Hia Soo Gan Benson *v* Public Prosecutor and other matters
[2013] SGCA 40

Case Number : Criminal Motion Nos 76, 78, 79 and 99 of 2012

Decision Date : 15 July 2013

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; V K Rajah JA; Tay Yong Kwang J

Counsel Name(s) : Hamidul Haq, Thong Chee Kun, Istyana Putri Ibrahim and Wong Shi Yun (Rajah & Tann LLP) for the applicant in CM 76 and 78 of 2012; Harpreet Singh Nehal SC and Jared Chen (WongPartnership LLP) for the applicant in CM 79 and 99 of 2012; Mark Jayaratnam and Jean Kua (Attorney-General's Chambers) for the respondent.

Parties : HIA SOO GAN BENSON — PUBLIC PROSECUTOR — LIM KOW SENG

CRIMINAL PROCEDURE AND SENTENCING – Appeal

CRIMINAL PROCEDURE AND SENTENCING – Criminal references

CRIMINAL PROCEDURE AND SENTENCING – Habeas corpus

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 4 SLR 845.]

15 July 2013

V K Rajah JA (delivering the grounds of decision of the court):

1 These are four related criminal motions filed by two parties – Hia Soo Gan Benson ("Hia") and Lim Kow Seng ("Seng") – who had been committed to be extradited to the United States of America ("US") to stand trial. Hia and Seng (collectively, "the Parties") had earlier applied to the High Court for an order for review of detention pursuant to s 417 of the Criminal Procedure Code 2010 (Act No 15 of 2012) ("CPC 2010") but their applications were dismissed by the High Court judge ("the Judge") in *Wong Yuh Lan v Public Prosecutor and other matters* [2012] 4 SLR 845 ("the Judgment"). The criminal motions filed before us pertain to two preliminary issues: firstly, whether this Court has jurisdiction to hear an appeal against the Judgment; and secondly, whether leave to refer alleged questions of law of public interest under s 397(1) of CPC 2010 to this Court should be granted.

2 We heard the Parties and the Prosecution on 6 November 2012. After considering their submissions, we dismissed all four criminal motions on 9 November 2012 on the basis that the Court of Appeal has no jurisdiction to hear an appeal against the Judgment and leave should not be granted for the Parties' questions of law to be referred to the Court of Appeal under s 397(1) of CPC 2010. The Parties therefore remained to be extradited to the US. We now set out the detailed reasons for our decision.

Facts

3 In late 2010, the US made a requisition to the Minister for Law ("the Minister") for the extradition of Lim Yong Nam ("Nam"), Seng, Hia and Wong Yuh Lan ("Wong") (collectively, "the Applicants") to the US to stand trial. The requisition was made pursuant to the United States of

America (Extradition) Order in Council, 1935 (Cap 103, OR 1) which contains the extradition treaty between Singapore and the US ("the Singapore-US Treaty"). The US District Court issued warrants of arrest against the Applicants on 15 September 2010 for 12 counts of conduct ("the Superseding Indictment"). Not all counts of conduct, however, were proceeded with by the Attorney-General's Chambers ("AGC") in Singapore.

4 AGC on behalf of the State sought the committal of Wong and Nam only for Count One of the Superseding Indictment for conspiracy to defraud the US by dishonest means under Title 18 United States Code Section 371. Wong and Nam were accused of conspiring with various individuals and companies to defraud the US by exporting modules from a company in the US, Company A ("Company A modules") to Iran *via* Singapore. The US complained that this breached US export restrictions against unauthorised shipment of US-origin goods from a third country to Iran.

5 As against the Parties (see above at [1]), AGC sought their committal only in respect of Count Eight, also pursuant to Title 18 United States Code Section 371. In Count Eight, the Parties were accused of being part of a separate scheme to cause antennae which were classified as "defense articles" under US law to be exported without a licence. Between July and September 2007, batches of antennae were shipped from the US to Hong Kong. The US accused the Parties of conspiring *via* e-mail with individuals based in the US to procure the antennae in violation of US export regulations.

6 At the committal proceeding in the Subordinate Courts (in *In the Matter of Wong Yuh Lan, Lim Yong Nam, Lim Kow Seng & Hia Soo Gan Benson* [2012] SGDC 34), the District Judge ("DJ") committed the Applicants to custody on 10 February 2012 to await the warrant of the Minister for their surrender. In response, the Applicants filed originating summonses pursuant to O 54 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") in the High Court requesting for an order for review of detention (previously known as a writ of *habeas corpus*) to be issued forthwith or for directions that a summons for the order for review of detention be issued. Order 54 r 2 of the ROC states:

