IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 97

Criminal Motion No 29 of 2020

Between

Moad Fadzir Bin Mustaffa

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

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

Moad Fadzir Bin Mustaffa
v
Public Prosecutor

[2020] SGCA 97

Court of Appeal — Criminal Motion No 29 of 2020
Tay Yong Kwang JA
22 and 25 September 2020

12 October 2020

Tay Yong Kwang JA:

The Criminal Motion

1 On 22 September 2020, Mr Moad Fadzir Bin Mustaffa ("the applicant") filed this application under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") for leave to make a review application to the Court of Appeal under s 394I of the CPC. The application is supported by an affidavit by his present counsel, Mr Ravi s/o Madasamy ("Mr M Ravi").

2 Under s 394H(6)(*a*) of the CPC, such a leave application is to be heard by a single Judge of Appeal in any case where the appellate court in question is the Court of Appeal. It is on this basis that I am dealing with this leave application.

Summary of the factual background

3 The intended review application seeks to review an earlier decision of the Court of Appeal (comprising Sundaresh Menon CJ, Judith Prakash JA and me) in *Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals* [2019] SGCA 73 ("the earlier CA judgment") delivered on 25 November 2019. The detailed facts of the applicant's criminal case are set out in the earlier CA judgment.

4 Briefly, the applicant was tried jointly with Zuraimy bin Musa ("Zuraimy") in the High Court on the following respective capital charges under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"):

> **Moad Fadzir bin Mustaffa**
>
> You, Moad Fadzir bin Mustaffa, are charged that you, on 12th April 2016, at or about 12.15 a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, together with one Zuraimy bin Musa, NRIC No. XXXXXXXXX, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(*a*) read with section 5(2) of the Misuse of Drugs Act read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) which offence is punishable under section 33(1) of the Misuse of Drugs Act.
>
> **Zuraimy bin Musa**
>
> You, Zuraimy bin Musa, are charged that you, on 12th April 2016, at or about 12.15 a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, together with one Moad Fadzir bin Mustaffa, NRIC No. XXXXXXXXX, in furtherance of the common intention of both of you, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain

> not less than 36.93 grams of diamorphine, without any authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(*a*) read with section 5(2) of the Misuse of Drugs Act read with section 34 of the Penal Code (Cap 224, 2008 Rev Ed) which offence is punishable under section 33(1) of the Misuse of Drugs Act.

5 The applicant and Zuraimy claimed trial with each alleging that the four packets of drugs belonged to the other. The High Court found the applicant guilty on his charge and convicted him. As the applicant did not satisfy any of the requirements for alternative sentencing under s 33B(2) of the MDA, the mandatory death penalty was imposed. In respect of Zuraimy, the High Court amended his charge to one of abetting the applicant's possession of diamorphine, convicted him on the amended charge and sentenced him to the maximum term of ten years' imprisonment.

6 The applicant appealed against his conviction and sentence, disputing the elements of knowledge of the nature of the drugs and possession of the drugs for the purpose of trafficking. Zuraimy appealed against his sentence on the amended charge while the Prosecution appealed against Zuraimy's acquittal on the original trafficking charge.

7 In the earlier CA judgment (at [106]), we amended the charge against the applicant by deleting all references to common intention as necessitated by the findings of the High Court and affirmed his conviction and the mandatory death sentence based on the charge as amended and reproduced below.

> You, Moad Fadzir bin Mustaffa, are charged that you, on 12th April 2016, at or about 12.15 a.m., at the vicinity of Blk 623 Woodlands Drive 52, Singapore, did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act (Cap 185, 2008, Rev Ed), to wit, by having in your possession for the purpose of trafficking, four packets of granular substances that were analysed and found to contain not less than 36.93 grams of diamorphine, without any

> authorization under the said Act or Regulations made thereunder and you have thereby committed an offence under section 5(1)(*a*) read with section 5(2) of the Misuse of Drugs Act which offence is punishable under section 33(1) of the Misuse of Drugs Act.

