IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 101

Criminal Motion No 28 of 2020

Between

Syed Suhail bin Syed Zin

… *Applicant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Appeal No 38 of 2015

Between

Syed Suhail bin Syed Zin

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Review application]

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v
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Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
22 September; 25 September 2020

16 October 2020 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 Finality is a fundamental part of the legal system. Without it, dissatisfied litigants could (and probably would) bring repeated applications to the courts. Judicial decisions must confer certainty and stability and it is impossible to have a properly functioning legal system if legal decisions are open to "constant and unceasing challenge" (see the decision of this court in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") at [47]). Finality, however, is not desired for its own sake. When we speak of finality, we refer to finality that is achieved after due process, during which a just and fair decision has been arrived at by the court of first instance as well as by the appellate court concerned in accordance with the applicable legal principles. Put simply, justice and fairness in both procedure *as well as* substance is – and will always be – the ultimate aim of the courts and the law. This applies to both civil and criminal

proceedings alike. Indeed, it cannot be the case that a dissatisfied litigant could bring repeated applications until the desired outcome is achieved. If so, that would be the very *perversion* of justice and fairness and would make a *mockery* of the rule of law. Counsel should act in the best traditions of the bar and discourage litigants from repeatedly bringing patently unmeritorious applications before the court.

2 In support of the fundamental principle of justice enunciated above, there are legal doctrines that prevent civil cases from being re-litigated after the court has arrived at a final decision (see, in particular, the decision of this court in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104). Likewise, such re-litigation is also proscribed in the criminal sphere. Nevertheless, as justice and fairness are the ultimate aims of the legal system, there exists an extremely limited legal avenue to review decisions even after the accused person has been afforded his or her due process under the law. This is not surprising as life or liberty is at stake. However, such review will only be granted in rare cases (in accordance with the legal criteria which we will elaborate upon below). Put simply, even a right to review in this context will be the exception rather than the rule. This is one end of the spectrum. At the other (and extreme) end of the spectrum, dissatisfied convicted persons may be tempted to (and, in all probability would succumb to the temptation to) utilise this legal process to bring repeated applications for review which will not only undermine the spirit and substance of the review process, but also bring us back full circle by undermining the very finality that we referred to at the outset of this judgment. As we shall see, therefore, the existing law provides a filtering or sifting process by way of an application for leave that allows applications that are without merit

(and which therefore constitute an abuse of the process of court) to be dismissed either summarily or after an oral hearing.

Background facts

3 We first set out the relevant facts that led to this application.

4 The applicant, Syed Suhail bin Syed Zin, was convicted and sentenced to the mandatory death penalty for trafficking in not less than 38.84g of diamorphine (commonly known as "heroin") under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). In the applicant's bedroom, four plastic packets containing brownish granular substances ("the packets") and a white metal container which contained a brownish granular substance ("the bowl") were found. The contents of the packets and the bowl were analysed and found to contain at least 38.84g of heroin, which quantity formed the subject of the trafficking charge (see *Public Prosecutor v Syed Suhail bin Syed Zin* [2016] SGHC 8 ("the GD") at [4]–[6]).

5 In the applicant's statements, he claimed that he had collected two packets of heroin from his drug supplier. Shortly before his arrest, he sold one packet and poured the second packet into the bowl with the intention of packing it later. He denied knowledge of the four plastic packets and stated that he could not have afforded the heroin found in them. The applicant explained that he sold drugs sometime in May 2011 to pay for his daily expenses and rental, and ordered one to two "batu" of heroin per week from his drug supplier (see the GD at [11]–[16]).

6 The applicant's case at the trial was starkly different. His case was that *all* the drugs found in his possession (*ie*, those in the packets and bowl) were for his *personal consumption*. He sought to persuade the court that he was a heavy

user who consumed roughly 12g to 18g of heroin per day and had the financial capability to sustain his consumption. Regarding his financial means, he asserted that he had obtained a cash advance of about $20,000 from one Ami Aziz, his uncle in Malaysia (the "uncle"), and had earned $8,400 from April to July 2011 (see the GD at [26] and [29]–[30]). The applicant claimed that he did not inform the Central Narcotics Bureau ("CNB") that the drugs were for his own consumption when giving his statements as: (a) he was in a state of panic and confusion and had experienced drug withdrawal symptoms; (b) he wanted to distance himself from the packets; (c) he was in shock from the sheer amount of heroin that he had been caught with; and (d) he had fabricated parts of the statements to put across the story that he had ordered only two packets of heroin (see the GD at [36]–[38]).

7 The trial judge ("the Judge") was not persuaded that the applicant had the financial capability to sustain his alleged consumption. The applicant had irregular jobs. His bank account balances and the text messages between him, his family and his girlfriend revealed an individual who was constantly in need of money. There was also no evidence that the applicant had secured the $20,000 advance from his uncle. Further, the applicant had not informed CNB that the drugs in his possession were for personal consumption despite having had multiple opportunities to do so. In the circumstances, the Judge held that the applicant had failed to prove on a balance of probabilities that the heroin in his possession was for personal consumption and, as a consequence, had failed to rebut the presumption under s 17 of the MDA (see the GD at [45]–[52]).

