IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 219

Criminal Revision No 3 of 2016

Between

Rahimah Bte Mohd Salim

… *Petitioner*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Revision of proceedings]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **3**

BACKGROUND FACTS 3

THE PROCEEDINGS 3

THE PETITIONER'S CASE **7**

THE PROSECUTION'S CASE **8**

ISSUES BEFORE THIS COURT **9**

MY DECISION **10**

THE ADDITIONAL EVIDENCE ISSUE 10

THE PRIVILEGE ISSUE 12

THE WAIVER ISSUE 18

THE REMEDIES ISSUE 23

Whether the Disclosure Order should be set aside *23*

Whether the IMH Reports should be delivered up and struck off from the record *30*

Whether a retrial should be ordered before a different district judge *38*

CONCLUSION **40**

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Rahimah Bte Mohd Salim
v
Public Prosecutor

[2016] SGHC 219

High Court — Criminal Revision No 3 of 2016
Chao Hick Tin JA
25 May 2016

11 October 2016 Judgment reserved.

Chao Hick Tin JA:

Introduction

1 Criminal Revision No 3 of 2016 ("CR 3/2016") is an application brought by the accused person, Rahimah Binte Mohd Salim ("the Petitioner"), who is charged with an offence under s 411 of the Penal Code (Cap 224, 2008 Rev Ed) and an offence under s 47(1)(*b*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("the Charges"). In the course of the trial in the State Courts, the learned district judge ("the DJ") made an order ("the Disclosure Order") under s 235(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC") compelling the Petitioner to produce the following two medical reports from the Institute of Mental Health ("the IMH") ("the IMH Reports"):

(a) a psychiatric report authored by Dr Stephen Phang ("Dr Phang") ("Dr Phang's Report"); and

(b) a psychiatric report authored by Ms Jackki Yim and Dr Gwee Kenji ("Ms Yim's Report").

The IMH Reports had been obtained by the Petitioner in contemplation of and for the purpose of claiming trial to and defending the charges brought against her.

2 The main issue which arises in CR 3/2016 is whether the IMH Reports are protected by litigation privilege and whether the DJ had erred in making the Disclosure Order. The Petitioner argues that the DJ had so erred and that this court should exercise its revisionary jurisdiction to:

(a) set aside the Disclosure Order;

(b) order that all copies of the IMH Reports be delivered up to the Petitioner by the Prosecution and be struck off the record; and

(c) order a retrial on the Charges by any other district judge other than the DJ.

3 Before setting out my decision and the reasons for my finding, I will briefly set out the background facts and the respective submissions of the parties.

Version No 1: 27 Oct 2020 (22:40 hrs)

Facts

Background facts

4 The Petitioner faces the charges of dishonestly receiving stolen property and transferring the same to another party.

5 For the purpose of assisting the Petitioner's defence, counsel for the Petitioner corresponded with the IMH to obtain a forensic psychiatric report on the Petitioner. This led to the creation of the IMH Reports. The IMH Reports *were not* obtained as a result of a court motion or on the application of the Prosecution.

6 The Petitioner decided not to use the IMH Reports and sought an assessment from Dr Lim Yun Chin ("Dr Lim") and Ms Joanne Toh ("Ms Toh") of Raffles Hospital. A psychiatric report was produced by Dr Lim ("Dr Lim's Report") and a psychological report was produced by Ms Toh ("Ms Toh's Report"). These reports will be collectively referred to as "the Raffles Reports". The Petitioner eventually decided to use only Ms Toh's Report in her defence.

The proceedings

7 The issue of the Petitioner's mental state was first brought up on 1 October 2014 when counsel for the Petitioner sought an adjournment at a pre-trial conference ("PTC") on the basis that the Petitioner was waiting for an IMH appointment. Five months later, counsel sent representations enclosing the Raffles Reports to the Attorney-General's Chambers on behalf of the Petitioner.

Version No 1: 27 Oct 2020 (22:40 hrs)

8 At the following PTC on 22 May 2015, the district judge hearing the PTC was informed that counsel had sent further representations to the Prosecution indicating that the Petitioner was willing to attend at IMH at the Prosecution's expense on condition that she be assessed by a different doctor who should have no access to her previous medical history with IMH, while reserving her right to exercise litigation privilege over any further medical report that may be produced by IMH.

9 At the second Criminal Case Disclosure Conference on 24 June 2015, the Prosecution informed the court that IMH had declined to provide a second opinion because it had already rendered an opinion on the Petitioner in the IMH Reports. The Prosecution then asked the Petitioner to disclose the IMH Reports but she refused to do so, citing litigation privilege.

10 Subsequently, on 11 November 2015, the Prosecution applied under s 235(1) of the CPC for disclosure of the IMH Reports ("the s 235 Application"). Thereafter on 18 April 2016, as part of this application, the Prosecution gave notice of its intention under s 231 of the CPC to adduce an additional witness at the trial (*ie*, Dr Phang).

11 The DJ indicated that he preferred to continue with the rest of the trial first and deal with the s 235 Application at an appropriate juncture. Dr Phang was called to the witness stand on 21 April 2016 and he gave evidence on IMH's policies and processes when assessing patients who wished to obtain a psychiatric assessment from any of its medical professionals. Dr Phang testified that before any forensic psychiatric assessment is undertaken, the subject would be cautioned that whatever was revealed in the course of the assessment would not be confidential, could be to the subject's disadvantage and could also be produced in court as evidence. He further testified that the

Version No 1: 27 Oct 2020 (22:40 hrs)

psychiatric assessment would not be proceeded with unless the subject understood and agreed with the caution.

12 The DJ then decided to proceed with an ancillary hearing on the same day (*ie*, 21 April 2016), pursuant to s 279 of the CPC, to decide the s 235 Application. The issue considered in the ancillary hearing was, presuming that the IMH Reports were subject to litigation privilege, whether there had been a waiver of such privilege. At the ancillary hearing, Dr Phang testified that he had issued a caution along the following lines to the Petitioner:

> This is a forensic psychiatric assessment therefore, by definition, whatever you tell me has to be recorded down. And whatever I record down may be subsequently produced in Court during your trial. So whatever you tell me is not confidential.

13 The following evidence was also given by Dr Phang:

(a) He had ascertained that the Petitioner understood and agreed to his caution at the commencement of the session, both by verbal indication and gestures.

(b) He assessed that the Petitioner understood English and therefore an interpreter was not necessary.

(c) While the IMH Reports were labelled "confidential", the confidentiality applied to the rest of the world but not in respect of the trial proceedings.

(d) He would always inform his patients that what they told him could be used in court in evidence against them regardless of who had made the request for the report.

Version No 1: 27 Oct 2020 (22:40 hrs)

(e) His clinical notes expressly reflected that he had "explained nature and purpose of psyche assessment, including no-confidentiality issue".

14 At the ancillary hearing, after Dr Phang had given his evidence, the Petitioner was asked whether she wished to take the stand. She declined to give evidence on this issue. The DJ eventually found that there was sufficient evidence to indicate a waiver of privilege and he ordered her to produce the IMH Reports to the Prosecution.

15 Immediately after the DJ rendered his decision, counsel for the Petitioner requested the Disclosure Order to be stayed so that a criminal revision could be brought before the High Court. This was rejected by the DJ. The Defence was therefore compelled to disclose the IMH Reports to the Prosecution.

16 The trial then proceeded with Dr Phang taking the stand and evidence was led from him as to the contents of the IMH Reports with questions put to him regarding the same.

