

James Raj s/o Arokiasamy v Public Prosecutor
[2014] SGHC 10

Case Number : Criminal Motion No 70 of 2013
Decision Date : 14 January 2014
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : M Ravi (L F Violet Netto), Eugene Thuraisingam and Jerrie Tan Qiu Lin (Eugene Thuraisingam) for the applicant; G Kannan, Tang Shangjun and Timotheus Koh (Attorney-General's Chambers) for the respondent.
Parties : James Raj s/o Arokiasamy — Public Prosecutor

Constitutional Law – Accused person – Rights – Right to consult and be defended by a legal practitioner

14 January 2014

Judgment reserved.

Choo Han Teck J:

1 The applicant is suspected of having carried out computer attacks on several websites under the moniker of “The Messiah”. Separately, he is also alleged to have committed a number of drugs-related offences in Singapore. He was arrested on 4 November 2013 in Kuala Lumpur by the Malaysian police and was sent to Singapore. He was charged in the Subordinate Courts for offences under the Computer Misuse and Cybersecurity Act (Cap 50A, 2007 Rev Ed) and the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). His counsel, Mr M Ravi (“Mr Ravi”), filed this criminal motion on his behalf on 13 November 2013. By this application, the applicant sought two things. First, a declaration that, under Art 9(3) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (“the Constitution”), there is “an immediate right to counsel upon the request of a person remanded for investigations”. Second, an order that he be granted immediate access to his counsel.

2 In an affidavit filed in support of the criminal motion, Mr Ravi explained that the applicant had been remanded from the time of his arrest, and that counsel and client had no access to each other since. Mr Ravi said that on 11 November 2013, he learnt from an acquaintance of the applicant that the applicant wanted immediate access to him. Accordingly, he contacted the police that same day for access to the applicant, but his request was rejected. The next morning, on 12 November 2013, the applicant was brought before the Subordinate Courts. The prosecution sought an order for the applicant to be remanded at the Institute of Mental Health for psychiatric evaluation. The hearing was adjourned to the afternoon and Mr Ravi sought leave from the court to speak to the applicant for five minutes in the meantime. This request was also rejected. At the close of the afternoon’s hearing, the District Judge granted the order sought by the prosecution, and ordered that while the applicant was at the Institute of Mental Health, access to him should be denied to all third parties, including his counsel. This criminal motion was filed the following day.

3 The main issue in this application concerned the question when an arrested person’s right to counsel under the Constitution arises. Article 9(3) of the Constitution states: “Where a person is arrested, he ... shall be allowed to consult and be defended by a legal practitioner of his choice”. This provision does not stipulate the point in time at which the person arrested is entitled to consult counsel. But the Court of Appeal made it clear in *Jasbir Singh and another v Public Prosecutor* [1994]

1 SLR(R) 782 ("*Jasbir Singh*") that the arrested person's constitutional right to counsel did not mean that he was entitled to consult counsel immediately after his arrest. Instead, he was entitled to consult counsel only a "reasonable time" after arrest. The Court of Appeal approved (at [47]) a passage in the High Court decision of *Lee Mau Seng v Minister for Home Affairs and another* [1971–1973] SLR(R) 135 ("*Lee Mau Seng*") at [12], in which Wee Chong Jin CJ ("Wee CJ") held that the constitutional right of an arrested person to consult a legal practitioner of his choice "must be granted to him within a reasonable time after his arrest". Even though the Court of Appeal in *Jasbir Singh* cited the words of Wee CJ with approval, the tenor of their opinions appears to be different. The *Lee Mau Seng* passage seems to proclaim the primacy and supremacy of the constitutional right in a positive, affirmative spirit, but it was nonetheless cited in *Jasbir Singh* as authority for a proposition of a more negative and restrictive nature, *ie*, the proposition that the constitutional right is not an immediate one. *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205, a differently-constituted Court of Appeal affirmed *Jasbir Singh*, albeit in *obiter dicta*, in stating at [57] that an accused person's constitutional right to counsel "does not extend to immediate access".

