***When the Court may Order Personal Costs Against Defence Counsel: Syed Suhail bin Syed Zin v Public Prosecutor* [2021] SGCA 53**

I. EXECUTIVE SUMMARY

Criminal prosecutions involve potentially irreversible consequences, such as the death penalty. As such, defence counsel often try to assist their clients not only by using legal arguments, but also by invoking various court processes. One such process is asking the Court of Appeal ("**CA**") (the highest court in Singapore) for leave under section 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("**CPC**") to make a review application under section 394J of the CPC: this is essentially an application for the CA to review its own prior decision on the same case.

However, such methods may be considered an irresponsible use of the court's time, as litigants may seek to make such review applications without merit. In such cases, the CA has the power under section 357(1)(*b*) of the CPC, as well as its own inherent powers, to order that defence counsel personally pay the Prosecution's costs for the review. Thus, invoking the court's processes in this manner, an important question arises: when should the court make a personal costs order against defence counsel in such cases?

In *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] SGCA 53, the CA adopted a three-step test to determine when its power should be exercised:

> (a) whether the legal representative of whom complaint was made acted improperly, unreasonably, or negligently;
> (b) if so, whether such conduct caused the other party to incur unnecessary costs; and
> (c) if so, whether under the circumstances it was just to order the legal representative to compensate the other party for the whole or any part of the relevant costs.

The CA also clarified that a personal costs order was not an exercise of the court's sentencing function. Instead, it was to ensure that the costs of legal proceedings were appropriately allocated between the parties.

II. MATERIAL FACTS

Mr Syed Suhail bin Syed Zin ("**Syed**") was initially convicted in the High Court **("HC")** for trafficking in not less than 38.84g of diamorphine under section 5(1)(*a*) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**"). Syed's defence was that the diamorphine in his possession was for his personal consumption. However, the HC held that on the balance of probabilities, Syed had not proven that the diamorphine was for his personal consumption. He was sentenced to the mandatory death penalty.

As for sentencing, the HC held that the applicant was not a mere courier (as opposed to trafficker). The abnormality of mind ground under section 33B(3)(*b*) of the MDA did not apply, as Syed had made no such claim. Further, the Prosecution had not issued Syed a certificate of substantive assistance. Thus, Syed was sentenced by the HC to the mandatory death penalty.[1] Syed's appeal to the CA on the HC's conviction and sentence was also dismissed.

Pursuant to section 394H of the CPC, Syed then applied for leave of the court to make a review application of the CA's dismissal of his appeal. This time, he relied on a different lawyer Mr Ravi s/o Madasamy ("**Ravi**"), to argue his case.
As Syed's new lawyer, Ravi raised two arguments:

[1] Generally, under section 33B of the MDA, in the absence of a successful argument on the accused (a) being a mere courier (rather than a trafficker) and also suffering from an abnormality of mind, or (b) being a mere courier and also obtaining a certificate of substantive assistance from the Prosecution (certifying that the accused has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking within or outside Singapore), an accused person charged under section 5(1) or 7 of the MDA is subject to the mandatory death penalty.

(a) the issue of whether he had suffered an abnormality of mind was not sufficiently discussed at trial in the HC or on appeal ("**Abnormality of Mind Ground**"); and

(b) Syed's trial and appellate lawyers did not make necessary inquiries to provide evidence which may have shown that Syed had the financial capacity to sustain his alleged level of drug consumption, which would go towards proving that he was indeed using the diamorphine for personal use ("**Inheritance Ground**").[2]

The application for review was dismissed by the CA. The CA held that the materials sought to be relied on for his appeal could have been, with reasonable diligence, produced in the prior proceedings. Further, as the court noted, since the prior criminal proceedings, there was no change in the law which would give rise to new legal arguments. In any event, the materials were not sufficiently compelling to support the claim. The requirement was that the materials must be "reliable, substantial, powerfully probative, and capable of showing almost conclusively that there has been a miscarriage of justice" in the earlier decision of the court. This reflects the need to preserve finality in judicial pronouncements. Regarding the Inheritance Ground, the CA held that Ravi had misrepresented certain facts regarding this matter. It should also have been clear from the outset that the Inheritance Ground would have failed; the applicant had ample opportunity to adduce the necessary evidence in prior proceedings, but no proper steps were taken to do so. Ravi himself conceded this when he subsequently confirmed that he was no longer relying on the Inheritance Ground.

