IN THE GENERAL DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 82

Criminal Motion No 30 of 2021

Between

Mohammad Yusof bin Jantan

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal review] — [Leave for review]

TABLE OF CONTENTS

Version No 3: 13 Apr 2021 (14:22 hrs)

This judgment is subject to final editorial corrections to be approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Mohammad Yusof bin Jantan
v
Public Prosecutor

[2021] SGHC 82

General Division of the High Court — Criminal Motion No 30 of 2021
Tay Yong Kwang JCA
5 March, 5 April 2021

9 April 2021

Tay Yong Kwang JCA:

Introduction

1 On 5 March 2021, Mr Mohammad Yusof bin Jantan ("the applicant") filed the present application in person under ss 405 and 407 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). In the application, he states that "pursuant to section 394H(I), I am seeking leave to file a criminal motion on the grounds of miscarriage of justice". He adds a request that his application be heard before the Chief Justice. The case in which he alleges that miscarriage of justice occurred is his concluded appeal in HC/MA 9309/2019 ("MA 9309"), an appeal from the State Courts.

2 MA 9309 was heard before me on 24 July 2020. I affirmed the decision of the State Court and dismissed the applicant's appeal. Under s 394H(6)(*b*) of the CPC, where the appellate court in question is the High Court, such an

application for leave to make a review application is to be heard by the Judge who made the decision to be reviewed unless that Judge is not available. It is on this basis that I deal with this leave application.

Factual and procedural background

3 The facts relevant to the applicant's appeal are set out in *Public Prosecutor v Mohammad Yusof bin Jantan* [2019] SGDC 282 (the "GD") at [9]–[21]. I recount the facts briefly here.

The trial

4 The applicant claimed trial to three charges:

(a) Consuming monoacetylmorphine, a Specified Drug listed in the Fourth Schedule to the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"), without authorisation under the said Act, an offence under s 8(*b*)(ii) of the MDA ("Charge 1").

(b) Consuming methamphetamine, a Specified Drug listed in the Fourth Schedule to the MDA, without authorisation under the said Act, an offence under s 8(*b*)(ii) of the MDA ("Charge 2").

(c) Possession of one straw containing not less than 0.22g of diamorphine, a controlled drug specified in Class A of the First Schedule of the MDA, without authorisation under the said Act, an offence under s 8(*a*) of the MDA ("Charge 3").

The offences in Charges 1 and 2 were punishable under s 33A(2) of the MDA as the applicant had a previous conviction in DAC-53787-2006 for consumption of buprenorphine for which he was punished under s 33A(1) of the MDA.

Version No 3: 13 Apr 2021 (14:22 hrs)

5 The drugs that formed the subject matter of Charge 3 were in the applicant's possession on 28 March 2018. The applicant was at Block 541 Bedok North Street 3 #03-1232 and was searched by officers from the Central Narcotics Bureau ("CNB"). The CNB officers found a straw containing diamorphine in the right pocket of the applicant's trousers.

6 The applicant was arrested and brought to the CNB office where his urine sample was procured. The applicant's urine samples were sealed and correctly identified with his particulars. The applicant challenged the urine procurement process but the District Judge ("the DJ") rejected his allegations and found that "the urine samples of the [applicant] were procured in accordance with the requirement for the procurement of urine procedure set out in MDA and the Regulations": GD at [17]. The DJ also found that there was no leakage in the applicant's urine samples. The applicant's urine samples were analysed and found to contain monoacetylmorphine and methamphetamine, the drugs that formed the subject matter of Charges 1 and 2 respectively.

7 In several statements made during the investigations, the applicant admitted that he had possession of the straw of diamorphine (Charge 3) and that he had consumed heroin and ice (a street name for methamphetamine). At the trial, the applicant attempted to challenge the voluntariness of these statements. However, at the end of the ancillary hearing, the DJ found that the applicant's challenge was baseless. The DJ thus admitted the statements into evidence and placed full weight on the admissions therein.

8 Based on the above, the DJ convicted the applicant on all three charges. On the question of sentence, the DJ imposed seven years' imprisonment and six strokes of the cane each for Charges 1 and 2 and eight months' imprisonment for Charge 3. The sentences for Charges 2 and 3 were ordered to run

Version No 3: 13 Apr 2021 (14:22 hrs)

consecutively. The aggregate sentence for the applicant was therefore seven years and eight months' imprisonment and 12 strokes of the cane.

