

Re Seed Nigel John QC
[2003] SGHC 177

Case Number : OM 20/2003
Decision Date : 21 August 2003
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Peter Cuthbert Low and Khoo Guan Chuan (Peter Low, Tang & Belinda Ang) for the applicant; Anandan Bala and Kwek Lou Winn (Attorney-General's Chambers) for the Attorney-General and the Public Prosecutor;; Laurence Goh Eng Yau (Laurence Goh Eng Yau & Co) for the Law Society of Singapore
Parties : —

Constitutional Law – Fundamental liberties – Freedom of religion – Articles 15(1) and 15(3) of the Constitution of the Republic of Singapore (1999 Rev Ed)

Constitutional Law – Fundamental liberties – Right to life and personal liberty – Accused person's right to be defended by legal practitioner of choice – Whether art 9(3) of the Constitution of the Republic of Singapore (1999 Rev Ed) renders s 21 of the Legal Profession Act (Cap 161, 2001 Rev Ed) a mere formality

Legal Profession – Admission – Ad hoc – Queen's Counsel to act as defence counsel in criminal case – Whether factual issues in case sufficiently complex – Whether "special reason" exists for admission of Queen's Counsel – Whether existence of canon law issues necessitates admission of Queen's Counsel – Whether requirements of s 21 of the Legal Profession Act (Cap 161, 2001 Rev Ed) satisfied

1 This Originating Motion seeks the admission of Mr Nigel John Seed Queen's Counsel ("QC") as an advocate and solicitor of the Supreme Court of Singapore for the purpose of appearing as leading Counsel for the accused in PP v Joachim Kang Hock Chai.

The Case for the Applicant and for the Accused

2 The accused, Father Joachim Kang, is a Roman Catholic priest ordained in 1974. There are two main classifications of Roman Catholic priests – the diocesan or secular and the religious. Father Joachim Kang belongs to the class of diocesan or secular priests. Both classes of priests have the same powers. A major difference between the two classes is that secular priests are not required to take the vow of poverty.

3. Father Joachim Kang was appointed the parish priest of the Church of St. Teresa (with a congregation of around 2000) from 1989 until February 2002. He was then appointed the parish priest of the Church of the Holy Trinity (which has a congregation of some 8000).

4. The 54 year old priest has been charged with 19 counts under section 409 Penal Code (criminal breach of trust of funds belonging to the Church of St. Teresa in his capacity as an agent of the Titular Roman Catholic Archbishop of Singapore). The 19 charges cover the period from 1994 to 2002 and involve a total of about \$5.1 million. The priest denies the charges and the trial in the Subordinate Courts is scheduled to begin on 22 September 2003.

5. It was argued that the criminal case was particularly difficult and complex as it involved complicated transactions over a substantial period of time. The amounts in issue were large and were received and dealt with in different ways. Accounting for and tracing them would therefore be a complicated exercise. There were also voluminous documents on the purchase and lease of two properties in Singapore, four in Malaysia and two in the United Kingdom, on numerous transactions in respect of four bank accounts in Singapore, four in Malaysia and one in the United Kingdom, on

investments in unit trusts in Singapore and Malaysia and on Father Joachim Kang's shareholding in many Singapore and Malaysian companies (many of which were given to him by his mother a long time ago). In addition, there were documents pertaining to the bank accounts of the Church of St. Teresa, the construction works and the income and expenditure of the church, its accounting records and the renovation of the family home of the priest.

6. The facts of the criminal trial would concern the decade-long relationship between the priest/confessor cum spiritual director and his parishioner/penitent (one Emily Chan) who gave large sums of money and substantial shares to him, to other Roman Catholic churches in Singapore and overseas and to various educational institutions recommended by the priest. In one of the statements made to the investigators, the priest said he invested Emily Chan's donations in two properties and some unit trusts leaving the rest of the money in his bank accounts to earn interest. He was entrusted with the donations to manage for the benefit of the archdiocese in Singapore. In two other such statements, he told the investigators that he believed he gave church funds to other churches and charities in response to their requests for donations. He also stated that he purchased two computers for two church helpers and paid an honorarium to another. He believed his actions were authorised under the Canon Law of the Roman Catholic Church.

7. The criminal trial was said to be unique because of the ecclesiastical dimension. Father Joachim Kang had to abide by the Code of Canon Law 1983 promulgated by the Vatican (replacing the Code of 1917). The priest's duties were almost exclusively spiritual and his duties and activities were dictated not by contract but by conscience. His integrity was his life blood and it was this very integrity that would be called in question at the trial.

8. As the parish priest, he had authority, power, control and management in respect of the income and expenditure of the parish church. The income (from whatever source) was deposited into the church's two bank accounts. Money was drawn from these two accounts for the church's expenditure.

