IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 13

Criminal Motion No. 19 of 2020

Between

(1) Khartik Jasudass
(2) Puniyamurthy A/L Maruthai

… *Applicants*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law] — [Criminal motion] — [Review of concluded appeal]

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Khartik Jasudass and another
v
Public Prosecutor

[2021] SGCA 13

Court of Appeal — Criminal Motion No. 19 of 2020
Tay Yong Kwang JCA
11 December 2020, 29 January 2021

25 February 2021

Tay Yong Kwang JCA:

Introduction

1 This Criminal Motion ("this CM") is an application made pursuant to s 394H(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") by Khartik Jasudass (the "First Applicant") and Puniyamurthy A/L Maruthai (the "Second Applicant") (collectively, the "Applicants") for leave to apply for a review of the Court of Appeal's decision in CA/CCA 26/2015 ("CCA 26") and CA/CCA 27/2015 ("CCA 27"). In that decision, the Court of Appeal dismissed the Applicants' appeals against conviction in the circumstances described below.

2 This CM was filed by the Applicants on 27 July 2020. On 29 July 2020, the Prosecution wrote to the Supreme Court Registry stating the following:

> …
>
> 2. Pursuant to r 11(5) and r 11(6) of the Criminal Procedure Rules 2018, the respondent may file written submissions and an affidavit in relation to CM 19 within three days after the date on which it was filed (*ie*, by 30 July 2020). Pursuant to r 11(1) of the said Rules, CM 19 must be fixed for hearing within 21 days after the date on which it was filed (*ie*, by 17 August 2020).
>
> 3. We write to respectfully request that CM 19 be held in abeyance pending the Court of Appeal's delivery of judgment in CA/CM 3/2020 ("**CM 3**"), *Gobi A/L Avedian v Public Prosecutor*.
>
> 4. We have spoken with counsel for the applicants on 29 July 2020 and parties are in agreement that the judgment in CM 3 may have implications on CM 19. The submissions filed by the applicants on 27 July 2020 (in support of CM 19) make reference to CM 3 as one of the cases constituting a "change in the law" for the purposes of s 394J(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed): see the applicant's submissions at [9.4], [43], [46.4] and [48]. It would therefore be useful to wait for the guidance of the Court of Appeal in CM 3, before deciding if and how CM 19 should be proceeded with.
>
> 5. Suspending the application and related timelines in CM 19, until judgment has been delivered in CM 3, would better allow parties to formulate their respective positions and possibly come to agreed positions and/or narrow the issues for adjudication.
>
> 6. In the circumstances, we respectfully request that this Honourable Court suspend the timelines for the filing of the respondent's submissions, and the hearing of CM 19, until after judgment is delivered in CM 3. After the said judgment has been delivered, if the applicants are still minded to proceed with CM 19 at that stage, we will seek the court's directions on the filing of submissions in CM 19 and the hearing thereof (including any directions pertaining to amendment of applicants' submissions).
>
> 7. A copy of our e-mail correspondence with counsel for the applicants, recording the parties' agreement as mentioned above, is enclosed for reference.
>
> …
>
> [emphasis in original]

3 On 19 October 2020, the five-Judge Court of Appeal delivered its reserved judgment in *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102

("*Gobi*"). Thereafter, a Case Management Conference ("CMC") was held on 30 October 2020 before an Assistant Registrar ("AR"). At the CMC, the parties agreed that this CM did not have to proceed on an expedited basis as both Applicants are serving life imprisonment sentences. The parties also agreed on the proposed timelines for submissions and these were incorporated in the Court's directions communicated to the parties through the Registry's letter dated 5 November 2020. Pursuant to the Court's directions, the Applicants filed an affidavit affirmed by their counsel, Mr Suang Wijaya and their revised submissions on 11 December 2020 and the Prosecution filed its submissions on 29 January 2021.

