

Levelling the Playing Field between the Prosecution and the Defence: Steps in the Right Direction*

I. Introduction

1 Developed by Herbert Packer, the Crime Control Model and Due Process Model espouse different ideologies in criminal justice – the former prioritises efficient crime suppression in the interests of public order, while the latter emphasises the primacy of individual rights in relation to the state. While Singapore’s criminal justice regime incorporates characteristics of both,¹ historically, experts have argued that it bears greater similarity to the Crime Control Model.²

2 A key characteristic of the Crime Control Model is the leeway granted to official power – this is visible in Singapore where the Prosecution has a wide discretion to institute, conduct or discontinue criminal prosecutions as enshrined in Art 35(8) of the Constitution of the Republic of Singapore³ and s 11 of the Criminal Procedure Code.⁴ However, recent decisions appear more consonant with the spirit of the Due Process Model, where prosecutorial power came under scrutiny and the integrity of the criminal justice process was emphasised.

3 Overall, recent court developments are a step in the right direction to protect procedural fairness and prevent prejudicial outcomes for accused persons by levelling the playing field between the Prosecution and Defence through three ways: refining the doctrine of abuse of process when necessary, placing limits on prosecutorial discretion and imposing disclosure obligations on the Prosecution. These thresholds are generally principled, being grounded in sound reasoning, and sensible, being practical in application.

II. Abuse of Process

4 In the context of criminal proceedings, the doctrine of abuse of process refers to the discretionary power of the court to grant a stay of proceedings where it deems justified. As

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¹ Chan Sek Keong, “The Criminal Process – The Singapore Model” (1996) *Sing L Rev* 431 at 443.

² Keith Jieren Thirumaran, “The Evolution of the Singapore Justice Process” (2019) 31 *SAC LJ* 1042 at 1046.

³ Constitution of the Republic of Singapore (1999 Reprint) (“**Constitution**”) Art 35(8).

⁴ Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“**CPC**”) s 11.

Lord Diplock aptly put, the doctrine may be invoked to prevent the use of court procedures in a way which, while consistent with a literal application of procedural rules, is “manifestly unfair” to a party before it.⁵ As such, a core function of the doctrine is to act as a judicial check on prosecutorial power. While the circumstances in which abuse of process may arise are varied, the decision of *Beh Chew Boo v Public Prosecutor*⁶ made significant pronouncements on the doctrine in respect of prosecutorial power to revive charges previously withdrawn.

5 In *Beh*, the accused was charged with five charges of drug importation. In line with common practice, the Prosecution proceeded with the charge carrying capital punishment (“**Capital Charge**”) and stood down the other four charges (“**Non-Capital Charges**”), to allow the accused to focus on the Capital Charge. The accused was convicted of the Capital Charge in the High Court (“**HC**”) but was later acquitted by the Court of Appeal (“**CA**”). Subsequently, the Prosecution sought to reinstate the previously withdrawn Non-Capital Charges, as *prima facie* permitted by s 147(3) of the CPC.⁷ The CA ruled 2-1 that the Prosecution would not be allowed to do so as this would be an abusive collateral attack on the CA’s acquittal, thereby amounting to an abuse of process.⁸ The decision signals the court’s preparedness to exercise its power in circumscribing prosecutorial power to ensure procedural fairness for the accused.

6 The majority’s decision reflected its concern with potential prejudice arising from undue leniency on the Prosecution. First, the court noted how permitting the Prosecution to revive the charges would effectively allow it to ‘undo’ the consequences of some of its choices.⁹ Second, this would give it room to proceed on one charge at a time and try different case theories with different sets of evidence at each new trial.¹⁰ This demonstrates the court’s intention to avoid giving the Prosecution any undue advantage and ensure procedural fairness for the accused. Additionally, sending a clear signal that the Prosecution cannot be given ‘second chances’ would encourage it to put forth as strong a case as possible the first time, ensuring high standards within the Prosecution, and making for a more efficient criminal justice system. Thus, the majority decision is principled.

⁵ *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529 at 536.

⁶ *Beh Chew Boo v Public Prosecutor* (“*Beh*”) [2021] SGCA 44.

⁷ CPC, *supra* n 4, s 147(3).

⁸ *Beh*, *supra* n 6, at [3].

⁹ *Id.*, at [91]–[99].

¹⁰ *Id.*, at [103]–[104].

