IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 35

Court of Appeal / Criminal Motion No 32 of 2024

Between

S Iswaran

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Criminal references]
[Criminal Procedure and Sentencing — Disclosure]

Version No 1: 13 Sep 2024 (14:13 hrs)

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S Iswaran
v
Public Prosecutor

[2024] SGCA 35

Court of Appeal — Criminal Motion No 32 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Woo Bih Li JAD
3 September 2024

13 September 2024

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This was an application ("CM 32") made under s 397(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") for permission to refer two questions of law (the "Questions") to the Court of Appeal. The Questions were as follows:

> (a) Whether, in cases in the General Division of the High Court where the criminal case disclosure procedures in the CPC, Part 10, Division 5 apply, under s 214(1)(*d*) of the CPC, the Prosecution has to include, in the Case for the Prosecution (the "CFP"), the facts and evidence supporting the charge(s) by way of statements of the witnesses for the Prosecution or in any other form? ("Question 1")

(b) Whether the court can and ought to invoke its inherent powers and/or the case management powers and/or s 6 of the CPC to order the Prosecution to include, in the CFP, the facts and evidence supporting the charge(s) by way of statements of the witnesses for the Prosecution or in any other form? ("Question 2")

2 After hearing oral arguments from the applicant, we dismissed CM 32.

Procedural history

3 The applicant stands accused in a criminal case to be tried in the General Division of the High Court (HC/HC 900019/2024).

4 In accordance with its obligation under s 213(1) of the CPC, the Prosecution filed and served the CFP on 31 May 2024. Subsequently, at a criminal case disclosure conference ("CCDC") conducted on 11 June 2024 (the "11 June CCDC"), the applicant applied to the Assistant Registrar (the "AR") for an order that the Prosecution should supplement the CFP by 25 June 2024 with conditioned statements under s 264 of the CPC for every witness whom it intends to call at the trial. After hearing arguments from both parties, the AR dismissed the application.

5 On 18 June 2024, the applicant filed HC/CR 12/2024 ("CR 12") under s 404 of the CPC for the General Division of the High Court to call for and examine the record of the 11 June CCDC, to set aside the AR's order dismissing his earlier application, and to order that the Prosecution serve the following on the applicant by 19 July 2024:

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(a) for all witnesses in the Prosecution's list of witnesses who *agree* to provide a conditioned statement, the conditioned statements of those witnesses;

(b) a letter setting out the identities of the witnesses who *do not agree* to provide a conditioned statement and each such witness' reasons for not agreeing; and

(c) draft conditioned statements which set out the evidence that the Prosecution intends to lead from the witnesses referred to in [5(b)] at the trial.

6 The matter was heard by a judge of the General Division of the High Court (the "Judge") on 5 July 2024. On 19 July 2024, the Judge dismissed CR 12: see *S Iswaran v Public Prosecutor* [2024] SGHC 185 (the "CR 12 Judgment"). In gist, he reasoned and held as follows:

(a) The central issue was whether the Prosecution had a statutory obligation to file a statement under s 264 of the CPC from *every* witness whom it intended to call at the trial as part of the CFP it was required to file in the High Court pursuant to s 213(1) of the CPC: at [3].

(b) The meaning of s 214(1)(*d*) of the CPC was clear and unambiguous, and the extraneous material that the parties referred to the Court was not useful in confirming the Court's interpretation of those specific words. The Court was satisfied that the AR's decision was not in error. There was also no suggestion of any procedural irregularity in the proceedings: at [97]. More specifically, the Judge reasoned:

(i) The plain meaning of s 214(1)(*d*) of the CPC was that the Prosecution was only required to include as part of the CFP such

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"statements of the witnesses under section 264" that it *intended* to admit at the trial. Conversely, if the Prosecution did not *intend* to admit any such statements at the trial, it was not required to file those statements as part of its CFP under s 214(1)(*d*) of the CPC. Section 214(1)(*d*) of the CPC could not be construed to mean that the Prosecution had to *obtain* statements under s 264 from *all* the witnesses that it intended to call to give evidence at the trial. There was nothing in the wording of s 214(1)(*d*) of the CPC which required the Prosecution to file and serve under s 264 of the CPC the statements of every witness that it intended to call at trial, or to provide the *drafts* of such written statements where any such witness was not willing to provide a conditioned statement: at [32].

