IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 16

Civil Appeal No 2 of 2023 (Summons No 8 of 2023)

Between

(1) Jumaat bin Mohamed Sayed
(2) Lingkesvaran Rajendaren
(3) Datchinamurthy a/l Kataiah
(4) Saminathan Selvaraju

… *Applicants*

And

Attorney-General

… *Respondent*

JUDGMENT

[Civil Procedure — Extension of time — Filing documents out of time]

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Introduction

1 CA/SUM 8/2023 ("SUM 8") is an application seeking: (a) the reinstatement of the appeal in CA/CA 2/2023 ("CA 2"); and (b) an extension of time to file the Appellants' Case, the Record of Appeal, Core Bundle and all other relevant documents (the "Documents") pursuant to O 19 r 30(4) of the Rules of Court 2021 ("ROC") to no later than eight weeks following the date on which the Foreign Counsel Applications of Mr Edward Fitzgerald KC ("Mr Fitzgerald KC") and Mr Theodoros Kassimatis KC ("Mr Kassimatis KC") to represent the applicants in CA 2 (the "Admission Applications") are decided and all consequential matters arising from the Admission Applications are addressed. Notwithstanding that the extension of time is sought with reference to the *outcome* of the Admission Applications, to date, the Admission Applications have not been filed.

2 CA 2, which SUM 8 seeks to restore, is an appeal against the decision of Justice Valerie Thean (the "Judge") to dismiss the application in HC/OA 480/2022 ("OA 480"). In OA 480, the applicants applied for permission to seek the following reliefs: (a) a declaration that the presumptions in "[ss] 18(1) and 18(2) of the Misuse of Drugs Act 1973" ought to be "read down" and "given effect as imposing an evidential burden only in [c]ompliance with" Articles 9(1) and 12(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution") and the common law presumption of innocence; (b) alternatively, a declaration that the presumptions are unconstitutional for violating Articles 9(1) and 12(1) of the Constitution; and (c) a prohibiting order against the execution of death sentences upon the applicants. On 25 November 2022, the Judge provided her reasons for dismissing OA 480 in *Jumaat bin Mohamed Sayed and others v Attorney-General* [2022] SGHC 291 (the "Judgment").

3 I note that while the applicants have applied for declaratory relief in respect of the present version of the Misuse of Drugs Act 1973 (2020 Rev Ed), the version of the Act in force at the time of their respective trials and appeals was the Misuse of Drugs Act (Cap 185, 2008 Rev Ed). For the purposes of this judgment, I shall refer to the current Act and the previous Act in force interchangeably and abbreviate this as the "MDA", as there is no change to the relevant provision of the Act, *ie*, section 18.

4 The applicants filed the Notice of Appeal against the Judge's decision on 23 December 2022. By a letter dated 17 January 2023, the Supreme Court Registry (the "Registry") informed the applicants that the Record of Proceedings ("ROP") was available and the time to file the Documents would run from the date of the notice.

5 Thereafter, a series of correspondence ensued between one of the applicants, Datchinamurthy a/l Kataiah ("Datchinamurthy"), and the Registry in relation to the applicants' intended Admission Applications including a request for a waiver of the filing fees for the Admission Applications. On 14 March 2023, the time for the filing of the Documents in CA 2 lapsed. This was communicated to the parties at the Case Management Conference ("CMC") on 20 March 2023 and by letter on 21 March 2023. Consequently, CA 2 was deemed withdrawn on 14 March 2023 pursuant to O 19 r 30(6). On 31 March 2023, SUM 8 was filed.

6 The principal reason relied on by the applicants in support of SUM 8 is that their non-compliance with the filing and service timelines under O 19 r 30(4) of the ROC was due to the administrative hurdles in relation to the filing of the Admission Applications.

