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Case Comment

LEVELLING THE PLAYING FIELD IN CRIMINAL PROCEEDINGS

Muhammad Nabill bin Mohd Fuad v Public Prosecutor [2020] 1 SLR 984

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I. Introduction

1 In 2011, the Court of Appeal issued judgment in the case of *Muhammad bin Kadar v Public Prosecutor*[1] ("*Kadar*"). The decision was the first time that the Singapore courts imposed an obligation on the Prosecution to disclose "unused material"[2] (the "*Kadar* Obligation"). Whilst it was hoped that the decision would result in more disclosure being made available to the Defence, in reality, very little changed. This was largely down to the requirement that disclosure only applied to material that undermined the Prosecution's case or strengthened the Defence's case. Material that was neutral or adverse to the Defence was not disclosable.[3] Further, disclosure only applied to "material …

1 [2011] 3 SLR 1205.
2 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [76].
3 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

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that might reasonably be regarded as credible and relevant"[4] and the case law that developed around this requirement effectively stymied any meaningful change.

2 In the recent judgment of *Muhammad Nabill bin Mohd Fuad*[5] ("*Nabill*"), the Court of Appeal revisited the issue of disclosure and imposed a further duty on the Prosecution to disclose material witness statements (the "*Nabill* Obligation"). Importantly, the court resisted the temptation to limit the material disclosable by imposing any requirements: the Prosecution is under a duty to disclose statements of material witnesses not called by the Prosecution, irrespective of whether their statements support or undermine the Defence. This effectively removed prosecutorial oversight over what was or was not helpful to the Defence. Whilst there is still a long way to go in achieving a criminal justice system that treats the Defence as an equal partner, the early signs post-*Nabill* appear promising.

3 This article will provide an analysis and summary of the important points laid down in *Nabill*, a consideration of the subsequent case of *Lim Hong Liang v Public Prosecutor*[6] ("*Lim Hong Liang*") (where the Prosecution admitted that it had, among others, breached its *Nabill* Obligation), and conclude with the practical implications *Nabill* has for the practice of criminal law.

II. The decision in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*

A. The facts

4 The appellant, Muhammad Nabill, was convicted and sentenced to death by the High Court on two capital charges of possessing diamorphine and cannabis for the purposes of trafficking.

4 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [114].
5 [2020] 1 SLR 984.
6 [2020] 5 SLR 1015.

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5 At the material time, the appellant lived in his flat (the "Flat") with his wife, Mashitta, their children, their domestic helper, and his cousin, Sufian. On the evening of 26 January 2016, Faizal, the appellant's friend, brought a trolley bag to the Flat.[7] The following day, at around 8.00pm, officers from the Central Narcotics Bureau raided the Flat, seizing diamorphine from Sufian's bedroom, and cannabis (which was in the trolley bag) from the storeroom.

6 In respect of the diamorphine charge, the appellant's defence was that he did not intend to traffic in the diamorphine. When he became aware of the presence of the diamorphine in the bedroom occupied by Sufian, the appellant called Faizal and Sufian, whom he suspected to be responsible for bringing the drugs to his Flat, and told them to remove the drugs from his home. In respect of the cannabis charge, the appellant denied knowledge of the existence of the cannabis and, accordingly, possession of it. The cannabis was contained in a trolley bag brought by Faizal to the Flat when he was asleep, and the appellant denied being aware of its presence.

7 At trial, the appellant applied for disclosure of the statements of the domestic helper, Fazial and Sufian. The Prosecution and the trial judge rejected the request on the basis that it was not relevant to the case against the appellant.

8 On appeal, it was argued that the trial judge failed to appreciate the significance of the witnesses not called by the Prosecution and, in not calling the witnesses, the Prosecution had failed to rebut the appellant's defence. The domestic helper's statement was relevant as she would have been in a position to explain the circumstances of how the trolley bag came to be in the Flat and, importantly, whether the appellant was aware of it; Sufian's and Faizal's statements were relevant in confirming the appellant's account that he was not aware of, or involved with, the drugs.

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7 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [9].

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9 The Court of Appeal directed further submissions on the following question:[8]

> Where a witness has had a statement taken from him by the police or the CNB and where the defence can be expected to be confirmed or contradicted in material respects by such a witness, is there a duty on the Prosecution either to call such a witness or to make available to the Defence copies of any statement that has been taken from that witness or both?