> **Power of Court to whom ex parte application made (O. 54, r. 2)**
>
> 2.—(1) The Judge to whom an application under Rule 1 is made may —
>
> (*a*) make an Order for Review of Detention forthwith; or
>
> (*b*) direct that a summons for the Order for Review of Detention be issued.
>
> …

7 On 23 February 2012, the Judge granted the Applicants leave for summonses for an order for review of detention to be issued. Further hearings then took place before the Judge on the legality of the Applicants' detention. Subsequently, a question arose as to whether the summonses for an order for review of detention should have been filed as criminal motions under CPC 2010, as opposed to originating summonses under O 54 of the ROC. The Judge noted that the proper procedure would have been for criminal motions to be filed instead. The Applicants duly filed their individual criminal motions (*ie*, CM 63/2012, CM 65/2012, CM 66/2012 and CM 67/2012) prior to the release of the Judgment.

Decision Below

8 In the Judgment, the Judge allowed the applications of Wong and Nam (*ie*, CM 63/2012 and CM 66/2012 respectively), holding that their detentions were unlawful and that they were to be

released forthwith; but dismissed the applications of the Parties (*ie*, CM 65/2012 and CM 67/2012). The portions of the Judgment which are relevant to the background of the present applications are summarised as follows.

9 The Judge first laid down the conditions which must be satisfied before the Applicants could be committed to await the Minister's warrant for surrender to the US (see the Judgment at [5]):

(a) the Applicants must be "fugitives" as defined under s 2 of the Extradition Act (Cap 103, 2000 Rev Ed) ("the Extradition Act 2000") read with Art 1 of the Singapore-US Treaty ("Condition 1");

(b) the act or omission constituting the offence in Count One and Count Eight must constitute an offence in Singapore, had it taken place here (*ie*, the double criminality principle must be satisfied) ("Condition 2");

(c) the offence made out by the Applicants' conduct must fall under one of the categories of offences listed in Art 3 of the Singapore-US Treaty ("Condition 3"); and

(d) the committing magistrate must be satisfied on the evidence adduced that the Applicants were liable to be surrendered to the US ("Condition 4").

10 The bulk of the Judgment centred on Condition 2 – *ie*, whether the acts constituting the offences in Count One and Count Eight respectively could be said to constitute offences in Singapore, namely, abetment by conspiracy to cheat under s 415 read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("the PC"). Sections 107, 109 and 415 of the PC provide as follows:

Abetment of the doing of a thing

107. A person abets the doing of a thing who —

...

(*b*) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

...

...

Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

...

Cheating

415. Whoever, by deceiving any person, whether or not such deception was the sole or main

inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to "cheat".

11 Essentially, Wong and Nam were released because the Judge was of the view that the offence in Count One *did not* constitute an offence in Singapore; whereas the Parties remained to be committed for extradition because Count Eight, in the Judge's view, constituted an offence in Singapore when the facts were transposed accordingly.

12 In relation to Count Eight, the Judge first set out the undisputed proposition that an abetment by conspiracy to have controlled goods exported without a licence would be punishable in Singapore. This is because there are regulations in Singapore governing the export of goods that can be used for military purposes, *eg*, the Strategic Goods (Control) Act (Cap 300, 2003 Rev Ed) (see the Judgment at [24]).

13 The main argument advanced by counsel for the Parties before the Judge against Count Eight was *based on extraterritoriality*, namely, that the acts allegedly committed by the Parties took place entirely outside the US and the Singapore courts would not have jurisdiction to try acts of abetment occurring outside Singapore (had the facts been transposed locally). Counsel argued that s 109 did not have extraterritorial application until s 108B of the PC came into force with effect from 1 February 2008. Section 108B of the PC provides:

Abetment outside Singapore of an offence in Singapore

108B. A person abets an offence within the meaning of this Code who abets an offence committed in Singapore notwithstanding that any or all of the acts constituting the abetment were done outside Singapore.

Prior to 1 February 2008 (*ie*, the material period in which the Parties had allegedly committed the criminal acts), counsel argued that the court would assume jurisdiction only if the acts of abetment by conspiracy had taken place in Singapore (see the Judgment at [24] and [26]).

14 The Judge agreed with counsel that s 109 of the PC did not have extraterritorial application until s 108B of the PC came into force (see the Judgment at [26]). Critically however, the Judge identified the crux of the issue to be whether the Parties' acts of abetment *were indeed committed outside Singapore* (had the facts been transposed locally) – *ie*, whether an email sent from a person located outside Singapore to a person in Singapore as a means to engage the latter in a conspiracy could be said to be an act of abetment by conspiracy that took place in Singapore.

