IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 26

Civil Appeal No 61 of 2021

Between

Nagaenthran a/l K Dharmalingam

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 1109 of 2021

Between

Nagaenthran a/l K Dharmalingam

… *Plaintiff*

And

Attorney-General

… *Defendant*

Criminal Motion No 30 of 2021

Between

Nagaenthran a/l K Dharmalingam

… *Applicant*

And

I

Public Prosecutor

… *Respondent*

JUDGMENT

[Constitutional Law — Judicial review]
[Criminal Procedure and Sentencing — Appeal — Adducing fresh evidence]

Nagaenthran a/l K Dharmalingam
v
Attorney-General and another matter

[2022] SGCA 26

Court of Appeal — Civil Appeal No 61 of 2021 and Criminal Motion No 30 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Belinda Ang Saw Ean JAD and Chao Hick Tin SJ
9 November 2021, 1 March 2022

29 March 2022 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The appellant in these proceedings, Mr Nagaenthran a/l K Dharmalingam, has been embroiled in legal proceedings since his arrest for importing a substantial quantity of diamorphine into Singapore nearly 13 years ago. The history of the various proceedings is outlined at [4]–[7] below. This judgment is issued in respect of two sets of proceedings that came before us: Civil Appeal No 61 of 2021 ("CA 61"), which was the appellant's appeal against the High Court's dismissal of his application in Originating Summons No 1109 of 2021 ("OS 1109") for leave to commence judicial review proceedings in respect of his impending execution; and Criminal Motion No 30 of 2021 ("CM 30"), which was the appellant's motion for him to be assessed by an independent panel of psychiatrists and for a stay of execution of his sentence

in the meantime. The central argument that underlies both these matters concerns an assertion that pertains to the appellant's mental faculties: it is said that because of an alleged deterioration in the appellant's mental faculties since the time of his offence, the sentence of death cannot be allowed to be carried out. It is important to note that the assertion does not concern the appellant's mental faculties at the time of the offence, nearly 13 years ago. Instead, it pertains to his alleged mental faculties *today*.

2 We dismiss both CA 61 and CM 30. In our judgment, these proceedings constitute a blatant and egregious abuse of the court's processes. They have been conducted with the seeming aim of unjustifiably delaying the carrying into effect of the sentence imposed on the appellant; and the case mounted by the appellant's counsel is baseless and without merit, both as a matter of fact and of law.

3 Just a few months ago, in *Public Prosecutor v Pang Chie Wei and other matters* [2021] SGCA 101, we explained that an important function of justice is the attainment of *finality*. In the context of criminal justice, while the principle of finality is not applied in as unyielding a manner as in the civil context, to echo the observation of this court in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 (at [1]), there must come a time when the last word of the court *is* the last word, and that the last full stop in a written judgment is not liable to be turned into an open-ended and uncertain ellipsis. Judicial decisions, if they are to mean anything at all, must confer certainty and stability. As we noted further in *Kho Jabing v Attorney-General* [2016] 3 SLR 1273 ("*Kho Jabing*") (at [2]), "no court in the world would allow an applicant to prolong matters *ad infinitum* through the filing of multiple applications". This principle applies with even greater force when such further applications are completely bereft of merit, such as those which form the subject matter of this hearing. Counsel who assist their

clients in drip-feeding applications and evidence act contrary to their duties, as officers of the court, to assist the court in the administration of justice. This is aggravated when such applications are made without basis and counsel knew or ought reasonably to have known this. Such actions, if allowed to run unchecked, will throw the whole system of justice into disrepute.

Background

4 The appellant was charged under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") with importing not less than 42.72g of diamorphine on 22 April 2009. He was convicted after trial and sentenced to the mandatory death penalty, and his conviction and sentence was upheld by this court on appeal: see *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830; *Nagaenthran a/l K Dharmalingan v Public Prosecutor* [2011] 4 SLR 1156 ("*Nagaenthran (Appeal)*"). After we delivered judgment in *Nagaenthran (Appeal)*, the MDA was amended to introduce a new section, s 33B, which provides that a convicted drug trafficker or importer who satisfies certain requirements may be sentenced to life imprisonment, notwithstanding that the offence he was convicted of would otherwise be punishable with death.

5 In 2015, the appellant filed Criminal Motion No 16 of 2015 ("CM 16") and Originating Summons No 272 of 2015 ("OS 272"). In CM 16, he applied for re-sentencing and sought to be sentenced to life imprisonment instead, under s 33B(1)(*b*) read with s 33B(3) of the MDA. In OS 272, he sought leave to commence judicial review proceedings against the Public Prosecutor in respect of his decision not to issue him a certificate of substantive assistance under s 33B(2)(*b*) of the MDA. Both CM 16 and OS 272 were dismissed by a High Court judge: see *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222 ("*Nagaenthran (CM)*") and *Nagaenthran a/l K Dharmalingam v*

Attorney-General [2018] SGHC 112 ("*Nagaenthran (Judicial Review)*"). The High Court dismissed CM 16 because, amongst other things, the appellant was found *not* to be suffering from an abnormality of mind within the meaning of s 33B(3)(*b*) of the MDA.

6 The appeals against the decisions in *Nagaenthran (CM)* and *Nagaenthran (Judicial Review)* were dismissed in *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 ("*Nagaenthran (CA)*"). Pertinently, this court held that the appellant could not avail himself of s 33B(3) of the MDA. Even assuming that he did suffer from an abnormality of mind, such abnormality did *not* substantially impair his mental responsibility such that s 33B(3) could be invoked (see *Nagaenthran (CA)* at [40]–[41]).

7 The appellant then petitioned the President of the Republic of Singapore for clemency, but his application was rejected.[i] The execution of the appellant was eventually scheduled for 10 November 2021. The appellant was notified of this on 27 October 2021.[ii]

The present applications

8 We now trace the tortuous path by which CA 61 and CM 30 have come before us.

9 On 2 November 2021, the appellant, through his then counsel on record Mr Ravi s/o Madasamy ("Mr Ravi"), filed OS 1109, seeking leave to commence judicial review proceedings against his impending execution. The sole factual basis furnished for this application was an affidavit of Mr Ravi deposing to, among other things, his "firm belief" as to the appellant's mental age. Notwithstanding the supposed firmness of his belief, Mr Ravi acknowledged

that he did not have the necessary medical expertise to form a view on the question of the appellant's mental age.[iii]

10 OS 1109 was heard on 8 November 2021. Notably, *during the hearing of OS 1109*, Mr Ravi informed the High Court judge ("the Judge") that he was in possession of an affidavit of the appellant's brother, Mr Navinkumar a/l K Dharmalingam ("Mr Navinkumar"), in which Mr Navinkumar purportedly "affirms that [the appellant's] mental condition has deteriorated very significantly". When asked by the Judge whether this affidavit was before the court, Mr Ravi informed the Judge that he had *just* filed CM 30 directly to the Court of Appeal and that Mr Navinkumar's affidavit was included as an exhibit to an affidavit affirmed by Mr Ravi in support of CM 30.

11 At the conclusion of the hearing, the High Court dismissed OS 1109. The appellant, through his counsel Mr Ravi, filed CA 61 on the very same day to appeal against the High Court's decision in OS 1109.

