IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 37

Court of Appeal / Criminal Motion No 22 of 2023

Between

Pausi bin Jefridin

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 32 of 2023

Between

Pannir Selvam a/l Pranthaman

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 45 of 2023

Between

Tan Kay Yong

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 46 of 2023

Between

Ramdhan bin Lajis

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 47 of 2023

Between

Saminathan Selvaraju

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 48 of 2023

Between

Roslan bin Bakar

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 49 of 2023

Between

Datchinamurthy a/l Kataiah

… *Applicant*

And

Public Prosecutor

… *Respondent*

Court of Appeal / Criminal Motion No 50 of 2023

Between

Masoud Rahimi bin Merzad

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Criminal review]
[Criminal Procedure and Sentencing — Reopening concluded decisions — Threshold]

Pausi bin Jefridin
v
Public Prosecutor and other matters

[2024] SGCA 37

Court of Appeal — Criminal Motions Nos 22, 32, and 45–50 of 2023
Sundaresh Menon CJ, Steven Chong JCA and Woo Bih Li JAD
1 August 2024

27 September 2024

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 CA/CM 32/2023 ("CM 32"), CA/CM 45/2023 ("CM 45"), CA/CM 46/2023 ("CM 46"), CA/CM 47/2023 ("CM 47"), CA/CM 48/2023 ("CM 48"), CA/CM 49/2023 ("CM 49"), and CA/CM 50/2023 ("CM 50") (collectively, the "Seven Criminal Motions") were criminal motions brought by several of the appellants in CA/CA 30/2022 ("CA 30"). CA 30 was an appeal against the decision in HC/OS 188/2022 ("OS 188"), which was a civil action brought by 12 plaintiffs, all of whom were prisoners awaiting capital punishment ("PACPs"). That action arose after it was disclosed by the Attorney-General (the "AG") that certain correspondence belonging to each of the plaintiffs had been released by the Singapore Prison Service (the "SPS") to the Attorney-General's Chambers (the "AGC"). The plaintiffs brought civil proceedings for a declaration that the actions of the SPS and the AG, in giving,

receiving and/or requesting these documents were *ultra vires*. The plaintiffs also sought damages for, among other things, infringement of copyright and breach of confidence.

2 The General Division of the High Court made certain orders which were appealed against in CA 30. In the course of hearing CA 30, it emerged that the appellants were also raising a contention that aside from the civil remedies they were seeking, they were further seeking to impugn the validity of their convictions on account of these disclosures. Because it was clear that this was not something the Court of Appeal exercising its civil jurisdiction could deal with in CA 30, the court granted the appellants permission to bring criminal motions seeking relief under the criminal law to the extent that such motions arose from the disclosures.

3 The Seven Criminal Motions were heard on 1 August 2024 alongside CA/CM 22/2023 ("CM 22"), which was filed by Mr Pausi bin Jefridin ("Mr Pausi"). Mr Pausi was a co-accused who was tried together with Mr Roslan bin Bakar ("Mr Roslan"), the applicant in CM 48. We dismissed the Seven Criminal Motions and CM 22 at the end of the hearing. We now set out the reasons for our decision.

Background

4 The applicants in the Seven Criminal Motions are PACPs. They had each earlier been convicted and sentenced on various capital charges under the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (the "MDA"). All of them appealed to the Court of Appeal against their respective convictions and sentences, and their appeals were heard and dismissed. Some of the applicants, including Mr Pannir Selvam ("Mr Selvam") in CM 32, Mr Roslan in CM 48, and Mr Datchinamurthy a/l Kataiah ("Mr Datchinamurthy") in CM 49, also

filed further applications in which they sought permission to review either their convictions or sentences, or filed civil applications in relation to their criminal proceedings.

5 The commonality between the applicants in the Seven Criminal Motions lay in the fact that copies of their correspondence with various external parties when they were in prison (the "Disclosed Correspondence") had been forwarded by the SPS to the AGC. This fact was voluntarily disclosed by the AG in HC/OS 975/2020 (see *Syed Suhail bin Syed Zin and others v Attorney-General and another* [2021] 4 SLR 698 at [43]). The forwarding of such correspondence to the AGC was noted in *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 (at [88]) to be unauthorised under the Prisons Regulations (2002 Rev Ed).

6 In OS 188, filed on 25 February 2022, the applicants in the Seven Criminal Motions, alongside other PACPs, sought one or more of the following declarations: (a) the AG had acted *ultra vires* and unlawfully in requesting from the SPS their personal correspondence; (b) the SPS had acted *ultra vires* and unlawfully in disclosing the said correspondence; (c) the AG had committed a breach of confidence by obtaining and retaining their confidential correspondence; and (d) the AG had infringed the copyright of a subset of the applicants in OS 188 by the reproduction and retention of their correspondence. They also sought an order for damages and/or equitable relief in respect of the declaration for breach of confidence, and nominal damages for infringement of copyright.

7 On 1 July 2022, the General Division of the High Court declined to grant the reliefs sought in OS 188, save for nominal damages of $10 being awarded

to three applicants in OS 188 for infringement of copyright. In CA 30, the applicants in OS 188 appealed against that decision.

8 CA 30 was heard over the course of four separate sittings of the Court of Appeal between January 2023 and May 2024. By the third hearing of CA 30 on 2 August 2023, it became clear that the appellants in CA 30 premised at least part of their claims for damages for breach of confidence and infringement of copyright on the basis that there had been a breach of their fair hearing rights in the criminal process relating to their convictions and/or sentences. For this reason, the court noted that the appropriate remedy for this lay in the criminal rather than the civil realm, and the appellants in CA 30 were granted permission to bring separate criminal motions for relief under the criminal law, to the extent that such motions arose from the Disclosed Correspondence in CA 30. These motions were to be filed by 2 November 2023. The court also noted that permission to file these criminal motions for permission to make review applications in respect of their convictions and/or sentences would not dispense with any applicable requirements under s 394K of the Criminal Procedure Code 2010 (2020 Rev Ed) (the "CPC") before such a review could be undertaken, and that the court's directions would not derogate from the rights of the AG to take the position that the applications for permission should not be allowed under the CPC. The Court of Appeal has reserved judgment in respect of CA 30.

9 We emphasise at the outset that the *only* issue that the applicants were given permission to address in the Seven Criminal Motions related to the implications which the Disclosed Correspondence may have had on the propriety of the applicants' convictions and/or appeals. We certainly did not grant permission to the applicants to raise other issues completely unconnected to the Disclosed Correspondence. As alluded to at [3] above, CM 22 was heard together with the Seven Criminal Motions only because Mr Pausi was a co-

accused who was tried together with Mr Roslan, the applicant in CM 48. Given, however, that CM 22 did not arise from the Disclosed Correspondence, we address CM 22 separately at [67]–[87] below.

The Seven Criminal Motions

10 On 20 October 2023, the appellants in CA 30 sought an extension of time of four weeks to file their separate criminal motions. This was not objected to by the AG, and we granted this request. The Seven Criminal Motions were eventually filed by a subset of the appellants in CA 30 by 5 December 2023.

Overview of arguments in the Seven Criminal Motions

11 The central contention of the Seven Criminal Motions was that the Disclosed Correspondence was illustrative of a practice by the AGC that breached the fundamental rules of natural justice due to a breach of prosecutorial disclosure obligations, which tainted the legitimacy of the applicants' criminal convictions and appeals. The applicants alleged that the Prosecution would have gained an unfair advantage through informational asymmetry and/or advance notice of what the applicants would be arguing in their criminal proceedings.

12 The applicants also raised other arguments in the Seven Criminal Motions that did not arise out of the Disclosed Correspondence. Among other things, the applicants argued variously that:

(a) the Disclosed Correspondence was evidence that the Prosecution must have committed *other* breaches of its disclosure obligations during the applicants' respective trials and appeals;

(b) other material (unrelated to the Disclosed Correspondence) which would have been beneficial to them in their respective trials or appeals had not been disclosed by the Prosecution in those proceedings;

(c) there were changes in the law between the time of the applicants' appeals and the present application which would have materially affected the outcome of their cases; and

(d) there were other new pieces of evidence in their respective criminal cases which would have materially affected their convictions and/or sentences.

Procedural history

13 We first explain the developments in the Seven Criminal Motions which led to some deviation from the typical procedural course of an application for permission to make a review application. In the ordinary course, an application to review a criminal conviction or sentence involves two stages: the permission stage and the review stage. In the permission stage, the appellate court determines whether to grant permission for the applicant to make a review application; the court may at this stage summarily dismiss the application without a hearing (see s 394H(7) of the CPC). The threshold at the permission stage is high – an applicant must demonstrate that there is sufficient material (being evidence or legal arguments) on which the appellate court may conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made. If the court grants permission, the application then proceeds to the review stage where the review application is considered on its merits.

