IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 4

Criminal Motion No 27 of 2022

Between

Muhammad Abdul Hadi bin Haron

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal review — Leave for review]
[Criminal Law — Statutory offences — Misuse of Drugs Act]

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v
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Steven Chong JCA:

Introduction

1 This is an application by Muhammad Abdul Hadi bin Haron ("the Applicant") for leave under s 394H(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") to review an earlier judgment of the Court of Appeal in CA/CCA 36/2019 ("CCA 36"), which was reported in *Muhammad Abdul Hadi bin Haron v Public Prosecutor and another appeal* [2021] 1 SLR 537 ("*Hadi (CA)*"). This application is premised on the change in the law brought about by the decision of *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 ("*Gobi*") in respect of the proper treatment of the concept of wilful blindness in the context of the presumption under s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") (the "s 18(2) presumption"). In *Gobi*, the Court of Appeal held that the knowledge that is to be presumed under s 18(2) is

confined to actual knowledge. The Prosecution is thus not permitted to invoke the s 18(2) presumption to presume wilful blindness.

2 The present application is yet another addition to the litany of applications for leave to review a concluded criminal appeal inspired by the change of the law in *Gobi*. In three prior applications, *Khartik Jasudass and another v Public Prosecutor* [2021] SGCA 13 ("*Khartik*"), *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 ("*Datchinamurthy*") and *Rahmat bin Karimon v Public Prosecutor* [2021] 2 SLR 860 ("*Rahmat*"), the applicants brought leave applications on the basis that following *Gobi*, the presumption of knowledge under the s 18(2) presumption was not open to the Prosecution as the Prosecution's case at the trial had purportedly been based on wilful blindness rather than on actual knowledge. Those leave applications all failed for the same reason: that the Prosecution's cases and the court's decisions were in fact based on actual knowledge and not wilful blindness. Those applicants also regrettably all failed to appreciate the specific circumstances of *Gobi* that caused prejudice to the accused in question – that the Prosecution's case at the trial was one of wilful blindness, but on appeal, its case had changed to one of actual knowledge.

3 The present application is unfortunately, no different. Similar to the applicants in *Khartik, Datchinamurthy and Rahmat*, the Applicant submits the Prosecution ran an alternative case of wilful blindness which it sought to establish through s 18(2) of the MDA, which was clarified to be impermissible in the decision of *Gobi*. For the reasons below, I find that the Prosecution's case throughout the proceedings had in fact been based on actual knowledge, and that the Applicant has therefore failed to demonstrate any legitimate basis for the exercise of the court's power of review.

Factual and procedural background

Background facts

4 The Applicant was instructed by the second appellant in CCA 36, Muhammad Salleh bin Hamid ("Salleh") to collect two black-taped bundles from one "Kakak" in Johor Bahru, Malaysia. On 22 July 2015 at about 10.27am, the Applicant entered Johor Bahru on his motorcycle. The Applicant picked up two bundles wrapped in black tape from a woman known as "Kakak" and hid the two bundles in his motorcycle. After the Applicant collected the drugs, he sent Salleh messages (in Malay) stating: "total I have 2 pack only"; and "250 each".

5 The Applicant returned to Singapore on the same day. Later that evening, at about 7.10pm, officers from the Central Narcotics Bureau ("CNB") arrested the Applicant at his residence. During questioning, the Applicant told one of the CNB officers that the two bundles that he had collected from Johor Bahru were in his motorcycle. The Applicant led the CNB officers to his motorcycle where the two bundles were recovered.

6 Several statements were recorded from the Applicant. On 22 July 2015 at 8.15pm, the Applicant was served a notice regarding s 33B of the MDA. The Applicant provided a response which was recorded in writing, stating that he *did not know* the contents of the bundles, only that it was an "illegal thing". Two further contemporaneous statements were recorded on the same night, and the Applicant's cautioned statement was recorded the next day, on 23 July 2015. The Applicant's long statement was recorded on 27 July 2015, five days after his arrest. The Applicant raised his defence for the first time in this statement, that he thought that the bundles contained "gold and cash". At the trial, the Applicant did not challenge the admissibility of his statements.

Procedural history

7 The Applicant was jointly tried with Salleh. At the trial, the Prosecution's case in relation to the Applicant was that he had actual knowledge that the two bundles contained methamphetamine, and that in the alternative, s 18(2) of the MDA applied to *presume* that the Applicant had actual knowledge of the nature of the drugs, and the Applicant was unable to rebut this presumption. The Applicant's defence was that he thought that the bundles contained gold and cash, as he had collected them in the course of his work as a courier for Salleh, whom he knew to be a gold and currency investor.

