IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 10

Criminal Motion No 7 of 2021

Between

Sinnappan a/l Nadarajah

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

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

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Sinnappan a/l Nadarajah
v
Public Prosecutor

[2021] SGCA 10

Court of Appeal — Criminal Motion No 7 of 2021
Andrew Phang Boon Leong JCA
14 January, 15 February 2021

19 February 2021

Andrew Phang Boon Leong JCA:

Introduction

1 The applicant, Sinnappan a/l Nadarajah, was convicted in 2017 by the High Court on one count of importing not less than 319.37g of methamphetamine. The applicant was sentenced to life imprisonment and 15 strokes of the cane pursuant to s 33B(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). His appeal against his conviction was dismissed by the Court of Appeal in 2018. The applicant is now seeking the court's leave pursuant to s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to make a review application.

Facts and procedural history

2 On 10 February 2017, the applicant was convicted by the High Court on the charge of importing not less than 319.37g of methamphetamine, an offence

under s 7 of the MDA (see *Public Prosecutor v Sinnappan a/l Nadarajah* [2017] SGHC 25 ("*Sinnappan (HC)*")). The drugs forming the subject matter of the charge were recovered from a tissue box in a car which the applicant had driven into Singapore via the Woodlands checkpoint at about 6.17am on 16 May 2012.

3 At the trial, the Prosecution relied heavily on certain messages and call records recovered from the applicant's mobile phones to show that the applicant had entered into an arrangement with one "Ravindran" to bring controlled drugs into Singapore. Two mobile phones in particular are pertinent for the purposes of this application:

(a) a "Sony Ericsson K800i" mobile phone ("HP1") containing one "hi!" Universal Subscriber Identity Module ("SIM") card and one "SanDisk" 2GB Micro SD card; and

(b) a "Sony Ericsson W100i" mobile phone ("HP2") containing one "Digi" SIM card and one 2GB Micro SD card.

4 Two reports were produced in respect of each of the mobile phones. First, a report produced by the Technology Crime Forensic Branch of the Criminal Investigation Division ("the TCFB Report"). Second, a report produced by the Forensic Response Team of the Central Narcotics Bureau ("CNB") ("the FORT Report"). These reports were the "centrepiece of the Prosecution's case" (see *Sinnappan (HC)* at [88]). In particular, the Prosecution focused on a series of text messages and call records recovered from HP1 and HP2 (see *Sinnappan (HC)* at [43]). The High Court found that the applicant was unable to provide a convincing explanation for these highly incriminating phone records (see *Sinnappan (HC)* at [41]).

5 Following his conviction, the applicant was sentenced to life imprisonment and 15 strokes of the cane pursuant to s 33B(2) of the MDA. On 3 May 2018, the applicant's appeal against his conviction was dismissed by the Court of Appeal in *Sinnappan a/l Nadarajah v Public Prosecutor* [2018] SGCA 21 ("*Sinnappan (CA)*"). Amongst other things, the Court of Appeal rejected the applicant's attempt to impugn the reliability, accuracy, and completeness of the FORT Report and TCFB Report for HP2 (see *Sinnappan (CA)* at [41]).

6 The applicant is now seeking leave under s 394H of the CPC to make a review application. By way of brief background, the applicant initially filed an application under s 392 of the CPC on 14 January 2021. Upon further clarification by the Registry, the applicant indicated that his intention was to seek leave from this court to reopen his appeal pursuant to s 394H of the CPC. His application was thus processed as an application under s 394H of the CPC on 21 January 2021.

The parties' cases

The applicant's case

7 The applicant raises the following arguments in support of his application:

(a) The reports for HP2 are inaccurate and unreliable. There is new evidence that proves this, specifically, a report from Digi Telecommunication Centre Malaysia ("Digi").

(b) There are discrepancies in the evidence that suggest that there was a break in the chain of custody.

(c) At the relevant time, the applicant did not know the nature of the drugs in his possession.

(d) The court adopted the wrong translations of the words "*keja*" and "*tauke*" used in the messages.

(e) The applicant was denied the opportunity to prove his innocence.

(f) The court should have placed more weight on the fact that the applicant had successfully proven certain aspects of his evidence.

8 For completeness, it should be observed that after the Prosecution filed its written submissions, the applicant sought to file reply submissions responding to the arguments raised by the Prosecution. Notwithstanding that these reply submissions were filed without the leave of the court, I proceeded to consider them. However, I found that they did not add anything to the present application or to the arguments already raised by the applicant in his earlier set of written submissions.

