Mohammad Faizal bin Sabtu and another *v* Public Prosecutor and another matter [2013] SGCA 1

Case Number	: Criminal Motions No 36 and 37 of 2012
Decision Date	: 11 January 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: S K Kumar (M/s S K Kumar Law Practice LLP) for the Applicants; Tan Ken Hwee, Sandy Baggett and Kwek Chin Yong (Attorney-General's Chambers) for the Respondent.
Parties	: Mohammad Faizal bin Sabtu and another — Public Prosecutor

Criminal Procedure

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 4 SLR 947.]

11 January 2013

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

Introduction

1 These two Criminal Motions arose out of an answer given by the High Court on two separate questions of law stated for the High Court's determination pursuant to s 395 of the Criminal Procedure Code (Act 15 of 2012) ("the CPC 2010") relating to the constitutionality of certain provisions in s 33A of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA").

2 In *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("Special Case No 1"), Mr Mohammad Faizal bin Sabtu ("the 1st Applicant") had challenged the constitutionality of s 33A(1)(a), (d), and (e) of the MDA. In brief, the said sub-sections provide for enhanced punishment for persons who had previously been admitted to an approved Drug Rehabilitation Centre ("DRC"), previously convicted of consumption of a specified drug, or previously convicted for an offence of failure to provide a urine specimen. The stated question in Special Case No 1 was:

> Does s 33A(1)(a), (d), &/or (e) of the MDA violate the separation of powers embodied in the Constitution of the Republic of Singapore in requiring the court to impose a mandatory minimum sentence as prescribed thereunder, with specific reference to "admission" as defined in s 33A(5)(c) of the MDA?

3 In *Amazi bin Hawasi v Public Prosecutor* [2012] 4 SLR 981 ("Special Case No 2"), Mr Amazi bin Hawasi ("the 2nd Applicant") challenged the constitutionality of s 33A(5)(a) of the MDA. Section 33A(5)(a) of the MDA deems a previous conviction for consumption of a "controlled drug" as a conviction for consumption of a "specified drug" under s 8(b) of the MDA, for the purposes of bringing recalcitrant abusers of controlled drugs into the enhanced punishment regime under s 33A of the MDA. The stated question in Special Case No 2 was:

> Does s 33A(5)(a) of the MDA violate the separation of powers embodied in the Constitution of the

Republic of Singapore in deeming a previous conviction for consumption of a controlled drug as a conviction for consumption of a specified drug, and thereby requiring the court to impose a mandatory minimum sentence as prescribed in s 33A(1) of the MDA?

4 The stated questions in both Special Case No 1 and No 2 (collectively, "the Special Cases") raised fundamental issues of constitutional law in the context of the principle of separation of powers as to the role of the Legislature, the Executive and the Judiciary in the punishment of offenders under our criminal justice system.

5 The High Court (*per* Chan Sek Keong CJ) answered the stated questions in the Special Cases in the negative, ruling that the impugned provisions of the MDA did not violate the principle of separation of powers embodied in the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution").

6 In light of the High Court's decision in the Special Cases, the Applicants applied, pursuant to s 397 of CPC 2010, for leave to refer the same two questions of law to this court on the ground that such reference was in the public interest.

7 On 4 September 2012, after hearing arguments from the parties, we dismissed both Criminal Motions for leave. We now give our reasons for the decision.

The background facts

8 The background facts relating to the Special Cases are succinctly set out in the written grounds of decision for Special Case No 1 at [5] and Special Case No 2 at [1]-[6]. Briefly, the 1st Applicant was charged with a number of offences under the MDA, including one charge of consumption of morphine under s 8(b)(ii) of the MDA ("the consumption charge"). As he had two previous DRC admissions, he would have to suffer an enhanced punishment of a minimum of five years' imprisonment and three strokes of the cane pursuant to s 33A(1)(a)(i) and (ii) of the MDA. After being charged, and upon refusal by the District Court, he obtained leave from the High Court to state the question set out in [2] above for determination by the High Court. As regards the 2nd Applicant, he pleaded guilty to a charge of consumption of morphine (among other charges) and because of his previous convictions for drug consumption offences, he would have to suffer a similar enhanced punishment under s 33A(1)(b)(i) and (ii), read with the deeming provision in s 33A(5)(a) MDA. Like the 1st Applicant, he obtained leave from the High Court to state the question set out in [3] above for determination by the High Court. In the 2nd Applicant's view, the deeming provisions in ss 33A(5)(a) and 33A(5)(c) of the MDA had the effect of transforming a previous conviction or DRC admission for consumption of a controlled drug into a previous conviction or DRC admission for consumption of a specified drug. In short, in both Special Cases, the Applicants had sought to challenge certain provisions in the MDA as being unconstitutional.