8 On 10 January 2020, the trial judge ("the Trial Judge") found that the Applicant had failed to rebut the s 18(2) presumption on a balance of probabilities and convicted the Applicant of the charge against him. The Trial Judge's primary findings were: that the Applicant's defence was an afterthought as he had only raised it five days after his arrest; that the Applicant gave internally inconsistent explanations that affected the credibility of his account; and that the Applicant told deliberate lies on a material issue, which led to the irresistible conclusion that he was jointly involved with Salleh in drug trafficking (*Public Prosecutor v Muhammad Abdul Hadi bin Haron and another* [2020] 5 SLR 710 ("*Hadi (HC)*") at [56]–[63]).

9 The Applicant appealed against his conviction and sentence. On 23 November 2020, this court dismissed the Applicant's appeal. This court agreed with the Trial Judge's finding that the Applicant failed to rebut the s 18(2) presumption. As there was no scope to reduce the sentence any further, the Applicant's appeal on sentence was also dismissed. On 2 December 2022, the Applicant filed the present criminal motion. The Prosecution sought and was granted an extension of time to file its written submissions by 19 January 2023.

Applicable law

10 As this court stated in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17], only an application that discloses a "legitimate basis for the exercise of this court's power of review" should be allowed to proceed. To determine if such a legitimate basis exists, the court hearing the leave application would have to consider the requirements for a review application stipulated in s 394J of the CPC.

11 Under s 394J(2) of the CPC, the applicant in a review application has to demonstrate to the appellate court that there is (a) sufficient material on which (b) 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 (see also *Gobi* at [24]).

12 The requirement of sufficiency is set out in s 394J(3) of the CPC. For the material to be "sufficient", it must satisfy all the requirements set out in ss 394J(3)(*a*)–(*c*) of the CPC:

> (*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.

13 Crucially, where an applicant is relying on a change in the law, the text of s 394J(4) of the CPC also provides an *additional requirement* that the legal arguments are based on a change in the law that arose *after* the conclusion of all

proceedings relating to the criminal matter in respect of which the earlier decision was made (see also *Rahmat* at [16]).

14 To determine whether there was a miscarriage of justice, the appellate court has to consider if the decision in the criminal appeal that is sought to be reopened is "demonstrably wrong" by considering whether it is 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" (see ss 394J(5)(*a*) and 394J(6)(*a*)–(*b*) of the CPC). In the alternative, the court may conclude that there has been a miscarriage of justice if the earlier decision is "tainted by fraud or a breach of the rules of natural justice" (see s 394J(5)(*b*) of the CPC).

The parties' cases in this application

15 The Applicant accepts that the Prosecution's main case was one of actual knowledge. However, the Applicant submits that the Prosecution sought to establish an *alternative case* of wilful blindness using s 18(2) of the MDA. Given the clarifications made on the law of wilful blindness in *Gobi*, the Applicant submits that this court erred in finding that the Applicant failed to rebut the s 18(2) presumption.

16 The Prosecution submits that it never ran a case of wilful blindness at any point of time. Instead, the s 18(2) presumption was relied on to presume *actual knowledge*. Further, there was no risk of any miscarriage of justice to the Applicant as this court's decision in *Hadi (CA)* was premised on the Applicant's failure to rebut the presumption of knowledge.

Issues to be determined

17 The principal issue to be determined is whether there is a legitimate basis for the court to exercise its power of review. It is necessary to consider whether, under s 394J(2) of the CPC, the sufficiency and miscarriage of justice requirements have *both* been satisfied.

Sufficiency requirement

18 It bears emphasis that the requirements of sufficiency and miscarriage of justice are a *composite* requirement under s 394J(2) of the CPC (*Rahmat* at [22]). As per s 394J(3)(*c*) of the CPC, the new material is thus only sufficient if it is "capable of showing almost conclusively that there has been a miscarriage of justice". Section 394J(3)(*c*) of the CPC also has a relevancy threshold, which requires that the change in the law must be *prima facie* relevant to show that the appellate court's decision is demonstrably wrong (*Rahmat* at [28]).

