

Don't judge a prosecution by its cover – Equality in Implementing Prosecutorial Discretion

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I. Introduction

When two people commit the same criminal act in tandem, but one is charged with a different or lesser crime, questions of “unfairness” may arise. For instance, one may question whether the exercise of the discretionary powers of the Attorney-General was constitutional in relation to Article 12 of the Constitution. An example of such a situation is the recent New Year’s Eve “superspreader” gathering in Clarke Quay on 31 December 2021, where some of the attendees were charged with breaching Covid-19 rules but others were merely served with notices of composition.¹ While this decision may seem suspect at first blush, this article seeks to provide clarity on why such decisions are nevertheless consistent with Article 12 and thus constitutional.

II. Prosecutorial discretion and its limits

Article 12(1) of the Constitution states that “[a]ll persons are equal before the law and entitled to equal protection of the law”.² The concept of equality under Article 12(1) does not mean that all persons are to be treated equally, but simply that “all persons in like situations will be treated alike”.³ Regarding the exercise of prosecutorial discretion, it follows that all things being equal, co-offenders of similar culpability should be charged with the same crime.

Nevertheless, there is a seeming tension between the constitutional right to equality, and the exercise of prosecutorial discretion as provided for under the Constitution. Article 35(8) of the Constitution⁴ provides that the Attorney-General (acting as the Public Prosecutor) is granted the “power, exercisable at his discretion, to institute, conduct or discontinue any proceedings

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¹ Jessie Lim, “Clarke Quay New Year’s Eve gathering: 4 more to be charged with breaching Covid-19 rules”, *The Straits Times* (22 March, 2022).

² Constitution of the Republic of Singapore (1999 Reprint) Art 12(1).

³ *Attorney-General v Datchinamurthy a/l Kataiah* [2022] SGCA 46 at [29] *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51]; *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [54].

⁴ Constitution of the Republic of Singapore Art 35(8).

for any offence”. All criminal proceedings are therefore subject to his discretion, including the decision to charge who with what.⁵

Nevertheless, the Legislature and the Executive (which includes the Attorney-General) remain subject to Article 12 when exercising their powers.⁶ As one of the Fundamental Liberties under Part 4 of the Constitution, the right to equality is a fundamental part of the rule of law in Singapore. And the Attorney-General’s powers as constituted under Part 5 of the Constitution is not unlimited and must respect the rule of law. This principle has been affirmed in case law. In *Law Society of Singapore v Tan Guat Neo Phyllis* (“*Phyllis*”),⁷ the court held that all legal powers have legal limits and for the Attorney-General to have complete discretion would be contrary to the rule of law.⁸ Further, the Public Prosecutor must exercise his powers in good faith and not for any collateral purpose.⁹ Such exercise must also not be in breach of any constitutional right, which includes Article 12.¹⁰

III. Relevant caselaw

The following cases involve situations where the applicants believe that they have been treated unfairly by the prosecution relative to others who are on seemingly equal footing with him. As will be shown, these prosecutorial decisions were deemed consistent with Article 12(1) of the Constitution, as the applicants were not in fact equally situated with their peers.

A. *Ramalingam Ravinthran v Attorney-General*

In *Ramalingam Ravinthran v Attorney-General*¹¹ (“*Ramalingam*”), the applicant Ramalingam had met one Sundar, who placed a bag containing drugs in the car that Ramalingam was driving. Sundar alighted shortly after. Both men were later arrested separately by the Central Narcotics Bureau (“CNB”). Ramalingam was charged under the Misuse of Drugs Act with trafficking the full amount of drugs that he was found with, which attracted the mandatory death penalty. However, Sundar was charged with trafficking a smaller amount of drugs, which

⁵ Criminal Procedure Code 2010 s 11.

⁶ Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2017) at para 13.001.

⁷ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.

⁸ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].

⁹ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].

¹⁰ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [130].

