IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 252

Magistrate's Appeal No 9110 of 2017

Between

Mia Mukles

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Appeal]

[Criminal Law] — [Statutory offences] — [Work Injury Compensation Act (Cap 354, 2009 Rev Ed)]

Mia Mukles
v
Public Prosecutor

[2017] SGHC 252

High Court — Magistrate's Appeal No 9110 of 2017
Steven Chong JA
31 August 2017

13 October 2017 Judgment reserved.

Steven Chong JA:

Introduction

1 The Appellant, Mia Mukles, is a Bangladeshi who worked for Wee Seng Marine and Engineering Pte Ltd ("Wee Seng"). At the material time, he was working on a modular section of a hull under construction ("the Block") at Keppel Fels Shipyard ("the Shipyard"). He is appealing against his conviction on two charges in the court below. The first charge was for making a fraudulent claim for compensation under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("WICA"), an offence under s 35(2)(*f*) and punishable under s 35(2)(iv) of the WICA. The second charge was for making a false statement to an investigation officer ("IO") during the investigation in respect of his compensation claim, which is an offence under s 35(2)(*c*) of the WICA.

2 It is not disputed that the Appellant submitted a claim for compensation under the WICA.[1] It is also not disputed that he made a statement to the IO that he sustained injury to his back when he fell while climbing up a ladder in the course of his work on the Block.[2] The only dispute in the court below and on appeal is whether the claim and consequently the statement were false. The District Judge ("the Judge") found against the Appellant on both scores. The convictions therefore turn entirely on one factual issue – is there any reasonable doubt that the Appellant fell from the ladder thereby injuring his back while working on the Block on 17 May 2015?

3 The Judge convicted the Appellant of both charges and sentenced him to two terms of imprisonment of six weeks and four weeks for the first and second charges respectively and ordered both sentences to run concurrently. The Judge preferred the evidence of the prosecution witnesses and found the Appellant's evidence to be "inconsistent, incoherent or incredible" (see the Grounds of Decision ("the GD") at [71]). In particular, the Judge accepted the eye witness account of a fellow Bangladeshi worker who saw the Appellant walk up to the ladder area and sit down before lying down on the floor (see the GD at [41]–[45]). This is diametrically contrary to the Appellant's claim that he fell off a ladder while working on the Block.

4 For this appeal, counsel for the Appellant, Mr Anil Narain Balchandani, raises many arguments to challenge the Judge's findings. I find two of the arguments particularly troubling not just because they were not raised during the trial below but also because they allege serious impropriety against the

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1 ROP Vol 2 at pp 239–240; Appellant's written submissions at para 11; Respondent's written submissions at para 8.

2 ROP Vol 2 at p 244; Appellant's written submissions at para 11; Respondent's written submissions at para 8.

prosecution witnesses, their two employers, and the Shipyard without having put these allegations to them and without any evidential foundation.

5 First, in his zeal to advance the Appellant's best case, Mr Balchandani alleges that the prosecution witnesses had *colluded* with each other to provide false testimony to wrongly implicate the Appellant, an innocent man. His submission went so far as to suggest that the collusion involved the Shipyard, Wee Seng, and another sub-contractor, OUS Pte Ltd ("OUS"). Not only was this collusion theory not formally put to the witnesses during the trial, there is simply no evidential basis for such serious allegations to be made in the first place. The second argument which troubles me concerns some videos and photographs (Exhibits D3 to D8 – collectively, "the Exhibits") which the IO received from the Shipyard[3] and which were brought to the attention of the Judge just before the close of the Prosecution's case. Their existence emerged in the course of the IO's cross-examination. The Prosecution explained that it was not relying on the Exhibits as it took the position that the Exhibits were at best neutral to the two charges. The Judge nevertheless gave the Appellant sufficient time to consider the Exhibits and thereafter allowed him to recall several witnesses following an interval of some four months. Despite Mr Balchandani's submission that the Exhibits, in particular the videos, were exculpatory of the Appellant, the Judge found that the Exhibits did not assist the Appellant but instead undermined the Appellant's defence (see the GD at [83]). What is especially disturbing is that for this appeal, without any factual or expert evidence, Mr Balchandani maintains the same submission he made before the court below that it is "plausible" that the videos had been *tampered* with or at least edited by the Shipyard.[4] The very nature of such an allegation cries out for

3 ROP Vol 1 at p 341.

4 ROP Vol 2 at p 432 (para 52); Appellant's written submissions at para 168.

substantiation. Yet this was not even put to any witness in the court below. Mr Balchandani claims on appeal, as he did below, that *he* only realised the possibility of the videos having been edited while he was preparing his closing submissions for the trial.[5] His belated *personal* assessment of the videos offers no excuse for his misconceived pursuit of such a serious allegation without any *independent* factual foundation.

6 While it is the duty of every counsel to put forward all *available* arguments in the best interest of his client, it is equally important for counsel to recognise his overarching duty as an officer of the court (see *Public Trustee and another v By Products Traders Pte Ltd and others* [2005] 3 SLR(R) 449 at [26] and [35]). The balancing of these twin duties requires counsel to make submissions in a *responsible* manner. This is especially so if the submission suggests either impropriety (such as evidence-tampering) or the commission of a crime (which in this case would be perjury alleged against the prosecution witnesses with the connivance of the Shipyard, Wee Seng, and OUS). In my view, submissions of such gravity should never be made by counsel without any legitimate evidential basis and without putting the serious charges to the relevant witnesses to afford them an opportunity to respond. To do otherwise would not only be reckless but would also be a breach of counsel's ethical duties.

7 I think it is timely to remind counsel of two important provisions in the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("the PCR"), namely rr 12(3) and 12(4) which bear on such conduct:

> **12.**— …

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[5] Appellant's written submissions at paras 164–165, 168.

