IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 189

Magistrate's Appeal No 9352 of 2017

Between

Sukla Lalatendu

… *Appellant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 12 of 2018

Between

Public Prosecutor

… *Applicant*

And

Sukla Lalatendu

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Appeal] — [Plea of guilty] — [Retraction of plea]

Sukla Lalatendu
v
Public Prosecutor and another matter

[2018] SGHC 189

High Court — Magistrate's Appeal No 9352 of 2017
Sundaresh Menon CJ
3 April 2018

3 September 2018

Sundaresh Menon CJ:

Introduction

1 In criminal appeals, it is unfortunately the case that allegations of impropriety are sometimes made against the judges and judicial officers who had presided over the matters in question in the courts below. Occasionally, the allegations may have some basis and, in such cases, it may be found that they have arisen out of some genuine miscommunication or misunderstanding or conceivably even from improper conduct of the matter. More commonly, however, such allegations are borne out of desperation and are contrived efforts on the part of the accused to avoid a conviction and/or sentence that was appropriately imposed. Whatever the case may be, appellate courts need to be especially careful in dealing with these allegations. While due weight should be given to the policy of finality and the need to prevent an abuse of the court's

processes, the prudent approach in dealing with such cases is to carefully consider the allegations and their basis to assess whether they merit closer scrutiny, so that any miscarriage of justice may be promptly corrected if the allegations are borne out, or if they are not, then the relevant appeal or application may be dismissed, if necessary with appropriate observations. It is only in this way that the hard-won reputation and standing of our judiciary can be vigorously protected.

2 This appeal presented just such a situation. Allegations were made against a district judge as to matters which transpired in chambers and this formed the basis of the accused's application to retract his plea in subsequent appellate proceedings that came before me. Having closely examined the facts, I found that the allegations were wholly unmeritorious and accordingly disallowed the retraction. I then considered and dismissed the accused's appeal against the sentence imposed. I provided brief reasons for my decision at the time I disposed of the matter and now elaborate on my grounds of decision.

Background

The present charges

3 The accused, Sukla Lalatendu ("the Accused"), was a 42-year-old Indian national and a Singapore Permanent Resident at the time of the offences. He was also the owner of a car insurance company. He faced a total of three charges, all of which were for the offence of theft in dwelling under s 380 of the Penal Code (Cap 224, 2008 Rev Ed) ("PC") which provides as follows:

> **Theft in dwelling-house, etc.**
>
> **380.** Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or for the custody of property, shall be punished with

> imprisonment for a term which may extend to 7 years, and shall also be liable to fine.

4 Two of the three charges were proceeded with, and the Accused was convicted on the Statement of Facts, the relevant extracts of which may be summarised as follows:

(a) **First charge**: On 27 April 2017, the Accused committed theft in dwelling of a "Logitech Spotlight Presentation Remote" valued at $169.00 from a Popular bookstore at United Square Shopping Mall ("United Square"). The bookstore's surveillance footage showed the Accused behaving suspiciously at the location where the remotes were kept. Subsequent investigations revealed that at or about 6.13pm that day, the Accused dishonestly took a remote which was displayed on a shelf in the bookstore and placed it in a plastic bag that he was carrying. He then left the bookstore with the remote without paying for it. United Square is a building used for the custody of property, and the stolen remote was taken out of the possession of the bookstore manager. There was no mention in the Statement of Facts of whether the stolen remote was subsequently recovered.

(b) **Second charge**: On 1 May 2017, the Accused committed theft in dwelling of a "Samsung Gear 360 Globe handheld camera" valued at $348.00 from a Samsung Experience Store at No 3 Gateway Drive Westgate ("Westgate"). The store's surveillance footage showed that at or about 7.40pm that day, the Accused had taken the camera and left the store without making payment for it. Subsequent investigations revealed that the Accused had gone to Westgate at about 7.15pm that day. He entered the Samsung Experience Store and noticed the camera which was left unlocked on one of the shelves. The Accused then decided to

steal the camera. He placed the camera in his bag and left the store without paying for it. At the material time, the Accused had with him a sum of between $150 and $200 in cash and a credit card. The stolen camera was subsequently recovered from the Accused and no sales record was registered for it at the store. Westgate is a building used for the custody of property, and the stolen camera was taken out of the possession of the complainant who was the manager of the store.

5 The Accused consented to a third charge of theft in dwelling on 6 May 2017 of a "Hue Tap Switch" valued at $89.00 from a store called Harvey Norman located at Millennia Walk being taken into consideration ("TIC") for the purpose of sentencing.

The antecedents of the Accused

6 The Accused had two sets of convictions prior to the present offences, one set of which was for property-related offences:

Date of conviction	**Offence**	**Provision**	**Sentence**
19 Jun 2009	Criminal intimidation	S 506 PC	$1,800 fine (rendered spent on 2 Dec 2016)
	Using threatening, abusive, or insulting words or behaviour with intent	S 13A(1)(*a*) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997, Rev Ed) ("MOA")	
	Using threatening, abusive, or insulting words or behaviour within the hearing or sight of any person	S 13B(1)(*a*) MOA	TIC

30 Nov 2016	Theft	S 379 PC	$2,000 fine
	Theft	S 379 PC	
	Theft	S 379 PC	TIC

7 Notably, the set of convictions dated 19 June 2009 were spent convictions. Section 7E of the Registration of Criminals Act (Cap 268, 1985 Rev Ed) ("ROCA") provides for the legal effect of such convictions. Amongst other things, s 7E(1) of the ROCA deems the offender, in certain circumstances, to have had "no record" of his convictions which are spent or treated as spent. However, the protective provisions in ss 7E(1)(*a*) and (*c*) of the ROCA are subject to the caveat in s 7E(2)(*c*) and therefore do not extend to "any proceedings before a court" or to "any decision by a court, including any decision as to sentence". On that basis, it would not be improper for me to mention or consider the Accused's convictions dated 19 June 2009. Nor was it improper for the district judge below ("the DJ") to have done the same in his grounds of decision (at [20] and [27]). The Accused did not submit otherwise. In any event, no material weight could be placed on these convictions given the lapse of time and the fact that they did not concern property-related offences.

