Public Prosecutor *v* Li Weiming and others
[2014] SGCA 7

Case Number	: Criminal Reference No 1 of 2013
Decision Date	: 23 January 2014
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; V K Rajah JA; Lee Seiu Kin J
Counsel Name(s)	: Tan Ken Hwee, Alan Loh, Kenneth Wong and Tan Zhongshan (Attorney-General's Chambers) for the applicant; Lok Vi Ming SC, Derek Kang, Joseph Lee and Tan Jin Sheng (Rodyk & Davidson LLP) for the first respondent; Lai Yew Fei, Alec Tan and Lee Hui Yi (Rajah & Tann LLP) for the second respondent; Julian Tay, Marcus Foong, Jacqueline Chua and Jonathan Cho (Lee & Lee) for the third respondent.
Parties	: Public Prosecutor — Li Weiming and others

CRIMINAL PROCEDURE AND SENTENCING

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 2 SLR 1227.]

23 January 2014 Judgment reserved.

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

1 This is a criminal reference filed by the Public Prosecutor ("PP"), referring four questions of law of public interest to this court. They relate to the operation of the Criminal Case Disclosure Conference ("CCDC") regime contained in contained in the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC 2010"). These questions of law arose from the decision of the judge ("the Judge") in *Li Weiming v Public Prosecutor and other matters* [2013] 2 SLR 1227 ("the GD"). While the questions essentially pertain to issues of criminal process, they raise matters of considerable importance in the administration of criminal justice. It has been rightly stated that "[t]he criminal process is at the heart of the criminal justice system. It is not only a subject of great practical importance; it is also a reflection of our ideals and values as to the way in which we can accord justice to both the guilty and to the innocent" (see Chan Sek Keong, "The Criminal Process – The Singapore Model" (1996) 17 Sing Law Rev 433 at 433).

Background facts

2 The background to the four questions of law referred to us by the PP is set out below in a condensed account of the material facts and the earlier proceedings. In this judgment, we adopt the term "PP" to refer to the applicant in the present case, and the term "Prosecution" to refer more generically to the Public Prosecutor.

3 The first respondent Li Weiming ("Li") was an employee of ZTE Corporation ("ZTE"), a company headquartered in Shenzhen, China, and listed on the Shenzhen Stock Exchange and the Hong Kong Stock Exchange. ZTE is a large vendor of information technology and telecommunications equipment. Li was posted to the Singapore office of ZTE in early 2008 and was appointed ZTE's chief representative for Brunei, Papua New Guinea and the South Pacific Islands from December 2010. In 2010, the Papua New Guinea government awarded ZTE a $35m contract for a community college

programme ("the Project"). A British Virgin Islands company, Questzone Offshore Pte Ltd ("Questzone"), was allegedly set up for the purpose of receiving commissions from ZTE for the award of the Project. Lim Ai Wah ("Lim"), the second respondent, was a director of Questzone and her husband Thomas Philip Doehrman ("Doehrman"), the third respondent, assisted the Papua New Guinea government under a trust for the Project. Lim's sister, one Lim Swee Kheng, is the only other director of Questzone. The respondents all participated in the negotiations which led to the award of the Project to ZTE.

4 On 25 July 2012, the respondents were each charged with six charges. The six charges comprised a single charge of conspiracy to falsify accounts under s 477A read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") ("the s 477A Charge") and five charges of acquiring, possessing, using, concealing or transferring benefits of criminal conduct under s 47(1)(*b*) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("the CDSA Charges").

5 The s 477A Charge against Li states in full:

> You,
>
> [Li Weiming]
>
> are charged that you, in mid 2010, in Singapore, did engage in a conspiracy with one Lim Ai Wah (a Director and an officer of [Questzone]) and one Thomas Philip Doehrman, to falsify a paper belonging to Questzone wilfully and with intent to defraud,
>
> and in pursuance of the conspiracy, and in order to the doing of that thing, an act took place; to wit, the said Lim Ai Wah instructed one Lim Swee Kheng (a Director of Questzone) to prepare a Questzone invoice dated 15 July 2010 that falsely purported to seek payment to Questzone as a sub-contractor under a fictitious sub-contract,
>
> and which act was committed in consequence of the abetment, and you have thereby committed an offence punishable under section 477A read with section 109 of the Penal Code, Cap 224.

The s 477A Charges against Lim and Doehrman are identical in all material aspects. The CDSA Charges relate to five payments made from Questzone's bank account, *viz*, two cheques issued to a bank account in Singapore and three remittances to a bank account in Hong Kong. The respondents purportedly conspired to disburse these monies from Questzone's account, which represented the benefits derived from the criminal conduct alleged in the s 477A Charge.

6 On 13 September 2012, the PP filed and served the Case for the Prosecution on the respondents individually, pursuant to a direction made at the initial CCDC under s 160 of the CPC 2010. Each Case for the Prosecution contained copies of the s 477A Charge and the CDSA Charges, a list of witnesses, a list of exhibits, statements of the person charged which the PP intended to use as part of his case, and a summary of facts.

7 The summary of the facts supporting the s 477A Charge ("the Summary of Facts") is set out in full below as the details and particulars contained therein – or rather the absence of – formed the gravamen of the respondents' complaints:

> 1. Sometime in mid-2010, in Singapore, [Li] engaged in a conspiracy with [Doehrman] and [Lim]

to falsify a paper belonging to [Questzone] wilfully and with intent to defraud.

2. Pursuant to the said conspiracy, Lim (a Director of Questzone) instructed one Lim Swee Kheng (a Director of Questzone) to prepare a Questzone invoice dated 15 July 2010 that falsely purported to seek payment to Questzone as a sub-contractor under a fictitious contract between [ZTE] and Questzone for the sum of US$3.6 million ("the Invoice").

3. Sometime in July 2010, Lim passed the Invoice to [Li] in Singapore, which [Li] then forwarded [*sic*] the ZTE Singapore branch office. On or about 31 July 2010, having approved the payment of US$3.6 million to Questzone in accordance with the Invoice and the fictitious contract between ZTE and Questzone, ZTE effected the said payment of US$3.6 million through its Hong Kong subsidiary, ZTE (HK) Limited via a telegraphic transfer to Questzone's Standard Chartered Bank Account (account number: xxx) in Singapore ("the Questzone account").

8 Counsel for respondents subsequently informed the presiding judicial officer at a further CCDC that the Summary of Facts did not contain sufficient facts relating to the s 477A Charge. More precisely, it was claimed that the Summary of Facts did not particularise (a) the identity of the person allegedly defrauded, (b) the reasons why the subcontract was fictitious, and (c) the roles of each respondent and the acts committed pursuant to the conspiracy. The respondents then filed applications seeking further particularisation of the Summary of Facts or a discharge not amounting to an acquittal ("DNAQ") pursuant to s 169(2) of the CPC 2010.

9 The application was dismissed by a district judge ("the District Judge"), who ruled that the Summary of Facts tendered in the Case for the Prosecution sufficed to meet the requirements of s 162(*b*) , *ie*, a summary of the facts *in support of the charge*. The District Judge nevertheless observed that the application for particulars had some merit, but that these issues should be deferred to the trial judge.

10 The respondents proceeded to file petitions for revision pursuant to s 404 of the CPC 2010 (*vide* Criminal Revision Nos 24, 25 and 26 of 2012), seeking an order from the High Court that a DNAQ be granted or that the Prosecution furnish three categories of particulars (see [8] above) with respect to the Summary of Facts. The Judge allowed the petition in part.

The decision of the Judge

11 The Judge considered (at [27] of the GD) that where an application for revision of an order made during a CCDC was brought before the High Court, the consequences under s 169 of the CPC 2010 for non-compliance with the mandatory contents of the Case for the Prosecution were not exhaustive; the High Court's revisionary powers under s 404 were widely framed and could not be limited to the remedies available to the presiding judicial officer under s 169. The argument that recourse for deficient particulars should be deferred to the trial judge detracted from the purpose of pre-trial discovery and if the court were limited to the options in s 169, curial supervision over the CCDC process would be rendered anaemic (at [28] of the GD). The High Court therefore had the jurisdiction to order the PP to provide further particulars where the summary of facts was deficient.

12 The Judge then held (at [32] of the GD) that the omission of key particulars in the summary of facts constituted a failure under s 169(1)(*b*) of the CPC 2010 to provide "part of the items specified in section 162" and observed that the summary of facts ought to offer further notice and clarity of the case that the accused has to answer by way of elaboration, instead of merely replicating the charge.

13 With respect to the contents of the Summary of Facts that was tendered in support of the s 477A Charge, the Judge was of the view (at [45] of the GD) that the PP had to present a specific case as to the nature of the accused's fraudulent intention, including the person who was the object of the fraudulent intention. The explanatory note to s 477A did not provide a categorical general exemption from the requirement to specify the particular individual intended to be defrauded (at [46] of the GD). The Judge thus held that in order for the Summary of Facts to be in support of the charge, particulars of (a) the party whom the accused persons had allegedly conspired to defraud and (b) the reasons why the subcontract between ZTE and Questzone was allegedly fictitious had to be provided (at [47] of the GD), and ordered the PP to do so accordingly.

The four questions of law of public interest

14 After the Judge gave his decision, the PP applied by way of a criminal reference to refer the following four questions of law to this court:

(a) Does s 169 of the CPC 2010 set out comprehensively and exhaustively all the available consequences for alleged non-compliance with the criminal case disclosure procedures in the Subordinate Courts under Division 2 of Part IX of the CPC 2010? ("Question 1")

(b) If the answer to (a) is negative, does the Magistrate or District Judge who presides over a CCDC have the power to order the Prosecution to furnish additional particulars in the summary of facts in support of the charge filed and served as part of the Case for the Prosecution? ("Question 2")

(c) If the answer to (b) is positive, where the Magistrate or District Judge who presides over a CCDC has refused to order that the Prosecution furnish additional particulars in the summary of facts in support of the charge filed and served as part of the Case for the Prosecution, what is the legal threshold that needs to be crossed before the High Court should exercise its revisionary jurisdiction pursuant to s 404 of the CPC 2010 in respect of such refusal? ("Question 3")

(d) Can the Prosecution be ordered to provide facts in relation to a specific intent to defraud for a charge under s 477A of the Penal Code in the summary of facts in support of the said charge that was filed and served as part of the Case for the Prosecution under s 161(2) of the CPC 2010 where the Explanation to s 477A of the Penal Code specifically provides that it shall be sufficient in any charge under the said section to allege a general intent to defraud without naming any particular person intended to be defrauded? ("Question 4")

A preliminary threshold issue: reference of a question of law of public interest by the PP

15 Before answering the questions referred to this court, we first consider the respondents' preliminary objection to the PP's application. There are four cumulative requirements specified in s 397(1) of the CPC 2010 (see *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*") at [15]; *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 at [29], dealing with the repealed s 60 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), which was the precursor provision to s 397):

(a) the determination by the High Court of a criminal matter must have been in the exercise of its appellate or revisionary jurisdiction;

(b) the question of law must be a question of law of public interest;

(c) the question must have arisen in the matter; and,

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

16 The respondents submitted that for a question to be referred to the Court of Appeal pursuant to s 397(1) of the CPC 2010, the PP had to satisfy the court that the question had "arisen in the matter and the determination of which by the Judge [had] affected the case", and argued that the four questions referred by the PP did not satisfy this requirement. In particular, counsel for the respondents submitted that the determination by the Judge of the four questions of law had not affected the case as the matter determined in the criminal revision before the Judge was not in the nature of a final judgment or sentence.

17 This court recently considered the same argument in *Public Prosecutor v Goldring Timothy Nicholas and others* [2013] SGCA 59 ("*Goldring Timothy Nicholas*") and it suffices for us to set out the conclusions at [25]–[26]:

> 25 … The *express* language of s 397(2) of the CPC is crystal clear – "The Public Prosecutor may refer any question of law of public interest without the leave of the Court of Appeal". To interpret s 397 as being the same as s 60 of the SCJA 2007 and to hold that the Public Prosecutor needs to also satisfy this court that the other (or all) requirements for leave are made out would fly in the very face of the *express* language of s 397(2) and is thus impermissible. Therefore, notwithstanding the factors mentioned in the preceding paragraph, given the clear and *express* language of s 397(2), we find that Parliament had in effect widened the scope of the Public Prosecutor's ability to refer questions to this court. Put simply, under the CPC, the Public Prosecutor can refer any question that it wishes to refer to the Court of Appeal without having to obtain leave to do so.
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> 26 We hasten to clarify this does *not* mean that the Court of Appeal is invariably *bound* to answer all questions referred to it by the Public Prosecutor. In our view s 397(2) of the CPC statutorily permits the Public Prosecutor to leapfrog the *leave* stage. This, however, does not affect the Court of Appeal's exercise of its jurisdiction at the *substantive* stage. When exercising its *substantive* jurisdiction under s 397, the Court of Appeal will naturally consider whether the case before it falls truly within the scope of that particular provision. This, in turn, entails considering whether all the requirements in s 397(1) are made out. …
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> [emphasis in original]

18 Therefore, although the PP does not have to satisfy all the requirements in s 397(1) of the CPC 2010 to refer a question of law of public interest to this court, we will nevertheless still consider whether these requirements are satisfied in deciding whether we ought to exercise our substantive jurisdiction under s 397 to answer the four questions referred to us by the PP. Counsel for Lim and Doehrman confined their submissions to requirement (d) (see [15] above), arguing that it was not satisfied because the decision of the Judge had not affected the outcome of the criminal matter against each respondent, which had yet to go to trial. Reliance was placed on the following passages in *Mohammad Faizal* (at [26]–[27]) for the broad proposition that a decision could only affect the outcome of a matter where a formal judgment or sentence had been passed:

> 26 In the circumstances of the Special Cases *it was clear that the answers given by the High Court had yet to affect the outcome of the charges which were preferred against the Applicants. No decision has been made by the trial court in relation to the said charges*.

