

James Raj s/o Arokiasamy v Public Prosecutor
[2014] SGCA 33

Case Number : Criminal Motion No 15 of 2014
Decision Date : 28 May 2014
Tribunal/Court : Court of Appeal
Coram : Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s) : Ravi s/o Madasamy (L F Violet Netto), Eugene Thuraisingam and Jerrie Tan (Eugene Thuraisingam) for the applicant; G Kannan, Tang Shangjun, Jurena Chan and Timotheus Koh (Attorney-General's Chambers) for the respondent.
Parties : James Raj s/o Arokiasamy — Public Prosecutor

Criminal Procedure and Sentencing – Criminal references

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2014\] 2 SLR 307.](#)]

28 May 2014

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 This was a criminal motion for leave to refer the following as two ostensible questions of law of public interest to the Court of Appeal pursuant to s 397(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“the CPC”):

- (a) Whether there is an immediate right to counsel upon the request of a person remanded for investigations; or alternatively
- (b) On the premise that there is no immediate right to counsel upon the request of a person remanded for investigations, what is a “reasonable time” within which the right to counsel can be exercised.

2 After hearing the parties on 7 May 2014, we dismissed the criminal motion on the basis that the references sought did not relate to questions of law of public interest. We now give the detailed grounds for our decision.

Background Facts

3 The applicant in this case is James Raj s/o Arokiasamy (“the Applicant”). He was charged in the State Courts with various drug-related offences as well as suspected computer attacks on several websites using the moniker “the Messiah”. The Applicant’s counsel is Mr Ravi s/o Madasamy (“Mr Ravi”), though he was jointly represented at the hearing of the present criminal motion by Mr Ravi and Mr Eugene Thuraisingam (“Mr Thuraisingam”).

4 The Applicant was first produced in the State Courts on 5 November 2013 for charges to be preferred against him. He was then remanded for one week to enable further investigations to be carried out. On 11 November 2013, Mr Ravi was informed by an acquaintance of the Applicant that the latter was seeking to engage Mr Ravi as his counsel and wished to have immediate access to him. Mr Ravi accordingly contacted the police on the same day seeking access to the Applicant, but his

request was denied.

5 On the following morning, 12 November 2013, Mr Ravi attended the next mention in the State Courts, in the course of which the Prosecution applied for, among other things, an order that the Applicant be remanded at the Institute of Mental Health ("the IMH") for psychiatric evaluation. The hearing was adjourned to the afternoon and Mr Ravi sought leave to speak to the Applicant for five minutes in the meantime. This request was denied. At the close of the resumed hearing, the district judge ("the District Judge") granted the orders sought by the Prosecution and ordered that the Applicant be remanded at the IMH and that he was not permitted contact with any third parties.

6 On 13 November 2013, the Applicant filed an application to the High Court by way of Criminal Motion No 70 of 2013 ("CM 70/2013") for the following orders: (1) a declaration that under Art 9(3) of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution"), there is an immediate right to counsel upon the request of a person remanded for investigations; and (2) that the Applicant be granted immediate access to his counsel.

7 CM 70/2013 was heard on 15 November 2013 before a High Court judge ("the Judge"), who reserved judgment and directed that parties file further submissions within two weeks on the issue of what a "reasonable time" should be for the purpose of an arrested person being granted access to counsel. The Judge also permitted Mr Ravi to speak to the Applicant for a few minutes in court after the hearing.

8 The next mention in the State Courts took place on 26 November 2013. The Prosecution applied for the Applicant to be remanded for one more week for further investigations, with no access to counsel during that period. This application was granted. On 3 December 2013, with the consent of the Prosecution, the Applicant was granted access to his counsel.

Decision Below

9 On 14 January 2014, the Judge dismissed CM 70/2013. His judgment is reported as *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 2 SLR 307 ("the Judgment").

10 On the first prayer, the Judge declined to grant a declaration that under Art 9(3) of the Constitution, there is an immediate right to counsel upon the request of a person remanded for investigations. He considered himself bound by the decision of the Court of Appeal in *Jasbir Singh and another v Public Prosecutor* [1994] 1 SLR(R) 782 ("*Jasbir Singh*"), where it was held that an arrested person was not entitled to consult counsel immediately but only within a "reasonable time" of his arrest.

