

Case Comment

**GAG ORDERS – IN SERVICE OF THE INTERESTS OF
VICTIMS OF CRIME**

Chua Yi Jin Colin v Public Prosecutor [2021] SGHC 290

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I. Introduction

1 It is indubitably in the public interest that any crime is timeously reported, expeditiously investigated and, in appropriate cases, vigorously prosecuted.

2 However, for victims of crime, there are real concerns that may militate against crime reporting, especially when the crime involves a deeply personal violation of the victim. In particular, the fear of embarrassment and/or harassment that may ensue because of public awareness of their identities can discourage victims from coming forward.

3 To address these concerns, gag orders have been imposed by Singapore's courts in appropriate cases. These are, however, exceptions rather than the norm because the principle of open justice demands that criminal proceedings are held in the public eye and open to public scrutiny. A commitment to open justice must also necessarily include the publication of information

1 While the author is with RHTLaw Asia LLP, the views expressed in this article are his own.

relating to court hearings, including the identities of accused persons, their accusers and other witnesses called to testify.

4 Given the commitment to open justice, can an accused person and/or convicted offender have his or her identity protected by a gag order? If the answer is “yes”, under what circumstances will this protection be granted?

5 The case of *Chua Yi Jin Colin v Public Prosecutor*² (“*Colin Chua*”) confirms that gag orders will only be granted for the purpose of protecting victims, and never for the benefit of accused persons. It behoves criminal law practitioners to familiarise themselves with the court’s reasoning so that they are better positioned to address the common query of whether accused persons can seek to protect their identities when they are charged in court.

6 This case comment also explores the limits of the facilitative and protective functions (espoused in *Colin Chua*) in justifying all gag orders, especially in circumstances where: (a) they are sought to protect witnesses who are *not* victims of crime; or (b) they are sought for reasons other than to protect witnesses from harassment and embarrassment or to facilitate crime reporting; or (c) the alleged offence is not one of sexual assault or does not involve minors.

II. Factual and procedural background of *Colin Chua*

7 On 2 October 2019, the offender was first produced in the State Courts and charged. At the time, two charges under s 509 of the Penal Code³ were tendered against him. Section 509 of the Penal Code (which has since been repealed and replaced by the more comprehensive s 377BB) then criminalised the “insult[ing] [of] the modesty of a woman”. This provision was routinely deployed to prosecute and punish those who took voyeuristic pictures and/or videos of women.

2 [2021] SGHC 290.

3 Cap 224, 2008 Rev Ed.

8 The two charges involved two victims who were the offender's schoolmates and classmates. The Prosecution thus sought a gag order under s 7(3) of the State Courts Act⁴ (the "SCA") which provides as follows:

(3) A State Court may at any time order that no person is to —

(a) publish the name, address or photograph of any witness in any matter or proceeding or any part thereof tried or held or to be tried or held before it, or any evidence or any other thing likely to lead to the identification of any such witness; or

(b) do any other act which is likely to lead to the identification of such a witness.

9 The offender then sought to have the gag order extended to cover his identity. The Prosecution did not object to this for two reasons. First, since the two victims were his schoolmates and classmates, identifying the offender would risk the inadvertent identification of those victims. Second, it was revealed that investigations were still ongoing as of 2 October 2019 and more victims might be involved. If the offender was identified, disclosure of the offender's identity would risk exposing the identities of the other victims. Given the foregoing, the State Court granted the gag order which prohibited the publication of the victims' identities as well as the offender's identity and university.

10 On 8 January 2020, an additional 18 charges were preferred against the offender. Seventeen charges were framed under s 509 of the Penal Code and one charge was the possession of obscene films under s 30(1) of the Films Act.⁵ In total, the offender faced 20 charges, all of which related to voyeuristic films of women.

11 The fresh charges involved victims who were the offender's schoolmates, classmates, or friends. As the extant gag order applied only to the two charges preferred earlier, the State Court granted a further gag order in relation to the identities of

4 Cap 321, 2007 Rev Ed.

5 Cap 107, 1998 Rev Ed.

the victims in those fresh charges. The gag order to cover the identity of the offender was also extended.

12 On 14 January 2020, the Prosecution sought to vary the gag order to permit the disclosure of the offender's identity. It was disclosed that 10 victims were in favour of varying the gag order to disclose the offender's identity. The 11th victim had reservations about varying the gag order and the 12th victim's view was not sought because she was overseas, and the Prosecution had respected her family's wishes for her not to be disturbed.

