IRWAN ABDULLAH & ORS
v.
PP

High Court Malaya, Alor Setar
Balia Yusof Hj Wahi JC
[Criminal Application No: 44-01-2002]
21 April 2002

JUDGMENT

Balia Yusof JC:

This application for revision is made by a notice of motion supported by an affidavit affirmed by one Jagdeep Singh Deo, counsel for all the applicants in this application. Together with the same, a certificate of urgency was also filed requesting for an early disposal of the subject matter. In the said notice of motion, this court is urged to exercise its revisionary powers under s. 323 of the Criminal Procedure Code (hereinafter referred to as the CPC) to determine the propriety of the order of the learned magistrate made on 10 March 2002 refusing the application of the applicants to have the sentence of imprisonment in default of payment of the fine to commence from the date of their arrest on 2 February 2001. Accordingly, this court is urged to substitute for the order of the learned magistrate an order for the sentence of imprisonment in default of payment of fine to run from the date of arrest.

Briefly stated, the facts of the case show that all the 39 applicants who are Indonesians were arrested on 2 February 2001 and charged under ss. 15(1)(a) and 53 of the Fisheries Act 1985 (Act 317) at the Langkawi Magistrate Court. The amended charges against the applicants read as follows:

Pertuduhan Pertama (Pindaan)

Bahawa kamu bersama-sama pada 1.2.2001 lebih kurang jam 11:00 malam di atas vesel penangkapan ikan asing no. pendaftaran GT85 No. 736/PPb "KM SEMESTA PAHALA SAKTI IV" di kedudukan garis lintang 05 darjah 37.00 minit Utara dan garis bujur 099 darjah 00.50 minit Timur di dalam perairan perikanan Malaysia jarak kedudukan 54.6 batu nautika dari Pulau Cupu dalam daerah Langkawi, Kedah telah didapati menangkap ikan dengan peralatan menangkap ikan iaitu Pukat Jerut tanpa satu permit yang sah dikeluarkan oleh Ketua Pengarah Perikanan Malaysia di bawah seksyen 19 Akta Perikanan 1985 maka dengan itu kamu semua bersama-sama telah melakukan kesalahan di bawah seksyen 15(1) Akta Perikanan dan boleh dihukumkan di bawah seksyen 25(a) Akta yang sama yang dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Kedua (Pindaan)

Bahawa kamu bersama-sama pada 1.2.2001 dari jam 11:00 malam di kedudukan

garis lintang 05 darjah 37.00 minit Utara dan garis bujur 099 darjah 00.50 minit Timur hingga 2.2.2001 jam 1:30 pagi di kedudukan garis lintang 05 darjah 45.50 minit Utara dan garis bujur 099 darjah 01.80 minit Timur di dalam perairan perikanan Malaysia telah didapati tidak mematuhi kehendak pegawai berkuasa, Lt Kdr Ameir Azmi Bin Kamalul Ariffin selaku Pegawai Memerintah kapal Di Raja Serampang dari Tentera Laut Diraja Malaysia (TLDM) supaya memberhentikan vesel nombor Pendaftaran GT8S No. 736/PPb "KM SEMESTA PAHALA SAKTI IV" dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 53 Akta Perikanan 1985 dan boleh dihukum di bawah seksyen yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

At the outset, all the applicants were denied bail by the learned magistrate and were remanded at the Alor Setar Prison. By way of revision, the Alor Setar High Court had on 10 October 2001 allowed bail in the sum of RM10,000 with two sureties for the first applicant and RM5,000 with two sureties for second to the thirty ninth applicant. All, however were unable to raise the amount stipulated and to provide the sureties required and accordingly they were further remanded at the Alor Setar Prison while awaiting trial. On 10 March 2002 all the applicants were found guilty on both amended charges and were sentenced to a fine. For the first applicant who was the master of the vessel, he was sentenced to a fine of RM200,000 in default five months imprisonment on the first amended charge and to a fine of RM5,000 in default one month imprisonment on the second amended charge. The rest of the applicants (2nd to 39th) were sentenced to a fine of RM10,000 in default two months imprisonment on the first amended charge and to a fine of RM5,000 in default one month imprisonment on the second amended charge. Before the learned magistrate, an application was made to have the sentence of imprisonment in default of payment of the fine to take effect from the date of arrest. It was refused, and thus this application for revision by the said applicants.

