IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 44

Criminal Appeal No 1 of 2020

Between

Beh Chew Boo

… *Appellant*

And

Public Prosecutor

… *Respondent*

In the matter of Criminal Case No 30 of 2019

Between

Public Prosecutor

And

Beh Chew Boo

GROUNDS OF DECISION

[Abuse of Process] — [Collateral attack]
[Res Judicata] — [Issue estoppel]

[Constitutional Law] — [Fundamental liberties] — [Protection against repeated trial]
[Criminal Procedure and Sentencing] — [Charge] — [Outstanding offences]

Beh Chew Boo
v
Public Prosecutor

[2021] SGCA 44

Court of Appeal — Criminal Appeal No 1 of 2020
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
2 March 2021

29 April 2021

Sundaresh Menon CJ (delivering the grounds of decision of the majority consisting of Steven Chong JCA and himself):

Introduction

1 It is well-established that, pursuant to Art 35(8) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution") and s 11 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), the Public Prosecutor has a very wide discretion in the initiation, conduct, and discontinuance of criminal prosecutions. However, it is equally well-established that the courts retain the ultimate control over the management and conduct of court proceedings, including criminal proceedings, and the responsibility to ensure that this is done in a fair and efficient manner. The interaction between these two principles may sometimes give rise to the need to explore the extent to which the court is permitted and, indeed, required to control the conduct of criminal prosecutions in the interest of fairness and justice.

2 The present case required us to consider this issue in the light of the Prosecution's intention to revive and then proceed with charges that had been withdrawn. Mr Beh Chew Boo ("Mr Beh") was charged with five charges of drug importation. These charges concerned various types of drugs. The Prosecution initially stood down four of the charges (which were all non-capital charges ("Non-Capital Charges")) and proceeded with and then obtained a conviction before the High Court on one capital charge of drug importation under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). Mr Beh was accordingly sentenced to death. The practice of standing down charges is commonly observed especially when the Prosecution proceeds only with a capital charge. By doing so, the accused person can focus on his defence to the capital charge without having to also defend himself against the other charges at the same time. Following his conviction, with the leave of the High Court, the four Non-Capital Charges were withdrawn on the application of the Prosecution. In the meantime, Mr Beh appealed against his conviction on the capital charge in CA/CCA 1/2020 ("CCA 1"). The Prosecution did not, in the course of resisting the appeal, take issue with any of the interlocutory rulings the High Court Judge had made. This Court unanimously acquitted Mr Beh of the capital charge. After we delivered our verdict, the Prosecution informed the Court that it wished to reinstate and proceed with a trial of the Non-Capital Charges. The Defence objected to this on the grounds of double jeopardy, *res judicata*, and abuse of process.

3 After considering the parties' written and oral submissions, we decided that the Prosecution should not be allowed to reinstate and proceed with the withdrawn Non-Capital Charges because we considered that this would amount to an abuse of the process of court. The crux of the abuse lay not in any ulterior or improper motive in pursuing the prosecution of the Non-Capital Charges, but in the continuation of criminal prosecutions that could result in a collateral

attack against at least some of this Court's findings in CCA 1 and in the fact that the Prosecution was seeking in effect to reopen a key finding of fact we had made in coming to our verdict in CCA 1, based on evidence it could have produced at the original trial but chose not to. We now explain our decision.

Procedural history

Charges

4 Mr Beh faced five charges of unauthorised importation of controlled drugs. Although this concerned a single incident on 26 October 2016 at about 5.20am at Woodlands Checkpoint, there were five charges because different drugs were found in the motorcycle that Mr Beh was riding that day (collectively, "the Charges"). The Prosecution proceeded on only the first charge of importation of 102 packets of crystalline substance containing not less than 499.97g of methamphetamine ("the Ice"), which carried the death penalty ("the Capital Charge"). The Ice was found in a blue plastic bag that was hidden in the storage compartment of the motorcycle. Mr Beh had borrowed the motorcycle from its owner and had ridden it into Singapore with a female pillion rider.

5 The four remaining Non-Capital Charges did not carry the death penalty and were stood down at the commencement of trial. While the Prosecution stated broadly in its written submissions filed for these proceedings that the Non-Capital Charges related to the unauthorised importation of 1650 tablets, it appeared from our review of the record of proceedings that the Non-Capital Charges involved 1270 tablets, though of course nothing turns on this for the purposes of these proceedings. These 1270 tablets, which contained a mix of Class A and Class C controlled drugs, were from six different exhibits that were all found in the same blue plastic bag that also contained the Ice. These six

exhibits were marked as "A1A" (150 beige tablets), "A1D1" (100 pink tablets), "A1D4A" (100 beige tablets), "A1A4A" (230 orange tablets), "A1A4B" (230 orange tablets), "A1A4C" (230 orange tablets), and "A1A4D" (230 orange tablets). The Non-Capital Charges were framed as follows.

Charge	Unauthorised importation of the following drugs:
2nd Charge	• 150 beige tablets (Exhibit A1A) found to contain ethylone, a Class A controlled drug; • 100 pink tablets (Exhibit A1D1) of which at least 90% contained ethylone; and • 100 beige tablets (Exhibit A1D4A) of which at least 90% contained ethylone
3rd Charge	• 150 beige tablets (Exhibit A1A) containing not less than 0.47g of ketamine, a Class A controlled drug; and • 100 beige tablets (Exhibit A1D4A) of which at least 90% contained ketamine
4th Charge	• 150 beige tablets (Exhibit A1A) found to contain 5-methoxy-MiPT or its methoxy positional isomer in the 6-membered ring, which are Class A controlled drugs; • 100 pink tablets (Exhibit A1D1) of which at least 90% contained 5-methoxy-MiPT or its methoxy positional isomer in the 6-membered ring; and • 100 beige tablets (Exhibit A1D4A) of which at least 90% contained 5-methoxy-MiPT or its methoxy positional isomer in the 6-membered ring
5th Charge	• 920 orange tablets (Exhibits A1A4A–A1A4D) of which at least 90% contained nimetazepam, a Class C controlled drug

High Court Trial

6 Mr Beh was convicted on the Capital Charge in the High Court on 20 January 2020 and sentenced to death on 24 January 2020. The Prosecution then applied to withdraw the Non-Capital Charges under s 147(1) of the CPC, which the High Court Judge ("the Judge") granted. Section 147 of the CPC provides:

> **Withdrawal of remaining charges on conviction on one of several charges**
>
> **147.**—(1) Where 2 or more charges are made against the same person and he has been convicted on one or more of them, the prosecution may, with the consent of the court, withdraw the remaining charge or any of the remaining charges.
>
> (2) Such withdrawal shall have the effect of an acquittal on the remaining charge or charges withdrawn unless the conviction is set aside.
>
> (3) Where a conviction is set aside under subsection (2), and subject to any order of the court setting aside the conviction, the court may proceed with the trial of the charge or charges previously withdrawn.

7 Therefore, under s 147(2) of the CPC, the withdrawal of the Non-Capital Charges would have the effect of an acquittal on the Non-Capital Charges unless the conviction of the Capital Charge was set aside. Under s 147(3) of the CPC, as the conviction of the Capital Charge had been set aside, a trial of the Non-Capital Charges previously withdrawn may be proceeded with, *subject* to any order of the court setting aside the conviction.

The Court of Appeal's findings

8 On 13 October 2020, Mr Beh's conviction was overturned on appeal on the basis that he had rebutted the presumption of possession under s 21 of the MDA: see *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 (the "first CA Judgment"). The key findings and observations made by the Court in the first CA Judgment that were relevant to the present case were as follows.

(a) Mr Beh's defence was that he did not know that the blue plastic bag was in the motorcycle (see the first CA Judgment at [13]). While such a claim is sometimes dismissed where it is found to be incredible as a bare denial, we were satisfied that Mr Beh's account was not inherently incredible. There were several unique features in this case, including the following:

(i) the motorcycle belonged to Mr Lew Shyang Huei ("Mr Lew");

(ii) Mr Beh claimed that he borrowed the motorcycle from Mr Lew for his trip to Singapore;

(iii) by the time of the trial, Mr Lew had been arrested in an unrelated matter and was in police custody in Singapore and his DNA was found on the drug exhibits in this case;

(iv) Mr Beh's DNA was not found on any of the drug exhibits;

(v) Mr Beh's positions in his statements and in his oral evidence were consistent in that he maintained all along that he was unaware of the presence of the blue plastic bag in the motorcycle, and that, as the motorcycle belonged to Mr Lew, the investigating authorities should ask Mr Lew about the drugs (see the first CA Judgment at [64]–[70]).

(b) In all the circumstances, we were satisfied that the evidential burden had shifted to the Prosecution.

(c) The Prosecution should therefore have applied to call Mr Lew to testify especially after the Defence had decided not to call him as a

witness. This was especially so since, as we have noted above, Mr Lew was in custody in Singapore during Mr Beh's trial (see the first CA Judgment at [71]–[75]).

(d) The Prosecution, by deciding not to call Mr Lew, failed to discharge its evidential burden. We therefore found that Mr Beh had rebutted the presumption of possession under s 21 of the MDA.

(e) Separately, after Mr Beh testified but before he was cross-examined by the Prosecution, Mr Beh's counsel, Mr Wong Siew Hong ("Mr Wong"), objected to the Prosecution's intended examination of Mr Beh in respect of certain text messages. These messages had been extracted from Mr Beh's mobile phone and were reflected in a forensic examination report that had been adduced in evidence as part of the Prosecution's case (see the first CA Judgment at [22]). The Judge allowed the Prosecution to cross-examine Mr Beh on some of the text messages, but either disallowed or limited the scope of the Prosecution's cross-examination on the remaining messages (see the first CA Judgment at [24]). This Court observed in the first CA Judgment that it would have been more appropriate for a trial court to rule on such objections as and when they were taken in the course of cross-examination, rather than pre-emptively by broadly disallowing specific areas of cross-examination. Several of the messages that the Prosecution were not permitted to examine Mr Beh on could have been relevant to the trial. However, the Judge's rulings on the text messages were not the subject of the submissions on appeal. This Court therefore did not make any findings on this issue (see the first CA Judgment at [56]–[62]).

9 The foregoing points will prove relevant and material to the question of abuse of process, as we explain further below.

The Prosecution's intention to proceed with the Non-Capital Charges

10 Shortly after the Court acquitted Mr Beh of the Capital Charge on 13 October 2020, the Prosecution informed the Court that it may wish to proceed with the Non-Capital Charges. The Defence reserved its position pending the finalisation of the Prosecution's position. The Court directed the Prosecution to communicate its decision on the Non-Capital Charges to the Court and to Defence counsel within three days from 13 October 2020.

11 On 14 October 2020, the Prosecution informed the Defence counsel, Mr Wong, that it intended to proceed with the trial of the Non-Capital Charges in the State Courts, as these charges were not triable only by the High Court. The Prosecution also conveyed a certain offer in relation to the Non-Capital Charges to Mr Wong.

12 On 15 October 2020, Mr Wong informed the Prosecution that Mr Beh was not prepared to accept the Prosecution's offer and intended to raise a preliminary objection against any attempt by the Prosecution to revive and prosecute the Non-Capital Charges. On the same day, the Prosecution conveyed its position to the Court that it intended to proceed with the trial of the Non-Capital Charges in the State Courts, and that Mr Beh had raised an objection. The parties then sought leave to file written submissions on the issue of whether the Prosecution could proceed to try the Non-Capital Charges. On 16 October 2020, the Court allowed the parties' request to file written submissions and directed Mr Wong to confirm, within two working days, that Mr Beh consented to remain in custody pending the determination of the preliminary objection or

until further order. On 18 October 2020, Mr Wong confirmed by letter that Mr Beh consented to this.

The parties' submissions

13 Mr Beh submitted that a trial of the Non-Capital Charges should not be permitted because the drugs in both the Capital and Non-Capital Charges were found in the same plastic bag. If Mr Beh had rebutted the presumption of possession in respect of the methamphetamine, which was in that plastic bag, it must follow that he had similarly rebutted the presumption of possession in respect of the other drugs in the Non-Capital Charges. On this basis, Mr Beh made the following alternative submissions.

(a) Mr Beh may not be tried for the Non-Capital Charges because this was proscribed by s 244(1) of the CPC which barred a fresh trial even for a different offence if that arose from the same facts as the Capital Charge.

(b) The trial of the Non-Capital Charges would infringe Mr Beh's rights against double jeopardy under Art 11(2) of the Constitution.

(c) Mr Beh was entitled to raise the plea of *autrefois acquit*.

(d) Having successfully rebutted the presumption of possession under s 21 of the MDA in respect of the Capital Charge, the issue of his knowledge of the existence of the drugs and possession of the same in the Non-Capital Charges could not be reopened by reason of the doctrine of *res judicata*.

