IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 89

Criminal Motion No 21 of 2021

Between

Iskandar bin Rahmat

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Appeal]

TABLE OF CONTENTS

Iskandar bin Rahmat
v
Public Prosecutor

[2021] SGCA 89

Court of Appeal — Criminal Motion No 21 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
16 August 2021

21 September 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 Iskandar bin Rahmat ("the Applicant") was convicted by the High Court of two counts of murder under s 300(*a*) of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") and sentenced to the mandatory death penalty. His appeal against his convictions was dismissed by this Court on 3 February 2017 in *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("Judgment").

2 Generally, the issuance of a final judgment by this Court brings an end to the legal process available to parties in relation to a criminal conviction or sentence. Whilst the law provides an avenue to review a concluded criminal appeal, it is not disputed that this is an extremely limited avenue. In fact, the Applicant acknowledged that he would not be able to seek leave to make a

review application under s 394H of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"), as the Applicant's constitutional arguments would not *presently* satisfy the requirement that the Judgment was demonstrably wrong.

3 In addition, the Applicant also recognised that he would no longer be able to bring a constitutional challenge against s 300(*a*) of the Penal Code by way of an originating summons in the High Court. Such an application would constitute an abuse of process because it would be invoking the civil jurisdiction of the court to mount a collateral attack on a decision made by the court in the exercise of its criminal jurisdiction.

4 We observe that these two acknowledgments are not controversial as they are the consequences arising from the principle of finality. Confronted with this situation, the Applicant filed the present application, CA/CM 21/2021 ("CM 21") for leave to intervene in a completely unrelated criminal proceeding, namely, CA/CCA 36/2020 ("CCA 36"). The ostensible purpose of the leave application was to enable the Applicant to raise an additional argument to support the constitutional challenge mounted to ss 299 and 300(*a*) by the appellant in CCA 36, Teo Ghim Heng ("Teo"). If the challenge by Teo is successful, the Applicant intends to use that decision to mount a review application under s 394H of the CPC.

5 We heard and dismissed the application on 16 August 2021. In our view, this Court has no jurisdiction to permit the Applicant to intervene in an unrelated criminal appeal on account of his interest in the point of law under consideration in CCA 36. Litigants, including accused persons, do not have a right to intervene in an unrelated pending proceeding just because they have a common interest in a point of law which is being considered in that proceeding. To hold otherwise would open the floodgates to litigation, as a point of law canvassed in almost

any given case may *ultimately* affect the decision of any other case. But that, in our view, is merely a function of the common law and not a licence to intervene.

Brief procedural history

6 As mentioned above, the Applicant was convicted by the High Court of two counts of murder under s 300(*a*) of the Penal Code and sentenced to the mandatory death penalty.

7 On appeal, the Applicant challenged his convictions on the basis that his actions did not show an intention to cause death, but merely reflected an intention to cause injuries sufficient in the ordinary course of nature to cause death under s 300(*c*) of the Penal Code. He also relied on three exceptions under s 300 of the Penal Code, namely, (a) Exception 2 (private defence); (b) Exception 4 (sudden fight); and (c) Exception 7 (diminished responsibility).

8 On 3 February 2017, this Court dismissed the Applicant's appeal and issued the Judgment. More than a year later, on 14 February 2018, the Applicant wrote to the Law Society to file a complaint against his trial counsel alleging that they had failed to comply with his instructions in the conduct of his defence. A four-member Inquiry Committee unanimously recommended that no formal investigation by a Disciplinary Tribunal was necessary and that the complaint should be dismissed. The Council of the Law Society ("Council") thus informed the Applicant, by way of a letter dated 20 March 2019, that the Law Society would not take further action on his complaint.

9 Dissatisfied with the decision of the Council, on 7 June 2019, the Applicant filed HC/OS 716/2019 ("OS 716") pursuant to s 96 of the Legal Professions Act (Cap 161, 2009 Rev Ed) seeking a review of the Council's determination and an order directing the Law Society to apply to the Chief

Justice for the appointment of a Disciplinary Tribunal. On 10 October 2019, the High Court dismissed OS 716. The Applicant's appeal against the High Court's decision in CA/CA 9/2020 ("CA 9") was also dismissed by this Court on 5 July 2021.

