Adri Anton Kalangie v Public Prosecutor **[2018] SGCA 40**

I. Executive Summary

When courts issue decisions establishing or clarifying sentencing guidelines, a concern is whether these guidelines should only be applied prospectively (known as "**the doctrine of prospective overruling**"), and if so what that prospectivity entails. In *Adri Anton Kalangie v PP* [2018] SGCA 40, the Court of Appeal ("**CA**") held that although as a general rule, decisions establishing or clarifying sentencing guidelines will apply both retroactively as well as prospectively, the court laying down the guidelines may, in an exceptional case, state that such guidelines will only come into effect from a specific date. In such a case, the guidelines should apply to all offenders *sentenced after* the date of the decision, regardless of when they had committed the underlying offence. However, they would not apply to the actual offender in the decision.

In this case, one Adri Anton Kalangie (the "**Offender**") was charged with importing not less than 249.99g of methamphetamine under section 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**"). At sentencing, the High Court ("**HC**") applied the sentencing framework from *Suventher Shanmugam v Public Prosecutor* [2017] 2 SLR 115 ("***Suventher***"), which the CA had recently released, albeit after the date of the Offender's offence. The HC rejected the Offender's argument that since his offence was committed before *Suventher* was released, the *Suventher* framework should not be applied.

On appeal, the CA considered whether the doctrine of prospective overruling should apply to *Suventher*, such that the *Suventher* sentencing framework would not apply to the Offender's case. It laid down the following principles in determining the applicability of the doctrine:

(a) The doctrine should only be invoked in exceptional cases.

(b) The question is whether a departure from the ordinary retroactivity of a decision is necessary to avoid serious and demonstrable injustice to the parties, or to the administration of justice. Relevant factors include but are not limited to: (i) the extent to which the pre-existing legal principle was entrenched; (ii) the extent of the change to such principle; (iii) the extent to which such change was foreseeable; and (iv) the extent of reliance on such principle.

(c) The onus of establishing grounds to exercise the court's discretion in this regard is ordinarily on whoever seeks such exercise of discretion.

(d) Unless expressly stated or plainly indicated otherwise, decisions are presumed to be retroactive. If the doctrine is invoked, the court should explicitly state so, and explain the precise effect of the doctrine.

Further, where the decision involves establishing or clarifying a new sentencing guideline:

(a) The prospectivity of such a decision should generally be considered and pronounced by the court establishing or clarifying the guideline. In this context, the court is also likely to be sitting in an appellate capacity; and

(b) Sentencing guidelines which apply prospectively should apply to all offenders sentenced after the delivery of the decision, regardless of when they had committed the underlying offence. Thus, such a decision would "exempt" the offender in the case at hand from the new framework, but not other offenders sentenced after the delivery of the decision, regardless of when they had committed the underlying offence.

Applying these principles, the CA upheld the sentence imposed by the HC. It held that any claim of prospectivity should have been raised in *Suventher* itself. Even if the doctrine applied

to *Suventher*, that only affected the offender in that case, and not the Offender. In any event, the doctrine of prospective overruling did not apply to *Suventher*. *Suventher* merely affirmed a rule that had been laid down in several previous lower court cases; it did not introduce a significant or unforeseeable change in the law. Nor could the Offender be said to have relied on the pre-*Suventher* state of law. Finally, the CA held that the sentence imposed by the HC was unimpeachable and not manifestly excessive.

II. Material Facts

The Offender was recruited to transport drugs between China and Indonesia, through ingesting or inserting drugs pellets into his body. In 2016, the Offender transited in Singapore *en route* to Indonesia. While in the transit hall, he admitted to a customer service officer that he was in possession of drugs. He was subsequently arrested. Although not less than 275.44g of methamphetamine was in fact recovered from the Offender (which would have warranted the imposition of capital punishment), the Prosecution agreed to reduce his charge to importation of not less than 249.99g of methamphetamine (which was below the capital threshold), as the Offender agreed to plead guilty at the pre-trial stage. The HC sentenced the Offender to 25 years' imprisonment and 15 strokes of the cane, based on a sentencing framework extrapolated from the earlier CA decision in *Suventher*.

III. Issues

The appeal raised two main issues: (a) whether the doctrine of prospective overruling applied to *Suventher*, and (b) whether the HC's sentence warranted the CA's intervention.