27 … *[T]he High Court in the Special Cases had not passed any judgment or sentence on the Applicants.* All it did was to give its opinion on the two questions. Neither had the District Court passed any judgment or sentence on the Applicants. But for the instant Criminal Motions, the cases would have gone back to the District Court to continue where they left off before the Special Cases were filed. *Indeed, it is clear from this fourth condition, especially the word "affected", that for a reference to be made under s 397, a ruling must already have been made, or a sentence passed, by the High Court. In the present case, no such ruling or sentence has yet been passed on either Applicant.* To allow the Criminal Motions to go on any further, when final judgment or sentence has yet to be passed on both Applicants, would lead to an unnecessary and unacceptable disruption to the final disposal of both matters.

[emphasis added]

19 The facts in *Mohammad Faizal* are unique and the purported principle of general application that counsel attempted to distil from this case should not be taken out of context. *Mohammad Faizal* involved two accused persons who had been charged with the consumption of morphine under s 8(*b*)(ii) of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA") and were liable for enhanced punishment under s 33A of the MDA. Both accused persons brought applications to state a question of law to the High Court pursuant to the case stated procedure in s 395 of the CPC 2010 with respect to the constitutionality of s 33A of the MDA. The High Court answered the stated questions, and the accused persons made subsequent applications under s 397 to refer the same questions of law to the Court of Appeal. It was in this context that this court made the observations in the preceding paragraph that no decision had been rendered by the trial court in respect of the charges against the accused persons and no judgment or sentence had been passed; all that the High Court had done was to answer the questions stated as a matter of law without making any determination on the facts.

20 We do not think that this court intended to lay down any rigid proposition of law in *Mohammad Faizal* that the determination of the High Court must be a final judgment or sentence on the substantive merits before it can be construed as having "affected the outcome of the case", and the above remarks certainly do not support such a wide proposition. In our judgment, what is necessary is that the answer to that question of law had been one of the grounds or bases upon which the High Court had decided the matter or issue before it. This is clear from the wording of s 397(1), which refers to the determination of the question which has "affected the case", *ie*, the criminal revision or appeal heard by the High Court. It is not necessary that the determination of the question should have had an additional impact on the merits of the final decision or the sentence in respect of the charges against the accused.

21 Although the four questions of law referred to us in the present criminal reference were not directly answered in the course of the proceedings below, we are of the view that they clearly affected the result of the criminal revisions before the Judge:

(a) Question 1 would have affected the order made by the Judge to grant particulars as the Judge would not have had powers to do so had he determined that s 169 exclusively and exhaustively prescribed the consequences of non-compliance with the CCDC procedures.

(b) Question 2 would have affected the order made by the Judge as a Judge may affirm, vary or set aside any of the orders made by the presiding judicial officer at a CCDC on revision, but the presiding judicial officer would not be able to make the requisite orders to give effect to the High Court's decision or order under s 404(5) if the District Court or Magistrate Court had no power to do so. By implication, the Judge may have determined that he had no power to order

particulars if he had decided this question in the negative.

(c) Question 3 would have affected the order made by the Judge as the Judge may have been constrained in making the order if he had considered that a particular threshold for intervention applied to an application for criminal revision under s 404 of the CPC 2010.

(d) Question 4 would have affected the order made by the Judge as the Judge may not have made the order for particulars if he had determined that he was not entitled to do so as the only *mens rea* necessary for a charge under s 477A was a general intent to defraud.

22 Accordingly, we see no reason to decline to exercise our substantive jurisdiction under s 397 to answer these four questions.

The CCDC regime

The statutory framework

23 The sequential progression of the statutory CCDC framework can be summarised briefly as follows:

(a) Pursuant to s 159 of the CPC 2010, the CCDC procedure applies to an offence specified in the Second Schedule and which is to be tried in a District Court. The accused may inform the court that he wishes to opt out of the CCDC procedures (s 159(2)).

(b) If the accused refuses to plead or claims trial, the court will direct the Prosecution and the accused to attend a CCDC for the purpose of settling, *inter alia*, the filing of the Case for the Prosecution and the Case for the Defence (ss 160(1) and 161(1)).

(c) The Prosecution is required to file and serve the Case for the Prosecution, not later than two weeks from the date of the first CCDC (s 161(2)), containing a copy of the charge, a summary of the facts in support of the charge, a list of names of witnesses for the Prosecution, a list of exhibits that the Prosecution intends to admit in evidence at trial and statements of the accused that the Prosecution intends to adduce in evidence at trial (s 162).

(d) After the Case for the Prosecution is filed, the court may fix a date for a further CCDC (s 161(4)). If the accused does not indicate that he wishes to plead guilty at this further CCDC, the accused will then be required to file and serve the Case for the Defence not later than two weeks from the date of the CCDC (s 163(1)), containing a summary of the defence to the charge and facts in support of the defence, a list of names of witnesses for the Defence, a list of exhibits that the Defence intends to admit in evidence at trial, and a statement of the nature of any objection to the Case for the Prosecution, if any, which identifies the issues of fact or law in dispute (s 165).

(e) Following the service of the Case for the Defence, the Prosecution must, within two weeks, serve on the accused copies of all other recorded statements of the accused in relation to the charges which the Prosecution intends to proceed with, the documentary exhibits which will be adduced as evidence and any criminal records ("the Prosecution's Supplementary Bundle") (s 166(1)). Service of the Prosecution's Supplementary Bundle is only mandatory if the Case for the Defence has been filed and served (s 166(2)(*a*)).

(f) The court may fix another CCDC after the service of the Case for the Defence and the

Prosecution's Supplementary Bundle (s 163(2)). If the accused indicates that he does not wish to plead guilty at this CCDC, the court may fix a date for trial (s 167).

The legislative purpose underpinning the CCDC regime

24 The CCDC regime was introduced by the CPC 2010 and was warmly heralded by the legal community as a watershed in the move towards greater procedural fairness and transparency in the criminal justice system. Prior to this there was no procedure in place for the reciprocal exchange of information and evidence in criminal cases. The Minister for Law ("the Minister"), set out the basic paradigm for the new CCDC procedures in his introductory speech at the Second Reading of the Criminal Procedure Code Bill (Bill No 11 of 2010) ("the Bill") (see *Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 ("*18 May 2010 Parliamentary Debates*") at cols 413–414 (K Shanmugam, Minister for Law)):

> Disclosure is familiar to lawyers operating within the common law system. *In civil proceedings, the timely disclosure of information has helped parties to prepare for trial and assess their cases more fully*.
>
> ***Criminal cases can benefit from the same approach. However, discovery in the criminal context would need to be tailored to deal with complexities of criminal practice, such as the danger of witnesses being suborned.***
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> *To this end, Part IX of the Bill introduces a formalised framework obliging the prosecution and the defence to exchange relevant information about their respective cases before trial.* ***This will introduce greater transparency and consistency to the pre-trial process .***
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> ...
>
> *The framework has a number of safeguards to try and prevent abuse. The sequential nature of the process protects the interests of prosecution and defence.* The onus is on the prosecution to set out its case first, with the accused's statements that it is relying upon. The provision of all statements after the defence case is filed cuts down on opportunities to tailor evidence. At the same time, if either party refuses to file its case, or files an incomplete case, or advances an argument at trial inconsistent with its previously filed case, the Court may draw any inference it deems fit. *In addition, where the prosecution fails to comply with its obligations, the Court may order a discharge not amounting to an acquittal. This approach tries to ensure that parties take discovery seriously.*
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> [emphasis added in italics, bold italics and underline]

25 During the public consultations and parliamentary debates over the Bill, members of the criminal bar and Members of Parliament expressed concerns that the proposed statutory disclosure obligations on the part of the Prosecution were not sufficiently extensive, but there was little objection to the *quid pro quo* nature of the sequential CCDC procedures. The CCDC regime creates a formalised system of reciprocal disclosure that imposes obligations on both the Prosecution and accused to reveal aspects of their cases and the evidence that each party intends to rely on at the pre-trial stage. This framework is an adaptation of the existing discovery framework in civil litigation and seeks to balance both the interests of the Prosecution in the effective functioning of the criminal justice process and the interests of the accused in preparing adequately for trial.

26 Timely disclosure of information facilitates the efficient dispensation of criminal justice as both

the Prosecution and accused are in a position to evaluate the merits of their respective cases and decide whether a reduction or a withdrawal of the charge is warranted or whether early guilty pleas should be entered (see *18 May 2010 Parliamentary Debates* at cols 449–450 (Mr Christopher De Souza, Member of Parliament for Holland-Bukit Timah); Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 ("*Modernising the Criminal Justice Framework*") at para 37). Disputed issues are also identified at an early stage and parties may focus efforts on only the material issues, saving time and costs. Pre-trial disclosure also shifts the dynamics of the trial process from a purely adversarial model akin to a "game or sporting contest" (see Glanville Williams, "Advance Notice of the Defence" (1959) Criminal Law Review 548 at 554) to a truth-seeking model. The CCDC regime encourages the Prosecution and accused to engage with each other on a reasoned and open basis by providing an avenue for parties to sharpen the material issues in the Cases. This creates a balanced and fair procedure that provides a system for arriving at the truth (see *18 May 2010 Parliamentary Debates* at col 408 (K Shanmugam, Minister for Law)) and precludes resort to ambush tactics. The interest of the Prosecution in a criminal trial is not to obtain a conviction at any costs, and a procedure whereby the Prosecution first lays its cards on the table is an acknowledgment that it is the duty of the Prosecution to prove its case beyond reasonable doubt and to assist the court by placing before it all relevant facts and evidence so that the truth may be ascertained. The traditional reluctance to allow wide discovery stemmed from the fear of perjury, but "[t]he true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other, where both are present" (see Edson R Sunderland, "Scope and Method of Discovery Before Trial" (1932–1933) 42 Yale Law Journal 863 ("*Sunderland*") at 868). This article also drily notes that "if one were critically to examine this legal hobgoblin of perjury he might perhaps find reason to believe that it was not actually so terrifying to the profession as they pretended" (see *Sunderland* at 868). Any residual concerns that the accused may shape his defence to meet the Prosecution's case are assuaged by the sequential disclosure under the CCDC regime – details of the Prosecution's case, including full statements and copies of documentary exhibits, are made available to the accused only after the Case for the Defence has been filed. From the perspective of the accused, an early disclosure of the Prosecution's case enables him to make preparations for his defence, and although the mutual exchanges of information makes a limited incursion into the accused's right to silence, it ensures that relevant facts are not concealed from the trial judge. Reciprocal discovery, *if properly implemented*, therefore enhances the reliability and transparency of the criminal justice process in searching for the truth (see *Modernising the Criminal Justice Framework* at para 38).

27 An understanding that the CCDC procedures were consciously envisaged as a model of reciprocal discovery, which serves a commonality of interests and seeks a fair equilibrium between the rights of the Prosecution and the accused, informs the analysis below of the questions posed to this court.

Question 1

28 The statutory consequences for failure to comply with the CCDC procedures relating to the Case for the Prosecution or the Case for the Defence (collectively the "Cases") are prescribed in s 169 of the CPC 2010:

> **Consequences of non-compliance with Division 2**
>
> **169.**—(1) The court may draw such inference as it thinks fit if —
>
> (*a*) the prosecution fails to serve the Case for the Prosecution on the accused or the

defence fails to serve the Case for the Defence after the Case for the Prosecution has been served on the accused;

(*b*) the Case for the Prosecution or the Case for the Defence does not contain any or any part of the items specified in section 162 or 165(1), respectively; or

(*c*) the prosecution or the defence puts forward a case at the trial which differs from or is otherwise inconsistent with the Case for the Prosecution or the Case for the Defence, respectively, that has been filed.

(2) If the prosecution fails to serve the Case for the Prosecution in respect of any charge which the prosecution intends to proceed with at trial within the time permitted under section 161 or the Case for the Prosecution does not contain any or any part of the items specified in section 162, a court may order a discharge not amounting to an acquittal in relation to the charge.

Under s 169, the powers of the court to draw inferences as it thinks fit or to order a DNAQ are *permissive*, not mandatory. The available sanctions are as follows:

(a) If the Prosecution fails to comply with ss 161 or 162, the court may draw inferences as it thinks fit at trial under ss 169(1)(*a*) or 169(1)(*b*) or order a DNAQ under s 169(2).

(b) If the accused fails to comply with ss 163 or 165, the court may draw inferences as it thinks fit at trial under ss 169(1)(*a*) or 169(1)(*b*).

(c) If the Prosecution or accused put forth a case at trial that is inconsistent with their filed Cases, the court may draw inferences as it thinks fit under s 169(1)(*c*).

Parliamentary intent in the drafting history of s 169 of the CPC 2010

29 We first consider whether Parliament had intended for s 169 to exhaustively and comprehensively prescribe all the consequences for a failure by any party to comply with its statutory obligations under the CCDC procedures.

30 The PP submitted that s 169 sets out all the possible consequences for any alleged non-compliance with the CCDC procedures relating to the filing of Cases and the prescribed contents. The PP argued that the CCDC procedures created a formalised framework that was designed to address the complexities of discovery within the criminal context, and that the drafting history of the CPC 2010 supported the interpretation that Parliament had intended for s 169 to confer upon the court a limited and exclusive set of powers by statute to deal with non-compliance with the CCDC procedures. The respondents submitted that the relevant parliamentary debates during the second reading of the Bill demonstrated that the legislative intent was to leave a residual discretion for the court to fashion appropriate remedies when there was a failure to comply with the prescribed CCDC procedures.

