IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 21

Criminal Motion No 26 of 2021

Between

Sanjay Krishnan

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Appeal — Adducing fresh evidence]

Sanjay Krishnan
v
Public Prosecutor

[2022] SGCA 21

Court of Appeal — Criminal Motion No 26 of 2021
Sundaresh Menon CJ, Steven Chong JCA and Chao Hick Tin SJ
2 March 2022

9 March 2022

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 The applicant, Mr Sanjay Krishnan ("Sanjay" or "the applicant"), was charged and convicted by a judge of the General Division of the High Court ("the Judge") on one charge of trafficking 2375.1 grams of cannabis and received the mandatory sentence of death. He has appealed against his conviction. This was his application to adduce certain evidence that was available to and/or readily obtainable by him at trial but was not adduced. He sought leave to adduce the evidence as he contended that it was material and may have a bearing on the conviction.

2 We heard and dismissed the application on 2 March 2022, giving brief oral grounds. We now provide more detailed reasons and further observations on some issues arising from the application.

Facts

3 On the afternoon of 23 February 2015, one Dzulkarnain bin Khamis ("Dzulkarnain") collected a brown box from a bus stop near Tuas Checkpoint ("the Tuas Bus Stop"). He then drove to Lorong 37 Geylang ("Lorong 37") where he dropped the brown box near a green dustbin before driving off. Shortly after Dzulkarnain had driven away, Sanjay drove to Lorong 37 and retrieved a box from near the same green dustbin. After doing so, he returned to his car and left. He was apprehended by a team of Central Narcotics Bureau ("CNB") officers at around 4.35pm. At about the same time, Dzulkarnain was also arrested by another team of CNB officers.

4 During the course of investigations, the box which was recovered from Sanjay (referred to for convenience as "the SKP Box") was found to contain not less than 2375.1 grams of cannabis ("the Drugs"). Investigative statements were taken from Sanjay. Relevant to the present case, at the time of his arrest, Sanjay gave a contemporaneous statement ("Sanjay's contemporaneous statement") stating that he did not know the contents of the SKP Box. He later gave a cautioned statement to the Investigation Officer, Senior Staff Sergeant Ranjeet s/o Ram Behari ("IO Ranjeet") on 24 February 2015 ("Sanjay's cautioned statement") in which he asserted that he was told by "a guy called Malaysia Boy" that the contents of the SKP Box "was illegal cigarettes". We observed that Sanjay did not sign the cautioned statement, though the Judge was satisfied that it was an accurate record of what Sanjay had said to IO Ranjeet.

5 Both Dzulkarnain and Sanjay claimed trial, and were convicted by the Judge. The Judge explained her reasons for doing so: see *Public Prosecutor v Dzulkarnain bin Khamis and another* [2021] SGHC 48 (the "GD"). The Judge found that there was no break in the chain of custody, and thus Sanjay did

possess the Drugs: GD at [75]. It was also undisputed that Sanjay knew that the SKP Box contained items, and thus the element of knowing possession was established: GD at [80]. She also found that Sanjay had intended to effect onward delivery of the Drugs, and so she was satisfied that he had been in possession of the Drugs for the purposes of trafficking: GD at [113]. This left the question of whether Sanjay knew that the SKP Box contained the Drugs.

6 Sanjay's position was that he thought that the SKP Box contained hunting knives and possibly illegal cigarettes. The Judge rejected this contention for multiple reasons. One of her reasons was that Sanjay's position as to what he thought the SKP Box contained had evolved overtime. In particular, she made reference to Sanjay's cautioned statement, where he only mentioned cigarettes, and Sanjay's contemporaneous statement, where he stated that he did not know what was in the SKP Box. Sanjay had argued that his cautioned statement was not recorded properly. However, the Judge found that there was no reason for any of the CNB officers including IO Ranjeet to record any of the statements improperly, including Sanjay's cautioned statement: GD at [84].

7 As we have noted above, Sanjay was convicted and sentenced to death on one charge of trafficking in 2375.1 grams of cannabis. Dzulkarnain was also found guilty of trafficking in the same and was sentenced to life imprisonment.

The present application

8 Both Sanjay and Dzulkarnain have appealed against their convictions and sentences. By this application, Sanjay sought to adduce two affidavits to be placed before the court in his appeal, with an order that the matter be remitted to the Judge to take further evidence and to set out her findings on remittal.

9 The first was his own affidavit ("Sanjay's Affidavit"). The evidence in Sanjay's Affidavit pertained mainly to the events that occurred when the CNB officers were taking photographs of the exhibits recovered, and during the taking of his cautioned statement. The new evidence pertained to an altercation with IO Ranjeet in the course of which he alleges that IO Ranjeet had called him a "bastard" and Sanjay had retorted. Sanjay argued that this is relevant because it would show that IO Ranjeet was displeased with him and so had a motivation to record his cautioned statement improperly, thus undermining the Judge's reasoning at [84] of the GD.