(e) The proposed trial of the Non-Capital Charges was an abuse of process as it was in effect a backdoor attempt to retry a critical finding of fact that had been made in respect of the Capital Charge.

(f) The proposed trial of the Non-Capital Charges was otherwise unfair, oppressive and an abuse of process.

14 In response, the Prosecution made the following submissions.

(a) Proceeding on the Non-Capital Charges would offend neither the prohibition against double jeopardy under Art 11(2) of the Constitution nor the prohibition under s 244(1) of the CPC because the Non-Capital Charges were distinct offences from the Capital Charge. Section 244(2) of the CPC also provides that a person acquitted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him in the former trial under s 134 of the CPC. The common law doctrines of *autrefois acquit* and *convict* have been codified in Art 11(2) of the Constitution and s 244(1) of the CPC, and cannot be relied upon as a separate principle of general application.

(b) The Prosecution also noted that the relevant *res judicata* doctrine raised by Mr Beh in fact related to the principle of issue estoppel. The Prosecution submitted that this doctrine should not apply to criminal proceedings in Singapore. Even if it did, the doctrine would not bar the Prosecution from tendering evidence, in a subsequent trial on the Non-Capital Charges, on Mr Beh's knowledge of the other drugs, since such evidence had not been adduced in the earlier trial of the Capital Charge.

(c) Prosecuting Mr Beh on the Non-Capital Charges could not be construed as an abuse of prosecutorial power or an abuse of the judicial process.

Issues

15 We had to determine the following issues in deciding whether the Prosecution should be permitted to proceed with a trial of the Non-Capital Charges.

(a) Would proceeding with the Non-Capital Charges offend the rule against double jeopardy under Art 11(2) of the Constitution, s 244(1) of the CPC and/or the common law?

(b) Did issue estoppel prevent a trial of the Non-Capital Charges?

(c) Would proceeding with the Non-Capital Charges amount to an abuse of process?

16 For reasons that will be evident below, we did not think that there was a point on double jeopardy in this case because the requirements of the double jeopardy rule are strict, and the doctrine does not preclude a reinstatement of withdrawn charges following the acquittal of a distinct charge. We also considered it unnecessary to reach a conclusion on the controversial issue of whether issue estoppel should apply to criminal proceedings. The key concern was whether permitting a trial of the Non-Capital Charges would amount to an abuse of process, and it is this issue which we will focus our attention on. However, we will first briefly address the issues of double jeopardy and issue estoppel.

Double Jeopardy

17 Mr Beh's first three arguments – made in reliance on Art 11(2) of the Constitution, s 244(1) of the CPC, and the common law doctrine of *autrefois acquit* – were commonly premised on the double jeopardy rule.

18 Art 11 of the Constitution provides:

> **Protection against retrospective criminal laws and repeated trials**
>
> **11.**—(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.
>
> (2) A person who has been convicted or acquitted of an offence shall not be tried again *for the same offence* except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was convicted or acquitted.
>
> [emphasis added]

19 Section 244 of the CPC provides:

> **Person once convicted or acquitted not to be tried again for offence on same facts**
>
> **244**.—(1) A person who has been tried by a court of competent jurisdiction for an offence and has been convicted or acquitted of that offence shall not be liable, while the conviction or acquittal remains in force, to be tried again for the same offence nor on the same facts for any other offence for which a different charge might have been made under section 138 or for which he might have been convicted under section 139 or 140.
>
> (2) A person acquitted or convicted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him in the former trial under section 134.
>
> …

20 Section 244(1) of the CPC consists of two limbs: a person who has been tried and convicted or acquitted of an offence shall not be liable, while the

conviction or acquittal remains in force, to be tried again (a) for the "same offence" ("first limb"); (b) nor on the same facts for any other offence which could have been pursued under ss 138–140 ("second limb"). As the first limb is identical in effect to Art 11(2) of the Constitution, we do not need to consider it separately.

21 There were thus three distinct issues arising from Mr Beh's double jeopardy arguments.

(a) First, were the Non-Capital and Capital Charges the "same offence" within the meaning of Art 11(2) of the Constitution and/or the first limb of s 244(1) of the CPC such that a trial of the Non-Capital Charges was prohibited?

(b) Second, would proceeding with the Non-Capital Charges amount to trying Mr Beh "on the same facts for any other offence" within the meaning of the second limb of s 244(1) of the CPC?

(c) Third, did the common law doctrine of *autrefois acquit* apply to bar the Prosecution from proceeding with a trial of the Non-Capital Charges?

Retrial for the "same offence" within the first limb of s 244(1) of the CPC and Art 11(2) of the Constitution

22 In respect of both s 244(1) of the CPC and Art 11(2) of the Constitution, Mr Beh argued that the Non-Capital and Capital Charges entailed the "same offence" because they pertained to the same section of the MDA and the particulars of the charges were identical. This is not entirely accurate: the particulars of the Non-Capital and Capital Charges were not identical because there were differences as to the drug type and weight.

23 On the other hand, the Prosecution submitted that a purposive interpretation of the term "same offence" in s 244(1) of the CPC and in Art 11(2) of the Constitution would establish that it only applies to an offence that is the same in both fact and law. The Capital and Non-Capital Charges did not involve the "same offence" because the Charges involved different controlled drugs of different weights which are classified differently under the MDA. By extension, the specific *mens rea* and *actus reus* elements to be proved also differed.

24 We agreed with the Prosecution. The phrase "same offence" requires an offence identical in fact and law, in contrast to "any other offence" caught by the second limb of s 244(1) or "distinct offences" mentioned in s 244(2) of the CPC. We reach this conclusion even on a textual interpretation of the first limb of s 244(1) of the CPC and Art 11(2) of the Constitution, because the ordinary and natural meaning of the term "same", as highlighted by the Prosecution, would require the offences to be identical.

25 As the drugs and drug weights indicated in the Non-Capital and Capital Charges differ, the Charges were not identical in fact, and thus were not in respect of the "same offences". In simple terms, the Capital Charge was for importing a certain quantity of methamphetamine while the Non-Capital Charges were for importing various quantities of various other drugs. As such, we were satisfied that Art 11(2) of the Constitution and the first limb of s 244(1) of the CPC did not prevent the Prosecution from proceeding with the Non-Capital Charges.

Retrial "on the same facts for any other offence" within the second limb of s 244(1) of the CPC

26 As to the second limb of s 244(1) of the CPC, Mr Beh submitted that the Prosecution was seeking to retry him on the basis of "reformulated charges" that

arise from only one material act – his entering Singapore on 26 October 2016 with the plastic bag containing the drugs as set out in the Charges.

27 The Prosecution submitted that the Non-Capital Charges were not ones for which a different charge might have been made under s 138 of the CPC or for which Mr Beh might have been convicted under ss 139 or 140 of the CPC, which is the limitation contained within the second limb of s 244(1) of the CPC. The Prosecution also argued, as a point of general application to the entire double jeopardy argument, that s 244(2) of the CPC expressly permitted Mr Beh to be tried for the Non-Capital Charges as it specifically provides that a person acquitted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him in the former trial under s 134 of the CPC. The Prosecution submits that Mr Beh could have been tried for the Non-Capital Charges in the former trial under s 134.

28 We also agreed with the Prosecution on this issue. The second limb of s 244(1) of the CPC was not at issue here because the provisos concerning ss 138, 139 and 140 of the CPC had not been met. These provisions provide as follows:

> **If it is doubtful what offence has been committed**
>
> **138**. If a single act or series of acts is such that it is doubtful which of several offences the provable facts will constitute, the accused may be charged with all or any of those offences and any number of the charges may be tried at once, or he may be charged in the alternative with any one of those offences.
>
> …
>
> **When person charged with one offence can be convicted of another**
>
> **139**. If in the case mentioned in section 138 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under that section, he may be convicted of the offence

> that he is shown to have committed although he was not charged with it.
>
> …
>
> **Conviction of attempt or abetment**
>
> **140**. When the accused is charged with an offence, he may be convicted of having attempted to commit it or of having abetted its commission, although neither the attempt nor the abetment is separately charged.

29 These provisions were analysed and construed in *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 at [89]–[116] and it is clear that they do not apply in the present context. Section 138 of the CPC involves an accused who has been charged with several offences because it is doubtful what offence has been committed on the provable facts and s 139 is a consequential provision to s 138. As for s 140, that involves an accused person who is charged with an offence and who may be convicted of having *attempted* to commit it or of having *abetted* its commission. None of these provisions applied to the Non-Capital Charges. Therefore, the second limb of s 244(1) of the CPC did not prevent the Prosecution from reinstating the Non-Capital Charges.

30 We also agreed with the Prosecution that the Non-Capital Charges in any event fell within s 244(2) of the CPC, which provides that a person acquitted or convicted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him in the former trial under s 134 of the CPC. Section 134 of the CPC provides:

> **Trial for more than one offence**
>
> **134.** If, in one series of acts connected so as to form the same transaction, 2 or more offences are committed by the same person, then he may be charged with and tried at one trial for every such offence.

31 Section 134 of the CPC deals with the power to try a person at one trial for more than one offence, where all of the offences are committed by the same person in one series of acts forming the same transaction. Acts form the same transaction if there is "proximity of time, unity of place, unity of purpose or design and continuity of action", though these requirements are not cumulative: see *Tse Po Chung Nathan and another v Public Prosecutor* [1993] 1 SLR(R) 308 at [31]. The Charges clearly involved acts forming the same transaction since all the drugs were found in the same plastic bag brought into Singapore by Mr Beh on the same occasion on 26 October 2016. As such, s 244(2) of the CPC was also applicable. This, however, was not the end of the matter, since there remained possible questions as to issue estoppel and abuse of process.

Autrefois acquit

32 Before we turn to those questions, we briefly deal with one remaining aspect of double jeopardy. At common law, it is well-established under the doctrine of *autrefois acquit* and *convict* that a person cannot be tried for a crime in respect of which he has previously been acquitted or convicted. The *locus classicus* of this doctrine is the House of Lords' decision in *Connelly v Director of Public Prosecutions* [1964] AC 1254 ("*Connelly*"), though the precise contours of that judgment have been widely debated. In particular, Lord Devlin had taken a narrower view of *autrefois convict* in that case, concluding that the doctrine only applied if the offences are the same in both fact and law (at 1339). On the other hand, Lord Morris took the view that the doctrine could apply if the offences were substantially the same (at 1305).

33 Mr Beh submitted that his case fell within both the narrow and broader views of *autrefois acquit* in *Connelly*. The Prosecution made three main points in response.

(a) The common law doctrine has been codified in Art 11(2) of the Constitution and s 244(1) of the CPC, and hence could not be relied upon as a separate principle of general application.

(b) In any case, the accepted common law doctrine of *autrefois acquit* adopts the same formulation in Art 11(2) of the Constitution and s 244(1) of the CPC as requiring that the later offence be the same both in fact and in law.

(c) Even if the broad view applied, there was no substantial similarity between the Non-Capital Charges and the Capital Charge.

34 We hesitate over the submission that the common law doctrines of *autrefois convict* and *acquit* have been completely repealed by Art 11(2) of the Constitution and/or s 244(1) of the CPC. Even in *Gunalan s/o Govindarajoo v Public Prosecutor* [2000] 2 SLR(R) 578 ("*Gunalan*") at [11], which was referred to by the Prosecution, Yong Pung How CJ, while holding that the common law doctrine of *autrefois convict* is "enshrined in Art 11(2) of the Constitution", also recognised that it was not yet settled whether the doctrine required the offences to be the same in both fact and law or merely to be substantially similar. This suggests an implicit recognition that the common law doctrine remains relevant in Singapore. In *Gunalan*, Yong CJ held at [12] that it was unnecessary in that case to decide the point because the petitioner's claim of *autrefois convict* in that case failed on either view.

35 Nevertheless, the common law position has since been clarified in two English Court of Appeal cases, and it is now clear that the narrow view prevails. In *R v J(JF)* [2014] QB 561, Sir John Thomas P (delivering the judgment of the court), after a review of the different judgments in *Connelly*, concluded (at [23]) that, while it was "by no means easy to determine what the ratio in *Connelly* …

was", the majority decision of that case was "contained in the speech of Lord Devlin" because "Lord Reid, at p 1295, and Lord Pearce, at p 1368, agreed with Lord Devlin, rather than Lord Morris". Therefore, "the scope of *autrefois* is narrow and the offence, as well as the facts, must be the same for the plea of *autrefois* to apply". Similarly, in *R v Lama* [2017] QB 1171 at [109], Hallett LJ (delivering the judgment of the court) held that either plea of *autrefois acquit* or *convict* "will only succeed where the later proceedings are for an offence which is the same as an earlier offence both in fact and law."

