**IN THE GENERAL DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2023] SGHC 123**

Magistrate's Appeal No 9073 of 2022/01

Between

Xu Yuanchen

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrate's Appeal No 9078 of 2022/01

Between

Daniel De Costa Augustin

… *Appellant*

And

Public Prosecutor

… *Respondent*

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# JUDGMENT

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[Criminal Law — Defamation]
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## Introduction

1 The present appeals concern appellants who were convicted on criminal defamation charges ("the criminal defamation charges") pursuant to ss 499 and 500 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") for having defamed members of the Cabinet of Singapore ("the Cabinet").[1] The appellant in HC/MA 9078/2022/01 ("the second appellant"), Mr Daniel De Costa Augustin, was also convicted on a charge under s 3(1) of the Computer Misuse Act (Cap 50A, 2007 Rev Ed) ("CMA") ("the CMA charge") for accessing an email account without authority for the purpose of sending an email.[2]

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1 *Public Prosecutor v Daniel De Costa Augustin & Xu Yuanchen* [2022] SGMC 22 ("GD") at [92].

2 GD at [53].

2 The appellants are appealing against their respective convictions and sentences. With respect to the criminal defamation charges, they argue that the impugned publication did not defame members of the Cabinet and that they lacked knowledge that the publication would harm the reputation of members of the Cabinet.[3] In addition, the appellant in HC/MA 9073 of 2022/01 ("the first appellant"), Mr Xu Yuanchen, raises issues regarding the constitutionality of ss 499 and 500 of the Penal Code ("the criminal defamation provisions").[4] With respect to the CMA charge, the second appellant argues that he had the email account owner's consent to use the account for the purpose of sending out the relevant email.[5]

## Background

3 The first appellant was, at the material time, the director of The Online Citizen Pte Ltd ("TOC"), a company which runs the socio-political website "www.theonlinecitizen.com" ("the TOC website").[6] He was the chief editor of the TOC website. The second appellant was a regular contributor to the TOC website who wrote and submitted several opinion pieces to the TOC editorial team.[7]

4 On 4 September 2018, at an Internet cafe located in Chinatown, the second appellant sent an email which he had written titled "PAP MP apologises to SDP" ("the Email") from the email account "willysim71@yahoo.com.sg"

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3 Appellant's Skeletal Arguments dated 28 October 2022 in HC/MA 9073/2022/01 ("Xu Appeal Submissions") at para 2; Appellant's Skeletal Arguments dated 18 October 2022 in HC/MA 9078/2022/01 ("De Costa Appeal Submissions") at paras 69 and 77.

4 Xu Appeal Submissions at para 2.

5 De Costa Appeal Submissions at para 43.

6 Agreed Statement of Facts ("ASOF") at para 2 (Record of Appeal ("ROA") p 16).

7 ROA at p 6124; Notes of Evidence ("NEs") (Day 7) p 151 lines 10–26 (ROA p 801).

("the Yahoo Account") to "theonlinecitizen@gmail.com", an email account used by the TOC team.[8] He intended for the contents of the Email to be published on the TOC website.[9]

5 The Yahoo Account was registered not in the second appellant's name but rather in the name of one Mr Sim Wee Lee ("Mr Sim"), who was the second appellant's acquaintance at the time.[10] The alleged unauthorised use of the Yahoo Account to send the Email was thus the subject of the CMA charge.

6 On the same day, the first appellant approved the publication of the Email on the TOC website. It was published in the form of a letter from "Willy Sum" titled "The Take Away From Seah Kian Ping's Facebook Post" ("the Article").[11] The Article read as follows:[12]

> THE TAKE AWAY FROM SEAH KIAN PING'S FACEBOOK POST
>
> by Willy Sum
>
> I refer to Mr Seah Kian Peng and K. Shanmugam's recent outburst against some Singaporean activists meet-up with the sitting Malaysian Prime Minister, both Members of Parliament from the People's Action Party, and I wonder what they have to be afraid of about this meeting?
>
> Besides the cheap gimmick to draw attention to his pathetic Facebook following and amidst all the clamour and relentless hammering from the establishment, one thing in particular stood out to me from Seah's post, which is: "I'm amazed that Dr Thum and his supporters should proclaim that Singapore is part of Malaysia (or Malaya). Perhaps that is why he thinks it is permissible to ask its current prime minister to interfere in our affairs".

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8 ASOF at para 3 (ROA p 16).

9 ASOF at para 3 (ROA p 16).

10 GD at [9]; NEs (Day 5) p 28 lines 19–25 (ROA p 436).

11 ASOF at para 5 (ROA p 17).

12 ROA at pp 1217–1218.

> This is actually not too remote a probability that we should start thinking about, given that the only reason and cause for our independence and continued sustenance is now no longer around to assure our survival as a Nation.
>
> The present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap. We have seen multiple policy and foreign screw-ups, tampering of the Constitution, *corruption at the highest echelons* and apparent lack of respect from foreign powers ever since the demise of founding father Lee Kuan Yew. The dishonorable son was also publicly denounced by his whole family, with none but the PAP MPs on his side as highlighted by Mr Low Thia Khiang! The other side is already saying that we have no history, origins, culture and even a sound legal system to begin with.
>
> The continuing saga also reminded me of the lead up to the Budget debate 2018, where Workers' Party MP Sylvia Lim was accused by the same gang against her speech, which she did not accept the "over characterisation those PAP MPs have put on her words and intentions", based on their own interpretation and "bourne out of overactive imaginations and oversensitivity".
>
> The one country two systems can perhaps be considered, if and when the day comes where we have to return to Malaysia due to our dwindling population, lack of resources, diminished international stature and over development of our economy and there is no more room to do so.
>
> [emphasis added]

7 The subject of the criminal defamation charges was the phrase "corruption at the highest echelons" ("the Disputed Phrase") in the fourth paragraph of the Article ("the Paragraph"). The appellants were charged for making or publishing an imputation which stated that there was "corruption at the highest echelons", knowing that such imputation would harm the reputation of members of the Cabinet of Singapore.[13]

8 On 18 September 2018, the Info-communications Media Development Authority ("IMDA") issued a direction pursuant to s 16(1) of the Broadcasting

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13 ROA at pp 12–13.

Act (Cap 28, 2012 Rev Ed) to the first appellant to remove the Article from the TOC website. He complied with this direction and the Article was taken down on the same day.[14]

## The criminal defamation charges

### *The parties' cases below*

9 The Prosecution submitted before the District Judge below ("the Judge") that on an objective interpretation of the Paragraph, it was clear that the imputation of there being "corruption at the highest echelons" concerned the members of the Cabinet.[15] Since the first sentence of the Paragraph alleged that the "present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap",[16] the Prosecution argued that the second sentence of the Paragraph provided illustrations of these shortcomings, including "policy and foreign screw-ups" and "tampering of the Constitution". The Disputed Phrase "corruption at the highest echelons", which followed these illustrations, was thus similarly an imputation concerning members of the Cabinet.[17] This was argued to have been a serious imputation alleging illegal, fraudulent, or dishonest conduct by the members of the Cabinet,[18] which the appellants knew would harm their reputation.[19]

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14 ASOF at para 7 (ROA p 17); NEs (Day 9) p 15 lines 7–10 (ROA p 996).

15 Prosecution's Closing Submissions filed on 27th Sep 2021 ("Prosecution Trial Submissions") at para 48 (ROA p 2508).

16 Prosecution Trial Submissions at para 48(a) (ROA pp 2508–2509).

17 Prosecution Trial Submissions at para 48(b)–(c) (ROA p 2509).

18 Prosecution Trial Submissions at paras 51–52 (ROA pp 2510–2512).

19 Prosecution Trial Submissions at para 54 (ROA p 2513).

10 The second appellant's defence in the court below had several facets:

(a) First, by prosecuting the second appellant and not the Lee siblings, who allegedly made similar representations, the Attorney-General had violated the second appellant's right to equality before the law as enshrined in Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution");[20]

(b) Second, the criminal defamation charge was defective because it lacked material particulars as to the exact identity of the persons harmed;[21]

(c) Third, the reference in the criminal defamation charge to "members of the Cabinet of Singapore" was in essence referring to the Government of Singapore, which was not a "person" with a reputation protected under s 499 of the Penal Code.[22]

(d) Fourth, the Disputed Phrase "corruption at the highest echelons" did not refer to the members of the Cabinet, and instead referred to elite members of society;[23]

(e) Finally, the second appellant could rely on the defence provided by the Second Exception to s 499 of the Penal Code, which protects the

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20 Closing Submissions for the Accused dated 27 September 2021 ("De Costa Trial Submissions") at para 40 (ROA p 6787).

21 De Costa Trial Submissions at paras 63–73 (ROA pp 6795–6802).

22 De Costa Trial Submissions at para 75 (ROA p 6803).

23 De Costa Trial Submissions at para 93 (ROA p 6810).

> expression of opinions, made in good faith, concerning the public conduct of public servants.[24]

11 The first appellant argued that the Disputed Phrase, read in the context of the Article, did not refer to individual members of the Cabinet of Singapore.[25] Rather, there were other interpretations of what the Disputed Phrase was referring to, including the Government in general, elite members of society, the Oxley Road dispute involving the Lee family ("the Oxley Road Dispute"), or the Central Executive Committee of the People's Action Party ("the PAP CEC").[26] The first appellant gave evidence that he understood the Disputed Phrase to be referring to the Oxley Road Dispute; hence, he argued that he could not have known that the Disputed Phrase would harm the reputation of members of the Cabinet.[27]

12 The first appellant argued further that the criminal defamation provisions were unconstitutional as they violated Art 14 of the Constitution.[28] It was submitted that as laws enacted prior to independence, the criminal defamation provisions were not introduced, debated, and enacted by Parliament as is required for them to have been imposed by Parliament under Art 14(2)(*a*) and considered by Parliament to be "necessary or expedient" for the purposes enumerated under Art 14(2)(*a*).[29] Hence, they were not constitutionally valid restrictions of the right to freedom of speech and expression. The first appellant

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24 De Costa Trial Submissions at para 97 (ROA p 6813).

25 Defence's Closing Submissions dated 27 Sep 2021 ("Xu Trial Submissions") at para 35 (ROA p 3874).

26 Xu Trial Submissions at paras 37–45 (ROA pp 3874–3876).

27 Xu Trial Submissions at paras 46–49 (ROA pp 3876–3877).

28 Xu Trial Submissions at paras 77 (ROA p 3888).

29 Xu Trial Submissions at paras 72–76 (ROA p 3888).

argued further that for pre-independence laws, a proportionality analysis should be adopted to review their constitutionality.[30] On the facts, the incursion into Art 14 rights by the criminal defamation provisions was wholly disproportionate to their purpose of protecting individual reputations. Hence, the first appellant argued that the provisions should be found to be an impermissible restriction on Art 14 rights.[31] In the alternative, it was submitted that the criminal defamation provisions were not "necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality" as is required under Art 14(2)(*a*).[32]

### *The decision below*

13 The Judge found the criminal defamation charges to be made out and accordingly convicted the appellants of them.[33] He observed that the imputation of there being "corruption at the highest echelons" clearly concerned members of the Cabinet.[34] He accepted the Prosecution's argument that the first sentence – *ie*, "[t]he present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap" – was the thesis statement of the Paragraph, and that the second sentence referred to illustrations to support the first sentence, including "policy and foreign screw-ups", "tampering of the Constitution", as well as the Disputed Phrase "corruption at the highest echelons".[35] He agreed with the Prosecution that the "present PAP leadership" would be understood by an ordinary reasonable Singaporean to refer to the leaders of the prevailing

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30 Xu Trial Submissions at para 85 (ROA p 3890).

