IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 49

Criminal Motion Nos 71 and 72 of 2016

Between

(1) Rajendar Prasad Rai
(2) Gurchandni Kaur Charan Singh

… *Applicants*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Revision of Proceedings]

[Criminal Procedure and Sentencing] — [Seizure of Property] — [s 370 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)]

[Criminal Procedure and Sentencing] — [Police] — [Power to Investigate] — [s 35 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed)]

Rajendar Prasad Rai and another
v
Public Prosecutor and another matter

[2017] SGHC 49

High Court — Criminal Motion Nos 71 and 72 of 2016
Sundaresh Menon CJ
14, 20 February 2017

13 March 2017 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 This is an application by Rajendar Prasad Rai ("the 1st Applicant") and Gurchandni Kaur Charan Singh ("the 2nd Applicant") (collectively "the Applicants") seeking the release pursuant to ss 35(7) and 370(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") of certain property that had earlier been seized or frozen by the authorities sometime in October 2015. The Applicants sought an order setting aside the decision of the court below, which extended the seizure until 30 June 2017; and in the alternative, for the release, pursuant to s 35(7) of the CPC, of certain amounts to meet their reasonable expenses including to pay their legal fees and expenses. I decided, after hearing the parties, to defer the application under s 35(7) of the CPC and instead to consider whether the court below was correct,

in the circumstances, to extend the seizure as aforesaid. I now furnish my decision.

Background facts

2 The 1st Applicant was arrested by officers from the Corrupt Practices Investigation Bureau ("CPIB") on 26 September 2015. He was subsequently charged with six counts under s 5(*b*)(i) read with s 29 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the PCA offences"). He contested the PCA offences. The trial for the PCA offences is part-heard and currently continuing. It has since emerged that the 1st Applicant is also being investigated for offences under the Corruption, Drug Trafficking and Serious Offences (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("the CDSA"), although no further charges have been preferred under the CDSA or otherwise.

3 By 8 October 2015, all the funds in some ten bank accounts belonging to the Applicants had been seized by the CPIB pursuant to powers conferred by s 35 of the CPC. These bank accounts contained a total of US$2,204.88 and S$556,404.07. It is not clear on the evidence whether the Applicants had any other bank accounts. Caveats were also lodged by the Registrar of the Singapore Land Authority ("the Registrar") over three of the Applicants' properties on 5 October 2015 preventing any dealing with the land ("the Caveated Properties"). It is now evident that the Registrar acted pursuant to s 7(1)(*b*) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"). It is also now evident that the Registrar acted on the basis of an intimation or request emanating from the CPIB although the details of this have not been disclosed.

4 Section 370 of the CPC provides as follows:

> **Procedure governing seizure of property**
>
> **370.**—(1) If a police officer seizes property which is taken under section 35 or 78, or alleged or suspected to have been stolen, or found under circumstances that lead him to suspect an offence, he must make a report of the seizure to a Magistrate's Court at the earlier of the following times:
>
> (*a*) when the police officer considers that such property is no longer relevant for the purposes of any investigation, inquiry, trial or other proceeding under this Code; or
>
> (*b*) one year from the date of seizure of the property.
>
> (2) Subject to subsection (3), the Magistrate's Court must, upon the receipt of such report referred to in subsection (1), make such order as it thinks fit respecting the delivery of the property to the person entitled to the possession of it or, if that person cannot be ascertained, respecting the custody and production of the property.
>
> (3) The Magistrate's Court must not dispose of any property if there is any pending court proceeding under any written law in relation to the property in respect of which the report referred to in subsection (1) is made, or if it is satisfied that such property is relevant for the purposes of any investigation, inquiry, trial or other proceeding under this Code.

5 Pursuant to the requirement in s 370(1)(*b*), the seizure was reported and the parties appeared before the learned District Judge ("the Magistrate") on 1 November 2016 and again on 21 November 2016 ("the s 370 Hearing").

6 At the s 370 Hearing on 1 November 2016, the Prosecution submitted that in relation to three out of the ten bank accounts, the seizure should be extended because they were relevant to investigations into the CDSA offences. Seeking to make good its contention in this regard, the Prosecution led the evidence of the Investigating Officer from the CPIB ("the IO") who stated, among other things:

> (a) that "there [is] an ongoing CDSA investigation and these three accounts [are] relevant to [CPIB's] investigation";

(b) that the CDSA investigations are "separate" from the PCA offences which were then and are still being tried;

(c) that the continued seizure of the bank accounts would be relevant to the CDSA investigations; and

(d) repeatedly that this was so because the Applicants had amassed a "huge sum of money" and the CPIB needed to establish "whether it [came] from known or unknown sources of income".

7 The Prosecution's position in this connection was supported by two written reports that had been issued by the CPIB dated 21 September 2016 and 14 October 2016 respectively ("the CPIB Reports"). In the first report, the CPIB listed the ten bank accounts that had been seized and asserted that they were relevant and required for investigation into the CDSA offences. In the second report, the CPIB indicated that only three of the ten accounts that had been seized remained relevant to the CDSA offences. It may be noted that pursuant to the second report, the total amount that was released to the Applicants following the release from seizure of the other seven accounts was a modest sum of US$2,204.88 and S$4,680.51.

8 In my judgment, certain conclusions may be drawn from the evidence that was led from the IO at the hearing, as well as from the CPIB Reports and these are as follows:

(a) At all times, the seizure was sought to be justified on the basis that this was required for the purposes of investigation. What is significant is that on the evidence before the Magistrate, the position taken by the Prosecution and the IO was that they were still looking into the matter and were not yet ready to come to any conclusion. At

the s 370 Hearing, the IO explained that the CPIB's investigations into the CDSA offences remained incomplete because the CPIB had not taken a statement from the 1st Applicant for the CDSA offences due to the ongoing trial for the PCA offences. I also note that during the s 370 Hearing, the Prosecution did not seek to justify the seizure on the basis of the risk of dissipation of the funds in the three bank accounts;

(b) The investigations, for which the extension of the seizure was sought, were those pertaining to possible offences under the CDSA, which were evidently still being investigated, and not the PCA offences. In a sense this stood to reason: the investigations into the PCA offences must have been completed since they were the subject of the ongoing trial. The continuing investigation into the CDSA offences was also the express basis upon which the CPIB Reports rested; and

(c) The central point advanced by the Prosecution as matters stood at the time of the s 370 Hearing was that the CPIB was not yet satisfied as to whether the sums of money amassed by the Applicants could be explained on the basis of their known legitimate sources of wealth.

