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

[2021] SGHC 64

Criminal Motion No 65 of 2020

Between

Xu Yuanchen

… *Applicant*

And

Public Prosecutor

… *Respondent*

Criminal Motion No 78 of 2020

Between

Augustin, Daniel De Costa

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Courts and Jurisdiction] — [Jurisdiction] — [Revisionary]

[Courts and Jurisdiction] — [Appeals]
[Criminal Procedure and Sentencing] — [Disclosure]
[Criminal Procedure and Sentencing] — [Statements]

Xu Yuanchen
v
Public Prosecutor and another matter

[2021] SGHC 64

General Division of the High Court — Criminal Motion Nos 65 and 78 of 2020
Sundaresh Menon CJ
3 February 2021

18 March 2021

Sundaresh Menon CJ:

Introduction

1 These were a pair of criminal motions filed by the applicants, Mr Xu Yuanchen and Mr Daniel De Costa Augustin ("Mr Xu" and "Mr Augustin" respectively), seeking production of all statements that had been recorded from them in earlier police investigations. These statements were recorded on 20 November 2018, pursuant to s 22 of the Criminal Procedure Code (Cap 68, Rev Ed 2012) ("the CPC") and it was their case that these statements ("s 22 CPC statements") were disclosable pursuant to the Prosecution's common law disclosure obligations. I dismissed the applications. These are my reasons.

Facts

2 The applicants were charged on 12 December 2018. Mr Augustin faces two charges in the State Courts. The first charge is for criminal defamation under s 500 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code'), and the second is for unauthorized access to computer materials under s 3(1) of the Computer Misuse Act (Cap 50A, 2007 Rev Ed). Mr Xu faces one charge of criminal defamation under s 500 of the Penal Code. Both claimed trial, which commenced in November 2019. However, the proceedings have been delayed by a number of interlocutory applications brought by the applicants. For present purposes, three interlocutory applications may be noted.

3 The first is Mr Augustin's application made to District Judge Christopher Tan ("DJ Tan") for the disclosure of his s 22 CPC statements. This was dismissed on three grounds. First, disclosure was not mandated by statute since the parties had opted not to proceed under the statutory criminal case disclosure regime. Second, disclosure was not mandated by the common law either. The disclosure obligations in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*") require the disclosure of "unused material" that was thought to be *prima facie* credible and relevant to the guilt or innocence of the accused. DJ Tan took the view that the statements did not come within the definition of "unused" material. Since the applicants had not yet testified in court, it was uncertain whether the Prosecution might eventually use the statements to cross-examine or impeach the testimony of the applicants or possibly even of other witnesses. DJ Tan considered that in such circumstances, where it was not yet certain that the statement would not be used, it could not be regarded as part of the *unused material* to which the *Kadar* disclosure obligations applied. The Defence had also, in DJ Tan's view, failed to establish how the statements could have helped to strengthen the case for innocence or

undermine the case for guilt. The Defence on the other hand contended that such disclosure would ensure "regularity" and prevent any "disparity" between the testimony given on the stand and the position reflected in the recorded statements. As to this, DJ Tan took the view that those were not the objectives of the disclosure contemplated in *Kadar*.

4 The second and third applications, respectively brought by Mr Augustin and Mr Xu, were made at the same time and sought the same disclosure of the s 22 CPC statements. These applications were heard by District Judge Ng Peng Hong ("DJ Ng"), who adopted DJ Tan's reasoning and dismissed these applications as well.

5 Following this dismissal, the applicants brought the present criminal motions seeking the disclosure of their s 22 CPC statements.

The parties' cases

6 In these criminal motions, the applicants sought to invoke my revisionary jurisdiction to order the production of their s 22 CPC statements. They challenged DJ Tan's interpretation of the ambit of the *Kadar* disclosure obligation and contended that the material in question here *should* be regarded as "unused material". They further argued that the statements would be relevant to their guilt or innocence, though the two applicants differed slightly on how this was said to be so. Mr Xu's counsel, Mr Choo, also sought to persuade me that I should recognize an accused person's general entitlement to his s 22 CPC statements, pursuant to s 6 of the CPC.

7 The Prosecution resisted the applications on three grounds. First, it submitted that the applications were procedurally defective and amounted in substance to impermissible attempts to circumvent the general prohibition

against interlocutory appeals. To that extent, entertaining these applications would potentially undermine the efficient conduct of the trial process. Second, it defended DJ Tan's interpretation of *Kadar*'s "unused material" requirement, as well as his application of this interpretation to the facts. Third, it argued that ordering disclosure in these circumstances would undermine the statutory disclosure regime.