MA 9309

9 In MA 9309, the applicant appealed against his conviction and sentence. The applicant's position at the appeal was essentially the same as that which he took at the trial. In summary, the applicant argued that the DJ erred in (a) finding that he had given the statements voluntarily; (b) failing to hold against the Prosecution its failure to produce "missing" CCTV footage of the urine procurement process; (c) finding that there was no impropriety in the urine procurement process; and (d) finding that the applicant was in possession of the straw of diamorphine.

10 On 24 July 2020, I affirmed the DJ's decision and dismissed the applicant's appeal against his conviction and sentence.

The present application

11 About six months later, on 11 January 2021, the applicant filed a criminal motion ("the first CM"). In the first CM, the relief sought by the applicant was unclear. A case management conference ("CMC") was therefore convened on 26 January 2021 to ascertain whether the applicant was seeking a review of the High Court's decision in MA 9309 and, if so, to inform the applicant that he should first apply for leave to make a review application under s 394H of the CPC. At the CMC, the applicant confirmed that he was seeking a review of the decision in MA 9309 and that he would refile his application. The first CM was therefore rejected administratively with the applicant's consent.

Version No 3: 13 Apr 2021 (14:22 hrs)

12 On 5 March 2021, the applicant filed the present application. This was accompanied by the applicant's handwritten affidavit. On 22 March 2021, the applicant filed his handwritten submissions setting out his arguments in the present application.

13 On 5 April 2021, the Prosecution filed its written submissions in response. The Prosecution relies on the Court of Appeal's decision in *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159 and submits that this application should be dismissed.

The parties' cases

The applicant's case

14 The applicant raises five broad points of contention in his submissions.

(a) First, the straw of diamorphine (*ie*, the subject matter of Charge 3) was not found on him.

(i) The two CNB officers from the arresting party, Mohd Affendi bin Idris ("PW1") and Daniel Quek Wee Liang ("PW2"), gave inconsistent evidence on where the applicant was searched and found to have the straw in his possession.

(ii) No DNA test was done to determine if the applicant was in possession of the straw of diamorphine.

(b) Second, the applicant's urine was not procured by the CNB officers in accordance with the urine procurement procedure.

(i) Two witnesses for the Defence, Mohamed Yahya bin Mohamed Ali ("DW2") and Alias bin Samat ("DW3"), who

Version No 3: 13 Apr 2021 (14:22 hrs)

were arrested by CNB and were in the CNB office at the material time, gave reliable evidence to show that the CNB officer in charge of urine sample sealing did not comply with the urine procurement procedure.

(ii) There was leakage in the urine sample.

(iii) No CCTV footage was produced. It was unreasonable for the CCTV footage to be deleted after three months.

(iv) The applicant's statements to CNB were not recorded voluntarily and/or accurately.

(c) Third, and in a similar vein, the applicant argues that the urine test results pertaining to Charge 1 were unreliable. He claims that there was an analytical variation of 57.1% in his urine specimen and that exceeds the acceptable variation range of 20%.

(d) Fourth, the applicant received the certified copy of the Record of Proceedings for MA 9309 only four days before the hearing. This gave him insufficient time to prepare his arguments for the appeal.

(e) Finally, the applicant raises several "questions of law", namely:

(i) the Prosecution's disclosure obligations;

(ii) the steps or safeguards required with respect to the urine procurement procedure where there is a leakage in a urine sample;

(iii) whether the s 22 MDA presumption is triggered where the urine procurement procedure is not complied with; and

Version No 3: 13 Apr 2021 (14:22 hrs)

(iv) how the interests of accused persons can be safeguarded when the urine procurement procedure is not complied with.

15 All the arguments above challenge his conviction. The applicant has not raised any specific arguments in relation to his sentence.

The Prosecution's case

16 The Prosecution submits that none of the arguments raised by the applicant satisfies the cumulative requirements in s 394J of the CPC.

(a) The points at [14(a)] and [14(b)] above have been canvassed at the trial and/or the appeal. They do not satisfy the requirement of sufficiency as set out in s 394J(3)(*a*) of the CPC.

(b) The argument at [14(c)] above is premised on a clerical error that has since been rectified. It does not, in any event, demonstrate a miscarriage of justice within the meaning of s 394J(6) of the CPC.

(c) The assertion at [14(d)] above is factually wrong. The applicant received the Record of Proceedings well before the hearing of MA 9309.