The Prosecution, prior to the CA's decision on the review application, also wrote to the CA expressing its intention to seek personal costs from Ravi. The Prosecution made three arguments. *First*, Ravi had misrepresented or materially omitted facts concerning what had taken place in prior proceedings in his affidavit and raised legally unsustainable arguments. *Second*, Ravi had made unjustified allegations against Syed's previous counsel, without notifying them that he was going to make those allegations and giving them a chance to respond. *Third*, Ravi's real purpose in bringing the review application was to "frustrate the lawful process of the execution of the sentence provided by law", and he had adopted a "blunderbuss approach" that amounted to an abuse of the court's process.

III. ISSUES

In deciding whether to make a personal costs order against Ravi, the CA applied the aforementioned three-step test, which was based on the test laid down by the English Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205.

A. Step 1: Improper, unreasonable, or negligent conduct

In considering whether Ravi had acted improperly, unreasonable, or negligently, the CA considered three questions:

(a) whether he had omitted material facts, misrepresented facts, or advanced factually/legally unsustainable arguments;

(b) whether he made unsustainable allegations against Syed's previous counsel, without giving them a chance to respond; and

(c) whether he acted in a manner to frustrate the lawful process of execution in abuse of the court's process.

The CA found Ravi's conduct to have been improper, both in the manner and conduct of the review application.

(1) Omissions, misrepresentations, and unsustainable arguments

The Prosecution alleged that Ravi had *not* indicated, in the supporting affidavit for the review application, that Syed's trial counsel had represented to the HC that Syed was not relying on the

[2] The Inheritance Ground entailed arguments that Syed's uncle was to make a payment of $20,000 to him, a sum of money that could sustain Syed's large personal consumption of diamorphine.

Abnormality of Mind Ground.[3] While the CA agreed that Ravi had not included this fact in his supporting affidavit, it decided that this point was not material to the review application. This was because Ravi's actual argument was a slightly different one: his argument was that Syed's trial counsel had not properly considered whether the Abnormality of Mind Ground applied to Syed, thus leading to the position taken in court that Syed would not rely on this ground. In other words, Ravi argued that it was the previous counsel's decision, rather than being Syed's decision, to not rely on the Abnormality of Mind Ground. The Prosecution had also argued that Ravi ought to have made "full and frank disclosure" in the affidavit that Syed's trial counsel had represented to the HC that Syed would not be relying on the Abnormality of Mind Ground. However, the CA held that such a duty did not exist in the present context, as the present application was not an *ex parte* application.[4]

However, the CA found merit in the Prosecution's argument that a reasonable defence counsel would have found no basis for the Abnormality of Mind Ground, for three reasons. *First*, in order to get around the fact that trial counsel had expressly confirmed twice that Syed was not alleging that he suffered an abnormality of mind under section 33B(3)(*b*) of the MDA, Ravi had to allege that Syed's trial and appellate counsel had simply failed to pursue the inquiry. However, there was no basis for such allegations.

Second, Ravi, in advancing arguments for the Abnormality of Mind Ground, was in fact not aware of the legal requirements of the MDA. Specifically, Ravi was not aware that in order to qualify for the alternative sentencing regime under section 33(B)(3) of the MDA such that the CA could impose life imprisonment instead of the mandatory death penalty, the accused would have to prove both abnormality of mind and that he/she was a mere courier.[5] *Third*, the CA also held that the Abnormality of Mind Ground itself was without merit, and this was evident from the outset. With reasonable diligence, these arguments could have been raised in earlier proceedings, but they were not. In any event, none of the medical evidence supported this argument.

Concerning the Inheritance Ground, the CA held that Ravi misrepresented some facts in his affidavit – specifically by suggesting that Syed's trial counsel had not made inquiries relating to the Inheritance Ground, when in fact such inquiries were made. Similar to the Abnormality of Mind Ground, the Inheritance Ground was also held to be without merit, and one doomed to fail. This was because it was neither a legal argument, nor evidence that fell within the ambit of the review application process. In any event, Syed had had ample opportunity to pursue this route of inquiry and raise further evidence on appeal, but had not taken this opportunity. Indeed, Ravi conceded this when he confirmed he was no longer relying on this ground. Further, the CA noted Ravi's attempt to characterise his concession of the Inheritance Ground as a point in his favour to be entirely implausible. This was not a matter of potentially contradictory evidence, or material that was difficult to assess without detailed investigation or inquiry. Neither was this a case where Ravi initially had some basis for advancing the argument which was then rebutted by the Prosecution. This was a case where there was simply no basis at all for advancing the argument in the first place.

