IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 106

Magistrate's Appeal No 9111 of 2019/01

Between

Lim Hong Liang

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Disclosure] — [Prosecution failing to disclose material] — [Consequences of Prosecution's non-disclosure]

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Introduction

1 These grounds address issues pertaining to the motion for criminal reference which has been filed by the appellant against my decision in the Magistrate's Appeal, which was to send the case for a retrial before another District Judge. The focus will be on my decision as to the consequences that should follow the breach of disclosure obligations by the Prosecution, which has not taken issue that there has been such a breach.

Background Facts

2 The appellant was charged with engaging in a conspiracy with several others to voluntarily cause grievous hurt to one Mr Joshua Koh Kian Yong (the

"victim") by means of an instrument for stabbing or cutting, pursuant to s 326 read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").[1]

3 On 30 April 2016, thugs assaulted the victim, and one of them slashed his face with a penknife, causing lacerations and permanent disfiguration of his face. After a trial in the District Court, the District Judge found that it was the appellant who had enlisted the help of Mr Ong Hock Chye ("Ong") and his thugs to slash the victim's face (*Public Prosecutor v Lim Hong Liang and Ong Hock Chye* [2019] SGDC 127 ("*Lim Hong Liang DC*") at [78]).

4 The District Judge found that the appellant was the mastermind of the conspiracy to grievously hurt the victim, primarily based on the evidence of Mr Lim De Mai Ron ("Ron Lim") (*Lim Hong Liang DC* at [55]–[56]). Ron Lim is the appellant's nephew who worked as a driver in the appellant's company.[2] On the back of Ron Lim's evidence, the District Judge found a number of material facts which connected the appellant to the conspiracy, including the fact that the appellant, through Ron Lim, paid Ong for the attack on the victim (*Lim Hong Liang DC* at [56]). The District Judge also found that the appellant had the motive to harm the victim, because the victim was having an affair with the appellant's mistress, Ms Audrey Chen Ying Fang ("Chen") (*Lim Hong Liang DC* at [50]).

5 Accordingly, on 2 April 2019, the District Judge convicted the appellant for an offence under s 326 read with s 109 of the Penal Code, and was sentenced to six years' imprisonment (*Lim Hong Liang DC* at [79] and [99(i)]).

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1 Record Of Appeal ("ROA") at p 8.

2 ROA at p 922, para 7.

Procedural History

6 The matter first came up on appeal against the appellant's conviction and sentence on 20 January 2020, in Magistrate's Appeal No. 9111 of 2019. At the hearing of the appeal, the Prosecution resisted the disclosure of a police statement made by Edwin Cheong Jia Fong on 13 May 2016 ("Edwin's Statement"). The District Judge had refused to order the disclosure of Edwin's Statement, but made, according to the appellant, observations that were adverse to the appellant. The matter was adjourned, pending my consideration of a decision. However, before judgment was given, the Court of Appeal issued its decision in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*").

7 Thereafter, on 16 April 2020, the appellant sought to make further arguments on the basis of the Court of Appeal's decision in *Nabill* that there had been a breach of the Prosecution's disclosure obligations in not releasing Edwin's Statement. Just as arguments were to be heard on whether there should be disclosure, the Prosecution indicated that it did accept that Edwin's Statement was disclosable under the disclosure regime in *Nabill* and that it had breached its disclosure obligations under *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"), and it then disclosed Edwin's Statement to the appellant.

8 The parties were then at odds about whether Edwin's Statement could be shown to the court in the Magistrate's Appeal, and this prompted the appellant to file a Criminal Motion on this issue. After hearing arguments, I concluded that the appellant could indeed refer to it in so far as it was to be used for indicating a possible breach of disclosure obligations and the consequences that should flow from such breach, and in so far as it was material to arguments

that the conviction was unsafe, and/or that an adverse inference should be drawn due to the non-disclosure; however, I accepted the Prosecution's arguments that if the statement was to be used as evidence of the truth of its contents, then the proper procedure would have been to have it admitted (*Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 ("*Lim Hong Liang CM*") at [16] and [29]).

9 Subsequently, the appellant and the Prosecution filed further submissions on 21 September 2020 and 12 October 2020 respectively on the appropriate consequences of the Prosecution's breach of its disclosure obligations. That led us to the last oral hearing of arguments, following which I concluded that the appropriate course, given the possible effect of Edwin's Statement on the credibility of Ron Lim's evidence against the appellant, was that a retrial should be ordered.

Reference to CA

10 The appellant now seeks leave from the Court of Appeal to refer questions of law, pertaining to the effect of the *Kadar* breach.

Summary of the appellant's arguments on the effect of the breach

11 The appellant argued that in seeking a reversal of his conviction, he only needed to show either that the breach of the *Kadar* obligations has rendered his conviction unsafe or that there was a material irregularity, unless the Prosecution could show that no miscarriage of justice was occasioned.[3] In determining what the consequences of a breach of the *Kadar* obligations should be, the court should consider several matters which include the Prosecution's reasons for non-disclosure, impact of the non-disclosure on the conduct of the

[3] Appellant's Further Submissions dated 21 September 2020 at para 5.

trial as well as the trial judge's reasoning, and how the prejudice could be addressed.[4] On the facts, the appellant's conviction was rendered unsafe by the Prosecution's breach.[5] There was deliberate suppression of material that contradicted the evidence of the Prosecution's key witness,[6] that affected the conduct of defence at trial and the trial judge's reasoning.[7] A reasonable doubt would have been shown had Edwin's Statement been produced,[8] and the prejudice here could only be addressed by reversing the appellant's conviction.[9]

Summary of the respondent's arguments on the effect of the breach

12 The Prosecution argued that a breach of the disclosure obligations in itself does not render a conviction unsafe.[10] The three potential consequences of a failure to disclose set out in the *Lim Hong Liang CM* should not apply on the current facts,[11] and this court should uphold the appellant's conviction as the Prosecution's case has been established beyond reasonable doubt.[12]

The decision

13 Given the importance of Ron Lim's evidence to the appellant's conviction, and the possible effect of Edwin's Statement on Ron Lim's credibility, I was of the view that the appropriate course was to order a retrial

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4 Appellant's Further Submissions dated 21 September 2020 at para 4.

