IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 42

Criminal Motion No 25 of 2021

Between

Leck Kim Koon

… *Applicant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing — Criminal references]
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v
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21 February, 18 April 2022

18 May 2022 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 In the present application, the applicant, Mr Leck Kim Koon (the "Applicant"), seeks leave under s 397(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the "CPC") to refer two purported questions of law of public interest ("Question 1" and "Question 2", respectively) to the Court of Appeal. The Applicant subsequently sought, via an oral application, to amend Question 1. However, part of this application also included what was in substance an application to refer an additional question to this court (the "Additional Question"). We shall refer to these three questions collectively as the "Questions".

2 The Questions arise out of the Applicant's conviction by the District Court on six charges of cheating under s 420 of the Penal Code (Cap 224,

2008 Rev Ed) (the "Penal Code") for having used duplicate copies of the same transport document to obtain disbursements of funds from six banks (see *Public Prosecutor v Leck Kim Koon* [2020] SGDC 292 (the "Trial GD")). He was sentenced to a global sentence of 36 months' imprisonment. He then appealed against his conviction and sentence and the High Court dismissed both appeals in *Leck Kim Koon v Public Prosecutor* [2021] SGHC 236 (the "HC GD").

Background

3 The facts have been detailed at [2]–[4] of the HC GD and we briefly highlight the salient facts.

4 At the time of the offences, the Applicant and one Madam Neo Poh Choo ("Mdm Neo") were directors of Intraluck Pte Ltd ("Intraluck"). Intraluck's stated business was the importation and exportation of aluminium and related products. The Applicant was the majority shareholder and the remaining shares were held by Mdm Neo and other shareholders.

5 At that time, Intraluck had trade financing credit facilities with various banks. These credit facilities permitted sums to be disbursed to the relevant suppliers as indicated by Intraluck upon the submission of designated documents, including an application form, to the respective banks. The banks providing the credit facilities included United Overseas Bank Ltd ("UOB").

6 On 9 September 2015, Intraluck submitted an application to UOB for clean invoice financing in the sum of US$60,415.51. This was supported by an arrival notice dated 28 August 2015 issued by Orient Overseas Container Line Limited, stating that Intraluck was to receive a shipment of aluminium products from Norinco New Energy Co Ltd under a bill of lading numbered

"OOLU2564105080" ("BL080"). This application was approved and the funds were disbursed by UOB.

7 Subsequently, between 10 and 15 September 2015, Intraluck submitted six other applications (the "Applications") for invoice financing to other banks for various sums of money using BL080 or an arrival notice referencing that same bill of lading ("AN080"). Three of the Applications were signed by the Applicant, and three were signed by the Applicant and Mdm Neo. All the Applications were approved by the various banks and the amounts applied for were disbursed to the suppliers under the relevant invoices.

8 It was not disputed that the financing of the invoices was secured by the personal guarantees given by the Applicant, and that all the outstanding payments in relation to the six proceeded charges were fully repaid by Intraluck. In consequence, none of the banks suffered any loss as a result of the Applications.

The purported questions of law of public interest

9 Four conditions must be met before leave can be granted for a question to be referred to the Court of Appeal (see the decision of this court in *Tang Keng Lai v Public Prosecutor* [2021] 2 SLR 942 ("*Tang Keng Lai*") at [6]):

(a) Firstly, the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction.

(b) Secondly, the reference must relate to a question of law, and that question of law must be a question of law of public interest.

(c) Thirdly, the question of law must have arisen from the case which was before the High Court.

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

10 In our judgment, the Questions do not satisfy these conditions.

Oral application

11 In the Notice of Criminal Motion filed by the Applicant, the Questions read as follows:

> **Question 1:**
>
> (a) Should a statement under section 22(4) of the Criminal Procedure Code 2010 (Cap 68) ("CPC"), which is recorded in English where the person giving the statement is speaking in a language other than English, be interpreted and read over to the person verbatim in a language he understands or will an "explanation" of the statement to the person in a language he understands be sufficient for the purpose of section 22(4) of the CPC?
>
> (b) Should the Investigating Officer examining a witness in order to record a statement be required to: (a) record the statement word for word rather than in an edited narrative form, and/or (b) arrange for an interpreter to interpret and read over the statement to the person being examined rather than the Investigating Officer being examiner, recorder and interpreter?
>
> (c) What weight should be given to a statement, in particular, parts which are alleged to be admissions and used for the purposes of conviction, when the examination by the Investigating Officer is reduced into a written statement in a narrative form, rather than verbatim, and/or not interpreted and read over verbatim by a person other than the examiner?
>
> **Question 2:**
>
> (a) Where the terms and conditions of a transaction (such as invoice financing of the banks) do not require a

> document to be furnished (a transport document such as a Bill of Lading) as a precondition for disbursement of monies or handing over of property, can there be deception by the submission of a wrong but unnecessary (transport) document?
>
> (b) Whether the element of "dishonestly induces any person to deliver any property" in section 420 of the Penal Code is satisfied when a misrepresentation in a contractual document submitted by a customer without an intention to cause wrongful gain or wrongful loss and the document was not relied upon by and/or did not cause that person allegedly induced to deliver property.
>
> (c) Arising from (a) and (b), does the fact that the banks rely only on the customer's contractual warranties and external independent security to disburse the loans, imply that the banks cannot be said to have been induced by other non-material and non-essential documents, to deliver property within the meaning of section 420 of the Penal Code?

12 Question 1 concerns purported requirements for a statement recorded pursuant to s 22 of the CPC ("s 22 statement"), while Question 2 concerns the elements of s 420 of the Penal Code.

