

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 65

Criminal Motion No 28 of 2021

Between

Kong Swee Eng

... Applicant

And

Public Prosecutor

... Respondent

In the matter of Magistrate's Appeal No 9418 of 2020

Between

Public Prosecutor

... Appellant

Against

Kong Swee Eng

... Respondent

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing — Criminal reference — Leave to refer]

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Kong Swee Eng
v
Public Prosecutor

[2022] SGCA 65

Court of Appeal — Criminal Motion No 28 of 2021
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
10 October 2022

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Tay Yong Kwang JCA (delivering the judgment of the court *ex tempore*):

Background

1 Kong Swee Eng (the “applicant”) and her husband owned a company called Rainbow Offshore Supplies Pte Ltd (“Rainbow”). Rainbow was in the business of supplying equipment and materials for the oil and gas industry. At the material times, Rainbow was a supplier of Jurong Shipyard Pte Ltd (“JSPL”) and JSPL was its only customer. In 2016, following investigations by the Corrupt Practices Investigation Bureau, the applicant was charged under s 6(b) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) with ten counts of corruptly giving various forms of gratification to JSPL employees between 2008 and 2013 to advance Rainbow’s business interests with JSPL. The majority of the employees who received the gratification worked in JSPL’s procurement department.

Procedural history

Trial in the District Court

2 At trial, the applicant raised several defences to the charges she faced. In particular, she claimed that there was a “special relationship” between Rainbow and JSPL by which Rainbow was effectively guaranteed JSPL’s custom. This went towards the *mens rea* of the ten charges because the gratification would not have advanced Rainbow’s business interests if Rainbow had been guaranteed JSPL’s custom. There would therefore have been no corrupt intent in the giving of the gratification. Throughout these proceedings, this has been called the “special relationship” defence and we adopt the same term here.

3 On the applicant’s case, there were only four persons who were privy to this alleged special relationship: (a) the applicant; (b) her husband, Huan Ming Chye Michael (“Mr Huan”); (c) the chief executive officer (“CEO”) of JSPL at the time of the trial, Wong Weng Sun (“Mr Wong”); and (d) the previous CEO of JSPL, Tan Kim Kuan (“Mr Tan”). Mr Wong and Mr Tan were not called to testify for the Prosecution. Mr Huan was a witness for the Prosecution and during his testimony, he suggested that there was a unique business relationship between Rainbow and JSPL, although he did not go so far as to say that Rainbow was guaranteed JSPL’s custom. The applicant gave evidence in her own defence and it was only then that she raised the special relationship defence.

4 Around this time, the Prosecution indicated to the District Judge (the “DJ”) and the applicant that it intended to call Mr Wong as a rebuttal witness. Near the end of the Defence’s case, however, the Prosecution decided otherwise. The Prosecution then disclosed Mr Wong’s investigation statements to the applicant’s then defence counsel, Mr Michael Khoo SC (“Mr Khoo”).

This was after the applicant had testified in her own defence. The Defence was given the opportunity to call Mr Wong as its witness on the special relationship defence but Mr Khoo took the view that the onus lay on the Prosecution to rebut the special relationship defence. The Defence therefore elected not to call Mr Wong as its witness and it closed its case.

5 After hearing the parties' closing submissions, the DJ found that the special relationship defence was not inherently incredible and that it created a reasonable doubt in respect of all ten charges as to whether there was an objectively corrupt element and whether the applicant possessed the requisite guilty knowledge. As there was no rebuttal by the Prosecution, the various acts of giving could not be gratification given with a corrupt intent and could not be inducements to advance her business interests. The applicant was therefore acquitted on all ten charges. The DJ's grounds of his decision are set out in *Public Prosecutor v Kong Swee Eng* [2020] SGDC 140.

Appeal to the General Division of the High Court

6 The Prosecution appealed against the DJ's decision to acquit. On appeal, the Judge of the General Division of the High Court (the "Judge") held that the special relationship defence was inherently incredible. In particular, the Judge observed that: (a) this defence was raised only at the trial and the applicant had given inconsistent accounts as to the existence of the special relationship; (b) there was no corroborative evidence which supported the existence of the special relationship; (c) it was completely unclear how the special relationship worked, particularly alongside JSPL's procurement processes; and (d) in many instances, the special relationship defence was contradicted by the evidence adduced at the trial.

