IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 29

Criminal Motion No 1 of 2015

Between

ROSLAN BIN BAKAR

… *Applicant*

And

PUBLIC PROSECUTOR

… *Respondent*

GROUNDS OF DECISION

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

[Criminal Procedure and Sentencing] — [Adducing fresh evidence post-appeal]

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Roslan bin Bakar
v
Public Prosecutor

[2016] SGCA 29

Court of Appeal — Criminal Motion No 1 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tay Yong Kwang J
30 November 2015

9 May 2016

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The applicant, Roslan bin Bakar ("the Applicant"), and his co-accused, Pausi bin Jefridin ("Pausi"), were convicted and sentenced to death on 22 April 2010 for trafficking in drugs. They appealed to this court, and, after careful consideration, the court dismissed their appeal on 17 March 2011. The legal proceedings were therefore concluded. Almost four years later, on 30 January 2015, the Applicant filed Criminal Motion No 1 of 2015 ("the Present Motion") seeking leave to adduce new evidence and an order for a retrial to be held based on the new evidence sought to be admitted. We heard and dismissed this application on 30 November 2015.

2 After the delivery of our judgment in this matter, and after a draft of our grounds of decision had already been prepared, a five-judge panel of this

court handed down its judgment in *Kho Jabing v Public Prosecutor* [2016] SGCA 21 ("*Kho Jabing*") on 5 April 2016. That was a seminal decision as it carefully considered the issue of when the Court of Appeal may exercise its power of review to reopen a concluded criminal appeal. In the course of arriving at its conclusion, the court undertook a detailed examination of all the relevant cases in this area, including the previous decision of this court in *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 ("*Yong Vui Kong*"), on which we relied in coming to our decision in the present case. *Kho Jabing* affirmed the test which was set out in *Yong Vui Kong* and elaborated on its requirements in detail.

3 In future, all applications for a review of a concluded criminal appeal will undoubtedly have to be decided in line with the principles laid down in *Kho Jabing*. However, we still propose to set out the detailed reasons that led us to dismiss the Present Motion last year because it concerns a discrete and important point in this area of the law – *viz*, the treatment of recantation evidence in applications for review – which we thought would benefit from appellate discussion. In a separate coda to these grounds, we will explain why our decision in the present case and the principles which we applied in reaching it are *wholly consistent with* the principles which were subsequently articulated in *Kho Jabing*.

Background

4 In 2010, the Applicant and Pausi were jointly tried on two charges of trafficking in controlled drugs under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). At that time, because of the quantity of drugs involved, these offences carried the *mandatory* death penalty. A number of witnesses were called in the course of the Prosecution's case, including

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Nuradaha Putra bin Nordin ("Nuradaha"), Norzainy bin Zainal ("Norzainy"), and Mohamed Zamri bin Mohamed Sopri ("Zamri"), all of whom were found to have been involved in the drug transaction which formed the subject matter of the charges. The trial judge ("the Judge") convicted the Applicant and Pausi of both charges and sentenced them to suffer death. His judgment is reported as *Public Prosecutor v Pausi bin Jefridin and another* [2010] SGHC 121 ("*Roslan (trial)*").

The decisions of the High Court and the Court of Appeal

5 The Judge found that on 14 June 2008, the day of the offence, the Applicant, Nuradaha, Zamri, and Norzainy met at a coffee shop at Lengkok Bahru before proceeding, on the Applicant's instructions, in two separate vehicles (Nuradaha with Zamri in one; the Applicant with Norzainy in the other) to Marsiling MRT Station. There, they were joined by Pausi, who was waiting in a third car. Together, the five men proceeded to a car park in Choa Chu Kang where the drug transaction was to take place. At the car park, Nuradaha alighted from his vehicle and retrieved a bag containing the drugs from the rear passenger seat of Pausi's car, before walking back to the car he (Nuradaha) was travelling in and placing the bag on the front passenger seat. Following that, Zamri and Nuradaha drove off. The Applicant was present throughout this process, even though he did not physically handle the drugs in question. Officers from the Central Narcotics Bureau ("CNB") arrested everyone (save for the Applicant, who went into hiding) on the same day. The Applicant was only arrested more than a month later on 18 July 2008.

6 During the trial, the Applicant's *sole* defence was that of alibi (see *Roslan (trial)* at [6]). He claimed that at all material times, he was neither at the coffee shop at Lengkok Bahru nor at the car park in Choa Chu Kang. In

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support of his defence of alibi, the Applicant claimed that there was a conspiracy on the part of the others to falsely implicate him in the drug transaction, and that "he was named only because the others wanted to frame him" (likewise at [6]). The Applicant's mother, Medah bte Dollah, and stepbrother, Shamsubari bin Jaafar, were called to give evidence on his behalf.

7 The Judge rejected the defence of alibi as he assessed the evidence of the Applicant's mother and stepbrother to be unreliable. He also rejected the notion that there was any conspiracy to falsely implicate the Applicant, finding that there was no credible evidence of any motive for the other arrested persons to so conspire. Critically, the Judge noted that Pausi – who testified that he had been at the car park in Choa Chu Kang at the material time to collect a sum of money from the Applicant – must have been telling the truth on this. Pausi's defence at the trial was that he had been at that car park only to collect a debt from the Applicant on the instructions of one Bobby, and not to deal in drugs. While the Judge ultimately rejected Pausi's defence that he had no knowledge of the drug transaction in question, he found that Pausi must have been telling the truth when he testified that the Applicant had been at the scene of the offence. The Judge noted that, quite apart from the fact that this was consistent with the evidence which had been presented, it would have been "wildly imaginative and self-defeating for Pausi to say that he was at the scene of the crime with someone who was not there" (see *Roslan (trial)* at [6]).

8 Both the Applicant and Pausi appealed against the decision of the Judge. On appeal, the Applicant maintained his defence of alibi, which remained his only defence. On 17 March 2011, the Court of Appeal heard and dismissed their appeal without issuing written grounds of decision.

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The Present Motion

9 In 2012, Parliament passed the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) ("the Amendment Act"), which permitted convicted drug traffickers facing capital sentences to be reconsidered for a term of life imprisonment and caning in lieu of a sentence of death. Pursuant to s 27(6) of the Amendment Act read with s 33B of the MDA, two cumulative conditions had to be satisfied in order for the Applicant to qualify for a reduced sentence. First, the Applicant had to prove on a balance of probabilities that he was only a "courier" (*ie*, that his involvement in the offence of drug trafficking was restricted only to the transportation, sending, or delivery of drugs). Second, the court had to be satisfied *either* that: (a) the Public Prosecutor had certified that the Applicant had "substantively assisted" the CNB in disrupting drug trafficking activities within or outside Singapore; *or* that (b) the Applicant was suffering from "such abnormality of mind … as substantially impaired his mental responsibility" for the commission of the offence.

