IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 15

Criminal Motion No 6 of 2018

Between

HISHAMRUDIN BIN MOHD

… Applicant

And

PUBLIC PROSECUTOR

… Respondent

EX TEMPORE JUDGMENT

[Courts and Jurisdiction] — [Court of Appeal] — [Power to reopen concluded criminal appeals]

[Res Judicata] — [Abuse of process]

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

Background

1 The applicant was tried and convicted and sentenced on two charges of trafficking in diamorphine under s 5(1)(*a*), read with s 5(2), of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). The first charge was a non-capital charge for trafficking in not less than 3.56g of diamorphine and the second was a capital charge for trafficking in not less than 34.94g of diamorphine. The applicant was sentenced to six years' imprisonment for the non-capital charge and the mandatory death penalty for the capital charge given that the Public Prosecutor had decided not to issue the applicant with a certificate under s 33B(2)(*b*) of the MDA. The trial judge's decision can be found at *Public Prosecutor v Hishamrudin bin Mohd* [2016] SGHC 56.

2 The applicant's appeal against this decision was heard and dismissed by

this Court in *Hishamrudin bin Mohd v Public Prosecutor* [2017] SGCA 41 ("the Judgment") on 3 July 2017.

3 More than eight months later on 12 March 2018, the applicant filed Originating Summons No 289 of 2018 seeking leave for judicial review of the Judgment ("OS 289"). At the hearing of OS 289, the applicant applied to convert that summons into a criminal motion to be filed before the Court of Appeal to reopen the Judgment. The applicant filed his criminal motion, Criminal Motion No 6 of 2018 ("CM 6"), this afternoon.

4 We have carefully reviewed the applicant's written submissions as well as his oral submissions to this Court.

Converting the originating summons to a criminal motion

5 In the first place, we note that the applicant was correct in filing CM 6 rather than proceeding with OS 289. Otherwise, he would have been using the court's civil jurisdiction to mount a collateral attack on a decision made by the court in the exercise of its criminal jurisdiction. This was the case in *Kho Jabing v Attorney-General* [2016] 3 SLR 1273, where this Court observed at [2] that this would have been an impermissible abuse of the process of the court. So the original application in the form of OS 289 would have failed for the same reasons.

The criminal motion

6 Under this criminal motion, the applicant seeks to re-open this Court's decision in the Judgment. The requirements for a review of a concluded criminal appeal were set out by this Court in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing v PP*") at [77].

7 There are two requirements: whether there is sufficient material to warrant the exercise of the power, and whether the applicant has discharged his burden to show that there has been a miscarriage of justice.

(a) Material is sufficient only if it is both new and compelling.

(i) Material is new if it (A) has not been considered at any stage of the proceedings and (B) could not, even with reasonable diligence, have been adduced in court prior to the review application. Where legal arguments are concerned, (B) would ordinarily only be satisfied if the legal arguments are made following a change in the law. This applies even if the legal arguments are constitutional ones.

(ii) Material is compelling if it is reliable and powerfully probative. The material must be reliable in the sense that it possesses a high degree of cogency – usually objective evidence. The material must be powerfully probative in that it shows more than a real possibility that the decision is wrong.

(b) The material must show that there was a miscarriage of justice – a manifest error or an egregious violation of a principle of law or procedure that strikes at the heart of the decision and robs it of its character as a reasoned judicial decision. This is found chiefly in two situations although the list is non-exhaustive:

(i) where the decision on conviction or sentence is demonstrably wrong; or

(ii) where there was fraud or breach of natural justice in procuring the decision.

8 The applicant's main argument before us is that his case was not accurately represented during the trial and the appeal, and that if it had been, the outcome would have been different.

9 According to the applicant, he had decided to represent himself and to discharge Mr Amolat Singh and Mr Calvin Liang before this Court in his appeal against the trial judge's decision. He therefore asked the Supreme Court Registry to ignore the submissions that his counsel had put forth on his behalf. But his instructions were ignored and the submissions found their way before this Court in the appeal hearing. The applicant suggested that "someone powerful had manipulated and ignored [his] instruction, to cover up flaws in the prosecution cases' against [him]".

