LI JUN, TAN LU GUANG v STATE (CAV0017 of 2007S)

SUPREME COURT — CRIMINAL JURISDICTION

MARSOOF, HETTIGE and CHANDRA JJ

1, 9 May 2012

Courts and judicial system — appeal — review of Supreme Court judgment — whether Supreme Court may review judgments made by it in criminal matters — no special circumstances — no substance — rerun of same arguments — abuse of process — waste of time — frivolous and vexatious — Administration of Justice Decree s 8(5) — Constitution s 122(5) — Penal Code ss 199, 200.

Two applications were filed for review of the judgments of the Supreme Court dismissing the appeal of the petitioner to the Court of Appeal, dismissing the special leave to appeal application and affirming the decision of the High Court.

Held –

(1) Section 8(5) of the Administration of Justice Decree 2009 applies to both criminal and civil matters.

State v Eliki Mototabuwa CAV 0005 of 2009, followed.

(2) There are no special circumstances warranting any review of the petitioners' applications and there is no substance to be considered in any of these applications. The petitioners have attempted to rerun the same arguments which have already been fully considered and rejected by this Court on the basis of being vexatious. They involve an abuse of process and the waste of time of this Court.

Applications for review dismissed.

Case referred to

Autodesk Inc v Dyason (No 2) [1993] 176 CLR 300; *Grierson v R* [1938] 60 CLR 431; *Jeyaraj Fernandopulle v Premechandra de Silva* [1996] 1 Sri LR 70; *Silatolu & Ors v State* (Criminal Appeal No CAV0002 of 2006); *Smith v NSW Bar Association* [1992] 176 CLR 256, considered.

Makario Anisimai v State CAV0006 of 2008, disapproved.

R v Cross [1973] QB 937 CA 941, cited.

Petitioners in person.

M. Korovou for the State.

Mudunavosa instructed by *Office of the Director of Public Prosecution, Suva* for the respondent.

[1] Hettige J. These two applications have been filed pursuant to s 8(5) of the Administration Justice Decree 09 of 2009 for review of the judgments of this court dated 13th October 2008 dismissing the appeal of the petitioner to the Court of Appeal on counts 2, 3 and 4 and the Judgment dated 21st October 2011 dismissing the Special Leave to Appeal application and affirming the decision of the High Court.

[2] The earlier same provision in s 122(5) of the Constitution which was abrogated by (Amendment) Act No 9 of 2009 has been re-enacted in s 8(5) of the Decree of 2009.

The s 8(5) of the Administration of Justice Decree provides as follows:

> "The Supreme Court may review any Judgment, pronouncement or Order made by it"

[3] The power conferred upon the Supreme Court under s 8(5) of the Decree of 2009 s 122(5) of the Constitution) enables the Supreme Court to re- open and review its own Orders and Judgments even after the formal entry of the Orders have been made.

[4] In these two petitions for review this court has fully heard the Special leave to appeal applications and the considered judgments of this court have been delivered. This court, having considered the relevant principles applicable to the review applications has dismissed such applications for review in criminal matters due to lack of substance and in order to prevent abuse of the court process.

[5] In Silatolu & Ors v The State (Criminal Appeal No CAV0002 of 2006 the Court) said that "a court of final appeal has power in truly exceptional circumstances to recall it's even after they have been entered, in order to avoid irremediable injustice" (Emphasis added)

The Supreme Court has come to that conclusion after considering many judgments from the Privy Council, House of Lords and the High Court of Australia.

[6] The cases that have been decided on review matters have established that the power of appellate court to re-open and review their orders should be exercised with great caution.

[7] In *Smith v NSW Bar Association* (1992) 176 CLR 256, 265 High Court of Australia said:

> "The power is discretionary and, although it exists up until the entry of the judgment, it is one that is exercised having regarded the public interest in maintaining the finality of litigation. Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for review… these considerations may tend against the re-opening of the case, but they are not matters which bear on the nature or review…once the case re-opened… the power to review a judgment where the order has not been entered will not ordinarily be exercised to permit a general re-opening…But…once a matter been re-opened, the nature and extent of the review must depend on the error or omission which has led to that step being taken."

[8] It is to be noted that in these two review applications we do not find any special circumstances warranting any review of the petitioners' applications and we observe that there is no substance to be considered in any of these applications. It appears that the petitioners have attempted to rerun the same arguments which have already been fully considered and rejected by this court on the basis of being vexatious. They involve an abuse of process of court and waste of time of this court.

