THE FUTURE OF SINGAPORE'S CRIMINAL PROCESS

This discussion traces the evolution of Singapore's criminal process from one which was decidedly pro-prosecution to one where we are beginning to see glimpses of a reformist imperative. It uses what is perhaps the single most important decision on pre-trial procedure, *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205, as a lens to observe how the Judiciary seems to be leading the way in reshaping criminal procedure to be more compliant with modern conceptions of process fairness, in particular in the context of two "hot button" areas – police confessions and disclosure of prosecutorial material. It also takes note of what appears to be institutional resistance from the prosecution and perhaps law enforcement agencies, and concludes with the hope that all the institutional stakeholders of the criminal law in Singapore – the judges, the prosecutors, the law enforcers and the criminal bar – will in time begin to realise that the sustainable strengthening of process rights is a mutual and co-operative endeavour which will result in a criminal justice system which we can all be proud of.

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I. Civilising the criminal process

1 Freshmen observers of the Singapore criminal process are often struck with the obvious contradiction between what they can see with their own eyes to be an ultra-modern metropolis stuffed to the gills with state-of-the-art technology and infrastructure,[1] and what they have come to learn to be its antique criminal process, essentially unchanged since the British colonial government established it well over a century ago.[2] Fuelled by pride and armed with precedent, it might be said that

1 In one reckoning, Singapore has the highest GDP *per* capita in the world: *The World Wealth Report 2012* (Knight Frank and Citi Private Bank, Think Publishing) at p 11, <http://thewealthreport.net/The-Wealth-Report-2012.pdf> (accessed 13 August 2013).

2 The three major pieces of legislation – the Penal Code (Cap 224, 2008 Rev Ed), first enacted in 1872, the Criminal Procedure Code (Cap 68, 2012 Rev Ed), which was amended in 2010 but remains essentially, for our purposes, similar to its 19th century forebears, the Evidence Act (Cap 97, 1997 Rev Ed), first enacted in 1893 – contain no radical difference in terms of process rights since the original

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common lawyers the world over are inclined towards conservatism, and, if absolutely necessary, incremental – and some would say, glacial – change. Yet even as the bastions and bulwarks of the common law elsewhere experienced a spring of constitutionalism and human rights transforming what societies there consider to be acceptable and desirable in the criminal process,[3] Singapore's system, like some reliable old deity, remained the same. Then in the mid-2000s things began to change. Legislative amendments started to enjoy hitherto unheard of consultation with non-governmental stakeholders;[4] judicial decisions no longer predictably producing prosecutorially-desired outcomes.[5] Some attribute it to the personalities of changed personnel in government, others to a general democratisation or liberalisation of the socio-political climate in Singapore.[6] The pundits began to ask if all this was just an aberration, or more cynically, a mere public-relations exercise designed to give only an appearance of change, or if it might eventually revolutionise the way we think about how the criminal process ought to

Victorian ordinances. There were, subsequently, significant legislative amendments to these statutes, and the enactment of "specialist" criminal legislation, but the changes which they brought about, if anything, tended to reduce process rights and made successful prosecutions easier and the consequences of a conviction more punitive. The recent amendments to soften the mandatory death penalty regime for drugs and murder in 2012 were a breath of fresh air and broadly resonate with the kind of reform the Judiciary attempted in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205, but that is another story for another day.

3 Outside of the US, the Canadian Supreme Court led the way with *R v Oakes* [1986] 1 SCR 103 following the enactment of the Canadian Charter of Rights and Freedoms, and closer home, the Court of Final Appeal in Hong Kong has been actively scrutinising aspects of the criminal justice process for compliance with the Basic Law 1997.

4 The Criminal Procedure Code amendments of 2010 (Criminal Procedure Code 2010 (Act 15 of 2010)), for example, enjoyed extensive consultation with not only prosecutors, but also the defence bar and criminal law academics.

5 Apart from *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205, there was the decision in *Daniel Vijay s/o Katherasan v Public Prosecutor* [2010] 4 SLR 1119 which overthrew a rather harsh understanding of liability for joint criminal enterprises that had prevailed for about four decades. It makes a brief, but critical, appearance in *Kadar*.

6 Chan Sek Keong succeeded as Chief Justice in 2006 after his predecessor's 16-year tenure. K Shanmugam became Minister for Law in 2008, ending his predecessor's 20-year incumbency. Politically, a series of elections had yielded results which demonstrated that public support for the hitherto overwhelmingly dominant ruling party had become more nuanced and textured. It is still firmly in power, but the picture has become much more interesting than in the past. The General Elections of 2011 stunned with the first ever opposition victory in a multi-seat Group Representation Constituency and the defeat of two Cabinet Ministers. The Presidential Election of the same year produced a voting pattern which many believed would have resulted in a complete rout of the government-backed candidate had there not been two other candidates to "split" the opposition vote. A bell weather by-election for Punggol in 2003 ended up with a resounding opposition victory in what was considered by many observers to have been a "safe" seat for the Government.

be constituted.[7] In an effort to go some way towards answering this question, two developments are selected and studied here, remarkably arising from just one decision, which are felt by some to provide evidence of an impending spring.

II. Judicial awakening

2 In the realm of criminal procedure, few judicial decisions have had the kind of impact enjoyed by the Court of Appeal decision in *Muhammad bin Kadar v Public Prosecutor*[8] ("*Kadar*"). The story of the Kadar brothers and their harrowing journey through the criminal justice system provides the dramatic backdrop. An elderly woman was brutally stabbed to death in her apartment as her husband, previously paralysed by a stroke, looked on but could do nothing. On the same day Ismil Kadar was arrested for handphone theft. Improbably, it appears that the police noticed that he lived in an apartment on the floor below the scene of the killing, somehow managed to put two and two together, and suspected that Ismil was involved.[9] Sure enough, the police were able to extract several statements in quick succession, apparently from Ismil, confessing to the killing – he alone had killed her in an attempt to rob. Ismil was a primary school-educated, long-term substance abuser who had successively sniffed glue and consumed opium, subutex and dormicum since the age of 15. Needless to say, he was in need of money. An open and shut case, so it appeared – here was motive, opportunity and a series of iron-clad confessions. Kudos to all for a nifty piece of investigatory work.

3 Then a seemingly inconsequential purse was recovered near the foot of the fateful apartment block. Forensic analysis turned up a surprising result. Two sets of DNA were detected, that of the murder victim, and that of one other person who was, surprise, surprise, not Ismil, but someone closely related to him – Ismil's brother, Muhammad. Predictably, the arrest and interrogation of Muhammad produced another set of confessions – now it appeared, from this revised version, that Muhammad was there and party to the robbery, but Ismil was still the one who stabbed the victim to death. A fresh round of interrogation of Ismil produced, *voila*, a second set of statements from him which changed the initial story to one which corroborated Muhammad's account. Not a problem, so the police and prosecutors must have thought. A minor hiccup, but now everything was open and shut again –

7 It should not surprise that the criminal justice system is often a microcosm of what is going on in the rest of government – very similar questions have been asked about the nature of government in Singapore in general.

8 [2011] 3 SLR 1205.

9 Nothing in the publicly available material indicates what, apart from temporal coincidence, formed the basis of police suspicion of Ismil's part in the murder.

Ismil was to be charged with murder and Muhammad for being jointly responsible for the killing *via* the doctrine of common intention, now more fashionably called "joint criminal enterprise".[10] Armed with Muhammad's statements, and Ismil's confessions, second edition, the trial proceeded.[11] It took a long but predictable course. The accused persons challenged the admissibility of the statements on the ground of threats, inducement and oppressive treatment. A parade of prosecution witnesses appeared to say that all was above board. The statements were ruled admissible and the Defence called.

