# Muhammad bin Kadar and another *v* Public Prosecutor and another matter [2011] SGCA 44

| | |
|---|---|
| **Case Number** | : Criminal Appeal No 8 of 2009 and Criminal Motion No 57 of 2011 |
| **Decision Date** | : 26 August 2011 |
| **Tribunal/Court** | : Court of Appeal |
| **Coram** | : V K Rajah JA; Kan Ting Chiu J; Steven Chong J |
| **Counsel Name(s)** | : Aedit Abdullah, Vanessa Yeo and Joel Chen (Attorney-General's Chambers) for the applicant in Criminal Motion No 57 of 2011; Kanagavijayan Nadarajan (Kana & Co) and Rajan Supramaniam (Hilborne & Co) for the first respondent in Criminal Motion No 57 of 2011; Thrumurgan s/o Ramapiram (Thiru & Co) for the second respondent in Criminal Motion No 57 of 2011. |
| **Parties** | : Muhammad bin Kadar and another — Public Prosecutor |

*Courts and Jurisdiction – Court of Appeal*

*Criminal Procedure and Sentencing*

26 August 2011

**V K Rajah JA (delivering the grounds of decision of the court):**

**Introduction**

1 Shortly after we delivered judgment in *Muhammad bin Kadar and another v Public Prosecutor* [2011] SGCA 32 ("*Kadar*"), the Prosecution requested (by way of a letter dated 8 July 2011) the temporary suspension, for six months, of the operation of [99]–[121] of *Kadar* ("the relevant passage") which concerned our findings on a common law criminal disclosure regime for unused material in the hands of the Prosecution. The stated reason was to allow the Attorney-General more time to study the full impact of *Kadar* for the purposes of advising the government whether to legislatively amend its effect or to change the operating procedures of the Prosecution and police. We directed that the Prosecution file and serve a Criminal Motion for us to formally hear and decide on the issues raised in open court. Pursuant to this direction, the Prosecution filed Criminal Motion No 57 of 2011 (CM 57/2011). This motion contained two prayers: the first was for the court to clarify the scope of the Prosecution's duty to disclose unused material as set out at the relevant passage of *Kadar* in the manner set out in an affidavit filed with the motion. The second was for the six-month suspension of the relevant passage with effect from the date of our judgment in *Kadar*.

2 On 19 August 2011, we heard the Prosecution's submissions in this matter and those of counsel for Ismil bin Kadar (the second appellant in Criminal Appeal No 8 of 2009 and the second respondent in CM 57/2011). Counsel for Muhammad bin Kadar (the first appellant in Criminal Appeal No 8 of 2009 and the first respondent in CM 57/2011) were present at the hearing but did not make submissions. In the Prosecution's submission, the relevant passage was capable of two interpretations: the broader interpretation suggested that the Prosecution's duty of disclosure includes a duty to review *all material* gathered by the police and law enforcement agencies in the course of investigations and evaluate that material for the purposes of disclosure. The narrower interpretation suggested that the Prosecution is only under a duty to disclose material that the prosecutor is *actually aware of* without the additional duty to review all material gathered in investigations. The Prosecution also indicated

that it would not proceed with the second prayer if the narrow interpretation was confirmed.

3 At the conclusion of the hearing we expressed our views on the issues raised and informed counsel that we would elaborate on these in writing. We now issue these supplemental grounds to explain our reasons for giving the clarifications sought by the Prosecution as well as to restate the matters clarified.

**Inherent jurisdiction and power of this court to clarify its own previous judgments**

4 The Prosecution's first prayer was for a clarification of a previous judgment of this court. We therefore had to consider at the outset whether we had the jurisdiction to hear such an application and make the requested clarification, a question that this court had not answered before. Although no directly relevant authorities could be found, all counsel accepted that the Court of Appeal had an inherent jurisdiction and power to clarify its own previous judgments.