5 Appellant's Further Submissions dated 21 September 2020 at para 23.

6 Appellant's Further Submissions dated 21 September 2020 at paras 23, 28 and 40g.

7 Appellant's Further Submissions dated 21 September 2020 at paras 34–35, 40b, 40d and 40e.

8 Appellant's Further Submissions dated 21 September 2020 at paras 24, 29 and 40e.

9 Appellant's Further Submissions dated 21 September 2020 at para 40f.

10 Prosecution's Further Submissions dated 12 October 2020 at para 14.

11 Prosecution's Further Submissions dated 12 October 2020 at pp 7, 11, 13-14.

12 Prosecution's Further Submissions dated 12 October 2020 at paras 5–6 and p 14.

before a different District Judge. While in some cases a breach of disclosure obligations can lead to the conviction being unsafe, and an acquittal being ordered, the appropriate outcome will depend on a balancing of interests and factors.

The *Kadar* breach

14 The Prosecution accepted that Edwin's Statement should have been disclosed.

15 The relevant portions of Edwin's Statement read:[13]

> **Q3: Did Ron know who "Chai" was?**
>
> A3: Yes. When "Chia" [*sic*] was released from prison, I went to visit him at his house. However, at that time, Ron called me to ask about my location. I then told him that I was at Jurong East where "Chai" was. Ron then came up to find me and it was when Ron first saw "Chai" and I introduced "Chai" to him. We then had a talk and started to talk about the assault case which Ron was involved in. Ron started to talk about the case, and nothing much happened. After talking about 1-2 hour, we left the house.
>
> …
>
> **Q6: Did Lim Hong Liang contact Ron during the visit at "Chai" house?**
>
> A6: No
>
> …
>
> **Q9: Did you ever hear your uncle, Lim Hong Liang mentioned that he had found someone to beat up a girl's boyfriend?**
>
> A9: No. I did not hear before.
>
> **Q10: Did you know anyone called Audrey or Joshua?**
>
> A10: No. I do not know.
>
> [emphasis in original]

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[13] Appellant's Supplementary Bundle of Documents dated 30 June 2020 at pp 19–20.

For context, "Chai" referred to Ong. Edwin's Statement claimed that the appellant did not contact Ron Lim during their visit at Ong's home. The significance of Edwin's Statement was that it seemed contrary to two aspects of Ron Lim's evidence, namely:

(a) that the appellant had called Ron Lim when Ron Lim and Edwin were at Ong's home;[14] and

(b) that Edwin was the only one who could prove that the appellant was involved in the incident.[15]

16 It is important to note however that Edwin's Statement is not yet in evidence. The appellant did not seek to have it brought in as evidence, and essentially relied on the breach alone, given the putative effect of the statement, as rendering the conviction unsafe.[16]

Consequences of a Kadar breach: applicable legal principles

Parties' arguments

17 The appellant contended that the breach of the various disclosure obligations laid down and applied in the trilogy of cases in *Kadar*, *Nabill* and *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 ("*Wee Teong Boo*"), which I shall refer to compendiously as the *Kadar* breach, required that the appeal be allowed and an acquittal entered.[17] Reliance was placed primarily on English and other Commonwealth

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14 ROA at pp 1634–1635, D2 at para 3; ROA at p 1637, D3 at A6; ROA at p 1639, D4 at A8.

15 ROA at p 1646, D5 at A4.

16 Appellant's Further Submissions dated 21 September 2020 at paras 40–41.

17 Appellant's Further Submissions dated 21 September 2020 at paras 40–41.

authorities.[18] The primary focus of these authorities was whether the *Kadar* breach rendered the conviction unsafe. The appellant argued that the position in England should be followed, as encapsulated in cases such as *R v Anne Rita Maguire* [1992] 94 Cr App R 133 and *R v Judith Theresa Ward* [1993] 1 WLR 619 ("*Ward*") which led to the enactment of the Criminal Procedure and Investigations Act 1996 (c 25) (UK).[19] *Ward* was considered by the Singapore Court of Appeal in *Kadar* at [85(h)(iii)] in the context of disclosure obligations. The overview of the English position in *R v Knaggs and others* [2018] EWCA Crim 1863 was relied upon by the appellant. In that case, the English Court of Appeal considered various decisions, including *R v Garland* [2017] 4 WLR 117, in which the court said that the ultimate question is whether, taking into account all the circumstances of the trial, the material that should have been disclosed causes the court to doubt the safety of the conviction.[20] Reference was also made by the appellant to *Yeo Tse Soon & Anor v Public Prosecutor* [1995] 3 MLJ 255, a Bruneian decision considered in *Kadar*.[21]

18 The appellant also urged the court to consider several matters before deciding on the consequences of a *Kadar* breach. These factors generally concerned the prejudice suffered by the accused, as well as the Prosecution's conduct.[22]

19 On the other hand, the Prosecution argued that the consequences of a *Kadar* breach was set out in *Kadar* at [120].[23] Relying on *Mia Mukles v Public*

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18 Appellant's Further Submissions dated 21 September 2020 at paras 8–14.

