IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 63

Criminal Motion No 23 of 2016

Between

CHIJIOKE STEPHEN OBIOHA

… *Applicant*

And

PUBLIC PROSECUTOR

… *Respondent*

ORAL JUDGMENT

[Constitutional Law] – [Fundamental Liberties]
[Abuse of Process]

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17 November 2016

17 November 2016 Judgment reserved.

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

Introduction and background

1 Criminal Motion No 23 of 2016 ("CM 23/2016") is an application brought by the applicant seeking a stay of execution of the death sentence imposed on the applicant and that the death sentence imposed on the applicant be set aside. The application is justified on the ground that "[m]ental anguish and agony has been inflicted on [the applicant] due to the inordinate delay of about 8 years (since the date of his conviction and sentence … by the High Court on 30 December 2008)" (see the applicant's written submissions at para 2).

2 It is pertinent to consider the background of this case. This is the second time that the applicant has filed a last minute application. The first was on 13 May 2015, where the applicant filed Criminal Motion No 12 of 2015

("CM 12/2015"), seeking an eleventh hour stay of execution or a reversal of his sentence on the basis that there was DNA evidence that had not been raised at the trial which could demonstrate that he had been wrongly convicted. We dismissed the motion on the basis that even if the DNA evidence was to be accepted, this was not evidence which showed, or could show, that the conviction was "demonstrably wrong in law or that there is a reasonable doubt that the conviction was wrong" (see *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 at [13]). We held this to be the case because of the overwhelming weight of the other objective evidence leading to the conclusion that the applicant was guilty beyond reasonable doubt of the charge preferred against him.

3 During the hearing of CM 12/2015, the applicant informed us that he wished to apply to be re-sentenced under s 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). This was a sudden about-turn. Before the hearing, the applicant consistently maintained, in all the more than ten pre-trial conferences held between February 2013 and February 2015 that he did ***not*** wish to be re-sentenced. Despite the lateness of this request, we considered it appropriate to grant him a final indulgence and ordered that there be a stay of execution and that the applicant file a motion for re-sentencing by four weeks from that date. Subsequently, on 19 June 2015, the applicant filed Criminal Motion No 43 of 2015 ("CM 43/2015") for re-sentencing in accordance with s 33B of the MDA. A number of hearings were held before the High Court judge. However, on 25 August 2016, the applicant withdrew CM 43/2015.

4 On 12 October 2016, a letter was sent to the applicant requesting him to confirm that there was no pending application on record before the court. The letter also stated that the stay of execution imposed in CM 12/2015 would be lifted at 4.00 pm on 24 October 2016 *unless* it was demonstrated by

12 noon on 21 October 2016 that there were good reasons not to do so. As no application was received by the Court of Appeal by the stated time, the stay of execution imposed under CM 12/2015 was lifted. We pause to stress this. In spite of all the time given to the applicant from when the stay of execution was imposed on 14 May 2015 to the time when the stay was lifted on 24 October 2016, the applicant had not filed any application alleging undue delay until yesterday.

The *Kho Jabing* principles and abuse of process

5 In *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135, the Court of Appeal stated that it would be impossible to have a functioning legal system if all legal decisions were open to constant and unceasing challenge (at [47]). The principle of finality is also a facet of justice, and it is no less important in cases involving the death penalty. As the court stated at [50], after the appellate and review processes have run their course, the attention must shift from the legal contest to the search for repose. It was of no benefit to anyone – whether accused persons, their families or society at large – for there to be an endless inquiry into the same facts and same law with the same raised hopes and dashed expectations that accompany each fruitless endeavour.

6 Indeed, as we commented in a subsequent application involving the same offender, the filing of multiple applications in dribs and drabs to prolong matters *ad infinitum* amounts to an abuse of the process of the court (see *Kho Jabing v Public Prosecutor* [2016] 3 SLR 1259 at [3]). Yet, this is exactly what the applicant has done in the present case. The applicant had the full benefit and opportunity of the trial and appeal process and was found guilty beyond reasonable doubt on the charge preferred against him. He then filed CM 12/2015, which was an unmeritorious attempt to reopen the concluded

criminal appeal that we heard and dismissed. He then had an opportunity to apply for re-sentencing under s 33B of the MDA in CM 43/2015, but chose to withdraw it. Later, when informed that the stay of execution was to be lifted, he was given an opportunity to demonstrate why the stay ought not to be lifted but failed to proffer any explanation at all.