¹¹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49.

did not attract the death penalty. This difference in charges was allowed by the lower court as Ramalingam was considered more culpable than Sundar.¹² After being sentenced, Ramalingam filed a criminal motion to amend the charges against him to non-capital charges (similar to the charges that Sundar received), arguing that the Attorney-General's exercise of prosecutorial discretion was contrary to Article 12(1).

On appeal, the court held that under Article 12(1), all that is required is that the prosecution "give unbiased consideration to every offender and to avoid taking into account any irrelevant consideration".¹³ In cases like *Ramalingam* where there are multiple offenders committing the same crime, the Attorney-General must still treat like with like, but is entitled to consider factors which differentiate the co-offenders.¹⁴ These include their personal circumstances, their willingness to testify, and other policy factors.¹⁵ These factors serve to differentiate the co-offenders and justify why they have been prosecuted differently.¹⁶ In *Ramalingam*, the court decided that Sundar was not as blameworthy as Ramalingam, as he was not instrumental to the crime.¹⁷ Sundar was also a witness for the prosecution.¹⁸

In deciding what would indeed be a breach of Article 12(1), the *Ramalingam* court referred to *Thiruselvam s/o Nagaratnam v Public Prosecutor*¹⁹ ("*Thiruselvam*"). In *Thiruselvam*, one K was the main offender, but was given a non-capital charge while Thiruselvam was given a capital charge. The court found that the role played by Thiruselvam was arguably greater than that of K, as Thiruselvam was effectively K's controller or supplier.²⁰ This was because Thiruselvam occupied a more significant position in the supply chain of illegal drugs, making him a more culpable offender than K in the context of combating drug trafficking in Singapore.²¹ Had the situation been the converse, Article 12 would be breached.²²

B. *Quek Hock Lye v Public Prosecutor*

¹² *Ramalingam Ravinthran v Attorney-General* [2011] 4 SLR 196 at [20]-[24].

¹³ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [24].

¹⁴ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [52].

¹⁵ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [52].

¹⁶ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [52].

¹⁷ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [73].

¹⁸ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [78].

¹⁹ *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362.

²⁰ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [38].

²¹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [38].

²² *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [37].

*Quek Hock Lye v Public Prosecutor*²³ (“*Quek*”) then came before the Court of Appeal. Like *Ramalingam*, *Quek* had been charged with trafficking the full amount of drugs found on him, while a co-offender (one Winai) was charged with a smaller amount despite being part of the same criminal enterprise. On appeal, *Quek*’s counsel argued that the Public Prosecutor’s actions with regard to the difference in charges had breached Article 12(1) of the Constitution.

In making its decision that the difference in charges was constitutional, the court followed *Ramalingam* in holding that different consequences arising from the same criminal act are not *per se* a breach of Article 12(1).²⁴ It is entirely within the Public Prosecutor’s power to prefer a lesser charge for a co-offender, as granted to him by Art 35(8).²⁵ As the court put it, “*Quek*’s Art 12(1) challenge fails as the issue is not whether the Public Prosecutor can exercise his discretion to prefer a lower quantum of the same seized drugs between co-offenders but rather whether this decision was made for legitimate reasons”²⁶ (in the same vein as *Ramalingam*). Indeed, the decision was made for legitimate reasons as *Quek* was the brain behind the criminal enterprise and thus the main culprit.²⁷ The court also suggested that Winai’s willingness to testify against *Quek* may also have influenced the Public Prosecutor.²⁸

C. *Yong Vui Kong v Public Prosecutor*

The principle of assessing one’s culpability in differentiating him from others in *Ramalingam* was reiterated in *Yong Vui Kong v Public Prosecutor*²⁹ (“*Yong Vui Kong*”).³⁰ In *Yong Vui Kong* the applicant was arrested by CNB for drug trafficking after being asked to deliver some “gifts” by one Chia. The prosecution later applied for a discharge not amounting to acquittal with respect to Chia. The applicant argued that in light of this, the decision to prosecute him was in breach of Art 12(1). However, the court noted that this case is distinguished from *Ramalingam* in that Chia was more culpable than *Yong*.³¹ The court rejected the applicant’s arguments, holding that under Art 35(8) the Attorney-General may discontinue any prosecution at his

²³ *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012.