15 The Judge held that it was artificial to regard an act of abetment as having been committed in Singapore only if the communications had taken place during a physical meeting in Singapore, as opposed to a phone call, email or letter from an abettor overseas to a person in Singapore. Relying on the English Court of Appeal's decision in *Regina v Baxter* [1972] 1 QB 1, the Judge held that acts of abetment in the form of email correspondence sent to and received by a person in Singapore could be construed as having been committed within the territorial jurisdiction of Singapore. Therefore, on the transposed facts alleged by the US (see above at [5]), the Parties' acts of abetment would be justiciable in Singapore (see the Judgment at [28]).

16 As for Wong and Nam (*vis-à-vis* Count One), the Judge understood the US to be seeking their

extradition for their part in a conspiracy to breach US trade sanctions against the export of goods from the US or provided by a US person to Iran *via* Singapore. The Judge held that the essence of the criminality in Count One *would not* give rise to an offence in Singapore because Singapore did not have absolute prohibitions against trade with Iran at the time the acts in Count One were committed (see the Judgment at [31] and [32]). There was also no averment in the Superseding Indictment or the supporting affidavits stating that Company A modules were by nature classified as goods that required a permit or licence for export, irrespective of the shipment destination (see the Judgment at [34]). For these reasons, Wong and Nam were ordered to be released.

17 The Judge then proceeded to hold that Conditions 3 and 4 (see above at [9]) were also satisfied with regards to the Parties. In relation to Condition 4, the Judge was satisfied that there was sufficient evidence for the DJ's findings. The Parties' defences and their questions as to the weight or quality of the evidence should thus be left to the trial judge of the requesting state (*ie*, the US) to determine (see the Judgment at [39]). In the result, the applications of the Parties (*ie*, CM 65/2012 and CM 67/2012) were dismissed by the Judge and the DJ's order of committal for extradition against them remained valid.

The criminal motions before this Court

18 On 17 August 2012, Seng filed an appeal against the Judge's decision dismissing his application for an order for review of detention. However, Seng was then advised by his solicitors that there is an issue as to whether the law permits an appeal against the Judge's decision. CM 79/2012 was thus filed by Seng to petition this Court to rule that it has jurisdiction to hear an appeal against the Judge's decision below.

19 This was subsequently made known to Hia whose wife then attempted to file a notice of appeal on 22 August 2012. However, she was informed by the Registry that she had exceeded the 14 days' time limit for filing a notice of appeal (the last day being 21 August 2012). CM 78/2012 was then filed by Hia to petition this Court to extend time to allow him to file his notice of appeal pursuant to s 377(2) of CPC 2010.

20 Earlier, Hia has also filed CM 76/2012 seeking leave to raise two alleged questions of law of public interest to this Court pursuant to s 397(1) of CPC 2010 (see the questions below at [65]). Just a few days prior to the hearing before this Court, Seng also filed a criminal motion (*ie*, CM 99/2012) requesting for an extension of time to file the application for leave to raise seven alleged questions of law of public interest to this Court (see the questions below at [69]).

Issues

21 The two primary issues before this Court were as follows:

(a) did the law permit an appeal by the Parties against the decision of the Judge to the Court of Appeal ("Issue 1"); and

(b) should leave be granted for the alleged questions of law of public interest raised by the Parties to be referred to the Court of Appeal ("Issue 2")?

Our decision

Issue 1: whether an appeal is allowed to the Court of Appeal

22 On the novel issue of whether the Judge's decision in an order for review of detention hearing could be appealed against, Seng argued that a right of appeal existed on the following grounds: [note: 1]

(a) the plain language of s 12(2)(*b*) of the Extradition Act 2000 expressly contemplated an "appeal" to the "appellate court" against the High Court's decision on the legality of a fugitive's detention;

(b) the application to review the legality of Seng's detention originated in the High Court, and the High Court's decision was thus made as part of its "original criminal jurisdiction", satisfying s 29A(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"); and

(c) section 422 of CPC 2010, properly understood, did not bar an appeal against the High Court's *substantive decision* as to the legality of Seng's detention; it merely prohibited an appeal against the High Court's "*preliminary determination*" on whether or not a substantive review of the legality of the detention should be conducted.

23 We shall now deal with these grounds *seriatim*.

Section 12(2)(b) of the Extradition Act 2000 did not vest a right of appeal with the Parties

24 Section 12(2)(*b*) of the Extradition Act 2000 states:

Surrender of fugitive to foreign State

…

(2) After —

(a) the expiration of the period referred to in subsection (1); or

(b) if, within that period, an application for an Order for Review of Detention is made by the prisoner and the court to which the application is made or, *where an appeal is brought from the decision of that court to another court*, the other court does not order that the prisoner be released — the expiration of the period of 15 days from the date of the decision of the first-mentioned court *or the appellate court*, as the case may be,

whichever is the later, the Minister may, in his discretion … order that the prisoner be delivered into the custody of a person specified in the warrant and be conveyed by that person to a place in the foreign State … and there surrendered to some person appointed by the foreign State to receive him.