> (3) A legal practitioner must not, by asserting in a statement to a court or tribunal, make any allegation against a witness whom the legal practitioner cross-examined or was given an opportunity to cross-examine, *unless the legal practitioner has given the witness an opportunity to answer the allegation during cross-examination.*
>
> (4) A legal practitioner must not suggest that a witness or any other person is guilty of any offence or conduct, or attribute to a witness or any other person any offence or conduct of which the legal practitioner's client is accused, unless the suggestion or attribution relates to a matter in issue (including the credibility of the witness) which is material to the client's case ***and*** *which appears to the legal practitioner to be supported by reasonable grounds.*
>
> [emphasis added]

By failing to put serious allegations to the witnesses, counsel run the risk of breaching these two provisions.

No reason to disturb the Judge's assessment of the witnesses

8 It is common ground between the parties that an appellate court has a limited scope of review over a trial judge's findings of fact (*Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 61 at [91]) and an "extremely heavy burden" is cast on an appellant to displace such findings of fact (*Syed Jafaralsadeg bin Abdul Kadir Alhadad v Public Prosecutor* [1998] 3 SLR(R) 352 at [57]). When a trial judge makes finding of fact based on the credibility of witnesses whom he has had the opportunity to see and assess, an appellate court will generally defer to the conclusion which the trial judge has formed unless the appellate court is "convinced" that the trial judge's decision was wrong (*Public Prosecutor v Poh Oh Sim* [1990] 2 SLR(R) 408 at [8]). The decision of the Judge was largely based on his assessment of the witnesses whom he heard over a nine-day trial. His findings (which were painstakingly set out in a 51-page GD) must be examined against the conspicuous absence of any bruising or swelling to the Appellant's back. Given the Appellant's description of the

severity of the pain he endured, one would have expected there to be bruising or swelling or some form of physical appearance of the injury.

9 Having considered the parties' submissions and the evidence, I find that there is plainly no reason for me to disturb the Judge's assessment of the witnesses. I begin by examining the evidence of the prosecution witnesses, specifically that of Md Safikul Islam (Safik) Md Sukkur Ali ("Safikul"), Ali Hasmot ("Hasmot"), Ashek Abdul Hashem ("Ashek"), and Sujon Moniruzzaman ("Sujon").[6]

Eye witness account – Safikul

10 The most crucial witness was Safikul. He witnessed the Appellant feigning the fall. Safikul testified that he saw the Appellant bend down and move towards the ladder.[7] After that, the Appellant sat down, laid down on the floor next to the ladder and then shouted that he had fallen from the ladder.[8] It follows from Safikul's evidence that the Appellant did not fall while climbing up the ladder. Safikul testified that he was observing the Appellant because he was concerned that the Appellant might enter the area where lifting operations were taking place under his supervision.[9]

11 I note that Safikul was in close proximity to the Appellant throughout the entire incident. He was only approximately three to four and a half metres away from the Appellant.[10] He had a clear line of vision to the Appellant as the

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6 ROP Vol 2 at p 197.

7 ROP Vol 1 at p 210 (lines 20–22); ROP Vol 2 at p 222.

8 ROP Vol 1 at p 211 (lines 7–13).

9 ROP Vol 1 at p 210 (lines 23–25).

10 ROP Vol 2 at pp 209 (lines 24–25), 222.

Appellant walked to the location of the ladder with his body bent,[11] and subsequently sat and laid down on the floor. Referring to Exhibit D8,[12] Mr Balchandani argues that Safikul's line of sight was obstructed by objects and materials standing between Safikul's position and the Appellant's position at the time of the incident.[13] In my view, Exhibit D8 does not assist the Appellant. On the contrary, it confirms Safikul's evidence that the Appellant had to bend down before he could lie down on the ground next to the ladder, which was under the Block. Exhibit D8 also shows that Safikul's line of vision was not completely blocked. The mere fact that there were other objects in his line of vision did not prevent Safikul from observing the Appellant's behaviour. There is no reason for me to doubt the Judge's assessment that Safikul was well able to observe the Appellant's movement towards the ladder and thereafter his lying down next to it.

12 Next, in an attempt to challenge Safikul's eye witness account, the Appellant relies on Sujon's testimony that he did not notice any lifting operations or any person standing at Safikul's position at the time of the alleged incident.[14] However, the mere fact that Sujon did not notice the lifting operations does not mean that the lifting operations did not take place. Sujon explained that the reason he did not notice the lifting operations was because he was "underneath … the [B]lock doing [his] work" whereas lifting works are normally done outside the [B]lock.[15] Ashek's testimony that he did not know of any person by the name of Safikul also cannot possibly assist the Appellant.[16]

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11 ROP Vol 1 at p 210 (lines 26–29).

12 ROP Vol 2 at p 252.

13 Appellant's written submissions at para 76.

14 Appellant's written submissions at para 72.

15 ROP Vol 1 at p 296 (lines 12–16).

That Ashek does not know Safikul is irrelevant to the inquiry as to whether Safikul's evidence is to be believed. After all, they worked for different companies – Safikul worked for OUS while Ashek worked for Wee Seng. I should add that the fact that Ashek did not know Safikul reinforces my finding that Safikul had no reason to collude with Ashek and the other prosecution witnesses to falsely implicate the Appellant (this is elaborated at [20]–[22] below). Further, Safikul's evidence was consistent throughout the trial. Even after he was recalled and the videos were disclosed, his evidence remained unshaken. He confirmed that his view of the ladder was not obstructed[17] and that he saw the Appellant walk towards the ladder, before sitting and lying down on the floor.[18] The Appellant also sought to discredit Safikul's testimony by comparing his evidence with that of Hasmot's. Safikul said that he saw the Appellant moving his body from side to side on the floor while Hasmot stated that the Appellant rolled his body twice over. However, Safikul did testify when he was recalled that the Appellant "sat and he lied down, then he start to roll".[19] Such a minor inconsistent description of some bodily movement does not affect Safikul's clear evidence that he saw the Appellant sitting down before lying down on the floor instead of falling off the ladder while climbing.

