Phang Wah *v* Public Prosecutor and another matter
[2012] SGCA 60

Case Number : Criminal Reference Nos 1 and 2 of 2012

Decision Date : 23 October 2012

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah JA; Lee Seiu Kin J

Counsel Name(s) : Subhas Anandan, Sunil Sudheesan, Noor Marican and Diana Ngiam (RHTLaw Taylor Wessing LLP) for the applicant in Criminal Reference No 1 of 2012 Philip Fong, A Sangeetha and Lionel Chan (Harry Elias Partnership LLP) for the applicant in Criminal Reference No 2 of 2012; Aedit Abdullah SC, April Phang, Ma Hanfeng and Yau Pui Man (Attorney-General's Chambers) for the respondent.

Parties : Phang Wah — Public Prosecutor

Criminal Law

[LawNet Editorial Note: These Criminal References arose from the decision of the High Court which is reported in [2012] 1 SLR 646.]

23 October 2012

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The two criminal references before this court arose from two Magistrates' Appeals heard by the High Court Judge ("the Judge"), which appeals (by the First Applicant and the Second Applicant) were dismissed in *Phang Wah and others v Public Prosecutor* [2012] 1 SLR 646 ("the Judgment").

2 The First Applicant then applied by way of Criminal Motion 89 of 2011 ("CM 89") for questions of law of public interest to be referred to this court pursuant to s 60 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("s 60 SCJA"). The Judge granted this application, and referred four questions of law of public interest for determination by this court.

3 Following the successful application by the First Applicant (referred to in the preceding paragraph), the Second Applicant applied by way of Criminal Motion 10 of 2012 to this court for an extension of time to make a similar application. This court granted him the extension of time to refer the *same* questions in CM 89 for determination by this court as well (we point out, parenthetically, that this court adopted this course of action purely out of considerations of symmetry and (more importantly) due process to the Second Applicant, in light of the successful application by the First Applicant). At a subsequent application pursuant to s 60 SCJA by way of Criminal Motion 29 of 2012, the Judge granted that application, and referred the same four questions of law of public interest (again, referred to in the preceding paragraph) for determination by this court.

4 After carefully considering the submissions of counsel, we decided that *no* question of law of public interest had in fact arise in the present case. However, out of deference to the efforts of counsel, we nevertheless proceeded to answer the four questions placed before this court, as follows:

(a) "Whether the learned High Court Judge correctly interpreted and applied Section 340 of the Companies Act (Chapter 50) when it was determined that the Applicant along with Hoo Choon Cheat Jackie knowingly carried on a business of Sunshine Empire Pte Ltd ("Sunshine") with a fraudulent purpose."

(a) *Answer*: Yes, s 340 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") was correctly interpreted and applied by the High Court Judge.

(b) "Whether the conclusion that both *actus reus* and *mens rea* elements in respect of Section 340 were established beyond a reasonable doubt was correct in law and in fact considering the following:

(i) That there is some merit in the argument that Sunshine was not legally bound to pay up Consumer Rebate Privileges at the rates Sunshine had been paying for 15 months (GD [34]); and

(ii) That business decisions are undoubtedly influenced by the legally binding terms of the contract signed between participants and Sunshine (GD [34])."

(b) *Answer*: Yes, the conclusion that both the *actus reus* and *mens rea* elements in respect of s 340 of the Act were established beyond a reasonable doubt was correct in law and in fact.

(c) "Whether a company's business decisions which are influences [*sic*] by the extra-legal considerations such as consistent business practices can supersede the binding legal contract between parties."

(d) *Answer*: This is a question of fact.

(d) "Whether the sustainability of a company is to be taken as a factor in deciding whether there was fraud from the initial stages of the company's business."

Answer: This is a question of fact.

5 We now proceed to give the detailed grounds for our decision.

Background facts

6 In order to address the questions in their appropriate context, a brief rendition of the facts of the case, which are not complex, is apposite. The First Applicant and Second Applicant (collectively, "the Applicants") had been involved in a multi-level-marketing ("MLM") business under the auspices of Sunshine Empire Pte Ltd ("Sunshine Empire"), a company which was first incorporated on 18 July 2003 under a different name, Niutrend International Pte Ltd. It was later renamed Sunshine Empire on 8 January 2007. The First Applicant was the consultant of the business and mentor of the Second Applicant, who in turn was the director of Sunshine Empire. Both were involved in the day-to-day running of the business.

