Ramalingam Ravinthran *v* Attorney-General
[2012] SGCA 2

Case Number : Criminal Motion No 60 of 2011

Decision Date : 10 January 2012

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : M Ravi (L F Violet Netto) for the applicant; Mavis Chionh, Teo Guan Siew and Zhuo Wenzhao (Attorney-General's Chambers) for the respondent.

Parties : Ramalingam Ravinthran — Attorney-General

Constitutional Law – Attorney-General – Prosecutorial discretion

Constitutional Law – Equality before the law

Courts and Jurisdiction – Jurisdiction – Appellate

10 January 2012 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The applicant, Ramalingam Ravinthran ("the Applicant"), was convicted after a trial before a High Court judge ("the Trial Judge") of two charges of trafficking in controlled drugs under s 5(1)(*a*) read with s 5(2) of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("the MDA") (see *Public Prosecutor v Ramalingam Ravinthran* [2009] SGHC 265 ("*Ramalingam (HC)*")). Both charges carried the mandatory death penalty under s 33 of, read with the Second Schedule to, the MDA. The Applicant subsequently appealed to this court, which dismissed his appeal (see *Ramalingam Ravinthran v Public Prosecutor* [2011] SGCA 14 ("*Ramalingam (CA)*")).

2 The Applicant has now applied to this court, by way of Criminal Motion No 60 of 2011 ("this Motion"), to re-open our judgment in *Ramalingam (CA)* so as to enable him to argue that the prosecution leading to his conviction in *Ramalingam (HC)* was unconstitutional. The specific ground relied on by the Applicant is the alleged violation of Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") which occurred when the Attorney-General, in his capacity as the Public Prosecutor, decided to charge the Applicant with capital offences while charging one Sundar Arujunan ("Sundar"), who was involved in the same criminal enterprise, with non-capital offences. The Applicant seeks the following orders to remedy this alleged breach of Art 12(1): (a) that the capital charges against him be amended to non-capital charges; and (b) that the sentence imposed by the Trial Judge be set aside and replaced with a suitable non-capital sentence, such that there is no difference in punitive treatment between him and Sundar.

Factual background

3 The factual background to this Motion is set out in *Ramalingam (HC)* and *Ramalingam (CA)*. For present purposes, the material facts are as follows. On 13 July 2006 at around 5.15pm, the Applicant drove his car to Sri Arasakesari Sivan Temple at Sungei Kadut Avenue. He met Sundar in the

compound of the temple. Sundar placed a sports bag on the back seat of the Applicant's car. The Applicant then drove off with Sundar seated in the front passenger seat. After a while, Sundar alighted from the car at a bus stop, and the Applicant drove on towards his destination. Both men were separately arrested shortly afterwards by officers of the Central Narcotics Bureau ("CNB") in a planned operation. The sports bag in the Applicant's car was found to contain eight blocks of vegetable matter wrapped in aluminium foil and transparent plastic cling wrap. Analysis done by the Health Sciences Authority showed that the blocks contained 5,560.1g of cannabis and 2,078.3g of cannabis mixture. In statements taken from the Applicant and Sundar that were adduced at the Applicant's trial, both men admitted to having been previously involved in similar suspicious activities, but claimed that they had no knowledge that the "things" which they had delivered on those previous occasions were drugs.

The charges against the Applicant and Sundar

4 The Applicant and Sundar were charged separately with drug trafficking. Sundar was charged on 20 June 2007 (in Criminal Case No 17 of 2007) with two offences. The first charge against him stated:

> [O]n the 13th day of July 2006 at about 5.20 p.m., at the Sri Arasakesari Sivan Temple, No. 25 Sungei Kadut Avenue, Singapore, [you] did traffic in a controlled drug specified in Class 'A' of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, *by delivering to one Ramalingam Ravinthran not less than 499.99 grams of vegetable matter which was analysed and found to be cannabis*, without any authorisation under the said Act or the regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) and punishable under section 33 of the Misuse of Drugs Act, Chapter 185. [emphasis added]

The second charge against Sundar stated:

> [O]n the 13thday of July 2006 at about 5.20 p.m., at the Sri Arasakesari Sivan Temple, No. 25 Sungei Kadut Avenue, Singapore, [you] did traffic in a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, *by delivering to one Ramalingam Ravinthran not less than 999.99 grams of vegetable matter which was analysed and found to contain tetrahydrocannabinol and cannabinol*, without any authorisation under the said Act or the regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) and punishable under section 33 of the Misuse of Drugs Act, Chapter 185. [emphasis added]

5 The quantities of controlled drugs stated in the charges against Sundar were just *below* the threshold at which they would carry the mandatory death penalty on conviction. On 6 July 2007, Sundar pleaded guilty to both charges in the High Court and was sentenced to a total of 20 years' imprisonment and 24 strokes of the cane.

6 The Applicant was charged on 9 October 2007 (in Criminal Case No 29 of 2007), likewise with two offences. In contrast to the charges against Sundar, the quantities of controlled drugs stated in the charges against the Applicant *met* the threshold which would carry the mandatory death penalty on conviction. The first charge against him stated:

> [O]n the 13th day of July 2006 at about 5.40 p.m., in a motorcar bearing registration number SBR 4484S along Pioneer Road, Singapore, [you] did traffic in a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, by having in your possession for the purpose of trafficking eight blocks containing 5560.1 grams of vegetable matter which was analysed and found to be cannabis, without any authorisation under the said

Act or the regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) read with section 5(2) and punishable under section 33 of the Misuse of Drugs Act, Chapter 185.

The second charge against the Applicant stated:

> [O]n the 13th day of July 2006 at about 5.40 p.m., in a motorcar bearing registration number SBR 4484S along Pioneer Road, Singapore, [you] did traffic in a controlled drug specified in Class "A" of the First Schedule to the Misuse of Drugs Act, Chapter 185, to wit, by having in your possession for the purpose of trafficking eight blocks containing 2078.3 grams of fragmented vegetable matter which was analysed and found to contain tetrahydrocannabinol and cannabinol, without any authorisation under the said Act or the regulations made thereunder, and you have thereby committed an offence under section 5(1)(a) read with section 5(2) and punishable under section 33 of the Misuse of Drugs Act, Chapter 185.

7 At the Applicant's trial, the Prosecution called Sundar as a witness. Although Sundar turned hostile on the witness stand, the Prosecution successfully applied under s 147(3) of the Evidence Act (Cap 97, 1997 Rev Ed) to admit a previous inconsistent statement which he had made to the CNB and substituted it for his oral evidence. That statement implicated the Applicant as to his knowledge that there was cannabis in the sports bag placed in his car. The Trial Judge convicted the Applicant on the basis of Sundar's statement as well as the Applicant's own statements as recorded by various CNB officers.

The Applicant's judicial review proceedings

8 After the Applicant's appeal against conviction and sentence was dismissed on 7 September 2010, the Applicant applied (via Originating Summons No 234 of 2011) for leave to commence judicial review proceedings seeking a quashing order to quash his conviction, a prohibiting order to prohibit the Director of Prisons from executing the death sentence against him and an order that the same charges be preferred against him as the charges that were preferred against Sundar. The Applicant's leave application was heard by a High Court judge as a substantive application. At the hearing, the Applicant withdrew his application for a quashing order. After hearing the parties, the High Court judge dismissed the Applicant's application for judicial review on 31 May 2011 (see *Ramalingam Ravinthran v Attorney-General* [2011] 4 SLR 196). The Applicant then filed this Motion on 9 September 2011.

The issues in this Motion

9 This Motion involves two issues – one procedural and the other substantive. The procedural issue is whether this court should hear this Motion at this stage of the proceedings, when the Applicant has already exhausted his right of appeal. The substantive issue is whether, in the circumstances of this case, the Attorney-General violated the Applicant's constitutional right to equality before the law, as guaranteed by Art 12(1) of the Constitution, by prosecuting him for two capital offences of drug trafficking while prosecuting Sundar for two non-capital offences of drug trafficking, even though both of them were involved in the same criminal enterprise. We deal with these two issues below, beginning with the procedural issue.