²⁴ *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [24].

²⁵ *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [24].

²⁶ *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [24].

²⁷ *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [25].

²⁸ *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [25].

²⁹ *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872.

³⁰ *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [17].

³¹ *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [19].

discretion.³² The issue was whether they had a valid reason to do so, and in this case, it was due to the insufficiency of evidence.³³

D. *Syed Suhail bin Syed Zin v Attorney-General*

In *Syed Suhail bin Syed Zin v Attorney-General* (“*Syed Suhail*”), the plaintiffs comprising of 17 inmates of Malay ethnicity who were sentenced to death for drug trafficking, argued that the Public Prosecutor had discriminated against them based on race where offenders of other races were less likely to be charged for a capital offence. They cited the disproportionate number of Malay persons prosecuted for capital drug offences and that offenders of other ethnicities were more likely to have their charges reduced below the death penalty threshold. In a culmination of previous jurisprudence (*Ramalingam*), the court first set out a two-step test to determine whether the executive action has breached Article 12(1): (a) whether the plaintiff was treated differently from other equally situated persons; and (b) whether this differential treatment was reasonable in that it was based on legitimate reasons.³⁴

The court then affirmed the presumptions of constitutionality and legality for acts of public office holders, and held that “general statistical disparities will not, without more, be presumed to be attributable to direct discrimination on the ground of ethnicity in *prima facie* breach of Article 12(1).”³⁵

E. *Daniel De Costa Augustin v Public Prosecutor*

Beyond the typical Article 12(1) case involving the Public Prosecutor choosing to charge co-offenders differently, the same principles that apply there will also apply to one where the Public Prosecutor chooses to charge one but not the other for seemingly similar acts.³⁶ In *Daniel De Costa Augustin v Public Prosecutor*, the applicant had accessed another person’s email without consent and sent an email to The Online Citizen, alleging that there was corruption at the highest echelons, and signing off the email in the name of the email owner. The email had also defamed members of the Cabinet. The applicant argued that his email

³² *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [27].

³³ *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [27].

³⁴ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [59]; *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61]-[62].

³⁵ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [74].

³⁶ *Daniel De Costa Augustin v Public Prosecutor* [2020] 5 SLR 609 at [63].

merely repeated allegations made by the Prime Minister's siblings and that it was unconstitutional for the Public Prosecutor to charge him for defamation and not the siblings.

The court rejected the applicant's argument and held that the fact that one offender faces prosecution while others who may have committed similar actions do not, does not *ipso facto* indicate breach of Article 12.³⁷ Instead, there were many differentiating factors. The Applicant had engaged in the unauthorised use of another person's email and impersonation of that person's identity. The email had also related to members of the Cabinet while the siblings' statements centred on family displeasure between them and the Prime Minister.³⁸

IV. Commentary

We can draw a few conclusions from the above decisions. First, and most importantly, the power of prosecutorial discretion does not trump a constitutional right.³⁹ Under Article 12, the Attorney-General must give unbiased consideration to every offender, and avoid taking into account irrelevant considerations in differentiating the offenders based on their culpability.⁴⁰

Secondly, what Article 12(1) requires is not that two or more co-offenders involved in the same criminal act be charged with the same crime, but rather that the Attorney-General give unbiased consideration to the circumstances.⁴¹ As seen from the above cases, factors such as the role played by the offender and his willingness to testify often lead to the conclusion that the co-offenders have varying culpability and are thus not equally situated. This is the actual cause of the seemingly "differential treatment" of co-offenders.

Thirdly, whether a prosecutorial decision is consistent with Article 12(1) depends on (a) whether the plaintiff was treated differently from other equally situated persons; and (b) whether this differential treatment was reasonable in that it was based on legitimate reasons.⁴² The plaintiff bears the burden under the two-step test to show a *prima facie* breach of Article

³⁷ *Daniel De Costa Augustin v Public Prosecutor* [2020] 5 SLR 609 at [83].

