Bhavashbhai s/o Baboobhai *v* Public Prosecutor
[2014] SGHC 46

Case Number : Criminal Revision No 9 of 2013

Decision Date : 17 March 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Udeh Kumar s/o Sethuraju (S K Kumar Law Practice LLP) for the applicant; Anandan Bala and Joshua Lai (Attorney-General's Chambers) for the respondent.

Parties : Bhavashbhai s/o Baboobhai — Public Prosecutor

Criminal Law – Statutory offences – Misuse of Drugs Act

Criminal Procedure and Sentencing – Revision of proceedings

17 March 2014

Choo Han Teck J:

1 The applicant in this Criminal Revision was charged in DAC 28580 of 2012 and was tried on 3 July 2013. The charge was for an offence under s 8(*b*)(ii) read with s 33A(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the Act"), namely, for the consumption of morphine. The charge under DAC 28580 of 2012 is one known as an "LT-2" charge. "LT" is the acronym for "long term".

2 A person can only be convicted of an LT-2 offence if he had previously been convicted of an LT offence, which is referred to as the "LT-1" offence. A person can be convicted of an LT-1 offence under s 33A(1)(*d*) of the Act if he has not less than one previous admission, as defined in s 33A(5)(*c*) of the Act, and one previous conviction for consumption of a *specified* drug under s 8(*b*) of the Act. The terms LT-1 and LT-2 are not legislated terms but descriptions of convenience used by lawyers and the courts.

3 The applicant's trial in the court below was stayed on account of this application made on his behalf by his counsel, Mr Udeh Kumar ("Mr Kumar"). I was informed that the trial was at the stage when the defence had been called and the applicant had elected to remain silent, and the court was adjourned for final submissions to be made. Mr Kumar contended that the LT-2 charge, on which the applicant was being tried in the court below, was wrong because the applicant's previous LT-1 conviction in 2008 was erroneous. Mr Kumar alleged that this was because the applicant's LT-1 conviction in 2008 was premised on a previous conviction for consumption of a *controlled* drug, morphine, under s 8(*b*) of the Misuse of Drugs Act (Cap 185, 1998 Rev Ed) in 2000. The previous conviction did not qualify as one of the previous convictions that would trigger an LT-1 offence under s 33A(1)(*d*). This application was thus made so that this court may exercise its revisionary powers and quash the LT-1 conviction in 2008 or amend the conviction in 2008 such that it would not qualify as an LT-1 conviction.

4 In passing, I should point out that when I use the term "amend the conviction", I refer to the procedure of framing an altered charge and convicting the applicant accordingly. The relevant procedure is that set out in ss 256 and 269 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed). Those are broader provisions than the equivalent provisions found in the Criminal Procedure Code (Cap

68, 2012 Rev Ed), namely, ss 390(4)–(8) and s 401(2). The Criminal Procedure Code (Cap 68, 1985 Rev Ed) applied at the time the applicant was convicted in 2008. However, the difference in wording between the provisions of the two codes was not material to my decision here.

5 Counsel for prosecution and defence both referred me to my previous decision in *PP v Shaik Alaudeen s/o Hasan Bashar* [2013] 2 SLR 538 ("*Shaik Alaudeen*"). The accused in *Shaik Alaudeen* was convicted in 2002 after pleading guilty to a charge ("the original charge") of consuming a controlled drug under s 8(*b*)(i) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). That would not have counted as an offence that could have been taken into account under s 33A(1) of the Act as a relevant previous conviction for an LT-1 offence. He was subsequently charged with six charges of consuming a specified drug under s 8(*b*)(ii) read with s 33A(1) of the Act. The six charges were hence framed as LT-1 charges, brought on the basis that the accused had one previous drug rehabilitation centre admission for the consumption of morphine and one previous conviction for consumption of a specified drug. For the latter, prosecution sought to rely on the 2002 conviction. Prosecution thus applied to amend the 2002 conviction on the ground that it was a technical error that resulted in the accused having been convicted, in 2002, of an offence that could not be taken into account for an LT-1 charge. The Deputy Public Prosecutor ("DPP") (in *Shaik Alaudeen*) relied on the decision of the Court of Appeal in *Garmaz s/o Pakhar* [1996] 1 SLR(R) 95 ("*Garmaz*") as an authority for the application to amend the conviction. In *Shaik Alaudeen*, I interpreted *Garmaz* to have stood for the proposition that "the court could exercise its powers… to amend a charge if the proceedings at trial would have taken the same course and the evidence recorded would have been substantially unchanged". For clarity, the phrase "amend a charge" in *Shaik Alaudeen*, refers to "amending a previous conviction", which is the subject matter of this case.

6 Had the DPP succeeded in *Shaik Alaudeen*, the six charges would have counted as LT-1 charges, and would have attracted a greater punishment than if they were enhanced consumption charges, within meaning of s 33(4) of the Act. I held in *Shaik Alaudeen* that *Garmaz* was not directly applicable. In exercising the revisionary power to amend a previous conviction, the nature of the error, the circumstances of the case, and when the amendment was sought are some of the factors the court has to take into account. Given the various factors to take into account, whether the amendment may be allowed depends on the facts of each case. In *Shaik Alaudeen*, I declined to allow the amendment because it would have prejudiced the accused in that he would have faced a more severe punishment if a change was made to his previous conviction retrospectively.

7 The present application by Mr Kumar is materially different on the facts. Counsel is seeking to change a previous conviction to a lesser offence. The time for that has passed. The applicant could have appealed in 2008 but did not. The contemporary LT-2 charge that the applicant here faced was for an offence that he had claimed trial to with full knowledge of his previous LT-1 conviction. Mr Kumar hoped to avert what might otherwise be a severe sentence for his client by cutting the base off the LT-2 charge upon which his client was tried by his application to amend a previous LT-1 conviction into a non-LT-1 conviction. As such, while the present application is factually different from *Shaik Alaudeen*, both applications are similar in that both are unmeritorious. The application in *Shaik Alaudeen*, if allowed, would have caused prejudice to the accused in the contemporary trial. The application in this case, if allowed, would result in the applicant evading justice. The difference between this case and *Shaik Alaudeen* is in the consequence of amending the previous conviction. If the amendment had been allowed in *Shaik Alaudeen*, it would have been akin to enhancing a sentence retrospectively. That is not the same in the present application because the prosecution is not seeking to enhance the punishment by amending a previous conviction. The accused is seeking to avoid a greater punishment by reducing his previous conviction, but if he had thought that the previous conviction was wrong, he ought to have appealed against the decision of the judge in 2008. Mr Kumar did not satisfy me that this was a case of serious injustice that required me to exercise my

revisionary powers.

8 This criminal revision should not have been brought. An accused should not interrupt the normal course of a trial by making an application for criminal revision (except in exceptional situations). His recourse is by way of an appeal after the trial court has handed down its verdict. This case was not an exceptional one, and the court will not allow a criminal revision to amend the previous conviction now (when the applicant ought to have appealed the conviction). This application was therefore dismissed.