8 In so far as sentencing was concerned, the Judge considered the applicability of the alternative sentencing regime under s 33B of the MDA. The Judge held that the applicant was not a mere courier and ss 33B(2)(*a*) and 33B(3)(*a*) of the MDA were not satisfied. The Prosecution informed the Judge

that it would not be issuing a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. Finally, the Judge held that s 33B(3)(*b*) of the MDA did not apply as the applicant "did not claim that he was suffering from such abnormality of mind as would have substantially impaired his mental responsibility at the time of the offence". In the circumstances, the Judge imposed the mandatory death penalty on the applicant (see the GD at [53]).

9 On 18 October 2018, the applicant's appeal in CA/CCA 38/2015 ("CCA 38") against his conviction and sentence was dismissed by this court for the following reasons. First, the applicant had never mentioned in his statements that the drugs found in his possession were for his own consumption. Second, the medical evidence could not corroborate the alleged level of consumption. Third, there was no evidence of the $20,000 advance that the applicant had allegedly received from his uncle. Finally, the text messages found in the applicant's phone revealed a person who was desperately scrambling for small loans to tide him over financially. This court affirmed the Judge's decision and found that the applicant had failed to raise even a reasonable doubt (let alone prove on the balance of probabilities) that the entire consignment of drugs found in his possession was for his personal consumption.

10 On 20 January 2020, acting pursuant to s 313(*f*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"), the President of the Republic of Singapore ("the President") ordered the sentence of death imposed on the applicant to be carried into effect on 7 February 2020. On 5 February 2020, the President ordered a respite of the execution pending any further order. On 8 September 2020, the President ordered the sentence of death imposed on the applicant to be carried into effect on 18 September 2020.

11 On 17 September 2020, the applicant applied for leave under s 394H of the CPC to make a review application under s 394J of the CPC on two grounds: (a) that the issue of whether he had suffered from an abnormality of mind under s 33B(3)(*b*) of the MDA had not been sufficiently canvassed at the trial or appeal stages ("the Abnormality of Mind Ground"); and (b) that his trial counsel did not make the necessary inquiries to adduce evidence in relation to his uncle, in particular, on the alleged $20,000 advance which would have shown that he had the financial means to sustain his alleged level of consumption ("the Inheritance Ground"). The applicant wished to reopen his case for resentencing under s 33B(3)(*b*) of the MDA, as well as to reopen his appeal against his conviction. On 19 September 2020, this court granted the applicant leave to make his review application under s 394H(7) of the CPC.

12 We heard the review application on 22 September 2020. At the outset of the hearing, the applicant's counsel, Mr M Ravi ("Mr Ravi") sought to disqualify Mr Francis Ng SC ("Mr Ng") and his team from representing the Public Prosecutor on the basis that the Public Prosecutor had come into contact with privileged or confidential information in the form of a letter from the applicant to his then-counsel, Mr Ramesh Tiwary ("Mr Tiwary") and four letters from the applicant to his uncle (collectively, "the Letters") during the course of the proceedings in CCA 38. The discovery by Mr Ng that the Prosecution was in possession of the Letters had been disclosed in a letter from the Prosecution to the court, copying Mr Ravi, dated 18 September 2020. It is unfortunate that Mr Ravi did not give prior notice to the court, or for that matter to the Prosecution, that he intended to bring such an application. Because of this, coupled with the fact that the application was made by way of an oral application, we struggled to understand the precise relief that was being sought, or the basis upon which it was sought. When we sought this clarification, Mr Ravi submitted that the entire corps of officers at the Attorney-General's

Chambers ("AGC") were conflicted from addressing the court. Without having filed any evidence, Mr Ravi also made some representations as to what the applicant's previous counsel had informed him in connection with the disclosure by the Prosecution in relation to the Letters. We take this opportunity to reiterate that this is not the appropriate way to raise such issues before the court. There was an emotive quality to the submissions that were being advanced, but a court is bound to deal with such matters only on established legal principles. Despite the absence of any evidentiary material that was put before us by Mr Ravi, we sought and obtained from Mr Ng confirmation that he had not been involved in CCA 38 and did not have sight of the contents of the Letters. In these circumstances, we were satisfied that Mr Ravi had failed to show the court any basis on which he could justify his claim that the entirety of the AGC was disqualified from appearing in this matter, nor any prejudice that may have been occasioned by the disclosure of the Letters in the context of the present application. As we found no basis on which to disqualify Mr Ng and his team from representing the Public Prosecutor in this application, we proceeded to hear the arguments.