Facts and procedural history

4 At the joint trial in the High Court in 2015, the Applicants claimed trial to one charge each of trafficking in diamorphine in furtherance of their common intention, an offence under s 5(1)(a) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") and read with s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). On 3 August 2015, they were convicted by the High Court and each was subsequently sentenced to life imprisonment and 15 strokes of the cane. The decision of the High Court judge (the "Judge") is found in *Public Prosecutor v Khartik Jasudass and Puniyamurthy A/L Maruthai* [2015] SGHC 199 (the "Judgment").

5 Briefly, the facts are as follows. On 27 August 2012, the Applicants rode into Singapore on a motorcycle which had three bundles of drugs hidden in it. They delivered one bundle to a male Malay and collected S$2,500 from him in exchange. Before they could deliver the other two bundles, officers from the Central Narcotics Bureau arrested them. These two bundles were found to

contain a total of 26.21g of diamorphine and they formed the subject matter of the charges against the Applicants.

6 The charges stated that on 27 August 2012, at about 6.20pm, the accused persons had in their possession for the purpose of trafficking, two packets of granular or powdery substances weighing a total of 454.6g which were analysed and found to contain not less than 26.21g of diamorphine. The Judge found that the Prosecution had not proved beyond reasonable doubt that the Applicants knew or were wilfully blind to the nature of the drug that they were trafficking: [59] and [73] of the Judgment. However, the Judge held that the presumption in s 18(2) of the MDA was not rebutted by either of them. On sentence, the Judge found that the Applicants satisfied the requirements under s 33B(2) of the MDA. Accordingly, the Judge imposed on the Applicants the sentence of life imprisonment and 15 strokes of the cane.

7 The Applicants appealed against their convictions and sentences. The Second Applicant's petition of appeal indicated that he was appealing only on the ground that his sentence was manifestly excessive although his notice of appeal was an appeal against both conviction and sentence.

8 On 9 September 2016, the Court of Appeal (comprising Chao Hick Tin JA, Judith Prakash JA and me) delivered its brief oral judgment in the following terms:

> The law on the interpretation and application of s 18(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) has been well explored and ruled upon in previous cases, one of the latest being *Dinesh Pillai a/l Raja Retnam v Public Prosecutor* [2012] 2 SLR 903. The facts of this case show that both appellants knew that they were carrying illegal drugs. They did not bother to ascertain or make further enquiries as to what nature of the drug it was. In these circumstances, the trial judge held that the appellants had failed to rebut the presumption prescribed

> in s 18(2). We do not see how we could disturb that finding. A mere assertion by the appellants that they did not in fact know the exact nature of the drug is not good enough when they made no efforts at all to ascertain what exact drug they were carrying.
>
> Accordingly, we will dismiss the appeals of both appellants.

The Applicants' arguments

9 In seeking leave to file a review application, the Applicants make three main arguments which are summarised below:

(a) First, the Prosecution did not challenge the Applicants' evidence at the trial that they did not know the type of drugs that they were carrying.[1] The Prosecution's case focussed on the Applicants not caring or bothering to find out what type of drugs they were carrying. It followed from this that the presumption under s 18(2) of the MDA was rebutted.

(b) Second, the Judge erred in her reasoning.[2] The Judge did not state expressly whether the Applicants had proved successfully that they did not actually know the nature of the drugs. Instead, the Applicants were required to go further to prove that they could not reasonably be expected to have known the nature of the drugs, with an objective inquiry imposed on the reasonableness of the Applicants' actions.

(c) Third, the Judge erred by applying the doctrine of wilful blindness to determine whether the Applicants had rebutted the presumption under s 18(2) of the MDA.[3]

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1 Applicants' submissions paras 5, 16–22.

2 Applicants' submissions paras 6–8, 23–26.

3 Applicants' submissions para 9.

10 The above indicated collectively that CCA 26 and CCA 27 were decided incorrectly because the law has developed significantly after the appeals were dismissed.[4] The Applicants point specifically to the decisions of *Masoud Rahimi bin Mehrzad v Public Prosecutor and another appeal* [2017] 1 SLR 257, *Obeng Comfort v Public Prosecutor* [2017] 1 SLR 633 ("*Obeng*"), *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*") and *Gobi*.

