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ADDUCING FRESH EVIDENCE ON APPEAL: GUIDANCE FROM RECENT COURT OF APPEAL DECISIONS

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I. Introduction

1 Arriving at substantively just and correct decisions, and the need to prevent the waste of judicial resources, are two important objectives within the criminal justice system that can potentially tug in opposite directions.[2] This tension may arise, for example, where parties seek to adduce fresh evidence in criminal appeals. In this regard, s 392 of the Criminal Procedure Code[3] (the "CPC") attempts to strike a balance between these two countervailing considerations by giving an appellate court the discretion to allow fresh evidence to be admitted on appeal, if it thinks that such additional evidence is necessary.

2 In determining whether to admit fresh evidence, the Singapore courts have been guided by the touchstones of non-availability at trial, relevance, and reliability,[4] which were established in the seminal English decision in *Ladd v Marshall*.[5]

1 While the authors are with the Attorney-General's Chambers, the views expressed in this article are their own.
2 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [16].
3 Cap 68, 2012 Rev Ed.
4 See *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 at [13].
5 [1954] 1 WLR 1489.

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In *Soh Meiyun v Public Prosecutor*[6] ("*Soh Meiyun*"), Chao Hick Tin JA succinctly summarised the three *Ladd v Marshall* conditions as follows:[7]

> The first condition of 'non-availability' is satisfied if the evidence could not have been obtained with reasonable diligence for use at the trial. The second condition of 'relevance' is satisfied if the evidence is such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive. The third condition of 'reliability' is satisfied if the evidence is such as is presumably to be believed, *ie*, apparently credible, although it need not be incontrovertible.

3 In its original form, the *Ladd v Marshall* conditions were restrictive in nature, and applications to introduce fresh evidence would only be allowed in "extremely limited" circumstances.[8] In recent years, however, the Singapore courts have refined the *Ladd v Marshall* conditions in the context of criminal proceedings.[9] The upshot of these developments is that accused persons may find it *easier* to admit fresh evidence on appeal, although they run the risk of facing significantly enhanced sentences should they be found to have abused the court's process. This article provides a broad overview of recent jurisprudential developments and suggests some implications for the practitioner.

II. Evolution of the *Ladd v Marshall* conditions

A. Non-availability at trial

(1) Non-availability relaxed for accused persons

4 *Soh Meiyun* represented the first major development in the *Ladd v Marshall* conditions. In that case, the appellant was convicted after trial of maid abuse charges and sentenced to an aggregate of 16 months' imprisonment. She subsequently appealed against

6 [2014] 3 SLR 299.
7 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [14].
8 *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 at [15].
9 The *Ladd v Marshall* conditions have also been applied in the context of civil appeals, but this article focuses solely on the developments of these conditions in the criminal context.

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the sentence and applied to adduce fresh evidence in the form of a psychiatric report from the Institute of Mental Health, with the assessing psychiatrist opining that she suffered from major depressive disorder and obsessive compulsive disorder at the material time. Chao JA observed that such a report could have been adduced at trial with reasonable diligence,[10] and that the report thus did not satisfy the non-availability condition.[11]

5 Chao JA went on to explain, however, that while the non-availability requirement sought to guard against the waste of judicial resources, the need to prevent wrongful convictions or erroneously heavy punishment was equally (if not more) important in criminal cases.[12] Accordingly, Chao JA held that additional evidence which was *favourable to the accused person*, and which fulfilled the conditions of relevance and reliability, should be admitted on appeal even if it failed to satisfy the condition of non-availability.[13]

6 The Court of Appeal in *Iskandar bin Rahmat v Public Prosecutor*[14] endorsed this approach, and held that the non-availability condition was to be regarded as "less paramount than the other two conditions".[15] It was subsequently clarified in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan*[16] ("*Mohd Ariffan*") that where it was the Prosecution seeking to adduce fresh evidence, the *Ladd v Marshall* conditions would continue to apply in an unattenuated manner, since the underlying rationale for allowing accused persons more leeway and relaxing the non-availability condition did not similarly feature.[17]

10 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [17].
11 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [17]–[19].
12 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [16].
13 *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 at [16].
14 [2017] 1 SLR 505.
15 *Iskandar bin Rahmat v Public Prosecutor* [2017] 1 SLR 505 at [72].
16 [2018] 1 SLR 544.
17 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [63].

