IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 20

Civil Appeal No 6 of 2022

Between

(1) Roslan bin Bakar
(2) Pausi bin Jefridin

… *Appellants*

And

Attorney-General

… *Respondent*

In the matter of
HC/OS 139 of 2022

In the matter of
Order 53, Rule 1 of the Rules of Court (Cap 322, R5)

And

In the matter of
Articles 9 and 12 of the Constitution of the Republic of Singapore

And

In the matter of
CA/CCA 26/2018, CA/CCA 59/2017 and CA/CCA 61/2017

Between

(1) Roslan bin Bakar
(2) Pausi bin Jefridin

… *Plaintiffs*

And

Attorney-General

… *Defendant*

GROUNDS OF DECISION

[Administrative Law — Judicial review — Leave]

Roslan bin Bakar and another
v
Attorney-General

[2022] SGCA 20

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

9 March 2022

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

Introduction

1 This civil appeal was the second time in which the two appellants, Mr Roslan bin Bakar ("the first appellant"), and Mr Pausi bin Jefridin ("the second appellant"), had appeared before this court in as many days.

2 On 15 February 2022, we heard and dismissed an application by the appellants for an order that they be granted leave to ask this court to review two of its earlier decisions. In the relevant decisions, CA/CCA 59 of 2017 ("CCA 59") and CA/CCA 26 of 2018 ("CCA 26"), this court had affirmed the sentences of death which had been passed against the appellants for their offences of drug trafficking. The reasons for our decision on 15 February 2022 can be found in *Roslan bin Bakar and others v Public Prosecutor* [2022] SGCA 18 ("CM 6"). The appellants had filed CM 6 in an attempt to set aside their

capital sentences. The application was extremely urgent as the carrying out of these sentences had been scheduled to take place on 16 February 2022.

3 In CM 6, the appellants were represented by Mr Yeo Yao Hui Charles ("Mr Yeo") who informed us that he was a salaried partner of the firm of LF Violet Netto ("LFVN"). Mr Yeo asked for, and we granted, permission for Mr M Ravi ("Mr Ravi"), whom he described as the knowledge manager of LFVN, to sit in and assist him. During the hearing, when we indicated that the appellants were not able to satisfy s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) as they were required to do in order to get leave to commence criminal review proceedings, Mr Yeo informed us that then the appellants would have to file an application for judicial review.

4 That very evening, the firm of LFVN filed an originating summons, *viz*, HC/OS 139 of 2022 ("OS 139"), on behalf of the appellants in the General Division of the High Court in which they asked for leave to start judicial review proceedings. OS 139 was heard before the High Court Judge ("the Judge") on the morning of 16 February 2022. It was dismissed and the appellants then filed this appeal which we heard on the same afternoon and dismissed.

5 Our brief grounds for the dismissal of the appeal were as follows:

> We dismiss this appeal. We will give our full grounds later.
>
> Having considered the arguments carefully, we have concluded that there are no merits at all in the appellant's contentions for the reasons given by the learned judge below.
>
> Before us, Mr Yeo, counsel for the appellants, put his case for prohibitory orders against the execution of his clients on the basis that to execute them would be an unlawful act. He confirmed that he was not challenging the decisions in CA/CCA 59/2017 and CA/CCA 26/2018 which were the appeals against the re-sentencing decisions in respect of the appellants wherein it was held that neither of them suffered from an abnormality of mind within the meaning of that

> condition in s 33B(3) of the Misuse of Drugs Act. Indeed, he could not maintain such a challenge in the light of yesterday's decision in CA/CM 6/2022.
>
> Mr Yeo was driven to concede that there is no law in Singapore currently that categorically prohibits the execution of a person with an IQ of less than 70. He was not able either to point to any rule of international law or any provision of an international treaty that contains such a prohibition. In the ultimate analysis, he agreed that his contention was based on a possible change in the law which he hopes may be made after the case of one Mr Nagaenthran is heard by the Court of Appeal next month. This was an entirely speculative argument which we cannot accept.
>
> Quite apart from the fact that there is no such law in the terms Mr Yeo contends for, we must emphasise that his clients were found by the Courts (after hearing evidence from psychiatrists and psychologists engaged by them as well as the Public Prosecutor as well as their own evidence) to be able to function in ways no different from people with higher IQ levels in relation to the drug offences. Mr Roslan was found to be the central figure in the drug transaction and Mr Pausi was able to carry out his part in it, which involved transporting the drugs from Malaysia to Singapore and delivering them here, with no difficulty.
>
> In the circumstances, we are satisfied that there is no reasonable suspicion at all that the application for the orders sought would be successful.

