IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 18

Criminal Motion No 6 of 2022

Between

(1) Roslan bin Bakar
(2) Pausi bin Jefridin
(3) Lawyers for Liberty

… *Applicants*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Law — Statutory offences — Misuse of Drugs Act]
[Criminal Procedure and Sentencing — Criminal review — Leave for review]

Roslan bin Bakar and others
v
Public Prosecutor

[2022] SGCA 18

Court of Appeal — Criminal Motion No 6 of 2022
Judith Prakash JCA, Belinda Ang Saw Ean JAD and Woo Bih Li JAD
15 February 2022

7 March 2022

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 On 15 February 2022, we heard and dismissed this application by Roslan bin Bakar ("the first applicant"), Pausi bin Jefridin ("the second applicant") and Lawyers for Liberty ("the third applicant") for an order that leave be granted to the applicants to ask this court to review its earlier decisions in CA/CCA 59/2017 ("CCA 59") and CA/CCA 26/2018 ("CCA 26") which were given in relation to the criminal cases against, respectively, the first and second applicants. The application was made under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC").

2 The first and second applicants have been convicted, in separate cases, of drug trafficking and have been sentenced to death. These sentences were scheduled to be carried out on Wednesday, 16 February 2022. This application

was filed on the evening of 14 February 2022 in an attempt to set aside the sentences of death that had been imposed upon them.

3 We heard the application on the afternoon of 15 February 2022 and dismissed it. In respect of the first and second applicants, we were of the view that they were not able to meet the requirements for a review set down by s 394H of the CPC and had no material (whether legal or evidential) with which to do so. In respect of the third applicant, our judgment was that it had no standing to be a party to the application and we therefore dismissed the application in respect of the third applicant as a preliminary matter.

4 We now give our full grounds of decision.

The third applicant

5 The affidavit filed in support of the application was affirmed by one Mr Charles Yeo ("Mr Yeo"), counsel for the applicants. In his affidavit, Mr Yeo gave reasons why he considered that it was necessary to review the earlier decisions of the Court of Appeal in CCA 59 and CCA 26. Those reasons related entirely to the death penalty imposed on the first and second applicants. Nothing about the third applicant was mentioned in the affidavit.

6 Shortly before the application was heard, the Public Prosecutor ("PP"), the respondent herein, filed written submissions in which, amongst other points, it submitted that the third applicant lacked the standing to be an applicant in the application. At the commencement of the hearing, we asked Mr Yeo to inform us who the third applicant is and why the third applicant was entitled to be party to the application. Mr Yeo told us that the third applicant is a Malaysian non-governmental organisation which campaigns against the death penalty. It has

also, he said, provided legal assistance to the first and second applicants. Indeed, he confirmed that the third applicant would be paying the disbursements incurred by the applicants in these court proceedings. When we asked him what the interest of the third applicant was in these proceedings, his only response was that it was interested in assisting the applicants as it was against the imposition of the death penalty. We were of the view that such an interest did not qualify the third applicant, or give it standing, to be a party to an application under s 394H of the CPC.

7 Section 394H of the CPC appears within Div 1B of Part 20 thereof which is entitled "Review of earlier decision of appellate court". In line with that title, the term "review application" is defined in s 394F as meaning "an application to review an earlier decision of an appellate court". Section 394G sets out the conditions for making a review application while s 394H(1) provides that before making a review application, the applicant must apply to the appellate court for, and obtain, the leave of that court to do so. The criminal motion before us was the leave application required by s 394H(1).

8 The term "applicant" is not defined in s 394H, or anywhere else in Div 1B for that matter. We agreed, however, with the PP's submission that as a matter of statutory interpretation, the "applicant" had to be one of the parties to the decision of the appellate court which the applicant wanted to have reviewed. As the CPC applies to criminal cases and appeals, that would mean that the only parties to an application under s 394H would be the PP itself and the person against whom the original criminal case had been brought.

9 The PP's submissions set out in detail why what the PP describes as the "narrow interpretation" (that is, the interpretation that we adopted) should be

favoured over the "broad interpretation". The broad interpretation would allow any person who desired a different result in a concluded appeal to be an applicant in a review application. We agreed with the PP that applying the framework for purposive statutory interpretation set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 would result in the conclusion that the context of the provision within the CPC and the purpose of s 394H itself clearly support the narrow interpretation. The broad interpretation would allow all and sundry to file review applications and such a wide licence would go against Parliament's intention to limit the scope of review (as is clearly seen from the stringent requirements set out in s 394H itself) and weed out unmeritorious cases.