Issues to be determined

8 Leaving the parties' substantive submissions to one side, the preliminary question was whether these applications failed for being procedurally defective in that they contravened the prohibition against appeals being taken against interlocutory rulings. The Prosecution maintained that this was the true nature of these applications. Alternatively, if I found that the applications were not barred on this ground, the remaining question was whether I should exercise my revisionary jurisdiction in this case. As to this, I had to consider:

(a) whether DJ Tan's order (which DJ Ng substantially adopted) was legally correct; and

(b) whether some material and serious injustice had been occasioned as a result.

My decision

9 I turn first to the preliminary question of whether the applications were barred for being procedurally defective owing to the fact that they were effectively appeals against interlocutory rulings.

Appeals against interlocutory rulings

10 Generally, directions and orders given on interlocutory matters are not appealable. This broad prohibition was stated in our jurisprudence by Sir Alan Rose CJ in *Public Prosecutor v Hoo Chang Chwen* [1962] 1 MLJ 284 ("*Hoo Chang Chwen*"), who considered that appeals against interlocutory rulings would stifle the course of criminal trials "on points which are in their essence procedural", and that the proper time to take those points would be upon appeal "after determination of the principal matter in the trial court". After all, in the course of a typical trial, the trial judge can be expected to make numerous interlocutory rulings and it would pose impossible difficulties for the expeditious conduct of the trial if each and every one of these could be appealed.

11 This is also an expression of the law's concern with curbing unreasonably litigious behaviour. In the criminal context, this is a serious concern, not just as a matter of practical policy but as a matter of justice as well. As Choo Han Teck J has observed, frequent interruptions of a trial disrupt "the flow and dignity of a trial" and "[tarnish] the image of the rule of law": *Yap Keng Ho v Public Prosecutor* [2007] 1 SLR(R) 259 ("*Yap Keng Ho*") at [7]. In a similar vein, Chan Sek Keong CJ cautioned against "disrupted and fractured criminal trials" which create "unacceptable delays in their final disposal": *Azman bin Jamaludin v Public Prosecutor* [2012] 1 SLR 615 ("*Azman*") at [44].

12 Moreover, it is difficult to justify appellate intervention in "inchoate circumstances" where there is little basis for a judge to evaluate what the nature and extent of any alleged injustice is: *Yap Keng Ho* at [6]. If there are any errors, those may be corrected on appeal: *Azman* at [44] and [51]. Barring something "imminently fatal to the applicant's case" (*Yap Keng Ho* at [6]), the law does countenance such premature applications in the middle of trial. In short, such

appeals are not absolutely barred though they must clear a high hurdle before they will be entertained.

13 The Prosecution contended that these applications were in substance appeals against interlocutory rulings and as there was nothing exceptional about them, ought not even to be entertained. The applicants did not seriously challenge the fact that the effect of their applications was to seek my intervention sitting in the High Court, to reverse the rulings of two District Judges. However, they contended that this was not fatal to their case because they were entitled to invoke and were in fact invoking my revisionary jurisdiction.

14 There is some authority for the suggestion that the "revisionary jurisdiction is wide and not limited to final orders": *Ng Siam Cheng Sufiah v Public Prosecutor* [2020] 4 SLR 659 ("*Ng Siam Cheng*") at [37]. As explained by See Kee Oon J in *Ng Siam Cheng* at [37] – [40]:

> 37 … In any event, the applicable case law on s 370, including my earlier decision of *Jeremy Lee* … supports the view that the High Court's revisionary jurisdiction is wide and not limited to final orders.
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> 38 In *Public Prosecutor v Sollihin bin Anhar* [2015] 2 SLR 1, Tay Yong Kwang J (as he then was) considered that the revisionary powers of the High Court were sufficiently broad to allow it to reverse a decision by the State Courts to grant bail to an accused. In reaching this decision, Tay J noted at [14] that both parties had agreed that a decision arrived at in relation to a bail application was interlocutory in nature and did not amount to a judgment or order of finality from which an avenue for appeal arises. The lack of finality in the State Courts' decision was of no significance.
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> 39 In *Rajendar Prasad Rai and another v Public Prosecutor and another matter* [2017] 4 SLR 333 ("*Rajendar*"), Sundaresh Menon CJ was faced with the question of whether the Magistrate had appropriately exercised her discretion to extend seizure under s 370 of the CPC. He was similarly unconcerned with the lack of finality in the Magistrate's orders – it did not

