IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 37

Civil Appeal No 73 of 2016

Between

KHO JABING

… *Appellant*

And

ATTORNEY-GENERAL

… *Respondent*

EX-TEMPORE JUDGMENT

[Res judicata] — [Abuse of process]

[Constitutional Law] — [Equality before the law]

[Constitutional Law] — [Fundamental liberties] — [Protection against retrospective criminal laws] — [Right to life and personal liberty]

Kho Jabing
v
Attorney-General

[2016] SGCA 37

Court of Appeal — Civil Appeal No 73 of 2016
Chao Hick Tin JA, Andrew Phang Boon Leong JA, Woo Bih Li J,
Lee Seiu Kin J and Chan Seng Onn J
20 May 2016

Chao Hick Tin JA (delivering the judgment of the court *ex tempore*):

1 We last saw the appellant yesterday. He had attended before us for the urgent hearing of his second application to set aside the sentence of death imposed on him. That application proceeded by way of a criminal motion to reopen a concluded criminal appeal and it had been filed on Wednesday evening. We heard his application and we dismissed it. After we delivered judgment in that matter, we learnt that yesterday morning – even before we had urgently convened to hear his second application – he had filed two separate originating summonses in the High Court seeking a series of declarations that various provisions in the Penal Code (Cap 224, 2008 Rev Ed) and the Penal Code (Amendment) Act 2012 (Act 32 of 2012) ("Amendment Act") are unconstitutional. One originating summons was eventually withdrawn. We will come to the details shortly, but it suffices to say for now that he seeks these declarations in order that he might obtain a stay of execution of the sentence of death that is to be carried out today. Once again,

an urgent hearing was convened and a Judicial Commissioner heard arguments late into the evening and at about 9.00pm last night, the Judicial Commissioner dismissed the application. An urgent appeal was filed at 10.19pm the same night. This is the appeal now before us.

2 This case has been about many things. But today, it is about the abuse of the process of the court. In a 19th century decision of the House of Lords called *The Rev. Oswald Joseph Reichel, Clerk (Pauper) v The Rev John Richard Magrath, Provost of Queen's College, Oxford University* (1889) 14 App Cas 665 at 688, Lord Halsbury LC said that

> … it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.

This is precisely what has happened here. The applicant has tried twice to obtain relief by engaging the criminal jurisdiction of this court. After his applications were dismissed, he has gone away and sought relief by means of a civil action. This cannot be allowed. Yesterday, we said that no court in the world would allow an applicant to prolong matters *ad infinitum* through the filing of multiple applications. This principle applies here. And it applies with greater force because what the appellant seeks to do is to use the civil jurisdiction of the court to mount a collateral attack on a decision made by the court in the exercise of its criminal jurisdiction. Indeed, what the appellant has tried to do is even worse, for he has come to this court presenting arguments which are largely the same as, if not identical with, the arguments he presented in his criminal motions. What the appellant has done today, if allowed, would throw the whole system of justice into disrepute.

3 We will return to these points in a moment. But first, we propose to deal with a preliminary matter. When Mr Dodwell appeared before us, he sought to impress upon us that this appeal concerns only the decision of the Judicial Commissioner not to grant an interim stay. He therefore submits that there is no basis for us to consider the substantive merits of the application. We disagree. In the course of oral arguments, Mr Dodwell referred to the decision of the Privy Council in *Thomas Reckley v Minister of Public Safety and Immigration and others* [1995] 2 AC 491. There, the Privy Council was asked to grant a stay of a scheduled execution pending the determination of an eleventh hour constitutional challenge. The Privy Council said, and here we quote (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.

4 We therefore hold that the merits of the present originating summons are clearly relevant to this appeal. We turn to summarise the appellant's arguments. He has raised a number of arguments in support of his appeal but, so far as we understand it, he has put forward three principal contentions. These are:

(a) One, the test set out by this court for determining when a sentence of death should be imposed is too vague and lacks that quality of certainty required for it to be considered "law" within the meaning

of Art 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution").

(b) Two, the re-sentencing regime is unconstitutional because it has: (i) denied the appellant the right to a fair trial in violation of Art 9(1) of the Constitution; (ii) subjected him to retrospective punishment contrary to Art 11 of the Constitution; and (iii) treated him unequally in violation of Art 12(1) the Constitution.

(c) Three, he says that this court had acted without jurisdiction in hearing the Prosecution's appeal against his sentence in 2015 because the Prosecution has no right of appeal against a sentence of life imprisonment and caning imposed by the High Court (*in lieu* of a sentence of death) in an application for re-sentencing.

5 We begin with the argument on vagueness. There are three reasons why this argument must fail. First, this is the exact argument he brought before us previously, in his first criminal motion he filed last year (CM 24/2015") and we rejected this submission at [87]–[90] of our judgment delivered this April (*Kho Jabing v Public Prosecutor* [2016] SGCA 21 ("*Kho Jabing*"). To this, Mr Dodwell could only say that we did not look at the matter through "constitutional goggles" and that this makes a difference. This was a constant refrain we heard throughout the hearing but we reject this submission as being wholly without merit. An estoppel arises when a court of competent jurisdiction has determined some question of fact or law in previous litigation between the same parties. The question raised by the appellant last year, and the question which he raises now, is whether the test was too vague. We said it was not. This is a matter which is *res judicata*.

