Soh Guan Cheow Anthony *v* Public Prosecutor
[2014] SGHC 238

Case Number : Special Case No 1 of 2014

Decision Date : 19 November 2014

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Michael Khoo SC, Josephine Low, Chung Yee Shen Bernard and Joel Yeow Guan Wei (Michael Khoo & Partners) for the applicant; Peter Koy, Leong Weng Tat and Nicholas Tan (Attorney-General's Chambers) for the respondent.

Parties : Soh Guan Cheow Anthony — Public Prosecutor

Criminal Procedure and Sentencing – Reservation of Questions of Law

19 November 2014 Judgment reserved.

Chao Hick Tin JA:

Introduction

1 The application before me raises the question as to whether a trial judge sitting in the State Courts may, *in the course of a trial*, refer a question of law to the High Court for determination under s 395(2)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the CPC"). This provision states that any application or motion made to refer questions of law other than those relating to the Constitution must be made within 10 days from the time of the making or passing of the "judgment, sentence or order" by the trial court.

2 In the present case, whilst the applicant was being tried in the State Court, the trial judge granted his application to refer certain non-constitutional questions of law to the High Court. Before me, the respondent raised the preliminary objection that the trial judge had no jurisdiction to grant the application under s 395(2)(*b*) of the CPC, because the word "order" in s 392(2)(*b*) is to be read narrowly to mean only a *final* order made following the determination of the innocence or guilt of the accused person. Therefore, the trial judge did not have jurisdiction to refer the questions of law to the High Court under that provision as a final order had not yet been granted. The applicant, however, contends that the trial judge acted entirely within his jurisdiction in referring the questions of law to the High Court whilst in the midst of the trial.

Background

3 The applicant, Soh Guan Cheow Anthony, is presently on trial in the State Courts for 11 charges under the Securities and Futures Act (Cap 289, 2006 Rev Ed). The charges arose from a failed takeover bid by the applicant's investment holding company for all the shares in a company listed on the Singapore Stock Exchange.

4 Following the close of the Prosecution's case on 4 November 2013, the applicant filed a discovery application which was eventually dismissed by the trial judge on 25 February 2014. Dissatisfied, the applicant applied on 6 March 2014 for the trial judge to state a case to the High Court on five questions of law pursuant to s 395(2)(*b*) of the CPC in relation to the Prosecution's

common law duty of disclosure ("the reference application").

5 Before the trial judge, the Prosecution contended that the reference application should be dismissed pursuant to s 395(4) of the CPC as it was frivolous and without merit. According to the Prosecution, the discovery application in substance raised only two points of law, both of which were well settled. The Prosecution did not argue at this stage of the proceedings that the reference application should be dismissed for any other reason, or that the trial judge had no jurisdiction to state the case pursuant to that provision.

6 After considering the submissions from both parties, the trial judge exercised his discretion and allowed the reference application. In so doing, the trial judge added a further question of his own and modified one of the questions stated by the applicant, thus stating a total of six questions of law to the High Court. These questions have nothing to do with the Constitution. The trial judge's grounds of decision for dismissing the disclosure application and allowing the reference application can be found in *Public Prosecutor v Soh Guan Cheow Anthony* [2014] SGDC 107.

7 The parties attended before me on 8 October 2014. Although the parties were prepared to make submissions on the substantive merits of the application (*ie* what the answer to the six questions referred ought to be), lead counsel for the applicant and the respondent, respectively Mr Michael Khoo, SC ("Mr Khoo"), and the Deputy Public Prosecutor Mr Peter Koy, ("Mr Koy"), agreed that the preliminary objection should be determined first, notwithstanding that this was an objection that the respondent was taking for the very first time in these proceedings, because if it were sustained, it would undermine the legitimacy of the reference itself.

8 Having regard to both parties' written and oral submissions, in my judgment the central issue before me is whether the word "order" in the phrase "judgment, sentence or order" in s 395(2)(*b*) of the CPC should be construed to refer only to final orders, so that the reference of non-constitutional questions of law may be made only after a final judgment, sentence or order has been rendered, or whether it is broad enough to *also* encompass interlocutory orders made in the course of a criminal trial.

