IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 227

Originating Summons No 559 of 2020

In the matter of Section 82A of the Legal Profession Act (Cap 161, 2009 Rev Ed)

Parti Liyani

… *Applicant*

JUDGMENT

[Legal Profession] — [Disciplinary proceedings] — [Application for leave under s 82A(5) of the Legal Profession Act (Cap 161, 2009 Rev Ed)]

Re Parti Liyani

[2020] SGHC 227

High Court — Originating Summons No 559 of 2020
Sundaresh Menon CJ
1 October 2020

23 October 2020 Judgment reserved.

Sundaresh Menon CJ:

Introduction

1 In HC/OS 559/2020 ("OS 559"), the applicant, Ms Parti Liyani, seeks leave to commence disciplinary proceedings against two legal service officers pursuant to s 82A(5) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"). The two officers are Deputy Public Prosecutors ("DPPs"), namely, DPP Tan Yanying ("Ms Tan") and DPP Tan Wee Hao. These DPPs had conduct of the applicant's trial before the District Court, at which she was convicted of four theft-related charges including one charge of theft by servant of property in possession of her employer, Mr Liew Mun Leong ("Mr Liew") under s 381 of the Penal Code (Cap 224, 2008 Rev Ed) ("the s 381 charge"): see *Public Prosecutor v Parti Liyani* [2019] SGDC 57 ("*Parti Liyani (DC)*").

2 The s 381 charge alleged that the applicant had stolen, amongst other things, a Pioneer DVD player ("the Device"). On appeal to the High Court, Chan Seng Onn J ("the Judge") found the applicant's convictions unsafe and

acquitted her of all four charges: see *Parti Liyani v Public Prosecutor* [2020] SGHC 187 ("*Parti Liyani (HC)*").

3 The present complaint arises out of the manner in which the DPPs led evidence and made submissions on the functionality of the Device. In particular, the applicant contends that the DPPs had, in their conduct of the trial, concealed material facts and thereby created the false impression that the Device was fully functional. She contends that but for the false impression that had been conveyed, she would not have agreed, under cross-examination, that the Device was operational. On this basis, the DPPs suggested that she had lied about the circumstances in which the Device came to be in her possession. However, if she had been apprised of all the facts, there would have been no basis for the DPPs to suggest that she had been lying. The applicant thus seeks leave for an investigation to be made into her complaint.

Background facts

4 The facts surrounding the applicant's conviction and subsequent acquittal have been comprehensively set out in the Judge's decision in *Parti Liyani (HC)*. I therefore mention only the salient facts relevant to the present application. The applicant was a foreign worker, employed as a domestic helper by Mr Liew. In October 2016, Mr Liew filed a police report against the applicant, alleging that she had stolen numerous items from members of the Liew household. The applicant's complaint in OS 559 is confined to the DPPs' conduct in relation to the Device, which was one of the items that formed the subject of the s 381 charge. In brief, the applicant's defence at trial and on appeal in relation to the Device was that it was faulty and that Mr Liew's wife, Mdm Ng Lai Peng ("Mdm Ng"), had told her this and indicated that she wished to dispose of it (see *Parti Liyani (DC)* at [22]; *Parti Liyani (HC)* at [80]). The

applicant maintained that it was in these circumstances that she came into possession of the Device.

5 At trial, the functionality of the Device became a live issue. Both parties sought to address and eventually took divergent positions on this before the District Judge ("the DJ"). On 16 August 2018, under cross-examination, Mr Liew testified that he did not think the Device was in working condition because it had not been used in a long time. While he admitted the possibility that the applicant might have asked Mdm Ng whether she could take the Device and get it fixed for her use in Indonesia, he declined to speculate whether such a conversation had taken place. Subsequently, on 17 August 2018 and 7 September 2018, in the course of her examination-in-chief and cross-examination respectively, Mdm Ng testified that the Device was in fact functional and further that the applicant had never sought permission to take it.

6 As against this, on 25 September 2018, in the course of her examination-in-chief, the applicant testified that Mdm Ng had told her that the Device was damaged and that she intended to throw it away. While there were slight inconsistencies in the applicant's evidence as to whether Mdm Ng had explicitly allowed her to take the Device or if she had simply taken it after being told it was to be discarded because it was not working (see *Parti Liyani (HC)* at [95]), her position *even prior* to the trial (as disclosed in the Case for the Defence and her statements), had been that she had believed the Device was spoilt.

