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

[2021] SGHC 146

Magistrate's Appeal No 9068 of 2019/01

Between

Parti Liyani

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Compensation and costs]
[Statutory Interpretation] — [Construction of statute] — [Purposive approach]

TABLE OF CONTENTS

Parti Liyani
v
Public Prosecutor

[2021] SGHC 146

General Division of the High Court — Magistrate's Appeal No 9068 of 2019/01
Chan Seng Onn J
16, 26 April 2021

21 June 2021 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The facts surrounding the conviction and subsequent acquittal of the appellant, Parti Liyani ("Parti"), have been comprehensively set out in my decision in *Parti Liyani v Public Prosecutor* [2020] SGHC 187 (the "*Main Judgment*") at [4]–[21]. For the sake of brevity, I do not propose to repeat them here save to briefly summarise the facts relevant to this judgment. Unless otherwise indicated, I will adopt the abbreviations used in the *Main Judgment*.

2 Following a trial in the lower court, Parti was convicted of one charge of theft as a servant under s 381 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and three charges of theft in dwelling under s 380 of the Penal Code. She was sentenced to a total of 26 months' imprisonment (see *Public Prosecutor v Parti Liyani* [2019] SGDC 57).

3 After hearing Parti's appeal against conviction and sentence, I found that the Prosecution failed to prove its case against Parti beyond a reasonable doubt in relation to all four charges that were brought against her. As such, I allowed Parti's appeal and acquitted her of those charges.

4 Following her acquittal, Parti applied for a compensation order under s 359(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") against the respondent, the Public Prosecutor (the "Prosecution"). Under s 359(3) of the CPC, this court is to determine whether "the prosecution was frivolous or vexatious". *Prima facie*, this raises the concern that the prosecutorial discretion constitutionally granted to the Prosecution may be circumscribed by this review. This is not the case. The court does not impinge on the Prosecution's discretion whether to prefer charges against an accused person or what kind of charges to prefer. It is not engaging into an inquiry into the constitutionality of prosecutorial discretion. It is only asked to assess, at the conclusion of the proceedings, whether the prosecution was "frivolous or vexatious".

5 To the extent that the inquiry under s 359(3) of the CPC may constitute any circumscribing of prosecutorial power, I find the observations made by the Court of Three Judges in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 (at [146]) to be applicable:

> However, in our view, the High Court went too far in *Glenn Knight* ([115] supra) when (at [70]) it stated:
>
> > As a branch of government, the judiciary has the decision making power to affect whatever concerns the administration of justice. *This is circumscribed only to*

> *the extent that Art 35(8) vests prosecutorial discretion in the AGC*. … [emphasis added]
>
> With respect, this statement puts the relationship between the two constitutional organs the wrong way round. The *prosecutorial power cannot circumscribe the judicial power*. On the contrary, it is ***the judicial power that may circumscribe the prosecutorial power*** in two ways: First, the court may declare the wrongful exercise of the prosecutorial power as unconstitutional. This point is discussed later (see [148]–[149] below). Secondly, it is an established principle that when an accused is brought before a court, the proceedings thereafter are subject to the control of the court: see *Goh Cheng Chuan v PP* [1990] SLR 671, *Ridgeway* at 32–33 and *Looseley* at [16]–[17]. Within the ***limits of its judicial and statutory powers, the court may deal with the case as it thinks fit in accordance with the law***.
>
> [emphasis added in italics and bold italics]

To the extent that prosecutorial power is circumscribed in any way, the court's inquiry pursuant to ss 355(2) and 359(3) of the CPC is wholly within the limits of its judicial power as set out by the CPC. It is also a corollary of its power to control the proceedings before it.

6 This is the first application for a compensation order against the Prosecution under s 359(3) of the CPC before the Singapore courts and it raises several novel issues concerning the scope and meaning of the provision. To assist me, I appointed Assistant Professor of Law, Benjamin Joshua Ong ("Prof Ong"), as *amicus curiae* under the Young Amicus Curiae Scheme for this hearing.

7 For reasons which I will explain in this judgment, I find that the prosecution of Parti was not frivolous or vexatious and dismiss Parti's application for compensation.

Factual background

8 Parti was employed as a foreign domestic worker in the Liew household for approximately nine years from March 2007 to 27 October 2016. The Liew household residing at 49 Chancery Lane ("49 CL") comprised Mr Liew Mun Leong ("Mr Liew"), his wife, Mdm Ng Lai Peng ("Mdm Ng"), their daughter Ms Liew Cheng May ("May"), their son Mr Karl Liew ("Karl") and Karl's wife, Ms Heather Lim ("Heather"). Karl, Heather and their children lived in 49 CL until they moved to 39 Chancery Lane ("39 CL") on 1 March 2016.

9 In October 2016, Mr Liew, while overseas, decided to terminate Parti's employment because he suspected that Parti had stolen several missing items over the years. On the morning of 28 October 2016, Karl served the termination notice and informed Parti that her employment was terminated at 49 CL in the presence of two representatives from the employment agency and Mdm Ng. She was given only two hours to pack all her belongings. Besides packing her items into three jumbo boxes, Parti also brought out a black bag (the "Black Bag") containing clothes which had been given by Karl to Jane, the Liew household's previous domestic worker. She looked at the contents of the Black Bag and decided that she did not want any of the clothes either. The Black Bag was left there. After packing, Parti left the house with the representatives from the employment agency and returned to Indonesia.

10 After Parti left, Mdm Ng, Karl and Heather checked the contents of the boxes at 49 CL on 29 October 2016 and discovered items in the boxes that allegedly belonged to members of the Liew household. In the process, a 21-second video clip was recorded of the items that they had taken out (the

"Video"). After Mr Liew's return to Singapore, Karl and Mr Liew filed a police report on 30 October 2016.

11 On 2 December 2016, Parti returned to Singapore and was arrested upon her arrival at the airport. Parti was charged with the following charges which she contested at trial (see *Main Judgment* at [6]):

Charge	Description of Items
DAC 931427-2017 **(the "1st Charge")** Section 381 of the Penal Code	one Pioneer DVD player valued at $1,000.00 one Brown Longchamp bag valued at $200.00 one Blue Longchamp bag valued at $200.00 in the possession of **Mr Liew**
DAC 931428-2017 **(the "2nd Charge")** Section 380 of the Penal Code	115 pieces of clothing valued at $150.00 each one blanket valued at $500.00 three bedsheets valued at $100.00 each one "Philips" DVD player valued at $150.00 an assortment of kitchenware and utensils valued at $300.00 one "Helix" Watch valued at $50.00 one damaged "Gerald Genta" watch valued at $10,000.00 two white iPhone 4 with accessories valued at $2,056.00 in the possession of **Karl**

Charge	Description of Items
DAC 931429-2017 (the "3rd Charge") Section 380 of the Penal Code	one leather "Vacheron Constantin" watch with unknown value one white-coloured "Swatch" watch with orange-coloured design valued at S$75.00 one silver-coloured ring with blue shiny stones valued at $150.00 one pair of silver-coloured earring with white opaque stone valued at $150.00 one yellow-coloured earring with one white opaque ball valued at $75.00 an assortment of fashion accessories valued at $400.00 one pair of black "Gucci" sunglasses valued at $250.00 in the possession of **May**
DAC 931430-2017 (the "4th Charge") Section 380 of the Penal Code	one purple "Prada" bag valued at $1,000.00 one black "Gucci" sunglasses with red stains valued at $500.00 in the possession of **Heather**

12 Parti's defence to the charges was a denial that any of the listed items were stolen. Her explanation for each of the items could be grouped broadly as follows:

(a) some of the items were purchased by her;

(b) some of the items were given to her;

(c) some of the items were discarded and found by her; and

(d) some of the items were not packed by her in the three jumbo boxes.

13 The evidence and testimony given by the factual witnesses of both parties were hotly contested at trial and on appeal.

14 In the lower court, the trial judge ("Judge") convicted Parti of one charge of theft as a servant under s 381 of the Penal Code and three charges of theft in dwelling under s 380 of the Penal Code. The Judge also amended the 2nd charge by removing several items. Parti was sentenced to a total of 26 months' imprisonment.

15 On appeal, I considered the undue emphasis on Parti's failure to inquire about the three jumbo boxes she was accused of stealing, the break in the chain of custody of some of the items, the existence of an improper motive by members of the Liew family for mounting the allegations against Parti, the potential inaccuracies of the statements (*ie* P31, P32 and P33) due to various reasons and the lack of credibility of several Prosecution witnesses. In the light of these considerations, I accepted parts of Parti's defence that some of the items were purchased and belonged to her, some were given to her, some were not packed by her and some were discarded items and retrieved by her. As such, I acquitted Parti of all the charges and allowed her appeal.

The parties' cases

16 In this application, Parti submits that the prosecution was frivolous or vexatious and asks this court to order that the Prosecution pays compensation of a sum of $10,000.00 to her.[1]

17 Regarding the scope of s 359(3) of the CPC, Parti makes the following submissions:

(a) The legislative purpose of s 359(3) of the CPC is not to serve a punitive function but to grant the acquitted party a convenient and less burdensome path to receive recompense where it is rightfully deserved.[2] It is a statutory innovation that provides a check and balance that ensures the maintenance of public trust in the Prosecution's exercise of its function.[3]

(b) The test for "frivolous or vexatious" prosecution should be less onerous than the torts of malicious prosecution or false imprisonment and "extravagant and unnecessary" conduct by the Defence under s 355(1) of the CPC.[4] Where the Prosecution's conduct is purposeless or lacking in seriousness as considered by the court in the context of the Prosecution's duties as ministers of justice, it is "frivolous or vexatious".[5] Where the Prosecution undertakes a prosecution "without reasonable and probable cause", this is a possible indication that the

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1 Appellant's submissions dated 7 December 2020 ("AS1") at paras 43, 108.

2 AS1 at paras 23 to 24.

3 Appellant's reply submissions dated 11 January 2021 ("AS2") at para 8.

4 AS1 at para 35.

5 AS1 at paras 10 to 11.

prosecution is "frivolous or vexatious".[6] Malice or dishonesty on the part of the Prosecution is not required.[7] Parti also aligns her position with Prof Ong's submissions on the meaning of "frivolous or vexatious" (see below at [26(d)] below).[8] Alternatively, the test for "frivolous or vexatious" prosecution is akin to "dishonest or malicious" conduct.[9]

(c) Section 359(3) of the CPC does not limit the meaning of "the prosecution" to just commencement and continuation of a case but includes the conduct of the Prosecution in advancing the case at trial.[10]

(d) The factors to be considered are the circumstances as a whole, the facts of the case, the strength of the prosecution, and the course of conduct of the Prosecution.[11]

(e) The standard of proof would require the Defence to show *prima facie* evidence of "frivolous or vexatious" prosecution which will then require the Prosecution to justify its conduct to the court. If the Prosecution fails to do so, the prosecution will be found to have been "frivolous or vexatious". Alternatively, the standard of the balance of probabilities should apply.[12]

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6 Appellant's response to *amicus curiae* dated 5 March 2021 ("AS3") at para 9.

7 AS1 at para 13.

8 AS3 at para 3.

9 AS1 at para 38.

10 AS2 at para 14.

11 AS1 at para 14.

12 AS1 at paras 18 to 20.

(f) The Prosecution's conduct of trial does not fall within the purview of constitutionally protected prosecutorial discretion.[13]

18 Parti argues that the following conduct of the Prosecution in the trial below amounts to "frivolous or vexatious" prosecution and entitles her to compensation:[14]

(a) taking issue with the post-offence conduct of Parti and her representatives which were merely intended to annoy or embarrass the Defence;[15]

(b) proceeding against Parti on an unsustainable charge (*ie*, 1st charge);[16]

(c) relying on unreliable and improperly procured statements;[17]

(d) proceeding despite the break in the chain of custody of the alleged stolen items;[18]

(e) failing to objectively value the items;[19]

(f) impeding Parti's preparation for trial;[20]

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13 AS1 at para 41.

14 AS1 at para 43.

15 AS1 at paras 44 to 47.

16 AS1 at paras 48 to 50.

17 AS1 at paras 51 to 52.

18 AS1 at paras 53 to 56.

19 AS1 at paras 57 to 62.

20 AS1 at paras 63 to 64.

(g) nit-picking at Parti's inability to recall the exact price of kitchenware;[21]

(h) making purposeless attacks in respect of the use of supermarket shopping points in cross-examination;[22]

(i) withholding evidence on the functionality of the Pioneer DVD Player;[23]

(j) repeatedly objecting to the introduction of evidence of illegal deployment;[24]

(k) admitting statements (*ie*, exhibits P31, P32 and P33) after the investigative officers (*ie*, IO Amir and ASP Lim) had taken the stand, and failing to recall them as rebuttal witnesses;[25]

(l) continuing with charges relating to Karl despite his lack of credibility;[26]

(m) continuing with the 2nd charge in relation to 115 pieces of clothing, despite the serious risk of contamination of evidence owing to the Black Bag;[27] and

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21 AS1 at paras 65 to 68.

22 AS1 at para 69.

23 AS1 at paras 70 to 74.

24 AS1 at para 75.

25 Table presented by counsel for the Defence on 16 April 2021 ("Table") at p 4.

26 Table at p 4.

27 Table at p 5.

(n) including the Phillips DVD player in the 2nd charge (relating to Karl Liew's items), when evidence from witnesses indicated it was Heather's.[28]

19 For the quantum of compensation, Parti submits that she incurred losses of $73,100.00 but seeks the statutory maximum amount of $10,000.00.[29]

20 On the other hand, the Prosecution submits that the decision to prosecute was not frivolous or vexatious by any account and Parti's application for compensation should be dismissed.[30]

21 Regarding the scope of s 359(3) of the CPC, the Prosecution makes the following submissions:

(a) Section 359(3) of the CPC is meant to provide a convenient and rapid route to obtaining compensation which should ordinarily be pursued through a civil claim for malicious prosecution.[31] It is not a *sui generis* cause of action but an alternative route to the torts of malicious prosecution and false imprisonment.[32]

(b) To prove that a prosecution was "frivolous or vexatious", it is necessary to prove that there was "dishonesty or malice" on the Prosecution's part. An applicant must prove that the Prosecution did not

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28 Table at p 5.

29 AS1 at paras 82, 90, 108.

30 Respondent's submissions dated 4 January 2021 ("RS1") at para 2.

31 RS1 at para 2.

32 Respondent's submissions in reply to YAC dated 5 March 2021 ("RS2") at paras 1(a), 2 to 10.

honestly and reasonably believe that there was sufficient evidence against the accused person to make a case fit to be tried to begin with. A prosecution will be "frivolous or vexatious" if it was not motivated by a desire to achieve justice but by improper and indirect considerations, including a desire to harass or annoy the accused and thus lacked a *bona fide* or legitimate purpose.[33]

(c) The threshold should be higher than that of O 18 r 19(1)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") where an objective standard prevails[34] and not less onerous than the tort of malicious prosecution.[35] This is because the Prosecution exists to perform a public function and their decisions must be adequately protected from excessive scrutiny.[36] The constitutional role of the Prosecution is relevant to interpreting the threshold and scope of s 359(3) of the CPC.[37] The lower the threshold for proving that a prosecution was "frivolous or vexatious", the greater the risk that this will erode the independent exercise of prosecutorial discretion.[38]

(d) The subject of the inquiry under s 359(3) of the CPC is the decision to prosecute itself, and not the Prosecution's conduct at trial.

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33 RS1 at para 41.

34 RS1 at para 42.

35 RS1 at para 46.

36 RS1 at paras 30 to 40.

37 RS2 at paras 11 to 30.

38 RS1 at para 35.

Disciplinary proceedings exist to provide redress for breaches of professional responsibilities.[39]

(e) The appropriate standard of proof is a "high degree of confidence" where the criminal court must not be entangled in complex issues of liability but must be satisfied that the evidence is so overwhelmingly strong that malicious prosecution can be proved.[40]

(f) The statutory limit of $10,000.00 applies whenever a person is acquitted, whether of one or multiple charges.[41]

22 The Prosecution maintains that it had sufficient basis to prosecute Parti because of the following:[42]

(a) the testimony of the Liew family clearly identifying the respective items within the charges as belonging to them;

(b) Parti's admission during investigations that she had taken some of the items listed in the charges without their owners' consent;

(c) there was no apparent reason for the Liew family to frame Parti at the time of making the decision to prosecute; and

(d) this is supported by the fact that Parti did not make any submission that there was no case to answer at the close of the Prosecution's case.

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39 RS1 at para 44.

40 RS1 at para 52.

41 RS2 at paras 63 to 73.

42 RS1 at paras 57 to 61.

23 The Prosecution argues that none of Parti's arguments relating to the Prosecution's conduct at trial shows basis to conclude that the decision to prosecute was "frivolous or vexatious":

(a) While the Prosecution overlooked the fact that Parti's employment terminated on 27 October 2016 for the 1st charge, this does not reflect a lack of seriousness, dishonesty or malice. In any case, the upshot is that any conviction recorded ought to be for an offence under s 380 of the Penal Code rather than s 381 of the Penal Code.[43]

(b) Any issues with the statement recording process ought to affect the admissibility or weight of the statements but are not grounds for compensation.[44] It was reasonable for the Prosecution to rely on the statements given the Liew's corroborative statements and the statement recorder's testimony that Parti had no difficulty understanding him.[45]

(c) The break in the chain of custody only affected the items that were not seized from Parti personally and which she claimed that she did not intend to take with her to Indonesia. Further, the Prosecution's decision to prosecute was supported by other evidence such as the statements of the Liew family.[46]

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43 RS1 at paras 66 to 69.

