Shamim Reza bin Abdul Samad v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–6 OF 2009(B)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND GOPAL SRI RAM FCJJ
15 SEPTEMBER 2009

Constitutional Law — Fundamental liberties — Right to fair hearing — Right to be represented by competent counsel — Whether conviction in criminal trial could be quashed on grounds of incompetence of counsel

Criminal Law — Penal Code — s 300 — Murder — Appeal against conviction and sentence — Whether conviction could be quashed on grounds of incompetence of counsel in conduct of defence

Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Whether conviction could be quashed on grounds of incompetence of counsel in conduct of defence

The appellant was charged for the murder of one Zuriyati Othman ('the deceased'). PW10 testified that at the time of the incident, she heard the deceased cry from her room which was locked from inside. PW10 opened the door using a spare key and found only the deceased and the appellant inside the room. The deceased had been stabbed. The appellant claimed that it was some third person who had stabbed the deceased and caused her death. This defence was never put to the prosecution witnesses and the trial judge rejected it as an afterthought. The appellant was convicted and he appealed to the Court of Appeal claiming that he had not had a fair trial by reason of the incompetence of counsel assigned to conduct the defence. In particular, it was submitted that the defence of a third person having been the assailant was not suggested to PW10. The issues arising for determination was whether the incompetence of counsel is a legitimate ground upon which an appellate court may intervene to set aside a conviction.

Held, dismissing the appeal:

(1) The right to a fair trial is a constitutionally guaranteed right. The right to be represented by competent counsel forms part of the right to a fair trial (see paras 3–4).

(2) The incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. The appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments (see para 6).

(3) The evidence made it clear that no person other than the appellant was in the room at the material time. The room was locked from within. The possibility of a third person having entered the room was, on the facts, so far-fetched that a reasonable tribunal of fact would have rejected it as creating no reasonable doubt in its mind. Accordingly, the fact that the trial judge excluded that line of defence, occasioned no miscarriage of justice. This was not an extreme case of incompetence on the part of counsel (see paras 7–8).

[Bahasa Malaysia summary

Perayu dituduh dengan pembunuhan Zuriyati Othman ('si mati'). PW10 memberi keterangan bahawa pada masa kemalangan, dia terdengar teriakan si mati dari biliknya yang dikunci dari dalam. PW10 telah membuka pintu menggunakan kunci pendua dan hanya menjumpai si mati dan perayu dalam bilik tersebut. Si mati telah ditikam. Perayu mendakwa bahawa orang ketiga yang telah menikam si mati dan menyebabkan kematiannya. Pembelaan ini tidak pernah diketengahkan kepada saksi-saksi pendakwaan dan hakim bicara menolaknya sebagai sesuatu yang difikirkan kemudian. Perayu disabitkan dan dia merayu ke Mahkamah Rayuan mendakwa bahawa dia tidak diberikan perbicaraan yang adil disebabkan ketidakcekapan peguam yang ditugaskan melaksanakan pembelaan. Secara terperincinya, dihujahkan bahawa pembelaan orang ketiga sebagai penyerang tidak dicadangkan kepada PW10. Isu-isu yang berbangkit untuk ditentukan ialah sama ada ketidakcekapan peguam merupakan dasar sah untuk mahkamah rayuan mengenepikan sabitan.

Diputuskan, menolak rayuan:

(1) Hak untuk perbicaraan yang adil merupakan hak yang dijamin oleh Perlembagaan. Hak untuk diwakili peguam yang cekap adalah sebahagian daripada hak untuk mendapat perbicaraan yang adil (lihat perenggan 3–4).

(2) Ketidakcekapan peguam dalam mengendalikan pembelaan dalam perbicaraan jenayah merupakan asas di mana sabitan boleh dibatalkan dengan syarat bahawa: (i) ketidakcekapan tersebut mestilah amat jelas dalam keadaan kes ini; dan (ii) ketidakcekapan tersebut menafikan tertuduh perbicaraan yang adil dan mengakibatkan salah laksana

keadilan. Apa-apa yang kurang tidak mencukupi. Mahkamah rayuan mestilah mengambilkira tindak-tanduk peguam secara keseluruhannya dan bukan hanya pada kegagalannya dalam satu atau dua bahagian (lihat perenggan 6).

