IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 37

Criminal Motion No 12 of 2022

Between

(1) Panchalai a/p Supermaniam
(2) Nagaenthran a/l K Dharmalingam

… *Applicants*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure And Sentencing — Criminal references — Stay of execution]
[Constitutional Law — Accused person — Rights]
[Constitutional Law — Natural justice — Bias]
[Constitutional Law — Natural justice — Right to fair hearing]

Panchalai a/p Supermaniam and another
v
Public Prosecutor

[2022] SGCA 37

Court of Appeal — Criminal Motion No 12 of 2022
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Belinda Ang Saw Ean JAD
26 April 2022

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Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 The first applicant, Mdm Panchalai a/p Supermaniam, in Criminal Motion No 12 of 2022 ("CM 12/2022") is the second applicant's mother. The second applicant, Mr Nagaenthran a/l K Dharmalingam, is a prisoner facing capital punishment who has exhausted his rights of appeal and almost every other means of recourse under the law. The numerous proceedings spanning some 11 years are detailed below at [5]–[13].

2 The second applicant was scheduled to be executed on 27 April 2022 for the second time. Just two days before the scheduled execution, the applicants filed CM 12/2022 seeking a stay of his execution pending the filing and disposal of certain applications which the applicants intend to file. They intend to file applications to set aside the decisions in Criminal Appeal No 50 of 2017

("CCA 50/2017"), Civil Appeal No 98 of 2018 ("CA 98/2018"), Civil Appeal No 61 of 2021 ("CA 61/2021") and Criminal Motion No 30 of 2021 ("CM 30/2021") (referred to collectively as "the CA Decisions") on the basis of a reasonable apprehension of bias. In support of their application, the applicants rely on the primary fact that the presiding Judge of the *coram* which issued the CA Decisions, Sundaresh Menon CJ, had held the office of the Attorney-General of the Republic of Singapore ("AG") between 1 October 2010 and 24 June 2012, during which period the second applicant was convicted and his appeal against conviction and sentence was dismissed.

3 In essence, the applicants' case is that Menon CJ was the AG who had control, supervision and authority over the second applicant's prosecution (which includes his conviction and appeal against conviction and sentence), and this was "incompatible" with his judicial function in hearing the CA Decisions. This, in turn, gives rise to a reasonable apprehension of bias. Consequently, the second applicant's right to a fair trial pursuant to Art 9(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution") has been "fundamentally breached" and the CA Decisions are "unconstitutional, unlawful and null and void". They argue that the Court of Appeal was "bound by law" to have reconstituted the *coram* without Menon CJ on the *coram* on the Court's own initiative. They also assert that the matter was not raised by the *coram* to counsel representing the second applicant in the hearings leading to the CA Decisions, and that the fact that there was no objection from the second applicant's counsel is irrelevant. In any case, the second applicant's rights under Art 9(1) of the Constitution cannot be waived, whether by himself or by counsel.

4 Having carefully considered the parties' submissions, we find CM 12/2022 to be devoid of merit and accordingly dismiss it. The present application, which was filed just two days before the scheduled execution,

appears to be a calculated attempt to diminish the finality of the judicial process and disrupt the second applicant's execution. As we have repeatedly reiterated, "no court in the world would allow an applicant to prolong matters *ad infinitum* through the filing of multiple applications" (*Kho Jabing v Attorney-General* [2016] 3 SLR 1273 ("*Kho Jabing (Abuse of Process*)") at [2]). There must come a time when the last word of the court *is* the last word. For the second applicant, that time had actually arrived some time ago.

Brief procedural history

5 On 22 November 2010, the second applicant was convicted under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") for importing not less than 42.72g of diamorphine into Singapore. He was sentenced to suffer death by the High Court (see *Public Prosecutor v Nagaenthran a/l K Dharmalingam* [2011] 2 SLR 830). His appeal against conviction and sentence was dismissed on 27 July 2011 by the Court of Appeal comprising Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA (see *Nagaenthran a/l K Dharmalingan v Public Prosecutor* [2011] 4 SLR 1156).

6 On 24 February 2015, the second applicant filed Criminal Motion No 16 of 2015 ("CM 16/2015") under s 33B of the MDA for the death sentence imposed to be substituted with a term of life imprisonment. On 14 September 2017, the High Court dismissed CM 16/2015 (see *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2017] SGHC 222). The second applicant filed CCA 50/2017 on 19 September 2017, to appeal against the dismissal of CM 16/2015.