7 A possibly more controversial aspect of the majority decision is what it represents for the principle of finality. To the majority, “manifest inconsistency” between previous and subsequent proceedings could amount to an abusive collateral attack on the finality of an acquittal, possibly signalling an abuse of process.¹¹ The emphasis on finality shows the majority’s concern with protecting the integrity of the court process and upholding fairness of *procedure*. The dissent, however, seems to prioritise fairness of *outcome*, viz, the elucidation of the truth.¹²

8 However, fairness of outcome and fairness of procedure are deeply intertwined. Fair procedure often naturally leads to fair outcomes – protecting fairness of process goes a long way to securing a fair outcome for the accused. It can be critiqued how, theoretically, invoking the doctrine could lead to the *factually* guilty accused to, by reason of procedure, be declared *legally* innocent – producing an arguably unjust outcome. However, the majority’s decision to emphasise finality and invoke the doctrine is still principled. Firstly, such cases would likely be exceptional and this should not be reason to restrict application of the doctrine across the board. Secondly, finality is indispensable to the criminal justice regime because subjecting the accused to additional litigation may be unfairly oppressive, tax valuable resources, and bring the system into disrepute if the public perceives the court as indecisive. Lastly, the majority decision does not spell unwarranted leniency for the accused; rather, it merely focuses on mitigating the power disparity between the Prosecution and Defence to prevent prejudice to the accused. Viewed in this light, the decision is principled.

9 It remains to be seen how the guidelines from *Beh* will be applied in practice, but this is unlikely to be without difficulties. The court refrained from formulating a fixed list of factors to consider, deeming such “unduly prescriptive”,¹³ but listed five relevant to the instant case.¹⁴ Such open-endedness seems necessary to accommodate the unique factual matrix of each case, but the absence of clear guidelines may create uncertainty in application. Additionally, the lack of unanimity among the bench suggests that the assessment is unlikely to be straightforward in practice. Ultimately, finding an abuse of process is a highly discretionary undertaking, with

¹¹ *Id.*, at [82] and [89]–[90].

¹² *Id.*, at [136] and [140].

¹³ *Id.*, at [84].

¹⁴ *Id.*, at [88]–[105].

which the courts seemingly have great leeway. The application of the doctrine is likely to be an inherently tricky process; the guidelines from *Beh* are not necessarily unsensible, but rather provide a starting point for future reference.

III. Prosecutorial Discretion

10 The courts have sought to further level the playing field by placing limits on prosecutorial discretion. Following the recent CA case of *Public Prosecutor v Aishamudin bin Jamaludin*, while the Prosecution has the discretion to charge multiple co-offenders with differing common intention charges,¹⁵ an accused person might challenge such differing charges by raising a challenge under Art 12(1) of the Constitution or seek to raise reasonable doubt over elements of the charge.¹⁶ Additionally, he may also raise a wider objection against *inconsistent cases*.¹⁷

11 The court elaborated on the two strands to this objection: first being the need to ensure procedural fairness in criminal proceedings (avoiding situations where inconsistencies in the Prosecution’s case would prevent the accused from understanding and being fully prepared to meet the Prosecution’s case),¹⁸ and second being the need to avoid prejudicial outcomes.¹⁹ This might occur when the Prosecution secures a conviction against A based on one set of facts, and then subsequently secures a conviction against B based on a different set of facts which necessarily contradicts the basis of A’s conviction.²⁰ Thus, allowing accused persons to raise this objection would ensure they are not prejudiced by any inconsistencies in the Prosecution’s case, leading to greater fairness.²¹

12 However, while this seems reasonable in principle, it remains to be seen how this will sensibly translate into practice. In obiter, the court briefly addressed this by providing a tentative framework for the objection against inconsistent cases based on prejudicial outcomes to be considered more fully in future.²² The court held that there are two categories of inconsistent cases – cases that can be resolved based on the Prosecution’s burden of proof, and

¹⁵ *Public Prosecutor v Aishamudin bin Jamaludin* (“*Aishamudin*”) [2020] 2 SLR 769 at [45]–[47].

¹⁶ *Id.*, at [53].

¹⁷ *Id.*, at [55].

¹⁸ *Id.*, at [59].

¹⁹ *Id.*, at [60].

²⁰ *Id.*, at [61].

²¹ *Id.*, at [77].

