IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 94

Magistrate's Appeal No 9133 of 2022/01

Between

Ahmad Danial Bin Mohamed Rafa'ee

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing — Charge — Discharge]

Ahmad Danial bin Mohamed Rafa'ee
v
Public Prosecutor

[2023] SGHC 94

General Division of the High Court — Magistrate's Appeal No 9133 of 2022/01
Sundaresh Menon CJ
9 March 2023

13 April 2023

Sundaresh Menon CJ:

Introduction

1 The appellant, Mr Ahmad Danial bin Mohamed Rafa'ee, was charged with murder under s 302 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed) (the "Charge") on 17 December 2020. About 18 months later, on 27 June 2022, the Prosecution applied for a discharge not amounting to an acquittal ("DNATA") in respect of the Charge. The district judge below (the "DJ") granted the DNATA. The appellant appealed against that decision contending that the DJ should instead have granted a discharge amounting to an acquittal ("DATA") on the Charge. After hearing the parties, I dismissed the appeal and gave my reasons in brief. I now provide the full grounds for my decision.

Facts

2 At the outset, it may be noted that the facts are unusual. The Charge arose out of events that took place in 2007, when Ms Felicia Teo Wei Ling ("Ms Teo") went missing. The last two people to see Ms Teo alive were the appellant and one Mr Ragil Putra Setia Sukmarahjana ("Mr Ragil"). The appellant and Mr Ragil were traced and interviewed by the authorities in 2007, but they both claimed at the time that they did not know what happened to Ms Teo or where she was.

3 Thirteen years later, in 2020, a review of the case uncovered evidence that suggested that the appellant might have provided an inaccurate account of events when he was interviewed in 2007. This led to the appellant being arrested on 15 December 2020 and questioned again. On 17 December 2020, the appellant was charged with the murder of Ms Teo in furtherance of a common intention between him and Mr Ragil. In the course of further investigations, the appellant revealed to the authorities that, in 2007, he had deposited Ms Teo's corpse in a public place, misappropriated her property, failed to report her death, given false statements to the police and fabricated false evidence to evade suspicion. The appellant maintained, however, that he was not in any way responsible for causing Ms Teo's death.

4 From the time of his arrest on 15 December 2020, the appellant remained in remand because he was facing a charge of murder, which is a non-bailable offence. Slightly more than 18 months after it brought the Charge, on 27 June 2022, the Prosecution applied under s 232(1) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") for a DNATA in respect of the Charge. The appellant objected to the Prosecution's application and sought a DATA instead. The DJ allowed the Prosecution's application. On the same day, the Prosecution

tendered six new charges arising from the appellant's admissions about his conduct after Ms Teo's death.

5 On 14 October 2022, the appellant pleaded guilty to four of those charges: one for depositing Ms Teo's corpse with Mr Ragil; one for dishonestly appropriating Ms Teo's property with Mr Ragil; one for giving false information to the police with Mr Ragil; and one for fabricating false evidence with Mr Ragil. He consented to having the remaining two charges taken into consideration for the purpose of sentencing. He was sentenced to an aggregate of 26 months' imprisonment, which was backdated to the date of his initial arrest on 15 December 2020. He was therefore released on the same day, having already spent 22 months in remand.

The parties' cases below

6 Before the DJ, the Prosecution explained that it was seeking a DNATA because Mr Ragil was still at large. Based on investigations, the police had traced him to Indonesia and were in contact with the Indonesian authorities. While the Prosecution could adjourn proceedings in the hope that Mr Ragil would be found soon, it thought it would be fairer to grant the appellant a DNATA so that he could be released from remand while the police continued their efforts to locate Mr Ragil.

7 The appellant, on the other hand, submitted that he should instead be given a DATA for the following reasons. First, the Prosecution had not stipulated a determinate period of time to exhaust their efforts to locate Mr Ragil. Instead, it seemed that Mr Ragil had disappeared, at least in the sense that it was not evident that his whereabouts were known, and there was no reason to think he would turn up to assist the police with investigations. After all, he was a co-accused person facing a charge of murder. The appellant also

submitted that, in any case, the investigation officer should be called to give evidence and be open to being cross-examined in order to satisfy the court that there was good reason to keep the proceedings in abeyance while matters were being followed up with the Indonesian police. The appellant emphasised that because the Prosecution could not say with certainty when, if at all, it would find Mr Ragil, the Charge could remain unresolved indefinitely.

8 Second, by the time of the Prosecution's application, the appellant had already spent 18 months in prison. It was submitted that the six new charges that the Prosecution preferred would not typically result in a sentence that would be close to that duration. Thus, there was a need to compensate the appellant for the 18 months he had spent in prison on account of the Charge. The appellant also highlighted the suffering that he and his family were still subject to as a result of his arrest in December 2020 and by reason of the Charge being laid against him. In these circumstances, fairness demanded that he be given a DATA.

9 Third, there was no evidence to suggest that the appellant had in fact committed murder. The correct order in such circumstances was a DATA.