44 RS1 at para 71.

45 RS1 at paras 72 to 74.

46 RS1 at paras 75 to 78.

(d) The valuation of the stolen items is a factor primarily relevant to sentencing and does not undermine the integrity of the decision to prosecute.[47]

(e) The Prosecution's submissions and questions about Parti's post-offence conduct is relevant under s 8 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") as to the court's determination of Parti's guilt or innocence.[48]

(f) The tendering of additional exhibits during trial is part and parcel of the criminal litigation process.[49] Parti could have sought an adjournment had it been required and there was no prejudice arising out of the exhibits disclosed.[50]

(g) The Prosecution's cross-examination of Parti regarding the purported discrepancy on the price of kitchenware and her purported use of supermarket shopping points to purchase a ceramic pot were clearly permitted under s 148 of the Evidence Act.[51]

(h) Regarding the functionality of the Pioneer DVD player, there was no prejudice to Parti because Parti's counsel had sufficient access to the DVD player to pursue her case and had ample opportunity to re-examine Parti.[52]

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47 RS1 at para 80.

48 RS1 at paras 85 to 86.

49 RS1 at para 92.

50 RS1 at paras 92 to 93.

51 RS1 at paras 94 to 95.

52 RS1 at paras 98 to 99.

(i) The Prosecution's objections to the introduction of evidence of illegal deployment cannot amount to "frivolous or vexatious" conduct since the court can decide on whether to sustain or overrule such objections and the objections must be seen in light of the Prosecution's understanding of Parti's case at that juncture (as disclosed in the Case for the Defence) which did not include any allegation of false accusations by the Liew family.[53]

24 For the quantum of compensation, the Prosecution submits that Parti's quantification of $73,100.00 as the compensation she is entitled to is grossly overstated, but the discussion is "somewhat academic" since Parti limits her application to the statutory limitation of $10,000.00.[54]

The young amicus curiae's submissions

25 Prof Ong was asked to address me on the following issues:[55]

(a) What is the object and purpose of the court's power to order compensation under s 359(3) of the CPC?

(b) What is the meaning of a prosecution that is "frivolous or vexatious" in the context of s 359(3) of the CPC?

(c) What is the relevant test for proving "to the satisfaction of the court that the prosecution was frivolous or vexatious"? Without limiting the generality of the foregoing, to consider:

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53 RS1 at paras 100 to 103.

54 RS1 at para 105.

55 Amicus curiae's submissions on compensation dated 13 January 2021 ("YAC1") at Appendix A.

(i) Whether this involves a subjective standard, an objective standard, or a combination of both?

(ii) What factors should the court consider when determining whether a prosecution was frivolous or vexatious?

(iii) What is the standard of proof for the test and who bears the burden of that proof?

(d) In determining whether there has been a "frivolous or vexatious" prosecution, are the parties allowed to furnish further or fresh evidence (*ie*, other than those which has been admitted into evidence at the trial) in support of their respective positions?

(e) Assuming it is proved to the satisfaction of the court that the prosecution was "frivolous or vexatious", how should the court assess the quantum of compensation payable under s 359(3) of the CPC? Without limiting the generality of the foregoing, to consider:

(i) What factors should the court consider in assessing the quantum of compensation payable?

(ii) Do the words "[i]f an accused is acquitted of any charge for any offence …" in s 359(3) of the CPC mean that the $10,000.00 limit for compensation under that subsection is to apply per charge?

(iii) What should the court's approach be in cases where the court is satisfied that the prosecution is "frivolous or vexatious" in relation to some charges but not in relation to others?

(iv) Whether there is a difference and if so, what is the difference in assessing the quantum of compensation payable if it is proved to the satisfaction of the court that the prosecution was:

(A) both frivolous and vexatious;

(B) frivolous but not vexatious; and

(C) vexatious but not frivolous?

26 Following an extensive review of the genealogy of s 359(3) of the CPC, Prof Ong helpfully makes the following submissions:[56]

(a) The object and purpose of s 359(3) of the CPC is to create and define a new type of legal wrong captured by the phrase "frivolous or vexatious" which is not coterminous with, and cannot be subsumed within, an existing legal wrong (such as the torts of false imprisonment or malicious prosecution); its purpose is also to create an expedient procedure to obtain redress in the form of monetary compensation ("Possibility A"). Alternatively, the object and purpose of s 359(3) of the CPC is to create a new procedure to obtain a monetary remedy for a type of wrong that was already recognised by the law (*eg*, the torts of malicious prosecution or false imprisonment) ("Possibility B"). Possibility A is to be preferred.[57]

(b) The phrase "the prosecution" in s 359(3) of the CPC *prima facie* refers to the commencement, continuation, and the conduct of the

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56 YAC1 at paras 7 to 21.

57 YAC1 at paras 8, 39 and 44 to 56.

prosecution.[58] Compensation is available if the fact of prosecution (including both the initiation and the continuation of the prosecution) or the manner of prosecution was "frivolous or vexatious".[59]

(c) The meaning of "frivolous or vexatious" cannot depend on characteristics specific to the Prosecution because s 359(3) of the CPC applies to private prosecutors as well. Therefore, the constitutional role of the Prosecution should have no impact on the meaning of "frivolous or vexatious".[60]

(d) If Possibility A is correct, a prosecution is "frivolous or vexatious" if *one or more* of the following applies:[61]

(i) The prosecution is or becomes legally or factually unsustainable, in that:

(A) the initiation of the prosecution was legally or factually unsustainable in the light of the known evidence and applicable law; or

(B) at any point during the prosecution, the prosecution becomes legally or factually unsustainable in the light of the known evidence and applicable law.

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58 Amicus curiae's further submissions on compensation dated 13 January 2021 ("YAC2") at para 15.

59 YAC1 at para 58a.

60 Amicus curiae's reply submissions on compensation dated 26 March 2021 ("YAC3") at para 28; YAC1 at para 58b.

61 YAC1 at para 11.

(ii) The prosecutor lacks an honest belief that there is a reasonable and probable cause of action, in that:

(A) when initiating the prosecution, the prosecutor did not honestly believe that "there is a case fit to be tried" or "a proper case to lay before the court"; or

(B) at any point during the prosecution, the prosecutor ceased to honestly believe that "there is a case fit to be tried" or "a proper case to lay before the court".

(iii) The prosecutor's motive is improper, in that:

(A) the prosecution was initiated with an improper motive, such as to annoy, embarrass or harass; or

(B) at any point during the prosecution, the prosecutor formed such a motive.

(iv) The prosecution is not conducted seriously, in that:

(A) the prosecution was initiated with a lack of seriousness; or

(B) the prosecution was initiated with a sense of seriousness, but this sense of seriousness disappeared at any point during the prosecution.

(v) As to the prosecutor's conduct:

(A) the prosecutor's conduct evinces any of (ii), (iii), or (iv) above; or

(B) the prosecutor engages in conduct that does not advance its case or serves no purpose but to protract the trial, or is otherwise unnecessary and extravagant.

(e) If Possibility B is correct, a prosecution is "frivolous or vexatious" if:[62]

(i) the Prosecution has committed the tort of frivolous imprisonment by unlawfully charging the defendant with an offence to which s 95(1) of the CPC applies; or

(ii) the Prosecution has committed the tort of malicious prosecution.

(f) The applicant for compensation bears the legal burden of proving that the prosecution was "frivolous or vexatious". As to the standard of proof:[63]

(i) the appropriate standard is the "balance of probabilities";

(ii) the acquitted person will fail if he/she fails to adduce evidence which, if unrebutted, will warrant a conclusion that the prosecution was "frivolous or vexatious"; and

(iii) the weightier is the evidence by the prosecution that the prosecution was not "frivolous or vexatious", the more (and/or more weighty) is the evidence which the acquitted person will need in order to "tip the balance" by rebutting the prosecution's evidence.

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62 YAC1 at para 12.

63 YAC1 at para 13.

(g) Even after the trial, parties may adduce fresh evidence as to whether the prosecution was "frivolous or vexatious", and, if it was, what quantum of compensation should be paid. This may be adduced by way of witness testimony or the production of documents through a relatively straightforward procedure to which the criminal process (as opposed to the civil litigation process) is suited.[64]

(h) The quantum of compensation is to be that which will put the accused in a position as though the accused had not been frivolously or vexatiously prosecuted by compensating for proven injuries to legally protected interests, subject to causation, mitigation, and remoteness.[65]

(i) The methodology just described applies regardless of whether the prosecution is frivolous, vexatious, or both, subject to a rule against double recovery.[66]

(j) The costs of the accused's defence (which, for the avoidance of doubt, Parti is not claiming) is not recoverable as compensation.[67]

(k) The maximum amount of compensation which the court may award is $10,000.00 per charge.[68]

(l) If the prosecution was "frivolous or vexatious", it is nonetheless open to the court, in its discretion, to award no compensation or to award

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64 YAC1 at para 14.

65 YAC1 at para 15.

66 YAC1 at para 16.

67 YAC1 at para 17.

68 YAC1 at para 19.

a smaller sum than the proposed method of computing the quantum would yield.[69]

Issues to be determined

27 Based on the parties' submissions, the main issues to be determined before me are as follows:

(a) what is the meaning of "the prosecution was frivolous or vexatious" in s 359(3) of the CPC; and

(b) whether the prosecution was frivolous or vexatious in this case and, if so, what quantum of compensation should be awarded.

Legislative history

28 Before turning to my decision, I summarise the legislative history of the law on costs and compensation.

29 The court's power to order complainants or informants (*ie*, persons on whose complaint or information the accusation was made) to compensate an acquitted accused person on the basis that the *complaint* was "frivolous or vexatious" was created in 1900. The first provision, brought in force in Singapore, that contemplated this power was s 179 of the Criminal Procedure Code 1900 (SS Ord No 21 of 1900) ("1900 CPC") which provides the following:

> **179.** (1) If in any case the Court acquits the accused and is of opinion that ***the complaint was frivolous or vexatious*** it may in its discretion either on the application of the accused or

69 YAC1 at para 20.

> on its own motion order *the complainant or the person on whose information the complaint was made* to pay to the accused or to each or any of the accused where there are more than one such compensation not exceeding twenty-five dollars as the Court thinks fit.
>
> Provided that the Court (*a*) shall record and consider any objections which the complainant or informant may urge against the making of the order and (*b*) shall record its reasons for making such order.
>
> (2) The sum so awarded shall be recoverable as if it were a fine. Provided that if it cannot be realized the imprisonment to be awarded shall be simple and for such term not exceeding thirty days as the Court directs.
>
> (3) At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any sum paid or recovered as compensation under this sub-section upon proof of the same.
>
> [emphasis added in italics and bold italics]

This provision was later re-enacted as s 180 of the Criminal Procedure Code 1910 (SS Ord No 10 of 1910) ("1910 CPC") without any change to the wording. At this point, the court did not have the power to order the Prosecution to pay costs or compensation to an accused person who had been acquitted.

30 It was only in 1917 when the 1910 CPC was amended (see Criminal Law (Amendment) Ordinance 1917 (SS Ord No 10 of 1917)) to include s 432D that the court was given the power to order the *prosecutor* to pay costs to an accused person who had been acquitted. The section provides the following:

> **432D.** Whenever the accused is acquitted, and it appears to the Supreme Court or District Court that the ***prosecution was vexatious and without reasonable and probable cause***, the Court may order the *prosecutor to pay* the amount of the said expenses and compensations to the Treasurer, and also to pay *to the accused his full costs, charges and expenses*, to be taxed

> by the Registrar or District Judge, which he incurred in and about his defence.
>
> [emphasis added in italics and bold italics]

31 In the next major milestone, however, s 432D of the 1910 CPC was not retained in the Colony of Singapore's Criminal Procedure Code 1955 (No 13 of 1955) ("1955 CPC"). This removed the court's power to order the *prosecutor* to pay costs to an accused person who had been acquitted. Instead, the law on costs and compensation was consolidated in s 446 of the 1955 CPC. It provides for the court's power to make compensation and costs orders against *only the complainant or informant* as follows:

> **446.—**(1) If in any case a Magistrate's Court acquits the accused and is of the opinion that ***the prosecution was frivolous or vexatious*** it may, in its discretion either on the application of the accused or on its own motion order the *complainant or the person on whose information the prosecution was instituted* to pay to the accused, or to each or any of the accused where there are more than one, such compensation not exceeding fifty dollars as the Court thinks fit:
>
> Provided that the Court –
>
> (*a*) shall record and consider any objections which complainant or informant may urge against the making of the order; and
>
> (*b*) shall record its reasons for making such order.
>
> (2) Whenever in *like circumstances* an accused is acquitted by the High Court or a District Court such Court may, in addition to exercising the powers conferred on a Magistrate's Court by subsection (1) *order the complainant or informant to pay to the accused, or to each or any of them, the full costs,* charges, and

> expenses, to be taxed by the Registrar or District Judge, incurred by the accused in and about his defence.
>
> (3) Such compensation shall be no bar to an action for false imprisonment.
>
> [emphasis added in italics and bold italics]

32 Section 446 of the 1955 CPC was later re-enacted as s 402 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("1985 CPC") without any change to the wording. Apart from s 402(2) of the 1985 CPC, only the High Court presiding over an appeal could award costs against the Prosecution for appeals, points reserved and revision under s 262(1) of the 1985 CPC (the predecessor of this provision was s 305 of the 1955 CPC) which provides the following:

> **Costs**
>
> **262.**—(1) The High Court shall have full power in all proceedings under Part VII to award such costs to be paid by or to the parties thereto as the Court thinks fit.

33 The same provisions remained in force in Singapore (though renumbered several times) until 2010. In the Criminal Procedure Code 2010 (Act 15 of 2010) ("2010 CPC"), the court's power to award costs orders against the Prosecution was consolidated in ss 355(2), 356 and 409 of the 2010 CPC while the court's power to award compensation orders against the Prosecution was created in s 359 of the 2010 CPC for the first time.

The law

34 At present, the law on costs and compensation against the Prosecution is consolidated in ss 355, 356, 359 and 409 of the CPC.

35 Most notably, the CPC now gives the court the power to order the *Prosecution* to compensate an accused person who is acquitted (see *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012) ("*CPC Commentary*") at para 18.034). Prior to that, the predecessors of the provision only permitted compensation orders to be made against the *complainant or the person on whose information the prosecution was instituted*. Section 359 of the CPC, which took effect on 2 January 2011 and has been unchanged since, sets out the law on compensation orders as follows:

> **Order for payment of compensation**
>
> **359.**—(1) The court before which a person is convicted of any offence shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by —
>
> (a) the offence or offences for which the sentence is passed; and
>
> (b) any offence that has been taken into consideration for the purposes of sentencing only.
>
> (2) If the court is of the view that it is appropriate to make such an order referred to in subsection (1), it must do so.
>
> (3) *If an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that the* ***prosecution was frivolous or vexatious****, the court may order the prosecution or the complainant or the person on whose information the prosecution was instituted to pay as compensation to the accused a sum not exceeding $10,000.*
>
> (4) Any order for compensation made under subsection (1) shall not affect any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order, but any claim by a person

> or his representative for civil damages in respect of the same injury arising from the offence, shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation.
>
> (5) *The order for compensation made under subsection (3) shall not affect any right to a claim for civil damages for* ***malicious prosecution or false imprisonment*** *beyond the amount of compensation paid under the order, but any claim by the accused for civil damages in respect of the malicious prosecution or false imprisonment shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation.*
>
> [emphasis added in italics and bold italics]

Section 359(3) of the CPC also increased the amount of compensation that the court may order from $50.00 to $10,000.00.

