Bachoo Mohan Singh v Public Prosecutor and Other Applications
[2009] SGCA 59

Case Number : Cr M 14/2009, 30/2009, CA 6/2009

Decision Date : 04 December 2009

Tribunal/Court : Court of Appeal

Coram : Choo Han Teck J; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Michael Hwang SC (Chambers of Michael Hwang SC), Ang Cheng Hock SC (Allen & Gledhill LLP) and Eugene Thuraisingam (Stamford Law Corporation) for the applicant in CM 14/2009, the appellant in CCA 6/2009 and the respondent in CM 30/2009; Jennifer Marie, Lee Sing Lit, Tan Boon Khai, Kan Shuk Weng and Kenneth Yap (Attorney-General's Chambers) for the respondent in CM 14/2009 and CCA 6/2009 and the applicant in CM 30/2009; Wong Meng Meng SC and Fay Fong (WongPartnership) for the Law Society of Singapore

Parties : Bachoo Mohan Singh — Public Prosecutor

Criminal Procedure and Sentencing

4 December 2009 Judgment reserved.

V K Rajah JA:

1 After a trial spanning over 50 days in the Subordinate Courts, the appellant-cum-applicant, Bachoo Mohan Singh ("BMS"), an advocate and solicitor of some 36 years' standing[note: 1], was convicted on a single charge under s 209, read with s 109, of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC"). He was then sentenced to a term of three months' imprisonment. BMS's appeal to the High Court against the district judge's ("the District Judge") decision on conviction was dismissed but his appeal against sentence was partially allowed. BMS was instead sentenced to one month's imprisonment and fined $10,000. BMS then applied to the High Court judge (the "HC Judge") to reserve questions of law of public interest to the Court of Appeal under s 60(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). The HC Judge dismissed BMS's application.

2 In Criminal Motion No 14 of 2009 ("CM 14/2009"), BMS seeks to (*inter alia*) review and set aside the HC Judge's decision not to reserve questions of law of public interest to this Court. In the alternative, BMS asks that this Court determines the question of public interest pursuant to its inherent jurisdiction. In addition, during the course of the hearing, Mr Michael Hwang SC ("Mr Hwang"), counsel for BMS, amended his application to seek leave pursuant to s 60(2) of the SCJA for an extension of time to reserve questions of law of public interest (see [25] below). In Criminal Appeal No 6 of 2009 ("CCA 6/2009"), BMS is appealing against the HC Judge's decision not to reserve the stated questions of law of public interest to the Court of Appeal. The Prosecution strenuously opposes both CM 14/2009 and CCA 6/2009, arguing that BMS has no right to appeal or any other recourse once the HC Judge had dealt with the appeal and the application under s 60(1) of the SCJA. In other words, the Prosecution contends that the Court of Appeal has no jurisdiction to hear either CM 14/2009 or CCA 6/2009.[note: 2] However, in a surprising turn of events, after the oral arguments were completed, on 28 August 2009, the Prosecution wrote to inform this Court that it would be applying to the court for an extension of time under s 60(2) of the SCJA. The Prosecution duly filed Criminal Motion No 30 of 2009 ("CM 30/2009") on 11 September 2009, seeking an extension of time to apply to the HC Judge for leave to reserve two questions of law of public interest to this Court. The court allowed both BMS and the Law Society to respond to the Prosecution's application.

Their initial responses were received on 24 and 25 September 2009 respectively. Having considered these responses, the court invited the parties on 30 September 2009 to make their final observations on the questions of law of public interest that had been earlier formulated. The parties duly responded. Subsequently, on 22 October 2009, the Prosecution wrote again and (*inter alia*) made further submissions in respect of both s 60(2) applications (see below at [52]).

3 The background to the Law Society's participation in the present proceedings requires some explanation. The Law Society had unsuccessfully sought leave to be heard by the HC Judge when he considered the appeal from the District Judge. Certain observations made by the District Judge in his written grounds of decision had apparently caused a stir within the legal profession, prompting the Law Society's interest in this matter. Concerns had arisen in relation to the proper delineation of a solicitor's duty to verify instructions from a client. Did the decision suggest that in certain hitherto unidentified circumstances, a solicitor had an absolute duty to verify the client's instructions? Noting the Law Society's serious concerns, the court allowed it to be represented before us and make known the reasons for its concerns. Mr Wong Meng Meng SC ("Mr Wong") appeared on behalf of the Law Society.

4 As this is not a hearing on the questions of public interest that have been put before us for determination, I should emphasise that any views I express here that may have a bearing on the merits of BMS's convictions are *no more than preliminary*. In addition, I should also make it clear that any reference to "solicitors" in this judgment is to be taken to include "counsel" (or "advocates" as they are sometimes called) as well. Given the fused profession in Singapore, these terms are often used interchangeably.

Facts of the case

Dramatis personae

5 It will be helpful to first identify the key individuals involved in the commission of the alleged offence. Koh Sia Kang ("Koh") and his wife, Kang Siew Guek ("Kang") (together, the "Sellers"), were the sellers of a flat located in Redhill ("the Flat"). The buyers of the Flat were Hong Swee Kim ("Hong") and his wife, Elizabeth Bong (together, the "Buyers"). Two agents were involved in the sale and purchase of the Flat, namely, Tony Ho ("Ho") and Teo Pei Pei ("Teo") (together, "the Agents"). Ho was Teo's supervisor. Both Ho and Teo worked for PropNex Realty Pte Ltd ("PropNex"), a real estate agency. The solicitors who originally acted in respect of the sale and purchase of the Flat were M/s Rayney Wong and Eric Ng ("M/s Rayney Wong"). However, the Sellers later sought legal advice from BMS, an advocate and solicitor employed as a consultant at M/s K K Yap & Partners ("M/s K K Yap").

The sale and purchase of the Flat

6 Teo, having earlier acted as the Buyers' agent in the sale of their flat, agreed to help the Buyers to find a flat whose sellers were prepared to do a cash-back arrangement. Under a cash-back arrangement, the flat's selling price is falsely inflated above the agreed selling price. The inflated selling price is declared to the Housing and Development Board ("HDB") and the lending bank as the actual sale price. The bank, relying on the inflated selling price, grants a larger loan to the buyer and this larger sum is disbursed as part of the sale proceeds to the seller on completion. After the seller receives the inflated sale proceeds, he returns the excess amount to the buyer.

7 Koh, around this time, had just become acquainted with Ho. He asked Ho to act for him in the sale of the Flat. Koh also requested Ho for loans on at least two occasions. Ho arranged for these

loans with a moneylender. The loans were to be repaid from the sale proceeds of the Flat.[note: 3] Ho eventually arranged for Teo to be appointed as agent in the sale of the Flat. She brought the Buyers to view the Flat. The Agents testified that Teo had informed the Sellers that the Buyers wanted a cash-back arrangement and the Sellers had agreed to this arrangement.[note: 4] Koh, to the contrary, has resolutely denied this. The parties agreed on a sale price of $390,000 for the Flat. However, the Sellers, at Teo's request, signed an Option to Purchase ("the OTP") without the price being expressly stated on it. The Flat was later valued at $490,000 and Teo inserted this figure into the OTP.

8 The first appointment at the HDB was scheduled for 2 December 2003. Just before meeting the HDB officer, Teo informed the Sellers that the price to be declared was $490,000. According to Koh, this was the first time he came to know about the inflated selling price or the cash-back arrangement.[note: 5] Koh, though unhappy with the inflated price, nevertheless declared to the HDB that the $490,000 sale price stated in the OTP was the actual price. The Buyers confirmed this to be so. After this, Teo introduced the Sellers to a solicitor from M/s Rayney Wong. The Sellers were then requested to execute two documents. One document authorised M/s Rayney Wong to act as the solicitors in the sale of the Flat[note: 6], and the other authorised M/s Rayney Wong to (*inter alia*) distribute $100,000 of the sale proceeds received to Kang.[note: 7] According to the Agents, the $100,000 distributed to Kang was to be withdrawn and passed to Teo, who would then hand the money over to the Buyers.

9 Some time after these documents were signed, Koh sought fresh legal advice. He approached BMS, whom he casually knew, for advice. On BMS's advice, Koh and his wife affirmed statutory declarations fully disclosing the various alleged breaches of duties by the agents, solicitors and moneylenders involved in the cash-back arrangement. Relying on these statutory declarations, similar complaints were also lodged with the police (on 12 January 2004)[note: 8], the HDB[note: 9] and the Inland Revenue Authority of Singapore ("the IRAS")[note: 10] (both on 27 February 2004).

10 The Agents and the Buyers were shocked by this bombshell. Teo, nevertheless, persevered in her attempts to persuade the Sellers to proceed with the sale of the Flat. Koh, however, adamantly refused to deal with her directly. Subsequently, a meeting was arranged at the premises of M/s K K Yap (the "K K Yap Meeting") on 15 January 2004. BMS, the Sellers, the Buyers and Ms Ong Bee Lay ("Ong"), a solicitor from Messers PKWA Law Practice LLC, were present at the meeting. Ong attended the meeting at the Buyers' request. The Agents were not invited to attend. During this meeting, Hong informed BMS about the cash-back arrangement. In response, BMS tersely stated that "he did not want to know about [the] arrangements" from Hong and would sue on the price stated on the OTP.[note: 11] No settlement was reached. After the meeting, Ong advised the Buyers that the transaction was illegal (she had not been earlier informed by Hong of these details prior to the meeting) and that she would not act for them to complete the deal. The Buyers accepted her advice and called off the purchase.

11 On BMS's advice, Koh engaged a new agent to sell the Flat. It was finally sold, on 21 March 2004, for only $380,000.[note: 12] On 2 April 2004, BMS sent a letter of demand to the Buyers, demanding payment of $120,000, comprising $110,000 (being the difference between the inflated sale price and the price at which the Flat was eventually sold at) and $10,000 (for expenses).[note: 13] There was no response to this demand.[note: 14]

12 On 10 April 2004, the Straits Times published an article (Tanya Fong, "Flat seller claims he was asked to inflate its price" *The Straits Times* (10 April 2004) at p 3) in which Koh reportedly asserted

that he was "asked to inflate the selling price of his flat by $100,000".[note: 15] This article immediately caught the attention of Propnex's management. PropNex then hastily arranged for a meeting at the Marina Mandarin Singapore hotel (the "Marina Mandarin Meeting") on the same evening. The Marina Mandarin Meeting was attended by BMS, Mr K K Yap, Koh, the Agents, and Mr Mohd Ismail, the chief executive officer of Propnex. During this meeting, Ho offered to pay the Sellers $20,000 to settle all the claims made by the Sellers, but his offer was roundly rejected by BMS.

13 Two days after the Marina Mandarin Meeting, a writ of summons endorsed with a statement of claim (the "SOC")[note: 16] was filed by M/s K K Yap on behalf of the Sellers in the Subordinate Courts, with the Buyers named as the defendants. The SOC read:

> 1. The Plaintiffs are the lessees of a Housing and Development Board apartment known as Block 82 Redhill Lane #02-75 Singapore 150082 (hereinafter referred to as the "Premises").
>
> 2. On the 30th. September 2003, the Plaintiffs granted the Defendants an Option to Purchase the said [sic] at a price of $490,000.
>
> 3. On the same day, the Defendants duly exercised the said Option.
>
> 4. The consent/approval of the Housing Development Board for the sale and purchase was duly obtained. The sale and purchase was fixed for completion on 5th. January 2004.
>
> 5. The Defendants failed, refused and/or neglected to complete the sale and purchase on 5th January 2004 or thereafter despite a Notice to Complete issued pursuant to Clause 29 of the Singapore Law Society's Conditions of Sale 1999 being served on their solicitors.
>
> 6. The Plaintiffs thereafter put the said Premises up for sale. In or about late March 2004, the Plaintiffs received an offer for $380,000 for the said premises. The said offer was the highest that was received. The Plaintiffs thereafter, granted an Option to the offerors to sell the said premises to them at the price of $380,000.
>
> 7. By reason of the aforesaid, the Defendants have been in breach of agreement and the Plaintiffs have suffered loss and damage.
>
> And the Plaintiffs claim against the Defendants, jointly and severally for:-
>
> i. damages and loss;
>
> ii. interest;
>
> iii. cost.

It is worth noting, at this juncture, two points. There were no references, whatsoever, to the agreed sale price of $390,000. On the face of it, this was a claim for a breach of contract in connection with the sale of the Flat for the sum of $490,000. Further, the claim for damages was not quantified.

14 Not long after the filing of the SOC, the Buyers and the Agents agreed with the Sellers to settle the claim for $70,000.[note: 17] The Buyers were represented by solicitors in the settlement agreement. The Agents testified that they were advised by PropNex's management (and its solicitors)

to settle the claim. They were also very concerned about being prosecuted for their involvement in the cash-back arrangement.[note: 18] The Buyers apparently also had similar concerns and contributed towards the settlement.[note: 19] Of this $70,000 settlement sum, the Agents paid $55,000 while the Buyers contributed $15,000.[note: 20] The suit was later discontinued on 30 April 2004.[note: 21] Before that, the Buyers did not file any pleadings in relation to the claim; neither did their solicitors appear to dispute the legitimacy of the claim before the suit was discontinued. Further, neither BMS nor Koh had, as a term of the settlement, agreed to withdraw all the earlier complaints they had lodged.

The District Court decision

15 The District Judge, relying to a great extent on an Indian case (*Bulaki Ram* (1890) 10 AWN 1 ("*Bulaki Ram*")) that appeared to expound on the scope of s 209 of the Indian Penal Code (which is *in pari materia* to s 209 of the PC), decided that a claim was false if the person making the claim knew that he was claiming for more than what was due; it was not necessary for the Prosecution to prove that the claim was entirely made up. In his view, it did not matter if the action would succeed or fail (*PP v Bachoo Mohan Singh* [2008] SGDC 211 ("*DC GD*") at [149]–[150]; [235]–[236]). The Flat's selling price was $390,000. The $490,000 price indicated on the OTP was to facilitate the illegal cash-back arrangement. Therefore, the claim could not be properly made and was a false claim dishonestly made in court (*DC GD* at [238]–[241]).

16 Next, the District Judge relied on Teo and Ho's evidence and held that Koh had known that the claim was false and was therefore dishonest in making the claim. While Teo and Ho gave evidence that the Sellers knew and agreed to the cash-back agreement when they signed the OTP (*DC GD* at [74] and [79]–[80]), Koh had denied that there was any discussion as to the cash-back arrangement at that time (*DC GD* at [93]). The District Judge found that both Teo and Ho were truthful and credible witnesses (*DC GD* at [103] and [110]) and that Teo's evidence was corroborated by Ho's and Hong's evidence (*DC GD* at [109] and [111]). Koh's evidence, on the other hand, was not reliable (*DC GD* at [129]).

17 The District Judge further held that BMS knew that Koh had originally agreed to participate in the cash-back arrangement because:

(a) BMS had known the truth from Koh or Hong, as evidenced by the letters sent to the HDB and the IRAS (*DC GD* at [166]–[170]);

(b) Hong had told BMS that he had an agreement with Koh to pay back $100,000 after completion at the K K Yap Meeting (*DC GD* at [206]); and

(c) Ho had told BMS of the cash-back arrangement in the transaction at the Marina Mandarin Meeting (*DC GD* at [219]).

Therefore, BMS knew that Koh had intended and agreed to sell the Flat to the Buyers at $390,000 (*DC GD* at [224]). BMS, the District Judge determined, had used the filing of the writ as a tool to induce the Agents and Buyers to settle the claim and never intended the matter to go to trial (*DC GD* at [226]–[227]).

18 In the circumstances, the District Judge sentenced BMS to three months' imprisonment (*DC GD* at [271]).

The High Court decision

19 The High Court dismissed BMS's appeal on conviction. The HC Judge held that the claim was false within the meaning of s 209 of the PC for the following reasons:

(a) The evidence clearly showed that the agreed sale price was $390,000. The price in the OTP indicated $490,000 only because of the illegal cash-back scheme (*Bachoo Mohan Singh v PP* [2009] 3 SLR 1037 ("*HC GD*") at [45] and [47]). The court proceedings were commenced as part of Koh's "blatant attempt to enforce the [OTP] without the [cash-back arrangement]" after the parties had agreed on the cash-back arrangement (*HC GD* at [47]). The HC Judge further considered the facts leading to the filing of the writ and found that BMS, knowing that the $490,000 price was inflated, was not entitled to take the view that the Sellers were entitled to claim for the difference between the price stated in the OTP ($490,000) and the price at which the Flat was eventually sold ($380,000), without alluding to the cash-back arrangement. Further, the SOC was filed in the District Court, indicating that the unliquidated claim was for more than $60,000 (the jurisdictional limit of civil claims that can be made in the Magistrate's Courts under s 52(1) (read with s 2) of the Subordinate Courts Act (Cap 321, 2007 Rev Ed)) (*HC GD* at [51]).