13 At the hearing, the Applicant made an oral application to amend Question 1(b) and 1(c) and to, in substance, introduce an additional question (*ie*, the Additional Question). The amendments are as follows:

> The Amended Question 1(b) and (c):
>
> (b) Should the Investigating Officer examining a witness in order to record a statement be required to: (a) record the statement word-for-word rather than in ~~an edited narrative form~~ a question-and-answer format with the follow-on questions being not recorded and the answers recorded in a singular fashion and/or (b) arrange for an interpreter to interpret and read over the statement to the person being examined rather than the Investigating Officer being examiner, recorder and interpreter?
>
> (Arising from the above, an additional question (not framed in motion) is):

> Should an ancillary hearing under Section 279 CPC be called where the accused challenges the accuracy of his recorded statements, even if he does not challenge the voluntariness of the statement?
>
> (c) What weight should be given to a statement, in particular, parts which are alleged to be admissions and used for the purposes of conviction, when the examination by the Investigating Officer is ~~reduced into a written statement in narrative form~~ in question and answer format with follow-on questions being unrecorded and the answers recorded in a singular fashion, rather than verbatim, and/or not interpreted and read over verbatim by a person other than the examiner?
>
> [deletion marks and underlined text in original]

14 Since the Additional Question was, in substance, a fresh application under s 397(1) of the CPC, pursuant to s 397(3), that application should have been made within one month of the determination of the matter in the court below, *ie*, one month from 20 October 2021. Hence, the application for leave to refer the Additional Question was filed out of time. Nevertheless, s 397(3) also empowers this court to grant an extension of time.

15 The Prosecution did not object to the oral application. We therefore allowed the amendments to Question 1(b) and 1(c) and granted an extension of time for the Applicant to apply for leave to refer the Additional Question to this court.

16 We now turn to examine the merits of the present application.

Question 1

17 First, we must analyse Question 1 as a whole.

18 To begin with, the plain language of s 22 of the CPC does not contain requirements for: (a) Investigating Officers ("IOs") to record a s 22 statement

word for word; and (b) independent interpreters to be present during the taking of s 22 statements. In relation to the interpretation point, s 22(4)(*b*) simply provides that if the witness does not understand English, the s 22 statement must be interpreted for him in a language that he understands. In other words, the statement can be translated to the witness by persons apart from interpreters.

19 Next, Question 1 essentially concerns compliance with purported procedural requirements of taking s 22 statements according to the Applicant. The statutory admissibility regime is set out in s 258(3) of the CPC, Explanation 2(*e*) thereof provides that if a statement is otherwise admissible, it will not be rendered inadmissible merely because the recording officer or interpreter did not "fully comply" with the requirements of ss 22 or 23. Also, as held by this court in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*"), the court has a residual discretion at common law to exclude a voluntary statement from evidence where their prejudicial effect exceeds their probative value. Hence, where a statement has been recorded by the police in breach of legal requirements or the Police General Orders, the court can exclude such statement as more prejudicial than probative unless the Prosecution gives some reasonable explanation for the irregularity (at [53] and [60]–[62]).

20 We pause to note that, as regards *Kadar*, the Applicant claims the following observations by V K Rajah JA support his case (at [59] and [60]):

> 59 There is always a small but real possibility that an overzealous police officer who believes that a suspect is guilty will decide, perhaps half-consciously, that strict compliance with the procedural requirements for statement-taking may contribute to a factually guilty offender being let off. He may not go so far as to extract an incriminatory statement by threat, inducement or promise, or a statement that is otherwise involuntary. All that is required for a miscarriage of justice to occur is for such a police officer to record the statement with

> embellishments, adding nothing more than a few carefully-chosen words to the suspect's own account. If the statement is not read back or signed soon after by the suspect (with proper interpretation where appropriate), there is no assurance that the statement faithfully reflects what he had actually disclosed. Alternatively, a police officer might simply be indolent, leaving the recording of the statement to well after the examination. His memory of the interview having faded, such an officer might fill in the gaps based on his own views about the suspect's guilt. Such questionable statements could, standing alone, form the basis for wrongful convictions even for capital offences if an accused, disadvantaged by the lapse of time and memory, is unable to convince the court that he did not say what appears in writing to be his words. The salutary requirements of the CPC and the Police General Orders, especially those requiring statements to be promptly reduced to writing, immediately read back to their maker, and corrected if necessary and signed, are the only prescribed safeguards standing in the way of such an unacceptable possibility.
>
> 60 Police investigators are aware when they record statements that they are likely to be tendered as evidence before a court and that there is therefore an *uncompromising need* for *accuracy* and *reliability*. The objective of the relevant provisions in the CPC and the Police General Orders is to ensure that both these twin objectives are met in every investigation. For this reason, as well as what we have articulated earlier, we think that a court should take a *firm* approach in considering its exercise of the exclusionary discretion in relation to statements recorded by the police in violation of the relevant requirements of the CPC and the Police General Orders (or other applicable legal requirements). This means that the court should not be slow to exclude statements on the basis that the breach of the relevant provisions in the CPC and the Police General Orders has caused the prejudicial effect of the statement to outweigh its probative value.
>
> [emphasis in original]

21 In our view, the above statements are uncontentious and we do not dispute their general applicability. However, they do not contain any pronouncement to the effect that the court *must* exclude statements where there is no strict compliance with the procedural requirements of s 22(4) of the CPC. They also do not state that any of those requirements is mandatory such that its

contravention would *ipso facto* warrant the exclusion of a s 22 statement. We therefore fail to see how the cited passage supports the Applicant's case.

22 Hence, as regards admissibility, the legal position is clear. In so far as there is a dispute here, it can relate only to the *application* of the relevant law to the facts, *ie*, whether the procedural non-compliance (if any) was sufficiently egregious such that the statement's prejudicial effect exceeded its probative value. This is plainly a question of *fact*. Indeed, the Applicant oddly appears to have accepted this position in his own submissions:

> 49. It is acknowledged that the Court's exclusionary discretion *will not operate in every circumstance where there is non-compliance*. This Court's decision in *Kadar* set out the application of the court's discretion to exclude unreliable statements which are otherwise admissible in evidence. Only serious irregularities which "materially affect the evidential value of a voluntary statement will suffice to cause the court to exercise the exclusionary discretion".
>
> [emphasis added]

Moreover, once the s 22 statement is admitted, the weight to be given to it is a question of *fact* and not a question of law. Hence, even if the procedural requirements alleged by the Applicant can be read from or read into s 22(4) of the CPC, the resulting inquiry is one of fact.