13 The State Court declined to vary the gag order on the basis that the 11th and 12th victims did not give unequivocal consent. The matter was apparently not revisited during the pre-trial stages of the case.

14 As it turned out, the 11th victim subsequently supported the disclosure of the offender's identity and the Prosecution withdrew four charges under s 509 of the Penal Code, including one charge that involved the 12th victim. This meant that of the remaining 16 charges, none of them involved the 12th victim.

15 On 29 July 2021, the offender pleaded guilty to eight proceeded charges. Seven were for offences under s 509 of the Penal Code and the remaining charge was for the possession of obscene films under s 30(1) of the Films Act. The other eight charges were stood down and eventually taken into consideration for the purposes of sentencing.

16 The Prosecution then adduced victim impact statements ("VIS") from 11 victims. Each of these victims stated in their respective VIS that they agreed to the lifting of the gag order on the offender's name, "even if it increases the risk of [the victims] being identified".⁶ At this point, there was unanimous consent from the victims who were named in the charges. The Prosecution thus applied once again for the gag order to be varied to allow for the disclosure of the offender's name.

6 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [11].

17 The State Court granted this application and consequently, “the victims’ identities, their relationships with the [offender], their educational institutions and the locations of the offences”⁷ were covered by the gag order but not the identity of the offender. The offender then sought a stay of the order to vary the gag order. The stay was granted by the State Court and the offender then filed an application with the High Court seeking to invoke the High Court’s revisionary powers to set aside the State Court’s order.

18 The offender sought to invoke the High Court’s revisionary powers on two preliminary grounds and two substantive grounds as follows:

(a) The Prosecution ought to have filed a petition for criminal revision because a State Court is not empowered to lift, vary or rescind a gag order made under s 7(3) of the SCA (“Ground 1”).

(b) The Prosecution should not have used the VIS to convey the victims’ views on varying the gag order to disclose the offender’s identity (“Ground 2”).

(c) The victims’ views, in any event, have no bearing on the whether the gag order should be varied. The only relevant factor was whether the disclosure of the offender’s identity would likely lead to the identification of the victims (“Ground 3”).

(d) The disclosure of the offender’s identity risked identifying the 12th victim, even though the charge involving her had been withdrawn (“Ground 4”).

III. Summary of the High Court’s decision

19 On Ground 1, the High Court found that the State Court was empowered to vary the gag order on the following grounds:

7 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [12].

(a) Section 27(3) of the Interpretation Act⁸ makes it plain that in the absence of any legislative intention to the contrary, where an Act confers a power “to issue any order or to do any act”, that would include the power “to amend, vary, rescind, revoke” the order issued. In so far as s 7(3) of the SCA is concerned, “a State Court’s power to make gag orders under s 7(3) of the SCA necessarily includes the power to amend, vary, rescind, revoke or suspend such orders”,⁹ given the absence of any contrary legislative intent.

(b) The State Court’s power under s 7(3) of the SCA “is an ancillary power intended to allow the court to carry out its processes more effectively”.¹⁰ Orders made pursuant to the exercise of this ancillary power “can be amended or rescinded in the light of changing circumstances”¹¹ to ensure that the ancillary power serves its proper function. Also, since the question of whether to vary the gag order does not go towards the merits of the case at hand, the doctrine of *res judicata* is not engaged.

(c) The court’s power to amend or revoke a gag order lies primarily in its original jurisdiction, which encompasses matters incidental or ancillary to its trial jurisdiction and does not lie exclusively in its revisionary jurisdiction. Adopting the position that a gag order can only be revoked or varied by invoking the High Court’s revisionary powers would “entail the illogical conclusion that a gag order imposed by the High Court at first instance can never be varied or revoked”.¹² This is because the High Court exercises its revisionary powers in respect of criminal proceedings in subordinate courts, and the Court of Appeal cannot “amend or revoke the gag order in the exercise of its appellate jurisdiction, since a gag order is an interlocutory order that cannot be appealed against”.¹³

8 Cap 1, 2002 Rev Ed.

9 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [22].

10 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [25].

11 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [25].

12 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [26].

13 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [26].

