

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 24

Court of Appeal / Criminal Motion No 29 of 2024

Between

Moad Fadzir bin Mustaffa

... Applicant

And

Public Prosecutor

... Respondent

JUDGMENT

[Criminal Procedure and Sentencing — Criminal review]

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Moad Fadzir bin Mustaffa

v

Public Prosecutor

[2024] SGCA 24

Court of Appeal — Criminal Motion No 29 of 2024
Tay Yong Kwang JCA
26 July 2024

30 July 2024

Tay Yong Kwang JCA:

Introduction

1 Mr Moad Fadzir bin Mustaffa (“the applicant”) is a prisoner awaiting capital punishment. On 19 April 2024, the applicant filed CA/CM 15/2024 (“CM 15”) under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) (“CPC”) for permission to make a review application in respect of an earlier decision of the Court of Appeal in *Moad Fadzir bin Mustaffa v Public Prosecutor and other appeals* [2019] SGCA 73 (the “first CA Judgment”), which was delivered on 25 November 2019. I dismissed CM 15 summarily on 21 May 2024 in *Moad Fadzir bin Mustaffa v Public Prosecutor* [2024] SGCA 20 (the “CM 15 Judgment”).

2 In the present application, CA/CM 29/2024 (“CM 29”), the applicant seeks a review of the CM 15 Judgment, purportedly pursuant to s 60D(c) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (“SCJA”).

Factual background

3 The factual background to this case involving the applicant has been set out in detail in the first CA Judgment and summarised adequately in the CM 15 Judgment. As will become apparent subsequently in this judgment, there are in fact two other judgments delivered between the first CA Judgment and the CM 15 Judgment. Therefore, I need not repeat the factual background here.

Procedural history

4 Following the first CA Judgment, on 22 September 2020, the applicant filed CA/CM 29/2020 (“CM 29/2020”) to seek permission to make an application under s 394H of the CPC for the Court of Appeal to review the first CA Judgment. This was done two days before the original scheduled date of his execution on 24 September 2020. On 23 September 2020, the President of the Republic of Singapore (“the President”) ordered a respite of the execution pending further order.

5 The following points were raised by the applicant in CM 29/2020:

- (a) the failure of prosecutorial duty to call material witnesses;
- (b) the court’s failure to consider the applicability of s 33B(2) of the MDA prior to sentencing;
- (c) the court’s failure to correctly classify the applicant’s role in the offending;

- (d) the failure of the CNB officers to caution the applicant on the applicant's right to silence; and
- (e) the lack of clarity as to the standard applied by the trial judge when considering the applicant's state of mind to rebut the presumption of knowledge under s 18(2) of the MDA.

For the reasons set out in *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] SGCA 97, I dismissed CM 29/2020 summarily on 12 October 2020.

6 On 12 April 2024, the President issued his order that the death sentence on the applicant be carried into effect on Friday, 26 April 2024. The applicant filed CM 15 on 19 April 2024 for permission to make a review application in respect of the first CA Judgment. He argued that there was new material on which the Court of Appeal may conclude that there had been a miscarriage of justice in the first CA Judgment. The new material was a statement by a prisoner named "Kishor", whom the applicant claimed was a material witness whose evidence was not made available by the Prosecution to the applicant's counsel or the court in the first CA Judgment. According to the applicant, Kishor was the "unknown Indian man" who threw the white plastic bag containing the four packets of drugs through the front window of the car which the applicant and his co-accused, Zuraimy bin Musa ("Zuraimy"), were in on the night of 11 April 2016. In his statement, Kishor claimed that a person named "Boy Kejr" had asked him to pass certain drugs to Zuraimy and to collect money from Zuraimy. Kishor had also allegedly collected money for Boy Kejr from Zuraimy on previous occasions. Accordingly, the applicant submitted that Kishor's evidence corroborated his case that *Zuraimy* was the intended recipient of the drugs and that the applicant was not even aware that the drug transaction was going to take place.

7 The Prosecution sought an extension of time on 23 April 2024 to review the issues raised by the applicant in CM 15 and to file its written submissions and supporting affidavit. On this basis, the Prosecution requested a stay of execution pending further order. The Court of Appeal (comprising Steven Chong JCA, Woo Bih Li JAD and myself) granted this request on 24 April 2024.

