IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 44

Criminal Motion No 4 of 2017

Between

ILECHUKWU UCHECHUKWU CHUKWUDI

… *Applicant*

And

PUBLIC PROSECUTOR

… *Respondent*

JUDGMENT

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

[Criminal Procedure and Sentencing] — [Adducing fresh evidence]

TABLE OF CONTENTS

Ilechukwu Uchechukwu Chukwudi
v
Public Prosecutor

[2017] SGCA 44

Court of Appeal — Criminal Motion No 4 of 2017
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
4 May 2017

2 August 2017 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 In *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 ("*Kho Jabing*") at [2], this court established that in exceptional cases, it would review its previous decision in a concluded criminal appeal where it was necessary to correct a miscarriage of justice. In recent years, applications to review concluded criminal appeals have arisen on several occasions (see *Kho Jabing*, *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*"), *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 ("*Yong Vui Kong (Prosecutorial Discretion)*") and *Quek Hock Lye v Public Prosecutor* [2015] 2 SLR 563 ("*Quek Hock Lye*")). These applications were all based on new legal arguments.

2 The present criminal motion ("the Present Motion") differs from these cases in that the sole basis for review relied upon by the applicant, Ilechukwu Uchechukwu Chukwudi ("the Applicant"), is fresh evidence. The question before us is whether the Applicant's case is sufficiently exceptional to warrant a review under the principles set out in *Kho Jabing*.

The facts

3 On 13 November 2011, the Applicant, a Nigerian national, flew from Lagos, Nigeria to Singapore. Prior to his departure from Lagos, he checked in a black luggage bag ("the Black Luggage"), which he collected upon his arrival in Singapore. That night, the Applicant passed the Black Luggage to one Hamidah Binte Awang ("Hamidah"). Hamidah placed the Black Luggage in her car and drove to Woodlands Checkpoint. At Woodlands Checkpoint, Hamidah's car was searched. The Black Luggage was cut open at the sides and drugs were discovered therein.

4 The Applicant was subsequently charged with trafficking in not less than 1,963.3g of methamphetamine under s 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). Hamidah was charged with attempting to export not less than 1,963.3g of methamphetamine, an offence under s 7 read with s 12 of the MDA and punishable under either s 33 or s 33B of the MDA. Both the Applicant and Hamidah claimed trial.

5 On 21 June 2013, the Applicant was asked by ASP Deng Kaile ("ASP Deng"), the Investigating Officer handling the investigations into his case, if he wished to be sent for a psychiatric evaluation.[1] The Applicant indicated that he did not want a psychiatric evaluation.

[1] ASP Deng's affidavit dated 13 April 2017 at para 5.

6 The trial took place in late 2014. The main issue before the trial judge ("the Judge") was whether the Applicant and Hamidah had knowledge of the drugs concealed in the Black Luggage. At the end of the trial, the Judge acquitted the Applicant but convicted Hamidah (see *Public Prosecutor v Hamidah Binte Awang and another* [2015] SGHC 4).

7 The Prosecution appealed against the Applicant's acquittal by way of Criminal Appeal No 10 of 2014 ("CCA 10/2014"). On 29 June 2015, we allowed the appeal and convicted the Applicant of the charge preferred against him (see *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33 ("*CA (Conviction)*")). We should point out that one of our reasons for allowing the appeal was that we found that the Judge had failed to properly consider the impact of the Applicant's lies and omissions in his statements to the Central Narcotics Bureau ("CNB") (*CA (Conviction)* at [88]).

8 The matter was remitted to the Judge for sentencing. Given the quantity of drugs trafficked, the Applicant could be sentenced to suffer the penalty of death. On 18 September 2015, with a view to considering whether the Applicant had grounds to argue that he should instead be sentenced to life imprisonment under s 33B(3)(*b*) of the MDA on the basis of diminished responsibility, the Applicant's lawyer, Mr Eugene Thuraisingam ("Mr Thuraisingam"), requested Changi Prison's Complex Medical Centre for a psychiatric report on the Applicant.[2] The Complex Medical Centre issued its report ("the CMC Report") on 30 November 2015.[3]

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2 Affidavit of Eugene Thuraisingam dated 4 April 2017 ("Eugene's affidavit") at para 21.

3 Eugene's affidavit at para 24.

9 To secure a second opinion, Mr Thuraisingam also obtained a psychiatric report dated 28 March 2016 from Dr Ung Eng Khean ("Dr Ung"), a psychiatrist in private practice.[4] Dr Ung's report ("the Private Report") was served on the Prosecution on 25 April 2016.[5]

10 The Prosecution then arranged for the Applicant to be assessed by the Institute of Mental Health ("IMH"), which subsequently issued a report dated 6 March 2017 ("the IMH Report"). That report was prepared by Dr Jaydip Sarkar ("Dr Sarkar").

