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CHIN CHEE WEI & ANOR v. PP

HIGH COURT MALAYA, TAIPING
MUNIANDY KANNYAPPAN JC
[CRIMINAL REVISION NO: AB-43-2-04-2020]
29 APRIL 2020

B

CRIMINAL PROCEDURE: *Revision – Sentence – Exercise of revisionary jurisdiction by High Court – Charge under Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 2) Regulations 2020 – Violation of movement control order – Sentence of three months' imprisonment –*

C

Whether substantial justice accorded to accused persons – Whether sentence harsh and severely excessive – Whether mitigating factors considered – Whether Magistrate ought to have considered alternative punishment – Whether sentence ought to be substituted with compulsory attendance order – Courts of Judicature Act 1964, s. 31 – Offenders Compulsory Attendance Act 1954, s. 5(1)

D

CRIMINAL PROCEDURE: *Sentence – Offences – Charge under Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 2) Regulations 2020 – Violation of movement control order – Sentence of three months' imprisonment – Whether substantial justice accorded to accused persons – Whether sentence harsh and severely excessive – Whether mitigating factors considered –*

E

Whether Magistrate ought to have considered alternative punishment – Whether sentence ought to be substituted with compulsory attendance order – Courts of Judicature Act 1964, s. 31 – Offenders Compulsory Attendance Act 1954, s. 5(1)

F

The two accused persons were arrested and jointly charged at the Magistrate's Court for an offence under the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 2) Regulations 2020 ('Regulations'). In effect, the Regulations prescribe a movement control order ('MCO') on its citizenry at the time when the infectious disease, Covid-19, was on the rise *via* human transmission. At the time of arrest on 2 April 2020, the accused persons were found near a fishing

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pond. Thus, they had committed an offence under reg. 11(1) for contravening reg. 3(1) of the Regulations and, on conviction, shall be liable to a fine not exceeding RM1000 or imprisonment for a term not exceeding six months or both. Both the accused persons pleaded guilty to the charge and therefore were convicted and sentenced to a period of three months' imprisonment.

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The High Court Judge, upon having his attention drawn to the case *via* media, called for the records of the case pursuant to s. 323 of the Criminal Procedure Code ('CPC'). The pivotal issue to be determined was whether the sentence meted out was proper in the circumstance of the case.

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Held (substituting sentence of three months' imprisonment with compulsory attendance order):

(1) Exercise of revisionary jurisdiction by this court was not a matter of right for the accused persons but a privilege which is anchored on an occurrence of substantial miscarriage of justice and nothing less. The categories of cases for a trigger of revisionary jurisdiction by the High Court is not closed nor exhaustive. The key consideration is whether substantial justice was accorded to the accused persons and whether the sentence meted out should be interfered with, in the interest of justice. (paras 8 & 17)

(2) Section 31 of the Courts of Judicature Act 1964 ('CJA') enables a trigger of revisionary jurisdiction over the subordinate criminal court in order to decide whether the sentence meted out was proper in the time period of MCO imposed pursuant to the Regulations read together with Prevention and Control of Infectious Diseases Act 1988. The sentence meted out has to reflect both specific and general deterrence. The aim of deterrent sentence is to punish the accused persons so that they will repent and will not re-offend and also, to deter future offenders. It shall also have the attributes of an effective administration of criminal justice, anchored on well-settled judicial principles. (paras 10 & 11)

(3) Although the mitigating factors advanced by the accused persons were amply considered, the Magistrate ought to have taken into account other forms of alternative punishments available pursuant to the law which would be befitting the crime committed by the accused. Their plea in mitigation, in the main, was that the act of fishing was in order to place food on the table for the family. It was so, as they were daily wage earners who were unable to go out to work in order to earn and feed their respective families. However, their plea in mitigation was outweighed by public interest which demanded that they be indoors so as to comply with the MCO. The Regulations which catered for a penal consequence in a case of breach had to be viewed in its context and period of time in which it was made, when the spread of the deadly infectious disease, Covid-19, was looming locally and also globally. Hence, the intent and purport of the Regulations has to be accorded the treatment it deserves and any breach of it has to be viewed seriously. (paras 15 & 20-22)

