

The case for a moratorium on death penalty executions in Singapore

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- 1 In last week's landmark decision, our Court of Appeal acquitted Malaysian Gobi Avedian of a death penalty charge. Last month, the Court similarly acquitted a Nigerian man. Then last Friday, the Court paved the way for a judicial review in the case of a drug trafficker on death row after finding a seeming inconsistency between an affidavit tendered by the state and known facts. Important as these cases are, it is three other Supreme Court decisions this year on the prosecution's duty to disclose evidence to the defence that have far reaching implications for all our pending death penalty cases.

- 2 Those cases confront us with an important question: *should there be an immediate moratorium on all executions in Singapore to allow a full review by the Attorney-General's Chambers (AGC) of every pending death penalty case to ensure that all relevant evidence has been disclosed by the prosecution to defence counsel, especially evidence that strengthens the defence's case or undermines the prosecution's case?* The purpose of any trial, civil or criminal, is to enable the court to arrive at a just outcome. In criminal cases, it is to ensure that only the guilty are convicted. Both the prosecution and defence counsel have an important role to assist the court. It is not the role of the prosecution to secure a conviction at all costs. Rather, prosecutors serve the wider public interest as "*ministers of justice*" to help ensure that only the guilty are convicted. A crucial part of that role is to ensure that evidence obtained during police investigations which supports the accused is disclosed to defence counsel.

- 3 First, some background.

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prosecution and defence counsel have an important role to assist the court. It is not the role of the prosecution to secure a conviction at all costs. Rather, prosecutors serve the wider public interest as “*ministers of justice*” to help ensure that only the guilty are convicted. A crucial part of that role is to ensure that evidence obtained during police investigations which supports the accused is disclosed to defence counsel.

- 5 In a 2011 murder case, our Court of Appeal in *Muhammad bin Kadar v PP (Kadar)* clarified the prosecution’s duty of disclosure in criminal cases. The Court noted “*to our consternation*” that three vital items of evidence supporting the accused’s innocence were withheld by the prosecution until very late. The Court found that there was a conscious decision by those involved in the investigation and prosecution not to reveal that helpful evidence before the trial. That evidence unexpectedly came to light during the cross-examination of a police witness, 18 months into the trial. Both accused were acquitted of the death sentence.
- 6 *Kadar* is a landmark. The prosecution had argued based on a previous case that it had no duty to disclose evidence which was inconsistent with its case. The Court of Appeal disagreed and departed from that previous ruling. *Kadar* established an important principle - the prosecution has a *legal duty* to disclose to the defence certain evidence that tends either to undermine the prosecution’s case or strengthen the defence’s case. The Court left it to future cases to work out the precise scope of this duty. Importantly, the Court observed that a failure by the prosecution to comply with this duty could result in a conviction being overturned.
- 7 The *Kadar* Court said that prosecutors in criminal trials should regard themselves as “*ministers of justice*” who owe a public duty to ensure that only guilty persons are convicted. They must discharge their duties “*conscientiously and ethically, not just zealously*”. In this, they must ensure that all relevant material is placed before the court to assist it in determining the truth, even if the evidence is unhelpful or detrimental to the prosecution’s case.
- 8 This is where this year’s three Supreme Court cases come in.
- 9 *Muhammad Nabill v PP (Nabill)*, a drug trafficking case, was decided in March. The Court of Appeal quashed the death sentence and expressed concern that the prosecution had not disclosed the written statements of four witnesses who could be expected to either confirm or contradict the accused’s defence.
- 10 The prosecution explained that it had not disclosed those statements because they neither strengthened the defence nor undermined the prosecution’s case. In a landmark ruling, the Court of Appeal decided that the prosecution has certain “*additional disclosure obligations*”. The prosecution must also disclose to defence counsel a material witness’ statement whether the statement is favourable, neutral or adverse to the accused.