We therefore dismissed the applicant's appeal. We also dismissed Zuraimy's and the Prosecution's appeals.

Events after the earlier CA judgment

8 For more than nine months after the appeals were dealt with in the earlier CA judgment of 25 November 2019, there was no application to the court. On 15 September 2020, the President of the Republic of Singapore ("the President") issued her order that the death sentence on the applicant be carried into effect on Thursday, 24 September 2020 between 6.00am and 6.00pm. In the afternoon of Tuesday, 22 September 2020, barely two days before the date of execution, the applicant filed the present Criminal Motion for leave to make a review application to the Court of Appeal. This was accompanied by Mr M Ravi's affidavit and his written submissions. On 23 September 2020, the President ordered a respite of the execution pending further order.

9 On Friday, 25 September 2020, the Prosecution filed an affidavit by DPP Muhamad Imaduddien bin Abd Karim (the lead counsel for the Prosecution in the abovementioned trial in the High Court), an affidavit by DPP Sarah Siaw Ming Hui (one of three DPPs who conducted the appeal in the earlier CA judgment, none of whom was involved in the trial in the High Court) and the Prosecution's written submissions in response to and in objection to the application.

The decision of the court

10 The principles governing the stringent threshold for a review application have been reiterated in the recent decision of the Court of Appeal in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] SGCA 91 ("*Kreetharan*") (at [17]–[20]). An application for leave to make a review application must disclose a legitimate basis for the exercise of the court's power of review (*Kreetharan* at [17]). An applicant in a review application must demonstrate to 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 (s 394J(2) of the CPC). For the material to be "sufficient", it must satisfy all the requirements set out in s 394J(3)(*a*) to (*c*): (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 said criminal matter; (b) the material could not have been adduced in court earlier even with reasonable diligence; and (c) the material is 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 said criminal matter. Where the material consists of legal arguments, s 394J(4) imposes an additional requirement that it 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 said criminal matter.

11 The applicant submits that his application concerns important points of procedural fairness and seeks to argue the following five grounds:

(a) failure of prosecutorial duty to call material witnesses;

(b) failure to consider the applicability of s 33B(2) of the MDA, the "Courier Plea", prior to sentencing;

(c) failure to correctly classify the applicant's role in the offending;

(d) failure to caution the applicant and the applicant's right to silence; and

(e) the standard applied by the trial judge when considering the applicant's state of mind to rebut the presumption of knowledge under s 18(2) MDA.

Both parties' submissions refer to the above grounds as Ground 1 to Ground 5 respectively. I shall do likewise here.

12 As is apparent from the above, this application does not rely on new evidence for the purpose of showing "sufficient material" under s 394J(2) of the CPC. It therefore rests on only new legal arguments.

Ground 1: failure of prosecutorial duty to call material witnesses

13 The applicant contends that the Prosecution's failure to call two material witnesses (Benathan and Yan) was not considered at any stage of the criminal proceedings. He refers to this court's decision in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*"), which was decided after the earlier CA judgment here, for the proposition that while the Prosecution has no duty to call material witnesses, in appropriate circumstances it may be that such failure to call a material witness could result in the Prosecution failing to satisfy its evidential burden or to rebut a defence put forward by the accused (at [67]).

14 *Nabill* concerned a case where statements had been taken from witnesses who could be expected to confirm or to contradict material aspects in the accused's defence. This court held that the Prosecution had no duty to call such

material witnesses to testify but had the duty to disclose to the Defence their statements where the Prosecution was not calling those witnesses to give evidence in court (at [39] and [58]). This court in *Nabill* also stated that in appropriate circumstances, the failure to call a material witness might mean that the Prosecution had failed to discharge its evidential burden to rebut the defence advanced by an accused person (at [67]). This court further stated that the Prosecution ran a real risk that it would be found to have failed to discharge its evidential burden on material facts in issue if the Defence had adduced evidence that was not inherently incredible and the Prosecution failed to call the relevant material witnesses to rebut that evidence (at [71]).