31 When the draft Criminal Procedure Code Bill 2009 ("the Draft Bill") was first issued for public consultation, the equivalent provisions to the present s 169 stated:

Division 6 — Non-compliance with this Part

Consequences of non-compliance of certain requirements under this Part by prosecution

186. If before the trial —

(*a*) the prosecution fails to file the Case for the Prosecution within the time prescribed under this Part;

(*b*) the Case for the Prosecution does not contain any or part of any of the items specified in section 168 or 179; or

(*c*) the prosecution fails to comply with section 171 or 182,

the court may discharge the accused and such discharge shall not amount to an acquittal.

Consequences of non-compliance of certain requirements under this Part by accused

187. If the accused fails to file the Case for the Defence within the time prescribed under this Part or the Case for the Defence does not contain any or part of any of the items specified in section 170 or 181 or puts forward a defence at the trial that differs from any defence set out in the Case for the Defence then the court may, at the trial, draw such inference as it thinks fit.

Notably, in the Draft Bill, if the Prosecution failed to comply with the requirements for the filing of the Case for the Prosecution or the Prosecution's Supplementary Bundle, the only sanction available was for the court to order a DNAQ. Conversely, if the accused failed to comply with the requirements for the filing of the Case for the Defence or changed its case at trial, the court may draw inferences as it deemed fit. The sanction of an adverse inference was not available against the Prosecution.

32 In the Association of Criminal Lawyers of Singapore's ("ACLS") report on the Draft Bill (see Association of Criminal Lawyers of Singapore, *Feedback on the Proposed Amendments to the Criminal Procedure Code* (28 February 2009) ("the ACLS Report")), the ACLS commented that although an adverse inference could be drawn against the accused if it amended the Case for the Defence, the Prosecution was not subject to the same limitation and could alter its position without adverse consequences, save for the possibility of a DNAQ. The ACLS suggested that this was inequitable and recommended that no adverse inferences should be drawn either way. It was also observed that the DNAQ was not a severe consequence as the Prosecution was entitled to resurrect the charge at any time (see para 36 of the ACLS Report). The provisions relating to consequences for non-compliance were subsequently amended in s 169 to extend the court's powers to draw adverse inferences against both the accused and Prosecution at trial. It appears, therefore, that it was initially contemplated that only a *pre-trial* sanction in the form of a DNAQ would be available against the Prosecution, and the present CCDC procedures similarly provide no corresponding pre-trial remedy against the accused.

33 Subsequently, during the Second Reading of the Bill, a Member of Parliament, Mr Hri Kumar Nair, raised a query as to whether s 169 encompassed all the potential consequences for concealment of material evidence (see *18 May 2010 Parliamentary Debates* at col 455):

> ... are there any consequences if there is deliberate concealment of material evidence? Clause 169 of the Bill says that the Court can draw an adverse inference or order a discharge not amounting to an acquittal if the defence or the prosecution fails to disclose some items. That implies that there is a choice and that both parties may choose to exclude evidence for tactical reasons. But if the State has evidence, should the Court not be entitled to order disclosure at the pain of contempt? The State should have a higher duty to ensure fairness and due process. Where discovery is concerned, it should not be permitted to make tactical decisions.

The Minister responded that the Bill did not purport to exclusively define the full ambit of the discovery regime applicable to criminal proceedings (see *Singapore Parliamentary Debates, Official Report* (19 May 2010) vol 87 at col 564):

> Mr Kumar queried whether there will be consequences for deliberate concealment of material evidence and that the State can be compelled to provide disclosure on pain of contempt. Where there is inadequate discovery given by a party, the Court can ask for an explanation and draw such inferences as it thinks fit.
>
> ***The Bill does not seek to prescribe all the consequences for inadequate disclosure as it can occur in a wide range of circumstances*** *. If documents are being deliberately withheld, the appropriate remedy should be left as a matter of judicial discretion to the Court*. It should be noted that lawyers appearing in Court, whether prosecution or defence lawyers, are officers of the Court. If they deliberately suppress material evidence, they will be acting in gross breach of their duties. *One cannot put forward evidence in Court while holding back other evidence which could put a different complexion on the evidence that has in fact been tendered in Court. I have no doubt that the Court will take a serious view of such conduct.*
>
> [emphasis added in italics, bold italics and underlining]

34 The respondents relied on the Minister's remarks in support for the argument that Parliament evidently did not intend for s 169 to exhaustively and comprehensively set out the consequences of non-compliance within the context of the CCDC regime, given the multitude of fact patterns that may arise. The PP contended that these comments did not give rise to any indication that Parliament had intended for the courts to have a broad power to order disclosure of evidence, and that the Minister's allusion to the deliberate suppression of evidence referred to a more general situation that went beyond non-compliance with the statutory obligations under the CCDC regime.

35 We agree with the PP that the Minister's observations have to be read contextually, and this exchange in Parliament cannot support an inference that Parliament had unequivocally intended that the court would have an overriding discretion to impose additional consequences for failure to comply with the CCDC regime. The Minister's response was clearly directed at a much broader duty of adequate disclosure, and not the specific question of the consequences for failure to comply with the statutory obligations under the CCDC procedures to disclose certain categories of information (*ie*, the Cases) or documents (*ie*, the Prosecution's Supplementary Bundle). In *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"), this court referred to the same passage and observed that (at [103]):

> [T]his indication of parliamentary intent is contrary to the view expressed in [*Selvarajan James v PP* [2000] 2 SLR(R) 946] that it is not for the court to impose a duty of disclosure on the Prosecution, although in all fairness it should be noted that similar legislative statements were not in existence at that point in time. In our view, as seen through the Minister's statements, Parliament had expressly contemplated that:
>
> (a) the absence of statutory prescription did not imply the absence of any duty of disclosure or of any consequences for non-disclosure;
>
> (b) prosecutors and defence counsel, as officers of the court, have a duty not to suppress material evidence; and
>
> (c) the court would have the discretion to prescribe appropriate remedies for the serious

act of deliberately suppressing evidence (which would include the deliberate non-disclosure of unused material).

Kadar thus acknowledged that where the CPC 2010 provisions on discovery did not expressly provide for certain aspects of discovery, the court's residual powers – either through the application of existing common law rules or by the exercise of judicial discretion – were not superseded or circumscribed by the CCDC framework. The same reasoning does not apply when a formalised mode of discovery is mandated by statute. The presence of a statutory framework in relation to a particular subject matter, by definition, imposes certain strictures on the powers of the courts. The Minister's comments do not provide conclusive support for the respondents' contentions that s 169 was not intended to be exhaustive when the non-compliance relates to an obligation imposed by the CCDC procedures.

36 The PP also submitted that the issue of whether the courts ought to have discretion to give orders in respect of discovery had in fact been drawn to the attention of the drafters of the final Bill during the consultation process, who must by implication have declined to provide for such a power by omitting to include a provision to this effect. This argument was premised on a recommendation made in the Council of the Law Society's Report on the Draft Bill (see Council of the Law Society, *Report on the Draft Criminal Procedure Code Bill 2009* (17 February 2009) ("the Law Society Report")) at para 4.19 that:

> Subject to what has been said, the Courts are best placed to supervise the substantive discovery process and should be the final arbiter in the event of any dispute between the Prosecution and Defence. They should be vested with discretion to give directions in such cases on discovery whether the trial is in the Subordinate Courts or the High Court.

In the same paragraph and immediately following the cited passage, the Law Society Report made reference to cl 24 of the Draft Bill, which vested power to order the production of a document or other thing that was necessary or desirable for, *inter alia*, any investigation, trial or proceeding only in a police officer, and commented that the general power should always remain with the court. This is indicative of the context within which this recommendation was made.

37 Contrary to the PP's contentions that Parliament had made the conscious decision not to provide for a general power of discovery, the Law Society's recommendation was implemented in substance by s 235 of the CPC 2010, which vests in the court a power to direct the production of any document or thing necessary or desirable for the purpose of any inquiry, trial or proceeding. Under s 235(6), the court's powers under s 235(1) are not exercisable by a court presiding over CCDC proceedings or pre-trial conferences. There was no equivalent provision in the Draft Bill. It appears to us that the Law Society had clearly recommended, and Parliament had responded accordingly, that the courts ought to have a wider power to order the disclosure or production of documents in the course of the substantive proceedings. The Law Society Report had not directly addressed the issue of whether courts had a general discretion to make directions on the filing of the Cases or interlocutory orders in the course of the CCDC procedures, and there is nothing to support the inference that the drafters had this in mind. We are therefore not persuaded by the PP's argument that the drafters of the Bill must thereby be taken to have adopted the considered view that the consequences in s 169 were exhaustive and were the only orders that the court could make in CCDC proceedings. In any event, this court has, even in the situation envisaged by the Law Society, rejected an approach that regards the CPC 2010 as a self-contained code that implicitly abrogates the court's common law powers to order the discovery of certain categories of documents where the CPC 2010 is silent (see generally, *Kadar* at [112]; *Goldring Timothy Nicholas* at [82]).

38 Pursuant to our direction to parties to furnish further submissions on how other jurisdictions have dealt with criminal discovery, the PP drew our attention to a number of jurisdictions with similar statutory frameworks for pre-trial disclosure involving the formal exchanges of information and submitted that it was highly instructive that in other jurisdictions, the power of the court to order particulars of a charge or a statutory summary or statement of facts – where available – was expressly conferred by statute. Parliament, therefore, must have been aware of the option of providing such a power but had declined to do so. We have some difficulty with this submission. First, as the PP correctly acknowledged, the existence of a statutory power of the court to order further particulars of a *charge* is not directly relevant to the present issue before the court. Sections 123–125 of the CPC 2010 set out requirements relating to the form of a charge as well as the details that must be contained in the charge in order to give the accused adequate notice of the offence he is charged with, and to the extent that these constitute the formal legal requirements that must be complied with in the framing of charges that initiate the process of prosecution, this is a prior procedural step that usually takes place before the criminal discovery process. Evidence of the practices of other jurisdictions with respect to the power to order particulars necessary to properly set out a charge is only of tangential assistance. Second, the jurisdictions relied on by the PP where the Prosecution is required to provide a summary of facts or a similar statutory statement of facts do not, as a general rule, have exhaustive statutory codes that contain a specific express power for the court to order particularisation of the facts. We note that the New South Wales Criminal Procedure Act 1986 (No 209 of 1986) (NSW) ("NSW CPC 1986") contains general statutory powers for the court to order the disclosure of matters that are required to be disclosed or to make orders to resolve any dispute between the parties to criminal proceedings over the requirements for pre-trial disclosure (see ss 149E, 149F, 247V and 247X), but there is no express power for the court to order the provision of further information relating to the required statement of facts. Section 9(4)(d) of the ("UK CJA 1987") gives the judge the power to order "any amendments of any case statement" (which includes the principal facts of the prosecution case) supplied by the Prosecution pursuant to an order under s 9(4)(a), and in *R v Smithson* [1994] 1 WLR 1052, the English Court of Appeal accepted that the judge could order amendments to the contents of the Prosecution's case statement as part of the judge's overall case management powers. The United Kingdom Criminal Procedure and Investigations Act 1996 (c 25) (UK) ("UK CPIA 1996"), as well as the Victorian Criminal Procedure Act 2009 (No 7 of 2009) (Vic) are silent on this. The overall picture emerging from this survey is a fragmented one, and the practice in other jurisdictions therefore provides inconsistent support for the PP's contention that an express statutory power would generally have been provided for if the legislature had intended for the courts to be able to order further particularisation of the summary of facts.

39 We accept that the CCDC regime was not intended to create a code encompassing the entirety of each party's disclosure obligations, but the nature of the present question is a much narrower one – whether statutorily prescribed consequences for the failure to comply with *statutory obligations* relating to disclosure were intended to be exhaustive and circumscribed. Although both sides have urged us to draw inferences from a patchwork of background material, it is not apparent from the drafting history of the Bill or the parliamentary debates whether Parliament had intended for the courts to retain some residual powers to manage the CCDC regime or had even turned its mind to this question. The material before us is equivocal.

A purposive interpretation of s 169

40 Before considering the scope of s 169, we make a preliminary observation on the general role of the presiding judicial officer at a CCDC. Section 160 mandates that a CCDC shall be convened for the *purpose of settling* pre-trial matters, and implicitly envisages that the presiding judicial officer may make directions to this end:

Criminal case disclosure conference

160.—(1) The prosecution and the accused shall attend a criminal case disclosure conference as directed by a court in accordance with this Division *for the purpose of settling the following matters*:

(*a*) the filing of the Case for the Prosecution and the Case for the Defence;

(*b*) any issues of fact or law which are to be tried by the trial judge at the trial proper;

(*c*) the list of witnesses to be called by the parties to the trial;

(*d*) the statements, documents or exhibits which are intended by the parties to the case to be admitted at the trial; and

(*e*) the trial date.

(2) The Magistrate or District Judge who presides over a criminal case disclosure conference *must not make any order in relation to any matter referred to in subsection (1) in the absence of any party if the order is prejudicial to that party*.

