

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 38

Criminal Motion No 3 of 2022

Between

Gaiyathiri d/o Murugayan

... Applicant

And

Public Prosecutor

... Respondent

EX TEMPORE JUDGMENT

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

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Gaiyathiri d/o Murugayan

v

Public Prosecutor

[2022] SGCA 38

Court of Appeal — Criminal Motion No 3 of 2022
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Steven Chong JCA
4 May 2022

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Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 The applicant in Criminal Motion No 3 of 2022 (“CM 3”) pleaded guilty on 23 February 2021 (“the PG Hearing”) before a judge in the General Division of the High Court (“the Judge”) to 28 offences under the Penal Code (Cap 224, 2008 Rev Ed) (“the Penal Code”), including a charge of culpable homicide not amounting to murder under s 304(a) of the Penal Code for having caused the death of her foreign domestic worker, a 24-year-old single mother from Myanmar (“the Victim”). Another 87 related charges were taken into consideration for the purposes of sentencing.

2 It was agreed, for the purposes of the plead guilty proceedings, that the psychiatric assessment of the applicant by one Dr Derrick Yeo (“Dr Yeo”) of the Institute of Mental Health (“IMH”) should be taken as reflective of her

mental state at the time she committed the offences. Dr Yeo assessed the applicant as suffering from Major Depressive Disorder with peripartum onset with moderate severity and Obsessive-Compulsive Personality Disorder (“OCPD”) at the time of the offences, and that the applicant’s psychiatric conditions partially impaired her mental responsibility for her acts, although she was not of unsound mind at the material time. Having considered the proper mitigatory weight to be placed on the applicant’s psychiatric condition, the Judge sentenced the applicant to an aggregate term of 30 years’ imprisonment.

3 The applicant has filed an appeal against her sentence in Criminal Appeal No 21 of 2021 (“CCA 21”). In CM 3, the applicant applies for: (a) an order against the respondent (the Prosecution) and/or the Singapore Prison Service (“the SPS”) for disclosure of five categories of documents (“the Additional Materials”); and (b) leave to adduce as further evidence in CCA 21 the Additional Materials and further evidence pertaining to her psychiatric condition, consisting of, in the main, an alleged further report by Dr Jacob Rajesh (“Dr Rajesh”), another psychiatrist who had also examined her.

4 Unlike Dr Yeo, Dr Rajesh assessed the applicant as suffering from Obsessive-Compulsive Disorder (“OCD”) with “absent insight”, but not OCPD. Like Dr Yeo, Dr Rajesh had also assessed the applicant as not being of unsound mind at the time of the offences, and that she had been aware of her actions and had known that they were wrong and against the law. The applicant claims that, in the alleged further report, which has not been put before us, Dr Rajesh sets out, amongst other things, his disagreement with Dr Yeo’s assessment that the applicant had the cognitive and volitional capacity in inflicting violence on the Victim, and his disagreement with Dr Yeo’s diagnosis of the applicant as suffering from OCPD instead of OCD.

5 In the applicant’s affidavit filed in support of CM 3, she also made several allegations against Mr Sunil Sudheesan and Ms Diana Ngiam (“the Former Counsel”), who had represented her from 1 August 2016 until 30 March 2021. The latter date was slightly more than a month after her guilty plea had been taken before the Judge at the PG Hearing, following which the Judge reserved his decision on the appropriate sentence. The applicant alleges that the Former Counsel had not gone through the Statement of Facts (“SOF”) with her, that she had raised her objections to particular points in a draft version of the SOF through the Former Counsel but which were included anyway in the SOF, and that they did not show her a copy of the mitigation plea, which had been filed for the purposes of the PG Hearing. The applicant also alleges that she had informed the Former Counsel to obtain medical reports of her mother, Prema d/o Naraynasamy (“Prema”) between 2016 until 2021 from the SPS. Prema is a co-accused in some of the offences with which the applicant had been charged. Prema’s medical reports is part of the Additional Materials for which the applicant seeks disclosure in CM 3.

