IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 68

Criminal Motion No 19 of 2021

Between

BQG

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal references]

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BQG
v
Public Prosecutor

[2021] SGCA 68

Court of Appeal — Criminal Motion No 19 of 2021
Andrew Phang Boon Leong JCA, Tay Yong Kwang JCA and Steven Chong JCA
15 June 2021

9 July 2021

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

1 This is an application pursuant to s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") seeking leave to refer a question of law of public interest to the Court of Appeal. The applicant and a co-accused claimed trial in the General Division of the High Court to charges of serious sexual offences in HC/CC 40/2019 ("CC 40"). Before the trial had even commenced, the applicant and the co-accused filed HC/CM 20/2021 and HC/CM 28/2021 respectively, seeking that the Prosecution disclose witness statements of the complainant and her boyfriend. The High Court judge ("the Judge") refused to grant the motions. The applicant thus filed CA/CM 19/2021 ("CM 19") pursuant to s 397(1) of the CPC (*ie*, the present application) seeking leave to refer a question of law of public interest to the Court of Appeal. The co-accused did not make a similar application. The question that the applicant seeks to refer is: "Whether the Public Prosecutor should disclose to the Defence the witness

statements of prosecution witnesses who are also witnesses to be called at a criminal trial". The applicant alternatively asks this court to direct the Prosecution to refer the question to the court pursuant to s 397(2) of the CPC. In response, the Prosecution argues that CM 19 should be summarily refused under s 397(3B) of the CPC.

2 The relevant parts of s 397 of the CPC read as follows:

> **Reference to Court of Appeal of criminal matter determined by General Division of High Court in exercise of its appellate or revisionary jurisdiction**
>
> **397.**—(1) When a criminal matter ***has been determined*** by the General Division of the High Court ***in the exercise of its appellate or revisionary jurisdiction***, ***and*** a party to the proceedings wishes to refer any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case, that party may apply to the Court of Appeal for leave to refer the question to the Court of Appeal.
>
> (2) The Public Prosecutor may refer any question of law of public interest without the leave of the Court of Appeal.
>
> …
>
> (3B) Where —
>
> (*a*) a party applies under subsection (1) for leave to refer a question to the Court of Appeal; and
>
> (*b*) it appears to the Court of Appeal that the question is not a question of law of public interest which has arisen in the matter, and the determination of which has affected the case, to which the application relates, the application may, without being set down for hearing, be summarily refused by an order, under the hand of a presiding Judge sitting in the Court of Appeal, certifying that the Court of Appeal is satisfied that the application was made without any sufficient ground.
>
> (3C) A decision of the Court of Appeal to summarily refuse under subsection (3B) an application under subsection (1) can only be made by a unanimous decision of all the Judges sitting in the Court of Appeal.

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> [emphasis in bold in original; emphasis added in bold italics and underlined bold italics]

3 It is of the first importance to note at the outset ***the context*** in which the present application has been made. Put simply, this application has been made *in the context of the exercise of the* ***original jurisdiction*** *of the General Division of the High Court and, indeed, has been made even prior to the commencement of the trial itself*. It is clear, therefore, that the General Division of the High Court has ***not*** made any determination *in the exercise of its* ***appellate or revisionary jurisdiction*** (which is a ***requirement that must be satisfied before an application can even be made pursuant to s 397 of the CPC ("s 397") in the first place***). The rationale for an application pursuant to s 397 is to allow the Court of Appeal to consider a question of law of public interest that would affect the ***determination of a case before the General Division of the High Court from which there is no further right of appeal***. This occurs where the General Division of the High Court has considered an *appeal* from a decision in the State Courts ***or*** has exercised its *revisionary* jurisdiction. Section 397 provides that in ***very limited*** *situations*, the reference of a point of ***law*** of ***public interest*** might be permitted in order that the Court of Appeal, which is the final appellate court in the land, might, *notwithstanding* that there is no further right of appeal in the particular case, consider the question as the court's determination of that point of law of *public* interest would, by its very nature, be of relevance to future cases (see also, for example, the decisions of this court in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 at [20]–[22]; *Huang Liping v Public Prosecutor* [2016] 4 SLR 716 at [20]–[22]; and *Tang Keng Lai v Public Prosecutor* [2021] SGCA 52 at [1]).