...

[emphasis added]

25 Counsel for Seng, Mr Harpreet Singh SC ("Mr Singh"), relied on the italicised phrase above – *where an appeal is brought from the decision of that court to another court* – and submitted that s 12(2)(*b*) of the Extradition Act 2000 has conferred upon the Court of Appeal jurisdiction to hear an appeal against the Judge's decision because it expressly contemplates an "appeal" process. [note: 2]

26 In our view, this submission contradicts the principle succinctly expressed in Tan Yock Lin, *Criminal Procedure* vol 3 (LexisNexis, Looseleaf Ed, 2010) ("*Tan Yock Lin*") at ch XIX para [155]–[200] that "[appellate jurisdiction] given by statute … extends only as far as the words of that statute necessarily require". It is clear that the words of s 12(2)(*b*) do not *necessitate* the vesting of a *right of appeal* with a party dissatisfied with the outcome of an order for review of detention hearing. In fact, given that such an interpretation would conflict with s 422 of CPC 2010 (see below at [58]) and s 29A(2) of the SCJA (see below at [34]–[36]), we were of the view that it would be stretching the language of s 12(2)(*b*) too far to claim that Parliament had intended, through this one phrase, to vest a right of appeal with a dissatisfied fugitive. The construction of s 12(2) of the Extradition Act 2000 proffered by Mr Mark Jayaratnam, on behalf of the Prosecution, was, in our view, more persuasive. We agreed that it is "far more logical to view s 12(2) as having been intended to provide directions to the Minister when a warrant of surrender can be issued" [original emphasis omitted]. [note: 3] Section 12(2)(*b*) is more likely to have been inserted to *cater for the possibility of a right of appeal that could, in the future, be vested with a dissatisfied fugitive by some other statute(s)*. It is thus, properly construed, a facilitative provision rather than a standalone, substantive remedy in favour of a dissatisfied fugitive.

27 In support of our view, we would point out the stark differences of the various equivalents of the Extradition Act 2000 in other Commonwealth jurisdictions. A rudimentary glance at the "appeal provisions" in these other foreign statutes would suggest that s 12(2)(*b*) of the Extradition Act 2000 has indeed *not* been drafted with the intention of vesting a right of appeal with fugitives.

28 In the United Kingdom, extradition proceedings are governed by the Extradition Act 2003 (c 41) (UK) ("EA 2003 (UK)"). *Clear provisions* describing the right and process of appeal are listed in EA 2003 (UK) in ss 26 to 34, and the relevant provisions are reproduced here as follows:

> **26 Appeal against extradition order**
>
> (1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.
>
> ...
>
> (4) Notice of an appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.
>
> **27 Court's powers on appeal under section 26**
>
> (1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> ...

....

32 Appeal to Supreme Court

(1) An appeal lies to the Supreme Court from a decision of the High Court on an appeal under section 26 or 28.

(2) An appeal under this section lies at the instance of—

(a) the person in respect of whom the Part 1 warrant was issued;

(b) the authority which issued the Part 1 warrant.

(3) An appeal under this section lies only with the leave of the High Court or the Supreme Court.

(4) Leave to appeal under this section must not be granted unless—

(a) the High Court has certified that there is a point of law of general public importance involved in the decision, and

(b) it appears to the court granting leave that the point is one which ought to be considered by the Supreme Court.

(5) An application to the High Court for leave to appeal under this section must be made before the end of the permitted period, which is 14 days starting with the day on which the court makes its decision on the appeal to it.

…

29 In Alun Jones QC and Anand Doobay, *Jones and Doobay on Extradition and Mutual Assistance* (Sweet & Maxwell, 3rd Ed, 2005) ("*Jones and Doobay*") at p 264, the learned authors helpfully explain that the "aim of the 2003 Act is to remove the statutory acknowledgement of the right to make an application for [*habeas corpus*] under the 1989 Act, and to replace it with a right of appeal to the High Court". An appeal heard in the High Court in the UK is therefore the equivalent of the order for review of detention hearing in Singapore. Upon the decision of the High Court in the UK, section 32 of EA 2003 (UK) *expressly and clearly* provides for the dissatisfied fugitive to seek leave to appeal to the Supreme Court. This is explained in *Jones and Doobay* as follows (at pp 271–272):

> An appeal to the [Supreme Court] can only be made with the leave of the High Court or the [Supreme Court] (s.32(3)). However, leave to appeal must not be granted unless the High Court has certified that there is a point of law of general public importance involved in the decision and it appears to the court granting leave that the point is one which ought to be considered by the [Supreme Court] (s.32(4)).

