

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 40

Court of Appeal / Criminal Motion No 45 of 2024

Between

Sulaiman bin Jumari

... Applicant

And

Public Prosecutor

... Respondent

JUDGMENT

[Constitutional Law — Equal protection of the law]

[Constitutional Law — Fundamental liberties — Right to life and personal liberty]

[Criminal Procedure and Sentencing — Stay of execution]

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Sulaiman bin Jumari

v

Public Prosecutor

[2024] SGCA 40

Court of Appeal — Criminal Motion No 45 of 2024

Tay Yong Kwang JCA

15 October 2024

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Tay Yong Kwang JCA:

1 CA/CM 45/2024 (“CM 45”) is a criminal motion filed by Mr Sulaiman bin Jumari (the “applicant”) on 14 October 2024. In CM 45, the applicant seeks the following orders:

- 1) That this Honourable Court exercises its inherent jurisdiction and/or power under Articles 93 and 94 of the Constitution of the Republic of Singapore (Cap, 1999 Rev Ed) to stay the order of the Court of Appeal in CA 25/2019 dated 2 December 2020 ordering the execution of the applicant
- 2) That this Honourable Court exercises its jurisdiction and power to order a stay of the execution of the applicant on the basis that the applicant still has an ongoing civil proceeding at High Court case no HC/OA 972/2024 (“OA972”) and concluding the outcome of OA 972/2024, the applicant intends to file a post appeal application for his criminal case.
- 3) Any such other order/relief as this Honourable Court deems fit.

Factual Background

2 The applicant was convicted on a capital charge of having in his possession not less than 52.75g of diamorphine for the purpose of trafficking, an offence under s 5(1)(a) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the “**MDA**”): see *Public Prosecutor v Sulaiman bin Jumari* [2019] SGHC 210. The applicant could not qualify for the alternative sentencing regime in s 33B of the MDA and the mandatory death penalty was imposed.

3 The applicant’s appeal against his conviction in CA/CCA 25/2019 (“**CCA 25**”) was dismissed by the Court of Appeal on 2 December 2020 (see *Sulaiman bin Jumari v Public Prosecutor* [2020] SGCA 116). The main contention in the appeal concerned the admissibility of the applicant’s contemporaneous statement recorded on 23 June 2016. The Court of Appeal agreed with the trial court’s conclusion that no inducement was given by the recording officer and that the contemporaneous statement was given voluntarily. The Court of Appeal also agreed that the applicant was clear minded during the recording of the said statement and that there was nothing that warranted the court’s exercise of its exclusionary discretion. The said statement was therefore clearly admissible. In the result, the Court of Appeal affirmed the trial court’s decision and dismissed the applicant’s appeal.

4 On 28 April 2021, the applicant’s petition for clemency was rejected. The applicant was initially scheduled for execution on 2 May 2024. On 29 April 2024, the applicant filed CA/CM 18/2024 (“**CM 18**”) seeking a stay of execution of his death sentence on the basis that he had an ongoing civil proceeding in HC/OA 306/2024 (“**OA 306**”) which he claimed could have a bearing on his intended review application under s 394H of the Criminal

Procedure Code 2010 (2020 Rev Ed) (the “**CPC**”) to review the decision in CCA 25. The Court of Appeal allowed CM 18 summarily on 30 April 2024 and ordered a stay of execution of the death sentence pending the outcome of OA 306 or until further order.

5 OA 306 was a challenge by 36 prisoners awaiting capital punishment (“**PACPs**”) (including the applicant) against the policy of the Legal Assistance Scheme in Capital Offences (“**LASCO**”) Assignment Panel to not assign counsel for any post-appeal application. On 20 May 2024, OA 306 was struck out by the General Division of the High Court: see *Iskandar bin Rahmat and others v Attorney-General* [2024] SGHC 122. On 9 September 2024, the PACPs’ appeal in CA/CA 38/2024 was dismissed by the Court of Appeal.

6 On 19 September 2024, 31 PACPs (including the applicant) filed HC/OA 972/2024 (“**OA 972**”) for a declaration that various statutory provisions introduced by the Post-appeal Applications in Capital Cases Act 2022 (Act 41 of 2022) (the “**PACC Act**”) are void for being inconsistent with Arts 9 and 12 of the Constitution of the Republic of Singapore (2020 Rev Ed) (the “**Constitution**”). The Attorney-General, who is the respondent in OA 972, has indicated at a case conference that he was considering an application to strike out OA 972 on the ground that it disclosed no reasonable cause of action. The applicant here stated at another case conference that he was not challenging his conviction or sentence in OA 972. The proceedings in OA 972 are ongoing.