The procedural issue: the *functus officio* principle and the finality principle

Overview of the applicable principles

10 The procedural issue concerns the applicability of two general principles to this case: the principle of *functus officio* and the principle of finality. The first principle raises the question of whether this court is *functus officio* and no longer has any jurisdiction to rehear or re-open any issue relating to the Applicant's conviction and sentence *vis-à-vis* the charges brought against him (as set out at [6] above). The *functus officio* principle, as enunciated in *Lim Choon Chye v Public Prosecutor* [1994] 2 SLR(R) 1024 at [8], *Abdullah bin A Rahman v Public Prosecutor* [1994] 2 SLR(R) 1017 at [10] and *Vignes s/o Mourthi v Public Prosecutor* [2003] 4 SLR(R) 518 at [4]–[8] (which cases will hereafter be called "the *Vignes* line of decisions"), is that once this court has rendered judgment in an appeal before it, it is *functus officio* in so far as that appeal is concerned. In *Koh Zhan Quan Tony v Public Prosecutor and another motion* [2006] 2 SLR(R) 830 ("*Tony Koh*"), this court held (at [11]–[13]) that the *Vignes* line of decisions would not apply to a case where the question sought to be raised at the second hearing before it was not concerned with the substantive merits of the case which it decided at the first hearing, but went instead to its jurisdiction to hear that case at the first hearing. For instance, if, at the first hearing before it, the Court of Appeal decided a matter which was not within its jurisdiction, there would be no decision in law on that matter, and, therefore, the court would not have exhausted its jurisdiction (*ie*, would not be *functus officio*) *vis-à-vis* that particular matter (see *Tony Koh* at [22]).

11 The second principle mentioned in the preceding paragraph – *viz*, the principle of finality – is broader. The basis underlying this principle is that it is generally in the public interest that court judgments should be final and parties should not be allowed to re-litigate issues which have already been decided by the courts. This principle is expressed by the Latin maxim "*interest rei publicae ut sit finis litium*". When it is applied to civil proceedings, it is subject to very narrow exceptions (see *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 at [72]–[73]). The finality principle also applies to criminal proceedings. However, in that context, broad exceptions do apply in certain circumstances, even where the offender in question has exhausted his right of appeal to the final appellate court. This was the opinion of this court in *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 ("*Yong Vui Kong (Jurisdiction)*").

12 In *Yong Vui Kong (Jurisdiction)*, this court recognised that the principle of *functus officio*, as laid down in the *Vignes* line of decisions, was based on the policy considerations underlying the principle of finality. In the criminal context, the *functus officio* principle is a self-limiting principle applied by this court so as not to open the floodgates to frivolous and unmeritorious applications for previous criminal judgments to be reviewed. However, the relevant statutory provisions governing criminal appeals (previously Pt V of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and now Div 1 of Pt XX of the Criminal Procedure Code 2010 (Act 15 of 2010)) do not expressly state when the court is *functus officio*.

13 In this light, it was observed in *Yong Vui Kong (Jurisdiction)* that where this court, being the final appellate court in this jurisdiction, had made a mistake of fact or law which had caused a person to be convicted and punished, it must have the power to correct its own mistake so as to avoid a miscarriage of justice. At [15]–[16] of *Yong Vui Kong (Jurisdiction)*, this court, after discussing (*inter alia*) the *Vignes* line of decisions, said (*per* Chan Sek Keong CJ):

> 15 We note … that the main justifications of these cases, that the court is *functus* after it has delivered judgment on the case, rest on the public interest in having finality of litigation and the absence of an express provision in the SCJA [*ie*, the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)] to empower the court to review its decisions. The first justification is bolstered by the fear of abuse of the judicial process and the floodgates argument (an argument which was also made to the [High Court] [j]udge in this case). In our view, the finality principle should not be applied strictly in criminal cases where the life or liberty of the accused is at stake as it would

subvert the true value of the judicial process, which is to ensure, as far as possible, that the guilty are convicted and the innocent are acquitted. The floodgates argument should not be allowed to wash away both the guilty and the innocent. Suppose, in a case where the appellate court dismisses an appeal against conviction and the next day the appellant manages to discover some evidence or a line of authorities that show that he has been wrongly convicted, is the court to say that it is *functus* and, therefore, the appellant should look to the Executive for a pardon or a clemency? In circumstances where there is sufficient material on which the court can say that there has been a miscarriage of justice, this court should be able to correct such mistakes.

16 Another argument which this court should take into account (but which has never been addressed to the court), is that Art 93 of the Constitution vests the judicial power of Singapore in the Supreme Court. The judicial power is exercisable only where the court has jurisdiction, but where the SCJA does not expressly state when its jurisdiction in a criminal appeal ends, there is no reason for this court to circumscribe its own jurisdiction to render itself incapable of correcting a miscarriage of justice at any time. We have not heard the Public Prosecutor on this point, and it will be necessary to do so in an appropriate case in the future.

The parties' arguments on the procedural issue

14 Before us, counsel for the Applicant, Mr M Ravi ("Mr Ravi"), relied on [15] of *Yong Vui Kong (Jurisdiction)* in support of his argument that we should hear this Motion. He also referred to *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*") at [149] (reproduced at [17] below), where the Court of 3 Judges stated that the Attorney-General's prosecutorial discretion could not be exercised for an extraneous purpose or in breach of constitutional rights.

15 In reply, State Counsel appearing for the Attorney-General, Ms Mavis Chionh ("Ms Chionh"), contended that this court was indeed *functus officio* after making its decision in *Ramalingam (CA)*, and argued that the *Vignes* line of decisions was applicable to this Motion as the exception established in *Tony Koh* was not applicable. Ms Chionh also contended that *Yong Vui Kong (Jurisdiction)* was not applicable as, unlike the scenario described at [15] of that decision, the Applicant had not raised any new evidence or new argument of law that would show that he had been wrongfully convicted. Ms Chionh further submitted that the Applicant must show a *prima facie* case of unconstitutionality before this court could re-open its judgment in *Ramalingam (CA)*.

Our decision on the procedural issue

16 As mentioned at [2] above, this Motion is an attempt to re-open a conviction (in *Ramalingam (HC)*) which has been unsuccessfully appealed against (in *Ramalingam (CA)*). The substantive issue in this Motion (as set out at [9] above) concerns a constitutional point which the Applicant could have raised during his trial in the High Court and also at the hearing of his appeal against the Trial Judge's decision. The Applicant had two opportunities to raise that constitutional point, but did not avail himself of either of them. In the circumstances, the Applicant could have had no cause to complain if we had declined to hear this Motion on the basis that he had exhausted all his rights to due process and had ceased to have any standing to challenge before a court of law the legality of his prosecution for the two capital offences set out at [6] above.

17 Be that as it may, because this Motion involves capital offences, we decided to hear the Applicant's arguments on why we should not dismiss this Motion outright and the Prosecution's response to those arguments. After considering the arguments of the parties, we decided to hear this Motion as the substantive issue in this Motion concerns a constitutional point – namely, the interaction between the prosecutorial discretion in Art 35(8) of the Constitution and the right to

equality before the law conferred by Art 12(1) thereof – which, in our view, needs to be examined in greater detail and clarified in the public interest. Our decision (apropos the procedural issue in this Motion) to hear this case accords with our decision in *Yong Vui Kong (Jurisdiction)*, where the need to settle the constitutionality (or otherwise) of the mandatory death penalty for the offence of trafficking in more than 15g of diamorphine was the critical factor behind this court's decision to hear the applicant's arguments in that case notwithstanding that he had earlier withdrawn his appeal against his conviction for that offence (see [28] of *Yong Vui Kong (Jurisdiction)*). In deciding that we would hear this Motion, we also endorsed the following observations made by the Court of 3 Judges in *Phyllis Tan* at [149] (*per* Chan CJ):

> The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose [for which] it is intended, *ie*, to convict and punish offenders, and not for an extraneous purpose. As the Court of Appeal said in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86], all legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law. In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, *ie*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a discriminatory prosecution which results in an accused being deprived of his right to equality under the law and the equal protection of the law under Art 12 of the Constitution). Authority for this proposition may be found in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh*"). In that case, although the Privy Council recognised that the unconstitutional exercise of prosecutorial discretion could be challenged, it held that there was *no material on the facts of that case* on which to found an argument that the Attorney-General [of Malaysia] had exercised his discretion unlawfully. *Teh Cheng Poh* has been followed by the Court of Appeal in two cases, *viz*, *Sim Min Teck v PP* [1987] SLR(R) 65 and *Thiruselvam s/o Nagaratnam v PP* [2001] 1 SLR(R) 362. [emphasis in original]

As stated in this passage, even though the prosecutorial power is a constitutional power under Art 35(8) of the Constitution, it is not immune to judicial correction where it has been exercised arbitrarily or in breach of constitutionally-protected rights. An arbitrary exercise of the prosecutorial power would be *ultra vires* Art 35(8), while a prosecution in breach of constitutionally-protected rights would be unconstitutional. In intervening in such cases, the court would not be intruding on the prosecutorial power (as stated in *Phyllis Tan* at [144], which is set out at [43] below).