20 On Ground 2, the High Court agreed that VIS should not have been used to convey the victims' views on varying the gag order to disclose the offender's identity because VIS "are only relevant to the Prosecution's address on *sentence*, and their sole purpose is to allow victims to convey to the court any harm that they have suffered as a direct result of an offence".¹⁴ As such, the proper mode for conveying the victims' views in relation to the varying of the gag order should have been by way of affidavits. Nevertheless, the High Court found that the improper use of VIS did not occasion any failure of justice and thus declined to set aside the State Court's order to vary the gag order on this basis.

21 On Ground 3, the High Court held that "the views of the victims are an undoubtedly relevant factor that must be weighed in the balance"¹⁵ where a gag order is sought to be varied.

22 The starting point is the principle of open justice, which the High Court noted is enshrined in s 7(1) of the SCA. Fundamental to this principle "is the notion that justice must not only be done but must also be seen to be done".¹⁶

23 So far as criminal proceedings are concerned, the High Court noted that the adherence to open justice means that trials are publicly conducted, verdicts are publicly announced and public reporting of judicial proceedings is permitted, subject to the important caveat that the proper administration of justice is not prejudiced as a result. In the context of an accused person's identity, the commitment to open justice "permits the publication of an accused person's identity, despite the risk that he will suffer considerable reputational damage even if acquitted".¹⁷

24 Given the paramount importance of the principle of open justice, the power to issue a gag order under s 7(3) of the SCA is necessarily a derogation from that commitment which can be justified on two principal grounds:

14 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [31].

15 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [38].

16 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [34].

17 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [35].

- (a) first, gag orders have a *facilitative function* in that they “encourage witnesses and victims to testify candidly by shielding them from the glare of public scrutiny”;¹⁸ and
- (b) second, gag orders have a *protective function* in that they “minimise re-victimisation by sparing victims the further trauma of unwanted public scrutiny and embarrassment” which “in turn, encourages victims to report offences”.¹⁹

25 The High Court opined that the facilitative and protective functions of gag orders “explain why they are mostly, though not exclusively, imposed in cases involving sexual offences and minors”²⁰ and why “they are imposed solely for the protection of victims or witnesses and never for the benefit of accused persons”.²¹ The High Court thus held that “the *only* basis for extending the scope of a gag order to include an accused person’s identity is that the disclosure of his identity would likely lead to the identification of the victims or witnesses”.²²

26 As for the views of the victims, the High Court opined that they are “an undoubtedly relevant factor that must be weighed in the balance”²³ for the following reasons:

- (a) The protective function of a gag order is diminished and more weight “accorded to the public interest in open justice”²⁴ when “victims consent to the disclosure of an accused person’s identity and to the heightened risk of their identification”.²⁵
- (b) Indeed, the High Court perceptively noted that “in cases where the victims are in favour of the disclosure of an accused person’s identity, the continued suppression of the accused person’s identity may well *compound* the

18 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].

19 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].

20 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].

21 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].

22 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].

23 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [38].

24 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [38].

25 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [38].

victims' distress, thereby undermining the very purpose of a gag order".²⁶

27 With respect to the offender's submission that the SCA did not expressly permit the State Court to take the victims' views into account, the High Court dismissed this submission, noting that Parliament had no need to legislate it specifically "because s 7(3) of the SCA is a *discretionary* provision that inherently allows the court to take the victims' views into account when exercising that discretion".²⁷

28 The High Court also reaffirmed that the decision on whether to vary the gag order lies with the court, which is "entitled to have regard to the views of the victims, as conveyed by the Prosecution"²⁸ which are "eminently relevant to the court's decision on whether to order such disclosure".²⁹

29 On Ground 4, the High Court noted that because the charge involving the 12th victim had been withdrawn, she would not have been a witness in any criminal proceedings that would have arisen from that charge. Since any gag order under s 7(3) of the SCA could only relate to "any witness in any matter or proceeding or any part thereof tried or held or to be tried or held before [the State Court]", her interests would not be relevant for the purposes of an order under s 7(3) of the SCA.

30 The High Court accordingly dismissed the offender's application to set aside the State Court's order.

IV. Practical implications

31 The facilitative and protective functions of gag orders explain why they are concerned with the interests of the victims and not the interests of the accused persons. However, would the facilitative and protective functions justify gag orders where:

26 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [39].

27 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [42].

28 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [44].

29 *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [44].

(a) they are sought to protect witnesses who are *not* victims of crime; or (b) they are sought for reasons other than to protect witnesses from harassment and embarrassment or to facilitate crime reporting; or (c) the alleged offence is not one of sexual assault or does not involve minors? Two distinct points may be made in this respect.

