DISCHARGES NOT AMOUNTING TO AN ACQUITTAL: A RE-APPRAISAL

K. Abdul Rasheed v. *Public Prosecutor* and *Ah Chak Arnold* v. *Public Prosecutor*[1]

IN the course of proving its case against an accused in court, the prosecution may occasionally be unable to present vital witnesses or certain other crucial evidence. The Public Prosecutor may decide in such cases to withdraw the charge altogether or to hold the charge in abeyance until such time as the required evidence becomes available. The prosecution might then apply to the court for the accused to be discharged without amounting to an acquittal.

In respect of summary trials, the provision which enables the prosecution to make such an application is s. 183 of the Criminal Procedure Code.[2] This section reads as follows:—

> (1) At any stage of any summary trial before judgment has been delivered, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the defendant upon the charge and thereupon all proceedings on the charge against the defendant shall be stayed and he shall be discharged from and of the same.
>
> (2) Such discharge shall not amount to an acquittal unless the court so directs except in cases coming under section 176.

Two questions arise from a reading of this provision. Firstly, when may it be invoked by the prosecution or, put in another way, when can the court order that the accused be discharged not amounting to an acquittal? The answer to this lies in the interpretation to be given to the phrase "[the Public Prosecutor] will not further prosecute the defendant upon the charge" appearing in sub-section one of the provision. Do these words mean that the prosecution must have decided never to prosecute any further or can they mean that the prosecution is not pursuing the charge against the accused only for the time being? The second question relates to the circumstances when the court should exercise its discretion under sub-section two of the provision to acquit the accused instead of merely discharging him without that discharge amounting to an acquittal.

There have, over the years, been a number of reported decisions from Singapore and Malaysia involving these issues. A very recent Singapore decision was delivered by the High Court sitting in its appellate jurisdiction in the cases of *K. Abdul Rasheed* v. *P.P.*[3] and *Ah Chak Arnold* v. *P.P.*[4] The High Court heard these cases together as both concerned the ambit of s. 183 of the Criminal Procedure Code.[5]

1 [1985] 1 M.L.J. 193.

2 Cap. 113, Singapore Statutes, 1970 Rev. Ed., hereinafter termed "the Code".

3 *Supra,* note 1. For the District Court's decision, see M.A.C. No. 490 of 1983; Magistrate's Appeal No. 41 of 1984.

4 *Supra,* note 1. For the District Court's decision, see D.A.C. Nos. 4104-4105 of 1983; Magistrate's Appeal No. 78 of 1984.

5 The High Court subsequently delivered a single written decision in respect of both cases.

The Facts

Since the issues raised in these two cases concerned s. 183 of the Code, the facts pertained more to matters of procedure than of evidence. In *Abdul Rasheed,* the accused was charged with the offence of having, with two other persons and in furtherance of their common intention, committed theft of money punishable under s. 380 read with s. 34 of the Penal Code.[6] Before the commencement of the trial, the prosecuting officer applied for an order that the accused be given a discharge not amounting to an acquittal. The defence counsel objected to the application and sought an order of acquittal instead. The case was stood down to enable the prosecuting officer to confirm whether the prosecution was proceeding at a later stage. At the resumption of the case in the afternoon, the prosecution renewed its application for a discharge not amounting to an acquittal without giving any reasons why it was not proceeding with the prosecution beyond that stage. The District Court understood the prosecution to mean that the charge against the accused was not being withdrawn. Thereupon, the court ordered the accused to be discharged without amounting to an acquittal after opining that it "should not deny the prosecution the right to proceed with the case subsequently."[7]

The accused in *Ah Chak Arnold* was a detective sergeant of the Singapore Police Force who faced two charges of corruptly obtaining for himself gratifications in the form of sexual intercourse from two prostitutes as inducements to return them their passports and not placing them on the blacklist for immigration purposes. These constituted offences punishable under s. 6(a) of the Prevention of Corruption Act.[8] When the case was heard before the District Court, the Deputy Public Prosecutor applied for the accused to be discharged without amounting to an acquittal in respect of both charges. The reason given in support of this application was that the prosecution was unable to proceed with its case as the two prostitutes, as principal prosecution witnesses, were not available. The defence counsel responded by requesting the court to exercise its power under s. 183(2) of the Code to discharge the accused amounting to an acquittal. However, the court declined to do so on the ground that such a discharge could be made only when the prosecution was withdrawing the charge (as opposed to the prosecution being unable to proceed for the time being) which was not the case here.[9] It later transpired at the appeal stage that one of the two principal prosecution witnesses had died and that the other, a foreigner, was likely to remain unavailable for an indefinite period. Evidence was also tendered that the accused had, in the meanwhile, undergone certain disciplinary proceedings and had emerged unscathed as a result of which he had been re-instated in the Singapore Police Force. We shall observe shortly how these additional facts assisted the High Court in arriving at its decision to vary the order of the District Court to one of a discharge amounting to an acquittal.

The Holding of the High Court

The appeals against the decisions of the District Courts were heard on the 28th of December 1984 before the Honourable Justice Lai Kew

6 Cap. 103, Singapore Statutes, 1970 Rev. Ed.
7 See the District Court's decision, *supra,* note 3, at p. 2.
8 Cap. 104, Singapore Statutes, 1970 Rev. Ed.
9 See the District Court's decision, *supra,* note 4, at pp. 2, 3 and 7.