(b) Since the Sellers had to rely on the illegality to substantiate their claim against the Buyers, the claim was bound to fail (*HC GD* at [48]).

(c) In the light of the decision in *Bulaki Ram*, BMS could not argue that the Sellers had no duty to raise a potential defence for the Buyers, and that it was for the Buyers to raise any such defence (*HC GD* at [52]).

(d) Section 209 of the PC was not limited to cases where the whole claim was false and applied even where a claim was false in a material particular, whether by way of an outright lie, deliberate omission or suppression of material facts. On the present case, the amount of damages was the essence of the claim filed in court, and it had been computed on the falsely pleaded basis that the actual price was $490,000 (*HC GD* at [53]).

(e) The offence was complete once the claim was filed in court (if other elements of s 209 were satisfied) and not only when evidence on the claim was adduced. Here, the falsehood was carried to the point of no return when the settlement was effected (*HC GD* at [55]).

20 The HC Judge also upheld the District Judge's findings that: (a) the Sellers had agreed to participate in the cash-back arrangement; and (b) BMS knew that the Sellers had agreed to participate in the cash-back arrangement. As to (a), there was nothing which showed that the District Judge's findings was wrong (*HC GD* at [64]). As to (b), there was clear evidence that BMS had actual or constructive knowledge of the cash-back arrangement, evidenced by the K K Yap meeting, the Marina Mandarin Meeting, the letters signed by BMS and sent to the HDB and the IRAS, and Koh's statements given to the Corrupt Practices Investigation Bureau (*HC GD* at [66]–[71]).

21 However, the HC Judge partially allowed BMS's appeal on sentence and reduced the sentence to one month's imprisonment together with a fine of $10,000. The HC Judge took into account the fact that BMS's livelihood as a solicitor was likely to be severely affected, together with other mitigating factors (such as doing charity work and acting for clients *pro bono*) (*HC GD* at [73] and [75]).

22 After the HC Judge dismissed BMS's appeal on conviction, BMS filed Criminal Motion No 5 of 2009 ("CM 5/2009") to reserve certain questions of law of public interest to the Court of Appeal under s 60(1) of the SCJA. The questions that BMS sought to reserve were as follow (*HC GD* at [77]):

1 Where: -

(a) a lawyer acts for a seller of a flat in a claim against a buyer for damages for breach of contract to purchase that flat;

(b) the lawyer knows that:

(i) the parties orally agreed on a sale price of $390,000,

(ii) a written contract was later executed stating the price at $490,000,

(iii) the parties intended that, on completion, the buyer would pay $490,000 and the seller would repay the buyer $100,000,

(c) by reason of the buyer's failure to complete the purchase, the seller is obliged to resell the property and thereby suffers loss, and consequently has a valid clam for damages for breach of contract;

(d) the lawyer prepares and files the Statement of Claim, claiming general damages for breach of contract and pleads the written contract and the purchase price of $490,000 and does not mention the price of $390,000; and

(e) no evidence has yet been led in court;

is there an offence under s 209 read with s 109 of the Penal Code (Cap 224)?

Alternatives

2 In s 209 read with s 109 of the Penal Code (Cap 224):

(a) does "claim" mean:

(i) an unsworn pleading filed in court; or

(ii) a court proceeding that has been completed?

(b) does "false claim" mean:

(i) an unsworn pleading which is manifestly without merit; or

(ii) a completed court proceeding which is manifestly without merit?

(c) does "false claim" include:

(i) a pleading which is founded on a valid cause of action but (to the drafter's knowledge) includes an incorrect statement of fact;

(ii) a pleading which (to the drafter's knowledge) contains an incorrect price which will form the reference sum for calculation of damages but no specific sum is claimed by way of damages;

(iii) a pleading which is substantially correct but (to the drafter's knowledge) omits a

relevant fact in terms of the factual matrix;

(iv) a pleading which (to the drafter's knowledge) bases a claim on an illegal contract which the drafter reasonably believes could be enforced;

(v) all or any of the above cases if the drafter reasonably believes that the true and complete facts will be brought to the court's attention at or before the trial of the action?

(d) in the premises set out in (c)(v) above, can the drafter's conduct be described as "dishonestly"?

23 The HC Judge dismissed CM 5/2009, holding that no questions of law of public interest had arisen. Although BMS was the first person ever to be prosecuted under s 209 of the PC, there was, in his view, no difficult point of construction in respect of the words in that section. Some of the words used in that section were defined in the PC, whilst others were easily understood using commonsense and by applying general principles of law (*HC GD* at [79]). Therefore, whether a claim was false was a question of fact in each case. Further, the fear that s 209 was a legal trap to solicitors was unfounded. To make out the offence, the claimant had to know that the claim was false, and the claim had to be made "fraudulently, or dishonestly" (*HC GD* at [80]). A solicitor who was unaware of the falsity of his client's claim did not have to worry about s 209 of the PC. The HC Judge further clarified that his decision did not suggest that there was a duty on a solicitor to verify facts stated by his clients (*HC GD* at [81]).

Issues before the Court

24 In CM 14/2009, BMS sought (a) to set aside the HC Judge's decision that there were no questions of law of public interest; (b) for the Court of Appeal to determine the question of public interest pursuant to its inherent jurisdiction; and (c) for his conviction to be set aside. In CCA 6/2009, BMS appealed against the HC Judge's refusal to reserve the stated question of law of public interest to the Court of Appeal. Under CM 14/2009 and CCA 6/2009, BMS was clearly seeking to appeal from the HC Judge's decision that there was no question of law of public interest in the present case.

25 After the court indicated its difficulties with the application/appeal as framed by BMS, Mr Hwang applied for an extension of time to re-apply to the HC Judge to refer questions of law of public interest pursuant to s 60(2) of the SCJA. The Prosecution objected to this course of action on the basis that, firstly, the High Court had already heard a similar prior application, and secondly, the application was seriously out of time. However, as pointed out earlier (above at [2]), the Prosecution itself has now (and belatedly) made an application on the basis that questions of law of public interest have arisen in this matter. Pursuant to CM 30/2009, it applied for an extension of time to apply to the HC Judge to refer two questions of law of public interest to this Court. As such, there are now two distinct issues for this Court to deal with. The first is whether the Court of Appeal has the jurisdiction to hear either CM 14/2009 and/or CCA 6/2009. The second is whether this Court can and should grant an extension of time for BMS and/or the Prosecution to apply to the HC Judge to refer the questions of law of public interest to the Court of Appeal, pursuant s 60(2) of the SCJA. I will discuss these issues *seriatim*.

Reserving questions of law of public interest to the Court of Appeal

The legislative policy underpinning s 60 of the SCJA

26 Before I turn to consider the merits of the applications, I will first discuss the purport and intent of s 60 of the SCJA, which reads:

> **Reference to Court of Appeal of criminal matter determined by High Court in exercise of its appellate or revisionary jurisdiction**
>
> **60.** —(1) When a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, the Judge may on the application of any party, and shall on the application of the Public Prosecutor, reserve for the decision of the Court of Appeal any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case.
>
> (2) An application under subsection (1) shall be made within one month or such longer time as the Court of Appeal may permit of the determination of the matter to which it relates and in the case of an application by the Public Prosecutor shall be made by him or with his written consent.
>
> (3) When a question has been reserved under subsection (1), the Judge who has reserved the question may make such orders as he may see fit for the arrest, custody or release on bail of any party in the case.
>
> (4) The Court of Appeal shall hear and determine the question reserved under subsection (1) and may make such orders as the High Court might have made as the Court of Appeal may consider just for the disposal of the case.
>
> (5) For the purposes of this section, any question of law which the Public Prosecutor applies to be reserved or regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest.

27 It would be helpful to start off by briefly sketching the legislative genesis of s 60 of the SCJA. It appears that the progenitor to s 60 was introduced in 1960 through s 19B(1) by the Court of Criminal Appeal (Amendment) Ordinance, 1960 (No 24 of 1960). The relevant Legislative Debates indicate that the provision (*ie*, s 19B(1) of the Court of Criminal Appeal Ordinance) was adopted from the Courts Ordinance, 1948 (No 43 of 1948) (Federation of Malaya). Section 19B(1) states:

> When an appeal from the decision of a District Court or Magistrate's Court in a criminal matter has been heard and determined by the High Court under the provisions of Chapter XXVIII of the Criminal Procedure Code and the Judge who heard the appeal or the Public Prosecutor, on his own behalf or on the application of any party to the proceedings, has within one month of such determination or within such further time as the Court of Criminal Appeal may permit, signed and filed with the Registrar a certificate that the determination of such appeal involved a point which it is desirable in the public interest to have determined by the Court of Criminal Appeal, such appeal shall be re-heard by the Court of Criminal Appeal.

28 There is at least one important difference between s 19B(1) of the Court of Criminal Appeal Ordinance and s 60 of the SCJA as it currently stands. In the former (and earlier) provision, the threshold was notably lower as it only required "a point which it is *desirable in the public interest* to have determined by the Court of Criminal Appeal" [emphasis added] for the point to be referred to the Court of Criminal Appeal ("the CCA").There was no stipulation that the "point" had to be, additionally, one of *law* (as now required by the SCJA). This additional requirement for the question having to be one of *law* was only subsequently introduced when the Court of Criminal Appeal Ordinance was repealed (following Singapore's merger with Malaysia) by the Courts of Judicature Act, 1964 (No 7 of

1964) (Malaysia) ("Malaysia Courts of Judicature Act 1964") (see, in particular, s 66 thereof). After Singapore gained her independence, the links between the two judicial systems were severed when the Supreme Court of Judicature Act 1969 (Act 24 of 1969) came into force. However, the new legislation retained, in substance, the requirements set out in s 66 of the Malaysia Courts of Judicature Act 1964. The Malaysian equivalent to s 60 of the SCJA (s 66 of the Malaysia Courts of Judicature Act 1964) was later amended (by the Courts of Judicature (Amendment) Act 1982 (Act A530)) in 1982 which provided for the Federal Court of Malaysia to be the sole body deciding whether or not to grant leave for the determination of a question of law of public interest within Malaysia. The entire s 66 of the Malaysia Courts of Judicature Act 1964 was subsequently repealed in 1995. Currently, it is the Court of Appeal that grants leave to and hears appeals on "*questions of law* which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision" [emphasis added] (see s 50(2) of the Malaysia Courts of Judicature Act 1964).

29 It is plain from the architecture of s 60(1) of the SCJA that four distinct requirements have to be satisfied before the High Court can grant leave to reserve any questions of law of public interest to the Court of Appeal. These four requirements are that (see *Ong Beng Leong v PP (No 2)* [2005] 2 SLR 247 ("*Ong Beng Leong*") at [5]):

(a) there must be a question of *law*;

(b) the question of law must be *one of public interest* and not of mere personal importance to the parties alone;

(c) the question must have arisen in the matter dealt with by the High Court in the *exercise of its appellate or revisionary jurisdiction*; and

(d) the determination of the question by the High Court must have *affected the outcome* of the case.

30 Section 60 of the SCJA encapsulates the balance set by Parliament in respect of two significant competing considerations. The first is the public interest in ensuring finality in proceedings. Proceedings commenced and determined in the Subordinate Courts are to end in the High Court with, generally, no further recourse or avenue for appeal (see *PP v Bridges Christopher* [1998] 1 SLR 162 ("*Bridges Christopher (CA)*") at [17]). On the other hand, there is a public interest in ensuring that justice is done in all cases. This means ensuring that accused persons are not wrongly convicted of any offence, be it minor or grave. As Chan Sek Keong J, with his customary acuity, observed in *Abdul Salam bin Mohamed Salleh v PP* [1990] SLR 301 ("*Abdul Salam*") at 310, [28]:

> It is in the public interest that a person who has been wrongly convicted of any offence (and not only a grave offence), whether by the wrong application of the law or the application of the wrong law, should be able to have it corrected on appeal. Such a *right* is provided under existing law, but it does not go beyond the High Court. [emphasis added]

31 Section 60(1) of the SCJA seeks to strike a balance between the two competing considerations identified above in a measured way once the statutory right to appeal has been exhausted. It does not confer on any accused, the right to proceed to the Court of Appeal. A question of law that is of *public interest* must first exist. Whether the question is of public interest is for the HC judge to assess, if an application is made within one month from the date of his determination, unless the Public Prosecutor certifies this to be so (see s 60(5) of the SCJA). In addition, there is the possibility that two or more conflicting High Court decisions may exist, rendering it impossible for judges of the

Subordinate Courts to consistently apply the law. This is a practical concern because appeals from the lower courts to the High Court are currently heard by a number of different judges. As judges of the High Court are not bound by the decisions of other judges sitting in a similar capacity, the High Court may not always be in a position to authoritatively determine the legal position on a particular legal controversy.

32 The courts have consistently adopted a firm view of applications made under s 60 of the SCJA, emphasising that this discretion is to be exercised sparingly (*Ng Ai Tiong v PP* [2000] 2 SLR 358 at [10]). It is settled that an application under s 60(1) of the SCJA should only be allowed in deserving cases, where the dominant consideration is the interest of the public and not that of the accused. As such, the HC Judge hearing the s 60 application conceivably has the discretion to refuse to refer the question of law of public interest stated by the applicant even if all the conditions thereof have been satisfied, unless it is raised by the Public Prosecutor (see *Cigar Affair v PP* [2005] 3 SLR 648 at [8(b)]). That said, strong and cogent grounds must exist before the High Court refuses to refer a matter to this Court if all the conditions (reproduced above at [29]) are satisfied. When s 60 SCJA was amended in 1993, the need to confer on the High Court judge a discretion to allow the application was clarified as follows (*Singapore Parliamentary Debates, Official Report* (12 April 1993) vol 61 at col 116 (Prof S Jayakumar, Minister for Law)):

> This discretion is necessary in order to sieve out questions which are not genuine points of law and are not of public interest and which are advanced merely as a guise for what is in fact an appeal.

33 As to what constitutes a question of law of *public interest*, it remains instructive to refer to the following observations of the Malaysian Federal Court in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 (that was referred to by this Court in *Abdul Salam bin Mohamed Salleh v PP* [1991] SLR 235), where Raja Azlan Shah Ag LP pithily stated (at 141–142):

> [I]t is not sufficient that the question raised is a question of law. It must be a question of law of public interest. *What is public interest must surely depend upon the facts and circumstances of each case*. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and *substantially affects the rights of the parties* and if so whether it is an *open question in the sense that it is not finally settled by this court or by the Privy Council or is not free from difficulty or calls for discussion of alternative views*. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest. [Emphasis added]

34 This suggests that an "open question" which "directly and substantially affects the rights of the parties" and "is not free from difficulty or calls for discussion of alternative views" should be referred to the Court of Appeal. However, this is not to say that a question of personal importance primarily to a convicted person *alone* can be referred to the Court of Appeal (*Chan Hiang Leng Colin v PP* [1995] 1 SLR 687 at 693, [17]). It must be stressed that this is not an avenue to allow the parties another bite at the cherry, if the public interest threshold is not crossed.