11 On 5 April 2017, the Applicant filed the Present Motion requesting (in the main) this court to rehear the Prosecution's appeal in CCA 10/2014 against the Judge's acquittal of the Applicant.[6] In support of his motion, the Applicant relied on the IMH Report as fresh evidence of his innocence.

The law on reopening concluded criminal appeals

12 The law on reopening concluded criminal appeals was extensively reviewed by a five-judge coram of this court in *Kho Jabing* (at [10]–[24]), where we traced the "gradual shift" in this court's attitude towards reopening concluded criminal appeals over the years. This court had in the past considered itself *functus officio* in such situations, as held in four cases decided in the 1990s and early 2000s. A limited exception was later recognised in *Koh Zhan Quan Tony v Public Prosecutor and another motion* [2006] 2 SLR(R) 830, which is not relevant for present purposes. In *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192, this court expressed *obiter* support for a wider jurisdiction to reopen

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4 Eugene's affidavit at paras 26–27.

5 Eugene's affidavit at para 30.

6 Notion of Motion, p 2.

concluded criminal appeals. Following that decision, concluded criminal appeals were reviewed in three cases (namely, *Ramalingam*, *Yong Vui Kong (Prosecutorial Discretion)* and *Quek Hock Lye*), all of which involved questions of constitutional law that had not been considered at the hearing of the respective appeals.

13 In *Kho Jabing*, after tracing the developments in Singapore in this area of law, this court examined the position in several foreign jurisdictions before restating the test for determining whether it would review a concluded criminal appeal as follows (at [44]) – there had to be "sufficient material on which the court can say that there has been a miscarriage of justice". The court went on to elaborate on this test in these terms (likewise at [44]):

> … Analytically, we see this test as comprising two essential components:
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> > (a) The first is the evidential requirement of "sufficient material". The court must be satisfied that the material adduced in support of the application for review is both "new" and "compelling" before it will consider the application. If the material presented does not satisfy these two indicia, then the application fails *in limine* and the inquiry stops there. The burden of production rests on the applicant.
> >
> > (b) The second is the substantive requirement that a "miscarriage of justice" must have been occasioned. This is the threshold which must be crossed before the court will consider that a concluded criminal appeal ought to be reopened. The burden of proving this likewise rests on the applicant.

14 The test laid down in *Kho Jabing* represents this court's perception of the right balance between the prevention of error on the one hand and the according of proper respect to the principle of finality of proceedings on the other. We also discussed in *Kho Jabing* the policy tension in a case involving the death penalty such as the Present Motion (at [50]):

> In our judgment, the principle of finality is no less important in cases involving the death penalty. There is no question that as a modality of punishment, capital punishment is different because of its irreversibility. For this reason, capital cases deserve the most anxious and searching scrutiny. This is also reflected in our laws. … But, once the processes of appeal and/or review have run their course, the legal process must recede into the background, and attention must then shift from the legal contest to the search for repose. We do not think it benefits anyone – not accused persons, not their families nor society at large – for there to be an endless inquiry into the same facts and the same law with the same raised hopes and dashed expectations that accompany each such fruitless endeavour.

15 With these policy considerations in mind, we now proceed to apply the test set out in *Kho Jabing* to the Present Motion. Should this court's decision in *CA (Conviction)* be reopened?

Our analysis of the Present Motion

The IMH Report

16 The only fresh evidence relied on by the Applicant in the Present Motion is the IMH Report. Given its central importance, we begin by elaborating on its genesis and its contents.

17 It will be recalled that in March 2016, the Applicant obtained the Private Report from Dr Ung (see [9] above). For this report, Dr Ung was instructed to opine on whether the Applicant "was (on the balance of probabilities) suffering from an abnormality of mind as would substantially impair his mental responsibility for his acts and omissions in respect to the offence".[7] In the Private Report, Dr Ung stated that the Applicant suffered from Attention Deficit Hyperactivity Disorder ("ADHD") at the time of the offence, and that the

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7 Eugene's affidavit at p 161 (Private Report at para 6.1).