The proceedings below

8 The events which transpired in the proceedings below were heavily disputed. I set them out briefly here and will elaborate on them later in this judgment.

9 Proceedings against the Accused were initiated in the State Courts on 19 May 2017. On 30 October 2017, the DJ conducted a pre-trial conference ("the 30 October PTC") and saw both the Accused and a deputy public prosecutor, Ms Lim Yu Hui ("DPP Lim"), in chambers. The Accused was

unrepresented at that time, and he continued to act in person throughout the course of the proceedings below as well as in the appeal before me.

10 On 8 November 2017, a hearing was conducted in open court ("the 8 November PG Hearing") where the Accused pleaded guilty to the two proceeded charges and consented to the third charge being TIC for the purpose of sentencing. The DJ then imposed the following sentences:

Charges under s 380 of the PC	**Items stolen**	**Sentence imposed**
First charge	"Logitech Spotlight Presentation Remote" valued at $169.00	2 weeks' imprisonment
Second charge	"Samsung Gear 360 Globe handheld camera" valued at $348.00	3 weeks' imprisonment
Third charge	"Hue Tap Switch" valued at $89.00	TIC
Aggregate Sentence	**3 weeks' imprisonment (the sentences were ordered to run concurrently)**	

11 On 22 November 2017, which was the date the Accused was supposed to commence serving his sentence, he appeared before the DJ and sought a stay of execution pending appeal ("the 22 November Stay Hearing").

12 On 2 January 2018, the DJ released his grounds of decision: see *Public Prosecutor v Sukla Lalatendu* [2018] SGDC 6 ("GD"). I will discuss this in further detail below.

The proceedings on appeal

13 On 21 November 2017, the Accused filed a Notice of Appeal stating that he was dissatisfied with the sentence imposed by the DJ. However, in his Petition of Appeal dated 17 January 2018, the Accused raised several arguments

which did not relate to the sentence imposed, including that he had only pleaded guilty because "of the record promises and threats [*sic*]", and that he had been "denied a constitutional right to counsel".

14 The Accused subsequently tendered three sets of submissions dated 14, 21, and 28 March 2018, which I will refer to the 1st, 2nd, and 3rd Submissions respectively. The submissions focused primarily on his claim that even though he had not committed the offences, he had pleaded guilty to the charges because "he was misguided by the [DJ] and so as not to drag the case unnecessarily". In the submissions, he also made several factual allegations about what the DJ had told him at the 30 October PTC. Although the Accused did not expressly state that he wished to retract his plea of guilt or file any application for criminal revision for that purpose, his intention to do just that seemed clear to me.

15 At the hearing before me on 3 April 2018, the Accused orally confirmed that he was seeking to retract his plea of guilt that had been taken at the 8 November PG Hearing. Anticipating this, the Prosecution had on 13 March 2018 filed Criminal Motion No 12 of 2018 ("CM 12") in which it sought leave to adduce an affidavit deposed to by DPP Lim as to her version of what had transpired in chambers at the 30 October PTC ("the Affidavit").

The issues

16 Two main issues arose for consideration in this appeal:

(a) Whether the Accused should be allowed to retract his plea of guilt and have his convictions set aside, and in this regard, whether the Prosecution's application to admit the Affidavit as additional evidence in CM 12 should be granted.

(b) If the Accused should not be allowed to retract his plea of guilt, whether the sentences imposed by the DJ were manifestly excessive.

Retraction of plea

17 I turn first to the Accused's oral application to retract his plea of guilt. The main thrust of his argument was that he had pleaded guilty even though he did not commit the offences because the DJ had made representations at the 30 October PTC which "misguided" him into thinking that he would be sentenced only to a day's imprisonment and a fine, provided he pleaded guilty. Further, he alleged that the items that he surrendered to the authorities for investigation were actually his own property, and that the serial numbers on those items would not match the serial numbers of the items that had in fact been stolen. Before me, the Accused also clarified that he contested only his convictions in relation to the two proceeded charges; he raised no objections in respect of the third (TIC) charge.

18 The Prosecution opposed the Accused's application. It sought the admission of the Affidavit in CM 12 on the basis that DPP Lim's evidence was necessary for me to come to a conclusion as to what had in fact transpired at the 30 October PTC. Relying on the Affidavit, as well as the transcripts of the subsequent open court hearings, the Prosecution's position was that the Accused's allegations regarding the DJ's alleged representations to him at the 30 October PTC were untruthful, and that he had in fact voluntarily decided to plead guilty at the subsequent 8 November PG Hearing.

Admission of fresh evidence

19 Before turning to the substantive analysis of the Accused's application to retract his plea, the preliminary question was whether the Prosecution's application to adduce the Affidavit in CM 12 should be granted.

20 In my judgment, it was clear that the Prosecution's application should be granted. Under s 392(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the appellate court is empowered, in dealing with a criminal appeal, to take any additional evidence itself or direct it to be taken by the trial court, if it thinks that such evidence is "necessary". Insofar as applications by an accused person to retract his plea of guilt are concerned, the precedents show that depending on the nature of the allegations grounding the application, the courts will generally require the adduction of sworn or affirmed evidence by the relevant persons or authorities concerned. There are at least two reasons for this: first, to assist the court in its inquiry into the veracity of the accused's allegations; and second, to allow the party or parties against whom allegations were made an opportunity to respond.