10 On 11 June 2021, while the proceedings in CA 9 were ongoing, the Applicant filed the present application seeking leave to intervene in CCA 36 in order to make submissions in support of Teo's argument that s 300(*a*) of the Penal Code violates Article 12(1) of the Constitution (1985 Rev Ed, 1999 Reprint) ("Constitution"), Article 93 of the Constitution, and/or the principle of separation of powers as embodied in the Constitution.

The parties' submissions

The Applicant's submissions

11 The Applicant averred that he had filed CM 21 because there was no other avenue for him to obtain the relief he sought. As highlighted above, he acknowledged that he could not have brought a constitutional challenge against ss 299 and 300(*a*) of the Penal Code. Nor could he have obtained leave to make a review application under s 394H of the CPC as his constitutional arguments would not presently satisfy the requirement that the Judgment was demonstrably wrong.

12 In relation to procedure, the Applicant argued that he was correct in filing a criminal motion to seek leave to intervene in CCA 36. Citing *Amarjeet Singh v Public Prosecutor* [2021] 4 SLR 841 ("*Amarjeet Singh*"), the Applicant argued that CM 21 was brought to seek relief ancillary to the conduct of a primary criminal action, namely CCA 36 (being an action that invoked the appellate criminal jurisdiction of the court).

13 The Applicant further contended that the court had the jurisdiction and/or powers to grant the orders sought under s 6 of the CPC, which allows the court to adopt "such procedure as the justice of the case may require, and which is not inconsistent with [the CPC] or such other law", as regards matters of criminal procedure for which no special provision has been made. In this connection, the Applicant submitted that the court could adopt a procedure modelled after the rules for intervention in civil actions provided under O 15 rr 6(2)(*b*)(ii) and 6(3) of the Rules of Court (2014 Rev Ed) ("ROC").

14 Finally, the Applicant argued that this Court should exercise its powers in favour of granting the relief that he seeks, as he would satisfy the requirements under O 15 r 6(2)(*b*)(ii) of the ROC if they were adapted for the criminal context. Furthermore, the Applicant's intervention would not be redundant or unnecessary as he seeks to raise an argument on the constitutionality of ss 299 and 300(*a*) of the Penal Code which has not been raised by Teo in CCA 36. In particular, he seeks to argue that ss 299 and 300(*a*) of the Penal Code violate Article 12 of the Constitution on the basis that an offender convicted under s 299 has a "right to mitigate", whereas an offender convicted under s 300(*a*) would have no such right, even though the requirements for the two offences overlap.

The Prosecution's submissions

15 The Prosecution submitted that the Applicant's motion did not validly invoke the court's criminal jurisdiction. The Applicant was not involved in any proceedings over which the court could exercise criminal jurisdiction, as this Court had already dismissed his appeal against his conviction and there were no pending criminal proceedings involving him. The mere fact that the Applicant took an interest in the arguments being made in CCA 36 was insufficient to

overcome the fact that his application lacked any jurisdictional basis. If the Applicant's contentions were accepted, an offender who had already exhausted his legal options would be allowed to completely bypass the strict conditions governing review applications under s 394H of the CPC and mount a collateral attack on the correctness of his conviction.

16 In any event, the Prosecution argued, there were no compelling or principled reasons to justify the Applicant's intended intervention even if this Court was prepared to overlook the absence of jurisdictional basis for his application. Section 6 of the CPC was also of no assistance to the Applicant as his intended intervention in CCA 36 would be inconsistent with the CPC. Nor were there any exceptional circumstances that necessitated the court exercising its inherent powers in the Applicant's favour. There were sufficient safeguards to ensure that all arguments going towards the constitutionality of ss 299 and 300(*a*) of the Penal Code would be fully ventilated and, if the Applicant or his counsel truly believed that they could add value to the proceedings, there was nothing to stop them from sharing their arguments with the counsel in CCA 36.

Issues to be determined

17 Having regard to the parties' submissions, the sole issue before us was whether this Court had the jurisdiction to grant leave to the Applicant to intervene in CCA 36.