7 To understand SUM 8 in its proper context, it is necessary to explain how and why SUM 8 came to be filed by the applicants. As SUM 8 is an application for the restoration of CA 2 and for an extension of time to file the Documents, it is necessary to examine the merits of the underlying matter, *ie*, CA 2, pursuant to which the reliefs are sought. This would necessarily entail an examination of the true substance of the reliefs sought in OA 480 which will in turn determine whether the applicants were correct to have proceeded by way of judicial review under O 24 r 5 of the ROC instead of seeking permission under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") to review their concluded criminal appeals. Identifying the correct procedure is significant because the relevant tests for granting leave under these two separate regimes are quite different.

Background facts

8 The applicants are Jumaat bin Mohamed Sayed, Lingkesvaran Rajendaren, Datchinamurthy, and Saminathan Selvaraju. They have previously been convicted and sentenced to the mandatory death penalty under s 33(1) read with the Second Schedule to the MDA. Their appeals against their convictions were separately dismissed by this court in the period spanning between February 2016 and May 2020.

Procedural history

OA 480

The applicants' case in OA 480

9 In OA 480, the applicants proceeded by way of judicial review under O 24 r 5 of the ROC and argued that Articles 9 and 12 of the Constitution protect the fundamental rules of natural justice, which are procedural rights aimed at securing a fair trial. This included the presumption of innocence. The applicants contended that ss 18(1) and 18(2) of the MDA violate the constitutionally-protected presumption of innocence. On their case, the presumption of innocence mandates that the prosecution proves each and every element of the offence beyond a reasonable doubt. The presumptions in ss 18(1) and 18(2), however, shift the *legal* burden of proof in respect of certain key elements of the offence in question to the accused person. The applicants also submitted that the presumptions in ss 18(1) and 18(2) can "stack", in that the presumption under s 18(1) operates to shift the burden of proof in respect of possession to an accused person, and also triggers the presumption of knowledge under s 18(2).

10 In the alternative, the applicants argued that the presumptions should be "read down" to impose only an evidential (rather than legal) burden on the accused. This was the applicants' main submission at the hearing below.

11 Further, the applicants submitted that because an accused person is required to rebut the presumptions *on the balance of probabilities*, an accused person can be convicted even though he has raised a reasonable doubt to rebut the presumptions. In other words, the applicants contemplate a situation where an accused person is able to raise some reasonable doubt in relation to either his knowledge or possession, but is nonetheless convicted because he is unable to rebut the presumptions on the balance of probabilities. This, the applicants argued, would be contrary to the presumption of innocence.

12 The applicants emphasised that the presumption of innocence should be given added weight when interpreting ss 18(1) and 18(2) of the MDA by virtue of the severity of the offence of drug trafficking as the courts should be slower to derogate from an individual's constitutional rights when the penalties are severe.

13 The applicants proposed interpreting ss 18(1) and 18(2) of the MDA such that they may be rebutted where the accused is able to raise a reasonable doubt. They submitted that this was consistent with the Parliamentary intention in relation to ss 18(1) and 18(2), and contended that Parliament did not intend to seriously infringe the presumption of innocence.

The respondent's case in OA 480

14 The Attorney-General ("AG") raised several preliminary procedural issues, including the fact that the application was time-barred under O 24 r 5(2)

of the ROC, given that more than three months had elapsed since the final determinations of the applicants' respective criminal proceedings.

15 The AG submitted that the proper mode for the reliefs sought by the applicants should be by way of a review application under s 394H of the CPC.

16 There was no serious dispute that ss 18(1) and 18(2) of the MDA place a legal burden of proof on accused persons to rebut the presumptions on a balance of probabilities and that the presumptions may operate together. The AG argued, however, that the presumptions under ss 18(1) and 18(2), being presumptions of fact, do not detract from the need for the prosecution to prove its case beyond reasonable doubt. Consequently, the presumptions do not contravene Articles 9(1) or 12(1) of the Constitution. Further, the AG submitted that while the presumption of innocence is a bedrock principle of the criminal justice system, Parliament may nonetheless legislate statutory provisions which shift the burden of proof to the accused under certain circumstances, *per Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 at [27]–[29] ("*Ong Ah Chuan*").