31 Xu Trial Submissions at para 128 (ROA p 3902).

32 Xu Trial Submissions at para 78 (ROA p 3889).

33 GD at [92].

34 GD at [73].

35 GD at [74].

People's Action Party ("PAP") Government, namely the members of the Cabinet of Singapore who were responsible for policies and the day-to-day administration of the affairs of the State.[36]

14 Next, the Judge considered that the ordinary reasonable person would know that allegations of foreign policy screw-ups and tampering of the Constitution were matters which involved decisions made by the Cabinet. Since these examples referred to the Cabinet, the following phrase "corruption at the highest echelons" would also be understood by the ordinary reasonable person to be an imputation concerning members of the Cabinet.[37] Thus, this imputation of corruption would be understood to refer to illegal, fraudulent, or dishonest conduct by members of the Cabinet – a serious allegation which the appellants knew would harm the reputation of these members.[38]

15 The Judge also noted that a previous article published on the TOC website dated 30 July 2018, titled "Current Ministers are administrators of a system – not politicians or statesmen" ("the 30 July 2018 Article"), expressly equated the "current PAP leaders" with the members of the Cabinet by setting out a group photograph of the Cabinet members captioned "[m]ost expensive cabinet in the world (Not the furniture type)" and then criticising the "current PAP leaders" in the main text of the article.[39] In his view, the temporal proximity between the 30 July 2018 Article and the present Article showed that the first appellant, as sole administrator and chief editor of the TOC website, must have known that the "present PAP leadership" reference in this Article would be

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36 GD at [74].

37 GD at [75].

38 GD at [82].

39 GD at [76]; ROA at p 1314.

construed by readers to refer to members of the Cabinet.[40] Besides the first appellant's own knowledge, the Judge also cited the 30 July 2018 Article as support for the view that the "present PAP leadership" in the Paragraph would objectively be understood as referring to members of the Cabinet.[41]

16 As for the appellants' constitutional arguments, the Judge noted that the High Court in *Daniel De Costa Augustin v Public Prosecutor* [2020] 5 SLR 629 had found at [83] that the second appellant had not proven a prima facie breach of Art 12(1) to displace the presumption of constitutionality in respect of the decision of the Public Prosecutor. In any event, the second appellant had not provided actual evidence of bias by the AG or the PP, or that there was the application of irrelevant considerations in the exercise of prosecutorial discretion.[42] In respect of the first appellant's argument that the criminal defamation provisions violated Art 14 of the Constitution, the Judge noted that "law" as defined in Art 2 of the Constitution clearly included pre-independence laws such as the Penal Code.[43] Hence, the criminal defamation provisions did not fall outside of the category of permissible restrictions to Art 14 rights under Art 14(2)(*a*). The Judge also rejected the argument that proportionality analysis should be used to review the constitutionality of pre-independence laws, noting that our courts had consistently rejected the notion of proportionality as part of Singapore law.[44]

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40 GD at [76].

41 GD at [74].

42 GD at [65].

43 GD at [65].

44 GD at [65].

### *The offence of criminal defamation*

17 Sections 499 and 500 of the Penal Code read as follows:

> **Defamation**
>
> **499.** Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.
>
> …
>
> **Punishment for defamation**
>
> **500.** Whoever defames another shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

18 The term "person" is defined under s 11 of the Penal Code as including "any company or association or body of persons, whether incorporated or not". This is in line with Explanation 2 to s 499 of the Penal Code:

> *Explanation* 2.—It may amount to defamation to make an imputation concerning a company, or an association or a collection of persons as such.

19 Thus, there are three elements to the offence of criminal defamation under s 499 of the Penal Code:

(a) Making or publishing an imputation concerning any person, which includes a company or an association or collection of persons as such;

(b) Making such imputation by words either spoken or intended to be read or by signs or by visible representations; and

(c) Making such imputation with the intention of harming or knowing or having reason to believe that such imputation will harm the reputation of that person.

20 There are several exceptions to the offence under s 499. The Second Exception, which protects opinions made in good faith respecting the public conduct of public servants, is pertinent in this case as the second appellant relies on it. This exception will be discussed in greater detail at a later section.

21 There are several differences between the offence of criminal defamation under s 499 of the Penal Code and civil defamation. First, whilst the burden of proof in civil suits is on the balance of probabilities, the burden of proof with respect to criminal proceedings is beyond reasonable doubt. Second, the consequences of making out an offence of criminal defamation are more serious than that for civil defamation. Damages are typically granted for successful civil defamation suits, whereas under s 500 of the Penal Code a person found guilty of criminal defamation may be punished with imprisonment for a term of up to two years, or with a fine, or with both.

22 Third, there is a key difference between who the subject of defamation may be in civil defamation as compared to criminal defamation. For civil defamation, where the offending words refer to a class or body of persons as opposed to a specific individual, a successful claim may still be made out if the ordinary reasonable person can conclude that the statement is capable of being interpreted as referring to the individual: *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing (CA)*") at [53].

23 However, for criminal defamation, there is no such requirement that the relevant statement be capable of being interpreted as referring to an individual. Both s 11 of the Penal Code and Explanation 2 to s 499 establish that criminal defamation is not limited to imputations concerning individuals and may still be made out where the relevant imputation concerns a company or an association or collection of persons.

### *The issues to be determined*

24 The following issues arise for consideration with respect to the criminal defamation charges:

(a) First, whether the charges were defective for lack of particulars as to the precise identities of the allegedly defamed persons;

(b) Second, whether, and if so in what way, the Disputed Phrase referred to members of the Cabinet;

(c) Third, whether the appellants knew that the Disputed Phrase would harm the reputation of the members of the Cabinet;

(d) Fourth, whether the appellants may avail themselves of the Second Exception under s 499 of the Penal Code; and

(e) Fifth, whether the criminal defamation provisions are unconstitutional.

### *Whether the criminal defamation charges were defective for lack of particulars*

25 The second appellant submits that the criminal defamation charge against him was defective because it lacked material particulars as to the exact identity of the persons allegedly targeted by the Disputed Phrase. Essentially,

the second appellant argues that since the membership of the Cabinet changes from time to time, it is incumbent on the Prosecution to frame the charge as including the precise names of the members of the Cabinet who were allegedly defamed.[45]

26 Section 124(1) of the Criminal Procedure Code (2020 Rev Ed) ("CPC") stipulates the details which must be included in a criminal charge. It reads as follows:

> **Details of time, place and person or thing**
>
> **124.**—(1) The charge must contain details of the time and place of the alleged offence and the person (if any) against whom or the thing (if any) in respect of which it was committed, *as are reasonably sufficient to give the accused notice of what the accused is charged with*. [emphasis added]

27 As observed earlier at [23], the effect of s 11 of the Penal Code and Explanation 2 to s 499 of the Penal Code is that the victims of an offence under s 499 – *ie*, the allegedly defamed persons – need not be individual persons and may be an association, collection, or body of persons. Thus, contrary to the second appellant's contention, it is not incumbent on the Prosecution to frame the charge as including the precise names of the members of the Cabinet who were allegedly defamed. The term "members of the Cabinet" refers to a sufficiently specific collection or body of persons and comes within Explanation 2 to s 499 as well as the definition of a "person" under s 11. Hence, in the context of s 499, framing the alleged victims of the criminal defamation charge as "members of the Cabinet" is "reasonably sufficient to give the accused notice of what the accused is charged with", as is required under s 124(1) of the CPC.

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[45] De Costa Appeal Submissions at paras 51–59.

There is therefore no reason to find that the criminal defamation charges were defective.

### ***Whether, and in what way, the Disputed Phrase referred to members of the Cabinet***

*The applicable interpretive approach*

28 The following principles for determining the natural and ordinary meaning of allegedly defamatory words are distilled from *Microsoft Corp and others v SM Summit Holdings Ltd and another and other appeals* [1999] 3 SLR(R) 465 ("*Microsoft Corp*") at [53]:

> (a) The court decides what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense. The test is an objective one: it is the natural and ordinary meaning as understood by an ordinary, reasonable person, not unduly suspicious or avid for scandal.
>
> (b) The meaning intended by the maker of the defamatory statement and the sense in which the words were understood by the party alleged to have been defamed are irrelevant. Extrinsic evidence is also not admissible in construing the words; the meaning must be gathered from the words themselves and the context of the entire passage in which they are set out.
>
> (c) The court is not confined to the literal or strict meaning of the words, but takes into account what the ordinary, reasonable person may reasonably infer from the words. The ordinary, reasonable person reads between the lines.

*Application to the facts*

29 The Paragraph in which the Disputed Phrase appears reads as follows:

> The present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap. We have seen multiple policy and foreign screw-ups, tampering of the Constitution, *corruption at the highest echelons* and apparent lack of respect from foreign powers ever since the demise of founding father Lee Kuan Yew. The dishonorable son was also publicly denounced by his whole family, with none but the PAP MPs on his side as highlighted by Mr Low Thia Khiang! The other side is already saying that we have no history, origins, culture and even a sound legal system to begin with. [emphasis added]

30 The focus of the criminal defamation charges was on the Disputed Phrase "corruption at the highest echelons". Each of the criminal defamation charges read in similar form. The first appellant's charge reads:[46]

> You … are charged that you, on or about 4 September 2018, in Singapore, had defamed members of the Cabinet of Singapore by publishing an imputation concerning members of the Cabinet of Singapore by words intended to be read, to wit, by approving the publication on the website www.theonlinecitizen.com of a letter from 'Willy Sum' titled "*The Take Away From Seah Kian Ping's Facebook Post*" which stated that there was "corruption at the highest echelons", knowing that such imputation would harm the reputation of members of the Cabinet of Singapore, and you have thereby committed an offence punishable under s 500 of the Penal Code (Cap 224, 2008 Rev Ed).

31 Similarly, the second appellant was charged as follows:[47]

> You … are charged that you, on 4 September 2018, at about 7.24pm, at an Internet café located in Chinatown, Singapore, had defamed members of the Cabinet of Singapore by making an imputation concerning members of the Cabinet of Singapore by words intended to be read, to wit, by sending an email titled "PAP MP apologises to SDP" from willysim71@yahoo.com.sg to theonlinecitizen@gmail.com which you had written and which

46 ROA at p 12.

47 ROA at p 13.

> stated that there was "corruption at the highest echelons", intending that the contents of the said email would be published on the website www.theonlinecitizen.com, knowing that such imputation would harm the reputation of members of the Cabinet of Singapore, and you have thereby committed an offence punishable under s 500 of the Penal Code (Cap 224, 2008 Rev Ed).

(1) The parties' arguments on appeal

32 Both appellants argue that the Judge erred in finding that the Disputed Phrase referred to members of the Cabinet. The first appellant argues that there was no defamation of members of the Cabinet since no reference to members of the Cabinet was made in the Article or the Disputed Phrase. Furthermore, the Disputed Phrase was open to multiple interpretations and could have referred to elite members of society, scandals at Keppel Corporation, or the entire system of governance in Singapore.[48]

33 The second appellant argues that viewed as a whole, the reference to the "highest echelons" in the Disputed Phrase could not have been referring to the same body of persons as the "PAP leadership" in the first sentence of the Paragraph.[49] The illustration referring to the "highest echelons" could not have been the same as the primary subject the "PAP leadership" itself; otherwise, there would have been no need to use a different term if the author's intention was to refer to the same subject.[50] Furthermore, the example of "tampering of the Constitution" as one of the PAP leadership's shortcomings could not have been directed at members of the Cabinet, since pursuant to Art 5(2) of the Constitution, constitutional amendments are not passed by members of the

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48 Xu Appeal Submissions at paras 22–31.