> serve as an obstacle for the court's exercise of its revisionary jurisdiction.
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> 40 Finally, the broader scope of the High Court's revisionary jurisdiction may be seen from the plainly different wording of the applicable sections themselves. Section 395(2)(*b*) uses the phrase "*the* judgment, sentence or order", which may be contrasted with the broader wording of s 400(1), which refers to "*any* judgment, sentence or order" …
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> [Emphasis in original]

15 As against these authorities, I noted that Chan CJ took a different view of the scope of the revisionary jurisdiction of the High Court in *Azman* at [54]. In his view, the words "finding, sentence or order" in s 266(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the 1985 CPC") had the "same element of finality that the rather similar words in ss 241 and 263 [of the 1985 CPC]" had. Sections 266(1), 241 and 263 of the 1985 CPC were the predecessors to ss 400(1), 374 and 395 of the CPC, which are in turn the provisions catering for revisions, appeals and points reserved, respectively. Accordingly, he seemed to have understood (albeit in *obiter*) the revisionary jurisdiction as one that is limited to final orders.

16 In my judgment, there is no prohibition against invoking the revisionary jurisdiction of the court where the ruling is not a final order. The authorities cited by See J in *Ng Siam Cheng* demonstrate this. At the same time, the court faced with such an application should consider three related things. First, it should consider whether the application is in truth and in substance nothing more than an interlocutory appeal disguised as an attempt to invoke the revisionary jurisdiction in order to circumvent the general and presumptive prohibition against interlocutory appeals. Second, it should examine the nature of the relief sought and consider whether the application implicates the sort of mischief that the prohibition against interlocutory appeals was designed to avoid. Applications pertaining to bail or the seizure of property may be less

directly connected with the continuing conduct of a trial, as compared to an application for discovery of documents (as in the applications before me) or to admit or exclude evidence or to permit lines of cross-examination. The former may not always disrupt or interfere with the proper conduct of the trial whereas the latter almost invariably will. Further, the former may not always concern matters that can appropriately be taken up in the substantive appeal whereas the latter almost always will. Third, the court should remind itself that the revisionary jurisdiction is concerned with errors that are so serious as to give rise to grave and serious injustice that strikes at the relevant act as an exercise of judicial power.

17 Taking these three considerations together, it was clear to me that the applications before me were in substance interlocutory appeals that were barred. The nature of the applications was precisely of the sort that gives rise to the very mischief that the prohibition is designed to avoid; they were applications for discovery which is precisely the sort of ruling a trial judge will make throughout the course of the trial. Further, there was nothing to indicate the sort of injustice, if any at all, that would have justified invoking the revisionary jurisdiction. This was therefore sufficient to dismiss these applications.

18 Because an aspect of this reasoning turns on whether my revisionary jurisdiction was being properly invoked, I now explain my reasoning on this aspect of my decision.

The applicable legal principles

The court's revisionary jurisdiction

19 The court's revisionary jurisdiction was extensively discussed in *Ng Chye Huey and another v Public Prosecutor* [2007] 2 SLR(R) 106 ("*Ng Chye*

Huey"). There, the Court of Appeal explained the jurisdiction (at [46]–[47]) as a "statutory *hybrid* of the pre-existing supervisory and appellate jurisdictions […] formulated to remedy perceived inadequacies in the High Court's inherent supervisory jurisdiction over inferior courts". In effect, the revisionary jurisdiction allows the High Court to examine errors of law and fact (rather than being confined to scrutinising the decision-making *process*), and to afford the High Court complete flexibility in terms of the remedies it can order (rather than being limited to the prerogative or declarative reliefs available upon judicial review): *Ng Chye Huey* at [46].

20 At the same time, the revisionary jurisdiction is extraordinary in some respects. After all, the merits will have been canvassed at the time of the trial when the original jurisdiction of the court is invoked and quite likely at the time of the appeal when the appellate jurisdiction is invoked. The revisionary jurisdiction which extends to reviewing the merits is therefore sparingly exercised: *Oon Heng Lye v Public Prosecutor* [2017] 5 SLR 1064 at [14]. If it were otherwise, "such jurisdiction would be little more than another form of appeal": *Knight Glenn Jeyasingam v Public Prosecutor* [1998] 3 SLR(R) 196 ("*Knight Glenn*") at [21]. As such, the revisionary jurisdiction may only be invoked when two conditions are fulfilled. First, there must be some error in the decision or order made by the judge below and second, material and serious injustice must have been occasioned as a result. As was stated in *Knight Glenn* at [19]:

> The court's immediate duty is to satisfy itself as to the correctness, legality or propriety of any order passed and as to the regularity of any proceedings of that subordinate court. However, this is not sufficient to require the intervention of the courts on revision. The irregularity or otherwise noted from the record of proceedings must have resulted in grave and serious injustice.