Decision below

10 The DJ granted the Prosecution's application for a DNATA: see *Public Prosecutor v Ahmad Danial Bin Mohamed Rafa'ee* [2022] SGDC 176.

11 The DJ found that even if he were to accept the appellant's claims as to the hardship suffered by him and his family, this would not displace the strong public interest in ensuring that all who may be responsible for Ms Teo's death were held to account for their actions. The 18-month period that the appellant had spent in remand was not unduly long in all the circumstances of the case. It

was clear that the Prosecution had made some progress on the case in that period, and that the appellant was indeed involved in Ms Teo's disappearance.

12 Further, while it was clear that the appellant's family (and the appellant himself, after serving his time for the charges that were pursued) deserved to be allowed to go about their affairs without undue interference, the appropriate way to achieve this was not by granting the appellant immunity from prosecution. Doing so would be contrary to the public interest in pursuing whoever was responsible for Ms Teo's death.

13 Finally, there was no basis to accept the appellant's contention that he was not responsible for Ms Teo's death. It was not for the court, in the course of a routine mention, to make substantive findings on the facts or merits of a case. Further, it was evident from the circumstances of this case that the appellant was prepared to put up false pretences in order to protect himself. The Prosecution was entitled not to take his word that he was not involved in Ms Teo's death, and to reserve their right to pursue the Charge pending their efforts to verify whether that was indeed the case.

Parties' cases on appeal

Appellant's case

14 Before me, the appellant argued that the DJ erred for the following reasons.

15 First, the DJ failed to conduct a proper inquiry into the status and details of the police's efforts to locate Mr Ragil. He simply accepted the Prosecution's "brief" reasons for seeking a DNATA without taking further steps to apprise himself of the state of the investigations. The DJ had therefore not been able to

make a proper and informed assessment of the likelihood of Mr Ragil being found within a reasonable period of time, or at all. The appellant contended that based on the prevailing jurisprudence, the court would lean towards ordering a DATA where the Prosecution was not in a position to indicate a determinate time within which it could proceed with charges against the accused person.

16 Second, and following from the first point, it was said that it would be unfair to have the Charge hang over the appellant indefinitely. In this connection, the appellant contended that:

(a) The DJ failed to consider that the authorities had had ample time to search for Mr Ragil since the appellant's arrest in December 2020. They ought to have commenced efforts to locate Mr Ragil from that time because that was when the appellant had informed them of Mr Ragil's involvement in Ms Teo's disappearance.

(b) The Prosecution erred in charging the appellant prematurely when there was insufficient evidence to substantiate the charge. The appellant cited a recent decision of the Malaysian Federal Court, *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] 5 MLJ 639 ("*Vigny Alfred Raj*"), where the court criticised the prosecutorial approach of "charge now, investigate later" (at [92]). The appellant maintained that this applied to the Prosecution's approach in this case and that by granting a DNATA on the Charge, the DJ in effect condoned the Prosecution's poor conduct.

(c) Further, even if Mr Ragil were to be found, it was highly unlikely that he would provide evidence that could go towards proving the Charge against the appellant. He was a co-accused person who was unlikely to incriminate himself by incriminating the appellant.

(d) In addition, it was said that the Prosecution had been less than forthcoming when informing the Defence of the status of investigations. This suggested that it was doubtful whether the current investigations were being conducted efficiently in order to avoid any further delays and this would further prejudice the appellant.

(e) Finally, the DJ failed to give sufficient weight to the hardship suffered by the appellant and his family, which was said to be exceptional. Unless a DATA was granted, the appellant and his family would remain at the receiving end of the negative public opinion that had already caused them much hardship.

17 Third, the appellant maintained that the DJ placed excessive weight on the fact that the present case concerned a murder charge. It was not the case that such cases could be held in abeyance indefinitely.

Respondent's case

18 The Prosecution, on the other hand, submitted that there had been no undue delay in the investigations. The lapse in time between Ms Teo's disappearance in 2007 and the arrest of the appellant in 2020 had been caused, or at least significantly contributed to, by the appellant's lies to the police when he was first interviewed in 2007. From the time the appellant was arrested in 2020 until the time of the application, there had been clear progress in the investigations which revealed that the appellant had committed various offences after Ms Teo's death, leading to his being charged with six new charges. There was also no basis for the appellant to allege that the police were not taking the necessary steps to locate Mr Ragil. The Prosecution's request for additional time was justified given the need to work with foreign authorities and the complexity of the case.

19 Further, the seriousness of the offence involved weighed heavily against a DATA being granted at this stage of the proceedings. The hardship suffered by the appellant did not justify conferring on him an absolute immunity from being prosecuted in respect of the Charge even if new evidence were to emerge. This was especially the case given that there were pending investigations and leads being pursued.

20 At the hearing, the Prosecution, at my request, also confirmed the following points:

(a) In its present view, Mr Ragil's evidence was necessary to enable the Charge to be prosecuted against the appellant.

(b) In the absence of Mr Ragil's further assistance, the Prosecution's position at present was that it would not proceed with the Charge against the appellant based on such evidence as it had been able to obtain.

(c) There was reason to believe that Mr Ragil was in Indonesia.