(3) Keterangan jelas menunjukkan bahawa tidak orang lain selain perayu yang berada dalam bilik itu pada masa yang material. Bilik itu dikunci dari dalam. Kemungkinan pihak ketiga memasuki bilik tersebut, atas fakta-faktanya, sangatlah tidak masuk akal sehinggakan tribunal fakta yang waras akan menyangkal kemungkinan tersebut kerana tidak membangkitkan keraguan yang munasabah. Maka, fakta bahawa hakim bicara tidak memasukkan pembelaan tersebut, tidak mengakibatkan salah laksana keadilan. Tiada ketidakcekapan melampau di pihak peguam (lihat perenggan 7–8).]

Notes

For a case on appeal againts conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 176.

For a case on right to fair hearing, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2217.

For cases on s 300 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1474–1497.

Cases referred to

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, FC (folld)

Chong Ching Yuen v The Hong Kong Special Administrative Region [2004] HKCFA 16 (folld)

Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)

PP v Choo Chuan Wang [1992] 2 CLJ 1242, HC (refd)

R v Birks (1990) 48 A Crim R 385 (folld)

Sankar v The State [1994] UKPC 1, PC (refd)

Wong Lai Fatt v PP [1973] 2 MLJ 31, FC (refd)

Legislation referred to

Federal Constitution art 5(1)

Appeal from: Criminal Appeal No B-05–71 of 2007 (Court of Appeal, Putrajaya)

N Sivananthan (Tina Ong with him) (Sivananthan) for the appellant.
Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] The appellant was convicted by the High Court of the offence of murder and sentenced to death. His appeal to the Court of Appeal was dismissed. He has now appealed to us.

[2] The substance of the prosecution's case is that the appellant murdered one Zuriyati Othman ('the deceased') on 9 August 2002 between 11am and 12 noon. The offence is said to have taken place at No 101, Blok A, Kolej Kediaman Meranti, UiTM, Seksyen 2, Shah Alam, in the district of Petaling, Selangor Darul Ehsan. The evidence led in support of this case is as follows. The appellant and the deceased had had a relationship which became estranged. On the day in question, the appellant called at the deceased's flat. Later, the deceased's sister (PW10) heard a cry from the deceased. It came from the deceased's room. PW10 could not enter the room as it was locked from inside. She looked for the spare key, found it, opened the door and entered the room. She found only two persons there: the deceased and the appellant. The deceased was lying on her bed. She had been stabbed several times. She succumbed to her wounds. The appellant had also injuries. A large knife (referred to as 'a Rambo knife') was found in the room. It was identified as the probable weapon used to inflict the wounds upon the deceased. Based on these pieces of evidence the prosecution argued that it was the appellant who stabbed the deceased and that he did so with the intention of causing her death. The appellant's case before the High Court was that it was some third person who had stabbed the deceased and caused her death. This defence was never put to the prosecution witnesses. The trial judge rejected it as an afterthought. Before the Court of Appeal and before us, the appellant advanced the argument that he had not had a fair trial by reason of the incompetence of counsel assigned to conduct the defence. Questions essential to present the defence to the prosecution were never put to the latter's witnesses. In particular, the defence of a third person having been the assailant was not suggested to PW10. There had simply been no attempt to conduct a searching cross examination of the main prosecution witnesses. All this when taken together demonstrates that counsel who conducted the defence was incompetent in consequence of which the appellant had been deprived of his right to a fair trial. So much for the submissions.