36 Sections 355(1) and 355(2) of the CPC pertain to the court's power to order the accused to pay costs to any other person and the prosecution to pay costs to the accused. The sections are as follows:

> **Order for payment of costs by accused and order for payment of costs incurred by accused in his defence**
>
> **355.**—(1) The court before which a person is convicted of an offence may, in its discretion and if satisfied that the *defence of the person was conducted in an extravagant and unnecessary manner*, make an order for costs, of an amount fixed by the court, to be paid by the person to any other party to the proceedings in which the person is convicted of the offence.
>
> (2) If an accused is *acquitted* of any charge for any offence, and if it is proved to the satisfaction of the court that *the prosecution was frivolous or vexatious*, the court *may order the prosecution* or the complainant or the person on whose information the prosecution was instituted *to pay full costs, charges and expenses incurred by the accused in and for his defence*, to be

> taxed by the Registrar of the Supreme Court or the Registrar of the State Courts, as the case may be.
>
> [emphasis added in italics]

37 The *CPC Commentary* (at para 18.015–18.016) explained the adaptations to s 355(2) of the CPC from its predecessor as follows:

> **Subsection (2)** Subsection (2) had been adapted from section 402(2) of the old CPC, with two significant variations. First, unlike its antecedent, this subsection extends the powers of ordering payment of costs beyond the District Court and the High Court, and confers such powers upon all courts. Second, its predecessor limited the powers of the court to order payment of costs against the complainant or informant under section 402(2) of the old CPC. The present subsection allows such costs to be ordered against the Prosecution as well. It would be interesting to assess the jurisprudential developments vis-à-vis the matter as to when, and to what extent, the Prosecution would be liable for costs. Suffice it to say that in light of the fact that the exercise of prosecutorial discretion cannot, generally speaking, be reviewed save in very circumscribed situations (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239), and the fact that the decision to prosecute may, at times, be dependent on considerations that may be wholly legitimate but that may not be admissible in a court of law (or is otherwise not a factor that a court can take cognizance of in the determination of guilt), the awarding of such costs against the Prosecution, where it was the Public Prosecutor who arrived at the decision to prosecute, would be limited to the most exceptional of circumstances. Indeed, it would be fair to imagine that the primary, if not singular, use of the mechanism lies in the possible impropriety of selected private prosecutions (see, in this regard, comments of a similar vein in *Halsbury's Law of Singapore* vol 8(2) (LexisNexis, 2008 Reissue) at para 95.256), and even then, it is envisioned that such use would be rare in light of the fact that a patently frivolous and vexatious prosecution conducted by way of a private prosecution would have, in all likelihood, been halted midway through proceedings by way of a *nolle prosequi* filed by the Public Prosecutor. Needless to say, since the Public Prosecutor's consent to the initiation of such private prosecutions is, in many instances, not a prerequisite to the commencement of some such proceedings, it would be incumbent upon the defendant in an unmeritorious case to inform the Public Prosecutor of the extant proceedings so that the Public Prosecutor can assess as

> to whether it ought to intervene in the proceedings and/or to file a *nolle prosequi*.
>
> What is clear, however, is that the fact that the criminal proceedings result in an acquittal does not, *per se*, render the prosecution "frivolous or vexatious". In this connection, it is clear that the fact that a prosecutor has taken ill and seeks an adjournment would also be plainly insufficient: see *R v Chin Ah Chong* [1953] MLJ 10. For an illustrative example of a situation in which the facts were sufficiently egregious such as to warrant an order for costs, see *Sabastian Ratnam & Thangavelu v Public Prosecutor* [1934] MLJ 225.

38 Section 356 of the CPC deals with the powers of the Court of Appeal or the General Division of the High Court to order costs for appeals, points reserved, revisions and criminal motions, and provides as follows:

> **Costs ordered by Court of Appeal or General Division of High Court**
>
> **356.**—(1) The Court of Appeal or the General Division of the High Court, in the exercise of its powers under Part XX, may —
>
> > (a) on its own motion, make an order for costs to be paid by any party to any other party as the Court of Appeal or the General Division of the High Court thinks fit; or
> >
> > (b) on the application of any party, make an order for costs, of such amount as the Court of Appeal or the General Division of the High Court thinks fit, to be paid to that party by any other party.
>
> (2) Where the Court of Appeal or the General Division of the High Court makes any order for costs to be paid by the prosecution to an accused, the Court of Appeal or the General Division of the High Court must be satisfied that *the conduct of the matter under Part XX by the prosecution was frivolous or vexatious*.
>
> (3) Before the Court of Appeal or the General Division of the High Court makes any order for costs to be paid by an accused

> to the prosecution, the Court of Appeal or the General Division of the High Court must be satisfied that —
>
> > (a) the *commencement, continuation or conduct of the matter under Part XX by the accused was an abuse of the process* of the Court; or
> >
> > (b) the conduct of the matter under Part XX by the accused was done in an extravagant and unnecessary manner.
>
> (4) If the prosecution applies to the Court of Appeal or the General Division of the High Court for an order for the costs of any matter under Division 1B of Part XX to be paid by an accused to the prosecution on the ground that the commencement, continuation or conduct of that matter by the accused was an abuse of the process of the Court, the Court of Appeal or the General Division of the High Court must state whether it is satisfied that the commencement, continuation or conduct of that matter by the accused was an abuse of the process of the Court.
>
> [emphasis added in italics]

39 Section 409 of the CPC provides for the court's power to order costs against any party following a criminal motion as follows:

> **Costs**
>
> **409.** If the relevant court dismisses a criminal motion and is of the opinion that the *motion was frivolous or vexatious or otherwise an abuse of the process* of the relevant court, it may, either on the application of the respondent or on its own motion, order the applicant of the criminal motion to pay to the respondent costs on an indemnity basis or otherwise fixed by the relevant court.
>
> [emphasis added in italics]

40 This judgment is concerned primarily with the interpretation of s 359(3) of the CPC since Parti is only seeking a compensation order against the Prosecution. She is not seeking a costs order against the Prosecution under s 355(2) of the CPC. However, it is crucial to understand that ss 355(2) and

359(3) of the CPC apply in tandem with each other. From their plain wording, it is clear that when an accused person is acquitted and the court is satisfied that "the prosecution was frivolous or vexatious", the court may order the prosecution, the complainant or the informant to pay compensation *and/or* full costs, charges and expenses incurred by the accused in and for his defence. Therefore, as I explain below (at [83]), this forms part of the relevant context in interpreting s 359(3) of the CPC.

Issue 1: The meaning of "the prosecution was frivolous or vexatious" in s 359(3) CPC

41 The proper interpretation of the scope and meaning of s 359(3) of the CPC has not hitherto been considered by the Singapore courts. Since the interpretation of s 359(3) of the CPC is a novel one, I turn first to the principles of statutory interpretation applicable in Singapore.

42 It is trite that the court adopts a purposive approach in interpreting statutory provisions (see s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA")). The Court of Appeal in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") (at [37] and [54]) set out a three-stage framework as follows:

(a) First, the court will ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.

(b) Second, the court will ascertain the legislative purpose or object of the statutory provision in question.

(c) Third, the court will compare the possible interpretations of the text against the purposes or objects of the statute. The interpretation which furthers the purpose of the written text should be preferred to the interpretation which does not.

43 As the Court of Appeal in *Tan Cheng Bock* cautioned (at [50]), the proper function of the court when applying s 9A of the IA is to *interpret* a given statutory provision. While purposive interpretation is an important and powerful tool, it is not an excuse for the court to *rewrite* a statute. The authority to alter the text of a statute lies with Parliament, and judicial interpretation is generally confined to giving the text a meaning that its language can bear. Hence, purposive interpretation must be done with a view toward determining a provision's or statute's purpose and object "as reflected by and in harmony with the express wording of the legislation".

44 Applying the *Tan Cheng Bock* framework in the context of determining the meaning of "the prosecution was frivolous or vexatious" in s 359(3) of the CPC, the analysis proceeds as follows:

(a) First, this court will consider the various possible meanings of the phrase "the prosecution was frivolous or vexatious" in s 359(3) of the CPC, having regard to the text of s 359(3) of the CPC and the context of that provision within the CPC as a whole.

(b) Second, this court will ascertain the legislative purpose of s 359(3) of the CPC. In so doing, this court ought to give primacy to the *text* of the provision. Where appropriate, this court may also consider extraneous material for this purpose.

(c) Third, this court will compare the possible meanings of the phrase "the prosecution was frivolous or vexatious" in s 359(3) of the CPC against the legislative purpose and ascertain which of these possible meanings best furthers the legislative purpose of s 359(3) of the CPC.

45 For ease of reference, I set out s 359(3) of the CPC again:

> (3) If an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that ***the prosecution was frivolous or vexatious***, the court may order *the prosecution* or the complainant or the person on whose information *the prosecution* was instituted to pay as compensation to the accused a sum not exceeding $10,000.
>
> [emphasis added in italics and bold italics]

46 With this, I turn to the first stage of the *Tan Cheng Bock* framework, namely, to determine the various possible meanings of "the prosecution was frivolous or vexatious" as used in s 359(3) of the CPC.

The first stage of the Tan Cheng Bock *framework*

The various possible meanings of "the prosecution"

47 I begin with the various possible meanings of "the prosecution" in s 359(3) of the CPC. I note that the provision uses the term "the prosecution" three times, though not necessarily in the same way. In the first use of the term, the provision describes a situation where "the prosecution" was frivolous or vexatious ("the First Use"). In the second use of the term, the provision describes the court ordering "the prosecution or the complainant" to pay compensation ("the Second Use"). In the third use of the term, the provision describes an informant as "the person on whose information the prosecution was

instituted" ("the Third Use"). It is the First Use which is material to the dispute before me.

48 Parti submits that the First Use refers to "not only the commencement and continuation, but also the conduct of the government agent advancing the case".[70] The Second Use refers specifically to the person who instituted the case. The Third Use refers only to the proceeding that was instituted and carried on by due course of law. The First Use is a broader use of the term "the prosecution" and indicates not only the commencement and continuation of the proceeding, but also the conduct of the government agent advancing the case.[71] Parti also argues that the references to "conduct" in ss 356(2) and 356(3)(*a*) of the CPC show that conduct is a factor when the courts intend to make costs orders. In fact, s 356(2) of the CPC is confined to the Prosecution's conduct.[72]

49 The Prosecution submits that the First Use "plainly denotes the decision to commence and continue prosecution, and cannot encompass the minutiae of how each prosecutor conducts himself or herself at every stage of the proceedings".[73] This interpretation is supported by the following:

(a) Since other CPC provisions provide for costs to be ordered in view of the "conduct of the matter … by the prosecution" (see s 356(2) of the CPC), the "commencement, continuation or conduct of the matter … by the accused" (see s 356(3)(*a*) CPC), and "the conduct of the matter … by the accused" (see s 356(3)(*b*) CPC), the fact that no such wording

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70 AS2 at para 14.

71 AS2 at paras 14 to 15.

72 AS2 at paras 17 to 19.

73 RS1 at para 44.

is used in s 359(3) of the CPC suggests that only the prosecution *itself* (and not the conduct of the proceedings *per se*) determines whether compensation should be ordered.[74]

(b) If the provision were intended to address improper conduct by the Prosecution, there would be no reason for compensation under s 359(3) of the CPC to be limited to cases where the accused was acquitted.[75]

(c) Section 359(5) of the CPC refers to "civil damages for malicious prosecution", which likewise target wrongful prosecution (and not the prosecutor's conduct of the proceedings).[76]

50 On this point, Prof Ong submits that the First Use means the entire process of prosecution, from its initiation, to its continuance and the manner in which it was conducted, all the way until the end of the proceedings.[77] Prof Ong relies on the change of wording from "the complaint was frivolous or vexatious" in s 179 of the 1900 CPC (see [29] above) to "the prosecution was frivolous or vexatious" to submit that the Legislature must be taken to have intended a change in the scope of the provision. Unlike the word "complaint", the word "prosecution", as used in the 1900 CPC and the CPC, describes not just the initiation of a process, but an entire process, from the bringing of the charges to the conclusion of the court proceedings.[78]

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74 RS1 at para 44(a).

75 RS1 at para 44(b).

76 RS1 at para 44(c).

77 YAC1 at para 65.

78 YAC1 at paras 62 to 63.

51 While parties agree that the First Use includes the initiation and continuation of the proceedings,[79] they dispute as to whether the First Use also includes the conduct of the prosecutors during the proceedings *per se*.

52 *Prima facie*, the ordinary meaning of "the prosecution" is broad and capable of encompassing the conduct of the prosecutors during the proceedings. As such, I accept that there are two possible interpretations of the First Use having regard to the text of s 359(3) of the CPC and the context of that provision within the CPC:

(a) "the prosecution" means only the decision to prosecute and continue prosecuting ("Interpretation 1"); and

(b) "the prosecution" means the entire process of prosecution including the decision to prosecute and continue prosecuting as well as the conduct of the prosecutors during the proceedings ("Interpretation 2").

53 However, the correct interpretation must depend on the "**particular statutory context** in which it is used, in particular, the ***legislative intention*** underlying the relevant statutory provision, which in turn is *primarily* embodied in the *text* of the statutory provision itself or, failing which, in extraneous material" (see *Skyventure VWT Singapore Pte Ltd v Chief Assessor and another and another matter* [2021] SGCA 40 at [32]).

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[79] Transcript (16 April 2021) at pp 16 to 18.

The various possible meanings of "frivolous or vexatious"

54 The phrase "frivolous or vexatious" is not new. Apart from s 359(3) of the CPC, the word "frivolous" appears eight other times in the CPC and the word "vexatious" appears seven other times in the CPC albeit in various formulations. The same phrase is also utilised in other legislation (see O 18 r 19 (1)(*b*) of the Rules of Court and ss 85(8)(*a*), 85(19), 93(2A) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA")). Before turning to the possible meanings of "frivolous or vexatious" in the context of s 359(3) of the CPC, I examine the ordinary meaning of "frivolous or vexatious" as set out in local and foreign case law.

(1) The meaning of "frivolous or vexatious" in local cases dealing with costs orders against the Prosecution under the CPC

55 Within the CPC, the same phrase "frivolous or vexatious" is seen in ss 355(2), 356(2) and 409 of the CPC which relate to costs orders against the Prosecution.

56 In *Arun Kaliamurthy and others v Public Prosecutor and another matter* [2014] 3 SLR 1023 ("*Arun Kaliamurthy*"), Tan Siong Thye JC (as he then was) dealt with an application under s 357(1) of the CPC where the prosecution sought a costs order against the defence counsel on the grounds that the filing of the criminal motion by the defence counsel was unreasonable and without reasonable competence and expedition.

57 Tan JC made some pertinent observations regarding costs orders in civil proceedings and criminal proceedings (at [17]–[18]) as follows:

> 17 In civil proceedings which involve *disputes between private parties advancing their own private interests*, costs

> orders are *usually made in the course of proceedings*. The general principle that "costs follow the event" governs such orders. This means that the costs of an action are usually awarded to the successful litigant. However, ***in criminal proceedings, costs orders are usually not made***. Costs orders against the defence ("the Defence") or the Prosecution are made only in very limited circumstances and are not premised upon who is the successful litigant. For example, under s 355(1) of the CPC, a court may only order costs against the Defence after a conviction if it is found that the defence was conducted in an "extravagant and unnecessary" manner. In the case of the Prosecution, s 355(2) of the CPC allows a court to order costs against a prosecution after an acquittal if it is found that the prosecution was "frivolous or vexatious".
>
> 18 The reason behind limiting ground for the award of costs in criminal proceedings is the ***public interest element in criminal litigation***. Criminal proceedings are not initiated for the purpose of advancing private interests. Proceedings are brought by the Prosecution in exercise of its largely unfettered and lightly regulated prosecutorial responsibility, acting in the public interest and for the sake of the maintenance of law and order. ***It would, thus, not be right to expose prosecutors to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful unless there is dishonesty or malice.*** Conversely, the Defence acting honestly and reasonably must be encouraged to advance the cause of justice without fear of financial prejudice. Both the Prosecution and the Defence are ***discharging public functions*** in the interests of justice by securing convictions and acquittals of criminals and innocents respectively. Neither should be deterred from performing such public functions out of fear of a likely adverse costs order. As a result, adverse costs orders are only provided ***for in limited circumstances***.
>
> [emphasis added in italics and bold italics]

58 In *Ang Pek San Lawrence v Singapore Medical Council* [2015] 2 SLR 1179 ("*Ang Pek San*") (at [24]), the Court of Three Judges noted that the rationale for limiting the power to make adverse costs orders in criminal proceedings was explained in *Arun Kaliamurthy* (at [18]). Thus, while the Prosecution is not immune from adverse costs orders and the courts may award costs against the Prosecution (see ss 355(2) and 356(1) of the CPC), this was limited to appropriate, *albeit limited*, circumstances.

59 The Prosecution submits that *Arun Kaliamurthy* is authority for the proposition that costs and compensation orders should not be made against the Prosecution unless there is "dishonesty or malice".[80] In the context of discussing s 356(2) of the CPC, this must be mean that "frivolous or vexatious" requires "dishonesty or malice to be proven". Prof Ong disagrees and submits that the phrase "dishonesty or malice" was nothing more than a passing remark by Tan JC. It was not meant to lay down a test on when costs should be awarded against the Prosecution (which was not the issue in the *Arun Kaliamurthy*). Even if it was, Tan JC's own assumption of "properly brought proceedings" in that sentence does not help to resolve the very question of when a prosecution is "frivolous or vexatious" (*ie*, not properly brought).[81] In any event, even if Tan JC intended to set out such a test, it should be considered implicitly overruled by the Court of Appeal in *Huang Liping v Public Prosecutor* [2016] 4 SLR 716 ("*Huang Liping*") when it accepted (at [25]) that one example of "frivolous or vexatious" conduct by the Prosecution was "fil[ing] a criminal reference which did not raise a question of law of public interest and which was, instead, a 'back-door' appeal" [emphasis in original omitted]. Clearly, such an example did not involve "dishonesty or malice". Therefore, it is incorrect to equate "frivolous or vexatious" with "dishonesty or malice".[82]

60 After considering *Arun Kaliamurthy* in its entirety, I am of the view that Tan JC did not take the view that "frivolous or vexatious" requires "dishonesty or malice" to be proven. The learned judge made this clear (at [31]) when he opined that the meaning of "frivolous or vexatious" in criminal proceedings

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80 Transcript (16 April 2021) at pp 77 to 78; see RS1 at para 41.

