# Ng Chye Huay and Another v Public Prosecutor
# [2005] SGHC 193

**Case Number** : MA 54/2005, 55/2005

**Decision Date** : 17 October 2005

**Tribunal/Court** : High Court

**Coram** : Yong Pung How CJ

**Counsel Name(s)** : Alfred Dodwell (Alfred Dodwell) for the appellants; Hay Hung Chun and Stanley Kok (Deputy Public Prosecutors) for the respondent

**Parties** : Ng Chye Huay; Cheng Lu Jin — Public Prosecutor

*Constitutional Law – Equality before the law – Whether legislation permitting absolute discretion to issue permits and certificates arbitrary – Article 12 Constitution of the Republic of Singapore (1999 Rev Ed)*

*Constitutional Law – Fundamental liberties – Whether appellants' rights to fundamental liberties of freedom of association and freedom of expression violated – Article 14 Constitution of the Republic of Singapore (1999 Rev Ed)*

*Criminal Law – Statutory offences – Miscellaneous Offences (Public Order and Nuisance) Act – Appellants convicted of participating in an assembly without permit – Whether appellants' convictions should be overturned – Section 5(1) Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed), r 5 Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed)*

*Criminal Law – Statutory offences – Films Act – Appellants convicted of possession and distribution of uncertified films – Whether appellants' convictions should be overturned – Section 21 Films Act (Cap 107, 1998 Rev Ed)*

1 The first appellant, Ng Chye Huay ("Ng"), was convicted by Magistrate Wong Li Tien on a total of eight charges:

(a) one charge for participating in an assembly that was held without a permit under r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) ("the Rules") read with s 5(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("the Act");

(b) two charges for possessing uncertified video compact discs ("VCDs") under s 21(1)(*a*) punishable under s 21(1)(i) of the Films Act (Cap 107, 1998 Rev Ed); and

(c) five charges for distributing uncertified VCDs under s 21(1)(*b*) read with common intention punishable under s 21(1)(ii) of the Films Act, read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed).

2 The second appellant, Cheng Lu Jin ("Cheng"), was convicted on a total of seven charges:

(a) one charge for participating in an assembly that was held without a permit under r 5 of the Rules read with s 5(1) of the Act;

(b) one charge for possession of uncertified VCDs under s 21(1)(*a*) punishable under s 21(1)(i) of the Films Act; and

(c) five charges for distributing uncertified VCDs under s 21(1)(*b*) read with common

intention punishable under s 21(1)(ii) of the Films Act, read with s 34 of the Penal Code.

3 Ng was sentenced to a total fine of $20,000 or 20 weeks' imprisonment in default, while Cheng was sentenced to a total fine of $24,000 or 24 weeks' imprisonment in default. Being dissatisfied with the outcome of the trial, both came before me to appeal against conviction and sentence.

**Undisputed facts**

4 Ng and Cheng were Falungong practitioners who committed a series of offences on four occasions, despite numerous warnings from and exchanges with the police. Most of the offences committed by Ng corresponded to those committed by Cheng. The remaining offences, committed by Ng and Cheng in their individual capacities, were treated as stand-alone charges. In examining the legal issues involved in the appeal, I found it useful to first set out the relevant facts chronologically, before proceeding to analyse the charges against the appellants.

***The first incident: 23 November 2002***

5 On 23 November 2002, Ng was found to be in possession of 12 uncertified VCDs while she was practising Falungong at the Esplanade Park. The investigating officer on that day was Assistant Superintendent Kevin Teoh ("ASP Teoh"), who at the time was attached to the Central Police Division.

6 ASP Teoh arrived at the Esplanade Park at about 5.25pm with his colleague in response to a police message. He observed a gathering of about ten persons. Six women and two men were seated on the floor meditating. Two other women were standing and distributing flyers, and one of them was also distributing VCDs which had been placed in a stack on the floor beside her. ASP Teoh approached the woman distributing both flyers and VCDs to ask if the VCDs were certified. She answered in the negative, whereupon ASP Teoh seized a total of 12 VCDs from her and issued an acknowledgement slip to her. This woman was identified at trial as Ng, the first appellant. The second appellant, Cheng, was not involved in this incident.

***The second incident: 27 December 2002***

7 About a month after the first incident, Ng and Cheng sent five packages to various officers in the Singapore Police Force. Each of the packages contained an identical cover letter written in Mandarin, two uncertified VCDs and reading material on Falungong. Ng had composed the text of the cover letter, while Cheng had typed it out. Both had appended their signatures at the end of the letter.

8 The cover letter was translated into English by the Chinese translator of the Criminal Investigation Department, Mr Ong Shieu Tien, and tendered to the court by the Prosecution. The main text of the letter was as follows:

> Hi! We are Falungong practitioners. For the past three years we have been practising Falungong near the site of the Merlion. We have also been distributing informative materials of Falungong to tourists and residents at various places. Unfortunately, some members of the public misunderstood our good intentions and alerted the police to our activities. These members of the public do not have a real understanding of Falungong. They believe all the fabricated news they see in the media and utter libelous remarks about Falungong to others. This is not good for their lives [*sic*].

We are sending you some materials on Falungong. We hope you would take a look at them. Thank you.

9 The packages were sent to Tiong Bahru Neighbourhood Police Post, Tanjong Pagar Neighbourhood Police Post, the Head of Investigations, and the Commander as well as the Deputy Commander of the Central Police Division Headquarters. The police officers who received these packages followed their established internal procedures of passing the packages onto their colleagues in charge.