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(2) Expansion of the non-availability condition

7 The Court of Appeal in *Mohd Ariffan* also expanded the scope of the non-availability condition, such that evidence not reasonably thought necessary at trial could satisfy this condition.

8 Prior to this, the inquiry with regard to non-availability was focused on whether the evidence was physically available to the applicant, and whether the applicant would have known of the existence of the said evidence.[18] However, in *Mohd Ariffan*, the Prosecution argued that the non-availability condition was satisfied, *not* because it could not, with reasonable diligence, have obtained the evidence for the trial, *but because it could not reasonably have known that the evidence would be necessary* in the first place.[19]

9 In that case, the Prosecution appealed against the trial judge's acquittal of the accused on various sexual assault charges and sought to admit, *inter alia*, an expert report concerning the issue of how rape victims usually approached the disclosure of sexual abuse and reasons for their delays in such disclosure.[20] This was necessary because the trial judge, in acquitting the accused, found that the victim's delay in reporting the sexual assault negatively affected her credibility as a whole,[21] even though this specific issue of delay was not a live point of contention at trial.[22] Given that parties had not addressed the trial judge on the victim's delayed disclosure,[23] this aspect of the judge's finding was based solely on his own impression of how rape victims in general come forward to disclose the abuse they have suffered.[24]

10 The Court of Appeal held that in determining whether the non-availability condition was satisfied, the court should consider the question of *whether the evidence was reasonably not thought to be necessary at trial*,[25] as this was essential to ensuring fairness

18 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [66].
19 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [67].
20 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [95].
21 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [88].
22 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [94].
23 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [94].
24 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [67].
25 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [68].

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and due process.[26] This would, in turn, necessitate a consideration of the issues that the applicant would reasonably have become aware of, either before or during the close of the trial. Having said that, the Court of Appeal also recognised that the need for such an inquiry would be rare, as trial judges were generally unlikely to have "unilaterally propounded an issue or decided it without the aid of evidence or submissions".[27] More importantly, the Court of Appeal also stressed that this was an *objective inquiry* that focused on what parties *reasonably* would have been aware of, and not what parties were *subjectively* cognisant of.[28]

11 The Court of Appeal then examined the record of proceedings – including the Defence's cross-examination of the victim and parties' closing submissions – and concluded that the Prosecution could not reasonably be expected to have considered it necessary to adduce the expert evidence at the trial.[29] The non-availability condition was therefore satisfied.

B. Introducing the consideration of proportionality

12 Apart from its expansion of the non-availability condition, *Mohd Ariffan* is also significant because it introduced an additional concept of *proportionality* as a guide for determining whether to allow fresh evidence to be admitted on appeal.

13 Proportionality essentially requires the court to consider the likely procedural consequences of admitting the fresh evidence and the potential prejudice that might be occasioned to the respondent if this were done, and weigh this against the justification advanced in support of the application.[30] In other words, the court balances between the significance of the new evidence on the one hand, and the need for expeditious conduct and conclusion of litigation together with any potential prejudice, on the other.[31]

26 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [69].
27 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [69].
28 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [70].
29 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [91]–[95].
30 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [2].
31 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [72].

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14 For example, admitting the fresh evidence may prolong proceedings if the respondent seeks to cross-examine the maker of the new evidence and other witnesses, or if a complete retrial of the matter is necessary. It may also subject vulnerable witnesses to considerable trauma, should they be made to relive the experience of being cross-examined again. More importantly, the respondent may be prejudiced if evidence that was favourable to it at the trial is no longer available at the further proceedings, whether by intervening events or the lapse in time.[32] On this note, the Court of Appeal cautioned that where severe prejudice might be occasioned to the respondent, the application may not be allowed even if all three *Ladd v Marshall* conditions are satisfied.