36 Therefore, we provisionally agree with the Prosecution's second argument, which is that it ultimately does not matter whether the common law has been excluded because the position under the common law too adopts the narrow view, meaning that the offences must be the same in fact and in law. Consequently, on the facts of this case, we were satisfied that the common law doctrine of *autrefois acquit* would not preclude the Prosecution from proceeding with the Non-Capital Charges. Nevertheless, we found it unnecessary to reach a final conclusion on whether the common law doctrine of *autrefois acquit* should be expanded to accommodate the broader test of substantial similarity, since, as alluded to at [16] above and as will be evident below, we concluded that the Prosecution was precluded from reinstating the Non-Capital Charges by operation of the doctrine of abuse of process.

Issue Estoppel

37 Mr Beh argued that the question of his knowledge of the existence of the drugs that form the subject matter of the Non-Capital Charges is in any case barred from being reopened by reason of the doctrine of *res judicata*. This was said to follow from his having successfully rebutted the presumption of

possession under s 21 of the MDA in respect of the methamphetamine found in the same plastic bag that also contained the drugs in the Non-Capital Charges.

38 As this Court has stated in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*RBS*") at [98], endorsing Lord Sumption's *dicta* in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 at [17], *res judicata* is a "portmanteau term which is used to describe a number of different legal principles with different juridical origins". The doctrine of *res judicata* includes the distinct but interrelated principles of (a) cause of action estoppel; (b) issue estoppel; and (c) the "extended" doctrine of *res judicata* under *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 ("*Henderson*") (see *RBS* at [98]–[102]; see also *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [17]–[25]).

(a) Cause of action estoppel prevents a party from asserting or denying against the other party the existence of a particular cause of action which has already been determined in previous litigation between the same parties.

(b) Issue estoppel is of wider application than cause of action estoppel and arises when a court has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties. Issue estoppel prevents a party from relitigating such a question of fact or law.

(c) The rule in *Henderson* extends cause of action estoppel and issue estoppel to cases where the point sought to be argued in later

> proceedings was not previously decided by the court in the earlier proceedings between the same parties because it was not raised in the earlier proceedings, even though it could and should have been raised in those earlier proceedings (see also *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 ("*Andy Lim*") at [36]). While some potential confusion on terminology might arise because the rule in *Henderson* is also sometimes referred to as the "abuse of process" doctrine, this overlap is rationalised on the basis that *res judicata* and abuse of process are overlapping concepts with a common underlying purpose of limiting abusive and duplicative litigation. Thus, there is no difficulty in conceiving of the rule in *Henderson* as being concerned with abuse of process while simultaneously being part of the doctrine of *res judicata*. This overlap was pertinent in the present case because, as shall be evident below, the abuse of process concerns in this case overlapped significantly with those underlying the rule in *Henderson*.

39 As we also explained in *RBS* at [103]–[104], it is important to determine precisely which of the three *res judicata* principles applies on the facts of a given case because they call for different approaches. Where cause of action estoppel applies, the bar is absolute in relation to all points decided unless fraud or collusion is alleged. On the other hand, issue estoppel is less rigid, in that there might be an exception to it in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, provided that the further material in question could not by reasonable diligence have been adduced in those earlier proceedings. This may be further contrasted with the *Henderson* extended doctrine of *res judicata*, which accords a higher degree of flexibility to the court to look at all the circumstances of the case, including whether there is fresh

evidence that might warrant re-litigation or whether there are *bona fide* reasons for a matter not having been raised in the earlier proceedings.

40 Mr Beh did not identify which aspect of the doctrine of *res judicata* he was relying on. He also did not address the question of whether issue estoppel was applicable in the criminal context ("criminal issue estoppel"). It is unfortunate that Mr Beh was unable to provide a clear and precise articulation of the particular aspect of the *res judicata* doctrine which he was relying on.

41 The Prosecution submitted that the applicable doctrine was issue estoppel, and cited *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 at [60] to emphasise that the court there thought it was not settled whether issue estoppel should apply to criminal law. In any case, the Application of English Law Act (Cap 7A, 1994 Rev Ed) imports the position in the UK that the doctrine of issue estoppel had no place in criminal law, as was held in *Director of Public Prosecutions v Humphrys* [1977] AC 1 ("*Humphrys*"). Thus, the Prosecution submitted that issue estoppel should not apply to criminal proceedings in Singapore. Alternatively, the Prosecution submitted that a broader exception to criminal issue estoppel than is applicable in civil proceedings should apply.

42 We agreed with the Prosecution that the issue framed by Mr Beh appeared to concern the principle of issue estoppel, since Mr Beh was submitting that a question of fact – namely, whether he knew of the existence of the plastic bag in the motorcycle's seat compartment – had already been determined by this Court and therefore could not be raised in a fresh criminal trial. We thus proceed with the analysis on this basis.

43 The current status of criminal issue estoppel appears to vary across the common law jurisdictions. The starting point for analysing issue estoppel in the criminal law is the House of Lords' decision in *Humphrys.* There, the respondent was acquitted on a charge of driving while disqualified because the constable's eyewitness evidence was unsatisfactory. Subsequently, the respondent was charged with perjury for saying on oath that he had not driven any vehicle in 1972. The prosecution sought to call the constable as a witness again to repeat his testimony that the respondent was the rider of the motorcycle he had stopped. Over the objections of the defence, the constable gave evidence and the respondent was convicted of perjury. The English Court of Appeal quashed the conviction, finding that the constable's evidence was inadmissible because of issue estoppel. The prosecution appealed.

44 The House of Lords allowed the appeal. First, the Law Lords unanimously rejected the applicability of issue estoppel in criminal proceedings (per Viscount Dilhorne at 21; per Lord Hailsham of St. Marylebone at 40–41; per Lord Salmon at 43–44; per Lord Edmund-Davies at 48; per Lord Fraser of Tullybelton at 58). In so holding, they departed from *dicta* in *Connelly* (at 1306, 1321, 1334, 1366 per Lords Morris, Hodson and Pearce) suggesting the potential applicability of issue estoppel. The main reasons for coming to this view were explained primarily by Lord Salmon and can be distilled as follows.

(a) First, it was unnecessary because the doctrines of *autrefois acquit* and *convict* sufficiently protect against double jeopardy without the need to introduce a technical and complex doctrine into the criminal law (per Lord Salmon at 43–44).

(b) Second, it was inappropriate because there are no pleadings in criminal proceedings that serve to define the issues and no judgments

that explain how the issues, even if identifiable, are decided. Juries return general verdicts of "guilty" or "not guilty" (per Lord Salmon at 43).

(c) Third, it was artificial and unfair. Where the jury decides in favour of the accused only because they are left in doubt as to whether the contrary has been proved, it would be "artificial and unjust" if the accused is "given the added bonus that that issue should thereafter be presumed for ever to have been irrevocably decided in his favour as between himself and the Crown", with the effect that upon a totally different charge, supported by overwhelming evidence against him, he might escape conviction because of issue estoppel (per Lord Salmon at 43). This would "work public mischief by bringing the law into disrepute" (per Lord Edmund-Davies at 56).

(d) Finally, it should not be open to the Crown to invoke issue estoppel in criminal proceedings. The Crown and the accused are not in the same or even an analogous position to opposing litigants in civil proceedings (who are on an equal footing and subject to the same rules of public policy). In criminal cases, issue estoppel springs from the rule of public policy that is the prohibition against double jeopardy (which is intrinsically unavailable to the Crown). In civil cases, the relevant rule of public policy underlying issue estoppel – the need for finality in litigation – is intrinsically applicable to both parties. Also, in criminal proceedings the Crown is charged with protecting innocent citizens against crime and vindicating public justice. It therefore has "interests and duties which are not simply those of a civil litigant'" and the application of "artificial rules, like those of estoppel" to the criminal

process must be seen in the light of these considerations (per Lord Hailsham at 32–33).

45 Therefore, the House of Lords held that the determination at the first trial of an issue in the accused's favour was no bar to the admission at the second trial of evidence given at the first trial where this was directed to establishing perjury at the first trial (per Viscount Dilhorne at 26). The House of Lords unanimously allowed the appeal and restored the conviction entered by the trial judge.

46 *Humphrys* has been endorsed and followed in New Zealand (see *R v Davis* [1982] 1 NZLR 584 at 589) and Hong Kong (see *R v Yu Wai-shan and another* [1986] HKLR 550 at 553–554). Australia also does not recognise criminal issue estoppel (see, for example, *Rogers v R* (1994) 123 ALR 417).

47 On the other hand, other jurisdictions have recognised criminal issue estoppel. We do not propose to outline all the cases here. It suffices for present purposes to highlight the Canadian case of *R v Mahalingan* [2008] 3 SCR 316 ("*Mahalingan*"), which was a useful reasoned decision on this issue. There, the Supreme Court of Canada held by a 5:3 majority that fairness requires that an accused should not be called upon to answer discrete factual and legal issues (short of the ultimate verdict) that have been resolved in his or her favour in a previous proceeding. If an issue supporting an acquittal is resolved in favour of the accused person on one offence, whether on the basis of a positive factual finding or a reasonable doubt, evidence to contradict the finding on that issue cannot subsequently be led again in respect of different charges (*Mahalingan* at [31], [39], [40], and [75]). The majority in *Mahalingan* further opined that other rules of criminal law did not completely meet the fairness concern. The doctrine of *autrefois acquit* only applied to the final verdict and not to specific underlying

elements of the Crown's case. It was also thought that abuse of process was a broad, discretionary concept requiring a high threshold of proof that may not adequately protect against re-litigation of a particular issue (at [41]–[42]).

48 It is evident that a multitude of reasons have been cited both for and against the applicability of issue estoppel in criminal proceedings. Not all of them are relevant to the context in Singapore, particularly some of the concerns highlighted in *Humphrys*, since we do not have a system of jury trials at all. Consequently, *Humphrys* cannot be imported into Singapore without careful consideration of its applicability in our context.

49 In Singapore, this Court has made the following observations in relation to the differences between criminal and civil cases, and the implications of the applicability of *res judicata* in criminal proceedings, in *RBS* at [127]–[128] (though the issue there was whether a prior decision made by a court without jurisdiction can give rise to *res judicata*):

> 127 … Criminal cases and civil cases may involve different considerations. Among the more obvious of these is that in criminal cases, what is at stake is very often an individual's liberty, and, sometimes, even his life. There is also the fact that a criminal conviction marks an individual, potentially for life, with the accompanying moral stigma. Given the gravity of the potential consequences and the public interest in ensuring that the exercise of the State's coercive powers in the realm of criminal justice is beyond reproach, we doubt that any court in the world would uphold a wrongful conviction – let alone a conviction handed down by a court without jurisdiction – on the ground of finality alone. These are not concerns in civil cases. A similar appreciation for this difference between civil cases and criminal cases was demonstrated in a different context by Chao Hick Tin JA in *Soh Meiyun v PP* [2014] 3 SLR 299, where he considered (at [13]–[15]) that an appellate court's readiness to admit additional evidence on appeal in a criminal case would not necessarily be constrained to the same degree as in a civil case.
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> 128 Another difference between criminal cases and civil cases was articulated by Lord Hailsham of St Marylebone in the

> House of Lords decision of *Director of Public Prosecutions v Humphrys* [1977] AC 1 at 32G–33B, namely, that the parties in civil cases are "on an equal footing", but in criminal cases, the accused "requires to be protected against oppression by the executive". Moreover, in criminal cases, the State "has interests and duties which are not simply those of a civil litigant". Because the parties in criminal proceedings are not equally situated, criminal cases may require an approach that allows more flexibility in appropriate circumstances in order to correct the imbalance; the logic of *res judicata*, however, is that it operates equally against all parties. Hence, *res judicata may be less apt in the criminal context*, and correspondingly, any generosity that may be extended in the criminal context towards an accused who wishes to reopen a decision against him by taking a belated jurisdictional objection, such as was shown by the CA in *Koh Tony*, would not be apt in the civil context, where greater stringency would be called for and where considerably more weight will be placed on the interest of finality in litigation.
>
> [emphasis added]

50 As alluded to at [16] above, it was unnecessary for us to reach a conclusion on this controversial issue of whether issue estoppel should apply in criminal proceedings. We thus left this question open for determination in a more appropriate case in the future where it squarely arises. In the present case, we found the crux of the problem with the Prosecution's intention to proceed with the Non-Capital Charges to be that it would amount to an abuse of process. It is to this question that we now turn.