13 Turning to the substantive grounds, Mr Ravi confirmed at the hearing of the present application that he would *not* be relying on the Inheritance Ground. Mr Ravi in fact acknowledged in the course of his arguments that he had no real basis to advance this ground. As we pointed out to him, it should not then have been advanced at all. We reiterate this point because the review process is not to be invoked lightly and as officers of the court, counsel are bound not to advance grounds that are without reasonable basis, for if they do, they face the prospect of being sanctioned for abusing the process of the court. As to the Abnormality of Mind Ground, we pointed out to Mr Ravi that to qualify for the alternative sentencing regime under s 33B(3) of the MDA, the applicant's involvement in the trafficking offence *must* be restricted to being a courier as

defined under s 33B(3)(*a*) of the MDA, *in conjunction* with proving that he had been suffering from an abnormality of mind at the relevant time, as these were *cumulative* requirements. This was a point Mr Ravi did not seem to have appreciated in his written submissions filed in the leave application. In the circumstances, Mr Ravi requested an opportunity to persuade the court that the applicant was a courier within the meaning of s 33B(3)(*a*) of the MDA, which we granted accordingly. On 25 September 2020, Mr Ravi filed further submissions attempting to address this issue ("Further Submissions"). We will elaborate on the parties' further submissions in the course of our decision.

14 Before turning to the issues proper, we reiterate the *stringent* requirements that *must* be satisfied before the court will exercise its power to review an earlier decision of the appellate court.

Exercise of power of review in criminal proceedings

15 To recapitulate, before a criminal review can be set down for hearing, there must first be an application for leave under s 394H of the CPC, which application might be dismissed either summarily or after an oral hearing. If the application for leave is dismissed, that is the end of the matter.

16 As the judge hearing the application for leave in these proceedings under s 394H(6)(*a*) of the CPC, I was of the view that this was, based on the relevant materials before me, an application that ought to have been dismissed. What tipped the scales in favour of the grant of leave (and, hence, the present review hearing before a full *coram* of judges) was the fact that the current statutory regime was relatively new and there was some benefit to be had in having a full *coram* set out the stringent nature of the criteria for allowing any such application after considering the arguments. Indeed, it seemed to me that if the court concluded that the present application was one that was so lacking in

merit, then having set out the position in this judgment, it would afford a principled basis for similar applications in the future to be dismissed at the leave stage (perhaps even summarily), thus remaining true to the spirit as well as substance of the statutory regime (see for example, *Moad Fadzir Bin Mustaffa v Public Prosecutor* [2020] SGCA 97 ("*Moad Fadzir*")).

17 Section 394J of the CPC, which codified a number of considered decisions by this court on the manner in which the interests of finality should be balanced against the need to prevent a miscarriage of justice in criminal proceedings (see *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 at p 79 (Indranee Rajah, Senior Minister of State for Law)), sets out the requirements before the court will review its earlier decision as follows:

> **Requirements for exercise of power of review under this Division**
>
> **394J**.—(1) This section —
>
> (*a*) sets out the requirements that must be satisfied by an applicant in a review application before an appellate court will exercise its power of review under this Division; and
>
> (*b*) does not affect the inherent power of an appellate court to review, on its own motion, an earlier decision of the appellate court.
>
> (2) The applicant in a review application must satisfy the appellate court that there is sufficient material (being evidence or legal arguments) 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.
>
> (3) For the purposes of subsection (2), in order for any material to be "sufficient", that material must satisfy all of the following requirements:
>
> (*a*) before the filing of the application for leave to make the review application, the material has not been canvassed at any stage of the proceedings in the criminal matter in respect of which the earlier decision was made;

> (*b*) even with reasonable diligence, the material could not have been adduced in court earlier;
>
> (*c*) the material is compelling, in that the material is reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made.
>
> (4) For the purposes of subsection (2), in order for any material consisting of legal arguments to be "sufficient", that material must, in addition to satisfying all of the requirements in subsection (3), 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 in respect of which the earlier decision was made.
>
> (5) For the purposes of subsection (2), 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, only if —
>
> (*a*) the earlier decision (being a decision on conviction or sentence) is demonstrably wrong; or
>
> (*b*) the earlier decision is tainted by fraud or a breach of the rules of natural justice, such that the integrity of the judicial process is compromised.
>
> (6) For the purposes of subsection (5)(*a*), in order for an earlier decision on conviction to be "demonstrably wrong" —
>
> (*a*) it is not sufficient that there is a real possibility that the earlier decision is wrong; and
>
> (*b*) it must be apparent, based only on the evidence tendered in support of the review application and without any further inquiry, that there is a powerful probability that the earlier decision is wrong.
>
> (7) For the purposes of subsection (5)(*a*), in order for an earlier decision on sentence to be "demonstrably wrong", it must be shown that the decision was based on a fundamental misapprehension of the law or the facts, thereby resulting in a decision that is blatantly wrong on the face of the record.