The substantive issue: the application of Article 12(1) of the Constitution in the context of the prosecutorial discretion

The principles established by the authorities

18 Moving now to the substantive issue in this Motion (as described at [9] above), before we consider the parties' arguments on this issue, it is useful that we examine the principles established in certain cases where Art 12(1) of the Constitution was interpreted and applied. These cases consist of the decision in *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*"), which the Applicant has cited as his main authority in relation to the substantive issue, and a trio of decisions relied upon by the Attorney-General in response, namely, *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh*"), *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65 ("*Sim Min Teck*") and *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 ("*Thiruselvam*"). In our view, this examination of the case authorities will show that the Applicant's case in this Motion, which concerns the interaction and the potential tension between the constitutional prosecutorial power in Art 35(8) and the right to equality before the law under

Art 12(1), has novel elements. We should add that even though *Ong Ah Chuan*, *Sim Min Teck* and *Thiruselvam* concern predecessor versions of the Constitution (as defined at [2] above), for ease of discussion, we will likewise refer to these predecessor versions as "the Constitution".

The decision in Ong Ah Chuan

19 We consider first the decision in *Ong Ah Chuan*. In that case, the appellants contended that the legislated mandatory sentence of death for trafficking in more than a prescribed amount (*viz*, 15g) of diamorphine (heroin) was inherently contrary to Art 12(1) of the Constitution. The Privy Council (*per* Lord Diplock) responded to this argument as follows:

> 32 … As their Lordships understood the argument presented to them on behalf of the appellants, it was that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by s 3 of the Drugs Act [*ie*, the Misuse of Drugs Act 1973 (Act 5 of 1973)], rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. This, it was contended, was arbitrary and not "in accordance with law" as their Lordships have construed that phrase in Art 9(1); alternatively it offends against the principle of equality before the law entrenched in the Constitution by Art 12(1), since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15g of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99g.
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> …
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> 34 In order to dispose of the appellants' argument their Lordships do not find it necessary to embark upon a broad analysis of what the constitutional requirements of "equality before the law" and "the equal protection of the law" involve in contexts other than that of criminal laws which provide for mandatory penalties or mandatory limits upon penalties to be imposed upon the offenders convicted of particular crimes.
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> 35 All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances – the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. *Equality before the law and equal protection of the law require that like should be compared with like. What Art 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others*; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.
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> …
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> 39 Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real: it is perhaps more theoretical than real in the case of large-scale trafficking in drugs, a crime of which the motive is cold calculated greed. *But Art 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with*

equal punitive treatment for similar legal guilt.

[emphasis added]

20 The above statements were made in the context of criminal statutes which provide for mandatory death sentences. The Privy Council's statements merely set out the general criteria for determining whether a particular statute of this nature violates the constitutional guarantee of equality before the law. The specific statute under consideration in *Ong Ah Chuan*, *viz*, the Misuse of Drugs Act 1973 (Act 5 of 1973) ("the MDA 1973"), prescribed the mandatory death penalty for trafficking in more than a prescribed quantity of certain controlled drugs. The issue before the Privy Council was whether the relevant provisions of the MDA 1973 were arbitrary in mandating the death penalty for trafficking in 15g or more of heroin, but not for trafficking in less than 15g of heroin. The case was *not* concerned with the constitutionality of the Attorney-General's exercise of the prosecutorial discretion (which is the complaint of the Applicant in this Motion). The test of what equality before the law requires is not necessarily the same in both situations.

The decision in Teh Cheng Poh

21 In contrast to *Ong Ah Chuan*, *Teh Cheng Poh* (cited at [18] above) directly concerned the constitutionality of an exercise of the prosecutorial discretion *vis-à-vis* the protection of equality before the law enshrined in Art 8(1) of the Federal Constitution of Malaysia (1970 Reprint) ("the Malaysian Constitution"), which corresponds to Art 12(1) of the Constitution. In that case, the appellant was charged under s 57(1) of the Internal Security Act 1960 (Act 82, 1972 Rev Ed) (M'sia) ("the ISA 1960") with being in unlawful possession of a firearm and ammunition. At that time, there was another law, *viz*, the Arms Act 1960 (Act No 21 of 1960) (M'sia) ("the Arms Act 1960") read with the Firearms (Increased Penalties) Act 1971 (Act 37 of 1971) (M'sia) ("the Firearms (Increased Penalties) Act 1971"), under which the appellant could have been charged. The offence under the ISA 1960 was a capital offence, whereas the offence under the Arms Act 1960 read with the Firearms (Increased Penalties) Act 1971 was not. The appellant was prosecuted under the ISA 1960, convicted and sentenced to death. Before the Privy Council, the appellant argued that the Malaysian Attorney-General's decision to prosecute him for a capital offence was a violation of Art 8(1) of the Malaysian Constitution.

22 The Privy Council rejected this argument. At 56 of *Teh Cheng Poh*, their Lordships (*per* Lord Diplock) said:

> … Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney General of Malaysia by Article 145(3) of the [Malaysian] Constitution …
>
> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. *All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiassed* [*sic*] *consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.*

> If indeed the Attorney General [of Malaysia] was possessed of a discretion to choose between prosecuting the appellant for an offence [under] section 57(1) of the [ISA 1960], or for an offence under the Arms Act [1960] … and the Firearms (Increased Penalties) Act [1971], … *there is no material on which to found an argument that in the instant case he exercised it unlawfully*. But, in their Lordships' view, although he had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the appellant but not proceeded with), once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the [ISA 1960].
>
> [emphasis added]

23 The statements of the Privy Council in this passage on what the constitutional requirement of equality before the law entailed were directed specifically towards the exercise of the prosecutorial discretion. The Privy Council considered the constitutional status of the Malaysian Attorney-General's prosecutorial discretion under Art 145(3) of the Malaysian Constitution (corresponding to Art 35(8) of the Constitution). In the light of that status, their Lordships found that the protection of equality before the law only required the Malaysian Attorney-General to give unbiased consideration to all offenders in criminal cases, and to be mindful not to take into account irrelevant considerations in exercising his prosecutorial discretion.

24 The Privy Council in *Teh Cheng Poh* was not addressing a situation where two offenders were involved in the same criminal enterprise (as in the present case). In general, like cases must be treated alike with respect to all offenders involved in the same criminal conduct. If there is evidence that A and B have committed murder, and A is charged with murder, then, *all other things being equal*, B should be charged with murder as well. Likewise, if the evidence indicates that A and B have committed culpable homicide not amounting to murder, and A is charged with that offence, then (if all other things are equal) B should be charged with the same offence. An unbiased consideration of A's and B's respective cases, if the circumstances of the two cases are identical, should lead to the same prosecutorial decision being taken in respect of A and B. This is what Art 12(1) of the Constitution requires in the context of prosecutorial decisions. But, as the Privy Council acknowledged in *Teh Cheng Poh* (consistent with the established position at common law), the Prosecution is entitled and obliged to take into account many factors in deciding whether A and/or B should be charged with murder or a lesser offence (*eg*, culpable homicide not amounting to murder) or no offence at all. Relevant factors for the Prosecution's consideration in making prosecutorial decisions include the available evidence, public interest considerations, the personal circumstances of the offender, the offender's degree of culpability, *etc*. Where these factors apply differently to different offenders, this would justify differential treatment between them. The only qualifications stated in *Teh Cheng Poh* are that there must be no bias on the Prosecution's part and irrelevant considerations must not be taken into account.

25 In applying the aforesaid criteria to the facts of *Teh Cheng Poh*, the Privy Council observed (at 56) that "there [was] no material on which to found an argument that in the instant case [the Malaysian Attorney-General] exercised [the prosecutorial discretion] unlawfully". In other words, the Privy Council stated that a mere allegation that the Malaysian Attorney-General had exercised his prosecutorial power unlawfully, unsupported by evidence, could not engage Art 8(1) of the Malaysian Constitution. Although the actual outcome in *Teh Cheng Poh* was ultimately based on other grounds, it was implicit in this finding that if the appellant had somehow been able to produce evidence that the Attorney-General of Malaysia had not given unbiased consideration to his case or had taken into account irrelevant considerations in deciding to charge him with a capital offence, Art 8(1) of the Malaysian Constitution would have been infringed.

26 Hence, *Teh Cheng Poh* stands for the principle that (in our local context) the Attorney-General may not exercise his prosecutorial power under Art 35(8) of the Constitution in breach of Art 12(1) (or, for that matter, in breach of any other fundamental liberty set out in Pt IV of the Constitution) – but, if the offender alleges such a breach has occurred in his case, the burden lies on him to produce evidence of the alleged breach. On the facts of *Teh Cheng Poh*, unless direct proof of the Prosecution's decision-making process in the appellant's case somehow came to light, the appellant would only have been able to show *prima facie* impropriety by producing evidence that another offender in similar circumstances had been prosecuted for a non-capital offence.

27 That the burden of proof lies on the offender in this regard is a wholly trite proposition that is reflected in s 103(1) of the Evidence Act, which states that "[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist". In constitutional challenges to the prosecutorial discretion based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution, it is only when enough evidence is adduced to show a *prima facie* breach that the evidential burden will be shifted to the Attorney-General to justify his prosecutorial decision.

