IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 55

Civil Appeal No 29 of 2022

Between

Nazeri bin Lajim

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of Originating Application No 347 of 2022

Between

Nazeri bin Lajim

… *Applicant*

And

Attorney-General

… *Respondent*

EX TEMPORE JUDGMENT

[Constitutional Law — Equal protection of the law]
[Constitutional Law — Fundamental liberties — Right to life and personal liberty]
[Constitutional Law — Judicial review]

[Criminal Procedure and Sentencing — Stay of execution]

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v
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Court of Appeal — Civil Appeal No 29 of 2022
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21 July 2022

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

Introduction

1 In 2017, Mr Nazeri bin Lajim (the "appellant") was convicted on a capital charge and sentenced to the mandatory death penalty. On 19 July 2022, three days before his scheduled execution on 22 July 2022, the appellant filed Originating Application No 347 of 2022 (the "Originating Application") seeking: (a) a declaration that the Attorney-General ("AG") had arbitrarily imposed the capital charge upon him in breach of his rights under Arts 9(1) and 12(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution") and (b) a prohibiting order and/or a stay of execution in respect of the execution of his sentence of death, pending the disposal of this matter.

2 A judge of the General Division of the High Court (the "Judge") heard the Original Application on an expedited basis on 20 July 2022 and dismissed it, but made no order as to the stay of the execution of the appellant's sentence of death. The appellant appealed against the Judge's decision and an expedited appeal was ordered and heard at 2.30 pm today by this court.

3 Before the commencement of the hearing, the appellant filed further submissions seeking time to consult and/or hire a lawyer to present the arguments he had made in support of his Originating Application. We rejected his request for an adjournment, for reasons which will be elaborated upon below.

Background

4 On 8 August 2017, the appellant was convicted by the High Court on a capital charge of possessing two bundles containing not less than 33.39g of diamorphine for the purpose of trafficking under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA") (see *Public Prosecutor v Dominic Martin Fernandez and another* [2017] SGHC 226 ("*Nazeri (HC Conviction)*") at [1] and [54]). As the appellant did not fulfil any of the criteria in the alternative sentencing regime under s 33B of the MDA, he was sentenced to the mandatory death penalty pursuant to s 33(1) of the MDA (*Nazeri (HC Conviction)* at [57]–[58]). Meanwhile, the appellant's co-offender, who was arrested by the Central Narcotics Bureau ("CNB") in the same operation and in respect of the same subject matter as the appellant, was convicted of trafficking in not less than 35.41g of diamorphine under s 5(1)(*a*) of the MDA, but qualified for the alternative sentencing regime under s 33B of the MDA and was sentenced to life imprisonment and 15 strokes of the cane (*Nazeri (HC Conviction)* at [1], [34] and [57]–[58]).

5 The appellant's appeal against his conviction and sentence was dismissed by this court in CA/CCA 42/2017 ("CCA 42") on 4 July 2018.

6 On 1 October 2020, the appellant, along with 21 other plaintiffs, filed an application in HC/OS 975/2020 for pre-action discovery and leave to serve pre-action interrogatories against the AG and the Superintendent of Changi Prison in respect of the disclosure of personal correspondence of some of the plaintiffs in the possession of the Attorney-General's Chambers ("AGC"). The General Division of the High Court dismissed the application in HC/OS 975/2020 on 16 March 2021 (see *Syed Suhail bin Syed Zin and others v Attorney-General and another* [2021] 4 SLR 698 ("*Syed Suhail (OS 975)*"). It was undisputed that no correspondence was sought by the AG or forwarded to the AG by the Singapore Prison Service in respect of the appellant (see *Syed Suhail (OS 975)* at [7]). No appeal has been filed against the General Division of the High Court's decision in *Syed Suhail (OS 975)*.