4 Then Muhammad took the stand and electrified the court by testifying that he alone had robbed and killed the victim, and that Ismil had nothing at all to do with the killing or the robbery. Ismil testified to the same effect with respect to his involvement. So now there was a third narrative. Put in a rather unenviable position, the trial judge could not say with sufficient confidence who actually killed the victim, but he did find, as the law then allowed him to, that it was either Ismil or Muhammad who had killed the victim, and the circumstances were such that the other brother, whoever he was, was complicit in the robbery knowing that the victim might be killed, and was therefore equally liable for murder by the doctrine of common intention (as it was then understood).[12] So one brother was liable for murder *simpliciter*, and the other by the operation of "common intention".

5 There the matter might have rested but for the intervening and remarkable decision of *Daniel Vijay s/o Katherasan v Public Prosecutor*[13] where the Court of Appeal held that the legal fraternity had been wrong about "common intention" for decades – it was never intended to impose liability for murder because of participation in a joint criminal enterprise. It did matter who killed the victim, after all. So it was that when the Kadar brothers appealed to the Court of Appeal, the Prosecution had to make up its mind as to who it was who killed the victim. They settled for Muhammad (following Muhammad's testimony in court), but still sought Ismil's conviction for robbery with hurt (following his confession, second edition, that he was at least present at the scene of the crime). Muhammad's appeal failed – he had testified that he killed the victim, and his attempt to argue diminished responsibility was unsuccessful. And there we shall leave Muhammad.

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10 This is the star-crossed s 34 of the Penal Code (Cap 224, 2008 Rev Ed). See the discussion in Michael Hor, "Vicarious Liability" in *Codification, Macaulay and the Indian Penal Code* (Wing-Cheong Chan, Barry Wright & Stanley Yeo eds) (Ashgate Publishing, 2011) at p 155.

11 The best account of the proceedings at the trial are found in the judgment of the High Court, *Public Prosecutor v Ismil bin Kadar* [2009] SGHC 84.

12 The governing authority then was *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447.

13 [2010] 4 SLR 1119.

6 For Ismil, it became crucial to decide if he was there at all – a conviction for robbery with hurt is not a capital offence, but is no walk in the park either.[14] Enter the husband of the victim, whose condition had deteriorated such that he could not testify, and who had died in the course of the trial. It was revealed by the investigation officer for the first time, some 18 months into the trial, that three statements were taken from him in which he had stated quite categorically that there was only one person who had entered the apartment on the day in question. These statements were not disclosed in the preliminary inquiry as the Prosecution had not intended to use them. The Court of Appeal obviously found these statements to have been very material, for if there had been only one person, and if Muhammad was there, then Ismil could not have been there as well. Thus contradicted by independent and apparently reliable evidence, Ismil's confession that he was there and party to the robbery could not stand.[15] He was acquitted.

7 These events made it necessary for the court to address two particularly tender aspects of the fairness of Singapore's pre-trial criminal process – the need to ensure integrity in the extraction and use of custodial confessions, and the need to give the Defence access to potentially exonerating material in the possession of the Prosecution. These issues will be dealt with in turn.

III. The law and the police – Guarding the guardians

8 The story of custodial confessions in the Singapore criminal process has been one long, depressing tale of what seems to be a system that has become so hooked on the extraction and use thereof that almost everything else has to be sacrificed to feed the addiction. Most Singaporeans will not know or remember that when the original Criminal Procedure Code and Evidence Ordinance came into force in the later half of the 19th century, officially extracted confessions were so frowned upon that they were generally inadmissible.[16] To be good evidence, they had to be made before a Magistrate.

14 Section 394 of the Penal Code (Cap 224, 2008 Rev Ed) prescribes "imprisonment for a term of not less than 5 years and not more than 20 years" and "caning with not less than 12 strokes".

15 The court also took into account other factors like the vulnerable physical and mental condition of Ismil, the lack of detail in his confessions, and the absence of any objective evidence tying Ismil to the scene of the crime.

16 Interestingly, that position is still the law in India; and after a dalliance with admitting "cautioned statements" in Malaysia, it appears that following the astounding Criminal Procedure Code (Amendment) Act of 2007, the original position of inadmissibility prevails once again.

9 Then in 1960, both the rule against custodial statements, and against statements made after the commencement of police investigations were essentially abrogated. Custodial confessions could now be used, but subject to compliance with a set of procedures prescribed in "Schedule E", adapted from the English Judges' Rules.[17] It is unfortunate that this momentous change did not get the airing it deserved. The reason was that it was overshadowed by another more sensational concurrent amendment – that of the abolition of trial by jury for all offences except murder. Yet the Legislative Assembly[18] was not unaware of the two major problems with refocusing the criminal process away from the trial, and to the extraction of confessions before the trial. The first was official mendacity – the police might do one thing at the police station and then tell another story when the statement is challenged. That, the government of the day felt, was adequately "solved" by requiring admissible statements to be taken by police officers of or above the rank of Inspector. As then Prime Minister Lee Kuan Yew said: "Nobody … would suggest that the English-educated, who are good enough to be inspectors, would go into court and perjure."[19]

10 Then Minister for Law, K M Byrne, addressed the other potential problem: "[I]t is recognised that the greatest care would have to be taken to avoid encouraging an attitude of mind among police officers which tended to rely on confessions to the detriment of other available evidence in support of the prosecution."[20]

11 Sadly, even after more than half a century, as the case of *Kadar* demonstrates, the opportunity and temptation for law enforcers to be less than forthright about how statements are extracted cannot yet be discounted,[21] nor can the incentives for investigators to become over-reliant on confessions to the neglect of other potential evidence be

17 The story is told with admirable clarity by Chao Hick Tin J (as he then was), in *Mohamed Bachu Miah v Public Prosecutor* [1992] 2 SLR(R) 783 at [39]–[49]. See also Michael Hor, "The Confessions Regime in Singapore" [1991] 3 MLJ lvii.

18 As the primary legislative authority of Singapore was then called.

19 *Singapore Legislative Assembly Debates, Official Report* (2 September 1959) vol 11 at col 568. The idea that an "English" education is somehow a guarantee of integrity sounds quaint these days, but it perhaps made some sense when it was much rarer then.

20 *Singapore Legislative Assembly Debates, Official Report* (2 September 1959) vol 11 at col 557. Exactly what "care" this was to be was not entirely clear except that the lynchpin was "control or supervision" of "senior officers".

21 If Ismil's investigators had done only what they said in court they did, it seems highly unlikely that Ismil would have initially confessed to the murder, and then subsequently to the robbery – both versions which were later found to be false. The Court of Appeal clearly felt that undisclosed "questionable means" had been employed (*Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [190]).

ignored.[22] Just as jurisdictions with a much longer history of admissible custodial confessions, and which the 1960 amendment in Singapore professed to emulate,[23] began to realise the shortcomings of such evidence, Singapore moved in the other direction. The bad experience of the UK with the use of custodial confessions culminated in the Police and Criminal Evidence Act 1984[24] with its detailed Codes of Practice and sanctionable rules on how the police may or may not behave when interrogating a suspect.[25] The common law and the Judges' Rules did not prove sufficient for the task. Singapore veered the other way through a combination of legislative action and judicial interpretation.

12 In 1976, history was to repeat itself. Singapore embraced the doctrine of adverse inferences from silence in the face of official interrogation with great enthusiasm. Up went the pressure on a suspect to speak to self-incriminatory effect. But while that amendment basked in all the attention, very quietly Schedule E, Singapore's Judge's Rules, was repealed without replacement, leaving almost no legislative prescription concerning the manner in which police interrogation is to be conducted.[26] The threadbare provisions of a previously unimportant section of the Code, one which was never meant to deal with the interrogation of suspects, and essentially requiring only reading back and signing, had to be called in aid to provide a semblance of order.[27]

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22 The Court of Appeal details what it described as "an absence of diligence on the part of investigators in completing their inquiries" in the context of there being "absolutely no objective [*ie*, non-confessional] evidence of Ismil being present" in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [182]–[184].