28 However, once the offender shows, on the evidence before the court, that there is a *prima facie* breach of a fundamental liberty (*ie*, that the Prosecution has a case to answer), the Prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At that stage, the Prosecution will not be able to rely on its discretion under Art 35(8) of the Constitution, without more, as a justification for its prosecutorial decision.

29 It should be noted that the decision in *Teh Cheng Poh* was concerned with a single offender whose criminal act was an offence under two different statutory regimes which prescribed two different punishments (one capital and the other non-capital). Hence, although the principle established in *Teh Cheng Poh* (*ie*, that the Prosecution, in exercising its prosecutorial decision, must give unbiased consideration to all relevant factors with respect to all offenders and must not take into account irrelevant considerations) is applicable to all prosecutions, whether concerning one or several offenders, it does not specifically address the application of Art 12(1) in cases like the present which concern differential treatment of two offenders involved in the same criminal enterprise (in this case, drug trafficking).

The decision in Sim Min Teck

30 The decision in *Teh Cheng Poh* was followed by this court in *Sim Min Teck* (cited at [18] above). In that case, the appellant, Sim Min Teck ("Sim"), was charged with murder committed in the course of a robbery and was convicted after a trial. In contrast, his accomplice, Beh Meng Chai ("Beh"), was charged with culpable homicide not amounting to murder (to which he pleaded guilty). At the trial, Beh testified that it was Sim and another person, Chng Meng Joo ("Chng"), who had inflicted the injuries that caused the death of one of the victims (see *Sim Min Teck* at [6]). At the hearing of Sim's appeal, this court found that there was overwhelming evidence that Sim, Beh and Chng had fatally stabbed the two victims in circumstances which amounted to murder by one or more of them, and that they had done so in furtherance of a common intention to commit armed robbery and to use knives if necessary. On this finding of fact, all three of them could have been liable for murder.

31 Sim argued that his prosecution for murder violated Art 12(1) of the Constitution since Beh had been charged with a lesser offence even though he (Sim) and Beh had committed the same criminal acts in furtherance of a common intention. This court rejected the argument. At [9] of *Sim Min Teck*, this court (*per* Wee Chong Jin CJ) explained:

… [I]t was contended on behalf of the appellant [*ie*, Sim] that because Beh had been charged on the same facts with the lesser offence, the appellant had been discriminated against contrary to Art 12(1) of the Constitution … which states that "All persons are equal before the law and entitled to the equal protection of the law". We rejected this contention. The Attorney-General of Singapore is by Art 35(8) of the Constitution given power, exercisable at his discretion to institute, conduct or discontinue any proceedings for any offence. As was said by Lord Diplock when delivering the judgment of the Privy Council in *Teh Cheng Poh* … at 56 of the discretion exercisable by the Attorney-General of Malaysia under Art 145(3) of the Malaysian Constitution which is *in pari materia* with our Art 35(8):

> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

32 With respect, this court, in rejecting Sim's argument that he had been denied equality before the law, did not seem to have recognised that the facts in *Sim Min Teck* were quite different from those in *Teh Cheng Poh* – alternatively, if it did recognise the factual differences, it did not regard those differences as important. In our view, the factual situation in *Sim Min Teck* (in contrast to that in *Teh Cheng Poh*) called for a deeper analysis of the interaction between the right to equality before the law under Art 12(1) and the prosecutorial power in Art 35(8). Unlike the scenario in *Teh Cheng Poh*, this court was faced in *Sim Min Teck* with two apparently equally culpable offenders, one of whom had been charged with and convicted of a more serious (capital) offence than the other. In relying on the passage from 56 of *Teh Cheng Poh* (as set out in the above quote from [9] of *Sim Min Teck*), this court should have asked itself whether the evidence before it, including the very fact of the differentiated charges against Sim and Beh, was sufficient to raise a *prima facie* case of a possible infringement of Art 12(1). This court did not do so, but instead dismissed Sim's argument by applying the reasoning in *Teh Cheng Poh* without any regard for the distinguishing facts in *Sim Min Teck*. It is not clear whether this court, in simply quoting the aforesaid passage from *Teh Cheng Poh*, was dismissing Sim's argument because of the width of the Attorney-General's prosecutorial discretion (which was the reason it actually gave), or because Sim had produced no evidence that the Attorney-General had exercised his prosecutorial discretion unlawfully (which was the reason set out in the third paragraph of the quote from *Teh Cheng Poh* reproduced at [22] above). It is therefore not possible to tell what the true *ratio* of *Sim Min Teck* was, although (as discussed at [78] below) the fact that Beh agreed to give evidence against Sim might well have justified the Attorney-General's decision to bring different charges against the two men.

The decision in Thiruselvam

33 The next case where Art 12(1) of the Constitution was invoked as a defence to a prosecution was *Thiruselvam* (cited at [18] above). The facts of that case were as follows. In a sting operation, one Katheraven s/o Gopal ("Katheraven") was arrested after he offered to sell 807.6g of cannabis and 115g of cannabis mixture to an undercover officer from the CNB ("Sgt Andrew"). Prior to the sale, Katheraven had made four successive outgoing calls to the appellant, Thiruselvam s/o Nagaratnam ("Thiruselvam"), on the latter's pager. After Katheraven's arrest, Thiruselvam made altogether four

calls to Katheraven's handphone, which were intercepted and answered by a CNB officer. In the course of those calls, Thiruselvam said, "[i]f the thing is taken, the money must be paid" (see *Thiruselvam* at [6]). The CNB officer arranged to meet Thiruselvam to pay him the money for the drugs. Thiruselvam was arrested on his way to receive the money. Thiruselvam was charged with a capital offence, *ie*, abetting the trafficking of 807.6g of cannabis (the actual quantity of cannabis found in Katheraven's possession), while Katheraven was charged with two non-capital offences, one of which was for trafficking in "not more than 500g and not less than 300g of cannabis" (see *Thiruselvam* at [28]).

34 At the trial, Katheraven, having earlier pleaded guilty to the two non-capital charges against him for supplying the drugs to Sgt Andrew, was a witness for the Prosecution (see *Thiruselvam* at [14]). In his evidence, he completely exonerated Thiruselvam from any involvement in the supply or sale of the drugs. However, the trial judge admitted (pursuant to s 147(3) of the Evidence Act) Katheraven's voluntary statements which implicated Thiruselvam in the commission of the offence charged and convicted Thiruselvam.

35 Thiruselvam appealed against his conviction on the ground that, *inter alia*, the capital charge against him infringed Art 12(1) of the Constitution since Katheraven, who was the main offender and therefore at least equally guilty, had been prosecuted for two non-capital charges. The argument was rejected. This court (*per* L P Thean JA) first noted (at [30]) that "[a] point similar to the one under consideration was decided by the Privy Council in *Teh Cheng Poh*", and, further (at [31]), that "[a] more direct authority on the point [was] the case of *Sim Min Teck*". Thean JA went on to find as follows (at [32]):

> It is true that in *Sim Min Teck* … the accused was one of the main offenders and the accomplice played *a lesser rol*e in the commission of the offence of murder. In the instant case, the position ***is the reve* rs *e*** : [Thiruselvam] was only an abettor of Katheraven, the person who committed the main offence. To that extent, this case is slightly different from *Sim Min Teck*. ***However, this difference is immaterial and does not detract from the weight of that authority.*** *The principle remains the same. The Prosecution has a wide discretion to determine what charge or charges should be preferred against any particular offender, and to proceed on charges of different severity as between different participants of the same criminal acts.* In this case, it has a discretion to choose between preferring a charge against [Thiruselvam] for abetment of trafficking in a quantity which carries the capital punishment and preferring one for abetment of trafficking in a quantity which does not. In our judgment, there was no breach of Art 12 of the Constitution. [emphasis added in italics and bold italics]

36 In *Thiruselvam*, this court, just as it did in *Sim Min Teck*, merely referred to *Teh Cheng Poh* and, without any reference to the particular facts of the case before it, applied the general principle that the Prosecution had a wide discretion to determine what charge or charges should be preferred against an offender (see [32] of *Thiruselvam*). We have already commented earlier (at [32] above) on such an uncritical approach in our discussion of *Sim Min Teck*. In fact, in *Thiruselvam*, this court went even further (compared to the approach which it took in *Sim Min Teck*) and held that the prosecutorial discretion under Art 35(8) of the Constitution was wide enough to entitle the Attorney-General to charge Thiruselvam with a capital offence and Katheraven with two non-capital offences without violating Art 12(1), *even though* (so this court appeared to have found) *Thiruselvam had played a lesser role*.