***The third incident: 10 February 2003***

1 0 On 10 February 2003, approximately six weeks after sending the packages to the police, Cheng was practising Falungong with a group at the Esplanade Park when police officer Assistant Superintendent Shee Tek Tse ("ASP Shee") approached her group. ASP Shee testified that there was a stack of 26 VCDs on the ground in front of the group. When he asked the group to whom the VCDs belonged, Cheng acknowledged that they belonged to her. Subsequently, an acknowledgment slip was issued for the VCDs, and when ASP Shee asked Cheng to inspect the VCDs and confirm that they were the same ones listed in the acknowledgement slip, she did so, and signed on the slip accordingly.

***The fourth incident: 23 February 2003***

1 1 Thereafter, on 23 February 2003, the police responded to a "999" call relating to Falungong activities at the Esplanade Park. The police team was led by Mr Wendell Chua ("Mr Chua"), who at the time was the Senior Investigating Officer with the Central Police Division. Mr Chua testified that he observed a gathering of seven persons, which included Ng and Cheng, for about ten minutes. Five persons were seated on the ground meditating while Ng and Cheng were distributing flyers to member of the public (Ng did not dispute this but Cheng denied that she had been distributing flyers at the relevant time). The group had put up two banners and various displays publicising the Falungong movement.

12 Upon approaching the group, Mr Chua first spoke withCheng, asking if the group had obtained a permit to assemble. Cheng replied that they had not, and that it was pointless to apply for one as the application would have been rejected anyway. Ng then went over to speak to Mr Chua, upon which he advised Cheng and Ng to remove their displays and leave the area immediately. However, Ng only removed one banner and refused to leave the area. Mr Chua thus proceeded to take down the particulars of the appellants and seized some other items that were displayed, including six uncertified VCDs that Ng had acknowledged ownership of. Ng signed the acknowledgement slip that Mr Chua issued for the six VCDs. Mr Chua's testimony was corroborated by Assistant Superintendent Eugene Oei ("ASP Oei"), who was also at the scene.

***The charges against the appellants***

1 3 I will deal with the issues on appeal by dividing the offences chronicled above into three groups:

(a) the charges against Ng and Cheng for assembling without a permit on the day of the fourth incident ("the assembly offences");

(b) the charges against Ng and Cheng for their joint effort in the distribution of letters and uncertified VCDs on the day of the second incident ("the distribution offences"); and

(c) the charge against Ng for possession of uncertified VCDs during the first and fourth incidents and Cheng's charge for possession of uncertified VCDs during the third incident ("the possession offences").

The assembly and distribution offences are common to both Ng and Cheng, while the possession offences are particular to each of the appellants.

**The trial and decision below**

***The assembly offences***

1 4 The relevant provisions are r 5 of the Rules read with s 5(1) of the Act. Section 5(1) of the Act states:

> The Minister may make rules —
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> (*a*) regulating assemblies and processions in public roads, public places and places of public resort;
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> (*b*) providing for the grant of permits for holding assemblies and processions in public roads, public places and places of public resort, and the fees to be charged therefor;
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> (*c*) for keeping order and preventing obstruction or inconvenience in public roads, bridges, landing places, and all public places and places of public resort; and
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> (*d*) prescribing the punishment by a fine not exceeding $5,000 or imprisonment for a term not exceeding 3 months or both for any act or omission in contravention of the provisions of any such rules.

Rule 5 of the Rules states:

> Any person who participates in any assembly or procession in any public road, public place or place of public resort shall, if he knows or ought reasonably to have known that the assembly or procession is held without a permit, or in contravention of any term or condition of a permit, be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000.

Additionally, r 2(1) of the Rules states:

> Subject to paragraph (2), these Rules shall apply to any assembly or procession of 5 or more persons in any public road, public place or place of public resort intended —
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> (*a*) to demonstrate support for or opposition to the views or actions of any person;
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> (*b*) to publicise a cause or campaign; or
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> (*c*) to mark or commemorate any event.

15 Counsel for the appellants advanced a number of arguments at trial against this charge. Firstly, he averred that Ng and Cheng did not remove their displays and leave the Esplanade Park area because Mr Chua, the police officer who arrived at the scene, did not properly identify himself as a police officer. The trial judge dismissed this argument, as it was clear from Mr Chua's evidence in

court that he had in fact identified himself to Ng and Cheng. Moreover, after he had identified himself, Cheng tried to reason with him to allow them to stay until the end of their desired session.

16 Secondly, counsel tried to disassociate members of the group from each other by arguing that there had been different activities going on at the same time. Ng had been distributing flyers and talking to passers-by, Cheng had been minding her child (although Mr Chua's testimony was that he had seen Cheng distributing flyers as well), while the rest of the group were meditating. The trial judge dismissed this contention, observing that whatever activities they had been engaged in, Ng and Cheng shared an *esprit de corps* with the rest of the group. The trial judge also made the finding of fact that Ng and Cheng had worn the same yellow T-shirts as the other members of the group. When Mr Chua had approached the group, Cheng had also taken it upon herself to speak to him and she had identified herself as part of the group gathered there.

17 Thirdly, it emerged during trial that Ng and Cheng believed that they did not require a permit to gather because they thought that the police had waived the requirement for police permits when it came to Falungong practices. The basis of this was correspondence between the Falun Buddha Society (Singapore) ("SFBS") and the police in January 2001 and 2002. The police permitted SFBS gatherings without a permit, subject to the condition that preaching and the distribution of flyers were prohibited at all times. The trial judge held that, on the present facts, the waiver granted by the police was inapplicable as the gathering had clearly breached the conditions prescribed by the waiver.

