IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 25

Criminal Motion No 24 of 2024

Between

BWJ

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

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

BWJ
v
Public Prosecutor

[2024] SGCA 25

Court of Appeal — Criminal Motion No 24 of 2024
Tay Yong Kwang JCA
12 July 2024

1 August 2024

Tay Yong Kwang JCA:

1 The applicant's name has been redacted as "BWJ". In the present CA/CM 24/2024 ("CM 24"), the applicant seeks permission pursuant to s 394H(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") to review the Court of Appeal's decision in CA/CCA 20/2020 ("CCA 20"). In CCA 20, the Court of Appeal allowed the Prosecution's appeal against BWJ's acquittal on a charge of aggravated rape, set aside the acquittal and convicted BWJ on the charge. BWJ was sentenced to 13 years' imprisonment and 12 strokes of the cane. The Court of Appeal's grounds of decision in CCA 20 are set out in *Public Prosecutor v BWJ* [2023] 1 SLR 477 (the "CA GD").

2 In CM 24, BWJ claims that there has been a change in the law arising from the Indian Supreme Court decision of *Bhupatbhai Bachubhai Chavda & Anr v State of Gujarat* [2024] 4 S.C.R. 322: 2024 INSC 295 ("*Bhupatbhai*"). In particular, BWJ states that there has been a development in the law relating to

when an appellate court may interfere with an order of acquittal made by a lower court. According to BWJ, the change in the law arising from *Bhupatbhai* constitutes sufficient material for the Court of Appeal to review its decision in CCA 20.

3 Having considered: (a) BWJ's affidavit dated 20 May 2024; (b) the affidavit of BWJ's counsel dated 25 May 2024; (c) BWJ's written submissions dated 14 June 2024; and (d) the Prosecution's written submissions dated 12 July 2024, I dismiss CM 24 summarily pursuant to s 394H(7) of the CPC. BWJ has failed to meet the requirements for permission to be granted to make a review application under the CPC. BWJ has not raised any legal argument based on a change in the law which constitutes sufficient material for the purposes of CM 24. Instead, BWJ is seeking a second appeal to the Court of Appeal by repeating factual arguments which were dealt with in the CA GD.

Factual background and procedural history

4 BWJ claimed trial to a charge of aggravated rape under s 375(1)(*a*) and punishable under s 375(3)(*a*)(i) of the Penal Code (Cap 224, 2008 Rev Ed) (the "Charge") for raping the victim ("V") on 6 August 2017. V was BWJ's girlfriend from early 2012 to sometime in 2017. According to the Prosecution, V ended her relationship with BWJ prior to 6 August 2017 and BWJ, refusing to accept this fact, turned to violence and raped her on 6 August 2017. BWJ did not dispute that he had sexual intercourse with V on this date. However, he asserted that their relationship had not ended at that time and the sexual intercourse was consensual.

5 Following the trial in CC 75, BWJ was acquitted of the Charge. In its brief oral reasons, the High Court indicated that there were inconsistencies in

V's account of how the offence occurred as well as her deliberate downplaying of the state of her relationship with BWJ which affected her credibility. Coupled with the inconclusive nature of the forensic and medical evidence, the High Court found that there remained reasonable doubt over the guilt of BWJ. On BWJ's part, the High Court found that the numerous messages sent by BWJ to V after the incident were not conclusive of BWJ's guilt since none of the messages contained a confession that BWJ had raped V. The High Court found that these messages could have been sent simply because BWJ feared that V would get him into trouble with the police for reasons which he was not fully aware of. The High Court also noted that V did not flee but remained in the flat where the offence was said to have occurred and volunteered information to the police that he had sexual intercourse with V.

6 In CCA 20, the Court of Appeal found that the High Court's decision to acquit BWJ was "wholly against the total weight of the objective evidence and the testimony of the Prosecution's witnesses": GD at [74]. The Court of Appeal found that there were four factual issues where the evidence led to the conclusion that the Prosecution had proved the charge against BWJ beyond reasonable doubt. These were set out in detail in the CA GD (at [75]–[87]) and are summarised briefly below:

(a) First, the Court of Appeal found that the romantic relationship between BWJ and V had clearly ended before the offence on 6 August 2017. This was evident from the WhatsApp messages between the two, as well as the fact that V was cold towards BWJ and uninterested in interacting with him in the days just before the offence. This also showed that V would not have consented to having sexual intercourse on 6 August 2017.

