Wham Kwok Han Jolovan
v
Attorney-General

[2015] SGHC 324

High Court — Originating Summons No 594 of 2015
Woo Bih Li J
23 November; 22 December 2015

Administrative Law *— Remedies — Quashing order — Whether police warning for offence in lieu of prosecution could be quashed*

Facts

The applicant, Wham Kwok Han Jolovan, was issued a warning by the Central Police Division ("CPD") on 25 March 2015 ("the 25 March Warning") in lieu of prosecution for an offence under the Public Order (Unrestricted Area) Order 2013. When he was requested to sign a notice of warning to acknowledge receiving the warning, he refused. The applicant subsequently wrote to both the police and the Attorney-General's Chambers to protest the issuance of the warning against him. He did not receive a reply. He then commenced the present application on 22 June 2015 for leave to commence judicial review proceedings to quash the warning administered to him by the CPD. He argued that a warning affected him by increasing the likelihood of prosecution if he was to commit a fresh offence in the future and that the courts had taken into account a warning in the course of sentencing.

Held, dismissing the application:

(1) A warning was not binding on its recipient such that it affected his legal rights, interests or liabilities. The warning was no more than an expression of the opinion of the relevant authority that the recipient had committed an offence. It did not and could not amount to a legally binding pronouncement of guilt or finding of fact. The recipient was entitled to challenge the warning: at [33] and [34].

(2) With respect to the applicant's arguments, an individual had no right to insist that he be issued a warning before prosecution was initiated. The Attorney-General ("AG") was also not bound to consider whether a prior warning had been given or not before deciding whether to prosecute. Further, a court was not entitled to treat a warning as an antecedent or as an aggravating factor since it had no legal effect and was not binding on the recipient: at [36], [37] and [44].

(3) There was thus no decision in the 25 March Warning for the court to quash: at [45]

[Observation: The applicant's consent was not necessary for the AG to issue him a warning: at [47].]

Case(s) referred to

Comptroller of Income Tax v ACC [2010] 2 SLR 1189 (folld)
Hot Holdings Pty Ltd v Creasy (1996) 134 ALR 469 (refd)
Jeyaretnam Kenneth Andrew v AG [2014] 1 SLR 345 (refd)
PP v Siew Boon Loong [2005] 1 SLR(R) 611; [2005] 1 SLR 611 (refd)
PP v Tan Hiang Seng [2012] SGDC 484 (refd)
PP v Yap Rogers [2009] SGDC 146 (refd)
Tan Eng Hong v AG [2012] 4 SLR 476 (refd)

Legislation referred to

Income Tax Act (Cap 134, 2008 Rev Ed) s 45
Public Order (Unrestricted Area) Order 2013 (S 30/2013) paras 4(1)(*b*), 4(2)
Mining Act 1978 (WA)

Choo Zheng Xi and Jason Lee Hong Jet (Peter Low LLC) for the applicant; Francis Ng Yong Kiat, Zhuo Wen Zhao and Elton Tan (Attorney-General's Chambers) for the respondent.

22 December 2015 Judgment reserved.

Woo Bih Li J:

Introduction

1 Originating Summons No 594 of 2015 ("OS 594") is an application by Mr Wham Kwok Han Jolovan ("Mr Wham"), for leave to commence judicial review proceedings to quash two warnings administered to him by the Central Police Division ("CPD") on or about 25 March 2015 and 5 May 2015 respectively. Although OS 594 seeks to quash two different warnings on two different days, the parties agreed that there was no warning administered by the CPD on 5 May 2015. Indeed, as I will elaborate below, it was not even clear whether a warning was administered on the earlier date of 25 March 2015.

Background

2 On 1 October 2014, Mr Wham organised a candle light vigil entitled "Democracy Now! Singapore in Solidarity with Hong Kong" at Hong Lim Park. The event was publicised on Facebook where it was expressly stated that foreigners and permanent residents required a permit in order to participate in the event. At the start of the event, Mr Wham also informed the participants that only Singapore citizens were allowed to participate.