17 On 25 April 2016, the Petitioner filed her application for the present criminal revision (*ie*, CR 3/2016). As part of this application, the Petitioner also sought a stay of the proceedings before the DJ. I granted this application on 29 April 2016.

The Petitioner's case

18 The Petitioner argues first that the IMH Reports were protected by litigation privilege and therefore could not be ordered to be disclosed pursuant to s 235(1) of the CPC.

Version No 1: 27 Oct 2020 (22:40 hrs)

19 Secondly, the Petitioner submits that litigation privilege had not been waived by the Petitioner. She relies on several basis to support this position:

(a) Dr Phang's evidence betrays a wrong and mistaken view of the law of confidentiality and litigation privilege; Dr Phang was mistaken in concluding that because he owed a duty to communicate the truth to the court, the communication between him and the Petitioner was not confidential.

(b) The evidence does not evince a loss or waiver of confidentiality.

(c) Even if there was a loss of confidentiality, this did not result in a loss or waiver of litigation privilege; there has to be an intentional and deliberate act to waive the legal privilege with complete awareness of the result of such waiver on the part of the Petitioner, which was lacking on the facts of the case.

(d) The Petitioner also seeks to rely on additional evidence which she has adduced via an affidavit dated 25 April 2016 ("the Additional Evidence") which states (at paras 73–76) that her command of the English language would not have allowed her to understand the significance of the caution rendered by Dr Phang to her before the commencement of the assessment. She also asserted that she did not recall what Dr Phang had said to her at the start of the session.

20 Thirdly, the Petitioner argues that serious injustice has been and will continue to be caused by the Disclosure Order. Because of the Disclosure Order and because Dr Phang is allowed by the DJ to testify as to privileged communications, the Petitioner is being forced to waive or forego litigation

Version No 1: 27 Oct 2020 (22:40 hrs)

privilege in order to defend herself. The Petitioner therefore avers that the court should exercise its revisionary power pursuant to s 400 of the CPC to set aside the Disclosure Order.

21 Additionally, the Petitioner submits that the court should order the delivery up and striking of all privileged materials from the record. Further, a retrial should be ordered before a different district judge as the privileged material would have had an impact on the DJ.

The Prosecution's case

22 The Prosecution submits that there is nothing to suggest that a serious injustice or palpable wrong had occurred which would justify the exercise of the court's revisionary power. According to the Prosecution, the Disclosure Order had been made correctly as the DJ had found that any litigation privilege had been waived. The Prosecution submits that by Dr Phang issuing his caution at the start of the commencement and by the Petitioner agreeing to proceed with the assessment, she had waived litigation privilege.

23 The Prosecution accepts that confidentiality and privilege are distinct legal doctrines and submits that the court was correct in ascertaining, based on Dr Phang's evidence, that privilege had been waived by the Petitioner. The Prosecution submits that the Petitioner's attempt to characterise Dr Phang's evidence as "irrelevant" because he used the language of confidentiality, and not privilege, is without merit. To do so would ignore the precise language utilised by Dr Phang which directly undercuts the purpose of litigation privilege, *ie*, to withhold information sought in contemplation for the purpose of litigation.

Version No 1: 27 Oct 2020 (22:40 hrs)

24 The Prosecution also points out that the Petitioner had the opportunity to challenge Dr Phang's evidence at the ancillary hearing but chose not to do so. Therefore, her attempt to now introduce the Additional Evidence has to be treated with suspicion. According to the Prosecution, the Additional Evidence being sought to be admitted should be rejected as they fail to meet the first and third conditions as laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*").

25 Finally, the Prosecution submits that the Disclosure Order should not be disturbed prior to the DJ's final judgment.

Issues before this court

26 There are several issues which have to be determined by the court:

(a) whether the Additional Evidence should be admitted ("the Additional Evidence Issue");

(b) whether the Petitioner's communication with Dr Phang is protected by litigation privilege ("the Privilege Issue");

(c) whether such privilege had been waived by the Petitioner ("the Waiver Issue"); and

(d) whether there is serious injustice such that the court should invoke its revisionary power to set aside the Disclosure Order, order the delivery up and striking out of all the privileged evidence from the record and order a retrial before a different district judge ("the Remedies Issue").

Version No 1: 27 Oct 2020 (22:40 hrs)

My decision

The Additional Evidence Issue

27 In my judgment, the Additional Evidence should not be admitted as the *Ladd v Marshall* conditions have not been satisfied. In *Tan Sai Tiang v Public Prosecutor* [2000] 1 SLR(R) 33 ("*Tan Sai Tiang*"), Yong Pung How CJ had endorsed the applicability of the *Ladd v Marshall* conditions in the context of admitting fresh evidence in a criminal revision.

28 With respect to the first *Ladd v Marshall* condition of non-availability, it is not disputed between the parties that the Petitioner could have given evidence as to her command of the English language and her understanding of Dr Phang's caution in the proceedings below but simply chose not to. The Petitioner, however, seeks to rely on *Tan Sai Tiang*, where it was observed by Yong CJ (at [19]) that a court may nevertheless admit evidence even if this condition had not been fulfilled if there were "extraordinary circumstances" wherein a failure to admit such evidence could result in a miscarriage of justice. In this regard, I observed in *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299 ("*Soh Meiyun*") (at [16]) that with respect to fresh evidence that is being sought to be admitted *on appeal*, there is a "spirit of greater willingness to admit such evidence" where "the fresh evidence would go towards exonerating a convicted person or reducing his sentence". While in this case, the Additional Evidence is not being adduced for the purpose of, nor does it have the direct effect of, exonerating the Petitioner or reducing her sentence, the Additional Evidence is ultimately being adduced to strike off the IMH Reports from the record which may have a bearing on the eventual determination of the Petitioner's guilt or culpability.

Version No 1: 27 Oct 2020 (22:40 hrs)

29 That being said, I find the Petitioner's explanation as to why she did not adduce such evidence in the proceedings below to be lacking and unpersuasive. The Petitioner argues that she chose not to take the stand during the ancillary hearing to give evidence as to her understanding of Dr Phang's caution because to do so would result in her running the "very real risk of waiving [legal professional privilege] over the communications with Dr Phang". However, given that the nature of the Additional Evidence pertains to the Petitioner's command and understanding of the English language and whether she understood the preliminary caution which had been given to her *prior* to the psychiatric assessment by Dr Phang, I do not think that it was reasonable for the Petitioner to have believed that the giving of such evidence would have prejudiced her position. Additionally, given that the Petitioner was represented by legal counsel throughout the proceedings, it was always open for counsel to have objected to the asking of questions which might compromise her right to litigation privilege and the Petitioner could have declined to answer such questions.

30 Further, I am of the view that her Additional Evidence is not so reliable that I can disregard the failure to satisfy the first *Ladd v Marshall* condition. The Petitioner's averments, that her command of the English language was so basic that she would not have understood the significance of what Dr Phang was saying, are self-serving and fly against the face of the other evidence before me:

(a) First, Dr Phang testified that the Petitioner was competent to communicate in English.

(b) Secondly, the investigating officer testified that the Petitioner was comfortable speaking in English.

Version No 1: 27 Oct 2020 (22:40 hrs)

(c) Thirdly, the chat logs between the Petitioner and one Fred Barton, with whom the Petitioner had an online relationship, showed that although she speaks in broken English, the Petitioner is able to understand and communicate competently in the language.