11 Notwithstanding this, the Judge considered it appropriate to express some doubt over the interpretation that was placed by the Court of Appeal in *Jasbir Singh* on the earlier High Court decision of *Lee Mau Seng v Minister for Home Affairs and another* [1971–1973] SLR(R) 135 ("*Lee Mau Seng*"). The latter decision has widely been understood as authority for the proposition that as a matter of our law, an arrested person's right to counsel is not one that he may avail himself of immediately but rather only within a reasonable time after his arrest. Nonetheless, the Judge having undertaken an analysis of *Lee Mau Seng* doubted that the High Court there had contemplated that its holding to the effect that the right to counsel must be granted to an arrested person within a reasonable time after his arrest meant that such a right could be postponed for such period as might reasonably be required by the police to enable them to carry out their investigations. However, it was unquestionably the case that this was precisely how the Court of Appeal in *Jasbir Singh* had struck the balance between the arrested person's right to have access to his counsel and the discharge by the police of their

duty to investigate the matter.

12 The Judge also declined to grant the second prayer for an order that the Applicant be granted immediate access to his counsel. The Judge noted that this issue had become academic because the Applicant had already been granted access to his counsel on 3 December 2013. Nonetheless, the Judge, having invited submissions on the issue, ventured to express a view on whether the Applicant would have been entitled to the order sought as at 29 November 2013, this being the date on which the parties had filed further submissions on the issue of what would have been a "reasonable time" in all the circumstances. The Judge held that the police had the onus of proving that giving effect to the right to counsel would impede police investigations or the administration of justice. In the absence of sufficient evidence adduced to discharge this burden, the Judge observed that "had the question not been wholly academic, [he] would have held that the applicant was entitled to access to his counsel by 29 November 2013".

13 On 13 February 2014, the Applicant filed this criminal motion seeking leave to refer the two ostensible questions of law of public interest (see above at [1]) to this Court.

Our Decision

14 It is uncontroversial that the four cumulative conditions specified in s 397(1) of the CPC must be satisfied before leave may be granted to refer a question of law of public interest to the Court of Appeal (see *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*") at [15]):

- (a) First, the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction;
- (b) Second, the reference must relate to a question of law and that question must be one of public interest;
- (c) Third, the question of law must have arisen from the case which was before the High Court; and
- (d) Fourth, the determination of that question of law by the High Court must have affected the outcome of the case.

15 In deciding whether to grant leave to refer questions of law of public interest to the Court of Appeal, the court's discretion is to be exercised sparingly. Further, we have the discretion to refuse to refer questions of law of public interest stated by an applicant even if all the four conditions are satisfied, although in such circumstances, strong and cogent grounds would have to be shown to exist before we would do so (*Mah Kiat Seng v Public Prosecutor* [2011] 3 SLR 859 at [13]).

16 With these general principles in mind, we address the following two issues that arose in the present application:

- (a) The Prosecution's preliminary objections that the High Court had no jurisdiction to hear the application in CM 70/2013 and that the questions sought to be referred were moot before the High Court; and
- (b) Whether the references relate to questions of law of public interest.

Preliminary objections raised by the Prosecution

17 The Prosecution, in its written submissions and in the course of the oral arguments, raised a number of preliminary objections to the application. We were satisfied that these were without substance. We specifically mention two of the points that were taken.

18 First, the Prosecution argued that the High Court had entertained the application in CM 70/2013 when, in fact, it had no jurisdiction to do so. We note in passing that the force with which this objection was taken before us did not sit at all well with the fact that nothing had been said by the Prosecution before the High Court about any want of jurisdiction. A jurisdictional objection ought properly to be taken timeously and before the tribunal that is said to be acting without the requisite capacity to do so.

19 Turning to the objection itself, it was clear that the High Court was not acting in its appellate jurisdiction; and according to the Prosecution, it could not have been acting in its revisionary jurisdiction because the proceedings before the High Court had been commenced by way of criminal motion rather than by way of a petition for criminal revision.

20 Second, the Prosecution submitted that we should exercise our overriding discretion to refuse leave to refer the two questions posed by the Applicant because these were moot from the outset. It was submitted that the first question, namely whether Art 9(3) of the Constitution confers an immediate right to counsel upon the Applicant's request, was moot since the Applicant had already been in remand for more than a week by the time CM 70/2013 was heard and there was therefore no prospect of his getting "immediate" access. The second question, relating to what constituted a "reasonable time", was also said to be moot since the Applicant had access to his counsel from 3 December 2013 onwards, long before the Judge determined the issue and delivered his decision on 14 January 2014.