8 The applicant then filed CA/CM 20/2024 (“CM 20”) on 3 May 2024 seeking my recusal from hearing CM 15 on the ground of apparent bias. CM 20 was dismissed by the Court of Appeal (comprising Steven Chong JCA, Woo Bih Li JAD and myself) in *Moad Fadzir Bin Mustaffa v Public Prosecutor* [2024] SGCA 18 on 17 May 2024.

9 On this basis, I proceeded to deal with CM 15 as a single Judge sitting in the Court of Appeal pursuant to s 394H(6)(a) of the CPC. I dismissed CM 15 summarily on 21 May 2024 because (a) repeat applications for permission to review were prohibited under s 394K(1) of the CPC and (b) in any event, Kishor’s statement did not amount to sufficient material pursuant to s 394J(2) of the CPC on which the court could conclude that there had been a miscarriage of justice.

The parties’ cases in the present CM 29

Applicant’s case

10 In the present application, the applicant asserts that the finding that he was the intended buyer, recipient and owner of the drugs “is palpably wrong and constitutes a serious miscarriage of justice”. Accordingly, he submits that “it is our thesis that [the applicant] should not be proven beyond reasonable

doubt to have either (knowingly or intentionally) possessed the drugs for trafficking”.

11 The applicant argues that this purported miscarriage of justice would not have occurred if:

(a) “properly conceived charges of the Common Intention Cases were framed by the Prosecution in view of the Conflicting Case Theories”;

(b) the Prosecution had complied with procedure (as set out in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 (“*Nabill*”)) and produced a material witness like Kishor to corroborate or to undermine the applicant’s defence of bailment or of safekeeping the drugs for Zuraimy;

(c) the court had taken the proper precautions against completely disbelieving or rejecting an arguable defence raised by the applicant simply on the basis that he and Zuraimy had stated obvious untruths in respect of a different aspect of their case;

(d) the court, in dismissing CM 15, did not take into account the above misconceptions of law by the Prosecution and its failure to observe the proper disclosure procedures in withholding Kishor’s evidence when it found that there was insufficient material to show a miscarriage of justice; and

(e) the court’s “apparent harshness in disallowing another application to review [the applicant’s] criminal appeal by reason of his

previous application under CM 29 of 2020 being barred by section 394K of the Criminal Procedure Code 2010”.

12 The applicant’s case in this present application is said to be founded upon s 60D(c) of the SCJA. In his attempt to demonstrate the applicability of this provision to the present application, the applicant cites *Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 (“*Beh Chew Boo*”), where the Court of Appeal observed that s 60D sets out the criminal jurisdiction of the Court of Appeal, which includes the jurisdiction to “hear appeals against orders of finality”. It therefore appears to be his case that the present application may be made as a standalone review application under s 60D(c) of the SCJA.

Prosecution’s case

13 The Prosecution argues that the present CM 29 is an abuse of process and should be dismissed.

14 First, the Prosecution submits that s 60D of the SCJA does not create any new causes of action in criminal matters. Section 60D sets out the criminal jurisdiction of the court which refers to its authority to hear and determine a criminal matter that is brought before it. Specifically, s 60D(c) of the SCJA sets out the Court of Appeal’s jurisdiction to hear “any review of a decision of the Court of Appeal... under Division 1B of Part 20 of the [CPC]”. According to the Prosecution, this means that the Court of Appeal’s exercise of such jurisdiction must be subject to the conditions set out in Division 1B of Part 20 of the CPC. Section 60D(c) therefore does not provide an independent basis for the applicant to bypass the statutory requirements and prohibitions for the making of a review application in the CPC. The Prosecution submits that the “cases cited by the applicant do not support his proposition that s 60D of the

SCJA somehow allows disgruntled litigants to obtain an audience with the Court of Appeal by bypassing all statutory requirements”.