10 More generally, it is against the whole purpose and tenor of criminal proceedings to allow third parties to participate in them. A criminal proceeding is the prosecution by the State of an alleged offender charged with breaking its laws. Thus, the parties to any criminal proceeding from the very start and throughout the whole process can only be the prosecution and the accused. Other persons may have an interest in the outcome of any particular case, for example, a victim or a person charged with a similar offence, but such persons are not and cannot be parties to that case as they are neither the prosecutor or the accused. Nor does this position change as the case goes through the various stages from trial to appeal to criminal reference and, occasionally, criminal review.

11 The principle stated above was applied and re-emphasised recently in *Iskandar bin Rahmat v Public Prosecutor* [2021] 2 SLR 1151. Mr Iskandar, the applicant there, had been tried and convicted on murder charges. His subsequent appeal to this court was dismissed. The applicant then filed an application for

leave to intervene in a completely unrelated criminal proceeding, a criminal appeal in which the appellant one Mr Teo Ghim Heng was, among other things, challenging his own conviction for murder on constitutional grounds. The ostensible purpose of the leave application was to support the constitutional challenges being mounted by Mr Teo. This court had no hesitation in dismissing Mr Iskandar's application. It observed at [5] that litigants, including accused persons, do not have a right to intervene in an unrelated pending proceeding just because they have a common interest in a point of law that is being considered in that proceeding. Mr Iskandar had submitted that the intervention sought was "incidental to or supportive of" Mr Teo's appeal but this argument was robustly rejected in the following words at [21]:

> … It could not be said that an application to intervene by an unrelated third party in order to make additional submissions on a legal issue in another criminal appeal was so "fundamentally tethered" to that appeal as to affect the correctness of its outcome. *If the Applicant's argument was taken to its logical conclusion, any person who has an interest in any legal point that was being argued in any criminal appeal could make an application for leave to intervene in that appeal. We rejected that broad and far-reaching proposition as it was plainly wrong as a matter of principle.*
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> [emphasis added]

12 Accordingly, before we considered the merits of the application proper, we dismissed it as against the third applicant. Whatever the third applicant's interest in the outcome of the application may have been, it had no right to appear before us as a party thereto.

Background to the application

13 From here onwards, references to the applicants should be understood as referring only to the first and second applicants.

14 The first and second applicants were each charged with, and claimed trial to, a capital offence of trafficking in not less than 96.07g of diamorphine and a non-capital offence of trafficking in not less than 76.37g of methamphetamine, under s 5(1)(*a*) read with s 33 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). They were convicted and sentenced to death on 22 April 2010. Their appeals against conviction and sentence were dismissed on 17 March 2011.

15 Subsequently, following amendments to the MDA which provided a framework allowing convicted offenders such as the applicants to apply to be re-sentenced under s 33B of the MDA to either life imprisonment with caning or life imprisonment alone, the applicants both availed themselves of this procedure. In June 2016, the first applicant filed a criminal motion to apply for re-sentencing to life imprisonment on the basis that he was a courier within the meaning of s 33B(3)(*a*) of the MDA and that he suffered from an abnormality of mind that substantially impaired his mental responsibility for his acts and omissions within the meaning of s 33B(3)(*b*) of the MDA. The second applicant made a similar application in July 2016. The applications were heard together and dismissed in November 2017. The High Court found that the second applicant was a courier but that the first was not. It further found that neither the first applicant nor the second applicant suffered from an abnormality of mind.

The applicants then appealed by CCA 59 and CCA 26 to the Court of Appeal but these appeals were dismissed in September 2018.

16 In late January 2022, the President ordered that the sentences of death pronounced on the applicants were to be carried into effect on 16 February 2022.