30 Similarly, s 21 of the Extradition Act 1988 (No 4 of 1988 as amended) (Cth) in Australia ("EA 1988 (Australia)") also provides clearly and expressly for the right and process of appeal in extradition proceedings:

Review of magistrate's or Judge's order

(1) Where a magistrate or eligible Federal Circuit Court Judge makes an order under subsection 19(9) or (10) in relation to a person whose surrender is sought by an extradition

country:

(a) in the case of an order under subsection 19(9)—the person; or

(b) in the case of an order under subsection 19(10) —the extradition country;

may, within 15 days after the day on which the magistrate or Judge makes the order, apply to the Federal Court for a review of the order.

(2) The Federal Court may, by order:

(a) confirm the order of the magistrate or Judge; or

(b) quash the order.

...

(3) The person or the extradition country, whether or not the person or country was the applicant for review under subsection (1), *may appeal to the Full Court of the Federal Court from the order of the Federal Court*.

…

[emphasis added]

As s 21(3) of EA 1988 (Australia) makes clear, a right of appeal is vested with a dissatisfied party against the "review" decision of the Federal Court in Australia (*ie*, the Singapore equivalent of an order for review of detention in the High Court). This observation is confirmed by E P Aughterson, *Extradition: Australian Law and Procedure* (The Law Book Company Limited, 1995) at p 225 and also reinforced by David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand, The South Pacific* (The Federation Press, 2000) at p 258 where the learned authors explain that "[the] right of appeal against refusal of the writ [of *habeas corpus*] is conferred by statute. Appeals are dependent on a statutory basis."

31 Finally, in Malaysia, there are also clear statutory provisions providing for an appeal to the Federal Court against a decision of a High Court judge in a *habeas corpus* proceeding *by the person sought to be extradited* (see *Public Prosecutor v Ottavio Quattrocchi* [2004] 3 MLJ 149 at [17] and [90]). Section 36 of the Extradition Act 1992 (Act 479, 2006) (Malaysia) provides that:

Application for *habeas corpus*

36. A fugitive criminal who is committed to prison under this Act may apply to the High Court for a writ of *habeas corpus* in accordance with the procedure as provided in the Criminal Procedure Code.

Chapter XXXVI of the Criminal Procedure Code (Act 583, 2006) (Malaysia) ("the Malaysian CPC") lists out the provisions relating to the "directions of the nature of a *habeas corpus*". Importantly, in s 374 of the Malaysian CPC, it is clearly and expressly stated that:

Any person aggrieved by any decision or direction of the High Court under this Chapter may appeal to the Federal Court within thirty days from the date of the decision or direction appealed against.

32 Indeed, s 374 of the Malaysian CPC serves as a stark contrast to s 422 of CPC 2010 (see below at [37]). The difference between the two provisions has prompted an author to observe, almost three decades ago, that "[t]here is no appeal for either side from a High Court decision concerning *habeas corpus* in Singapore. [However, there] is provision for appeal to the Federal Court in Malaysia." (Janice M Brabyn, "Extradition in Singapore and Malaysia" (1985) 27 Mal LR 243 at p 255).

33 For the above reasons, we were of the view that s 12(2)(*b*) of the Extradition Act 2000 – unlike the statutes of the various Commonwealth jurisdictions surveyed – did not vest a right of appeal with the Parties against the Judge's decision.

The High Court hearing the application for an order for review of detention was not a court of original criminal jurisdiction

34 Seng also submitted that the Judge's decision was made as part of the "original criminal jurisdiction" of the High Court, and thus the Court of Appeal has jurisdiction to entertain an appeal pursuant to s 29A(2) of the SCJA. Section 29A(2) of the SCJA provides:

> 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]

35 Seng sought to persuade us that because his *application* to review the legality of his detention before the Judge *originated in the High Court*, the High Court should therefore be deemed as having "original criminal jurisdiction". In our view, Seng's understanding of the phrase "original criminal jurisdiction" was mistaken. In *Kiew Ah Cheng David v Public Prosecutor* [2007] 1 SLR(R) 1188 ("*David Kiew*") at [3], this Court explained that:

> ... The distinction between an original and an appellate jurisdiction is not one that normally requires extensive elaboration. *A court exercises original jurisdiction in all proceedings at first instance*. A court exercises an appellate jurisdiction when it conducts proceedings arising from any decision of a court in the exercise of its original jurisdiction … *Original jurisdiction is a legal term and the word "original" here does not refer only to a matter that originated from that court and had not arisen before any previous one*. [emphasis added]

This explanation provided in *David Kiew* was in response to the argument that the application for an extension of time "was a prayer first made before [the High Court]" and had therefore vested the High Court with "original jurisdiction" (see *David Kiew* at [3]). In eventually holding that the High Court was not a court of "original jurisdiction", this Court in *David Kiew* has made clear that the *mere fact* that an application or matter commences for the first time only in the High Court *does not necessarily* mean that the High Court has "original criminal jurisdiction".