An overview of the s 395 procedure

9 It is apposite to start with a brief consideration of how the s 395 reference procedure in the present CPC came to be.

10 Prior to the enactment of s 395 of the CPC, there were three distinct procedures for referring questions of law for determination by a higher court in relation to a criminal trial. The first was the procedure to refer questions of law from the Subordinate Courts (now the State Courts) to the High Court under ss 263 and 264 of the now repealed Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985"):

> **Reservation of points of law and stating of cases**
>
> 263.—(1) Any Magistrate's Court or District Court acting in summary jurisdiction in any criminal cause or matter may, on the written application of any party to the proceedings made to the court within 10 days from the time of the judgment, sentence or order passed or made in it, or without any such application, if the court thinks fit, reserve for the consideration of the High Court any question or questions of law arising in the proceedings setting out shortly the facts on which the law is being applied and the questions of law to be determined on them.

(2) Every question of law so reserved shall be submitted to the High Court in the shape of a special case…

…

(4) Where a court refuses to state a case under sub-section (3) it shall be lawful for the applicant to apply to the High Court for a Mandatory Order and if the High Court makes the order the court shall state the case accordingly.

(5) Every such special case shall be drawn up by the Magistrate or District Judge of the court before which the proceedings are held and shall —

(*a*) set out shortly the facts which are considered by the Magistrate or District Judge to be proved;

(*b*) state the questions of law which is or have been reserved for the opinion of the High Court;

…

264.—(1) The High Court shall hear and determine the question or questions of law arising on such special case and shall thereupon affirm, amend or reverse the determination in respect of which the special case has been stated or remit the matter to the Magistrate or District Judge with the opinion of the Court on it or may make such order in relation to the matter as to the Court seems fit.

…

11 The second was the procedure to refer questions of law from the High Court to the Court of Appeal under the now-repealed s 59 of the Supreme Court Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"):

Point reserved in trial for Court of Appeal

59.—(1) When any person has in a trial before the High Court in the exercise of its original criminal jurisdiction *been convicted of an offence*, the Judge may, if he thinks fit, reserve for the decision of the Court of Appeal any question of law which has arisen in the course of the trial of such person and the determination of which would affect the event of the trial.

…

(3) The Court of Appeal shall review such case, or such part of it as may be necessary, and finally determine the question and thereupon may alter the sentence passed and pass such sentence or give or make such judgment or order as it thinks fit.

(4) When any person has, in a trial before the High Court acting in the exercise of its original criminal jurisdiction, been convicted of an offence and the Public Prosecutor is of opinion that any point or points of law arising on the trial which has or have not been reserved under this section ought to be further considered, the Public Prosecutor may certify accordingly under his hand.

(5) Thereupon the Court of Appeal may review the case or such part of it as is necessary and

finally determine the point or points of law and thereupon may alter the sentence passed and pass such judgment and sentence as the Court of Appeal thinks fit in like manner as though the point or points of law had been reserved under subsection (1).

[emphasis added]

12 The third was the procedure to refer *constitutional* questions of law from the Subordinate Courts (now the State Courts) to the High Court under the now-repealed s 56A of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) (now renamed the State Courts Act) ("the SCA"):

Reference of constitutional question to High Court

56A.—(1) Where in any proceedings in a subordinate court a question arises as to the interpretation or effect of any provision of the Constitution, the court hearing the proceedings *may stay the proceedings* on such terms as may be just to await the decision of the question on the reference to the High Court.

(2) An order staying proceedings under this section may be made by the court of such stage of the proceedings as the court may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the High Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.

(3) Where an order for stay of proceedings has been made under this section, the court shall state the question which in its opinion has arisen as to the interpretation or effect of the Constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative.

(4) The court shall cause the special case to be transmitted to the High Court and the High Court shall hear and determine the constitutional question arising out of the case in the exercise of its original jurisdiction.

…

[emphasis added]

13 Following the enactment of the CPC, these three reference procedures appear to have been amalgamated (albeit with certain changes) into a single reference procedure found in ss 395, 398 and 399 of the CPC.