7 On 26 September 2018, during the cross-examination of the applicant, the DPPs conducted a demonstration of the Device. Some images were displayed on a monitor when the Device was connected to it via a HDMI cable. The DPPs did not inform the court, the applicant or her counsel, Mr Anil Balchandani ("Mr Balchandani"), that the Device had been operating in the

HDD mode (see [10] below) or that they had difficulties playing a "Capitaland" DVD, which had been found in the Device, earlier that morning (see [15] below). However, Ms Tan, when asked by the DJ, said that she had not inserted anything into the Device prior to her demonstration (see [32] below). Under cross-examination by Ms Tan, the applicant agreed that the Device had been working during the demonstration. Since the applicant herself had not claimed at any time to have tested the Device, the point of this was primarily to demonstrate that if the Device *was* working, it was implausible that Mdm Ng would have said that it was not, or for that matter, that she would have wanted to discard the Device. This would contradict the applicant's contention and undermine her case. Ms Tan then put to the applicant that she had been lying when she claimed that Mdm Ng had told her the Device was spoilt.

8 On 27 September 2018, during the lunch recess, Mr Balchandani sought and was afforded the opportunity to inspect the Device with the assistance of the DPPs. Thereafter, he informed the court that the Device was not functional despite the DPPs' demonstration the previous day. The DJ invited him to take the issue up in re-examination since the DPPs were still in the midst of their cross-examination of the applicant at that point.

9 On 20 November 2018, during the re-examination of the applicant, Mr Balchandani highlighted to the DJ that the DPPs had in their demonstration used certain equipment which was not part of the courtroom (presumably he was referring to the HDMI cable which the DPPs had brought and used) and that therefore he was at a disadvantage. From this, he argued that, amongst other things, the DJ ought to consider the fact that the DPPs had not shown how the Liew household had used the Device, specifically how it was connected to any television, for instance. The implication appeared to have been that the specific setup might have a bearing on the functionality of the Device and the veracity

of the applicant's defence. In response, Ms Tan stated that Mr Balchandani misunderstood the purpose of their demonstration which was "in relation to the [applicant's] evidence on the condition of [the Device]" and notably, that their demonstration "*proved that [the Device] was indeed working*" [emphasis added].

10 On 4 December 2018, Mr Balchandani conducted a live demonstration of the Device during the continued re-examination of the applicant. Ms Tan objected to the relevance of his demonstration, contending that Mr Balchandani would, in doing so, be giving evidence from the Bar. She further submitted that there had been "no confusion" as to whether the Device could work since the applicant had "testified explicitly and expressly" on this issue, and the DJ had already seen the demonstration on 26 September 2018. Notwithstanding these objections, Mr Balchandani was allowed to proceed. It emerged that the Device had two modes in which it could function: the first was the DVD mode, in which DVDs could be played; the second was the HDD mode, in which images could be recorded on the Device's hard drive and then played back. In addition to the "Capitaland" DVD which had been found in the Device, Mr Balchandani also brought along other DVDs. When Mr Balchandani attempted to play the "Capitaland" DVD and another DVD he had brought on the Device using the DVD mode, various error messages were displayed. However, when the Device was switched to HDD mode, the footage that had been displayed during the DPPs' demonstration appeared on the monitor. On this basis, Mr Balchandani observed that the DPPs had not informed the court that they had operated the Device using the HDD function during their demonstration. He stated that while the DPPs had conducted their demonstration in the manner they did to show that the Device was working, he had shown that to be untrue.

11 While the applicant did not specifically refer to this, for completeness it should be noted that in the closing submissions, the DPPs argued that the fact the Device had failed to play a DVD which Mr Balchandani had brought and inserted was more likely to have been because of a problem with Mr Balchandani's DVD rather than the functionality of the Device. Their submissions also did not mention the fact that their own demonstration had utilised the HDD mode of the Device; nor did they address the difficulties that Mr Balchandani had encountered in attempting to play back the "Capitaland" DVD. The DPPs further submitted that the applicant's case that the Device had been discarded by Mdm Ng because it was spoilt had been "rubbished by the demonstrations in court which clearly showed that the said items [including the Device] were working".

