Re Nalpon Zero Geraldo Mario
[2012] SGHC 97

Case Number : Originating Summons No 77 of 2012
Decision Date : 07 May 2012
Tribunal/Court : High Court
Coram : Chan Sek Keong CJ
Counsel Name(s) : R S Wijaya (R S Wijaya & Co) for the applicant.
Parties : Re Nalpon Zero Geraldo Mario

Legal Profession – Disciplinary Procedures

7 May 2012 Judgment reserved.

Chan Sek Keong CJ:

Introduction

1 This originating summons ("the present OS") is an *ex parte* application made by Mr Zero Geraldo Mario Nalpon ("the Applicant"), an advocate and solicitor, under s 82A(5) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA") for leave for an investigation to be made into his complaint of misconduct against Ms Nor'Ashikin binte Samdin ("the DPP"), a Legal Service Officer ("LSO") who was, at the relevant time, designated as a Deputy Public Prosecutor.

2 The complaint of misconduct arose out of the trial in the District Court ("the District Court trial") of the Applicant's client, Ezmiwardi bin Kanan ("the Accused"), on two charges of criminal breach of trust, namely, District Arrest Case ("DAC") No 18210 of 2009 and DAC No 18211 of 2009 (referred to hereafter as "the 1st Charge" and "the 2nd Charge" respectively). A third charge, DAC No 18212 of 2009, was stood down. At the end of the District Court trial, the district judge ("the DJ") convicted the Accused of the 1st Charge, but acquitted him of the 2nd Charge.

3 In support of the present OS, the Applicant filed an affidavit dated 31 January 2012 ("the Applicant's 31/1/2012 affidavit") setting out the specific allegations of misconduct against the DPP. The present OS and the Applicant's 31/1/2012 affidavit were not served on the DPP. However, she came to know about the application and obtained copies of these two documents from the Supreme Court Registry. The DPP thereupon applied to me for leave to be heard at the hearing of the present OS. In support of her application, the DPP filed an affidavit dated 9 March 2012 exhibiting (*inter alia*) the following documents:

(a) a copy of the Applicant's affidavit filed on 15 August 2011 ("the Applicant's 15/8/2011 affidavit") in support of Criminal Motion No 58 of 2011 ("CM 58/2011"), which was the Applicant's application for leave for a document to be admitted in the Accused's appeal (*viz*, Magistrate's Appeal No 401 of 2010 ("MA 401/2010")) against his conviction of the 1st Charge by the DJ;

(b) a copy of the DPP's affidavit dated 2 November 2011 filed in CM 58/2011;

(c) a copy of the affidavit of Senior Station Inspector Yong Chok Choon ("PW10") dated 4 November 2011 filed in CM 58/2011; and

(d) a certified transcript of the proceedings in MA 401/2010 and CM 58/2011, which were heard together.

4 Initially, I was minded to grant the DPP leave to be heard, but subsequently, I decided to hear the present OS on an *ex parte* basis as I was (perhaps overly) concerned that any decision which I made against the DPP at a n *inter partes* hearing, in the event of my allowing the Applicant's application in the present OS, might influence the subsequent disciplinary proceedings before a Disciplinary Tribunal. Accordingly, I heard the present OS on an *ex parte* basis.

The statutory framework for disciplinary proceedings against LSOs

The relevant statutory provisions

5 Before I consider the merits of the present OS, it is necessary that I examine the statutory framework governing the conduct of LSOs in their professional work in court and out of court. All LSOs are officers of the court when they act in any court proceedings; they are also officers of the court if they have been admitted as advocates and solicitors. As such, they are subject to the control of the Supreme Court, and, like all other officers of the court, they are liable to be disciplined and punished under the LPA for misconduct committed in Singapore or elsewhere. In the case of LSOs (as well as non-practising lawyers who have been admitted as advocates and solicitors), the statutory regime is set out in s 82A of the LPA. The provisions relevant to the present OS are as follows:

> **Disciplinary proceedings against Legal Service Officers and non-practising solicitors**
>
> **82A.**—(1) …
>
> (2) All Legal Service Officers … shall be subject to the control of the Supreme Court and shall be liable on due cause shown to be punished in accordance with this section.
>
> (3) Such due cause may be shown by proof that a Legal Service Officer … —
>
> (*a*) has been guilty in Singapore or elsewhere of such misconduct unbefitting a Legal Service Officer or an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession; …
>
> …
>
> (4) No application for a Legal Service Officer … to be punished under this section shall be made unless leave has been granted by the Chief Justice for an investigation to be made into the complaint of misconduct against the Legal Service Officer ... concerned.
>
> (5) An application for such leave shall be made by ex parte originating summons and shall be accompanied by an affidavit setting out the allegations of misconduct against the Legal Service Officer …
>
> (6) Where the Chief Justice is of the opinion that the applicant has made out *a prima facie case for an investigation into his complaint*, the Chief Justice may grant such leave and appoint a Disciplinary Tribunal under section 90.
>
> …

(7) The Disciplinary Tribunal shall hear and investigate into the complaint and submit its findings of fact and law in the form of a report to the Chief Justice.

(8) A copy of the report shall be supplied to the Legal Service Officer … concerned, and to the Attorney-General if the report relates to a Legal Service Officer.

(9) Where the Disciplinary Tribunal finds that no cause of sufficient gravity for disciplinary action exists under this section against the Legal Service Officer … concerned, the Chief Justice shall dismiss the complaint.

(10) Where the Disciplinary Tribunal finds that cause of sufficient gravity for disciplinary action exists under this section against the Legal Service Officer … concerned, the Chief Justice may appoint an advocate and solicitor or a Legal Service Officer to apply by summons in the same proceedings for an order that the Legal Service Officer … concerned be struck off the roll, prohibited from applying for a practising certificate, censured or otherwise punished.

(11) Section 98 shall apply, with the necessary modifications, to any application under subsection (10).

(12) On completion of the hearing of the application under subsection (10), the court may —

(*a*) censure the Legal Service Officer …;

(*b*) prohibit him from applying for a practising certificate for such period not exceeding 5 years as it may specify;

(*c*) order that his name be struck off the roll;

(*d*) order him to pay a penalty of not more than $20,000; or

(*e*) make such other order as it thinks fit.

…

(15) For the avoidance of doubt, nothing in this section shall prevent any Legal Service Officer from being subject to disciplinary action by the Legal Service Commission for any act or omission which constitutes a disciplinary offence under this section.

[emphasis added]

What is "a prima facie case for an investigation" for the purposes of s 82A(6)?

6 In an application under s 82A of the LPA for leave for an investigation to be made into a complaint of misconduct against an LSO, s 82A(6) requires the applicant to make out "a prima facie case for an investigation" before the Chief Justice may grant such leave and appoint a Disciplinary Tribunal under s 90. In the present case, the Applicant did not make any submissions on the meaning of "a prima facie case" for the purposes of s 82A(6). He assumed that the matters disclosed in his supporting affidavit for the present OS (*viz*, the Applicant's 31/1/2012 affidavit mentioned at [3] above) were sufficient in law to make out such a case. In the circumstances, I shall have to embark on an *ex parte* examination of the legal principles to determine what the requirements of "a prima facie case" are under s 82A(6) of the LPA in order to decide whether the present OS is a proper case

for granting leave for an investigation into the alleged misconduct of the DPP.

7 The concept of "a prima facie case" has been applied by Singapore and Malaysian courts (and their predecessors) in other contexts in both civil and criminal proceedings. For example, in *Gan Soo Swee and another v Ramoo* [1968–1970] SLR(R) 324, a civil case, Wee Chong Jin CJ defined the expression to mean the following (at [21]):

> … [W]e have here a case where the plaintiff was alleging that either the lorry driver or the taxi driver or both were responsible for the accident. He had therefore to prove a state of facts from which the reasonable inference to be drawn was that *prima facie* one if not both drivers had been negligent before he is entitled to call on both defendants for an answer. To make a *prima facie* case he must prove facts from which in the absence of an explanation liability could properly be inferred. …

8 The concept of "a prima facie case" has also been extensively used in criminal proceedings as the basis for the court's decision on whether or not to call on the accused to enter his defence at the close of the Prosecution's case. An early example is *Public Prosecutor v Chin Yoke* [1940] MLJ 47 ("*Chin Yoke*"), where Gordon-Smith Ag JA, in examining the scope of s 173(*f*) of the Criminal Procedure Code (Cap 6) of the Federated Malay States, held (at 48–49) that at the close of the Prosecution's case:

> It is then that it is the duty of the Magistrate or Judge to consider the evidence already led and decide whether or not to call on the accused for his defence, and the question arises what is a *prima facie* case? …
>
> … *[I]t does not follow, in my opinion, that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value*. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, *if unrebutted*, it would warrant the accused's conviction. In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie case* has been made out and the accused should not be called on for his defence.
>
> [emphasis added]

This passage sets out a number of principles:

(a) First, the court must consider the Prosecution's evidence as it stands at the close of the Prosecution's case. If that evidence as a whole (weighing up all the pluses and the minuses) is sufficient, *if unrebutted*, to warrant the accused's conviction, then a *prima facie* case has been made out.

(b) The hypothesis "if unrebutted" (see *Chin Yoke* at 48) refers to a case where the accused, having been called on to enter his defence, either: (i) declines to do so; or (ii) having entered his defence, fails to adduce sufficient evidence to rebut the Prosecution's *prima facie* case.