15 In the present case, the identities of Benathan and Yan could not be ascertained and accordingly, no statements were taken from them. The fact that they could not be identified or located was also considered in the earlier CA judgment and the court did not find their absence damaging to the Prosecution's case in any way. The applicant mentioned Yan only during the trial and likewise, Zuraimy mentioned Benathan only in his testimony. In these circumstances, any suggestion that the Central Narcotics Bureau ("CNB") was wanting in its investigations in respect of these two purported witnesses is unwarranted.

16 Whatever new law pertaining to the Prosecution's additional disclosure obligations that resulted from *Nabill* therefore has no application to the case here. This court's pronouncements concerning the evidential burden did not result in any change in the law. Further, the earlier CA judgment in this case did not find the applicant's evidence concerning Yan to be credible ([82]). Ground 1 would certainly fail to meet the standard of "sufficient material" set out in s 394J of the CPC.

Ground 2: failure to consider the applicability of s 33B(2) of the MDA, the "Courier Plea", prior to sentencing

17 The applicant argues that the alternative sentencing regime in s 33B(2) of the MDA was not raised by both parties before the High Court. The High Court therefore did not consider specifically its applicability and it imposed the death penalty immediately after finding the applicant guilty. It was further argued that the earlier CA judgment stated incorrectly that the High Court imposed the death penalty after it found that the applicant did not satisfy any of the requirements of s 33B(2).

18 The applicant relies on the Court of Appeal's statement in *Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 1374 ("*Azli*"), a judgment which was issued after the earlier CA judgment, that "if the accused person is convicted of the capital charge, the Defence, the Prosecution and the trial judge are each responsible for considering the applicability of s 33B(2) and 33B(3) prior to sentencing" (at [34]). He alleges that he suffered a miscarriage of justice as he was "denied the ability to be considered for the benefit of the alternative sentencing regime of s 33B(1)(*a*) of the MDA which would have prohibited the Judge from sentencing the applicant to a mandatory death sentence".

19 *Azli* did not change the law on s 33B of the MDA. It only sought to remind everyone involved in a trial which concerns a capital charge under the MDA of the existence and importance of s 33B as it confers a discretion on the High Court not to impose the death penalty and instead allows the court to sentence the accused person to life imprisonment, with or without caning depending on the grounds relied upon. I should mention in passing here that s 33B does not "prohibit" the High Court from imposing the death penalty (as

submitted by the applicant above) even if all the statutory requirements are met. Instead, it confers the discretion just mentioned.

20 Further, the earlier CA judgment concluded that the applicant did not satisfy the "courier and certificate" requirements in s 33B(2) and therefore did not qualify for consideration under the alternative sentencing regime (at [88]). The applicant has not put forward any material to show that this conclusion is so clearly wrong that it resulted in a miscarriage of justice. The affidavit of DPP Muhamad Imaduddien bin Abd Karim also confirms that the Public Prosecutor did consider the question of the certificate of substantive assistance and decided that none would be issued for the applicant. As for the suggestion that the applicant deserved such a certificate as he was cooperative and had provided the information necessary to charge Zuraimy, the application here is not for the purpose of challenging the Public Prosecutor's decision not to issue the certificate. Further, if the applicant is suggesting that the question of whether he was suffering from diminished responsibility has not been considered, it is clear that he did not attempt to adduce any evidence relating to this issue in the earlier proceedings and has not produced any new evidence relating to such in this application. There can be no dispute that s 33B of the MDA places the burden of proving that an accused person was a mere courier or that he was suffering from diminished responsibility on the accused person.