3 After the event, the CPD commenced investigations against Mr Wham as officers from the CPD had observed that there were participants that appeared to be foreigners. Upon the completion of its investigations, the CPD submitted its findings to the Attorney-General

("AG") for him to make a decision in relation to Mr Wham. The AG directed the CPD to issue a warning to Mr Wham to refrain from conduct amounting to an offence under para 4(1)(*b*) read with para 4(2) of the Public Order (Unrestricted Area) Order 2013 (S 30/2013) ("the Order") or any other criminal conduct in the future, instead of charging Mr Wham. Paragraph 4(1)(*b*) of the Order provides that an organiser of any demonstration held in Hong Lim Park must not allow any person who is neither a Singapore citizen nor a permanent resident to take part in the demonstration, while para 4(2) provides that contravention of para 4(1)(*b*) will result in an offence.

4 On 25 March 2015, Mr Wham met Deputy Superintendent of Police S Pannirselvam ("DSP Pannirselvam") at the CPD Headquarters. According to DSP Pannirselvam's first affidavit of 31 August 2015, DSP Pannirselvam had explained to Mr Wham that investigations against him had been completed and after careful consideration of the circumstances of the case and in consultation with the AG, a warning would be administered to Mr Wham in lieu of prosecution for an offence under para 4(1)(*b*) read with para 4(2) of the Order. DSP Pannirselvam proceeded to verbally warn Mr Wham as directed by the AG and informed Mr Wham that the same leniency may not be shown to him if he were to commit any offence in the future.

5 DSP Pannirselvam then invited Mr Wham to sign a document entitled "Notice of Warning". The Notice of Warning set out Mr Wham's name, the offence he was being warned for and the date and place of that offence. I will set out the material terms of the Notice of Warning later. Mr Wham refused to sign the Notice of Warning because he believed that he had done nothing wrong to warrant a warning and therefore he did not consent to the warning being issued to him. He informed DSP Pannirselvam that he wanted to consult his lawyers and requested a copy of the Notice of Warning. DSP Pannirselvam refused to give Mr Wham a copy as Mr Wham did not want to sign the Notice of Warning to acknowledge that he had received the document. DSP Pannirselvam said he then made some notes on the unsigned Notice of Warning. In the meantime, Mr Wham left CPD Headquarters.

6 On 4 May 2015, Mr Wham called the Investigation Branch Call Centre of the CPD to enquire about the outcome of the investigations against him. Mr Wham was informed that a warning had been administered to him on 25 March 2015. Mr Wham then requested that a document stating the outcome of his case be sent to him at his home address. On 5 May 2015, CPD sent a letter to Mr Wham stating that it had been placed on CPD's record that Mr Wham was "warned by … DSP S Pannirselvam on 25 March 2015" and "[a]ll investigations into the matter would cease and the case will be closed". This letter is the alleged warning on 5 May 2015 that is referred to in OS 594. Mr Wham had

mistaken the 5 May 2015 letter to be a warning distinct and separate from what transpired on 25 March 2015 and had therefore sought a quashing order in relation to it in OS 594 which he had drafted and filed on his own before he engaged solicitors. Mr Wham has since agreed through counsel that the 5 May 2015 letter was not a separate warning in itself.

7 On 9 May 2015, Mr Wham wrote to the police and protested the issuance of a warning against him. He did not receive a reply. On 23 May 2015, he wrote to the Attorney-General's Chambers to similarly protest the issuance of the warning against him. He stated that the issuance of the warning was unlawful and in breach of proper procedure as he had not consented to be warned in lieu of prosecution, and that the stern warning will cause severe prejudice to him as it would remain on the record and there was no guarantee that it would not be relied on in future proceedings against him. Again, he did not receive a reply. Mr Wham then commenced OS 594 on 22 June 2015.

8 Before I continue, I would mention one point which the AG raised in submission regarding the Notice of Warning which caused me some concern.

9 The AG submitted that the Notice of Warning was distinct from the warning that DSP Pannirselvam had orally administered to Mr Wham on 25 March 2015. The Notice of Warning was simply what it purported to be, that is, a notice to Mr Wham that he had been issued with a warning. However, I noted that the substantive terms of the Notice of Warning contained a warning. The material terms are found in paras 2 and 3 of the Notice of Warning which states:

> 2. Our investigations into the case have been completed. After careful consideration of the circumstances of the case and in consultation with the Attorney-General's Chambers, we have decided that a **Stern Warning** would be administered to you in lieu of prosecution.
>
> 3. You are hereby warned to refrain from such conduct or any criminal conduct. If you commit any offence in future, the same leniency may not be shown towards you.
>
> [emphasis in bold and underline in original]

10 The words, "You are hereby warned" in para 3 contained a warning. Therefore, I did not agree that the Notice of Warning was merely a notice of a warning previously given and not a warning in itself. Indeed, para 2 also stated that a stern warning "would be administered", and not "has been administered". As para 3 comes after para 2, it appeared that para 3 is the warning referred to in para 2.

