

## Introducing new evidence after trial is over

\*Written by: Samuel Tay

### I. Introduction

1. Suppose that you have been charged for a crime. During trial, perhaps you tried to raise a defence or a mitigating circumstance (i.e., a fact that would help you receive a lower sentence). However, you failed due to insufficient evidence. But after the trial, you discovered evidence in your favour – perhaps some video footage that could help support a defence, or a psychiatric report which says that you have a recognised psychiatric condition which could give you a lighter sentence. What can you do?
2. In such cases, you may apply for the court to consider this new evidence. For criminal cases, a different set of requirements apply depending on whether you have already filed an appeal. This article will explain the different scenarios in criminal cases, and how to meet the respective requirements. Civil cases will be briefly considered at the end.

### II. If you have not yet appealed

3. In order to appeal against the decision based on new evidence, the appellate court (the court that hears the appeal) must first be satisfied that the new evidence fulfils these conditions:<sup>1</sup>
  - (a) Non-availability;
  - (b) Relevance; and
  - (c) Reliability

#### A. *Non-availability*

4. The condition of non-availability is satisfied “if the evidence could not have been obtained with reasonable diligence for use at the trial”.<sup>2</sup> However, the courts place considerably less emphasis on this condition for accused persons – in criminal cases,

---

<sup>1</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [16]; *Iskandar bin Rahmat v PP* [2017] 1 SLR 505 at [72].

<sup>2</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [16]

the appellate court generally admits additional fresh evidence so long as it fulfils the conditions of relevance and reliability.<sup>3</sup>

5. For example, suppose that a video-taker who had a video showing your innocence did not come forward until after the trial. Then, the condition of non-availability would be satisfied because you could not have obtained the video even with reasonable diligence.
6. But what happens if you could have obtained the evidence with reasonable diligence at the time of trial? For instance, you knew that someone had the footage, but you did not ask for it. Then the courts will consider “whether the evidence to be submitted was reasonably thought not to be necessary at trial”.<sup>4</sup> If so, the condition of non-availability remains satisfied.<sup>5</sup>
7. The standard of reasonableness differs according to the circumstances. For instance, accused persons with lawyers may be held to a higher standard of reasonableness *versus* those without. In *Soh Meiyun v PP*,<sup>6</sup> the accused appealed against her sentence for voluntarily causing hurt. She sought to lower her sentence by admitting a psychiatric report showing that she was suffering from major depressive disorder and obsessive-compulsive disorder when she committed the offences.<sup>7</sup> However, she possessed the medical report even prior to the trial.<sup>8</sup> If her lawyer had searched with reasonable diligence for mitigating circumstances, he would have asked about her state of mind and obtained the psychiatric report from her.<sup>9</sup> Hence, the report failed the condition of non-availability.<sup>10</sup>
8. However, if the accused has represented herself in person, it would be understandable that she did not appreciate that the report was necessary at trial to reduce her sentence. In this situation, the requirement of non-availability would be satisfied.<sup>11</sup>

---

\*Year 4 LL.B student, Singapore Management University, Yong Pung How School of Law.

<sup>3</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [16]; *Iskandar bin Rahmat v PP* [2017] 1 SLR 505 at [72]; *PP v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [48]–[49].

<sup>4</sup> *PP v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [68].

<sup>5</sup> *Ibid.*

<sup>6</sup> [2014] 3 SLR 299.

<sup>7</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [10].

<sup>8</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [17].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

9. Fortunately for Soh, the court allowed her to admit the evidence due to the lessened emphasis on the non-availability factor in criminal cases.<sup>12</sup>

**B. *Relevance and reliability***

10. The condition of relevance is satisfied if the evidence would “probably have an important influence on the result of the case”.<sup>13</sup> The evidence need not be capable of deciding the case if admitted.<sup>14</sup> For example, where an accused wants to prove a psychiatric disorder, a report supporting the disorder is relevant.
11. The condition of reliability is satisfied if the evidence is credible at first blush.<sup>15</sup> It does not need to be incontrovertible.<sup>16</sup> For example, the courts have admitted psychiatric reports during appeal as long as they were based on the psychiatrist’s professional and good faith assessment.<sup>17</sup> The reports were admitted even though there were some doubts as to its contents,<sup>18</sup> or even though they contained new information that was possibly provided as “mere afterthoughts”.<sup>19</sup> These features would instead affect the weight that the court places on the report.<sup>20</sup>

