IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 34

Criminal Appeal No 1 of 2023 (Criminal Motions No 7 and 8 of 2023)

Between

Tan Wei Wen

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing – Criminal references]
[Criminal Procedure and Sentencing — Reopening concluded decisions]
[Criminal Procedure and Sentencing — Appeal]

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v
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[2023] SGCA 34

Court of Appeal — Criminal Appeal No 1 of 2023 (Criminal Motions No 7 and 8 of 2023)
Judith Prakash JCA, Tay Yong Kwang JCA and Belinda Ang JCA
4 July 2023

30 October 2023

Tay Yong Kwang JCA (delivering the judgment of the court):

Introduction

1 There were two applications filed by the applicant, a litigant in person, before this Court. In CA/CM 7/2023 ("CM 7") filed on 30 January 2023, the applicant sought "an extension of time to file Notice of Appeal and Petition of Appeal within 14 days from the date of the Order to be made herein". In CA/CM 8/2023 ("CM 8") filed on 2 February 2023, the applicant sought "permission and to file the notice & petition of appeal to the Court of Appeal for the concluded case to be reopen".

2 As will be seen subsequently in these grounds, these two applications related to the decision of Vincent Hoong J ("the High Court Judge") in HC/MA 9129/2022/01 ("MA 9129"). MA 9129 was the applicant's appeal to the General

Division of the High Court against the decision of a District Judge ("the DJ"). The High Court Judge was therefore exercising his appellate jurisdiction when he heard MA 9129.

3 Subsequent to the filing of the two applications set out above, on 7 February 2023, the applicant also filed CA/CCA 1/2023 ("CCA 1"). CCA 1 appeared to be an appeal to the Court of Appeal against the High Court Judge's decision in MA 9129.

4 It is settled law that that there is only one tier of appeal in criminal matters. In this case, it is from the State Courts to the High Court. No appeal lies against the decision of a judge sitting in the High Court in the exercise of its appellate jurisdiction. This court has affirmed this position on more than one occasion: see *Mah Kiat Seng v Public Prosecutor* [2021] SGCA 79 at [73]–[74]; *Tang Keng Lai v Public Prosecutor* [2021] 2 SLR 942 ("*Tang Keng Lai*") at [1]; *Public Prosecutor v Lim Yong Soon Bernard* [2015] 3 SLR 717 at [32].

5 For the reasons that we had explained to the applicant at the hearing of oral arguments and which we set out below, we dismissed CM 7 and CM 8. Consequently, CCA 1 was also dismissed.

Background facts

6 On 26 November 2019, the applicant was charged in the District Court with two counts of insulting the modesty of a woman under s 509 of the Penal Code (Cap 224, 2008 Rev Ed) (the "Charges"). In the first charge, he was alleged to have sent to the complainant on 5 May 2018 a video of himself stroking his penis. In the second charge, he was alleged to have sent to the complainant on 7 May 2018 another video of a male stroking his penis with a

photograph of the complainant in the background, accompanied by crude words with sexual connotations.

7 The applicant claimed trial to the Charges and the trial was fixed for 21 and 22 July 2020. On 6 July 2020, about two weeks before the trial was scheduled to start, the Prosecution applied to withdraw the Charges against the applicant. On 7 July 2020, the District Court granted the applicant a discharge amounting to an acquittal. This order was made without requiring the parties' attendance in court because of the Covid-19 pandemic.

Proceedings in the District Court

8 Subsequently, on 25 March 2021, more than eight months after the withdrawal of the Charges, the applicant sought compensation from the Prosecution. He applied for a compensation order pursuant to s 359(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) on the basis that the prosecution against him was "wrongful to even begin with" and had not been in good faith. The compensation sought comprised $3000 for the "abus[e] of juridical process" and $10 per day from the date the applicant's phone was seized by the police for "los[s] of income from phone rental".

