

SINGAPORE / JUDGMENT

TAN KI PENG v PUBLIC PROSECUTOR

[2022] SGHC 279

COURT

General Division of the High Court

DECIDED

3 November 2022

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HC/CM 45/2022|HC/CM 44/2022|HC/CM 46/2022

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In the GENERAL DIVISION OF THE high court of the republic of singapore

[2022] SGHC 279 Criminal Motion No 44 of 2022 Between Tan Ki Peng ... Applicant And Public Prosecutor ... Respondent Criminal Motion No 45 of 2022 Between Ng Woei Koon ... Applicant And Public Prosecutor ... Respondent Criminal Motion No 46 of 2022 Between Ang Boon Kian ... Applicant And Public Prosecutor ... Respondent grounds of decision [Criminal Procedure and Sentencing] — [Appeal] — [Out of time] This judgment is subject to final editorial corrections to be approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports. Tan Ki Peng v Public Prosecutor and other matters

[2022] SGHC 279 General Division of the High Court — Criminal Motions Nos 44, 45 and 46 of 2022 Tay Yong Kwang JCA 28 October 2022 3 November 2022 Tay Yong Kwang JCA: Factual background 1 The applicants filed three similar applications for extension of time to file notices of appeal against their sentences. The three applicants, together with Ching Jia Sheng (“Ching”), were arrested on 8 April 2021 for being concerned in loading into a truck 1,585kg of cigarettes for which duty was not paid. 2 On 20 August 2021, each of the three applicants pleaded guilty to one charge under the Customs Act (Cap 70, 2004 Rev Ed) for the evasion of excise duty of \$732,732. Each of them also admitted to one charge (the “GST Charge”) under the same Act for the evasion of Goods and Service Tax (“GST”) amounting to \$58,786.73 and consented to having it taken into consideration for the purpose of sentencing. 3 The three applicants were represented by the same Defence Counsel. In their joint written mitigation plea dated 18 April 2021, their Defence Counsel urged the District Judge (“DJ”) “to impose an imprisonment term of not more than 32 months, backdated to 10 April 2021, the date of the Accused persons remand”. On 20 August 2021, the DJ sentenced each of the three applicants to 34 months’ imprisonment with effect from 10 April 2021. 4 On 6 April 2022, the applicants’ co-accused, Ching, pleaded guilty before another DJ to the same evasion of excise duty charge and consented to having the same GST Charge taken into consideration for the purpose of sentencing. Ching was also

sentenced to 34 months' imprisonment but his sentence was backdated to 8 April 2021, the date of arrest, which was 2 days before the date of remand. The applicants' submissions

5 On 24 August 2022, the three applicants filed the present applications in the General Division of the High Court to seek an extension of time to file their respective notices of appeal against sentence. In their individual written skeletal arguments, their common ground was that they "only got to know about it [that is, Ching's sentence being backdated to the date of arrest] recently". 6 All three applicants asserted erroneously that they did not have a lawyer during their sentencing. They also stated that they did not know that they could have requested the DJ to backdate their imprisonment terms to the date of arrest. They asked that they be allowed to appeal out of time in order to have their imprisonment terms backdated to the date of arrest. 7 They each claimed that the difference of 2 days would "mean a lot to my family and me" as they would be released from prison earlier. They cited their respective families' financial and/or health issues in support of this. They also stated that they were very remorseful for all that had happened. The Prosecution's submissions 8 The Prosecution contended that these three applications were a misguided attempt to appeal against sentence more than 11 months out of time. The applicants were represented by Defence Counsel before the DJ and they had not given any explanation for the inordinate delay. Even after Ching's sentencing on 6 April 2022, they filed these applications only on 24 August 2022, some 4 months and 19 days later. 9 Citing the recent decision of the Court of Appeal in *Adeeb Ahmed Khan s/o Iqbal Ahmed Khan v PP* [2022] SGCA 61, the Prosecution submitted that where the delay and the surrounding circumstances suggested that an applicant did not intend to challenge the decision at first instance, a higher threshold of substantial injustice must be met before an application for extension of time to appeal could succeed. The applicant must show that an injustice had arisen in that the earlier decision was based on a fundamental misapprehension of the law and the injustice must be substantial in that the said misapprehension had a significant bearing on the sentence imposed. 10 In any case, there was no reasonable prospect of success on appeal. The sentences of 34 months' imprisonment approximated the 32 months' imprisonment that the applicants' Defence Counsel had asked for. Pursuant to ss 318(5)(a) and (b) of the Criminal Procedure Code 2010 (2020 Rev Ed), both the date of arrest and the date of remand are factors that the court must consider before deciding when an imprisonment term is to take effect. The applicants' Defence Counsel had asked for the imprisonment terms to be backdated to the date of remand and the DJ ordered as requested. 11 Clearly therefore, there was no injustice, let alone substantial injustice to justify an extension of time to appeal. The court's power to backdate a custodial sentence is purely discretionary and there is no principle in law that imprisonment must be backdated in all cases. The 2-day adjustment sought to the 34 months' imprisonment terms would be of marginal significance and could not justify appellate intervention in the DJ's exercise of discretion. 12 The Court of Appeal in *BWM v PP* [2021] SGCA 83 (a decision rendered on 16 August 2021, 4 days before the applicants pleaded guilty) stated at [25] that: Finally, we think that in the absence of special reasons, imprisonment terms should be backdated to the date of arrest rather than

