Kim Gwang Seok *v* Public Prosecutor
[2012] SGCA 51

Case Number	: Criminal Appeal No 1 of 2012
Decision Date	: 06 September 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Lee Seiu Kin J
Counsel Name(s)	: Tito Shane Isaac and Jonathan Wong (Tito Isaac & Co) for the appellant; Gordon Oh, Jean Chan and Eunice Ng (Attorney-General's Chambers) for the respondent
Parties	: Kim Gwang Seok — Public Prosecutor

Courts and Jurisdiction – Court of Appeal – Criminal jurisdiction – Whether Court of Appeal had jurisdiction to hear appeal against High Court judge's dismissal of application by criminal motion seeking to allow witnesses to testify from overseas through live video link for criminal trial in Singapore – Section 29A(2) Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)

Criminal Procedure and Sentencing – Trials – Witnesses – Whether witnesses allowed to give evidence from overseas through live video link for criminal proceedings in Singapore – Section 364A Criminal Procedure Code (Cap 68, 1985 Rev Ed)

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 51.]

6 September 2012

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 The appellant, Kim Gwang Seok, ("the Appellant") filed Criminal Motion No 88 of 2011 ("the Criminal Motion") seeking leave from the High Court to allow the following five Korean nationals to testify for him at his impending trial in Criminal Case No 45 of 2011 ("CC 45/2011") via video link from Korea: [note: 1]

(a) Mr Lee Byeong Gyun ("witness (a)");

(b) Mdm Lee Myung Soon ("witness (b)");

(c) Ms Kwak Jisuk ("witness (c)");

(d) Ms Kwak Jihye ("witness (d)"); and

(e) Mr Im Jongshin ("witness (e)").

(hereinafter collectively referred to as "the foreign witnesses")

The High Court judge ("the Judge") dismissed the application. The Appellant appealed to this court. After hearing submissions of the parties, we dismissed the appeal. We now set out our grounds in

writing.

Background

2 In CC 45/2011, the Appellant was charged, along with two others, in the High Court for an offence under s 7 read with s 12 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) of engaging in a conspiracy to export not less than 1546.4 grammes of diamorphine from Singapore to Australia.

3 The offence that the Appellant was alleged to have committed took place on 30 August 2009. A Nepalese man delivered three pairs of shoes containing diamorphine to the Appellant and the two co-accused. They then wore the shoes to Changi Airport Terminal 3, intending to board Singapore Airlines flight SQ 233 bound for Sydney.

4 The Appellant's intended defence at trial would be that he was asked by witness (a) to carry credit card computer chips in the shoes from Singapore to Australia, and that both he and witness (a) believed that he would be carrying such chips in the shoes. [note: 2] Both did not know that the shoes contained diamorphine.

5 The Appellant averred that witness (a) would testify for him and corroborate his defence as stated at [4] above. [note: 3] Witness (b) would testify that she was aware that her daughters, witnesses (c) and (d), had previously carried or delivered computer chips upon witness (a)'s request. [note: 4] Witnesses (c), (d) and (e) would testify that they had all previously travelled internationally and carried computer chips upon witness (a)'s request. [note: 5]

6 Witness (a) is an inmate in the custody of the Korean prison authorities and is the subject of ongoing investigations and possible prosecution in respect of various offences under Korean law. [note: 6]

7 Witness (b) is the sister of witness (a) and the mother of witnesses (c) and (d). She lives outside of central Seoul, Korea and is employed on a full-time basis at a care centre. [note: 7] She is unable to obtain leave of absence from her employers to attend the trial in Singapore. She intended to remain in Korea for at least the next three to six months to look after her first grandchild who was then expected to be born to witness (c) sometime in February 2012. [note: 8] She is unable to personally bear the costs of travelling to Singapore for the purpose of testifying at the trial.

8 Witness (c) also lives outside of central Seoul, Korea. She was then about eight months' pregnant with her first child and had been advised not to undertake any air travel or long journeys and/or until after she had fully recuperated from delivering her child. [note: 9] She too is unable to personally bear the costs of travelling to Singapore for the purpose of testifying at the trial.