21 For instance, where allegations are made against the accused person's previous defence counsel, such counsel ought to be directed or invited to respond by way of an affidavit or statutory declaration. This was done in *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 ("*Thong Sing Hock*"), where the accused asserted on appeal that he had pleaded guilty only on the advice of his previous counsel who allegedly knew that he did not possess the requisite mental element for the offence. VK Rajah JA, who heard the appeal in the High Court, invited the previous counsel to respond to the allegation and directed the Prosecution to investigate the matter further. After an adjournment, three affidavits were filed to which the court referred: (a) an affidavit by the

previous counsel, (b) a response affidavit by the accused, and (c) an affidavit by the investigating officer as to matters within his knowledge which were relevant to the allegation (at [18]). The court further laid down at [30]–[32] the general procedure that may be adopted in investigating allegations made by an accused person against his previous counsel, which may be distilled as follows:

> (a) First, the accused should be asked to confirm his intention to make the specific allegations and to make clear the precise contents of these allegations. An affidavit may be required of the accused if the allegations are numerous and involved, but this is not necessary if the court can clearly distil their essence since the allegations would have to be made in open court and on the record.
>
> (b) Secondly, the accused's previous counsel should be given an opportunity to respond. This is because the allegations will usually involve an attack on the counsel's integrity and/or professionalism, and any alleged misconduct by a member of the profession often stains the image of the profession as a whole. Further, the evidence can then be evaluated to determine whether there is any basis for the accused's allegations. There is no hard and fast rule about the modalities of how the previous counsel should respond, but the filing of an affidavit is often desirable as this will provide the court with sworn or affirmed evidence which can then form the basis for its decision. In contrast, significantly less weight may be attached to the previous counsel's version of the events if he decides to respond by way of unsworn evidence.
>
> (c) Thirdly, the accused may be given an opportunity to respond to the evidence provided by his previous counsel.

22 I agree that this is generally sound as a matter of procedure. Indeed, I took a similar approach in *Chng Leng Khim v Public Prosecutor and another matter* [2016] 5 SLR 1219 ("*Chng Leng Khim*"), where the accused alleged on appeal that she had pleaded guilty only because she was pressured into doing so by her previous counsel. I directed the relevant parties, including the accused and her previous counsel, to file statutory declarations regarding the events that led up to her pleading guilty at the hearing, and explained my reasons at [1] as follows:

> … after the [accused] persisted with her assertion that she had been pressured to plead guilty, including by [her previous counsel], I directed the various parties concerned to each file a statutory declaration ("SD") detailing the events and exchanges leading to the [accused]'s plea of guilt. I did so because an allegation of pressure to plead guilty that is directed by an accused person at counsel often – as is the case here – concerns matters that the court will generally know nothing about but may well be relevant to the court's decision on whether it will allow the application to set aside the plea.

23 The considerations and the procedures explicated in *Thong Sing Hock* and *Chng Leng Khim* may be applied with suitable modification in different contexts, where other kinds of allegations have been made to support an application to retract one's guilty plea. To this end, it is not controversial that the Prosecution and other authorities may also be invited or directed to file an affidavit or statutory declaration if they are implicated by the allegations, or if they are aware of facts which might shed light on the veracity of the allegations (see, for instance, *Thong Sing Hock* and *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619).

24 In the present case, the Accused's allegations centered around what the DJ had allegedly said or done, in his capacity as a judicial officer, at the 30 October PTC. This conference was conducted in the privacy of the DJ's chambers (which is the proper and usual practice for pre-trial conferences), and

DPP Lim was the only person who was present apart from the Accused and the DJ. In that light, the Affidavit deposed to by DPP Lim was highly probative to my assessment of the veracity of the Accused's allegations. The fact that it was not for the DJ as a judicial officer to provide evidence himself as to the events at the 30 October PTC was a further justification for admitting the Affidavit, since it would otherwise leave the court in the unenviable position of having to determine whether the plea should be set aside based *solely* on the Accused's account of the events. That would run against the need, which I have mentioned above (at [1]), for allegations against judicial officers to be closely investigated in order to ensure that any miscarriage of justice is promptly corrected, and to firmly and decisively protect the reputation of the judiciary against any unfounded allegation.

25 The Accused, in any event, did not seriously object to the admission of the Affidavit. His main contention was as to the accuracy of the contents of the Affidavit, and not its admissibility. In fact, in his 3rd Submissions, he stated that even though he disputed the contents of the Affidavit, he "understand [*sic*] the prosecutor should be allowed to submit a criminal motion".

26 There was also no need for an adjournment or a further response by the Accused, since CM 12 was filed and the Affidavit disclosed on 13 March 2018, which was some weeks in advance of the hearing of this appeal on 3 April 2018 (see [15] above). In the circumstances, the Accused had ample opportunity to consider and respond to the contents of the Affidavit in his written submissions and, indeed, at the hearing before me.

27 For these reasons, I considered the admission of the Affidavit proper and necessary for the consideration of the Accused's application to retract his plea

of guilt. Pursuant to s 392(1) of the CPC, I allowed CM 12 at the hearing of the appeal and admitted the Affidavit as additional evidence in the appeal.

The factual background

28 I now set out the relevant facts of the proceedings below insofar as they bear on the application of the Accused to retract his plea.

29 As I have already mentioned, the Accused's primary allegation was that the DJ had represented to him, at the 30 October PTC, that if he pleaded guilty, he would only be sentenced to a day's imprisonment and a fine. In this regard, the Accused's version of the events may be summarised as follows:

(a) In chambers, the "very first statement" from the DJ before the Accused had said or asked anything was "why do you want to drag the case, it will be only one day prison and fine".

(b) The Accused was "never allowed" to say anything in chambers.

(c) The Accused "truly trusted the [DJ's] word and agreed to plead guilty even though [he] had not done the crime."

(d) The Accused was not alleging that the DJ had "promised [him] anything. The word promised [was] used by the prosecutors and not [him]." Rather, he "always thought anything the honourable Judge (of any jurisdiction and any country) says is more than a promise".

(e) He then asked the DJ how the Judge presiding over the plead guilty hearing would know about the one-day imprisonment term. The DJ said that he would preside over that hearing.

(f) DPP Lim "ma[de] false affidavits and hid[] true facts" in the Affidavit. Referring specifically to para 5 of the Affidavit, he said he "never asked, about what would be the minimum punishment for section 380, as claimed by the prosecutor. I am completely aware of the Maximum sentence as mentioned in the charges. The prosecutor is simply making false statements and hiding true facts to cover up their inefficiency."