14 In this case, a case management conference ("CMC") was convened on 20 February 2024, after the parties had exchanged one round of written submissions. At the CMC, the court decided, with the consent of all the parties, that the two stages would be heard together. In effect, this meant that the hearing would proceed *as if* permission had been given and the parties would address the court on the full merits of the review applications. We also gave permission for the parties to exchange a further set of submissions, and the matter was accordingly set for hearing on 1 August 2024.

The applicants' adjournment application

15 Late in the evening on 29 July 2024, counsel for the applicants in the Seven Criminal Motions, Mr Ong Ying Ping ("Mr Ong"), wrote in to the court to state that the applicants in the Seven Criminal Motions were discharging him as counsel, and that he had filed Notices of Intention to Act in Person on behalf of each of the applicants. Mr Ong explained that he had run into difficulties with the applicants over the nature of the arguments that he was being pressed to raise by some or all of the applicants, and this came into tension with the issues that he felt he was able to raise having regard to the applicable law and the constraints that applied to him as an advocate and solicitor and an officer of the court. Specifically, Mr Ong did not feel that he was in a position to advance certain arguments which the applicants wished for him to raise because, in his judgment, to do so would entail him coming into conflict with his duty to the court. In these circumstances, Mr Ong stated that the applicants wished to mount their own arguments.

16 We observe that Mr Ong's concerns were very much borne out, at least in the case of Mr Datchinamurthy's application in CM 49. On 18 July 2024, two weeks before the hearing, the court received a handwritten letter from

Mr Datchinamurthy, containing further submissions unrelated to the disclosure of his correspondence to the AGC. Mr Datchinamurthy stated that he was raising these arguments with the court directly *because* Mr Ong was unwilling to raise these arguments on his behalf. Mr Datchinamurthy raised these same points at the hearing, along with accusations (repeated by the other applicants) that it was Mr Ong who had chosen to discharge himself. In the circumstances of these matters, where the applicants had had their cases ventilated at trial and at least once more on appeal, and in many instances with yet further applications for review or raising new grounds, and having regard to the sole ground on which they had been permitted to bring these Seven Criminal Motions, as noted at [9] above, we considered it immaterial whether the decision to discharge was made by the applicants or by Mr Ong himself. We were satisfied, in these circumstances, that the discharge was justified, and we therefore granted it.

17 Mr Ong also requested that the court grant an adjournment of the hearing fixed on 1 August 2024 so that the applicants could prepare their oral submissions for the Seven Criminal Motions. We refused this request. We outline briefly our reasons for this decision.

18 First, we reiterate that these were cases where all the applicants each had the benefit of a full trial and appeal. The due process rights of a person in such circumstances were necessarily attenuated (see *Masoud Rahimi bin Mehrzad and others v Attorney-General* [2024] 1 SLR 414 at [13]). While the law affords some room for even such cases to be reviewed, as indeed some of the applicants have previously availed themselves of, this is limited and would typically require the court to be satisfied that there are almost conclusive grounds for the view that there has been a miscarriage of justice, based on new factual or legal material that has not previously been canvassed (and could not, with reasonable

diligence, have previously been canvassed), and is compelling, reliable, and powerfully probative.

19 Second, the applicants were represented by counsel from the time they initiated their applications for review. This was not a case where the court would be depending *entirely* on the applicants' oral submissions made in person. Mr Ong had represented the applicants from the time of their filing of the Seven Criminal Motions to the date of his discharge which was just before the hearing. In the course of his representation, he had filed *two* sets of written submissions on behalf of each of the applicants. We therefore had the benefit of these detailed written submissions when considering the Seven Criminal Motions.

20 Third, having regard to the timeline of proceedings, we were satisfied that ample time had been afforded for all the submissions and materials to be advanced. The applicants had first known that they would have the opportunity to commence criminal review applications on 2 August 2023, when permission was granted by the court in CA 30. They sought and were granted an extension of time until 2 December 2023 to prepare their applications. After filing a first round of written submissions on 4 and 5 December 2023 while represented by counsel, they were granted permission on 20 February 2024 to file a second round of written submissions, which they filed on 15 March 2024, again through counsel. The applicants then had until 1 August 2024 to finalise the oral submissions that they intended to make at the hearing. This timeline was more than sufficient for the applicants to prepare what they would need to, having particular regard to the uncomplicated nature of the dispositive issue in the Seven Criminal Motions which we elaborate on below at [24]–[27].

21 Fourth, the court had the benefit of the Disclosed Correspondence, as well as the various documents sent by the applicants to the court at various

times. We were thus well-placed to adjudge the potential impact that the disclosure of these documents might have had on the applicants' criminal proceedings, even without the benefit of oral submissions by counsel.

22 In view of the above, and noting the narrowness of the issue before us (being confined to the impact of the Disclosed Correspondence on the applicants' respective criminal proceedings), we saw no grounds for adjourning the hearing of the Seven Criminal Motions.

The Disclosed Correspondence

23 Having read and considered the written submissions by the parties, which included two sets of written submissions filed by the applicants' counsel, as well as having heard oral submissions by the applicants in person, we were satisfied that none of the Disclosed Correspondence could have potentially affected the applicants' criminal proceedings in relation to their convictions and/or sentences.

The Disclosed Correspondence post-dated the applicants' criminal proceedings

24 In all but one of the Seven Criminal Motions (CM 47 being the exception), disclosure of the relevant correspondence had taken place *after* both the applicants' convictions and appeals had concluded. This is set out below:

(a) In CM 32, the applicant Mr Selvam was convicted and sentenced on 2 May 2017. His appeal against his conviction and sentence in CA/CCA 21/2017 ("CCA 21") was dismissed by the Court of Appeal on 9 February 2018. The earliest disclosure of his correspondence to the AGC, however, only took place on 17 May 2019 in respect of a letter

dated that same day. The other instance of disclosure of his correspondence to the AGC took place on 29 May 2019.

(b) In CM 45, the applicant Mr Tan Kay Yong ("Mr Tan") was convicted and sentenced on 1 December 2017. His appeal against his conviction and sentence in CA/CCA 63/2017 was dismissed by the Court of Appeal on 30 January 2019. The earliest disclosure of his correspondence took place on 24 December 2019, in respect of a letter that he had written to the Law Society to make a complaint about the counsel that had represented him previously. The other instance of disclosure of his correspondence took place on 6 May 2020.

(c) In CM 46, the applicant Mr Ramdhan bin Lajis ("Mr Ramdhan") was convicted and sentenced on 27 April 2018. His appeal against his conviction and sentence in CA/CCA 23/2018 ("CCA 23") was dismissed by the Court of Appeal on 1 March 2019. The single instance where his correspondence was disclosed to the AGC took place on 29 July 2019, long after CCA 23 had concluded.

(d) In CM 48, the applicant Mr Roslan was convicted and sentenced on 22 April 2010. His appeal against his conviction and sentence in CCA 10/2010 ("CCA 10") was dismissed by the Court of Appeal on 17 March 2011. The earliest disclosure of his correspondence to the AGC, however, only took place on 15 February 2019 in respect of an undated letter. Other instances of disclosure of his correspondence to the AGC took place on 18 February 2019 and 15 March 2019. In Mr Roslan's case, the disclosure of his correspondence also took place *after* the conclusion of various post-appeal applications which he had filed.

(e) In CM 49, the applicant Mr Datchinamurthy was convicted on 1 April 2015 and sentenced on 15 April 2015. His appeal against his conviction and sentence in CA/CCA 8/2015 ("CCA 8") was dismissed by the Court of Appeal on 5 February 2016. The earliest disclosure of his correspondence to the AGC took place on 12 December 2017, with further disclosures taking place on 10 January 2019, 17 May 2019, 4 September 2019, 13 March 2020 and 16 June 2020. While the disclosures pre-dated Mr Datchinamurthy's *first* application in CA/CM 9/2021 ("CM 9") to review this court's decision in CCA 8 on 3 February 2021 (CM 49 being his *second* attempt to do so), that does not change the fact that the disclosures would have had no bearing on the correctness of the decision in CCA 8.

(f) Finally, in CM 50, the applicant Mr Masoud Rahimi bin Merzad ("Mr Masoud") was convicted on 18 November 2013 and sentenced on 19 October 2015. His appeal against his conviction and sentence in CA/CCA 35/2015 ("CCA 35") was dismissed by the Court of Appeal on 10 October 2016. The earliest disclosure of his correspondence to the AGC took place on 30 January 2019, with further disclosures taking place on 31 January 2019, 16 May 2019 and 4 June 2019.

25 It followed that it was impossible that the Prosecution could have gained any form of advantage in the criminal proceedings at trial or on appeal involving the applicants above; there was no conceivable way in which the Prosecution would have been able to utilise information gained from correspondence which was disclosed to it only *after* those proceedings had concluded.

