Muhammad bin Kadar and another
v
Public Prosecutor

[2011] SGCA 32

Court of Appeal — Criminal Appeal No 8 of 2009
V K Rajah JA, Kan Ting Chiu J and Steven Chong J
21 January; 15 April; 31 May; 5 July 2011

Criminal Law *— Special exceptions — Diminished responsibility — First appellant under effects of Dormicum consumption at time of offence — Whether first appellant suffered from any abnormality of mind at time of offence — Exception 7 to Section 300 of the Penal Code (Cap 224, 1985 Rev Ed)*

Criminal Procedure and Sentencing *— Disclosure — Victim's husband had made total of three statements to police — Statements giving details of how offence was committed — Statements consistently indicating that only one intruder was present at scene of crime — Prosecution not intending to rely on statements as part of its case — Prosecution disclosing one statement to Defence after investigating officer's evidence-in-chief — Disclosure made almost 18 months after commencement of trial — Details of other statements emerging during cross-examination of investigating police officers — Whether Prosecution was under duty to disclose statements at earlier stage of proceedings — Whether Prosecution under general duty to disclose material it did not intend to use as part of its case at trial*

Criminal Procedure and Sentencing *— Statements — Admissibility — Statements taken from second appellant without compliance with procedural requirements in s 121 Criminal Procedure Code (Cap 68, 1985 Rev Ed) and Police General Orders — Whether court had power to exclude statements as more prejudicial than probative on basis of procedural irregularity — Whether irregularly-recorded statements should have been admitted as evidence — Section 121 Criminal Procedure Code (Cap 68, 1985 Rev Ed) — Police General Orders*

Criminal Procedure and Sentencing *— Statements — Statements taken from second appellant materially contradicting evidence given by witness — Statements contradicting confession of sole involvement by first appellant — Certain statements taken when second appellant was suffering from withdrawal symptoms arising from Dormicum addiction — Second appellant alleged to have low intelligence and malleable personality — Contents of statements taken from second appellant changed as investigators discovered more facts — Statements not supported by objective evidence that second appellant was present at scene of crime — Whether even if admitted statements of second appellant should have been given weight*

Facts

The first appellant, Muhammad bin Kadar ("Muhammad"), and the second appellant, Ismil bin Kadar ("Ismil"), (collectively "the Appellants") were charged with the murder of the victim ("the Deceased") in the High Court. The

Deceased, who was attacked at her home, received more than 110 incised and stab wounds and had died due to severe blood loss.

Ismil was arrested on the day of the killing for an unrelated offence and was later interrogated in connection with the killing. His first two statements were taken by Senior Station Inspector Zainal Abidin bin Ismail ("SSI Zainal"). Before recording the first statement, SSI Zainal told the two police officers accompanying Ismil in a police car to leave so that he could interview Ismil alone. During this interview Ismil initially denied knowledge of the offence but allegedly subsequently confessed to killing the Deceased alone. The second statement also contained a similar confession. No warning was administered to Ismil before either recording, neither statement was read back to him and he was not given the opportunity to make corrections or sign either statement.

Subsequently, Muhammad was placed under investigation based on DNA evidence found on the Deceased's purse. Muhammad then made several statements stating that both he and Ismil were present at the scene of the crime, with Ismil having killed the deceased and himself only having assisted in committing robbery. From this point in time, Ismil made several more statements that (unlike his previous statements) mentioned that Muhammad was present during the crime. These statements indicated that Muhammad only assisted in committing robbery without participating in the killing. Before the trial began, Ismil filed a notice of alibi stating that he was at home at the time of the killing, contradicting what he said in his statements.

During the trial, the Appellants disputed the admissibility of a number of their statements. Both at the time of the offence and when their earlier statements were taken, the Appellants were chronic abusers of substances including Dormicum. The appellants argued that some of their statements were involuntary as they were suffering from withdrawal symptoms arising from Dormicum addiction when they were taken. Threats, inducements and oppressive circumstances were also alleged. The trial judge ("the Judge") dismissed these arguments and found all the disputed statements admissible.

During the main part of the trial, almost 18 months after the trial had commenced and after the Investigating Officer ("IO") had given his evidence-in-chief, the Prosecution made available a statement by Loh Siew Kow ("Mr Loh") to the Appellants' counsel. Mr Loh, the Deceased's husband, was present at the scene of the crime though he was bedridden at the time. In the course of cross-examination of the IO and another police officer, it emerged that Mr Loh had made a total of three statements to the police. All these statements gave details of how the killing was committed. They also consistently stated that there was only one intruder present at the scene of the crime.

Muhammad's evidence at trial, in an abrupt departure from his statements, was that he was solely responsible for both the robbery and killing of the Deceased. He stated that Ismil was not present at the scene of the crime. In relation to the charge of murder he relied on the defence of diminished responsibility due to an abnormality of mind caused by consumption of Dormicum. Ismil's evidence, also in a departure from his statements, was one of alibi. He stated that he was at home at the time of the killing. Ismil also adduced evidence that his statements should be held inadmissible or given no weight due to the fact that they were

given under the effect of withdrawal symptoms arising from Dormicum addiction and also in the light of Ismil's low intelligence.

The Judge rejected the Appellants' arguments and, without making a finding as to which of the Appellants was responsible for the actual killing of the Deceased, convicted both of them of murder in furtherance of a common intention under s 302 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code") and sentenced them to the mandatory death penalty. The Appellants appealed against the Judge's decision. At the appeal, the Prosecution took the position that Ismil was not guilty of murder but was present at the scene of the killing and was guilty of robbery with hurt under s 394 read with s 34 of the Penal Code.

Held, dismissing the appeal of the first appellant, substituting his conviction for murder in furtherance of a common intention to commit robbery under s 302 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed) with a conviction for murder under s 302 of the Penal Code and allowing the appeal of the second appellant:

(1) The court had a discretion to exclude a voluntary statement from evidence where its prejudicial effect exceeded its probative value. The objective of the procedural requirements concerning the taking of statements in the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") and the Police General Orders was to ensure accuracy and reliability. For this reason, where a statement had been recorded by the police in breach of those requirements or other applicable legal requirements, the court would not be slow to exclude it as more prejudicial than probative unless the Prosecution gave some reasonable explanation for the irregularity. Where the breach was deliberate or reckless, more cogent explanation would be required: at [53] and [60] to [62].

(2) After a statement had been admitted into evidence, the truth of its contents had to be evaluated throughout the trial, especially if its truth was disputed. Confessions admitted into evidence that were partly or wholly retracted should be the subject of special care, especially if they were uncorroborated: at [73] to [75].

(3) Muhammad's evidence that he was the sole assailant and offender should have been accepted by the trial judge as it was consistent with the weight of the evidence and accounted for several aspects of the case that were previously unexplained: at [125] to [128].

(4) The Prosecution, having taken the position at appeal that Muhammad was solely responsible for the killing of the Deceased, had to accept that no weight should be placed on Muhammad's statements which stated that Ismil killed the Deceased while Muhammad was present to commit robbery: at [130].

(5) Muhammad failed to establish that he was suffering from an abnormality of mind at the material time. His expert witness' evidence to this effect was correctly rejected by the Judge. His conduct after attacking the Deceased also supported this conclusion. He should therefore not be allowed to rely on the defence of diminished responsibility: at [135] to [137].

(6) The first two statements recorded from Ismil were recorded in breach of the procedural requirements in s 121(3) of the CPC and the relevant Police General Orders. The Prosecution did not discharge the burden of explaining these apparently-deliberate and manifest irregularities. There was also a major discrepancy between the original recording of the second statement and SSI Zainal's subsequent entry of this statement into his field diary. As such, both statements should have been found inadmissible as their prejudicial effect exceeded their probative value: at [140], [141], [146] and [147].

(7) Even assuming they were held to be admissible, all of Ismil's statements should have been given little or no weight. This was because they materially contradicted the three statements of Mr Loh, which consistently and reliably stated that there was only one intruder as well as providing other details contradicting Ismil's statements. Ismil's statements also contradicted Muhammad's confessions of sole involvement, which were reliable and true. Ismil was in a vulnerable physical and mental state when the first two statements were recorded. Further, Ismil had a low IQ and a malleable personality. The narrative of his statements also dramatically changed as the investigators uncovered more facts, without any cogent explanation by the Prosecution. Finally, there was no objective evidence linking Ismil to the scene of the crime: at [158] to [160], [173], [174], [184] and [185].

(8) Muhammad's evidence against him having been found unsafe, the only evidence against Ismil was in his police statements. Given the inadmissibility of Ismil's first two statements and the unreliability of the others, the Prosecution had failed to prove that Ismil was present at the scene of the crime or guilty of any offence: at [138] and [191].

[Observation: For statements taken subsequent to an irregularly recorded statement that contained similar content to the earlier statement, the court should satisfy itself that fear of being inconsistent with the earlier statement did not render the maker's later statement involuntary. After the recording of Ismil's first two police statements, which should have been found inadmissible, Ismil made ten more statements. It was plausible that the fear of departing from the contents of the first two statements acted as an inducement or threat on Ismil such as to make his subsequent statements involuntary. The fact that his final two statements contained information that had conveniently just been independently discovered by the investigators made their voluntariness even more doubtful: at [71], [148] and [149].

The Prosecution was under a duty to disclose a limited amount of material that it did not intend to use as part of its case at trial to the Defence at an early stage of proceedings. This would include material (a) likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused and (b) material likely to be inadmissible but would provide a real (not fanciful) chance of pursuing a line of inquiry that led to material described in (a). *Selvarajan James v PP* [2000] 2 SLR(R) 946 ("*Selvarajan James*") should no longer be taken as representing the law in this area. A failure of the Prosecution to comply with this duty could result in a conviction being overturned on appeal if it occasioned a failure of justice. Even if *Selvarajan James* were correct and the Prosecution's duty of disclosure was

merely ethical and not legal, that ethical duty, on the facts, would still have obliged the Prosecution to disclose Mr Loh's statements to the Appellants' counsel at the latest soon after Ismil filed his notice of alibi: at [107], [110], [113], [120], [202] and [203].]

Case(s) referred to

ADF v PP [2010] 1 SLR 874 (folld)

Beh Chai Hock v PP [1996] 3 SLR(R) 112; [1996] 3 SLR 495 (refd)

Dallison v Caffery [1965] 1 QB 348 (refd)

Daniel Vijay s/o Katherasan v PP [2010] 4 SLR 1119 (folld)

Eu Lim Hoklai v PP [2011] 3 SLR 167 (folld)

Foong Seow Ngui v PP [1995] 3 SLR(R) 254; [1995] 3 SLR 785 (refd)

Fung Yuk Shing v PP [1993] 2 SLR(R) 771; [1993] 3 SLR 421 (refd)

Garnam Singh v PP [1994] 1 SLR(R) 1044; [1994] 2 SLR 243 (refd)

Hanafiah bin Bedullah v PP [1994] 1 SLR(R) 101; [1994] 1 SLR 321 (refd)

HKSAR v Lee Ming Tee & Securities and Futures Commission (Intervener) (2003) 6 HKCFAR 336 (refd)

Jagatheesan s/o Krishnasamy v PP [2006] 4 SLR(R) 45; [2006] 4 SLR 45 (folld)

Jasbir Singh v PP [1994] 1 SLR(R) 782; [1994] 2 SLR 18 (refd)

Kong Weng Chong v PP [1993] 3 SLR(R) 453; [1994] 1 SLR 34 (refd)

Kulwant v PP [1985–1986] SLR(R) 663; [1986] SLR 239 (not folld)

Law Society of Singapore v Ang Boon Kong Lawrence [1992] 3 SLR(R) 825; [1993] 1 SLR 522 (refd)

Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 SLR(R) 239; [2008] 2 SLR 239 (folld)

Lee Chez Kee v PP [2008] 3 SLR(R) 447; [2008] 3 SLR 447 (refd)

Lee Yuan Kwang v PP [1995] 1 SLR(R) 778; [1995] 2 SLR 349 (refd)

Lian Kian Boon v PP [1991] 1 MLJ 51 (refd)

Mallard v R (2005) 224 CLR 125 (refd)

Muzammil Izat bin Hashim v PP [2003] 6 MLJ 590 (refd)

Ong Pang Siew v PP [2011] 1 SLR 606 (refd)

PP v Chin Moi Moi [1994] 3 SLR(R) 924; [1995] 1 SLR 297 (refd)

PP v Dahalan bin Ladaewa [1995] 2 SLR(R) 124; [1996] 1 SLR 783 (folld)

PP v Hanafiah bin Bedullah [1993] SGHC 211 (refd)

PP v Ho So Mui [1993] 1 SLR(R) 57; [1993] 2 SLR 59 (refd)

PP v IC Automation (S) Pte Ltd [1996] 2 SLR(R) 799; [1996] 3 SLR 249 (refd)

PP v Ismil bin Kadar [2009] SGHC 84 (overd)

PP v Mazlan bin Maidun [1992] 3 SLR(R) 968; [1993] 1 SLR 512 (refd)

PP v Raymond Chia Kim Chwee; Zainal bin Haji Ali v PP [1985] 2 MLJ 436 (refd)

PP v Somporn Chinphakdee [1994] SGHC 209 (refd)

PP v Syed Abdul Aziz bin Syed Mohd Noor [1992] SGHC 197 (refd)

PP v Vasavan Sathiadew [1989] 2 SLR(R) 357; [1989] SLR 944 (refd)

Practice Note – Guidelines of the AG of England on disclosure of information to the defence [1982] 1 All ER 734 (refd)

R v Banks [1916] 2 KB 621 (refd)

R v Stephen Christopher Makin [2004] EWCA Crim 1607 (refd)

R v Brown (Winston) [1994] 1 WLR 1599 (refd)

R v Brown (Winston) [1998] 1 AC 367 (refd)

R v Byrne [1960] 2 QB 396 (refd)

R v DPP, Ex parte *Lee* [1999] 1 WLR 1950 (refd)

R v Keane [1994] 1 WLR 746 (refd)

R v Mills [1998] AC 382 (refd)

R v Preston (Stephen) [1994] 2 AC 130 (refd)

R v Sang [1980] AC 402 (folld)

R v Ward [1993] 1 WLR 619 (refd)

R v Bryant and Dickson (1946) 31 Cr App R 146 (refd)

Salwant Singh s/o Amer Singh v PP [2005] 1 SLR(R) 632; [2005] 1 SLR 632 (refd)

Seeraj Ajodha v The State [1982] AC 204 (refd)

Selvarajan James v PP [2000] 2 SLR(R) 946; [2000] 3 SLR 750 (not folld)

Sheshrao v The State 2001 Cri LJ 3805 (refd)

Sukma Darmawan Sasmitaat Madja v PP [2007] 5 MLJ 666 (refd)

Syed Abdul Aziz v PP [1993] 3 SLR(R) 1; [1993] 3 SLR 534 (refd)

Tan Khee Koon v PP [1995] 3 SLR(R) 404; [1995] 3 SLR 724 (refd)

Tay Charlie v PP [1965–1967] SLR(R) 788; [1965–1968] SLR 686 (refd)

Tsang Yuk Chung v PP [1990] 2 SLR(R) 39; [1990] SLR 107 (refd)

Vasavan Sathiadew v PP [1992] SGCA 26 (refd)

William B Stinchcombe v R [1991] 3 SCR 326 (refd)

Wong Keng Leong Rayney v Law Society of Singapore [2007] 4 SLR(R) 377; [2007] 4 SLR 377 (folld)

Yap Giau Beng Terence v PP [1998] 2 SLR(R) 855; [1998] 3 SLR 656 (refd)

Yeo Tse Soon v PP [1995] 3 MLJ 255 (refd)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Rev Ed) ss 5, 58(1), 121, 122(5), 122(6) (consd);
ss 122(1), 123(1), 127, 396(*c*)

Criminal Procedure Code 2010 (Act 15 of 2010) ss 6, 161(2), 162, 176(3)(*b*), 176(4) (consd);
ss 5, 19, 22, 23, 159, 235(1), 258(1), 258(2), 258(3), 258(4), 258(6)(*c*), 259, 261(1), 423(*c*), Pt IX Div 2

Evidence Act (Cap 97, 1997 Rev Ed) ss 2(2), 27, 28, 128(1), 169

Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 74 (consd);
rr 24(1), 86

Penal Code (Cap 224, 1985 Rev Ed) ss 34, 300 Exception 7 (consd);
ss 109, 302, 381, 394

Charter of Rights and Freedoms (Can) s 7

Criminal Procedure and Investigations Act 1996 (c 25) (UK) s 21(1)

Criminal Procedure Code (Act 593) (M'sia) s 51

Criminal Procedure Code (Cap 7, 1984 Ed) (Brunei) s 117(1)

Penal Code (Act 574) (M'sia) s 377D

Kanagavijayan Nadarajan (Kana & Co) and Rajan Supramaniam (Hilborne & Co) for the first appellant;
Thrumurgan s/o Ramapiram (Thiru & Co) and Balvir Singh Gill (B S Gill & Co) for the second appellant;
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[Editorial note: This was an appeal from the decision of the High Court in [2009] SGHC 84.

Criminal Motion No 57 of 2011 (which was filed by the Prosecution to clarify the extent of its duty of disclosure) was heard by the Court of Appeal on 19 August 2011. For the supplemental grounds issued by the Court of Appeal on 26 August 2011, see [2011] SGCA 44.]

5 July 2011 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an extraordinary case. Two brothers, Muhammad bin Kadar ("Muhammad") and Ismil bin Kadar ("Ismil") (collectively referred to as "the Appellants"), were charged with the brutal murder of a 69-year-old woman ("the Deceased") in the High Court. They were convicted by the trial judge ("the Judge"), who gave his grounds in a 214-page judgment (see *Public Prosecutor v Ismil bin Kadar* [2009] SGHC 84) ("the Judgment") that paid commendable attention to detail, and were sentenced to suffer capital punishment. The trial, one of the longest in the Singapore judiciary's annals, took 94 days stretching over a period of more than two years from 20 March 2006 to 9 May 2008. One of the primary reasons for this lengthy period was the fact that not long after the trial commenced, both of Muhammad's counsel discharged themselves (for reasons that will be revealed later in this judgment (see [123] below)) and new counsel had to be engaged.

2 At the start of the trial, the Prosecution unequivocally asserted that Ismil was the *sole* assailant. This initial position can be traced to statements that Ismil made on the day after he was arrested. The Prosecution accepted that Muhammad was not involved in the actual killing of the Deceased, but argued that by virtue of s 34 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code"), he was also legally responsible for the killing since he was present at the scene of the crime and shared a common intention with Ismil. But, after Muhammad dramatically testified to his sole involvement in the killing, the Prosecution did a startling *volte-face* in that it then emphatically contended that Muhammad alone had inflicted the fatal wounds. However, the Prosecution maintained that both the Appellants were equally liable for murder pursuant to s 34 of the Penal Code, as they shared a common intention to commit robbery. The Judge agreed with the Prosecution in this regard in convicting both the Appellants.

3 Unsurprisingly, the twists and turns did not end with the trial. Before us, when queried, the Prosecution changed its position yet again. This time, it conceded that the Judge had erred in that only Muhammad should be found liable for murder, and that Ismil should not be held to be equally liable as the evidence on record was insufficient to prove a common intention to cause the Deceased's death. The Prosecution, however, submitted that Ismil should be found guilty of committing robbery with hurt since he was present at the scene of the crime and there was sufficient evidence to show that he shared a common intention with Muhammad to commit robbery. In maintaining that Ismil should be convicted, albeit for robbery with hurt, the Prosecution referred to statements in which he claimed to be the sole assailant. This, of course, raises a vexing conundrum – a veritable legal curate's egg – in that it has to be decided whether the Prosecution can rely on the barest residue of evidence from statements that have already been seriously compromised. It should be added that absolutely no objective evidence was placed before the court that tied Ismil to the scene of the crime or the crime itself. Pertinently, the lead investigator acknowledged that more could have been done in the investigations to secure objective evidence (see [183] below).

4 Another unusual feature is that the Judge did not make a finding as to the identity of the actual assailant – whether it was Muhammad or Ismil. He stated that he was unable to do so. Yet, he concluded that by virtue of s 34 of the Penal Code, both should be held liable for murder as they had shared a common intention to rob. In arriving at this determination, he relied on the series of confessions made by the Appellants in their statements. All counsel before us (including Muhammad's) unreservedly accepted that only Muhammad was responsible for the killing. Counsel for Ismil, however, went further, in that he forcefully maintained that Ismil was never even present at the scene of the crime and that false confessions in statements that had been made by Ismil during police investigations had caused a

miscarriage of justice. Several manifest evidential inconsistencies in the said statements were also alluded to.

5 Aside from the aforementioned unusual aspects, another aspect of the proceedings that has left us disturbed would be the fact that the Prosecution failed to disclose statements made on 12 May 2005 and 5 September 2005 by the Deceased's bedridden husband, Mr Loh Siew Kow ("Mr Loh"), until nearly 18 months after the trial had commenced. Mr Loh, who passed away due to cancer a few months after the trial began, was no ordinary witness. He was the only person – other than the Deceased and her assailant or assailants – present in the Deceased's flat throughout the incident. In his detailed statements, he clearly and consistently stated that there was only *one intruder*. In addition to this lapse, the day before the trial was due to end, it somehow emerged that Mr Loh had made an even earlier statement to the investigators. This was made the day after the murder on 7 May 2005. In this statement, Mr Loh unambiguously stated that there was only one intruder and then proceeded to give a detailed description of that person. The Prosecution, when queried by us, acknowledged that with hindsight, the timely disclosure of Mr Loh's evidence "may have been the … wiser decision", though it insists it had no legal obligation to disclose those three statements.

6 The present appeal, in short, presents knotty issues of both fact and law for this court to resolve. As this is a fairly lengthy judgment, it makes sense to first outline what will be covered in schematic form:

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Factual background

The dramatis personae

7 The Appellants are brothers who lived in a flat with their family at Block 185 Boon Lay Avenue #04-154, one floor below the Deceased's flat

which was #05-156. Muhammad was 29 years old at the time of his arrest. His highest educational qualification was Primary Seven (extended). At the time of his arrest, he was working as an odd-job general worker on a part-time basis. In terms of criminal history, he has had two stints in the Drug Rehabilitation Centre as well as a number of antecedents in property and drug offences. He started taking drugs at the age of 15. His history of drug abuse began with cannabis and then progressed to various other kinds of drugs, including heroin. From 2003, he started consuming Subutex in place of heroin. He began consuming Dormicum in 2004. Prior to his arrest, he had been consuming Dormicum on a daily basis. He was, in short, a chronic substance abuser.

8 Ismil was 37 years old at the time of his arrest. His highest educational qualification was Primary Six. At the time of his arrest, he was working as a general worker on a contract basis. He began consuming cannabis and sniffing glue at the age of 15, and continued this habit until the age of 17. He then stopped sniffing glue, and consumed cannabis and opium up till 2004, with various breaks because of time spent in remand either at Queenstown Remand Prison ("QRP") or the Drug Rehabilitation Centre. Having been released from long-term detention in the Drug Rehabilitation Centre in 2003 – his fifth stint in the Drug Rehabilitation Centre – Ismil managed, for a short period, to cease regular substance abuse. From 2004 or 2005, and all the way up till his arrest, he consumed, *inter alia*, Subutex and Dormicum on a daily basis. Like his brother, he would easily fall within the description of a chronic substance abuser.

9 The Deceased lived with Mr Loh, a bedridden stroke patient, at Block 185 Boon Lay Avenue #05-156. They were both 69 years of age as at 6 May 2005. Due to Mr Loh's poor health, he had to be fed by means of a nasogastric tube. A nurse, Madam Tan Bee Choo ("Mdm Tan"), visited Mr Loh three times a week to provide medical care. One of her duties was to change the nasogastric tube every two weeks.

The discovery of the death of the Deceased

10 On 6 May 2005, at around 8.00pm, the Deceased was found dead in her flat. The circumstances leading to the discovery of the Deceased's death are as follows. Mdm Tan arrived at the Deceased's flat at about 4.00pm that fateful day to follow up on an appointment that she had made earlier. She knocked on the door for about five minutes, but there was no response. She then used her mobile phone to call the residential line of the Deceased, and could hear the phone ringing, but again there was no response. Worried by this, she called the Deceased's daughter, Madam Loh Yim Leng ("Catherine"), and informed her that the Deceased was not responding to her door knocks and phone calls. Catherine said that she would visit the Deceased's flat after work. Catherine thereafter also tried calling the Deceased's residential line repeatedly, but without success.

11 Catherine arrived at the Deceased's flat at about 7.30pm. She knocked repeatedly, but there was no response. She then sought the assistance of the police. Two police officers, Sergeant Sim Pui Hong and Sergeant Lee Boon Howe, arrived on the scene at just after 8.00pm. They obtained Catherine's permission to break open the door. When the door was opened, the Deceased was found lying still on the floor in a pool of blood in the living room next to the refrigerator. One of the two bedrooms in the house had been hurriedly ransacked, and Mr Loh was found in severe distress in the other bedroom. A bloody chopper was found on a rack near to where the Deceased was lying and a knife blade was found on the kitchen toilet floor. The floor, walls and door of the kitchen toilet and some of the living room furniture were splattered with blood. A paramedic later pronounced the Deceased dead at about 8.40pm.

12 In his autopsy report, Dr Lai Siang Hui ("Dr Lai"), a pathologist, provided the following summary of findings:

> This was a case of homicide. *Autopsy revealed more than 110 incised wounds and stab wounds* together with blunt trauma to the neck and, head and back. Most of the wounds were of slashes and chopping-type wounds (collectively being described as sharp-force injuries or incised wounds) to the head and neck. There were also numerous incised wounds to the upper limbs consistent with defence injuries. These injuries indicated that the victim had put up significant resistance and self-defence against the assault.
>
> The mechanism of death was due to severe blood loss from exsanguination. … *There was no single life-threatening wound or injury that accounted for death. Instead, the collective numbers of wounds had caused a relatively slow venous bleeding.*
>
> …
>
> … The many overlapping and directions of the wounds indicated a *prolonged* yet somewhat frantic assault on the victim, *who was all the while, making great effort to move away from her assailant.* …
>
> …
>
> In summary, the injuries on the body and with correlation of scene evidence was [*sic*] *consistent with the victim having suffered two attacks*. The victim had finally succumbed at entranceway [*sic*] to the kitchen, where the second and final assault occurred. *The overall pattern was consistent with two weapons being used in the assault.* ***At this point, the findings were also consistent with the assault having being inflicted [*****sic****] by one assailant.***
>
> [emphasis added in italics and bold italics]

The arrest of the Appellants

13 The Appellants were not arrested immediately in connection with the killing. Although Ismil was arrested on that very same day, it was for reasons unrelated to the killing of the Deceased. At about 3.00pm on 6 May

2005, Mr Yoo Yee Weng ("Yee Weng"), who operated a mobile phone business at Boon Lay Shopping Centre, discovered that two mobile phones were missing from his shop. He informed his friend, Mr Tan Yi Long Jafred ("Jafred"), who also operated a mobile phone business at Boon Lay Shopping Centre, to look out for the phones in case anyone should try to sell them to him. At about 4.30pm, Jafred called Yee Weng to inform him that a male Malay – Ismil – was in his shop trying to sell a mobile phone to him. Yee Weng went over to Jafred's shop and identified that phone as one of the two that had been taken from his shop. They then called the police, who arrived and arrested Ismil in Jafred's shop. Ismil, who did not attempt to escape or resist arrest, was brought to Jurong Police Division Headquarters and remanded.

14 Although Ismil was initially remanded for theft, the police's suspicion of him as a possible suspect in the murder was aroused after it was ascertained that he lived just one floor below the Deceased's flat. As a result, the next morning, investigators proceeded to question Ismil on the killing of the Deceased. Ismil was observed to be tired and in a vulnerable physical and mental state at that point in time (see [160]–[165] below). Upon being interrogated, Ismil allegedly provided several statements in which he incriminated himself in the killing of the Deceased. In these statements, Ismil admitted that he had proceeded to the Deceased's flat on the morning of 6 May 2005 to rob the Deceased as he was in need of money. After the Deceased raised her voice, he went into the kitchen and took a knife in an attempt to scare her. A struggle broke out between him and the Deceased, and he *accidentally stabbed* her.

