IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 13

Criminal Motion No 19 of 2023

Between

Tangaraju s/o Suppiah

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal review — Leave for review]
[Criminal Law — Statutory offences — Misuse of Drugs Act]

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v
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25 April 2023 Judgment reserved.

Steven Chong JCA:

Introduction

1 In 2018, Tangaraju s/o Suppiah (the "applicant") was convicted on a capital charge and sentenced to the mandatory death penalty. On 24 April 2023, two days before his scheduled execution on 26 April 2023, the applicant filed *another* criminal motion ("CM 19") seeking:

(a) an order that leave be granted to the applicant pursuant to s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") or the court's inherent jurisdiction to make a review application in respect of the Court of Appeal's decision in CA/CCA 38/2018 ("CCA 38");

(b) a stay of the execution scheduled for 26 April 2023, pending the determination of this leave application; and

(c) at the conclusion of any substantive appeal, that the sentence of death imposed by the High Court Judge (the "Judge") be set aside.

Background

2 The complete facts are set out in the Judge's grounds of decision in *Public Prosecutor v Tangaraju s/o Suppiah* [2018] SGHC 279 ("*Tangaraju (HC Conviction)*") at [6]–[37]. I briefly summarise the procedural history of this matter below.

3 On 9 October 2018, the applicant was convicted by a Judge of the General Division of the High Court (the "Judge") on a capital charge of abetting with one Mogan Valo ("Mogan") by engaging in a conspiracy to traffic in cannabis by delivering 1017.9g of cannabis to himself, an offence under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA"), read with s 5(2) and s 12 of that same Act (see *Tangaraju (HC Conviction)* at [2] and [81]). As the applicant did not fulfil any of the criteria in the alternative sentencing regime under s 33B(1) of the MDA, he was sentenced to the mandatory death penalty pursuant to s 33(1) of the MDA (*Tangaraju (HC Conviction)* at [82]–[83]).

4 The applicant's appeal against his conviction and sentence was dismissed by this court in CA/CCA 38/2018 ("CCA 38") on 14 August 2019 with brief oral grounds. This court agreed with the Judge that the applicant had abetted Mogan by engaging in a conspiracy to traffic in cannabis and that he used a phone bearing the first number to communicate with Mogan.

5 On 7 November 2022, the applicant filed CA/CM 25/2022 ("CM 25") under s 394H of the CPC for permission to apply to review the concluded appeal

in CCA 38. On 23 February 2023, this court summarily dismissed CM 25 (see *Tangaraju s/o Suppiah v Public Prosecutor* [2023] SGCA 8).

The parties' arguments

The applicant's case

6 The applicant seeks permission to review pursuant to s 394H of the CPC or to invoke the court's inherent jurisdiction to re-open the appeal.

7 In particular, the applicant states that this application concerns "important issues" of:

(a) first, whether the Prosecution bears the burden of proving beyond a reasonable doubt the elements of possession and trafficking for the purposes of proving a charge of abetment by engaging in a conspiracy of trafficking to himself; and

(b) second, whether in sentencing the applicant to the death penalty, the Judge was satisfied beyond reasonable doubt, in circumstances where the applicant had neither seen nor received the drugs, and in the circumstances where the co-conspirator gave no evidence of an agreement as to the weight of the drugs, that the applicant was aware of:

(i) the quantity of the cannabis being trafficked; and

(ii) that the quantity was pursuant to the agreement he had with Mogan.

8 The applicant's submissions in CM 19 mainly concern his knowledge of the *quantity* of the drugs being trafficked. In particular, the applicant submits that the Prosecution had failed to prove beyond a reasonable doubt that he and

Mogan had an agreement to traffic 1017.9g of cannabis. The applicant claims that there was no evidence that the applicant and Mogan had an agreement to traffic a *specific quantity*. The applicant submits that the quantity of the drugs trafficked is an essential element which needs to be agreed between the parties to the conspiracy and proved beyond a reasonable doubt by the Prosecution. In this regard, the applicant also points to Mogan's evidence, including his statement dated 10 February 2016 and his evidence at the trial, as well as one Suresh s/o Subramaniam's ("Suresh") testimony in court. The applicant submits that there was a lack of any discussion about the *quantity* of cannabis to be trafficked. As such, the applicant submits that the Judge erred in sentencing the applicant on the basis that he had conspired with Mogan to traffic in 1017.9g of cannabis and that the applicant was liable to be sentenced to the mandatory death penalty.