B. The Prosecution has a duty to disclose a material witness's statement

10 The court found that the Prosecution *was* under a duty to disclose the statements of material witnesses (whom they did not call to give evidence) that could be expected to confirm or contradict an accused person's defence.[9]

11 In directing that the Prosecution disclose such statements to the Defence, the court recognised that it was not for the Prosecution to determine whether a statement was helpful to, or undermined, an accused person's case.[10] By taking the discretion away from the Prosecution, the court noted that a duty to disclose would avoid situations where the Prosecution erred in its assessment of the significance of certain evidence, and deprived the court of relevant evidence that might potentially exculpate the accused.[11]

12 Moreover, the court rejected the suggestion that it was open to an accused person to call such witnesses if he so wished. Without disclosure of the witness's previous statement, an accused person would not be in a position to make an informed decision whether to call the witness, because of the risk of not knowing what the witness had previously said to the investigating authorities.[12] This effectively precluded the witness from being called. Such an outcome did not strike a balance between

8 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [36].
9 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [39].
10 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [44].
11 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [44].
12 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [45].

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ensuring fairness to the accused on the one hand and preserving the adversarial nature of the trial process on the other.[13]

13 In terms of the timing of the disclosure, if the statutory disclosure regime is applicable, the statements should be disclosed together with the case for the Prosecution.[14] Where the statutory disclosure regime does not apply, the disclosure should take place before the trial commences.[15] As the duty is an ongoing one, disclosure should be made as soon as the defence becomes apparent, although this should be read with the requirement that the statements apply irrespective of whether the witness is favourable to the defence.

14 It should be noted that the *Nabill* Obligation is different and fundamentally departs from the *Kadar* Obligation in that:[16]

(a) it does not matter whether the statement in question is: (i) favourable (and so triggers the *Kadar* Obligation); (ii) neutral; or (iii) adverse to the accused; and

(b) it does not require the Prosecution to carry out a prior assessment of whether a material witness's statement is *prima facie* credible and relevant to the guilt or innocence of the accused.

15 Finally, the court left open the issue of whether the Prosecution was required to disclose the statement of a material witness who was a prosecution witness.[17]

C. The Prosecution does not have a duty to call a material witness

16 The court found that the Prosecution does not have a duty to call a material witness as there are legitimate reasons why the Prosecution may choose not to do so, such as when the witness

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13 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [47].
14 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [50].
15 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [50].
16 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [41].
17 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [54].

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may not be credible.[18] However, the failure to call a material witness may lead to the Prosecution being found to have failed to discharge its burden of proof.[19]

17 Additionally, the court may in certain circumstances draw an adverse inference pursuant to s 116 of the Evidence Act[20] that the Prosecution did not call a particular witness as the evidence would have been unfavourable to the Prosecution.[21] Such an inference may be more readily drawn where the Prosecution had access to a material witness whose evidence would be directly relevant to rebutting evidence led by the Defence.[22]

18 The court emphasised that s 116 of the Evidence Act did not apply to the Defence with the same vigour as it did to the Prosecution, as the Defence did not bear the burden of proving its case beyond reasonable doubt.[23] In particular, "the Prosecution cannot seek to discharge [its evidential] burden by relying on the Defence not calling particular evidence from a material witness to advance its case".[24]

D. Decision on conviction

19 In respect of the diamorphine charge, the court found that the appellant had rebutted the presumption of trafficking.[25] The conviction was set aside, and the court amended the charge to one of possession and sentenced the appellant to eight years' imprisonment.

20 In respect of the cannabis charge, the court found that the appellant had rebutted the presumption of knowledge as there was no reason not to believe the appellant's defence that he thought the trolley bag contained cigarettes because that was

18 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [58].
19 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [67].
20 Cap 97, 1997 Rev Ed.
21 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [67].
22 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [73].
23 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [81].
24 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [82].
25 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [95].

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what Faizal had told him.[26] The appellant was therefore acquitted of this charge.

21 The court found that the Prosecution should have called Faizal, Sufian and/or the domestic helper to discharge its evidential burden to rebut the appellant's defence that: (a) he was unaware that Faizal had brought the trolley bag to the Flat on 26 January 2016, and only discovered it the next day; and (b) the appellant had called Sufian and Faizal to return to the Flat upon discovery of the drugs and told them to remove the drugs.[27]

III. Why it matters

22 The issue of disclosure is an increasingly important feature of criminal trials. It must be recognised that there is an inherent disparity in the balance of power between the Prosecution and the Defence. The Prosecution has, at its disposal, the various investigation agencies who exercise statutory powers in their investigation of offences. The same does not apply to the Defence. The authorities are first on the scene and are able to not only secure evidence, but also to interview witnesses whilst events are still fresh in their minds. Inevitably, it will be months, if not years, before an accused person is charged with an offence. During the investigation, the Defence has no access to the information in the Prosecution's possession. The Defence's instructions are limited to the recollection of the accused, who may or may not be aware of what evidence advances his defence.

23 The suggestion that these "fruits of the investigation" belong to the Prosecution and the Prosecution alone not only fails to recognise this disparity in power but is at odds with the fundamental objective of any criminal trial, namely the search for the truth. The Supreme Court of Canada encapsulated this rationale in its ruling in *R v Stinchcombe*, when it stated:[28]

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26 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [146].
27 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [90], [104]–[106], [107], [120]–[122] and [136].
28 *R v Stinchcombe* [1991] 3 SCR 326 at [12] and [15].