17 The AG also contended that the foreign cases relied on by the applicants are unhelpful because they were decided under different constitutional contexts.

Decision below in OA 480

18 The Judge dismissed OA 480 for the following reasons:

(a) The application for permission to seek a prohibiting order against the execution of their death sentences which were meted out in respect of drug offences for which they were convicted amounted to a collateral attack on the earlier criminal decisions. If proper reason

existed to reconsider their convictions, the proper mode for such reconsideration would be a review application under ss 394F to 394K of the CPC: Judgment at [19] and [20]. In that regard, the Judge found that the applicants were unable to satisfy *any* of the *cumulative* criteria mandated under ss 394J(3) and (4) of the CPC: Judgment at [21]–[22].

(b) In any event, the application for judicial review under O 24 r 5 was made more than three months since the final judicial determinations in all of the applicants' criminal cases, which was contrary to the requirement in O 24 r 5(2) of the ROC that requires an application for permission to apply for a mandatory, prohibiting or quashing order to be made within three months after the date of the omission, judgment, order, conviction or proceedings which gave rise to the application: Judgment at [17] and [18].

(c) There was no arguable case that Articles 9(1) and 12(1) of the Constitution were infringed by the presumptions under ss 18(1) and (2) of the MDA. The meaning of "law" in Art 12(1) of the Constitution did not include the rules of natural justice, and consequently precluded the consideration of whether there was a breach of Art 12(1). As for Art 9(1), there was no contravention because the presumption of innocence is a fundamental guiding principle that finds expression through technical rules and sits appropriately within Art 9(1): Judgment at [40], [77] and [78].

CA 2

19 In CA 2, the applicants appeal against the entirety of the Judge's decision. However, as the applicants did not satisfy the timeline to file the Documents after the Registry had notified them that the ROP was ready, CA 2

was deemed withdrawn on 14 March 2023 pursuant to O 19 r 30(6). This led to the applicants filing SUM 8 under O 3 r 4(2). The applicants accept that they have not complied with O 19 r 30(4), resulting in the deemed withdrawal of CA 2 under O 19 r 30(6).

The present application

The applicants' case

20 The applicants raise the following arguments in support of SUM 8:

(a) The length of the delay is not inordinate. The applicants were only 17 days out of time when they filed SUM 8.

(b) The delay was due to the difficulties experienced by the applicants in seeking clarification and making arrangements for the Admission Applications. Based on Datchinamurthy's affidavit dated 28 March 2023, due to logistical issues, the applicants were unable to file the Admission Applications prior to the lapse of the deadline to file the Documents. It is argued that greater latitude may be allowed in the present case.

(c) As to the merits of the appeal, the applicants submit that the appeal deals with a novel question of law as the case involves, among other issues, an examination of the relationship between the presumption of innocence and Art 9(1) of the Constitution. CA 2 is consequently not only meritorious, but holds broad public importance. The applicants rely on the holding of this court in *Ong Cheng Aik v Dayco Products Singapore Pte Ltd (in liquidation)* [2005] 2 SLR(R) 561 ("*Ong Cheng Aik*") at [18] to suggest that the threshold for the merits requirement with respect to CA 2 is a low one.

(d) Any prejudice caused to the respondent is minimal as it was already on notice about the grounds of appeal and cannot be said to be caught unaware. Further, the delay is unlikely to have caused any unfairness to the respondent in terms of their preparation for the case.

The respondent's case

21 The AG urges this court to dismiss the present application for the following reasons:

(a) The applicants' conduct amounts to an abuse of process. As the Judge observed, OA 480 amounted to a collateral attack on the earlier criminal decisions. Further, the present application is the latest application in the string of unmeritorious post-appeal civil applications by one or more of the applicants.

(b) The applicants do not have a valid reason for their delay in filing the Documents. Their attempt to apply for the Admission Applications is another tactic to delay proceedings and the execution of their sentences.