The Prosecution's case

9 The Prosecution submits that none of the arguments raised by the applicant meets the conjunctive requirements in ss 394J(3) and 394J(4) of the CPC. Accordingly, those arguments do not provide a legitimate basis for the exercise of the court's power of review and the application should be dismissed. The Prosecution's arguments can be divided into four broad categories: (a) the reliability of the HP2 reports; (b) the alternative translation of the messages; (c) the alleged break in the chain of custody of the drug exhibits; and (d) the alleged denial of opportunity for the applicant to prove his innocence. These largely correspond to the arguments raised by the applicant.

The decision of the court

The applicable law

10 In order for leave to be granted, the applicant must show a "legitimate basis for the exercise of the court's power of review" (see the Court of Appeal decisions in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 ("*Kreetharan*") at [17]; *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 at [10]; *Lim Ghim Peow v Public Prosecutor* [2020] SGCA 104 at [5]; and *Chander Kumar a/l Jayagaran v Public Prosecutor* [2021] SGCA 3 at [14]).

11 This is assessed with reference to the requirement in s 394J(2) of the CPC that an applicant in a review application must satisfy the court that there is "sufficient material … on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made". The term "sufficient" is explained in ss 394J(3) and 394J(4) as follows:

> (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.

12 As the Court of Appeal observed in *Syed Suhail bin Syed Zin v Public Prosecutor* [2020] SGCA 101 at [18], the material must satisfy *all* of the requirements under s 394J(3) in order to be regarded as "sufficient". The failure to satisfy any one of the requirements in s 394J(3) will thus result in a dismissal of the review application. Furthermore, the requirement in s 394J(4) is an *additional* requirement that applies to any new legal arguments raised.

13 Moreover, ss 394H(7) and 394H(8) of the CPC provide that a leave application may, without being set down for hearing, be summarily dealt with by a written order of the court. However, the court must consider the applicant's written submissions (if any) and may consider the respondent's written submissions (if any) before summarily refusing a leave application.

Accuracy and reliability of the reports for HP2

14 The applicant raises a host of arguments in support of his contention that the reports for HP2 are inaccurate and unreliable. I turn first to the applicant's argument regarding the report from Digi, before addressing the other arguments raised by the applicant.

The Digi Report

15 The applicant contends that there is new evidence that will show that the dates and times of the messages as reflected in the TCFB Report for HP2 are inaccurate. According to the applicant, a private investigator hired by his family

at his request was informed by an officer from Digi that on 16 May 2012 (the day the messages were sent), the phone number from which the messages originated belonged to someone other than Ravindran. Based on this, the applicant submits that the messages could not have been sent to him by Ravindran *on that date*. Accordingly, the TCFB Report is inaccurate. It appears that by this argument, the applicant is disputing the *date and time* of the messages, rather than the identity of their sender or the fact that they had been sent to him.

16 However, the applicant is presently unable to produce a report from Digi confirming the above ("the Digi Report"). According to the applicant, Digi requires an official letter from a Singapore lawyer, investigation officer or the court because the offence took place in Singapore and the information contained in the report is "confidential" and "under the Privacy Act". Thus, the applicant requests the court to send an official letter to Digi, or to direct the investigation officer or the applicant's former lawyer to obtain the Digi Report.

17 This argument is of no merit. Given that the applicant has not adduced the *actual* Digi Report, the only material before this court is the applicant's own hearsay evidence of the existence and contents of the Digi Report. Such material cannot be said to be compelling. Furthermore, the review application mechanism should not be used as a tool by litigants to attempt to *obtain* evidence. On this ground alone, the applicant's argument should be rejected.

18 Nevertheless, even assuming that the Digi Report exists, there is no reason why it could not have been adduced earlier. Given that the Digi Report pertains to the identity of the registered user of a phone number in May 2012, it must have been in existence at the time of the applicant's trial, or even at the time of the appeal. It is also clear that the applicant's incarceration has not

prevented him from carrying out the necessary investigations. The applicant's explanation for his belated disclosure appears to be that he did not know at the time whether he could submit the Digi Report to court and his counsel did not mention it. However, the second requirement in s 394J(3)(*b*) concerns the *non-availability* of the material (see the Court of Appeal decision in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [55]). The fact that the applicant did not *know* about the Digi Report or whether he could submit it does not mean that the Digi Report was not *available*.

19 Moreover, the Digi Report is not compelling. The identity of the *registered* user of a phone number may be different from the identity of the *actual* user of the phone number. It is not the case that the calls could not have been made by Ravindran using the phone number even assuming it was registered in another person's name. Besides, by the applicant's own account, he had two phone calls with Ravindran on the morning of 16 May 2012 (see *Sinnappan (CA)* at [38]). This clearly shows that without much more evidence, even taking the Digi Report at its highest and assuming it exists in the form the applicant contends *and* was properly adduced before me in evidence, it would *still* not be sufficient to meet the high threshold to warrant a review by this court.