32 First, there is a question of *how far* the facilitative and protective functions can be stretched to justify gag orders in cases involving victims of other types of crime. For example, in a recent case, a local businessman was charged with cheating, amongst others, prominent lawyers and businessmen in the country, using an allegedly fraudulent investment scheme.³⁰ It is not inconceivable that these alleged victims, given their respective prominence in wider society and the embarrassment that would plausibly result from the ensuing media coverage, would desire the protection of a gag order to forestall any public discussion about their involvement in the investment scheme or the amount of moneys they have invested.

33 Such concerns are neither irrational nor unreasonable, and it can be argued that the facilitative and protective functions of a gag order are fulfilled because other presently unidentified victims of the alleged fraudster could have been deterred from coming forward due to the ignominy of the publicity that would conceivably beset them should their plight become the subject matter of a criminal charge later.

34 However, are the victims' subjective concerns of embarrassment, anxiety and/or fear of harassment sufficient to displace the primacy that the principle of open justice deserves? Is it possible to devise an objective test or standard where such concerns of embarrassment, anxiety and/or fear of harassment can be measured, such that only those victims whose concerns pass muster can be protected by a gag order?

30 "Finian Tan, Top Lawyers Thio Shen Yi, Sunil Sudheesan, Among Alleged Victims in S\$1b Nickel Scam" *The Business Times* (9 July 2021).

35 In this regard, some guidance was provided by the High Court in *Public Prosecutor v BPK*³¹ (“BPK”), where the offence did not involve elements of sexual assault.

36 In *BPK*, the offender was charged with one count of attempted murder causing hurt under s 307(1) of the Penal Code. The offender and victim were working in the same place of employment and became acquainted. The offender took a liking to the victim and started to pursue her romantically. The victim apparently had no intention of engaging in a genuine relationship with the offender but played along. The victim’s true intentions were not known to the offender. From the offender’s perspective, he thought that they were in a serious relationship. Things started to fall apart when the offender discovered that the victim was sending romantic messages to another individual. While there was a dispute over whether the victim had eventually told the offender that their relationship was a prank, it is clear that things soured between them although the offender remained persistent in getting together with the victim.

37 On the day of the offence, the offender visited the victim’s block and accosted her at the lift lobby. He tried to get the victim to talk to him behind the block, but the victim refused. The offender, who was armed with a knife, stabbed the victim in the back and abdomen and she fell to the ground. The offender then sat on the victim’s abdomen and continued to assault her with the knife. The victim screamed for her parents, who heard her cries and rushed downstairs. The victim’s father managed to push the offender away and the offender eventually ran off.

38 At the beginning of the trial, the Prosecution applied for a gag order under s 8(3) of the Supreme Court of Judicature Act³² (“SCJA”). In its submission, the Prosecution explained that:

31 [2018] SGHC 34.

32 Cap 322, 2007 Rev Ed. The provision is *in pari materia* with s 7(3) of the State Courts Act (Cap 321, 2007 Rev Ed).

(a) a “gag order is necessary in this case to facilitate candid testimony by the Victim and to uphold the pursuit of justice”;³³

(b) “given the Victim’s fragile emotional state and the intensive media attention that the case had received, she should be spared from further trauma arising from media scrutiny into her personal life”;³⁴ and

(c) “[f]rom a broader perspective, it is also in the interests of justice that victims be unafraid to testify in Court against any kind of offence”.³⁵

39 The High Court granted the Prosecution’s application, opining as follows:

(a) “[T]he fact that there is a residual discretion under s 8(3) of the SCJA to grant a gag order suggests that Parliament envisaged situations, beyond cases involving minors and sexual offences, which may warrant a restriction on the publication of a witness’s (including a victim’s) identification particulars.”³⁶

(b) “[W]hile there are virtues to upholding open justice, such as transparency, it was not necessary in this case to have public disclosure of the Victim’s identity. The identity and particulars of the Victim were not of such importance to the case that it would adversely affect the public’s understanding or appreciation of this case if the Victim remained unidentified.”³⁷

(c) Granting a gag order in this case would not open the floodgates to the Prosecution seeking a gag order in all other cases because “[t]he Courts will have ultimate control over the conduct of proceedings, and will need to be persuaded on the balance of interests”.³⁸

33 *Public Prosecutor v BPK* [2018] SGHC 34 at [105].

34 *Public Prosecutor v BPK* [2018] SGHC 34 at [105].