9 Faced with these considerations, the Applicants' counsel, Mr N Sreenivasan SC ("Mr Sreenivasan"), mounted a robust challenge against any extension of the seizure. The centrepiece of that challenge may be summarised in his contentions that:

(a) By the time of the s 370 Hearing, it was incumbent on the Prosecution to explain to the Magistrate the basis upon which it sought to extend the seizure. This was so because it was in turn incumbent on the Magistrate to consider whether the extension was justified. It was only upon considering the reasons and the basis for the extension

including, at least in general terms, the matters that were being investigated, that the Magistrate could apply her mind to whether in the circumstances, the continued seizure was relevant to such investigations and could therefore be justified.

(b) The court could not reasonably be so satisfied in the present circumstances because the Prosecution had not disclosed anything in relation to the offences that were being investigated beyond identifying s 47 of the CDSA as the possibly relevant provision.

10 On 21 November 2016, the Magistrate concluded that the three remaining bank accounts remained relevant to the CPIB's investigations into possible offences under s 47 of the CDSA. She therefore extended the seizure of the three bank accounts until the next court review which was scheduled to be on or before 30 June 2017 ("the Magistrate's Order"). The three bank accounts contain a total of S$551,723.56 ("the Seized Funds"). As for the Caveated Properties, she held that as the caveats had been extended by the Registrar in his own capacity, whether or not this was motivated by the request of the CPIB, it did not fall to be dealt with by her in the context of the s 370 Hearing.

11 On 2 December 2016, the Applicants filed CM 71/2016 and CM 72/2016, seeking the release of the Seized Funds and the Caveated Properties.

The parties' submissions before the High Court

12 The parties appeared before me on 14 February 2017 and at the end of the hearing, I posed some questions. They then appeared before me again on 20 February 2017, at which time, among other things, they addressed the questions I had posed.

13 The Applicants were essentially making an application to the High Court's revisionary jurisdiction. They sought to set aside the Magistrate's Order, arguing that she had not appropriately exercised her discretion under s 370 of the CPC.

14 The Applicants submitted that the Seized Funds and the Caveated Properties should be released because the CPIB and the Prosecution had not established at the s 370 Hearing that these remain relevant to the CPIB's investigations into the possible offences under the CDSA. The Applicants further argued that the IO's explanations were inadequate. He had merely stated that there were possible offences under s 47 of the CDSA but had done nothing to identify, much less particularise, the predicate offence. The IO also could not explain the CPIB's reasons for believing that the Seized Funds were the proceeds, whether of the PCA offences or of any other specific offences, that might have been the subject of investigation. Further, the Prosecution had expressly informed the Magistrate that it did not wish to disclose information regarding the investigations to her, even though the Magistrate was willing to receive this on an *ex parte* basis in order to ensure the integrity of the continuing investigations, and even after the Magistrate had asked whether it wished to do so. The Applicants submitted on this basis that the IO and the Prosecution had not provided any information that would enable the Magistrate to exercise her judgment and come to an appropriate decision with respect to the continuing relevance of the Seized Funds and Caveated Properties to any investigations.

15 As for the Prosecution, it submitted first, that the application for the release of the Caveated Properties pursuant to s 370 of the CPC was procedurally incorrect. That is because it was not the Police but the Registrar who had lodged the caveats under the LTA.

16 With respect to the Seized Funds, the Prosecution submitted that these were "relevant to investigations under the CDSA" and indeed were the "main focus of the CDSA investigations". This was certainly the Prosecution's position in its first set of written submissions and at the hearing on 14 February 2017. I questioned this on the basis that if the extension was sought for the purpose of "investigations" then it did not appear to me to be necessary or justified to extend the seizure to *the funds* in the bank accounts. Rather, what would in fact be required would be the bank statements and the related entries in the records of the bank in question. When I raised this, the Prosecution then informed me that the investigations had progressed since the s 370 Hearing and offered to furnish me with additional evidence, *ex parte*, in order to demonstrate and establish the relevance of the Seized Funds *to the CDSA investigations*. The Prosecution further submitted that the continued seizure of the funds was necessary in order *to prevent their dissipation* so as to preserve them for a possible confiscation order should the 1st Applicant be convicted of an offence under the CDSA.

17 It should be noted that this was the first occasion on which the extension of the seizure was sought to be justified on the basis that it was necessary to do so in order to prevent a risk of dissipation. It may also be noted that even at this stage, the Prosecution's position was that the extension was necessitated by reference to what might follow after the investigations into the CDSA offences. Because of these developments, I adjourned the hearing to 20 February 2017 and directed the parties to make further submissions on the following issues:

(a) Whether the powers of seizure under s 35 of the CPC may be exercised in order to freeze the assets of the Applicants with a view to an eventual prosecution being brought and an eventual confiscation

order being made under the CDSA, in circumstances where no charge under the CDSA had as yet been filed;

(b) Whether the Prosecution may adduce further evidence at this stage in order to justify retrospectively the continuance of the seizure of the bank accounts that had been ordered in November 2016;

(c) If the answer to (b) is yes, whether such evidence may be considered by the High Court exercising its revisionary jurisdiction or whether the matter should be remitted to the Magistrate for further consideration; and

(d) If the matter may be considered by the High Court, whether in all the circumstances it should.