15 It is noteworthy that the first statement provided by Ismil was given in rather unusual circumstances. On the morning of 7 May 2005, the day after he had been remanded, Ismil was brought to the Deceased's flat at Block 185 Boon Lay Avenue. While Ismil was in a police car with two police officers at a carpark near Block 185, Senior Station Inspector Zainal Abidin bin Ismail ("SSI Zainal"), an officer who was asked to assist in the investigations, entered the car and asked the two officers to leave as he wanted to interview Ismil alone. Ismil initially said that he did not know anything about the murder of the Deceased. However, according to SSI Zainal, after further probing, Ismil voluntarily confessed to having attacked the Deceased alone. SSI Zainal also produced what he claimed to be a recording of the confession, *viz*, a piece of paper that stated:

> [A]t c/p [*ie*, carpark] of Blk 185 B/L [*ie*, Boon Lay], interview suspect Ismil b. He said he remember [*sic*] slashing an old f/Chinese on Fri morning …

16 Ismil was subsequently brought to a briefing room at Jurong West Neighbourhood Police Centre ("JWNPC") where SSI Zainal had a second interview alone with him between 11.30am and 11.50am. During that interview, Ismil allegedly told SSI Zainal that he had gone to the Deceased's flat to borrow some money and that he had taken a knife from her flat. Ismil

also told him that there was an old man lying on a bed in the Deceased's flat, and maintained that he had acted alone. This statement was recorded much later in the day, after lunch, by SSI Zainal in his field diary. The alleged confession in the police car was also recorded after lunch by SSI Zainal in his field diary (in addition to being written on the slip of paper). No warning was administered to Ismil before these statements were recorded. Further, the statements were neither read back to him nor signed by him.

17 It must be pointed out here that these statements implicated Ismil only, and did not implicate Muhammad at all. The early statements provided by Ismil made no reference to Muhammad being present at the scene of the crime. However, subsequent to Muhammad's arrest and his confession that he was also present at the scene of the crime, the statements provided by Ismil began to allude to Muhammad's presence at the scene of the crime and his participation in the robbery. In these latter statements, Ismil, nevertheless, continued to maintain that it was he alone who had stabbed the Deceased. Muhammad had merely agreed to join him in committing robbery.

18 The circumstances leading to the arrest of Muhammad are also germane. On 27 May 2005, the lead investigating officer for the killing of the Deceased, Station Inspector Raymond Tan ("the IO"), was suddenly informed by Dr Christopher Syn ("Dr Syn"), an analyst attached to the DNA Laboratory for Forensic Science at the Health Sciences Authority, that a black purse, which had been found lying on the ground outside of Block 185 on the night of 6 May 2005, contained the Deceased's DNA and the DNA of a male person who was likely to be one of Ismil's brothers. Muhammad was then asked to turn up at the Special Investigation Section ("the SIS") of the Criminal Investigation Department ("the CID") on 30 May 2005. On that day, the IO received confirmation from Dr Syn that it was indeed Muhammad's DNA that had been found on the black purse.

19 Muhammad reported to the SIS' office on 30 May 2005 and was interviewed from 10.40am onwards. By about 6.00pm, he made the first of several confessions regarding his role and that of Ismil in the killing on 6 May 2005. The statements that were provided by Muhammad were consistent with those that were subsequently provided by Ismil from 3 June 2005 onwards; amongst other things, they stated that Ismil alone had attacked and killed the Deceased. While Muhammad admitted to being present at the scene of the crime, his role was just to assist in the robbery.

20 The Appellants were initially charged with committing murder in furtherance of a common intention under s 302 read with s 34 of the Penal Code. This was later amended to a charge of committing murder in furtherance of a common intention to commit robbery under s 302 read with s 34 of the Penal Code.

The trial in the High Court

21 The trial commenced on 20 March 2006. The evidence that was adduced by the Prosecution and the Appellants has already been comprehensively summarised by the Judge in the Judgment. As such, in this section, we will, instead, broadly describe what transpired during the trial with reference to evidence that we feel should be highlighted in particular.

The trials-within-a-trial

22 The core of the Prosecution's case against the Appellants consisted of the various statements that they had made to the police. The Appellants, however, launched a root-and-branch attack against the admissibility of a number of their statements (see [27] and [197] of the Judgment for a list of Ismil's and Muhammad's respective disputed statements). For this reason, the Judge had to conduct two trials-within-a-trial shortly after the trial commenced. The trials-within-a-trial took place between 27 March 2006 and 18 January 2007.

23 In the trial-within-a-trial on Ismil's disputed statements, Ismil alleged, *inter alia*, that he had been suffering from withdrawal symptoms owing to his moderate to severe Dormicum addiction and that such symptoms included being in a state of confusion and/or being unable to cope with stressful situations. He also alleged that the police had subjected him to threats, inducements and oppressive circumstances. After having considered the evidence, which is summarised at [27]–[126] of the Judgment, the Judge accepted that Ismil was suffering from withdrawal symptoms from 7 May 2005 as a result of not having consumed drugs, but came to the conclusion that the symptoms were mild to, at most, moderate. These symptoms, therefore, did not affect the voluntariness of the statements that he gave (see the Judgment at [144]). The Judge also dismissed Ismil's challenges to admissibility based on allegations of threats, inducements and oppressive circumstances. The Judge concluded, accordingly, that all of Ismil's disputed statements were admissible (see, generally, the Judgment at [127]–[196]).

24 In the trial-within-a-trial on Muhammad's disputed statements, Muhammad alleged, *inter alia*, that he had been suffering from withdrawal symptoms owing to his Dormicum addiction, and this resulted in him being in a state of confusion, being unable to cope with stressful situations and having his will sapped and overborne. He also alleged that the police had subjected him to threats, assault, inducements and suggestion. After having considered the evidence, which is summarised at [197]–[271] of the Judgment, the Judge held that it was likely that Muhammad was suffering from withdrawal symptoms, but not to the degree that would render him susceptible to threats, assault, inducements or suggestion (see the Judgment at [279]). As the Judge was not of the opinion that there was any threat,

assault, inducement or oppressive circumstances, he held that all of Muhammad's disputed statements were admissible (see, generally, the Judgment at [272]–[312]). Before us, the admissibility of these statements was not raised as an issue.

The main trial

25 The main trial continued after the trials-within-a-trial were completed. The evidence that was adduced as part of the main trial has been summarised at [313]–[420] of the Judgment. Many witnesses testified on behalf of the Prosecution, including the IO. The IO was cross-examined on, *inter alia*, Mr Loh's statement of 5 September 2005. That statement had not been disclosed during the Preliminary Inquiry proceedings and was eventually only made available to counsel for the Appellants on 4 September 2007, nearly 18 months after the trial had commenced and some six months after the trials-within-a-trial had concluded. The material parts of the statement are as follows:

> 3 On [6 May 2005] at about 8.10 am, I saw my wife opened the door and gate to chase away wild cats outside our house. At that moment, I was lying on the bed in the bedroom nearer to the kitchen. There was a clock hung on the wall in front of me. From where I was, I could see portion of the living room practically the main door and the living room near altar. I look back and could see what my wife was doing.
>
> 4 There was nobody outside the house when my wife went to chase the cats. 2 minutes after my wife was outside the house, I saw a thief came into my house. The thief is a man. He was wearing a brown cap and a dark red shirt. … He was wearing a long pant and I did not know the colour of his pant. I did not see my wife came into the house when the thief came into my house. The thief went to the kitchen and I heard my wife shouted for help twice in Cantonese. Her voice was coming from the kitchen near the refrigerator in the living room. I then heard the theft shouted '*shut up*' twice in English. Following that, I heard loud 'bung, bung' sound. I did not know where it came from. Simultaneously, I heard my wife shouted for help in Cantonese twice. I could not see what had happened as my view was blocked by a wall.
>
> 5 I looked at the clock and noticed that it was 8.20 am. Next, the thief came into my bedroom and squeezed my neck hardly using his hand for 5 minutes. I felt a bit dizzy when my neck was being squeezed. When he let go of his hand, he placed a knife on my throat which is meant for chopping chicken. He did not harm me with the knife but merely threatened me. At that moment, I looked at the ceiling and did not pay attention to the clock. I did not know how long he placed the knife on my neck. The thief did not utter any words. At times, I looked at the thief and noticed that he is a Malay and had a tanned complexion. He was still wearing the same cap. He is slim built … After the thief removed the knife from my neck, he pulled away my feeding tube that was inserted into my nose. Next, he left my bedroom.

6 After the thief [left] my bedroom, I heard someone pulling the drawers in the other bedroom. I did not hear my wife's voices. I looked at the clocked again and noticed that the time was 8.25 am. Next, I looked at the living room and noticed the same thief opened the main door and left the house. He closed the door before he left the house. After the thief left, I did not see my wife. She is died. I could not do anything and was lying on the bed. I was sacred [*sic*] and having headache. After the theft left, nobody came into my house.

7 At about 4.00 pm, I heard the nurse knocking and calling for my wife outside the house. I remained lying on the bed and could not do anything. I also heard the telephone rung in the living room. The nurse could not enter the house and she left shortly.

8 After the sky turned dark, I heard my daughter knocking and calling for my wife outside the house. A while later, the police banged open the door and rescued me. I was then conveyed to the hospital.

The following questions were posed to the witness:

Q1: Prior to the incident, did you see the thief before?

A1: Yes, I did.

Q2: With regards to your answer in A1, when was the first time you saw the thief?

A2: On 3 May 2005. … At that time, my wife was paying money to the nurse for her service.

Q3: Where did you see him?

A3: Outside my house. He came with male Malay. He brought a bowl of curry for my wife. My wife did not accept his offer. They then left.

Q4: With regards to your answer in A1, what time did the male Malay came to your house?

A4: 11 am.

Q5: Did the male Malay wear any cap?

A5: Both of them wore caps. One of them is taller than the other one. The short one wore the same cap that he wore on 6 May 2005.

Q6: On 6 May 2005 that was on the day of the incident, you saw the short person or the tall person?

A6: The short one.

[emphasis in original]

26 The IO testified that Mr Loh had also been asked to attend an identification parade. However, he identified not one but three male persons, none of whom were the Appellants, although the Appellants were in the line-up. Dr Francis Ngui ("Dr Ngui"), a practicing psychiatrist and consultant psychogeriatrician, examined Mr Loh on several occasions.

Dr Ngui considered him fit to give evidence as at 5 September 2005, when he gave a statement to the police, but considered him unfit to give evidence three months later, on 12 December 2005. Mr Loh subsequently passed away on 15 October 2006.

27 At the close of the Prosecution's case, both the Appellants were called upon to enter their defence. Muhammad elected to give evidence first. This resulted in what was described by the Judge as a "significant and dramatic twist to the case" (see the Judgment at [329]). Muhammad proceeded to take sole responsibility for the robbery and the murder of the Deceased. He also affirmed that Ismil was not present at the scene of the crime (see the Judgment at [329]). This was a fundamental departure from the statements that had been provided by both the Appellants, which the Judge had earlier ruled to be admissible. In its closing submissions, the Prosecution summarised Muhammad's evidence on his sole liability as follows:

> *Confession of sole involvement during court testimony*
>
> 96. Muhammad asserted that he was solely responsible for the robbery and murder of the [D]eceased on 6 May 2005 and exonerated Ismil totally from any involvement. Muhammad testified that at a family gathering at his mother's flat at Blk 185 Boon Lay Avenue #04-154 attended by his siblings held soon after Ismil's arrest (7 May 2005), Muhammad had said that Ismil was '*bersih*' (clean) and did not know anything about the murder. Subsequently, when Muhammad was arrested and remanded in Queenstown Remand Prison (QRP), he told his sisters (Sabariah binte Kadar and Rosnani binte Kadar) sometime in December 2005 when they visited him that he committed the crime alone. He had also made similar admissions to 2 prison inmates (Mohd Zam and Yusuff bin Ahmad) before the trial commenced in March 2006. Muhammad made his first written admission of sole responsibility for the offence on 19 December 2005, which was before the Preliminary Inquiry (PI), when he saw his previous assigned counsel (Amarick Singh Gill …) for the first time and he [*ie*, Mr Gill] wrote a note. Muhammad also wrote a 4 page confession … in QRP about a week before 10 September 2007. Muhammad testified that he wanted to confess in court for his sole responsibility in the offence as he felt guilty and did not want his innocent brother to be punished and he had not admitted earlier as he was afraid of the death sentence. [Notwithstanding] the various statements that Muhammad made to the CID investigators where he described the role played by Ismil in the robbery and killing of the [D]eceased, Muhammad now claims that all these had been false and were concocted by him as he was frightened and since Ismil was already arrested, Muhammad decided to push the blame to Ismil by fabricating Ismil's involvement.
>
> 97. Muhammad gave evidence that he went to the [D]eceased']s flat on 3 occasions that culminated in him robbing and murdering the [D]eceased on the morning of 6 May 2005 (third occasion). Prior to the three occasions, he had not spoken to the [D]eceased or her husband but he was under the impression that the [D]eceased knew him as her 4th floor neighbour.

First occasion – end April 2005

98. The first occasion was around end April 2005 at about 6 p.m. when Muhammad was alone [and] had just returned from work and was about to enter his flat on the 4th floor when the [D]eceased called him from the 5th floor stairs landing just outside her flat, to assist her to help lift her bedridden husband from his bed. Muhammad agreed and spent about 5 minutes in the [D]eceased'[s] flat. He had never seen the [D]eceased'[s] husband before and noticed that he was unable to speak. Muhammad addressed him as 'uncle'. Upon returning home, he did not relate this to Ismil.

Second occasion

99. The second occasion that he went to the [Deceased's] flat was sometime after the first occasion and before 6th May 2005 when Muhammad went with his drug addict friend, 'Mamat Jurong', to deliver food to the [D]eceased. According to him, this occurred after Muhammad and 'Mamat Jurong' had abused Dormicum together in Muhammad's flat. Muhammad brought some food wrapped in plastic and deliver it to the [D]eceased because he felt pity for the old man that he saw on the first occasion. Muhammad clearly recalled that the [D]eceased accepted the food and that he did not enter the flat. He could, however, see the [D]eceased'[s] husband when he stood outside the flat. Again, Muhammad did not tell Ismil about this incident.

Third occasion – 6 May 2005

100. The third occasion Muhammad went to the [D]eceased']s flat was on the morning of 6 May 2005 when he decided to rob the [D]eceased as he was short of money to buy drugs. Although Muhammad was unaware of Ismil's financial state on 6 May 2005 at the time, he acknowledged that Ismil was not working then. Muhammad admitted that he had planned to rob the [D]eceased by himself a few days before 6 May 2005 but did not mention this to Ismil as he wanted [to] commit the offence alone. Muhammad did not have a specific plan for the robbery but he targeted the [D]eceased'[s] corner flat as he felt that few people pass by it. Muhammad also acknowledged that he was prepared to confront the [D]eceased and use force on her if she refused to give him money.

101. On 6 May 2005, Muhammad woke up about 8 a.m. and noticed that Ismil was still asleep in the same bedroom. He claimed that he went to the toilet to consume Dormicum intravenously as he did not want to share the drug with Ismil. After consuming Dormicum, at which point, Ismil was still sleeping in the bedroom, and proceeded to the [D]eceased'[s] flat on the 5th floor. He knocked on the door a few times and when the [D]eceased opened the door, he used 'hand signals' to tell her that he wanted to see 'uncle' and she let him in and closed the front door. Muhammad went straight to the bedroom where [Mr] Loh was lying on the bed and stood by [Mr] Loh's bed for a very short while before proceeding to the kitchen. Thereat, he signalled the [D]eceased to come to the kitchen and took a knife

from a knife holder … . When the [D]eceased was right in front of him, he immediately thrusted the knife 3 times towards the front of her body. The [D]eceased ran towards the toilet and he followed her there and stabbed her again in the toilet until the knife handle broke. Muhammad did not ask the [D]eceased to 'shut up' but she groaned as a result of her injuries. When the knife handle broke, Muhammad took a chopper from the knife holder and returned to the toilet to inflict more injuries on the [D]eceased. He used the chopper at the [Deceased's] head as she was then crouching on the toilet floor, until she collapsed. Muhammad did not think that the [D]eceased was dead yet as her hand was still moving but he thought that [she] was going to die from the injuries which he inflicted. After he attacked the [D]eceased with the chopper, Muhammad picked up the knife handle from the toilet and threw this into the rubbish chute of the [D]eceased'[s] flat.

102. Muhammad then went into [Mr] Loh's bedroom whilst holding the chopper in his hand. He removed [Mr] Loh's feeding tube and threatened [Mr] Loh by putting his left finger on his lip whilst holding the chopper with his right hand. Muhammad categorically denied that he placed the chopper at [Mr] Loh's neck and also that he squeezed [Mr] Loh's neck for 5 minutes. Muhammad spent only a short time in [Mr] Loh's bedroom before he went to ransack the first room (near the main door) where he found a black purse containing $15 in a cupboard in the first room and he kept it. When he came out of this room, he saw the [D]eceased at the kitchen area approaching him and he took the chopper … and went to inflict more injuries on the [D]eceased until she collapsed. Muhammad left the chopper on a shelf … .

103. In the course of attacking the [D]eceased with the chopper, Muhammad realised there was blood at the kitchen area and he put on a pair of brown 'slip on' shoes (belonging to [Mr] Loh) which he found in a shoe rack behind the main door so as to avoid getting his bare feet bloodied. During the time that he was in the [D]eceased'[s] flat, he also washed his hands and feet in the shower room (next to the toilet) and threw buckets of water at the kitchen area to wash away the blood stains on the floor. He also used a cloth to wipe the chopper and cupboard which he ransacked as well as the tap … before leaving the [D]eceased'[s] flat and closing the door and metal gate. Muhammad wore his slippers and went upstairs to dispose of [Mr] Loh's brown shoes between the 8th and 9th floor stairs landing. He then returned to his flat on the 4th floor, took out the $15 from the black purse he stole from the [D]eceased'[s] flat earlier and threw the empty black purse down to the 1st floor. Muhammad estimated that he spent about an hour in the [D]eceased'[s] flat. During the period that Muhammad was in the [D]eceased'[s] flat, he attacked the [D]eceased with a knife and a chopper during three distinct episodes, firstly in the kitchen with the knife blade which continued to the toilet until the knife handle broke, secondly, when he took the chopper and attacked her in the toilet until she collapsed and thirdly, when he attacked her in the kitchen area (near the refrigerator) when he came out of the 1st room and saw her approaching him from the kitchen.

104. Muhammad entered his flat and headed to the kitchen where he soaked his clothes (T-shirt, Bermudas and blue jacket) in a pail of water with detergent. When he went to his bedroom, he met Ismil and they abused

Dormicum together. Muhammad claimed that he cannot recall whether Ismil was still sleeping when he entered the bedroom after returning from the [D]eceased'[s] flat. Muhammad maintained that he did not tell Ismil anything about what he had done earlier that morning when he went to the [D]eceased'[s] flat.

105. The events after Muhammad returned from the [D]eceased'[s] flat are not particularly significant for the purposes of the case before this Honourable Court as he had spent the rest of the day with his brothers, Hathinin and Muhammad and friends, Saini and Mat Hassim, abusing and buying drugs. Muhammad confirmed that no one else knew about the murder and robbery and Mat Hassim arrived at their flat after he had returned from the [D]eceased'[s] flat.

Clothes worn on 6 May 2005

106. When Muhammad went to the [D]eceased'[s] flat on the morning of 6 May 2005, he claimed that he wore a beige T-shirt (P245), a pair of Bermuda shorts (P244), a maroon cap …, a dark blue jacket and a pair of slippers. During scene investigations, Muhammad had only identified to [the IO] the beige T-shorts and the Bermuda shorts which he wore to the [D]eceased'[s] flat. He lied to [the IO] that the slippers had been stolen and there was no mention of the blue jacket. By the time P244 and P245 had been seized on 30 May 2005, Muhammad had already washed P244 and P245. The dark blue jacket was not seized.

107. During his court testimony, Muhammad contended that when he learnt about Ismil's arrest for murder of the [D]eceased on 8 May 2005, he knew that the police had arrested the wrong person but he was afraid of turning himself in. He made a complete denial when he was questioned by the CID officers on 13 May 2005 and on 30 May 2005 until SSI Mazlan confronted him with the DNA evidence on the [D]eceased'[s] black purse. Muhammad acknowledged that as at 30 May 2005, had the police not found his DNA on the black purse, he was prepared to let Ismil face the murder charge.

Muhammad's statements to the CID officers

108. When Muhammad admitted to the CID officers on 30 May 2005 and subsequently, fabricated a minimal role for himself that involved only ransacking the [D]eceased'[s] flat, he did so partly because he was afraid and partly due to suggestions by the CID officers. Muhammad agreed that most of these statements (in particular the account of what Ismil did to the [Deceased] in the [D]eceased'[s] flat and Ismil's participation and presence in the [D]eceased'[s] flat) were concocted by him rather than being the result of active suggestions from the CID officers.

[emphasis in original]

28 Muhammad's main line of defence was that he was suffering from an abnormality of the mind, and was therefore entitled to invoke the defence of diminished responsibility. In support of this, Dr Calvin Fones Soon Leng

("Dr Fones"), a psychiatrist, was asked to give evidence. Dr Fones testified that it was likely that Muhammad was suffering from an abnormality of mind. He agreed that Muhammad did not suffer from paradoxical rage when he attacked the Deceased, but was of the view that Dormicum had affected Muhammad, having regard partly to the nature and extent of the injuries inflicted on the Deceased as well as partly to the fact that Muhammad could not recollect the extent to which he had attacked the Deceased. In Dr Fones' written report, he stated:

> 1. Muhammad was NOT of unsound mind during the alleged offence. He was aware of his actions during the time of the alleged offence and knew that what he was doing was wrong.
>
> 2. [Muhammad] is fit to advise counsel and is fit to plea.
>
> 3. [Muhammad] was however, clearly under the influence of drugs during the time of the alleged offence. He formed the intention to rob and kill the woman shortly after or during the time he had consumed intravenous Dormicum; as he puts it 'it made him feel brave when under influence'. It is likely that his intention to kill was formed while under the influence of Dormicum that he had taken. The disinhibitory effects of the drug also contributed to the nature of the crime where he slashed the woman repeatedly without a clear recollection of how many times he had done so. Indeed he remarked that he was 'shocked' when told later how many times he had allegedly slashed the woman. The effects of the drug had likely led to a major reduction in self-control and regulation of his own actions.
>
> 4. It is thus conceivable that [Muhammad] was suffering from such abnormality of mind at the time of the offence, due to the effects of Dormicum, in that it substantially impaired his responsibility for his actions in causing the death of his victim. He had earlier formed the intention to harm the woman while under the influence of Dormicum, and the effects of the drug on his mental state further affected the extent of his actions at the material time.

29 To rebut Dr Fones' evidence, the Prosecution adduced the evidence of Dr G Sathyadevan ("Dr Sathyadevan"), Senior Consultant Psychiatrist and Chief of the Department of Forensic Psychiatry at the Institute of Mental Health ("IMH"). Dr Sathyadevan had re-examined Muhammad on 17 and 29 January 2008 and produced a report dated 13 February 2008. In his report, Dr Sathyadevan stated that Muhammad has an IQ of 76. In Dr Sathyadevan's opinion, Muhammad did not suffer from an abnormality of mind or a substantial impairment of judgment. Being high on Dormicum would not amount to an abnormality of mind unless there are psychiatric complications such as paradoxical rage or confusion. Muhammad's actions had to be consistent with an abnormality of the mind. While Dormicum gave Muhammad boldness, he was in control of his mental faculties and actions.

30 Ismil also elected to give evidence. The main thrust of his case was that he was not at the scene of the crime. For completeness, we should also mention that on 3 January 2006, Ismil's counsel filed a notice of alibi stating that Ismil was at home at the time of the murder. This was contrary to what he had said in his statements (see the Judgment at [348]). Notwithstanding the fact that the Judge had already ruled on the admissibility of the statements made by the Appellants, counsel for Ismil attempted to persuade the Judge to either review the admissibility of his statements or to give no weight to them due to his low IQ and personality coupled with the withdrawal symptoms he had been suffering at the relevant time (see the Judgment at [421]). Ismil's witnesses included Dr Harold Peter Robers ("Dr Robers"), a clinical psychologist, and Dr Ung Eng Khean ("Dr Ung"), a senior consultant psychiatrist and psychotherapist with Adam Road Medical Centre.

31 Dr Robers had conducted an intelligence quotient ("IQ") test known as the Performance Scale IQ of the Wechsler Adult Intelligence Scale, 3rd edition ("the WAIS-III") and a Comprehensive Test of Nonverbal Intelligence ("the CTONI") on Ismil on 22 September 2007. The result of the WAIS-III indicated that Ismil had an IQ of 73. This score was accepted by the Prosecution (see the Judgment at [382]). The report dated 24 September 2007 that Dr Robers produced contained the following summary:

> On the WAIS-III, Ismil achieved a Performance Scale IQ of 73, which is in the Borderline range to Mid Mentally Retarded range of scores (95% confidence interval: 68-81). On the CTONI, Ismil achieved a CTONI overall nonverbal IQ of 75. This also places him in the borderline range of intellectual functioning. He achieved a Pictorial IQ score of 70 (Poor/borderline to mentally deficient) and a Geometric IQ score of 83 (Low average).
>
> Both tests indicate that Ismil has mentally deficient skills (Borderline to mild mentally retarded) and while similar individuals function at a higher level than those classified as more severely mentally retarded, their *cognitive functioning is nevertheless limited*, *creating problems for everyday functioning, judgment, and academic or occupational achievement*.
>
> From the results of the testing, Ismil has *weak reasoning and comprehension skills*. This is likely to be reflected in *poorer judgment and he is apt to become more suggestible and more easily influenced by others when pressured or coerced*. He is likely to be *prone to be vulnerable to suggestions and manipulations when he in [*sic*] under stress or threat*. Although Ismil can perform and remember concrete tasks and information with some adequacy, he experiences difficulty when he has to deal with information, pictures and material related to common everyday occurrences. He is likely to have significant limitations in processing information that are more abstract or complex in nature.

> In view of this information gained through the psychological testing concerning Ismil's cognitive-intellectual functioning, it is recommended that a psychiatric interview is conducted to ascertain specifically how his deficits have affected and influenced his functioning, behaviour and responses.
>
> [emphasis added]

32 Dr Ung testified that Ismil had been suffering from moderate to severe withdrawal symptoms, having regard to his answers to a questionnaire and oral responses during the interviews that he conducted. He added that even if Ismil had only been experiencing mild withdrawal symptoms, his other conclusions about the likelihood of a coerced false confession remained because of a confluence of factors, *viz*, Ismil's low intelligence, personality and the stress he faced. He also stated that Ismil had said that his poor command of English was one of the reasons as to why he had not disclosed the full range of withdrawal symptoms or his innocence to Dr Cheong Hong Fai ("Dr Cheong"), the doctor who had conducted a medical examination of him, and to Dr Stephen Phang ("Dr Phang"), a consultant psychiatrist at the Institute of Mental Health ("IMH") who had conducted a psychiatric examination of him. Dr Ung produced a report dated 18 March 2008, which contained the following summary of findings:

> 1. Ismil is a **moderate to severe abuser of Benzodiazepines**.
>
> 2. Given this level of abuse, a moderate to severe level of withdrawal is likely to manifest on abrupt cessation of Benzodiazepine consumption.
>
> 3. Ismil was suffering from **moderate to severe benzodiazepine withdrawal** at the time of his interrogation.
>
> 4. A psychological assessment by Dr Harold Robers revealed that Ismil's performance IQ is 73. This is in the **Borderline to Mild Mentally Retarded range of intellectual functioning**.
>
> 5. I fully concur with Dr Rober's opinion that Ismil is apt to **manifest poor judgment** and to **become more suggestible** and **be more easily influenced by others when pressurized or coerced thus being vulnerable to suggestions and manipulations when he is under stress or threat**.
>
> 6. **Drug intoxication and/or withdrawal** and **mental handicap/low intelligence** are prominent factors in Ismil's case that significantly increase the likelihood of a false confession.
>
> 7. Because of his withdrawal symptoms, anxiety, low intellect and lack of assertiveness, Ismil was unable to cope with the distress and was preoccupied with alleviating any further distress. There was total preoccupation with the short and immediate term with little regard of the long-term consequences of his action.
>
> 8. Other personal factors relevant in Ismil's case that have been implicated in increasing suggestibility thus increasing the likelihood of a false confession are **anxiety, lack of assertiveness and poor memory**.