81 YAC1 at paras 152 to 155.

82 YAC1 at paras 156 to 158.

should be the same as that in civil proceedings under the Rules of Court (see [65] below). The meaning of "frivolous or vexatious" in civil proceedings under the Rules of Court does not require malice or dishonesty (see [65]–[67] below). I understand Tan JC to have made this remark simply to point out that *when there was a properly brought proceeding in the sense that there was sufficient evidence to bring the case to trial* but there was dishonesty or malice shown, that may be a case to consider the award of costs against the Prosecution. His remark cannot be taken to mean that "malice or dishonesty" must be proven in order to conclude that the prosecution was "frivolous or vexatious". I elaborate further on my views regarding the interaction between malice and "frivolous or vexatious" below (see [125]–[127] below).

61 In *Huang Liping*, the Court of Appeal (at [17]–[19]) discussed *Arun Kaliamurthy* and made the following observations:

> 17 In *Arun Kaliamurthy*, Tan JC considered the interpretation of not only s 356, but also s 409 of the CPC, both of which differ slightly in wording. Section 356 relates to the High Court and the Court of Appeal's power to award costs with respect to Part XX of the CPC (*ie*, appeals, points reserved, revisions and criminal motions). In so far as the latter provision is concerned, it provides, more specifically, for the High Court's power to award costs if it dismisses a criminal motion. …
>
> 18 From the above provisions, the following principles may be distilled:
>
> (a) *The Prosecution* could be made to pay costs to an accused person by the High Court or the Court of Appeal if the conduct of the matter by the Prosecution is "frivolous or vexatious" (see s 356(2) of the CPC).
>
> (b) *An accused* could be made to pay costs to the Prosecution by the High Court or the Court of Appeal if he conducts the matter in a manner that is "extravagant and unnecessary" (see s 356(3) of the CPC).
>
> (c) *An applicant* could be made to pay costs to the respondent by the High Court if the criminal motion is

> deemed to be "frivolous or vexatious or otherwise an abuse of process of the Court" (see s 409 of the CPC).
>
> 19 Notwithstanding that different terms are used to describe the circumstances in which costs may be awarded pursuant to either s 356 or 409 of the CPC, Tan JC noted in *Arun Kaliamurthy* (at [35]) that "the matters to be assessed in determining whether [a criminal motion] is frivolous or vexatious, or an abuse of process of the court, are similar to those *vis-à-vis* determining whether the accused persons had conducted the matter in an extravagant and unnecessary manner". ***We agree with the observations made by Tan JC***. Whether one uses the words "frivolous or vexatious" or "extravagant and unnecessary", when deciding whether costs should be awarded in a criminal proceeding, the court should ultimately look at the circumstances as a whole and scrutinise, *inter alia*, the facts of the case, the strength of the Defence (or Prosecution) and the course of conduct of the Defence (or Prosecution) …
>
> [emphasis in original]

62 While the Court of Appeal did not go further to explain the meaning of "frivolous or vexatious" in the context of ss 356(2) and 409 of the CPC, it emphasised the factually intensive nature of the inquiry inherent within legal terms of art like "frivolous or vexatious", "extravagant or unnecessary" or "abuse of process of the Court". The Court of Appeal also made the following observations as regards s 356(2) of the CPC (at [24]):

> 24 We would also add that, pursuant to s 356(2) of the CPC, the Prosecution could also be made to pay the accused costs. Although that particular subsection is worded differently (in that the *Prosecution's conduct of the matter must be "frivolous or vexatious*"), as noted above, similar considerations *vis-à-vis* determining whether the conduct of the matter is "extravagant and unnecessary" would apply. *This is not to say, however, that the considerations when deciding whether to award costs against the Prosecution as compared to an accused are one and the same*. In this regard, in *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie and Mohamed Faizal Mohamed Abdul Kadir gen ed) (Academy Publishing, 2012), the learned authors opined as follows (at para 18.015):

> It would be interesting to assess the jurisprudential developments *vis-à-vis* the matter as to when, and to what extent, the Prosecution would be liable for costs. Suffice it to say that in light of the fact ***that the exercise of prosecutorial discretion cannot, generally speaking, be reviewed save in very circumscribed situations*** (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239), and the fact that the decision to prosecute may, at times be dependent on considerations that may be wholly legitimate but that may not be admissible in a court of law (or is otherwise not a factor that a court can take cognizance of in the determination of guilt), the awarding of such costs against the Prosecution, where ***it was the Public Prosecutor who arrived at the decision to prosecute would be limited to the most exceptional of circumstances***. [emphasis added]
>
> We note, however, that the above observations were made in the context of the bringing of frivolous or vexatious prosecutions (as compared to a criminal reference). Since this was not an issue that arose before us, we decline to render any conclusion on this point save to say, without the benefit of full arguments, that the above observations appear to be of weight.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

63 To summarise the above at [62], the Court of Appeal observed that while there are similar considerations behind the award of costs orders against the accused and the Prosecution, they are not "one and the same". The Court of Appeal considered the view of the authors of the *CPC Commentary* to beof weight. The authors opined that in the light of the circumscribed review of prosecutorial discretion and wholly legitimate but possibly inadmissible considerations in coming to the decision to prosecute, the awarding of costs against the Prosecution would be limited to the "most exceptional of circumstances". This view was made in the context of the bringing of "frivolous or vexatious" prosecutions (see s 355(2) of the CPC) as opposed to the context of the prosecution's conduct of the matter (*ie*, appeals, points reserved, revisions or criminal motions) being "frivolous or vexatious" (see s 356(2) of the CPC).

64 The upshot of these local cases is that they speak with one voice on the *limited and exceptional* circumstances required before the court orders costs against the Prosecution. In my view, this high threshold is accurately encapsulated by the phrase "frivolous or vexatious" as set out statutorily in ss 355(2) and 356(2) of the CPC which, by its nature, would require exceptional circumstances.

(2) The meaning of "frivolous or vexatious" in the Rules of Court

65 Under O 18 r 19(1)(*b*) of the Rules of Court, the court may strike out or amend any pleading or endorsement of any writ in the action and order that the action be stayed, dismissed or given judgment for if it is "scandalous, frivolous or vexatious". As stated above (at [60]), Tan JC in *Arun Kaliamurthy* (at [31]–[33]) observed that the meaning of "frivolous or vexatious" in the CPC should be the same as the Rules of Court:

> 31 In light of the applicability of s 409, I can order costs against the accused persons in this case if I find that CM 32 is frivolous or vexatious, or an abuse of process of the court. Section 409 is a relatively new provision and has never been considered before and there *has been no discussion of what is frivolous or vexatious, or an abuse of process of the court, in the context of s 409*. However, what is frivolous or vexatious, or an abuse of process of the court has been discussed extensively in the context of civil proceedings, especially under O 18 r 19(1)(*b*) of the Rules of Court. ***I do not think there should be any difference between the definitions under the Rules of Court and the CPC in this regard***. Different standards should not be imposed on the conduct of court proceedings, whether they are civil or criminal proceedings. Accordingly, ***what is frivolous or vexatious, or an abuse of process of the court, should not differ between civil and criminal proceedings***.
>
> 32 What amounts to a frivolous or vexatious proceeding, or one that is an abuse of process of the court, has been explained by the Court of Appeal in *Riduan bin Yusof v Khng Thian Huat* [2005] 2 SLR(R) 188. Lai Siu Chu J who delivered the judgment of the court held at [29]–[30]:

29 In *Afro-Asia Shipping Co (Pte) Ltd v Haridass Ho & Partners* [2003] 2 SLR(R) 491 I had defined (at [22]) the words 'frivolous or vexatious' under O 18 r 19(1)(*b*) of the Rules to mean ***'cases which are obviously unsustainable or wrong, [and where] the words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of bona fides'.*** The definition as held by Yong Pung How CJ in *Goh Koon Suan v Heng Gek Kiau* [1990] 2 SLR(R) 705 at [15], also included ***proceedings where a party 'is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result'***.

30 Similarly, the phrase 'abuse of process' under O 18 r 19(1)(*d*) of the Rules was explained by the Court of Appeal in *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [22] thus:

> … It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents. In *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

33 Accordingly, ***CM 32 is frivolous or vexatious, if the motion is obviously unsustainable or wrong, or if there is a lack of bona fides*** in the filing of the CM 32. It will also be an abuse of process if it is not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose. To determine whether CM 32 is frivolous or vexatious, or an abuse of process of the court, I must therefore have regard

> to the merits of CM 32, the conduct of proceedings in relation to CM 32 and the surrounding facts.
>
> [emphasis added in italics and bold italics]

66 With regard to "plainly or obviously unsustainable" actions, the Court of Appeal, in *The "Bunga Melati 5"* [2012] 4 SLR 546 (at [39]), explained that this would refer to:

> (a) legally unsustainable actions: if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or
>
> (b) factually unsustainable actions: if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

67 While I am hesitant to hold that the definition of "frivolous or vexatious" in the different provisions of the CPC is *wholly the same* as that in the Rules of Court, I accept that the terminology used in the cases setting out the meaning of "frivolous or vexatious" in the Rules of Court is potentially instructive. At the least, it fleshes out the ordinary meaning of the phrase "frivolous or vexatious" as applied to civil proceedings that ought not to have been instituted in the first place. I note that the inquiry as to whether the proceeding is "frivolous or vexatious" in the Rules of Court is both objective and subjective. It is objective in that the merits of the case have to be considered in order to determine if the proceeding is "obviously unsustainable and wrong". However, it is subjective

in that a lack of *bona fides* or an improper motive (*ie*, to annoy or embarrass one's opponent) is also relevant to the inquiry.

(3) The meaning of "frivolous or vexatious" in foreign cases dealing with costs or compensation

68 The Indian courts have, in a series of cases, shed some light on the meaning of the terms "frivolous" and "vexatious" as well as its interaction with deliberately false reports. The majority of the court, in *Beni Madhub Kurmi v Kumud Kumar Biswas* [1903] ILR 30 Cal 123 ("*Beni Madhab*") at 129, dealing with whether compensation may be ordered in a case where the complaint was false as well as frivolous or vexatious, observed that "frivolous" indicates that the accusation is of a trivial nature, but may or may not be false. "Vexatious" implies that the accusation is one which ought not to have been made in a criminal court, and which is intended to harass the accused. Neither "frivolous or vexatious" excludes a situation where the charge was false. The majority considered that there was no reason why a case in which the accusation was false should be considered as being outside the scope of "frivolous or vexatious".

69 Next, in *Musammat Jaina v Santukdas and another* [1919] 54 Indian Cases 249 at 250, the court affirmed *Beni Madhab*'s observations and similarly described "frivolous" as trifling, silly, or without due foundation. It observed that "[i]f the charge was found to be a false one, it was to my mind patently both a vexatious and frivolous one". Finally, in *Bakaji v Mukundsingh and others* [1920] 55 Indian Cases 98 at 100, the court observed that "there seems to be no room for doubt that an accusation may be frivolous or vexatious without being wholly false". It also stated that a "vexatious" charge may be partly true and the

idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused.

70 Turning to the Malaysian authorities, in *Malacca Municipality v Ng Leong Wah* [1973] 2 MLJ 183 ("*Malacca Muncipality*"), the court overturned an order for compensation against the prosecution. In so doing, the court noted that the term "frivolous" indicates that the "accusation is of a "trivial nature" or is "trifling", "silly," or "without due foundation" and the term "vexatious" implies that the accusation is one that ought not to have been made and is intended to harass or annoy the accused. The court took the view that it must be affirmatively proved that the complainant "knew or had good reason to believe that the complaint he was making was either frivolous or vexatious". This, as it appears, suggests an objective and subjective test. It would not suffice if the complaint made was not an improbable one and the complainant was simply unable to prove his case. The court observed that "frivolity is one thing and vexation is another" and cautioned that it should not be left ambiguous upon which of the two the order was made.

71 Finally, there are two cases where the Malaysian courts have ordered costs against the prosecution, *Sabastian Ratnam & Thangavelu v Public Prosecutor* [1934] 1 MLJ 225 ("*Ratnam*") and *R v Mohamed Bin Sudin and Kassim Bin Abdullah* [1935] SSLR 309 ("*Sudin*"). Since there was no statutory precondition in the provisions concerned in *Sudin* and *Ratnam*, both cases cited *Stubbs and another v The Director of Public Prosecutions* (1890) 24 QBD 577 ("*Stubbs*") at 581 for the proposition that costs may be ordered against the public prosecutor if it is shown that "the prosecution was vexatious, that is, begun or continued without reasonable and probable cause", or "frivolous". In *Ratnam*, the prosecution had not made any attempt to prove the age of the child which

was critical for a conviction for kidnapping or explored any corroborative evidence mentioned in the information for warrant. The court considered it a charge "which there was absolutely no justification in bringing" and ordered costs of $25.00 for each accused against the prosecution. In *Sudin*, the prosecution appealed against an acquittal of bribery charges against two accused persons. This was despite the trial judge's finding of fact that the prosecution's principal witness was a "scallywag and unworthy of credit". The court considered that the prosecution did not have a case since the testimony of the principal witness had collapsed. While the appeal was not frivolous, the appeal had been brought without reasonable and probable cause. Thus, the court ordered costs of $75.00 against the prosecution.

(4) The tort of malicious prosecution

72 Section 359(5) of the CPC (see [35] above) provides that any compensation paid out under s 359(3) of the CPC shall be counted towards the satisfaction of any claim for civil damages for malicious prosecution. The tort of malicious prosecution is similar to "frivolous or vexatious" prosecution in s 359(3) of the CPC in that they both deal with proceedings which ought not to have been brought in the first place and are contingent on the acquittal of the accused person. Therefore, the elements of the tort of malicious prosecution may potentially have some relevance to the meaning of "frivolous or vexatious" in s 359(3) of the CPC.

73 In *Zainal bin Kuning and others v Chan Sin Mian Michael and another* [1996] 2 SLR(R) 858 ("*Zainal Kuning*") (at [54]), the elements of the tort of malicious prosecution were set out by the Court of Appeal as follows:

(a) the plaintiff was prosecuted by the defendant (*ie*, the law was set in motion against him on a criminal charge);

(b) the prosecution was determined in the plaintiff's favour;

(c) the prosecution was without reasonable and probable cause; and

(d) the prosecution was malicious.

74 The Court of Appeal (at [56]) accepted Hawkins J's definition in *Hicks v Faulkner* (1878) 8 QBD 167 at 171 that reasonable and probable cause was "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". This is both subjective and objective: not only must there be reasonable and probable cause, the prosecutor must have subjectively believed that it existed (see *Challenger Technologies Pte Ltd v Dennison Transoceanic Corp* [1997] 2 SLR(R) 618 at [44]).

75 The degree of guilt believed by the prosecutor need not extend to a belief that the accused would be convicted but simply *whether there is a case fit to be tried*. This was persuasively observed by Lord Denning in *Glinski v McIver* [1962] AC 726 at 758:

> [I]n truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause 'to bring the [accused] "to a fair and impartial trial"': see *Johnstone v Sutton* 1 Term Rep 493, 547. After all, he cannot judge whether the witnesses are telling the

> truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him.

Similarly, Lord Devlin expressed, at 766, that:

> This makes it necessary to consider just what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds; I shall hereafter in my speech not always repeat the adjectives 'reasonable' and 'probable') for thinking that the plaintiff was probably guilty of the crime imputed: *Hicks v Faulkner* 8 QBD 167, 173. This does not mean that the prosecutor has to believe in the probability of conviction: *Dawson v Vandasseau* (1863) 11 WR 516, 518. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried.

76 The requirement of malice, in the context of prosecutions, means being motivated by improper and indirect considerations. It must be shown that the prosecution was motivated not by a desire to achieve justice but for some other reason (see *Zainal Kuning* at [84]).

(5) The possible meanings of "frivolous or vexatious" for s 359(3) of the CPC

77 Since each statutory context may target different mischief and Parliament may well use the same phrase to mean different things (see *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*") at [61]), the case law above may only offer guidance on the ordinary meaning of "frivolous or vexatious" across several contexts. I emphasise that it is still ultimately a matter of interpretation as to what "frivolous or vexatious" means in the context of s 359(3) of the CPC.

78 Parti (see [17(b)] above) and Prof Ong (see [26(d)] above) agree that "frivolous or vexatious" prosecution would not require proof of malice or dishonesty but could include any of the following:

(a) where the prosecution is or becomes legally or factually unsustainable in the light of the known evidence and the applicable law;

(b) where the prosecutor lacks an honest belief that there is a reasonable and probable cause of action;

(c) where the prosecutor's motive is improper in that it was initiated with an improper motive (such as to annoy, embarrass or harass);

(d) where the prosecution is not conducted seriously in that the prosecution was initiated with a lack of seriousness or that sense of seriousness disappeared at any point during the prosecution; and

(e) where the prosecutor's conduct (i) evinces a lack of an honest belief, an improper motive or a lack of seriousness; or (ii) evinces conduct that does not advance its case, is purposeless and only protracts the trial, or is unnecessary or extravagant.

79 In contrast, the Prosecution (see [21(a)] and [21(b)] above) submits that "frivolous or vexatious" has the same meaning as malicious prosecution. It is necessary to prove dishonesty or malice on the Prosecution's part and that the Prosecution did not honestly and reasonably believe that there was sufficient evidence against the accused to make a case fit to be tried to begin with. This could be the case where the prosecution was not motivated by a desire to achieve justice but by improper and indirect considerations, including a desire to harass or annoy the accused and thus lacked a *bona fide* or legitimate purpose.