9 Witness (d) also lives outside of central Seoul, Korea. She is employed on a full-time basis as a teacher outside of central Seoul and is unable to obtain leave of absence from her employer to attend the trial in Singapore. [note: 10] She is also unable to personally bear the costs of travelling to Singapore for the purpose of testifying at the trial.

10 Witness (e) is unrelated to the Appellant. The Appellant's counsel got his name after interviewing witness (a). [note: 11] Witness (e) lives and works in an area some 300 kilometres away from central Seoul and is unable to obtain leave of absence from his employer to attend the trial in

Singapore. [note: 12] He, like witnesses (b), (c) and (d) is also unable to personally bear the costs of travelling to Singapore for the purpose of testifying at the trial.

11 However, all the witnesses are willing to testify at the trial through video link from Korea. [note: 13] The Appellant stated in his affidavits that there would be considerable practical and logistical difficulties as well as substantial costs and expenses to be incurred if the foreign witnesses were required to come to Singapore to testify. [note: 14]

Decision below

12 The Judge dismissed the Appellant's application. The Judge noted that s 364A of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("s 364A" and "the CPC" respectively) was the relevant statutory provision, and held that the clear words of s 364A, buttressed by the statements made in Parliament at the Second Reading of the Criminal Procedure Code (Amendment) Bill, showed that only witnesses physically present in Singapore might be permitted to testify via video link if the prescribed conditions of s 364A were met. [note: 15] He noted that the position remained the same under the corresponding s 281(1) of the Criminal Procedure Code 2010 (Act 15 of 2010) ("the CPC 2010").

13 The Judge rejected the Appellant's argument that since there was no provision in Singapore law that expressly prohibited a person physically outside Singapore from testifying via video link for a criminal proceeding in Singapore, the court retained the discretion whether to allow a witness outside Singapore to testify in the proceeding. [note: 16] The Judge was of the view that counsel's argument here was plainly illogical. Under the CPC, before the enactment of s 364A, witnesses were required to testify in the presence of the judge in court. As s 364A had only allowed a witness who was in Singapore to testify via video link subject to the specified conditions, it would necessarily follow that in a case, where those conditions were not met, evidence by video link of a witness would not be allowed. To construe otherwise, as counsel sought to contend, would fly in the face of logic and be inconsistent with the intention of Parliament in enacting s 364A.

The Appellant's case

14 The Appellant argued that the Judge was wrong to base his decision solely on an interpretation and application of s 364A, and failed to give sufficient regard and weight to the other arguments which he had made, *viz*:

(a) the evidence which the foreign witnesses would give was clearly relevant and admissible under the Evidence Act (Cap 97, 1997 Rev Ed);

(b) there were no express statutory provisions which explicitly prohibited a foreign witness from testifying from abroad via video link in relation to criminal proceedings;

(c) there would be unreasonable delay in trying to bring the foreign witnesses to Singapore to testify and in the case of witness (a), it would be impossible to procure his presence in Singapore;

(d) the Prosecution would suffer no prejudice as the substance of the intended evidence of witnesses (b) to (e) was disclosed in the Appellant's affidavit supporting his application, and as regards witness (a), the investigators had already personally interviewed him in Bangkok and recorded statements from him;

(e) the Appellant would be highly prejudiced if the vital testimonies of the foreign witnesses could not be obtained; and

(f) this court had the inherent power to prevent injustice in criminal cases.

15 The Appellant further reiterated that the intended evidence of the foreign witnesses was clearly relevant and material to proving or disproving the Appellant's defence to the charge he faced, especially in relation to the issues of whether the Appellant knew that he was carrying diamorphine and whether he was able to rebut the presumption of knowledge under s 18 (2) of the Misuse of Drugs Act.

16 The Appellant submitted that the Judge erred in his interpretation of s 364A, in that he was wrong to find that there was an implicit restriction on overseas witnesses being allowed to testify via video link in criminal proceedings by virtue of the fact that the same was not specifically provided for in the CPC, and failed to give sufficient regard to the fact that Parliament, when enacting s 364A in 1995, did not and was not required to consider a scenario like the present case. He further submitted that the Judge's reading of s 364A had failed to keep pace with the evolution and tremendous advancements in video-conferencing technology since 1995. The Appellant argued that it was not inconsistent with Parliament's intention to allow the adduction of evidence via video link of a witness who was abroad. The mischief targeted by the enactment of s 364A, which was that of witnesses testifying from abroad being able to fabricate evidence with impunity as they would be outside the sanction of the Singapore courts and as such their evidence would be highly unreliable, was not to be found in the present circumstances as there were safeguards to ensure that the witnesses did not fabricate evidence.