9 The applicant also submits that the cannabis was never actually in the applicant's possession and therefore, the Judge was not entitled to draw an adverse inference against the applicant based on the weight of the drugs found in Mogan's possession.

The Prosecution's case

10 The Prosecution submits that this application is impermissible as the applicant has already filed one previous s 394H application and he has therefore exhausted his rights of review of his conviction and sentence, as s 394K(1) of the CPC does not allow an applicant to make more than one application for leave under s 394H of the CPC.

11 Notwithstanding this procedural irregularity, the applicant has not met the statutory requirement under s 394J(3) of the CPC to show that there is

sufficient material on which this court may conclude that there is a miscarriage of justice. The Prosecution highlights three reasons for this:

(a) The allegation that the Prosecution has failed to prove that, pursuant to the conspiracy, he and Mogan had agreed to traffic a specific quantity of drugs is a belated challenge to a finding of fact by the Judge and has been raised without any fresh evidence to suggest the absence of such an agreement. There has also been no change in the law since the conclusion of the trial and the appeal which requires a fresh look at this finding of fact.

(b) The applicant has not shown how the defence could not have been adduced in court earlier with reasonable diligence. He could have raised this at the trial or the appeal, where he was represented by counsel on both occasions.

(c) In any event, this defence is unmeritorious, as there was ample evidence before the Judge and this court to conclude that the applicant did engage in a conspiracy with Mogan to deliver 1017.9g of cannabis to himself.

12 The Prosecution submits that this application should be summarily dismissed without a hearing under s 394H(7) of the CPC as it is without any merit and is an abuse of process.

Issues to be determined

13 The issues to be determined are:

(a) whether there is a legitimate basis for this court to exercise its power of review under s 394H of the CPC; or

(b) whether this court should exercise its inherent jurisdiction to make a review application in respect of the decision in CCA 38.

Section 394H of the CPC

14 Under s 394H(1) of the CPC, an applicant must first obtain leave from the appellate court before making a review application. Only an application that discloses a "legitimate basis for the exercise of this court's power of review" should be allowed to proceed under s 394H of the CPC (*Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 ("*Kreetharan*") at [17]). To determine if such a legitimate basis exists, the court hearing the leave application would have to consider the requirements for a review application stipulated in s 394J of the CPC.

15 Under s 394J(2) of the CPC, the applicant must also 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. The requirements of sufficiency and miscarriage of justice are a *composite* requirement under s 394J(2) of the CPC (*Rahmat bin Karimon v Public Prosecutor* [2021] 2 SLR 860 at [22]). As per s 394J(3)(*c*) of the CPC, the new material is thus only sufficient if it is "capable of showing almost conclusively that there has been a miscarriage of justice".

16 For any material to be "sufficient", it must satisfy *all* the requirements set out in ss 394J(3)(*a*)–(*c*) of the CPC:

> (*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.

17 In the present application, the applicant's submissions mainly focus on his alleged lack of knowledge of the specific *quantity* of drugs being trafficked. In particular, the applicant submits that the Prosecution had failed to prove beyond a reasonable doubt that he and Mogan had an agreement to traffic the *specific quantity* of 1017.9g of cannabis.

18 It is indeed the case that for a finding that the applicant had engaged in a conspiracy with Mogan to traffic, the Prosecution must prove that the applicant had intended to traffic the *precise* amount of 1017.9g of cannabis. To this end, it was undisputed that Mogan had brought 1017.9g of cannabis into Singapore (*Tangaraju (HC Conviction)* at [79]) and that the applicant knew the nature of the drugs to be cannabis (*Tangaraju (HC Conviction)* at [10]). The Prosecution had also specifically put to the applicant at the trial that: (a) the applicant had knowledge that Mogan was carrying two bundles containing not less than 1017.9g of cannabis; (b) that he was engaged in criminal conspiracy with Mogan to traffic the cannabis in the said amount; and (c) that he intended to traffic in the said quantity of cannabis once he had taken receipt of them. This was met with the applicant's bare denial, which was consistent with his defence at the trial that he had nothing to do with the transaction.

19 It was, however, *never* the applicant's case at the trial that the agreement with Mogan was to traffic an amount that was below the threshold amount for capital punishment, or any lesser quantity. It thus appears that the applicant is essentially seeking to advance an entirely new argument. As conclusively stated

by this court in *Kreetharan* (at [21]), it is *insufficient* for an applicant to attempt to re-characterise evidence already led below or to mount fresh factual arguments on the basis of such evidence. In claiming that the Prosecution had failed to prove that he and Mogan had intended to traffic the *specific* quantity of cannabis, this appears to be precisely what the applicant is seeking to do.