Chai who delivered a written judgment a week later. The learned judge dealt firstly with the appeal of Ah Chak Arnold. After outlining what occurred in the District Court, the learned judge went on to deal with the scope of s. 183(1) of the Code as contained in the phrase "[the Public Prosecutor] will not further prosecute the defendant upon the charge." Lai J. suggested that the phrase gave rise to two possible meanings. The first and broader meaning is the Public Prosecutor informing the court that he will not take the prosecution beyond what has gone on up to that stage of the trial.[10] According to this interpretation, the Public Prosecutor may intend either to continue on with the prosecution at a latter stage or to withdraw the charge altogether. The second and narrower meaning that might be given to the phrase is the Public Prosecutor informing the court that he will not ever prosecute the accused on the charge.[11] This is equivalent to saying that s. 183 applies only when the prosecution has notified the court of its decision to withdraw the charge against the accused. Lai J. held that the District Court had fallen into error by applying the second meaning to the phrase and, in the course of his judgment, gave the reasons in support of his own preference for the first meaning.[12] Having held that the court was empowered to direct a discharge amounting to an acquittal in the case before it, the learned judge proceeded to decide whether, in all the circumstances of the case, he would direct that the discharge should amount to an acquittal. He so discharged the accused after noting the additional facts, mentioned earlier, as to the unavailability of the two principal prosecution witnesses and the outcome of disciplinary proceedings against the accused.

Turning next to *Abdul Rasheed,* Lai J. gathered from the District Court's grounds of decision that it was the practice of the subordinate courts to order a discharge not amounting to an acquittal whenever the prosecution indicated that it was not withdrawing the charge. The learned judge held that this practice was clearly wrong for the same reasons given by him in the earlier appeal.[13] He then ordered the accused to be discharged amounting to an acquittal after observing that the District Court had failed to consider the question whether or not it was unfair to subject the accused to a charge hanging over his head for an indefinite period.[14] The court order to acquit the accused was further justified when the prosecution indicated that it was not resisting the appeal.

This decision of the High Court, which overrules what appears to be a longstanding practice of the subordinate courts, is now final since the Public Prosecutor did not subsequently apply for the decision to be reserved for the determination of the Court of Criminal Appeal.[15] The ensuing comment on the case will deal mainly with the two

10 *Supra,* note 1, at p. 195.

11 *Ibid.* This meaning would be achieved by substituting the word "further" with "ever" in s. 183(1) of the Code.

12 These reasons will be presented and discussed later in this case note.

13 *Supra,* note 1, at p. 196.

14 *Ibid.*

15 Section 60(1) of the Supreme Court of Judicature Act, Cap. 15, Singapore Statutes, 1970 Rev. Ed., empowers the Public Prosecutor to apply to have the appellate High Court's decision reserved for the decision of the Court of Criminal Appeal on any question of law of public interest which has arisen in the course of the appeal.
The High Court's decision has also been subsequently followed in the case of *Chow Man Poh & Anor.* v. *P.P.* Magistrate's Appeal Nos. 54 and 55 of 1985.

questions of when a court may order a discharge not amounting to an acquittal under s. 183(1) of the Criminal Procedure Code and in what circumstances should the court, in the exercise of its discretionary power under s. 183(2), order the accused to be acquitted rather than discharged without amounting to an acquittal.

When can a Discharge Not Amounting to an Acquittal be Ordered

Each of the two meanings ascribed to the phrase "[the Public Prosecutor] will not further prosecute the defendant upon the charge" find some support in previous local and Malaysian decisions. Some of these decisions were cited in *Abdul Rasheed* and *Ah Chak Arnold.* The cases favouring the meaning subscribed to by the District Courts in *Abdul Rasheed* and *Ah Chak Arnold,* and rejected by the High Court on appeal, will firstly be discussed.

When the prosecution will not ever prosecute

Both the District Courts cited the Malayan case of *Kuppusamy* v. *P.P.*[16] to hold that s. 183 of the Code was restricted to cases where the prosecution had informed the court that it had decided not to ever prosecute the accused upon the charge (that is, was withdrawing the charge altogether). Accordingly, this case warrants careful examination. The facts were that the complainant was not ready with her evidence at the time of hearing and had applied for an adjournment. The magistrate rejected the application and ordered that the defendants be discharged without amounting to an acquittal. One of the defendants then appealed against the order, contending that he should be acquitted of the charge against him. Murray-Aynsley J. (as he then was) who heard the appeal began his judgment by setting out the different types of orders that could be made by a magistrate. These were (a) a finding of guilt; (b) an acquittal; (c) a discharge not amounting to an acquittal; and (d) in cases under s. 183 [17] of the Code, a discharge amounting to an acquittal. Since the learned judge had to decide whether the appellant could be acquitted, he proceeded to deal solely with orders (b) and (d). Dealing firstly with order (d), he held, without any elaboration, that the case did not come under s. 183 of the Code. The facts in this short judgment do not reveal the precise reason for this holding. It may have been because the complainant was requesting her first adjournment[18] so that the learned judge was not prepared to close the trial without giving her a reasonable opportunity of presenting her case against the defendants. Dealing next with order (b), the learned judge referred to s. 179(f) and (n)[19] which empower the magistrate to acquit an accused. He then went on to state that "it is clear that the earliest stage at which a Magistrate can acquit an accused person is *after hearing all the evidence of the prosecution.*"[20]

16 (1948) 14 M.L.J. 25. For the reliance on *Kuppusamy* by the District Courts, see *supra,* note 3, at p. 2; and *supra,* note 4, at pp. 2-3.

17 This provision is referred to in the judgment as s. 254 since the court was dealing with the Malaysian Criminal Procedure Code (F.M.S. Cap. 6).

18 It is uncertain whether this was indeed the first adjournment applied for. For the relevance of adjournments to a decision whether to order a discharge amounting to an acquittal under s. 183(2) of the Code, see *infra* pp. 184-186.

