IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 9

Criminal Motion No 47 of 2024

Between

Masri Bin Hussain

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Abuse of process — Collateral purpose]
[Criminal Procedure and Sentencing — Appeal — Adducing fresh evidence]
[Criminal Procedure and Sentencing — Trials — Whether accused person received inadequate legal assistance from trial counsel]

Masri Bin Hussain
v
Public Prosecutor

[2025] SGCA 9

Court of Appeal — Criminal Motion No 47 of 2024
Steven Chong JCA, Belinda Ang Saw Ean JCA and See Kee Oon JAD
7 March 2025

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Steven Chong JCA (delivering the judgment of the court *ex tempore*):

1 Although cloaked as an application for the introduction of additional evidence, CA/CM 47/2024 ("CM 47") is none other than an application for a retrial in a hope of pursuing a wholly inconsistent defence from the one advanced at the trial which had failed. The applicant also wishes to adduce further evidence from persons who were already examined in relation to issues that had been ventilated at the trial. The misleading nature of CM 47 and its patent lack of merit renders it an abuse of the court's process. We therefore dismiss CM 47 in its entirety.

Background to the application

2 The applicant claimed trial to one charge of having in his possession not less than 23.86g of diamorphine for the purpose of trafficking, an offence punishable under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185,

2008 Rev Ed). The applicant's case at the trial was that the drugs found in his possession were *entirely* for his personal consumption. We refer to this as the "Total Consumption Defence". On 16 October 2023, the trial judge rejected the Total Consumption Defence, convicted the applicant on the charge and imposed the mandatory death sentence.

3 The applicant has filed an appeal against his conviction and sentence by way of CA/CCA 17/2023. The appeal is pending.

4 In CM 47, the applicant seeks to adduce two categories of *additional evidence* pursuant to s 392(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC"). First, evidence that the drugs found in his possession were mainly for his personal consumption, but he was open to selling some of the drugs where an opportunity to do so arose. We refer to this defence as the "Partial Consumption Defence". Second, evidence by way of further examination and cross-examination of various persons who had already testified at the trial in relation to the applicant's purported state of drug withdrawal during the recording of his contemporaneous statement.

The law on taking additional evidence

5 Pursuant to s 392(1) of the CPC, an appellate court may take additional evidence itself or direct it to be taken by the trial court, where such additional evidence is deemed necessary. In a s 392 application, the appellate court considers whether the additional evidence satisfies the three requirements of non-availability at the trial, relevance and reliability as articulated in *Ladd v Marshall* [1954] 1 WLR 1489. The requirement of non-availability is regarded as "less paramount than the other two [*Ladd v Marshall*] conditions" in

applications by accused persons, although it is not dispensed with altogether: *Miya Manik v Public Prosecutor and another matter* [2021] 2 SLR 1169 at [32].

6 As a starting point, any s 392 application would require the applicant to identify the additional evidence with some specificity. This is necessary because the admission of fresh evidence must be evaluated with reference to the *Ladd v Marshall* conditions. Examples of additional evidence include medical reports (see *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299), expert reports (see *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544) and affidavits of relevant persons (see *Sukla Lalatendu v Public Prosecutor and another matter* [2018] 5 SLR 1183).

Our decision

CM 47 is not an application to adduce additional evidence

7 CM 47 fails *in limine* because on close scrutiny, it is in substance not an application to adduce additional evidence.

8 First, apart from the applicant's Instant Urine Test ("IUT"), the applicant has not particularised the additional evidence that he wishes to adduce. In respect of the Partial Consumption Defence, the applicant's written submissions state obliquely that "evidence would be primarily led from the [a]pplicant", but no further details are given as to what fresh evidence is now available. Similarly, in relation to the applicant's state of drug withdrawal, the applicant's written submissions make vague reference to the evidence of "numerous doctors, the recorder of the [contemporaneous] statement and the [a]pplicant" himself. It is telling from the glaring imprecision of the purported "additional evidence" that CM 47 is not a genuine application to adduce additional evidence.

