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Further clarification from the High Court on the limits to the constitutional right to counsel

***James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10**

CHEN SIYUAN* AND KENNETH TAN JUN HUA†

Article 9(3) of the Constitution¹ states that “Where a person is arrested, he ... shall be allowed to consult and be defended by a legal practitioner of his choice.” However, art 9(3) does not stipulate the point in time at which an arrested person is entitled to consult counsel. The local jurisprudence over the past few decades have affirmed the interpretation that an arrested person is not entitled to access counsel immediately upon arrest, but only after a reasonable amount of time has elapsed. The High Court in *James Raj s/o Arokiasamy v Public Prosecutor* (“*James Raj*”) has now shed more light on the rationale and operation of the limitation to this right.

Facts and decision

The accused was suspected of hacking into several websites under the moniker of “The Messiah” as well as the commission of drug-related offences. He was arrested on 4 November 2013 and subsequently charged under the Computer Misuse and Cybersecurity Act² and the Misuse of Drugs Act.³ On 11 November 2013, counsel for the accused contacted the police for access to the accused for the first time, but this request was rejected.⁴ On 12 November 2013, when the prosecution sought an order for the accused to be remanded at the Institute of Mental Health for psychiatric evaluation, counsel for the accused sought leave to speak to the accused, but this request was also rejected.⁵ On 13 November 2013, a criminal motion was filed by counsel for the accused, seeking a declaration that there is “an

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¹ (1985 Rev Ed, 1999 Reprint).

² (Cap 50A, 2007 Rev Ed).

³ (Cap 185, 2008 Rev Ed).

⁴ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [2].

⁵ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [2].

immediate right to counsel upon the request of a person remanded for investigations”.⁶ As access to counsel was eventually granted on 3 December 2013, the criminal motion, which was only scheduled to be concluded at a later date, was rendered academic.⁷ Nonetheless, the judge made some noteworthy observations on art 9(3) of the Constitution:

(1) Although there are some Malaysian decisions that have drawn a distinction between the time at which the right to counsel arises and the time at which the right may be exercised, this distinction makes no difference in practical terms; perhaps the better question to ask is at what point is the arrested person entitled to consult counsel.⁸

(2) In this regard, the Court of Appeal in *Jasbir Singh v Public Prosecutor* (“*Jasbir Singh*”)⁹ has clearly stated that an arrested person is entitled to consult counsel only a reasonable time after arrest.¹⁰

(3) More recently, the Court of Appeal in *Muhammad bin Kadar v Public Prosecutor*¹¹ has confirmed, albeit in *obiter dicta*, that art 9(3) does not extend to immediate access.¹²

(4) But while *Jasbir Singh* cited the High Court case of *Lee Mau Seng v Minister for Home Affairs* (“*Lee Mau Seng*”),¹³ the latter had characterised the constitutional right in a more affirmative way than *Jasbir Singh* by considering the right from the perspective of the arrested person rather than the police.¹⁴ For instance, while *Jasbir Singh* (at [48]) took the view that the rationale for granting a reasonable time is to afford the police a degree of latitude in carrying out their investigations, *Lee Mau Seng* (at [17]) seemed to imply that the constitutional right to counsel is not lightly to be curtailed by the needs of police investigations.¹⁵

(5) In addition, based on the High Court case of *Public Prosecutor v Leong Siew Chor* (“*Leong Siew Chor*”),¹⁶ the onus of proving that giving effect to the right to counsel would impede police investigation or the administration of justice is on the state, and the state has to show that any derogation was necessary and not merely desirable or convenient.¹⁷

⁶ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [1].

⁷ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [8].

⁸ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [4]. For convenience, a distinction will not be drawn between an “arrested person” and “accused” in this commentary, though there is indeed a difference between the two terms.

⁹ [1994] 1 SLR(R) 782 at [47].

¹⁰ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [3].

¹¹ [2011] 3 SLR 1205 at [57].

¹² *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [3].

¹³ [1971–1973] SLR(R) 135 at [12].

¹⁴ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [3].

¹⁵ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [5]–[6].

¹⁶ [2006] 3 SLR(R) 290 at [85].