7 On 9 March 2021, the appellant filed CA/CM 12/2021 ("CM 12") to the Court of Appeal seeking leave pursuant to s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to file an application for review of the Court of Appeal's decision in CCA 42. The Court of Appeal summarily dismissed CM 12 (see *Nazeri bin Lajim v Public Prosecutor* [2021] SGCA 41).

8 Thereafter, on 13 August 2021, the appellant and 16 other plaintiffs filed HC/OS 825/2021 ("OS 825") seeking declaratory relief to the effect that the CNB and the AG had discriminated against persons of Malay ethnicity in investigating and prosecuting capital drugs offences under the MDA, in violation of their constitutional rights. On 2 December 2021, the General Division of the High Court dismissed the application (see *Syed Suhail bin Syed*

Zin and others v Attorney-General [2021] SGHC 274 ("*Syed Suhail (OS 825)*"). There was no appeal against this decision.

9 The President's order for the appellant's execution under s 313(*f*) of the CPC was issued on 6 July 2022, and the Warrant of Execution under s 313(*g*) of the CPC was issued on 8 July 2022 for the death sentence to be carried out on 22 July 2022.

10 On 19 July 2022, three days before his scheduled execution, the appellant filed the Originating Application seeking: (a) a declaration that the AG had arbitrarily imposed the capital charge upon him in breach of his rights under Arts 9(1) and 12(1) of the Constitution and (b) a prohibiting order and/or a stay of execution in respect of the execution of his sentence of death, pending the disposal of this matter.

The parties' cases

11 Before the Judge, the appellant argued that his rights under Art 9(1) of the Constitution ("Art 9(1)") were violated on the basis that the deprivation of his life is in breach of his rights under Art 12(1) of the Constitution ("Art 12(1)").

12 In respect of his challenge pursuant to Art 12(1), the appellant submitted that he was to be regarded as equally situated with other accused persons who – in relation to the MDA offences of trafficking, possession for the purpose of trafficking and importing – were caught with drugs of a quantity that was above the minimum amount required to attract the mandatory death penalty (*ie*, the capital threshold). However, he argued that the AG had acted arbitrarily and unfairly in preferring and maintaining a capital charge against him, whilst reducing the charges of other equally situated accused persons from a capital

charge (*ie*, for a quantity of drugs above the capital threshold) to a non-capital charge (*ie*, for a quantity of drugs below the capital threshold). The appellant therefore submitted that by placing him on trial for a capital charge, the AG had breached his rights under Art 12(1).

13 On a related note, the appellant complained of the lack of transparency as to how, and on what legal basis, the AG exercises his discretion in preferring a capital or non-capital charge. In Exhibit A of his affidavit, the appellant listed cases wherein the convicted offenders faced a non-capital charge despite trafficking in a quantity above the capital threshold, and sought a court order for the AG to *further* disclose detailed records of accused persons whose charges were reduced from a capital to a non-capital charge, and those who were not given this reduction.

14 Lastly, the appellant sought to clarify that the Originating Application was not an abuse of process. He asserted his belief that this application was meritorious, and claimed that he had, for "a very long time", wanted to raise these issues but was unable to because no lawyer was willing to take up his case. The appellant also alleged that the counsel who represented him in *Syed Suhail (OS 825)*, Mr Ravi s/o Madasamy ("Mr Ravi"), tried to raise this issue back in 2021, but he found out recently that his counsel had not appropriately addressed the matter and had instead "mixed up and/or combined the issue with racial discrimination" against persons of Malay ethnicity. As a result, the issues which the appellant now raise in this Originating Application, were overlooked.

15 In response, the AG argued that the Originating Application, which was filed only after the appellant had been notified of his execution date, was an abuse of process. The AG argued that the application was time-barred under O 24 r 5(2) of the Rules of Court 2021 because it was brought more than three

months after the prosecutorial decision was made to proceed against the appellant in the High Court for a capital charge for being in possession of not less than 35.41g of diamorphine for the purpose of trafficking. There was no reason why the present application could not have been filed earlier, especially since the appellant had filed a similar constitutional challenge in OS 825. It could therefore be inferred that the true purpose of the Originating Application was to frustrate the appellant's scheduled execution from being carried out on 22 July 2022.