14 Sections 395(1) and (2) of the CPC now set out *when* a question of law may be referred by a trial court:

Power of court to state case

395.—(1) A trial court hearing any criminal case, may on the application of any party to the proceedings or on its own motion, state a case to the relevant court on any question of law.

(2) Any application or motion made —

(*a*) on a question of law which arises as to the interpretation or effect of any provision of the Constitution may be made at any stage of the proceedings after the question arises and must set out the question to be referred to the relevant court; and

(*b*) on any other question of law must be made in writing within 10 days from the time of the making or passing of the *judgment, sentence or order* by the trial court and set out briefly the facts under deliberation and the question of law to be decided on them.

[emphasis added]

15 I make three observations at this juncture. First, the present s 395 reference procedure makes a clear and sharp distinction between constitutional and non-constitutional questions of law. Second, where the trial court is one of the courts in the State Courts, the "relevant court" is the High Court and where the trial court is the High Court, the "relevant court" is the Court of Appeal: s 395(15) of the CPC. The upshot of this is that s 395 now expressly provides an accused person facing trial *before the High Court* with an avenue to refer *both* constitutional and non-constitutional questions of law (subject of course to the trial judge's permission) where it would appear that the now-repealed s 59(1) of the SCJA did not expressly provide for such an avenue. It is unclear to me, however, whether this is in substance any different from the position under s 59(1) of the SCJA. Although the now-repealed s 59(1) of the SCJA provided that it was the *Judge* who may reserve a question of law, it would have been entirely open to *an accused person* to request the Judge to exercise his powers under this sub-section; and I do not see why a Judge would not have done so if the Judge was also of the view that a reference was appropriate in the circumstance. Third, a reference from the High Court to the Court of Appeal of a "question of law", whether constitutional or non-constitutional, was under the now-repealed s 59(1) of the SCJA only possible *after* an accused was "convicted of an offence". However, under s 395(1) of the CPC, a reference of a non-constitutional question of law from the High Court (or any trial court for that matter) is now only possible after a "judgment, sentence or order", whilst a reference on a constitutional question of law from the High Court (or any other trial court) can be made at any stage of the proceedings.

16 Section 395(3) of the CPC then sets out the different ways in which a question of law should be referred, depending on whether it is a constitutional or a non-constitutional question of law:

(3) The trial court shall —

(*a*) upon an application or motion made on a question of law which arises as to the interpretation or effect of any provision of the Constitution, state the case to the relevant court by setting out the question which in its opinion has arisen as to the interpretation or effect of the Constitution, which question shall, so far as may be possible, be in a form which shall permit of an answer being given in the affirmative or the negative; and

(*b*) upon an application or motion made on any other question of law, state the case to the relevant court by briefly *setting out the facts that it considers proved* and the question of law to be reserved for the opinion of the relevant court.

[emphasis added]

17 Section 395(4) of the CPC sets out the grounds on which a trial court may refuse to refer a question of law:

(4) Notwithstanding subsection (3), the trial court may refuse to state a case upon any application if it considers the application frivolous or without any merit, but it must state a case if the application is made by the Public Prosecutor.

18 However, even if the trial court refuses to state a case upon the accused's application, that is not the end of the matter. Under s 395(5) of the CPC, the accused may still apply to the relevant court to direct the trial court to state the case:

> (5) If a trial court refuses to state a case under subsection (4), the applicant may apply to the relevant court for an order to direct the trial court to state the case.

19 Sections 395(8) and (9) then provide the trial court with the power to stay proceedings pending the determination of a reference to the relevant court of constitutional questions of law:

> (8) Before stating any case to the relevant court under subsection (3)(*a*) [which concerns the references of constitutional questions of law], the trial court may make an order to stay the proceedings which shall be made at such stage of the proceedings as the court may see fit, having regard to —
>
> > (*a*) the decision of such questions of fact as may be necessary to assist the relevant court in deciding the question which has arisen; and
> >
> > (*b*) the speedy and economical final determination of the proceedings.
>
> (9) The trial court making an order to stay the proceedings under subsection (8) may impose any terms to await the opinion and order, if any, of the relevant court on any case stated under subsection (3)(a).