18 The trial judge thus convicted both appellants of this offence, and imposed a fine of $1,000 each, or one week's imprisonment in default on each of them.

***The distribution offences***

19 Counsel for the appellants argued against the distribution offences on two fronts. Firstly, he contended that the VCDs produced in court as exhibits were not the same ones that had been sent out during the second incident. After examining the evidence, the trial judge dismissed this argument.

20 Secondly, counsel raised preliminary objections before the commencement of proceedings on the first day of trial, averring that the charges relating to the distribution offences against both Ng and Cheng could not stand because the VCDs distributed formed part of letters of representation to the police that were made in the course of plea negotiations. Counsel submitted that the VCDs were enclosures of letters written to the police by Ng and Cheng because they had been "constantly under threat of investigation and/or actual investigation had commenced, thus they had valid reasons to write these letters". Thus, the letters and accompanying VCDs distributed were tantamount to plea negotiations and privileged under the law as set out in *PP v Knight Glenn Jeyasingam* [1999] 2 SLR 499 ("*Glenn Knight*").

21 The trial judge considered this argument carefully, and came to the conclusion that the letter and VCDs did not constitute letters of representation and were therefore not privileged under the law in *Glenn Knight*. In making her decision, the trial judge noted firstly that the letters written by Ng and Cheng were addressed to the police, and not to the Attorney-General's Chambers ("AGC"). In *Glenn Knight*, the question reserved for consideration of the High Court was specifically targeted at representations made to the AGC. Secondly, the trial judge could not find anything in the letters written by Ng and Cheng that indicated an attempt to negotiate the charges that either Ng or Cheng was facing. On the contrary, the letters struck the trial judge as possessing the nature of an advertisement and were meant to encourage the readers to enjoy the Falungong materials enclosed with the letters. Thirdly, letters of representation must state that the accused person's attention has been drawn to the consequences of making a false statement under s 182 of the Penal Code. Without

this statement being signed or acknowledged by the accused person, the AGC would not consider the representation as having been made. The requisite statement was not found in the letters written by Ng and Cheng. Lastly, as of the date of the second incident when the letters and VCDs were distributed, only Ng faced charges based on events that had occurred during the first incident. Cheng did not face any charges predating the letters. The trial judge held that this destroyed counsel's assertion that the letters were sincere attempts at plea negotiations. Hence, the trial judge imposed a fine of $1,000 for each of the ten VCDs, amounting to a total fine of $10,000 or ten weeks' imprisonment in default for both the appellants.

***The possession offences***

22 Section 21(1) of the Films Act states:

> Any person who —
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> (*a*) has in his possession;
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> (*b*) exhibits or distributes; or
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> (*c*) reproduces,
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> any film without a valid certificate, approving the exhibition of the film, shall be guilty of an offence and shall be liable on conviction —
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> (i) in respect of an offence under paragraph (*a*), to a fine of not less than $100 for each such film that he had in his possession (but not to exceed in the aggregate $20,000); and
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> (ii) in respect of an offence under paragraph (*b*) or (*c*), to a fine of not less than $500 for each such film he had exhibited, distributed or reproduced, as the case may be (but not to exceed in the aggregate $40,000) or to imprisonment for a term not exceeding 6 months or to both.

23 Ng was found to be in possession of 12 VCDs at the time of the first incident and six VCDs at the time of the fourth incident, while Cheng was found to be in possession of 26 VCDs on the occasion of the third incident.

24 Mr Seng Boon Meng and Ms Lee Ching, both Deputy Censors with the Board of Film Censors ("BFC"), gave evidence at trial that the VCDs in question were not certified. The Defence did not dispute this.

25 With regard to Ng's charge for possession of 12 uncertified VCDs during the first incident, counsel for the appellants contended that Ng was not the actual owner of the VCDs in that they did not belong to her and that the material contained in the VCDs was freely downloadable on the Internet, and therefore did not require BFC certification. With regard to Ng's charge for possession of six uncertified VCDs during the fourth incident, counsel argued that the six VCDs tendered in court were not the ones that were actually seized on the day in question.

26 With regard to Cheng's charge for possession of 26 VCDs on the occasion of the third incident, counsel alleged that although Cheng had acknowledged that the 26 VCDs belonged to her, in fact only five pieces were hers, and she did not know exactly which VCDs belonged to whom. She had

admitted ownership of them globally because no one else from the group answered ASP Shee's queries and she had signed the slip merely to prove that the police had taken the VCDs away, so that she could retrieve the items from the police in the future.

27 The trial judge considered all the arguments in detail and dismissed them. In particular, she observed that whether the VCDs belonged to Ng or not was irrelevant as the test was one of possession. Drawing from the cases that discuss the concept of possession, especially those dealing with the Misuse of Drugs Act (Cap 185, 2001 Rev Ed), the trial judge concluded that the Prosecution had successfully proved, firstly, that Ng had physical control of the VCDs as they were placed beside her, secondly that the VCDs were uncertified, and thirdly, that Ng knew that they were uncertified.

28 In order to deal with Ng's assertion that the VCDs produced in court were not the ones actually seized, the Prosecution adduced evidence showing that there were no irregularities in the handling of the evidence by either the police or the BFC. The trial judge accepted this evidence and rejected Ng's assertion as nothing more than a red herring.