10 On 19 March 2014, the Applicant and Pausi were informed during a pre-trial conference ("PTC") that they would *not* be issued with certificates of substantive assistance, and that the Public Prosecutor, the respondent in the Present Motion ("the Respondent"), would be contesting any submission that they were suffering from an abnormality of mind at the time of the offence. On 30 April 2014, the Applicant's counsel, Mr Kertar Singh ("Mr Singh"), informed the court during a further PTC that new evidence had emerged to the effect that while the Applicant was indeed present at the scene of the offence on the day in question (contrary to his position at the trial and on appeal), he had taken no part in the drug transaction and had merely been there to accompany Norzainy, who had promised to give him some drugs for consumption.

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11 On 30 January 2015, the Applicant filed the Present Motion seeking "leave to adduce fresh/new evidence to the effect that there was a conspiracy by the other arrested accused persons to falsely push the blame to him", and an order for a retrial of the case following the grant of leave to adduce the "fresh/new evidence". The evidence that the Applicant wanted to adduce was a handwritten statement signed by Pausi dated 16 May 2013 ("the handwritten statement") which read as follows:

> I, Pausi Bin Jefridin would like to say the following:–
>
> 1) At the time of the transaction [Nuradaha] came to my car and took the drugs from my car directly.
>
> 2) Whilst we were in the lock-up after the arrest, one Yusof Kassim @ Kimo told us ([Nuradaha], Norzainy @ Jack, Zamri, Yusof @ Kimo and myself) to push the blame to [the Applicant] since he was not arrested[.]
>
> 3) [The Applicant] was in fact not involved in the transaction[.]
>
> 4) I make this statement voluntarily in the presence of my solicitor Mr Chung Ting Fai.

12 The handwritten statement was expressed to have been recorded at Changi Prison with the assistance of the Applicant's counsel, Mr Singh, who served as the interpreter and who also signed the document and dated it 16 May 2013. The handwritten statement was subsequently exhibited in an affidavit which the Applicant affirmed on 26 January 2015 in support of the Present Motion (the Applicant's "first affidavit"). In that affidavit, the Applicant explained that Pausi had approached him sometime in May 2013 while they were in the yard of Changi Prison, and had told him that he "had decided to come clean" and would inform the CNB that the Applicant had not been involved in the act of drug trafficking for which they had both been convicted. The Applicant also said that Pausi had told him that the other persons who had been arrested – *ie*, Pausi himself, Nuradaha, Norzainy,

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Zamri, and one Mohamad Yusof bin Kasim ("Kimo") – had conspired to falsely implicate him in the offence.

The subsequent affidavits

13 Subsequently, a series of letters were exchanged between the Applicant's solicitors, M/s Kertar & Co, and the Respondent, in which the latter sought to clarify the precise circumstances which led to the recording of the handwritten statement. The Applicant then affirmed a second affidavit on 21 August 2015 (the Applicant's "second affidavit") in which he clarified that Pausi had told him of his intention to tell the truth on two occasions. The first was "sometime in December 2012 or January 2013", when Pausi said that he would be "unfolding the truth to the CNB". The second was "sometime in February or March 2013", when Pausi told him that "all [the] others arrested, including Yusof Kassim @ Kimo … had conspired to falsely push the entire criminal liability to [him] since [he] was the only one not arrested together with them, and it was convenient to do so".

14 In response, ASP Chee Tuck Seng ("ASP Chee"), the investigating officer who had the conduct of the Applicant's case at the time of the trial, and ASP Lawrence Seow Kian Peng ("ASP Seow"), the investigating officer who had the conduct of the Applicant's case at the time the Present Motion was brought, both filed affidavits to respond to some of the matters raised by the Applicant. ASP Seow averred that the CNB became aware of the existence of the handwritten statement *only* on 3 February 2015, when it was informed that the Applicant had filed the Present Motion. In his affidavit, ASP Seow exhibited three pieces of correspondence which had been received by the Respondent and the CNB in the months of May and June 2014:

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(a) The first was a letter dated 27 May 2014 from M/s Kertar & Co to the Respondent. The salient portions of the letter read:

> We are instructed that there is fresh evidence in the case, in the form of a statement from the co-accused, [Pausi] exculpating our client.
>
> We understand that the CNB is aware of the same as [Pausi] has given them the exculpatory statement as well.
>
> As such we have instructions to apply for criminal revision inter alia for admission of fresh evidence and a re-trial.
>
> We are in the process of taking further instructions.
>
> The aforesaid is for your information and record.

ASP Seow stated in his affidavit that, "[t]o the best of [his] knowledge": (i) the CNB was in fact *not* aware of the existence of the aforesaid "fresh evidence" as at 27 May 2014; (ii) Pausi did not at any point in time provide the CNB with any statement exculpating the Applicant; and (iii) similarly, the Applicant never informed the CNB about the existence of any "fresh evidence" or "exculpatory statement" by Pausi.

(b) The second piece of correspondence was a short letter written by Pausi from Changi Prison dated 13 June 2014 and addressed to ASP Seow. It read, simply, "I recall something important I wish to share with your [*sic*]. Can your [*sic*] please come down here."

(c) The third piece of correspondence was a letter from ASP Seow to Mr Chung Ting Fai ("Mr Chung"), Pausi's counsel, dated 23 June 2014 seeking clarification on the purpose of the intended meeting mentioned in Pausi's letter of 13 June 2014. ASP Seow testified that he had not written to Pausi directly as Pausi was represented. It appeared

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> that no response was received, and so no further action was taken on the matter until the filing of the Present Motion. ASP Seow averred that neither the CNB nor the Respondent was aware of the existence of the handwritten statement until the Present Motion was filed.

15 On 8 October 2015, the Applicant affirmed a third affidavit (the Applicant's "third affidavit") in which he continued to maintain that Pausi had told him that he had "revealed the truth" to a CNB officer sometime in March 2013. On his part, the Applicant averred that he had continued to maintain his innocence, and had also informed one IO Chan Joo Jin ("IO Chan"), when the latter interviewed him, that the other arrested persons had "played [him] out" and that he was in fact innocent.

16 On the same day (*viz*, 8 October 2015), Pausi affirmed an affidavit in support of the Present Motion as well. He began by confirming the veracity of the contents of the handwritten statement before proceeding to explain that he had already told ASP Seow on 1 March 2013, when the latter interviewed him to ascertain whether he could assist the CNB in disrupting drug trafficking activities, that the Applicant had been framed. He said that he felt "relieved" after he had done so, and had stopped by the Applicant's cell on his way back to his own to inform the Applicant of this. Pausi explained that his letter of 13 June 2014 to the CNB "had nothing to do with the conspiracy involving [the Applicant]", which he had already made a clean breast of. In addition, Pausi also gave details of when, where, and how the alleged conspiracy to falsely implicate the Applicant came to be formed.

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The new narrative of events in the Applicant's and Pausi's affidavits

17 As can be seen, the Applicant gave differing accounts of how he came to know about Pausi's plan to "come clean". His reasons for doing so will become apparent as the facts are unpacked. For present purposes, however, we shall focus on the new narrative of events as they were presented in the Applicant's and Pausi's affidavits. In essence, both the Applicant and Pausi claimed that they had lied at the trial and on appeal. The "truth", they asserted, was that even though the Applicant had been present at the scene of the offence at the material time, he had not played any role in the drug transaction which formed the basis of their convictions.

