IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 11

Criminal Motion No 11 of 2023

Between

Mohd Akebal s/o Ghulam Jilani

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal review — Permission for review]

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Introduction

1 This is an application under s 394H(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") for permission to make a review application in respect of this court's judgment in *Mohd Akebal s/o Ghulam Jilani v Public Prosecutor and another appeal* [2020] 1 SLR 266 (the "Appeal Judgment"). The applicant was convicted on one charge of trafficking not less than 29.06g of diamorphine under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") punishable under s 33(1) or s 33B of the MDA (the "Charge") and sentenced to the mandatory death penalty on 27 February 2019. His appeal against his conviction was dismissed by this court on 28 November 2019 in the Appeal Judgment.

2 In this application, the applicant claims that he was wrongly identified as the individual involved in the drug transaction that gave rise to the Charge. He criticises the trial judge's factual findings and argues that he should be given permission to make an application for this court to review the Appeal Judgment.

The trial

3 The applicant was tried in a joint trial with two others: one Mohammed Rusli Bin Abdul Rahman ("Rusli") and one Andi Ashwar bin Salihin ("Andi"). The trial judge convicted the applicant on the Charge in *Public Prosecutor v Andi Ashwar bin Salihin and others* [2019] SGHC 44 (the "Trial Judgment"). The trial judge found the facts to be as follows.

4 Between 21 August 2014 and the morning of 22 August 2014, Rusli instructed Andi to collect diamorphine for him. On 22 August 2014 at about 9.06am, Rusli gave a mobile phone number (the "Phone Number") to Andi and, in a phone call, instructed Andi to make arrangements with the user of the Phone Number as to when and where to pick up the diamorphine.

5 At about 10.20am on 22 August 2014, Andi drove to the service road near Block 716 Woodlands Avenue 7 ("Block 716"). Earlier that day, at about 9.00 am, Senior Station Inspector David Ng ("SSI Ng") had received information about Andi. SSI Ng and his officers tailed Andi's car until it ended up at the service road near Block 716. SSI Ng was dropped off and walked to the void deck of Block 716. There, he spotted an Indian male who was carrying an orange plastic bag. The Indian male was standing about 5–10 metres away from SSI Ng and SSI Ng observed his face for about 30 seconds.

6 A few minutes later, a CNB officer who was observing Andi's car reported that an Indian male carrying an orange plastic bag (the "Orange Bag")

had approached Andi's car and placed that Orange Bag on the passenger seat. The Indian male then walked away and Andi drove off. I will refer to this as the "drug transaction".

7 Shortly thereafter, SSI Ng saw the same Indian male at a sheltered walkway leading towards the main road. He observed the Indian male boarding bus No. 964. He reported this over his communications set, describing the Indian male as wearing a grey T-shirt with blue jeans. He instructed Staff Sergeant Goh Jun Xian Eric ("SSgt Goh") to tail the Indian male.

8 SSgt Goh tailed bus No. 964 till it reached Woodlands Bus Interchange where he saw the Indian male wearing a grey T-shirt and blue jeans alight and wait for bus No. 913. When the Indian male boarded bus No. 913, SSgt Goh boarded as well and sat two rows in front of him. When the Indian male alighted, SSgt Goh followed. However, SSgt Goh lost sight of him at Block 1 Marsiling Road.

9 SSgt Goh then returned to the Woodlands area to continue looking for the Indian male. At about 8.25pm, he reported that he had spotted the same Indian male wearing a grey T-shirt and blue jeans. The Indian male was arrested and he turned out to be the applicant. A Nokia mobile phone which was using the Phone Number (the "Mobile Phone") was found in a grass patch next to the applicant when he was arrested.

10 Separately, CNB officers had continued tailing Andi's car after it left Block 716. CNB officers arrested Andi and his car was searched. The Orange Bag was recovered. There were two black-taped bundles in the Orange Bag. Immediately after Andi's arrest, at about 1.30pm, a statement was recorded from him. When shown a photoboard with photographs of 13 individuals, Andi

identified the photograph of the applicant as the one showing the person who had given him the Orange Bag earlier. In his long statement taken on 26 August 2014, Andi repeated that the applicant was the one who had passed him the Orange Bag.

11 The two black-taped bundles that were found in the Orange Bag were found to contain 14.60g and 14.46g of diamorphine respectively.

The applicant's defence

12 The applicant's defence was that he was not involved in the drug transaction at all and that he had been wrongly identified: the Trial Judgment at [17]. The Prosecution relied on the identification evidence of SSI Ng, SSgt Goh and Andi to establish that the applicant was the Indian male involved in the drug transaction. The applicant argued that the identification evidence was insufficient for the following reasons:

(a) First, he was not wearing a grey T-shirt at the material time on 22 August 2014. He was wearing a long-sleeved white shirt with blue sleeves because he was reporting for a urine test that day and had to cover up the tattoos on his arms: the Trial Judgment at [18] and [60].

(b) Second, the Prosecution's witnesses gave inconsistent testimony on the attire worn by the applicant during the drug transaction: the Trial Judgment at [61].