15 Finally, the Court of Appeal noted that considerations of proportionality and prejudice are also relevant to the *type of further proceedings* to be ordered, and the court should only order additional proceedings which are strictly necessary to address the issues raised by the new evidence.[33]

C. Abuse of process: BLV v Public Prosecutor

(1) Facts and decision

16 More recently, the Court of Appeal in *BLV v Public Prosecutor*[34] ("*BLV*") considered the issue of abuse of process in the context of applications to adduce fresh evidence. In *BLV*, the offender was charged with sexually abusing his daughter by, *inter alia*, digital and penile penetration of her mouth and anus. The offender's main defence at the trial was that his penis was deformed at the time of the offences, which made it highly improbable for him to have been able to penetrate the victim with his penis. The High Court rejected this defence as there was insufficient evidence to prove that the penile deformity existed at the time of the offences in 2013, and convicted the offender. The offender appealed against his conviction and sentence.

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32 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [75].
33 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [80].
34 [2019] 2 SLR 726.

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17 At the first hearing of the appeal, the offender's counsel informed the Court of Appeal that the offender had, by chance, met with an acquaintance barely *three days before the hearing*. During the ensuing conversation between them, the acquaintance, Mohamed bin Alwan ("Mohamed") purportedly stated that he had seen the offender's deformed penis at around the time of the offences, and was willing to testify to the same.[35] The Court of Appeal granted leave for the offender to file a criminal motion to adduce fresh evidence, along with a supporting affidavit from Mohamed, within three weeks from the hearing date.[36]

18 Subsequently, Mohamed decided not to give an affidavit on this matter. The offender instead filed an affidavit affirmed by *another witness*, Muhammad Ridzwan bin Idris ("Ridzwan"). In that affidavit, Ridzwan explained that he too had a chance meeting with the offender six days before the filing deadline. In conversing with the offender, Ridzwan learnt that the offender had been accused of raping his daughter, and that Mohamed had changed his mind and no longer wished to testify for the offender. Ridzwan then informed the offender that he too had seen the latter's penis in 2013 and was willing to testify to the same.[37]

19 The Prosecution objected to the introduction of this fresh evidence, arguing that the application was an abuse of process, and that the offender was conniving to introduce false evidence.[38] While it recognised the Prosecution's concerns, the Court of Appeal nonetheless remitted the matter to the High Court with directions that the following additional evidence was to be received:[39]

(a) the offender's evidence, to explain the circumstances in which he found two witnesses within two weeks who had seen his penis at the time of the offences, specifically for the purpose of determining whether the offender was party to any abuse of process; and

(b) Ridzwan's evidence.

35 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [35].
36 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [35].
37 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [40].
38 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [37].
39 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [37].

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20 After hearing evidence from the offender and Ridzwan, the High Court rejected the further evidence on the basis that it was devoid of credibility, and also found beyond a reasonable doubt that the offender had arranged for false evidence to be presented before the court, which amounted to an abuse of the court's process.[40]

21 At the next hearing of the appeal, the Court of Appeal upheld the High Court's decision to reject the further evidence and agreed that there was an abuse of the court's process.[41] Among other reasons, the Court of Appeal found that the offender's chance encounters with Mohamed and Ridzwan were highly remarkable and suspicious, and that there were significant inconsistencies between the offender's and Ridzwan's accounts. It also dismissed the offender's appeal against conviction and sentence.

22 Additionally, because of the offender's abuse of process, the Court of Appeal enhanced the aggregate sentence by four and a half years, increasing it to 28 years' imprisonment,[42] for the following reasons:

(a) There was a need to specifically deter the offender given his complete lack of remorse, as evidenced by his choice to "devise an elaborate scheme to present false evidence to the court" and to "procure someone else to lie in court" to exonerate himself.[43]

(b) There was also a need to deter like-minded persons from making similarly unmeritorious applications to delay and frustrate judicial proceedings.[44]

(c) The offender's conduct "attacked the integrity of the judicial process".[45]

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40 *BLV v Public Prosecutor* [2019] SGCA 6.
41 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [63].
42 The sentence of 24 strokes of the cane, which was the maximum permissible number in law, was untouched.
43 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [84] and [85].
44 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [86] and [87].
45 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [88].