49 De Costa Appeal Submissions at para 66.

50 De Costa Appeal Submissions at para 66.

Cabinet alone but rather by the votes of not less than two-thirds of the total number of Members of Parliament.[51]

34 The Prosecution's argument on appeal is largely similar to that raised in the proceedings below. It may be summarised as follows:

(a) In the first sentence of the paragraph, the author alleges that the "present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap". As a matter of common sense and plain language, this sentence contains the thesis statement of the Paragraph.[52]

(b) The second sentence then sets out a variety of illustrations to justify the proposition made in the first sentence that the "present PAP leadership" lacks innovation, vision, and drive. These illustrations include "policy and foreign screw-ups" and "tampering of the Constitution", which are both matters within the remit of the Executive and more specifically within the purview of the members of the Cabinet.[53]

(c) The Disputed Phrase "corruption at the highest echelons" in the second sentence is likewise an illustration of the thesis statement in the first sentence. It logically follows that this was an imputation concerning the members of the Cabinet.[54]

(d) This conclusion is bolstered by the fact that in the context of governance in Singapore, an ordinary reasonable person would

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51 De Costa Appeal Submissions at para 67.

52 Prosecution Appeal Submissions at para 45(a).

53 Prosecution Appeal Submissions at para 45(b).

54 Prosecution Appeal Submissions at para 45(c).

understand the phrase the "present PAP leadership", in the manner it was used in the Paragraph, to be referring to the leaders of the prevailing PAP Government; namely, the members of the Cabinet. Since the members of the Cabinet are responsible for all policies and the day-to-day administration of affairs of the State, allegations of "policy or foreign screw-ups" or "tampering of the Constitution" would naturally be construed as being levelled at the members of the Cabinet. Accordingly, the following illustration of there being "corruption at the highest echelons" would also be understood by an ordinary reasonable person as being levelled at the members of the Cabinet.[55]

(e) The fact that the "present PAP leadership" refers to the members of the Cabinet is also evident from the other articles published on the TOC website, specifically the 30 July 2018 Article which allegedly equated the "current PAP leaders" with the members of the Cabinet.[56]

(2) The decision

35 As a preliminary point, the Prosecution's reliance on the 30 July 2018 Article to shed light on the meaning of the phrase "present PAP leadership" in the Paragraph is misplaced. When assessing the meaning of the allegedly defamatory words, extrinsic evidence is inadmissible, and the meaning must be gathered from the words themselves and the context of the passage in which they are set out: *Microsoft Corp* at [53]. The 30 July 2018 Article constitutes such inadmissible extrinsic evidence and cannot be used in the interpretive exercise.

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55 Prosecution Appeal Submissions at para 45(d).

56 Prosecution Appeal Submissions at para 45(e).

36 The Paragraph requires interpretation as to:

(a) First, whether the "present PAP leadership" would be read by the ordinary, reasonable person as referring to members of the Cabinet; and

(b) Second, the relationship between the "present PAP leadership" and "corruption at the highest echelons".

37 As regards the first point, the ordinary, reasonable person would indeed read the "present PAP leadership" in the first sentence of the Paragraph as referring to members of the Cabinet. Read alone, the phrase "present PAP leadership" may refer to different bodies of persons other than the members of the Cabinet – for example, members of the PAP CEC. However, read in the context of the paragraph, the phrase "present PAP leadership" would naturally be equated by the ordinary, reasonable person with the present PAP Government's leadership, *ie*, members of the Cabinet. The key to this interpretation is the reference, in the second sentence of the Paragraph, to "multiple policy and foreign screw-ups" and "tampering of the Constitution". These are matters of State which would reasonably be read as being primarily within the purview of the main decision-making body of the Executive – *ie*, the Cabinet – as opposed to that of bodies such as the PAP CEC, which is an internal party structure. The second appellant argues that constitutional amendments are approved not by the members of the Cabinet, but rather by the votes of two-thirds of Parliament.[57] However, an ordinary, reasonable person would not be focused on the strict legal requirements for passing constitutional amendments, but rather on the body of persons which, in practice, makes the decision to pursue these amendments; that is, the Cabinet. Indeed, the ordinary, reasonable

[57] De Costa Appeal Submissions at para 67.

person reads between the lines, as opposed to being confined to the literal or strict meaning of the words: *Microsoft Corp* at [53].

38 This analysis informs the assessment of the ordinary, reasonable person's reading of the phrase "present PAP leadership" in the first sentence. Since the illustrations of the perceived failures of the "present PAP leadership" in the second sentence are matters which are primarily within the purview of members of the Cabinet, the reasonable inference is that the "present PAP leadership" is a reference to the body of persons responsible for those perceived failures – *ie*, the members of the Cabinet. This conclusion is further supported by the fact that in the Singaporean context, the ordinary, reasonable person would be cognisant that members of the Cabinet would invariably be key members of the PAP, and thus would be apt to associate the "present PAP leadership" with the members of the Cabinet.

39 As for the relationship between the "present PAP leadership" and "corruption at the highest echelons", it is difficult to accept the Prosecution's position that the Disputed Phrase "corruption at the highest echelons" would be interpreted by the ordinary, reasonable person as an allegation levelled at members of the Cabinet.

40 Though I accept the Prosecution's argument that the second sentence of the Paragraph gave illustrations of perceived failures which occurred under the purview of the members of the Cabinet, such as "multiple policy and foreign screw-ups" and "tampering of the Constitution",[58] it does not follow that "corruption at the highest echelons" means, as the Prosecution argues, that the members of the Cabinet were themselves corrupt. Indeed, the more natural

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58 Prosecution Appeal Submissions at para 45(b)–(c).

interpretation, as argued for by the first appellant, is that alongside the other failures, corruption occurring at the highest levels was another instance of a failure of action or omission by the Cabinet.[59] In other words, there is a crucial distinction between saying that members of the Cabinet were in some way responsible for the rise of "corruption at the highest echelons" under their watch and saying that the Cabinet members were corrupt. To my mind, there is more than a reasonable doubt that the objective meaning of the text was that the members of the Cabinet were themselves corrupt.

41 What the ordinary, reasonable person would have read the Paragraph as imputing is that "corruption at the highest echelons" arose under the "present PAP leadership" – *ie*, members of the Cabinet – because of their allegedly poor leadership. The Paragraph clearly characterises the various alleged failures described in the second sentence, including "corruption at the highest echelons", as events which had occurred as a result of the leadership failures referred to in the first sentence, specifically a severe lack of innovation, vision and drive. Whether "the highest echelons" referred to the establishment, the "great and good", or some other segment is not entirely clear, but what matters is that there was an imputation within the Paragraph that members of the Cabinet were responsible, because of their incompetence or failures, for the emergence of serious and substantial corruption in Singapore.

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59 Xu Appeal Submissions at paras 13 and 19.

***Whether the appellants knew that the Disputed Phrase would harm the reputation of the members of the Cabinet***

*The applicable law*

42 Under s 499 of the Penal Code, the applicable *mens rea* to be shown is that the accused published the relevant imputation concerning a person "intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person".

43 Explanation 4 of s 499 elaborates on how an imputation may be said to harm a person's reputation. It reads as follows:

> *Explanation* 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, *lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his calling, or lowers the credit of that person*, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. [emphasis added]

*Application to the facts*

44 The criminal defamation charges against the appellants are for "knowing that such imputation [*ie*, the Disputed Phrase] would harm the reputation of members of the Cabinet of Singapore".[60] Hence, the focus of the inquiry here is on whether the appellants knew that the imputation of "corruption at the highest echelons" would harm the reputation of members of the Cabinet in a manner falling within Explanation 4 of s 499.

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60 ROA at pp 12–13.

(1) The parties' arguments on appeal

45 The second appellant submits that the Judge erred in finding that he had reason to know that harm would be caused to the reputation of members of the Cabinet. Since the Disputed Phrase was allegedly not a reference to members of the Cabinet, the second appellant argues that he did not have either actual or constructive knowledge that harm would be caused to members of the Cabinet.[61] Furthermore, the second appellant submits that the Judge did not consider, or failed to give sufficient weight to the following matters: first, his alleged intention for the Disputed Phrase to refer to "the cream of the crop of society";[62] second, his statements during examination-in-chief that when writing the Article, he had in mind the scandals involving the high echelons of the Keppel Corporation management, the Football Association of Singapore, and the Lee siblings' joint statement about a member of the Cabinet.[63] Thus, the second appellant argues that there was a reasonable doubt as to whether he had actual or constructive knowledge that the reputation of members of the Cabinet would be harmed by his actions.[64]

46 The first appellant also argues that he did not have knowledge that the Article would harm the reputation of members of the Cabinet.[65] First, he submits that he did not know that the Disputed Phrase referred to members of the Cabinet.[66] Instead, he thought that the Disputed Phrase referred to the Oxley

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61 De Costa Appeal Submissions at para 74.

62 De Costa Appeal Submissions at para 76(b).

63 De Costa Appeal Submissions at para 76(a).

64 De Costa Appeal Submissions at para 77.

65 Xu Appeal Submissions at para 37.

66 Xu Appeal Submissions at para 40.

Road Dispute.[67] Next, the first appellant advances three related arguments to show that no harm was occasioned to the reputation of members of the Cabinet, and hence that he would not have known that such harm would result. The arguments are as follows:

(a) First, there was nothing to show that the reputation of individual members of the Cabinet was harmed. There was no complaint made and no civil suit started by the allegedly defamed members of the Cabinet.[68] Furthermore, the Prosecution was unable to particularise which members of the Cabinet had been defamed and failed to call any members of the Cabinet to testify.[69]

(b) Second, it was unclear if the Prosecution was alleging that it was the Cabinet as an entity or individual members of the Cabinet who had been defamed. The first appellant argues that the Prosecution vacillated on this position as it was afraid of contravening the principle in *Derbyshire County Council v Times Newspapers Ltd* [1993] 2 WLR 449 ("*Derbyshire*") that a government body cannot sue for defamation.[70]

(c) Third, the word "corruption" in the Disputed Phrase could refer to moral corruption, as opposed to there being illegal, fraudulent, or dishonest conduct by members of the Cabinet.[71]

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67 Xu Appeal Submissions at paras 46–50.

68 Xu Appeal Submissions at para 59.

69 Xu Appeal Submissions at para 66.

70 Xu Appeal Submissions at paras 69–79.

71 Xu Appeal Submissions at paras 80–82.

The first appellant submits that these three arguments show that no harm was occasioned to the reputation of members of the Cabinet, with the corollary being that he would not have known that any such harm would result.[72]

47 The Prosecution argues that both appellants knew that the "present PAP leadership" would be construed as a reference to members of the Cabinet. First, the Prosecution submits that the second appellant conceded in cross-examination that his references in the Article to "multiple policy and foreign screw-ups" and "tampering of the Constitution" were necessarily references to matters determined by the members of the Cabinet.[73] The Prosecution argues that crucially, the second appellant made a reference to the "PAP leadership cabinet" when answering, in cross-examination, a question relating to which body made decisions on those matters.[74] It argues that this represents a "Freudian slip" which establishes that the second appellant clearly understood the phrase "present PAP leadership" to be a reference to the members of the Cabinet. The second appellant therefore knew that the allegations in the first and second sentences of the Paragraph, including the Disputed Phrase, would be construed as concerning the members of the Cabinet.[75]

48 The Prosecution further contends that the 30 July 2018 Article was evidence that the first appellant, as the chief editor of the TOC website, knew that the reference to the "present PAP leadership" in the Article would be construed as a reference to the members of the Cabinet.[76] The Prosecution also

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72 Xu Appeal Submissions at para 83.