35 *Public Prosecutor v BPK* [2018] SGHC 34 at [105].

36 *Public Prosecutor v BPK* [2018] SGHC 34 at [108].

37 *Public Prosecutor v BPK* [2018] SGHC 34 at [109].

38 *Public Prosecutor v BPK* [2018] SGHC 34 at [110].

40 In the context of the facts presented in *BPK*, the High Court noted the following:³⁹

... In the present case, it was not disputed that *the existence and extent of an allegedly intimate relationship between the Accused and the Victim were issues that were going to be contested during the trial. Therefore, balancing the non-apparent benefit that could be derived from the identification of the Victim, against the distress that may be revisited upon the Victim given the probable intense scrutiny of her past decisions by the media and the public, and against the possible deterrence of other victims in similar situations from reporting offences and testifying against other accused persons*, I was of the view that a gag order would be appropriate in this case. In my view, ***even though this case did not strictly speaking involve a sexual offence, it invoked similar concerns.*** [emphasis added]

41 It is notable that the High Court underscored its decision by stating that the present case “invoked similar concerns” that would usually be presented in sexual offences. This suggests that *BPK* is evolutionary rather than revolutionary and the courts would continue to be circumspect in imposing gag orders where there is unlikely to be any evidence led of an intimate nature. This may also be interpreted as an implied rejection of the Prosecution’s submission that “[f]rom a broader perspective, it is also in the interests of justice that victims be unafraid to testify in Court against *any kind of offence*”⁴⁰ [emphasis added] and the courts remain firm in limiting derogation from the principle of open justice.

42 Second, there is a question of whether the facilitative and protective functions can sufficiently justify imposing gag orders where: (a) they are sought to protect witnesses who are *not* victims of crime; or (b) they are sought for reasons other than to protect witnesses from harassment and embarrassment or to facilitate crime reporting. In this regard, the High Court had astutely observed that the “*facilitative and protective functions of gag orders explain why they are mostly, though not exclusively,*

39 *Public Prosecutor v BPK* [2018] SGHC 34 at [110].

40 *Public Prosecutor v BPK* [2018] SGHC 34 at [105].

imposed in cases involving sexual offences and minors” [emphasis added in bold].⁴¹

43 This observation is important because it cannot be assumed that the question of the appropriateness of gag orders would only arise in cases involving sexual offences and minors, or indeed, only in relation to victims of crime. Gag orders can be imposed in cases to prevent the identification of witnesses who are *not* victims. Such cases would include cases where witnesses are undercover officers who continue to operate undercover, or where witnesses require anonymity on national security grounds. In such cases, the facilitative and protective functions of gag orders would cease to have primacy and other interests would come into the frame.

44 In this regard, it ought to be noted that the recent amendments to s 7 of the SCA pursuant to the Courts (Civil and Criminal Justice) Reform Bill now specifically address cases where there are national interest or national security concerns. The newly enacted s 7(3)(c) of the State Courts Act 1970⁴² (the “SCA 1970”) now empowers a State Court to make a gag order prohibiting the publication of “any information relating to any matter or proceeding before the court that, if disclosed, may be prejudicial to the national interest or national security of Singapore”.

45 While the purpose of the newly enacted s 7(3)(c) appears self-evident, there is still a question as to how it would be applied in practice. For example, in a case involving witnesses who are undercover officers, it might be tempting to invoke s 7(3)(c) to protect their identities. Yet, given that s 7(3)(a) already contemplates gag orders which covers the “name, address or photograph of any witness”, an argument can be made that s 7(3)(c) ought only to cover “information” not already covered by ss 7(3)(a) and 7(3)(b). If this argument is accepted, it means that an application for a gag order over the names of witnesses should never be made under s 7(3)(c). What this means is that the court

⁴¹ *Chua Yi Jin Colin v Public Prosecutor* [2021] SGHC 290 at [36].

⁴² 2020 Rev Ed.

will still have to consider what interests take precedence when an application is made under s 7(3)(a) to protect the identities of undercover officers, since the twin interests of national interest and national security are not automatically available to the court.

46 Since s 7(3)(c) is a very recent enactment, one can only wait with bated breath for a suitable case to come before Singapore's courts and for a decision on whether s 7(3)(c) ought to be construed narrowly such that it only addresses matters falling outside of ss 7(3)(a) and 7(3)(b).