…

[emphasis added]

Upon our queries during oral arguments before us, the PP accepted that it was inherent in the CCDC regime that the courts must be entitled to qualitatively assess whether parties have complied with the statutory requirements for the filing of the Cases. After we directed parties to file further written submissions, the PP nuanced his position and submitted that after determining whether each party had complied with the respective statutory obligations, the court's powers to deal with non-compliance were limited to the following: (a) invoking the consequences under s 169; (b) setting the matter down for trial under s 160(1)(*e*); or (c) adjourning CCDC proceedings pursuant to its general powers under s 238 to allow the defaulting party time to comply. The PP underscored this argument by submitting that the role of the court within the CCDC regime was essentially a "ministerial" one, confined to administering the procedures set down in the CPC 2010.

41 In our view, the role of the court at the pre-trial CCDC stage is not a purely administrative and mechanistic one that that is limited to overseeing the progress of the sequential CCDC procedures. Section 160 sets out a list of matters that may be settled at a CCDC, and the settling of these matters would inevitably involve the court giving incidental directions or orders. Quite apart from the statutory obligations under the CCDC procedures, it would be fanciful to contend that because there are no express statutory powers relating to the matters in ss 160(1)(*b*)–(*d*) (the court's power to set a trial date under s 160(1)(*e*) is found in s 167), the court cannot give directions to the parties but can merely "encourage" the parties to settle these matters. Further, s 160(2) enjoins the court from making orders in the absence of a party if the order is prejudicial to that party. This is premised on the assumption that a CCDC court may make substantive orders relating to the matters set out in s 160(1). The High Court's powers of revision over orders made at CCDC proceedings under s 404 of the CPC 2010 also necessarily presume that orders with substantive impact can and will be made in these proceedings. The CPC 2010 understandably did not institutionalise a rigid procedural framework or formal strictures with respect to the manner in which CCDC hearings should be conducted and the directions or orders that may be made by the presiding judicial officer, the legislature opting instead

to leave this to the development of practice and discretion. We consider that it is entirely within the purpose of the overall CCDC regime that the presiding judicial officer assumes an active role in case management at the pre-trial stage to ensure that matters proceed expeditiously and that all material issues are placed before the trial judge. This necessitates some degree of discretion, and it would be entirely contrary to the aim of the CCDC regime if the judicial officer's powers are limited to the scheduling of CCDC hearings so as to move the parties through each stage of the procedures and towards trial.

42 We now turn to consider whether s 169 should be construed as exhaustively enumerating all possible consequences of any failure by the Prosecution or the Defence to substantially comply with each party's respective statutory obligations under ss 161–168.

43 The PP submitted that the plain words of s 169 only envisaged two possibilities if the Case for the Prosecution did not contain any or any part of the items specified in s 162: the drawing of an adverse inference at trial or the ordering of a DNAQ. Under the *expressio unius est exclusio alterius* principle of statutory interpretation, s 169 should thus be construed as delineating the scope of the possible consequences that may be imposed by the court. On a purposive construction of the overall CCDC framework, the limited range of remedies in s 169 was consonant with the sequential structure of the CCDC procedures, which provided in s 165(1)(*d*) that if an accused objected to "any issue of fact or law in relation to any matter contained in the Case for the Prosecution", a statement of the nature of the objection should be included in the Case for the Defence. Any objections to deficiencies in the Case for the Prosecution should therefore be raised in the Case for the Defence and not through an independent application to further particularise the Case for the Prosecution. The CCDC regime thus contained an in-built procedure to address the respondents' complaints in the present case, and a power to order particulars was not necessary.

44 The respondents took the position that allowing the court to make directions or orders for compliance would be in line with the purpose of achieving a fairer and more efficient trial by facilitating timely and transparent exchanges of information at the pre-trial stage. The PP's interpretation of the CCDC regime as operating in a purely mechanistic fashion would frustrate the purpose of these procedures in facilitating proper pre-trial discovery, as there would only be a limited degree of court involvement at the pre-trial stage and any coercive powers could only be substantially invoked at trial.

45 The plain language of s 169 is silent on whether s 169 exhaustively defines all possible consequences of non-compliance with Division 2 of Part IX of the CPC 2010, which contains the CCDC procedures. The heading of s 169 states "Consequences of non-compliance with Division 2", but s 169 only prescribes consequences for a failure to comply with ss 161, 162, 163 and 165. There are other obligations in Division 2, such as the duty of the Prosecution to file the Prosecution's Supplementary Bundle under s 166 after the Case for the Defence is filed, for which there are no express consequences for non-compliance. The PP argued that s 169 should be interpreted with reference to the *expressio unius* principle, which is described in Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) as follows (at p 1254):

> **Section 392. *Expressio unius* principle: words providing remedies etc**
>
> Where an Act sets out specific remedies, penalties or procedures it is presumed that other remedies, penalties, procedures that might have been applicable are by implication excluded.

Accordingly, where a statute has set out defined consequences, it is presumed that the legislature has excluded other consequences or penalties.

46 An expansive reading of s 169 as being inclusionary – covering only examples of the consequences that may arise from non-compliance with the CCDC procedures – and not exclusionary cannot be correct. It would be an impermissible arrogation of powers for the CCDC court to order a DNAQ at its discretion should the Prosecution fail to serve its Case, and to this extent, we are in full agreement with the logical force of the Prosecution's submissions. However, the boundaries of the application of the *expressio unius* principle must depend on the genus of the matters that are excluded by omission. This principle of statutory interpretation is a commonsensical one based on linguistic implication – in certain contexts, the absence of matters that fall within the same category that is covered by the provision may warrant an inference that these matters were deliberately excluded. This principle does not preclude other types of matters that were not within contemplation. Section 169 created sanctions for non-compliance to "to ensure that parties take discovery seriously" (see *18 May 2010 Parliamentary Debates* at col 414), and this choice of sanctions represents a legislative balancing of the various policy implications relating to criminal discovery. The imposition of an additional layer of sanctions must therefore be excluded by implication. However, orders made by the court imposing sanctions are, in our view, *qualitatively* different from orders of the court that a party has not complied with his or her statutory obligations and directing measures that have to be taken for compliance.

47 The Judge drew a similar distinction between *facilitating* compliance with the criminal discovery process and consequences in the form of *sanctions* which flow from non-compliance with the same (at [29] of the GD) in reaching the conclusion that the High Court was not precluded by s 169 from invoking its powers under s 404 to ensure that the CCDC regime is effective in assisting the parties to prepare for trial. The PP submitted that this distinction was a distinction without a difference, as the existence of possible consequences for non-compliance in itself facilitated compliance. With respect, we do not agree that this is a mere technical distinction. Although the PP rightly observes that both types of orders are aimed at the same *result* of securing compliance with the statutory obligations, each involves a discrete legal procedural mechanism.

48 In *R v Rochford* [2011] 1 WLR 534, a case decided under the UK CPIA 1996, the trial judge found that the accused had failed to comply with his obligations under s 6A of the UK CPIA 1996. Section 11 of the same act provides for the consequences of the accused's failure to comply with his obligation to file a defence statement under s 5(5) or to include the required contents prescribed by s 6A. The judge invited the accused to amend his statement to comply with the requirements. This invitation subsequently became a direction, and the judge indicated that if the accused failed to do so, he would be in contempt of court. After the accused continued to refuse to amend his statement, the judge imposed a sentence of imprisonment on the accused for contempt, finding that he was in flagrant breach of the order. On appeal, the Court of Appeal held (at [18]):

> The second question which we need to address is if it is plain that there is a breach of section 6A, either because there is no defence statement or because it has not got in it what it ought to have, can the court by ordering compliance then vest itself with the power to punish as a contempt of court disobedience to the order? The answer to that is "No". *Any order such as a judge might make would be no more than an emphatic articulation of the statutory obligation created by section 5(5) and 6A. The sanction for non-compliance is explicit in the statute in section 11. It is not open to the court to add an additional extra-statutory sanction of punishment for contempt of court.* [emphasis added]

The Court of Appeal therefore quashed the sentence for contempt as the judge did not have the power to punish for contempt in the face of the presence of s 11 (at [19]).

49 The court's reasoning in the passage cited in the preceding paragraph contrasts an order that

is "no more than an emphatic articulation of the statutory obligation" with an "extra-statutory sanction", and we would endorse a similar approach within the context of s 169. In our view, there is a conceptual distinction between the court's regulation of the CCDC hearings it presides over by determining whether the respective Cases of the parties are deficient and making consequential orders that direct what is required for full compliance, and the imposition of sanctions such as ordering a DNAQ for non-compliance. In this respect, we emphasise that the order made by the Judge for the PP to include certain details in the Summary of Facts is not the criminal analogue of the court's power to order further and better particulars in civil proceedings. The court is not exercising an additional or extra-statutory power to order the Prosecution to augment its case against the accused by providing further particularisation, but is making a legal determination of what must be contained in the "summary of facts in support of the charge" under s 162(*b*) and directing parties accordingly. The parties are simply being ordered to do what they are by statute bound to do but have not done. The drafting history that we have traversed above suggests that when Parliament was considering the consequences for non-compliance under s 169, it had in mind the imposition of punitive or coercive sanctions, but the question of the court's interlocutory powers in relation to disputes that arose between the parties in the course of CCDC proceedings was never directly canvassed during the consultation process or the debates during the passage of the Bill. The power to order the particularisation of a summary of facts to ensure compliance with the statutorily prescribed contents falls in the latter category, and it is not evident to us why s 169 has to be read as excluding a power of a different nature.

50 The PP further submitted that the objections raised by the respondents were in fact covered by the sequential CCDC procedures, and that the exclusion of the court's powers to make consequential or ancillary orders was entirely consistent with Parliament's intent not to permit any delays to the strict timelines envisaged in the framework. The PP took the position that if the Case for the Prosecution was allegedly deficient, the correct procedure had been set out in s 165(1)(*d*), which states as follows:

> **165.**—(1) The Case for the Defence must contain —
>
> ...
>
> (*d*) if objection is made to any issue of fact or law in relation to any matter contained in the Case for the Prosecution —
>
> (i) a statement of the nature of the objection;
>
> (ii) the issue of fact on which evidence will be produced; and
>
> (iii) the points of law in support of such objection.
>
> ***Illustration 1***
>
> *A* is charged with robbery. The summary should state the nature of the defence, the facts on which it is based (for example, that the victim gave the items to *A* voluntarily) and any issue of law which *A* intends to rely on (for example, that *A*'s act did not amount to robbery as the elements of that offence were not made out, or that a general exception in Chapter IV of the Penal Code (Cap. 224) applied in this case).
>
> *Illustration 2*

> The accused, *A*, intends to challenge, at the trial, the voluntariness of his statements made to the police which statements are intended by the prosecution to be admitted as part of its case. *A* must specify which of the statements he intends to challenge and the facts that he intends to rely on to support his challenge.

...

51 We do not think that the sequential nature of the CCDC regime provides a sound basis for the PP's proposition that Parliament had created a contained and self-executing framework that would be undermined if the CCDC court had the discretion to make additional directions and orders or determine applications claiming that one party had not complied with his obligations. Section 165(1)(*d*) clearly does not deal with the present situation, and in fact contradicts the PP's argument that the CCDC regime was designed to resolve disputes of a similar nature. The hypothetical factual scenarios set out in the illustrations to s 165(1)(*d*) indicate that the accused's "objection" to any matter contained in the Case for the Prosecution is one that relates to the substantive aspects of the Case for the Prosecution. The accused has an obligation to explain the nature of his objection and identify the factual or legal issues that he is relying upon to challenge the Prosecution's case theory. This subsection was not intended to create a procedure through which the accused may "object" to what he perceives to be inadequacies in the Case for the Prosecution. Instead, taken to its logical conclusion, the PP's interpretation would undermine the rationale underlying sequential disclosure. If the accused is to make his objections to any perceived deficiency in the Case for the Prosecution while filing the Case for the Defence, it would plausibly lead to unnecessary duplication and delay if the Case for the Defence is similarly lacking in material details due to the an inability to ascertain with sufficient clarity the Prosecution's case theory or to narrow down any disputed issues of fact or law. The Prosecution may then plausibly attempt to argue that the statutory requirements for the Case for the Defence have not been satisfied and that the Prosecution is thereby under no corresponding obligation to file the Prosecution's Supplementary Bundle under s 166(2). Neither the Prosecution nor the accused obtains any helpful discovery. This deadlock, which the court would be powerless to resolve, cannot be the intended result of the CCDC procedures. There is thus nothing in the architecture of the CCDC regime that is inconsistent with a purposive construction of s 169 as prescribing *substantive* consequences for non-compliance whilst retaining a limited degree of discretionary power for the presiding judicial officer to make orders or directions for parties to comply with their statutory obligations during the course of CCDC proceedings. On the contrary, it would appear to us to be rather anomalous if s 169 were to be read as an exhaustive code on *all* types of directions or orders that the court may make at the pre-trial stage, leaving the CCDC court with only a single instrument of ordering a DNAQ.