37 In our view, this court's decision in *Thiruselvam* would have been difficult to defend if Thiruselvam had indeed played a lesser role. It is contrary to any notion of justice that (all other things being equal) a less culpable offender should be charged with a more serious offence (and

subjected to a more serious punishment) than a more culpable offender when both are involved in the same criminal enterprise, especially when one offence is a non-capital offence and the other is a capital offence. If all other things had been equal between Thiruselvam and Katheraven, the Attorney-General should not have exercised his prosecutorial power differentially as between them – to do so would have been *prima facie* either arbitrary or biased, and therefore contrary to Art 12(1). Once this court found that Thiruselvam was less culpable than Katheraven (which it appeared to have done), if it saw no other legitimate reason for differentiation between the two men, it ought to have found that a *prima facie* breach of Art 12(1) of the Constitution was made out with respect to Thiruselvam's prosecution, and it should have required the Prosecution to justify its decision or be found to be in breach of Art 12(1) (following the approach described at [28] above).

38 That said, in our view, the facts in *Thiruselvam*, if properly evaluated, could have justified the differentiated charging of Thiruselvam and Katheraven. The evidence in that case showed that Thiruselvam had instructed Katheraven to pay him the proceeds from the sale of the drugs upon the successful delivery of those drugs. Thiruselvam was thus either Katheraven's controller or supplier in relation to the latter's drug trafficking. If, in this situation, Thiruselvam occupied a higher or more significant position in the supply chain of illegal drugs, then his criminal activities would have been more significant in terms of the potential harm caused to society. In comparison, Katheraven would have been a mere courier. Thus, from a policy perspective, Thiruselvam could be said to have been more culpable an offender than Katheraven in the context of combating drug trafficking in Singapore.

39 In this regard, if the court in *Thiruselvam* did indeed suggest that Thiruselvam was less culpable than Katheraven because the criminal act of an abettor was less culpable than that of the substantive offender, then the court was, with respect, mistaken because it would be contrary to s 109 of the Penal Code (Cap 224, 2008 Rev Ed), which provides that the offence of abetment generally carries the same punishment as the substantive offence if there is no express punishment provision in the Penal Code for the abetment offence. In the context of anti-drug trafficking enforcement policy, the abettor in *Thiruselvam* (*viz*, Thiruselvam) would have posed a greater danger to the public welfare than the actual drug trafficker (*viz*, Katheraven). On this basis, that Thiruselvam was charged with an offence carrying a more severe punishment than the punishment for the offences charged against Katheraven could not be said to have been a violation of Art 12(1).

Summary of the authorities

40 We can now summarise the applicability of the four cases which we have examined above to this Motion in the following manner. *Ong Ah Chuan* is not applicable as it was concerned with the application of Art 12(1) of the Constitution to legislation, and not to the exercise of the prosecutorial discretion. While *Teh Cheng Poh* did concern the scope of Art 12(1) in the prosecutorial context, it is not directly relevant to the present case as it was concerned with the exercise of the prosecutorial discretion in relation to a single offender whose acts were punishable under two different statutory regimes carrying different punishments. In contrast to *Teh Cheng Poh*, *Sim Min Teck* was concerned with the prosecutorial discretion to differentiate between the charges against two offenders who were, in law, liable for the same criminal acts (committed in furtherance of a common intention). However, this court applied *Teh Cheng Poh* uncritically without considering the material difference between the factual situations in the two cases. Similarly, although *Thiruselvam* was concerned with a factual situation that was essentially the same as that in *Sim Min Teck*, this court (just as it did in *Sim Min Teck*) proceeded on the basis that *Teh Cheng Poh*, despite being concerned with a different factual scenario, could be directly applied to dispose of the case.

41 It is important to note that in *Sim Min Teck*, this court did not decide that the Prosecution could never contravene Art 12(1) in exercising its prosecutorial discretion in a particular case. On the

contrary, it recognised, by quoting from 56 of *Teh Cheng Poh*, that there could be such a contravention. In contrast, this court went further in *Thiruselvam* (as stated above at [36]) and, in so doing, almost appeared to have held that no exercise of the prosecutorial discretion could possibly breach Art 12(1) because of the width of that discretion. In our view, this is not the law (as the Court of 3 Judges stated in *Phyllis Tan* at [149] (reproduced at [17] above)). If it were the law, the prosecutorial discretion would override the fundamental liberties conferred by Pt IV of the Constitution. This outcome is not acceptable because an exercise of an executive decision-making power, even one with a constitutional status, cannot be allowed to override a fundamental liberty enshrined in the Constitution.

42 In the circumstances, although the four cases discussed above contain some relevant general principles, none of them contains legal reasoning which we can directly apply in determining whether the differentiation between the charges against the Applicant and those against Sundar in the present case is a breach of Art 12(1). We will therefore have to address the substantive issue raised by the Applicant by referring to first principles.

The constitutional status of the prosecutorial power

43 As mentioned earlier, the prosecutorial power is a constitutional power vested in the Attorney-General pursuant to Art 35(8) of the Constitution. It is constitutionally equal in status to the judicial power set out in Art 93. In *Phyllis Tan*, the Court of 3 Judges referred to the judicial power in Art 93 and the prosecutorial power in Art 35(8), and said at [144] (*per* Chan CJ):

> … These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other's functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally. Indeed, this is not even a true "interference" inasmuch as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the Constitution itself) to prevent.

The presumption of constitutionality in relation to the prosecutorial power

44 In view of the co-equal status of the two aforesaid constitutional powers, the separation of powers doctrine requires the courts not to interfere with the exercise of the prosecutorial discretion unless it has been exercised unlawfully. The prosecutorial power is part of the executive power, although, under existing constitutional practice, it is independently exercised by the Attorney-General as the Public Prosecutor. In view of his high office, the courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of whether he was acting alone or in concert with other offenders), the Attorney-General does so in accordance with the law. In other words, the courts should presume that the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise.

45 This presumption would be consistent with the constitutional standing of the office of Attorney-General. In *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong (Clemency)*"), one of the issues raised before this court was whether the constitutional clemency process was justiciable. In discussing this issue, this court considered the possibility of unconscious bias or inadvertent errors on the part of, *inter alios*, the Attorney-General in submitting his opinion to the Cabinet under Art 22P(2) of the Constitution *vis-à-vis* an offender who had been sentenced to death. This court (*per* Chan CJ) observed at [139] of *Yong Vui Kong (Clemency)*:

> Given the high constitutional offices held by these individuals [*ie*, the persons directly involved in the making of a clemency decision, namely, the trial judge, the presiding judge of the appellate court (if there is an appeal), the Attorney-General, the members of the Cabinet and the President], no court is justified in hypothesising that the trial judge and (where there is an appeal) the presiding judge of the appellate court may write biased or inaccurate reports, or that the Attorney-General may give a spiteful opinion on the offender's case, or that the Cabinet members and/or the President may be unconsciously prejudiced against the offender or may not give his case full and fair consideration. *In my view, until the contrary is shown, the courts, instead of proceeding on such fanciful hypotheses, should proceed on the basis of presumptive legality encapsulated in the maxim* "omnia praesumuntur rite esse acta" – *all things are presumed to have been done rightly and regularly*, ie*, in conformity with the law*. [emphasis added]

46 Although these observations were not made in the context of prosecutorial decisions, it is our view that they provide additional support for applying a presumption of constitutionality in the prosecutorial context. Given the constitutional status of the Attorney-General, the courts should presume that he acts in the public interest as the Public Prosecutor, and that he acts in accordance with the law when exercising his prosecutorial power. This approach should not be regarded as the courts deferring to the Prosecution. It is, instead, really an application of the established principle that the acts of high officials of state should be accorded a presumption of legality or regularity, especially where such acts are carried out in the exercise of constitutional powers.

47 We might add that as a matter of legal policy, it is not only officials with a constitutional standing who enjoy a presumption of legality for their acts (although the presumption will certainly be stronger in relation to the acts of an official who holds a constitutional office). This can be seen from *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 ("*Howe Yoon Chong*"), which concerned the Chief Assessor's assessment of the annual value of the appellant's dwelling house at a much higher value than the annual values of other properties in the same area. The appellant argued that this was a violation of Art 12(1) of the Constitution. At [13] of *Howe Yoon Chong*, the Privy Council stated (*per* Lord Keith of Kinkel):

> The question is whether this state of affairs amounted to a contravention of Art 12(1) of the Constitution. Their Lordships were referred to a number of cases in the property tax field in the United States of America, in relation to the equal protection of the law clause in the Fourteenth Amendment to the Constitution of that country. In *Sunday Lake Iron Co v Township of Wakefield* 247 US 350 (1918) the Supreme Court made the following statement of principle at 352:
>
> > The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond v Chicago Union Traction Co* 207 US 20, 35, 37. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more – something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.*
>
> [emphasis added]

48 In this connection, we should mention that an analogous presumption applies *vis-à-vis* the validity of statutes. The courts accord a presumption in favour of the constitutionality of a statute (see *Lee Keng Guan and others v Public Prosecutor* [1977–1978] SLR(R) 78 ("*Lee Keng Guan*") at [19] and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [60] and [79]–[80]). The basis of this doctrine is that a legislature, when enacting legislation, is presumed to comply with constitutional requirements. In relation to allegations of unlawful discrimination in legislation, the courts "[presume] that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds" (see *Lee Keng Guan* at [19], quoting from the Indian Supreme Court case of *Ram Krishna Dalmia v Justice Tendolkar* AIR 1958 SC 538 at 547). In principle, as the Legislature and the Executive are co-equal under the Constitution, the courts should also accord a similar presumption to the exercise of the prosecutorial power as a facet of the executive power.