12 In the light of what transpired, the applicant alleged in her closing submissions before the DJ that the DPPs' actions showed "a larger scheme … to mislead the court". This was because the Device could not have been operating in the HDD mode without it being deliberately engaged and the DPPs had "provided no explanation of what they were doing" and "how they got the [Device] to display the moving image" during the demonstration. According to the applicant, the DPPs "knew they were fudging the facts so they could score an immediate victory and discredit [the applicant]" and had performed their demonstration in the shortest time possible "to catch [Mr Balchandani] off-guard". In their reply submissions, the DPPs argued that their demonstration had been done "openly", and proved that the Device had been working because it had been able to turn on, open, close and display appropriate error messages.

13 At the end of the trial, the DJ held that the key question in relation to the Device was not its functionality but rather whether the applicant had permission to take the Device. On this, the DJ accepted Mdm Ng's evidence that the

applicant had *not* had permission to do so. The DJ also relied on what she considered was an admission by the applicant to this fact in her statements (see *Parti Liyani (DC)* at [22]–[23]). No finding was made as to the Device's functionality or whether Mdm Ng had intended to throw it away. I digress to observe that the DJ appeared not to have appreciated the potential significance of whether the Device was or was not working in assessing the credibility of Mdm Ng and the applicant. It was not disputed that the applicant had not herself tested the Device. However, if it turned out that the Device was faulty, it would lend weight to her contention that she had been told it was faulty; and would cut against Mdm Ng's contention that it was perfectly functional. This could then bear on the credibility of each of them on the question of whether the Device had been discarded or not.

14 On appeal, the Judge thought that the evidence as to the working condition of the Device was in fact of crucial relevance to the applicant's defence. In this regard, the Prosecution conceded *on appeal* that during the trial, difficulties had been encountered when attempts were made to play a DVD using the Device. However, it could play the clip that was recorded on the hard drive. The Judge noted that the fact that there had been at least some difficulties with the functionality of the Device had not been disclosed to the applicant prior to her being cross-examined on the Device's condition or to the DJ in the trial below (see *Parti Liyani (HC)* at [90]). The Judge considered that the Device could fairly be described as spoilt in so far as the DVD function appeared to be faulty. Accordingly, he accepted the applicant's defence that her employers had no longer wanted the faulty Device and acquitted the applicant of the s 381 charge in relation to the Device (see *Parti Liyani (HC)* at [94]–[96]).

15 The DPPs stated in the affidavit they filed on 4 August 2020 in support of their application to intervene in OS 559 (see [21] below) that on the morning

of 26 September 2018, before the commencement of the day's hearing, they had tested the Device on their own. When the Device was in the DVD mode, it could not play the "Capitaland" DVD found inside the Device. However, the Device was able to display some images from the Discovery Channel when it was in the HDD mode and plugged into a monitor in court. Notwithstanding this, the DPPs had made no mention of their difficulties playing the "Capitaland" DVD during the applicant's cross-examination or in their closing submissions.

Procedural history

16 On 11 June 2020, some weeks before the Judge delivered his decision on the appeal, the applicant filed OS 559. Since the substantive appeal was still pending at that point, I decided to defer my consideration of OS 559. This seemed sensible and appropriate to me given that the complaint might be impacted by factual findings that had yet to be made by the Judge. The Judge's decision in *Parti Liyani (HC)* was issued on 4 September 2020.

17 Shortly after the release of *Parti Liyani (HC)*, I directed that a pre-trial conference ("PTC") be convened and this was done on 23 September 2020. At the PTC, Mr Balchandani confirmed that the applicant intended to proceed with OS 559. Hence, the matter was fixed for hearing before me on 1 October 2020. However, on 29 September 2020, the applicant filed a Notice of Discontinuance/Withdrawal of OS 559. I considered that leave was required before the application could be discontinued. I therefore directed the Registry to inform the parties that I wished to hear them before I permitted the applicant to discontinue OS 559. On 1 October 2020, the applicant appeared before me by counsel and informed me that she was reconsidering her position on discontinuing OS 559.