I should add that ss 395(8) and 395(9) of the CPC largely replicate the now-repealed ss 56A(1) and (2) of the SCA. Crucially, there are no equivalent provisions for references of non-constitutional questions of law.

20 Finally, ss 398 and 399 of the CPC set out what the "relevant court" can do upon determining the case stated:

> **Determination and order**
>
> 398.—(1) The High Court or the Court of Appeal, as the case may be, must hear and determine any question of law arising on the case stated under section 395 or 396 and must affirm, amend or reverse the decision or make any other order it thinks fit.
>
> …
>
> Opinion on case stated
>
> 399.—(1) The opinion of the High Court or the Court of Appeal must be in the form of an answer to the question set out in the case stated under section 395 or 396.
>
> …
>
> (3) If the opinion of the High Court or the Court of Appeal, as the case may be, is given pending the conclusion of the trial, the trial court must proceed with the case having regard to the opinion on the case stated and any order of the High Court or the Court of Appeal made under section 398.

The relevant policy considerations

21 Perhaps I should start with the issue which troubled me the most, which is the policy implications of *both* parties' positions. Mr Koy contended that the policy considerations which militate against allowing a party to appeal interlocutory orders ought to apply with equal force to references of questions of law in connection with interlocutory orders. Mr Koy submitted that construing the word "order" broadly to mean interlocutory as well as final orders would effectively provide a backdoor for appealing against interlocutory orders and this would be highly disruptive to the flow of a criminal trial.

22 Although I see the force in this argument, I do not think that it can be decisive of the matter. For starters, the risk of a disruption to trial affects both references of constitutional questions and non-constitutional questions of law but yet there seems to be no issue with constitutional questions of law being referred midway through a criminal trial.

23 Further, as Mr Koy candidly acknowledged, there is a conceptual difference between an appeal and the reference procedure. Moreover, even though Mr Khoo did not take the point, it is certainly arguable that the s 395 reference procedure contains a built-in mechanism that mitigates the risk of unnecessary disruption to the criminal trial process: s 395(1) of the CPC requires an accused person to make the application to the trial court, which would arguably be in the best position to assess the impact of any disruption and to weigh that against the necessity of having the questions of law determined by the relevant court; and s 395(4) gives the trial court the power to refuse the reference if it considers the application frivolous or without any merit.

24 Mr Khoo, on his part, submitted that policy considerations should compel me to resist construing the word "order" in s 395(2)(*b*) in such a narrow way as to preclude references made in the course of a trial. He emphasised that the utility of the reference procedure under s 395 would be greatly reduced if a reference on non-constitutional questions of law can be made only after the trial. Such an approach would, so his argument went, lead to a waste of judicial time and resources if the trial judge were to proceed on an erroneous course simply because he was unable to obtain guidance from a higher court in the course of trial. Mr Khoo pointed to the present case as an illustration of his point. Here, the trial judge thought it important to refer the applicant's questions (and even included a new question not raised by the applicant) in order to assist him in the proper conduct of the criminal trial.

25 I can certainly see Mr Khoo's point that there are advantages in allowing mid-trial references. Nevertheless, I also do not think that this point is decisive of the matter.

26 In my view, a wide reading of the word "order" is not without its problems, especially if an accused were minded to request persistently for a reference in order to disrupt the process of the trial. It is true, as I have already mentioned above, that the reference process is ultimately in the control of the trial judge. It is also true that there may be adverse cost consequences for parties who make completely unmeritorious applications. But one cannot ignore the practical realities of a criminal trial. The fact of the matter is that the trial judge will need to hear the request, meritorious or unmeritorious, when it is made and the trial will, at the very least to that extent, be disrupted. It is not inconceivable that there could be repeated applications which need not pertain to the same legal question. Neither is it inconceivable that the accused may, upon refusal by the trial judge, also take the matter up with the relevant court pursuant to s 395(5) of the CPC in hope that the trial court would, out of abundance of caution, find a way to stay proceedings to see if the relevant court would entertain the application.