9. The criminal case would involve an "in-depth consideration of the financial duties, responsibilities and authority of a Roman Catholic parish priest as well as his, and the parish's, relationship to the Archbishop/Diocese and the accounting procedures of individual parishes and the Roman Catholic Church in Singapore as a whole". This study would require an understanding of the Code of Canon Law 1983 and how it was interpreted and applied in Singapore and elsewhere as well as knowledge of ecclesiastical practice. The priest's defence lawyer would need to have this understanding and knowledge in order to question witnesses properly and to advance the case for the defence.

10. Novel and difficult issues of fact and of law would arise in the trial and there was no local case law or legal treatise on such matters. This was the first time a Roman Catholic priest was charged for criminal breach of trust in Singapore, Malaysia and the United Kingdom and the first time that the courts would be asked to consider the interplay of secular law and Canon law. No local counsel was capable of handling the Canon law dimension of the case.

11. The prosecution would be calling an expert on Canon law and 52 other persons as witnesses. The priest may call 12 witnesses and a foreign expert on Canon law. The trial was estimated to last at least six weeks. The issues to be raised included the questions whether the priest was an agent of the Titular Roman Catholic Archbishop of Singapore as alleged in the charges and who the legal and beneficial owner of the income of the Church of St. Teresa was under Canon law and/or under secular law. The trial court would also have to consider whether the priest had the right to acquire, administer and alienate donations, to deposit such donations in his personal bank account and to invest such donations in properties, unit trusts and interest-bearing deposit accounts.

12. The case would be of concern to the Roman Catholic clergy and to the estimated 300,000 Catholics who donate to the Roman Catholic Church.

Qualifications of Mr Nigel John Seed QC

13. Mr Nigel John Seed QC was called to the Bar in 1978 and was appointed QC in 2000. Before taking silk, he was involved mainly in serious criminal cases, handling serious fraud cases involving large sums of money. He was also a senior grade prosecutor.

14. Mr Nigel John Seed QC maintains a specialist ecclesiastical practice. He had numerous ecclesiastical appointments. In his ecclesiastical practice, he has appeared in many of the consistory courts of the various English dioceses and has sat in the Court of Arches, the ecclesiastical court of appeal in the Church of England. He has also undertaken work in ecclesiastical matters in the English courts of law. He is a Catholic member of the Church of England and is fully conversant with the nature of the sacraments and the practice of the Catholic faith, the Canons of the Church of England and the Codex of the Roman Catholic Church. He has also represented the Cardinal Archbishop and Archdiocese of Westminster (Roman Catholic) in the High Court and has advised various Anglican and Catholic bishops, priests and lay officials.

The Attorney General's Views

15. The prosecution in the criminal trial would be seeking to prove that Father Joachim Kang acted dishonestly when he transferred church funds to his personal bank accounts in Singapore and in Malaysia and used church funds to purchase two residential properties in Singapore, \$100,000 worth of unit trust, two computers for parishioners and to make payments to two persons. The prosecution's case would be that all these acts were carried out without the knowledge of the donor or of anyone in the Catholic Church's hierarchy and were kept a secret.

16. Most of the primary facts would not be in dispute and the main focus of the trial would be the *mens rea* of the priest. This was an issue of fact that could be gleaned from the circumstances of the case. Certain rules of the Catholic Church would be relevant but these would merely form the backdrop of the offences in question.

17. In any case, issues of Canon law would be adequately addressed by the experts to be called by both parties and it was unclear how the expert court craft and experience of the QC in ecclesiastical matters would advance the case where interpretation of the Canon law was concerned. Any issue of agency could be resolved by looking to the Roman Catholic Archbishop Act (Chapter 375), the Universal Canon Law and the Priest's Directory of 1995 (a manual produced by the Archdiocese of Singapore for its priests).

18. Where the special qualifications of the QC were concerned, there was no evidence of any previous experience in the interpretation of Canon law relating to the scope of power of parish priests and their relationship with the Archdiocese or the manner in which church funds are to be administered. Local counsel would be equally competent to present the arguments on Canon law after studying it in consultation with the expert for the defence or even with the QC himself. No evidence had been proffered on any steps taken to brief Senior Counsel on the case.

19. There was no "special reason" [section 21 (2) Legal Profession Act ("LPA")] why a QC should be admitted for this case. There were no issues of constitutional law involved. There was also no evidence that parish priests were greatly confused about the scope of their financial obligations and that clarification from the courts was therefore desirable.

The Law Society's views

20. The Law Society was of the view that the factual issues were neither difficult nor complex. The Roman Catholic Church has been in Singapore for a long time and any issue of Canon law could be easily and more effectively addressed by the expert witnesses. The QC would be of more assistance to the priest as his witness learned in Canon law rather than as his advocate.