Applicant's ADHD had "substantially impaired" his mental responsibility for the offence.[8]

18 In response, the Prosecution arranged for the Applicant to be assessed by Dr Sarkar, culminating in the IMH Report. The instructions given to Dr Sarkar were more general than those given to Dr Ung (which focused on the Applicant's state of mind at the time of the offence). Dr Sarkar was "provided no specific instructions other than to carry out a '*psychiatric assessment of the [Applicant]*'"[9] [emphasis in original]. In the IMH Report, Dr Sarkar disagreed with Dr Ung and opined that the Applicant did not suffer from ADHD. Instead, he diagnosed the Applicant as suffering from Mild Neurocognitive Disorder ("MND") which was "extant at the time of [the] commission of [the] offence",[10] but concluded that the Applicant's MND had not substantially impaired his criminal responsibility for the offence.[11]

19 Dr Sarkar did not, however, stop at assessing the Applicant's mental state at the time of the offence. He also examined the Applicant's mental state at the time the Applicant gave his statements to the CNB in the course of the investigations. Dr Sarkar diagnosed the Applicant as suffering from Post-Traumatic Stress Disorder ("PTSD") which arose as a result of childhood trauma. According to the IMH Report, as a young Christian child living in a Muslim-dominated town, the Applicant had witnessed an attack by a Muslim tribe. The attack was recounted in the IMH Report as follows:[12]

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8 Eugene's affidavit at p 185 (Private Report at para 43).

9 Eugene's affidavit at p 23 (IMH Report at para 6).

10 Eugene's affidavit at p 33 (IMH Report at para 73(a)).

11 Eugene's affidavit at p 35 (IMH Report at paras 85–87).

12 Eugene's affidavit at p 23 (IMH Report at para 10).

> [The Applicant] said he was playing outside the provision store owned and run by his mother when he saw people being attacked with choppers and cutlass [*sic*] (a short sword with a slightly curved blade) and maimed and killed. He has an abiding image of them being chased by assailants who raised bladed weapons above their heads and bring [*sic*] them down with full force upon the victims who fall [*sic*] down. He recalls seeing a lot of blood around a well near their shop into which bodies were chopped and thrown …

20 Dr Sarkar was of the view that the childhood trauma of "being nearly killed and viewing the killing of others" had caused the Applicant to suffer intermittently from PTSD symptoms throughout his life. The Applicant's PTSD symptoms were triggered after the Applicant was told by CNB officers that he faced the death penalty, and those symptoms were present when he gave his statements to the CNB.[13] Dr Sarkar opined that the Applicant's PTSD was "*likely to have led to an overestimation of [the] threat to his life which could have prompted him to utter unsophisticated and blatant falsehoods in order to save his life*"[14] [emphasis added].

21 This is the material part of the IMH Report that is relied upon by the Applicant in the Present Motion – Dr Sarkar's opinion as to how the Applicant's PTSD was likely to have caused the Applicant to lie in his statements to the CNB. This opinion is said to contradict key portions of our decision in *CA (Conviction*), for example, at [61], where we held that the Applicant's lies could only be explained by "his realisation of his guilt".

22 We now proceed to apply the test laid down in *Kho Jabing* to determine whether the IMH Report constitutes "sufficient material on which the court can say that there has been a miscarriage of justice" in the sense that there is a

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13 Eugene's affidavit at p 34 (IMH Report at paras 79–80).

14 Eugene's affidavit at p 35 (IMH Report at para 88).

"powerful probability" that our decision in *CA (Conviction)* is wrong (*Kho Jabing* at [44] and [65]).

Whether the evidential requirement of "sufficient material" has been met

23 In order for the material tendered in support of an application for review to be considered "sufficient", it must be both "new" and "compelling": *Kho Jabing* at [52]. In our judgment, the IMH Report is clearly "new", and is also *prima facie* "compelling".

The IMH Report is "new"

24 The requirements which have to be satisfied in order for material to be considered "new" were explained in *Kho Jabing* at [53] as follows:

> "New" material is that which: (a) has hitherto not been considered at any stage of the proceedings leading to the decision under challenge; and (b) could not, even with reasonable diligence, have been adduced in court prior to the filing of the application for review. …

25 The Prosecution submits that limb (b) of the above extract from *Kho Jabing* ("limb (b)") has not been satisfied as the Applicant could easily have obtained a psychiatric report from IMH at an earlier point in time. According to the Prosecution, the Applicant had a clear opportunity to do that on 21 June 2013 when ASP Deng expressly asked him whether he wished to be sent for a psychiatric evaluation. Having rejected this offer, the Applicant should be made to bear the attendant consequences.[15]

26 We are unable to accept this submission. The rationale behind limb (b) is to prevent litigants from "introducing their evidence in a piecemeal and

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15 Prosecution's submissions ("PS") at paras 33–34.