6 Second, it is plainly wrong to say that the test is not sufficiently precise and hence is unconstitutional. In our decision in April this year, we explained that the inquiry is whether the offender has displayed so "blatant [a] disregard for human life" and whether his actions are so "grievous an affront to humanity and so abhorrent" that the death penalty should be imposed. To put it simply, the "outrage test" calls on the court to do what it always does in any sentencing exercise, which is to determine whether the punishment fits the crime. This test, like any test set out in the realm of sentencing, provides useful signposts and guidance to future courts. They are there to improve, rather than detract from, the principle of consistency in sentencing.

7 Third, the vagueness of which the appellant complains is no more than the indeterminacy that is inherent in the sentencing exercise. In our judgment in April this year, we said that sentencing is an "intensely difficult exercise, and… reasonable persons can, and often do, disagree as to what the appropriate sentence ought to be" (see *Kho Jabing* at [102]). That should not be surprising, because sentencing is not a mathematical exercise. In fact, the appellant himself urged us to adopt an even vaguer test last year. He said we should hold that the death penalty should only be reserved for cases which are the "rarest of the rare" (see *Kho Jabing* at [87]). This formulation, in our judgment, is far worse than the outrage test we have advanced. It does not offer any guidance to lower courts or to accused persons.

8 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. As we

explained at [95]–[97] of the judgment we delivered in April, the appellant had 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.

9 Second, he says that his right under Art 11(1) of the Constitution has been infringed. However, we cannot see how Art 11 is at all relevant here. Article 11 embodies a central principle in the law, which is that no person may be punished for an act which was not a crime at the time he committed it nor may a person be subject to greater punishment for an offence than was prescribed by law at the time the offence was committed. What it does not prohibit is the retrospective lowering of a sentence. This was precisely what Parliament did when it passed the Amendment Act – it gave the appellant and other offenders in a similar situation a new lease on life. There is absolutely no basis for saying that Art 11 has been violated.

10 Third, he says that his right to equal treatment under Art 12(1) has been violated. This argument, as far as we understand it, proceeds as follows. He says that he has been treated unfairly as compared to persons who were sentenced to death at first instance. Such persons, he contends, have the benefit of a review of a death sentence by the Court of Appeal, whether by way of an ordinary appeal or through a petition of confirmation under ss 394A and 394B of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). The fact that he did not have such an opportunity, he submits, amounts to unfair treatment. In our judgment, this argument is wholly misconceived.

11 The Criminal Procedure Code says that all sentences of death cannot be carried out on a convicted person until two tiers of courts have reviewed the matter of the person's sentence. This is exactly what the appellant has received in this case. The appellant has been treated no differently from any accused person before or after the passage of the Amendment Act. He is eligible to one hearing in the High Court, in which the matter of his sentence will be considered, subject to an appeal to the Court of Appeal. The fact that he has been sentenced to death by the Court of Appeal rather than the High Court is not relevant. Indeed, there have been cases where the Court of Appeal has overturned an acquittal by the High Court and convicted the accused on appeal and imposed the death sentence. One such case is *Public Prosecutor v Ilechukwu Uchechukwu Chukwudi* [2015] SGCA 33.

12 Finally, we turn to the third principal contention, which is that we lacked jurisdiction to hear the Prosecution's appeal against his sentence in 2015. We note that this issue was not raised in oral argument. This is the exact argument which was raised in CM 24/2015 and which we rejected. This may be seen at [82]–[83] of the judgment we delivered in April.

13 In conclusion, the arguments raised by the appellant before us are the same arguments raised in CM 24/2015, sometimes presented in new wineskins, sometimes not, but the substance of the arguments is entirely the same. This is merely, in the words of our judgment in CM 24/2015 (see *Kho Jabing* [78]), "an attempt to re-litigate a matter which had already been fully argued and thoroughly considered." We consider that no real issues of any merit have been raised under the originating summons filed. For the reasons we have stated, the originating summons is plainly misconceived and obviously bound to fail. Accordingly, we dismiss the appeal.

14 Before we rise, we note that Mr Dodwell has brought our attention to a series of correspondence between the appellant's solicitors and the President's office. From the documents shown to us, it is clear that the President has taken the stand that the clemency process has been completed. We cannot see how further correspondence from the solicitors changes the position.

Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal	Woo Bih Li Judge

Lee Seiu Kin Judge	Chan Seng Onn Judge

Alfred Dodwell (Dodwell & Co LLC) (instructed), Chong Yean Yoong Jeannette-Florina (Archilex Law Corporation) for the applicant;
Francis Ng, Mohamed Faizal, and Zhuo Wenzhao (Attorney-General's Chambers) for the respondent