

## I. NEW FRONTIERS

1. In the recent decision in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25, the Court of Appeal allowed the Appellant's appeal in respect of his convictions for trafficking diamorphine and cannabis. As a result, the Appellant was acquitted of the cannabis charge, and his conviction for trafficking diamorphine was amended to simple possession. The two death sentences that had previously been imposed upon him were replaced with a single sentence of 8 years imprisonment for the possession of diamorphine charge.
2. Whilst the appeals were allowed on the basis that the Prosecution had failed to satisfy the burden of proof, importantly, the Court also ruled on the Prosecution's disclosure obligations. The Court directed that where the Prosecution was not calling a witness, who could be expected to confirm or contradict an accused person's defence, the Prosecution is obliged to disclose that witness statement to the Defence. In particular, the Court made clear that it was no longer a requirement for disclosure that the witness statement was favourable to the Accused.
3. This judgment is an important step towards levelling the playing field between the Prosecution and Defence in the search for the truth. It affirms the principle that our justice system is best served by an Accused having the proper tools to help him defend his case, including where such information

is in the possession of the Prosecution.

## II. BRIEF FACTS

4. The Appellant was convicted and sentenced by the High Court to two capital charges of possession for the purposes of trafficking diamorphine and cannabis.
5. In respect of the diamorphine charge, the Appellant's defence was that he did not intend to traffic the diamorphine. When he became aware of the existence of the diamorphine, the Appellant called the persons he believed responsible to remove the drugs from his home.
6. In respect of the cannabis charge, the Appellant's argued that he was not aware of the existence of the cannabis and, accordingly, could not be in possession of the drug. The cannabis was contained in a red trolley bag brought by another person to the Appellant's house. The Appellant was subsequently made aware of the trolley bag and believed that it contained contraband cigarettes.
7. At trial, the Appellant had requested disclosure of the statements of the domestic helper, those persons who were living in the house at the time and the person responsible for bringing the drugs to the house. The application was rejected by the Court and the Prosecution on the basis that the statements neither undermined the Appellant's case nor strengthened it, and therefore did not fall within the Prosecution's disclosure obligations in relation to unused materials.

### III. THE PROSECUTION'S DUTY TO DISCLOSE MATERIAL WITNESS STATEMENT

8. The Court of Appeal directed parties to address the following question:

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

9. In directing that the Prosecution disclose the witness statements to the Defence, the Court recognised that it was not for the Prosecution to determine whether a statement was helpful to, or undermined, an Accused's case. By taking the discretion away from the Prosecution, the Court noted that a duty to disclose would prevent situations where the Prosecution failed to understand the nature of the Accused's defence and withheld the statement on such mistaken belief.
10. Moreover, an Accused should have access to all the relevant information in order to make an informed choice in deciding whether to call a material witness. Leaving an Accused in a situation where he chooses not to call a material witness because of the dangers arising from not being aware of what that witness has previously said in his statements to

the investigating authorities is not a satisfactory balance between ensuring fairness to the Accused on the one hand and preserving the adversarial nature of the trial process on the other.

11. In a fundamental departure from the disclosure obligations under *Kadar*, the Court held that:

(1) “[I]t does not matter whether the statement in question is: (a) favourable (and so triggers the *Kadar* obligation); (b) neutral; or (c) adverse to the accused persons”.

(2) “The second difference is that the additional disclosure obligations do not require the Prosecution to carry out a prior assessment of whether a material witness's statement is *prima facie* credible and relevant to guilt or innocence to the accused person”.

12. Importantly, the Court left open the issue of whether the Prosecution has a duty to disclose the statement of a material witness who is called as a Prosecution witness.

### IV. THE PROSECUTION DOES NOT HAVE A DUTY TO CALL MATERIAL WITNESS

13. On this issue, the Court agreed with parties' submissions that such a duty should not be imposed. The Prosecution has a discretion whether to call a witness, and there are legitimate reasons why the Prosecution may choose not to do so.

14. However, in appropriate circumstances, the failure to call material witness might mean that the Prosecution did not discharge its evidentiary

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burden of proof.

what such a witness might say.

15. Additionally, the Court is also entitled to draw an adverse inference against the Prosecution under section 116(g) of the Evidence Act that the evidence was not called as it would have been unfavourable to the Prosecution.

19. It further reaffirms the principle that our justice system is best served by an Accused having the proper tools to help him to defend his case, including where that information is in the Prosecution's possession.

## V. THE PROSECUTION'S FAILURE TO DISCHARGE ITS EVIDENTIARY BURDEN OF PROOF

20. The Appellant was successfully defended by Andre Jumabhoy and Priscilla Chia of Peter Low & Choo LLC.

16. On the facts of the case, the Court found that the Appellant successfully rebutted the presumption of trafficking in respect of the diamorphine. As the Appellant did not dispute that he had possession of the diamorphine, the Court amended the diamorphine charge to one of simple possession and sentenced him to 8 years' imprisonment.

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17. In respect of the cannabis charge, the Court found that the Appellant rebutted the presumption of knowledge and acquitted him of the cannabis charge.

## VI. OBSERVATIONS

18. The recognition that the Prosecution has a duty to disclose material witness statements is significant. Not only does it move towards a levelling of the playing field between the Prosecution and the Defence, it also addresses a fundamental dilemma constantly faced by an Accused as to whether to call a material witness who could potentially bolster the defence, in the absence of knowledge of