20 Furthermore, given that the Prosecution's position was clearly put to the applicant at the trial, there was no reason why this argument could not have been raised earlier with reasonable diligence either before the Judge or before this court in CCA 38, as *per* s 394J(3)(*b*) of the CPC. It should also be noted that no explanation has been put forth by the applicant as to why this argument was not raised earlier.

21 In any event, the agreement to traffic the quantity found in Mogan's possession was proved beyond a reasonable doubt. Had the applicant's argument in relation to his alleged lack of *knowledge* of the quantity of the drugs been advanced earlier, this would have been rejected. Similar arguments have also been advanced in similar cases where accused persons, who have been charged under s 5(1)(*a*) of the MDA, read with s 5(2) and s 12, denied knowledge of the exact quantity of drugs. In *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 ("*Ridzuan*"), the appellant was charged for trafficking in furtherance of a common intention. In *Ridzuan*, this court held that if an accused person intended for *any* amount of drugs to be collected, as opposed to some smaller defined amount, he or she cannot evade liability by claiming that he or she did not know of the specific quantity of drugs that were in fact collected (*Ridzuan* at [57], approved in *Muhammad Abdul Hadi bin Haron v Public Prosecutor and another appeal* [2021] 1 SLR 537 at [26]–[27], in the context of an abetment by instigation charge under s 5(1)(*a*) read with ss 5(2) and 5(12) of the MDA). Based on

Mogan's testimony at the trial, the Judge had determined that the applicant knew that Mogan was delivering cannabis, and that he had used the first phone number to coordinate the delivery of the said cannabis to himself by instructing Mogan to pass the cannabis to Suresh, who was to collect the cannabis on the applicant's behalf. The applicant had therefore engaged in a conspiracy with Mogan for Mogan to deliver the *entire quantity* of 1017.9g of cannabis to himself. To this end, the Judge determined that (*Tangaraju (HC Conviction)* at [77]):

> … I found that the accused knew that Mogan was delivering cannabis, and that he had coordinated the delivery of the said cannabis to himself by instructing Mogan to pass the cannabis to Suresh, who was to collect the cannabis on the accused's behalf. The accused had engaged in a conspiracy with Mogan for Mogan to deliver the 1017.9g of cannabis to himself.

The charge against the applicant was therefore proved beyond a reasonable doubt. The Judge's decision was affirmed on appeal and there is no reason to disturb this finding.

22 For completeness, I agree with the Prosecution that the applicant's new argument is premised on *false assertions*. The applicant had stated in his written submissions that there was no evidence of: (a) Mogan's knowledge of the quantity of cannabis; and (b) that it was never put to the applicant that he had an agreement with Mogan to traffic 1017.9g of cannabis. These are untrue and contrary to the evidence adduced at the trial. To begin with, the evidence at the trial was that Mogan had *knowledge* of the quantity of the cannabis. Mogan had testified that he had collected cannabis from "Selva" and that he had been instructed to deliver the drugs to the applicant. He testified that he had knowledge that the "two rectangular-shaped blocks wrapped in white packaging" were cannabis upon his own inspection, and the drugs were subsequently analysed and found to contain 1017.9g of cannabis. Furthermore,

as highlighted above (at [18]), it was also expressly put to the applicant that he had an agreement to traffic 1017.9g of cannabis. I reproduce the relevant portion of the notes of evidence:

> Notes of Evidence (30 April 2018) at pp 19–20
>
> Q I put it to you that you knew that Mogan was transporting or bringing cannabis from Malaysia into Singapore when he entered Singapore on 6th September 2013, you knew this.
>
> A I disagree, Your Honour.
>
> Q You knew the amount of cannabis he was carrying was two bundles containing not less than 1017.9 grams of cannabis.
>
> …
>
> A I disagree, Your Honour.
>
> Q In fact, on 6th September 2013, you were engaged in criminal conspiracy with Mogan to traffic in cannabis in the said amount which you have just mentioned.
>
> …
>
> A I disagree, Your Honour.
>
> …
>
> Q I'm putting it to you the cannabis that Mogan was supposed to deliver to you, you intended to traffic in them.
>
> A I disagree, Your Honour.