A. Does the doctrine of prospective overruling apply to Suventher

(i) Background

Traditionally, a decision on a legal issue is taken to be unbounded by time and have *both* retroactive and prospective effect. It has been argued, among other things, that limiting the retroactivity of a decision draws an arbitrary line between similarly-situated litigants and thereby raises questions of fairness and equality.

However, such justifications have been challenged. For one thing, retroactive decisions have also been criticized as arbitrary, as they would also not apply to all similarly-situated litigants. Moreover, as people tend to conduct their affairs on the basis of what they understand the law to be, an absolute rule of retroactivity may result in serious injustice, as it may frustrate their legitimate expectations as to the legal principles applicable to their actions. Limiting the retroactivity of decisions, on the other hand, enables people to arrange their affairs on the basis of the law then prevailing, without fear that their rights or obligations would be affected by any subsequent decision to the contrary.

(ii) Principles of the doctrine

The CA laid out the following principles in determining the applicability of the doctrine of prospective overruling. *First*, the doctrine should only be invoked in exceptional cases. This is a function of the restrictive approach to the doctrine of prospective overruling adopted in Singapore. It represents the appropriate balance of the tension between retroactivity and prospectivity in this jurisdiction. Such a restrictive approach is also consistent with that adopted in most other Commonwealth jurisdictions, including the UK, Malaysia and Hong Kong.

Second, the exceptionality of the doctrine means that it should only be invoked where a departure from the ordinary retroactivity of a decision is necessary to avoid serious and

demonstrable injustice, to the parties or to the administration of justice. Against this backdrop, the following non-exhaustive factors are relevant in determining whether the doctrine should be invoked:

(a) The extent to which the pre-existing legal principle or position was entrenched;
(b) The extent of the change to the legal principle;
(c) The extent to which the change in the legal principle was foreseeable; and
(d) The extent of reliance on the legal principle.

No one factor is preponderant over any other, and no one factor is necessary before the doctrine can be invoked in a particular case. For example, in a previous case, the HC had decided on new sentencing frameworks for certain vice offences, which would involve custodial sentences. However, prior to that case, the usual punishment for those offences was only a fine. The court found that the previous sentencing position was entrenched, and the change in sentences was fundamental and unforeseeable from an offender's perspective. As such, the court decided the new sentencing frameworks should only apply prospectively.

Third, the onus of establishing that there are grounds to exercise the court's discretion to limit the retroactive effect of a decision is ordinarily on whoever seeks the court's exercise of that discretion.

Fourth, given that decisions are by default retroactive in nature, a decision should presumptively be taken as having retroactive effect unless the appropriate appellate court[*] *explicitly* states otherwise. Where the doctrine is invoked, courts should say so and explain the precise effect of the doctrine, for example, the reference date from which the decision would take prospective effect.

The CA also made two specific points regarding decisions which establish or clarify a new sentencing framework or guideline in criminal matters. *First*, as a general rule, the prospectivity of such decision should only be considered and pronounced by the court which is so establishing or clarifying the new framework. Since the court establishing or clarifying a new framework will likely be an appellate court, it is unlikely that this doctrine will be raised in or by a court of first instance[†] (i.e. the HC sitting in its original criminal jurisdiction, and the State Courts). The corollary is that these courts ought, generally, to avoid invoking the doctrine of prospective overruling. For instance, if an appellate court issues a sentencing guideline decision, it would be inappropriate for the State Court to subsequently consider the prospectivity of the earlier appellate decision when dealing with another offender.

Second, if a new framework is held to apply only prospectively, it should apply to all offenders *sentenced* after the decision establishing such framework, regardless of when they had committed the offence. Thus, a new framework which is only meant to apply prospectively would not apply to the offender in the underlying case, even though it was that very case which gave rise to the new framework. The new framework would, however, apply to any offender sentenced at a later time, even if the offender committed the offence prior to the date of the decision establishing such new framework. The focus is on the *date of sentencing*, rather than the date of commission of the offence or the date of conviction. Any concerns about the

[*] An appellate court (also known as a "higher" court) is a court that can review the decisions of a lower court. For instance, if a case started from the State Courts, the appellate court would be the HC. For serious criminal matters starting in the High Court, the appellate court would be the CA.