11 Secondly, the two paragraphs did not mention a warning which had already been administered to Mr Wham. Therefore, it appeared that the

Notice of Warning itself proceeded on the premise that there was no earlier oral warning administered to Mr Wham.

12 Thirdly, the handwritten notes of DSP Pannirselvam stated that "No copies of the warning was issued to him". Here, the officer was treating the Notice of Warning as the warning itself. He was not trying to draw a distinction between a warning and a notice of that warning.

13 While it is true that DSP Pannirselvam did say in his first affidavit that he had verbally warned Mr Wham (on 25 March 2015), this was a self-serving version given after the event. On the other hand, Mr Wham's position was confusing. In his first affidavit of 22 June 2015, he said at para 8 that DSP Pannirselvam had presented him with the document in question, "which he said was a warning letter". However, that letter was not handed over for Mr Wham to retain. Yet, Mr Wham proceeded in this action on the basis that he did receive a warning on 25 March 2015.

14 Fourthly, it seemed more likely to me that CPD would have used a written warning rather than an oral one with all the latter's attendant difficulties about having to prove what was actually said. However, when the Notice of Warning was not handed to Mr Wham because he had said he wanted to consult a lawyer, there was a problem as to whether a warning had been administered to Mr Wham at all. Perhaps it was because of this problem that the position was then taken by CPD that an oral warning had already been issued.

15 Based on the evidence so far before me, I was not inclined to accept that position. However, because both Mr Wham and the AG proceeded on the premise that a warning had been given to him on 25 March 2015, I will proceed for present purposes on the assumption that an oral warning was indeed administered to Mr Wham on 25 March 2015 and I will refer to it as "the 25 March Warning".

16 I would also add that if indeed CPD had intended all along for DSP Pannirselvam to administer a warning orally followed by a notice that the oral warning had been administered, then the Notice of Warning was poorly drafted. Either way, the present state of affairs is not satisfactory.

17 Furthermore, it appeared from para 12 of DSP Pannirselvam's first affidavit that he did not hand a copy of the Notice of Warning to Mr Wham because Mr Wham did not want to sign to acknowledge having received the document. The implication was that a copy would have been handed to Mr Wham if he had signed the acknowledgement.

18 It seems to me that if CPD's intention was to hand over a copy of the Notice of Warning to Mr Wham after the warning had been administered, then DSP Pannirselvam should have handed over a copy even though Mr Wham chose not to sign the acknowledgement. It would be a simple matter for DSP Pannirselvam to make a note on the original (or his own

copy) that he had handed a copy to Mr Wham who refused to give a written acknowledgement. That would appear to be more logical rather than withholding a document which was supposed to be handed over to Mr Wham in the first place. Furthermore, it is not illogical for someone who is informed about a warning of an offence to want to seek legal advice before signing any document pertaining to the warning.

19 I also note that the Notice of Warning was not dated and while the heading of the document states "Notice of Warning", para 2 refers to a "Stern Warning". What is the difference between a "warning" and a "stern warning"? If there is no difference, then different terminology should not be used. If there is a difference, then the two terms should not be used interchangeably.

20 For present purposes, I will refer to the 25 March Warning as a warning. I now move on to more substantive issues.

Issues

21 In order for the court to grant an applicant leave to bring judicial review proceedings, the court must be satisfied that (see *Jeyaretnam Kenneth Andrew v AG* [2014] 1 SLR 345 at [5]):

(a) the matter complained of is susceptible to judicial review;

(b) the applicant has a sufficient interest or standing in the matter; and

(c) the material before the court discloses an arguable case or *prima facie* case of reasonable suspicion in favour of granting the public law remedies sought by the applicant.