The Applicant's account

18 In his first affidavit, the Applicant admitted that his defence of alibi – his *sole* defence both at the trial and on appeal – was entirely *false*. His evidence, in essence, was that he was "just a drug consumer and not a trafficker" who had been caught in the wrong place at the wrong time. According to the Applicant, he usually obtained his weekly dose of methamphetamine from Kimo's runners, Norzainy and Nuradaha. On the day of the offence, he met Norzainy and was told to accompany him in his car, where he (the Applicant) would receive the methamphetamine which he had ordered. The Applicant said that he agreed only because he was not in a rush and was hoping to get a lift. That was how he came to be present at the car park in Choa Chu Kang. However, he clarified, he had no part to play in the drug transaction in question. He further averred that after leaving the car park, Norzainy drove him to a betting centre in Bukit Merah and sold him his weekly dose of methamphetamine there.

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19 The Applicant also explained that he felt compelled to lie because he did not think the investigating officer would have believed his account, *viz*, that he had been present at the scene of the offence, but had not been involved in the drug transaction. Elaborating, he said that when he was interviewed after his arrest in 2008, the investigating officer had placed photographs of Nuradaha, Zamri, Norzainy, Pausi, and Kimo before him, and had told him that all of them had given statements identifying him as the head of the drug syndicate. As a result, the Applicant claimed, he "felt trapped by the statements" and, while in a state of "fear and shock", decided to lie. He added that once he had taken that position during the investigations, he was unable to go back on it for fear that if he told the truth, he would not be believed and his statements would instead be used against him.

20 In his third affidavit, the Applicant added to this account by explaining that a female interpreter who had been present when he was shown the photographs of the other arrested persons had told him (in the Malay language) "*kau megakan sudah lah*", which he understood to mean "you just confess". In response, he had protested (also in the Malay language) "*ini nyawa aku*", which, he explained, meant "this is my life". He also deposed that ASP Chee had specifically informed him that the other arrested persons had all given statements to the effect that the drugs in question belonged to him and that he was the head of the drug syndicate. As mentioned earlier at [15] above, the Applicant further averred that he subsequently informed IO Chan of how the other arrested persons had "played [him] out" when IO Chan interviewed him (the date of this interview with IO Chan was not given in the affidavit, but according to IO Chan it took place in January 2013: at [22] below). According to the Applicant, IO Chan had initially been reluctant to write that down as he said that the interview was "only for the

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purpose of seeking cooperation from [him]". However, IO Chan eventually relented and wrote down what he said in a one-page statement, which he then signed.

21 In reply, ASP Chee, who was in charge of recording all the investigation statements from the Applicant, deposed that he had shown the Applicant the photographs of the other arrested persons in order to apprise him of the allegations made against him and to give him a chance to respond to them. He explained that this was standard investigative practice as allegations had to be put to a suspect in order that he might respond to them if he wished. ASP Chee clarified that he had always "kept an open mind" about the Applicant's involvement in the offence, and denied having conducted himself in any way that might have suggested that he would have disbelieved the Applicant if the latter had said that he had been present at the scene of the offence but had not been involved in the drug transaction in question. ASP Chee also stated that the Applicant never made any protest during the statement recording process, and that there was certainly nothing along the lines of what, according to the Applicant, had happened before the female interpreter (see [20] above). In addition, ASP Chee clarified that he never told the Applicant that the other arrested persons had singled him out as the head of the drug syndicate as he would not have had any basis for making such a statement at the time.

22 IO Chan likewise filed an affidavit to refute the allegations made in the Applicant's third affidavit. He explained that he had interviewed the Applicant on 18 January 2013 to determine whether the Applicant would be able to provide the CNB with information which would be useful in disrupting drug trafficking activities either in Singapore or overseas, and whether the

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Applicant wished to go for a psychiatric assessment. He categorically denied having refused to record anything that the Applicant had said at that interview.

Pausi's account

23 Like the Applicant, Pausi, in his affidavit of 8 October 2015, admitted to having lied at the trial and on appeal. He claimed that the sum of money found on him at the time of his arrest, which he had previously testified to be money collected from the Applicant, actually belonged to him. The "truth", according to Pausi, was that he was helping Bobby, a drug supplier in Malaysia, to deliver drugs to Nuradaha, who was to collect them on Kimo's behalf. Pausi claimed that he did not know and had never met the Applicant before he was arrested. This was markedly different from his evidence at the trial, where he had testified that he had been instructed by Bobby to collect a sum of money *from the Applicant* (see [5] of *Roslan (trial)* and also [7] above). Pausi explained in his affidavit that he had lied because he "wanted to create a defence which could exculpate [himself]".

24 The "conspiracy" to falsely implicate the Applicant, according to Pausi, was masterminded by Kimo, who told Nuradaha, Zamri, Norzainy, and Pausi to push the blame to the Applicant as he had not been arrested together with the rest of them. Kimo first told them to do so on the day of their arrest (*viz*, 14 June 2008) while they were in the lock-up at the Police Cantonment Complex. Pausi claimed that Kimo did not give specific instructions on how they should tailor their evidence to frame the Applicant, save to say that the blame should be pushed to the Applicant. The next day, the five of them were brought to the Subordinate Courts (now known as the State Courts). While waiting to be brought up to court, they were placed in the same cell. On that occasion, Kimo reiterated that they were to identify the Applicant as the

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person responsible for the drug transaction in question, but once again did not go into any specific detail as to how they were to shape their evidence to that effect. Pausi explained in the penultimate paragraph of his affidavit that he went along with this plan because his primary concern then was to "save [himself] by pushing the blame to [the Applicant]".

25 Pausi explained that after his appeal was dismissed, he wanted to tell the truth, but "did not know how to do so". An opportunity arose when ASP Seow of the CNB interviewed him on 1 March 2013 to determine whether he would be able to substantively assist the CNB in disrupting drug trafficking activities. Pausi claimed that during that interview, he informed ASP Seow that the Applicant was innocent; he could not, however, recall whether ASP Seow wrote down all that he said. Pausi explained in the last two paragraphs of his affidavit that "having been sentenced to death, [he was] no longer afraid of the consequences of telling the truth as opposed to when the trial was ongoing", and that his "only motive" was to "clear [his] conscience as [he was] unable to live with the guilt of having falsely implicated [the Applicant]".

26 In response, ASP Seow filed a second affidavit dated 9 November 2015 wherein he categorically denied that Pausi had told him of the existence of a conspiracy to frame the Applicant. He deposed that if Pausi had told him anything of that sort, he would have recorded it in the statement taken from Pausi on that occasion. He ended his affidavit with an averment that, to the best of his knowledge, neither Pausi nor the Applicant had *ever* told the CNB, prior to the filing of the Present Motion, of any of the information that was eventually set out in the handwritten statement.