10 The second affidavit was that of one Shankari d/o Danakodi, who is Sanjay's former fiancée ("Shankari's Affidavit"). This contained photographs of the area surrounding the Tuas Bus Stop at three different points in time ("the Photographs"). Sanjay argued that the Photographs contradict one of Dzulkarnain's investigative statements which implicated Sanjay.

Our decision

11 To succeed in this application, Sanjay needed to fulfil the requirements set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"). As we set out in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 ("*Ariffan*") at [27]–[28], these requirements are that the fresh evidence:

(a) could not have been obtained with reasonable diligence for use at trial (the "non-availability" requirement);

(b) would probably have an important influence on the result of the case, although it need not be decisive – in other words, it must be "material" (the "materiality" requirement); and

(c) be credible, although it need not be incontrovertible (the "reliability" requirement).

Shankari's Affidavit

12 With regard to Shankari's Affidavit, Sanjay's argument pertained to an investigative statement made by Dzulkarnain, in which he stated that once he reached the Tuas Bus Stop, he saw a brown box near some bushes and thought that it contained drugs. He then called Sanjay to inform him, and Sanjay then told him that it was the box and he should proceed to "take the box from [the] bushes". This passage was put to Sanjay at trial, and he disagreed with its veracity. Sanjay submitted that the Photographs would show that Dzulkarnain's evidence to this effect is not credible because the Photographs show that there are no bushes at the Tuas Bus Stop.

13 In our judgment, the Photographs could not have any material influence on the appeal. This was a point rightly conceded by Sanjay's counsel, Mr Ramesh Chandr Tiwary ("Mr Tiwary") at the hearing. First, the Photographs were not contemporaneous – two of the three photographs were taken four years before and after Sanjay's arrest, respectively. They said nothing about the state of the location at the material time. Second, the Photographs were not clear and were taken from several different angles, and it was not apparent to us what exactly they were showing. Third, Sanjay's submission was that the Photographs show that there are no bushes at the Tuas Bus Stop. However, the Photographs clearly show vegetation, and thus they did not assist Sanjay's contentions. For those reasons, we dismissed the application to adduce Shankari's Affidavit.

Sanjay's Affidavit

14 The evidence in Sanjay's Affidavit pertained to his alleged confrontation with IO Ranjeet in the exhibits-management room on the day of his arrest. Importantly, this confrontation took place prior to the recording of Sanjay's cautioned statement.

(a) According to Sanjay, IO Ranjeet had called him a "bastard", and Sanjay had retorted, telling IO Ranjeet not to involve his family in this. IO Ranjeet then approached Sanjay aggressively but was then restrained by the other CNB officers. Sanjay claimed that, later, when photographs of the exhibits were being taken, he asked IO Ranjeet if he could use the toilet, but IO Ranjeet refused. Sanjay stated that Dzulkarnain had witnessed all of this taking place.

(b) Later, when he was giving a urine sample, he asked another CNB officer if he could have his case handled by an investigating officer other than IO Ranjeet. However, the officer said that he did not think it would be possible.

(c) Sanjay then alleged that on 1 March 2015, prior to the recording of his first long statement, he told IO Ranjeet that he had nothing against him and that they should put the matter aside as he did not want any tension between them during the recording of his long statement. As an aside, we mention that the long statement too did not mention the intention to collect some knives on the day in question. That was first mentioned in a further statement dated 8 March 2015.

15 It was undisputed that the foregoing evidence would be within Sanjay's personal knowledge at the time of trial; but it did not emerge at trial even though Sanjay's case was that he had been at the scene to collect some knives and possibly some cigarettes. What was significant was that Sanjay's position was that the decision not to lead this evidence at trial was a *conscious decision* made with the advice of counsel, and this has been confirmed by a letter from Sanjay's former counsel. However, no explanation was forthcoming from either Sanjay or his former counsel as to *why* this decision was made. As a consequence, we were left in a position where no material was put forward to justify Sanjay's change of position.

16 In *Ariffan*, we held that the non-availability requirement would apply with attenuated force where the application is made by the Defence. We explained in that judgment at [56]–[60] our reasons for drawing this distinction between the position of the Prosecution and the Defence.

17 However, as we subsequently noted in *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 ("*Miya Manik*"), this does not mean that the first condition does not apply at all where applications made by the Defence are concerned: at [32]. In *Miya Manik*, we were unimpressed by the case of an applicant who gave no explanation at all for why he had failed to obtain and adduce the evidence at trial, when that evidence was clearly obtainable, available, and in his view, relevant: at [33].