(g) The Prosecution's allegation that the Accused had asked the DJ about the minimum sentence repeatedly was a "complete false statement".

30 DPP Lim's version of the events was set out in the Affidavit:

(a) At the 30 October PTC, the Accused asked the DJ what sentence he would receive if he was convicted under s 380 of the PC. The DJ informed him that the best possible outcome would be a one-day imprisonment term. However, the DJ emphasised that the sentence would ultimately be a decision made by the sentencing judge, who would consider the Prosecution's submissions on sentence as well as the Accused's mitigation.

(b) The Accused then stated that he would plead guilty if the sentence was a one-day imprisonment term. The DJ replied that the court was not making any promises, and that the sentence imposed would ultimately depend on the parties' submissions.

(c) The Accused repeated his position that he would plead guilty if the sentence was a one-day imprisonment term. The DJ again

emphasised that the court could not make any promises, and that the sentence imposed would depend on the parties' submissions.

(d) DPP Lim then informed the DJ that the Prosecution did not make any promise concerning its sentencing position to the Accused.

(e) The Accused acknowledged the DJ's remarks to him and said that he would plead guilty. The DJ then gave directions for the Accused's plea to be taken on a scheduled date.

(f) DPP Lim "categorically state[d]" that the DJ did not tell the Accused that he would receive a sentence of one day's imprisonment and a fine if he pleaded guilty.

31 The next time the Accused appeared before the DJ was at the 8 November PG Hearing. Deputy Public Prosecutor Claire Poh ("DPP Poh") represented the Prosecution, and a copy of the verbatim transcripts of the hearing ("the PG Transcripts") was made available to me. The PG Transcripts recorded the exchange between the DJ and the Accused which was salient and may be summarised as follows:

(a) At the outset, before the Accused even indicated his willingness or otherwise to plead guilty, DPP Poh stated that the Prosecution "will be very upfront" about its sentencing position and this was that it sought "more than 3 weeks' imprisonment if the accused pleads guilty. If the matter goes for trial, we would … submit for a higher imprisonment sentence." DPP Poh also referred to a decision in a Magistrate's Appeal involving a conviction under s 380 of the PC.

(b) The DJ then asked the Accused if he intended to plead guilty or claim trial. The Accused claimed that "[i]n the PTC, [he] was informed that minimum---like, minimum will be 1-day prison". The DJ replied:

> The minimum is 1 day by law. But like I said, it is not---does not mean that you may---you will get … 1-day imprisonment. So the Court will have to see what the submission of the prosecution is, what your mitigation is, what the facts are, before coming to a conclusion. Alright, so it's up to you.

The Accused repeatedly stressed that three weeks' imprisonment would be "very difficult" for him because of his newborn child. The DJ told him that he had a choice whether to plead guilty or claim trial. When the Accused indicated that he was "not sure what to do", the DJ offered to stand down the matter to give him more time to consider.

(c) The Accused then stated that he was "not sure, why the prosecution is asking for 3 weeks … like, it will be minimum 3 weeks or it could be less as well. I'm not sure." The DJ explained that the sentence that would eventually be imposed "could be less; it could be more; it could be exactly 3 weeks that the Court will sentence. I cannot tell you before you tell me your plea." The DJ subsequently reiterated: "[s]o once there's imprisonment, minimum is 1 day. It can go up to 7 years based on the provision in the law … Prosecution is asking for 3 weeks".

(d) The Accused indicated an intention to plead guilty. The following exchange then transpired:

> Court: So do you want to plead guilty?
>
> Accused: Plead guilty, 1 day, 1---like---
>
> Court: Okay, you ask for 1 day but you may not get 1 day. Do you still want to plead guilty?

> Accused: Yes.
>
> Court: Alright.
>
> Accused: 1 day and fine will be really good for me.
>
> Court: Do you understand? This is not a plea bargain. I'm not accepting your plea if you---
>
> Accused: I'm not---I'm not bargaining. I'm mi--- I'm---I'm requesting.
>
> Court: Okay, then you leave it for mitigation.

(e) At this point, Mr Amarick Gill ("Mr Gill"), a senior member of the criminal bar, interjected. He did not formally represent the Accused but having witnessed this exchange in open court, he stepped in to try to assist him. Mr Gill proposed to the DJ that the matter be stood down for him to speak with the Accused. The DJ agreed but around 10 minutes later, Mr Gill informed the DJ that he had spoken with the Accused who informed that he "will handle this on his own right now". Mr Gill added that he did not know what application the Accused was going to make.

(f) When the DJ next sought to confirm whether the Accused intended to plead guilty, the Accused unequivocally responded in the affirmative. He then tried to ask for a lower sentence but the DJ firmly told him that he should first decide whether he wanted to plead guilty. To this, the Accused again confirmed that he intended to plead guilty.

(g) The DJ then proceeded to formally record the Accused's plea. The Accused pleaded guilty to the two proceeded charges and admitted to the Statement of Facts without qualification. He also admitted to his antecedents which were read to him in court. This was followed by the respective oral sentencing submissions of the Prosecution and the Accused. It may be noted that in his submissions, the Accused made

specific reference to the fact that imprisonment was mandatory in the case of a conviction under s 380 of the PC.

(h) The DJ proceeded to make some sentencing remarks before announcing at the end that he was sentencing the Accused to an aggregate of 3 weeks' imprisonment. Upon hearing that, the Accused claimed that he had denied committing two of the offences at the 30 October PTC. He also claimed that he had pleaded guilty only because he was told that it would be a one-day imprisonment term. The DJ responded by stating that "I already told you … there is a possibility you'll get more than what you've asked for".

(i) The Accused then stressed again his familial circumstances and the plight of his newborn child. The DJ asked if he needed some time to make arrangements for his family. Subsequently, the Accused asked for two weeks' deferment of the commencement of the sentence. The Prosecution did not object and the DJ granted the request. The Accused then asked for even more time, which the DJ disallowed.