21 On the first objection, we were satisfied that the revisionary jurisdiction of the High Court had been invoked in CM 70/2013. It was evident that in substance, the Prosecution's real objection on this issue related to a matter of form and procedure rather than of substantive jurisdiction. As a matter of substance, the application was brought to persuade the High Court to exercise its revisionary jurisdiction over the District Court after it had denied counsel's application to be afforded access to the Applicant.

22 It is true that the *form* of this application to the High Court was inappropriate in the circumstances. The Applicant should have filed a petition for criminal revision of the District Judge's order on 12 November 2013, instead of a criminal motion. However, had this point been taken by the Prosecution before the Judge in a timely way at first instance, we have no doubt at all that it could and would have been readily corrected. As we have observed, the Prosecution had not raised the slightest jurisdictional objection when the matter came before the Judge. We therefore held that although the form used by the Applicant was inappropriate, he had in substance sought to invoke the High Court's criminal revisionary jurisdiction in CM 70/2013. We were satisfied that it would have been unjust to uphold the procedural failing against the Applicant when this had not been raised by the Prosecution at the time the matter had first come before the Judge, nor even at any time before the Judge had ruled upon it. We therefore saw no merit in the Prosecution's first objection.

23 As to the second objection, the Prosecution's position that the application before the High Court was moot seemed to us, at least with respect to the first question, to be patently ill-conceived. The essential contention was that since the Applicant was asserting an "immediate" right to counsel and since by the time the application was brought, the Applicant had already been in remand for more than a week without access to counsel, the application was moot because he would

not on any basis be able to have *immediate* access, that moment having already passed. This is plainly incorrect. As a matter of logic, the right is a continuing right once it accrues and the fact that it has been denied *and is still being denied at the time the application is brought* cannot on any sensible basis mean that it has become moot. Indeed, it was precisely because the Applicant was still being denied access to his counsel that he applied to the High Court for a declaration that there is an immediate right to counsel upon the request of a person remanded for investigations under Art 9(3) of the Constitution. The fact that by that time the Applicant had already, allegedly, been denied access to counsel for some time and therefore could not avail of an immediate right of access cannot entail the conclusion that the alleged denial had become moot.

24 The Prosecution's position would entail the somewhat bizarre conclusion that once a right had been violated, it was to be regarded as spent and therefore incapable of being adjudicated by the courts, even if the violation was still continuing. Whatever may be the position where the alleged breach of the right is no longer continuing at the time of the application, there is no question in our mind that in this case, on the basis of the right framed by the Applicant, there was an allegedly continuing breach at the time of the application and there was nothing moot about this.

25 As to whether the second question was moot, it is not necessary for us to address this since as a matter of substance we were satisfied that the criteria for granting leave to refer this question were not met.

26 We accordingly turn to consider the criteria laid down in s 397(1) of the CPC.

Whether the references relate to questions of law of public interest

27 As stated above, one of the essential requirements in s 397(1) of the CPC for leave to be granted to refer a question of law of public interest to the Court of Appeal is that it must relate to a question of law and that question of law must be one of public interest. In our view, this requirement alone was sufficient to dispose of the criminal motion before us.

28 It is clear from the authorities that the use of the reference procedure is not appropriate where the question concerns matters of settled law or which can readily be resolved by the application of established principles: see *Wong Sin Yee v Public Prosecutor* [2001] 2 SLR(R) 63 at [26]; *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 at [37].

29 The first question framed by the Applicant was whether there is an immediate right to counsel upon the request of a person remanded for investigations. From the Applicant's written and oral submissions, it was evident that the basis for seeking to refer this question was to be found in the following observations contained in the Judgment (at [5]–[6]), which seemed to cast some doubt on the correctness of the interpretation placed on the words "a reasonable time" by the Court of Appeal in *Jasbir Singh*:

5 ... The Court of Appeal [in *Jasbir Singh*], 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 ... [I]t 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. ...

30 With great respect to the Judge, the position on the issues raised in the present application has been clear and settled since the decision of this Court in *Jasbir Singh*. This position has been re-affirmed in a number of later decisions including of this Court (see below at [32]). That being the case, as a matter of *stare decisis*, the position remains settled notwithstanding the doubts that might have been expressed by the Judge in the High Court.