16 The AG, in any event, dealt with the Originating Application on its merits. The AG pointed out that leave must be obtained to commence judicial review proceedings, and in so far as the three-fold leave requirements were concerned (see below at [24]), the AG did not dispute that the subject matter at hand was susceptible to judicial review and that the appellant had sufficient interest in the subject matter. However, the AG contended that the materials fell far short of showing a *prima facie* case of reasonable suspicion that the appellant's rights under Art 12(1) had been violated:

> (a) First, the appellant had not shown a *prima facie* case as to how he was equally situated with the offenders referred to in the cases listed in Exhibit A (see [13] above). The fact that the quantities involved in those other cases were also above the capital threshold did not in and of itself mean that the appellant was equally situated with those other offenders. Citing the Court of Appeal's decision in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*"), which held at [70] that the mere differentiation of charges between co-offenders, even between those of equal guilt, is not *per se* sufficient to constitute *prima facie* evidence of bias or the taking into account of irrelevant considerations, the AG argued that a multitude of fact-specific

considerations may legitimately influence the exercise of prosecutorial discretion, and the surrounding circumstances would justify not finding that the accused persons are equally situated, and provide an eminently reasonable basis for treating different offenders differently.

(b) Secondly, the appellant had not shown any impropriety in the exercise of prosecutorial discretion in relation to his case, in that it was biased or based upon irrelevant considerations.

17 As against the appellant's argument that the AG was more fit and appropriate to disclose the details of those whose charges were reduced to a non-capital charge and those who were not given a similar reduction, the AG argued that this argument was legally unsound. Citing the Court of Appeal's decisions in *Ramalingam* and *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*"), the AG contended that he will only be under an evidential burden to justify his prosecutorial decision when an applicant has produced *prima facie* evidence of the alleged unconstitutionality. Since the appellant in this case had failed to present the requisite *prima facie* evidence, the AG was under no obligation to disclose details of other cases or to justify his prosecutorial decision.

18 Finally, the AG submitted that there had been no breach of the appellant's rights under Art 9(1). The appellant was sentenced to death after being afforded due process through a trial in the High Court, and not as a result of the Prosecution's decision to charge him. The appellant was given every opportunity to present his case at trial, and in CCA 42 following his conviction, and was given the opportunity in CM 12 to seek leave to reopen his concluded appeal after his appeal was dismissed.

Decision below

19 During the hearing below, which took place on 20 July 2022, the appellant sought an adjournment so that he could seek legal representation. The Judge, pointing to the fact that the appellant had filed his application, affidavit and submissions without the help of a lawyer, found that the appellant's last-minute attempt to adjourn the hearing of the Originating Application was clearly an abuse of process and refused the appellant's application for an adjournment.

20 Next, the Judge held that the Originating Application was filed way out of time, and that the appellant did not furnish an acceptable explanation for the delay.

21 In so far as the merits of the Originating Application were concerned, the Judge observed that in substance, the appellant's case rested only on a breach of Art 12(1), because the appellant's case in respect of Art 9(1) was premised on there being a breach of Art 12(1). Noting the principle set out in *Ramalingam* that the mere differentiation of charges between co-offenders is not sufficient *prima facie* evidence of a breach of Art 12(1), the Judge held that this principle applied with even greater force in this case because the appellant's complaint of differentiation of charges compared his case not against his co-offender's case, but against other unrelated cases. The Judge therefore dismissed the appellant's application for (a) a declaration that the charge against him breached Arts 9(1) and 12(1), and (b) a prohibiting order in respect of the execution of the sentence of death against him, on the basis that the appellant had not discharged his burden of producing *prima facie* evidence of a breach of Art 12(1).

22 The Judge, however, made no order as to the appellant's stay of execution of his sentence of death pending the disposal of those proceedings.