³⁸ *Daniel De Costa Augustin v Public Prosecutor* [2020] 5 SLR 609 at [82]-[84].

³⁹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [41].

⁴⁰ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51].

⁴¹ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.

⁴² *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [59]; *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61]-[62].

12(1).⁴³ This requires the plaintiff to show that he was treated differently from other equally situated persons.⁴⁴

The reason why the burden lies with the plaintiff is due to the presumption that acts of public office holders are constitutional.⁴⁵ Requiring the Public Prosecutor to explain and justify every decision would be onerous and impede his ability to carry out his duties. Only if a *prima facie* breach is shown that the evidential burden will shift to the Attorney-General to justify his prosecutorial decisions to the court,⁴⁶ failing which Article 12(1) is breached.⁴⁷ The “legitimacy of reasons” under the second step requires the rationale for the differential treatment to bear sufficient rational relation to the object for which the power was conferred.⁴⁸ What this means in the context of prosecutorial discretion is that the reason must bear sufficient rational relation to the Attorney-General’s duty to maintain law and order, and uphold the rule of law.⁴⁹

While the Attorney-General is not obliged to disclose his reasons for making a particular prosecutorial decision,⁵⁰ as the court in *Ramalingam* noted, it would be unreasonable of us to automatically assume that illegitimate reasons are at play.⁵¹ There are many considerations that the Attorney-General has to take into account; some of them would not be in the public’s interest to disclose. For example, the court in *Ramalingam* speculated that the prosecution’s refusal to disclose their reason for preferring a lesser charge for Sundar was due to Sundar’s willingness to testify.⁵² Such speculation, if true and also disclosed by the prosecution, could paint Sundar (or parties in similar positions) as a “snitch”, endangering his safety in prison.

Notwithstanding the Attorney-General’s ability to refrain from disclosing his reasons behind his decisions, there is recourse when injustice occurs. The courts act as a check against

⁴³ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [60].

⁴⁴ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [64].

⁴⁵ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [74].

⁴⁶ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [60].

⁴⁷ Nevertheless, the legitimate reasons provided by the Attorney-General under the second step of the test may also be relevant under the first step to dispute the plaintiff’s assertion that the co-offenders are equally situated persons. See *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [68].

⁴⁸ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274 at [59]; *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 at [61]-[62].

⁴⁹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53].

⁵⁰ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [74].

⁵¹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [78].

⁵² *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [78].

prosecutorial discretion via the means of judicial review.⁵³ This allows the court to right the wrongs when impropriety is discovered in prosecutorial decisions.⁵⁴ Nonetheless, the courts are cognisant that factors such as the strength of the case, the prosecution's general deterrence value, and the government's enforcement's priorities, are not readily susceptible to the kind of analysis the courts are competent to undertake.⁵⁵

V. Conclusion

The exercise of prosecutorial discretion is not unlimited and is subject to constitutional limits like Article 12. One should not be quick to view seemingly "unequal" prosecutorial decisions as unconstitutional but take a deeper dive to understand the complex factual matrix of the case and the various considerations of the Public Prosecutor. Factors such as the role of the offender in the crime, his personal circumstances, and his willingness to testify, go a long way in helping the Public Prosecutor charge offenders appropriately while helping society to maintain law and order. It is also helpful to know that the courts are unafraid of engaging in an extensive analysis to determine the constitutionality of prosecutorial decisions.

⁵³ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].

⁵⁴ Media Fact Sheet Judicial Review Proceedings at [1], *Attorney-General's Chambers*, (31 May 2012) <https://www.agc.gov.sg/docs/default-source/newsroom-documents/media-releases/2012/mediafactsheetonjudicialreviewproceedings_31may2012.pdf> (accessed 4 August 2021).

⁵⁵ *US v Christopher Lee Armstrong et al* 517 US 456 (1996).