73 Prosecution Appeal Submissions at para 51.

74 Prosecution Appeal Submissions at para 51.

75 Prosecution Appeal Submissions at para 52.

76 Prosecution Appeal Submissions at para 55.

argues that the first appellant conceded in cross-examination that the first sentence of the Paragraph was inextricably linked to the second sentence.[77] Thus, he knew that the matters in the second sentence, including the Disputed Phrase, would be linked to the members of the Cabinet.[78]

49 Lastly, the Prosecution submits that the appellants knew that an imputation of corruption, which insinuates illegal, fraudulent, or dishonest conduct on the part of those in power, would harm the reputation of the members of the Cabinet.[79] Thus, the Judge correctly found that the appellants knew that the imputation of "corruption at the highest echelons" would harm the reputation of the members of the Cabinet.[80]

(2) The decision

50 There are two sub-issues here:

(a) First, whether the appellants knew that the "present PAP leadership" in the first sentence of the Paragraph would be construed as a reference to members of the Cabinet; and

(b) Second, whether the appellants knew that the imputation of there being "corruption at the highest echelons" would harm the reputation of members of the Cabinet.

51 The Prosecution cannot rely on the 30 July 2018 Article as evidence that the first appellant knew that the "present PAP leadership" would be equated

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77 Prosecution Appeal Submissions at para 56.

78 Prosecution Appeal Submissions at para 56.

79 Prosecution Appeal Submissions at paras 50 and 57; NEs (Day 9) p 93 lines 2–7 (ROA p 1074).

80 Prosecution Appeal Submissions at para 59.

with members of the Cabinet. The link between the 30 July 2018 Article and the present Article is tenuous. The articles are written on different dates and by different authors. Although the main subject-matter of the articles may be similar – *ie*, criticising the leaders of the PAP – the present Article must be viewed in its own context. It cannot be inferred, based on the usage of the phrase "current PAP leaders" in a different article by another author, that the first appellant would think the present Article used the phrase "present PAP leadership" in the same manner, just because he was the editor of the TOC website and would have reviewed both articles close in time to each other.

52 Nevertheless, I am satisfied that the appellants knew that the phrase "present PAP leadership" would be construed as a reference to members of the Cabinet. The first appellant agreed in cross-examination that he was aware that the Cabinet was responsible for all government policies and the running of day-to-day affairs,[81] and that "ordinary folks would probably say that a cabinet will be … responsible for all the policies when introduced".[82] Thus, he knew that the failures discussed in the second sentence of the Paragraph, which concerned matters of State, would be construed as matters which were under the purview of the members of the Cabinet.

53 The first appellant went on to acknowledge the link between the first and second sentences of the Paragraph, agreeing that when read together, the sentences suggested that the "PAP leadership" played a part in the "apparent lack of respect from foreign powers".[83] He also acknowledged that members of

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81 NEs (Day 9) p 58 lines 25–31 (ROA p 1039).

82 NEs (Day 9) p 59 lines 8–10 (ROA p 1040).

83 NEs (Day 9) p 58 lines 5–22 (ROA p 1039).

the Cabinet were part of the PAP leadership.[84] Thus, I am satisfied that he knew that the linkage of the "present PAP leadership" to matters which were under the purview of the members of the Cabinet would lead the "present PAP leadership" to be construed as a reference to the members of the Cabinet.

54 The second appellant conceded in cross-examination that the illustrations in the second sentence of the Paragraph involved matters determined by the Cabinet.[85] He also conceded that in the Paragraph, what he meant to say was that as a result of the PAP leadership lacking innovation, vision and drive, the failures listed in the second sentence occurred.[86] Thus, by claiming that the "present PAP leadership" was responsible for certain failures, and then listing failures which he knew were under the purview of the members of the Cabinet, it is evident that the second appellant knew that the "present PAP leadership" would be construed as referring to members of the Cabinet.

55 Furthermore, the second appellant acknowledged, with respect to the illustrations mentioned in the second sentence, that "the lines here are pretty blurred when it comes to the separation of powers, as in PAP leadership cabinet [*sic*]".[87] I agree with the Prosecution that this statement showed that to the second appellant, the PAP leadership and the members of the Cabinet were groups which blurred into each other.[88] This bolsters the conclusion that he knew the "present PAP leadership" would be construed as a reference to members of the Cabinet.

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84 NEs (Day 9) p 66 lines 10–11 (ROA p 1047).

85 NEs (Day 8) p 83 line 16–p 84 line 28 (ROA pp 900–901).

86 NEs (Day 8) p 80 lines 1–24 (ROA p 897).

87 NEs (Day 8) p 84 lines 3–5 (ROA p 901).

88 Prosecution Appeal Submissions at para 52.

56 The second sub-issue is whether the appellants knew that the imputation of there being "corruption at the highest echelons" would harm the reputation of members of the Cabinet. As found above at [40]–[41], the imputation of there being "corruption at the highest echelons" is not to be read as an allegation that the members of the Cabinet were themselves corrupt. Rather, it was an imputation that the members of the Cabinet were responsible for the emergence of "corruption at the highest echelons", in the sense that it occurred on their watch as a result of their incompetence.

57 On this reading, the appellants' arguments that they thought "corruption at the highest echelons" referred to corruption external to the members of the Cabinet do not aid them. Rather, these arguments are in line with the present interpretation – *ie*, that the appellants knew they were saying that because of the incompetence of the members of the Cabinet, "corruption at the highest echelons" had arisen in whatever forms they had in mind. Examples of these alleged instances of corruption include the Oxley Road Dispute (cited by the first appellant),[89] as well as the alleged scandals involving Keppel Corporation, the Football Association of Singapore, and the Lee siblings' joint statement regarding a member of Cabinet (cited by the second appellant).[90]

58 Explanation 4 to s 499 of the Penal Code provides that "[n]o imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others … lowers the character of that person in respect of his calling, or lowers the credit of that person". The imputation contained in the Disputed Phrase satisfies this threshold for finding harm to a person's reputation. The word "corruption" is defined in the *Oxford Advanced*

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89 Xu Appeal Submissions at paras 46–50.

90 De Costa Appeal Submissions at para 76(a).

*Learner's Dictionary* (Diana Lea and Jennifer Bradbery ed) (Oxford University Press, 10th ed, 2023) as "dishonest or illegal behaviour, especially of people in authority".[91] The word "echelon" is defined in *The New Shorter Oxford English Dictionary* (Lesley Brown ed) (Oxford University Press, 1993) as "a particular level in any organization". Thus, the imputation is that as a result of the incompetence of members of the Cabinet, dishonest or illegal behaviour had been allowed to emerge amongst people in authority in certain high-ranking segments of Singaporean society. This allegation is one which strikes at the question of the Cabinet members' competence to run the country. It clearly lowers the character of members of the Cabinet in respect of their position as political leaders and certainly lowers their credit in general. Thus, the appellants, knowing that this was the nature of the imputation, did in fact make the imputation with the knowledge that it would harm the reputation of members of the Cabinet.

59 Taking next the three related arguments which the first appellant advances to show that he had no knowledge that the imputation would harm the reputation of members of the Cabinet, none of these are made out. First, he argues that there was no evidence that the reputation of individual members of the Cabinet was harmed, since no complaint was made nor was any civil suit started by the defamed members, none of them were called by the Prosecution to testify as to the harm they suffered, and the Judge did not specify the harm caused by the imputation.[92] This argument cannot stand. Section 499 of the Penal Code does not require actual harm to the person's reputation to be shown. Rather, the provision stipulates intention or knowledge on the accused's part that the imputation would harm the allegedly defamed person's reputation. It

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91 Respondent's Bundle of Authorities at p 1098.

92 Xu Appeal Submissions at paras 50, 66–67.

may be that in most cases, actual harm to the person's reputation would result, but the provision does not require such evidence of actual harm to be shown. In any case, it is not necessary that there be a complaint, civil suit, or testimony from the defamed persons before harm results from the imputation. Explanation 4 of s 499 provides the threshold for such a finding, namely that the imputation would lower the credit of the allegedly defamed persons or their character in respect of their calling. This threshold has been crossed here.

60 Next, the first appellant argues that the Prosecution vacillated on its position on whether it was the Cabinet as an entity or individual members of the Cabinet who were defamed as it was afraid of contravening the *Derbyshire* principle that a government body cannot sue for defamation.[93] This argument does not touch the analysis under s 499 of the Penal Code. As elaborated earlier at [23], the effect of s 11 of the Penal Code and Explanation 2 to s 499 is that the offence of criminal defamation under s 499 allows for the allegedly defamed "person" to be an association, collection, or body of persons. Thus, the line which the first appellant seeks to draw between the Cabinet as an entity and the members of the Cabinet is not relevant. The crucial point is that the term "members of the Cabinet" refers to a sufficiently specific collection or body of persons, which falls within the acceptable limits of s 499 of the Penal Code.

61 As for *Derbyshire*, the proposition advanced in that case was that a government body cannot sue for defamation in the civil context. Lord Keith held at 459 that "under the common law of England a local authority does not have the right to *maintain an action of damages for defamation*" [emphasis added]. There is no relevance between this principle, which relates to a government body suing for civil defamation, and the present case, which involves criminal

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93 Xu Appeal Submissions at paras 69–79.

proceedings instituted by the AG, not the allegedly defamed persons, concerning criminal defamation under s 499 of the Penal Code.

62 Lastly, the first appellant submits that the word "corruption" in the Disputed Phrase could refer to moral corruption, as opposed to there being illegal, fraudulent, or dishonest conduct by members of the Cabinet.[94] This argument has reduced relevance given the finding that the imputation is that members of the Cabinet were responsible for the emergence of "corruption", as opposed to being corrupt themselves. In any case, based on the political context of the Paragraph and its focus on alleged grave governmental failures, it is difficult to accept that "corruption" would have referred to some more minor form of moral impropriety as opposed to *bona fide* corruption in the form of illegal, fraudulent, or dishonest behaviour by those in power.

### *Whether the appellants may avail themselves of the Second Exception under s 499 of the Penal Code*

63 The second appellant relies on the Second Exception to s 499 of the Penal Code. The Second Exception and the Explanation to Exceptions under s 499 read as follows:

> **Public conduct of public servants**
>
> *Second Exception.*—It is not defamation to *express in good faith any opinion* whatever respecting the conduct of any person touching any discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.
>
> …
>
> **Explanation to Exceptions**
>
> In proving the existence of circumstances as a defence under the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth or Tenth

94 Xu Appeal Submissions at paras 80–82.

> exception, good faith shall be presumed unless the contrary appears.
>
> [emphasis added]

64 The second appellant submits that the Judge erred in rejecting his reliance on the Second Exception. The second appellant argues that since he did not have the members of the Cabinet in mind when he wrote the Article, there was no duty on his part to make any effort to ascertain the truth of facts which he had no intention to refer to.[95] Furthermore, the lack of a subjective intention to refer to the members of the Cabinet meant that he could not have been actuated by malice in writing the Article.[96] Thus, the presumption of good faith under the Explanation to Exceptions was not displaced, and the Judge therefore erred in rejecting his reliance on the Second Exception.[97]

65 There are two issues to be clarified here:

(a) First, what constitutes an "opinion" under the Second Exception as opposed to a statement of fact; and

(b) Second, what constitutes good faith under s 499 of the Penal Code.

66 As regards the first issue, guidance may be taken from case law relating to the defence of fair comment in civil defamation. Although this defence relates to civil defamation, there is no reason – and indeed the appellants do not contend otherwise – why the principles from this body of case law relating to statements

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95 De Costa Appeal Submissions at para 82.

96 De Costa Appeal Submissions at para 83.

97 De Costa Appeal Submissions at para 84.

of fact versus opinion should not be applicable to s 499 of the Penal Code as well.

67 Under the defence of fair comment, a statement of opinion is one which comes with clear indications, from the context in which it appears, that it is the author's own view or interpretation of matters rather than a statement of fact: *Review Publishing (CA)* at [146]–[147]. A statement of opinion must not be intermingled with a statement of fact such that the reader cannot distinguish between what is opinion and what is fact: *Review Publishing (CA)* at [147]. The identification of a statement of opinion or fact is a question of fact for the court's determination and is dependent upon the nature of the imputation conveyed, and the context and circumstances in which it is published: *Review Publishing (CA)* at [144].