23 In addition, parts of Question 1 were drafted using hypothetical facts that were very specific to the present case. For example, Question 1(c) is premised on "parts [of a statement] which are alleged to be admissions and used for the purposes of conviction". As this court observed in *Public Prosecutor v Teo Chu Ha* [2014] 4 SLR 600 at [31], such questions are plainly those of *fact*:

> … As a matter of principle, the courts must determine whether there is sufficient generality embedded within a proposition posed by the question which is more than just descriptive but also contains normative force for it to qualify as a question of

> law; a question which has, at its heart, *a proposition which is descriptive and specific to the case at hand is merely a question of fact*. …
>
> [emphasis added]

24 Based on the considerations set out above, Question 1 appears to be an attempt at inventing *normative* questions of law from the mere process of applying s 22 of the CPC to the *facts* of the case.

25 We now turn to examine the sub-questions of Question 1.

Question 1(a)

26 In Question 1(a), the Applicant seeks the court's determination on whether a statement recorded in English pursuant to s 22(4) of the CPC, from a person speaking in a language other than English, should be *translated* and read over to the person *word for word* in a language he understands (in the present case, Mandarin), or in the alternative, whether an "explanation" of the statement to the person in a language he understands would suffice.

27 The Prosecution submits that it is clear and unambiguous that under s 22(4) of the CPC, where a statement is recorded in writing from a person who does not understand English, that statement must be read over and interpreted for the person in a language that the person understands, and also be signed by the person. There was thus no legal controversy or live legal issue for determination by this court.

28 We agree with the Prosecution's submission as the plain wording of "read over" and "interpret" must connote that the person reading over the statement *dictates* that statement *verbatim*. Semantically, "read over" does not encompass the acts of *summarising* or *explaining* the contents of the statement.

Indeed, the *Oxford English Dictionary Online* (Oxford University Press, 2021) defines "read over" as: (a) "[t]o go over or through (a text, written list, etc.), reading aloud"; or (b) "[t]o go over or look back over (a letter, book, etc.); to peruse in full. …".

29 Hence, while Question 1(a) is a question of law, the answer to it is so obvious that there is no public interest in referring it to the Court of Appeal.

Question 1(b)

30 Question 1(b) sets out two separate questions for the court's determination:

> (a) Should the IO recording a statement be required to record the statement word for word rather than in "a question-and-answer format with the follow-on questions being not recorded and the answers recorded in a singular fashion"?
>
> (b) Should the IO recording a statement be required to arrange for an interpreter to interpret and read over the statement to the person being examined rather than the IO being the examiner, recorder and interpreter?

31 At the outset, we reiterate that even if either requirement *can* be read from or read into s 22(4) of the CPC, as stated above at [19]–[22], the effect of non-compliance with such requirements on admissibility and weight is a factual inquiry. Question 1(b) is therefore a question of fact, not law.

32 Moreover, even if Question 1(b) is a question of law, it relates to settled legal issues.

33 As the Prosecution rightly submits, neither requirement can be read from the plain text of s 22(4) of the CPC, which requires that a statement "recorded in writing" must: "be read over to the [witness]", "if the [witness] does not understand English, be interpreted for the [witness] in a language that the [witness] understands"; and "be signed by the [witness]".

34 Indeed, as regards the issue of whether the IO has to record a s 22 statement word-for-word, this is clearly not a legal requirement (see *Halsbury's Laws of Singapore vol 10* (LexisNexis, 2021) at para 120.119, citing *Public Prosecutor v Pachaiappan* [1941] MLJ 102 and *Public Prosecutor v Subramaniam & Anor* [1956] MLJ 58). In the two Malaysian authorities cited, the court held that since s 112 of the Malaysian Criminal Procedure Code did not provide that a statement taken pursuant to that section must be in a question-and-answer format as opposed to a running narrative, there was no such procedural requirement. In the former manner of recording, the accused's answers would be recorded verbatim. Similarly, in the present case, the Applicant should not read in additional procedural requirements for the recording of s 22 statements where there are none.

35 We note that the Applicant has, quite mischievously in our view, used specific phrasing in his amended Question 1(b): "a question-and-answer format with the follow-on questions being not recorded and the answers recorded in a singular fashion". In the Applicant's view, this meant that while his answers were recorded in a question-and-answer format, there were instances where a few answers to a few subsidiary questions to a main question would be consolidated into a singular answer that reflected, in the Applicant's view, a narrative that the IO understood him to be saying. Hence, this question-and-answer format did not reflect verbatim answers. Nevertheless, we emphasise

that the point here is that s 22 of the CPC does not prescribe any specific format for s 22 statements that are recorded in writing.

36 Moreover, the above phrasing of the amended Question 1(b) is plainly an attempt to revisit the findings of the lower courts, thus constituting an impermissible back-door appeal.