(2) Allegations against Syed's previous counsel

The CA observed that Ravi's arguments in the review application rested heavily on his allegations against Syed's trial and appellate counsel. However, the CA held that Ravi's allegations against the former counsel were baseless and advanced without any evidence or factual basis. Indeed, the

[3] This reflects the exceptional nature of a review application, in which arguments that were not submitted in the court below cannot now be argued before the CA. This requirement is also provided by section 394J(3)(a) of the CPC.

[4] An *ex parte* application to the court is one that only requires one party i.e., the applicant. In such situations, the applicant appears before the court without the other party present. The CA held that a duty to make "full and frank disclosure" would only arise in an *ex parte* application, but not in the present application where both parties are present and are able to make arguments before the court.

[5] Essentially, to invoke the Abnormality of Mind Ground under section 33B(3) of the MDA, Syed not only had to be suffering from an abnormality of mind, but his involvement must have been restricted to nothing more than a mere courier.

allegations against former counsel were only made because Syed had confirmed through his former counsel that he was not pursuing certain grounds during the trial and appeal. As an attempt to get around inconvenient facts, such allegations were entirely inappropriate.

Further, the CA held that Ravi's allegations transgressed rule 29 of the Legal Profession (Professional Conduct) Rules 2015 ("**PCR**"), which provides that a legal practitioner must not permit an allegation to be made against another legal practitioner in a document filed on behalf of the former's client in court, unless the latter has an opportunity to respond, and such response is disclosed in court. Here, Ravi's allegations were made without giving Syed's trial and appellate counsel the opportunity to respond. His failure was also one that went against *Mohammad Farid bin Batra v Public Prosecutor* [2020] 1 SLR 907, which held that the rules of natural justice applied also to previous counsel: if accused of some wrong, he must be given notice of the allegations made against him and must have a reasonable opportunity to respond in writing and, where necessary, to attend and make submissions at the hearing where his conduct as counsel is an issue.

The CA found Ravi's failure in this case was particularly egregious. *First*, Ravi had made various uncorroborated accusations against Syed's trial counsel. The court found this to be "collateral", especially in the context of a review application in a criminal matter. Instead of pursuing relevant inquiries before the court, Ravi made allegations that were ultimately "distracting". *Second*, in making these allegations, Ravi did not seek Syed's trial counsel's explanations for their alleged conduct. By failing to do so, Ravi did not take reasonable care to ensure he presented the truth before the court. As such, the court found that Ravi's actions entailed an abdication of his duty to the court.

(3) Collateral purpose

The Prosecution alleged that Ravi's chief purpose in setting up the review application was to frustrate the lawful process of the execution of the sentence provided by law. The CA noted that this effectively amounted to an allegation of collateral purpose, i.e. that Ravi was bringing the review application merely to delay Syed's execution, and not to legitimately invoke the court's process. The CA, however, held that Ravi's review application was not brought simply to postpone Syed's execution. While it might be the case that Ravi's application was to ultimately acquit Syed of the death penalty, that was not by itself sufficient to find a collateral purpose. More would be needed to suggest that intended outcome was in itself an abuse of process.

In conclusion, the CA found that Step 1 of the three-step test was made out. Ravi had acted improperly as his conduct fell short of what was expected of reasonable defence counsel. He had brought an application without any real basis and without due regard to the statutory requirements for the alternative sentencing regime and for the review application process, lacked candour in misrepresenting what the applicant's prior counsel had done to pursue the inquiry relating to the Inheritance Ground, and failed to comply with the PCR and principles of natural justice in relation to giving Syed's prior counsel a chance to respond.

The CA also rejected Ravi's counter-arguments. Ravi *first* argued that he did not have much time to assess Syed's case. The court held that this was not a compelling reason, as the issues that plagued Syed's case did not require a lot of time to understand. The CA also rejected Ravi's *second* argument that this was a capital case that should lead the court to relax the standards expected of counsel. The fact that the applicant faced the death penalty did not warrant a relaxation in the standards expected of counsel. In fact, maintaining rigorous standards in this context was particularly important. The CA recognised that in this emotive context, these decisions are not easy. However, standards must be upheld and counsel, as professionals, must be able to exercise self-discipline, and to act with reason and not just on the basis of emotions.