26 We were thus satisfied that in respect of CM 32, CM 45, CM 46, CM 48, CM 49, and CM 50, since the disclosures took place *after* the respective

applicants' convictions and appeals, these could not have affected or undermined the integrity of the convictions or appeals therefrom.

27 We take the opportunity to observe that this was not a point requiring fine-grained legal analysis. It involved a commonsensical observation derived from a basic understanding of the passage of time. The applicants were each given the opportunity to address this point at the hearing. Further, this objection was raised by the Prosecution in their *first* set of written submissions in the Seven Criminal Motions filed on 22 January 2024, and the applicants had the opportunity to address this issue *with the benefit of counsel's advice* in their written reply submissions filed on 15 March 2024, which we had sight of at the time of the hearing. We thus did not think that the applicants were prejudiced by the absence of counsel making oral submissions on this issue: first, because the nature of the issue was simple; second, because they were given the opportunity to state what they thought necessary in person; third, because they had the benefit of counsel in making written submissions on this point; and fourth, because we could not see how the presence of counsel's oral submissions would have made a difference to our conclusion on this issue. This conclusion was buttressed by our consideration of the written submissions advanced by Mr Ong, the central thesis of which was that the purpose of the disclosure of the applicants' correspondence by the SPS to the AGC was "to gain advance notice of [the applicants'] intended review proceedings", and thus "undermine" their cases by depriving them of the opportunity to ensure all relevant material was placed before the court. As disclosure had happened only *after* the applicants' trials and appeals, we did not see how the applicants had been deprived of any opportunity to place material before the court, how the AGC could have gotten advance notice of the applicants' cases, or more broadly how there could have been any causative mechanism for the "breach of natural justice" alleged by the applicants. Further, as can be seen from [29]–[32] below, the nature of the

Disclosed Correspondence was such that they did not shed much light on the applicants' "intended review proceedings". The AGC could not, therefore, have gotten any advanced notice of such intended proceedings.

The nature of the Disclosed Correspondence could not have affected the applicants' criminal proceedings

28 For completeness, we note that even if the Disclosed Correspondence had been forwarded to the AGC by the SPS *prior* to the relevant criminal proceedings, which was not in fact the case, these could not have affected the propriety of the applicants' criminal proceedings. We illustrate with reference to the facts of CM 46, although identical reasoning would apply to the rest of the Seven Criminal Motions (again, barring CM 47).

29 In CM 46 involving Mr Ramdhan, the relevant correspondence which had been forwarded by the SPS to the AGC were:

(a) a letter dated 17 March 2019 from Mr Ramdhan to the Innocence Project from the National University of Singapore's Criminal Justice Club, in which the applicant stated his innocence and requested the Innocence Project to evaluate his case;

(b) a letter dated 9 July 2019 sent to Mr Ramdhan from the Recourse Initiative from the National University of Singapore's Criminal Justice Club, in which it acknowledged the application by the applicant;

(c) a letter dated 24 May 2019 from Mr Ramdhan to Eugene Thuraisingam LLP, in which he stated his intention to engage the firm and seek legal advice; and

(d) a letter dated 28 May 2019 from Mr Ramdhan to the Registrar of the Supreme Court of Singapore, in which he asked to retrieve the judgment, transcript, and bundle for his criminal appeal, in order to make submissions.

30 It is apparent from the foregoing that even if the Prosecution had obtained copies of the letters *prior* to the conclusion of Mr Ramdhan's criminal proceedings (which they did not), there would have been no conceivable advantage which the Prosecution could have obtained. Knowledge of the fact that an accused person has engaged counsel or sought help from other organisations would not by itself aid the Prosecution in preparing its case against the accused; much less so the fact that the accused person has requested court documents from the court registry. Certainly, it could not be said that there would be such tainting of the applicants' criminal proceedings so as to have any material effect on their convictions or sentences.

31 The other applicants' Disclosed Correspondence involved letters sent to or received from various parties. We briefly set out the types of letters which were disclosed:

(a) First, there were letters sent by the applicants to various law firms, as well as letters sent by various law firms to the applicants. Broadly, this category of letters contained one or more of the following: (i) requests by the applicants for legal assistance to file various criminal applications; (ii) requests by the applicants for lawyers to meet them for an interview; (iii) complaints by the applicants to law firms about the conduct of their criminal matters by former counsel; (iv) warrants to act; and (v) notices by some law firms that they were either discharging

themselves from representing the applicants or that they were unable to act as counsel for the applicants.

(b) Second, there were letters sent by the applicants to the Singapore courts. Broadly, this category of letters contained one or more of the following: (i) requests by the applicants for their cases to be reviewed; (ii) requests by the applicants for counsel to be assigned for their applications; and (iii) administrative updates on hearings, such as the estimated time required for oral arguments.

(c) Third, there were letters sent by the applicants to the Law Society of Singapore (the "Law Society"), as well as letters sent by the Law Society to the applicants. Broadly, this category of letters contained one or more of the following: (i) complaints by the applicants about the conduct of former counsel; (ii) responses by the Law Society to the applicants' complaints about the conduct of former counsel; (iii) requests by the applicants for counsel to be assigned for their applications; and (iv) responses by the Law Society denying requests for counsel to be assigned to various applicants.

(d) Fourth, in the case of CM 49 in particular, there was a letter by Mr Datchinamurthy to the Malaysian High Commission requesting an interview. There were also letters to and from the Singapore Police Force in relation to a complaint by Mr Datchinamurthy on the method by which the death sentence is carried out.

(e) Fifth, in the case of CM 50 in particular, there was a letter sent by Mr Masoud to the Legal Services Regulatory Authority with a request for legal advice and assistance.

32 What was clear to us from the nature of the vast majority of the Disclosed Correspondence set out above was that, as in Mr Ramdhan's case, even if the Prosecution had obtained copies of the letters *prior* to the conclusion of the applicants' criminal proceedings (which they did not), there would have been no conceivable advantage which the Prosecution would have obtained. Further, to the extent that some of the applicants' letters to the Singapore courts contained requests with substantive reasons for their cases to be reviewed, we highlight that the applicants could not have had any legitimate expectation that such correspondence would be confidential. Justice cannot be expected to unfold in shadows; litigation cannot be conducted by way of *ex parte* communications. Rather, criminal litigation *demands* the presence and participation of both the Prosecution and the Defence, and not whispered exchanges between one party and the court.

The Disclosed Correspondence in CM 47

33 Of the Seven Criminal Motions, CM 47 was the only case in which the correspondence relied on had been disclosed *prior* to the conclusion of criminal proceedings. In CM 47, Mr Saminathan Selvaraju ("Mr Saminathan") relied upon the fact that his letter dated 17 December 2019 had been disclosed to the Prosecution on 26 December 2019, which was after the conclusion of his trial, but prior to the hearing of his appeal against his conviction and sentence in CA/CCA 13/2018 ("CCA 13") on 15 January 2020.

34 This letter was sent by Mr Saminathan to the Singapore Police Force, and in it he had made allegations against his handwriting expert, Mr William Pang, as follows:

> … I had engaged a handwriting specialist, Mr. William Pang, during my trial @ High Court for clarification of my handwriting statement and also paid him for the same. Only during the trial

> I realised the proof submitted by Mr. William Pang were all false documents and he had cheated me in hiding lot of aspects. Hence I would like to make a detailed statement of police report in tamil. Hence I kindly request the officials to meet me in person and take my complaint.

35 It was Mr Saminathan's case that the disclosure of this letter allowed the Prosecution to gain an advantage during the hearing of CCA 13, though this was not explained.

36 In our judgment, the disclosed correspondence in CM 47 could not possibly have affected the propriety of the criminal proceedings involving Mr Saminathan. The fact that Mr Saminathan's correspondence had been forwarded by the SPS to the AGC was made known by the Deputy Public Prosecutor appearing in that case to Mr Saminathan's counsel *prior* to the hearing of CCA 13. Further, according to Mr Saminathan *himself*, this fact was also raised before the Court of Appeal on 15 January 2020, when CCA 13 was heard.

37 Finally, in its judgment for CCA 13, the Court of Appeal expressly noted that it did not regard the handwriting evidence as relevant or material to the issues in the case (see *Mohammad Rizwan bin Akbar Husain v Public Prosecutor and another appeal and other matters* [2020] SGCA 45 at [117]). It followed that the disclosure of this correspondence could not have had any impact on the integrity of the conviction or the appeal in this matter.

The Disclosed Correspondence did not warrant an exercise of the court's power of review

38 For the reasons outlined above, we were of the view that *all* the Disclosed Correspondence did not disclose sufficient cause for review.

39 Given the above, and given the fact that the appellants in CA 30 were granted permission by the Court of Appeal to bring separate criminal motions for relief under the criminal law *to the extent that such motions arose from the materials disclosed by the AG in CA 30* (see [9] above), we dismissed the Seven Criminal Motions solely on the basis that the Disclosed Correspondence did not disclose sufficient cause for review.