Analysis

The court's criminal jurisdiction

18 A court's jurisdiction refers to "its authority, however derived, to hear and determine a dispute that is brought before it": *Re Nalpon Zero Geraldo*

Mario [2013] 3 SLR 258 ("*Re Nalpon Zero*") at [13], citing *Muhd Munir v Noor Hidah and other applications* [1990] 2 SLR(R) 348 at [19]. This Court's criminal jurisdiction is statutorily conferred by s 60D of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which provides:

> **Criminal jurisdiction**
>
> **60D.** The criminal jurisdiction of the Court of Appeal consists of the following matters, subject to the provisions of this Act or any other written law regulating the terms and conditions upon which those matters may be brought:
>
> (*a*) any appeal against any decision made by the General Division in the exercise of its original criminal jurisdiction;
>
> (*b*) any petition for confirmation under Division 1A of Part XX of the Criminal Procedure Code (Cap. 68);
>
> (*c*) any review of a decision of the Court of Appeal, or a decision of the General Division, under Division 1B of Part XX of the Criminal Procedure Code;
>
> (*d*) any case stated to the Court of Appeal under section 395 or 396 of the Criminal Procedure Code;
>
> (*e*) any reference to the Court of Appeal under section 397 of the Criminal Procedure Code;
>
> (*f*) any motion to the Court of Appeal under Division 5 of Part XX of the Criminal Procedure Code.

19 Sub-paragraphs (*a*) to (*f*) above can generally be categorised into matters falling within the court's original, appellate, revisionary or supervisory criminal jurisdiction: *Amarjeet Singh* at [14].

20 Beyond matters which directly invoke the four types of jurisdiction set out above, the court also has the jurisdiction to hear and determine applications for specific reliefs which are *incidental to or supportive of* a primary action invoking its original, appellate or revisionary criminal jurisdiction: *Amarjeet Singh* at [34]. In such a case, the court, in hearing the application, would simply be invoking (albeit indirectly) its original, appellate or revisionary jurisdiction

(as the case may be). Examples of these applications include applications to vary bail, extend time for steps to be taken or adduce further evidence, which are invariably brought by way of criminal motion. In each instance, the subject-matter of the motion is "fundamentally tethered" to the conduct of the primary action, in the sense that it goes towards ensuring that the correct outcome is reached in *that* action: *Amarjeet Singh* at [27]. However, it was plain and obvious that the present application did not directly invoke the court's original, appellate, revisionary or supervisory criminal jurisdiction. Nor was it incidental to or supportive of a primary action falling within the court's criminal jurisdiction.

21 First, contrary to the Applicant's submissions, the intervention sought could not be described as "incidental to or supportive of" *CCA 36*, in the sense of being "fundamentally tethered" to the same. Save for the fact that the Applicant and Teo had both been charged with the offence of murder, there was nothing to connect the Applicant's case with Teo's. The two cases were factually distinct and completely unrelated. It could not be said that an application to intervene by an unrelated third party in order to make additional submissions on a legal issue in another criminal appeal was so "fundamentally tethered" to that appeal as to affect the correctness of its outcome. If the Applicant's argument was taken to its logical conclusion, any person who has an interest in *any* legal point that was being argued in *any* criminal appeal could make an application for leave to intervene in that appeal. We rejected that broad and far-reaching proposition as it was plainly wrong as a matter of principle.

22 Secondly, the intended intervention likewise could not be characterised as "incidental to or supportive of" the Applicant's *own* appeal since the Applicant's appeal had been dismissed in 2017 and the Applicant was not presently a party to any criminal action. While the court's statutorily-conferred

appellate jurisdiction is not completely exhausted by the mere rendering of a decision on the merits (see *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [77(a)]), it was still incumbent on the Applicant to identify a legitimate jurisdictional basis to ground the present application. In this regard, a distinction may be drawn between the present application and an application for review under s 394H of the CPC. The latter would clearly be ancillary or incidental to the appeal that is the subject of the review, as the success of the 394H application would directly affect the outcome of that appeal. In contrast, the present application bears no direct correlation to the outcome of the applicant's concluded appeal. Even if this motion had been granted, the applicant would still have had to file a separate review application in order to reopen his concluded appeal.