5 A judgment, once given in criminal proceedings, cannot be *altered* save as provided for in s 301 of the Criminal Procedure Code (Act 15 of 2010) ("CPC 2010"). This section provides for the rectification of clerical errors at any time and of other errors by the next working day after delivery of the judgment. But it does not follow from this that the court is immediately *functus officio* after it has given its judgment. There remain a few circumstances where a court may either revisit its prior decision or clarify certain aspects of it. As the issue of clarification has not been provided for in the CPC 2010, we believed that s 6 of the CPC 2010 applied permitting us to adopt any procedure as the justice of the case may require that was not inconsistent with the CPC 2010 or any other law. In relation to the concept of *functus officio* we fully agreed with the observations of the High Court in *Godfrey Gerald QC v UBS AG and others* [2004] 4 SLR(R) 411 at [18]–[19]:

> 18 The Latin term *functus officio* is an abbreviated reference to a facet of the principle of finality in dispute resolution. *Functus officio* means that the office, authority or jurisdiction in question has served its purpose and is spent. A final decision, once made, cannot be revisited. In dispute resolution, this principle may manifest itself in the guise of *res judicata*, *functus officio* or issue estoppel. This principle of finality is intended to embody fairness and certainty. It is not to be invoked merely as a sterile and mechanical rule in matters where there are minor oversights, inchoateness in expression and/or consequential matters that remain to be fleshed out. Given that the court is always at liberty to attend to such axiomatic issues, various judicial devices such as the "slip" rule and the implied "liberty to apply" proviso are invoked from time to time to redress or clarify such issues. ***In short, both the High Court and the Court of Appeal retain a residual inherent jurisdiction even after an order is pronounced, to clarify the terms of the order and/or to give consequential directions*** .
>
> 19 That such inherent jurisdiction exists, has never been doubted. In point of fact, it is regularly invoked and exercised by the court: see O 92 r 4 of the [Rules of Court (Cap 322, R 5, 2004 Rev Ed ("RSC")] and the helpful and incisive conspectus in Professor Jeffrey Pinsler's article "Inherent Jurisdiction Re-Visited: An Expanding Doctrine" [2002] 14 SAcLJ 1 and the commentary in *Singapore Court Practice 2003* at paras 1/1/7 and 1/1/8. ***This inherent jurisdiction is a virile and necessary one that a court is invested with to dispense procedural justice as a means of achieving substantive justice between parties in a matter. The power to correct or clarify an order is inherent in every court*** . This power necessarily extends to ensuring that the spirit of court orders are appropriately embodied and correctly reflected to the letter. Indeed, to obviate any pettifogging arguments apropos the existence of such inherent jurisdiction, the RSC was amended in 1995 to include O 92 r 5, which expressly states:

> Without prejudice to Rule 4, the Court may make or give such further orders or directions incidental or consequential to any judgment or order as may be necessary in any case.

By dint of this rule, the court has an unassailable broad discretion and jurisdiction to give effect to the intent and purport of any relief and/or remedy that may be necessary in a particular matter. Admittedly, while the rule sets out in stark terms the court's wide inherent jurisdiction in this area of procedural justice, ***I should add for completeness, that the power to "make or give such further orders or directions incidental or consequential to ..." does not*** prima facie ***extend to correcting substantive errors and/or in effecting substantive amendments or variations to orders that have been perfected*** . This is plainly not such a case.

[emphasis added in bold italics]

6 While these observations were made in the context of orders made by the High Court in the exercise of its civil jurisdiction, we think the same position applies to a court, including the Court of Appeal, stating the law in the hearing of a criminal matter. This is because the inherent power of the court flows from its inherent status regardless of the subject matter of the case being heard. To decide otherwise would be to needlessly impose the fog of ambiguity and the injustice of uncertainty on all within the legal system who have to abide by a decision that may lack clarity. It is axiomatic that the law must be made clear enough to allow all persons subject to it to order their affairs with certainty. Nothing in the CPC 2010 alters this inherent right of a court.