Issues unrelated to the Disclosed Correspondence

40 The applicants in the Seven Criminal Motions also variously raised other arguments that were not directly related to the Disclosed Correspondence which they argued showed that substantial injustice had been occasioned in the course of their criminal proceedings. Though unnecessary – because permission had not been granted – we also considered these other arguments. We referenced above the general categories under which these arguments fell at [12] above. More specifically, these categories were that:

(a) the Prosecution breached its disclosure obligations under *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*");

(b) there was a change in law in the case of *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*");

(c) the Court of Appeal's decision in *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771 ("*Harven*") led to a systematic practice of disclosing documents for the purpose of "re-scheduling executions"; and

(d) there were other new pieces of evidence or new arguments in the applicants' respective criminal cases which would have materially affected their convictions and/or sentences.

41 Before setting out our conclusions on these arguments, however, we set out the law relating to criminal review applications as well as restate the relevant legal principles.

The law relating to criminal review applications

42 We begin by considering the statutory regime in the CPC which allows for criminal review applications.

An applicant is not allowed to make more than one review application in respect of any decision of the appellate court

43 First, s 394K(1) of the CPC makes clear that an applicant is not permitted to make more than one review application in respect of any decision of an appellate court. Further, as was held by Tay Yong Kwang JCA in *Mohammad Yusof bin Jantan v Public Prosecutor* [2021] 5 SLR 927 (at [12]–[13]) and affirmed by this court in *Panchalai a/p Supermaniam and another v Public Prosecutor* [2022] 2 SLR 507 (at [28]), since a review application can only be made after permission to do so has been obtained, a purposive and proper reading of s 394K(1) of the CPC would dictate that since an applicant cannot make more than one review application in respect of any decision of the court, he also cannot make more than one permission application because that is the necessary prelude to a review application. This statutory bar applies even if a subsequent permission application is made on a *different* basis from the first. In the latter scenario, the only avenue available to the applicant is the court's inherent jurisdiction, which we elaborate on at [54]–[56] below.

44 We take this opportunity to clarify the scope of s 394K of the CPC, and in particular what constitutes "one review application" under s 394K(1). While the ordinary meaning of the phrase is clear, it is unclear whether there is room

for an applicant to make two separate review applications: first against his conviction, and subsequently against his sentence. In our judgment, the courts must necessarily focus on substance over form. It may be appropriate for an applicant to bring two separate review applications – and not be barred by s 394K(1) – if the decisions regarding his conviction and sentence are separate in substance. One example is if the applicant is subject to resentencing under s 27(6) of the Misuse of Drugs (Amendment) Act 2012 (Act 30 of 2012). In such circumstances, allowing the applicant to bring two separate review applications may be justified. However, where an applicant is found guilty of an offence that is subject to the mandatory death penalty, his conviction and sentence will generally be inextricably linked. Allowing him to bring two review applications would be contrary to s 394K of the CPC, and in our view would not be permissible.

An applicant is not allowed to make a review application in respect of an earlier decision of an appellate court where there has been a related civil application in which the court reserves judgment or has delivered judgment

45 Second, s 394K(2) of the CPC prevents an applicant from making a review application where there has been a "related civil application" made by the same applicant and where the court has either reserved judgment in that related civil application (s 394K(2)(*a*)) or delivered judgment in that related civil application (s 394K(2)(*b*)).

46 Sections 394F(1)–394F(2), in turn, explain the terms "civil application" and "related civil application" and are reproduced below:

> **Interpretation of this Division**
>
> **394F.**—(1) In this Division, unless the context otherwise requires —
>
> …

> 'civil application' means an application to a court when exercising its civil jurisdiction, and includes —
>
> > (*a*) where the court is the Court of Appeal, an appeal to the Court of Appeal from any judgment or order of the General Division of the High Court, or of the Appellate Division of the High Court, in such an application; or
> >
> > (*b*) where the court is the Appellate Division of the High Court, an appeal to the Appellate Division of the High Court from any judgment or order of the General Division of the High Court in such an application;
>
> …
>
> (2) In this Division, unless the context otherwise requires, a civil application is related to a review application made in respect of an earlier decision if —
>
> > (*a*) any common question of law or fact arises in both applications; or
> >
> > (*b*) any relief claimed in the civil application —
> >
> > > (i) may affect the review application in any way; or
> > >
> > > (ii) may affect the outcome of the criminal matter in respect of which the earlier decision was made.

47 The effect of the foregoing provisions is to prevent an applicant from bringing a review application that is essentially duplicative of a related civil application. Situations where this may be the case are set out in s 394F(2). For instance, a civil application is related to a review application if both involve common questions of law or fact (s 394F(2)(*a*)), or if the relief claimed in the civil application may affect the review application (s 394F(2)(*b*)(i)) or the outcome of the criminal matter in respect of which the earlier decision was made (s 394F(2)(*b*)(ii)).

Threshold for permission to be granted for a review application to be made

48 Third, for permission to be granted for a review application to be made, an applicant must show a "legitimate basis for the exercise of [the] court's

power of review" (see *Kreetharan s/o Kathireson v Public Prosecutor and other matters* [2020] 2 SLR 1175 at [17]). As stated by this court in *Roslan bin Bakar and others v Public Prosecutor* [2022] 1 SLR 1451 (at [21]), this would require showing that the material the applicant will be relying on in the review proper is "almost certain" to satisfy the requirements under s 394J of the CPC.

49 Under s 394J(2) of the CPC, an applicant must satisfy the appellate court that there is sufficient material (being evidence or legal arguments) to conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made.

50 For the material to be "sufficient", the material must satisfy *all* the requirements set out in ss 394J(3)(*a*)–394J(3)(*c*), as follows:

> (a) before the filing of the application for permission to make the review application, the material has not been canvassed at any stage of the said criminal matter;
>
> (b) the material could not have been adduced in court earlier even with reasonable diligence; and
>
> (c) the material is compelling, in that it is reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice in the said criminal matter.

51 As was made clear in *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159 (at [18]), the failure to satisfy any of the three requirements will result in a dismissal of the review application.

52 Further, under s 394J(4) of the CPC, where the material which the applicant relies on consists of legal arguments, such material will only be

"sufficient" if it is based on a change in the law that arose *after* the conclusion of all proceedings relating to the criminal matter in respect of which the earlier decision was made.

53 In addition, under s 394J(5) of the CPC, for the court to find that there has been a miscarriage of justice, the court must be satisfied of either of the following:

(a) The earlier decision that is sought to be reopened is "demonstrably wrong" (s 394J(5)(*a*) of the CPC). Where the earlier decision pertains to conviction, this means that the court must find it apparent, based only on the evidence tendered in support of the review application and without any further inquiry, that there is a "powerful probability" – and not just a "real possibility" – that the decision is wrong (s 394J(6) of the CPC). Where the earlier decision pertains to sentence, the court must find that the decision was based on a fundamental misapprehension of the law or the facts, such that it was "blatantly wrong" on the face of the record (s 394J(7) of the CPC).

(b) The earlier decision is "tainted by fraud or a breach of the rules of natural justice" (s 394J(5)(*b*) of the CPC).

The statutory regime does not foreclose the possibility of the court exercising its inherent power to review an earlier decision on its own motion

54 Finally, we note that s 394J(1)(*b*) of the CPC makes clear that the statutory regime does not affect the inherent power of an appellate court to review, on its own motion, an earlier decision of the appellate court. Indeed, the Court of Appeal – as the final appellate court in Singapore – possesses the inherent power of review (*Public Prosecutor v Pang Chie Wei and other matters* [2022] 1 SLR 452 ("*Pang Chie Wei*") at [26]). An applicant may challenge the

court's decision by invoking either the court's statutory power of review or its inherent power; the substance of the application is typically unaffected by the choice of remedial avenue (*Pang Chie Wei* at [30]).

55 As we had noted in *Pang Chie Wei* (at [31]), the two avenues are not duplicative, as s 394K of the CPC limits an applicant to making only *one* review application under s 394I of the CPC. However, if the "sufficient material" on which an appellate court may conclude that there has been a miscarriage of justice emerges *after* a prior review application brought under s 394I of the CPC has been heard and dismissed, an applicant may have further recourse to the court's inherent power of review but not to its statutory power. This suggests that in the *absence* of new material emerging after the dismissal of a prior review application, the court should not exercise its inherent power of review.

56 In our judgment, this approach strikes a balance between, on the one hand, preventing an applicant from making multiple review applications, in line with the prohibition imposed under s 394K of the CPC, and, on the other hand, the flexibility of bringing a further application should new material emerge subsequently. We note that, during the second reading of the Criminal Justice Reform Bill (Bill No 14/2018) (the "Bill") on 19 March 2018, Nominated Member of Parliament Mr Kok Heng Leun ("Mr Kok") highlighted the situation where an applicant has already made one review application, but years later discovers new evidence that may potentially prove his innocence. In such circumstances, Mr Kok observed that the strict wording of s 394K as proposed in cl 108 of the Bill would preclude that applicant from making a further review application. However, as then-Senior Minister of State for Law Ms Indranee Rajah clarified during the second reading of the Bill, where new evidence which has not previously been considered emerges, but an applicant does not meet one

of these conditions, the statutory provisions would not affect the inherent power of an appellate court to review on its own motion an earlier decision of the court.