13 I will now turn to the evidence of the other prosecution witnesses, namely Hasmot, Ashek, and Sujon.

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16 ROP Vol 1 at p 194 (lines 19–23).

17 ROP Vol 2 at p 38 (lines 22–24).

18 ROP Vol 2 at p 70 (line 16).

19 ROP Vol 2 at p 70 (line 16).

Hasmot, Ashek, and Sujon

14 The Appellant is correct in stating that neither Hasmot, Ashek, nor Sujon witnessed what Safikul saw (*ie*, the Appellant walking towards the ladder, bending down, and lying on the floor). Nonetheless, their evidence is relevant to the pivotal question of whether the Appellant had any reason to climb up the ladder to the second level of the Block. This, together with their observations of the Appellant's behaviour and reaction after the alleged fall, supports the Judge's finding that the Appellant did not fall while climbing up the ladder at the material time.

Was the Appellant instructed to do any work on the second level?

15 While the questions of whether the Appellant had any reason to climb up the ladder and whether he did in fact climb up the ladder are strictly separate inquiries, it is, nonetheless, crucial to understand the context under which the fall allegedly occurred, as recounted by the Appellant. It is the Appellant's own evidence that he was instructed by Hasmot to go up to the second level to "cut the support".[20] However, in the Appellant's online submission for his workplace injury claim he stated that he was instructed by Ashek instead to do the grinding work on the support … standing upon the staging ladder almost 2 [metres] [high]".[21] Although the Appellant gave conflicting accounts as to who had instructed him to go to the second level, it is clear that his case is that he did not use the ladder to climb up on his own accord. On either account, his evidence was that he was instructed to do so. Therefore, on the Appellant's own case, the two inquiries are inextricably connected. If he was not instructed by Hasmot or Ashek to do any work on the second level as he claimed, it stands to reason that

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20 ROP Vol 1 at p 566 (lines 21–24).

21 ROP Vol 2 at p 239.

the Appellant, by his own evidence, had no reason to use the ladder and consequently did not fall while climbing up the ladder.

16 Ashek, who is the Appellant's supervisor, testified that the Appellant had no reason to use the ladder at the material time.[22] This was not challenged. According to Hasmot, the Appellant had complained that he was suffering from a stomach ache and a headache.[23] It was Hasmot's evidence that he told the Appellant to "take [a] rest"[24] and that he did not need to work.[25] He added that there was no urgency to finish the work as they were not on a tight schedule.[26] There is also no dispute that Hasmot did contact Ashek, his supervisor, to get a replacement for the Appellant after the latter claimed that he was not feeling well.[27] It was during this call that the Appellant allegedly climbed the ladder to undertake some work on the second floor and thereafter allegedly fell from the ladder.[28] However, it was never put to Hasmot that he had specifically instructed the Appellant to go to the second level to do some work, whether it was cutting or grinding or even both. Instead, all that was put to Hasmot was that he had told the Appellant to continue working and "so he went and climbed to level 2".[29] The distinction between the two is quite material because it was the Appellant's own evidence that Hasmot had specifically instructed him to go to the second level to "cut the support".[30] Further, during the hearing of the appeal,

22 ROP Vol 1 at p 158 (lines 26–27).

23 ROP Vol 1 at pp 23 (lines 22–27), 26 (lines 13–16).

24 ROP Vol 1 at pp 52 (lines 10–11), 54 (lines 1–5).

25 ROP Vol 1 at p 66 (lines 6–8).

26 ROP Vol 1 at p 55 (lines 3–5).

27 ROP Vol 1 at pp 23 (lines 22–27), 151 (lines 2–6).

28 ROP Vol 1 at pp 24 (lines 8–13); 26 (lines 22–27).

29 ROP Vol 1 at p 66 (lines 16–17).

30 ROP Vol 1 at p 566 (lines 21–24).

Mr Balchandani submitted that Hasmot had lied in that he only contacted Ashek and requested for a replacement *after* the Appellant had fallen from the ladder. However, when probed, he conceded that this was never put to Hasmot in cross-examination. Leaving aside for the moment the Appellant's conflicting evidence as to the nature of work he was tasked to do on the second level, I agree with the Prosecution and, in particular, the Judge's finding that there was no reason for the Appellant, "in his 'stricken' condition", to do any work on the second level of the Block at the time of the incident (see the GD at [32]). Not only was the Appellant allegedly unwell, Hasmot had specifically told him that he had "no need to work" as Hasmot was already calling for a replacement for him.[31] The Appellant did not dispute the fact that Hasmot had made these statements to him and I see no reason to disbelieve Hasmot's evidence.

17 Another important point to note is the fact that the Appellant was barely a metre from Hasmot at the time of the incident.[32] It would be too much of a coincidence that the Appellant would use the ladder to climb to the second level to do work which he was not instructed to do at the precise moment when Hasmot had his back turned away from the Appellant while calling Ashek for the replacement worker. It is therefore difficult to imagine how Hasmot would not have noticed the Appellant climbing and falling from the ladder if that had actually happened.

18 The prosecution witnesses' observations of the Appellant's behaviour and reaction after the alleged fall also support the Judge's finding that the Appellant did not fall while climbing up the ladder. According to Hasmot, when the Appellant was on the floor, he complained to Hasmot that he had "more

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31 ROP Vol 1 at p 66 (lines 6–8).

32 ROP Vol 1 at p 28 (lines 5–15).

stomach and headache".[33] Ashek also consistently testified that when he saw the Appellant, he was rubbing "both hands on his stomach".[34] In fact, on seeing the Appellant in this condition, he thought that he was suffering from stomach pain.[35] What is particularly telling is that Ashek did not see the Appellant holding onto his back at any time.[36] Likewise, Sujon testified that when he arrived at the scene of the alleged accident, he saw the Appellant rubbing his stomach.[37] All these unchallenged observations are entirely inconsistent with the Appellant's claim that he injured his back as a result of his alleged fall.