7 The MLM scheme involved the selling of "lifestyle" packages to members of the public. These packages included call-back services from EM-Call ("EM-Call talk time"), e-points, mall points and access to an online platform, e-Mall, on which they could sell their products. There were two categories of packages: Merchant packages and Prime packages, respectively. The differences between the two categories lay in their cost (Prime packages were more expensive), the EM-Call talk

time available (Prime packages offered more) and the possibility of receiving Consumer Rebate Privileges ("CRP") payouts (only Prime package participants were eligible to receive these payouts). There were three sub-categories of Prime packages: Bronze, Silver and Gold packages. The most expensive of the three was the Gold Prime package: it provided the most EM-Call talk time and the highest maximum cap of CRP payouts that a participant could be entitled to. These Gold Prime packages were also the most popular. The Applicants both agreed that these CRP payouts were intended to be an incentive to participants, but also insisted that they were non-guaranteed and purely discretionary in nature. Crucially, they both confirmed that CRP payouts were funded from the sale of lifestyle packages, even though this fact was never revealed explicitly to the participants.

8 Sunshine Empire's MLM scheme proved to be popular amongst members of the public, with some even purchasing multiple packages. Throughout its operation from August 2006 to October 2007, there was a general upward trend in the price of the packages, and a total of 25,733 lifestyle packages were sold. The total revenue during that period was about $175 million, and the total CRP payouts amounted to about $107 million. However, all of its operations came to a halt when the Commercial Affairs Department raided Sunshine Empire's premises on 13 November 2007.

The decision below

9 In considering the law on s 340 of the Act, the Judge acknowledged from the outset that the learned District Judge ("the DJ") below had correctly cautioned that the "fact that the Sunshine Empire scheme would not have worked was not sufficient by itself to establish dishonesty, since over-optimistic and honest businessmen could have miscalculated their moves without being dishonest" (see the Judgment at [25]). As such, the Judge's decision on the fraudulent trading charges consisted of two related parts:

(a) whether Sunshine Empire's business was unsustainable (*actus reus*); and

(b) whether the Applicants ran Sunshine Empire for a fraudulent purpose (*mens rea*).

10 In examining the first issue, the Judge recognised that the issue of sustainability centred largely on the CRP payouts. He found that CRP constituted a very high proportion of Sunshine Empire's revenue (*viz*, 99%) and that these payouts were funded by the sale of new packages. Crucially, the CRP payouts were maintained at a high level over 15 months, leading to a return of 160%. Hence, it was an "irresistible inference" that, notwithstanding the fact that CRP payouts were not contractually guaranteed, they were the main attractive feature – the "life blood", in fact – of the entire scheme (see the Judgment at [35]). This inference is further supported by the fact that the Gold Prime packages were the most popular ones, despite being the most expensive and having no real additional benefit over the other Prime packages, save for some additional EM-Call talk time and the prospects of obtaining more CRP payouts.

11 In relying on the Prosecution's expert witness's calculations, the Judge found that the various components of the packages would have constituted only a small proportion of what a reasonable participant would have spent on a package. In particular, a $12,000 Gold Prime package would yield 15,000 mall points worth at most $1,200 (*ie*, 10% of the price), 2,100 minutes of talk time (worth 4% of the price) and some e-Point bonuses (worth 6% of the price). Quite obviously, since the other benefits that came with the packages were worth such a low proportion of the package price, the main attraction of the packages must have been the CRP payouts. This was bolstered by the evidence of witnesses who were participants in the scheme testifying that they were drawn to the scheme by the prospect of high returns. The model was hence clearly unsustainable (see the Judgment at [41]), and, crucially, the Judge found that "it had to be blatantly obvious to Phang and

Hoo that if CRP had been stopped or reduced significantly, the enticing glitter of the packages would have faded almost immediately and further sales thereof would have been severely affected" (see the Judgment at [35]).

12 With regard to the issue of whether the Applicants had run the scheme for a fraudulent purpose, the Judge agreed with the DJ's finding that the whole concept of CRP had been deliberately obfuscated with reference to the consumption on the e-Mall platform and "global turnover" to make participants believe that there was a viable source of profits to fund CRP returns, when there was, in fact, none. Such vague references were disingenuous and "part of a well thought-out scheme designed to defraud participants under an aura of legitimacy and respectability" (see the Judgment at [43]). Accordingly, the Applicants were found guilty of fraudulent trading.