18 At the hearing on 1 October 2020, Mr Balchandani explained the reason for the applicant's changing positions. He clarified that on the one hand, the applicant stood by the matters set out in the affidavit she filed on 9 June 2020 in support of OS 559, in which the allegations of misconduct had been levelled against the DPPs. At the same time however, Mr Balchandani informed me that the applicant had also been somewhat overwhelmed by the flurry of events that had taken place since the release of the Judge's decision in *Parti Liyani (HC)*, including her application for a compensation order under s 359(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and related discussions with the Attorney-General's Chambers on that front. Moreover, uppermost in his client's mind was the fact that she has not been home to Indonesia for four years and she naturally wished to return as soon as conveniently possible. Therefore, the applicant was very much torn between the various competing considerations.

19 In order to help mitigate those tensions, I acceded to Mr Balchandani's request that the matter be adjourned two weeks for the applicant to come to a final decision on whether she intended to proceed with OS 559 or not. By way of a letter dated 14 October 2020 from Mr Balchandani, the applicant confirmed that she wished to proceed with OS 559.

Application to intervene

20 Before I deal with the substance of the application in OS 559, I should note for completeness that the DPPs had sought leave by way of HC/SUM 3349/2020 ("SUM 3349") to appear and be heard by their counsel at the hearing of OS 559 on 1 October 2020 and to put some evidence before me. I allowed SUM 3349 in part for the following reasons.

21 Pursuant to s 82A(5) of the LPA, an application for leave for an investigation to be initiated into the conduct of legal service officers is to be made on an *ex parte* basis. In support of SUM 3349, the DPPs filed two joint affidavits in which they sought to put forward various documents from the trial and appeal records. They also recounted the manner in which they had tested the Device prior to the commencement of the day's hearing on 26 September 2018 (see [15] above) and made various assertions as to whether their demonstration of the Device's functionality in court had been misleading or had any prejudicial effect on the applicant.

22 I admitted the affidavits filed by the DPPs into evidence. In my view, an application under s 82A of the LPA engages questions of public interest and attention should be directed at the *substance* of the complaint. In this regard, rather than getting mired in arguments as to whether there had been full and frank disclosure in the applicant's *ex parte* application, it was in the interest of justice that any materials reasonably thought to be relevant be placed before the court such that it has as full a picture as possible of the context in which the alleged misconduct had occurred. The DPPs' affidavits included some relevant *factual* material and were helpful in shedding light on matters within their exclusive knowledge, for instance, as to when the decision to test the functionality of the Device had been made and what had transpired when they did so. I saw no reason to exclude the joint affidavits, which, in my view, put forward some relevant and material evidence, and I therefore admitted them into evidence. However, I disregarded anything in the affidavits which amounted in essence to submissions. I did so for two reasons. First, as an *ex parte* process, it seemed inappropriate to have regard to such material at this stage when the issue is whether there is basis to look further into the conduct of the DPPs. Second, as I note below, the DPPs had not even seen the applicant's affidavit when they

prepared their joint affidavits. This strengthened my view that it would neither be helpful nor appropriate to consider anything that amounted to submissions.

23 In line with this, State Counsel, Ms Kristy Tan, who appeared on behalf of the DPPs, clarified at the hearing that the DPPs were not seeking to make submissions on the merits of OS 559, and indeed, were not opposing the application. I therefore saw no prejudice in allowing State Counsel to be present at the hearing, either to render any assistance where appropriate, or to enable the DPPs to understand the complaint that is being made against them. That was the footing on which the hearing was conducted on 1 October 2020.

24 As I have just noted, I was informed at the hearing that the DPPs had not had sight of the applicant's supporting affidavit in OS 559 filed on 9 June 2020. During the hearing, Mr Balchandani agreed to extend a copy of the applicant's supporting affidavit to the DPPs. Having reviewed the affidavit, the DPPs indicated by way of a letter dated 6 October 2020 that they reserved their position on all the allegations made by the applicant therein. In particular, they denied having any intention to mislead the trial court and also denied that the court was in fact misled.