(d) Efforts were underway to locate Mr Ragil and to enable the Singapore authorities to secure his further assistance.

21 Finally, the Prosecution raised a new point that was not raised in the proceedings before the DJ. The Prosecution contended that the DJ did not have the power to grant the appellant a DATA on the Charge. This was because an acquittal on a murder charge could only be recorded by the General Division of the High Court (the "High Court"). Accordingly, it would have been an excess of jurisdiction for the DJ to have granted a DATA on the Charge. This point raised the further question of whether I could have ordered a DATA on appeal if the DJ could not even have done so at first instance.

Issues to be determined

22 There were two issues before me. The first was whether the DJ properly exercised his discretion to grant a DNATA on the Charge. The second was whether the I had the power to grant a DATA on the Charge when hearing an appeal against the DJ's decision.

Did the DJ properly exercise his discretion to grant a DNATA on the Charge?

Applicable law

23 The Prosecution's application for a discharge was brought pursuant to s 232 of the CPC. Sections 232(1) and 232(2) of the CPC provide:

> **232**.—(1) At any stage of any proceedings in court —
>
> (*a*) before an accused is acquitted of any charge; or
>
> (*b*) where an accused has been convicted of any charge but before the accused is sentenced for that charge,
>
> the Public Prosecutor may, if he thinks fit, inform the court that the Public Prosecutor will not further prosecute the accused upon the charge, and the proceedings on the charge against the accused must then be stayed and the accused must be discharged from and of the same.
>
> (2) Except in cases referred to in section 147, a discharge under subsection (1) does not amount to an acquittal unless the court so directs.

Sections 232(1) and 232(2) of the CPC are substantially similar to ss 184(1) and 184(2) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) (the "CPC 1985 Ed"). Sections 184(1) and 184(2) of the CPC 1985 Ed have been considered in a number of High Court cases, and the principles set out in those cases apply equally to s 232 of the CPC.

24 The decision to seek a discharge pursuant to s 232(1) of the CPC is made in the exercise of the Public Prosecutor's constitutional discretionary power. When the Public Prosecutor informs the court that he will not further prosecute an accused person upon a charge, the court *must* order a discharge pursuant to s 232(1) of the CPC. The court has no discretion as to whether or not the discharge should be granted: *Loh Siang Piow and another v Public Prosecutor* [1998] 1 SLR(R) 347 ("*Loh Siang Piow*") at [22]–[23]; *Public Prosecutor v Ng Guan Hup* [2009] 4 SLR(R) 314 ("*Ng Guan Hup*") at [10].

25 The court does, however, have the discretion to decide whether that discharge should amount to an acquittal. This discretion is encapsulated in s 232(2) of the CPC. In exercising this discretion, it is well-established that: (a) there is an initial presumption in favour of granting a DNATA, and the accused person must show sufficient reasons to displace this presumption; and (b) the court must decide the matter on the merits, balancing the public interest and the rights of the accused person (see *K Abdul Rasheed and another v Public Prosecutor* [1985–1986] SLR(R) 1 ("*K Abdul Rasheed*") at [5]–[6]; *Goh Cheng Chuan v Public Prosecutor* [1990] 1 SLR(R) 660 ("*Goh Cheng Chuan*") at [14]; *TS Video and Laser Pte Ltd v Lim Chee Yong and another appeal* [2001] 3 SLR(R) 639 ("*TS Video*") at [7]).

My decision

Principles guiding the exercise of discretion under s 232(2) of the CPC

(1) The presumptive position

26 To understand the relevant principles guiding the discretion under s 232(2) of the CPC, it is important first to situate the issue correctly. Typically, the question of whether a DNATA or a DATA should be granted will arise

where: (a) an accused person has been charged; (b) there is no clarity as to his guilt or innocence; and (c) there is some basis for thinking that the accused person is involved in the matter. Where it is clear that the accused person is innocent or there is no basis at all for thinking he might be involved in the offence, it is obvious that a DATA would be appropriate.

27 Next, it is important to appreciate the difference between a DNATA and a DATA. When a discharge is ordered, whether it be a DNATA or a DATA, the accused person is no longer subject to prosecution and in that sense, he is free to live his life as if he had not been charged in the first place. But there is an important difference. When a DATA is ordered instead of a DNATA, the accused person is effectively cleared of the offence without a trial. In effect and in law, it is the same as it would have been if he had been charged, had undergone a trial and had then been acquitted. This results in two key differences between a DNATA and a DATA. First, when the court orders a DATA, the accused person can be certain that he will never be prosecuted on the charge in the future because he has effectively been acquitted. By virtue of the acquittal, he is entitled to rely on s 244(1) of the CPC which provides that a person who has been acquitted of a charge may not be tried again for the same offence or on the same facts for any other offence (see *Arjan Singh v Public Prosecutor* [1993] 1 SLR(R) 542 ("*Arjan Singh*") at [11], referring to s 239 of the CPC 1985 Ed). On the other hand, when the court orders a DNATA, the possibility remains that the Prosecution may revive the charge in the future, and it remains indefinitely. Secondly, when it charges an accused person, the State in effect makes a statement that it has good reason to believe that the accused person is involved in the offence. This is a statement that carries weight. Indeed, for this reason, the moment a charge is laid against an accused person, that person's life can be irreversibly affected. When a DATA is subsequently ordered and an accused person is effectively acquitted, the State essentially

retracts the grave public statement it has earlier made, and this is obviously of great importance to the accused person. On the other hand, when a DNATA is ordered, the State is simply saying that it will not continue with the prosecution of the accused person *for the time being*; the State does not retract its statement of belief in the accused person's possible involvement in the offence.