¹⁷ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [12]. The court in *James Raj* was probably referring to the so-called evidential burden, since it went on to say that “all that [the arrested person] has to do is show that he has not been permitted to consult counsel subsequent to his arrest. That would furnish sufficient grounds to indicate that there might have been a breach, and the burden is then on the other (the prosecution) to

(6) Be that as it may, it cannot be correct that (as originally argued by the accused) an arrested person is entitled to consult counsel immediately upon his request, since this might imperil the investigative process.¹⁸

(7) However, as at 29 November 2013 (which was the date the parties filed their submissions), permitting the accused access to counsel would not have hindered investigations; indeed, in the absence of evidence, permitting access even on 11 November 2013 would not have hindered investigations either.¹⁹

(8) Although *Jasbir Singh* and *Leong Siew Chor* held that two weeks and 19 days respectively was a reasonable time, each case turns on its own facts: here, the prosecution did not furnish substantive grounds to prove that access to counsel would jeopardise investigations; it was speculative to conclude that the accused would become uncooperative and refuse to assist the police in collecting evidence had he been granted access; and a lot of the (digital) evidence was already in the possession of the police, and allowing access to counsel would not have adversely affected the ability of the police to analyse the evidence.²⁰

(9) The better way forward may be for the police to specify the amount of time which the arrested person is entitled to spend with his counsel per day, rather than to do away with the right entirely so long as investigations are ongoing – this will address any concern that the arrested person may spend too much time with his counsel and/or refuse to be interviewed by the police unless his counsel is present.²¹

Some comments on the decision

James Raj offers a welcome re-examination of the right to counsel under art 9(3) of the Constitution.²² The court's affirmation that the accused would only be entitled to access counsel after a reasonable time was not surprising considering the preponderance of existing authorities (including that from the Court of Appeal).²³ Yet this affirmation was only the beginning of the inquiry; at the heart of the matter was determining the reasonable limits of depriving an accused of access to counsel. While every case must indeed be treated on its

show that there was no breach because, as in this case, the investigation process is underway." In this regard, see *Rajapakse Pathurange Don Jayasena v The Queen* [1970] 1 AC 618; *Public Prosecutor v Yuvaraj* [1970] 1 AC 913.

¹⁸ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [7] and [9].

¹⁹ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [14].

²⁰ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [13]–[14].

²¹ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [14].

²² The question of access to legal representation was also in the spotlight recently during the Little India riot: see Chen Siyuan, "The Domestic and International Legal Frameworks for Singapore's Regime for Repatriation without Judicial Process" (forthcoming). As to how the right to counsel interacts with the right to presumption of innocence, see generally Chen Siyuan, "A Preliminary Survey of the Right to Presumption of Innocence in Singapore" (2012) 7 LAWASIA Journal 78.

²³ Other local cases typically associated with art 9(3) of the Constitution are *Balasundaram s/o Suppiah v Public Prosecutor* [1996] 1 SLR(R) 853, *Soong Hee Sin v Public Prosecutor* [2001] 1 SLR(R) 475, *Sun Hongyu v Public Prosecutor* [2005] 2 SLR(R) 750, and *Tan Choor Jin v Public Prosecutor* [2008] 4 SLR(R) 306, but these cases did not involve answering the question of what constitutes reasonable time.

own facts,²⁴ the determinative questions remain: *what* facts are material, and *how* are they to be treated? Answering these would turn on the underlying rationale of permitting delays to an accused's access to counsel, a matter the court sought perhaps to provide a preliminary answer to.²⁵

Choo J, the judge in *James Raj*, took the view that *Lee Mau Seng* and *Jasbir Singh* possibly presented divergent conceptions of what would amount to a "reasonable time" before the arrested person ought to be allowed access to counsel. In the former case, Wee CJ sought to afford primacy to constitutional rights²⁶ and it was therefore suggested by Choo J that Wee CJ intended only to impose the modest restriction that there must be an allowance of "reasonable time" to accommodate "necessary or unavoidable delay occasioned by practical or administrative concerns".²⁷ In contrast, the Court of Appeal in *Jasbir Singh* seemed to have adopted a wider understanding of "reasonable time" as permitting delays to access if required for police investigations and procedure.²⁸

It is suggested, however, that the narrow and broad conceptions of "reasonable time" do not so much reflect different thresholds but really *qualitative* differences in how the right to counsel is understood. With respect to the narrow conception, the word "time" is somewhat of a misnomer; the accused is not afforded access to counsel immediately in the literal sense, but if the only allowable delays to access are the administrative processes that are unavoidable or even necessary for providing access to counsel to the accused in remand, as suggested by the examples cited by Choo J,²⁹ then in substance the right is available to the accused immediately since it does not recognise *any substantive grounds* for curtailing the right to access. In contrast, the broad conception of "reasonable time" conceives of the right to counsel precisely as one that can be curtailed on the substantive ground that police investigations may be impeded or disrupted.