(d) The questions raised at [14(e)] above are irrelevant as they do not arise on the facts. In any event, the questions do not constitute "sufficient" material under s 394J(4) of the CPC as they are not based on a change in the law arising from a decision of the court after MA 9309 was decided.

Version No 3: 13 Apr 2021 (14:22 hrs)

The decision of the court

Applicable principles

17 The Court of Appeal in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 ("*Kreetharan*") at [17]–[20] set out the principles governing an application for review. An application for leave to make a review application must disclose a legitimate basis for the exercise of the court's power of review. It must satisfy the stringent requirements in s 394J of the CPC, which is reproduced below:

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

Version No 3: 13 Apr 2021 (14:22 hrs)

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

18 It is clear that if an application for leave fails to meet any of the cumulative requirements above, leave will not be granted. This point has been stressed repeatedly in recent cases: see *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159 at [18]; *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 at [23]; *Karthik Jasudass and another v Public Prosecutor* [2021] SGCA 13 at [16]; *Sinnappan a/l Nadarajah v Public Prosecutor* [2021] SGCA 10 at [12]; *Chander Kumar a/l Jayagaran v Public Prosecutor* [2021] SGCA 3 at [15] and [18]; *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364.

Section 394J(4) of the CPC is not satisfied

19 There is a single preliminary point that is fatal to the applicant's case in its entirety. None of the applicant's legal arguments is based on "a change in the law" that arose from any decision made by our courts after the conclusion of all

Version No 3: 13 Apr 2021 (14:22 hrs)

proceedings relating to MA 9309. No reference has been made to any such decision in the applicant's affidavit or in his written submissions. The matters that he has raised are clearly not "sufficient material" within the meaning of s 394J(2) of the CPC. It is equally clear that all that the applicant is seeking is a re-hearing of his appeal and that is plainly not permissible.

20 On this basis alone, the application may be dismissed. For completeness, I will address briefly the applicant's contentions to explain why they (a) do not show any miscarriage of justice within the meaning of s 394J(5) of the CPC, or (b) are premised on arguments already canvassed at the trial or in MA 9309, which is impermissible under s 394J(3) of the CPC.

Arguments on urine procurement and test results

Urine procurement

21 On the issue of the urine procurement process, to reiterate, the applicant's four arguments are as follows (see [14(b)] above):

(a) DW2 and DW3 gave evidence that there was non-compliance with the urine procurement procedure by the CNB officers;

(b) there was a leakage in his urine sample;

(c) no CCTV footage was produced; and

(d) his statements were not given voluntarily.

22 All these arguments were raised at the trial and the DJ dealt with them in his decision to convict the applicant (see [15], [16] and [28]–[41] of the GD). Points (a), (b) and (d) were also canvassed during the appeal in MA 9309. Accordingly, these are not arguments that have "not been canvassed at any stage

Version No 3: 13 Apr 2021 (14:22 hrs)

of the proceedings in the criminal matter in respect of which the earlier decision was made": s 394J(3)(*a*) of the CPC.

23 In any event, none of the arguments shows even a real possibility that the earlier decision is wrong, much less a powerful probability that the decision in MA 9309 is wrong (see ss 394J(6)*(a)* and 394J(6)(*b*) of the CPC). Bearing in mind that the present application is not a second appeal, I summarise briefly the key points as follows:

(a) The DJ, as the finder of fact, rejected the factual allegations that the urine procurement process was not complied with and that there was a leakage in the applicant's urine sample. These findings were upheld on appeal as they were not against the weight of the evidence. No new material has been introduced to show otherwise. The repetition of the factual allegations therefore cannot stand.

(b) The urine procurement procedure does not mandate CCTV monitoring and there was nothing sinister in the fact that the CCTV recording was no longer available.

(c) As for the voluntariness of the applicant's statements, the DJ held an ancillary hearing to determine this issue. There is nothing new that will show that the DJ's findings are incorrect.

Urine test results

24 As for the alleged unreliable nature of the urine test results, the fact that the applicant relies on – that his urine specimen contained "12 nanogram per millimetres of monoacetylmorphine in the urine" – was contained in the original Notes of Evidence for the trial. The original Notes of Evidence were available

Version No 3: 13 Apr 2021 (14:22 hrs)

in MA 9309. However, the applicant did not raise this issue during the hearing of MA 9309.