²² *Id.*, at [76].

cases which cannot.²³ The former includes instances where the Prosecution has not proved its cases beyond reasonable doubt, or runs inconsistent cases against co-offenders at a joint trial.²⁴ This can be resolved relatively easily as only one of the mutually incompatible cases can be true, and there would therefore be reasonable doubt in the Prosecution's case against *at least* one of the co-offenders.²⁵ The latter category includes instances where the Prosecution runs inconsistent cases against co-offenders in separate proceedings and the court concludes at the subsequent trial that the Prosecution has proved its new case beyond reasonable doubt.²⁶ It is this category that may be addressed through abuse of process,²⁷ but it remains to be seen exactly how this will translate into practice.

IV. Prosecutorial Disclosure

13 The courts have also sought to narrow the information disparity between the Prosecution and Defence. The seminal judgment of *Muhammad bin Kadar v Public Prosecutor* imposed the *Kadar* disclosure obligations which require the Prosecution to disclose to the Defence unused material likely to be admissible and might reasonably be regarded as credible and relevant to the guilt or innocence of the accused or likely to be inadmissible but would provide a real chance of pursuing a line of inquiry leading to such credible and relevant material.²⁸

14 Subsequently, the recent CA case of *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* imposed additional disclosure obligations which require the Prosecution to disclose material witness' statements²⁹ *even if* they do not undermine its case or strengthen the Defence's case.³⁰ The apex court explained that it would be an intolerable outcome if the court were deprived of potentially exculpatory evidence simply because the Prosecution erred in its assessment of certain evidence.³¹ Furthermore, leaving the accused in a situation where he chooses not to call a material witness because he is unaware of what that witness has said in his statements to the investigating authorities would not reflect a satisfactory balance between

²³ *Id*, at [85].

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Id*, at [86].

²⁷ *Id*, at [87].

²⁸ *Muhammad bin Kadar v Public Prosecutor* (“*Kadar*”) [2011] 3 SLR 1205 at [113].

²⁹ *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* (“*Nabill*”) [2020] 1 SLR 984 at [39].

³⁰ *Id*, at [41].

³¹ *Id*, at [44].

ensuring fairness to the accused vis-à-vis preserving the adversarial nature of the trial process.³² Since the court's fundamental objective in criminal trials is to arrive at a just outcome through a fair process, this will ensure all relevant material is placed before the court to assist in its determination of the truth such that only the guilty are convicted.³³

15 Furthermore, the court directly addressed the Prosecution's concerns of disclosing such information before the trial and not after the accused has testified. In respect of the Prosecution's concern that the accused person might tailor his defence to bring it in line with a material witness' account if such statements are disclosed earlier,³⁴ the court explained that the Prosecution can challenge such a defence by taking further statements from the relevant material witnesses and calling them as rebuttal witnesses.³⁵

16 Like the *Kadar* obligations, where there is any doubt over whether a particular statement is subject to disclosure, the Prosecution ought to err on the side of disclosure as the consequences of non-disclosure could be severe.³⁶ This would sensibly motivate the Prosecution to adhere to the guidelines.

17 While the court's reasoning appears sound, unresolved issues pertaining to the *Kadar* obligations could affect how well-grounded such duties of disclosure are in principle. Critics have suggested that the premises invoked by the court to impose the *Kadar* disclosure obligations on the prosecution are not completely consistent with its conclusion, with the proposed test based on relevance and credibility appearing to have conflated the two distinct issues of the nature of the duty to disclose and the standard of disclosure to be complied with (whether legal or ethical).³⁷ Thus, while the additional disclosure obligations are a welcome change that expands the Prosecution's duty of disclosure, the current thresholds for prosecutorial disclosure may still require further analysis as to whether the reasoning behind such disclosure obligations is logically defensible.³⁸

³² *Id.*, at [47].

³³ *Ibid.*

³⁴ *Id.*, at [51].

³⁵ *Id.*, at [52].

³⁶ *Id.*, at [48].

³⁷ Chen Siyuan, "The Prosecution's Duty of Disclosure in Singapore: Muhammad bin Kadar v Public Prosecutor [2011] 3 SLR 1205. (2011). *Oxford University Commonwealth Law Journal*. 11, (2), 207-216, at 216.

³⁸ *Ibid.*

V. Conclusion

18 Overall, the current thresholds established in recent cases emphasise procedural fairness for accused persons and are arguably principled and founded on sound reasoning. While the specifics of application remain to be seen, such thresholds are a sensible starting point.