(c) The words "would warrant" in the same context do not mean that the court *must* convict the accused if the Prosecution's *prima facie* case has not been unrebutted. The reason is that the burden is always on the Prosecution to prove its case beyond a reasonable doubt.

9 In *Public Prosecutor v R Balasubramaniam* [1948] MLJ 119 ("*R Balasubramaniam*"), where the accused was charged under s 477A of the Penal Code (FMS Cap 45) with wilful falsification of a hospital's account book by omitting to record 82 bedsheets in the account book, Callow J said at the close of the Prosecution's case (at 120):

> … I must go further and consider whether even if a *prima facie* case is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced. The *onus* is on the prosecution to prove the case and this burden never shifts [citing *Public Prosecutor v Lim Teong Seng* [1946] MLJ 108]. … [emphasis in original]

After evaluating the strength of the Prosecution's evidence, Callow J held that the Prosecution had not made out a *prima facie* case as the evidence did not establish an essential element of the offence charged (at 122):

> … The accused made a terrible mess of the bedsheet entries and if it had been shown that he had done this after Dr Sabaratnam's investigation [Dr Sabaratnam being one of the prosecution witnesses] had commenced an intent to defraud would be a reasonable inference.
>
> But does the evidence for the prosecution point irresistibly to wilful fraud? The fact that this book is incorrect, ill-kept or misleading is not enough; there must be conscious determination to defraud as distinguished from ignorant incompetency … It is a question of fact for me to decide on the evidence before me; I am unable to allow the prosecution to attempt to supplement, improve or confirm what may be now a possible though doubtful case by whatever can be elicited from the defence. The Crown case rests at the close of the prosecution.
>
> …
>
> … [I]ncompetence and inefficiency by the accused is apparent, but on the evidence before me I cannot be sure whether the accused in 1946 deliberately falsified the book … or simply muddled it. … I am by no means convinced of the innocence of the accused, of which he might have satisfied me had he elected to continue, but I do not find a case by the prosecution which if unrebutted would warrant a conviction, and I am bound in law to acquit the accused of the charge. …

10 In *Hoh Keh Peng v Public Prosecutor* [1948] MLJ 3 ("*Hoh Keh Peng*"), where the appellant was convicted of being in possession of a counterfeit seal with the intention of using it for the purposes of committing forgery, the Court of Appeal of the Malayan Union (comprising Willan CJ, Jobling and Spenser-Wilkinson JJ), without using the terminology of "a prima facie case", appeared to have held that at the close of the Prosecution's case, the evidence must be sufficient to prove the guilt of the accused beyond a reasonable doubt; otherwise, the Prosecution would not have made out a *prima facie* case. The court (*per* Spenser-Wilkinson J) said (at 4):

> … Unless at the close of the case for the prosecution the offence has been made out, there is no justification for calling upon the accused for any explanation whatever. There is a positive duty upon the Judge under section 180 of the Criminal Procedure Code to acquit the accused at the close of the prosecution if he is not prepared then and there to convict without hearing more. If an accused is called upon for his defence he may be able to turn the balance in his favour; but he should never be called upon for his defence in a case of doubt so that he may convict himself by supplementing a weak prosecution case.

11 Similarly, in *Ong Kiang Kek v Public Prosecutor* [1968–1970] SLR(R) 821 ("*Ong Kiang Kek*"),

where the appellant appealed against his conviction for murder, the Singapore Court of Criminal Appeal ("the CCA") also did not use the terminology of "a prima facie case", but appeared to have adopted the same approach as that of the Malayan Union Court of Appeal in *Hoh Keh Peng*. At [13]–[14] and [21]–[22] of *Ong Kiang Kek*, the CCA said (*per* Wee Chong Jin CJ):

> 13 It has been held that a judge (of the High Court) sitting without a jury, where the relevant section is *in pari materia* with our ss 177C and 172(*f*) [of the Criminal Procedure Code (Cap 132, 1955 Rev Ed)], must acquit the accused if, at the close of the case for the Prosecution, the court is of the opinion that on the prosecution evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt. (*PP v Lim Teong Seng* [1946] MLJ 108.) We are of the same opinion and are of the view that the trial court is required by s 177C, at the close of the case for the Prosecution, to determine whether or not the evidence tendered on behalf of the Prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused.
>
> 14 We must therefore examine whether the evidence at the close of the case for the Prosecution has established the case against the appellant beyond a reasonable doubt so as to justify the trial court's calling on the appellant to enter on his defence.
>
> …
>
> 21 The case for the Prosecution on murder *simpliciter*, was that the appellant sat next to the driver's seat and it was the appellant's hand holding the pistol from which the fatal shots were fired which the [victim's] widow saw although there were three other men in the Cortina car at the time and although the bullet which inflicted the fatal wound was a .32 bullet whereas the appellant when arrested was in possession of a .22 pistol and some .22 ammunition. In our opinion, on these facts and having regard to the other possible inferences which we have endeavoured to show can be drawn from the mere fact that a hand holding a pistol appeared from the nearside front window of the car, the Prosecution ha[s] failed at the close of its case to discharge the burden resting on it to prove beyond a reasonable doubt that the appellant was guilty of murder.
>
> 22 In our judgment it is clear that if at the close of the prosecution case the evidence is such that it is possible for the fatal shots to have been fired by any one of three of the four men in the Cortina car no case has been made out against the appellant which if unrebutted would warrant his conviction of murder *simpliciter*. Accordingly we are of the opinion that the trial court was wrong in law to call on the appellant to enter on his defence whether on the charge of murder read with s 34 [of the Penal Code (Cap 119, 1955 Rev Ed)] or of murder *simpliciter* and the appellant should have been acquitted at the close of the case for the Prosecution.

1 2 *Ong Kiang Kek* was a decision that was based on s 177C of the Criminal Procedure Code (Cap 132, 1955 Rev Ed). The CCA's approach in that case was applied by the High Court in *Public Prosecutor v Haw Tua Tau* (unreported) ("*Haw Tua Tau (HC)*"), which was based on the substantively similar s 181(1) of the Criminal Procedure Code (Cap 113, 1970 Rev Ed) ("the 1970 CPC"), and affirmed by the CCA in *Haw Tua Tau v Public Prosecutor* [1979–1980] SLR(R) 266 ("*Haw Tua Tau (CCA)*"). On further appeal, the Privy Council, whose written judgment was delivered by Lord Diplock (see *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 ("*Haw Tua Tau (PC)*")), disapproved of the approach in *Ong Kiang Kek* and held that the test applied by the CCA in that case had been more rigorous than what was required by the statutory words.

13 It is useful to recall Lord Diplock's analysis of s 181(1) of the 1970 CPC, which provided as follows:

> **181.**—(1) When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.

Lord Diplock commented (at [14]–[15]):

> 14 Section 188(1) [*sic*] states the conditions precedent to the right and duty of the judge of trial to call on the accused to enter on his defence. It takes the form of a double negative: if the court does *not* find that *no* case against the accused has been made out which, if unrebutted, would warrant his conviction. For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the Prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.
>
> 15 The crucial words in s 188(1) are the words "if unrebutted", which make the question that the court has to ask itself a purely hypothetical one. The Prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words "if unrebutted" refer. What they mean is that for the purpose of reaching the decision called for by s 188(1) the court must act on the presumptions: (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or [as] to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the Prosecution or the Defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.
>
> [emphasis in original]

14 Lord Diplock then proceeded to explain the effect of s 181(1) by comparing it with the procedure in a jury trial before that mode of trial was abolished in Singapore. His Lordship said (at [16]–[17]):

> 16 The proper attitude of mind that the decider of fact ought to adopt towards the Prosecution's evidence at the conclusion of the Prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the Prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate*, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. ***If there is no evidence (or only evidence that is so inherently incredible that no reasonable person***

could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the judge must let the case go on. It is not the function of the jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had an opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

17 In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the Prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of s 188(1) [*sic*]. Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the Prosecution's witnesses until the Defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

[emphasis in original in italics; emphasis added in bold italics]

15 Lord Diplock continued (at [18]):

Although s 188(1) [*sic*] first became law in 1960 and so forms no part of the amendments made by Act 10 of 1976 [*viz*, the Criminal Procedure Code (Amendment) Act 1976 (Act 10 of 1976), which (*inter alia*) introduced certain new provisions relating to trials in the High Court], their Lordships have dealt with its interpretation at some length because in the judgment of the [CCA] in the case of *Ong Kiang Kek* … there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the Prosecution's case the evidence adduced has already satisfied the judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. But this can hardly have been what that court intended, for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the court refers, and it converts the hypothetical question of law which the judge has to ask himself at that stage of the proceeding: *"If I were to accept the Prosecution's evidence as accurate would it establish the case against the accused beyond a reasonable doubt?" into an actual and quite different question of fact: "Has the Prosecution's evidence already done so?"* For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of s 188(1).