It is trite law that in exercising the discretionary power of revision, the judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and to the regularity of any proceedings of such inferior court (*Liaw Kwai Wah & Anor v. PP* [1986] 1 MLRA 254; [1987] 2 MLJ 69; [1987] CLJ (Rep) 163).

It is the contention of the applicant that the learned magistrate in ordering the default sentence of imprisonment for the failure of the applicants to pay the fine ought to have considered that the applicants has been in custody since the date of arrest on 2 February 2001, a period of over 13 months. In his submission, counsel for the applicants contended that s. 282(d) of the CPC empowers the learned magistrate to do so. Section 282(d) reads:

282. With regard to sentence of imprisonment the following provisions shall be followed:

a) ...

b) ...

c) ...

d) ... every sentence of imprisonment shall take effect from the date on which the sentence was passed unless the Court passing such sentence otherwise directs.

In support of his argument, counsel relied on the Indian Supreme Court case of *Mr. Boucher Pierre Andre v. Superintendent, Central Jail Tikar New Delhi & Anor*[1975] AIR 164as an authority that when an accused person is sentenced to imprisonment for a term in default of payment of fine, it is as much a sentence of imprisonment imposed upon him as a substantive sentence of imprisonment. In the light of that proposition, it is further submitted by counsel that for all intent and purposes there is no distinction between a sentence of imprisonment in default of payment of fine as provided in s. 283(1)(b)(iv) of the CPC and a substantive sentence of imprisonment as provided in s. 282(d) of the same. This being the case, it is therefore open to the learned magistrate to exercise his discretion to order the sentence of imprisonment in default of payment of fine to commence from the date of arrest under s. 282(d) of the CPC.

I pause here to note that the above case cited by counsel for the applicant is an authority on the interpretation and applicability of s. 428 of the Indian Code of Criminal Procedure 1973. For ease of reference, s. 428 is reproduced and reads:

428. where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

I find no similar provision in the CPC. The principle of "setting off" is not provided for in our jurisdiction. Be that as it may, even in the provisions of s. 428 of the Indian Code of Criminal Procedure 1973 itself, the Indian Parliament treats a term of imprisonment in default of fine differently from a substantive sentence of imprisonment for purposes of setting off and this was done in 1978 when an amendment was introduced into the section. To say that s. 428 of the Indian Code of Criminal Procedure 1973 is similar to s. 282(d) of the CPC as submitted by counsel for the applicants, would in my view be erroneous. In my view, there is a clear distinction between the provisions of the Indian Code of Criminal Procedure 1973 and the CPC.

Section 428 of the Indian Code of Criminal Procedure 1973 is a specific section granting the power to set off whereas s. 282(d) of the CPC gives the power to the courts either to order the sentence of imprisonment to run from the date on which the same was passed or some other date, which in practice is normally translated into to take effect either from the date of arrest if the subject is still under detention

or some other date depending on the particular facts and circumstances of the matter. In exercising the discretionary power under this section the court must exercise it according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself *(Liaw Kwai Wah & Anor v. Public Prosecutor (supra))*. In this respect, even if s. 282(d) of the CPC is held to be applicable in the instant case, the burden is on the applicants in making this application to indicate to this court that there was a wrong exercise of discretion by the learned magistrate in not exercising his discretion to allow the sentence of imprisonment in default of payment of fine to take effect from the date of arrest. In my view and I so hold, they have not. Again, in my view there is a distinction between the provisions of ss. 282 and 283 of the CPC. While s. 282 deals with the sentences of imprisonment, s. 283 relates to sentences of fine. It is abundantly clear that they are distinct provisions, each section being very specific in nature.