Summary of the key principles relating to criminal review applications

57 In summary, the following are the principles that govern review applications:

(a) There are two stages in a review application. The applicant must first apply for permission to make a review application. If the appellate court grants permission, the applicant can then proceed to the review stage where his application is considered on its merits.

(b) An applicant is not permitted to make more than one review application under s 394K(1). This is subject to one qualification: if his conviction and sentence are the result of separate decisions in substance, he may bring two separate review applications against each decision. Whether the decisions are indeed separate is a question of substance over form, and the qualification we have set out should not be seen as a licence to file multiple applications to review concluded appeals by narrowing the scope of each application.

(c) Pursuant to s 394K(2) read with ss 394F(1) and 394F(2), an applicant may not make a review application where he has made a related civil application and the court has either reserved judgment or delivered judgment in that related civil application.

(d) In order to be granted permission to bring a review application, the applicant must demonstrate that the material he will be relying on is almost certain to satisfy the requirements under s 394J. In this regard, s 394J(2) requires the applicant to satisfy the appellate court that there

is sufficient material (being evidence or legal arguments) to conclude that there has been a miscarriage of justice in the criminal matter in respect of which the earlier decision was made.

(i) Where the material relied on consists of new evidence, s 394J(3) requires that: (A) the material must not have been canvassed at any stage in the said criminal matter; (B) the material could not have been adduced in court earlier even with reasonable diligence; and (C) the material is compelling in showing that there has been a miscarriage of justice.

(ii) Where the material relied on consists of legal arguments, s 394J(4) prescribes that it must be based on a change in law that arose after the conclusion of all proceedings relating to the criminal matter in which the earlier decision was made.

(iii) In order to demonstrate that there has been a miscarriage of justice, s 394J(5) sets out that the earlier decision must either be demonstrably wrong (s 394J(5)(*a*)) or tainted by fraud or breach of the rules of natural justice (s 394J(5)(*b*)).

(e) Finally, an applicant may invoke either the court's statutory power of review (as set out above) or its inherent power of review. These are two independent avenues. However, in the absence of new material emerging after the dismissal of a prior review application, the court should not ordinarily exercise its inherent power of review.

The effect of s 394K of the CPC on the present applications

58 We first note that had it been necessary, we would also have found that some of the Seven Criminal Motions were barred by s 394K of the CPC, to the

extent that they were premised on arguments unconnected with the Disclosed Correspondence. As summarised at [57(b)]–[57(c)] above, s 394K(1) provides that an applicant cannot make more than one review application in respect of any decision of an appellate court, while s 394K(2) provides that an applicant cannot make a review application in respect of an earlier decision of an appellate court after the court delivers judgment in a related civil application made by that same applicant.

59 Of the Seven Criminal Motions, CM 32, CM 48, and CM 49 would have been barred by s 394K of the CPC:

(a) CM 32 would have run afoul of s 394K(2)(*b*) of the CPC because of Mr Selvam's earlier applications in HC/OS 807/2019 ("OS 807") and CA/CA 33/2020 ("CA 33"), in which he sought, among other reliefs, leave to commence judicial review proceedings seeking a mandatory order obliging the Public Prosecutor to certify under s 33B(2)(*b*) of the MDA that he had substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug trafficking within or outside Singapore. These proceedings were related to the present application as the relief claimed in CM 32 (a reduced sentence of life imprisonment) would affect the outcome of the criminal matter (Mr Selvam's sentence and appeal against sentence in HC/CC 18/2017 ("CC 18") and CCA 21) in respect of which OS 807 and CA 33 were made.

(b) In the case of CM 48, Mr Roslan's application would have been barred under ss 394K(1) *and* 394K(2) of the CPC. First, his application would have been barred under s 394K(1) of the CPC because of CA/CM 6/2022 ("CM 6"), in which Mr Roslan had previously sought permission under s 394H(1) of the CPC for the Court of Appeal to

review its decision in CA/CCA 59/2017 ("CCA 59"). CM 6 was dismissed by the Court of Appeal on 15 February 2022. In CM 48, Mr Roslan once again sought to review CCA 59. Further, Mr Roslan's application would have been barred under s 394K(2) of the CPC, given that he had filed a number of related civil applications, including HC/OS 139/2022 ("OS 139") and HC/OS 149/2022 ("OS 149"), both of which were dismissed. In these applications, Mr Roslan sought various declarations which would have affected a review application brought in respect of CCA 59 and/or the outcome of Mr Roslan's criminal case.

(c) CM 49 would have been barred under s 394K(1) of the CPC, because Mr Datchinamurthy had previously applied in CM 9 for permission under s 394H(1) of the CPC for the Court of Appeal to review its decision in CCA 8. CM 9 was dismissed by the Court of Appeal on 5 April 2021 (see *Datchinamurthy a/l Kataiah v Public Prosecutor* [2021] SGCA 30). CM 49 was therefore Mr Datchinamurthy's second attempt to review CCA 8.

60 In this connection, we considered whether it was open to the applicants in CM 32, CM 48, and CM 49 to rely on the court's inherent power of review, given our view at [57(e)] above that an applicant may, in limited circumstances, be able to rely on the court's inherent power of review even if he fails to meet the statutory conditions. On the facts, there was no question of any new material in CM 32, CM 48, and CM 49 emerging after the dismissal of the respective prior review applications to warrant an exercise of our inherent power of review.

The Prosecution's alleged breach of its disclosure obligations

61 We turn to consider the individual arguments raised by the applicants.

62 The argument that the Prosecution allegedly failed to disclose pursuant to its *Kadar* obligation could be dismissed based on the applicants' failure to satisfy any of the three requirements in 394J(3) of the CPC. First, some – if not all – of the evidence had been properly disclosed by the Prosecution. It cannot therefore be said that, as regards s 394J(3)(*a*), the material had not been canvassed in the earlier proceedings. Second, even if the evidence had not been properly disclosed, the applicants could, with reasonable diligence pursuant to s 394J(3)(*b*), have raised the possibility of the breach of the *Kadar* obligation during the trials or the appeals, instead of waiting until the Seven Criminal Motions before us. Third, even if the applicants could not, with reasonable diligence, have raised this previously, the breach of the *Kadar* obligation (which we did not find to have occurred) would not have affected the applicants' convictions and sentences. Any alleged breach of the *Kadar* obligation would not have sufficed to establish that there had been a miscarriage of justice in the earlier proceedings, as required under s 394J(3)(*c*). Therefore, the requirements summarised at [57(d)] above were not satisfied.

63 Similarly, the argument that there was a change in law in *Nabill* was a non-starter. We note that only Mr Roslan, Mr Selvam, and Mr Masoud alleged a failure by the Prosecution to disclose the statement of a material witness to the Defence (see *Nabill* at [39]); in all three cases there was no evidence that the Prosecution had in fact breached its disclosure obligation under *Nabill*. As for the other applicants, all their arguments pertained to the purported non-disclosure of other forms of evidence which would have been adverse to the Prosecution's case. This engaged the Prosecution's disclosure obligation under *Kadar*, not *Nabill*. This is relevant because *Kadar* was decided in 2011 and would not have been a *new* legal development that came after the applicants' convictions or appeals. On the other hand, while *Nabill* was decided in 2020 and may have post-dated the applicants' criminal trials and appeals, it was

irrelevant to this issue. Again, the requirements summarised at [57(d)] above were not satisfied.

64 We make the following observations in respect of each of the Seven Criminal Motions:

(a) In CM 32, Mr Selvam argued that the Prosecution had failed to produce a witness named "Zamri" at his trial in CC 18, or to disclose his statements. However, there was no evidence that the Prosecution's failure to produce Zamri as a witness or to disclose his statements was a breach of its disclosure obligations under *Kadar* or *Nabill*. First, Zamri could not be said to have been a material witness because the identity of a potential recipient of the drugs carried by Mr Selvam, which Zamri was alleged to be, was irrelevant to the charge faced by Mr Selvam, which was one of importation rather than trafficking. Further, the Prosecution could not be expected to have identified Zamri as a material witness. Zamri was not identified by Mr Selvam himself as a material witness during his trial, and in any event he misidentified someone else as Zamri during a photo-identification.