[emphasis in original omitted; emphasis added in italics]

16 Finally, in relation to the approach of the High Court in *Haw Tua Tau (HC)* (which, as mentioned earlier, was affirmed by the CCA in *Haw Tua Tau (CCA)*), Lord Diplock said (at [30]):

> Finally their Lordships would mention briefly, lest it be thought that they had overlooked it, the suggestion that at the trial of Haw Tua Tau the judges may have taken literally those delphic passages in the judgment of the [CCA] in *Ong Kiang Kek* … to which their Lordships have had occasion to refer. If this be so the only effect can be that the judges applied to the Prosecution's evidence a more rigorous test of credibility than they need have done before deciding to call on Haw Tua Tau to give evidence. The error, if there was one – and there is nothing in the judges' reasons for judgment to indicate what was the standard that they did apply – can only have been in favour of the accused. …

17 It should be noted that the Privy Council in *Haw Tua Tau (PC)*, like the CCA in *Haw Tua Tau (CCA)* and *Ong Kiang Kek*, eschewed the terminology of "a prima facie case" in explaining when the court would call on the Defence at the close of the Prosecution's case. But, it is clear from the passages in *Chin Yoke* and *R Balasubramaniam* which I quoted earlier that the court in those two cases had merely used the terminology of "a prima facie case" as a convenient shorthand for describing the threshold that had to be met before the court would call on the Defence at the close of the Prosecution's case. Even after *Haw Tua Tau (PC)*, the courts in Singapore did not adopt a consistent approach in using or eschewing (as the case might be) the terminology of "a prima facie case": see *Sim Ah Cheoh and others v Public Prosecutor* [1991] 1 SLR(R) 961 ("*Sim Ah Cheoh*"), *Public Prosecutor v Wong Wai Hung and another* [1992] 2 SLR(R) 918 ("*Wong Wai Hung*"), *Tan Siew Chay and others v Public Prosecutor* [1993] 1 SLR(R) 267, *Public Prosecutor v Gan Lim Soon* [1993] 2 SLR(R) 67 ("*Gan Lim Soon*"), *Ng Theng Shuang v Public Prosecutor* [1995] 1 SLR(R) 407 ("*Ng Theng Shuang*") at [27] and *Public Prosecutor v IC Automation (S) Pte Ltd* [1996] 2 SLR(R) 799 at [41].

18 In *Gan Lim Soon*, Yong Pung How CJ summarised the principles that a court should apply in deciding whether or not to call on the Defence at the end of the Prosecution's case as follows (at [3]–[4]):

> 3 The principles on which a court should decide at the closing of the Prosecution's case whether there is a case for the accused to answer have been set out by the Privy Council in *Haw Tua Tau [(PC)]* … Although these principles are not without their problems in implementation, they have been followed by the courts in Singapore ever since. What these principles mean is that if the judge comes to the conclusion after hearing the Prosecution's evidence that there is evidence (not inherently incredible) which constitutes a *prima facie* case which the accused should be called upon to answer, he must call upon the accused to enter upon his defence. Of course, the accused might choose not to give evidence or call witnesses, and it is then left to the judge to assess the credibility of the witnesses and to decide in a case of conflict which of them he finds to be the more credible, before deciding whether the case is proved beyond reasonable doubt.
>
> 4 However, there is one qualification to this. If, apart from the disputed facts and the credibility of the witnesses, there is hard evidence, whether in the shape of documents or photographs or what are known as "silent facts", which is itself sufficient to constitute a *prima facie* case on the charge, the accused cannot choose to remain silent when called upon. If he does remain silent, the unavoidable result is that the case would then have been effectively proved against him beyond reasonable doubt by default.

19 In *Ng Theng Shuang*, counsel for the appellant attempted to persuade the Court of Appeal (at [20]):

> … to re-examine the test [enunciated by Lord Diplock in *Haw Tua Tau (PC)*] and reject *the minimum evaluation of the evidence* as advanced by *Haw Tua Tau [(PC)]*, that is to say that the

evidence at that stage of the trial was not inherently incredible, which if unrebutted would warrant the appellant's conviction before his defence is called and opt for a *maximum evaluation of the evidence* which would require the court to rule that a case beyond reasonable doubt had been made out against the appellant before calling his defence. [Counsel] reminded [the court] that the Malaysian Supreme Court had recently in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 rejected the minimum evaluation test for the maximum evaluation test. [emphasis added]

In response, the court (*per* M Karthigesu JA) said at ([21]–[22]):

21 It seems to us that the Malaysian Supreme Court laid emphasis on the words "*would warrant a conviction*" in [the Malaysian equivalent of] s 189(1) of the Criminal Procedure Code [(Cap 68, 1985 Rev Ed)] thus ignoring the words "*if unrebutted*" as this court had done in *Ong Kiang Kek* … and came to the conclusion that only proof beyond a reasonable doubt *would warrant a conviction*. …

22 We respectively agree with Lord Diplock that the crucial words in s 189(1) of the Criminal Procedure Code, which deals with the procedure to be followed at the close of the Prosecution's case, are "if unrebutted". Clearly s 189(1) calls for a two-stage process in a criminal trial and this can only be achieved if a minimum evaluation of the evidence is made at the close of the Prosecution's case and this of necessity makes the question that the court has to ask itself at the close of the Prosecution's case a purely hypothetical one.

[emphasis in original]

20 The Court of Appeal in *Ng Theng Shuang*, after referring to the cases of *Sim Ah Cheoh* and *Gan Lim Soon*, noted with approval (at [25]) MPH Rubin JC's observations at [96]–[97] of *Wong Wai Hung*, which were as follows:

96 ... The guidelines of Lord Diplock in *Haw Tua Tau ([PC])* were neither novel nor a total innovation of the criminal law. Practitioners at the criminal Bar might be aware that what Lord Diplock attempted in *[Haw Tua Tau (PC)]* was to modulate and amplify the practice directions issued by Lord Parker CJ to the benefit of magistrates and justices in 1962.

97 In a practice note dated 9 February 1962 (see [1962] 1 All ER 448, [1962] 1 WLR 227), Lord Parker CJ sitting in the English Court of Appeal with Ashworth and Fenton Atkinson JJ set out for the benefit of magistrates guidelines when submissions were made on no case to answer. He said:

> Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.
>
> A submission that there is no case to answer may properly be made and upheld:
>
> (a) when there has been no evidence to prove an essential element in the alleged offence;
>
> (b) when the evidence adduced by the prosecution has been so discredited as a

result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. *If, however, a submission is made that there is no case to answer, the decision should depend not so much* on whether the *adjudicating tribunal* (if compelled to do so) would at that stage convict or acquit *but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer*.

[emphasis in original]

21 The Court of Appeal in *Ng Theng Shuang* then went on to say (at [26]–[27]):

26 We were not persuaded by [the appellant's counsel] that *the minimum evaluation of the evidence at the close of the Prosecution's case as propounded by* Haw Tua Tau [(PC)] and consistently followed in Singapore since then was not the proper test applicable to the provisions of s 189(1) of the Criminal Procedure Code which we set out below for the sake of completeness. It reads:

When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence.

27 Accordingly, on such an evaluation of the evidence a *prima facie* case was clearly made out against the appellant on each of the three charges with which he was charged and in our view the learned trial judge correctly called on the appellant to enter on his defence.

[emphasis added]

22 In my view, the references in *Ng Theng Shuang* (at, *inter alia*, [20]) to "[a] minimum evaluation of the evidence" and "a maximum evaluation of the evidence" for the purposes of determining whether a trial judge should call on the Defence at the close of the Prosecution's case mischaracterises the nature of the judicial process in evaluating the evidence at that stage of a criminal trial. The issue at the end of the Prosecution's case is whether the Defence has a case to answer, and this depends on whether the evidence as it stands then, *if accepted* by the court, would be sufficient to prove every element of the offence in question either directly or inferentially. In this regard, as Lord Parker CJ said in *Practice Direction (Submission of No Case)* [1962] 1 WLR 227 ("the 1962 English Practice Direction") (quoted at [97] of *Wong Wai Hung* (see [20] above)), the court does not have to believe everything in the Prosecution's evidence at this stage of the proceedings. In my view, this is what is properly meant by "a prima facie case" in a criminal trial at common law.

23 In *May v O'Sullivan* (1955) 92 CLR 654, the High Court of Australia (comprising Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) examined the terminology of "a prima facie case" at common law and said in its unanimous decision (at 658–659):

When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be

convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there *is* a "case to answer" has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in *Wilson* v. *Buttery* [(1926) SASR 150] for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. *Morgan* v. *Babcock & Wilcox*, per Isaacs J. [(1929) 43 CLR 163 at 178]. But to say this is a very different thing from saying that the onus of proof shifts. ***A magistrate who has decided that there is a "case to answer" may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made "a prima facie case", but it does not follow that in the absence of a "satisfactory answer" the defendant should be convicted*** **.** [emphasis in original in italics; emphasis added in bold italics]

24 Similarly, in *Zanetti v Hill* (1962) 108 CLR 433, which was likewise heard by the High Court of Australia (comprising Dixon CJ, Kitto, Menzies and Owen JJ), Kitto J, in his separate decision, restated the meaning of "a prima facie case" in these words (at 442–443):

> … I can see no reason for excluding a charge under s. 65(1) [of the Police Act 1892–1952 (WA)] from the application of the jealously guarded principle upon which justice is administered under our system, that save where the Legislature has shown a contrary intention a person is not to be convicted of any offence, great or small, unless the tribunal of fact before which he is charged is satisfied beyond a reasonable doubt that every element of the offence exists. *Of course this does not mean that the case for the prosecution must be proved beyond a reasonable doubt before there is a case for the defence to answer. The question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands, – whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt*. See *May* v. *O'Sullivan* … The ultimate question of fact must be decided on the whole of the evidence; and on a charge under s. 65(1) there is no more reason than there is in any other case why a weakness in the prosecution's case may not be eked out by something in the case for the defence, or why a prima facie inference which by itself would not be strong enough to exclude reasonable doubt may not be hardened into satisfaction beyond reasonable doubt by a failure of the defendant to provide satisfactory evidence in answer to it when he is in a position to do so: cf. *R.* v. *Burdett* [(1820) 4 B & Ald 95; 106 ER 873]; *Ex parte Ferguson; Re Alexander* [(1944) 45 SR (NSW) 64 at 67]. … [emphasis added]