23 The applicant also submits in CM 19 that the cannabis was never actually in the applicant's possession and therefore, the Judge was not entitled to draw an adverse inference against the applicant based on the weight of the drugs found in Mogan's possession. This is misconceived. To begin with, no such adverse inference was drawn by the Judge. Instead, the Judge had found that, in the absence of any arguments that the cannabis was intended for the applicant's own consumption and given the large quantity of cannabis involved, the applicant had intended to traffic the said cannabis (*Tangaraju (HC*

Conviction) at [80]). This conclusion was in no way dependent on the applicant's possession of the cannabis. For the offence of *abetting* in a drug trafficking offence, it need only be shown that: (a) the abettor had intended to be a party to the agreement to traffic in the drugs; (b) the abettor must have known the general purpose of the common design (*ie*, to traffic in the drugs) and the fact that the act agreed to be committed is unlawful; and (c) the drugs trafficked must not have been intended for the abettor's own consumption (*Chandroo Subramaniam v Public Prosecutor and other appeals* [2021] SGCA 110 at [35]). The Judge had duly considered all these points in her decision (see *Tangaraju (HC Conviction)* at [52], [71], [74]–[77], [79]–[80]). It was thus irrelevant that the cannabis was never in the applicant's possession.

24 In any case, filing another application for permission to make a review application to reopen this court's decision in CCA 38 is impermissible under s 394K(1) of the CPC as that provision states that an "applicant cannot make more than one review application in respect of any decision of an appellate court". In *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 ("*Yusof*") (at [12]–[13]), this court determined that a purposive and proper reading of s 394K(1) of the CPC is that "since an applicant cannot make more than one review application in respect of any decision of the court, it follows logically that he also cannot make more than one leave application because that is the necessary prelude to a review application" (affirmed in *Panchalai a/p Supermaniam and another v Public Prosecutor* [2022] 2 SLR 507 at [28] and *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46). It should be noted that in *Yusof*, the applicant's second leave application raised the same arguments as those in the first application. In the present case, the applicant had filed the earlier CM 25 on the change of the law brought about by the decision of *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984, as regards the Prosecution's duty to disclose a material witness' statement to the

Defence. CM 19 is now based on entirely different grounds, *ie*, a new argument in relation to the applicant's knowledge of the quantity of drugs. Such drip-feeding of applications in a bid to thwart the court's efforts to discharge its responsibility to dispose with the matter timeously in accordance with its merits would amount to an abuse of the process of the court (*Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] 2 SLR 211 at [17]). In any case, the applicant would be precluded from filing any further applications for permission to bring a review application under s 394K(1) of the CPC.

25 As such, the applicant has not met the conjunctive requirements in s 394J of the CPC and no legitimate basis for the court to exercise its power of review has been disclosed.

Court of Appeal's inherent power to reopen concluded criminal appeals

26 It should be noted that, in the alternative to invoking an appellate court's statutory power to review its earlier decision under s 394 of the CPC, this court has the inherent power to reopen a concluded criminal appeal to prevent a miscarriage of justice (*Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 ("*Pang Chie Wei*") at [13]). An applicant's choice between these two avenues will not affect the substance of the review application, since the requirements for the exercise of the appellate court's power of review under s 394I of the CPC mirror the requirements for the exercise of the court's inherent power to reopen a concluded criminal appeal (*A Steven s/o Paul Raj v Public Prosecutor* [2023] SGCA 9 ("*A Steven*") at [17]; *Pang Chie Wei* at [30]).

27 As such, if the material put forth by the applicant does not satisfy the requirements set out under s 394J of the CPC, the court cannot exercise its inherent power to reopen a concluded criminal appeal on the basis of the same

material (*A Steven* at [18]). It would be arbitrary if the success of a review application was contingent on the applicant's choice of the remedial avenue (*Pang Chie Wei* at [30]).

28 Since I have determined above that there is no legitimate basis for this court to exercise its power of review under s 394H of the CPC, the new arguments which the applicant has advanced at the eleventh hour, without more, do not warrant the court's exercise of its inherent power to reopen a concluded criminal appeal.

Conclusion

29 Accordingly, I find that the applicant has failed to show a legitimate basis for the court to review his appeal in CCA 38. There is also no basis for the court to exercise its inherent power to reopen a concluded criminal appeal. This application is therefore dismissed without being set down for hearing.

Steven Chong
Justice of the Court of Appeal

The applicant in person;
Anandan Bala, Selene Yap and Tan Zhi Hao (Attorney-General's Chambers) for the respondent.