IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 38

Court of Appeal / Criminal Motion No 40 of 2024

Between

Mohammad Azwan bin Bohari

… *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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Mohammad Azwan bin Bohari
v
Public Prosecutor

[2024] SGCA 38

Court of Appeal — Criminal Motion No 40 of 2024
Tay Yong Kwang JCA
2 October 2024

3 October 2024

Tay Yong Kwang JCA:

1 CA/CM 40/2024 ("**CM 40**") is a criminal motion filed by Mr Mohammad Azwan bin Bohari (the "**applicant**") on 1 October 2024, in which the applicant seeks the following orders:

> 1) This Honourable Court exercises its inherent jurisdiction and/or power under Articles 93 and 94 of the Constitution of the Republic of Singapore (Cap Const, 1999 Rev Ed) to stay the order of the Court of Appeal dated 24/10/2019 ordering the execution of the applicant
>
> 2) That the Court exercise its jurisdiction and power to order a stay on the basis that the applicant still has a relevant ongoing proceeding at High Court, OA 972/2024, and concluding the outcome of OA 972/2024, the applicant intends to filed a review application to review his criminal case.
>
> 3) Such other order or direction as this Honourable Court may think fit.

Facts

2 The applicant was convicted on a capital charge of possessing three packets containing not less than 26.5g 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) on 11 February 2019: see *Public Prosecutor v Mohammad Azwan bin Bohari* [2019] SGHC 23. The applicant's appeal against his conviction and sentence in CA/CCA 11/2019 ("**CCA 11**") was dismissed by the Court of Appeal on 24 October 2019. The Court of Appeal rejected the applicant's contention that he had intended to consume half of the 26.5g of diamorphine and sell the remaining half and held that the applicant failed to discharge the burden that he did not intend to traffic in all of the drugs.

3 On 23 March 2020, the applicant's petition for clemency was rejected. The applicant was initially scheduled to be executed on 19 April 2024 (the "**Earlier Scheduled Execution**"). On 16 April 2024, the applicant filed CA/CM 14/2024 ("**CM 14**") seeking a stay of execution of his death sentence on the basis that he had an ongoing civil proceeding, namely, HC/OA 306/2024 ("**OA 306**"), which he claimed could have a bearing on his intended application under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "**CPC**") to review the decision in CCA 11. CM 14 was allowed summarily on 17 April 2024 and an order was granted for a stay of execution of the death sentence imposed on the applicant, pending the outcome of OA 306 or until further order.

4 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 not to assign counsel for any post-appeal application. OA 306 was struck out by the General Division of the High Court on 20 May 2024: see *Iskandar bin Rahmat and*

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others v Attorney-General [2024] SGHC 122. The appeal therefrom, CA/CA 38/2024, was dismissed by the Court of Appeal on 9 September 2024.

5 On 19 September 2024, 31 PACPs (including the applicant) filed HC/OA 972/2024 ("**OA 972**") for a declaration that various 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 proceedings for OA 972 are ongoing.

6 On 23 September 2024, the President of the Republic of Singapore issued a new order for the applicant to be executed on 4 October 2024. The Warrant of Execution was issued on 24 September 2024 pursuant to s 313(1)(*g*) of the CPC. On 30 September 2024, the applicant was informed of his upcoming execution.

7 The PACC Act, which was passed by Parliament on 29 November 2022, came into effect 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**").

8 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

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the carrying out of the sentence of death on, the PACP. A PACC application does not include a review application under the CPC (s 60F of the SCJA).

9 As the application in the present CM 40 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 amounts to 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. However, I waive this procedural irregularity, in view of the lateness of the application and the very short time frame before the date of execution. I therefore regard the present CM 40 as an application for permission to make a PACC application under s 60G of the SCJA.

The parties' cases

10 The grounds upon which the applicant is seeking a stay of execution are as follows:

(a) First, the applicant's primary ground is that OA 972 has a bearing on his intended review application which he will make after OA 972 has been determined by the court. The applicant states that OA 972 was filed before he was informed of the date of execution. He claims that the PACC Act contains sections that overlap with the existing law and restrict post-appeal applications. He submits that the outcome in OA 972 "may shed some light as to where exactly PACP stands, and how should we (PACP) proceed". As matters stand, "its all very complex and hard to understand something that is so relevant to

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[his] situation" and he does not know "exactly where [he] stands and what [he should] do".

(b) Second, the applicant was only informed of his execution scheduled for 4 October 2024 five days in advance on 30 September 2024. He claims that, according to Singapore Prison Service ("**SPS**"), he was informed only five days in advance (as opposed to seven days in advance) because he had previously obtained a stay of execution in CM 14. Therefore, the applicant had "no right to be given the standard 1 week period notice". The applicant submits that the truncated notification period is a breach of his rights under Art 12(1) of the Constitution as he is being treated "differently from other inmates previously – whom were given 1 week of notice of execution". He feels that he is being "punished for the State decision to jump the gun on CM 14".