31 Considering all the circumstances, I decline to admit the Additional Evidence.

The Privilege Issue

32 The Petitioner argues that the IMH Reports are protected by litigation privilege and therefore could not be ordered to be disclosed unless privilege was waived (the issue of waiver is considered below at [42]–[53]). I note, however, that the Prosecution does not engage the issue of whether the IMH Reports even had a privileged status to begin with. It simply states in its submission that "[t]he DJ was correct in ascertaining that litigation privilege (*which was assumed*) had been waived" [emphasis added]. Therefore, while the Prosecution does not appear to readily accept that the IMH Reports are protected by litigation privilege, at the same time, it appears to be contented with proceeding on the assumption that there is such litigation privilege attached to the IMH Reports.

33 I will therefore proceed on the assumption that the IMH Reports are protected by litigation privilege although I pause here to make certain observations which would support the view that the IMH Reports do indeed fall within the protection of litigation privilege.

34 In the seminal decision of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367, the Court of Appeal noted at [44] that:

Version No 1: 27 Oct 2020 (22:40 hrs)

> … litigation privilege applies to every communication, whether confidential or otherwise so long as it is for the purpose of litigation. It also applies to communications from *third parties* whether or not they were made as agent of the client. This is the critical difference between legal advice privilege and litigation privilege … One is concerned with protecting confidential communications between lawyers and clients, and ***the other is concerned with protecting information and materials created and collected for the dominant purpose of litigation***. [emphasis in original in italics; emphasis added in bold-italics]

The Court of Appeal further held that two requirements must be satisfied before litigation privilege may be established (at [70]–[74]): (a) litigation must have been contemplated; and (b) the dominant purpose for which the advice had been sought and obtained was for anticipation or contemplation of litigation.

35 In the present case, it is clear that both of these requirements had been satisfied *vis-à-vis* the Petitioner's procurement of the IMH Reports. In this regard, the English Court of Appeal decision of *Regina v Davies* [2002] All ER (D) 159 ("*Davies*") is instructive. In *Davies*, the defence had obtained a psychiatric report on the accused person from one Dr Cope. The defence did not disclose this report to the prosecution and instead called evidence from two other doctors, Dr Kennedy and Dr Haldane. The prosecution came to learn of the existence of Dr Cope's report and applied to the trial judge for an order that it be disclosed. This order was granted and, as a result, Dr Cope provided statements to the prosecution and was called to give evidence for the prosecution. On appeal, the English Court of Appeal held that Dr Cope's report was privileged and that the trial judge should have excluded the evidence.

36 At this juncture, I address an authority which, although not raised by the Prosecution, might support the position that the IMH Reports, or at least

Version No 1: 27 Oct 2020 (22:40 hrs)

the information contained therein, were not privileged to begin with. In *re L (a minor*) (Police Investigation: Privilege) [1996] 2 WLR 395 ("*Re L (a minor)*"), a child was admitted to hospital in an unconscious state having consumed a quantity of methadone. The child's parents were registered heroin addicts who were receiving methadone on prescription. The mother's explanation was that the child had accidentally drunk the substance from a beaker left carelessly in the kitchen. The local authority instituted care proceedings in the county court as a result. The mother was given leave by the district judge to disclose the court papers to a consultant chemical pathologist, who was to give her an independent opinion as to whether L's medical condition when he was admitted to the hospital was consistent with the mother's account of events. The district judge's order required the report to be filed with the court and thereby made available to the other parties. The mother's solicitors filed the report as ordered without any attempt to vary the terms of the order. The area police authority learnt of the report's existence and asked for leave to be given a sight of the report to assist in their investigation as to whether a criminal offence had been committed. The district judge ordered disclosure to the authorities. The mother appealed against such disclosure on the basis of legal professional privilege or privilege against self-incrimination. This was rejected by the English Court of Appeal and the mother then appealed to the House of Lords. The House of Lords dismissed the appeal (by a majority of 3:2) and Lord Jauncey, in delivering the judgment of the majority noted the following (at 400):

> My Lords, I reject [the] contention [that the absolute nature of the privilege attaching to the solicitor-client relationship extended equally to all other forms of legal professional privilege]. There is, as Mr. Harris, for the city council and the police authority, pointed out, a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports by third parties prepared on the instructions of a client for the purposes of litigation. In

Version No 1: 27 Oct 2020 (22:40 hrs)

> the former case the privilege attaches to all communications whether related to litigation or not, but in the latter case *it attaches only to documents or other written communications prepared with a view to litigation*: *Waugh v. British Railways Board* [1980] A.C. 521, 533B, 537G, 544B. There is this further distinction that whereas a solicitor could not without his client's consent be compelled to express an opinion on the factual or legal merits of the case, a third party who has provided a report to a client can be subpoenaed to give evidence by the other side and cannot decline to answer questions as to his factual findings and opinion thereon. There is no property in the opinion of an expert witness: *Harmony Shipping Co. S.A. v. Saudi Europe Line Ltd.* [1979] 1 W.L.R. 1380, 1386G, *per* Lord Denning M.R. [emphasis added]

37 Although at first glance, the above passage seems to suggest that Dr Phang's opinions, as expressed in his IMH Reports, are not subject to litigation privilege and he may be compelled to give evidence as to the findings in the IMH Reports, the statement that "there is no property in the opinion of an expert witness" must be understood in its proper context. In *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380 ("*Harmony Shipping*"), a handwriting expert who was consulted the plaintiffs in an action concerning a charterparty was later approached by the defendants' solicitors to give an opinion on the same document. After giving them his opinion, the expert realised that it concerned the same matter and therefore informed the defendants' solicitors that he could no longer accept further instructions. This led the defendants to subpoena the expert to give his testimony in court. The plaintiffs then sought to set aside the subpoena or to restrain the expert from giving evidence in court. It was in this regard that Lord Denning MR observed (at 1384–1385) that there is no property in a witness, even an expert witness. It is instructive, however, to set out Lord Denning's observations in some detail:

> The question in this case is whether or not that principle applies to expert witnesses. They may have been told the substance of a party's case. They may have been given a great

Version No 1: 27 Oct 2020 (22:40 hrs)

> deal of confidential information on it. They may have been given advice to the party. Does the rule apply to such a case?
>
> *Many of the communications between the solicitor and the expert witness will be privileged. They are protected by legal professional privilege. They cannot be communicated to the court except with the consent of the party concerned. That means that a great deal of the communications between the expert witness and the lawyer cannot be given in evidence to the court. If questions were asked about it, then it would be the duty of the judge to protect the witness (and he would) by disallowing any questions which infringed the rule about legal professional privilege or the rule protecting information given in confidence* …
>
> Subject to that qualification, it seems to me that an expert witness falls into the same position as a witness of fact. The court is entitled, in order to ascertain the truth, to have the actual facts which he has observed adduced before it and to have his independent opinion on those facts. … *In this particular case the court is entitled to have before it the documents in question and it is entitled to have the independent opinion of the expert witness on those documents and on those facts – excluding, as I have said, any of the other communications which passed when the expert witness was being instructed or employed by the other side.* Subject to that exception, it seems to me … that the expert witness is in the same position when he is speaking as to the facts he has observed and is giving his own independent opinion on them, no matter by which side he is instructed.
>
> [emphasis added]

38 From the above, it becomes clear that although there is no property in an expert witness, this does not change the fact that any privileged communications made to the expert will remain privileged. Lord Denning had spelt that out expressly in the quote above. The English Court of Appeal in *Davies* had considered *Harmony Shipping* as well and reached a similar conclusion (at [28]):