(b) Second, the Court of Appeal found that the objective evidence showed the use of violence by BWJ towards V. This included the tear in V's T-shirt, the damage to the fastening system of her brassiere and the bruises on V's neck. The presence of violence militated sharply against any suggestion that V consented to sex, even implicitly. BWJ's assertion that there was no violence involved was therefore rejected.

(c) Third, the Court of Appeal found that BWJ's behaviour after the offence demonstrated his guilt beyond reasonable doubt. If what had taken place was consensual sex, BWJ would not have been fearful or sounded so desperate in the more than 60 messages which he sent to V while she was being examined at a clinic after the police arrived. While he may not have confessed to raping V in the messages, his messages showed clearly his fear that she was going to make a police report against him. He also did not dare to return to the clinic after the arrival of the police. Coupled with BWJ's messages to V were the urgent voice messages sent by BWJ to his family members which showed that he could not have believed that V had consented to sex, implicitly or otherwise. Further, there was evidence that BWJ was trying to leave Singapore urgently. Collectively, the Court of Appeal found that BWJ's conduct pointed clearly to a guilty mind and his guilt stemmed from the fact that he knew that the sexual encounter with V involved violence to subdue V so that he could force sex on her.

(d) Fourth, the Court of Appeal disagreed with the High Court's finding that V's credibility was affected by inconsistencies in her evidence. While there were some inconsistencies, these did not affect the pivotal point of the totality of the evidence which showed that V's relationship with BWJ had ended before BWJ's return to Singapore on

2 August 2017. Further, the fact that BWJ had to use violence against her showed clearly that the sexual intercourse was not consensual but coerced.

7 The Court of Appeal therefore set aside the acquittal and convicted BWJ on the Charge. BWJ was sentenced to 13 years' imprisonment and 12 strokes of the cane.

The decision of the Court

The applicable legal principles

8 In order for an applicant to be granted permission to make a review application under s 394H(1) of the CPC, an applicant must disclose a "legitimate basis for the exercise of the [appellate court's] power of review": *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17]. This would entail the applicant showing that there is "sufficient material" 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: s 394J(2) of the CPC. Section 394J(3) of the CPC defines "sufficient material" to mean material that satisfies all three conditions set out below:

(a) first, the material must not have been canvassed at any stage of proceedings in the criminal matter before the application for permission to review was made;

(b) second, it must be such that the material could not have been adduced in court earlier even with reasonable diligence; and

(c) third, the material must be compelling, in that it is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter.

9 If the applicant is seeking to rely on material in the form of legal arguments, in addition to satisfying the above three conditions, he must show that the material, is "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 which the earlier decision was made": s 394J(4) of the CPC.

BWJ has not shown that his legal argument is based on a change of law that arose from any decision made by a court after the conclusion of CCA 20

10 In CM 24, BWJ relies on the Indian Supreme Court decision of *Bhupatbhai* in support of his argument that there has been a change in the law following the Court of Appeal's decision in CCA 20. According to BWJ, the Indian Supreme Court held in *Bhupatbhai* that an appellate court may only interfere with an order of acquittal if it is satisfied, after re-appreciating the evidence, that the only possible conclusion was that the guilt of the accused had been established beyond a reasonable doubt. The appellate court cannot overturn an order of acquittal only on the ground that another view is possible. In other words, the acquittal must be found to be perverse before there can be any interference on appeal. BWJ relies on the following passage in *Bhupatbhai* (at [6]):

> 6. It is true that while deciding an appeal against acquittal, the Appellate Court has to reappreciate the evidence. After re-appreciating the evidence, the first question that needs to be answered by the Appellate Court is whether the view taken by the Trial Court was a plausible view that could have been taken based on evidence on record. Perusal of the impugned judgment of the High Court shows that this question has not been

> adverted to. Appellate Court can interfere with the order of acquittal only if it is satisfied after reappreciating the evidence that the only possible conclusion was that the guilt of the accused had been established beyond a reasonable doubt. The Appellate Court cannot overturn order of acquittal only on the ground that another view is possible. In other words, the judgment of acquittal must be found to be perverse. Unless the Appellate Court records such a finding, no interference can be made with the order of acquittal. The High Court has ignored the well-settled principle that an order of acquittal further strengthens the presumption of innocence of the accused. After having perused the judgment, we find that the High Court has not addressed itself on the main question.