In the instant case, the applicants were sentenced under ss. 25(a) and 53 of the Fisheries Act 1985 (Act 317) which provide for only a sentence of fine and that being so, the provisions of s. 283(1)(b)(iv) of the CPC applies and the learned magistrate has rightly rejected the applicants' request for the sentence of imprisonment in default of payment of fine to take effect from the date of arrest. Section 283 of the CPC explicitly lays down the provisions relating to sentences of fine. It is pertinent at this juncture that the said provision be quoted in extenso and it reads:

Provisions as to sentences of fine.

283. (1) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply:

(a) where no sum is expressed to which the fine may extend the amount to which the offender is liable is unlimited, but shall not be excessive;

(b) in every case of an offence in which the offender is sentenced to pay a fine the Court passing the sentence may, in its discretion, do all or any of the following things:

(i) allow time for the payment of the fine;

(ii) direct payment of the fine to be made by instalments;

(iii) issue a warrant for the levy of the amount by distress and sale of any property belonging to the offender;

(iv) direct that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable

under a commutation of sentence:

Provided that where time is not allowed for the payment of such fine an order for imprisonment in default of payment shall not be issued in the first instance unless it appears to the Court that the person has no property or insufficent property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment.

(v) direct that the person be searched and that any money found on him when so searched or which, in the event of his being committed to prison, may be found on him when taken to prison, shall be applied towards the payment of such fine the surplus, if any, being returned to him:

Provided that the money shall not be so applied if the Court is satisfied that the money does not belong to the person on whom it was found or that the loss of the money will be more injurious to him than his imprisonment;

(c) the period for which the Court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale:

(i) if the offence is punishable with imprisonment:

Where the maximum term The period shall not

of imprisonment exceed

does not exceed six months ... the maximum term of

imprisonment

exceeds six months but does

not exceed two years ... ... six months

exceeds two years ... ... one quarter of the

maximum

imprisonment

(ii) if the offence is not punishable with imprisonment:

Where the fine - the period shall not

exceed

does not exceed tweny-five

ringgit ... ... two months

exceeds twenty-five ringgit but

does not exceed fifty ringgit ... four months

exceeds fifty ringgit ... ... six months

(d) (Omitted).

(e) the imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law;

(f) if, before the expiration of the time of imprisonment fixed in default of payment, such a proportion of the fine is paid or levied that the time of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate;

(g) the fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period that six years then that at any time previous to the expiration of that period, and the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts.

(2) A warrant for the levy of a fine may be executed at any place in Malaysia, but if it is required to be executed outside the State in which it is issued it shall be endorsed for that purpose by a Judge or by a First Class Magistrate having jurisdiction in the Sate in whkh it is to be executed.

In my view, the words "shall be in excess of" as used in s. 283(1)(b)(iv) clearly and unambiguously spells out the intention of Parliament to have a term of imprisonment ordered in default of payment of fine to be consecutive to any other term of imprisonment to which an accused may be sentenced or to which he may be liable under a commutation of sentence. It is also my considered view that in cases like the instant before me, where the sentence to be imposed as provided by the law is only that of a fine, the court in ordering the term of imprisonment in default of payment of the fine is only left with the choice of ordering it to take effect on the date of the passing of such sentence. To order the default sentence to run from the date of arrest would in my view, be against the spirit and intent of that section. Suffian LP in our Federal Court case of *Public Prosecutor v. Sihabduin & Anor* [1980] 1 MLRA 3; [1980] 2 MLJ 273; [1981] CLJ (Rep) 82 said:

Thirdly, if the law maker so amends the law, to paraphrase the words of Lord Diplock at page 541 in *Duport Steels Ltd v. Sirs* [1980] 1 All ER 529, the *role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it.* Where the meaning of the words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral; or to paraphrase the words of Lord Scarman at page 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the

enactment. *Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judges duty is to interpret and apply it.* (emphasis added)

