IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 52

Criminal Motion No 4 of 2021

Between

Tang Keng Lai

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal references]
[Criminal Procedure and Sentencing] — [Compensation and costs]

Tang Keng Lai
v
Public Prosecutor

[2021] SGCA 52

Court of Appeal — Criminal Motion No 4 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA and Tay Yong Kwang JCA
11 May 2021

11 May 2021

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

1 It is well known – although perhaps the significance of this fact is sometimes not as well understood – that we have a single tier of appeals for criminal matters. While provision has been made in the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") for certain procedures which are designed to meet specific needs, these are exceptional and do not detract from the system of a single tier of appeals. The present application in CA/CM 4/2021 ("the application") has been brought under one such exceptional procedure, the reference procedure under s 397 of the CPC. The authorities have made it very clear that the reference procedure is sparingly invoked, and there are clear principles in place for when it may be used. As a matter of practice, counsel should be clear on these requirements and should ensure that they have applied their minds to them and satisfied themselves that there is, in fact, a basis for bringing such an application. Any attempt to use this procedure to circumvent

the single tier of appeals would, by definition, be an abuse of process. This case – we are sorry to say – provides us with an opportunity to reiterate these principles and to consider the costs implications of a misconceived application.

2 There were many aspects of the present case that we found to be unsatisfactory. Even before considering the merits of the application, we observe here that the Criminal Motion itself did not spell out what the purported questions of law were or even how many questions were being put forward. It merely asked for leave to be granted to refer questions of law of public interest, and then stated that the grounds of the application were to be found in the applicant's affidavit. One then had to plough through the said affidavit before discovering the two questions set out at paras 23 and 28 respectively. This is an appalling way to bring such an application. Unfortunately, things did not get better from there. We take this opportunity to remind counsel of their duty as officers of the court and to flag the real prospect that they may end up paying costs themselves if they bring applications that are as hopeless as the present one. With that in mind, we turn to the background of the application before setting out our decision.

Background

3 The applicant, Mr Tang Keng Lai, was convicted in the State Courts of 16 charges under s 471 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") punishable under s 465 and read with s 109 of the same, for engaging in a conspiracy to fraudulently use forged quotations as genuine during an audit of the Singapore Prisons Service ("Prisons") that was conducted by the Auditor-General's Office. The facts have been dealt with in detail in the District Judge's decision (see *Public Prosecutor v Tang Keng Lai and another* [2020] SGDC 39 and 40), and we do not propose to go through them again here. It suffices for us

to state that the offences concerned the submission of quotations for items of work which were backdated to give the impression that they had been issued when the projects were ongoing. The quotations were also written in such a way as to give the impression that Thong Huat Brothers (Pte) Ltd ("Thong Huat") had given the lowest quotation and had then completed those works, which covered up the fact that Thong Huat had overcharged Prisons for these items.

4 The District Judge concluded after trial that the applicant, a Prisons officer at the material time, was aware of the plan to submit backdated quotations and had agreed to it. In response to the applicant's argument that the co-conspirators who were called as Prosecution witnesses had testified that they were unaware that the documents were "forged", the District Judge accepted the Prosecution's submission that there was evidence of an agreement to submit *backdated* quotations, which sufficed to constitute an offence under s 471 of the Penal Code. As will be seen, this point was renewed before the High Court and, subsequently, before us in the present application. The District Judge convicted the applicant of the 16 proceeded charges and sentenced him to a total of eight months' imprisonment.

5 Dissatisfied with this outcome, the applicant appealed to the High Court. He again argued that the Prosecution's witnesses had agreed in cross-examination that there was no conspiracy or agreement to submit forged documents. The High Court judge ("the Judge") disagreed, finding no contradiction because the witnesses had reaffirmed in re-examination that there was an agreement to submit backdated quotations, which amounted to forged documents. The Judge upheld the District Judge's decisions on conviction and sentence. The applicant then brought the present application for leave under s 397(1) of the CPC to refer two questions of law of public interest to the Court of Appeal.

The purported questions of law of public interest

6 Four conditions must be met before leave can be granted for a question to be referred to the Court of Appeal (see *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 at [64]): (a) the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction; (b) the reference must relate to a question of law, and that question of law must be a question of law of public interest; (c) the question of law must have arisen from the case which was before the High Court; and (d) the determination of the question of law by the High Court must have affected the outcome of the case. We find that both questions raised by the applicant fall far short of meeting these conditions.

7 The first question raised by the applicant was in the following terms:

> In determining whether there is evidence of conspiracy; and when the prosecution have called witnesses to give direct evidence of conspiracy, and when these witnesses have in their cross-examination contradicted the prosecution's case and testified that there is no conspiracy, can a court infer evidence of conspiracy by looking for such conspiracy from circumstantial evidence?

8 This, self-evidently, is not a question of law, much less one of public interest. It is a question about how to apply the law of evidence to certain specified facts and is one that this court could never answer without regard to the entirety of the evidence. Given the degree of specificity assumed by this question, it is eminently a question of fact: see *Public Prosecutor v Teo Chu Ha* [2014] 4 SLR 600 at [31].