(ii) The legislative purpose of CCDCs in proceedings in the General Division of the High Court was statutorily enshrined in s 212(1) of the CPC. It was to settle the filing of the parties' respective Cases, the issues of fact or law which were to be tried and the disclosure of information including the parties' intended witnesses and the "statements, documents or exhibits" which "are intended by the parties to be admitted at the trial": at [41].

(iii) The interpretation of the plain and unambiguous words of s 214(1)(*d*) of the CPC was not assisted by the extraneous material quoted by the parties, because they did not specifically deal with the introduction of s 214(*d*) of the Criminal Procedure Code 2010 (Act 15 of 2010) in 2010, in the context of proceedings transmitted to the High Court for trial without the need for committal proceedings: at [65].

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(c) There was no basis for invoking the court's revisionary or inherent powers, or to adopt any procedure under s 6 of the CPC to compel the Prosecution to provide information on its overall case theory and trial strategies: at [118]. The applicant had received sufficient information that disclosed the factual premise of the charges against him, and it was not the law that the Prosecution had to detail its intended case at trial to the point of informing the applicant of exactly what each witness would testify, which exhibit each witness would give evidence on, and what the evidence on each exhibit would entail. The applicant had also not demonstrated any injustice he would suffer from not receiving the draft conditioned statements or a letter stating reasons why certain witnesses would not sign draft conditioned statements (if any drafts existed): at [122].

(d) Having decided to dismiss the application in the exercise of the revisionary jurisdiction of the General Division of the High Court, the Court saw no further basis to make the orders sought in the exercise of its original jurisdiction: at [129].

7 On 2 August 2024, the applicant filed CM 32, seeking permission under s 397 of the CPC to refer the two Questions to the Court of Appeal.

Applicable law

8 The law is clear that four conditions must be met before a question may be referred to the Court of Appeal pursuant to s 397(1) of the CPC (see, for instance, *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*") at [15]). In brief, they are as follows:

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(a) First, the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the General Division of the High Court in the exercise of its appellate or revisionary jurisdiction.

(b) Second, the reference must relate to a question of law, and that question of law must be a question of law of public interest.

(c) Third, the question of law must have arisen from the case which was before the General Division of the High Court.

(d) Fourth, the determination of that question of law by the General Division of the High Court must have affected the outcome of the case.

These are cumulative, and we confine our judgment to just one of the conditions: that is the second condition, which is that the reference must relate to a question of law and that question of law must be a question of law of public interest.

9 There are two sub-requirements to the second condition. First, the question sought to be referred must be one of law. Second, the question of law must be one of public interest. In this regard, a question of law will not be considered a question of public interest if it is one which can readily be resolved by applying established legal principles (see *Xu Yuanchen v Public Prosecutor* [2024] 1 SLR 635 ("*Xu Yuanchen*") at [22]–[28]). In other words, where the law is settled and established, there can be no question of law of public interest (*Xu Yuanchen* at [47]). This is similarly the case where the question is not a difficult one or does not admit of viable alternative views. The Court in *Mohammad Faizal* cited with approval at [19] the following extract from the decision of the Malaysian Federal Court in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141:

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> … What is public interest must surely depend upon the facts and circumstances of each case. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be *whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternate views. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.*
>
> [emphasis in original]