the date of remand for cases where the accused person remains in custody after arrest. However, although the trial Judge in that case backdated the imprisonment term to the date of remand, one day later than the date of arrest, the court did not see any need to make the “very fine adjustment in favour of the appellant” in the light of the entire situation there, including the fact that the issue of backdating was not raised on appeal.

13 The Prosecution argued that the applicants here were also asking for a very fine adjustment of 2 days. This did not justify the appellate court interfering with the DJ’s exercise of discretion. My decision 14 At the hearing of these applications before me, the applicants acknowledged that they were represented jointly by Defence Counsel in the District Court. They explained that they meant to state that they had no Defence Counsel to represent them in the present applications. 15 The applicants confirmed that they were not seeking to appeal against their 34 months’ imprisonment terms. They were only asking for extension of time to appeal against the imprisonment terms commencing on the date of remand instead of the date of arrest. The crux of their complaint therefore was that their sentences were effectively 2 days longer than Ching’s. 16 On the issue of delay in seeking an extension of time to appeal, the applicants did not state when they found out about Ching’s sentence after Ching was sentenced on 6 April 2022. In their affidavits filed on 24 August 2022, they only stated that they found out about it “recently”. Their applications here were also filed on 24 August 2022, about four and a half months after Ching was sentenced. I proceeded on the basis that they filed their applications soon after finding out about Ching’s sentence having been backdated to the date of their arrest. 17 On the merits of the applications, the DJ’s backdating of their imprisonment terms to the date of remand was in accordance with their former Defence Counsel’s request in their joint written mitigation plea, as seen in [3] above. This manner of backdating was discouraged by the Court of Appeal in *BWM v PP* in the absence of special reasons. Perhaps both the former Defence Counsel and the DJ were not aware of the decision in *BWM v PP* at that time as the Court of Appeal’s decision was given 2 days before the joint written mitigation plea was filed and 4 days before the DJ sentenced the applicants. 18 However, as seen in the outcome of *BWM v PP*, the Court of Appeal declined to further backdate the appellant’s sentence from the date of remand to the date of arrest because it was a “very fine adjustment” of one day in the light of the entire situation there, including the fact that the issue of backdating was not raised on appeal. Backdating an imprisonment term to the date of remand instead of the date of arrest was therefore not an illegal sentence. If it was, I would have exercised my revisionary power to correct the applicants’ respective imprisonment sentences. 19 Although the applicants believed that the 2 days’ difference in the imprisonment terms, if these started from date of arrest instead of date of remand, would mean a lot to them and/or their families, this difference must be considered in the context of their 34 months’ imprisonment terms. Seen in this context, the difference of 2 days was really too insignificant an adjustment to warrant an extension of time to appeal against a decision made on 20 August 2021. 20 There was clearly no substantial injustice caused by the backdating to the date of remand in the circumstances here. Accordingly, the applications for extension of time to appeal against

their sentences were dismissed. Tay Yong Kwang Justice of the Court of Appeal The applicants in person; Kong Kuek Foo (Attorney-General's Chambers) for the respondent in HC/CM 44/2022, HC/CM 45/2022 and HC/CM 46/2022.

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