(c) There is no merit to the substantive appeal in CA 2, and the propriety of the applicants' convictions is beyond doubt. In relation to the applicants' case that the presumptions under ss 18(1) and 18(2) of the MDA are inconsistent with Articles 9 and 12 of the Constitution and the common law presumption of innocence, the presumption of innocence is not a fundamental rule of natural justice under Art 9. Further, the foreign jurisprudence relied on by the applicants in OA 480 is not relevant to the present case because those jurisdictions (namely,

United Kingdom, Hong Kong and Canada) have statutes that entrench the presumption of innocence.

My decision

The relevant factors

22 The following factors are relevant to the court's consideration of the merits of SUM 8 (see *Sunpower Semiconductor Ltd v Powercom Yuraku Pte Ltd* [2023] SGHC(A) 14 at [1] and [20]; *Bin Hee Heng v Ho Siew Lan (acting as executrix and trustee in the estate of Gillian Ho Siu Ngin)* [2020] SGCA 4 ("*Bin Hee Heng*") at [23]; *Ong Cheng Aik* at [10]–[11]):

(a) the length of the delay;

(b) the reasons for the delay;

(c) the merits of the intended appeal; and

(d) the question of prejudice to the respondent if the extension of time were granted.

23 Before turning to examine the above factors, it is first essential to ascertain the true nature of the reliefs sought in OA 480.

The true nature of the reliefs in CA 2

24 For convenience, the reliefs sought by the applicants are reproduced below:

(a) a declaration that the presumptions in ss 18(1) and 18(2) of the MDA ought to be "read down" and "given effect as imposing an

evidential burden only in [c]ompliance with" Articles 9(1) and 12(1) of the Constitution and the common law presumption of innocence;

(b) alternatively, a declaration that the presumptions are unconstitutional for violating Articles 9(1) and 12(1) of the Constitution; and

(c) a prohibiting order against the execution of death sentences upon the applicants.

25 It is plain that OA 480 and consequently CA 2, is in essence a challenge against the conviction of the applicants. This amounts to an attempt to review the *concluded* criminal appeals with respect to their convictions. In seeking leave to apply for a prohibiting order against the execution of their capital punishments, the applicants are in substance challenging their convictions. The proper procedure to mount such a challenge following their concluded criminal appeals, as rightly determined by the Judge, is by way of a criminal review application under s 394H of the CPC or by invoking the inherent power of the court.

26 To obtain permission under s 394H(1) of the CPC, the application must disclose a "legitimate basis for the exercise of [the appellate court's] power of review": *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17]. In order to do so, the applicant must establish that the cumulative requirements under s 394J of the CPC for the appellate court's exercise of its power of review are satisfied. Section 394J(2) of the CPC requires the applicant to show that there is "sufficient material" (being evidence or legal argument) 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 requirements of sufficiency and miscarriage of justice are a composite requirement under s 394J(2) of the CPC: *Rahmat bin Karimon v Public Prosecutor* [2021] 2 SLR 860 at [22]. "Sufficient material" must (a) not have been canvassed at any stage of proceedings in the criminal matter before the application for permission to review was made; (b) be such that it could not have been adduced in court earlier even with reasonable diligence; and (c) be compelling, in that it is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter as stipulated in s 394J(3) of the CPC. Pursuant to s 394J(4) of the CPC, in addition to the requirements under s 394J(3), the "sufficient material" in the form of new legal arguments must 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.

27 In the present case, there is no "sufficient material" for the court to consider that the threshold of a miscarriage of justice has been crossed. The applicants' arguments on the unconstitutionality of the presumptions in s 18 of the MDA could have been raised earlier with reasonable diligence. Given that the Prosecution had relied on the presumptions under s 18 of the MDA in their cases against the applicants at first instance, it would have been clear to the applicants that the presumptions were significant in the case brought against them. There was no reason why the applicants could not have raised the purported contravention of Articles 9(1) and 12(1) of the Constitution at their trials or on their respective appeals. Furthermore, the applicants' argument on the unconstitutionality of s 18 of the MDA is clearly not based on any change in the law that arose from any decision made by a court after the conclusion of

all proceedings relating to their criminal matters in respect of which their convictions rest and as such would have failed to satisfy s 394J(4) of the CPC.