18 In summary, an applicant in a review application must satisfy the appellate court that there is sufficient material, either evidential or of a legal nature, 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 (s 394J(2)). For the material to be "sufficient", it is necessary for *all* of the requirements under s 394J(3) to be satisfied. That is, the applicant must show: (a) that the material has not been canvassed at any stage of the criminal proceedings; (b) that the material could not have been adduced with reasonable diligence; and (c) that the material is compelling, in that the material is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made. The failure to satisfy ***any*** of these requirements will result in the dismissal of the review application. In respect of new legal arguments, there is an *additional* requirement that the legal arguments must be based on a *change in the law* that arose from any decision made by the court *after* the conclusion of the applicant's criminal proceedings (s 394J(4)). We had explained the rationale for such a requirement prior to the introduction of s 394J in *Kho Jabing* ([1] *supra*) at [57]–[58] as follows:

> 57 … The wastage of judicial resources that would accompany the reopening of a case which has already been decided on its merits (which the requirement of non-availability is designed to prevent) is therefore concomitantly greater. For this reason, we are of the view that greater stringency is warranted in an application for a review of a concluded criminal appeal, and the requirement of non-availability must be strictly adhered to in respect of such an application.
>
> 58 We appreciate that this means that *it will be rare for this court to entertain an application for review which is premised on new legal arguments alone because it will normally be difficult for the applicant in such a case to show that the legal arguments in question could not, even with reasonable diligence, have been raised prior to the filing of the application for a review.* It seems to us that in respect of new legal arguments, the criterion of "non-availability" will ordinarily be satisfied only if the legal arguments concerned *are made following a change in the law.*
>
> [emphasis added]

19 As we have stated, in considering whether the material is sufficient, the court must consider whether the material is "capable of showing almost conclusively that there has been a miscarriage of justice" (s 394J(3)(*c*) of the CPC). Likewise, when it comes to the ultimate question of whether the review application should be allowed, the material must be such that the court "may conclude that there has been a miscarriage of justice" (s 394J(2)). There will be a miscarriage of justice if there is a "manifest error" or an "egregious violation of a principle of law or procedure which strikes at the very heart of the decision under challenge" (see *Kho Jabing* at [63]). This may be shown in two ways: (a) that the earlier decision is "demonstrably wrong" (s 394J(5)(*a*)); or (b) that the earlier decision is tainted by fraud or a breach of the rules of natural justice such that the integrity of the judicial process is compromised (s 394J(5)(*b*)). To show that an earlier decision on *conviction* is "demonstrably wrong", it must be apparent from the evidence tendered that there is a powerful probability that the earlier decision is wrong; to show that an earlier decision on *sentence* is "demonstrably wrong", it must have been based on a fundamental misapprehension of the law or the facts (s 394J(6)–(7)).

20 These strict requirements give effect to the principle of finality and reflect the fact that the review procedure concerns the situation where the case has already been heard at least *twice*. We explained this recently in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] SGCA 91 at [19]–[20]:

> 19 These requirements reflect the fact that the s 394H and s 394I procedure does not provide a second-tier appeal, but, instead, concerns the distinct situation where the case, by this point, has been heard at least twice. Indeed, Ms Rajah observed as follows (see *Singapore Parliamentary Debates*, *Official Report* (19 March 2018) vol 94 at p 79 (Indranee Rajah, the Senior Minister of State for Law)):

> Before the filing of the application of leave to make the review application, the material must not have been canvassed at any stage of the proceedings in the criminal matter, in respect of which the earlier decision was made.
>
> So, *it must be remembered that this scenario is different from a scenario where something is coming up for consideration for the first time. This is intended to address the scenario where it has been heard once – it has been appealed, it has been heard – and, therefore, you are trying to re-open it again, which means the Court has already applied its mind. Therefore, the threshold is different.*
>
> You therefore have to show that it is something where it could not or had not been canvassed at an earlier stage. Because if it had been canvassed at an earlier stage and it was considered, and the Court had said no, *then really, it should follow the normal procedural rules, which is that you do not re-open concluded hearings.*
>
> It is also a requirement that even with reasonable diligence, the material could not have been adduced in Court earlier. Obviously, that is to impress upon parties that they must take all reasonable efforts to look for the relevant evidence.
>
> …
>
> [emphasis added]

> 20 Where the material concerned consists of legal arguments, it must, in addition to satisfying the requirements in s 394J(3) of the CPC, be based on a change in the law that arose from any decision made by a court after the conclusion of all earlier proceedings relating to the criminal matter in respect of which the earlier decision was made (s 394J(4) of the CPC). The appellate court may conclude that there has been a miscarriage of justice only if the earlier decision is demonstrably wrong, or if the earlier decision is tainted by fraud or a breach of the rules of natural justice, such that the integrity of the judicial process is compromised (s 394J(5) of the CPC).

21 Having set out the statutory regime and the stringent requirements that must be fulfilled before the court will exercise its power of review, we turn to the issues proper.