The applicable legal principles

25 I turn now to the substance of OS 559. The applicable legal principles are well-established. The purpose of an application under s 82A(5) of the LPA is a limited one, namely, to determine whether an investigation should be made into a complaint of misconduct. Following *Re Salwant Singh s/o Amer Singh* [2019] 5 SLR 1037 ("*Salwant Singh*") at [30], in considering whether to grant leave for an investigation to be made under s 82A(6) of the LPA, the Chief Justice adopts a two-stage process (the "*Salwant Singh* framework"):

(a) First, the Chief Justice must be satisfied that there is a *prima facie* case for an investigation into the complaint (see also *Law Society of Singapore v Ravi s/o Madasamy* [2015] 3 SLR 1187 ("*Ravi (2015)*") at [21]).

(b) Second, if a *prima facie* case is found, the Chief Justice should then consider any relevant factors in favour of as well as those militating against an investigation into the alleged misconduct (see also *Ravi (2015)* at [22]). In other words, the finding of a *prima facie* case does not mean that leave must be given but instead that the Chief Justice has the discretion to do so (see *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 ("*Re Nalpon*") at [27]).

My decision

26 After considering the evidence before me, I allow OS 559 for the reasons I now explain.

Prima facie *case*

27 At the first stage of the *Salwant Singh* framework, the question is whether there is a *prima facie* case for investigation. In other words, the question is whether the evidence, if accepted by the court, would be sufficient to prove every element of the offence in question, either directly as a primary fact, or inferentially as a secondary fact (*Re Nalpon* at [22]–[24]). However, this does not mean that the court must, at this stage, unquestioningly accept *all* evidence proffered and instead may find that the evidence is discredited or wholly unreliable. Further, the court may not draw an inference from primary facts unless it is reasonable to do so (see *Salwant Singh* at [34]–[44]; *Re Nalpon* at [25]).

28 In my judgment, whether the applicant has established a *prima facie* case of misconduct against the DPPs engages an anterior question as to what the alleged misconduct is. It appears from the materials before me, that in broad terms, the alleged misconduct consists of a lack of candour on the part of the DPPs in the way they cross-examined the applicant and in the way they presented the position to the court, with the consequence that (a) the applicant was cross-examined unfairly; and (b) the applicant and possibly the court were misled. The inquiry turns essentially on three questions. First, whether the DPPs had reason to think that there might have been a problem with the Device; second, assuming the answer to the first question is "yes", whether the DPPs made this known to the DJ, Mr Balchandani and the applicant; and third, and more seriously, again, assuming the answer to the first question is "yes", whether the DPPs *suggested* to the DJ, Mr Balchandani and the applicant that there was nothing wrong with the Device. The second question is concerned with a *failure to disclose* a potentially material fact known to the DPPs; while the third question is concerned with a more positive case of *attempting to mislead* the court, the applicant and Mr Balchandani as to the truth concerning the functioning state of the Device.

29 On the first question, the material before me suggests that the DPPs could or might have had reason to think that there were issues with the Device's functionality. According to the DPPs' affidavits, they had decided on the night of 25 September 2018 to test the Device and ascertain whether it was working. As noted in the chronology I set out earlier, when they did so the following morning, they found that the Device was unable to read the "Capitaland" DVD which had been found inside the Device. However, the Device had a HDD mode, from which some images of a recording from the Discovery Channel could be played.

30 As such, by the morning of 26 September 2018, the DPPs appear to have encountered difficulties playing the "Capitaland" DVD found in the Device. In keeping with this, the Prosecution conceded at the hearing of the appeal, although they did not mention this at the trial, that there had already been difficulties with playing a DVD using the Device during the trial (see [14] above). While the precise reason for those difficulties might have been unclear in the absence of expert evidence (including whether the problem was with the "Capitaland" DVD itself or with the Device), the DPPs could nevertheless have had reason to think that the DVD function might be faulty, particularly in the context of the defence run by the applicant (see [6] above). Further, during his re-examination of the applicant, Mr Balchandani had attempted to play two different DVDs using the Device, which prompted various error messages (see [10] above). This also could have indicated to the DPPs that there was a problem with the Device's DVD-playing functions.