[†] A court of first instance is a court where legal proceedings are begun or first heard. An appellate court may review the decisions of a court of first instance.

arbitrariness of choosing the date of sentencing rather than the date of conviction are misplaced – arbitrariness exists in either situation. There is similarly no good reason to distinguish between an offender who commits an offence one day prior to the date of a sentencing guideline decision, and one who does the same thing a day after.

Importantly, the rationale for this rule is to allow the court to avoid injustice where the offender is made to immediately bear the consequences of a change in the law, when it was by chance that his case happened to become the occasion for the development of a new sentencing framework. The rule should not be seen as protecting a potential offender's legitimate expectation in the eventual sentence to be imposed; rather, it is a *concession* extended only in exceptional cases, to avoid serious and demonstrable injustice to the offender in the case at hand.

(iii) Whether the doctrine applied to *Suventher*

The CA explained at the outset that it was not the appropriate court to consider *Suventher*'s prospectivity; any issue of prospectivity should have been raised in *Suventher* itself. Even if the doctrine applied in *Suventher*, it would only exempt the actual offender in *Suventher* from the new sentencing framework, and not the Offender here.

In any event, the CA held that the doctrine of prospective overruling did not apply to *Suventher*. In *Suventher*, which was released in 2017, the offender pled guilty to a charge of importing not less than 499.9g of cannabis, and to a second charge of importing not less than 999.9g of cannabis mixture. The CA decided to apply the sentencing approach set out in a HC case decided two years ago in 2015. This involved using the quantity of drugs stated in the charge to derive an indicative starting sentence, before making the appropriate adjustments to reflect the offender's precise culpability and the presence of any aggravating or mitigating factors. The CA then laid down a sentencing table, indicating the starting terms of imprisonment and strokes of the cane, for the importation of between 330g and 500g of cannabis.

In the present case, the CA held that *Suventher* did not introduce a significant or unforeseeable change in the law as it had merely affirmed the central proposition from the previous HC case, which had itself been used in several other HC and lower court decisions.

Moreover, the Offender had in fact imported a quantity of drugs which would have warranted capital punishment, and therefore would not have fallen within the scope of any sentencing table extrapolated from *Suventher*. It was the Prosecutor who had decided to exercise its discretion to reduce the quantity of drugs stated in the Offender's charge to one below the capital threshold. As such, the Offender could not claim to have actually relied on the state of law prior to *Suventher*.

B. Did the HC's sentence warrant intervention

The second issue was whether the sentence imposed by the HC warranted appellate intervention. The threshold for appellate intervention in sentencing is a high one: an appellate court will only intervene if the sentencing judge made a wrong decision as to the proper facts for sentencing, had erred in appreciating the material before him, had erred in principle in arriving at the sentence, or had imposed a manifestly excessive or inadequate sentence.

In this regard, the CA broadly agreed with the HC's analysis. Further, the fact that the pellets were not intended for the Singapore market could not constitute a mitigating factor: the offence contemplated the bringing of drugs into Singapore, regardless of whether it was a mere transit

stop and regardless of the final destination. Taking all the factors into consideration, the CA held that the threshold required to impeach the HC's sentence had not been met, and affirmed the sentence imposed by the HC.

IV. Lessons Learnt

This is a welcome decision, as it instils greater certainty regarding the doctrine of prospective overruling. Nonetheless, it is to be hoped that the courts will exercise their discretion to invoke the doctrine where necessary to avoid serious and demonstrable injustice.

It is also noted that there may be practical difficulties in trying to establish such injustice in civil cases. In particular, it is unlikely that mere commercial hardship or inconveniences caused by the retroactive effect of a decision would suffice to establish such injustice. Such hardship or inconvenience cannot compare to situations in criminal law where the retroactive application of a new, and often harsher, sentencing framework may deprive a person of their life and liberty. The corollary, however, is that it may nonetheless be possible to invoke the doctrine of prospective overruling in civil cases presenting exceptional circumstances, for instance where a party may be deprived of his or her livelihood as well as all of his or her assets, in a situation akin to losing his or her liberty. It remains to be seen how the courts would apply the doctrine of prospective overruling in a civil case.

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