9 The applicant's case was that the prosecution was commenced without sufficient evidence and was "malicious". In support of his claim that the prosecution was commenced without sufficient evidence, the applicant referred to the following: (a) the Prosecution's decision to withdraw the Charges and (b) the fact that no evidence was admitted at the charging stage. To buttress his allegation that the prosecution was "malicious", the applicant made the following allegations: (a) he was charged after he refused to accept a written warning for one count of an alleged offence under s 292 of the PC regarding the

sale of obscene books; (b) the Prosecution dragged out his case in an attempt to coerce him to plead guilty to the Charges; and (c) a plead-guilty offer was made to incentivise him to plead guilty to the Charges.

10 The Prosecution submitted that the applicant failed to discharge his burden of proof in relation to his allegations of frivolous and vexatious prosecution. It explained that the decision to withdraw the Charges was consistent with the Prosecution's ongoing practice of assessing the evidence continually and the appropriateness of the case for prosecution throughout the course of the prosecution, taking into account any new developments. The mere fact that the Charges were withdrawn subsequently could not, therefore, lead to an inference that the evidence was so insufficient from the outset that the case should never have been brought to court.

11 The Prosecution had also responded by letter to the applicant's emails in an attempt to explain to the applicant the evidence that it had against him. In the Prosecution's letter dated 22 December 2020 (the "AGC Letter"), the Prosecution stated:

> 2. You were charged with two counts under s 509 of the Penal Code (Cap 24,2008 Rev Ed) for insulting the modesty of a woman by sending to the victim a video of a male subject stroking his penis on two occasions in May 2018.
>
> 3. In your emails, you suggested that there was no basis for the authorities to prefer the charges against you. This is incorrect. Amongst other things:
>
> > (a) One of the videos captured part of your face and a blue Polo T-shirt which was found in your home. The background in the video also matched the tiled wall of your home toilet.
> >
> > (b) On 7 June 2018, during a police interview, you were informed that there was a report of a person sending a

video via Instagram to a female subject, and that investigations had surfaced your name. When invited to comment on this, you made the following claims:

(i) That you had previously taken a video of your private parts with your mobile phone in your home toilet;

(ii) That you had lost your mobile phone "in **2017** maybe in February" [emphasis added]; and

(iii) Someone might have used your mobile phone to disseminate the video.

(c) On 19 November 2019, you were served with notices of the two charges against you under s 23 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). In response to notice of the two charges -

(i) You did not dispute that you were the subject who performed the acts as depicted in the video stated in the first charge. You also did not deny knowledge of the video stated in the second charge.

(ii) Instead, you claimed that **in 2015 or earlier**, the "pictures" from your mobile phone had been leaked to an unknown person who had been "blackmailing" you for money.

(d) Your claim that an unknown person might have sent the videos relating to the two charges is not supported by forensic investigations. These investigations revealed that the videos were sent from IP addresses that were traced back to your father's coffeeshop and to your home.

4. On 7 July 2020, in the exercise of prosecutorial discretion, the Prosecution withdrew the two charges against you and the Court made an order of a discharge amounting to an acquittal against you. (This order was made without requiring parties' attendance, given the COVID-19 situation.) In deciding to withdraw your charges, the Prosecution considered, among others, the fact that you did not commit further offences after the incidents referred to in the charges.

5 Regarding your request for the names of the prosecutors "in charge" of your case, please note that different prosecutors

> were involved in different aspects of the case against you. You have not set out any details, nor given any basis, to support any allegations of misconduct, including how or when such alleged misconduct occurred. In the circumstances, we will not be providing the names of the prosecutors.
>
> 6 For the avoidance of doubt, the Attorney-General's Chambers rejects any allegation that there was any unlawful, improper or malicious conduct in the prosecution against you.
>
> 7 All our rights are reserved.
>
> [emphasis in original]

12 The Prosecution also argued that there was no basis for the applicant's assertions of improper motive or malice. As for the applicant's allegations of malice, the Prosecution stated that the applicant was never charged with one count of an offence under s 292 of the PC and, for completeness, it had informed the DJ that the applicant was only served with a conditional warning for three counts of an offence under s 509 of the PC. Further, the Prosecution submitted that the applicant's claim that his case was deliberately dragged out was made without any basis. In addition, the applicant's reliance on the plead-guilty offer to extrapolate malice on the part of the Prosecution was misconceived. It was an accepted practice that a plead-guilty offer may be extended to an accused person on the basis that he may be sentenced on a fewer number of charges or on charges which attract penalties which are less severe.