47 What can fairly be said at this juncture, however, is that the facilitative and protective functions of gag orders may justify the imposition of *some*, but not all, gag orders. Further, even if the facilitative and protective functions of a gag order are *prima facie* engaged, it may not be obvious or even intuitive to grant gag orders in some cases, notwithstanding the subjective (and sometimes strong) desires of the victims to have their identities protected.

48 As discussed above, it is not inconceivable that other interests may come to the fore and justify the imposition of a gag order. What these other interests are and how they interact with the prime interest of open justice would be something that the court has to confront when the appropriate case comes before it. These issues were not before the High Court in *Colin Chua* and the High Court cannot be faulted for not comprehensively addressing them.

49 Given that there will continue to be some uncertainty as to how a court would exercise its discretion under ss 7(3)(a) and 7(3)(b), it may be suggested that some guidance might be useful or indeed, necessary. It is here that a curious anomaly becomes apparent. Section 7(2) of the SCA 1970 permits hearings to be held in private and s 7(2A) permits redaction of information contained in court documents. Because orders under ss 7(2) and 7(2A) are also effectively derogations from the principle of open justice enshrined in s 7(1) of the SCA 1970, a State Court may only grant such orders "if [it is] satisfied that it is expedient in the interests of justice, public safety, public security or propriety, the

national interest or national security of Singapore, or for other sufficient reason to do so”. Such a proviso is noticeably missing from ss 7(3)(a) and 7(3)(b).

50 Additionally, in relation to s 7(2), the court’s discretion is further guided by a list of matters enumerated in s 7(6) including:

- (a) whether the defence of any accused person in that matter or proceeding will be prejudiced by the presence of any member of the public in the courtroom;
- (b) whether any accused person or witness in that matter or proceeding has any legitimate interest in privacy that needs to be protected;
- (c) whether the object of that matter or proceeding will be defeated by publicity if that matter or proceeding is heard in open court;
- (d) whether any accused person or witness in that matter or proceeding has any legitimate interest in protecting the confidentiality of any information that may be disclosed during the hearing of that matter or proceeding; and
- (e) whether any information that may be disclosed during the hearing of that matter or proceeding will be prejudicial to the interests of Singapore.

51 Section 7(6) was first enacted pursuant to the Criminal Justice Reform Bill passed in Parliament in 2018. Indranee Rajah, then Senior Minister of State for Law, explained during the Bill’s Second Reading that the amendment was to “fine-tune the courts’ discretion to order exceptions to open court proceedings”⁴³ and intended to “clarify the scope of the [court’s] discretion by setting out a non-exhaustive list of matters that the Court may consider when deciding whether to grant such an order”.⁴⁴ It was emphasised that s 7(6) was “not amending the discretion per se”.⁴⁵

43 *Parliamentary Debates, Official Report* (19 March 2018), vol 94 (Indranee Rajah, Senior Minister of State for Law).

44 *Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Law).

45 *Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Law).

52 It may be observed that while Parliament found it necessary to *further* guide the court’s discretion *vis-à-vis* hearings held in private, it did not see a need to do so in relation to redaction of court documents or gag orders under ss 7(2A) and 7(3) respectively. A careful study of all the relevant statutory provisions will reveal that Parliament appears to have given the most guidance in relation to hearings held in private, some guidance when it relates to redaction of court documents and the least guidance when it involves the imposition of gag orders. This gradated approach is, however, not insensible. Orders that hearings are to be conducted in private represent the most significant derogations from the principle of open justice and hence Parliament may have wanted to signal, through s 7(6), that a more thorough analysis of the factual circumstances must be conducted when the application is for a hearing to be held in private.

53 Gag orders, on the other hand, sit on the opposite end of the spectrum and represent a lesser derogation from the principle of open justice; in cases where gag orders are made, members of the public can attend court hearings and be privy to all the information disclosed and are only prevented from publishing that information. As such, Parliament may not have found it necessary to provide extensive guidance in relation to gag orders.

54 Notwithstanding the above, it can be argued that the addition of a proviso akin to one in ss 7(2) and 7(2A) would give the court a useful starting point in evaluating applications for gag orders. For example, it may be submitted that in the interests of *propriety*, the names of victims of sexual offences ought to be redacted because the criminal intrusion to the victims is deeply personal and invasive and there is no reason to compound their trauma by making their identities public knowledge.

55 In the same vein, should the Prosecution seek a gag order to protect the identities of victims of commercial fraud who happen to be prominent members of society, it would have to satisfy the court that “it is expedient in the interests of justice, public safety, public security or propriety, the national interest or

national security of Singapore” to grant such an order or provide the court with a “sufficient reason to do so”.

