IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 35

Criminal Motion No 40 of 2023

Between

CHANDER KUMAR A/L JAYAGARAN

… *Applicant*

And

PUBLIC PROSECUTOR

… *Respondent*

JUDGMENT

[Criminal law] — [Statutory offences] — [Misuse of Drugs Act]
[Criminal procedure and sentencing] — [Criminal review]

Chander Kumar a/l Jayagaran
v
Public Prosecutor

[2023] SGCA 35

Court of Appeal — Criminal Motion No 40 of 2023
Tay Yong Kwang JCA
6 October 2023

31 October 2023

Tay Yong Kwang JCA (delivering the judgment of the court):

Introduction

1 CA/CM 40/2023 ("CM 40") is an application by Chander Kumar a/l Jayagaran ("the applicant") under s 394H(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") for permission to make an application to review an earlier decision of the Court of Appeal in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 (*"Ramesh (CA)*"). Previous to CM 40, the applicant filed CA/CM 37/2020 ("CM 37"), also an application under s 394H(1) of the CPC for permission to review *Ramesh (CA)*. On 18 January 2021, I dismissed CM 37 summarily: see *Chander Kumar a/l Jayagaran v Public Prosecutor* [2021] SGCA 3 ("*Chander (Permission)*"). CM 40 is therefore the applicant's second application for permission to review *Ramesh (CA)*.

2 The facts relevant to this application are set out in *Ramesh (CA)* at [5]–[20]. They are summarised briefly below.

3 The applicant claimed trial to three charges:

(a) Possession of two bundles containing not less than 14.79g of diamorphine for the purpose of trafficking, a non-capital offence under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA").

(b) Trafficking in not less than 19.27g of diamorphine by delivering three bundles of drugs to Harun bin Idris ("Harun"), a capital offence under s 5(1)(*a*) of the MDA.

(c) Trafficking in not less than 29.96g of diamorphine by giving four bundles of drugs to his co-accused, Ramesh a/l Perumal ("Ramesh"), a capital offence under s 5(1)(*a*) of the MDA.

4 The drugs that formed the subject matter of the charges were brought from Malaysia into Singapore in a lorry driven by the applicant, with Ramesh as the passenger. The drugs were contained in nine separate bundles. The applicant's position, both at the trial and on appeal, was that he had been told by one "Roy", a Malaysian Indian man living in his estate, that the bundles that the applicant was to deliver contained betel nuts and not controlled drugs.

5 The High Court rejected the applicant's defence and convicted the applicant on all three charges. On the issue of sentence, the High Court found that the applicant satisfied the requirements of the alternative sentencing regime set out in s 33B(2) of the MDA. The High Court imposed on the applicant the minimum sentence of life imprisonment and 15 strokes of the cane for each of

the capital charges and 26 years' imprisonment and 15 strokes of the cane for the non-capital charge. The aggregate sentence for the applicant was therefore life imprisonment and 24 strokes of the cane (the maximum number of strokes of the cane allowed by law). Ramesh was convicted on one charge of possession of drugs containing not less than 29.96g of diamorphine. The High Court held that Ramesh also satisfied the requirements set out in s 33B(2) of the MDA and sentenced him to life imprisonment and 15 strokes of the cane.

6 The applicant and Ramesh appealed against their respective convictions and sentences. In its judgment delivered on 15 March 2019 (*Ramesh (CA)*), the Court of Appeal dismissed the applicant's appeal and upheld the sentence imposed upon him by the High Court. In relation to Ramesh, the Court of Appeal amended the trafficking charge to one of possession of drugs under s 8(*a*) of the MDA. Ramesh was convicted on the amended charge and sentenced to ten years' imprisonment.

7 On 23 December 2020, the applicant filed CM 37. CM 37 was placed before me. While CM 37 was filed under ss 405 and 407 of the CPC, I regarded it as an application under s 394H of the CPC for permission to make a review application in respect of *Ramesh (CA)* based on the contents of the applicant's supporting affidavit in CM 37: see *Chander (Permission)* at [1]. I dismissed CM 37 summarily on 18 January 2021 as none of the matters raised by the applicant in CM 37 satisfied the requirement of "sufficient material" within the meaning of s 394J of the CPC. No new evidence was adduced in CM 37. The applicant's contentions advanced in CM 37 concerned matters which had been canvassed or could have been raised at the trial or at the appeal: see *Chander (Permission)* at [15].