35 In *Jeyaretnam JB v Law Society of Singapore* [1988] SLR 1 at 13–14, [43], the Privy Council took the view that a "serious question of law arising in a criminal case on which a person's conviction of a *grave offence* may depend" [emphasis added] was of public interest. However, the Privy Council did not elaborate on what it meant by its vague reference to a "grave offence". Chan Sek Keong J in *Abdul Salam* took issue with this approach and concluded that it was difficult to see how this criterion

of "grave offence" was to be applied in practice. Chan J's concerns merit a full reference (at 309–310, [19]–[27]):

> 19 … The test laid down by the Privy Council as to when a question of law is of public interest, ie 'any serious question of law... on which a person's conviction of a grave offence may depend', is not easy to apply, if only because of its uncertain ambit. What is a grave offence as distinguished from any other offence? From the case itself, we can deduce that any offence which carries a sentence of imprisonment is a grave offence, as Jeyaretnam was sentenced to one month's imprisonment on one of the charges. He was also fined on one charge in an amount which disqualified him from being a Member of Parliament. Does potential disqualification from holding a public office make an offence grave? Is the test of gravity related to the standards of morality or conduct of Singapore society or to the individual's own standing in society or both? ***The gravity of an offence is not necessarily commensurate with the gravity of its consequences to the person who has been convicted of such offence***.
>
> 20 What is a *serious* question of law as distinguished from any other question of law? The ambit of this requirement is also uncertain as the Privy Council have not given any guidelines, beyond stating that the convictions against Jeyaretnam raised serious questions of law. What were these questions of law?
>
> …
>
> 25 It can thus be seen that of the questions of law considered as serious by the Privy Council, two of them concerned substantive principles of law: (i) the gift cheque as a revocable mandate, which was the 'simplest of all', and (ii) the legal nature of a declaration under s 199 of the Penal Code, which turned on the fine distinction between a declaration that is admissible as evidence of the facts stated therein and one that is admissible in evidence but not of the facts stated therein. The other two questions of law concerned (iii) the proper role of an appellate court in regard to findings of fact by a trial judge.
>
> 26 The word 'serious' used in relation to ideas and concepts connotes the quality of weightiness, complexity and importance and requiring or deserving careful and thoughtful consideration. Except for point (ii) which was conceptually a subtle and therefore difficult point, the other points were not serious in the above sense as point (i) was held to be simple, and point (iii) is settled law.
>
> 27 In regard to point (iii), it was, of course, open to argument that the Chief Justice's approach was wrong, and, in the event, the Privy Council held that the Chief Justice committed a serious error of law. However, the word `serious` in this context means no more than that it made the difference between an acquittal and a conviction. But, it should be noted, that this kind of questions of law, by its nature, can only be raised in relation to a particular case. It is of no public interest. It was of personal interest to Jeyaretnam in each case.
>
> [emphasis in original in italics; emphasis added in bold italics]

36 In my view, the gravity or seriousness of the offence cannot be the sole litmus test in deciding whether a question of public interest exists. Every individual convicted of an offence would consider his conviction to be a "grave" matter. In short, the threshold cannot be *simply* pegged to the punitive measures imposed or to the adverse personal consequences felt by an offender after a conviction. Rather, the focus should always be on the questions of law that arise from the case, and whether these questions are of such public interest that the Court of Appeal's authoritative views, whether it

be a result of difficult and/or controversial points of law or otherwise, are required. Whether a question is of public interest must depend on the circumstances of the case and the legal matrix. For example, the courts have considered questions raising constitutional rights (see *Jeyaretnam JB v PP* [1990] SLR 594 at 598, [8]) or pertaining to the administration of justice (see *Abdul Salam* at 312, [35]) to be apt for reference to the Court of Appeal for its determination. Attempts to define exhaustively what the concept of public interest might embrace will not be helpful because it can arise in a multitude of situations and, furthermore, it is not a static abstraction. It evolves over time. What can be said, however, is that in every reference, under s 60 of the SCJA, public interest assumes primacy over the personal interests of a convicted person in evaluating whether the threshold under s 60(1) of the SCJA has been met.

37 However, s 60 ought not be used to route to the Court of Appeal questions "which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts" (*Abdul Salam* at 311, [30]). A new or novel question of law is not invariably a difficult or contentious question. A novel question of law will not always satisfy the *public interest* threshold. On this issue, I entirely agree with the following apt observations made by the HC Judge (*HC GD* at [78]):

> If the general principles in determining the questions raised are well settled and it is a mere exercise of applying those principles to the facts of the individual case, those questions would not qualify as questions of law of public interest. Likewise, the mere construction of words in statutory provisions in their application to the facts of a case does not satisfy the requirement of public interest. If it were otherwise, prosecution under any new statutory provision would always have to end up before the highest court of law.

38 Given all the above limitations, it is plain that s 60 of the SCJA does not permit a dissatisfied accused a third bite at the cherry. Crucially, it does not provide a *right* to be heard by this Court. While this discretion is to be exercised sparingly, nevertheless, each application ought to be very carefully assessed so as not to overlook a matter that meets the statutory threshold. Indeed, it is entirely conceivable that an applicant may incorrectly frame his so-called questions of law. The High Court judge hearing the application to reserve questions of law of public interest to the Court of Appeal has the discretion to restate the questions proposed to ensure that they conform to s 60 of the SCJA. Nevertheless, this discretion does not extend beyond ensuring that the questions posed fall within the four corners of s 60 of the SCJA or restating the questions so that they are made clearer (see *PP v Bridges Christopher* [1997] 2 SLR 217 at [19], affirmed by this Court in *Bridges Christopher (CA)* at [28])). Similarly, it has been established that the Court of Appeal, in deciding the questions of law of public interest reserved by the High Court, has the power to reframe the question to achieve clarity (*PP v Fernandez Joseph Ferdinent* [2007] 4 SLR 1). This court explained (at [19]):

> We should stress that such a refashioning of a question being posed by an applicant to this court in a criminal reference is neither novel nor inappropriate. The overriding task of this court in any criminal reference is to clarify questions of law of public interest. It should not be forgotten that the primary objective of such a process is to allow this court an opportunity to provide an authoritative articulation of the applicable principles for future cases. This purpose would undoubtedly be frustrated if this court is compelled to decide on questions that may be of insignificant utility as a result of the use of inappropriate nomenclature by an applicant. ***For that reason, where a question is couched in a manner which would inadvertently mask its true import (which is the situation here), the court retains a discretion to pose the question in a manner which will be more appropriate and which will ensure that the substance of the question is rendered clear, save that the refashioned question has to remain within the four corners of s 60 of the SCJA***: see the Singapore Court of Appeal decision of *PP v Bridges*

Christopher [1998] 1 SLR 162 at [28]. [Emphasis added in bold italics]

The Court of Appeal's jurisdiction under s 60 of the SCJA

39 The Court of Appeal's criminal appellate jurisdiction is statutorily prescribed by s 29A(2) of the SCJA, which states:

> The criminal jurisdiction of the Court of Appeal *shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction*, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought. [emphasis added]

40 Section 29A(2) of the SCJA confers on the Court of Appeal the jurisdiction to hear an appeal only when it arises from a decision of the High Court made "in exercise of its *original* criminal jurisdiction" [emphasis added]. Therefore, the issue here is whether the HC Judge's decision not to refer the questions of law of public interest was made in exercise of the High Court's original or appellate criminal jurisdiction or some other special jurisdiction. This issue was previously considered by this court in *Wong Hong Toy v PP* [1984-1985] SLR 298 ("*Wong (No 1)*"). In *Wong (No 1)*, the Senior District Judge acquitted the accused persons of certain offences. On appeal, the acquittals were reversed by the Chief Justice (sitting in the High Court). The appellants sought to reserve certain questions of law of public interest to the CCA, but their motion was dismissed by the Chief Justice, who took the view that the questions were not of law or public interest. The appellants then sought to appeal against the Chief Justice's decision not to refer the questions of law of public interest to the CCA. I pause at this juncture to set out s 44 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) ("the SCJA (1985 Rev Ed)"), the predecessor to s 29A(2) of the SCJA that was in force at the time *Wong (No 1)* was decided:

> (1) The Court of Criminal Appeal shall have jurisdiction to hear and determine any appeal against any decision ***made by the High Court in the exercise of its original criminal jurisdiction***, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.
>
> (2) An appeal by a person convicted shall be either against the sentence or against both:
>
> Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence.
>
> (3) An appeal by the Public Prosecutor shall be either against the acquittal of an accused person or against the sentence imposed upon an accused person by the High Court.
>
> (4) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.
>
> (5) The Court of Criminal Appeal shall also have jurisdiction to hear and determine matters brought before it in accordance with the provisions of s 59 or 60.
>
> [emphasis added in bold italics]

41 The only issue before the CCA was simply whether the Chief Justice's refusal to reserve the questions of law was one "made by the High Court in the exercise of its *original criminal jurisdiction*" [emphasis added] within the meaning of s 44(1) of the SCJA (1985 Rev Ed). The court decided the

issue in the negative for the following reasons:

(a) *The CCA was a creature of statute* and *had no powers*, *other than those conferred upon it by the SCJA (1985 Rev Ed)* (*Wong (No 1)* at 305, [18]).

(b) The Chief Justice's decision not to reserve the questions of law was "*made after the conclusion of an appeal to the High Court in exercise of its appellate … jurisdiction"* [emphasis added], and it was on the appellant's application (*Wong (No 1)* at 304, [16]). To hold the Chief Justice as exercising the High Court's original criminal jurisdiction would "extend the meaning and scope of the 'original criminal jurisdiction' of the High Court to an extent quite out of line with the statutory framework for the administration of the appellate criminal justice in Singapore" (*id*). While the High Court had "all-embracing original criminal jurisdiction" under the SCJA (1985 Rev Ed), the High Court exercised its original criminal jurisdiction, generally, for the more serious offences or such less serious offences that were transferred from the Subordinate Courts (*id*).

(c) Section 60(4) of the SCJA (1985 Rev Ed), while providing that the CCA shall hear and determine the question(s) reserved by the High Court, did not provide for any appeal by a party aggrieved by the High Court's decision not to reserve any question of law of public interest (*Wong (No 1)* at 304, [17]).

(d) The dearth of authority in Singapore on the meaning of "decision made by the High Court in the exercise of its original criminal jurisdiction" in s 44(1) of the SCJA (1985 Rev Ed) reflected, in the Court's view (*Wong (No 1)* at 304, [18]):

> [I]n part the long accepted view of the legal profession that appeals from the subordinate courts end in the High Court and that a decision not to reserve any question of law was part and parcel of the exercise of the appellate criminal jurisdiction of the High Court.

(e) In *Gurbachan Singh v Public Prosecutor* [1967] 2 MLJ 220 ("*Gurbachan Singh*"), the Federal Court of Malaysia, interpreting the Malaysian equivalent to s 44(1) of the SCJA (1985 Rev Ed), held that the Federal Court only had the jurisdiction to hear an appeal from the decision of the lower court if the matter was sent up by an order of the High Court. The right of appeal (under the Malaysian Constitution) was a statutory one and there was no inherent right to appeal.

(f) In *Kulasingam v Public Prosecutor* [1978] 2 MLJ 243, the Federal Court, in interpreting the Malaysian equivalent (which was amended after *Gurbachan Singh*) to s 44(1) of the SCJA (1985 Rev Ed), held that the application to reserve questions of law of public interest did not fall within that section and that there could be no appeal against that decision (*Wong (No 1)* at 305, [19]).

(g) In *Public Prosecutor v Lim Joo Soon* [1981] 1 MLJ 107, the Malaysian Public Prosecutor applied to the Federal Court for a mandatory order for the High Court to reserve the questions of law instead of appealing against the decision. The fact that this matter went by way of an application for mandatory order rather than by way of an appeal underscored "the recognition that there was a problem about the lack of jurisdiction" (*Wong (No 1)* at 306, [21]).

Wong (No 1) was subsequently followed by this court in *Wong Hong Toy v PP* [1994] 2 SLR 396.

42 Mr Hwang raised the argument that the determination of an application under s 60 of the SCJA by the High Court was final and not interlocutory, and that the High Court was therefore, on that issue, exercising its original criminal jurisdiction. With respect, Mr Hwang's ingenious approach

misapprehends the local authorities on this point. It would be useful, at this juncture, to trace some of the more pertinent authorities on what constitutes "original criminal jurisdiction".

43 In *Mohamed Razip v PP* [1987] SLR 142 ("*Mohamed Razip*"), this Court had to consider whether the High Court's refusal to grant bail to the accused persons was appealable to the CCA. It noted that (at 144, [12]):

> [T]he words 'any decision made by the High Court' in s 44(1) of the Supreme Court of Judicature Act were inserted to accommodate appeals by the Public Prosecutor, thereby enlarging the jurisdiction of the Court of Criminal Appeal in that respect. The words were, in our opinion, not inserted as a 'catch-all' phrase. They must be read in the context of the other provisions. In s 44(2), the appellant is the 'person convicted' and the appeal is against conviction, or sentence, or both. In s 44(3), the appellant is the Public Prosecutor and the appeal is against acquittal, or sentence. Even when questions of law are referred to the Court of Criminal Appeal under s 59 or 60 of the Supreme Court of Judicature Act, they are done only at the conclusion of the trial or the appeal, as the case may be. The only logical conclusion, therefore, is that the jurisdiction of the Court of Criminal Appeal is to hear *appeals against orders of finality, ie those resulting in conviction and sentence, or acquittal*. [emphasis added]

On the facts of the case, the Court of Appeal held that an order made on a bail application was interlocutory and tentative in nature, did not fall within s 44 of the SCJA (1985 Rev Ed) and, therefore, could not be appealed against (at 145, [15]).

44 In *Ang Cheng Hai v PP* [1995] 3 SLR 201 ("*Ang Cheng Hai*"), the issue was whether the appellants had the right to appeal against the High Court's decision not to transfer the proceedings to the High Court from the Subordinate Courts. Relying on *Mohamed Razip*, the Prosecution argued that the appeal involved an interlocutory matter and therefore no right of appeal lay to the Court of Appeal. Agreeing, the Court of Appeal held that it was empowered only to entertain appeals which concerned orders of finality, *ie*, those resulting in conviction and sentence or acquittal (*Ang Cheng Hai* at 205, [19]). The Court of Appeal explained (at 205, [17]–[18]):

> The concept of 'original jurisdiction' has been defined to mean '*jurisdiction to consider a case in the first instance … to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts'*: Black's Law Dictionary (6th Ed). In *Wong Hong Toy & Anor v PP*, the Court of Criminal Appeal observed (at p 457):
>
> > The all-embracing original criminal jurisdiction of the High Court under s 15 of the (Supreme Court of Judicature) Act is not in all cases exercised by the High Court but the administration of criminal justice in respect of what we may call the less serious criminal cases, generally those cases not involving the sentence of death or life imprisonment, is entrusted to the subordinate courts. The exercise of the original criminal jurisdiction of the High Court involves generally the more serious criminal cases or such less serious criminal cases as may be transferred from the subordinate courts to the High Court.
>
> It is implicit from the above dicta that 'original jurisdiction' refers to original trial jurisdiction. In respect of the High Court, its original criminal jurisdiction is enumerated under s 15 SCJA, which denotes its trial jurisdiction. For this reason, the dictum of Coomaraswamy J [in *Kulwant v Public Prosecutor* [1986] 2 MLJ 10] did not assist the appellants. In the present cases, as the prosecution rightly pointed out, there was no trial which had commenced in the High Court. The High Court had not yet taken cognizance of the offences in question. The only matters before the High Court were the applications under s 185 CPC. We recognized that both the magistrate's

court and the High Court may have been jurisdictionally competent to try the offences in question. Nevertheless, the proceedings had been validly commenced in a magistrate's court, which had properly taken cognizance of the offences and had proceeded to exercise original criminal jurisdiction.