7 On 27 March 2015, the second applicant filed Originating Summons No 272 of 2015 ("OS 272/2015") seeking leave to commence judicial review proceedings against the Public Prosecutor's decision not to grant the certificate under s 33B(2)(*b*) of the MDA. On 4 May 2018, the High Court dismissed OS 272/2015 (see *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112). The second applicant filed CA 98/2018 on 4 June 2018, to appeal against the dismissal of OS 272/2015.

8 On 8 January 2016, the second applicant filed Criminal Motion No 2 of 2016 ("CM 2/2016") to the Court of Appeal seeking among other things, a declaration that s 33B of the MDA is unconstitutional and contrary to the rule of law. It is critical to note that the precise matter now alleged in the present CM 12/2022 (*ie*, that there was an overlap between Menon CJ's term as AG and the second applicant's prosecution) had been raised with the second applicant. The court had asked the second applicant's counsel, Mr Suang Wijaya ("Mr Wijaya") of Eugene Thuraisingam LLP, during a case management conference on 25 January 2016 whether there was any objection if certain judges, including Menon CJ, were part of the *coram* hearing CM 2/2016. Mr Wijaya indicated that he would take instructions. At a second case management conference on 11 February 2016, Mr Eugene Thuraisingam ("Mr Thuraisingam") and Mr Wijaya appeared for the second applicant. Mr Thuraisingam stated that "[a]t the last [PTC], understand that court has asked us to look at whether [the applicants in CM 2/2016, including the second applicant in the present CM 12/2022] have objections to CJ … being on the [*coram*] of the [Court of Appeal]. We have taken instructions and they have no objections". At a third case management conference and by way of a letter on 9 March 2016, Mr Thuraisingam confirmed again that his client (*ie*, the second

applicant in the present CM 12/2022) had no objections to Menon CJ being on the *coram*.

9 On 2 December 2016, the Court of Appeal comprising Menon CJ, Chao Hick Tin JA and Phang JA dismissed CM 2/2016 (see *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173).

10 Given that the second applicant had no objections to Menon CJ sitting on the *coram* for CM 2/2016 notwithstanding the overlap between Menon CJ's term as AG and the second applicant's prosecution, it is not surprising that no additional conflict checks were conducted for hearings in the subsequent applications filed by the second applicant. In CCA 50/2017 and CA 98/2018, Mr Thuraisingam represented the second applicant (it will also be recalled that he had represented him in CM 2/2016 as well). On 27 May 2019, the Court of Appeal comprising Menon CJ, Phang JA, Judith Prakash JA, Chao SJ and Belinda Ang Saw Ean J dismissed both CCA 50/2017 and CA 98/2018 (see *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216).

11 The second applicant subsequently petitioned the President of the Republic of Singapore for clemency but his application was rejected. His execution was scheduled for the first time on 10 November 2021. However, on 2 November 2011, the second applicant filed Originating Summons No 1109 of 2021 ("OS 1109/2021") for judicial review against his impending execution. This was dismissed by the High Court on 8 November 2021. On the same day, the second applicant filed an appeal, CA 61/2021, against the High Court's dismissal of OS 1109/2021 and a criminal motion, CM 30/2021, seeking orders for the second applicant to be assessed by an independent panel of psychiatrists

and for a stay of execution until all proceedings were concluded. CA 61/2021 and CM 30/2021 was scheduled for hearing on 9 November 2021 by the Court of Appeal comprising Phang JCA, Prakash JCA and Kannan Ramesh J. As the second applicant tested positive for COVID-19, the Court of Appeal adjourned the proceedings and issued a stay of execution until the proceedings were concluded.

12 On 9 November 2021, the second applicant filed Criminal Motion No 31 of 2021 ("CM 31/2021") under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the 2012 CPC") for leave to bring a review application under s 394I of the 2012 CPC to reopen the Court of Appeal's earlier decision in CCA 50/2017. On 23 November 2021, Phang JCA granted leave for the second applicant to bring his review application under s 394H(7) of the 2012 CPC and issued specific directions for the second applicant to file and serve the review application by 12 noon on 26 November 2021. However, the second applicant failed to do so by the deadline or at all.