2 9 The trial judge then rejected Cheng's argument that not all 26 VCDs belonged to her. The trial judge found that Cheng had admitted ownership to all 26 VCDs because she had possession over them in the sense that she was free to distribute them to interested passers-by as she wanted. The test under s 21 of the Films Act was, in any case, one of possession rather than ownership, and Cheng clearly had possession of all 26 VCDs at the relevant time.

30 The trial judge convicted Ng and Cheng accordingly, and fined them $500 for each uncertified VCD in their possession. Ng was sentenced to a total fine of $6,000 or six weeks' imprisonment in default for the 12-VCD charge and a total fine of $3,000 or three weeks' imprisonment in default for the six-VCD charge. Cheng was sentenced to a total fine of $13,000 or 13 weeks' imprisonment in default.

**The appeal**

31 On appeal, counsel for the appellants chose to present his arguments for both appellants at the same time, rather than dealing with one appellant at a time. I shall address the issues raised accordingly.

***Constitutional law arguments***

32 The cornerstone of the appellants' appeal was that they had been lawfully exercising their rights under the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") in carrying out the activities that gave rise to the charges that they were convicted for. I noted, however, that despite being certain that their constitutional rights had been violated, the appellants chose not to instruct their counsel to apply under s 56A of the Subordinate Courts Act (Cap 321, 1999 Rev Ed) to make a reference of constitutional questions to the High Court.

33 The constitutional law arguments raised before me revolved around Arts 12, 14 and 15 of the Constitution. Article 12 reads:

> (1) All persons are equal before the law and entitled to the equal protection of the law.
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> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the

administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) This Article does not invalidate or prohibit —

(*a*) any provision regulating personal law; or

(*b*) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

Article 14 reads:

(1) Subject to clauses (2) and (3) —

(*a*) every citizen of Singapore has the right to freedom of speech and expression;

(*b*) all citizens of Singapore have the right to assemble peaceably and without arms; and

(*c*) all citizens of Singapore have the right to form associations.

(2) Parliament may by law impose —

(*a*) on the rights conferred by clause (1) (*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;

(*b*) on the right conferred by clause (1) (*b*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and

(*c*) on the right conferred by clause (1) ©, such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by clause (1) © may also be imposed by any law relating to labour or education.

Article 15 reads:

(1) Every person has the right to profess and practise his religion and to propagate it.

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

(3) Every religious group has the right —

(*a*) to manage its own religious affairs;

(*b*) to establish and maintain institutions for religious or charitable purposes; and

(*c*) to acquire and own property and hold and administer it in accordance with law.

(4) This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

34 In essence, Arts 12, 14 and 15 enshrine a citizen's right to equality, freedom of assembly/expression and freedom of religion respectively. I rejected counsel's arguments under Art 15 from the outset as the Falungong declare that they are not a religion, but merely practitioners of a specific form of *qigong*. As such, the appellants' rights under Art 15 were irrelevant for the purposes of this appeal.

*Article 12*

3 5 During trial, it emerged through the testimony of Mr Chua that, in dealing with the assembly on the day of the fourth incident, he had followed a Standard Operating Procedure ("SOP") memorandum that the police had issued to its officers. Before me, counsel for the appellants appealed against the usage of this SOP on the ground that the SOP was specifically targeted at Falungong activities, and that this was in violation of Art 12 of the Constitution. Counsel also contended that the Rules were themselves unconstitutional as the issuance of permits was left in the absolute discretion of the police, who provided no explanation for or appeal mechanism against their decisions. This was a violation of Arts 12 and 14 of the Constitution. Additionally, counsel for the appellants averred that there are many groups in Singapore, such as those practising yoga and *tai chi*, who are not subject to investigation and arrest even if they assemble without a permit.

36 I found counsel's cavil about the police SOP unmeritorious. A careful scrutiny of the Notes of Evidence revealed that the SOP was not directed specifically at the Falungong, but at illegal assemblies in general. Mr Chua stated thus in cross-examination:

Q: Do you have SOPs in relation to any other groups in Singapore?

A: When I mentioned SOP earlier, it wasn't pertaining specifically to Falungong but for guidelines governing illegal assemblies.

This was then confirmed by the testimony of Deputy Superintendent Eefon Ng ("DSP Ng"), who at the relevant time was the Head of Investigation at the Central Police Division Headquarters:

Q: Are you aware of any SOP within the Singapore Police Force pertaining to or providing guidelines on handling Falungong practitioners?

A: We do have SOP for handling assemblies without a permit by any member of public. It's a generic rule of engagement guiding police action. Not targeted at Falungong.

Since the police SOP was not specifically targeted at the Falungong, but was instead generally applicable to all assemblies held without a permit, counsel's argument that the police SOP was discriminatory could not stand.

37 Turning to the appellants' second argument that the subsidiary legislation (the Rules) was itself unconstitutional as the issuance of permits was left in the absolute discretionary and arbitrary will of the police, I found that this was once again without merit. The first issue I had to examine was

whether the Rules were in violation of the fundamental right to equality enshrined in Art 12 of the Constitution. In the case of *PP v Taw Cheng Kong*[1998] 2 SLR 410, I cited (at [58]) with approval the test governing Art 12 of the Constitution, set out by Mohamed Azmi SCJ in*Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165:

> (a) The first question to be asked is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, it is good law, but if it is discriminatory, then because the prohibition of unequal protection is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation, we have to ask the further question, is it allowed? If it is, the law is good, and if it is not the law is void.
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> (b) Discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, provided that
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> > (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
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> > (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.
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> (c) In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

38 The key question under the first limb of this test is whether the law is discriminatory. I found that the provisions in the Rules granting the police power and discretion to grant permits for assemblies were not discriminatory because anyone who wants to have an assembly is open to apply for a permit. The Rules do not specifically target Falungong gatherings, but apply to any participant of an assembly of more than five people. The Rules therefore satisfy the criteria laid down under the first limb of the test stated above, and cannot be considered discriminatory at all. There is therefore no necessity to examine the latter parts of the test set out above.