haphazard fashion" (*Kho Jabing* at [55]). The evidence before us does not in any way indicate that the Applicant has been intentionally drip-feeding his evidence. It is significant to note that in his interviews with Dr Sarkar, the Applicant denied having any mental disorder.[16] He also did not volunteer any symptoms of PTSD to Dr Sarkar, and only stated them when probed. As Dr Sarkar noted in the IMH Report:[17]

> The characteristic symptoms of PTSD were offered spontaneously and voluntarily and in response to open ended questions (e.g. can you tell me about your childhood a little?). He did not try to bring attention to PTSD or dissociative symptoms at all and responded in detail only when asked. …

27 Dr Sarkar noted that the Applicant had a "culturally-based negative attitude towards mental disorders" and "did not wish for a mental illness tag".[18] In the circumstances, we find that the Applicant, even with reasonable diligence, could not have adduced the IMH Report in court earlier. Thus, limb (b) is not an impediment to the IMH Report being considered "new" evidence.

The IMH Report is prima facie *compelling*

28 There are two dimensions to the requirement that the material relied on in support of an application for review must be "compelling". First, the material in question must be "reliable"; second, it must be "substantial" and "powerfully probative" (*Kho Jabing* at [60]–[61]). In our judgment, the IMH Report is *prima facie* compelling in both respects even though it has come into existence only at a very late stage of the proceedings due to the unique turn of events in this case. Indeed, it is precisely because of this unique turn of events – which has

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16 Eugene's affidavit at p 26 (IMH Report at para 28).

17 Eugene's affidavit at p 35 (IMH Report at para 91).

18 Eugene's affidavit at pp 35–36 (IMH Report at para 92).

led to the IMH Report being issued only at the sentencing stage and only in response to the *Prosecution*'s request for a psychiatric report – that we are prepared to accept this report as material that is ***prima facie*** compelling despite what was said in *Kho Jabing* at [65] (see [44] below).

(1) The IMH Report is *prima face* reliable

29 Reliable material is material that "possesses a high degree of cogency, and is credible and trustworthy in respect of the matters to which it pertains" (*Kho Jabing* at [60]). Objective evidence (such as DNA evidence and documentary evidence) is more likely to be considered reliable than subjective evidence (such as evidence from witnesses testifying on the witness stand).

30 In the Present Motion, the Prosecution takes the position that the IMH Report is unreliable. It accepts that Dr Sarkar is an objective witness, but contends that his diagnosis of PTSD is unreliable as it is based on the Applicant's "self-reported and uncorroborated version of events"[19] [emphasis in original omitted]. These events, particularly those relating to the childhood trauma which the Applicant allegedly suffered in Nigeria, have not (so the Prosecution argues) been independently verified.[20]

31 In our view, the fact that the Applicant's alleged childhood trauma is uncorroborated does not in itself mean that Dr Sarkar's diagnosis of PTSD is therefore unreliable. We expressly stated in *Kho Jabing* (at [60]) that "we would not go so far as to dogmatically exclude all subjective evidence" from being considered "reliable" material. In the present case, we note that Dr Sarkar specifically ruled out the possibility that the Applicant was malingering in

19 PS at para 37.

20 Eugene's affidavit at p 23 (IMH Report at para 7).

arriving at his diagnosis of PTSD. In addition, Dr Sarkar considered various factors, including the manner in which the Applicant brought up his PTSD symptoms (see above at [26]), the Applicant's aversion to being labelled mentally ill and the Applicant's record in prison of repeatedly stopping the antidepressant medication which he had been prescribed, before stating that the validity of his diagnosis of PTSD "is not in question".[21]

32 We accept that there is, at present, no expert evidence to either confirm or refute Dr Sarkar's diagnosis of the Applicant's PTSD and his opinion of the likely effects of PTSD on the Applicant. However, that is wholly due to the unique turn of events in this case – the CMC Report and the Private Report were entirely silent on the issue of PTSD as they were prepared before Dr Sarkar's diagnosis in the IMH Report. The Prosecution's objection that the IMH Report is unreliable can be easily addressed if this court allows the Present Motion and makes the appropriate orders for the taking of further evidence on matters arising from the IMH Report. It could then turn out that the psychiatrist who prepared the CMC Report and Dr Ung (who prepared the Private Report), or any other psychiatrist who might be consulted, might disagree with Dr Sarkar's diagnosis if asked to comment on it. Such disagreement among psychiatrists is not uncommon. It will then be for the court to decide whether Dr Sarkar's diagnosis of PTSD is correct, and if so, to assess what impact PTSD had on the Applicant.