36 In the present case, the "proceedings at first instance" was clearly the committal proceeding in the Subordinate Courts before the DJ (see above at [6]). In *Re Onkar Shrian* [1968–1970] SLR(R) 533, the High Court, faced with a similar *habeas corpus* proceeding that arose from an extradition decision of the lower court, held that "submissions as to the validity of the proceedings or the jurisdiction of the court should be made to the Magistrate's Court *in the first instance*" (at [29], emphasis added). Even if, as submitted by Seng, the proceeding before the DJ had elements resembling an "administrative" proceeding, this did not detract from the fact that the "proceedings at first instance" nevertheless took place in the *Subordinate Courts before the DJ*, *upon which* the

Parties' summonses for an order for review of detention before the Judge originated.

Section 422 of CPC 2010 prohibited an appeal by the Parties against the Judge's decision not to issue an order for review of detention

37 Finally, Seng's case that he had a right of appeal to this Court was also contradicted by s 422 of CPC 2010 (previously s 335 of Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC 1985")) which states:

> **No appeal**
>
> 422. No appeal shall lie from an order directing or refusing to direct the issue of an order for review of detention or from an order made under section 418 but the High Court or Judge of the High Court may at any time adjourn the hearing for the decision of a Court consisting of 3 or more Judges.

38 The predecessor of s 422 of CPC 2010 has been interpreted by the High Court in two instances as barring an applicant who was refused an order for review of detention in the High Court from appealing to the Court of Appeal (see *Salwant Singh s/o Amer Singh v Public Prosecutor* [2008] SGHC 164 at [15] and *Salwant Singh s/o Amer Singh v Public Prosecutor* [2009] 3 SLR(R) 105 at [14]). In *Tan Yock Lin* at ch XIX para 151, the learned author also appears to share a similar understanding of the predecessor of s 422 of CPC 2010 (*ie*, s 335 of CPC 1985):

> In Singapore, the Court of Appeal's ordinary appellate jurisdiction is to hear appeals against any decision made by the High Court in exercise of the High Court's original criminal jurisdiction. If a case begins in the lower courts, there can be no further appeal to the Court of Appeal, unless the case is first transferred to the High Court to continue thereafter as a High Court case.
>
> This appellate jurisdiction is subject to the provisions of the Supreme Court of Judicature Act as well as any other written law. And this is why *the provisions of section 335 of [CPC 1985], for instance, must prevail over the provisions as to appeal in the judicature legislation; so that in habeas corpus proceedings under the Code, there shall be no appeal, as section 335 provides*.
>
> [emphasis added]

39 Faced with these seemingly unfavourable authorities, Mr Singh submitted a novel argument that has not been canvassed in the courts previously. He submitted that a review of the legality of detention by the High Court is in fact a *two-stage process*: (a) first, the High Court has to decide, preliminarily, whether to *order the detainee to be brought before the court for a substantive review* ("the first stage"); and (b) second, after the detainee is brought to court, the High Court would then conduct a *substantive review* of the legality of detention and decide whether the detainee was lawfully detained ("the second stage"). Mr Singh then argued that the prohibition of appeal in s 422 of CPC 2010 only applies to the *first stage*, and not the second stage.

40 Mr Singh's submission on this issue naturally begged the question of what the phrase "the issue of an order for review of detention" (in s 422 of the CPC 2010) actually meant *in practice*. Previously, prior to the Statutes (Miscellaneous Amendments) (No 2) Act 2005 (No 42 of 2005), an order for review of detention was known as "a writ of *habeas corpus*" – a term which is still being utilised in other Commonwealth jurisdictions today.

41 According to Mr Singh, a writ of *habeas corpus* must *only* be a reference to an order directing a

detainee to be brought to court in order for the legality of the detention to be reviewed; and it can only be issued at the first stage upon the applicant satisfying the court that there is a *prima facie* case that the legality of his detention is questionable. Once the detainee has been brought to court, and a substantive review has been conducted by the judge leading him to the view that the continued detention is indeed illegal, the court could no longer issue "a writ of *habeas corpus*", but would have to issue an "order for release" instead.

42 While Mr Singh's explanation struck us as linguistically and analytically plausible, we were of the view that it did not accord with what "a writ of *habeas corpus*" meant functionally in practice. Contrary to Mr Singh's submissions, it appeared to us that the contested phrase is a legal term of art which has come to *possess a dual functional meaning*. A writ of *habeas corpus* could be said to be "issued" by the courts *either* (a) for the detainee to be brought to court for a substantive review of the legality of detention (*ie*, the first stage); *or* (b) for the release of the detainee after the court has made a substantive decision (*ie*, the second stage).