19 Appellant's Further Submissions dated 21 September 2020 at paras 9–12.

20 Appellant's Further Submissions dated 21 September 2020 at para 13.

21 Appellant's Further Submissions dated 21 September 2020 at para 14.

22 Appellant's Further Submissions dated 21 September 2020 at para 4.

23 Prosecution's Further Submissions dated 12 October 2020 at para 13.

Prosecutor [2017] SGHC 252 ("*Mia*") at [48], the Prosecution reiterated that a *Kadar* breach in itself does not render a conviction unsafe.[24]

Decision on the applicable legal principles

20 The position in Singapore remains open as to the consequences of a *Kadar* breach. I was of the view that the approach favoured by the appellant did not fully reflect the position that should be taken.

21 While there may indeed be *Kadar* breaches that should lead to an acquittal, a *Kadar* breach on its own is not a "poison pill" that automatically causes a conviction to be overturned; there must be material irregularity that occasions a failure of justice to justify an acquittal (*Kadar* at [120]; *Mia* at [48]).

22 In deciding on what the consequences ought to be, specifically whether a *Kadar* breach should lead to an acquittal or other outcomes such as a retrial, the court should to my mind assess a number of factors including, but probably not limited to:

(a) the effect of the breach on the evidence against the accused;

(b) how the breach prejudiced the accused;

(c) whether steps can be, or have been, taken to remedy the prejudice caused; and

(d) the causes of the breach, including the conduct of the Prosecution.

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[24] Prosecution's Further Submissions dated 12 October 2020 at para 14.

A balancing exercise weighing these specific factors as well as the broader objectives of the administration of justice, including certainty and fairness, must be undertaken. There must be fairness not only to the accused, but also to the victims, especially when the charge is serious.

23 If, upon weighing the above factors, the court comes to a decision that a retrial ought to be the appropriate consequence flowing from a *Kadar* breach, the appellate court should then assess whether it can exercise its powers under s 390(1)(*b*)(i) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to order a retrial in light of the established principles governing retrials in *Beh Chai Hock v Public Prosecutor* [1996] 3 SLR(R) 112 ("*Bei Chai Hock*") and *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*"). This point will be re-visited in greater detail in the analysis below.

24 There may be some overlap between the first inquiry of whether the *Kadar* breach should lead to an acquittal or other outcomes such as a retrial, and the second inquiry of whether the ordering of a retrial under s 390(1)(*b*)(i) CPC would be in line with established authorities. But I hesitate to merge these two inquiries into one. The first inquiry focuses on the nature of the specific *Kadar* breach: the causes and effect of the breach, including steps to remedy the resulting prejudice. The result of this inquiry may or may not lead to a retrial, and I do not preclude the possibility that there may be other outcomes apart from an acquittal or a retrial. These are not the only two binary options. Upon deciding the outcome that ought to have flowed from a *Kadar* breach, the second inquiry concentrates on whether the court has the power to bring about that outcome. Certain requirements, either from statute or case law, may have to be satisfied before a court could have the power to grant certain orders. It may be that a particular outcome that ought to have flowed from a *Kadar* breach could not be made due to the non-satisfaction of certain statutory requirements.

This was not the case on the current facts, but the point is that it would be conceptually neater to separate the inquiries of what ought to be the consequences flowing from a particular *Kadar* breach and whether the court has the power to bring about that outcome.

Discussion

25 The local authorities do not expressly lay out the consequences of a *Kadar* breach. In *Kadar*, the Court of Appeal said at [120]:

> In our view, there is no reason why a failure by the Prosecution to discharge its duty of disclosure in a timely manner should not cause a conviction to be overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice, or, put in another way, renders the conviction unsafe (see, also, *Lee Yuan Kwang v PP* [1995] 1 SLR(R) 778 at [40]). … It should be pointed out that not all non-disclosures will be attributable to fault on the part of the Prosecution (or a lack of *bona fides*); nevertheless, as pointed out in *Lee Ming Tee* ([88] *supra*) at [142] (see [89] above), where such non-disclosures result in a conviction being unsafe the result will still be the overturning of that conviction. …

The Court of Appeal then referred to *Beh Chai Hock* on when a retrial should be ordered, which is considered below at [63]. While the Court of Appeal laid down that a material irregularity that occasioned a failure of justice may cause a conviction to be overturned, it did not have to consider the specific circumstances in which such a material irregularity would arise. The actual outcome in *Kadar* turned on the evidence of a co-accused as well as the reliability and admissibility of confessions.

26 The obligation to disclose the statement of a material witness, and the possibility of drawing an adverse inference against the Prosecution where the Prosecution failed to call a material witness, were considered in *Nabill* at [39] and [67] respectively, but that case did not consider the consequences of a

Kadar breach in relation to the non-disclosure of a statement. The acquittal in that case flowed from the analysis of the evidence before the court. In *Wee Teong Boo*, the acquittal on appeal was also on the basis of an analysis of the evidence before the court, with one of the *Kadar* breaches in that case being found to have limited prejudice.

27 The question is when a *Kadar* breach should lead to an acquittal or overturning of a conviction, and when other possible outcomes such as remittal or a retrial should result. While at one end of the spectrum, a determination can be made that a conviction is unsafe or that a failure of justice has occurred, on other occasions, it may be, as in *Wee Teong Boo*, that the prejudice suffered is not substantial.

28 In my judgment, an important consideration to my mind is how the non-disclosure affects the rest of the evidence, and consequently, whether the verdict below is supported. Where the non-disclosure is of an important piece of evidence that clearly or even strongly points towards an acquittal, then it is clear that the conviction is unsafe, provided that the evidence is clearly admissible as well. But in many instances, the non-disclosed evidence may fall short of that effect, and has to be weighed against the other evidence: it may help tilt the balance one way or another, requiring a determination by the court, as well as the attendant process of adducing that evidence properly. This was I think presaged in *Kadar* by the Court of Appeal at [120]. In such cases, the conviction cannot be said to be unsafe on the surface, and further deliberation is called for, rather than an immediate acquittal.