12 We digress to note that CM 30 was filed *during the hearing of OS 1109*. This was so even though the arguments presented in CM 30 were essentially the same as, if not identical with, the arguments Mr Ravi presented in OS 1109. Further, although OS 1109 was, on its face, an application for leave to commence judicial review proceedings, the appellant's submissions in OS 1109 included a request for additional time to procure further psychiatric examinations and reports on the appellant's present mental faculties. In substance, this was the same relief that was then sought in CM 30. It is not clear, nor has it been explained, why it was necessary for the appellant to bring a separate application by way of CM 30. The evidence relied on was available to the appellant and could have been filed in OS 1109 or, at any rate, by the time

OS 1109 was heard on 8 November 2021, so that the Judge would have all the material before him.

13 In CM 30, Mr Navinkumar's evidence *first* appeared in the form of an unaffirmed affidavit that was annexed to an affidavit affirmed by Mr Ravi on 8 November 2021. Mr Ravi claimed in that affidavit that Mr Navinkumar had been unable to affirm the affidavit in time for the application in view of the urgency of the matter. However, later that very day (*after* the dismissal of OS 1109), an affidavit affirmed by Mr Navinkumar was filed. This affidavit had, in fact, been affirmed *some three days earlier*, on 5 November 2021. It was also evident from its contents that it had been prepared *in support of OS 1109 rather than CM 30*. In line with this, the appellant's written submissions in OS 1109 dated 6 November 2021 also made reference to the evidence of the appellant's family, but ultimately no such evidence was forthcoming. Instead, an affidavit of Mr Navinkumar was mentioned (but not produced) *during the hearing of OS 1109* itself. It was subsequently confirmed by the appellant's counsel on record (who took over the appellant's case from Mr Ravi), Ms L F Violet Netto ("Ms Netto"),[iv] that Mr Ravi, through the firm he was practising with at the time, had indeed received Mr Navinkumar's affirmed affidavit on 5 November 2021. This makes it clear that there was no need at all for CM 30 to be separately filed and all the papers, including Mr Navinkumar's affidavit, could and should have been filed in OS 1109 on or around 5 November 2021. It may in the circumstances be the case that Mr Navinkumar's evidence was deliberately withheld for the purpose of deploying it in support of a further application,[v] namely CM 30, in anticipation of OS 1109 being dismissed, as a reasonable counsel would have expected it to be, given its utter lack of basis or merits, for the reasons set out below. It also appears to be the case that Mr Ravi had misrepresented the position in his affidavit dated 8 November 2021 when he

said that Mr Navinkumar had not been able to affirm his affidavit because of the urgency of matters. In fact, as we have noted, Mr Navinkumar had already affirmed his affidavit, three days earlier.

14 CM 30 was fixed to be heard before this court together with CA 61 on 9 November 2021 at 2.30pm. On the morning of 9 November 2021, Mr Ravi sought an adjournment of the hearing, citing, among other things, the need to file further affidavits. The court declined and directed that the hearing continue as scheduled, whereupon Mr Ravi filed two expert reports, a report of one Dr Danny Sullivan ("Dr Sullivan") dated 5 November 2021 and a report of one Mr P B J Schaapveld ("Mr Schaapveld") dated 7 November 2021. No explanation was advanced to account for why these documents had not been filed earlier and in any event in advance of the hearing of OS 1109 before the High Court on 8 November 2021.

15 Notably, in Mr Schaapveld's report, he expressly stated that his opinion had been prepared on short notice for use at a hearing that was to take place on the afternoon of 8 November 2021. This could only be a reference to the hearing of OS 1109. If indeed it is the appellant's position that these reports are material and relevant to the key issue at hand, namely, the appellant's present mental state, it would have been incumbent upon the appellant and his counsel to have adduced the evidence of Dr Sullivan and Mr Schaapveld as soon as they received the reports. They did not do so. In addition, the respondent pointed out that in Dr Sullivan's report dated 5 November 2021, he expressly stated that he had reviewed an affidavit of Mr Navinkumar dated 5 November 2021 in preparing his report. If Mr Navinkumar's affidavit could have been extended to Dr Sullivan for the purpose of preparing his report dated 5 November 2021, it is inexplicable why that same affidavit was not placed before the court and made available to all parties before the hearing of OS 1109 on 8 November 2021. The

respondent has asserted that in these circumstances, the only inference that can be drawn is that the appellant and his counsel deliberately chose to withhold the evidence they had on hand because they intended to drip-feed the applications and the evidence, in order to prevent the conclusion of the matter in any way they could. Nothing has been put forward to address this or to suggest that there is some other inference that can be drawn in these circumstances.

16 Just before the hearing of CM 30 and CA 61 by this court on 9 November 2021 at 2.30pm, Mr Ravi filed Criminal Motion No 31 of 2021 ("CM 31") on behalf of the appellant for leave under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") to bring a review application under s 394I of the CPC, seeking to reopen his concluded criminal appeal, namely the appeal against the decision in *Nagaenthran (CM)*, which had been disposed of in *Nagaenthran (CA)*. The stated object of this application was to set aside the sentence of death imposed on the appellant. This was filed a day before the appellant's sentence was to have been carried into effect. The grounds for this application as set out in an affidavit affirmed by Mr Ravi dated 9 November 2021 included, among other things, the alleged need to assess the present mental condition and IQ of the appellant. Given that this was the same factual contention raised in OS 1109 and CM 30, it is not clear why this needed to be pursued separately instead of being dealt with at the same time as either OS 1109 or CM 30.

17 Given the manner in which these various applications have been made, we are unable to see how the conduct of the appellant's case can be said to be anything other than the drip-feeding of applications in a bid to thwart the court's efforts to discharge its responsibility to dispose of the matter timeously, in accordance with its merits.

18 When CM 30 and CA 61 eventually came on for hearing on 9 November 2021, we were informed that the appellant had tested positive for COVID-19. In the circumstances, the court adjourned the hearing of CM 30 and CA 61 to a date to be fixed and issued a stay of execution until the proceedings were concluded. On 12 November 2021, the appellant filed an affidavit from Dr Sullivan dated 12 November 2021 which exhibited his report dated 11 November 2021, which was substantially similar to the report dated 5 November 2021 (see [14] above).

19 On 23 November 2021, Andrew Phang Boon Leong JCA granted the appellant leave to bring his review application under s 394H(7) of the CPC (see also [16] above) and issued specific directions for the appellant to file and serve the review application and any supporting affidavit by 26 November 2021. The appellant did not do so; nor has he sought an extension of time to do so.

20 The hearing of CM 30 and CA 61 was originally fixed for 24 January 2022 but was adjourned to 1 March 2022. This transpired because as at 14 January 2022, the appellant's counsel, Mr Ravi, was unable to practice as he had been placed on an extended period of medical leave. At a case management conference on 17 January 2022, the appellant confirmed that Ms Netto was now acting for him in place of Mr Ravi. On 3 February 2022, a notice of change of solicitor was filed. On 15 February 2022, the appellant filed a further affidavit of Mr Schaapveld dated 19 November 2021, which exhibited Mr Schaapveld's report dated 11 November 2021. This report was substantially similar to Mr Schaapveld's report dated 7 November 2021 (see [14] above). Nothing has been put forward to explain the multiple filings or the time lag between the date of the report and its filing in court.