(b) In CM 45, Mr Tan argued that the Prosecution had failed to disclose evidence in his laptop concerning his online gambling activities; this would ostensibly have supported his defence at trial, which was that he believed that the packet of diamorphine delivered to him inside a plastic bag had in fact contained a book related to his gambling debts. There was in fact no evidence of the Prosecution withholding such evidence. To the contrary, Mr Tan had testified at his trial that his mother had thrown his laptop away when he was arrested, and he failed to mention the existence of this laptop in any of his

investigative statements despite being specifically questioned about his online gambling activities.

(c) In CM 46, Mr Ramdhan made two main arguments. First, the Prosecution had failed to disclose his phone records, text messages between his co-accused and another individual ("Surani"), as well as the letter that was sent by his co-accused person to the AGC. Not only were these pieces of evidence disclosed during his trial in HC/CC 12/2016 ("CC 12"), the court in CC 12 had also expressly considered the relevance of the evidence (see *Public Prosecutor v Ramdhan bin Lajis and another* [2018] SGHC 104 ("*Ramdhan*") at [81]–[89]). This evidence therefore could not have affected his conviction and sentence. Second, it was said that the Prosecution had failed to disclose the statements of his friend "Firza", who was driving the car in which Mr Ramdhan was arrested. We found that this alleged non-disclosure could have been raised earlier with reasonable diligence if in fact it was thought to be relevant.

(d) In CM 47, Mr Saminathan's case was that the Prosecution had failed to disclose certain phone communications with either of the other two co-accused ("Zulkarnain" and "Rizwan"), which would have revealed the absence of any incriminating communications linking Mr Saminathan to the latter two. This was factually untrue. During the trial in HC/CC 43/2016, the Prosecution had disclosed the fact that there were no incriminating communications linking Mr Saminathan to Zulkarnain or Rizwan. Further, the burden was on Mr Saminathan to rebut the presumption of knowledge under s 18(2) of the MDA, which he failed to do. Hence, this issue would not have changed the conclusion that Mr Saminathan was guilty under s 5(1)(*a*) of the MDA.

(e) In CM 48, Mr Roslan's case was that the Prosecution had failed to disclose the following at trial: (i) investigative statements from four accomplices whom we shall refer to as Nuradaha, Zamri, Norzainy, and Yusof; (ii) the fact that Nuradaha had earlier pleaded guilty to possession of drugs; and (iii) an explanation for why Zamri and Norzainy had each been granted a discharge not amounting to an acquittal. We saw no merit in this for the following reasons:

(i) First, Mr Roslan's defence at the trial was one of *alibi* – he denied being involved in the drug transaction at all and stated that he was not even at the location where the drug transaction occurred. In view of his defence, it is clear that Nuradaha, Zamri, Norzainy, or Yusof would not have been material witnesses since their evidence did not relate to the defence of alibi. The non-disclosure of their statements did not, therefore, constitute a breach of the Prosecution's disclosure obligations under *Nabill*. Mr Roslan was also unable to point to any evidence suggesting that the Prosecution's *Kadar* disclosure obligations had arisen.

(ii) Second, it was known to Mr Roslan that Nuradaha had pleaded guilty to an offence of drug trafficking since this was led during the examination-in-chief of Nuradaha at Mr Roslan's trial.

(iii) Third, the Prosecution was not required to disclose its reasons for making a particular prosecutorial decision (which led to a discharge not amounting to an acquittal), as observed by the Court of Appeal in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam Ravinthran*") at [74].

(f) In CM 49, Mr Datchinamurthy argued that the Prosecution had failed to disclose (i) the fact that he was suffering from severe pain in his scrotum when his contemporaneous statement was recorded; (ii) the fact that he had not been found with money from selling drugs; (iii) certain text messages allegedly sent from one "Land" to Mr Datchinamurthy and his co-accused, Christeen d/o Jayamany ("Christeen"); and (iv) Christeen's psychological report from the Institute of Mental Health. We saw no merit in any of these allegations. The first two allegations did not relate to evidence for the Prosecution to disclose to begin with; they were simply factual allegations which Mr Datchinamurthy himself could have raised at trial. As for the text messages with Land, all such messages had already been disclosed at trial, and Mr Datchinamurthy offered no details about the messages which he alleged remained undisclosed. Lastly, Christeen's psychological report had no bearing on Mr Datchinamurthy's knowledge of the drugs he carried, which was the central issue at trial.

(g) In CM 50, Mr Masoud argued that the Prosecution had failed to disclose his long statements to the CNB, his phone records and messages, statements taken from his stepsister and her boyfriend "Arab", and the Prosecution's investigation documents relating to one "Alf". Mr Masoud contended that as a result of these non-disclosures, he was unable to prove that Alf existed, thereby hampering his defence that he was merely a courier acting on Alf's instructions. We saw no merit in these arguments. First, Mr Masoud's long statements, phone records and messages had already been disclosed at trial. Second, the Prosecution did not possess any statements from Arab to disclose since he could not be traced. Third, the Prosecution similarly did not possess any statement from Mr Masoud's stepsister, and it was in any event open

to Mr Masoud to call her as a witness to prove Alf's existence. Fourth, the Prosecution had been unable to locate Alf, and it was unclear how investigation documents about these unsuccessful attempts would have assisted Mr Masoud's case.

The decision in Harven

65 The third argument pertained to the Court of Appeal's decision in *Harven*. The applicants argued that the close temporal proximity between the decision in *Harven* and the timing of the SPS's forwarding of the Disclosed Correspondence to the AGC suggested that the latter was triggered by the former, out of the apparent concern that similar challenges might be raised in other cases where the AGC knew that it had breached its *Kadar* obligations. Put simply, there were two parts to the applicants' arguments: first, that *Harven* involved a breach of the Prosecution's *Kadar* obligation; second, that there was a connection between *Harven* and the cases underlying the Seven Criminal Motions. There was no basis to either of these allegations. It was not the case that the court in *Harven* found a breach of the *Kadar* obligation; neither was this the basis for the appellant's acquittal there. Any alleged connection between *Harven* and the cases underlying the Seven Criminal Motions was also not supported by evidence. *Harven* was instead decided on the basis that, on the facts placed before the court, the appellant had successfully rebutted the presumption of knowledge under s 18(2) of the MDA because: (a) his account that he did not know the contents of the relevant bundles in his possession that were found to contain drugs was largely internally consistent; (b) the appellant's account was consistent with his conduct in making no attempt to conceal the bundles when undergoing inspection by Singapore customs; and (c) the circumstances in which the appellant had received the bundles were not so suspicious such that he would have been alerted to the illegal nature of the

contents of the bundles. This was therefore of no relevance to the applicants' case.

New evidence or arguments unrelated to the Disclosed Correspondence

66 Finally, with regard to the purported new evidence or arguments in each of the Seven Criminal Motions unrelated to the Disclosed Correspondence, we found that they did not rise to the level of being sufficient material on which this court could conclude that there had been a miscarriage of justice, as required under ss 394J(3)(*c*) and 394J(5). Therefore, the requirements summarised at [57(d)] above were not satisfied.

(a) In CM 45, Mr Tan alleged a failure of the police to attempt to access the account number and password of his gambling accounts on his laptop, which would have supported his defence at trial. We could not see how the police could have, or why they should have, looked for a laptop which Mr Tan had failed to mention in his investigative statements or which he testified at trial had been thrown away by his mother immediately after his arrest.

(b) In CM 46, Mr Ramdhan made two other allegations, both of which we disagreed with. His first argument was that the Prosecution failed to produce a witness named Surani at trial. We found this to be factually untrue. Surani was a witness who testified during the trial. His testimony had also been evaluated by the court in CC 12 (see *Ramdhan* at [80]). Mr Ramdhan's other argument was that the test for wilful blindness had not been satisfied. In so far as the presumption of knowledge under s 18(2) of the MDA had been invoked and remained unrebutted by Mr Ramdhan, there was no need for the court to consider

whether the test for wilful blindness had been satisfied (see *Ramdhan* at [37], [40], and [91]).

(c) In CM 47, Mr Saminathan alleged that there was no evidence that he knew he was carrying drugs, and that there was no evidence that the driver of the car was a drug dealer. In our view, this missed the key point. First, given that Mr Saminathan was presumed to be in possession of the drugs pursuant to s 18(1) of the MDA, he was presumed to have known the nature of the drugs as provided for in s 18(2) of the MDA. There was no need for the Prosecution to adduce evidence if they were relying on the presumptions. Indeed, the burden was on Mr Saminathan to rebut this. Second, as Mr Saminathan was charged for drug trafficking under s 5(1)(*a*) of the MDA, it sufficed for the Prosecution to prove that he trafficked the drugs and that he knew the nature of the drugs. The Prosecution had established that Mr Saminathan trafficked the drugs by delivering them to the driver of the car. Whether the driver of the car was a drug dealer was not relevant to the legal inquiry.