7 The Judge therefore found the special relationship defence to be inherently incredible. It followed that the applicant had not met her evidential burden and that she had not put the existence of the special relationship into issue. The Prosecution therefore did not have to call Mr Wong to rebut the applicant’s testimony on this and its failure to do so was not fatal to its case.

8 After considering the evidence in respect of the other elements of the ten charges against the applicant, the Judge held that eight charges were made out and convicted the applicant on those charges accordingly. The Judge affirmed the acquittal on the remaining two charges. The Judge has directed the parties to file their submissions on sentencing. The applicant has not been sentenced. The Judge’s decision is set out in *Public Prosecutor v Kong Swee Eng* [2022] SGHC 6 (“*Kong (MA)*”).

Application for leave to apply to review

9 After the Judge gave his decision in the Prosecution’s appeal on 13 September 2021, the applicant invited Mr Wong to provide two further statements. These were recorded on 6 October and 10 November 2021. Relying on these two new statements, the applicant filed HC/CM 105/2021 (“CM 105”) on 18 November 2021 to seek leave under s 394H(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”) to make an application to review the Judge’s decision.

10 The Judge held that the two further statements obtained from Mr Wong were substantially similar to his investigation statements which the Prosecution had disclosed to the applicant at the trial. The purported “new evidence” could have been adduced earlier with reasonable diligence. The Judge took the view that Mr Wong’s evidence could have been adduced earlier at the trial but the Defence took a considered decision not to call him as a witness.

11 In any event, the further statements did not show conclusively that there had been a miscarriage of justice. They did not show that Rainbow had been guaranteed JSPL’s custom. Instead, they suggested that JSPL had relationships with what Mr Wong called “strategic suppliers”. These suppliers still had to meet certain conditions in order to secure JSPL’s custom.

12 Accordingly, the Judge dismissed CM 105 (see *Kong Swee Eng v Public Prosecutor* [2022] SGHC 50). In connection with CM 105, the Prosecution sought a personal costs order against Mr Khoo as he was counsel for the applicant at the time CM 105 was made to the court. On 23 May, the Judge ordered Mr Khoo to pay the Prosecution costs fixed at \$2,500. Mr Khoo did not appeal against this order on costs.

Criminal motion to the Court of Appeal

13 On 12 October 2021, the applicant filed the present application, CA/CM 28/2021 (“CM 28”) under s 397(1) of the CPC seeking leave to refer questions of law of public interest to this court. Initially, the applicant posed three questions. However, in February 2022, the applicant discharged her lawyers and engaged a new firm of lawyers, Quahe Woo & Palmer LLC. The new lawyers took the view that the three questions posed were unlikely to satisfy the requirements in s 397(1). In CA/CM 19/2022, they applied to amend CM 28. The amendment was allowed without objection and the only question before us now is (the “Question”):

In the event where a defence has been raised by an accused person but the Prosecution elects not to call a material witness central to disproving that defence, whether an appellate Court should reverse an acquittal without exercising its powers under section 392 of the Criminal Procedure Code 2010 to hear the evidence of that material witness.

14 Section 392 of the CPC concerns an appellate court’s power to take or direct the taking of additional evidence. The relevant sub-section reads:

Taking additional evidence

392.—(1) In dealing with any appeal under this Part, the appellate court may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court.

We note in passing that neither the Prosecution nor the Defence invited the Judge to exercise his powers under this provision to take or to direct the taking of Mr Wong’s evidence.

Threshold requirements to refer a question under section 397(1)

15 As this court stated in *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [51], the following requirements in s 397(1) of the CPC need to be satisfied in order for a question of law of public interest to be referred to the Court of Appeal:

- (a) the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the General Division of the High Court in exercise of its appellate or revisionary jurisdiction;
- (b) the reference must relate to a question of law and that question of law must be a question of law of public interest;
- (c) the question of law must have arisen from the case which was before the General Division of the High Court; and
- (d) the determination of the question of law by the General Division of the High Court had affected the outcome of the case.