6 Following the discharge of the Former Counsel, Mr Joseph Chen (“Mr Chen”) took over as counsel for the applicant for the remainder of the plead guilty proceedings until the Judge sentenced the applicant on 22 June 2021. Mr Chen was later appointed to represent the applicant for CCA 21 and CM 3. On 8 April 2022, the applicant sought leave to file an affidavit in reply to the affidavit filed by the SPS (on the respondent’s behalf) in these proceedings. We granted the applicant’s request on 11 April 2022 and directed that the reply affidavit be filed by 22 April 2022. However, on 19 April 2022, Mr Chen applied to discharge himself, citing the difficulties he faced in complying with court timelines due to his health ailments. We allowed his application and so the applicant now acts in person, although we note that

Mr Chen has agreed to assist the applicant (whilst not representing her) in filing the necessary court documents. Mr Chen's discharge necessitated a further extension of time for the applicant to file her reply affidavit, which in the event was filed on the evening of 28 April 2022. In arriving at our decision for CM 3, we have considered the contents of the reply affidavit, which we note, canvassed various other matters, in spite of the court's earlier direction that it be strictly confined to responding to matters raised in the SPS's affidavit.

The issues

7 The main issues before us are: (a) whether there is any basis for this court to order disclosure of the Additional Materials; and (b) whether we should grant the applicant leave to adduce as further evidence in CCA 21 the Additional Materials and/or further evidence of her psychiatric condition.

8 However, before we turn to these issues, we address two preliminary points. The first point deals with the general approach which we should take in considering CM 3. The respondent, in opposing CM 3, has submitted that the applicant has sought the reliefs therein with the objective of qualifying or retracting her plea of guilt, an attempt which it says should not be permitted, and which by extension will require this court to dismiss CM 3 as well. We have some hesitation in accepting this submission because it conflates two distinct issues: (a) whether there is any merit in the reliefs sought in CM 3, and (b) whether the applicant should be allowed to qualify or retract her plea of guilt after having pleaded guilty before the Judge. We are presently only concerned with the former, and not the latter. Even if the reliefs sought in CM 3 suggest that the applicant is likely to attempt to retract or qualify her plea of guilt (whether in CCA 21 or in any subsequent application for criminal revision), unless and until CCA 21 and/or any such subsequent proceeding is heard, this

court can have no certainty as to whether she will indeed make such an attempt, which also, contrary to the respondent's suggestion, is not entirely impermissible provided that the relevant grounds are made out (see the decision of this court in *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [48]–[65]). Put simply, if the court were to dismiss CM 3 on the basis that the applicant should not be permitted to qualify or retract her plea of guilt, then we are essentially premising our decision in CM 3 on an assumption that the applicant *will* make an attempt to retract her plea of guilt and that there *will* be no grounds for her to do so. That cannot be correct. In our judgment, the proper course is for the court to consider CM 3 on its merits, and then determine in CCA 21 or any subsequent proceeding if the applicant should be permitted to qualify or retract her plea of guilt, if she indeed seeks to do so.

9 The second point relates to the allegations which the applicant has made against the Former Counsel. Pursuant to the court's directions, Mr Chen had sought the responses of the Former Counsel to those allegations and annexed them to a solicitor's affidavit, which has been put before us. In brief, we note that the Former Counsel have denied the applicant's allegations and stated their willingness to address the court on those allegations. However, we did not find it necessary to require the attendance of the Former Counsel at the hearing of CM 3 to address those allegations. All of the applicant's allegations (save for the one relating to Prema's medical records) do not relate to the reliefs sought in CM 3, but only pertain broadly to whether her admission to the SOF had been unequivocal and whether she had been prevented from advancing particular points in her mitigation plea before the Judge (though, we note, Mr Chen had put forward a further mitigation plea on her behalf after he took over conduct of the proceedings). We find that the applicant's allegations squarely go towards the issue of whether she should be permitted to retract her plea of guilt before

the Judge because they are aimed at casting doubt on the propriety and validity of the plead guilty procedure before the Judge. As explained earlier, that is not the issue with which we are concerned in CM 3. We also do not see how the allegation about the Former Counsel's failure to obtain Prema's medical records is at all relevant to the reliefs sought in CM 3. Whether an attempt had been made by the Former Counsel to obtain those reports previously has no bearing whatsoever on whether the applicant should be granted discovery of those reports now.

10 With these preliminary points out of the way, we turn to consider the main issues in CM 3.

Issue 1: Whether there is any basis for this court to order disclosure of the Additional Materials

11 The Additional Materials comprise five categories of documents, as follows: (a) Prema's medical records, which we have alluded to earlier; (b) the applicant's own medical records from the SPS between 2016 till the present date, which she says shows that she has not been administered the required psychiatric treatment while in prison; (c) records kept by the SPS of alleged incidents involving the applicant in prison; (d) records of WhatsApp messages allegedly exchanged between the applicant and the Victim's next-of-kin which would show that the latter had forgiven the applicant; and (e) medical records of the applicant's children from their private paediatrician.