19 It is futile for the Appellant to identify inconsistencies in the evidence of the prosecution witnesses where they have no bearing to the relevant issues before the court. The Appellant identifies inconsistencies such as (a) when lunch break was held; (b) whom they had lunch with;[38] (c) who was the first to attend to the Appellant,[39] (d) whether Ashek had poured water on the Appellant's head;[40] and (e) who had helped the Appellant to the Shipyard clinic.[41] In my view, these trivial discrepancies are not material to the relevant inquiry as to whether the Appellant had any reason to use the ladder and whether he fell from the ladder in the process. Given Hasmot's evidence that he had told the Appellant to rest, coupled with the Appellant's failure to put to Hasmot that he

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33 ROP Vol 1 at pp 28 (lines 1–4), 56 (lines 6–8).

34 ROP Vol 1 at pp 151 (lines 7–15), 157 (lines 4–6), 173 (lines 14–15), 181 (lines 7–13).

35 ROP Vol 1 at pp 157 (lines 4–6), 181 (lines 1–2).

36 ROP Vol 1 at p 173 (lines 16–17).

37 ROP Vol 1 at pp 251 (line 1).

38 Appellant's written submissions at para 115.

39 Appellant's written submissions at para 117.

40 Appellant's written submissions at para 118.

41 Appellant's written submissions at para 120.

had specifically instructed the Appellant to go to the second level to do work, it is simply not open to the Appellant to challenge the Judge's finding that he did not fall while climbing up the ladder. He had no reason to go up to the second level to begin with.

Collusion – a baseless submission

20 It is unacceptable for the Appellant to rely on these irrelevant inconsistencies to make the astonishing submission that such inconsistencies arose because the prosecution witnesses were "told generally to state that the Appellant feigned the accident but the details as to how he feigned the accident were lost in translation".[42] In essence, the Appellant's case is that Hasmot, Ashek, Sujon and Safikul had *colluded* to provide false testimonies to incriminate an innocent man but somehow the collusion was carried out incompetently. The Appellant expressly submits:[43]

> … that the witnesses had *colluded or rehearsed* some part of their testimon[ies] to promote a larger objective. The larger objective is to accuse the Appellant of fabricating the incident so that the Shipyard would not have to answer to the Ministry of Manpower. [emphasis added]

21 I agree with the Prosecution that there is no evidence for this incredible claim.[44] In my view, there is no conceivable motive for any of the prosecution witnesses to have colluded against the Appellant. Quite apart from the undeniable fact that it was never put to any of them that they had colluded with one another to concoct false evidence against the Appellant, it bears mention that all of them, save for Safikul, were identified by the Appellant as *his*

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42 Appellant's written submissions at para 119.

43 Appellant's written submissions at para 64.

44 Respondent's written submissions at para 19.

witnesses whom the Ministry of Manpower ("MOM") could inquire with in order to *verify* his compensation claim. The significance of the Appellant's choice lies in the fact that the Appellant obviously regarded them as witnesses who would speak the truth should they be approached by MOM to assist in processing his claim. This makes the failure to put the collusion allegation to them all the more egregious. While it was suggested to Hasmot and Safikul that they *had lied* in relation to certain aspects of their evidence (for example, that the Appellant was suffering from a headache and stomach ache,[45] that the Appellant rolled one metre away,[46] and in respect of Safikul's position at the time of the incident[47]), it is entirely different to suggest that they *had colluded* with each other to falsely incriminate the Appellant. Inherent in any collusion is an agreement among witnesses to provide false evidence in a co-ordinated manner. What is even more unacceptable is Mr Balchandani's submission that "it cannot be a very distant thought to form a nexus between [Wee Seng] and [the Shipyard], and OUS and [the Shipyard] to arrive at a conclusion that [the Shipyard] likely *orchestrated* a story to benefit [Wee Seng]" [emphasis added].[48] This is a shocking submission in blatant breach of the rule in *Browne v Dunn* (1893) 6 R 67 and *possibly* rr 12(3) and (4) of the PCR.

22 There is also no reason for Safikul to have falsified his evidence against the Appellant. Safikul worked for OUS, a different company from that of the Appellant.[49] There is no evidence that Safikul had anything to gain from testifying against the Appellant or bore any ill will towards him. It is improper

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45 ROP Vol 1 at p 67 (lines 8–17).

46 ROP Vol 1 at p 67 (lines 24–26).

47 ROP Vol 2 at pp 58 (line 10) – 59 (line 13).

48 Appellant's written submissions at para 60.

49 ROP Vol 1 at p 197 (lines 29–32).

for Mr Balchandani to submit that Safikul "was beholden to [OUS] and was told to state certain facts in a manner that represented the overall story that [the Shipyard] wished to portray to the IO: that an accident did not happen and that the Appellant feigned the entire incident".[50] It is improper because Mr Balchandani effectively accused Safikul of perjury at the instigation of the Shipyard when it was never even put to Safikul. It is also unacceptable for Mr Balchandani to launch a scurrilous attack to unfairly impugn the reputation of three companies, namely the Shipyard, Wee Seng, and OUS.

The Appellant's evidence

23 Unlike the inconsequential discrepancies in relation to the prosecution witnesses' evidence, the discrepancies in the Appellant's evidence were significant as they directly concerned the circumstances of the alleged fall. The discrepancies in the Appellant's evidence relate to (a) his reasons for climbing the ladder; (b) whether he was wearing a helmet at the time of the incident; (c) whether he was unconscious immediately following his fall; and (d) whether he was carried from the in-house hospital to the lorry.

24 The Judge found that the Appellant gave inconsistent explanations as to why he had to use the ladder to get up to the second level of the Block. For the appeal, Mr Balchandani devotes much effort to explain that the Appellant's evidence in this regard was not in fact inconsistent. According to Mr Balchandani, there was apparently some confusion in the Appellant's evidence as to whether cutting and grinding were separate tasks when in truth they meant the same thing. He submits that the Judge failed to take into account the Appellant's clarifications in re-examination.