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Our decision

27 Simply put, what the Applicant sought in the Present Motion was for this court to set aside his conviction and sentence, and to remit his case to the High Court for a retrial on the ground that there was "fresh/new evidence" in the light of which his conviction should be considered afresh. Critically, he contended that the material referred to in the handwritten statement and in the affidavits filed after the commencement of the Present Motion had changed the evidential landscape by addressing the Judge's central concern with the conspiracy theory, which was that there was no credible motive for the other arrested persons to conspire to falsely implicate him.

28 Thus framed, the critical issue before us was whether this court could reconsider the merits of a concluded criminal appeal, and, for that purpose, take cognisance of further material presented *post*-appeal. Before we turn to explain our decision on the merits of the Present Motion, there is one preliminary point which we wish to make. Strictly speaking, the only piece of "fresh/new evidence" which the Applicant sought to admit via this motion was the handwritten statement. However, it was clear to us that all the information contained in the affidavits filed after the Present Motion was brought (particularly that contained in Pausi's affidavit of 8 October 2015) was vital to this application. For that reason, we proceeded on the basis that all this new information formed the subject matter of the Present Motion as well. We shall hereafter refer to this new information and the handwritten statement collectively as "the new narrative".

The admission of new evidence after the disposal of an appeal

29 The Applicant proceeded on the basis that the tripartite conditions set out in the English Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR

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748 ("*Ladd*") governed his application for leave to admit the new narrative. However, as we intimated at the hearing, *Ladd* concerned the admission of fresh evidence *on appeal*. In the present case, the Applicant's appeal against his conviction had already been heard *and* dismissed. Therefore, the reference to *Ladd* was not perfectly apposite. Instead, we agreed with the Prosecution that the Present Motion would fall to be decided based on the principles articulated in a series of cases commencing with the decision of this court in *Abdullah bin A Rahman v Public Prosecutor* [1994] 2 SLR(R) 1017 ("*Abdullah*").

30 In *Abdullah*, the applicant ("Abdullah") and one Awang were charged with and jointly tried for abetting one Rashid in drug trafficking. Abdullah and Rashid were convicted and sentenced to death, while Awang was acquitted. Abdullah's and Rashid's respective appeals against their convictions were dismissed. Three days before his scheduled execution, Rashid purportedly told Abdullah that the statements which he had made to the investigating officer as well as the testimony which he had given in court were a "total fabrication" (see *Abdullah* at [2]). Abdullah then applied for leave to adduce Rashid's retraction as fresh evidence. The application was rejected by the Court of Appeal as it held that it had no jurisdiction to reopen a concluded appeal in order to receive fresh evidence. The court observed that once it had heard and disposed of an appeal, it was *functus officio*. Therefore, in the absence of a specific statutory provision affording the court the jurisdiction to admit fresh evidence after hearing and disposing of an appeal, the court could not reopen the appeal. For this reason, the court dismissed Abdullah's application *in limine* and did not turn to consider its merits.

31 In the subsequent decision of this court in *Yong Vui Kong*, Chan Sek Keong CJ, delivering the grounds of decision of the court, drew a distinction

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between, on the one hand, "a true case of new evidence having come to light after judgment" and, on the other hand, "a case where the principal convicted offender apparently changed his mind in a last-minute attempt to help his accomplice" (at [12]). Chan CJ placed *Abdullah* in the latter category. He expressed the view that in "an actual situation where new evidence is discovered", this court would have to consider whether it had the jurisdiction to admit the new evidence in question and review its earlier decision in order to correct any miscarriage of justice (at [13]). Given the centrality of the court's comments, we reproduce the relevant paragraphs of the court's judgment (at [15]–[16]) *in extenso*:

> 15 We note also that the main justifications of these cases [*ie*, the cases discussed at [7]–[12] of *Yong Vui Kong*], that the court is *functus* after it has delivered judgment on the case, rest on the public interest in having finality of litigation and the absence of an express provision in the SCJA [*viz*, the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)] to empower the court to review its decisions. The first justification is bolstered by the fear of abuse of the judicial process and the floodgates argument (an argument which was also made to the [High Court judge] in this case). In our view, the finality principle should not be applied strictly in criminal cases where the life or liberty of the accused is at stake as it would subvert the true value of the judicial process, which is to ensure, as far as possible, that the guilty are convicted and the innocent are acquitted. The floodgates argument should not be allowed to wash away both the guilty and the innocent. *Suppose, in a case where the appellate court dismisses an appeal against conviction and the next day* ***the appellant manages to discover some evidence or a line of authorities that show that he has been wrongly convicted, is the court to say that it is*** **functus** *and, therefore, the appellant should look to the Executive for a pardon or a clemency?* ***In circumstances where there is sufficient material on which the court can say that there has been a miscarriage of justice, this court should be able to correct such mistakes.***
>
> 16 Another argument which this court should take into account (but which has never been addressed to the court), is that *Art 93 of the Constitution [of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)] vests the judicial power of Singapore in the Supreme Court. The judicial power is*

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> *exercisable only where the court has jurisdiction, but* ***where the SCJA does not expressly state when its jurisdiction in a criminal appeal ends, there is no reason for this court to circumscribe its own jurisdiction to render itself incapable of correcting a miscarriage of justice*** *at any time.* We have not heard the Public Prosecutor on this point, and it will be necessary to do so in an appropriate case in the future.
>
> [emphasis added in italics and bold italics]

32 Two important points can be gleaned from the paragraphs cited above. First, the court in *Yong Vui Kong* did not (unlike the court in *Abdullah*) think that there was any need for there to be a specific statutory provision empowering it to receive new evidence after an appeal had been heard and concluded before it could admit such new evidence. It observed that the Supreme Court of Judicature Act (Cap 332, 2007 Rev Ed), which governs the Court of Appeal's criminal appellate jurisdiction, did not state when the court's jurisdiction was exhausted, and that there was therefore no reason for the court to "circumscribe its own jurisdiction to render itself incapable of correcting a miscarriage of justice" (at [16]). Second, the court in *Yong Vui Kong* envisaged that an application to reopen a concluded criminal appeal would succeed only where there was new material – be it in the way of "evidence or a line of authorities" – which constituted "sufficient material on which the court can say that there has been a miscarriage of justice" (at [15]).

33 Following *Yong Vui Kong*, this court reconsidered the substantive merits of a concluded criminal appeal in three decisions: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49, *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872, and *Quek Hock Lye v Public Prosecutor* [2015] 2 SLR 563. However, *none* of these cases involved applications for leave to admit new *factual* evidence after the disposal of a criminal appeal. Instead, they all concerned applications for leave to submit, post-appeal, new *legal*

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arguments (all of which concerned fundamental liberties guaranteed under the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)) that had not been canvassed in the court below. In each of these cases, the court considered the merits of the new legal arguments presented, but held that they did not throw sufficient doubt on the legality of the convictions which had been entered.