23 We turn now to the issue to be decided in this appeal.

Issue to be determined in this appeal

24 The appellant framed the Originating Application as an application for judicial review. However, before such an application can proceed, leave to commence judicial review must first be obtained. We will therefore focus our inquiry on whether the appellant should be granted leave, on the assumption that we are prepared to waive any non-compliance as to procedure (including the time limit to file such leave applications). Three requirements must be satisfied before the court will grant an applicant leave to commence judicial review (see *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 ("*Gobi*") at [44]):

(a) the subject matter of the complaint has to be susceptible to judicial review;

(b) the applicant has to have a sufficient interest in the matter; and

(c) the materials before the court have to disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

25 The first two requirements are undisputed. In relation to the third requirement, we agree with the Judge that, since the appellant's other ground in respect of Art 9(1) is premised on there being a breach of his rights under Art 12(1), the appellant's case turned essentially on whether there was a breach of Art 12(1).

26 Therefore, the central issue which arises for our determination is whether there is an arguable or *prima facie* case of reasonable suspicion that

the AG, by preferring and maintaining the appellant's capital charge, breached the appellant's rights under Art 12(1). It is to this issue which we now turn.

Analysis

27 The concept of equality under Art 12(1) does not mean that all persons are to be treated equally, but simply that "all persons in like situations will be treated alike" (see *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [54]; *Attorney-General v Datchinamurthy s/l Kataiah* [2022] SGCA 46 at [29]). In assessing whether executive action has breached Art 12(1), the applicant must first discharge his evidential burden of showing that he has been treated differently from other equally situated persons, before the evidential burden shifts to the decision-maker in question to show that the differential treatment was reasonable, in that it was based on legitimate reasons which made the differential treatment proper (see *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61]–[62]).

28 Art 12(1) merely requires the AG (in his capacity as the Public Prosecutor) to give unbiased consideration to every offender and to avoid taking into account any irrelevant consideration (see *Ramalingam* at [51]).

29 In this connection, this court has held that the AG may take into account a myriad of factors in determining whether or not to charge an offender (including his co-offenders in the same criminal enterprise, if any) and, if charges are to be brought, for what offence or offences. These factors include the question of whether there is sufficient evidence against the offender and his co-offenders (if any), their personal circumstances, the willingness of one offender to testify against his co-offenders and other policy factors. Where relevant, these factors may justify offenders in the same criminal enterprise

being prosecuted differently (see *Ramalingam* at [52]; *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [17]).

30 Applying these legal principles to the facts, we agree with the Judge that the appellant has not discharged his burden of producing *prima facie* evidence of a breach of Art 12(1).

31 The appellant's entire case proceeds on the flawed premise that he is equally situated with other offenders who were likewise caught with drugs above the capital threshold, in relation to the MDA offences of trafficking, possession for the purpose of trafficking and importation. However, simply because these other offenders were (*literally*) also caught with drugs above the capital threshold, does *not* mean that they are (in *law*) equally situated with the appellant. The reality is that offences are committed by all kinds of people in all kinds of circumstances, and the AG must be entitled to take into account all the facts of a particular case, beyond the quantity of drugs involved, in arriving at his charging decision. There are many other factors, as enumerated above at [29], which may equally justify not regarding the appellant as being equally situated with these other offenders, and which justify differential treatment.

32 Indeed, due to the fact-sensitive manner in which the AG has to exercise his discretion, this court in *Ramalingam* observed at [70] that *even where* accused persons involved in the *same* criminal enterprise are concerned, the mere fact that there is a differentiation of charges between co-offenders, even if they have equal guilt, is not *per se* sufficient to constitute *prima facie* evidence of bias or the taking into account of irrelevant considerations. As noted by the Judge, this observation in *Ramalingam* applies, *a fortiori*, to the present case because the appellant's complaint of differentiation of charges compared his case not against his co-offender's case, but against *other unrelated cases*.

