

## Erring on the Side of Disclosure: the Prosecution’s Additional Disclosure Obligations under *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984

### I. Executive Summary

The Prosecution has been described as owing “a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth”. However, what exactly does the scope of this duty entail? The Court of Appeal (“CA”) addressed this question in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984.

Muhammad Nabill bin Mohd Fuad (“Nabill”) appealed against his conviction on two capital drug trafficking charges under section 5(1)(a) read with section 5(2) of the Misuse of Drugs Act (“MDA”). He was convicted for having in his possession, for the purpose of trafficking, not less than 63.41g of diamorphine (“the First Charge”), and for having in his possession, for the purpose of trafficking, not less than 2,251.90g of cannabis (“the Second Charge”). In his defence, Nabill generally disputed that he had possession and, in particular, physical control of the drugs. He also disputed that he knew the nature of the drugs. The High Court (“HC”) rejected his defence, convicting him of both charges and imposing the mandatory death sentence. Nabill subsequently appealed against his conviction as well as his sentence; he also raised concerns regarding excessive judicial interference<sup>1</sup> during the HC proceedings.

During the appeal, the Court of Appeal (“CA”) was concerned that statements recorded from four material witnesses were not disclosed to the Defence, and that none of these witnesses were called by the Prosecution to rebut the Defence. The CA subsequently held the following:

- (a) The Prosecution has a duty to *disclose* to the Defence the statement of a *material* witness, meaning a witness who can be expected to confirm or contradict the accused person’s defence in material respects; and
- (b) While the Prosecution has no legal duty to *call* a material witness, in appropriate circumstances its failure to call a material witness could mean that the Prosecution has failed to discharge its evidential burden to rebut an accused person’s defence. Moreover, the court may in certain circumstances be entitled to draw an adverse inference that the evidence of a material witness, who could have been but was not called by the Prosecution, would have been unfavourable to the Prosecution.

While the CA found no excessive judicial interference in the HC, it took the opportunity to provide some guidance on appropriate judicial conduct in the context of criminal proceedings.

The CA ultimately set aside Nabill’s conviction on both charges, convicting and sentencing him instead under an amended charge of possession of diamorphine under section 8(a) of the MDA.

### II. Material Facts

Nabill lived with, among others, his wife (“Mashitta”), his cousin (“Sufian”) and their domestic helper (the “Helper”) in a flat (“the Flat”). Nabill was a habitual consumer of methamphetamine, receiving his supply from his friend Muhammad Faizal bin Mohd Shariff (“Faizal”). On the night of 26 January 2016, Faizal brought a trolley bag to the Flat. Nabill testified that he did not know that Faizal would be bringing the bag to the Flat, and that he had been asleep when Faizal arrived. (However, the Prosecution later produced records of calls that were made from and received by Nabill’s phone while Nabill was supposedly asleep; this became a point of contention during trial.)

Nabill further claimed that unknown to him, the trolley bag was placed in the storeroom of the Flat by the Helper. It was only on the afternoon of the next day that he saw several packets of diamorphine

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<sup>1</sup> Generally, excessive judicial interference is found when a judge interferes in the court proceedings to the extent that he/she is no longer able to fairly evaluate and weigh the case presented by each side, resulting in prejudice to a party.

on the bed in Sufian's bedroom ("**Bedroom 1**"), and discovered the trolley bag in the storeroom. He suspected that it was Sufian who had laid out the diamorphine on the bed. He was also informed by Mashitta, who had in turn been told by the Helper, that Faizal had brought the trolley bag to the Flat. On that same afternoon, Nabill called Sufian and Faizal and asked them to return to the Flat to "clear the stuff". Both men agreed to do so. Nabill's call records in this regard corroborated his claims.

While Nabill initially suspected that the trolley bag might contain drugs, Faizal apparently informed him that it contained cigarettes. Nabill claimed he did not verify this as he trusted Faizal. Faizal also had a history of leaving drugs at the Flat and then removing them after Nabill noticed them and called for their removal.

Later that night, Nabill was arrested by officers from the Central Narcotics Bureau ("**CNB**"). They seized the diamorphine from Bedroom 1. (Nabill's DNA was later found on the exterior of a group of ten mini packets of the seized diamorphine.) Thereafter, in response to a question from one of the CNB officers ("**Senior SSgt Ika**"), Nabill directed the CNB officers to the storeroom, where they seized the trolley bag containing cannabis. Forty cartons of contraband cigarettes were also taken from the storeroom.

### **III. Issues on Appeal**

The CA considered the following issues:

- (a) The Prosecution's duty in relation to a material witness;
- (b) The First Charge and the Second Charge; and
- (c) Nabill's complaint of excessive judicial interference.

#### ***A. Prosecution's duty in relation to a material witness***

The CA considered whether the Prosecution had a duty to: (1) *disclose* to the Defence a material witness' statement, and (2) *call* a material witness.