9 Perhaps more importantly, this question did not arise for determination by the High Court. The question is narrowly directed to a situation where (a) the charge is one of conspiracy; (b) the Prosecution witnesses have been called to

give direct evidence of the conspiracy; and (c) the witnesses have contradicted the Prosecution's case in testifying that there was no conspiracy during cross-examination. However, the Judge had considered the evidence and found that the witnesses had not, in fact, given contradictory evidence. Indeed, the applicant himself recognised this in his affidavit, when he contended that the question arose because, in his view, the Judge had *erred* in her conclusion that the witnesses had reaffirmed their evidence of a conspiracy in re-examination. What the applicant was really asking this court to do was to say that the Judge's interpretation of the witnesses' evidence was wrong. However, that would be an appeal on the facts and renders this a question that we could never entertain on a criminal reference. In addition, because the Judge's decision was based on the conclusion that there was in fact no contradiction in the evidence of the relevant witnesses, the determination of the question could never have affected the outcome of the case. In order to overcome this hurdle, the applicant would have first needed to persuade us that we should interfere with the Judge's interpretation of the evidence. There is absolutely no basis on which he could do so in this kind of application. Hence, the first question is utterly without merit.

10 The second question was in the following terms:

> As a decider of fact, when witnesses given evidence [*sic*] 2 contradictory versions of fact that is [*sic*] contrary to the prosecution theory, and where the prosecution failed to clarify the contradictions, should she accept such evidence or reject it?

We first note that this question is riddled with error and with ambiguity. It is not clear if the question assumes that one of the allegedly contradictory versions was inconsistent with the Prosecution's theory or whether it is both that were inconsistent. If the latter, then it is furthermore not clear why it would matter at all that the two versions contradicted each other. It is also not clear if the

question envisages that there was other evidence which went to the same issue. However, regardless of how one interprets this question, we find that it fares no better than the first question.

11 This question assumes that (a) there are two contradictory versions of evidence; and (b) the Prosecution has not clarified these contradictory versions. The identical difficulty as with the first question arises here: the Judge had in fact found that the versions given by the witnesses were *not* contradictory but were consistent in that the plan was to submit backdated quotations. Unless the applicant can persuade us that we can overturn the Judge's findings to this effect, there is no basis at all for us to entertain this question. Given the nature of an application under s 397(1) of the CPC, it is clear that he cannot do so, and we accordingly find that there is no merit to this question. Put simply, this is a question about the application of the law of evidence in a particular set of facts which could never amount to a question of law of public interest. Worse still, it is a question about a particular set of circumstances which do not actually obtain, rendering this a purely hypothetical question which could never have made a difference to the case.

12 We therefore find no merit to the application whatsoever and dismiss it. We observe here that this application, which was fatally flawed from the outset and premised on a misunderstanding of the nature of a criminal reference, could have been dismissed summarily without being set down for hearing under the procedure provided for by s 397(3B) of the CPC. In future cases, the court will not hesitate to use this procedure to deal with matters that are bereft of merit. In this case, however, we proceeded to a hearing primarily to provide counsel with an opportunity to address the court on the costs implications of the present application. We now turn to that issue of costs.

Costs

13 The Prosecution sought a costs order of $2,000 against the applicant. We agree that this is an appropriate case in which to make a costs order under s 409 of the CPC. That provision reads:

> **409.** If the relevant court dismisses a criminal motion and is of the opinion that the motion was frivolous or vexatious or otherwise an abuse of the process of the relevant court, it may, either on the application of the respondent or on its own motion, order the applicant of the criminal motion to pay the respondent costs on an indemnity basis or otherwise fixed by the relevant court.

14 We find that the application in this case was an abuse of the process of the court. This application should never have been brought. As this court had stated in *Huang Liping v Public Prosecutor* [2016] 4 SLR 716 ("*Huang Liping*") at [20], an applicant who brings what is in substance a "back-door" appeal that merely seeks to re-litigate issues that have already been decided in the courts below would, absent exceptional circumstances, be considered as having acted in an "extravagant and unnecessary manner", which the court also equated with "frivolous or vexatious" conduct. This is so because s 397 of the CPC is not intended to furnish a further right of appeal, but, as we began by observing, is an exceptional procedure intended for a specific purpose. An attempt to use that procedure for a purpose other than that for which it was intended, where the case falls far short of the strict conditions that must be met before the process may be invoked, would justify a finding that the application was brought in abuse of process. This court further warned at [23] of *Huang Liping* that "the bringing of such unmeritorious applications will not be countenanced and … this court will … not hesitate to award costs against applicants who attempt 'back-door' appeals by recourse to s 397". Unfortunately, the applicant in this case has not heeded those warnings. The application is wholly without merit and assumed facts which contradicted the Judge's findings, in effect asking this

court to overturn the Judge's interpretation of the evidence. The questions themselves were questions of fact which turned on the assessment of evidence in this particular case. This is a prime example of a "back-door" appeal with entirely misconceived questions. A costs order against the applicant is entirely appropriate.

15 While the order of costs is against the applicant in this case, we remind counsel that they must be particularly cognisant of their duties as officers of the court. Given the nature of s 397 of the CPC, it seems clear to us that applicants will depend heavily on counsel to assess whether there is a question of law of public interest which satisfies the conditions for leave to be granted. Counsel have a duty to act with reasonable competence and to uphold the administration of justice. This necessitates being familiar with the various requirements for and purposes of the statutory procedures under the CPC, both to properly advise their clients and to ensure that they do not put forward a case that amounts to an abuse of process. Otherwise, if such an unmeritorious application is brought, an adverse costs order under s 357(1) of the CPC may be made against counsel personally. Although this case seems to us to be an appropriate case in which to make an order against counsel, we do not do so only because the Prosecution has not sought such an order and neither party has submitted on whether the threshold for such an adverse costs order has been crossed.

Conclusion

16 We therefore dismiss the application and order that the applicant pay $2,000 in costs to the Prosecution.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Ang Sin Teck (Jing Quee & Chin Joo) for the applicant;
Nicholas Khoo, Suhas Malhotra and Tan Hsiao Tien (Attorney-General's Chambers) for the respondent.