

# Fair Enough? An Examination of Existing Legal Limits on Prosecutorial Discretion\*

## I. Introduction

1 The story of Ms Parti Liyani is one of a harrowing journey through the criminal justice regime, resulting in eventual victory, but at great cost. In March 2019, Ms Liyani stood trial for four theft-related charges and was found guilty of all four charges. On appeal, it was found that the Prosecution had led Ms Liyani to make an admission at the trial below, by failing to disclose the non-functional state of a DVD player she was accused of stealing. Although she was eventually acquitted, Ms Liyani's story is a demonstration of the impact of prosecutorial decisions on accused persons.

2 Article 35(8) of the Constitution of the Republic of Singapore confers upon the Attorney-General the discretionary powers to “institute, conduct or discontinue any proceedings for any offence”, and to “control and [direct] criminal prosecutions and proceedings”. The exercise of these far-reaching powers has raised questions as to whether the powers of the Prosecution may work contrary to the right of the accused to a fair trial, and to what extent courts ought to have a say over prosecutorial decisions. With this context in mind, this essay will examine the existing thresholds that protect the fairness of trials for accused persons.

## II. Prosecutorial Discretion

3 The powers conferred upon the Prosecution, while wide, are not unfettered. As outlined in the case of *Law Society of Singapore v Tan Guat Neo Phyllis* (“*Phyllis Tan*”), all legal powers have legal limits.<sup>1</sup> Prosecutorial powers may be placed under judicial review in two situations; where such powers are exercised in bad faith, and where such powers are exercised unconstitutionally.<sup>2</sup> Though the authors propose that such limits are indeed principled, the limits to prosecutorial discretion, insofar as they act as protection of the rights of accused persons to a fair trial, come with more complications.

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<sup>1</sup> *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, at [149] (“*Phyllis Tan*”).

<sup>2</sup> *Ibid.*

4 Firstly, in respect of the constitutionality of prosecutorial decisions, the defence must overcome the presumption that prosecutorial decisions are constitutional, by showing that there is *prima facie* evidence that the decision was unconstitutional.<sup>3</sup> This is a high threshold due to the absence of suitable case precedents to show that other accused persons in similar circumstances to the accused were prosecuted differently,<sup>4</sup> as well as the need to prove that there were “no valid grounds”<sup>5</sup> for the prosecutor’s decisions despite the fact that the Prosecution has no obligation to disclose its decision making process.<sup>6</sup>

5 As for bad faith, that is, the use of prosecutorial powers for purposes outside of what they are intended for, which is the conviction and punishment of offenders,<sup>7</sup> this is consistent with the concept of malice in a civil action for malicious prosecution,<sup>8</sup> which requires proof that prosecutorial decisions were motivated by improper considerations.<sup>9</sup> This carries with it a burden of proof identical to that needed to overcome the presumption of constitutionality.

6 Moreover, the court in *Phyllis Tan*, while noting that the exercise of prosecutorial power can be challenged by the court, also stated that this “would have to be a very exceptional case given that it is a constitutional power”.<sup>10</sup> Therefore, the defence, in order to challenge the constitutionality of a prosecutorial decision, would not only have to overcome a great evidential burden, but convince the court of the exceptional nature of its case.

7 This onerous burden of proof notwithstanding, the authors note the efforts taken by Singapore courts to take into account considerations of the Prosecution’s powers, while ensuring the fairness of the trial. This is evident in the recent case *Beh Chew Boo v Public Prosecutor* (“*Beh Chew Boo*”), where the issue before the court was whether the Prosecution’s decision to revive the four non-capital charges previously withdrawn amounted to an abuse of process. The court, holding in favour of Mr Beh, stated that it was the responsibility of the court and not the

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<sup>3</sup> *Ramalingam Ravinthran v AG* [2012] 2 SLR 49 at [44] (“*Ramalingam*”).

<sup>4</sup> Gary Chan, “Prosecutorial Discretion and the Legal Limits in Singapore” (2013) 25 SAclJ at p 36.

<sup>5</sup> *Ramalingam*, *supra* n 3, at [26].

<sup>6</sup> Chan, *supra* n 4, at p 37.

<sup>7</sup> *Phyllis Tan*, *supra* n 1, at [149].

<sup>8</sup> *Id.*, at p 29.

<sup>9</sup> *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858.

<sup>10</sup> *Phyllis Tan*, *supra* n 1, at [150].

