IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 145

Criminal Motion No 34 of 2023

Between

Iseli Rudolf James Maitland

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing—Appeal—Procedure]

Iseli Rudolf James Maitland
v
Public Prosecutor

[2023] SGHC 145

General Division of the High Court — Criminal Motion No 34 of 2023
Vincent Hoong J
16 May 2023

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Vincent Hoong J (delivering the judgment of the court *ex tempore*):

Introduction

1 The Applicant, Mr Iseli Rudolf James Maitland ("James"), has filed the present Criminal Motion seeking permission to rely on additional grounds of appeal other than those set out in the Petition of Appeal ("the Petition") which was originally filed by him on 27 October 2022, six and a half months ago.

2 The additional grounds of appeal that the Applicant seeks to include are reproduced as follows:

> a. The learned Trial Judge had erred in adjudicating the matter on the basis of a joint trial where the appellants, James and How Soo Feng were treated as co-conspirators involved in a conspiracy to commit an offence where no such conspiracy element was reflected in the charge that Your Appellant faced.
>
> b. Further to the point of appeal made herein at a), Your Appellant was prejudiced to the effect that:-

> a. He did not know that in effect he had to meet a conspiracy charge; and
>
> b. The Prosecution was in effect excused from having to prove the element of conspiracy; and
>
> c. And as a result, Your Appellant has suffered severe and irreparable prejudice.

The applicable test for amending a petition of appeal

3 The Applicant contends that the additional grounds of appeal are critical for the purpose of addressing the issue of prejudice suffered by him. However, it is not immediately apparent that this should be the exhaustive test for an appellate court to grant permission under s 378(6) of the Criminal Procedure Code 2010 ("CPC"). For this reason, I first consider the applicable test for amending a petition of appeal.

4 Case law on this issue is inconclusive. In *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907, an application to amend the petition of appeal was granted without further reasons. In *Public Prosecutor v Miya Manik and another appeal and another matter* [2022] SGCA 73 ("*Miya Manik*"), the Prosecution's application to amend the petition of appeal was allowed on the basis that it pertained to a legal position which had been modified by subsequent cases post-dating the decision below.

5 The language of s 378(6) of the CPC does not prove to be of additional assistance, besides stating that the permission of the court is necessary for amendment of the petition of appeal.

6 I find that s 380(1) of the CPC, which pertains to permission to appeal for persons debarred from appealing for non-compliance with the CPC, provides helpful guidance on this issue. It is helpful because an appellant's inability to argue specific grounds not included in a petition of appeal is of the same kind

of prejudice, though to a different extent, as that where an appellant cannot raise any arguments altogether because procedural noncompliance debars them from appealing. Under that section, the granting of permission by the appellate court is guided by what it considers to be the interests of justice. I am of the view that a similar consideration should guide the discretion of the court in granting permission for amending a petition of appeal.

7 I also draw from the case law on s 380(1), in particular that governing applications for extension of time to appeal. As set out in *Public Prosecutor v Tan Peng Khoon* [2016] 1 SLR 713 ("*Tan Peng Khoon*") at [38], this would include (a) the length of the delay in the prosecution of the appeal; (b) the explanation put forward for the delay; and (c) the existence of some prospect of success in the appeal.

8 In approaching the present case, I find it appropriate to modify the factors in *Tan Peng Khoon* to apply to the context of s 378(6) of the CPC. I summarise the non-exhaustive components of the modified analytical framework I adopt for this case as follows:

a) First, the court should consider the nature of the amendment and the explanation put forward for the amendment.

b) Second, the court should also consider the length of the delay between the filing of the petition of appeal and the application to amend the petition, and the explanation for the delay.

c) Third, the court should consider the existence of some prospect of success in the amended petition of appeal.

d) Finally, the court should consider the potential prejudice to either party should the application be allowed or denied, in particular the potential prejudice to accused persons.

9 As noted in *Lim Hong Kheng v Public Prosecutor* [2006] 3 SLR(R) 358 at [28], these factors are not to be considered in a mechanistic way.

The nature of the amendment is not unreasonable

10 The nature of the Applicant's amendment is not itself unreasonable. The Applicant in his affidavit states that his new set of solicitors were appointed on 10 October 2022, and the Petition of Appeal was filed on 27 October 2022. I note there are indeed a large number of documents that counsel would have had to go through in a short period of time. I also note that the amendment relates to potentially important arguments that, if true, would cast doubt on the safety of the conviction below, and references relevant portions of the decision of the District Judge ("DJ").