9 Second, the application to adduce additional evidence regarding the Partial Consumption Defence is in truth an attempt to run a *completely new* defence which is diametrically opposed to the Total Consumption Defence advanced and rejected at the trial. It is significant that before the trial judge, the applicant did not dispute that he was in possession of the drugs and knew that the drugs contained diamorphine: *Public Prosecutor v Masri bin Hussain* [2024] SGHC 78 ("*Masri (HC)*") at [16]. In other words, the Total Consumption Defence was the *only* defence that the applicant presented. The sole issue before the trial judge was whether the Total Consumption Defence was proven on the balance of probabilities: *Masri (HC)* at [20]. The applicant's about-face in this regard fundamentally alters the premise of the decision below, and if the present application is allowed, it would necessitate a retrial.

10 Further, as explained in *A Steven s/o Paul Raj v Public Prosecutor* [2023] 1 SLR 637 at [31], it would be impossible to run a Partial Consumption Defence without credible evidence of (a) the accused person's daily rate of consumption of the relevant drug; and (b) the number of days the drugs in his possession were meant to last for in order to apportion the quantity of the drugs found in his possession which was meant for the applicant's own consumption such that only the balance was intended to be trafficked. The accused person bears the burden of adducing such evidence (at [32]). No such evidence was before the trial judge and more significantly, the applicant has not sought to adduce any such evidence in CM 47. Consistent with his Total Consumption Defence at the trial, the applicant did not seek to adduce any such evidence below to support a *Partial* Consumption Defence. In fact, at the trial, when the applicant was asked to clarify which part and how much of the drugs he was selling in response to his testimony that the drugs were "mainly for [his] consumption", he admitted under examination-in-chief that he was unable to

provide an answer because as he had stated earlier, the drugs were mainly for his consumption. Consequently, the applicant's intended pursuit of the Partial Consumption Defence is tantamount to a request for a retrial with a view for the applicant to offer evidence to contradict his own evidence at the trial. We should add that the applicant's evidence in relation to his daily rate of consumption of 3.75g (gross weight) to last him for nine to ten months at the trial was to support his Total Consumption Defence. It was however rejected by the trial judge, *inter alia*, because the applicant's claimed rate of consumption rested solely on his bare allegation, was not supported by any other *credible* evidence and was inconsistent with the assessed rate of consumption in the medical report prepared by Dr Sahaya Nathan, a doctor who examined the applicant during his admission to Changi Prison's Complex Medical Centre ("CMC"): *Masri (HC)* at [39].

11 Third, the evidence regarding the applicant's purported state of drug withdrawal suffers from the same fatal defect. Aside from the portion relating to the applicant's IUT, the rest of his application seeks permission to examine or cross-examine various persons who have already given evidence at the trial. They comprise the applicant himself, three doctors who attended on the applicant during his admission to the CMC, and Staff Sergeant Nor Saharil bin Sulaimai ("SSgt Saharil"), the recorder of the applicant's contemporaneous statement. Quite apart from the fact that the applicant is seeking to adduce unknown answers to unknown questions, which is inimical to the very nature of an application to adduce additional evidence, his application for a second attempt at examination-in-chief and cross-examination would require a retrial.

12 For the foregoing reasons, CM 47 is in substance an attempt to seek a retrial in the guise of an application to adduce additional evidence. On this

premise, the purported application to introduce additional evidence for the appeal in and of itself is an abuse of the process and must therefore be dismissed.

The additional evidence does not satisfy the Ladd v Marshall conditions

13 Even if CM 47 were to be treated as a legitimate application to adduce additional evidence, the evidence in question would not have satisfied the conditions of non-availability, relevance and reliability laid down in *Ladd v Marshall.*

Additional evidence in relation to the Partial Consumption Defence

14 In respect of the Partial Consumption Defence, the applicant's main argument is that the counsel who represented him at the trial (the "Trial Counsel") disregarded his instructions to present such a defence. Instead, the case that was run by the Trial Counsel was the Total Consumption Defence, contrary to his alleged instructions.