The parties' submissions

The applicant's submissions

16 There is no dispute between the parties that the first requirement is met.

17 In respect of the second requirement, counsel for the applicant, Mr Sunil Sudheesan (“Mr Sudheesan”) makes two points. First, the Question is a question of law of public interest because, if answered by this court, our answer will provide clarification as to the approach to be taken by an appellate court where that court is aware of the existence of a material witness who can conclusively support or rebut a defence raised by the accused person. Second, the existence of such clarification would affect the rights of accused persons because they have a right to a presumption of innocence until the Prosecution discharges its legal burden of proving its case beyond reasonable doubt. Relying on *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45, the applicant submits that reasonable doubt can arise from a “lack of evidence” (at [61]). In the present case, the Judge did not consider the reasonable doubt that arose because of the lack of evidence from Mr Wong, a material witness who was available to be called to testify.

18 On the third requirement, Mr Sudheesan argues that the Question arose in the appeal before the Judge as he was called upon to decide the legal and the evidential burdens involved in proving the special relationship defence and whether Mr Wong’s evidence was needed to establish that defence. The Judge also had to decide whether the DJ was correct to find that the Prosecution should have called Mr Wong to rebut the existence of that relationship.

19 On the fourth requirement, Mr Sudheesan acknowledges that the Judge’s determination of the Question may not affect the eventual outcome of the case

because Mr Wong could have supported or rebutted the special relationship defence. However, Mr Sudheesan contends that the requirement has nonetheless been met because Mr Wong's evidence would have given the Judge "a complete picture" before determining the applicant's guilt. With Mr Wong's evidence, the special relationship defence would have been established or rebutted conclusively and the Judge would not have "to rely on counter-factuals or his own analysis of the special relationship defence to determine the guilt of the applicant".

The Prosecution's submissions

20 On the second requirement, the Prosecution submits that the Question is not a question of law of public interest because it merely engages settled principles regarding: (a) what is the evidential burden of an accused person in relation to a defence raised and when is it necessary for the Prosecution to call a witness to rebut that defence; and (b) an appellate court's exercise of its discretion to take further evidence under s 392 of the CPC. These are not novel questions and the application of the established legal principles is entirely dependent on the facts of the case. More fundamentally, the applicant's real contention is with the Judge's decision on whether the applicant had satisfied her evidential burden with respect to the special relationship defence and this is a matter of applying established legal principles to the particular facts of the case.

21 On the third and fourth requirements, the Prosecution contends that they are not satisfied because the Question did not arise before the Judge and did not affect the outcome of the case. In essence, the Prosecution says that the issue before the Judge was not whether the special relationship defence could be accepted or rejected without the evidence of Mr Wong. Rather, the issue was

whether, based on the applicant's own evidence at the trial, the defence had been properly put into issue. In the light of the Judge's finding that the applicant had failed to put the defence into issue and the applicant's tactical decision not to call Mr Wong as her witness despite having his statements, Mr Wong's evidence is irrelevant here.

Our decision

22 In our judgment, the short and obvious answer to the Question posed to us is that it all depends on the facts of the case. In the context of this case, in particular, it depends on whether the "defence" raised by the applicant is a credible defence which is capable of injecting reasonable doubt into the Prosecution's case. The Question appears to assume that the applicant's defence is such a defence and that she had succeeded in shifting the evidential burden of proof to the Prosecution because she had cast doubt on the Prosecution's case on corrupt intent in the giving of the gratification. This is a completely misplaced assumption.

23 As we have seen from the history of these proceedings elaborated on earlier, the DJ's holding was that the applicant's special relationship defence was not inherently incredible and that it created reasonable doubt in respect of all ten charges as to whether there was an objectively corrupt element and whether the applicant possessed the requisite guilty knowledge to sustain the charges. However, the Judge disagreed with the DJ and explained in detail why he thought that the special relationship defence was inherently incredible (*Kong (MA)* at [50]–[78]). The Judge's affirmation of the applicant's acquittal on two of the charges had nothing to do with the issue of special relationship (*Kong (MA)* at [35] and [42]).