21. The fact that the case would attract more attention than others was not a "special reason" to admit the QC.

22. The QC's credentials in civil and criminal law could not be doubted and his ecclesiastical appointments were impressive. However, his claim of having a specialist ecclesiastical practice was not substantiated.

23. Mr Peter Cuthbert Low is a very senior lawyer experienced in criminal law. He is also a Roman Catholic and conversant with the nature of the sacraments and the practice of the Catholic faith. He would be more than suitable and qualified to conduct the priest's defence.

The decision of the Court

24. *Ad hoc* admission of QC is governed by section 21(1) LPA which provides:

"21. (1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case where the court is satisfied that it is of sufficient difficulty and complexity and having regard to the circumstances of the case, admit to practise as an advocate and solicitor any person who –

(a) holds Her Majesty's Patent as Queen's Counsel;

(b) does not ordinarily reside in Singapore or Malaysia but who has come or intends to come to Singapore for the purpose of appearing in the case; and

(c) has special qualifications or experience for the purpose of the case."

This has been explained by Yong Pung How CJ in *Re Caplan Jonathan Michael QC* [1998] 1 SLR 432 (at paragraph 12 of the judgment) as having created the well known three-stage test.

25. Where criminal cases are concerned, Parliament imposed an additional requirement on 1 January 1997 in the form of section 21(2) LPA which states that "the court shall not admit a person under this section in any criminal case unless the court is satisfied that there is a special reason to do so". In introducing this new provision, the Minister for Law made the following speech in Parliament on 10 October 1996 (see columns 633 and 634 of the Singapore Parliament Report Volume 66):

"Let me turn to the admission of Queen's Counsels in criminal cases. Sir, the provision relating to the admission of Queen's Counsels was last amended in 1991 to add an additional condition for allowing them to appear in our courts. That condition is that the court must be satisfied that the case is of 'sufficient difficulty and complexity' to warrant a QC to be admitted. At that time in this House I had made it clear that the Government's policy was that QCs should only be admitted for complex and difficult cases where the necessary knowledge or experience was not available from or could not be provided by local counsel. I also stressed then that the intention was to favour the admission of QCs particularly in banking and commercial cases.

The general policy of allowing QCs to appear in our courts remains unchanged. However, there should be less need for QCs in criminal cases with the growth of the Criminal Bar in the last five years, not only in terms of numbers, but also in terms of advocacy skills, experience and expertise. Since 1991, only 10 QCs have been admitted to appear in

criminal cases in Singapore and I am told that out of the nine cases dealt with by QCs, only two cases were successful. Presently, there are 89 criminal lawyers who are designated as senior counsel and 125 criminal lawyers who are designated as junior counsel for the purposes of the Assignment List of the High Court for capital cases. There is no shortage therefore of criminal lawyers in the local Bar who have the confidence to undertake all criminal cases without having to rely on Queen's Counsels.

I should add that it is also important to note that our criminal process and criminal law are, except for basic principles, quite different from English criminal law and procedure. Our Penal Code, Criminal Procedure Code and Evidence Act are all based on Indian law and not on English criminal law and procedure and evidence. Many of our criminal statutes were enacted to meet local circumstances. Queen's Counsels, in general, are not familiar with our criminal justice system.

Eventually, we should do away with representation by Queen's Counsels in criminal cases. But this should be looked at again when we have an adequate number of Senior Counsel practising at the Criminal Bar. I am using the term 'Senior Counsel' as spelt out in the Legal Profession Act which provides for the status of Senior Counsel. The Senate of the Academy of Law, in fact, is now about to appoint such Senior Counsel."

26. In the case cited above, Yong Pung How CJ dismissed an application for the admission of QC for the purpose of appearing on behalf of an appellant who had been convicted by a District Court and who had appealed to the High Court against both conviction and sentence. The Chief Justice said [section 21(2) LPA was then section 21(1A)]:

"16. Examples of 'special reasons' are of course not confined to cases with constitutional implications. There may well be other cases where the verdict holds significant repercussions not just for the individual accused but also for the way in which an entire section of the population orders their daily lives or the conduct of their business. An example of this sort of case can be found in the case of *Re Sir Allan David Green QC* (OM 20/96). Again, the application here was actually heard before the introduction of s 21 (1A), but as with *Re How William Glen QC*, I think the facts are nevertheless instructive..... The application for admission was allowed by the judge who held that the issues raised as to the construction of the relevant statutory provisions were sufficiently difficult and complex to warrant the appearance of Queen's Counsel. The judge also felt that determination of the issues raised by the appellant 'could have far reaching implications for the legal profession of which the appellant is a member'.

17. ... I have given the above two examples in an effort to illustrate the sort of factors which may be treated by the courts as 'special reasons' under s 21(1A). The list of such factors is one which will have to be developed on a case-by-case basis, having regard to the particular circumstances of any individual case."