##### *(1) Prosecution's duty to disclose to the Defence a material witness' statement*

The CA held that the Prosecution was under a duty to disclose to the Defence the statement of a material witness ("**additional disclosure obligations**").<sup>2</sup> It did not matter whether the statement was favourable, neutral, or adverse to the accused person. In addition, the additional disclosure obligations did not require the Prosecution to carry out a prior assessment as to whether a material witness' statement was *prima facie* (on its face) credible and relevant to the guilt or innocence of the accused person. Finally, the additional disclosure obligations did not affect the operation of any ground for non-disclosure recognised by law.

The CA further stated that the Prosecution should satisfy its additional disclosure obligations either when it filed and served the Case for the Prosecution on the accused person (if the statutory disclosure procedure<sup>3</sup> applied), or at the latest, before the trial began (if the statutory disclosure procedure did not apply). If the relevance of a particular material witness' evidence only became apparent after the accused person had testified at trial, that witness' statement should be disclosed to the Defence then. This was because the Prosecution's additional disclosure obligations were a continuing obligation which only ended when the proceedings against the accused person (including any appeal) were disposed of. The CA left open the issue of whether the Prosecution was required to disclose the statement of a material witness who was a *prosecution* witness, as that issue did not arise here.

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<sup>2</sup> These were in addition to the obligations already required under *Muhammad bin Kadar v Public Prosecutor* [2011] SGCA 32 ("**Kadar obligations**"). Under the *Kadar* obligations, the Prosecution has a duty to disclose likely admissible material which might reasonably be credible and relevant to the accused's conviction, or likely inadmissible material which nonetheless provides a real chance of leading to such admissible material.

<sup>3</sup> Under section 159 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("**CPC**").

### Basis of additional disclosure obligations

*First*, the CA noted that the Prosecution might inadvertently fail to disclose statements which might tend to support the Defence. It would be an intolerable outcome if the court were deprived of relevant evidence that might potentially exculpate the accused person, simply because the Prosecution made an error in its assessment of the significance of certain evidence.

*Second*, an accused person ought to have access to all relevant information to make an informed choice in deciding whether or not to call a material witness. The Defence is at a disadvantage in deciding whether to do so when it is not aware of what the witness has previously said during investigations. Indeed, the practical difficulties of eliciting self-incriminating evidence from a material witness might be insurmountable. For instance, if Nabill had called Faizal as a witness, Nabill would have had to elicit from Faizal an admission that Faizal himself was involved in drug trafficking activities and intended to return to the Flat to retrieve the drugs. However, Faizal might also have been involved in discussions with or making representations to the Prosecution over potential charges in relation to the drugs. If Nabill failed to elicit an admission from Faizal as to his drug trafficking activities and intent to retrieve the drugs, Nabill might have had to apply to impeach Faizal.<sup>4</sup> But if the Prosecution did not disclose those statements, Nabill would have had to do so without having Faizal's statements. As such, any attempt at impeaching Faizal would likely have been doomed from the outset.

In addition, suppose the Defence had interviewed Faizal, and Faizal had confirmed Nabill's defence (that Nabill had called Faizal the next day to retrieve the drugs from the Flat and Faizal agreed to do so). Nabill might still have faced a dilemma as to whether to call Faizal as a witness. This is because Nabill would be aware that the Prosecution had access to whatever statements Faizal had previously made, and that those statements were thought by the Prosecution not to be subject to disclosure. Thus Nabill would have had to consider the possibility that Faizal's prior statements were in fact adverse to him and might contradict his defence (contrary to what Faizal might have told him), which would ultimately harm his case at the trial.

To leave the accused person in a situation where he chooses not to call a material witness because of the dangers due to his not being aware of what that witness has previously said in his statements to the investigating authorities, does not reflect a satisfactory balance between ensuring fairness to the accused person on the one hand, and preserving the adversarial nature of the trial process on the other. The Prosecution's duty to disclose a limited amount of unused material to the Defence was based on the Prosecution's duty to the court and to the public to ensure that only the guilty are convicted, and that all relevant material was placed before the court to assist it in its determination of the truth. The court's fundamental objective in criminal trials was to arrive at a just outcome through a fair process. The CA also encouraged the Prosecution, in cases of doubt, to err on the side of disclosure, as the consequences of non-disclosure could be severe.

### *(2) Prosecution's duty to call a material witness*

The Court held that the Prosecution had no legal duty to call any material witness. However, in appropriate circumstances, its failure to call a material witness might mean that it had failed to discharge its evidential burden to rebut an accused person's defence, and/or may justify the court in drawing an adverse inference if the Prosecution is unable to satisfy the court that it had good reason not to call that witness. This is especially when a defence identifies specific material witnesses and the Prosecution, despite having had access to these witnesses, chooses not to call them.