7 In settling on this view, we were conscious of the general dangers of releasing more than one set of grounds of decision. These include the possibilities of inconsistency, undermining of judicial credibility and *ex post facto* justification: see S Chandra Mohan, "Remarks, More Remarks and a Grounds of Decision: One Judgment too Many? *T T Durai v Public Prosecutor* Magistrate's Appeal No 126 of 2007" (2009) 21 SAcLJ 591 at para 20. Nevertheless, it also bears mention that ss 298(3), (4) and (5) of the CPC 2010 now permit a court to give supplemental reasons for its decision in certain circumstances. This, however, is not to be taken as a statutory *carte blanche* for the courts to engage in piecemeal justification. For these reasons, the Court of Appeal will generally only use its inherent jurisdiction to issue a clarification of a statement of law in a previous judgment where the following conditions are present:

(a) the judgment contains a patent ambiguity;

(b) the clarification of this ambiguity is necessary in the public interest to ensure that the judgment can be correctly implemented in practice, and then only to the extent necessary;

(c) the application for a clarification is made within a reasonable time; and

(d) the clarification sought is a genuine clarification and not an attempt to re-open litigation, meaning that the clarification should not affect the orders already made in the main judgment.

8 There is some interaction between requirements (a) and (b) in the sense that some judgments require a greater degree of certainty to practically implement than others. This is particularly so, in a case such as this, where a court restates the legal position on an important area of law that will have significant consequences for the administration of justice. Where this court is convinced that in a particular case there is little or no room for ambiguity, this will influence its decision as to whether requirement (a) has been met. If the court is persuaded that the public interest necessitates that a legal issue be made absolutely clear, this might be done even if there is only an apparent ambiguity. It will be noted that requirement (c) is really a corollary of requirement (b): if the application for a

clarification is not made within a reasonable time, this will be compelling evidence that the clarification was not necessary for the practical implementation of the judgment.

**Our decision in CM 57/2011**

9 In CM 57/2011, the Prosecution was primarily concerned to clarify whether a prosecutor's duty (which it accepted as both institutional and individual) to evaluate unused material for disclosure in criminal cases extended to calling for and scrutinising material pertaining to the case that he or she had not already been made aware of (see [2] above). This was in the light of the large amount of such material gathered by law enforcement agencies in the course of criminal investigations. Not all of this material is always made available to the Prosecution (because of its irrelevance to the charge(s) preferred or for operational reasons). In addition, the Prosecution wished to clarify whether the timeline for disclosure of unused material falling under ss 196 and 166 of the CPC 2010 would be the timelines prescribed in those sections. Counsel for the second respondent accepted that the judgment in *Kadar* did not impose an obligation on the Prosecution to search for material not in its possession but asserted that the duty was not confined to only the prosecutor having carriage of the trial.

10 On a strict application of the test above at [7], we did not see this as a particularly compelling case in terms of requirement (a).We did not find the Prosecution's arguments on the purported ambiguity in the Prosecution's duty of disclosure as outlined in *Kadar* particularly convincing. When queried which particular paragraphs in the Judgment had given rise to such an ambiguity the Prosecution responded that it was the broad thrust of the views expressed therein rather than any particular passage. We were also doubtful about the existence of an ambiguity necessitating the second clarification, considering that this court does not have any power to depart from the express requirements of written law such as that contained in ss 196 and 166 of the CPC 2010.

11 However, the Prosecution also submitted that the continued viability of a great deal of investigative and prosecutorial practice turned on a definitive resolution of the doubts they had raised. Specifically, if prosecutors had a duty to search through everything the investigators gathered in the course of their work, this would necessitate very substantial changes in the conduct of both investigations and prosecutions. The judgment in *Kadar*, it appears from the Prosecution's submissions, had far-reaching consequences because it mandated a sea change in the previously settled view of the Prosecution's duty of disclosure (which rested on the now rejected view of the High Court in *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946). The Prosecution maintained that it was most anxious to ensure that it properly understood what was henceforth expected of it by the courts in the conduct of criminal proceedings. We found this particular concern more persuasive. Despite the absence of a patent ambiguity, we recognised that any reasonable misapprehension entertained about our views on the duty expressed in *Kadar* might lead the relevant agencies to undertake a significant overhaul of their practices even though it might not be immediately warranted. As such, we felt that this was indeed an exceptional occasion that justified the clarification requested even though the relevant passage contained (on the reading most generous to the Prosecution) only an apparent ambiguity. We also found that the other requirements stated above at [7] were met.