> 9. External interrogative factors such as **exaggeration of the evidence** available, the threatened consequences to Ismil by 'not signing' and **inducements of leniency** for confession is likely to have added to Ismil's likelihood of false confession.
>
> 10. The constellation of these internal and external factors would synergistically interact to magnify the risks of a false confession.
>
> 11. Ismil's confession would conform to a **coerced-complaint false confession**. His main motive for doing so was to alleviate and minimize his distress.
>
> 12. Ismil's highly selective memory gaps in his statements given to the Police are unlikely to be a consequence of anterograde amnesia related to Benzodiazepine use or withdrawal. These would be consistent that he made up a story based on what information and cues he obtained from the Police. In the absence of such cues and information, he would usually claim that 'he could not remember.'
>
> 13. His behaviour at being confronted after trying to sell the two stolen handphones after the alleged murder is consistent with his assertions of innocence.
>
> 14. The presence of **incontrovertible forensic evidence** would seriously detract from Ismil's claims of innocence and the possibility of a false confession. Conversely, the absence of any such incontrovertible forensic evidence would lend credence to his account of providing a false confession.
>
> 15. Having considered Ismil's case carefully in the context of the available information and scientific/medical opinion, I would caution against undue reliance being placed upon his confession as there is a **significant likelihood that his confession is false**.
>
> 16. Ismil's poor command of English is likely to have hindered a proper and thorough psychiatric evaluation being conducted by Dr Cheong and Dr Phang shortly after the alleged murder.
>
> [emphasis in original]

33 The Prosecution called a number of witnesses to rebut the evidence of Dr Robers and Dr Ung. Dr Rasaiah Munidasa Winslow ("Dr Winslow") testified, amongst other things, that Ismil may have had mild physical withdrawal symptoms from Dormicum and/or Subutex during the recording of the statements. However, the withdrawal from drug use was unlikely to have had a significant effect on his ability to provide statements. This opinion was based, in part, on the consistency in the account provided by Ismil to the investigators and Ismil's account of facts given to Dr Phang as to what transpired that fateful day. When he testified, Dr Winslow appeared to be less certain in his opinion:

> Q: So are you able to comment on all the evidence that we have so far - low intelligence, withdrawal symptoms, right, and 'you've been

> questioned by the police officers'? Would you take a position as to whether he had made a false confession in this case, Dr Winslow?
>
> A: My own feeling would have been no, because of the---the consistency of the---the account over a period of time right up to the time and by---- by the time he saw me, he was---he had a different story because he knew that he was in---he was able to say that 'I gave a wrong---I gave that statements because I was scared'. But I cannot give you a 100% guarantee on that.

34 Dr Phang, himself, testified for the Prosecution as well. He denied that there was any breakdown in communication between him and Ismil even though he had communicated with Ismil in English. To Dr Phang, Ismil did not come across as a credulous, weak-willed individual who had simply confessed because no one believed him. Dr Phang disagreed with Dr Robers that Ismil's cognitive functioning was limited. While Dr Phang acknowledged that there would be some problems with cognitive functioning for persons who fall within such a low IQ range, this did not pose any problems with daily functioning. Neither did Ismil have deficient judgment nor a lack of occupational achievement. Dr Phang also disagreed with Dr Ung and Dr Robers that Ismil was vulnerable to suggestions and manipulations and with Dr Ung that it was likely that Ismil's confessions were false. It would be apposite to observe, parenthetically, that it appears that Dr Phang was not made aware of the precise circumstances of Ismil's initial confession and his physical condition (see, also, [168]–[170] below).

The decision of the High Court

35 The following could be regarded as a summary of the main reasons for the Judge's conclusion that the Prosecution had proven beyond reasonable doubt that both the Appellants should be held to be equally liable for murder pursuant to s 302 read with s 34 of the Penal Code:

> (a) Ismil's withdrawal symptoms were mild to, at most, moderate (see the Judgment at [433]). Dr Ung was too willing to accept Ismil's responses at face value (see the Judgment at [423]). For all the allegations of withdrawal symptoms, Ismil had already begun to outline his defence – that he had accidentally stabbed the Deceased – from the first time he gave a formal statement on 7 May 2005 and he had steered away from mentioning Muhammad's presence at the scene of the crime initially, which suggested that his mind was not as affected by withdrawal symptoms as was suggested (see the Judgment at [426] and [427]). The emphasis on poor English was a distraction – it was not clear what Ismil wanted to say to Dr Cheong or Dr Phang on his withdrawal symptoms but could not due to his poor English (see the Judgment at [431]).
>
> (b) The evidence of family members and fellow inmates did not suggest that Ismil had an acquiescent personality (see the Judgment

at [437]). Dr Phang's evidence was more persuasive than Dr Ung's evidence of an acquiescent personality (see the Judgment at [438]). Ismil's evidence that he could not understand questions was not convincing, and his latest position that he was not able to understand about half the contents of his statements indicated that he was street-smart and not acquiescent (see the Judgment at [439] and [441]).

(c) Although s 121(3) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") requires a statement of a person examined by a police officer to be signed, s 122(5) of the CPC allows any statement of an accused person, whether oral or in writing, to be admitted if the statement is made to a police officer of the rank of sergeant or above. Thus, the two statements Ismil made to SSI Zainal were admissible (see the Judgment at [454]).

(d) The details in the statements provided by Ismil, which suggested that it was likely that he was at the crime scene at the material time (see the Judgment at [462]), carried more weight than the discrepancies (see the Judgment at [463]). Additionally, the statements provided by Muhammad, which incriminated Ismil, were "damning" against Ismil (see the Judgment at [465]).

(e) Muhammad mentioning his sole involvement to his previous lawyers, his fellow inmates and his sisters was part of his "plan" to save Ismil (see the Judgment at [467]–[474]). Mr Loh's statement of 5 September 2005 did not rule out the presence of more than one perpetrator (see the Judgment at [476]). It was also possible that Mr Loh could have missed seeing someone in the flat due to his position in the bedroom (see the Judgment at [477] and [478]).

(f) Although it could not be said that Muhammad was the assailant beyond reasonable doubt, it could be said that both the Appellants were involved, and that they were both at the scene of the crime at the material time (see the Judgment at [495]). The confessions of Ismil and the broad consistency in his statements, including his knowledge of some details and his statements on Muhammad's role, as well as Muhammad's confessions all placed Ismil at the scene of the crime at the material time (see the Judgment at [495]).

(g) A finding as to the identity of the sole assailant would not be required for the operation of s 34 of the Penal Code (see the Judgment at [498]–[499]). There was a plan between the Appellants to rob the Deceased (see the Judgment at [503]). Whether Muhammad or Ismil was the assailant, each must have known that it was likely that the Deceased would have to be killed to avoid any risk of identifying them, and each must have been aware of the attack on the Deceased (see the Judgment at [504]–[506]). Having regard to the law as laid

out in *Lee Chez Kee v PP* [2008] 3 SLR(R) 447, it could be concluded that (see the Judgment at [508]):

> [the Deceased] was killed in furtherance of the common intention to commit robbery. Accordingly, Ismil and Muhammad would be guilty of murder under s 302 read with s 34 of the Penal Code unless there was some other defence.

(h) Based on the psychiatric evidence, the defence of diminished responsibility would not be available to either of the Appellants, as they had not been suffering from an abnormality of mind (see the Judgment at [521]).

The present appeal

36 We first heard this appeal on 21 January 2011. The Prosecution's position during that hearing was that both the Appellants were guilty of murder committed in furtherance of their common intention to commit robbery. Both Appellants, on the other hand, maintained that it was Muhammad alone who carried out both the robbery and killing. During the course of that hearing, it appeared to us that the Prosecution had not adequately considered various issues that were central to the appeal. We therefore adjourned the hearing to 15 April 2011, and directed the Prosecution to address the court on, *inter alia*, the following points:

(a) Was s 34 of the Penal Code applied correctly by the Judge?

(b) If there was only one assailant, what was the position of the other person, *ie*, the accomplice, in the light of *Daniel Vijay s/o Katherasan v PP* [2010] 4 SLR 1119 ("*Daniel Vijay*")?

(c) Who was the real assailant in the Prosecution's view?

37 The Prosecution was granted leave to file further written submissions to address the above points, and this was subsequently done on 4 March 2011. The Appellants were also granted leave to respond to the Prosecution's further written submissions. Counsel for Ismil did so and filed written submissions on 18 March 2011. Counsel for Muhammad confirmed that they would not be filing any written submissions, and that Muhammad's position was unchanged from the position that he had adopted at the hearing on 21 January 2011.

38 The Prosecution's further written submissions and oral submissions at the hearing on 15 April 2011 revealed that the Prosecution had changed its position yet again. In this regard, the Prosecution, in essence, accepted that the Judge erred in convicting Ismil jointly of murder (see [3] above). However, the Prosecution, as mentioned earlier, submitted that Ismil should not be acquitted completely, but should still be found guilty of an offence, *viz*, robbery with hurt pursuant to s 394 read with s 34 of the Penal

Code. Under this latest position of the Prosecution, Muhammad alone would be guilty of murder. The following is a summary of the final position of parties:

(a) **Prosecution**: Muhammad alone should be found guilty of murder, whereas Ismil should be found guilty of robbery with hurt pursuant to s 394 read with s 34 of the Penal Code;

(b) **Muhammad**: Muhammad was the sole participant in the crime, but he was not guilty of murder as he was entitled to rely on the defence of diminished responsibility; and

(c) **Ismil**: Ismil was not guilty of any offence as he was not present at the scene of the crime and was not involved in either the killing or the robbery.

39 In their submissions, both the Prosecution and counsel for the Appellants raised numerous issues of fact and law. In dealing with the issues of fact, we shall adopt the approach set out in *ADF v PP* [2010] 1 SLR 874, where this court stated (at [16]):

> [A]n appellate court has a limited role when it is asked to assess findings of fact made by the trial court. In summary, the role is circumscribed as follows:
>
> (a) Where the finding of fact hinges on the trial judge's assessment of the credibility and veracity of witnesses based on the demeanour of the witness, the appellate court will interfere only if the finding of fact can be shown to be plainly wrong or against the weight of evidence: see *PP v Mohammed Liton Mohammed Syeed Mallik* [2008] 1 SLR(R) 601 at [32] and *Yap Giau Beng Terence v PP* [1998] 2 SLR(R) 855 ('*Yap Giau Beng Terrence*' [*sic*]) at [24]. An appellate court may also intervene, if, after taking into account all the advantages available to the trial judge, it concludes that the verdict is wrong in law and therefore unreasonable: *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 ('*Jagatheesan*') at [43].
>
> (b) Where the finding of fact by the trial judge is based on the inferences drawn from the internal consistency (or lack thereof) in the content of witnesses' testimony or the external consistency between the content of their testimony and the extrinsic evidence, an appellate court is in as good a position as the trial court to assess the veracity of the witness's evidence. The real tests are how consistent the story is within itself, how it stands the test of cross-examination, and how it fits in with the rest of the evidence and the circumstances of the case: see *Jagatheesan* at [40]. If a decision is inconsistent with the material objective evidence on record, appellate intervention will usually be warranted.
>
> (c) An appellate court is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case: see *Yap Giau Beng Terence* at [24].

40 Having said that, we will begin by considering certain pertinent issues of law, before considering the convictions of each of the Appellants in turn.

Preliminary legal issues

41 The applicable legislation governing criminal procedure for this case is the CPC. Where appropriate, reference will also be made to the Criminal Procedure Code (Act 15 of 2010) ("the CPC 2010"), which came into force on 2 January 2011. Given the several twists and turns in both the Defence's and the Prosecution's respective cases, there are four issues of law that we feel should be considered on a preliminary basis. They are:

(a) the admissibility of and discretion to exclude procedurally-flawed statements;

(b) the treatment of subsequent statements with similar content to an excluded statement;

(c) the court's testing of the veracity of a disputed statement admitted into evidence; and

(d) the duty of the Prosecution to the court in relation to the disclosure of relevant material not favourable to the case that it seeks to present.

Admissibility and exclusion of procedurally-flawed statements

42 Statements recorded by the police from accused persons can be classified into two categories, *viz*, "long statements" or "investigation statements" under s 121 of the CPC (now s 22 of the CPC 2010) or "cautioned statements" under s 122(6) of the CPC (now s 23 of the CPC 2010) (see Tan Yock Lin, *Criminal Procedure* vol 1 (LexisNexis, Looseleaf Ed, 1996, November 2010 release) at ch V para 1905). The power under s 121 of the CPC to examine any person and reduce their statement into writing is one of the powers of investigation that a police officer may exercise in investigating a seizable offence (now an "arrestable offence" under the CPC 2010). Section 121 of the CPC provides:

> **121**.—(1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case *and shall reduce into writing any statement made by the person so examined*.
>
> (2) Such person shall be *bound to state truly the facts and circumstances with which he is acquainted* concerning the case except only that *he may decline to make with regard to any fact or circumstance a statement which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture*.

> (3) *A statement made by any person under this section shall be read over to him and shall, after correction if necessary, be signed by him*.
>
> [emphasis added]

As can be seen, s 121 of the CPC prescribes certain formal requirements for the taking of long statements. However, the section does not state the consequences of non-compliance with these requirements.

43 Cautioned statements are statements that are given in response to the notice in writing that is required pursuant to s 122(6) of the CPC (now s 23 of the CPC 2010) once a person is informed that he may be prosecuted for an offence or is charged with an offence. The notice informs the person, *inter alia*, that if there is any fact that he wishes to rely on in his defence, he should state it as doing so at trial for the first time may render it less likely to be believed. Any statement given by an accused person, whether pursuant to s 121 or s 122(6) of the CPC, to a police officer of or above the rank of sergeant would be admissible pursuant to s 122(5) of the CPC (now sub-ss 258(1)–258(3) of the CPC 2010), which prescribes the requirement of voluntariness. Section 122(5) of the CPC states:

> *Where any person is charged* with an offence *any statement, whether it amounts to a confession or not or is oral or in writing*, made at any time, *whether before or after that person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer of or above the rank of sergeant shall be admissible at his trial in evidence* and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that the court shall refuse to admit such statement or allow it to be used as aforesaid if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient, in the opinion of the court, to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> [emphasis added]

44 As a general rule, voluntary statements from an accused person recorded by a police sergeant (or more senior officer) pursuant to s 121 and/or s 122(6) would be admissible under s 122(5) even if the procedural requirements set out in ss 121 and 122(6) are not met. The Court of Criminal Appeal held in *Vasavan Sathiadew v Public Prosecutor* [1992] SGCA 26 ("*Sathiadew (CCA)*") that a breach of the signature requirement in s 121(3) would not render a statement inadmissible under s 122(5); it would only affect the weight to be attached to the statement by casting doubt on whether it was actually made. This determination in *Sathiadew (CCA)* was reached by parity of reasoning with *Tsang Yuk Chung v PP*

[1990] 2 SLR(R) 39 ("*Tsang Yuk Chung*"), where the court held (at [17]–[20]) that a failure to follow the notice procedure in s 122(6) did not render a statement inadmissible under s 122(5), although it would affect the inferences which could be drawn under s 123(1) of the CPC (now s 261(1) of the CPC 2010) from a failure on the accused person's part to state his defence upon being cautioned. The principle set out in these cases has been incorporated as Explanation 2(*e*) of s 258(3) of the CPC 2010.

45 If procedural breaches under s 121 or s 122(6) of the CPC of themselves would not render a statement inadmissible, it stands to reason that breaches of the Police General Orders that relate to the recording of statements would also not of themselves render statements inadmissible under s 122(5) of the CPC.

46 That having been said, in *PP v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124 ("*Dahalan*"), S Rajendran J held (at [26]–[27]) that he had the discretion to refuse to admit an accused person's statement under s 122(5) of the CPC even if it was voluntarily made without threat, inducement or promise. He appeared to have concluded that he had such a discretion based on the fact that s 122(5) made statements "admissible" without mandating that they be "admitted". He then proceeded to exercise this discretion to exclude the statement in the case before him – this despite making findings that the statement in question had been involuntarily given, which would therefore have obviated the need to consider any general discretion to exclude voluntary statements. In his view, at the time of recording, the accused had been suffering from severe effects of heroin and Erimin consumption such as to make his statement involuntary, applying the standard set by this court in *Garnam Singh v PP* [1994] 1 SLR(R) 1044 at [31] (see *Dahalan* at [74]).

47 In *Dahalan*, a police sergeant, one Sergeant Lai Thong Fock ("Sgt Lai"), took a statement from the accused, a drug addict. The accused had consumed heroin and Erimin on the morning that the statement had been recorded. He was interviewed in English without being asked if he wished to speak in Malay. When interviewing the accused, Sgt Lai jotted down the answers in note form on a piece of paper. The statement was not read back to the accused, nor was the accused asked to sign on the paper. Just under four hours later, Sgt Lai wrote an expanded version of the statement in his pocket book, and destroyed the original piece of paper.

48 Rajendran J decided to exercise his discretion to exclude the statement based on the fact that (at [86]):

> (a) the accused was under the effects of Erimin and heroin consumption during the recording (see also [74]–[77]);
>
> (b) an interpreter was not made available despite the accused's lack of proficiency in English (see also [78]); and

(c) Sgt Lai had disregarded the procedural requirements in s 121 of the CPC and the Police General Orders in the recording of the statements (see also [79]–[85]).

Regarding this last point, Rajendran J distinguished *Fung Yuk Shing v PP* [1993] 2 SLR(R) 771 ("*Fung Yuk Shing*"), where a similarly irregular statement was admitted. The written recording of the recording officer in *Fung Yuk Shing* had been found to be honest and accurate; in contrast the "professionalism of Sgt Lai or the accuracy of his memory or record" was questionable in view of, *inter alia*, his untruths in court and discrepancies between his evidence and that of another police officer (see *Dahalan* at [82]).

49 Rajendran J, however, acknowledged that mere non-compliance with s 121 or the Police General Orders would not automatically result in inadmissibility, having regard to *PP v Mazlan bin Maidun* [1992] 3 SLR(R) 968 ("*Mazlan*") (see *Dahalan* at [84]). However, he then empathically declared (at [85]):

> Where, as in this case, the violation of these provisions was *flagrant*, *it was incumbent on the Prosecution to either offer some reasonable explanation for such violation or desist from attempting to adduce statements taken in disregard of these provisions* as evidence before the court. [emphasis added]

To put Rajendran J's statement in its factual context, Sgt Lai initially claimed that as a plainclothes officer, he was not expected to carry his pocket book with him; he also did not take the trouble to go up to his office and take his pocket book (see *Dahalan* at [9]). However, when confronted by evidence that his practice was in direct violation of the relevant provisions in the Police General Orders, he merely claimed to have forgotten about those provisions (see *Dahalan* at [10]–[12]). By his above statement, Rajendran J seems to have meant that the court would refuse to admit statements taken in such "flagrant" violation of the procedural provisions if no reasonable explanation were offered, although he did not say so explicitly.

50 Rajendran J also referred to the case of *Kong Weng Chong v PP* [1993] 3 SLR(R) 453 ("*Kong Weng Chong*") (see *Dahalan* at [83]). In that case, the Court of Criminal Appeal held (at [27]–[28]) that the grave procedural irregularities in a statement made by the accused meant that it "should not have been accepted" by the trial judge. These irregularities included the fact that the statement was not reduced into writing until about five weeks after it was made. The recording narcotics officers also admitted that important details had been left out of the statement in question, which was furthermore wholly inconsistent with a cautioned statement recorded from the accused on the same day. In Rajendran J's view, the decision in *Kong Weng Chong* to reject the statement was an exercise of the discretion to exclude an irregular statement. In our view, however, it is not clear whether

the court in *Kong Weng Chong* was exercising a discretion to exclude an irregular statement or whether it was admitting the statement but giving it no weight.

51 In determining whether a residual discretion exists to exclude voluntary statements made by an accused person, it is necessary to consider the observations of the court in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*"). To summarise what was an in-depth discussion, the court observed (at [126]) that the principle relied on in certain cases that the court had a discretion to exclude evidence only on the ground that it was obtained in ways unfair to the accused was incompatible with the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). That principle was ousted, in particular, by s 2(2) of the EA. However, the court further held (at [126]) that the key holding of the House of Lords in *Regina v Sang* [1980] 1 AC 402 ("*Sang*") to the effect that there remained a discretion to exclude any evidence that had more prejudicial effect than probative value is "consistent with the EA and in accordance with the letter and spirit of s 2(2), and is therefore applicable in the Singapore context".

52 Even before *Phyllis Tan* was decided, the existence of the *Sang* type of discretion had been endorsed by this court in *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 ("*Rayney Wong*") in the following terms (at [27]):

> We know of no principle which states that evidence that has been procured improperly or unfairly in order to prosecute offenders but which is not procured unlawfully is an abuse of process or that it is inadmissible in evidence, *except when there would be unfairness at the trial in terms of its prejudicial effect exceeding its probative value*. [emphasis added]

In Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) ("*Evidence and the Litigation Process*") at ch 10 (which is a reproduction of the article by Jeffrey Pinsler SC, "Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings" (2010) 22 SAcLJ 335), this discretion is regarded as not only approved in *Phyllis Tan*, but as arising from an inherent jurisdiction of the court to prevent injustice at trial (see *Evidence and the Litigation Process* at paras 10.20 and 10.24).

53 For present purposes, it suffices for us to state that from the recent authorities cited above, it is clear that a common law discretion to exclude voluntary statements that would otherwise be admissible exists where the prejudicial effect of the evidence exceeds its probative value (for convenience, this discretion will be referred to hereafter as the "exclusionary discretion" where appropriate). In our view, the discretion exercised by Rajendran J in *Dahalan* ([46] *supra*) was none other than this exclusionary discretion. This is evident from [74], [77], [78] and [82] of *Dahalan*, where Rajendran J's discussion focused on the effect that certain

conditions had on the evidential value of the statement's content. In his view, the powerful effects of drugs on the accused's mind, the lack of necessary language interpretation and the destruction of the original record of the statement coupled with Sgt Lai's unreliability as a witness all combined to make it "unsafe" to admit the statement (see [86]). The approach of the court in *Kong Weng Chong*, in so far as it also focused on the poor probative value of the accused's statement in the light of the facts surrounding its recording, should also be regarded as consistent with the existence and correct exercise of the exclusionary discretion.

54 Other examples of cases where the exclusionary discretion appears to have been exercised include *PP v Vasavan Sathiadew* [1989] 2 SLR(R) 357, *Public Prosecutor v Syed Abdul Aziz Bin Syed Mohd Noor* [1992] SGHC 197 and *Public Prosecutor v Hanafiah bin Bedullah* [1993] SGHC 211, where statements of accused persons were not admitted due to the absence of language interpretation (or sufficiently competent language interpretation) at their recording. These exclusions were not disturbed on appeal (see *Sathiadew (CCA)* ([44] *supra*), *Syed Abdul Aziz v PP* [1993] 3 SLR(R) 1 and *Hanafiah bin Bedullah v PP* [1994] 1 SLR(R) 101).

55 In our view, there is no reason why a discretion to exclude voluntary statements from accused persons should not exist where the prejudicial effect of the evidence exceeds its probative value. For one, where prejudicial effect exceeds the probative value, the very reliability of the statement sought to be admitted is questionable. It appears to us that this is an area of judicial discretion that Parliament has left to the courts. In this regard, we agree with Rajendran J's perceptive interpretation of s 122(5) of the CPC in *Dahalan* (see [46] above). Probative value is, in other words, the crucial factor *vis-à-vis* admissibility or non-admissibility of statements from accused persons under the CPC. This is already the settled position under the EA, as evident from the following passage from *Phyllis Tan* at [127]:

> In this connection, it may also be pertinent to note that under the EA, the only kind of incriminating evidence that has expressly been denied admissibility is admissions and confessions made involuntarily by an accused to a person in authority. …
>
> …
>
> Even a confession obtained in consequence of a deception practised on the accused person or when he was drunk is similarly relevant and admissible. Section 29 of the EA provides:
>
> > If such a confession is otherwise relevant, it does not become irrelevant merely because —
> >
> > > (*a*) it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk …

> Relevant evidence obtained in the situations referred to in s 29 may be said to be unfair to the accused. *Yet, these kinds of evidence are admissible because of their probative value. This being the overarching principle of the EA*, we are of the view that in so far as the High Court in *Cheng Swee Tiang* [*v PP* [1964] MLJ 291] recognised a discretion to exclude relevant evidence on the ground of unfairness to the accused, such a proposition is not entirely consonant with the provisions of the EA.
>
> [emphasis added]

56 Plainly, procedural irregularities may be a cause for a finding that a statement's prejudicial effect outweighs its probative value. As stated in *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2006 Reissue) at para 120.138:

> If the breach of procedure or impropriety casts serious doubts on the accuracy of the accused's statement that has been recorded, the court may exclude evidence of the statement on the ground that its prejudicial effect outweighs its probative value.

It cannot be denied that the rules prescribed by the CPC for the recording of statements are in existence to provide a safeguard as to reliability. The same can be said in respect to the Police General Orders that pertain to the recording of statements. As stated in *Dahalan* by Rajendran J (at [84]):

> There is … good reason why the Legislature has in s 121 [of the CPC] spelt out the manner in which statements are to be recorded. Similarly, there is good reason why the Commissioner of Police under powers given to him under s 55 of the Police Force Act issued General Orders specifying in lucid detail the manner in which pocket books are to be kept. *The fact that s 122(5) provides that oral statements are admissible in evidence should not be treated as licence for police officers to ignore the [Police General Orders] and the provisions of s 121 and render these safeguards meaningless.* [emphasis added]

In our view, Rajendran J was articulating a salutary principle. The Police General Orders, especially, set out basic but essential practices for police officers – including those who are investigating officers. When fully complied with, the Police General Orders thus help ensure that statements are reliably recorded. It follows as a logical conclusion that a serious breach of procedural rules, whether prescribed by the CPC or the Police General Orders, would necessarily render such statements less reliable.

57 In our criminal justice system, accused persons are entitled, as a constitutional right, to have access to counsel – but this entitlement does not extend to immediate access (see *Jasbir Singh v PP* [1994] 1 SLR(R) 782 at [45]–[49]). Even after the accused engages counsel (assuming he does), there is no legal rule requiring the police to let counsel be present during subsequent interviews with the accused while investigations are being carried out. In fact, an adverse inference may be drawn against the accused under s 123(1) of the CPC for remaining silent at his interview on the ground that he wishes to take legal advice before answering a question (see

Yap Giau Beng Terence v PP [1998] 2 SLR(R) 855 at [38]). Plainly, in Singapore, the law provides police officers with great freedom and latitude to exercise their comprehensive and potent powers of interrogation in the course of investigations. This means that the evidential reliability of any written statements taken from accused persons rests greatly on the conscientiousness with which the police investigators who conduct the process of examination and recording observe the prescribed safeguards.

58 It also appears to be the case that written statements taken by the police are often given more weight by finders of fact as compared to most other kinds of evidence. This is because formal statements taken by the police have the *aura of reliability that comes from their being taken (as would be normally, and correctly, assumed) under a set of strict procedures strictly observed by a trustworthy officer well-trained in investigative techniques*. This aura is further enhanced by the admissibility requirement in s 122(5) that the recording police officer must be of the rank of sergeant or above. It is, it may be said, statutorily assumed that such senior police officers are competent and will discharge their obligations conscientiously. All in all, it seems that public policy is in favour of trusting the integrity of the police, and this gives them a certain freedom to conduct their investigations more effectively and efficiently, statement-taking included. However, such an approach comes with certain inherent risks.