37 The District Court had taken great pains to explain its reasoning as to why it found that the s 22 statements were accurate (see the Trial GD at [221]–[232]). Indeed, it was evident to us that the court engaged in a meticulously detailed analysis, which spanned many paragraphs. Moreover, the allegation that the IO had excluded the accused's answers or mis-recorded the questions was put before that court at [221], as follows:

> While not disputing the voluntariness of any of the four statements, the Defence challenged the accuracy of the s 22 statements and urged the Court not to rely on them. Essentially, the allegations of the Defence centred on claims that the recorder, ASP Yue, had *inserted portions in the statements that were not said by the accused*, or *excluded things that the accused had said*, or *mis-recorded the questions and/or the accused's answers*, and also apparently had a pre-conceived notion that there was a scheme to cheat the banks.
>
> [emphasis added]

38 On appeal, the Applicant also argued that the IO had added to his answers and the High Court noted as follows (at [35] of the HC GD):

> Central to the DJ's finding that the appellant possessed the requisite *mens rea* (*ie*, guilty knowledge) were the statements recorded from the appellant under s 22 of the CPC. In these proceedings, the appellant's attempts to impugn the statements can be summarised into the following bases:
>
> > (a) That the statements were inaccurate as the interviews with the appellant were in Mandarin, but the statements were recorded in English. In addition, that *there were gaps and procedural deficiencies in the statements*;

> (b) That the DJ had misconstrued the statements.
>
> [emphasis added]

Ultimately, the High Court agreed that the District Court was justified in rejecting the Applicant's allegations against the IO in the recording of the statements and that the s 22 statements were accurate (see the HC GD at [36]–[39]).

39 Since Question 1(b) is premised on the attempted negation of the lower courts' findings, it is an ill-conceived attempt at re-litigating these facts, in what is, in substance, a back-door appeal.

40 In so far as the requirement of an independent interpreter to translate and read over the statement to the person being examined is concerned, this was suggested during the Parliamentary Debates relating to the Criminal Procedure Code Bill in 2010 but was not adopted. Indeed, in response to such suggestions, the Minister for Law, Mr K Shanmugam, stated as follows (see *Singapore Parliamentary Debates*, *Official Report* (19 May 2010), vol 87 at col 557):

> Mr Lim Biow Chuan and Mr Hri Kumar asked if it will be more appropriate for an independent interpreter, instead of the IO, to read the accused person's statements back to him after the statements have been recorded. *The Police have found it difficult in the past to require the presence of an independent interpreter in every case.* The Police are now reviewing these aspects as part of a review which I have just referred to earlier on how investigations are conducted.
>
> [emphasis added]

41 Since the legislature had intended to omit such a requirement in view of operational difficulties in investigations, we emphasise that it is not up to this court to act as if it were a "mini-legislature" by reading such a requirement into s 22(4) of the CPC. This would be beyond this court's remit as a court of law.

42 It may, at most, be argued that it was unclear if the above debate related only to the taking of a statement under s 23 of the CPC ("s 23 statements"). Section 23(3A) of the CPC is worded similarly to s 22(4) of the CPC:

> (3A) Where a statement made by an accused in answer to a notice read to the accused under subsection (1) is recorded in writing, the statement must —
>
> (*a*) be read over to the accused;
>
> (*b*) if the accused does not understand English, be interpreted for the accused in a language that the accused understands; and
>
> (*c*) be signed by the accused.

Nevertheless, given the similarity in wording between s 23(3A) and s 22(4) of the CPC, there should be no requirement for an independent interpreter for *both* s 22 and s 23 statements where such a requirement is not expressly stated in the wording of both provisions.

43 Moreover, in *Kong Weng Chong and others v Public Prosecutor* [1993] 3 SLR(R) 453 ("*Kong Weng Chong*"), this court held that, as regards the taking of *oral* statements from accused persons, there is "no principle of law which requires that on such occasion an interpreter not involved in the investigation should be called upon to interpret" (at [25]). Hence, it was immaterial that the accused's oral statement was made to a Central Narcotics Bureau ("CNB") officer with another CNB officer acting as the Mandarin interpreter in that case. Since s 22(3) of the CPC stipulates that a s 22 statement must be recorded either in writing or in the form of an audiovisual recording, it may be argued that *Kong Weng Chong* concerned a different legal context. Nevertheless, we see no reason, in *principle*, for limiting the reasoning in that case only to oral statements and hold that it is equally applicable to s 22 statements.

44 In addition, the Applicant's submissions on this point were plainly unmeritorious.

45 In oral submissions, the Applicant clarified that his position with respect to whether an independent interpreter is required for s 22 statements of accused persons who did not understand English, was as follows:

> (a) When a s 22 statement is being recorded from or read back to the accused, there is *no* requirement for an independent interpreter to be present.
>
> (b) However, where a s 22 statement is sought to be admitted at the proceedings, that statement must have been independently interpreted (during recording or reading back). Otherwise, that statement is not admissible.

The Applicant submits that, since the requirement of an independent interpreter is only imposed at the point where the statement is sought to be admitted, this requirement does not interfere with investigations.

46 In our view, this is a fallacious argument. When a s 22 statement is recorded, the relevant authorities would not know if that statement would later be relevant at the trial. Hence, the Applicant's position would effectively mandate the requirement of an independent interpreter in *all* cases out of prudence. This would cause great operational difficulties in investigations. As we have already noted (at [40] and [41] above), the legislative intent in omitting an express requirement for an independent interpreter to be present was the avoidance of such operational difficulties. We therefore dismiss this submission.

47 The Applicant also placed great reliance on Yong Pung How CJ's statements in *Lee Kwang Peng v Public Prosecutor and another appeal* [1997] 2 SLR(R) 569 ("*Lee Kwang Peng*") (at [121]–[125]):