17 The Appellant also argued that the present law was unsatisfactory for numerous reasons. First, there was a lacuna in the law as it did not cater for the situation where a witness was overseas and was prevented from testifying in Singapore for wholly legitimate and unavoidable reasons, and where his or her testimony might represent the best or only evidence available on the material issues. Second, the present law was also premised on the unfair, unreasonable and illogical presumption that all witnesses testifying from overseas were unable to give reliable evidence for criminal proceedings in Singapore because they had a predilection to lie with impunity, regardless of the legitimacy of their reasons for not being able to be present in Singapore. Third, the present law failed to recognise that the ultimate safeguard against the giving of unreliable evidence lay with the trial judge who would undoubtedly be competent and capable of assessing and assigning weight to video link evidence.

18 Moreover, the Appellant underscored the following points:

(i) He would be greatly prejudiced if the foreign witnesses were not allowed to testify from Korea as his defence was wholly dependent on the intended evidence of the foreign witnesses and excluding these witnesses from testifying at the trial would be fatal to his defence and the fair administration of justice in the case. These considerations of justice should clearly outweigh the need to adhere to any technical statutory requirement of requiring witnesses to testify in person at the trial.

(ii) There were truly unique and exceptional circumstances in relation to witness (a), who could not leave Korea to testify in Singapore because of his incarceration and involvement in proceedings in Korea. The court should exercise its inherent powers to prevent injustice in relation to criminal proceedings.

The Respondent's case

19 The Respondent submitted that Singapore law did not permit witnesses who were abroad to give evidence via video link in criminal proceedings in a Singapore court. The proceedings here were governed by the CPC and, by virtue of s 364A, evidence by video link could only be adduced in limited specified circumstances; and even then, a witness who was permitted to give evidence through video link must be present in Singapore when giving evidence for a criminal proceeding through this means. The rationale underlying the rule requiring a witness to be present here in Singapore when he or she gave evidence in a criminal proceeding was to ensure that the witness appreciated the obligation to tell the truth, failing which there would be criminal sanction for perjury. In this regard, reliance was placed by the Respondent on the statement made by the Parliamentary Secretary to the Minister for Law at the Second Reading for the Criminal Procedure Code (Amendment) Bill which introduced s 364A (see [23] below). The Judge's interpretation of s 364A was consistent with the plain and ordinary meaning of the wording of s 364A(1), as well as what was the expressed intention of Parliament.

20 Apart from this substantive point, the Respondent also made the preliminary argument that this court did not have the jurisdiction to entertain this appeal because this was not an appeal against a decision of the High Court made pursuant to its original criminal jurisdiction: see s 29A(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA").

Issues before this court

21 Accordingly, there were two questions which this court needed to address in this appeal:

(i) Did this court have the jurisdiction to hear this appeal?

(ii) Did s 364A allow witnesses who were physically outside Singapore to testify via video link for criminal proceedings in Singapore?

(a) However, for reasons which would be apparent later, we shall first examine the second issue.

Our analysis of the second issue

22 In order to facilitate a proper appreciation of the scope and effect of s364A, which was central to the second question before us, we set out s 364A in full:

Evidence through live video or live television links.

364A.—(1) Notwithstanding any other provision of this Act or the Evidence Act, a person in Singapore (other than the accused person) may, with leave of the court, give evidence through a live video or live television link in any trial, inquiry, appeal or other proceedings if —

(a) the witness is below the age of 16 years;

(b) the offence charged is an offence specified in subsection (2);

(c) the court is satisfied that it is expedient in the interest of justice to do so; or

(d) the Minister certifies that it is expedient in the public interest to do so.