The Applicants' arguments

9 The Applicants were represented by the same counsel, Mr S K Kumar, who made a joint submission on behalf of both Applicants. He submitted that leave ought to be granted as the questions posed engaged the public interest and were not free of doubt despite the High Court's decisions in the Special Cases. The bulk of Mr Kumar's arguments focused on why he thought the grounds of decision rendered in the Special Cases were wrong in law.

The Respondent's arguments

10 The Respondent, on the other hand, submitted that leave ought not be granted for the following reasons:

(a) The questions posed did not engage the public interest, especially since they had been settled conclusively by the High Court's decision in the Special Cases with reference to established legal principles;

(b) The questions which the Applicants now wished to raise to the Court of Appeal were not questions which arose when the High Court was hearing a matter in the exercise of its appellate or revisionary jurisdiction;

(c) Applications under s 397 of the CPC 2010 are intended for concluded cases, and not cases like the present where there were as yet no final orders; and

(d) Having elected to state the Special Cases to the High Court under s 395 of the CPC 2010, when they had the option under s 396 of the CPC 2010 to state their cases directly to the Court of Appeal instead, the Applicants should not be allowed another proverbial bite at the cherry.

Analysis of the issues before this court

11 To better appreciate the scheme of points reserved to the relevant courts under the CPC 2010, it is necessary that we first refer to the relevant provisions, *ie*, ss 395, 396 and 397 of the CPC 2010 (hereinafter referred to as "s 395", "s 396" and "s 397" respectively). Under s 395, a Subordinate Court may, on the application of a party in a criminal case, state a case for the determination of the High Court on a question of law. If the Subordinate Court refuses to do so, that party may apply to the High Court to direct the Subordinate Court to state the case. This was, in fact, what transpired in the Special Cases. However, s 396 grants a party in a criminal case in the Subordinate Court the option, albeit with leave of the Court of Appeal, of applying for the case to be stated directly to the Court of Appeal. Section 396 reads:

Application to state case directly to Court of Appeal

396.—(1) Any party to the proceedings may, instead of applying to state a case on any question of law arising at a trial before a Subordinate Court for the opinion of the High Court under section 395, apply to state a case directly to the Court of Appeal.

(2) An application under subsection (1) shall only be made with the leave of the Court of Appeal.

(3) When an application is made under subsection (1), the Court of Appeal may make such orders as it sees fit for the arrest, custody or release on bail of any accused.

(4) Section 395(2), (3), (6) to (12) and (14) shall apply to the case stated under this section, except that any reference to the relevant court in those provisions shall be a reference to the Court of Appeal.

12 The purpose of s 396 is helpfully elucidated in *The Criminal Procedure Code of Singapore: Annotations and Commentary* (Jennifer Marie & Mohamed Faizal gen eds) (Academy Publishing, 2012) ("*Marie & Faizal*") at paras 20.166 and 20.167, as follows:

Section 396 is a new provision that allows any party to the proceedings to state a case on a

question of law arising at a trial in the Subordinate Court directly to the Court of Appeal, instead of using the procedure in section 395 of the Code. As highlighted by the Minister at the Second Reading of the Criminal Procedure Code (Amendment) Bill on 18 May 2010 (*Singapore Parliamentary Debates, Official Report* (18 May 2010) vol 87 at cols 487-488 (K Shanmugam, Minister of Law)), the situations where a "leapfrog", as such provisions are known, will apply are:

a) Where the High Court is already bound by a prior decision of the Court of Appeal on the point of law being stated, or

b) Where there is a conflict of binding authority on the High Court on the question at hand.

In these situations, the legal issues, for example, binding precedent on the High Court, are more appropriately dealt with by the Court of Appeal than the High Court. A "leapfrog" direct to the Court of Appeal would thus save parties time and cost. To ensure that the provision is not abused, however, the leave of the Court of Appeal would be required before the "leapfrog" process can be utilised. The Court of Appeal will determine whether the question of law is indeed of public importance, and whether a "leapfrog" is appropriate in the circumstances of the case.

