Ascertaining the delicate balance between justice and finality: *Public Prosecutor v Pang Chie Wei and others* [2021] SGCA 101

I. Executive summary

Finality and justice are twin pillars of the criminal justice system. A presumption of finality attaches to every judgment rendered by the court, lending credence to the notion that justice has been done and may be treated as having been done. However, notwithstanding the conclusion of a case, applicants may attempt to have their case re-adjudicated based on subsequent changes to the law. Such applications must be carefully scrunitised. At the same time, finality should not be a law unto itself such that miscarriages of justice go unremedied.

In *Public Prosecutor v Pang Chie Wei and others* [2021] SGCA 101 ("***Pang Chie Wei***"), the Court of Appeal ("**CA**") outlined the avenues and parameters by which a concluded criminal matter can be reopened for readjudication.

II. Material facts

The dispute in question concerned the Prosecution's "dual-charging practice" ("**DCP**"). Previously, where a single compressed block of cannabis-related plant material was certified by the Health Sciences Authority as containing (a) cannabis and (b) fragmented vegetable matter containing cannabinol ("**CBN**") and tetrahydrocannabinol ("**THC**"), the Prosecution would consider preferring both (a) a charge in respect of the portion certified to consist purely of cannabis, and (b) a charge in respect of the portion consisting of fragmented vegetable matter that had been found to contain CBN and THC. However, the DCP has been rendered impermissible following *Saravanan Chandraram v Public Prosecutor and another matter* [2020] 2 SLR 95 ("***Saravanan***"). In *Saravanan*, the CA held that in order to establish a drug importation charge, the Prosecution must prove that the accused person knew the nature of the drugs in question, and establish accurately the relevant drug involved at the time of the offence. Since these difficulties are insurmountable where drugs consist of cannabis-related plant material containing *both* cannabis and cannabis mixture, the DCP was held to be indefensible, and was disallowed.

In light of *Saravanan*, the Prosecution filed four applications for the cannabis mixture charges that had been filed pursuant to the DCP against the defendants in this case to be set aside, and consequently for the defendants' sentences to be reviewed. However, the Prosecution eventually withdrew all four applications, stating that *Saravanan* did not automatically apply to the defendants as their cases pre-dated it.

The CA granted leave for the withdrawals, holding that the Prosecution, in exercising its discretion, was entitled to so decide. Nonetheless, the CA went on to consider the applicable threshold for reopening a concluded decision in the light of a subsequent change in the law.

III. Issues

The CA considered three issues: (a) the avenues by which a court may revisit an earlier decision following a change in the law, (b) the applicable threshold for the court's exercise of its statutory or inherent power to reopen concluded matters, and (c) whether substantial injustice would likely be established based on the changes in the law occasioned by *Saravanan*.

A. Avenues by which a court may revisit an earlier decision following a change in the law

There are three avenues by which courts may revisit earlier concluded decisions. However, these avenues would only be successfully invoked in exceptional and deserving cases. Final judgments, particularly those issued by an appellate court, would not be readily unsettled.

(i) Leave to appeal out of time

Where a decision has not previously been appealed against, an appellate court has the power to grant an offender leave to appeal even after the period for appeal has lapsed. As the court's appellate jurisdiction had already been exhausted, this avenue of recourse was not open to the defendants. The CA nevertheless reviewed the law and distilled the following general principles:

- The mere fact that the law has changed, *without more*, will not justify the court granting leave to appeal out of time, even if the change in the law corrected misconceptions about the meaning of a statute or declared the previous law to be erroneous.
- An applicant who relies on a change in the law in seeking leave to appeal out of time must show that he has suffered substantial injustice. If the application is based on nothing other than a change in the law but the applicant's conviction was properly made at the time, the court is unlikely to find that substantial injustice has arisen.
- A key consideration when evaluating if an applicant has suffered substantial injustice is whether the change in the law would have made a difference to his case.
- The fact that an applicant could have been charged with or convicted of a different offence is a factor that strongly militates against a finding of substantial injustice, though refusal of leave is not limited such situations.
- Applicants will be expected to act promptly and without undue delay in seeking leave to appeal out of time following a change in the law. Additionally, the court may be more circumspect about making a finding of substantial injustice if the applicant pleaded guilty or made a conscious decision not to appeal.
- The court will also consider the extent to which the law was changed. If the change in the law was far-reaching such that granting an applicant leave to appeal out of time would open the floodgates to similar applications by many other similarly situated defendants, the court may be less inclined to grant an extension of time.