68 Applying these principles, the imputation made by the appellants is clearly a statement of fact. The first and second sentences of the Paragraph read as follows:

> The present PAP leadership severely lacks innovation, vision and the drive to take us into the next lap. We have seen multiple policy and foreign screw-ups, tampering of the Constitution, corruption at the highest echelons and apparent lack of respect from foreign powers ever since the demise of founding father Lee Kuan Yew. …

69 There is no clear indication, from the context of these sentences, that the allegation of "corruption at the highest echelons" was the author's own view or interpretation rather than a statement of fact. Instead, the author appears to be making a definitive statement of fact that there have been "multiple policy and foreign screw-ups, tampering of the Constitution, corruption at the highest echelons and apparent lack of respect from foreign powers" under the "present PAP leadership" ever since the demise of Mr Lee Kuan Yew. Hence, the

imputation here – *ie*, that "corruption at the highest echelons" occurred under the watch of members of the Cabinet due to their incompetence – was a statement of fact rather than a statement of opinion. The appellants therefore cannot rely on the Second Exception under s 499 of the Penal Code.

70 Given this finding, it is not strictly necessary to address the second issue pertaining to good faith under s 499. Nevertheless, I note that it is doubtful whether the second appellant acted in good faith. Contrary to what the second appellant argues, I have found (at [54]–[57]) that he knew the phrase "present PAP leadership" would be construed as a reference to members of the Cabinet and "corruption at the highest echelons" would be construed as something which had occurred on the watch of members of the Cabinet due to their incompetence. Thus, the second appellant's argument that he had no duty to make any effort to ascertain the truth of his allegations cannot stand.[98]

71 The factors for ascertaining whether an accused person acted in good faith under the Exceptions to s 499 of the Penal Code are the nature of the imputation, the circumstances under which it was made, whether there was malice, whether any enquiry was made before making the imputation, and whether there were reasons to accept the accused's story that due care and attention were taken and he or she was satisfied that the imputation was true: *Harbans Singh Sidhu v Public Prosecutor* [1971-1973] SLR(R) 610 at [11]. On the facts, there was nothing in the Article or the second appellant's testimony which indicated that he had made any enquiry to satisfy himself that the imputation was true. Instead of being a considered account which was composed with due care and attention to the facts, the imputation appeared to be a broad attack on members of the Cabinet which stemmed from the second

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98 De Costa Appeal Submissions at paras 83–84.

appellant's own unhappiness with them and his personal conviction that their poor leadership was to blame for the various alleged failures. Hence, it cannot be said that the second appellant acted in good faith.

***Whether the criminal defamation provisions were unconstitutional***

*The parties' arguments on appeal*

72 On appeal, the second appellant does not continue with his arguments at trial that the AG's decision to prosecute him violated Art 12 of the Constitution. Thus, only the first appellant makes submissions relating to constitutional issues. The first appellant advances essentially the same arguments as he did in the proceedings below, chiefly that:

(a) Article 14(2)(*a*) of the Constitution does not apply to pre-independence laws, which includes the criminal defamation provisions;[99]

(b) A proportionality analysis should apply to scrutinise the constitutionality of pre-independence laws restricting the rights protected under Art 14(1);[100]

(c) The criminal defamation provisions are not proportionate to achieving any interest in Art 14(2)(*a*);[101] and

(d) Even if Art 14(2)(*a*) is applicable, the criminal defamation provisions are unconstitutional as Parliament did not consider

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99 Xu Appeal Submissions at paras 89–92.

100 Xu Appeal Submissions at para 97.

101 Xu Appeal Submissions at para 122.

them to be necessary or expedient and there is no nexus between them and the purposes enumerated under Art 14(2)(*a*).[102]

*The decision*

(1) Article 14(2)(*a*) applies to the criminal defamation provisions

73 Article 14(1)(*a*) of the Constitution enshrines the right to freedom of speech and expression in Singapore. Article 14(2)(*a*), however, provides for the type of restrictions which may be imposed on this right. The two provisions read as follows:

> **Freedom of speech, assembly and association**
>
> 14.—(1) Subject to clauses (2) and (3) —
>
> (a) every citizen of Singapore has the right to freedom of speech and expression;
>
> …
>
> (2) Parliament may by law impose —
>
> (a) on the rights conferred by clause (1)(a), *such restrictions as it considers necessary or expedient* in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
>
> …
>
> [emphasis added]

74 The first appellant's argument is that since Art 14(2)(*a*) states that "Parliament may by law impose … such restrictions as it considers necessary or expedient", the relevant laws permitted under Art 14(2)(*a*) must have been

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102 Xu Appeal Submissions at paras 142–147.

introduced, debated, and enacted by Parliament.[103] As pre-independence laws such as the criminal defamation provisions were not introduced, debated and enacted by Parliament as such, they were not imposed by Parliament and Parliament could not have considered them to be "necessary or expedient" for any of the purposes listed under Art 14(2)(*a*).[104] The criminal defamation provisions are therefore not valid restrictions on the right to freedom of speech and expression falling within the scope of Art 14(2)(*a*).[105]

75 The difficulty with this argument is that Art 14(2)(*a*) does not require that Parliament must have introduced, debated, and enacted such laws. Pre-independence laws which have been retained by Parliament may also be said to be "imposed" by Parliament, since their continued operation takes place only with Parliament's approval. Indeed, Parliament is not excluded from assessing and considering laws which were enacted before independence. The text of Art 14(2)(*a*) does not stipulate that Parliament cannot consider such laws to be "necessary or expedient" for the purposes enumerated under Art 14(2)(*a*). Thus, the analysis for the constitutionality of pre-independence laws under Art 14 is no different from that for post-independence laws – *ie*, via the framework under Art 14(2)(*a*).

76 The criminal defamation provisions, despite being pre-independence laws, do satisfy the requirements of Art 14(2)(*a*). They have been continuously retained by Parliament as part of the body of Singapore criminal law throughout the numerous reviews and amendments of the Penal Code conducted since independence. Indeed, Parliament constantly reviews and updates the

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103 Xu Appeal Submissions at para 91.

104 Xu Appeal Submissions at para 92.

105 Xu Appeal Submissions at para 93.

provisions within the Penal Code. Some provisions are amended, whilst new provisions are introduced and provisions which are no longer necessary are repealed. Thus, in the Second Reading of the Penal Code (Amendment) Bill 2007, Senior Minister of State for Home Affairs Associate Professor Ho Peng Kee emphasised the detailed review of the Penal Code which had been conducted then (*Singapore Parliamentary Debates, Official Reports* (22 Oct 2007), vol 83 at col 2175):

> We carefully considered every feedback received, holding discussions with the relevant agencies to explore the ideas, suggestions and views that surfaced … In all, this review will see 77 provisions expanded, updated or clarified, four provisions repealed, and 21 new offences enacted to address identified gaps in the law … we have undertaken *a comprehensive and holistic review of all the penalties set out in the Code*. [emphasis added]

77 The continuous retention of the criminal defamation provisions as part of the body of Singapore law indicates that they are "imposed" by Parliament since their continued operation takes place only with Parliament's approval. Since the provisions are retained specifically as part of the Penal Code, this also indicates that they are considered by Parliament to be "necessary or expedient" for the interests of public order under Art 14(2)(*a*). For the purposes of evaluating whether a law was considered by Parliament to be "necessary or expedient", it is not necessary for Parliament to have expressly referred to the restriction of the relevant constitutional right; rather, the court may infer from the general purposes for which Parliament approved the relevant legislation that it had considered it "necessary or expedient" to restrict the constitutional right in question: *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 ("*Jolovan Wham*") at [31]. I am satisfied that the clear inference from the continuous retention of the criminal defamation provisions as part of the Penal Code is that Parliament does consider the criminal defamation provisions to be

"necessary or expedient" in the interests of public order as is required under Art 14(2)(*a*).

78 However, the simple fact of a law's existence and approval by Parliament would not be sufficient to find that Parliament considered it to be "necessary or expedient". The court must determine, under Art 14(2)(*a*), whether Parliament considered a law to be "necessary or expedient" *for one of the enumerated purposes* in the provision. The mere existence or approval by Parliament of a law would be insufficient to show that it considered there to be a link between the law and one of the enumerated purposes. Nevertheless, with respect to the criminal defamation provisions, it is hard to see how Parliament could not have considered there to be a link between the provisions and providing against public order. This purpose is inherent within the Penal Code and the criminal defamation provisions themselves, such that it is unnecessary for there to be any explicit recognition of the link before it can be said that Parliament considered the link to exist. The retention of the criminal defamation provisions within the Penal Code since independence is therefore sufficient to find an implicit recognition on Parliament's part that the criminal defamation provisions were "necessary or expedient" in the interests of public order.

79 Furthermore, under Art 14(2)(*a*), the phrase "necessary or expedient" does not appear to apply to restrictions which "provide against contempt of court, defamation or incitement to any offence". Art 14(2)(*a*) states that "Parliament may by law impose … such restrictions as it considers necessary or expedient [in the interests of the various purposes] … *and* restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation, or incitement to any offence" [emphasis added]. Hence, the phrase "necessary or expedient" does not seem to apply to the second group of restrictions, which includes laws providing against defamation. It is therefore

doubtful whether the phrase "necessary or expedient" under Art 14(2)(*a*) even applies to the criminal defamation provisions. Nevertheless, this analysis is of little consequence to the present case, given the finding that the criminal defamation provisions were in any case considered by Parliament to be "necessary or expedient" in the interests of public order.

(2) Proportionality analysis does not apply in Singapore constitutional law

(A) PROPORTIONALITY ANALYSIS

80 The first appellant argues that since Art 14(2)(*a*) should not apply to pre-independence laws such as the criminal defamation provisions, proportionality analysis should be applied instead to determine if the provisions are constitutionally valid.[106] Given the finding at [75] that Art 14(2)(*a*) is in fact applicable to pre-independence laws, it is not strictly necessary, on the first appellant's case, to consider his submissions relating to proportionality analysis. However, since it could be argued that proportionality analysis should apply in spite of Art 14(2)(*a*), this issue will be examined.

81 The doctrine of proportionality analysis is a specific legal test used for determining whether governmental acts or laws are justified under limitation clauses in constitutional provisions. It has been described as comprising four components (see Aharon Barak, *The nature and function of proportionality*, in *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) ("*Proportionality: Constitutional Rights and their Limitations*") at p 131 and Alec Stone Sweet and Jud Mathews, *Proportionality and Constitutional Governance*, in *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford

106 Xu Appeal Submissions at paras 92–94.

University Press, 2019) ("*Proportionality Balancing and Constitutional Governance*") at p 35):

> (a) First, the "proper purpose" test, which requires that the proposed limitation of a constitutional right serves a constitutionally authorised purpose.
>
> (b) Second, the "rational connection" test, which requires a rational nexus to exist between the proposed limitation and the purpose pursued.
>
> (c) Third, the "necessity" test, which requires that the limitation does not impair the constitutional right more than necessary for the achievement of the purpose pursued.
>
> (d) Fourth, the "balancing" test (also known as "proportionality in the strict sense"), which requires the court to balance the benefits gained by fulfilling the pursued purpose against the impairment caused to the constitutional right. This balance must be determined by the court to be proportionate – *ie*, the benefits gained by the proposed limitation must justify the impairment to the right.

If a proposed limitation fails any of these four sub-tests, it will be constitutionally invalid under proportionality analysis.

### (B) LACK OF APPLICABILITY TO SINGAPORE CONSTITUTIONAL LAW

82 Proportionality analysis has been adopted, to varying degrees, in several jurisdictions around the world (see Vicki Jackson, "*Constitutional Law in an Age of Proportionality*" (2014) 124(8) Yale Law Journal 3094 at 3094). The doctrine is perhaps most prominently applied in the jurisprudence of the European Court of Human Rights. It has also been applied in jurisdictions such

as the United Kingdom and Canada (see Professors Stone Sweet and Mathews, *Proportionality Balancing and Constitutional Governance* at pp 70–72).