15 On this interpretation of s 60D(c) of the SCJA, the Prosecution contends that CM 29 is impermissible in at least three aspects:

(a) s 394K(5) of the CPC expressly disallows the making of any review application in respect of a decision of an appellate court on an application for permission or on a review application and this is precisely what the applicant is seeking to do in CM 29;

(b) s 394G(1) sets out exhaustively the types of decisions which can be the subject of a review application. A decision of the Court of Appeal denying permission to bring a review application (that is, the CM 15 Judgment) cannot be the subject of a review application under this provision in the CPC; and

(c) even if the CM 15 Judgment is somehow reviewable, s 394H(1) requires the applicant to first obtain the permission of the Court of Appeal to make a review application under s 394I of the CPC. That has not been done in the present case, despite the applicant being clearly aware of this requirement since he had applied for permission twice earlier.

16 In the light of these express prohibitions in the CPC, the Prosecution submits that the applicant’s true intention in the present application “is to devise an opportunity to relitigate the issues before a 3-Judge bench of the Court of Appeal” instead of having this application determined by a single Judge sitting in the Court of Appeal. The Prosecution say this is unacceptable and CM 29 should be dismissed accordingly.

17 The Prosecution also seeks costs of \$5,000 to be paid personally by counsel for the applicant, Mr Ong Ying Ping (“Mr Ong”). Such an order is warranted as (a) Mr Ong acted improperly and unreasonably by filing CM 29, (b) the filing of CM 29 caused the Prosecution to incur unnecessary costs and (c) it is just in all the circumstances to make such an order. A costs order of \$5,000 would also be consistent with precedent cases.

The decision of the Court

18 It is clear that the present CM 29 is, in essence, an application under Division 1B of Part 20 of the CPC (*ie*, ss 394F to 394K of the CPC) to review the CM 15 Judgment. I do not accept the applicant’s argument that CM 29 can be a standalone review application under s 60D(c) of the SCJA. Section 60D(c) of the SCJA provides as follows:

Criminal jurisdiction

60D. The criminal jurisdiction of the Court of Appeal consists of the following matters, subject to the provisions of this Act or any other written law regulating the terms and conditions upon which those matters may be brought:

...

- (c) any review of a decision of the Court of Appeal, or a decision of the General Division, under Division 1B of Part 20 of the Criminal Procedure Code 2010;

19 The provision not only states specifically that the criminal jurisdiction of the Court of Appeal extends to any review of a decision of the Court of Appeal under Division 1B of Part 20 of the CPC, it also makes it clear that the exercise of such jurisdiction is subject to “any other written law regulating the terms and conditions upon which those matters may be brought”. The exercise of the Court of Appeal’s criminal jurisdiction under s 60D(c) of the SCJA must

therefore be subject to the provisions governing review applications brought under Division 1B of Part 20 of the CPC.

20 In the applicant’s written submissions, he reproduces the following extracts from *Beh Chew Boo*:

94 ... Section 29A(2) of the applicable Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“SCJA”) during the Capital Charge proceedings (“then-SCJA”) – now amended by the Supreme Court of Judicature (Amendment) Act 2019 (Act 40 of 2019) with effect from 2 January 2021 as s 60D – also sets out the criminal jurisdiction of the Court of Appeal:

...

- (c) any review of a decision of the Court of Appeal, or a decision of the High Court, under Division 1B of Part XX of the Criminal Procedure Code;

...

95 The text of s 60D of the present SCJA is *in pari materia* with s 29A(2), except that the phrase “High Court” in ss 29A(2)(a) and 29A(2)(c) has been amended and replaced with the phrase “General Division” in ss 60D(a) and 60D(c) (to refer to the General Division of the High Court). It is clear that the Judge’s ruling on the text messages does not fall within ss 29A(2)(b)–29A(2)(f) of the then-SCJA. Sections 29A(2)(b)–29A(2)(c) deal with review applications; s 29A(2)(d) concerns applications to state a case on a question of law; s 29A(2)(e) concerns criminal references on a question of law of public interest; and s 29A(2)(f) concerns criminal motions. As for s 29A(2)(a) of the then-SCJA, the phrase “original criminal jurisdiction” has been interpreted to refer to the trial jurisdiction of the High Court: *Kim Gwang Seok v Public Prosecutor* [2012] 4 SLR 821 (“*Kim Gwang Seok*”) at [36]. ...