22 Presently, only the first and third requirements are disputed. The following two issues therefore arise:

(a) whether the 25 March Warning was a determination or a decision that may be quashed; and

(b) if so, whether a *prima facie* case of reasonable suspicion in favour of granting the quashing order against the 25 March Warning is established.

The court's decision

Whether the 25 March Warning may be quashed

23 The AG submitted that the 25 March Warning has no legal effect and therefore cannot be the subject of a quashing order. He relied on the Court of Appeal ("CA") decision of *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 ("*ACC*") to support his proposition.

24 In *ACC*, the respondent had made a series of payments to its overseas subsidiaries without withholding tax for these payments. The Comptroller for Income Tax ("the Comptroller") subsequently sent a letter to the respondent informing the respondent that withholding tax requirements under s 45 of the Income Tax Act (Cap 134, 2008 Rev Ed) ("Income Tax Act") applied and that the respondent was required to personally account for the amount of tax which should have been withheld and pay any corresponding penalties. The respondent treated the Comptroller's letter as containing an administrative decision or determination that would result in it having to pay withholding tax and any corresponding penalties. As the respondent disagreed with the Comptroller, he applied for leave to apply for a quashing order against the Comptroller's letter. He was successful at first instance.

25 On appeal, the CA identified the real question as being whether the Comptroller's letter could be quashed (at [15]). It held at [21] that "a quashing order will only lie against decisions which have some form of actual or ostensible legal effect, whether direct or indirect". A decision has legal effect when it is capable of altering the legal rights, interests or liabilities of the individual. The CA proceeded to frame the issue as follows (at [25]):

> The question thus arose as to whether the Comptroller's determination was a decision which had actual or ostensible legal effect, whether direct or indirect, on the respondent. *If that determination were made under a statutory power and were binding on the respondent unless and until it was set aside by a court, then it would certainly affect the rights of the respondent. If, on the other hand, the determination had no such effect, it would be nothing more than an expression of the Comptroller's opinion or view as regards the respondent's liability for withholding tax.* Such a determination would be no more than advice to the respondent or an answer to the query by the respondent as to its liability for withholding tax, and the respondent was free to disregard the determination if it did not agree with it. … [emphasis added]

26 The CA found that there was nothing in the Income Tax Act that gave the Comptroller the power to unilaterally determine an individual's liability for withholding tax under s 45. It further found that there was nothing preventing the respondent from resisting a future claim by the Comptroller to recover the debt referred to in the Comptroller's letter on the ground that the Comptroller's determination was wrong in law. It therefore held that the Comptroller's determination in the letter was nothing more than an expression of the Comptroller's opinion (at [26]–[28]).

27 The question that thus presently arises is whether the 25 March Warning was binding on Mr Wham unless and until it was set aside such that it would affect his legal rights, interests or liabilities. This requires an examination of the nature of a warning.

28 The AG submitted that a warning is "nothing more than the communication of information to the warned individual about the possible consequences if he engages in future conduct prohibited by a statutory provision". He relied on the following passage in the CA's decision of *Tan Eng Hong v AG* [2012] 4 SLR 476 at [183] to support his submission:

> … We find that the fact that stern warnings have been issued under s 377A for private consensual acts between adult males suggests that there is not just a mere spectre of prosecutions under that provision. *A stern warning is a way of informing the individual who is warned that if he continues to indulge in the type of conduct circumscribed by s 377A, leniency may no longer be forthcoming in future and he may well be charged under s 377A if he is found engaging in such conduct in the future.* Further, there is a real possibility that the individual police officer or Deputy Public Prosecutor handling a case may decide not to proceed with a stern warning, but to instead prefer a charge under s 377A. … [emphasis added]

29 On the other hand, Mr Wham submitted that the above passage does not mean that a warning has no actual or ostensible legal effect. Indeed, he then relied on the same passage to support his argument that a warning adversely impacts the rights of a recipient. He argued that the sentence before the emphasised sentence in the passage above, *ie*, "the fact that stern warnings have been issued … suggests that there is not just a mere spectre of prosecutions", suggests that warnings are more than mere communications of information and have some legal effect, raising the prospect of prosecution beyond a "mere spectre of prosecution".