33 The Prosecution has also cast doubt on the reliability of the IMH Report on the basis that the Applicant, when assessed by Dr Ung, did not mention anything about the alleged childhood trauma which forms the foundation of Dr Sarkar's diagnosis of PTSD.[22] As we have already noted, the Applicant was

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[21] Eugene's affidavit at pp 29–30 and 35–36 (IMH Report at paras 52–53 and 91–92).

averse to being labelled mentally ill and did not volunteer his account of his alleged childhood trauma to Dr Sarkar (see [26] above). Whether the facts underlying the Applicant's account of his alleged childhood trauma are true and whether the Applicant's aversion to being labelled mentally ill is indeed the reason why he did not mention those facts to Dr Ung are all questions which have yet to be explored, again because of the unique turn of events in this case. However, these questions can and will be examined if, as indicated at [32] above, this court allows the Present Motion and makes the appropriate orders for the taking of further evidence on matters arising from the IMH Report.

34 We therefore reject the Prosecution's submissions on the unreliability of the IMH Report and find that that report is *prima facie* reliable.

(2) The IMH Report is *prima facie* substantial and powerfully probative

35 In *Kho Jabing*, we explained the second dimension of the requirement of "compelling" material as follows (at [61]):

> The second dimension of the requirement of "compelling" material is that the material in question must be "substantial" and "powerfully probative" in the sense that it is logically relevant to the precise issues which are in dispute. …

36 In our view, the IMH Report, as it presently stands, is *prima facie* "substantial" and "powerfully probative" in the sense that it is logically relevant to the precise issues in dispute in CCA 10/2014. Let us explain.

37 In CCA 10/2014, a key issue in dispute was whether the Applicant had rebutted the statutory presumption under s 18(2) of the MDA that he had knowledge of the nature of the drugs found in his possession. In determining

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[22] PS at para 39.

this issue, we considered it highly relevant to examine the reasons why the Applicant lied in his statements to the CNB ("the False Statements Issue"). This issue was variously described as (*inter alia*) a "key" and "essential" point in CCA 10/2014, as can be seen from the following extracts from *CA (Conviction)* at [33] and [61]:

> 33 In determining whether the Judge had erred in accepting the [Applicant]'s defence [*viz*, the Applicant had come to Singapore on business and did not know that the Black Luggage, which had been handed to him only at the airport in Lagos, Nigeria, contained drugs (see *CA (Conviction)* at [5])], the ***key dispute*** centres on the probative effect of the numerous lies and omissions made by the [Applicant] in his statements to the CNB, and the Judge's treatment of the [Applicant]'s explanations for those lies and omissions. To narrow the point down even further, the critical question to be answered is whether the [Applicant] had lied for innocent reasons, or whether he had intentionally lied because he *knew* that telling the truth would link him to the crime.
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> …
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> 61 … The ***essential question***, as we have said earlier, is whether the [Applicant] had lied for innocent reasons, or whether he had intentionally lied because he knew that telling the truth would link him to the crime. …
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> [emphasis in original in italics; emphasis added in bold italics]

38 The Applicant's explanation for the lies in his statements to the CNB was summarised at [56] of *CA (Conviction)* as follows:

> The [Applicant's] explanations for the lies, in summary, is that he had decided to lie out of fear because his life was at stake, and that ASP Deng was the "shepherd" who had led him to say the things that he wanted the [Applicant] to say. Essentially, [the Applicant's] point is that, because he did not know the full facts of what had happened, he decided to deny anything that was not in his possession as he felt that was the safer course to take. …

39 After analysing the Applicant's explanation for his lies, we ruled on the False Statements Issue as follows (*CA (Conviction)* at [61] and [87]–[88]):

