Mustafa Ahunbay *v* Public Prosecutor
[2013] SGHC 188

Case Number : Criminal Revision No 13 of 2013

Decision Date : 27 September 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : N Sreenivasan SC, Murali Rajaram and Lisa Chong (Straits Law Practice LLC) for the applicant; Peter Koy, Gordon Oh and Leong Weng Tat (Attorney-General's Chambers) for the Public Prosecutor.

Parties : Mustafa Ahunbay — Public Prosecutor

Criminal Procedure and Sentencing – revision of proceedings

27 September 2013 Judgment reserved.

Choo Han Teck J:

1 This was an application for criminal revision to set aside an order made by DJ Sarah Tan ("DJ Tan") on 20 May 2013 ("the 20th May order") that the seizure of three accounts continues pending an investigation by the Commercial Affairs Department ("CAD").

2 These accounts ("the seized accounts") had been seized on 23 June 2011 pursuant to s 35(1) of the Criminal Procedure Code 2010 (Cap 68, Rev Ed 2012) ("CPC"). The seized accounts had previously been owned by Mr Mohamed Masood Sayed ("Mr Sayed"), an Indian national, who is related to the applicant by marriage. Mr Sayed was investigated by Indian authorities for cheating, criminal conspiracy and money laundering offences in India. In February 2011, the Indian authorities contacted the CAD to ask for its assistance in its investigations into Mr Sayed's illegal activities. In the course of lending its assistance in the Indian investigations, the CAD suspected that Mr Sayed had also committed offences in Singapore under s 47(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, Rev Ed 2000) and section 411 of the Penal Code (Cap 224, Rev Ed 2008). The CAD accordingly commenced its own investigations into Mr Sayed's accounts and activities in Singapore. Neither the Indian nor the Singaporean investigations have been concluded. The seized accounts relate to both sets of investigations and contain US$13,686,741.93.

3 The seized accounts were registered in the names of two trust companies, JJ Venture Ltd ("JJ Venture") and Blue Lagoon Holdings Limited ("Blue Lagoon"), with Mr Sayed as the beneficiary. The seized accounts contain a large amount of Mr Sayed's and his wife's personal assets. In 2009, Mr Sayed approached the Applicant to ask if the Applicant would buy over his shares in JJ Venture, Blue Lagoon, and two other companies for a sum total of US$49 million. The Applicant agreed and funded the purchase using loans from Suisse Financial Services Limited ("Suisse Financial"), a company incorporated in the United Arab Emirates. The Applicant and Mr Sayed entered into four sale and purchase agreements (one for each of the companies), but the share transfers were not eventually executed. Mr Sayed told the Applicant in 2012 that the relevant banking institutions in Singapore had refused to effect the share transfers to the Applicant. At the same time, Suisse Financial called on the loan to the Applicant. The Applicant, Mr Sayed and Suisse Financial thus entered into a settlement deed on 21 March 2012 whereby the Applicant agreed to take such steps

as were necessary to release the assets of the four companies to repay the loan, including the seized accounts belonging to JJ Venture and Blue Lagoon.

4 The Applicant, through his lawyers Straits Law Practice LLC ("Straits Law"), accordingly wrote to the banks holding the seized accounts and was told on 27 April 2012 that those accounts had been seized. Straits Law began corresponding with CAD in May 2012 to make enquiries about the seizure of these accounts and about the status of the investigations which involved the seized accounts. On 12 July 2012, pursuant to Straits Law's request, the CAD furnished a redacted copy of their latest investigation report and an order of court dated 7 September 2011 permitting the continued retention by CAD of the seized accounts.

5 Straits Law filed a criminal motion on the Applicant's behalf to quash the 7 September 2011 order of court, but this was dismissed on 22 August 2012. Straits Law wrote to the Prosecution the following day, asking to be kept informed of any applications to extend the period of seizure. The Prosecution obliged and Straits Law attended on the Applicant's behalf at hearings on 13 September, 6 November and 23 November 2012. Both parties made submissions before DJ Mathew Joseph ("DJ Joseph") at these hearings. Straits Law was also given copies of two further investigation reports dated 13 September 2012 and 23 November 2012. On 23 November 2012, DJ Joseph made an order that the seizure of the accounts continue for a further six months. Parties were due to appear before DJ Joseph again, if necessary, on 22 May 2013 at 2.30pm.