43 This dual usage of the phrase finds academic support in Judith Farbey and R J Sharpe, *The Law of Habeas Corpus* (Oxford University Press, 3rd Ed, 2011) ("*Farbey and Sharpe*"). The learned authors observe that there are two possible functions of a writ of *habeas corpus* (at pp 234–235):

> ... It is possible… for the court or judge to order that the writ issue forthwith on the application without notice. This is a somewhat extraordinary step, and would be taken in cases of special urgency, for example a danger that the respondent will flee from the jurisdiction and deprive the prisoner of the remedy. In such a case, a formal return to the writ is required, and the substance of the matter is argued on the return.
>
> In the ordinary case, however, the court will adjourn the application so that notice may be given. *It is now almost inevitably the case that the hearing of the application for the writ becomes the substantive hearing*; the respondent producing the alleged justification for the restraint by witness statement or affidavit, and *full argument from all sides being presented*. This is the modern version of the old rule nisi procedure which was evolved to avoid having to deal with formal returns. The court comes to a determination and either orders that the prisoner be remanded or discharged. *The court may order the writ to issue so that the prisoner is brought up and formally discharged, but this seems unnecessary and is not usually done. If this does happen it is quite clear that the order for the writ to issue must be treated as a final determination in favour of the prisoner, and proceedings after an order for the writ are purely formal*.
>
> [emphasis added]

44 In other words, the courts may indeed, as proposed by Mr Singh, order the issue of a writ of *habeas corpus* simply to direct that the detainee be immediately brought to court. However, the learned authors also made clear that *in the ordinary case*, "the hearing of the application for the writ becomes the substantive hearing" and if an order is then made for the writ of *habeas corpus* to be issued, it "must be treated as a final determination in favour of the prisoner". Therefore, the "issue of a writ of *habeas corpus*" *could also, in practice*, be a reference to a formal court order directing that the detainee be brought to court *to be released after the substantive hearing*.

45 In addition, Mr Singh's submission that the prohibition against an appeal in s 422 of CPC 2010 could only pertain to the first stage also did not cohere with the law and practice of *habeas corpus* and extradition proceedings in Singapore for the past century and more. Prior to the enactment of the first ever code of criminal procedure in Singapore in 1900 (see Andrew Phang Boon Leong, "Of Codes

and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore" (1989) 31 Mal L Rev 46 ("*Of Codes and Ideology*") at p 64), the law and procedure relating to extradition in the Straits Settlements was governed by the Extradition Act 1870 (33 & 34 Vict. c. 52) ("the Imperial Extradition Act of 1870"). Section 11 of the Imperial Extradition Act of 1870 provided that:

> **11. Surrender of fugitive to foreign state by warrant of Secretary of State. — If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.**
>
> Upon the expiration of the said fifteen days, or, ***if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be*** , or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by a warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may, in his opinion, be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.
>
> [emphasis added in bold italics]

46 In *In Re Charles Ryskschroeff* [1879] KY 5 ("*Re Charles Ryskschroeff*"), the Supreme Court of the Straits Settlements held that, pursuant to s 11 of the Imperial Extradition Act of 1870, a prisoner who was due to be extradited to Netherlands had *no* right of appeal against a decision "on a return to a writ of *habeas corpus*". Importantly, the writ of *habeas corpus* was "returned" in *Re Charles Ryskschroeff* – against the prisoner's favour – after a judge had, in the words of Sidgreaves CJ:

> ... [given] his decision … *deciding, after argument*, on the return to the Writ, *against the prisoner on all the grounds raised by his Counsel*–by deciding that the British Colonies are within the combined operation of the Dutch Treaty, the [Imperial Extradition Act of 1870] and the Order in Council applying it, and that the prisoner was liable to be surrendered under them. [emphasis added]

Sidgreaves CJ was of the view that the judge's decision was final and that "all judicial proceedings were then to be considered as having terminated", thereby holding that the prisoner had no further right of appeal.

47 In our view, the case of *Re Charles Ryskschroeff* is of some historical significance because it established that, as early as 1879, the prohibition against an appeal in a *habeas corpus* proceeding over an extradition matter could clearly *pertain to the substantive review of the legality of detention conducted by the court*, and not just the "first stage" as submitted by Mr Singh. However, this piece of historical artefact is not an adequate portrayal of the local understanding of the *habeas corpus* proceeding, for it could still be questioned whether subsequent enactments of the criminal procedure codes in Singapore might have changed the position accepted by the court in *Re Charles Ryskschroeff*. An examination of the predecessors of CPC 2010 – in particular, the predecessors of s 422 of CPC 2010 – is thus in order.