80 Parties do not dispute that the meaning of "frivolous or vexatious" in s 359(3) of the CPC will include a situation where the prosecution was instituted or continued dishonestly, maliciously, for an improper motive (such as a desire to harass or annoy an accused person without a *bona fide* or legitimate purpose). The central dispute is whether there is a requirement to prove malice or dishonesty before "frivolous or vexatious" prosecution under s 359(3) of the CPC is made out. I am of the view that both interpretations proffered by the parties are possible when considering the text of the CPC and the context of that provision within the CPC as a whole.

The second stage of the Tan Cheng Bock *framework*

81 I turn next to ascertain the legislative purpose or object as per the second stage of the *Tan Cheng Bock* framework. As observed in *Ting Choon Meng* (at [61]), the more general object of the statute may cast little light on the purpose of a particular provision within that statute. As such, it is sensible to focus on ascertaining the more specific purpose behind s 359(3) of the CPC. The starting point of ascertaining legislative purpose should be giving primacy to the internal sources (*ie*, the text of the relevant legislative provision itself and the statutory context) (see *Tan Cheng Bock* at [43]). This is because the law enacted by Parliament is the text which Parliament has chosen to embody and give effect to its purposes and objects. Where appropriate, extraneous material may be referred to under ss 9A(2) and 9A(3) of the IA to assist the court in ascertaining the legislative purpose.

82 Prof Ong suggests Possibility A and Possibility B (see [26(a)] above) as alternative versions of the legislative purpose of s 359(3) CPC and he takes the view that Possibility A is correct. In substance, Parti's position (see [17(a)] and

[17(b)] above) is aligned with Possibility A and the Prosecution's position (see [21(a)] above) is aligned with Possibility B.

83 As observed above (at [40]), the statutory context includes the fact that, in most cases, ss 355(2) and 359(3) of the CPC apply in tandem. The Legislature used the same phrasing "[i]f an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that the prosecution was frivolous or vexatious" in both provisions. It is likely the case that the Legislature intended that the court may award compensation (under s 359(3) of the CPC) and/or costs (under s 355(2) of the CPC) to an accused person who is acquitted if it is satisfied that there was a "frivolous or vexatious" prosecution.

84 In our criminal justice system, it is not the case that an accused person who is acquitted is entitled as of right to costs for the sums he incurred in his defence and/or compensation for his loss from the Prosecution. As seen from the legislative history above (at [28]–[33]), the earliest predecessors of s 359(3) of the CPC only allowed compensation from the *complainant or informant* if it could be proven that the *complaint* was "frivolous or vexatious". Similarly, the earliest predecessor of s 355(2) of the CPC (see [30] above) also made the payment of costs by the Prosecution contingent on proving that the "prosecution was vexatious and without reasonable and probable cause". This provision, however, was repealed subsequently. After the introduction of the current ss 355(2) and 359(3) of the CPC, the courts were given the power to make both compensation and costs orders against the Prosecution if it is satisfied that the prosecution was "frivolous or vexatious".

85 After considering the relevant internal and external sources, I am of the view that Possibility A is to be preferred over Possibility B. In my judgment,

the legislative purpose of s 359(3) of the CPC is to ***define a legal wrong, "frivolous or vexatious" prosecution, which delineates the circumstances of when the bringing or continuing of a prosecution is so wrong that compensation ought to follow***. The compensation and costs orders are to provide some means of redress for the legal wrong done to the acquitted accused person arising from a "frivolous or vexatious" prosecution. The purpose is not simply to create a convenient or alternative procedure for such accused persons to obtain compensation and costs orders by proving the torts of malicious prosecution or false imprisonment. I come to this decision for the following reasons.

Text of s 359(3) of the CPC and the statutory context

86 The Legislature's choice of the phrase "frivolous or vexatious" is the strongest indication of legislative intention that s 359(3) of the CPC is intended to carefully define a new legal wrong, "frivolous or vexatious" prosecution, to delineate the exceptional circumstances for when it is appropriate for an accused person who is acquitted to be compensated by the Prosecution, the complainant or the informant for both his loss (capped, however, at $10,000.00) and also in the case of s 355(2) of the CPC, his full costs, charges and expenses of defending himself. The mischief the provision targets is a limited and exceptional spectrum of ***prosecutions which ought not to have been brought*** which could be accurately described as a ***"frivolous or vexatious" prosecution***. Under the CPC, this legal wrong allows the consequences of compensation and costs to flow.

87 The purpose is not simply to create a convenient "shortcut" to obtain compensation by proving the torts of malicious prosecution or false

imprisonment. This would not be in harmony with the literal wording of the CPC. There is no indication from the plain words of s 359(3) and s 355(2) of the CPC that the Legislature intended to allow compensation and costs ***only*** for cases where the torts of malicious prosecution or false imprisonment have been made out. Instead, the phrase "frivolous or vexatious" is used to describe the kind of prosecution that is caught within the ambit. As noted above (at [54]–[71]), this phrase is not new and has been used in a variety of contexts to connote the bringing of a complaint, proceeding or prosecution which should not have been brought. The use of this phrase in several different legal contexts as explained above (at [54]–[71]) do not require malice to be shown. The Legislature must have been cognisant of this when it chose the phrase "frivolous or vexatious".

88 On this point, I take guidance from the following extract in Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th ed, 2008) at p 1157:

> Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and *different words should be given different meanings*.
>
> [emphasis added]

89 The Legislature decided that "frivolous or vexatious" is the ***one and only test*** to delineate the type of exceptional circumstances which constitute a legal wrong such that compensation or costs consequences should follow. Applying the intuitive principle of construction that "different words should be given different meanings", I find that it is the Legislature's intention to give a different meaning to "frivolous or vexatious" which, while similar in some respects, is distinct from the tort of malicious prosecution. There is nothing to suggest the

contrary. In fact, it is telling that the Legislature chose "frivolous or vexatious" when it was fully cognisant of the tort of malicious prosecution. It concurrently uses the phrase "a claim for civil damages for malicious prosecution or false imprisonment" in s 359(5) of the CPC. Section 359(5) makes clear that a compensation order granted by a criminal court does not affect any right to a claim for civil damages for malicious prosecution or false imprisonment beyond that paid under a compensation order, but any such claim for civil damages shall be deemed satisfied to the extent of the amount paid under a compensation order. This simply ensures that there is to be no double recovery for any loss arising from the same prosecution. Nothing in s 359(5) of the CPC suggests that the meaning of "frivolous or vexatious" prosecution in s 359(3) of the CPC should be equated to the meaning of the tort of malicious prosecution. Such a reading renders the Legislature's choice of the phrase "frivolous or vexatious" otiose.

90 Had the Legislature intended that compensation for an accused person who is acquitted is *only available* if the torts of malicious prosecution or false imprisonment had been made out, it would have simply used the phrase "the prosecution was malicious or the accused person was falsely imprisoned" instead of "the prosecution was frivolous or vexatious". At most, it may be observed that the Legislature considered that a malicious prosecution would likely satisfy the test of "frivolous or vexatious" prosecution. This, as I explain below at [126], is correct.

91 The analysis would have been different if the Legislature had given the discretion to the courts to award compensation in an appropriate case without specifying a test, similar to what was done in s 359(1) of the CPC. A three-judge *coram* of the High Court in *Tay Wee Kiat and another v Public Prosecutor and*

another appeal [2018] 5 SLR 438 (*Tay Wee Kiat*) (at [9]), in considering an application for compensation under s 359(1) of the CPC, held that the court must "be able to say, with a high degree of confidence, that the damage in question ha[d] been caused by the offence under circumstances which would ordinarily entitle the victim to civil damages". The court also observed (at [7]) that criminal compensation is a "convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid". Essentially, the mechanism under s 359(1) of the CPC operates like a shortcut to the remedy that the victim could obtain in a civil suit against the offender. The Prosecution submits that this same reasoning applies to s 359(3) of the CPC.[83] I do not accept this submission. Section 359(1) of the CPC does not specify any test and only provides for "compensation to the person injured, or his representative, in respect of his person, character or property". However, in utilising the phrase "the prosecution was frivolous or vexatious" in s 359(3) of the CPC, the Legislature intended to delineate the line as to when the circumstances justify an award of compensation or costs against the prosecution (see s 355(2) and 356(2) of the CPC). Therefore, the comparison between ss 359(1) and 359(3) is inapposite.

92 I now consider the purpose behind the recognition of the legal wrong of "frivolous or vexatious" prosecution or the mischief that the provision seeks to address. This is material since the parties dispute over whether the legal wrong of "frivolous or vexatious" prosecution encompasses the conduct of the prosecutors at trial *even if there was a case fit to be tried before the court*. In my view, the language chosen suggests that the mischief that the Legislature intended to address in s 359(3) of the CPC is ***prosecutions that ought not to***

[83] RS2 at para 6.

have been brought or continued but was frivolously or vexatiously done so and ***not how the prosecutions were conducted by the prosecutors***. If the latter was the intention, the Legislature could have worded s 359(3) of the CPC as "the commencement, continuation or conduct of the prosecution was frivolous or vexatious" similar to s 356(3)(*a*) of the CPC as opposed to "the prosecution was frivolous or vexatious". However, the Legislature chose to utilise "the prosecution" in s 359(3) of the CPC despite having used other phrases which clearly encompass the prosecutors' or the accused's conduct such as the "conduct of the matter … by the prosecution" (see s 356(2) of the CPC) and the "commencement, continuation or conduct of the matter … by the accused" (see s 356(3)(*a*) of the CPC) in other provisions of the CPC.

93 Nothing in the provision suggests that the mischief sought to be addressed includes the conduct of the prosecutors at trial ***even if there was a case fit to be tried*** before the courts. Conversely, the requirement of an acquittal in s 359(3) of the CPC suggests that the legislative intention behind the creation of the new legal wrong of "frivolous or vexatious" prosecution is not to regulate the conduct of prosecutors at trial. This is because it would not be logical to make the legal wrong contingent on an acquittal if the mischief targeted was the conduct of the prosecutors at trial. Frivolous or vexatious conduct by the prosecutors at trial would be unacceptable ***regardless of whether there is an acquittal or a conviction***. I do not think that the legislative purpose is for the legal wrong of "frivolous or vexatious" prosecution to censure such conduct by the prosecutors when there is an acquittal but to have no application when there is a conviction. This fortifies my view that the legislative purpose of s 359(3) of the CPC, as discerned by the Legislature's choice of words in the provision, is intended to primarily address the mischief of prosecutions that ought not to have instituted or continued but was frivolously or vexatiously done so, and not the

conduct as such of the prosecutors at trial. As it stands, the latter ought to be left to the remit of the disciplinary procedures available under the LPA.

Parliamentary debates

94 I turn next to consider whether there are any parliamentary debates that may help me ascertain the legislative purpose behind s 359(3) of the CPC. At the outset, I should point out that there is a dearth of any legislative material concerning the Legislature's specific purpose in enacting s 359(3) of the CPC. The introduction of ss 355(2), 356(2) and 359(3) of the CPC was not debated in Parliament. The only written material available on s 359(3) of the CPC specifically is the Ministry of Law's Consultation Paper dated 11 December 2008 to 5 February 2009 ("Consultation Paper") which states:

> **(iii) *Compensation to accused***
>
> 40. An amendment will be made to allow the court to order the prosecution to pay compensation to an accused person if the prosecution was frivolous or vexatious.

95 The Prosecution submits that the parliamentary debates in 1994, 1996 and 2008 regarding the concerns against allowing costs orders against the Prosecution in the event of an acquittal are relevant to this court's interpretation of s 359(3) of the CPC.[84] The Prosecution cites the following portions of the debates in support of its point that the Prosecution performs a public function and its decisions must be adequately protected from excessive scrutiny:

> (a) In 1994, Assoc Prof Walter Woon (NMP) asked the Minister for Law to look into giving the courts the discretion to award costs to a defendant, payable by the State, where the defendant was acquitted in a frivolous case and the courts were satisfied that he was in fact innocent. The Minister replied: "If we are going to provide for costs whenever a person is acquitted, I feel

84 RS1 at para 32; RS2 at para 19.

> that *this will have an inhibiting effect on prosecutors and on the Police … It will lead to a situation where the Police and the prosecution will want to take up only sure-win cases*" (emphasis added): *Singapore Parliamentary Debates*, *Official Reports*, vol 62 cols 689–692 (9 March 1994).
>
> (b) Assoc Prof Walter Woon (NMP) raised the same issue in 1996. The Minister for Law replied: "When the Attorney-General prosecutes, he is performing a constitutional duty … a public duty. He does so on behalf of the Government and on behalf of the public because public interest must be uppermost in his mind … *[A] general blanket rule on awarding costs against the prosecution can have an inhibiting effect on the Prosecutors and Police.* It will be against public interest" (emphasis added): *Singapore Parliamentary Debates*, *Official Reports*, vol 65 cols 971–978 and 1014–1018 (12 March 1996).
>
> (c) In 2008, parliamentary questions were raised to the Minister for Law on the Government's position on compensation for acquitted persons. The Minister reiterated that the Prosecution prosecutes on behalf of the public, and the provision of costs against the Prosecution would be "too high a burden" for it to bear from a "public policy perspective": *Singapore Parliamentary Debates*, *Official Reports*, vol 84 col 2990 (25 August 2008).
>
> [emphasis in original]

96 The Prosecution also submits that the comments made by the Minister of Law, K Shanmugam (the "Minister for Law"), in August 2008, just a few months before the Consultation Paper was released, show that the genesis of s 359(3) of the CPC is the tort of malicious prosecution.[85] I quote the relevant extract from the 2008 debates as follows (*Singapore Parliamentary Debates, Official Report* (25 August 2008), vol 84 at cols 2991 to 2992):

> **Mr Sin Boon Ann**: Sir, a clarification. My position is not one of strict liability. My position is essentially one of assurance to the public that if a decision is taken to prosecute, the parties have looked at it with duty of care and the duty has been discharged, and that this is not a decision taken lightly. What the parties certainly do not want is a flippant prosecution which will result in great cost to the defendant to have to defend his good name.

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85 Transcript (16 April 2021) at pp 68 to 70.

Mr Shanmugam: I think whatever our prosecution in Singapore is accused of, it is usually not accused of flippant prosecution. The Member probably knows that *there is already a provision in our law which provides for compensation should there be malicious prosecution*. ***One has got to be very careful about frivolous, vexatious and malicious prosecutions, and that certainly is not the approach the prosecution takes***.

…

Mr Christopher de Souza: On the issue of cost and on the arguments on cost, should not the real question be whether the prosecution should have been commenced in the first place and not whether a man who has been acquitted is factually guilty? I think there is a distinction in that and I would like the Minister's response. Should not the question be, at the cost hearing, whether the prosecution should have been commenced in the first place, ie, it was not frivolous, and not whether a man who has been acquitted is factually guilty?

Mr Shanmugam: I am not sure I understand the precise nature of the question, but let me try and understand and answer it to the best of my ability. I think there are two separate questions, which is something that I have been saying as well. In the context of the hon. Member's and Mr Yeo's questions, the issue is what are the legal consequences and what is the precise nature of an acquittal. That is a philosophical issue, as it were, that we have been debating and dealing with. It is an entirely separate question as to whether either costs or compensation ought to be paid upon an acquittal and a couple of Members asked that question. I have tried to deal with it as best as I can, and I will repeat that answer, which is that when you get acquitted, there can be a number of policy perspectives.

One, anyone who gets acquitted should get compensation. I do not think the public in Singapore would support that for the reason that there are many who may in fact have gotten away on a technicality. And if you tell the man in the street that all of them are going to get paid, I think people would not support it. I do not see Members in this House supporting it. I do not see the public supporting it. And I know of no jurisdiction where that is enforced as a matter of principle.

A second possibility could be compensation or some kind of costs are paid upon the accused not only proving that he got acquitted but going further to prove his innocence. There are jurisdictions where that is allowed. What we provide for is, *if you can show that the prosecution was malicious*, and in some ways, what Mr de Souza said, *that the prosecution should never have been started in the first place*, then there are possibilities,

> *if you can show that it was malicious or vexatious, for you to get some compensation.* ***That is where we have set the bar, and we are not looking at changing that****.*
>
> [emphasis added in italics and bold italics]

97 The Prosecution argues that the genesis of s 359(3) of the CPC is malicious prosecution because the Minister for Law used the terms "frivolous", "vexatious" and "malicious prosecutions" interchangeably and declared that the bar would not be changed in August 2008 when the Consultation Paper was released in December 2008.[86] This means that the law following s 359(3) of the CPC should be the same as the tort of malicious prosecution.

98 Prof Ong, however, submits that these debates are not relevant to the interpretation of s 359(3) of the CPC for the following reasons. First, these debates were several years before s 359(3) of the CPC was enacted and are not directly relevant to the Legislature's intention *in enacting* s 359(3) of the CPC. Second, the Minister for Law was only stating his view that an accused person ought not to be entitled to costs and/or compensation from the Prosecution merely because the accused person has been acquitted. The debates cited also do not address the point of *when* an acquitted person should be entitled to costs and/or compensation. In any event, even if these debates do shed any light on that point, it was always open to the Legislature when it passed the amendments to the CPC to stipulate a different answer. Third, regardless of the views of the Legislature before 2010, upon the enactment of s 359(3) of the CPC in 2010, the Legislature intended to allow the Prosecution to be liable to pay compensation to an acquitted accused person.[87]

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86 Transcript (16 April 2021) at pp 69 to 71.