**III. If your appeal is already concluded**

12. One generally cannot reopen a decision of an appellate court.<sup>21</sup> Doing so goes against the principle of finality, which is that people “must be able to order their affairs according to the settled conviction that the last word of the court *is* the last word”.<sup>22</sup> However, for *criminal* cases, an accused person’s liberty, or sometimes even life, is at stake.<sup>23</sup> Therefore, the court have the power of criminal review – to correct a miscarriage of justice in *exceptional* cases.<sup>24</sup>

---

<sup>12</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [20].

<sup>13</sup> *Id.*, at [14].

<sup>14</sup> *Ibid.*

<sup>15</sup> *Soh Meiyun v PP* [2014] 3 SLR 299 at [14].

<sup>16</sup> *Ibid.*

<sup>17</sup> *Iskandar bin Rahmat v PP* [2017] 1 SLR 505 at [75].

<sup>18</sup> *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 at [29] and [56].

<sup>19</sup> *Iskandar bin Rahmat v PP* [2017] 1 SLR 505 at [75].

<sup>20</sup> *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 at [29];

<sup>21</sup> *Kho Jabing v PP* [2016] 3 SLR 135 at [9].

<sup>22</sup> *Id.*, at [1].

<sup>23</sup> *Id.*, at [2].

<sup>24</sup> *Ibid.*

13. For the courts to admit the new evidence, you must first apply for *leave* to make the review application.<sup>25</sup> This is a preliminary hearing for the court to weed out clearly unmeritorious applications.<sup>26</sup> Leave will only be granted if there is a legitimate basis for the review application.<sup>27</sup>
14. If leave is granted, you must then show that the evidence:
  - (a) has not been discussed, and could not have been produced in court earlier, even with reasonable diligence;<sup>28</sup> and
  - (b) is compelling.<sup>29</sup>
15. Under requirement (a), the courts in a review application will strictly enforce the non-availability requirement,<sup>30</sup> as set out above.<sup>31</sup> Therefore, if the accused person in *PP v Soh Meiyun* had only brought out her psychiatric report post-appeal, the court would not have considered the report at all.
16. For requirement (b), evidence is compelling when it is “reliable, substantial, powerfully probative, and capable of showing *almost conclusively* that there has been a miscarriage of justice”.<sup>32</sup> The threshold here is hence similar to, but more stringent, than the conditions of “relevance” and “reliability” which apply to criminal appeals. Thus far, no reported case has successfully reopened a criminal appeal.
17. Evidence is reliable when it has “a high degree of cogency, and is credible and trustworthy in respect of the matters to which it pertains”.<sup>33</sup> This threshold is usually satisfied only by objective evidence, such as DNA or documentary evidence.<sup>34</sup> Subjective evidence such as witness testimony will usually not meet this threshold,

---

<sup>25</sup> *Syed Suhail bin Syed Zin v PP* [2021] 1 SLR 159 (“*Syed Suhail*”) at [15]; Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”) s 394H.

<sup>26</sup> *Kreetharan s/o Kathireson v PP* [2020] 2 SLR 1175 at [17].

<sup>27</sup> *Ibid.*

<sup>28</sup> CPC, *supra* n. 26, ss 394J(3)(a) and (b). See also *Syed Suhail*, *supra* n. 26 at [17]–[18].

<sup>29</sup> CPC, *supra* n. 26, ss 394J(3)(c). See also *Syed Suhail*, *supra* n. 26 at [17]–[18].

<sup>30</sup> *Kho Jabing v PP* [2016] 3 SLR 135 at [56]–[57].

<sup>31</sup> See paragraphs 4 to 7 of this article.