6 We now explain those grounds in more detail.

The application for leave for judicial review

7 By OS 139, the appellants asked for leave to be granted for the hearing of the following prayers in a judicial review application:

> (a) A Declaration that the execution of the [appellants'] sentences of death would be in breach of [their] rights under Article 9(1) of the Constitution.

(b) A Declaration that the execution of the [appellants'] sentences of death would be in breach of [their] rights under Article 12(1) of the Constitution.

(c) A Declaration that the execution of the [appellants'] sentences of death would be in breach of Singapore's Prisons internal policy not to execute sentences of death in respect of the mentally disabled and would hence be unlawful.

(d) A Prohibitory Order in respect of the execution of the [appellants'] sentences of death.

(e) A Prohibitory Order against the execution of the [appellants'] sentences of death on the grounds that [appellants] suffer from mental disability.

(f) A Prohibitory Order and or Stay of execution in respect of the execution of the [appellants'] sentences of death, pending the outcome of the court proceedings in the case of Nagaenthran a/l K Dharmalingam.

8 The application was supported by an affidavit affirmed by Mr Yeo. In the affidavit, Mr Yeo gave four reasons for the application. All these reasons had to do with the assertion that by reason of an alleged mental disorder or substantial mental impairment on the part of each of the appellants, it would not be lawful or constitutional to carry out the death sentences that had been imposed. To understand what the appellants were doing, it may be helpful if we set out the reasons stated in the affidavit in full. Mr Yeo stated:

a. The general principle is that the presence of mental disorder may operate at any stage of a capital case as a bar to trial or conviction, the imposition of a death sentence of the carrying out of a death sentence.

> b. In *Pitman & Anr v State of Trinidad and Tobago* UKPC 6, (2017) Privy Council confirmed that executing offenders suffering from substantial mental impairment would violate the constitutional prohibition of cruel and unusual punishment. Hence execution of death sentence would be unconstitutional.
>
> c. 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 mental disorder develops later and is present at the time of either sentence or execution. As argued by the previous Counsel for the plaintiff (Roslan) under the Criminal Motions No 40 of 2016 that Plaintiff were suffered [*sic*] from an abnormality of mind as his IQ [*sic*] to be at 74. His views with the expert's opinion that plaintiff had "limited capacity for judgment, decision-making, consequential thinking, impulse control and execution function" due to the underlying cognitive defects. Whereas the First Plaintiff, Pausi bin Jefridin's IQ was assessed at 67.
>
> d. 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 *State v Taanorwa* [quoting Beadle CJ in *S v Sulpisio (unreported)*], 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.

9 On examination, it was plain that the four "reasons" for the judicial review application were almost identical to the four grounds that had been stated in the motion papers in CM 6 as the grounds on which leave to commence criminal review proceedings should be granted. The only significant difference between the two was the sentence in para (c) of the reasons: "Whereas the first Plaintiff, Pausi bin Jefridin's IQ was assessed at 67". This sentence was not present in the CM 6 motion papers.

10 Mr Yeo also stated in his affidavit that court proceedings involving one Mr Nagaenthran a/l K Dharmalingam ("Mr Nagaenthran") which concerned

issues regarding the imposition of the death penalty, similar to those raised in respect of the appellants, was pending in this court and would come up for hearing on 1 March 2022. The implication was that the application should not be heard until this court had dealt with Mr Nagaenthran's case which is CA/CA 61 of 2021 ("CA 61").

11 It should be noted that the affidavit did not contain any factual material whatsoever. In particular, there was no material relating to the alleged mental impairment of the appellants or either of them. Nor was there any material to support the prayer for a declaration that the execution of the appellants would be in breach of an internal policy of the Singapore Prisons not to execute mentally disabled persons.

12 The Judge, as stated, dismissed OS 139. In his oral grounds of decision, he noted that the requirements for leave to commence judicial review proceedings are that:

(a) The subject matter of the complaint has to be susceptible to judicial review;

(b) The applicants need to have sufficient interest in the matter; and

(c) The materials before the court must disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicants.

In the case before him, only the third requirement was in dispute.

