



Singapore  
Institute of Legal Education

# **Private Client Practice Criminal Litigation Practice**

Criminal Case Disclosure Conference (CCDC)

# DISCLOSURE

- What needs to be disclosed
- When does it need to be disclosed
- Who needs to disclose

# DISCLOSURE

## STATUTORY REQUIREMENTS – CCDC

- Sections 157-171 and 227(5) of the CPC
- Section 159 of the CPC: when CCDC procedures apply
  - Offences in the Second Schedule and to be tried in a District Court
  - Option to opt in for CCDC (for offences which do not fall within definition above) / opt out (for offences which do fall within)

# DISCLOSURE

## CRIMINAL CASE DISCLOSURE CONFERENCE

- Case for the Prosecution (“CFP”) (s 162 of the CPC)
- Case for the Defence (“CFD”) (s 165 of the CPC)
- Prosecution’s Supplementary Bundle (“PSB”) (s 166 of the CPC)
  - If the CFD is not served, the Prosecution need not serve the PSB (s 166(3) of the CPC)
- Defence’s bundle of exhibits (s 166(4) of the CPC)

# DISCLOSURE

## CCDC – TIMELINES

Court Event	Timeline	CPC
PTC / Mention	<ul style="list-style-type: none"> <li><b>1<sup>st</sup> CCDC</b> to be fixed <u>not earlier than 8 weeks</u> from the PTC / Mention</li> </ul>	<ul style="list-style-type: none"> <li>S 161(1)</li> </ul>
1 <sup>st</sup> CCDC	<ul style="list-style-type: none"> <li>Prosecution to file and serve <b>CFP</b> <u>not later than 2 weeks from 1<sup>st</sup> CCDC</u></li> <li><b>2<sup>nd</sup> CCDC</b> to be fixed <u>not earlier than 7 days from filing of CFP</u></li> </ul>	<ul style="list-style-type: none"> <li>S 161(2)</li> <li>S 161(4)</li> </ul>
2 <sup>nd</sup> CCDC	<ul style="list-style-type: none"> <li>Defence to file and serve <b>CFD</b> <u>not later than 2 weeks from 2<sup>nd</sup> CCDC</u></li> <li>Prosecution to serve <b>PSB</b> <u>within 2 weeks from service of CFD</u></li> <li>Defence to serve <b>DSB</b> <u>within 2 weeks from service of CFD</u></li> <li><b>3<sup>rd</sup> CCDC</b> may be fixed <u>at any time after CFD is filed and PSB is served</u></li> </ul>	<ul style="list-style-type: none"> <li>S 163(1)</li> <li>S 166(1)</li> <li>S 166(4)</li> <li>S 163(2)</li> </ul>
3 <sup>rd</sup> CCDC	<ul style="list-style-type: none"> <li><b>Trial dates</b> to be fixed</li> </ul>	<ul style="list-style-type: none"> <li>S 167</li> </ul>

# DISCLOSURE

## CCDC – CONSEQUENCES OF BREACH

- The court may draw such inference as it thinks fit where there is non-disclosure, or where the case put forward at trial is inconsistent with the CFP or CFD, or from either the prosecution's or defence's failure to serve any exhibit (s 169(1) of the CPC).
- Failure to serve CFP or exhibits may result in a DNATA (s 169(2) of the CPC).

# DISCLOSURE

## CCDC – Audiovisual Recordings

- Statements recorded in audiovisual recordings
  - The only offence for which this is required is s 375(1)(a) of Penal Code (Third Schedule of the CPC).
- Impact on the CCDC procedure: the Prosecution is not required to produce the audiovisual recording.
  - The Defence is entitled to view the recording. If a transcript is made, the accused is entitled to it as soon as practicable (s 23(6) of the CPC).
  - The CFP/PSB will include the transcript (s 166(1)(aa) of the CPC), and viewing of the recording will be arranged in accordance with the CPC.

# DISCLOSURE

## CCDC – Personal Attendance of Accused

- Dispensation with personal attendance at the CCDC
  - The defence may indicate that the accused wishes to plead guilty, rather than the accused himself indicating (s 167 of the CPC).
  - Documents can be served on counsel and do not need to be served on the accused personally.

# DISCLOSURE

## CCDC – Admissibility of CFD and CFP at trial

- The CFD is admissible for use in cross-examination or to impeach the accused's credit (s 258A).
- The court has discretion to refuse to consider the CFD if the prejudicial effect outweighs the probative value.
- Certain documents in the CFP may also be admitted as if they are part of the prosecution's opening statement (s 258B).