29 This approach bears some resemblance to the principles governing the court's exclusionary discretion in respect of statements recorded in breach of procedural requirements under the CPC and Police General Orders. Such

statements will be excluded where the procedural breach has caused a statement's prejudicial effect to outweigh its probative value (*Kadar* at [55]). Reliability lies at the heart of this discretion (*Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 at [45]–[46]; *Kadar* at [55]–[56]), which has been regarded as stemming from the court's inherent jurisdiction to prevent injustice (*Kadar* at [52]). It appears then, that there must be a causal link between the procedural breach and the occasion of injustice; and this causal link is established when the procedural breach raises serious concerns about a statement's reliability, on the premise that written statements taken by the police are often given more weight than other pieces of evidence and can very well lead to wrongful convictions (*Kadar* at [58]–[59]). Accordingly, where the procedural breaches in statement recording have little or no bearing on the reliability of the statement, the statement will still be admitted (see examples in *Kadar* at [65]).

30 Similarly, there will be a miscarriage of justice where there is a clear causal link between the *Kadar* breach and a wrongful conviction, *ie*, the undisclosed material is such an important piece of evidence that, on its own or along with other pieces of evidence before the court, it would have enabled the accused to cast a reasonable doubt if admitted into evidence. However, if it is unclear whether the non-disclosed evidence will have such an effect, the presence of that causal link will be doubtful, such that an immediate acquittal may not be warranted.

31 As a point of clarification, in seeking a reversal of conviction, it is not necessary to demonstrate that the disclosure would have led to an acquittal in the proceedings in the court below. If this can be shown, the conviction will be clearly unsafe. Nonetheless, even if it is unclear how the non-disclosure will impact the evidence before the court, an acquittal may still be in the interest of

justice following a holistic consideration of the circumstances and the various factors.

32 Such other factors include the impact of the non-disclosure on the accused, which is a material consideration. Where there has been substantial prejudice to the accused, such as in the conduct of his or her defence, it may be in the interests of justice that an acquittal should follow from non-disclosure. There can be a situation where the undisclosed material, on its face, does not clearly point towards an acquittal, but if admitted at trial below, would have opened up a new line of questioning against the sole Prosecution witness, thereby potentially raising a reasonable doubt in that witness' testimony and hence the Prosecution's case. Yet, a retrial is out of the question as that Prosecution witness had died in the meantime. In such circumstances, the accused would have effectively lost a good chance to disprove his guilt, and therefore suffer substantial and irremediable prejudice by the Prosecution's earlier non-disclosure. In such a scenario, it may be in the interests of justice that an acquittal should be granted.

33 It follows then that the issue of prejudice caused to the accused must be taken alongside the consideration of whether steps can be taken to remedy or rectify the prejudice caused to the accused. In *Wee Teong Boo*, a piece of evidence which would have adversely affected the victim's credibility was only disclosed to the Defence after the victim had completed her evidence, including her cross-examination (at [133]–[134]). Nonetheless, the Court of Appeal found that the prejudice to the Defence was limited because it was open to the Defence to apply for the victim to be recalled under s 283(1) of the CPC so that she could be questioned on this previously undisclosed evidence (at [135]).

34 The specific factors canvassed in the discussion so far, namely the effect on the evidence, prejudice to the accused as well as remedial steps, relate generally to the effects arising from a particular *Kadar* breach. These ought to be holistically evaluated in light of the broader concern as to whether the *Kadar* breach has culminated in a miscarriage of justice. If so, the conviction may be overturned (*Kadar* at [85(h)(iii)], citing *Ward* at 641–642).

35 Effects of the *Kadar* breach aside, the reason for the breach, specifically the Prosecution's conduct, can also affect what ought to be the outcome of a *Kadar* breach. As highlighted in *Lim Hong Liang CM* at [24], in seeking a finding that the Prosecution's non-disclosure is of such a degree that the conviction is rendered unsafe, the Defence may rely on the circumstances surrounding the non-disclosure to indicate misconduct or suppression such as to cast doubt on the integrity of the prosecution process and on the evidence presented below. In establishing this point, the Defence will be relying on the fact that material was undisclosed previously, rather than inferences from, or contents of, the undisclosed evidence.

36 I do not consider however, that this examination of factors will generally include any punitive or disciplinary element as against the Prosecution. Proof that there is Prosecutorial non-disclosure alone, without showing how that puts the integrity of the prosecution process and the evidence into doubt, will be insufficient to justify an immediate acquittal. It may be that there will be situations where a salutary effect may be desired, through the granting of an acquittal, but these must involve very serious breaches in which the need for a salutary effect trumps the need for proper administration of justice. Such a situation will be very rare since it is not the trial judge's or appellate court's function to exercise disciplinary powers over the Prosecution's conduct of proceedings; there are other avenues to seek redress or achieve that objective.

Rather, the judicial system exists to ensure that persons are acquitted or convicted according to law, and for it to operate effectively, those who commit crimes must face the consequences. For that reason, rendering acquittals too readily because of a *Kadar* breach will ill serve the needs of society, particularly the victims, especially when the crime committed is serious.

37 All of these various factors, set out at [22] above, must be weighed against each other: the precise facts in each case have to be carefully considered.

The appropriate consequence of this Kadar breach

Effect of the undisclosed material on the evidence against the appellant

(1) Overview

38 Applying the approach above to the case before me, the effect of the *Kadar* breach must be considered alongside the other evidence, and I had to determine whether the verdict below was supported. It suffices here to note that the case turned primarily on Ron Lim's evidence, such that his credit and credibility were of importance.

39 On one side, the *Kadar* breach affected the finding of whether the appellant did speak to the primary prosecution witness, Ron Lim, on a specific occasion. While Edwin's Statement was not tested in court and the person making the statement was not called as a witness, the Prosecution did point to other evidence that they contend supported the conviction, even if this call between the appellant and Ron Lim (which resulted in the appellant speaking directly to Ong) was disregarded.[25]

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[25] Prosecution's Further Submissions dated 12 October 2020 at paras 35–36, 41–54.