[emphasis added]

45 Subsequently, in *Microsoft Corporation v SM Summit Holdings* [2000] 2 SLR 137 ("*SM Summit*"), the issue was whether the Chief Justice's refusal to release or vary the undertaking given in relation to certain search warrants in the High Court was one made in exercise of the High Court's original jurisdiction. After considering *Wong (No 1)*, *Mohamed Razip* and *Ang Cheng Hai*, the Court of Appeal took the view that (at [27]):

> [T]he words 'original criminal jurisdiction' in s 29A(2) of the SCJA, on the true construction, *refer to 'trial jurisdiction'* and the decision of the learned Chief Justice in refusing to release or vary the implied undertaking was not an order made in exercise of the original criminal jurisdiction of the High Court within the meaning of s 29A(2) of the SCJA. Therefore, no appeal lies from that order and this court has no jurisdiction to hear these appeals. [emphasis added]

46 Two recent decisions of the Court of Appeal have further illuminated the meaning to be accorded to the term "original criminal jurisdiction". In *Kiew Ah Cheng David v PP* [2007] 1 SLR 1188 ("*David Kiew*"), the appellant sought to appeal against the High Court's refusal to grant an extension of time to file his notice of appeal and petition of appeal, both against conviction. The Court of Appeal unhesitatingly rejected the appellant's attempt, observing that the application before the High Court was "so intertwined with the appeal" (at [4]) and therefore could not be reviewed by the court on appeal. The Court of Appeal made the following observations with respect to what constituted an "original jurisdiction" (at [3]):

> The distinction between an original and an appellate jurisdiction is not one that normally requires extensive elaboration. A court exercises original jurisdiction in all proceedings at first instance. *A court exercises an appellate jurisdiction when it conducts proceedings arising from any decision of a court in the exercise of its original jurisdiction*. It is only in the narrowest sense that the proceedings before the judge in Criminal Motion No 22 of 2006 can be regarded as proceedings by a judge exercising his original jurisdiction. That is plausible only because the application for an extension of time was a prayer first made before that court. It had not been adjudicated upon or made in any other court. *Original jurisdiction is a legal term and the word "original" here does not refer only to a matter that originated from that court and had not arisen before any previous one*. [emphasis added]

47 Next, in *Ng Chye Huey v PP* [2007] 2 SLR 106 ("*Ng Chye Huey*"), the appellants there had filed a motion in the High Court for three orders, in exercise of the High Court's supervisory and appellate jurisdiction. The Court of Appeal considered whether, if the application constituted an appeal against the High Court judge's decision, it (*ie*, the Court of Appeal) had the jurisdiction to hear the appeal. The court held that it did not possess the jurisdiction. Andrew Phang Boon Leong JA, delivering the judgment of the Court of Appeal, began by explaining that (at [30]):

> It was clear, in our view, that Choo J [the High Court judge] had *not*, in hearing the High Court motion, exercised his "original criminal jurisdiction". The scope of the High Court's "original criminal jurisdiction" was the subject of discussion in this court's earlier decision in [*SM Summit*], where L P Thean JA held (at [27]) that "the words 'original criminal jurisdiction' in s 29A(2) of the SCJA, on [their] true construction, refer to '*trial jurisdiction*'" [emphasis added]. This interpretation of

s 29A(2) is supported by the legislative history behind this provision: see, generally, the Singapore Court of Appeal decision of *Mohamed Razip v PP* [1987] SLR 142 … at 143–144, [8]–[12]. [emphasis in original]

48 The Court of Appeal in *Ng Chye Huey* further considered the amendments effected prior to the re-enactment of s 29A(2) of the SCJA and noted that the predecessor to the section (*viz*, s 44(1) of the SCJA (Cap 15, 1970 Rev Ed)) had originally limited the CCA's jurisdiction to "any appeal by a person *convicted* by the High Court" [emphasis in original] (at [32]). For completeness, I will set out the court's view in full (at [32]–[34]):

> 32 The original reference in s 44(1) to "any appeal by a person *convicted* by the High Court in the exercise of its original criminal jurisdiction" [emphasis added] made it patently clear that **a litigant's right of appeal to the Court of Appeal was limited to situations where the High Court's decision had been made following a completed trial**. This phrase was subsequently removed in 1973 by way of the Supreme Court of Judicature (Amendment) Act 1973 (Act 58 of 1973) ("the 1973 Amendment Act"), and was substituted by the phrase "any appeal against any decision by the High Court in the exercise of its original criminal jurisdiction", which continues, in substance, to form part of the current s 29A(2) of our SCJA.
>
> …
>
> 34 The Minister's statement makes it evident that the 1973 amendments were not intended to expand or modify the scope of the phrase "original criminal jurisdiction" as it previously existed in the original s 44(1). They only sought to give the Prosecution equal rights *in situations where the accused had previously been given the right to appeal but the Prosecution had been denied such a right*. The original reference in s 44(1) to "an appeal by a person convicted in the High Court" should therefore continue to guide and qualify our understanding and interpretation of the phrase "original criminal jurisdiction". The Court of Appeal's appellate criminal jurisdiction under s 29A(2) accordingly remains limited to judicial determinations by the High Court that result in *a final verdict of conviction and sentence, or acquittal*. As Wee Chong Jin CJ confirmed in *Mohd Razip* ([30] *supra* at 144, [12]):
>
> > It is plain from the legislative history of all these sections that the words 'any decision made by the High Court' in s 44(1) [the predecessor to s 29A(1)] … were inserted to accommodate appeals by the Public Prosecutor, thereby enlarging the jurisdiction of the Court of Criminal Appeal in that respect. *The words were, in our opinion, not inserted as a 'catch-all' phrase. They must be read in the context of the other provisions*. In s 44(2), the appellant is the 'person convicted' and the appeal is against conviction, or sentence, or both. In s 44(3), the appellant is the Public Prosecutor and the appeal is against acquittal, or sentence. … *The only logical conclusion, therefore, is that the jurisdiction of the Court of Criminal Appeal is to hear appeals against orders of finality, ie, those resulting in conviction and sentence, or acquittal*.
>
> [emphasis in original in italics; emphasis added in bold italics]

49 Mr Hwang, relying on the passages cited above from *Mohamed Razip* (reproduced at [43] above) and *Ng Chye Huey* at [34] (reproduced at [48] above), submitted that the Court of Appeal has characterised the High Court's exercise of its "original criminal jurisdiction" as referring only to instances where the High Court had rendered a final, as opposed to interlocutory verdict.[note: 22] Since an application under s 60 of the SCJA was final, Mr Hwang reasoned, it was therefore an exercise of the High Court's original criminal jurisdiction which could be appealed to the Court of

Appeal.[note: 23] I disagree. It is evident that there are two limbs to s 29A(2) of the SCJA (as well as s 44(1) of the SCJA (1985 Rev Ed)). The first is that of "any decision made by the High Court" and the second is that of the High Court's "original criminal jurisdiction". In respect of the former (*ie*, "any decision made by the High Court"), the Court of Appeal in *Mohamed Razip* took the view that the words meant that the CCA (as it then was) was to hear appeals against orders of finality (*ie*, those resulting in conviction and sentence, or acquittal) and were not inserted in 1973 as a "catch-all phrase" to include all decisions made by the High Court. In respect of the latter, it is clear that the phrase "original criminal jurisdiction" refers to the trial jurisdiction of the High Court: see *Ang Cheng Hai* at 205, [18] (reproduced at [44] above) and *SM Summit* at [27] (reproduced at [45] above). The fact that an order made by the High Court may be considered final (for the avoidance of doubt I do not make such a finding in respect of s 60(1) of the SCJA) does not necessarily make it one that was given by the High Court in exercise of its original criminal jurisdiction. I agree with the observations of this Court in *David Kiew* at [3], where Choo J observed (see above at [46]):

> A court exercises an appellate jurisdiction when it conducts proceedings arising from any decision of a court in the exercise of its original jurisdiction. ... Original jurisdiction is a legal term and the word "original" here does not refer only to a matter that originated from that court and had not arisen before any previous one.

50 I would further observe that it can be argued that the Legislature has implicitly accepted the position that was set out in *Wong (No 1)*. In particular, Prof Jayakumar, in explaining why it was necessary to amend s 60 of the SCJA to deem a question of law referred by the Public Prosecutor as one of public interest, gave the following reason (*Singapore Parliamentary Debates, Official Report* (26 November 1998) vol 69 at col 1630 (Prof S Jayakumar, Minister for Law)):

> However, the existing provision in relation to the Public Prosecutor is unsatisfactory because *the issue of whether a question of law is one of public interest is determined* ***exclusively*** *by the High Court*. The result therefore is that the Public Prosecutor may be prevented from seeking a conclusive ruling from the Court of Appeal on questions which the Public Prosecutor considers to be of public interest. [emphasis added in italics and bold italics]

The use of the word "exclusively" suggests that the Legislature has implicitly accepted the decision in *Wong (No 1)*, in so far as any appeal against the High Court judge's decision not to reserve questions of law of public interest is concerned. This amendment to the SCJA was made following the Court of Appeal's observations in *Bridges Christopher (CA)*. In that case, the Prosecution argued that there was a rebuttable presumption that the Public Prosecutor's question was always one of public interest, but the Court of Appeal rejected any such notion. After the amendment to s 60(5) of the SCJA, the Public Prosecutor's determination that a question of public interest has arisen can no longer be queried by the court. While the High Court remains the sole arbiter on whether a question is of public interest if an application is made within one month as contemplated by ss 60 (1) and 60(2) of the SCJA, this does not necessarily mean, for reasons I will elaborate further below (at [51]–[62]), that the Court of Appeal is unable to consider the issue of whether the public interest threshold has been met, in the light of s 60(2) of the SCJA.

Section 60(2) of the SCJA

51 The Court of Appeal has by virtue of s 60(2) of the SCJA, a deferred jurisdiction extending to all applications that might be properly made pursuant to s 60(1) of the SCJA. Section 60(2) of the SCJA states:

> An application under subsection (1) shall be made within one month *or such longer time as the*

Court of Appeal may permit of the determination of the matter to which it relates and in the case of an application by the Public Prosecutor shall be made by him or with his written consent. [emphasis added]

Jurisdiction of this Court to entertain applications

52 BMS is now applying to the Court of Appeal for an extension of time. This comes after his failed application under s 60(1) of the SCJA to the HC Judge. Therefore, the most vital issue for this Court to determine is whether it has been conferred, in addition to entertaining fresh applications made pursuant to s 60(2) of the SCJA, the jurisdiction to grant an application for an extension of time that is made after an earlier application filed within time has been rejected by the High Court judge. The Prosecution has sought, in its letter dated 22 October 2009 to the court, to draw a sharp distinction between the two applications under s 60(2) of the SCJA that are before this Court. Its application, the Prosecution points out, is the first such application made to either court. BMS's application, on the other hand, is his second to the courts, though admittedly it is his first application to this Court. Once an application under s 60(1) of the SCJA has been rejected by the High Court (as was the case for BMS), the Prosecution forcefully asserts that the Court of Appeal ought not to entertain a subsequent application. It submits that:[note: 24]

> [The principle is] that the applicant may only make one application under section 60 of the SCJA. It must be presumed that Parliament was mindful of the need to make an end to proceedings and prima facie "an appeal" means one appeal and "*an application" means one application*. [emphasis added]

53 In support, the Prosecution relies on the English Court of Appeal decision of *Regina v Ashdown* [1974] 1 WLR 270 ("*Ashdown*"). In that case, the defendant was convicted of a robbery offence and was sentenced to a term of life imprisonment. His appeal against sentence was dismissed by the Court of Appeal. The defendant applied to the Court of Appeal for leave to appeal to the House of Lords. This was refused. The defendant then made a second application, again to the Court of Appeal, for leave to appeal again. The Court of Appeal held that it did not have the jurisdiction to consider the defendant's second application (at 274E), and that in any case, no point of law was involved (at 276D). Before I address the relevance of this authority, it is necessary understand the jurisdictional underpinning for "an application" pursuant to s 60(2) of the SCJA.

54 I begin by observing that the Court of Appeal's jurisdiction to hear any matters relating to s 60 stems from s 44(5) of the SCJA, which states:

> The Court of Appeal shall also have jurisdiction to hear and determine matters brought before it in accordance with section 59 or 60.

55 Certainly, an application made under s 60(2) of the SCJA to the Court of Appeal for an extension of time is one made "in accordance with section … 60". However, the issue is whether the inclusion of the words "*[a]n* application under [s 60(1)]" [emphasis added] in s 60(2) intentionally restricts the Court of Appeal's jurisdiction to hear only applications being made for the first time. I do not think the word "an" in the present context is necessarily a limiting one implying exclusivity as the Prosecution suggests: see *eg*, Anandan Krishnan, *Words, Phrases & Maxims Legally & Judicially Defined* vol 1 (LexisNexis, 2008) at p 1, for the various judicial definitions of the word. Indeed, the dictionary meaning of "a" (which is synonymous to "an" except that the latter is typically used before a word beginning with a vowel) makes it plain that the word is "strictly [an] adjective and can only be used with a substantive following" (see *The Oxford English Dictionary* vol 1 (Clarendon Press, 2nd Ed, 1989) at p 4). Ordinarily, it can refer to either "one" or "any" (*ibid*).

56 On the face of it, the term "an application" is a neutral means of referring to the application that is being made to the Court of Appeal. In my view, on a proper construction and taking into account the close nexus between ss 60(1) and 60(2) of the SCJA, it means "any application" that is being made, rather than the first application before either court. This view is amply supported by s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed), which states that unless the context indicates otherwise, "words in the singular include the plural" and *vice versa*. Interestingly, s 60(1) of the SCJA uses the term "the application" instead of "an application", thus faintly suggesting that the Legislature had intended for only one application to be made directly to the High Court in the first instance. If, however, it intended that only one application ought to be made either to the High Court (if in time) or the Court of Appeal (if out of time), Parliament could have with ease made its intention clear by using the term "*The* application under subsection (1)" or similar terminology that would convey such an intention.

57 The Prosecution's argument that "an application" refers to a single application is adapted from *Ashdown*, which in turn relied on the case of *Regina v Grantham* [1969] 2 QB 574 ("*Grantham*"). In *Grantham*, the court was concerned with the Court Martial Appeals Act 1968 (c 20) (UK) ("the Court Martial Act"). Under s 8(1) of the Court Martial Act, a convicted person may appeal to the Appeal Court only with leave of the Appeal Court. Section 9(3) of the Court Martial Act further provides that only the Appeal Court can extend the period of time within which the application for leave to appeal is to be lodged under s 9(1). In such a case, where an earlier application for leave has already been made and rejected by the Appeal Court, the application for an extension of time would necessarily constitute the second proceedings in respect of the same matter *before the same court*. The position is, on closer analysis, no different from that in *Ashdown*, which applied the Criminal Appeal Act 1968 (c 19) (UK), since the applicant there had applied for an extension of time to the same court (*viz*, the Court of Appeal) that heard and rejected the first application for leave to appeal to the House of Lords. In the present case, however, the application for an extension of time, under s 60(2) of the SCJA, is, I reiterate, being made to a different court. Quite simply, this is the first application made to the Court of Appeal. What ss 60(1) and 60(2) of the SCJA prescribe is that barring good reasons justifying a delay, the parties only have the right to apply under s 60(1) of the SCJA to the High Court during the one-month period. After the lapse of the one month, the High Court loses oversight of the application process and an application has then to be made to the Court of Appeal for an extension of time (under s 60(2)). For all these reasons, I do not think *Ashdown* takes the Prosecution's argument any further. The scheme and interplay for leave to the House of Lords in England are very different from that contemplated under s 60 of the SCJA.

58 It is, of course, trite principle that it is in the public interest for there to be finality to proceedings. Yet, it would be wrong to treat such desirability for finality as being of the essence in construing s 60(2) of the SCJA. The role of the Court of Appeal, as the apex court in criminal matters, is to ensure that justice is done not only in cases where a statutory right of appeal exists, but also to ensure that important decisions of the High Court involving questions of law of public interest are correctly arrived at. It has the heavy responsibility as the final court to correct errors and is also charged with ensuring public confidence in the administration of criminal justice. An incorrect decision or any uncertainty on a legal point of *public interest* could have severe consequences; it would be adverse not just to the applicant but crucially to others, who may also face similar charges in future, since the lower courts are bound by the High Court's decision until it is corrected by this Court or Parliament. For these reasons and those below, I see no good reason to interpret the jurisdiction under s 60(2) of the SCJA restrictively, such that the Court of Appeal can only hear and grant an extension of time for first-time applications only. *First*, a narrow interpretation could result in the Court of Appeal being unable to consider even obviously erroneous determinations on a question of law that is of public interest. *Second*, it cannot be assumed that the Public Prosecutor will always raise such a question to this Court if it arises. In the present case, if such a restrictive view of

s 60(2) of the SCJA had been taken from the outset, BMS would not have been heard and the Prosecution would not have been prompted to make its own application. One must accept, as the saying goes, even Homer nods.

59 *Third*, construing this jurisdiction narrowly to apply only to first time applications to the Court of Appeal would mean that there can be no available relief even in those unusual and troubling cases where there has been a failure by counsel to properly state the questions of law of public interest. Such errors could lead to the High Court's refusal to exercise its discretion pursuant to s 60(1) of the SCJA even in appropriate cases. Faced with two plausible constructions of s 60(2), I think that it is preferable to interpret the provision in a manner that grants the Court of Appeal the greater leeway to correct errors of law or injustice in cases of public interest.