11 There are a number of issues with BWJ's reliance on *Bhupatbhai*. First, in an application for permission to make a review application, where the material which an applicant seeks to rely on consists of legal arguments, s 394J(4) of the CPC makes it clear that such material must 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. The word "court" in s 394J(4) of the CPC refers to a Singapore court which exercises criminal jurisdiction. This is clear from s 2(1) of the CPC reproduced below:

> **Interpretation**
>
> **2.**—(1) In this Code, unless the context otherwise requires —
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> …
>
> "court" means the Court of Appeal, the General Division of the High Court, a Family Court, a Youth Court, a District Court or a Magistrate's Court (as the case may be) which exercises criminal jurisdiction; …

A decision of the Supreme Court of India therefore does not come within the ambit of s 394J(4).

12 Second, it is clear that the decision in *Bhupatbhai* does not change the law in any way. The principles governing appellate intervention are well-settled

and were set out in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 (at [66]–[69]). These principles were considered and applied by the Court of Appeal in CCA 20 (CA GD at [73]–[74]):

> 73 The principles governing appellate intervention in criminal matters are settled law. The relevant authorities were cited and affirmed by VK Rajah JA in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [66]–[69]. Two principles are typically at play. First, appellate review is of a limited nature and appellate courts will be slow to overturn a trial judge's findings of fact unless they are shown to be plainly wrong or against the weight of the evidence (see also s 394 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)). This is particularly so where the findings rest on the trial judge's assessment of the credibility and veracity of witnesses. Second, a trial judge's findings of fact are distinct from the inferences he draws from such findings. An appellate court is justified in differing from the inferences drawn by a trial judge if they are not supported by the primary or objective evidence on record. As the learned Chief Justice stated recently *in Loh Der Ming Andrew v Koh Tien Hua* [2022] 3 SLR 1417 at [98], a trial judge "has no advantage over, and therefore commands no deference from [an appellate court] when it comes to drawing inferences from established, objective facts". These two general principles apply equally to appeals against acquittal and to appeals against conviction.
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> 74 Applying these principles, it was clear to us that the Judge's decision to acquit was wholly against the total weight of the objective evidence and the testimony of the Prosecution's witnesses. There were essentially four factual issues where the evidence supported factual conclusions that led us to conclude that the Prosecution had proved the charge against BWJ beyond reasonable doubt.

13 Based on the relevant passage in *Bhupatbhai* at [10] above, it is clear that the court in *Bhupatbhai* was merely restating the existing criminal jurisprudence on the principles governing appellate intervention in criminal matters using different words. In particular, *Bhupatbhai* merely restates the principle that appellate review is of a limited nature and an appellate court will be slow to overturn a trial judge's findings of fact unless they are shown to be plainly wrong or against the weight of the evidence.

14 Third, even taking BWJ's case at its highest and assuming *Bhupatbhai* introduced new law in the sense that an appellate court must find the lower court's order of acquittal to be perverse before it can overturn the acquittal, it is clear that this condition was met in the present case. As can be seen at [12] above, the Court of Appeal in CCA 20 held that "the Judge's decision to acquit was wholly against the total weight of the objective evidence and the testimony of the Prosecution's witnesses": GD at [74]. This must mean that the Judge's order of acquittal was perverse, a word that appellate courts in Singapore usually refrain from using out of courtesy to the lower courts. The "perverse" acquittal was therefore rightly reversed.

15 It is therefore clear that there has been no change in the law following CCA 20 that is relevant to this application. The legal arguments raised by the applicant here certainly do not fulfil the requirement of "sufficient material" within the meaning of s 394J(2) and (4) of the CPC.

The other arguments raised by BWJ merely seek to re-argue the appeal in CCA 20

16 In his written submissions, BWJ also makes various other arguments in support of his assertion that the High Court was correct in acquitting him. These arguments were raised previously in CCA 20 and were dealt with in detail by the Court of Appeal in the CA GD. The repetition of these arguments makes it clear that this application is nothing more than an impermissible attempt to re-argue the appeal on its merits. A review is certainly not a second appeal.

Conclusion

17 For the above reasons, the requirements set out in s 394J of the CPC are plainly not satisfied by BWJ in CM 24. There is no legitimate basis to allow a

review of the Court of Appeal's decision in CCA 20. I therefore dismiss CM 24 summarily pursuant to s 394H(7) of the CPC. As the Prosecution did not seek costs, none is ordered.

Tay Yong Kwang
Justice of the Court of Appeal

Hua Yew Fai Terence (Rex Legal Law Corporation) for the applicant;
Ng Yiwen, Yvonne Poon and Selene Yap (Attorney-General's Chambers) for the respondent.