40 On the other hand, the strength of a large part of the other evidence relied on by the Prosecution, as well as the District Judge in his findings, centred on Ron Lim. Ron Lim's credit and credibility would thus be the centre of focus. He was the only clear link between the conspiracy and the appellant. However, the *Kadar* breach involving the non-disclosure of Edwin's Statement raises questions about the strength of Ron Lim's testimony and inferences from it.

41 As it was, there were, aside from the *Kadar* breach, some concerns in any event about Ron Lim's evidence.

42 Given the centrality of Ron Lim's evidence and his credibility, it would not be possible to conclude on the current evidence that the conviction was safe; but it is not possible either to conclude that it was not. Ron Lim's credibility had to be re-assessed holistically in light of Edwin's Statement along with other evidence, before concluding whether there is sufficient evidence to convict.

(2) Discussion

43 The findings of fact by the District Judge leading to the appellant's conviction were primarily founded on Ron Lim's testimony, which the District Judge found to be consistent with the statements he gave to the police (*Lim Hong Liang DC* at [55] and [57]). Ron Lim's testimony implicated the appellant in the conspiracy, as it showed many material facts, including (*Lim Hong Liang DC* at [56]):

(a) the appellant had instructed Ron Lim to use a GPS unit to track Chen's movements;

(b) Ron Lim was instructed by the appellant to beat up the victim on 8 April 2016;

(c) Ron Lim was asked by the appellant not to implicate the latter in respect of the beating on 8 April 2016;

(d) the appellant paid Ong, who had offered to help, through Ron Lim;

(e) Ron Lim conveyed to the appellant Ong's suggestion to cut the victim's face, and the appellant agreed;

(f) Ron Lim updated the appellant that the assault was done; and

(g) the appellant had promised to pay Ron Lim for not implicating him.

44 In finding that Edwin's Statement fell outside the *Kadar* obligation to disclose, the District Judge surprisingly found that on the face of Ron Lim's evidence, Edwin's Statement would probably implicate the appellant (*Lim Hong Liang DC* at [76]). As it was, this finding was wrong: Edwin's Statement in fact supported the appellant in that Edwin said that there was no communication between Ron Lim and the appellant, on the day that Ron Lim and Edwin were at Ong's home. This was plainly contrary to Ron Lim's statement that the appellant had called him on that specific day.

45 On appeal, before the question of Edwin's Statement came up, the appellant argued that there were a number of external and internal inconsistencies in the statements and testimony from Ron Lim, including:

(a) discrepancies between his earlier as opposed to later statements;[26]

[26] Appellant's Written Submissions dated 10 January 2020 at paras 21–22.

(b) when Ong allegedly agreed to help the appellant break the victim's arms and legs, and when this subsequently turned into a plan to slash the victim's face;[27]

(c) Ron Lim's implicating of the appellant in respect of an earlier assault on 8 April 2016;[28]

(d) discrepancies in what Ron Lim had supposedly passed on to those involved in the assault from the appellant;[29]

(e) whether Ron Lim had withdrawn S$1,000 from an ATM and passed the cash to Ong;[30] and

(f) whether the appellant had shown Ron Lim a photograph of the victim with this face slashed, which was said to demonstrate the Appellant's complicity in the assault on 30 April 2016.[31]

46 In comparison, the Prosecution argued that the District Judge was correct in convicting the appellant as full weight should be given to Ron Lim's evidence, which was internally and externally consistent.[32]

47 As noted by the Defence, while Ron Lim gave a number of statements, some of which clearly implicated the appellant, there were other statements which did not. Cogent explanations must be given for these changes in position.

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27 Appellant's Written Submissions dated 10 January 2020 at para 38.

28 Appellant's Written Submissions dated 10 January 2020 at para 47.

29 Appellant's Written Submissions dated 10 January 2020 at paras 53–56.

30 Appellant's Written Submissions dated 10 January 2020 at para 66; ROA at p 308.

31 Appellant's Written Submissions dated 10 January 2020 at paras 69–70.

32 Prosecution's Submissions dated 10 January 2020 at paras 31–45.

48 For instance, Ron Lim made two statements in 2016 which claimed that when Ron Lim was at the appellant's house, the appellant mentioned that he had asked Ong to hit the victim.[33] In a statement made in 2018, Ron Lim alleged that Ong had informed him that the act was done, and that he (Ron Lim) then relayed this information to the appellant.[34] However, these events were not mentioned by Ron Lim in an earlier statement in 2016, where he claimed that, in a cryptic conversation with the appellant at a hospital, it was the appellant who had told him that the victim was beaten, and he "believed" that it was the appellant who had instructed Ong to do so.[35]

49 The Prosecution and the District Judge (*Lim Hong Liang DC* at [50] and [52]) relied on an earlier attack on 8 April 2016 to establish that the appellant had a clear motive to cause hurt to the victim.[36] The facts relating to that attack and its connection to the appellant was again dependent on Ron Lim's credibility to a great extent. However, between his earlier and later statements, Ron Lim changed his position as to whether the appellant had instructed him to beat the victim on 8 April 2016. In his earlier statements, he explained that he punched the victim in the heat of the moment following an argument with the latter; he did not mention that he was acting under the instructions of the appellant to beat the victim.[37] Yet, in his later statements, he claimed that it was the appellant who had instructed him to hit the victim.[38]

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33 ROA at p 1637, D3 at A7; ROA at p 1645, D5 at A1 and A2.

34 ROA at p 933, P20 at para 18.

35 ROA at p 1635, D2 at para 5.

36 ROA at p 1246 and 1249, Prosecution's End-of-Trial Submissions dated 12 March 2019 at p 34 and p 37; Prosecution's Submissions dated 10 January 2020 at paras 56–59.

