IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 3

Criminal Motion No 37 of 2020

Between

Chander Kumar a/l Jayagaran

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

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

TABLE OF CONTENTS

INTRODUCTION **1**

FACTUAL AND PROCEDURAL BACKGROUND **2**

THE PARTIES' CASES **4**

THE APPLICANT'S CASE 4

THE PROSECUTION'S CASE 6

THE DECISION OF THE COURT **7**

APPLICABLE PRINCIPLES 7

ARGUMENTS ON CONVICTION 9

ARGUMENTS ON SENTENCE 11

NEW EVIDENCE ON HIS FAMILY'S CIRCUMSTANCES 12

CONCLUSION **12**

Chander Kumar a/l Jayagaran
v
Public Prosecutor

[2021] SGCA 3

Court of Appeal — Criminal Motion No 37 of 2020
Tay Yong Kwang JCA
23 December 2020, 6 January 2021

18 January 2021

Tay Yong Kwang JCA:

Introduction

1 On 23 December 2020, Mr Chander Kumar a/l Jayagaran ("the applicant") filed this application in person under ss 405 and 407 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") stating the relief sought as "New evidence my case". Sections 405 and 407 of the CPC are provisions relating to criminal motions generally and do not provide for any specific relief. However, from the applicant's supporting affidavit, I understand his application to be one made under s 394H of the CPC for leave of the court to make a review application in respect of his appeal in CA/CCA 58/2017 ("CCA 58"). CCA 58 was dismissed by the Court of Appeal on 15 March 2019 in its decision reported in *Ramesh a/l Perumal v Public Prosecutor and another appeal* [2019] 1 SLR 1003 ("*Ramesh (CA)*").

2 Under s 394H(6)(*a*) of the CPC, such an application for leave of the court is to be heard by a single Judge sitting in the Court of Appeal in any case where the appellate court in question is the Court of Appeal. It is on this basis that I deal with this leave application.

Factual and procedural background

3 The Court of Appeal in *Ramesh (CA)* comprised Sundaresh Menon CJ, Andrew Phang Boon Leong JA and me. The facts relevant to the applicant's appeal are set out in *Ramesh (CA)* at [5]–[20]. Briefly, the applicant claimed trial to three charges:

(a) Possession of two bundles containing not less than 14.79g of diamorphine for the purpose of trafficking, a non-capital offence under s 5(1)*(a)* read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA").

(b) Trafficking in not less than 19.27g of diamorphine by delivering three bundles of drugs to Harun bin Idris, a capital offence under s 5(1)(*a*) of the MDA.

(c) Trafficking in not less than 29.96g of diamorphine by giving four bundles of drugs to his co-accused, Ramesh a/l Perumal ("Ramesh"), a capital offence under s 5(1)(*a*) of the MDA.

4 The drugs that formed the subject matter of the charges were brought from Malaysia into Singapore in a lorry driven by the applicant, with Ramesh as the passenger. The drugs were contained in nine separate bundles.

5 The applicant was convicted on all the three charges. On the question of sentence, the High Court found that the applicant satisfied the requirements for

alternative sentencing set out in s 33B(2) of the MDA. The High Court imposed on the applicant the minimum sentence of life imprisonment and 15 strokes of the cane for each of the capital charges and 26 years' imprisonment and 15 strokes of the cane for the non-capital charge. The aggregate sentence for the applicant was therefore life imprisonment and 24 strokes of the cane (the maximum number of strokes of the cane allowed by law).

6 Ramesh was convicted on one charge of possession of drugs containing not less than 29.96g of diamorphine. The High Court also held that he satisfied the requirements for alternative sentencing set out in s 33B(2) of the MDA. He was sentenced to life imprisonment and 15 strokes of the cane.

7 The applicant and Ramesh appealed against their respective convictions and sentences. The applicant's position on appeal was "essentially the same as that which he took at the trial below": *Ramesh (CA)* at [34]. He claimed that he had been told that the bundles that he was to deliver contained betel nuts, not drugs. The Court of Appeal rejected this argument and his appeal in CCA 58. Ramesh's appeal was allowed. He was convicted on an amended charge of possession of drugs under s 8(*a*) of the MDA and was sentenced to ten years' imprisonment.

8 As mentioned earlier, the judgment in *Ramesh (CA)* was delivered on 15 March 2019. On 23 December 2020, the applicant filed the present application. His supporting affidavit (which was largely handwritten) sets out various grounds on why he believes the decision in *Ramesh (CA)* should be reviewed.

9 On 6 January 2021, the Prosecution filed its written submissions in response to the application. The Prosecution relies on the principles set out in

the recent Court of Appeal decision in *Syed Suhail bin Syed Zin v Public Prosecutor* [2020] SGCA 101 and submits that the application is "so lacking in merit" (quoting the words of the court at [16]) that it warrants summary dismissal, pursuant to s 394H(7) of the CPC.