Prosecution to determine the management of the proceedings as a whole.<sup>11</sup> Crucially, it effectively reframed the abuse of process issue from one which asked whether the exercise of prosecutorial discretion amounted to an abuse of process, to one which asked whether management and conduct of the proceedings as a whole would amount to an abuse of process.<sup>12</sup> While the essence of the former is whether the Prosecution was correctly performing its duty, the essence of the latter is whether the court, in allowing the reinstatement of charges, would be performing its duty to ensure the fairness of the trial. The authors opine that the reframing of the issue allowed the court to protect the rights of the accused, without infringing on the separation of powers.

8 The case of *Beh Chew Boo* is reflective of how thresholds may be shifted to ensure the right of accused persons to a fair trial. The exercise of the judicial duty of the court is one way in which the courts may respect the separation of powers, while balancing the considerations of prosecutorial discretion and fairness for the accused.

### III. Kadar obligations

9 In a similar vein, recent cases have reinforced the Prosecution's common law duty to disclose evidence before trial, in support of accused persons' right to a fair trial. The Kadar obligation was laid out in *Muhammad bin Kadar v PP* ("Kadar"), which overturned the murder conviction of an innocent man, after the Prosecution disclosed eyewitness statements in favour of the defence midway through the trial.<sup>13</sup> In the judgement, the Court of Appeal ruled that the Prosecution must disclose the following prior to trial:<sup>14</sup>

- (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
- (b) any unused material that is likely to be inadmissible, but would provide a real chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

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<sup>11</sup> *PP v Beh Chew Boo* [2021] SGCA 44 at [86].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Muhammad bin Kadar and another v PP* [2011] 3 SLR 1205 ("Kadar").

<sup>14</sup> *Id.*, at [113].

10 The ambit of the Prosecution’s duty of disclosure was widened in the recent cases of *Muhammad Nabill bin Mohd Fuad v PP* (“Nabill”).<sup>15</sup> In *Nabill*, the court imposed upon the Prosecution an additional duty to disclose material witness statements.<sup>16</sup> Crucially, the court held that it did not matter whether the statement was favourable, neutral, or adverse to the accused person.<sup>17</sup> Additionally, the Prosecution is not required to assess whether the statement is prima facie credible and relevant to the guilt or innocence of the accused.<sup>18</sup>

11 Explaining its decision, the Court of Appeal stated that accused persons should not be deprived of evidence simply due to a prosecutor’s mistake in assessing the significance of certain evidence.<sup>19</sup> In addition, the court recognised that not having access to relevant information can put the accused in a position of disadvantage, as it will impact the accused’s ability to make informed choices about calling a material witness.<sup>20</sup>

12 The authors propose that the Kadar and Nabill obligations (“Kadar obligations”) are sensible thresholds that protect the right of accused persons to access relevant evidence while building their defence. This finding is supported by the court’s judgement in the subsequent case of *Lim Hong Liang v PP*, which discussed the consequences of a breach of Kadar obligations.<sup>21</sup> On whether a Kadar breach should lead to an acquittal or other outcomes like a retrial, the court introduced an examination of factors such as whether the non-disclosure renders the conviction unsafe,<sup>22</sup> and whether there has been substantial (unrectifiable) prejudice to the accused.<sup>23</sup> While it was recognised that the conduct of the Prosecution can have an effect on the outcome of the trial, it was also stated that the examination of factors is unlikely to include any disciplinary elements against the Prosecution, noting that there were other avenues to achieve that objective.<sup>24</sup> In this regard, the court emphasized that its function was to ensure that “persons are acquitted or convicted according to the law”, and that “rendering acquittals too readily because of a Kadar breach” would

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<sup>15</sup> *Muhammad Nabill bin Mohd Fuad v PP* [2020] 1 SLR 984 (“Nabill”).

<sup>16</sup> *Id.*, at [39].

<sup>17</sup> *Id.*, at [41].

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.*, at [44].

<sup>20</sup> *Nabill*, *supra* n 15, at [45] - [47].

<sup>21</sup> *Lim Hong Liang v PP* [2021] SGHC 106 (“*Lim Hong Liang*”).

<sup>22</sup> *Lim Hong Liang*, *supra* n 21, at [28].

<sup>23</sup> *Id.*, at [32]-[33].