> 121 At least as far as the first s 122(6) statement was concerned, which was the only one in which the appellant said anything other than to deny the charge, this was translated into Hokkien for the appellant by his own admission, a fact which was consistent with PW7's evidence. The evidence given by PW8 was that he assisted in the making of the first three statements but not the other three as he was called off to do something else. The appellant alleged the other s 122(6) statements were not translated, but this need not be regarded as material as it appeared that, even given the appellant's limited knowledge of English, he would have understood the statements, which were very simple.
>
> 122 In respect of the long statement, it appeared at trial that no translation was provided at any time during the interview. The questions posed to the appellant when PW7 took his long statement were not in fact translated to him. When the interpreting officer, PW9, was asked whether he heard what had transpired between the appellant and PW7, his reply was "Yes, but not exactly". However, PW7 stated that the statement was translated to the appellant before he signed it although the appellant alleged that it was not.
>
> 123 A further irregularity was that although the appellant signed the statement, his residential and business addresses were wrong, suggesting the statement might not have been translated to him. PW9 attempted to explain this by saying that he did not translate the first paragraph as he expected the appellant to be familiar with his personal particulars.
>
> 124 The questions before the court were therefore, where an appellant claims not to understand English very well: (a) what is the effect of the interview for the long statement being conducted in English without interpretation; (b) what is the effect if the interview was conducted in English without interpretation but the statement translated to him in a language he understands before he signed it; and (c) what is the effect if the interview was conducted in English without interpretation and the statement was not translated to him at all?
>
> 125 I am of the view that, unless the accused person's understanding of English is so poor that he cannot understand what is being asked of him or cannot communicate with the interviewer, *there is nothing wrong with the interview being*

> *conducted in English so long as the statement is translated to him and he is given an opportunity to amend or make additions to it. He may then do so in whatever tongue he is comfortable with, and the translator should dictate this to the recording officer.* Unless there is bad faith on the part of the translator or recording officer, for example in refusing to incorporate the accused's amendments or in falsely recording what the accused wished to add, the statement must be good and valid as it has been adopted by the accused. If, however, the statement is not translated to him at all, then it cannot be his statement as the risk of him having adopted as his own something he did not understand is too great to warrant admission of the statement.
>
> [emphasis added]

48 As with the Applicant's reliance on *Kadar* (see [20] and [21] above), we do not see how these general and uncontentious statements in *Lee Kwang Peng* above assist the Applicant's case. While these statements in *Lee Kweng Peng mention* the use of an independent interpreter to translate and read back the statement to the accused, they do not *mandate* the same, such that contravention would warrant the exclusion of a s 22 statement.

49 Hence, even if Question 1(b) is a question of law, it is not one relating to the public interest.

Question 1(c)

50 Question 1(c) is essentially a different way of phrasing Question 1(b). However, Question 1(c) now asks what *weight* should be given to "parts [of a s 22 statement] which are alleged to be admissions and used for the purposes of conviction".

51 Given that Question 1(c) expressly concerns the degree of *weight* that should be accorded, such an inquiry must *inherently* be *factual*, for it is weight that is accorded to facts and not propositions of law. As the Prosecution aptly submits, the premise of the question being framed as "what weight should be

given" is a dead giveaway for a question of fact. Accordingly, Question 1(c) is not a question of law, but one of *fact*.

52 Indeed, Question 1(c) is plainly an attempt to re-litigate the Applicant's case in the form of a back-door appeal. The Applicant is in substance claiming that the "admissions" he gave in the s 22 statements, which were relied upon by the District Court in convicting him, were improperly and inaccurately recorded. The District Court has given many reasons as to why the s 22 statements can be relied upon, which include, *inter alia*, various safeguards taken by the IO in the recording of the s 22 statements (see the Trial GD at [214]–[232]). The High Court took a similar view, observing that "the truth of the allegations premised on the perceived inaccuracies of language or whether the statement were (or were not) read back to the appellant (whether in English or Mandarin) ultimately turned on whether the IO or the appellant's evidence at trial was to be accepted" (see the HC GD at [36]).

53 Before turning to address Question 2, we pause briefly to note that Question 1 bears great similarity with some of the questions posed to this court in *Ng Chye Huay v Public Prosecutor* (CA/CM 32/2017) ("*Ng Chye Huay*"). In that case, the applicant was convicted of four charges under s 180 of the Penal Code for refusing to sign statements, when legally required to do so. The applicant's appeal against conviction and sentence was dismissed by the High Court. The applicant subsequently sought leave to refer seven purported questions of law of public interest to the Court of Appeal. The seven questions, all of which related to the statement recording process, were:

> Question 1: Whether a recording officer has an obligation to record a statement word-for-word when exercising powers under s 22 of the Criminal Procedure Code.
>
> Question 2: Whether the statement has to be recorded in a question-and-answer format.

> Question 3: Whether the recording officer can paraphrase the statement.
>
> Question 4: Whether the recording officer has the discretion to decide what to include and exclude from the statement.
>
> Question 5: Whether the person giving the statement can rely on the right against self-incrimination under s 22(2) of the CPC in refusing to sign the statement.
>
> Question 6: Whether a person can legally refuse to sign a statement that is not recorded word-for-word.
>
> Question 7: Whether a refusal to sign a statement that is not recorded word-for-word is an offence under s 180 of the PC.

54 As the Prosecution rightly submitted, Question 1 in the present case is similar to Questions 1 to 4 in *Ng Chye Huay*. We note that, in dismissing the s 397(1) application for those four questions in *Ng Chye Huay*, this court held as follows:

> … In so far as these four questions are concerned, we find that they are not questions of law of public interest as it is ***well-established*** *that the recording officers can* ***paraphrase statements*** – indeed, *there would,* ***inevitably, be a need to do*** *so when translating statements given in other languages into English.* Moreover, statements recorded pursuant to s 22 of the CPC are meant to serve an investigative purpose and there is no need to include matters that are irrelevant. Finally, it bears mention that the s 22 statements are read back to the person giving the statement, and an opportunity to amend the statement is afforded. There is therefore a safeguard that is built into the framework of s 22 of the CPC.
>
> [emphasis added in italics and bold italics]

We are therefore fortified in our reasoning above for the present case by our previous approach to similar questions in *Ng Chye Huay*.