13 On 28 June 2022, the DJ dismissed the applicant's application for compensation after applying the principles in *Parti Liyani v Public Prosecutor* [2021] 5 SLR 860 ("*Parti Liyani*"): see *Tan Wei Wen v Public Prosecutor* [2022] SGMC 44 (the "DJ's GD") at [12]–[26]. The High Court in *Parti Liyani* stated that an applicant may establish that a prosecution brought against him was frivolous or vexatious by proving on a balance of probabilities that: (a) the commencement and continuation of the prosecution was marked by evidential

insufficiency (in the sense that an objective, reasonable Deputy Public Prosecutor ("DPP") would not have considered that there was sufficient evidence to render the case fit to be tried); or (b) the prosecution was brought because of malice, dishonesty or an improper motive (at [116] and [126]). The DJ found that the applicant had not shown that there was any evidential insufficiency on the part of the Prosecution when the case was commenced against him and that he had provided no basis for an inference of malice or improper motive (DJ's GD at [19] and [25]–[26]).

14 On the issue of evidential insufficiency, the DJ disagreed with the applicant's suggestion that the withdrawal of the Charges showed that there was evidential insufficiency in the prosecution. The DJ held that the applicant had to show that, on the evidence, the case was never fit to be tried in the first place (DJ's GD at [14]). However, it was clear from the applicant's affidavits filed in the proceedings that he had not shown "an iota of evidence" of this. The DJ did not think that the applicant's assertions of innocence on earlier occasions to be adequate to show that there was insufficient evidence for the case to be tried (DJ's GD at [16]). Further, the applicant failed to address any of the evidence raised in the AGC Letter that was sent to him (DJ's GD at [17] and [18]).

15 On the question of malice, dishonesty or improper motive in the prosecution of the applicant, the DJ noted that there was no basis for the applicant's assertion that his charges were "increased" because of his refusal to accept a written warning for an offence under s 292 of the PC (DJ's GD at [22]). Further, the DJ found that there was no evidence of any delay by the Prosecution in its conduct of the matter in the alleged hope that the applicant would plead guilty. He also noted that the Government had implemented the circuit breaker measures in response to the Covid-19 pandemic between 7 April 2020 and

1 June 2020. In the DJ's view, there was therefore nothing to show that the Prosecution had sought to delay the trial deliberately (DJ's GD at [23]–[24]). The DJ considered that there was nothing untoward in the plead-guilty offer extended to the applicant (DJ's GD at [25]). The DJ therefore held that the applicant had not shown, on a balance of probabilities, that his prosecution was frivolous or vexatious under s 359(3) of the CPC (DJ's GD at [27]).

The Magistrate's Appeal

16 On 6 July 2022, the applicant filed an appeal in MA 9129 against the DJ's decision to dismiss his application for a compensation order against the Prosecution. In his Petition of Appeal for MA 9129, the applicant reiterated that he was prosecuted frivolously and that the Prosecution was fully aware that the applicant would be asking that the charges against him be dismissed or be withdrawn. The applicant also suggested that the Prosecution had acted in a calculated manner to prevent him from bringing a civil action for the tort of malicious prosecution.