(c) Third, Andi was suffering from drug withdrawal during the recording of his statements in which he identified the applicant: the Trial Judgment at [19].

13 The applicant also claimed that while he had the Mobile Phone at the time of his arrest, he was not in possession of the Mobile Phone during the drug transaction. He claimed that he had passed it to a "Bala" at 11.00 pm on 21 August 2014 and it was returned to him shortly before he was arrested on 22 August 2014: the Trial Judgment at [71].

The trial judge's findings

14 In rejecting the applicant's defence, the trial judge made the following key findings.

(a) The urine test was almost two hours after the drug transaction and the applicant could have easily changed his attire after the drug transaction and before his urine test: the Trial Judgment at [63].

(b) The inconsistent testimony on the applicant's attire did not diminish the veracity of the identification evidence because SSI Ng and Andi would have been focused on the applicant's face rather than his attire. Further, three to four years had passed between the drug transaction and the witnesses' evidence in court, so allowance had to be given for human fallibility in recollection: the Trial Judgment at [62].

(c) The applicant's own medical expert accepted that by the time the long statement was recorded, Andi was likely to have been more "clearheaded" and the withdrawal symptoms were likely to have been "past its peak": the Trial Judgment at [55].

(d) The phone records in evidence corroborated the identification of the applicant as the individual involved in the drug transaction. There were multiple phone calls between the Phone Number and

Andi on 22 August 2014, between 9.00am and 10.21am. The Mobile Phone, which used the Phone Number, was found next to the applicant when he was arrested: the Trial Judgment at [68]–[70].

(e) The applicant's claim that he had passed the Mobile Phone to "Bala" was improbable, especially since it contradicted directly his own statement to CNB given on 28 August 2014: the Trial Judgment at [75].

The appeal

15 On appeal, the applicant argued that the trial judge erred in fact and law in finding that the identification evidence before him was of good quality. At the appeal hearing, his counsel also raised a new allegation – that the applicant could have been the subject of a conspiracy to frame him: the Appeal Judgment at [9].

16 This court found that Andi's testimony was consistent. Andi had identified the applicant as the man who handed him the Orange Bag several hours before the applicant was arrested. He then repeated this in his subsequent long statement. Also, there was no basis to contend that the applicant was the subject of a conspiracy involving Andi: the Appeal Judgment at [12].

17 In any case, Andi's identification of the applicant was not the sole basis for his conviction. There was the mobile phone evidence which linked the applicant to the drug transaction. It would have been an incredible coincidence for Andi to have wrongly identified the applicant and for the applicant to be arrested subsequently with the incriminating Mobile Phone in his possession.

The applicant's suggestion that he had passed the Mobile Phone to someone else was "not credible and much too convenient": the Appeal Judgment at [13].

18 Further, the applicant lived at Block 719, Woodlands Avenue 7, which was in the vicinity of Block 716: the Appeal Judgment at [14].

19 Finally, Andi stated in his long statement that the person to whom he had spoken on the phone told him that he had to rush off for a urine test when they were arranging the drug transaction. It was true that the applicant had to attend a urine test that day and that he did so at 12.22pm: the Appeal Judgment at [15].

20 Taking all this evidence together, this court was satisfied that the applicant was the individual who handed the Orange Bag to Andi. The appeal was dismissed accordingly: the Appeal Judgment at [16].

Parties' cases in this application

21 In this application, the applicant suggests that the identification evidence in this case was not sufficient to prove that he was the Indian male that was involved in the drug transaction and that there were many operational irregularities surrounding his arrest. He claims that there was absolutely no credible evidence to support his conviction and there was, on the other hand, evidence to suggest his innocence. On the day of the drug transaction, he was actually reporting for his urine test, in an effort to reintegrate into society and wean himself off drugs. He therefore urges this court to look at the "tangible evidence" and "proper legal precedent" and to set him free.

22 In response, the Prosecution highlights that the applicant has not raised "sufficient material" as defined in s 394J(2) and (3) of the CPC on which this

court may conclude that there has been a miscarriage of justice in the applicant's criminal proceedings. Every issue raised by the applicant has either been canvassed at the trial or on appeal. The application is an impermissible attempt to make a second appeal against the decision of the trial judge. The Prosecution asks that this application be summarily dismissed pursuant to s 394H(7) of the CPC.

Applicable law

23 To obtain permission under s 394H(1) of the CPC to make a review application, the application for permission must disclose a "legitimate basis for the exercise of [the appellate court's] power of review": *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 ("*Kreetharan*") at [17]. To show a legitimate basis for the appellate court's exercise of its power of review, the applicant must show that the cumulative requirements for the appellate court's exercise of its power of review are satisfied. These requirements are those contained in s 394J of the CPC: *Roslan bin Bakar and others v Public Prosecutor* [2022] 1 SLR 1451 at [21]. Section 394J(2) of the CPC requires the applicant to show that there is "sufficient material" on which the appellate court may conclude that there has been a "miscarriage of justice" in the criminal matter in respect of which the earlier decision was made. Section 394J(3) then defines "sufficient material" as referred to in s 394J(2). Sufficient material must:

(a) not have been canvassed at any stage of proceedings in the criminal matter before the application for permission to review was made;

(b) be such that it could not have been adduced in court earlier even with reasonable diligence; and

(c) be compelling, in that it is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter.