39 I noted that licensing and permit schemes are an integral and necessary part of the Government's ability to efficiently regulate public behaviour. Additionally, although the legislation does not provide for an appeal mechanism, there is adequate scope for redress as any aggrieved individual is free to challenge a decision of the police through judicial review.

40 Next, counsel for the appellant argued that no other group that assembles without a permit is subject to investigation and arrest by the police similar to that experienced by the Falungong. According to this argument, there are groups all over Singapore that assemble without a permit, and yet the police have chosen to only investigate, arrest and charge participants of Falungong gatherings. This constituted a specific and discriminatory targeting of Falungong practitioners in violation of Art 12 of the Constitution.

41 In my view, the relevant provisions of the Act and the Rules are enacted in order to promote public order by allowing for better control over public gatherings. Rule 5 and s 5(1) lay down a blanket law that requires all assemblies to attain permits. At the same time, it is in no way inconsistent with the intendment of the statute for the police to use their discretion to determine which particular

assemblies are especially likely to cause trouble. In furtherance of their duties, the police are well entitled to investigate these assemblies and, if warranted, to arrest their participants. I was of the opinion that far from being unconstitutional, this practice is carried out wholly in furtherance of the relevant provisions, and is indeed the only practical way that the law can be enforced.

42 Further, it was clear to me that the police were correct to use their discretion to investigate, arrest and charge Ng and Cheng in respect of the assembly on the day of the fourth incident. Unlike participants of *tai chi* or yoga gatherings, Ng and Cheng were surrounded by provocative displays, actively distributing flyers and talking to passers-by. Their cause was undeniably controversial. Thus, the police had good reason to decide that the potential for mischief was alive, even if no actual mischief had yet taken place.

***Article 14***

43 In essence, counsel for the appellants averred that their right to freedom of assembly had been violated because the police had the absolute discretion to issue permits that were required for assemblies to be lawful, while their right to freedom of expression had been infringed upon because the BFC had the absolute discretion to issue certification that was required before VCDs could be lawfully possessed and distributed.

44 I need only state that I was utterly unimpressed by these arguments. First, the wording of Art 14 itself makes clear that the rights enshrined in that article are qualified, rather than absolute, rights. Secondly, I agreed entirely with the trial judge, who opined in [188] of her Grounds of Decision ([2005] SGMC 13) that:

> This case is not about an individual's right to speak freely about an issue he is passionate about, or his individual right to faith in a particular religion. It is about the accused persons being part of a group of five or more persons who had gathered for a united cause when the requisite permit to do so had not been previously obtained, and for their possession and distribution of VCDs which had not been previously certified as required. There was absolutely nothing in the way to prevent the accused persons from applying for these permits and certificates. The requirements for such permits and certificates is expressly legislated by Parliament in rule 2 of the Miscellaneous Offences (Public Order and Nuisance)(Assemblies and Processions) Rules and section 21 of the Films Act respectively, and is therefore valid law for the accused persons to abide by.

45 Hence, I found the appellants' arguments on constitutional grounds unpersuasive, and dismissed them accordingly. I then turned my mind to the substantive grounds of appeal against the trial judge's findings of fact.

***The assembly offences***

*Definition of "assembly" in r 5 of the Rules and s 5(1) of the Act*

4 6 Counsel's key contention was that the trial judge misdirected herself on the definition of "assembly" and erroneously concluded that the participants in the alleged "assembly" shared an *esprit de corps.* It was argued that the appellants were in fact private individuals conducting their own independent acts.

47 In considering this issue, I noted at the outset that the term "assembly" is also used in the freedom of assembly provision under Art 14 of the Constitution. *Halsbury's Laws of Singapore* vol 1 (Butterworths Asia, 1999) at para 10.194 defined the term's usage in the context of Art 14 as

follows:

> An assembly is complete, as it were, by collection or aggregation: no form or object in coming together is required.

However, I observed that neither the Act nor the Rules provides a definition of the term "assembly". The relevant sections in the Act and the Rules are seldom used, and there is little case law giving guidance on the meaning of this term in respect of these two pieces of legislation. Its meaning, for the purposes of the offences committed by the appellants, must thus be derived by looking at the mischief that the legislation was enacted to address, as well as comparing these provisions to the unlawful assembly provision found in the Penal Code.

4 8 A search in Hansard revealed that during a debate on the Minor Offences (Amendment) Bill (as the Act was then known as the "Minor Offences Act") on 16 February 1989, one Member of Parliament articulated that the seriousness of the problem of assemblies stemmed from the propensity of participants of such gatherings to create trouble (*Singapore Parliamentary Debates*, *Official Report* (16 February 1989) vol 52 at col 699). Furthermore, statistics at the time showed that the number of assemblies, which increased from seven in 1986 to 22 in 1988, were on the rise. The amendment bill thus vested authority in the Minister to require permits for assemblies of more than five people.

4 9 In my opinion, the legislation was aimed at dealing with the misbehaviour of the persons gathered in an assembly of five or more, and such mischief can occur even if those gathered are engaged in varied activities. It is not necessary for every member of the assembly to be engaged in the exact same activity in order for the assembly to create trouble. It is sufficient that the people gathered can be identified as a collective entity and that they have a common purpose.