19 These provisions are referred to in the judgment as s. 173 (f) and (m) since the court was dealing with the Malaysian Criminal Procedure Code, *supra,* note 17.

20 *Supra* note 16, at p. 26. Emphasis added.

It is possible that this statement was responsible for causing later courts to construe *Kuppusamy* as authority for the proposition that s. 183 is relevant only when the prosecution had informed the court that it was not ever going to prosecute the accused. According to this construction, an accused cannot be acquitted until and unless the court has heard all the evidence sought to be tendered by the prosecution. Hence, an indication by the Public Prosecutor that he intends to continue on with the prosecution at some later stage will mean that the court has not heard all the evidence against the accused and, consequently, is disallowed from ordering an acquittal under s. 183 of the Code. The error which is committed by this construction of *Kuppusamy* is the attachment of Murray-Aynsley J.'s statement to s. 183 when he was quite clearly confining it to the magistrate's power to order an acquittal under s. 179 of the Code. That the learned judge's decision dealt with not one but two separate types of orders of acquittal is evidenced in his concluding remark that "the magistrate could not have acquitted in the present case, nor could he have awarded a discharge which amounted to an acquittal."[21] Accordingly, *Kuppusamy* cannot be regarded as clear authority for the view that s. 183 is restricted to cases where the prosecution has decided not to ever prosecute an accused upon a charge. In this regard, the later case of *R. v. Chong Song Chun*,[22] which was cited by the District Court in *Ah Chak Arnold*,[23] likewise fails to provide clear authority for the abovestated view. In *Chong Song Chun,* Wee Chong Jin J. (as he then was) reversed an order of acquittal made by the magistrate and substituted it with an order of discharge not amounting to an acquittal. The reason given by the learned judge for his decision was that "it seems clear from the provisions of the Criminal Procedure Code and on the authority of *Kuppusamy* v. *P.P.* that the learned Magistrate had no jurisdiction to make the order of acquittal which he made."[24] It is unfortunate that Wee J. did not elaborate any further as to which provisions of the Code he was referring to, nor did he embark upon any comment of *Kuppusamy.*

In contrast, the Malayan decision in *Koh Teck Chai* v. *P.P.*[25] was one which not only referred to *Kuppusamy* but dealt with the case at length. The prosecuting officer had applied to the magistrate for the accused to be discharged without amounting to an acquittal. Defence counsel submitted that no grounds had been given in support of the application and that the order should consequently be a discharge amounting to an acquittal. However, the magistrate acceded to the application of the prosecuting officer after holding that the court "had no power under the Criminal Procedure Code to discharge the accused, amounting to an acquittal, without a trial."[26] On appeal, Ong Hock Sim J. (as he then was) ruled that the magistrate had, in so holding, misconstrued the case of *Kuppusamy.* In Ong J.'s view, the case simply held that an order of acquittal in summary trials could only be made

21 *Ibid.* See also *Mallal's Criminal Procedure* (4th ed., 1957), at p. 275 which interprets *Kuppusamy* as holding that "except in cases coming within the special order under [s. 183 of the Criminal Procedure Code], a Magistrate cannot acquit an accused person until the evidence for the prosecution has been heard."
22 (1961) 27 M.L.J. 313.
23 *Supra,* note 4, at p. 2.
24 *Supra,* note 22, at p. 313.
25 [1968] 1 M.L.J. 166.
26 *Ibid*., as cited by Ong Hock Sim J.

under s. 179(f) and (n)[27] of the Criminal Procedure Code. It was in no way meant to rule out the application of s. 183(2) as another provision which empowered the magistrate to order an acquittal in circumstances contemplated by that provision.[28] It is noteworthy that *Koh Teck Chai* was among the authorities cited by the High Court in *Abdul Rasheed* and *Ah Chak Arnold* in support of its ruling that s. 183 should be accorded a broader meaning than the one given to it by the District Courts.[29]

The decision in *Koh Teck Chai* was, however, somewhat dampened in the later Malaysian case of *P.P.* v. *Khoo Kay Jin*.[30] The magistrate had in that case ordered the accused, on the authority of *Koh Teck Chai,* to be discharged amounting to an acquittal after the prosecution had indicated that the complainant could not be traced. On appeal by the prosecution against the order, Chang Min Tat J. held that the magistrate had completely misunderstood the decision in *Koh Teck Chai.* The learned judge regarded the proper construction of that decision to be "applicable only to cases where the Public Prosecutor in his discretion informed the court that he would not proceed with the prosecution"[31] and that it "could have no relevance in a case where the prosecution wanted to carry on with the charge against the accused but for the moment was unable for some reason to do so."[32] Read on their own, these *dicta* constitute highly persuasive authority for the view that s. 183 of the Code should be confined to cases where the prosecution informs the court that it will not ever prosecute the accused upon the charge. The weakness of these *dicta,* however, stems from their dependence on the decision in *Koh Teck Chai* itself. Chang J. based his own construction of *Koh Teck Chai* upon the fact that the court in that case was empowered to invoke s. 183(1) of the Code only after it was informed by the police that the accused would probably be proceeded against by way of departmental action.[33] With respect, however, a careful reading of *Koh Teck Chai* reveals that the probability of departmental action did not comprise the only ground for the court's decision. The particular way in which that court interpreted the case of *Kuppusamy* has already been noted.[34] In addition, the court cited with approval the decision in P.P. v. *Suppiah Father*[35] which envisaged the use of s. 183 in cases where the prosecution was still not ready to proceed with its case after reasonable adjournments had been granted. A request by the prosecution for an adjournment clearly indicates that he intends to proceed with the charge but for the time being is unable to do so. Applying this decision to the case at hand, the court in *Koh Teck Chai* noted that the charge had, at the time of hearing, been allowed to hang over the accused for nearly a

27 These provisions are referred to in the judgment as s. 173(f) and (m) since the court was dealing with the Malaysian Criminal Procedure Code, *supra,* note 17. Ong J. also cited s. 173(g) erroneously as that provision under the States Code uses the word "discharging" instead of "acquitting". See the marginal Editorial Note appearing at the bottom of p. 166 of the case report.