31 On the second question, the evidence before me further suggests that the DPPs did not make this possibility that the Device was faulty known to the DJ, Mr Balchandani or to the applicant. As I indicated above, on 26 September 2018, notwithstanding the difficulty they had encountered playing the "Capitaland" DVD earlier that day, the DPPs proceeded to cross-examine the applicant on the functionality of the Device. As part of the cross-examination, Ms Tan conducted a demonstration, in the course of which she turned on the Device which was linked to a monitor using a HDMI cable. The Device was able to display some images on the monitor. As mentioned, neither of the DPPs informed the DJ of the dual functions of the Device (namely, that there was both a HDD mode and a DVD mode), that the Device was operating in the HDD mode during the demonstration, or that the DPPs had difficulties playing the "Capitaland" DVD on the Device earlier that morning. The DJ asked Ms Tan if

she had inserted anything into the Device prior to her demonstration (see [32] below), and Ms Tan said she had not. It is not clear to me what, if any, significance is to be placed on that. The applicant stated in her supporting affidavit that she had not known at that point that the Device had two functions, and only learned of this after the examination and demonstration conducted by Mr Balchandani prior to and during her re-examination.

32 On the third question, based on the materials before me, it also seems arguable that the DPPs had gone further to suggest that there were *no* problems with the functionality of the Device in at least three ways. The first of these is in the cross-examination of the applicant. The key portions of the transcript are as follows:

[Ms Tan]:	Your Honour---Your Honour, we will now be referring to the actual exhibit of [the Device].
…	
[Ms Tan]:	With Your Honour's indulgence, I will just link it to the monitor here, if that is suitable?
Court:	Yes.
[Ms Tan]:	Okay.
Court:	No, I don't think you can turn it the other way but what's--- what's your point? You want to show what it works, is it?
[Ms Tan]:	Yes.
Q	Ms. Liyani, the---sorry, for the record, [the Device] is connected to the monitor at the---oh, sorry, at the Prosecution's desk area. You---
…	

Q	So you are able to see the picture on the screen, Ms. Liyani?
A	Yes, I can see.
[Ms Tan]:	Is Your Honour able to see as well? Okay it's a bit hard---just want to see it. Can you confirm---you can come over and see it first.
Court:	It's okay, you can turn it around, I don't need to see that anymore.
[Mr] Balchandani:	*What have you done? You have to explain what have you done.*
…	
[Mr] Balchandani:	What have you put in? What---Your Honour, can you maybe direct the Prosecution to describe what they have done? How they have connected it, what is playing, et cetera, et cetera?
Court:	Okay, very well, maybe just---just---
[Ms Tan]:	Yes---Yes, Your Honour, for the record. For the record we have connected [the Device] to the monitor via a HDMI cable and ***we have then powered on [the Device] and we pressed play and there were images which were shown on the monitor which came from [the Device].***
[Mr] Balchandani:	But where is it---what is playing?
Court:	Okay, well, perhaps put it the other way. *You didn't insert anything into [the Device] before this, is that right?*
[Ms Tan]:	***No, Your Honour.***
Court:	Okay, right. Okay.
[Ms Tan]:	Alright---and Your Honour, I am---okay, so, okay.
Q	***So, you agree---I mean, so you see that [the Device] is working, isn't it?***

A	***Only now I realised, before that, I wouldn't know.***
Q	***So I put it to you that you were lying that [Mdm Ng] gave you [the Device] and told you that it was spoilt.***
A	Disagree.
Q	***I put it to you that you stole [the Device].***
A	I did not steal this---I have---I am a poor person but my mother never teach me to steal. Even my deceased father never teach me to steal. If I steal, I would have already brought it home, why is it still around?

[emphasis added in italics and bold italics]

33 In the foregoing exchange, while the DPPs did not explicitly represent that the *DVD function* was working, the specific significance of this would not have been in the minds of the applicant, the applicant's counsel or the court since there had been no mention of the fact that the Device was capable of operating in two distinct modes. It seems that the applicant's admission ("[o]nly now I realised, before that, I wouldn't know") had *only* been made because it appeared from the DPPs' demonstration that the Device was functioning as it should. Ms Tan then used this admission to put to the applicant that she had been lying and that her defence was false.

