IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 118

Criminal Motion No 27 of 2021

Between

Murugesan a/l Arumugam

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal Procedure and Sentencing] — [Criminal review] — [Convicted person applying for leave to make review application]

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Andrew Phang Boon Leong JCA:

Introduction

1 This is a review application brought under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The Applicant pleaded guilty to and was convicted on one charge of trafficking in not less than 14.99g of diamorphine under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). He was sentenced to 25 years' imprisonment and 15 strokes of the cane by the High Court judge ("the Judge") on 29 September 2020 (see *Public Prosecutor v Murugesan a/l Arumugam* [2020] SGHC 203). On appeal, he challenged only his sentence claiming that it was manifestly excessive. The Court of Appeal dismissed his appeal in CA/CCA 23/2020 ("CCA 23") on 6 April 2021, affirming the sentence imposed by the Judge (see *Murugesan a/l Arumugam v Public Prosecutor* [2021] SGCA 32).

2 He now claims that he had never been guilty in the first place. He claims that he was pressured into pleading guilty by his former counsel, and claims that they had conspired with the Prosecution to "make [him] take the [plead guilty] offer". Besides being bare assertions, the Applicant's claims fall far short of the high threshold for a review under s 394H of the CPC.

3 Section 394H(7) of the CPC provides that the court may dismiss summarily an application for leave to make a review application. Before the court does this, it must consider the applicant's written submissions (if any) and may, but is not required to, consider the Prosecution's written submissions (if any) (see s 394H(8) of the CPC). In this case, I have considered the affidavits of the Applicant's former counsel, and the submissions tendered by the Applicant as well as the Prosecution. I conclude that the Applicant has failed to show a legitimate basis for the court to review his appeal in CCA 23. There has clearly been no miscarriage of justice. Pursuant to s 394H(5) of the CPC, the Court of Appeal extended the period within which a leave application must be fixed for hearing. The period was extended to 28 January 2022, and this was conveyed to parties in a letter dated 20 September 2021. I dismiss this criminal motion summarily without setting it down for hearing for the reasons that follow. However, before proceeding to do so, I set out briefly the facts and earlier proceedings.

Facts and earlier proceedings

Background to the dispute

4 These were the facts in the Statement of Facts which the Applicant accepted without qualification when his plea of guilt was taken. On 24 March 2016, at about 12.10pm, the Applicant rode a motorcycle bearing license plate number JQR 5667 ("the Bike") into the HDB carpark located at Lengkong Tiga.

Separately, about ten minutes later, a co-accused person name Ansari, accompanied by his girlfriend Bella, entered the same HDB car park in a car driven by one Jufri ("the Car"). Ansari and Bella met the Applicant at the void deck of Block 106 of Lengkong Tiga, where they received two packets from the Applicant in exchange for $5,880. At about 12.25pm, the Central Narcotics Bureau ("CNB") officers arrested all four individuals, namely, the Applicant, Ansari, Bella and Jufri.

5 When the CNB officers conducted their searches, they found two things: first, a dark blue sling bag in the front basket of the Bike, containing $5,880; and second, a white plastic bag containing two plastic packets of brown granular substance on the floorboard under the front passenger seat of the Car. Analysis later revealed that the two packets contained, respectively, 457.7g of granular powdery substance containing not less than 20.51g of diamorphine; and 457.5g of granular powdery substance containing not less than 19.17g of diamorphine.

6 The Applicant later admitted to collecting illicit drugs from an Indian man at Jurong Bird Park on the instructions of one "Ismail". He also admitted to having taken instructions to pass the collected drugs to a Malay man – who turned out to be Ansari – at Block 106 Lengkong Tiga. The Applicant was promised RM500 for delivering "a packet or two".

Earlier proceedings

7 For present purposes, there are three key facts in relation to the earlier proceedings:

(a) At no point in any of the earlier proceedings did the Applicant indicate any dissatisfaction with his former counsel (Mr Chia Soo, Michael ("Mr Chia") and Mr Sankar s/o Kailasa Thevar Saminathan

("Mr Saminathan"), respectively). If anything, he specifically requested for Mr Chia to represent him again at the appeal stage, and *thanked* Mr Chia for being a "great counsel and a great listener". The Applicant further acknowledged that Mr Chia had been "diligen[t] in [his] work when [he was] still [the Applicant's] counsel".