Section 394J(4) then clarifies that, for any material consisting of legal arguments to be considered "sufficient", it must, in addition to the three points above, be based on a change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to the criminal matter.

24 Put simply, for an s 394H(1) application to be successful it must, at the very least, cite new evidence or new law.

My decision

25 The applicant has certainly not raised "sufficient material" for the purposes of s 394J of the CPC.

26 First, many of the arguments he makes were raised and rejected either at the trial or on appeal. Even where the applicant has raised arguments that are somewhat different from those made at the trial and appeal, they are premised on evidence that was considered by both the trial judge and this court on appeal. As held by this court in *Kreetharan* at [21], "it is *insufficient* for an applicant to attempt to re-characterise the evidence already led below or to mount fresh factual arguments on the basis of such evidence".

27 In fact, the applicant does not even suggest that he is raising new material in this application. Rule 166 of the Supreme Court Practice Directions 2021 (the "PD") requires that every affidavit filed in support of an application for permission under s 394H must attach, as an exhibit, an information sheet in Form B45 of Appendix B of the PD. In this information sheet, the applicant

confirms that the evidence that he wishes to rely on in the application has been canvassed in the earlier proceedings in his criminal matter.

28 Even leaving aside the applicant's confirmation, the substance of his arguments also reveals that he is simply raising material that has already been canvassed. For example, the applicant criticises both the CNB officers' and Andi's evidence on the attire that he was wearing on the day of his arrest. He notes that SSI Goh's evidence on his attire was obtained in a report from SSI Ng and SSI Ng himself could not remember the applicant's attire during the trial. He also points out that Andi gave contradictory evidence about his attire. As mentioned above, this argument was made at the trial (see [12(b)] above) and rejected by the trial judge (see [14(b)] above).

29 He also argues that Andi's contemporaneous statement in which he identified the applicant should be disregarded because it was recorded when Andi was suffering from withdrawal symptoms. Again, this was an argument made at the trial (see [12(c)] above). At the trial, the applicant called a medical expert to dispute the reliability of Andi's contemporaneous statement based on his consumption of heroin and methamphetamine at the time of his arrest. In his written submissions at the trial, the applicant accepted that the medical expert's testimony "did not make any dent in the reliability of Andi *vis-à-vis* his contemporaneous statement and his long-statements to CNB". On appeal, the applicant did not depart from this position. The applicant has not referred to any new evidence and is simply seeking to re-characterise the evidence that was before the court.

30 A further point which applies to the applicant's arguments about the quality of the identification evidence is that they are hardly capable of conclusively showing that there was a miscarriage of justice in his conviction.

This is because the identification evidence was not the sole basis for his conviction. When upholding his conviction, this court did not even rely on SSI Ng's identification evidence. While this court did rely on Andi's identification evidence, the appeal was dismissed after considering all the surrounding circumstances: see [12]–[16] of the Appeal Judgment.

31 The applicant also alleges that when the drug transaction took place, he was travelling in a bus to his urine test and this meant that he could not have been present at the drug transaction. Again, this was canvassed at the trial. The trial judge found that the applicant could have been at the drug transaction, changed his attire and then reported for his urine test (see [14(a)] above).

32 Finally, the applicant's suggestion that he was the subject of a conspiracy between Andi and Rusli to frame him was raised on appeal and was rejected by this court (see [15] above). In his submissions, the applicant relies on the following facts to advance his claim of conspiracy: Rusli, who ordered the drugs, was only convicted of ordering one bundle of drugs despite Andi collecting two bundles. Therefore, Andi must have had something to do with the ordering of the drugs. Knowing that he would receive a certificate of substantive assistance, Andi wished to be considered a courier and implicated the applicant. Again, this argument is insufficient because it is premised on facts that were before this court when it found that there was no basis for the applicant's allegation of a conspiracy: [12] of the Appeal Judgment.

33 It is clear from the foregoing that the application only raises material that has already been canvassed in the applicant's criminal proceedings. Therefore, s 394J(3)(*a*) of the CPC cannot be satisfied.

34 In addition, the applicant has not cited any change in the law that arose from a court decision after the conclusion of his appeal. It is obvious that there is no change in the law following the Appeal Judgment that is relevant to any of the arguments made in this application. Therefore, by virtue of s 394J(4), there is no legal argument made in the application that can constitute "sufficient material".

Conclusion

35 For the above reasons, it is clear that this application is nothing more than an impermissible attempt to re-argue the appeal. None of the requirements set out in s 394J is satisfied. Accordingly, there is no legitimate basis for the exercise of this court's power of review. I therefore dismiss this application summarily pursuant to s 394H(7) of the CPC.

Tay Yong Kwang
Justice of the Court of Appeal

The applicant in person;
Mark Jayaratnam, Chin Jincheng and Chong Yong (Attorney-General's Chambers) for the respondent.