> 61 The [Applicant]'s excuses for the lies were wholly unsatisfactory and unbelievable. It is clear to us that he had deliberately lied to distance himself from the drugs in the Black Luggage, the existence of which he knew. Quite simply, there is no acceptable explanation for the lies save for his realisation of his guilt. To suggest that the [Applicant] was justified to lie as a defensive move would be to turn reason and logic on its head.
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> …
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> 87 In the present case, the [Applicant]'s version of the facts is quite improbable. There was also no corroborating evidence for various key aspects of the [Applicant]'s case. That said, we would still have hesitated to think that the [Applicant]'s version of the facts is so incredible that it would *ipso facto* justify appellate interference. Had the case *merely* turned on the Judge's assessment [of] the credibility of the [Applicant]'s oral testimony at trial (and nothing more), we might have declined to interfere.
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> 88 What ***tipped the scales*** are the numerous lies and omissions made by the [Applicant] in his statements, for which there is no innocent explanation. This is an ***important distinguishing factor*** from *Farid* [*ie*, *Public Prosecutor v Muhammad Farid bin Mohd Yusop* [2015] SGCA 12] and the majority judgment in *Hla Win* [*ie*, *Public Prosecutor v Hla Win* [1995] 2 SLR(R) 104]. In those cases, the evidence of the respective [accused persons] at trial was consistent with their statements, and this lent credibility to their evidence at trial (see *eg*, *Farid* at [28] and *Hla Win* at [42] and [43]). Indeed, even Yong [Pung How] CJ in his dissenting judgment in *Hla Win* said that the [accused] "had been a very consistent witness" (*Hla Win* at [61]). Unfortunately, the Judge erred in failing to draw an adverse inference against the [Applicant] for his lies and omissions, and also in failing to properly consider the impact of the lies and omissions in [the Applicant's] statements on the credibility of the [Applicant]'s evidence at the trial … We could not see how the [Applicant] could be considered to have rebutted the presumption of knowledge on a balance of probabilities when the objective facts are all stacked against him, including all the lies he uttered as well as the material facts he deliberately suppressed in all his statements, and when the sole objective fact which is in his favour (going into the car of Hamidah) is really of limited value. The lies were told by the [Applicant] obviously to distance himself from the Black Luggage and the [d]rugs concealed therein.
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> [emphasis in original in italics; emphasis added in bold italics]

40 The IMH Report is *prima facie* powerfully probative in relation to the False Statements Issue because Dr Sarkar has opined that the Applicant's PTSD was "likely" to have caused him to give false statements to the CNB (see [20] above). The pertinent parts of Dr Sarkar's assessment in this regard are reproduced below:[23]

> 79. Given his experiences during his early life … of being nearly killed and viewing the killing of others, [the Applicant] has experienced intermittently post-traumatic stress symptoms throughout his life. It is unclear whether this could have crossed a threshold into a frank disorder state since there is no collaborative information available.
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> 80. It is my opinion that he experienced … Post-traumatic Stress Disorder or PTSD (after becoming aware of [the] death penalty …). ***The statements that he provided to CNB were given at a time when he was experiencing the symptoms of this disorder.*** His current symptoms include obsessive ruminations and nightmares about death and dying.
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> …
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> 84. The [Applicant]'s tendency to provide inconsistent statements and change his account repeatedly following arrest and his explanations for those were not considered innocent enough to have rebutted [the] s 18(2) assumption, i.e. he did not know there were drugs in the baggage. That being so, ***the [Applicant] was suffering from acute symptoms of PTSD with dissociation around the time that he made the inconsistent and unreliable statements*** (between 14 Nov and 21 Nov 2011). ***This could be a factor relevant in providing an unreliable account***.
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> …
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> 88. He was suffering from a recognized mental disorder (PTSD with dissociative symptoms) at the time that his statements were taken by investigating officers. In my opinion ***[the] presence of this disorder is likely to have led to an overestimation of [the] threat to his life which could have prompted him to utter unsophisticated and blatant falsehoods*** in order to save his life as outlined in paragraph 48.
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> [emphasis in original underlined; emphasis added in bold italics]

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[23] Eugene's affidavit at pp 34–35 (IMH Report at paras 79, 80, 84 and 88).

41 One limitation of this theory that the Applicant was likely to have lied in his statements to the CNB because of his PTSD is that it does not account for the lies told by the Applicant in the first statement which he made after his arrest on 14 November 2011 ("the First Statement"). According to the IMH Report, the Applicant experienced PTSD symptoms after he became aware that he potentially faced the death penalty.[24] That occurred only after he had given the First Statement,[25] and it therefore appears that he was not suffering from PTSD when he made that statement.

42 That said, we are mindful that in CCA 10/2014, we did not find that the Applicant's lies in the First Statement alone warranted overturning the Judge's decision to acquit the Applicant. As we stated in *CA (Conviction)* at [45] and [54]:

> 45 … Taken in isolation, it is indeed *possible* that the [Applicant] had lied in the First Statement even though he did not know before he was arrested that the Black Luggage contained drugs. ***We might not have held this lie against the [Applicant] if he had come clean afterwards. However, the [Applicant] did not stop here***.
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> …
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> 54 As we have alluded to earlier, the [Applicant]'s misstatement in the First Statement might not have been held against him if he had corrected himself when giving the cautioned statement, as by then he had been informed of and given clear warning as to the consequences of continued deception. He did not change his ways. He lied in the cautioned statement and continued to lie in all the long statements.
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> [emphasis in original in italics; emphasis added in bold italics]

43 In other words, it was the *collective* effect of the Applicant's lies in *all* his statements to the CNB, and not solely the lies in the First Statement, that led

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24 Eugene's affidavit at p 34 (IMH Report at para 80).