7 There was therefore more than ample time and opportunity for the applicant to bring forth a motion based on the present argument, especially within the period between after we had granted the stay of execution in CM 12/2015 and the period of more than one year after. CM 12/2015 was heard in May 2015 which was more than six years after the date of his conviction in the High Court. Furthermore, all the material which the applicant is relying on in this application was reasonably available to him during the hearing of CM 12/2015. The applicant was therefore well-placed to bring an application on this basis well ahead of the time scheduled for his execution. There was no reason for him to wait until the days before the date scheduled for his execution to file the present application.

8 Having regard to the background of the case, it is clear that the *sole* purpose of the current application before us is to put in motion a mechanism to delay the execution of the sentence imposed by law on the applicant. In our judgment, the filing of the present application at the eleventh hour before the applicant's scheduled execution in order to prevent the carrying out of a sentence which has been properly imposed by law amounts to an abuse of the court's processes for collateral motives and amounts to a calculated and contumelious abuse of the process of the court.

9 This cannot be countenanced. For these reasons, this application is an abuse of the court's process and we are prepared to dismiss the application on this basis.

10 In any case, it has been established in *Kho Jabing v Attorney-General* [2016] 3 SLR 1273 that there is no automatic right to a stay of execution merely because an accused person had filed an application to challenge the constitutionality of a sentence of death which had been imposed on him. A stay would only be granted if the application raised a real issue for determination. If the application was plainly and obviously bound to fail, those proceedings would be vexatious and could be struck out. Thus, aside from any question of abuse, it is incumbent on the applicant to demonstrate merits if he is to be granted a stay and it is to this which we now turn to consider.

The present application

11 In this application, the applicant essentially argues that "it is cruel and inhuman to terminate [the applicant's] life in view of the fact that he has suffered mental agony and anguish from the prolonged delay in execution of about 8 years" and that this has breached his constitutional right not to be deprived of life and liberty save in accordance with law under Art 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") (see paras 10 and 17 of the applicant's written submissions).

12 Significantly, the applicant recognises that the present issue has been considered in *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong (2010)*") but urges this court to consider afresh the interpretation of the Constitution, having regard to the fact that the mandatory death penalty regime had been reviewed by the Legislature. He

also submits that the court in *Yong Vui Kong (2010)* erred in its interpretation of the Constitution by taking an "originalist" approach.

13 In our view, the applicant has not raised any argument that would merit a revisiting of the principles laid down in *Yong Vui Kong (2010)*. First, the court in *Yong Vui Kong (2010)* came to the conclusion that it was not possible to incorporate in the Constitution an express or implied prohibition against inhuman punishment based on an *extensive* and *comprehensive* analysis of the history and text of the Constitution (see [46]–[74]). Second, the principles in *Yong Vui Kong (2010)* were affirmed in the more recent decision of *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 ("*Yong Vui Kong (2015)*") (see *Yong Vui Kong (2015)* at [83]).

14 The position laid down in *Yong Vui Kong (2010)* that there is no constitutional prohibition against inhuman punishment therefore remains the legal position in Singapore. In *Yong Vui Kong (2015)*, the court also held that the fundamental rules of natural justice were procedural rights aimed at securing a fair trial, and had *nothing to say* about the punishment of criminals *after* they had been convicted pursuant to a fair trial (at [64]). Additionally, the court could not read "unenumerated rights" into the Constitution as this would "entail judges sitting as a super-legislature and enacting their personal views of what is just and desirable into law, which is not only undemocratic but also antithetical to the rule of law" (see *Yong Vui Kong (2015)* at [75]). Based on the above, the applicant's argument plainly has no constitutional footing to stand on.

15 Nevertheless, taking the applicant's case at its highest, we turn to the precise facts and context of the present case in relation to the allegations by the applicant of cruel and inhuman punishment. To state the background

briefly, we set out a summarised chronology of events below. We pause to note that this chronology of events had been given to the parties and counsel prior to the hearing and counsel had confirmed its accuracy during today's hearing.

Date	**Description**
April 2007	The applicant was charged with having in his possession, for the purposes of trafficking, 2,604.56 g of cannabis.
30 December 2008	The applicant was convicted and sentenced to death.
12 January 2009	The applicant filed Criminal Case Appeal No 1 of 2009 ("CCA 1/2009").
16 August 2010	The Court of Appeal dismissed CCA 1/2009.
July 2011 to January 2013	The Singapore Government had begun a review of the mandatory death penalty and executions were suspended from July 2011 pending the review.
10 June 2013	The President's office acknowledges receipt of the petition for grant of pardon for the applicant.
February 2013 to February 2015	Pre-trial conferences conducted with the applicant and his lawyers to ascertain if the applicant wished to be re-sentenced under the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012) ("the 2012 Amendment Act"). Time was also given to the applicant as a "test-case" concerning the interpretation of s 33B of the MDA was being run through the courts. The applicant confirmed that he did not