28 *Supra,* note 25, at pp. 166-167.

29 *Supra,* note 1, at p. 195.

30 [1973] 1 M.L.J. 259.

31 *Ibid*., at p. 260.

32 *Id.*

33 *Id.*

34 *Supra,* pp. 178-179.

35 This case is reported in the Editorial Note to *Ariffin bin Cassim Jayne* v. *P.P.* [1953] M.L.J. 126.

year.[36] Yet another ground taken into consideration by the court was that the accused had incurred expenses in connection with the attendance of witnesses.[37] Thus, it may be seen that there were many other reasons besides the pending departmental action which prompted the court to acquit Koh Teck Chai.

The final reported decision in favour of narrowing the scope of s. 183 is the recent Malaysian case of *P.P. v. Hettiarachigae Perera*.[38] The trial had already been adjourned on three previous occasions when the prosecution sought a further adjournment on the ground that the investigation had not been completed. Defence counsel objected to yet another postponement and submitted that the charge should not be left to hang over the accused's head for such a long period. The magistrate agreed with this submission and thereupon acquitted and discharged the accused. On appeal, Harun J. set aside the magistrate's order and held that the only power that the magistrate had was to order a discharge under s. 179(g)[39] of the Criminal Procedure Code, such discharge not amounting to an acquittal. With regard to s. 183[40] of the Code, the learned judge implicitly held that the judicial power contained therein to acquit the accused was available only in cases where the prosecution had informed the court that it was not ever going to prosecute the accused upon the particular charge. In support of this holding, Harun J. referred to Article 145(3) of the Federal Constitution [which is *in pan materia* with Article 35(8) of our Constitution[41]] which grants the Attorney-General the power, exercisable at his discretion, "to institute, conduct or discontinue any proceedings for any offence." In the light of this constitutional power, the learned judge said that "until [the Attorney-General] makes up his mind the courts have to wait. Magistrates therefore have no business to usurp the functions of the Attorney-General."[42] With due respect, the said constitutional provision only lays down a general statement of the Attorney-General's powers. Those powers must surely be circumscribed by specific and detailed laws which set out precisely how they are to be exercised. For instance, the Attorney-General's decision to institute proceedings against an accused may be overriden by a magistrate who has examined the complaint and considers that there are insufficient grounds for proceeding.[43] With regard to the Attorney-General's decision to continue with a prosecution, this is subject to the court's finding as to whether the charge is groundless.[44] Likewise, the Attorney-General's power to discontinue proceedings is circumscribed by the duty of the court to ensure that the discontinuance is not the result

36 *Supra,* note 25, at p. 167.
37 *Ibid.*
38 [1977] 1 M.L.J. 12.
39 This provision is referred to in the judgment as s. 173 (g) since the court was dealing with the Malaysian Criminal Procedure Code, *supra,* note 17.
40 This provision is referred to in the judgment as s. 254 since the court was dealing with the Malaysian Criminal Procedure Code, *supra,* note 17.
41 1980 Reprint of the Constitution of the Republic of Singapore.
42 *Supra,* note 38, at p. 14.
43 See s. 135(i), Malaysian Criminal Procedure Code, *supra,* note 17; s. 133(2), Criminal Procedure Code, *supra* note 2.
44 See s. 173(g), Malaysian Criminal Procedure Code, *ibid;* s. 179(g), Criminal Procedure Code, *ibid.*
See also s. 175 and s. 401 of the Criminal Procedure Codes of Malaysian and Singapore respectively which empower the court to order the complainant to pay compensation and costs when the court determines that the prosecution was frivolous or vexatious.

of grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under law, directs the Attorney-General to withdraw the prosecution.[45] This being the position, it was erroneous on the part of the learned judge in *Hettiarachigae Perera* to hold that s. 183 of the Code could never be read as empowering the court to question the prosecution's decision to continue or discontinue criminal proceedings. If s. 183 does indeed empower the courts to override the prosecution's decision, then the legislative intention contained in that provision should be adhered to by the courts. The generality in wording of the relevant Article in the Constitution not only answers any arguments of inconsistency but practically dictates that the Article be read in conjunction with specific rules of procedure formulated in respect of the Attorney-General's powers.

The holding in *Hettiarachigae Perera* may also be countered by arguing that principles of natural justice are introduced into legal proceedings by virtue of Article 5(1) of the Federal Constitution (which is *in pan materia* with Article 9(1) of our Constitution[46]). This article states that "[n]o person shall be deprived of his life or personal liberty save in accordance with law." Natural justice invariably imports fair procedure into legal proceedings and the courts should, wherever possible, interpret procedural provisions in a way which promotes a fair trial. Section 183 of the Code may be one such provision since, quite clearly, a broad interpretation of that provision would prevent unwarranted hardship to accused persons in certain cases.

In retrospect, the cases that are said to be authorities for restricting the ambit of s. 183 either fail on closer analysis to be such authority or comprise decisions which have not been properly thought through by the courts making them. It now remains to examine both the cases and arguments in support of the broader view that s. 183 should not be confined to cases where the prosecution has decided not to ever prosecute but should extend to cases where it has decided to stay proceedings for the time being.