(2) The offences specified for the purposes of subsection (1) (b) are —

(a) an offence which involves an assault on, or an injury or a threat of injury to, persons including but not limited to sections 319 to 338 of the Penal Code;

(b) an offence under Part II of the Children and Young Persons Act (relating to protection of children and young persons);

(c) an offence under sections 354 to 358 and sections 375 to 377B of the Penal Code;

(d) an offence under Part X of the Women's Charter (relating to offences against women and girls); and

(e) such other offences as the Minister may, after consulting the Chief Justice, prescribe.

(3) Notwithstanding any other provision of this Act or the Evidence Act, the court may, in its discretion, order an accused person to appear before it through a live video or live television link whilst in remand in Singapore in proceedings for any of the following matters:

(a) any application for bail;

(b) any extension of the remand of an accused person under section 198; and

(c) such other matters as the Minister may, after consulting the Chief Justice, prescribe.

(4) The court may, in the exercise of its powers under subsection (1) or (3), make an order on any or all of the following matters:

(a) the persons who may be present at the place where the witness is giving evidence;

(b) that a person be excluded from the place while the witness is giving evidence;

(c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;

(f) the stages in the proceedings during which a specified part of the order is to have effect;

(g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and

(h) any other order which the court considers necessary in the interests of justice.

(5) The court may revoke, suspend or vary an order made under this section if —

(a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;

(b) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;

(c) it is necessary for the court to do so so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;

(d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or

(e) there has been a material change in the circumstances after the court has made an order.

(6) The court shall not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.

(7) An order made under this section shall not cease to have effect merely because the person in respect of whom it was made attains the age of 16 years before the proceedings in which it was made are finally determined.

(8) Evidence given by a witness through a live video or live television link by virtue of this section shall be deemed for the purposes of sections 193, 194, 195, 196, 205 and 209 of the Penal Code as having been given in the proceedings in which it is given.

(9) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Act and the Evidence Act be deemed to be giving evidence in the presence of the court, the accused person or his advocate, as the case may be.

(10) In subsections (4), (8) and (9), a reference to "witness" shall include a reference to an accused person who appears before a court through a live video or live television link under subsection (3).

(11) The Chief Justice may make such rules as appear to him to be necessary or expedient for the purpose of giving effect to this section and for prescribing anything which may be prescribed under this section.

Of particular significance to the present case are subsections (1), (2) and (8) of the section.

23 At the Second Reading for the Criminal Procedure Code (Amendment) Bill which introduced s 364A, the Parliamentary Secretary to the Minister for Law stated thus (*Singapore Parliamentary Debates, Official Report* (1 November 1995) vol 65 at col 39):

I should point out that *this amendment does not provide for foreign witnesses to give evidence in Singapore via this procedure. Government is concerned that to allow witnesses outside the jurisdiction to give evidence would encourage the giving of false evidence exonerating accused persons*. It would be difficult for the Attorney-General to prosecute such persons and it would hamper our enforcement effort against drug traffickers.

[emphasis added]

24 As unequivocally shown by this statement of the Parliamentary Secretary, Parliament clearly intended that s 364A should not be applied to allow witnesses who are physically outside Singapore to give evidence via video link for criminal proceedings in Singapore because of the potential problem of foreign witnesses giving false evidence to exonerate accused persons, particularly in cases involving drug offences, which was exactly the situation in the present case. Significantly, s 364A(8) expressly provides that evidence so adduced through video link by a witness in Singapore will be regarded as evidence (*ie* evidence adduced in the presence of the judge in court) for the purposes of offences relating to perjury. The statement of the Parliamentary Secretary is completely in line with the express terms of s 364A(1) which provides that the giving of evidence by a witness through video link in a criminal proceeding is only available to "a person in Singapore".

25 Moreover, the Appellant's application under s 364A raised other difficulties. By virtue of s 364A(1)(a), one ground for allowing a witness to give evidence in a criminal proceeding through video link is that the witness is under 16 years of age. However, none of the foreign witnesses are below 16 years of age. The Appellant also could not rely on s 364A(1)(b) since this limb of s 364A(1) only applies to the specific offences prescribed under s 364A(2), and an offence under the Misuse of Drugs Act (which the Appellant was charged for) is not one such specified offence. From an examination of the list of the specified offences, as well as the prescribed age limit, it was clear to this court that the object of this exceptional measure is to protect victims of certain offences so that they will not have to directly face their aggressor-offender and be intimidated thereby when they give evidence.