52 Viewed from a pragmatic perspective, we also consider that it is inherent in the progressive nature of the CCDC framework that it may not always be self-executing, and the court ought to be able to facilitate the CCDC procedures by intervening when appropriate. The PP appeared to conceive of the sequential CCDC procedures as involving *quid pro quo* exchanges of information – each party's obligations are only triggered after the opposing party has complied with his or her obligations at a prior step – and submitted that if there were any breaks or disruptions in the procedures, the proper course for the CCDC court would be to set the matter down for trial or order a DNAQ if the defaulting party was the PP. Alternatively, the court may adjourn the CCDC hearing to give parties time to comply. The former two measures would terminate the CCDC procedures, while the latter option renders the court a passive neutral evaluator. However, given that the PP accepted that s 169 envisages that the court must have the power to make a qualitative assessment of whether the parties have complied with the statutory requirements and that the court could adjourn proceedings to "encourage" the parties to comply, there is very little practical difference between this position and the approach contended for by the respondents, *viz*, that the court may make affirmative orders

directing the parties to comply with their statutory obligations. Parties may, in the course of the CCDC procedures, have legitimate disagreements on what the Cases should contain. In such circumstances, the CCDC regime should be implemented in a practical and workable fashion by preserving the court's discretion to make the necessary consequential orders to each party directing the steps for compliance, instead of leaving it to each party to unilaterally determine whether their concomitant obligations have been triggered by the previous step taken by the opposing party or how they should comply. Parties would otherwise be free to interrupt the flow of the CCDC procedures or abandon their obligations, with the only threat being the blunt sanction of ordering a DNAQ or the possible drawing of an adverse inference at trial.

53 The sequential steps set out in ss 160 to 168 of the CPC 2010 and the consequences of non-compliance in s 169 should therefore be construed purposively as creating a minimal framework for criminal discovery that leaves a residual measure of discretion for the presiding judicial officer to make interlocutory orders and directions. The effectiveness of the CCDC regime in achieving greater transparency, fairness and efficiency at the pre-trial stage would be undermined if the court's only role at the pre-trial stage was limited to terminating the CCDC procedures by fixing the matter for trial or ordering a DNAQ, and we are unable to accept the PP's argument that no grave substantive injustice would be caused by a failure to comply with CCDC procedures as all evidence and documents would eventually be adduced at trial and the trial judge would have oversight of the proceedings. We share the Judge's concerns (at [28] of the GD) that the potential availability of an adverse inference at trial is of scant consolation to the accused if the information contained in the Case for the Prosecution is insufficient for the accused to be properly prepared for trial, and similarly, the accused may not be able to file an adequate Case for the Defence that would assist in distilling the disputed issues. Whether or not substantive injustice would result when the eventual verdict is rendered based on the merits of the Prosecution's case, the CCDC regime was intended to tilt the balance of what was previously regarded as an uneven playing field by introducing early discovery, and the court should endeavour to play a role that achieves this purpose. If the court is able to provide efficient remedial responses to disputes at the interlocutory stage, we can think of no good reason why this should be deferred to trial.

54 Under the PP's conceptualisation of the CCDC regime, it is also entirely possible for parties to choose which statutory obligations they wish to comply with and adopt a cost-benefit analysis – weighing the possibility of an adverse inference that may affect the eventual verdict against the benefits of concealing material information – in making tactical decisions on what and how much can be disclosed while still obtaining information from the opposing party. A recent article on the criminal discovery framework under the CCDC has rightly observed that (see Denise Huiwen Wong, "Discovering the Right to Criminal Disclosure: Lessons from Civil Procedure" (2013) 25 SAcLJ 548 ("*Denise Wong*") at para 31):

> ***[T]he necessary and logical corollary of the prosecutorial duty to disclose and the power of the court to compel such disclosure is that the accused person must have a*** *legal right* ***to seek such disclosure from the court where it is not forthcoming.*** Even if the Prosecution's duty is in strict terms owed to the court, the Defence is entitled to and can exercise the right to access the documents at the pre-trial stage. To do so, he must be able to seek the court's assistance to obtain these documents. Similarly, the disclosure obligations of the Defence can be framed in terms of the right of the Prosecution to utilise the court process to obtain the relevant information and documents from the Defence. [italics in original; emphasis added in bold italics]

The CCDC regime envisages that both the Prosecution and the accused have a right to a minimum dossier of information in the form of the Cases. This is the correlative right corresponding to the duty of the Prosecution and the accused to file and serve their Cases on the opposing party. Although the

CCDC regime does present a theoretical "choice" between the provision of such information and suffering the consequences for non-compliance under s 169, we see no reason why the court should not also have the power to enforce the "right" to such information by making orders or directions when such information is not forthcoming, sending out an unequivocal message that parties who have opted into the CCDC regime or who perform a constitutional duty of prosecution are expected to comply with their obligations.

55 At the hearing, we queried parties on the related issue of whether the existence of a discretion for the CCDC court to make consequential orders would have an asymmetrical impact as between the Prosecution and the accused. The PP submitted that effective sanctions would exist against the Prosecution as the Prosecution discharges a constitutional power in conducting criminal prosecutions and is an officer of the court. The Prosecution would therefore endeavour to comply with all court orders. In contrast, the accused may not be under the same duty to comply with orders and the court is not in a position to order sanctions akin to the striking out of pleadings or default judgment for breach of "unless" orders which are available in civil proceedings (see O 34A r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)), or to cite the accused for contempt of court in the absence of a statutorily prescribed power. The respondents submitted that if the accused refused to comply with court orders, he was equally susceptible to having an adverse inference drawn against him at trial and would also lose the right to obtain the Prosecution's Supplementary Bundle under s 166(2).

56 Having considered the above submissions and the rhetorical question posed by the PP whether it would be "a vain thing to formulate a power without the corresponding ability to enforce it", we do not think that the court's power to make orders or directions in the course of the CCDC proceedings would necessarily be rendered illusory by the absence of an effective enforcement mechanism that the CCDC court may invoke against the accused. The available consequences under s 169 may be invoked by the court if either the Prosecution or the accused refuse to comply with a direction that further information be provided as part of the Cases. Whilst s 169 only envisages a *pre-trial* sanction against the Prosecution of ordering a DNAQ should it fail to serve its Case for the Prosecution or if the Case for the Prosecution is deficient, this is in our view in line with the golden thread in criminal law that the onus is on Prosecution to prove its case beyond reasonable doubt. If there is a failure by the Prosecution to set out its case by serving its Case for the Prosecution on the accused, Parliament has considered that a fair and balanced sanction may be for the court to order a DNAQ. Clearly, unlike in civil cases, there can be no parity of sanctions as it is not open to the court – in the absence of a statutory power – to dismiss the accused's defence or bar the accused from advancing certain factual or legal aspects of his defence. There remains, however, the possibility of sanctions at trial that may have real implications on how the accused presents his case. We acknowledge that the prescribed consequences in s 169 are not, as the PP correctly pointed out, strictly predicated on a prior failure to comply with an order made by the presiding judicial officer at a CCDC hearing. Nonetheless, the trial judge is vested with discretion as to when and how such consequences should be invoked, and persistent default by a party or an adamant refusal to abide by consequential directions made by the CCDC court may justify a greater willingness to impose these sanctions. We agree with the observations in *Denise Wong* (at para 38) that:

> [t]he problem lies not only with the lateness of any relief at trial, but also with the adequacy and proportionality of the possible remedial responses to the non-compliance. The court would be in a far better position to address the non-compliance at an interlocutory stage as it would be able to avail itself of a wider range of orders, rather than waiting until the trial when the available options at the court's disposal are not only limited but likely to be disproportionate. *The polar extremes, of a discharge on one end of the spectrum and the somewhat amorphous concept of drawing an adverse inference on the other, mean that any relief at the stage of trial would not be tailored to suit the nature, gravity and significance of the non-compliance and would be sorely deficient*

in giving meaningful effect to the rights to discovery. [emphasis added]

57 Finally, we add that we are conscious of the implications of our decision on the efficient disposal of cases in the Subordinate Courts and have taken into account the PP's position on this issue. The PP submitted that a new category of "satellite litigation" may be created – defence counsel may attempt to delay the CCDC procedures by making applications for a supplementary summary of facts from the Prosecution, and this may potentially result in a corresponding increase in the number of criminal revisions filed in the High Court if applications for further particulars are denied. In the light of the PP's concession that the CCDC court must have the power to make a qualitative assessment as to whether each party has discharged his statutory obligations, we doubt that the floodgates argument of potential problem of delays caused by unmeritorious ancillary applications or applications for criminal revisions is likely to be a pressing concern. If the accused makes spurious or tactical applications alleging that the Case for the Prosecution is inadequate, we do not see why these applications cannot be summarily dismissed at the further CCDC hearing following the service of the Case for the Prosecution. On the other hand, if the court is of the view that the Case for the Prosecution or Defence is deficient and directs that further particulars or information ought to be furnished, firm timelines may be fixed for compliance, and the court may either invoke s 169(2) (if the defaulting party is the Prosecution) or immediately schedule the matter for trial if there are persistent refusals to comply. The CCDC court is well placed to identify instances where parties are deliberately obstructing the CCDC procedures and have no honest intentions of complying, and may respond accordingly to prevent further delay. Even if we were inclined towards the PP's position, the CCDC court might still be faced with applications requesting legal assessments of whether the parties have substantially complied with their obligations, but its options would be limited to adjourning the CCDC hearing to give parties time to comply or fixing the matter for trial. In either eventuality, the timeline of the sequential CCDC procedures would be susceptible to interruptions, except that in the latter situation, either party would be able to unilaterally determine whether it wishes to comply, holding the CCDC procedures in abeyance in the interim. This does not appear to us to be a more practical solution to the PP's reservations.

58 We answer Question 1 as follows: No, s 169 enumerates the substantive consequences for non-compliance with the CCDC procedures in Division 2 of Part IX of the CPC 2010, but does not preclude any directions or orders that the court may make in relation to compliance with the requirements for the filing of the Cases.

Question 2

59 This question has been considered above as part of our analysis of Question 1, and it suffices for us to address the source of the court's power to order the Prosecution to furnish particulars relating to the summary of facts in order to comply with the requirements of s 162(*b*). In our judgment, the source of the court's power is found in s 160(1)(*a*) of the CPC 2010, which mandates the convening of a CCDC to settle "the filing of the Case for the Prosecution and the Case for the Defence".

60 As we have considered above (at [41]), ss 160(2) and 404 are predicated on the assumption that the court may make orders in the course of a CCDC hearing relating to the matters enumerated in s 160(1), although s 160 understandably does not set out an extensive list of the precise types of orders that may be made. To the extent that these orders or directions do not impose additional legal obligations or subject parties to substantive legal disabilities that are not otherwise prescribed under the CPC 2010 or another written law, we consider that the powers to make such orders are conferred by s 160(1) as powers that are necessary or ancillary to "*settling [such] matters*". Under s 29(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), a written law conferring powers to do any act or thing

shall be understood to confer powers that "are reasonably necessary to enable the person to do...the act or thing". The term "settling" is a broad one and ordinarily refers to the resolving of matters in dispute and/or which have not been agreed upon. It is implicit that a power of the presiding judicial officer to settle must incorporate the power to do what is necessary to achieve that objective. In our view, this must necessarily include directions to parties on the timelines for filing and service, as well as orders to provide further particulars or information to fully comply with the requirements for the contents of the Cases under ss 162 and 165. In the light of the foregoing analysis, it is not necessary for us to have recourse to the court's power under s 6 of the CPC 2010 to adopt a procedure as the justice of the case may require or to invoke the court's inherent powers.

61 We answer Question 2 as follows: Yes, the Magistrate or District Judge who presides over a CCDC has general powers under s 160(1)(*a*) of the CPC 2010 to make orders relating to the filing of the Cases. This includes the power to order the Prosecution to furnish additional particulars in the summary of facts in support of the charge filed and served as part of the Case for the Prosecution.

Question 3

62 The three criminal revisions before the Judge were brought pursuant to s 404 of the CPC 2010, which states:

> **Power to revise orders made at criminal case disclosure conference**
>
> **404.**—(1) The High Court may, on its own motion or on the application of the Public Prosecutor or the accused in any criminal case disclosure conference, call for and examine the record of any criminal case disclosure conference held under Part IX or X before a Magistrate, a District Judge, the Registrar of the Subordinate Courts or the Registrar of the Supreme Court to satisfy itself as to the correctness, legality or propriety of any order recorded or passed at the criminal case disclosure conference, and as to the regularity of the criminal case disclosure conference.
>
> (2) Any application by the Public Prosecutor or the accused under subsection (1) must be made within 7 days from the date of the order so recorded or passed at the criminal case disclosure conference to which the application relates.
>
> (3) On examining a record under revision in this Division, the High Court may affirm, vary or set aside any of the orders made by the Magistrate, District Judge, Registrar of the Subordinate Courts or Registrar of the Supreme Court, as the case may be, who presided over the criminal case disclosure conference.
>
> (4) The High Court may not proceed under subsection (3) without first giving the parties adversely affected by the High Court so proceeding an opportunity of being heard either personally or by advocate.
>
> (5) Where a case is revised under this Division, the High Court must certify its decision or order to the Magistrate, District Judge, Registrar of the Subordinate Courts or Registrar of the Supreme Court, as the case may be, who recorded or passed the order at the criminal case disclosure conference and that Magistrate, District Judge, Registrar of the Subordinate Courts or the Registrar of the Supreme Court, as the case may be, must make the requisite orders to give effect to the decision or order.

63 Although the Judge expressly premised his powers to order particulars as stemming from the "widely framed" revisionary jurisdiction of the High Court in s 404(3) of the CPC 2010 (at [27] of the

GD), the Judge did not discuss the threshold for intervention. The Judge's reasoning, however, appeared to be based on a *de novo* evaluation of the merits of an application for further particulars. This was also the approach advocated by counsel for Li before the High Court, who argued that the specific power under s 404 to revise orders made at a CCDC was not subject to the requirement of serious injustice applicable to the court's general revisionary jurisdiction. Instead, the High Court was to satisfy itself as to the correctness, legality or propriety of the order or the regularity of the proceedings pursuant to s 404(1), and could intervene on any of the four grounds.