5 0 Dealing first with Ng, although she had been distributing flyers while the other five members of the group were meditating, the acts were both carried out under the auspices of the Falungong movement. As Ng herself testified, Falungong practitioners were encouraged to clarify the truth and share their faith with the public, and her distribution of flyers was in accordance with this mission. It was also part of a demonstration of Falungong faith to meditate and carry out their exercises in public.

51 Turning next to Cheng, even if I was to accept her testimony that she was minding her child at the time the police officers approached the group, there were other elements of her behaviour that sufficiently indicated that she was part of the assembly. For example, she had been the first person there on the day of the assembly, and she had brought along the music to which the group had meditated. Cheng herself testified that she had been wearing the yellow Falungong T-shirt, and that when the police officers approached the group, she had tried to reason with them on behalf of the group. Hence, it was clear to me that the members of the group, including Ng and Cheng, shared an *esprit de corps* that qualified them as an assembly under the relevant provisions.

52 This reading is buttressed by examining the unlawful assembly provision found in s 141 of the Penal Code. Section 141 reads:

> An assembly of 5 or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is:
>
> > (*a*) to overawe by criminal force, or show of criminal force, the Legislative or Executive Government, or any public servant in the exercise of the lawful power of such public servant;

(*b*) to resist the execution of any law, or of any legal process;

(*c*) to commit any mischief or criminal trespass, or other offence;

(*d*) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

(*e*) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Similar to s 5 of the Act and r 5 of the Rules, s 141 of the Penal Code concerns itself with the potential mischief of a gathering or assembly of people. The offence in s 141 is defined by reference to the type of common object held by that assembly. It was clear to me that the concept of an undesirable assembly is closely linked to the common object of that assembly. In the instant case, the finding that the members of the group shared a common object was in no way negated by the fact that they were engaged in separate activities. Hence, the appellants' argument that the gathering did not constitute an assembly did not stand up to scrutiny.

***The distribution offences***

53 The appellants petitioned against the trial judge's findings that the letters and VCDs distributed were not letters of representation and were therefore not privileged under the law set out in *Glenn Knight* ([20] *supra*). This claim was substantiated on three grounds. First, *Glenn Knight* did not preclude letters sent to the police from being considered letters of representation. Secondly, lay persons such as the appellants would not have known of the requirement that letters of representation must include a statement indicating awareness of s 182 of the Penal Code (which states the consequences of making a false statement). Ng and Cheng's letters to the police thus should not be denied privilege for want of this procedural requirement. Thirdly, the trial judge erred in placing too much emphasis on the police officers' evidence that they did not read the letter as a letter of representation when they had first received it. Instead, counsel submitted that the trial judge should have looked at the actual intention of Ng and Cheng.

54 The general law regarding letters of representation in Singapore was set out clearly in *Glenn Knight*. In that case, I noted that plea negotiations are made for a myriad of offences and through different modes. They are not always brought by a legal representative. An accused person's main aim in writing a letter of representation is to request for leniency, whether it be in the form of a reduced charge or a withdrawal of charges. I noted that the question before the court in *Glenn Knight* involved representations made to the AGC, and I observed at [23] that on the facts of that case, "there [was] no question regarding statements made to, for example, the CNB or the police in carrying out investigations". Therefore, *Glenn Knight* does not directly address the point in issue of whether representations may be made to the police, and from there, whether Ng and Cheng's letters may be considered letters of representation. Indeed, there seems to be no previous case law on this specific point.

55 The privilege that attaches to letters of representation is a crucial facet of our judicial system, as it is the basis of honest and open negotiations between the Prosecution and the accused in the hope of consensual case disposal outside of the courts. In a sense, the parties are bargaining in the shadow of the law, because they bear the law in mind while carrying out negotiations, even though their aim is to reach agreement on the nature and severity of the offences (which the charges

are based upon) outside of the courtroom. It is logical for an accused person to carry out this negotiation with the Prosecution, because it is the Attorney-General who has the discretion to decide on the charges, pursuant to Art 35(8) of the Constitution. Had the Attorney-General and his deputies not been vested with such a discretion, it would be useless for the accused person to discuss the charges he faces with the AGC, as the AGC would not have the power to vary or withdraw the charges. This is settled law.

56 However, before an accused person's file reaches the AGC, it is the police who handle all matters relating to the accused person and the offence with which he is charged. Crucially, the police are vested with some discretion in deciding whether to pursue any particular lead in the course of investigation. The fact that this discretion exists was confirmed at trial by the testimony of ASP Oei:

> Q: You mean that every time Police receives a call or any time on five people involved in any activity you would go down to investigate? Or is there a filtering process?
>
> A: What mean by filtering process?
>
> Q: If I call 999 and say I see 5 people on bicycle under Esplanade bridge and dressed in white T-shirts, would you go to investigate?
>
> A: Depends on facts. If call is 5 children on bicycles we may not proceed. However, if call is on informing, for example, 5 males seen with knives cycling, we would proceed definitely.

This is reinforced by the fact that the AGC and police have a close working relationship, which does not end even when a case is referred by the police to the AGC.

57 From another perspective, a lay person's first point of contact with the law is usually with the police, and it is likely that from a lay person's point of view, it is the police who have the greatest power and discretion in determining whether an act is illegal and worth investigating. It is no surprise then that such a person would choose to write a letter of representation to the police.