(4) Taking into consideration the nature of the breach, the prevailing plea in mitigation advanced by the accused persons as well as public interest, this court, in the exercise of its revisionary jurisdiction, found the three months' term of incarceration harsh and severely excessive. Within that orbit, and pursuant to ss. 31 and 35 of the CJA, read together with

A s. 325(1) and s. 316(b)(ii) of the CPC, the sentence was altered from three months' imprisonment for both the accused persons to an alternative punishment of a compulsory attendance order under s. 5(1) of the Offenders Compulsory Attendance Act 1954, requiring both the accused persons to attend daily at the Perak Compulsory Attendance B Centre and to undertake compulsory work for a period of three months for four hours each day. To ensure compliance with the Order, both the accused persons were to enter into a bond with one surety for an amount of RM500. (para 25)

(5) *Albeit*, violation of the MCO by the accused persons was the worst act C of indiscipline at this prevailing period of time coupled with the act of defiance on their part, it was also unfathomable for the accused persons, as violators, to remain in an overcrowded prison, where social distancing was near to an impossibility. The prison doors should remain closed shut behind for only prisoners who have committed heinous D crime. Under the current circumstances, the public had no greater interest than that the accused persons, being violators of the MCO, be 'quarantined' at home pending compliance with the compulsory attendance order. Pending the compliance with the Order, both the accused persons were ordered to report to Ibu Pejabat Daerah (IPD) Sungai Siput Utara Police Station, once a week, every Monday. E (paras 27 & 31)

(6) In view of the seriousness of the violation committed by the accused persons at this prevailing time period, an order of binding over under s. 294 of the CPC, read with s. 294A of the same, was inappropriate. F Further, considering the plea in mitigation, a sentence of fine was also inappropriate. If a sentence of fine was imposed, it would not be paid and the court would have no alternative but to impose a period of default term of imprisonment pursuant to s. 283(1)(c) of the CPC and, invariably, the accused persons would have to face incarceration. G (paras 28 & 29)

Case(s) referred to:

Lee Yu Fah & Ors v. PP]1937] 1 LNS 31 HC ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Nasrullah & Ors v. Emperor AIR (1928) All 287 ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
H *PP v. Kulasingam [1974] 1 LNS 118 HC* ***(refd)***
R v. Sargeant (1974) 60 Cr App R 74 ***(refd)***

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Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35(1)
Criminal Procedure Code, ss. 31, 173(a), (b), 283(1)(c), 294, 294A, 307(1), 316(b)(ii), 323, 325(1)
Federal Constitution, art. 5(1)
Offenders Compulsory Attendance Act 1954, ss. 5(1), (4), 6, 8
Prevention and Control of Infectious Diseases Act 1988, s. 11(2), First Schedule
Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 2) Regulations 2020, regs. 3(1), (2), 11(1)

For the applicants - Balakrishna Balaravi Pillai, National Legal Aid Foundation
For the respondent - Mohd Azrul Faidz Abdul Razak, DPP

[Editor's note: Appeal from Magistrate's Court; Case No: AF83-38-04-2020]

Reported by S Barathi

JUDGMENT

Muniandy Kannyappan JC:

[1] This matter originated at the Magistrate's Court at Sungai Siput. There were two accused persons. They were arrested and jointly charged for an offence under the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 2) Regulations 2020 (PU(A) 109/2020). The regulations are made pursuant to s. 11(2) of the Prevention and Control of Infectious Diseases Act 1988 (Act 342).

[2] They offended reg. 3(1) of the said regulations by moving from one place to another place within an infected local area for a purpose which is not provided for in reg. 3(2). In effect, the regulations prescribe a movement control order (MCO) on its citizenry at this time when the infectious disease, Covid-19 is on the rise *via* human transmission. At time of arrest on 2 April 2020, the accused persons were found near a fishing pond at Kawasan Kolam Ikan Rimba Panjang, 31100 Sungai Siput (U), Perak. Both of them were on a motorcycle type Honda EX5 No. AFK 2777 (see exh. P5 A-B) carrying fishing rods (see exh. P6 A-C).

[3] Thus, they have committed an offence under reg. 11(1) for contravening reg. 3(1), on conviction shall be liable to a fine not exceeding RM1,000 or to imprisonment for a term not exceeding six months or to both.