23 Then Minister for Law, K M Byrne, conveyed the lament of the Singapore police that they could not use custodial confessions at all, although the police in England, Hong Kong and Sarawak could if they had been taken in compliance with the Judge's Rules (*Singapore Legislative Assembly Debates, Official Report* (2 September 1959) vol 11 at col 556).

24 Police and Criminal Evidence Act 1984 (c 60) (UK).

25 See the fascinatingly intimate account of Michael Zander, "PACE (The Police and Criminal Evidence Act 1984): Past, Present and Future" (London School of Economics, Law, Society and Economy Working Papers, 1 of 2012) <http://www.lse.ac.uk/collections/law/wps/WPS2012-01_Zander.pdf> (accessed 15 August 2013). Essentially PACE was the product of the "Phillips Report", Royal Commission on Criminal Procedure, *Report* (Cmnd 8092, 1981) which was based on the need for a "fundamental balance" between the Prosecution and Defence, the prevailing situation having become weighted in favour of the Prosecution. In stark contrast was the earlier, and subsequently abandoned, "11th Report" of the Criminal Law Revision Committee, *Evidence (General)* (Cmnd 4991, 1972), wherein the "central message was that the criminal justice system was tipped too far in favour of the defence" and "virtually every one of the … recommendations was aimed at strengthening the position of the prosecution". It is a selection of this second set of recommendations which were seized and brought into force with alacrity in Singapore.

26 *Mohamed Bachu bin Miah v Public Prosecutor* [1992] 2 SLR(R) 783 at [48].

27 This survives as s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

13 In a series of rulings, the court was to hold that a confession could be sufficient without corroboration to sustain a conviction, and that is so even if the accused retracts from it at the trial.[28] It was also to decide that breach of the procedures which do remain has no effect on admissibility unless it also engages the voluntariness rule.[29] Regarding the voluntariness rule itself, although the technical position is that it is for the Prosecution to prove that the statements were voluntary, in practice, a strong presumption of official credibility is firmly in place – in essence, if it boils down to whether the court will choose to believe the accused or the police, and where there is no independent corroboration either way, the police story will be accepted.[30] In an important ruling in the broader context of a discretion to exclude evidence on the ground that it was improperly obtained, the court seems to have ruled decisively that it is not the function of the court, in a criminal trial, to discipline police misbehaviour.[31]

14 Two prominent ways in which other jurisdictions have sought to improve the regime of pre-trial confessions – that of an early right to counsel and of video recording of what happens at the police station – have been met with a brick wall in Singapore.[32] Time and time again, there have been calls for legislative action to require video recording of the process of interrogation and extraction of confessions, but to no avail. A right to counsel does indeed exist under the Singapore Constitution,[33] but in another series of rulings, the court has rendered it practically toothless in the context of police interrogation and extraction of confessions. The right does indeed exist, but the exercise of it may be delayed for as long as several weeks in order for the police, to put it crudely, to obtain incriminating confessions before the suspect gets to speak to his or her counsel. Needless to say, there is no right to have counsel present during interrogation, so the court has held.[34]

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28 *Ismail bin UK Abdul Rahman v Public Prosecutor* [1974–1976] SLR(R) 91.

29 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [44].

30 See Michael Hor, "Review of Legislative and Judicial Reform of Criminal Evidence 1990–1995" in *Review of Judicial and Legal Reforms in Singapore Between 1990 and 1995* (Singapore: Butterworths Asia, 1996).

31 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR (R) 239.

32 For perhaps the latest airing, see the Parliamentary speech of Minister for Law, K Shanmugam, in moving the Criminal Procedure Code amendments of 2010: *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at cols 558–560.

33 Article 9(3) of the Constitution of the Republic of Singapore (1999 Rev Ed) is plain as day: "Where a person is arrested, he … shall be allowed to consult and be defended by a legal practitioner of his choice."

34 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [57]. See the particularly egregious case of *Jasbir Singh v Public Prosecutor* [1994] 1 SLR 782, where deprivation of counsel for two weeks after the arrest in a capital case was held to be "reasonable" although the police advanced no particular reason why that course of action was necessary for any legitimate investigatory purpose.

15 The judgment of the Court of Appeal in *Kadar* was a master class in combining declarations of loyalty to the present regime of police interrogation and extraction of confessions, and a subtle but discernible critique of it. It sums up the present situation in these terms:[35]

> 57 … Plainly, in Singapore, the law provides police officers with great freedom and latitude to exercise their *comprehensive and potent powers* of interrogation in the course of investigations. This means that the evidential reliability of any written statements taken from accused persons rests greatly on the conscientiousness with which the police investigators who conduct the process of examination and recording observe the prescribed safeguards.
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> 58 It also appears to be the case that written statements taken by the police are often given more weight by finders of fact as compared to most other kinds of evidence. This is because formal statements taken by the police have the *aura of reliability* that comes from their being taken (as would be normally, and correctly, assumed) under a set of strict procedures strictly observed by a trustworthy officer well trained in investigative techniques. This aura is further enhanced by the admissibility requirement in s 122(5) that the recording police officer must be of the rank of sergeant or above. It is, it may be said, *statutorily assumed that such senior police officers are competent and will discharge their obligations conscientiously. All in all, it seems that public policy is in favour of trusting the integrity of the police, and this gives them a certain freedom to conduct their investigations more effectively and efficiently, statement-taking included*. However, such an approach comes with certain inherent risks.
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> 59 There is always a small but real possibility that an *overzealous police officer* who believes that a suspect is guilty will decide, perhaps half-consciously, that strict compliance with the procedural requirements for statement-taking may contribute to a factually guilty offender being let off. He may not go so far as to extract an incriminatory statement by threat, inducement or promise, or a statement that is otherwise involuntary. All that is required for a miscarriage of justice to occur is for such a police officer to record the statement with embellishments, adding nothing more than a few carefully-chosen words to the suspect's own account. If the statement is not read back or signed soon after by the suspect (with proper interpretation where appropriate), there is no assurance that the statement faithfully reflects what he had actually disclosed. Alternatively, a police officer might simply be indolent, leaving the recording of the statement to well after the examination. His memory of the interview having faded, such an officer might fill in the gaps

35 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [57]–[60]. The author of the judgment was, unsurprisingly, V K Rajah JA, who over the years has emerged as the most formidable criminal law judge on the bench. He was joined, significantly, by Steven Chong J who would soon become the Attorney-General. Kan Ting Chiu J rounded up the team, then on the verge of retirement when judges are wont to do bold things.