18 On 20 February 2017, the Prosecution, making reference to Indian and Singapore authorities, submitted that s 35 of the CPC empowers the Police to seize any property that is suspected to be the traceable proceeds of a crime in order to prevent its dissipation. Because s 35(1)(*a*) read with s 35(9) of the CPC extends the Police's power of seizure to property which is subsequently converted, the exercise of the power of seizure is not confined to the preservation of evidence or the instrumentalities of the crime. The Prosecution further submitted that at this stage, the initial powers of seizure under s 35 are effectively unfettered, subject only to the internal procedures and safeguards within the Police. The issue of external control or oversight only arose under s 370(1)(*b*) of the CPC, which requires a report to be made to the Magistrate within a year of the seizure. At the reporting date, the IO would have to show that investigations had progressed (for example, by showing that statements had been recorded) and that the property remains relevant to the ongoing investigations, doing so on an *ex parte* basis where necessary.

19 In response, the Applicants submitted that s 35(1)(*a*) of the CPC is specific as to the property that may be seized and this requires that the seizure be limited to property in respect of which an offence has been or is suspected to have been committed. This allows a seizure where a specific offence is being investigated or prosecuted. To the extent that the courts have exercised the powers of confiscation in respect of such property, this has occurred where the property was the traceable proceeds of the very offence of which the accused has been convicted. However, this does not extend to permitting the seizure of an accused person's property with a view to conserving those assets for the purpose of an eventual confiscation under the CDSA that may or may not be initiated.

20 At this stage, the Prosecution seemed to me to change its position yet again and contended that the Applicants' assets, the dissipation of which it wished to prevent, were connected to the existing *PCA offences* and it wished to extend the seizure with a view to preserving the assets for the purposes of their eventual disposal under s 364 of the CPC. Hence, it was no longer the case that the Prosecution was seeking the extension on the basis of possible offences or a confiscation order *under the CDSA*.

21 I raised concerns with respect to the defects in the Magistrate's Order, which had been made in relation to possible offences under the CDSA and not the PCA offences, as well as the paucity of information before the Magistrate when she made the order. The Prosecution submitted that these concerns could be addressed by the High Court which has the power to receive additional evidence to determine if the Magistrate's Order should be set aside; as against this, the Applicants submitted that the High Court should not receive such evidence (pursuant to its powers under s 401(2) read with s 392 of the CPC) for the purpose of determining whether the Magistrate's Order should be set

aside. Relying on the case of *Public Prosecutor v Sollihin bin Anhar* [2015] 3 SLR 447 ("*Sollihin CA*") at [16] and drawing a parallel with bail decisions made by lower courts, the Applicants argued that the new evidence did not have any bearing on the legality of the Magistrate's Order because that order could not be rendered *wrong* as a result of *new* facts or evidence that had not been before the Magistrate and which she therefore could not have considered. The Applicants submitted that the High Court in the exercise of its revisionary jurisdiction should only consider whether the Magistrate had made the correct decision *at that point in time*. The Applicants further submitted that in the light of the Prosecution's several changes of position, it was plain and evident that the Magistrate's Order should be set aside since it could not possibly stand based on the evidence that was before her at the time it was made. The Applicants further submitted that the additional evidence should not be remitted to the Magistrate for her fresh consideration because she was *functus officio* in relation to the matter.

22 In response, the Prosecution submitted that s 401(2) read with s 392 of the CPC allows the High Court to receive fresh evidence in the process of reviewing the Magistrate's Order if "it thinks the additional evidence is necessary". If I was then satisfied that the Magistrate's Order crossed the threshold for intervention, the order may be set aside; specifically, the Prosecution seemed to take the position that I could receive and then assess the relevance and reliability of any additional evidence on an *ex parte* basis for the purpose of determining whether I should set aside the Magistrate's Order. However, if I concluded that the Magistrate's order should be set aside, then, in the Prosecution's submission, the matter should be remitted to the Magistrate's court which would be free to consider any new material and determine whether the extension should be upheld. In such a case, the High Court would not be entitled to step into the shoes of the Magistrate's court and

issue a fresh order in its place. Rather, also relying on *Sollihin CA*, the Prosecution argued that s 370 of the CPC, like a bail application under s 102 of the CPC, envisages a process of reassessment by the Magistrate. The Magistrate is therefore not *functus officio*. The new evidence should consequently be remitted to the Magistrate so that she may consider the evidence during her reassessment.

The issues

23 Having heard the parties' submissions on both 14 and 20 February 2017, the following issues arise for my determination and I deal with them in this sequence:

(a) Whether, if the High Court in the exercise of its revisionary jurisdiction determines that it should set aside the Magistrate's Order, it may receive additional evidence, on the basis of which it may then make a fresh order or whether, in those circumstances, it should remit the matter to the Magistrate;

(b) Whether the High Court in the exercise of its revisionary jurisdiction has the power to order the release of the Caveated Properties;

(c) Whether the powers of seizure that avail the Police under s 35 of the CPC extend to or beyond the power to do so in order to preserve funds or assets that are the direct and traceable proceeds of a crime;

(d) Whether, and if so how, the powers of seizure or restraint under the CDSA are distinct from the powers of seizure that are found in s 35 of the CPC; and

(e) Whether, having regard to all the material before me, the Magistrate's Order should be set aside and whether any other order should be made.

My decision

The High Court's revisionary jurisdiction and powers

24 The High Court's revisionary jurisdiction is provided for in s 400 of the CPC. This jurisdiction may be exercised over any judgment, sentence, or order recorded or passed by the State Courts (*Public Prosecutor v Yang Yin* [2015] 2 SLR 78 ("*Yang Yin*") at [20]). It is settled law that the High Court's reversionary jurisdiction should be exercised "sparingly" and that the threshold that must be crossed before the court will act to grant any relief is that of "serious injustice" and this has been said to entail the finding that there is "something palpably wrong in the decision that strikes at its basis as an exercise of judicial power" (*Yang Yin* at [25], citing *Ang Poh Chuan v Public Prosecutor* [1995] 3 SLR(R) 929 at [17]). For reasons that I will explain, I am satisfied that the threshold justifying the High Court's intervention has been crossed in this matter.