18 In the present case, Mr Tiwary had sought to go further. The evidence in Sanjay's Affidavit was not only available to the Defence – the question of whether to adduce it was *actively considered* by the Defence which then decided not to. Yet, as we have said, nothing was put forth to explain this. In our judgment, in such cases, an application to adduce the evidence on appeal where

that evidence was known to, assessed and then put aside by the Defence, and not adduced at trial, will rarely be successful.

19 It seems to us that in such cases, as a first step, it is incumbent on the Defence to offer an explanation as to why the decision was made to not adduce the evidence, so that the court can consider whether to exercise its discretion in favour of the applicant. This must be so, because, as we pointed out to Mr Tiwary, any other view would allow the Defence to conduct its case at trial in a piecemeal fashion. That would be wholly incompatible with the principle of finality in proceedings, and the need to avoid any abuse of process.

20 This is not an unacceptable position, because as we also explained to Mr Tiwary, in cases where the evidence is so compelling as to strongly suggest that the decision below was wrong, the court would invariably act to prevent a miscarriage of justice. This is in line with our observations in *Miya Manik* that the question of non-availability must be considered in light of the other conditions of materiality and credibility. In other words, a "holistic approach" needs to be taken in applying the criteria set out in *Ladd v Marshall*: at [33].

21 Aside from the absence of any explanation, the materiality of the evidence in Sanjay's Affidavit was marginal at best. As noted above, the evidence in question pertained to an alleged confrontation between Sanjay and IO Ranjeet in the exhibits-management room. It was suggested by Sanjay that this confrontation might afford an explanation for why IO Ranjeet allegedly failed to record in Sanjay's cautioned statement that he was at the scene to collect some cigarettes *and knives* and not just some cigarettes as is set out there.

22 To begin with, this evidence is contrary to Sanjay's contemporaneous statement, where he repeatedly denied having any knowledge of the contents of the SKP Box. Further, the Judge's finding that Sanjay knew that the SKP Box contained the Drugs was not based solely or even largely on his failure to mention the knives in his cautioned statement. Aside from the inconsistency in Sanjay's position which was contributed to by his cautioned statement, the Judge had considered other strands of evidence before concluding that Sanjay knew the nature of the Drugs in the SKP Box: GD at [91]–[110].

23 Importantly, there was no basis for saying that the Judge would or would likely have come to a different view if the evidence in Sanjay's Affidavit had been led. Indeed, she would have had to first accept that the altercation between IO Ranjeet and Sanjay had taken place. She then would have had to find that IO Ranjeet had acted maliciously as a result of the altercation. She would also need to be satisfied that there was a reasonable explanation for the inconsistency with Sanjay's contemporaneous statement. Finally, she would have needed to find that Sanjay was in fact at the scene to collect knives and cigarettes.

24 This sequence of steps that would be needed to establish the relevance of the evidence in Sanjay's Affidavit illustrates the absence of any direct link between the evidence and the outcome that the Judge arrived at. Thus, the evidence could in no way be said to be material, let alone material enough to overcome the initial hurdle posed by the Defence's conscious decision to not adduce it at trial. Furthermore, the considerable difficulty this posed to Sanjay's application was exacerbated by the fact that he did not offer an explanation to account for why this evidence was not adduced in the first place.

25 Faced with all this, Mr Tiwary's only remaining argument was that the potential consequence of this case, namely the imposition of the death penalty, warranted a different approach. We rejected this submission because there is no basis in principle for suggesting that capital cases can be conducted by the Defence subject to a different set of rules.

26 Mr Tiwary's argument may have been based in part on observations made in the case of *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327, where at [37], it was stated as follows:

> 37 Admittedly, there have been isolated instances where in an effort to correct glaring injustice, evidence which was in fact considered at the trial has been allowed to be introduced in an appeal. But this is warranted only by the most extenuating circumstances, *which may include the fact that the offence is a serious one attracting grave consequences* …
>
> [emphasis added]

27 The case was cited in Mr Tiwary's written submissions, but once read in context, it became evident that it had no relevance to the present application. The rest of that paragraph focuses on the quality of the evidence and specifically, that "the additional evidence sought to be adduced [is] *highly cogent and pertinent and the strength of which render[s] the conviction unsafe*" [emphasis added]. This is in line with what we have stated, and as we have already observed, the evidence in Sanjay's Affidavit could hardly be said to be so pertinent that it could render his conviction unsafe.

Conclusion

28 For the reasons set out above, we dismissed the application. For the avoidance of doubt, we made the above observations in the context of explaining why the application to adduce the further evidence fails. We did not assess the ultimate merits of the appeal, that being something we will do when the substantive appeal is heard in due course.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Ramesh Chandr Tiwary (Ramesh Tiwary) and Kavita Pandey (Leo Fernando LLC) for the applicant;
Mark Tay, Nicholas Wuan and Keith Jieren Thirumaran (Attorney-General's Chambers) for the respondent.