21 The hearing on 1 March 2022 was scheduled to start at 10.00am. Although the appellant and the Prosecution were in court and although the court was ready to hear the matter at 10.00am, Ms Netto only arrived at 10.15am. She was accompanied by Mr Ravi, even though he is not presently able to practise as an advocate and solicitor or to appear before the court. Ms Netto sought to tender a speaking note (which was, in reality, a further set of written submissions) as well as a further report of Dr Sullivan dated 27 February 2022 at the hearing itself. Because this was yet another occasion where evidence was being introduced on behalf of the appellant at the last possible moment, we asked Ms Netto for an explanation. We specifically asked why the report had not been e-filed or sent by any electronic means at any point prior to the hearing given that it was dated and presumably issued to her two days earlier. Ms Netto informed us that she could not or would not say anything to address this. Ms Netto also mentioned in her remarks a report of one Dr Marianne C Kastrup, but we have not had sight of any such report to date.

22 When the hearing started, Ms Netto introduced Mr Ravi and sought permission for him to be allowed to sit at the counsel table to provide her with "technical support". When asked to explain the nature of this technical support, Ms Netto said that his role would be limited to handing her documents when she asked for them. However, as the hearing progressed, Mr Ravi hardly handed any documents to Ms Netto. Instead, it became obvious that Ms Netto would not take any position in relation to the case or the arguments without Mr Ravi's substantive inputs: nearly every submission made by Ms Netto and just about every answer she gave in response to questions from the court over the course of the hour-long hearing was preceded by an often extended, hushed discussion with Mr Ravi. This was embarrassing, since Mr Ravi was not permitted to act as a solicitor at this time but appeared to be giving instructions to Ms Netto; it

was also disrespectful to the court for such conduct to be carried on in our sight and in a manner that was wholly contrary to what Ms Netto had conveyed to us as the basis for her request that Mr Ravi be permitted to sit beside her at the counsel table when he was not entitled to do so.

23 Towards the end of the hearing, we inquired about the status of CM 31 since nothing had been done pursuant to the directions and timelines set by Phang JCA. Ms Netto then stated that she needed an extension of time to follow up on the application. It is dismal that having done nothing to act upon the application, the question of a further extension of time was only raised when prompted by the court. When pressed by the court on the subject of the appellant's failure to adhere to the timelines for filing and on the fact that this yet again demonstrated a lack of good faith, Ms Netto sought to rely on her own medical issues. We asked if she was even aware of when leave had been given in CM 31 for the filing of the review application, so that her medical issues could be assessed in the context of what ought to have been done to advance CM 31 at the relevant time. Ms Netto was forced then to acknowledge that she was not aware of the details of the application at all. As at the date of this judgment, nothing further has been done by or behalf of the appellant in respect of CM 31.

24 We have narrated the history of this matter in considerable detail to demonstrate the manifest lack of good faith in the conduct of the appellant and his counsel in relation to this matter. We accept that filings may occasionally be made late and deadlines may occasionally be missed, without suggesting any lack of good faith. However, when every single action on the part of one party is done in a manner that is contrary to the applicable rules and contrary even to basic expectations of fairness to the other party and of courtesy to the court, it becomes difficult to accept that there is an innocent explanation for this. This is

heightened when either no explanations are offered, or explanations that are offered are shown to be untrue.

25 If there remain any lingering doubts as to whether the present applications are an abuse of the process of the court, these will be dispelled once we turn to the substance of the applications, which, as we explain, are utterly without merit.

The substance of the applications

OS 1109 and CA 61

26 In OS 1109, the central factual contention was that the appellant has a mental age below 18, and that as a result he does not appear to understand what he is facing in relation to his pending execution.[vi] On this factual premise, Mr Ravi raised *six* arguments in support of his application for leave to commence judicial review proceedings and to prevent the carrying out of the sentence pending the outcome of those proceedings. We summarise these as follows:

(a) First, it is said that international law prohibits the imposition of cruel and unusual punishments on intellectually disabled persons. This rule can either be *interpreted from*, or be *incorporated into*, the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"). The court is therefore obliged to give effect to it, and the intended execution of the appellant would violate this rule.

(b) Second, it is said that *customary* international law prohibits the execution of those who are mentally disabled. This rule can either be *interpreted from*, or be *incorporated into*, the Constitution, and the court

is therefore obliged to give effect to it. The intended execution of the appellant would contravene this rule.

(c) Third, the execution of the appellant would be "arbitrary and unreasonable" and so offend Art 9 of the Constitution, because it is irrational that s 314 of the CPC only prohibits the imposition of a sentence of death against a person below the chronological age of 18 years, without also proscribing such a sentence where an offender's *mental age* falls below that threshold.

(d) Fourth, the execution of the appellant would not pass muster applying the "reasonable classification" test under Art 12 of the Constitution, since differentiation on the basis of chronological age, as provided for by s 314 of the CPC, bears no rational relation to the object of s 314 itself, which protects offenders of a certain age *at the time of the offence*. The argument seems to us to be directed at suggesting that those with a mental age below the same threshold should be regarded as being similarly situated as those of a corresponding chronological age and in failing to do so, s 314 is said to offend Art 12.

(e) Fifth, the intended execution of the appellant is unlawful as it would violate the Singapore Prison Service's ("the SPS") internal policy, which bars the SPS from executing sentences of death on mentally disabled prisoners.

(f) Sixth, the court should extend judicial mercy to the appellant, and at least allow additional time for appropriate medical examinations to be carried out.

27 In OS 1109, the Judge declined to grant leave for a further hearing. The Judge's reasoning is set out in the minute sheet to the hearing, and we set it out in full because it explains in succinct and precise terms, why the application was thought to be and indeed is hopeless:

> 1 This OS seeks leave to apply for prerogative relief in relation to the execution of the Plaintiff's impending death sentence. The OS hinges on one factual contention, namely that the Plaintiff allegedly possesses the mental age of a person below 18 years of age.
>
> 2 On this assumption of the Plaintiff's mental age, the relief sought in Prayers 1a to 1c of the OS encompasses declarations that the Plaintiff's constitutional rights under Art 9(1) and Art 12(1) of the Constitution would be violated if the death sentence is carried out, and also that there would be a violation of the 'internal policy' of the Singapore Prison Service ('SPS') not to execute convicted persons who are mentally disabled. Prayer 1d of the OS seeks a prohibiting order. The Plaintiff submits that judicial mercy should be exercised to grant him a reprieve from the execution of the death sentence pending further psychiatric examinations and reports on his mental state.
>
> **Brief background facts**
>
> 3 At the outset, I note that the Plaintiff's fitness to plead and stand trial to the charge has never been in question. It is also not disputed that in subsequent post-trial proceedings for re-sentencing, he was assessed to have an IQ of 69. The trial judge found that the Plaintiff was *not* suffering from intellectual disability to any degree but accepted that he had borderline intellectual functioning. He also found that the Plaintiff was able to understand the nature and consequences of his actions and to exercise judgment in terms of whether his conduct was right or wrong.
>
> 4 The trial judge's findings were considered and upheld by the Court of Appeal in May 2019 in dismissing the Plaintiff's appeal against his earlier unsuccessful attempt to be re-sentenced to life imprisonment under s 33B of the Misuse of Drugs Act. A separate appeal against the trial judge's refusal to grant leave for judicial review was also dismissed by the Court of Appeal.