34 The DPPs' demonstration and the questions put in cross-examination could arguably be said to have created a misleading impression that there were no problems with the functionality of the Device. Cross-examination is a potent and critical instrument for eliciting the truth in the adversarial process (see *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2013] 3 SLR 573 at [25]). While leading questions are certainly permissible in cross-

examination, they must not be used to mislead the witness. In this regard, s 145(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) prohibits leading questions in cross-examination which "assume that facts have been proved which have not been proved". The crux of this provision is that it would be inappropriate and unethical for an advocate to base a question on a falsehood and the court should not accept evidence that has been elicited in this manner (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at para 20.111). On the evidence, it seems to me that there is a *prima facie* case that it was improper for Ms Tan to have put to the applicant that she had been lying based on an admission that might have been procured in an unfair and misleading manner.

35 The paramount duty of any advocate and prosecutor is to assist the court in the administration of justice. This duty is enshrined in r 9(1) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("PCR"). As Lord Reid observed in *Rondel v Worsley* [1969] 1 AC 191 at 227:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, *as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public*, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, *he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession …*
>
> [emphasis added]

These remarks, though made with reference to the conduct of barristers, apply with equal, if not greater, force to prosecutors who are delegated and exercise the coercive powers of the State.

36 Second, the DPPs arguably perpetuated the misleading impression by the arguments they made during Mr Balchandani's re-examination of the applicant. As noted above, Ms Tan had stated on 20 November 2018 that their demonstration "proved that [the Device] was indeed working" in response to Mr Balchandani's criticism that the DPPs had not shown how the Device was set up in the Liew household (see [9] above). Further, as I have also indicated above, Ms Tan objected to Mr Balchandani's proposed demonstration during re-examination on 4 December 2018 on two grounds: first, that it would be evidence from the Bar; and second, that "there [was] no confusion" about whether the Device could work since it had already been demonstrated in court, "the [applicant] had testified explicitly and expressly on whether or not it worked" and that the DJ had "also seen that" for herself (see [10] above). Given that there had been no disclosure by the DPPs up to this point of the possibility that the Device might not in fact be able to play DVDs, it seems arguable that Ms Tan's insistence that the Device had been working during their demonstration was, *prima facie,* misleading and could have created an unfair picture of the evidence against the applicant. It might also be argued that the line of objection being taken would prevent discovery of the very difficulties that the DPPs had themselves encountered.

37 Finally, in closing submissions, the DPPs took the position that any issues with the Device's functionality suggested by Mr Balchandani's demonstration was "probably" due to the DVD *he* used rather than with the Device itself. Specifically, they submitted that the fact that Mr Balchandani's DVD could not be played was "neither here nor there, since it could well be that it was [Mr Balchandani's] DVD that was damaged". By taking this position, the DPPs arguably maintained the impression created during cross-examination that there were no issues at all with the Device's functionality. Yet,

Mr Balchandani's demonstration made clear that the Device had difficulties playing not one, but two DVDs. The DPPs however, made no mention of the fact that they too had experienced difficulties with the "Capitaland" DVD on the morning of 26 September 2018.

38 It is a basic proposition that the Prosecution is under a *fundamental duty* to assist in the administration of justice, and must present the evidence against an accused person *fairly* and *impartially*, and without malice, fear or favour, in accordance with the law (see rr 15(1) and (2) of the PCR). Furthermore, r 15(6) of the PCR imposes a duty on the Prosecution to inform the court of any apparent error, whether of fact or of law, and any apparent omission of fact or procedural irregularity which ought to be corrected. In this regard, to the extent that the DPPs might have *inadvertently* failed to bring the difficulties with the Device to the court's attention during their own demonstration, it would have been incumbent upon them to do so once they became aware that there could have been issues with the Device's functionality (see rr 9(5) and 15(6) of the PCR). This arguably should have been apparent at least by the time of Mr Balchandani's demonstration, which suggested that the difficulties with playing DVDs using the Device were not confined to those they had themselves encountered using the "Capitaland" DVD.

