Prosecutorial discretion revisited

Quek Hock Lye v Public Prosecutor [2012] SGCA 25

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The context

Quek Hock Lye is the latest of three very recent Court of Appeal decisions that addresses the constitutional challenge against the exercise of prosecutorial discretion in the context of the Misuse of Drugs Act† (the other two decisions being Ramalingam Ravinthran v Attorney-General‡ and Yong Vui Kong v Public Prosecutor§).

In Quek Hock Lye, the appellant Q was convicted of participating in a criminal conspiracy with W and S to traffic in not less than 62.14 grams of diamorphine (thus attracting the mandatory death penalty).§ Before Q’s trial began, W had pleaded guilty to a separate charge of possession of not less than 14.99 grams of diamorphine in furtherance of a criminal conspiracy with Q and S to traffic the said drugs (thus avoiding the mandatory death penalty). On appeal, Q argued that as both W and Q fell within the same class of accused persons and shared the same legal guilt (in that both were charged for trafficking diamorphine and were in possession of the same amount of diamorphine), it was unconstitutional for the Prosecution to have charge Q as it did.

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† Cap 185, 2001 Rev Ed.
§ [2012] SGCA 23. In this case, the supposed mastermind behind the drug operation was given a discontinuance-not-amounting-to-an-acquittal and later detained under national security laws, while the “mule” in the operation (the appellant) was convicted of drug trafficking and sentenced to death. The Court of Appeal, in a fairly comprehensive decision, ruled that the Prosecution had good reasons to act as it did on the facts and there was therefore no breach of the Constitution (1985 Rev Ed, 1999 Reprint).
§ Officers from the Central Narcotics Bureau had raided and seized drug paraphernalia and no less than 62.14 grams of diamorphine from an apartment rented by Q, W, and S.
§ § Q’s other argument was that the Judge had erred in law in proceeding to hear the charge against him after he had pleaded guilty to the charge, but that point will be outside the confines of this piece.
§ § [2012] SGCA 25 at [19]–[20].
The decision

The Court of Appeal, in dismissing the constitutional challenge (and subsequently, the appeal), noted the following:

(1) Q was raising the same constitutional argument as that raised in Ramalingam Ravinthran, viz, “whether the exercise of prosecutorial discretion which resulted in differential treatment of two offenders involved in the same criminal enterprise constituted a breach of Art 12(1) of the Constitution.” Q was also relying on cases already discussed and reconciled in Ramalingam Ravinthran: Ong Ah Chuan v Public Prosecutor, Teh Cheng Poh v Public Prosecutor, and Thiruselvam S/o Nagaratnam v Public Prosecutor.

(2) It was concluded in Ramalingam Ravinthran that Art 12(1) of the Constitution would not be infringed if the Prosecution had grounds to bring different charges of unequal gravity against two or more offenders in the same criminal enterprise. Such grounds would include (but are not limited to) the legal guilt of the offender, the moral blameworthiness, the gravity of the harm caused, whether there is sufficient evidence against a particular offender, whether the offender is willing to cooperate with the authorities in providing intelligence, whether one offender is willing to testify against his co-offenders, and whether it is possible to show some degree of compassion in some cases.

(3) Indeed, “the divergent consequences faced by accused persons in the same criminal enterprise from the prescribed punishments (whether mandatory or not), flowing from their respective charges by the Public Prosecutor, are not per se sufficient to found a successful Art 12(1) challenge. To the contrary, this divergence in sentence experienced by accused persons is but a consequence of the broader constitutionally vested discretion in the Public Prosecutor in preferring charges against accused persons.”

(4) Q “did not make any arguments concerning the relative culpability of [W and Q] which could have enabled this Court to review the Public Prosecutor’s decision”, even though Ramalingam Ravinthran had established that the accused bears the burden of producing prima facie evidence of bias or the taking into account of irrelevant considerations by the Attorney-General when differentiating between the charges against an accused and a co-offender. Be that as it may, Q “was really the brain behind the criminal enterprise and thus the main culprit. In addition, [W’s] willingness to testify against [Q] and [S] was a relevant consideration which could have operated on the mind of the Public Prosecutor in preferring separate charges against [Q] and [W].”

(5) Under the Constitution, “the judiciary does not possess the power or jurisdiction to formulate or prefer charges against accused persons; that is the constitutional provenance of the Attorney-General ... While the court has the power to review the considerations taken into account by the Public Prosecutor in preferring the charge, to

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7 Art 12(1) states that “All persons are equal before the law and entitled to the equal protection of the law.”
8 [2012] SGCA 25 at [22].
9 [2012] SGCA 25 at [22]–[24].
decide whether or not the evidence adduced by the Public Prosecutor proves the charge beyond a reasonable doubt and to amend the charge in light of the evidence before it, it is not for the court to determine what charge should be preferred against an accused person irrespective of whether the charge would invoke a mandatory penalty. This principle applies equally to the situation where multiple parties are involved in a criminal enterprise.”17

(6) The “incongruity in the charges faced by [Q] and [W] does not impact their underlying agreement to traffic in the 62.14 g of diamorphine … [this] merely reflects the Public Prosecutor’s discretion to prefer a less serious charge... where sufficient evidence can be adduced to prove the underlying agreement between the co-conspirators beyond a reasonable doubt, the outcome per se of the proceedings of a co-conspirator... is not ipso facto a reason to set aside the conviction or amend the charge preferred against the other co-conspirator.”18

Some comments on the decision

Given that Quek Hock Lye comes hot on the heels of Ramalingam Ravinthran and Yong Vui Kong, this commentary will be directed at the trio of cases as a whole rather than any one in particular.