Our decision

The Abnormality of Mind Ground

Whether the applicant could not have adduced the materials with reasonable diligence

22 The applicant submits that his legal argument on the Abnormality of Mind Ground constitutes a new and compelling reason to reopen the appeal in CCA 38. He argues that his trial and appeal counsel did not consider the viability, or the possibility, of his circumstances falling within the alternative sentencing regime under s 33B(3)(*b*) MDA. Mr Ravi additionally deposed on affidavit that Dr Ken Ung Eng Khean, a Consultant Psychiatrist at Adam Road Medical Centre, has stated his willingness to visit the applicant to prepare a report on the question of abnormality of mind ("Dr Ung's Report"). In the applicant's Further Submissions, he submits that the activities which formed the basis of his conviction (*ie*, his purchase of the drugs, transporting them to his house and emptying one packet of the drugs into the bowl) fell within the ambit of s 33B(3)(*a*) of the MDA. He asserts that the Judge erred in finding that all the drugs found in his possession were intended for sale and that it was Parliament's intention for an accused like him to be afforded recourse to the alternative sentencing regime because Parliament had intended only to impose the mandatory death penalty upon "those who manufacture or traffic in drugs" (see *Singapore Parliamentary Debates, Official Report* (9 July 2012) vol 89 at p 264 (Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs)). We shall refer to this argument as the "Courier Argument". The Abnormality of Mind Ground, the Courier Argument and Dr Ung's Report shall be collectively referred to as "the materials".

23 It is a necessary requirement for the applicant to show that the materials could not have been adduced previously with reasonable diligence (s 394J(3)(*b*)

of the CPC). This requirement is *not satisfied* in the present application. It is not disputed that the alternative sentencing regime under s 33B(3) of the MDA was in force at the time the applicant was convicted in the High Court. The applicant had ample opportunity to introduce the materials, *ie*, to argue that his circumstances fell within the alternative sentencing regime, but he chose not to do so. As pointed out by the Prosecution, the applicant was queried, twice, by the Judge on whether he sought to raise any issues pertaining to being a courier (s 33B(3)(*a*) of the MDA) or in relation to an abnormality of mind (s 33B(3)(*b*) of the MDA) at the trial. The applicant had confirmed on 19 November 2015 and 2 December 2015, through his trial counsel Mr Mahendran s/o Mylvaganam, that he would ***not*** be raising these issues.

24 The Judge found that the "facts showed that [the applicant] *was not a mere courier of drugs*" [emphasis added] (see the GD at [53]) and this finding was not reversed on appeal. It is also significant that the only case run by the defence on this point was that he had all the drugs in his possession for his own consumption. He never gave any other explanation as to his intentions in relation to the drugs. The judge rejected this in large part because he found that the applicant could not have afforded such an outlay for his own consumption and in coming to this conclusion, he rejected the inheritance argument (see [7] above). Once Mr Ravi admitted that he really had no basis for attempting to reopen this case on the Inheritance Ground (see [13] above), he had nothing left in his arsenal with which to displace the Judge's finding of fact on this issue. In any case, the applicant has not satisfied us that the Abnormality of Mind Ground and the Courier Argument were legal arguments that *could not* have been pursued with reasonable diligence at any time during the criminal proceedings. In so far as the applicant wishes to introduce Dr Ung's Report as new evidence, this court had, in CCA 38, afforded the applicant ample opportunity to consider whether a further psychiatric report was required on appeal and the applicant

had decided not to adduce such evidence. At the appeal hearing on 3 May 2018, Mr Tiwary, the applicant's then-counsel, confirmed that the applicant sought an adjournment of the appeal in order to file a motion to adduce the evidence of his uncle, but *not* that of a psychiatrist.

25 It is apposite to highlight that in respect of new legal arguments, the applicant must also satisfy the court that the legal arguments, *ie*, the Abnormality of Mind Ground and the Courier Argument, were based on a *change in the law* that arose from any decision made by a court *after* the conclusion of the applicant's criminal proceedings (see s 394J(4) of the CPC and [18] above). With regard to the Courier Argument, the applicant has failed to raise any such change in law. As for the Abnormality of Mind Ground, the applicant refers to this court's recent decision in *Mohammad Azli bin Mohammad Salleh v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 1374 ("*Mohammad Azli*") at [34] to support his contention that the parties involved (*ie*, the trial judge, the Defence and the Prosecution) are now obliged to explore arguments in relation to the alternative sentencing regime under s 33B(3)(*b*) MDA and that this constitutes a change in the law:

> ... We take this opportunity to highlight the importance of ensuring that the alternative sentencing regime under ss 33B(2) and 33B(3) of the MDA is specifically canvassed in *every* trial involving a capital charge under the MDA. It is the duty of defence counsel to consider, at the earliest stage, whether their clients have a viable case under either s 33B(2) or s 33B(3), so that the necessary evidence may be adduced during the trial. If the accused person is convicted of the capital charge, the Defence, the Prosecution and the trial judge are each responsible for considering the applicability of ss 33B(2) and 33B(3) prior to sentencing. This extends to the Prosecution intimating its position, in relevant cases, on whether it intends to issue the offender with a certificate of substantive assistance under s 33B(2)(*b*). [emphasis in original]