While Choo J felt bound to apply the broader conception of "reasonable time" as established in *Jasbir Singh*, he also sought to uphold the integrity of constitutional rights as evident from his harking back to Wee CJ's philosophical treatment of such entitlements as

²⁴ See also *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [8].

²⁵ See also *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 80 at col 1656 (Mr Wong Kan Seng, Deputy Prime Minister and Minister for Home Affairs): "Giving the accused person immediate access to legal counsel or family members could compromise Police investigations, especially in cases where the prosecution relies primarily on the testimony of witnesses and accused persons to lead them to crime scenes, accomplices and other corroborating evidence. Permitting an accused person to communicate with third parties before the Police can wrap up their investigation may result in evidence being destroyed or accomplices being alerted. Sir, we will continue to carefully balance the needs of the accused person and the public interest which is to enable the Police to conduct complete and thorough investigations. Every country must find the right balance that suits its circumstances. Our system is well-established and has proven to be effective over the years in helping to keep Singapore safe and secure, and our crime rates low."

²⁶ *Lee Mau Seng v Public Prosecutor* [1971–1973] SLR(R) 135 at [17].

²⁷ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [6]. Choo J also noted (at [6]) that since *Lee Mau Seng* concerned the Internal Security Act (Cap 115, 1970 Ed), "Wee CJ would have intended his philosophy to apply in the context of criminal proceedings just as much as in the context of detention. Indeed, that philosophy ought to apply *a fortiori* to ordinary criminal proceedings, since the element of national security, present in detention cases, is not usually in issue."

²⁸ *Jasbir Singh v Public Prosecutor* [1994] 1 SLR(R) 782 at [48].

²⁹ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [6].

fundamental rights.³⁰ Recognising that arrested persons would face practical and evidential difficulties in challenging assertions by the police that earlier access to counsel would impede police investigations, he agreed with the High Court in *Leong Siew Chor* that the burden falls on the state to adduce evidence of such impediment.³¹ But one may pause to consider if all of this belies a more fundamental dilemma presented by recognising a substantive grounds for withholding access to counsel under the broad conception of “reasonable time” established in *Jasbir Singh*. It was explicitly acknowledged in *James Raj* that in determining if access to counsel could impede police investigations, the accused “may have little or no knowledge of what and how the investigation is proceeding, nor how it might be disrupted or tampered.”³² Practically, evidence that the delay was unreasonable is likely unavailable to the accused until he obtains eventual access to counsel, the only party positioned to investigate suspected delays and present claims of unreasonable delay before the court. The consequent paradox is that an accused would not know when he is entitled to access unless access is first afforded to him.

Before such time, the implications of delayed access to counsel as identified by the accused in *James Raj* present a real danger of prejudice (to the accused).³³ Specifically, the accused could be coerced into making false confessions, unwittingly make incriminating statements and statements which justify an adverse inference being drawn against him at trial, or even plead guilty to a crime he did not commit.³⁴ The ramifications of such prejudice are not easily unravelled. For instance, the threshold for proving that a confession was inadmissible for being procured by a threat, promise or inducement is high;³⁵ a guilty plea cannot be challenged even if the accused, through no fault of his own, entered the plea without the benefit of legal advice.³⁶ Accordingly, a successful claim by an accused that his right to counsel under art 9(3) was violated may prove a pyrrhic victory if, prior to access, the accused was prejudiced by the absence of legal advice and his inability to effectively demand

³⁰ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [12]. It is trite, of course, that the Constitution is the supreme law of the land; art 4 states that “any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”

³¹ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [12].

³² *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [12].