25 But, having satisfied myself that the circumstances warrant my setting aside the Magistrate's Order, a further question arises as to whether I may then proceed to consider the matter afresh, having regard to any further material that might be put before me and make any further order that the Magistrate could have made, or whether I am limited in such circumstances to remitting the matter to the Magistrate, if I should so choose to do. Although both the Applicants and the Prosecution relied on *Sollihin CA*, they reached different conclusions on this issue. The Applicants' view was that the matter should not be remitted to the Magistrate whereas the Prosecution's view was that it

should. However, for the reasons which follow, I consider they were both mistaken in their understanding of the implications of *Sollihin CA*.

26 The specific question in *Sollihin CA* was whether the High Court could be moved in its revisionary jurisdiction to consider new facts to review the propriety of a lower court's bail decision. In that context, the Court of Appeal held that (a) it could not be said the lower court's decision was wrongly made so as to warrant invoking the revisionary jurisdiction of the High Court, if that conclusion was predicated on new material that had not been before the lower court; and (b) in the context of a bail application, there would also, at least in general, be no need to invoke the High Court's revisionary jurisdiction on the basis of any new material because it would be possible to go back before the lower court to review the matter with the benefit of that new material since in that particular context, the court would not be *functus officio* upon issuing its decision on bail (see *Sollihin CA* at [14]–[19], especially [16], [18] and [19]).

27 In my judgment, the decision in *Sollihin CA* is not directly relevant to the question before me which is a narrower one: that is, whether, having determined that the threshold for the exercise of my revisionary jurisdiction has been crossed, and this without reference to any new material, I may then proceed to consider the matter afresh and if satisfied, make a further order instead of remitting the matter to the Magistrate. In my judgment, the answer to this is plainly in the affirmative, so that if the circumstances warrant this, I may, instead of remitting the matter to the Magistrate, figuratively step into the place of the Magistrate and make a fresh order. That follows from s 401(2) read with s 390(1)(*d*) of the CPC which together provide that the High Court has the power to "alter or reverse the order" of the lower court; see also the decision of the High Court in *Public Prosecutor v Sollihin bin Anhar* [2015] 2 SLR 1 at [30]. In order to facilitate the exercise of that power to alter or

reverse an order, ss 401(2) and 392 of the CPC also empower the High Court to receive additional evidence when "necessary".

28 The question in the circumstances is whether I *should* receive further evidence on an *ex parte* basis and then make a further order. I deal with this in the final section of this judgment.

The Caveated Properties

29 I turn then to the substantive issues. I deal first with the Caveated Properties. The caveats were lodged by the Registrar exercising his discretion under s 7(1)(*b*) of the LTA. That section provides as follows:

> **General powers of Registrar**
>
> **7**.—(1) The Registrar may exercise the following powers:
>
> …
>
> (*b*) he may enter caveats for the prevention of fraud or improper dealing whenever he has reason to think that fraud or improper dealing may occur, or for the prevention of any dealing with any registered land which has been found to be erroneous…

30 It emerged from the evidence of the IO at the s 370 Hearing that the information given by the CPIB to the Registrar concerning its investigation into the possible CDSA offences on the part of the 1st Applicant had, in all probability, led the Registrar to lodge the caveats. The nature of that information was not disclosed to the court and having regard to the view I take of its relevance to the present proceedings, it is not necessary for me to examine it. What is material and seems to be common ground is that it was the Registrar who lodged the caveats in the purported exercise of *his* powers and not the CPIB that acted in the exercise of its powers under s 35 of the CPC.

31 In my judgment, it follows from this that the Magistrate was correct to conclude that the extension of the seizure and more precisely the s 370 Hearing could not be concerned with the Caveated Properties. This is so because the High Court exercises its criminal revisionary jurisdiction over the State Courts but it has no such jurisdiction over the Registrar; it therefore does not have the power to order the release of the Caveated Properties in the exercise of its revisionary jurisdiction. The appropriate procedure, if the Applicants wished to challenge the legality of the Registrar's actions, would have been to apply for judicial review. The Registrar might well have exercised *his* powers in order to further the ends of the Police. But that does not make it an exercise of Police powers under s 35 of the CPC. On the contrary, it remains the exercise of the Registrar's powers even if the purpose underlying that was to assist the Police. When I pointed this out, Mr Sreenivasan readily accepted that the proper course in the circumstances would be for him to apply for judicial review. However, he emphasised that he nonetheless wished to refer to the fact that the CPIB had by prevailing on the Registrar, secured a freeze of what appeared to be a very substantial portion, if not the entirety of the Applicants' assets, and that he wished to do this in order to demonstrate the oppressive effect of the present actions on his clients. I return to this at [68] below.

32 The rest of my judgment is therefore concerned only with the Seized Funds.

The extent of the powers of seizure under section 35 of the CPC

33 Section 35(1) of the CPC provides as follows:

> **Powers to seize property in certain circumstances**
>
> **35.**—(1) A police officer may seize, or prohibit the disposal of or dealing in, any property —
>
> (*a*) in respect of which an offence is suspected to have been committed;
>
> (*b*) which is suspected to have been used or intended to be used to commit an offence; or
>
> (*c*) which is suspected to constitute evidence of an offence.

34 It may be recalled from what I have said at [18] and [20] above that the Prosecution's current position is that it is entitled to extend the seizure of the funds in question pursuant to s 35, read with s 370 in order to prevent their dissipation pending a disposal order made pursuant to s 364 of the CPC. This calls for a consideration of the proper construction of s 35(1)(*a*) of the CPC. Without attempting an exhaustive definition of the range or breadth of s 35(1), it seems to be accepted that ss 35(1)(*b*) and (*c*) are concerned with the seizure or the prevention of the disposal of evidence or items used or intended to be used to commit an offence. Neither of these provisions would typically extend to a seizure for the purpose of preventing the dissipation of certain property pending a final order for the disposal of that property. The question before me is whether s 35(1)(*a*) of the CPC would.