27 As can be seen, there are reasonable policy arguments in favour of and against both parties. At

this juncture, it is perhaps important to appreciate that these policy arguments do not take place in vacuum. For this reason, I turn next to consider if Parliament's intention as to the scope of the word "order" can be gleaned from the manner in which the reference provision was drafted.

The legislative provision

28 I begin with two propositions which the parties appeared to be in broad agreement with.

29 First, there is a presumption in statutory construction that similar words in the same statute should be given the same meaning. To this end, the phrase "judgment, sentence or order" is also found in provisions of the CPC which deal with appeals (*eg* s 374 of the CPC). It is trite that the appeal provisions apply only to judgments, sentences and orders which have an element of finality in them. This therefore gives rise to a presumption that the word "order" in s 395(2)(b) must relate to a final order ("the Presumption"). This Presumption is also supported by the *ejusdem generis* rule since the words "judgment" and "sentence" preceding the word "order" relate to decisions which have an element of finality. By way of example, following the passing of a *judgment* of guilt against an accused, the court may impose a *sentence* (*eg* a term of imprisonment or a fine) as well as in appropriate cases, make a further *order* (*eg* a disqualification or confiscation order).

30 Second, notwithstanding the above, the Presumption is a rebuttable one: *Public Prosecutor v Ng Guan Hup* [2009] 4 SLR(R) 314 at [31]. Neither is it disputed that the *ejusdem generis* rule may be displaced by the context.

31 Both these propositions were relied upon in the High Court case of *Azman bin Jamaludin v PP* [2012] 1 SLR 615 ("*Azman*"), where the court considered whether s 263 of the CPC 1985 (set out at [10] above) could apply to interlocutory orders.

32 At this juncture it may be appropriate to examine briefly what was decided in *Azman*. There, the trial judge made an order for a witness to be called to testify at the close of both the Prosecution and the defence's cases. In so doing, the trial judge dismissed the defence counsel's objection to this. In response, the defence applied under s 263 of the CPC 1985 to refer questions of law concerning the trial judge's power to summon and examine witnesses. The trial judge rejected the s 263 reference application.

33 The defence then brought an application under s 263(4) of the CPC 1985 to the High Court seeking an order to compel the trial court to refer the question of law. The Prosecution resisted the s 263 reference application on various grounds, including the ground that the s 263 application was only applicable to final orders, not interlocutory orders. As in the present case, this contention turned on how the word "order" in the phrase "judgment, sentence or order" in s 263(1) of the CPC 1985 (reproduced at [10] above) ought to be construed.

34 Chan Sek Keong CJ noted that the same words "judgment, sentence or order" also appeared in the appeal provisions in the CPC 1985 and this collocation of words had been held to apply to decisions which have an element of finality in them. On that basis he accepted that there was a presumption that the phrase "judgment, sentence or order" appearing in s 263 of the CPC 1985 should bear the same meaning. Chan CJ then held that this presumption was not rebutted by anything in s 263 or any other section of the CPC 1985 (*Azman* at [44]). In coming to his decision, Chan CJ also had regard to some of the policy arguments already canvassed above.

35 Returning to the present case, I note that Mr Koy argued that while the position in relation to s 263 of the CPC 1985 was made clear in *Azman*, the manner in which s 395 of the CPC was drafted

made it *even clearer* that the word "order" could only refer to final orders. Mr Khoo, on his part, argued that the Presumption was rebutted by the policy arguments which he had advanced. Mr Khoo also relied on the fact that the powers under s 395(1) of the CPC are conferred on any "trial court hearing any criminal case". On this basis he argued that the use of the present participle (*ie* "hearing") showed that Parliament contemplated that all s 395 references could be made whilst the trial court was *still hearing the matter* rather than only at the conclusion of trial.