60 *Fourth*, as the Prosecution rightly acknowledged in the course of submissions before us, there is no question of issue estoppel as the Court of Appeal is statutorily empowered to hear the application. As an aside, I note that there is no consensus on whether the doctrine of issue estoppel should apply to criminal law (see, for example, *Director of Public Prosecutions v Humphrys* [1977] 1 AC 1 (where the House of Lords adopted the view that the doctrine was not applicable) and *R v Mahalingan* [2008] 3 SCR 316; (2008) 237 CCC (3d) 417 (where the majority of the Supreme Court of Canada took the view that the doctrine was applicable in certain circumstances)). On the facts of the present case, it is clear that the rationale for the doctrine of issue estoppel in criminal matters (*viz*, the rule against double jeopardy), if applicable, does not bite.

61 *Fifth*, the exercise of this discretion does not immediately result in *an appeal* being heard by this Court. The applicant will still have to apply to the High Court for leave to refer the questions of law to this Court. The High Court judge has an unfettered discretion in evaluating the application, unless the application is made by the Public Prosecutor. In this regard, I ought to emphasise that my preliminary observations below on whether there is a question of law of public interest in the present case are solely for the purpose of assessing whether an extension of time should be granted, and will not be binding on the HC Judge later. Finally, in relation to the perennial concerns about frivolous applications and the opening of "floodgates", which have also been raised by the Prosecution, I have this to say. I expect applications under s 60(2) of the SCJA to be few and far between, and applicants (or their solicitors) should only consider this avenue in compelling cases. This Court will exercise firm control and have little hesitation in dismissing applications for matters which do not satisfy the statutory threshold. Solicitors who make obviously unmeritorious applications pursuant to s 60(2) of the SCJA may find themselves censured. Litigants (or their solicitors) may find themselves personally responsible for the costs and inconvenience incurred. As for vexatious litigants, it is always open to the Attorney-General to obtain an order under s 74(1) of the SCJA restraining the initiation of any further proceedings (see the decision of the High Court at *AG v Tee Kok Boon* [2008] 2 SLR 412). In short, the "floodgates" concerns that the Prosecution have alluded to may be overstated, given the various measures that can be instituted if there are any hints of abuse.

Summary on the Court of Appeal's jurisdiction under s 60(2) of the SCJA

62 Section 60 of the SCJA is a unique provision which provides the Court of Appeal with the avenue to ensure that questions of law of public interest are correctly arrived at. It would therefore be wrong to restrictively interpret this provision due to concerns about the opening of the proverbial floodgates. *Further, I find it difficult to sympathise with a contention that this Court should interpret a* prima facie *broad jurisdiction narrowly when doing so could result in turning a blind eye to grave errors involving questions of law clothed with public interest*. For the proper administration of its own caseload and good order, Parliament has conferred on the Court of Appeal the jurisdiction to decide whether it should grant leave for the High Court to entertain any s 60(1) application where such

application is made out of time, pursuant to s 60(2) of the SCJA. Again, I emphasise that the Court of Appeal, in determining whether leave should be granted, is determining on a *prima facie* basis whether the questions are of public interest. The High Court judge is not bound by the Court of Appeal's preliminary views. The High Court is the gatekeeper for applications under s 60(1) of the SCJA. Section 60 of the SCJA is a safeguard that should be applied in a restrained yet commonsensical manner. Nevertheless, the existence of this jurisdiction is not an open invitation for applications to correct all manners of supposed wrongs. An application to this Court ought to be only made in very limited circumstances where obviously important questions of law *that are also of public interest* have arisen, and even then, only after very careful deliberation. When hearing an application, after leave has been granted by the Court of Appeal pursuant to s 60(2) of the SCJA, the High Court judge will have to exercise his discretion pursuant to s 60(1) of the SCJA *de novo* on the new questions which he did not consider at the earlier hearing, notwithstanding that an unsuccessful application may have been earlier made to him. Whether there is a further right of appeal to this Court or other relief available if such an application is dismissed is not something that this Court has to decide in the present proceedings.

The relevant factors in assessing a s 60(2) application

63 As stated earlier, *only the Court of Appeal* can decide whether or not to grant an extension of time to make an application under s 60(1) of the SCJA to the High Court judge. If the Court of Appeal sees merit in the application, it will grant an extension of time to make an application under s 60(1) of the SCJA (see the observations of Yong CJ in *Ong Beng Leong* at [14] and also *Harbhajan Singh v Public Prosecutor* [1980] 1 MLJ 322 at 322). In *Tee Kok Boon v PP* [2006] SGCA 16 ("*Tee Kok Boon*"), the applicant ("Tee") applied to the Court of Appeal for an extension of time (under s 60(2) of the SCJA) to apply to the High Court under s 60(1) of the SCJA. The Court of Appeal dismissed Tee's application. In arriving at its decision, the Court of Appeal took into account two factors: (a) the relevance of the question of law of public interest sought to be raised (at [6]); and (b) whether there were "good and compellable reasons why his application for leave under s 60(1) was not made in time" (at [10]). On the facts of the case, the Court of Appeal held that the questions raised were either questions of fact (as opposed to questions of *law*) or questions of law but of personal interest (rather than questions of law of *public* interest). Further, the delay of three months, from the time Tee obtained the records from the court until the time he filed the motion for an extension of time, was a "long period of time" in the context of s 60(1) of the SCJA.

64 Apart from *Tee Kok Boon*, I am not aware of any authoritative local or Malaysian authority that has explicated the relevant factors in assessing an application for an extension of time under s 60(2) of the SCJA (or its Malaysian equivalent). The wording of s 60(2) clearly states that the decision as to whether or not to grant an extension of time lies solely within the Court of Appeal's discretion. This Court in *Tee Kok Boon* identified the factors of the length and reasons for the delay and the merits of the application as those that will inform the court in the exercise of its discretion. A similar approach was adopted by this Court in *Salwant Singh v PP* [2005] 1 SLR 36 ("*Salwant Singh*") in respect of an application for an extension of time to file a notice of appeal under s 50 of the SCJA, and by Sundaresh Menon JC in *Lim Hong Kheng v PP* [2006] 3 SLR 358 ("*Lim Hong Kheng*") in respect of an application for an extension of time to file a petition of appeal under s 250 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC"), with the requirements of s 50 of the SCJA being "strikingly similar" to that under s 250 of the CPC (see *Salwant Singh* at [11]–[12]). In *Lim Hong Kheng*, Menon JC painstakingly undertook an extensive review of the authorities elaborating on the applicable criteria for an extension of time in relation to both criminal and civil appeals. He (*inter alia*) made the following incisive observations, which I entirely agree with (at [27]):

> … It virtually goes without saying that the procedural rules and timelines set out in the relevant

rules or statutes are there to be obeyed. **These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases**. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an *entitlement* to an extension of time. The foregoing cases all establish that in exercising the court's discretion under s 250 of the CPC it is relevant to consider all the circumstances, and in doing so to use a framework that incorporates such considerations as:

(a) the length of the delay in the prosecution of the appeal;

(b) the explanation put forward for the delay; and

(c) the prospects in the appeal.

[emphasis in original in italics; emphasis added in bold italics]

65 While the present applications are made under s 60(2) of the SCJA (for an extension of time to reserve questions of law of public interest) and do not involve an appeal *per se*, I can see nothing in this distinction that requires the court to take a different approach in respect of an application for an extension of time. As such, the relevant factors in respect of a s 60(2) application remain (after suitable modifications) as follow:

(a) the length of the delay in making an application under s 60(2) of the SCJA;

(b) the explanation put forward for the delay, and, if no earlier application had been made pursuant to s 60(1) of the SCJA, the reasons for this; and

(c) the prospects of the application, after taking into account all factors listed at [29] above, especially the significance of the public interest element in the application to be made under s 60(1) of the SCJA.

66 Generally speaking, the longer the delay, the more significant will be the consideration given to the second and third factors. However, the relative importance to be placed on each of these three factors will depend on the circumstances of each case. For example, while the court, in an exceptional case, has granted an extension of time to file a petition of appeal after an 18-month delay (see *Anuar bin Othman v PP* [1990] SLR 1180 at 1186, [28]), on the other hand, this Court has declined to grant an extension of time even where the delay was not caused by the applicant, as the appeal had no prospect of success at all (see *Salwant Singh* at [16] and [22]). I should further emphasise that ordinarily, an application must first be made to the relevant High Court judge. Most matters ought to end there. I will now turn to apply the above factors to the facts of this case.

Length of delay and reasons for the delay

67 In the present case, the HC Judge dismissed the appeal against conviction and partially allowed the appeal against sentence on the day of the hearing itself, *viz*, 19 January 2009. At first blush, this represented a substantial seven-month delay for BMS's application (that was made during the hearing on 27 August 2009) and an eight-month delay for CM 30/2009 (which was filed on 11 September 2009). However, BMS had already applied, on 16 February 2009, to reserve questions of law of public interest for the Court of Appeal's decision in CM 5/2009. During the hearing, Mr Hwang informed this

Court that his team had filed the application just before the expiry of the one-month period as they were waiting for the HC Judge's written grounds of decision to be issued. CM 5/2009 was heard and dismissed by the HC Judge on 9 April 2009, and *on the same day*, BMS personally filed CM 14/2009 to invite the Court of Appeal to (*inter alia*) determine the question of law of public interest as set out in CM 5/2009. CM 14/2009 and CCA 6/2009 were fixed for hearing on 27 August 2009. At this juncture, I observe that the present case is distinguishable from the usual cases where the delay would ordinarily be brought about by some misunderstanding, the applicant's inadvertence or the solicitor's fault.

68 In addition, during the course of the hearing, Mr Hwang informed the court that he had not filed an application under s 60(2) of the SCJA sooner as he and his team did not appreciate that it was still open to them to apply for an extension of time to raise questions of law of public interest under s 60(2) of the SCJA, until it was very late in the day. There is no case law inviting such an approach. As a consequence (and in the light of *Wong (No 1)*), Mr Hwang initially took the view that it might be ethically challenging for him to pursue an appeal to the Court of Appeal after the HC Judge had dismissed both the appeal against conviction and the original s 60(1) application. In this regard, I note that this is the first time that an application for an extension of time under s 60(2) of the SCJA has been made in similar circumstances.

69 Quite plainly, although the length of the delay appears substantial at first glance, closer analysis reveals that there has been really no delay attributable to any fault of BMS. BMS did not *simply* allow seven months to lapse without taking any further steps in this matter. On the contrary, BMS had made an application under s 60 of the SCJA within the stipulated time and was most anxious to vindicate himself and to exhaust all possible legal avenues open to him. The one "crime" he cannot be accused of is delay. The chronology of the various steps he took, outlined above (at [67]), unequivocally bears testament to this. In the prevailing circumstances, any suggestion that delay is even a pertinent consideration would be entirely lacking in force. The Prosecution's application, made soon after it objected to BMS's application, is highly significant. What is sauce for the goose is sauce for the gander. One should also not lose sight of an apparent irony here. Had BMS not tenaciously persisted in his contentious attempts to vindicate himself, it is unlikely that the Prosecution would have been prompted to make its application.

70 With regard to the Prosecution's application (CM 30/2009) which was filed only on 11 September 2009 (see above at [2]), the questions of law of public interest for which it seeks leave to reserve are as follows:[note: 25]

> 1. If an advocate and solicitor files a statement of claim in court on behalf of his client with the knowledge that the claim is based on facts which are false; and that his client was dishonest in making the false claim, does he commit an offence under section 209 read with section 109 of the Penal Code?
>
> 2. If the answer to question 1 is in the affirmative, would he still have committed an offence if he was only acting on his client's instructions?

71 In its affidavit in support of the motion, the Prosecution provided the following reason for having made its application out of time (at para 6):

> In particular, in light of the concerns expressed by the Court of Appeal on 27th August 2009 and particularly the comments of Andrew Phang JA, the Public Prosecutor has decided to frame questions of law of public interest in relation to the ambit and application of section 209 of the Penal Code, Cap 244 … *In this regard, the Public Prosecutor therefore considers that it is in the public interest to clarify the ambit and application of section 209 of the Penal Code*. [emphasis

added]

72 In my view, given the above circumstances and reasons, the fact of delay here is not a material consideration. This is especially since the Public Prosecutor himself has raised questions of law of public interest because s 60 of the SCJA deems those questions to be in the public interest. When an application for an extension of time is made by the Public Prosecutor to raise questions of public interest, in the absence of any unexplainable delay that may have caused prejudice to any party, the Court of Appeal would ordinarily be slow to dismiss the application. Ordinarily, it will be its duty to answer questions raised by the Public Prosecutor.

The significance of the points of law alluded to

73 I will now consider the substance of the parties' applications. The present case is unique in a number of ways. This is the first case in Singapore involving a prosecution pursuant to s 209 of the PC. Further, BMS is being charged for abetting the making of a false claim in advising, in his capacity as the solicitor, his client to file the SOC. As far as I am aware, there are no reported cases in any other relevant jurisdiction where a solicitor has been charged with the offence of abetting a client in the making of a false claim. Therefore, I can see some force in Mr Wong's submission that the profession requires further clarification in relation to s 209 of the PC on the scope of a solicitor's duties in preparing pleadings and the extent of his or her duties when taking and acting on instructions.

74 BMS vigorously maintained that he believed and accepted his client's version of events, and that until the first appointment at the HDB, the Sellers were not privy to the cash-back arrangement (see [8] above). The District Judge stated that BMS ought to have taken additional steps to verify his client's instructions (*DC GD* at [184]–[185]). The HC Judge, however, did not rely on such a finding in upholding the conviction. The Law Society and Mr Hwang (whom, I understand, was not involved in the Law Society's participation before this Court), not surprisingly, have taken issue with the District Judge's observations, in particular. In my view, it is certainly questionable whether BMS ought to have verified his clients' instructions simply because he was aware that the Buyers and the Agents had a diametrically-opposing version of events (see [20] above). How was he to ascertain who was telling the truth? Was that his role?

75 In *Wee Soon Kim Anthony v Law Society of Singapore* [1988] SLR 510, Chan Sek Keong JC held that there is no legal duty on the part of a solicitor to verify the instructions of his client "unless he himself has personal knowledge of the matter or unless his client's statements are inherently incredible or logically impossible" (at 515, [21]). Solicitors frequently find themselves in a position where they are confronted with opposing versions of events, but should be allowed to act on their client's instructions even in the face of conflicting evidence, unless the instructions received fly in the face of incontrovertible evidence or documents. As Lord Halsbury sagely observed more than a hundred years ago, "Very little experience of courts of justice would convince any one that improbable stories are very often true notwithstanding their improbability." (see Showell Rogers, "The Ethics of Advocacy" (1889) 15 LQR 259 at 265). The solicitor should not create or act as a pre-trial sieve that a client's instructions must pass through as he or she is not a fact-finder. The lower courts' decisions may indeed have inadvertently, as the Law Society and Mr Hwang suggest, sowed some seeds of doubt on two crucial aspects of a solicitor's duty:

(a) *When there is a factual controversy, can a solicitor rely exclusively on his client's version of events in prosecuting a claim or defence?; and*

(b) *What is the extent of a solicitor's duty of verification, if any, in the absence of*

incontrovertible evidence that entirely undermines his client's instructions?

On the facts of the case, the precise communications between Koh and BMS would assume enormous significance. I say no more for now.

76 It was also argued that if the offence under s 209 of the PC is not clearly defined by the court, any person (who may not be legally represented) and/or his solicitor who makes a general claim in court by pleading material facts in his favour (without mention of adverse facts) may find that he has committed the offence. If this is the case, there is a plausible argument that it is in the public interest that such questions are raised as they relate to a possible "chilling" effect on access to justice. A claimant who seeks redress in a court of law may also find himself being punished by the law for doing so and his solicitor may find himself punished by the law for abetting his client. A possible consequence that may arise is that solicitors may decline to act in disputes if their client's assertions and/or claims are not supported by unequivocal objective evidence. This may, in particular, have an unintended consequence in relation to access to justice for parties in cases where the outcome of a matter depends solely on the witnesses' credibility. Indeed, given that the Prosecution now accepts that "*it is in the public interest to clarify the ambit and application of s 209 of the Penal Code*" [emphasis added] (see above at [71]) despite having taken a contrary position before the HC Judge, it would be difficult for me to now say that no questions of public interest are involved, though I stress that I am not making such a determination here.