(c) Third, the applicant highlights a note from the Ministry of Home Affairs ("**MHA**") titled "Note to inform Prisoners Awaiting Capital Punishment of MHA's position on the effect of pending legal proceedings on the execution of sentence" dated 27 September 2024 which was issued to the applicant and other PACPs on the same date (the "**MHA Note**"). Paragraph 2 states that the MHA Note was given "to explain some of the changes" introduced by the PACC Act. The applicant says that he is not sure what the changes refer to and he has not had any opportunity to seek clarification or assistance from a lawyer to file an application, as he was informed of his execution only on 30 September 2024, shortly after the MHA Note was provided on 27 September 2024. He claims that it is unfair that other inmates may have more time to seek clarification.

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11 On 1 October 2024, I directed the Registry to conduct a case management conference ("**CMC**") to ask the applicant what the grounds are for his intended review application to show that there was a miscarriage of justice in the Court of Appeal's dismissal of his appeal against conviction and sentence in CCA 11. During the CMC on 2 October 2024, the applicant informed the Assistant Registrar that he does not have any fresh material. The applicant also confirmed that he does not have any grounds to challenge the Court of Appeal's decision to uphold his conviction and sentence and that he accepts the decision of the Court of Appeal in CCA 11.

12 The Prosecution filed affidavits in response to the application in CM 40. Mr Sanjay Nanwani ("**Mr Nanwani**"), Senior Director of the Policy Development Division, MHA, explained MHA's practice of notifying a PACP in advance of the PACP's scheduled execution. Mr Nanwani stated as follows:

> (a) The practice of giving advanced notice of the date of execution is to provide the PACP an opportunity to attend to any final matters before the PACP's execution. To facilitate these arrangements, PACPs are given special visitation privileges and other special requests by the PACP will be considered.
>
> (b) The existing practice prior to June 2024 was that all PACPs would be given at least a seven-day notification period, even if it were a renotification of an execution that was rescheduled (*ie*, where a PACP has his or her execution rescheduled to a later date) (the "**Renotification Period**"). In June 2024, MHA reviewed this practice. It was then determined that if a PACP had previously been notified of a scheduled execution and had their execution stayed or halted by respite past the halfway mark of their notification period, the PACP would be given a

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reduced Renotification Period. Under the reviewed practice, every PACP will still receive at least seven days in total to settle their affairs.

(c) The applicant was notified of his Earlier Scheduled Execution seven days before it was due to take place. As the Court of Appeal granted a stay of the applicant's execution in CM 14, he was given a reduced Renotification Period in relation to the present scheduled execution on 4 October 2024. The applicant was notified on 30 September 2024, four days before the date of his scheduled execution.

(d) The revised practice has been applied consistently since the MHA's review in June 2024. For example, Mr Moad Fadzir bin Mustaffa ("**Mr Fadzir**"), another PACP, was notified of his scheduled execution on 29 July 2024, four days before his scheduled execution on 2 August 2024. Prior to that, Mr Fadzir had been scheduled for execution twice on 24 September 2020 and 26 April 2024. On each occasion, Mr Fadzir was given a seven-day notification period and his execution was stayed after the halfway mark of each notification period.

13 Another affidavit filed by the Prosecution was by Mr Tan Bin Kiat ("**Mr Tan**"), Superintendent of Institution A1, SPS. Mr Tan notified the applicant of his execution scheduled for 4 October 2024. In his affidavit, Mr Tan explained that he did not inform the applicant that he had "no right to be given the standard 1-week period notice" because he had previously obtained a stay of execution. Instead, when the applicant asked him why his notification period was less than one week, Mr Tan replied that the notification period was to give the applicant time to attend to personal and estate matters before his sentence is carried out and the applicant had previously been given notice.

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14 The Prosecution submits that permission should not be granted to the applicant. It makes the following arguments:

(a) As a preliminary point, the Prosecution highlights that the applicant failed to file written submissions, contrary to ss 60G(4) and 60G(7)(*c*) of the SCJA and failed to comply with the requirements set out in O 24A r 2 of the ROC.

(b) In any event, the Prosecution submits that the applicant's PACC application has no reasonable prospect of success.

(c) First, the applicant has not disclosed any new material relevant to his conviction or sentence that could not have been adduced in court during his trial or appeal. Neither the MHA Note nor the applicant's argument that the reduced Renotification Period is a breach of his rights under Art 12 of the Constitution constitutes new material that affects the applicant's conviction and/or sentence.

(d) Second, OA 972 is not a relevant pending proceeding in which the applicant's involvement is required (as contemplated in *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [67] and *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [40]–[41]) because it has no bearing on the applicant's conviction and sentence and has no connection at all to the applicant's criminal proceedings.

(e) Third, CM 40 is an abuse of process, brought solely for the purpose of delaying the applicant's execution. The Prosecution highlights that, to date, the applicant has not made any substantive application which discloses new evidence or arguments that challenge the correctness of his conviction and/or sentence. This shows that the

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applicant's claim that he intends to file such an application is disingenuous.