23 We agreed with the Prosecution's submission that to grant the Applicant's intended intervention would be tantamount to allowing an offender who had already exhausted his appeal options to completely bypass the strict conditions governing review applications under s 394H of the CPC and to mount a collateral attack on the correctness of his conviction. This would amount to an unprincipled circumvention of the safeguards in the CPC.

24 Given the above, we were of the view that CM 21 was entirely without jurisdictional basis and also procedurally improper in so far as it had been brought by way of a criminal motion.

Whether the court may allow intervention in criminal proceedings under s 6 of the CPC

25 In the Applicant's quest to identify a jurisdictional basis to ground CM 21, he invited this Court to adopt O 15 r 6(2)(*b*)(ii) of the ROC which provides as follows:

> **Misjoinder and nonjoinder of parties (O. 15, r. 6)**
>
> …
>
> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> …
>
> (b) order any of the following persons to be added as a party, namely:
>
> …
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

26 The Applicant submitted that this Court has the power to adopt the procedure in O 15 r 6(2)(*b*)(ii) by virtue of s 6 of the CPC which provides:

> **Where no procedure is provided**
>
> **6**. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require, and which is not inconsistent with this Code or such other law, may be adopted.

27 The Prosecution argued that granting leave for a third party to intervene in appellate criminal proceedings would be inconsistent with the CPC and therefore could not be allowed under s 6 of the CPC. In support of this argument, the Prosecution relied on two provisions (namely, ss 377(1) and 387 of the CPC) which, in the Prosecution's view, indicated that third parties would not be permitted to intervene in a criminal appeal. The material portions of these two provisions are reproduced below:

> **Procedure for appeal**
>
> **377.**—(1) Subject to sections 374, 375 and 376, *a person who is not satisfied with any judgment, sentence or order of a trial court in a criminal case or matter* to which he is a party may appeal to the appellate court against that judgment, sentence or order in respect of any error in law or in fact, or in an appeal against sentence, on the ground that the sentence imposed is manifestly excessive or manifestly inadequate.
>
> **Procedure at hearing**
>
> **387.**—(1) At the hearing of an appeal, the appellate court *shall hear the appellant or his advocate*, if he appears, and if it thinks fit, the respondent or his advocate, if he appears, and shall hear the appellant or his advocate in reply.
>
> [emphasis added]

28 With respect, we did not think that the above two provisions were material to the analysis. Section 377(1) of the CPC limits the *right of appeal* in any criminal case or matter to any person who is not satisfied with any judgment, sentence or order to which he is a party. However, the provision does not directly address the question whether a person who is not a party to an appeal can seek to be heard by the court. In a similar vein, s 387(1) of the CPC merely provides that the court must hear the appellant or his advocate, if he appears, and if it thinks fit, the respondent or his advocate, if he appears. Likewise, that provision does not directly concern the court's powers to hear persons other than the appellant (or his advocate) and the respondent (or his advocate). It is silent on that point and thus cannot be said to be "inconsistent" with O 15 r 6(2)(*b*)(ii).

29 In any event, we found it unhelpful to examine the propriety of intervention in criminal proceedings by narrowly focusing on the issue as to whether O 15 r 6(2)(*b*)(ii) is "inconsistent with" the CPC. Even if O 15 r 6(2)(*b*)(ii) were not inconsistent with the CPC, it did not necessarily follow

that it should be adopted in criminal proceedings. Focusing on whether the adoption of O 15 r 6(2)(*b*)(ii) is inconsistent with the CPC would completely overlook the more fundamental inquiry as to whether the adoption of O 15 r 6(2)(*b*)(ii) is required by the "justice of the case", which is also a precondition to the invocation of s 6 of the CPC.