# DISCLOSURE

## CCDC – Defence Bundle

- Within two weeks of serving the CFD, the Defence is now required to serve on the prosecution a copy of the documentary exhibits listed in the CFD (s 166(4)).
- The obligation to serve the PSB and defence bundles are independent of each other.

# DISCLOSURE

## COMMON LAW REQUIREMENTS

- Laid down pursuant to s 6 of the CPC.
- Disclosure obligations pursuant to the duty the Prosecution owes “to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth”: *Muhammad bin Kadar and another v PP* [2011] 3 SLR 1205 (“*Kadar I*”) at [200].
- The Prosecution has an “overarching duty of fairness” and “acts at all times in the public interest”: *Muhammad Nabill bin Mohd Fuad v PP* [2020] 1 SLR 984 (“*Nabill*”) at [4] and [37].

# DISCLOSURE

## COMMON LAW REQUIREMENTS

- The *Kadar* disclosure obligation:
  - *Kadar I* at [113]-[114] and [117]
  - *Muhammad bin Kadar and another v PP and another matter* [2011] 4 SLR 791 (“*Kadar II*”)
- The *Nabill* disclosure obligation applies to statements of material witnesses and goes beyond *Kadar*:
  - *Nabill* at [39]-[56]

# Kadar disclosure

## **Kadar disclosure:**

The Prosecution's obligation is to disclose to the Defence any **unused material which tends to undermine the Prosecution's case or strengthen the Defence's case** where the said material:

- a) is likely to be admissible and might reasonably be regarded as *prima facie* credible and relevant to the guilt or innocence of the accused; and
- b) is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as *prima facie* credible and relevant to the guilt or innocence of the accused. This is an “exceptional category”: *Kadar I* at [117].

*Kadar I* at [113]

# Nabill disclosure

## **Nabill disclosure:**

- a) ... where the additional disclosure obligations are concerned, it does not matter whether the statement in question is (i) favourable (and so triggers the *Kadar* obligations); (ii) neutral; or (iii) adverse to the accused person. ....
- b) ... the additional disclosure obligations do not require the Prosecution to carry out a prior assessment of whether a material witness's statement is *prima facie* credible and relevant to the guilt or innocence of the accused person. ....

*Nabill* at [41]

# KADAR DISCLOSURE – WHAT

- The obligation “certainly does not cover all unused material or even all evidence inconsistent with the Prosecution’s case”: *Kadar I* at [113].
- Not obliged to disclose unused material which is neutral or adverse to the accused: *Kadar I* at [113].
- No duty to search for additional material – the duty applies only to material within the Prosecution’s knowledge: *Kadar II* at [14].
- The obligation does not affect the operation of any ground for non-disclosure recognised by any law: *Kadar II* at [18].

# KADAR DISCLOSURE – WHAT

- If a prosecution witness has provided a statement that is inconsistent with his testimony at the trial, there is no reason why that statement ought not to be disclosed to the Defence as part of the Prosecution's *Kadar* obligations. The Defence ought to have that statement for the purposes of cross-examination and impeachment of the witness's credit if appropriate: *Nabill* at [54].

# KADAR DISCLOSURE – WHEN

- Pre-trial disclosure follows the statutory scheme: *Kadar I* at [113].
- Where the statutory regime does not apply, before the trial: *Kadar I* at [113].
- Once the trial or appeal begins: *Winston Lee Siew Boon v PP* [2015] 4 SLR 1184 at [184].
- The disclosure obligation is a continuing one and ends only when the case is completely disposed of, including any appeal: *Kadar I* at [113].
- Late disclosure may result in an adjournment to give the defence time to consider the material: *Kadar I* at [121].

# KADAR DISCLOSURE

## PRESUMPTION OF REGULARITY

- The presumption of regularity applies to the actual conduct of the case in court by prosecutors: *Lee Siew Boon Winston v PP* [2015] SGCA 67 (“*Winston Lee (CA)*”) at [8].
- The presumption will only be displaced if the Defence shows reasonable grounds to believe that the Prosecution has in its possession material which should be disclosed: *Winston Lee (CA)* at [10]-[12].