36 In my judgment, there is insufficient ground in the CPC to rebut the Presumption. As I have mentioned above, the policy arguments are equivocal. Further, I note that s 263(1) of the CPC 1985 also uses the present participle when it refers to "Any Magistrate's Court or District Court acting in summary jurisdiction" (*ie* "acting"). However, Mr Khoo is not suggesting that the reference procedure under s 263 of the CPC 1985 only applied to final orders. Ultimately, I agree with Mr Koy that s 395 has been drafted in a manner which supports a narrow reading of the word "order". Section 395(2)(*a*) of the CPC expressly states that constitutional questions of law may be referred at any time in the proceedings after the question arises. Sections 395(8) and (9) expressly give the trial court additional powers to stay the proceedings and impose ancillary terms while awaiting the relevant court's decision on the constitutional questions of law.

37 In sharp contrast, s 395(2)(*b*) of the CPC only provides that non-constitutional questions of law may be referred within 10 days of the passing or making of the judgment, sentence or order of the trial court. Further, as mentioned above, s 395 does not expressly grant the trial court the power to stay proceedings or impose additional terms while a reference is pending in relation to non-constitutional questions of law. In fact, s 395(3)(*b*) of the CPC requires the trial court to set out the facts that *it* considers *proved* in the case stated in references of non-constitutional questions of law. Under s 3 of the Evidence Act (Cap 97, 1997 Rev Ed), a fact is "proved" only when "after considering the matters before it, the court … believes it to exist" and this can be done only at the end of a trial, and not before. Again, this suggests that a reference under s 395(1) can be made only after the hearing and not during it.

38 In my judgment, the additional powers which a trial court is given in ss 395(8) and (9) (reproducing provisions which already existed in the now-repealed ss 56A(1) and (2) of the SCA) are a reaffirmation of Parliament's desire to treat constitutional questions differently from non-constitutional legal questions for the purpose of a reference to a higher court. Thus, even though there are some policy arguments that favour a broader construction of the word "order", I cannot ignore the fact that the structure of s 395 as enacted and the provisions discussed above point towards Parliament's intention that only constitutional questions of law can be referred to the relevant higher court at any time during the course of a trial. All other questions of law must await the final decision or order of the trial court. I should add that a narrow construction of the word "order" would also be in line with the previous procedure to refer questions of law from the High Court to the Court of Appeal under the s 59 of the SCJA, which states that references could only be made when the accused was convicted (*ie* at the end of the trial).

39 I have to say that I reach this decision with some hesitation. I admit to being troubled by the argument raised by Mr Khoo that, as a matter of public policy, if references of non-constitutional questions of law under s 395 can be made only after a final order is made by the trial court, the utility of the reference procedure would be severely limited. This is because, aside from the reasons proffered by Mr Khoo, an accused person is entitled at the end of the trial, if convicted of the offence for which he was tried, to appeal the decision as a matter of right; and if the reference process can only be invoked by the accused person at this stage, and only with leave of the trial judge or the relevant court, then it would be difficult to think of any situation in which the reference procedure might be useful or preferable to an appeal. I also remain troubled by the observations of the learned

judge in *Azman* at [64] that if a trial court were to rule as admissible evidence which the Prosecution claims to be protected by public interest immunity, the Prosecution will not be able to invoke the reference procedure to obtain a ruling from the relevant higher court to reverse the trial court's order.

40 However, at the end of the day, I recognise that I would be ignoring the clear scheme implicit in s 395 if I were to read the word "order" so broadly as to include an interlocutory order. Because of that, it is not without a tinge of regret that I have to rule that I agree with the preliminary objection taken by the respondent.

41 Before leaving this point, I must address s 399(3) of the CPC which states that if the opinion of the relevant court is given *pending the conclusion* of the trial, the trial court must proceed with the case *having regard to the opinion* on the case stated. One could be tempted to argue that this provision (which makes no distinction between constitutional and non-constitutional questions of law) expressly contemplates that non-constitutional questions of law can also be referred pending the conclusion of trial.