There is substantial unexplained delay in the filing of the application

11 There is substantial delay in the filing of the present application, which the Applicant has failed to explain. The Applicant filed CM 34/2023 on 3 May 2023, **one day** before the scheduled day of the hearing of Magistrates' Appeal 9189/2022/01 on 4 May 2023. Even if I accept the Applicant's submission that his present set of counsel did not have much time to file the appeal before 27 October 2022, this does not explain why there was a further delay of six months after that date before any application to amend the Petition was made. In my view, this delay is substantial. It comes *after* the original day for hearing the appeal had been fixed and vacated. I also consider that there is no good

reason as to why counsel could not have filed the application earlier. There is also no evidence for any material change in evidence or circumstances in the weeks leading up to the hearing.

12 The Applicant has not even attempted to offer an explanation as to why this application could only be filed the day before the hearing of the appeal. This shows a callous disregard for the effect such belated applications have on the respondent, or for that matter the court. Although I am not inclined to make such a finding in this case, I note that the last-minute nature of this application would normally be suggestive of some measure of abuse of process.

The Applicant's amended grounds of appeal have no prospect of success

13 As framed in the present application, I am of the view that the further points of appeal have no prospect of success.

14 The Applicant advances two main arguments to support the additional ground of appeal he seeks to raise.

a) First, he contends that the Prosecution advanced its case on the basis that James and Sue were co-conspirators within the meaning of s 107(1)(*b*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") or with a common intention under the meaning of s 34 of the Penal Code ("the first argument"). This supposedly meant that James did not have a chance to properly challenge the elements of these provisions.[1]

b) Second, he contends that the DJ erred in treating James and Sue as interchangeable co-conspirators sharing in a common design. The DJ

[1] Applicant's Submissions at para 10.

further erred by imputing the knowledge and intention of one accused person on the other, when this was not put to both accused persons ("the second argument").[2]

The first argument has no merit

15 The first argument by the Applicant is irrelevant, self-contradictory, and in any case unviable.

16 The first argument is irrelevant. Regardless of whether the Prosecution advanced its case on the basis that James and Sue were co-conspirators, as long as the specific charge against each accused was proven on the basis of examination of evidence relating to their own cases by the DJ, there would be no prejudice to James. In as much as he did not rebut the fact that the Prosecution was alleging a co-conspiracy, this would have been irrelevant to whether the specific charge was made out against him.

17 The first argument is also self-contradictory. If the Prosecution had indeed advanced its case on this basis in the trial below, then there is no reason why James would not have a chance to challenge this case.

18 The first argument is also unviable. The Applicant raises four instances of questions in cross-examination where the Prosecution raised "put" questions against an accused person that related to them sharing a common design. To begin with, all the examples raised by the Applicant are questions that were put to *Sue* in cross-examination. It is hard to see how these examples illustrate any prejudice of any sort to *James*.

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[2] Applicant's Submissions at para 12.

19 Moreover, it is quite understandable that the questions by the Prosecution were framed this way. The charge against each appellant was that they were "knowingly a party to the carrying on of the business of the Company for the fraudulent purpose…". It is not surprising that if the Prosecution's case was that both accused persons were knowing parties to the carrying on of TGL PL, this would involve a case theory where both accused persons were acting in concert. That both appellants were knowing parties acting in the same business does not affect the legal test in assessing whether their individual charges under the Companies Act are made out. Merely putting such a case to the appellants does not import any requirement under s 107(1)(*b*) or s 34 of the Penal Code either.

20 The first argument thus has no prospect of success.

The second argument has no merit as framed in the application

21 I do not find that there is evidence on the face of the judgment by the DJ that James and Sue were "treated as co-conspirators involved in a conspiracy to commit an offence where no such conspiracy element was reflected in the charge that Your Appellant faced".

22 Nowhere in the oral judgment on conviction did the DJ make any statement to such an effect, or state that the legal test he was applying was that of conspiracy.