64 The PP submitted that the same threshold ought to apply to the exercise of the High Court's general revisionary jurisdiction under s 400 of the CPC 2010 and the revisionary jurisdiction for orders made at a CCDC under s 404. The respondents submitted that a different test ought to apply under s 404 as a distinction should be drawn between a "judgment, sentence or order" recorded during any criminal proceedings before a Subordinate Court under s 400 and an "order" made at a CCDC under s 404. A high threshold of "serious injustice" need not apply to the latter as there was no additional right of appeal against an order made at a CCDC and a liberal exercise of the High Court's powers under s 404 would therefore not be tantamount to a backdoor appeal. Further, as the orders in an application made under s 404 were interlocutory or procedural in nature and involved comparatively less serious consequences, the same revisionary threshold for final decisions on the substantive merits under s 400 should not be applied by analogy to s 404.

The threshold for the exercise of the court's revisionary powers under s 404

65 Section 404 is a new provision introduced by the CPC 2010 that exclusively governs orders made at a CCDC. There is no available guidance, either in the case law or the explanatory note to the corresponding clause in the Bill, as to how the High Court's powers are to be exercised. The wording of s 404(1) closely mirrors the general revisionary powers under s 400(1), which provides as follows:

> **400.**—(1) Subject to this section and section 401, the High Court may, on its own motion or on the application of a Subordinate Court, the Public Prosecutor or the accused in any proceedings, call for and examine the record of any criminal proceeding before any Subordinate Court *to satisfy itself as to the correctness, legality or propriety of any judgment, sentence or order recorded or passed and as to the regularity of those proceedings*. [emphasis added]

66 There are two opposing textual arguments as to how s 404 of the CPC 2010 should be construed. The first is an argument from juxtaposition – if orders made at a CCDC are not included within the ambit of the High Court's appellate jurisdiction and are governed by a separate provision in s 404 described as the court's power to *revise* orders, it follows logically that the legislature had made a conscious choice to draw a distinct divide between revision and appeal. The nomenclature of "revision" must be given legal effect, and the powers under s 400 therefore should not be construed as akin to appellate powers over the merits of the order made by the CCDC court. The second argument is that orders made at CCDC proceedings can only be the subject of a revision and not an appeal because such orders are interlocutory in nature (see *The Criminal Procedure Code of Singapore* (Jennifer Marie, Mohamed Faizal Mohamed Abdul Kadir gen ed) (Academy Publishing, 2012) at para 20.013, discussing s 374(5) of the CPC 2010, which provides that no appeal shall lie against an order made at any CCDC). It does not thereby follow that the court's powers relating to revision of such orders must necessarily parallel the broad general powers of revision. Section 404 is placed within a standalone division in Part XX and the literal meaning of the words "correctness, legality, propriety or regularity" are capable of encompassing a more robust standard of intervention when invoked in a defined context.

67 We are of the view that the first argument should be preferred as a matter of preserving the

structural and theoretical consistency of the High Court's powers of criminal revision. The High Court's revisionary powers in criminal proceedings are a creature of statute. They are conferred by s 23 of the SCJA and may be exercised in accordance with the relevant provisions of the CPC 2010. This general revisionary jurisdiction was described in the following terms by Prof Tan Yock Lin (see Tan Yock Lin, "Appellate, Supervisory and Revisionary Jurisdiction" in ch 7 of *The Singapore Legal System* (Walter Woon ed) (Longman, 1989) ("*Tan Yock Lin*") at p 234):

> The power of revision is a very wide power. *It can be seen as paternalistic in nature, designed to enable the correction of miscarriage of justice* arising from a misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment. … However, too liberal intervention can undermine the finality of judgments, and upset the balance between finality and control which the appeal rules are designed to achieve. [emphasis added]

The revisionary jurisdiction "is or looks very much like appeal and supervision joined in wedlock because it may be founded on formal defects or defects of merits" (*Tan Yock Lin* at p 235, also see *Ng Chye Huey and another v Public Prosecutor* [2007] 2 SLR(R) 106 at [46], referring to the court's revisionary jurisdiction as a "statutory hybrid"). Where reference is made by statute to powers that are labelled as *powers of revision*, it must therefore be intended to mean something separate and distinct from the court's criminal appellate jurisdiction.

68 The language used in s 404 largely replicates the language of ss 400–403 governing the court's general revisionary jurisdiction – the court is to satisfy itself as to the "correctness, legality or propriety" of a judgment, sentence or order recorded and the "regularity" of the criminal proceedings or CCDC. In our judgment, Parliament's clear intention, in defining the court's powers to "revise orders" made at CCDCs, must have been to subsume the High Court's powers to review orders made at CCDCs under the umbrella of the court's paternalistic revisionary jurisdiction, instead of granting an independent and separate power to the High Court to conduct a *de novo* review of the merits of the order. The type of jurisdiction invoked must be of significance, and we are not persuaded by the respondents' arguments that the operative words "correctness, legality or propriety" or "regularity" in s 404 mean that the High Court is entitled to interfere if the order made at the CCDC is incorrect, illegal or improper or if there is a procedural irregularity. These words delineate the *scope of review* – which may be founded on formal or substantive defects – that apply equally to the court's general revisionary jurisdiction, but not the *threshold for intervention*, which is a separate question of how the court ought to exercise its powers within the scope of the review. It is well-established that the discretionary powers of revision should be exercised "sparingly" (*per* Yong Pung How CJ in *Bedico Ma Teresa Bebango v Public Prosecutor* [2002] 1 SLR(R) 122 at [8]) and intervention is only warranted where "serious injustice" would otherwise result. The threshold requirement of "serious injustice" was discussed by Yong CJ in *Ang Poh Chuan v Public Prosecutor* [1995] 3 SLR(R) 929 ("*Ang Poh Chuan*") at [17]:

> [T]here cannot be a precise definition of what would constitute such serious injustice for that would in any event unduly circumscribe what must be a wide discretion vested in the court, the exercise of which would depend largely on the particular facts. *But generally it must be shown that there is something palpably wrong in the decision that strikes at its basis as an exercise of judicial power by the court below*. [emphasis added]

There is extensive judicial authority discussing the circumstances when the High Court may invoke its general powers of revision, and if Parliament had intended to depart from this threshold, Parliament would not have labelled the High Court's power *vis-à-vis* orders made at CCDCs as a power to *revise* orders.

69 We are also not persuaded by the submission that the different nature of the orders under review necessitates the application of a different test for the invocation of the High Court's revisionary powers. The respondents argued that the exercise of revisionary powers *vis-à-vis* a final judgment, order or sentence should be circumscribed because there is a parallel appellate jurisdiction that entitles the party to bring a challenge on the merits and the separate jurisdictions should not be merged through the application of an identical threshold for intervention under both jurisdictions. The parties cannot be allowed to bring what is in effect an appeal under the guise of a petition for revision. In contrast, there is only a single avenue of recourse under s 404 to challenge an order made during a CCDC (which is only interlocutory or procedural in nature) and the test for invocation thus ought not to be equally onerous. We acknowledge that the powers of criminal revision are generally not exercised readily so as to preserve the finality of judgments and orders and to prevent the circumvention of the appellate process, but it does not follow that the absence of an appeal against orders made at a CCDC should mean that an attenuated threshold would apply to applications seeking revision of such orders. There is no general right of appeal in the CPC 2010 against interlocutory orders made in the course of criminal proceedings; such orders can only be challenged as part of an appeal against the decision on the merits. Where a power of revision is statutorily conferred with respect to a specific category of interlocutory orders that otherwise cannot be appealed, an equally possible interpretation is that the legislature had intended to keep the scope of intervention within the narrow recognised boundaries of revision, instead of extending what is in effect an appellate review on the merits in all but name. This would balance the considerations of ensuring that criminal proceedings are not subject to undue delays caused by dilatory tactics, while providing a limited safeguard against interlocutory orders that may lead to a miscarriage of justice. We consider that this is more likely to have been the legislative intention in creating an express power for the revision of orders made at CCDCs. It is otherwise difficult to conceive of some intermediate standard of intervention that is neither appellate nor revisionary, and if Parliament had intended to create a different mode of recourse, it would have done so in clear and express words.

The application of the "serious injustice" threshold under s 404

70 The legal threshold of "serious injustice" was added as a judicial gloss to the statutory criminal revisionary powers of the High Court that can be traced back to s 312 of the Criminal Procedure Code 1900 (Ordinance No 21 of 1900). In *Ang Poh Chuan*, Yong CJ analysed the Indian jurisprudence and concluded that the common denominator was that there had to be in existence some measure of serious injustice before the courts would exercise s 268 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), which is *in pari materia* with s 400 of the CPC 2010. The High Court has eschewed rigid rules in determining when the revisionary powers should be exercised, and this threshold was necessarily crafted in very wide and elastic terms due to the varied factual situations that may arise before the court exercising this paternalistic revisionary power. Without attempting to provide a general definition or precluding any relevant considerations that may arise in future cases, we would observe that the threshold is often malleable in practice and the court could take into account the following factors:

(a) Orders made during CCDCs inevitably involve some measure of administrative discretion, exercised within the context of the course of the entire CCDC process, which the High Court ought to accord some latitude to.

(b) As the orders that may be challenged are interlocutory in nature, what may constitute substantial injustice would have to be viewed flexibly through this perspective, and substantial injustice need not necessarily rise to the level of requiring the order to have a considerable or immediate bearing on the actual merits of the case.

(c) In assessing whether an order made at a CCDC would lead to substantial injustice, the court may have due regard to the yardsticks of fairness and natural justice and whether the impugned order would severely undermine the statutory purpose of the CCDC regime in assisting the parties to prepare adequately for their cases before trial.

71 We answer Question 3 as follows: The High Court's exercise of its powers to revise orders made at CCDCs under s 404 of the CPC 2010 is subject to the threshold of "serious injustice".

Question 4

The legislative history of s 477A

72 Section 477A of the Penal Code states as follows:

Falsification of accounts

477A. Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully and with intent to defraud destroys, alters, conceals, mutilates or falsifies any book, electronic record, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book, electronic record, paper, writing, valuable security or account, shall be punished with imprisonment for a term which may extend to 10 years, or with fine, or with both.

Explanation—. —It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud or any particular day on which the offence was committed.

The explanation contains three separate limbs on what does not have to be alleged in a charge under s 477A: (a) the particular person intended to be defrauded, (b) the particular sum of money intended to be the subject of the fraud and (c) the particular day on which the offence was committed.

73 Section 477A was introduced to the then Straits Settlements Penal Code (Ordinance 4 of 1871) by s 25 of the Penal Code Amendment Ordinance 1902 (Ordinance 12 of 1902). During the first reading of the bill, the Attorney-General W R Collyer explained the amendment as follows (see *Proceedings of the Legislative Council of the Straits Settlements* (15 April 1902) at p B99):

> The remaining section is again derived from one of the Indian amendments, and it is a section which, I think, adds to the usefulness of the Code. It makes an offence of destroying documents and valuable securities or accounts for the purpose of fraud; it makes actual falsification of accounts an offence in itself, instead of leaving it merely evidence of fraud. That is a useful amendment, and I am glad it is included in this Bill.
>
> By this Bill, we shall have brought our own Code, up to date, in line with the Indian Code. We shall have the advantage of the Indian decisions not only on the old sections, but also in regard to these additions. …

It appears to have been intended that s 477A of the Penal Code would be construed in conformity with s 477A of the Indian Penal Code 1860 (Act 45 of 1860) ("IPC") (also see the explanatory

statement to the bill in *Straits Settlements Government Gazette* (18 April 1902) at para 28).

74 The equivalent s 477A of the IPC was inserted by s 4 of the Indian Criminal Law (Amendment) Act 1895 (Act 3 of 1895) and was enacted in response to a perceived defect in the law that arose in an unreported Calcutta case involving one Shama Churn Sen ("Shama's Case") (see C K Thakker & M C Thakker, *Ratanlal & Dhirajlal's Law of Crimes* (Bharat Law House, 26th Ed, 2007) ("*Ratanlal's Law of Crimes*") vol 2 at p 2638; Dr Sir Hari Singh Gour, *The Penal Law of India* (Law Publishers (India) Private Limited, 11th Ed, 1999) ("*Gour*") vol 4 at p 4542; *The Times of India*, 18 April 1894). Shama, a cashier employed by the Chartered Bank of India, was charged with criminal breach of trust and Shama admitted that he had misappropriated nearly twelve lakhs of rupees from the bank. However, the charge preferred against Shama related to a specific sum of three lakhs, and the jury was directed by the judge to consider whether, based on the charge, Shama had embezzled that particular sum of three lakhs on one particular day. The jury returned a verdict of not guilty as the Prosecution had failed to prove the offence in respect of that sum (see *The Times of India*, 26 September 1890).

75 This section was in turn derived from the United Kingdom Falsification of Accounts Act 1875 (38 & 39 Vict c 24) (UK) ("Falsification of Accounts Act"), which was enacted to deal with dishonest clerks who could not be indicted for embezzlement as it was often difficult to prove an actual appropriation without the making of any entry or acknowledgment of receipt, even if it was proven that money had been received by them (see Courtney Stanhope Kenny, *Outlines of Criminal Law* (Cambridge University Press, 1st Ed, 1902) at p 234). Section 1 of the Falsification of Accounts Act stated:

> **1**. That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.

The first limb of the explanatory note to s 477A also closely tracked s 2 of the Falsification of Accounts Act:

> **2**. It shall be sufficient in any indictment under this Act to allege a general intent to defraud without naming any particular person intended to be defrauded.