Abuse of process

51 Mr Beh argued that the proposed trial of the Non-Capital Charges would be an abuse of process. The Prosecution's intention in going ahead with the Non-Capital Charges was to call Mr Lew. Not only was this impermissible because Mr Lew's testimony is not new evidence as it was reasonably available to the Prosecution, but calling Lew would also be an attempt to relitigate the acquittal on the Capital Charge. In addition, the proposed trial of the Non-Capital Charges was otherwise unfair or oppressive because it suggests that

there was nothing preventing the Prosecution from proceeding with the Non-Capital Charges one at a time, perhaps until Mr Beh was eventually convicted.

52 The Prosecution submitted that there was no abuse of process because the criminal process was not being invoked to serve a purpose other than *bona fide* prosecution of Mr Beh on the remaining charges. The Prosecution was not seeking a retrial on the Capital Charge since, regardless of the outcome for the Non-Capital Charges, the former acquittal would stand. There was, in any case, no evidence of oppressive drip-feeding, because the Prosecution had indicated that it would apply for Mr Beh to be tried on all the Non-Capital charges together and not sequentially.

The principles and contours of abuse of process

53 The traditional concept of abuse of process in the context of the criminal law is where the criminal process is being used for a purpose other than the *bona fide* prosecution of criminals. The essence of the concern is that the judicial process is being used for a purpose for which it was not intended or where the extraneous purpose is the dominant purpose for its use: see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [132]. However, the doctrine of abuse of process is of wider application. For instance, in *Effrizan Kamisran v Public Prosecutor* [2020] 5 SLR 747 at [50], a special three-judge bench sitting in the High Court recognised that an individual would generally be protected by the abuse of process doctrine from a prosecution being initiated in respect of or arising from the same conduct that had led to an admission into a drug rehabilitation centre.

54 In this case, the specific complaint raised by Mr Beh was that the Prosecution was seeking, in effect, to mount a collateral attack against the first CA Judgment by attempting to secure an inconsistent court judgment in the

proposed trial of the Non-Capital Charges and this would amount to an abuse of process. After all, if the trial of the Non-Capital Charges resulted in a finding that Mr Beh did know of the plastic bag and its contents, it would raise questions as to his acquittal on the Capital Charge.

55 In order to determine the contours of the doctrine of abuse of process and its specific applicability in this case, we begin by distinguishing several contexts in which the question of "collateral attack" arises. To draw out the relevant considerations, we will consider the situations where the collateral attack is said to be:

(a) on a prior civil judgment, in later civil proceedings;

(b) on a prior criminal judgment, in later civil proceedings;

(c) on a prior civil judgment, in later criminal proceedings; and

(d) on a prior criminal judgment, in later criminal proceedings (the present case).

Prior civil and later civil proceedings

56 We first consider the situation where the "collateral attack" is said to be on a prior civil judgment in later civil proceedings. Suppose that X has claims under three contracts against Z, and some of the issues overlap. X brings a claim under the first contract to trial and is unsuccessful. X then seeks to litigate the second claim but seeks to adduce new evidence in respect of the identical issue that has been ruled against it.

57 In such a scenario, where the litigant attempts to relitigate the matter instead of bringing its whole case at once, the *Henderson* extended doctrine of

res judicata, which also has underlying considerations of preventing the abuse of the judicial process, would be a safeguard to bar the re-litigation of a point that properly belonged to the subject-matter of earlier litigation and which the parties, exercising reasonable diligence, should have brought forward at the time (see [38(c)] above). The rule in *Henderson* is not confined only to repeated claims by the same plaintiff or to repeated claims against the same defendant. The rule is applicable where "some connection" can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, and such a connection would make it unjust to allow that party to reopen the issue: see *Andy Lim* at [44].

Prior criminal and later civil proceedings

58 The next situation is where the "collateral attack" is said to be on a prior criminal judgment in later civil proceedings ("criminal-civil" scenario). The leading case on this issue is and remains the House of Lords' decision in *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529 ("*Hunter*"). There, the appellant was charged with murder. During the trial, a *voir dire* was held to ascertain the voluntariness of certain statements recorded from the appellant. In particular, the appellant alleged that he had been assaulted by the police before his confession was obtained. The trial judge admitted the evidence, finding that the prosecution had proven beyond reasonable doubt that the appellant had not been assaulted by the police and the statements were in fact voluntary. The appellant was convicted of murder and sentenced to life imprisonment. He appealed but no issue was taken with the judge's ruling on the admissibility of the statements. The appeals were dismissed. Subsequently, the appellant commenced a civil action against the police claiming damages for the identical assaults that had allegedly taken place and had been canvassed at

the *voir dir*e to determine the voluntariness of the statements. The defendant sought to strike out the statement of claim on the ground of abuse of process.

59 The House of Lords unanimously held that the civil action was an abuse of process. Lord Diplock (who delivered the leading judgment) began by explaining the abuse of process doctrine as follows (at 536B):

> My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be *manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. … [emphasis added]

60 Lord Diplock then further outlined the collateral attack doctrine as follows (at 541H–542C):

> My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. … But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith L.J. in *Stephenson v. Garnett* [I8981 1 Q.B. 677, 680-681 and the speech of Lord Halsbury L.C. in *Reichel v. Magrath* (1889) 14 App. Cas. 665, 668 which are cited by Goff L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J.:
>
> > '… the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so *when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court*.'
>
> The passage from Lord Halsbury's speech deserves repetition here in full:
>
> > '… I think it would be a *scandal to the administration of justice* if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'

> [emphasis added]

61 As to whether there was an abuse of process on the facts of that case, Lord Diplock found that "the identical question sought to be raised has been already decided" (at 542B). Thus, the abuse of process lay in (at 541B):

> … the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings *in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made*. [emphasis added]

62 The "proper method" of attacking the trial judge's decision in the *voir dire* that he was not assaulted by the police (at 541C):

> … would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous *a ground of his appeal against his conviction* to the Criminal Division of the Court of Appeal. This Hunter did not do. [emphasis added]

63 This was a point which was somewhat material to the present case, as we explain below.

64 Also relevant to Lord Diplock's decision was the fact that the expert evidence from the doctor that the appellant sought to adduce "was available at the trial or could by reasonable diligence have been obtained then" (at 545B); and further that the "dominant purpose" of the action was not to recover damages, but to pressurise the Home Secretary to release them from the life sentences. Lord Diplock inferred this purpose from the manner in which the action was conducted (the appellant did not obtain judgment on liability and proceed to assessment of damages, even though he was in a position to do so, since the Home Office had amended their defence to admit liability for the alleged assaults by the prison officers) (at 541F–G).

65 Lord Diplock went further on in *Hunter* to observe that, to relitigate the matter, there needs at least to be new evidence not called at the criminal trial that will "entirely change the aspect of the case" at the civil trial (at 545C, applying a *dictum* of Earl Cairns L.C. in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, 814).

66 While the Law Lords in *Hunter* found it relevant in that case that Hunter had improper purposes for the civil proceedings, it has since been established that an improper motive is not necessary for a finding that the subsequent proceedings constitute an abuse of process: see *Smith v Linskills (a firm)* [1996] 1 WLR 763 at 771D per Sir Thomas Bingham MR.

67 *Hunter* has been consistently considered and applied by the English courts: see, for example, *Arthur J S Hall & Co (a firm) v Simons; Barratt v Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615 ("*Arthur J S Hall*") at [16] and [32]; *Michael Wilson & Partners Ltd v Sinclair and others (Emmott, Part 20 defendant)* [2017] 1 WLR 2646 ("*Michael Wilson*") at [39]; *Koza Ltd and another v Koza Altin Isletmeleri AS* [2021] 1 WLR 170 ("*Koza*") at [30] and [36].

68 In *Arthur J S Hall*, the House of Lords was concerned with the question of whether the advocate's immunity from suit should be retained. It was in that context that the Law Lords had to consider the applicability of the principle in *Hunter*, including whether it precluded those convicted of criminal offences from suing their advocates for negligence. What is relevant for present purposes is that Lord Bingham of Cornhill LCJ said at [38] that a careful analysis of the specific circumstances of each case would have to be undertaken to determine whether there is an abuse of process by collateral attack:

> … the House of Lords did not decide in the *Hunter* case that the initiation of later proceedings collaterally challenging an earlier judgment is necessarily an abuse of process *but that it may be*. In considering whether, in any given case, later proceedings do constitute an abusive collateral challenge to an earlier subsisting judgment *it is always necessary to consider with care (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such)*. [emphasis added]

69 In *Arthur J S Hall*, Lord Hoffmann outlined (at 701) two policies which underlie the discouragement of re-litigation:

> The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with *the interests of the defendant: a person should not be troubled twice for the same reason*. This policy has generated the rules which prevent relitigation when the parties are the same: *autrefois acquit*, *res judicata* and issue estoppel. The second policy is wider: *it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again*. … [emphasis added]

70 Lord Hoffmann (with whom Lords Browne-Wilkinson, Hutton and Millett agreed) also considered that there is a relevant distinction between criminal and civil proceedings (at 706):

> There is, I think, a relevant difference between criminal proceedings and civil proceedings. In civil proceedings, the maxim *nemo debet bis vexari pro una et eadem causa* applies very strongly. Fresh evidence is admissible on appeal only subject to strict conditions. Even if a decision is based upon a view of the law which is subsequently expressly overruled by a higher court, the judgment itself remains *res judicata* and cannot be set aside: see *In re Waring (No 2)* [1948] Ch 221. An issue estoppel created by earlier litigation is binding subject to narrow exceptions: see *Arnold v National Westminster Bank plc* [1991] 2 AC 93. *But the scope for re-examination in criminal proceedings is much wider*. Fresh evidence is more readily admitted. A conviction may be set aside as unsafe and unsatisfactory when the accused appears to have been

> prejudiced by "flagrantly incompetent advocacy": see *R v Clinton* [1993] 1 WLR 1181. After appeal, the case may be referred to the Court of Appeal (if the conviction was on indictment) or to the Crown Court (if the trial was summary) by the Criminal Cases Review Commission: see Part II of the Criminal Appeal Act 1995.
>
> It follows that in my opinion it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a conviction on a plea of guilty as well as after a trial. The resulting conflict of judgments is likely to bring the administration of justice into disrepute. The arguments of Lord Diplock in the long passage which I have quoted from *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222-223 are compelling. The proper procedure is to appeal, or if the right of appeal has been exhausted, to apply to the Criminal Cases Review Commission under section 14 of the 1995 Act. I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute. *Walpole v Partridge & Wilson* [1994] QB 106 was such a case.
>
> [emphasis added]

71 As to the relationship between the rule in *Henderson* and the *Hunter* principle resting on a collateral attack constituting an abuse of process, there is, as recognised by Simon LJ in *Koza* at [38], a "potential overlap" between the two doctrines. In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, which remains the leading modern authority on the rule in *Henderson* in England and Wales, Lord Bingham noted (at 31) that the *Hunter* fact pattern may simply be a "much more obviously abusive" situation than the *Henderson* scenario.

72 The modern principles on the relevant considerations under the *Hunter* doctrine were distilled and outlined by Simon LJ (with whom the other Lord Justices agreed with) in *Michael Wilson* at [48], which we reproduce in full here because it is a helpful summary of the position at common law:

> (1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: *the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not*

having issues repeatedly litigated; see Lord Diplock in *Hunter's* case [1982] AC 529, Lord Hoffmann in the *Arthur J S Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect *unfairness to a party on the one hand*, and *the risk of the administration of public justice being brought into disrepute on the other*, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged.

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no *prima facie* assumption that such proceedings amount to an abuse: see *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur J S Hall* case.

(3) To determine whether proceedings are abusive the court must engage in a *close 'merits based' analysis of the facts*. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v Gore Wood & Co* and Buxton LJ in *Laing v Taylor Walton* [2008] PNLR 11.

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur J S Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case [2004] Ch 1; or, as Lord Hobhouse put it in the *Arthur J S Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.

To which one further point may be added.

(6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion.

> Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Laing v Taylor Walton* case, para 13.
>
> [emphasis added]

Prior civil and later criminal proceedings

73 As for the situation where the "collateral attack" is said to be on a prior civil judgment in later criminal proceedings, this appears hardly ever to have been regarded as giving rise to an abuse of process. This was succinctly explained by Templeman J in the decision of the Court of Criminal Appeal of Western Australia in *Roberts v Western Australia* [2005] WASCA 37 at [50]:

> … no authority was cited to the Court in which it had been held inappropriate to prosecute criminal proceedings where the issues which fell to be determined in those proceedings had been determined previously in civil litigation. That is perhaps because subsequent criminal proceedings, while no doubt oppressive to the accused person, could not usually be said to be *unjustifiably* so: in most, if not all cases, the public interest in prosecuting alleged offenders would far outweigh the oppressive nature of the proceedings. [emphasis in original]

74 Templeman J elaborated at [51]–[52] that a factor to consider is the public confidence in the administration of justice. That confidence would be lost if the State were unable to prosecute alleged offenders simply because the relevant issue had been litigated in civil proceedings.