21 "Serious injustice" will only arise when there is "something palpably wrong in the decision that strikes at its basis as an exercise of judicial power": *Rajendar Prasad Rai v Public Prosecutor* [2017] 4 SLR 333 at [24], citing *Ang Poh Chuan v Public Prosecutor* [1995] 3 SLR(R) 929 at [17]. In the present case, the applicants argued that the court had misapprehended and misapplied the principles set out in *Kadar* ([3] *supra*) at [110] and [113] – [119]. It is to these principles that I now turn.

Kadar

22 In *Kadar*, the Court of Appeal held (at [113]) that the Prosecution must disclose to the Defence material which takes the form of:

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

23 It is possible to analyse the triggering of the disclosure obligation by reference to four main elements: the material must be (a) unused; (b) either "likely to be admissible" or "provide a [real] chance of pursuing a line of inquiry that leads to material that is likely to be admissible"; (c) seemingly credible; and (d) seemingly relevant to the guilt or innocence of the accused. Requirements (b), (c) and (d) were not seriously engaged in the present application. The main controversy centred on what *Kadar* meant by "unused material".

24 For reasons that will shortly become evident, it should also be noted that in *Kadar*, the Court of Appeal had clarified that these disclosure obligations do not cover materials that are neutral or adverse to the accused. The Prosecution

is expected to evaluate (and continue evaluating) the character of the evidence to determine whether it "tends to undermine the Prosecution's case or strengthen the Defence's case": *Kadar* at [113]. By the time the trial begins or an appeal is being pursued, the Prosecution is presumed to have evaluated the evidence, released any disclosable material and ultimately complied with its *Kadar* disclosure obligations: *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 ("*Winston Lee*") at [184]. The Defence is free to challenge this presumption and where a dispute over the disclosability of the evidence arises, the court will be the final arbiter as to whether disclosure ought to have been made: *Winston Lee* at [162].

25 I turn now to consider whether the orders made in the court below properly apprehended the extent and nature of the Prosecution's *Kadar* disclosure obligations.

Whether DJ Tan and DJ Ng's orders were legally correct

26 In my view, the correct result was reached by each of the District Judges in these matters though I did not agree with the reasoning. Specifically, it seems to me that in each case, there was a misapprehension as to what was contemplated by the term "unused material" in *Kadar* ([3] *supra*). On the other hand, I also considered that in each case, the District Judges did not sufficiently appreciate the fact that the Prosecution's *Kadar* disclosure obligations extend only to material that tends to strengthen the Defence's case or weaken the Prosecution's. I first addressed the "unused material" requirement.

27 The term "unused material" was envisaged in *Kadar* in these terms at [76]:

> Before beginning any discussion on the Prosecution's duties of disclosure in a criminal context, an important distinction needs

> to be made between (a) material *which forms part of the Prosecution's case and will be adduced as evidence at trial* and (b) other material in the possession of the Prosecution which *will not be relied on at trial.* This latter category is commonly referred to as "unused material" …
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> [Emphasis added]

28 As to whether this might extend to witness statements, the court in *Kadar* said as follows at [80]:

> It can be seen that under both the CPC and the CPC 2010 regimes, there is no statutory requirement for the Prosecution to disclose any kind of *unused material*. For instance, statements made by an accused which the Prosecution does not intend to rely on at trial need not be disclosed. Potential exhibits, including the results of forensic tests, need not be disclosed if they are not intended to be tendered as evidence. The existence and identity of persons who may have information about the case but who will not be called as Prosecution witnesses need not be disclosed. More importantly, the written statements of potential material witnesses that the Prosecution does not wish to rely on need not be disclosed, even where those statements would otherwise be admissible in evidence under an exception to s 122(1) of the CPC or under s 259 of the CPC 2010.
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> [Emphasis in original]

29 It follows from this that where a statement has been recorded from the accused or from other witnesses which the Prosecution does not intend to rely on at trial, such materials would appear to fall within the universe of unused material. That said, the Prosecution is not always obliged to disclose such material (see [24] above).