[9] In *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300,303 Mason J said:

> "What must emerge, in order to enliven the exercise of the jurisdiction, is that the court has apparently proceeded according to some misapprehension of the facts or the relevant law and this… cannot be attributed solely to the neglect of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases."
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> (emphasis added)

[10] It may be useful to cite the case of *Grierson v R* (1938) 60 CLR 431, 435 wherein Dixon J said that,

"a second appeal from a conviction could not be entertained after the dismissal, on the merits, of an appeal or application for leave to appeal and… the first appeal could not be re-opened after a final determination."

It has also been held in *R v Cross* [1973] QB 937 CA 941 that the principles of law on review matters also apply in criminal appeals.

[11] However, in Fiji a different view has been taken by the Supreme Court in Makario Anisimai v State CAV0006 of 2008 wherein it was held that s 8 (5) of the Administration of Justice Decree of 2009 only applies to civil matters and not to criminal cases. At the hearing of this matter the State heavily relied on the Makario Anisimai judgment because these were review applications involving criminal convictions against the petitioners.

[12] It was contended by the State that, based on the Makario's judgment, the Supreme Court was of the view that the history of criminal appeal in Fiji, United kingdom and its colonies endorses that there be finality to litigation once a matter has been dealt with on appeal. State Counsel further argued that there is no case authority permitting Supreme Court to review its final decision on criminal appeal.

[13] However, at this stage it is pertinent to mention that in the Judgment of this court delivered on 09/05/2012 in the Supreme Court in State v Eliki Mototabuwa Review application CAV0005 of 2009 Mr Justice Anthony Gates has said that on a plain reading, there is no limitation of the application of s 8 (5) of the Decree of 2009 upon criminal matters. It must therefore be construed to permit in criminal matters also. We agree with the view expressed by Chief

[14] Justice Gates that s 8 (5) of the Decree of 2009 applies to both criminal and civil matters. Therefore, we cannot agree with the submission of the State based on Makario Anisimai's judgment.

[15] It was held in Sri Lankan Supreme Court case of *Jeyaraj Fernandopulle v Premechandra de Silva* 1996 1 Sri LR 70 (Five Judge bench decision) that " …when the Supreme Court has decided a matter, that matter is at end, there is no occasion for other judges to be called upon to review or revise a matter. The Supreme Court is a creature of statute and its powers are statutory. The court has no jurisdiction conferred by the Constitution or any other law to rehear, review, alter, or vary its decision. Decision of the Supreme Court are final."

It is to be noted that this court has considered the principles of law regarding review applications (second appeals) in other jurisdictions such as Privy Council, House of Lords, Australia and Sri Lanka where it has been held that second appeal in the same matter to the Appellate court had not been allowed.

LI JUN

[16] The petitioner in this application for review was a Chinese national who was represented by an interpreter of his choice. The interpreter having administered his oath before the Judges of the court did translate the submissions of the petitioner at the hearing. The petitioner through the interpreter wanted an adjournment of the hearing on the basis that he has not filed written submissions and he has not received a copy of the court record.

[17] The court was reluctant to grant any adjournment of the hearing on the basis that this was an application for review filed after about 3 years of the Supreme Court decision which had fully heard the appeal by the State, the petitioner's case and the decision of the Court of Appeal.

[18] The petitioner had been charged with offence of murder of Li Lianzhan, his wife (Wei Zhongyun) their son (Li Chung) and their niece (Wei Lan) by stabbing them to death at their home at Lekutu Street Samabula on 14th June 2002 and was convicted by the trial Judge, Gates J (as he then was) and sentenced to life imprisonment on each count of murder with a minimum term of 17 years, each sentence to be served concurrently.

[19] The petitioner's arguments at the trial court had been that he acted in self defence and that he should therefore, have been acquitted. In the alternative, the petitioner also took up the position that he acted under provocation in relation to the count of murdering Li Lianzhan. The trial Judge concurred with the unanimous decision of the assessors who found the petitioner guilty on each of the four counts.

[20] The petitioner filed an appeal against the decision of the High Court to the Court of Appeal on the limited issues of self-defence and provocation. The Full Bench of the Court of Appeal on 25th June 2007 quashed the petitioner's conviction on all 4 counts and ordered a new trial.

[21] The State filed an appeal against the decision of the Court of Appeal to the Supreme Court and on 13th October 2008 the Supreme Court partially allowed the appeal in affirming the conviction of the petitioner for murder of Wei Zhangyun, Li Chung and Wei Lan but ordered a new trial in respect of the murder of Li Lianzhan.

[22] By a letter dated 20th October 2011 (filed in the registry on 3 November 2011) the petitioner filed the present application for review of the Supreme Court decision dated 13 October 2008 which affirmed the conviction of the murder of Wei Zhangyun, Li Chung and Wei Lan. We assume that the application filed by the petitioner on 3 November 2011, though the petitioner does not refer to any statutory provision in his application, is one instituted under s 8(5) of the Administration of Justice Decree 9 of 2009.

