IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 18

Criminal Motion No 20 of 2024

Between

Moad Fadzir Bin Mustaffa

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal review]

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v
Public Prosecutor

[2024] SGCA 18

Court of Appeal — Criminal Motion No 20 of 2024
Tay Yong Kwang JCA, Steven Chong JCA and Woo Bih Li JAD
14 May 2024

17 May 2024

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

Introduction

1 In this application, CA/CM 20/2024 ("CM 20"), the applicant seeks the following order:

> The Honourable Justice of the Court of Appeal Tay Yong Kwang should disqualify himself from hearing the summary determination stage in CA/CM 15/2024, as to whether the Applicant therein be permitted to make the review application by reason of circumstances that would give rise to a reasonable suspicion or apprehension of bias in the fair-minded and informed observer.

The grounds for the application are set out in the supporting affidavit of Mr Ong Ying Ping ("Mr Ong"), the applicant's counsel, dated 2 May 2024.

2 CA/CM 15/2024 ("CM 15") is the applicant's earlier application under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") for

permission to make a review application to the Court of Appeal pursuant to s 394I of the CPC. It was also his second such application. CM 15 was brought on the basis that there is new material on which the Court of Appeal may conclude that there has been a miscarriage of justice in its decision in *Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals* [2019] SGCA 73 ("First CA Judgment"). CM 15 has not been decided.

Facts

3 The applicant was tried jointly with Mr Zuraimy bin Musa ("Zuraimy") in the High Court for trafficking in a controlled drug in furtherance of a common intention under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed). We set out below a very brief summary of the First CA Judgment for context.

4 On the night of 11 April 2016, the applicant drove a car, with Zuraimy in the front passenger seat, to Block 157 Toa Payoh. After the car was parked at the loading/unloading bay there, an unknown Indian man walked to the driver's side and threw a white plastic bag through the front window and it landed on the applicant's lap. The applicant passed the white plastic bag to Zuraimy. The white plastic bag was subsequently placed in the applicant's sling bag in the car. The applicant then drove to Commonwealth Avenue West where Zuraimy alighted and walked towards Holland Close. Thereafter, the applicant drove the car, with the sling bag inside, to his home in Woodlands Drive 52.

5 Officers from the Central Narcotics Bureau ("CNB") arrested the applicant when he alighted from the car at Woodlands Drive 52. When the applicant was arrested, he was carrying the sling bag with four bundles of drugs which were later established to contain 36.93g of diamorphine. CNB officers

arrested Zuraimy at Holland Close the next day when he came down from his residence.

6 On 15 February 2019, the trial judge (the "Judge") found the applicant guilty as charged and sentenced him to suffer death. However, the Judge was not satisfied that the Prosecution had proved beyond a reasonable doubt that Zuraimy had the common intention with the applicant for the applicant to be in possession of the diamorphine for the purposes of trafficking. Accordingly, he amended the charge against Zuraimy to one of abetting by intentionally aiding the applicant to possess the diamorphine, an offence under s 8(*a*) read with s 12 of the MDA. The Judge convicted Zuraimy on the amended charge and sentenced him to the maximum of ten years' imprisonment.

7 The applicant appealed against his conviction and sentence while Zuraimy appealed against his sentence on the amended charge. The Prosecution appealed against Zuraimy's acquittal on the original trafficking charge.

8 On 25 November 2019, in the First CA Judgment, the Court of Appeal (comprising Sundaresh Menon CJ, Judith Prakash JCA and Tay Yong Kwang JCA) dismissed the appeals and affirmed the applicant's conviction and mandatory death sentence. The court also amended the charge against the applicant to delete the references to common intention. The Court of Appeal affirmed Zuraimy's conviction on the amended charge of abetment by intentionally aiding the applicant to possess the diamorphine and his sentence. Tay JCA delivered the First CA Judgment on the court's behalf.

9 On 22 September 2020, the applicant filed CA/CM 29/2020 ("CM 29") for permission to make an application under s 394H of the CPC for the Court of Appeal to review the First CA Judgment. CM 29 was filed two days before the

applicant's scheduled date of execution which was on 24 September 2020. Following his application, the President of the Republic of Singapore ("the President") ordered a respite of the execution pending further order.

10 Pursuant to s 394H(6)(*a*) of the CPC, Tay JCA, sitting as a single judge in the Court of Appeal, dealt with CM 29. It was the practice for a member of the Court of Appeal which heard the appeal sought to be reviewed to deal with any application for permission to make a review application in respect of that appeal. On 12 October 2020, Tay JCA dismissed CM 29 summarily in *Moad Fadzir Bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 ("Second CA Judgment").

11 Subsequently, the applicant was involved in seven post-appeal applications together with other prisoners sentenced to undergo the death penalty.

12 On 12 April 2024, the President issued his order that the death sentence on the applicant be carried into effect on 26 April 2024. On 19 April 2024, the applicant applied in CM 15, his second application under the CPC, for permission to make a review application in respect of the First CA Judgment. This was accompanied by Mr Ong's supporting affidavit and his written submissions. A tentative hearing date for CM 15 was fixed for 25 April 2024 before Tay JCA.

