



Singapore Court of Appeal further levels the playing field for the Criminal Defence

***Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25 (“Muhd Nabill”)**

The Singapore Court of Appeal's (“CA”) decision in *Muhd Nabill* is a potential landmark in the development of Singapore's criminal jurisprudence.

It critically expands on the Prosecution's common law disclosure obligations in respect of an important class of documents that had not received the judicial attention it deserved: statements recorded from material witnesses.

From now, in addition to its *Kadar* obligations¹, the Prosecution has an “*additional disclosure obligation*” to disclose statements recorded during investigations from material witnesses who are not called by the Prosecution to testify.

A “*material witness*” is someone who may be expected to either confirm or contradict the factual narrative underpinning the defence in material respects.

As to whether this new requirement obliges the Prosecution to disclose statements of material witnesses who are called by the Prosecution to testify, the CA left that question open because it did not arise on the facts.

However, the CA did hold that if a Prosecution witness gives testimony in court that is *inconsistent*

with what he had said in statements taken during investigations, there is no reason why the Prosecution should not disclose such statements to the Defence as part of its *Kadar* obligations. The Defence ought to have that statement for purposes of cross-examination and impeachment, where appropriate².

The CA further held that the Prosecution's failure to call a material witness to testify may result in an adverse inference being drawn against the Prosecution.

In coming to these conclusions, the CA made the following critical observations.

(1) Prosecution's role

The Prosecution's twin public duties are to ensure that (i) only the guilty are convicted, and (ii) all relevant material are placed before the Court to help it determine the truth.

Given that the Prosecution acts in the public interest, it is generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings.

(2) Prosecution's duty to disclose a material witness's statement to the Defence

The Prosecution is duty-bound to disclose a material witness's statement to the Defence,

¹ *Kadar* obligations refer to the Prosecution's obligations to produce to the Defence unused (and likely admissible) material that is reasonably credible/relevant to establishing the guilt/innocence of the accused and unused (and likely inadmissible) material that would provide a real (and not fanciful) chance of pursuing a line of inquiry that leads to the production of admissible material that is reasonably credible/relevant to establishing the guilt/innocence of the accused. This does not include material which is neutral or adverse to the accused, but only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case.

² The CA referred to the Code of Practice for Conduct of Criminal Proceedings, para 41, which provides that where a Prosecution witness gives evidence on a material issue that is in substantial conflict with his prior statement to justify impeachment proceedings, the Prosecution should disclose the prior statement to the Defence.

which the CA described as its "*additional disclosure obligations*".

As with *Kadar* obligations, this obligation arises pursuant to section 6 of the Criminal Procedure Code, which enables the Court to adopt such criminal procedure as the justice of the case requires where the CPC or written law has no special provision. This includes procedures that uphold established notions of a fair trial in an adversarial setting that is not already part of the written law.

There are two key differences between "*additional disclosure obligations*" compared to the *Kadar* obligations:

- Statements of material witnesses who are not called by the Prosecution must be disclosed under the "*additional disclosure obligation*". It matters not whether the statement is favourable to the defence (and so triggers *Kadar* obligations), neutral, or adverse to the defence.
- The Prosecution is not required to assess whether a material witness's statement is *prima facie* credible/relevant to the guilt/innocence of the accused. Such an assessment was required for materials disclosed pursuant to *Kadar* obligations because the Court was concerned in *Kadar* to reasonably limit the amount of unused material that Prosecution would have to disclose. This concern does not arise for statements of material witnesses because the number of such statements is likely to be limited.

(3) Rationale for requiring disclosure of material witness's statement

The CA took pains to explain the reasons and rationale for imposing this additional disclosure obligation on the Prosecution.

- The CA held it would be intolerable if the court were deprived of relevant and potentially exculpatory evidence simply because a prosecutor made an error in assessing the significance of certain

evidence, even if that error is made in good faith.

- The Accused should have access to all relevant information to make an *informed choice* about calling a material witness. It is a distinct disadvantage in this regard to not know what the witness had previously said during investigations into the offence.
- The Accused will face practical difficulties eliciting self-incriminating evidence from a material witness who is similarly under investigations. The Accused would also not be able to impeach a material witness without having his prior inconsistent statements disclosed.
- Having the Accused choosing not to call a material witness because of concerns of what that witness's prior statements might have said does not reflect a satisfactory balance between ensuring fairness to the Accused and preserving the adversarial nature of the trial process.

The CA sounded prophylactic advice that if the Prosecution had any doubt as to whether a particular statement is subject to disclosure (per *Kadar* obligations or the additional disclosure obligations), it must err on the side of disclosure, because the consequences of non-disclosure could be severe.