59 There is always a small but real possibility that an overzealous police officer who believes that a suspect is guilty will decide, perhaps half-consciously, that strict compliance with the procedural requirements for statement-taking may contribute to a factually guilty offender being let off. He may not go so far as to extract an incriminatory statement by threat, inducement or promise, or a statement that is otherwise involuntary. All that is required for a miscarriage of justice to occur is for such a police officer to record the statement with embellishments, adding nothing more than a few carefully-chosen words to the suspect's own account. If the statement is not read back or signed soon after by the suspect (with proper interpretation where appropriate), there is no assurance that the statement faithfully reflects what he had actually disclosed. Alternatively, a police officer might simply be indolent, leaving the recording of the statement to well after the examination. His memory of the interview having faded, such an officer might fill in the gaps based on his own views about the suspect's guilt. Such questionable statements could, standing alone, form the basis for wrongful convictions even for capital offences if an accused, disadvantaged by the lapse of time and memory, is unable to convince the court that he did not say what appears in writing to be his words. The salutary requirements of the CPC and the Police General Orders, especially those requiring statements to be promptly reduced to writing, immediately read back to their maker, and corrected if necessary and signed, are the only prescribed safeguards standing in the way of such an unacceptable possibility.

60 Police investigators are aware when they record statements that they are likely to be tendered as evidence before a court and that there is therefore an *uncompromising need* for *accuracy* and *reliability*. The objective of the relevant provisions in the CPC and the Police General Orders is to ensure that both these twin objectives are met in every investigation. For this reason, as well as what we have articulated earlier, we think that a court should take a *firm* approach in considering its exercise of the exclusionary discretion in relation to statements recorded by the police in violation of the relevant requirements of the CPC and the Police General Orders (or other applicable legal requirements). This means that the court should not be slow to exclude statements on the basis that the breach of the relevant provisions in the CPC and the Police General Orders has caused the prejudicial effect of the statement to outweigh its probative value.

61 If the Prosecution seeks to admit a statement recorded in breach of the relevant provisions in the CPC and/or the Police General Orders, it will bear the burden of establishing that the probative value of the statement outweighs its prejudicial effect. The Prosecution can discharge this burden if, for instance, some reasonable explanation is given for the irregularity such that the court can find that the probative value of the statement exceeds its prejudicial effect.

62 Statements taken in deliberate or reckless non-compliance (or "flagrant" violation, to adopt the words of Rajendran J in *Dahalan* ([46] *supra*) at [85]) in relation to procedural requirements will generally require more cogent explanation from the Prosecution to discharge its burden, as compared to where the irregularities are merely careless or arising from some pressing operational necessity. This would be because the *bona fides* of a recording police officer who deliberately breaches the requirements or knowingly disregards them would necessarily be more questionable. Further, such conduct should not be encouraged. The court should be wary of accepting any explanation by way of ignorance of the correct procedures, considering that s 122(5) imposes an admissibility requirement that the recording police officer is to be at least of the rank of sergeant (a rank implying a certain level of responsibility and competence). That having been said, the court should always evaluate probative value and prejudicial effect on the facts of each scenario.

63 Where there is a dispute of fact regarding whether the statement was indeed irregularly recorded, or where the Prosecution wishes to adduce evidence to explain an irregularity, a trial-within-a-trial should be held. This is in accordance with the general principle stated in *Beh Chai Hock v PP* [1996] 3 SLR(R) 112 ("*Beh Chai Hock*") by Yong Pung How CJ (at [25]):

> Counsel did not cite to me any authority directly covering the question of whether it is necessary for a trial judge to hold a *voir dire* to determine the admissibility of a statement when the only dispute is over the identity of the officer who recorded the statement. In my view, nevertheless, the position is

> clear. *The necessity for a* voir dire *encompasses situations other than when the voluntariness of a confession is in dispute. As a general rule, it would cover all situations when the admissibility of a confession is challenged*. In this case, since the question of the identity of the recorder of the statement was effectively a challenge to its admissibility, the trial judge should have held a *voir dire* to resolve the question of admissibility. [emphasis added]

64 Because an objection to admission of a statement based on procedural irregularity in recording seems similar to an allegation that the statement was partly or wholly fabricated, the following hypothetical scenario described in *Seeraj Ajodha v The State* [1982] 1 AC 204 at 222 by Lord Bridge of Harwich should be considered briefly:

> On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely upon oral statements, the defence case is simply that the interview never took place or that the incriminating answers were never given; in the case of a written statement, the defence case is that it is a forgery. In this situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury.

In our view, where there is evidence of serious procedural irregularity that raises the issue of inadmissibility, a trial-within-a-trial ought to be held if there is a relevant dispute of fact to be resolved. However, where a statement has been seemingly recorded in accordance with procedure and the allegation is simply that part or all of it was fabricated without the maker's knowledge, Lord Bridge's views should apply and no trial-within-a-trial need be held. Courts should be careful to distinguish between these two situations with the assistance of counsel.

65 For completeness, we would caution defence counsel against burdening the court with unmeritorious technical defences. Only serious irregularities, meaning those that materially affect the evidential value of a voluntary statement, will suffice to cause the court to exercise the exclusionary discretion. Examples of irregularities that would not suffice can be drawn from the following cases:

> (a) In *Sathiadew (CCA)* ([44] *supra*), the statement of one of the appellants had been read back to him by the recording officer but the recording officer had failed to obtain his signature. That being the only omission, the Court of Criminal Appeal held that the trial court was entitled to admit the statement. We observe that the finding, essentially, was that the irregularity did not greatly impact the probative value of the statement on the facts.
>
> (b) In *Tsang Yuk Chung* ([44] *supra*), the question raised was whether a statement would be inadmissible due only to a failure on

the part of the recording police officer to give a notice to the maker in the form stated in s 122(6) of the CPC. The Court of Criminal Appeal held that the trial court was entitled to admit the statement, as, *inter alia*, the admission of the statement was favourable to the appellant's case or, at least, did no damage to it. We observe that this meant that the prejudicial effect of the statement was low.

(c) In *Mazlan* ([49] *supra*), there was a failure to inform the maker of a statement of his right against self-incrimination under s 121(2) of the CPC. It was indicated by this court that such an irregularity, without more, was in fact irrelevant to both the admissibility and the evidential value of the statement.

(d) In *Foong Seow Ngui v PP* [1995] 3 SLR(R) 254 ("*Foong Seow Ngui*"), one objection raised was that the recording officer failed to indicate at the end of the statement that the statement had been read over to the accused and that the accused had been offered the opportunity to make corrections. In this regard, this court stated (at [44]):

> We are unable to agree [with the objection]. In our view, what is important is not whether that clause was included at the end of the statement, but whether the statement was read over to the maker and, after correction, if any, signed by him. This is a requirement stated in s 121(3) of the CPC. The mere absence of such a clause does not make the statement inadmissible *if the requirements of that subsection have been fulfilled*. In the present case, the learned trial judge had directed his mind to this question and had adequately dealt with it. [emphasis added]

66 In support of the decisions in *Tsang Yuk Chung* ([44] *supra*) and *Mazlan*, we would further add that a failure to be cautioned under s 122(6) of the CPC or to be informed of rights under s 121(2) of the CPC may affect *what a person chooses to say* in his statement, but it does not affect the accuracy or reliability or voluntariness of *what he actually says*. Such failures therefore should not, of themselves, form grounds for exclusion of a statement under the exercise of the exclusionary discretion. In relation to the decision in *Foong Seow Ngui*, we would add that, strictly speaking, the inclusion of a clause in a statement that the requirements of s 121(3) of the CPC have been fulfilled is helpful but not essential under that provision. Even if the omission of such a clause is in fact an irregularity, if the substantive requirements of s 121(3) have been complied with, as they were in that case, the probative value of the statement would not be affected by such an omission.

67 It remains for us to clarify that even if a trial court has wrongly exercised (or omitted to exercise) the exclusionary discretion, an appellate court will not alter the decision of the trial court unless the improper exercise of the exclusionary discretion occasions a miscarriage of justice

(see s 169 of the EA and s 396(*c*) of the CPC (now s 423(*c*) of the CPC 2010)). The decision of this court in *Fung Yuk Shing* ([48] *supra*) should be considered in this regard. The recording police officer in that case had taken down the appellant's statement on a piece of paper but did not show the paper to him or allow him to sign it. The next day, the officer transcribed the contents into his pocket book. The pocket book was produced and admitted at the trial but not the original piece of paper. This court stated that the admission of the pocket book entries did not "occasion the appellant such prejudice as to deprive him of a fair trial" (at [14]). The failure to produce the original paper had not prejudiced the appellant as the officer was made available for cross-examination and the trial judge had found his account of the interrogation to be credible. Furthermore, the trial judge did not ultimately rely on the contents of the pocket book as evidence against the appellant.

68 Before moving on to the next preliminary legal issue to be considered, we emphasise that the court should be careful to avoid basing the exercise of the exclusionary discretion primarily on a desire to discipline the wrongful behaviour of police officers (or officers of other enforcement agencies) or the Prosecution. The importance of distinguishing an evidential discretion from a disciplinary function was highlighted by the courts in *Sang* ([51] *supra*) at 436 and *Mazlan* at [23] (see also *Evidence and the Litigation Process* ([52] *supra*) at paras 5.38, 10.07 and 10.11). In the light of *Rayney Wong* ([52] *supra*) and *Phyllis Tan* ([51] *supra*) (see [52] and [55] above respectively), courts also should refrain from excluding evidence based only on facts indicating unfairness in the way the evidence was obtained (as opposed to unfairness in the sense of contributing to a wrong outcome at trial). That being said, a vigilant emphasis on the procedural requirements in the recording of statements can have a positive effect on the quality of such evidence generally. By making it clear that non-compliance with the required procedures could actually weaken the Prosecution's case against an accused person, we hope to remove the incentive for such non-compliance on the part of police officers. This will help ensure that all evidence in the form of written statements coming before the court will be as reliable as possible.

Treatment of subsequent statements with similar content to an excluded statement

69 Given the principles laid down above, the question arises as to whether statements recorded subsequent to an excluded statement can be admitted and/or given weight, especially if they contain similar content. Such statements will be referred to as "subsequent statements" (or "subsequent statement") for convenience where appropriate.

70 Section 28 of the EA, which was repealed and replaced by a similar provision in the CPC 2010, *viz*, s 258(4), previously provided for the

admissibility of confessions that would be otherwise inadmissible due to what could be regarded as an inducement, threat or promise. Section 28 of the EA stated:

> If a confession referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

To our knowledge, the only case that has applied this section would be *Public Prosecutor v Somporn Chinphakdee* [1994] SGHC 209. One application of this section would be where a person makes two similar confessions in two statements, the first of which is caused by inducement, threat or promise but the second of which is made after the inducement, threat or promise is fully removed. In such cases, although the subsequent statement would be admissible, the fact that it is similar to an earlier statement should lead the court to be especially vigilant in inquiring whether the effect of the inducement, threat or promise was really removed.

71 In the context of voluntary statements being excluded due to their prejudicial effect being greater than their probative value as a result of serious procedural irregularity, different considerations should apply. For a subsequent statement that follows an *involuntary* statement, the question before the court is whether the subsequent statement is untainted by involuntariness. For a subsequent statement that follows a *voluntary* but *irregularly recorded* statement, the real concern is whether what the maker said in the subsequent statement was accurately represented in writing. If all the applicable procedural requirements are fully complied with and the subsequent statement is voluntary, admission should generally be allowed. However, where the subsequent statement contains similar content to a previous excluded statement, caution ought to be exercised. It may, for instance, be necessary for the court to satisfy itself that the fear of being inconsistent with the previous statement did not act as an inducement on the maker such as to render the subsequent statement involuntary.

72 Police work, of course, has to be acknowledged as being often unpleasant, stressful, complex and not infrequently punctuated by unpredictable developments. An accused person's statement may inadvertently turn out to have been affected by serious irregularities in recording. Once this is discovered, a conscientious investigating officer need not call off the investigation. He may proceed to have a subsequent statement taken from the accused as long as he ensures that it is voluntary, and this will be admissible. In addition, he may proceed to find other material or witness evidence relevant to the case based on what was revealed by the accused person in the first statement. Under s 27 of the EA (which was repealed and replaced by a similar provision in the CPC 2010, *viz*, s 258(6)(*c*)), any fact discovered in consequence of information obtained through a statement may be proved, even if the statement in

question may be inadmissible of itself (see the application of this section in *PP v Chin Moi Moi* [1994] 3 SLR(R) 924).

Testing the veracity of a disputed statement admitted into evidence

73 The issue of when and how a court should test the veracity of a statement that has been admitted into evidence but whose contents are disputed must also be briefly considered. Just like any other form of evidence, the truth of an admitted statement's contents (and therefore the weight to be given to that statement) is to be evaluated on an ongoing basis throughout the trial. This should be done regardless of whether its truth is disputed by its maker, but especially if it is so disputed. The court and counsel should bear in mind that even if a statement has, standing alone, more probative value than prejudicial effect (and is therefore admitted), this does not mean that its contents should, as a matter of course, be given some or any weight after being assessed alongside all the other evidence in the case. The standard tools available to the court can all be used for this assessment, including examination of internal consistency, corroborating evidence, contradictory evidence, evaluation of the credibility of the witnesses, and so on and so forth.

74 Confessions admitted into evidence that are partly or wholly retracted by the maker should be the subject of special care. This, as well as other general principles concerning retracted statements, was enunciated in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 ("*Jagatheesan*"), in the following passage (at [84]–[87]):

> 84 The retraction of his own statement by a witness may or may not be treated with circumspection by the court depending on the circumstances. For instance, it is settled law that an accused can be convicted solely upon his own confession even though that statement is subsequently retracted: *Lim Thian Lai v PP* [2006] 1 SLR(R) 319 ('*Lim Thian Lai*') at [43]. It has also been held by the Court of Appeal that a retracted confession of a co-accused implicating the accused in the offence may also be relied upon to establish the accused's guilt: *Panya Martmontree v PP* [1995] 2 SLR(R) 806 ('*Panya Martmontree*') at [50]. By parity of reasoning, the fact that a witness (in this case, an accomplice) may have retracted his statement inculpating the accused does not, *ipso facto*, render the statement of little evidential weight.
>
> 85 *However*, both *Lim Thian Lai* and *Panya Martmontree* have cautioned that the evidential weight to be assigned to the retracted statement should be assiduously and scrupulously assessed by the courts. In particular, I would add, if the retracted statement forms the only evidence upon which the Prosecution's case rests, such statements should attract painstaking if not relentless scrutiny. Therefore, in *Lim Thian Lai* ([84] *supra*) at [43], it was held that it was necessary for the court to be satisfied that the retracted confession is voluntary, *true* and reliable. In fact, the court in *Lim Thian Lai* cited *Taw Cheng Kong v PP* [1998] 1 SLR(R) 78 as an example of where it was

correct for the court to have accorded precious little weight to the accused's statements because of how he had changed his story repeatedly.

86 I pause here only to emphasise that the requirements of the proviso to the general principle that a retracted statement may still be relied upon as being true, *viz*, that the statement should *be voluntary and objectively reliable* should be required conjunctively. Therefore, it is not sufficient for the Prosecution merely to prove beyond reasonable doubt that the statement was made voluntarily. A statement by a witness (or even an accused) even if it was given voluntarily may or may not be reliable depending on the circumstances of the case and the cogency of the statement itself and may to that extent, be dubious.

87 In my view, it is neither productive nor meaningful to treat retracted statements as a separate class of evidence attracting its own peculiar rules of analysis. Rather, I prefer to regard retracted statements as an instance of inconsistency in the witness's testimony. In other words, the fact that a witness admits to a statement and later withdraws it constitutes, both, in principle and in effect, a discrepancy or inconsistency in his evidence. Accordingly, the weight to be assigned to such statements and the assessment of the witness's credibility falls to be determined by the general *corpus* of case law relating to inconsistencies, discrepancies and falsehoods in a witness's statement. In other words, whether the fact that a witness has retracted his statement should be allowed to cast about the credibility of that witness and the veracity of his statement depends on whether a *reasonable and reliable* explanation can be furnished for the retraction; see, in this regard, the Court of Appeal decision in *Syed Abdul Mutalip bin Syed Sidek v PP* [2002] 1 SLR(R) 1166 at [22] where it was held, in the context of an accused retracting his confession, that 'While the court should consider any explanation that the accused person gives for his change of position, the explanation can be rejected if it is found to be untrue.' I would respectfully add that if the explanation for the retraction is unsatisfactory then this may cast doubt on the entire evidence of that witness.

[emphasis in original]

75 All that we need to emphasise for present purposes, however, is that courts should exercise particular caution when relying on uncorroborated confessions that have for good reason (or reasons) been withdrawn by their makers.

The Prosecution's duty to the court in relation to disclosure of relevant material not favourable to the case it seeks to present

76 Before beginning any discussion on the Prosecution's duties of disclosure in a criminal context, an important distinction needs to be made between (a) material which forms part of the Prosecution's case and will be adduced as evidence at trial and (b) other material in the possession of the Prosecution which will not be relied on at trial. This latter category is commonly referred to as "unused material" (see, *eg*, Commonwealth

Secretariat, "Prosecution Disclosure Obligations" (2008) 6(2) JCLLE 251 at para 14).

The Prosecution's duty of disclosure under the CPC and the CPC 2010

77 Under the CPC, material that the Prosecution intends to rely on would, in practice, be disclosed to the defence as part of the Preliminary Inquiry proceedings for the case in question (see Chan Sek Keong, "Rethinking the Criminal Justice System of Singapore for the 21st Century" in *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020* (Butterworths, 2000) at p 46). Preliminary inquiry proceedings, however, would only take place for cases prosecuted in the High Court.

78 Following the reforms in the CPC 2010, "criminal case disclosure" procedures were introduced for criminal matters in the Subordinate Courts (see Div 2 of Pt IX of the CPC 2010). If an accused does not wish to plead guilty to a charge in the Subordinate Courts, a "criminal case disclosure conference" (or "CCDC" for short) will be held, with the Prosecution having to file and serve a "Case for the Prosecution" no later than two weeks from the CCDC (or the date to which the CCDC is adjourned to) (see s 161(2) of the CPC 2010). Section 162 of the CPC 2010 sets out the requirements for the Case for the Prosecution as follows:

> **162**. The Case for the Prosecution must contain —
>
> (*a*) the charge which the prosecution intends to proceed with at the trial;
>
> (*b*) a summary of the facts in support of the charge;
>
> (*c*) a list of the names of the witnesses for the prosecution;
>
> (*d*) a list of the exhibits that are intended by the prosecution to be admitted at the trial; and
>
> (*e*) any statement made by the accused at any time and recorded by an officer of a law enforcement agency under any law, which the prosecution intends to adduce in evidence as part of the case for the prosecution.

79 Under the CPC 2010, for High Court trials, committal hearings have replaced preliminary inquiry proceedings with the new procedures being found in Div 2 of Pt X. Under the new procedures, if an accused intends to plead guilty to a capital offence or wishes to claim trial, the Prosecution must file and serve its Case for the Prosecution not less than seven days before the date fixed at the CCDC for the committal hearing (see s 176(3)(*b*)). Section 176(4) of the CPC 2010 sets out the requirements for the Case for the Prosecution as follows:

> (4) The Case for the Prosecution filed under subsection (3)(*b*) must contain the following:

> (*a*) the charge which the prosecution intends to proceed with at the trial;
>
> (*b*) a list of the names of the witnesses for the prosecution;
>
> (*c*) a list of exhibits that are intended by the prosecution to be admitted at the trial;
>
> (*d*) the statements of witnesses which are intended by the prosecution to be admitted under section 179(1); and
>
> (*e*) any statement made by the accused at any time and recorded by an officer of a law enforcement agency under any law, which the prosecution intends to adduce in evidence as part of the case for the prosecution.

80 It can be seen that under both the CPC and the CPC 2010 regimes, there is no statutory requirement for the Prosecution to disclose any kind of *unused material*. For instance, statements made by an accused which the Prosecution does not intend to rely on at trial need not be disclosed. Potential exhibits, including the results of forensic tests, need not be disclosed if they are not intended to be tendered as evidence. The existence and identity of persons who may have information about the case but who will not be called as Prosecution witnesses need not be disclosed. More importantly, the written statements of potential material witnesses that the Prosecution does not wish to rely on need not be disclosed, even where those statements would otherwise be admissible in evidence under an exception to s 122(1) of the CPC or under s 259 of the CPC 2010.

81 The issue of disclosure of unused material was considered by the High Court in *Selvarajan James v PP* [2000] 2 SLR(R) 946 ("*Selvarajan James*"). This was an appeal against a decision of a district judge who had convicted the appellant of abetting an offence of theft by a servant under s 381 read with s 109 of the Penal Code. The appellant's accomplice had given three statements to the police, of which two were adduced at trial by the Prosecution as evidence against the appellant. The appellant was not aware of the existence of the third statement, which was apparently exculpatory, at the trial. The appellant filed an appeal and also took out a criminal motion for an order to compel the Prosecution to produce the third statement. In dismissing the motion, Yong CJ stated the following (at [18]–[19]):

> 18 The procedure for criminal discovery in Singapore is governed by the Criminal Procedure Code (Cap 68) (the 'CPC'). The CPC does not impose on the Prosecution an onerous duty of disclosure. This differs from the requirements in civil cases where extensive rules of discovery are provided for in the Rules of Court. For criminal cases, there is no requirement in the CPC for the Prosecution to disclose witnesses' statements to the Defence. *In this case, the Prosecution did not intend to rely on the third statement given by Kanan and was not compelled by law to disclose or produce the statement to the Defence.*

> 19 The present duty of disclosure on the part of the Prosecution in criminal cases, as provided for in the CPC, is minimal. This position is not necessarily the most ideal and it has been argued on numerous occasions that more disclosure and early disclosure on the part of the Prosecution are desirable to ensure that the accused knows the case that has to be met and as such would get a fairer trial. *However, it is not for this court to impose such requirements on the Prosecution.* It is for Parliament to decide if it wants to enact these revisions when it updates the CPC and, until then, *the court cannot direct the Prosecution* to produce witnesses' statements to the Defence.
>
> [emphasis added]

82 This holding in *Selvarajan James* was framed in absolute terms and based entirely on statutory grounds – in particular, the absence of a provision in the CPC requiring prosecutorial disclosure of unused material. If this reasoning is valid, it applies with equal force to the new regime under the CPC 2010, which also does not mention unused material. However, in *Selvarajan James*, the authorities and principles relating to the common law on prosecutorial disclosure, which had by that time been well-developed in England and adopted in other mature common law jurisdictions, were not considered. Such principles could have been relevant under s 5 of the CPC (as elaborated on at [105] and [107] below), although they may not have made a difference to the outcome. For this and other reasons explained below (see [101]–[112] below), we believe that *Selvarajan James* should not be followed on this point. That having been said, we will explore the common law principles on prosecutorial disclosure in other jurisdictions before setting out what we believe is the position in Singapore.

The Prosecution's duty of disclosure under the common law in other jurisdictions

England

83 Since the passage of the Criminal Procedure and Investigations Act 1996 (c 25) (UK) ("the CPIA 1996"), the scheme of prosecutorial disclosure in England has been largely governed by statute. However, English jurisprudence had been developing in this area even before the enactment of the CPIA 1996. The House of Lords in *Regina v Brown (Winston)* [1998] 1 AC 367 ("*Brown*") gave an outline of the English common law on prosecutorial disclosure, including a summary of key decisions. The common law rules were applicable in that case as the defendant was convicted before the CPIA 1996 disclosure regime came into operation. The leading judgment was delivered by Lord Hope of Craighead, who stated (at 374–376):

> *The common law duty of disclosure*
>
> The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a

defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context, as Lord Taylor of Gosforth C.J. observed in *Reg. v. Keane* [1994] 1 W.L.R. 746, 750G, the great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence. *These are the rules upon which sections 3 and 7 of the [CPIA] 1996 have been based. But they had already found their expression in decisions by the courts.* It is necessary to mention only a few of them in order to identify the extent of the duty of disclosure, and to trace its development, as background to the issue which arises in this case.

In *Dallison v. Caffery* [1965] 1 Q.B. 348, 369 Lord Denning M.R. described the duty of the prosecution in these terms:

> '*The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give.* If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings [for committal before the magistrates], gave the solicitor for the defence the statement of Mr. and Mrs. Stamp; and thereby he did his duty.'

In the same case, at p. 375G, adopting the words of Lord Goddard C.J. in *Rex v. Bryant and Dickson* (1946) 31 Cr.App.R. 146, Diplock L.J. observed that the proposition that it is the duty of the prosecution to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person, was erroneous. It is clear, then, that in his view the principle of open justice did not extend that far. As he put it, at pp. 375-376:

> 'A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or, although not inconsistent with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence.'

I do not need, for the purposes of this case, to examine these dicta, which are not wholly consistent with each other, in greater detail. … The plaintiff, whose action was for damages for false imprisonment and malicious prosecution, had put forward a defence of alibi. The statement which the police had obtained from Mr. and Mrs. Stamp supported his alibi. This was information in the hands of the prosecutor which might have assisted the defence case on an issue of fact which was relevant to the plaintiff's guilt or innocence.

In *Reg. v. Ward (Judith)* [1993] 1 W.L.R. 619, 645, the court adopted the words of Lawton L.J. in *Reg.* v. *Hennessey (Timothy)* (1978) 68 Cr.App.R. 419, 426, where he said:

> 'those who prepare and conduct prosecutions *owe a duty to the courts* to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence.'

The court went on to observe:

> 'We would emphasise that 'all relevant evidence of help to the accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.'

The effect of that decision was to widen the scope of the duty. But the instances of non-disclosure with which it was concerned related mainly to scientific evidence which had been obtained during the process of investigation. … The court explained the rules of disclosure which were relevant to the case in this way, at p. 674:

> 'An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence.'

In *Reg. v. Keane* [1994] 1 W.L.R. 746 the court was concerned with the problems which arise when a trial judge is invited by the defence to order disclosure of documents and is invited by the Crown in the public interest to refuse such disclosure. After noting that the court must then conduct a balancing exercise, Lord Taylor of Gosforth C.J. said, at pp. 751–752:

> '*If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.* But how is it to be determined whether and to what extent the material which the Crown wish to [*sic*] withhold may be of assistance to the defence? First, it is for the prosecution to put before the court only those documents which it regards as material but wishes to withhold. As to what documents are "material["] we would adopt the test suggested by Jowitt J. in *Reg.* v. *Melvin* (unreported), 20 December 1993. The judge said: "I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (l) or (2)." '

[emphasis added]

84 Lord Hope proceeded to endorse the view of Steyn LJ expressed in the Court of Appeal's decision in *Brown* (see *Regina v Brown (Winston)* [1994] 1 WLR 1599 at 1606–1607) and the Court of Appeal's stance in *Regina v Ward* [1993] 1 WLR 619 ("*Ward*") at 645 that the phrases "an issue in the case" and "all relevant evidence of help to the accused" must be given a broad interpretation, as illustrated by the obligation on the Prosecution to disclose any (a) previous statements, (b) requests for a reward, and (c) previous convictions of a Prosecution witness. Lord Hope concluded his overview with the following statement of general principles (at 377):

> [T]he common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. *The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence.* The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. *Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed.* The question [of] whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important 'issues' in the case, although the material which bears upon it may be … collateral. [emphasis added]

85 From *Brown* and other key English cases we may list the main English common law principles on the Prosecution's duty of disclosure as follows:

> (a) Prosecutors owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the Defence (see *Brown* at 375 and *Ward* at 645).
>
> (b) The obligation of disclosure extends beyond material which could be admissible in evidence, as inadmissible information may lead by a train of inquiry to evidence which is admissible. The test is materiality, not admissibility (see *Regina v Preston (Stephen)* [1994] 2 AC 130 at 163–164).
>
> (c) The test of materiality would require disclosure of whatever can be seen on a sensible appraisal by the Prosecution to be (see *Regina v Keane* [1994] 1 WLR 746 ("*Keane*") at 752):
>
> > (i) relevant or possibly relevant to an issue in the case;
> >
> > (ii) to raise or possibly raise a new issue whose existence is not apparent from the evidence that the Prosecution proposes to use; or

(iii) to hold a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (i) or (ii).

(d) The court may permit the non-disclosure of material if an exception (such as public interest immunity) is found to apply. However, where the material may prove the defendant's innocence or avoid a miscarriage of justice, the balancing exercise comes down resoundingly in favour of disclosure (see *Brown* at 376 and *Keane* at 751–752).

(e) Fairness requires that the Prosecution discloses material in its possession which may cast doubt on the credibility or reliability of its witnesses (see *Brown* at 377). Material relevant to that issue of credibility embraces "collateral" material (see *Brown* at 376–378).