28 Given that a DATA completely clears an accused person of the offence with which he was charged without a trial, it is evident why a DATA will not generally be appropriate where the three conditions set out at [26] above are satisfied. Where there remains reason to believe that the accused person is in some way involved in the offence that is the subject of the charge against him, the public interest demands that the authorities be given adequate opportunity to complete their investigations. It is also true that, the more serious the charge, the more time the authorities will need to complete their investigations. Indeed, the public interest in giving the authorities ample time to complete their investigations is reflected in the fact that, in Singapore, there is no limitation period on criminal offences, and so no time limit is placed on the gathering of evidence and the subsequent mounting of a charge. The facts of this case provide a good example. Thirteen years after Ms Teo's disappearance, when investigations revealed new evidence, the appellant was apprehended, charged and also convicted of some other offences relating to her disappearance.

29 In that sense, the fact that a DNATA leaves an accused person with a charge hanging over him, even "indefinitely", is not as remarkable as it may seem. Any individual who is being investigated for his role in relation to an offence is subject to the possibility that he may be charged at some indefinite point in the future. Therefore, in this respect, when a DNATA is ordered, the accused person is simply returned to the position that he would have been in had no charge been laid. Of course, that is not to say that the charge is of no

consequence. It is, as I have explained, tantamount to a statement by the State that it has reason to believe the accused person was involved in the offence forming the subject of the charge against him, and until that is resolved either by the conclusion of a trial or by way of a DATA being ordered, one can expect that it will continue to be a source of pain and stress for the accused person. While this is relevant, at the same time, it should not unduly tilt the balance against the public interest in the authorities having sufficient time to complete their investigations.

30 In the majority of cases, a DNATA strikes an obvious balance in that it allows the State to revive the proceedings if and when it is able to pursue the prosecution, while the accused person is freed of at least of some of the restrictions that come with having been charged, including very onerous ones such as being held in remand where the offence is a non-bailable one. It is for these reasons that the presumptive position is that the court's discretion will be exercised in favour of ordering a DNATA.

31 In certain cases, the presumptive position will be even stronger. Where the charge is for a serious offence, the presumptive position will be stronger because there is a stronger public interest in prosecuting serious offences, and accordingly, there is a stronger public interest in giving the authorities adequate time to do so. Where there is no uncertainty about when the Prosecution will complete its investigations, the presumptive position is stronger because the accused person will not be subject to the indefinite apprehension of potential criminal proceedings. This could be the case where the Prosecution simply needs a reasonable time to review new evidence that has come to light (see *Ng Guan Hup* at [62]) or where the accused person needs to complete a course of treatment at a drug rehabilitation centre before the Prosecution proceeds with pending criminal proceedings (see *Arjan Singh* at [5] and [14]). Similarly, in

cases where the accused person has somehow wrongfully contributed to the Prosecution's difficulty in proceeding with the matter, the presumptive position will typically be stronger. In such cases, there is the added public interest in preventing an accused person from benefitting from his own wrongful conduct.

32 While I have referred to the granting of a DNATA as the "presumptive position", that does not mean that the Prosecution can expect such an order to be made without providing an explanation for why it is seeking a discharge on these terms. The Prosecution should invariably inform the court of its reasons for seeking a discharge, and of all other matters that may be relevant to the court's consideration as to how it should exercise its discretion: *Loh Siang Piow* at [25].

(2) Displacing the presumptive position

33 At the same time, being a presumptive position, it should be recognised that this may be displaced in suitable cases. This would be so where the specific facts of the case are such that the prejudice to the accused person in facing an uncertain future outweighs the public interest in ensuring that a suspect is not cleared of an offence without trial. By way of example, this could be where: (a) there is no real or reasonable prospect of a prosecution occurring in the future; or (b) there are grounds to suggest that the charge should not have been brought at all. I elaborate on this by reference to some of the past cases involving discharges.

34 In *Goh Cheng Chuan*, the Prosecution sought a discharge because it had not yet traced a material witness. The Prosecution confirmed that it intended to proceed with the charge the moment the witness was found. L P Thean J (as he then was) noted at [22] the fact that the Prosecution had been trying, without success, to trace the witness for five years prior to the hearing of the application.

