure Code?"

22 Although Mr Singh did not dispute that s 262 CPC empowers the High Court to award costs in an application for criminal revision, he was hoping to obtain a blanket prohibition against the making of a costs order against persons who were seeking a criminal revision. That would be to curtail the court's very discretion. It seemed to me that Question 6 was not really a question of law for reference to the Court of Appeal.

Summary

23 It was clear to me that Cigar Affair's application under s 60 SCJA was nothing but a backdoor appeal against my decision in No 23. Accordingly, I dismissed it.

Application dismissed.