25 Eugene's affidavit at p 28 (IMH Report at para 42).

this court to overturn the Applicant's acquittal by the Judge. Given that Dr Sarkar's opinion may possibly explain why the Applicant continued to lie in the statements which he made to the CNB after the First Statement, we find that the IMH Report is *prima facie* "powerfully probative" in respect of the False Statements Issue – which, we reiterate, was "[t]he ***essential question***" [emphasis added in bold italics] before us in CCA 10/2014 (see the extract from [61] of *CA (Conviction)* reproduced at [37] above).

Whether the substantive requirement of "miscarriage of justice" has been met

44 We turn now to the substantive requirement of "miscarriage of justice" laid down in *Kho Jabing*. As we explained in *Kho Jabing* (at [63]), a miscarriage of justice is chiefly (but not exclusively) found either where a decision is "demonstrably wrong", or where there has been fraud or a breach of natural justice. The question in the Present Motion is whether the IMH Report as it currently stands shows *prima facie* that our decision in *CA (Conviction)* is demonstrably wrong. The requisite standard in this regard was described in *Kho Jabing* at [65] as follows:

> In our judgment, where the decision under challenge is a decision on conviction, it is not sufficient to show that there is a real possibility that the decision is wrong. Instead, it must be shown, *based on the material tendered in support of the application for review alone and without the need for further inquiry*, that there is a powerful probability that the decision concerned is wrong. … [emphasis added]

45 We earlier highlighted that the False Statements Issue was "[w]hat tipped the scales" in CCA 10/2014 and led us to overturn the Judge's acquittal of the Applicant (see the extract from [88] of *CA (Conviction)* quoted at [39] above). We have also found that the IMH Report is *prima facie* powerfully probative in relation to the False Statements Issue. We therefore find that the IMH Report does *prima facie* raise a "powerful probability" that our decision

in *CA (Conviction)* is wrong. We emphasise here that it is because of the unique turn of events in this case that we are prepared to accept evidence which ***prima facie*** satisfies the substantive "miscarriage of justice" requirement articulated in *Kho Jabing* even though we stated in that judgment that the material tendered in support of an application for review must demonstrate "*alone and without the need for further inquiry*" [emphasis added] a powerful probability that the decision under challenge is wrong (see [44] above).

46 In resisting the Present Motion, the Prosecution has pointed to other aspects of our reasoning in *CA (Conviction)* (apart from our reasoning on the False Statements Issue) to show that our decision in CCA 10/2014 is not demonstrably wrong (*eg*, our analysis in *CA (Conviction)* at [71]–[82] of the Applicant's "improbable" account of the events which took place on 13 November 2011).[26] As we stated in *CA (Conviction)* at [83], CCA 10/2014 "turn[ed] primarily on questions of fact, and it is a well-established principle that an appellate court is usually slow to overturn the factual findings of a trial judge". The IMH Report raises a powerful probability that our decision on the False Statements Issue – and, in turn, on CCA 10/2014 as a whole – is wrong, notwithstanding the other aspects of our reasoning in *CA (Conviction)* which support our decision in that appeal. Given these circumstances, we think it would be best to reconsider all the facts of this case only after the additional evidence outlined in our orders at [50] below has been adduced and dealt with.

47 Another objection which the Prosecution has raised in the Present Motion is that the Applicant seeks, as an alternative to a rehearing of CCA 10/2014, an order that additional oral and/or other evidence be taken in relation to the IMH Report. This, the Prosecution argues, indicates that contrary

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[26] PS at para 52.

to the standard set in *Kho Jabing* – which requires the wrongfulness of the decision under challenge to be shown "based on the material tendered in support of the application for review alone and without the need for further inquiry" (see the extract from [65] of *Kho Jabing* quoted at [44] above) – the IMH Report does not on its own show a powerful probability that this court erred in overturning the Judge's order of acquittal and convicting the Applicant in *CA (Conviction)*.

48 We have already dealt with this point earlier when we explained at [28] and [45] above why we are applying the principles laid down in *Kho Jabing* in a slightly modified form here. Due to the unique turn of events in this case, there is nothing objectionable about the Applicant's prayer for additional evidence to be taken. In fact, this is what we direct below (at [50]) before a review of our decision in *CA (Conviction)* takes place. We are also of the view that the best course of action in this case would be to have such evidence received by the Judge as he would have had to hear the psychiatric evidence in any event, if the Present Motion had not been filed, for the purposes of sentencing the Applicant following this court's reversal of his acquittal by the Judge.

49 Accordingly, we will review our decision in *CA (Conviction)* only after the Judge has taken the further evidence set out at [50] below.