³³ See also Ho Hock Lai, “The Privilege against Self-Incrimination and Right of Access to a Lawyer” (2013) 25(3) SAcLJ 826 at 840–842: “In explaining or justifying the delay in granting access to legal advice, there is typically reliance on the general assertion that allowing a detained suspect to consult a lawyer will obstruct police investigation. There is no convincing explanation of how this is so ... Fear of “the accused shutting up” [is] the other – and likely the main – reason for denying access to custodial legal advice. It would be wrong to prevent the accused from seeing his lawyer so as to reduce the chances of him getting to know of and claiming the privilege against self-incrimination ... Trials are won or lost in large part by what the accused had told or failed to tell his interrogating officers. Allowing suspects in custody to have access to legal advice will help to ensure that the accused’s statement is taken fairly, accurately, in accordance with law, and in a manner that respects his legal rights ... the recording of police interviews, the corroboration requirement, the prohibition against the drawing of an adverse inference from silence ... are absent in Singapore ... It is conceivable, though surely rare, that allowing a detained suspect to consult a lawyer might result in unlawful or improper interference with criminal investigation. But the remote possibility of this happening cannot justify withholding access as a general rule.”

³⁴ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [9]. With respect to false confessions, see s 258 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”). With respect to adverse inferences, see s 261 of the CPC. With respect to procedural requirements of pleading guilty, see Part XI of the CPC.

³⁵ See *eg*, *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR(R) 338 at [33]–[34]; *Yeo See How v Public Prosecutor* [1996] 2 SLR(R) 277 at [39]–[41]; *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR(R) 319 at [18].

³⁶ See *eg*, *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR(R) 10 at [26]; *Shan Kai Weng v Public Prosecutor* [2004] 1 SLR(R) 57 at [22].

access to counsel. The narrow conception would largely obviate this problem since it would likely result in a practice by the authorities of allowing the accused to demand access to counsel once in remand, even if physical access cannot be provided immediately.

Choo J's proposal that the accused need only "show that he has not been permitted to consult counsel subsequent to his arrest"³⁷ to establish a breach of his right to counsel appears to be an attractive solution to the problem presented by the broad conception by affording the accused access to counsel until proven by the authorities that early access would impede investigations. However, his proposal presupposes that the accused already possesses an understanding of his legal entitlements and the appropriate means of enforcing them. Again, the accused is unlikely to possess such knowledge until obtaining eventual access to counsel, in light of the holding in *Rajeevan Edakalavan v Public Prosecutor* ("*Rajeevan Edakalavan*") that the accused has no right to be informed of his right to counsel.³⁸ In the absence of such a right, the accused remains vulnerable to the attendant risk of prejudice mentioned above. If art 9(3) is to afford any meaningful protection to the accused under the broad conception, the holding in *Rajeevan Edakalavan*, that the accused has no right to be informed of his constitutional right to counsel, may require a reappraisal as well.

It was perhaps with appreciation of these difficulties that Choo J suggested that there should not be a full denial of an accused's right to counsel while investigations are still on-going. Instead, access to counsel may be allowed pending investigations so long the content of the right to counsel is clearly delineated.³⁹ This would cut through the Gordian knot of existing rules of criminal procedure and practical difficulties which emasculate the protection afforded by art 9(3) of the Constitution.⁴⁰ The key impediment is that this approach finds no support from existing local case law. Yet our Court of Appeal is empowered to consider it if reinvigorating the protection afforded by art 9(3) reinstates it as a fundamental right and advances the object of the Constitution.⁴¹

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³⁷ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [12].

³⁸ [1998] 1 SLR(R) 10 at [21].

³⁹ *James Raj s/o Arokiasamy v Public Prosecutor* [2014] SGHC 10 at [14].

⁴⁰ See also Chin Tet Yung, "Remaking the Evidence Code: Search for Values" [2009] 21(1) SAcLJ 52 at 66: "The so-called 'right' [in art 9(3)] may be no more than a privilege, and only if an accused *knows* that he has a right to legal representation, can afford a lawyer or rely on the Law Society's legal aid scheme would she be in a position to realise the right, and she must reasonably exercise her right in good time though not during the process of investigation" (emphasis in original).

⁴¹ Section 9A of the Interpretation Act (Cap 1, 1985 Rev Ed) demands that the court adopt a purposive interpretation of written law, which is defined under s 2(1) of the same statute to include the Constitution. See also *Attorney-General of Trinidad and Tobago v Whiteman* [1991] 2 WLR 1200 at 1204: "The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."