10 Further, as emphasised by the court in *Xu Yuanchen* at [2], the court should look to the *substance*, and not just the form, of the question when it assesses the application for leave to refer the question. An example of the impermissible "dressing up" of a question is "where it is argued that the law is unsettled or that a question of law of public interest has otherwise arisen when the *converse* is in fact the case" [emphasis in original] (*Xu Yuanchen* at [3]). The observations of this court, albeit in a slightly different context, in *CRH v Public Prosecutor* [2024] SGCA 29 at [23], are also pertinent. There, we observed that the three-step framework to be adopted when undertaking the purposive interpretation of a statutory provision that had been laid down in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 is germane where there are *contesting* interpretations of the provision. This requirement is not fulfilled just because the parties take different positions on the correct interpretation of a statutory provision; rather, it envisages that the court is satisfied that the statutory text admits of two or more plausible interpretations. In line with this observation, a point of difficulty in the interpretation of a statutory provision does not arise just because the parties take different views on it. What is needed is the genuine room for these alternative views to be held in the light of the express language of the relevant provision.

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Question 1

11 In that light, we deal first with Question 1. In our judgment, it was clear that this is not a question of law of public interest. As we have noted, it is established law that a question of law that is settled or that does not admit of difficulty is not a question of law of public interest (see above at [9]).

12 In relation to Question 1, this was expressly tied to the duties of the Prosecution under s 214(1)(*d*) of the CPC, which, in turn, refers to statements to be admitted under s 264 of the CPC. It is helpful for us to briefly explain s 264. This section was intended to enable evidence to be adduced *in writing* in lieu of it being adduced by way of oral evidence. We were satisfied that s 214(1)(*d*) could not be read in the way that was put to us, namely as a provision requiring the Prosecution to also disclose other evidence not falling within the limits of s 264. In essence, the submission of Mr Singh, counsel for the applicant, was to the effect that the Prosecution was obliged to explore whether conditioned statements could be obtained from the Prosecution's witnesses, and if this was not possible, the Prosecution would be required to include a draft of the statements or an outline of the evidence that it intended to adduce from these witnesses at the trial. With respect, in circumstances where the Prosecution could not even obtain a statement from the witness, the intended evidence would surely *not* fall within s 264, which refers to "statements". It would also almost surely *not* fall within the category of statements that are contemplated by that section, which contemplates that, aside from the witness's own willingness to provide a statement and to make a declaration of its truth, the parties, namely the Prosecution and the Defence, agree to the statement being tendered in evidence. These point to statements of a sort which the Prosecution would not ordinarily have difficulty obtaining. Further, aside from this, there is nothing in

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the language of s 214(1)(*d*) that points to statements other than those which the Prosecution intends, at the time of filing the CFP, to admit *under s 264*.

13 Mr Singh pointed us to s 231 of the CPC, which provides that if, after the CFP or the Case for the Defence has been filed, either party wishes to adduce the evidence of a witness not identified in the CFP or the Case for the Defence, then the Prosecution or the Defence must give prior notice in writing to the court and the other parties to the trial of the intention of the Prosecution or the Defence to adduce the evidence, and such notice must state the name of the witness and include an outline of the witness's evidence. As we pointed out to Mr Singh, this requirement cannot be imported into the regime that is provided for in s 214(1)(*d*), which concerns statements that may be admitted *under s 264*. As Mr Singh accepted, s 231 is not limited to statements sought to be admitted under s 264, but concerns *any* evidence not identified at the time the CFP or the Case for the Defence is filed. The simple point is that they are concerned with different things, and it is not helpful to look at s 231 to discern the meaning of s 214(1)(*d*).

14 In our judgment, in so far as Question 1 was expressly framed by reference to the obligations of the Prosecution under s 214(1)(*d*) of the CPC, the meaning and scope of that provision are clear and do not admit of difficulty; the section means what it says, namely, it refers to statements that the Prosecution intends, at the time of filing the CFP, to seek to admit at the trial under s 264. This Question therefore did not raise a question of law of public interest.