30 If, however, there is any disclosure to be made, it is clear from *Kadar* at [113] that this would have to be done before the trial:

> To ensure congruence with the statutory scheme for disclosure, this material should initially be disclosed no later than seven days before the date fixed for the committal hearing for High Court trials or two weeks from the CCDC for Subordinate Court trials (corresponding to the timelines in ss 176(3)(*b*) and 161(2)

> of the CPC 2010 respectively). Where under s 159 of the CPC 2010 the statutory criminal case disclosure procedures do not apply, the common law disclosure described here *should take place at the latest before the trial begins*…
>
> [Emphasis added]

31 It follows that the Prosecution is expected to evaluate the evidence *before trial* to determine whether it will be used or not. Thus, when *Kadar* speaks of "using" material, it refers to material that is part of the Prosecution's *affirmative*, rather than its *responsive* case. Indeed, it cannot be the situation that the evidence remains in limbo, being neither "used" nor "unused", until the Prosecution (at the close of both parties' cases) can confirm that the evidence will not form part of its (responsive) case. Such a view would cut against the tenor of the disclosure obligations established in *Kadar* and would potentially denude the disclosure obligation of much of its significance.

32 Moreover, DJ Tan's interpretation of the "unused materials" requirement seemed to me to be unsatisfactory. On his interpretation, s 22 CPC statements could not be regarded as "unused" as yet because the Prosecution had not yet had a chance to consider whether it needed to use such material. In my view, this appeared to tilt the balance in favour of the Prosecution's interest in retaining the *potential* to use the s 22 CPC statements for cross-examination or to impeach defence witnesses and away from the interest of affording the Defence *actual access* to evidence that might potentially be important to establish the innocence of the accused person. This seemed to me to be inconsistent with the concerns that underlay the decision in *Kadar*.

33 In any case, s 22 CPC statements may be used in cross-examination or to impeach a witness's credibility even *after* they have been disclosed to the Defence. In fact, this is precisely the current practice as far as an accused person's cautioned statement is concerned. This is disclosed early on but may

be used subsequently during cross-examination or to support impeachment applications.

34 It is also helpful to recall that the Prosecution's interest in using s 22 CPC statements should be weighed against the accused person's interest in having access to his earlier statements. As Kan Ting Chiu J put it in *Public Prosecutor v Ng Beng Siang* [2003] 4 SLR(R) 609 ("*Ng Beng Siang"*) at [49]–[51]:

> 49 An accused has a legitimate interest to know and be reminded of what he has told in his statements, so that he can obtain proper advice thereon as to the course of action he should take, or he may wish to refer to them in his evidence.
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> 50 Should he be refused the statements so that they can be used to impeach his credit? In many cases where, an accused who is refused his statements makes his defence no action is taken to impeach his credit. In my experience, impeachment applications are made in a small minority of such cases. Thus in the majority of cases, this reason for refusing the statements eventually does not stand.
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> 51 That reason is also not applied consistently. In practice, the Prosecution would furnish an accused person with cautioned statements recorded from him. Cautioned statements may be used for impeachment in the same way as investigation statements. If the former is furnished, there is no reason why the latter should not.

35 It follows that I did not agree with DJ Tan's view that the s 22 CPC statements did not form part of the universe of unused material in this case. I nonetheless agreed with the result reached by DJ Tan, although I rested this on the principles set out in *Winston Lee* instead. Specifically, I was of the view that the *Kadar* disclosure obligations had not been triggered since there was no indication that the s 22 CPC statements would assist the Defence or weaken the Prosecution's case. It should be emphasised that this rested on a considered assessment and assertion by the Prosecution that it has reviewed the material and come to the conclusion that the material in question did not come within the

ambit of its *Kadar* disclosure obligations. There was no material before me to cast doubt on the Prosecution's assessment and its consequent assertion that the statements were not disclosable at this stage, and there was therefore no basis for displacing the working presumption that the Prosecution was in compliance with its obligations (see *Winston Lee* at [184(b)]).

Whether material injustice had been occasioned as a result of DJ Tan's order

36 This again was sufficient to dispose of the applications. For completeness, however, I went on to consider in any event whether any material injustice had been or would be occasioned by the denial of the applicants' s 22 CPC statements at this stage.

37 In my view, putting the applicants' cases at their highest, it was difficult to consider whether injustice, much less *material* injustice, had arisen in the circumstances. As Choo J observed in *Yap Keng Ho* at [6], "[j]ustice and its mirror image, injustice, are often determined by the consequences or imminent consequences of the act in question". These proceedings being at such a nascent stage, it was difficult to assess whether any prejudice had arisen and if so, in what manner and to what extent. The Prosecution had not even closed its case at this juncture and in these circumstances, the applicants were not able to point to any particular injustice.