(d) In CM 48, Mr Roslan submitted that there was new evidence in the form of two statutory declarations ("SDs") which showed that Yusof was the individual who directed the drug transaction and who also directed Nuradaha, Zamri, Norzainy, and Mr Pausi to falsely implicate Mr Roslan. One of these two SDs was by one Mohammad Farid bin Batra ("Farid") dated 19 November 2018 ("Farid's SD") and the other by Nuradaha dated 7 July 2023 ("Nuradaha's SD"). There were a number of issues with Mr Roslan's reliance on the two SDs:

(i) First, Mr Roslan had not explained how he came to be in the possession of the two SDs or why he could not have adduced these earlier.

(ii) Second, both SDs could not be said to be reliable, since there were material differences in the SDs on the purported instructions given by Yusof to the various persons involved to implicate Mr Roslan. Further, Farid acknowledged in his SD that he did not personally hear any instructions from Yusof. Rather, he only claimed to have assisted by passing a message from Norzainy to Nuradaha. To that extent, Farid's SD did not in fact assist Mr Roslan's case that Yusof had instructed the various persons involved to implicate Mr Roslan.

(iii) Third, we note that Mr Roslan first sought to advance a claim that his accomplices had conspired to implicate him in CA/CM 1/2015 ("CM 1"). In CM 1, Mr Roslan similarly relied on supposed fresh evidence claiming that there was a conspiracy to falsely implicate him. In dismissing CM 1, the Court of Appeal observed that the case against Mr Roslan was "the product of an interlocking lattice of testimonies" which showed that Mr Roslan was the central figure in the drug transaction, given that he directed the actions of the others involved and orchestrated all its moving parts: *Roslan bin Bakar v Public Prosecutor* [2016] 3 SLR 1023 at [57]–[59]. This was the same problem in CM 48. In our judgment, the accounts given by the witnesses were too detailed and too consistent to have been fabricated. Farid's SD and Nuradaha's SD did not explain in any way how the accounts given by the witnesses were crafted with such a level of detail and consistency, as was found by the Court of Appeal to be the case in CM 1.

(e) In CM 50, Mr Masoud submitted that he had received unequal treatment in breach of Art 12(1) of the Constitution of the Republic of Singapore (2020 Rev Ed) (the "Constitution") because he had been charged with a capital offence while his co-accused, Mogan Raj Terapadisamy ("Mogan"), had been charged with a non-capital offence. Mr Masoud also submitted that his conviction should be reviewed because of a change in the law on wilful blindness in the Court of Appeal's decision in *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254 ("*Adili*"). He argued that under the new test in *Adili*, he would not have been found to be wilfully blind. These arguments were without merit. First, Mr Masoud's allegations of unequal treatment relate to the Prosecution's charging decision (which is a matter of prosecutorial discretion) and not to his conviction on the charge proffered. Mr Masoud's case was essentially that the mere fact of differentiation in the charges between himself and Mogan is indicative of a breach of Art 12(1) and calls for an explanation. We disagreed. The mere fact that different offenders involved in the same criminal enterprise have received different charges does not, without more, raise an inference of a breach of Art 12(1). In the absence of *prima facie* evidence to the contrary, the inference would be that the Prosecution has based its differentiation on relevant considerations (see *Ramalingam Ravinthran* at [71]). As Mr Masoud offered no such evidence, we rejected his assertion as baseless. Second, Mr Masoud was convicted on the basis of his *actual knowledge* that bundles in his possession contained drugs. The test of wilful blindness was therefore irrelevant to his case.

CM 22

67 Finally, we outline our reasons for dismissing the application in CM 22. Mr Pausi's application for review in CM 22 was unconnected to the Seven Criminal Motions, there being no evidence that his correspondence had been disclosed by the SPS to the AGC. However, it was heard together with the Seven Criminal Motions because he had been jointly tried with Mr Roslan.

Brief facts

68 Briefly, Mr Pausi and Mr Roslan were jointly tried in CC 35/2009. The Prosecution's case at trial was that Mr Roslan had met up with three co-accused persons – Nuradaha, Zamri, and Norzainy (see [64(e)] above). Together, they proceeded to a public car park in Choa Chu Kang to receive a delivery of drugs from Mr Pausi. At the car park, Mr Roslan paid Mr Pausi $3,000 for the drugs and instructed Nuradaha to retrieve a "Levi's" paper bag from Mr Pausi's car, which Nuradaha did. The paper bag was later found to contain 96.07g of diamorphine. Mr Pausi's defence at the trial was that he had been asked by one "Bobby" to collect a debt from Mr Roslan at the Choa Chu Kang car park, for which he was paid $3,000. He claimed that he did not know that a drug transaction had taken place and denied being in possession of any drugs.

69 On 22 April 2010, the trial judge convicted Mr Pausi and Mr Roslan of trafficking in not less than 96.07g of diamorphine and sentenced them to the mandatory death penalty. Mr Pausi and Mr Roslan appealed against their respective convictions and sentences in CCA 10. On 17 March 2011, this court dismissed CCA 10.

70 Following the dismissal of CCA 10, Mr Pausi made various applications to the courts, all of which were found to be unmeritorious. These included, among other things, the following:

(a) CM 6, in which Mr Pausi sought leave under s 394H(1) of the CPC to review the Court of Appeal's decision in CA/CCA 26/2018 ("CCA 26"). CCA 26 was, in turn, Mr Pausi's appeal against the High Court's decision in HC/CM 45/2016 refusing Mr Pausi's application to be re-sentenced to life imprisonment on the basis that he had fulfilled the conditions of s 33B(1)(*b*) read with s 33B(3) of the MDA (namely, that he was a courier and suffered from an abnormality of mind). CM 6 was dismissed by the Court of Appeal on 15 February 2022.

(b) OS 139, in which Mr Pausi sought leave to commence judicial review proceedings. In OS 139, Mr Pausi sought various reliefs including a declaration that the carrying out of the sentences of death imposed on him and his co-accused person would breach their rights under Arts 9(1) and 12(1) of the Constitution, and a prohibiting order against the execution of their respective sentences of death. On 16 February 2022, a Judge sitting in the General Division of the High Court dismissed OS 139. Mr Pausi's appeal against this decision by way of CA/CA 6/2022 ("CA 6") was dismissed by the Court of Appeal on 16 February 2022.

(c) OS 149, in which Mr Pausi sought declarations that the death penalty for drug offences was unconstitutional. On 16 March 2022, OS 149 was dismissed by a Judge sitting in the General Division of the High Court.

(d) HC/OA 465/2022 ("OA 465"), in which Mr Pausi sought permission to apply for a declaration that the Prosecution had acted in bad faith in violation of his right to a certificate of substantive assistance ("CSA"), and an order that a CSA be issued to him. On 8 November 2022, OA 465 was dismissed by a Judge sitting in the General Division of the High Court. Mr Pausi's appeal against this decision by way of CA/CA 49/2022 ("CA 49") was dismissed by the Court of Appeal on 1 August 2023.

Mr Pausi's arguments in CM 22

71 In CM 22, Mr Pausi sought permission to review the decision in CCA 10 on two main grounds:

(a) First, Mr Pausi relied on the change in law in *Nabill*. Mr Pausi submitted that the Prosecution had breached its *Nabill* disclosure obligations by failing to disclose the investigative statements of Yusof for whom Norzainy and Nuradaha worked as runners. Mr Pausi claimed that he was therefore deprived of a fair trial as Yusof's involvement was not addressed or explored in court despite Yusof being directly involved in the drug transaction.

(b) Second, Mr Pausi contended that there was new evidence that showed that Yusof directed him, Nuradaha, Zamri, and Norzainy to wrongly implicate Mr Roslan, so that Yusof would be absolved of his involvement in the drug transaction. Mr Pausi referred to various pieces of evidence in support of this claim.

Our decision on CM 22

72 We found CM 22 to be wholly without merit as Mr Pausi had not disclosed any basis on which permission to review the decision in CCA 10 should be granted.

Mr Pausi's application was not barred by virtue of s 394K(1) of the CPC

73 As a preliminary point, while the Prosecution argued that Mr Pausi's application in CM 22 was barred by virtue of s 394K(1) of the CPC given that Mr Pausi had brought a similar application in CM 6, we did not agree with this.

74 As we have summarised at [57(b)] above, it may be appropriate for an applicant to bring two separate review applications – and not be barred by s 394K(1) – if the decisions regarding his conviction and sentence are separate in substance. In Mr Pausi's case, the Prosecution accepted that CM 6 was an application for leave to review the decision in CCA 26 (which related to Mr Pausi's application to be re-sentenced to life imprisonment following the 2012 amendments to the MDA), whereas CM 22 sought permission to review a different decision (namely, the pre-amendment decision in CCA 10 dismissing Mr Pausi's appeal against his conviction and mandatory sentence of death). Mr Pausi was therefore not barred under s 394K(1) from bringing CM 22.