The section 394H application

17 As stated above, this application was filed on the evening of 14 February 2022. The grounds of the application were stated in the affidavit of Mr Yeo. There, he deposed that the "reasons" why it was necessary to review the earlier decisions of the appellate court were as follows:

> (a) The general principle is that the presence of mental disorder as opposed to an abnormality of mind *per se* may operate at any stage of a capital case as a bar to trial or conviction, the imposition of a death sentence or the carrying out of a death sentence.
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> (b) In *Pitman v State of Trinidad and Tobago; Hernandez v State of Trinidad and Tobago [on appeal from the Court of Appeal of Trinidad and Tobago]* [2018] AC 35, the Privy Council confirmed that executing offenders suffering from substantial mental impairment would violate the constitutional prohibition of cruel and unusual punishment. Hence, execution of the death sentence imposed on the applicants would be unconstitutional.
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> (c) The underlying principle in the common law is firstly that nobody should be convicted of a capital offence, sentenced to death or executed if they were suffering from significant mental disorder at the time of the offence. And secondly, nobody should be sentenced to death

or executed if the mental disorder develops later and is present at the time of either sentence or execution. As argued by the previous counsel for the first applicant under the Criminal Motion No 40 of 2016, the first applicant suffered from an abnormality of mind as his IQ was found to be at 74. The expert's opinion was that the first applicant had "limited capacity for judgment, decision-making, consequential thinking, impulse control and execution, decision-making, consequential thinking, impulse control and executive function" due to the underlying cognitive defects.

(d) Even where an offender's mental illness is only moderately severe, it may well provide a cogent reason for not imposing the death penalty in a discretionary sentencing regime. In *S v Taanorwa* 1987 (1) ZLR 62 (SC), the Supreme Court of Zimbabwe held that some background of mental disturbance less than a formally diagnosed mental disorder could provide a reason not to impose the death penalty.

18 It would be noted that the "reasons" given were in the nature of legal arguments.

19 Section 394H of the CPC does not state expressly the conditions that an applicant for leave to make a review application must satisfy in order to be granted such leave. This question was considered by the Court of Appeal in *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 ("*Kreetharan*"). The court observed at [17] that the inclusion of a leave stage appeared to be a codification by Parliament of the observations of the court in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 that a leave stage would better balance the rights and interests of all persons who make use of scarce

judicial resources and allow unmeritorious applications to be weeded out at an early stage. The court in *Kreetharan* went on to state that the leave stage would allow only those applications which disclosed a legitimate basis for the court's power of review to proceed.

20 The phrase "legitimate basis" in *Kreetharan* as well as the reference by the court there to s 394J of the CPC when it was considering whether to allow the leave application in that case indicates the approach to be taken to such an application. Section 394J sets out the requirements for exercise of the power of review under Div 1B. Section 394J(2) states that an applicant in a review application must satisfy the appellate court that there is "sufficient material" (being evidence or legal arguments) on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made. The term "sufficient" in s 394J(2) is elaborated on in s 394J(3) in relation to both types of material and further in s 394J(4) as well in relation to legal material only. The material must be either evidence or legal arguments that had not previously been canvassed and could not, with reasonable diligence, have been adduced in court earlier. The material must be compelling in that it is capable of showing almost conclusively that there has been a miscarriage of justice. Additionally, where the material comprises legal arguments, it must be based on a change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to the criminal matter in respect of which the earlier decision was made (see ss 394J(3) and (4)).

21 It follows from the above that in a leave application under s 394H, the applicant must be able to show the court that the material it will be relying on in the review proper is almost certain to satisfy the s 394J requirements. If the

material produced cannot meet this standard, there will be no legitimate basis on which to grant leave. While the standard may appear to be set high, it must always be borne in mind that a criminal review proceeding, which is intended to reopen a final decision of an appellate court after the applicant has been accorded all due process rights, is an extraordinary proceeding and can only be initiated in rare and extraordinary circumstances.

22 In the present case, the applicants were seeking leave for the court to review the decisions in CA 59 and CA 26. These were not the original decisions relating to the conviction and sentencing of the applicants. They were rather the decisions that arose from the appeals against the re-sentencing hearings conducted in 2017. Those appellate decisions were limited to considering the specific issue of whether the applicants ought to be re-sentenced in accordance with s 33B of the MDA. It is worth emphasising that at the re-sentencing hearings both the applicants produced reports and evidence from psychologists and psychiatrists in support of their submissions that they each suffered from an abnormality of mind that impaired their responsibility for their offences. In the case of the first applicant the evidence tendered showed him to have an IQ of 74. In the case of the second applicant, his IQ was assessed as being 67 by his expert, a psychologist who conceded that his test conditions were less than ideal. At the same hearings, the prosecution produced its own expert reports and evidence on the issue of the applicants' intellectual ability. These experts disputed the opinions of the applicants' experts. After considering all the evidence on the issue, the High Court found that neither of the applicants suffered from an abnormality of mind that impaired his responsibility for the

offence that he committed. These findings were upheld by the Court of Appeal in CA 59 and CA 26.