> based on his own views about the suspect's guilt. Such *questionable statements could, standing alone, form the basis for wrongful convictions even for capital offences if an accused, disadvantaged by the lapse of time and memory, is unable to convince the court that he did not say what appears in writing to be his words*. The salutary requirements of the CPC and the Police General Orders, especially those requiring statements to be promptly reduced to writing, immediately read back to their maker, and corrected if necessary and signed, are the only prescribed safeguards standing in the way of such an unacceptable possibility.
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> 60 Police investigators are aware when they record statements that they are likely to be tendered as evidence before a court and that there is therefore an uncompromising need for accuracy and reliability. The objective of the relevant provisions in the CPC and the Police General Orders is to ensure that both these twin objectives are met in every investigation. For this reason, as well as what we have articulated earlier, we think that a court should take *a firm approach* in considering its exercise of the exclusionary discretion in relation to statements recorded by the police in violation of the relevant requirements of the CPC and the Police General Orders (or other applicable legal requirements). This means that the court *should not be slow* to exclude statements on the basis that the breach of the relevant provisions in the CPC and the Police General Orders has caused the prejudicial effect of the statement to outweigh its probative value.
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> [emphasis added]

16 The Court of Appeal seems to be saying this. The police are given much freedom to interrogate and to extract confessions from suspects. Such confessions are given considerable weight. This is justifiable on the ground the police can be trusted to follow the prescribed procedure in the Criminal Procedure Code[36] ("Code") and the Police General Orders ("PGO"). If those procedures are not followed, the court should exclude confessions extracted thereby if the breach gives reason for the court to seriously doubt the probative value of the content of the confession. The law has always allowed the court to do something about confessions extracted improperly, either through the device of admissibility or the process of assessing probative value.[37] What appears to have happened in *Kadar* is a change in judicial attitude towards breaches of procedure. They can be benign, in the sense that it was an unintended lapse – this would be the kind of "technicality" which ought not to result in rejecting the confession. On the other hand,

36 Cap 68, 2012 Rev Ed

37 It is unlikely to matter, especially in bench trials, whether a confession is declared inadmissible, or is admitted but assessed to have little or no probative value. The only exception to this is when the court is deciding, at the end of the Prosecution's case, whether or not a *prima facie* case has been made out – an inadmissible confession cannot, of course, be called in aid of the Prosecution.

they may be part of a more sinister course of official conduct tantamount to manufacturing incriminating evidence – this would either render the confessions inadmissible through the exercise of a discretion to exclude prejudicial evidence or cause the probative value to be so poor that they cannot be relied upon.

17 The Court of Appeal in *Kadar* seems to mark a shift in the willingness of the court to draw an adverse inference of a lack of good faith on the part of the police when there is procedural impropriety. Ismil's first two confessions – declaring that he was solely responsible for the murder and the robbery – had failed to follow the requirements in both the Code and the PGO. The statements were accordingly rejected. The court's treatment of two earlier cases where similar breaches of procedure were encountered is telling.[38] The Court of Appeal decision in *Fung Yuk Shing v Public Prosecutor*[39] ("*Fung*") was one in which statements were obtained following very similar breaches of procedure. The court in that case thought nothing of it, saying that the officer concerned was available in court to be cross-examined and the trial court had found his account of the interrogation to be "credible". The court in *Kadar* used the traditional face-saving measure of "distinguishing" *Fung*, saying that it stood merely for the proposition that "an appellate court will not alter the decision of the trial court unless the improper exercise of the exclusionary discretion occasions a miscarriage of justice".[40] It did seem as if the court in *Fung* did not think that the confessions ought to have been excluded at all, and it is not at all clear why the breaches of procedure in *Fung* were innocuous, but a very similar failure in *Kadar* was thought, to put it graphically, to infect the entire investigation. The truth is that the particular judicial attitude in *Fung* had been the predominant one. The message from the court in *Fung* and in a host of other decisions[41] was crystal clear – it would be virtually impossible, barring a "smoking gun", to dislodge the assumption of police integrity and of the innocent nature of any breach of procedure. Instead, the humble High Court decision in *Public Prosecutor v Dahalan bin Ladaewa*,[42] which contained blistering criticism of the police resulting in the rejection of statements obtained in breach of procedure, and seen in its time as an outlier, took pride of place in *Kadar*. Clearly the tide had somehow turned – just how much and for how long remains to be seen.

38 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [46]–[53] and [67].
39 [1993] 2 SLR(R) 771.
40 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [67].
41 These are conveniently collected in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [65].
42 [1995] 2 SLR(R) 124. S Rajendran J, who was the judge in this High Court decision and, interestingly, a former Deputy Public Prosecutor, seemed to have entertained a degree of scepticism about the police – something which was exceptional then.

18 But *Kadar* contained a far more radical, but only half-expressed, critique. Laudable though the shift in attitude towards the drawing of adverse inferences against the police for breaches of procedure is, it could not have escaped the court that that alone is not going to be enough. It is painfully obvious that failure to follow the procedure prescribed in the Code and the PGO was entirely "unnecessary" – it seems likely that an investigator bent on extracting confessions conforming to what he or she believed the case theory to be would have obtained them from Ismil in any event, all the "i"s dotted and the "t"s crossed. Indeed, several "properly" obtained confessions were subsequently obtained from Ismil. It is chilling to ponder what would have happened if the officer concerned had not made those obvious mistakes. The truth is that even if the proper procedures had been followed religiously, that is still very far from ensuring, in any meaningful sense, that the confessions would have been reliable enough to be given the deference they appear to enjoy in court. The procedural prescriptions contained in the Code and what we know of the PGO are so threadbare[43] that they are easy enough to comply with by the good and the bad cop alike.

19 It also seems likely that even without the "silly" procedural mistakes, Ismil would still have not escaped if not for several extraordinary and fortuitous turns of events. First was the recovery of that fateful purse with the surprising DNA on it. Then, there was the remarkable about-turn in the testimony of Muhammad. That was followed by the unexpected decision of the Court of Appeal on common intention. Then, there was that dramatic turnabout in Muhammad's testimony. Finally, of course, there were in existence the statements of the paralysed husband, which might never have seen the light of day. Take, for example, just one of them – if the purse had not been discovered, is there any doubt that Ismil would in all probability have

43 Section 22 (then s 121(3)) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) simply requires a statement to be read back, an opportunity given to correct, and to be signed by the declarant. The Police General Orders is a mysterious document which need not be published (s 119 of the Police Force Act (Cap 235, 2006 Rev Ed)), and is in fact not published. For our purposes, it contains rules governing the use of police pocket books and field diaries, especially as a means of recording confessions (*Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [142]). To the credit of the Judiciary, that has not deterred the court from ordering the production of the document – a practice originated by the redoubtable S Rajendran J. This calls into question the present practice of not publishing it, or at least those portions concerning interrogation and extraction and recording of confessions. If, as *Kadar* says, compliance with the Police General Orders is crucial to its reliability, then perhaps the accused and the public ought to be aware of the content of the Police General Orders. How else can compliance be satisfactorily supervised by the court and non-compliance be argued by the Defence?

been convicted of murder notwithstanding the procedural lapses in the extraction of the two initial confessions?

20 The real concern of the court was not so much non-compliance with prescribed procedure – that is easily handled by the usual tools of admissibility and assessment of probative value – but with something the court chose to express itself in near mystic terms:[44]

> 190 Has the Prosecution established that Ismil, who has a low IQ and who was plainly in real physical distress immediately after his arrest because of the withdrawal effects arising from his substance abuse problem, was ingenious enough to concoct a narrative that provided the barest of details of what might have transpired in the flat while taking extreme care not to give any details that might implicate the real assailant, his brother? On this score, we note that the Prosecution did not challenge [the] evidence that Ismil's 'speed of processing novel information is weak and inefficient'. What made Ismil, when he was unwell, precipitately confess his sole involvement to SSI Zainal [one of the investigation team] when they were alone in the car? Why did the statements given by Ismil on 7 May 2005 unerringly echo the key facts then known to the investigators but lack details that only the real assailant would have been aware of? Why did Ismil only later implicate Muhammad? These are troubling questions that seem to *point unequivocally towards a series of false confessions procured by questionable means*.
>
> …
>
> 194 We are also constrained to point out that these proceedings have revealed several serious lapses on the part of the investigators who had carriage of this matter … We have raised *several unanswered questions* in this appeal … *One, of course, hopes for one set of answers. One fears, that in reality, there might be another.*
>
> [emphasis added]