77 Further, I am constrained to observe that the District Judge had relied solely on one dated Indian case to support his interpretation on the element of falsity under s 209 of the PC. Unfortunately, both the lower courts and counsel did not previously adequately consider the genesis of s 209 of the PC and the mischief it was intended to address. A modicum of legal archaeology would have revealed a number of pertinent matters. First, a reference to the authoritative commentary on the Indian Penal Code by its architect, Lord Macaulay, would have revealed that the Penal Code Drafting Committee had made the following important observations in relation to s 209 of the PC (T B Macaulay, *Indian Penal Code* vol II (Longmans Green & Co, Albany Ed) at pp 97–100):

> *We think this is the proper place to notice an offence which bears a close affinity to that of giving false evidence, and which we leave for the present unpunished, only on account of the defective state of the existing law of procedure, — we mean the crime of deliberately and knowingly asserting falsehoods in pleading*. Our opinions on this subject may startle persons accustomed to that boundless license which the English law allows to mendacity in suitors. On what principle that license is allowed we must confess ourselves unable to discover. …
>
> It appears to us that all the marks which indicate that an act is a proper subject for legal punishment meet in the act of false pleading. That false pleading always does some harm is plain. Even when it is not followed up by false evidence it always delays justice. That false pleading produces any compensating good to atone for this harm has never, as far as we know, been even alleged. That false pleading will be more common if it is unpunished than if it is punished appears as certain as that rape, theft, embezzlement, would, if unpunished, be more common than they now are. It is evident also that there will be no more difficulty in trying a charge of false pleading than in trying a charge of false evidence. …*Whether the accused person knew that he was pleading falsely, the Courts will determine on the same evidence on which they now determine whether a witness knew that he was giving false testimony*.
>
> …
>
> *We consider a law for punishing false pleading as indispensably necessary to the expeditious and*

satisfactory administration of justice, and we trust that the passing of such a law will speedily follow the appearance of the code of procedure. We do not, as we have stated, at present propose such a law, because, while the system of pleading remains unaltered in the Courts of this country, and particularly in the Courts established by Royal Charter, it will be difficult, or to speak more properly, impossible to enforce such a law. We have, therefore, gone no further than to provide a punishment for the frivolous and vexatious instituting of civil suits, a practice which, even while the existing systems of procedure remain unaltered, may, without any inconvenience, be made an offence. The law on the subject of false evidence will, as it appears to us, render unnecessary any law for punishing the frivolous and vexatious preferring of criminal charges.

[emphasis added]

There are a few interesting points to note here: The Committee acknowledged that it was creating a new offence that had no English equivalent. It then suggested that the offence "for punishing false pleadings' should only become law once the Indian rules of civil procedure were overhauled. Further, the evidence to be relied on to establish such an offence ought to be similar to that required to establish the offence of giving false testimony in court.

78 I should also note, from the Indian Law Commission Report in 1837 (*A Penal Code*, prepared by the Indian Law Commissioners and published by command of the Governor General of India in Council, 14 October 1837 (Calcutta, Bengal Military Orphan Press, 1837) (a reprint of the Calcutta edition is published by The Lawbook Exchange, Ltd, 2002)), that there were very peculiar reasons for the English colonialists to have created this peculiar offence. A fundamental reason was the perceived lack of morality in the local population resulting in claims or defences with entirely no factual foundations being maintained in court. One may rightly ask how relevant some of these considerations should be in interpreting s 209 of the PC in Singapore today. In addition, some of the illustrations given there are highly instructive in indicating the mischief the provision was intended to address. I think it will be helpful to reproduce some of the relevant passages here (at p 41):

In countries in which the standard of morality is high, direct evidence is generally considered as the best evidence. In England assuredly it is so considered, and its value as compared with the value of circumstantial evidence is perhaps overrated by the great majority of the population. *But in India we have reason to believe that the case is different. A Judge, after he has heard a transaction related in the same manner by several persons who declare themselves to be eye-witnesses of it, and of whom he knows no harm, often feels a considerable doubt whether the whole from beginning to end be not a fiction, and is glad to meet with some circumstance, however slight, which supports the story, and which is not likely to have been devised for the purpose of supporting the story*. [emphasis added]

The Law Commission Report goes on to observe (at p 43):

We think this is the proper place to notice an offence which bears a close affinity to that of giving false evidence, and which we leave, for the present, unpunished, only on account of the defective state of the existing law of procedure. We mean the crime of deliberately and knowingly asserting falsehoods in pleading. Our opinions on this subject may startle persons accustomed to that boundless licence which the English law allows to mendacity in suitors. On what principle that licence is allowed, we must confess ourselves unable to discover. *A lends Z money. Z repays it. A brings an action against Z for the money, and affirms in his declaration that he lent the money, and has never been repaid. On the trial A's receipt is produced. It is not doubted, A himself cannot deny, that he asserted a falsehood in his declaration. Ought A to enjoy impunity?*

Again: Z brings an action against A for a debt which is really due. A's plea is a positive averment that he owes Z nothing. The case comes to trial; and it is proved by overwhelming evidence that the debt is a just debt. A does not even attempt a defence. Ought A in this case to enjoy impunity? If, in either of the cases which we have stated, A were to suborn witnesses to support the lie which he has put on the pleadings, every one of these witnesses, as well as A himself, would be liable to severe punishment. But false evidence in the vast majority of cases springs out of false pleading, and would be almost entirely banished from the Courts if false pleading could be prevented. [emphasis added]

79 Second, there appear to be a number of differences in the civil procedure regimes in Singapore today and India then. This may have a bearing on how s 209 of the PC should be interpreted in Singapore. These include: (a) radical differences between the civil pleading systems in India when s 209 of the PC came into force and the framework currently prescribed by the Rules of Court (Cap 322, R 5, 2006 Rev Ed) in Singapore; (b) different verification procedures for civil claims (in India, pleadings had to be verified on oath when s 209 was passed, but not so in Singapore); and (c) the fact that there did not appear to be any provision in India, when s 209 of the Indian Penal Code came into force, requiring or allowing a claimant to file a reply, whereas in Singapore, a claimant need not invariably anticipate the contents of a defence and may opt to reserve appropriate material facts or even legal points, for inclusion in a reply. Further, it is also not insignificant that the procedures to initiate a prosecution under s 209 of the PC in India and Singapore are very different. In India, unlike Singapore, it is the court that decides whether a prosecution under s 209 of the Indian Penal Code ought to be sanctioned, in the first instance.

80 I am also puzzled why both the District Judge and the HC Judge relied so extensively (see above at [15] and [19(c)] respectively) on *dicta* attributed to the antiquated Indian case of *Bulaki Ram* (a decision of a single judge) *as selectively excerpted* in *Ratanlal & Dhirajlal's Law of Crimes* (Bharat Law House, 23rd Ed, 1987) at p 746 (*in pari materia* with its previous editions). It is unlikely that either of the judges below had sight of the relevant law report as neither the Prosecution nor counsel for BMS had provided it for the courts' attention (though it would be apposite, in fairness to all the parties involved, to note that this case report could not be obtained from local libraries). It is also noteworthy that the Indian legal authorities or commentaries do not speak with one voice on this issue of the degree of falsity required for a claim to be "false" within the meaning of s 209. In *Ramnandan Prasad Narayan Singh v Public Prosecutor* (1921) 22 Cr LJ 467, for example, the court opined (*obiter*) that the fact that the plaintiff had "over-estimated his case and even may have claimed more than what was his legal due" did not necessarily mean that the plaintiff was making a false claim (at 472). In addition, I note with interest that another leading Indian treatise, Hari Singh Gour, *The Penal Law Of India* vol II (Law Publishers (India) Pvt Ltd, 11th Ed, 2000) does not place the same emphasis on *Bulaki Ram* and appears to takes a more restrained view on the ambit of s 209 of the PC. In particular, it remarks that (at pp 1866–1867):

> This section [s 209] does not strike at perjured evidence, but faked up claims. *If it is a false claim, the debtor may have his remedy elsewhere, but not under this section. It is not necessary under this section that the whole of the claim be false [citing Bulaki Ram]. Nor is a claim false because it is exaggerated, nor indeed, because some inconsiderable portion of it is wholly false. If a claim is in the main and substantially false, it is then a false claim within the meaning of this section* [s 209].
>
> Again, the mere making of false claim is not an offence. It must be made with the knowledge that it is a false claim. It must be shown that the claim was false and the accused knew it at the time he made it. Knowledge cannot be inferred from mere falsehood, though the fact that a claim was false may reasonably raise an inference that the claimant might and ought to have been aware of

it. Sometimes the question is one which may exercise the most trained intellect. At other times, it is one upon which there may be no room for a reasonable doubt. ***It may be, however, safely laid down that where a claim depends upon a question of law or upon the validity of a custom having the force of law, and not upon a question of fact, it will generally be found to be impossible to establish the charge, and it is a case in which the Court might well exercise its discretion against prosecution***. **The word "make" is not necessary restricted only to the plaintiff. If the *principal* was equally aware of the false claim, he would then be equally liable, for criminal liability under this section depends upon knowledge and the presence of intention**. Where a person knowingly makes a false claim, and for that purpose, falsely verifies that plaint, he can only be convicted of one or the other, but not of both. And since false verification was necessary to launch a false claim this is the only section appropriate to such a case. It must be made with the object specified in the section.

[Emphasis added in italics, bold italics and bold]

I note that BMS's defence in the courts below was two-fold. First, he argued that he was entitled to accept and act on the version of events given to him by Koh. Second, he was, *as a matter of law*, entitled to claim the higher sum notwithstanding the illegality tainting the cash-back arrangement. The judges below did not appear to consider the second point adequately.

81 When this Court queried the Prosecution why they had relied primarily on *Bulaki Ram* to interpret s 209 of the PC, without perusing the actual law report, Ms Jennifer Marie, who appeared for the Prosecution, candidly acknowledged that this was not good practice. I agree. Neither counsel nor a court should rely on judicial *dicta* without perusing and considering the context in which such judicial views have been made. This is especially so if it involves a point that takes centre stage in the proceedings. One can never be sure whether there may have been peculiar considerations, legal or otherwise, that influenced the *dicta*, or whether those observations were made purely in the context of the peculiar issue or type of facts before that court. Alternatively, the weight placed on that authority may turn out to be misplaced if the court has merely made those remarks *casually or* without proper deliberation or reference to authority.

82 After noting this Court's observations made during the hearing, the Prosecution helpfully sent us a copy of the entire decision of *Bulaki Ram*. Upon perusing it, I note that is a rather *brief* decision of a single judge made without reference to any authority. In addition, the issue decided there was not whether the petitioner was guilty of an offence under s 209, but whether a prosecution under s 209 could be *maintained*. For completeness, and considering the reliance placed by the lower courts on this decision, I will now reproduce the decision in full:

Straight J,— I am of opinion that this application must be refused. *The petitioner brought a suit against another person to recover from that person a sum of Rs. 88-11, and in his plaint he alleged that the whole of that amount was due and owing from the defendant. In the course of the proceedings the defendant produced a receipt purporting to have been made by the plaintiff for a sum of Rs. 71-3-3. Both the Courts of first instance and the appellate Court which subsequently heard the appeal, were of opinion that the defendant satisfactorily established that he had paid to the plaintiff the sum of Rs. 71-3-3, and that to that extent the claim of the plaintiff was an untrue and unjust one, and accordingly his suit was dismissed to that extent, and the decree given him for the balance*. The Munsif, who tried the case, had an application made to him for sanction for prosecution of this plaint for false verification of plaint and also for dishonestly and fraudulently making a false claim, and he sanctioned, prosecution under both sanctions. The learned Judge in appeal, for reasons which are stated in his judgment, and which I need not discuss, considers it unnecessary that the prosecution should be maintained under

s. 198, but he affirms the sanction under s. 209 of the Indian Penal Code.

The contention urged before me on behalf of the petitioner against that order is first, that s. 209 of the Indian Penal Code has no application to the facts of the case, and secondly, that taking all the circumstances together there is no case in respect of which it is likely a conviction can be sustained. ***I think it enough, with the exception of one remark I shall have to make, to say that I am not trying, nor am I deciding upon the guilt or otherwise of the person to be prosecuted***. *I have to determine whether in my opinion there is* prima facie *material to warrant the institution of his prosecution. How that prosecution will proceed or what effect the evidence when produced to support it will have I am unable to say, but there is sufficient* prima facie *material to warrant prosecution*. Mr *Amiruddin* has contended that because a part of the petitioner's claim was held to be well founded and due and owing, therefore his conduct and action does not fall within s. 209 of the Indian Penal Code, and he says that section contemplates that the whole claim and every piece of it must be false. I entirely dissent from this view. As I put an illustration in the course of argument, so I do now, that if that view were adopted, a man having a just claim against another for Rs. 5, may make claim for Rs. 1,000, the Rs. 995 being absolutely false, and he may escape punishment under this section. The law never intended anything so absurd. These provisions were made by those who framed this most admirable Code, which I wish we had in England, with full knowledge that this was a class of offences very common in this country*. We who sit in this Bench and try civil cases know that this is so, and that most dishonest claims are made by persons who thinking to place a judgment-debtor in difficulty, repeat claims against him which are satisfied*. I am, however, not trying this case or expressing any opinion as to the petitioner's guilt. If he is convicted, he will be able to appeal and have his case decided by a competent Court. The application is refused.

[emphasis added in italics and bold italics]

I consider it significant that Straight J's observations were made in the context of a matter where a claim had been pursued despite an earlier payment of a substantial portion of that alleged debt. This situation bears an uncanny resemblance to the illustration given by the Law Commissioners in their Report (reproduced at [78] above), but can be quite different from the present matrix. Further, I note that the HC Judge had concluded that in the light of the decision in *Bulaki Ram*, BMS could not argue that the Sellers had no duty to raise a potential defence for the Buyers, and that it was for the Buyers to raise any such defence (*HC GD* at [52], referred to at [19(c)] above). Having perused the actual decision, it is not clear to me as to how this particular proposition could be divined from *Bulaki Ram*. However, since it is not necessary for this Court to decide on the merits of the appeal, I need not express my view on whether *Bulaki Ram* (as excerpted) was rightly decided or otherwise.

83 Further, to succeed under s 209 of the PC, the Prosecution must prove that the claim was filed *dishonestly* (see *DC GD* at [145] and *HC GD* at [34]). Section 24 of the PC defines "dishonesty" as doing anything "with the intention of causing wrongful gain to one person, or wrongful loss to another person". Section 23 of the PC sets out what "wrongful gain" and "wrongful loss" refer to, as follow:

"Wrongful gain" and "wrongful loss"

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining it is not legally entitled; "wrongful loss" is loss by unlawful means of property to which the person losing it is legally entitled.

Explanation.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is

wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

What level of dishonesty had to be established in order to find BMS liable? The District Judge did not expressly consider this issue of dishonesty, except to say that the claim was a "false claim dishonestly made in Court" because there was nothing to show that the claim could be made in law or by custom (*DC GD* at [241]). The HC Judge took the view that the Prosecution had to prove that *BMS knew* Koh was dishonestly making a false claim. He held that BMS had aided Koh in pursuing a false claim dishonestly, because they (BMS and Koh) knew that the Buyers would be pressured into settling, and therefore, the false claim would cause wrongful loss to the Buyers (by claiming the additional $100,000) and wrongful gain to the Sellers, under ss 23 and 24 of the PC (*HC GD* at [69]). During the course of hearing, Mr Wong took issue with that characterisation of dishonesty, pegged to ss 23 and 24 of the PC, and questioned how the filing of a claim based on a written contract could ever be considered to be dishonest or unlawful. If the HC Judge's decision was correct, Mr Wong expressed concern that solicitors, by filing pleadings, could be taking on the risk of knowingly assisting their clients to cause a wrongful loss or gain. On the other hand, by not pleading the written contract, the solicitor could be said to be negligent. Therefore, Mr Wong argued that a specific finding on the element of dishonesty ought to have been made. I can see some force in Mr Wong's argument for now. If a solicitor files a claim, which causes the opposing party some loss and/or his client some gain, would the solicitor have acted dishonestly within the meaning of the PC if it is ultimately held that the claim was misconceived? In my view, an authoritative ruling on this issue is clearly one of public interest, given its potential impact on the legal profession and, more pertinently, the general public.

84 In the final analysis, it seems to me clear that this case has raised a number of questions of law that may be of public interest, given its potential impact (especially) on the duties and the role of solicitors in enforcing their clients' claims. In any event, the Prosecution's application now makes this aspect of BMS's application rather moot. For CM 30/2009, given that s 60(5) of the SCJA deems the Public Prosecutor's questions to be of public interest, there is no need for me to assess the application. On balance, weighing the relevant factors for assessing an application (see [29] above), I think that an extension of time ought to be granted to both the Prosecution and BMS, especially in the light of the exceptional circumstances that have arisen (see [73]–[83] above). I should add, as an aside, that there can be little doubt that if this Court takes a different view from the courts below on how s 209 of the PC should be construed and applied in Singapore, BMS's conviction may no longer be safe.