There was also nothing to suggest that the prospects of finding the witness had improved. He therefore ordered a DATA. In *K Abdul Rasheed*, the Prosecution sought a discharge because two principal Prosecution witnesses were not available. It transpired that they were not available because one had died and the other was a foreigner who was unavailable and likely to remain unavailable for an indefinite period. In these circumstances, Lai Kew Chai J was persuaded that it was unfair to subject the accused person in that case to any further agony and ordered a DATA (see [8]). In both these cases, there was no real or reasonable prospect of the matter being prosecuted in the foreseeable future.

35 In contrast, in *Loh Siang Piow*, the Prosecution sought a DNATA because it had lost contact with a material witness in the case (see [7]). Yong Pung How CJ distinguished the case from *Goh Cheng Chuan* and *K Abdul Rasheed* and held that the witness's non-availability should not militate in favour of granting a DATA. This was because: (a) the witness was a Singapore citizen; (b) the Corrupt Practices Investigation Bureau had indicated that the assistance of the police had been sought in tracing the witness; (c) a check with the Singapore Immigration Department did not indicate that the witness had left Singapore; (d) arrangements had been made for the investigator to be informed should the immigration authorities come across the witness attempting to leave Singapore; (e) that was not a case where it appeared that the witness would not be found even if much time and effort were expended; and (f) the loss of contact was fairly recent (at [32]–[33]). In *Loh Siang Piow*, the non-availability of a material witness did not detract from the presumptive position because there was clearly a real and reasonable prospect of a prosecution in the future, and a live lead was being pursued.

36 As for cases where the charge should not have been brought in the first place, there is *Vigny Alfred Raj.* In *Vigny Alfred Raj*, the Prosecution applied,

on the first day of trial, for a DNATA because "the investigation [*sic*] still going on" (at [17]). The trial judge granted the DNATA, which was affirmed by the Malaysian Court of Appeal. On further appeal to the Malaysian Federal Court, Mary Lim FCJ described the Prosecution's explanation for seeking a DNATA as "troubling and telling" (at [90]). She explained that there should not have been a charge in the first place if investigations were still going on or incomplete, and that it would be "an aberration and a travesty on the administration of criminal justice if the courts were seen to condone a practice of charge now, investigate later" (at [92]). The Malaysian Federal Court allowed the appeal, set aside the orders of the Malaysian High Court and the Malaysian Court of Appeal, and granted a DATA on this basis.

37 While the decision seems unimpeachable on the facts, it should be noted that it is not necessarily wrong for the Prosecution to charge an accused person before the investigations are *complete.* In fact, a person is typically charged at an early stage when the Prosecution has sufficient reason to think that he was involved in the offence. There usually follows a long process during which the investigations are pursued, and all the evidence required to secure a conviction at trial is gathered. This can take years. It is important to note that in *Vigny Alfred Raj*, by the time *the appeal* was heard by the Malaysian Federal Court, the Prosecution had "completed" investigations and indicated that it did not wish to proceed (see [13]). This suggests that the appellant in that case had been charged even though the investigations had not progressed to the point where it could be reasonably said that he was likely to have been involved in the offence.

(3) Irrelevant considerations

38 Having outlined the considerations that may be relevant to the exercise of discretion under s 232(2) of the CPC, it is also useful to explain what should be *irrelevant* to this exercise.

39 First, when it comes to s 232(2) of the CPC, the prejudice to the accused person that is balanced against the public interest in pursuing the charge is the prejudice that would arise by reason of ordering a DNATA instead of a DATA. The cases have not considered *past* prejudice to the accused person, whether due to poor conduct of the Prosecution or simply arising in the ordinary course of events, to be relevant. None of the authorities discussed above suggest that a DATA can be ordered either to punish the Prosecution for subjecting the accused person to unfair treatment, or to compensate the accused person for having suffered hardship. In *Goh Cheng Chuan,* Thean J did take note of past delay by the Prosecution, namely, the five years during which the Prosecution failed to locate the material witness. However, this was only relevant because it shed light on the real issue, which was the prospect of locating the material witness in the future. This is reflected in the following passage (at [22]):

> Up to this date approximately five years have elapsed since the charge was first brought against the appellant, and the charge relates to an offence alleged to have taken place some six and a half years ago. Clearly, the Prosecution has had ample time to trace this witness, *and the witness still cannot be found, notwithstanding the efforts made*; *the prospect of tracing this witness does not appear to have improved.* [emphasis added]

40 Thean J was not suggesting that the Prosecution had conducted itself poorly in its failure to locate the material witness for five years, or that such poor conduct would justify the granting of a DATA. As I explained earlier (at [27] above), the consequence of a DATA is that the person suspected of an offence is cleared of the offence without a trial. It would be inappropriate for

such a consequence, with such a significant adverse impact on the public interest where there remains reason to believe the accused person was involved in the offence, to be deployed as a means of punishing the Prosecution or compensating the accused person for the hardship he may have endured. The discretion under s 232(2) of the CPC is not to be exercised as a form of social accounting where the harms said to have been suffered by the accused person are somehow to be weighed in his favour to offset the prejudice that he may suffer if the Prosecution were to be given more time to complete the investigations.