The CA then analysed *Public Prosecutor v Ong Say Kiat* [2017] 5 SLR 946 ("***Ong Say Kiat***") where leave to appeal out of time was granted. In *Ong Say Kiat*, the accused had been sentenced in 2014 to five years' corrective training for the offence of "theft in dwelling with common intention". However, in line with another case *Sim Yeow Kee v PP and another appeal* [2016] 5 SLR 936, the Prosecution filed a criminal revision for the sentence imposed to be set aside, as five years' corrective training appeared an unduly disproportionate sentence in comparison with the likely term of regular imprisonment that would otherwise have been imposed. This was notwithstanding that the imposition of corrective training was justified based on the law during Ong's sentencing.

The High Court ("**HC**") noted that the factual and legal substratum that underlay the new sentencing approach to corrective training (as explained in *Sim Yeow Kee*) had already existed at the time of Ong's sentencing. However, this was not appreciated by the sentencing court. The impetus for the granting of leave to appeal out of time was that Ong's sentence had been imposed based on a fundamental misapprehension of the law. The injustice inflicted on Ong was "doubtlessly substantial" as he had already spent over two and a half years in prison, when the maximum imprisonment term for his offence would only have been nine months. The court in *Ong Say Kiat* thus granted leave for Ong to appeal out of time, allowed the appeal and sentenced Ong to a term of imprisonment of the time already served. The CA also observed that where substantial injustice featured, it would be irrelevant whether that injustice occurred a short time or a long time ago.

(ii) The CA's statutory and inherent power to reopen concluded criminal appeals

When a case has already been heard and disposed of by an appellate court, a dissatisfied litigant may have recourse to either the CA's inherent power of review, or the appellate court's statutory power of review. This power of review is based in section 394I of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("**CPC**").

(a) The court's inherent power of review

The CA noted that following the requirements laid down in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("***Kho Jabing***"), a successful applicant must satisfy the court that there was sufficient material on which it could concluded that there had been a miscarriage of justice. Sufficiency entails that the material must be "new" and "compelling". Arguments would be deemed "new" if they:

- had not been considered at an earlier stage of the proceedings; and
- were material which could not, even with reasonable diligence, have been presented to the court before the filing of the review application.

Typically, new arguments would only constitute the basis for a review application if they were made following a change in the law. Further, "compelling" material refers to material that are "reliable, substantial and powerfully probative" such that they could show "almost conclusively" that there had been a "miscarriage of justice". "Substantial" and "powerfully probative" material are logically relevant to the precise issues in dispute.

The CA observed that the finding of a "miscarriage of justice" would generally be limited to the following situations:

- First, the court might find that a decision on conviction or sentence had been shown to be "demonstrably wrong".
    - In relation to a decision on *conviction*, the applicant had to show that it was apparent, based on the evidence tendered in support of the application alone, that there was a powerful probability that the decision was wrong.
    - In relation to a decision on *sentence*, the applicant had to show that the decision was based on some fundamental misapprehension of the law and was thus blatantly wrong on the face of the record.
- Second, the court might find that the impugned decision was tainted by fraud or a breach of natural justice, such that the integrity of the judicial process had been compromised.

(b) The court's statutory power of review

Section 394I of the CPC sets out the procedure by which an appellate court may review its earlier decision. This power may be exercised by the General Division of the High Court and the CA. Parliament intended section 394J of the CPC to be a codification of several considered CA decisions involving the balancing the interests of finality against the need to prevent a miscarriage of justice.

The CA made four observations on the court's statutory power of review:

- Section 394J(1)(*b*) of the CPC makes it clear that an appellate court's statutory power of review does not affect its inherent power to review an earlier decision on its own motion (discussed in the next section).
- While an applicant may challenge the court's decision in a concluded criminal appeal by invoking either the court's statutory power of review under section 394I of the CPC or its inherent power, the substance of any such application is typically unaffected by the choice of remedial avenue. It is therefore unsurprising that the requirements under section 394J of the CPC mirror those laid down in *Kho Jabing*; indeed it would be somewhat arbitrary if the success of a review application were contingent on one's choice of remedial avenue.
- Although the substance of a review application remains the same regardless of which remedial avenue is utilized, the two avenues are not duplicative. An applicant may only make one review application under section 394I of the CPC in respect of any decision of an appellate court. This means that where "sufficient material" on which an appellate court may conclude that there has been a miscarriage of justice only emerges after a prior review application brought under section 394I of the CPC has been heard and dismissed, an applicant may have further recourse to the court's inherent power of review but not to its statutory power.
- Parliament had clearly contemplated that a subsequent change in the law could constitute the basis for a review application under section 394I of the CPC. This is made explicit in section

394J(4), which provides that any material consisting of legal arguments will only be "sufficient" within the meaning of section 394J(2) if, in addition to satisfying all the requirements set out in section 394J(3), it is based on "a change in the law that arise 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".