100 ... Division 1B of Pt XX of the CPC – ss 394F–394K – sets out the applicable framework for an application to review an earlier decision of an appellate court (“review application”). ...

21 The applicant does not explain how *Beh Chew Boo* supports his proposition that a standalone review application may be made under s 60D(c) of the SCJA against a decision of the Court of Appeal denying permission for a review application to be brought. The case does not support such a proposition

at all. The cited extracts from *Beh Chew Boo* at [94] and [95] simply restate s 60(c) of the SCJA and provide a broad explanation as to the predecessor provision of s 60D. Similarly, the cited portion of [100] makes it clear that an application to review an earlier decision of an appellate court must be made under the applicable framework set out in Division 1B of Part 20 of the CPC. The applicant's attempt to cloak CM 29 as a standalone application under s 60D(c) of the SCJA is clearly intended to circumvent the statutory requirements in Division 1B of Part 20 of the CPC.

22 For the above reasons, CM 29 must necessarily be treated as an application under Division 1B of Part 20 of the CPC seeking to review the CM 15 Judgment. This means that the statutory requirements set out in Division 1B are applicable to CM 29 and must be complied with.

Whether CM 29 is permissible under Division 1B of Part 20 of the CPC

23 On the correct basis that the statutory requirements in Division 1B of Part 20 of the CPC apply to the present application, it is clear in law that CM 29 is expressly prohibited under the framework set out in the CPC.

24 First, as pointed out by the Prosecution, s 394K(5) unequivocally disallows the making of any review application (or an application for permission) in respect of a decision of an appellate court on an application for permission or on a review application. As CM 29 seeks to review the CM 15 Judgment (which was the Court of Appeal's decision rejecting the applicant's application for permission under s 394H of the CPC), CM 29 is clearly prohibited under s 394K(5) of the CPC. It may therefore be dismissed on this basis alone.

25 Second, s 394G(1) of the CPC provides as follows:

Conditions for making review application

394G.—(1) A review application cannot be made in respect of an earlier decision of an appellate court unless any of the following applies:

- (a) the earlier decision is a decision of the appellate court on the merits of an appeal;
- (b) the earlier decision is a decision of the appellate court to dismiss an appeal under section 387(3) after the appellant fails to appear at the hearing of the appeal, and the appellate court does not reinstate the appeal under section 387(3);
- (c) where the appellate court is the Court of Appeal — the earlier decision is a decision of the Court of Appeal to issue a certificate under section 394E(1) confirming the imposition of the sentence of death on the accused;
- (d) where the appellate court is the Court of Appeal — the earlier decision is —
 - (i) a determination by the Court of Appeal of any question of law of public interest referred to the Court of Appeal under section 397; or
 - (ii) an order made by the Court of Appeal under section 397(5).

The CM 15 Judgment, which CM 29 seeks to review, does not fall within any of the permitted categories. It follows that no review application may be made in respect of it. This must also logically mean that no application for permission to review the CM 15 Judgment may be brought.

26 In the light of the two statutory provisions above, CM 29 is obviously taken out in defiance of the legislative framework. It must therefore be dismissed summarily.

27 For completeness, I address an argument raised by Mr Ong at a case management conference (“CMC”) held on 8 July 2024 before an Assistant

Registrar of the Supreme Court. Mr Ong contended there that CM 29 seeks to invoke the “inherent power” of the court to review the CM 15 Judgment. Mr Ong cited the case of *Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 at [13] and [21]–[28], which made reference to the court’s inherent power to reopen a concluded criminal appeal.

28 This argument has no merit. The court’s inherent power to review concluded criminal appeals will only be warranted where the material put forth by an applicant renders certain relevant facts practically irrefutable and those facts show conclusively that there has been a miscarriage of justice on the face of the record: see the CM 15 Judgment at [28]. In the present application, the applicant has failed to put forth any material which demonstrates conclusively that there has been a miscarriage of justice on the face of the record. Instead, the arguments in CM 29 merely repeat submissions which have already been canvassed and rejected in CM 15, such as the Prosecution’s alleged failure to produce Kishor as a witness and the alleged breaches of the Prosecution’s duty of disclosure as set out in *Nabill*. Any call for the court to invoke its inherent power to review the first CA Judgment or the subsequent review judgments is therefore totally unjustified in the present case.