56 It should be acknowledged that the proviso is no panacea, and it is fair to question whether the court’s discretion would be better guided with the proviso in place; it is entirely foreseeable that the inquiry will then shift to discerning what constitutes, for example, “propriety” or “sufficient reason”. However, there is no reason to see this as a defect in the law because a degree of suppleness is necessary when it comes to matters of discretion to ensure that the courts can effectively respond to the innumerable circumstances that may prompt the exercise of its discretion. The difference that the proviso would make is that the courts would at least be aided by a framework in exercising this discretion.

57 As the law now stands following *Colin Chua*, the final question that remains is how the courts ought to, in practice, exercise their discretion under ss 7(3)(a) and 7(3)(b) where (a) the gag orders are sought to protect witnesses who are *not* victims of crime, or (b) the gag orders are sought for reasons other than to protect witnesses from harassment and embarrassment or to facilitate crime reporting, or (c) the alleged offence is not one of sexual assault or does not involve minors. The simple answer is that nothing stops the courts from assessing the application through the lenses of “interests of justice, public safety, public security or propriety, the national interest or national security of Singapore” or to require “sufficient reason[s]” from the applicant, referencing the proviso in ss 7(2) and 7(2A) of the SCA 1970; this is entirely in keeping with the discretionary nature of ss 7(3)(a) and 7(3)(b).

58 It should be noted, however, that there may still be resistance towards referencing the proviso in ss 7(2) and 7(2A) or referring to matters enumerated in s 7(6) when the court considers how best to exercise its discretion under ss 7(3)(a) and 7(3)(b). In *Public Prosecutor v GDB*⁴⁶ (“GDB”), the offender sought a gag order under s 7(3) of the SCA to prohibit the disclosure of his identity. The offender submitted that “a wide discretion to

46 [2020] SGMC 49.

order a gag order is introduced by analogy via Section 7(6) of the SCA”.⁴⁷ The Magistrate’s Court did not accept this submission, opining that “[t]he factors enumerated in Section 7(6) CPC (*sic*) are clearly expressed to apply to Section 7(2) of the SCA only, i.e. for the purposes of determining whether in-camera hearings should be ordered”.⁴⁸ The court noted that “[t]his is not the factual matrix encountered in the present case, which concerns the imposition of a gag order”.⁴⁹

59 The position taken in *GDB* may have to be revisited in the light of the High Court’s affirmation of s 7(3) as being a “discretionary provision” which ought inherently to allow a court to consider a wide range of factors, including those listed in ss 7(2), 7(2A) and 7(6). It is important to highlight that the argument does not go so far as to suggest that a court should simply import the provisos in ss 7(2) and 7(2A) and the matters referred to in s 7(6) into ss 7(3)(a) and 7(3)(b), for had that been Parliament’s intention, it could have simply amended those provisions. The exercise of discretion should, however, mean that a court can be guided, though not bound, by the provisos in ss 7(2) and 7(2A) and the matters referred to in s 7(6).

60 Furthermore, as case law incrementally develops, the courts will undoubtedly fine-tune how they exercise their discretion when presented with novel situations that cannot be fully justified with present understanding. While it may not be an entirely satisfactory answer to the question, this is a wholly sensible approach until such time that Parliament has occasion to revisit ss 7(3)(a) and 7(3)(b) of the SCA 1970.

V. Conclusion

61 Following the High Court’s decision in *Colin Chua*, there should be no doubt that gag orders are for the protection of witnesses and never for the benefit of accused persons. This is on the basis that gag orders are granted, in derogation from the

⁴⁷ *Public Prosecutor v GDB* [2020] SGMC 49 at [28].

⁴⁸ *Public Prosecutor v GDB* [2020] SGMC 49 at [28].

⁴⁹ *Public Prosecutor v GDB* [2020] SGMC 49 at [28].

principle of open justice, to fulfil their facilitative and protective functions. However, in cases where (a) gag orders are sought to protect witnesses who are *not* victims of crime, or (b) gag orders are sought for reasons other than to protect witnesses from harassment and embarrassment or to facilitate crime reporting, or (c) where the alleged offence is not one of sexual assault or does not involve minors, the facilitative and protective functions may not be so apparent. It would be necessary then for the courts to revisit this topic when the appropriate cases present themselves.