When the prosecution will not prosecute for the time being

It has been observed how the High Court in *Abdul Rasheed* and *Ah Chak Arnold* preferred a wider interpretation of s. 183 to that given by the District Courts. The primary ground for this view was that the consequences of a stay of proceedings and discharge of the accused, as spelt out in the provision, would otherwise make little sense.[47] In the words of Lai J.:—

> If the Public Prosecutor were withdrawing the charge to the intent that he will not ever resurrect the charge against the defendant, the ensuing provisions setting out the consequences should, and only could, be that the defendant shall be discharged from and

45 For example, see s. 171 and s. 176 of the Criminal Procedure Codes of Malaysia and Singapore respectively which allow the prosecution to withdraw any remaining charges only with the consent of the court; see *infra,* p. 182.

46 *Supra,* note 41. See Harding, "Natural Justice and the Constitution" (1981) Mal. L.R. 226.

47 Lai J. used the expression "too convoluted or tortuous" to describe the consequence of applying the narrow meaning to the particular phrase in s. 183(1) of the Code; see *supra,* note 1 at p. 195.

of the same and that such discharge shall amount to an acquittal. The elaborate procedure for a stay and a discharge and the court's power to direct an acquittal would have been unnecessary.[48]

He went on to hold that no such difficulties arose when the phrase "[the Public Prosecutor] will not further prosecute the defendant upon the charge" was read as including cases where the Public Prosecutor informs the court that he is not going on which the prosecution for the moment. The learned judge then held that both sub-sections 183(1) and (2) operated as follows:—

(i) Whenever the prosecution under s. 183(1) informs the court that he will not go on with the prosecution (whether or not it has decided forever to withdraw the charge), all proceedings on the charge against the accused shall be stayed and the accused shall be discharged from and of the same.

(ii) The court will then decide, by virtue of s. 183(2), whether to discharge the accused without amounting to an acquittal or direct that he be acquitted.[49]

Further support for Lai J.'s reasoning may be gleaned from s. 176 of the Criminal Procedure Code.[50] Sub-section (1) of this provision contemplates a situation where an accused is faced with a number of charges and is convicted of one or more of them. When this happens, the prosecution "may, with the consent of the court, withdraw the remaining charge or charges." Sub-section (2) continues by stating that "such withdrawal shall have the effect of an acquittal on such charge or charges...." Here then is a provision, embodied in the same statute as s. 183, which generally holds that the consequence of the prosecution's decision to withdraw a charge is that the accused must be acquitted. In the same vein, the consequence of the prosecution's decision not to ever prosecute the accused (that is, to withdraw the charge altogether) under s. 183(1) should be to acquit the accused of the charge. It is also revealing that the framers of the Code did not use the words "is withdrawing the charge" in s. 183(1) but chose instead to use the phrase "will not further prosecute the defendant upon the charge." Had the legislative intention been to confine s. 183 to cases where the prosecution was withdrawing the charge, clear words to this effect could easily have been formulated as had been done under s. 176 of the Code. Hence, the particular phrase appearing in s. 183(1) must have been intended by Legislature to connote a meaning which was different from the withdrawal of a charge by the prosecution. This is especially so when it is observed that s. 183(2) contains a direct reference to s. 176 of the Code.

48 *Ibid.*

49 *Id.*

50 Section 176 of the Code reads:

(1) When more charges than one are made against the same person and when a conviction has been had on one or more of them, the officer or other person conducting the prosecution may, with the consent of the court, withdraw the remaining charge or charges or the court of its own accord may stay the inquiry into or trial of such charge or charges.

(2) Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction is set aside, in which case the said court, subject to the order of the court setting aside the conviction, may proceed with the inquiry into or trial of the charge or charges so withdrawn.

In view of the above comments, it is submitted that the ground relied on by the High Court in *Abdul Rasheed* and *Ah Chak Arnold* was sufficient on its own to justify the court's decision to interpret s. 183 more widely than the lower courts had done. However, there are other grounds which could be canvassed in support of that decision.

One such ground arises from an examination of those provisions in the Criminal Procedure Code which enable an accused to be discharged in the course of a summary trial. Apart from s. 183, the only other provision permitting the discharge of the accused is s. 179(o) which deals with the limited instance of a complainant under oath who is absent on the day fixed for hearing.[51] This being the case, one wonders which provision was being relied on by the District Courts in *Abdul Rasheed* and *Ah Chak Arnold* when they ordered the accused to be discharged without amounting to an acquittal. Clearly, s. 179(o) was not relevant to the cases at hand and s. 183 had been expressly rejected by them. A possible explanation may be that the District Courts were unduly influenced by the Malayan decision in *Kuppusamy*.[52] It will be recalled that the appellate court in that case had maintained the order of the magistrate to discharge the accused without amounting to an acquittal. The magistrate was clearly empowered to make such an order by virtue of s. 173(g)[53] of the Malaysian Criminal Procedure Code. In contrast, s. 179(g) of our Code (which is the equivalent of the Malaysian provision) requires our courts to *acquit* the accused in similar circumstances. This material difference was highlighted by the District Court *in Ah Chak Arnold* but it did not proceed to elaborate upon its significance.[54] Thus, while it may be permissible under Malaysian law to discharge an accused in circumstances beyond those envisaged by sections 179(o) and 183(1) of our Code,[55] the Singapore courts are not empowered to do so. This position makes it all the more necessary to accord a broad interpretation to s. 183 of our Code.