4 A distinction has sometimes been drawn between the time at which the right to counsel arises and the time at which that right may be exercised. This distinction is derived from a number of Malaysian cases from the 1970s which the Court of Appeal in *Jasbir Singh* referred to at [46]. It was held in those cases that the right to consult counsel begins from the moment of arrest, but cannot be exercised immediately after arrest. One can understand why the distinction is drawn: the opening words of Art 9(3), "[w]here a person is arrested", suggest that the right to counsel is one which arises or begins in some abstract sense at the moment of arrest; yet, the courts in Singapore and Malaysia have consistently declined to impose on the authorities an obligation to allow an arrested person to consult counsel immediately after arrest. But the Court of Appeal in *Jasbir Singh* seemed to disapprove of this distinction, holding, at [48], that it was "elliptical to say on the one hand that an arrested person had a right to see counsel immediately but to stipulate on the other hand that the police could deny him that right if they needed time to complete investigations". It appears that the Court of Appeal in *Jasbir Singh* preferred the view that the right to counsel simply does not arise immediately upon arrest. Perhaps it is no more than a matter of semantics. I think it makes no practical difference whether or not the distinction is recognised, but I mention all this in order to point out that there is more than one meaning to the phrase "immediate right", which has been employed by the applicant in the present case. An "immediate right" can mean a right that arises immediately upon arrest but may not be exercised immediately upon arrest, or it can mean a right that may be exercised immediately upon arrest. There is no doubt that the applicant means the latter. In order to avoid ambiguity, the language which I shall use is that of the time at which the arrested person is entitled to consult counsel, rather than the time at which the right to counsel arises or the time at which it may be exercised.

5 On the authority of *Jasbir Singh*, the constitutional right to counsel does not mean that an arrested person is entitled to consult counsel immediately upon or after arrest. He is entitled to do so only a "reasonable time" after arrest, which leads naturally to the question of what a "reasonable time" is. The Court of Appeal in *Jasbir Singh* at [48] was of the view that the rationale for granting a "reasonable time" was to afford the police a degree of latitude in carrying out their investigations. Implicit in this reasoning is the premise that there are circumstances in which permitting an arrested person to consult counsel might hinder or undermine police investigations. The Court of Appeal, having referred to *Lee Mau Seng*, held that Wee CJ must have "intended the element of allowance for police investigations and procedure to be already built into the 'reasonable time' time-frame". But I think that it is not certain that Wee CJ himself would have agreed with this interpretation.

6 In *Lee Mau Seng*, an order of detention under the Internal Security Act (Cap 115, 1970 Ed) was made against the applicant. By that time, 20 days had passed since he was arrested. Throughout

those 20 days, he had been denied access to his counsel while in police custody. The Attorney-General argued (at [12]) that the provisions of the Internal Security Act lawfully deprived the applicant of his constitutional right to counsel. The full arguments were rather involved, relying as they did on the interaction between a number of constitutional and statutory provisions, and it is not necessary for me to delve into the intricacies of the arguments for present purposes. What is pertinent is that Wee CJ did not accept the Attorney-General's arguments, and held at [14]–[22] that the applicant had been wrongfully denied his constitutional right to counsel, although he also held that this wrongful denial, by itself, did not justify releasing the applicant from detention. The passage which gives me cause to think that Wee CJ might not have agreed with the interpretation that *Jasbir Singh* placed on his use of the phrase "reasonable time" is this (*Lee Mau Seng* at [17]):

It is disturbing to hear a submission which, stated in simple ordinary language, puts forward the proposition that the Legislature, by enacting s 74 of the [Internal Security Act], must have intended to deprive a person of a "fundamental liberty" which the Constitution guarantees to him, namely the right to be allowed to consult a legal practitioner of his choice, so as to enable a police officer acting under preventive detention powers to better carry out enquiries or investigations concerning that person of whom the police officer has reason to believe that there are grounds which would justify his detention under s 8 and of whom the police officer has reason to believe has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore or any part thereof. In my judgment that is an unacceptable proposition. If a person detained under s 74 is to be deprived of this constitutional fundamental right then the Legislature must do so in clear and unequivocal language. Also, if such wide powers are to be conferred on police officers, then the Legislature must confer them in clear and unequivocal language.

The philosophy apparent in these words of Wee CJ is that the right to counsel, being a fundamental one enshrined in the Constitution, is not lightly to be curtailed by the needs of police investigations; so much so that the only way in which such investigative needs may affect that right is where the right is explicitly and unambiguously limited or excluded by legislation that is itself not *ultra vires* the Constitution. Given this philosophy, it looks to me at least arguable that when Wee CJ said that the right to counsel "must be granted to [an arrested person] within a reasonable time after his arrest", he did not mean that the police ought to be afforded a "reasonable time" for investigations, as the Court of Appeal in *Jasbir Singh* thought he meant, but rather intended no more than to acknowledge that, while an arrested person should be entitled to consult counsel immediately after arrest, there has to be a "reasonable time" for any necessary or unavoidable delay occasioned by practical or administrative concerns, *eg*, having to transport the arrested person to the place of remand or having to contact the counsel of the arrested person's choice. Although *Lee Mau Seng* was a case of detention under the Internal Security Act and not a case of ordinary criminal proceedings, I think that Wee CJ would have intended his philosophy to apply in the context of criminal proceedings just as much as in the context of detention. Indeed, that philosophy ought to apply *a fortiori* to ordinary criminal proceedings, since the element of national security, present in detention cases, is not usually in issue. Nevertheless, the Court of Appeal in *Jasbir Singh* held expressly that "reasonable time" was to be given to the police as an element of allowance in carrying out their investigations. That is the legal position that I am bound to follow.