30 We briefly examine several cases where s 6 of the CPC has been successfully invoked to determine how our courts have previously applied the "justice of the case" requirement. In *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"), this Court considered that the wide scope of s 5 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), which was the precursor to s 6 of the CPC, supported the imposition of a duty on the Prosecution to disclose a limited amount of unused material, where no such statutory obligation to do so was prescribed in either version of the CPC. In *Kadar*, this Court held that the reference to what "the justice of the case may require" must include "procedures that uphold established notions of a fair trial in an adversarial setting where [such procedures are] not already part of the written law" (at [105]). Thus, the invocation of s 6 of the CPC to impose a duty on the Prosecution to disclose a limited amount of unused material was warranted because "[t]o hold that there is no such legal obligation would be to effectively sanction unscrupulous methods of prosecution with the court's stamp of approval" (at [110]). Subsequently, in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 ("*Nabill*"), this Court held that the Prosecution ought to be under a duty to disclose a material witness' statement to the defence, pursuant to s 6 of the CPC (at [40]). The court found that it would not "reflect a satisfactory balance between ensuring fairness to the accused person on the one hand, and preserving the adversarial nature of the trial process on the other", if such statements were not disclosed (at [47]).

31 Another case where the court accepted that it would have been appropriate to invoke s 6 of the CPC is *Public Prosecutor v Goldring Timothy Nicholas and others* [2014] 1 SLR 586 ("*Goldring (CA)*"). In that case, this Court held, in *obiter*, that if there had been no common law right permitting an accused person access to documents over which he had ownership or legal custody or a legal right to control immediately before the lawful seizure, such a right to access would have been recognised pursuant to s 6 of the CPC. This Court observed (at [85]) that the "adoption of a procedure in the context of s 6 amounted (in substance and even form) to the promulgation of a new common law rule (albeit made in the context of a gap in the criminal procedure laid down in a statute)". The court also endorsed the High Court's reasoning in the decision below that allowing an accused person access to such documents would be "entirely consistent with notions of a fair trial" and that, if a common law right of access did not exist, it would have been in the interests of justice to recognise the existence of this right pursuant to s 6 of the CPC: see *Goldring Timothy Nicholas and others v Public Prosecutor* [2013] 3 SLR 487 ("*Goldring (HC)*") at [74] and [78], endorsed in *Goldring (CA)* at [85].

32 The above cases demonstrate that in order to successfully invoke s 6 of the CPC, an applicant must justify why the adoption of the procedure in question would be in the interests of justice. This is illustrated by *Kadar* and *Nabill* where the court introduced disclosure obligations on the Prosecution, and by *Goldring (HC)* and *Goldring (CA)* where it was held that a right of access to documents could have been adopted under s 6 of the CPC, in both cases to uphold the notion of a fair trial. The rationale behind this requirement is, as observed by this Court in *Goldring (CA)*, that the adoption of a procedure in the context of s 6 of the CPC essentially amounts to the promulgation of a new common law rule.

33 Turning back to the facts of the present case, it was our view that allowing intervention in criminal proceedings was not required by the "justice of the case". Indeed, instead of ensuring that a fair trial would be conducted, the intervention procedure being sought to be introduced would be susceptible to abuse. We elaborate on the reasons for our view below, with reference to both unrelated and related criminal proceedings.

34 In so far as *unrelated* criminal proceedings are concerned, we have already explained at [21]–[23] above that the court lacks jurisdiction to grant leave to an unrelated party to intervene even if the applicant has an interest in a point of law under consideration. As such, an application for intervention in an unrelated criminal proceeding cannot be necessary for the purposes of justice. Nor can there be any question of injustice arising from the denial of such an application.

35 In so far as *related* criminal proceedings are concerned, the "justice of the case" would ordinarily dictate that criminal cases emanating from the same criminal transaction or incident should be tried together. This is reflected by s 143 of the CPC, which sets out the situations where persons may be charged and tried together, and s 144 of the CPC, which sets out the situations where persons may be charged separately and tried together. Apart from s 145 of the CPC, which allows for joint trials to take place by consent, the court has power to order joint trials where there is some connection between the offences committed by the accused persons, such as where the persons are accused of the same or different offences committed in the *same transaction* (ss 143(*a*) and (*b*)); or where those offences *arise from the same series of acts*, whether or not those acts form the same transaction (s 144(*a*)).

36 This notwithstanding, we note that there is no precedent or legislative mechanism allowing a party – even a related party – to intervene in another criminal proceeding, save in one very limited exception. That exception is the Attorney-General's power to intervene in private prosecutions, as provided for under s 13 of the CPC and reflected in Art 35(8) of the Constitution (see *Attorney-General v Tee Kok Boon* [2008] 2 SLR(R) 412; *Cheng William v Loo Ngee Long Edmund* [2001] 2 SLR(R) 626 at [15]–[17]). This stems from the Attorney-General's "unique and integral role as the guardian of the public interest *vis-à-vis* the institution and conduct of all criminal proceedings" (*Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 at [53]).