8 On 6 October 2023, the applicant filed the present application in CM 40. In his supporting affidavit, the applicant raises various issues which I summarise in six points below. The first fiverelate to the manner in which the Prosecution conducted the criminal proceedings against the applicant. The applicant alleges that the Prosecution:

(a) failed to "thoroughly analyse" certain documents, such as the phone records and travel movement records of Ramesh. The applicant claims that if the Prosecution had done so, it would have established Ramesh's "greater involvement" in the drug trafficking scheme and would possibly have preferred less serious charges against the applicant;

(b) failed to identify that Ramesh had told '*Lucas* lies' in the course of giving evidence at the trial and out of court (see *Regina v Lucas (Ruth)* [1981] QB 720) and had sought to "push the blame" to the applicant regarding the drug bundles;

(c) failed to put to the applicant the elements of "all 3 charges [against him], separately";

(d) erred in taking the applicant's statements in his three cautioned statements as "confession[s]" within the meaning of s 17(2) of the Evidence Act (Cap 97, 1997 Rev Ed); and

(e) failed to disclose the statements made by the applicant's sister and father in breach of the disclosure obligations set out in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*").

9 The applicant submits that these failures led both the High Court and the Court of Appeal to find wrongly that the applicant failed to rebut the

presumption of knowledge under s 18(2) of the MDA. In addition, the Prosecution's alleged errors caused the Court of Appeal to amend the charge against Ramesh wrongly from a charge of trafficking to simple possession. This led the Court of Appeal to impose a heavier sentence on the applicant than on Ramesh, despite Ramesh's allegedly greater role in the drug transaction. The applicant alleges that these 'unequal' sentences constitute a breach of Art 12(1) of the Constitution of the Republic of Singapore (2020 Rev Ed).

10 The sixth point is that the trial judge had engaged in excessive judicial interference.

The decision of the court

Applicable principles

11 To obtain permission under s 394H(1) of the CPC to make a review application, the application must disclose a "legitimate basis for the exercise of the [appellate court's] power of review": *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17]. To show a legitimate basis for the appellate court's exercise of its power of review, the applicant must satisfy the requirements set out in s 394J of the CPC: *Roslan bin Bakar and others v Public Prosecutor* [2022] 1 SLR 1451 at [21].

12 Section 394J(2) of the CPC requires the applicant to show that there is "sufficient material" upon 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. Section 394J(3) defines "sufficient material" as material which satisfies all the following requirements:

(a) it must not have been canvassed at any stage of proceedings in the criminal matter before the application for permission to make the review was made (s 394J(3)(*a*) of the CPC);

(b) it could not have been adduced in court earlier even with reasonable diligence (s 394J(3)(*b*) of the CPC); and

(c) it must be compelling, in that it is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter (s 394J(3)(*c*) of the CPC).

13 Section 394J(4) then clarifies that, for any material consisting of legal arguments to be considered "sufficient", it must, in addition to the three points above, 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 issue.

14 In assessing whether there was a miscarriage of justice, the appellate court must consider if the earlier decision that is sought to be reopened is "demonstrably wrong". 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" (see ss 394J(5)(*a*) and 394J(7) of the CPC). In the alternative, the court may conclude that there has been a miscarriage of justice if the earlier decision is "tainted by fraud or a breach of the rules of natural justice" (see s 394J(5)(*b*) of the CPC).

The first to fourth and sixth points do not amount to "sufficient material"

15 Leaving aside for the time being the applicant's fifth point regarding the Prosecution's alleged breach of its obligation to disclose the statements of material witnesses to the Defence, none of the points raised by the applicant satisfies the requirement of "sufficient material" within the meaning of s 394J of the CPC. These points are based on evidence that was already canvassed at the trial and they could have been raised at first instance or on appeal.