[4] It is emphasised that pursuant to the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 (PU (A) 87/2020), the Minister of Health after being satisfied that all States and Federal Territories in Malaysia are threatened with an epidemic of an infectious disease namely Covid-19, a life-threatening microbial infection as specified in Part I of the First Schedule to Act 342, declares the State of Perak to be an infected area, effective for the period from 18 March 2020 to

31 March 2020. The said order is extended for the period from 1 April 2020 to 14 April 2020 *vide* Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) Order 2020 (PU (A) 98/2020).

[5] Both the accused persons, pleaded guilty to the charge. They were found guilty, convicted and sentenced to a period of six months' imprisonment.

[6] I had intimated to the Deputy Registrar of this court to call for the records of the Sungai Siput Magistrate's Court with regard to matter pursuant to s. 323 of the Criminal Procedure Code (Act 593; CPC). It is within my power to do so as my attention was drawn to the case, *via* media.

[7] Simultaneously, counsel for accused too, has applied to this court for a perusal of the record of proceedings of the Sungai Siput Magistrate's Court to see if this court could revise the sentence meted out against the accused persons. The fact of the matter is, the case is brought to my attention, pursuant to s. 323 of the CPC.

[8] Exercise of revisionary jurisdiction by this court is not a matter of right for the accused persons but a privilege which is anchored on an occurrence of substantial miscarriage of justice and nothing less. The strictures are found in ss. 31 and 35 of the Courts of Judicature Act 1964 (CJA; Act 91) which has to be read together with ss. 323 and 325 of the CPC. (see *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69; *Nasrullah & Ors v. Emperor AIR* (1928) All 287).

[9] Is there any which is apparent on the face of the record? The sentence passed is correct, it is legal as it is in accordance with law pursuant to reg. 11(1) of the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 2) Regulations 2020 (PU(A) 109/2020), the proceedings has been regular as there has been total compliance with s. 173(a) and (b) of the CPC which feature the duo's plea of guilty and its consequent conviction and sentence.

[10] The pivotal issue is, is the sentence meted out proper in the circumstance of the case? The sentence passed may border on harshness or in the language of the CPC, of excessive severity, (see s. 307(1) of the CPC) which plainly befits an appellate intervention. But the rigors of an appeal could be time demanding as there is a process which has to be adhered to, by which time the sentence meted may turn academic as the accused persons would have completed serving the sentence of imprisonment passed. This is where s. 31 of the CJA enables a trigger of revisionary jurisdiction over the subordinate criminal court to see if the sentence meted out is proper in this time period of MCO imposed pursuant to the regulations read together with Act 342.

[11] The sentence meted out has to reflect both specific and general deterrence. The aim of deterrence is to punish the accused persons so that they repent and will not reoffend and that future offenders will be deterred by seeing the punishment meted out on these accused persons. It shall also have the attributes of an effective administration of criminal justice, anchored on well-settled judicial principles. (see the case of *PP v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315). It cannot be a mere tap on the wrist. It has to reflect seriousness of the offence. The case of *R v. Sargeant* (1974) 60 Cr App R 74, *albeit* persuasive, is testimony to the fact that, the courts do not have to reflect public opinion but on the other hand, must not disregard it and its main duty is to lead public opinion.

[12] The aim of the regulations is to promote public good as the rakyat is prostrating before the State and its machinery to alleviate the looming pandemic of Covid-19. Thus the conduct of its people has to be befitting and not to act in defiance to the State who is responsibly enforcing MCO *via* its law enforcement mechanism.

[13] It is not a case of whether the law enforcement official has acted right or not right when dealing with the duo but it is the responsibility of the duo to respect and abide by the advice of the law enforcement officer at the material time to go back home and not to continue fishing at the pond.

[14] It is apparent on the face of the record that the law enforcement officials have not acted in excess of their powers or have abused it but as part of policing, they have gracefully tendered their friendly advice to the duo. If they have heeded to the advice and moved away from the fishing pond to home, they would not have succumbed to the arms of the law. Defiance is least expected from the people including the accused persons, for whom the State wishes to do good at this critical time and period.

[15] Has the Magistrate accorded ample consideration to the mitigating factors advanced by the accused through their counsel? Yes, but in the premise, the Magistrate ought to have taken into account other form of alternative punishments available pursuant to the law which would be befitting the crime committed by the accused.