Other arguments raised by the applicant

20 Apart from the Digi Report, the applicant raises numerous other arguments relating to the accuracy and reliability of the reports for HP2. However, many of these arguments had already been canvassed in the previous proceedings, where the issue of the accuracy and reliability of the reports for HP2 featured significantly. These arguments are as follows:

(a) there are discrepancies in the time of the retrieval of screenshots from HP2 (see *Sinnappan (CA)* at [36]);

(b) the applicant's explanation regarding the messages and calls should not be relied on because these messages and calls had not been put to him in the proper sequence, owing to the unreliability and inaccuracy of the phone records (see *Sinnappan (CA)* at [30]);

(c) the applicant had not been shown the messages on 16 May 2012 and 20 May 2012 (see *Sinnappan (CA)* at [63]);

(d) based on the screenshots for HP2, the messages show the name of the sender whereas the call records only show the phone number of the caller (see *Sinnappan (CA)* at [40]);

(e) the phone call records contradict the testimony of one Vasagi a/p Madavan ("Vasagi") that she had been asleep between 5am and 7am on 16 May 2012 (see *Sinnappan (CA)* at [37]); and

(f) the screenshots of the messages in the TCFB Report are not arranged in chronological order (see *Sinnappan (HC)* at [73] and [74]).

21 As for the remainder of the applicant's arguments, these are essentially "fresh factual arguments" made on the basis of evidence that had already been led in the previous proceedings (see *Kreetharan* at [21]). These arguments are as follows:

(a) if the FORT Report and TCFB Report for HP1 are accepted as being inaccurate and unreliable, the same should apply for the FORT Report and TCFB Report for HP2;

(b) the absence of any calls or messages recorded from Vasagi, Digi and the lottery company suggest that the phone records for HP2 are incomplete;

(c) the court should have examined the messages that were sent from HP2 as well as HP2's call logs, rather than only the messages contained in HP2's inbox;

(d) any calls received by the applicant while he was in Singapore would reflect "+6" in front of the phone number, hence the missed calls from Vasagi and Ravindran on 16 May 2012 should have contained the notation "+6" in front of their respective phone numbers;

(e) it did not make sense for the applicant to have only set an accurate date and time for HP2 in May 2012 and not before that, and for the accurate messages to form only 5% of the entire period during which the applicant had been using HP2;

(f) the messages relating to the results for the lottery could only show the accuracy of the dates of the messages, not the accuracy of the time of the messages; and

(g) the absence of any messages preceding the applicant's first message to Ravindran "What time? Have how many?" suggests that the records were incomplete, as it would not have made sense for the applicant to ask Ravindran these questions if he did not even know whether there was work in the first place.

22 There is no reason why the applicant could not, with reasonable diligence, have raised these points earlier at the trial and/or on appeal. Neither has the applicant offered any explanation as to why he failed to do so.

Alleged break in the chain of custody

23 The applicant contends that discrepancies in the evidence suggest that there was a break in the chain of custody of the drugs. The applicant makes the following arguments:

(a) There is a discrepancy in the weight of the drugs reported by Investigation Officer Mohaideen Abdul Kadir Bin Gose Ahmad Sha ("IO Mohaideen") and that reported by Ms Lim Jong Lee Wendy, an analyst from the Health Sciences Authority.

(b) Sergeant Muhammad Hidayat Bin Jasni ("Sgt Hidayat") left the CNB office with the drug exhibits from 7am to 11.20am (a period of four hours and 20 minutes), during which time the drug exhibits could have been tampered with.

(c) There is a discrepancy between the evidence given by Sgt Hidayat and the evidence given by IO Mohaideen regarding the number and type of bags in which the drugs were placed.

24 Turning first to the allegations set out in [23(a)] and [23(b)] above, these were raised and rejected at the trial and nothing new has been put before me. As for the allegation set out in [23(c)], this is a fresh factual argument that could have been but was not raised earlier in the previous proceedings, and no explanation has been given for this.

Knowledge of the nature of the drugs

25 The applicant contends that he did not know that the drugs were methamphetamine and claims that he only suspected that they were cannabis.

Thus, the applicant argues that he has successfully rebutted the presumption in s 18(2) of the MDA that he knew the nature of the drugs in his possession.