That said, the Prosecution would not need to call material witnesses if it were satisfied that it could

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<sup>4</sup> Generally, to impeach a witness is to undermine his credibility by showing that his testimony in court should not be believed. This can be done through, e.g., proof of material inconsistencies between the witness' evidence in court and in his prior statements.

rely on other evidence to discharge its evidential burden, or if the accused person's defence was patently and inherently incredible to begin with.

### ***B. First Charge & Second Charge***

The CA set aside Nabill's conviction on both charges.

#### ***(1) The First Charge (Diamorphine in Bedroom 1)***

Nabill did not dispute that he possessed the diamorphine and knew what it was; the sole question was whether he possessed the diamorphine for the purpose of trafficking. The Prosecution was thus entitled to rely on the presumption of trafficking under section 17 of the MDA, and the issue was whether Nabill had rebutted the presumption of trafficking.<sup>5</sup>

The CA first considered whether Nabill's account of events (see Material Facts above) was inherently incredible. If not, it was the Prosecution's job to produce sufficient evidence to discharge its evidential burden to rebut Nabill's defence. The CA found that there was nothing inherently incredible about Nabill's account. Indeed, he was always consistent in maintaining that he did not possess either the trolley bag or the diamorphine for trafficking. Moreover, his claim that he was seeking to return the bag and the diamorphine to their actual owners was not inconsistent with his past interactions with Faizal.

As such, the evidential burden shifted to the Prosecution to rebut Nabill's defence, through calling Faizal, Sufian and the Helper as witnesses to challenge Nabill's account of events. Faizal could have explained why he had brought the trolley bag to the Flat on the day in question, whether he had handed the bag to Nabill or the Helper, and whether Nabill had known that he would be bringing the bag to the Flat that day. Sufian could have confirmed whether he had used Nabill's phone on the night of 26 January 2016 – this was relevant to Nabill's claim that he had been asleep that night, and any phone calls made on his phone that night were actually by Sufian. The Helper could have confirmed whether she had received the bag from Faizal and placed it in the storeroom, and what Nabill and Sufian had been doing when Faizal arrived with the bag. The Prosecution's failure to call any evidence from these witnesses to challenge Nabill's assertions left its evidential burden undischarged.

Significantly, the Prosecution had access to and did record statements from these witnesses which were not disclosed to the Defence. In the circumstances, and absent any other explanation, the CA held that it was reasonable to draw an adverse inference that these witnesses' evidence, if produced, would have been unfavourable to the Prosecution.

With respect to Nabill's *first* key defence that he did not know Faizal would be bringing the bag to the Flat on 26 January 2016, the CA also disagreed with the HC's finding that one of Nabill's statements to the CNB officers amounted to an admission that he knew Faizal would be bringing the bag to the Flat then. Instead, the CA found that the statement was consistent with Nabill's account of events when correctly read in context. Further, the fact that calls were made from and received on Nabill's phone that night did not show who actually made or received those calls; Nabill's argument was that it was Sufian making those calls, and the Prosecution failed to produce evidence to rebut that account (including through calling Sufian, Faizal or the Helper as witnesses).

The CA also considered Nabill's *second* key defence, which was that when he discovered the bag and the diamorphine in the Flat on 27 January 2016, he called Sufian and Faizal asking them to return to the Flat to remove these items, and they agreed. Again, the Prosecution's failure to call any evidence from Sufian and Faizal to rebut Nabill's claim left its evidential burden undischarged. An adverse inference was therefore again drawn against the Prosecution.

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<sup>5</sup> Under section 17(b) of the MDA, any person who is proved to have had in his possession more than 2g of diamorphine shall be presumed to have had that drug in possession for the purpose of trafficking.

As to the contents of the phone calls by Nabill to Sufian and Faizal on 27 January 2016, the CA noted that Nabill was never challenged, in clear and express terms, that he *did not* in fact call Sufian and Faizal to ask them to remove the bag and the diamorphine from the Flat, nor did they agree to do so. There was thus no contrary explanation of the contents of the phone calls. Nabill's account was also consistent with his evidence as to his past interactions with Faizal.

Finally, the CA disagreed with the HC's finding that the presence of Nabill's DNA on the exterior surface of the mini packets in Bedroom 1 showed that he was involved in packing the diamorphine. There were other reasonable explanations for this situation, such as Nabill accidentally depositing his DNA through his saliva on the packets when the diamorphine was unpacked in the Flat in the presence of the CNB officers. The CA noted that a CNB officer's DNA had also been found on the exterior surface of a Ziploc bag which contained the mini packets of diamorphine, and that the CNB officer had explained that there was a probability that his saliva had come into contact with the Ziploc bag.