37 ROA at pp 1631–1633, D1; ROA at pp 1634–1635, D2.

38 ROA at p 931, P20 at para 2.

50 The District Judge explained that the earlier statements were recorded from Ron Lim when he was being investigated for the present offence and he thus tried to minimise his own involvement and culpability, but in his subsequent statements, he decided to come completely clean (*Lim Hong Liang DC* at [62]). In this connection, I observed that in one of Ron Lim's later statements given in 2018, he explained that he was not truthful earlier, but was willing to reveal all the facts now because he was willing to testify against the appellant.[39] As for the change in position concerning the incident on 8 April 2016, the District Judge accepted Ron Lim's explanation in court that he did not implicate the appellant initially because the appellant promised to pay Ron Lim for keeping quiet (*Lim Hong Liang DC* at [61]). Notably, the explanations provided for these changes in position yet again banked on Ron Lim's credibility.

51 It was clear that Ron Lim was the essential link between the persons committing the actual assault and the appellant, and that the credibility of Ron Lim's evidence was crucial to the appellant's conviction. However, Edwin's Statement potentially showed that Ron Lim was contradicted in material ways. Ron Lim's evidence was that the appellant had called him when he and Edwin were at Ong's home,[40] and that Edwin was the only one who could prove that the appellant was involved in the slashing incident.[41] Yet, on its face, Edwin's Statement (see above at [15]) showed that the appellant did not contact Ron Lim during the visit at Ong's home, and that Edwin did not have knowledge of the appellant's involvement in the incident. Edwin's Statement should thus be put

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39 ROA at p 934, P20 at A1.

40 ROA at pp 1634–1635, D2 at para 3; ROA at p 1637, D3 at A6; ROA at p 1639, D4 at A8.

41 ROA at p 1646, D5 at A4.

into evidence, or at least the relevant party would have to be put to the test of bringing it into evidence. In other words, the party who ought to adduce it would have an opportunity to consider whether it should be put into evidence, and if it decided against doing so, the court would have to weigh what the outcome should be, and whether any adverse inference should be drawn against that party. Who should bear this burden would have to be fully canvassed. But if Edwin's Statement was adduced, then its truth would have to be tested, both as regards its maker and recorder, as well as against the other evidence, including the evidence of Ron Lim, who should be given the opportunity to respond to it. Upon assessing the truth of its contents, there ought to be a consideration of whether and to what extent Edwin's Statement impacted Ron Lim's credibility, in light of all the other statements and testimony provided by Ron Lim. All of these considerations pointed to the need for a retrial or remittal. None of these matters could I think be fully considered by an appellate court. Absent a retrial or remittal, it was not possible to conclude whether the conviction was safe or not.

52 Motive was relied upon by the District Judge (*Lim Hong Liang DC* at [50]–[54]) and the Prosecution,[42] but motive alone cannot provide a basis for conviction. It must be considered together with the other evidence and the other possible motives of other people. I did not find that there was such consideration that would allow me to conclude that the appellant's motive was sufficient to cure the open question about Ron Lim's credibility, which ought to be properly assessed via a retrial.

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42 ROA at pp 1246–1252, Prosecution's End-of-Trial Submissions dated 12 March 2019, at pp 34–40; Prosecution's Submissions dated 10 January 2020 at paras 48–60.

53 Before I leave this point, it bears highlighting that for my decision in the present matter, Edwin's Statement was not evidence as such: it was not used for the truth of its contents, or for its making. Rather, it was considered by the court in assessing the impact of the *Kadar* breach, and in doing so some examination of its contents had to be made. The court, it must be emphasised, does not at this time need to come to a concluded view as to its admissibility or weight.

Prejudice caused to the appellant and steps that can be taken to remedy the prejudice caused

54 The conduct of the Defence's case was prejudiced by the non-disclosure of Edwin's Statement. As rightly accepted by the Prosecution,[43] the appellant was hampered in his decision on whether to call Edwin as a witness, without knowing whether Edwin had said anything in his statement which implicated the appellant. In fact, it was the appellant's position in this Magistrate's Appeal that the disclosure of Edwin's Statement would have led the Defence into calling Edwin as a witness since Edwin would have contradicted the key Prosecution witness, Ron Lim.[44] As it was, the appellant did not call Edwin as a witness in the trial below.

55 The Court of Appeal in *Wee Teong Boo* at [131] aptly observed that the Prosecution's non-disclosure of a piece of evidence could lead the Defence to infer that the undisclosed evidence is either immaterial or even prejudicial to the Defence; this inference then contributes to the calculus upon which the defence strategy is developed. In this case, the possibility could not be ruled out that the Defence, upon inferring that Edwin's Statement was neutral or adverse to the Defence, refrained from calling Edwin as a witness at the trial below.

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43 Prosecution's Further Submissions dated 12 October 2020 at para 21.

44 Appellant's Further Submissions dated 21 September 2020 at paras 40b and 40d.

56 I was satisfied that the prejudice that the appellant suffered in the conduct of his defence below could be remedied by a retrial. A retrial would afford the appellant a chance that it previously did not have, that is, to consider how its case ought to be shaped and whether it ought to call Edwin as a witness, with the benefit of assessing Edwin's Statement along with all the other pieces of evidence. The rectification of the prior prejudice via a retrial, would not inflict further undue or unfair prejudice on the appellant (see below at [66]).

57 Indeed, where the prejudice to the accused could be appropriately remedied, as it was in this case, the court should be slow to grant an immediate acquittal. The administration of justice requires the achievement of a just outcome by means of a fair trial, and this requires compliance with disclosure obligations on the part of the Prosecution; but at the same time, in fairness to the victims and for the protection of society, accused persons must also answer for their crimes if it could be proven beyond reasonable doubt. Accused persons ought not be allowed to get off the hook easily due to a *Kadar* breach, if the prejudice that the accused suffered could be adequately remedied.