13 The Judge noted that the fundamental factual assertion on which the application was based was that the appellants suffered from an abnormality of mind by reason of their alleged low IQs. In court, Mr Yeo clarified that the

ground being advocated was that, by reason of their alleged low IQs, carrying out the sentence of death on them would be in breach of Arts 9 and 12 of the Constitution. This ground was predicated on the submission that executing a person who has a low IQ is against customary international law, which ought to be part of Singapore law. The Judge observed that this ground before him was the same as that ventilated before us in CM 6. CM 6 had been dismissed because there was no new material, in terms of both evidence and legal arguments, that warranted leave being granted to the appellants to make an application to review this court's earlier decisions in CCA 59 and CCA 26. He noted also that in those decisions, this court had agreed with the trial judge that the appellants did not suffer from any abnormality of mind.

14 It therefore appeared to the Judge that the application before him was an attempt to re-open issues which had already been dealt with in the re-sentencing applications which had culminated in CCA 59 and CCA 26 and, more recently, in CM 6. This attempt to re-open issues that had already been decided, led to the conclusion that the third requirement was not satisfied in relation to the first ground. Further, there was no evidence of any rule of customary international law prohibiting the execution of intellectually disabled persons or that the execution of such persons amounted to inhuman punishment. Therefore, the argument based on Arts 9 and 12 of the Constitution and customary international law did not satisfy the third requirement for leave to be granted.

15 The Judge observed that, as regards the second ground relating to the alleged internal policy of the Singapore Prison Service, there was no evidence in the supporting papers to support the existence of such a policy. As there was no evidential basis for it, the Judge could not consider that ground. It should be noted that before the Judge, counsel for the respondent drew the court's attention to the fact that in CA 61 in relation to Mr Nagaenthran, the Singapore

Prison Service had categorically refuted the existence of such a policy. Mr Yeo did not challenge that refutation. As regards the third ground, the Judge rejected it on the basis that it was settled law that the principle of judicial mercy applies at the stage of sentencing. The matter before the Judge was well past that stage and there was no reference to that ground in the supporting papers. Therefore, that ground was also of no assistance to the appellants.

The appeal

16 Mr Yeo appeared on behalf of the appellants at the appeal. At the commencement of the hearing, he asked us for permission to allow Mr Ravi, who would be arriving shortly, to attend the hearing. He explained that Mr Ravi was not yet present as he had gone to file some papers. In the event, Mr Ravi did not attend the hearing at all. It later transpired that the papers which Mr Ravi had filed comprised a second application for judicial review by the appellants which had been prepared for them by the same law firm, LFVN, that acted for the appellants in the present appeal.

17 The main question that we had to consider on the appeal was whether the materials before the court disclosed a *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the appellants. There was some contention about whether the first requirement was satisfied, *ie*, whether the subject matter was susceptible to judicial review. However, as this point was not taken below, we did not go into it in depth on the appeal.

18 On behalf of the appellants, Mr Yeo put forward three main points which he argued justified reversing the decision of the Judge. We did not find any of the points meritorious. Not only did they repeat matters that had already been raised on behalf of the appellants in CM 6 and rejected there, but also there was

no factual basis for them. In addition, they were speculative and amounted to asking the court to give a decision in the appellants' favour on the basis that there could possibly be a change in the law when CA 61 was dealt with.

19 The judicial review application was taken out on the premise that it would be unlawful or unconstitutional for the sentences of death passed against the appellants to be carried out. That was the justification for the prohibitory orders and the related declarations that the appellants had applied for. To succeed, the appellants had to establish a *prima facie* case of a reasonable suspicion that carrying out the death sentences would be unlawful or unconstitutional. They were totally unable to do so.

20 Mr Yeo's main point was that carrying out the executions would be unlawful because of the appellants' alleged mental impairment. When pressed on this, he said that the alleged unlawful act would be the execution of a person with an IQ of less than 70. We rejected that argument primarily on the basis that both appellants had been found by the courts to have no abnormality of mind that impaired their responsibility for the offences they had committed. Further, no new material had been furnished by the appellants which could cast any doubt whatsoever on the findings regarding their mental capacity. It appeared to us that because there was no new material available, the appellants were trying in these proceedings to focus their argument more on the basis of their IQs as assessed by their experts in the course of the re-sentencing trials that they had been through. This change of focus made no difference, however, since the factual findings on the appellants' responsibility for their criminal actions remained in place.