33 We therefore affirm the Judge's decision that the appellant has failed to established an arguable or *prima facie* case of reasonable suspicion that there has been a breach of the appellant's rights under Art 12(1). The same can be said of the appellant's case pursuant to Art 9(1), since it is premised on an alleged breach of Art 12(1). The requirement for leave to commence judicial review is a means of filtering out groundless or hopeless cases at an early stage (see *Gobi* at [45]), and this is clearly one such case.

34 Given that the appellant has not been able to show any *prima facie* breach of Art 12(1), the AG is not required to justify his prosecutorial decision to the court. This accords with the presumptions of constitutionality and legality which apply as a matter of the separation of powers doctrine (see *Ridzuan* at [36]).

35 It must be evident by now that the orders sought by the appellant are entirely devoid of *factual* basis. It is for this reason that we decline to grant the adjournment sought for by the appellant (see above at [3]). Whilst the court would consider reasonable attempts by an applicant to seek legal counsel to vindicate his rights, the situation here is similar to that in *Norasharee bin Gous v Public Prosecutor* [2022] SGCA 51 ("*Norasharee*"), in that there is simply "no substratum of fact to support a real possibility of relief being granted" (see *Norasharee* at [12]). We emphasise that the law in this area is already well-settled and the issue with the appellant's case is that it is completely unsupported as a matter of *fact*. Legal assistance would not give *factual* substratum to a case which has none to begin with.

36 We also highlight that the appellant has been afforded full due process when he was represented by counsel during his trial before the High Court, the appeal arising therefrom, and his leave application for a criminal review in

CM 12. There must come a point in time that the appellant accepts the consequences of his actions. It is impermissible for the appellant to prevent the law from taking its course by taking out meritless applications at the eleventh-hour, and the court would not allow its processes to be abused where an applicant asks for a last-minute adjournment in order to seek legal representation for what is an application that has no factual basis to begin with.

37 Indeed, this is yet another instance of an abuse of the court's process, conducted with the aim of frustrating the imposition of capital punishment on an offender whose guilt has been finally and fairly determined in accordance with the law. The timing of this patently unmeritorious application says it all.

Conclusion

38 In conclusion, we affirm the Judge's dismissal of the appellant's application for (a) a declaration that the charge against him breached Arts 9(1) and 12(1), and (b) a prohibiting order in respect of the execution of the sentence of death against him. We also dismiss the appellant's application for a stay of the execution of his sentence of death since there is no reason for this stay now that proceedings relating to the appellant's application for a declaration and a prohibiting order has been finally determined and dismissed.

Postscript

39 On 20 July 2022, shortly after the Judge dismissed the appellant's application, and shortly before the appellant filed his notice of appeal against the Judge's decision, the court registry received an email from Mr Ravi.

40 In that email, Mr Ravi states that he wrote a letter dated 5 October 2021 under the letterhead KK Cheng Law LLC (the "5 October Letter") to AGC, on

behalf of the appellant and the other plaintiffs, in a matter involving a possible contempt of court by Minister Mr K Shanmugam ("Minister Shanmugam"). Mr Ravi explained that the subject matter of the 5 October Letter was a statement made by Minister Shanmugam "who [was] directly responsible for Changi prison which schedules executions". By a letter dated 23 March 2022, Mr Ravi was allegedly notified that he was being investigated under s 182 of Penal Code 1871 (Cap 68, 2012 Rev Ed) on a complaint that he did not have instructions from the appellant, amongst others, in writing the 5 October Letter. On the basis that the appellant's statement, evidence and testimony is "crucial" to his (Mr Ravi's) defence in the said investigation, and for the purpose of the ongoing police investigation, Mr Ravi asked this court to exercise its inherent powers "to safeguard the administration of justice by ordering a stay of the scheduled execution of [the appellant] pending the completion of the police investigation[s]". According to Mr Ravi, AGC is scheduled to report on the status of police investigations to the State Court on 15 August 2022.