(f) The obligation on the Prosecution to consider making disclosure begins at the moment of arrest, albeit with practical limitations. Although this will be rare, material to be disclosed at this stage may include (see *Regina v Director of Public Prosecutions, Ex parte Lee* [1999] 1 WLR 1950 ("*Lee*") at 1962):

(i) information about a complainant's or deceased's previous convictions which may reasonably be expected to assist the accused in applying for bail;

(ii) material which might enable the accused to make an application to stay proceedings as an abuse of process;

(iii) material which would enable the accused to make a submission against committal or for committal on a lesser charge; and

(iv) material which will enable the accused to make preparations for trial which may be significantly less effective if disclosure is delayed (*eg*, names of eye-witnesses whom the Prosecution do not intend to use).

(g) The disclosure obligation is a continuing one, subsisting for as long as the proceedings remain at first instance or on appeal (see *R v Stephen Christopher Makin* [2004] EWCA Crim 1607 at [36]).

(h) A breach of the disclosure obligation may:

(i) justify an order made by the trial court to disclose the material (see *Brown* at 376 and *Lee* at 1957);

(ii) in rare cases, justify a court other than the trial court reviewing the Prosecution's decision and compelling disclosure (see *Lee* at 1957 and 1963); or

(iii) cause a conviction to be overturned on appeal if the breach had led to a miscarriage of justice at trial (see *Ward* at 641–642).

(i) Once the Prosecution's duty of disclosure is satisfied, it is not its duty to conduct the case for the Defence. Once the duty has been satisfied, the investigation and preparation of the Defence's case is a matter for the Defence. That includes the tracing, interviewing and assessment of possible witnesses (see *Brown* at 379–380).

86 As can be seen, the pre-CPIA 1996 approach developed by case law had many intricacies, complexities and difficulties, including a potential burden on the Prosecution to disclose masses of material of only speculative relevance. It was partly in response to these practical problems that the report of the Royal Commission on Criminal Justice (United Kingdom, Royal Commission on Criminal Justice, *Report* (Cmnd 2263, 1993) (Chairman: Viscount Runciman of Doxford)) recommended that a new regime of disclosure be created, which eventually resulted in the enactment of the CPIA 1996 (see, also, *Lee* at 1956–1957). Knowing this history, it would be imprudent for us to lightly import the full scope of the English common law rules. Much of it (*eg*, disclosure from the point of arrest) would also be incompatible with the CPC and the CPC 2010. However, we have nevertheless laid out the English position because the *rationale* and *general principles* therein remain highly instructive in so far as they relate to our courts' fundamental purpose in criminal trials. This purpose is *to secure the conviction and punishment of the guilty and the acquittal and vindication of the innocent* – in short, *to achieve a just outcome by means of a fair trial*.

Australia

87 The English common law disclosure regime is consistent with the position prevailing in all the other common law jurisdictions that we have surveyed. As Kirby J observed in his judgment in the High Court of Australia's decision in *Mallard v The Queen* (2005) 224 CLR 125 ("*Mallard*") at [76], "[t]he English authorities have been influential throughout Commonwealth countries". In his judgment, Kirby J summarised his conclusions from his survey of other jurisdictions as follows (at [81]–[82]):

> 81 … The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, *particularly in countries observing the accusatorial form of criminal trial …, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability*

> *of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.*
>
> 82 According to the principles expressed (as in *Apostilides* [(1984) 154 CLR 563]), this Court will not second guess the prosecutor in the decisions that have to be made in presenting the prosecution case. Still less is the prosecutor burdened with an obligation to present the defence case (which, in any event, may not always be known in advance of the trial). *The obligation imposed by the law is to ensure a fair trial for the accused, remembering the special requirements that descend upon a prosecutor, who represents not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice.*
>
> [emphasis added]

Kirby J concluded (at [83]–[84]) that where the Prosecution fails to disclose or suppresses material evidence, thereby creating a risk of miscarriage of justice (for instance where the non-disclosure may have seriously undermined the effective presentation of the Defence's case), a conviction will be set aside on appeal unless the non-disclosure is found to be unlikely to have altered the outcome of the trial. The joint reasons given by the other judges of the court referred to a similar common law principle at [17], although not with the same level of detail.

Hong Kong

88 Next we consider the Hong Kong Court of Final Appeal's decision in *HKSAR v Lee Ming Tee & Securities and Futures Commission (Intervener)* (2003) 6 HKCFAR 336 ("*Lee Ming Tee*"). Sir Anthony Mason NPJ, who delivered the judgment of the court, stated (at [139]–[140]):

> 139 *That the prosecution is under a common law duty to disclose to the defence material or information in its possession in the interests of a fair trial is not in dispute. What is in dispute is the nature and scope of the duty.* …
>
> …
>
> 140 In order to examine these questions, it is necessary to trace the development — and it has been a recent development — of the common law duty in England. …
>
> [emphasis added]

89 Sir Anthony Mason NPJ proceeded to set out (at [140]–[152]) what we consider to be an excellent summary of the English common law position, which he proceeded to adopt (at [155]). The following penetrating statements, in our view, are especially helpful (at [142] and [152]):

> 142 Although breach of the prosecutor's duty of disclosure may result in the setting aside of a conviction, the law relating to the duty of disclosure was not developed in tandem with the principles governing the grounds on which a conviction will be set aside. The two areas of law intersect, however, when

> non-disclosure by the prosecutor results in an unsafe or unsatisfactory conviction, a material irregularity or miscarriage of justice. Non-disclosure to the defence of relevant material, even if not attributable to any breach by the prosecutor of his duty to disclose, can result in material irregularity and an unsafe conviction, as it did in *R v Maguire* [1992] QB 936 and *R v Ward* [1993] 1 WLR 619, where forensic scientists called by the prosecution failed to disclose to the prosecution information which tended to weaken their expert evidence. An understanding that these two areas of law do not necessarily co-extend and correspond is essential to an appreciation of the cases.
>
> …
>
> 152 While the principles just discussed are expressed in terms of the prosecutor's duty to the defence, when a dispute as to disclosable materials arises, *it is for the court, not prosecuting Counsel, to decide such questions and to rule on any asserted legal ground relied upon to justify the withholding of disclosure of relevant material.* …
>
> [emphasis added]

Canada

90 The Supreme Court of Canada's decision in *William B Stinchcombe v Her Majesty The Queen* [1991] 3 SCR 326 ("*Stinchcombe*"), should be considered next. Sopinka J, who delivered the court's judgment, held that the Prosecution had an extensive duty to disclose to the Defence "all material evidence whether favourable to the accused or not" (at 338–339), and that this would be a continuing obligation and should first occur before the accused is called upon to elect the mode of trial or to plead (at 342–343). Although the court reached its decision partly with reference to the right of the accused to "make full answer and defence" to a criminal charge under s 7 of the Canadian Charter of Rights and Freedoms (at 336), there are general statements about the duty of the Prosecution in Sopinka J's judgment that strike us as being of wider application. The following passage, in particular, should be highlighted (at 333):

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. … In *Boucher v. The Queen*, [1955] S.C.R. 16, Rand J. states, at pp. 23-24:
>
> > It cannot be over-emphasized that *the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime*. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. *The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal*

> *responsibility*. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
>
> I would add that *the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done*.
>
> [emphasis added]

India

91 Turning to jurisdictions with legislation similar to our CPC, the current position in India is represented by *Sheshrao v The State* 2001 Cri LJ 3805 ("*Sheshrao*"), a decision of the Karnataka High Court on appeal from the decision of a sessions judge to convict the appellants of murder. In that case, H N Narayan J, who delivered the judgment of the court, noted (at [22]) that "[o]n careful perusal of the prosecution papers, we find that there is an attempt to suppress some material facts from the purview of the Court". Although the court did not refer to the English cases, it cited decisions (at [24]–[25]) of the Supreme Court of India for the propositions:

> (a) that a prosecutor "is … an officer of the Court … and the Court is entitled to have the benefit of the fair exercise of his function";
>
> (b) that the Public Prosecutor is an independent statutory authority not part of the investigating agency; and
>
> (c) that the Public Prosecutor holds a public office and the primacy given to him under the law of criminal procedure has a social purpose.

92 Narayan J then came to the following findings on the duty of the Prosecution (at [26]):

> There should be on the part of the Public Prosecutor no unseemly eagerness for or grasping at conviction. His duty as Public Prosecutor is not merely to secure the conviction of the accused at all costs but to place before the Court whatever evidence is in his possession, whether it be in favour or against the accused and to leave it to the Court to decide upon all such evidences whether the accused had or had not committed the offence with which he stood charged. *The Public Prosecutor is not supposed to go out of his way to secure a conviction. He has to be truthful and impartial. A Public Prosecutor is not a mouthpiece for the State. He must not consciously mis-state the facts, nor knowingly conceal the truth. The Public Prosecutor must not suppress or keep back from the Court evidence relevant to the determination of the guilt or innocence of the accused. He must present a complete picture and not be partial. He has to be fair to both sides in the presentation of the case.* The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying the departments of the State Government, with which he has to be in contact. *He must consider himself as an agent of justice.* [emphasis added]

Narayan J then held (at [29]) that the evidence suppressed by the Prosecution suggested that the material incriminating the appellants had been concocted and could not be relied on, and ordered the setting aside of the convictions and sentences of the appellants.

Malaysia

93 The Malaysian case of *Sukma Darmawan Sasmitaat Madja v Public Prosecutor* [2007] 5 MLJ 666 ("*Sukma*") concerned an appellant who had pleaded guilty before a sessions court to a charge of gross indecency under s 377D of the Penal Code (Act 574, 1997 Rev Ed) (M'sia). The appellant had appealed as well as sought criminal revision before the High Court, but his appeal and application for revision were dismissed on procedural grounds. He then appealed to the Malaysian Court of Appeal, which stated the following (at [8]–[10]):

> **8** … [I]t is our opinion that the decision of the High Court cannot stand for several reasons.
>
> **9** First, there was evidence placed before the High Court that at the time when the accused pleaded guilty the prosecution had in their possession material which, at the very least, cast a doubt on the guilt of the accused. The material in question was a medical report by a Government doctor who had examined the accused. In his report he says that there were no signs of any penetration in the accused's anus, whether recent or old. … If you look at the charge, in substance it alleges penetration. That is the particular act of gross indecency which the prosecution says brings the case under s 377D. … So, it comes to this. The prosecution had in its possession evidence favourable to the defence. What should it do in such circumstances? The answer is to be found in the decision of the English Court of Appeal in *Dallison v Caffrey* [*sic*] [1965] 1 QB 348. In that case Lord Denning MR said:
>
> > The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings, gave the solicitor for the defence the statement of Mr and Mrs Stamp; and thereby he did his duty.
>
> **10** In the present case, the sessions judge was denied access to information favourable to the accused. Had it been made available to her, she may well have rejected the plea of guilt on the ground that an offence may not have been committed for the want of proof of an essential allegation in the charge. For it is trite law that in a case where an accused pleads guilty, the prosecution when reciting the facts, confine itself to only those facts it can prove. See, *Abdul Kadir bin Abdul Rahman v Public Prosecutor* [1984] 1 MLJ

> 80; *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65. We are satisfied that the accused's conviction based on his plea of guilt may be quashed on this ground alone. But, as it happens, there are other grounds as well. And before moving onto them we must express our deep regret that the suppression of material evidence by the prosecution occurred in this case despite the reminder given by Vincent Ng JC (as he then was) in *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322 when he said that the duty of deputy public prosecutors is (at p 336):
>
> > … to help the court arrive at the truth and to honour truth itself overrides any lingering ill-founded eagerness that they may harbour, to satisfy their superiors that they have robotically objected to the objectable. Surely, the eternal question of which version if any, abides by the truth is solely and exclusively within the domain of judicial determination and not within the purview of counsel or DPPs.

94 The proposition followed in *Sukma* that the Prosecution's statement of facts should only contain facts it is able to prove (first stated in *Lian Kian Boon v Public Prosecutor* [1991] 1 MLJ 51) is one that has not been considered in the Singapore courts. We would tentatively accept that if there is reason for a court to suspect that part of a statement of facts relating to an essential element of the offence charged is false (for instance due to contradiction between facts in the statement of facts), it should not accept a plea of guilt based on that statement of facts. That aside, as a matter of general principle we empathically agree with the Malaysian Court of Appeal's view in *Sukma* that there is an inextricable link between the Prosecution's specific duty not to suppress material evidence and its general duty to the court, and that where a breach of the duty against suppression threatens to cause a miscarriage of justice the court should prevent it by any permissible means.

Brunei

95 Finally, we consider the position in Brunei. The Bruneian case of *Yeo Tse Soon v Public Prosecutor* [1995] 3 MLJ 255 concerned several offences committed by the appellants accompanied by one Lau Foo Tze ("Lau"). Lau had given a statement to the police in the course of investigations but he later disappeared and was not traced by the time of trial. The appellants believed that Lau's statement contained material that tended to exonerate them. They applied to the trial judge thrice for Lau's statement to be produced by the Prosecution, the first two times based on a common law duty of disclosure and citing *Dallison v Caffery* [1965] 1 QB 348 ("*Dallison*") (see [83] above) and the third time based on s 117(1) of the Criminal Procedure Code (Cap 7, 1984 Ed) (Brunei) ("the Brunei CPC") which would be similar to s 122(5) of the CPC except that it does not limit the statement's admissibility to the trial of its maker. The trial judge dismissed all three applications and convicted the appellants after the trial.

The appellants subsequently appealed to the Brunei Court of Appeal against their convictions.

96 The Brunei Court of Appeal agreed with the trial judge's application of s 117(1) of the Brunei CPC. However, it went on to find (at 268I) that "[t]he matter stands very differently in relation to the bearing of common law principle on this application for disclosure". The court then (at 268–270) considered the relevant English cases, and summarised their effect as follows (at 270F):

> At p 632 of [*Ward*], Glidewell LJ, giving the judgment of the court, summarized the principles of law and practice which now govern the disclosure of evidence by the prosecution before trial in criminal trials in the United Kingdom. Having first recited the duty of the prosecution to make available a witness whom the prosecution has decided not to call, the learned judge went on to say:
>
> > Unless there are good reasons for not doing so, the duty should normally be performed by supplying copies of the witness statements to the defence or allowing them to inspect statements and make copies: see *R v Lawson* [[1990] 90 Cr App R 107]. Where there are good reasons for not supplying copies of the statements, the duty to disclose can be performed by supplying the name and address of the witness to the defence.
>
> In the present state of authority in the United Kingdom it would seem, therefore, that only if there are good reasons for withholding a statement should the prosecution refuse to disclose it and make it available.

97 Applying the common law principles to the facts, the court held (at 270–271) that the non-disclosure of Lau's statement had materially hampered the Defence in the cross-examination of the complainant, who had given the only testimony supporting the serious charges against the appellants. The court considered the refusal of the trial judge to order production a material irregularity. The court then considered some additional grounds for allowing the appeal before stating the following conclusion (at 272H):

> These matters taken together with the refusal by the prosecution to make Lau's statement available to the defence have persuaded us, after anxious consideration, that the convictions were unsafe and accordingly we allowed the appeals of both appellants and set aside the sentences.

98 It is very clear that although the main developments in the common law occurred in England, all major common law jurisdictions (besides Singapore) have imposed some kind of non-statutory disclosure obligation on the Prosecution. This grounds the duty of disclosure by the Prosecution firmly in the common law, not just the law of England. In our view, it seems that the courts of the jurisdictions that have been discussed have generally perceived this obligation to be based on "the elementary right of every defendant to a fair trial" (see *Brown* ([83] *supra*) at 374; see, also, *Mallard*

([87] *supra*) at [82] and *Lee Ming Tee* ([88] *supra*) at [139]), on "the rules of natural justice" including "open justice" (see *Brown* at 374) and on a duty owed by prosecutors to the court (see *Brown* at 375; see, also, *Mallard* at [82] and *Sheshrao* ([91] *supra*) at [24]).

The Prosecution's duty of disclosure under the common law in Singapore

99 On 23 May 2011, we directed the parties to make further submissions on the following question:

> Is the Prosecution under a duty (legal and/or ethical) to the Court to disclose to it material that is a) not part of the Prosecution's case, b) from a seemingly credible source, c) that would be admissible in evidence and d) that may have a direct bearing on the guilt or innocence of an accused? If so, when ought this to be done?

In its further written submissions dated 30 May 2011, the Prosecution began by stating that "the question, as phrased, must be answered affirmatively but with qualifications". Specifically, the Prosecution made a distinction between an *ethical duty to the Court to disclose certain material* and a *legal duty of (criminal) discovery*. The Prosecution took the position that it did not bear any *legal* duty of discovery (what we have called disclosure) whether at the pre-trial or trial stage, based on the analysis of the CPC in *Selvarajan James* ([81] *supra*). This means that "*not all prima facie inconsistent evidence* must or needs or ought to be disclosed by the Prosecution" [emphasis in original].

100 However, the Prosecution acknowledged that it bore an *ethical* duty to produce before the court any evidence, including evidence inconsistent with its case, which was credible and material to the matter before the court. The Prosecution stated that this was a continuing obligation, but submitted that the question of whether a piece of evidence was credible and/or material, and, therefore, whether there is a duty to disclose it, should be for the Prosecution *alone* to decide in a *bona fide* exercise of discretion, considering the effect of other evidence available to it. For this last proposition, which we interpret as implying a subjective prosecutorial discretion not to disclose, the Prosecution relied on Diplock LJ's speech in *Dallison* (the same passage quoted in *Brown* at 345 (see [83] above)). This proposition, in our view, is plainly wrong (see [114]–[115] below).

101 As a convenient starting point to address the Prosecution's submissions and to discuss whether there is any common law disclosure obligation in Singapore, we will first deal with the decision in *Selvarajan James* (see [81] above). That case actually stood for two distinct propositions relating to disclosure:

> (a) that the Prosecution has *no duty* to produce unused material in the form of a witness statement to the Defence (at [18]); and

(b) that the court has *no power* to order the Prosecution to produce witness statements to the Defence (at [19]).

102 Regarding the Prosecution's duty of disclosure, it is true that neither the CPC nor the CPC 2010 prescribe a statutory obligation to disclose unused material. However, we believe that the statutes do not prevent us from acknowledging the existence of a similar duty at common law. This proposition is amply supported by the second reading speech of the Minister for Law ("the Minister") for the Criminal Procedure Code Bill, which was subsequently enacted as the CPC 2010, in the following excerpt (see *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at cols 563–564 (K Shanmugam, Minister for Law)):

> Ms Lee asked why witness statements are not provided to the defence. *Witness statements are not provided to the defence for public policy reasons.* The police rely quite substantially on the assistance of the public to solve crimes. *If witnesses know that statements that they have given in the course of investigations may be supplied to the accused for his counsel, they may not be inclined to come forward.* We also cannot rule out the possibility that threats may be made to witnesses or that they may be otherwise suborned.
>
> Mr Kumar queried whether there will be consequences for deliberate concealment of material evidence and that the State can be compelled to provide disclosure on pain of contempt. Where there is inadequate discovery given by a party, the Court can ask for an explanation and draw such inferences as it thinks fit.
>
> *The Bill does not seek to prescribe all the consequences for inadequate disclosure as it can occur in a wide range of circumstances. If documents are being deliberately withheld, the appropriate remedy should be left as a matter of judicial discretion to the Court. It should be noted that lawyers appearing in Court, whether prosecution or defence lawyers, are officers of the Court. If they deliberately suppress material evidence, they will be acting in gross breach of their duties.* ***One cannot put forward evidence in Court while holding back other evidence which could put a different complexion on the evidence that has in fact been tendered in Court. I have no doubt that the Court will take a serious view of such conduct.***
>
> [emphasis added in italics and bold italics]

103 This significant statement was not drawn to our attention by the counsel for the Appellants or the Prosecution. In our view, this indication of parliamentary intent is contrary to the view expressed in *Selvarajan James* that it is not for the court to impose a duty of disclosure on the Prosecution, although in all fairness it should be noted that similar legislative statements were not in existence at that point in time. In our view, as seen through the Minister's statements, Parliament had expressly contemplated that:

(a) the absence of statutory prescription did not imply the absence of any duty of disclosure or of any consequences for non-disclosure;

(b) prosecutors and defence counsel, as officers of the court, have a duty not to suppress material evidence; and

(c) the court would have the discretion to prescribe appropriate remedies for the serious act of deliberately suppressing evidence (which would include the deliberate non-disclosure of unused material).

Regarding (b) specifically, the Minister very correctly pointed out that a party cannot fulfil its duty to the court by adducing evidence, however compelling, while suppressing other evidence that "put[s] a different complexion" on what has been adduced. Although the speech was in respect of what would become the CPC 2010, in our view, the same sentiments would be equally applicable in the context of the CPC. In relation to the Minister's earlier comments on the disclosure of witness statements, it can be said that the public policy concerns alluded to would ordinarily become valid only where statements that *inculpate* the accused are concerned; if the statements are *exculpatory*, ordinarily there seems no reason for them not to be disclosed, even from the makers' perspective.

104 Beyond the Minister's statements, it may further be observed that neither the CPC nor the CPC 2010 contain any provision equivalent to s 21(1) of the CPIA 1996, which states that the common law rules in relation to the Prosecution's duty of disclosure do not apply after certain specified stages in criminal proceedings. In addition, the CPIA 1996 was specifically intended to prescribe a less extensive scheme of disclosure than the common law rules it was replacing (as seen in its different approach to unused material), which led the court in *Lee* to conclude (at 1962E) that "[t]he disclosure required by the [CPIA 1996] is, and is intended to be, less extensive than would have been required prior to the Act at common law".

105 In contrast with the CPIA 1996, s 5 of the CPC states the following:

> **Laws of England, when applicable**.
>
> **5**. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in Singapore the law relating to criminal procedure for the time being in force in England *shall be applied* so far as the procedure does not conflict or is not inconsistent with this Code and can be made auxiliary thereto.
>
> [emphasis added]

The new equivalent of this section is s 6 of the CPC 2010, which states:

> **Where no procedure is provided**.
>
> **6**. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being

> in force, *such procedure as the justice of the case may require*, and which is not inconsistent with this Code or such other law, *may be adopted*.
>
> [emphasis added]

In our view, the reference to what "the justice of the case may require" must include procedures that uphold established notions of a fair trial in an adversarial setting where not already part of the written law.

106 It can be seen that s 5 of the CPC gives courts a wide scope to consider and apply English criminal procedure where the CPC was silent. *Criminal Procedure* vol 1 (Tan Yock Lin) (LexisNexis, Looseleaf Ed, 1996, November 2010 Ed) at ch I, para 603 points out that where s 5 applies it imposes a mandatory application of English law: see also *Tay Charlie v PP* [1965–1967] SLR(R) 788 at [9]. This is unlike s 6 of the CPC 2010, which is phrased in discretionary terms. In *Kulwant v PP* [1985–1986] SLR(R) 663 ("*Kulwant*"), P Coomaraswamy J declined to use s 5 to apply a common law duty of disclosure in relation to an accused's previous statements for four reasons (see [46] and [47]):

> (a) there was no lacuna in the CPC necessitating the use of English law;
>
> (b) the English Attorney-General's guidelines (*Practice Note (Criminal Evidence: Unused Material)* [1982] 1 All ER 734) ("the guidelines") cited by the Defence did not have the status of law;
>
> (c) the guidelines did not support the Defence's application on the facts; and
>
> (d) the English cases cited by the Defence dealt with witnesses' statements rather than statements of the accused.

107 In our view, it is clear that the CPC makes "no special provision" for the disclosure of unused material and that the English common law on disclosure (as it had developed at that time) would generally not have conflicted with any part of the CPC. In other words, the English common law on disclosure could, to a large extent, have been adopted and applied via s 5 of the CPC in *Kulwant*. As for *Selvarajan James* ([81] *supra*), we find that the court, upon observing the absence of any statutory duty to disclose unused material, should have used this absence as a basis to consider the use of English law under s 5 of the CPC. Thus, *Selvarajan James* should no longer be considered to represent the law on the issue of disclosure by the Prosecution, although the subsequent findings on the adduction of fresh evidence in that case point to a correct outcome on the facts. The Prosecution's position that there is no legal obligation of disclosure of material evidence inconsistent with its case (or in the Minister's words, evidence "which could put a different complexion on the evidence that has in fact been tendered in Court" (see [102] above)) in Singapore, based as it was on the reasoning in *Selvarajan James*, cannot be sustained.

108 It is striking that the Minister unequivocally stated that if prosecutors withhold material evidence "they will be acting in *gross breach of their duties*" [emphasis added]. In our view, this is true in relation to the general duty of prosecutors who are called as advocates and solicitors of the Supreme Court, and are, hence, officers of the court (see *Law Society of Singapore v Ang Boon Kong Lawrence* [1992] 3 SLR(R) 825 at [13]). For a practicing advocate and solicitor conducting a prosecution, this duty is partly expressed in r 86 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("the LP(PC)R") as a duty to "assist the Court at all times before the conclusion of the trial, by drawing attention to any apparent errors or omissions of fact … which in his opinion ought to be corrected". Although the Minister also referred to a duty on defence counsel not to suppress evidence, we should make it clear that this duty takes a different form. While r 74 of the LP(PC)R emphatically states that defence counsel cannot set up an affirmative case inconsistent with any confession made to them by their client, they are not obliged to proactively disclose evidence of their client's guilt. Such disclosures would normally be covered by legal professional privilege under s 128(1) of the EA and r 24(1) of the LP(PC)R. The reason for this asymmetry in duty is linked to the presumption of innocence. To require Defence counsel to disclose evidence of guilt would be to undermine the fundamental principle that the Prosecution must prove its case beyond reasonable doubt (see *Jagatheesan* ([74] *supra*) at [61]).

109 There are, however, also duties inherent to the role of the prosecutor which apply whether or not a prosecutor is an advocate and solicitor. In *Lee Ming Tee* ([88] *supra*) at [144], Sir Anthony Mason NPJ (citing *R v Banks* [1916] 2 KB 621 at 623) stated that prosecutors, in conducting a criminal trial, "should 'regard themselves' rather 'as ministers of justice' assisting in its administration than as advocates". Similar sentiments were expressed in *Mallard* at [82] (see [87] above), *Stinchcombe* at 333 (see [90] above), *Sheshrao* at [26] (see [91] and [92] above) and *Sukma* at [10] (see [93] above). The duty of prosecutors is not to secure a conviction at all costs. It is also not their duty to timorously discontinue proceedings the instant some weakness is found in their case. Their duty is to assist the court in coming to the correct decision. Although this assistance often takes the form of presenting evidence of guilt as part of the adversarial process, the prosecutor's freedom to act as adversary to defence counsel is qualified by the grave consequences of criminal conviction. The certainty required by the court before it will impose these consequences is recognised in the presumption of innocence enjoyed by the accused. *For this reason, a decision to prosecute in the public interest must be seen as compatible with a willingness to disclose all material that is* prima facie *useful to the court's determination of the truth, even if it is unhelpful or even detrimental to the Prosecution's case.*

110 We therefore are of the view that there is indeed a duty on the Prosecution to disclose a limited amount of unused material in Singapore, although the precise scope of this will have to be the subject of further development (see [113]–[119] below and onwards). This duty is based on the general principles in the common law and supported by parliamentary intention (see [102] above), the wide scope of s 5 of the CPC and the even wider scope of s 6 of the CPC 2010, which permits the court to adopt "such procedure as the justice of the case may require" where no provision is made in the CPC 2010 or other law and where that procedure is not inconsistent with written law. Although this duty has its basis in an ethical duty (as the Prosecution has recognised in its further submissions), it is not a "mere" ethical duty (such as the duty of courtesy) the breach of which attracts censure but has no effect on the substantive outcome of the trial. Because of its significance to the legal outcome of the trial, this duty is accompanied by a substantive legal obligation which can be enforced by the court. To hold that there is no such legal obligation would be to effectively sanction unscrupulous methods of prosecution with the court's stamp of approval. It would be thoroughly disingenuous to suggest (and the Prosecution, to its credit, has not so suggested) that the Prosecution, being obliged by the committal threshold (in preliminary inquiry proceedings and committal hearings) and the "no case to answer" procedure (at trial) to reveal the *absence of evidence* going to the elements of an offence, nevertheless has the right to conceal *positive evidence* of the accused's innocence from the court at any of those proceedings.