83 However, the adoption of proportionality analysis in other jurisdictions does not determine its applicability in Singapore. The established position in Singapore is that proportionality analysis has never been part of our constitutional law: *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") at [87].

(C) PROPORTIONALITY ANALYSIS CONTRADICTS THE SEPARATION OF POWERS

84 Besides the forgoing difficulty, adoption of proportionality analysis would contradict the principle of separation of powers, which is well-established in Singapore constitutional law: *Jolovan Wham* at [27]. The separation of powers is inherent in our Constitution: Art 38 of the Constitution vests the legislative power of Singapore in the Legislature (comprising the President and Parliament); Art 23(1) vests the executive power in the President (and exercisable by the Cabinet or any Minister authorised by the Cabinet); and Art 93 vests the judicial power in the courts. Essentially, the Legislature is charged with making laws, the Executive with governing the country according to those laws, and the Judiciary with the responsibility for adjudicating individual cases by pronouncing on the meaning of the laws: *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*") at [90].

85 Although the relationship between the different branches of Government is admittedly a complex one (see *Tan Seet Eng* at [91]), it has been a consistent position in Singapore law that courts cannot create or amend laws in a manner which permits recourse to extra-legal policy factors and considerations: *Lim*

*Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang*") at [77]. The Judiciary is not well-equipped to handle extra-legal issues involving national security, policy, or other polycentric political considerations: *Tan Seet Eng* at [93]. Rather, the courts and judges specialise in interpreting and applying the law in order to uphold justice in the specific cases which come before them. Furthermore, as unelected officials, judges lack the democratic mandate to pronounce upon matters requiring the determination and assessment of moral, political, social, and cultural mores: *UKM v Attorney-General* [2019] 3 SLR 874 at [128]. Thus, the evaluation of the substantive merits of laws – *ie*, the assessment of the moral, political, social, and cultural desirability of certain laws – should be left to the Legislature.

86 Deference to the Legislature in the evaluation of the substantive merits of laws is evident in Singapore case law: see *Ong Ah Chuan v Public Prosecutor* [1981] 1 AC 648 at 673–674; *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [49]; *Lim Meng Suang* at [82]. In *Lim Meng Suang*, concerning the former s 377A of the Penal Code, Andrew Phang Boon Leong JA explained the importance of courts refraining from assuming the legislative function of reviewing the extra-legal merits of legislation. He observed that it would be a violation of the separation of powers for courts to engage in the determination of extra-legal considerations and matters of social policy (at [189]):

> … many of the arguments tendered to this court, whilst valid (or, at least, plausible) in their own right, *involved extra-legal considerations and matters of social policy which were outside the remit of the court*, and should, instead, have been canvassed in the legislative sphere … *the court can only consider legal (as opposed to extra-legal) arguments*. This ensures that it will not become a "mini-legislature". The court *cannot – and must not – assume legislative functions which are necessarily beyond its remit*. To do so would be to efface the very separation of powers

> which confers upon the court its legitimacy in the first place. *If the court were to assume legislative functions, it would no longer be able to sit to assess the legality of statutes from an objective perspective*. Worse still, it would *necessarily be involved in expressing views on extra-legal issues which would – in the nature of things – be (or at least be perceived to be) subjective in nature*. This would further erode the legitimacy of the court, which ought only to sit to administer the law in an objective manner. [emphases added; emphases in original omitted]

87 Thus, respect for the separation of powers generally precludes courts from engaging in reviews of the substantive merits of legislative acts, which would necessarily entail courts engaging in the determination of matters involving extra-legal polycentric considerations of policy, politics, and ethics: matters which are rightfully the province of the Legislature rather than the Judiciary.

88 The scrutiny befitting the courts' role is defined by the enumerated rights and other provisions of the Constitution. Adopting a proportionality doctrine rewrites the Constitution, arrogating to the courts a limitation on the breadth of action of the Legislature that is not contemplated by the text of the Constitution. If the courts were to do so, they would be grafting a concept alien to the text. The true life of the text lies in its proper interpretation, not in the improper infusion of the subjective wishes of unelected officials, lawyers, or academics. If the constitutional framework is to be changed, there are proper mechanisms to be used; the courts cannot be invoked for that.

(3) The applicable approach under Art 14

89 The applicable approach under Art 14 to determine the validity of a restriction on the right to freedom of speech and expression was set out in *Jolovan Wham* and stems solely from the text of Art 14(2)(*a*). The three-step framework in *Jolovan Wham* at [29]–[32] (and as applied in *The Online Citizen*

*Pte Ltd v Attorney-General and another appeal and other matters* [2021] 2 SLR 1358 at [55]) is as follows:

> (a) First, the court must assess whether the legislation restricts the constitutional right under Art 14 in the first place;
>
> (b) Second, if the legislation restricts the constitutional right, the court must determine whether Parliament considered the restriction to be "necessary or expedient" in the interests of one of the enumerated purposes under Art 14(2)(*a*). In making that assessment, the court may have regard to the relevant legislation, parliamentary material, contemporary speeches as well as documents to determine whether Parliament had considered it "necessary or expedient" to restrict the constitutional right in question, or more generally to assess the purposes for which Parliament passed the relevant legislation. It is not necessary for Parliament to have expressly referred to the restriction of the relevant constitutional right: the court may infer from the general purposes for which Parliament passed the relevant legislation that it had considered it "necessary or expedient" to restrict the constitutional right in question.
>
> (c) Third, the court must analyse whether, objectively, the restriction of the constitutional right falls within any of the enumerated purposes under Art 14(2)(*a*). This must be established by showing a nexus between the purpose of the restriction and one of the enumerated purposes.

90 The Court of Appeal in *Jolovan Wham* further elaborated at [33] that "[i]n the final analysis, it is imperative to appreciate that a balance must be found between the competing interests at stake". The first appellant argues that the requirement of a "balance" here resembles the balancing exercise

undertaken in proportionality analysis.[107] However, the "balance" referred to in *Jolovan Wham* appears to be quite different from the balancing exercise in proportionality analysis. The Court of Appeal in *Jolovan Wham*, in holding that "a balance must be found between the competing interests at stake", followed that statement by noting that "the idea of achieving a balance between a constitutional right and a constitutionally permitted derogation *is not novel to our law*" [emphasis added]. It went on to cite the cases of *Chee Siok Chin* at [2] and *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*") at [120] as support for the presence of this idea in Singapore law.

91 *Chee Siok Chin* is the very same case in which V K Rajah J held at [87] that the notion of proportionality had never been part of the common law or Singapore law on judicial review. Thus, the "balance" referred to by Rajah J at [2] is not the balancing conducted under proportionality analysis. Rather, the "balance" referred to in *Chee Siok Chin* is one required by Art 14 itself such that a proposed restriction on the right can be said to be "necessary or expedient". This interpretation is supported by the Court of Appeal's observation in *Ting Choon Meng* at [120] (also cited in *Jolovan Wham*) that the question is "whether the balance between the right to free speech and the protection of public order has been struck in a "necessary or expedient" manner".

(4) The criminal defamation provisions are constitutionally valid under Art 14(2)(*a*)

92 Applying the *Jolovan Wham* framework, the criminal defamation provisions are constitutionally valid under Art 14(2)(*a*). First, the criminal

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107 Xu Appeal Submissions at paras 114–118.

defamation provisions do restrict the right to freedom of speech and expression under Art 14(1)(*a*). Second, Parliament did consider the criminal defamation provisions to be "necessary or expedient" in the interests of public order. As was observed at [76], the Penal Code has been considered, reviewed, and amended from independence till the present-day. The criminal defamation provisions have been continuously retained throughout these reviews and amendments. Thus, Parliament did consider the criminal defamation provisions to be "necessary or expedient" in the interests of public order. Third, there is a clear nexus between the criminal defamation provisions and public order, which is one of the enumerated purposes under Art 14(2)(*a*). Hence, the criminal defamation provisions are constitutionally valid under Art 14(2)(*a*).

***Conclusion on the criminal defamation charges***

93 For the reasons above, the convictions of the two appellants on the criminal defamation charges were upheld, though on different reasoning from that of the court below. This difference in reasoning did not call for the amendment of the charges or the calling of new defences; it was only in relation as to how the elements were made out on the facts found by the court. The charges against the two appellants did not have to and did not actually go into how the defamatory effect was made out. Taking the charge against the first appellant as an example, it read:

> You … are charged that you, on or about 4 September 2018, in Singapore, had defamed members of the Cabinet of Singapore by publishing an imputation concerning members of the Cabinet of Singapore by words intended to be read, to wit, by approving the publication on the website www.theonlinecitizen.com of a letter from 'Willy Sum' titled "*The Take Away From Seah Kian Ping's Facebook Post*" which stated that there was "corruption at the highest echelons", knowing that such imputation would harm the reputation of members of the Cabinet of Singapore, and you have thereby committed an

> offence punishable under s 500 of the Penal Code (Cap 224, 2008 Rev Ed).

The charges against the two appellants can stand unaltered even on the finding of this court that the defamatory effect was not that there was corruption within the Cabinet but that the Cabinet had allowed such corruption to arise at the highest echelons external to itself.

## The CMA charge

### *The parties' cases below*

94 Before the Judge below, the Prosecution submitted that the second appellant had used Mr Sim's Yahoo Account without authority for the purpose of sending out the Email on 4 September 2018.[108]

95 The Prosecution's characterisation of the relevant events was as follows:

> (a) Mr Sim created the Yahoo Account prior to meeting the second appellant, having met him sometime in 2005 to 2006.[109] Sometime between 2006 to 2008, he gave the second appellant the account and password details for the Yahoo Account as he needed the second appellant's help to craft emails relating to his bankruptcy matter.[110] He did this as he was bad with computers, writing emails, and writing in English.[111] The second appellant subsequently helped Mr Sim with writing emails to the relevant departments for his bankruptcy, Housing

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108 Prosecution Trial Submissions at para 9.

109 Prosecution Trial Submissions at para 12; NEs (Day 3) p 17 lines 8–20 (ROA p 305).

110 Prosecution Trial Submissions at para 12; NE (Day 3) p 17 lines 25–29 (ROA p 305).

111 Prosecution Trial Submissions at para 12; NE (Day 3) p 15 lines 2–7, p 16 lines 10–12 (ROA pp 303–304).

Development Board ("HDB") and traffic matters. Mr Sim essentially left it to the second appellant to draft and send out these emails.[112]

(b) During the period when the second appellant was using the Yahoo Account to send emails on Mr Sim's behalf, Mr Sim came to realise that certain other emails had also been sent out from the Yahoo Account without his knowledge. Mr Sim spoke to the second appellant on a few occasions and made it clear to him that he should not use Mr Sim's personal accounts to send emails to other addressees without his permission.[113] However, Mr Sim did not change the password to his Yahoo Account as he still needed the second appellant's help to craft emails relating to the bankruptcy, HDB and traffic matters on his behalf and also because he trusted the second appellant as a friend.[114]

(c) Sometime in 2015 to 2016, Mr Sim realised that he could not access the Yahoo Account. He asked the second appellant for the password, but he claimed not to have it either. Mr Sim only managed to regain access to his Yahoo Account on 21 December 2018 with the assistance of the police, using another account, willysim71@gmail.com ("the Gmail Account"), which was linked to the Yahoo Account. Prior to that, he did not think of using the Gmail Account to change the password to the Yahoo Account.[115]

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112 Prosecution Trial Submissions at para 10; NEs (Day 3) p 16 lines 16–18 (ROA p 304).