41 Mr Ravi further stated that he would be happy to appear before this court should this court require his attendance to clarify matters for the stay.

42 We directed AGC to respond to Mr Ravi's email. AGC subsequently replied by way of its letter dated 21 July 2022 (the "21 July Letter"):

> We refer to your letter and the Registrar's Notice dated 20 July 2022 on the abovementioned matter, and the e-mail from Mr M Ravi dated 20 July 2022.
>
> 2 Mr M Ravi was the counsel on record for the 17 plaintiffs in HC/OS 825/2021 ("OS 825"), which included the [a]ppellant, Nazeri bin Lajim ("the Plaintiffs"). On 5 October 2021, the Attorney-General's Chambers received a letter from Mr M Ravi ("the [5 October Letter]"), seeking a sanction from the Attorney-General ("AG") to commence contempt of court proceedings on behalf of the Plaintiffs against the Minister for Home Affairs Mr K Shanmugam.

> 3 On 16 November 2021, a police report was lodged against Mr M Ravi for a potential offence under s 182 of the Penal Code (Cap 224, 2008 Rev Ed). The alleged offence relates to whether Mr M Ravi had falsely represented to the AG that he had acted under the instructions of the Plaintiffs when he sent the [5 October] Letter. The police commenced investigations thereafter. In a letter dated 23 May 2022, Mr M Ravi was required to attend before the investigation officer for an interview. Mr M Ravi was interviewed on 26 May 2022. Investigations into this matter are still ongoing.
>
> 4 To date, the Police has not interviewed the [a]ppellant. In view of the scheduled judicial execution on 22 July 2022, the Police will not be interviewing the [a]ppellant in respect of the investigations against Mr M Ravi. In the event that Mr M Ravi faces criminal charges arising from these investigations, the Prosecution will not aver that Mr M Ravi had acted without the instructions of the [a]ppellant in sending the Letter.
>
> 5 Finally, the review before the District Court on 15 August 2022 was fixed by District Judge Loh Hui-min ("DJ Loh") in connection with the return of Mr M Ravi's passport following his application under s 113 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), which was heard on 13 May 2022. Mr M Ravi's passport was seized by the police on 20 March 2020 following investigations into possible contempt of court under s 3(1)(b) of the Administration of Justice (Protection) Act 2016 (No. 9 of 2016). On 13 May 2022, DJ Loh ordered that the passport be returned to Mr M Ravi. DJ Loh subsequently fixed the matter for a review on 15 August 2022 to provide Mr M Ravi's sureties more certainty as to when Mr M Ravi would be required to attend before the Court, and for the Prosecution to provide an update on investigations against Mr M Ravi.

43 Mr Ravi responded by way of an email received by the Registry at 11.37 am on 21 July 2022, essentially reiterating that the appellant's evidence "remains crucial to [his] defence and the police investigation".

44 In further submissions received by the Registry at 1.26pm, the appellant makes reference to Mr Ravi's claim that he (Mr Ravi) requires his (the appellant's) evidence for the purpose of an ongoing police investigation, and

seek a stay of his execution so that he could testify in Mr Ravi's criminal proceedings in the event that Mr Ravi faces criminal charges.

45 The position of AGC in the 21 July Letter is clear and we therefore saw no reason for Mr Ravi's attendance. Given that the appellant is one of the many plaintiffs in OS 825, and the AGC's position that it would not be averring that Mr Ravi had acted without the appellant's instructions in the criminal proceedings against Mr Ravi, no prejudice would be occasioned to Mr Ravi if the execution of the appellant's sentence of death is not stayed.

46 We would like to add that this judgment is the final word in respect of this case and the court will not be replying to or entertaining any further application or correspondence.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

The appellant in person;
Anandan Bala, Chan Yi Cheng and Rimplejit Kaur (Attorney-General's Chambers) for the respondent.