28 In any event, the applicants' argument that ss 18(1) and 18(2) of the MDA violate the constitutionally-protected presumption of innocence is neither new nor novel. This argument was first examined by the Privy Council in *Ong Ah Chuan*. There, the Privy Council considered the previous iteration of s 17 of the MDA (*ie*, s 15 of the Misuse of Drugs Act (Act 5 of 1973)), which provided that an accused person would be presumed to have had controlled drugs in his possession for the purpose of trafficking if it was proven that he was in possession of more than a specified quantity of controlled drugs. The appellants argued that the statutory presumption under s 15 of the MDA was in conflict with the "presumption of innocence", which is a fundamental human right protected by the Constitution and cannot be limited or diminished by any Act of Parliament which has not been passed by the majority of votes necessary under Art 5 for an amendment to the Constitution. The Privy Council in *Ong Ah Chuan* held that the equivalent of s 17 of the MDA, being a statutory presumption which, upon proof of certain facts, shifted the burden of proof to the accused and could be rebutted on a balance of probabilities, was not contrary to Articles 9(1) and 12(1) of the Constitution: *Ong Ah Chuan* at [38] and [40].

29 It was thus hardly surprising that the Judge found that none of the cumulative requirements under s 394J of the CPC have been satisfied by the applicants (see [18(a)] above). Finally, the crux of the applicants' constitutional argument seeks to persuade this court to interpret the presumptions under ss 18(1) and 18(2) of the MDA as an evidential burden such that the raising of a reasonable doubt would have sufficed to rebut the presumptions. However, the applicants have not been able to demonstrate that the courts which convicted them on the premise that they had not rebutted the presumptions on a balance

of probabilities had nonetheless found that they had raised a reasonable doubt. In short, CA 2 is devoid of any merit.

30 For completeness, I should add that the alternative basis of invoking the court's inherent power to reopen a concluded criminal appeal is no different from that under the statutory regime: *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 at [30]. As such, if the material put forth by an applicant does not satisfy the requirements set out under s 394J of the CPC, the court cannot exercise its inherent power to reopen a concluded criminal appeal on the basis of the same material: *A Steven s/o Paul Raj v Public Prosecutor* [2023] SGCA 9 at [19].

31 Having explained the true nature of the reliefs sought in OA 480, it becomes self-evident why the applicants have sought the reliefs by way of judicial review under O 24 r 5 of the ROC. Not only would the applicants have failed to satisfy the requirements under s 394J of the CPC, one of the applicants, Datchinamurthy, would have been barred under s 394K(1) of the CPC as it is impermissible to file more than one review application in respect of any decision of an appellate court: *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 at [12]–[13] and *Tangaraju s/o Suppiah v Public Prosecutor* [2023] SGCA 13 at [24]. The prior review application filed by Datchinamurthy under s 394H was dismissed by this court on 5 April 2021: see *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30 at [48]–[49].

32 In my judgment, the applicants cannot circumvent the more stringent test mandated under s 394J of the CPC by purporting to frame the application under a different procedure, that is, by way of judicial review under O 24 r 5 of the ROC.