Again, it is trite that if, in construing the relevant provisions there appears any reasonable doubt or ambiguity, it will be resolved in favour of the persons who would be liable to the penalty. Reading s. 283(1)(b)(iv) of the CPC there appears to be no doubt or any ambiguity whatsoever as to the words used and the intention of Parliament in enacting the same. The said section is a specific provision dealing with the subject matter of default sentence and thus, is penal in nature. Reading the said section, one can only conclude that in enacting the same, through the use of the words "shall be in excess" Parliament envisages a consecutive term of imprisonment which is "over and above" any other sentence of imprisonment suffered by the convicted person. In adopting such an interpretation, I do not see any violence is done to the language of the provision and on the contrary I am of the view that it falls squarely within the express letter of the law and in accord with its intent and purpose to order the sentence of imprisonment in default of payment of fine in the instant case to commence from the date on which the same was passed. It is the duty of this court to give effect to the words of Parliament.

In *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* ([1985] CLJ (Rep) 122) at p. 516 (at p. 125) Abdoolcader SCJ observed:

The Court however is not at liberty to treat words in a statute as mere tautology or surplasage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the Court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co. Ltd. v. Vandry,* Lord Summer in delivering the judgment of the Judicial Committee said (at page 676):

Secondly, there is no reason why the usual rule should not apply to this as to other statutes namely, that effect must be given, if possible, to all words used for the legislature is deemed not to waste its words or to say anything in vain.

My view in interpreting s. 283(1)(b)(iv) of the CPC in the manner as above is further fortified by the judgment of Gill J (as he then was) in *Re Cheng Seng Fatt* [1964] 1 MLRH 171; [1965] 31 MLJ 91 where his Lordship said:

The effect of section 102 of the Courts Ordinance is that where a person upon conviction at one trial of two or more distinct offences is sentenced to a term of imprisonment for each offence, the Court has discretion to order the sentences to run concurrently or consecutively. **But if the sentence for any one offence is a fine, then the sentence in default of payment of such fine must be consecutive to any other term or terms of imprisonment.** (emphasis added)

Again, Chang Min Tat J (as he then was) in *Public Prosecutor v. Yuen Peng Lam* [1919] MLJ 211 in exercising his Lordship's power of revision set aside the

order of concurrency and substitute thereof an order that the default sentence run consecutively. In that case the order of the learned Magistrate ordering the default sentences on the two charges against the respondent to run concurrently was held to be wrong and in contravention of s. 102(c) of the Courts Ordinance 1948.

I pause here to observe that the above two judgments lay down the principle of sentencing in default of payment of fine as provided in s. 102 of the now Subordinate Courts Act 1948 (Act 42) which principle, in my view is similarly echoed in s. 283(1)(b)(iv) of the CPC.

I next move on to the issue of the discretionary power of the court under s. 283(1)(b) of the CPC. In this respect, I need go no further than referring to the case of *Public Prosecutor v. Amir b. Mahmood & Ors* [1996] 5 MLJ 159 referred to by the learned counsel for the applicants. Abdul Malik Ishak J expressed the view *(percuriam)* that s. 283(1)(b) of the CPC gives a discretionary power to the court to exercise according to common sense and justice "and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet". In this case, His Lordship imposed an additional sentence of fines on the first and third accused without exercising the discretion to direct that in default of payment of those fines they should suffer imprisonment for a certain term. While I may adopt and agree with those views, I further hold and add that once the court orders a sentence of imprisonment in default of payment of fines, such imprisonment sentence must be consecutive to any other term of imprisonment which an accused person is sentenced to.