21 Strangely, the applicant also included under Ground 2 the contention that "a further extension to this ground arises from" CA/CM 27/2020, *Syed Suhail bin Syed Zin v Public Prosecutor* ("*Syed Suhail*") (I believe it should have been CA/CM 28/2020 which is pending decision by the Court of Appeal). He submits that the conduct of the Singapore Prison Service in that case raises questions as to whether it has abused its powers or acted illegally in that case and in other similar cases by making unauthorised disclosure to the Attorney-

General's Chambers of an accused person's letters which may contain information which is subject to privilege. The applicant submits that given the potential implications in relation to whether disclosures of this nature have been made in cases beyond *Syed Suhail*, "further prosecutorial disclosures on this point in connection with this applicant's case are required in the interests of justice".

22 In any case, the affidavits of DPP Muhamad Imaduddien bin Abd Karim and DPP Sarah Siaw Ming Hui have confirmed that there was no disclosure by the Singapore Prison Service to the Attorney-General's Chambers of any of the applicant's correspondence to third parties which were of a private or confidential nature.

Ground 3: failure to correctly classify the applicant's role in the offending

23 The applicant submits that the earlier CA judgment erred in ranking him as the primary offender and concluding that Zuraimy's role was one of aiding and abetting. There is no new evidence or new legal argument on this point and the applicant's short one-paragraph submissions on the existing evidence are nothing more than an attempt to re-argue the appeal, something clearly not permitted in a review application.

Ground 4: failure to caution the applicant and the applicant's right to silence

24 The applicant contends that the CNB officer who recorded the two contemporaneous statements ("P84" and "P85") did not caution him on his right to silence or the right to refuse to provide information that could expose him to criminal sanctions. While he accepts that there is no duty to inform an accused person of the right to silence under the CPC, he argues that there is persuasive

comparative case law to the effect that a caution of the right to silence ought to be given at the time that evidence is being given. He further argues that he was warned that he had an option to give evidence but if he elected to remain silent, adverse inferences could be drawn therefrom. He submits that this warning effectively induced him into giving evidence involuntarily, rendering his statement inadmissible under s 258(3) of the CPC.

25 The applicant also contends that there was a threat to arrest his mother, he was not provided with a Malay interpreter and he was suffering from acute drowsiness.

26 A study of the earlier CA judgment will show that the issue of the admissibility of the contemporaneous statements in P84 and P85 was dealt with fully (see [58] to [73]). Ground 4, like the contentions in Ground 3, is nothing more than an impermissible attempt to re-argue the appeal. Insofar as the law is concerned, the applicant has acknowledged what the applicable law is. Far from showing that there has been "a change in the law" (s 394J(4) of the CPC), he appears to be advocating that there should be a change in the law.

Ground 5: the standard applied by the trial judge when considering the applicant's state of mind to rebut the presumption of knowledge under s 18(2) MDA

27 The applicant submits that this application raises important points of law on the proper interpretation of the presumption of knowledge in s 18(2) of the MDA. The applicant argues that it is "not clear what standard of state of mind was applied by the Honourable trial judge and appears more consistent with wilful blindness than actual knowledge". He then refers to another decision of this court in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 for the

proposition that wilful blindness has no application to the presumption of knowledge in s 18(2) of the MDA.

28 The earlier CA judgment (at [74] and [75]) shows that the applicant was found to have known for a fact that the four bundles were drugs and that they contained diamorphine. There was therefore no issue about any presumption of knowledge or wilful blindness.

Conclusion

29 Under s 394H(7) of the CPC, a leave application may, without being set down for hearing, be summarily dealt with by a written order of the appellate court. Under s 394H(8), before summarily refusing a leave application, the appellate court must consider the applicant's written submissions (if any) and may, but is not required to, consider the respondent's written submissions (if any). I have considered both parties' affidavits and written submissions and for the reasons set out in this judgment, none of the applicant's five grounds discloses a legitimate basis for the exercise of the Court of Appeal's power of review. I am therefore summarily refusing the applicant's leave application. The leave application is dismissed.

Tay Yong Kwang
Judge of Appeal

Ravi s/o Madasamy (Carson Law Chambers) for the applicant;
Wong Woon Kwong, Muhamad Imaduddien bin Abd Karim, Li Yihong, Sarah Siaw (Attorney-General's Chambers) for the respondent.