27. According to the Attorney General, in four other applications for the admission of QC in criminal matters heard since the introduction of section 21 (2) LPA, none has succeeded. They are Originating Motions 12 of 1997, 11 of 1998, 14 of 1998 and 7 of 2003.

28. The case against Father Joachim Kang is certainly not difficult or complex on the facts. Essentially, the issue at the trial will be, did he render to the church the things that belong to the church? The transactions in question were all documented and, as revealed in the priest's statements made to the investigators exhibited in the affidavit supporting the application and as submitted before me, would not be challenged. The defence will be attempting to show that what the priest did was permissible under Canon law or some other applicable regulation and that the transactions were for

the purposes of the church or that he made an honest mistake (where the payment in the 15th charge was concerned). Much has been written about the precepts of Canon law. Mr Peter Cuthbert Low produced two such works in court. Pointing out the relevant Canon law or some other regulation should surely pose no problem to local counsel, especially since he will have the assistance of experts. Presumably, the priest himself would also be aware of the sources of the authority that he said allowed him to do what he did.

29. In *Wayne Kaskiw v Pornbacher and others* [1997] 32 BCLR (3d) 360 (BCSC), a case concerning sexual assault by a priest and involving the issue whether the Bishop of Nelson, Corporation Sole, was vicariously liable, Quijano J in the Supreme Court of British Columbia said:

“This was a matter of more than average complexity, both in terms of the evidentiary issues and in terms of the legal issues. This is particularly so in light of the reliance by the defendant bishop on the Code of Canon Law.”

The learned judge then went on to award costs on a higher scale.

30. *Re Residential Schools* [2000] ABQB 45 concerned actions commenced by former residents of what were then called Indian residential schools for unlawful confinement and physical and sexual abuse as a result of the defendants’ negligence, breach of trust and of fiduciary duty. The defendants there included a Catholic Archdiocese and the Roman Catholic Church. The decision was in respect of an application by the Catholic Archdiocese to strike out certain claims and to strike out the Roman Catholic Church as a defendant on the ground that it was not a legal entity capable of being sued. R E Nation J in the Court of Queen’s Bench of Alberta, in ruling that the issue whether the Church was an entity capable of being sued could not be determined at that early stage of the proceedings, said:

“I am also satisfied by the argument presented that the identification of the ecclesiastical versus the legal structure of the Church is, factually and legally, an extremely complex matter.”

31. In the present case, the issue of agency alleged in the charges would involve some legal research and arguments but could be resolved by reference to all applicable provisions and this task could be undertaken quite competently by local counsel who, as in any other case involving contractual or regulatory instruments, would have familiarised himself with those provisions. He would be assisted in this task by the expert witnesses for both parties and by very senior members of the local Catholic Church called by the prosecution. In any case, it is for the prosecution to prove the agency asserted in the charges. The issue of law may be argued for the first time in our courts but it is not of such difficulty and complexity that place it beyond the ability of local counsel.

32. Passing comments were made that this case would involve Article 15 of the Constitution of the Republic of Singapore relating to freedom of religion. I see no issue in this case relating to the right of the priest to profess, practise and propagate his religion [Article 15(1)] and neither is there any challenge to the right of the Catholic Church to manage its own religious affairs, to establish and maintain institutions for religious or charitable purposes and to acquire and own property and hold and administer it in accordance with law [Article 15(3)].

33. The circumstances of the case must show a “special reason” for admission. I accept that the criminal trial will probably attract more than a fair bit of attention among the Catholic clergy and laity as well as non-Catholics locally and probably outside Singapore as well. It is also true that the integrity of the priest will be tested publicly. However, these factors by themselves do not persuade me that the circumstances of the case warrant the admission of QC. There are many competent local lawyers, whether Catholic or not, who would be able to give the case the serious attention it deserves. These factors fall short of being “special reasons” for admission. There is also no evidence

that Catholic priests are in confusion as to what they can or cannot do with church funds and that this case will therefore have repercussions beyond the facts circumscribing it.

34. It was also argued that the priest should be “allowed to consult and be defended by a legal practitioner of his choice” [Article 9(3) of the Constitution]. However, under this provision, the QC chosen must not only be willing and able to act for the defence, he must also be properly admitted under the LPA. Section 21 LPA is not a mere formality. It enjoins the court to consider the various matters set out in sub-sections (1) and (2). It is certainly not the law that the court *must* admit any QC chosen by the defence.

35. For the third stage test, I accept that Mr Nigel John Seed QC satisfies the requirement of having “special qualifications or experience for the purpose of the case” in view of his vast experience in the areas of secular and spiritual law. However, as indicated above, the case does not warrant his admission.

36. It follows from the above discussion that the application must fail. I therefore dismissed the application to admit the QC.

Application dismissed.