The Prosecution's arguments

11 The Prosecution argues that none of the arguments raised by the Applicants is sufficient to justify the re-opening of the concluded criminal appeals. The Prosecution's response to the Applicants' arguments is as follows:

(a) First, the Applicants had misconstrued the Prosecution's case, which was one of actual knowledge as established by the presumption in s 18(2) of the MDA.[5]

(b) Second, the Applicants had read the Judge's findings wrongly.[6] The Judge did not accept that they had proved on a balance of probabilities that they did not know the nature of the drugs.

(c) Third, the Applicants mischaracterised the Judge's reasoning when they claimed that she applied the doctrine of wilful blindness in determining whether the s 18(2) presumption was rebutted.[7]

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4 Applicants' submissions paras 38–50.

5 Prosecution's submissions paras 29(b), 48–59.

6 Prosecution's submissions paras 29(c), 60–68.

7 Prosecution's submissions paras 29(d), 69–73.

12 The Prosecution also argues, on the basis of the evidence at the trial, that the Applicants could not possibly rebut the presumption in s 18(2) of the MDA.[8] No positive belief was asserted and their concessions on cross-examination showed that they were indifferent as to the items that they were carrying.

13 The Prosecution relies on *Gobi* at [26] which stated that the mere fact that there has been a change in the law does not in itself justify the re-opening of concluded appeals. Accordingly, the Prosecution submits that there is no miscarriage of justice in the present case and that the circumstances here warrant a summary dismissal of this CM pursuant to s 394H(7) of the CPC.[9]

My decision

14 In an application for leave to file a review application, where the appellate court in question is the Court of Appeal, only one Judge of the Court of the Appeal is required to hear the application. This is provided in s 394H(6)(*a*) of the CPC. It is on this basis that I am dealing with this CM.

15 An application for leave to make a review application must disclose a legitimate basis for the exercise of the court's power of review (*Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17]). Having read the affidavit of the Applicants' solicitor and the parties' submissions, I find that the Applicants have not shown a legitimate basis for the court to exercise its power of review.

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8 Prosecution's submissions paras 29(a), 31–47.

9 Prosecution's submissions paras 3, 74–75.

The applicable law

16 The requirements relating to the court's exercise of its power of review are set out in ss 394J(2)–(7) of the CPC. These provisions read:

> (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.

As the Applicants are relying on new legal arguments as "sufficient material", they must also show that there has been a change in the law within the meaning of 394J(4).

The arguments in this application

(1) The Prosecution's case at trial

17 The Prosecution's case at the trial was one of actual knowledge of the nature of the drugs. This was clear from its opening statement in court. Contrary to the Applicants' contentions, the Prosecution had questioned both Applicants repeatedly as to whether they knew that they were in possession of drugs. Even if, as the Applicants argued, the only instance in which the Prosecution challenged their evidence that they did not know the type of drugs that they were carrying was a "single and bare 'put' question",[10] the Prosecution repeated its case in its closing submissions. The Prosecution's case was therefore consistently one of actual knowledge.

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10 Applicants' submissions paras 5 and 16.

18 The relevance of an accused's indifference was made clear in *Gobi* at [64]–[69]. The court in *Gobi* stated the following:

> 64 It is clear from these cases that whether or not an accused person's defence is accepted ultimately depends on the strength of the evidence led. An assertion or finding of *ignorance* alone would not suffice. As we observed in *Obeng* ([13] *supra*) at [39]:
>
> > … It would not suffice for the accused to claim simply that he did not know what he was carrying save that he did not know or think it was drugs. If such a simplistic claim could rebut the presumption in s 18(2), the presumption would be all bark and no bite. …
>
> 65 In this light, it also follows that an accused person who is *indifferent* to what he is carrying cannot be said to believe that the nature of the thing in his possession is something other than or incompatible with the specific drug he is in possession of. This is because an accused person who is indifferent is simply nonchalant about what the thing in his possession is, and therefore cannot be said to have formed any view as to what it *is* or is *not*. Such indifference can usually only be inferred from the objective circumstances. In this connection, we consider that in the context of rebutting the s 18(2) presumption, an accused person may be said to be indifferent to the nature of the thing in his possession if he had the ready means and opportunity to verify what he was carrying, but failed to take the steps that an ordinary reasonable person would have taken to establish the nature of the thing, and also fails to provide any plausible explanation for that failure. Of course, this is a conclusion to be arrived at in the light of all the evidence in the case. …
>
> 66 … We emphasise that this inquiry is entirely separate from the question of wilful blindness, which looks at whether the accused person had a clear, grounded and targeted *suspicion* of the fact to which he is said to have been wilfully blind, as opposed to mere *indifference* (see [77(a)] and [79(a)] below). We are concerned here with how the presumption that the accused person had actual knowledge of the nature of the drugs in his possession may be rebutted and whether it has been rebutted. In this context, if the Prosecution invokes the presumption and the court concludes that the accused person was in fact indifferent to the nature of what he was carrying, then he will be treated as not having rebutted the presumption.
>
> …

> 69 … The question for present purposes is whether Parliament intended for the s 18(2) presumption to be rebutted by an accused person whose defence is simply that he was indifferent to what he was carrying. In our judgment, the answer to this is in the negative because, as we have explained above, the s 18(2) presumption will only be rebutted where the accused person is able to establish that he *did not know the nature of the drugs* in his possession, and an accused person who is indifferent to the nature of the thing he is carrying cannot be said to have formed any view as to what the thing *is* or *is not* (see [65] above).
>
> [emphasis in original in italics]

19 Although the Applicants' case appears to be that *Gobi*, having been decided after CCA 26 and CCA 27, represented "a change in the law" within the meaning of s 394J(4) of the CPC, they also argue that: (1) the observations in *Gobi* on indifference or nonchalance were *obiter* and the Court of Appeal was only making an evidential point in that if an accused person makes a bare assertion of indifference or nonchalance, his claim would normally be regarded as incredible; and (2) if the Court of Appeal in *Gobi* was making a point of principle, then the Applicants ask the court to reconsider its view because "such a point of principle is wholly inconsistent with statute and principle" and "this is a wrong turn in the law that must be rejected at this early juncture, before it becomes entrenched".[11]

20 The Applicants' arguments are unmeritorious. The observations by the five-Judge Court of Appeal in *Gobi* were an integral part of the court's reasoning process on the relationship between indifference and the presumption under s 18(2) of the MDA. In the present case, at the trial, the Applicants agreed a number of times that they did not care what type of drugs was involved and that they would have brought whatever type of drugs into Singapore. The

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[11] Applicants' submissions para 48.

observations in *Gobi* are amply clear about the consequences of being indifferent about what was being carried. Therefore, far from favouring a review of the Applicants' cases, *Gobi* supports the Prosecution's arguments at the trial.

21 In my recent decision in *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 at [26], I commented that the applicant there was in fact advocating a change in the law rather than relying on a change in the law. Here, the Applicants are relying on a change in the law which they say could be erroneous if understood to be making a point of principle and therefore should in turn be reconsidered and rejected. They want *Gobi* to be read as favouring a review of their concluded appeals when the case actually affirms the correctness of their convictions and the dismissal of their appeals. It is obvious that what the Applicants are advocating in this CM is not within the letter and the spirit of s 394J(4) of the CPC.

(2) The Judge's findings

22 The Applicants argue that the Judge had only in mind one question at the trial: whether the Applicants had shown that they could not reasonably be expected to have known the nature of the drugs that they were trafficking in. In other words, the Judge convicted the Applicants solely on the basis that they had failed to act as reasonable persons in their shoes would have done to find out the nature of the drugs.

23 This argument misconstrues the Judgment. The Judge focussed first on what both Applicants knew at the material time. This was the starting point of the inquiry for the Judge: at [60] and [74].