21 What the court at one point chooses to describe as "unanswered questions" were, at another point in the judgment, in fact answered by the court itself. Why did Ismil confess to something he did not do? Why did he change his story so conveniently following new information received by the police? Why did his second version tally so nicely with Muhammad's first version (and with the prevailing police theory), both of which were ultimately found to be untrue? The answer, as the court says is "unequivocal" – a series of false confessions had been procured by "questionable means". There could be no other reason and therefore no "set of answers" to "hope" for. The investigators had collectively "made" Ismil confess and then made him change his story by illegitimate means – either by threats, inducements or promises, or subtler forms of coercion. And here is the nub – all this can happen undetected, and be

44 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [190] and [194].

undetectable, by what is often held out to be the inerrant gatekeeper – the trial-within-a-trial to determine the "voluntariness" of the confessions. The trial judge did indeed conduct the *voir dire*, but predictably chose to believe the police and not the accused. Diplomatically perhaps, the court chose not to rule on voluntariness but dealt with the tainted confessions on the basis of "probative value".[45]

22 The subtlety of the judicial message enabled the police to play dumb. They simply responded by saying that the prescribed procedures will be followed in the future.[46] That of course does nothing to solve the problem of what is to happen in a future case in which "a series of false confessions" are extracted by "questionable means", but which are obtained in strict compliance with the Code and the PGO. Imagine a future Ismil with a punctilious investigation officer and *sans* the dramatic twists and turns. What is there but the unsupervised and unverified "integrity" of the police officers concerned to stand between an accused and a wrongful conviction? To cut to the chase, how long will the court wash its hands of what happens in the police station when the crucial confessions are extracted? This passage from the *Kadar* judgment is telling:[47]

> [We] emphasise that the court should be careful to *avoid basing the exercise of the exclusionary discretion primarily on a desire to discipline the wrongful behaviour of police officers* (or officers of other enforcement agencies) or the Prosecution … In the light of [prior Court of Appeal decisions like *Law Society of Singapore v Tan Guat Neo Phyllis*[48]] courts also should refrain from excluding evidence based only on facts indicating unfairness in the way the evidence was obtained (as opposed to unfairness in the sense of contributing to a wrong outcome at trial). That being said, a vigilant emphasis on the procedural requirements in the recording of statements can have a positive effect on the quality of such evidence generally. By making it clear that non-compliance with the required procedures could actually weaken the Prosecution's case against an accused person, we hope to *remove the incentive* for such non-compliance on the part of police officers. [emphasis added]

45 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [147] and [149].

46 "Collection of Evidence Treated with Utmost Seriousness: Police" *The Straits Times* (9 July 2011), <http://news.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20110709-288216.html> (accessed 15 August 2013) contains the full statement from the police in response to *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205. In essence, the police simply reassured the public that "it has reminded its officers to ensure that they endeavour to always comply with such procedures under any circumstances".

47 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [68].

48 [2008] 2 SLR(R) 239.

23 The court appears to cling to the idea, outmoded elsewhere,[49] that the criminal trial (and therefore the judges) are only concerned with the narrow question of probative guilt or innocence, and not with propriety or legitimacy of the pre-trial process. But we already begin to see a sort of judicial awakening, a kind of "proto-constitutional" concern for pre-trial fairness. The earlier decisions seem clear that the need to discipline the police is an irrelevant consideration.[50] *Kadar* signals a shift in that dealing with wrongful behaviour is no longer taboo, although it cannot be the "primary" or "only" reason for the court to intervene. The disciplinary rationale is no more in the wilderness and it is now legitimate for courts to "hope to remove the incentive" for improper police behaviour. Nonetheless, at the moment, it appears that there must still be a probative peg for the court to hang judicial concern for the pre-trial process. If and when the court decides to cross the next frontier towards a freestanding concern for pre-trial legitimacy, we will begin to see the civilising of the pre-trial process in Singapore – what is now, virtually, a legal no man's land. The court will then, probably relying on constitutional norms of due process, insist on a much more meaningful right to counsel,[51] and perhaps require the police to take measures to ensure independent verification of police propriety.[52] Only then will we be able to deal effectively with the danger of false confessions extracted by questionable means. Singapore has had more than 60 years of experience with custodial confessions, and still the present system of near complete self-regulation of investigations and interrogations by the police is capable of producing a situation like Ismil's. Surely, we cannot be doing our best.

IV. Disclosure and the discovery of fairness

24 Just as the trial focus of the traditional common law procedure has retarded judicial recognition of a stronger role in the pre-trial

49 Evidenced by, *eg*, the famous s 78 of the English Police and Criminal Evidence Act 1984 (c 60) which expressly confers power on the courts to exclude unfairly obtained evidence. The section was intended to overrule the anaemic decision of *R v Sang* [1980] AC 402, or at least Lord Diplock's judgment in it, which the Singapore courts seem to have clung on to for dear life.

50 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 appears to have been the high-watermark of this narrow conception of the judicial role.

51 Other jurisdictions have done just this with constitutional language no clearer than that which exists under the Constitution of the Republic of Singapore (1999 Rev Ed).

52 A striking example is the decision of the High Court of Australia in *McKinney v The Queen* (1991) 171 CLR 468. While the High Court did not, and perhaps could not, go as far as to direct the police to videotape the extraction of confessions, it did indicate that it could and would draw adverse inferences against the police and Prosecution if the police had the resources but still refused to provide videotaping facilities.

process, its adversarial tenor seems to have perpetuated a stunningly primitive regime of discovery. Essentially, each party is left to its own devices and is expected to meet the evidence as he or she best can, as and when it is adduced at the trial. Neither party is under any obligation to help the other and it follows that one party does not have the right to see the other's hand before the trial. In short, there is to be no compulsory access to the material in the possession of the other party. That probably did not matter very much in the early days when the resources of a fledgling police and prosecution were probably not very different from that of the accused and his or her counsel. Those days are long gone. The police and prosecutorial bodies in Singapore have become institutional behemoths, professional, well trained and blessed with ample budgets. On the other side, however, nothing much has changed – it is still the accused, his or her counsel, and whatever personal resources he or she happens to possess. Compound that with another aspect of those fateful 1976 amendments – the legitimisation of the drawing of adverse inferences from silence in the face of police interrogation.[53] So the accused is expected to disclose, in effect, his or her defence right from the very start.[54] What the Prosecution is or should be obliged to show to the Defence, on the other hand, has been a matter of considerable dissatisfaction. Defendants in High Court trials have always enjoyed a degree of incidental discovery because of the necessity for the Prosecution to go through a Preliminary Inquiry – now renamed "Committal Proceedings".[55] This pre-trial proceeding requires the Prosecution to satisfy an examining Magistrate that there are "sufficient grounds for committing the accused for trial".[56] Naturally, a fair bit of prosecution material is normally disclosed. Defendants in the Subordinate Courts, until as recently as 2010, remained in a dark age where there was, generally, no obligation[57] at all on the part of the Prosecution to disclose anything apart from what was required to be stated in the charge.[58] Compound that with the very significant increases to the sentencing jurisdiction of the Subordinate Courts[59] and the

53 Now in section 261 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

54 Or suffer the risk of adverse inferences being drawn, *eg*, the court drawing the inference that a particular defence advanced at the trial is untrue but manufactured as an afterthought.

55 Criminal Procedure Code (Cap 68, 2012 Rev Ed) Pt X, Division 2.

56 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 185(*b*).

57 This, of course, did not prevent a particular prosecutor from choosing to disclose anything, perhaps out of generosity or a sense of fairness.

58 The governing authority was thought to be *Kulwant v Public Prosecutor* [1985–1986] SLR(R) 663. The reasoning was simply that there was no express statutory provision empowering the court to order disclosure, and that criminal and civil proceedings were meant to be different. It was in the context of a High Court trial, but there was no reason why it did not also apply to Subordinate Court trials.