The United States' approach

49 According a presumption of constitutionality or legality to the exercise of the prosecutorial discretion is also consonant with both the legal policy and the decisions of the United States Federal Courts on the exercise of the prosecutorial power by attorneys of the United States ("United States Attorneys"). The Constitution of the United States, unlike our Constitution (*ie*, the Constitution as defined at [2] above), does not recognise the prosecutorial power as a constitutional power. Instead, the prosecutorial power is conferred on United States Attorneys by § 35 of the Judiciary Act of 1789 (Cap 20, 1 Stat 73) (US). Nevertheless, the United States Federal Courts have strongly endorsed the principle of judicial non-interference with the prosecutorial discretion of United States Attorneys on the basis of the separation of powers doctrine. For instance, in *Inmates of Attica Correctional Facility et al v Nelson A Rockefeller et al* 477 F 2d 375 (1973), the United States Court of Appeals for the Second Circuit said at 379–380:

> The primary ground upon which [the] traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.
>
> > "Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, *supra* 342 F.2d at 171.
>
> …
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> Although a leading commentator has criticized this broad view as unsound and incompatible with the normal function of the judiciary in reviewing for abuse or arbitrariness [in] administrative acts that fall within the discretion of executive officers, K. C. Davis, Administrative Law Treatise § 28.16(4) at 982–990 (1970 Supp.), he has also recognized, as have most of the cases cited above, that the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision.
>
> …
>
> Nor is it clear what the judiciary's role of supervision should be were it to undertake such a review. At what point would the prosecutor be entitled to call a halt to further investigation as

> unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled? … What collateral factors would be permissible bases for a decision not to prosecute, [*eg*], the pendency of another criminal proceeding elsewhere against the same parties? …
>
> These difficult questions engender serious doubts as to the judiciary's capacity to review and as to the problem of arbitrariness inherent in any judicial decision to order prosecution. …

50 Similarly, in *United States v Christopher Lee Armstrong et al* 517 US 456 (1996), a case specifically concerning the constitutional prescription of equal protection, the United States Supreme Court said at 464–465:

> A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985). The Attorney General and United States Attorneys retain " 'broad discretion' " to enforce the Nation's criminal laws. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530–1531, 84 L.Ed.2d 547 (1985) [("*Wayte*")] (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 102 S.Ct. 2485, 2492, n. 11, 73 L.Ed.2d 74 (1982)). They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. [apropos the United States' judiciary and judicial procedure] §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926) [("*Chemical Foundation*")]. …
>
> Of course, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 2204–2205, 60 L.Ed.2d 755 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 694–695, 98 L.Ed. 884 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962). …
>
> In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." *Chemical Foundation*, *supra*, at 14–15, 47 S.Ct., at 6. We explained in *Wayte* why courts are "properly hesitant to examine the decision whether to prosecute." 470 U.S., at 608, 105 S.Ct., at 1531. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.*, at 607, 105 S.Ct., at 1530. …

The limits of the prosecutorial discretion

51 Although the courts are entitled to presume that the prosecutorial power has been properly exercised in a particular case, its exercise is nevertheless subject to legal limits. As a requirement of the rule of law, all legal powers are subject to limits (see *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 at [86], *Phyllis Tan* at [149] and *Yong Vui Kong (Clemency)* at [77]). An inherent limitation on the prosecutorial power is that it may not be exercised

arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose. In the context of Art 12(1) of the Constitution, Art 12(1) merely requires the Attorney-General (in his capacity as the Public Prosecutor) to give unbiased consideration to every offender and to avoid taking into account any irrelevant consideration (see *Teh Cheng Poh* at 56). These principles apply to *every* prosecution. In cases involving a single offender, this suffices to ensure that like cases are treated alike.

52 In cases where several offenders are involved in the same or similar offences committed in the same criminal enterprise, the same principles stated above at [51] apply, and the Attorney-General must of course also have regard to Art 12(1). He must compare and treat like with like (see [61] below), and must not unlawfully discriminate against one offender as compared to another. In this regard, the Attorney-General may take into account a myriad of factors in determining whether or not to charge an offender (including his co-offenders in the same criminal enterprise, if any) and, if charges are to be brought, for what offence or offences. These factors include the question of whether there is sufficient evidence against the offender and his co-offenders (if any), their personal circumstances, the willingness of one offender to testify against his co-offenders and other policy factors. Where relevant, these factors may justify offenders in the same criminal enterprise being prosecuted differently.

53 The Attorney-General is the custodian of the prosecutorial power. He uses it to enforce the criminal law not for its own sake, but for the greater good of society, *ie*, to maintain law and order as well as to uphold the rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they have committed offences. Furthermore, not all offences are provable in a court of law. It is not necessarily in the public interest that every offender must be prosecuted, or that an offender must be prosecuted for the most serious possible offence available in the statute book. Conversely, while the public interest does not require the Attorney-General to prosecute any and all persons who may be guilty of a crime, he cannot decide at his own whim and fancy who should or should not be prosecuted, and what offence or offences a particular offender should be prosecuted for. The Attorney-General's final decision will be constrained by what the public interest requires.

The parties' arguments on the substantive issue

54 With the foregoing principles in mind, we will now examine the arguments of the parties in this Motion in relation to whether or not Art 12(1) of the Constitution was breached in the present case.

The Applicant's case

55 In his written submissions, Mr Ravi advanced three arguments in support of this Motion. In his oral submissions before us, Mr Ravi withdrew two of those arguments. The first withdrawn argument was that the Attorney-General had a duty, by reason of Art 9 of the Constitution, to give reasons for his decision to charge the Applicant with the capital offences set out at [6] above as he (the Attorney-General) was the last "decision-maker" [note: 1] in the realm of sentencing where there was a legislated mandatory death penalty. The second withdrawn argument was that the Applicant had a justifiable sense of grievance in that, by reason of the parity principle in sentencing, he should not have been charged and sentenced differently from Sundar (who was equally culpable as him).

56 In the circumstances, we only need to consider the Applicant's remaining argument, which dealt with Art 12(1) proper. This, as pleaded in Mr Ravi's oral submissions, was that the decision of this court in *Thiruselvam* was no longer good law and should not be followed as it was inconsistent with

the Privy Council's ruling in *Ong Ah Chuan* at [35] and [39] on the scope of Art 12(1) of the Constitution (here, Mr Ravi specifically referred to the italicised parts of the paragraphs quoted at [19] above). Alternatively, Mr Ravi sought to distinguish *Thiruselvam* on the ground that in that case, Katheraven and Thiruselvam were charged with different offences (*ie*, drug trafficking and abetment of drug trafficking respectively), whereas in the present case, the Applicant and Sundar were charged with identical offences of drug trafficking, save for the quantity of drugs involved.

57 Mr Ravi further argued that in the present case, it was patently irrational for the Prosecution to have charged Sundar with trafficking in a lesser amount of drugs than the amount which he had actually delivered to the Applicant because doing so "defie[d] the physical laws of nature". [note: 2] In so doing, Mr Ravi contended, the Prosecution ignored reality, or rather, created its own reality, in order to reduce the gravity of the charges against Sundar and, correspondingly, the severity of the punishment he would face. Such a decision, it was argued, could not be within the legitimate discretion of the Attorney-General, wide though the prosecutorial discretion might be.

58 Additionally, Mr Ravi contended that the Applicant's culpability in the commission of the criminal enterprise in the present case was not greater than that of Sundar because Sundar had delivered the drugs to the Applicant and should therefore be treated as the principal offender. It was argued that even if Sundar were not treated as the principal offender, he and the Applicant were at the very least of equal blameworthiness. Alternatively, Mr Ravi contended that the Applicant's role in transporting the drugs was not instrumental to the success of the criminal enterprise as Sundar's supplier could have found someone else to transport Sundar and, in turn, the drugs.

