

Applicant: M. Ravi: 1st: 05/03/10
IN THE COURT OF CRIMINAL APPEAL OF
THE REPUBLIC OF SINGAPORE
Criminal Motion No. of 2010

In the Matter of Criminal Case No. 26 of 2008 –
Public Prosecutor-vs-Yong Vui Kong

And

In the matter of Criminal Appeal No. 13 of 2008 –
Yong Vui Kong -vs-Public Prosecutor

And

In the Matter of Article 9 and 12 of the Constitution
of the Republic of Singapore

And

In the Matter of Supreme Court Judicature Act cap
322

And

In the Matter of Yong Vui Kong
(Fin No. G0623288X/Malaysian)

... Applicant

v

Public Prosecutor

... Respondent

AFFIDAVIT

.....
M. Ravi
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Tel: 6533-7433
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Ref: MR.6049.09
Dated this 05 day of March 2010

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AFFIDAVIT

I, M. Ravi (NRIC No. S6913333I) of c/o 101 Upper Cross Street #05-45
Singapore 058357 do solemnly and sincerely affirm and say and say as
follows: -

1. I am the counsel having conduct of this matter. I make this affidavit in support of the application filed herein.

2. In so far as the matters deposed to herein are from my personal knowledge they are true. In so far as they are from documents in my possession they are true to the best of my knowledge information and belief.

3. The Applicant submits that there is no evidence to support the proposition that the mandatory death penalty for drug trafficking is an effective deterrent. The Applicant therefore seeks to rely on the expert evidence of Professor Jeffrey Fagan in an Affidavit prepared for this Court (which is annexed to the written submissions on behalf of the Appellant). Annexed hereto and marked "MR-1" is a copy of the Affidavit by Professor Jeffrey Fagan.

4. Professor Fagan is a professor of law and public health at Columbia University, and a Visiting Professor at Yale Law School. His research has examined the administration of the system of capital punishment in the U.S., drug policy and drug enforcement, and also changes in homicide rates in American cities over the past three decades. Professor Fagan received his PhD from the University at Buffalo, State University of New York in 1975, where he was trained in econometrics,

statistics, and engineering. He was elected as a Fellow of the American Society of Criminology in 2001, and was appointed to the Committee on Law and Justice of the National Research Council in 2000. He served as the Committee's Vice Chair from 2004-2006. Professor Fagan served on the Committee on Violence and Traumatic Stress for the National Institute of Mental Health from 1994-98. He teaches courses at Columbia Law School *Criminal Law, Juvenile Justice, Drug Law and Policy, Criminology, and Law and Social Science*. His research and writing has been supported by federal research agencies and private foundations. Professor Fagan frequently publishes in law reviews and in peer-reviewed social science journals. A comprehensive list of his writings on capital punishment and drug policy is reproduced and exhibited at "JF1" to his Affidavit.

5. The purpose of Professor Fagan's evidence is to demonstrate that the deterrent effect of the mandatory death penalty for drug trafficking has not been established and that the higher rate of executions in Singapore has not reduced crime rates when compared to the position in the comparable state of Hong Kong.
6. Professor Fagan's Affidavit also demonstrates the type of offender who is often persuaded to act as a courier in drug trafficking offences and the limited deterrent effect of the mandatory death penalty on such offenders.

SUBMISSIONS

7. The Applicant submits that the evidence should be admitted in accordance with the test laid down by the Judicial Committee of the Privy Council when called on to interpret s 47 of the Supreme Court of Judicature Act of Trinidad & Tobago, as interpreted in Solomon v. The State [1998] 2 LRC 50 and more recently by the Privy Council in Pitman v. The State [2008] UKPC 16, para 31:

"Section 47 of the Supreme Court of Judicature Act of Trinidad and Tobago gives the Court of Appeal power in a criminal appeal to receive fresh evidence "if it thinks it necessary or expedient in the interest of justice". It was made clear by de la Bastide CJ in Solomon v The State (1999) 57 WIR 432 that the breadth and generality of this power do not remove the long accepted requirements of the law that fresh evidence should appear to be capable of belief and that a reasonable explanation be furnished for the failure to adduce it at trial. These factors are not, however, conclusive of the issue of admission of fresh evidence, and an appellate court has the overriding statutory power to admit it if it is in the interest of justice: see Benedetto v The Queen [2003] UKPC 27, [2003] 1 WLR 1545, and cf Smalling v The Queen [2001] UKPC 12."

8. The Applicant submits that the evidence now available is certainly capable of belief, the author being of the highest repute in his field. Moreover, the Affidavit is based on published material that is also readily available to the Respondent. There is also a reasonable explanation for the failure to adduce such evidence at trial, namely that

the question of the constitutionality of the death sentence imposed on the Applicant was simply not in issue before the High Court.

9. Furthermore, the Court of Appeal when it rendered its decision in *Nguyen Tuong Van v PP* [2005] 1 SLR 103 plainly considered that the arguments advanced regarding the unconstitutionality of the mandatory death penalty were incomplete due to the absence of "sociological data" (*Nguyen*, paragraph 72, distinguishing *Mithu*) and comparable "material" before the Court, which meant that the Court had to dismiss the Appellant's Article 12 argument "in the absence of full arguments":

"74. In the appeal before us, it is not as clear (as it was in Mithu) that there is no 'rational justification' for the 15g differentia at all. The appellant asserted that it was 'axiomatic' that the gravity of the offence could not be gauged by the quantity of the drug alone. Yet the appellant had not provided any material on which we may base such a conclusion.

[...]

77. The appellant had not placed comparable material before us to properly decide whether the legislative judgment made in s 7 read with the Second Schedule of the MDA is insupportable. In the absence of full arguments on the issue, the 15g differentia is upheld, and the Art 12(1) argument is therefore dismissed." (emphasis added)

10. The evidence of Professor Fagan seeks to address the issue of whether the type of offender who is likely to be convicted of possession of more than 15 grams will necessarily be a hardened criminal and whether in any event that type of offender is likely to be deterred. More widely it

addresses the issue of whether there is a compelling deterrent justification for retaining a mandatory death penalty when the dictates of justice and general human rights law all point towards the desirability of a discretionary system. It is respectfully submitted that it cannot be in the interests of justice for the Court of Appeal to consider the constitutionality of the mandatory death penalty in this case without having the benefit of hearing the fullest argument and on the basis of the best available evidence.

11. It is right that the Applicant's principal submissions are based on fundamental principles of justice that do not depend on whether the case for deterrence is justified or not. But, the Court may wish to know whether there is any compelling and generally accepted evidence that a mandatory death penalty for drug trafficking does have a deterrent effect that can be established scientifically. It is clear from Professor Fagan's report that there is no evidence to support the deterrent effect of the mandatory death penalty for drug trafficking and that negative evidence if not accepted by the State must be relevant to the proper determination of this appeal against the sentence of death that was imposed upon him. Therefore, it is submitted that it would be eminently in the interests of justice for this Honourable Court to admit the evidence of Professor Fagan as evidence.

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AFFIRMED by the abovenamed

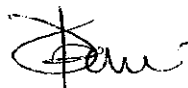
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M. RAVI

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On this 5th day of March 2010

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Before me,



A COMMISSIONER FOR OATHS

This Affidavit is filed on behalf of the Applicant