The Plaintiff's alleged mental age

5 I turn first to the issue of the Plaintiff's alleged mental age. This is the key plank of the Plaintiff's application. Mr Ravi's belief or opinion as to the Plaintiff's mental age as expressed at [15] of his supporting affidavit is inadmissible in law. He concedes that he possesses no medical expertise to comment on this matter. There is no credible basis upon which his assertions as to the Plaintiff's mental age can be considered. Moreover, as Supt Shahrom bin Thamby Ahmad has made clear in his reply affidavit, Mr Ravi has only met the Plaintiff once in the last three years, for a mere 26 minutes in all from 9.20 am to 9.46 am on 2 Nov 2021. It would appear that Mr Ravi has **never** met the Plaintiff prior to that meeting either; at any rate, he does not claim to have done so in his affidavit. Further, the affidavit makes no mention of the Plaintiff's family's view on how the Plaintiff has 'normally presented in the past', even assuming that this is relevant and admissible, despite this point being alluded to at [7] and [80] of the Plaintiff's written submissions.

6 Prayers 1a, 1b and 1c are premised on the *assumption* that the Plaintiff does have a mental age below 18. As there is no evidential basis whatsoever for the assertion of the Plaintiff's assumed mental age of 18, this alone would suffice to dispose of Prayers 1a and 1b. Nevertheless, for completeness, I shall explain briefly why I take the view that there is no basis for Prayers 1a and 1b in any case.

Prayers 1a and 1b

7 I address the substantive arguments for Prayer 1a first. The Plaintiff argues that Art 9(1) should be interpreted to incorporate a rule of customary international law that prohibits the execution of intellectually disabled persons on the ground that this would amount to inhuman punishment.

8 The Plaintiff's reliance on Declaration 6 of the UN Declaration on the Rights of Mentally Retarded Persons ('the UN Declaration') is misplaced. The Plaintiff has not shown how Declaration 6, which is not legally binding, applies to the case of an intellectually disabled person who is liable to capital punishment. The Plaintiff has been accorded his right to due process of law with full consideration of his degree of mental responsibility. The issue of the Plaintiff's mental responsibility has already been examined by the High Court and addressed by the Court of Appeal in its judgment delivered on 27 May 2019. The Court of Appeal found that the Plaintiff's mental responsibility for his acts was not substantially impaired and his culpability was not diminished.

9 Further, there is no legal basis for the Plaintiff's submission that customary international law whether in the form of Declaration 6 of the UN Declaration or Art 15 of the Convention on the Rights of Persons with Disabilities ('CRPD') should take precedence over domestic law. As recognised by the Court of Appeal in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [29] and [45], unless transposed into domestic law whether by legislation or by a court declaration, they are not legally binding on Singapore which is a dualist jurisdiction. Moreover, the Plaintiff has not adduced any evidence demonstrating extensive and virtually uniform state practice and *opinio juris* to justify recognition of the existence of any such rule of customary international law: *Yong Vui Kong v Public Prosecutor and another matter* [2010] SGCA 20 at [98].

10 In respect of Prayer 1b, the Plaintiff argues that s 314 CPC should not be read as prohibiting the execution of a death sentence on a person based purely on chronological age. In his submission, reading s 314 in this manner would fail to accord with its object which is to take into account the offender's maturity as measured according to his mental age. The short answer to this submission is that the ordinary meaning of 'age' in s 314 CPC must mean chronological age. There is no ambiguity in the language of s 314, and it is clear that the concept of mental age is not a criterion for assessment under s 314.

11 The Plaintiff has also not shown any legal or evidential basis to support his submission that mental age should be reassessed after the time of commission of the offence. He has not shown an arguable prima facie case demonstrating that his current mental state is any different compared to his mental state at the time of commission of the offence. Finally, I agree with the Defendant that the use of chronological age in s 314 CPC to determine whether the death sentence should be imposed does bear a rational relation to the object of s 314 insofar as it provides for the offender's maturity to be considered in determining his culpability. The argument that Art 12 would be violated is thus without merit.

Prayers 1c and 1d

12 Prayer 1c is similarly predicated on the unfounded assertion that the Plaintiff's mental age is 18. In addition, Supt Shahrom categorically confirms that there is no 'internal policy' within the SPS of the nature alleged at [45] of Mr Ravi's supporting affidavit. No legal or evidential basis has been put forth for Mr Ravi's purported 'understanding' that the SPS has such a policy. The assertion that the SPS would be in breach of

> its own policy is thus entirely unsubstantiated. Simply put, there can be no breach when no such policy has been shown to exist.
>
> 13 In relation to Prayer 1d, the Plaintiff's written submission contains a request for 'additional time to procure the relevant psychiatric examinations and reports to examine the Plaintiff's general mental competence for execution'. This request is consequential upon his plea for the exercise of judicial mercy, citing *Chew Soo Chun v PP*. With respect, the submission is wholly misconceived in law and *Chew Soo Chun's* case is irrelevant for this purpose. There is no scope for the exercise of judicial mercy as the legal process in respect of the imposition of the sentence has already run its course. The Plaintiff has had his sentence affirmed by the Court of Appeal. His attempt to seek re-sentencing was dismissed as well by the Court of Appeal. There are no grounds for this court to invoke judicial mercy to review the decisions of the Court of Appeal in connection with the Plaintiff's sentence, and the consequence that flows from those decisions.
>
> **Conclusion**
>
> 14 I reiterate that the Plaintiff has been accorded due process in accordance with the law. It is not open to him to challenge the court's findings pertaining to his mental responsibility, whether directly or indirectly, in yet another attempt to revisit and unravel the finality of those findings.
>
> 15 To sum up, I find that the Plaintiff has not established any arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought. Accordingly, I dismiss the application.
>
> [emphasis in original]

CM 30

28 As we have noted above, CM 30 was filed on 8 November 2021, *during the hearing of OS 1109*. It sought: (a) an order that the court require the appellant to be assessed by a panel of psychiatrists comprising the State's nominated psychiatrists as well as psychiatrists appointed by the appellant's family; and (b) to have the court exercise its inherent jurisdiction and/or power under Arts 93 and 94 of the Constitution to stay the intended execution of the

appellant until the final disposal of this motion. As mentioned earlier, CM 30 was supported by an unaffirmed affidavit of Mr Navinkumar that was annexed to Mr Ravi's affidavit filed on 8 November 2021 (see [13] above). In the unaffirmed affidavit, Mr Navinkumar stated that he had visited the appellant daily in Changi Prison from 1 to 5 November 2021 and had purportedly observed disturbing changes in the appellant's mental condition. It was not stated whether the alleged changes took place during the course of the five-day period in question or by reference to an earlier point in time.