32 Two weeks later, at the 22 November Stay Hearing, after the DJ granted the Accused's application for a stay of execution pending appeal (see [11] above), the DJ called for the next matter to be heard. At this point, the Accused interrupted him and requested that the DJ "mention", in his grounds of decision, the "indication" that his sentence would be a day's imprisonment and a fine. The DJ immediately said "No, I told you there was no indication at all. There is a possibility but it's not an indication". The Accused then repeated that he "ha[d] not done both … crimes" and that his "plea of guilty was on condition that it will be 1-day prison". The DJ pointed out that the Prosecution had indicated its sentencing position before the Accused pleaded guilty, and that the

court had also told him that there could be imprisonment of more than one day. The Accused replied "Yes, yes, yes", and the matter was concluded.

33 Those are the relevant facts against which I evaluated the application made by the Accused to set aside his plea and therefore his convictions.

My decision

34 The starting point of an appellate court's power to set aside a conviction after an accused has been convicted and sentenced upon a plea of guilt is s 390(3)(*a*) of the CPC, which provides as follows:

> **Decision on appeal**
>
> **390.** …
>
> (3) Notwithstanding section 375 and without prejudice to the generality of subsections (1) and (2), where an accused has pleaded guilty and been convicted on such plea, the appellate court may, upon hearing … any appeal against the sentence imposed upon the accused –
>
> (*a*) set aside the conviction
>
> …

35 In *Chng Leng Khim*, I explained that s 390(3)(*a*) of the CPC was introduced in 2010 and was designed to "mirror[] the power of a superior court of record seised of revisionary jurisdiction" (at [8]). There, I also reviewed a number of cases and set out some principles applicable to the exercise of this power, which may be summarised as follows:

(a) The power to set aside a conviction is not foreclosed by the fact that the safeguards attending the taking of a plea of guilt were observed in the lower court (see *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383 ("*Yunani*") at [59]), but there is a high threshold to be met.

(b) The power to set aside the conviction must be exercised sparingly and only in circumstances where a failure to do so will result in "serious injustice" or a "miscarriage of justice" (see *Thong Sing Hock* at [26]).

(c) The court will exercise this power if it is satisfied either that there are real doubts as to the offender's guilt or that the offender was pressured to plead guilty in the sense that he did not genuinely have the freedom to choose how to plead (citing *Yunani* at [50] and [55]–[56] and *Thong Sing Hock* at [23] and [27]).

(d) The court may have regard to a variety of factors in coming to a decision as to whether an offender who has entered a plea of guilt had done so under circumstances of such pressure that it was not a truly voluntary decision. This is a fact-sensitive inquiry and, in that context, it may be relevant to consider:

(i) whether the decision to plead guilty was contrary to a sincere attempt and sustained intention to contest the charges which was overwhelmed by the pressure of the moment; and

(ii) whether the application to withdraw the guilty plea was made before or after the sentence was passed, and in this regard, whether the application is genuinely reflective of an underlying unwillingness to plead guilty rather than being motivated by a frustrated hope or expectation that a different sentence had been imposed.

(e) A finding of pressure does not necessarily depend on a finding that the accused's counsel had acted improperly.

36 *Chng Leng Khim* primarily concerned an allegation that the accused was pressured into pleading guilty by her previous counsel, but the principles stated there are of general application since they rest on the fundamental tenet underpinning all pleas of guilt: that they must be voluntary, deliberate, and unequivocal (see *Yunani* at [53]; *Thong Sing Hock* at [27]). The principles therefore also apply in the present instance, where the Accused's application to retract his guilty plea was premised on an allegation made against the sentencing judge.

37 In the context of the present case, I am satisfied, as a matter of principle, that if a judge or judicial officer makes a promise or unequivocal representation to the accused that he would receive a particular sentence on condition that he pleads guilty, and that promise or representation in fact induces the accused to plead guilty when he would not otherwise have done so, that would almost always constitute good grounds for the conviction premised on that plea to be set aside. In the words of Rothman JA in *Regina v Lamoureux* (1984) 13 CCC (3d) 101 (at 106), which I accepted with emphasis in *Chng Leng Khim* (at [9]), "[a] plea of guilty must always be a free and voluntary act by the accused himself, untainted by any threats or promises to induce the accused to admit that he committed the offence when he does not wish or intend to do so". Given the dynamics in criminal proceedings and the nature of the judge's role, such a promise or representation that stems from the judge would in all likelihood operate on the accused's mind to such a degree as to deprive him of the genuine freedom in choosing how to plead (see [35(c)] above), thereby amounting to a "serious injustice" or a "miscarriage of justice" warranting the setting aside of the conviction (see [35(b)] above). More importantly, it is wholly improper for a judge to make such a promise or representation in a bid to induce a guilty plea, and the fact that this was done may be said to taint the entire order as to

conviction and sentence, as well as threaten to fundamentally undermine the integrity of our criminal justice system.

38 I should emphasise that the foregoing observations, though undoubtedly of considerable importance, do not apply to some limited situations in which a judge may make certain statements to the accused regarding the issue of sentence. An example of this is where the judge is merely explaining the mechanics of the sentencing process, or conveying the statutorily-prescribed sentencing range, to the accused. Without more, there is nothing improper in this and it may in fact be necessary and of assistance, for instance, to an accused who happens to be unrepresented by counsel. The observations set out at [37] above also do not apply to formalised processes under which judges provide accused persons with sentencing *indications* to help better inform their decision as to whether to plead guilty to the charges or otherwise. For instance, in the State Courts, judges conducting Criminal Case Resolutions have the discretion to provide sentencing indications, subject to safeguards including generally that the accused must be represented by counsel and that such indications can only be provided on request by the accused person and only after both the Prosecution and the Defence have been invited to provide their input as to the appropriate sentence (see the Subordinate Courts' Registrar's Circular No 4 of 2011 at para 7). These sentencing indications essentially equip the accused person with information to facilitate his decision-making process and do not in fact operate as a form of coercion or pressure to plead guilty and nor should they be perceived as such. In such a context, the choice whether to plead guilty remains wholly and solely that of the accused. It is also important to emphasise that the safeguards mentioned above are designed precisely to ensure that the mischief I have identified in [37] above, namely the risk that an accused person's freedom to decide whether or not to plead guilty is compromised by pressure from the court, does not arise.