15 The non-availability, relevance and reliability of the additional evidence in relation to the Partial Consumption Defence thus hinges on the applicant satisfying us that there was indeed inadequate legal assistance by the Trial Counsel. Unless the applicant is able to prove that the Trial Counsel acted contrary to his instructions in running the Total Consumption Defence, the additional evidence in respect of a completely inconsistent defence will not satisfy the elements of reliability and non-availability. Evidence that is not reliable would also not be relevant. The two requirements to prove inadequate legal assistance are well-established – the applicant must prove that the Trial Counsel's conduct of the case amounted to "flagrant or egregious incompetence or indifference" and that there was a real possibility that the inadequate assistance resulted in a miscarriage of justice: *Mohammad Farid bin Batra v*

Public Prosecutor and another appeal and other matters [2020] 1 SLR 907 ("*Farid*") at [135] and [139].

16 We do not think that there is any merit in the applicant's case of inadequate legal assistance. As against his bare assertions of impropriety against the Trial Counsel, the evidence before us clearly demonstrates that his instructions for the trial were confined to the Total Consumption Defence.

17 First, from as early as 18 August 2021, the applicant had already instructed the Trial Counsel to run the Total Consumption Defence. A letter of representation to the Prosecution, which the applicant reviewed line by line and confirmed on that date, stated that his position was that "he had purchased the drugs for his personal consumption and … there had been no intention to make the drugs available to any other person, whether for profit or otherwise".

18 Second, records of numerous meetings between the applicant and the Trial Counsel show that the applicant's consistent and recurring stance was the Total Consumption Defence. Ms Luo confirmed during the hearing that she has no basis to doubt the accuracy of those records. We refer to the notes of the meetings on 31 May 2022, 23 June 2022, 9 September 2022, 14 December 2022 and 18 January 2023, as well as the undated charge sheet annotated by the Trial Counsel. For instance, during the 31 May 2022 meeting, the applicant informed the Trial Counsel that he denied the statement in P27 that "[s]ome of the 'heroin' [he] can also use to make money" and "[i]f [he] can make money, [he] would try to sell the 'heroin'". Consistent with that denial, at the 14 December 2022 meeting, the applicant (a) confirmed that he did not make that statement in P27; (b) confirmed his intention "was never to make money" from the drugs, and that they were "strictly and *exclusively* for [his] consumption" [emphasis added]; (c) stated that "if [he] were trafficking [he would] at least have a plastic, straw,

[and] small packets to repack" the drugs, but no such paraphernalia was found; and (d) explained that he had purchased the drugs to "keep for [himself]", so that he could avoid the risk of detection arising from multiple deliveries and maintain a stable supply during the COVID-19 pandemic.

19 Third, on 18 August 2022, the applicant endorsed the Case for the Defence, which stated categorically that "the [drugs] had been purchased *solely* for his own consumption" [emphasis added] and that he "has never expressed an intention to sell [them]". The applicant attributes this to the purported advice of the Trial Counsel that running the Total Consumption Defence was the only way to succeed in his defence. We do not accept this. As we mentioned, from as early as August 2021 and long before the Case for the Defence was filed, the applicant had already adopted the Total Consumption Defence as was clearly stated in his letter of representation to the Prosecution and corroborated by the various contemporaneous notes of the meetings.

20 Fourth, during the trial, the applicant repeatedly stated that the drugs were for his personal consumption and not for sale. We note that the applicant also mentioned on the stand and in P27 that the drugs were "mainly" for his own consumption and that he would sell the drugs if the opportunity to do so arose. However, considering the contemporaneous documents and the applicant's general conduct at the trial, his allusion to the Partial Consumption Defence is an afterthought; it did not in any way change his earlier instructions to the Trial Counsel to present the Total Consumption Defence. It is plainly misconceived for the applicant's counsel to suggest that "[g]iven the vast differences in the position of the [a]pplicant and [the Trial Counsel]" as regards the Partial Consumption Defence, we should direct evidence to be taken "to determine if in fact the [a]pplicant had provided [the Partial Consumption Defence] instructions to [the Trial Counsel]". Finally, to the extent that the applicant did

mention that the drugs were "mainly" for his consumption when he was on the stand, it would follow that the alleged "additional evidence" was already before the court below but it was ultimately of no consequence because, as explained at [10] above, the applicant did not provide any evidence in relation to his daily rate of consumption and the number of days the drugs in his possession were meant to last for to support a *Partial* Consumption Defence.

