**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2016] SGCA 36**

Court of Appeal/Criminal Motion No 13 of 2016

Between

**KHO JABING**

… *Applicant*

And

**PUBLIC PROSECUTOR**

… *Respondent*

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# EX-TEMPORE JUDGMENT

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[Courts and Jurisdiction] — [Court of Appeal] — [Power to reopen concluded appeals]

[Courts and Jurisdiction] — [Court of Appeal] — [Natural justice]

# Kho Jabing
# v
# Public Prosecutor

**[2016] SGCA 36**

Court of Appeal — Criminal Motion No 13 of 2016
Chao Hick Tin JA, Andrew Phang Boon Leong JA, Woo Bih Li J,
Lee Seiu Kin J and Chan Seng Onn J
19 May 2016

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

1 This is the second time the applicant has filed an application to set aside the sentence of death imposed on him. The first was on 4 November last year, two days before his sentence was to have been carried out. We heard his application the very next day, adjourned it; and at the conclusion of the restored hearing of the application on 23 November 2015, we reserved judgment, granting a stay of execution pending our decision. We dismissed his first application on 5 April 2016. This application was filed yesterday afternoon. Like his first application, it was filed two days before his sentence was to have been carried out.

2 In this application, he says that this court's decision to sentence him to death on 14 January 2015 was in breach of natural justice and should be set aside. His main argument is that Justice Andrew Phang was a member of the court which first heard his appeal against his conviction in 2011 and ought not

to have heard the Prosecution's appeal against his sentence in 2015. The fact that Justice Phang did, he submits, gives rise to a reasonable suspicion of bias. He says that in doing so, Justice Phang effectively sat on appeal against his earlier decision in 2011. This is a breach of natural justice, he elaborates, because it is akin to having a person be a judge in his own cause. The applicant further contends that this is a new argument which has not yet been advanced and considered. This is not true.

3 When the applicant first applied to set aside the sentence of death on 4 November last year, he made the *exact same argument*. However, he withdrew his argument on 20 November 2015 when he amended his notice of motion. He did not give any reasons for doing so, but it is plainly his prerogative to amend his motion as he sees fit in order that he might put forward the best case he possibly can. We then considered his application on the basis of his amended motion and we dismissed it. It is an abuse of the process of the court for a person to file an application containing a particular argument, withdraw the argument sometime before the hearing, and then – after his first application is dismissed – file a fresh application premised on the argument which had been withdrawn. If this were allowed, applicants would prolong matters *ad infinitum* by drip-feeding their arguments one by one through the filing of multiple applications. We cannot allow this. No court would ever allow this. The English courts set their face against this in the 1800s in a case called *Henderson v Henderson* (1843) 3 Hare 100 and we have affirmed that principle many times before this. For this reason, we would dismiss this motion.

4 But even if the applicant's argument were completely new, we would still have dismissed his application. The premise of the applicant's argument is that the court in 2011 and the court in 2015 were effectively deciding the same

issue: that is, how he caused the death of the victim and, in particular, the number of blows he inflicted on the victim. Thus, he argues that it was entirely improper for Justice Phang to have heard and decided the matter in 2011 and then to sit in judgment on the Prosecution's appeal in 2015. This is also plainly wrong.

5 The issue in 2011 was whether the applicant was guilty of murder. To put matters in the correct legal perspective, the question which the Court of Appeal had to decide then was whether the applicant intentionally inflicted an injury on the victim which, in the ordinary course of things, would lead to death. The court held that he did. The question of what sentence to impose was never at issue, because the sentence of death was mandatory at the time. Subsequently, Parliament made amendments to the Penal Code (Cap 224, 2008 Rev Ed) to provide that a conviction for murder of the kind the applicant was found guilty of would no longer attract the mandatory death penalty. Instead, the court was given the discretion to sentence such a convicted person either to death or to a term of life imprisonment. The Penal Code Amendment Act 2012 (Act 32 of 2012) also permits a convicted person like the applicant who was already sentenced to suffer a previously mandatory death penalty to apply for re-sentencing in accordance with the amended law. Thus, the issue before the Court of Appeal in 2015 was what should be the appropriate sentence to be imposed on the applicant for committing murder. When Justice Phang heard the matter in 2015, therefore, he was deciding a completely different issue than he was in 2011. There is no basis for saying that he was being asked to revisit or review his own earlier decision.

6 In courts all over the world, trial judges who decide on the guilt of accused persons are routinely required to pass sentence on them straightaway. The trial judge is best placed to do this because he is the one who is most

familiar with the facts of the case. This is necessarily the case under our re-sentencing regime. Applications for re-sentencing are routinely scheduled to be heard before the same trial judges who decided on the guilt of the accused persons at the trial, however many years ago that might have been. It has never been suggested that there is anything improper with that. Indeed, it is the correct and ideal thing to do, as these trial judges are most familiar with the facts of the case and can exercise their discretion appropriately.

7 Likewise, Justice Phang's position was, in relation to the issue under consideration, analogous to that of a trial judge who had first convicted an accused person and is now asked to pass sentence on him after the amendments to the Penal Code granted the courts a limited sentencing discretion in such matters. We cannot see any logical basis for the applicant to argue that Justice Phang's 2011 involvement meant that the decision made by the court in 2015 was tainted by apparent bias. Indeed, if the amended law had in fact been in force at the time the applicant's first appeal had been heard, the *same* coram would have determined both the issues of conviction *and* sentence.

8 Counsel for the applicant also referred to s 30(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). All we wish to say is that he has, with respect, misread that provision.

9 For the foregoing reasons, we dismiss this application. In conclusion, we only wish to say this. The applicant was arrested in 2008. Eight years and an innumerable number of legal applications later, he still stands before this court. When we delivered judgment on 5 April 2016, we stressed the importance of finality. We said that there comes a point, after the appeals have been heard and the applications for reviews have been decided, when the legal

process must recede into the background and give way to the search for repose. We think that time has come.

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| Chao Hick Tin<br>Judge of Appeal | Andrew Phang Boon Leong<br>Judge of Appeal | Woo Bih Li<br>Judge |

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| Lee Seiu Kin<br>Judge | Chan Seng Onn<br>Judge |

Gino Hardial Singh (Prestige Law LLP) for the applicant;
Francis Ng, Ruth Teng, and Foong Leong Parn
(Attorney-General's Chambers) for the respondent.

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