> Thus, in both *Harmony Shipping* and [*R v King* [1983] 1 WLR 411], the handwriting expert's opinion was expressed by reference to material *which was not itself privileged,* that is by reference to facts which he himself had observed from documents provided to him by solicitors, for which the solicitor's clients could not claim privilege. The court is

Version No 1: 27 Oct 2020 (22:40 hrs)

> entitled to have the independent opinion of the expert on such documents and on the actual facts which he has observed in circumstances which were not privileged. *But these authorities do not, in our judgment, support the proposition that the court is additionally entitled to have the opinion of an expert which is based on material which is privileged and which is provided to the expert in privileged circumstances.* … [emphasis added]

39 Although Lord Jauncey did not expressly draw the distinction as was done in *Davies* (*ie*, opinions based on privileged material contrasted with opinions based on non-privileged material), on the facts of *Re L (a minor)*, Lord Jauncey had found as well (at 402) that "all the material to which [the doctor] had access was material which was already available to the other parties". Therefore, *Re L (a minor)* concerned an expert opinion which was based on non-privileged material and which undoubtedly would have had a bearing as to why the House of Lords found that the opinion was not subject to privilege. In this regard, the holding in *Davies* would be entirely consistent with *Re L (a minor*).

40 Such an understanding is also affirmed in Paul Matthews & Hodge M Malek, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012), wherein the learned authors note the following (at para 22.18):

> Nor is there any property in an expert witness and he can be made the subject of a witness summons served by the other side to appear at trial if he is not called by his own client. *However, it is inappropriate to use a witness summons and seek to compel an expert who had been instructed by another party but not called, into giving his opinion which had been based on privileged material provided to the expert in privileged circumstances.* [emphasis added]

41 Given that the IMH Reports were based on material which was provided to Dr Phang in privileged circumstances, I am of the view that the IMH Reports and the opinions of Dr Phang contained therein are protected by litigation privilege, unless waived by the Petitioner.

Version No 1: 27 Oct 2020 (22:40 hrs)

The Waiver Issue

42 Given that the IMH Reports and Dr Phang's findings are protected by litigation privilege, it remains to be considered whether such privilege had been waived by the Petitioner.

43 As noted above, the Petitioner first argues that Dr Phang was incorrect in taking the view that because he was a forensic psychiatrist, he was in the position of being both a medical professional and a court-appointed expert with an overarching responsibility to communicate the truth in court, and could therefore give evidence of the psychiatric assessment with the Petitioner notwithstanding the Petitioner's objection. According to the Petitioner, if this position were adopted, all expert witnesses (who would owe a duty to communicate the truth to the court) would never owe confidentiality to their clients and privilege would never apply to communications between them and their clients. While there may be some validity in this contention, I do not think it is necessary to go into that because ultimately even if Dr Phang had been mistaken in believing that he did not owe a duty of confidentiality to the Petitioner, and that his caution was rendered on the basis of such a misconception, the fact of the matter is that he had indeed administered such a caution and the Petitioner had acknowledged the same.

44 The only relevant question to be considered in the circumstances here is whether the Petitioner's understanding of the *substance* of the caution and her acknowledgment of this caution amounted to a waiver of litigation privilege.

45 According to Dr Phang, the words that he typically uses are as follows:

> This is a forensic psychiatric assessment therefore, by definition, whatever you tell me has to be recorded down. And

Version No 1: 27 Oct 2020 (22:40 hrs)

> whatever I record down may be subsequently produced in Court during your trial. So whatever you tell me is not confidential.

46 According to the Petitioner, the caution, when seen in its context, simply means that "Dr Phang might be obliged to disclose [the] communications [from] the Petitioner to Court if compelled to do so by law" and that "[t]o the extent that the Petitioner agreed with this, that is entirely correct as a matter of law, subject always to her right to prevent a compulsory disclosure of such communications on the basis of [legal professional privilege]".

47 In my view, this is an entirely reasonable understanding of the caution. The caution may also be reasonably understood to mean that whatever is recorded down may be to the Petitioner's detriment and therefore if she chooses to rely on Dr Phang's Report as evidence, Dr Phang would have to testify as to the entire contents of the report in court. Another possible understanding of Dr Phang's caution could be that the usual doctor-patient confidentiality which would arise would not apply between him and the Petitioner. Therefore, if Dr Phang is compelled by law to give evidence, an action cannot lay against him for breach of confidentiality if he discloses what would ordinarily be confidential information.

48 It should be noted that, as highlighted by the Petitioner, the expression "waiver" is used to describe a "voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise". Additionally, "it cannot meaningfully be said that a party has voluntarily elected not to claim a right or raise an objection if he is unaware that it is open to him to make the claim or raise the objection" (see the observations of Lord Bingham in *Millar v Dickson* [2002] 1 WLR 1615 at

Version No 1: 27 Oct 2020 (22:40 hrs)

[31]). It has also been noted in *Regina v Perron* [1990] RJQ 752 (at [52]) that "waiver of such a fundamental right [*ie*, privilege] must be clear and done in complete awareness of the result".

49 In *Yeo Ah Tee v Lee Chuan Meow* [1962] MLJ 413, a legally-aided plaintiff had allegedly made a statement to the Legal Aid Bureau, which had been recorded by a Legal Aid Bureau investigator, and the question which arose was whether that statement was inadmissible. The plaintiff's position at the trial below was that he had never made such a statement and testified that "if [he had] made a statement to the Legal Aid [he] would not object to it being produced". This led the trial judge to find that privilege had been waived by the plaintiff. The Court of Appeal, however, found that the above testimony could not be construed as an express waiver by the plaintiff of the privilege attached to the statement, and held as follows:

> On the face of that evidence, I am unable to construe it as an express waiver by the plaintiff of the privilege and indeed, in my view, *it falls short of that express consent of the client which is required before any such disclosure can be made.* … I must confess I am unable to see how the plaintiff could be said to expressly consent to the production of a statement which he insists he never made. In any event, *I do not think the position was ever made clear to him as to what his position was in the matter or what was required of him.* [emphasis added]

50 The above case demonstrates the need for courts to exercise caution before making a conclusive determination that privilege had been waived. As was noted by Moore-Bick LJ in *R v Ahmed (Muhammed)* [2007] EWCA Crim 2870 at [23], "the importance of legal professional privilege to the proper administration of justice is such that it should be *jealously guarded* and it follows that courts should not be astute to hold that a litigant has lost the right to claim privilege save to the extent that justice and the right to a fair trial make that necessary" [emphasis added].

51 In most circumstances, waiver of such privilege is found because the accused person himself seeks to rely on the expert report in his defence. I do not think that simply by acknowledging this caution, the Petitioner had unequivocally agreed that she would be amenable to disclosing the IMH Reports to the Prosecution without objection. This must be contrasted with a situation where the court orders an accused person to undergo an IMH assessment or where an accused person agrees to submit to an IMH assessment upon a motion by the Prosecution. In such circumstances, it may be said that by virtue of agreeing to attend the assessment, the accused person would already have waived any privilege to the medical reports since it would be obvious that the purpose of the assessment is to enable the court to have a proper appreciation of the matter on which the assessment was called for. The court and the Prosecution should have sight of such reports. Therefore, when a forensic psychiatrist issues this caution to such accused persons, their acknowledgement may be construed as confirmation of a waiver of privilege. Support for this proposition may be found in *Davies*, where the English Court of Appeal noted (at [33]) that "[i]f a defendant agrees to be interviewed by a doctor instructed by the prosecution, he has the opportunity of being advised and knowing that what he says to the doctor may be used in evidence at his trial. If he is interviewed by a doctor at the instigation of his own lawyers for the purpose of his own defence, he is entitled to assume that what he says has the same status as his communications with his own lawyers".