31 In *Jasbir Singh*, this Court had considered what, at that time, was the only existing Singapore authority on the ambit of the constitutional right of access to counsel, namely the High Court decision in *Lee Mau Seng*. There, it had been held that an arrested person who wished to consult a legal practitioner of his choice was entitled to have this constitutional right granted to him by the authority having custody of him within a reasonable time after his arrest (*Lee Mau Seng* at [12]). The Court of Appeal in *Jasbir Singh* noted that while *Lee Mau Seng* did not elaborate on what a "reasonable time" would be, it could be surmised that an allowance for police investigations and procedure was intended to be incorporated within the framework of a "reasonable time" (*Jasbir Singh* at [48]). The exercise of the right of access to counsel was framed in this way to strike a balance that was considered appropriate to our circumstances between, on the one hand, the arrested person's undoubted right to legal representation and, on the other hand, the public interest in enabling the police to discharge their duty and carry out investigations effectively and expeditiously (*Jasbir Singh* at [46]).

32 The principles in *Jasbir Singh* have since been applied in subsequent cases. In *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [87], the High Court reiterated that giving effect to the right of access to counsel entailed balancing the rights of the arrested person against the public interest that crime be effectively investigated. On appeal, the Court of Appeal also applied *Jasbir Singh*, and observed that the fact that an arrested person had been fully co-operative with the police in the course of investigations was, in itself, no basis for granting access as soon as it was sought (see *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38 at [9]). Most recently, in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205, we affirmed the decision in *Jasbir Singh*, observing that there was no legal requirement that the police permit counsel to be present during interviews with the arrested person while investigations were being carried out (at [57]).

33 It is evident from these decisions that the first question in fact pertained to a matter of settled law. It was not an open question that had not finally been settled by the apex court or that admitted of continuing difficulty or that called for the discussion or further consideration of alternative views (*Mohammad Faizal* at [19], citing with approval the Malaysian Federal Court decision in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141).

34 In the course of the oral submissions, we asked what the effect would be if the alleged right that the Applicant was contending for was breached. To the extent it was suggested that in that event, any statement given by the arrested without having had access to his counsel should be automatically excluded, this would have been untenable, first because there is a statutory framework for excluding statements that are found to be involuntary (see s 258(3) of the CPC). Moreover, that precise point has already been considered and rejected by this court in *Jasbir Singh*, when it concluded that the right was properly framed as one available within a reasonable time and that required a consideration and balancing of the relevant facts and circumstances (*Jasbir Singh* at [49]).

35 Before us, Mr Thuraisingam suggested that the thrust of the first question (even if it was not

quite drafted in this way) was directed at whether access to counsel must be afforded to the arrested person within sufficient time to enable him to be represented at the first mention before a magistrate, which will be within 48 hours of arrest. Mr Thuraisingam submitted that this issue had not been considered before by the courts and further submitted that if the right to counsel was properly understood in this way, then whenever the right was denied to the arrested person, he would be entitled to be released immediately and in any event could not be held in remand in such circumstances.

36 In our judgment, this, in substance, was just a new way of characterising the real issue in contention, which is whether the right to counsel that is assured under Art 9(3) is one that may be availed of immediately upon arrest or within a reasonable time. This was squarely dealt with and disposed of by this court in *Jasbir Singh* and we are satisfied that the decision in that case is not only settled law but also good law. In our judgment, there are adequate safeguards within the statutory framework that is in place to enable the court to ensure that in any given case, the balance is in fact being appropriately struck between the interests of the arrested person on the one hand and the public interest in effective police investigations on the other. This underlay the approach taken by this court in *Jasbir Singh* and nothing was put forward that persuaded us that we should revisit this settled aspect of our law.

37 As to Mr Thuraisingam's suggestion, that if the alleged right he contended for was breached, this would entitle the arrested person to an order for his immediate release, in our judgment this was untenable because *habeas corpus* is not an available remedy to a person in such circumstances; the courts will not order the release of a person in *habeas corpus* proceedings unless it can be shown that the detention itself is illegal or unlawful (*Lee Mau Seng* at [21]–[22]).

38 We therefore did not see that there was any open controversy in the first question and hence this question did not call for a reference to this Court under s 397(1) of the CPC.

39 As for the second question that was framed by the Applicant, what is a "reasonable time" within which the right to counsel can be exercised is inherently a question of fact in the sense that it calls for a factual inquiry of all the relevant considerations. It is evident that this is not a question of law that can be answered in the abstract. In the circumstances we did not see any basis for this question to be referred.

Conclusion

40 For these reasons, we dismissed the criminal motion filed by the Applicant on the basis that the questions sought to be referred to this Court pursuant to s 397(1) of the CPC were not questions of law of public interest. It was therefore unnecessary for us to consider the other requirements.

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