58 I was thus of the view that in some circumstances, it should be possible for letters of representation to be written to the police. Just as it is crucial for privilege to accrue to representations to the AGC, it is equally important for open and honest dialogue between an accused person and the police while investigations are ongoing. The accused person's representations could inform and sway the exercise of the police's discretion, thereby saving both the AGC and the courts valuable time and resources when the case is passed on subsequently. Honest and open dialogue is not possible where the accused person under investigation fears recrimination stemming from his statements and representations to the police.

5 9 This is congruent to the American position on plea negotiations. Although American cases must be read in the light of the US Federal Rules of Evidence that comprehensively set out the laws of plea negotiation, the principles of law that are stated in these cases can still provide useful guidance. The case of *US v Castillo* 615 F 2d 878 (1980) discussed the two-tiered test first introduced in *US v Pantohan* 602 F 2d 855 (1979) ("*Pantohan*") for determining whether an admission by an accused was made in the course of plea negotiations. First, the accused must exhibit an actual subjective intent to negotiate a plea at the time of the discussion. Next, the expectation of negotiating a plea at that time must be reasonable, given the totality of the circumstances. On the facts of that case, it was found that Castillo's discussion with his prison counsellor met neither prong of the *Pantohan* test and therefore was not considered part of plea negotiations. Nevertheless, in my opinion, the two-tiered approach adopted by the American courts in principle allows for plea

negotiations to be made to persons other than the Prosecution as long as it can be proved that the accused had the actual intention to negotiate a plea (the first tier), and it was reasonable for him to have done so (the second tier).

60 Hence, letters of representation may, in principle, be written to the police without prejudice. However, a letter written to the police may only be considered a privileged letter of representation if certain conditions are satisfied. Firstly, the letter must refer specifically to the investigation or charge faced by the accused. Otherwise, any person on the street who is not subject to investigation may take it upon himself to send a letter to the police containing illegal material, and the material would automatically be considered privileged. Secondly, the letter must have been written with the object of reducing the charge or halting investigations, and not just to provide general information to the police. The object of the letter can be deduced from evidence of the accused's actual intention at the time of writing the letter. However, the accused's intention alone is not determinative. The letter must be written such that a reasonable police officer, as the party receiving the letter, understands that it has been written as a letter of representation and warrants being treated as such. The test is thus one of both subjective and objective intention. Thirdly, the letter must contain a statement that the author of the letter understands the consequence of making a false statement under s 182 of the Penal Code. If the letter does not contain such a statement (which is likely where the sender is a lay person), the police should return the letter to the sender with an explanation of this requirement. The onus is then on the sender to re-draft the letter to include this statement.

61 On the present facts, the letters sent by Ng and Cheng did not constitute letters of representation. The contents of the letters were generally drafted and did not refer to either Ng's pending charge or police investigations into Falungong activities in the Esplanade Park. Besides, it was clear from the testimony of Staff Sergeant Ong Tiong Seng and DSP Ng that upon receiving and reading the letters, they considered the letters promotional material rather than letters of representation. Had Ng and Cheng's letters been more specific, they could well have been considered privileged under the criteria set out above. But based on the letters actually written, I found no reason to overturn the trial judge's finding that these were not privileged letters of representation.

***The possession offences***

62 Counsel for the appellants raised a number of arguments in respect of the possession offences. Firstly, counsel asserted that the test in s 21(1) of the Films Act should be that of "ownership" and "control" rather than "possession", and there was insufficient evidence to show that Ng and Cheng owned or were in control of the VCDs. Secondly, counsel contended that the trial judge erred in failing to consider whether materials freely available and downloadable from the Internet were subject to the same laws requiring certification from the BFC. Thirdly, counsel challenged the trial judge's assessment of the credibility of the witnesses and other findings of fact.

***Is the test under s 21(1) of the Films Act that of possession or ownership?***

63 Once again, I was minded to dismiss the appellants' petition on this matter. The trial judge had already dealt with this at [196]–[200] and [223] of her Grounds of Decision ([44] *supra*), finding that the question of whether Ng and Cheng were owners of the VCDs was irrelevant as the test was one of possession and not ownership. That the test is one of possession is easily gleaned from the wording of s 21 itself, which states that:

> Any person who has in his possession … any film without a valid certificate … shall be guilty of an offence …

64 The concept of possession is one that is found in many areas of the law and is applicable in many contexts. The trial judge's understanding of the concept was informed by cases pertaining to the Misuse of Drugs Act such as *Fun Seong Cheng v PP* [1997] 3 SLR 523 and *Lim Beng Soon v PP* [2000] 4 SLR 589. From those cases, the trial judge observed that the test that was applicable on the present facts should be as follows:

(a) Did the appellant have physical control of the uncertified VCDs placed beside her?

(b) Were the VCDs uncertified?

(c) Did the appellant know that the VCDs were uncertified?

The trial judge applied this test to both Ng and Cheng (who were charged for possession of uncertified VCDs on different occasions) and found that they were guilty of the charges.

65 The concept of possession in the context of the Films Act was discussed in the Magistrate's Court case of *Mohd Ariffin bin Mohamad v PP* [2001] SGMC 10, where the judge cited with approval the analysis of Gordon-Smith Ag CJ in the case of *Toh Ah Loh v Rex* [1949] MLJ 54:

> Possession, in order to incriminate, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

The test used by the trial judge was substantially similar to that articulated by Gordon-Smith Ag CJ, and I was of the view that this was the test that the appellant's behaviour should be measured against. Based on this test, I found Ng guilty of possession of 12 uncertified VCDs during the first incident and six VCDs during the fourth incident, and Cheng guilty of possession of 26 VCDs on the occasion of the third incident.