The parties' cases

The applicant's case

10 The applicant's affidavit advances many issues which I summarise in six main points. The first five relate to his conviction and the sixth relates to his sentence.

(a) First, the applicant argues that there were issues with the recording of his cautioned statements.

(i) The applicant was not asked if he was physically and mentally sound and able to be interviewed.

(ii) When the applicant admitted that he brought the bundles to Singapore, it was not his intention to admit to trafficking in heroin.

(iii) When the applicant was informed that the bundles contained heroin, it was his intention to help CNB with its investigations and the arrest of "the actual traffickers". He was not aware of the contents of the bundles.

(iv) There was miscommunication because of the jargon used. The applicant's statements indicated clearly that he said "pakku" but the CNB claimed that this meant heroin. The interpreter said the colour of the drugs was "brownish and

similar to diamorphine". To the Applicant at the time of questioning, it was still "pakku" to him, being a known herb taken in Asian countries.

(v) The interpreter spoke in Tamil. The applicant was not familiar with a lot of the words used by the interpreter. The interpreter's evidence was doubtful and inaccurate as he changed his testimony. The applicant said "jamma" but the interpreter said that he mentioned "bothai porul".

(vi) At no point during the recording of the cautioned statements was the word diamorphine interpreted to the applicant in Tamil as heroin. The first time that he heard the word diamorphine being interpreted in Tamil was in court during the trial.

(b) Second, the applicant's DNA was not found on the drug bundles but Ramesh's DNA was. Ramesh therefore "clearly had knowledge" of the nature of the bundles that contained the drugs.

(c) Third, Ramesh lied in his statements and in court. Ramesh was well aware of the bundles and had himself taken four bundles, which were kept in the passenger side compartment. Ramesh did this when the applicant was driving the lorry.

(d) Fourth, this was the second time that the applicant delivered such bundles to Singapore for one "Roy". The applicant was under the impression that he was delivering betel nuts. None of the evidence proved that the applicant was aware of the contents of the bundles.

(e) Fifth, insufficient weight was given to the applicant's willingness to co-operate with the CNB. Despite the co-operation of the applicant and his family, the CNB did not follow up on the information provided by them, preferring to push the entire blame on him.

(f) Sixth, the applicant takes issue with the fact that he received a heavier sentence than Ramesh. Ramesh had "equal part" in the offence "yet he is getting off on a lighter sentence and charge". The applicant had only "a small role" in the supply chain, as shown by the amount of payment that he received for his delivery service.

11 In addition, the applicant states several matters in mitigation to ask for a "lighter sentence". This appears to be the only "new evidence" he seeks to adduce in this application. First, he came from a humble background. His father was a hawker and his mother is a housewife. He is the eldest of five siblings. Second, he has limited formal education and his last job prior to his arrest was as a lorry driver. Third, he was married twice and has six children. His elderly parents are providing for five of his children while he is serving his prison sentence. Both his wives have left him. Fourth, he ended up in debt because he had to provide for his family and had to borrow money for the expenses. Fifth, his family is in contact with him through email and telephone calls. His family is anxious about his situation and wishes for him to be back home sooner. The applicant asks for a "revised lesser sentence" since Ramesh was "given a reprieve of 10 years". This will allow him to go home to his family sooner.

The Prosecution's case

12 The Prosecution submits that none of the arguments raised by the applicant involves new evidence that was not canvassed at the trial or at the appeal. The five main points relating to his conviction were considered and dealt

with in *Ramesh (CA)*. The sixth main point and the other matters relating to his sentence are also unmeritorious as the applicant has not shown that the Court of Appeal in *Ramesh (CA)* laboured under any misapprehension of the law or the facts, let alone a fundamental one: s 394J(7) of the CPC. Ramesh was convicted on a different offence carrying a punishment which is vastly different from the applicant's offences. In any case, the applicant received only the mandatory minimum sentences for each capital charge and for the caning for the non-capital charge. The aggregate sentence of life imprisonment and 24 strokes of the cane was also the minimum that he could have received in the circumstances.

13 Accordingly, the Prosecution submits that this application warrants summary dismissal under s 394H(7) of the CPC.

The decision of the court

Applicable principles

14 The recent Court of Appeal decision in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 ("*Kreetharan*") at [17]–[20] sets out the principles governing an application for review. 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* at [17], applied by me in *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] SGCA 97 at [10]. It must satisfy the stringent requirements in s 394J of the CPC, which is set out below:

> (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.