12 For context it would be helpful if we set out here a crucial part of what we stated in *Kadar* under the heading "Scope of the Prosecution's duty of disclosure under the common law of Singapore" at [113]:

> ***In our view, it is not necessary, for present purposes, for us to attempt a comprehensive statement of what the law of Singapore should be in this area. There is still ample scope for the development of the fine details in subsequent cases or by legislative intervention.***

***It suffices for us to say that we agree with the Prosecution that the duty of disclosure certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case*** . However, the Prosecution must disclose to the Defence material which takes the form of:

> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

This will not include material which is neutral or adverse to the accused – it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case. To ensure congruence with the statutory scheme for disclosure this material should initially be disclosed no later than seven days before the date fixed for the committal hearing for High Court trials or two weeks from the CCDC for Subordinate Court trials (corresponding to the timelines in ss 176(3)(*b*) and 161(2) of the CPC 2010 respectively). Where under s 159 of the CPC 2010 the statutory criminal case disclosure procedures do not apply, the common law disclosure described here should take place at the latest before the trial begins. The obligation of disclosure (as the Prosecution has correctly acknowledged in its further submissions) is a continuing one and only ends when the case has been completely disposed of, including any appeal. Throughout this period, the Prosecution is obliged to continuously evaluate undisclosed material ***in its possession*** to see if it ought to be the subject of further disclosure.

[emphasis added in bold italics]

13 The following is clear from the entirety of the above passage. First, there was no attempt by this court in *Kadar* to comprehensively state the law on this issue. Second, "the duty of disclosure certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case". Third, our judgment in *Kadar* does not frame any duty in relation to the work of investigators and how they ought to interact with the Prosecution. That issue did not arise on the facts before us. Fourth, we referred to the duty imposed on the Prosecution as applying continuously to undisclosed material "in its possession", that is to say, within its knowledge.

14 We therefore clarified that the Prosecution's duty of disclosure as stated at [113] of *Kadar* certainly does not require the Prosecution to search for additional material. This view was also plainly indicated by the factual context of *Kadar*, where the statements that were disclosed late by the Prosecution were actually unused material within the knowledge of the Prosecution (as opposed to material outside their initial knowledge that they had to search for). The Prosecution's explanation for non-disclosure (which we rejected) was based on the credibility of the statements (see *Kadar* at [198]). No suggestion had been made that the Prosecution did not know about those statements at the relevant time. There was absolutely no issue for us to consider as to whether the Prosecution had failed to ascertain the existence of those statements. In addition, none of the authorities we referred to from various common law jurisdictions suggested that the Prosecution's common law duty of disclosure extended to material outside of the Prosecution's knowledge. *Surely, the Prosecution cannot be expected to disclose what it does not know of?* Where such an issue has been addressed, it has been addressed outside the scope of judge-made law: see for example the English Crown Prosecution Service Disclosure Manual <http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/> (accessed on 25 August 2011) at ch 2, para 2.2 (describing the duty of the investigator to inform the

prosecutor as early as possible whether any material weakens the case against the accused) and ch 3 (containing detailed roles and responsibilities for investigators in relation to disclosure as set out in the relevant statutory Code of Practice). We do not know of a power under Singapore law that empowers a court to *compel* investigative agencies (which are executive bodies) to adopt a code of practice purely by way of judicial pronouncement.

15 We also clarified that where material falls within the scope of ss 196 or 166 of the CPC 2010, such material should be disclosed within the timelines provided for in those sections, while all other disclosable material should be provided in accordance with the timings set out in [113] of the judgment in *Kadar*.

16 The Prosecution indicated that with such a clarification, it would no longer be pursuing an application for a temporary suspension of the relevant passage of *Kadar*. We therefore made no order in relation to the second prayer in CM 57/2011, although we indicated to the Prosecution that we were doubtful that such an order could have been made in any case given the prevailing circumstances.