***Are films freely downloadable on the Internet subject to the certification requirements of the Films Act?***

66 Counsel's contention that materials freely available and downloadable from the Internet are not subject to the same laws requiring certification from the BFC was patently fallacious. Firstly, s 40 of the Films Act lists the types of films that are exempt from the Act, and material freely available and downloadable from the Internet is not included in this list. Section 40(1) states:

> This Act shall not apply to —
>
> (*a*) any film sponsored by the Government;
>
> (*b*) any film, not being an obscene film or a party political film or any feature, commercial, documentary or overseas television serial film, which is made by an individual and is not intended for distribution or public exhibition; and
>
> (*c*) any film reproduced from local television programmes and is not intended for distribution or public exhibition.

67 Secondly, I rejected counsel's argument as a matter of principle as there are all kinds of

material available and freely downloadable on the Internet, including pornography. If such an argument were accepted, then everything available on the Internet would be excluded from the BFC's purview. This could not have been Parliament's intention in passing the Films Act, as it would render the BFC otiose and allow undesirable films into our society through the back door.

***Arguments as to evidence and findings of fact***

68 Counsel's averments in respect of the evidence and findings of fact can be summarised as two main issues. First, the VCDs that were seized by the police were not the same ones tendered as evidence during trial. Second, the trial judge erred in believing the testimony of the police witnesses over the evidence of the two accused persons. After scrutinising the trial judge's Grounds of Decision and the Notes of Evidence, I found that there was no basis for either of these points of appeal, and that the trial judge's findings should therefore be upheld.

**The appeals on sentence**

69 The punishment prescribed for an offence under r 5 of the Rules read with s 5(1) of the Act is a fine of up to $1,000. The punishment prescribed under s 21(1) of the Films Act for possession of uncertified VCDs is a fine of not less than $100 for each film, but not exceeding an aggregate of $20,000. The punishment under s 21(1) of the Films Act for distribution of uncertified VCDs is a fine of not less than $500 for each film but not exceeding the aggregate of $40,000.

7 0 The trial judge's Grounds of Decision ([44] *supra*) at [274]–[295] set out clearly the factors she took into consideration in passing sentence against the appellants. In summary, the trial judge took into account that:

(a) Ng had one similar previous conviction in 2001 under r 5 of the Rules for participating in an assembly that was held without a permit. This assembly was also a Falungong gathering.

(b) Ng and Cheng appeared unremorseful throughout the trial.

(c) With regard to the assembly offences, Ng and Cheng had taken part in the assembly knowing full well that it was an offence to do so. Both of them had been warned several times before by police officers who had come to check on their activities after receiving complaints from members of the public.

(d) With regard to the possession offences, Ng and Cheng flagrantly breached the law by repeatedly being found in possession of uncertified VCDs despite numerous warnings by police officers. Each time, they regarded their practice of distributing VCDs as paramount to the laws of the land, and they accused the law of being unfair and inadequate when it failed to legalise their conduct.

(e) Ng and Cheng had claimed trial to charges that they knew they had no real defence to, dragging through the court process no less than 19 police officers who had no reason to implicate them falsely. They also wasted the court's time and resources by insisting on challenging the chain of evidence when it was clear that there was nothing at all wrong with the way the case exhibits were handled by the police.

71 The trial judge thus passed the following sentence on Ng:

(a) Police Summons No 383 of 2004 (the assembly offence): $1,000 fine or one week's

imprisonment in default;

(b) Police Summons No 384 of 2004 (the six-VCD possession offence): $500 fine for each of the six VCDs, amounting to a total fine of $3,000 or three weeks' imprisonment in default;

(c) Police Summonses Nos 385 to 389 of 2004 (the distribution offence): $1,000 fine for each of the ten VCDs, amounting to a total fine of $10,000 or ten weeks' imprisonment in default; and

(d) Police Summons No 390 of 2004 (the 12-VCD possession offence): $500 fine for each of the 12 VCDs, amounting to a total fine of $6,000 or six weeks' imprisonment in default.

Ng was thus fined a total of $20,000 or 20 weeks' imprisonment in default.

72 The trial judge passed the following sentence on Cheng:

(a) Police Summons No 391 of 2004 (the assembly offence): $1,000 fine or one week's imprisonment in default;

(b) Police Summons No 392 of 2004 (the 26-VCD possession offence): $500 fine for each of the 26 VCDs, amounting to a total fine of $13,000 fine or 13 weeks' imprisonment in default; and

(c) Police Summonses Nos 393 to 397 of 2004 (the distribution offence): $1,000 fine for each of the ten VCDs, amounting to a total fine of $10,000 or ten weeks' imprisonment in default.

Cheng was thus fined a total of $24,000 or 24 weeks' imprisonment in default.

7 3 On appeal, counsel argued that the sentences meted out by the trial judge were manifestly excessive as the judge failed to consider that the appellants had a deep-seated religious belief that led them to champion a cause against persecution. He also stated that the appellants were simple-minded housewives with young children.

7 4 I found these arguments unmeritorious, and dismissed the appeals against sentence. It was clear to me from the Notes of Evidence that both appellants committed the various offences knowing full well that they were in breach of the law. During the trial, the appellants exhibited no remorse and instead alluded to the unfairness and inadequacy of the law.

**Conclusion**

75 In coming to my decision, I was of the view that there were very few doubts in this appeal that the Prosecution had not already overcome at trial. I found no merit in the arguments that the appellants presented before me. As such, I dismissed the appeals of both the appellants against conviction and sentence.