39 But the present case did not fall within these exceptional circumstances, and the question for me was whether the allegations were borne out on the evidence. In this regard, as a matter of evidence, taking into account the ease with which it may be alleged that a judge had made certain promises or representations to an accused person in chambers, and the fact that it runs wholly counter to the basic judicial duty of a judge to make such a promise or representation, cogent evidence would generally be required before a court will conclude that such an improper promise or representation had in fact been made.

40 On the facts before me, not only was there an absence of any such corroborating evidence, the surrounding evidence in fact pointed *against* the truth of the Accused's allegations against the DJ.

41 First, the Accused's account of what transpired at the 30 October PTC was internally inconsistent. On one hand, he asserted that he was "never allowed" to say anything in chambers at the 30 October PTC (see [29(b)] above). On the other hand, in an apparent bid to buttress the credibility of his allegations, his account included a claim that he had even asked the DJ how the sentencing judge would know of the DJ's promise of a one-day imprisonment term, to which the DJ allegedly replied that he would preside over the sentencing hearing (see [29(e)] above). As will be seen below, this was a significant detail which, if true, rendered some of what subsequently transpired inexplicable.

42 Second, the allegations about the representations made by the DJ were unequivocally contradicted by the Affidavit deposed to by DPP Lim who was also present at the 30 October PTC. I have summarised the contents of the Affidavit above (at [30]), and the following three points stood out:

(a) At the 30 October PTC, the Accused was clearly interested in finding out from the DJ what his sentence would be. This was somewhat at odds with what he said at the appeal before me, when he seemed at times to border on suggesting that he had not really thought about the sentence that he was likely to receive at the time of the 30 October PTC.

(b) The DJ said that the best *possible* outcome from the perspective of the Accused would be the minimum custodial sentence which was a day's imprisonment, but that he would *not* be able to say what sentence the Accused would in fact receive until after having heard the Prosecution's sentencing submissions and the Accused's mitigation.

(c) When the Accused said that he would plead guilty *if* the sentence was a one-day imprisonment term, the DJ repeated that he would *not* be able to say what the sentence would be until he had heard the parties' sentencing submissions. It was only after this that the Accused indicated that he would plead guilty.

43 Third, if the Accused's contention as to what the DJ had allegedly represented to him at the 30 October PTC were to be believed, I would have to find not only that the DJ had acted improperly, but also that DPP Lim was lying on oath as to what had transpired in chambers. One had to ask: why would two public officers, serving the public interest in different institutions and in different capacities, have conspired in such a gross miscarriage of justice? Further, since both the Prosecution and the DJ took broadly similar sentencing positions at the 8 November PG Hearing, was it really being suggested that they had colluded to take a particular position at the 30 October PTC to induce the Accused into agreeing to plead guilty, all the while knowing and intending that

they would both then take a very different position at the 8 November PG hearing? Such a hypothesis would have entailed the further conclusion that they had discussed all this beforehand. Not only was this inherently incredible, such a serious allegation would have to be supported by strong corroborating evidence, which was notably absent. Instead, all I had were the self-serving, inconsistent allegations of the Accused.

44 Fourthly, and related to this, assuming that the allegation did not extend to the Prosecution being privy to a plan by the DJ to induce the Accused into pleading guilty – and it has to be said that this had never been expressly alleged by the Accused – I found it inherently inconceivable that the DJ would have made such a representation at the 30 October PTC, when this would clearly have been improper judicial conduct and when the sentence allegedly promised (of a day's imprisonment) would almost certainly have run contrary to the position that the Prosecution would wish to take. There was no reason whatsoever for the DJ to have acted in such unabashed contravention of his judicial duties, or to have held out a position that was so blatantly in favour of the Accused, *in the presence of the Prosecution*, and no sensible reason for this was advanced. Indeed, had matters in fact transpired as the Accused contended, I would have expected the Prosecution to have lodged a complaint against the DJ.

45 Fifthly, and in my judgment perhaps most importantly, the best light that was shed on what likely happened at the 30 October PTC was in fact the PG Transcripts which recorded the exchanges between the Accused and the DJ just over a week later at the 8 November PG Hearing. I have summarised the PG Transcripts above in some detail (at [31]), and would note that it reflected the following:

(a) First, the Prosecution made it very clear at the outset of the 8 November PG Hearing that it would be seeking a three-week term of imprisonment if the Accused pleaded guilty, and asked that the Accused's position that he intended to plead guilty be reconfirmed in that light (see [31(a)] above). This would have been an exercise of futility and irony if the DJ had, at the 30 October PTC in the presence of the Prosecution, already made representations to the Accused about the sentence that he would receive if he pleaded guilty.

(b) Second, the DJ on several occasions repeatedly and unequivocally told the Accused that he could *not* come to any conclusion as to the sentence that would in fact be imposed on the Accused, until after the plea had been taken and after he had heard the parties' sentencing submissions (see, for instance, [31(b)], [31(c)] and [31(d)]). He also made it clear that the Accused had a choice whether to plead guilty or claim trial, and even offered to stand down the Accused's matter for him to have some time to reconsider his options (see [31(b)] above). Indeed, the DJ also told the Accused on several occasions that the sentence he would eventually mete out might be the same as that requested by the Prosecution, or more than that, or less (see [31(c)] above). At no point was this contradicted by the Accused.