52 The context in which an expert report is produced is therefore critical. In the present case, where it is the Petitioner who sought an assessment from IMH out of her own volition so as to assist in her defence, I do not think that her acceptance of the caution can amount to a "clear, informed and unequivocal" election to waive her right to litigation privilege. Although Dr

Version No 1: 27 Oct 2020 (22:40 hrs)

Phang has testified that he would issue the same caution to all patients no matter which agency makes the request for the report, this does not affect the analysis. I wholly appreciate, as Dr Phang said, what he had explained to the Petitioner was what he had been doing in every instance when a psychiatric assessment was required of him. But not being a lawyer who is conversant with the law on professional privilege, even if his subjective understanding was that the Petitioner was indeed waiving privilege, that is not sufficient. The entire circumstances surrounding the matter would have to be examined to ensure that the Petitioner had in fact waived the privilege, bearing in mind the distinction between confidentiality and privilege. In this regard, the perspective and understanding of the Petitioner are crucial.

53 Therefore, I am of the view that the DJ had erred in finding, on the basis of Dr Phang's evidence, that the Petitioner had waived litigation privilege over the IMH Reports.

The Remedies Issue

54 The final question to be considered is whether, in the light of the DJ's error, this court should exercise its revisionary power to correct the error.

Whether the Disclosure Order should be set aside

55 The Petitioner has sought to rely on s 400 of the CPC which provides that the High Court may "call for and examine the record of any criminal proceedings before any State Court to satisfy itself as to the correctness, legality or propriety of any judgment, sentence or order recorded or passed and as to the regularity of those proceedings". Such a power is also found in 27(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) which states that the High Court may "if it appears desirable in the interests of

Version No 1: 27 Oct 2020 (22:40 hrs)

justice, … at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and … may give to the subordinate court such directions as to the further conduct of the matter or proceeding as justice may require".

56 In *Public Prosecutor v Yang Yin* [2015] 2 SLR 78, Sundaresh Menon CJ summarised the well-established principles governing the exercise of revisionary powers of the High Court:

> 25 Having decided that this court could exercise powers of revision in the present case, the next question that arose for consideration was whether I should exercise those powers. It is settled law that the threshold is that of "serious injustice" and that reversionary power should be exercised "sparingly" (see *Yunani bin Abdul Hamid v PP* [2008] 3 SLR(R) 383 at [47]). The requirement of serious injustice was explained by Yong Pung How CJ in the High Court decision of *Ang Poh Chuan v PP* [1995] 3 SLR(R) 929 at [17] in the following terms:
>
>> … there cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. But generally it must be shown that there *is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below*. …
>
> 26 A similarly high threshold for intervention was also recognised in *Knight Glenn Jeyasingam v PP* [1998] 3 SLR(R) 196 at [19] where it was stated:
>
>> … The court's immediate duty is to satisfy itself as to the correctness, legality or propriety of any order passed and as to the regularity of any proceedings of that subordinate court. However, this is not sufficient to require the intervention of the courts on revision. The irregularity or otherwise noted from the record of proceedings must have resulted in *grave and serious injustice*. …
>
> [emphasis in original]

Version No 1: 27 Oct 2020 (22:40 hrs)

57 The Prosecution has argued that the high threshold of a "serious injustice" or "palpable wrong" has not been satisfied, pointing to examples of cases where such a serious injustice had been found (*eg*, the finding that an accused person's statement amounted to a confession to a charge when the statement did not contain admissions to all of the elements of the charge; or the entering of a plea of guilt by an accused person even where the Statement of Facts did not disclose all the necessary elements of the offence).

58 While indeed the examples cited above amount to extremely egregious instances of injustice wherein the guilt of an accused person had been improperly or inappropriately determined, one need only look towards the case of *Public Prosecutor v Yang Yin* to find an example of a serious injustice having been found despite the order below having no immediate or direct bearing on the guilt of an accused person. In *Public Prosecutor v Yang Yin*, the district judge had granted the accused person bail in the sum of $150,000 with one surety or $75,000 with two sureties. The Prosecution sought a revision of this order. Menon CJ found it appropriate to exercise the High Court's revisionary powers and noted the following:

> 43 In these circumstances, I considered that it was appropriate for me to intervene. The misapplication of the burden of proof as well as the grant of bail without appreciating that the pull of bail was absent would have resulted in the release of the respondent on bail to sureties who would have had no incentive to ensure that the respondent complied with the bail conditions. Further, the respondent could in effect have paid for his freedom through the provision of funds which came in the first instance from his parents, but which in turn could possibly have come from the respondent himself (see the two transfers I have referred to at [31] above). *In my judgment, these errors resulted in the possibility of grave and serious injustice, which met the threshold for the invocation of the court's powers of revision.* In all the circumstances, including the fact that the respondent faced a number of charges disclosing offences that were by no means trifling in nature, there was a significant flight risk. The question then was whether to direct that the order

Version No 1: 27 Oct 2020 (22:40 hrs)

> granting bail be revoked altogether or whether the quantum of bail should be increased. [emphasis added]

59 In my view, the incorrect determination by the DJ that privilege over the IMH Reports had been waived and his consequent order that the reports be disclosed to the Prosecution also carry the "possibility of grave and serious injustice". In *Davies*, the English Court of Appeal found that Dr Cope's evidence should not have been admitted due to litigation privilege and that without her evidence, there would have been no evidence to gainsay that of the other doctors to the effect that the appellant suffered from abnormality of mind such as to have substantially impaired his mental responsibility for his acts in killing his brother (at [34]). The Court of Appeal further noted that although the jury was not bound by the other doctors' evidence, "absent Dr Cope's evidence, this court cannot regard the conviction for murder as safe where the issue was balanced and the case in support of the defence intrinsically quite strong" (at [34]). As the Crown did not seek a retrial in that case, the Court of Appeal substituted a verdict of manslaughter by reason of diminished responsibility (at [39]).

60 It is therefore evident from the above that the incorrect admission of a psychiatric report which should be kept confidential and is protected by litigation privilege may result in an improper conviction. This, in my view, gives rise to a "possibility of grave and serious injustice".

61 I note that the Prosecution has argued that that there is no basis to seek an exercise of the High Court's revisionary powers during the course of the trial, presumably alluding to the fact that even if the DJ's decision was wrong, this could be corrected on appeal. While I recognise that this could be a possible approach, it does not mean that it should be applied in every such situation. It seems to me that this submission might be based on the holding of

Version No 1: 27 Oct 2020 (22:40 hrs)

Chan Sek Keong CJ in *Azman bin Jamaludin v Public Prosecutor* [2012] 1 SLR 615. There, the applicant sought to state a case to the High Court pursuant to s 263 of the former CPC (which is similar to s 395 of the current CPC) on the basis that the evidence of one Cpl Hakim should not have been allowed by the district judge as both parties had already closed their respective cases and Cpl Hakim's testimony was not rebuttal evidence. Chan CJ held that the words "judgment, sentence or order" under s 263 of the former CPC only applied to final and not interlocutory orders. In so finding, Chan CJ noted the following (at [51]):

> There are two other considerations which have persuaded me that s 263 of the CPC should be interpreted narrowly. … The second consideration is that even if the District Judge's Order has prejudiced the Applicant, resulting in his conviction (a conclusion which still cannot be determined at this stage of the proceedings), the Applicant can appeal against his conviction on the ground that Cpl Hakim's evidence was wrongly admitted. A conviction caused by the wrongful admission of evidence may be set aside on appeal under s 396 of the CPC (corresponding to s 423 of the CPC 2010) if it has occasioned a failure of justice. As such, the Applicant is not left without a remedy if the District Judge's Order is not reversed as this stage of the proceedings.