13 If it was the opinion of the Court of Appeal which they wished to have obtained, the Applicants should have applied accordingly under s 396 giving their reasons for the "leapfrog". Having said that, we hasten to add that it does not necessarily follow that even if the Applicants had applied under s 396, their application would have been granted. The parties had not argued before us as to the circumstances under which a leapfrog application should be entertained by the Court of Appeal. As such, this is not an appropriate occasion for us to make a pronouncement on this point. Suffice it to say that the two clear instances where a leapfrog application could be entertained have already been highlighted in *Marie & Faizal* (see [12] above).

14 We turn next to s 397. To better appreciate the scope and purpose of s 397, we reproduce s 397 in full:

Reference to Court of Appeal of criminal matter determined by High Court in exercise of its appellate or revisionary jurisdiction

397. — (1) When a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, and a party to the proceedings wishes to refer any question of law of public interest which has arisen in the matter and the determination of which by the Judge has affected the case, that party may apply to the Court of Appeal for leave to refer the question to the Court of Appeal.

(2) The Public Prosecutor may refer any question of law of public interest without the leave of the Court of Appeal.

(3) An application under subsection (1) or a reference under subsection (2) shall be made within one month, or such longer time as the Court of Appeal may permit, of the determination of the matter to which it relates, and in the case of an application by the Public Prosecutor shall be made by him or with his written consent.

(4) In granting leave to refer any question of law of public interest under subsection (1), or where the Public Prosecutor refers any question of law of public interest under subsection (2), the Court of Appeal may reframe the question or questions to reflect the relevant issue of law of public interest, and may make such orders as the Court of Appeal may see fit for the arrest,

custody or release on bail of any party in the case.

(5) The Court of Appeal, in hearing and determining any questions referred, may make such orders as the High Court might have made as the Court of Appeal considers just for the disposal of the case.

(6) For the purposes of this section, any question of law which any party applies to be referred regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest.

15 There are four conditions which must be satisfied before a reference will be granted under s 397(1):

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

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

(c) Third, the question of law must have arisen from the case which was before the High Court; and

(d) Fourth, the determination of the question of law by the High Court had affected the outcome of the case.

See also *Ong Beng Leong v Public Prosecutor* [2005] 2 SLR(R) 247 at [5] and *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 ("*Bachoo Mohan Singh*") at [29], which present a slightly different organisation of the four conditions, but which do not differ in substance from the present formulation.

16 Section 397(1) is derived from, and is for all relevant purposes, *in pari materia* with s 60 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") which has since been repealed. As noted by this court in *Mah Kiat Seng v Public Prosecutor* [2011] 3 SLR 859 ("*Mah Kiat Seng*") at [9], the only important difference between s 397 and s 60 of the SCJA is that under s 397, it is the Court of Appeal, and not the High Court, which assesses whether the question(s) which the applicant seeks to refer to the Court of Appeal meet(s) the criteria prescribed in s 397(1). However, this court in *Mah Kiat Seng* also opined that, given that the operative clauses of both provisions are identical, the principles established by case law under s 60 of the SCJA remain fully relevant in the interpretation and application of s 397.

First condition

17 Under s 19 of the SCJA, the appellate criminal jurisdiction of the High Court is defined as consisting of:

(*a*) the hearing of appeals from District Courts or Magistrates' Courts before one or more Judges according to the provisions of the law for the time being in force relating to criminal procedure; and

(*b*) *the hearing of points of law reserved by special cases submitted by a District Court or Magistrate's Court before one or more Judges according to the provisions of the law for the*

time being in force relating to criminal procedure.

[emphasis added]

18 By virtue of this provision, the decisions rendered by the High Court in the Special Cases were in exercise of its appellate criminal jurisdiction. Thus the first condition of s 397 is satisfied.

Second condition

19 There is no doubt that the questions which were posed in the Special Cases were questions of law. However, the issue which required greater consideration was whether those questions were questions of law of *public interest* which warrant the determination of this court. As to what constitutes a question of law of public interest, we think the answer is neatly encapsulated in the Malaysian Federal Court decision in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141 (cited with approval by the High Court in *Chan Hiang Leng Colin and others v Public Prosecutor* [1995] 1 SLR(R) 388 at [18] and by this court in *Bachoo Mohan Singh* at [33], *Phang Wah v Public Prosecutor* [2012] SGCA 60 ("*Phang Wah*"), and *Mah Kiat Seng* at [18]):