No questions of law of public interest

13 As mentioned above, the key provision in the context of the present proceedings is s 60 SCJA, which reads as follows:

> **Reference to Court of Appeal on appeal from subordinate court**
>
> **60.** —(1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Judge may, on the application of any party and shall on the application of the Public Prosecutor, reserve for the decision of the Court of Appeal any question of law of public interest which has arisen in the course of the appeal and the determination of which by the Judge has affected the event of the appeal.
>
> (2) An application under this section shall be made within one month or such longer time as the Court of Appeal may permit of the determination of the appeal to which it relates and in the case of an application by the Public Prosecutor shall be made by or with the consent in writing of that officer only.
>
> (3) When a question has been reserved under this section the Judge who has reserved the question may make such orders as he may see fit for the arrest, custody or release on bail of any party to the appeal.
>
> (*4*) *The Court of Appeal shall hear and determine the question reserved and may make such orders as the High Court might have made as it may consider just for the disposal of the appeal.*
>
> (5) For the purposes of this section but without prejudice to the generality of its provisions —
>
> > (*a*) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and
> >
> > (*b*) the reservation of a question of law for the consideration of the High Court under the provisions of any written law relating to criminal procedure or the exercise by the High Court of any power of revision under any such written law shall be deemed to be an appeal from a decision of a subordinate court in a criminal matter.
>
> [emphasis added]

14 A threshold issue which concerned us was this: Notwithstanding the fact that the Judge had given leave to the First Applicant to refer the four questions to this court, what would be the

situation if this court was of the view that those questions were not even questions of law, much less questions of law of public interest?

15 Counsel for the First Applicant, Mr Subhas Anandan, and counsel for the Public Prosecutor, Mr Aedit Abdullah SC, conceded (correctly, in our view) that, in the situation described in the preceding paragraph, this court would not be bound to answer the questions referred to it. It is true that s 60(4) (italicised above at [13]) does state that this court "shall hear and determine the question reserved". However, after "hearing" the relevant arguments, we see no reason why this court might (in the appropriate situation) "determine" that the question reserved really entailed no question of law of public interest to begin with. Adopting a purposive approach (as embodied in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed)), such an approach would, in our view, be wholly consistent with s 60(4), although it is admitted that such a "determination" would necessarily entail some consideration of the merits of the case itself. *However*, there is no reason – in principle, logic and commonsense – why this court should be constrained to mechanistically go through the motions of answering the question(s) reserved if it is of the clear view that the question(s) do *not* involve any question of law of public interest in the first place.

16 We should add, however, that criminal references to the Court of Appeal are currently provided for by s 397 of the Criminal Procedure Code 2010 (No 15 of 2010) ("s 397 CPC"), which replaces the now repealed s 60 SCJA. In light of this, the issue just considered is in all probability an academic one only, as under s 397 CPC only the Court of Appeal will decide *in the first place* whether or not there is a question of law of public interest which ought to be referred to it.

17 We now proceed to explain why, in the context of the present proceedings, we found there to be no questions of law of public interest.

18 The Applicants had been charged with an offence under s 340(1) read with s 340(5) of the Act. These provisions read as follows:

> **Responsibility for fraudulent trading**
>
> **340.-**(1) If, in the course of the winding up of a company or in any proceedings against a company, it appears that *any business of the company has been carried on* with intent to defraud creditors of the company or creditors of any other person or *for any fraudulent purpose*, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
>
> ...
>
> (5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), *every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence* and shall be liable on conviction to a fine not exceeding $15,000 or to imprisonment for a term not exceeding 7 years or to both.
>
> [emphasis added]

19 In CM 89, the First Applicant's submissions on the first question (a) (set out above at [4]) were as follows: As a pre-condition for triggering the operation of s 340(5) of the Act, it was necessary for the Prosecution to prove that, under s 340(1) of the Act, either (a) the company was in the course

of winding up or had been wound up, or (b) there were proceedings against the company unrelated to the prosecution of the offence of fraudulent trading. This argument was also referred to by the Second Applicant in his written submissions to this court. However, during oral submissions before this court, it appeared that the Applicants were no longer proffering arguments with regard to this legal issue. Be that as it may, we agreed with the Prosecution's written submissions that the Judge was correct in his interpretation and application of s 340(5) of the Act. The effect of s 340(5) of the Act was to create separate criminal liability independent of the civil liability embodied in s 340(1) of the Act. This separation was all the more apparent when read together with s 340(6) of the Act, which is as follows:

> (6) Subsection (5) shall apply to a company whether or not it has been, or is in the course of being, wound up.