13 On 23 April 2024, the Prosecution sought an extension of time to review some of the issues raised by the applicant and to file its supporting affidavit and written submissions. On this basis, the Prosecution requested a stay of execution of the death sentence pending further order and that the hearing fixed for 25 April 2024 be vacated. On 24 April 2024, the Court of Appeal (comprising

Tay JCA, Steven Chong JCA and Woo Bih Li JAD) granted this request and stayed the execution of the death sentence pending the outcome of CM 15 or until further order.

14 Also on 23 April 2024, Mr Ong sent a letter to the Supreme Court Registry stating that the applicant was "concerned with a reasonable apprehension of bias" if Tay JCA should hear CM 15. His grounds were essentially that Tay JCA heard and dismissed his appeal against conviction and sentence and also his first application for permission to make a review application. The letter also stated that in the First CA Judgment, Tay JCA "expressed disbelief in the Applicant's case relating to the bailment of the drugs, because a view was formed" concerning some factual issues. In respect of CM 15, the applicant's case concerns a new witness (Kishor) who allegedly delivered the drugs from the supplier to Zuraimy. In relation to the credibility of this new witness, Tay JCA had expressed "a strong dissenting view in *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [122] ("*Harven Segar*") that the evidential burden should rest on the Applicant to produce this witness". In the circumstances, the applicant was concerned that "a reasonable observer with the relevant information may apprehend that the decision maker of the summary determination may have reached or formed an opinion on the evidential burden" and that in view of the applicant's concern that Tay JCA "may be pre-disposed to deciding [CM 15] with the view that the burden fell on the applicant to call Kishor as a witness, the applicant humbly seeks to have this matter re-fixed to a different Justice of the Court of Appeal, and if necessary, an adjournment of the matter if the request is refused".

15 On 24 April 2024, the Supreme Court Registry replied to the parties as follows:

> Having considered the matters stated in the letter, the Honourable Justice Tay Yong Kwang has found that there are no grounds which warrant his recusal from hearing CM 15. Accordingly, the applicant's request to have CM 15 refixed before a different Justice of the Court of Appeal is rejected.

16 On 26 April 2024, at a case management conference ("CMC"), Mr Ong indicated that he was instructed by the applicant to file a further "formal application" for Tay JCA's recusal. This was subsequently brought by way of the present CM 20 on 3 May 2024. At another CMC on 7 May 2024, the Prosecution confirmed that it would not be filing a reply affidavit in CM 20. On 14 May 2024, both parties filed their submissions.

Whether Tay JCA should recuse himself from hearing CM 15 on the basis of the alleged apparent bias

The applicant's case

17 The applicant argues that there is reasonable basis to apprehend that CM 15 will be prejudged. This is because Tay JCA ruled against the applicant in the First CA Judgment. In particular, Tay JCA disbelieved the applicant's case relating to the bailment of the drugs and had "formed a negative impression" of the applicant who had lied about several matters. Tay JCA also dismissed CM 29 summarily in the Second CA Judgment.

18 According to the applicant, this "negative impression" affected Tay JCA to the extent that it caused "severe and adverse prejudice" to the applicant. This prejudice manifested in the form of inferences drawn by the court which were not based on any evidence, the rejection of Zuraimy's evidence and a "biased preference towards allegedly incriminating evidence pointing to [the applicant's] alleged ownership of the drugs". On this basis, the applicant submits that the production and admission of Kishor as a material witness in CM 15 is likely to be viewed adversely by Tay JCA, who may regard the

applicant's failure to raise this piece of evidence earlier to the applicant's prejudice and refuse CM 15 summarily.

19 The applicant also highlights that Tay JCA expressed a "strong dissenting view" in *Harven Segar* that the evidential burden lies on the applicant to produce a witness in support of his defence to rebut the presumption in s 18(2) of the MDA. He submits that Tay JCA may retain this view and find that the applicant's failure to produce Kishor earlier renders this new material not sufficiently compelling to meet the requisite threshold under s 394H of the CPC despite the fact that it was incumbent on the Prosecution to adduce Kishor's statements and testimony.

The Prosecution's case

20 The Prosecution submits that CM 20 is utterly bereft of merit and does not cross the high threshold required for a party to prove apparent bias. For multiple adverse rulings against a single litigant by a single judge to amount to grounds for finding apparent bias, the rulings will not only need to be made in error but will also have to be typically accompanied by exaggerated or intemperate language or based on facts or statements of law that are clearly and inescapably wrong (see *Pradeepto Kumar Biswas v Gouri Mukherjee and another* [2022] 2 SLR 1347 at [15]). Specifically, applications under s 394H of the CPC for leave to review decisions of the Court of Appeal are typically heard by a judge who heard the appeal.

21 The grounds which the applicant relies on are unmeritorious. In relation to Tay JCA's minority view in *Harven Segar*, the mere fact that a judge has expressed a particular view on the evidential burden in the specific context of one case cannot possibly be a ground for his recusal in an unrelated case with different factual circumstances. In relation to the findings of the Court of Appeal

in the First CA Judgment, they were arrived at on the basis of "clear and cogent reasons". These findings were also not inconsistent with the cases put forth by Zuraimy and the Prosecution.