Another ground supporting the High Court's ruling in *Abdul Rasheed* and *Ah Chak Arnold* is when s. 183 is regarded as analogous to the power of *nolle prosequi* under English law. There is strong case authority for treating the provision as such[56] and subsidiary legislation

51 Section 179(o) of the Code reads:—
when the proceedings have been instituted upon the complaint of some person upon oath under section 132 and upon any day fixed for the hearing of the case the complainant is absent and the offence may lawfully be compounded, the court may, in its discretion notwithstanding anything hereinbefore contained, discharge the accused at any time before calling upon him to enter upon his defence.

52 Both courts cited *Kuppusamy* in support of their holding; see *supra,* note 16.

53 This provision states: "nothing in paragraph (f) shall be deemed to prevent the court from *discharging* the accused at any previous stage of the case if, for reasons to be recorded by the court, it considers the charge to be groundless." Emphasis added.

54 *Supra,* note 4, see the Grounds of Decision of the District Court, at pp. 3-4. It is of interest to note that this difference was relied on in the Malaysian case of *Hettiarachigae Perera, supra,* note 38 at p. 13 to deny the application of *Suppiah Father supra,* note 35, the latter being one of the cases supporting a broader interpretation of s. 183 of the Code.

55 The equivalent provisions in the Malaysian Criminal Procedure Code, *supra,* note 17, are ss. 173(n) and 254(i) respectively.

56 See *Theopillai* v. P.P. (1956) 22 M.L.J. 177; P.P. v. *Ng Nam Onn (1964)* 30 M.L.J. 455; *P.P.* v. *Khoo Kay Jin supra,* note 30. See also *Sohoni's Code of Criminal Procedure* (16th ed., 1966) at pp. 2051-2052 discussing s. 333 of the Indian Criminal Procedure Code (Act No. 5 of 1898). Section 183 of our Code is borrowed from this Indian provision.

further confirms this position.[57] The major difference between s. 183 and the English concept of *nolle prosequi* is that the latter is not subject to any control by the courts[58] while our provision enables the courts to have some say in the outcome of the matter.[59] However, the point which is directly pertinent to our discussion is that under English law, a *nolle prosequi* puts an end to the prosecution but it does not operate as a bar or discharge or an acquittal on the merits such that the party remains liable to be re-indicted.[60] In order to provide s. 183 with a similar effect, the provision should not be read as being applicable only to cases where the prosecution has decided not to ever prosecute an accused person upon a particular charge. To restrict the provision to such cases would clearly run against the concept of *nolle prosequi* which entertains the possibility of an accused being prosecuted on the same charge at some later stage.

The final ground in support of the High Court's ruling is by reference to the notion of fairness in legal proceedings. This has been alluded to earlier in respect of the case of *Hettiarachigae Perera* and Article 9(1) of our Constitution.[61] In the context of s. 183(1) of the Code, this notion of fairness places a duty on the courts to avoid unnecessary delay in the trial process as well as its outcome. To cite Murray-Aynsley C.J. in *Goh Oon Keow* v. *P.P.,* "the power given by [s. 183] of the Criminal Procedure Code to the prosecution may, unless vigilance is displayed by the Courts of summary jurisdiction, result in oppression and that it is the duty of such Courts to prevent this."[62] More specifically, in P.P. v. *Suppiah Pather,* it was held that "[i]f the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely."[63] A discharge not amounting to an acquittal should be ordered only when the cause of the delay in presenting the prosecution's case is excusable and the court is satisfied that the prosecution will proceed within a reasonable time.[64] Otherwise, such a discharge will be like the proverbial Sword of Damocles hanging over an accused's head since he is kept uncertain as to whether the proceedings against him would be resumed or not.[65] It is also observed that all these cases supporting the notion of fairness were cited with approval by the High Court in *Abdul Rasheed* and *Ah Chak Arnold.*[66]

67 Subsidiary Legislation Supplement No. 31 of 1980, No. s. 162, which sets out the functions and duties of Public Prosecutors under the Criminal Procedure Code and, in particular, para. 1(c) which empowers Deputy Public Prosecutors "to enter a *nolle prosequi* at any stage of a summary trial...."

68 *R.* v. *Comptroller of Patents* [1899] 1 Q.B. 909.

69 See s. 183(2) which states that the discharge shall not amount to an acquittal "unless the court so directs".

60 *Goddard* v. *Smith* (1704) 3 Salk, 245; *R.* v. *Ridpath* (1713) 10 Mod. 152. See also *Archbold's Criminal Pleading, Evidence and Practice* (41st ed., 1982), paras. 1-121 and 1-122.

61 *Supra,* p. 181.

62 (1949) 15 M.L.J. 35. Section 183 of the Code was referred to in the judgment as s. 187 since the court was dealing with the Criminal Procedure Code, Cap. 21, Laws of the Straits Settlements (1936 ed.).

63 *Supra,* note 35.

64 *Ibid.*

65 *Seet Ah Ann* v. *P.P.* (1950) 16 M.L.J. 293, at p. 294.

66 *Supra,* note 1, at p. 195. The High Court also specifically stated that "unless some good ground is shown it would not be right to leave an individual saddled with a charge in which proceedings are stayed for an indeterminate period."

Based on all the above grounds, it is submitted that the High Court was correct in holding that s. 183(1) of the Code operates the moment the prosecution informs the court that it is not going on with the prosecution of the accused, whether or not it has decided forever to withdraw the charge. Having held thus, the High Court was then confronted with the question of when a court should exercise its discretionary power under s. 183(2) of the Code to acquit an accused rather than order that he be discharged not amounting to an acquittal.