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[50] Appellant's written submissions at para 62.

25 The Appellant initially testified that he had to do "pipe support work".[51] Later, he testified that he went up to the second level to "cut a support".[52] This differed from his online form to MOM[53] and earlier statement to MOM where he claimed that he was to do grinding work.[54] He then tried to equate cutting with grinding despite explaining that grinding was for the purpose of smoothening the surface.[55] The Appellant argues that cutting requires using a different edge of the disc of the grinding machine[56] but this does not change the fact that his testimony was inconsistent in respect of the type of work he was engaged in. However, in his re-examination, the Appellant, in response to Mr Balchandani's question as to whether cutting and grinding in the industry mean the same thing, answered in the affirmative.[57]

26 In my view, it is a wholly misdirected exercise to seek to reconcile the different explanations provided by the Appellant as to the work he was tasked to do on the second level before he allegedly fell. Even if I am prepared to give the Appellant the benefit of the doubt that he might have provided inconsistent answers about the task he was asked to do on the second level because he did not fully understand the questions asked of him in cross-examination, it is important not to lose sight of the real significance of this line of questioning. Its significance lies in establishing whether the Appellant had any reason to use the ladder in the first place. It should not be overlooked that the Appellant was

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51 ROP Vol 1 at p 468 (lines 1–2).

52 ROP Vol 1 at p 472 (lines 1–5).

53 ROP Vol 2 at p 239.

54 ROP Vol 2 at p 244.

55 ROP Vol 1 at p 568 (lines 7–18).

56 Appellant's written submissions at para 34.

57 ROP Vol 1 at p 646 (lines 5–9).

assisting Hasmot with his work that day. It is the Appellant's own evidence that he was instructed by Hasmot to go up to the second level to "cut the support".[58] However, it was never put to Hasmot that he had specifically instructed the Appellant to do any work on the second level of the Block. This was a significant omission considering Hasmot's evidence that he had told the Appellant to rest as he was calling for a replacement worker. In other words, Hasmot, whom the Appellant was assisting, did not task the Appellant to do *any* work on the second level.

27 Second, the Appellant gave vacillating accounts as to whether he was wearing a helmet when he hit the ground. Initially, he could not remember if the helmet was on his head because he claimed to have lost his "memory" and consciousness when he hit the ground.[59] Subsequently, when the Appellant was asked to provide an explanation as to why he did not suffer from a head injury, he then changed his explanation that this was because he was wearing his helmet when he hit the ground.[60] When questioned further as to whether his helmet was on his head when he hit the ground, he said that after he fell down, he "cannot say anything".[61] I accept that there might be some doubt as to whether the Appellant was wearing a helmet when he was observed to be walking to the ladder area. In this respect, I note that Safikul testified that he saw the Appellant wearing a helmet as he walked towards the ladder (not when he was found lying on the ground)[62] while the objective evidence suggests otherwise. In Exhibit D3, one of the persons in the Appellant's vicinity when he was on the ground can

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58 ROP Vol 1 at p 566 (lines 21–24).

59 ROP Vol 1 at pp 572 (lines 31–32), 573 (lines 5–16).

60 ROP Vol 1 at pp 609 (line 25) – 610 (line 12).

61 ROP Vol 1 at p 610 (lines 28–32).

62 ROP Vol 1 at p 222 (lines 12–13); ROP Vol 2 at p 46 (lines 6–11).

be heard repeatedly asking the Appellant, "where is your helmet?" Further, Exhibits D4 and D7 show the Appellant's position on the ground after the fall but no helmet could be seen in the vicinity. However, the materiality of the Appellant's conflicting accounts lies in the reason for his vacillations and not the factual inquiry *per se* as to whether he was in fact wearing a helmet. It appears to me that he *changed* his evidence in order to reconcile the fact that he did not sustain any head injury notwithstanding that his head allegedly hit the ground causing him to lose consciousness momentarily.

28 Third, although the Appellant claims that he was unconscious immediately following his fall, this is not supported by any objective evidence. It is not disputed that no one saw the Appellant in an unconscious state. What I find interesting is the Appellant's claim that someone must have removed his helmet when he was on the floor in order to pour water on his head.[63] He said he saw Hasmot pouring water on his head while he was lying on the ground and that Sujon also told him that he did the same.[64] This was confirmed by Hasmot and Sujon. In fact, Sujon testified under cross-examination that he poured the water *at the Appellant's request* because he claimed to be suffering from a headache and not because they found him in an unconscious state.[65] Both Hasmot's and Sujon's evidence was unchallenged. That water was poured at the request of the Appellant because he had complained of a headache is neither consistent with the Appellant's alleged back injury nor a reaction from an *unconscious* person.

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63 ROP Vol 1 at p 574 (lines 14–15).

64 ROP Vol 1 at pp 621 (line 32) – 622 (line 13).

65 ROP Vol 1 at pp 58 (line 29) – 59 (line 14), 249 (lines 10–13), 251 (lines 1–5).

29 Fourth, even though Mr Balchandani (presumably on the Appellant's instructions) had put it to Ashek that he and a few others *carried* the Appellant from the hospital or from the clinic to the lorry,[66] this was refuted by the Appellant himself who said that his friends had merely helped him to *walk*[67] and that he climbed onto the lorry on his own.[68] The video in Exhibit D6 likewise shows the Appellant walking unassisted towards the lorry and climbing up the lorry with its tailgate still up.

30 In the circumstances, there is no reason to disturb the Judge's finding that the Appellant's evidence was indeed "inconsistent, incoherent or incredible" (see the GD at [71]).[69] In any event, his evidence did not undermine the Prosecution's evidence.