# NABILL DISCLOSURE – WHAT

- Applies to statements by a material witness, i.e. a witness “who can be expected to confirm or, conversely, contradict an accused person’s defence in material respects”: *Nabill* at [4].
- An accused person ought to have access to all relevant information in order to make an *informed choice* in deciding whether or not to call a material witness: *Nabill* at [45].
- No decision taken yet on whether the Prosecution is required to disclose the statement of a material witness who is a prosecution witness: *Nabill* at [50].
- Like *Kadar*, the obligation does not affect the operation of any ground for non-disclosure recognised by law: *Nabill* at [42].

# NABILL DISCLOSURE – WHEN

- Same timelines as for *Kadar*.
- The Prosecution ought to satisfy its additional disclosure obligations when it files and serves the case for the Prosecution on the accused person (if the statutory disclosure procedure applies), or at the latest, before the trial begins (if the statutory disclosure procedure does not apply): *Nabill* at [50].
- The Court rejected the Prosecution's argument that the statements be disclosed only after the accused person has testified. Instead, it should be disclosed before the trial and before the accused person has given evidence: *Nabill* at [51]-[53].
- Like *Kadar*, the disclosure obligation is a continuing one and ends only when the case is completely disposed of, including any appeal: *Nabill* at [50].

# NABILL –

clarification in *Roshdi bin Abdullah Altway* [2022] 1 SLR 535

- Prosecution's additional disclosure obligations are triggered *if and when* (a) the accused raises a defence *and* (b) the Prosecution has a statement of a witness who may be expected to materially confirm or contradict that defence: *Roshdi* at [155].
- Process for identifying material witness: *Roshdi* at [156] – [161]
- No legal duty on the Prosecution and law enforcement agencies to conduct further investigations by recording statements from a new “material witness”: *Roshdi* at [166]. However, the Prosecution takes the risk that it will be found to have failed to discharge its evidential burden in respect of the facts that have properly come into issue: *Roshdi* at [167].
- Consequences of a breach of the additional disclosure obligations will depend on the facts: *Roshdi* at [168]-[169].

# CONSEQUENCES OF NON-DISCLOSURE

- A *Kadar* breach on its own will not automatically cause a conviction to be overturned: *Lim Hong Liang v PP* [2021] 5 SLR 626 (“*Lim Hong Liang*”) at [21].
- However, the conviction may be overturned if non-disclosure results in a material irregularity that occasions a failure of justice: *Kadar I* at [120], *Nabill* at [48], and *Lim Hong Liang* at [21].
  - The conviction is unsafe where – provided that the non-disclosed evidence is clearly admissible – the non-disclosed evidence strongly points towards an acquittal, with a causal link between the *Kadar* breach and a wrongful conviction: *Lim Hong Liang* at [28] and [30].
- Otherwise, there may be a retrial, if s 390(1)(b)(i) of the CPC is satisfied, in light of the established principles governing retrials: *Lim Hong Liang* at [23].
- Acquittals and retrials are not the only two binary options, there may be other outcomes: *Lim Hong Liang* at [24].

# CONSEQUENCES OF NON-DISCLOSURE

- In deciding on the consequences of a *Kadar* breach the court should balance:
  - the effect of the breach on the evidence against the accused;
  - how the breach prejudiced the accused;
    - E.g. if the undisclosed material would have opened up a new line of questioning against a Prosecution witness who can no longer be called for retrial, there may be substantial and irremediable prejudice warranting an acquittal: *Lim Hong Liang* at [32]
  - whether steps can be, or have been, taken to remedy the prejudice caused;
  - the causes of the breach, including the conduct of the Prosecution;
    - Prosecutorial non-disclosure alone, without casting doubt on the integrity of the prosecution process, may not warrant an acquittal: *Lim Hong Liang* at [36]
  - the broader objectives of the administration of justice, including certainty and fairness (not only to the accused, but also to the victims especially when the charge is serious). *Lim Hong Liang* at [22]

## CONSEQUENCES OF NON-DISCLOSURE

- Having balanced the factors at the first stage of inquiry, if the court finds a retrial appropriate, the second stage of inquiry is to assess whether it can order a retrial.

# UPSHOT OF KADAR AND NABILL

- For the Prosecution: When in doubt, disclose: Nabill at [48].
- For the Courts: Keep in mind that for the judicial system to operate effectively, those who commit crimes must face the consequences. Rendering acquittals too readily because of a Kadar breach will ill serve the needs of society, particularly the victims, especially when the crime committed is serious: Lim Hong Liang at [36].

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