16 The mere recharacterisation of factual matters as alleged prosecutorial misconduct cannot assist the applicant. For instance, the applicant's first point that the Prosecution had failed to analyse Ramesh's phone and travel records properly is nothing more than an attempt by the applicant to advance at this very late stage a narrative that Ramesh and Roy had some affiliation prior to Ramesh's arrest on 26 June 2013. Leaving aside the issue of whether such a narrative would have any material impact on the applicant's conviction and sentence, it is obvious that the opportunity to advance such a case and to present the relevant evidence in support was available all along at the trial and also at the appeal. These were matters that certainly could have been adduced in court earlier: see s 394J(3)(*b*) of the CPC. Seeking to rely on evidence that was plainly available at the trial and at the appeal at this stage under the guise of "egregious mistake[s] of the Prosecution" contradict the very essence of a review within the meaning of the CPC provisions.

17 In relation to the argument that the trial judge had engaged in excessive interference in the course of trial, this could also have been raised at the appeal but was not. Nevertheless, there was clearly no miscarriage of justice. The applicant relies primarily on an estimate of the number of questions posed by the trial judge and compares that to the number of questions posed by the

Prosecution and the respective accused's counsel. He then highlights that the judge asked more questions than each of the parties. This is surely a ridiculous basis on which to mount a submission of excessive judicial interference because it considers only quantity and has no regard for the type and quality of the questions.

The fifth point does not raise a miscarriage of justice

18 I return to the fifth point. In *Nabill*, the Court of Appeal held at [39] that the Prosecution has a duty to disclose a material witness' statement to the Defence (the "*Nabill* obligation"). The decision in *Nabill* was delivered on 31 March 2020, after *Ramesh (CA)* was decided on 15 March 2019. The decision in *Nabill*, therefore, could possibly constitute a "change in the law" for the purposes of s 394J(4) of the CPC. However, this point on the *Nabill* obligation was not raised in the applicant's first application for permission to review in *Chander (Permission)* although the first application and its supporting affidavit were filed on 23 December 2020, almost nine months after *Nabill* was decided by the Court of Appeal.

19 In *Tangaraju s/o Suppiah v Public Prosecutor* [2023] 1 SLR 622, Steven Chong JCA, sitting as a single judge of the Court of Appeal, dealt with an application under s 394H of the CPC which was also brought on the basis of a change of law due to the decision in *Nabill*. The Court there clarified that a change in the law is not a licence to review concluded appeals and that a mere change in the law would not by itself constitute "sufficient material". Instead, what must be considered is the impact, if any, that this change in the law would bring to the particular case which is the subject of the application for permission to review.

20 The applicant here argues that the Prosecution failed to disclose the

statements of his sister and father, which pertained to "details of Roy and other materials, which, if disclosed, could have corroborated the [applicant's] statements". While these "details of Roy" were not elaborated upon, the applicant had mentioned elsewhere in his affidavit that his sister had informed him that Roy knew Ramesh some time before the applicant began delivering bundles for Roy and further, that Ramesh sought to keep this fact from the applicant. His sister also stated that Roy had told her that Ramesh wanted the applicant to "looks [*sic*] like the leader" so that he (Ramesh) could have the "last laugh".

21 Presumably, therefore, the statements that the Prosecution allegedly failed to disclose pertained to the 'true' nature of Ramesh's and Roy's association. However, even assuming that the applicant's sister and his father could be considered "material" witnesses for the purposes of the *Nabill* obligation, it is difficult to see how any evidence pertaining to Ramesh's and Roy's relationship would have any substantial bearing on the applicant's conviction and sentence. The case against the applicant turned on whether the applicant could rebut the presumption of knowledge under s 18(2) of the MDA: see *Ramesh (CA)* at [39] and [40]. In this regard, both the High Court and the Court of Appeal rejected the applicant's defence that he thought that the drug bundles contained betel nuts, since this defence was not mentioned in his contemporaneous or his cautioned statements and it was not credible since the applicant had received $2,300 in a previous delivery to Harun: *Ramesh (CA)* at [40]–[43]. In fact, the applicant's cautioned statements contained unequivocal admissions of the charges levied against him. The alleged history between Roy and Ramesh, even if it were substantiated, therefore could not have any bearing on the applicant's conviction and sentence. There was certainly no miscarriage of justice from this alleged non-disclosure.