(c) Third, the DJ even acceded to a request by Mr Gill, a member of the criminal bar who happened to be present, for time to speak with the Accused and to explain the situation to him (see [31(e)] above). There was not the slightest basis to think that the Accused had told Mr Gill that he had been promised a certain sentence by the DJ. Yet, one would have expected him to have done that, if that had in fact been the case.

(d) Fourth, throughout the course of the hearing, not once did the Accused say to the DJ, *before* the sentence was pronounced, that the DJ had earlier assured him that he would get a one-day imprisonment term. Instead, the Accused specifically stated that he had been informed at the 30 October PTC that the *minimum* custodial sentence he faced was one-day imprisonment (see [31(b)] above). As a legal proposition, this was manifestly and factually true, and there was nothing improper in the DJ having conveyed to him the statutorily-prescribed minimum sentence (see [38] above). The fact that the Accused did not mention or raise questions about the DJ's purported assurances as to sentence was a striking and inexplicable omission given the Accused's claim that he had even taken the trouble to ask the DJ, at the 30 October PTC, how the alleged "deal" would be made known to the judge presiding at the later hearing to take the plea (see [29(e)] above). Further, in responding to the Accused's comment about the *minimum* custodial sentence, the DJ had immediately informed the Accused in open court that while it was correct that the minimum custodial sentence was one day by law, he would only be able to determine the actual sentence that he would impose *after* hearing the parties' sentencing submissions (see [31(b)] above).

(e) Fifth, the Accused admitted to the Statement of Facts without qualification, pleaded guilty, and then made a mitigation plea in which he raised the difficulties that he faced with his new-born child, and told the DJ that if he was let off with a one-day term of imprisonment, the DJ could add three weeks of imprisonment if he ever committed another offence (at [31(g)] above). Throughout the plea-taking process, he made no mention of any representation that the DJ had allegedly made to him at the 30 October PTC, even though that would obviously have been his

strongest submission. This was inexplicable, particularly given his contention that as far as he was concerned, "anything the honourable Judge … says is more than a promise" (see [29(d)] above).

(f) Sixth, the very first time the Accused contended that he had not committed two of the three offences was *after* the sentences had been pronounced (at [31(h)] above).

46 Taking all these facts in the round, I had no hesitation in disbelieving the Accused's allegation that the DJ had promised or represented to him that he would receive only one day's imprisonment and a fine if he pleaded guilty. I also disbelieved the Accused's belated and unsubstantiated claim that he was innocent and had not committed the offences, at least insofar as the two proceeded charges were concerned. Nor did I find it at all credible, as the Accused had alluded to in his submissions, that he had pleaded guilty in order to save the court's time (see [14] above).

47 Instead, the irresistible inference from the evidence was that the Accused's attempt to retract his earlier plea of guilt was motivated by the fact that he received a sentence that was more onerous than what he had hoped for. I based this, in particular, on his repeated contention throughout his submissions that a sentence of one day's imprisonment was what he sought at the 8 November PG Hearing, as well as the fact that the first time he contended that he was in fact innocent was *after* the sentence had been pronounced by the DJ. As I noted in *Chng Leng Khim* (at [12]) and reiterated above (at [35(d)(ii)]), disappointment in receiving a sentence different from one that was expected or hoped for was simply not an acceptable basis for allowing an accused person to retract a plea of guilt.

48 There was no question, in the present case, that the Accused was hoping to get away with the minimum custodial term given that he knew that a term of imprisonment was mandatory in the light of the charges that he faced. Perhaps this hope was so strongly held that it may have caused him to ignore the repeated, unequivocal, and entirely appropriate cautions by the DJ in open court that the sentence could only be determined after hearing the parties' sentencing submissions, and that it could be more, less, or the same as what the Prosecution was seeking. But any such misplaced hope was entirely of the Accused's own making and had nothing to do with *any* improper promise or representation made by the DJ. In the circumstances, there was simply no question of any injustice or a miscarriage of justice, much less a serious case of this, and there was therefore no ground for the convictions to be set aside.

49 For these reasons, I dismissed the Accused's application to retract his plea of guilt and for his convictions to be set aside.

Appeal against sentence

50 I turn to explain my decision regarding the sentence imposed on the Accused.

The submissions below

51 In respect of the offence of theft in dwelling under s 380 of the PC, it was common ground that imprisonment was mandatory and could be as much as seven years, and in addition, a fine may also be imposed (see [3] above).

52 The Prosecution sought an aggregate imprisonment term of more than three weeks, or at least 22 days. In this regard, they relied on *Public Prosecutor v Jaidul Late Jomshid Mia* [2015] SGDC 256 ("*Jaidul*") in which the district

judge sentenced the offender to three weeks' imprisonment for theft in dwelling of items worth $230.00 from the Mustafa Shopping Centre. The sentence was upheld on appeal to the High Court. The Prosecution argued that the Accused was more culpable than the offender in *Jaidul* given the former's antecedents.

53 In mitigation, the Accused submitted for a fine and the minimum mandatory one-day imprisonment. He repeatedly stressed that he had two children: a 2-year-old and a newborn. He and his wife did not have a domestic helper and the children needed both of their parents. He promised the DJ that he would never offend again, and invited the DJ to put "a note" on his record that if he reoffended, a three-week imprisonment term could be added to his sentence at that time.

54 The DJ imposed two and three weeks' imprisonment in respect of the two proceeded charges respectively, which were ordered to run concurrently for an aggregate sentence of three weeks' imprisonment (see [10] above). In the GD, the DJ reasoned as follows:

> (a) The overriding sentencing consideration in relation to a property offence committed out of greed was deterrence (GD at [25]). The Accused committed the offences out of greed. He stole items that could not on any basis be considered necessities. He also had the means to pay for them but deliberately chose not to do so (GD at [26]).
>
> (b) Specific deterrence was also relevant. The Accused had been let off with a fine for his theft antecedents in late 2016. Barely six months later, he re-offended not once but three times (GD at [27]).
>
> (c) The value of the items stolen was not insignificant (GD at [26]).

(d) The Accused's plea to consider the plight of his children was heartfelt but could not carry much weight as it did not amount to exceptional or extreme circumstances (GD at [28]).