[23] The State strongly objected to this application for review of the Supreme Court decision dated 13 October 2008 on the ground that the application has been filed out of time. In that, the delay in filing this review application is about 3 years which is grossly unreasonable.

[24] The petitioner submitted that he was acquitted by the trial court after re-trial ordered by Supreme Court on 13 October 2008 was heard in respect of the charge of murder of Li Lianzhan.

[25] He further submitted that, had he appealed against the conviction in respect of counts 2, 3 and 4 he would have been acquitted by Court. It appears that the petitioner, after about three years from the Supreme Court decision had not understood the fact that the Supreme Court has already heard the parties on appeal and gone into all the grounds of appeal to the Court of Appeal on provocation and self-defense.

[26] The State Counsel submitted that the trial Judge has properly referred to the law of provocation in paragraphs 32-37of the summing up and further the trial judge had directed the assessors that the prosecution must prove the absence of provocation beyond reasonable doubt in paragraph 35 of the summing up.

[27] The petitioner relentlessly pursues in this review application the same ground of provocation due to lack of intent and his defense at the trial being self-defense which the assessors had carefully considered and rejected at the trial in respect of the counts of murder of Wei Zhangyun, Li Chung and Wei Lan. The

Supreme Court affirmed the conviction having fully considered the grounds of appeal of the petitioner to the Court of Appeal.

[28] We conclude that, in the circumstances, that this is a vexatious application for review and an abuse of process of the court. The petitioner's application is also out of time. The Supreme Court has already determined this matter.

[29] Accordingly the petitioner's application for review is dismissed.

TAN LU GUANG

[30] The petitioner in this application was a Chinese National and it appears from the material available before court that the petitioner is now educated in the English Language. The petitioner appeared in person. The petitioner also stated that he would stick to the written submissions he has already filed in court in this regard.

[31] The petitioner in this application was charged with one count of murder contrary to s 199 and 200 of the Penal Code and at first the petitioner pleaded not guilty to the charge in the first instance and subsequently on 24 December 2004 he changed his plea and pleaded guilty. On his own plea the petitioner was convicted for the offence of murder and was sentenced to life imprisonment on 14th January 2005.

[32] The petitioner applied for Leave to appeal out of time to the Court of Appeal against the sentence on 23rd January 2007. Justice Gordon Ward considered the appeal and refused it on 23rd March 2007. The petitioner made another appeal on 21st February 2011 against the conviction and before Justice Marshall presiding as a single Judge of the Court of Appeal on the ground that the court interpreter who assisted him in court and his counsel had not interpreted the proceedings fully the during the trial against him. The Court of Appeal refused the application for extension of time for leave to appeal.

[33] The petitioner made a further application for leave to appeal out of time to the Full Bench of the Court of Appeal where the petitioner's application was dismissed for want of jurisdiction.

[34] Being dissatisfied with the decision of the Court of Appeal the petitioner made a Special Leave to Appeal application to the Supreme Court which came up for hearing on 12th October 2011 and adjourned till 19th of October 2011 to enable the petitioner to obtain the services of an interpreter. On 19th October 2011, the petitioner was assisted by an interpreter and his application was fully heard and dismissed by the Supreme Court affirming the decision of the High Court.

[35] The present application to this court is for review of the decision of the Supreme Court made on 21st October 2011.

[36] On 1st May 2012 when this matter was taken up for hearing the petitioner was unrepresented and appeared in person and said that the grounds of appeal in this application for review are the same grounds of appeal made to the Court of Appeal.

[37] The main issue raised by the petitioner in this review application are:

a) That the trial Judge failed to consider the fact that the petitioner was prejudiced when the interpreter lacked skill and ability to translate accurately the questions asked by counsel and the answers given by the accused appellant.

b) The petitioner, Tan Lu Gang did not at any time plead guilty to the charge of murder.

c) That the petitioner did not understand the nature of the charge, the basis for allegation being made against him and the nature of the proceedings.

[38] It would appear that the petitioner is attempting to reargue his appeal on the same grounds of appeal referred to in the written submissions dated 14th September 2011 in the Special leave to appeal application.

[39] The petitioner relies on the same case law referred to in his written submissions on providing interpreters and their role and same grounds of appeal made to the Court of Appeal where the petitioner was represented by a counsel from the Legal Aid.

[40] The present application is without substance and is an abuse of process. There is nothing disclosed in this application warranting review of the earlier decision of the Supreme Court made on 21st October 2011.

[41] Accordingly, we refuse and dismiss the petitioner's application for review which is frivolous and vexatious.

The Orders of the Court are:

(a) The two applications seeking review are rejected.
(b) The two petitions are dismissed.

Applications dismissed.