(iii) The CA's inherent power to review any matter on its own motion

It was noted that the CA has the power to review any matter on its own motion if so warranted. This power is a facet of the judicial power vested in the CA by Article 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). In the absence of a statutory provision which expressly states when the jurisdiction of the CA in a criminal appeal ends, there is no reason why the CA should circumscribe its own judicial power to preclude itself from reviewing any matter on its own motion.

However, the CA noted that courts should not be too eager to review matters on their own motion as their role is to adjudicate the disputes before them. Adopting an overly permissive approach towards review not only risks encroaching upon the territory of the Public Prosecutor, but also risks jeopardizing the courts' perceived legitimacy. That this power should not be lightly exercised is perhaps underscored by the fact that it has yet to be exercised by this court. Nonetheless, the CA left this discussion to a more suitable occasion in the future.

B. The applicable thresholds for the court's exercise of its statutory or inherent power to reopen concluded matters

After a detailed survey of English authorities, the CA held that an appellate court may only reopen an earlier decision when it has been presented with new material that gives rise to a powerful probability that substantial injustice has arisen in the criminal matter in respect of which the earlier decision was made. The same threshold applies whether the court is exercising its power pursuant to its inherent or statutory power of review. This test mirrors the test adopted when deciding whether to grant leave to appeal out of time. As for "change in the law" cases, the "new material" in question will likely take the form of new legal arguments based on changes in the law brought about by a judicial decision.

The uniform standard of "substantial injustice" would apply across reviews of sentences and convictions. In both cases, the starting point would be that the matter was adjudicated upon based on its merits, and correctly decided based on the law as it then stood.

The test of substantial injustice entails a two-stage inquiry. Not only must an injustice have arisen, but the injustice must also be substantial to warrant the court's exercise of its power of review.

(i) Stage 1 – An injustice may be said to have arisen in one of two ways:

- Where an applicant seeks to set aside his conviction, an injustice will only have arisen if the new material strikes at the soundness of the conviction in a fundamental way.
- Where an applicant seeks to challenge his sentence, an injustice will only have arisen if the new material shows that the earlier decision was based on a fundamental misapprehension of the law.

(a) Applications involving an applicant's conviction

An injustice will only have arisen if the new material strikes at the soundness of the conviction. The court's overarching consideration would be whether the change in the law would likely have made a difference to the outcome of the applicant's case.

New material that strikes at the soundness of a conviction in a fundamental way must give rise to a powerful probability that no offence had in fact been committed. Such new material will typically arise in the light of subsequent changes in the law as to the constituent elements of an offence and/or the proper interpretation of statutory provisions that generate criminal liability. The requirement that the new material must relate to the fundamental propriety of a conviction serves to sift out unmeritorious applications that seek to reopen matters based on subsequent changes in the law that are only tangentially relevant to the conviction.

Where an applicant successfully establishes a powerful probability that his conviction is unsound and no comparable offence has been committed, he will have established substantial injustice. Matters of procedural fairness (or criminal procedure) would not typically impugn the soundness of a conviction in the sense of establishing that an offence has not in fact been committed. They are more properly classified as potential breaches of natural justice. An applicant will likely be unable to demonstrate that such a change in the law would have yielded a different outcome, which is a critical element of the "substantial injustice" test.

Even in cases where it was subsequently found that substantial injustice has arisen following a change in the law, those cases would still have been correctly decided in accordance with the prevailing law as it was understood at the time. While a matter might have been properly decided in line with the then prevailing jurisprudence, the "substantial injustice" test engages considerations of prejudice to the applicant or the unconscionability of tying him to the old legal position.

The rigorous standard of substantial injustice accords due recognition to the fact that the impugned decision has already undergone at least two rounds of independent scrutiny – once by the court exercising original criminal jurisdiction and another by the appellate court. The requirement that the injustice be "substantial" also distinguishes the function of an appeal (the correction of error) from that of a review (the correction of miscarriages of justice).