35 In my judgment, it would, but this is subject to an important limit which is that the items seized must be the fruits or the traceable proceeds of an identifiable crime. I arrive at this conclusion on the basis of (1) the language of s 35 of the CPC; (2) local and Indian precedents; and (3) the Minister's speech during the Second Reading of the Criminal Procedure Code Bill in 2010 ("CPC Bill") which sheds some light on Parliament's intention behind the enactment of s 35 of the CPC.

The language of s 35 of the CPC

36 I begin with the language of s 35 of the CPC. In my judgment, it is evident from the distinction between s 35(1)(*a*) on the one hand, and ss 35(1)(*b*) and (*c*) on the other, that the former cannot be confined to property that is either evidence of an offence (s 35(1)(*c*)) or suspected to have been used or intended to be used in an offence (s 35(1)(*b*)). The natural reading of s 35(1)(*a*) which refers to property "in respect of which an offence has been committed" would certainly encompass property that represents the fruits or proceeds of a crime. To put it starkly, if a painting were stolen, it seems plain and obvious that such a painting is property in respect of which an offence has been committed. Equally, it seems plain and obvious that s 35(1)(*a*) would not extend to property in respect of which no identifiable offence has been committed.

37 Hence, I am satisfied that the power to seize property under s 35(1)(*a*) does extend beyond property that may be used as evidence or that may be the items used in the commission of the offence, to property that is the fruits or the proceeds of an offence. This is then extended further by s 35(9)(*b*) which provides that "property in respect of which an offence is suspected to have been committed" (which is property referred to in s 35(1)(*a*)), extends to "any property into or for which the property which was originally in the possession or under the control of any person has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise". It is not necessary for me, for the purpose of the present applications, to decide how far s 35(9)(*b*) extends. In the course of its submissions, the Prosecution contended that if the 1st Applicant had corruptly fixed a soccer match and then placed bets in the expectation that the match result would be as fixed, the winnings would be proceeds or fruits of the crime

within the meaning of s 35(1)(*a*) and/or s 35(9)(*b*). While this seems a reasonable view, it is not necessary for me to reach a conclusion on this point at this stage. Hence, any reference to the direct and traceable proceeds of an identifiable offence should be understood subject to this qualification.

38 In my judgment, the extension of the powers of seizure to the traceable proceeds of a crime is founded on the principle that an offender has no basis for asserting any enforceable proprietary interest in such property. Such is the position in equity (see *Halley v The Law Society* [2003] EWCA Civ 97 ("*Halley*") at [105]) and it should be even more so in the context of the criminal law, which is concerned with criminal conduct that generally goes beyond conduct that is merely inequitable or unconscionable in nature. In this sense, the power in s 35(1)(*a*) of the CPC can be seen as analogous to the right of a claimant in equity to seek relief in respect of a specific asset or fund. In equity, a constructive trust would arise where a person procures a transfer of property to himself by fraud, bribery, or breach of trust (see *Halley* at [83] and *Attorney-General for Hong Kong v Charles Warwick Reid and others* [1994] 1 AC 324 ("*Reid*") at 331). The victim may assert a proprietary claim in such circumstances using various remedies and devices including tracing. Tracing "enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim" (*Forskett v McKeown and others* [2001] 1 AC 102 at 128, cited in John McGhee gen ed, *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) at para 30-051). This is analogous to the provision in s 35(9)(*b*), to which I have referred and which extends the property referred to in s 35(1)(*a*) to anything else to which it has been converted or for which it has been exchanged. Similarly, s 35(9)(*c*) of the CPC allows interest in such bank accounts to be seized and this too is analogous to the position in equity, where the victim may claim any increase in the value of the property (see *Reid* at 331).

39 For the avoidance of doubt, my observations in this context are not meant to import into the criminal law the technical rules of tracing or of other equitable remedies or devices. Rather my point is to situate the *extent* of the seizure power in s 35 of the CPC to the proceeds of the crime in question by analogising this to the parallel (but distinct) remedy fashioned by equity to affect the proceeds of inequitable conduct.

40 A question remains as to the *purpose* for which such property may be seized under s 35(1)(*a*) and what the relevant tests are to determine the legality of such a seizure. The question in particular is whether property may be seized in order to preserve it and, especially in the context of monetary proceeds, to prevent it from being dissipated pending a final disposal order. To consider this, it is helpful to first consider the scheme of the provisions in the CPC that deal with the seizure and disposal of property.

41 Section 35 of the CPC, in the first instance, confers the power of seizure on the Police. But, in keeping with the oft-cited observation in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 at [86] and reiterated more recently in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [2], "all power has legal limits". Hence the power of seizure under s 35 of the CPC is not immune from review; but in keeping with the architecture of the provision itself and of the CPC as a whole, it would fall on the applicant, in a given case, to prove to the satisfaction of the court that the power has been invoked or exercised unlawfully, even if this is likely to place an imposing burden on such an applicant.

42 Leaving that to one side, in the normal case, after a seizure has been made under s 35, the process then shifts to s 370. Specifically, s 370(1)(*b*) of

the CPC imposes a long-stop date of one year from the date of seizure, within which the Police must report the seizure to the Magistrate. Should the Police consider that the seized property is no longer relevant for the purposes of any investigation, inquiry, trial or other proceeding under the CPC, it should also make the report: see s 370(1)(*a*) of the CPC.

43 At this stage, assuming the Police wish to extend the seizure beyond the one-year period, judicial oversight is imposed. For convenience, I set out ss 370(2) and (3) again, as follows:

> (2) Subject to subsection (3), the Magistrate's Court must, upon the receipt of such report referred to in subsection (1), make such order as it thinks fit respecting the delivery of the property to the person entitled to the possession of it or, if that person cannot be ascertained, respecting the custody and production of the property.
>
> (3) The Magistrate's Court must not dispose of any property if there is any pending court proceeding under any written law in relation to the property in respect of which the report referred to in subsection (1) is made, or if it is satisfied that such property is relevant for the purposes of any investigation, inquiry, trial or other proceeding under this Code.