25 In any event, the fact that the applicant relies on was in truth a clerical error in the original Notes of Evidence. The Prosecution has clarified this point at paras 37 and 38 of its written submissions. The original Notes of Evidence (Day 1 – page 81, line 15) stated "12 nanograms" when it was supposed to be "42 nanograms" according to the evidence given by the witness from the Health Sciences Authority ("HSA"). The applicant was not misled because at the trial, he asked the HSA witness (at line 22), "So, that is if it's 42 nano per gram, the --- 20% is?" Further, the original Notes of Evidence also show correctly (at lines 27–29) that the analytical variation of the monoacetylmorphine between the two bottles of the applicant's urine specimen was in fact 2.3%, well within the acceptable range of 20%. The applicant's argument on this issue therefore does not assist his case. The clerical error has since been corrected and the amended Notes of Evidence have been given to the applicant recently.

Arguments on the straw of diamorphine

26 To recap, the arguments raised by the applicant in this regard are that (a) the CNB officers, PW1 and PW2, gave inconsistent evidence on the exact location where the applicant was found to have the straw of diamorphine in his possession; and (b) no DNA test was done.

27 These arguments were canvassed before the DJ and the point on the DNA test was also raised in MA 9309. It therefore cannot be said that "the material has not been canvassed at any stage of the proceedings in the criminal matter in respect of which the earlier decision was made". Accordingly, s 394J(3)(*a*) of the CPC is not satisfied.

Version No 3: 13 Apr 2021 (14:22 hrs)

The applicant's receipt of the Record of Proceedings

28 The applicant also contends that he received the Record of Proceedings only four days before the hearing of MA 9309 and therefore had insufficient time to prepare for his appeal. This is factually incorrect. As the Prosecution points out, the applicant collected the certified Record of Proceedings on 6 February 2020 personally. MA 9309 was heard on 24 July 2020, more than five months later.

The questions of law raised by the applicant

29 Finally, I deal briefly with the purported questions of law raised by the applicant in his submissions. These questions do not arise from any change in the law arising from a decision of our courts after MA 9309. They also do not arise on the facts of MA 9309. The Prosecution makes the following points at para 42 of its written submissions which I agree with and which I set out below:

> (a) The first question is whether the Prosecution breached its disclosure obligations. The point is premised on the Prosecution's alleged non-disclosure of the CCTV footage of the urine procurement process. However, the Prosecution never had possession of the said CCTV footage. It is not disputed that the CCTV footage was deleted some three months after 28 March 2018, well before the applicant requested the footage in late 2018. There was therefore no question, at the trial or in MA 9309, of the Prosecution failing to disclose material evidence.
>
> (b) The second question is on the safeguards required in the urine procurement process when there is a leakage in the urine specimen. The DJ found that there was no leakage in the applicant's urine sample. The

Version No 3: 13 Apr 2021 (14:22 hrs)

question of the safeguards to be taken in a case of leakage is therefore academic.

(c) The third and fourth questions concern the application of the presumption in s 22 of the MDA when the urine procurement procedure has not been complied with and how the interests of accused persons can be safeguarded in such situations. As with the previous point, the DJ found that the said procedure was complied with. These questions therefore also do not arise in the present case.

Conclusion

30 Looking at this application in its totality, all that the applicant is doing is essentially to re-state or re-formulate arguments that have been canvassed and rejected in MA 9039. Applicants in recent applications for leave to make review applications appear to have misunderstood altogether what the new review provisions in the CPC are meant to achieve. They seem to perceive the CPC review provisions as giving them a second chance to appeal and, as suggested by the applicant's request in this application, perhaps an opportunity also to re-argue their case before another Judge. Such perceptions are obviously wrong and lead to unnecessary wastage of time and effort in reviving and reviewing concluded cases.

31 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 (if any) and may, but is not required to, consider the Prosecution's written submissions (if any): s 394H(8) of the CPC. I have considered the application, the applicant's affidavit and his handwritten submissions as well as the Prosecution's written submissions. For the reasons

Version No 3: 13 Apr 2021 (14:22 hrs)

set out above, nothing that the applicant has raised discloses a legitimate basis for the exercise of the court's power of review. The application is therefore dismissed summarily.

Tay Yong Kwang
Justice of the Court of Appeal

The applicant in person;
Norman Yew and Louis Ngia (Attorney-General's Chambers) for the respondent.

Version No 3: 13 Apr 2021 (14:22 hrs)