Finally, the CA rejected Ravi's *third* argument that he had believed in good faith that the review application was not bound to fail, i.e. that the court's granting of leave to begin the review application

gave him a reasonable basis to believe that the application would not fail. This argument was based on a misunderstanding of counsel's responsibility: counsel could not be a merely passive agent acted upon by his client and the court. Ravi's good faith belief in the merit of the review application should have been independent of the court granting leave. If the case had merit, that would have been independent of the grant of leave. If the case did not have merit, and Ravi's assessment was based merely on the fact that leave was granted, that suggested he was simply raising arguments to see what would stick – a "blunderbuss approach", as the Prosecution characterised it.

In any case, regardless of what Ravi believed in good faith, the CA was unable to conclude that he had a reasonable basis to believe that the application had merit. In any event, the court noted that a mere good faith belief, without reasonable basis, did not necessarily preclude a personal costs order from being made. Such haphazard and irresponsible attempts at reopening concluded appeals would be looked upon with disfavour. The manner in which such an unmeritorious application was brought gave rise to the conclusion that the application was brought in abuse of the process set out in Division 1B of Part XX of the CPC. The arguments raised by Ravi were effectively attempts to relitigate what had already been conceded or determined in prior proceedings, or for which there was simply no new evidence or argument to be raised. It was contrary to the very rationale of the statutory requirements for the application to have been brought. The CA thus found that the application was brought in abuse of process under section 357(1A) of the CPC.[6]

B. Step 2: Prosecution incurring unnecessary costs

The CA held that Ravi's improper conduct in bringing and managing the review application did lead to the Prosecution incurring unnecessary costs. While Ravi countered that the costs would have been lower if the CA had not granted leave for the review application, this was an unsustainable position to take. It was Ravi's position that the matter should go on for a full hearing. He could not then turn around to argue that the CA should have dismissed the matter at an earlier stage.

C. Step 3: Whether it is just to make an order for personal costs

In deciding whether it was just to order personal costs against Ravi, the CA considered the following factors: the context of a review application; the salutary reminder to defence counsel of their responsibility to their clients; and Ravi's particularly egregious conduct.

(1) Context of a review application

The CA stressed the unique context of a review application. Review applications (under Division 1B of Part XX of the CPC) entailed strict and specific requirements. These requirements reflect the value of finality in the face of justice – a fundamental aspect of the legal system. In the context of criminal proceedings, "an extremely limited legal avenue" has been provided to review even a concluded appeal. However, such review will only be granted in rare cases. Otherwise, dissatisfied convicted persons may be tempted to utilise this legal process to bring repeated applications for review. This would not only undermine the spirit and substance of the review process, but also undermine the very finality of the original judgment.

Defence counsel had a very important role to play in this context. Pursuant to rule 14(1)(*a*) of the PCR, legal practitioners representing accused persons in criminal proceedings owe a fundamental duty to assist in the administration of justice. This duty includes maintaining and preserving finality in the legal system. Further, the role of defence counsel is highlighted by the requirement under rule 11(2)(*a*) of the Criminal Procedure Rules 2018 (S 727/2018) which requires counsel to file an affidavit which includes specific statements about counsel's belief as to the merits of the review application.

[6] Section 357(1A) states that if the Court makes an order under sections 357(1)(*a*) or (*b*) of the CPC regarding proceedings under Division 1B of Part XX, and the prosecution has applied to the Court for an order for the costs to be paid to the prosecution on the ground that the commencement, continuation or conduct of that matter was an abuse of process, the Court must state whether it is satisfied that the commencement, continuation or conduct of that matter was an abuse of the process of the Court.

This is an exceptional requirement in criminal procedure; in no other instance under the CPC is counsel required to file an affidavit as to his or her belief in the merits of the application. Thus this requirement underscores the principles that review applications must be exceptional; the threshold for review is high; and defence counsel must ensure that unmeritorious applications are not brought.