13 The putative review application to be filed pursuant to the leave granted in CM 31/2021 was to be heard together with CA 61/2021 and CM 30/2021. Given that the grounds raised in CM 31/2021 included issues relating to the second applicant's mental condition which were similarly raised in CA 61/2021 and CM 30/2021 and that CM 31/2021 prayed for leave to make a review application in respect of the Court of Appeal's decision in CCA 50/2017, the same *coram* which had heard CCA 50/2017 was empanelled to hear CA 61/2021 and CM 30/2021. On 29 March 2022, the Court of Appeal comprising Menon CJ, Phang JCA, Prakash JCA, Ang JAD and Chao SJ dismissed CA 61/2021 and CM 30/2021 (see *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] SGCA 26 ("*Nagaenthran (Abuse of Process)*").

Our decision

14 As a preliminary point, we agree with the respondent's submission that the first applicant has no standing. As we recently observed in *Roslan bin Bakar and others v Public Prosecutor* [2022] SGCA 18 at [10], "it is against the whole purpose and tenor of criminal proceedings to allow third parties to participate" in criminal proceedings which are the prosecution by the State of alleged offenders charged with breaking its laws. We stated that this position does not change as the case goes through the various stages from trial to criminal reference and, occasionally, criminal review. It is clear that while the first applicant can be said to be interested in the outcome of the proceedings, she has no legal standing to appear before the court. We therefore dismiss CM 12/2022 in respect of the first applicant. We also note that although the first applicant maintained at the hearing before us that she wanted more time to consult a lawyer and that she had hitherto no legal assistance whatsoever, the documents that she filed in respect of the present application were clearly drafted by a lawyer.

15 We now turn to the substance of CM 12/2022 on the basis that the affidavit in support of CM 12/2022 was filed by the second applicant himself. This court has the power to grant a stay of the carrying out of an execution pending the filing and resolution of other proceedings. In *Kho Jabing (Abuse of Process*), we cited with approval the decision of the Privy Council in *Thomas Reckley v Minister of Public Safety and Immigration* [1995] 2 AC 491 ("*Reckley*") at [3] as setting out the appropriate principles on which the Court of Appeal should decide applications to stay a scheduled execution pending the determination of an eleventh hour constitutional challenge (see also *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [81]). In *Reckley*, the Privy Council said at 496H–497A:

> Their Lordships accept that, if the constitutional motion raises *a **real issue for determination***, it must be right for the courts to grant a stay prohibiting the carrying out of a sentence of death pending the determination of the constitutional motion. But *it does not follow that there is an automatic right to a stay in all cases*. If it is demonstrated that ***the constitutional motion is plainly and obviously bound to fail***, those proceedings will be *vexatious and could be struck out*. If it can be demonstrated to the court from whom a stay of execution is sought that the constitutional motion is vexatious as being *plainly and obviously ill-founded*, then in their Lordships' view it is right for the court to refuse a stay even in death penalty cases.
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> [emphasis added in italics and bold italics]

It goes without saying that the court will assiduously scrutinise any motion filed in a case involving the life of an individual and this task is undertaken with greater rigour especially when a constitutional challenge is made. However, as the Privy Council in *Reckley* astutely pointed out, this does not mean that the court will countenance vexatious motions that are plainly and obviously bound to fail. That would be contrary to the well-established principle of finality in the criminal process and encourage applicants to prolong matters *ad infinitum* through the filing of multiple frivolous and vexatious motions.

16 It is clear to us that CM 12/2022 is patently devoid of factual and legal merit. Amongst other reasons given below, the evidence before us indicates that Menon CJ was not personally involved in the second applicant's matter and neither did he make any decisions pertaining to the second applicant's matter in the course of his tenure as AG. It would be entirely futile to stay the impending execution pending the filing and disposition of applications (see [2] above) which are frivolous and plainly and obviously bound to fail.

17 The crux of the second applicant's case that he has been deprived of a fair trial fails because the *factual basis upon which he relies* in support of his allegation of "a reasonable apprehension of bias" had been brought to his

attention through Mr Wijaya and Mr Thuraisingam at the earliest opportunity and before the hearing of CM 2/2016. The Prosecution raised the fact that Menon CJ's tenure as AG overlapped with the period in which the second applicant was convicted and his appeal was dismissed. As we extensively elaborated upon earlier (see [8] above), Mr Wijaya and Mr Thuraisingam took instructions from the second applicant and confirmed at the next case management conference that the second applicant had no objections to the same. Before the hearings that led to the CA Decisions, the second applicant also had every opportunity to object to Menon CJ being on the *coram* or to file recusal applications if he so wished. Even at the recent hearing on 1 March 2022 for CA 61/2021 and CM 30/2021, the second applicant (who was then represented by Ms L F Violet Netto) did not raise any objections to Menon CJ being on the *coram*.