37 It appears to us that the complete absence of any prior attempt by an accused person to intervene in another criminal proceeding can be attributed to one very sensible reason. Although intervention allows the applicant intervener to participate in another criminal proceeding, the outcome of that proceeding would not determine the applicant's criminal liability. This is because s 132 of the CPC provides that, subject to exceptions such as that of joint trials, there must be a separate charge for every distinct offence of which any person is accused, and every charge must be tried separately. As such, where an accused person intervenes in another *criminal* proceeding, he still has to be separately tried for each of the charges that he faces and is not bound by the outcome of the intervention. Unlike in a civil proceeding where intervention allows the court to *determine* any question or issue arising between the intervenor and any party to the cause or matter (see O 15 r 6(2)(*b*)(ii) of the ROC), intervention in a criminal proceeding serves no such purpose. Intervention may also be a fruitless endeavour where, for instance, the Prosecution chooses to run a different case against the applicant, or the applicant's liability is based on certain grounds which are not in issue in the proceedings in which intervention is

sought. In such instances, the applicant's intervention may not help to advance his own case. Furthermore, if the case against the applicant proceeds after the intervention is spent, the conduct of the case against such an applicant may be subject to subsequent events or developments which may or may not be anticipated in the criminal proceeding in which the applicant intervened.

38 The fact that intervention does not determine the applicant's criminal liability also means that it is potentially subject to abuse. Instead of applying for a joint trial, an offender might seek to intervene in a related criminal proceeding for strategic reasons, such as to obtain a preview of the Prosecution's evidence, the cross-examination questions and the reaction and responses of the judge which the offender would be expected to face in his or her own separate trial. This may lead to offenders tailoring their evidence with the benefit not of hindsight but of foresight.

39 In our view, on the rare occasions when accused persons who were allegedly involved in the same criminal transaction or incident are not tried together for whatever reason, the proper response would be to apply for the charges against the related accused persons to be tried together rather than to seek leave to intervene. Such an application was made, albeit by the Prosecution, in *Public Prosecutor v Ridhaudin Ridhwan bin Bakri and others* [2019] SGHC 105. In that case, the High Court considered that it had the power to grant the Prosecution's application for a joint trial of three accused persons under ss 143(*b*) and/or (*c*) of the CPC, and a joint trial was ordered accordingly (at [41]). In our view, there is no reason in principle why an accused person cannot similarly make an application to be jointly tried with *related* accused persons pursuant to ss 143 or 144 of the CPC. By instead applying to intervene in another proceeding, an applicant is attempting to bypass the restrictions (see [35] above) which determine when cases are intended to be

tried together, and obtain a right to be heard in a proceeding in which his own criminal liability would not be decided.

40 In the present case, the only reason given by the Applicant to justify his intervention was that he would be able to raise an *additional* argument to support Teo's constitutional challenge in CCA 36, *ie*, that ss 299 and 300(*a*) of the Penal Code violate Article 12 in that an offender convicted under s 299 has a "right to mitigate", whereas an offender convicted under s 300(*a*) would have no right to do so, even though the requirements for the two offences overlap. However, this purported justification suffered from a serious drawback. It ignored the fact that it is the prerogative of Teo and his counsel to decide on the arguments which should be placed before the court in CCA 36. Teo may wish to disassociate himself from the "additional" argument for whatever reason. But if he chooses to adopt it, there is no reason why that argument cannot be made by his own counsel.