113 Prosecution Trial Submissions at para 14; NEs (Day 3) p 43 line 23–p 44 line 8 (ROA pp 331–332).

114 Prosecution Trial Submissions at para 14; NEs (Day 3) p 44 line 27–p 45 line 5 (ROA pp 332–333).

115 Prosecution Trial Submissions at para 13; NEs (Day 3) p 18 lines 4–11 (ROA p 306), p 39 lines 2–15 (ROA p 327).

(d) Mr Sim had not authorised the second appellant to use the Yahoo Account to send the Email, and he only found out that the second appellant had done so when the police raided Mr Sim's house in connection with the Email.[116]

96 In contrast, the second appellant argued that Mr Sim had given him blanket permission to use the Yahoo Account for his purposes. The second appellant's narrative was that Mr Sim did not want the Yahoo Account anymore and he had told Mr Sim that he would be using the account for writing articles. He claimed that Mr Sim never told him to stop writing articles using the Yahoo Account.[117] The second appellant further argued that this narrative was largely consistent with his statements, *ie*, that he had helped Mr Sim to write appeals relating to summonses, arrears and traffic offences; that Mr Sim had never objected to him using the Yahoo Account for other purposes; and that Mr Sim had even given him feedback regarding his usage of the Yahoo Account for other purposes.[118]

97 The second appellant also contended that Mr Sim never took active steps to recover his account even after finding out that the second appellant had allegedly sent emails without his permission. He argued that Mr Sim could have recovered his account if he genuinely wanted to, with the corollary being that Mr Sim had given consent for him to access the Yahoo Account for all purposes.[119]

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116 Prosecution Trial Submissions at para 10; NEs (Day 3) p 36 lines 21–29 (ROA p 324), p 50 line 19–p 51 line 17 (ROA pp 338–339).

117 De Costa Trial Submissions at para 10; ROA at p 1239 (P14 – Mr De Costa's Statement to police dated 26 November 2018).

118 De Costa Trial Submissions at para 11.

119 De Costa Trial Submissions at paras 14–21.

### *The decision below*

98 The Judge found Mr Sim to be a truthful and credible witness who gave consistent and textured evidence and had no motive to fabricate the evidence against the second appellant.[120] In contrast, the Judge rejected the second appellant's evidence that Mr Sim had never objected to his use of the account, noting that Mr Sim had been very angry about the emails criticising government officers which were sent without his consent.[121] Furthermore, the Judge found the second appellant to be an unreliable witness who gave evidence that was inconsistent internally and externally.[122] Thus, he preferred Mr Sim's evidence to that of the second appellant and convicted the second appellant on the CMA charge.[123]

### *The arguments on appeal*

99 The second appellant argues that Mr Sim's evidence does not meet the "unusually convincing" standard which applies to the uncorroborated evidence of a witness where such evidence forms the sole basis for conviction: *Public Prosecutor v GCK* [2020] 1 SLR 486 ("*GCK*").[124] First, he claims that Mr Sim had a propensity to be evasive or unreliable when giving testimony. In support of this claim, he refers to an alleged inconsistency in Mr Sim's testimony where Mr Sim claimed to have no knowledge about the existence of a 2008 article published on the TOC website ("the 2008 Article") which was co-written by the

120 GD at [35].

121 GD at [36].

122 GD at [37].

123 GD at [52]–[53].

124 De Costa Appeal Submissions at paras 8–9.

second appellant and another author in relation to Mr Sim's troubles with loan sharks.[125]

100 Next, the second appellant submits that Mr Sim, even after finding out that the second appellant had allegedly been sending emails from the Yahoo Account without his knowledge, did not take active steps to change the password to the Yahoo Account until December 2018.[126] Furthermore, when Mr Sim forgot the password to the Yahoo Account in 2016 and asked the second appellant on several occasions for the password but to no avail, he did not take active steps thereafter to recover the Yahoo Account until December 2018.[127] Given that Mr Sim could have asked his friend for help to recover the Yahoo Account instead,[128] the second appellant argues that Mr Sim's conduct in not taking active steps to recover the Yahoo Account evinced retrospective consent by acquiescence or inaction to the sending of emails to other third parties without his knowledge.

101 On appeal, the Prosecution refers to several pieces of documentary evidence to show that the second appellant was in the habit of using Mr Sim's Yahoo Account without his consent to send out emails. These include the following:

(a) Documentary evidence showing that the Yahoo Account was used to send an appeal to the Public Service Division regarding the

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125 De Costa Appeal Submissions at paras 14–16; NEs (Day 4) p 48 lines 23–25 (ROA p 393), p 49 lines 1–4, 16–22 and 24–25 (ROA p 394), p 54 lines 23–32–p 55 lines 1–3 (ROA pp 399–400), p 56 lines 12–32–p 57 lines 1–3 (ROA pp 401–402).

126 De Costa Appeal Submissions at para 25.

127 De Costa Appeal Submissions at para 40(b).

128 De Costa Appeal Submissions at para 32.

repossession of Mr Sim's HDB flat.[129] The Prosecution argues that this supports Mr Sim's account that he had asked the second appellant to use the Yahoo Account for sending out such appeals.[130]

(b) Documentary evidence showing that, as of 4 September 2018, the profile name for the Yahoo Account remained as "Wee lee Sum".[131] The Prosecution argues that this contradicts the second appellant's narrative that he actively sought to dissociate the Yahoo Account from Mr Sim's identity by changing its profile name after allegedly taking over the account in 2016 – in particular, by changing the profile name to "Willie Tan".[132]

(c) Documentary evidence showing that the second appellant continued to sign off on emails sent from the Yahoo Account with variations of the name "Willy Sum".[133]

(d) Documentary evidence pertaining to the second appellant's own email address which showed that he sent multiple emails to TOC using his own email address, decostadaniel@yahoo.com, on more benign matters or when he intended to use temperate language in his commentary.[134] This indicated that the second appellant deliberately chose to use the Yahoo Account and signed off as "Willy Sum" for

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129 ROA at p 3817.

130 Prosecution Appeal Submissions at para 19(d).

131 ROA at p 1216.

132 Prosecution Appeal Submissions at para 19(c); ROA at p 1239.

133 Prosecution Appeal Submissions at para 19(b); NEs (Day 8) p 39 lines 14-18 (ROA p 856).

134 ROA at pp 3806 and 3813.

articles in which he sought to include controversial or insulting political comments.

102 The Prosecution further submits that Mr Sim's narrative should be accepted as he was found by the Judge to be a credible witness who was candid and truthful in answering difficult questions.[135] Furthermore, he had no reason to falsely incriminate the second appellant.[136] In contrast, the Prosecution argues that the second appellant's evidence was full of inconsistencies, and hence the Judge did not err in preferring Mr Sim's evidence over the second appellant's and in concluding that the second appellant had no authority to access the Yahoo Account for the purpose of sending out the Email.[137]

***The applicable law***

103 Section 3(1) of the CMA reads as follows:

> **Unauthorised access to computer material**
>
> **3.**—(1) Subject to subsection (2), any person who knowingly causes a computer to perform any function for the purpose of securing access without authority to any program or data held in any computer shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a second or subsequent conviction, to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both.

104 There are two elements to the offence under s 3(1) of the CMA. First, the accused must have "knowingly" caused a computer to perform a function;

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135 Prosecution Appeal Submissions at para 21.

136 Prosecution Appeal Submissions at para 20.

137 Prosecution Appeal Submissions at para 23.

second, this must have been done for the purpose of securing access "without authority" to any program or data held in the computer.

105 The phrase "without authority" is defined in s 2(5) of the CMA:

> (5) For the purposes of this Act, access of any kind by any person to any program or data held in a computer is unauthorised or done without authority if —
>
> > (*a*) he is not himself entitled to control access of the kind in question to the program or data; and
> >
> > (*b*) he does not have consent to access by him *of the kind* in question to the program or data from any person who is so entitled.
>
> [emphasis added]

106 Thus, the authorisation must relate to the kind of access in question to the program or data: *Lim Siong Khee v Public Prosecutor* [2001] 1 SLR(R) 631 at [19]. The key inquiry is therefore whether authorisation was granted for the specific purpose or use for which the accused person had accessed the relevant program or data.

### *Application to the facts*

107 It is undisputed that the second appellant knowingly sent the Email from the Yahoo Account on 4 September 2018.[138] The main issue concerns the second element of the offence, which is whether he had authority to access the Yahoo Account for the purpose of sending the Email. The Prosecution does not dispute that Mr Sim granted the second appellant access to the Yahoo Account to send emails on his behalf to various government departments concerning his bankruptcy, HDB and traffic summons-related matters.[139] However, the

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138 ASOF at para 3.

139 Prosecution Appeal Submissions at para 8(a).

Prosecution argues that this consent did not extend to the usage of the Yahoo Account to send the Email.[140]

108 Contrary to the arguments of the second appellant, the "unusually convincing" standard does not apply. It is only relevant if the evidence of a witness is uncorroborated and forms the sole basis for conviction: *GCK* at [89]. The present case is not one where Mr Sim's evidence was uncorroborated. Various pieces of documentary evidence were relied upon to corroborate his narrative; including the emails sent from the Yahoo Account.

109 The second appellant's arguments are really limited to two points. First, he claims that Mr Sim was an evasive and unreliable witness, based on the alleged inconsistency in Mr Sim's evidence regarding whether someone from TOC had contacted him concerning the 2008 Article.[141] Second, he argues that by failing to take any steps to recover the Yahoo Account after finding out that the second appellant had allegedly sent emails out without his knowledge, and during the period from 2016 to 2018 when he was unable to access the Yahoo Account, Mr Sim had retrospectively consented, by acquiescence or inaction, to the second appellant using the Yahoo Account to send emails out to other third parties without his knowledge.[142]

110 The alleged inconsistency in Mr Sim's evidence does not have much bearing on his credibility. In the first place, the portions of the trial transcript cited by the second appellant do not show much of an inconsistency in Mr Sim's

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140 Prosecution Appeal Submissions at para 8(h).

141 De Costa Appeal Submissions from paras 13–18.

142 De Costa Appeal Submissions from paras 19–32 and 35–43.

evidence. In the first portion cited by the second appellant,[143] Mr Sim said, at first, that staff from TOC did not contact him regarding the 2008 Article.[144] However, when counsel asked Mr Sim specifically if one Andrew, an editor from TOC, had contacted him regarding the 2008 Article, he said that he was "not very sure".[145] In the second portion cited by the second appellant,[146] when asked again if Andrew had contacted him regarding the 2008 Article, Mr Sim said "I cannot remember",[147] and when pressed on whether his failure to recall meant that there was a possibility that someone from TOC could have contacted him, he agreed.[148]

111 There is no material inconsistency in Mr Sim saying at first that staff from TOC did not contact him regarding the 2008 Article, and later when asked specifically if an Andrew had contacted him, saying that he was "not very sure" and that he could not remember. This seems to be quite a natural way for a witness' mind to work while he is on the stand, especially when he is trying to recall events which happened a decade or more ago. Clouds of uncertainty regarding his memory may form when a different and more specific question is asked, and it is simply honest for him to acknowledge that he is in fact not entirely confident in his recollection. In any case, Mr Sim's evidence relating to the 2008 Article is peripheral to the main thrust of his narrative concerning the Yahoo Account. The alleged aberrations, even if present, certainly do not impact his credibility or that of his narrative in general.

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143 NEs (Day 4) p 54 lines 23–32 (ROA p 399), p 55 lines 1–3 (ROA p 400).

144 NEs (Day 4) p 54 line 29–p 55 line 5 (ROA pp 399–400).

145 NEs (Day 4) p 55 lines 1–2 (ROA p 400).

146 NEs (Day 4) p 56 lines 12–32–p 57 lines 1–3 (ROA pp 401–402).

147 NEs (Day 4) p 56 line 30 (ROA p 401).

148 NEs (Day 4) p 57 line 3 (ROA p 402).

112 Contrary to the second appellant's next argument, Mr Sim's failure to take actions to reassert control over the Yahoo Account did not constitute implied consent for the second appellant to use the Yahoo Account to send any type of email. There are other, more plausible reasons for Mr Sim's inaction.