34 In the light of the foregoing, we agreed with the parties that the position in the authorities appeared to be that this court did have the inherent jurisdiction to reopen a concluded criminal appeal to receive further evidence. However, we accepted the Respondent's submission that this power of review would not be readily exercised. It seemed to us that the position was, instead, that this power would only rarely be exercised. We noted that during the hearing in *Yong Vui Kong*, Chan CJ appeared to contemplate that in order to warrant the exercise of this power, the evidence in question had to be "sufficient" to show there had been a "miscarriage of justice" (at [15]; also reproduced above at [31]).

Can recantation evidence be relied on as a basis for reopening a concluded criminal appeal?

35 The Applicant based the whole of the Present Motion on the premise that the evidence sought to be admitted – *viz*, the new narrative – was new. In one sense, it was. Before the filing of the Present Motion, Pausi had never given evidence exonerating the Applicant. For that reason, the handwritten statement by Pausi, his affidavit of 8 October 2015, and the other material contained in the new narrative had plainly never been considered either at first instance or on appeal. However, in another sense, Pausi's recantation evidence, which formed the core of the new narrative, was not "new" because it came from a witness who had *already* taken the stand and given his

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evidence of what had taken place at the material time. The only difference was that this witness now sought to resile from what he had previously said and to give an alternative account of the events. Put more precisely, the *content* of Pausi's recantation evidence was new, but the *source* of the information was not. This gave rise to the following question: could the evidence of a recanting witness *ever* form the subject matter of an application to reopen a concluded criminal appeal?

36 This court in *Yong Vui Kong* did not appear to think so. It commented that *Abdullah* could not be considered "a *true case* of new evidence having come to light after judgment" [emphasis added] (at [12]). In order to understand why this court made that remark, the facts of *Abdullah* must be examined more closely. During the investigations in that case, Rashid had given three statements implicating Abdullah in the act of drug trafficking, and he had repeated the contents of those statements in his oral testimony at the trial. Based on this and other evidence, Abdullah was convicted. On appeal, Abdullah argued that the trial court had erred in relying on Rashid's evidence to convict him since the court, having rejected Rashid's defence, ought not to have placed *any* weight on those portions of Rashid's testimony which incriminated him (see *Abdul Rashid bin Mohamed and another v Public Prosecutor* [1993] 3 SLR(R) 656 ("*Abdul Rashid*") at [23]).

37 Abdullah's argument, which was based on what is historically known as the doctrine of *falsus in uno, falsus in omnibus* ("false in one thing, false in everything"), was rejected by the Court of Appeal. The court held that there was no rule of law that if a witness lied in one respect, his evidence must be rejected *in toto*. The court observed that the trial judge had been alive to the dangers of relying on Rashid's testimony to convict Abdullah (see *Abdul Rashid* at [44]), but had been satisfied, after comparing Rashid's account of

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the events with the rest of the direct and circumstantial evidence, that Rashid had been telling the truth when he implicated Abdullah but exonerated Awang. After examining the evidence itself, the Court of Appeal likewise held that Abdullah's guilt had been proved beyond a reasonable doubt (at [59]).

38 When viewed in this light, Abdullah's subsequent application (in *Abdullah*) for leave to admit Rashid's recantation evidence as fresh evidence was an exercise in futility. Even if the Court of Appeal had allowed Abdullah's application and received the evidence in question as fresh evidence, the outcome of his appeal (in *Abdul Rashid*) would not have changed. The court which heard Abdullah's appeal had already held that there was sufficient evidence, quite apart from Rashid's (original) testimony implicating him, to sustain his conviction. Viewed in this light, Rashid's retraction did not change anything because it did not offer any alternative explanation for the rest of the evidence which pointed to Abdullah's involvement in the drug transaction concerned and which had already been held to be sufficient to sustain his conviction for drug trafficking.

39 In the circumstances, we could well understand what Chan CJ meant when he stated in *Yong Vui Kong* that *Abdullah* was "not a true case of new evidence having come to light after judgment" (at [12]). *Abdullah* was far removed from a case where the fresh evidence sought to be admitted raised any doubts about the correctness of the outcome which had been reached on appeal – *ie*, it fell far short of showing that there had been a "miscarriage of justice". It was therefore "unsurprising that the Court of Appeal was *not receptive* to [Abdullah's] application" [emphasis added] (see likewise *Yong Vui Kong* at [12]). However, we did not think that Chan CJ meant to say that recantation evidence could *never* form the basis of an application to reopen a concluded criminal appeal.

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40 We thought that this point was brought out in the contrast which Chan CJ drew between what he called "a true case of new evidence having come to light after judgment" on the one hand and "a case where the principal convicted offender apparently changed his mind in a last-minute attempt to help his accomplice" on the other (see *Yong Vui Kong* at [12]; also reproduced above at [31]). The real distinction between these two categories of cases, it seemed to us, lay in the ***reliability*** of the "new evidence" in question. This much was clear at [13]–[14] of *Yong Vui Kong*, where Chan CJ gave an example of what he had in mind by "a true case of new evidence having come to light after judgment" when he described that scenario as "an actual situation where new evidence is discovered":

> 13 … [W]e do not think that these cases should be accorded a status of finality and immutability such that a future court should not reconsider the rationale of those decisions *where we have* ***an actual situation where new evidence is discovered****,* eg*, DNA or other evidence, which shows, or may show, that* ***the conviction is demonstrably wrong in law*** *or that* ***there is a reasonable doubt that the conviction was wrong****.* In such a case, this court will have to consider or reconsider whether it has any inherent jurisdiction to review its own decisions in order to correct any miscarriage of justice.
>
> 14 It is not uncommon in other jurisdictions, such as the United States, for ***new exculpatory evidence*** to be discovered, *eg*, DNA evidence *which can show* ***almost conclusively*** *that the blood found at the scene of the crime or on the body of the deceased (in murder cases) was not that of the accused.* There may be *other types of evidence which could have the same effect,* eg*, new documentary evidence which was not discovered during the trial or the appeal.* In such cases, it would be in the interest of justice that the court should have the power to correct the mistake, rather than rely on the Executive to correct what is essentially an error in the judicial process. …
>
> [emphasis added in italics and bold italics]

41 When viewed in this light, it seemed to us that the objection to recantation evidence was not so much the fact that the evidence was not "new"

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per se, but that it was usually *insufficient* to establish that a miscarriage of justice had been occasioned. There would usually be two reasons for this. The first is the problem of adequacy. Oftentimes, the recantation of one witness alone cannot change the outcome, particularly where the accused person's conviction is sustained on the back of multiple threads of evidence. This (as we have already noted) was the situation in *Abdullah*. The second is the problem of reliability. By its *very nature*, recantation evidence is ***inherently suspect***. As the Virginia Supreme Court put it in *Alex J Carpitcher v Commonwealth of Virginia* 641 SE2d 486 (2007) at 492, "recantation evidence is generally questionable in character and is widely viewed by courts with suspicion because of the obvious opportunities and temptations for fraud". ***This is an extremely important point, and the courts must be astute to dismiss bare applications which in fact constitute an abuse of the process of the court*** (see also below at [47]).