12 In our judgment, there is no basis whatsoever for this court to order disclosure of the Additional Materials. We say so for three reasons, each of which when taken on its own, is fatal to this part of CM 3.

13 First, the respondent is not the proper party against whom any such order for disclosure of the Additional Materials can be made. Except for the alleged record of WhatsApp messages exchanged between the applicant and the Victim's next-of-kin, the remainder of all the Additional Materials are in the possession of the SPS and not the respondent. The applicant, who in her affidavit spoke of the SPS's attempts in frustrating her access to those materials, implicitly recognises this. Indeed, the SPS has explained, in an affidavit filed in these proceedings, that they would have provided the applicant's and Prema's medical records to the applicant if a request had been made. As for the medical records of the applicant's children, the SPS stated that they had facilitated the applicant's request to obtain those records from the private paediatrician, which have been provided to her on 5 October 2021. As for the records of the alleged incidents, they would necessarily also be in the SPS's possession.

14 As for the records of the alleged WhatsApp messages, the applicant does not even specify in whose possession it can be found. In our view, given that the applicant has not had access to a mobile device with messaging capability since the time of her arrest, the existence of these messages is, at best, speculative, and which in any event, cannot be in the possession of the respondent.

15 Second, there is no legal basis on which the applicant can seek disclosure of the Additional Materials. None of the established legal bases on which an accused person may obtain discovery or disclosure of documents as against the Prosecution in criminal proceedings applies in this case. For instance, the Criminal Case Disclosure regime under the Criminal Procedure Code 2010 (2020 Rev Ed) only provides for pre-trial criminal discovery (see the High Court decision of *Li Weiming v Public Prosecutor and other matters* [2013] 2 SLR 1227 at [16]) and does not apply in a case where an accused person has already

pleaded guilty and been sentenced, as is the case here. Further, neither of the Prosecution's disclosure obligations at common law is applicable here. As a matter of principle, the Prosecution's obligation to disclose to the Defence unused material, which this court identified in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205, only subsists while there remains a dispute over the accused person's guilt or innocence. In this case, any dispute over the applicant's guilt has ceased following her plea of guilt and unqualified admission to the SOF before the Judge. Finally, it is also self-evident that the Prosecution's obligation to disclose to the Defence a statement of a "material witness" not called as a Prosecution witness, which this court identified in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984, cannot be relevant in this case.

16 Third, even if we assume, in the applicant's favour that there is some legal basis on which she can rely in seeking disclosure of the Additional Materials, there is no factual basis on which the court can compel disclosure. For a court to do so, the material in question must, at the very least, be relevant to the proceedings with which the application for disclosure is concerned. At this stage, given the applicant's plea of guilt, no live dispute remains over her guilt or innocence. The only issues which may potentially remain contested are: (a) the validity of the plead guilty procedure pursuant to which her plea was taken; and (b) whether her sentence is manifestly excessive. Thus, even if there were a legal principle affording the applicant with some basis to obtain disclosure, she must still demonstrate that the Additional Materials are relevant in connection with those two issues.

17 Quite clearly, the applicant cannot do so. The records kept by the SPS of the alleged incidents, and the medical records of Prema and the applicant, are all of no relevance as they post-date the applicant's commission of the offences

and are unrelated to the propriety of the plead guilty procedure before the Judge. The alleged WhatsApp messages (assuming they even exist) also can have no relevance. There is little place for forgiveness in the field of criminal law, which punishes offenders on the basis that they have committed criminal acts against the State (see the decision of this court in *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [48]). Finally, while the applicant's children's medical records may well be relevant in showing the stressors which she faced at the time of the offences and may affect the mitigatory weight to be attached to her psychiatric conditions in sentencing, as we explained earlier, these reports are not in the possession of the respondent (see [13] above). We also note that this point had been raised in the further mitigation plea (see [9] above), although reliance had been placed on the medical records of the applicant's children that were kept with KK Women's and Children's Hospital.

18 For the foregoing reasons, there is no basis on which we can order disclosure of the Additional Materials. Hence, the only further evidence which we need consider for the remainder of CM 3 is that relating to the applicant's psychiatric condition at the time of the offences.