41 Second, it is not typically for the court to assess whether the Prosecution's intended investigative efforts are likely to succeed. Generally, a confirmation from the Prosecution that it is actively pursuing a live lead and that it has reason to believe its investigations will bear fruit should be sufficient to warrant a DNATA being ordered. The court should not undertake a detailed assessment of the intended course of the investigations for several reasons. First, this is not a matter admitting of judicial oversight or supervision. The court is simply not in a position to supervise the conduct of investigations. Second, the court cannot possibly embark on such an inquiry without detailed information about those investigations. It is not hard to see why it would not be desirable to expect the investigating authorities to make this information available to the court, the accused person and the public. Simply put, such disclosure could well compromise the investigations. That is especially so in a case like the present where the Prosecution is tracing a material witness who is at large.

(4) Summary of the guiding principles

42 To summarise:

(a) The presumptive position is that a DNATA should be ordered. The presumptive position is stronger where the charge involves a serious offence, where the Prosecution is simply seeking a finite pause in the criminal proceedings or where the accused person has wrongfully contributed to the Prosecution's difficulties in proceeding with the charge.

(b) The presumptive position may be displaced where the circumstances of the case are such that a DATA would strike a better balance between the public interest and the individual rights of the accused person. This could be the case where: (a) there is no real or reasonable prospect of a prosecution being pursued in the future; or (b) the charge was improperly brought.

(c) Any past prejudice caused to the accused person, whether or not arising due to the fault of the Prosecution, will not typically be relevant.

(d) In assessing the prospect of a future prosecution, the court is not required to make an objective assessment of the Prosecution's intended investigative efforts. A confirmation from the Prosecution that it is pursuing live leads and has reason to believe its investigations will bear fruit should suffice.

The balance in the present case

43 In the present case, the offence was that of murder. Therefore, the public interest in enabling the investigations to be completed was perhaps at the highest end of the scale. As explained at [31] above, this strengthened the presumptive position that a DNATA was the appropriate order.

44 On the other hand, Mr Nathan pointed to the fact that the offence occurred some 16 or so years ago. That was true, but, as I pointed out in the course of the arguments, when Ms Teo's disappearance first came to light, the appellant and Mr Ragil were both interviewed by the police and they evidently lied about their involvement. In that sense, the Prosecution's inability to locate Mr Ragil was at least partly due to the appellant's conduct. Had he been truthful about his and Mr Ragil's involvement in Ms Teo's disappearance when he was first interviewed, Mr Ragil may have been prevented from leaving Singapore. In these circumstances, the appellant's hardship stemming from the time the Prosecution needed to locate Mr Ragil carried much less weight. Any delay was, in a sense, a problem of his own making.

45 In any case, as I explained at [39] and [40] above, any delay was only likely to be weighty in so far as it suggested that there was no real or reasonable prospect of the Charge proceeding to trial. In this regard, the Prosecution's confirmation of the points set out at [20] above were key. It seemed to me that the Prosecution was pursuing a live lead. The Prosecution's position in this case was quite different from that in *Goh Cheng Chuan* and *K Abdul Rasheed*. In *Goh Cheng Chuan*, when the Prosecution first applied for a DNATA, it explained that the material witness in that case was known to have been employed in two places in Johor Bahru and that efforts were being made through the Anti-Corruption Agency of Malaysia to trace the material witness (see [6]). Admittedly, this was somewhat similar to the Prosecution's position before me. However, by the time the appeal in *Goh Cheng Chuan* was heard more than three years later, the witness had still not been located. The Prosecution's position before Thean J was as follows: "the material witness was still not available and could not be traced" (see [22]). In these circumstances, Thean J ordered a DATA, finding that the Prosecution had failed for five years to trace the witness and that the prospects of doing so had not improved. In *K Abdul*

Rasheed, the Prosecution did not challenge the position that the material witness who was still alive "was unavailable and likely to remain unavailable for an indefinite period" (see [8]). Given the positions adopted by the Prosecution in those cases, it would be fair to conclude that there was no real or reasonable prospect of a prosecution ensuing in the future. In contrast, on the facts of this case, I was satisfied that there remained a reasonable prospect of a prosecution on the Charge ensuing in the future.

46 I accepted that the Prosecution could not be *certain* that such a prosecution would take place in the future, because it could not be *certain* that Mr Ragil would be located, and, even if he was, the Prosecution could not be *certain* that he would provide them with the required assistance. But I only had to be satisfied that a future Prosecution on the Charge was not so unlikely that the strong presumption of a DNATA being appropriate was displaced. On that count, I was satisfied.

47 I was also not convinced by the appellant's reliance on *Vigny Alfred Raj* and the suggestion that the charge against him was improperly brought or premature. As I have explained at [37] above, it is not the case that an accused person cannot be charged until investigations are *complete*. What matters is whether, when the charge was made, the Prosecution had sufficient basis for considering that the accused person was involved in the offence. In this case, the appellant was one of the last two people to see Ms Teo alive; he disposed of Ms Teo's body; he misappropriated Ms Teo's property; he took steps to conceal his involvement; and then he lied about all this to the authorities. This was hardly a case where there was no basis for the Charge in the first place.