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23 In determining the *extent* of the uplift in sentences, the Court of Appeal set out the following non-exhaustive factors to be considered:

(a) First, the severity of the sentence that was to be enhanced. To be sufficiently deterrent, the uplift in sentence had to be severe enough to outweigh the prospect of an acquittal. Accordingly, if the sentence for the original offence was objectively lengthy, then the uplift imposed had to be correspondingly higher.[46]

(b) Second, the egregiousness of the abuse that had been committed, which the court considered to be more significant where false evidence was adduced on appeal as opposed to at first instance.[47]

(c) Third, any applicable safeguards to ensure that the uplift imposed was not excessive. In this regard, the enhanced sentence could not exceed the statutorily-imposed maximum sentence for the original offence, and the uplift could not exceed the maximum sentence that the accused could have received had he been separately charged with his offending behaviour constituting the abuse of process.[48]

(2) Comments

24 *BLV* raises several questions and observations.

25 First, does the Court of Appeal's decision to remit the matter to the High Court to receive further evidence suggest a relaxation of the reliability condition? It could be argued that the Court of Appeal adopted a more liberal approach towards admitting further evidence, seeing as it remitted the matter when it could have justifiably dismissed the application given how plainly unreliable the evidence was. In the authors' view, the Court of Appeal's decision to remit the matter simply reflected its preference for such types of evidence to be given orally and tested under

46 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [96].
47 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [100].
48 *BLV v Public Prosecutor* [2019] 2 SLR 726 at [101].

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cross-examination, as opposed to being adduced by affidavit. Such a preference may arise from the trial judge having had the benefit of hearing the oral evidence of the offender and observing the offender's demeanour at trial. This does not, therefore, indicate a relaxation of the reliability condition.

26 Second, it is unclear whether the Court of Appeal's approach is confined to this case or is of broader application. For example, would future applications to admit fresh evidence on appeal be remitted to the trial court as a matter of course, or would the appellate court in clear cases simply reject the application? Additionally, if the appellate court directs that the trial court receive further evidence, would it invariably also require evidence to be led to determine whether there was an abuse of process?

27 Third, while the threat of enhanced punishment is possibly enough safeguard for most cases, it is unlikely to deter accused persons facing capital punishment from abusing the court's process in the hopes of securing an acquittal. However, given the irreversibility of the death penalty and the consequent need for the "most anxious and searching scrutiny" in capital cases,[49] it may well be that the need to prevent erroneous convictions applies with greater force, especially if the application to adduce fresh evidence is made at the appeal stage and not post-appeal.[50]

III. Implications for practitioners

28 There are at least three implications that these recent developments may have for practitioners.

29 First, practitioners should be aware that the non-availability condition can be satisfied if it can be shown that the fresh evidence was not reasonably thought necessary at trial, although the

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49 *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [50].

50 See ss 394F–394K of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") for applications to review a concluded criminal appeal and, in particular, s 394J of the CPC, which prescribes the statutory requirements that must be satisfied before an appellate court will exercise its power of review. While these requirements bear some similarity to the *Ladd v Marshall* conditions, they are far stricter in nature.

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cases where such an argument would succeed are likely to be rare.[51] Additionally, practitioners should note that where such an argument is made, the appellate court will scrutinise the trial records, including counsel's questions and submissions, and their reasons for making (or omitting to make) certain submissions, in order to understand the precise areas of contention that parties had in mind.[52]

30 Second, when applying to adduce fresh evidence, practitioners should address the issue of proportionality in their submissions, which should include an assessment of resulting waste of judicial resources and potential prejudice to the respondent. This is crucial because an application to admit fresh evidence may be dismissed even if all three *Ladd v Marshall* conditions are satisfied, if this severely prejudices the respondent. Additionally, should the application be allowed and further proceedings found necessary, parties should work together to identify the witnesses to be recalled and limit the scope of their evidence to what is necessary in the light of the new evidence.[53]

31 Finally, practitioners should advise their clients on the possible consequences should they be found to be abusing the court's process, including an uplift in sentence that is severe enough to outweigh the prospects of an acquittal. In any event, as officers of the court, practitioners should bear in mind their overriding duty to the court, even as they seek to advance their clients' cases to the best of their abilities.

IV. Conclusion

32 The developments in the law have sought to balance the competing interests of substantive justice and the efficient use of court resources in a more flexible manner. The courts will admit fresh evidence in deserving cases but will also strenuously guard

51 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [69]. See also para 10 above.
52 See, for example, *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [91] and [92].
53 *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [80].

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against the increased potential for abuse of its process. These developments are welcome, and it is unlikely that one will have heard the last word on the weighty issue of adducing fresh evidence on appeal.

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