<sup>32</sup> CPC, *supra* n. 26, ss 394J(3)(c), emphasis added. See also *Syed Suhail*, *supra* n. 26 at [17]–[18].

<sup>33</sup> *Kho Jabing v PP* [2016] 3 SLR 135 at [60].

<sup>34</sup> *Ibid.*

unless substantiated by other objective evidence.<sup>35</sup> An example of subjective evidence that may meet the threshold is where there is evidence to show that a witness had been bribed or coerced into lying at trial.<sup>36</sup>

18. Evidence is “substantial” and “powerfully probative” when it is logically relevant to the precise issues in dispute.<sup>37</sup> Just because evidence is highly reliable does not mean it is relevant.<sup>38</sup> For instance, a person’s fingerprint on an object shows almost conclusively that he had touched the object, but may be of little use in determining that he did not commit the crime.<sup>39</sup>
19. The last question is what “miscarriage of justice” means. If you are challenging the appellate court’s decision regarding your conviction, there is a miscarriage of justice if the new evidence, on its own, clearly shows a *powerful probability* that you were not guilty.<sup>40</sup> It is not sufficient for the evidence to merely raise a real possibility.<sup>41</sup> Hence, new evidence that merely suggests that expert evidence *may* be wrong (as opposed to showing that it *was* wrong) is not sufficient to reopen the case.<sup>42</sup>
20. If you are challenging your sentence, there is a miscarriage of justice if the court’s decision was based on a fundamental misapprehension of the facts such that the sentence is blatantly wrong.<sup>43</sup> The courts will not overturn sentence on the usual grounds of appeal, e.g. that the sentence was manifestly excessive.<sup>44</sup> Hence, if the new evidence merely shows that the accused is unlikely to reoffend, which may in some cases be a mitigating factor,<sup>45</sup> the courts are unlikely to admit it.

#### IV. Civil cases

---

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ladd v Marshall* [1954] 1 WLR 1489 at 1491–1492.

<sup>37</sup> *Kho Jabing v PP* [2016] 3 SLR 135 at [61].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> CPC, *supra* n. 26, s 394J(6)(b).

<sup>41</sup> CPC, *supra* n. 26, s 394J(6)(a).

<sup>42</sup> *In re Uddin (A Child)* [2005] 1 WLR 2398 at [22], [50] and [70]–[94].

<sup>43</sup> CPC, *supra* n.26, s 394J(7).

<sup>44</sup> *Kho Jabing v PP* [2016] 3 SLR 135 at [61].

<sup>45</sup> *PP v Siow Kai Yuan Terence* [2020] 4 SLR 1412 at [56(e)].

21. To admit new evidence when appealing a *civil* trial, the evidence must meet the conditions of non-availability, relevance and reliability, as elaborated above.<sup>46</sup> The condition of non-availability will be strictly enforced, because only money, not life or liberty, is at stake.<sup>47</sup> For the same reason, once a litigant has exhausted all chances of appeal for civil cases, the courts will strictly not re-open the case, no matter how relevant or reliable the new evidence.<sup>48</sup>

## **V. Conclusion**

22. Overall, in criminal cases, an appellate court will generally admit evidence that the trial judge did not know about, if it is highly relevant and reliable in your favour. But at the post-appeal stage, the court will only admit such evidence that could not be obtained with reasonable diligence.
23. Sometimes, people who represent themselves may not realise that certain materials that they *already* have might be relevant for contesting liability or sentence. If you intend to appeal, you should invest in a lawyer who is willing to go through your case carefully. Such a lawyer will be able to tease out such information and raise it during the appeal. This is crucial, because the courts will not entertain any requests to reconsider such material after the conclusion of the appeal.
- 

---

<sup>46</sup> See paragraphs 4 to 9 of this article.

<sup>47</sup> See *Ladd v Marshall* [1954] 1 WLR 1489 at 1491–1492, and *Soh Meiyun v PP* [2014] 3 SLR 299 at [14].

<sup>48</sup> See *Kho Jabing v PP* [2016] 3 SLR 135 at [2].