The medical evidence

31 I turn now to the medical evidence before the court. In examining the medical evidence, it is important to bear in mind the Appellant's claims that he lost consciousness after the fall and that the pain due to his back injury was at the maximum level of 10 even after he was administered two pain killer injections.[70] Therefore, if the Appellant's evidence is to be believed, the fall and the consequent injury must have been quite severe. However, does the medical evidence bear out the severe back injury claimed by the Appellant?

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66 ROP Vol 1 at p 185 (lines 12–13).

67 ROP Vol 1 at p 627 (lines 18–23).

68 ROP Vol 1 at p 628 (lines 1–3).

69 ROP Vol 2 at p 175.

70 ROP Vol 1 at p 495 (lines 26–30).

32 The convictions against the Appellant are premised on the falsity of his claim that he fell while climbing up a ladder to do some work on the second level and thereby sustained injury to his back.[71] Hence, the question is whether the medical evidence before the court has raised any reasonable doubt that the Appellant falsely claimed that he fell from the ladder and suffered a back injury as a result, and not whether the Appellant suffered any back strain or contusion *per se*. Pertinently, even if it is accepted that the Appellant was suffering from some back injury, the court must ask whether the evidence has established that the back injury was actually caused by the fall. In this regard, the medical evidence must necessarily be assessed with reference to the Appellant's evidence of the nature of his fall and the extent of his injury. It is also critical to examine the medical evidence with reference to the evidence of the prosecution witnesses, namely Safikul, Hasmot, Ashek, and Sujon, whose evidence is in itself sufficient to convict the Appellant of the two charges.

33 The evidence of Dr Benjamin Ding and Dr Thomas Catabas on the whole does not raise any reasonable doubt. Dr Ding examined the Appellant on the day of the alleged fall while Dr Catabas reviewed the Appellant a week later on 25 May 2015.

34 Dr Ding's diagnosis that the Appellant suffered from lower back contusion[72] was premised on the Appellant's oral history, his physical examination of the Appellant, as well as a CT scan.[73] He explained that his physical examination involved an observation of the Appellant's posture and by palpation, *ie*, feeling the location of the pain indicated by the Appellant.[74] He

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71 ROP Vol 1 at pp 4–5.

72 ROP Vol 1 at p 259 (line 32).

73 ROP Vol 1 at pp 258 (lines 20–24), 260 (lines 11–16).

observed that the Appellant was "not in too severe pain" and was able to walk.[75] According to Dr Ding, the CT scan showed evidence of "mild disc disease". When he was asked what "mild disc disease" meant, Dr Ding opined that the best person to comment would be the radiologist on duty that day.[76] Nonetheless, he testified that the CT scan disclosed no fracture or dislocation.[77]

35 Dr Catabas' diagnosis was that of a "back strain".[78] At trial, he explained that his diagnosis was based on the account or history provided by the Appellant, his physical examination of the Appellant, as well as an X-ray investigation.[79] He noted that the X-ray results were unremarkable, meaning that there were no significant findings and no fracture detected.[80] Although Dr Catabas' "main source" of information leading to his diagnosis was the Appellant's own account, he explained that the Appellant's account must go "hand in hand" or correlate with the physical examination.[81] From his physical examination, he noted there was "no bruising, no swelling, no tenderness, no steps felt".[82] When asked how such physical examination results could be consistent with the diagnosis of a back strain, Dr Catabas explained that the diagnosis was "from what the patient complained of" and that "back strain is one of the … diagnos[es] that [he] usually use[d] for patients who come in with

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74 ROP Vol 1 at p 258 (lines 20–29).

75 ROP Vol 1 at p 260 (lines 2–5).

76 ROP Vol 1 at p 259 (lines 13–28).

77 ROP Vol 1 at p 260 (lines 2–5).

78 ROP Vol 1 at p 93 (lines 13–14).

79 ROP Vol 1 at p 93 (lines 19–29).

80 ROP Vol 1 at p 102 (lines 5–8).

81 ROP Vol 1 at p 99 (lines 22–26).

82 ROP Vol 1 at p 100 (lines 25–28).

the complaints of back pain although the physical examination itself is unremarkable".[83]

36 I agree with the Prosecution that there is no objective evidence to support the Appellant's case that he suffered from any back injury as a result of falling from the ladder.[84] The Appellant claims that he lost consciousness after the fall and experienced pain at the maximum level of 10. However, the evidence shows that there was no bruising or swelling and that the X-rays and CT scans were unremarkable and did not reveal any fresh injury. In my view, such severe pain is entirely inconsistent with the complete lack of objective evidence such as bruising, swelling, or tenderness. Mr Balchandani relies on the two pain killer injections given to the Appellant at the Shipyard's clinic before he boarded the lorry in his effort to explain why the Appellant was able to board the lorry without assistance. However, as the Judge noted at [55] of the GD, the Appellant claimed that the pain was still at the maximum level of "10" even *after* the injections.

37 Further, having reviewed the video evidence, I find that the videos are entirely inconsistent with the fall as described by the Appellant. For instance, immediately after the alleged fall, he was found on the floor rubbing his stomach. He did not indicate to Hasmot, the first person who attended to him, that his back was injured.[85] Also, the Appellant was able to walk and climb onto the lorry without assistance. Mr Balchandani submits that the Appellant climbed up the lorry unassisted because he was ordered to do so. That submission misses the point. If the injury was so severe (based on the Appellant's claim that he lost

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83 ROP Vol 1 at p 101 (lines 9–16).

84 Respondent's written submissions at para 24.

85 ROP Vol 1 at pp 56 (lines 3–8), 58 (lines 15–31), 59 (lines 12–19).

consciousness and experienced the maximum pain level of "10" even after the two injections),[86] in all likelihood, it would not have been possible for the Appellant to climb onto the lorry without assistance even if he had been told to do so.