4 In the present case, there has been *no* determination *whatsoever* by the General Division of the High Court in the exercise of either its *appellate or*

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revisionary jurisdiction. Indeed, it is a case which engages the ***original jurisdiction*** of the High Court instead. For this reason alone, the present application is not only misconceived but is also *an abuse of process of the court*. Quite apart from the clear and unambiguous language of s 397(1) (which meaning would have been obvious to any reasonably competent lawyer), counsel for the applicant, Mr Wong Siew Hong ("Mr Wong"), himself ***admitted*** during a Case Management Conference ("CMC") conducted on 24 May 2021 that there is *no recourse* to s 397 when the General Division of the High Court is exercising its *original* jurisdiction. He further admitted that the General Division of the High Court in CC 40 was exercising its original jurisdiction. It therefore beggars belief that Mr Wong, an experienced criminal law counsel, would nevertheless proceed to file the present application when it was clear beyond all reasonable doubt that *the Court of Appeal did* ***not possess the necessary jurisdiction to even entertain the application to begin with*** (also bearing in mind the fact that the Court of Appeal is a creature of statute and is hence only seised of the jurisdiction that has been conferred upon it by the relevant provisions, whether derived from the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) or elsewhere (see, for example, the decision of this court in *Ng Chye Huey and another v Public Prosecutor* [2007] 2 SLR(R) 106 at [17])). In the premises, the present application ***must fail*** **in limine**.

5 We therefore dismiss the present application summarily pursuant to s 397(3B) of the CPC. It is clear that the determination by the Judge has *not* affected the case within the meaning and scope of s 397 (unlike, for example, *Public Prosecutor v Li Weiming and others* [2014] 2 SLR 393, which Mr Wong relies upon). Indeed, as already observed, the trial itself has not even commenced. The Judge's determination was *an interlocutory order* made in the exercise of his original jurisdiction in the course of a criminal matter. It is clear

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law that such an order generally cannot be appealed (see the decision of the General Division of the High Court in *Xu Yuanchen v Public Prosecutor and another matter* [2021] SGHC 64 ("*Xu Yuanchen*") at [10]). As Sundaresh Menon CJ observed, "in the course of a typical trial, the trial judge can be expected to make numerous interlocutory rulings and it would impose impossible difficulties for the expeditious conduct of the trial if each and every one of these could be appealed" (at [10]). This rationale applies to both the Prosecution and the Defence alike.

6 In the context of the present case, the applicant's claim that the failure to disclose the relevant witness statements would affect his preparation for trial is purely speculative because he has not seen those statements and therefore does not know whether the contents of the statements would have any impact on how he would conduct his case. These are precisely the "inchoate circumstances" referred to in *Xu Yuanchen* (at [12]) which would have prohibited an *appeal* against the Judge's order. Looked at in this light, the present application is, in substance, a "backdoor appeal" against the Judge's order and reinforces the point (already made above) that the present application is an abuse of the process of court.

7 Finally, the applicant's alternative prayer that this court direct the Public Prosecutor to refer the question at [1] above to it is fatally flawed since, as already explained above, this court does not possess the requisite jurisdiction to consider that question to begin with. Further, s 397(2) of the CPC provides that "[t]he Public Prosecutor may refer any question of law of public interest without the leave of the Court of Appeal". It is evident from this provision that the discretion to refer is conferred on the Public Prosecutor and the court cannot compel him to exercise it.

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8 For the reasons set out above, the application is summarily dismissed. We are minded to order costs in this application against Mr Wong. He was alerted by the Assistant Registrar during the CMC to the Court of Appeal's lack of jurisdiction to hear the application, and was also given the opportunity to reconsider his position. Yet, he decided to proceed with this unmeritorious application. We therefore direct Mr Wong to tender submissions, within ten days from the date of this Judgment, as to why a costs order should not be imposed personally upon him, and as to the quantum of costs if a costs order is in fact imposed. If the Prosecution wishes to respond, whether on the issue of Mr Wong's personal liability or on the quantum of costs, it shall file and serve its submissions within 7 days after Mr Wong has filed and served his submissions.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Wong Siew Hong, Lee Peng Khoon Edwin, Charles Ng and Clarence Cheang Wei Ming (Eldan Law LLP) for the applicant;
Kumaresan Gohulabalan, Sruthi Boppana and Tay Jia En (Attorney-General's Chambers) for the respondent.

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