7 Drawing together the threads in the discussion above, having regard to the authorities which I am bound by, it would not be open to me to grant a declaration that an arrested person is entitled to consult counsel immediately upon arrest. However, the declaration sought by the applicant is slightly different. It is that an arrested person is entitled to consult counsel immediately upon his request to do so. Notwithstanding this, I do not consider that it would be right to grant that declaration. Since, following *Jasbir Singh*, the availability of the right to counsel depends entirely on investigative needs, the time at which an arrested person is entitled to consult counsel cannot be contingent upon the

time at which an arrested person makes the request to consult counsel. The request could have been made at any time — it could, for instance, have been made immediately upon arrest — but permitting the arrested person to consult counsel at that time might imperil the investigative process. The arrested person should not be permitted to consult counsel at that time, notwithstanding the request. Hence it would not be correct as a general proposition that the arrested person is entitled to consult counsel immediately upon request.

8 I turn now to the order sought by the applicant that he be granted immediate access to his counsel. Whether the applicant is entitled to the order sought depends on whether it was within “reasonable time” of the applicant’s arrest. This has since become a question of academic interest because the applicant here was granted access to counsel on 3 December 2013. However, in view of the important constitutional matters raised, I give my decision on whether the applicant was entitled to the order sought as at 29 November 2013, the date on which parties filed their submissions on the issue of what a “reasonable time” was, in the circumstances of this case. I should explain that, at the close of the hearing of this criminal motion before me on 15 November 2013, I reserved judgment and directed that parties file submissions within two weeks on the issue of what a “reasonable time” was, with replies to follow by 19 December 2013. I summarise their submissions filed on 29 November 2013 as follows.

9 The applicant submitted that a “reasonable time” cannot exceed 48 hours. He based his argument on Art 9(4) of the Constitution, which provides that a person who is arrested must be produced before a Magistrate within 48 hours, as well as s 68 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), which provides that the police may not detain a person arrested without a warrant for more than 48 hours. Counsel for the applicant advanced four broad arguments. First, when an arrested person is brought before the Magistrate within the 48-hour period, the prosecution typically makes applications against the person. Hence, the person should be entitled to instruct counsel by the time this is done for his hearing before the Magistrate. Second, the rationale of Art 9(4) of the Constitution and s 68 of the Criminal Procedure Code is to allow the judicial authority to apply its mind to the case within 48 hours of the person’s arrest. This rationale would be frustrated if the judicial authority has no opportunity to hear the person’s reasoned position or defence due to his not having been able to instruct counsel. Third, there is a need for counsel to be involved at an early stage after the person is arrested in order to guard against the possibility of coerced and/or false confessions, and/or the possibility of the accused failing to state a material fact, from which failure an adverse inference may later be drawn against him at trial. Fourth, a 48-hour time period would serve as a check on the police.

10 The prosecution submitted that the question of what a “reasonable time” is must be assessed by taking into account all the circumstances of the case, and that there should not be an inflexible rule that anything exceeding 48 hours is not a “reasonable time”. The prosecution argued that the applicant’s reliance on Art 9(4) was misconceived, because there is no direct link between Art 9(4) and Art 9(3); on the contrary, just as Art 9(4) grants the police a 48-hour grace period in order that they will be in a better position to complete investigations and carry out follow-up action, so an element of allowance for the conduct of investigations must be read into Art 9(3). The prosecution relied on the decision of Tay Yong Kwang J (“Tay J”) in *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 (“*Leong Siew Chor*”). Tay J said, at [87], that 19 days without access to counsel was “justifiable in the circumstances, bearing in mind the duty of the police to follow up on new leads quickly and to gather swiftly whatever evidence was available lest it disappears or is destroyed”. The prosecution in the present case further pointed out that Tay J, at [61] of that case, recorded the investigating officer as explaining that he “did not want to take a chance with external parties impeding the investigations and resulting in the accused shutting up”, as there were “many exhibits to collect and only the accused could help the police to do so”.

11 The prosecution submitted that, in the circumstances of this case, a "reasonable time" had not elapsed as at 29 November 2013. This was so due to a number of factors. First, the accused is being investigated for multiple separate offences, including drugs charges, which means that more time is required to complete the investigations. Second, as the alleged offences are trans-border in nature, the Singapore authorities need to work with their Malaysian counterparts. Third, the forensic process of retrieving digital evidence is a time-intensive one, as investigators can only access the evidence indirectly so as not to compromise the integrity of the evidence. Since the applicant has to be questioned on this digital evidence, the investigations cannot conclude before all the digital evidence has been retrieved. Fourth, time is needed to locate and analyse hacking tools in the applicant's possession. Fifth, new sources of digital evidence have been identified which the applicant has control over, hence his assistance is needed to access this new evidence. Sixth, it is likely that the applicant had accomplices, and therefore there is a need to investigate these other suspected persons. Seventh, there are multiple law enforcement agencies involved in the investigations, hence more time is needed to complete all the investigations as each law enforcement agency needs its own time with the applicant. Eighth, it is in the public interest that the applicant be questioned, in that such questioning would assist in the identification of computer system vulnerabilities and thus facilitate the protection of other computer systems.