44 It will be evident from these provisions that the Magistrate:

(a) *must not* dispose of the property and *must* extend the seizure if there are *pending court proceedings* (whether under the CPC or not) in relation to that property – s 370(3);

(b) *must not* dispose of the property if *satisfied that such property is relevant* for the purposes of any investigations, inquiry, trial or other proceeding under the CPC – s 370(3); and

(c) subject to the foregoing, *must* make such order as *thought fit* regarding the delivery, custody or possession of the property – s 370(2).

45 In *Mustafa Ahunbay v Public Prosecutor* [2015] 2 SLR 903 ("*Mustafa Ahunbay*"), on which Mr Sreenivasan placed great reliance, the Court of Appeal considered these provisions and explained at [43] that the word "satisfied" in s 370(3) of the CPC "would necessarily connote consideration and judgment". The court observed that a Magistrate is "expected to examine what is placed before him" in order to make the appropriate decision and this should be guided by the need to strike the appropriate balance between the interest of the individual, whose property has been seized and who has not yet been convicted of an offence on the one hand, and the needs of society on the other, to prevent crime and to enable investigations to be conducted (at [43] and [47]). Further, the Court of Appeal also noted that "what is recommended in the investigation report is not binding on the court"; instead the Magistrate ought to consider various factors, including "the nature of the wrongdoing which gave rise to the investigation or inquiry" (at [84]).

46 In my judgment, having regard to the observations of the Court of Appeal in *Mustafa Ahunbay* and having regard also to the relevant provisions of the CPC, the Magistrate when exercising her power under s 370 must apply her mind to:

(a) the legislative basis on which an order for the continued seizure of the property is sought;

(b) the purpose for which it is sought; and

(c) the factual basis on which it is sought,

and in that light, the Magistrate must determine whether she is satisfied that the seizure should be extended.

47 This means that before exercising her powers under s 370 of the CPC, the Magistrate must first be satisfied that the Police seized the property pursuant to its powers under ss 35 or 78 of the CPC (which is the other provision that is contemplated in s 370(1) of the CPC), and not pursuant to some other legislation that is not contemplated in s 370 of the CPC. If the property is seized under s 35 of the CPC, the Magistrate should next be apprised of the limb of s 35(1) under which the extension is sought. If the extension is sought pursuant to s 35(1)(*a*), the Prosecution would have to satisfy the Magistrate that the property is reasonably believed to be the fruits or the traceable proceeds of an identifiable crime that the applicant is suspected to have committed. In this connection, the Prosecution would also ordinarily have to inform the Magistrate of the offence to which the seized property relates.

48 The Prosecution would also have to inform the Magistrate of the justification for the extension and of such facts as form the basis of its request. I accept that notwithstanding the passage of a year since the seizure, investigations might not yet be complete. But this does not mean that a bland assertion from the Investigating Officer to the effect that investigations are continuing and that the seized assets are relevant will suffice. In such circumstances, the Magistrate would be entitled to some explanation for the delay. The short point is that the Magistrate should be provided with such information as would enable her to be satisfied that there is a *reasonable basis* for thinking that the seized property is "relevant for the purposes of any investigation, inquiry, trial or other proceeding under [the CPC]" if, as is the case here, that is the basis on which the required extension is being sought.

49 With specific respect to the Seized Funds, if the position of the Prosecution is that the Seized Funds are the proceeds of, say, the PCA offences, and the extension is sought to preserve the funds for the purposes of a possible disposal order under s 364 of the CPC, then it would have been incumbent on the Prosecution to provide the Magistrate, if necessary on an *ex parte* basis, with sufficient information to demonstrate that there is a reasonable basis for thinking that the Seized Funds were the proceeds of the offences in question and also for thinking that a disposal order under s 364 of the CPC may be sought. Otherwise, the Magistrate would be reduced to acting in a purely formal role to endorse whatever she was presented with, without any basis for satisfying herself that these assertions were validly made, and it is meaningless in such circumstances to speak of judicial oversight of the seizure process, as was contemplated in *Mustafa Ahunbay*.

50 In my judgment, the threshold for *continued* seizure under s 370 of the CPC should be and is more stringent than the threshold for *initial* seizure under s 35 of the CPC. This follows from the fact that:

(a) by the time the matter is reviewed under s 370, a period of up to one year would have passed;

(b) judicial oversight is introduced at this stage and this is only meaningful, as I have noted above, if the court is presented with enough information to assess and calibrate the balance between the private interests of an applicant who has not yet been convicted and the public interest in the contemplated prosecution; and

(c) otherwise, the only remedy in respect of a seizure under s 35 would be judicial review, which as I have noted in [41] above presents

a demanding threshold to meet given the broad powers conferred upon the Police by s 35.

51 As noted in *Mustafa Ahunbay* at [81(c)], should the Police or the Prosecution consider that investigations or proceedings will be prejudiced if certain information is divulged in open court, the Magistrate is entitled to receive the necessary information on an *ex parte* basis in order to assess whether the property was seized under s 35 of the CPC and if so, whether it should continue to be subject to seizure on the ground that it is "relevant" under s 370 of the CPC. However, even at this stage, the Magistrate should independently consider and assess whether it is necessary and appropriate in the circumstances to exclude such material from the defence.

52 Finally, I note that s 364(2)(*a*) of the CPC allows the court to "make an order as it thinks fit" for the disposal of any property in respect of which an offence "is or was alleged to have been committed" during the course or at the conclusion of the criminal proceeding. It may be noted that the language used in s 364(2)(*a*) is identical to that used in s 35(1)(*a*). The effect of this, in my judgment, is that property that has been seized pursuant to s 35(1)(*a*) may then be ordered to be disposed of by the court during or at the conclusion of the trial. It follows from this that the purpose of the seizure under s 35(1)(*a*) can extend to the preservation of seized assets pending a disposal order pursuant to s 364.

Local and Indian precedents

53 Having examined the statutory framework, I briefly turn to the local and Indian precedents which in my judgment are consistent with the foregoing analysis.