6 The CAD then stopped updating Straits Law as to the status of the investigation. Two days before the expiry of the six month extension, the Prosecution appeared before DJ Tan and obtained a further extension. Straits Law was not informed of this hearing and did not attend. Straits Law and the Prosecution appeared before DJ Tan again on 6 August 2013 to contest the 20th May order. DJ Tan declined to make an alteration to the 20th May order. At this hearing, the Prosecution submitted that the Applicant, who was not legal owner of the seized accounts, did not have *locus standi* to make submissions on the continued seizure of the seized accounts. As for failing to inform Straits Law of the hearing on 20May 2013, this was an oversight of the DPP having charge of the case.

7 The Applicant thus filed this criminal revision to set aside the 20th May order on the ground that there was something palpably wrong in the decision that struck at its basis as an exercise of judicial power; see *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383 and *Ang Poh Chuan v Public Prosecutor* [1995] 3 SLR(R) 929, namely:

(a) Making the application before DJ Tan when the matter had been fixed for hearing before DJ Joseph a mere two days after;

(b) Failing to notify Straits Law of the application before DJ Tan, thus permitting them the opportunity to be heard; and

(c) Failing to notify Straits Law of the 20th May order.

8 At its heart, this criminal revision is about whether there has been a breach of natural justice from the Applicant's not being heard before the 20th May order was made. The making of an application before one DJ whilst another was scheduled to hear the matter at a later date was a procedural irregularity, but that would not make the exercise of judicial power by that DJ invalid or palpably wrong. Each extension of seizure of the seized accounts did not need to be heard before the same judge. In fact, DJ Joseph was the second judge to hear an application for extension of seizure of the same seized accounts. The real reason why the Applicant is objecting to the making of the

application before a different judge at an earlier date is because it was viewed as part of the deprivation of his right to be heard.

9 The right to be heard is a component of natural justice; it is not a stand-alone right. A failure to accord a right of hearing does not automatically lead to a finding that there has been a breach of natural justice. Whether there has been a breach of natural justice would depend on the facts of the case. Megarry V-C observed in *McInnes v Onslow-Fane* [1978] 3 All ER 211 that natural justice "evolves to a concept of 'fairness', a flexible term which implies different requirements in different cases". The circumstances which affect the requirements of natural justice in a particular case include the character of the decision-making body, the kind of decision it has to make, and the statutory or other framework in which it operates; see Lord Bridge's opinion in *Lloyd v McMahon* [1987] AC 625. In this particular case, the statutory framework is crucial to an assessment of whether the failure to hear the Applicant during the 20 May 2013 hearing was a breach of natural justice.

10 Unlike the usual criminal trial, this is not an accused who is at risk of losing life or liberty. The Applicant alleges that his property rights are being affected. This will invariably be the case for a possessor of property or any contingent rights-holder where seizure of their property is involved. It is therefore important to look at the statutory framework which governs the balancing of those rights against the needs of an investigation or proceeding under the CPC, and whether that framework gives the Applicant a right to be heard. The question is not whether the Applicant has *locus standi* to attend the hearing, but whether the Applicant has a right to be heard such that any breach of that right would also be a breach of natural justice.

11 Sections 35 and 370 of the CPC govern different aspects of the process of seizure of property for investigation. Section 35 deals with an investigator's or authority's power to seize property in certain circumstances while s 370 deals with how that property should be returned to the rightful owner after it is no longer relevant to investigations or after a sufficient time has passed with no further developments in proceedings or investigations. The relevant parts of s 35 of the CPC read as follows:

> **Powers to seize property in certain circumstances**
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> 35.—(1) A police officer may seize, or prohibit the disposal of or dealing in, any property —
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> (*a*) in respect of which an offence is suspected to have been committed;
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> (*b*) which is suspected to have been used or intended to be used to commit an offence; or
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> (*c*) which is suspected to constitute evidence of an offence.
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> …
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> (7) A court may —
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> (*a*) subsequent to an order of a police officer made under subsection (2); and
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> (*b*) on the application of any person who is prevented from dealing with property,
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> order the release of such property or any part of such property.