With this duty in mind, the CA held that where defence counsel brought clearly unmeritorious applications for a review, the case for a personal costs order was particularly strong. Counsel could be lying in his affidavit, in which case he or she would be dishonestly trying to bring an application when he or she knew that the requirements are not satisfied. While defence counsel may bring unmeritorious applications holding an honest belief in the merits of their application, they may still be in breach of their duty to act with reasonable competence, if the application was objectively without merit *and* a reasonable defence counsel would see no merit in such applications.

(2) A salutary reminder to defence counsel of their responsibility to clients

The CA had regard particularly to accused persons who had been sentenced to death. Specifically, such accused persons should be protected from being invested in a potentially favourable outcome on the basis of incompetent legal advice. Lawyers should be aware that their advice must be accurate, measured, and serve the interests of justice, and that they should not simply encourage last-ditch attempts to reopen concluded matters without a reasonable basis. Defence counsel's advice must serve the interests of justice, and not merely be attempts to relitigate matters before the court without merit.

(3) Ravi's particularly egregious conduct

The CA held that Ravi's conduct of the proceedings completely lacked merit. It was particularly egregious, even to the extent of grandstanding, which was wholly inappropriate in a court of law. Specifically, the Abnormality of Mind Ground brought by Ravi was based on a complete misapprehension of the requirements of section 33B(3) of the MDA, and in complete disregard of the evidence. Further, the Inheritance Ground advanced by Ravi was also without reasonable basis.

Ravi also misrepresented the efforts made by prior counsel in relation to the Inheritance Ground. Further, Ravi's allegations against Syed's trial and appellate counsel were in breach of his professional duties and constituted acts of misrepresentation. This was not merely a weak case on the merits (which counsel cannot generally be faulted for trying to pursue), but a case that was misconceived from the outset and improperly conducted. The court also noted that it did not entertain Ravi's argument that prosecutors are "under the AGC's umbrella" and are thus outside the reach of the courts, and cautioned Ravi against making broad, sweeping and unsubstantiated allegations – especially where they had no relevance to the case. Though the CA recognised that Ravi represented Syed *pro bono*, it held that such a fact was irrelevant here. The standard expected of counsel rendering *pro bono* services does not differ from that of a lawyer representing a paying client. In fact, a client who is particularly vulnerable and entirely dependent on counsel requires representation of a sufficiently high standard.

The CA further recognised that there was a public interest in ensuring access to justice. Counsel who conducted themselves properly, even in advancing weak cases, will not be subject to adverse costs orders. The CA also encouraged counsel to take up opportunities to conduct cases *pro bono* for needy clients. However, there was no public interest in withholding criticism and adverse costs orders against counsel whose improper conduct amounted to an abuse of the court's process. Put another way, there was a public interest in maintaining standards at the Bar, and it was that interest that a personal costs order in the present case aimed to advance. Ultimately, the CA found Ravi's conduct to be egregious. The need for the court to impose a personal costs order to reflect its firm disapproval of his conduct in this matter far outweighed any countervailing considerations. The CA wanted to make it clear that it would not tolerate such misconduct. Thus, the court found it just to order personal costs against Ravi.

The Prosecution sought a costs order of $10,000, explaining it partly by arguing that Ravi's conduct

was particularly egregious in comparison with another case where a personal costs order of $5,000 was made against counsel. However, the CA held that the central question was the amount of costs incurred by the Prosecution in this specific case, and the extent to which defence counsel should be made responsible for those costs. Even if the personal costs order was used to express disapproval of counsel's conduct, this exercise remained one of properly apportioning costs of proceedings between parties. Thus after assessing the surrounding circumstances, including the length of the hearing and facts of the case, and considering Ravi's conduct, the CA found that a personal costs order of $5,000 against Ravi was appropriate.

IV. LESSONS LEARNT

The judgement cements the courts' stance on the importance of proper conduct of counsel in bringing and managing criminal defence.[7] Thus, counsel who bring criminal matters before the court ought to be mindful of the merits of their claims, as well as the manner in which they advance their arguments. The author submits that a personal costs order in this case should not deter defence counsel from their continued efforts to mount a robust defence for their clients. If anything, this case only reinforces the professional conduct already embodied by many lawyers at the Bar.

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[7] Criminal defence, as introduced at the start of this brief, involves not only substantive legal arguments, but also procedural arguments couched in terms of criminal procedure.