10 We reject this submission because the material is not new. The applicant could have raised this argument before this Court during the appeal hearing and indeed he was given the chance to. At the appeal hearing, the applicant was self-represented and addressed this Court for more than an hour. He also replied to the submissions of the Public Prosecutor. The applicant was allowed to tender three sets of further written submissions even though they were unsolicited. This Court had allowed them "[o]ut of an abundance of caution, and being mindful that this was a capital case and the [applicant] was acting in person" (see the Judgment at [3]). So this argument is not new because the applicant could have raised it earlier.

11 In fact, we note that although the applicant had discharged Mr Singh and Mr Liang as his counsel prior to the appeal hearing, he applied to this Court for both counsel to continue to attend the hearing as *McKenzie* friends because he was "up against the might of the CNB and AGC, and their presence would help the appeal Judges to understand the case better, and [they would] try not to leave

any stone unturn[ed]". Their presence at the hearing, coupled with the fact that the applicant was allowed to speak for himself and *did* speak for himself, meant that the applicant's argument is not new material that satisfies the test in *Kho Jabing v PP*.

12 We further note that the applicant alleges that because Mr Singh and Mr Liang were discharged only days before the appeal hearing, he did not have sufficient time to prepare his arguments for it. We accept the Prosecution's submission that the applicant was not handicapped in any way during the conduct of his appeal. The applicant had drafted and tendered nine bundles of arguments prior to the appeal hearing and three sets of further written submissions after the hearing. It is therefore clear that the applicant's contention that he could not prepare for the appeal hearing was without merit.

13 The rest of the applicant's arguments, both written and oral, were also not new material. The *substance* of those arguments was the same as those mounted before the trial judge and this Court in the appeal hearing in the exercise of their original and appellate criminal jurisdiction, respectively. This Court had already rejected these arguments, noting at [95] of the Judgment that the applicant's "entire defence consisted of scurrilous accusations and wild, irrational, and unfounded theories which appeared to have been calculated to raise illusory doubts". These arguments cannot be used to re-open the concluded criminal appeal. As this Court observed in *Chijioke Stephen Obioha v Public Prosecutor* [2017] 1 SLR 1 ("*Chijioke*") at [5]:

> In *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*"), the Court of Appeal stated that it would be impossible to have a functioning legal system if all legal decisions were open to constant and unceasing challenge (at [47]). The principle of finality is also a facet of justice, and it is no less important in cases involving the death penalty. As the court stated at [50], after the appellate and review processes have run

> their course, the attention must shift from the legal contest to the search for repose. It was of no benefit to anyone – whether accused persons, their families or society at large – for there to be an endless inquiry into the same facts and same law with the same raised hopes and dashed expectations that accompany each fruitless endeavour.

14 We also note that there had been more than ample time and opportunity for the applicant to file an application based on these arguments. There was therefore no reason for him to wait until the days before the date scheduled for his execution to file OS 289 and subsequently this criminal motion. Indeed, given (as we have just observed) that the contents of the present criminal motion are, in *substance*, the same as that which had earlier been proffered and rejected in the appeal hearing, it is clear that the *sole* purpose of OS 289 and the criminal motion is (as was also the case in *Chijioke*) to delay the execution of the sentence imposed by law on the applicant. The filing of this application at the eleventh hour before the applicant's scheduled execution in order to prevent the carrying out of a sentence which has been properly imposed by law amounts to an abuse of the process of the court for collateral motives and "amounts to a calculated and contumelious abuse of the process of the court" (*Chijioke* at [8]).

15 In fact, the applicant's pattern of repeatedly discharging counsel that had been assigned to him and blaming them also shows that he is determined to abuse the court's process. This included four free legal counsel at trial and an additional two other free legal counsel assigned to him for the appeal hearing (see the Judgment at [2]). This cannot be countenanced.

Conclusion

16 For these reasons, we dismiss the criminal motion in its entirety.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Hoo Sheau Peng Judge

Eugene Thuraisingam and Suang Wijaya (Eugene Thuraisingam LLP) as *McKenzie* friends for the applicant in person; Anandan Bala and Rajiv Rai (Attorney-General's Chambers) for the respondent.