> But it 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 the Privy Council or is not free from difficulty or calls for discussion of alternate 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.*
>
> It was urged upon us that in at least two previous cases (see *Public Prosecutor v D'Fonseka* [1958] MLJ 102 and *Yap Ee Kong v Public Prosecutor* [1981] 1 MLJ 144) the applicants had successfully obtained a reference, and that we should follow those cases and determine the questions referred to us. It was further said that the questions are of general importance upon which further argument and a decision of this court would be to the public advantage (see *Buckle v Holmes* [1926] 2 KB 125). A short answer is, that the two cases referred above involved misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views. There are no two views about the present case.
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> ...
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> But basically, we must consistently decline to receive and answer questions which though they may be questions of law are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject ...
>
> [emphasis added]

20 As noted above at [16], under s 397, it is now this court and not the High Court judge who hears the application for leave to refer a question of law of public interest to the Court of Appeal. Nevertheless, the avenue afforded by s 397 continues to remain a limited one, which is to be exercised sparingly (see *eg Ng Ai Tiong v Public Prosecutor* [2000] 1 SLR(R) 490 at [10], *Phang Wah* at [22] and [37] and *Bachoo Mohan Singh* at [37] and [38]), and especially when there are conflicting

High Court decisions on a particular legal controversy necessitating an authoritative determination by the Court of Appeal. Another possible scenario where reference to the Court of Appeal may be made is where the same question was answered differently (and not due to differences in statutory provisions) in another Common Law jurisdiction. The court will not exercise its discretion if no genuine points of law of public interest are raised and the application is merely a guise for what is in fact an appeal. A question of law does not necessarily constitute a question of public interest just because it involves the construction or interpretation of a statutory provision which could also apply to other members of the public: *Cigar Affair v Public Prosecutor* [2005] 3 SLR(R) 648 at [8(a)]. Again, neither is it so just because the point has serious consequence for the applicant personally or is novel: *Bachoo Singh Mohan* at [36] and [37]. With regard to the present Criminal Motions, the High Court had authoritatively and clearly explained why it had answered the two questions in the negative. We would further add that in rendering its decisions in the Special Cases, the High Court had considered not only the submissions of the applicants, but also that of the *amicus curiae*. In the written grounds of decisions which followed, the High Court had analysed the case law of multiple jurisdictions, including England, Australia, the United States of America, Malaysia and of course, Singapore, before coming to the firm conclusion that there was no question of the impugned MDA provisions being in violation of the principle of separation of powers under the Singapore Constitution. The court accorded the questions a holistic and comprehensive treatment.

21 While we acknowledge that the two questions of law had never before been raised in the High Court as the relevant statutory provisions which gave rise to the questions were only recently enacted, it does not follow that every such new question of law must reach the Court of Appeal. Otherwise it would defeat the very object of our criminal justice system which is that a case heard in a Subordinate Court has only one level of appeal to the High Court. To liberally construe s 397 so as to more freely allow a reference to the Court of Appeal would seriously undermine the system of one-tier appeal. The interests of finality would strongly militate against the grant of such a reference save in very limited circumstances. In our opinion, we do not see how justice and public interest would be better served by having the matter proceed further, given that the aim of both Applicants was merely to seek another opportunity to persuade a higher court to accept their point of view so that the enhanced punishments provided in s 33A of the MDA would not apply to them.

22 In this regard, the decision in *M V Balakrishnan v Public Prosecutor* [1998] 2 SLR(R) 846 ("*M V Balakrishnan*") is germane. There the court, in dealing with an application to refer two questions pursuant to s 60 of the SCJA, made it clear that in instances where the law has been authoritatively laid down and there is no conflict of authority, the court will, in the interests of finality, guard the exercise of its discretion most jealously. The following observations made by Yong Pung How CJ in *M V Balakrishnan* at [11] are pertinent:

> ... While in agreement with this principle, I had regard to the advice of the court in *Chan Hiang Leng Colin v PP* [1995] 1 SLR(R) 388 that in the interest of maintaining finality in proceedings, it was better to exercise a discretion to refer sparingly so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court. I found this application to be one such veiled appeal. The court is not faced with so many vastly differing views as to suggest there is a rift in the authorities. I did not find the question so exceptional as to require reference; in fact, a glance at the many authorities upholding Whittall demonstrates that this was a common question before the High Court hearing appeals from the Magistrate's Courts. It has clearly been authoritatively laid down and consistently applied by the courts here and, in the circumstances, there is no conflict of authority: *PP v Bridges Christopher* [1997] 1 SLR(R) 681.

Third and fourth conditions

23 We will now address the third and the fourth conditions together. In *Public Prosecutor v Bridges Christopher* [1997] 1 SLR(R) 681 ("*Bridges Christopher*") at [17], the court stated:

> Turning to the third precondition, the question must have arisen in the course of the appeal and the determination of which by this court must have affected the event of the appeal. There is no difficulty with what this requirement means, and reference need only be made to *PP v Choo Ching Hwa* [1990] 3 MLJ 229 .