54 There are two local cases in which the Police exercised powers of seizure under s 68 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the 1985 CPC"), which was the predecessor to s 35 of the CPC. In *Sim Cheng Ho and another v Lee Eng Soon* [1997] 3 SLR(R) 190, the Police seized three vehicles in the course of investigations into the forgery of the complainant's signature on the instruments of transfer of the vehicles; and in *Public Prosecutor v Intra Group (Holdings) Co Inc* [1999] 1 SLR(R) 154, the accused pleaded guilty to purchasing a property as a nominee in contravention of the Residential Property Act (Cap 274, 1985 Rev Ed). The accused had also contracted to sell the property to another company without his principal's consent. The Police seized the proceeds of sale which consisted of some S$1.1m in a bank account. It is evident that both these cases involved either the property that was the very subject of the offence or the direct proceeds of the offence.

55 Similarly, in *State of Maharashtra v Tapas D. Neogy* (1999) 3 A.Cr.R. 2154 ("*Tapas*"), the Indian Supreme Court held that a bank account could be seized under s 102(1) of the Indian Criminal Procedure Code, which is *in pari materia* with s 68 of the 1985 CPC. It said at [12] that the bank account of the accused or any of his relation can be seized "if such assets have direct links with the commission of the offence for which the police officer is investigating into." Otherwise, the "[c]ourts would be powerless to get the said money which has any direct link with the commission of the offence" because all the money "could be withdrawn by the accused". In my judgment, this is entirely consistent with my analysis at [36]–[39] above. Significantly, it may be noted that the Prosecution was not able to produce any case in which the seizure power under s 35(1)(*a*) had been invoked in relation to property that was not the traceable proceeds of an identifiable offence.

Minister's speech during the Second Reading of the CPC Bill

56 Finally, I turn to parts of the Minister's speech at the Second Reading of the Criminal Procedure Code Bill in 2010 ("the CPC Bill"). The Minister then sought to illustrate the nature of the powers conferred upon the Police by clause 35(1) and (2) of the CPC Bill (which is now ss 35(1) and 35(2) of the CPC), stating that "if a suspected watch thief has sold the stolen watch and used the proceeds to buy a computer, the Police may seize the computer instead": see *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 411 (K Shanmugam, Minister for Law). In my judgment, this too is consistent with my foregoing analysis, especially at [37]–[38] above.

Seizure under the CDSA

57 It will be recalled that until the resumed hearing on 20 February 2017, the Prosecution had taken the position that the continued seizure was relevant to the investigation of possible offences under the CDSA. This raised the question as to why the Prosecution did not then proceed under the CDSA on the basis of the powers contained there. In response, the Prosecution submitted that the powers of seizure under the CPC overlapped with but were nonetheless distinct from the powers of seizure and confiscation under the CDSA. As noted above (at [20]), it also subsequently took the position that it would be seeking the extension for the purpose of preserving the funds on the basis that these were the suspected proceeds of the *PCA offences*.

58 It would be helpful, before I turn to consider the application of the relevant principles I have identified in the previous sections of this judgment to the facts that are before me, for me to briefly outline the position under the CDSA. I emphasise that I do this for the sake of clarity and completeness only

since it is clear that the Prosecution has not proceeded and is not proceeding on the basis of the seizure powers under the CDSA. Subject to that observation, in my judgment, the CDSA provides a separate regime for the seizure of property and at least in some respects, it expands the reach of the powers of seizure beyond what is provided in s 35 of the CPC. In particular, property may be seized under the CDSA even if it does not form the traceable proceeds of an identifiable offence. But generally, such enhanced powers are subject to judicial control. Confiscation and restraint orders under the CDSA, for example, can only be issued by the order of the court (ss 4, 5, and 16 of the CDSA)

59 The Second Minister for Law made it clear that the Corruption (Confiscation of Benefits) Bill 1988 ("CCB Bill"), which is the predecessor of the CDSA, extends the powers of seizure to a new class of property, namely, the unexplained assets of persons convicted of certain serious offences: *Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 ("*Parliamentary Debates 30 March 1988*") at col 1717 (Prof S. Jayakumar, Second Minister for Law). The Minister explained that the law as it then stood was inadequate to deal with the confiscation and recovery of corruption benefits. The following paragraphs of the Minister's speech at the Second Reading of the CCB Bill encapsulates the purpose of the CCB Bill (see *Parliamentary Debates 30 March 1988* at col 1718):

> But let us take the case of an offender who has been corrupt prior to that particular offence for which there was discovery and for which he was charged. He may have assets which are clearly disproportionate to his known sources of income and for which *he can give no satisfactory explanation*. Such assets, under existing law, cannot be confiscated unless it is proved that he has actually derived those assets by corruption. But *these are matters which are specially within his own knowledge and it would be difficult, if not, impossible to obtain evidence concerning them.*

> The Bill, therefore, provides *new powers for tracing and freezing the benefits of corruption and for confiscating those benefits.*
>
> [emphasis added]

60 Unsurprisingly, the CDSA reflects this position. Under the CDSA, an accused person or an offender may have his property seized pursuant to restraint orders or confiscation orders. These orders may be sought in the context of drug dealing offences and criminal conduct amounting to serious offences which are specified in the First and Second Schedule of the CDSA respectively.

61 The High Court may make restraint orders "prohibit[ing] any person from dealing with any realisable property" (s 16(1)) during the course of CDSA proceedings if there is "reasonable cause to believe that benefits have been derived by the defendant from drug dealing or from criminal conduct" (s 15(1)(*c*)). Such orders can only be made after proceedings have been commenced against a person for a drug dealing or a serious offence (s 15(1)(*a*)) and before such proceedings are concluded (s 15(1)(*b*)). The CDSA further defines "realisable property" as including "any property held by the defendant" (s 2 of the CDSA); the potential reach of a CDSA restraint order is therefore wider than that of seizure under s 35 of the CPC.