75 McLure J further explained at [160]:

> … Parties in civil proceedings choose the issues they wished to contest and the evidence to support those issues. It would be contrary to the public interest if the conduct of matters by litigants in civil proceedings could prevent the pursuit by the State of alleged breaches of criminal law. …

Prior criminal and later criminal proceedings

76 We turn finally to the situation in this case, which concerns the potential "collateral attack" on a prior criminal judgment in later criminal proceedings ("criminal-criminal" scenario).

77 In *R v Carroll* (2002) 194 ALR 1 ("*Carroll*"), the High Court of Australia laid down a standard of manifest inconsistency to identify an abuse of process in circumstances where a prior criminal decision appeared to be collaterally attacked in subsequent criminal proceedings. The case concerned an earlier murder charge and a later perjury charge. The following principles may be distilled from the court's reasoning, particularly in the judgments of Gleeson CJ and Hayne J.

(a) Finality is an important aspect of any system of justice. The incontrovertibility of an acquittal is rooted in the finality of judicial proceedings: *Carroll* at [22] and [48].

(b) The basic position is that the acquittal at the first trial is to be treated as "incontrovertibly correct": *Carroll* at [35].

(c) There are cases where a subsequent charge of an offence would be manifestly inconsistent on the facts with a previous acquittal, even though no plea of *autrefois acquit* was available. Since, in most cases of trial by jury, it will not be known why the accused was acquitted, the inconsistency, if it exists, will appear from a comparison of the elements of the new charge with the verdict of not guilty of the previous charge, understood in the light of the issues at the first trial: *Carroll* at [40].

(d) The court declined to set down the limits of the incontrovertibility of a decision, beyond relying on manifest

inconsistency or "direct inconsistency" between the new charge and earlier verdict as an instance of abuse. It observed that it would be necessary to examine the elements of the offence of which the person was acquitted and those of the offence with which the person is later charged. It also noted that the assessment of abuse would "[s]eldom, if ever" require considering whether the evidence which would be led at a second trial is new or persuasive: *Carroll* at [45] and [47].

(e) The court also noted at [50] that the finality of a verdict of acquittal does not necessarily prevent the institution of proceedings or the tender of evidence "which might have the incidental effect of casting doubt upon, or even demonstrating the error of, an earlier decision". The court had in mind cases where, at a later trial of allegedly similar conduct of an accused, evidence of conduct may be adduced even though the accused had earlier been charged with and acquitted of an offence said to be constituted by that conduct.

78 Manifest inconsistency was found on the facts of *Carroll*. The only element of the offence of murder in issue was whether the respondent killed the victim. The perjury alleged at the second trial was the respondent's false denial on oath that he had killed the victim. It was necessarily implied in the perjury indictment that the respondent had killed the victim. Thus, the indictment for perjury should have been stayed as the prosecution "inevitably sought to controvert" the earlier acquittal on a charge of murder: *Carroll a*t [41]–[42], [51].

79 *Humphrys* likewise highlights the importance of scrutinising the facts and allegations raised. The facts of that case have been summarised at [43] above. The House of Lords held (per Lord Hailsham at 41) that:

> … where the evidence is substantially identical with the evidence given at the first trial without any addition and the Crown is in substance simply seeking to get behind a verdict of acquittal, the second charge is inadmissible both on the ground that it infringes the rule against double jeopardy and on the ground that it is an abuse of the process of the court, whether or not the charge is in form a charge of perjury at the first trial.

80 Therefore, unlike *Carroll* (see [77(d)] above), *Humphrys* emphasises the need to examine whether any fresh evidence is to be adduced in the subsequent proceedings. On the facts of *Humphrys*, Lord Salmon reasoned (at 47) that:

> If, in the present case, the respondent at his first trial had said no more than that he had not been the man driving the motor cycle caught in the radar trap by Police Constable Weight on 18 July 1972, and after his acquittal had been charged with perjury, Police Constable Weight being again the only witness against him, corroborated to some extent by the respondent's plea of guilty to forging on July 20, 1972, the application to re-license the motor cycle PGY 673E, *in my view this would have been oppressive and an abuse of the process of the court.* But here the facts are very different. The respondent was not charged with perjury in saying that he had not been the man driving a motor vehicle on July 18, 1972. He was charged with perjury in saying that he had not driven any motor vehicle at any time during 1972. And there was a substantial body of evidence, to which I have already referred, to prove that this evidence was a lie. In my view the evidence of Police Constable Weight on this point was admissible for the reasons I have already given. [emphasis added]

81 The notion that it may be an abuse of process to continue a prosecution in light of a prior court decision is also supported by the Canadian case of *R v Clarke* (2003) NSPC 12. The accused person there was charged in Nova Scotia with marijuana possession. She applied for a stay of the charge on the ground that courts in Ontario and Prince Edward Island had ruled that the offence was invalid. The Nova Scotia Provincial Court agreed that permitting the proceedings to continue would be an abuse of process, as the Crown should not be allowed to relitigate the issue in each province and the public was entitled to expect uniformity in the prosecution of federal law (at [15] and [17]).

The proper approach in the present case

82 We found the authorities in the criminal-civil and criminal-criminal scenarios to be relevant to the present situation. The following broad principles could be distilled from the cases.

(a) The court has the inherent power to prevent the use of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people (see [59] above).

(b) Finality is an important aspect of any system of justice (see [77(a)] above).

(c) A verdict of acquittal (after the avenues of appeal have been exhausted) is to be treated as incontrovertibly correct (see [77(b)] above).

(d) The doctrine of abuse of process is founded not only on the private interest of a party not to be vexed twice in respect of the same complaint but also on the public interest of the state in not having issues repeatedly litigated. These interests reflect unfairness to a party on the one hand, and the risk of the administration of justice being brought into disrepute on the other. On the latter point, it would bring disrepute to the administration of justice if, the same question having been disposed of in one case, the litigant in a civil case were permitted by changing the form of the proceedings to reopen the same issue (see [60], [69] and [72] above). This should similarly be the case in the criminal-criminal context.

(e) The "proper method" of challenging any aspect of a trial judge's decision is to make that challenge in an appeal against the trial judge's decision (see [62] above).

(f) The initiation of later proceedings collaterally challenging an earlier judgment is not necessarily an abuse of process, but it may be. The court's power to strike out or prohibit the subsequent proceedings on the basis that it is an abusive collateral attack on the prior judgment should only be used where justice and public policy demand it. Whether or not there is an abusive collateral attack in any given case is a fact-sensitive enquiry (see [68], [72], [77(d)] and [79] above).

(g) It may be an abuse of process to continue a prosecution in the light of a prior court decision (see [81] above). An improper motive is not necessary for subsequent proceedings to constitute an abuse of process (see [66] above). In the criminal-criminal context, the key yardstick should be whether there would be manifest inconsistency between the court's findings in the new proceedings and the earlier judgment (per *Carroll*; see [77] above). There would clearly be such a risk of manifest inconsistency if there is an "identical" material issue in both the prior and subsequent proceedings (per *Hunter*; see [60] to [61] above). While *Carroll* concerned a trial by jury, the principle applies with even greater force in our context, which does not feature jury trials. This is so because a potential manifest inconsistency in a criminal-criminal context can be more easily identified, given that the court's reasons for a previous decision (where available) can be scrutinised in order to determine whether the fresh criminal proceedings give rise to such a manifest inconsistency.

83 We were satisfied that the foregoing principles were applicable in the criminal-criminal context here. While Lord Hoffmann did recognise in *Arthur J S Hall* at 706 that the scope for re-examination is wider in criminal proceedings than civil proceedings (see [70] above), he was making this comment in the context of a prior criminal *conviction* which ought to be re-examined and set aside as unsafe and unsatisfactory on the basis of fresh evidence. This was not the same situation as the present, where there is a prior *acquittal* which may be potentially collaterally attacked by a court's findings in the subsequent criminal trial (albeit on different charges).

84 Therefore, the central consideration is the degree of overlap between the issues raised in the prior and subsequent criminal proceedings. However, the existence of manifest inconsistency between the earlier and the pending or intended proceedings may not, in and of itself, amount to an abuse of process. It will be necessary to consider whether, in all the circumstances, it would be unfair and unjust to the accused person or otherwise inconsistent with the fair administration of justice to permit the pending or intended proceedings to continue (see [82(f)] above). We do not wish to be unduly prescriptive as to the factors that should be considered in determining whether there would be an abuse of process, but, in the context of this matter, we considered a number of factors which are set out below at [88] to [105] below. This included, in particular, the availability of what may properly be regarded as *fresh* evidence. Fresh proceedings that are commenced on the basis of evidence *that was not available in the earlier proceedings* might well not amount to an abuse of process. Conversely, an attempt in fresh proceedings to rely on evidence that was not, *but could have been*, adduced in the earlier proceedings would more likely amount to an abuse of process (see *Humphrys* at [79] above; see also *Hunter* at [65] above). This is because *res judicata* and abuse of process are overlapping concepts which seek to prohibit abusive and duplicative litigation

(see [38(c)] above). The doctrine of abusive collateral attack is, essentially, an extension of the *Henderson* doctrine (see [71] above).

85 How do the foregoing principles implicate the Public Prosecutor's discretion to conduct prosecutions? We accept that the Public Prosecutor has, under Art 35(8) of the Constitution and s 11 of the CPC, a wide discretion on how to institute, conduct or discontinue any criminal prosecutions. In this case, the Prosecution's intention to reinstate and proceed with a trial of the Non-Capital Charges was *prima facie* permitted by s 147(3) of the CPC, as highlighted at [7] above. However, that was not the end of the matter. As this Court explained in *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 ("*Lim Chit Foo*") at [20]–[22], while the prosecutorial and judicial functions are given equal status in the Constitution, the judicial power may circumscribe prosecutorial power in two ways. First, the court may declare the wrongful exercise of the prosecutorial power to be unconstitutional. Second, when an accused is brought before a court, the proceedings thereafter are subject to the control of the court.

86 It is thus the function and responsibility of the *court* to determine how the proceedings as a whole, involving both the Prosecution and the Defence, will be managed and conducted. In this case, the question of whether the Prosecution should be permitted to reinstate and proceed with a trial of the Non-Capital Charges was clearly not confined to a question of the Prosecution's discretion in its conduct of criminal prosecutions. It also raised the question of how the proposed criminal proceedings as a whole would be managed and specifically whether it would give rise to an abuse of process. This seems also to be consistent with the fact that, under s 147(3) of the CPC, the ability to proceed with the trial of any charges previously withdrawn is subject to any order of the court setting aside the conviction. It was therefore not disputed

between the parties that it was open to this Court to determine whether the Prosecution should be permitted to reinstate and proceed with a trial of the withdrawn Non-Capital Charges. We now turn to this question.

Application to the present case

87 To be clear, there was no question or suggestion of any bad faith or improper motives underlying the intended prosecution of the Non-Capital Charges. However, as mentioned at [82(g)] above, this was neither relevant nor material and was not the nature of abuse of process with which we were concerned in this case. Rather, we found that allowing the Prosecution to reinstate and proceed with a trial of the Non-Capital Charges would amount to an abuse of process because it would amount to a collateral attack on Mr Beh's prior acquittal of the Capital Charge and it would be unfair and unjust to him or otherwise inconsistent with the fair administration of justice to permit the intended trial of the Non-Capital Charges to be proceeded with.

88 There were five critical factors which led us to this conclusion.

89 First, the key fact on which Mr Beh was acquitted of the Capital Charge – the fact that he did not know of the existence of the blue plastic bag containing the Ice (the "possession issue") – is the identical fact which will need to be proved by the Prosecution in any trial of the Non-Capital Charges. This is because (a) all the Charges were for the offence of unauthorised drug importation under s 7 of the MDA, which contain the same elements of knowing possession of the drug and knowledge of the nature of the drug; and (b) all the drugs in the Charges were found in the *same blue plastic bag* hidden in the motorcycle that Mr Beh had borrowed and ridden into Singapore with on the *same occasion* on 26 October 2016 at about 5.20am at the Woodlands Checkpoint. This gave rise to a manifest and irreconcilable inconsistency

between the finding of this Court in respect of the Capital Charge and the outcome the Prosecution was seeking in respect of the Non-Capital Charges.