Applying the above principles to the evidence adduced by the Prosecution in *Zanetti v Hill*, Kitto J continued (at 445):

> This was no meagre prima facie case. It was a powerful case of insufficient lawful means of support [that being an element of the offence which the accused was charged with]; and it presented the [accused] with as plain a challenge as could well be imagined. …

The meaning of "a prima facie case" as explained by Lord Parker in the 1962 English Practice Direction

(see [20] and [22] above) and by the High Court of Australia in the decisions quoted above is, in my view, the meaning that Lord Diplock intended to convey in his analysis of s 181(1) of the 1970 CPC in *Haw Tua Tau (PC)*. "A prima facie case" in this context simply means (using Kitto J's formulation in *Zanetti v Hill*) a case of such a nature that the accused can be lawfully convicted on the evidence as it stands at the close of the Prosecution's case (assuming such evidence is accepted by the court) on the basis that such evidence would either prove every element of the offence in question directly or enable its existence to be inferred. In this regard, it is important to bear in mind that the evidence as it stands at the close of the Prosecution's case, even if accepted by the court, may not be sufficient to prove every element of the offence when, as stated by Lord Parker in the 1962 English Practice Direction:

> … the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

25 Such discredited or manifestly unreliable evidence would not be accepted by the court even as *prima facie* evidence of a primary fact, and therefore, the inherent incredibility exception in the first presumption in *Haw Tua Tau (PC)* at [15] (quoted at [13] above) would not be relevant to such evidence. In other words, where the evidence adduced to prove a primary fact is discredited or wholly unreliable, there is no need for the court to even *presume* that that evidence is true unless it is inherently incredible: this is because that evidence has already clearly been shown to be wholly unreliable. Further, even if the court were to apply the inherent incredibility exception in such a situation, the court *cannot* presume that an inference drawn from a primary fact is true *unless* that inference can reasonably be drawn. The court may not draw any inference which it likes from primary facts just because the inference is credible, or just because the inference is not inherently incredible. There is a distinction between, on the one hand, accepting evidence of primary facts as true for the purposes of deciding whether to call on the Defence at the close of the Prosecution's case and, on the other hand, inferring further facts from those primary facts for that purpose. For example, *mere evidence* of the accused's failure to record certain items in an account book does not allow the court to infer an intention on his part to defraud where fraud is an element of the offence charged (see the passage from *R Balasubramaniam* (at 122) quoted at [9] above). The different standards that apply to primary facts and inferred facts must be kept in mind in the present context.

26 The *Haw Tua Tau (PC)* approach is now enacted in s 230(1)(*j*)–230(1)(*k*) of the Criminal Procedure Code 2010 (Act 15 of 2010), but such enactment is not intended to change the principles laid down in *Haw Tua Tau (PC)* as to when the court will call on an accused to enter his defence at the close of the Prosecution's case (see *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012)). The aforesaid provisions read as follows:

> **230.**—(1) The following procedure must be complied with at the trial in all courts:
>
> …
>
> (*j*) if after considering the evidence [tendered by the Prosecution], the court is of the view that there is some evidence which is not inherently incredible and which satisfies each and every element of the charge …, the court must call on the accused to give his defence;
>
> (*k*) the court must order a discharge amounting to an acquittal if it is of the view that there is no such evidence as referred to in paragraph (*j*) …
>
> …

In essence, at the close of the Prosecution's case, the judge must, keeping in mind the distinction between primary facts and inferred facts, ask himself: "If I were to accept the Prosecution's evidence as accurate, *would* it establish the case against the accused beyond a reasonable doubt?", and not "Has the Prosecution's evidence already done so?" Or, as the Australian High Court said in *May v O'Sullivan* at 658 (reproduced at [23] above), the question to be decided at the close of the Prosecution's case is not whether, on the evidence as it stands, the accused *ought* to be convicted, but whether, on that evidence, he *could* lawfully be convicted. Calling for the accused's defence at the close of the Prosecution's case only brings the proceedings to the next stage, when the accused is expected to rebut the Prosecution's *prima facie* case. Even if the Defence is called, should the accused elect not to enter his defence, the court may still acquit him if, on a final evaluation of all the evidence adduced before it, it concludes that the charge has not been proved beyond a reasonable doubt – a burden which never shifts to the accused.

Restatement of the meaning of "a prima facie case" in s 82A(6) of the LPA

27 In civil/criminal proceedings, if the defendant/accused makes a submission of no case to answer at the close of the plaintiff's/Prosecution's case and the court accepts the submission (*ie*, the court agrees that the plaintiff/Prosecution has indeed failed to establish a *prima facie* case), the claim/charge against the defendant/accused will be dismissed. However, there is a difference between civil and criminal proceedings where a *prima facie* case has been made out. In civil proceedings, if the defendant makes a submission of no case to answer at the close of the plaintiff's case but the court rejects that submission (*ie*, the court finds that the plaintiff has made out a *prima facie* case), judgment *will* be given for the plaintiff; the defendant will not be allowed to enter his defence. In criminal proceedings, if the court finds that the Prosecution has made out a *prima facie* case, the accused will be called upon to enter his defence. If he elects not to do so, the court may still acquit him of the charge if it considers that some or all of the elements of the offence in question have not been proved beyond a reasonable doubt (see [26] above). In contrast, disciplinary proceedings under the LPA are a *sui generis* form of proceedings having, under existing judicial authority, some of the characteristics of criminal proceedings in that: (a) the standard of proof of misconduct under the LPA is the criminal standard of proof beyond a reasonable doubt; and (b) if the respondent's submission of no case to answer after the "Prosecution" has closed its case is rejected, the respondent will still be allowed to enter his defence. This would be the ordinary rule in disciplinary proceedings under the LPA against advocates and solicitors. More importantly for present purposes, disciplinary proceedings against LSOs (as well as non-practising solicitors) under s 82A of the LPA in particular ("s 82A disciplinary proceedings") contain an additional feature absent in criminal proceedings. Under s 82A(6) of the LPA, even if a *prima facie* case for an investigation into a complaint of misconduct against an LSO is made out, this merely entails that the Chief Justice "*may*" [emphasis added] give leave for such an investigation to be carried out; the Chief Justice is not mandated to give leave whenever a *prima facie* case for an investigation has been established. If leave is given, the Chief Justice will appoint a Disciplinary Tribunal, which will then investigate the complaint and report its findings to the Chief Justice. If the Disciplinary Tribunal finds that no cause of sufficient gravity for disciplinary action exists against the LSO concerned, the Chief Justice "*shall*" [emphasis added] (see s 82A(9) of the LPA) dismiss the complaint. If the Disciplinary Tribunal finds otherwise, the Chief Justice "*may*" [emphasis added], pursuant to s 82A(10) of the LPA, appoint an advocate and solicitor or an LSO to apply by summons in the same proceedings for an order that the LSO concerned be struck off the roll, prohibited from applying for a practising certificate, censured or otherwise punished. Again, the Chief Justice is not mandated to appoint an advocate and solicitor or an LSO to apply for such an order even if the Disciplinary Tribunal makes an adverse report against the LSO concerned.

28 It can be seen from the foregoing that the Chief Justice is vested with a statutory discretion in

s 82A disciplinary proceedings which a court of law does not have in civil/criminal proceedings. Under s 82A of the LPA, the Chief Justice has the discretion *not* to grant leave for an investigation to be made into a complaint of misconduct against an LSO even if a *prima facie* case of misconduct has been made out against the LSO concerned, and, furthermore, also has the discretion *not* to take the matter further even if the Disciplinary Tribunal finds that cause of sufficient gravity for disciplinary action against that LSO exists. Of course, this does not mean that the Chief Justice may decide arbitrarily in these matters as the discretionary powers under s 82A have been given to him to achieve the legislative objective of this section and not to frustrate it.

29 In view of the discretionary powers vested in the Chief Justice in s 82A disciplinary proceedings as distinguished from the court's powers in civil/criminal proceedings, is there a case for applying a different type of test for "a prima facie case" for the purposes of s 82A(6) of the LPA? In this regard, the crucial difference between civil/criminal proceedings and s 82A disciplinary proceedings is that in the former, if the judge rules at the close of the plaintiff's/Prosecution's case that a *prima facie* case has been made out and, as a corollary, calls on the defendant/accused to enter his defence, it is the defendant/accused who decides whether to continue with the trial by entering his defence. If the defendant/accused elects to continue with the trial, he will be tried by the same judge (*viz*, the judge who ruled that a *prima facie* case has been made out). In contrast, in s 82A disciplinary proceedings, if the Chief Justice is of the opinion that a *prima facie* case has been made out, it is he who decides whether to take the matter further by appointing a Disciplinary Tribunal to investigate the complaint in question. If the Chief Justice does decide to appoint a Disciplinary Tribunal, the LSO concerned will be "tried" by a different tribunal from the "tribunal" (*viz*, the Chief Justice) which decided that a *prima facie* case has been made out. In my view, this difference between civil/criminal proceedings and s 82A disciplinary proceedings, although significant, is ultimately merely a procedural difference. It is therefore not in itself a sufficient reason to apply a different test for "a prima facie case" in s 82A disciplinary proceedings from the test applicable in civil/criminal proceedings.