12 There is a preliminary point relating to the burden of proof. In *Leong Siew Chor* at [85], Tay J cited without disapproval from a text (a footnote to *Halsbury's Laws of Singapore*, vol 1 (Administrative and Constitutional Law) (Butterworths Asia, 1999) at para 10.136) the proposition that "the onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice is on the police". I think that this proposition is correct. As Wee CJ repeatedly said in *Lee Mau Seng*, the right to counsel is a fundamental right protected by the Constitution. The arrested person who alleges that his Constitutional right had been impinged bears the burden of proving that allegation. Ordinarily all that he has to do is to show that he has not been permitted to consult counsel subsequent to his arrest. That would furnish sufficient grounds to indicate that there might have been a breach, and the burden is then on the other (the prosecution) to show that there was no breach because, as in this case, the investigation process is underway. On that practical and evidential level, the arrested person may have little or no knowledge of what and how the investigation is proceeding, nor how it might be disrupted or tampered. I would add that, this being a constitutional fundamental right, the burden is to prove that it is necessary, and not merely desirable or convenient, to derogate from it.

13 Based on the prosecution's submissions, I accepted that the investigations against the applicant, and perhaps his alleged accomplices as well, are complex and will require a significant amount of time to be completed. However, the prosecution failed to furnish substantive grounds in support of its claim that permitting the applicant access to counsel would jeopardise those investigations. From the prosecution's reliance on *Leong Siew Chor* and their allusion to the reasons provided by the investigating officer in that case for denying access to counsel, it may be inferred that the prosecution's argument is that access to counsel might result in the applicant in the present case "shutting up" and refusing to help the police collect evidence. But that is speculation. No reason was given as to suggest that access to counsel would make the applicant more uncooperative than he is at present; in the first place, it is not known how cooperative he has been up to this point. As to the collection of digital evidence, it would seem that a lot of it is already in the possession of the police, except that they need time to sort through and analyse the evidence. It is difficult to see how allowing access to counsel would adversely affect the ability of the police to go through that evidence. Perhaps the strongest reason for denying access to counsel is that the applicant might have digital evidence under his control, and counsel might advise him not to yield up that evidence. As it stood, it was only an unsupported assumption that counsel might advise him along those lines; and it may well be that the applicant has long since his arrest adopted an uncooperative attitude

towards the police, in which event it would seem doubtful that permitting access to counsel would make him any less forthcoming.

14 In summary, the prosecution did not appear to have addressed the question of whether access to counsel in this case would have hindered investigations. In the absence of evidence, no ruling can be made; in other words, I cannot hold that permitting the applicant access to counsel on 29 November 2013 would have hindered investigations. I add that in the absence of evidence I did not think that permitting the applicant access to counsel on 11 November 2013, the date on which Mr Ravi first requested access to the applicant, would have hindered investigations. The Court of Appeal in *Jasbir Singh and Tay J in Leong Siew Chor* might have held that two weeks and 19 days respectively was a "reasonable time" for the arrested persons in those cases not to have had the right to counsel, but these precedents are not necessarily helpful because each case turns on its own facts. Had the prosecution made out their case, the "reasonable time" in this case might have been even longer than two weeks. There might have been circumstances in those cases which persuaded the courts that police investigations necessitated denial of access to counsel, but I do not see any circumstances warranting such denial in this case. It may be argued that if access to counsel is permitted, there is nothing to stop the applicant from consulting his counsel for hours upon hours, thereby depriving the police of much time which could be spent questioning him. Or, the applicant might refuse to be interviewed by the police unless his counsel was present. But if these are the concerns, they are better addressed by delineating the content of the right to counsel, *eg*, specifying the amount of time which the arrested person is entitled to spend with his counsel per day, rather than by doing away with the right entirely so long as investigations are ongoing. Access to counsel is not unlimited and unrestricted access. The investigators also need access to the suspect.

15 Accordingly, had the question not been wholly academic, I would have held that the applicant was entitled to access to his counsel by 29 November 2013. I do not need to identify the precise moment in time at which the applicant became entitled to consult counsel, if that were even possible; it suffices to say that a "reasonable time" had elapsed by 29 November 2013 and the applicant therefore had become entitled to consult counsel by then. I need not, and do not, express a view on the applicant's contention that a "reasonable time" should be no more than 48 hours, although I do record that this issue had been argued in full by both parties before me. For the reasons above, the application is dismissed.