29 *After* the filing of Mr Ravi's affidavit, the affirmed version of Mr Navinkumar's affidavit, which was dated 5 November 2021, was filed on 8 November 2021 (see also [13] above). In the speaking note, Ms Netto sought to explain why this affidavit was not filed earlier. Ms Netto claimed that although Mr Navinkumar had affirmed and signed the affidavit on 5 November 2021 and this affidavit was delivered to the law firm (that Mr Ravi was practising with at the time) that same evening, the commissioner for oaths who witnessed the signing through live video link only signed and stamped the affidavit on 8 November 2021. Yet, this explanation appears to contradict Mr Ravi's explanation in his affidavit dated 8 November 2021 which states that it was Mr Navinkumar who had been unable to affirm his affidavit in time for the application in view of the urgency of the matter (see [13] above). Ms Netto's belated explanation raises, in our view, more questions than answers. Mr Navinkumar's evidence *first* came annexed in a solicitor's affidavit from Mr Ravi. If Mr Navinkumar's evidence could have come annexed in a solicitor's affidavit, there is the question of why the affirmed affidavit of Mr Navinkumar dated 5 November 2021 (purportedly already signed by Mr Navinkumar, but pending the signing and stamping of the commissioner for oaths) could not have come annexed in a solicitor's affidavit and filed *on 5 November 2021 itself*,

considering the urgency of the situation. This is all the more unsatisfactory given our observation as noted at [15] above, that when Dr Sullivan prepared his report, he evidently had reviewed an affidavit of Mr Navinkumar dated 5 November 2021. Aside from this, as we note at [38] below, there were differences between the affirmed and unaffirmed versions of Mr Navinkumar's affidavit and as we note at [49] below, no explanation was forthcoming as to why there were these differences. In addition to Mr Navinkumar's affidavit, the appellant also relied on the reports of Dr Sullivan and Mr Schaapveld. It is not disputed that both Dr Sullivan and Mr Schaapveld have not examined or even spoken to the appellant.

The appellant's arguments have no factual basis

There is no evidence in CA 61 to support the assertion that the appellant had a mental age below 18 years

30 In OS 1109, Mr Ravi conceded that he was not "challenging directly the previous judicial findings regarding the [appellant's] mental state *during the commission of the offence*" [emphasis in original].[vii] Similarly, in the speaking note which Ms Netto tendered at the hearing of 1 March 2022, Ms Netto stated that we need only be concerned as to the appellant's *present* mental faculties as opposed to the appellant's level of intellectual ability and functioning at the time of the offence. It is therefore appropriate to begin by setting out some of the key judicial findings on the appellant's mental faculties at the time of the offence.

31 In *Nagaenthran (CM)* (at [71] and [75]), the High Court found that the appellant had borderline intellectual functioning; *not* that he was suffering from mild intellectual disability. This was conceded by the appellant's own psychiatrist, Dr Ung Eng Khean ("Dr Ung"). Further, Dr Ung also accepted (see *Nagaenthran (CM)* at [76]) that borderline intellectual functioning is *not* a

mental "disorder" as set out in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th Ed, 2013). Further, in *Nagaenthran (CA)* (at [34]–[41]), we held that *even assuming* the appellant suffered from an abnormality of mind, any such abnormality *did not* substantially impair his mental responsibility, because he did not lose his ability to tell right from wrong. It bears repeating our findings on the appellant's mental state during the commission of the offence (see *Nagaenthran (CA)* at [41]):

> [The appellant's counsel, Mr Thuraisingam] eventually conceded that this was a case of a poor assessment of the risks on the appellant's part. But, as the Minister stated in *Singapore Parliamentary Debates, Official Reports* (14 November 2012) vol 89 … '[g]enuine cases of mental disability are recognised [under s 33B(3)(b) of the MDA], while, errors of judgment will not afford a defence'. To put it quite bluntly, this was the working of a criminal mind, weighing the risks and countervailing benefits associated with the criminal conduct in question. The appellant in the end took a calculated risk which, contrary to his expectations, materialised. Even if we accepted that his ability to *assess risk* was impaired, on no basis could this amount to an impairment of his *mental responsibility* for his acts. He fully knew and intended to act as he did. His alleged deficiency in assessing risks might have made him more prone to engage in risky behaviour; that, however, does not in any way diminish his culpability.
>
> [emphasis in original]

32 It follows from what we have set out above, that Mr Ravi's argument that the appellant "has a mental age under the age of 18 years" and "does not appear to [Mr Ravi] to understand what is happening to him" is an assertion that the appellant's mental condition has *deteriorated* ***after*** the commission of the offence. Any other view would contradict the findings made in *Nagaenthran (CM)* and *Nagaenthran (CA)* and the present applications are not advanced on that basis. Indeed, we reiterate that Mr Ravi and Ms Netto have separately stated that the thrust of their case is directed at the appellant's *present*

mental faculties rather than the position at the time of the offence (see [30] above).

33 The case for the appellant runs into a fatal difficulty here – there is no admissible evidence showing any such decline in the appellant's mental condition. As rightly pointed out by the Judge, the burden lies on *the appellant* to raise a *prima facie* case of reasonable suspicion in favour of granting the remedies sought. All we have is Mr Ravi's bare assertion as to the appellant's mental condition. As evidence, that, with respect, is worthless. Mr Ravi himself acknowledged that he has *no* medical expertise, and that he was in effect speculating what the appellant's mental age was. His assertion that he had a "firm belief" in his *own* speculation was self-serving and not supported by anything at all. It is therefore irrelevant and inadmissible.

34 Further, Mr Ravi, as the appellant's counsel, cannot be said to be a disinterested party and by reason of his engagement as counsel, should not even have been putting himself forward as a material witness. In addition, to underscore the lack of good faith in the position that was being taken, Mr Ravi's purported opinion seems to be based on a single interaction with the appellant over the course of the last three years, which lasted less than half an hour, specifically on 2 November 2021. The Judge was plainly correct to find that there is "no credible basis" on which Mr Ravi's assertions as to the appellant's mental age can be believed. It follows that the threshold of "*prima facie* case of reasonable suspicion" has not been satisfied.

35 Since the evidence from Mr Ravi is insufficient to raise a *prima facie* case, it is strictly not necessary to even consider the evidence raised by the respondent. But that evidence is material to contextualise the conduct of the appellant and his counsel in this matter, because it further undermines the

appellant's case that he had suffered a deterioration in his mental faculties. The prison officer in charge of observing the appellant, Supt Shahrom bin Thamby Ahmad ("Supt Shahrom") deposed that the appellant displayed no abnormality in his behaviour, after he was informed of the execution date and in the days leading up to the date of Supt Shahrom's affidavit filed in OS 1109, which was just five days before the appointed date of execution. We stress that Supt Shahrom has *no interest* in seeing that the appellant be executed, and therefore we see no reason to disbelieve his testimony.

36 Further, the respondent was prepared to tender a report in respect of a psychiatric assessment that was conducted on 5 August 2021, and a further report in respect of a medical assessment that was conducted on 3 November 2021, which the respondent contended would show that there was no abnormality affecting the appellant. Despite professing a concern over the appellant's mental faculties, Mr Ravi objected to the admission of the reports into evidence, citing the appellant's interest in medical confidentiality. With respect, having called his medical condition into question, we cannot see how the appellant can at the same time, in good faith, prevent access to evidence that pertains to the very condition in question. Mr Ravi also contended that the reports should be sent to him and the appellant's family directly, but *not* be seen by the court. Ms Netto maintained Mr Ravi's objection at the hearing on 1 March 2022. In our judgment, the position taken by the appellant on the disclosure of his medical records smacks of bad faith.

37 The factual assertion of a deterioration in the appellant's mental faculties has been advanced on the basis of the purported belief of a solicitor who evidently had a single brief meeting with the appellant over the last three years, who is directly interested in the case, who lacks any qualifications to make or advance this opinion, and who has professed no basis at all for forming the

opinion or belief. Yet, we have been asked to grant relief on this basis. At the same time, there are contemporaneous medical records and psychiatric and medical assessments of the appellant carried out on 5 August 2021 and 3 November 2021 respectively and the appellant and his counsel are objecting to our seeing it. These records and reports could have been highly probative evidence in the *court's* assessment of the appellant's mental condition, if this was in fact a genuine concern. Seen in that light, the objection mounted on the appellant's behalf supports the inference that he is aware of the evidential difficulties with his case, and is seeking to prevent the court from accessing that evidence because he knows or believes it would undermine his case.