21 In any case, Mr Yeo's statement that the law forbade the execution of persons who had IQs of less than 70, if correct, immediately implied that there

could be no illegality in carrying out the death sentence passed on the first appellant as it was his own case that his IQ was 74. The illegality would only apply to the second appellant who had an IQ of less than 70. Mr Yeo, aware that there is no domestic law which prohibits the execution of persons with IQs of less than 70, contended that a series of foreign instruments had given rise to customary international law and were part of the law of Singapore. He referred to Art 15 of the United Nations Convention of the Rights of Persons with Disabilities ("CRPD") and to two resolutions passed by the United Nations on the rights of mentally retarded persons. However, the CRPD does not contain any express provisions on the death penalty. Further, in so far as the appellants may have been seeking to argue that the prohibition against subjecting anyone to "cruel, inhuman or degrading treatment or punishment" in Art 15 of the CRPD covers the imposition of the death penalty, they put forward no material showing how this was so. In any event, neither Art 15 of the CRPD or any other material relied on by the appellants expressly prohibits the execution of persons who have IQs of less than 70.

22 The argument based on the CRPD and other resolutions of the United Nations suffered from the further, more basic, weakness that none of them is even part of Singapore law. As noted by the Judge, even if these instruments were considered to be customary international law, there are limits to the incorporation of such law as part of Singapore's domestic law. In particular, if such law is inconsistent with domestic law it cannot be incorporated: see *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [50]. We would further reiterate the established legal position that under Singapore's dualist system, provisions in treaties do not become part of Singapore domestic law unless incorporated by specific legislation passed by Parliament for that purpose. None

of the alleged customary international laws relied on by the appellants have been legislated on here.

23 There was thus no basis whatsoever on which to impugn the carrying out of death sentences which had been lawfully passed after due process of law had been afforded to the appellants as being unlawful or unconstitutional.

24 When these points were put to Mr Yeo, he submitted that even if the Judge held that these "laws" are not yet part of the law of Singapore and this court upheld that position, they could become part of Singapore law at the point of the decision in CA 61. This argument was totally unacceptable. Mr Yeo was speculating on the outcome of a case that was entirely distinct from the appeal before us. Further, the facts of CA 61 were different in that one of the main allegations there concerned an alleged substantial deterioration in Mr Nagaenthran's mental acuity after his conviction so much so that his mental age had been reduced to that of a person below the age of 18. There was no such allegation in the present appeal. In any event, this court has to determine a case on the basis of the law as it is at the time of the hearing, not on the basis of the law as it might one day be. Although Mr Yeo was apparently confident that CA 61 was likely to result in a change in the law, he was unable to articulate the arguments that would be so persuasive in that regard notwithstanding that his firm was acting for Mr Nagaenthran as well and had filed CA 61.

25 Mr Yeo's next point was equally devoid of merit. He wanted the court to order an examination of the appellants by relevant experts, who they would appoint, with a view to establishing their present mental states and IQs. This was a wholly unjustifiable request. The issue of the appellants' mental states and whether either of them suffered from an abnormality of mind that impaired his responsibility for his offences was gone into in great detail in the re-

sentencing proceedings. Expert evidence was given on behalf of all parties and a determination was reached after the evidence was considered. There was no reason to go through the exercise again and no basis for doing so had been put forward. As we noted in our brief oral grounds at the end of the hearing, the finding of the High Court, after considering all the evidence, was that the first appellant, Mr Roslan, was the central figure in the drug transaction and the second appellant, Mr Pausi, was able to carry out his part in it, which involved transporting the drugs from Malaysia to Singapore and delivering them here, with no difficulty.

Conclusion

26 At the end of the hearing, we were satisfied that the contentions of the appellants were simply a re-hash of the arguments which they had put forward in CM 6 and which we had rejected. That should have been the end of the matter. Instead, they sought to invoke the civil jurisdiction of the court by resorting to judicial review proceedings and using these as an opportunity to put forward the same baseless arguments. In our view, this was an abuse of process. The only new matter in this appeal was the request made for a further examination of the appellants. That request could well have been made in CM 6 as well. The appellants, however, when all is said and done, are not familiar with legal arguments and the court's processes. What was proper and what was not were matters for their lawyers to determine. The responsibility for the way the

litigation has been conducted thus lies completely on the shoulders of these lawyers.

27 The respondent asked for the costs of the appeal. We have asked the parties to make their full submissions on the same.

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

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