26 In *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*"), the applicant filed a criminal motion on the ground that the Attorney-General had exercised his prosecutorial discretion contrary to Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") by prosecuting the applicant for capital offences while prosecuting his co-offender, who was involved in the same criminal enterprise, for non-capital offences. This court held that the applicant had ample opportunity to raise, at an earlier stage, the constitutional points which he now sought to advance in his application for review, and "had no cause to complain if [the Court of Appeal] had declined to hear this Motion on the basis that he had exhausted all his rights to due process" (at [16]). This court nevertheless decided to hear the applicant's motion to clarify, in the public interest, the interaction between the prosecutorial discretion in Art 35(8) of the Constitution and the right to equality before the law conferred by Art 12(1) (at [17]). In the circumstances, the applicant's motion was dismissed as this court held that he had not proved a *prima facie* case of a violation of Art 12(1) and the evidence on record did not rebut the presumption of constitutionality which applied to the Attorney-General's prosecutorial discretion (at [73]).

27 In *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 ("*Yong Vui Kong*") the applicant brought a criminal motion, two weeks after this court's decision in *Ramalingam*, to reopen his case on the ground that the selective prosecution as between the applicant and his co-offender ("Chia") violated Art 12(1) of the Constitution. This court decided to reopen the decision as the case presented itself as a more compelling instance in which there might have been unequal treatment given that Chia, who was alleged to be the applicant's boss and supplier, appeared to be the more culpable offender than the applicant (at [19]). This court also held that ***before*** *Ramalingam*, the legal position in

Singapore in relation to the constitutional relationship between Arts 12(1) and 35(8) of the Constitution was *unclear* (at [18]). In that regard, the argument raised by the applicant in *Yong Vui Kong* on the basis of *Ramalingam* was "new", both in the sense that it had not been considered before the filing of the application for review and in the sense that until *Ramalingam* the point was not clarified and hence, could not, even with reasonable diligence, have been raised in court prior to that (see *Kho Jabing* ([1] *supra*) at [75]).

28 In contrast to *Yong Vui Kong*, the Abnormality of Mind Ground and the Courier Argument were arguments that could have been raised with reasonable diligence at the proceedings below, as we have elaborated upon at [23]–[24] above. Further, in so far as both *Ramalingam* and *Yong Vui Kong* were concerned, the legal position in Singapore in relation to the constitutional relationship between Arts 12(1) and 35(8) of the Constitution was unclear before the decision in *Ramalingam*. On the contrary, there was *no uncertainty* in relation to the applicability of the alternative sentencing regime in the context of the present case. We accept the Prosecution's submission that *Mohammad Azli* at [34] did not give rise to any change in the law but merely highlighted the importance of ensuring that the alternative sentencing regime under s 33B of the MDA was given due attention (see also *Moad Fadzir* at [19]). This, the Judge had done. The Judge had considered whether the applicant's circumstances fell within the alternative sentencing regime based on the *available* evidence at the trial (see [23] above).

29 In the circumstances, the applicant has failed to show that the materials could not have been adduced with reasonable diligence either at the trial or on the appeal. As we shall see, even if we were to consider the Abnormality of Mind Ground and the Courier Argument, they are, in any event, far from being of the compelling nature required to satisfy the requirement under s 394J(3)(*c*).

Whether the materials are compelling

30 Compelling material is material that is "reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice" (see s 394J(3)(*c*) of the CPC and *Kho Jabing* at [59]–[61]). The applicant submits that the evidence available at the trial and on appeal suggest that his circumstances fell within s 33B(3)(*b*) of the MDA. The applicant relies on the following evidence: (a) a report by Dr Munidasa Winslow ("Dr Winslow") and Dr Julia CY Lam dated 15 May 2014 ("Dr Winslow's Report") where it was concluded that the applicant was likely to have had heroin dependence at the time of his arrest; (b) Dr Winslow's testimony at the trial that if a heroin user's source was reliable, he would keep one month's worth of heroin to ensure that the supply did not run out, or if supply line was erratic, three months' worth of heroin; and (c) the fact that the amount of morphine found in the applicant's urine samples increased from 1999 to 2011. In his Further Submissions, the applicant argues that the activities which formed the basis of his conviction (*ie*, his purchase of the drugs, transporting them to his house and emptying one packet of the drugs into the bowl) fell within the ambit of s 33B(3)(*a*) of the MDA and that he should, for all intents and purposes, be treated as a "courier" (see [22] above).

31 In contrast, the Prosecution submits that that there was unchallenged evidence adduced at the trial that the applicant had been free of psychotic symptoms for many years and his attempt to rely on the Abnormality of Mind Ground is an afterthought. In response to the applicant's Further Submissions, the Prosecution submits that the court is entitled draw inferences from an offender's intended actions based on the evidence available and that there was sufficient evidence at the trial to show that the applicant had intended to sell the drugs in his possession. The Prosecution emphasises that the burden falls on the

applicant to prove that his involvement in the offence was restricted to the circumstances set out in s 33B(3)(*a*) of the MDA and at the trial, the applicant's case was that he had intended to consume all the drugs found in his possession. We accept the Prosecution's submissions.