Prosecution's conduct

58 The Prosecution explained that the trial team had made a genuine error in assessing that Edwin's Statement was neutral, in that it neither inculpated nor exculpated the appellant as being involved in the conspiracy, because on its face, Edwin's Statement indicated that he knew nothing about the incident.[45]

59 On the other hand, the appellant's counsel contended that there was Prosecutorial misconduct and deliberate suppression.[46] As the Prosecution had

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45 Prosecution's Further Submissions dated 12 October 2020 at para 17.

46 Appellant's Further Submissions dated 21 September 2020 at paras 23, 28 and 40g.

refused to disclose Edwin's Statement in the face of a contested application and detailed submissions, the Prosecution knew of the need to disclose Edwin's Statement, but made a conscious decision to not disclose.[47]

60 Indeed, the Prosecution took the position that it need not disclose Edwin's Statement at trial, and in fact maintained this position even at the first hearing of the Magistrate's Appeal. It was only subsequently that the Prosecution appeared to have re-evaluated its stance. The Prosecution did consciously refuse the disclosure of Edwin's Statement, but this would appear to be because the Prosecution had previously taken the mistaken view that Edwin's Statement was neutral.[48] There was nothing before me to indicate misconduct or any lack of *bona fides* in the Prosecution's determination. I could not thus conclude on any basis that there was any such misconduct.

Whether a retrial should be ordered

61 The law and facts here, in my judgment, both point to the ordering of a retrial before a different District Judge.

62 The appellate court has the power under s 390(1)(*b*)(i) of the CPC to order a retrial:

> **390.**—(1) At the hearing of the appeal, the appellate court may, if it considers there is no sufficient ground for interfering dismiss the appeal, or may —
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> …
>
> (*b*) in an appeal from a conviction —
>
> (i) … order [the accused] to be retried by a court of competent jurisdiction, or remit the matter,

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47 Appellant's Further Submissions dated 21 September 2020 at paras 20 and 31.

48 ROA pp 452–453, Notes of Evidence on 7 September 2018, p 65 line 18 – p 66 line 16; Prosecution's Further Submissions dated 12 October 2020 at para 17.

> with the opinion of the appellate court, to the trial court; …

63 The law governing when retrials should be ordered has been considered in a number of local decisions, with controlling authority in the form of *Beh Chai Hock* and *AOF*. In *Beh Chai Hock*, the court at [38] noted two competing principles which guide the court's discretion in ordering a retrial:

> … When exercising its discretion whether to order a retrial, the court must have regard to all the circumstances of the case. The court must also have regard to two competing principles. One is that persons who are guilty of crimes should be brought to justice and should not be allowed to escape scot-free merely because of some technical blunder by the trial judge in the course of the trial. The countervailing principle is one of fairness to the accused person. The Prosecution has the burden of proving the case against the accused person; if the Prosecution has failed to do so once, it should not ordinarily get a second chance to make good the deficiencies of its case. These principles are summarised in *Chee Chiew Heong v PP* [1981] 2 MLJ 287.

In *AOF*, the Court of Appeal considered when a retrial should be ordered, including Lord Diplock's holding in *Dennis Reid v The Queen* [1980] AC 343 ("*Dennis Reid*"), and stated at [296]–[298]:

> 296 To summarise, from the cases referred to above, it is clear that where the evidence adduced at the original trial was insufficient to justify a conviction, such as in *Dennis Reid* ([274] *supra*), an acquittal, as opposed to a retrial, should ordinarily be ordered ("category one cases"). At the other end of the extreme, where the evidence adduced at the original trial was so strong that a conviction would have resulted, the more appropriate course would be to dismiss the appeal and affirm the conviction ("category two cases").
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> 297 Between the two extremes, the residual category of cases would include the following, non-exhaustive situations ("category three cases"):
>
> (a) critical exculpatory evidence is no longer available (see, for example, *R v B* ([288] *supra*); *Khalid Ali* ([288] *supra*));

> (b) the fairness of the trial below is compromised by the trial judge's conduct (see, for example, *Roseli* ([281] *supra*); *Ng Chee Tiong Tony* ([279] *supra*); and *Beh Chai Hock* ([279] *supra*)); and
>
> (c) the length of time before the putative retrial is disproportionate to the appellant's sentence and/or ongoing period of incarceration (see, for example, *Roseli*; *Ng Chee Tiong Tony*).
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> 298 In so far as "category three cases" are concerned, the appropriate course would be for the appellate court to weigh the non-exhaustive factors enunciated by Lord Diplock in *Dennis Reid* (see above at [276]), while at all times exercising its "collective sense of justice and common sense", in order to determine whether a retrial should be ordered. …

The non-exhaustive factors that can be considered in "category three cases" were laid out by Lord Diplock in *Dennis Reid* (at 349D–351C), and summarised by *AOF* at [277(d)] as follows:

> Fourthly, in cases that fall between the two extremes ("category three" cases), the relevant factors include, but are not limited to the following (*Dennis Reid* at 350D–G):
>
> (i) The seriousness and prevalence of the offence.
>
> (ii) Where the original trial was prolonged and complex, the expense and the length of time for a fresh hearing.
>
> (iii) An appellant ought not to be condemned to undergo a trial for the second time through no fault of his own unless the interests of justice require that he should do so.
>
> (iv) The length of time that will have elapsed between the offence and the new trial if one is to be ordered. Owing to the onus of proof which lies upon the Prosecution, a lapse of time may tend to operate to its disadvantage rather than to that of the appellant.
>
> (v) Whether there was evidence which tended to support the appellant at the original trial which would no longer be available at the new trial.
>
> (vi) The relative strengths of the case presented by the Prosecution and appellant at the original trial, but, except in the two extreme cases that have been referred to (see above, at [277(c)]), the weight to be attached to this factor may vary widely from case to case.