(e) The mandatory minimum of a day's imprisonment would be manifestly inadequate in the light of the number of charges and the antecedents (GD at [29]).

(f) As mitigating factors, the Accused pleaded guilty and "all the items had been recovered" (GD at [30]).

Arguments on appeal

55 On appeal, the Prosecution sought to uphold the sentences imposed by the DJ and advanced the following submissions:

(a) There was a clear need for specific deterrence in this case. Leniency had been shown to the Accused when he was sentenced to a fine in November 2016 for theft offences. Yet, the Accused remained wholly undeterred.

(b) The Accused had committed the offences out of greed.

(c) His familial circumstances did not amount to exceptional hardship and therefore the DJ was correct in placing little mitigating weight on this fact.

(d) The sentences imposed by the DJ were aligned with that in *Jaidul*.

(e) In fact, the sentences imposed were on the low side because the DJ had placed mitigating weight on the fact that the Accused pleaded

guilty. This was an unwarranted discount in the light of the fact that the Accused was, on appeal, shirking responsibility for his actions, and had launched baseless and vexatious allegations against the DJ.

56 The Accused did not raise any substantive arguments as to why the sentences imposed by the DJ were manifestly excessive.

My decision

57 In my judgment, it was clear that the sentences imposed were not manifestly excessive. I agreed that a deterrent sentence was called for, with appropriate emphasis in this case on the interest of specific deterrence, given the Accused's recent set of property-related antecedents in November 2016 (see [6] above). Further, the sentences were in line with the three-week imprisonment term imposed by the district judge in *Jaidul*, which was subsequently upheld on appeal by See Kee Oon JC (as he then was) in Magistrate's Appeal No 9133 of 2015. There, the offender committed theft in dwelling of various items collectively worth $230.00 from the Mustafa Shopping Centre in circumstances where he pleaded guilty and the stolen items were all subsequently recovered. In this regard, I should also point out that the DJ had erred in finding that *all* the items had been recovered in the present case, since the Statement of Facts only recorded the recovery of the Samsung Gear 360 Globe handheld camera (which was the subject of the second charge) and not the Logitech Spotlight Presentation Remote (which was the subject of the first charge) (see [4] above). To that extent, the present case was slightly more serious than *Jaidul*.

58 As for the other sentencing factors, I considered that none were materially operative.

(a) The DJ mentioned that the value of the stolen items was "not insignificant" (see [54(c)] above). Insofar as the DJ took this as an aggravating factor, he might have erred because the value of the stolen items had already been used to compare the present case to *Jaidul* in order to derive the starting sentence of three weeks' imprisonment, and so to use this factor again in calibrating the sentence upwards from that imposed in *Jaidul* would constitute double counting.

(b) The Accused's familial circumstances were not exceptional and could not possibly constitute a mitigating factor.

(c) I also did not place weight on the Prosecution's submission that the sentences imposed by the DJ in this case were too lenient because they had taken into account an unwarranted discount for the Accused's earlier plea of guilt (see [55(e)] above). Such an analysis was invoked in *Thong Sing Hock*, the brief facts of which I have recounted above (at [21]). In that case, the court dismissed the offender's application to retract his plea and thereupon raised the sentence from 24 months' to 33 months' imprisonment on the basis that the sentencing judge had given an unwarranted discount for the offender's guilty plea in the light of his lack of remorse on appeal. There is force in this analysis, but in the present case, although I did think that the sentences were somewhat lenient for the reasons I set out at [57] and [59], I was not minded to enhance the sentences that had been imposed. Among other things, the allegations, while serious, were relatively confined. Further, the Prosecution did not file a cross-appeal seeking enhancement of the sentences. I was also mindful that such reasoning should not be lightly

invoked to enhance the sentence imposed below, lest it chills what might turn out to be legitimate attempts to retract a plea of guilt.

59 In any case, the aggregate sentence imposed by the DJ was on the *low* side, since the Accused was effectively *not* being punished at all for the second charge by virtue of the DJ's decision to run both the individual sentences concurrently. As I observed recently in *Public Prosecutor v Raveen Balakrishnan* [2018] SGHC 148, where unrelated offences are involved, individual sentences should generally be ordered to run consecutively, with possible adjustments made to the aggregate sentence on account of the totality principle at the end of the sentencing process to ensure the proportionality of the aggregate sentence (at [98(b)] and [98(c)]). However, since, as I have already noted, the Prosecution had not appealed for a higher sentence, I did not interfere with the sentences that were imposed in this case.

Other allegations

60 In his Petition of Appeal, the Accused raised an argument that he had been denied his constitutional right to counsel (see [13] above). The Accused did not mention this anywhere else in his written submissions, and he did not pursue this in oral arguments before me. It thus appeared that he had discarded this argument. In any event, there was no basis at all to find that the Accused had been denied access to counsel within a reasonable time after his arrest (see *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 3 SLR 750 at [31]). In fact, the Accused was released on bail and could have instructed counsel at any time but apparently chose not to do so. The open court transcripts of the 8 November PG Hearing and the 22 November Stay Hearing showed that the Accused made no complaint about any prejudice or earlier attempt to preclude him from seeking counsel, and also made no request for more time to seek

representation. Indeed, it appeared that he had rejected Mr Gill's offer of help at the 8 November PG Hearing (see [31(e)] above). In my judgment, this allegation was nothing more than an afterthought contrived on appeal to avoid the sentence which was appropriately imposed but more onerous than that which the Accused had hoped for.

Conclusion

61 For these reasons, I dismissed the Accused's application to retract his plea of guilt and for his convictions to be set aside. I also dismissed the Accused's appeal against his sentence.

Sundaresh Menon
Chief Justice

The appellant in MA 9352/2017 and
respondent in CM 12/2018 in person;
Anandan Bala and Chin Jincheng (Attorney-General's Chambers) for
the respondent in MA 9352/2017 and the applicant in CM 12/2018.