Section 2 was repealed by the Indictments Act 1915 (5 & 6 Geo 5 c 90) (UK) ("Indictments Act") and materially re-enacted in Form 25 of the Appendix to the Rules contained in the First Schedule to the Indictments Act, which set out particulars of the offence that had to be contained in the indictment for a charge under s 1 of the Falsification of Accounts Act. The prescribed format for the particulars did not specify the person whom the intent to defraud was directed at:

> **Particulars of Offence.**
>
> ***A.B.*** , on the day of , in the county of , being clerk or servant to ***C.D.*** , with intent to defraud, made or concurred in making a false entry in a cash book belonging to the said ***C.D.*** , his employer, purporting to show that on the said day 100*l*. had been paid to ***L.M.***

The Falsification of Accounts Act was subsequently repealed and replaced with an offence under s 17 of the Theft Act 1968 (c 60) (UK).

76 The explanatory note to s 477A of the IPC and the Penal Code is broader than s 2 of the Falsification of Accounts Act, and only the second and third limbs (see above at [72]) deal squarely with the issue that arose in Shama's Case. Therefore, although it appears to have been necessary to specify the particular sum of money and the day on which the offence was committed for a charge under s 1 of the Falsification of Accounts Act, the explanatory note went further and dispensed with these requirements. It is nonetheless apparent that the identity of the person alleged to have been defrauded was also not a requirement for an offence under s 1 of the Falsification of Accounts Act.

The import of the explanation to s 477A

77 The Judge considered that a general intent to defraud would serve to "cover cases where the deception is directed indiscriminately at the general public" and gave as examples the falsification of accounts to present a misleading picture of a company's accounts to the public or an internet scam directed at internet users at large (at [36] of the GD). The Judge also observed (at [44] of the GD) that:

> … the practical emphasis of s 477A PC was placed more on relieving the Prosecution from having to prove a particular sum which had been misappropriated or a particular occasion on which money had been misappropriated, and less on not having to name the particular person intended to be defrauded.

From the foregoing, the Judge concluded that where a charge was brought under s 477A, the Prosecution had to "present a specific case as to the nature of the accused's fraudulent intention, including the person who was the object of the fraudulent intention, and cannot hide behind the explanatory note in s 477A [of the Penal Code] to avoid taking a position" (at [45] of the GD). The Judge also noted that the PP had not taken the position in the present s 477A Charges that the respondents had acted with a general intent to defraud. The explanatory note did not provide the PP with a categorical general exemption from specifying the individual or entity alleged to have been defrauded, and the PP in the present case had to specify whether he was relying on a general intention to defraud or a specific intention to defraud, and if it was the latter, the specific person or entity had to be identified (at [46] of the GD).

78 In effect, the Judge took the position that the explanatory note meant that it sufficed only in certain cases for the Prosecution to assert a general intent to defraud. If, however, the Prosecution's case was premised on a specific intent to defraud, the person or entity to which this intent was directed ought to be identified.

79 Before us, the PP submitted that the express words of the explanatory note provided that "[i]t shall be sufficient *in any charge* under this section to allege a general intent to defraud" [emphasis added], and that the Judge's holding that a specific intent to defraud was necessary in some cases, but not all, was not supported by authority. The PP took the position that he was under no legal obligation to specify the persons or entities intended to be defrauded in the summary of facts relating to a s 477A charge. The respondents submitted that s 2 of the Falsification of Accounts Act was intended only to affect the formal aspects of a charge, and the Prosecution was thereby not absolved from proving at trial that the accused intended to defraud a specific person or entity. Similarly, the explanation to s 477A should be construed as only affecting the form of pleadings and not the elements required to make out the offence.

80 Counsel for Li relied on the House of Lords decision in *R v Henry Hodgson* (1856) Dears & Bell 3 ("*Henry Hodgson*") for the proposition that the effect of a section setting out the contents of a charge went only to the formal aspects of the charge and not the legal elements of the offence. In *Henry Hodgson*, the offender was indicted for an offence of forgery under the common law, and the form of indictment followed s 8 of the United Kingdom Criminal Procedure Act 1851 (14 & 15 Vict c 100) (UK) ("Criminal Procedure Act 1851"), which stated:

> From and after the coming of this Act into operation it shall be sufficient in any Indictment for forging, uttering offering, disposing of, or putting off any Instrument whatsoever, or for obtaining or attempting to obtain any Property by false Pretences, to allege that the Defendant did the Act with intent to defraud without alleging the Intent of the Defendant to be to defraud any particular Person; and on the Trial of any of the Offences in this Section mentioned, it shall not be necessary to prove an Intent on the Part of the Defendant to defraud any particular Person, but it shall be sufficient to prove that the Defendant did the Act charged with an Intent to defraud.

It was alleged that the accused had forged and uttered a diploma of the College of Surgeons. The jury found that the accused had forged the document with a general intent to induce a belief that the document was genuine and had shown it to two persons with an intent to induce belief; however, he had no intent in the forging, or in the uttering, to commit any particular fraud or specific wrong to any individual. During oral arguments, Jervis CJ expressed the view that "[t]he intent must not be a roving intent, but a specific intent" (at 893) in response to a submission by the Crown that it would be enough for the Crown to allege, at the time the document was forged, an intent "to deceive divers persons" (or in modern day parlance, various persons). Jervis CJ then concluded (at 894) that s 8:

> … *alters and affects the forms of pleadings only, and does not alter the character of the offence charged*. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law … [and] *in order to make out the offence, there must have been, at the time of the instrument being forged, an intention to defraud some person*. *Here there was no such intent at that time*, and there was no uttering at the time when it is said there was an intention to defraud. [emphasis added]

81 In our view, *Henry Hodgson* does not support the argument that the explanatory note merely relates to the formal framing of the charge and that the Prosecution is still under a burden to prove a specific intent to defraud in order for a charge under s 477A to be made out. Jervis CJ's remarks must be read in the light of the background facts in *Henry Hodgson*. Section 8 of the Criminal Procedure Act 1851 did not purport to amend the then common law offence of forgery, and cannot be taken to have thereafter altered the requisite legal elements of the offence. The key distinction drawn by Jervis CJ and similarly in Wightman J's brief concurring judgment (at 894) was that an intention to defraud must have been present at the time that the forgery was committed, not that a specific intention to defraud any particular person must have been proven. Under the common law offence of forgery, the *mens rea* requirement for forgery was an "intent to defraud", but this was long accepted as including a general intent: see *Tatlock v Harris* (1789) 3 Term Reports 174 (as argued by counsel); *R v Robert Powell* (1771) 2 Blackstone W 787. In the words of Lord Denning in *Welham v Director of Public Prosecutions* [1961] AC 103 ("*Welham*") (albeit made in the context of the statutory offence of forgery) at 133:

> Put shortly, "with intent to defraud" means "with intent to practise a fraud" on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

The House of Lords in *Henry Hodgson* was not casting doubt on whether s 8 of the Criminal Procedure Act 1851 meant that a general intent to defraud would suffice; this was already part of the common law offence. We therefore do not think that this case is convincing authority for the argument that the explanation to s 477A of the Penal Code must be viewed as affecting only the formal elements of the charge and not what has to be proved by the Prosecution at trial.

82 We now consider the disputed *mens rea* element in s 477A of the Penal Code, *viz*, that the accused must have had an "intent to defraud". An offence under s 477A is not made out by a mere alteration or falsification of any book, record or paper. The alteration must also have been done "wilfully and with intent to defraud" (see *Ratanlal's Law of Crimes* vol 2 at p 2639). The explanation to s 477A further states that a "general intent to defraud" shall be sufficient for any charge under this section. Under the structure of the Penal Code, explanations that follow specific sections are used to describe the words used by the legislature in the main section in greater detail. The technique adopted by the drafters of the IPC is explained by Sir James Fitzjames Stephen in *A History of the Criminal Law of England* (MacMillan and Co, 1883) vol 3 at pp 302–303:

> The Penal Code was the first specimen of an entirely new and original method of legislative expression. It has been found of the greatest possible use in India, and has been employed in all the most important acts passed since the Penal Code. The mode adopted is as follows:—*In the first place the leading idea to be laid down is stated in the most explicit and pointed form which can be devised. Then such expressions in it are not regarded as being sufficiently explicit are made the subject of definite explanations.* This is followed by equally definite exceptions, to which, if necessary, explanations are added, and in order to set the whole in the clearest possible light the matter thus stated explained and qualified is illustrated by a number of concrete cases. [emphasis added]

Explanations are therefore not akin to examples or the illustrations in the Penal Code which exemplify the practical applications of the provision in relation to particular hypothetical problems that may arise and "make nothing law which would not be law without them" (see Indian Law Commissioners, *A Penal Code prepared by the Indian Law Commissioners and published by command of the Governor-General of India in Council* (Bengal Military Orphan Press, 1837), Prefatory Address at p 7). Rather, they are intended to "explain or clarify certain ambiguities which may have crept in the statutory provision" (*per* Fazl Ali J in *S Sundaram Pillai and others v V R Pattabiraman and others* (1985) 1 SCC 591 at [46]). The explanation to s 477A should therefore be construed as *defining* the meaning of the phrase "intent to defraud" as used by the legislature with greater precision, not as restricting or extending the main enactment.

83 The phrase "intent to defraud" is not generally defined in the Penal Code, but was explained by the Supreme Court of India in *S Harnam Singh v The State* (1976) 2 SCC 819 in relation to a charge under s 477A of the IPC (at [18]):

> [I]t has been settled by a catena of authorities that "intent to defraud" contained two elements viz. deceit and injury. A person is said to deceive another when by practicing "*suggestio falsi*" or "*suppressio veri*" or both he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. "Injury" has been defined in Section 44 of the [IPC] as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property".

A slightly wider definition was adopted by the Court of Three Judges in *Law Society of Singapore v Nor'ain bte Abu Bakar* [2009] 1 SLR(R) 753 ("*Nor'ain bte Abu Bakar*") at [46] (albeit in the context of whether a lawyer was guilty of fraudulent conduct within the meaning of s 83(2)(*b*) of the Legal

Profession Act (Cap 161, 2001 Rev Ed)):

> An advocate and solicitor will be held to have acted fraudulently or deceitfully if he has acted with the intention that some person, including the judge, be deceived and, by means of such deception, that either an advantage should accrue to him or his client, or injury, loss or detriment should befall some other person or persons. He need not make an explicit false representation; it is fraudulent if he intentionally seeks to create a false impression by concealing the truth: *suppressio veri, suggestio falsi*. [emphasis in original]

It may be observed that the latter definition, unlike the former, does not require loss, injury or detriment to another as a necessary element in proving a fraudulent intent; it is sufficient that a deception is intended to result in an advantage accruing to the person alleged to have acted fraudulently (see *Seet Soon Guan v Public Prosecutor* [1955] MLJ 223 ("*Seet Soon Guan*"), cited with approval in *Nor'ain bte Abu Bakar* at [44]). The PP submitted that the definition in *Seet Soon Guan* supported the interpretation that a general intent to defraud would suffice for a charge under s 477A because it was not always necessary to show an intention for any person to suffer a loss. The intent to defraud could therefore be proven by an intention to obtain an advantage without being at the expense of anyone in particular.

84 We do not consider that the difference between the two definitions above turns on a distinction between a general or specific intent to defraud. In *Welham*, Lord Radcliffe observed (at 123) – in the context of an offence under the United Kingdom Forgery Act 1913 (3 & 4 Geo 5 c 27) (UK) – that the word "defraud" required a person as its object and that this act involved doing something to someone. While it is not necessary that some person was actually defrauded or that there was some person who could possibly have been defrauded (see *R v Charles Nash* (1852) 2 Den Cr 493), the *consequences or effect* of the act should be distinguished from the *intent* to defraud, which may exist even if the accused's intended end does not come to fruition (see *In re Doraiswami* AIR 1951 Mad 894 at 895). A general intent to defraud therefore does not relieve the Prosecution of the burden of proving the existence of such an intent, albeit relating to unknown persons at large or persons as a class. This is explained in *Gour* vol 1 at pp 235–236:

> **5. "Intent to defraud."**. –There can be no fraud, unless there was an intention to defraud. Usually that intention is directed to defraud someone in particular, but it is not necessary that it should have been invariably so directed. A person may gild a brass ring and throw it on the road to cheat passersby the object being to make the finder pay a share of its supposed value to the cheat. Here there was clearly an intention to cheat someone though no one in particular. …

It is clearly possible that a person may carry out an act with an intent to defraud by practicing a deception with the aim of causing an injury, loss or detriment or obtaining an advantage, even if he is indifferent as to who the object of his fraudulent intent is. For example, in *Ram Chand Gurvala v King Emperor* AIR 1926 Lahore 385, the directors of a bank were convicted of a charge under s 477A of the IPC of inflating figures in a statutory report that was presented to members of the company. The court held that the directors had intended that the shareholders and the public would, as a result of the deception practiced on them, deposit a larger amount in the bank or purchase a larger amount of shares; this constituted an intent to defraud, and any person who might invest monies in the bank should be deemed to have been defrauded by them (at 387). An intent of this nature would be regarded as a general intent to defraud. A specific intent to defraud, on the other hand, is proven by showing that this intent was directed at particular identified persons.

85 In our judgment, the phrase "intent to defraud" in s 477A of the Penal Code, read together with the explanation, should not be analysed as though "general intent" or "specific intent" are technical

binary *mens rea* requirements, and we do not think that it is helpful to subject the phrase "intent to defraud" to further minute legal refinement by interpreting it as comprising two separate and independent legal categories of intent. The relevant *mens rea* in s 477A is simply an intent to defraud directed at an object, which may be proven by adducing *evidence that supports a finding or inference of fact* of an intention to either defraud persons generally or a named individual or entity. Section 477A itself does not make the intent to defraud a specific person an essential ingredient of the offence and the explanation makes it clear that it is sufficient to satisfy the required *mens rea* by alleging a general intent to defraud.