When is an Acquittal preferred over a Discharge Not Amounting to an Acquittal

In *Abdul Rasheed* and *Ah Chak Arnold,* Lai J. dealt with this matter by stating at the outset that "[i]t is not desirable to set down any principle which a court must follow when acting under sub-section 183(2) of the Code as if it is writ of stone and thereby fetter the discretion of the court which has to be judicially exercised."[67] The learned judge then went on to say that circumstances varied from case to case such that each had to be dealt with on its merits. Some of these circumstances which have actually transpired will now be discussed.

Firstly, it appears that the courts will invariably acquit an accused in cases where the prosecution has indicated that it is withdrawing the charge altogether.[68] It will be recalled how Lai J. held that if the Public Prosecutor has decided not to "ever resurrect the charge against the defendant, … the consequence should, and only could, be that the defendant shall be discharged … and that such discharge shall amount to an acquittal."[69] Another instance when the court will definitely acquit the accused is in cases where the charge is clearly not sustainable.[70]

But what of cases where the prosecution has informed the court that it is applying for a stay of proceedings only for the time being? In such cases, the courts will acquit the accused when the prosecution fails to tender good reasons as to why the accused should be discharged without amounting to an acquittal.[71] For example, in *Abdul Rasheed,* no reasons whatsoever were given by the prosecution which resulted in the High Court directing that the accused be discharged amounting to an acquittal.[72]

A valid reason for not acquitting an accused would be where the prosecution is unable to proceed for the time being owing to the difficulty in obtaining a witness.[73] However, the court should note whether the prosecution has already been given a reasonable time to locate the witness. In this connection, it has previously been observed

67 *Ibid.*
68 For example, see P.P. v. *Mat Zain* (1948-49) M.L.J. Supp. 142; *Tan Ah Chan* v. *R.* (*1955*) 21 M.L.J. 218; P.P. v. *Ng Nam Onn, supra,* note 56; *Koh Teck Chai* v. *P.P., supra,* note 25.
69 *Supra,* note 1, at p. 195.
70 *P.P.* v. *Mat Zain, supra,* note 68.
71 *Seet Ah Ann* v. P.P., *supra,* note 65; P.P. v. *Suppiah Pather, supra,* note 35.
72 Supra, note 1, at p. 196.
73 For example, see P.P. v. *Suppiah Pather, supra,* note 35; *Koh Teck Chai* v. *P.P., supra,* note 25; *Khoo Kay Jin* v. P.P., *supra,* note 30; *Chow Man Poh & Anor. P.P., supra,* note 15.

how the court in *Suppiah Pather* held that an accused should be acquitted if the prosecution was not ready with its case after reasonable adjournments had been granted.[74] The court should also determine the prospects of tracing a prosecution witness. Thus, *in Ah Chak Arnold,* the High Court was not prepared to order the accused to be discharged not amounting to an acquittal after discovering that, of the two principal prosecution witnesses, one had died and the other was likely to remain unavailable for an indefinite period.[75]

The courts will be inclined to order an acquittal in cases where the accused faces, or has already undergone, other proceedings against him in respect of the same charge. Hence, it was seen how the outcome of the disciplinary proceedings against *Ah Chak Arnold,* a police detective, influenced the High Court to acquit him.[76] Another instance is to be found in the case of *Koh Teck Chai* where the court said, in acquitting the accused, that "it seemed a little hard … if he is not freed from the prospect of further prosecution because [the] police would most probably take departmental action against him."[77]

There are other circumstances which have been suggested by the courts as lending weight to the acquittal of an accused. These include expenses by an accused (for example, to secure the attendance of witness) which have gone to waste because of numerous adjournments requested by the prosecution;[78] and the procuring of a discharge not amounting to an acquittal in order to induce an accused to give evidence satisfactory to the prosecution in another case.[79]

It appears that the onus of satisfying the court that an acquittal should be preferred over a discharge not amounting to an acquittal lies with the accused. This burden is easily discharged if the circumstances in the proceedings so far on record show that the prosecution's conduct of its case is highly unsatisfactory so that the proper course would be to discharge the accused amounting to an acquittal. However, where such circumstances are not present, the High Court in *Abdul Rasheed* and *Ah Chak Arnold* has held that "the accused must show sufficient reasons to displace the principle that the discharge should not amount to an acquittal."[80] The High Court regarded this to be the position since the Legislature had in the opening words of s. 183(2) set down the principle that the discharge "shall not" amount to an acquittal.[81] The court further opined that judges must "bear in mind and give due regard to the right of the prosecution to proceed at a later stage."[82]

A survey of the case authorities, however, does initially suggest that the onus lies with the prosecution to satisfy the court as to why it should not discharge the accused amounting to an acquittal. Thus in P.P. v. *Mat Zain,* it was held that "the discharge should amount to

74 *Supra,* note 35.
75 *Supra,* note 1, at p. 196.
76 *Ibid.*
77 *Supra,* note 25, at p. 167.
78 *Ibid.*
79 *Seet Ah Ann* v. *P.P., supra,* note 65, at p. 294.
80 *Supra,* note 1, at p. 195.
81 *Ibid.*
82 *Id.*

an acquittal unless good cause is otherwise shown,"[83] and in *Koh Teck Chai* the view was expressed that the "power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the Court is satisfied, for good cause shown, that the public interest insistently demands that it be used."[84] These *dicta* indicate that the court will normally exercise its power to acquit an accused unless the prosecution can provide satisfactory reasons as to why this should not be done.