30 He further argued that a warning has the following consequences:

> (a) it is a finding of fact by the law enforcement agency and recorded by the AG that the recipient has in fact committed an offence;
>
> (b) the recipient has been shown leniency; and
>
> (c) if he commits a similar offence in the future, he stands a higher chance of being prosecuted compared with an individual who has not received a warning before.

31 Therefore, Mr Wham submitted that the case of *ACC* ([23] *supra*) actually supported him because there the CA said at [18]:

> … A decision which operates as a prerequisite to or a step in a process capable of altering rights, interests or liabilities may also be the subject of a quashing order. …

This was because a warning falls within the ambit of a "step in a process capable of altering rights, interests or liabilities" and is therefore different from the statement of opinion of the Comptroller in *ACC*.

32 Mr Wham further submitted that a warning may also be taken into account as an aggravating factor in sentencing and cited a number of cases for this proposition. I will come back to these cases later.

33 In my view, a warning is not binding on its recipient such that it affects his legal rights, interests or liabilities. It is, as its name suggests, nothing more than a warning, *ie*, a communication to its recipient that if he were to subsequently engage in conduct prohibited by a particular statutory provision, or any criminal conduct for that matter, leniency may not be shown to him and he may be prosecuted for it. I am mindful that a warning on its face may give the impression that the individual who receives it has in fact committed an offence. For example, a warning, even if given orally, would presumably identify the offence and other particulars like the date and venue. Indeed, the Notice of Warning in question identifies the offence and states the date and place of the offence. It also adopts language such as "in lieu of prosecution" and "the same leniency may not be shown towards you" which suggests that the relevant authority is of the view that the recipient has committed an offence and that he could have been charged for it.

34 However, in my view the warning is still no more than an expression of the opinion of the relevant authority that the recipient has committed an offence. It does not bind the recipient. It does not and cannot amount to a legally binding pronouncement of guilt or finding of fact. Only a court of law has the power to make such a pronouncement or finding and this is not disputed between the parties. It follows that a recipient is entitled to challenge the warning. Indeed, what Mr Wham could have done was to send a letter to CPD to say that he disputes that he has committed an offence and that the warning is inappropriate. There was no dispute that he could have done that. In this regard, a warning is similar to the Comptroller's letter in *ACC*. The CA in *ACC* was of the view that although the tone of the Comptroller's letter "indicated the finality of the Comptroller's decision that the respondent was liable … and must arrange to pay the amount assessed or computed", the Comptroller's determination in the letter was nothing more than an expression of the Comptroller's opinion which the respondent could challenge in the future (at [23]–[28]).

35 I now address Mr Wham's argument that the AG is more likely to decide to prosecute him if he committed a fresh offence in the future in the light of the fact that he has been warned before.

36 First, an individual has no right to insist that he be issued a warning before prosecution is initiated.

37 Second, the AG is not bound to consider whether a prior warning has been given or not before deciding whether to prosecute. This distinguishes the present case from situations like those in *Hot Holdings Pty Ltd v Creasy* (1996) 134 ALR 469 ("*Creasy*"), a decision of the majority of the High Court

of Australia ("HCA") which was cited in *ACC* ([23] *supra*) as an example of an administrative decision that has an indirect legal effect on the individual. *Creasy* concerned a recommendation made by a mining warden to the Minister under the Mining Act 1978 (WA) that a ballot should be held in respect of applications for exploration licences and mining leases. The HCA ruled that, although the mining warden's recommendation was not binding on its own, it was susceptible to a quashing order because the Minister was *bound* to take it into account when exercising its discretion, and thus, it had a discernible legal effect upon the Minister's exercise of discretion and the applicant's rights (at 484).

38 I will now address Mr Wham's argument that there appears to be some cases in which the court has taken into account a warning in the course of sentencing and in one of the cases, the warning was considered as an antecedent, *ie*, as a prior conviction.

39 The first case Mr Wham cited was *PP v Siew Boon Loong* [2005] 1 SLR(R) 611, a Magistrate's Appeal by the Public Prosecutor against sentence. Yong Pung How CJ noted at [8] under the heading "The respondent's criminal antecedents" that the respondent, as a juvenile, had been charged with attempted lurking house-trespass by night, for which he was given a warning in lieu of prosecution. However, at [11] under the sub-heading "Juvenile antecedents", Yong CJ did not appear to consider the warning but rather only considered the respondent's two previous convictions for property offences as a juvenile.

