



Summary of Judgment

Chu Kong (“Respondent”) v Sun Min & Others (“Appellants”)

FACV 6/2022 & FACV 7/2022; [2022] HKCFA 24

Decision : Appeals unanimously dismissed
Date of Hearing : 31 October 2022
Date of Judgment : 6 December 2022

Background

1. These appeals arise from disputes between private litigants in injunction proceedings, leading to criminal contempt proceedings commenced by the Respondent as applicant for contempt against the Appellants as the potential contemnors. The Respondent alleged the Appellants and another person (“Yan”) for fabricating evidence and giving false statements in affirmations in the said injunction proceedings, forming the basis of the said criminal contempt proceedings.
2. The Respondent applied in 2016 for leave to commence contempt proceedings against the Appellants and Yan. Leave was granted by DHCJ Kent Yee but subsequently set aside by DHCJ Saunders on the ground of material non-disclosure. DHCJ Saunders also held that it was unnecessary for the Respondent to obtain consent of the Secretary for Justice (“SJ”) to bring the contempt proceedings.
3. In 2018, the Court of Appeal allowed the Respondent’s appeal against DHCJ Saunders’ decision, overruling the finding of material non-disclosure, but agreeing that the SJ’s consent to bring the contempt proceedings was not needed. Leave to appeal was refused by the Court of Appeal in January 2022.
4. In July 2022, the Appeal Committee granted the Appellants leave to appeal. The SJ was invited to make submissions, and sought leave to join as intervening party.
5. On 6 December 2022, the CFA unanimously dismissed these appeals.

Key issues

6. The key issue in these appeals is whether a person other than the SJ who wishes to commence criminal contempt proceedings must obtain the SJ’s consent before



commencing such proceedings and, if not, whether the SJ is required to be consulted before the same.

7. The questions for determination by the CFA are:-

- (1) Whether the SJ has the exclusive right to bring criminal contempt proceedings against an alleged contemnor ("**Question 1**");
- (2) If the answer to the first question is "no", whether a private litigant who seeks to commit another for criminal contempt under Order 52 of the Rules of the High Court (Cap. 4A) is or should be required to consult the SJ beforehand ("**Question 2**");
- (3) If the answer to the second question is "yes", and the SJ declines to bring the proceedings, whether the private litigant is required to join the SJ as party, and/or lay the relevant facts before the court including any views expressed by the SJ ("**Question 3**"); and
- (4) If the answer(s) to any of the above questions is/are "yes", whether the leave granted to the Respondent to commence committal proceedings against the Appellants and Yan should be set aside ("**Question 4**").

Department of Justice's Summary of the Court's rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=149184&currpage=T)

Nature and purpose of criminal contempt proceedings

8. The Court's power to punish contemnors exists to enable judges to maintain the authority of, and public confidence in, the Courts, by preventing and punishing abuse or obstruction of the Court process; this is a well-established aspect of the Court's inherent jurisdiction which is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute (§§21-22).
9. The law on contempt is founded entirely on public policy (§23).
10. The Court then dealt with the distinctions between (a) civil contempt and criminal contempt, and (b) criminal contempt proceedings and criminal proceedings:-
 - (a) Civil contempt involves a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is



simply to protect the private rights of that other party, while criminal contempt involves a breach of an order made to protect the administration of justice and its breach involves a general interference from which the administration of justice must be safeguarded. (§27)

- (b) Criminal contempt proceedings are civil in nature and does not fall within the scope of the ordinary criminal law. A criminal contemnor is liable to be dealt with both in criminal proceedings for the crime involved in the criminal contempt, as well as in civil proceedings for the contempt involved in the criminal contempt. (§§30-33)

The basic function of a party bringing criminal contempt proceedings is to draw the attention of the Court to the facts and matters said to give rise to the contempt, leaving it to the Court to decide whether there was a criminal contempt and the appropriate sanction (§ 35); the Court can also punish a person for criminal contempt of its own motion (§37).

Question 1 – Is it exclusive for SJ to bring criminal contempt proceedings?

11. The CFA answers in the **negative**.

12. As a matter of principle, it would be surprising if any entity other than the Court itself was able to fetter the ability of any person to bring an alleged contempt to the attention of the Court (§39); even if the SJ has obviously a vital and fundamental role in supporting the rule of law, he as a member of the executive should not have the power to prevent the court from hearing a criminal contempt application, and therefore from upholding its own authority (§40).

13. The SJ in bringing criminal contempt proceedings acts like any other citizen and in playing a part in contempt proceedings brought by another, the SJ is assisting the Court. The Court would normally be in at least as good a position as the SJ to decide whether to let an application proceed, and may request the SJ's assistance if it considers it would benefit from so (§§42-43).

14. The fact that the Court can initiate criminal contempt proceedings of its own motion reinforces the notion that the only gatekeeper controlling access to the Court in criminal contempt proceedings should be the Court itself and the fact that civil contempt proceedings can freely be brought to Court without the consent of the SJ also supports the proposition that the same should be true for criminal contempt proceedings (§§44-45).



15. The fact that all members of the public have an interest in the proper administration of justice tends to support the contention that there should be no fetter imposed by any entity other than the Court itself; there should also not be the need for two gatekeepers as a matter of course in relation to every potential criminal contempt proceedings (§§47-48).
16. No unnecessary burden should be placed on the SJ by having to vet every proposed contempt application (§49).
17. There is no inherent conflict between the conduct of criminal contempt proceedings and a private party's own agenda and motive, especially noting the Court's role in scrutinising applications to bring such proceedings (§50); on potential abuse, the Court itself is also carrying out the filtering function (§53).
18. The Appellants were unable to show in reliance of any legislative provision or case law that there is any further fetter on the bringing of criminal contempt proceedings (§55).
19. The wording of Article 63 of the Basic Law falls a very long way short of having the effect of enabling the SJ to prevent the Court from considering an alleged contempt which the Court wishes to consider (§68); in any event, it does not apply to criminal contempt proceedings (§71).
20. The Singapore position as decided in the case of *Aurol*¹ seems to be the only exception requiring the AG to be informed, but that does not assist the Appellants because (i) even in Singapore the AG does not have the power to prevent a private party from bringing criminal contempt proceedings; (ii) the SJ (Hong Kong) has made it clear that it is not his position for all projected criminal contempt proceedings to be brought to his attention; (iii) the Singapore Court's reasoning partly based on Article 35 of the Singaporean Constitution has no part to play in Hong Kong (§99).
21. In conclusion, subject to the leave of the Court, all private parties are free to initiate criminal contempt proceedings.

Question 2 – Is SJ's consent or involvement required?

22. The CFA answers in the **negative**.

¹*Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246



23. The Court would not favour imposing a burden on an applicant who wishes to bring criminal contempt proceedings as (i) it could add to cost and delay, (ii) it is always open to the SJ to apply to take over, or be a party to, criminal contempt proceedings, and (iii) the SJ would not be particularly well equipped to deal with every prospective contempt application (§102).

24. It is a better allocation of resources for the Court to act as the initial filter, while seeking the SJ's assistance if wanted (§103).

Questions 3 and 4

25. In light of the above, Questions 3 and 4 are **not applicable** while the Court also specifically answers them in the negative in that, should the SJ decline to bring the proceedings, the private litigant is not required to join the SJ as party, and/or lay the relevant facts before the Court including any views expressed by the SJ; and the leave granted to the Respondent to commence committal proceedings against the Appellants and Yan should not be set aside.

Civil Division

Department of Justice

6 December 2022