Accordingly, the Applicants' reading of pre-conditions into s 340(5) of the Act simply had no merit.

20 In fairness to the Applicants, we were prepared to assume that this particular question might (alternatively) be interpreted as concerning the application of the law to the facts of the case. If so, this would raise, in substance, the same issue as the second question (b), to which we therefore now turn.

21 With regard to the second question (b) (set out above at [4]), the Applicants' arguments confirmed in no uncertain terms that that question was *not* a question of law of public interest.

22 We did not understand the Applicants to be arguing that the (*legal*) test as to what constitutes a "fraudulent purpose" under s 340(1) was unclear and ought to be clarified. Even if so, it is clear that questions of law pertaining to novel areas or hitherto untested provisions which may be resolved by applying established general principles of law should not be referred to this court *via* s 60 SCJA. In the Singapore High Court decision of *Cigar Affair v Public Prosecutor* [2005] 3 SLR(R) 648, Woo Bih Li J correctly refused to grant leave for such a question to be referred to this court, observing as follows (at [13]):

> Mr Singh [counsel for the applicant] also submitted that there was no other prior authority on the interpretation of s 49 TMA [Trade Marks Act (Cap 322, 1999 Rev Ed)]. In my view, that was neither here nor there. If his submission were correct, it would mean that each time a provision is interpreted by the High Court for the first time in the exercise of its appellate or revisionary jurisdiction in a criminal matter, this would qualify for a reference to the Court of Appeal under s 60(1) SCJA.

23 The Applicants' respective arguments centred instead on the *application* of the law to *the facts* of the case. Notwithstanding prodigious efforts on the part of the Applicants to characterise their arguments as ones of law (or at least mixed fact and law), their arguments were – in both substance as well as form – *purely factual* in nature. Indeed, their focus on *the nature of the business model* adopted in order to make good their argument that the Applicants had not contravened s 340 of the Act ("s 340") demonstrates this precise point in no uncertain terms. In particular, the main planks in the Applicants' arguments before this court centred on the fact that the respective contracts with the various customers were wholly legal and that the CRP payouts were non-guaranteed. In so far as the latter argument was concerned, the Applicants emphasised the following observation by the Judge (see the Judgment at [34]):

> There is *some merit* in this argument [that the CRP payouts were non-guaranteed], in so far as Sunshine Empire was not legally bound to pay out CRP at the rates it had been paying for the

15 months in question (or at all). [emphasis added]

24 In our view, the arguments just mentioned raised *wholly factual* issues. In so far as the argument to the effect that the respective contracts with the respective customers were wholly legal is concerned, this does *not necessarily* entail a finding that fraudulent *trading* had *not* taken place. On the *contrary*, a situation in which a wholly legal contract is concerned can involve – as it did here – the business concerned being conducted for a "fraudulent purpose". Looked at in this light, whether or not there was indeed fraudulent trading is self-evidently and quintessentially a question of *fact – and fact alone.*

25 In so far as the argument to the effect that the CRP payouts were non-guaranteed is concerned, this, again, cannot be conclusive of a finding as to whether or not the Applicants had contravened s 340. Indeed, the Judge was wholly cognisant of this particular argument, acknowledging it as "[t]he key plank" in the Applicants' argument in the High Court (see the Judgment at [33]). Once again, we fail to see – quite apart from the non-conclusiveness of this argument *per se* – how it is not an integral part of the *factual* inquiry as to whether or not there had been fraudulent trading within the meaning of s 340 in the sense outlined in the preceding paragraph.

26 What, then, of the Judge's observation referred to above (at [23])? In our view, the Applicants have wrenched that particular observation completely out of its *context*. In this regard, the Judge proceeded immediately to make the following observations after that particular one, as follows (see the Judgment at [34]):

> However, one cannot rely solely on a legalistic view of Sunshine Empire's business model. While making a business decision to enter into a contract is undoubtedly influenced by the legally binding terms of the contract, such business decisions are also often influenced by other extra-legal considerations, such as a particular contracting party's consistent business practice (and, it must be emphasised, regardless of whether that party was legally bound to continue such practices or not).