26 Given the very limited specific offences for which s 364A allows witnesses in Singapore to testify via video link, as well as the safeguards prescribed by Parliament, we do not see how an argument can validly be made that there is still room for judicial discretion to allow witnesses to do so in relation to an offence which is not one of the specified offences and where the circumstances are not those specified in s 364A. It would amount to the judiciary usurping legislative function if this court extended the circumstances under which evidence by video link may be obtained in a criminal proceeding.

27 Furthermore, it seemed to us that the norm was that witnesses must be physically present in court to give evidence, as a matter of both practice and law. This was acknowledged by the Court of Appeal in *Sonica Industries Ltd v Fu Yu Manufacturing Ltd* [1999] 3 SLR(R) 119 ("*Sonica*") with respect to civil proceedings at [8]:

> *The general principle is that the evidence of a witness is to be given orally and in person in open court*. This principle, subject to a number of exceptions, is found in O 38 r 1 of the Rules of Court which provides:
>
> > Subject to these Rules and the Evidence Act (Chapter 97), and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by examination of the witnesses in open court.
>
> [emphasis added]

28 While the CPC does not explicitly state that witnesses must be physically present in court to give evidence, its provisions stipulating the procedure at trial clearly assumed that this was indeed the case (see ss 180, 187-192 of the CPC, and the corresponding s 230 of the CPC 2010). It must be borne in mind that video link is a facility which was brought about by advances in technology made in the last two decades. The common law could not have envisaged such a hearing method which was then not available. As such, the provisions in the CPC are based on the assumption that the entire trial process, which includes the giving of evidence by witnesses, was to be physically conducted in a

courtroom. We would further add that the manner in which s 364A itself was framed reinforces this point: s 364A provides a sole and exceptional avenue for allowing a witness to give evidence in a criminal proceeding while physically outside of the court through video link, as could be inferred from the presence of the words "[n]otwithstanding any other provision of this Act or the Evidence Act" at the beginning of s 364A.

29 It may also be germane to note that with regard to civil proceedings, adducing evidence through video link is allowed by virtue of an express provision enacted in 1996, *viz* s 62A of the Evidence Act ("s 62A"). The court in *Sonica* opined (at [9]) that s 62A is "an exception to [the] general principle" that witnesses in civil proceedings are to give evidence orally in open court. By analogy, s 364A is a similar exception in relation to criminal proceedings. Additionally, it should be noted that while there is much similarity between the provisions of s 364A and s 62A, there is, however, a very significant difference. Under s 62A, the adduction of evidence by video link of a witness who is abroad is expressly permitted. This shows that as far as adduction of evidence by video link is concerned, Parliament clearly intended that criminal proceedings are to be treated differently from civil proceedings. For criminal proceedings, the witnesses who are giving evidence via video link must be present in Singapore even though they need not be physically present in court before the judge.

30 Accordingly, we held that the courts here do not have the jurisdiction in relation to criminal proceedings to hear witnesses from abroad through video link. Although counsel for the Appellant urged us to exercise our inherent jurisdiction to allow the foreign witnesses to give evidence through video link, we could not see how that could be done in the face of the existing statutory framework.

31 As an aside, quite apart from the aforesaid legal considerations, we noted that what was presented to the court in the Criminal Motion were bare assertions on the part of the Appellant, long on generalisations and short on specifics. There was no evidence of the following: [note: 17]

(a) the full reasons for witness (a)'s detention in the Seoul Detention Centre and the period for which he was expected to remain incarcerated there;

(b) the reasons why witness (a) would not be allowed to leave Korea or the steps (if any) that had been taken to seek dispensation from the Korean authorities to allow witness (a) to come to Singapore to testify;

(c) whether witness (a) was willing to come to Singapore to testify if permission was granted by the Korean authorities; and

(d) the precise practical, logistical and financial difficulties or inconveniences for the other foreign witnesses to travel to Singapore.

We would also observe that the Judge had commented that the difficulties cited above under heading (d) were not insuperable. The Respondent also noted that, in any event, the Appellant could apply under the CPC for expenses incurred by his witnesses.