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Question 2

15 This leads us to Question 2 and also to Mr Singh's effort to reformulate that question in the course of our discussion with him. The reformulated question was as follows:

Whether, pursuant to s 6 of the CPC and/or the inherent powers of the court, there is an obligation on the part of the Prosecution to provide the Defence with the facts and evidence supporting the charge(s), which would have been provided under the committal hearing procedure, as set out in s 188(4) of the CPC as it stood prior to the repeal of the committal hearing procedure, and which is independent of s 214 of the CPC?

16 Both Question 2 and the reformulated version of it rested on the notion that if we were not persuaded that s 214(1)(*d*) of the CPC had the effect for which Mr Singh contended, then, based on the parliamentary debates, Parliament must have overlooked the need to amend or modify s 214, when the previously existing regime for committal procedures as an anterior step in certain criminal proceedings was repealed by the Criminal Justice Reform Act 2018 (Act 19 of 2018). Mr Singh developed this argument in the following way. He submitted that in passing the amendments that repealed the previously existing regime for committal proceedings, Parliament had indicated that it intended to ensure that the regime for disclosure that availed under those proceedings would continue to be available to the Defence. Mr Singh submitted that if we took the view that s 214(1)(*d*) of the CPC did not have the expanded meaning for which he contended, then the discovery rights of an accused person now would be less than they were previously. Hence, if this was the effect, it was not reflective of Parliament's intention and so Parliament must be taken to

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have overlooked this unintended effect when the amending legislation was passed.

17 We did not think that Question 2 gave rise to a question of law of public interest for a few reasons. As a preliminary point, we must state that we were not convinced that the current disclosure regime and the previous disclosure regime are properly comparable, such that it would be correct to say that the disclosure regime now is less extensive than it was in the past. The point is that we are dealing with a different regime now altogether.

18 In any case, Parliament's intention is to be gauged in the first instance by the legislative text that Parliament chooses. The one thing Parliament did not do was to amend the language of s 214 to *broaden* the scope of disclosure in the way that Mr Singh sought to persuade us. More importantly, in the CR 12 Judgment at [74]–[79], the Judge traced the history of the amendments to the CPC in 2010 and then in 2018. It is significant that consideration had initially been given to expanding the scope of the Prosecution's discovery obligations in 2008, but after extensive public consultation, this was dropped by the time the 2010 amendments were passed, and it was then not revisited when the law was amended again in 2018 to do away with the committal procedure. The short point is that if Parliament had intended to modify the disclosure obligations in any way upon the passage of legislation to repeal the committal procedure, it could have done so, but did not.

19 In his reformulation of Question 2, Mr Singh in effect invited us to exercise our gap-filling power under s 6 of the CPC or our inherent jurisdiction to read into s 214 an obligation on the part of the Prosecution to provide such pre-trial disclosure of the evidence as would mirror that which was provided for under s 188 of the CPC as it stood prior to 2018, when the section was repealed.

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As we pointed out to Mr Singh, he was in effect inviting us to craft a disclosure scheme that was not provided for in the statute. We did not consider that s 6 of the CPC or our inherent jurisdiction would allow us to do this because, in effect, it would require us to invalidate or undo a repeal of a provision that has been effected by an Act of Parliament. In the present context, that is not within the ambit of our powers under s 6 of the CPC or under our inherent jurisdiction and so could not give rise to a genuine question. Hence, in our judgment, even this reformulated question, which certainly was not raised before the Judge in this way, also did not give rise to a question of law of public interest.

20 We therefore dismissed CM 32.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Davinder Singh S/O Amar Singh SC, Navin Shanmugaraj Thevar, Sumedha Madhusudhanan, Sheiffa Safi Shirbeeni and Harriz Bin Jaya Ansor (Davinder Singh Chambers LLC) for the applicant; Deputy Attorney-General Tai Wei Shyong SC, Christopher Ong, Kelvin Chong Yue Hua and Sarah Siaw (Attorney-General's Chambers) for the respondent.

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