17 The High Court Judge dismissed MA 9129 for the following reasons. First, the applicant had not furnished any evidence that the case against him was marked by evidential insufficiency. As stated in *Parti Liyani*, the test for evidential insufficiency is satisfied when the evidence was so insufficient that there was no case fit to be tried before the court. This category included cases where "the decision to commence and/or continue prosecution is based on such insufficient evidence that the prosecution is objectively factually unsustainable" and a "prosecution which is legally unsustainable where, even if the Prosecution succeeds in proving all the facts asserted, the elements of the charge will still not be satisfied" (*Parti Liyani* at [117]). The applicant bears the burden of proof

on a balance of probabilities (*Parti Liyani* at [129]). In the present case, the applicant's claim that he was prosecuted frivolously because he had protested his innocence earlier and was acquitted eventually was beside the point. It did not go towards the evidence at the Prosecution's disposal when it decided to commence proceedings against the applicant, which was the relevant inquiry. Further, there was sufficient evidence for the Prosecution to exercise its discretion to bring the Charges against the applicant. The Prosecution had set out its reasons for proffering the Charges against the applicant in the AGC Letter and this included the fact that forensic investigations contradicted the applicant's claim that an unknown person might have sent the videos to the complainant.

18 Secondly, the High Court Judge held that the decision to prosecute the applicant was not tainted by malice, dishonesty or improper motive. The applicant's claim on this issue was bare and unsubstantiated. Although that was sufficient to dismiss the application, the High Court Judge also accepted the Prosecution's submission that it had not delayed proceedings deliberately so as to exert pressure on the applicant to plead guilty. Notably, the proceedings against him coincided with the Covid-19 circuit breaker period during which there was significant disruption to court proceedings. Similarly, the fact that the Prosecution extended a plead-guilty offer to the applicant or withdrew the Charges subsequently did not suggest that it had acted in bad faith.

The present applications in CM 7 and CM 8

19 As it was unclear to us what the applicant was seeking to do with his applications in CM 7 and CM 8 and his subsequent appeal in CCA 1, we instructed the Registry to place all three matters before us at the same hearing

and also asked the Registry to inform the applicant to clarify in writing before the hearing whether CCA 1 was meant to be:

(a) an appeal to the Court of Appeal against the decision of the High Court Judge in MA 9129;

(b) an application for review or reopening of the decision of the High Court Judge in MA 9129; or

(c) an application to refer questions of law to the Court of Appeal arising from the decision in MA 9129.

20 The applicant responded in his email of 24 May 2023 that "CCA 1 is an appeal:

(a) To apply for an extension of time to file a question of law, on the decision made in the Magistrate Court where the application was first heard under [MA 9129];

(b) To review on [General Division High Court's] decision why the court agrees on the requirement of bad faith and evidential sufficiency to be proven which was not stated in the law, as the law had only meted out frivolous or vexatious prosecution (proceedings) to be proven to the court satisfaction;

(c) To obtain evidence of bad faith, in verbatim version, on the insulting remarks made during the appeal heard in [General Division High Court] by the prosecution where the edited transcript provided by [General Division High Court] has put the appellant in a disadvantage position to prove bad faith;

(d) To obtain a summary judgment, based on Houda v The State of New South Wales [2005] NSWSC 1053, whether the prosecution in this case is malicious so as to rightfully commence civil claim against the prosecution."

21 As mentioned earlier, in CM 7, the applicant sought "an extension of time to file Notice of Appeal and Petition of Appeal" against MA 9129 and in CM 8, he sought "permission and to file the notice & Petition of Appeal to the Court of Appeal for the concluded case to be reopen". In his written submissions, the applicant raised two issues which amounted to challenges against the merits of the decision in MA 9129: (a) whether proceedings can be considered frivolous after an applicant has been granted a discharge amounting to an acquittal in criminal proceedings; and (b) whether charges against an accused person "simply meant to put him under the false light to tarnish his reputation, harass, annoy and embarrass him" amounted to vexatious prosecution.