62 After a person has been convicted of one or more drug dealing offences (s 4) or one or more serious offences (s 5), confiscation orders can be issued on the application of the Prosecution in respect of the "benefits derived by [the defendant]" from drug dealing or serious offences (ss 4(1), 5(1)). Further, ss 4(4) and 5(6) of the CDSA provide that where a person holds "any property or any interest therein (including income accruing from such property or interest) disproportionate to his known sources of income, the holding of

which cannot be explained to the satisfaction of the court, [such property] shall, until the contrary is proved, be presumed to have derived benefits from drug dealing" or "criminal conduct". This is consistent with the purpose of the CDSA, which casts its ambit beyond the direct and traceable proceeds of a crime and into unexplained wealth.

63 Therefore, the purpose of the CCB Bill and the subsequent enactment of the CDSA is clear – it seeks to *expand* the powers of seizure that are vested in the Police to include unexplained wealth even where the evidence linking such wealth to specific offences may be difficult to obtain because it lies in the hands of the accused. This simply does not apply in the context of the powers arising under s 35 of the CPC, which is the provision that the Prosecution and the CPIB relied on in this case.

Whether in all the circumstances, the Magistrate's Order should be set aside and if so, whether a further order should be made

64 I turn to apply the relevant principles that I have identified to the facts that are before me. In my judgment, the Magistrate's Order suffers from significant irregularities and the threshold of "serious injustice" has been crossed for several reasons.

65 First, the evidence that was before the Magistrate suggested that the funds were seized in order to facilitate investigations into offences under the CDSA. This was also what the orders appended to the CPIB Reports ("CPIB Orders") expressly said. Moreover, the IO repeatedly testified that the CPIB needed to establish "whether [the Seized Funds] [had been amassed] from known or unknown sources of income" (see above at [6]). This is relevant to establishing whether the Seized Funds formed the "benefits of … criminal conduct" under the CDSA, which have been defined as including unexplained

wealth (ss 7(1)(*a*) and 8(1)(*a*)). In short, the seizure appeared to be directed not at the traceable proceeds of an identifiable crime but at unexplained wealth pursuant to the CDSA. If that is indeed the case, the Magistrate should not have made an order under s 370 of the CPC because the Seized Funds could not have been seized pursuant to s 35 of the CPC unless, as I have said, they were the suspected proceeds of an identifiable offence. Had the Prosecution wished to seize the assets on the basis that their sources were not explained, they could have proceeded under the CDSA, but in that case, as noted above, the exercise of the relevant powers would have been subject to judicial oversight.

66 Second, at the resumed hearing on 20 February 2017, the Prosecution submitted that the Seized Funds could and would come within the ambit of s 370 of the CPC because the Prosecution intended in due course to bring proceedings under s 364 of the CPC (see above at [18]) on the basis that these assets were the proceeds of the PCA offences. This, however, is inconsistent with the terms of the Magistrate's Order, which states that the funds were to remain seized for the purpose of investigations under s 47 of the CDSA. The new position adopted by the Prosecution is also inconsistent with the IO's evidence at the s 370 Hearing (see above at [6]) and with the terms of the CPIB Orders, neither of which were predicated on the possibility of a disposal proceeding under s 364 arising out of the PCA offences.

67 Third, on the evidence, the Applicants had put forward a case purporting to explain the sources of their wealth in a bid to show that the funds had been obtained before the alleged acts that are the subject matter of the PCA offences that are now being tried. Although the Prosecution's position at that time was that they were proceeding in respect of possible offences under the CDSA and although there appeared to be some suggestion that these were

somehow separate from the PCA offences, the Applicants presumably did this in an attempt to address the only criminal conduct that they were aware had been alleged against the 1st Applicant, which was the PCA offences. The Prosecution did not put forward any evidence to rebut this. Perhaps this was because at that stage, the Prosecution's position was that the extension of the seizure was justified on the basis of its relevance to continuing investigations to the CDSA offences. However, once its case shifted to the assertion that the funds were being held because they were suspected to be the proceeds of the PCA offences, then this directly engaged the evidence that the Applicants had put forward. The question is not whether the evidence of the Applicants is therefore deemed to be true; rather, the point is that in these circumstances, there is no apparent basis for rejecting the Applicants' evidence when no contrary material has as yet been put forth by the Prosecution.

68 Fourth, no attempt was made by the Prosecution to set out how much of the Seized Funds were in fact proceeds of the PCA offences or the basis on which this can be said to be so. As I have noted above, the effect of the seizure order, taken together with the lodgement of the caveats, was to freeze most if not all of the Applicants' known assets. Such a draconian action must be shown to be justifiable. The only evidence provided at the s 370 Hearing was the IO's testimony that the 1st Applicant was facing an unspecified "predicate offence" and that the CPIB decided to "convene a CDSA investigation". As explained above at [48]-[49], the Prosecution must demonstrate that there is a reasonable basis for thinking that the Seized Funds are the proceeds of an identifiable offence and also that proceedings under s 364 of the CPC might ensue. The evidence fell far short of this. The extent of the seizure also demonstrated why there was serious injustice to the Applicants in the circumstances.

69 In the circumstances, I am satisfied that the Magistrate erred. On the basis of the evidence that was before her, there was no reasonable basis to find that the Seized Funds were relevant to any of the purposes listed in s 370(3) of the CPC. Finally, I am also satisfied that it would not be appropriate for me to receive further evidence with a view to my then making a fresh order because the case that was eventually presented to me was so substantially different from that which underlay the CPIB Orders, a fact accepted by the Prosecution, and also that which was presented the Magistrate and it would not be just to enable the Prosecution to attempt to remedy the flawed proceedings in this way.

Conclusion

70 I am therefore satisfied that the Applicants' motion should be granted and I accordingly set aside the Magistrate's Order.

Sundaresh Menon
Chief Justice

N Sreenivasan SC and Jason Lim (Straits Law Practice LLC) for the applicants;
G Kannan, Zhuo Wenzhao, Navin Naidu, Tan Zhongshan, and Stacey Fernandez (Attorney-General's Chambers) for the respondent.