41 In this connection, we note that similar observations have been made in the context of intervention in appellate *civil* proceedings. The applicable provision in this regard is O 57 r 10 of the ROC, which empowers the Court of Appeal to direct that the record of appeal and cases be served on any person who is not a party to the appeal proceedings, and to allow that person's participation in the appeal. The principles governing O 57 r 10 were recently clarified in *Golden Hill Capital Pte Ltd and others v Yihua Lifestyle Technology Co, Ltd and another* [2021] SGCA 85, where this Court endorsed (at [51]) the following remarks by the English Court of Appeal in *Berg v Glentworth Bulb Company Ltd* (English Court of Appeal, 30 September 1988, unreported) in the context of the UK equivalent of O 57 r 10:

> … This court always has a discretion to hear anyone in support of an appeal. It is a discretion, however, which is very sparingly

> exercised and would not normally be exercised in favour of a person in the position of [the non-party in this case] unless there were exceptional circumstances. In the ordinary situation a person in the position of [the non-party] who had a *shared interest with a defendant, as here, or any other party in the proceedings*, can usually protect his position perfectly satisfactorily by *informing the legal advisers of the person who is already a party to the appeal of the nature of any argument which they would like to be advanced*, and in that way the argument is brought to the attention of the court. …
>
> [emphasis added]

42 Therefore, the justification for the Applicant's interest to intervene in CCA 36 could simply be addressed by the Applicant sharing the "additional" argument with Teo's counsel and leaving it to him to decide whether it should be adopted. After all, the Applicant has no right to unilaterally impose the "additional" argument on Teo in *the latter's* appeal in CCA 36.

43 In the circumstances, the justice of any criminal case would not justify intervention in related or unrelated criminal proceedings, *a fortiori* in appellate criminal proceedings.

44 Furthermore, even if the Applicant's case was taken at its highest and it was assumed that O 15 r 6 of the ROC could be adopted in criminal appellate proceedings (which we disagree with for the reasons set out above), the Applicant would not have satisfied the requirements under that provision.

45 In applying O 15 r 6(2)(*b*)(ii) of the ROC, the court must undertake a two-step inquiry (*Ernest Ferdinand Perez De La Sala v Compania De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*Ernest Ferdinand*") at [84]):

(a) First, the court must ascertain whether there exists a question or issue having the requisite relationship with the main dispute. This is the non-discretionary stage of the inquiry.

(b) Second, assuming the first stage of the inquiry is satisfied, the court must determine whether it would be "just and convenient" to order joinder for the purpose of determining the question or issue referred to above. This is the discretionary stage of the inquiry.

46 In our view, the Applicant failed to satisfy the first element of the non-discretionary stage because there was simply no "question or issue" between him and any party to CCA 36. The Applicant's appeal had long been concluded, and there were no live or existing criminal proceedings against him. Thus, there was no "question or issue" between him and the Public Prosecutor, who is the respondent in CCA 36. Similarly, there was no "question or issue" between the Applicant and Teo, who is the appellant in CCA 36. The Applicant's case and Teo's case are factually unrelated and they are not involved in any proceedings with each other.

47 Even assuming that there *was* a live issue between the Applicant and the Public Prosecutor as to whether ss 299 and 300(*a*) of the Penal Code are constitutional, we did not think that such an issue could bear the requisite relationship with the relief or remedy claimed in CCA 36.

48 At the hearing before us, counsel for the Applicant cited *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 2020) ("*Singapore Civil Procedure*") in support of his argument that the Applicant could rely on O 15 r 6(2)(*b*) to seek intervention in the present case. With respect, however, that authority did not assist the Applicant as the authors of

Singapore Civil Procedure comment, at para 15/6/2, that the purpose of O 15 r 6(2) is to empower the court to "secure the determination of all disputes relating to the *same subject matter*, without the delay and expense of separate actions" [emphasis added]. As to what the phrase "subject matter" entails, the authors go on to state (at para 15/6/8) that O 15 r 6(2)(*b*)(ii) "is not wide enough to permit joinder of a party who is *merely interested in the case in so far as it determines a question of law*" [emphasis added].

49 The abovementioned observation by the authors of *Singapore Civil Procedure* is amply supported by local cases which have interpreted and applied O 15 r 6(2)(*b*) in the context of civil proceedings. In the recent decision of *Reignwood International Investment (Group) Co Ltd v Opus Tiger 1 Pte Ltd and other matters* [2021] SGHC 133, the High Court applied the test in *Ernest Ferdinand* in respect of proceedings under s 216A of the Companies Act (Cap 50, 2006 Rev Ed). Reignwood had sought an order for leave under s 216A(2) to commence derivative proceedings against a company known as SHSY. SHSY then applied to be joined as a party to the s 216A applications. Notably, the High Court Judge held (at [145]) that "the mere fact that a person is able to assist the court with evidence and submissions on an issue which the court will have to determine in pending proceedings is [not] sufficient in itself to warrant joining that person as a party to those proceedings under the just and convenient limb" as "[t]here will always be many persons who can assist the court with evidence and submissions on an issue which the court will have to determine in pending proceedings".