22 The applicant submitted that the "case should be reopened as there is a miscarriage of justice". The use of the words "reopened" and "miscarriage of justice" suggested that the applicant was seeking a review of the High Court Judge's decision in MA 9129. He repeated his arguments made in MA 9129 that there was some kind of bad faith on the part of the Prosecution in preferring the Charges against him. He alleged that the Prosecution "put [him] in trouble and abused him in the judicial process" after he rejected a 12-month conditional warning that was issued to him initially. He also claimed that the Prosecution maintained the Charges against him for seven months and only applied to withdraw the Charges prior to the trial "out of spite" or "ill will" because he did not want to accept the 12-month conditional warning.

23 Finally, the applicant contended in his written submissions that his application was also for leave to refer a question of law. Under the header "IV. QUESTION OF LAW" in his written submissions, he set out the following question:

> If bad faith is required in 359(3), why or how would bad faith of the prosecution after proven, provide the court in law to frivolously decide whether the two other innocent parties stated in the law should make compensation to the accused person, when the court had already clearly identified the prosecution to be the **only party** acting in bad faith and the only one with power to commence a frivolous or vexatious prosecution.
>
> [emphasis in bold in original]

In the concluding paragraphs of his written submissions, the applicant stated the following:

> X. ISSUE TO BE DETERMINED
>
> 40. Whether the criminal appeal can be allowed in this case where the appellant exhausted his appeal due to the error made by the lower court.
>
> 41. The second issue is whether bad faith is required to be established in order to prove to the court satisfaction that the prosecution was frivolous or vexations.
>
> 42. The third issue is whether the proceedings can be considered frivolous after the appellant was discharged amount to acquittal in a criminal proceeding where the prosecution has not set the law into effect, and will not be able to do so under the same fact using the same law in accordance to the Constitution.
>
> 43. The fourth issue is whether the charges against the accused person, was deliberately calculated and phrased in a way that it will not succeed in convicting the accused person and was simply meant to put him under the false light to

> tarnish his reputation, harass, annoy and embarrass him to create vexation.
>
> XI. CONCLUSION
>
> 44. The appellant now turn to the court to seek leave to file a question of law by way of criminal appeal or through the proper procedure with extension of time in order for the case to be review by the Criminal Court of Appeal in light of the miscarriage of justice suffered by the appellant on the error made by the lower court or a summary judgment on the case if the respondent cannot come out with any defense.

Issues before the Court

24 It is apparent from what we have quoted from the applicant's very confused thoughts in his applications and his written submissions that all he wanted was for the High Court Judge's decision to be reversed and consequently, that an order of compensation be made in his favour. He used the language relating to appeals, review applications and references on questions of law interchangeably as if they were all part of the same legal process. The issues that we distilled were as follows:

(a) Whether the applicant should be granted an extension of time to file a Notice of Appeal and Petition of Appeal against MA 9129;

(b) Whether the applicant should be granted permission to make a review application in respect of the decision in MA 9129 if CCA 1 were regarded as a review application to the Court of Appeal; and

(c) Whether the applicant should be granted permission to refer a question of law under s 397 of the CPC if CCA 1 were regarded as an application to refer a question of law to the Court of Appeal.

Issue 1: Whether the applicant should be granted an extension of time to file a Notice of Appeal and Petition of Appeal against MA 9129

25 Section 380(1) of the CPC allows this court to grant permission to the applicant to file a Notice of Appeal and a Petition of Appeal out of time if it considers it to be in the interests of justice to do so. In *Lim Hong Kheng v PP* [2006] 3 SLR(R) 358, the High Court held (at [27]) that in exercising this discretion, it is relevant to consider all the circumstances including: (a) the length of the delay in the prosecution of the appeal; (b) the explanation put forward for the delay; and (c) the prospects of the appeal.

26 However, as we have stated earlier in this judgment, there could be no appeal against the decision in MA 9129 because the High Court Judge was exercising appellate jurisdiction when he heard the appeal against the DJ's decision. Sections 49(1) read with 60D of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA") set out the matters over which this court has criminal jurisdiction. Indeed, the applicant himself acknowledged that he had "exhausted his appeal".