The Attorney-General's case

59 The Attorney-General did not join issue with Mr Ravi's contentions concerning the Applicant's and Sundar's relative blameworthiness in the trafficking of the drugs. State Counsel Ms Chionh, however, submitted that *Ong Ah Chuan* was decided in a different context and was not applicable to the Applicant's case. She contended that *Teh Cheng Poh*, *Sim Min Teck* and *Thiruselvam* were the relevant authorities on the substantive issue raised by the Applicant, and that the decisions in the latter two cases foreclosed any argument that the prosecutorial decision in the present case was an infringement of Art 12(1) of the Constitution.

Our decision on the substantive issue

The applicability of Ong Ah Chuan

60 We accept the Attorney-General's argument that *Ong Ah Chuan* can be distinguished from the present case. As we discussed above at [20], *Ong Ah Chuan* was concerned with the constitutionality of certain provisions of the MDA 1973, and not with any issue relating to the prosecutorial discretion. However, in our view, there are certain observations in *Ong Ah Chuan* on what Art 12(1) requires in the context of legislation which, in their essence, are also applicable to prosecutorial decisions.

61 The Privy Council stated in *Ong Ah Chuan* at [35] that "[e]quality before the law and equal protection of the law require[d] that like should be compared with like". We recognise this as a general principle under Art 12(1) that applies to all acts of state, whether legislative or executive. Since both the exercise of the legislative power and the exercise of the executive power are subject to judicial review, the same should apply to the exercise of the prosecutorial power because it is merely a facet of the executive power (as stated at [44] above). In enacting penal legislation that classifies offenders for the purposes of punishment, Parliament must not violate Art 12(1), which requires that "like should be compared with like" (see *Ong Ah Chuan* at [35]). Similarly, the Attorney-

General is obliged to compare like with like in deciding whether or not to differentiate between the charges against different offenders involved in the same criminal transaction (the issue arising in *Sim Min Teck*, *Thiruselvam* and the present case). Nevertheless, it is clear that the application of this very general principle in the *prosecutorial* domain is different from its application in the *legislative* domain.

62 In the context of penal legislation, the Privy Council stated (at [39] of *Ong Ah Chuan*) that "Art 12(1) of the Constitution [was] not concerned with equal punitive treatment for equal moral blameworthiness; it [was] concerned with equal punitive treatment for similar legal guilt". What a class of offenders defined in penal legislation have in common is that they all fulfil the specified ingredients of the same criminal offence. Within this class, there may be substantial variations in moral blameworthiness among the offenders. The fact that penal legislation does not distinguish between offenders within the same class based on such moral differences does not in itself render such legislation in breach of Art 12(1).

63 In contrast, in the context of the prosecutorial power, the Prosecution is obliged to consider, in addition to the legal guilt of the offender, his moral blameworthiness, the gravity of the harm caused to the public welfare by his criminal activity, and a myriad of other factors, including whether there is sufficient evidence against a particular offender, whether the offender is willing to co-operate with the law enforcement authorities in providing intelligence, whether one offender is willing to testify against his co-offenders, and so on – up to and including the possibility of showing some degree of compassion in certain cases. *Teh Cheng Poh* acknowledged this distinctive feature of the prosecutorial discretion and set out a specific formulation for the application of Art 12(1) to prosecutorial decisions (which we explained at [24] above).

The Applicant's other arguments

64 Having regard to these matters, we are unable to accept the Applicant's alternative argument that *Thiruselvam* should be distinguished on the basis that while the co-offenders in that case were charged with different offences (*viz*, abetment of drug trafficking and drug trafficking), in the present case, they were both charged with drug trafficking, but with the charges against one offender (*viz*, Sundar) based on a quantity of drugs much less than the actual quantity of drugs trafficked (as forensically determined) (see [56]–[57] above). In our view, there is no meaningful distinction between the scenario in *Thiruselvam* and that in the present case as the underlying prosecutorial decision in each case was the same. On the facts of *Thiruselvam*, Katheraven was, like Sundar in this case, charged with offences based on a quantity of drugs less than the actual quantity of drugs trafficked. In substance, *Thiruselvam* and the present case (and, for that matter, *Sim Min Teck*) are all concerned with the Prosecution charging two offenders involved in the same criminal acts with offences of unequal gravity. Article 12(1) would apply to all of these cases in exactly the same way.

65 With regard to the Applicant's argument that the prosecutorial discretion cannot and may not extend to contradicting the scientific fact that a specific set of drugs can only have one quantification in weight (see [57] above), we note the established practice that whenever the Prosecution decides to prefer a less serious drug trafficking charge against an offender, its practice is to specify the quantity of drugs involved as "not less than" a certain quantity. This formulation is, of course, expressly designed to bring the charge under the applicable sentencing scale prescribed in the Second Schedule to the MDA (in words similar to the statutory language used to define the different sentencing scales according to different quantities of drugs). In this way, the formulation used by the Prosecution, despite being somewhat artificial and intended to describe a quantity of drugs other than the forensically-established quantity, permits two offenders trafficking in the same quantity of drugs to be charged with different offences carrying different punishments. In doing so, the Prosecution is

not denying any scientific fact, but is instead simply reducing the quantity of drugs specified in the charge against one offender in order to give effect to its decision to charge that offender differently from his co-offender. The crucial issue is whether a decision of this nature is within the limits of the prosecutorial discretion accorded to the Attorney-General under the law. In our view, provided that such a decision is made for legitimate reasons, it is and has always been permitted under the common law, and Art 35(8) of the Constitution has merely incorporated that position.

Application of the requirement of evidence to the present facts

66 The Applicant's case on the substantive issue in this Motion is that the Prosecution's differentiation between the charges against him and the charges against Sundar was a breach of Art 12(1) because Sundar was either: (a) more culpable, or (b) at the very least, equally culpable in the commission of the criminal enterprise in the present case (referred to hereafter as "premise (a)" and "premise (b)" respectively for ease of discussion). *Vis-à-vis* premise (a), it was argued that the Prosecution's decision to bring more serious charges against the Applicant even though he was less culpable than Sundar was outright and unlawful discrimination against the Applicant, and *vis-à-vis* premise (b), it was argued that the Prosecution had not treated like cases alike. Mr Ravi also insisted that the Applicant's case on the substantive issue was based purely on the Applicant's constitutional right to equality before the law. He expressly disclaimed any suggestion that the Applicant's complaint of unlawful discrimination would not have arisen if Sundar had been charged with the same capital offences as the Applicant.

67 Mr Ravi did not elaborate on or explain the legal basis of the aforesaid disclaimer, but it would appear to rest, where premise (a) is concerned, on the basis that because Sundar was more culpable than the Applicant, Sundar should also have been charged with capital offences and, further, the Applicant should have been charged with less serious offences so as to reflect Sundar's greater culpability. If this were not the basis of Mr Ravi's disclaimer, then we are unable to find any sound legal basis for it. Assuming that Mr Ravi's disclaimer does indeed rest on the aforesaid basis where premise (a) is concerned, we find that this argument has no merit as, on the evidence, the Applicant was not less culpable than Sundar (see [73] below).

68 With regard to premise (b), we are of the view that if Sundar had been charged with the same capital offences as the Applicant, this Motion could not have been brought because the Applicant would have had no cause whatever to claim that he had been discriminated against contrary to Art 12(1). Although (as just mentioned) Mr Ravi has also disclaimed arguing, if premise (b) applies, that Sundar should have been charged with the same capital offences as the Applicant in order to satisfy the requirements of Art 12(1), Mr Ravi has in fact (whether unwittingly or otherwise) made this very argument. This is evident from the way in which Mr Ravi has crafted his case on unlawful discrimination. He has not suggested that the Applicant was wrongly convicted of the two capital offences with which he was charged. Therefore, implicit in Mr Ravi's case on unlawful discrimination (assuming premise (b) applies) is the contention that both the Applicant and Sundar should have been charged with either the same capital offences or the same non-capital offences (as the case may be), and that the Prosecution infringed Art 12(1) by differentiating between the charges against the two men as there was no legitimate reason for such differentiation.

69 In respect of both premise (a) and premise (b), the Applicant bears the burden of establishing a *prima facie* case that the Prosecution infringed Art 12(1) in charging him but not Sundar with capital offences even though he was less culpable than Sundar (see our discussion of *Teh Cheng Poh* at [26] above). A mere allegation of unlawful discrimination is insufficient to invoke the intervention of the court to review (or cause to be reviewed) his prosecution for the capital offences set out at [6] above, in contrast to the non-capital offences which Sundar was prosecuted for. In *Teh Cheng Poh*,

the fact that the appellant was charged with a capital offence under one statutory regime, rather than with a non-capital offence under an alternative applicable statutory regime, was not sufficient to show that he had been unlawfully discriminated against compared with all other offenders in the same situation. In the circumstances of that case, it was virtually impossible for the appellant to show a *prima facie* case of discrimination without producing evidence that, on similar facts, another offender had been charged with the alternative non-capital offence (see [26] above), and even if the appellant had succeeded in establishing a *prima facie* case against the Prosecution, that *prima facie* case would have remained rebuttable by the Prosecution.