The questions of law on which leave to apply to the High Court is given

85 It appears to me that the Prosecution has opted to frame the questions of law it wishes to refer to us rather vaguely. However, in its response to the objections raised by BMS and the Law Society, the Prosecution maintains that the two questions it has framed would include a number of sub-issues, namely:[note: 26]

(a) When a solicitor is charged as abettor under s 209, is it necessary for the factual element of dishonesty of the client to be proved as a fact or can it be presumed under s 24?

(b) When is a "claim" made under s 209 of the PC since our system of pleadings provide for a reply to be made?

(c) Is a "false claim" made if the claim is for damages to be assessed and the known falsehood relates to the quantum of the claim and does not affect the question of liability?

(d) Can a "claim" be false for the purposes of s 209 if the claim is settled by the parties to the action?

(e) Is it limited to situations where he [the solicitor] has actual or Nelsonian knowledge of the falsity of the claim?

86 I am not entirely convinced that the Prosecution's two questions can embrace all the sub-issues it has identified above or the points that I have raised above (see [73]–[83] above) but in the light of the above concessions by the Prosecution about the scope of their questions, these reservations can be safely put aside. On the other hand, BMS has taken a not altogether dissimilar kitchen-sink approach from his earlier application (see [22] above) to raise all manner of variegated issues. In fairness to the HC Judge, I should say that I am not at all surprised that he rejected BMS's first application, given the way those questions were originally framed. That said, I do not think it would be a productive use of judicial time to also analyse each of the present questions posed by BMS and explain why they have fallen short of the threshold under s 60(1) of the SCJA. It is clear to me that the questions BMS has posed do not relate to or clearly elucidate the public interest elements he has sought to raise, as described above (at [73]–[83]). As such, I think it would be preferable, given that there is now finally some common ground between the parties on the real issues that require this Court's attention, to reframe the questions he has attempted to pose. I would accordingly exercise the Court of Appeal's broad discretion (within the confines of s 60) to reframe all the proposed questions (see above at [38]). This is to ensure that the parties will be focused on comprehensively addressing all the pertinent issues if and when the matter is heard by this Court.

87 In the result, I would allow an extension of time for both the Prosecution and BMS to apply to the HC Judge for leave to raise, to the Court of Appeal, questions, pursuant to s 60(2) of the SCJA. The Public Prosecutor has leave to file the questions he has framed and BMS has leave to file the following restated questions of law of public interest:

(a) Section 209 of the Penal Code (Cap 224, 1985 Rev Ed) makes it an offence for a person to (i) **dishonestly** (ii) **make** (iii) **before a court of justice** (iv) a **claim** which he (v) **knows** to be (vi) **false**. *What is the meaning of each these words and the cumulative purport of this provision in the Singapore context?*

(*Observation*: The meaning of each of the words in bold needs to be interpreted in the context of the mischief that s 209 of the PC seeks to remedy. Accordingly, there are six questions of law arising from this section. Each of the words individually will not raise a question of public interest, but read together in constituting the offence of making a false claim under s 209 of the PC, they are collectively of public interest.)

(b) The following questions of law have arisen in relation to the role of the solicitor who files pleadings in a court:

(i) In what circumstances would a solicitor be held to have acted dishonestly (causing wrongful gain or wrongful loss, as defined in s 24 of the Penal Code (Cap 224, 1985 Rev Ed)) since if he obtains judgment for a client in an action for payment of a debt or for damages, it is bound to cause a loss to the defendant. When is the gain or loss wrongful or unlawful for this purpose?

(ii) In what circumstances is the offence committed: at the point of the filing of the statement of claim or defence in court?

(iii) Can a claim before a court ever be held as false if the defendant settles the claim in whole or in part before the claim is tried in court, or if the defendant submits to judgment to the whole or part of the claim?

(iv) In what circumstances ought a solicitor decline to accept and/or doubt his client's instructions before filing pleadings considering that a solicitor has no general duty imposed on him to verify his client's instructions?

(*Observation*: When s 209 is read with s 109 in its application to a solicitor, the public interest in the certainty of the law under s 209 is reinforced as it affects the role of the solicitor in acting for clients who seek to enforce their legal rights before a court of law.)

88 The parties are to make their applications to the HC Judge within seven days. The Registry of the Supreme Court is to fix urgent dates for the hearing of this application and further consequential hearings arising from the application(s). In the meantime, BMS's bail is to be extended on the same terms until further order from this Court or the High Court.

Choo Han Teck J:

89 The facts leading to this application are comprehensively set out in the judgment by V K Rajah JA representing the majority view and I would adopt the terms used there. The application started as an appeal against the HC Judge's refusal of BMS's application to reserve a point of law of public interest to the Court of Appeal under s 60 of the SCJA. A concurrent application was made by BMS to the Court of Appeal to set aside the HC Judge's refusal to grant him leave. That was CM 14/2009. It was only in the course of arguments that Mr Michael Hwang SC, counsel for BMS, applied for an extension of time from this Court for him to make a fresh application (to refer a question of law of public interest) before the HC Judge. The majority, V K Rajah JA and Andrew Phang Boon Leong JA, would allow BMS the extension of time sought. It is not necessary for me to express any opinion on the merits of BMS's appeal before the HC Judge because this application before us was for (or has become) an extension of time for him to make another application before the HC Judge.

90 I am unable to concur fully with the majority decision on BMS's application on two main points. The first concerns the question whether an accused person can make more than one application under s 60 of the SCJA. In my view, the context of the provision does not incline to the accused having a right to make multiple or repeated applications under s 60. If a fresh question arises after the original question had been posed, the applicant can ask for the two to be consolidated or heard together. In the ordinary use of the words, "may on the application of any party … reserve for the decision of the Court of Appeal" in that section comes after "When a criminal matter has been determined by the High Court" and that suggests to me that the application can only be made once. On this ground I am of the view, therefore, that an extension of time should not be given in cases where the applicant had already made one application. I agree with the views expressed by the UK Court of Appeal in *Ashdown*. The power to grant an extension of time is conferred to the Court of Appeal to be exercised, in my view, in cases where the applicant had not made an application and was out of time – as was the case here in regard to the Public Prosecutor's application for an extension of time.

91 Secondly, I am of the view that an extension of time should not be granted in this case. The proposed second application to the HC Judge involves virtually the same question of law that the HC Judge dismissed. Furthermore, in my humble opinion, the question is not a question of law of public interest. In any event, I agree entirely with the majority that the decision whether to reserve the question to this Court lies in the absolute discretion of the High Court, whose decision is final. One

must be mindful that there is a clear distinction between an appeal and a reference on a question of law of public interest under s 60. The point was made during the Second Reading of the Supreme Court of Judicature (Amendment) Bill of 1993 by Prof Jayakumar, who said (*Singapore Parliamentary Debates, Official Report* (12 April 1993) vol 61 at col 116 (Prof S Jayakumar, Minister for Law)):

> The general legislative policy must, of course, be that there is a finality of decisions. Therefore, the law provides that there should be no appeal from a decision of the High Court in its appellate criminal jurisdiction.

The legislative enactment was intended to end appeals in criminal matters in the High Court. To that end, there is no appeal against a refusal by the High Court to grant leave on an application by the accused, otherwise the legislative intent in s 60 would be lost; and further, the narrower the question posed under a s 60 application, the more it resembles an appeal. Parliament, however, ensured that points of law of public interest would not be excluded from having the consideration of the then Court of Criminal Appeal by the provision in s 60. The Legislature made it clear that it was not any question of law that ought to occupy this Court's time, but a question of law of public interest. The guardians of what amounts to such a question of law are the High Court and the Public Prosecutor. Parliament in its wisdom seemed to be satisfied that this would adequately ensure that justice was done and, at the same time, provide the point of finality to appeals. Counsel for BMS thus initially proceeded to appeal against the refusal to grant leave by the HC Judge and, at the same time, applied concurrently to set aside the HC Judge's refusal to reserve a question of law to the Court of Appeal. It seemed clear then that unless the HC Judge's refusal was set aside, BMS could not make another application under s 60(1). The idea of making a second application arose only at the hearing of the initial applications, and thus the question of an extension of time became necessary because BMS was out of time if he were to file an application then.

92 In my opinion, BMS does not satisfy the requirement that only a question of law of public interest may be reserved for the determination of the Court of Appeal. A question of law under s 60 of the SCJA differs from a question of law *simpliciter* in that however interesting or important the question of law might be, it will not be reserved for the determination of the Court of Appeal if it does not satisfy the public interest requirement. In a general sense, almost all questions of law can be said to be of public interest, especially laws which have to be applied by the lower courts; but this aspect of public interest is not, in my view, the kind that the Legislature intended. Just because a High Court had interpreted a criminal provision in a way which some other court might disagree with does not make the interpretation of that law a question of law of public interest unless the Public Prosecutor thinks so, or, if there was a subsequent decision to the contrary by a court of concurrent jurisdiction (*ie*, another High Court). It might also be a question of public interest if, unless overruled or clarified, it renders the work of lawyers, prosecutors, or investigative bodies impossible. None of this can be said to apply presently in so far as BMS's application is concerned. I shall explain.

93 Mr Wong Meng Meng SC, counsel for the Law Society, argued that the question of law was of public interest because it affects lawyers. He submitted thus:

> [T]his Court should find that the presumption of dishonesty under section 24 of the Penal Code cannot be applicable in situations where the gain or loss flows from a writ which was properly filed in accordance with the law, even if the writ contains a false claim. Such a finding will not prejudice the aggrieved party as there are sufficient avenues, including striking out the false claim, by which the aggrieved party can seek redress.

The above passage from counsel's submission covers the only pertinent question that could possibly be of public interest, namely, whether s 209 is so anachronistic that it should not apply to claims filed

in the civil court. However, if that were the question, it is not one that the courts can answer. The amendment of a statutory provision to such an extent is the work of the Legislature. The Public Prosecutor as Attorney-General may recommend the removal or amendment of that provision to the Government. So long as s 209 of the PC remains in force, a person who makes a false claim in court is liable to be prosecuted under it. The Public Prosecutor decides whether he has sufficient evidence to charge the accused. The trial judge decides if that evidence sufficiently proves the element of dishonesty required for a conviction. The issue arising from this application before us is, in my view, one that is really an issue on a finding of fact (*ie*, whether BMS's client had made a false claim; and whether BMS had knowingly assisted him) and the application of law (whether the knowledge of BMS and his client amounted to "dishonesty" as defined in the PC). It is not a question of law, let alone a question of law of public interest. All the concerns that were raised – that claimants might be inhibited from suing and lawyers from acting, are, in my humble opinion, unwarranted. Hence, regardless of what *Bulaki Ram* signified, the trial judge in a s 209 trial has to evaluate the evidence and determine beyond reasonable doubt that the criminal intent has been proved, and separate the criminal from the greedy, the incompetent, and the innocent but erring, claimant. The HC Judge did not think that the case should cause concern to lawyers, and I am inclined to agree with him. They are not liable because a claim they filed for their client turned out to be false. They are liable only when they filed a claim knowing that it was false.

94 A question of law of public interest must, to be useful, be one to which the answer is as broad as possible so that it covers the wide net of public interest. The narrower it is, the less the public would be interested. The questions (although s 60 envisaged only "a question") of law as originally posed on behalf of BMS were so narrow that they could only be of interest to BMS alone. That those questions were rejected by the HC Judge is, in my view, unsurprising. None of the questions of law before us were different in substance from those raised before the District Judge and the HC Judge. The issues in law and on fact were clear and unambiguous then, and I think they still are. I therefore differ in my view on this point with the majority because I am of the opinion that the questions to be put before the HC Judge are the same questions as before, but now in different words, and apart from my view that the law does not allow it, it would be an abuse of process to make a second application recasting the same questions in different words. Furthermore, but for the fact that s 60(5) of the SCJA provides that any question of law asked by the Public Prosecutor would be deemed a question of public interest, I would also be of the view that the questions presently worded, were also not of public interest. The way the question of law of public interest is worded is important because that would be the question this Court has to answer. Although the Court of Appeal is empowered to amend the questions, the Court cannot answer a different question or a question that was not posed. Ironically, the only possible question of law of public interest was the one raised by Mr Wong cited above, but that was not the question that was being sought to be placed before the HC Judge.

95 For the reasons above, I would not allow the application by BMS for an extension of time to put a fresh question of law to the High Court.

Andrew Phang Boon Leong JA:

96 I note that there is a sharp difference in views between my brother judges in so far as the application by BMS for an extension of time to apply to the HC Judge for leave to raise, to the Court of Appeal, questions pursuant to s 60(2) of the SCJA ("s 60(2)") is concerned. V K Rajah JA would allow BMS's application in the terms set out above (at [87]), whereas Choo Han Teck J would not on the basis that an extension of time should not be given where (as here) the applicant had already made an unsuccessful application. Further, Choo J is of the view that no question of law of public interest has arisen in any event, notwithstanding the fact that the Public Prosecutor has now changed his mind. Having perused both judgments closely, I agree with Rajah JA for the reasons he

sets out in his judgment as well as for the brief reasons I set out below.

97 A significant point of practice, in fact, arises in the present appeal. Stripped to its bare essentials, it is this: Whether, assuming that there has been no abuse of process and a question of public interest appears to have been made out, the Court of Appeal can (pursuant to s 60(2)) entertain an application by the accused for an extension of time to make a further application to the High Court judge concerned under s 60(1) of the SCJA ("s 60(1)"). Rajah JA has answered this question in the affirmative subject to the safeguards he has identified, whereas Choo J disagrees. Choo J is of the view that an extension of time should not be given in any matter where the applicant has already made one unsuccessful application. As already mentioned, I agree with Rajah JA, but, because this is an important point of practice, I would like – in the briefest of terms – to emphasise the broader underpinnings which justify the approach that he has adopted.

98 It is clear that an accused who has been convicted in the Subordinate Courts has, in the normal course of events, no right of legal recourse beyond an appeal to the High Court. There are sound policy grounds for adopting this approach (as set out by Rajah JA and Choo J in their respective judgments). However, s 60(1) permits the reference of a question of law of public interest by the High Court judge, provided the decision on this question has affected the outcome of the case against the accused. As Rajah JA has observed, s 60(1) strikes a balance between the need for finality and the need to ensure that justice is done in all cases (see, generally, above at [26]–[32]). In particular, the focus that Parliament has laid down in requiring (in that provision) that there must be a "question of *law of public interest* which has arisen in the matter" [emphasis added] suggests, in my view, the following:

(a) Where there might have been an erroneous principle of *law* which has arisen in the proceedings concerned, the perpetuation of which will cause injustice not only to the accused in the case at hand but also *other accused* in *future like cases*, there is a need for the Court of Appeal to correct that error. I note, however, that it is *not* just *any* question of law that will attract the reference under s 60(1); it *must* be one "of *public interest*" [emphasis added]. This is crucial: If, in other words, there might be an important principle of *law* that is not merely esoteric but would also (on the contrary) potentially cause injustice on a broader public level, then the "public interest" requires that principle to be considered by the highest appellate court. Put simply, this policy perspective is one that relates to "justice for the *public*". Let me term this "*Principle (a)*". As shall be seen in a moment, it is perhaps of even greater importance than the second policy perspective (set out in (b) below).

(b) Where an accused might have been convicted on an erroneous principle of *law*, it is just and fair to him or her that a further opportunity be given to redress the situation. Hence, there is the further requirement, in s 60(1), that "the determination of [the question of law concerned] by the [High Court] Judge has affected the case". If it were otherwise (*viz*, if a consideration by the Court of Appeal would make no difference to the conviction concerned), then no injustice has resulted to the accused and, indeed, the Court of Appeal should not be required to act in vain. Viewed from a broader policy perspective, what I have said here thus far relates to "justice for the *individual*". Let me term this "*Principle (b)*".

99 One will note immediately that *Principle (a)* and *Principle (b)*, whilst reflecting somewhat different policy concerns, are, in point of fact, *cumulative requirements* before there can be a successful reference pursuant to s 60(1) (see s 60(1) itself as well as above at [29]). Whilst I have suggested that *Principle (a)* is probably relatively more important than *Principle (b)*, they nevertheless operate in an *integrated and holistic* fashion. Whist the accused's focus in a given case will almost invariably (and, understandably) be on *Principle (b)*, he or she must first satisfy the threshold

requirements that are undergirded by *Principle (a)*.