90 Had Mr Beh been acquitted of the Capital Charge because he successfully proved, for instance, that he did not know the nature of the drugs in that case, that would likely not have raised any risk of such manifest inconsistency since the drugs in the Non-Capital Charges are different in nature. However, the issue of knowing possession was *identical* for all the Charges, namely, whether Mr Beh knew of the existence of the blue plastic bag containing the "things" found to be drugs. This Court had made a finding on the possession issue in the first CA Judgment to the effect that Mr Beh did not knowingly possess the blue plastic bag containing the Ice. The Prosecution's intention to proceed with a trial in the State Courts on the Non-Capital Charges would, as the learned Deputy Public Prosecutor ("DPP"), Mr Wong Woon Kwong ("DPP Wong"), conceded, necessarily involve the Prosecution seeking to convince the trial court to reach an *opposite* conclusion on the possession issue. This was what created the risk of manifestly inconsistent findings on the possession issue. And as outlined above, this is one of the mischiefs which courts guard against, both because it would be unfair to the accused that the Prosecution can mount a second attempt to make its case against the accused on an identical issue, and also because it may bring the administration of justice into disrepute if manifestly inconsistent findings are reached by two different courts on the identical issue.

91 Second, to successfully prove the Non-Capital Charges, the Prosecution intended to adduce two pieces of evidence that it did not or was not able, in the event, to rely on in the Capital Charge proceedings. The Prosecution intended, first, to call Mr Lew as a witness and, second, to cross-examine Mr Beh on the text messages which the Judge had disallowed (see [8(e)] above). DPP Wong

admitted at the hearing before us that, in light of this Court's findings in the first CA Judgment, the prosecution of the Non-Capital Charges would not succeed or would at least face immense difficulties without these two pieces of evidence.

92 However, it was the Prosecution's own *election* not to call Mr Lew as a witness in the trial of the Capital Charge and this was a material factor that was held against it in the earlier judgment of this Court.

93 As to the Judge's ruling on the text messages, we accepted that, as a general rule, an interlocutory order may not be appealed against: see *Xu Yuanchen v Public Prosecutor and another matter* [2021] SGHC 64 ("*Xu Yuanchen*") at [10]. Furthermore, as the Judge had convicted Mr Beh, there was no question of the Prosecution appealing the judgment itself. However, when CCA 1 came before us, it was material that the Prosecution did not then indicate that it was taking issue with the Judge's ruling on the text messages as a factor in favour of upholding the Judge's decision. In other words, no attempt was made to persuade us that, even if we were troubled by the state of the evidence based on which Mr Beh had been convicted at trial, this was at least partly because the Judge erred in having excluded some of the evidence. The concern here is with the stance of the Prosecution at the appeal, and not with whether the Judge was wrong or whether the objections raised by the Defence were valid or not. Even if the Defence may have been wrong in the substance of the objection it raised against the Prosecution's cross-examination of Mr Beh on his text messages in the way it did, the Defence was plainly entitled to canvass the objection. It was also immaterial whether the Judge was wrong to uphold some of these objections. The central issue here was the stance the Prosecution took at the appeal before this Court. Of course, if Mr Beh had not appealed against his conviction, then the conviction would have stood and there would have been

no need or basis for the Prosecution to appeal against the Judge's rulings on the text messages.

94 In this case, however, Mr Beh did appeal against his conviction on the Capital Charge. As noted, we accept that the Prosecution could not have appealed against the Judge's rulings on the text messages just after the Judge made them. Under s 374(3) of the CPC, the Prosecution is only entitled to appeal against "the acquittal of an accused or the sentence imposed on an accused or an order of the trial court", and, under s 374(4A) of the CPC, no appeal may lie against the conviction of an accused of an offence until after the trial court had imposed a sentence in relation to that offence. Section 29A(2) of the applicable Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") during the Capital Charge proceedings ("then-SCJA") – now amended by the Supreme Court of Judicature (Amendment) Act 2019 (No 40 of 2019) with effect from 2 January 2021 as s 60D – also sets out the criminal jurisdiction of the Court of Appeal:

> (2) The criminal jurisdiction of the Court of Appeal consists of the following matters, subject to the provisions of this Act or any other written law regulating the terms and conditions upon which those matters may be brought:
>
> > (*a*) any appeal against any decision made by the High Court in the exercise of its original criminal jurisdiction;
> >
> > (*b*) any petition for confirmation under Division 1A of Part XX of the Criminal Procedure Code (Cap. 68);
> >
> > (*c*) any review of a decision of the Court of Appeal, or a decision of the High Court, under Division 1B of Part XX of the Criminal Procedure Code;
> >
> > (*d*) any case stated to the Court of Appeal under section 395 or 396 of the Criminal Procedure Code;
> >
> > (*e*) any reference to the Court of Appeal under section 397 of the Criminal Procedure Code;
> >
> > (*f*) any motion to the Court of Appeal under Division 5 of Part XX of the Criminal Procedure Code.

95 The text of s 60D of the present SCJA is *in pari materiae* with s 29A(2), except that the phrase "High Court" in ss 29A(2)(*a*) and 29A(2)(*c*) has been amended and replaced with the phrase "General Division" in ss 60D(*a*) and 60D(*c*) (to refer to the General Division of the High Court). It is clear that the Judge's ruling on the text messages does not fall within ss 29A(2)(*b*)–29A(2)(*f*) of the then-SCJA. Sections 29A(2)(*b*)–29A(2)(*c*) deal with review applications; s 29A(2)(*d*) concerns applications to state a case on a question of law; s 29A(2)(*e*) concerns criminal references on a question of law of public interest; and s 29A(2)(*f*) concerns criminal motions. As for s 29A(2)(*a*) of the then-SCJA, the phrase "original criminal jurisdiction" has been interpreted to refer to the trial jurisdiction of the High Court: *Kim Gwang Seok v Public Prosecutor* [2012] 4 SLR 821 ("*Kim Gwang Seok*") at [36]. Therefore, the jurisdiction of the Court of Appeal is generally "to hear appeals against *orders of finality*, meaning those resulting in *conviction and sentence, or acquittal*" [emphasis in original]: *Kim Gwang Seok* at [36]. Nevertheless, it has also been recognised that the bar against appeals on interlocutory matters in criminal proceedings may not be absolute. In *exceptional* cases where there is something "imminently fatal to the applicant's case" (*Xu Yuanchen* at [12]), the law might tolerate appellate intervention on such an issue otherwise than as part of the issues to be raised in the substantive appeal against the final outcome, though the threshold for such an appeal to be entertained is a "high" one.

96 We accept that, in this case, the Prosecution could not have *appealed* against the Judge's rulings on the text messages before conviction and sentence were passed. However, that did not mean that the Prosecution could not and should not have *challenged* the Judge's ruling on the text messages in this case. Since Mr Beh had appealed against his conviction on the Capital Charge, it was *for the Prosecution* to choose how it wished to run its case on appeal. That extended to its ability to contend in its submissions that the Judge had been

wrong to preclude examination of some of the text messages. This, as stated at [82(e)] above, would have been the "proper method" by which a party could challenge a particular aspect of a decision made by a first instance court, where the ultimate decision itself was in that party's favour. This is consistent with *Public Prosecutor v Hoo Chang Chwen* [1962] MLJ 284, where the court held that the appropriate course of action in respect of "interlocutory" matters is "to take such points … upon appeal, after determination of the principal matter in the trial court". It is true that this was said in the context of an appellant who contends that he was in fact prejudiced by the interlocutory ruling and seeks to rely on that in the substantive appeal. However, there is no principled basis for limiting the principle to that setting. The point can be illustrated with an extreme example. Suppose that, in a trial, a judge makes a series of interlocutory rulings that are incorrect and against the Prosecution, but then convicts the accused person. On the accused person's appeal, it cannot be the case that the judge's erroneous interlocutory rulings are immune from challenge or scrutiny. In such circumstances, the Prosecution need not launch a substantive appeal against the judge's interlocutory rulings but need only raise them in its submissions as the respondent in the accused person's appeal. This, the Prosecution did not do in this case.

97 We emphasise that this is not a novel proposition. The Prosecution itself has done so in other appeals. For instance, in *Sulaiman bin Jumari v Public Prosecutor* [2020] SGCA 116 ("*Sulaiman*"), which concerned an accused person's appeal to this Court against his conviction on a capital charge of drug possession for the purpose of trafficking under s 5(1)(*a*) read with s 5(2) of the MDA, the Prosecution explicitly challenged in the appeal the trial court's finding that it was unable to examine the contents of an impugned statement in a *voir dire* in its determination of whether the statement should be excluded or not: see *Sulaiman* at [30]. The Prosecution did this in *Sulaiman* even though the

trial court had decided the *voir dire* in the Prosecution's favour and admitted the impugned statement into evidence, the Prosecution was defending the conviction of the appellant, and the Prosecution had not filed any cross-appeal against the trial court's decision. This Court ultimately agreed with the Prosecution in *Sulaiman* that a court is entitled to examine the contents of an impugned statement in its determination of whether it should be excluded or not: see *Sulaiman* at [85]. In the same way, it was open to the Prosecution in this case to challenge the Judge's rulings on the text messages in CCA 1, even though the Prosecution was defending the conviction as a respondent in the appeal.

98 However, unlike in *Sulaiman*, the Prosecution chose not to challenge the Judge's ruling on the text messages in CCA 1. The Prosecution certainly did not take any issue with the Judge's ruling on the text messages in its written appeal submissions. On the contrary, the Prosecution seemed to have defended the Judge's ruling on the text messages. For instance, the Prosecution submitted that the Judge was "scrupulous in not imposing so onerous a burden on [Mr Beh]" by disallowing the Prosecution to cross-examine Mr Beh on the text messages on 1 October 2016. In addition, during the hearing of CCA 1, the learned DPP, Mr Mark Jayaratnam ("Mr Jayaratnam"), was clear in his oral submissions that there was no gap in the Prosecution's case and evidence. In other words, the crux of Mr Jayaratnam's submission was that Mr Beh's conviction could be upheld without the evidence on the text messages and Mr Lew's evidence. Therefore, while the Prosecution's case at the trial of the Capital Charge was that it wished to rely on and cross-examine Mr Beh on these text messages, its position at the appeal was that it *did not need* the evidence on those messages. This was a critical factor because it showed that the Prosecution's case on the possession issue at least by the time of the appeal in respect of the Capital Charge was that *it did not need Mr Lew's testimony or the*

evidence on the text messages to prove that Mr Beh knowingly possessed the blue plastic bag.

99 The acquittal of Mr Beh on the Capital Charge must be seen in context, and what is relevant is that the state of the evidence, to some extent before the Judge and certainly before this court, was essentially the result of choices made by the Prosecution rather than by the Defence – specifically, the Prosecution's election not to call Mr Lew as a witness and not to challenge the Judge's ruling on the examination of the text messages on appeal. Had the Prosecution challenged the Judge's ruling on the text messages in the appeal in CCA 1, and if the point had been accepted, this Court could, instead of acquitting Mr Beh of the Capital Charge, have affirmed the conviction or considered remitting the trial of the Capital Charge to the Judge under s 390(1)(*b*)(i) of the CPC to enable the Prosecution to cross-examine Mr Beh on the text messages. This would have avoided all the concerns of abuse of process and of finality that have now come to the fore. The Prosecution was now seeking to prove Mr Beh's knowing possession of the blue plastic bag in a trial of the Non-Capital Charges by adducing the very evidence which *it had explicitly taken the stand that it did not need* in the Capital Charge proceedings. As alluded to at [38(c)] above, this is precisely where the doctrine of abuse of process overlaps with the rule in *Henderson* in this case, because the Prosecution could and should have raised these points in the Capital Charge proceedings, but it chose not to. Therefore, allowing the Prosecution to proceed with a trial of the Non-Capital Charges would be giving the Prosecution a second chance in effect to "undo" some of the consequences of the choices it had made.

100 This leads to the third related point. It was also relevant that it would not have been available to the Prosecution to seek to adduce Mr Lew's evidence as

new evidence on appeal or as new evidence for any review of the first CA Judgment under s 394J of the CPC.

(a) Whether new evidence may be adduced on appeal is governed by the well-established cumulative requirements laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"), which are that (a) the evidence could not have been obtained with reasonable diligence for use in the lower court (the "non-availability" condition); (b) the evidence would probably have an important influence on the result of the case, although it need not be decisive; and (c) the evidence has to be apparently credible, although it need not be incontrovertible. Unlike applications by accused persons, all three conditions set out in *Ladd v Marshall* apply in an unattenuated manner to applications by the Prosecution to admit further evidence in a criminal appeal: *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 at [56]. As Mr Lew's evidence could have been obtained with reasonable diligence for use in the trial before the Judge, any attempt by the Prosecution to adduce Mr Lew's evidence as new evidence in the appeal in CCA 1 would have failed the non-availability condition.