59 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 7–9. See also specialised statutes like the Misuse of Drugs Act (Cap 185, 2008 Rev Ed), s 53, which ramp up

(*cont'd on the next page*)

enormity of it all strikes home. Practically all non-capital or non-life imprisonment prosecutions are tried in the Subordinate Courts. The "criminal case disclosure" process put in place by the 2010 amendments[60] was, no doubt, a major improvement. The Prosecution must disclose its "case", and if the Defence is ready to tango and reveal its "case", the Prosecution releases more of its "case" – a kind of mutual striptease.[61] Not all, however, is well. Neither the "committal proceeding" for High Court trials nor the criminal case disclosure for Subordinate Court trials obliges the Prosecution to disclose all that would be useful to the Defence. Perhaps even more ominously, some proceedings, inexplicably, appear to be exempt from the 2010 procedures – most famously, prosecutions under the Prevention of Corruption Act.[62]

25 The *Kadar* decision showcased a particular short-coming – material which is in the possession of the Prosecution, but which it does not intend to use at the trial. Neither the High Court committal proceeding, nor the 2010 case disclosure regime in the Subordinate Court for that matter, creates any obligation on the part of the Prosecution to disclose unused material. Deep into the *Kadar* trial, it was incidentally revealed by police officers that three statements had been taken from the paralysed husband of the victim where he stated that he was quite sure that there was only one person who had entered the apartment that day. If believed, this would have been fatal to the ultimate case theory of the Prosecution – that both brothers were at the apartment. If Muhammad had killed the victim, Ismil could not have been there at all. The Court of Appeal was understandably annoyed and directed the parties to submit arguments on the existence of a duty on the part of the Prosecution to disclose unused material in its possession.

26 Observers were caught by surprise by what the Court of Appeal had to say. There were a cluster of cases, which most in the profession thought to be immutable, standing for the proposition that without express statutory authority – and there was none – the courts were helpless to impose any sort of obligation on the Prosecution to reveal

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the jurisdictional and sentencing powers of the District Court to any punishment except death.

60 Criminal Procedure Code 2010 (Act 15 of 2010).

61 Criminal Procedure Code (Cap 68, 2012 Rev Ed) Pt IX.

62 Cap 241, 1993 Rev Ed. This curious omission, engineered by the absence of offences under the Prevention of Corruption Act, from the "Second Schedule" to the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (pursuant to s 159(1)(*a*)), surprisingly received no attention whatsoever in Parliament. It has never been explained how corruption proceedings are so materially different that the *ancien regime* of non-disclosure ought to be retained. Of course, after *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205, the same "common law" duty of disclosure attaches to corruption prosecutions as well.

anything.[63] It would have been simple enough for the court to have disposed of the issue in one line, perhaps one beginning with: "It is well established that …". Instead the court embarked on a world tour examining comparative developments in the major and neighbouring common law jurisdictions.[64] Unsurprisingly, this led to the "very clear" conclusion that "all major common law jurisdictions (besides Singapore) have imposed some kind of non-statutory disclosure obligation on the Prosecution", and that this was based on something as fundamental as "the elementary right of every defendant to a fair trial" and "the rules of natural justice".[65] It being unthinkable that the criminal process in Singapore should be in violation of elementary fairness, there had to be some sort of legal obligation on the Prosecution to disclose material in its possession. The technical route was, of course, the famed *casus omissus* provision in what is now s 6 of the Code. The current version of that provision expressly permits the court to fashion rules of procedure "as the justice of the case may require" if "no special provision has been made".[66] Was statutory silence a "special provision"? So strong was the imperative to ensure the fairness of the criminal process that the court held that silence was not a special provision, paving the way for the court to craft common law rules to govern disclosure, casting aside the long-standing precedent of *Kulwant v Public Prosecutor*[67] in the process. The Court of Appeal wisely refused to comprehensively declare the nature of this obligation, but was content to say that it, at least, encompassed:[68]

> (a) any unused material that is *likely to be admissible* and that might *reasonably be regarded as credible and relevant* to the guilt or innocence of the accused; and
>
> (b) any unused material that is likely to be inadmissible, but would *provide a real (not fanciful) chance of pursuing a line of inquiry* that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.
>
> [emphasis added]

63 We have already encountered *Kulwant v Public Prosecutor* [1985–1986] SLR(R) 663. There was also the more recent Court of Appeal decision in *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946.

64 The ports of call were England, Australia, Hong Kong, Canada, India, Malaysia and Brunei.

65 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [98].

66 The old provision directed the court to apply the prevailing law of England suitably modified, but that made no difference to the Court of Appeal – whether it was the prevailing law of England modified, or the demands of justice, the result was still the same.

67 [1985–1986] SLR(R) 663.

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

27 This aspect of the decision in *Kadar* represents one of the clearest examples of what might be called "proto-constitutional" thinking in the realm of criminal justice in Singapore – a fundamental reassessment of what is thought to be the current rules of criminal process according to higher and broader process values like fairness to the accused, and if the present position is found wanting, to reshape the rules to comply with them.

28 Perhaps realising the revolutionary (for Singapore) nature of the obligation it had just pronounced, the court hastened to "soften the blow" by describing the limits of the right of an accused person to disclosure of prosecution material: "[T]he duty certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case … This will not include material which is neutral or adverse to the accused."[69]

29 Essentially, only material which is "likely to be admissible" at the trial, or which is likely to lead to admissible evidence, must be disclosed. Evidence is admissible only if it is, as evidence lawyers call it, probative of some fact which has, potentially, a bearing on the outcome of the prosecution. This is partly an exercise in logic – does the existence of fact A increase the likelihood of the existence of fact B. But it is also a function of "weight" – and in the context of evidence in the nature of an assertion, "credibility". Is the significance of the evidence so slim that, although it is, as a matter of logic, relevant, it would be a waste of time for the court to bother with even considering it? The other aspect of admissibility is the inquiry into whether a particular piece of evidence is to be excluded by some rule of evidence, notwithstanding its potential weight. The problem is that reasonable people can disagree about both the assessment of probative value and about the operation of exclusionary rules of evidence. The reality is such that it is only the Prosecution which will have full knowledge of the material which is in its possession. So it is the Prosecution which must first apply its collective mind to what would be "likely to be admissible". If there is any doubt, and one assumes this must be reasonable doubt, the Prosecution ought to bring the matter before the court for a final decision as to whether it should be disclosed. So the Court of Appeal declared.

30 There is no doubt that the system crafted by the Court of Appeal is both workable and a quantum leap from the dingy past of criminal discovery in Singapore. Yet one cannot help wonder why the obligation to disclose should be circumscribed in this fashion. What if the Prosecution in all honesty, but mistakenly, decides that a particular piece of evidence is unlikely to be admissible at the trial, either because of a wrong, but reasonable, view of the interpretation or application of a

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

certain exclusionary rule, or because of an erroneous, but not entirely unreasonable, assessment of probative value? There is every indication that this may have been what happened in the *Kadar* case itself. There clearly was no deliberate attempt to conceal the statements. We have no reason to disbelieve the Prosecution when it explained that it had assessed the statements to be of insufficient "credibility". The husband of the deceased had witnessed the horror of the killing of his wife, himself lying paralysed and helpless on the bed. He could not speak in full sentences and his niece or daughter had to "interpret" the sounds he was uttering. He consistently misidentified the suspect at an identification parade. He died soon after giving the statements. The Court of Appeal was of a different view, but it does seem that the Prosecution had made a *bona fide* decision that the statements were of insufficient reliability to be admissible. The Prosecution entertained no doubt, or at least no reasonable doubt. So even under the system of disclosure described by the Court of Appeal, the Prosecution had done no wrong. What would have a much better chance of preventing the *Kadar* situation from happening again would be the English common law position which did not find favour with the Court of Appeal:[70] that disclosure attaches to anything possibly relevant and the Prosecution is not to indulge in assessment of probative value at all. True, the range of disclosable material will be rather larger, but what harm could there be? The disclosure regime should err on the side of disclosure and not non-disclosure. If the material is, as the Prosecution believes it to be, unlikely to be admissible, then all that will happen is that the accused will get to know of material which is unlikely to be of any use to him or her. If, however, the Prosecution is wrong, it could be a deciding factor in the determination of guilt or innocence – as it was in *Kadar*.