113 First, Mr Sim testified that when he found out that the second appellant had been sending emails from the Yahoo Account without his knowledge, he spoke to the second appellant and told him that he should not use Mr Sim's personal accounts to send emails to other addressees without his permission.[149] The second appellant agreed not to do so.[150] Since Mr Sim still needed the second appellant's help at the time to send emails on his behalf regarding the bankruptcy and HDB matters, he did not pursue the matter and did not take steps like changing his password to prevent the second appellant from using the Yahoo Account without his permission.[151] Furthermore, he trusted the second appellant as a friend and wanted him to continue to have the convenience of sending emails on his behalf without him around.[152]

114 Second, Mr Sim was not well-versed with technology or computers and was not familiar with how to change his account passwords. He testified that when he changed his Yahoo Account password in 2012, he had to ask a friend to help him make the change as he was "not very good with emails and computers".[153] This lack of computer literacy was corroborated by the police officers' interactions with Mr Sim. PW5 DSP Jonathan Au Yong ("DSP Au

149 NEs (Day 3) p 43 lines 12–20 (ROA p 331), p 44 lines 3–26 (ROA p 332).

150 NEs (Day 3) p 43 lines 19–20 (ROA p 331).

151 NEs (Day 3) p 44 line 27–p 45 line 5 (ROA pp 332–333).

152 NEs (Day 3) p 44 line 27–p 45 line 5 (ROA pp 332–333).

153 NEs (Day 3) p 37 line 26–p 38 line 4 (ROA pp 325–326).

Yong") testified that Mr Sim was unable to access the Yahoo Account and needed DSP Au Yong's assistance to change the account password.[154] PW6 ASP Violet Toh observed to similar effect that Mr Sim faced difficulties when asked to reset his Facebook password.[155] In fact, the second appellant's argument implicitly acknowledges Mr Sim's difficulties with changing his account passwords, since the submission is not that Mr Sim could have changed the password himself, but rather that Mr Sim could have asked his friend (the one who helped him change his password in 2012) to change the account password again if he had wanted to regain control of the Yahoo Account.[156]

115 Based on these strands of evidence, it is perfectly understandable why Mr Sim did not take any steps to change his Yahoo Account password after finding out that the second appellant had been sending emails from the Yahoo Account without his knowledge. He remained in need of the second appellant's help and also faced significant difficulties in changing his account passwords. Taken together, these factors explain Mr Sim's inaction both when he found out that the second appellant had been sending emails without his knowledge and during the period from 2016 to 2018 when he forgot the password to the Yahoo Account. These instances of inaction therefore do not evince Mr Sim's implied consent to the sending of emails to other third parties without his knowledge.

116 Overall, Mr Sim's account of the events relating to the Yahoo Account was both internally and externally consistent. He coherently explained why he had given the second appellant access to his Yahoo Account, which was for the second appellant to help send emails on his behalf to government departments

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154 NEs (Day 6) p 50 line 18–p 51 line 10 (ROA pp 544–545).

155 NEs (Day 7) p 19 line 30–p 20 line 1 (ROA pp 669–670).

156 De Costa Appeal Submissions at para 23.

regarding his bankruptcy, HDB and traffic summons matters as he had a poor command of English.[157] This difficulty with English was corroborated by the documentary evidence; specifically, the personal emails Mr Sim had sent to his ex-wife without any third party's assistance,[158] which contained numerous spelling and grammatical errors as exemplified by the phrases "I sincercly wishes you and Mr Nguyen LanT have a good long lasting relationship forever" and "thank for you to spent our 7 years friendship".[159] This was in contrast to the email sent from Mr Sim's Yahoo Account to the Public Service Division regarding his HDB matters,[160] which the second appellant acknowledged he had written on Mr Sim's behalf,[161] and which was written with a markedly more sophisticated level of English than Mr Sim's personal emails had been. Thus, I accept that Mr Sim had granted the second appellant access to his Yahoo Account for the limited purpose of sending emails to government departments regarding his bankruptcy, HDB and traffic summons matters.

117 This consent never extended to sending all types of emails from the Yahoo Account in general. As observed at [115], Mr Sim's inaction after finding out that the second appellant had been using the Yahoo Account to send emails to other third parties without his knowledge did not constitute implied consent to the second appellant's actions. Rather, Mr Sim's explanation of why he did not take any action – *ie*, that he trusted the second appellant as a friend and still needed his help at the time – was a coherent and credible one.

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157 NEs (Day 3) p 16 lines 7–21 (ROA p 304), p 14 lines 25–31 (ROA p 302).

158 ROA at pp 1234–1235 (Exhibits P12 and P13).

159 ROA at p 1235 (Exhibit P13).

160 ROA at p 3817.

161 NEs (Day 7) p 129 lines 1–12 (ROA p 779).

118 Mr Sim's coherent and credible narrative was to be contrasted with the many dubious claims in the second appellant's evidence. These include the following:

(a) The claim that he had set up the Yahoo Account with Mr Sim together (which was not put to Mr Sim during cross-examination and contradicted Mr Sim's account).[162]

(b) The claim that Mr Sim did not want the Yahoo Account and handed it over to him because "Sum" was a misspelling of Mr Sim's surname (which contradicted Mr Sim's simple explanation that he had used "Sum" as it was the Cantonese variant of "Sim").[163]

(c) The claim that his use of the name "Willy Sum" to sign off on emails was not an attempt to pass off as Mr Sim as the word "Willy" also meant "dick".[164]

(d) The suggestion that Mr Sim had allowed him to use the Yahoo Account to send out political emails as he was worried about the second appellant's safety (which was unsupported by any evidence).[165]

119 These inconsistencies and aberrations support the Judge's finding that the second appellant was not a credible witness and that his narrative was to be

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162 Prosecution Appeal Submissions at para 22(a); NEs (Day 7) p 89 lines 10–19 (ROA p 739).

163 Prosecution Appeal Submissions at para 22(b); NEs (Day 8) p 25 lines 25–28 (ROA p 842); NEs (Day 3) p 19 lines 4-15 (ROA p 307).

164 NEs (Day 8) p 44 lines 25–30 (ROA p 861), p 45 lines 13–16 (ROA p 862).

165 Prosecution Appeal Submissions at para 22(c); NEs (Day 8) p 51 lines 19–26 (ROA p 868).

rejected.[166] Overall, there is no reason to disturb the Judge's acceptance of Mr Sim's narrative and his finding that the Prosecution had proved the CMA charge against the second appellant beyond a reasonable doubt.

## Sentencing

### *The criminal defamation charges*

120 The Judge sentenced both appellants to three weeks' imprisonment for the respective criminal defamation charges.[167] In *Sulochana d/o Tambiah Dirumala Sakkrawarthi v Rajalakshmi Ramoo* [2004] 1 SLR(R) 214 at [23], the following non-exhaustive list of factors that would determine the seriousness of an offence under s 500 was set out:

(a) The nature of the defamatory remark;

(b) The conduct, position and standing of the defamed party;

(c) The mode and extent of the publication; and

(d) The conduct of the defendant after making the defamatory comments.

121 Based on the findings above at [41], the nature of the defamatory remark in this case is different from what the Judge found it to be. Instead of being an imputation that the members of the Cabinet themselves were corrupt, the defamatory remark was that "corruption at the highest echelons" had arisen under the watch of the members of the Cabinet, and thus that they were responsible for it due to their incompetence. This imputation is less serious than

166 GD at [52].

167 GD at [125].

the allegation that members of the Cabinet were themselves corrupt, since it imputes only incompetence to the members of the Cabinet instead of corruption. Thus, the Judge's finding that the imputation was grave because it besmirched the integrity of public leaders is not relevant.[168] The allegation of incompetence, while certainly harming the reputation of the members of the Cabinet, stops short of attacking their integrity.

122 The Judge was correct in finding that the reach of the defamatory remark here would have been extensive given the TOC website's wide readership and accessibility.[169] The first appellant indicated to a public audience in 2017 that the TOC website had over a million views a month,[170] and the Article itself had accumulated 1,132 pageviews within the short two weeks before it was taken down.[171] Furthermore, the nature of the platform is also a relevant consideration – TOC was a relatively well-known alternative news platform with its own staff and editors, and the first appellant acknowledged that TOC held itself out as "an independent media platform to turn to for social political news and views" with the aim of providing "honest, objective, independent and factual reporting".[172] Hence, given the standing of TOC and its extensive reach, the impact of the defamatory remark was likely to be more serious.

123 Credit should be given to the first appellant for his swift compliance with IMDA's instructions to take down the Article and his co-operation with the authorities in furnishing the information required under the Notice of

168 GD at [111].

169 GD at [112].

170 NEs (Day 9) p 20 lines 28–31 (ROA p 1001).

171 Mitigation Plea dated 3 December 2021 ("MP") at para 14 (ROA p 4832).

172 NEs (Day 9) p 16 line 29–p 17 line 13 (ROA pp 997–998).

Requisition dated 18 September 2018, which included the identity and particulars of the contributor of the Article as well as information on the process of publication at TOC.[173]

124 Taking the above factors as a whole, and especially considering the less serious nature of the defamatory remark, the sentence of three weeks' imprisonment each for the criminal defamation charges is manifestly excessive. The imputation that was made out was that the Cabinet members through their incompetence had allowed corruption to infect the establishment or the elite in Singapore. This was a less venal attack on integrity and credit than one alleging personal corruption on the part of the Cabinet, and should be reflected in a lower sentence. This difference in gravity would also be reflected in the type of punishment: the sentencing response does not need to cross into the custodial range, and a fine would be sufficient punishment. A fine would also to my mind act as sufficient deterrence, both specifically and generally. Given the target of the attack and the reach, the starting point would be a fine at the maximum of $10,000, given these are magistrate's arrest cases.

125 Thus, a reduction of sentence to a fine of $10,000 (in default three weeks' imprisonment) is appropriate for the second appellant. There was little to mitigate or reduce the sentence from the starting point. A lower fine is appropriate for the first appellant, considering his compliance and cooperation with the authorities; the sentence imposed is a fine of $8,000 (in default two weeks' imprisonment). The first appellant chose to serve the imprisonment sentence imposed below even while pursuing this appeal. I will hear counsel for the first appellant and the Prosecution on what should thus follow.

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173 MP at para 8; ROA at pp 4837–4838.

### *The CMA charge*

126 The sentence of three months' imprisonment imposed for the CMA charge is not manifestly excessive. The second appellant's culpability is high and there was harm caused to Mr Sim. Several factors indicated the severity of the offending conduct, including the planned and systematic nature of the second appellant's behaviour, the abuse of trust reposed in him by Mr Sim, the longstanding conduct of accessing Mr Sim's other online accounts without consent for years, and the significant harm caused to Mr Sim. The second appellant also showed a lack of remorse by making several dubious claims in his defence at trial which flew in the face of the evidence, as discussed above at [118]. Thus, considering the severity of the offending conduct and the lack of any mitigating factors, there is no reason to disturb the sentence imposed by the Judge in respect of the CMA charge.

## Conclusion

127 The appellants' appeals against conviction with respect to all charges and the second appellant's appeal against sentence for the CMA charge are dismissed. The appeals against sentence for the criminal defamation charges are

allowed, and the sentences of imprisonment imposed are set aside and substituted by the fines as noted at [125] above.

Aedit Abdullah
Judge of the High Court

Choo Zheng Xi and Yuen Ai Zhen Carol (Remy Choo Chambers LLC) for the appellant in HC/MA 9073/2022/01;
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