Jurisdictional issue

32 We now move to consider the second question relating to jurisdiction. The Respondent relied on several local cases [note: 18] where the courts interpreted and applied s 29A(2) of the SCJA (or its predecessor provisions) and held that the criminal jurisdiction of the Court of Appeal was to hear appeals against orders of finality, *ie* those resulting in conviction and sentence, or acquittal, and that

the phrase "original criminal jurisdiction" in s 29A(2) (quoted below at [35]) refers to the trial jurisdiction of the High Court - see *Mohamed Razip and others v Public Prosecutor* [1987] SLR(R) 525 ("*Mohamed Razip*"); *Ang Cheng Hai and others v Public Prosecutor and another appeal* [1995] 3 SLR(R) 151 ("*Ang Cheng Hai*"); *Microsoft Corp and others v SM Summit Holdings Ltd and another* [2000] 1 SLR(R) 423 ("*Microsoft Corp*"); *Ng Chye Huey and another v Public Prosecutor* [2007] 2 SLR(R) 106 ("*Ng Chye Huey*") and *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 ("*Bachoo Mohan Singh*"). In all these cases, the Court of Appeal was asked to consider appeals against orders of the High Court made either at the pre-trial stage or in relation to an ongoing trial in the Subordinate Court, and not against an order of conviction, acquittal or sentence *after* trial at the High Court. In these cases, the Court of Appeal held that those were non-appealable orders and it had no jurisdiction to hear appeals against those orders.

33 In the light of these authorities, the Respondent argued that since the Criminal Motion was a pre-trial application and the Appellant's trial had not yet commenced, the Judge's order dismissing the Criminal Motion was therefore interlocutory in nature and the High Court was thereby not exercising any original criminal jurisdiction or trial jurisdiction when it heard the Criminal Motion. [note: 19] Hence, this court had no jurisdiction to hear this appeal.

Our analysis

34 The Court of Appeal is a creature of legislation and its criminal jurisdiction is defined and limited by statute, such that it cannot exercise its powers in matters over which it has no jurisdiction: *Wong Hong Toy and another v Public Prosecutor* [1985-1986] SLR(R) 371 at [16] ("*Wong Hong Toy*"); *Abdullah bin A Rahman v Public Prosecutor* [1994] 2 SLR(R) 1017 at [7], [11]; *Lim Choon Chye v Public Prosecutor* [1994] 2 SLR(R) 1024 at [13]; *Microsoft Corp* at [17]; *Kiew Ah Cheng David v Public Prosecutor* [2007] 1 SLR(R) 1188 at [3]; *Ng Chye Huey* at [17].

35 Section 29A(2) of the SCJA statutorily prescribes the criminal jurisdiction of the Court of Appeal as follows:

> **Jurisdiction of Court of Appeal**
>
> **29A.**
>
> ...
>
> (2) The criminal jurisdiction of the Court of Appeal shall consist of appeals against *any decision made by the High Court in the exercise of its original criminal jurisdiction*, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.
>
> [emphasis added]

Hence, s 29A(2) confers on the Court of Appeal the jurisdiction to hear only appeals against "any decision made by the High Court in the exercise of its original criminal jurisdiction", subject to other provisions of the SCJA and any other written law.

36 We acknowledge that the words "any decision made by the High Court" have been interpreted to mean that the jurisdiction of the Court of Appeal is to hear appeals against *orders of finality*, *ie* those resulting in *conviction and sentence, or acquittal* (see *Mohamed Razip* at [12]; *Ang Cheng Hai* at [19]; *Ng Chye Huey* at [34]; *Bachoo Mohan Singh* at [49]). Furthermore, the phrase "original

criminal jurisdiction" has been interpreted to refer to the *trial* jurisdiction of the High Court (see *Ang Cheng Hai* at [18]; *Microsoft Corp* at [27]; *Ng Chye Huey* at [30], [35]; *Bachoo Mohan Singh* at [49]). The fact that an order made by the High Court may be considered final does not necessarily make it one that was given by the High Court in exercise of its original criminal jurisdiction (*Bachoo Mohan Singh* at [49]).