27 The observation just quoted in the preceding paragraph underscores the general point made above (at [24]) that whether or not the business concerned has been conducted for a "fraudulent purpose", and whether or not therefore fraudulent trading has indeed taken place, is wholly a question of *fact.*

28 It follows that the Applicants' contractual argument was really premised, with respect, on a misreading of the Judgment. The Judge had not taken any novel approaches in contract law that created fresh legal principles requiring an authoritative ruling from this court. In fact, the Judge was not even trying to make a contractual point at all. Instead, he was merely noting that the contract, alongside other considerations such as consistent business practice, formed the factual matrix within which fraudulent trading was eventually found to have been carried out. Instead, the Applicants' focus on contractual obligations (or the lack thereof) was a distraction from what really should be the central question in all fraudulent trading cases under s 340(5) of the Act: whether the accused person(s) possessed the requisite *mens rea* for carrying out the offence, *viz*, knowingly having been a party to carrying on a business for a fraudulent purpose. There was no reason why the Judge should not be entitled to take into account the business practice of Sunshine Empire's historical CRP payouts if that *fact* would have been relevant to making an inference that the Applicants were indeed being dishonest, which is the hallmark of having a "fraudulent purpose" (see, for example, the English High Court decision of *In re Patrick and Lyon, Limited* [1933] Ch 786 at 790). This was exactly what the Judge did in making the following inference (see the Judgment at [35]):

On the evidence, it had to be blatantly obvious to Phang and Hoo that if CRP had been stopped or reduced significantly, the enticing glitter of the packages would have faded almost immediately and further sales thereof would have been severely affected, thereby cutting off the life blood of the scheme.

29 In this regard, it is also apposite, in our view, to state that we agree entirely with the Judge's decision, as summarised above at [9]–[12]. We would also like to take this opportunity to commend the meticulous and comprehensive judgment by the DJ in *Public Prosecutor v Phang Wah* [2010] SGDC 505 which was in turn endorsed by the Judge on appeal.

30 We thus found that the arguments raised by the Applicants with regard to question (b) concerned *only factual* issues and were therefore clearly outside the purview of s 60 SCJA.

31 The third and fourth questions (*viz*, (c) and (d) respectively) are, *by their very nature*, *necessarily* questions of *fact – and fact alone.*

32 In our view, therefore, the Applicants did not even manage to fulfil the basic threshold requirement that the four questions referred to this court must be questions of law – let alone questions of law of public interest – in the first place, and both applications failed on this ground alone. However, as we mentioned, out of deference to the efforts put in by counsel, we nevertheless proceeded to answer the questions.

The questions answered

33 Following from our analysis above, the reasons for the answers given to each of the respective questions (set out above at [4]) is, in our view, self-evident and can therefore be dealt with briefly.

34 Question (a), in so far as it relates to an issue of statutory interpretation, must be answered in the affirmative. In so far as it relates to an issue of fact, it must also be answered in the affirmative for the same reasons that apply to question (b). In so far as question (b) is concerned, it follows from our unreserved endorsement of both the Judge's as well as the DJ's analysis and decisions that it must also be answered (as we did) in the affirmative.

35 As pointed out above, questions (c) and (d) are wholly questions of *fact*, and we answered these questions accordingly.

Conclusion

36 For the reasons set out above, we found that *no* question of law of public interest had in fact arise in the present case. Nevertheless, we proceeded to answer the four questions placed before this court, as follows:

(a) "Whether the learned High Court Judge correctly interpreted and applied Section 340 of the Companies Act (Chapter 50) when it was determined that the Applicant along with Hoo Choon Cheat Jackie knowingly carried on a business of Sunshine Empire Pte Ltd ("Sunshine") with a fraudulent purpose."

(a) *Answer*: Yes, s 340 was correctly interpreted and applied by the Judge.

(b) "Whether the conclusion that both *actus reus* and *mens rea* elements in respect of Section 340 were established beyond a reasonable doubt was correct in law and in fact

considering the following

(i) That there is some merit in the argument that Sunshine was not legally bound to pay up Consumer Rebate Privileges at the rates Sunshine had been paying for 15 months (GD [34]); and

(ii) That business decisions are undoubtedly influenced by the legally binding terms of the contract signed between participants and Sunshine (GD [34])."

(b) *Answer*: Yes, the conclusion that both the *actus reus* and *mens rea* elements in respect of s 340 were established beyond a reasonable doubt was correct in law and in fact.

(c) "Whether a company's business decisions which are influences [*sic*] by the extra-legal considerations such as consistent business practices can supersede the binding legal contract between parties."

Answer: This is a question of fact.

(d) "Whether the sustainability of a company is to be taken as a factor in deciding whether there was fraud from the initial stages of the company's business."

Answer: This is a question of fact.