31 Needless to say, the potential for the Prosecution to be "wrong" about admissibility is not inconsiderable – simply because reasonable people disagree about what is reasonable. Add to that the fluid and highly contextual nature of relevance and weight and we can just see future perfect storms of disclosure brewing on the horizon. The Court of Appeal gave an example of a piece of evidence which the Prosecution would not be obliged to disclose: "an anonymous letter mailed to investigators stating that the accused is not guilty (this would not be admissible and *prima facie* credible evidence, nor would it provide a real prospect of a relevant line of inquiry)".[71] How indeed can the court be so sure that it would not provide a real prospect of a relevant line of inquiry? While the identity of the writer may be opaque to investigators, it may not be so to the accused. It does not take much to imagine that the letter might have contained something distinctive, but known only to the accused – a signature turn of phrase or a particular grammatical,

70 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [115]–[116].
71 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [116].

spelling, or idiomatic error, for example. There would certainly be no harm in disclosing it to the accused, but there is an off chance that it might lead to exonerating evidence. Indeed what harm would there be if the entire prosecution dossier is disclosable, adequate provision being made for material which is legitimately confidential – for example, the identity of undercover agents. Arguments about why the criminal process should be different from the civil, and in particular as to why the criminal regime must be more stingy needs to be reassessed[72] – how indeed does the civil process deal with the tailoring of evidence or with the suborning of witnesses? That seems to be not just the legal position at common law but a constitutional imperative in Canada following the great decision of *Stinchcombe v The Queen*[73] and we have no reason to believe that it has not worked out satisfactorily there.

32 This account will not be complete without an attempt to chronicle what appears to be an apparently suspicious attitude on the part of the Prosecution towards the growth of the right to disclosure of prosecution material. So much so that the Court of Appeal felt constrained to counter it with these words:[74]

> [T]he duty of the Prosecution is not to secure a conviction at all costs. Rather, the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth. The fruits of investigations are after all the property of the community to ensure that justice is done …

33 *Kadar* itself seemed to have provided evidence of this. There were three statements taken from the husband of the victim, but they were revealed to the court in "dribs and drabs".[75] The first was revealed to the accused only two years after they were made and 61 days into the trial. The second had to be squeezed out of the investigation officer during cross-examination. The third emerged when another police officer was being cross-examined on the penultimate day of the very long trial, but only after the officer was "less than forthcoming initially".

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72 *Eg*, *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at col 413 (Mr K Shanmugam, Minister for Law), where this was said:

> Disclosure is familiar to lawyers operating within the common law system. In civil proceedings, the timely disclosure of information has helped parties to prepare for trial and assess their cases more fully. Criminal cases can benefit from the same approach. However, discovery in the criminal context would need to be tailored *to deal with complexities of criminal practice*, such as the danger of witnesses being suborned. [emphasis added]

73 [1991] 3 SCR 326.

74 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [200].

75 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [195]–[199]. This account is based entirely on what is publicly available – *ie*, what we know from the judgment itself. It is possible that not all the relevant details were picked up. If and when these are publicly known, the thesis might have to be moderated accordingly.

What could have explained the extreme reluctance of the Prosecution and the police to divulge the existence of the statements? If, as they told the court, the statements were clearly not reliable, then it would have done no harm to have disclosed the statements to the accused well in advance. If indeed they were potentially of some use, then the requirements of a fair trial must surely demand that they be disclosed. Could it have been the result of an adversarial stance taken by the Prosecution and police – nothing should be done to help the accused, even if it costs next to nothing to disclose the material?

34 When directed by the Court of Appeal to submit on the law concerning disclosure, the Prosecution, true to form, conceded only an "ethical" and not a legal duty,[76] and one which was discharged at the absolute discretion of the Prosecution.[77] Both propositions were wisely rejected by the court, but one scratches one's head in vain to fathom just why the Prosecution thought it necessary to draw a distinction between ethical and legal duties. Surely the Prosecution did not mean to imply that it might on occasion do the legal but unethical thing. Equally baffling is the insistence on the now woefully out-of-favour idea of an absolute discretion. Why does the Prosecution fear the court exercising some sort of supervision over disclosure decisions? It is hardly likely that the court will very often have a very different view of what ought to be disclosed, if indeed the Prosecution exercises its discretion in good faith.

35 Sadly, the apparent prosecutorial resistance to the development of disclosure obligations did not end with the decision in *Kadar*. It took the extraordinary course of requesting the Court of Appeal to clarify its pronouncements on disclosure. It was particularly anxious to know whether the duty to disclose encompassed material not within the immediate knowledge of the Prosecution, but which is in the possession of the police. If the court had meant to impose disclosure obligations on the Prosecution with respect to police material, then it requested for a suspension of six months to bring about the "very substantial changes in the conduct of both investigations and prosecutions" which would then be required. The court patiently explained in *Muhammad bin Kadar v Public Prosecutor*[78] ("*Kadar 2*") that the judgment had dealt with material which was clearly in the possession of the Prosecution and that the duty propounded was clearly meant to attach only to material within the knowledge of the Prosecution. The Prosecution could safely go home and have a good night's sleep that evening.

76 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [99].
77 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [100].
78 [2011] 4 SLR 791. This second, clarificatory judgment, bears, unfortunately, the same name as the earlier one.

36 The Court of Appeal could not have been unaware that in reality the police and the Prosecution normally act in unison in criminal proceedings. To put it bluntly, they are on the same side. Surely, fairness to the accused is equally compromised whether it is the case of the Prosecution not disclosing material evidence or of the police not apprising the Prosecution of material evidence. Imagine that in *Kadar* the Prosecution had not been aware of the statements of the victim's husband because the police had, for some reason, chosen not to tell the Prosecution about them. Should the court be powerless under those circumstances? This is what the court had to say in *Kadar 2*:[79]

> Where such an issue has been addressed, it has been addressed outside the scope of judge-made law: see for example the English Crown Prosecution Service Disclosure Manual … ch 2, para 2.2 (describing the duty of the investigator to inform the prosecutor as early as possible whether any material weakens the case against the accused) and ch 3 (containing detailed roles and responsibilities for investigators in relation to disclosure as set out in the relevant statutory Code of Practice). We do not know of a power under Singapore law that empowers a court to compel investigative agencies (which are executive bodies) to adopt a code of practice purely by way of judicial pronouncement.