38 While the doctors opined under cross-examination (upon being recalled as witnesses) that it was *"possible"* or that it would "appear to be" the case that the Appellant's back injury was consistent with him having fallen from the ladder, it is important to refrain from quoting their evidence out of context.[87] Quite often, a witness' answer depends on how the question is framed. Hence, it is always essential to analyse the evidence on the whole and in its proper context. When Dr Ding was asked why he thought the Appellant's back injury was most likely consistent with the alleged fall, he explained "[b]ecause I mean from the *history* it says that he fell from the ladder and landed on his back and there is a ladder and then he's shown on his back in the video" [emphasis added].[88] From my assessment of their evidence as a whole, it is clear that their diagnoses of *possible* back injury were based on the Appellant's account of the alleged incident together with the Appellant's indication of the location of the pain. What is noteworthy is that none of the doctors testified that they would have arrived at their diagnoses or concluded that the Appellant's back injury was due to a fall from a ladder *without* the Appellant's oral history. Dr Catabas testified that looking at the videos alone, without the history from the patient, he would not be able to make his diagnosis. He stated clearly that he would "still need the history from the patient".[89] Likewise, Dr Ding testified that without the

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86 ROP Vol 1 at p 495 (lines 29–30).

87 ROP Vol 2 at pp 23 (lines 5–10), 30 (lines 27–30).

88 ROP Vol 2 p 31 (lines 8–9).

89 ROP Vol 2 at pp 15 (line 25) – 16 (line 13).

history, it would "not [be] possible to determine the cause" and it would be "hard to be certain of a fixed diagnosis".[90] Further, although both doctors testified that there were many possible causes for the back injury,[91] neither of them was able to state affirmatively that the back injury (assuming that it did exist) was linked to the Appellant's fall from the ladder. In my view, contrary to the Appellant's written submissions, the medical evidence does not raise any reasonable doubt that the Appellant falsely claimed that the back injury was caused by the alleged fall.

Exhibits D3 to D8 and the *Kadar* disclosure principles

39 The Appellant also takes issue with the time at which the Prosecution disclosed the Exhibits. The Appellant argues that the Prosecution had breached its duties of disclosure as set out in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*") and that the late disclosure meant that his counsel could not appreciate during the trial that the videos had been edited or tampered with in order to present a "sanitized version of the events" that was disadvantageous to the Appellant.[92]

40 The circumstances under which the Exhibits were introduced in court are relevant. While the IO was being cross-examined on his investigation process on 12 October 2016, he stated that he was informed in a call with the Shipyard that the Shipyard denied that the accident was work-related.[93] The IO requested for an explanation from the Shipyard to support its position.[94] In

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90 ROP Vol 1 at p 261 (lines 21–23).

91 ROP Vol 1 at pp 94 (lines 16–20), 284 (lines 5–8).

92 Appellant's written submissions at para 168.

93 ROP Vol 1 at pp 339 (line 30–32) – 340 (lines 1–4 and 26–28).

94 ROP Vol 1 at p 340 (lines 2–7).

response, the Shipyard sent an email and transmitted the Exhibits online.[95] The Prosecution explained that the videos were not disclosed earlier because they were regarded as neutral evidence concerning "the aftermath of the incident".[96] Nonetheless, the Prosecution stated that it was intending to offer the Exhibits to the Appellant at the close of the Prosecution's case.[97] The Judge directed the Prosecution to provide them to the Appellant immediately and not at the end of the Prosecution's case.[98] The Judge also gave the Appellant the option of either continuing with the cross-examination of the IO or reviewing the Exhibits first.[99] Mr Balchandani elected to carry on with his cross-examination on aspects that did not involve the Exhibits.[100] The matter was then stood down to give Mr Balchandani more time to review the Exhibits.[101] When the hearing resumed, Mr Balchandani applied to admit the Exhibits as Defence exhibits. The Prosecution did not object to their admission[102] even though the maker(s) of the Exhibits remained unknown.

***Kadar* disclosure principles**

41 In the court below, the Appellant submitted that the Prosecution had contravened the principles in *Kadar*.[103] In response, the Prosecution maintained that the Exhibits did not have to be disclosed at the start of the trial because they

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95 ROP Vol 1 at p 341 (lines 12–32).

96 ROP Vol 1 at p 343 (lines 11–12).

97 ROP Vol 1 at p 343 (lines 8–13).

98 ROP Vol 1 at p 346 (lines 1–5).

99 ROP Vol 1 at pp 347 (line 28) – 348 (line 19).

100 ROP Vol 1 at p 348 (lines 13–15).

101 ROP Vol 1 at p 368.

102 ROP Vol 1 at p 369 (lines 19–20).

103 ROP Vol 1 at p 414 (lines 7–12).

were neutral evidence.[104] In its closing submissions, the Prosecution went further, submitting that the Exhibits were actually detrimental to the Defence.[105]

42 In *Kadar*, the statements by the deceased's husband, Mr Loh, had to be disclosed by the Prosecution because they were credible and relevant to the guilt or innocence of the accused persons (see *Kadar* at [202]). At trial, two brothers were convicted of murder on the basis that both were present in the deceased's flat although the trial judge was unable to conclude which of them actually murdered the deceased (see *Kadar* at [35(f)]). Mr Loh's evidence was there was only one person other than himself and the deceased in the deceased's flat throughout the incident. His statements consistently stated that there was only one intruder present in the flat (see *Kadar* at [5]). His evidence could therefore exculpate at least one of the two brothers.

43 In the present case, however, the Exhibits cannot by any stretch be exculpatory of the Appellant. I agree with the Judge and the Prosecution that they certainly do not strengthen the Appellant's case, and in fact undermine his defence (see the GD at [83]).[106] The Appellant submits the videos are exculpatory because they show him limping and show that assistance was not forthcoming even though he was in need of support. He claims that the Exhibits show that he had to climb up the lorry unassisted because he was forced to help himself. The Appellant also submits that the photographs were exculpatory because they evidence several things: (a) his proximity to the ladder during the incident; (b) his inability to roll either side as he was confined between the ladder and certain objects on the left; (c) that Safikul's line of sight had been

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104 ROP Vol 1 at pp 415 (lines 4–21), 539 (lines 17–22).