(8) The court shall only order a release of property under subsection (7) if it is satisfied that —

(*a*) such release is necessary for the payment of basic expenses, including any payment for foodstuff, rent, the discharge of a mortgage, medicine, medical treatment, taxes, insurance premiums and public utility charges;

(*b*) such release is necessary exclusively for —

(i) the payment of reasonable professional fees and the reimbursement of any expenses incurred in connection with the provision of legal services; or

(ii) the payment of fees or service charges imposed for the routine holding or maintenance of the property which the person is prevented from dealing in;

(*c*) such release is necessary for the payment of any extraordinary expenses;

(*d*) the property is the subject of any judicial, administrative or arbitral lien or judgment, in which case the property may be used to satisfy such lien or judgment, provided that the lien or judgment arose or was entered before the order was made under subsection (2)(*b*); or

(*e*) such release is necessary, where the person is a company incorporated in Singapore, for any day-to-day operations of the company.

12 Section 370 reads as follows:

Procedure governing seizure of property

370.—(1) If a police officer seizes property which is taken under section 35 or 78, or alleged or suspected to have been stolen, or found under circumstances that lead him to suspect an offence, he must make a report of the seizure to a Magistrate's Court at the earlier of the following times:

(a) when the police officer considers that such property is no longer relevant for the purposes of any investigation, inquiry, trial or other proceeding under this Code; or

(b) one year from the date of seizure of the property.

(2) Subject to subsection (3), the Magistrate's Court must, upon the receipt of such report referred to in subsection (1), make such order as it thinks fit respecting the delivery of the property to the person entitled to the possession of it or, if that person cannot be ascertained, respecting the custody and production of the property.

(3) The Magistrate's Court must not dispose of any property if there is any pending court proceeding under any written law in relation to the property in respect of which the report referred to in subsection (1) is made, or if it is satisfied that such property is relevant for the purposes of any investigation, inquiry, trial or other proceeding under this Code.

13 It will be readily apparent that both sections have different concerns and procedures. Section 35 of the CPC, which governs the powers of seizure, is more comprehensive and takes into account the needs of those who may be affected by the seizure. A balancing exercise is permitted under ss 35(7)(b) and 35(8) which is not part of the judicial exercise which subsequently takes place in s 370.

The Court of Appeal, expounding on the equivalent provisions in the Old Criminal Procedure Code, observed in *Ung Yoke Hooi v Attorney-General* [2009] 3 SLR(R) 307 (at [19(h)]) ("*Ung Yoke Hooi*") that –

> Section 68(1) [now s 35 of the CPC] is not a measure to preserve evidence, but a provision to empower a police officer to seize property found in suspicious circumstances and to require the police officer to report the seizure to an MC so that it may dispose of the property by delivering it to the person entitled in law to have possession of it.

Section 370 of the CPC closes that cycle by ensuring that the seized property is ultimately delivered to the person entitled in law to have possession of it. The sole question which the Magistrate's Court is to consider under s 370 is whether the seized property is still relevant for investigation, trial or other proceedings under the CPC. If it is not, it must be returned to the person who is legally entitled to it. This may be a different person from the person who had possession of the property when it was seized.

14 The balancing exercise which the Magistrate's Court may perform pursuant to ss 35(7)(b) and 35(8) is between the exigencies of the investigation or proceedings and the potential hardship to "any person who is prevented from dealing with the property". This is a broad class of persons which could conceivably include the possessor of the seized property at the time of seizure, or any person with a contingent claim to that property (in this case, the Applicant, JJ Ventures, Blue Lagoon or even the Applicant's creditor Suisse Financial). This person could bring an application to ask for the property seized (or part thereof) to be released, so long as he can satisfy one of the criteria of necessity in s 35(8) of the CPC. There is no need to prove that the applicant under s 35(7)(b) is legally entitled to the seized property (or to any part of it); that is not the test under s 35(8).