30 With these principles in mind, I shall now examine the substance of the Applicant's complaint in the present OS and his allegations against the DPP to determine whether the evidence contained in the Applicant's 31/1/2012 affidavit and the court records is sufficient to make out a *prima facie* case for an investigation into these allegations.

Background to the present OS

31 The complainant in the District Court trial ("PW3") was the owner of a Hyundai Matrix car ("the Car"), which had, at the material time, a market value (comprising its body value as well as PARF and COE rebates) of about $26,400. PW3 had an outstanding bank loan of $42,000 on the Car. Thus, the Car had a negative value of about $15,600. PW3 wanted to buy a new Honda Fit car for $58,800 from the Accused, who was a car salesman. They agreed to do a trade-in – PW3 would sell the Car to the Accused for $29,200 and also pay the Accused $13,000 so that the Accused could discharge the bank loan and de-register the Car. In exchange, the Accused would sell PW3 a new Honda Fit for $58,800.

32 Pursuant to this agreement, on 24 May 2008, PW3 delivered the Car to the Accused, who promptly sold it on 28 May 2008 to a re-exporter for $4,000. PW3 alleged that on 22 June 2008, he paid a further sum of $6,412 to the Accused. As the bank loan on the Car was still outstanding, interest continued to accrue and the value of the Car continued to decline. The bank began to threaten bankruptcy proceedings against PW3.

33 On 28 January 2009, PW3 made a police report against the Accused in connection with the Car. [note: 1] On 31 January 2009, PW3 made a "999" call to the police at 16:29:13h [note: 2] ("the 1st 999

Call"). About ten minutes later, at 16:38:07h, he made a second "999" call [note: 3] ("the 2nd 999 Call"). On 20 February 2009, PW3 made another call (this time, a non-"999" call) to Tanglin Police Station at 16:01:14h [note: 4] ("the Non-999 Call").

34 Hence, in total, PW3 contacted the police four times about the Car:

(a) PW3 was recorded as having told the police in his police report made on 28 January 2009: [note: 5]

> On 24.05.2008 at about 3.00pm, I traded [the Car] with Apex Global Trading via an agent, [the Accused,] for a new [Honda Fit]. I paid him SGD8000.00 for the transaction. …
>
> Two months later, I persistently received letters from the Land Transport Authority [("LTA")] to renew the [Car]'s road tax. When I confronted [the Accused], he asked me for the letters and told me that he would be settling it. Sometime in August 2008, I called LTA to enquire about the notice of road tax renewal for the [Car] and the status of the vehicle. They informed me that the [Car] is still under my name and if the [C]ar has already been exported, they would no longer have any records of the [C]ar.
>
> The [Accused] eventually paid the road tax for the [Car] along with the late renewal fee … sometime in November 2008. This is after I kept asking him about the letters that I received from LTA and the status of the [Car]. He kept insisting that the [Car] is already in export zone (EPZ).
>
> On top of the notice of renewal letter from LTA, I also received letters from the finance company, OCBC Bank[,] about the outstanding payments for the [Car]. Everytime [*sic*], I called the [Accused] about the letters from the finance company, he would take those letters and told me that he would deal with the company personally.
>
> I wish to state that the [Car] is not in my possession eversince [*sic*] I traded it with the new one when I handed it over to [the Accused]. I do not know its whereabouts and what had happened to it. …

(b) PW3 was recorded as having said in the 1st 999 Call on 31 January 2009: [note: 6]

> My car agent [*viz*, the Accused] is cheating me. He had been trying [to] avoid me. The bank are [*sic*] looking for the [C]ar as well. The wife is here now. Please send the police. [capital letters in original omitted]

(c) In the 2nd 999 Call on 31 January 2009, PW3 was recorded as having said: [note: 7]

> I called earlier regarding [the Accused] cheating on me. I was earlier here with his wife but she is gone. I no longer need the police assistance. I wish to cancel the police. [capital letters in original omitted]

(d) As for the Non-999 Call to Tanglin Police Station on 20 February 2009, the police recorded the substance of the call as: [note: 8]

> The [Accused] refused to return [PW3's] car.

35 PW3's complaint against the Accused was investigated by PW10. As a result, the Accused was prosecuted for (*inter alia*) two counts of criminal breach of trust. The investigation papers on which the charges were based ("the IPs") did not contain any record of either the 1st 999 Call or the 2nd 999 Call made by PW3. In other words, the IPs show that at the time those papers were prepared, PW10 was not aware about the precise number of times PW3 had contacted the police, and that information played little (if any) part in the decision to prosecute the Accused for the three charges mentioned at [2] above. The 1st Charge and the 2nd Charge, which were the two charges that the Prosecution eventually proceeded with, were as follows: [note: 9]

> **1st CHARGE (RE-AMENDED)**
>
> You
>
> …
>
> are charged that that you, sometime on 24.5.2008, … being entrusted with property, namely, [the Car], did commit criminal breach of trust by dishonestly converting to your own use, the said property, to wit, by selling the said motorcar to a car exporter … [for] S$4,000 and retaining the proceeds of sale, and you have thereby committed an offence punishable under section 406 of the Penal Code, Chapter 224.
>
> [handwritten amendments in original incorporated]
>
> **2nd CHARGE (AMENDED)**
>
> You
>
> …
>
> are charged that you, sometime on or about 22 June 2008, … being entrusted with property, namely cash amounting to **S$6,412** belonging to [PW3], did dishonestly misappropriate the said property, and you have thereby committed criminal breach of trust in respect of the said property, which offence is punishable under Section 406 of the Penal Code, Chapter 224.
>
> [emphasis in bold in original]

36 The prosecution of the Accused in the District Court was conducted by the DPP. The defence counsel was the Applicant. Twelve witnesses testified against the Accused. His defence to both the 1st Charge and the 2nd Charge was that he was the victim of a frame-up by PW3 and some of the other prosecution witnesses.

37 In the course of the District Court trial (specifically, on 22 March 2010), the Applicant asked PW3 during cross-examination about the Non-999 Call on 20 February 2009, and PW3 replied: [note: 10]

> … I remember making a few calls to Police, 2 or 3 times, I can't remember the details.
>
> I made 2 phone-calls to Police, by dialling 999, and another one made by my brother-in-law.

Subsequently, on 20 April 2010, when PW10 was asked by the DPP during re-examination about the record of the "999" calls made by PW3, he replied that he "ha[d] no information that a 999 call had been made". [note: 11]

38 Perplexed by this discrepancy between the testimony of PW3 and that of PW10 as to whether PW3 had made any "999" calls to the police, the DPP directed PW10 (on 20 April 2010) to make another search of the police call records. PW10 did so that evening and discovered that PW3 had indeed made two "999" calls on 31 January 2009. The calls were recorded in four documents:

(a) a first information report for the 1st 999 Call ("T1"); [note: 12]

(b) a full incident report for the 1st 999 Call ("F1"); [note: 13]

(c) a first information report for the 2nd 999 Call ("T2"); [note: 14] and

(d) a full incident report for the 2nd 999 Call ("F2"). [note: 15]

39 PW10 printed out one set of T1, F1, T2 and F2 (collectively, "the four '999' call records") that evening, and made another three sets of those documents. The following day (*ie*, 21 April 2010), he handed the four copies of the four "999" call records to the DPP either before the trial resumed or during the court recess. On the same day, PW3 was recalled for cross-examination by the Applicant. He was then re-examined by the DPP on the "999" calls which he had made to the police. The exchange between the DPP and PW3 was as follows: [note: 16]

Q: Testified just now, that you made two 999 calls to Police. First, around end-January or early February 2009.

A: Yes.

Q: When was the second?

A: The second call was on the day when Accused was detained [*viz*, 20 February 2009].

Q: Remember whether the report or complaint made in the first call?

A: I waited for Accused to tell me the whereabouts of my car, I waited for 5 hours, when he did not turn up, or tell me the whereabouts of my car, I asked my brother-in-law to call the Police.

Q: Tender exhibit.

CT: Marked at P17(M).

Q: P17(M). Is this the first phone call you described?

A: That's right.

Q: Put Investigation officer [*viz*, PW10] on stand-by to admit P17(M).

40 PW10 was then recalled by the DPP for re-examination, and the following exchange took place:

[note: 17]

Q: P17(M). Know what this is?

A: This is First Information Report of 999 call made on 31/1/09. Caller is [PW3]. In addition, caller made call from handphone 82040840. There is a detailed report indicating the caller's phone number.

Q: Refer to this document. Full Incident Report?

A: Yes.

Q: When obtain these 2 document?

A: Yesterday evening.

DC: Name is Mohd Arif [*viz*, PW3], not name of. No objection to authenticity.

CT: Admitted as P17, together.

41 What happened here was that on 21 April 2010, the DPP handed T1 and F1 to PW10 to identify, and they were admitted as a joint exhibit marked as "P17". At the same time, the DPP also handed to the Applicant another set of two documents, which, as it later transpired, turned out to be *T2* and F1 instead. It is not clear whether the Applicant read the documents there and then, but he did not cross-examine PW10 to clarify whether the police call records showed PW3 as having made one or two "999" calls.