It was further contended by counsel for the applicants that the propriety of the sentence imposed by the learned magistrate must also be looked at from the perspective of the totality principle which requires the court to review the sentence and consider whether the aggregate is just and appropriate (*Low Meng Chay v. PP* [1993] 1 SLR 569). It has been strenuously argued before me that taking into consideration the fact that all the 39 applicants has been in remand for about 13 months and nine days from the date of arrest to the date of conviction, a sentence of six months imprisonment in default of payment of fine on the first applicant and three months for the other applicants offends the totality principle. My answer to this argument is that in applying the totality principle what the court ought to do is to look at all the sentences that has been imposed on the accused person and consider whether the aggregate of all those sentences is appropriate having considered the overall circumstances of the case. To start with, all the 39 applicants were never sentenced to any other term of imprisonment or fine. Their stay in prison prior to the conviction cannot by any stretch of imagination be considered as a "sentence". Initially they were remanded because of the refusal of bail by the learned magistrate and subsequently upon being granted bail by the High Court Alor Setar, all of the applicants were unable to raise the amount of bail granted by the said court on 10 October 2001. Again they were kept in remand until 10 March 2002 when the case was finally disposed off and they were convicted. The sentence suffered by the first applicant, who is the 'Tekong' of the ship was: a fine of

RM200,000 in default five months imprisonment on the first amended charge and a fine of RM5,000 in default one month imprisonment on the second amended charge. While the rest of the applicants were sentenced to a fine of RM10,000 in default two months imprisonment on the first amended charge and a fine of RM5,000 in default one month imprisonment on the second amended charge. As adumbrated earlier, all the applicants were sentenced under ss. 25 and 53 of the Fisheries Act 1985 on the first and second charges respectively. For ease of reference, both sections are reproduced below:

25. Any person who contravenes or fails to comply with any provision of this Act shall be guilty of an offence and where no special penalty is provided in relation thereto, such person shall be liable:

(a) where the vessel concerned is a foreign fishing vessel or the person concerned is a foreign national, to a fine not exceeding one million ringgit each in the case of the owner or master, and one hundred thousand ringgit in the case of every member of the crew;

(b) in all other cases, to a fine not exceeding twenty thousand ringgit or a term of imprisonment not exceeding two years or both.

53. Any person who resists or wilfully obstructs any authorized officer or fails to comply with any requirement made by any authorized officer in the exercise of his powers and duties under this Act shall be guilty of an offence and liable to a fine not exceeding twenty thousand ringgit.

Having perused the said provisions and the sentence imposed on the applicants, I am of the considered view that the sentence imposed on the applicants in its totality is not manifestly excessive. I am inclined to agree with the learned deputy public prosecutor that taking into consideration the interest of the public and for the protection of national resources, the sentence imposed on the applicants is a fair one. As for the default term too, the period of imprisonment as ordered by the learned magistrate is certainly in accord with the provisions of s. 283(1)(c)(ii) of the CPC.

In this respect I am reminded of the oft quoted passage in the case of *R v. Kenneth John Ball* [1951] 35 Cr. App Reports 164:

In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as securing to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment would be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed seried, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and

leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe. (emphasis added)

It is entirely within the discretion of the learned magistrate to impose the appropriate sentence in the particular circumstances of the case and this court in the exercise of its revisionary powers should be slow to interfere with the sentence unless it can be shown that such sentence is unjust or manifestly wrong. In this respect, I stand guided by the decision of the Court of Appeal in *Liow Chow & Anor v. Public Prosecutor* [1939] 8 MLJ FMSR 170 holding that:

The sentence of the Court should not be altered unless the Appellate Court considers the sentence unjust. An Appellate Court must reject "the lore of nicely calculated less or more" in matters of sentence. Before the sentence is altered it must be manifestly wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

The same principle applies equally to the power of this court in exercising its revisionary power and having perused the records of the case before me, it has not been shown to the satisfaction of this court that the sentence imposed is manifestly wrong in that it being illegal or unsuitable to the proved facts and circumstances of the case. My perusal of the records of the case indicate that the learned magistrate has taken into account the facts and circumstances of the case, the submissions by the learned deputy public prosecutor and the plea in mitigation made on behalf of the applicants in considering the appropriate sentence to be imposed on the applicants.

For the reasons stated above, I hold that the learned magistrate was right in refusing the application of the applicants to have the sentence of imprisonment in default of payment of fine to take effect from the date of arrest and the said sentence is accordingly affirmed and the present application be and is hereby dismissed.