62 It should be noted, however, that Chan CJ's observations were not made in the context of an attempt to invoke the revisionary powers of the High Court. In fact, in *Azman*, the Prosecution sought to argue that because the applicant could have invoked the court's revisionary powers (pursuant to s 266(1) of the former CPC, which is similar to s 400(1) of the current CPC) to review the District Judge's order, s 263 of the former CPC should be read narrowly. Chan CJ declined to accept or reject the Prosecution's submission on that issue and left it to be decided in a future case although he noted that it would be "odd if the revisionary jurisdiction of the High Court were to apply to a subordinate court's interlocutory order … since the words "finding, sentence or order" in s 266(1) of the [former] CPC would also suggest the

Version No 1: 27 Oct 2020 (22:40 hrs)

same element of finality that the rather similar words in ss 241 and 263 of the [former] CPC (*viz*, "judgment, sentence or order") do" (at [54]).

63 This *obiter* observation of Chan CJ, however, has been put to rest by Menon CJ's holding in *Public Prosecutor v Yang Yin* where he noted the following:

> 21 I agreed with both the reasoning and conclusion reached by Tay J in [*PP v Sollihin bin Anhar* [2015] 2 SLR 1]. There was however one further observation that came to mind as I considered this application. This concerned the words "judgment, sentence or order" which may be found in s 400 of the CPC. I had earlier concluded that an order made on a bail application did not come within the same words found in s 377 of the CPC because it lacked the necessary quality of finality. If the same words must mean the same thing in each of these sections, it might be argued (although this argument was not raised before me) that the High Court could have no revisionary powers with respect to orders made on bail applications because these orders lacked the same necessary quality of finality and so could not come within the ambit of the words "judgment, sentence or order" in s 400 of the CPC.
>
> 22 *Having considered the matter, I do not think that these words can be interpreted in the same way in both provisions. Section 400 of the CPC is found in "Division 3–Revision of proceedings before State Courts" and the word "order" there should be read purposively to include any order that is liable for revision under the powers conferred in s 401(2) of the CPC. On the other hand, s 377 is found in "Division 1–Appeals" which is concerned with the issue of when an appeal might be brought and, correspondingly, with the finality of orders.*
>
> [emphasis added]

64 I therefore do not think that one can transpose Chan CJ's comments regarding the availability of an appeal should a conviction be wrongly meted out on the basis of incorrectly admitted evidence, to the present application. In my view, there is the possibility of serious injustice if evidence which may have a bearing on the conviction of an accused person, and which should not be disclosed at all on account of privilege, is admitted. The Prosecution should

Version No 1: 27 Oct 2020 (22:40 hrs)

prove its case against an accused person beyond a reasonable doubt based on the evidence which the Prosecution is entitled to adduce. Whether there should be a retrial ordered on account of wrongly admitted evidence must depend on the stage of the trial at which the wrong admission of evidence arose and the nature of the wrongly admitted evidence. The availability of an avenue of appeal at the end of the day may not eradicate the injustice which could be caused by such wrong admission. In the circumstances of this case, and for the further reasons alluded to at [83]–[87] below, a retrial is a necessary and just order to make.

65 In this regard, I agree with the Petitioner that the Malaysian case of *Public Prosecutor v Tan Sri Eric Chia Eng Hock* [2006] 4 MLJ 697 (*"Eric Chia*") is instructive. There, the sessions court judge had rejected the Public Prosecutor's application for the admission of certain evidence taken in Hong Kong. Upon application by the Public Prosecutor, the Malaysian High Court exercised its powers of revision and ordered that the evidence taken in Hong Kong be admitted as evidence in the trial of the appellant. In so ordering, the High Court noted the following:

> [5] Miscarriage of justice is a wide but not an abstract concept. This court is to determine that there is fair play all around, in this instance to balance the interests of the Public Prosecutor who represents the public at large and the accused person. …
>
> [6] It is my view that the issue at hand is certainly open to a revision by this court. It is also my view that to disallow that Hong Kong evidence would be a miscarriage of justice in the sense that the prosecution would be hampered from putting across its full and best evidence for the trial court's consideration. As such, I disagreed with the stand taken on this preliminary point that this court is barred from reviewing the order made by the learned sessions court judge, I cannot see any legal basis for restraining this court's powers in exercising its revisionary power. …

Version No 1: 27 Oct 2020 (22:40 hrs)

This decision was upheld by the Malaysian Court of Appeal (by a majority of 2:1) in *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2006] 3 MLJ 693.

66 Just as the incorrect exclusion of evidence in *Eric Chia* was seen to be a miscarriage of justice which "hampered" the prosecution from putting across its full and best evidence, on the obverse side of that coin, the wrongful inclusion of evidence should similarly be seen as such. This is especially so when it is considered that the inclusion of the evidence in the present case is one which derogates against a litigant's right to legal professional privilege, which has been recognised as a "fundamental human right" or a "basic tenet of the common law" (per Belinda Ang Saw Ean J in *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998 at [42]).

67 Furthermore, the Petitioner has highlighted that with the disclosure of the IMH Reports, she is being forced to waive or forego her entitlement to litigation privilege over these documents and the contents contained therein. The Prosecution would be free to rely on the Reports and cross-examine Dr Phang on the privileged communications and in order to rebut Dr Phang's evidence, the Petitioner would then have to divulge privileged communication between the two. By not correcting the erroneous Order issued by the DJ, the error would only be further perpetrated through the course of the trial and I am of the view that this would be a wholly unsatisfactory state of affairs.

68 Accordingly, I exercise this court's revisionary power to set aside the Disclosure Order made by the DJ.

Version No 1: 27 Oct 2020 (22:40 hrs)

Whether the IMH Reports should be delivered up and struck off from the record

69 As noted by the Petitioner, there is a line of cases beginning with the much criticised decision of *Calcraft v Guest* [1898] 1 QB 759 ("*Calcraft*") where it was held that privilege is no barrier to the admissibility of the secondary evidence of the documents (once they had come into the possession of the defendant), that being an issue governed solely by the question of relevance. Subsequently, it was held in the decision of *Lord Ashburton v Pape* [1913] 2 Ch 469 ("*Lord Ashburton*") that the court would have the equitable jurisdiction to restrain the publication of confidential information. The court in *Lord Ashburton* noted that *Calcraft* merely stood for the proposition that secondary evidence of documents may be admissible into evidence even if the originals were privileged from production. However, the fact that these documents might be admissible did not affect the court's equitable jurisdiction to grant an injunction to order their delivery up or to restrain their publication or copying on the basis that they contained confidential material which had been improperly obtained (see *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 ("*HT SRL*") at [23]–[27] where Hoo Sheau Peng JC provides a summary of the two English cases).