18 In the light of the second applicant's *confirmation* that he did not object to Menon CJ hearing CM 2/2016 and his *subsequent* lack of objection in the CA Decisions thereafter, it is baseless for the second applicant to now assert that he had been denied the right to a fair trial. The second applicant cannot also now allege that it was for the *coram* to raise in the ensuing applications the *same* issue which the second applicant had been apprised of in CM 2/2016 and had expressed no concern about then. If the second applicant had *changed* his mind and wished to object to Menon CJ sitting on the *coram* of the CA Decisions, the onus was on him to raise such an objection at the *appropriate juncture* ***and not at the eleventh hour in a separate application in the attempt to delay his execution***. After all, the CA Decisions related to the second applicant and pertained to the singular aim of seeking to impugn his sentence. Far from being irrelevant, it is telling that the second applicant had never raised *any* concern about a reasonable apprehension of bias from 2 December 2016 when

Menon CJ first heard CM 2/2016 *until just two days before his rescheduled execution*. This suggests to us that the second applicant's allegation that he has been denied a fair trial is clearly an afterthought and not made in good faith. We elaborate on this further at [26]–[27] below.

19 As apparent from [17]–[18] above, it does not now lie in the second applicant's mouth to allege that he had been denied a fair trial. In a similar vein, we rejected the appellant's argument in *Kho Jabing (Abuse of Process*) that the re-sentencing process violated his constitutional right to a fair trial under Art 9 of the Constitution at [8] as follows:

> We now turn to the second main argument, which is the argument that the re-sentencing process has violated his constitutional rights. He says this is so for a number of reasons, and we propose to deal with them in sequence. First, he says *it violates his right to a fair trial under Art 9 of the Constitution, for he was denied a right to lead evidence which might be relevant to the question of his sentence.* This is plainly not true for one simple reason. … the appellant ***expressly declined to lead further evidence*** when he appeared before the High Court judge who heard his re-sentencing application. When he appeared before us in the appeal in 2015, he could have made a fresh application to lead further evidence, but he did not. ***Having not done so, he cannot now say that he had been denied a right to a fair trial***.
>
> [emphasis added in italics and bold italics]

20 The second applicant seeks to address this point by arguing that his constitutional right under Art 9(1) of the Constitution cannot be waived, whether by himself or by his counsel. However, this is an unhelpful blanket statement which does not assist him in the least. At its core, this argument is premised on the erroneous assumption that there *is a reasonable apprehension of bias* by reason of Menon CJ's presence on the *coram* for the CA Decisions such that the breach of his right to a fair trial under Art 9(1) of the Constitution could not be waived. Let us explain.

21 Article 9(1) of the Constitution provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law". The expression of "law" in Art 9(1) of the Constitution has been interpreted to include the incorporation of "those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution" (see *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong 2011*") at [101] endorsing the decision of the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR(R) 710 at [26]). The two specific rules of natural justice are the rule against bias (encapsulated in the maxim "*nemo iudex in sua causa*") and the right to be heard (encapsulated in the maxim "*audi alteram partem*") (see *Yong Vui Kong 2011* at [88]). The former establishes the right to an unbiased tribunal (see *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [62]) and encompasses actual and apparent bias (see *Yong Vui Kong 2011* at [90]).

22 There is clearly no actual bias and the second applicant rightly does not contend so. The test for apparent bias is whether a reasonable and fair-minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial was not possible (see the High Court decision of *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [77]). The rationale for this ground of review is that there is a vital public interest in ensuring that justice is manifestly and undoubtedly seen to be done (see the High Court decision of *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 at [74]). There is no merit in the second applicant's contention that there is a reasonable apprehension of bias in this case.

23 There is no reason to suspect that a fair trial was not possible simply because Menon CJ's tenure as AG overlapped with the period in which the

second applicant was convicted and had his appeal dismissed. This is but a bare assertion that does not make out a case of apparent bias. The respondent has given evidence that Menon CJ was not personally involved in the prosecution of the second applicant during his time as AG or in the second applicant's appeal against his conviction and sentence. He had also not made any decisions pertaining to the second applicant's matter in the course of his tenure as AG.