24 This led her to the conclusion that the First Applicant knew that the drugs were "illicit items" and the "irresistible inference" that he knew that

different types of drugs existed: at [62]–[63]. In the Judgment at [64], the Judge stated in respect of the First Applicant:

> From the analysis above, the picture that emerges is that the first accused knew that delivering drugs is dangerous, that drugs are illegal, that the drugs are worth substantial amounts, that he would be paid well for the deliveries and that there are different types of drugs. I am not persuaded that the first accused was as ignorant of drugs and dealings in drugs as claimed.

25 In relation to the Second Applicant, the Judge found that he knew from the outset that "he was being asked to deliver drugs for substantial monetary rewards": at [74]. She also found that he "knew that it was a dangerous activity": at [75].

26 The Judge then went on to examine what reasonable persons in the positions of the Applicants would have done. This appears from the following portions of the Judgment:

> 65 Given such knowledge of the first accused, I turn to consider what a *reasonable person* in his shoes would have done to find out the nature of the drugs. …
>
> …
>
> 81 In light of such circumstances, did the second accused act as a reasonable person in his shoes would have done? …
>
> [emphasis in original]

27 I agree with the Prosecution that the Judge examined all the facts as part of a holistic enquiry. The Applicants' subjective knowledge and what reasonable persons would have done were considered together with an evaluation of their credibility, their individual characteristics (for example, the First Applicant's intelligence quotient: at [71]) and their indifference as to the nature of the drugs.

28 In fact, the reasoning exercise undertaken by the Judge was very much in tune with what the Court of Appeal in *Obeng* said. I therefore do not see how any of the subsequent cases resulted in "a change in the law" which rendered what the Judge did a "miscarriage of justice".

(3) The application of the doctrine of wilful blindness

29 The Applicants next argue that the Judge found that the Applicants "turned a blind eye" to the nature of the drugs, using this to justify her conclusion that the Applicants failed to rebut the presumption of knowledge in s 18(2) of the MDA. They submit:[12]

> … The logic of the Judge's ruling is that, if the Applicants were unable to establish that they did not "turn a blind eye" to the nature of the drugs, then even if they successfully prove that they did not *actually* know of the nature of the drugs in their possession, they would still be found to have failed to rebut the presumption of knowledge under s 18(2) of the MDA
>
> [emphasis in original]

30 While the Judge did use the phrase "turned a blind eye to the nature of the drugs" at [72] and [88], she also dealt in detail with the distinctions between actual knowledge, wilful blindness and the presumption of knowledge in s 18(2) of the MDA at [53] to [58] of the Judgment. These passages show that the Judge was very aware of the differences in these concepts. The Judge drew a distinction between the doctrine of wilful blindness and "turning a blind eye". She used the phrase "turned a blind eye" in the same sense in which it was used in *Dinesh Pillai a/l Raja Retnam v Public Prosecutor* [2012] 2 SLR 903.

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12 Applicants' Submissions para 9.

31 I agree with the Prosecution's submission that the Applicants have sought to recast the Judge's reasoning as one concerning wilful blindness in order that they can argue that *Adili* has changed the law undergirding their convictions when the convictions were amply warranted on the evidence before the court. I also agree that the Judge's decision (which was affirmed in CCA 26 and CCA 27) reflected "a correct application of principle, precedent and policy". The Applicants' contentions on this issue are without merit.

Conclusion

32 Section 394H(7) of the CPC provides that the court may dismiss summarily an application for leave to make a review application. Before the court does this, it must consider the applicant's written submissions (if any) and may, but is not required to, consider the Prosecution's written submissions (if any): s 394H(8) of the CPC. In this case, I have considered the Applicants' solicitor's affidavit and the submissions tendered by the Applicants and the Prosecution. I conclude that the Applicants have failed to show a legitimate basis for the court to review their appeals in CCA 26 and CCA 27. There is clearly no miscarriage of justice. Accordingly, I dismiss this CM summarily without setting it down for hearing.

Tay Yong Kwang
Justice of the Court of Appeal

Suang Wijaya (Eugene Thuraisingam LLP) for the applicants;
Anandan Bala, Marcus Foo, Sarah Siaw (Attorney-General's Chambers) for the respondent.