[3] In our view, the argument advanced by the appellant gives rise to two separate issues. First, whether the incompetence of counsel is a legitimate ground upon which an appellate court may intervene to set aside a conviction. Second, if the first question is resolved affirmatively, then, whether the present appeal is one in which such intervention is warranted. Take the first point. The starting point for this is art 5(1) of the Federal Constitution which guarantees

that neither life nor personal liberty may be deprived save in accordance with law. In accordance with the principles of interpretation discussed and accepted by this Court in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, the expressions 'life' and 'personal liberty' must be interpreted generously and given a wide meaning. In *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, this court held that the fundamental liberties expressed in the Constitution must be read in a prismatic fashion to discover the rights submerged in the wider concepts expressly guaranteed. This court also affirmed as accurate the following statement of the law by Edgar Joseph Jr J (as he then was) in *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia CJ in *Madheshwardhari Singh v The State* (*Madheshwardhari Singh and Anor v State of Bihar* AIR 1986 (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

We therefore accept that the right to a fair trial is a constitutionally guaranteed right.

[4] The question that now arises is whether the right to be represented by competent counsel forms part of the right to a fair trial. The authorities appear to provide an affirmative answer to that question. We do not find it necessary, as a starting point, to traverse beyond the judgment of Lord Woolf in *Sankar v The State* [1994] UKPC 1, where he put the test as follows:

> In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice.

[5] What is an 'extreme situation' must depend on the facts of each case. The authorities appear to envisage a case where there has been a flagrant or gross incompetence on the part of counsel as to deprive an accused of a fair trial. In our view the leading case on the subject is *Chong Ching Yuen v The Hong Kong Special Administrative Region* [2004] HKCFA 16. It is a decision of the Court of Final Appeal of Hong Kong, a court whose views are entitled to be treated with great respect. There, Bokhary PJ, reviewed several leading cases on the subject, including the decision of the New South Wales Court of Criminal Appeal in *R v Birks* (1990) 48 A Crim R 385, where Gleeson CJ (later CJ of the High Court) formulated the following propositions which we consider to be good law:

> The relevant principles may be summarised as follows:
>
> (1) A Court of Criminal Appeal has a power and a duty to intervene in the case of

a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.

(2) As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

(3) However, there, may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

Bokhary PJ then said:

> An appellate court cannot shut its eyes to the unsafe or unsatisfactory state of a person's conviction just because that state was caused or contributed to by his counsel's incompetence. Nor can an appellate court shut its eyes to an error of law against a person just because that error was caused or contributed to by his counsel's incompetence. But it should be clearly understood that appellate courts will approach those situations with a sense of realism, and not in such a way as would put a premium on briefing incompetent defence counsel at trial and then criticising them on appeal in the event of a conviction. As Cooke J (now Lord Cooke of Thorndon) said (at p 114) in the course of delivering the judgment of the Court of Appeal of New Zealand in *R v Pointon* [1985] 1 NZLR 109, it is necessary 'to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel'.

[6] That, then, is the state of the authorities. In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation. As the Federal Court said in *Wong Lai Fatt v Public Prosecutor* [1973] 2 MLJ 31:

The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd and others* [1969] 2 QB 158 at p 166:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.

[7] That brings us to the facts of the present case. The real complaint here is focussed upon the point that the deceased was killed by some person other than the appellant. It was submitted for the appellant that the failure to put this to the witnesses for the prosecution was flagrant incompetence because it resulted in the trial judge declining to consider that line of defence altogether. With respect we cannot agree. The evidence makes it clear that no person other than the appellant was in the room at the material time. The room was locked from within. This necessitated PW10 to look for the spare key. When she entered, the only person in the room other than the deceased was the appellant himself. The possibility of a third person having entered the room is, on the facts, so far-fetched that a reasonable tribunal of fact would have rejected it as creating no reasonable doubt in its mind. Accordingly, the fact that the trial judge excluded that line of defence has occasioned no miscarriage of justice on the facts of this case.

[8] Having regard to what we have said, we are satisfied that this is not an extreme case of incompetence on the part of counsel. Equally, we are satisfied that this is a case in which the appellant having been properly and deservedly convicted has sought to suggest flagrant incompetence on the part of counsel. Before concluding we must say that the trial could perhaps have been conducted with greater competence than that displayed by counsel who appeared for the appellant at his trial. But there was, on the material provided to us, no flagrant incompetence. In any event, no miscarriage of justice has been occasioned. The appeal is therefore dismissed. The conviction and sentence are affirmed.

Appeal dismissed.

Reported by Kanesh Sundrum