The Court of Appeal's decision in Hadi (CA)

19 To determine if *Gobi* is relevant to this application, it is of vital importance to examine this court's decision in *Hadi (CA)*. The crucial question is whether this court relied on s 18(2) of the MDA to presume wilful blindness, which is now impermissible following *Gobi*.

20 In my judgment, the answer to this question is unequivocally in the negative. On appeal, this court upheld the Trial Judge's decision that the Applicant had failed to rebut the presumption of *knowledge* of the nature of the drugs under s 18(2) of the MDA. Notably, as was done by the Trial Judge, this court's analysis was focused on the credibility of the Applicant's defence, as well as the inconsistencies in his statements and his account of events. Having considered these, this court found that the Trial Judge was "correct to reject [the

Applicant's] defence as an afterthought": *Hadi (CA)* at [22]. There was no reference to "wilful blindness" in either an evidential or legal sense. Therefore, it is clear that this court's decision in *Hadi (CA)* was based on the appellant's failure to rebut the s 18(2) presumption of *actual knowledge.*

21 For completeness, I note that in *Hadi (HC)*, the Trial Judge's decision was also premised on the appellant's failure to rebut the presumption of *actual knowledge* under s 18(2) of the MDA. The Trial Judge made no reference to "wilful blindness" in either an evidential or legal sense, nor did she make any mention of language such as "suspicion" or "turning a blind eye". Having found that the Applicant had failed to prove on a balance of probabilities that he believed he was carrying gold and cash, the Trial Judge found that the Applicant had failed to rebut the s 18(2) presumption that he had knowledge of the nature of the drugs.

The Prosecution's case at the trial

22 In this application, as was the case in *Datchinamurthy*, *Khartik* and *Rahmat*, the Applicant's submissions mainly focused on the Prosecution's case at the trial. As a preliminary point, it must be emphasised that the review application should in fact be directed at the earlier decision of the appellate court, which in this case, is *Hadi (CA)* (see *Datchinamurthy* at [25]). The Prosecution's case at the trial and the trial judge's decision are thus only relevant to the extent that they inform the *context* behind the appellate court's decision. The Prosecution's case at the trial and the trial judge's holding would be of significance where the Prosecution had *changed* its case from the trial to appeal, as was the case in *Gobi*, because the change in the Prosecution's case (from one of wilful blindness at the trial to actual knowledge on appeal) might prejudice

the accused person. However, this was not the case here, as the Prosecution's case throughout the trial and the appeal was never premised on wilful blindness.

23 From its opening address, it was clear that the Prosecution would be relying on the "presumptions of possession and *knowledge* of the controlled drugs under sections 18(1) and 18(2) of the MDA" [emphasis added]. There was no mention of an alternative case of wilful blindness.

24 The Prosecution's cross-examination of the Applicant also did not indicate that there was an alternative case of wilful blindness. Pursuant to its case of actual knowledge, the Prosecution expressly put to the Applicant on several occasions that he had *actual knowledge* of the items in his possession:

> Q Alright. I just put it to you. You can disagree or dis---or agree. That means I put it to you, you *actually knew* what 250 is in the context of 37 and 38. You disagree or you agree?
>
> A I disagree, Your Honour.
>
> …
>
> Q … I'm going to redo it again. That I'm going to reiterate this. That I'm going to put to you that *you have actual knowledge* that the items in question, in particular, on the 27th, 22nd of July that day, the two bags, the two packages, you knew that they were drugs. Agree or disagree?
>
> A I disagree, Your Honour.
>
> [emphasis added]

25 Immediately following this, the Prosecution then asked the Applicant the following question (the "Question"):

> Q Now even if—even if you denied it, even if this is not true, the circumstances under which you have taken delivery of the items, on the 22nd of July, the two black packet, *are so suspicious that you should have opened up the bundle to check.* Agree, disagree?

> A I disagree, Your Honour, because this was not the first time and the first occasion I have already checked.
>
> [emphasis added]

26 The Applicant submits that the use of the word "suspicious" in the Question was indicative of the Prosecution's alternative case that was premised on wilful blindness. I disagree. The inquiry should not focus on isolated phrases that were used in the course of cross-examination, but on the case that was put to the Applicant. Considering the Prosecution's argument as a whole, the Question appears to be directed at establishing that the Applicant had *no basis* for his belief that the bundles in his possession contained gold and cash. At no point did the Prosecution concede that the Applicant did *not* have actual knowledge of the nature of the drugs or imply that the Applicant was wilfully blind to the nature of the drugs. It was also *never* put to the Applicant that he was wilfully blind. That the Prosecution's case at the trial was never premised on wilful blindness is reflected in the decision of the Trial Judge and the decision of this court on appeal as elaborated at [19]–[21] above.