86 We therefore accept the PP's argument that they are *legally* entitled, if they wish, to construct a case against the respondents under s 477A premised on facts proving that the accused had a general intent to defraud. With respect, we depart from the observations of the Judge that the "practical emphasis of s 477A was … less on not having to name the particular person intended to be defrauded" (at [44] of the GD) and that "[the] explanatory statement should not be taken as providing a categorical general exemption from having to specify the particular individual or entity intended to be defrauded" (at [46] of the GD). In our view, this exemption from proving that an intent to defraud was directed at specific named persons was precisely the legislative intention in elucidating the meaning of the phrase "intent to defraud" in the explanatory note. This was the unequivocal object of s 2 of the Falsification of Accounts Act and was imported into the explanations to s 477A of the IPC and the Penal Code, which additionally dispensed with the requirements to prove that a particular sum had been misappropriated on a particular occasion. The legislative history of s 477A does not accord with the Judge's conclusion that the identity of the person intended to be defrauded was only an afterthought in the explanation, and the express words of the explanation should not be read down as applying only to certain categories of cases.

Can the Prosecution be ordered to provide facts in relation to a specific intent to defraud for a charge under s 477A?

87 Our interpretation above of the scope of the phrase "intent to defraud" relates only to the legal elements of a charge under s 477A of the Penal Code. It does not address the separate question of what facts must be proven to establish a finding of such an intention, and in particular, whether such facts must be provided in the "summary of facts in support of the charge" under s 162(*b*) of the CPC 2010. The PP's argument was essentially that because it was under no legal obligation to prove a specific intent to defraud under s 477A, the court was not entitled as a matter of law to order that the PP provide particulars to demonstrate a specific intent to defraud, *ie*, the identity of the person who was allegedly defrauded. Framed more generally, the question with wider practical import is whether the required contents of the summary of facts are limited only to the factual predicates that correspond to the minimum requisite elements of the charge.

88 We first consider the *legal significance* of the summary of facts within the CCDC regime. In particular, it appeared to us from the PP's submissions before the Judge that his primary objection to the provision of further details stemmed from the respondents' position that the summary of facts was akin to pleadings in the civil litigation process, *viz*, the PP would be bound by the factual basis of the charge as specified in the summary of facts and could not depart from this case at trial.

89 The Judge held that the purpose of the summary of facts was to enable both the Prosecution and the accused to know the case which they have to meet, and that the summary of facts should not be crafted in a manner that would leave parties vulnerable to being taken by surprise at trial (at [20] of the GD). The Judge also observed that "[t]he summary of facts tendered by the Prosecution should therefore reinforce the particulars already contained in the charge, and offer further notice and clarity of the case which the Defence is to answer" (at [32] of the GD). We fully agree with

these salutary statements of principle. The Minister alluded to the requirement for a summary of facts as providing "*information* about the facts" [emphasis added] (see *18 May 2010 Parliamentary Debates* at col 413) and we are of the view that Parliament intended for the summary of facts to serve the basic function of giving both the accused and the Prosecution adequate initial notice of the factual premises of the cases that will be pursued at trial. This purpose is also evident from the contents of the Case for the Defence filed after service of the Case for the Prosecution. The accused has to file his own summary of facts that responds to the charge – which by parity of reasoning, should also give adequate notice to the Prosecution – and raise any objections to the Case for the Prosecution. This second summary of facts will not be helpful in isolating the disputed issues if the accused is not apprised of at least the foundation of the charge against him. For there to be a meaningful exchange of information between the Prosecution and accused, the imperative must first lie with the Prosecution to candidly set out the alleged factual basis of the charge.

90 It may also be noted that other jurisdictions with statutory provisions for pre-trial disclosure have also generally adopted a similar approach in defining the nature of the facts that should be initially presented to the accused. The New Zealand Criminal Disclosure Act 2008 (No 38 of 2008) (NZ) provides at s 12(1)(*a*) that the prosecution must disclose to the defendant "a summary that is *sufficient to fairly inform* the defendant of the facts on which it is alleged that an offence has been committed and the facts alleged against the defendant" [emphasis added]. Under s 9(4)(*a*) of the UK CJA 1987, for cases involving serious or complex fraud, the judge may call for a preparatory hearing and may order the prosecution to supply the defendant with a statement containing "the *principal facts* of the prosecution case" [emphasis added]. Section 142(1) of the NSW CPA 1986 states that the prosecution is to provide a "prosecution's notice", which is to contain, *inter alia*, a "statement of facts". Although these do not provide direct guidance on the interpretation of s 162(*b*) of the CPC 2010, we consider that a statement or summary of facts, where required, generally serves the same broad purpose of identifying the key factual elements of the Prosecution's case that adequately notifies the accused of the case that he has to meet.

91 We would add that the PP's initial hesitance to be "bound" by the summary of facts is not consonant with the spirit of the CCDC procedures. The PP, quite rightly, did not reiterate this argument before us. As we discussed above (at [31]–[32]), the drawing of an adverse inference in s 169(1)(*c*) for advancing a different case at trial was originally not available against the Prosecution in the Draft Bill. The subsequent extension of the possibility of an adverse inference against the Prosecution in the CPC 2010 suggests that the view adopted after consultation was that both the Prosecution and accused ought to take their disclosure obligations under the CCDC seriously, and that the Prosecution should, as a general proposition, also be held to the case that it advanced during the pre-trial proceedings and which the accused would have relied on in preparation. If the Prosecution is subsequently compelled, acting in good faith, to depart from the original facts set out in its summary of facts due to the emergence of new evidence or because the summary of facts was drafted without the benefit of a full appreciation of the material circumstances, there is no reason why the court would not be able to take this into account and decline to draw any adverse inference. The Prosecution should not fear being unfairly "prejudiced" or restrained by being upfront of its present position in the Case for the Prosecution. We do not think that such concerns justify a skeletal summary of facts that would avoid forcing the Prosecution to commit to a particular position.

92 We now turn to consider the requisite contents of the summary of facts. There is no statutory definition of the summary of facts, save for the substantive requirement that it has to be "*in support of* the charge" [emphasis added]. The use of the word "summary" indicates that what Parliament had in mind was a concise, but not necessarily comprehensive, description of the Prosecution's case in relation to the charge, and "in support of the charge" suggests that the facts set out must establish the essential factual basis for the charge. The illustrations to s 162 further provide:

Illustrations

(*a*) *A* is charged with theft of a shirt from a shop. The summary of facts should state the facts in support of the charge, for example, that *A* was seen taking a shirt in the shop and putting it into his bag, and that *A* left the shop without paying for the shirt.

(*b*) *A* is charged with conspiracy to cheat together with a known person and an unknown person. The summary of facts should state —

(i) when and where the conspiracy took place; and

(ii) who the known conspirators were and what they did.

93 Illustration (*a*) may be read as requiring the summary of facts to contain not merely a bare recital of the requisite *actus reus* (*ie*, taking movable property out of a person's possession without consent) and *mens reas* (*ie*, dishonesty) elements of the charge, but also an elaboration of the fundamental surrounding facts that establish the elements. Similarly, illustration (*b*) demonstrates that the summary of facts ought to contextualise the charge by providing information on the alleged events that gave rise to the charge and, if relevant to establishing the charge, the identity of the persons involved and the degree of involvement. The level of detail required in the summary of facts should therefore generally suffice to provide adequate notice to the accused when read in the context of the entire Case for the Prosecution. What is adequate notice on a particular set of facts is not susceptible to abstract definition, but the summary of facts is not a mere formalistic requirement that can be satisfied by a cursory reproduction of the elements of the charge. Further, while we would generally accept that facts which do not go directly to proving the legal elements of the charge would not be essential facts "in support of the charge" required in the summary of facts, we decline to lay down a categorical rule, as contended for by the PP, that where certain elements are not required to be contained in the charge, *a fortiori*, the summary of facts can never be required to contain details of these elements. It would depend on the precise circumstances of the charge before the court.

94 However, on the facts of the present case, we would respectfully disagree with the Judge that the Summary of Facts for the s 477A Charge had to contain the identity of the person who had allegedly been defrauded and the reasons why the subcontract between Questzone and ZTE was fictitious.

95 First, we have explained that a general intent to defraud suffices for any charge under s 477A, and find that on the circumstances before us, it is not a legal requirement under s 162(*b*) for the Summary of Facts to state who was allegedly defrauded by the falsification of the invoice issued by Questzone to ZTE in order to provide adequate notice to the respondents of the PP's case. We have explained above that the PP is legally entitled to premise his case on any intent to defraud, and whether the intent is general or specific relates to the evidential question of how such fraudulent intent is to be proven. At this stage, we are of the view that the existing Summary of Facts adequately demonstrates that the intent to defraud alleged by the PP would be closely linked to the issuance of the invoice for the fictitious subcontract. The requisite *mens rea* would not be established if the respondents are able to put forward a non-fraudulent purpose for the issuance of the invoice or simply justify the creation of the invoice by reference to the subcontract, *eg*, that the invoice was for sums properly due under the subcontract. The respondents need not explain that they did not intend to defraud a specific individual or entity – ZTE or even the Papua New Guinea government – to establish their defence; it is sufficient for the respondents to state what their intentions were behind the creation of the invoice to rebut any intention to defraud. The precise

identity of the defrauded person would understandably be difficult to ascertain in cases with an international dimension involving large organisations or where there is a background of multiple cross-border transactions, and we do not think that it is for the court to indirectly frame the case for the PP by requiring him to specify at a preliminary stage whether the intent to defraud was general or specific. The PP is of course not relieved of the burden of advancing an affirmative case to establish the intent to defraud at trial, but the background facts that the PP has set out in the Summary of Facts suffice to provide the context within which the respondents may proffer a defence.

96 Second, we do not think that the respondents could claim to be taken by surprise at trial by reason of the absence of information on why the subcontract was allegedly fictitious. The reason for the PP's allegation that the subcontract was fictitious is self-evident – it simply means that the subcontract did not genuinely relate to the stated underlying transaction. A copy of the said subcontract was also included in the Case for the Prosecution, and we see no reason why further details need to be provided in the Summary of Facts for the respondents to understand the basic parameters of the PP's case. These are matters of evidence that will be fully ventilated at trial.

97 We answer Question 4 as follows: While the Prosecution cannot be ordered in every charge under s 477A of the Penal Code to provide facts that are necessary to prove a specific intent to defraud in the required summary of facts under s 162(*b*) of the CPC 2010, it does not follow that facts that relate to proof of an intent to defraud – including, but not limited to, the identity of the allegedly defrauded party – can never be required in the summary of facts for a charge under s 477A if such facts are necessary in the instant case to establish the primary factual foundation for the charge.

Conclusion

98 In summary, we answer the four questions placed before this court as follows:

(a) Question 1: Does Section 169 of the CPC 2010 set out comprehensively and exhaustively all the available consequences for alleged non-compliance with the CCDC procedures in the Subordinate Courts under Division 2 of Part IX of the CPC 2010?

(a) *Answer*: No. To the extent that consequences include the orders that a court has powers to make, we find that s 169 does not limit the court's powers to make orders requiring compliance with a party's statutory obligations under Division 2 of Part IX of the CPC 2010 (at [24]–[58]).

(b) Question 2: If the answer to Question 1 is negative, does the Magistrate or District Judge who presides over a CCDC have the power to order the Prosecution to furnish additional particulars in the summary of facts in support of the charge filed and served as part of the Case for the Prosecution?

(b) *Answer*: Yes. This power is implicit in s 160(1) of the CPC 2010 empowering the court to make orders to settle the filing of the Cases (at [59]–[61]).

(c) Question 3: If the answer to Question 2 is positive, where the Magistrate or District Judge who presides over a CCDC has refused to order that the Prosecution furnish additional particulars in the summary of facts in support of the charge filed and served as part of the Case for the Prosecution, what is the legal threshold that needs to be crossed before the High Court should exercise its revisionary jurisdiction pursuant to section 404 of the CPC 2010 in respect of such refusal?

(c) *Answer*: The legal threshold is similar to the threshold that applies to the exercise of the High Court's revisionary jurisdiction and is one of serious injustice (at [62]–[71]).

(d) Question 4: Can the Prosecution be ordered to provide facts in relation to a specific intent to defraud for a charge under section 477A of the Penal Code in the summary of facts in support of the said charge that was filed and served as part of the Case for the Prosecution under s 161(2) of the CPC 2010 where the Explanation to s 477A of the Penal Code specifically provides that it shall be sufficient in any charge under the said section to allege a general intent to defraud without naming any particular person intended to be defrauded?

(d) *Answer*: Yes. The summary of facts should provide adequate notice of the Prosecution's case when read in the context of the Case for the Prosecution. Although any charge under s 477A may be proven by establishing a general intent to defraud, it does not follow ineluctably in every case that the summary of facts need not contain facts relating to the identity of the person who was allegedly defrauded if, in the absence of such facts, the summary of facts would not even support a general intent to defraud (at [72]–[93]).

99 Under s 397(5) of the CPC 2010, this court may make such orders as the High Court might have made as this court considers just for the disposal of the case. We therefore set aside the Judge's orders that the PP provide the respondents with (a) the identity of the persons whom the respondents allegedly conspired to defraud and (b) the reasons why the subcontract between ZTE and Questzone was allegedly fictitious.