There may, however, be a simple explanation for this apparent judicial disregard for the legislative intention in s. 183(1) that the discharge "shall not" amount to an acquittal. It is observed that all the authorities suggesting the contrary view were cases where the prosecution was seeking to *withdraw* the charge. In these circumstances, it was perfectly right for the courts to cast upon the prosecution the burden of showing why an acquittal should not be ordered in place of a discharge not amounting to an acquittal.[85] This judicial approach would have been unnecessary had our Code incorporated both sections 333 and 494 of the Indian Criminal Procedure Code of 1898.[86] Section 333[87] of that Code states as follows:—

> At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of the Government that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

It will be noted immediately how closely this section resembles sections 183 and 192 (the equivalent provision for High Court trials) of our Code. However, in addition to this section, the Indian Code provides under s. 494[88] that:—

> Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person and, upon such withdrawal,—
>
> (a) if it is made before a charge has been framed, the accused shall be discharged;
>
> (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

This provision has only been partially adopted in the form of s. 176 of our Code.[89] The crucial difference between the Indian provision and s. 176 is that the latter is restricted to those cases where

[83] *Supra,* note 68, at p. 142.
[84] *Supra,* note 25, at p. 167, citing *Seet Ah Ann* v. *P.P., supra,* note 65.
[85] See the earlier discussion, *supra,* pp. 181-182 and 185.
[86] *Supra,* note 56. This Code has since been superceded by the Criminal Procedure Code (Act No. 2 of 1974).
[87] This provision has been deleted from the new Indian Criminal Procedure Code, *ibid.*
[88] This provision is now, which some modifications, s. 321 of the new Indian Criminal Procedure Code, *ibid.*
[89] See supra, note 51. For a fuller discussion of s. 176, see *supra,* p. 182.

the prosecution has successfully prosecuted an accused on one or more charges and is seeking to withdraw the remaining charges against him. Had s. 494 of the Indian Code been fully incorporated into our Code, the courts in *Mat Zain, Koh Teck Chai* and other similar cases would have resorted to that provision to acquit the accused rather than s. 183 of the Code. As our law stands, however, s. 183 is the only provision[90] which governs orders of discharges not amounting to an acquittal in summary trials. Hence, our courts have no choice but to refer to that provision whenever the prosecution indicates that it is going to withdraw the charge against an accused.

Conclusion

The High Court in *Abdul Rasheed* and *Ah Chak Arnold* delivered a landmark decision which put an end to the existing practice in the lower courts of ordering a discharge not amounting to an acquittal whenever the prosecution indicated that it was not withdrawing the charge. The following procedural steps emerge from an examination of the High Court's decision and the other case authorities dealing with s. 183 of the Code:—

(1) Section 183(1) comes into operation whenever the Public Prosecutor informs the court of his intention not to go on with the prosecution of the accused upon the charge (whether or not he has decided forever to withdraw the charge). The court takes cognizance of this intention whenever the Public Prosecutor requests for an adjournment of the proceedings[91] or expressly applies for a discharge not amounting to an acquittal.

(2) In cases where an adjournment is sought, the court should examine the reasons for this request and adjourn the proceedings when there are good grounds for doing so. As a general rule, such requests by the prosecution for an adjournment are usually granted by the court. On the other band, the court should seriously consider exercising its power under s. 183(2) to acquit the accused if it finds that the prosecution has already been granted a number of adjournments so as to have had ample opportunity to prepare its case. It appears that the onus is on the accused to show that it would be unjust to prolong the proceedings any further.

(3) In cases where a discharge not amounting to an acquittal is sought, the court should determine whether the prosecution actually intends to withdraw the charge. If so, then the court should exercise its power under s. 183(2) to acquit the accused.

However, should the prosecution be staying proceedings for the time being only, the court should consider the reasons of the prosecution for doing so. If these reasons are satisfactory, the court should be minded to discharge the accused without amounting to an acquittal. The onus is then on the accused to show why he should be acquitted instead.

90 Apart from s. 179(o) of the Code; see *supra,* note 51.

91 For example, see *P.P.* v. *Suppiah Pather, supra,* note 17; and *Chow Man Poh* v. *P.P., supra,* note 15.

It is submitted that the above procedure applies equally to s. 192 of the Code[92] which is the equivalent provision of s. 183 in respect of High Court trials. It should also arguably apply to s. 338 of the Code which concerns the decision of the Public Prosecutor to discharge an accused after a preliminary inquiry has been held.[93]

This judicial approach towards s. 183 has been achieved through a proper balancing of the competing public policy interests of crime control on the one hand and individual rights on the other which invariably arise in any criminal proceedings. That the High Court in *Abdul Rasheed* and *Ah Chak Arnold* had due regard for the interplay of these interests is reflected in its statement that "a court has to act judicially and consider both the public interest and any unfairness to an accused person. A consideration of one aspect without the consideration of the other [is] not a proper exercise of the power of the court under sub-section 183(2) of the Code."[94]

It may be appropriate to conclude here by commending to those having to deal with discharges not amounting to an acquittal (both public prosecutors and judges alike) the wisdom of Solomon when he said: "Do not withhold good from those who deserve it when it is in your power to act."[95]

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92 Section 192 of the Code reads:—
(1) At any stage of any trial before the High Court before the return of the verdict, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and he shall be discharged from and of the same.
(2) Such discharge shall not amount to an acquittal unless the presiding Judge so directs except in cases coming under section 176.

93 Section 338(1) of the Code reads:—
When a copy of the record of any inquiry before a Magistrate's Court has been transmitted to the Public Prosecutor as required by section 149, the Public Prosecutor, if he is of opinion that no further proceedings should be taken in the case, may make an order in writing, signed by himself, directing the accused person to be discharged from the matter of the charge and, if the accused person is in custody, from further detention upon the charge.
See also *Mallal's Criminal Procedure, supra,* note 21, at p. 393.

94 *Supra,* note 1, at p. 196.

95 Proverbs 3:27.