87 YAC1 at paras 81 to 92.

99 I find that the 1994, 1996 and 2008 parliamentary debates are of little assistance in ascertaining the legislative purpose of s 359(3) of the CPC for the following reasons.

100 As recognised in *Tan Cheng Bock* (at [35]), the relevant Parliamentary intention is to be found *at the time the law was enacted*. The implication of this is that notwithstanding the sentiments raised in Parliament before the enactment of s 359(3) of the CPC, I accept in principle that the Legislature could very well change its mind. Thus, Prof Ong's argument that these parliamentary debates are not useful because they were before the enactment of s 359(3) of the CPC has merit. None of the debates pertain to the material time when the law was enacted. In fact, those debates took place even before the Consultation Paper was released (*ie*, December 2008). As such, the will and intent of Parliament should be taken to be reflected in the text of the enactment (see *Tan Cheng Bock* at [35]) and not discerned from these debates.

101 These debates were also not directed towards the enactment of s 359(3) of the CPC. As stated in *Ting Choon Meng* (at [63]), under ss 9A(1) and 9A(2) of the IA, extraneous material may be resorted to where it is *capable of helping to ascertain the meaning of the provision by shedding light* on the objects and purposes of the statute as a whole, and where applicable, *on the objects and purposes of the particular provision in question*. Specifically, on the use of parliamentary material, *Ting Choon Meng* (at [20]) also cautions that special attention should be paid "not only to the Minister who actually moves the Bill concerned in Parliament but also (and in particular) to that part of his speech which relates *directly* to the clause(s) that are sought to be interpreted" [emphasis in original].

102 Most importantly, in determining the weight to be placed on extraneous material, the court should have regard to the clarity of the material and whether the statement is directed to the very point in dispute between the parties (see *Ting Choon Meng* at [71(h)]). The court noted (at [70(a)]) the following:

> In relation to statements made in Parliament in particular, it has been observed in several decisions of the English courts that these must be ***"clear and unequivocal" to be of any real use***: Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349 ("*Spath Holme*") at 398. See also, for example, *R v Warner* [1969] 2 AC 256 at 279e. The danger lies in the likelihood of the court being drawn into comparing one Parliamentary statement with another, appraising the meaning and effect of what was said and then considering what was left unsaid and why (per Lord Bingham of Cornhill at 392 of *Spath Holme*). In the process, it can begin to appear as if the *court is being asked to construe the statements made by Parliamentarians rather than the Parliamentary enactment.* In line with this, and in my judgment, more importantly, a requirement recognised by the English courts is that the statement in question ***must "disclose the mischief aimed at [by the enactment] or the legislative intention lying behind the ambiguous or obscure words"*** (*Pepper v Hart* [1993] AC 593 at 634). Lord Browne-Wilkinson has further re-stated this in terms of a requirement that the statement should be "directed to the very point in question in the litigation" because to do otherwise would "involve the interpretation of the ministerial statement in question" (*Melluish (Inspector of Taxes) v BMI (No 3) Ltd* [1995] 4 All ER 453 at 468).
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> [emphasis in original omitted; emphasis added in italics and bold italics]

103 The first two debates in 1994 and 1996 pertained to Associate Professor Walter Woon's suggestion that the courts be granted the discretion to award costs against the Prosecution. In both debates, Professor S. Jayakumar (the then Minister for Law) disagreed with that suggestion. In the first debate in 1994, Professor Jayakumar's comments were targeted towards a blanket rule allowing costs against the Prosecution in *all* acquittals. In the second debate in 1996,

Professor Jayakumar reiterated that "to have a blanket provision or cost against the prosecution whenever the accused is acquitted or in the cases where Prof. Woon mentioned, in a selective case, would encourage a situation where the prosecution takes up which can be described as 'sure-win' cases rather than cases which ought, in the public interest, to be prosecuted because public interest demands it". Since the court's discretion to grant costs against the Prosecution is not in issue before this court, these comments are clearly not relevant to the legislative purpose of s 359(3) of the CPC.

104 The third debate in 2008 pertained to certain comments made by the Minister for Law in relation to the law at that time which only provided recourse through the tort of malicious prosecution. On a closer scrutiny of the Minister for Law's comments, I do not find it capable of assisting this court in ascertaining the legislative purpose of s 359(3) of the CPC.

105 While the Minister for Law may have used the terms "frivolous", "vexatious" and "malicious" prosecutions interchangeably in addressing Mr Sin Boon Ann's concern on "flippant prosecution[s]", his comments do not shed any light on the meaning of the phrase "frivolous or vexatious" under s 359(3) of the CPC. When the Minister for Law said "[o]ne has got to be very careful about frivolous, vexatious and malicious prosecutions", this was preceded by a comment that "there is already a provision in our law which provides for compensation should there be malicious prosecution". Understood in its proper context, the Minister of Law was merely pointing out that there exists a tort of malicious prosecution, and therefore, a prosecutor has to be careful about "frivolous, vexatious and malicious prosecutions" as the tort of malicious prosecution may offer recourse in these instances. That, of course, ultimately depends on whether the elements of the tort of malicious prosecution (see [73]

above) are made out on the facts of each case. This is far from a "clear and unequivocal" indication of legislative intention for the phrase "frivolous or vexatious" in s 359(3) of the CPC to mean the tort of malicious prosecution.

106 When the Minister for Law made the remark that "[t]hat is where we have set the bar, and we are not looking at changing that", this was in the context of referring to the existing law of the tort of malicious prosecution. This can be seen from his preceding comments that "there are possibilities, if [the acquitted accused person] can show that [the prosecution] was *malicious* or vexatious, for [the acquitted accused person] to get some compensation." [emphasis added]. He did not appear to have had the proposed amendment of s 359(3) of the CPC in mind.

107 At that point in time, a closer reading of the context reveals that the Minister for Law accepts the possibility of "compensation or some kind of costs [to be] paid upon the accused not only proving that he got acquitted but *going further to prove his innocence*." [emphasis added]. He noted that there are other jurisdictions where that is allowed but maintained that Singapore only provided recourse for malicious or vexatious prosecution. Clearly, this possibility is at odds with the language eventually utilised in the enactment of s 359(3) of the CPC. The plain wording of the provision as enacted allows an accused person who is acquitted to claim compensation if the "prosecution was frivolous or vexatious" and not upon having to prove his *innocence*. Since the Minister for Law did not appear to even view such a provision as necessary at that point in time, his comments at that time clearly could not have been directed to the meaning of "frivolous or vexatious" prosecution. It is also not of any use in disclosing any mischief s 359(3) of the CPC was aimed at. To the extent that the Legislature may have subsequently changed its mind, it is not this court's

place to speculate as to why this is so. As demonstrated, it is rather difficult to attempt to discern any "clear and unequivocal" legislative intention from parliamentary debates especially when they are not of direct relevance to the enacted provision in question. It is therefore appropriate for me to give primacy to the will and intent of the Legislature as expressed in the words of the enactment over such extraneous parliamentary material.

108 As such, I conclude that the debates cited are not helpful in ascertaining the legislative purpose behind s 359(3) of the CPC. As I have found (at [85] above), the legislative purpose of s 359(3) of the CPC is to ***define a legal wrong, "frivolous or vexatious" prosecution, which delineates the circumstances of when the bringing or continuing of a prosecution is so wrong that compensation ought to follow***.

The third stage of the Tan Cheng Bock framework

109 This brings me to the third stage of the *Tan Cheng Bock* framework which requires me to compare the possible meanings of the phrase "the prosecution was frivolous or vexatious" against the legislative purpose of s 359(3) of the CPC and ascertain which of these possible meanings best furthers the legislative purpose.

110 As regards the interpretation of "the prosecution" (*ie*, the First Use) in s 359(3), I hold that Interpretation 1 (*ie*, that "the prosecution" means the decision to prosecute and continue prosecuting) best furthers the legislative purpose of s 359(3) of the CPC. The subject of what is "frivolous or vexatious" is not the conduct of the prosecutors at trial. This arises from my analysis at [92]–[93] above that the mischief that s 359(3) of the CPC, in creating the legal wrong of "frivolous or vexatious" prosecution, seeks to address is *prosecutions*

that ought not to have been brought or continued but was brought or continued frivolously or vexatiously. While I acknowledge that certain undesirable conduct by the prosecutors at the trial may cause undue delay, inefficiencies, or prejudice to accused persons, the provision is not directed at how the prosecutions were conducted by the prosecutors.

111 A prosecution that is brought or continued against an accused person in good faith and with sufficient evidence such that the case is fit to be tried before the court does not become a "frivolous or vexatious" prosecution simply because the prosecutor's conduct at the proceedings is unacceptable. The conduct of the prosecutors may ***only be of evidential value if it shows a lack of good faith or malice which renders the decision to commence prosecution and/or continue prosecution "frivolous or vexatious"***. Hypothetically, if there is an allegation of "frivolous or vexatious" prosecution because the particular prosecutors had an improper motive of harming the accused person for collateral purposes, the court may be entitled to consider the prosecutor's use of foul language, intimidation, harassment or other undesirable conduct as part of all the circumstances of the case. Such conduct may be of evidential value to the court's eventual determination of whether there was malice, dishonesty or improper motive which renders the decision to commence and/or continue prosecution "frivolous or vexatious".

112 For completeness, the Second Use refers to the Prosecution as the party liable to pay for the compensation order. I observe tentatively that the Third Use may not have the same meaning as the First Use. As the Third Use refers to the informant as "the person on whose information *the prosecution* was instituted", the words "was instituted" makes it more likely that the Third Use refers only to the decision to commence prosecution at first instance.

113 As regards the interpretation of "frivolous or vexatious" in s 359(3) of the CPC, given my analysis at [85]–[90] above, I hold that "frivolous or vexatious" in s 359(3) of the CPC does not have the *same* meaning as the tort of malicious prosecution. I reject the Prosecution's submission that to prove that a prosecution is "frivolous or vexatious", it is necessary to show that there was "dishonesty or malice" on the Prosecution's part. The phrase "frivolous or vexatious" is chosen by the Legislature to be the ***one and only test*** to delineate the type of exceptional circumstances which constitute a legal wrong such that an accused person who is acquitted should be awarded compensation or costs.

The interpretation of "the prosecution was frivolous or vexatious" in s 359(3) of the CPC

114 Across the various legal contexts examined, the phrase "frivolous or vexatious" has largely been used in a coherent manner. The word "frivolous" is used to connote complaints, accusations, proceedings, or prosecutions that are trivial, trifling, silly, purposeless, without due foundation, obviously unsustainable or wrong. The word "vexatious" is used to connote false accusations and complaints, or accusations, proceedings, or prosecutions which are made not in good faith or with improper motives (*eg*, intended purely or predominantly to harass or annoy the accused).

115 It is too ambitious to seek to set out an exhaustive definition of "frivolous or vexatious" in the context of s 359(3) of the CPC and, in my view, there is none. Even attempting to map out the exact contours of what is "frivolous" and "vexatious" is by no means easy given the overlap between them. There could be a frivolous prosecution, a vexatious prosecution, and in some cases, a frivolous and vexatious prosecution. While I note the court's caution in *Malacca Muncipality* that "frivolity is one thing and vexation is

another" (see [70] above), this caution was made in the context that the court was statutorily required to record its reasons for making such an order. Most of the case law have not identified specifically whether the facts before them was frivolous or vexatious or both. This is understandable given that there is no bright line between them. In the light of these brief observations, I turn to set out the following guidance for future cases of a similar sort.

116 Having regard to the various context in which the phrase "frivolous or vexatious" has been used and the legislative purpose underlying s 359(3) of the CPC, I am of the view that the touchstone of the inquiry as to whether "the prosecution was frivolous or vexatious" is the *evidential sufficiency of the commencement and continuation of the prosecution*. As the Prosecution rightly acknowledges,[88] the obvious consideration in the decision to commence prosecution is the strength of the evidence. The court will ask, based on the evidence the Prosecution had at the relevant time, whether ***an objective reasonable Deputy Public Prosecutor ("DPP") would have considered that there was sufficient evidence to render the case fit to be tried*** before the court.

117 It is inherent in the nature of every acquittal that the totality of the evidence adduced in the course of a trial is insufficient to prove the charge beyond a reasonable doubt. Where the accused person who has been convicted by the trial court is acquitted on appeal, as Parti was in this case, the appellate court must not merely entertain doubts as to whether the trial judge's decision is right but *must be convinced that the trial judge's decision is wrong* (see *Public Prosecutor v Azman bin Abdullah* [1998] 2 SLR(R) 351 at [21]). In relation to findings of fact based on the trial judge's assessment of the credibility and

[88] RS1 at para 36.

veracity of witnesses, an appellate court will only interfere if the finding of fact can be shown *to be plainly wrong or against the weight of evidence* (see *ADF v Public Prosecutor and another appeal* [2010] 1 SLR 874 at [16]). Thus, where there is an acquittal on appeal, there is almost certainly several aspects of the case that the appellate court deems to be plainly wrong. This may not necessarily suffice to make out a case of frivolous prosecution. The difficulty is drawing the line as to when the evidence is so insufficient that there is ***no case fit to be tried before the court***. The classic case of such a frivolous prosecution is when the decision to commence and/or continue prosecution is based on such insufficient evidence that the prosecution is objectively factually unsustainable (see [66] above). This would be the kind of groundless prosecution that is clearly wrong. *Ratnam* (see [71] above) is an illustration of such a prosecution which the court considered frivolous. The court even described the charge as one "which there was absolutely no justification in bringing". I am also of the view that a frivolous prosecution may also include a prosecution which is legally unsustainable where, even if the Prosecution succeeds in proving all the facts asserted, the elements of the charge will still not be satisfied.

118 In considering the sufficiency of evidence, the court is not concerned with the public interest motivation(s) behind the prosecution or inadmissible evidence which is irrelevant to the court's determination of guilt in any case. The Prosecution, playing its constitutional role, is presumed to be acting in the public interest when it commences or continues any prosecution (see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [72]). The Prosecution naturally assesses the sufficiency of the admissible evidence at the commencement of the prosecution and should continually do so throughout the continuation of the prosecution taking into account new developments. If cross-examination at trial reveals severe weaknesses in the testimony of the witnesses

or new evidence is discovered that destroys the very crux of the Prosecution's case, the onus is on the Prosecution to re-evaluate its case and decide if the prosecution should continue. If it is appropriate, the Prosecution should, as ministers of justice, exercise its discretion to discontinue the proceedings. Obviously, this does not mean that each time there is a weakness in the Prosecution's case, the Prosecution should discontinue the prosecution. It is a matter of weighing the evidence supporting its case throughout trial, as I believe has always been the practice of the Prosecution.

119 This brings me to the effect of an omission by the Defence to make a "no case to answer" submission at trial. The Prosecution argues that the Defence, by not making such a submission, "accepted that the evidence presented as part of the Prosecution's case at first instance *prima facie* tended to support the charges preferred against her and had raised serious questions that merited a response from her".[89] Parti argues that the fact that no such application was made is completely irrelevant to the application for compensation under s 359(3) of the CPC. She submits that such an application is merely an option that may be exercised by the Defence based on a number of considerations. It should not be a requirement for a compensation order.[90]

120 In my view, the omission of a "no case to answer" submission by the Defence and the trial judge's objective view, in calling the defence, that the test in *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 (the "*Haw Tua Tau* test") is satisfied ***are good indicators (though not***

89 RS1 at para 61.

90 AS2 at para 47.

determinative) that the prosecution was not "frivolous or vexatious" for the following reasons.

121 First, it is open to the Defence to invite the court to dismiss the case on the ground that there is no case to answer at the close of the Prosecution's case and the prosecutor may reply to the submission under s 230(1)(*f*) of the CPC. While Parti is correct that a submission of a "no case to answer" by the Defence is not a requirement of s 359(3) of the CPC, it stands to reason that if the Defence does not make such a submission, it could be said that the Defence implicitly accepts at that point that there is a *prima facie* case to be answered. In *The Law Society of Singapore v Gurbachan Singh* [2018] SGDT 13 (at [184]), the disciplinary tribunal was of the same view that the absence of the submission of "no case to answer" by the respondent is recognition that the Law Society's case was not inherently incredible. As a result, the disciplinary tribunal took the view that the complaints made were not "frivolous or vexatious" and accordingly did not order costs against the complainant under s 93(2A) of the LPA. I find this view persuasive.

122 However, I caution that while the absence of a submission of "no case to answer" by the Defence may be a good indicator that the prosecution is not "frivolous or vexatious", this is not determinative. Ultimately, the court must still consider the sufficiency of evidence in totality and may well come to the view that the prosecution is "frivolous or vexatious" even if the Defence did not make such a submission.

123 Second, regardless of whether the Defence makes an application of "no case to answer", the trial court must decide to call on the accused to give his defence if "there is some evidence which is not inherently incredible and which

satisfies each and every element of the charge" under s 230(1)(*j*) of the CPC. The trial judge has a duty to independently consider whether there is a *prima facie* case, which if unrebutted, could lawfully result in a conviction. Thus, if the trial judge calls for the defence and essentially finds that that "there is some evidence which is not inherently incredible and which satisfies each and every element of the charge" in accordance with the *Haw Tua Tau* test, this is a separate but objective indication that at the time of trial the prosecution was not "frivolous or vexatious". Some weight must be given to this since the trial judge is an objective party looking at the facts, albeit from a *prima facie* standpoint.