42 The Applicant was aware from the contents of T2 and F1 that PW3 had made two "999" calls about ten minutes apart on the same day. This is evident from his reference to the two "999" calls (as well as the other two times PW3 had contacted the police) in his written closing submissions dated 20 August 2010 for the District Court trial. He contended that the four "999" call records showed "a development in PW3's endeavo[u]r to frame the [A]ccused". [note: 18]

43 The DJ convicted the Accused of the 1st Charge (on the finding that he had dishonestly retained the sale proceeds of $4,000 after selling the Car contrary to PW3's instructions (see [32] above)), but acquitted the Accused of the 2nd Charge (on the finding that the Prosecution had not proved PW3's allegation (see, likewise, [32] above) that he had given $6,412 to the Accused). In his grounds of decision (see *Public Prosecutor v Ezmiwardi Bin Kanan* [2011] SGDC 152 ("*Ezmiwardi (DC)*")), the DJ made no mention whatever of either the 1st 999 Call or the 2nd 999 Call. In other words, neither of those calls was relevant to the factual findings made by the DJ in convicting the Accused of the 1st Charge.

44 The Accused appealed (via MA 401/2010) against his conviction of the 1st Charge, whilst the Prosecution appealed against his acquittal of the 2nd Charge. While preparing his skeletal arguments for the appeal, the Applicant discovered from the record of proceedings that P17 consisted of T1 and F1, but did not include T2. This led the Applicant to file CM 58/2011 for leave to admit T2 for the purposes of MA 401/2010. In the Applicant's 15/8/2011 affidavit filed in support of CM 58/2011, the Applicant made a number of allegations of misconduct against the DPP as follows: [note: 19]

7. To my surprise, *I discovered that the DPP had given the Court a copy of a different report*

for the exhibit P17. In particular, she hadsubmitted 2 different versions of a single '999' police report allegedly made byPW3 on 31st January 2009. *At the same time, she had handed me a copy of 2 separate '999' police reports! This must have been by accident as the Prosecution's case was that PW3 had made only one '999' report onthat date. The documents furnished to me proved that this was a clear lie!* PW3 had actually made 2 separate '999' reports almost 10 minutes apart.

…

14. The [Accused]'s case is that PW3 set out to frame him by making a false police complaint. The material witnesses in support of his claim were interested parties, his good friend and relatives … Even some of the non-material witnesses gave strange and inconsistent testimony during the trial. The 'cards' were stacked against the [Accused] and he faced the seemingly impossible task of proving his innocence.

15. This document [T2], which I seek to admit at this stage, does taint the proceedings to an extent. *In particular, the DPP put up a case that there was only one '999' call made by PW3 when she had two in her hand . She also got PW3 to state that he had made only one '999' call when he had earlier testified that he had made 2 on the same day.*

16. The Investigating Officer, PW10, then took the stand to give testimony with respect to P17. He was the person who claimed that he had obtained the said report sometime in the evening of 20th April 2010. In particular, on 20th April 2010, he had stated that there were no '999' calls on record … PW10, the unquestioned authority on the authenticity of the document, took the stand to say that P17 was 2 versions of the same '999' report.

17. Having received 2 separate '999' call records by the afternoon of 21st April 2010, both the DPP and PW10 chose to only admit the earlier call record as P17. This was probably to maintain 'consistency' with PW3's testimony. However, in so doing, both the DPP and PW10 were clearly misleading the Court by distorting the facts of the case. If the DPP had not 'inadvertently' furnished me with a Certified True Copy of the other '999' report, the [Accused] would never have known that the case against him was tainted.

18. Secondly, a study of PW3's evidence shows that he was misleading the Court with respect to the numbers of calls made and the circumstances surrounding the 1st '999' call … In particular, PW3 stated the following in E-I-C …:

> "Q: Apart from 999, on 20/2/09, to Police, did you call the Police on any other occasion about this case?
>
> A: Yes.
>
> Q[:]When was that?
>
> A: I remember making phone call to Police when I waited 5 hours, for Accused to turn up.
>
> Q: Did police come to your assistance then?
>
> A: No."

…

19. PW3 was clearly testifying that the authorities let him down on that occasion by failing to respond accordingly. Admission of the 2nd '999' report would have made a fool of PW3, for it would have shown that he was the person who told the police not to come. [The Applicant then quoted what PW3 was recorded as having said in the 2nd 999 Call (see sub-para (c) of [34] above)] …

20. In a 2nd version, PW3 stated that he made 2 '999' calls and this time it was to complain of documents not received. This went against the Prosecution's case that only one call was made. The text of P17 … was also inconsistent with PW3's testimony. His 2nd version was as follows …:

"Q: Asking you about [the non-999 Call made on 20 February 2009].

A: I have to recall.

I remember making a few calls to Police, 2 or 3 times. I can't remember the details.

I made 2 phone calls to Police by dialing 999, and another one made by my brother-in-law.

Q: To clarify – when did you make these telephone calls?

A: 2 telephone-calls were made by me, sometime in December 2008, January 2009 and I remember making 2 calls within the same day.

Q: Tell us what happened in the 1st phone call?

A: **The 1st call was about the documents which Accused was supposed to hand to me, but he did not do so, and I could not get him in the officer** (sic)"

…

21. PW3 gave the following testimony on 22nd March 2010, almost a month before P17 was discovered by PW10 and the DPP. PW3 was actually telling the truth about the 2 calls albeit lying about the content. After discovering and coming into possession of the said 2 '999' reports, the DPP and PW10 decided to admit only the 1st. Probably oblivious to the above testimony, the DPP chose to procure evidence from PW3 that he only made the one '999' call …:

"Q: Testified just now, that you made two 999 calls to Police. First, around end-January or early February 2009.

A: Yes.

Q: When was the second?

A: The second call was on the day the Accused was detained [*viz* , 20 February 2009].

Q: Remember whether the report or complaint made in the first call?

A: **I waited for Accused to tell me the whereabouts of my car, I waited for 5 hours, when he did not turn up, or tell me the whereabouts of my car, I asked my brother-in-law to call the police.**" …

22. Not only was PW3 now changing his position on the number of calls made, he was also changing the content of his complaint (in bold). With respect to the latter, this change would have been necessary to make it consistent with the freshly discoverd P17. Of course, this raises the issue of how PW3 was aware of the content of the 1st call … before it was even shown to him in Court?? …

[underlining and bold font in original; remaining emphasis in original omitted; emphasis added in italics]

45 In reply to the allegations made against her in the Applicant's 31/1/2012 affidavit, the DPP filed an affidavit dated 2 November 2011 in CM 58/2011 (see sub-para (b) of [3] above) to state as follows: [note: 20]

8. Based on my recollection, on 21 April 2010, either shortly before the proceedings commenced or during the short recess granted by His Honour [*viz*, the DJ], [PW10] passed to me several sets of documents which he had retrieved as a result of his search. I consequently had very little time to peruse the same or to notice that there were 4 different sets of documents, viz, [T1] and [F1], and [T2] and [F2]. With no cause to doubt that I had given the Court and the defence copies of the same set of documents, I sought to have [T1] and [F1] pertaining to what I thought to be the only '999' call [*ie*, the 1st 999 Call] admitted in evidence. The said documents were collectively admitted in evidence by His Honour as P17. …

9 Based on [the Applicant's 15/8/2011] affidavit, it appears that I had erroneously provided the Court with copies of [T1] and [F1], whilst [the Applicant] was furnished with *[F1]*, and *[T2]*.

10. With respect to [the Applicant]'s allegation that I had misled the Court by intentionally withholding *[T2]* … from His Honour, I declare and affirm that I had absolutely no such intention and take exception to the cavalier manner in which [the Applicant] has made such a serious allegation against me without first having the professional courtesy to notify me … Upon reflection, I can only surmise that in the confusion of having just received the various sets of documents on the day of the hearing itself and having neither sufficient time to examine them closely, nor to notice that they related to different '999' calls made on the same day, I duly furnished copies of what I had then assumed were identical sets of documents to His Honour and to [the Applicant] respectively.

11. I acknowledge that due to the oversight on my part, His Honour and [the Applicant] did not have identical copies of the exhibit P17 … I humbly and sincerely apologise for the said oversight and the inconvenience caused by my error. However, I categorically maintain that at no time did I intentionally omit to give [the Applicant] the identical copies of P17 … that I had given to His Honour, or intentionally withheld *[T2]* … from His Honour in order to mislead the Court into believing that PW3 had only made one '999' call.

12. In paragraph 17 of his affidavit, [the Applicant] has made two allegations against me:

(a) That I had "got PW3 to state that he had made only one '999' call["] when he had earlier testified that he had made "two on the same day"; and

(b) That I had done so "probably to maintain 'consistency' with PW3's testimony" in order to "mislead the Court by distorting the facts of the case", and that had I "not 'inadvertently' furnished him with a certified true copy of the other '999' report", the [Accused] "would never have known that the case against him was tainted".

My responses are as follows:

13. First, I did not pose leading questions to PW3 in relation to the number of phone calls he made. If at all, any confusion stemmed from PW3's testimony. While my question clearly sought to clarify his earlier testimony about making two '999' calls … his answer reveals that he confused the call made to the mainline of Tanglin Police Division [*ie*, the Non-999 Call made on 20 February 2009] … as being a '999' call … Though PW3 earlier gave testimony that he made two calls to the Police on the same day, in his answer to my open-ended question as to when the second call was made he made specific reference to a '999' call made on the day the [Accused] was arrested. The existence of [T2] clearly reveals that PW3 had confused the calls. It is therefore entirely baseless for [the Applicant] to contend that I had "got PW3 to state that he had made only one '999' call["] when he had earlier testified that he had made "two on the same day".