Arguments on conviction

15 None of the applicant's contentions satisfies the requirement of "sufficient material" within the meaning of s 394J of the CPC. They concern matters which have been canvassed or could have been raised at the trial or at the appeal. There is no new evidence. The only new evidence the applicant raises concerns his personal and family's circumstances, which have no bearing on his conviction or his sentence in the context of his case. There are also no new legal arguments. The arguments in this application are nothing more than a repetition of the arguments made at the trial or at the appeal using different words.

16 In the first main point relating to the cautioned statements, the applicant alleges a number of inaccuracies in his cautioned statements, as well as several incorrect conclusions reached in *Ramesh (CA)* based on these statements. Two of the six particulars in the first main point (see [10(a)(ii) and10(a)(iii)] above) relate to his state of mind during the offences, in particular his knowledge of the contents of the bundles brought into Singapore. This issue was dealt with extensively in *Ramesh (CA)* at [40]–[43].

17 The four remaining particulars relating to the cautioned statements (see [10(a)(i), (iv), (v) and (vi) above) are matters that were within the applicant's knowledge and could have been raised during the trial and the appeal if they were true. This is especially so because the cautioned statements featured prominently at the trial (*Ramesh (CA)* at [21]–[24]) and at the appeal (*Ramesh (CA)* at [34] and [35]). In the applicant's attempt to raise such allegations long

after the trial and the appeal were concluded, he has also not offered any explanation why "even with reasonable diligence, the material could not have been adduced in court earlier" (s 394J(3)(*b*) of the CPC).

18 In any case, none of the six particulars relating to the cautioned statements, individually or collectively, is capable of showing that the decision in *Ramesh (CA)* is "demonstrably wrong" (s 394J(5)*(a)* of the CPC) in the sense that "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" (s 394J(6)*(b)* of the CPC). There is therefore no miscarriage of justice.

19 The applicant's second main point is that insufficient weight was placed on the absence of his DNA on the drug exhibits (see [10(b)] above). The DNA evidence was before the High Court and there is nothing to show that the Court of Appeal in *Ramesh (CA)* was not aware of it. In any case, *Ramesh (CA)* (at [39] to [44]) gave detailed reasons as to why it affirmed the decision of the High Court to convict the applicant. This point is therefore nothing more than an attempt to re-argue the appeal without any basis.

20 The applicant's third main point is that Ramesh lied about his (Ramesh's) knowledge of the drugs (see [10(c)] above). However, Ramesh's alleged knowledge about the contents of the bundles would not affect the court's conclusions relating to the applicant's knowledge concerning the same.

21 The applicant's fourth main point is that he was under the impression that he was delivering "betel nuts" and not drugs (see [10(c)] above). This is simply a repetition of his defence at the trial and at the appeal which was

rejected as "unbelievable" (*Ramesh (CA)* at [40]). It is clearly an impermissible attempt to re-argue the appeal.

22 The applicant's fifth main point is that insufficient weight was given to his willingness to co-operate with the CNB (see [10(c)] above). The applicant was granted a certificate of substantive assistance which qualified him for alternative sentencing (instead of the mandatory death penalty). Quite evidently, his cooperation during the investigations was taken into consideration in granting him the said certificate. In any case, this factor of cooperation relates only to the question of sentence and cannot affect the correctness of the decision in *Ramesh (CA)* in affirming his conviction.

Arguments on sentence

23 The applicant's sixth main point concerns his sentence. He is unhappy with the fact that he received a heavier sentence than Ramesh. The applicant and Ramesh were sentenced on different charges. The Court of Appeal gave detailed reasons explaining why it convicted Ramesh on the amended charge. The applicant appears to be asserting that the Court of Appeal's decision to acquit Ramesh on the original capital charge and convict him on a non-capital charge is wrong. Even if this is so, it has no bearing on the applicant's conviction.

24 The point raised by the applicant also has no bearing on his sentence. The applicant received the statutory minimum sentences for the capital charges and his aggregate sentence for the three charges was the lowest he could have received on the facts of his case.

New evidence on his family's circumstances

25 As mentioned earlier, the only new evidence that the applicant seeks to introduce pertains to his personal and family's circumstances. These circumstances do not affect the correctness of the decision in *Ramesh (CA)* in any way and, as explained above, also cannot affect the applicant's sentence.

Conclusion

26 Under s 394H(7) of the CPC, a leave application may, without being set down for hearing, be dealt with summarily by a written order of the appellate court. Before refusing a leave application summarily, the court 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. I have considered the applicant's affidavit (which also contains his handwritten submissions) and the Prosecution's written submissions. For the reasons set out in this judgment, nothing that the applicant has raised comes close to disclosing a legitimate basis for the exercise of the Court of Appeal's power of review. The application is therefore dismissed summarily.

Tay Yong Kwang
Justice of the Court of Appeal

The applicant in person;
Francis Ng Yong Kiat, *SC* (Attorney-General's Chambers) for the respondent.