- 11 An important question arose: must the prosecution then also disclose statements of the *prosecution's own witnesses*? The prosecution argued against this. The Court left this question open to be decided in a future case. However, it expressed a strong view - where a prosecution witness has signed a statement that is inconsistent with his testimony at trial, "*we see no reason why that statement ought not to be disclosed to the Defence as part of the Prosecution's Kadar obligations*". This is crucial guidance from the Court. It shows how a prosecutor's duty as a "*minister of justice*" extends to disclosing even the prior inconsistent statements of the prosecution's own witnesses.
- 12 In a second case in June, the Court of Appeal in *PP v Wee Teong Boo* again ruled on the prosecution's duty of disclosure. This was a rape case. The Court found the prosecution had delayed disclosure of two important documents supporting the accused's defence. One, a medical report which showed the accused suffered advanced erectile dysfunction, was critical to the accused's innocence. The Court said the report was "*squarely caught by the Kadar obligation*" and also that it could not see "*how it could reasonably have been thought that the [report] was not relevant to [the accused]*". It acquitted the accused and reiterated the prosecution's "*overarching duty of fairness*".
- 13 A third important development took place two months later in August in *Lim Hong Liang v PP*. There, the prosecution had initially argued against disclosing a witness statement. That was prior to the *Nabill* decision. However, after *Nabill*, the prosecution reconsidered its stand. It now concluded that the witness statement it had previously withheld "*was disclosable under the disclosure regime in Nabill, and ought to have been disclosed under its Kadar disclosure obligation*". This statement suggests that the prosecution had made a mistake even in its initial assessment, *pre-Nabill*, whether the statement was disclosable under its *Kadar* obligation.
- 14 All of this has an important bearing on our pending death penalty cases.
- 15 Considering *Nabill*, it is vitally important that the AGC conducts a full review of all its death penalty files, including concluded cases where executions are pending. The review should determine if there exists any evidence which prosecutors previously believed did not need to be given to the defence but is in fact disclosable under the *Nabill* decision. This must include statements of all material witnesses and any prior inconsistent statements of the prosecution's own witnesses. In case of any doubt, the review should err in favour of disclosure.
- 16 Any such evidence affects the safety of a conviction and should immediately be forwarded to defence counsel to assess if urgent applications should be made to re-open any case. Until that process is complete, it is only proper that there be an immediate moratorium on all death penalty executions in Singapore.
- 17 This review is justified for three reasons.
- 18 *First*, it is very likely that for cases heard before *Nabill*, the prosecution may have understood its duty of disclosure more narrowly and not have disclosed relevant

evidence to defence counsel. In fact, in *Nabill* itself, the prosecution had explained why it thought it was under no duty to disclose the four witness statements. Additionally, just in August, the prosecution in *Lim Hong Liang* accepted after *Nabill* that it was required to disclose a witness statement that it had previously thought it had no duty to disclose.

- 19 *Second*, before *Nabill*, it is also very likely that prosecutors took a different view whether they were under a duty to disclose statements of the prosecution's own witnesses. In fact, in *Nabill*, the prosecution argued against this. Whatever may previously have been the prevailing view within AGC on this issue, the Court in *Nabill* expressed very strongly that the prosecution must disclose previous inconsistent statements of prosecution witnesses. There is a risk that such statements may not have been disclosed to defence counsel in cases heard before *Nabill*.
- 20 *Third*, given the utmost seriousness and irreversibility of a death sentence, we must do everything possible to avoid the risk of a wrongful conviction. Where there is a risk that evidence may not previously have been disclosed to defence counsel because of a different understanding of the prosecution's disclosure obligations, that risk must now be fully addressed.
- 21 To avoid any potential conflict of interest, each case file should be audited by a different team of prosecutors from the ones who prosecuted the case. Such independent file audits are routinely carried out by established law firms and banks to ensure proper legal and regulatory compliance by their teams. The stakes here are much higher. A similarly robust audit by the AGC of capital cases is entirely appropriate. Ideally, the process should also be overseen by an independent external scrutineer e.g. a retired Supreme Court Judge.
- 22 While the review will undoubtedly take considerable time and effort, any efficiency concerns must give way to ensuring the safety and correctness of any death penalty conviction. A wrongful death penalty conviction, even in a single case, will be a stain on our national conscience. Under no circumstance should this be tolerated.
- 23 The broader question of the effectiveness of the death penalty was raised during Parliament's most recent sitting. It is important that our debate continues. There are good arguments to abolish or fundamentally narrow the scope of the mandatory death penalty in Singapore. Whatever the outcome of that debate, we must, in the meantime, do everything to ensure that every death penalty case is subject to the most rigorous and exacting scrutiny.

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