(f) Fourth, the applicant's rights under Arts 9 and/or 12 of the Constitution have not been breached. The applicant was not treated differently from other equally situated persons (namely, PACPs who had previously been scheduled for execution but whose executions were rescheduled subsequently) as a result of the reduced Renotification Period. The reduced Renotification Period has been applied consistently since MHA revised its policy. In any event, the policy was reasonable and based on legitimate reasons. Carrying out the applicant's execution while the proceedings in OA 972 are pending is also not a breach of Art 12 because OA 972 is not a relevant pending proceeding in which the applicant's involvement is required. The scheduled execution is fully in accordance with law and there is no breach of Art 9 of the Constitution.

Applicable legal principles

15 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

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> 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.

16 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.

The decision of the court

17 The applicant's prayer for a stay of execution of sentence is largely premised on his claim that the outcome in OA 972 has a bearing on his intended review application. However, the fundamental flaw in the applicant's case is that he has no basis whatsoever to challenge the correctness of his conviction and sentence as well as the dismissal of his appeal against conviction and sentence in CCA 11. The applicant conceded this before the Assistant Registrar at the CMC and stated that he accepted the Court of Appeal's decision in CCA 11. Whatever the outcome in OA 972, it is clear that any intended review application will fail. Therefore, OA 972 is completely irrelevant to the applicant's intended review application even though he has joined himself as a party in that application.

18 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

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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. Given that the PACC procedure only 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 effect long after CCA 11 was dismissed, the constitutionality of the PACC procedure has no bearing whatsoever on the applicant's conviction and sentence.

19 A PACC application and a review application 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. This point was also emphasised by the then-Senior Parliamentary Secretary to the Minister for Law during the Second Reading of the Post-Appeal Applications in Capital Cases Bill (Bill No 34/2022): "[r]eview applications are applications to review an earlier decision of an appellate court and will continue to be governed by a separate procedure

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under the CPC" (Singapore Parl Debates; Vol 95, Sitting No 77; [19 November 2022] (Rahayu Mahzam, Senior Parliamentary Secretary to the Minister for Law)).

20 This court granted a stay of the applicant's execution in CM 14 because the applicant had a pending application in OA 306, which challenged the policy of the LASCO Assignment Panel not to 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. In contrast, OA 972 does not present the same considerations.

21 Under both the PACC regime and the review application regime, the court only grants a stay of an execution upon good grounds. This is set out in ss 394H(10) and 394I(13) of the CPC, which give the appellate court the power to order a stay of execution of the sentence "as the court considers necessary", in the process of determining an application for permission to make a review application or a review application. In *Masoud* at [12], the Court of Appeal emphasised 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. In the present case, the applicant stated at the CMC on 2 October 2024 that he does not have any fresh material that has arisen since CCA 11 was dismissed which would show a miscarriage of justice. He also confirmed that he does not have any grounds to challenge his conviction and sentence and that he accepts the Court of Appeal's decision in CCA 11. Therefore, the applicant's intended review application has no prospect of success whatsoever and there is no basis for the Court to stay his execution to await the outcome in OA 972.

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22 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. The applicant also has the freedom to bring his review application without being affected in any way by the PACC Act provisions but has not done so since his appeal against conviction and sentence was dismissed on 24 October 2019.

23 The applicant also raises arguments relating to the constitutionality of his reduced Renotification Period and how it is unfair that other inmates may have more time to seek clarification on the MHA Note. On 12 April 2024, the applicant was given prior notice of his Earlier Scheduled Execution. He therefore knew that his execution was imminent. As a result of the stay of execution granted in CM 14, the applicant was given a reprieve of more than five months. As for the applicant's complaint relating to the MHA Note, earlier on 27 June 2024, the SPS had informed all the PACPs, including the applicant, that the PACC Act would come into force on 28 June 2024. Each PACP was also given a copy of the press release dated 27 June 2024 titled "Operationalisation of the Post-Appeal Applications in Capital Cases Act 2022". Even before this, the applicant was aware of the PACC Act as he was an applicant in HC/OA 987/2023, filed on 26 September 2023, which challenged the constitutionality of two provisions in the PACC Act which, at that time, was not in force. Therefore, the applicant had the opportunity to seek clarification on the changes brought about by the PACC Act. Nothing has been raised which would call into question the correctness of the applicant's conviction and sentence.

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24 Clearly, the applicant's present application has no reasonable prospect of success because he has no grounds at all to challenge the dismissal of his appeal against conviction and sentence. For completeness, even if the present application were an application for permission to make a review application under the CPC, it would fail immediately as the applicant does not have any material that could show a miscarriage of justice.

25 In relation to the Prosecution's procedural argument that the applicant did not comply with s 60G(4) as he did not file written submissions, the applicant had confirmed that everything he wanted to put before the Court was in his affidavit. The affidavit would therefore also stand as his written submissions in this application and there can be no objection to this.

Conclusion

26 There is clearly no basis 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.

Tay Yong Kwang
Justice of the Court of Appeal

The applicant in person;
James Chew and Jocelyn Teo (Attorney-General's Chambers) for the respondent.

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