7 The applicant is now scheduled for execution on Wednesday, 16 October 2024. The applicant states in his affidavit in the present CM 45 that he was informed of the date of execution on Saturday, 12 October 2024. On Monday, 14 October 2024, the applicant filed the present CM 45.

8 As mentioned above, OA 972 is an application questioning the constitutionality of various statutory provisions introduced by the PACC Act. The PACC Act, which was passed by Parliament on 29 November 2022, came into operation on 28 June 2024. It introduced new provisions in the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the “**SCJA**”), namely ss 60F–60M of the SCJA, setting out the procedure (the “**PACC procedure**”) for post-appeal applications in capital cases (“**PACC applications**”).

9 Under the PACC procedure, a PACP must first apply for and obtain permission (“**PACC permission**”) from the Court of Appeal to make a PACC application (s 60G(1) of the SCJA). A PACC application is defined in s 60F of the SCJA to mean any application made by a PACP after the relevant date and which seeks a stay of the execution of the death sentence on the PACP or the determination of the application calls into question, or may call into question, the propriety of the conviction of, the imposition of the sentence of death on, or the carrying out of the sentence of death on, the PACP. A PACC application does not include a review application under the CPC (see s 60F of the SCJA).

10 As the application in the present CM 45 is made after the date of dismissal of the applicant’s appeal against conviction and seeks a stay of the execution of the death sentence on him, it falls within the definition of a PACC application. Under O 24A r 1(3) of the Rules of Court 2021 (2020 Rev Ed) (the “**ROC**”), an application for PACC permission must be made by originating application. Therefore, the applicant ought to have made the present application by originating application, as opposed to a criminal motion. Proceeding by way of a criminal motion circumvents the requirement that prior permission be obtained from the Court of Appeal.

11 However, in view of the lateness of the present application and the very short time frame before the date of execution, I waive this procedural irregularity. I therefore regard the present CM 45 as an application for permission to make a PACC application under s 60G of the SCJA. Alternatively, CM 45 could be regarded as an application for permission to make a review application under the CPC.

The applicant's case

12 The applicant filed an affidavit and his written submissions. Both are handwritten and they mirror each other in their contents. The ground upon which the applicant is seeking a stay of his execution is essentially that he is one of the applicants in OA 972. The applicant states that OA 972 pertains to his rights as a PACP, including his right to a fair trial, to access to justice and to be heard and his right to life and to equality before the law guaranteed to him under the Constitution.

13 The applicant states that OA 972 was filed on 19 September 2024 before he was notified on 12 October 2024 about the date of execution. OA 972 was therefore not filed with the knowledge that he would be scheduled for execution.

14 The applicant also states that he intends to file a PACC application “after the conclusion of OA 972 and any related proceedings”. He has not filed the application yet as he feels that the criteria imposed upon him under the impugned provisions are onerous, oppressive and in breach of his rights as contained in the Constitution. He claims that OA 972 is a relevant proceeding for his criminal case as it will help him decide how he proceeds with his PACC application. It is therefore only appropriate and logical that the hearing of OA 972 be disposed of first before he decides how to file his PACC application. He

also wishes to make it clear that he has not filed any review application or PACC application after his trial and his appeal. The applicant states further that it would be prejudicial to him to be singled out from the other applicants in OA 972 since they will have the benefit of charting how they proceed with their PACC application when OA 972 is concluded.

15 The applicant highlights that the appeal in OA 306 (the challenge to the LASCO policy) was dismissed on 9 September 2024, about a month ago. Within the short time span of one month, his family is having difficulties engaging a lawyer willing to take on his case. A lawyer is important to him for seeking advice on how to conduct his intended PACC application and it is unreasonable to expect the applicant as a lay person to be able to plan, prepare and file a PACC application on his own.

The Prosecution's case

16 In its submissions filed today, the Prosecution notes that the applicant claims that he intends to file a PACC application upon the conclusion of OA 972 without explaining why he did not file his intended application between the dismissal of his appeal against conviction on 2 December 2020 and the coming into force of the PACC Act on 28 June 2024. The applicant has also not provided any particulars of his intended PACC application and how this would be affected by the PACC Act.

17 The Prosecution points out the procedural irregularity (discussed at [10] and [11] above) and acknowledges that the Court of Appeal recently waived a similar irregularity in *Mohammad Azwan bin Bohari v PP* [2024] SGCA 38 (“*Azwan*”). Nevertheless, the Prosecution highlights that future potential applicants should be placed on notice of the procedural requirements which

generally should be followed henceforth. The Prosecution notes that the present CM 45 mirrors the application in *Azwan* and it follows that the principles and reasoning in *Azwan* are particularly apposite.