70 Subsequently, in *Goddard v Nationwide Building Society* [1986] 3 WLR 734 ("*Goddard*"), May LJ reconciled the decisions of *Calcraft* and *Lord Ashburton* and noted as follows (at 743F–743G):

> If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them. …

Version No 1: 27 Oct 2020 (22:40 hrs)

71 The observations of *Goddard* was cited with approval by Kan Ting Chiu J in *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR(R) 42 ("*Tentat*") where he noted (at [39]–[42]) that the critical question is whether the privileged documents had already been "used" (*ie*, whether the documents had been adduced in evidence or have otherwise been relied on at trial).

72 In the subsequent High Court decision of *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833, Lai Siu Chiu J (at [23]) interpreted Kan J's observations as "reject[ing] the principles stated in *Calcraft* in favour of a more protective attitude towards privileged documents". Whether Kan J's observations did amount to a rejection of the principle in *Calcraft* has been a matter of some debate and most recently, in *HT SRL*, Hoo JC concluded that she did not believe that Kan J had rejected the principles stated in *Calcraft* (at [39]):

> One point to note is that Lai J expressed the view that "it seemed clear that Kan J had actually rejected the principles stated in *Calcraft* in favour of a more protective attitude towards privileged documents" (at [23]). With respect, I do not believe that Kan J rejected the principles stated in *Calcraft*. While he acknowledged that the "rule [in *Calcraft*] has engendered disagreement and controversy" (see *Tentat* at [28]), he subsequently affirmed that "Calcraft is established law" (at [38]). Furthermore, by endorsing *Goddard* (see *Tentat* at [34], cited at [34] above), Kan J appears to have implicitly endorsed *Calcraft*. In *Goddard*, the court attempted to reconcile, on a technical level, the operation of both the common law rule of evidence articulated in *Calcraft* and the equitable jurisdiction of the court to restrain breaches of confidence, as exemplified in *Lord Ashburton*.

This led Hoo JC to then provide the following summary of the law:

> 40 In my view, the following propositions may be distilled from the cases, which I adopt and apply. First, the fact that a document is privileged is not a barrier to the admissibility of copies of the same into evidence. Second, the court may, in

Version No 1: 27 Oct 2020 (22:40 hrs)

> the exercise of its equitable jurisdiction to restrain breach of confidence, restrict the disclosure and use of privileged documents which have been disclosed to third parties to protect its confidential character. Third, the court may restrain the use of the privileged documents by way of an order to expunge offending portions of pleadings or affidavits. The court is not limited to an order for delivery up or the grant of an injunction. Fourth, such an application must be filed before the privileged documents have been formally admitted into evidence. After the privileged documents have entered into evidence, their exclusion would then fall to be governed by the common law rules on evidence.

73 Notwithstanding the authorities above, the Petitioner has sought to argue that *Calcraft* should not be followed as it is "no longer followed throughout virtually all the Commonwealth", citing authorities from New Zealand, Canada and Hong Kong as examples of this. While there may be some merit to this contention, it remains to be noted that our courts have not rejected the application of *Calcraft* in Singapore. In the recent decision of *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829, the Court of Appeal affirmed Hoo JC's summary and review of the line of cases emanating from *Calcraft* and noted, albeit in *obiter*, that "it is not entirely satisfactory that the question of whether privileged documents will be admitted as evidence should depend on when, in the course of litigation, applications are brought and steps are taken to restrain their use". Given that the Prosecution has not in fact made any submissions on this issue, I will not make any definite pronouncement on the same.

74 It should, however, be noted that *Calcraft* and the local decisions which considered *Calcraft* did not concern a criminal matter. In the decision of *Citic Pacific Limited v Secretary for Justice and Commissioner for Police* [2012] HKCA 153 ("*Citic*"), the Hong Kong Court of Appeal, in my view, succinctly addressed the difficulty with applying the position in *Calcraft* to criminal proceedings:

Version No 1: 27 Oct 2020 (22:40 hrs)

> 51. … it seems to me to be inherently contradictory to say that privilege, although a fundamental human right unassailable to competing issues of public interest, *may nevertheless be lost in criminal matters without any intention on the part of the holder, indeed on no more than a whim of fate; that is, by accident or inadvertence, or even (at the outer extreme) by the surreptitious conduct of a third party.* I do not accept that the Basic Law affords such frail protection. … [emphasis added]

75 That being said, I do note that there is a line of English decisions emanating from *Butler v Board of Trade* [1971] 1 Ch 680 ("*Butler*") (see also *R v Tompkins* (1978) 67 Cr App R 181) which had considered the applicability of the principle in *Calcraft* and the exception in *Lord Ashburton* in criminal proceedings and had reached a contrary conclusion. In *Butler*, a letter had been sent from the plaintiff's solicitor to the plaintiff and a copy of this letter was subsequently sent to the Official Receiver of a company in compulsory liquidation. This led to the Board of Trade coming into possession of this letter and the Board intended to use the letter in a criminal prosecution against the plaintiff for fraudulent trading. The plaintiff sought a declaration from the court that he was entitled to invoke the equitable jurisdiction of the court to restrain the Board of Trade from tendering a copy of the letter in evidence on the ground that the letter was privileged and the copy confidential. Goff J (as he then was) dismissed the plaintiff's action and found that the Crown was entitled to adduce the evidence for the purpose of the criminal prosecution. In so finding, Goff J noted the following (at 690–691):

> … there are two conflicting principles, the private right of the individual and the interest of the state to apprehend and prosecute criminals …
>
> In my judgment, it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged. It is not necessary for me to decide whether the same result would

Version No 1: 27 Oct 2020 (22:40 hrs)

> obtain in the case of a private prosecution, and I expressly leave that point open.
>
> My reasons for the conclusion I have reached are as follows: First, it is clear that if the copy letter were in the hands of a third party I would in restraining him have to except the power of the trial court to subpoena him to produce the letter and his obligation to comply with that order … It would be strange if the defendants could subpoena a witness to produce this document yet, having it themselves, not be allowed to tender it in evidence. Secondly, and even more compelling, is the effect of the conflict between the two principles to which I have already referred. … it seems to me that the interest and duty of the defendants as a department of the state to prosecute offenders under the Companies Act must prevail over the offender's limited proprietary right in equity to restrain a breach of confidence … This view of the matter is further supported by *Ghani v. Jones* [1970] 1 Q.B. 693 itself, and the statement by Lord Denning M.R. at pp. 708-709 of the relevant principles, and particularly the second and third, guiding the right of the police to retain and use articles where no man has been arrested or charged and a fortiori where, as here, a criminal prosecution is actually pending. I find some further support for this conclusion in *Saull v. Browne* (1874) 10 Ch.App. 64 and *Kerr v. Preston Corporation* (1876) 6 Ch.D. 463, which say that in general a court of equity will not interfere with a criminal prosecution, although the question there was one of restraining it altogether.

76 The case of *Butler* has never been considered in any reported judgment by our courts although I note that it has faced some criticism from other courts and academics alike. For example, in *Goddard*, Nourse LJ noted that the New Zealand Court of Appeal, in *R v Uljee* [1982] 1 NZLR 561, had declined to apply the principle in *Butler* and he opined as follows (at 686):

> Sixth, the distinction between civil proceedings and public prosecutions made in *Butler v. Board of Trade* [1971] Ch. 680 was again one which was made on grounds of public policy. The distinction has since been adopted and applied by the Criminal Division of this court in *Reg. v. Tompkins*, 67 Cr.App.R. 181. It can now be disregarded only by the House of Lords
>
> Finally, it is to be noted that the Court of Appeal in New Zealand, after an extensive consideration of the authorities, including *Calcraft v. Guest, Butler v. Board of Trade* and *Reg.*

Version No 1: 27 Oct 2020 (22:40 hrs)

> *v. Tompkins*, recently declined to apply the rule of evidence in a criminal case and held that the evidence of a police constable who had happened to overhear a privileged conversation between the accused and his solicitor … was not admissible: see *Reg. v. Uljee* [1982] 1 N.Z.L.R. 561. The practical result of the decision would seem to be to leave the spirit of *Lord Ashburton v. Pape* [1913] 2 Ch. 469 supreme in both civil and criminal proceedings in that jurisdiction, *a supremacy for which in my respectful opinion there is much to be said in this.*
>
> [emphasis added].