111 The proposition in *Selvarajan James* that the court lacks *power* to compel prosecutorial disclosure will now be considered in brief. In *Tan Khee Koon v PP* [1995] 3 SLR(R) 404 at [61]–[62], Yong CJ held that the court had the power under s 58(1) of the CPC (now s 235(1) of the CPC 2010) to compel the production of any document or thing necessary or desirable for the purposes of trial, although an application could only be made "to the court before which the actual trial was taking place and … only … after the recording of the prosecution evidence had commenced". Notably, s 58(1) cannot be used in relation to a "general demand" for an unspecified class of documents; an applicant must be precise in specifying the documents that are desired (see *PP v IC Automation (S) Pte Ltd* [1996] 2 SLR(R) 799 at [63]). The Malaysian courts have also stated that s 51 of the Criminal Procedure Code (Act 593, 1999 Rev Ed) (M'sia) (the equivalent to s 58(1) of the CPC) should not be taken to allow for access to materials in a manner akin to discovery and inspection in civil proceedings (see *Public Prosecutor v Raymond Chia Kim Chwee; Zainal Bin Haji Ali v Public Prosecutor* [1985] 2 MLJ 436 at 439 and *Muzammil Izat bin Hashim v Public Prosecutor* [2003] 6 MLJ 590 at 594).

112 It remains to be seen whether the decision in *Sukma* (see [93] above) will have any effect on the Malaysian position. For present purposes,

recognising the limitations on s 58(1) of the CPC imposed by its wording, we are inclined to say that any power necessary for enforcing the Prosecution's common law duty to disclose unused material may have to be itself based on the common law as applied through s 5 of the CPC or s 6 of the CPC 2010. It would be an absurd result if, having found that a common law disclosure duty exists, we hold that a trial court is unable to enforce that duty because of the lack of a relevant statutory power even in a case of grave and deliberate breach. We cannot see why it should be left to an appellate court to correct a miscarriage of justice in such a situation. In the final analysis, we would say that the necessary power arises from the inherent jurisdiction of the court to prevent injustice or an abuse of process (see *PP v Ho So Mui* [1993] 1 SLR(R) 57 at [36], *Salwant Singh s/o Amer Singh v PP* [2005] 1 SLR(R) 632 at [11] and *Evidence and the Litigation Process* ([52] *supra*) at paras 10.24–10.29 (albeit in a different context)).

Scope of the Prosecution's duty of disclosure under the common law in Singapore

113 In our view, it is not necessary, for present purposes, for us to attempt a comprehensive statement of what the law of Singapore should be in this area. There is still ample scope for the development of the fine details in subsequent cases or by legislative intervention. It suffices for us to say that we agree with the Prosecution that the duty of disclosure certainly does not cover all unused material or even all evidence inconsistent with the Prosecution's case. However, the Prosecution must disclose to the Defence material which takes the form of:

> (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
>
> (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

This will not include material which is neutral or adverse to the accused – it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case. To ensure congruence with the statutory scheme for disclosure this material should initially be disclosed no later than seven days before the date fixed for the committal hearing for High Court trials or two weeks from the CCDC for Subordinate Court trials (corresponding to the timelines in ss 176(3)(*b*) and 161(2) of the CPC 2010 respectively). Where under s 159 of the CPC 2010 the statutory criminal case disclosure procedures do not apply, the common law disclosure described here should take place at the latest before the trial begins. The obligation of disclosure (as the Prosecution has correctly acknowledged in

its further submissions) is a continuing one and only ends when the case has been completely disposed of, including any appeal. Throughout this period, the Prosecution is obliged to continuously evaluate undisclosed material in its possession to see if it ought to be the subject of further disclosure.

114 When we use the phrase "material … that might reasonably be regarded as credible and relevant", we refer to material that is *prima facie* credible and relevant. This is to be determined on an *objective* test. We reject the Prosecution's submission that it should have an exclusive and an unquestionable right to assess an item of inconsistent evidence alongside other evidence available to it, *which may never be seen by the court*, and in that way *unilaterally* decide on its credibility and/or relevance (and therefore disclosability) based on its own *bona fide* exercise of *subjective* discretion. *Such a procedure provides an unacceptably low level of accountability*. The Prosecution has curiously relied on Diplock LJ's speech in *Dallison* ([95] *supra*) at 375 to justify its position. Diplock LJ, as pointed out in *Brown* ([83] *supra*) at 375, was relying on the earlier case of *Rex v Bryant and Dickson* (1946) 31 Cr App R 146. This case was overruled by the House of Lords in *Regina v Mills* [1998] AC 382 ("*Mills*") at 402–404 in so far as it stood for the proposition that the Prosecution should disclose statements of witnesses regarded as credible but need not do so for witnesses not regarded as credible. The House of Lords emphatically disapproved of this distinction on the basis that it gave too much discretion to the Prosecution, and that this could lead to injustice.

115 The above approach (at [113]) gives more discretion to the Prosecution than *Mills*, which seemed to exclude all considerations of credibility from the disclosure exercise. That having been said, in the area of criminal law, where the life or liberty of an individual is at stake, it is axiomatic that there must be accountability in the process of assessing the weight of apparently-credible, relevant and admissible evidence. Where the Prosecution finds material objectively *prima facie* credible and relevant, it should be disclosed to the Defence. Any dispute or uncertainty that the Prosecution wishes to raise regarding the credibility and relevance of the disclosed evidence should be the subject of examination and submissions before the court, not of an opaque, purely internal and subjective exercise of discretion. It is true that prosecutors will still have to apply their minds as to whether material objectively falls under the disclosure obligation. However, where there is any doubt about whether a piece of unused evidence is credible, the court should be allowed to make the final decision. Counsel for the appellant in *Mills* argued (at 387A) that "[c]redibility cannot be determined in advance". We prefer to say that credibility may be *difficult* to determine in advance, and the critical question of whether exculpatory evidence is true ultimately resides within the domain of the court and not within that of the Prosecution. Similarly, if the Prosecution has any doubt

about the relevance of a piece of unused evidence, it should be drawn to the attention of the court so the court can rule on it (see, also, *Keane* at 752 and *Lee Ming Tee* ([88] *supra*) at [152]).

116 By limiting disclosure to material that is *prima facie* relevant (as opposed to *possibly* relevant) and adding a threshold of *prima facie* credibility to the Prosecution's consideration, this reasonably limits the amount of material to be disclosed and thereby avoids some of the practical difficulties of the common law regime as it evolved in England. Some examples of unused material that the Prosecution is not obliged to disclose might include:

> (a) an anonymous letter mailed to investigators stating that the accused is not guilty (this would not be admissible and *prima facie* credible, nor would it provide a real prospect of a relevant line of inquiry);
>
> (b) the statement of a person saying that he himself had committed the crime instead of the accused, except that it is incontrovertible that the person was not at the place of the crime at the time (this would not be *prima facie* credible, nor would it provide a real prospect of a relevant line of inquiry); and
>
> (c) a photograph of the scene of the crime a long time after it was committed (this in most cases would not be *prima facie* relevant, although it *may* become relevant in the course of the trial and may then have to be disclosed).

117 For a related reason, the duty of disclosure is limited to material that would likely be admissible in evidence or provides a real chance of leading to such "likely-admissible" material. This is a departure from the English position. Our statutory rules of admissibility as governed by the CPC, the CPC 2010 and the EA impose a certain minimum standard of credibility and materiality. For the most part they reflect the common law exclusionary rules, except that they are framed in terms of inclusionary categories of relevance and admissibility (see *Evidence and the Litigation Process* ([52] *supra*) at para 2.16). As summarised by Jeffrey Pinsler SC in *Evidence and the Litigation Process* (at para 2.15):

> **Rationale of the exclusionary rules**
>
> The exclusionary rules evolved because of the recognition that certain types of evidence were *not the best available*, or could be *unreliable*, or that their *prejudicial effect outweighed their probative value*, or because they gave rise to side issues which would complicate the case or distract the trier of fact and take up the time of the court. …
>
> [emphasis added]

For this reason, it appears to us that obligatory disclosure is primarily limited to such material as is likely to pass the standard of legal admissibility, in addition to an exceptional category of material providing a *real chance* of leading to such evidence by a line of inquiry. However, we would expect (as the court has always expected) investigators and the Prosecution to pursue inquiries arising from non-disclosed material as far as practicable, and where these produce material falling under the disclosure obligation, the Prosecution should consider whether to make further disclosure.

118 The Prosecution has taken the position that its duty of disclosure is owed "*to the Court*" [emphasis in original]. Its submissions firmly reject any duty that involves discovery by or disclosure to the Defence. While the duty has also been expressed in the authorities as being owed to the *court* (see the passage from *Brown* at [83] above (quoting *Ward* ([84] *supra*) at 645)), the authorities agree that in practice, it is fulfilled by disclosure to the *Defence* (see, *eg*, *Lee Ming Tee* at [155]). We believe that the reason for this is two-fold. First, to the extent that there is an obligation to disclose some material not admissible in evidence, it stands to reason that such material should not be placed before the court.

119 The second reason is as follows. To oblige the Prosecution to present material for disclosure directly to the court rather than to the Defence seems tantamount to compelling the Prosecution to present part of the Defence case. This would not be correct (see [85](i) above). The Prosecution will be placed in a situation of conflict by having to explain to the court why the material (which it may well subjectively regard as untrue or immaterial) is objectively *prima facie* credible and relevant to the case, especially since this disclosed material supports the Defence case or undermines the Prosecution's case (see [113] above). The Prosecution also should not be obliged to pursue further inquiries concerning the material on behalf of the Defence, nor is it in a position to make tactical decisions about when, how and whether to use the material in court. These all support the practice that disclosure should generally be made to the Defence, which will then decide what to do with the material.

Consequences of non-disclosure and late disclosure

120 In our view, there is no reason why a failure by the Prosecution to discharge its duty of disclosure in a timely manner should not cause a conviction to be overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice, or, put in another way, renders the conviction unsafe (see, also, *Lee Yuan Kwang v PP* [1995] 1 SLR(R) 778 at [40]). The usual rules and procedures for the adducing of fresh evidence in appellate proceedings would be applicable. It should be pointed out that not all non-disclosures will be attributable to fault on the part of the Prosecution (or a lack of *bona fides*); nevertheless, as pointed out

in *Lee Ming Tee* ([88] *supra*) at [142] (see [89] above), where such non-disclosures result in a conviction being unsafe the result will still be the overturning of that conviction. In considering whether to order a retrial, the following passage from *Beh Chai Hock* ([63] *supra* at [38]) should be noted:

> When exercising its discretion whether to order a retrial, the court must have regard to all the circumstances of the case. The court must also have regard to two competing principles. One is that persons who are guilty of crimes should be brought to justice and should not be allowed to escape scot-free merely because of some technical blunder by the trial judge in the course of the trial. The countervailing principle is one of fairness to the accused person. The Prosecution has the burden of proving the case against the accused person; if the Prosecution has failed to do so once, it should not ordinarily get a second chance to make good the deficiencies of its case. These principles are summarised in *Chee Chiew Heong v PP* [1981] 2 MLJ 287.

121 Where disclosure, for whatever reason, is made after the beginning of trial, the court may have to grant an adjournment of sufficient duration to allow defence counsel time to consider the effect of the disclosed material and to incorporate it into their case if necessary.

Muhammad's conviction

122 All counsel now accept that Muhammad was the sole assailant (the Prosecution maintains that Ismil was at the scene as well, but concedes that only Muhammad attacked the Deceased). Counsel for Muhammad submitted, however, that Muhammad is entitled to rely on the defence of diminished responsibility and because of this is not guilty of murder. Accordingly, the first issue that must be considered is the admissibility and reliability of the statements provided by Muhammad.

Admissibility and reliability of Muhammad's statements

Muhammad's confessions as to his sole involvement

123 Muhammad first revealed his sole involvement in court on 18 September 2007. Prior to that, in early September, he wrote a statement while in QRP in which he unequivocally admitted to his sole involvement ("the statement of September 2007"). This statement was produced and admitted into evidence. Prior to that, he had on two occasions confessed his sole involvement to his previous lawyers, Mr B J Lean ("Mr Lean") and Mr Amarick Singh Gill ("Mr Gill"). Both subsequently testified that Muhammad had previously disclosed his sole involvement to Mr Gill as early as 19 December 2005. Mr Gill testified that when he visited Muhammad in QRP, he recorded a statement from Muhammad which stated, *inter alia*, that "[m]y brother did not [*sic*] involve in this case" and that "[t]he person who do [*sic*] it is me … [h]e was not there". Muhammad

made a second admission of sole involvement around March 2007 to Mr Lean. On 20 March 2007, Mr Lean and Mr Gill applied to be discharged as counsel for Muhammad as they found themselves in a situation where they could no longer continue to act for him.

124 Aside from his counsel, Muhammad confessed his sole involvement to his fellow inmates at QRP and two of his family members. Mohammad Zam bin Abdul Rashid ("Zam"), Yusuff bin Ahmad ("Yusuff") and Ahmad Habibullah Salafi bin Haron ("Habibullah"), fellow inmates of Muhammad's at QRP, testified that Muhammad had told them in 2005 (sometime in 2005 in the case of Zam who could not recall the month, in August 2005 in the case of Habibullah and in December 2005 in the case of Yusuff) that he was solely responsible for the murder of the Deceased. Sabariah bte Kadar ("Sabariah") and Rosnani bte Kadar ("Rosnani"), sisters of the Appellants, testified that the family had gathered prior to Muhammad's arrest in the flat to discuss the murder case. He had informed them that Ismil was innocent. Sabariah and Rosnani subsequently visited Muhammad in prison in 2005. During that visit, he reaffirmed that he alone had committed the murder.

125 The Judge erred, in our opinion, in dismissing the evidence of Muhammad's fellow inmates, his sisters and his former lawyers as part of a fabricated plan on Muhammad's part to save Ismil. The weight of the evidence, which we will come to below, is consistent with Muhammad being the sole assailant and offender, and supports the evidence of the inmates, family members and former lawyers. Moreover, it should be emphasised that Muhammad had no knowledge of Mr Loh's account of a single assailant when he confessed his sole involvement to his fellow inmates, his family members and his former lawyers, or when he wrote the statement of September 2007. The fact that Mr Loh was aware of only one assailant was only disclosed on 4 September 2007. In their written submissions that were provided to us, counsel for Ismil pointed out:

> When Muhammad wrote [the statement of September 2007], told his previous counsel on 19 December 2005 [and March 2007], told his sisters and fellow inmates in [August 2005 and from] December 2005 to April 2006 of his sole involvement, Muhammad had no knowledge of Mr. Loh's account.

This submission was not challenged by the Prosecution.

126 That Muhammad was the sole assailant and offender would also account for several curious aspects of this matter which the Judge did not address. It would explain why neither DNA particles nor blood belonging to the Deceased was found on Ismil. In this regard, it should be noted that Dr Lai had stated that he would have expected some blood to have been splashed on the assailant's hands. It could also be added that the nail clippings obtained from Ismil on 7 May 2005 (one day after the murder) did not reveal any trace of the Deceased's DNA. Muhammad, on the other

hand, was only apprehended about three weeks after the attack, and therefore had ample time to erase all traces of evidence.

127 That Muhammad was the sole assailant and offender would also explain the graphic account of the crime that he was able to give to the court. This is to be contrasted with the "skeletal" details Ismil gave (see [188]–[189] below). The level of detail provided in Muhammad's statement of September 2007 and his confession in court go well beyond what was stated in Mr Loh's statements. He was able to provide a vivid and coherent account of three different episodes of attacks that took place at the flat. Indeed, the Prosecution submitted that "Muhammad's intimate knowledge of the layout of the [D]eceased's flat, and …, of a room in the [D]eceased's flat made it perfectly clear that he had been in the flat when the incident happened". Importantly, his account does not appear to be inconsistent with the objective evidence and Dr Lai's findings (see [12] above). In this regard, the following can be highlighted:

(a) Two different weapons were found at the scene – a knife blade and a chopper – and Dr Lai opined that the injuries suffered by the Deceased were consistent with the use of two weapons. Muhammad admitted to using a knife and a chopper and was also able to provide an explanation as to why two weapons were used – the knife handle broke, which was why he then used a chopper.

(b) Dr Lai opined that two assaults took place because the most significant blood spatters were found in two locations. Although Muhammad's account was that three attacks took place, this is not inconsistent with the objective evidence that the attacks were confined to two locations.

128 Muhammad was able to fill in significant gaps in the investigation's conclusions through his statement of September 2007 and testimony in court. He testified that he had worn a pair of brown shoes that had belonged to Mr Loh after the attack, as the "place was bloody", and that he had taken the shoes from a shoe rack located behind the front door of the Deceased's flat. The evidence until then had not indicated the presence of the shoe rack in question. However, the presence of the shoe rack was subsequently confirmed by the IO. The shoes in question were disposed of, according to Muhammad, by placing them at the staircase landing on either the 8th or 9th floors of the Deceased's block (he could not remember exactly which floor). The IO could not conclusively state that the police searched the staircase landings on or between the 8th and 9th floors, and this logically explains why the pair of shoes worn by Muhammad during the cleanup after the attack was not recovered. Muhammad's testimony that he had thrown the knife handle in question into the rubbish chute also solves the mystery as to why no knife handle was found at the crime scene.

129 It was established that Muhammad is not particularly bright. In his report dated 13 February 2008, Dr Sathyadevan stated that Muhammad has an IQ of 76. Yet it was not suggested by his counsel or counsel for Ismil that his confessions were likely to be false confessions due to his low IQ. We see no reason to come to such a conclusion, especially given that the factors above corroborate and point to the truth of the confessions of sole involvement by Muhammad. His ability to recollect striking details of the incident is pertinent. Further, unlike Ismil (see below at [166], [167] and [173]) there is no reason to conclude that he has a particularly malleable personality.

Muhammad's other statements

130 As for the other statements (*ie*, the statements other than those confessing to sole involvement) provided by Muhammad, little weight, if any, in our view, ought to be accorded to them. Those statements were contradicted in a material way in that they stated that Ismil was the assailant while Muhammad was there merely to commit robbery. That was inconsistent with Muhammad's position in court and in the statement of September 2007, where he confessed to being the sole offender. Muhammad's explanation for the inconsistency was that the initial statements were fabrications. He stated that certain parts were his concoctions, while other parts were embellishments as the recording officers had suggested to him what he should say in response to their questions. The Prosecution, in view of the stance that it has now taken on Muhammad's sole responsibility for the killing, has to accept that it is unsafe to place any weight whatsoever on these statements.

The defence of diminished responsibility

131 Counsel for Muhammad has submitted that Muhammad is entitled to rely on the defence of diminished responsibility. The defence of diminished responsibility is set out in Exception 7 to s 300 of the Penal Code as follows:

> Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

132 In *Ong Pang Siew v PP* [2011] 1 SLR 606 ("*Ong Pang Siew*"), this court elaborated that to establish the defence of diminished responsibility, three elements have to be established on a balance of probabilities (at [58]):

> (a) The appellant must have been suffering from an abnormality of mind.
>
> (b) Such abnormality of mind must have:

(i) arisen from a condition of arrested or retarded development of mind; or

(ii) arisen from any inherent causes; or

(iii) been induced by disease or injury.

(c) Such abnormality of mind as in (b)(i) to (b)(iii) must have substantially impaired the appellant's mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

133 As to what constitutes an "abnormality of mind", this court in *Ong Pang Siew* agreed (at [61]) with the English Court of Appeal's observations in *Regina v Byrne* [1960] 2 QB 396 at 403 that:

> 'Abnormality of mind,' … means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise the will power to control physical acts in accordance with that rational judgment.

134 On the evidence before the Judge, it was clear that Muhammad did not suffer from an abnormality of mind. Dr Fones, who testified on behalf of Muhammad, stated in his report that it was likely that Muhammad was suffering from an abnormality of mind at the material time due to the effects of Dormicum. Dormicum had made Muhammad so bold that he decided to rob and subsequently inflict the numerous wounds on the Deceased. This abnormality of mind, caused by Dormicum, substantially impaired his responsibility for the killing. In his testimony, Dr Fones stressed the nature and extent of the injuries caused as indicating the impairment of Muhammad's judgment. Dr Sathyadevan vigorously disagreed with Dr Fones' evidence. He was of the view that Muhammad was in control of his mental faculties and actions and did not suffer from an abnormality of mind. In his view, being high on Dormicum would not amount to an abnormality of mind unless there were psychiatric complications such as paradoxical rage or confusion, which Muhammad did not experience. Additionally, Muhammad had not taken an unusual quantity of Dormicum that morning.

135 We see no reason to differ from the Judge's assessment of Muhammad's state of mind at the material time (see [521]–[524] of the Judgment). Dr Fones, in his report, was unable to satisfactorily establish that Muhammad was suffering from an abnormality of mind. Rather, he was only able to state that:

> [it] is … *conceivable* that [Muhammad] was suffering from such abnormality of mind at the time of the offence, due to the effects of Dormicum, in that it

> substantially impaired his responsibility for his actions in causing the death of his victim. [emphasis added].

When cross-examined on this, Dr Fones acknowledged that the term "conceivable" was used by him because of "limitations" in the evidence. Indeed, Dr Fones subsequently conceded that "some of [his opinion was] speculative". As such, we agree with the Judge's non-acceptance of Dr Fones' evidence.

136 The conduct of Muhammad after attacking the Deceased also indicates that he was firmly in control of his mental faculties and was able to think and act rationally. According to the statement of September 2007, after the attack, Muhammad grabbed a bucket of water and poured it over the kitchen floor, and wiped the chopper. During this cleanup he wore Mr Loh's shoes (see [128] above), presumably to avoid leaving a footprint. He then disposed of the shoes by placing them on the staircase landing between the eighth and ninth floor. When he returned to his flat, he washed his hands, legs and face and then changed his clothing. In our view, all these steps to conceal his role in the killing cumulatively suggest clarity of thought and that a rational mind was at work, and further support the conclusion that he was not suffering from an abnormality of mind.

Conclusion on Muhammad's conviction

137 Having reviewed the statement of September 2007, Muhammad's testimony in court, and all other relevant facts and circumstances, we are satisfied that the case against him for murder of the Deceased was proven beyond reasonable doubt and that he should not be allowed to avail himself of the defence of diminished responsibility.

Ismil's conviction

138 In relation to Ismil, the only evidence against him (apart from the evidence of Muhammad which we earlier described as unsafe (see [130] above)) is found in the statements that he gave to the police. His conviction therefore pivots on the admissibility of and weight to be attached to his statements (if they are held to be admissible). We turn first to the issue of admissibility, starting with the admissibility of the initial statements provided by Ismil that were recorded by SSI Zainal.

The admissibility of Ismil's statements

Admissibility of the initial statements

Non-compliance with section 121 of the CPC

139 There was, in our view, clearly a failure on the part of the police to comply with s 121 of the CPC in relation to the first statement of Ismil recorded by SSI Zainal on 7 May 2005 in the police car (which will be

referred to hereafter as "the police car statement" for convenience) and the second statement of Ismil recorded by SSI Zainal on 7 May 2005 at JWNPC (which will be referred to hereafter as "the JWNPC statement" for convenience). The two statements were described by the Prosecution in its written submissions after the trials-within-a-trial before the High Court as "[o]ral statement[s] reduced into writing under Section 121 of [the CPC]".

140 The recording of the police car statement and the JWNPC statement contravened s 121(3) of the CPC in that both statements were not read back to Ismil, he was not given the opportunity to correct either statement, and both statements were not signed by him. It seems to us that the police car statement and the JWNPC statement were obtained in deliberate non-compliance with the procedural requirements of s 121(3) rather than mere carelessness or operational necessity. The Prosecution has not been able to give any plausible (let alone persuasive) reason as to why SSI Zainal, a seasoned investigator with some 28 years of experience, failed to observe the basic requirements of s 121(3).

Non-compliance with the Police General Orders

141 There were also breaches of the Police General Orders in the recording of the police car statement and the JWNPC statement. Here, we should mention that the Judge did not have sight of the relevant extracts from the Police General Orders. They were only produced to us after we indicated that it was a crucial document for us to consider in evaluating whether a breach had taken place and what the consequences ought to be in such an event.

142 The relevant provisions of the Police General Orders may be found in "PGO A18", which sets out the procedures for the issue, use and maintenance of pocket books. The Prosecution, in response to our query, expressed its acceptance that the provisions in PGO A18 apply equally to both field diaries and pocket books. Field diaries, it was explained, serve the precise same function as that served by pocket books and are carried by investigative officers in lieu of pocket books. For completeness, we should point out that the maintenance of field diaries was governed by s 127 of the CPC (now s 19 of the CPC 2010). While the accused has no right to call for or inspect a field diary, the court's powers have not been similarly circumscribed. To summarise the relevant parts of PGO A18 (for ease of reference PGO A18 is reproduced in full as an Appendix to this Judgment):

(a) Order 8 provides that the pocket book shall be used, *inter alia*, to "[r]ecord notes of events and personal movements which are likely to become the subject of any legal or disciplinary proceedings".

(b) Order 9 provides that notes recorded in pocket books which are likely to become the subject of legal or disciplinary proceedings shall

be recorded in the "fullest possible detail" including "[a]ctual words of relevant statements" and "behaviour of suspects".

(c) Order 10 provides that a statement recorded in a pocket book shall be "neatly and legibly written". It further provides that:

> *The statement shall in accordance with Section 121(3) of [the CPC], be read over to the person making it. He shall be offered the chance to correct his statement.* All corrections, if any, shall be initialled by him. The person making the statement shall sign on each page of the Pocket Book on which the statement is recorded. [emphasis added]

(d) Order 12 provides that if notes cannot be made at the time of the event, "they shall be made as soon after the event as possible whilst details are still fresh in the mind". It further provides that:

> Notes made elsewhere as a temporary measure shall be copied into Pocket Books as soon as possible thereafter and the original separate notes retained as exhibits in case they are needed.

(e) Order 13 provides that when an entry is made which is likely to be the subject of any legal or disciplinary proceedings, "an officer should submit his pocket books to his supervisor to be endorsed".

(f) Order 14 adds that the pocket books shall be signed and dated by the supervisor during endorsement.

(g) Order 15 states that the purpose of endorsement is for additional verification of the date and time of entries.

(h) Order 17 requires the pocket book to be maintained to ensure reliability as an official record. Amongst the criteria imposed through for the maintenance of pocket books are the following:

> (i) all entries are to be clearly written in indelible ink;
>
> (ii) all entries are to be recorded in chronological order on serially numbered pages;
>
> (iii) all entries are to include time of occurrence and place of occurrence;
>
> (iv) no erasure or obliteration of notes is to be made, and if any mistakes are made, the incorrect matter must be crossed out with a single ink line ensuring that it is legible, and the cancellation must be initialled and dated in ink;
>
> (v) no lines between entries in the pocket book are to be left blank; and
>
> (vi) leaves are not to be torn out from a pocket book for any purpose.

143 SSI Zainal did not record the initial statement in his pocket book or field diary. Rather he recorded it on a slip of paper, as he claimed not to have his field diary with him. As an aside, it is not clear why even if he did not have a field diary he was not carrying a pocket book. The relevant entry was not transferred to the field diary until much later in the day, after lunch, contrary to Order 12. This is clearly unacceptable. It would not have taken long for SSI Zainal to record the entry in his field diary upon arriving at JWNPC, or at the very least prior to lunch rather than after lunch. It also seems rather curious that such a crucial statement allegedly made by Ismil in relation to a capital case would not be properly recorded immediately thereafter, given that in all probability the statement would subsequently be relied upon by the Prosecution at trial. It is also not clear why the other officers who were with SSI Zainal could not have recorded the "confession" made by Ismil immediately in their field diaries or pocket books if told about this by SSI Zainal. If he did not disclose this to them contemporaneously, this of course raises other issues. Pertinently, Assistant Superintendent Ng Poh Lai ("ASP Ng") (who was standing outside the police car while SSI Zainal was questioning Ismil) claimed that while SSI Zainal had in fact told him that Ismil had admitted to "stabbing" the Deceased, he (ASP Ng) had "misplaced" his field diary which covered the relevant period. We also remain puzzled as to why SSI Zainal asked the other officers to leave Ismil and him alone in the car before he managed to obtain the police car statement from Ismil (see [15] above).