33 Just to be clear, I am not suggesting that an applicant must choose to proceed *either* under O 24 r 5 of the ROC for permission to seek certain remedies by way of judicial review *or* for leave to apply to review a concluded criminal appeal under s 394H of the CPC. That would ultimately depend on the subject-matter and the reliefs sought in the application. Therein lies the crucial importance in ascertaining the true nature of the reliefs sought by the applicants. There are some remedies which are capable of being the subject matter of judicial review. In *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883, while the appellants were awaiting the execution of their sentences, they applied for leave to commence judicial review seeking a prohibiting order to stay their sentences and a mandatory order directing the Attorney-General and the Minister for Home Affairs to grant immunity from criminal and civil liabilities to enable an unnamed prison officer to provide information about the purported unorthodox method of execution. In *Cheong Chun Yin v Attorney-General* [2014] 3 SLR 1141, the applicant sought leave under O 53 r 1 of the Rules of Court 2014 (now O 24 r 5) to review the Public Prosecutor's decision not to grant him a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. Similarly, in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773, the applicant applied for leave to commence judicial review proceedings against the Public Prosecutor on the basis that it had acted in bad faith in refusing to grant him a certificate of substantive assistance. In each of these cases where the applicants had proceeded by way of judicial review, the remedies sought did not seek to review or reopen the underlying concluded appeals. This is unlike the application in OA 480 which is in essence an application to review a concluded appeal. Such a remedy is not amenable to judicial review.

34 This fundamental procedural defect is sufficient to dispose of SUM 8. I will nonetheless briefly address the factors relied on by the applicants in support of SUM 8.

The length of delay

35 Under O 19 r 30(4) of the ROC, the applicants were required to file the Documents in CA 2 by 14 March 2023. SUM 8 was filed on 31 March 2023. The delay of 17 days was short and if the applicants were otherwise able to satisfy the merits criterion, I would have been minded to allow SUM 8.

The reason for delay

36 The applicants rely primarily on the fact that they intended to file the Admission Applications for Mr Fitzgerald KC and Mr Kassimatis KC to represent them in CA 2. However, due to several administrative hurdles which Datchinamurthy experienced in filing the Admission Applications and the inability of Datchinamurthy's sister to assist with the process due to her recent childbirth, the applicants were unable to comply with the deadline to file the Documents.

37 However, I note that the Admission Applications, which are independent and separate from CA 2, have not as yet been filed. This omission is significant for two reasons:

(a) SUM 8 is, *inter alia*, an application for an extension of time to file the Documents no later than eight weeks following the date on which the Admission Applications are to be decided. As the time extension is to run from the date of the determination of the Admission Applications, it is simply not tenable for this court to grant any such time extension

order given the fact that no such Admission Applications have to date been filed. While the applicants have purported to provide an explanation for the *delay* in the filing of the Admission Applications, there is no explanation why they remain *unfiled* to date.

(b) This is also not the first occasion where the applicants have purported to appoint foreign counsel to represent them in CA 2. At a previous CMC on 2 September 2022 for OA 480, the applicants were granted time to engage foreign counsel by 16 September 2022. Despite an indication from Datchinamurthy's sister on 15 September 2022 that Mr Kassimatis KC had agreed to act for the applicants, which was the basis on which the court granted an extension of time to file the admission application for Mr Kassimatis KC to represent the applicants, she later informed the court on 26 September 2022 that Mr Kassimatis KC would no longer be able to represent the applicants. The applicants thus have been afforded ample time to apply for the admission of the foreign counsel to represent them in the relevant proceedings and there is no reason why the Admissions Applications have not been filed to date.

The merits or lack thereof of CA 2

38 As explained in [25]–[32] above, SUM 8 is dismissed because there are no merits whatsoever in the reliefs sought in CA 2. Consequently, it serves no purpose to either restore CA 2 or to grant any extension of time for the filing of the Documents.

The question of prejudice to the respondent

39 The prejudice to the respondent that would be occasioned by the granting of the extension of time for the filing and service of the Documents is limited. The issue is, however, rendered moot as the intended appeal in CA 2 is without merit.

Conclusion

40 In the circumstances, SUM 8 is dismissed without the hearing of oral arguments pursuant to s 55(1) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed). I make no order as to costs.

Steven Chong
Justice of the Court of Appeal

The applicants in person;
Hay Hung Chun, Claire Poh and Theong Li Han (Attorney-General's Chambers) for the respondent.