26 This argument pertains to a critical element of the charge against the applicant. In the previous proceedings, as the drugs had been found in a car driven by the applicant, the Prosecution relied on the presumptions of possession and knowledge under ss 21 and 18(2) of the MDA. The applicant's defence was that the drugs had been planted in his car without his knowledge, such that he did not know that he was transporting the drugs into Singapore. Accordingly, he contended that he was able to rebut the presumptions under ss 21 and 18 (see *Sinnappan (HC)* at [23]; *Sinnappan (CA)* at [25] and [43]). However, based on the evidence before the court (in particular, the applicant's phone records), both the High Court and the Court of Appeal rejected the applicant's defence and concluded that the applicant had failed to rebut the presumption under s 18(2) of the MDA (see *Sinnappan (HC)* at [89]; *Sinnappan (CA)* at [66]).

27 Nothing has been raised in this application to show that such a finding by the High Court and the Court of Appeal is wrong. The claim that he suspected the drugs to be cannabis is but a bare assertion by the applicant. Notably, the applicant did not at any time prior to this application contend that he only suspected the drugs to be cannabis. Indeed, that would have been inconsistent with his defence – if he did not know of the presence of the drugs, he could not have suspected that the drugs were cannabis. Thus, the applicant's belated raising of this argument, which clearly contradicts his position at the trial and on appeal, suggests that it is a mere afterthought.

***Meaning of* "keja" *and* "tauke"**

28 The applicant contends that the court adopted the wrong translations of the words "*keja*" and "*tauke*" used in the messages. According to the applicant, "*keja*" should be interpreted as "*kejar*", meaning "hurry up" or "rush". Furthermore, "*tauke*" should be interpreted as "*tahuke*" or "*atauke*", meaning "know", "or", or "you know".

29 These alternative translations could have been raised in the previous proceedings, especially since the meanings of these terms were critical issues at the trial and on appeal. No explanation has been provided by the applicant as to why he did not do so. Moreover, the argument that these alternative translations should be adopted is not compelling because these translations directly contradict the positions taken by the applicant at the trial and on appeal (see *Sinnappan (HC)* at [45]; *Sinnappan (CA)* at [47] and [49]).

Opportunity to prove his innocence

30 The applicant contends that he was denied the opportunity to prove his innocence in two ways. First, as the Prosecution failed to adduce accurate, reliable and complete TCFB Reports and FORT Reports for HP1 and HP2, it was difficult for the applicant to prove his innocence. Second, if the applicant had been given an opportunity to contact Ravindran or send a message to Ravindran following his arrest, he would have been able to prove his innocence. The latter argument is made with reference to the Court of Appeal decision in *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499 ("*Gopu Jaya Raman*"). In that case, the accused had informed the CNB upon his arrest that he believed one "Ganesh" had planted the drugs in the vehicle he was driving. The CNB thus conducted a follow-up operation in which the accused communicated with Ganesh on the delivery of the drugs. The communication

between the accused and Ganesh was taken into account by the Court of Appeal in finding that the accused had successfully rebutted the presumption under s 21 of the MDA (see *Gopu Jaya Raman* at [72]).

31 This contention is of no merit in relation to the present application. There is no reason why these arguments could not have been raised in the previous proceedings and the applicant has not provided any explanation for his omission to do so. In any case, it bears emphasis that the CNB has no duty to assist the applicant in proving that he is not guilty.

Fact that the applicant had successfully proven certain aspects of his evidence

32 The applicant contends that the court should give greater weight to the fact that he had successfully proven certain aspects of his evidence. Specifically, the court had not rejected the applicant's evidence regarding his application for leave from work on 16 May 2012, the location of the motorcycle shop from which he planned to purchase a new motorcycle, and the applicant's plans to apply for a loan from the bank.

33 This is essentially a repetition of the applicant's submissions at trial and on appeal, which had been considered and rejected by the High Court and the Court of Appeal (see *Sinnappan (HC)* at [81] and [82]; *Sinnappan (CA)* at [64] and [65]). Furthermore, in so far as this may be considered a legal argument, the applicant has not shown that it is based on a change in the law that arose from a court decision after the conclusion of the trial and appeal.

Conclusion

34 Having considered the applicant's affidavit (which also contains his handwritten submissions), the applicant's written reply submissions and the Prosecution's written submissions, it is clear that the applicant's contentions have no merit and do not satisfy the requirements of sufficiency in s 394J(3) and/or s 394J(4) of the CPC. The applicant has failed to disclose any legitimate basis for the exercise of the court's power of review. The application is therefore summarily dismissed.

Andrew Phang Boon Leong
Justice of the Court of Appeal

The applicant in person;
Wong Woon Kwong and Jason Chua (Attorney-General's Chambers)
for the respondent.