14. Second, [the Applicant's] allegation that I acted in bad faith is entirely baseless. The error on my part in perceiving that only one '999' call transcript had been retrieved by [PW10] is now before this Honourable Court. In fact, [the Applicant]'s basis for leveling such allegations is purely from being in possession of *[T2]* … which I myself had furnished him. … [The Applicant]'s allegation that I intended to suppress this evidence and 'inadvertently' gave him a copy of the very document I intended to 'suppress' is wildly speculative, and untrue.

15. Further, … [F1] and [T2] clearly relate to two different '999' calls. In fact, it is evident from the '999' call transcript in his possession [*viz*, T2] that the call in question was a follow-up to an earlier '999' call. Whilst accepting my own mistake, it must be noted that [the Applicant] could have nipped the confusion in its bud if he had questioned PW3 on 21 April 2010 based on the '999' call transcript in his possession! Instead, he now dissects PW3's evidence given in re-examination and attributes bad faith where there was none. A further opportunity where [the Applicant] should clearly have been alerted that something was amiss came when PW10 was recalled on the same day to formally admit the '999' call transcript. If [the Applicant] had merely looked at his copies of the '999' call transcripts, he would have immediately realized that the message set out in [F1] and the message set out in [T2] (which ought to have corresponded) were completely different.

16. [The Applicant] has further insinuated at paragraph 22 of his affidavit that PW3 was shown P17 … before he took the stand on 21 April 2010 which led to him changing his testimony regarding the number of calls made. I categorically deny having 'coached' or in any way, having interfered with PW3 in order to procure evidence to support the prosecution's case. I also categorically deny having shown P17 … to PW3 before re-examining him on 21 April 2010. In this regard, I reiterate that [PW10] only handed me the '999' call transcripts on the morning of 21 April 2010 just prior to the commencement of the proceedings, or during the short recess granted by the Court.

17. … [The Applicant] contended at paragraph 26 of his affidavit that either the "DPP or [PW10] had chosen to mislead the Court by leading and/or tendering evidence of only one '999' call when they actually had copies of 2 reports in their possession". I categorically deny the allegations and I invite [the Applicant], having read the materials, to withdraw the same.

[emphasis in original]

46 At the joint hearing of CM 58/2011 and MA 401/2010, the High Court judge ("the Judge") admitted in evidence T2 (marked as "P17A") without any objection by the Prosecution. He declined to deal with the Applicant's allegations of misconduct against the DPP or the DPP's response to them.

47 At the conclusion of the hearing, the Judge acquitted the Accused of the 1st Charge (the Accused appealed against only his conviction of the 1st Charge as he had been acquitted by the DJ of the 2nd Charge). The Judge held that the 1st Charge and the 2nd Charge were based on the same transaction, and that the reason the Accused did not de-register the Car was because PW3 had not paid him the $13,000 which PW3 had agreed to pay under the terms of the trade-in agreement (see *Ezmiwardi bin Kanan v Public Prosecutor* [2012] SGHC 44 ("*Ezmiwardi (HC)*") at [17]). The Judge also found that PW3's statement in his police report made on 28 January 2009 that he had paid $8,000 to the Accused (see sub-para (a) of [34] above) contradicted his subsequent testimony at the District Court trial that he had paid $14,412 (*viz*, $8,000 plus $6,412) to the Accused (see *Ezmiwardi (HC)* at [14]–[16]). In the result, the Judge held that for these and other reasons, the Prosecution had failed to prove the 1st Charge beyond a reasonable doubt. It therefore followed (*vis-à-vis* the Prosecution's appeal against the Accused's acquittal of the 2nd Charge) that the 2nd Charge had also not been proved beyond a reasonable doubt.

48 The setting aside of the Accused's conviction of the 1st Charge and the dismissal of the Prosecution's appeal in respect of the 2nd Charge should have brought an end to this matter. However, the Applicant said that he had a deep sense of grievance that the DPP had unjustly put the Accused through the painful ordeal of a 22-day trial by misleading the DJ on the evidence. No small part of the Applicant's grievance could be attributed to his acrimonious exchange of letters with the Attorney-General's Chambers ("the AGC") following his complaint to the Attorney-General about the DPP's misconduct at the District Court trial. The AGC accused the Applicant of making "cavalier" [note: 21] and "entirely speculative" [note: 22] allegations against the DPP "without any basis whatsoever", [note: 23] and demanded the withdrawal of those allegations as well as the tender of an apology to the DPP "as a matter of courtesy". [note: 24] The Applicant filed the present OS under s 82A of the LPA on 31 January 2012, but he was pre-empted by the AGC filing on 19 January 2012 a complaint to the Law Society of Singapore against him for making the aforesaid allegations.

The Applicant's allegations of misconduct against the DPP

49 The Applicant's allegations of the DPP's misconduct have been set out at [44] above. Before me, the Applicant summarised his allegations as follows:

(a) the DPP intentionally withheld T2 from the DJ on 21 April 2010 ("the Applicant's 1st allegation");

(b) the DPP misled the DJ, the Accused and the Applicant into believing that only one "999" call, *viz*, the 1st 999 Call, had been made by PW3 ("the Applicant's 2nd allegation");

(c) the DPP led PW3 to lie about the two "999" calls which he had made by making him change his evidence to state that he had made only one "999" call instead of two ("the Applicant's 3rd allegation"); and

(d) the DPP colluded with PW10 to mislead the DJ, the Accused and the Applicant as described at sub-para (b) above ("the Applicant's 4th allegation").

I shall now consider if the Applicant has made out a *prima facie* case for an investigation by a Disciplinary Tribunal into each of these allegations.

The Applicant's 1st allegation: Did the DPP intentionally withhold T2 from the DJ?

50 In respect of the Applicant's 1st allegation, on the basis of the evidence before me, there is proof that: (a) the DPP tendered T1 and F1 to the DJ at the District Court trial (which documents were admitted and jointly marked as exhibit "P17"), but did not tender T2 as an exhibit; and (b) at the same time, the DPP gave a copy of T2 and F1 to the Applicant. There is no evidence that the DPP *intentionally* omitted to tender T2 as an exhibit. The Applicant has argued that the DPP's omission was intentional because she had been given T2 or had at least been informed of its existence by PW10 when PW10 handed copies of the four "999" call records to her on 21 April 2010. There is, however, no such evidence on record. The argument underlying the Applicant's 1st allegation is based solely on two primary facts, namely, the DPP did not tender T2 as an exhibit at the District Court trial, and yet, gave a copy of it to the Applicant. The Applicant is asking me to infer from these two primary facts that the DPP intentionally omitted to tender T2 to the DJ as an exhibit. I am unable, on any reasonable basis, to draw this inference simply because it would not explain why the DPP gave a copy of T2 to the Applicant if she had intended not to tender that document as an exhibit in court. Between inferring that the DPP's omission to tender T2 as an exhibit was an intentional act and inferring that that omission was an inadvertent act, it is unreasonable, if not irrational, to infer the former when it is obviously much more reasonable to infer the latter, given the lack of *prima facie* evidence that the DPP had intended to mislead the DJ into believing that PW3 had made only one "999" call.

51 The Applicant's 1st allegation has even less traction when one considers a crucial question which the Applicant should have asked himself, but did not, namely – why would the DPP have wanted to mislead the DJ on the number of "999" calls made by PW3? What was the point of doing so? I accept that the 1st 999 Call and the 2nd 999 Call were part of the background to PW3's complaints about the Accused to the police. But, these two "999" calls were not essential to the Prosecution's case against the Accused, nor were they part of the factual basis on which the three charges against the Accused were based. As such, neither the 1st 999 Call nor the 2nd 999 Call was relied on by the DJ in convicting the Accused of the 1st Charge. The DPP made no reference to any "999" call by PW3 as part of the Prosecution's evidence of the criminal act of the Accused in retaining the $4,000 which was the subject matter of the 1st Charge. The DJ made no reference to any "999" call in *Ezmiwardi (DC*); neither did the Judge in *Ezmiwardi (HC)*. The fact is that the 1st 999 Call and the 2nd 999 Call were incidental and innocuous events in the context of the Accused's prosecution for the 1st Charge and the 2nd Charge. They do not even qualify as primary facts which go towards proving any of the essential elements of these two charges.

52 Accordingly, *vis-à-vis* the Applicant's 1st allegation, I am unable to accept, on the evidence before me, that the Applicant has made out a *prima facie* case that the DPP intentionally withheld T2 from the DJ. It follows that it is not justifiable to appoint a Disciplinary Tribunal to investigate this particular allegation. At the highest, the only rational inference to be drawn from the DPP's failure to tender T2 to the DJ as an exhibit is that she was careless or might even have been negligent in failing to do so. In other words, as the Applicant himself alleged (in one of his letters to the Attorney-General), the DPP "botched" [note: 25] her job by not perusing the four "999" call records carefully before tendering only T1 and F1 as a joint exhibit at the District Court trial.

The Applicant's 2nd allegation: Did the DPP mislead the DJ, the Accused and the Applicant into believing that only one "999" call, viz, the 1st 999 Call, had been made by PW3?