Mr Pausi's application was barred by virtue of s 394K(2) of the CPC

75 However, it was clear to us that Mr Pausi's application was prohibited under s 394K(2) of the CPC. Mr Pausi made various civil applications after the dismissal of CCA 10, for which judgment had been delivered by the time the present application was filed. These were: (a) OS 139 and the corresponding appeal in CA 6; (b) OS 149; and (c) OA 465 and the corresponding appeal in CA 49. Moreover, those applications were "related" civil applications, in that

the very purpose of the reliefs sought was to affect the outcome of Mr Pausi's criminal matter in CCA 10 by reversing or overturning his sentence of death – OS 139 and OS 149 both effectively sought declarations that Mr Pausi's sentence of death was unconstitutional, while OA 465 sought, among other things, an order that Mr Pausi be issued with a CSA. In the circumstances, given the effect of s 394K(2) of the CPC as summarised at [57(c)] above, it followed that Mr Pausi was barred from bringing a review application in relation to CCA 10, and his application for permission in CM 22 therefore failed on this ground alone.

There was no evidence that the Prosecution had breached its disclosure obligations

76 In any case, it was clear that CM 22 did not disclose any basis on which permission should be granted.

77 Mr Pausi submitted that there was a miscarriage of justice as the Prosecution breached its *Nabill* disclosure obligations by failing to disclose Yusof's statement or to call him to the stand. However, Mr Pausi did not demonstrate how Yusof's statement fell within the Prosecution's disclosure obligations. Mr Pausi's defence at trial was that he was asked by Bobby to collect money from Mr Roslan, and that he did not know a drug transaction had taken place. At trial, Mr Pausi's *only* mention of Yusof was that after he had allegedly collected money from Mr Roslan, Mr Roslan had asked him to meet Yusof in Bukit Merah. Mr Pausi denied knowing Yusof and claimed that he eventually did not meet Yusof. In short, according to Mr Pausi himself, Yusof was not relevant to his defence, and would not have been able to confirm or contradict Mr Pausi's defence. Yusof was therefore not a material witness, and any alleged non-disclosure of his statement did not constitute a breach of the Prosecution's *Nabill* disclosure obligations.

The fresh evidence did not disclose a basis for granting permission

78 Turning to the "fresh evidence" that Mr Pausi relied on, these materials did not disclose a basis for granting permission either. Simply put, the requirements for permission to be granted as summarised at [57(d)] above were not satisfied.

(1) Farid's SD

79 Akin to Mr Roslan in CM 48, Mr Pausi also relied on Farid's SD dated 19 November 2018 in support of his application in CM 22. In Farid's SD, Farid claimed that while he was in lock-up at the Police Cantonment Complex with Mr Pausi, Norzainy, Nuradaha, Zamri, and Yusof, Yusof told Norzainy to say in his statement that the drugs belonged to Mr Roslan and to "push all the blame" to Mr Roslan. Farid further claimed that "all of the five" (namely, Mr Pausi, Norzainy, Nuradaha, Zamri, and Yusof) pushed the blame to Mr Roslan so that they could escape liability for the drug transaction.

80 There were three issues in relation to Farid's SD:

(a) First, even if Farid did allege in his SD that Mr Roslan was falsely implicated, this did not exculpate Mr Pausi in any way. On the contrary, Farid's SD *implicated* Mr Pausi in the drug transaction since it suggested that Mr Pausi was trying to "push the blame" to Mr Roslan so that he could escape. Farid's SD was therefore not capable of showing almost conclusively that there had been a miscarriage of justice in relation to Mr Pausi, as required under s 394J(3)(*c*) of the CPC.

(b) Second, Mr Pausi did not account for how he came to be in possession of Farid's SD, or why he could not have adduced it earlier despite the SD being allegedly made on 19 November 2018. Mr Pausi

therefore failed to demonstrate how Farid's SD could not have been adduced in court earlier even with reasonable diligence, pursuant to s 394J(3)(*b*) of the CPC.

(c) Third, Farid's version of events did not match the movements of Mr Pausi and his co-accused persons. Assistant Superintendent Mohamad Haziq bin Mohamad Ikhsan ("ASP Haziq") explained in his affidavit dated 28 June 2023 in reply to Mr Pausi's application in CM 22 that Farid could not have been in the lock-up at the Police Cantonment Complex together with Mr Pausi, Norzainy, Nuradaha, Zamri, and Yusof based on their movements on the relevant date. Farid's SD therefore also did not meet the requirement of being "reliable" material under s 394J(3)(*c*) of the CPC.

(2) Record of the lock-up register and CCTV footage of the lock-up

81 Mr Pausi next referred to a record of the lock-up register and CCTV footage. However, Mr Pausi did not provide any details of what these materials depicted, nor did he extend copies of these materials. ASP Haziq also affirmed that he was unable to identify the alleged lock-up register and CCTV footage. As this court observed in *Tangaraju s/o Suppiah v Public Prosecutor* [2023] 1 SLR 622 (at [5]), if the new material that the applicant relies on is presently not available and therefore cannot be placed before the court in a review application, a review application premised on that material would serve no purpose. It followed that a review application premised on these materials was futile and the granting of permission was therefore not warranted.

(3) SD by Mdm Haminah binte Bakar

82 Mr Pausi also relied on an SD by Mr Roslan's sister, Mdm Haminah binte Bakar ("Mdm Haminah") dated 2 April 2019 ("Mdm Haminah's SD"). In Mdm Haminah's SD, Mdm Haminah claimed that she met Yusof in August 2008, and that Yusof had confessed to her that the drugs belonged to him.

83 In so far as Mdm Haminah's SD suggested that Mr Roslan and Mr Pausi may have taken the blame for Yusof (and that they were not otherwise involved in the drug transaction), this contradicted Mr Pausi's evidence at trial since Mr Pausi's defence at trial was that he did not know Yusof. Mr Pausi also did not provide any explanation for the belatedness of his allegation that he was in fact taking the blame for Yusof, nor did he explain why he did not adduce Mdm Haminah's SD in court earlier, despite the SD having allegedly been made in April 2019. Mr Pausi further failed to show how the SD was material that could not have been adduced in court earlier even with reasonable diligence, or that it was sufficiently reliable or compelling to demonstrate that there had been a miscarriage of justice, pursuant to ss 394J(3)(*b*) and 394J(3)(*c*) of the CPC.

(4) Mr Pausi's draft affidavit

84 Next, Mr Pausi relied on a draft affidavit in his name that was not signed or affirmed.

85 As was highlighted by ASP Haziq in his affidavit, Mr Pausi's draft affidavit closely resembled the affidavit filed by Mr Pausi on 8 October 2015 in CM 1, which was Mr Roslan's application to adduce fresh evidence and to have a retrial. CM 1 was dismissed by this court on 30 November 2015. In doing so, the court found that Mr Pausi and Mr Roslan had collaborated with each other in the preparation of their respective affidavits (see *Roslan bin Bakar v Public*

Prosecutor [2016] 3 SLR 1023 at [51]). In the circumstances, Mr Pausi's draft affidavit was likewise unreliable, and could not be the basis on which permission for a review application was granted. In any case, it was plain that Mr Pausi's draft affidavit did not exculpate him as Mr Pausi admitted therein that he came to Singapore to deliver drugs to Yusof, and that he met with Nuradaha, Norzainy, and Zamri for that purpose. The gist of Mr Pausi's draft affidavit was that he pushed the blame to Mr Roslan, who was allegedly innocent. This did not assist Mr Pausi.

(5) Text messages by Yusof to Mr Pausi

86 Finally, Mr Pausi relied on various text messages that were allegedly sent by Yusof to him. In our judgment, it was unclear how Yusof's messages supported Mr Pausi's claim that it was Yusof who ordered the drugs from Bobby. In any case, the messages from Yusof were not new evidence as they had been admitted as evidence in the trial by way of a report by the Technology Crime Forensic Branch. They therefore could not form the basis for granting permission under s 394H(1) of the CPC.

87 For all these reasons, it was clear that Mr Pausi's application was wholly without merit.

Conclusion

88 We accordingly dismissed the applications in CM 22, CM 32, CM 45, CM 46, CM 47, CM 48, CM 49, and CM 50.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

The applicants in person;
Christina Koh and Chan Yi Cheng (Attorney-General's Chambers) for the respondent in CA/CM 22/2023 and CA/CM 48/2023;
Nicholas Wuan Kin Lek and Teo Siu Ming (Attorney-General's Chambers) for the respondent in CA/CM 32/2023 and CA/CM 45/2023;
James Chew (Attorney-General's Chambers) for the respondent in CA/CM 46/2023;
Marcus Foo and Chan Yi Cheng (Attorney-General's Chambers) for the respondent in CA/CM 47/2023;
Marcus Foo and Eugene Lau (Attorney-General's Chambers) for the respondent in CA/CM 49/2023;
James Chew and Lim Shin Hui (Attorney-General's Chambers) for the respondent in CA/CM 50/2023.