Question 2

55 Generally, the Applicant's submissions on Question 2 involved disputes regarding the findings of *fact* by the lower court. This much is evident even from the phrasing of his submissions, and we set out one example here:

> 145. *The Applicant submits that the evidence does not show that the banks were induced or deceived by the incorrect BLs submitted with the applications to enter any of the 6 (or 578 other) individual contracts*. There was simply no reliance on the bill of lading by the banks since the banks were never at risk. The banks were content to enter each individual contract because they had Intraluck's warranties, backed up by more than adequate security. Whatever the document checkers and relationship managers might have thought when they gave evidence at the trial below, the banks as a legally well-advised institution, were never relying on the bills of lading or transport documents in its decision to disburse the Invoice Financing loans. All that they relied on were Intraluck's warranties and the security of the Applicant's guarantee.
>
> [emphasis added]

56 We also note that, like Question 1 (see [23] above), parts of Question 2 were drafted using hypothetical facts that are very specific to the present case. For example, Question 2(a) is premised on "the terms and conditions of a transaction (such as invoice financing of the banks) [which] do not require a document to be furnished (a transport document such as a Bill of Lading) as a precondition for disbursement of monies or handing over of property".

57 We now turn to examine the sub-questions.

Question 2(a)

58 Question 2(a) is a question of *fact* and not one of law. This is apparent when the question is broken down as follows:

> (a) The question begins with the premise that "the terms and conditions of a transaction (such as invoice financing of the banks) do not require a document to be furnished (a transport document such as a Bill of Lading) as a precondition for disbursement of monies or handing over of property".

(b) "Deception" has been defined as the inducing of a person to believe to be true something which the person making the representation knows is in fact false (see the HC GD at [27], citing the decisions of the High Court in *Gunasegeran s/o Pavadaisamy v Public Prosecutor* [1997] 2 SLR(R) 946 at [42]; *Rahj Kamal bin Abdullah v Public Prosecutor* [1997] 3 SLR(R) 227 at [24]; and *Public Prosecutor v Ong Eng Teck* [2012] SGHC 242 at [23]).

(c) The question then asks if the premise suffices for a finding of deception "by the submission of a wrong but unnecessary (transport) document".

Question 2(b)

59 Question 2(b) looks at two requirements, *viz*, inducement and dishonesty, and then asks whether these requirements are satisfied if there was no reliance on the impugned document and if the maker of the document did not have any intention to cause wrongful gain and wrongful loss.

60 Properly understood, Question 2(b) is not a question at all.

61 To begin with, the *definition* of dishonesty under s 24 of the Penal Code requires either an intention to cause wrongful gain or an intention to cause wrongful loss. In this regard, Question 2(b) conveniently posits a hypothetical where the accused person does *not* have such an intention.

62 Next, the *definition* of inducement requires there to be some causal nexus between the deception and the parting of property (see Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Singapore* (LexisNexis,

2022) at paras 14.71–14.72). Again, Question 2(b) conveniently posits a hypothetical where such a causal nexus is *not* present.

63 Hence, Question 2(b) oddly asks if the *mens rea* under s 420 of the Penal Code can be satisfied under hypothetical facts where the elements of the offence are absent. Understood in this way, Question 2(b) is not even a question, and if it is, it is one of fact and not one of law.

64 Also, as the Prosecution submits, Question 2(b) did not arise from the appeal before the High Court and did not affect the outcome of the appeal because the High Court never found that there was no dishonesty (*ie*, "an intention to cause wrongful gain or wrongful loss") or that the banks were not induced. The District Court had found that the Applicant had been dishonest, given his admissions that he should not have submitted the same bill of lading for more than one bank application, but did so anyway due to the profitable nature of the transactions (see the Trial GD at [244]). The High Court agreed and held that a dishonest intention on the part of the Applicant was clearly established on the evidence, an intention which bore a clear nexus to the *actus reus* of cheating (see the HC GD at [39]).

65 Again, we emphasise that the present application to refer questions of law to this court cannot, and should not, be treated as an avenue to re-litigate issues of fact that have been decided in the courts below.

Question 2(c)

66 Question 2(c) first refers to a *specific fact*, *viz*, a situation where "the banks rely only on the customer's contractual warranties and external independent security to disburse the loans". It then asks if this fact implies *another fact*, *viz*, the banks did not rely on "other non-material and non-essential

documents", such that inducement under s 420 of the Penal Code is not made out. Plainly, Question 2(c) is a question of fact, not law.

67 Again, as submitted by the Prosecution, Question 2(c) also did not arise from the proceedings below and did not affect its outcome:

(a) The District Court had found that the transport documents were *considered and relied upon by the banks* as part of the approval process for the invoice financing (see the Trial GD at [248] and [249]). Further, the Applicant was aware that the banks would only grant a loan if they obtained a transport document, and being unable to produce a genuine transport document, the Applicant had chosen to submit either BL080 or AN080 to the banks (see the Trial GD at [242]). Indeed, the submission of the transport documents was an essential requirement for the applications for invoice financing and the banks would have checked for these documents as part of their internal processes (see the Trial GD at [253]).

(b) The High Court held that the DJ had rightly concluded from both the oral and documentary evidence, that the banks had in fact been induced by the provision of the transport documents to disburse the monies to the suppliers under the relevant invoices (see the HC GD at [31]).

The above findings of fact are contrary to those in the Applicant's hypothetical scenario. We reiterate that s 397 of the CPC should not be used as a back-door appeal.

The Additional Question

68 In so far as the Additional Question is concerned, the Applicant submits that this court should require that the ancillary hearing procedure in s 279 of the CPC be utilised whenever an accused person contests the accuracy of the recorded statement.