Issue 2: Whether this court should grant the applicant leave to adduce further evidence on appeal?

19 There are two aspects to the further evidence which the applicant says relates to her psychiatric condition: (a) first, an alleged further report by Dr Rajesh in which he sets out his disagreement with Dr Yeo's assessment of the applicant's psychiatric condition at the time of the offences; (b) second, evidence in the form of a Newton Hearing to address the differences between Dr Rajesh's and Dr Yeo's opinions. Quite clearly, if we do not grant leave in

respect of the former, then the latter would not arise for consideration at all. We therefore consider the alleged further report by Dr Rajesh first.

20 The applicable principles are as follows. An application to adduce further evidence in criminal proceedings is governed by the threefold requirements in the English Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR 1489. It must be shown, first, that the new evidence would not have been available for use at the trial even with reasonable diligence; second, it must be relevant and have an important influence on the result of the case, though it need not be decisive; third, the evidence must be apparently credible, though it need not be incontrovertible (see the decision of this court in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [28]). Where an application is made by the accused person to admit further evidence favourable to him, the requirement of non-availability is applied in an attenuated manner and the appellate court should generally admit the further evidence if it satisfied the *Ladd v Marshall* requirements of relevance and reliability (see the High Court decision of *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [16]) (though see [22] below).

21 In this case, there is no basis on which we could have determined if any of the *Ladd v Marshall* requirements were satisfied because this alleged further report by Dr Rajesh has not even been put before us. Indeed, there is no evidence that such a report even exists. We only have before us the applicant's claim that she had instructed Mr Chen to write to Dr Rajesh to provide such a report. Thus, we can do nothing except to dismiss the application. For completeness, we add that Dr Rajesh had in fact provided two further psychiatric reports after the issuance of Dr Yeo's report, and no mention had been made by Dr Rajesh in those reports of his disagreement with Dr Yeo's assessment of the applicant's psychiatric condition. It is also unclear to us as to whether the alleged

disagreement even exists. This is because the basis on which the applicant says she has invited Dr Rajesh to provide the alleged further report are the differences which *she perceived* of Dr Rajesh's and Dr Yeo's respective opinions. At no point in her supporting affidavit for CM 3 does the applicant say that Dr Rajesh has *disagreed* with any part of Dr Yeo's assessment.

22 We also make a further observation. In *Miya Manik v Public Prosecutor and another matter* [2021] SGCA 90 ("*Miya Manik*"), this court emphasised that the *Ladd v Marshall* requirement of non-availability is not dispensed with in respect of applications to adduce further evidence that are made by accused persons (at [32]). We also considered that the requirement of non-availability will not be applied in an attenuated manner if the evidence which the accused seeks to adduce on appeal was that which he ought reasonably to be aware would have a bearing on his case and which he has no good explanation for failing to adduce in the court below (see *Miya Manik* at [33]). In the plead guilty proceedings, it had been agreed between the Prosecution and the Defence that Dr Yeo's assessment of the applicant's psychiatric condition should be taken as reflective of her mental state at the time of the offences (see [2] above). Also, one of the main issues before the Judge was the appropriate mitigatory weight to be placed on her psychiatric condition. The alleged further report from Dr Rajesh disagreeing with Dr Yeo's assessment would have been clearly relevant and therefore ought to have been raised below. Thus, even if the alleged report existed, in the absence of good explanation, the applicant's failure to adduce that report in the plead guilty proceedings below would necessarily militate against the grant of leave now.

Conclusion

23 We therefore dismiss CM 3 in its entirety. There is no basis whatsoever on which we can order disclosure of the Additional Materials. Given that the alleged further report from Dr Rajesh has not even been put before us, we cannot do anything but dismiss the application for leave to adduce that report in evidence.

24 The respondent has sought a personal costs order against Mr Chen, under whose watch CM 3 was filed. In respect of that, both Mr Chen and the respondent are, within eight days from the date of this judgment, to tender written submissions not exceeding ten pages in length addressing: (a) why a personal costs order should (or should not) be made; and (b) the issue of the quantum of costs that are to be paid to the respondent should such a personal costs order be made.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

The applicant (in person);
Mohamed Faizal SC, Senthilkumaran Sabapathy and Sean Teh
(Attorney-General's Chambers) for the respondent.