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> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. …
>
> …
>
> *… The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.*
>
> [emphasis added]

24 The question then arises as to which party is best placed to bring such material to the attention of the court. The answer to this question was given as early as 1936 in the Privy Council case of *Seneviratne v R*.[29] Lord Roche, delivering the judgment, observed that the court could not "approve of an idea that a prosecution must call witnesses irrespective of consideration of number … or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination".[30] Implicit in this rule is that each side is better equipped to deal with their respective cases, which will then allow the trial judge a clear line of sight between the two opposing views.

25 The *Nabill* Obligation is a step towards achieving that "search for the truth" by reaffirming the important roles that *both* the Prosecution and the Defence play in criminal proceedings. If the consequence of more disclosure is that a greater number of defendants are acquitted as a result of having access to material that assists in their defence, that is not something our criminal justice system should fear.

IV. The *Nabill* Obligation in practice

26 In *Lim Hong Liang*, the court provided practical guidance on how an accused person can admit a statement that was

29 [1936] 3 ALL ER 36.
30 *Seneviratne v R* [1936] 3 ALL ER 36 at [49].

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disclosed pursuant to the *Nabill* Obligation post-hearing but pending appeal or judgment.

27 In this case, the applicant had been convicted of conspiracy to cause grievous hurt and sentenced to six years' imprisonment. In the trial, the applicant had applied for the statement of a witness, Edwin, who was not called by the Prosecution. According to another witness who had given evidence, Edwin would have supported his account that the applicant had engaged in the conspiracy (*ie*, the statement would be adverse to the applicant).

28 On appeal, the applicant renewed his request for disclosure of the statement, which was resisted by the Prosecution on the basis that it was likely that the statement implicated the applicant, and would not have satisfied the requirements for disclosure under *Kadar*. The appellate court declined to order disclosure.

29 Post-*Nabill*, and pending judgment in the appeal, the applicant commenced a criminal motion seeking disclosure of Edwin's statement. It was at that point that the Prosecution conceded that the statement was disclosable under *Nabill*, and also "ought to have been disclosed under its *Kadar* disclosure obligations".[31] Nevertheless, the Prosecution sought to argue that the statement could not be placed before the judge as statements of witnesses were inadmissible under s 259(1) of the Criminal Procedure Code.[32]

30 Whilst the court accepted that the statement could not be used as evidence "as the law stands",[33] it could be placed before the judge for indicating a possible breach of disclosure obligations and the consequences that flowed from such a breach, which included the conviction being overturned for a material irregularity,[34] or the drawing of an adverse inference against the Prosecution. Such an approach does not require the statement to be admitted as evidence.

31 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [6].
32 Cap 68, 2012 Rev Ed. See also *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [12].
33 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [16].
34 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [19].

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V. Practical implications of *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*

31 Practitioners should start to proactively seek disclosure of material witness statements from the Prosecution. A practical way to decide which statements to request may be to request statements of persons the accused has referred to in his police investigation statements. Practitioners must be prepared to justify how such witnesses are material to the defence when making the disclosure request to the Prosecution. In the event where the Prosecution refuses to disclose the statements, the Defence should be prepared to make an application to the relevant court for the disclosure.

32 It is important to recognise that disclosure is not the same as admissibility. It is hoped that when the courts decide such applications, they will recognise that a lower threshold applies and that is not the juncture to become embattled in technical arguments as to whether the disclosure is ultimately admissible, or to impose narrow interpretations on questions of "materiality". The courts should take as a starting point the fact that it is in the interests of justice that disclosure should be made.

33 Further, the Prosecution's duty under its *Nabill* Obligation is a continuing one. Even if the matter is at the stage pending an appeal decision or after the close of trial, prosecutors must be alive to the need to continually review the material in their possession. Criminal practitioners are not precluded from requesting material witness statements at any time. It may well be the case that the disclosure of the statement may require further applications to recall witnesses or call new witnesses.

34 Practitioners should also be mindful of the distinction between relying on the statement for the purposes of evidence and as a means of submitting that the trial was unfair. As discussed in *Lim Hong Liang* above, the former may be impermissible, whilst the latter may amount to a material breach of the Prosecution's

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obligations that may justify the conviction being overturned on appeal.[35]

35 In respect of the drawing of an adverse inference under s 116 of the Evidence Act against an accused person, the court has made it clear that it does not apply the same vigour to the Defence as to the Prosecution.[36] The Prosecution's duty to disclose material witness statements is to assist the Defence in assessing whether to call the witness, not to compel it to do so.[37]

36 Finally, the vast majority of cases are not capital cases. However, the specific facts do not shape the application of the law. It is important that the principles of disclosure apply equally, and are pursued as rigorously, no matter what the charge is.

35 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [19].
36 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [81].
37 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [81].

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