CM 30 is equally without basis or merit

38 We have already observed the unsatisfactory manner in which CM 30 was filed during the hearing of OS 1109, even though the substantive reliefs overlap to a significant degree. CM 30 was purportedly supported by the unaffirmed affidavit of the appellant's brother, Mr Navinkumar (see [13] above), in which he states that he visited the appellant daily between the 1st and 5th of November 2021, and observed supposedly disturbing behaviour on the part of the appellant, including conduct indicative of hallucinations and short-term memory loss.[viii] Mr Navinkumar also stated in the *affirmed* affidavit that was made prior to the filing of the unaffirmed affidavit, but filed after it (see also [13] above), that the appellant informed him that he was taking medication for his mental condition, and that the appellant displayed delayed reaction to stimuli, an inability to maintain eye contact, and mood changes.[ix]

39 CM 30 is framed as an application for the court to "order the [appellant] to be assessed by a panel of psychiatrists". CM 30 is in substance an application to obtain further evidence, and to stay the carrying out of the sentence imposed on the appellant pending this.

40 CM 30 cannot be entertained. This court's power to take further evidence, as provided by the CPC, arises where there is either (a) a pending appeal, or (b) an application for criminal review under s 394I of the CPC. Neither situation is engaged here. Furthermore, there is no *jurisdictional* basis for CM 30. Criminal motions are properly used to invoke the court's *criminal* jurisdiction (see *Amarjeet Singh v Public Prosecutor* [2021] 4 SLR 841 ("*Amarjeet Singh*") at [30]). There is no substantive criminal matter that CM 30 has been filed in support of or in connection with. On the face of it, the appellant is not seeking to invoke the court's criminal jurisdiction. Even if we were to assume in the appellant's favour that CM 30 has been filed to secure further evidence to support his case in OS 1109 and CA 61, those are matters concerned with the grant of leave to commence judicial review, which falls within the court's *civil* jurisdiction.

41 The High Court in *Amarjeet Singh* also discussed cases where criminal motions have been used to invoke the court's *civil* jurisdiction, specifically, in seeking judicial review of the Attorney-General's exercise of his prosecutorial discretion (see the decisions of this court in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 and *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872, which were discussed in *Amarjeet Singh* at [35]–[38]). However, it was noted in *Amarjeet Singh* (at [38]) that the criminal motions had been filed in those cases, seemingly incorrectly, in order to *directly initiate* judicial review proceedings, and thereby bypass the need to secure leave. While that is improper, a court may nonetheless accommodate a procedural defect in appropriate circumstances. The present case, however, is different, in that the appellant *did* apply for (and failed to obtain) leave to commence judicial review in OS 1109. CM 30 is at best, an attempt to adduce additional evidence to support a civil appeal against the refusal to grant leave and that is procedurally improper.

42 But even so, we consider the application. In *Ladd v Marshall* [1954] 1 WLR 1489, it was held that in assessing an application to adduce fresh evidence in support of an appeal, the court will be guided by whether three conditions are met: that such evidence was not available at the trial, that it is material in the sense that it is likely to have had an important influence on the outcome of the case, and that it is reliable. In *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 ("*Ariffan*"), we held that in a *criminal* matter, where the application is made by the Defence, the first condition (of "non-availability") is applied in an attenuated way; and in *Miya Manik v Public Prosecutor* [2021] 2 SLR 1169 ("*Miya Manik*") (at [32]), we set right the misapprehension that in *Ariffan*, we had displaced the condition of non-availability as a relevant consideration when the court is dealing with such an application brought by or on behalf of the Defence. We explained that non-availability remained relevant, though it would be applied in an attenuated way in favour of the Defence, and that it would be necessary to consider this holistically in the light of the other conditions of materiality and reliability. We assume in favour of the appellant, without deciding the point, that the same attenuated framework applies in this case even though this is a civil matter. Even so, on this basis, the present application cannot possibly succeed.

43 In our recent decision in *Sanjay Krishnan v Public Prosecutor* [2022] SGCA 21 ("*Sanjay Krishnan*"), we were confronted with an applicant seeking leave to adduce certain evidence in support of his appeal against conviction and sentence. The notable feature of that case was that the evidence in question pertained to matters within the knowledge of the applicant and which matters he had discussed with the counsel at trial, in the light of which a considered decision was made by the Defence not to lead that evidence at trial. No explanation was offered for why it was initially decided that the evidence would

not be led; nor even to account for the applicant's subsequent change in position. We considered (see *Sanjay Krishnan* at [18]–[19]) that:

> (a) an application to adduce further evidence on appeal in such circumstances will rarely be successful;
>
> (b) the absence of an explanation for the original decision not to adduce the evidence or for the subsequent change of position would generally be fatal to the applicant's chances of succeeding in the application because the court will have no material upon which to exercise its discretion; and
>
> (c) any other view would permit the Defence to conduct its case at trial in a piecemeal manner and that would be incompatible with the interest in finality and conduces to the process of the court being abused.

44 In this connection, it bears noting that in *Juma'at bin Samad v Public Prosecutor* [1993] 2 SLR(R) 327 (at [36]), the High Court considered that where evidence had been assessed at trial with counsel and put aside, the fact that this was done on the advice of counsel would not amount to a reasonable explanation, unless such advice was shown to be "flagrantly incompetent". This position is not unreasonable because, as we also noted in *Sanjay Krishnan* (at [20]), where the evidence is so compelling as to strongly suggest that the decision below was wrong, the court would act to prevent a miscarriage of justice.

45 In *Sanjay Krishnan*, there was no suggestion of counsel or the applicant acting in bad faith or to abuse the process of the court; yet, the application was dismissed. In the case at hand, we first reiterate all we have said about the wholly unsatisfactory conduct of this matter by the appellant and his counsel.

The present case goes far beyond the facts of *Sanjay Krishnan*, in that we are dealing with evidence that was available but was seemingly deployed in a cynical and tactical manner in an attempt to stymie the resolution of the court process. This alone, amounting as it does to an abuse of process, would doom the present application.

46 But beyond that, the so-called evidence that is sought to be admitted in CM 30 is, in the first place, not even new. And, as we shall shortly explain, it is unreliable and suffers from many of the fatal flaws that affect Mr Ravi's affidavit in OS 1109. Furthermore, it is to much the same effect.

47 First, the evidence in question was available and could have been filed in OS 1109 or by the time of the hearing of that matter (see [12]–[15] and [28]–[29] above). That was not done and the only conceivable reason for that, in the absence of any other explanation, is that it was being held back so that CM 30 could then be filed in anticipation of the dismissal of OS 1109. As we have said, the condition of non-availability is not displaced to begin with (see [42] above), and when evidence is known and held back, either without explanation or in a cynical attempt to prevent closure of a matter, leave to admit it subsequently will be denied.

48 Second, *even if* we were to disregard the condition of non-availability, the evidence of Mr Navinkumar – upon which CM 30 is premised – is wholly unreliable.