21 Accordingly, we find it entirely fallacious for the applicant to submit that "his defence has always been the Partial Consumption Defence". Not only is the applicant's present case completely incompatible with the Total Consumption Defence that he presented at the trial, but it is also in fact contrary to the applicant's instructions to the Trial Counsel. The applicant fails at the first step of the *Farid* test. It follows that the additional evidence in relation to the Partial Consumption Defence does not satisfy the *Ladd v Marshall* conditions.

Additional evidence in relation to the applicant's purported state of drug withdrawal

22 We turn to the additional evidence in relation to the applicant's purported state of drug withdrawal during the recording of his contemporaneous statement marked P18. The applicant had stated in P18 that the drugs in his possession were "[f]or [him] to sell".

23 To recapitulate, the applicant seeks to adduce his IUT report, further cross-examine the CMC doctors and SSgt Saharil, and provide further testimony of his own. For the reasons already given, the only specific piece of evidence which is the proper subject of an application to adduce additional evidence is the IUT report. However, the IUT report clearly fails to fulfil the *Ladd v Marshall* conditions of non-availability at the trial and relevance. In respect of non-availability, the applicant was made aware more than two years before the

trial that he tested positive for amphetamines and opiates in his IUT. There was no reason why he could not have obtained the IUT report for use at the trial if he considered it relevant to his defence. It must be borne in mind that the IUT is a presumptive screening test conducted by the Central Narcotics Bureau before the Health Sciences Authority ("HSA") performs a confirmatory test: *Public Prosecutor v Chong Hoon Cheong* [2021] SGHC 211 ("*Chong Hoon Cheong*") at [46]. The primary purpose of the IUT is to detect the presence of classes of drugs, while the HSA confirmatory test reveals the concentration of specific drug substances in the urine samples: *Public Prosecutor v Nandakishor S/O Raj Pat Ahir* [2020] SGDC 266 at [54]. Even where the IUT discloses an "over-range" level or a high concentration of a particular *class of drugs* – in this case, amphetamines (which include methamphetamine) or opiates (which include morphine) – this is not determinative of the concentration of a *specific drug substance* in the urine sample: *Chong Hoon Cheong* at [51]; *Public Prosecutor v Saridewi bte Djamani and another* [2022] 4 SLR 872 at [54]. The IUT report is thus irrelevant because the applicant's positive test results were confirmed by the HSA reports which were adduced at the trial.

24 We also observe that even if further (unknown) evidence from the applicant, the CMC doctors and SSgt Saharil constituted additional evidence for the purpose of a s 392 application, such evidence would not have satisfied the *Ladd v Marshall* conditions. We disagree with the applicant that the evidence was unavailable because the Trial Counsel had only challenged the weight to be accorded to P18 and not its admissibility. Whether the Trial Counsel impugned P18 by contesting its admissibility or the weight it should be given, the argument that the applicant was experiencing drug withdrawal is relevant and underpinned by the same evidential substratum. That the Trial Counsel did not dispute the admissibility of P18 does not explain why the additional evidence

as regards the applicant's drug withdrawal (which is speculative and unclear in any event) was unavailable.