(b) Applications involving an applicant's sentence

Where an applicant seeks to challenge his sentence, an injustice would have arisen only if the new material shows that the earlier decision was premised on a fundamental misapprehension of the law. The courts commonly lay down new sentencing frameworks. It would be alarming if every sentencing framework could unravel all previous sentencing decisions for the offence in question.

Any injustice (arising from a fundamental misapprehension of the law) will only be considered substantial if the said misapprehension had a significant bearing on the sentence imposed. Sentencing involves an exercise of discretion and potential adjustments to a sentence that area of marginal significance cannot justify the interference with the sentencing court's discretion. Given that an appellate court will only entertain an appeal against sentence where (among other things) the sentence is manifestly excessive or manifestly inadequate, the threshold for intervention by an appellate court in a review application cannot be any less stringent.

(ii) Stage 2 – An injustice may be said to be substantial under the following circumstances:

- An applicant may establish substantial injustice if the new material points to a powerful probability that his conviction is unsound and if the facts do not disclose any other offence of comparable gravity.
- Where the new material shows that the earlier decision was based on a fundamental misapprehension of the law, any resulting injustice will only be considered substantial if the said misapprehension had a significant bearing on the sentence imposed.
- A mere change in the law *without more* will not constitute sufficient material justifying either the grant of leave (under s 394H of the CPC) to make a review application or the exercise of the court's inherent power of review, even if the change in the law declared the previous legal

position to be wrong or rectified misconceptions about the meaning of a statute. A successful applicant would have to demonstrate that he has suffered substantial injustice.

(iii) General observations

Applicants of the view that a change in the law affords strong grounds for seeking a review of their convictions and/or sentences should act with all due urgency. An undue delay between the change in the law and filing of the review application would work against potential applicants, though the court would consider the length of time that passed from when the applicant ought reasonably to have known of the opportunity to seek a review and the reasons advanced to explain the delay. Generally, the greater the length of the delay, the more it can presumptively be said that the applicant has deliberately chosen not to challenge the earlier decision against him, and the more difficult it will likely be for him to establish substantial injustice. Where an applicant has, by willful and persistent inaction, assumed the risk of any prejudice that he may suffer, finality interests should assume priority.

The exacting criteria that must be fulfilled before an appellate court may review an earlier decision following a change in the law are intended to forestall endless re-litigation. The stringent requirements set out above cumulatively serve to ensure that only meritorious applications will be entertained. However, the possibility of error does not however mean that the courts should disregard the interests of certainty and repose. Those interests animate the strict requirements that must be met to establish substantial injustice.

C. Whether substantial injustice would likely be established based on the change in the law occasioned by Saravanan

The CA noted that it would be exceedingly rare for applicants to successfully establish substantial injustice arising from the change in the law occasioned by *Saravanan* and made several observations in this regard. First, in capital cases or cases in which the Prosecution has reduced the weight of the drugs stipulated in the charge to an amount falling just short of the capital threshold, the Prosecution's DCP will make little to no difference to the eventual sentence imposed. Where reviews of sentences are concerned, substantial injustice will only be established if it is shown that, among other things, the change in the law would have had a significant bearing on the sentenced imposed.

Second, where accused persons elect to plead guilty, the Prosecution will usually proceed on the cannabis charge and apply for the cannabis mixture charge (in respect of the same block(s) of cannabis-related plant material) to be taken into consideration ("**TIC**") for the purpose of sentencing. Where the proceeded charges and the TIC charges pertain to the same block(s) of cannabis-related plant material, courts tend not to accord the TIC charges significant aggravating weight.

Third, any application for the court to reopen a concluded decision pursuant to *Saravanan* essentially invites the court to assume that the position in *Saravanan* was already the applicable law when the case at hand was decided. However, any retrospective view of events must also take into account how the Prosecution might have acted had it appreciated the legal position in *Saravanan* at the material time. In majority of the cases pre-dating *Saravanan* where offenders had been charged pursuant to the Prosecution's DCP and so convicted, the Prosecution could have easily proceeded on charges other than the impugned cannabis mixture charges, leaving no appreciable difference in the aggregate sentence imposed.

IV. Lessons learnt

New developments to the law do not, in and of themselves, warrant overriding the finality of adjudication. *Pang Chie Wei* has made clear an applicant would have to meet the threshold of substantial injustice when applying for the court to reopen a previously concluded criminal matter. Though finality is not an absolute value that applicants with meritorious claims must unquestioningly be subject to, this exacting threshold is necessary to ensure that concluded judgments are only

unsettled with good legal basis. This threshold of substantial injustice is where the delicate balance between truth and finality properly lies.

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