49 As the appellant's brother, Mr Navinkumar is an interested witness, perhaps even more so than Mr Ravi. He is equally unqualified to opine on the appellant's medical state or mental faculties. As is the case with Mr Ravi's testimony, Mr Navinkumar's testimony is of no value. We note that there are

material unexplained differences between Mr Navinkumar's unaffirmed and affirmed affidavits (see [13] above), which raise further questions as to his credibility. The unaffirmed affidavit *does not* mention the claim that the appellant was taking medication for his mental health, while the affirmed affidavit *does* (see [38] above). The unaffirmed and the affirmed affidavits also ascribe entirely *different* symptoms to the appellant (see [38] above). These discrepancies could have been easily resolved by having regard to the medical records which the respondent offered to disclose, but the appellant and his counsel objected to this being made available to us. To the extent that Mr Navinkumar states that he has observed changes in the appellant's mood or in aspects of his behaviour since his last visit to the appellant in 2019, Mr Navinkumar first cannot testify to what was happening in the time between 2019 when he last visited the appellant and the present time. But this is precisely why access to the appellant's medical records would have been valuable to establish the position. Given the nature of the application and of the case run by the appellant, which is that there has been a deterioration, this would be a point of critical factual importance, assuming there was some legal basis for the application.

50 In addition, the factual assertions contained in the affidavits of Mr Navinkumar are contradicted by the evidence of Supt Shahrom (see [35] above). Supt Shahrom has deposed in his affidavit that any adverse findings or abnormalities noted during the assessments would be brought to his attention as the officer-in-charge of the appellant. His evidence was that there was no such notification, and he also did not observe any such changes in the appellant's behaviour. As we have already observed, Supt Shahrom is a disinterested witness and we have no reason to disbelieve his evidence; indeed, nothing has been advanced to suggest that we should do so.

51 We note at this juncture that the psychiatric and medical reports, which the respondent was prepared to disclose, could not only have shed real light on the appellant's present state of mind and any observed changes over time, coming as they do from trained personnel and presumptively being of probative value (see [36]–[37] above), but if it reflects what the respondent contends, it would have assuaged any genuine concerns that Mr Navinkumar harbours. It may also be noted that the reports were produced by third parties as part of scheduled check-ups, and *not as a litigation response to OS 1109 or CM 30*. These reports should therefore be regarded as presumptively objective.

52 We reiterate what we have said at [36]–[37] above, as to the relevance of the medical records and the two assessments and indeed, of the position taken by the appellant on the disclosure of these records and reports. On this, the appellant has argued that the *psychiatric* assessment was done in August 2021 and is therefore unreliable. This does not make sense to us because it does not appear to be the appellant's case that any deterioration in his mental faculties transpired only *after* August 2021. In any case, this also ignores the fact that a *medical* examination was done on 3 November 2021, in the midst of the period when Mr Navinkumar was visiting the appellant daily. If the appellant's condition was indeed as described by Mr Navinkumar in his affidavits – and assuming this condition was medically significant – one would expect this to be corroborated by the medical assessment of the appellant on 3 November 2021 and he would then have been referred for psychiatric assessment. In addition, Supt Shahrom would have been notified of the situation. As we have noted, none of this took place and at present, the medical records are not before us.

53 In the circumstances, we are satisfied that Mr Navinkumar's evidence was wholly unreliable.

54 Finally, no reliance can be placed on the reports of Dr Sullivan and Mr Schaapveld because ***they have not examined or even spoken to the appellant and have not seen his present medical records***. Their reports make it clear that the observations or opinions expressed there are based instead on the factual position reflected in Mr Ravi's and Mr Navinkumar's affidavits and on prior psychiatric and psychological reports from 2013 to 2017 relating to the appellant.[x] Given that no reliance can be placed on either affidavit for the reasons we have set out, and that the prior reports relate only to the appellant's mental faculties from 2013 to 2017 and not to the alleged recent deterioration, the reports of Dr Sullivan and Mr Schaapveld are devoid of any weight. Finally, the reports of Dr Sullivan and Mr Schaapveld are also speculative in many respects and opine on matters that are not relevant to the present case run by the appellant. Dr Sullivan, for instance, considers as relevant to the appellant's *offending* (which is *not* at issue in the present matters) that "[p]eople with impaired intellectual functioning frequently crave affiliation and acceptance, and may engage in offending and misconduct in order to gain the respect or support of peers".[xi] As for Mr Schaapveld, he suggests that the abnormal psychological state which he perceives in the appellant "in all probability will negate legal determination of 'competency for execution'",[xii] without furnishing any basis, legal or otherwise, for saying so. Finally, we reiterate the observations we have made at [14]–[15] above as to the lack of any explanation for the failure of file these documents before the Judge.

Conclusion on the factual argument

55 Given the lack of evidence to indicate any deterioration of the appellant's mental condition and for all the reasons we have set out, CA 61 as well as CM 30 must fail for lacking any foundation in fact, and we dismiss these accordingly.

The arguments on international law and the Constitution

56 This suffices to dispose of CA 61 and CM 30. Nevertheless, we make some very brief remarks on the arguments raised by the appellant which relate to international law and the Constitution. At the outset, we reiterate that without a factual foundation, these arguments are purely moot.

57 We agree with the Judge that the plain language of Art 9(1) of the Constitution cannot be ignored or rewritten by the court in order to accommodate a supposed rule of international law prohibiting the execution of intellectually disabled persons, assuming such a rule is shown to exist. The same is true if reliance is placed on Art 12(1) of the Constitution. Further, there is no basis for holding that Declaration 6 of the UN Declaration on the Rights of Mentally Retarded Persons or Art 15 of the Convention on the Rights of Persons with Disabilities ("CRPD") have the force of law in Singapore absent the adoption of these principles and provisions into the domestic legislative framework. This is so because ours is a dualist regime (see the decision of this court in *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong (Caning)*") at [29] and [45]). In *Yong Vui Kong (Caning)*, we rejected the argument that a prohibition against torture under customary international law could somehow be read into the Constitution without being legislatively enacted. While the CRPD was ratified by Singapore on 18 July 2013, and no reservations or declarations were made in relation to Art 15 thereto,[xiii] we reiterate that under the Westminster system of government, the Executive, which has the authority to sign treaties, may commit the State to such treaties without obtaining prior legislative approval. If treaties were self-executing, this would allow the Executive to usurp the legislative power of Parliament (see *Yong Vui Kong (Caning)* at [41] and [45]). However, even aside from this difficulty and the fact that treaty obligations are not self-executing under our

legal system, there are other insuperable obstacles that stand in the way of the appellant's argument. First, to reiterate the point we have made in the previous paragraph, there is no factual basis at all to support the contention of a decline in the appellant's mental faculties, much less of the type of decline he asserts. Second, beyond citing the CPRD, the appellant has not shown just how the carrying out of the sentence would violate Art 15. Third, he has not pointed to any domestic legislation that would support his case that the present sentence cannot be carried out. On the contrary, as we note in the following paragraph, the scheme of the MDA makes it clear that save in the specific instances provided for therein, the sentence of death is mandatory. To overcome this, the appellant would have to show not just that a treaty provision is automatically incorporated into our domestic legislation, but that in the event it conflicts with some domestic legislation, which we emphasise is not the case here, the later would be invalidated. There is simply no basis for this at all and it runs contrary to the essence of the interface between domestic and international law under a dualist system like ours. Further, the appellant also did not lead evidence showing extensive and uniform state practice and *opinio juris* to show that the rule of customary international law that he contends for exists to begin with.