69 Section 279(1) of the CPC provides as follows:

> **Procedure to determine admissibility of evidence**
>
> **279.**—(1) Subject to this Code and any other written law relating to the admissibility of evidence, where any party objects to the admissibility of any statement made by that party or any other evidence which the other party to the case intends to tender at any stage of the trial, the court must determine it separately at an ancillary hearing before continuing with the trial.
>
> …

70 Yet, in the Applicant's own submissions, he recognises that since he did not challenge the voluntariness of the s 22 statements but only their accuracy, it is not mandatory for the court to hold an ancillary hearing. This is because illus (*d*) to s 279(1) of the CPC states as follows:

> The prosecution seeks to admit a statement of the accused, who denies that he made it. *No ancillary hearing is necessary as this does not relate to the voluntariness of the statement.*
>
> [emphasis added]

Evidently, on a plain reading of illus (*d*), it does not impose a requirement for the court to hold an ancillary hearing where the sole challenge to the accused's statement relates to its accuracy. Also, since this is a matter of the court's discretion even on the Applicant's *own* view, the dispute here relates to the application of the law, which is a question of *fact*.

71 We nevertheless address, for completeness, the Applicant's reliance on the High Court decision of *Public Prosecutor v Parthiban Kanapathy* [2021] 5 SLR 372 ("*Parthiban*") (affirmed in *Parthiban a/l Kanapathy v Public Prosecutor* [2021] 2 SLR 847 (albeit without consideration of this particular point)).

72 In the Applicant's written submissions, he submitted that "this [c]ourt should determine that the approach in *Parthiban* is the correct position in law". In that decision, the High Court provided three reasons to support the calling of an ancillary hearing when the accuracy of an accused person's statement is challenged (see *Parthiban* at [29]–[38]). Indeed, at some points, the language used may appear to suggest that it is mandatory for the court to hold an ancillary hearing where the accused person challenges the accuracy of a statement, as seen below (at [32]):

> However, illus (*a*) to s 279(1) of the CPC shows that when it is suggested that a tape recording sought to be admitted has been tampered with, an ancillary hearing must first be held to determine if the tape had in fact been tampered with. A tape recording is one of the possible modes which may be utilised to record an accused's statement. Nonetheless, in reality, most accused statements (if not all of them) are not tape recorded, but are instead signed written statements obtained from the accused. Be that as it may, by way of an analogy with illus (a), if the accused disputes that: (a) his written statement sought to be admitted by the Prosecution has been wrongly or erroneously translated or recorded; or (b) the written statement as recorded is not his statement but a statement that, unknown to him at the time of penning down his signatures on various parts of the statement, has been fabricated by the recording officer, then *an ancillary hearing* ***must*** *be held* to determine if the statement has in fact been so tampered with. In other words, *an ancillary hearing* ***must*** *be held* to ascertain the accuracy and/or authenticity of the recorded statement that is purported to be the accused's statement. If what is recorded as a written statement is determined during the ancillary hearing to be inaccurate or fabricated, then it should not be admitted into evidence.
>
> [emphasis added in italics and bold italics]

73 Nevertheless, it is of the first importance in this particular context to note that the High Court expressly stated at the outset that its reasoning on this issue was *obiter dicta* (see *Parthiban* at [29]):

> Before considering the accuracy and admissibility of the statements, I make a few *observations* about the calling of an ancillary hearing when the accuracy, but not the admissibility of a statement is challenged during the course of a criminal proceeding.
>
> [emphasis added]

74 Moreover, the High Court ultimately clarified that its stance in relation to illus (*d*) to s 279(1) of the CPC did not deviate from the prevailing legal position. The court stated as follows (see *Parthiban* at [38]):

> In my view, s 279(1) of the CPC thus addresses this procedural problem by requiring an ancillary hearing to be held to determine any disputed issues concerning the accuracy and/or authenticity of the statements recorded from the accused *before* the case for the Prosecution is completed. In this regard, I note that illus (*d*) to s 279(1) of the CPC merely states that "[n]o ancillary hearing is *necessary*" [emphasis added] when the challenge does not relate to the voluntariness of the statement. While it is ***not necessary***, I find that it would be ***good practice to call for an ancillary hearing to determine the accuracy and/or authenticity of any statement***, in particular as the liberty of the accused may very well depend on whether those parts of the statement disputed by the accused as being accurate or authentic are admitted and relied on by the Prosecution after their admission.
>
> [emphasis in italics in original; emphasis added in bold italics and bold underlined italics]

75 Hence, even on the authority of *Parthiban*, it is a matter of the court's *discretion* to call for an ancillary hearing where the accused challenges the accuracy of his statements. The Additional Question is therefore a question of *fact* and not one of law. During oral submissions, the Applicant appeared to change his position. He clarified that *Parthiban* merely suggested that it is good practice for an ancillary hearing to be held when the accused challenges the

accuracy of his statements. Hence, in arguing for the same to be a mandatory legal requirement, his position *went beyond* that in *Parthiban*. His clarification therefore meant that his submission was *not* even supported by *Parthiban* itself. There was no other authority cited to us in support. Accordingly, we do not see how the Applicant's subsequent and more difficult position has any legal support at all.

76 Subsequently, the Applicant sought to rely on a slew of other authorities in his further written submissions tendered after the hearing. With respect, on the face of those authorities, they plainly do not assist the Applicant's case and we see no need to address them.

77 However, since the parties have submitted on the substance of the observations in *Parthiban* (at [29]–[38]), we shall turn to address them briefly although, as already observed (at [73] and [74]), they were made by way of *obiter dicta*.

78 As noted above, the court in *Parthiban* suggested three reasons in support of convening an ancillary hearing when the accuracy of an accused person's statement is challenged.

79 First, illus (*a*) to s 279(1) of the CPC provides that when it is claimed that a tape recording sought to be admitted has been tampered with, an ancillary hearing must first be held to determine the admissibility of that recording. The court suggested that, analogously, an ancillary hearing should be called to determine admissibility where: (a) the written statement sought to be admitted by the Prosecution has been wrongly or erroneously translated or recorded; or (b) the written statement as recorded is not the accused's statement but a

statement that, unknown to him at the time of penning his signature on various parts of the statement, has been fabricated by the recording officer.