27 In substance, CCA 1 was an appeal against the merits of the decision made by the High Court in the exercise of its appellate jurisdiction. It was bound to fail because there was no right of appeal in these circumstances. Consequently, the applicant's applications for an extension of time to file a Notice of Appeal and a Petition of Appeal in CM 7 and CM 8 were completely futile as they could only have substance if there was a valid appeal. Therefore, the applications had to be dismissed.

Issue 2: Whether permission should be granted for a review application in respect of the decision in MA 9129 if CCA 1 were regarded as a review application to the Court of Appeal

28 The language adopted in CM 8 ("permission and to file the notice & petition of appeal to the Court of Appeal for the concluded case to be reopen") suggested that the applicant was also seeking permission to file an application to review the appeal in MA 9129. The applicant did not cite the basis on which he made the application to review the appeal in MA 9129.

29 Pursuant to s 394H(6)(*b*) of the CPC, where the appellate court in question is the High Court, an application for leave to make a review application is to be heard by the Judge who made the decision to be reviewed unless that Judge is not available. Even if the applicant were entitled to make an application for permission to review the decision in MA 9129, such an application had to be made to the High Court Judge who decided MA 9129. There is no leap-frog right of review by the Court of Appeal.

30 Accordingly, even if CCA 1 were treated as an application for permission to review the decision in MA 9129, the application was filed in the wrong court. We therefore need not discuss the merits of such an application. In any case, no merits were disclosed in the applicant's affidavit and his written submissions.

Issue 3: Whether permission to refer a question of law under s 397 of the CPC should be granted if CCA 1 were regarded as an application to refer a question of law to the Court of Appeal

31 The applicant also raised a purported question of law in his written submissions. We therefore discussed CCA 1 as if it were an application for

permission to refer a question of law to the Court of Appeal under s 397 of the CPC.

32 It is well-established that the reference procedure under s 397 of the CPC is invoked sparingly and there are established principles regarding when it may be used. This court has cautioned against the use of this procedure to circumvent the single tier of appeals as such an attempt would amount to an abuse of process: *Tang Keng Lai* at [1].

33 For permission to be granted for a question to be referred to the Court of Appeal, the following four conditions must be met: (a) the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction; (b) the reference must relate to a question of law and that question of law must be a question of law of public interest; (c) the question of law must have arisen from the case which was before the High Court; and (d) the determination of the question of law by the High Court must have affected the outcome of the case: *Tang Keng Lai* at [6].

34 The question raised by the applicant in his written submissions read as follows:

> If bad faith is required in **359(3),** why or how would bad faith of the prosecution after proven, provide the court in law to frivolously decide whether the two other innocent parties stated in the law should make compensation to the accused person, when the court had already clearly identified the prosecution to

> be the **only party** acting in bad faith and the only one with power to commence a frivolous or vexatious prosecution.
>
> [emphasis in original]

35 The purported question of law was premised on the factual basis of "bad faith of the prosecution after proven" and "when the court had already clearly identified the prosecution to be the only party acting in bad faith". This was a factual basis that did not exist because the High Court Judge, like the DJ, found no bad faith on the part of the Prosecution. Therefore, the question did not arise from the case before the High Court and had no factual substratum. It was at best a hypothetical question if one could make sense of the question in the first place.

36 Consequently, even if we considered CCA 1 as an application to refer a question of law under s 397 of the CPC, there was no question which matched the requirements in s 397 of the CPC anyway. It followed that such an application was bound to fail.

Conclusion

37 On all the alternative bases in respect of CCA 1 discussed above, whether as an appeal, as an application for permission to review or as an application to refer a question of law to the Court of Appeal, it was bound to

fail. CCA 1 was therefore dismissed. As CM 7 and CM 8 were filed to support CCA 1, they were also dismissed.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

The applicant in person;
David Menon (Attorney-General's Chambers) for the respondent.