105 ROP Vol 2 at p 486 (para 4(d)).

106 Respondent's written submissions at para 37.

obstructed; and (d) that there was a pool of water near his head, consistent with his testimony that he had had his helmet removed so that water could be poured on his head.[107] However, in my view, the videos are not exculpatory. To begin with, they do not record the alleged fall. Instead, what they show is that the Appellant could walk to and climb onto a lorry unassisted. In the final analysis, I agree with the Prosecution that the Exhibits are at best neutral, and at worst, corroborative of the Prosecution's case that the Appellant was feigning his injury. Such evidence does not need to be disclosed pursuant to *Kadar*.

Tampering/Editing of videos – another baseless submission

44 In closing submissions before the court below, Mr Balchandani alleged that the Appellant was prejudiced by the Prosecution's late disclosure of the Exhibits because he was prevented from discovering in time that the videos *could* have been edited. Mr Balchandani claimed in written closing submissions that it was only at the stage of preparing his closing submissions that he was able to appreciate that the videos could have been "edited to … *minimise* the extent that the [Appellant] suffered trauma to his back" [emphasis in original].[108] On appeal, Mr Balchandani maintains that he could not have substantiated the allegation of tampering because he did not have the opportunity to analyse the Exhibits due to the late disclosure.[109] Without attempting any substantiation, he submits on appeal that "the videos *were edited* to an extent to show a sanitized version of events" [emphasis added].[110] Before dealing with this submission, it should be borne in mind that it was the Appellant who opted to admit the

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107 Appellant's written submissions at paras 172–173.

108 ROP Vol 2 at p 432 (para 52).

109 Appellant's written submissions at para 165.

110 Appellant's written submissions at para168.

Exhibits as the Appellant's exhibits in the court below. Hence, they were marked D3 to D8. The tampering allegation was however never raised at the trial. Instead, it was only brought up for the first time in the Appellant's closing submissions after it became clear that the Prosecution was relying on the Exhibits in its closing submissions to undermine the Appellant's evidence.

45 I find it extremely disturbing for Mr Balchandani to claim that the possibility of the videos having been edited only became apparent to him during the drafting of his closing submissions. Even if that were the case, he made no further attempt or application to the Judge to recall any witness or to offer new witnesses to make good his submission. Mr Balchandani also claims that the Appellant's application to recall Hasmot and Ashek was denied by the Judge. This is strictly incorrect. While Mr Balchandani did initially apply under s 230(1)(*q*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) to recall Hasmot, Ashek, Safikul, Sujon and "at the very least" Dr Ding prior to the close of the Prosecution's case,[111] the Judge informed him that the proper time to make the application was after the defence was called.[112] Nevertheless, the Judge allowed the Appellant's application to recall the witnesses but directed Mr Balchandani to formally apply at "the appropriate time".[113] Eventually, after the Appellant had completed his testimony, Mr Balchandani made a specific application to recall only the two doctors and Safikul.[114] The Judge allowed the application despite the Prosecution's objections. Thus, it would appear that it was Mr Balchandani who decided not to recall Hasmot, Ashek, or any other

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111 ROP Vol 1 at p 411 (lines 4–13).

112 ROP Vol 1 at p 418 (lines 5–14).

113 ROP Vol 1 at p 420 (lines 28–31).

114 ROP Vol 1 at p 524 (lines 28–30).

witness; it is therefore disingenuous and unfair to criticise the Judge for failing to recall them on his own motion.[115]

46 The suggestion that the late disclosure was done to ambush the Appellant is also a non-starter. The witnesses were recalled on 2 February 2017, after a period of almost four months *following* the disclosure of the Exhibits on 12 October 2016. It is clear that the Appellant had more than enough time to consider the steps that he wished to take, including recalling more witnesses or applying to admit expert evidence to demonstrate that the videos had been tampered with. In fact, counsel for the Appellant indicated on 13 October 2016 that he needed time to find expert witnesses to deal with the contents of the Exhibits.[116] However, he eventually did not offer any expert witness.

47 In the circumstances, it is reckless for Mr Balchandani to suggest that the videos had been tampered with when there is simply no evidential basis whatsoever to support such a speculative suggestion. Although this is a very serious allegation, it was never put to any witness. Further, although the Appellant was given the option of recalling witnesses, he chose not to recall the IO. This is significant because the IO was the witness who received the videos from the Shipyard and was therefore the person who could possibly explain the provenance of the videos. If Mr Balchandani wanted to pursue the tampering allegation, he should have at least recalled the IO to initiate the train of inquiry. Having elected not to do so, any suggestion of the videos having been tampered with is plainly baseless.

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115 Appellant's written submissions at para 109.

116 ROP Vol 1 at p 439 (lines 22–29).

48 The *Kadar* duty of disclosure is not some poison pill. Not all breaches of this duty would cause a conviction to be overturned (see *Kadar* at [120]). There must be material irregularity that occasions a failure of justice (*ie*, the conviction must be rendered unsafe as a result of the late disclosure or non-disclosure). The court also stated at [121] that where disclosure is made after the commencement of the trial, the court may grant an adjournment of sufficient duration to allow defence counsel time to consider the effect of the disclosed material and to incorporate it into their case if necessary. Here, this was clearly done. As explained, the Judge ensured that the Appellant had sufficient time to examine the Exhibits and to make the necessary application(s) to recall witnesses or to take whatever further steps necessary (almost four months later) to address them.

Conclusion

49 For these reasons, I find that the Judge was correct in finding that the two charges have been made out. There is also no reason to disturb the sentences imposed by the Judge. They are not manifestly excessive and are in line with the relevant precedents. Accordingly, this appeal is dismissed.

Steven Chong
Judge of Appeal

Anil Narain Balchandani and Mato Kotwani (IRB Law LLP) for the appellant;
Crystal Tan (Attorney-General's Chambers) for the respondent.