40 The next case cited by Mr Wham was *PP v Yap Rogers* [2009] SGDC 146 ("*Yap Rogers*"). In *Yap Rogers*, the accused was charged for leaving Singapore without the permission of the Official Assignee while he was a bankrupt. In considering the circumstances of the case, the court held at [12] that it was "significant … that the accused had been warned in 2002 for similar offences". However, before the court meted out its sentence, it noted at [15] that the accused was a "first offender".

41 The last case cited was *PP v Tan Hiang Seng* [2012] SGDC 484 ("*Tan Hiang Seng*"). In *Tan Hiang Seng*, the accused was charged for using his mother's identity card without lawful authority or reasonable excuse to gain entry into the Marina Bay Sands Casino. It was brought to the court's attention by the Public Prosecutor that the accused had also taken his mother's identity card without her permission and was issued a warning for it. At [16] of the decision, the district judge considered as an aggravating factor the fact that the accused had taken his mother's identity card without her permission, that it amounts to an offence of theft and that the accused was given a warning for it.

42 The AG's position was that it was only in *Tan Hiang Seng* that the court did in fact take into account a prior warning to the accused while considering the issue of sentence.

43 In any event, the AG submitted that it would be wrong for a court to take into account a prior warning, whether as an antecedent or not, for the purpose of sentencing and he stressed that the Prosecution would not in future mention a prior warning to a court for the purpose of enhancing a sentence.

44 I agree that a court is not entitled to treat a warning as an antecedent or as an aggravating factor since it has no legal effect and is not binding on the recipient. Indeed, as the learned author of Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009) noted in his commentary on the relevancy of previously administered warnings for the purpose of sentencing (at para 21.184):

> In this regard, note that stern warnings are not judicial findings of culpability. Accused persons accept stern warnings for a variety of personal reasons, and such conduct does not always reflect an unqualified admission of guilt. Similarly, the police administer stern warnings for various reasons, one of these being the weakness of their case.

This is all the more so in the present case where Mr Wham disputes that he has committed the offence in question.

45 In the light of the above, I am of the view that the 25 March Warning does not bind Mr Wham in a manner that directly or indirectly affects his legal rights, interests and liabilities. Therefore, like the Comptroller's letter in *ACC* ([23] *supra*), there is no decision in the 25 March Warning for the court to quash. In the light of this answer to the first issue, the second issue does not arise.

46 I will, however, say a few words about another complaint of Mr Wham. He said he was not given an opportunity to make representations on why he should not be issued a warning and that his consent must be obtained before any warning can be issued to him. However, Mr Wham has not furnished any legal basis to establish that he is entitled to an opportunity to make representations or that his consent must be sought first before a warning is administered. He mainly relied on the English procedure with respect to administering simple cautions, which he submitted is of the same nature as warnings. Under the English procedure, a simple caution can only be offered to a person if, *inter alia*, (a) the person has admitted to committing the offence; (b) the decision-maker is satisfied that there is sufficient evidence to prove the offence; and (c) the person is aware of the consequences of a simple caution (see guidance entitled "Simple Cautions for Adult Offenders" published by the United Kingdom's Ministry of Justice) ("the Guidance"). However, this does not advance Mr Wham's case. Simple cautions are different from warnings in nature. They perform different functions and have different consequences. For example, the Guidance states that a simple caution is taken to be an admission of guilt to the commission of an offence and forms part of an

offender's criminal record. It can further be used by the police and may be referred to in future legal proceedings. In contrast, I have already mentioned that a warning does not bind the recipient. It can be challenged by the recipient if it is used against him subsequently. Therefore, I see no reason why Mr Wham should be entitled to an opportunity to be heard or for his consent to be sought before a warning is issued to him.

47 Mr Wham also submitted that if he does not consent to a warning then either the warning must be withheld or the AG must prosecute him for the alleged offence. I do not agree. It is within the AG's discretion how he wishes to proceed. Since Mr Wham's prior consent is not necessary, the AG's hands are not fettered in the manner suggested by Mr Wham.

Conclusion

48 In conclusion, I dismiss Mr Wham's application.

49 I will hear the parties on costs.

Reported by Ang Tze Siong.