15 The position is different when it comes to the return of the seized property pursuant to s 370 of the CPC. The Magistrate's Court's powers are engaged when a year has passed since the initial seizure or when a police investigation report is made stating that the seized property is no longer relevant for investigation, trial or any other proceeding under the CPC. It is only in the latter scenario that the Magistrate's Court is obliged to make an appropriate order for return of the seized property to the person entitled to that property in law. Once this police report is made, legal control and custody passes to the Magistrate's Court, allowing it to make that order; see *Ung Yoke Hooi* (at [26)]). It is only when the Magistrate's Court makes an order that the property should be returned that the question of who it should be returned to arises.

16 There are only three possible situations: (1) the investigation, trial or proceedings reveal that the person entitled to the property in law is not the original possessor of that property but another known person; (2) the investigation, trial or proceedings reveal that the person entitled to the property in law is not the original possessor of that property but another unknown person; or (3) the investigation, trial or proceedings reveal that there is no other person (known or unknown) entitled to the property besides the original possessor. In scenarios (a) and (c), s 371 of the CPC applies to direct the Magistrate's Court to return the seized property to the known person or original possessor of the seized property. In scenario (b), s 372 of the CPC applies.

17 In all three scenarios, the investigation report on which the Magistrate's Court must act will reveal whether the original possessor of the property at the time it was seized is legally entitled to that property. There is no room, therefore, for a balancing exercise between the investigation and the rights of the original possessor of the seized property; the whole of the seized property must be returned to the person or entity who is entitled in law to that property. This makes sense in light of the certainty that is introduced by the investigation report referred to in s 370(1)(b) of the CPC. It is

no coincidence that s 35 of the CPC, in contrast, permits the Magistrate's Court to balance the competing interests of a wide class of persons whose rights may be affected. At the time of initial seizure, investigations have not yet revealed who is entitled to that property. This consideration no longer applies when an investigation is over or where it has been decided that the seized property is no longer relevant to the investigation or proceedings.

18 In the present case, the applicant assumes that the person entitled to the seized accounts is himself and that s 370 of the CPC thus applies to him. This is simply not the case. The whole purpose of the investigation or proceedings (both domestically and in India) is to determine whether the monies in the seized accounts were monies obtained illegally from money laundering activities in India, whether they were proceeds from illegal activities in Singapore, or neither. In any event, the person entitled to the seized accounts is far from clear: if, for example, the monies in the seized accounts were obtained from money laundering activities in India, the person or entity legally entitled to those proceeds may well be the government of India. Developments in India may therefore be crucial to the question of legal entitlement for the purposes of s 370 of the CPC.

19 The Applicant's claim to the property is also an ambiguous one. Counsel for the Applicant, Mr N Sreenivasan SC, pointed to the settlement deed between the Applicant, Mr Sayed, and Suisse Financial as the basis for his right to the monies (see above at [3]). This was, at most, an agreement allowing the Applicant to deal with the seized accounts as Mr Sayed's (the beneficial owner) agent. The settlement deed could not, by any stretch of the imagination, operate to execute share transfers to the Applicant of JJ Venture or Blue Lagoon shares, nor could it effect a transfer of ownership of the seized accounts. In any event, it was clear to me that the Applicant could not be said with any certainty to be the person entitled in law to possession of the seized accounts. The Applicant is not within the class of persons contemplated in s 370 of the CPC in order to argue that s 370 gives him a right to be heard.

20 Even if the Applicant were the person entitled in law to possession of the seized accounts, s 370 does not accord him a right to be heard. Section 370(2) makes it clear that an appropriate order for a return of the seized property by the Magistrate's Court may be made simply on perusal of the police report stating that the seized property is no longer relevant to investigations or proceedings. The process is meant to operate seamlessly: the seized property is released and then given to the person entitled to the property. It is assumed that there is no dispute about entitlement and there is thus no need for a further hearing.

21 I find that the statutory framework did not give the Applicant a right to be heard at the 20 May 2013 hearing. It is, moreover, unclear how the Applicant's rights were prejudiced by the alleged breach of the principle of *audi alteram partem* given that the Applicant did not have a clear claim to the seized property and still has an opportunity to proceed under s 35 of the CPC if it is necessary for him to recover part of the seized accounts pursuant to s 35(8). I accordingly find that there was no breach of natural justice in this case and if there was no breach of natural justice, the 20th May order could not have been palpably wrong and there is no ground for me to exercise my revisionary jurisdiction to set aside that order.