(b) Division 1B of Part XX of the CPC – ss 394F–394K – sets out the applicable framework for an application to review an earlier decision of an appellate court ("review application"). However, the Public Prosecutor cannot make a review application unless the Public Prosecutor alleges that the earlier decision is tainted by fraud or a breach of the rules of natural justice, and that the integrity of the judicial process is thereby compromised: s 394G(2), CPC. There was no suggestion that, in this case, the requirements of s 394G(2) were satisfied such that the

Prosecution could have made a review application against the first CA Judgment.

(c) Even assuming for the sake of argument that the Prosecution could have made a review application against the first CA Judgment, such an application would not have satisfied the necessary requirements under s 394J of the CPC: the Prosecution must satisfy the appellate court that there is sufficient material on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made (s 394J(2), CPC). For the material to be "sufficient", it is necessary for all of the requirements set out in s 394J(3) to be satisfied, meaning, the applicant must show that: (a) the material has not been canvassed at any stage of the criminal proceedings; (b) the material could not have been adduced with reasonable diligence; and (c) the material is compelling, in that the material is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made: see *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180 at [24]. In this case, the Prosecution would clearly not have been able to satisfy the requirement of s 394J(3)(*b*), since Mr Lew's evidence could have been adduced with reasonable diligence at the trial of the Capital Charge.

101 In these circumstances, the fact that the evidence that the Prosecution wished to rely on in the Non-Capital Charges could not have been invoked in a notional appeal was a further factor that pointed to this being an impermissible attack on the finality of the acquittal on the Capital Charge.

102 In addition, as DPP Wong accepted in the hearing before us, had the Charges been proceeded with in a joint trial before the Judge, Mr Beh would then have been acquitted of all the Charges in the appeal in CCA 1. In this hypothetical situation, there would have been no doubt at all that the Prosecution could not then have sought to reopen the matter. The Charges could have been proceeded with in a joint trial under s 134 of the CPC, but the Prosecution explained that this was not done because of the commonly applied rule of practice that, "when an accused person is defending himself on a capital charge, he generally ought not in fairness to be required to defend himself on other additional charges at the same trial": *Yong Yow Chee v Public Prosecutor* [1997] 3 SLR(R) 243 at [41]. This meant that the reason for standing down the Non-Capital Charges in this case was adherence to a rule of practice that is meant for *the accused person's benefit*. If so, it was troubling that the Prosecution was seeking to avail itself of that rule of practice to the accused person's *detriment*. This reinforced our view that the Prosecution should not be allowed to reinstate the Non-Capital Charges against Mr Beh.

103 Fourth, if the Non-Capital Charges were allowed to be proceeded with, this would give rise to a real asymmetry in the position of the Public Prosecutor on one hand and the Defence on the other, and this was potentially prejudicial. This is because, where an accused person faces multiple charges based on a common fact (as in the present case), the Public Prosecutor would have the option to proceed on one charge at a time and to apply to stand down the remaining charges under s 238 of the CPC, only to then revive the remaining charges against the accused if the accused were acquitted of the first charge. This would allow the Prosecution to try different case theories using different sets of evidence, in the guise of invoking "fresh evidence" in the new trials of the remaining charges. Further, this asymmetry would be exacerbated by the fact that the Prosecution would have locked down the accused person's evidence

in *one additional sense* aside from the fact of having obtained his investigative statements. We refer here to the accused person's oral testimony in court at the first trial. This would arm the Prosecution with more material with which to cross-examine the accused person in the subsequent trial on the initially stood down or withdrawn charges.

104 While we did not think that the Prosecution had stood down the Non-Capital Charges as part of such a litigation strategy, that did not displace the potential danger and prejudice in this case. It may be noted that the Defence does not have an analogous power to "stand down" certain defences before reviving them in fresh proceedings or in an appeal or review application if the primary defence does not succeed.

105 This leads us to the fifth point, which is that allowing the Prosecution to revive and proceed with the Non-Capital Charges would severely undermine the principle of finality and unjustifiably vex Mr Beh with multiple rounds of litigation. As this Court explained in *Lim Chit Foo* at [30], the court is responsible for managing the proceedings before it in a fair and efficient manner, and the court must pay close attention to any real risk of injustice in any given case, such as the potential oppressive effects on the accused person. Thus, the court will guard against a multiplicity of litigation if that would be unjustifiably oppressive on an accused person.

106 We noted finally that Mr Beh had already been in remand since end-2016. DPP Wong indicated to us at the hearing that the likely sentence which Mr Beh would receive for the Non-Capital Charges, if he was convicted of them, was an aggregate sentence of around 8 years' imprisonment and 20 strokes of the cane. Bearing in mind the typical remission of the sentence, that would mean that there was a real likelihood that Mr Beh's actual time spent in remand (from

end-2016 until the completion of the fresh trial of the Non-Capital Charges and any accompanying appeal) would exceed his custodial sentence. This reinforced our conclusion that it would be unfair and unjust to Mr Beh to permit the intended trial of the Non-Capital Charges to be proceeded with.

107 We recognised that the Public Prosecutor has wide discretion in the conduct of prosecutions. We also recognised the longstanding practice of the Prosecution to stand down charges while the prosecution of a certain charge proceeds. We accepted that the Prosecution did not stand down and withdraw the Non-Capital Charges for any ulterior litigation strategy. Nevertheless, bearing in mind the particular confluence of the foregoing factors, we found that permitting the Prosecution to reinstate and proceed with a trial of the withdrawn Non-Capital Charges would amount to an abuse of process because it would lead to the risk of manifestly inconsistent findings between the first CA Judgment and those in a subsequent trial of the Non-Capital Charges. In our judgment, this would have been an abusive collateral attack on this Court's findings in the first CA Judgment, and it would be unfair and unjust to Mr Beh or otherwise inconsistent with the fair administration of justice to permit the intended trial of the Non-Capital Charges to be proceeded with.

Conclusion

108 For these reasons, we held that the Prosecution was not permitted to reinstate and proceed with a trial of the withdrawn Non-Capital Charges. It followed that Mr Beh was to be released from custody.

109 Finally, having had the advantage of considering the draft of Justice Tay Yong Kwang's dissenting judgment, we take the opportunity to endorse the observation he has made at [145] below.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Tay Yong Kwang JCA (dissenting):

Introduction

110 This is a follow-up judgment to this court's decision in *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 which was delivered on 13 October 2020 ("the first CA judgment"). In the first CA judgment, we allowed the appeal of the appellant, Beh Chew Boo ("Beh"), against his conviction on the capital charge of importing into Singapore not less than 499.97g of methamphetamine, an offence under s 7 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA") and granted him an acquittal. We allowed Beh's appeal because we concluded that he had rebutted the presumption of possession in s 21 of the MDA.

111 As explained in the first CA judgment, there were a total of five charges of unauthorised importation of controlled drugs arising out of the same incident on 26 October 2016 at about 5.20am at the Woodlands Checkpoint. Besides the capital charge mentioned above (which was the first charge), Beh faced four non-capital charges of importation of three different types of Class A drugs and one Class C drug (which were the second to the fifth charges). It was not disputed that all the drugs in issue in the five charges were in a blue plastic bag in the storage compartment under the seat of the motorcycle which Beh rode into Singapore with his girlfriend, Ting Swee Ling, riding pillion.

112 In accordance with the long-standing practice of the Prosecution, the four non-capital charges were stood down at the commencement of the trial. At the conclusion of the trial in the High Court, the Prosecution withdrew these four charges pursuant to s 147(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). Under s 147(2), such withdrawal shall have the effect of an acquittal on the remaining charges withdrawn unless the conviction is set aside.

Under s 147(3), where a conviction is set aside under s 147(2), and subject to any order of the court setting aside the conviction, the court may proceed with the trial of the charges previously withdrawn.

113 At [82] of the first CA judgment, we allowed the Prosecution time to study the said judgment, discuss with Defence counsel and then communicate its decision on the four non-capital charges to the Court and to Defence counsel in writing by 12 noon, three days from the date of delivery of the judgment. Subsequently, the Prosecution informed us and the Defence Counsel that it would be proceeding with the trial of the four non-capital charges in the State Courts. As the Defence Counsel objected to the Prosecution's intention to proceed with the four non-capital charges, we directed the parties to make their respective submissions in writing. We then restored this matter for oral arguments.

Beh's arguments against proceeding with the four non-capital charges

114 At para 10 of Beh's written submissions, Beh summarised his arguments (which are in the alternative) in the following way.

(a) Having been acquitted of the capital charge, he may not be tried again for the non-capital charges, as provided in s 244(1) of the CPC.

(b) The trial of the non-capital charges would infringe his rights under Art 11(2) of the Constitution.

(c) He was entitled to raise the plea of *autrefois acquit*.

(d) Having successfully rebutted the presumption of possession under s 21 of the MDA in respect of the capital charge, the issue

of his knowledge of the existence of the drugs and possession of the same in the non-capital charges was *res judicata*.

(e) The proposed trial of the non-capital charges was an abuse of process as it was in effect a backdoor attempt to do a retrial of the capital charge.

(f) The proposed trial of the non-capital charges was otherwise unfair, oppressive and an abuse of process.

115 Beh argued that the methamphetamine in the capital charge was not separated from the other drugs but was in the same four bundles in the blue plastic bag. The methamphetamine was aggregated for the purpose of the capital charge and the same was done for the other drugs in the non-capital charges. Since he had rebutted the presumption of possession of the methamphetamine, it must follow as a matter of logic that he had similarly rebutted the presumption of possession of the other drugs in the four bundles. As the first CA judgment noted at [82], the four non-capital charges arose out of the same incident.

The Prosecution's arguments for proceeding with the four non-capital charges

116 In its written submissions in response, the Prosecution pointed out that the first three grounds canvassed by Beh all dealt with the issue of the rule against double jeopardy. The Prosecution relied on s 244(2) of the CPC which provides that a person acquitted or convicted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him in the former trial under s 134 of the CPC. In any case, using a purposive interpretation, the words "same offence" in Art 11(2) of the Constitution and s 244(1) of the CPC must mean an offence that is the same in fact and in law. The non-capital charges did not involve the same offence as that

in the capital charge. The doctrines of *autrefois acquit* and *autrefois convict* have been codified in Art 11(2) and s 244(1) and could not be raised as a separate principle.

117 The doctrine of *res judicata* or issue estoppel should not apply to criminal proceedings here. Even if it does, evidence that was relevant to the appellant's knowledge of the presence of the blue plastic bag in the compartment of the motorcycle was not adduced at the trial in the High Court and it would be in the public interest to allow the Prosecution to adduce such fresh material evidence. In this context, the first CA judgment at [61] commented that it was "patently obvious" that the Prosecution ought to have been allowed to ask questions about the messages found in Beh's mobile phone. The evidence of Lew Shyang Huei ('Lew") was also found to be relevant for the reasons explained in the first CA judgment at [71]–[76] but since both parties did not call Lew as a witness, the court was deprived of material evidence that could have assisted it in establishing the truth.

118 Public confidence in the judiciary would not be affected adversely by the possibility of inconsistent findings between the first CA judgment and the subsequent judgment of the State Court on the non-capital charges because the latter decision would have been made with the benefit of relevant evidence that was not available in the first CA judgment.

119 There would be no abuse of process or oppression in proceeding with the non-capital charges. The Prosecution was not attempting to do a collateral attack against the capital charge as it accepted that the acquittal could not be disturbed. The Prosecution also confirmed that it would not attempt to "drip-feed" the non-capital charges by standing down one or more of them but would be applying for all four charges to be tried at one trial. Such an attempt would

be subject to judicial scrutiny in any case (*Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64).

The decision of the court (minority)

120 I agree with the majority decision of this court that the real issue before us was whether there was abuse of process by the Prosecution in deciding to proceed with the four non-capital charges in the circumstances here. Clearly, double jeopardy was not made out here. The acquittal was a conditional one. As pointed out at [82] of the first CA judgment, the non-capital charges were withdrawn pursuant to s 147(1) of the CPC upon the conviction by the High Court on the capital charge. Under s 147(2), such withdrawal shall have the effect of an acquittal on the charges withdrawn unless the conviction is set aside. The conviction has been set aside and therefore s 147(3) applies.

121 The parties were aware that the withdrawn non-capital charges could be revived under s 147(3) if the conviction on the capital charge was set aside subsequently on appeal. Beh is not suggesting that s 147(3) violates Art 11 of the Constitution in allowing withdrawn charges to be revived when a conviction is set aside. The Prosecution was therefore at liberty to apply for the non-capital charges to be restored and for Beh to be tried on those charges.

122 I also agree that there is no need for us to consider whether *res judicata* or issue estoppel applies to criminal proceedings. Even if it does, I would think that it should allow for an exception to exclude or to limit its operation where there is new evidence in subsequent criminal proceedings. As will be apparent from the discussions that follow, it is my view that such "new evidence" is present here.