Our orders on the Present Motion at this stage

50 We therefore allow the Present Motion in part and order a review of this court's decision in *CA (Conviction)* because of the unique turn of events in this case, which make it a "truly exceptional" case of the kind envisaged by this court in *Kho Jabing* at [65]. In so ordering, we are not making a finding that the Applicant does indeed suffer from PTSD or that he was affected by it when he

made his statements to the CNB. We are likewise not implying that he is innocent. His guilt or innocence is a matter to be determined at the subsequent review of our decision in *CA (Conviction)*. As indicated at [48] above, we are of the view that the proper course of action at the present stage is to remit the matter to the Judge for him to receive evidence from Dr Sarkar in relation to the IMH Report as well as such other evidence on matters arising from this report as the Judge may allow either party to adduce. The Judge is then to make findings on:

(a) whether the Applicant was suffering from PTSD;

(b) the typical effects of PTSD on a sufferer;

(c) if the Applicant was indeed suffering from PTSD:

(i) the period of time during which PTSD affected him;

(ii) the effects of PTSD on him during that period; and

(iii) the extent to which PTSD affected him when he gave his statements to the CNB.

51 After the Judge has made his findings on the issues stated above, there shall be a further hearing where this court will review its decision in *CA (Conviction)*. At that hearing, the parties are to address us on the correctness of the Judge's findings on the aforesaid issues and their implications on our decision in *CA (Conviction)*.

52 At this juncture, we wish to highlight this court's ruling in *Public Prosecutor v Chum Tat Suan and another* [2015] 1 SLR 834 ("*Chum Tat Suan*") that an accused person is required to adduce all relevant evidence, whether pertaining to conviction or sentence, at the trial itself, and that no drip-feeding

of evidence will be allowed. This particular ruling does not apply to the Applicant since the judgment in *Chum Tat Suan* was delivered only after his trial in the High Court had ended. In any event, even if this ruling were applicable to the Applicant, we have already stated earlier (at [26] above) that there has not been any intentional drip-feeding of evidence on the Applicant's part.

Closing observations

53 We conclude with some observations on the principle of finality of proceedings. In *Kho Jabing*, this court recognised the importance of upholding the principle of finality. Thus, although we acknowledged "[t]he importance of truth in the criminal process" (at [46]), we also cautioned as follows (at [47]):

> That said, this does not mean that society should stand paralysed with indecision, or that every legal finding must be open to continual challenge because of perpetual anxiety over the possibility of an error. The perfect, as they say, cannot be allowed to be the enemy of the good. *Finality is also a function of justice. It would be impossible to have a functioning legal system if all legal decisions were open to constant and unceasing challenge, like so many tentative commas appended to the end of an unending sentence.* Indeed, in the criminal context, challenges to legal decisions are very likely (and are also likely to be continuous and even interminable), given the inherently severe nature of criminal sanctions and the concomitant desire on the part of accused persons to avoid them as far as they can. The concern here is not just with the saving of valuable judicial resources (vital though that is), but also with the integrity of the judicial process itself. *Nothing can be as corrosive of general confidence in the criminal process as an entrenched culture of self-doubt engendered by abusive and repetitive attempts to re-litigate matters which have already been decided.* [emphasis added]

54 In order to "better vindicate the importance of the principle of finality", this court set a high standard in *Kho Jabing* for its power of review to be invoked so as to ensure that reviews of concluded criminal appeals would be allowed "only in truly exceptional cases" (at [65]).

55 The Present Motion is, in our view, such a "truly exceptional" case because of the unique turn of events. It is entirely fortuitous that the IMH Report – issued only at the sentencing stage and emanating from the *Prosecution's* request for a psychiatric report – has raised a matter which has a crucial bearing on our decision in *CA (Conviction)*. In future, an accused person who seeks a review of a concluded criminal appeal which was decided against him should not expect that a diagnosis that he was suffering from PTSD (or any other psychiatric condition), whether at the time of the offence and/or at the time he gave his statements to the investigating authorities, will automatically entitle him to a review. Much will depend on the actual evidence, as well as the facts and circumstances of each case. As the majority of this court stated in *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 at [2], "[a] factor which is considered to be critical in one case may not be so in another". Thus, if a case identical or similar to the Present Motion should arise in future, whether or not this court will adopt the same stance as that which we have taken here will turn on whether the test laid down in *Kho Jabing* has been satisfied.

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

Eugene Singarajah Thuraisingam and Suang Wijaya (Eugene Thuraisingam LLP) for the applicant;
Ng Cheng Thiam and Chin Jincheng (Attorney-General's Chambers) for the respondent.