32 The Abnormality of Mind Ground and Courier Argument do not in any way (let alone "almost conclusively" as is the requirement under s 394J(3)(*c*) of the CPC) demonstrate that there has been a miscarriage of justice in his criminal proceedings. First, as pointed out by the Prosecution and as we put to Mr Ravi at the hearing of the present application (see [13] above), to qualify for the alternative sentencing regime, in addition to showing that the applicant was suffering from such abnormality of mind as would have substantially impaired his mental responsibility for the trafficking offence, the applicant's involvement in the offence *must have been restricted to being a courier* within the circumstances defined under s 33B(3)(*a*) of the MDA. These are *conjunctive* requirements. Mr Ravi seeks to convince this court on the Courier Argument that the applicant should be treated as a courier within s 33B(3)(*a*) of the MDA, but the language of the provision is clear and, as we have stated, the Judge made a *finding of fact* (which was not reversed on appeal) that the applicant "***was not a mere courier of drugs*** [and] had the intention and the means of ***repacking the drugs he had obtained from [his supplier] for sale to third parties***" [emphasis added] (see the GD at [53]). This must be viewed against the context that the crux of the applicant's defence at the trial was simply that ***all*** the drugs found in his possession were for his *personal consumption* and he had not advanced the case that he was merely a courier, which would have been *inconsistent* with his defence of personal consumption. As we stated at [23] above, the applicant himself confirmed that he would not be raising issues pertaining to being a courier. As a result, there was simply no evidence adduced at trial that could

support the Courier Argument, and on the available evidence the Judge was amply justified in finding that the applicant was more than a mere courier. The applicant has also not introduced any new evidence in this application to justify reopening the Judge's finding of fact.

33 We turn to the merits of the Abnormality of Mind Ground. To fall within s 33B(3)(*b*) of the MDA, the applicant has to show that: (a) he was suffering from an abnormality of mind; (b) the abnormality of mind arose from a condition of arrested or retarded development of mind, or arose from any inherent causes, or was induced by disease or injury; and (c) the abnormality of mind substantially impaired his mental responsibility for his acts and omissions in relation to his offence (see the decision of this court in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 at [21]). *Even if* the applicant were able to satisfy (a) and (b) above, the medical evidence adduced at the trial suggested that the applicant was *not* suffering from such abnormality of mind as would have substantially impaired his mental responsibility for the offence. In *Mohammad Azli* ([25] *supra*), the possibility that one of the appellants, Roszaidi, might fall within the scope of s 33B(3) of the MDA did not appear to have been considered by his then-counsel, the Prosecution, or the trial judge. In addition, Roszaidi had relied on a psychiatric report, *adduced at the trial itself*, which stated that he was diagnosed with "mental and behavioural disorder due to dependence o[n] multiple substances" and "major depressive disorder" (see *Mohammad Azli* at [29]). There was also some support from the relevant clinical notes admitted at trial for the contention that Roszaidi's substance dependence had substantially impaired his mental responsibility for the offence (see *Mohammad Azli* at [30]). This court in *Mohammad Azli* was thus persuaded of the possibility of Roszaidi's circumstances falling within the alternative sentencing regime (at [29]–[34]).

34 In contrast, and bearing in mind that *Mohammad Azli* was a case on appeal rather than an application for review, the applicant had been seen by a total of eight doctors, none of whom had reported that the applicant *might* have any mental or behavioural disorder, or any other related disorder that *might possibly* have supported the finding of an abnormality of mind which had substantially impaired his mental responsibility for the offence. In particular, Dr Kenneth Koh, a consultant at the Institute of Mental Health, examined the applicant on 22 and 25 August 2011. Dr Koh stated in his medical report dated 17 April 2012 that the applicant had "reported the absence of any psychotic symptoms for many years" and was "not of unsound mind at the time of the alleged offence". The relevant portions of the Dr Koh's medical report are as follows:

> ***Mental State Examination***
>
> [The applicant] was a well built man who was relevant and spontaneous in his speech. He maintained good eye contact. His affect was reactive and normal and he was neither psychomotor retarded or agitated.
>
> He *reported the absence of any psychotic symptoms for many years now*. He did not suffer from any hallucinations, delusions, or have feelings that his thoughts were being externally interfered with.
>
> He denied the presence of any extended period of low mood, and also had no disturbance of sleep, appetite or concentration.
>
> ***Opinion***
>
> When I last examined him, my opinions were that:
>
> 1. [The applicant] has opioid dependence.
>
> 2. He had a psychotic episode in the past, *but has been free of psychotic symptoms for many years now*.
>
> 3. He was not of unsound mind at the time of the alleged offence.
>
> 4. He is currently fit to plead.
>
> [emphasis added in italics]