**Other observations**

17 Although our actual clarification was confined to the matters set out at [14] and [16] above, we also took note of a further point mentioned in the Prosecution's submissions. The Prosecution submitted that the disclosure obligation should be subject to public interest requirements for confidentiality, such as statutes requiring non-disclosure of certain types of information. These include s 23 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") and s 127 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), both of which contain regimes for non-disclosure of information relating to the commission of certain criminal offences. Also mentioned were ss 125 and 126 of the Evidence Act: these restrict the giving of evidence as to affairs of State and communications made in official confidence respectively.

18 It is a trite proposition a court does not have the power to depart from or vary the requirements of statute law. We therefore state, purely for the avoidance of doubt, that our judgment in *Kadar* does not affect the operation of any ground for non-disclosure recognised by any law (*eg*, the MDA or Evidence Act). The procedure for such non-disclosure will be as contemplated in the respective laws, and where the procedure requires it, the Prosecution will have to make the necessary application to the court to show that the case falls within the scope where non-disclosure applies.

19 Counsel for the second respondent was concerned that the duty of disclosure should not be limited to the particular prosecutor conducting a criminal trial (see [9] above). In the same paragraph, we noted that the Prosecution accepted that its duty of disclosure was institutional as well as personal. However, the Prosecution did express a concern that certain material might be possessed by the Public Prosecutor's office generally (*eg*, material in the file relating to a different prosecution) without it being known to any specific prosecutor that such material was relevant and possibly disclosable in a specific case. To quote counsel for the Prosecution [note: 1]:

> [W]hat we are trying to say is that … whatever is in the [Investigation Paper] that a prosecutor should know, so insofar as whatever information is in the [Investigation Paper], in that sense, the prosecution as a whole should know what's in the [Investigation Paper]. Our concern was with situations where there's a need to connect the dots to other information beyond the prosecutor and for example, other [Investigation Papers] in other cases or in the investigation agencies or some other information within the government. We were … concerned about that. Because as an

institution, we are fairly large now and we were concerned that there might be linkages that we were expected to follow up on. That was our primary concern, your Honour. So, in that sense, if the prosecution is equated with whoever touches the [Investigation Paper] and is involved in that case, we---we, your Honour, would say that those persons are all under an obligation.

20 For the sake of clarity, we observe that if a prosecutor cannot be expected to disclose material that he *does not know of* in a *known case* (see [15] above), he also cannot be expected to disclose material if he *does not know* of a *case* where it should be disclosed. However, if a prosecutor knows of material *and* knows of a case where it should be disclosed, he is under a duty to arrange for the disclosure of that material even if he is not directly assigned to conduct that case. This is included in the Prosecution's institutional duty of disclosure, which at its most basic level is a duty to comply with the spirit of the Prosecution's disclosure obligation rather than the mere letter. We are heartened that the Prosecution seems willing to fulfil this institutional duty.

21 We would emphasise that the primary purpose of the disclosure obligation set out in *Kadar* is not to embarrass or inconvenience the Prosecution: it is to ensure a fair trial and that miscarriages of justice are avoided (see [86] and [98] of *Kadar*). We would draw attention to [120] of *Kadar*, where it was emphasised that "not all non-disclosures will be attributable to fault on the part of the Prosecution (or a lack of *bona fides*)". We then elaborated that such inadvertent non-disclosures might nevertheless lead to a conviction being unsafe. With this in mind, we would like to see the Prosecution proactively making continuous disclosure of material that was inadvertently not disclosed at an earlier stage of proceedings without undue fear of criticism. This would be in line with the spirit of the disclosure obligation. If the Public Prosecutor deems it appropriate, measures could be taken to minimise the risk of such inadvertent non-disclosure (*eg* better sharing of knowledge among prosecutors working on different cases involving related matters or parties).

**Conclusion**

22 For the reasons stated we have clarified the scope of the Prosecution's duty of disclosure as stated in our judgment in *Kadar* and made no order in relation to the second prayer in CM 57/2011.

---

[note: 1] Transcript dated 19 August 2011, p 19, lines 10–26