70 Although in *Sim Min Teck*, this court applied the principles laid down in *Teh Cheng Poh* in an ambiguous fashion (see [32] above), we agree that the interpretation given by *Teh Cheng Poh* to the Malaysian equivalent of Art 12(1) of the Constitution applies to the facts in *Sim Min Teck* and also to the facts in the present case. Applying that interpretation, on the facts of the present case, the Applicant must specifically produce *prima facie* evidence of bias or the taking into account of irrelevant considerations by the Attorney-General in differentiating, pursuant to his prosecutorial discretion, between the charges against the Applicant and the charges against Sundar. In this regard, the mere differentiation of charges between co-offenders, even between those of equal guilt, is not, *per se*, sufficient to constitute *prima facie* evidence of bias or the taking into account of irrelevant considerations that breaches Art 12(1). Differentiation between offenders of equal guilt can be legitimately undertaken for many reasons and based on the consideration of many factors (see [63] above). It is for the offender who complains of a breach of Art 12(1) to prove that there are no valid grounds for such differentiation. In the absence of proof by the offender, the court should not presume that there are no valid grounds in this regard.

71 Given that there are many legitimate reasons for the Prosecution to differentiate between the charges brought against different offenders involved in the same criminal enterprise, such differentiation *per se* does not necessarily mean that the Prosecution has not given unbiased consideration to the offender or offenders in question, or that the Prosecution has taken into account irrelevant considerations. Put another way, such differentiation, without more, does not raise an inference of breach of Art 12(1). Rather, in the absence of *prima facie* evidence to the contrary, the inference would be that the Prosecution has based its differentiation on relevant considerations. This conclusion does not mean that an aggrieved offender can never prove a case of unlawful discrimination. Such a case may be self-evident on the facts of a particular case (for example, where a less culpable offender is charged with a more serious offence while his more culpable co-offender is charged with a less serious offence, when there are no other facts to show a lawful differentiation between their respective charges).

72 A further reason for our decision (*viz*, that differentiation of the type outlined in the preceding paragraph is not in itself evidence of breach of Art 12(1)) lies in the presumption of constitutionality apropos the Attorney-General's exercise of the prosecutorial power. The presumption is that in prosecuting an offender or offenders, the Attorney-General acts in the public interest and does not abuse his prosecutorial power (see [44] and [46] above). As we stated earlier, the Attorney-General has an obligation to use the prosecutorial power to enforce the criminal law not as an end in itself, but for the greater good of society (see [53] above), and it can be presumed that he normally exercises his discretion with that purpose in mind.

73 In the circumstances, we are of the view that this Motion fails as: (a) the Applicant has not produced any evidence to prove a *prima facie* case of a violation of Art 12(1); and (b) in any event, the evidence on record is insufficient to rebut the presumption of constitutionality with regard to the Attorney-General's decision to prosecute the Applicant for capital offences rather than for non-capital offences (as in the case of Sundar). Moreover, in our view, the evidence does not show that Sundar

was more culpable than the Applicant in relation to their respective drug trafficking offences. At the highest, they could be said to be of equal culpability and/or moral blameworthiness in the trafficking of controlled drugs. That, in itself, is not sufficient to rebut the presumption of constitutionality *vis-à-vis* the Attorney-General's decision to prefer the charges which were brought against, respectively, the Applicant and Sundar. In this connection, we do not accept the Applicant's argument that he was not instrumental in the commission of the offences which he was charged with because Sundar's supplier could have used another person to receive the drugs from Sundar. The fact remains that the Applicant received those drugs for the purposes of trafficking, which offence he carried out before he was arrested.

Whether the Attorney-General has to disclose the reasons for his prosecutorial decisions

74 For the sake of completeness, it is necessary for us to say a few words on the Attorney-General's position (which he steadfastly held in the present case) that he has no general obligation to disclose his reasons for making a particular prosecutorial decision, even though Mr Ravi has (as mentioned at [55] above) withdrawn his argument to the contrary. We accept the Attorney-General's position, which reflects the English position at common law (see *Regina v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531 at 564E).

75 In support of his (now withdrawn) argument that the Attorney-General has a general obligation to disclose the reasons for his prosecutorial decisions, Mr Ravi referred to *Regina v Director of Public Prosecutions, Ex parte Manning and another* [2001] QB 330 ("*Ex parte Manning*"). In that case, the Director of Public Prosecutions of the UK ("the Director of Public Prosecutions") declined to prosecute a prison officer ("N") in connection with the death of the applicants' brother ("the victim") while in remand. The evidence showed that the victim's death resulted from the manner in which N held his head to restrain him during a violent altercation, and the jury returned a verdict of unlawful killing at the inquest.

76 The court (*per* Lord Bingham of Cornhill CJ) held (at [33]) that although, under English law, there was no absolute obligation on the part of the Director of Public Prosecutions to give reasons for a decision not to prosecute, since the right to life was the most fundamental of all human rights and since the death of a person in the State's custody resulting from violence inflicted by the State's agents necessarily aroused profound concern, the Director of Public Prosecutions would be expected, *in the absence of compelling grounds to the contrary*, to give reasons for his decision not to prosecute N in those circumstances. In that regard, in order to meet the concerns of the applicants, the court examined the review note on the case prepared by a specialist caseworker in the UK's Crown Prosecution Service. The review note, after setting out the factors which were deemed to be relevant, concluded that there was insufficient evidence to justify any criminal prosecution of N. The court found (at [41]) that the review note did not address or resolve five points against N which ought to have been taken into account, and accordingly quashed the decision of the Director of Public Prosecutions not to prosecute N. The court concluded its judgment by emphasising (at [42]):

> … [T]he effect of this decision is not to require the Director [of Public Prosecutions] to prosecute. It is to require reconsideration of the decision whether or not to prosecute. On the likely or proper outcome of that reconsideration we express no opinion at all.

77 Given that in the present case, both the Applicant and Sundar were prosecuted for and convicted of the drug trafficking offences which they committed, the decision in *Ex parte Manning* is distinguishable on the facts. Nothing in the present case can be said to raise any profound concern as to whether the Applicant was wrongly convicted of the offences with which he was charged. As observed by the Prosecution, in this Motion, the Applicant is not protesting that he was wrongfully

convicted. Instead, his case is that he was wrongfully *prosecuted* because Sundar, although prosecuted for the same criminal enterprise, was charged with offences that did not attract capital punishment, in contrast to the capital charges brought against the Applicant. Given the nature and width of the prosecutorial discretion, coupled with the fact that the Applicant did not avail himself of the two opportunities which he had to raise the issue that the Prosecution violated Art 12(1) in charging him, but not Sundar, with capital offences, there cannot be any compelling grounds for this court to now direct the Prosecution, at this stage of the proceedings, to explain its reasons for deciding to prosecute the Applicant and Sundar for offences carrying different punishments.

78 Furthermore, given the manifold factors that the Attorney-General is entitled to take into account in making a prosecutorial decision, it would be wholly unrealistic for this court to proceed on the basis that the Attorney-General would be unable to point to any relevant consideration to explain his prosecutorial decisions *vis-à-vis* the Applicant and Sundar respectively. Indeed, it is not difficult to discern a valid consideration in the present case. It is that Sundar was a prosecution witness against the Applicant at the trial in the High Court. The willingness of an offender to serve as a prosecution witness against his co-offender is the common thread that runs through *Sim Min Teck*, *Thiruselvam* and the present case, in which Sim, Thiruselvam and the Applicant respectively complained of a violation of Art 12(1) (in this regard, we note that in *Thiruselvam*, Katheraven turned hostile and tried, unsuccessfully, to exonerate Thiruselvam from any role in the criminal enterprise in question, just as Sundar did in the present case (see [7] above)). It is a common and well-known practice for the Prosecution to take into account an offender's willingness to testify against his co-offender when deciding what charges to bring against the offender as compared to his co-offender. Of course, we accept that what we have just said may be pure speculation in the present case since the Prosecution remained silent on the issue of why it differentiated between the charges against the Applicant and those against Sundar. Nevertheless, it does not detract from the point that Sundar's willingness to give evidence for the Prosecution (notwithstanding his subsequent about-turn on the witness stand) was a legitimate factor for the Prosecution to have taken into account in deciding to prosecute Sundar for non-capital offences; there could, of course, have been other valid factors as well.

Conclusion

79 For the reasons stated above, this Motion is dismissed.

[note: 1] See para 27 of the Applicant's skeletal arguments filed on 29 October 2011 ("the Applicant's Skeletal Arguments").

[note: 2] See para 41 of the Applicant's Skeletal Arguments.

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