

## Prosecutorial Disclosure

The Singapore Court of Appeal has recently delivered its decision in the case of *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25 ("*Nabill*"), overturning the conviction of an accused person ("**Appellant**") on capital drug trafficking offences and substituting this with a conviction on a lesser charge of drug possession. In so doing, the Court of Appeal affirmatively expanded the principles of evidential disclosure applicable in criminal proceedings in Singapore.

These expanded evidential disclosure obligations on the part of the prosecution will affect individuals who find themselves caught up in criminal proceedings, as well as companies and corporations involved in any statutory prosecutions, including tax or other statutory breaches or non-compliance.

### Background to the case

In *Nabill*, the Appellant's defence against the drug trafficking charges was that he was not aware that the drugs, contained in a trolley bag, had been left by his friend (also his drug supplier) at his apartment. He only learnt about this from his wife the next day, after she was told by their domestic helper. Upon learning this, the Appellant had called his friend to ask him to come and "clear the stuff". The Appellant was however arrested by Central Narcotics Bureau ("**CNB**") officers at the apartment, and the drugs were seized, before his friend returned to collect the trolley bag.

Statements were recorded by the CNB officers from not just the Appellant but also other persons, including his wife and domestic helper. However, the Prosecution refused to provide copies of any of these statements to the Defence, on the ground that in its view, the statements neither undermined the Prosecution's case nor strengthened the Defence's case. These other parties were also not called as witnesses, and

therefore no evidence from them was led at trial. The trial judge disbelieved the Appellant's defence, and convicted him of trafficking.

On appeal, this conviction was overturned. The Court of Appeal laid down as a general principle a duty by the Prosecution to disclose material witnesses' statements to the Defence. The reasoning was twofold:

- (i) First, the Prosecution may not always properly appreciate the defence being run by the accused person, and it would be an "*intolerable outcome*" if the court were deprived of relevant evidence that might exculpate an accused person simply because the prosecution erred in its assessment of the significance of the statements.
- (ii) Second, an accused person should have access to all relevant information in order to make an "*informed choice*" in deciding whether to call a material witness at trial, and would be severely disadvantaged in being unaware of what that witness may have previously said to the investigating authorities in the course of the investigations.

This disclosure of material witnesses' statements should be made by the Prosecution before the trial begins, if not earlier.

### Our comments

Post-*Nabill*, the Prosecution has a clear duty to disclose the statements of material persons to the Defence, regardless whether the contents of these statements are favourable, neutral or adverse to the Defence. A material person in this context would be someone who may be expected to be able to confirm or contradict some material aspect of the accused party's defence.

In situations where the company itself is charged with criminal offences, such as corruption or tax offences where corporate liability may be engaged for acts done by those who control the company, the *Nabill* decision means that in the course of the proceedings, the Prosecution has to disclose to the company the statements it has recorded from material persons. The company and its legal counsel would accordingly be able to access the information given firsthand by the relevant material witnesses to the authorities, and it can conduct its defence with the benefit of the same.

There are however limits to these disclosure obligations:

- (i) This disclosure may not be made at an early stage of the proceedings, but would typically only be after the accused party, be it a corporate entity or an individual, has elected to contest the charges and claim trial. This means that an accused party may not be able to make this decision (*i.e.* of

whether to contest the charges) with the benefit of these material statements.

- (ii) The Court of Appeal has also left open for now the question of whether this duty of disclosure also applies in respect of material persons who are being called as Prosecution witnesses. It bears noting that the Prosecution already has a separate obligation to disclose statements of its witness to the Defence where that witness gives evidence at trial inconsistent with the statement contents.

The Court of Appeal's decision is nevertheless both a clarification and an extension of the law in Singapore pertaining to prosecutorial disclosure in criminal proceedings. It goes some way towards ameliorating the asymmetry of information between prosecution and defence in criminal proceedings, and its implications should be noted by anyone who may be involved in law enforcement investigations.

If you would like information on this or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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