42 The problem with this line of argument, however, is that I do not think it could have been Parliament's intention to have the entire structure of the procedure set out in s 395 turn on this single sub-section. In its context, the most natural reading of s 399(3) which is harmonious with the other provisions in this division of the CPC is it can only be invoked if the reference involved a question of constitutional law, since the effect of ss 395(2)(*a*), (3)(*a*), (8) and (9) is that only such questions may be referred before the conclusion of trial. If this is correct, then for me to read s 399(3) of the CPC as supporting the broader meaning of the word "order" in s 395(2)(*b*) would be wholly unwarranted – it would amount to the tail wagging the dog. To the credit of Mr Khoo, he did not take this point.

43 Finally, I wish to deal with one of Mr Khoo's alternative arguments. Mr Khoo argued in oral submissions that even if the word "order" in s 395(2)(b) should be read narrowly to include only final orders, the s 395 procedure did not preclude the trial judge from referring questions on his own motion during the course of the trial in the present case. I understood his line of argument to be as follows:

(a) When Parliament enacted s 395 of the CPC, it did not intend to change the law as it stood in relation to s 263 of the CPC 1985.

(b) Under s 263 of the CPC 1985, the reference procedure provided that a court may "on a written application of any party made within 10 days of the judgment, sentence or order pass or made by it, or, without such application, if the court thinks fit, refer the question to the high court."

(c) The requirement that such an application be made within "10 days of the "judgment sentence or order" in s 263 of the CPC 1985 only applied to applications made by any party; it did not inhibit the court from stating a case on its own motion since it could do so "if the court thinks fit".

(d) Section 395(1) of the CPC states that a trial court may, on the application of any party to the proceedings "or on its own motion", state a case to the relevant court on a question of law.

(e) Section 395(2)(*b*) further states that any application "or motion made" on a non-constitutional question of law must be made in writing within 10 days from the time of the making or passing of the judgment, sentence or order by the trial court.

(f) The phrase "or motion made" in s 395(2)(*b*) referred to the filing of a criminal motion and not to a reference made by the court on its own motion.

(g) In the present case, the trial judge referred the questions of law on his own motion. Therefore, the phrase "judgment, sentence or order" in s 395(2)(*b*) did not apply to the situation at hand; there was therefore no need to decide the point of whether the word "order" should be construed narrowly or broadly. For this reason, the Prosecution's objection could not stand in the way of the present s 395 application.

44 With respect, I am unable to agree with this rather novel argument. The word "motion" in s 395(2) is, in this context, obviously a reference to a case stated on the court's own motion referred to in s 395(1) and not a criminal motion. I cannot see how it could be otherwise on *any* reasonable reading of ss 395(1) and (2), construed together. In any case, as Mr Koy rightly submitted, notwithstanding that the trial judge added an additional question in the reference, the present s 395 reference came about because a specific application was made by the applicant.

45 I should add that on a reasonable construction of the phrase "10 days from the time of the judgment, sentence or order passed or made in it" in s 263 of the CPC 1985 I do not agree that it applied only to applications made by a party and not to a reference by the court on its own motion. The rationale for timely reference of questions of law should apply to both situations, whether on the application of a party or on the court's own motion. Otherwise it would mean that the court could at any time in the future make a stale reference. This construction is also consistent with Mr Khoo's submission that s 395 of the CPC was not meant to change the law as it stood in s 263 of the CPC 1985 on this point, with which I agree.

Conclusion

46 Since I have, for the above reasons, ruled in favour of the respondent on the preliminary objection, I shall refrain from hearing arguments of the questions of law referred in the case stated. Instead, I direct that the trial judge should continue with the trial.

47 Before concluding, I ought, for the sake of emphasis, to repeat the point that I made earlier. At the hearing before the trial judge, the Prosecution *did not* object to the reference application on this preliminary point of jurisdiction; still less did the Prosecution refer the case of *Azman* for the trial judge's consideration. Instead, the Prosecution raised other grounds of objections (see [5] above). Thus the trial judge did not have the opportunity to consider the issues I have discussed above; but if these issues had been placed fairly before him, I think he would have come to the same conclusion, although not without some hesitation, as I have. I add that nothing in this judgment should be taken to have any bearing whatsoever on the questions of law referred in the case stated.