(b) His plea of guilt was an informed and considered decision. He took time to consider the plea offer before indicating that he would plead guilty on 31 March 2020. From 31 March 2020 to the plead guilty mention on 25 June 2020, the Applicant had a further three months to reconsider his decision to plead guilty. At the plead guilty mention itself, (i) the charge was read and explained to the Applicant in Tamil, (ii) the Applicant confirmed that he understood the nature and consequences of his plea, (iii) the Applicant admitted to the statement of facts without qualification, and (iv) the Judge obtained counsel's confirmation that the Applicant both intended to plead guilty and that he intended to admit to the statement of facts without qualification. It also bears noting that the Applicant had also mulled over his draft mitigation plea and had, in fact, made *changes* to it.

(c) He was given an opportunity to clarify *on appeal* as to whether he was contesting his conviction. This was given the nature of his submissions which included a claim that he had no knowledge the drugs in his possession. He clarified that he was contesting only his sentence and the appeal therefore proceeded on that basis.

Applicable legal principles

8 This is an application under s 394H of the CPC and the applicable principles relating to the court's power of review are found in ss 394J(2)–(7) of the CPC:

> **Requirements for exercise of power of review under this Division**
>
> …
>
> (2) The applicant in a review application must satisfy the appellate court that there is sufficient material (being evidence or legal arguments) on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made.
>
> (3) For the purposes of subsection (2), in order for any material to be "sufficient", that material must satisfy all of the following requirements:
>
> > (*a*) before the filing of the application for leave to make the review application, the material has not been canvassed at any stage of the proceedings in the criminal matter in respect of which the earlier decision was made;
> >
> > (*b*) even with reasonable diligence, the material could not have been adduced in court earlier;
> >
> > (*c*) the material is compelling, in that the material is reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made.
>
> (4) For the purposes of subsection (2), in order for any material consisting of legal arguments to be "sufficient", that material must, in addition to satisfying all of the requirements in subsection (3), be based on a change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to the criminal matter in respect of which the earlier decision was made.
>
> (5) For the purposes of subsection (2), the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made, only if —

> (*a*) the earlier decision (being a decision on conviction or sentence) is demonstrably wrong; or
>
> (*b*) the earlier decision is tainted by fraud or a breach of the rules of natural justice, such that the integrity of the judicial process is compromised.
>
> (6) For the purposes of subsection (5)(*a*), in order for an earlier decision on conviction to be "demonstrably wrong" —
>
> (*a*) it is not sufficient that there is a real possibility that the earlier decision is wrong; and
>
> (*b*) it must be apparent, based only on the evidence tendered in support of the review application and without any further inquiry, that there is a powerful probability that the earlier decision is wrong.
>
> (7) For the purposes of subsection (5)(*a*), in order for an earlier decision on sentence to be "demonstrably wrong", it must be shown that the decision was based on a fundamental misapprehension of the law or the facts, thereby resulting in a decision that is blatantly wrong on the face of the record.

9 If an application for leave fails to meet any of the cumulative requirements above (as set out in s 394J(3) of the CPC and, in respect of new legal arguments, the additional requirement in s 394J(4) of the CPC), leave will not be granted. This point has been stressed repeatedly in recent cases: see, for example, *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [18]; *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 at [10]; *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159 at [18]; *Chander Kumar a/l Jayagaran v Public Prosecutor* [2021] SGCA 3 at [14]; *Sinnappan a/l Nadarajah v Public Prosecutor* [2021] SGCA 10 at [12]; *Karthik Jasudass and another v Public Prosecutor* [2021] SGCA 13 at [16]; *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 at [23]; *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] SGHC 82 at [18]; *Nazeri bin Lajim v Public Prosecutor* [2021] SGCA 41 at [12] ("*Nazeri*"); *Mohammad Farid bin Batra v Public Prosecutor* [2021] SGCA 58 at [14]–[15];

as well as *Rahmat bin Karimon v Public Prosecutor* [2021] 2 SLR 860 at [15]–[16].

10 This case also involves allegations of inadequate legal assistance. The relevant legal principles were set out by the Court of Appeal in *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 ("*Farid*") at [134] as a two-step approach (see also *Nazeri* at [27]):

(a) first, the counsel's conduct of the case is assessed; and

(b) second, the court assesses whether that conduct affected the outcome of the case, in that it resulted in a miscarriage of justice.