37 However, we would highlight the fact that in *Ang Cheng Hai*, the order of the High Court under challenge related to the High Court's dismissal of an application to transfer the trial of a case pending in the Magistrate's Court to be heard in the High Court. In *Mohamed Razip*, the order under appeal concerned a refusal by the High Court to grant bail. In *Microsoft Corp*, the order related to an exercise by the High Court of its revisionary jurisdiction. Similarly, *Ng Chye Huey* was also concerned with an order made in exercise of the High Court's revisionary jurisdiction. Finally, *Bachoo Mohan Singh* related to an order of the High Court refusing to refer questions of law raised unsuccessfully by an appellant in a Magistrate's Appeal to be further considered by the Court of Appeal pursuant to s 60 of the SCJA which is now repealed. A similar order was at issue in *Wong Hong Toy*.

38 However, in the present case, the Criminal Motion was filed by the Appellant in relation to a trial on a capital charge which was to take place in the High Court. The trial is clearly within the "original criminal jurisdiction" of the High Court. The Appellant could have made his application at the commencement or during the course of his trial. Presumably, he applied early by filing the Criminal Motion so that the trial would proceed smoothly and not be disrupted. If he were to make the application at the time of the trial, it would appear to us that the High Court's decision on the application would be one made in exercise of the High Court's "original criminal jurisdiction". It should follow that that decision should be appealable. We recognise that in such a case the High Court could well decide to continue and complete the trial, in which event if the trial should result in a conviction, the High Court's decision on the application would have undoubtedly formed a part of the grounds of appeal. The nature of the Criminal Motion is thus very different from that of the applications made in the cases referred to above at [37]. Accordingly, we had considerable reservations as to whether the decisions in those cases necessarily applied here. We were inclined to think not. We would also observe that counsel for the Appellant did not make any submission on this jurisdictional point. Of course, in the light of our decision on the substantive issue, we did not have to make a definite ruling on the point in order to dispose of this appeal. We acknowledge that a definite ruling on the nature of an interlocutory decision (which may not be of the same kind as that in the present case) made by a judge of the High Court in relation to a case which was pending in the High Court would have to await another occasion where the court could rule with the benefit of full argument. Perhaps it may not even be wise to lump together all interlocutory decisions made in such circumstances and regard them as being similar. The specific nature of the decision in question could likely be critical.

Conclusion

39 In the result, the appeal was dismissed.

[note: 1] Affidavit of Kim Gwang Seok at 25; Record of Proceedings ("ROP") vol 2 at 21.

[note: 2] Affidavit of Kim Gwang Seok at 5; ROP vol 2 at 9.

[note: 3] Affidavit of Kim Gwang Seok at 10; ROP vol 2 at 14.

[note: 4] Affidavit of Kim Gwang Seok at 12; ROP vol 2 at 16.

[note: 5] *Ibid*.

[note: 6] Supplementary affidavit of Kim Gwang Seok at 3; ROP vol 2 at 165.

[note: 7] Supplementary affidavit of Kim Gwang Seok at 4; ROP vol 2 at 166.

[note: 8] Supplementary affidavit of Kim Gwang Seok at 5; ROP vol 2 at 167.

[note: 9] Supplementary affidavit of Kim Gwang Seok at 5; ROP vol 2 at 167.

[note: 10] Supplementary affidavit of Kim Gwang Seok at 6; ROP vol 2 at 168.

[note: 11] Certified transcripts for Day 1 at 12-13; ROP vol 1.

[note: 12] Supplementary affidavit of Kim Gwang Seok at 6; ROP vol 2 at 168.

[note: 13] Supplementary affidavit of Kim Gwang Seok at 7; ROP vol 2 at 169.

[note: 14] Affidavit of Kim Gwang Seok at 13-14; ROP vol 2 at 17-18; Supplementary affidavit of Kim Gwang Seok at 7-11; ROP vol 2 at 169-173.

[note: 15] Grounds of Decision at [24] ("GD").

[note: 16] GD at [27]-[28].

[note: 17] Respondent's Submissions at para 48.

[note: 18] Respondent's Submissions at paras 13-21.

[note: 19] Respondent's Submissions at paras 22-25.