42 In the final analysis, much will turn on *the facts* of each case. It depends on *who* is recanting (*eg*, a co-accused person, a prosecution witness, *etc*) and for *what reason*. This also appears to be the position taken in Australia, where the evidence of a recanting witness may be received as "fresh evidence", although with the very important caveat that anxious scrutiny must be given to such evidence because of the dangers associated with its use (see, *eg*, the decision of the Full Court of the Supreme Court of South Australia in *R v Keogh (No 2)* [2014] SASCFC 136 at [164]–[166] and the decision of the Court of Appeal of the Supreme Court of Victoria in *The Queen v AHK* [2001] VSCA 220 at [9]). In the light of the above analysis, we were prepared (in fairness to the Applicant) to assume that the new narrative constituted "new" evidence and could, in principle, be admitted into evidence *provided that* it was "sufficient" to demonstrate that there had been a "miscarriage of justice".

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An evaluation of the new narrative

43 After carefully considering the facts and the circumstances in their totality, we came to the view that the new narrative did *not* sufficiently establish that a miscarriage of justice had been occasioned. We propose to explain our decision in two (related) parts. First, we shall explain why we thought the new narrative was unreliable and should not be admitted into evidence. Second, we shall explain why, even if the new narrative were admitted, it would not have been adequate to demonstrate that the Applicant had been wrongly convicted. Before doing so, however, we shall first outline the courts' general approach to the admission of recantation evidence since the new narrative stemmed, in essence, from Pausi's retraction (via, to begin with, the handwritten statement) of the evidence which he had earlier given at the trial.

The general approach to the admission of recantation evidence

44 As a general rule of thumb, the evidence given by a recanting witness cannot, without more, be regarded as sufficiently reliable to be admitted into evidence unless it is substantiated by other objective evidence. It is worth noting that the examples given by Chan CJ in *Yong Vui Kong* of new material emerging post-appeal related to material of an *objective* character: *eg*, DNA evidence, documentary evidence, or a new line of authorities (at [13]; also reproduced above at [40]). Evidence from witnesses (particularly co-accused persons) who have already taken the stand and who now seek to resile from their earlier testimony would almost never pass muster if it merely consists of only a bare denial or a stark disavowal of the earlier testimony. It seemed to us that the court would have to be satisfied that there was some "good reason" why the witness might have lied earlier on before it could conclude that the evidence concerned should be admitted (see *Ladd* at 748). Such "good reason"

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might comprise, for example, convincing evidence that the witness had been suborned, or some other cogent and compelling narrative for the witness's about-turn in testimony.

45 In this regard, we found the Singapore High Court decision of *Low Khoon Hai v Public Prosecutor* [1996] 1 SLR(R) 958 ("*Low Khoon Hai*"), which the Respondent cited, instructive. The appellant in that case was charged with abetting robbery with hurt by conspiracy. His defence at the trial was one of bare denial – he claimed that he had not been involved in the offence at all. He was convicted based on the evidence of his accomplice, Teh, who had already been convicted and sentenced by then (Teh had earlier pleaded guilty to the charge against him). The trial judge accepted Teh's evidence and found that his evidence on the appellant's involvement was in no way self-serving. After the appellant's conviction, Teh purportedly gave a handwritten note to the appellant confessing that he had lied and fabricated evidence at the appellant's trial. The appellant filed an appeal and applied for leave to adduce fresh evidence (in the form of Teh's change in evidence). Yong Pung How CJ dismissed the application as well as the appeal.

46 In explaining the reasons for his decision, Yong CJ began by noting that as a general rule, a "confessed liar" could not be regarded as a credible witness (at [18]). In particular, the court would have to exercise additional caution if the witness in question had been involved in the offence and had taken the stand as a prosecution witness. It would be "all too easy", Yong CJ observed, for a convicted criminal who had testified against his accomplice to turn around after the latter's conviction and admit to having lied at the trial in an attempt to get the latter off on appeal (likewise at [18]). The "whole matrix of evidence" must be considered in order to determine whether the evidence sought to be adduced was credible (also at [18]). On the facts, Yong CJ held

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that there were three points which cast serious doubts on the credibility of Teh's retraction:

(a) First, Teh had implicated the appellant from the outset, and the statement of facts which he had admitted to had likewise incriminated the appellant. Teh had been represented at all times, and before pleading guilty, he had instructed his counsel to make representations to the Prosecution to the effect that he would cooperate fully by giving full particulars of the offence if the charge against him were reduced. In addition, Teh's counsel had been present when he pleaded guilty in court, and he had been fully aware of the consequences of his plea. These factors flew in the face of the appellant's assertion that Teh had been coerced by the police into implicating him (at [19]).

(b) Second, the allegations that Teh had been suborned were weak. There was no convincing reason why the police might have wanted to frame the appellant, and the appellant's argument that undue pressure had been placed on Teh to falsely implicate him was convincingly refuted by police officers who swore affidavits averring that nothing of that sort had taken place (at [20]).

(c) Third, Teh's account of the appellant's involvement in the offence was of such considerable detail that it could not have been made up. Teh had, on six different occasions and to three different police officers, consistently maintained his evidence that the appellant had been involved. This cohered with the evidence which Teh gave at the trial. Teh was also cross-examined at great length during the trial, and his evidence was scrutinised by the trial judge, who was convinced beyond a reasonable doubt that his testimony was true (at [20]–[21]).

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47 Even though *Low Khoon Hai* was a case concerning a witness who tried to change his evidence *on* appeal, we think that the principles articulated there would apply, *a fortiori*, in a case where the change in evidence occurs *after* the appeal has been heard and concluded. We think it is of the first importance to reiterate the critical point, made earlier at [41] above, that the courts must be astute to dismiss bare applications which are based on the unreliable testimony of witnesses who seek to retract their earlier testimony. Such bare applications, far from being sufficient to establish a miscarriage of justice, would usually demonstrate the *precise opposite*. They constitute opportunistic attempts to reverse convictions which undermine the principle of finality, and therefore constitute an abuse of the process of the court.

The new narrative was unreliable

48 Applying the above principles to the Present Motion, we found that there were four reasons why the new narrative ought to be *rejected* as being *unreliable*.

49 First, we did not think that Pausi had given a sufficiently good reason as to why he had (so he claimed) lied at first instance. Pausi's evidence *before* ***and*** *during* the trial was clear and consistent – he had been told by Bobby to collect a sum of money from the Applicant, and he had done as instructed. We could see no cogent or reasonable explanation for Pausi to have lied about the Applicant's involvement in the offence. Pausi claimed that he had lied about receiving a sum of money from the Applicant so as "to create a defence which could exculpate [himself]". But, this did not explain why Pausi named *the Applicant* as the one from whom he had collected the money. For Pausi's purposes, it would have sufficed for him to name *any* of the arrested persons, but he chose, instead, to name the *only* person who, during the trial, had

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explicitly *denied* having been at the scene of the offence: *the Applicant*. Indeed, as the Judge aptly observed at [6] of *Roslan (trial)*, naming the Applicant as the person from whom he had received the sum of money actually *weakened* Pausi's defence.