Per *Kadar*, the CA warned that failure to give timely disclosure can result in an acquittal if it is considered a material irregularity which occasions a failure of justice or renders the conviction unsafe.

(4) When to disclose?

The CA held that a material witness's statements ought to be disclosed when the Prosecution files and serves the Case for the Prosecution (if statutory disclosure procedure applies), or latest, before the trial begins (in all other cases).

The CA reminded parties that the duty to disclose is a continuing obligation, and arises whenever the relevance of a particular witness's evidence become evident.

(5) Whether the Prosecution has a duty to call a material witness

The CA held that there is no legal duty on the Prosecution to call material witnesses to testify. The Prosecution retains discretion on whom to call, provided there is no ulterior motive and the witness, who is available to Prosecution but not called, is offered to the Defence.

However, the Prosecution's failure to call material witnesses may, in the appropriate case, result in two adverse consequences:

- The Prosecution fails to discharge its evidential burden of rebutting the defence advances by the Accused; and
- Court may be entitled to draw adverse inference that the material witness would have given evidence unfavorable to the Prosecution.

(6) Failure to discharge Prosecution's evidential burden to rebut the defence

The Prosecution has the *legal* burden of proving the charge beyond a reasonable doubt. But the Prosecution also has an *evidential* burden: to adduce sufficient evidence to address facts that have been put in issue by the defence.

The CA made clear that the Defence may also have an *evidential* burden - depending on nature of the Defence and facts in issue being raised.

The concept of evidential burden is a dynamic one: this burden can shift between the parties. A failure to produce some evidence to either propound or rebut a particular fact will result in a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

In this case, the CA held that the Prosecution's evidential burden to adduce sufficient evidence is engaged when the Prosecution has to rebut a defence raised by the accused that has properly 'come into issue'.

In *Muhd Nabill*, the CA observed that the accused had advanced a specific defence, where specific material witnesses were identified. Despite this, the Prosecution chose not to call these material witnesses even though it had access to the said witnesses.

The CA held that the Prosecution ought to have called the material witnesses in this specific situation to discharge its evidential burden.

The CA clarified that the Prosecution would not have needed to do so in two situations, both of which did not apply here:

- Where the Prosecution could have relied on other evidence to discharge its evidential burden; and
- Where the Accused's evidence is inherently incredible to begin with.

(7) Court may be entitled to draw adverse inference that the material witness would have given evidence unfavorable to the Prosecution

Where the Prosecution fails to call material and essential witnesses, the court can draw adverse inference where appropriate having regard to all the circumstances of the case.

The Court would assess whether the failure to call a material witness has left a gap in the Prosecution's case or whether failing to do so constitutes withholding evidence from the Court.

The CA held that it is not sufficient for the Prosecution to justify its failure to call a material witness on grounds that the witness's statement was 'neutral' if that witness would have been able to confirm or contradict the defence in material respects.

The logical conclusion in such a case is that the witness's statements are neutral only in the sense that they were not questioned on material aspects of the defence.

The Prosecution is therefore expected to take statements from witnesses who are in a position to either confirm or contradict the defence in

material respects regardless of whether that defence emerges pre-trial or in the course of the hearing. This is line with first principles that the Prosecution is bound to place before the court all relevant material to assist it in its determination of the truth.

The CA held that it would be unfair to expect the Defence, in place of the Prosecution, to call material witnesses who may confirm or contradict the defence, citing two reasons:

- Accused may not have the ability or resource to find out what evidence a material witness might give.
- The Defence may have difficulty eliciting evidence from a material witness where such evidence necessarily incriminates the witness.

Conclusion

The CA's decision in *Muhd Nabill* underscores the fundamental concern of ensuring that relevant and material evidence in the Prosecution's possession that either incriminates or exculpates the accused is made available to the Defence at the pre-trial stage and is subsequently adduced at trial so that the Court is apprised of the full facts and all available evidence.

If you would like more information on this area of the law, please contact:



Abraham Vergis, Managing Director
(abraham@providencelawasia.com)

Abraham is an experienced Singapore court advocate and counsel. Abraham has been commended by the Singapore Court judgements on being "very competent", "impressed by the quality of Mr Vergis' advocacy, and certainly more than capable of advancing his client's position." Chambers and Partners ranked Abraham to be amongst the top twenty litigators in Singapore in 2018 and 2017. Abraham was nominated as "Asia's Disputes Star of the Year" by AsiaLaw.



Danny Quah, Counsel
(danny@providencelawasia.com)

Danny is a commercial litigator with a growing practice in civil fraud, business crime and regulatory defence matters. He recently returned from an attachment with UK "magic circle" barristers set Fountain Court Chambers.