27 The Prosecution's closing submissions at the trial also made no reliance on wilful blindness. The Prosecution's closing submissions at the trial were framed as follows:

(a) The Applicant had *actual knowledge* of the nature of the drugs, as Salleh gave credible evidence that he had an oral agreement with the Applicant to traffic in methamphetamine and that the Applicant's lies provided corroborative evidence that he had actual knowledge of the methamphetamine.

(b) In the alternative, the Applicant had failed to rebut the presumption of knowledge under s 18(2) of the MDA as he had

> failed to prove, on a balance of probabilities, that he *did not know* the nature of the drugs.

As such, while the Prosecution did present an alternative case in its closing submissions, this alternative case was that s 18(2) of the MDA applied to presume that the Applicant had *knowledge* of the nature of the drug, and that he had failed to rebut this presumption.

28 Significantly, the Prosecution's alternative case in its closing submissions was focused on establishing that the Applicant's account that the bundles contained "gold and cash" was *not credible*. In its closing submissions, the Prosecution first outlined the following principles from *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 ("*Obeng Comfort*") at [40]:

> 40 Where the accused has stated what he thought he was carrying ("the purported item"), the court will assess the veracity of his assertion against the objective facts and examine his actions relating to the purported item. This assessment will naturally be a highly fact-specific inquiry. *For example, the court will generally consider the nature, the value and the quantity of the purported item and any reward for transporting such an item. If it is an ordinary item that is easily available in the country of receipt, the court would want to know why it was necessary for him to transport it from another country.* If it is a perishable or fragile item, the court would consider whether steps were taken to preserve it or to prevent damage to it. If it is a precious item, the court would consider whether steps were taken to keep it safe from loss through theft or otherwise. If it is a dangerous item, the court would consider how the item was packed and handled. *Ultimately, what the court is concerned with is the credibility and veracity of the accused's account (ie, whether his assertion that he did not know the nature of the drugs is true). This depends not only on the credibility of the accused as a witness but also on how believable his account relating to the purported item is.*
>
> [emphasis added]

In line with the principles elucidated in this extract from *Obeng Comfort*, the Prosecution's alternative case focused on assessing the *credibility and veracity*

of the Applicant's account that he believed that the items in his possession were "gold and cash".

29 The Prosecution substantiated its alternative case with the following reasons:

(a) the Applicant's lies at the trial affected his credibility as a witness;

(b) the Applicant's defence that the items were gold and cash was an afterthought;

(c) the circumstances in which the Applicant collected the drugs were highly suspicious (the "Suspicious Circumstances Reason"); and

(d) the Applicant failed to give a logical explanation as to how the contents of the two bundles resembled gold and cash.

In its explanation of the Suspicious Circumstances Reason, the Prosecution made reference to terms such as "blind faith", "turn a blind eye" and "refrained from making further queries". It appears that the usage of such language formed a key basis for the Applicant's contention that the Prosecution relied on s 18(2) of the MDA to presume that the Applicant was wilfully blind to the drugs in his possession. However, this is misconceived.

30 In my view, the Prosecution canvassed the Suspicious Circumstances Reason to establish that there was no basis for the Applicant's belief that he was dealing with gold and cash on 22 July 2015, and that this in turn undermined the credibility of his account. This was in line with the Prosecution's overall approach to its alternative case, which was to establish that the Applicant's

defence lacked credibility and that accordingly, the Applicant failed to rebut the s 18(2) presumption of knowledge. The Prosecution did this by comparing the Applicant's evidence as to his subjective knowledge with what an ordinary, reasonable person would have known or done if placed in the same situation. This is also in line with this court's guidance in *Obeng Comfort* at [37], affirmed in *Gobi* at [66] that:

> … The court assesses the accused's evidence as to his subjective knowledge **by comparing it with what an ordinary, reasonable person would have known or done if placed in the same situation that the accused was in**. If such an ordinary, reasonable person would surely have known or taken steps to establish the nature of the drug in question, the accused would have to adduce evidence to persuade the court that nevertheless he, for reasons special to himself or to his situation, did not have such knowledge or did not take such steps. It would then be **for the court to assess the credibility of the accused's account** on a balance of probabilities. …
>
> [emphasis added]

31 To further demonstrate that the Prosecution's approach at the trial was in line with this court's guidance in *Obeng Comfort* at [37] and [40], I break down the Prosecution's sub-arguments for the Suspicious Circumstances Reason.