> (vii) There may well be cases where despite a near certainty that upon a second trial the appellant would be convicted the countervailing reasons are strong enough to justify refraining from that course. Conversely, it is not necessarily a condition precedent to the ordering of a new trial that the appellate court should be satisfied of the probability that it will result in a conviction.
>
> (viii) There may also be cases where, even though the appellate court considers that, upon a fresh trial an acquittal is on balance more likely than a conviction, it may be still be in the interest of the public, the complainant and the appellant that the question of guilt or innocence be determined finally by a trial court and not left as something which must remain undecided by reason of a defect in legal machinery.

Therefore, if the evidence is insufficient to justify a conviction, an acquittal should follow; but if the evidence is strong, the appeal should be dismissed. In between these two extremes, the court needs to weigh various factors such as those noted in *Dennis Reid* (at 349D–351C), bearing in mind the collective sense of justice and common sense, so as to determine whether a retrial ought to be ordered.

64 On the facts of the present case, it could not be said that the evidence at the original trial was insufficient, or sufficient, to justify a conviction. Given the centrality of Ron Lim's credibility to the appellant's conviction and the fact that Edwin's Statement, on its face, potentially contradicted Ron Lim's evidence in material ways, it was not safe to uphold the conviction. Yet, it could not be firmly said that the conviction was unsafe since Edwin's Statement was not put into evidence and its interaction with other pieces of evidence was unclear. These circumstances fall within what Lord Diplock called the "category three cases", and a weighing of various factors ought to be carried out to ascertain whether a retrial was warranted.

65 Here, balancing the various factors, I was of the view that a retrial was the most appropriate outcome. Given the serious nature of the offence alleged,

a conspiracy involving a crime of violence which resulted in grievous hurt, there was a strong public interest in ensuring that a full determination be made of what transpired, with a conclusive determination as to guilt or acquittal.

66 While the matter would take additional time, I did not see any unfair or undue prejudice that would prevent the appellant from making out his case on a retrial. His counsel referred to his illness,[49] but I did not see that that was of such a nature as to prevent a fair trial being held. I did note that further time would be taken, adding to the lapse of time since the incident in question, which dates back to 2016. The trial was conducted in 2018, with the appeal taking place some time last year because of the *Kadar* application. But such a lapse of time would not to my mind give occasion to injustice here. I did not see that a retrial would be inordinately long if properly managed, particularly as the other co-accused, Ong, would not be involved in a retrial as an accused person, though presumably he might be called. Witnesses might not be able to recall the relevant details as vividly, but this would tend to operate to the disadvantage of the Prosecution rather than that of the appellant, especially since the Prosecution here is relying heavily on a key Prosecution witness to recall details that linked the appellant to the conspiracy. There was no indication here of the loss of any other evidence. Importantly, consideration could be given by parties to the evidential effect of Edwin's Statement and what evidence should be led at the trial on it.

67 The issue of taking additional time aside, it could be said that the accused should not be put through a second trial through no fault of his own unless the interests of justice require a retrial. But in this case, with reference to the competing principles highlighted in *Bei Chai Hock* at [38], the interests of

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[49] Appellant's Further Submissions dated 21 September 2020 at para 40f.

justice did warrant a retrial. This was not a case where the Prosecution failed to prove its case previously such that a retrial would give it a second bite at the cherry (see *Beh Chai Hock* at [38]); rather, a retrial would operate in fairness to the accused by restoring to the Defence the opportunity to properly consider the contents of Edwin's Statement and re-shape its strategy at trial accordingly. Generally, it will also be in the interests of society and victims to ensure that those who are indeed guilty are not pardoned for their crimes due to *Kadar* breaches, where there exists an avenue to redress the prior prejudice caused without inflicting further unfair or undue prejudice on the accused.

68 I had considered that costs would have been incurred through one round of the trial, but that cost consideration cannot override the other factors pointing to the desirability for a retrial, including the seriousness of the charge and the availability of evidence. I noted that whether or not costs can be sought under s 356 CPC for the first trial would have to be considered by the appellant's legal advisors.

69 As for the question of whom the retrial should be before, it is on occasion permissible to have a retrial before the original judge, provided there has been no finding or conclusion which may raise perceptions of prejudgment. However, the difficulty here was that the original District Judge had already come to a conclusion about Edwin's Statement, without any justification on the evidence. There would be issues about the fairness of sending this case back to the same District Judge. I was puzzled by the conclusion reached by the District Judge about the nature of Edwin's Statement. The District Judge came to his conclusion that Edwin's Statement would likely inculpate the appellant based on what appeared from Ron Lim's evidence. I could not see how any such inference could be safely made. Given the weak inference concerning Edwin's Statement, I did not consider it appropriate to order a retrial by the same District

Judge. For the same doubts about fairness, I also did not consider that it was a viable option to have, instead of a retrial, a remittal to the original District Judge just to consider the effect of Edwin's statement.

70 Finally, there ought to be a retrial of the entire case by a new District Judge. A remittal before a different District Judge only on the narrow issue of Edwin's Statement alone would, I believe, pose substantial difficulties as it goes to the credibility of Ron Lim, requiring a holistic assessment of his statements and testimony.

Conclusion

71 For these reasons, I made an order for a retrial before a different District Judge under s 390(1)(*b*)(i) CPC. I had, however, asked parties to attend before the Assistant Registrar for a Case Management Conference so that they can inform the court whether any criminal reference would be pursued, and obtain the consequential case management directions.

Aedit Abdullah
Judge of the High Court

Narayanan Sreenivasan SC and Partheban s/o Pandiyan (K&L Gates Straits Law LLC) for the appellant;
Lee Lit Cheng and Li Yihong (Attorney-General's Chambers) for the respondent.