53 I turn now to the Applicant's 2nd allegation. Having regard to the factual basis and the reasoning of the DJ in convicting the Accused of the 1st Charge while acquitting him of the 2nd Charge, it would be unreasonable, if not irrational, for me to infer that the DJ was misled into making these two decisions by the DPP's omission to tender T2 as an exhibit at the District Court trial. The DJ could not have been misled as to the materiality or otherwise of PW3's "999" calls to the guilt or otherwise of the Accused *vis-à-vis* the 1st Charge and the 2nd Charge. As explained earlier, the 1st 999 Call and the 2nd 999 Call were both irrelevant to the essential elements of these two charges, and the DJ made no reference to either of them in convicting the Accused of the 1st Charge. The irrelevance of these two calls is also confirmed by *Ezmiwardi (HC)*, where the Judge likewise made no reference to either of these calls in setting aside the Accused's conviction of the 1st Charge. The Applicant (and, as a corollary, the Accused) also could not possibly have been misled into believing that PW3 had made only one "999" call (*viz*, the 1st 999 Call) because the Applicant had T2 in his possession and, as noted earlier (see [42] above), had referred to the 2nd 999 Call in his written closing submissions for the District Court trial. Accordingly, I find that the Applicant has not made out a *prima facie* case for a Disciplinary Tribunal to be appointed to investigate his second allegation against the DPP.

The Applicant's 3rd allegation: Did the DPP lead PW3 to lie by making him change his evidence to state that he had made only one "999" call instead of two?

54 The Applicant's 3rd allegation is based on the Applicant's interpretation of the sequence of answers given by PW3 in his testimony when he was re-examined by the DPP on 21 April 2010 (see the exchange between the DPP and PW3 quoted at [39] above). Essentially, this allegation is based on the case theory that the DPP and PW10: [note: 26]

> … [a]fter discovering and coming into possession of the said 2 '999' reports, … decided to admit only the 1st. Probably oblivious to the above testimony [*viz*, PW3's oral testimony on 22 March 2010 that he had made two "999" calls (see the quote at [37] above)], the DPP chose to procure evidence from PW3 that he only made the one '999' call … [underlining in original]

From the evidence on record, there is nothing which shows or even suggests that the DPP and PW10 made the above alleged decision or had any reason to do so. The only relevant evidence in this connection is that PW10, pursuant to the DPP's direction (see [38] above), made another search of the police call records in the evening on 20 April 2010, found the four "999" call records, made copies of those records and gave them to the DPP on 21 April 2010. The DPP then fumbled in tendering only F1 and T1 to the DJ as a joint exhibit on the same day (*viz*, 21 April 2010). From these primary facts, I am asked to infer that the DPP and PW10 decided to admit only F1 and T1, but the DPP let the cat out of the bag by her carelessness in giving a copy of T2 to the Applicant. In my view, such an inference is unreasonable, if not irrational. In fact, the evidence on record shows that the DPP actually reminded PW3 that he had earlier testified that he had made two "999" calls. But, when asked when those two calls were made, PW3 gave confusing answers to the DPP's questions by referring to the Non-999 Call on 20 February 2009 as his second "999" call. For ease of reference, I reproduce again below the relevant exchange between the DPP and PW3 in this regard: [note: 27]

> Q: Testified just now, that you made two 999 calls to Police. First, around end-January or early February 2009.
>
> A: Yes.
>
> Q: When was the second?

A: The second call was on the day when Accused was detained [*viz*, 20 February 2009].

Q: Remember whether the report or complaint made in the first call?

A: I waited for Accused to tell me the whereabouts of my car, I waited for 5 hours, when he did not turn up, or tell me the whereabouts of my car, I asked my brother-in-law to call the Police.

55 The Applicant has alleged that PW3's testimony here shows that PW3 changed his position on not only the number of "999" calls which he made, but also the contents of his complaint against the Accused, and that the DPP led him to do so. In my view, nothing in this exchange suggests that PW3 changed his evidence or the contents of his complaint (which was that the Accused cheated him by disposing of the Car in a manner contrary to his instructions). The Accused did not deny that on the occasion referred to in PW3's testimony (quoted above), PW3 did wait for five hours for him to turn up, but in vain. It is pertinent to note that on appeal in MA 401/2010, the Accused did not make any written submission to the Judge that PW3 had lied in this regard as a ground for disbelieving his evidence.

56 It is also pertinent to note that the Applicant's 3rd allegation was made only after the Applicant discovered that P17 in the court records consisted of only T1 and F1. If PW3 had indeed changed his evidence during the District Court trial as alleged, the Applicant, as defence counsel, would (or at least, should) have been aware of this. The Applicant could and should have cross-examined PW3 there and then on the apparent contradictions in his evidence. Further, the Applicant could also have addressed these inconsistencies in his written closing submissions. However, he did neither.

57 In the circumstances, I am not satisfied that the Applicant has made out a *prima facie* case of misconduct that requires an investigation by a Disciplinary Tribunal where his third allegation against the DPP is concerned.

The Applicant's 4th allegation: Did the DPP collude with PW10 to mislead the DJ, the Accused and the Applicant into believing that only one "999" call (viz, the 1st 999 Call) had been made by PW3?

58 For the reasons given in relation to the Applicant's first three allegations against the DPP (see [50]–[57] above), I find that the Applicant's 4th allegation – *viz*, that the DPP colluded with PW10 to mislead the DJ, the Accused and the Applicant into believing that PW3 had made only one "999" call, namely, the 1st 999 Call – is completely groundless and unwarranted. It follows that no *prima facie* case has been made out for an investigation into this allegation.

Observations on *ex parte* applications

59 The present OS is an *ex parte* application for leave to have the DPP, in her capacity as an officer of the court, investigated by a Disciplinary Tribunal for the four alleged acts of misconduct summarised at [49] above. The Applicant has filed an affidavit in support of his application (*viz*, the Applicant's 31/1/2012 affidavit), in which he has disclosed all the relevant facts and documents, *except* the affidavits filed by the DPP and PW10 in CM 58/2011. In not disclosing these documents, the Applicant has withheld a material fact – namely, that both the DPP and PW10 have endeavoured to explain, on affidavit, how and why the DPP's omission to tender T2 as an exhibit at the District Court trial came about. It is an established principle of law in all *ex parte* applications for orders that affect the rights or interests of the respondent that the applicant must give full disclosure to the court of all the material facts.

60 Of course, for the purposes of the present OS, I need not and should not decide on the truth or otherwise of the explanations given by the DPP and PW10 in their respective affidavits filed in CM 58/2011. These affidavits are not relevant to my determination of whether, on the evidence produced by the Applicant, a *prima facie* case has been made out for the purposes of s 82A(6) of the LPA. Be that as it may, in my view, the fact that the DPP and PW10 have both denied, on affidavit, the Applicant's allegations (the truth or otherwise of their denials being, as just mentioned, irrelevant in this regard) is a fact that should have been disclosed by the Applicant in his supporting affidavit for the present OS, especially since the DPP's and PW10's affidavits in CM 58/2011 are already part of the court records for that case. I assume that this omission on the Applicant's part was inadvertent, having regard to the fact that this is the first time that an application is being made under s 82A of the LPA.

Conclusion

61 For the reasons given above, I dismiss the present OS.

[note: 1] See pp 41–42 of the DPP's affidavit dated 9 March 2012 ("the DPP's 9/3/2012 affidavit").

[note: 2] See p 54 of the DPP's 9/3/2012 affidavit.

[note: 3] See p 57 of the DPP's 9/3/2012 affidavit.

[note: 4] See p 44 of the DPP's 9/3/2012 affidavit.

[note: 5] See pp 41–42 of the DPP's 9/3/2012 affidavit.

[note: 6] See p 54 of the DPP's 9/3/2012 affidavit.

[note: 7] See p 57 of the DPP's 9/3/2012 affidavit.

[note: 8] See p 44 of the DPP's 9/3/2012 affidavit.

[note: 9] See the record of proceedings for MA 401/2010 at p 4 (*vis-à-vis* the 1st Charge) and p 5 (*vis-à-vis* the 2nd Charge).

[note: 10] See the certified transcript of the notes of evidence of the District Court trial ("the NE") at p 264 (reproduced at p 312 of the DPP's 9/3/2012 affidavit).

[note: 11] See p 476 of the NE (reproduced at p 364 of the DPP's 9/3/2012 affidavit).

[note: 12] See p 54 of the DPP's 9/3/2012 affidavit.

[note: 13] See p 55 of the DPP's 9/3/2012 affidavit.

[note: 14] See p 57 of the DPP's 9/3/2012 affidavit.

[note: 15] See p 58 of the DPP's 9/3/2012 affidavit.

[note: 16] See p 510 of the NE (reproduced at p 396 of the DPP's 9/3/2012 affidavit).

[note: 17] See p 513 of the NE (reproduced at p 399 of the DPP's 9/3/2012 affidavit).

[note: 18] See pp 489–490 of the DPP's 9/3/2012 affidavit.

[note: 19] See pp 17–22 of the DPP's 9/3/2012 affidavit.

[note: 20] See pp 35–37 of the DPP's 9/3/2012 affidavit.

[note: 21] See p 17 of the Applicant's 31/1/2012 affidavit.

[note: 22] *Ibid*.

[note: 23] *Ibid*.

[note: 24] *Ibid*.

[note: 25] See p 25 of the Applicant's 31/1/2012 affidavit.

[note: 26] See p 21 of the DPP's 9/3/2012 affidavit.

[note: 27] See p 510 of the NE (reproduced at p 396 of the DPP's 9/3/2012 affidavit).