The criminal review regime and the abuse of process of court by repeat leave applications

22 As stated earlier, the present application is the applicant's second application for permission to review the Court of Appeal's decision dismissing his appeal. Having filed CM 37, which was dismissed summarily, the applicant is not allowed to file another application for permission to review. As I stated in *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 ("*Yusof*") at [12]–[13], filing more than one application for permission to make a review application is not permissible in law based on s 394K(1) of the CPC.

23 While s 394J(1)(*b*) of the CPC provides that the section does not affect the inherent power of an appellate court to review, on its own motion, an earlier decision of the appellate court, it should be noted that invoking the court's inherent power would generally not affect the substance of the review application. This is because the requirements under the statutory route of review mirror the requirements for the exercise of the court's inherent power: *Tangaraju s/o Suppiah v Public Prosecutor* [2023] SGCA 13 ("*Tangaraju (No 2)*") at [26]. If the material put forth by the applicant does not satisfy the requirements set out in s 394J, it follows that the court cannot exercise its inherent power to review a concluded criminal appeal on the basis of the same material: *Tangaraju (No 2)* at [27].

24 The court's inherent power to review concluded criminal appeals certainly must not be used to justify repeat applications lest the very instrument for ensuring that there is no miscarriage of justice becomes perverted into an instrument for the abuse of the process of justice. The inherent power should only be invoked as a last resort and only in the most exceptional of cases. For instance, a person convicted on a murder charge who has already failed in his appeal and in an earlier review application may invoke the inherent power of

the court to review its own decision should credible evidence surface subsequently that the alleged murder victim is actually still alive. This is the sort of situation where any reasonable person would say without hesitation or debate that the earlier decision has been shown by the "new evidence" to be "demonstrably wrong" and that if it were allowed to stand, there would be a "miscarriage of justice".

25 At a case management conference on 12 October 2023, the applicant was informed about the prohibition in s 394K(1) of the CPC against the making of more than one review application. He chose to proceed with the present CM 40 anyway. As shown above, substantial portions of his affidavit in CM 40 contained rehashed arguments on existing evidence. This sort of repeat application amounts clearly to an abuse of the process of the court. If it had been filed by a solicitor, the solicitor would in all likelihood be ordered to pay costs to the Prosecution personally.

26 As I have spelt out in *Yusof* at [20] and which I reiterate here, to curb such obvious abuse of process of the court, the Supreme Court Registry should adopt the following procedure. Should any applicant file more than one application for permission to review which plainly does not warrant the exercise of the appellate court's inherent power to review a concluded criminal appeal, the Supreme Court Registry should consult the relevant appellate Judge (where one has been assigned to the case) or the relevant appellate court. If so directed, the Supreme Court Registry should reject the filing. Even if the second or subsequent application has been accepted for filing, in error or otherwise, the Supreme Court Registry may still reject the filing if so directed by the assigned appellate Judge.

27 Such a procedure as set out above will help to stop abuse of the court's

process and the provisions in the CPC. It will ensure that judicial time and resources and similarly, the Prosecution's time and resources, are not wasted on repetitive and seemingly unceasing applications by litigants who refuse to accept the finality of the court's decisions unless or until they are in their favour.

Conclusion

28 Under s 394H(7) of the CPC, a leave application may, without being set down for hearing, be dealt with summarily by a written order of the appellate court. Before refusing a leave application summarily, the court must consider the applicant's written submissions and may, but is not required to, consider the Prosecution's written submissions (if any): s 394H(8) of the CPC. The timeline for the Prosecution to file its written submissions has not lapsed and it has not filed its submissions yet.

29 I have considered the application and the supporting affidavit which contains the applicant's handwritten submissions. I am satisfied that permission for a review application, especially a repeat application, should not be granted. The present application is clearly an abuse of process of the court. CM 40 is therefore dismissed summarily.

Tay Yong Kwang
Justice of the Court of Appeal

The applicant in person.