[16] The alternative punishments are, a binding over under s. 294 of the CPC or a compulsory attendance order under Offenders Compulsory Attendance Act 1954 (Act 461). These could be clustered as non-custodial options of sentencing, which is available in our system of administration of criminal justice.

[17] In this regard, it is iterated that the categories of cases for a trigger of revisionary jurisdiction by the High Court are not closed nor exhaustive. The key consideration is always, is substantial justice done to the accused persons with the sentence meted out on them by the Magistrate's Court and whether it should be interfered with in the interest of justice. (See s. 35(1) of the CJA as well as the case of *PP v. Kulasingam* [1974] 1 LNS 118; [1974] 2 MLJ 26).

[18] At this time of MCO and enhanced MCO at designated places, parties including the accused persons, are accorded immediate access to justice *vide* open court hearing to ventilate their grievance on the sentence meted out by the Magistrate's Court at Sungai Siput, which coincides with enforcement of substantial justice. This is consonant with the fundamental liberty enshrined in art. 5(1) of the Federal Constitution, guaranteeing liberty of the accused person from transgression of their rights. A right delayed is right denied. Hence, the timely issuance of the Practice Direction by the Chief Registrar of the Federal Court on 6 April 2020 with the sanction of the Chief Judge of Malaya and Chief Judge of Sabah and Sarawak for a speedy fixing and disposal of applications for criminal revision of this nature.

[19] Easing back into the salient facts of the case involving the accused persons, which are:

(i) They were caught going to fish at the fishing pond.

(ii) They were told to go back home in view of the MCO.

(iii) They had refused to do so.

(iv) The accused persons were aware that they cannot be out in the open at the fishing pond, in view of the MCO.

(v) They are unable to pay a fine if imposed by the court, as they cannot afford, thus willing to be imprisoned, if sentenced by the court.

[20] Their plea in mitigation in the main, is that the act of fishing is in order to place food on table for the family. It is so, as they were unable to go out to work in order to earn and feed their respective families. They are daily wage earners who do house repairs.

[21] The plea in mitigation advanced by both the accused is outweighed by public interest which demands that the duo have to be indoors so as to comply with the MCO.

[22] The regulations which cater for a penal consequence in case of breach has to be viewed in its context and the period of time in which it is made, when the spread of the deadly infectious disease, Covid-19 *via* coronavirus is looming locally. Globally, it has been ascribed to be a pandemic by the World Health Organization (WHO). Hence, the intent and purport of the regulations have to be accorded the treatment it deserves and any breach of it has to be viewed seriously.

[23] When our rakyat and the populace globally is in a state of mental anguish, it is least expected from our people including the accused persons, not to respect the dictates of the State *via* its law enforcement machinery to abide and adhere to the MCO imposed.

[24] The police officers were civil when they requested the duo to respect the MCO and leave the fishing pond and to go back home and stay there safely. But there has been total defiance on the duo's part. They were recalcitrant, by remaining *in situ*, till they have to face the consequence of an arrest forthwith due entirely to their fault.

[25] But for breach of the regulations and the MCO, do they deserve a three months' term of incarceration? This court in its exercise of its revisionary jurisdiction finds it harsh and severely excessive, after taking into consideration, the nature of the breach, the prevailing plea in mitigation advanced by the accused persons as well as public interest that needs to be protected. Within that orbit, and pursuant to ss. 31 and 35 of the CJA, read together with s. 325(1) of the CPC and s. 316(b)(ii) of the CPC, this court takes the position to alter the nature of the sentence from that of three months' imprisonment meted out on both the accused persons to an alternative punishment in the form of a compulsory attendance order under s. 5(1) of Act 461, requiring both the accused persons to attend daily at Perak Compulsory Attendance Centre and to undertake compulsory work for a period of three months for four hours each day. To ensure compliance with the order, both the accused persons are to enter into a bond with one surety for an amount of RM500.