50 We also did not find Pausi's explanation for waiting for more than two years before deciding to "come clean" persuasive. Pausi's appeal against his conviction was dismissed in March 2011. If his explanation were to be believed – *ie*, he decided to come clean because his sentence of death had been upheld by the appellate court and he had nothing to lose – then it would beg the question: why did he not do so earlier? His explanation that he had waited for so long because he "did not know who to approach" cut very little ice with us. For one, he had been represented throughout this period and could easily have consulted his solicitor on this matter. Further, as noted above at [14(b)], Pausi sent a cryptic letter to the CNB (addressed to ASP Seow) dated 13 June 2014 in which he stated that he had "something important" to share with the CNB. It was clear that he knew how to get in touch with the CNB and could have written to the CNB before May 2013 if he were truly stricken with guilt at having falsely accused the Applicant of a crime which the latter had not committed. Pausi did not, however, do so.

51 Second, we saw clear evidence of collusion between the Applicant and Pausi. As noted above, the Applicant gave *three different* accounts as to how he came to know about Pausi's plan to "come clean". In his first affidavit, he claimed to have been approached by Pausi and informed of the latter's plan "on [*sic*] or about May 2013" while they were both in a yard at Changi Prison. In his second affidavit, he claimed to have been told "sometime in December 2012 or January 2013" that Pausi intended to tell the truth, but that it was only "sometime in February or March 2013" that further details of the conspiracy

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were revealed to him. In his third affidavit, he changed his account again and claimed to have been told by Pausi that he "had revealed the truth to a CNB officer … sometime [in] March 2013". As is clear from the foregoing, all of the Applicant's accounts were different from each other, but the account in the Applicant's third and last affidavit (which was affirmed on 8 October 2015) matched neatly as well as precisely with the evidence given by *Pausi* in his affidavit of the same date. In the circumstances, it seemed to us clear that Pausi and the Applicant had collaborated with each other in the preparation of their respective affidavits.

52 Even more troubling than this, we thought, were the circumstances surrounding the recording of the handwritten statement, which we found extremely suspicious. As we noted above, the court was first notified on 30 April 2014, during a PTC before an assistant registrar, of the existence of new evidence which might potentially exonerate the Applicant. On that occasion, the Applicant's counsel, Mr Singh, informed the court that he had "*just*" [emphasis added] been informed of the existence of this new evidence. The following exchange was recorded in the notes of arguments recorded by the assistant registrar:

> [Mr Singh]: New evidence has emerged in the course of taking instructions which would tend to exonerate the [Applicant]. We will soon be filing a criminal revision. Asking for 3 to 4 weeks to complete instructions.
>
> …
>
> … [T]he new evidence is that [the Applicant] was on the day in question at the scene when the transaction took place and his purpose of going there was to accompany [Norzainy] who promised to give him some drugs for his consumption and he was never a part of the plan in relation to the transaction of the large

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> quantity of drugs, he was never part of that plan. And this is supported by Pausi …
>
> DPP: Has this been communicated to the investigating officer?
>
> [Mr Singh]: No, I have *just* obtained these instructions. If the prosecution wishes, I can do so by way of representations. But I believe the [Applicant] has informed the investigating officer of the latest developments.
>
> …
>
> [emphasis added]

53 In his first affidavit, the Applicant deposed that he had informed his solicitor, Mr Singh, of Pausi's intention to give a statement exonerating him of guilt. Pursuant to that, Mr Singh had, with the permission of Mr Chung, Pausi's solicitor, interviewed Pausi and recorded the handwritten statement. According to the handwritten statement, Mr Singh was the one who had assisted in interpreting Pausi's evidence (in both English and Malay) on 16 May 2013; further, he was the person to whom the handwritten statement was given after it had been recorded. Thus, according to both the Applicant's and Pausi's accounts of the events, Mr Singh would have been in possession of the handwritten statement *as at 16 May 2013*. In the circumstances, we struggled to understand how it could be the case that Mr Singh had only "*just* obtained these instructions [regarding the new evidence which might potentially exonerate the Applicant]" [emphasis added] shortly before the PTC on 30 April 2014. Whatever the reason for that might have been (and we did not wish to speculate, since we did not have the benefit of receiving full evidence on this matter), it seemed to us that this cast a pall over the veracity of the new narrative put forward by the Applicant.

54 Third, we found the Applicant's conspicuous delay in filing the Present Motion troubling. This motion was filed on 30 January 2015, *more than one*

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and a half years after the handwritten statement was purportedly recorded on 16 May 2013. No reasonable explanation was given for this delay. The Applicant's explanation – *viz*, that he "was waiting for the CNB to do something about this new evidence" – was not convincing in the slightest. Given the stakes involved, it would be reasonable to expect that the Applicant would have been anxious for the CNB to follow up on Pausi's recantation evidence, and would have instructed his counsel to take the necessary measures to move things along. To that end, we note that there were no fewer than *eight* PTCs from 29 May 2013 (the date of the first PTC held after the handwritten statement was allegedly recorded) to 30 April 2014 (when the Applicant first informed the court of the existence of new evidence), but there was *absolutely no* reference to the existence of the handwritten statement at any of these PTCs.

55 Finally, we found that many aspects of the new narrative were contradicted by the evidence of the investigating officers who had the conduct of this matter. ASP Seow categorically denied ever having been told by Pausi of a conspiracy to falsely implicate the Applicant. In particular, he stated that Pausi "did not, in any way whatsoever," inform him of any such conspiracy when he interviewed Pausi on 1 March 2013 (see also [26] above). Likewise, IO Chan deposed that the Applicant had not told him of the existence of any such conspiracy when he interviewed the Applicant on 18 January 2013. Both ASP Seow and IO Chan categorically stated that if they had been told anything of that nature, they would have recorded it down. We accepted their explanation. We saw no reason why either ASP Seow or IO Chan would have had any reason to lie about this.

56 In our judgment, therefore, the new narrative fell *far short* of constituting sufficiently reliable evidence. Indeed, the objective evidence

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suggested *the opposite*. It was therefore clear that the Present Motion failed *in limine* because we would have rejected the application for leave to admit the new narrative on the ground of its unreliability alone. However, for completeness, we went on to consider whether the contents of the new narrative – even if admitted into evidence – would have been adequate to show that the Applicant had been wrongly convicted.

The new narrative did not adequately establish that the Applicant's conviction was wrong

57 As a starting point, we note that this was *not* a case in which the Applicant's conviction was secured *purely* on the back of Pausi's conviction (unlike the conviction of the appellant in *Low Khoon Hai*). Instead, the evidence of all the actors in the transaction – Pausi, Norzainy, Nuradaha, and Zamri – cohered to present a convincing narrative of the Applicant's guilt. A brief précis of the evidence led at the trial will suffice to demonstrate this. In order to appreciate the evidence, two points should be noted. First, the Applicant was also known by a number of sobriquets, including "Lan", "C-lak", "Celak", "Lan Celak", and "Boy Gemuk". Second, there were three vehicles involved in the transaction (see *Roslan (trial)* at [2]): (a) a gold Chevrolet in which Zamri and Nuradaha were seated; (b) a blue Nissan in which Norzainy and the Applicant were seated; and (c) a green Perdana driven by Pausi.