35 The applicant relied substantially on Dr Winslow's Report which stated that the applicant was likely to have "moderately severe heroin dependence". This, however, did not go towards showing that the applicant had an abnormality of mind which substantially impaired his mental responsibility for the offence. Pertinently, Dr Winslow stated in the *same* report that there was "*no evidence of psychotic symptoms*" [emphasis added]:

> 14 In his mental state examination, he was alert and relevant, with good eye contact. He was forthcoming about events that led to his arrest and how it happened. *There was no evidence of psychotic symptoms*, and he was oriented to time, place and person. His mood, concentration and energy levels were fair. He reported poor and broken sleep.
>
> 15 In summary, [the applicant] has a history of using heroin and illicit drugs since his teens. He went to DRC two times and was a heroin dependent at the time of his arrest. It is possible that his use was 1.5 packet of heroin (12g) per day given his history and tolerance due to his daily injecting usage. We noted the discrepancies between his self-reported withdrawal signs and symptoms, and those observed and documented in his medical reports. Our reading of his raw medical notes though would indicate moderately severe withdrawal symptoms. It is likely that his moderately severe heroin dependence and heavy use was to avoid withdrawal symptoms.
>
> [emphasis added]

36 For completeness, the applicant's argument that he had been suffering from an abnormality of mind at the relevant time because the morphine level found in his urine samples increased from 1999 to 2011 is, with respect, a *non-sequitur*. There is no evidence of any link between the former and the latter.

37 We reiterate that the applicant had confirmed at the trial that he would not be raising any issue in relation to an abnormality of mind under s 33B(3)(*b*) of the MDA and this court had given the applicant ample opportunity to consider whether a further psychiatric report was required on appeal (see [23]–[24] above). In any event, given the Judge's finding that the applicant was not a mere

courier of drugs and our rejection of the Courier Argument (see [32] above), the Abnormality of Mind Ground is ultimately immaterial. In the circumstances, the Abnormality of Mind Ground and the Courier Argument do not come close to fulfilling the requirement of compellability under s 394J(3)(*c*) of the CPC.

The Inheritance Ground

38 We turn to the Inheritance Ground which we will deal with briefly. As stated at [13] above, Mr Ravi confirmed at the hearing of the present application that he would not be relying on this ground. In short, the applicant submits that his counsel failed to make the necessary inquiries to produce evidence in relation to the alleged $20,000 cash advance from his uncle. The applicant claims that he is now able, approximately *two years* after the conclusion of his appeal in CCA 38, to adduce evidence to show that he had obtained this alleged $20,000 cash advance from his uncle and should be granted the opportunity to do so. As against this, the Prosecution submits that this assertion is not material that falls within s 394J(3)(*b*) of the CPC and that in any event, the applicant had been granted numerous opportunities to adduce the necessary evidence.

39 In our view, the Inheritance Ground is a non-starter as it is neither a legal argument nor evidence that falls within the ambit of s 394J(2) of the CPC. In particular, this court had furnished ample opportunities for the applicant to explore this avenue and to adduce further evidence in relation to his uncle, but the applicant chose not to do so:

(a) On 3 May 2018, at one of the hearings of the appeal in CCA 38, this court granted an adjournment to allow the applicant to adduce the evidence of his uncle. This court directed that a statutory declaration from the applicant's uncle be filed within two weeks from 3 May 2018. The applicant failed to do so.

(b) At a subsequent hearing on 16 August 2018, notwithstanding the applicant's failure to file a statutory declaration on this court's previous directions, this court informed Mr Amarick Gill, the applicant's counsel at the time, that *if* the applicant wished to file a motion to adduce fresh evidence on appeal in relation to the uncle, "the Defence shall put forward a statutory declaration or affidavit of [the uncle] in relation to the evidence that he intend[ed] to give…". No such evidence was adduced.

40 In the circumstances, we were not surprised that Mr Ravi has decided to forsake reliance on the Inheritance Ground. In this regard, though, we reiterate the caution to counsel in future applications against raising points or arguments that they do not have a reasonable basis to submit upon as to do so would be an abuse of the process of court.

Conclusion

41 For the reasons set out above, we dismiss the applicant's review application in CA/CM 28/2020. The applicant has failed to produce sufficient material under s 394J(3)–(4) of the CPC and we are equally not persuaded that there has been any miscarriage of justice in the criminal proceedings in relation to the applicant. We have highlighted the stringent requirements that must be satisfied in an application for review and will not hesitate to summarily dismiss patently unmeritorious applications in the future – even at the leave stage.

Sundaresh Menon	Andrew Phang Boon Leong	Judith Prakash
Chief Justice	Judge of Appeal	Judge of Appeal

Ravi s/o Madasamy (Carson Law Chambers) for the applicant;
Francis Ng Yong Kiat SC, Wuan Kin Lek Nicholas and Chin Jincheng (Attorney-General's Chambers) for the respondent.