<sup>24</sup> *Id.*, at [35]-[36].

undermine this function.<sup>25</sup> Here, the authors note that the court has made a sensible separation between the need for fairness towards accused persons, and the need for proper administration of justice.

13 However, it is shortsighted to accept that the current thresholds are sufficient. In practice, numerous issues arise in the enforcement of the Kadar obligations. As the court held in *Lee Siew Boon Winston v PP*, when a trial begins, there is a presumption that the Prosecution has complied with its Kadar obligation.<sup>26</sup> This presumption is only displaced when the Defence satisfies the court that there are reasonable grounds for belief that the Prosecution failed to comply with its Kadar obligation.<sup>27</sup> This means that accused persons are not only unable to seek the enforcement of the obligation before trial, but are also put in a disadvantageous position of having to convince the court of the Prosecution's non-compliance, despite having little to no information on the evidence the Prosecution failed to disclose. In this regard, the difficulties in enforcement of the Kadar obligation can render the original purpose of the obligation obsolete.

#### **IV. Evaluation and Conclusion**

14 The arguments above are not signals of the court's unwillingness to ensure fairness for accused persons. Rather, they reflect the age-old debate surrounding the topic of judicial review over prosecutorial powers.

15 The limited justiciability of prosecutorial decisions arises from the doctrine of separation of powers. Forming different branches of the government, the powers granted by the Constitution to the Judiciary and the Attorney General are separate and equal.<sup>28</sup> Thus, each branch cannot intervene or encroach on the other's exercise of powers, save to prevent unconstitutionality.<sup>29</sup> This means that the court, in its efforts to make the criminal justice regime fairer for accused persons, must be careful to work within the limits of its judicial and statutory powers.

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<sup>25</sup> *Id.*, at [37].

<sup>26</sup> *Lee Siew Boon Winston v PP* [2015] 4 SLR 1184, at [184].

<sup>27</sup> *Id.*, at [184].

<sup>28</sup> Chan, *supra* n 4, at p 30-31.

<sup>29</sup> *Id.*, at p 32.

16 In maintaining this careful balance, there is an inevitable sacrifice of procedural fairness for accused persons, however miniscule the effect may be. This begs the question - how much of a sacrifice is deemed acceptable? How far is the court able and willing to go, to ensure the fairness of trials for accused persons?

17 In the recent case of *PP v Soh Chee Wen & Quah Su Ling*, the court drew a distinction between the AG's powers to conduct proceedings and the court's powers to maintain criminal proceedings.<sup>30</sup> The move limited the discretion of the AG to the ambit of Article 35(8), affirming the established principle that after an accused is charged in court, the proceedings thereafter are under the control of the court.<sup>31</sup> The authors are of the opinion that this delineation enables the court to introduce and reinforce thresholds that uphold the fairness of trials, within the limits of its judicial powers. At the same time, it serves as affirmation of prosecutorial powers, a move that is possibly reflective of the court's hesitance in imposing judicial review over the exercise of prosecutorial powers.

18 It is not unthinkable that the fairness of trials can be improved without infringing on the sacrosanct concept of separation of powers. Moves by the Prosecution to disclose reasons for their decisions are significant in increasing transparency, and addressing concerns of unfairness. However, the authors note that there is no legal obligation<sup>32</sup> or expectation of consistency<sup>33</sup> on the part of the Prosecution, to disclose reasons for prosecutorial discretion.

19 The truth remains that prosecutors can err in judgement; and these errors can range from the miniscule and irrelevant, to the deadly. In the absence of consistent transparency and significant judicial review over prosecutorial decisions, the authors respectfully opine that while the status quo is not adequate to ensure the rights of accused persons, that recent cases signify a welcome shift in the court's approach to the issue.

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<sup>30</sup> *PP v Soh Chee Wen & Quah Su Ling* [2020] SGHC 186, at [33] - [34].

<sup>31</sup> *Phyllis Tan*, *supra* n 1, at [146].

<sup>32</sup> *Ramalingam*, *supra* n 2, at [74].

<sup>33</sup> K Shanmugam, "Written Reply to Parliamentary Question on Sexual Assault Cases" (5 January 2021) <<https://www.mha.gov.sg/mediaroom/parliamentary/written-reply-to-parliamentary-question-on-sexual-assault-cases-5-january-2021-by-mr-k-shanmugam-minister-for-home-affairs-and-minister-for-law/>> (accessed 22 July 2021)