11 The court in *Farid* also set out three overarching policy concerns that would typically affect how the above test is applied:

(a) the concern that too liberal a construction of inadequate legal assistance may result in penalising even legitimate/strategic decisions and stifling the professional latitude accorded to lawyers in exercise of their duties. It must be shown "that the trial counsel's conduct of the case fell so clearly below an objective standard of what a reasonable counsel would have done or would not have done in the particular circumstances of the case that the conduct could be fairly described as flagrant or egregious incompetence or indifference. In other words, the incompetence must be stark and glaring" (at [135]);

(b) the concern that such processes may be abused through incessant and unmeritorious applications/complaints (at [136]); and

(c) natural justice, which requires that the accused's counsel should be given notice of the case to meet, and an opportunity to respond to these allegations. This is ordinarily achieved by the client waiving his solicitor-client privilege in relation to the instructions, discussions and advice between him and that counsel (at [137]).

12 This examination (of the former counsel's conduct) would ordinarily take place at the final step of the s 394J CPC analysis, namely when the court is evaluating whether the new material suggests that there has been a miscarriage of justice. In accordance with this court's observations in *Farid* (at [137]) and s 392 of the CPC, additional evidence may be taken on the question of whether the allegations about the former counsel were justified and what effect, if any, the additional evidence has on the decision being reviewed. To ensure that counsel has a full opportunity to present his side of the story, the accused person must confirm that he is waiving his solicitor-client privilege in relation to the instructions, discussions and advice between him and that counsel (see *Farid* at [137]). In the present instance, the Prosecution requested for directions to be made for the solicitor-client privilege between the Applicant and his counsel to be waived in a letter dated 16 September 2021. Such directions were granted on 20 September 2021 and the Applicant accordingly granted the waiver on 23 September 2021. Mr Chia's and Mr Saminathan's affidavits were filed on 8 October 2021.

My decision

13 In my view, the application fails for three reasons. First, the material is not "sufficient" in that it could have been adduced in court earlier and is not compelling (see s 394J(3) of the CPC); second, the material is not "sufficient" in that it is not based on a change in the law (see s 394J(4) of the CPC); and

finally, there has been no proof of any miscarriage of justice (see ss 394J(5) and 394J(6) of the CPC).

14 Before I embark on the analysis proper, the Applicant's allegations should be clarified. He makes three main claims: first, that his former counsel had pressured him into pleading guilty; second, that his former counsel had conspired with the Prosecution to get him to plead guilty; and third, that his former counsel refused to fight for a retrial on appeal.

Section 394J(3) of the CPC – whether the material could have been raised earlier and whether the material was compelling

15 Admittedly, the material is a new legal argument in that this is the first time that the court is hearing of these allegations of impropriety against the Applicant's former counsel. However, these were concerns (assuming that they are valid and *bona fide*) that the Applicant could easily have raised at any earlier stage of the proceedings. They could have been raised:

(a) between 31 March 2020 (when the offer was accepted by the Applicant) and 25 June 2020 (when his plea of guilt was taken),

(b) during the plead guilty mention itself on 25 June 2020, or

(c) during the appeal itself on 6 April 2021.

16 More importantly, the examples and explanations that he points to in his affidavit/submission are simply not instances of a lawyer coercing his client to plead guilty. The Applicant says that his lawyer "kept on saying [the plead guilty] offer [was] a good one". He says that his lawyers described his chances at trial as "very slim and hard". He calls this a "trap". That is plainly not true. This was simply just an ordinary instance of a lawyer explaining to his client

his legal position. The Applicant says that his lawyers "took turn[s] asking [him] to grab the offer", telling him that "there [was] no guarantee [that he] would be given the [Certificate of Cooperation] to spare [his] life if [he lost his] case". He says that he received "no assurance from the lawyer". All this, he says, contributed to "pressure". But again, this was simply evidence of the lawyers doing their job. They were advising him of the best course of action given the state of the evidence. No lawyer makes promises (if only out of professional prudence) and every accused person will naturally feel some pressure. The Applicant was no doubt under a lot of pressure. But that was not of his lawyers' making. The difficulty here is not with Mr Chia or Mr Saminathan. The problem is that the Applicant had already made various incriminating admissions in his earlier statements and, realistically speaking, his chances at trial were slim. All the lawyers did was convey their legal assessment of that fact.

17 Even taking the Applicant's case at its highest, that his lawyers had used emotionally manipulative language to convince him to take the plea (which we ought to emphasise was *not* borne out on the facts as we have just stated), the facts suggest that the Applicant was still very much in control of his case. In fact, the Applicant instructed his lawyers to send four sets of representations to the Attorney-General's Chambers ("AGC"), seeking a reduction in the charge and/or a certificate of substantive assistance, all of which Mr Chia and Mr Saminathan dutifully complied with. The Applicant was far from being at the mercy of his lawyers, and far from browbeaten into submission. He wrestled till the very end, going so far as to stand trial for nine days before finally pleading guilty after the first tranche of hearings. The facts do not show him to be the helpless victim he claims that he is. He was simply attempting to obtain the best possible deal for himself.