58 But even assuming that the treaty obligations or customary international law norms to the effect contended for by the appellant *exist*, as we stated in *Yong Vui Kong (Caning)* (at [50]), while the exercise of "interpretive incorporation" entails the interpretation of domestic laws in a way consistent with Singapore's international obligations as far as this is reasonably possible, there are *limits to interpretation*; neither customary international law nor treaty law can trump an inconsistent domestic law that is clear and unambiguous in its terms and *pretending* that the court is engaged in an interpretative exercise does not change this. The framework of the MDA is unambiguous. Once this court

affirms the decision of the High Court as to the guilt of the appellant, it *must* impose the mandatory death penalty unless the appellant comes within one of the two situations in s 33B of the MDA. Apart from these two situations, it is not open to us to imply or create new carve-outs that empower us to avoid imposing the prescribed mandatory death penalty. We add that the issue of whether a prohibition against inhuman punishment could be imported into the Constitution was canvassed in detail in *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong (MDP)*") (at [59]–[65]), and we found there that it was not open to us to legislate a new constitutional right that had been proposed to and rejected by the Government, much less to do so under the guise of interpretation. In the present case, the prohibitions, which the appellant contends should be imported into the Constitution, are a subset of the prohibition against inhuman punishment. We have no reason or basis to depart from the reasoning of *Yong Vui Kong (MDP)*. In essence, it is impermissible for the court to act as a legislator in the guise of interpreting the Constitution.

59 As to the question of whether "age" in our penal statutes refers to chronological age or whether it extends to mental age, this was considered in detail in the context of s 83 of the Penal Code (Cap 224, 2008 Rev Ed) in *Public Prosecutor v ASR* [2019] 1 SLR 941 ("*ASR*"). We concluded there that age in that context means chronological age. Nothing has been advanced to suggest that a different outcome obtains in relation to the CPC, which is the material statute here.

60 In *ASR* (at [50]–[67]), we also explained the nuanced and factually intensive nature of the inquiry into mental age. We make that observation to emphasise just how ill-conceived the case mounted on the appellant's behalf is. It consists in essence of nothing more than the bald assertion of Mr Ravi that the appellant has a mental age that is below 18 (see [9] and [32] above).

61 There remain two final points:

(a) As to the argument that carrying out the sentence imposed on the appellant would allegedly violate the internal policy of the SPS, no evidence of such a policy has been put before us. Indeed, the evidence led by the respondent is to precisely the opposite effect. It is not clear what the basis for this assertion was. It is also not clear how an agency's internal policy, assuming it is shown to exist in these terms, could possibly prevent the carrying out of a judicial verdict and sentence.

(b) As to the argument of judicial mercy, this was not pressed upon us in the course of the hearing. The Judge dealt with this in his oral remarks (at [13]), which we have set out at [27] above. Judicial mercy, where it applies, is a principle that is invoked at the time of imposing a sentence. Once a sentence has been imposed and the judicial process has run its course, the remaining avenue is a petition for clemency, and not a further plea for judicial mercy.

62 In short, the legal case mounted by the appellant is hopeless both because it is without *any* factual or legal basis and because it rests on serious misconceptions as to the correct nature of the interface between domestic and international law under our legal system.

Abuse of process

63 Having concluded that the present application and appeal are bereft of merit in both fact and law, and having considered in detail the procedural history of the matter, we return to a point we alluded to at [25] above; in short, it is now clear that the conduct of the appellant's case does amount to an abuse of the process of the court.

64 The appellant has been afforded due process under law, and it is not open to him to challenge the outcome of that process when he has put *nothing* forward to suggest that he does have a case to be considered.

65 It has been observed that it is an abuse of process if an action is not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose (see the decision of the Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22]). In *Arun Kaliamurthy and others v Public Prosecutor and another matter* [2014] 3 SLR 1023 at [32]–[33], the High Court applied the same principle in the context of a criminal motion. OS 1109 has *no factual* ***or*** *legal basis*. CM 30 is also *without jurisdictional* ***or*** *factual basis*. Coupled with the fact that CM 30 was filed at the *eleventh hour*, when the hearing of OS 1109 was *already under way*, we must infer that CM 30 (and for that matter, OS 1109) was filed, not with a genuine intention to seek relief, but rather as a "stopgap" measure devised by the appellant and his counsel to try to delay the carrying out of the sentence imposed on the appellant. The fact that these matters have been conducted by the appellant and his counsel in a manner that constitutes an abuse of process is a further ground for denying relief.

Conclusion

66 For the foregoing reasons, we dismiss both CA 61 and CM 30.

67 We close by reiterating our observations in *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 (at [56]), that lawyers should be mindful that their advice must be accurate, measured, and serve the interests of justice. It is improper to engage in or to encourage last-ditch attempts to reopen concluded matters without a reasonable basis.

68 Counsel who file unmeritorious applications, when they know or ought reasonably to know that the application is without basis, are acting improperly. This will be readily be found to be the case where the application is *patently* unmeritorious (see *Miya Manik* at [82]). In the present case, the court was moved by counsel on the purported basis of a deterioration in the appellant's mental faculties, without any factual or legal basis. Further, to the extent there is evidence that could shed light on this (namely the medical and psychiatric reports), Mr Ravi and Ms Netto have sought to prevent the court from looking at it (see [36]–[37], [49] and [51]–[51] above).

69 The imposition and carrying out of the death penalty are always difficult matters. Counsel may well have passionate views that run counter to imposition of the death penalty. At a societal level, the proper recourse for them and indeed for anyone similarly situated is to seek legislative change if they are minded to do so. But as long as the law validly provides for the imposition of capital punishment in the specified circumstances, it is improper for counsel to abuse the process of the court and thereby bring the administration of criminal justice into disrepute by filing one hopeless application after another and by drip-feeding the supposed evidence.

70 We give leave to the parties to raise by notice in writing any question of costs within seven days of the date of this judgment.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Chao Hick Tin
Senior Judge

L F Violet Netto (L F Violet Netto) for the appellant;
Wong Woon Kwong, Tan Wee Hao, Wong Li Ru, Andre Chong and Janice See (Attorney-General's Chambers) for the respondent.

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[i] Mr Ravi's Affidavit dated 2 November 2021 at [11].
[ii] Mr Shahrom's Affidavit dated 5 November 2021 at [9].

[iii] Mr Ravi's Affidavit dated 2 November 2021 at [15].

[iv] Speaking Note at pp 13–14.

[v] Respondent's Consolidated Submissions at [45]–[47].

[vi] Appellant's Submissions in OS 1109 at [6].

[vii] Appellant's Submissions in OS 1109 at [73].

[viii] Mr Ravi's Affidavit dated 8 November 2021 at p 6 (Mr Navinkumar's unaffirmed affidavit at para 7).

[ix] Mr Navinkumar's affirmed affidavit dated 5 November 2021 at paras 6, 7, 10 and 11.

[x] Affidavit of Danny Sullivan dated 12 November 2021 at p 4 para 2.

[xi] Affidavit of Danny Sullivan dated 12 November 2021 at p 6 para 16(4).

[xii] Affidavit of Peter Benjamin John Schaapveld dated 19 November 2021 at p 11.

[xiii] Appellant's Submissions in OS 1109 at [15].