124 That said, where the trial judge has come to the conclusion that there is a "case to answer", the trial judge may subsequently, quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution (see *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 at [23] and [26]). Therefore, this indicator is not determinative as well. The trial judge may have erred in concluding that there was a "case to answer" at that time or subsequent developments may mean that the continuation of the prosecution becomes "frivolous or vexatious". As such, the question before the court remains whether, based on the evidence the Prosecution had at the time of commencement of prosecution or continuation of prosecution, an objective reasonable DPP would have considered that there was sufficient evidence to render the case fit to be tried or continued before the court.

125 While the analysis as to the sufficiency of evidence is predominantly objective, the overall inquiry as to whether the prosecution was "frivolous or vexatious" under s 359(3) of the CPC has both objective and subjective elements. The word "vexatious" suggests a more subjective analysis into the state of mind of the prosecutors. Naturally, there is an overlap between

vexatiousness and the concepts of malice and dishonesty. For malice, in particular, it was noted in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 (at [99]) that the very concept itself tends towards a *subjective* inquiry which may create the problem of uncertainty. While the court will, as far as possible, have regard to the objective evidence before it, any inquiry into the presence or absence of malice will be inherently fraught with subjectivity. In this context, there is a further difficulty with ascertaining whose subjective mind the court ought to be concerned with. The DPPs who made the initial charging decision may not be the DPPs who had conduct of the trial. In any case, this depends largely on who the specific assertions of malice or dishonesty are made against.

126 While there is no requirement to prove malice or dishonesty to show "frivolous or vexatious" prosecution, this does not mean that they are necessarily irrelevant. The ***existence of malice, dishonesty or improper motives may well render the prosecution vexatious***. For instance, if the tort of malicious prosecution is made out on the facts, the court will most likely be satisfied that the prosecution was "frivolous or vexatious". This is because the tort of malicious prosecution requires the applicant to show malice *and* that there was no reasonable or probable ground to bring the prosecution. Other possible ways of showing malice or improper motive include producing evidence of illegality committed by the prosecutors in an attempt to pervert the course of justice, the presence of a collateral object to secure a conviction or even overt expressions of spite or ill-will (see *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 23rd Ed, 2020) at para 15.57). Naturally, convincing evidence must be required to establish this. The court has to consider the totality of the circumstances to arrive at a view as to whether the prosecution was "frivolous or vexatious".

127 In some circumstances, a prosecution brought with sufficient evidence may still be considered "frivolous or vexatious". There is authority that acknowledges that a vexatious charge may include a charge that is true but made with the primary objective of harassing the person accused (see above at [69] above). This suggests that from an objective perspective, even if the court is satisfied that there was ***sufficient evidence making the case fit to be tried***, it may still be possible that the prosecution was "frivolous or vexatious" if the ***prosecutor subjectively would not have brought the prosecution but for malice, dishonesty or an improper motive***. Hypothetically, if the particular DPP having conduct of the trial subjectively believed that the charge was groundless, even though in the court's view there may be some evidence fit to be tried, but only proceeded against the accused person because of a personal vendetta, this may possibly be considered vexatious.

The burden and standard of proof

128 It is undisputed that the burden of proving that the prosecution was "frivolous or vexatious" lies on the applicant under s 359(3) of the CPC. With regard to the standard of proof, the Prosecution submits that the applicable standard of proof is a "high degree of confidence" as derived from *Tay Wee Kiat*,[91] while Prof Ong submits that the appropriate standard of proof is on a balance of probabilities.[92] Parti submits that the standard of proof should require the Defence to show *prima facie* evidence of "frivolous or vexatious" prosecution which will then require the Prosecution to justify its conduct to the

91 RS1 at para 52.

92 YAC1 at para 13a.

court. If the Prosecution fails to do so, the prosecution will be found to have been "frivolous or vexatious".[93]

129 After considering the various submissions, I hold that the appropriate standard of proof is on a balance of probabilities. Considering that the sufficiency of evidence will likely have been ventilated in the course of trial and that allegations of malice, dishonesty or improper motive must only be made with good reason, there is no reason to adopt any *prima facie* standard.

130 I do not agree that the observations in *Tay Wee Kiat* where the court stated (at [9]), in the context of s 359(1) of the CPC, that it "should be able to say, with a high degree of confidence, that the damage in question has been caused by the offence under circumstances which would ordinarily entitle the victim to civil damages" is applicable to s 359(3) of the CPC. There are only two standards of proofs. On this, I find the observations made by the Court of Appeal in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 (at [14]) regarding standards of proof in the context of fraud particularly instructive:

> … There are, indisputably, *only two standards of proof*. For criminal cases, the standard is proof beyond reasonable doubt; for civil matters, the standard is that of a balance of probabilities, where, minimally, the party charged with the burden of proving will succeed if he can show just that little more evidence to tilt the balance. The prosecutor in a criminal case will have to furnish more evidence than just that little more to tilt the balance. So when fraud is the subject of a criminal trial, there is no difficulty appreciating what burden falls on the prosecutor. But since fraud can also be the subject of a civil claim, the civil standard of proving on a balance of probabilities must apply because there is no known "third standard" although such cases are usually known as "fraud in a civil case" as if alluding to a third standard of proof. However, ***because of***

[93] AS1 at paras 18 to 20.

> ***the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the "balance". They normally require more.*** That more is commonly described as "a burden that is higher than on a balance of probabilities, but lower than proof beyond reasonable doubt", see, for example, *Vita Health Laboratories Pte Ltd v Pang Seng Meng* ([12] supra) at [30], or, as stated in the English cases mentioned above, "proof is required on a preponderance of probabilities", or in reliance of the "different degrees of probabilities" notion that was discredited by Lord Nicholls and Lord Hoffmann. All these descriptions of the test would, in essence, produce the same effect. While it is not a test, the following short passage from the judgment of Morris LJ in *Hornal v Neuberger Products Ltd* at 266, quoted with approval by Lord Hoffmann, explains with great clarity what judges do in weighing evidence of fraud:
>
> > Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, ***the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale*** when deciding as to the balance of probabilities.
>
> Therefore, we would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; but ***the more serious the allegation, the more the party, on whose shoulders the burden of proof falls***, may have to do if he hopes to establish his case.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

131 In line with these observations, an application under s 359(3) of the CPC (or s 355(2) of the CPC) that the prosecution was "frivolous or vexatious" is a serious and grave assertion. This is especially so if the specific assertions made by the applicant in a compensation application involve allegations of malice, dishonesty or improper motives against the Prosecution. As such, I am of the view that ***the gravity of these allegations must be part of the whole range of circumstances that have to be weighed by the court when deciding as to the***

balance of probabilities. I come to this view with due regard to the constitutional status of the Prosecution in carrying out prosecutions and the public interest in upholding trust in its public office. Such assertions should not be lightly made by any officer of the court. If and when such assertions are made, the burden of proof must fall on the applicant to establish the truth of those serious assertions. This view is consistent with the highly exceptional and limited nature of awarding costs against the Prosecution endorsed by the Court of Appeal (see *Huang Liping* at [24]; *Ang Pek San* at [24]). I expect that it will only be in the rarest of cases that the Prosecution would have commenced or continued a prosecution frivolously or vexatiously. It is in those cases that the court is empowered to order costs or compensation against the Prosecution should there be an acquittal.

Issue 2: Whether the prosecution was frivolous or vexatious in this case and, if so, what quantum of compensation should be awarded

132 Having set out to explain the meaning of s 359(3) of the CPC, I turn now to consider whether Parti's prosecution was "frivolous or vexatious".

Evidence that may be adduced for the application for compensation

133 There is a preliminary issue of what kind of evidence may be considered to determine whether the prosecution was "frivolous or vexatious". Section 5 of the Evidence Act, which sets out the right of a party to adduce evidence, is phrased quite broadly. It provides that "[e]vidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others". Section 3 of the Evidence Act defines a "fact in issue" as including "any fact from which either by itself or in connection with other facts the existence, non-existence,

nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows". In my view, the applicant of a compensation application under s 359(3) of the CPC, should have the right to adduce additional evidence (which may not have been adduced at trial) if it is admissible and relevant to the assertions being made. Similarly, the Prosecution, complainant or informant, as the case may be, should also be entitled to put forth evidence in support of his position.

134 While the CPC does not specify any procedure for such additional evidence to be received, s 6 of the CPC provides that "[a]s regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted". Allowing evidence to be adduced for the purposes of determining facts relevant to whether the prosecution was "frivolous or vexatious" or to determine the quantum of compensation would not be inconsistent with the CPC. There should be no issue with fashioning a simple procedure for such compensation or costs applications. Depending on the nature of the assertions as to why the prosecution was "frivolous or vexatious", I am of the view that witness testimony, sworn affidavits and documentary evidence may be adduced for the compensation or costs hearing, in so far as they are admissible and relevant to the assertions being made.

135 In *Malacca Muncipality*, the court expressed its view that "a court can only come to a finding as to whether a complaint is frivolous or vexatious after having heard evidence on oath and not merely upon submission by the parties". The type of evidence required for each case should ultimately depend on the assertions made by the applicant. I agree that evidence on oath would likely be

useful to the court's determination where the subjective state of mind of the prosecutors is in question before the court. For instance, where malice is alleged, the court may have to hear evidence on oath. However, where the sting of the allegation is that the prosecution ought not to have been brought because of insufficiency of evidence, recourse to the record of proceedings and submissions by the parties may be sufficient for the court to come to a decision.

Whether the prosecution was frivolous or vexatious in the present case

136 I turn now to address the merits of the application. In dealing with the factual assertions made in an application for compensation under s 359(3) of the CPC, it will be helpful for the applicant to specify the stage at which the applicant asserts that the prosecution was frivolous or vexatious. This could be at the time of commencement of the proceedings or at some later stage during the proceedings. It is at that stage that the court will undertake the inquiry as to whether ***an objective reasonable DPP would have considered that there was sufficient evidence (including admissible evidence available to the DPP but not yet adduced) to render the case fit to be tried*** before the court. The court must not be distracted by hindsight reasoning.

137 In the present case, the substance of Parti's submission is that the decision to commence prosecution for the 1st charge and the decision to continue the prosecution for the other charges were frivolous or vexatious. The reasons relied upon by Parti as stated above (at [18]) may be categorised into three groups: (a) assertions against the prosecutor's conduct of the proceedings; (b) assertions against the sufficiency of evidence supporting the commencement and continuation of Parti's prosecution; and (c) assertions of malice or dishonesty. I will deal with these in turn below. In my judgment, these assertions

fail to meet the high threshold for establishing that Parti's prosecution was frivolous or vexatious.

Assertions against the prosecutor's conduct of the proceedings

138 Parti makes several assertions that were directed against the prosecutor's conduct of the proceedings which did not directly undermine the evidential sufficiency of Parti's prosecution. These were that the DPPs had:

(a) taken issue with the post-offence conduct of Parti and her representatives that were merely intended to annoy or embarrass the Defence;[94]

(b) failed to objectively value the items;[95]

(c) impeded Parti's preparation for trial by impeding Parti's ability to identify items during statement-making and withholding evidence till the day prior to trial;[96]

(d) nit-picked at Parti's inability to recall the exact price of kitchenware;[97]

(e) made purposeless attacks in respect of the use of supermarket shopping points in cross-examination;[98]

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94 AS1 at paras 44 to 47.

95 AS1 at paras 57 to 62.

96 AS1 at paras 63 to 64.

97 AS1 at paras 65 to 68.

98 AS1 at para 69.

(f) admitt[ed] statements (*ie*, exhibits P31, P32 and P33) after the investigative officers (*ie*, IO Amir and ASP Lim) had taken the stand, and fail[ed] to recall them as rebuttal witnesses;

(g) withheld evidence on the functionality of the Pioneer DVD Player;[99] and

(h) repeatedly objected to the introduction of evidence of illegal deployment.[100]

139 After considering the assertions raised, I am not satisfied that any of these in particular, or even seen cumulatively, show that Parti's prosecution was frivolous or vexatious. As I had found above (at [110]–[111]), the subject of what is "frivolous or vexatious" is not the conduct of the prosecutors at trial. The mischief that s 359(3) of the CPC seeks to address in creating the legal wrong of frivolous or vexatious prosecution is *prosecutions that* ***ought not to have been*** *brought or continued* ***but was*** *brought or continued frivolously or vexatiously.*

140 These assertions, in substance, mainly relate to Parti's dissatisfaction with how the DPPs conducted the proceedings. I note that Parti's trial in the lower court totalled 22 days and dealt with a voluminous number of items. It is not for this court in an application under s 359(3) of the CPC to inquire whether it was correct for the DPPs to have raised objections, asked questions or made submissions pertaining to the use of supermarket shopping points, the price of kitchenware, the introduction of evidence of illegal deployment, the post-

99 AS1 at paras 70 to 74.

100 AS1 at para 75.

offence conduct of Parti and her representatives or the decision whether to recall the investigative officers. This court is not the correct forum to air grievances about the manner the prosecution was conducted by the DPPs. This does not further the central inquiry as to whether the decision to commence prosecution and/or continue prosecution was frivolous or vexatious. To the extent that some of these assertions simultaneously form the basis of Parti's submission that there was malice, dishonesty or improper motive, I will deal with that below.

141 The criminal litigation process is not perfect. As officers of the court, prosecutors and defence counsel are expected to act in good faith and do their best to assist the court. However, it must be acknowledged that prosecutors and defence counsel are subject to the practical constraints of time and resources. Some aspects of preparation for trial or certain relevant evidence may be inadvertently overlooked. For instance, the need to objectively value the allegedly stolen items is still part of the trial preparation although it may be relevant later at the sentencing stage and only after conviction. In the heat of litigation, one cannot expect that every cross-examination question or objection raised by prosecutors or defence counsel to be entirely justifiable. I accept that there are likely to be imperfections at several instances especially over a long trial. Occasionally, the phrasing of certain questions may leave much to be desired. Other times, the points raised may have been unnecessary or unmeritorious. When that is so, opposing counsel may raise their concerns or objections. The judge presiding over the proceedings is in the best position to control the proceedings and guide counsel in the right direction or rule on the objections as may be necessary. That is simply part and parcel of litigation. To the extent that the prosecutor crosses the line in terms of misconduct unbefitting an officer of the court or a member of an honourable profession (see s 82A(3)(*a*) of the LPA), this will rightly be the subject of disciplinary proceedings. Mere

dissatisfaction with different aspects of how the prosecutors had conducted the proceedings, even if they are numerous, will not, *without more*, render the prosecution "frivolous or vexatious".

Assertions against the sufficiency of evidence supporting the commencement or continuation of Parti's prosecution

142 The Prosecution submits that it had sufficient evidence to prosecute Parti, as stated above at [22]. This includes testimony of the Liew family identifying the respective items within the charges as belonging to them, the corroboration between the Liew family's statements, Parti's own admission in her statements that she had taken some of the items listed in the charges without their owners' consent and the lack of an apparent reason for the Liew family to frame Parti at the time of making the decision to prosecute.

143 Parti makes certain assertions which are directed against the sufficiency of evidence supporting the commencement or continuation of Parti's prosecution. These are that the DPPs had:

(a) proceeded on an unsustainable charge (*ie*, 1st charge) under s 381 of the Penal Code (*ie*, theft by clerk or servant of property in possession of master) since Parti was no longer an employee on 28 October 2016 (*ie* the date the alleged theft in the 1st charge was committed);[101] and

(b) proceeded at trial on the other charges despite the following:

(i) the police statements were unreliable and improperly procured;[102]

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101 AS1 at paras 48 to 50; Transcript (16 April 2021) at p 132.

102 AS1 at paras 51 to 52.

(ii) there was a break in the chain of custody of the alleged stolen items;[103]

(iii) Karl clearly lacked credibility;[104]

(iv) there was a serious risk of contamination of evidence in relation to the 115 pieces of clothing owing to the Black Bag for the 2nd charge;[105] and

(v) evidence from other witnesses indicated that the Philips DVD player in the 2nd charge belonged to Heather.[106]

144 After considering the parties' submissions, I accept the Prosecution's submission that there was sufficient evidence at the commencement of proceedings such that there was a case fit to be tried before the court. While I overturned all of Parti's convictions in the lower court on the basis that all the charges were not proven beyond a reasonable doubt at the conclusion of the whole trial, I am of the view that the evidence of the Liew family and the inculpatory parts of the statements given by Parti were sufficient to justify the DPPs commencing prosecution on the charges against Parti. My conclusion is also supported by the fact that, at the close of the Prosecution's case, Parti decided not to make a "no case to answer" submission. This implicitly showed some recognition that there was sufficient evidence adduced by the Prosecution to justify Parti's prosecution at least up to that stage of the trial. The Judge had

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103 AS1 at paras 53 to 56.

104 Table presented by counsel for the Defence on 16 April 2021 ("Table") at p 4.

105 Table at p 5.

106 Table at p 5.

called for Parti's defence which implies that she also was of the view that the *Haw Tua Tau* test was satisfied. I am also of the same view.

145 I turn now to address the specific assertions made by Parti. I do not find that these assertions show that the Prosecution ought not to have commenced the prosecution of any of the charges or to have discontinued Parti's prosecution at any stage during the proceedings on the basis that the Prosecution's case had been irrefutably undermined by new developments.