48 And based on the reasons set out at [39] to [41] above, the past hardship caused to the appellant and his family and the alleged inefficiency of the Prosecution's past investigations carried no weight.

49 Given the very strong public interest in enabling the investigations to be completed, in all the circumstances of the case, I was satisfied that the DJ had struck the balance correctly when he granted a DNATA.

50 I noted Mr Nathan's submission that, if a DNATA were granted, there would be continuing hardship on the appellant. Further, it was only the Prosecution that could return to court to ask for a DATA instead, if, for example, its efforts to locate Mr Ragil turned out to be fruitless or it no longer wished to prosecute the appellant for some other reason. Section 232 of the CPC does not provide an avenue for the accused person to make such an application. In this regard, I noted the Prosecution's assurance that it would keep the matter under close review and would be mindful of the continuing hardship on the part of the appellant.

Did I have the power to grant a DATA on the Charge?

51 Given my conclusion that the DJ had exercised his discretion properly, I did not need to interfere with his decision. I therefore did not need to decide whether he had the power to grant a DATA and whether, as a consequence, I had the power to grant a DATA on appeal from his decision. Nevertheless, I make some observations on this point.

52 As mentioned at [21] above, the Prosecution did not take this point before the DJ, and the DJ proceeded on the basis that he did have the power to order a DATA. On appeal, the Prosecution cited *Yen Ching Yan v Public Prosecutor* [1998] 2 SLR(R) 890 ("*Yen Ching Yan*") for the proposition that the

DJ in fact had no power to grant a DATA, that being a matter that at the material time was reserved to the High Court.

53 In *Yen Ching Yan,* a district judge held that s 184(2) of the CPC 1985 Ed, which gave him the power to order an acquittal, was applicable only in district or magistrate arrest cases. It was not applicable in preliminary inquiry cases, being cases involving offences triable only in the High Court. He thus held he had no power to grant a DATA and instead granted a DNATA because the case concerned a capital charge. The appellant in that case appealed against the district judge's order, seeking an order that he be acquitted.

54 Yong CJ dismissed the appeal, holding at [12] that the District Court had no power to acquit an accused person of an offence that was exclusively triable in the High Court. Where such a matter was before a district judge who, in keeping with applicable procedure at that time, was conducting a preliminary inquiry, the district judge only had the power to grant a DNATA. In coming to this conclusion, Yong CJ relied on *Ee Yee Hua v Public Prosecutor* [1968–1970] SLR(R) 472, which was an appeal against an order of DATA made by a magistrate in respect of an offence that was triable only by a district judge. A V Winslow J expunged the words "amounting to an acquittal" from the order, holding that the magistrate had no power to acquit the accused person in that case, and was only entitled to discharge him without ordering an acquittal (see [44]).

55 Yong CJ then concluded (at [12]) that the High Court, in the exercise of its appellate criminal jurisdiction, could not revise the district judge's order of DNATA and substitute an order of DATA in its place. This was because the hands of an appellate court were tied to the same extent as those of the lower court. In the exercise of its appellate criminal jurisdiction, the power of the High

Court was limited to doing that which the lower court could and should have done, and nothing further (citing *Public Prosecutor v Lee Meow Sim Jenny* [1993] 3 SLR(R) 369).

56 It bears noting that, after *Yen Ching Yan* was decided, three new subsections were enacted in the CPC provision dealing with discharge. As mentioned at [23] above, ss 184(1) and 184(2) of the CPC 1985 Ed are substantially similar to ss 232(1) and 232(2) of the CPC. Unlike s 184 of the CPC 1985 Ed, however, s 232 of the CPC contains ss 232(3)–232(5), which provide:

> (3) Where an accused had previously been granted a discharge not amounting to an acquittal by a Magistrate's Court or District Court in relation to an offence triable in the State Courts, any Magistrate's Court or District Court (as the case may be) may grant the accused a discharge amounting to an acquittal on the application of the Public Prosecutor.
>
> (4) Where an accused had previously been granted a discharge not amounting to an acquittal by a Magistrate's Court or District Court in relation to an offence triable in the General Division of the High Court, any Magistrate's Court or District Court (as the case may be) may grant the accused a discharge on the application of the Public Prosecutor.
>
> (5) A discharge under subsection (4) has the effect of an acquittal.

57 Prior to the enactment of these subsections, there was no convenient way for the Prosecution to seek a DATA on a charge after a DNATA had previously been sought and granted. Such a situation could arise, for instance, where the Prosecution having initially sought a DNATA because investigations were pending, determined upon completion of those investigations that it was no longer viable to pursue the charge. In such a case, the reason for a DNATA being sought in the first place would no longer apply, and it would be fair to clear the accused person of the charge such that it no longer hangs over him. Under s 184 of the CPC 1985 Ed, for this to be done, the Prosecution would

have to first reinstate the charge before making a fresh application for a discharge under s 184(1) of the CPC 1985 Ed. Following the introduction of ss 232(3)–232(5) of the CPC, the Prosecution is no longer required to reinstate the charge but can just make an application to the Magistrate's Court or District Court for:

(a) a DATA to be ordered on that charge if the charge is triable in the State Courts (pursuant to s 232(3) of the CPC); or

(b) a discharge that "has the effect of an acquittal" to be ordered on that charge if the charge is triable only in the High Court (pursuant to s 232(4) read with s 232(5) of the CPC).