38 The furthest the applicants could go was to suggest that if the Prosecution was allowed to withhold the s 22 CPC statements, it could spring the (hitherto unseen) statements on the accused at a later stage in order to impeach his credit. This would supposedly have amounted to a "trial by ambush". I was not convinced that this amounted to material (or any) injustice as matters stood. It was after all open to the applicants to testify as to what had

transpired since anything relevant in the s 22 CPC statements would have pertained to matters that were known to them. In the course of the arguments, it was suggested that the applicants might wish to pursue a line of cross-examination of the Prosecution's witnesses based on what was *not* asked when the statements were being recorded and the statements would be relevant for this purpose. But, as I explained to Mr Choo, there was nothing to prevent him from doing so based on his client's instructions.

39 This all seemed especially tenuous given the Defence's avowed position that the applicants already knew the contents of their statements, having reconstructed from memory what they believed they had been asked and what they had said in response. If so, it was unclear how prejudice could possibly result from the Prosecution withholding the statements, the contents of which the applicants were apparently already aware of.

40 Beyond this, there were only general and vague assertions that the s 22 CPC statements would have assisted the Defence in formulating its case. This held no water. As explained earlier, given the Prosecution's assessment and confirmation that the evidence did not fall within the ambit of its *Kadar* disclosure obligations, there was no basis for me to take a different view.

41 I further note that the Prosecution also confirmed that it would in due course make the statements available to the applicants. At that stage, if it should emerge that prejudice had in fact been caused by the statements not having been disclosed earlier, and if the applicants are wrongly convicted as a result, that is a point that can be taken up on appeal. Further, in such an appeal, if it was established that the Prosecution had erred in denying these accused persons access to these statements (for example on the ground that these are later revealed to be exculpatory or possibly exculpatory in nature) this would

undoubtedly weigh against the Prosecution including in any assessment of whether there should be a retrial, for instance.

Coda on the breadth of the *Kadar* disclosure obligation

42 I have observed that based on the language used in *Kadar*, the disclosure obligation laid down in that case could extend to an accused person's own statements (see [29] above). However, I question whether such a broad reading is warranted. It seems to me that the sort of injustice described in *Kadar* (at [3] above), arises in the situation where evidence has been gathered by the law enforcement agencies that *the accused person cannot access or might not even be aware of*, and where such evidence is or may be probative of the accused person's innocence. The court in *Kadar* expressed its concern over the possibility of relevant evidence that is in existence but that "may never be seen by the court" (*Kadar* at [114]). Given that the duty of disclosure was "in practice, […] fulfilled by disclosure to the Defence" (*Kadar* at [118]), this would effectively mean that if there was no disclosure obligation, the Defence might be denied access to evidence that seems to be relevant and credible and that could aid its case. It seems to me that *this* is what gives rise to potential injustice and that led the Court of Appeal in *Kadar* to lay down the disclosure obligation as it did.

43 On that reading, the accused person's own statements, being a form of evidence that emanates entirely from the accused person, may not properly fall within the universe of unused evidentiary material that the *Kadar* disclosure obligations were intended to address. The accused person would almost invariably have known of his earlier statements and would have known of the underlying facts that were or could have been covered in those statements, and there would almost never be a situation of such evidence being overlooked by

the Defence despite its relevance as to the innocence of the accused person. I have not set this out as an absolute position since it is theoretically possible that the accused person might have suffered some loss of memory due to a medical condition, which might give rise to real prejudice if the material could not be accessed. However, these would be exceptional circumstances that could be dealt with by a suitable adjustment of the rule.

44 Nonetheless, having regard to the extracts from *Kadar* set out at [27]-[28] above, the obligations do on their face go so far, even though it is not clear whether the specific point I have set out in the preceding two paragraphs were considered by the court in that case. As it stands that is binding on me sitting in the High Court and I mention this as a point for consideration should the question come before the Court of Appeal in the future.

Conclusion

45 For these reasons, I dismissed the applications.

Sundaresh Menon
Chief Justice

Choo Zheng Xi and Chia Wen Qi, Priscilla (Peter Low & Choo LLC) for the applicant in HC/CM 65/2020;
Ravi s/o Madasamy (Carson Law Chambers) for the applicant in HC/CM 78/2020;
DPPs Mohammad Faizal SC, Senthilkumaran Sabapathy and Sheryl Yeo (Attorney-General's Chambers) for the respondent in both HC/CM 65/2020 and HC/CM 78/2020.