100 At this juncture, if the accused has attempted (and failed) to satisfy the requirements under s 60(1), is that an end to the matter? What if he or she has failed to frame the questions concerned in the appropriate manner, thus resulting in the rejection of the initial application? Can the accused then file a second application to *the High Court judge*? Consistent with the views expressed by Rajah JA above (at [57]) in general and *Ashdown* in particular, it would appear that repeated applications to the High Court judge might well amount to an abuse of process. *However*, this is *not* the situation before the court in the present proceedings, which relates, instead, to an application to *the Court of Appeal* under s 60(2) for *an extension of time* to file a second application to the HC Judge.

101 At this juncture, the question arises as to whether or not, by allowing for the possibility of an extension of time, this Court is nevertheless allowing the accused to do by the "backdoor" what he or she could not do by the "front". Put simply, if the accused is not generally permitted to make repeated applications to the High Court judge because this might well constitute an abuse of process of the court, would the possible grant of an extension of time by *this* Court *indirectly* permit the accused to make repeated applications to the High Court judge? This is a very valid question and, in order to answer it, this Court must, in my view, return to the language as well as spirit of s 60(2) itself, which reads as follows:

> An application under subsection (1) shall be made within one month *or such longer time as the Court of Appeal may permit of the determination of the matter* to which it relates and in the case of an application by the Public Prosecutor shall be made by him or with his written consent. [emphasis added]

102 Although Choo J is of the view that the language of s 60(1) did not permit an extension of time to be given in cases where the applicant had already made one application (see above at [90]), the focus ought (as I have mentioned) to be on s 60(2), read (of course) together with s 60(1). Viewed in that particular context, I agree with the detailed reasoning of Rajah JA (see above at [55]–[56]), which justifies not taking such a restricted reading of s 60(2). Indeed, the learned judge's reasoning is consistent, in my view, with both the language *and* context of s 60 of the SCJA itself. I should add that I agree, for the reasons given by Rajah JA (above at [57]), that *Ashdown* (which is also relied upon by Choo J (see above at [90])) is not really germane to the particular issue at hand (which relates to an application to this Court pursuant to s 60*(2)*, and *not* a second application to the HC Judge). Indeed, in the UK context, what is involved is (unlike s 60(1)) "[t]he *appeal*" by the accused (or the Prosecution), although (pursuant to s 33(2) of the Criminal Appeal Act 1968 (c 19) (UK) ("the 1968 UK Act")) "a point of law *of general public importance* is involved in the decision and it appears to [the court] that the point is one that ought to be considered by [the House of Lords]" [emphasis added]. In other words, the focus in the UK appears (unlike s 60(1)) to be more on *Principle (b)* rather than *Principle (a)*. More importantly, under s 33(2) of the 1968 UK Act, if the Court of Appeal refuses leave to appeal, leave can *then* be sought from *the House of Lords itself* (and see the general procedure laid down in s 34 of the 1968 UK Act). It is not surprising, therefore, that the Court of Appeal in *Ashdown* held that only one application (for leave to appeal to the House of Lords) could be made to it and that it had no jurisdiction to hear a second application on the same. However, that still leaves to be answered the question posed above, which is whether by permitting an extension of time pursuant to an application under s 60(2), this Court is simultaneously permitting a n *indirect circumvention* of the general rule proscribing repeated applications to *the High Court judge in order to prevent a possible abuse of process of the court*. In my view, this would *not* be the case because this Court would only permit an extension of time (particularly in a situation where there has already been one unsuccessful application by the accused before the High Court judge) in an

exceptional situation where not to do so might result in an injustice to the accused (assuming, of course, that there indeed existed questions of law of "public interest" within the meaning of s 60(1) to begin with). Everything would, in the nature of things, depend on the precise facts and circumstances before this Court. What *is* clear is that *if* the accused is, in fact, *abusing the process of the court in making an application for an extension of time pursuant to s 60(2)*, this Court would not only reject the application for the extension of time but *also* impose *the appropriate sanctions, if warranted* (see also *per* Rajah JA above at [61]). *Indeed, where there has been an abuse of process of the court, the application would not subsequently reach the High Court judge to begin with*. If, however, this Court decides that a case has been made out for an extension of time pursuant to s 60(2), then there is, *ex hypothesi*, no abuse of process, although (as emphasised below at [105]), the *ultimate decision on the merits lies with the High Court judge*. The important point to note is that *the Court of Appeal will ensure that the very danger of an abuse of process that proscribes a second application directly to the High Court judge is avoided*. Indeed, in my view, that is why the Legislature has conferred on *the Court of Appeal (and it alone)* the jurisdiction and power to decide on all applications relating to an extension of time pursuant to s 60(2). In fairness, it could be argued that the fact that such jurisdiction and power was conferred on the highest appellate court in the land is not inconsistent with the argument that an extension of time cannot be granted pursuant to s 60(2) where the applicant has already made an unsuccessful application under s 60(1). However, such an argument does not take into account, *inter alia*, two important (and closely related) factors (which are, I should point out, *in addition to* the detailed textual as well as policy analysis by Rajah JA (above, especially at [55]–[61])). The first is one that has already been considered in some detail in the present paragraph, *viz*, that *the Court of Appeal* has been tasked with the decision-making process under s 60(2) in order to ensure that *there is no abuse of process if a second (or even subsequent) application is made to the High Court judge*. The second is that a second (or even subsequent) application may, in fact, be necessary in an exceptional case where injustice might otherwise result – not only to the accused but also possibly on a broader public level as well. It is to this last-mentioned factor that my attention now briefly turns.

103 Indeed, although it is (as emphasised above) likely to be exceptional, there may, in fact, be situations where the policy perspective embodied in *Principle (b)* may, in fact, justify a *second* application, assuming an extension of time is granted pursuant to s 60(2) (in my view, whilst it is not entirely impossible for there to be more than two applications, this would likely be extremely rare and might, on the contrary, constitute an abuse of process of the court instead). It would be inappropriate to try to set out exhaustively what these exceptional instances of possible injustice might be simply because this would, practically speaking, be an impossible task and, secondly, the inherent nature of such situations would make such an exercise (even assuming it is practical) an invidious one. Further, I am entirely in agreement with Rajah JA that where there is an ambiguity, the court should lean towards an interpretation that will ensure a just outcome. When that worthy principle is translated onto a broader canvas, it is clear that, quite apart from the fact that there is nothing in s 60(2) preventing an accused from making a subsequent application thereunder, the possibility of injustice resulting to an accused pursuant to *Principle (b)* argues, *a fortiori*, for that limited flexibility which confining ss 60(1) and 60(2) to a single application would shut the door against. Given the practical realities clearly outlined by Rajah JA above (at [31]), I can see no reason why the more flexible approach suggested by Rajah JA should not be adopted, especially since (as has been pointed out above) any abuse of process of the court will be visited by the appropriate and necessary sanctions.

104 Without attempting to define what exceptional cases might be considered in future to merit leave under s 60(2), I can conceive of at least two instances where this Court might give leave for a fresh application to be made to the High Court, regardless of whether the High Court had apparently earlier heard an application under s 60(1) or not. The first would be where an applicant has, in fact,

not been heard. For example, if, even before the application is filed, the High Court judge informs the parties that he or she will not entertain such an application, it can be said forcefully that there has been a breach of the rules of natural justice. More importantly, it is as if there has been no prior hearing since the original application would be considered a nullity. This is, of course, an extreme example which I cannot imagine would ever happen and it certainly ought not to happen. A second, and more germane, example would be where (having regard to the substance of the proceedings) patently wrong questions have been framed. In such a situation, the High Court judge has not heard what he or she ought to have properly heard. It can, again, be said that there has been no prior decision on the merits for the purposes of s 60(1). If an extension of time is granted by this Court for a fresh application, the High Court judge has to hear the matter afresh unfettered by both this Court's views as well as his or her earlier "decision", if any. His or her jurisdiction to hear the fresh application has not been exhausted by the earlier application because he or she has never, both in law and in fact, ever considered the merits of the proper issues in the first place. Indeed, if a genuine mistake has, in fact, been made in framing the questions for reference to this Court pursuant to s 60(1), there might well be a justification under *Principle (a) as well* for the High Court judge to entertain a second application if this Court arrives at the conclusion that an extension of time ought to be given pursuant to s 60(2). Also, if there has been such a mistake (albeit originating from the accused), we see no reason why the Prosecution (as guardian of the people's rights, *including those of the accused*) would object to this (second) application. Further, and as we have seen (above at [98(a)]), the question of law concerned must be of "public importance". In this regard, it seems to me that *most* questions of law would, in the normal course of events, have been settled in any event. Further, if the question of law concerned is either artificially contrived in order to justify what is, in effect, a "backdoor appeal" to this Court (which is also a concern expressed by Choo J in the context of the present proceedings (at [91])), any attempt by the accused utilising s 60(2) will be rejected by the court concerned out of hand. Such an approach would, it should be emphasised, also be adopted by this Court where what is sought (by the accused) is, in effect, an abuse of process of the court inasmuch as the accused is *indirectly* making *repeated* attempts to *the High Court judge*, utilising s 60(2) as a convenient (albeit inappropriate) instrument (see also above at [101]). I should also observe that it is inadvisable to try to state what other circumstances would render a question of law as being (or not being) of "public importance". For example, it cannot be stated – at least as a blanket principle – that every esoteric or technical question of law will not be of "public importance". In the first place, at what point does a question of law become "esoteric" or "technical"? More importantly, even if a particular question of law is rather technical, it may involve a general issue impacting the public in a manner that renders that question of "public importance".

105 It is also, at the expense of repetition, of the first importance to emphasise that the *final decision* lies with *the High Court judge*. Indeed, for any subsequent application that is *out of time*, *the Court of Appeal* provides, in point of fact, *the initial gatekeeping function*, so to speak, by rejecting out of hand subsequent applications which are an abuse of process of the court – in which case the application concerned does not even reach the High Court judge in the first place. It is also important to emphasise (*yet again*) that, *even if* the Court of Appeal *grants* the extension of time, that is *not* an end to the matter because *the High Court judge* makes the *final decision*. The real significance in such a grant of an extension of time is that there is, in the view of the Court of Appeal, a question (or questions) which may, albeit on a *prima facie* level *only*, be "of public interest" within the meaning of s 60(1), the determination of which by the High Court judge has affected the case. Whether the question (or questions) *are*, in fact, "of public interest" within the meaning of this provision must, as has been emphasised more than once, be ultimately decided by *the High Court* based on the *substantive merits* of the case itself.

106 I turn now to Choo J's view that there were, in any event, no questions of law of "public interest" that were raised within the purview of s 60(1) in the present application by BMS. In

particular, the learned judge was of the view that "the only pertinent question that could possibly be of public interest, namely, whether s 209 is so anachronistic that it should not apply to claims filed in the civil court" was "not one that the courts can answer" and that this lay, instead, within the purview of the Legislature (see above at [93]). Choo J was also of the view that all the questions raised in the present application by BMS were, in substance, the same as those that were raised before the HC Judge and that "it would be an abuse of process to make a second application recasting the same question in different words" (see above at [94]). With respect, I would beg to differ. The questions raised in the present application by BMS were, admittedly, infelicitously phrased. This is not surprising, as, when applications are framed, there is often a conflation of *Principles (a)* and *(b)* above (at [98]), with the accused's application leaning more towards his or her interests, rather than those of the public (see also above at [99]). However, this does not, *ipso facto*, mean that no questions "of public interest" are present. In particular, the *correct general legal interpretation of what constitutes an offence under s 209 of the PC (especially when viewed against the backdrop of its possible impact on the role of a solicitor who files pleadings in a court, which role impacts (in turn) on the broader public in so far as clients are concerned) must surely raise a* prima facie *case that there are questions "of public interest" within the purview of s 60(1) that ought to be referred to the Court of Appeal*. That BMS might benefit from an interpretation in his favour is not, with respect, the crux of the matter; on the contrary, that the decision on the question(s) of law concerned "has affected the case" is (as we have seen) a prerequisite to the invocation of s 60(1) in the first instance. The real issue is not whether BMS's interests are affected but, rather, whether that is the "by-product" of much larger questions "of public interest" that have been claimed by BMS t o *simultaneously* impact both lawyers as well as their respective clients in the broader (*public*) sphere. In this regard, all the relevant material set out by Rajah JA (without arriving at a substantive decision on the merits, which is (as we have emphasised) the task of the High Court judge) suggests that there may well be very serious questions of law of this nature. As the learned judge has also pointed out (see above at [38]), this Court has the power to rephrase questions in order to clearly reflect their true import. Hence, the fact that BMS had phrased the questions infelicitously in his concern for his own case is beside the point if the questions themselves *simultaneously* embody broader questions of law "of public interest". It is also not insignificant, in my view, that *the Prosecution* has itself framed questions, for which it now seeks an extension of time to raise to this Court, because it "[considered] that it is in the public interest to clarify the ambit and application of section 209 of the Penal Code" (see its affidavit in support of its motion, as quoted above (at [71])).

107 Before I conclude this short judgment, I should observe that what is sauce for the goose is sauce for the gander. Put simply, whatever we have stated in respect of accused persons would apply, *mutatis mutandis*, to the Prosecution as well, albeit with this important qualification: Since the High Court judge has *no discretion* under s 60(1) *but to refer* any questions raised by the Prosecution to this Court, any *subsequent* application by the Prosecution would, *ex hypothesi*, be one that *supplements* the questions already raised in its initial application. There might be a number of reasons why such an application is necessary and it would serve no useful purpose to indulge in unnecessary speculation. Looked at in this light, there is flexibility in the approach which Rajah JA has advocated not only for the accused *but also for the Prosecution as well*. In this regard, I should note that the focus here would be on *Principle (a)*.

108 In the premises, I would agree with Rajah JA for the reasons stated in his judgment as well as for the brief reasons I have set out in this judgment that the applications (pursuant to s 60(2)) by both the Prosecution and BMS for an extension of time to apply to the HC Judge for leave to raise, to the Court of Appeal, questions be allowed in the terms set out by Rajah JA above (at [87]).

[note: 1] NE at p 2437 (vol 7) (EIC of BMS)

[note: 2] Respondent's Submissions dated 21 August 2009 at para 11

[note: 3] NE at p 292; 311 (Vol 1) (EIC of Ho)

[note: 4] NE at p 12-14; 74-75 (Vol 1) (EIC of Teo); NE at p 139; 166-167 (Vol 1) (X-X of Teo); NE at p 269-270; 274-277; 286; (Vol 1) (EIC of Ho)

[note: 5] NE at 497-503; 533-541 (Vol 2) (EIC of Koh)

[note: 6] Exh P 10

[note: 7] Exh P 11

[note: 8] Exh P 13

[note: 9] Exh P 16

[note: 10] Exh P 17

[note: 11] NE at p 1784 (Vol 5) (EIC of Hong); p 1909; 1917 (X-X of Hong).

[note: 12] Exh P 33

[note: 13] Exh P 19

[note: 14] NE at p 53 (Vol 1) (EIC of Teo); NE at p 216 (Vol 1) (X-X of Teo); NE at p 347 (Vol 1) (EIC of Ho)

[note: 15] Exh P 20

[note: 16] Exh P 21

[note: 17] Exhs P 22, P 24 and P 26

[note: 18] NE at p 71-72 (Vol 1) (EIC of Teo); NE at p 197 (Vol 1) (X-X of Teo); NE at p 380 (Vol 1) (EIC of Tony); NE at p 464-466 (Vol 2) (X-X of Tony)

[note: 19] NE at p 1805 (Vol 5) (EIC of Francis Hong)

[note: 20] NE p 71 (Vol 1) (EIC of Teo); NE at p 379 (Vol 1) (EIC of Tony); NE at p 462 (Vol 2) (X-X of Tony); NE at p 1809 (Vol 5) (EIC of Francis Hong).

[note: 21] Exh P 28

[note: 22] Applicant's Submissions on Jurisdiction at [22].

[note: 23] Applicant's Submissions on Jurisdiction at [27].

[note: 24] Letter from Attorney-General's Chambers dated 22 October at p 2.

[note: 25] Letter from Attorney-General's Chambers dated 18 September 2009 at p 3.

[note: 26] Letter from Attorney-General's Chambers dated 7 October 2009, Annex A at p 2.