58 These changes to the CPC are potentially relevant for two reasons. First, when enacting s 232 of the CPC, Parliament was clearly cognisant of the position in *Yen Ching Yan* set out at [54] above. This is illustrated by the structure of ss 232(3)–232(5) of the CPC. Practically speaking, for an accused person, there will not be any difference between a DATA and a discharge that "has the effect of an acquittal". Nevertheless, when enacting these subsections, Parliament saw fit to draw a distinction between the two. Presumably, this was in recognition of the proposition stated in *Yen Ching Yan*; strictly speaking, for a charge triable only in the High Court, a Magistrate's Court or District Court cannot order a DATA. If s 232(3) of the CPC applied to all charges, it would be possible for a Magistrate's Court or District Court to order a DATA on a charge triable only in the High Court.

59 Second, Parliament evidently recognised that in certain circumstances it would be desirable for a Magistrate's Court or District Court to be able to grant an accused person a discharge having the effect of an acquittal even though the charge was one triable only in the High Court. That said, the legislation only

provides for this to be done *on the Prosecution's application*. In other words, unless the Prosecution agrees that a discharge having the effect of an acquittal should be granted and accordingly makes such an application pursuant to s 232(4) of the CPC, a Magistrate's Court or District Court remains confined to granting a DNATA pursuant to s 232(2) of the CPC. Further, it only makes this a possible avenue where an application had initially resulted in a DNATA and the Prosecution then wished to seek a discharge having the effect of an acquittal. In short, even under the revised scheme, it is not open to a Magistrate's Court or District Court to order a discharge having the effect of an acquittal at the first application.

60 At the hearing, Mr Nathan took issue with the latter part of the reasoning in *Yen Ching Yan* set out at [55] above. While he accepted that the DJ may not have had the power to grant a DATA on the Charge even with the benefit of ss 232(2)–232(5) of the CPC, he contended that the High Court could grant a DATA when it was hearing an appeal against the DJ's decision pursuant to the High Court's inherent jurisdiction.

61 I did see some force in this submission. It does not appear to have been suggested to Yong CJ in *Yen Ching Yan* that the High Court could substitute an order of DNATA with one of DATA pursuant to its *inherent jurisdiction*. In *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [27], the Court of Appeal endorsed Sir Jack Jacob's definition of the "inherent jurisdiction" of the court as "being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them". In the criminal context, the court in *Public Prosecutor v Soh Chee Wen and another* [2021] 3 SLR 641 considered whether it had the

inherent power to stay criminal proceedings for abuse of process (see [9]). In deciding that it did, the court cited at [16] the following passage from the decision of the House of Lords in *Connelly v Director of Public Prosecutions* [1964] 2 WLR 1145 at 1153–1154:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. … *The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.* [emphasis added]

It did appear to me that, in certain circumstances, the granting of a DATA would be necessary to prevent abuses of process and to safeguard an accused person from oppression or prejudice.

62 In *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64, the Court of Appeal found at [25] that the practice of standing down charges should not be seen as falling purely within the Prosecution's discretion because doing so would grant the Prosecution "unfettered control over the conduct of criminal proceedings that are before the court". The Court of Appeal held:

> Whilst applications to stand down charges are almost always uncontroversial and unlikely to cause any prejudice to accused persons in the vast majority of cases, it is conceivable that the Prosecution could seek to control the pace and sequence of trials by standing down charges in a manner that might objectively be oppressive to the accused person. This may especially prove to be an issue in cases such as the present where an accused person faces a large number of charges relating to different offences. In our judgment, it would be wholly unsatisfactory if the court were powerless to intervene in such cases except by resorting to narrow concepts such as abuse of process or any allegation of improper conduct on the Prosecution's part.

63 Similarly, it seems to me to be untenable that the Prosecution could obtain a DNATA on a charge in circumstances where this would objectively be oppressive and prejudicial to the accused person. If both propositions from *Yen Ching Yan* (see [54] and [55] above) are correct, the District Court would be compelled to order a DNATA at first instance and the High Court would be powerless to rectify the situation on appeal (at least without resorting to narrow concepts of abuse of process or allegations of improper conduct on the Prosecution's part). Effectively, the Prosecution would have unfettered control over an issue which should and does in fact fall within the courts' control: namely, whether the discharge should amount to an acquittal or not. To avoid this unsatisfactory outcome, I considered that this could be an appropriate area to invoke the court's inherent powers in the proper case.

64 That said, I did not have to decide this point.

Conclusion

65 For these reasons, I dismissed the appeal.

Sundaresh Menon
Chief Justice

Nathan Shashidran and Laura Yeo Wei Wen (Withers KhattarWong LLP) for the appellant;
Yang Ziliang, Lim Shin Hui and R. Arvindren (Attorney-General's Chambers) for the respondent.