18 The Prosecution submits that the fact that the applicant here refers to an intended PACC application instead of a review application under the CPC does not change the analysis. Fundamentally, the applicant's case fails because he does not have any basis to challenge the correctness of his conviction and sentence and the dismissal of his appeal. The fact that the applicant has not made any review application confirms this.

19 The Prosecution also refers to what the applicant stated at a case management conference before an Assistant Registrar of the Supreme Court yesterday, 14 October 2024, that scheduling him for execution ahead of 19 other PACPs who had been sentenced to death before him was a breach of his rights under Art 12(1) of the Constitution. The Prosecution relies on the Court of Appeal's decision in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 ("***Syed Suhail***") where a similar contention was also raised.

20 In *Syed Suhail*, the Court of Appeal held (at [64]) that prisoners may *prima facie* be regarded as being equally situated once they have been denied clemency. The Court also accepted (at [71]) that the time that has passed since the pronouncement of the death sentence provides a rational baseline for equal treatment in that context. Whether the scheduling of a PACP's execution breached Art 12(1) of the Constitution would turn on (a) whether it resulted in that PACP being treated differently from other equally situated persons; and (b) whether this differential treatment was reasonable in that it was based on legitimate reasons (at [62]).

21 The Prosecution submits that there is no infringement of Art 12(1) of the Constitution because the applicant is not equally situated with the other 19 PACPs in question. The Prosecution filed an affidavit by Sanjay Nanwani, Senior Director of Policy Development Division, Ministry of Home Affairs (“MHA Affidavit”) to explain this. As set out in the MHA Affidavit, at the time that the applicant’s execution was scheduled, there were 19 PACPs who had been sentenced to death before the applicant. These 19 PACPs were either involved in proceedings which MHA determined to be relevant pending proceedings requiring their involvement or were affected by the outcome of such proceedings (for instance, because they were co-offenders of PACPs involved in such proceedings). The MHA affidavit affirms that the scheduling of the applicant for execution was done in accordance with the non-exhaustive list of factors set out at [18] of *Syed Suhail*. They are:

- (a) the date of the pronouncement of the death sentence;
- (b) the determination of any other court proceedings affecting the prisoner or requiring his involvement;
- (c) the policy that co-offenders sentenced to death will be executed on the same day;
- (d) whether the prisoner has previously been scheduled to be executed; and
- (e) the availability of judges to hear any application by the prisoner to the courts before the intended date of execution.

Taking into account the factors set out above, the applicant was determined to be the first in time to be sentenced to death.

22 The Prosecution further submits that the fact that the relevant proceedings for some of the 19 PACPs had concluded by the time of the filing of CM 45 does not affect the analysis. The Prosecution concludes that there is no basis to grant a stay of execution in this application and argues for its dismissal.

The decision of the Court

23 The matters that the Court of Appeal must consider in deciding whether to grant an application for PACC permission are set out in s 60G(7) of the SCJA, which states as follows:

Application for permission to make PACC application

...

(7) In deciding whether or not to grant an application for PACC permission, the Court of Appeal must consider the following matters:

- (a) whether the PACC application to be made is based on material (being evidence or legal arguments) that, even with reasonable diligence, could not have been adduced in court before the relevant date;
- (b) whether there was any delay in filing the application for PACC permission after the PACP or counsel for the PACP obtained the material mentioned in paragraph (a) and the reasons for the delay;
- (c) whether subsection (4) is complied with;
- (d) whether the PACC application to be made has a reasonable prospect of success.

24 Section 60G(7)(c) refers to whether the applicant in a PACC application for permission has complied with the requirement in s 60G(4) that he or she must file written submissions in support of the application and such other documents as are prescribed in O 24A r 2 of the ROC, within such periods as are prescribed in O 24A r 2 of the ROC. The considerations in s 60G(7) of the

SCJA mirror the considerations that the appellate court must consider under s 394H(6A) of the CPC in deciding whether or not to grant an application for permission to make a review application under the CPC.

25 The applicant’s basis for seeking a stay of execution of his death sentence is essentially that the outcome in OA 972 will have a bearing on his intended PACC application. However, the fundamental flaw in the applicant’s case is that in reality, he has no basis whatsoever to challenge the correctness of the dismissal of his appeal in CCA 25, decided more than three years ago.