39 As I have noted elsewhere, prosecutors are ministers of justice who must always act in the public interest and it is generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings (see *Public Prosecutor v Wee Teong Boo and other appeal and another matter* [2020] 2 SLR 533 ("*Wee Teong Boo*") at [137], citing *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [37]). This requires a willingness to disclose all relevant material to assist with the court's determination of the truth, even if it may prove unhelpful or detrimental to the

Prosecution's case (see *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 at [109] and [200]). This duty is an ongoing one and it might even extend to calling a *hostile* witness, where this is relevant to establishing the truth of the matter, as the Court of Appeal recently noted in *Beh Chew Boo v Public Prosecutor* [2020] SGCA 98 at [71]–[75]. These obligations are in addition to the general obligations which all legal practitioners are under, for instance not to knowingly mislead in any way, the court, any witness, or any other legal practitioner in the conduct of the proceedings before the court (see r 9(2) of the PCR).

40 Having regard to my assessment of the three questions above, I am satisfied that there is a *prima facie* case that the DPPs' conduct might suggest a lack of candour and that this may have resulted in the applicant being cross-examined unfairly, and in the applicant and the court being misled.

41 In coming to this view, I must emphasise that:

(a) I have not had regard to any defences the DPPs may raise; and

(b) I have not considered any specific explanation the DPPs may have that may explain their conduct and even exculpate them.

42 That, however, is not my task at this stage. Thus, while State Counsel, Ms Kristy Tan, did put forward some explanations and also made some concessions in her submissions before me, I neither consider nor hold her to them. The DPPs should deal with this in the proper setting and before the proper forum. Nothing I have said here can or should have any bearing on the decision of that forum.

Relevant factors

43 At the second stage of the *Salwant Singh* framework, the court should consider whether any relevant factors weigh in favour of or against an investigation into the alleged misconduct. In the present case, the evidence, including the affidavits filed by the DPPs, does not disclose any discretionary factors which militate against the granting of the s 82A(5) application.

44 The central consideration in the present case is the need to uphold the proper administration of justice and to safeguard the integrity of the public service (see *Salwant Singh* ([25] *supra*) at [64]). The alleged misconduct concerns DPPs acting in the conduct of a prosecution, when they have a *particular* obligation to assist the court, to act in the public interest, and to establish the *whole truth* in accordance with the law (see *Wee Teong Boo* ([39] *supra*) at [137]). The complaint that the DPPs may have knowingly omitted information and misled the court strikes at the very heart of these obligations. While it might be said that any substantive prejudice to the applicant has been mitigated by the applicant's full acquittal, that is only ever partly true. Every defendant in criminal proceedings suffers hardship, and this is true, at least in some ways, even of those who are acquitted. Aside from this, there is the overriding public interest in testing and establishing the validity of the allegations that have been raised. Given the High Court's observations, there is a need to set the record straight by way of the fact-finding process in the disciplinary proceedings, as was the case in *Ravi (2015)* ([25(a)] *supra*) at [55].

45 There has also been no real delay in prosecuting the complaint (see *Salwant Singh* at [64]). While the arguments on the Prosecution's conduct were first made in the District Court, it would have been reasonable for the applicant to wait for the appeal to be disposed of in the High Court before bringing the present application since the findings of fact in the High Court, for example, on the functionality of the Device and on the applicant's defence, could have had a significant impact on the present application. In fact, the application was filed on 11 June 2020 even before the Judge rendered his decision on the appeal. Thus, it cannot be said that there was any significant delay or prejudice to the DPPs arising therefrom.

46 In any case, as I have mentioned, the DPPs do not oppose OS 559. I welcome this since it is as much in their interest to vindicate themselves.

Conclusion

47 For these reasons, I allow OS 559 and grant leave for an investigation to be made into the applicant's complaint of misconduct against the DPPs. A Disciplinary Tribunal will be appointed accordingly.

48 I reiterate that nothing said in this judgment can or should have any bearing on the findings and decision of the Disciplinary Tribunal or the Court of Three Judges (should the matter reach that stage). As I held in *Ravi (2015)* ([25(a)] *supra*) at [23] and [49], the Disciplinary Tribunal is obliged to hear the matter *de novo*, and should not proceed on the basis that the DPPs bear the burden of proving their innocence simply because the *prima facie* threshold has been crossed for the purposes of the present application for leave.

Sundaresh Menon
Chief Justice

Anil Narain Balchandani (Red Lion Circle)
for the applicant.