37 We would like to add that, having regard to our findings above, both references were nothing more than "back door" appeals on the facts and had nothing whatsoever to do with the *raison d'être* underlying s 60 of the SCJA itself. The Judge was very kind in giving the Applicants the benefit of the doubt in referring the questions concerned for determination by this court. However, potential applicants would nevertheless do well to avoid attempting such "back door" appeals by recourse to s 397 CPC. In this regard, we would reiterate the following observations by this court in *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 (at [29]–[33] and [37]–[38], having regard, of course, to the fact that these observations must be read, with the necessary modifications, in so far as an application pursuant to s 397 CPC is concerned):

29 It is plain from the architecture of s 60(1) of the SCJA that four distinct requirements have to be satisfied before the High Court can grant leave to reserve any questions of law of public interest to the Court of Appeal. These four requirements are that (see *Ong Beng Leong v PP* [2005] 2 SLR(R) 247 ("*Ong Beng Leong*") at [5]):

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

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

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

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

30 Section 60 of the SCJA encapsulates the balance set by Parliament in respect of two significant competing considerations. The first is the public interest in **ensuring finality in proceedings**. Proceedings commenced and determined in the Subordinate Courts are to end in

the High Court with, generally, no further recourse or avenue for appeal (see *PP v Bridges Christopher* [1997] 3 SLR(R) 467 ("*Bridges Christopher (CA)*") at [17]). On the other hand, there is a public interest in **ensuring that justice is done in all cases**. This means ensuring that accused persons are not wrongly convicted of any offence, be it minor or grave. As Chan Sek Keong J, with his customary acuity, observed in *Abdul Salam bin Mohamed Salleh v PP* [1990] 1 SLR(R) 198 ("*Abdul Salam*") at [28]:

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

31 Section 60(1) of the SCJA seeks to **strike a balance** between the two competing considerations identified above in a measured way once the statutory right to appeal has been exhausted. **It does not confer on any accused, the right to proceed to the Court of Appeal**. A question of law that is of *public interest* must first exist. ... In addition, there is the possibility that two or more conflicting High Court decisions may exist, rendering it impossible for judges of the Subordinate Courts to consistently apply the law. This is a practical concern because appeals from the lower courts to the High Court are currently heard by a number of different judges. As judges of the High Court are not bound by the decisions of other judges sitting in a similar capacity, the High Court may not always be in a position to authoritatively determine the legal position on a particular legal controversy.

32 The courts have consistently adopted a firm view of applications made under s 60 of the SCJA, emphasising that **this discretion is to be exercised sparingly** (*Ng Ai Tiong v PP* [2000] 1 SLR(R) 490 at [10]). It is settled that an application under s 60(1) of the SCJA should only be allowed in **deserving cases**, where the **dominant consideration is the interest of the public and not that of the accused**. As such, the HC Judge hearing the s 60 application conceivably has the discretion to refuse to refer the question of law of public interest stated by the applicant even if all the conditions thereof have been satisfied, unless it is raised by the Public Prosecutor (see *Cigar Affair v PP* [2005] 3 SLR(R) 648 at [8(b)]). That said, strong and cogent grounds must exist before the High Court refuses to refer a matter to this Court if all the conditions (reproduced above at [29]) are satisfied. When s 60 SCJA was amended in 1993, the need to confer on the High Court judge a discretion to allow the application was clarified as follows (*Singapore Parliamentary Debates, Official Report* (12 April 1993) vol 61 at col 116 (Prof S Jayakumar, Minister for Law)):

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

33 As to what constitutes a question of law of *public interest*, it remains instructive to refer to the following observations of the Malaysian Federal Court in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 (that was referred to by this Court in *Abdul Salam bin Mohamed Salleh v PP* [1991] 2 SLR(R) 344), where Raja Azlan Shah Ag LP pithily stated (at 141-142):

> [I]t is not sufficient that the question raised is a question of law. It must be a question of law of public interest. *What is public interest must surely depend upon the facts and circumstances of each case*. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and *substantially affects the rights of the parties* and if so whether it is an *open*

> *question in the sense that it is not finally settled by this court or by the Privy Council or is not free from difficulty or calls for discussion of alternative views*. **If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest**. [emphasis added]

...

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

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

38 Given all the above limitations, it is plain that **s 60 of the SCJA does not permit a dissatisfied accused a third bite at the cherry**. Crucially, it **does not provide a right to be heard by this Court**. While this discretion is to be exercised sparingly, nevertheless, each application ought to be very carefully assessed so as not to overlook a matter that meets the statutory threshold ...

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

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