23 The applicant raises several arguments in favour that this was *implied* by the DJ.

a) The Applicant argues that the DJ at [47] of the judgment on conviction had relied on Sue's evidence in court in making findings

against both appellants.[3] However, this ignores the fact that the DJ considered that both appellants had made admissions in their own statements on that point.

b) The Applicant also argues that the DJ had failed to read James' statements in their rightful context.[4] Yet, this does not in any way go to show that the DJ had read the element of conspiracy into the charge against the Applicant.

c) The Applicant also notes that the DJ in his oral judgment at [45] had only considered James' explanation in court, but did not consider Sue's explanation.[5] The DJ had gone on to state that "these events would also have raised doubts in the minds of *James and Sue* as to the sustainability of TGL's business". First, it is not clear how this would cause prejudice to James. Second, this is not a case where the DJ imputed knowledge or intention of James to Sue. Rather, this is a case where events that have been established by the court to have occurred on the basis of testimony of a co-accused can be part of the relevant factual matrix from which the DJ could make inferences of the other co-accused's behaviour. An element of conspiracy is not necessary for the DJ to have done so.

d) The Applicant goes on to assert that the DJ at [49] of his oral judgment erred in finding that James and Sue both knew that (a) there was no substantive profit generating business or investment activities being carried out in TGL, and (b) that other profit-generating activities

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3 Applicant's Submissions at paras 22 and 25.

4 Applicant's Submissions at paras 23 and 24.

5 Applicant's Submissions at para 29.

had to be carried out. The Applicant claims that the DJ had relied only on James' admissions to find (a), and only on Sue's admissions to find (b). I disagree with this analysis. The relevant admission by James set out at [49(a)] of the judgment implies both that he knew that there were no other investments, and that he knew other profit generating activities had to be carried out. The DJ was justified in making those inferences from James' statement. The Applicant also contends that that portion of James' statement is not an admission that he knew those facts at the material time, merely that he knew those facts at the time of the statement taking.[6] However, this is irrelevant to showing that the DJ had treated the two appellants as being in a conspiracy.

e) Finally, the Applicant argues that the DJ had failed to consider that James had put his own money to TGL PL and had paid for the WongPartnership legal opinion.[7] However, it is unclear how this is related to Sue and James being treated as co-conspirators by the DJ.

24 No prejudice to the Applicant was occasioned by the findings of the DJ in the examples raised by the Applicant. Moreover, there is no substance to the statement that the Prosecution was "in effect excused from having to prove the element of conspiracy" —this was never an element of the charge to begin with.

25 I thus consider that the additional grounds of appeal that the Applicant seeks to raise have no prospect of success.

There is potential prejudice to the Applicant should he be unable to raise some of the material found in the additional grounds of appeal

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6 Applicant's Submissions at para 31.

7 Applicant's Submissions at paras 33 and 34.

26 Although I find that the additional grounds of appeal as framed by the Applicant have no merit, I am nevertheless of the view that there is potential prejudice to the Applicant should he be disallowed from raising certain arguments raised in the present application on appeal.

27 In particular, I find potential merit in the Applicant's observation at paragraph 22 of his submissions that there are areas on which the Applicant was not cross-examined, particularly given that the nature of the questions posed to the Applicant in cross-examination differed significantly in some areas from those posed to Sue. This observation does not contribute anything to the Applicant's additional ground of appeal as framed by him. However, I am of the view that it is significant enough that the Applicant should be allowed to ventilate this potential argument on appeal, as it does not fall within the original Petition. This is because it is an argument that is not completely devoid of the prospect of success, and *prima facie* raises arguments that do cast doubt on the specific evidence relied on by the DJ in reaching his decision on conviction. Instrumental in my reaching this decision is the fact that the Applicant is an accused person, necessitating extra caution in restricting further arguments that he seeks to raise regarding his conviction.

Conclusion

28 In light of the above, I find that there would be some prejudice to the Applicant should the application be denied. This is not because the Petition of Appeal as amended has any merit, but because some of the arguments that the Applicant seeks to make under the amended grounds do pertain to potentially viable arguments that highlight issues with the DJ's decision and have some prospect of success. Notwithstanding the unexplained delay in the timing of the

application, allowing the application would be in line with the interests of justice, and I order as such.

Vincent Hoong
Judge of the High Court

Suresh s/o Damodara and Leonard Chua Jun Yi
(Damodara Ong LLC) for the applicant;
Edwin Soh and Ong Xin Jie
(Attorney-General's Chambers) for the respondent.