25 The condition of relevance is also not satisfied. Further self-serving testimony from the applicant would clearly have little probative value. Additionally, the applicant has no basis to speculate that SSgt Saharil or the CMC doctors would corroborate his claim of drug withdrawal. SSgt Saharil had testified to the contrary at the trial. In respect of the CMC doctors, the applicant was admitted to the CMC for three days, during which he was examined by a different doctor each day. The doctors in question were Dr Nathan, Dr Tan Zi Feng and Dr Edwin Lymen. It is notable that of the three doctors, Dr Nathan's examination of the applicant was the most temporally proximate to P18. Dr Nathan's evidence during cross-examination was that the time between the applicant's last consumption of heroin and the recording of P18 was "too short a duration" for withdrawal symptoms to surface. Again, this contradicts the applicant's claim of drug withdrawal and there is no suggestion that Dr Nathan is prepared to take a different stance. As for Dr Tan and Dr Lymen, the applicant has not adduced any reports or affidavits from them expressing disagreement with Dr Nathan's assessment of the applicant's likely state during the recording of P18. We would add that it was understandable for the Trial Counsel not to cross-examine Dr Tan and Dr Lymen in relation to P18. First, as we mentioned, Dr Nathan's examination of the applicant was the closest in time to P18. Second, Dr Nathan was the one who prepared the applicant's medical report based on the collective observations of all three doctors. Third, given Dr Nathan's response during cross-examination and the fact that the applicant's medical report was based on the observations of all three doctors, the Trial Counsel took a strategic decision not to question Dr Tan and Dr Lymen on the applicant's likely state when P18 was recorded. Further questioning would only

risk affirmation of Dr Nathan's assessment that the period between the applicant's last consumption of heroin and the recording of P18 was "too short a duration" for withdrawal symptoms to develop.

26 In *Thennarasu s/o Karupiah v Public Prosecutor* [2022] SGCA 4 ("*Thennarasu*"), this court observed a disturbing rise in instances of accused persons levelling baseless accusations against their former counsel to further their own ends. This court stated that it would not hesitate to deal firmly with such reprehensible applications (at [15]).

27 In fact, just last week, Ms Luo Ling Ling, the applicant's counsel, in CM 44/2024 which was filed in CCA 3/2024, was herself accused of mishandling the defence and this court took the opportunity to repeat the admonition "that counsel would be well-advised to exercise great circumspection and care before going down this path. Without showing a real chance of a miscarriage of justice, an appellate court will not revisit the way trial counsel dealt with the matter. Counsel must walk a thin line and guard against the real danger of being found to have abused the process of the court by raising such allegations." The admonitions apply with equal force here. The present application is a grave disservice to the Trial Counsel and an obstruction to the finality of the judicial process. We reiterate that allegations of inadequate legal assistance must not be bandied about carelessly. An applicant who makes such allegations must substantiate them with clear and compelling evidence.

28 Most of these unfounded accusations are mounted by litigants in person unlike this case. We would also like to take this opportunity to remind counsel of their paramount duty to the court to assist in the administration of justice. In the interest of saving judicial time and resources, it is the responsibility of counsel to advise their clients appropriately such that applications that are

contrary to their client's own evidence and hence doomed to fail or amount to an abuse of process are not brought before the court. The failure to do so may trigger a personal costs order against the errant counsel, whether pursuant to s 357(1)(*b*) of the CPC or the court's inherent powers: see *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] 2 SLR 668 at [8]. In this case, while the applicant's counsel might have initially accepted the applicant's instructions, a review of the Trial Counsel's affidavits and the trial transcripts would have disclosed that the applicant's allegations were plainly untenable. In the circumstances, it was contrary to the applicant's counsel's duties as an officer of the court to persist with the present application. It is therefore particularly disappointing that Ms Luo saw it fit to persist in advancing the accusations of mishandling against the Trial Counsel in spite of the clear objective evidence to the contrary.

Costs

29 As the Prosecution has not sought personal costs orders and in the absence of submissions from the parties in this regard, we would refrain from making any adverse costs order against the applicant's counsel personally. However, we wish to state emphatically that subsequent cases involving similar irresponsible conduct may well attract such adverse costs orders.

Conclusion

30 We therefore dismiss CM 47 in its entirety.

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

See Kee Oon
Judge of the Appellate Division

Luo Ling Ling, Joshua Ho Jin Le (Luo Ling Ling LLC) and Ashvin Hariharan (Ashvin Law Corporation) for the applicant;
Sruthi Boppana, Emily Koh and Kiera Yu (Attorney-General's Chambers) for the respondent.