123 On the issue of abuse of process, I do not think there would be any in the Prosecution's decision to revive the non-capital charges. This is because there were "unique circumstances" in this case as pointed out at [80] of the first CA judgment.

124 From inception, the Prosecution charged Beh with one capital charge and four non-capital charges. This was never a case of "drip-feeding" charges by proffering only one charge and, upon acquittal, deciding to proffer some more charges. On the first day of trial in the High Court, in its opening remarks, the Prosecution informed the trial Judge that it would be proceeding on the capital charge and standing down the four non-capital charges. The trial Judge did not raise any concern.

125 The Record of Proceedings shows that the defence counsel did not say anything in objection and did not ask the Prosecution to state what its position on the non-capital charges would be in the event of a conviction or an acquittal on the capital charge. In all likelihood, the Prosecution had informed the defence counsel before the trial of its intention to proceed with the trial the way it did and the defence counsel had no objections.

126 Further, it is a time-honoured practice to proceed with capital charges first and to stand down non-capital ones. In its written submissions, the Prosecution states that it was "adhering to the common law rule of practice that a capital charge should not generally speaking be coupled with a non-capital charge in the same indictment". It explained that the reason for this rule "is that when an accused person is defending himself on a capital charge, he generally ought not in fairness to be required to defend himself on other additional charges at the same trial", citing the Court of Appeal's decision in *Yong Yow Chee v*

Public Prosecutor [1997] 3 SLR(R) 243 at [41]–[43]. I shall return to this point later.

127 The revival of the stood down and withdrawn non-capital charges was therefore a real and lawful possibility under s 147(3) of the CPC. The standing down of the four non-capital charges was never a strategic move by the Prosecution to hold back some charges as a standby in case it could not succeed in proving the capital charge. Therefore, there could be no abuse of process in the Prosecution's decision to proceed with the capital charge and to stand down the non-capital charges.

128 The first CA judgment acquitting Beh raised two important issues. They relate to the pre-emptive ruling regarding cross-examination on the text messages in Beh's phone records and the issue about Lew not being called as a witness by the Prosecution or by the Defence Counsel.

The text messages in Beh's phone records

129 At the conclusion of Beh's examination in chief and before the Prosecution started its cross-examination, the Defence Counsel argued strenuously for the Prosecution to be barred from cross-examining Beh on certain text messages in his mobile phone. The trial Judge accepted the Defence Counsel's submissions in part and did not allow cross-examination in respect of one category of text messages while allowing cross-examination on another category on a limited basis.

130 At [56]–[62] of the first CA judgment, particularly [61], we held effectively that the trial Judge was wrong in allowing the Defence Counsel's pre-emptive objections and making the pre-emptive rulings to disallow the Prosecution's cross-examination on the said text messages in Beh's phone even

before the Prosecution asked its first question. At [56], we said that the pre-emptive rulings were not the subject of the submissions on appeal but we felt obliged to express our views on this issue as it could affect the evidence at trial significantly. At [62], we said that as the said rulings were not the subject of the appeal, we "deal with this appeal on the state of the evidence as adduced during the trial".

131 Our statements at [56] and [62] that the pre-emptive rulings were not the subject of the appeal certainly did not mean that the said rulings could have been appealed against by the Prosecution. The parties cannot appeal on issues standing alone, such as rulings on allowing or disallowing certain questions or relating to the admission of documents. In any event, there is no dispute that the High Court's pre-emptive rulings made in the course of the trial could not be appealed against on their own by the Prosecution when the outcome was in the Prosecution's favour. Section 374(1) of the CPC provides:

> An appeal against any judgment, sentence or order of a court, or any decision of the General Division of the High Court mentioned in section 149M(1), may only be made as provided for by this Code or by any other written law.

132 Section 149M is not relevant here as it concerns Deferred Prosecution Agreements. It is accepted that the word "order" does not embrace all kinds of orders and directions made in the course of a trial. The "order" that is appealable is one which is final in that it disposes of the rights of the parties before the court. It does not include procedural rulings like the pre-emptive rulings here although such rulings may be challenged during an appeal on the principal matter. However, an appeal in the principal matter may be made only by the party who is aggrieved by the outcome of the trial court. In this case, although the High Court ruled against the Prosecution on some of the text messages, it ruled in favour of the Prosecution eventually in the outcome when it convicted

Beh on the capital charge. The Prosecution cannot appeal and has no reason to appeal in respect of the outcome of the trial, which is the principal matter. Further, the correctness of the procedural rulings on the text messages in Beh's mobile phone was not argued on appeal by the Defence Counsel. The Prosecution therefore could not have raised any submissions in relation to the correctness of the procedural rulings on the text messages.

133 The first CA judgment was decided on the state of the available evidence at the trial after the High Court's pre-emptive rulings on Beh's text messages (see [80]). These rulings denied the Prosecution the opportunity to cross-examine Beh on matters which were "at least apparently relevant" (see [60]) and to juxtapose the phone messages with the ICA records of Beh's numerous entries into and exits from Singapore. At [60] and [61], we referred in particular to the message asking whether there were police sniffer dogs at the Singapore customs that day and stating that they (meaning Beh and some person or persons) reached the Singapore customs but turned back to Johor Bahru (after only 18 minutes), "so there is no income today, most importantly keeping ourselves alive". At [61], we opined that such evidence, together with the ICA records of Beh's multiple short trips into Singapore, made it "patently obvious that the Prosecution ought to have been allowed to ask questions about those messages".

134 If the four non-capital charges proceed to trial (the Prosecution wants to do so in the State Courts), the Prosecution will be able to use the excluded portions of Beh's text messages as part of its case to try to prove that Beh was actually doing drug runs or other illegal importation into Singapore on his many entries into and exits from Singapore for brief periods during the material time. Material evidence was excluded wrongly at the trial to the prejudice of the Prosecution. There is therefore no abuse of process in the Prosecution now

seeking to proceed with the four non-capital charges on the complete evidence which was emaciated by the pre-emptive rulings which the Prosecution could not appeal against on the facts here.

135 To the extent that there will be additional evidence adduced by the Prosecution, the relevant State Court in the subsequent trial is not bound by the factual findings of the first CA judgment. As the first CA judgment at the end of [58] states, it may turn out that at the subsequent trial, the Prosecution will still fail to prove its case beyond reasonable doubt even with the complete evidence and Beh could still rebut the presumption of possession in s 21 MDA. Should the Prosecution succeed in proving the four non-capital charges beyond reasonable doubt, Beh's acquittal on the capital charge will still stand as the Prosecution cannot seek a review of the first CA judgment in the situation here.

136 The apparently conflicting decisions which result from this should not diminish public confidence in the courts or in the legal process. This is because the first CA judgment was constrained on appeal by the High Court's pre-emptive rulings on the text messages while the decision of the State Court would be premised on the Prosecution's complete evidence. The situation will be akin to that of a subsequent court receiving fresh material evidence which entitles it to reach a different conclusion from an earlier court. In my opinion, this is the same philosophy underlying s 394J of the CPC where the court can exercise its power of review in relation to an earlier decision if new material evidence becomes available subsequently. This is the basis on which a subsequent Court of Appeal can come to a diametrically opposite conclusion from that of an earlier Court of Appeal in *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* [2020] SGCA 90. Decisions of the Court are based on the available evidence and therefore a subsequent court can come to a totally different

conclusion from an earlier one if new evidence which is material to the case is available to the subsequent court.

The Prosecution's failure to call Lew as a witness

137 The second important issue in the first CA judgment was that the Prosecution ought to have called Lew as a witness, even if he should turn out to be a hostile one. At [74], we highlighted the Prosecution's role in the fair and impartial administration of criminal justice and stated that the Public Prosecutor is duty bound to serve the public interest by assisting the court to establish the truth and that includes putting forth relevant evidence especially in the context of the facts of this case.

138 At [75]–[76] of the first CA judgment, we highlighted that the Prosecution did try to act fairly by offering Lew as a witness to the Defence Counsel and by serving a copy of Lew's investigation statement on the Defence Counsel a few days before the exchange of written closing submissions. We also noted that the Defence Counsel accepted the offer and proceeded to interview Lew and then subpoena him to testify at the trial. It was only after Beh concluded his testimony in court that the Defence Counsel declined to call Lew as a witness. We opined that, even at that stage, the Prosecution could and should have applied to the trial Judge to be allowed to re-open its case by calling Lew to testify.

139 It was in the light of all these facts that the first CA judgment concluded at [80] that, "[i]n the unique circumstances here, as we are of the view that Beh's account was not inherently incredible on the state of the available evidence after the Judge's rulings on the text messages, the Prosecution should have applied to call Lew to testify after the Defence changed its mind about calling him". As the Prosecution decided not to call Lew, it was not able to discharge its

evidential burden after Beh's plausible defence that he had no knowledge of the existence of the drug bundles in the motorcycle, coupled with the fact that the motorcycle was borrowed from Lew and only Lew's DNA was found on the drug bundles. In the result, we held that Beh had rebutted the presumption in s 21 of the MDA and acquitted him on the capital charge (at [81]).

140 The Prosecution now seeks to fulfil what we said is its role in the fair and impartial administration of criminal justice and to fulfil its duty to serve the public interest by assisting the court to establish the truth by putting forth relevant evidence. It proposes to do this by calling Lew to testify at the trial for the four non-capital charges. We had described Lew at [71] as "the best person to confirm or deny these possibilities or any other possibilities" and that calling him as a witness at the trial would have obviated the parties and the trial court having to deal with "the hypotheses by logical reasoning and inferences" and would have allowed the consideration of direct evidence from Lew. I therefore do not see why the Prosecution's proposed action to comply with the first CA judgment amounts to an abuse of process in the circumstances here, bearing in mind always that the four non-capital charges were never stood down as part of the Prosecution's litigation strategy.

141 As the Prosecution informed us at [73] of the first CA judgment, Lew is likely to say that he knows nothing about the drugs in the motorcycle and therefore probably will not assist the Prosecution's case, unless he has given another statement in the meantime. Nevertheless, let Lew be questioned and let him explain why his DNA was found on the drug bundles.

142 The subsequent trial on the four non-capital charges will be a fresh set of proceedings and both parties should be at liberty to call witnesses who did not testify at the High Court trial or to exclude witnesses who did. This would

include calling Lee Wei Jye or Ah Fei (see [78]) and Ting Swee Ling (see [79]) if they become available and are considered necessary witnesses by any party.

143 It may be contended that Beh could be prejudiced at the subsequent trial because he could face impeachment should his evidence depart materially from that given at the first trial. I do not see this as unfair. The obligation of all witnesses in court, whether an accused or not, is to speak the truth. If such prejudice is a factor in deciding whether or not there is abuse of process, it can be argued equally that accused persons should not be asked to give multiple statements lest they contradict themselves materially along the way and their credibility is then impeached.

144 From the above discussions, I conclude that there will not be abuse of process for the Prosecution to revive the four non-capital charges pursuant to s 147(3) of the CPC. Even if I am wrong on the point that the Prosecution is now entitled to call Lew as a witness, I remain of the view that the Prosecution should be allowed to proceed with the trial on the four non-capital charges because of the issue relating to the text messages discussed earlier.

145 I mentioned at [126] above that I shall be returning to the point regarding the time-honoured practice of proceeding with capital charges first and standing down non-capital ones. I have often wondered about the correctness or the practicality of this common law rule of practice and the rationale that "when an accused person is defending himself on a capital charge, he generally ought not in fairness to be required to defend himself on other additional charges at the same trial". The rationale may have meaning if an accused person were facing a capital charge under the MDA and also facing some non-capital charges not related to drugs and not related in time and place to the capital charge. In a case such as the present, what difference would it have made whether the capital

charge was tried separately or together with the other non-capital charges when all the drugs were in the same bundles in the motorcycle? In my previous role as a trial Judge, I have often lamented at the artificiality of such a dichotomous approach. This is because in most cases where different classes of drugs were found, they would be in the same bundles or bag or in the same location (such as the car, the bedroom or even in the same drawer in the wardrobe). The prevailing practice of standing down non-capital charges led to the redaction of statements made by the accused person because the accused person would be asked about, and would mention, details relating to all the drugs, whether they were the subject of the capital charge or the non-capital charges. The result was that the redacted statements sometimes appeared disjointed. Further, oral testimony and cross-examination were similarly handicapped because of the perceived need not to delve into matters which were not technically within the parameters of the capital charge. Perhaps it is time to rethink whether this practice of standing down non-capital charges should continue in all cases even where the facts relating to the various charges are obviously intertwined and should be dealt with at one trial.

Tay Yong Kwang
Justice of the Court of Appeal

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