Whether costs should be ordered to be paid personally by Mr Ong

29 On the basis of what I have set out above, I am satisfied that Mr Ong should be ordered to pay costs of \$5,000 personally to the Prosecution for the present application. Mr Ong was given permission to respond to the Prosecution’s submissions on costs. He did not file his submissions in time and was granted an extension of time to do so. He did so the following day.

30 Mr Ong argues in his submissions that he has not acted unreasonably or improperly. In essence, he repeats his arguments that the present application is well founded on s 60D of the SCJA or on the court’s inherent jurisdiction. He also reiterates again what he has said about the Prosecution’s alleged failure of its duties of candour and disclosure and the relevance of Kishor’s evidence.

31 Under s 357(1)(b) of the CPC or by virtue of its inherent powers, the court may order a solicitor to pay the costs of the Prosecution directly (see *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 at [77]–[80]). The relevant three-step test in relation to the exercise of the court’s power to order costs against a solicitor is as set out in *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 (“*Syed Suhail*”) at [19]; *Roslan bin Bakar and others v Public Prosecutor and another appeal* [2022] 2 SLR 998 at [32]:

- (a) has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
- (b) if so, did such conduct cause the party seeking personal costs (*ie*, the Prosecution) to incur unnecessary costs?
- (c) if so, is it in all the circumstances just to order the legal representative to compensate the party seeking personal costs for the whole or any part of the relevant costs?

32 In my view, Mr Ong has acted improperly and unreasonably in assisting the applicant with the filing of CM 29. It should have been clear to Mr Ong, a lawyer of many years’ standing, that CM 29 is entirely devoid of merit given that it is statutorily prohibited under Division 1B of Part 20 of the CPC. These prohibitions were brought to Mr Ong’s attention at the CMC. There was therefore no reasonable explanation for the filing of CM 29.

33 Further, CM 29 is effectively the applicant's third attempt to have the first CA Judgment reviewed by the Court of Appeal. This is evident from the fact that the arguments raised in CM 29 either (a) pertain to what the applicant perceives to be erroneous reasoning on the part of the court in the first CA Judgment or (b) repeat his submissions in CM 15. Mr Ong should know, having represented the applicant in CM 15, that such repeat applications are plainly impermissible. The filing and continuation of CM 29 has caused the Prosecution to incur unnecessary costs as the Prosecution has to file submissions as well as to attend the CMC.

34 Defence counsel and the Prosecution are under a duty to assist in the administration of justice. They should ensure that hopelessly unmeritorious actions or applications are not commenced or continued. Where counsel brings a patently unmeritorious application in the face of these principles, the case for a personal costs order will be particularly strong: *Syed Suhail* at [55]. Considering the obvious fundamental flaws in CM 29, the fact that these flaws were highlighted to Mr Ong at the CMC and his insistence in maintaining CM 29, it is entirely just to order Mr Ong to pay costs of \$5,000 personally to the Prosecution pursuant to s 357(1)(b) of the CPC.

Conclusion

35 Under s 394H(7) of the CPC, a leave application may, without being set down for hearing, be dealt with summarily by a written order of the appellate court. Before refusing a leave application summarily, the appellate court must consider the applicant's written submissions (if any) and may, but is not required to, consider the respondent's written submissions (if any) (s 394H(8) of the CPC). Having considered both parties' written submissions as well as the applicant's affidavit, I dismiss CM 29 summarily on the basis that it is clearly

prohibited under ss 394K(5) and 394G(1) of the CPC. As CM 29 is patently unmeritorious, its commencement and continuation were an abuse of the process of the court, which in turn resulted in the incurrence of unnecessary costs. I therefore order Mr Ong to pay costs of \$5,000 personally to the Prosecution.

Tay Yong Kwang
Justice of the Court of Appeal

Ong Ying Ping (Ong Ying Ping Esq) for the applicant;
Wong Woon Kwong SC and Sarah Siaw (Attorney-General's
Chambers) for the respondent.