24 It appears that the applicant’s true complaint in this application for leave to refer the Question, taking it at the highest, is that the Judge was wrong to have arrived at the conclusion that the special relationship defence was inherently incredible or at least that he should not have arrived at this conclusion without first hearing Mr Wong’s testimony. To call into question the Judge’s findings in *Kong (MA)* would entail an appeal against his decision. However, it is clear in law that there can be no appeal against the General Division of the High Court exercising appellate criminal jurisdiction in hearing an appeal from the State Courts. It is equally clear in law that an application under s 397 of the CPC is not an appeal.

25 If the applicant’s complaint is that the Prosecution decided not to call Mr Wong as a witness at the trial and also did not make an application under s 392(1) of the CPC in the appeal before the Judge, it is again clear that this is not a complaint that is envisaged in an application under s 397 of the CPC. In any event, this court has made clear in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [67] and [71] and *Roshdi bin Abdullah Altway v Public Prosecutor and another matter* [2022] 1 SLR 535 (“*Roshdi*”) at [126]–[128] that the Prosecution does not have the obligation to call any particular witness, material or otherwise. When the Prosecution chooses not to call a material witness, it has to bear the risk that its evidence might not satisfy its burden of proof beyond reasonable doubt. This risk is most apparent in cases where the accused person advances a credible defence and is able to discharge his evidential burden of proof. However, if the accused person has not discharged his evidential burden of proof and the Prosecution is held to have satisfied its legal burden to prove its case beyond a reasonable doubt, there can be no issue about whether further witnesses are required. Again, all these matters depend on the facts to be proved in any particular case and the state of the evidence adduced. In any case, before us Mr Sudheesan concedes that the

Judge did not err in law in proceeding as he did. That makes the present application wholly untenable.

26 We reiterate that the Judge found the special relationship defence to be inherently incredible and he was therefore entitled to hold that the Prosecution did not have to call Mr Wong to rebut its existence and that its failure to do so was not fatal to its case (*Kong (MA)* at [78]). The Judge's factual findings cannot be challenged except by way of an appeal and there can be no appeal in law in this case. As long as the Judge's findings stand, the Question has absolutely no substratum of fact to stand on.

27 We mention briefly here that we think the third and fourth requirements for an application under s 397(1) of the CPC have also not been met. As we observed earlier, at the appeal before the Judge, it did not appear that the applicant's then-counsel, Mr Khoo, had submitted that the Judge ought to receive the evidence of Mr Wong before deciding the merits of the appeal. It also did not appear that Mr Khoo had suggested to the Judge that if he decided not to receive the evidence of Mr Wong, then the applicant's acquittal ought not to be overturned. It follows that the Question did not arise in the appeal before the Judge and it could not be said that the Judge's determination of the Question has affected the case.

Conclusion and costs

28 For the above reasons, we dismiss CM 28.

29 The Prosecution submits that CM 28 is an abuse of process as the applicant has used it as a disguise for a back-door appeal. It submits that the applicant should be ordered to pay costs of at least \$3,000 pursuant to s 409 of the CPC. In response, the applicant submits that this is not the type of case for

which costs should usually be ordered. In any case, the applicant asks that any costs ordered be kept as low as possible.

30 We agree that CM 28 is an abuse of process of the court. It is clearly nothing more than an attempt to overturn the factual findings made by the Judge on appeal. An order for costs under s 409 of the CPC is therefore justified.

31 On the issue of quantum, although CM 28 eventually posed only one question, it initially put forward three purported questions of law which the present counsel for the applicant accepted were “unlikely to satisfy” the threshold requirements for an application under s 397(1) of the CPC. Despite the honing process of reducing the original three questions into one, the fact remains that the Question is clearly a blunt attempt to mount an impermissible appeal against the Judge’s decision.

32 We therefore order the applicant to pay the Prosecution \$3,000 in costs for this application.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Sunil Sudheesan, Khoo Hui-Hui Joyce and Chow Ee Ning (Quah
Woo & Palmer LLC) for the applicant;
Jiang Ke-Yue and Dhiraj G Chainani (Attorney-General's Chambers)
for the respondent.