Indeed, in the decision of *Citic*, the Hong Kong Court of Appeal had considered the case of *Butler* and chose instead to adopt the New Zealand approach.

77 In R G Toulsen and C M Phipps, *Confidentiality* (Sweet & Maxwell, 3rd Ed, 2012), the learned authors similarly opined (at para 18-068) that:

> Where privileged information has been improperly or accidentally disclosed without the consent of the person entitled to the benefit of it, the court ought not to conduct a general balancing exercise in deciding whether to grant relief to protect the privilege. Such relief ought to be granted unless there are other grounds for not doing so (for example, that the information has already been deployed publicly or so widely that it can no longer sensibly be regarded as confidential). This is probably the present law, but it is not entirely settled. [emphasis added]

78 While I acknowledge the difficulties of the holding in *Butler*, I am of the view that due to the particular facts of the present case, I need not express an opinion on the applicability or validity of its holding to arrive at my conclusion.

79 First, the present case is different insofar as it did not concern an inadvertent disclosure of the privileged documents to the opposing party (as was the case in the above cited decisions). Instead, the Petitioner was

Version No 1: 27 Oct 2020 (22:40 hrs)

compelled to do so by the Disclosure Order of the DJ. It would be highly unsatisfactory for this court to find that the Disclosure Order was erroneously rendered, yet be unable to strike out the IMH Reports from the record. As a master of its own processes, this court must be able to correct errors made by the lower courts without compromising the rights of the Petitioner.

80 Secondly, the purpose of the exercise of the High Court's revisionary powers must be taken into account. As was noted in *Public Prosecutor v Yang Yin* (at [23]), where the threshold for exercising a court's revisionary power is met, "the court should be in a position to exercise its *wide powers* even in relation to orders that are not final in nature" [emphasis added]. Menon CJ further noted that "[t]he operative concern in an application for revision … is the avoidance of serious injustice". As noted above, in *Davies*, the English Court of Appeal had seen it fit to substitute the judgment of the court below on the basis of reliance on evidence which should never have been admitted due to its privileged nature. If that decision is correct, as I think it is, there should be no reason why the High Court should not be able, at this juncture, to strike all privileged material off the record. The revisionary powers of the High Court is meant to correct the injustice that has been precipitated by an incorrect order below and, therefore, if the Disclosure Order is to be set aside, it should follow that the revisionary powers of the High Court should entitle it to place the Petitioner in the position she would have been in if the erroneous Disclosure Order had not been made.

81 Thirdly, I would highlight that the Petitioner had done all it could to prevent the evidence from being used in court – she applied for a stay of the proceedings below immediately after the DJ ordered the disclosure of the IMH Reports so that she may proceed with the criminal revision. This, however, was rejected by the DJ. It was only subsequently after the Petitioner had filed

Version No 1: 27 Oct 2020 (22:40 hrs)

her application for the criminal revision that a stay of proceedings was granted by this court. The error of the DJ in ordering the disclosure of the IMH Reports was therefore further compounded by his decision to refuse the stay of proceedings and it would be, in my view, a miscarriage of justice if the cumulative effect of these errors would result in the Prosecution now being able to rely on the privileged material when it should never have been allowed to.

82 Therefore, I conclude that the IMH Reports and all privileged material in the Prosecution's possession should be delivered up and all such material should be struck off from the record.

Whether a retrial should be ordered before a different district judge

83 The Petitioner relies on a passage from *ITC Film Distributors Ltd and others v Video Exchange Ltd and others* [1982] Ch 431 ("*ITC*") (per Warner J at 441) to support her contention that a retrial should be ordered before a different district judge:

> On the other hand, I do not think it possible for me now to exclude the documents that I have already looked at. Of course, it often happens that a judge is called upon to look at a document in order to see whether it is admissible in evidence. If, having done so, he decides that it is not, he puts its contents out of his mind, even though that is not always an easy mental feat. But there the documents, although perhaps they have not been formally put in evidence, have in fact been used as evidence. It is quite impossible for me, for instance, to ignore the answers given by Mr. Browne when such documents were put to him. I therefore think that the provisos in my order must stand as regards those documents. …

According to the Petitioner, this passage implies that the DJ who has already seen the IMH Reports and heard the testimony of Dr Phang similarly cannot realistically be expected to disregard the privileged material.

Version No 1: 27 Oct 2020 (22:40 hrs)

84 I must observe that the passage quoted above was made in a different context and for a different purpose than what is being advanced by the Petitioner. In *ITC*, a number of privileged documents had been obtained by the defendant by trickery and disclosed in court. Warner J granted an injunction restraining the making of copies of any of the documents and the delivery up of all the documents or copies thereof which were in the defendant's possession and an injunction restraining him from making any use of the documents or copies or of any information contained therein. Warner J, however, qualified that the defendant should be allowed to make use of the documents already exhibited to his affidavit for the trial and he made the above observations to justify why the documents exhibited to the affidavit should remain open to the defendant for use. The case had nothing to do with the necessity of ordering a retrial on the basis of the trial judge having had sight of privileged documents.

85 However, since I have already held that *Calcraft* cannot be applied with its full force in the present criminal proceedings, and that the privileged material should be struck off the record, the observations of Warner J above do lend support to the Petitioner's position that a retrial before a different district judge is necessary. This is because, similar to *ITC*, the IMH Reports had already been used in evidence and questions had already been put to Dr Phang on the basis of the reports. Borrowing the words of Warner J, "it is quite impossible" for the DJ to completely remove from his mind the answers given by Dr Phang in this regard.

86 I hasten to add, however, that it is not the case that whenever evidence is successfully expunged from the record on the basis of non-admissibility, a retrial should be ordered. In the present case, I find it necessary in the interest of justice to order a retrial because first, the question of the mental condition

Version No 1: 27 Oct 2020 (22:40 hrs)

of the Petitioner may be pivotal to the trial, secondly, after the DJ had made the Disclosure Order, Dr Phang had taken the stand and given substantial evidence on what had transpired during the psychiatric assessment of the Petitioner, and, thirdly, the trial had started only for two days when this critical issue was brought into focus by the Prosecution initiating the s 235 Application.

87 Therefore, I agree with the Petitioner that a retrial should be ordered before a different district judge.

Conclusion

88 In the light of the aforementioned reasons, I make the following orders:

(a) The Disclosure Order of the DJ is set aside.

(b) All copies of the IMH Reports and all other privileged material pertaining to the Reports in the Prosecution's possession, power, custody or control are to be delivered up to the Petitioner or destroyed.

(c) All references to the privileged material are to be struck off from the record.

(d) A retrial is to be held before another district judge.

Chao Hick Tin
Judge of Appeal

Version No 1: 27 Oct 2020 (22:40 hrs)

Liew Wey-Ren Colin and Niklas Wong See Keat (TSMP Law Corporation) for the Petitioner;
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Version No 1: 27 Oct 2020 (22:40 hrs)