As such, the CA accepted Nabill's assertions and allowed Nabill's appeal on the First Charge. The CA then amended the charge to one of possession of the diamorphine under section 8(a) of MDA and convicted him to eight years' imprisonment.

### *(2) The Second Charge (Cannabis in the Trolley Bag)*

Nabill accepted that he was in possession of the cannabis, but argued that he neither had the requisite knowledge of the nature of the drugs, nor possessed the cannabis for the purpose of trafficking. The issue therefore was whether Nabill had rebutted the presumption of knowledge under section 18(2) of the MDA.<sup>6</sup> If the presumption of knowledge was not rebutted, the next issue would then be whether Nabill possessed the cannabis for the purpose of trafficking.

The CA disagreed with the HC that in response to a question by Senior SSgt Ika, Nabill had directed the CNB officers to the storeroom because he knew that there were drugs in the trolley bag in the storeroom.<sup>7</sup> Instead, the CA found that it could not be concluded, based solely on their interaction, that Nabill knew that the bag contained the cannabis. The context did not support the inference that Nabill understood Senior SSgt Ika to be asking whether there were any more drugs in the Flat. Nabill also consistently maintained that he was directing the CNB officers to the contraband cigarettes in the storeroom, which were indeed found and seized there.

Further, the CA found that there was no reason to disbelieve Nabill's defence that he thought the trolley bag contained cigarettes instead of drugs, which was what Faizal had told him and what Faizal apparently did bring from time to time. As such, Nabill's account was again not inherently incredible. This shifted the evidential burden to the Prosecution, who failed to rebut the defence by calling Faizal. The points concerning the Prosecution's evidential burden and the drawing of adverse inferences found under the First Charge therefore applied equally to the Second Charge.

Accordingly, the CA held that with regard to the Second Charge, Nabill had successfully rebutted the presumption of knowledge under section 18(2) of the MDA. The question of trafficking therefore did not arise here. The CA thus acquitted him of the Second Charge. As the Prosecution failed to establish that Nabill knew that the bag contained cannabis, Nabill could not be found guilty even of an offence of possession of cannabis under section 8(a) of the MDA.

### ***C. Excessive judicial interference***

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<sup>6</sup> Under section 18(2) of the MDA, any person proved to have had a controlled drug in his possession shall be presumed to have known the nature of that drug.

<sup>7</sup> Senior SSgt Ika testified that he asked "ada lagi" ("still some more?"). Nabill in turn gave three versions of the question: "ada barang salah" ("any illegal things?"), "ada barang salah lagi" ("any more illegal things?") and "ada barang lagi" ("any more things?"). Nonetheless, it is undisputed that Senior SSgt Ika did not expressly refer to drugs in his question.

The CA considered whether there was excessive judicial interference at trial. Although the CA found that the complaint of excessive judicial interference was not made out, it acknowledged that the HC ought to have asked questions regarding Nabill's case only *after* Nabill had been called to give his defence following the close of the Prosecution's case.

The CA also provided guidance on the applicable principles for a judge's conduct in the specific context of criminal proceedings, where:

- a. The judge should refrain from filling gaps in the Prosecution's case, as the burden lies on the Prosecution to prove its case against the accused person beyond a reasonable doubt;
- b. The judge should not ask questions of the Defence which would require the accused person to give advance notice of his case before he was even called to give his defence, since at this stage the Prosecution would not yet have discharged its burden to prove a case on its face. This is in accordance with the rules of criminal procedure which require the Prosecution to first prove a case on its face, before the Defence can be called or even invited to set out material aspects of its position;
- c. The judge should refrain from exploring lines of inquiry other than that which the Prosecution chooses to advance;
- d. The judge should exercise considerable restraint in intervening when the accused person is giving his evidence-in-chief, given that it is the Prosecution's (and not the judge's) role to cross-examine an accused person,. Further, an accused should have the opportunity to give his account in the way he would like his evidence to come out, without constant interruptions;
- e. The judge should be aware of the tendency for an accused person to present himself as agreeably as possible to the judge, so as not to upset him or her. Indeed, it is possible for an accused person to succumb to suggestions put forward by the judge so as not to appear disagreeable or even impolite; and
- f. The judge should refrain from asking leading questions<sup>8</sup> generally, as it may help a party with the direct examination or cross-examination of a witness.

The CA also noted the need, generally, for a judge to exercise greater caution, prudence and restraint in conducting criminal proceedings.

#### **IV. Lessons Learnt**

The Prosecution now appears to be subject to more stringent obligations in proving its case, due to the additional disclosure obligations imposed here as well as the CA's suggestion that the Prosecution err on the side of disclosure in such situations. The obligations imposed also help to remedy the information asymmetry that exists between the Prosecution and accused in terms of evidence. However, it remains to be seen what the practical effects of the CA's decision are in future criminal proceedings.

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<sup>8</sup> A question that prompts, suggests or encourages a particular answer to be given.