144 The JWNPC statement was likewise not recorded by SSI Zainal in his pocket book or field diary during or immediately after it was provided, and it was only recorded in his field diary after lunch. The police car statement, as well as the JWNPC statement, was also not read back to Ismil. He was not given the chance to correct either statement, nor was he given the chance to initial the pages on which the statements were recorded, contrary to Order 10. As it was extremely likely that the police car statement and the JWNPC statement would be the subject of legal proceedings, SSI Zainal was required, pursuant to Order 13, to submit the field diary to his supervisor for endorsement. It is not clear whether SSI Zainal had complied with Order 13, or whether his supervisor had complied with Order 14 in signing and dating the field diary during endorsement. If this was done immediately after the entry was made, it would have been additional verification of the date and time of the entry.

145 It is clear that the provisions of the Police General Orders that deal with punctilious maintenance of pocket books and field diaries (see [142] above) are meant to ensure reliability in the records kept by police officers. The fact that many of these provisions were breached obviously must raise some awkward question marks in this matter. There were no particular exigencies that could explain the rather flagrant breaches. SSI Zainal's explanation for not carrying his field diary with him on the morning of

7 May 2005 was this – as he was just assisting in the investigations of the case, and was not the investigating officer, there was no need for him to bring the field diary out to the field with him. As for why he did not have Ismil sign off on the statements that he had provided, SSI Zainal's explanation was that he wanted to refer Ismil to another officer to record a proper statement. SSI Zainal attempted to justify the delay in recording the statements in his field diary by claiming that after bringing Ismil to JWNPC and interviewing him further, he went out for lunch before returning to his office at the Police Cantonment Complex. As his field diary was in his office, it was only then that he made the relevant entries in his field diary. Given the profound implications of Ismil's purported confession, we are far from convinced that this is a satisfactory explanation.

Our view on the admissibility of the initial statements

146 In our view, the breaches of s 121 of the CPC and the Police General Orders are serious enough to compromise in a material way the reliability of the police car statement and the JWNPC statement. Having regard to all the circumstances, it is not apparent to us that the probative value of the two statements can be said to exceed the prejudicial effect of the statements against their maker. It could, perhaps, be said that this is more so in respect to the police car statement, as there was a major discrepancy between the contents of the piece of paper on which SSI Zainal recorded the statement and the field diary entry made based on the contents of the paper. On the piece of paper, it was stated that Ismil remembered "*slashing* an old f/Chinese on Fri morning" [emphasis added]. However, in the field diary entry made later that day, the description changes materially in that it is stated that Ismil "had *stabbed* an old F/Chinese lady" [emphasis added]. When cross-examined by counsel for Ismil, SSI Zainal admitted that he was aware that a slash is different from a stab. When re-examined, he admitted that the use of the word "slash" would be "inaccurate".

147 For the above reasons, we find that both statements should have been found inadmissible under the exclusionary discretion. The burden was on the Prosecution to convince the court that the probative value of each of the two statements, which had been compromised by the manifest irregularities that took place when each of them was supposedly recorded, was higher than their prejudicial effect against their maker. As the breaches of the CPC and the Police General Orders also appeared to be deliberate, the explanation given needed to be especially cogent (see [61]–[62] above). The Prosecution has been unable to discharge this burden.

Admissibility of subsequent statements

148 The remaining ten statements provided by Ismil were essentially a repetition of facts already known to the investigators. The statements were also obtained after the investigators had already allegedly obtained two

confessions from Ismil, *ie*, in the police car statement and the JWNPC statement, in circumstances that can be described as troubling, to say the least. Ismil abruptly changed the narrative in his final two statements (recorded on 3 June 2005 and 9 June 2005) by alleging that Muhammad was present at the scene of the crime too. However, this change in narrative coincided with the investigators unexpectedly uncovering evidence suggesting that Muhammad was at the scene of the crime, as well as after obtaining statements from Muhammad confessing to his presence at the scene of the crime. The change in narrative of Ismil's statements corresponded entirely to the new information found by the investigators.

149 Earlier (at [71]), we mentioned that a measure of caution ought to be exercised where a subsequent statement contains similar content to an earlier statement that has been excluded. In our view, the possibility that it may not have been clear to Ismil that he could have departed from the first two statements he provided cannot be dismissed easily. On the facts and circumstances, it is plausible that the fear of departing from the contents of the first two statements acted as an inducement or threat on Ismil so as to make his subsequent statements involuntary. In forming this view we also take into account his vulnerable mental state (see [160]–[165] below). The fact that his final two statements contained information that had conveniently just been independently discovered by the investigators renders the voluntariness of those statements even more doubtful. There is, however, no need for us to come to a firm conclusion in this regard, as for the reasons that follow, it is our view that little weight, if any, ought to have been attached to any of Ismil's statements.

The reliability of the statements made by Ismil

150 As stated earlier (at [73]–[75] above), the court should be careful to test the veracity of a statement that has been admitted into evidence but whose contents are disputed on an ongoing basis throughout the trial. This is especially so in the context of retracted confessions, and in particular, retracted confessions that are entirely uncorroborated by objective evidence. The confessions provided by Ismil were uncorroborated, retracted confessions. No objective evidence was produced to corroborate the truth of the confessions. The truth of the confessions ought to have been tested on an ongoing basis throughout the trial. In our view, even if the statements provided by Ismil had been admissible, the following factors create real doubt as to their reliability.

Inconsistencies with Mr Loh's statements

151 Had Ismil been at the Deceased's flat that fateful day, it is likely that Mr Loh would have seen him. Mr Loh was present during the attack, and would have disclosed to the investigators if there had been more than one intruder present. However, he maintained throughout, in all his statements

on 7 May 2005, 12 May 2005 and 5 September 2005, that there was just one intruder. In his statement of 5 September 2005 (see [25] above), Mr Loh stated:

> There was nobody outside the house when my wife went to chase the cats. 2 minutes after my wife was outside the house, I saw a thief came into my house. The thief is a man. He was wearing a brown cap and a dark red shirt.

152 It emerged on the penultimate day of the trial *ie*, 8 May 2008 that Mr Loh had provided an even earlier statement to SSI Lai Chun Hoong ("SSI Lai") on 7 May 2005. The fact that this statement and the statements of 12 May 2005 and 5 September 2005 were not disclosed in good time troubles us. Why did not the Prosecution disclose these documents in good time? SSI Lai revealed that he had taken a statement from Mr Loh on 7 May 2005, with assistance from his niece. The statement reads:

> … In the present [*sic*] of Loh Siew Kow's niece, Yong Sook Chee, F/28 yrs of Blk 428 Woodlands St 41, #08-230, [I] interview[ed] the witness.
>
> Mr Loh informed that at about 8.10 am, his wife (deceased) opened the gate to chase away the cats. While lying on his bed in room nearer to the kitchen, he saw a male Malay look like drug addict came into his house.
>
> The male malay entered the kitchen. He heard his wife shouting for help. Thereafter he heard nothing from his wife.
>
> The male malay then came to him. He was holding a chopper and came near me and put his other hand on my throat. After a while, the male Malay opened the door and left the house. Mr Loh could remembered [*sic*] the description of the male Malay. Wearing Cap, Dark complexion, Skinny built, about 1.58 m tall, wearing shirt wif [*sic*] 2 pockets.
>
> Mr Loh also revealed that 2 days ago the same male Malay came to his house to offer him cake but was turned away by his wife …

153 The Judge and the Prosecution were of the view that Mr Loh may not have seen the alleged accomplice due to his restricted view. The Judge concluded (see the Judgment at [478]):

> It was unlikely that Mr Loh would have been able to keep his head constantly turned to the right and his eyes constantly looking upwards. Therefore, he could have missed seeing someone else in the Deceased's flat.

The Prosecution submitted, similarly, that Mr Loh may not have fully seen what took place as he may not have had an unobstructed view of the living room:

> Counsel for Ismil sought to rely on 4 photographs taken inside the [D]eceased's flat (#05-156, Blk 185 Boon Lay Avenue) to show that [Mr] Loh, when lying on his nursing bed with his head on the pillow … would have a clear unobstructed view of the living room, the main entrance of the flat and outside the main entrance of the flat. However, it must be emphasised that this simulation exercise is seriously undermined by the fact that the entire flat

> was completely bare when the photographs were taken. More importantly, the impression of unobstructed line of vision is misleading as the photographs were taken at a straight line point of view where [Mr] Loh's head is assumed to have been. A more accurate depiction would be for the photograph to be taken in a lying position on the nursing bed and tilted backwards. There are also uncertainties about the manner in which the nursing bed was aligned as different alignments would give result in different lines of vision.

154 In our view, it is plain that Mr Loh *did* have a clear view of the door and entrance to the flat from his bed, and would not have missed seeing someone. First, the statements given by Mr Loh indicate that he was able to see persons standing outside the flat. In his statements of 7 May 2005 and 5 September 2005, he described having seen the assailant previously, when the assailant came to offer the Deceased food outside the flat, and that the Deceased turned him away. He must have had an unobstructed view of the entrance to the flat in order to have been able to observe the assailant offering the Deceased food. Secondly, Mr Loh's unobstructed view was confirmed by Catherine, who testified that Mr Loh was able to see her standing outside the flat from his bed when she first arrived on 6 May 2005. Thirdly, the IO testified that Mr Loh did have a good view of the main door and would have seen anyone entering or leaving the flat:

> Q: [W]ould you agree that from Mr Loh's bed and from where he was lying on his bed, he had a good view of the main door---main door to the flat?
>
> A: Yes, your Honour.
>
> Q: So he would have seen anyone entering the flat, you agree?
>
> A: Yes, your Honour.
>
> Q: He'd also have seen anyone leaving the flat?
>
> A: Yes, your Honour.

155 Fourthly, the IO, after he was recalled, on being referred to photographs taken from the proximity of Mr Loh's bed again confirmed that there was an unobstructed view of the main door from the bed. Additionally, the statements given by Mr Loh indicate that he was alert and acutely aware of what was going on during the attack. In his statement of 7 May 2005, Mr Loh described hearing the Deceased shouting for help, and thereafter hearing nothing from her. He recounted in riveting detail seeing the assailant come into his room with the chopper. He was able to recognise the assailant as the same person who came to his house two days before the attack to offer the Deceased cakes. In his statement of 5 September 2005, Mr Loh described the clothes the assailant was wearing. He also stated that the assailant came with a male Malay to his flat a few days prior to the incident. He saw the male Malay offer his wife some food outside his house, but his wife did not accept the offer. In both statements, he described the

assailant coming into the flat at about 8.10am, a time which he specifically noted from the clock that was hung on the wall in front of his room. He further noted the time when the Deceased shouted for help (at about 8.20am) after the assailant entered the flat. There was *no issue as to Mr Loh's mental faculties at the time the statements were recorded*. Dr Ngui, for one, testified that when he saw Mr Loh on 5 September 2005, he found him *fit to testify in court* (see [26] above).

156 It is a matter of profound significance that there are troubling differences between the statements made by Ismil and those made by Mr Loh. Yet, it appears that the investigators made no serious attempt to clarify these differences with Mr Loh between 7 May 2005 and 5 September 2005 when his second statement was obtained from him. Instead of attempting to assess the veracity of Ismil's "confessions" they were apparently content to sit back. The IO acknowledged that he did not ask Mr Loh if it was possible that there was someone else in the flat during the commission of the crime:

> *I did not specifically ask Mr Loh whether he was sure that there was only one person he saw in his flat on 6 May 2005.* Those are my---though my investigation revealed there [were] two persons, and I have two accused persons with me at the time, *I did not confront---I did not confront or ask Mr Loh or even tell him that I have two accused in this case and whether have he mistaken [*sic*] or he did not see the other persons. I did not ask him these questions.* [emphasis added]

157 When questioned, during cross-examination, as to why he did not ask Mr Loh on 5 September 2005 if it was possible that there was somebody else in the flat, the IO's unsatisfactory response was that Mr Loh was very traumatised and shocked, and could not speak very well. This was despite that the fact that by 5 September 2005, the investigations had already revealed that there was a possibility of two persons being involved and two persons had already been remanded on the suspicion of having been involved in the murder. Even if Mr Loh was traumatised for a period after the incident, this was not true as of 5 September 2005, as Mr Loh was certified medically fit (see [26] above). In our view, the investigators ought to have diligently clarified this grave discrepancy in the number of intruders that Mr Loh saw and the number of accused that they suspected were involved in the crime.

158 Other than the number of intruders, there were several other material discrepancies between the contents of Ismil's statements and what Mr Loh observed (as recorded in his statements). These ought to have been obvious to the investigators. In his statements, Mr Loh stated that the assailant entered the flat at around 8.10am. Ismil, however, stated that the attack took place at around 10.00am. Secondly, Mr Loh stated, in his statement of 5 September 2005, that he heard the assailant shout "shut up" twice in English. In his statements, Ismil stated that he communicated with the

Deceased in Malay, and there was no mention of him shouting "shut up" twice in English. In his statement of 5 September 2005, Mr Loh stated that the assailant came into his bedroom after attacking the Deceased, and squeezed his neck for about five minutes. When he let go, he placed a chopper on Mr Loh's neck. The assailant then removed the knife, and pulled away the feeding tube that had been inserted in Mr Loh's nose. This striking account is missing from the statements provided by Ismil. These material inconsistencies would reduce the apparent reliability of Ismil's statements significantly, were they held admissible. These material differences between Ismil's statements and Mr Loh's statements were not addressed by the Judge in his assessment of the reliability of Ismil's statements.

Confession of sole involvement by Muhammad

159 Muhammad apparently had disclosed his sole involvement in the crime to his family members, his former counsel and fellow inmates (see [123]–[124] above). The Judge was of the view that this was a "contrived plan" to save Ismil (see the Judgment at [467]–[474]). For reasons that we have already enunciated (see [125]–[129] above), we are unable to agree with this. The testimony of Muhammad's former counsel, family members and fellow inmates is consistent with the weight of the evidence. The confession of sole involvement by Muhammad, which we have accepted as reliable and true, not only leads to the conclusion that Muhammad was the sole intruder, but also that the confessions by Ismil were palpably false.

Physical condition of Ismil on the morning of 7 May 2005

160 Ismil was in a decidedly vulnerable physical and mental state – appearing to be weak and under the influence of drugs – on the morning of 7 May 2005, the day after his arrest for theft. A police officer testified that Ismil was limping and appeared tired earlier that morning at around 4.50am. Another officer, Inspector Steven Wee Chee Keong ("Insp Wee"), observed Ismil having bloodshot eyes and slurred speech and appearing tired and restless that morning when the officer was with him from 5.55am to 7.30am. Insp Wee thought that this could be an indication that Ismil was under the influence of drugs. Yet another officer stated that Insp Wee had told him at a briefing at 9.00am on 7 May 2005 that Ismil appeared "high".

161 Ismil testified that he was feeling unwell on 7 May 2005. His "body felt very cold and as though [he] was going to fall sick, that is, sickness in relation to drug consumption". He went on to elaborate that he felt withdrawal symptoms, his bones and joints were aching, and he felt like vomiting. Additionally, he wore only a pair of shorts and T-shirt and the air-conditioning was very cold. Later in the day, when he was being questioned at JWNPC, he told the officers that he was feeling sick, cold and confused. Dr Winslow testified that the worst withdrawal symptoms are

generally experienced the day after cessation of Dormicum. The addict may continue to feel weak or experience cravings for the drug for up to two weeks or more after cessation. As Ismil had last consumed Dormicum prior to his arrest on 6 May 2005, the withdrawal symptoms he was experiencing would have been worst on 7 May 2005. He was therefore quite plainly vulnerable when he was being interrogated on 7 May 2005.

162 In his report dated 18 March 2008 (see [32] above), Dr Ung notes (at para 44): "I concur with [Dr Phang's] and [Dr Winslow's] opinion that Ismil is at least a moderate and possibly heavy drug abuser". In our view, upon noticing that Ismil was clearly unwell and in some distress, be it due to withdrawal symptoms or other reasons, the investigators ought to have sought medical advice to ascertain whether he was fit for questioning. This, regrettably, was not done.

163 The Judge made a finding of fact that the withdrawal symptoms experienced by Ismil were mild to, at most, moderate. They were worst in the early morning of 7 May 2005 when he was observed at around 4.55am and "thereafter his condition improved instead of [deteriorated] as alleged" (see the Judgment at [144]). The Judge took into account the fact that at para 14 of Ismil's statement of 17 May 2005, he stated that he was slightly more sober later in the day on 7 May 2005 when he was interviewed by SSI Zainal at the carpark than when he was observed at around 4.55am. The Judge also noted that in the early morning of 7 May 2005, Ismil was "alert enough to deny any involvement in the murder of the [D]eceased" (see the Judgment at [144]). The Judge came to the conclusion that Ismil had exaggerated his withdrawal symptoms (other than some aches in his bones and joints and feeling cold, which the Judge accepted). He concluded that the symptoms did not affect the voluntariness of the statements given by Ismil (see the Judgment at [144]).

164 In our view, there are serious difficulties with these findings. The Judge appears to have concluded that Ismil's withdrawal symptoms were worst in the early morning of 7 May 2005 and thereafter dramatically improved by the time SSI Zainal interviewed him at 11.10am. It should be noted, however, that in his statement of 17 May 2005, Ismil maintained that when he was interviewed at the carpark on 7 May 2005, he was "having a *hangover* due to the drug that [he] had taken the day before" [emphasis in original]. In our view, the objective facts and the medical evidence did not permit the Judge to determine that he could have miraculously recovered just shortly before the police car statement was made to SSI Zainal. With respect, the inference drawn as to his alertness simply due to his ability to deny involvement in the crime is incorrect. Plainly he was not delirious and could to a degree understand what was happening but that does not mean he was not vulnerable and prone to suggestion under stress (see [166] below). We also note that the Prosecution's own witness, Dr Winslow,

appeared somewhat uncertain that the withdrawal from drug use did not affect Ismil's ability to provide the statement (see [33] above).

165 Further, SSI Zainal conceded that Ismil's legs were shaking while he was being questioned in the car. This is an indication of the state of physical distress or fear (or both) that Ismil was in while being questioned in dubious circumstances (as described at [15] above) by SSI Zainal, and is further evidence of his vulnerability that morning.

Ismil's malleable personality

166 It is not disputed that Ismil has a low IQ (see [31] above). Dr Robers stated in his report dated 24 September 2007 (see [31] above) that:

> From the results of the testing, *Ismil has weak reasoning and comprehension skills. This is likely to be reflected in poorer judgment and he is apt to become more suggestible and more easily influenced by others when pressured or coerced. He is likely to be prone to be vulnerable to suggestions and manipulations when he is under stress or threat*. Although Ismil can perform and remember concrete tasks and information with some adequacy, he experiences difficulty when he has to deal with information, pictures and material related to common everyday occurrences. He is likely to have significant limitations in processing information that are more abstract or complex in nature. [emphasis added]

167 Dr Ung reached a similar conclusion in his report dated 18 March 2008 (see [32] above). Dr Ung stated (at para 41):

> Ismil's confessions conform to **coerced-compliant false confession**, the characteristics of which are described below. Both internal factors (factors related to the individual such as drug withdrawal, mental illness, low intelligence and personality factors such as low assertiveness) and external factors (such as the nature of the interrogation) contribute to increase the likelihood of a false confession. [emphasis in original]

Dr Ung summed up his report as follows:

> 66. External interrogative factors such as **exaggeration of the evidence** available, the **threatened consequences** to Ismil by 'not signing' and **inducements of leniency** for confession is likely to have added to Ismil's likelihood of false confession.
>
> 67. The constellation of these internal and external factors would synergistically interact to magnify the risks of a false confession.
>
> 68. Ismil's confession would conform to a **coerced-compliant false confession**. His main motive for doing so was to alleviate and minimize his distress.
>
> 69. *Ismil's highly selective memory gaps in his statements given to the Police are unlikely to be a consequence of anterogate amnesia related to Benzodiazepine use or withdrawal. These would be consistent that he made up a story based on what information and cues he obtained from the Police. In the*

> *absence of such cues and information, he would usually claim that 'he could not remember.'*
>
> 70. His behaviour at being confronted after trying to sell the two stolen handphones after the alleged murder is consistent with his assertions of innocence.
>
> 71. *The presence of* ***incontrovertible forensic evidence*** *would seriously detract from Ismil's claims of innocence and the possibility of a false confession. Conversely, the absence of any such incontrovertible forensic evidence would lend credence to his account of providing a false confession.*
>
> 72. Having considered Ismil's case carefully in the context of the available information and scientific/medical opinion, I would caution against undue reliance being placed upon his confession as there is a **significant likelihood that his confession is false**.
>
> [emphasis in original in bold; emphasis added in italics and bold italics]

168 Although Dr Phang gave rebuttal evidence, we note that he examined Ismil much earlier on 15, 17 and 21 June 2005 purely for the limited purpose of ascertaining his fitness to plead, rather than examining if he was prone to suggestion and was weak-willed. Dr Phang did not subsequently conduct interviews specifically to examine if Ismil was vulnerable to suggestion due to his low IQ, and the likelihood of his confessions being false. Dr Phang was first told by the Prosecution that he needed to testify in court with regard to the issue of false confessions (rather than just fitness to plead) a few weeks before his testimony in court, which was on 7 May 2008. It was around that time that he first received the report prepared by Dr Ung, and formed his opinion that there was no likelihood of a false confession on the part of Ismil. This was nearly three years after he had conducted his interviews with Ismil.

169 In his interviews with Dr Phang, Ismil had confessed to being at the scene of the crime at the material time, although he stated that he had killed the Deceased accidentally. This, we now know, is a fundamental untruth as even the Prosecution now agrees that Ismil had nothing to do with the actual killing of the Deceased. The fact that this was repeatedly told to Dr Phang means that the dependability of the examination by Dr Phang and his assessment of the fragility of Ismil's mental state at all material times had been critically eroded. We also note that in his interviews with Dr Phang, Ismil, even when pressed, could not explain the presence of "2 bloodstained weapons" at the crime scene. Dr Phang's notes of the interview that was conducted on 21 June 2005 reveal the following exchange:

> SOF states that there were 2 bloodstained weapons – chopper & knife believed to have been used in the attack
>
> Accused claimed he couldn't remember – then said one knife ('pisau') only

> Previously clearly stated that he actually used a knife for cutting 'vege', but now claims 'I can't remember if big one or small one, I also don't know … [']

170 The reliability of Dr Phang's assessment is also eroded by the fact that he was not aware of crucial aspects of the murder. He testified that when he first examined Ismil, he had no idea what the number of incised wounds were, and became aware of this only during the preliminary inquiry proceedings when he happened to sit outside the courtroom with the pathologist; this was at least six months after he had examined Ismil. That was the first time he realised that there were actually more than one or two stab wounds. The statements given by Ismil to the investigators were only provided to him subsequently.

171 Dr Phang testified that he conducted his interviews with Ismil in English, with "an occasional smattering of Malay". According to him, there were no difficulties in understanding the accused during the interview process on all three occasions. This testimony is contradicted by the Prosecution's own witness, Dr Winslow. Dr Winslow testified that he communicated with Ismil in Malay, and that Ismil had difficulty expressing himself purely in English, especially when it came to specific withdrawal symptoms:

> Q: Okay. Can we--- let's come to the language. You took the history and you communicated with him in Malay?
>
> A: Yes.
>
> Q: Right. And even in Malay, you had to ask simple questions?
>
> A: That is correct.
>
> Q: You have to break up your questions into small parts---
>
> A: Yes.
>
> Q: ---and only then he would follow?
>
> A: That is correct.
>
> …
>
> Q: … With the fact that Ismil had difficulty even communicating in Malay, by that I mean that, you know, you have to break things down very simply for him. You would agree he would have some difficulty expressing himself in English adequately?
>
> A: He---he could speak English.
>
> Q: Yes.
>
> A: He---but, yes, he would have had probably difficulty expressing himself er, in---purely in English.

172 Dr Ung, on the other hand, conducted the interviews with the aid of a Malay language interpreter. In his report of 18 March 2008 (see [32] above),

Dr Ung stated that Ismil's "poor command of English is likely to have hindered a proper and thorough psychiatric evaluation being conducted by … Dr Phang shortly after the alleged murder". That the interviews were conducted in English without a Malay language interpreter, in our view, reduces the reliability of Dr Phang's evaluation of Ismil. It should also be noted that Dr Ung, who is a Malaysian and had been educated in the Malay medium for eight years, stated that he would have "found it very difficult without an interpreter to actually interview [Ismil] in Malay".

173 As such, we are of the view that the Judge erred in preferring the evidence of Dr Phang over that of Dr Ung. As far as the issue of the likelihood of the confessions being false is concerned, the evidence of Dr Ung with regards to the IQ and personality of Ismil ought to be preferred. It has even been conceded by the Prosecution in submissions before us that very significant aspects of what Ismil repeatedly told the investigators about his role in the killing are false (although the Prosecution now maintains that he did this to protect Muhammad (see [186]–[190] below). Interestingly, the Prosecution's own witness, Dr Winslow, accepts that due to Ismil's low intelligence level, he would omit to mention key matters even when examined for the purposes of a capital offence trial, and may not have been aware of the consequences of things happening around him:

> Q: Okay. Finally, you---do you recall when you interviewed Ismil for the purposes of the trial within a trial, he was taking Valium and Prothiade? Do you recall that at the material time?
>
> A: I---I was not aware of it at that time.
>
> Q: Okay.
>
> A: But yes.
>
> Q: And he himself didn't articulate that to you; right?
>
> A: No, he did not.
>
> Q: Does that suggest to you that Ismil is a person who wouldn't usually articulate matters even though he was being examined for purposes of his trial which involves the death penalty?
>
> A: I---yes he is, er, intelligence challe---challenged.
>
> Q: Okay. And he perhaps doesn't realise the consequences of things that are happening around him? Would you be able to say that?
>
> A: When I examined him, er, yes.

Dr Winslow also testified that Ismil's low IQ and general withdrawal symptoms such as impairment of memory, impaired concentration and insomnia all would have had an impact on his mental state.

Striking changes in details in statements as more facts were uncovered

174 Pertinently, the narrative in the statements provided by Ismil dramatically changed as the investigators uncovered more key facts. Ismil initially claimed sole responsibility for the murder and did not implicate Muhammad. The former provided ten statements between 7 May 2005 and 24 May 2005, not one of which made any mention, whatsoever, of Muhammad. Subsequent to the IO receiving confirmation that the DNA of Muhammad was found on the Deceased's purse (see [18] above), and after Muhammad had confessed to being at the scene of the crime, the statements provided by Ismil changed in that they stated that he and Muhammad had both agreed to commit robbery, and he (*ie*, Ismil) had knifed the Deceased in the course of the robbery. Why did Ismil change his narrative and implicate Muhammad, having already provided ten statements without mentioning Muhammad? The Prosecution now says that he had concealed his brother's role to protect him. The Prosecution, however, was unable to cogently explain why the strength of the fraternal ties was, in this case, so strong that for almost a month he was willing to accept sole responsibility for a capital offence.

175 It appears to us that the investigators mistakenly thought that they had an open and shut case against Ismil alone once they obtained the police car statement and the field diary statement. After this, they made little or no attempt to search for objective evidence at the scene of the crime (see [182]–[183] below). This state of affairs continued until Dr Syn unexpectedly informed the IO that the DNA trace on the Deceased's purse belonged to one of his brothers. The investigators then secured Muhammad's confession that he was present at the flat during the killing but had not participated in the attack of the Deceased. The Prosecution's evidence as to the change in narrative by Ismil is as follows. Ismil first implicated Muhammad in his statement of 3 June 2005, after Muhammad had already confessed to being at the scene of the crime. The statement was given to Assistant Superintendent Bahar Bakar ("ASP Bakar"), although Senior Station Inspector Mazlan bin Shariff ("SSI Mazlan") was present initially. SSI Mazlan testified that Ismil was told that Muhammad had revealed that he (*ie*, Muhammad) was present at the scene of the crime, and Ismil was asked for his response. Ismil was not forthcoming initially, before he acknowledged the involvement of Muhammad in the robbery. On the other hand, Ismil's evidence in this regard is that SSI Mazlan had informed him that Muhammad had implicated him and that he should do something to save Muhammad:

> Mazlan told me that my younger brother had informed him everything from A to Z. Mazlan also had told me to save my younger brother.