58 During the trial, the following points emerged in evidence:

(a) Nuradaha and Zamri testified that the Applicant had directed them to follow him to Marsiling MRT Station, and that they had later followed the Nissan (the car in which the Applicant had been travelling) to the car park in Choa Chu Kang. Norzainy similarly stated

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during the hearing that "Boy Gemuk" (whom the Judge concluded was a reference to the Applicant: see [60(a)] below) had directed him to drive the Nissan to Marsiling MRT Station and then to the car park in Choa Chu Kang. Likewise, Pausi stated that the Applicant had instructed him to follow the Nissan from Marsiling MRT Station to a car park in Choa Chu Kang, and that he had complied because he wanted to "collect the money" from the Applicant.

(b) Nuradaha testified that he had seen the Applicant having a conversation with Pausi. Zamri stated that he had seen the Applicant and Nuradaha walking towards the Perdana (the car driven by Pausi). When Pausi took the stand, he explained that the Applicant had given him a sum of money (which he valued at $3,000).

(c) Nuradaha testified that he had retrieved a paper bag from the rear seat of the Perdana and had carried it back to the Chevrolet (the car in which Nuradaha had been travelling) on the Applicant's instructions. Thereafter, he stated, the Applicant had instructed him to deliver the paper bag (which he later examined and noted was filled with drugs) to one "Arab" at French Road. When Zamri took the stand, he confirmed this aspect of Nuradaha's evidence. He further testified that Nuradaha had informed him that the Applicant had given instructions that they were to drive to French Road.

59 When we considered the factual matrix in its entirety, it was clear to us that the case against the Applicant did not hang on a single thread, but was instead the product of an interlocking lattice of testimonies which revealed that the Applicant was the central figure in the drug transaction in question. He directed the actions of the others involved and orchestrated all its moving

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parts. What was more, we were also of the view that the accounts given by Pausi, Norzainy, Nuradaha, and Zamri were too detailed and too consistent to have been fabricated. It would have been difficult enough for just one or two of them to have done so, but for all *four* of them to have done so, and for it to have been done in the manner alleged by Pausi – *ie*, that Kimo had merely told the four of them to push the blame to the Applicant *without* giving specific instructions as to *how* they should tailor their evidence (see [24] above) – was simply incredible. In our judgment, the only possible inference we could draw from the evidence was that Pausi, Norzainy, Nuradaha, and Zamri were telling the truth that the Applicant had not only been present at the time of the drug transaction, but had also been intimately involved.

60 Furthermore, the notion that there was a "conspiracy" to falsely implicate the Applicant – which lay at the heart of the new narrative – simply could not be believed for one simple reason. Far from trying to implicate the Applicant, it was clear that three of the arrested persons mentioned in the preceding paragraph (*viz*, Norzainy, Nuradaha, and Zamri) had in fact sought, in their own separate ways, to ***absolve*** the Applicant from responsibility. This can be seen from the following aspects of their evidence:

(a) During the trial, Norzainy testified that it was one "Boy Gemuk" (and not the Applicant) who was involved in the drug transaction in question. As the Judge observed, the role played by "Boy Gemuk" in Norzainy's narrative was identical to that played by the Applicant in the accounts given by the other arrested persons (see *Roslan (trial)* at [6]). It was clear, therefore, that Norzainy had wanted to give an accurate account of the events without naming the Applicant.

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(b) On his part, Nuradaha testified that the Applicant was "not involved in this drug case" because he "did not tell [Nuradaha] anything", but only asked him to retrieve a package from Pausi's car, without explicitly identifying the contents of the package as drugs.

(c) As for Zamri, he testified during the trial that the Applicant had only informed him that he was trading in contraband cigarettes.

In fact, as the Respondent pointed out, the Prosecution even applied to cross-examine Nuradaha and Norzainy (only the latter application was granted) because it was of the view that they had turned on the stand and were to be treated as hostile witnesses.

61 Against this background, it was clear to us that Pausi had attempted to concoct a "conspiracy" where none really existed in an attempt to explain away the evidence against the Applicant. However, this explanation was wholly unconvincing and flew in the face of the objective evidence. The new narrative, alone, could not provide an adequate explanation for the abundance of evidence which pointed towards the Applicant's guilt. *Even if* the new narrative were admitted, there would still be sufficient material to demonstrate, beyond a reasonable doubt, that the Applicant was guilty of the charges of which he had been convicted.

Conclusion

62 For the reasons set out above, we dismissed the Present Motion.

A coda – the principles set out in *Kho Jabing*

63 As noted in the introduction to these grounds of decision (see [3] above), we are of the view that our decision in this matter is entirely congruent

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with the principles set out in *Kho Jabing*. At [44] of that case, this court affirmed that the general test enunciated earlier in *Yong Vui Kong – viz*, that there must be "sufficient material on which the court can say that there has been a miscarriage of justice" – should be the touchstone for the exercise of this court's power of review. The court discussed the constituent parts of this test in great detail, amplifying and clarifying the requirements of each part. Specifically, in commenting on the requirement to produce "sufficient material", the court said (see *Kho Jabing* at [77(d)]):

> … The material put forward must possess two signal features in order to be considered "sufficient": (i) it must be "new" – *ie*, it must not previously have been canvassed at any stage of the proceedings prior to the filing of the application for review, and it must be something which could not, even with reasonable diligence, have been adduced in court earlier; and (ii) it must be "compelling" – *ie*, it must be reliable, substantial, powerfully probative, and therefore, capable of showing almost conclusively that there has been a miscarriage of justice.

64 Under the test set out in *Kho Jabing*, the material put forward in support of an application for a review of a concluded criminal appeal is "new" if it satisfies two cumulative conditions: (a) it has not hitherto been considered at any stage of the proceedings prior to the filing of the application for review; and (b) it could not, even with reasonable diligence, have been adduced in court earlier. Measured against these two indices, the handwritten statement would pass muster since it had (allegedly) only been recorded on 16 May 2013, and therefore had not been considered either at the Applicant's trial or during his appeal; nor could it have been adduced at either of these two stages since it only emerged after the Applicant's appeal had been heard and dismissed. This is consistent with how we proceeded in this case – as noted in our analysis above (at, *inter alia*, [42]), we were prepared to give the Applicant the benefit of the doubt by proceeding on the assumption that the "fresh/new evidence" which he proffered (*viz*, the new narrative) was "new".

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65 However, we did *not* find the new narrative reliable, nor did we find it adequate to establish that the Applicant had been wrongly convicted. It was therefore not "compelling" in the *Kho Jabing*-sense since it was not "reliable, substantial, powerfully probative, and therefore, capable of showing almost conclusively that there has been a miscarriage of justice" (at [77(d)]). In fact, we found that the new narrative pointed in precisely the *opposite* direction – if anything, it succeeded in confirming the previous courts' assessments that the Applicant was guilty of the charges brought against him.

Chao Hick Tin	Andrew Phang Boon Leong	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge

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