80 In our view, tampering with a tape recording is more analogous to a serious procedural irregularity in the recording of a written statement. An allegation of such tampering would almost certainly involve issues such as whether the chain of custody was broken and how the alleged tampering was effected. According to *Kadar* at [64], it is uncontentious that an ancillary hearing must be called in these circumstances to determine if the court should exercise its exclusionary discretion. This legal context is *distinct from* that where the accuracy of the accused's written statement is challenged.

81 Second, the court reasoned that on the authority of *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 ("*Haw Tua Tau*"), until an ancillary hearing is called to determine the accuracy of the accused's statement, it should not be considered as part of the Prosecution's evidence from which the court will decide whether the accused is to be called upon to enter his defence.

82 The Privy Council in *Haw Tua Tau* stated as follows (at [17]):

> … At the conclusion of the Prosecution's case …, the judge must consider whether there is some evidence (not inherently incredible) which, *if he were to accept it as accurate*, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of s 188(1). Where he has not so found, he must call upon the accused to enter upon his defence …
>
> [emphasis added]

83 It is apparent to us, however, that the Privy Council simply stated that the court must *assume provisionally* that the Prosecution's evidence is accurate at the close of the Prosecution's case. This does *not* mean that the court *determines* definitively that the Prosecution's evidence is accurate. Hence, the accused's written statement (which forms part of the Prosecution's evidence) can be challenged should the court call for the defence and the accused then elects to testify.

84 This leads to the third reason in *Parthiban* in support of calling an ancillary hearing to determine the accuracy of an accused's written statement. The court reasoned that if issues of accuracy and/or authenticity of the accused's statement were to be canvassed only during the main trial, the accused would not have the opportunity to give evidence on oath to challenge the accuracy and/or authenticity of the statements until after his defence is called and he decides to testify on oath. Hence, accused persons who do not wish to testify would be prejudiced.

85 We are not persuaded that the accused's opportunity to challenge the accuracy of his written statement must come at the cost of his right to remain silent. It remains open to the Defence to cross-examine the relevant Prosecution witnesses and to call on other Defence witnesses to support the Defence's case.

86 We are therefore of the view that the observations in *Parthiban* do not assist the Applicant in any case.

Leave should not be granted

87 For the above reasons, save in respect of Question 1(a), the application to refer the Questions to this court under s 397(1) of the CPC can, as a whole, be dismissed on the basis that they are not questions of law but of fact. While

Question 1(a) is a question of law, it is not one of public interest. In addition, Questions 2(b) and 2(c) do not arise from the proceedings below and do not affect its outcome.

Costs

88 The Prosecution submits that the Applicant has attempted to mount a back-door appeal against his conviction, which is an abuse of process. The Prosecution therefore submits that the court should order costs against the Applicant, pursuant to s 409 of the CPC.

89 Section 409 of the CPC provides as follows:

> **Costs**
>
> **409.** If the relevant court dismisses a criminal motion and is of the opinion that the motion was frivolous or vexatious or otherwise an abuse of the process of the relevant court, it may, either on the application of the respondent or on its own motion, order the applicant of the criminal motion to pay the respondent costs on an indemnity basis or otherwise fixed by the relevant court.

90 In *Huang Liping v Public Prosecutor* [2016] 4 SLR 716 at [23], this court clearly sounded the warning bell for unmeritorious applications under s 397(1) of the CPC:

> We therefore find it appropriate to state unequivocally that the bringing of such unmeritorious applications will not be countenanced and that this court will, henceforth, not hesitate to award costs against applicants who attempt "back-door" appeals by recourse to s 397. There will be *no excuse* for applicants who choose to waste valuable court time as well as the time of lawyers for the other party and (more importantly) make light of a statutory provision that is intended to be invoked ***in only exceptional circumstances in the public interest***.
>
> [emphasis in original]

91 For the reasons we have given above and summarised at [87], the present application for leave was entirely without merit. Furthermore, we also highlight the following ill-founded attempts at conjuring up or inventing questions of law where none existed:

(a) Despite the Applicant's late amendments to Questions 1(b) and 1(c), Question 1(c) was a mere rephrasing of Question 1(b) and its very phrasing showed that it was a question of fact;

(b) Question 2 mostly relied on hypothetical facts in an attempt to re-litigate findings of fact;

(c) Question 2(b) was not even a question at all; and

(d) the Applicant sought to refer the Additional Question through a late oral application and properly understood, his *own* position implied that this question was one of fact.

92 We therefore consider that an adverse costs order under s 409 of the CPC is eminently justified to deter future attempts at mounting back-door appeals.

93 In so far as the quantum of costs to be ordered is concerned, the Prosecution submits that costs of $3,000 is appropriate. The Prosecution refers to three precedent cases in support (see the decisions of this court in *Tok Ching Sim v Public Prosecutor* (CA/CM 9/2020), *Ng Chye Huay* and *Tang Keng Lai*). In these three cases, this court ordered that the applicant was to pay costs of $2,000.

94 Comparing the present case against that of *Ng Chye Huay*, we agree with the proposed quantum. As stated above (at [53] and [54]), we accept that

Questions 1 to 4 in that case are similar to Question 1 in the present case. This comparison serves as a starting point. Comparing Questions 5 to 7 in *Ng Chye Huay* against Question 2 in the present case, it is apparent that the former still relates to the statement recording process while the latter relates to a different subject matter, *viz*, the elements of s 420 of the Penal Code. The present application would therefore involve greater use of the court's time and resources. Hence, we agree that a slight uplift in the quantum of the costs order is justified.

Conclusion

95 We therefore dismiss the application and order that the Applicant pay $3,000 in costs to the Prosecution.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Sreenivasan Narayanan SC and Selvarajan Balamurugan (K&L Gates Straits Law LLC) (instructed), Letchamanan Devadason and Ivan Lee Tze Chuen (LegalStandard LLP) for the applicant;
Nicholas Khoo, Jordan Li, Ryan Lim and Ng Shao Yan (Attorney-General's Chambers) for the respondent.