23 Before us, the applicants did not produce any new evidence regarding their mental states. Mr Yeo's affidavit, which was the only supporting material filed in respect of the application, contained no new information on this matter. Instead, Mr Yeo stated:

> Reference will be made at the hearing to refer to the affidavits deposed by Nagaenthran's medical experts and the applicants would like to be given equal opportunity in what [*sic*] like to be treated with like. To be assessed by their international experts who are eminently qualified in their forensic psychiatric fields.

24 The reference to "Nagaenthran's medical experts" was a reference to the case involving one Mr Nagaenthran, another convicted drug-trafficker, who has applied to court for judicial review in respect of his death sentence on the basis that he should not be executed in view of his alleged intellectual disabilities. In Mr Nagaenthran's case, affidavits have been filed by two foreign medical experts giving their views on his abnormality of mind (albeit these views did not arise from any direct examination of Mr Nagaenthran). We should point out that whether these affidavits are in fact admissible in Mr Nagaenthran's proceedings has not yet been determined. It would appear that, as the PP submitted, the applicants here were asking the court to sanction their being examined by the same experts in the hope that such examination would end up creating evidence that would benefit them. It was clear from this that the applicants had no evidential material with which to challenge the findings of the re-sentencing court or the decision of the Court of Appeal in relation to their alleged abnormality of mind, bearing in mind that those decisions were based on the evidence of experts that had been adduced before the court.

25 We were therefore satisfied that there was no evidential material at all, much less compelling material, which could found a criminal review of either CA 59 or CA 26.

26 We then had to consider whether there was any material in the form of legal arguments that could support a review. We were satisfied that there was no such material. There was no change in the law that arose from any decision made by a court after the conclusion of all proceedings relating to CA 59 and CA 26. This in itself was sufficient for the dismissal of the application.

27 In [17] above, we have recited the "reasons" given by Mr Yeo in his affidavit as to why it was necessary to review the earlier appellate decisions. It can be seen that those reasons were based on alleged principles that assumed that the death penalty was to be carried out on persons who were subject to "mental disorder" or "substantial impairment" of their mental facilities. Even if we had accepted that such principles existed as independent legal bases to impugn the carrying out of the death penalty, they would not have been available to the applicants because, as a matter of fact, the applicants have been found to have no mental disorder or substantial mental impairment. This was the very question at issue in the re-sentencing proceedings in the High Court because the provisions of s 33B(3)(*b*) are designed to relieve an offender who suffers from an abnormality of mind that impairs his responsibility for his criminal acts from the imposition of the death penalty.

28 In his oral submissions, Mr Yeo argued that Singapore law incorporates a rule of customary international law that prohibits the execution of intellectually disabled persons on the ground that this would amount to inhuman punishment. He argued that it would be a breach of international human rights

law to execute a person with an IQ of less than 70. He was not, however, able to point out any provision of any convention or treaty which stated the proposition as baldly as he put it. Mr Yeo made reference to Art 15 of the Convention on the Rights of Persons with Disabilities and Declaration 6 of the United Nations Declaration on the Rights of Mentally Retarded Persons in arguing for such a rule but neither is a part of Singapore law and it is questionable whether the second, being an exhortation, is law at all. In fact, neither prohibits the execution of persons solely on the basis that their IQ is less than 70.

29 In any case, Mr Yeo was not even able to establish the general rule for which he advocated. In *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489, the court stated that for there to be a rule of customary international law, there needs to be "extensive and virtually uniform" state practice and *opinio juris* of States: at [98]. The applicants did not adduce any material to establish the existence of any rule prohibiting the execution of intellectually disabled persons or that the execution of such persons amounts to inhuman punishment. In any event, these arguments were wholly theoretical since neither of the applicants was so impaired.

Conclusion

30 Having heard and considered the applicants' arguments, we were satisfied that there was no basis for the application at all. Regrettably, it had been cobbled together without substance in a desperate attempt to halt the

scheduled executions of the first and second applicants. We therefore dismissed it.

31 The respondent asked for the costs of the application. We gave directions for the filing of submissions in this regard and will decide this issue at a later date.

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Charles Yeo Yao Hui (L F Violet Netto) for the applicants;
Francis Ng Yong Kiat SC, Samuel Yap Zong En and
Shenna Tjoa Kai-En (Attorney-General's Chambers)
for the respondent.