(a) First, the Prosecution made an overall comment that the circumstances in which the Applicant collected the two bundles were "high[ly] suspicious", and that he had every reason to make nquiries or to take a look at the items collected. This is consistent with the guidance from *Obeng* at [37] that if an ordinary reasonable person would surely have known or taken steps to establish the nature of the drug in question, the accused would have to adduce evidence to persuade the court that nevertheless he, for reasons unique to him or to his situation, did not take such steps.

(b) Second, the Prosecution highlighted that it was "plainly absurd" that the Applicant trusted that "Kakak", who was a complete stranger to him, would have handed him gold and cash. In my view, the language of "absurdity" is further indicative of the Prosecution's argument that the accused's account was unbelievable and therefore, devoid of credibility.

(c) Third, the Prosecution submitted that the Applicant should have made "enquiries" as to what "250" meant and that he was willing to turn a "blind eye" to this to get the job done for remuneration. The Prosecution also elaborated that a "reasonable person in his shoes" would have asked what the numbers meant. This appears to be directed at establishing that the Applicant's account lacked credibility as an ordinary reasonable person would surely have made the relevant enquiries to ascertain the meaning of the numbers. In line with its argument of actual knowledge, the Prosecution also *expressly* disagreed with the Applicant's submission that he "did not know" what "250 each" meant.

(d) Fourth, the Prosecution submitted that the bundle, which was packed in a compact bundle instead of a rectangular one, should have raised the Applicant's *suspicions*, but that the Applicant simply disagreed with this proposition without further explanation. This was also in furtherance of the Prosecution's argument that the Applicant's account lacked credibility, as he was unable to provide any reasons as to why his suspicions were not aroused.

32 In my view, the Prosecution did *not* run an alternative case of wilful blindness. The Prosecution's alternative case was premised on s 18(2) of the

MDA applying to presume that the Applicant had *actual knowledge* of the nature of the drug, and that the Applicant had failed to rebut this presumption. I should add that where the Prosecution's case, whether mounted as a primary or alternative case, is premised on the presumption of *actual knowledge* under s 18(2) of the MDA, there can be no dispute that it is for the accused person to rebut the presumption by offering an explanation for his belief that the items in his possession were items *other* than drugs. In that context, it is completely understandable for the Prosecution to challenge the accused's credibility because if that accused cannot be believed in that respect, it must follow that he would have failed to rebut the presumption on a balance of probabilities. Indeed, the isolated phrases relied on by the Applicant were employed by the Prosecution to challenge the Applicant's belief that the bundles contained "gold and cash" *ie*, to demonstrate that the presumption of actual knowledge had not been rebutted.

33 Given that the Prosecution's case was not premised on wilful blindness, the change in the law in *Gobi* has no relevance to the leave application. There is thus no basis for the argument that the decision in *Gobi* is capable of showing almost conclusively that there has been a miscarriage of justice in *Hadi (CA)*. As the sufficiency requirement has not been satisfied, there can be no miscarriage of justice.

Additional statutory requirement in s 394J(4) of the CPC

34 It should be noted that the Applicant has strictly failed to fulfil the additional statutory requirement in s 394J(4) of the CPC. Section 394J(4) of the CPC makes it clear that the Applicant must show that his legal arguments are based on a change of the law that took place *after* the conclusion of the proceedings in CCA 36, and that this is an "additional requirement" to be

fulfilled for a finding of sufficiency under s 394J(2) of the CPC. As the decision in *Gobi* was handed down on 19 October 2020, slightly over a month *before* this court's decision in *Hadi (CA)*, I accept that the true legal effect of the decision in *Gobi* might not have been fully appreciated by the Applicant's counsel prior to this court's decision in *Hadi (CA)*. In deciding this application, I did not strictly enforce this additional statutory requirement against the Applicant as there is no merit in the change in the law argument and hence it would not have made any difference to the outcome of this application.

Conclusion

35 Accordingly, I find that the Applicant has failed to show a legitimate basis for the court to review his appeal in CCA 36. This application is therefore dismissed.

Steven Chong
Justice of the Court of Appeal

The applicant in person;
Marcus Foo and Rimplejit Kaur (Attorney-General's Chambers) for the respondent.