176 The Judge held (see the Judgment at [185]) that SSI Mazlan's evidence "was the more probable of the two". The Judge reasoned that by 3 June 2005, Ismil had already given various statements which were effectively

confessions. The police investigators were not trying to make Ismil implicate himself further, but, rather, were trying to ascertain whether he was going to corroborate Muhammad's limited involvement in the murder.

177 With respect, we disagree. First and foremost, the Judge's remarks, which were given as part of his reasons for upholding the voluntariness of Ismil's statements, appear to reveal an application of an incorrect standard *vis-à-vis* the burden of proof that the Prosecution had to discharge. The standard with respect to the voluntariness of a statement in the context of a trial-within-a-trial is that the Prosecution has to establish the voluntariness of the contested statements beyond reasonable doubt, not on a balance of probabilities. In justifying one explanation as being "more probable" than the other, the Judge appears to have applied the "balance of probabilities" standard rather than the "beyond reasonable doubt" standard. We ought to pause here to also mention that despite the in-depth analysis of the facts and law by the Judge in the Judgment, it is not clear to us after a close reading of the Judgment which standard he had applied in establishing the voluntariness of the series of confessions made by Ismil.

178 Second, the explanation given by the Prosecution cannot withstand closer scrutiny. At the point in time where Ismil acknowledged the involvement of Muhammad, Ismil had already confessed to facts that would have attracted capital punishment. He had nothing to fear from not cooperating with the investigators. If he stuck to his original confession, Muhammad would not have been incriminated at all. Further, there was nothing Muhammad could have said that could have further exacerbated Ismil's predicament. Why did he not maintain the original version of events if he wanted to protect Muhammad? Why is it that his statements thereafter bore an uncanny resemblance to Muhammad's? Was it because they were true? But it is common ground now that, at the very least, all of Muhammad's evidence on his own subsidiary role was false.

Absence of any objective evidence

179 There is a *startling* lack of any objective evidence that links Ismil to the attack on the Deceased. It should first be noted that Ismil, unlike Muhammad, was apprehended on the very day of the offence. He had not changed his clothes that day and the investigators later seized other apparel belonging to him from his home. Clippings of his fingernails were also sent for testing. Yet, no bloodstains or DNA traces from the Deceased were found on any of these items (see [126] above). In contrast, by the time Muhammad was apprehended almost a month later, it was too late to conduct similar tests on his apparel or his fingernails. It is odd that if Ismil was involved in an attack as vicious as the attack on the Deceased, with over 110 wounds being inflicted and copious amounts of blood being splattered all over the flat, including the kitchen floor, furniture and the walls and floor of the toilet, no trace of the Deceased's blood or DNA was found on

him or his apparel. There was also evidence that the assailant may have used the wash basin in the kitchen to clean his hands. If some washing up was necessitated as a result of the attack, it would be reasonable to expect some remnants or particles of blood to have been found on Ismil. Even if he was not the assailant surely he would have assisted Muhammad in the washing up if he was present?

180 The investigators also did not report seeing any abrasions or bruises on the hands of Ismil, despite him allegedly wielding a knife and a cleaver and striking the Deceased over 110 times. When Ismil was sent for a pre-statement medical examination at about 6pm on 7 May 2005, the day after the attack, Dr Cheong, who conducted the medical examination, noted in his report dated 21 June 2005 that "[n]o other visible injuries were noted" aside from superficial abrasions on the chin and in front of the right ear, a 1.5cm scab on the right arm, and a 2cm abrasion on the right knee. For completeness, we should add that the Prosecution has not suggested that any of these are connected with the incident.

181 The Prosecution maintains in its further written submissions that even if Ismil is not guilty of murder, he was present in the Deceased's flat during the commission of the crime, and is guilty of having committed robbery with hurt. There is, however, absolutely no physical evidence of Ismil ever having been present in the Deceased's flat. Assuming he was present in the Deceased's flat, what was he doing when Muhammad was attacking the Deceased? It is not disputed that *the duration of the incident was about an hour*. Only one room, the bedroom adjacent to the one that Mr Loh was in, was ransacked. This was a very small room and a search of it would have taken no more than a few minutes. And Mr Loh only noticed one "thief" despite remaining alert throughout the incident (see [151]–[155] above). If there had been a second person in the flat, what would he have been doing for the duration of the attack on the Deceased? Also, why was there no communication at all between the two of them? Mr Loh did not hear anything. Why did the "second person" not assist in the washing up? It seems to us *on these facts that the Prosecution's case theory that there was a second intruder who managed to conceal himself from Mr Loh for about an hour, did not participate in the attack nor cleaning up, and remained silent throughout, is more than farfetched*.

182 When queried about the precise steps he took in searching for evidence at the scene of the crime, the IO's replies revealed a worrying lack of meticulousness in the discharge of his duties. The IO admitted that the following inquires were not carried out:

(a) no fingerprint examination was conducted in the bedroom in which Mr Loh was found;

(b) no fingerprint examination was conducted in the kitchen;

(c) no fingerprint examination was conducted in the toilet where there was an attack episode, despite it being highly likely that while attacking the Deceased, the assailant would have touched the wall at some point;

(d) no fingerprint examination was conducted at the water tap at the kitchen sink, despite there being blood and hair on the sink trap, which strongly suggests that the assailant must have used the water tap as he was the only person able to move;

(e) no fingerprint examination was conducted at the kitchen window, despite the fact that one of the weapons used in the attack, a knife, had a missing handle that was likely to been thrown out of the flat by some means;

(f) no questions were asked of Mr Loh as to whether any of his shoes were missing, despite there being a shoe print in the flat that did not match any footwear in the flat; and

(g) no search was made by the IO for evidence on any floor of the block other than the 6th floor, and he was unsure if any of his men searched other floors.

183 The IO eventually had no alternative but to acknowledge shortcomings in the investigations in the following exchange with counsel for Ismil:

Q: Would you agree with me, taking into account the totality of the evidence now, especially with the statement of Mr Low, that you should have taken more DNA samples at the scene of crime and lift more fingerprints there?

A: *I would say I still could do more forensic examinations in the [D]eceased's flat when I was---when I was there.*

[emphasis added]

184 The Prosecution accepted that there is absolutely no objective evidence of Ismil being present. It is trite that where there is doubt, it ought to be resolved in favour of the accused. Surely, in a case where there has been an absence of diligence on the part of the investigators in completing their enquiries, doubts on material issues cannot be resolved in favour of the Prosecution, which bears the burden of establishing their case theory beyond a reasonable doubt. As stated in *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167 at [64]: "… *where the court cannot decide with any degree of certainty between alternate case theories, the benefit of the doubt has to be given to the accused*" [emphasis in original].

Our view on the reliability of Ismil's statements

185 All of the above considerations, when considered in totality, collectively cast grave unresolved doubts about the reliability of the confessions provided by Ismil. It should be stated that the analysis in relation to the considerations above is distinct from that in relation to non-compliance with the CPC and the Police General Orders. For non-compliance with the CPC and/or the Police General Orders, any statement taken in breach would be inadmissible should its prejudicial effect exceed its probative value (see [60]–[61] above). The considerations above, however, when taken in the round, ineluctably lead us to the conclusion that even if the statements were held to be admissible, little weight, if any at all, ought to be placed on them.

Flaws in the Prosecution's case theory against Ismil

186 The Prosecution's case theory against Ismil is that he falsely confessed to committing the murder in order to shield his brother from prosecution. However, there was no question of Muhammad's involvement at the time of Ismil's false confession and no objective evidence of Muhammad being at the scene of the crime. Indeed, there was also no evidence at that point of Muhammad being at the scene of the crime or that Ismil was even aware of Muhammad's involvement. Why would Ismil therefore confess to a crime and link himself to it unnecessarily?

187 It is accepted by the Prosecution that Ismil's IQ is low (see [31] above). Is it likely that he would have been able to formulate a plan to shoulder the blame for his brother, all in the span of his first night in remand (since he could not have thought of the need to come up with such a plan until he was arrested and remanded), while he was suffering from the severe effects of drug withdrawal?

188 Furthermore, if Ismil had indeed been present in the flat when the Deceased was attacked, it would seem odd that his "voluntary" account of what transpired that day would be only "skeletal", as acknowledged by the Prosecution in submissions before us. Counsel for Ismil quite rightly made the following pertinent observation that "it simply is striking that Ismil [(unlike Muhammad)] did not mention any 'fact' that was at that time not known to the investigators".

189 If the confessions were voluntarily made, why were they so lacking in material details unlike Muhammad's eventual confession? Whenever key details were sought regarding the events that transpired that day, Ismil was unable to provide the same. Crucially, Ismil was unable to state if the Deceased had sustained more than one injury purportedly caused by him, something which he surely would have been able to confirm had he been the assailant:

Q61: How many injuries did the [D]eceased sustain?

A62: I could not remember.

Q62: Could she had [*sic*] sustained more than one injury caused by the knife that you were holding?

A62: I cannot answer this question. I cannot remember. I do not know.

190 That the Prosecution conceded in submissions before us that Ismil's statements were "skeletal" is not surprising. The statements do not account for the use of two weapons, nor for the numerous wounds inflicted on the Deceased, both of which were noted by Dr Lai in his autopsy report (see [12] above). Has the Prosecution established that Ismil, who has a low IQ and who was plainly in real physical distress immediately after his arrest because of the withdrawal effects arising from his substance abuse problem, was ingenious enough to concoct a narrative that provided the barest of details of what might have transpired in the flat while taking extreme care not to give any details that might implicate the real assailant, his brother? On this score, we note that the Prosecution did not challenge Dr Robers' evidence that Ismil's "speed of processing novel information is weak and inefficient". What made Ismil, when he was unwell, precipitately confess his sole involvement to SSI Zainal when they were alone in the car? Why did the statements given by Ismil on 7 May 2005 unerringly echo the key facts then known to the investigators but lack details that only the real assailant would have been aware of? Why did Ismil only later implicate Muhammad? These are troubling questions that seem to point unequivocally towards a series of false confessions procured by questionable means.

Conclusion on Ismil's conviction

191 As stated earlier (see [36]–[38] above), the Prosecution's position at present is that Ismil is not guilty of murder, but is guilty of robbery with hurt. However, the inadmissibility of certain statements made by Ismil (see [139]–[149] above) and the irresolvable doubts as to the reliability of the rest of the statements made by him (assuming they are admissible), coupled with the complete absence of other evidence, means that the Prosecution has failed to even establish that Ismil was present at the flat when the Deceased was killed, let alone that he shared in any common intention to commit robbery. The Prosecution has thus failed to prove that Ismil is guilty of any offence.

192 For completeness, it should be added that the approach of the Judge in applying s 34 of the Penal Code to the facts at hand was wrong, having regard to the decision of this court in *Daniel Vijay* ([36] *supra*) (which, in fairness to the Judge, was released only on 3 September 2010, some seven months after the Judgment was delivered). Section 34 of the Penal Code states:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

The Judge held that s 34 did not require him to make a finding as to who the assailant was (see the Judgment at [498]–[501]). He also found that there was a plan between the Appellants to rob the Deceased, and whether Muhammad or Ismil was the assailant, "each must have known that it was likely that the [D]eceased would have to be killed to avoid any risk of identifying them" (see the Judgment at [504]). The Judge then added that (see the Judgment at [506]):

> [T]he accomplice of the assailant must also have been aware of the attack on the [D]eceased in view of the small size of the [D]eceased's flat, the numerous blows inflicted upon the [D]eceased over a prolonged period of time and the presence of blood spatters in the kitchen facing the hall and the presence of her body in the hall.

For these main reasons, the Judge concluded that the Deceased was killed in furtherance of the common intention to commit robbery and that both the Appellants were jointly liable for murder pursuant to s 34.

193 For joint liability under the doctrine of common intention as set out in s 34, it was stated by this court in *Daniel Vijay* that the common intention of all the offenders must include an intention to commit the very criminal act done by the actual doer which resulted in the offence charged. The conclusion of the Judge was that the Deceased was killed in furtherance of a *common intention to commit robbery*. Applying *Daniel Vijay*, such a common intention would not suffice for joint liability for murder to be established, and neither the statements nor any other evidence adduced by the Prosecution establishes that there was any common intention by the Appellants that would suffice (*eg*, to commit an injury that "is sufficient in the ordinary course of nature to cause death" (see [145], [146] and [167] of *Daniel Vijay*)).

Conclusion

194 In the result, we dismiss Muhammad's appeal and substitute Muhammad's conviction for murder in furtherance of common intention to commit robbery under s 302 read with s 34 of the Penal Code with a conviction for murder under s 302 of the Penal Code. We allow Ismil's appeal and set aside his conviction. Ismil can be said to be a petty handphone thief and a chronic drug abuser, but the Prosecution has been unable to even begin to establish that he was at the scene of the crime, let alone being a party to the robbery or the killing of the Deceased. We are also constrained to point out that these proceedings have revealed several serious lapses on the part of the investigators who had carriage of this matter (see [140], [143]–[148], [156]–[157], [175] and [182]–[183] above).

We have raised several unanswered questions in this appeal (see, *eg*, [152], [179], [181], [189] and [190] above as well as [203] below). One, of course, hopes for one set of answers. One fears, that in reality, there might be another.

Coda on the Prosecution's conduct of these proceedings

195 Before we end, we have some observations on the Prosecution's conduct of the case that we feel we should set out in the interests of the administration of justice. To our consternation, three vital items of evidence were not provided to counsel for the Appellants by the Prosecution until very late in the proceedings.

196 The first piece of evidence is Mr Loh's statement of 5 September 2005. Mr Loh's statement would have corroborated Ismil's alibi defence (of being at home at time of the murder). Yet, Mr Loh's statement was only belatedly made available to counsel for the Appellants on 4 September 2007, two years after it was obtained and 61 days into the hearing. By then the IO had already completed giving his evidence-in-chief. When the IO was cross-examined it was revealed that another statement had been recorded from Mr Loh on 12 May 2005 and that this statement was consistent with the statement of 5 September 2005.

197 What is even more startling is that the third key piece of evidence, Mr Loh's first statement taken on 7 May 2005, was disclosed even later – only on the penultimate day of the trial. On that day, counsel for Ismil was cross-examining SSI Lai, and, during the course of cross-examination, SSI Lai revealed that he had taken a statement from Mr Loh on 7 May 2005. It bears mention that SSI Lai was less than forthcoming initially. He insisted, at first, that Mr Loh could not talk:

> Q: Okay. What did [Mr Loh] tell you?
>
> A: Oh, he---he---he can't talk.
>
> Q: He can't talk?
>
> A: Yes.
>
> Q: You are very sure today that he can't talk?
>
> A: At that point of time he can't talk.
>
> Q: Okay. So he didn't tell you anything about the facts of the case?
>
> A: He's unable to talk.

After some probing cross-examination by counsel, he eventually disclosed that he had recorded a statement in his diary from Mr Loh with assistance from his niece. Crucially, all three statements are consistent with each other in all material aspects.

198 The Prosecution when queried by us explained that Mr Loh's statements were not disclosed earlier because they were "not credible and would not have any bearing on the decision of the case at the commencement of the trial" [emphasis in original omitted]. It was added that Mr Loh was very emotional and could not speak in complete sentences. Further, at the identification parade, he was unable to identify the intruder and had pointed at three individuals, none of which was one of the Appellants. The Prosecution also asserted, for good measure, that Mr Loh was "never in a sufficiently fit state to clarify his evidence" and "the intention was to revisit this assessment if and when Mr Loh's condition improved". As Mr Loh subsequently passed away, the occasion to "revisit" his evidence never arose.

199 We find it difficult to accept these belated attempts by the Prosecution to justify their mistaken stance in leisurely revealing Mr Loh's statements in dribs and drabs for the following reasons:

(a) First, it is plain that the investigators had found Mr Loh's account credible enough to issue, on 7 May 2005, a Media Release based solely on his account that there was a single intruder who appeared to be a "male Malay look like a drug addict" during the incident.

(b) Second, the IO testified in re-examination that he did not ask Mr Loh why he had picked three persons as Mr Loh "was not in a very good condition to participate in the ID parade" and was in some "form of shock" when the ID parade was being conducted. Surprisingly, Catherine, his daughter, was not asked to accompany him. She was his interlocutor in both the earlier and subsequent interviews. Indeed, she also affirmed that Mr Loh was "very emotional" around the 12 and 13 May 2005. While the parade was conducted, Mr Loh, apart from being unwell, did not speak or communicate at all. Subsequently, even though his condition had improved by 5 September 2005 when a detailed statement was obtained, the investigators did not show him any photographs of the two accused to verify if he could identify either of them. Catherine affirmed that by the 5 September 2005 her father could "speak better" because he "was calm".

(c) Third, when the IO was queried on the 63rd day of the trial why the investigators had not disclosed Mr Loh's statements earlier he claimed that "*[i]t's simply because we are not using him as a witness*" [emphasis added]. However, he had no alternative but to concede that Mr Loh's statements were indeed "*very material*" [emphasis added]. There was absolutely no suggestion from him that Mr Loh was not a credible witness. It bears mention that he had direct contact with Mr Loh, unlike the Prosecutors.

(d) Fourth, the Prosecution also led evidence in the trial from Catherine, his daughter, that Mr Loh's mind was "not affected by his stroke" and that he had no difficulties with his ability to recollect. She confirmed that if one were to speak audibly and "pay attention when he spoke" her father could be understood. He used reading glasses when he had to read and had no problems differentiating colours. She also affirmed that "[f]or small things [Mr Loh] will not be able to see it properly, but for big size thing he---he had no problem. When we returned home he knew who we were. He could see us".

(e) Fifth, when the IO was examined as to why he did not closely query Mr Loh about the presence of a second intruder, he acknowledged his oversight. He did not mention anything in relation to Mr Loh's alleged lack of credibility that the Prosecution presently relies on to justify its decision for not making the necessary disclosure earlier. It could be added that even the Judge did not conclude that Mr Loh was not a credible witness notwithstanding his opinion that Mr Loh may have "missed" noting a second intruder (for reasons that we have explained are wrong (see [153] above and onwards)).

(f) Sixth, while Mr Loh was undoubtedly distraught by his wife's murder and had difficulties communicating, it cannot be gainsaid that a great deal of pertinent detailed information was eventually obtained from him. Several of the details he gave in the three statements were objectively verifiable and resonated with the established facts.

(g) Seventh, Mr Loh was medically certified to be fit to give evidence as of 5 September 2005 (see [26] above). This certification was apparently procured by the police investigators.

(h) Eighth, it bears mention that all three of Mr Loh's statements were consistent with each other. He never once wavered from his firm belief that there was a single male Malay intruder. The investigators failed to properly clarify with him whether he could be mistaken (see [157] above). This was a serious oversight.

200 In the light of the above it is surprising for the Prosecution to now assert that Mr Loh was not a reliable witness. The Prosecution's present position that Mr Loh's statements "would not have any bearing on the decision of the case at the commencement of the trial" is disappointing as even the IO acknowledged the statements are indeed "*very material*" [emphasis added]. We earlier concluded (at [115]) that the Prosecution ought not to arrogate to itself the decision to withhold from the court material evidence from a seemingly credible witness. *To reiterate, the duty of the Prosecution is not to secure a conviction at all costs. Rather, the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before*

the court to assist it in its determination of the truth. The fruits of investigations are after all the property of the community to ensure that justice is done, as was aptly stated in *Stinchcombe* (see [90] above).

201 This case amply illustrates the profoundly disturbing consequences that the wrong exercise by the Prosecution of its perceived unfettered discretion on disclosure could have on the administration of justice. There is no doubt in our minds that Mr Loh was on any account a credible witness who gave an entirely consistent account of crucially material facts. Even if there was indeed some genuine doubt about his reliability entertained by the Prosecution, on the basis of the prevailing facts and considering this was a matter that attracted capital punishment, disclosure of his statements was not an option but, plainly, an obvious necessity. It was for the court and not the Prosecution to have made that assessment. This ought to have been obvious to those responsible for the prosecution from the onset of this matter. They must have appreciated that all the *known objective evidence* pointed to only one intruder being present at the flat during the incident.

202 In our view, all of Mr Loh's statements ought to have been provided to counsel for the Appellants and to the court prior to the trial. The Prosecution relies on the High Court decision in *Selvarajan James* ([81] *supra*) to justify their omission to produce the three statements. But even if that decision may be said to suggest that it had no legal obligation to produce the statements there remains the ethical duty the prosecutors owed the court to produce them as they were highly pertinent to the issue of the guilt of Ismil and they came from a credible source. The number of intruders present during the incident went to the very heart of these proceedings. Had they been so provided at an earlier stage, the Judge could well have held the initial statements of Ismil to be inadmissible.

203 At the very latest, the Prosecution ought to have disclosed Mr Loh's statements to counsel for the Appellants soon after Ismil filed his notice of alibi on 3 January 2006. The Prosecution must have appreciated that these statements were important not just to counsel for the Appellants but to the court in its assessment of the charges that the Appellants faced. Yet Mr Loh's statements of 12 May 2005 and 5 September 2005 were only provided on 4 September 2007, more than a year and a half later. The existence of these two statements only incidentally emerged when the IO was being cross-examined. Mr Loh's statement of 7 May 2005 was provided later still, on 8 May 2008, more than two years after the notice of alibi was filed, also having been discovered during the course of the cross-examination of another investigator, SSI Lai. It ought also be mentioned that the testimony of Muhammad's former counsel, Mr Lean, that the IO had informed him that as far as Mr Loh was concerned no statements were recorded from him and it was a case of "[n]o hear, no see" was not challenged by the Prosecution. Clearly, there was a conscious decision by all involved in the investigation and prosecution of the appellants not to reveal

Mr Loh's statements prior to the commencement of the High Court proceedings. Why? It does not appear to us that this decision was solely underpinned by concerns about Mr Loh's credibility or the materiality of his statements.

204 Here, Ismil's counsel was deprived of crucial information which would have considerably assisted his case. The Judge was also kept in the dark until well after he had ruled on the admissibility of Ismil's confession. By the time Mr Loh's statements were revealed the Judge was placed in the entirely invidious position of having to reassess the correctness of his earlier decisions on admissibility and the reliability of certain witnesses.

205 We would end by emphasising the important role the Prosecution plays in the administration of justice. *It is of paramount importance that the Prosecution discharge its duties conscientiously and ethically, and not just zealously*. The ultimate determination as to innocence or guilt is to be made by the court, and it is the duty of the Prosecution to ensure that all known material evidence that is credible is fairly placed before the court in a timely manner.

206 We do not think that the prosecutors who had carriage of this matter in the High Court properly assessed their ethical obligations to the Court (even assuming they were entitled to rely on the decision in *Selvarajan James*). They made a deliberate decision not to disclose Mr Loh's statement dated 5 September 2005 to the court until late in the proceedings – and even then, the remaining statements had to be teased out through an achingly drawn-out process. This failure to make timely disclosure was disappointing.

207 Finally, we would like to acknowledge Mr Thrumurgan for his impassioned advocacy and the commendable conscientiousness with which he has conducted Ismil's defence. He deserves credit for placing on the record of proceedings many of the facts we have referred to above.

Reported by Adrian James and Yeo Shenglong, Jeremy.

Appendix

PGO A18	**POCKET BOOKS**	Last Reviewed: 1 May 02 Owner : P&O

This Order sets out the procedures for the issue, use and maintenance of Pocket Books.

2. For the purpose of this Order, Pocket Books shall be of such specifications and types as approved by the Commissioner and issued for use by the Quartermaster.

ISSUE OF POCKET BOOK

3. Every police officer shall, while in active service, be issued with a Pocket Book. The Pocket Book may be replaced as and when necessary.

4. All Divisions/Units shall maintain a register for recording the issue of Pocket Books to all regular Senior and Junior Officers. The Register shall contain:

   a. Unit Serial Number;

   b. Date of Issue;

   c. Name, Rank & Number of Recipient;

   d. Signature of Recipient; and

   e. Remarks.

5. However, In Divisions/Units where there are 20 or more serving Police National Service (Full-Time) Officers, an additional separate register has to be maintained to facilitate the issue of Pocket Books to Police National Service (Full-Time) officers and Police National Service Men.

6. The Head manpower, Administration and Logistics of a Land Division or a Senior Officer of equivalent rank or duty post in other Units shall carry out monthly inspections and surprise checks to ensure that the Register is properly maintained.

7. The Station Inspector or Sergeant Administration in Division/Unit shall be responsible for the proper maintenance of the Register. He shall also be the Issuing Officer of Pocket Books to all police officers in the Division/Unit. Each Pocket Book issued by him shall bear on the inside cover:-

a. The Station stamp;

b. The Unit Serial Number;

c. Signature of the Issuing Officer; and

d. Date of issue.

ISSUE OF POCKET BOOK

8. The Pocket Book shall be used to:-

a. Record notes of events and personal movements which are likely to become the subject of any legal or disciplinary proceedings; and

b. Record notes of events and personal movements which are likely to become useful to absolve the officer of false allegations of wrongdoing.

9. Notes recorded in Pocket Books which are likely to become the subject of legal or disciplinary proceedings shall be recorded in the fullest possible detail including

a. Actual words of relevant statements;

b. Behaviour of suspects;

c. Sketches or diagrams;

d. Identity Card, car or other reference numbers; and

e. Weather conditions, road conditions and lighting conditions where relevant.

10. A statement recorded in a Pocket Book shall be neatly and legibly written. The statement shall in accordance with Section 121(3) of the Criminal Procedure Code, Chapter 68 be read over to the person making it. He shall be offered the chance to correct his statement. All corrections, if any, shall be initialled by him. The person making the statement shall sign on each page of the Pocket Book on which the statement is recorded.

11. Officers shall also use the pocket book to record notes of events or personal movements that may call into question his conduct at a later date, such as visiting places of ill repute and fraternising with persons of doubtful repute in the course of duty, or any other activities that may cause him to be a subject of investigations under PGO A10.

12. If notes cannot be made at the time of the event, they shall be made as soon after the event as possible whilst details are still fresh in the mind. Notes made elsewhere as a temporary measure shall be copied into Pocket Books as soon as possible thereafter and the original separate notes retained as exhibits in case they are needed.

ENDORSEMENT BY SUPERVISORS

13. When an entry is made which is likely to be the subject of any legal or disciplinary proceedings, an officer should submit his pocket books to his supervisor to be endorsed. Officers holding sensitive posts or are likely to be subjects of malicious allegations should also submit their pocket books to their supervisors for regular endorsements to protect themselves against such allegations.

14. Pocket Books shall be endorsed by supervisors as frequently as the supervisor deems it necessary. The frequency of endorsements may also be set out in Unit Standing Orders. The pocket books shall be signed and dated by the supervisor during endorsement.

15. The purpose of endorsement is for additional verification of the date and time of entries.

MAINTENANCE OF POCKET BOOKS

16. Entries in pocket books should be legible, clear, concise and written in such a way that they are useful for recall at a later date. Entries should also contain sufficient facts to substantiate the claims or the police officer making those entries.

17. To ensure reliability of a Pocket Book as an official record the following points shall be observed in its maintenance:

    a. The Station stamp, the name, rank and number (where applicable) of the owner are to be endorsed on the inside cover of the Pocket Book;

    b. All entries are to be clearly written in indelible ink;

    c. All entries are to be recorded in chronological order on the serially numbered pages;

    d. All entries are to include:-

1 Time of occurrence; and

2 Place of occurrence

e. No erasure or obliteration of notes is to be made. If any mistakes are made, the officer shall cross out the incorrect matter with a single ink line, ensuring that it is legible, initial and date it in ink.

f. No lines between entries in the Pocket Book are to be left blank; and

g. Leaves are not to be torn out from a Pocket Book for any purpose.

18. Every police officer shall be responsible for the safe custody of his Pocket Book currently in use. He shall also be responsible for retaining and keeping his own completed Pocket Book for a period of 3 years after the last entry has been made therein. However, if any notes made therein are likely to be used in legal or disciplinary proceedings after the above retention period, the Pocket Books are to be retained until the proceedings are completed. He may destroy the completed Pocket Books after the expiry of the retention period or after the conclusion of the proceedings.

OTHER POLICE RECORDS

19. Entries which are made in other official Police records need not be reproduced in the pocket books. These include log sheets, station diaries and investigation field books. The issue, use, maintenance, inspection and custody of these records shall be laid out in Standard Operating Procedures by the respective staff departments or by the Command Standing Orders of the respective units.