37 The judges' nascent zeal for disclosure fairness seems to have run up against a piece of orthodoxy we have already encountered – the refusal of the courts to supervise police behaviour. It is questionable how much longer such a stand can persist. The court was well aware that in the more mature common law jurisdictions, Codes of Practice concerning what the police should do in this and other aspects of investigation clearly impose some sort of duty on the police to divulge material evidence. If indeed our police and enforcement agencies were to insist that they are not burdened with similar duties, will our courts simply stand by, fold their hands, and perhaps say "*c'est la vie*"? If the court thought the idea of the Prosecution having absolute discretion in determining the scope of disclosure to be unacceptable, then how can it be that it suddenly becomes *kosher* when it is the police who might be in possession of such a discretion? It could not have escaped the Court of Appeal that the disclosure obligation it cast on the Prosecution in the name of fairness can be easily subverted by the police adopting a policy of choosing not to tell the Prosecution anything which might become even faintly "inconvenient" later on. It is curious that the court suddenly thought itself powerless to adopt a "code of practice purely by way of judicial pronouncement". Perhaps the most famous "code of practice"

79 *Muhammad bin Kadar v Public Prosecutor* [2011] 4 SLR 791 at [14].

governing police behaviour in history was made by an extraordinary judicial act – the Judges Rules of 1912.[80]

38 It is also of some concern that the Prosecution felt that it would take as long as six months and "very substantial changes in the conduct of investigations and prosecutions" in order to comply with what it described as the "broader" view of the disclosure duty – that the Prosecution is somehow also responsible for material in the possession of the police. One might have thought that there must already be in place some kind of prosecutorial supervision over the police. If not, how indeed does the Prosecution decide if a prosecution is warranted? In the context of disclosure obligations, why would it take six months and substantial changes for the Prosecution to impose a similar duty, *mutatis mutandis*, on the police, as the court had cast upon it in *Kadar*; *ie*, some person or persons in the police force has to go over the entire dossier to see if any material or evidence which might be useful to the accused exists, and if there is, disclosure to the Prosecution must be made; and in situations of doubt, there must be disclosure. One certainly hopes that what is going on at the moment is not a situation where the Prosecution simply assumes that the material the police gives them is all that needs to be known, without an understanding that the police are under an obligation to disclose to the Prosecution all material of potential relevance to guilt or innocence. The work lies in going through all the police documents and exhibits collected in connection with the case – surely someone must already be doing that. Otherwise there would be just cause for concern, quite apart from disclosure obligations.

39 If a recent decision on criminal case disclosure for Subordinate Court trials is anything to go by, this prosecutorial attitude continues to persist. The statutory disclosure regime of 2010 required the Prosecution to disclose, amongst other things, "the charge" and, in addition, a "summary of the facts in support of the charge".[81] It was what this "summary of the facts" constituted which was the subject of the decision in *Li Weiming v Public Prosecutor*.[82] The Prosecution's submission as to what it should mean was very much in the spirit of what we have come to expect – it was part of an apparent mission to disclose as little as possible. The "summary of the facts" filed by the Prosecution had essentially repeated what was already in the charge; and the Prosecution submitted that that was all that was required. This provoked a rather stern lecture from Chao Hick Tin JA:[83]

80 See T E St Johnston, "Judges Rules and Police Interrogation in England Today" (1966) 57 *Journal of Criminal Law and Criminology* 85, <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5358&context=jclc> (accessed 15 August 2013).

81 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 162.

82 [2013] 2 SLR 1227.

83 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [32].

> The Prosecution cannot claim that it has complied with [the requirement] so long as it has merely nominally included a summary of facts, as [the section] expressly imposes a substantive requirement that the summary of facts be 'in support of the charge' … The summary of facts tendered by the Prosecution should therefore reinforce the particulars already contained in the charge, and offer further notice and clarity of the case which the Defence is to answer. It follows that in most cases, the summary of facts will have to elaborate on rather than replicate the charge

40 The Prosecution also submitted that even if it had not done its duty to provide the "summary of facts", the court had no power to order it to do so and the accused had to be content with the trial judge drawing whatever adverse inference he or she chooses to. The judge was not impressed:[84]

> 28 … the argument that any recourse for a lack of particulars should be deferred to the trial judge also detracts from the purpose of pre-trial criminal discovery. This is particularly so because the ability of the trial judge to draw adverse inferences will be frustrated or considerably hampered if the disclosed summary of facts is so bare that the Defence cannot contend that the Prosecution has done what [the section] proscribes, namely, put forward at the trial a case which 'differs from or is otherwise inconsistent with' the Case for the Prosecution that was filed. It would be difficult, in these circumstances, to draw any adverse inference from an omission in the Case for the Prosecution. *This will not be fair to the Defence.* Moreover, the difficulty of drawing an adverse inference will effectively place the trial judge in the invidious position of having to choose between either the drastic option of ordering a [discharge not amounting to an acquittal] so as to hold the Prosecution to its discovery obligations, or making no order to penalise the Prosecution for non-compliance with the same. Should these be the only meaningful options available to the court, then curial supervision over the [criminal case disclosure] process would be rendered anaemic and the stated objective of greater transparency would be thwarted.
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> 29 If, as the [Law] Minister said [in Parliament], parties are to 'take discovery seriously' …, then the court must be involved at the preliminary stages to ensure that the [criminal case disclosure] regime is effective in helping parties to prepare for trial.
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> [emphasis added]

41 Perhaps sensing that the problem was not really with these particular submissions but with the general attitude of the Prosecution, the judge sought to address this:[85]

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84 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [28]–[29].

85 *Li Weiming v Public Prosecutor* [2013] 2 SLR 1227 at [17]. It is all the more emphatic as Chao JA is not normally given to such vivid imageries of seas, tides and

(*cont'd on the next page*)

> The [Law] Minister's comments [in Parliament] reveal unequivocally that the CCDC regime was *intended to precipitate a sea change in the criminal discovery process, with the tide shifting towards greater transparency and parity between the parties* so as to help them prepare for trial. The requirement for a summary of facts in the Case for the Prosecution is one element in this climactic change. It is also noteworthy that the Case for the Prosecution is served before the Case for the Defence, and, significantly, [there the Prosecution does not have the discretion to opt out]. The Case for the Prosecution therefore sets the tone both practically and figuratively for the entire [criminal case disclosure] regime.

42 It is hoped that instead of viewing disclosure obligations with suspicion, the Prosecution will see itself as being constructively part of the process together with Parliament, the courts and the bar to fashion a criminal justice system which is heading towards greater fairness and accuracy. That might involve making the job of investigation and prosecution a little "more difficult" or of giving the Defence a little "more ammunition" – but that is surely a small price to pay for a criminal process we can all be proud of.

V. Is it finally spring?

43 Whereas in the past there was a clear and almost monolithic official philosophy of stacking in favour of the Prosecution and against the accused, the picture which emerges today is more complex and nuanced. One detects in decisions like *Kadar* the birth of "proto-constitutionalism" in the Judiciary – the use of broader and more abstract values like fairness to effect subtle changes in judicial attitudes, and to bring about rather more overt results like the overturning of precedent. It is not yet fully constitutional, in the sense that it does not involve a direct contradiction of parliamentary intent. The days are not yet consistently warmer – the court being stronger when it concerns the actual trial or the conduct of the prosecution, and weaker when it comes to the police and law enforcement agencies. It is not even certain whether this "awakening" is universal amongst the Judiciary, or whether it exists only for certain of its members. But there has been a definite change in the air – a decision like *Kadar* would have been unthinkable seven years ago, and it is not the only one of its kind. It seems unlikely that the clock will, or even can, be turned back in the reasonably foreseeable future. When we venture outside the courtroom and into the prosecutor's chambers and the police stations, we see less evidence of a thaw. Instead, we encounter a curious studied state of oblivion on the part of the police following the "series of false confessions extracted

climactic phenomenon. The CCDC is the Criminal Case Disclosure Conference which was introduced in 2010.

by questionable means" judgment in *Kadar*, and an attitude of suspicion on the part of the Prosecution both before and after the court's creation of a common law right to disclosure. We cannot of course be sure why this is so – one can think of reasons for such institutional inertia and conservatism, or a clinging on to primitive and extreme conceptions of adversarial or trial-fetish justice. Nonetheless a start has certainly been made and we can look forward to a future in which criminal justice is not just efficient, but fair and humane as well – Singapore deserves no less.