50 In *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW*"), the appellant applied for specific discovery of various internal documents ("Discovery Application"), which was granted by the High Court. The Comptroller then applied for leave to appeal against the

High Court's decision ("Leave to Appeal Application"), and filed two applications: (a) one for an extension of time to file a request for further arguments ("EOT Application"), and (b) one to adduce further evidence in support of the further arguments ("Further Evidence Application"). The further arguments related to, *inter alia*, public interest privilege. The Attorney-General filed an application for leave to intervene in the Discovery Application, the EOT Application, the Leave to Appeal Application, the Further Evidence Application, and in any application or appeal with regard to the same, in order to state his position on the application of public interest privilege. This Court held that the requirements under O 15 rr 6(2)(*b*)(i) and (ii) were both satisfied, and upheld the High Court's decision to grant the Attorney-General's application. In respect of O 15 r 6(2)(*b*)(ii), this Court held that there was "an existing question on the availability of public interest privilege… between the existing parties (*ie*, the Comptroller and the [appellant]), which involve[d] the Attorney-General, who is the guardian of the public interest" (at [47]). Although the Attorney-General in *ARW* was joined to the proceedings in relation to a point of law, the arguments that he intended to make in that case by way of intervention (as a guardian of the public interest) nevertheless related *directly to a factual issue arising in that case itself*, that being whether public interest privilege applied *as between the parties to that case* such that the internal documents in question could be kept from disclosure.

51 Given the above, the Applicant could not simply assert that his appeal and CCA 36 shared a common question of law in order to obtain an order for joinder under O 15 r 6(2)(*b*)(ii). Rather, he had to show there was an issue or question between him and Teo or the Public Prosecutor, being the parties to CCA 36, which bore a *sufficient relation* to an *existing factual* question or issue between Teo and the Public Prosecutor. Mere interest, whatever the degree, in

a point of law under consideration in a separate proceeding (whether civil or criminal) would not suffice to justify intervention in that proceeding. In our view, the Applicant's interest in the constitutionality of s 299 and 300(*a*) of the Penal Code did not relate to the facts undergirding the conviction or acquittal of Teo and he was therefore too far removed to be joined to the proceedings as an intervener. The present application was thus devoid of any jurisdictional basis and failed *in limine.*

Conclusion

52 For the reasons set out above, we were satisfied that there was no merit in the relief sought by the Applicant and we therefore dismissed CM 21 in its entirety.

53 In closing, we take this opportunity to remind counsel that it is their professional responsibility to ensure that all suits and applications filed possess a proper legal basis. In the present case, we were not merely concerned with unmeritorious arguments arising from a suit or an application which had been properly filed, but had to deal with an application which was *entirely devoid of legal foundation*. Such applications, if filed recklessly without any legitimate basis, may result in adverse costs consequences for the applicant or even his counsel and may in egregious cases cause counsel to face disciplinary proceedings. In particular, we draw counsel's attention to *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377, where it was held that the court has the power under s 357(1) of the CPC or inherently to order that defence counsel pay costs directly to the Prosecution if (a) counsel has acted improperly, unreasonably or negligently; (b) counsel's conduct caused the Prosecution to incur unnecessary costs; and (c) it is just in all the circumstances to order counsel to compensate the Prosecution for the whole or any part of the relevant

costs (at [18]–[19]). On this occasion, as the Prosecution did not seek an adverse costs order against the Applicant's counsel, the issue did not arise for our consideration. Ultimately, counsel can only fulfil their fundamental duty to assist in the administration of justice if they act with good faith and reasonable competence when initiating and conducting legal proceedings on their clients' behalf.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Ravi s/o Madasamy (KK Cheng Law LLC) for the applicant;
Winston Man and Ng Jun Chong (Attorney-General's Chambers) for the respondent.