18 His arguments are even less convincing given that he has not pointed to one piece of evidence that supports his narrative. In contrast, Mr Chia has produced voluminous correspondence between him and the Applicant, as well as evidence of the representations which he made to the Prosecution *on the Applicant's instructions*. In the circumstances, it is difficult to see how any of the bare assertions in the Applicant's affidavit/submissions are credible criticisms of his former counsel's conduct, much less *compelling* ones.

Section 394J(4) of the CPC – whether application based on change of law

19 Moreover, the Applicant has not pointed to any change of law that undergirds his s 394H application. To reiterate, the application must be based on "based on a change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to the criminal matter in respect of which the earlier decision was made" (see s 394J(4) of the CPC). This was patently *not* the case here.

Section 394J(5) of the CPC – whether there was a miscarriage of justice

20 Even assuming that all the above-mentioned requirements are fulfilled, the Applicant's claims simply do not suggest that there has been a miscarriage of justice.

21 Some of his claims plainly have nothing to do with justice or fairness. He complains, for example, of Mr Chia refusing to fight for a retrial on appeal. Mr Chia refused, as he was perfectly entitled to. But more importantly, Mr Chia refused for good reason. He thought that the sentence awarded was *not* manifestly excessive and simply could not bring himself to seek a retrial on appeal when he had acted for the Applicant during the plead guilty mention. It

beggars belief how this could be an example of conduct that led to a miscarriage of justice.

22 The Applicant's other claims are outrageous accusations, without any supporting reasons or evidence. All the Applicant proffers is speculation and hypothesis. His theory that Mr Chia conspired with the Prosecution to secure his plea of guilt, for example, is based entirely on one suspicion: "the paper work to take the offer has [*sic*] been prepared and ready even before Mr Michael Chia convinced me to take the offer. To me all of this is premeditated". This assertion, being absurdly speculative on its face and completely unsubstantiated, cannot, in my view, be accepted.

23 What makes all of the Applicant's claims even more unbelievable is that Mr Chia and Mr Saminathan stood to gain nothing from pressuring the Applicant into pleading guilty. They were lawyers volunteering their time and efforts under the Legal Assistance Scheme for Capital Offences. In the circumstances, I fail to see how there could have been a miscarriage of justice on the present facts. If anything, the Court of Appeal's warnings in *Farid* (at [136]) are particularly apposite here: this appears to be some form of abuse of process, with a plainly unmeritorious application brought, casting wild aspersions on the Applicant's former counsel. Indeed, there is at least a serious doubt about the Applicant's *bona fides* in this application. As the Prosecution points out in their submissions, the *entire body* of the Applicant's correspondence with the AGC prior to trial (and conviction) centred around asking the Prosecution to reduce the charge. There was no mention of him being innocent (as he now claims), no suggestion that he was hapless (as he now says), and no sign that he was genuinely confused by the criminal charges (as he now avers). He has consistently sought only one thing – a lower sentence. And the present application seems to be no different.

24 Indeed, the Applicant was accorded procedural fairness at every stage of the proceedings. Pre-trial, he was represented by counsel who consistently took and executed his instructions (as he himself acknowledged in his submissions), resulting in four separate representations being made to the Prosecution. He continued to be represented by counsel at trial and when he received the plead guilty offer from the Prosecution after seeking a reduction in the charge and/or a certificate of substantive assistance. Whilst still being represented, he had ample time to mull over the offer made and to retract his plea of guilt as well as to consider and make changes to his draft mitigation plea (see [7(b)] above). And finally, during the mention where he pled guilty, he was taken through the statement of facts (which he admitted to without qualification) and was provided with the requisite translation. There too, he was represented by counsel. In all this, not a single complaint was made of counsel's conduct and not a single suggestion was made that they had fallen short of any of their duties. If anything, the evidence that Mr Chia has produced suggests that the Applicant's counsel have acted in full accordance with the Applicant's instructions and that they did so in accordance with the best traditions of the Bar.

25 Put simply, the Applicant's application is wholly without merit and constitutes a wholly unwarranted attack on lawyers who had in fact done their level best for him at all times.

Conclusion

26 Accordingly, I dismiss this application summarily without setting it down for hearing.

Andrew Phang Boon Leong
Justice of the Court of Appeal

The applicant in person;
Terence Chua and Regina Lim (Attorney-General's Chambers) for the respondent.