The first observation to be made is that it would seem that ever since the 2008 seminal decision of Law Society of Singapore v Tan Guat Neo Phyllis,19 the settled position in Singapore is that consistent with the rule of law, the exercise of prosecutorial discretion is only subject to judicial review if the exercise was made in bad faith pursuant to some manner of extraneous purpose, or if the exercise was in breach of the Constitution; indeed, this position has been affirmed in the aforementioned three decisions in Ramalingam Ravinthran,20 Yong Vui Kong,21 and Quek Hock Lye.22 As a preliminary aside though, and presupposing that any substantive constitutional challenge against prosecutorial discretion invariably involves only the equality clause (Art 12(1) of the Constitution), it would appear that there are not two distinct grounds for judicial review but in effect only one: at least on the basis of the recent jurisprudence, any argument that has gone towards establishing bad faith has necessarily entailed the inquiry of whether the Attorney-General was biased in the prosecution and/or had factored in irrelevant considerations when deciding the prosecution,23 and such an inquiry is (co-incidentally or otherwise) the very same one when answering whether the Attorney-General had breached the equality clause when prosecuting as between different offenders, including those involved in the very same criminal enterprise.24 If indeed this analysis is correct (that there is no distinct ground of review for bad faith), then one could say that this makes any challenge against prosecutorial discretion even harder, bearing in mind too that Ramalingan Ravinthran et al have also established that because of the co-equal constitutional status (vis-à-vis other branches of the

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17 [2012] SGCA 25 at [29].
18 [2012] SGCA 25 at [37] and [40].
19 [2008] 2 SLR(R) 1149.
20 [2012] SGCA 2 at [51].
21 [2012] SGCA 23 at [17].
22 [2012] SGCA 25 at [22]–[25]. In the latest seminal work on constitutional law in Singapore, it is also not disputed that this should be the state of the law: Thio Li-ann, A Treatise on Singapore Constitutional Law (Academy Publishing: 2012) at pp 190–191 and 381.
23 Arguments have also been made along the lines of the Attorney-General not factoring in all relevant considerations but for all intents and purposes this is inextricably connected to whether the Attorney-General had factored in irrelevant considerations.
24 To be precise, the cases have employed a wider rubric than bad faith for the first limb (viz, “abuse of power”), but it is difficult to postulate a scenario or a test that can finely distinguish between bad faith and abuse of power. See also Michael Hor, “The Independence of the Criminal Justice System in Singapore” [2002] SJLS 497 at 510–512.
government) and presumptive legality afforded to the Attorney-General, the legal burden is on the accused to adduce any evidence to establish a *prima facie* breach.

Indeed, this legal burden imposed on the accused is certainly an interesting one that warrants judicial substantiation, not least because it is, at bottom, a question relating to the (fundamental) right to presumption of innocence. Having said that, the second observation to be made is that the legal erection of a high and virtually impregnable barrier around the Attorney-General’s constitutional prerogative known as prosecutorial discretion is not something novel to Singapore – at the very least, it seems fairly commonplace in Commonwealth jurisdictions, even up till recent times. A question may arise for our own consideration, however, as to whether this will remain, even in the medium- to long-term, a static state of affairs. With the seemingly unstoppable march of so-called international human rights developments in most places in the world, and the ever-increasing public appetite for political accountability and transparency here and elsewhere, there may come a time when the state (more specifically, the Attorney-General) has to confront the question as to whether it has to or should recalibrate the balance it has struck between its (extremely challenging) task of prosecuting crime and its commitment to protecting the right to presumption of innocence, which is, at bottom, a question relating to the wider norm where the idea of prosecutorial discretion is situated within). This is because there are no straightforward answers that would appease once political sensitivities creep into the calculations: one can make something as legally defensible as possible by way of statutory enactments or reforms and/or re-orienting the content of the common law, but the fact that the conceptualisation of the rule of law is (as one assumes) a balancing exercise renders its evaluation susceptible to political, extra-legal scrutiny. In this light, it is suggested that apart from explaining, when challenged, why the prosecutorial discretion was exercised in good faith, the rationale for providing a high level of protection of the discretion from easy assault ought to be explained in greater detail as well; necessarily, the implications for not protecting the discretion could be used to buttress the normative justification. Moreover, our courts have already taken the step of suggesting possible factors that motivate prosecutions (such as whether there is sufficient evidence, whether a co-offender is willing to testify, and whether there is a public interest served), so it would only seem logical to consummate the process.

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25 Indeed, it is not at all clear what happens when the Constitution is interpreted in a way such that the legal burden to prove something (typically rested on the Prosecution) is placed on the accused instead – constitutions usually do the reverse, for the simple reason that they are supposed to entrench basic rights and liberties. Quite separately, one wonders it is possible to square this trio of cases with say, *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205, where a differently constituted Court of Appeal established extra-statutory guidelines for the Prosecution *vis-à-vis* disclosure of unused but relevant material to the accused. One could, of course, distinguish *Muhammad bin Kadar* by saying that those requirements are of the province of criminal procedure and/or evidence law, but can those requirements not be characterised (predominantly) as a subset and consequence of the constitutional prerogative that is prosecutorial discretion as well?


27 In this regard, see also Melanie Chng, “Modernising the Criminal Justice Framework – the Criminal Procedure Code 2010)” (2011) 23 SAcLJ 23.


29 Indeed, the trio of cases that have taken centre-stage in this piece have gone at length at explaining why, on the facts, the exercise of prosecutorial discretion in each case was unimpeachable, though it is not always clear whether the explanations largely emanated from the state’s position or the court’s initiative.

30 This is especially since the Attorney-General is both one with, and yet independent from, the executive/legislative branches of government.