24 In *Public Prosecutor v Choo Ching Hwa* [1990] 3 MLJ 229, the court held:

> ... Apart from being a question of law of public interest, the other requirements of s 66(1) are that the question must have arisen in the course of the appeal, and more importantly, the determination of the question has affected the event of the appeal. Although s 66(1) of the Act says that the court shall on the application of the public prosecutor grant leave, the court should not just grant leave unless it is satisfied that the question was actually determined by the appellate judge and has affected the event of the appeal. It is common knowledge that various points may be raised in an appeal and submissions made thereon but it is not unusual that although a number of legal issues were argued and submitted by counsel the judge may decide on one obscure point and decide the appeal solely on that point without considering the other issues raised in the appeal before him. Therefore an applicant for leave under s 66(1) of the Act must satisfy the court that the question of law of public interest arose in the course of the appeal and the determination of that question had affected the event of the appeal. The easiest way to satisfy the court that this particular requirement of s 66(1) of the Act has been satisfied is to provide the court with the written judgment or grounds of decision of the learned judge or if it is not available to provide at least the certified notes of proceedings if it is clearly indicated therein that particular point was in fact raised, determined and had affected the event of the appeal.

25 As noted by the Respondent in its written submissions, the questions which the Applicants would wish to refer to this court were exactly the same as those posed to and answered by the High Court. There is thus no doubt that the questions of law were those that were raised and determined by the High Court. However, the problem which stood in the way of the present Criminal Motions related to the condition that the determination by the High Court must also have affected the outcome of the case, *ie* the fourth condition.

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

27 As may be seen from [5] and [8] above, the High Court in the Special Cases had not passed any judgment or sentence on the Applicants. All it did was to give its opinion on the two questions. Neither had the District Court passed any judgment or sentence on the Applicants. But for the instant Criminal Motions, the cases would have gone back to the District Court to continue where they left off before the Special Cases were filed. Indeed, it is clear from this fourth condition, especially the word "affected", that for a reference to be made under s 397, a ruling must already have been made, or a sentence passed, by the High Court. In the present case, no such ruling or sentence has yet been passed on either Applicant. To allow the Criminal Motions to go on any further, when final judgment or sentence has yet to be passed on both Applicants, would lead to an unnecessary and unacceptable disruption to the final disposal of both matters.

Abuse of Process

28 We also felt compelled to dismiss the present Criminal Motions because the steps taken by the Applicants here veered close to being an abuse of process. During oral submissions, we asked Mr Kumar why the Applicants had not availed themselves of the "leap-frog" provision in s 396. Mr Kumar's response was that the Applicants had the option of exhausting their rights under s 395 without prejudicing any subsequent application to state exactly the same case under s 396. In our view, this approach shows a misguided reading of the scheme of the relevant provisions. The very *raison d'etre* of s 396 is to save the parties', and if we may add, the courts', time and costs. In cases involving questions of law before a Subordinate Court, if a party is truly of the view that a genuine question of law of public interest has arisen and which warrants a leapfrog approach to the Court of Appeal, it should have availed itself of the avenue afforded under s 396 with expedition, instead of first stating the case to a High Court under s 395, only to apply to this court under s 397 when the result before the High Court turns out to be unfavourable to it. In the present case, not only have the Applicants applied to state exactly the same questions posed to the High Court, they have raised substantially the same arguments, albeit now with the added bare assertion that it would be in the public interest for this court to grant leave. In other words, the Criminal Motions were thinly disguised attempts at appealing against the High Court's decisions in the Special Cases – this runs totally contrary to the purpose of s 397.

29 In this regard, we gratefully adopt and reiterate the following admonition from the High Court in *Ong Boon Kheng v Public Prosecutor* [2008] SGHC 199 at [14]:

> It takes only a little ingenuity to re-cast what is a straightforward, commonsensical application of principles of law to the relevant facts into an apparent legal conundrum which seemingly calls for determination by the highest court of the land. I cautioned against this where Constitutional law issues are concerned in the context of s 56A of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) in *Johari bin Kanadi and another v PP* [2008] 3 SLR 422 at [9]. I think the courts should be astute to sieve out appeals dressed in s 60 SCJA disguise.

Conclusion

30 In the final analysis, it can only be said that the both Criminal Motions were utterly without merit. We therefore dismissed both applications and remitted both cases back to the District Court to take their normal course.