	wish to be resentenced.
24 April 2015	The applicant's clemency application was rejected and the warrant of execution of sentence of death on 15 May 2015 issued by the President.
13 May 2015	The applicant filed CM 12/2015, seeking a last minute stay of execution or for a reversal of his sentence of death on the basis of DNA evidence.
14 May 2015	The Court of Appeal dismissed CM 12/2015, save that a stay of execution was granted in order to enable the applicant to file an application for re-sentencing.
19 June 2015	The applicant filed an application for re-sentencing (*ie*, CM 43/2015).
July 2015 to December 2015	Pre-trial conferences conducted to prepare for the hearing of CM 43/2015 before a High Court judge.
22 February 2016	CM 43/2015 heard by Woo Bih Li J and adjourned for the applicant to engage a lawyer.
9 May 2016	CM 43/2015 heard by Woo J and adjourned for the applicant to engage a lawyer.
23 May 2016	CM 43/2015 heard by Woo J and adjourned for the applicant to engage Mr Eugene Thuraisingam.
27 June 2016	CM 43/2015 heard by Woo J and adjourned for Mr Thuraisingam to take instructions and file further affidavits if necessary.
25 August 2016	The applicant withdrew CM 43/2015.

12 October 2016	The applicant was requested by letter to confirm that no other application was on record and that the stay of execution would be lifted at 4 pm on 24 October 2016 unless it was demonstrated by 12 noon on 21 October 2016 to the Court of Appeal's satisfaction that there was good reason not to do so.
21 October 2016	No application was received by the Court of Appeal pursuant to the letter dated 12 October 2016.
24 October 2016	The stay of execution under CM 12/2015 was lifted with effect from 4 pm.
27 October 2016	The applicant was informed by letter that no application had been put before the Court of Appeal by the stated time and that the stay of execution under CM 12/2015 had been lifted with effect from 4 pm on 24 October 2016.
28 October 2016	Warrant of execution of sentence of death on 18 November 2016 issued by the President.
16 November 2016	The applicant filed the present application (*ie*, CM 23/2016).

16 As may be seen from the above chronology, the relevant time period comprised:

(a) the period from April 2007 to 16 August 2010 (which comprised the period during which the applicant was charged and tried to the point in time when his appeal was dismissed);

(b) the moratorium on executions for the period from July 2011 to January 2013 as a result of the review of the mandatory death penalty (which was potentially for the applicant's benefit);

(c) the period from February 2013 to February 2015 where the appropriate legal processes were undertaken to ascertain if the applicant wished to be resentenced under the 2012 Amendment Act (which was, once again, potentially for the applicant's benefit but which he did not then avail himself of, deciding that he did not wish to be resentenced under s 33B of the MDA);

(d) the period from February 2015 to 13 May 2015 (during which time the applicant was awaiting the outcome of his clemency petition, which petition was rejected and the warrant of execution of sentence of death was issued by the President to be carried out on 15 May 2015); and

(e) the period from 13 May 2015 to the present (during which time, the applicant actively availed himself of various legal avenues open to him, including: (i) filing CM 12/2015, seeking a last minute stay of execution or a reversal of his sentence of death on the basis of DNA evidence; (ii) filing an application for resentencing (in CM 43/2015) after CM 12/2015 was dismissed but a stay was given to enable him to file the said application; and (iii) withdrawing CM 43/2015 after numerous hearings where various adjournments were granted at the applicant's own request).

17 Based on these facts, even taking the applicant's case at its highest, we are of the view that there has been no undue delay. The time taken to review the mandatory death penalty and to enact the 2012 Amendment Act (which

was enacted in order to furnish accused persons in the applicant's position a possible legal route to escape suffering the death penalty) as well as the time afforded to the applicant to avail himself of their provisions (see periods (b) and (c) above) could not possibly be considered as undue delay. On the contrary, the applicant, having stated that he did not want to avail himself of this possible legal route (involving re-sentencing), later filed CM 12/2015 in which he sought a stay of execution on the basis that there was new evidence and for an application that he desired re-sentencing after all (see period (e) above), thereby delaying matters. That having been said, the applicant then – after numerous adjournments as detailed above – withdrew his application for re-sentencing and brought the present application, alleging that there had been delay that constituted cruel, inhuman or degrading punishment. A moment's reflection will reveal that, quite apart from there not being any cruel, inhuman or degrading punishment, the applicant has been guilty of an abuse of process, as we have already stated.

Conclusion

18 For the reasons we have just given, we dismiss the application.

Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal	Hoo Sheau Peng Judicial Commissioner

Joseph Chen (Joseph Chen & Co) for the applicant;
Francis Ng, Mohamed Faizal, Kelly Ho and Esther Tang (Attorney-General's Chambers) for the respondent.