24 The legal issues in the CA Decisions were also varied and distinct from the issues that arose in relation to the second applicant's trial and the subsequent appeal. The Court of Appeal had to determine the second applicant's alleged abnormality of mind, the judicial review of the Prosecution's decision not to grant him a certificate of substantial assistance, the judicial review of the constitutionality of the execution of his sentence of death and an order for him to be assessed by a panel of psychiatrists. These issues are clearly quite far removed from the second applicant's guilt. As we observed in *Ong Wui Teck v Attorney-General* [2020] 1 SLR 855 at [26], the Oath of Office taken by every judge, judicial commissioner and senior judge of the Supreme Court of Singapore pursuant to Art 97(1) of the Constitution emphasises how vital the qualities of judicial independence and impartiality are to the role and function of a judge. As an appellate judge, Menon CJ would well be able to consider the issues arising in the CA Decisions impartially notwithstanding that the second applicant was convicted during the period that Menon CJ was AG. No fair-minded and reasonable person would suspect that a fair trial would not be possible in the circumstances.

25 We therefore reject the second applicant's misconceived argument that the Court of Appeal was "bound by law" to have reconstituted the *coram* such that Menon CJ was not on the *coram*. Nothing in Art 9(1) of the Constitution imposes such a duty on the courts, especially where the litigant has expressly

stated that he has no objections during conflict checks and has thereafter chosen not to raise any objections as regards the propriety of the constitution of the *coram*.

26 We find it unfortunate that this case is yet another instance where a litigant seeks to utilise an allegation of judicial bias as a backdoor attempt to undermine the finality of the court process despite our repeated emphasis that allegations of judicial bias are extremely serious and have the potential to undermine public confidence in the administration of justice (see the decision of this court in *BOI v BOJ* [2018] 2 SLR 1156). As observed by Ang JAD in *Png Hock Leng v AXA Insurance Pte Ltd* [2022] SGHC(A) 10 at [3], the court also has to be vigilant in order to guard against the use of unfounded allegations of bias to engage in judge shopping as a procedural strategy or disrupt proceedings with such applications. This ill-disguised application is nothing more than a blatant and impermissible attempt to further obstruct the imposition of the sentence imposed on the second applicant.

27 The filing of CM 12/2022 at the eleventh hour once again is a clear continuation of the drip-feeding of applications in a bid to thwart the court's efforts to discharge its responsibility in the matter timeously. We have warned against these tactics in *Nagaenthran (Abuse of Process)* at [17]. We agree with the respondent's arguments in this regard. The applicants' assertion that the time available to them to file the motion was "very short" and they have been "compelled to rush to court" is inexplicable given that the second applicant has had more than 5 years since 2 December 2016 (when Menon CJ first heard CM 2/2016) to raise any concerns he may have had. The choice to keep this application in the pocket until the second day before his scheduled execution is reprehensible and improper.

28 Finally, as regards the intended application under s 394H of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") to review the CA Decisions, we note that filing another application for permission to make a review application to reopen this court's decision in CCA 50/2017 is impermissible under s 394K(1) of the CPC as that provision states that an "applicant cannot make more than one review application in respect of any decision of an appellate court". In *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 at [12]–[13], Tay Yong Kwang JCA held that a purposive and proper reading of s 394K(1) of the CPC is that "since an applicant cannot make more than one review application in respect of any decision of the court, it follows logically that he also cannot make more than one leave application because that is the necessary prelude to a review application". As the second applicant had previously filed CM 31/2021 for permission to bring a review application but did not thereafter file the application (see [12] above), he would be precluded from filing any further applications for permission to bring a review application under s 394K(1). In any case, given our analysis above, we would not have granted permission for the second applicant to make a review application of the CA Decisions under s 394H of the CPC since there is no merit in his allegation that he has been denied a fair trial.

29 It is also a non-starter for the second applicant to seek to invoke the inherent jurisdiction of this court to file further applications to review the CA Decisions given the lack of good faith in the filing of CM 12/2022 and the abusive conduct of the second applicant in commencing OS 1109/2021 and CM 30/2021 with the sole purpose of trying to delay the carrying out of the sentence imposed on the second applicant (see [63]–[65] of *Nagaenthran (Abuse of Process)*). Thus, we emphasise that there are to be no further improper

applications that have the effect of stymying the court's process in order to prevent the law from taking its course.

Conclusion

30 For the foregoing reasons, we dismiss CM 12/2022. The second applicant has been more than afforded the requisite due process under the law.

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

The first and second applicants (in person);
Wong Woon Kwong, Tan Wee Hao and Andre Chong (Attorney-General's Chambers) for the respondent.