146 With regard to proceeding on the 1st charge, the Prosecution submits that exhibit D9, the printout showing Parti's employment history and termination date, was only adduced by the Defence after Parti had finished giving evidence.[107] The Prosecution concedes that it had overlooked the fact that the printout showed that Parti's employment was terminated a day earlier than the charge suggested.[108] However, Parti herself testified that her employment was terminated on 28 October 2016, which was the date of the offence specified on the charge.[109] When the Judge queried about the necessity of adducing the printout given that several witnesses had testified to the dates of Parti's employment, counsel for Parti simply stated "[y]es, but here is a proper record".[110] This response indicated to the court and the Prosecution that the printout merely confirmed what the witnesses earlier testified. I note that the Prosecution submitted, in the hearing before me, that they were not aware of the discrepancy at the material time.[111]

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107 RS1 at paras 67 to 69.

108 RS1 at para 69.

109 ROP at p 1683.

110 ROP at p 2513.

111 Transcript (16 April 2021) at p 162.

147 It is true that the initial charge framed by the Prosecution was flawed because the charge under s 381 of the Penal Code would not have been made out since Parti was no longer an employee on 28 October 2016. While the Prosecution has a duty in the interests of justice to do its utmost to ensure that the charges it prefers against accused persons are accurate, oversights may happen. I accept, based on the Notes of Evidence, that the Prosecution was not aware of this oversight at the trial below.[112] Whether or not counsel for Parti was aware of this discrepancy, it was not brought specifically to the attention of the Prosecution and the Judge.[113] However, this oversight does not negate the fact that there was sufficient evidence for an objective reasonable DPP to have considered the case fit to be tried before the court. This is because the evidential basis of the assertion that Parti had stolen the items in the 1st charge is not affected by the discrepancy regarding the date of her termination. As I noted in the *Main Judgment* (at [107]), the effect of this oversight is that the charge ought to have been amended to a charge of theft in dwelling-house under s 380 of the Penal Code instead. The case was still one fit to be tried on the key issue of whether the criminal behaviour of theft of those items could be established.

148 The rest of Parti's assertions were largely based on many of the findings that I had made in the *Main Judgment*. However, the inquiry as to whether the prosecution was frivolous or vexatious cannot be undertaken based on hindsight. While I found that the break in the chain of custody for some items, the risk of contamination of evidence due to the Black Bag in respect of the pieces of clothing in the 2nd charge, and the delays in the seizing of the items by the police undermined the Prosecution's case, these were not necessarily

112 ROP at pp 2513 to 2514.

113 ROP at pp 2513 to 2514.

immediately apparent to the DPPs before the conclusion of the trial in the lower court. Similarly, my findings on the credibility of Karl and the unreliability of the statements given by Parti do not mean that an objective reasonable DPP would, without the benefit of hindsight of my findings, have discontinued the prosecution after hearing Karl's testimony on the basis that the prosecution was wholly unwarranted at that time. Many of my findings were nuanced and made after a detailed analysis of all the evidence already presented to the court. In my judgment, it is not clear to the Prosecution (and in particular, when there is no benefit of hindsight) that the evidential basis that made the case fit to be tried before the courts had collapsed at any stage of the proceedings even with all of Parti's assertions considered.

Assertions of malice or dishonesty

149 As a final argument in the alternative, Parti submits that the Prosecution was dishonest or malicious.[114] To show this, Parti asserts that the Prosecution had:[115]

(a) taken issue with the post-offence conduct of Parti and her representatives that were merely intended to annoy or embarrass the Defence;

(b) impeded the Defence's preparation for trial;

(c) withheld evidence on the functionality of the Pioneer DVD player; and

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114 AS1 at para 76; Transcript (16 April 2021) at p 156.

115 AS1 at paras 77 to 81.

(d) repeatedly objected to the introduction of evidence of illegal deployment.

150 In my judgment, these assertions are insufficient to establish the presence of malice or dishonesty on the part of the Prosecution. I now deal with these assertions in turn.

151 First, Parti submits that the Prosecution was dishonest in insinuating that the post-offence conduct of Parti and her representatives made the witnesses feel harassed because this was not remotely supported by witness testimony or evidence.[116] The Prosecution was also malicious because the acts were motivated by an improper purpose of embarrassing the Defence.[117] In response, the Prosecution contends that its position in submissions regarding the post-offence conduct of Parti and her representatives (presumably under Parti's instructions) may be relevant to her guilt or innocence if the court finds that there has been witness subornation, and could be potentially relevant to sentencing purposes as indicative of Parti's remorse (or lack of).[118]

152 In my view, the facts do not show any dishonesty or malice. Contrary to Parti's submission, there is a factual basis underlying the Prosecution's submissions. Karl gave evidence that Parti and two other women attended his hearing for an unrelated civil matter and giggled at him, and that he perceived such conduct as a message of intimidation.[119] Mdm Ng testified that she was called by a lady who wanted to speak to her about Parti's case and that, even

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116 AS1 at paras 77 to 78.

117 AS1 at paras 77 to 78.

118 RS1 at paras 84 to 88.

119 Record of proceedings ("ROP") at pp 297 to 302.

though she had said she did not wish to talk to the person, she received three to four further calls from the same lady and another call from a man who asked her out to talk about Parti's case.[120] Heather was also contacted numerous times by one "Sharifah" who was calling from a law firm asking her to attend an interview.[121] While it is a question of extent as to whether these acts and attempts to contact members of the Liew family amounted to witness subornation or harassment, the Prosecution was not dishonest in making the submissions it did regarding Parti and her representatives' conduct in the lower court. I do not consider that there was any improper motive to embarrass the Defence that is indicative of malice simply because the Prosecution took up this point, which in their view, was relevant either to Parti's conviction or sentencing.

153 Second, Parti submits that the Prosecution acted maliciously in impeding the Defence's preparation for trial by withholding evidence until the day prior to trial and in not securing evidence for the trial until at least two weeks before the trial started.[122] The evidence referred to two sets of photographs and the Video. The photographs are exhibit P1, which contained 43 photographs of the alleged stolen items, and exhibit P26, which contained 44 photographs of 49 CL.[123] The Video, exhibit P28, shows the Liew family taking out several items from the boxes (see [10] above). The Prosecution submits that since there were no photographs or videos listed in the List of Exhibits within the Case for the Prosecution and it was not part of the Prosecution's case at that time, there was no obligation under s 166 of the CPC for the Prosecution to

120 ROP at pp 1383 to 1384.

121 ROP at p 885.

122 AS1 at paras 63 to 64, 79.

123 ROP at pp 2789 to 2832, 2880 to 2925.

serve these exhibits on the Defence in the Prosecution's Supplementary Bundle.[124] The fact that additional exhibits were tendered during trial is "part and parcel" of the criminal litigation process and it was open for the Defence to request an adjournment to review and take further instructions on these materials.[125] Counsel for the Defence did not do so and this shows that this assertion is a hollow one.[126]

154 Parti's assertion relates primarily to dissatisfaction with the Prosecution's conduct in not making disclosure of the photographs and Video in a timely fashion. The Prosecution disclosed the photographs and the Video on the first day of trial on 23 April 2018.[127] I accept the Prosecution's submission that there was no undue prejudice caused to Parti's Defence. The police's failure to take photographs of and seize the allegedly stolen goods at an earlier time which created a break in the chain of custody of the evidence undermined the Prosecution's case instead of Parti's (*Main Judgment* at [61]). It is also not disputed that Parti's counsel was given access to the physical exhibits of the alleged stolen items prior to trial. Therefore, there was no prejudice arising from the Prosecution's disclosure of the photographs in P1 and P26 on the first day of trial. There is no basis to infer any malice or dishonesty from the late disclosure.

155 I note that the Video was only received by the police from the Liew family on 17 April 2018.[128] After the Prosecution had disclosed the Video on the

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124 RS1 at para 91.

125 RS1 at para 92.

126 RS1 at para 92.

127 ROP at pp 2789, 2928.

128 ROP at pp 154 to 155.

first day of trial, the Judge had suggested that Parti's counsel take instructions on the Video once he received it and this was accepted by Parti's counsel.[129] While even the Prosecution accepts that it would have been ideal for the Defence to have received it earlier,[130] there is no indication that the late disclosure was deliberate on the part of the Prosecution. In my view, there is no basis to infer any malicious conduct from the mere fact that the Prosecution took, at most, five days (including the weekend) to disclose the existence of the Video. There is also no evidence to suggest that the Prosecution had any deliberate or insidious motive to impede the Defence's preparation for trial.

156 Third, Parti submits that the Prosecution lacked good faith because it withheld evidence regarding the functionality of the Pioneer DVD Player despite being aware of its defective condition at trial.[131] This amounts to misleading the court and was prejudicial to Parti.[132] The Prosecution submits that there was no prejudice because Parti's counsel had the opportunity to inspect the Pioneer DVD player over lunch on 27 September 2018 and clarified before the Judge below that the Pioneer DVD player did not function in re-examination on the next day.[133]

157 Given that the Prosecution had conceded before me that there were difficulties in the functionality of the Pioneer DVD player in playing the DVD disc during the trial below, I observed that the DPPs ought to have fully disclosed those difficulties if they had known of the defect (*Main Judgment* at

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129 ROP at pp 29 to 30.

130 Transcript (26 April 2021) at p 75.

131 AS1 at paras 70 to 74.

132 AS1 at paras 70 to 74.

133 RS1 at paras 98 to 99.

[90]). I note that, in *Re Parti Liyani* [2020] 5 SLR 1080, Sundaresh Menon CJ granted leave for an investigation to be made into Parti's complaint of misconduct against the DPPs who had conduct of the trial. A disciplinary tribunal will be duly appointed. I do not wish to stray into the disciplinary tribunal's remit. For present purposes, it suffices for me to observe that even on the *assumption* that the DPPs failed to disclose the defect in the functionality of the Pioneer DVD player, this does not mean that Parti's prosecution was frivolous or vexatious. This is because the functionality of the Pioneer DVD player is related to only one aspect of one item in the 1st charge. The 1st charge also contains other items such as the brown coloured Longchamp bag and the blue coloured Longchamp bag (see [11] above). This assertion does not undermine the evidential basis of Parti's prosecution which was Mr Liew's evidence that these items were his and had been stolen from him. Looking at the facts and circumstances in totality, this assertion does not show that the Prosecution was malicious, dishonest, or had any improper motive in preferring the 1st charge against Parti.

158 Lastly, Parti submits that the Prosecution's repeated objections to the introduction of evidence relating to Parti's illegal deployment was intended to suppress evidence by improperly preventing the trial court from hearing relevant evidence related to the motive behind Parti's expulsion from Singapore.[134] The Prosecution submits that it is entitled to object to questions which appear irrelevant at trial and it is for the court to decide whether to sustain or overrule such an objection.[135] The objections made should be seen in the light of the Prosecution's understanding of Parti's case at that time (as disclosed in

134 AS1 at para 75; Transcript (16 April 2021) at p 144.

135 RS1 at para 101.

the Case for the Defence) which did not include any allegation of false accusations by the Liew family.[136]

159 Again, this assertion relates primarily to Parti's dissatisfaction with how the DPPs conducted the trial below. My observations with regards to the imperfections of the criminal litigation process above (at [141]) applies just as strongly. I agree that the decision as to whether to sustain or overrule any objections made lies within the remit of the court. The mere fact that an objection that *should not have been raised on the merits* but was raised does not necessarily lead to a finding that there was malice or a lack of good faith on the part of the Prosecution.

160 After considering the cumulative effect of all of Parti's assertions, I find that Parti's prosecution was not frivolous or vexatious having regard to all the facts and circumstances of the case. The decision to bring the charges against Parti was based on sufficient evidence such that there is a case fit to bring before the court. Parti has not established at any time during the proceedings that there were any new developments such that her prosecution ought to have been immediately discontinued mid-way through the trial. The high threshold of showing that the prosecution was frivolous or vexatious is not met.

Observations on the quantum of compensation

161 Since I have found that Parti's prosecution was not frivolous or vexatious, the issues relating to the quantum of compensation are moot. I will only make some brief observations on the potential issues that may arise in relation to the quantum of compensation.

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136 RS1 at para 103.

162 The burden to prove entitlement to a particular quantum of compensation rests on the applicant. Should compensation be awarded, the basis of compensation would be to give a remedy ***necessary to put the applicant in a position as though the frivolous or vexatious prosecution had not been committed***. This stems from the very concept of compensation itself.

163 Prof Ong submits that the following caveats in relation to the quantum of compensation should be applicable.[137] First, the specific wrong to be compensated for must be identified. For instance, if the prosecution was frivolous or vexatious because it should not have been instituted at all, then the sum of compensation should put the acquitted person in the same position as if he or she had not been prosecuted at all. Second, the law only awards compensation in the form of injuries to certain legally protected interests. Third, the applicant may only recover compensation for particular losses sustained that the applicant is able to prove. Fourth, in calculating compensation, the court may consider the principles of causation, mitigation and remoteness from the law of contract and tort. These have been held as applicable for cases involving victim compensation under s 359(1) of the CPC (see *Public Prosecutor v Donohue Enilia* [2005] 1 SLR(R) 220 at [22]; *Tay Week Kiat* at [13], [20]–[21]) and should similarly apply to s 359(3) of the CPC.

164 I express my tentative agreement with these points. It follows from the nature of compensation that the onus is on the applicant to show the quantum of the losses that has been suffered and, if they are losses recognised in law, the court may award compensation to remedy those losses. This does not include costs of the defence which cannot be claimed as part of compensation since that

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137 YAC1 at paras 234 to 237.

would be under the remit of s 355(2) of the CPC. The identification of the specific wrong and whether that wrong had caused the losses are relevant concerns in determining the appropriate quantum of compensation.

165 Since s 359(3) of the CPC makes clear that compensation is available if "an accused is acquitted of *any* charge for *any* offence" [emphasis added], compensation is available even if the accused person is convicted on some charges but acquitted of other charges if the prosecution of those other charges was frivolous or vexatious. However, issues of causation may arise since the losses suffered by the applicant may have been suffered in any case as a result of the trial proceeding for the charges upon which the applicant had been convicted.

166 On the applicability of the principle of mitigation, it may be relevant for the court to consider whether the applicant had brought the requisite issues to the Prosecution and/or the court's attention at any point during the trial. Similarly, if there were obvious ways in which the applicant could have mitigated the losses suffered but wilfully chose not to, this may be considered in determining the appropriate quantum of compensation.

167 Finally, parties have also submitted on whether the statutory maximum of $10,000.00 in s 359(3) of the CPC applies to each charge for which there is an acquittal or whenever a person is acquitted, whether of one or multiple charges.

168 Prof Ong submits that since the word "prosecution" in the CPC generally refers to prosecution on *one charge* and does not speak of one prosecution on *multiple charges*, the maximum amount of compensation is $10,000.00 per

charge.[138] He argues that this is appropriate given that there is greater potential harm when there are more charges which are considered frivolous or vexatious prosecutions.[139] While theoretically, the statutory limit for a prosecution with a large number of charges could be very high, it does not follow that the quantum of the compensation would be that high. This is because the applicant has to prove the quantum of losses suffered in order to obtain compensation.[140]

169 The Prosecution submits that when an accused person is acquitted (whether of one or multiple charges), the statutory maximum of $10,000.00 applies for the following reasons:[141]

(a) The wording of s 359(3) of the CPC makes the compensation of a sum not exceeding $10,000.00 contingent upon a specific event – that the accused is acquitted of any charge for any offence. This should be interpreted to mean that compensation is available upon an acquittal (whether of one or multiple charges).

(b) The alternative construction of $10,000.00 per charge would incentivise acquitted persons to pursue compensation under s 359(3) of the CPC instead of the tort of malicious prosecution since the benefits would be comparable (if the charges are numerous) without the expense of fresh civil proceedings.

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138 YAC1 at para 256; YAC3 at para 85.

139 YAC1 at para 258.

140 YAC3 at para 76.

141 RS2 at paras 64 to 72.

(c) Parliament would not have intended that the statutory limit for compensation should be dependent on the Prosecution's decision on whether to amalgamate charges.

(d) Section 2 of the IA states that "words in the singular include the plural and words in the plural include the singular", "unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided". There is nothing in the express wording or context of s 359(3) CPC that is inconsistent with interpreting the $10,000 as the limit for each acquitted person (rather than each charge on which the accused is acquitted).

170 Considering the wording of the provision, s 359(3) of the CPC sets out two preconditions before the court has the power to order the prosecution to pay compensation. There must be an acquittal "of any charge of any offence" and the court must be satisfied that the "prosecution was frivolous or vexatious". However, the provision states that the court may order payment of compensation "to the accused a sum not exceeding $10,000". My tentative view is that the wording seems to support the construction that the statutory maximum of $10,000.00 applies whenever the applicant is acquitted, whether of one or multiple charges.

Conclusion

171 In sum, I find that Parti has not succeeded in proving on a balance of probability that Parti's prosecution was frivolous or vexatious. Accordingly, I dismiss Parti's application for compensation under s 359(3) of the CPC.

172 I would like to express my appreciation to the learned young *amicus* curiae, Prof Ong, for his thorough and excellent research, his detailed submissions and his attendance at the hearing to offer the court his views. They were of much assistance to this court.

Chan Seng Onn
Judge of the High Court

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