[26] By ordering so, this court views that a balance is struck between public interest which the regulations intend to preserve and protect and the interest of the accused persons. In the current environment with the MCO, public interest for public good ultimately prevails. The accused persons are expected to be more responsible in adhering to the rules set by the State at this period of time. A compulsory attendance order to carry out compulsory work would best meet the interest of justice as well as to cater to the accused persons to be more responsible and law-abiding citizens. It is to the best advantage of the offenders and the society, as it augurs well for the rehabilitation of the accused persons through reintegration with the community at large, a pathway to restorative justice. The order is made after according appropriate consideration to the character of the offenders, nature and seriousness of the breach committed by them and all other circumstances of the case, including their plea in mitigation. Foremost is public interest, which varies according to time, place and circumstances of each case. What is public interest now, is flattening of the curve of transmission of the deadly infectious disease, Covid-19, and for our people to abide and adhere to the MCO by staying at home safely and to observe hygiene.

[27] In sum total, this court finds it inexpedient for the accused persons to continue to suffer imprisonment. As of date of this decision on 8 April 2020, they have been incarcerated for about six days, from the date of arrest on 2 April 2020. *Albeit*, violation of the MCO by the accused persons, is the worst act of indiscipline, at this prevailing period of time, coupled with the

act of defiance on their part, which the public in general cannot fathom, it is also unfathomable, for the accused persons as violators to remain in an overcrowded prison, where social distancing is near to an impossibility. The prison doors shall remain closed shut behind for only prisoners who have committed heinous crime. Under current circumstances, the public has no greater interest than that the accused persons who are violators of the MCO be "quarantined" at home pending compliance with the compulsory attendance order imposed. I am informed by the Deputy Registrar of this court that their first task at hand as compulsory work would be to clean their own home, which befits the prevailing period, as cleanliness is order of the day.

[28] In view of the seriousness of the violation committed by the accused persons, at this prevailing time period, as alluded to above, an order of binding over under s. 294 of the CPC read with s. 294A of the CPC is inappropriate. The violations are not minor or trivial infraction of the law for such an order to be processed by this court. Binding over is also not justified in view of the violations committed by the accused persons as they would be free from any restraints, thus no lesson learnt as a result of their offending.

[29] A sentence of fine is also inappropriate. It is not because of the admission by the accused persons that they are unable to pay if imposed. The consideration is the condition in which the accused persons are in, being daily wage earners, who are not gainfully employed during the period of MCO. Considering their plea in mitigation, they cannot even afford to put food on the table for their respective families to feast, what more to pay a fine, if imposed. Even if the court were to impose a sentence of fine, as it would not be paid, the court has no alternative but to impose a period of default term of imprisonment pursuant to s. 283(1)(c) of the CPC. Thus, invariably, they have to face incarceration. Principally, poverty is one of the factors which should be considered when the court imposes a sentence of fine. (see the case of *Lee Yu Fah & Ors v. PP* [1937] 1 LNS 31; [1937] MLJ 179).

[30] In the premise, it would be appropriate for subordinate court judges to be mindful of all available sentencing options available in our penal system of justice, so as to afford an accused person justice in all sense of its attributes, as otherwise it would be a right denied under the law.

[31] In view of the MCO, until attendance for the period of time and duration ordered, at Perak Compulsory Attendance Centre, both the accused persons are also ordered to report to Ibu Pejabat Daerah, (IPD) Sungai Siput Utara Police Station, once a week, every Monday.

[32] Section 5(4) of Act 461 is also complied with whereby, the accused persons have been duly informed by the Deputy Registrar of this court, on the content and effect of the compulsory attendance order made and the consequence of failure if they were not to comply with it, as provided under ss. 6 and 8 of Act 461. Both the accused persons have expressed their willingness to comply with the requirements of the order made by this court. Sentence of three months' imprisonment altered to an order of compulsory attendance order under s. 5(1) of Offenders Compulsory Attendance Act 1954 (Act 461).

Postscript

After having heard the application for criminal revision, I adjourned the matter for decision to the afternoon on 8 April 2020. Then I delivered an *ex tempore* broad grounds of judgment. The above judgment is similar in its substance and content to the broad grounds of judgment, save for citation of legal provisions as well as reference to case authorities, and with amplification, where appropriate and necessary. There is a typographical error in the broad grounds of judgment, with no prejudice meant to both the prosecution and accused persons, on the regulations which have been breached, which is PU(A) 109/2020, now correctly stated in this judgment.