26 At the same case management conference held yesterday, the applicant was asked what was the intended application that he wished to file. He replied that he wanted “to make judicial review for my case”. He then went on to say that there were quite a lot of things that he disagreed with in the judgment, especially during his trial. He mentioned some of the issues raised during the trial and in the appeal. When asked what new material he intended to rely on for his intended review application, he said, “It is not a new material”. He went on later to confirm that “All the material was already before the Judge”.

27 It is clear therefore that whatever the outcome in OA 972, any intended PACC application or review application under the CPC will fail. OA 972 is completely irrelevant to the applicant’s intended PACC application or review application under the CPC even though he has joined himself as a party in OA 972.

28 OA 972 challenges the constitutionality of the PACC procedure. The applicants in OA 972 seek a declaration that ss 60G(7)(d), 60G(8), 60H(6) and 60I(1) of the SCJA and s 313(2) of the CPC, provisions which were introduced by the PACC Act, are void for being inconsistent with Arts 9 and 12 of the

Constitution. In summary, these provisions pertain to the requirement that the Court of Appeal considers the reasonable prospect of success of a PACC application in deciding whether to grant PACC permission, the power to deal summarily with an application for PACC permission or a PACC application, the procedure for making a PACC application where there is a pending PACC application and the fact that a warrant of execution may be carried out notwithstanding an application for permission to apply for a stay of execution or an application for a stay of execution, in circumstances where the PACP was previously found by the Court of Appeal to have abused the process of the court. As the PACC procedure applies prospectively (see *Masoud Rahimi bin Mehrzad and others v Attorney-General* [2024] 1 SLR 414 (“*Masoud*”) at [12]) and the fact that the PACC Act only came into operation long after CCA 25 was dismissed, the constitutionality of the PACC procedure has no bearing whatsoever on the applicant’s conviction and sentence.

29 The Court of Appeal granted a stay of the applicant’s execution in CM 18 because the applicant had a pending application in OA 306 which challenged the policy of the LASCO Assignment Panel to not assign LASCO counsel for the purposes of post-appeal applications. The reason was that if OA 306 was heard on the merits and decided in the applicant’s favour, the applicant could conceivably apply for assistance from the LASCO to assist him in filing his intended review application. To that extent, it was relevant to the applicant to await the outcome of OA 306. However, OA 972 does not present the same considerations. In any event, as emphasised above, it is now clear that any intended PACC application or review application under the CPC is bound to fail at the application for permission stage because the applicant has no new material whatsoever and is merely hoping to re-appeal against his conviction.

30 A PACC application and a review application under the CPC are governed by separate regimes. A constitutional challenge to the PACC procedure will not affect the applicant's intended review application under s 394H of the CPC. As mentioned earlier, the definition of a PACC application excludes a review application. In *Masoud* at [11], the Court of Appeal observed that the PACC procedure concerns a very limited category of applications and does not affect applications to review a concluded appeal. In *Masoud* at [12], the Court of Appeal also stated that the PACC procedure was designed to cover situations where new material (whether in the form of evidence or legal arguments) is raised that could not have been brought earlier, whether at the trial or on appeal.

31 Further, the PACC procedure has not affected the applicant adversely at all. Aside from the present application, the applicant has not filed any application that is affected by the provisions governing the PACC procedure which are the subject of OA 972. The PACC procedure has not prevented the applicant from bringing any application, in particular, between the time of the dismissal of CCA 25 on 2 December 2020 and the date that the PACC Act came into operation on 28 June 2024. The applicant also has the freedom to bring a review application under the CPC without being affected in any way by the PACC Act provisions but has not done so since his appeal against conviction was dismissed on 2 December 2020. The reason for his inaction on this is now clear. He simply does not have any basis to do so.

32 As for the point raised by the applicant orally only at the case management conference held yesterday, I am satisfied with the explanations given in the MHA affidavit. There was no bad faith in the scheduling of the applicant's execution.

Conclusion

33 Clearly, the applicant's present application in CM 45 has no reasonable prospect of success because he has no basis to challenge the dismissal of his appeal against conviction in CCA 25. Whether the present application is treated as a PACC application for permission or an application for permission to make a review application under the CPC, it fails immediately as the applicant does not have any new material that could show a miscarriage of justice.

34 There is no basis whatsoever to grant the applicant's present application to order a stay of execution of sentence. I therefore dismiss this application summarily without the need for an oral hearing pursuant to s 60G(8) of the SCJA or, alternatively, under s 394H(8) of the CPC.

Tay Yong Kwang
Justice of the Court of Appeal

The applicant in person;
April Phang and J Jayaletchmi (Attorney-General's Chambers) for
the respondent.