The decision of the Court

22 The Judges in this decision are unanimous in our view that Tay JCA may sit as a member of this Court to hear the present CM 20. This accords with the practice that an application for any judge to recuse himself/herself from hearing a matter is made to that judge.

23 The test for apparent bias is whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial was not possible. The rationale for this ground of review is that there is a vital public interest in ensuring that justice is manifestly and undoubtedly seen to be done (*Panchalai a/p Supermaniam and another v Public Prosecutor* [2022] 2 SLR 507 ("*Panchalai*") at [22]).

24 The First CA Judgment was a unanimous decision of three Judges of the Court of Appeal. The views expressed were not the views of Tay JCA alone. While Tay JCA delivered that judgment on behalf of the Court of Appeal, the fact remains that the entire judgment was endorsed by the other two members of the Court. The applicant's assertions and submissions, if they are well-founded, would therefore presumably be directed also against the other two members of the Court.

25 In our view, the mere fact that Tay JCA delivered the First CA Judgment (which dismissed the applicant's appeal) cannot possibly result in a reasonable apprehension of apparent bias. The judgment of any Court is based on the evidence adduced and the cases put forward by the parties. The applicant's

assertions of wrong or unwarranted findings or inferences from the evidence are nothing more than an indirect and completely unjustifiable attack against the correctness of the First CA Judgment and are tantamount to re-opening and re-arguing the merits of the applicant's appeal. He is not entitled in law to do this.

26 In so far as the Second CA Judgment (which dismissed CM 29 summarily) is concerned, the hearing of an application for permission to review by one member of the original Court (or by the same members of that Court) which decided the matter sought to be reviewed is contemplated by the CPC. For example, in s 394H(6)(*b*) of the CPC, where the decision to be reviewed was made by the General Division of the High Court, the application under s 394H is to be heard by the judge "who made the decision to be reviewed" and if that judge is not available, then by any judge. Section 60E(2) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed), which provides for the composition of the Court of Appeal exercising its criminal jurisdiction, similarly imposes no prohibition against the existing practice.

27 The applicant submits that the production and admission of Kishor as a material witness is likely to be viewed adversely by Tay JCA in CM 15 as he may regard the applicant's failure to raise this evidence earlier to his prejudice and refuse to admit this vital evidence by summarily refusing CM 15. This is because Tay JCA was said to have expressed a strong dissenting view in *Harven Segar* at [122] that the evidential burden should rest on the applicant to produce a material witness. The applicant submits that this runs counter to the "established law" that the legal duty is on the Prosecution to call a material witness such as Kishor.

28 Without discussing whether the applicant's characterisation of the majority and minority holdings in *Harven Segar* are correct or not, the applicant

appears to be submitting that the mere fact that a judge has previously expressed a certain dissenting view on the law will give rise to a reasonable apprehension that the judge will simply reiterate and apply his dissenting view without regard for the majority decision and without applying his or her mind to the case at hand. This is clearly unwarranted. Whatever the perceived strength of a dissenting judgment may be, the dissenting view must give way ultimately to the majority view. The dissenting judge must still abide by and apply the law as declared by the majority view.

29 If the applicant's contention about a dissenting judgment is valid, then the same argument would also apply to the majority judgment. An opposing party may then assert that the judges in the majority judgment have also held a strong entrenched view on the relevant legal issues and should recuse themselves from future cases raising the same legal issues. This will surely lead to the absurd result that subsequent cases raising those legal issues must be decided by a different composition of judges each time.

30 Finally, as a matter of procedure, we consider it an abuse of the Court's process for the applicant to request by letter that a judge recuse himself and, when the request is rejected, to then apply by criminal motion for the same thing on essentially the same grounds. We hold that Tay JCA was entitled to consider and to reject the applicant's initial request by letter as it was made in relation to CM 15, which he was entitled to hear as a single judge sitting in the Court of Appeal pursuant to s 394H(6)(*a*) of the CPC. The applicant's insistence on successive applications containing essentially the same allegations of bias shows little regard for the Court of Appeal's observations in *Panchalai* at [26] that allegations of judicial bias are extremely serious and have the potential to undermine public confidence in the administration of justice.

Conclusion

31 Our unanimous view is that there can be no reasonable suspicion or apprehension of bias as alleged. We therefore dismiss CM 20.

32 In the Prosecution's written submissions, it reserves its right to seek personal costs against Mr Ong if this Court agrees that this CM should be dismissed. If the Prosecution wishes to submit on costs, it is to file and serve its written submissions by way of letter within two working days after the delivery of this judgment. If Mr Ong wishes to respond, he is to file and serve his written submissions by way of letter within two working days after service of the Prosecution's letter.

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Ong Ying Ping (Ong Ying Ping Esq) for the applicant;
Wong Woon Kwong SC and Sarah Siaw (Attorney-General's Chambers) for the respondent.