48 As mentioned above at [45], the earliest predecessor of CPC 2010 in Singapore can be traced to the Criminal Procedure Code 1900 (Ordinance 21 of 1900) ("CPC 1900"). The only provision (in the main text of CPC 1900) dealing with *habeas corpus* proceedings was s 372, which stated:

> **Directions of the Nature of a Habeas Corpus**

372. (1)—The Supreme Court may whenever it thinks fit direct —

(*a*) *that a person within the limits of the Colony be brought up before the Court to be dealt with according to law* ;

(*b*) *that a person illegally or improperly detained in public or private custody within such limits be set at liberty* ;

(*c*) that a prisoner detained in any prison situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court ;

(*d*) that a prisoner within such limits be removed from one custody to another for the purpose of trial ; and

(*e*) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2)—The Supreme Court may make rules to regulate the procedure in cases under this section.

(3)—Until such rules are made and subject thereto the *rules and forms in the fourth Schedule* shall be in force.

[emphasis added]

Rule 13 of Schedule IV of CPC 1900 further provided:

Before making any final order under s 372(1) (*b*) the Court shall order that all persons interested shall be at liberty to show cause on a day to be named in such order why the person alleged to be illegally or improperly detained should not be set at liberty. Notice of such order shall be served on such persons as the Court shall direct.

49 Crucially, there was no hint in CPC 1900 that the holding in *Re Charles Ryskschroeff* (*ie*, that there was no right of appeal against the substantive review of the legality of a detainee's detention) was wrongly decided or was to be statutorily reversed. In addition, the existence of *both* s 372(1)(*a*) and s 372(1)(*b*) of CPC 1900 also suggests the possibility of the dual usage of a "writ of *habeas corpus*" in Singapore as early as 1900. According to CPC 1900, it would appear that a "writ of *habeas corpus*", when issued, might properly refer to either a direction for a person to be brought before the court (*ie*, s 372(1)(*a*)), or a direction for a person to be "set at liberty" after a show cause proceeding (*ie*, s 372(1)(*b*) read with r 13 of Schedule IV).

50 CPC 1900 was superseded a few years later by the Criminal Procedure Code 1910 (Ordinance 10 of 1910) ("CPC 1910"). Although the basic structure of CPC 1900 was retained in CPC 1910 (see *Of Codes and Ideologies* at p 66, fn 24), the provisions relating to *habeas corpus* were significantly expanded and came to consist of a few sections (*ie*, ss 369 to 383) in the main text. The relevant sections of CPC 1910 are reproduced here as follows:

369.—(1) Every application for a writ of *habeas corpus* shall be by motion supported by affidavit for an order which if the Court so direct may be made absolute *ex parte* for the writ to issue in the first instance ; or if the Court so direct it may grant an order *nisi*.

(2) On an application by a person detained on a warrant of extradition the order *nisi* if granted shall call upon the Governor, the committing Magistrate and the Foreign Government to show cause why the writ should not issue. …

…

370. On the argument of an order *nisi* for a writ of *habeas corpus* the Court may in its discretion direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ which order shall be a sufficient warrant to the officer in charge of the prison or any Police Officer or other person for his discharge.

…

376. The Supreme Court may whenever it thinks fit order that a prisoner be detained in any prison situate within the limits of the Colony be

(*a*) admitted to bail ;

(*b*) brought before a Court Martial ;

(*c*) removed from one custody to another for the purpose of trial or for any other purpose which the Court may deem proper.

…

383. No appeal shall lie from an order directing or refusing to direct the issue of a writ of *habeas corpus* or from an order made under section 376 but the Court or Judge may at any time adjourn the hearing for the decision of a Court consisting of three or more Judges.

The next major re-enactment of the criminal procedure code would come much later in the form of the Criminal Procedure Code (Cap 132, 1955 Ed) ("CPC 1955") (see *Of Codes and Ideology* at p 71). The provisions relating to *habeas corpus* in CPC 1910 were, however, *substantially retained* in ss 375 to 390 of CPC 1955. They were only subsequently amended in the Criminal Procedure Code (Amendment) (No 10 of 1976) where references to the "order *nisi*" mechanism were removed.

51 Returning to CPC 1910, it is striking that despite the proliferation of provisions detailing the *habeas corpus* procedure as compared to CPC 1900, there was no evidence that the governing legislative authorities at the material time (*ie*, between 1900 and 1909) had wanted to *modify* the understanding of the law and practice relating to the writ of *habeas corpus* as previously established in *Re Charles Ryskschroeff* and CPC 1900. In our view, CPC 1910 was therefore meant to be construed – as far as possible and without doing violence to the text – in harmony with *Re Charles Ryskschroeff* and CPC 1900. The newly introduced "order *nisi*" mechanism in s 369 of CPC 1910 could thus be said to parallel s 372(1)(*b*) read with r 13 of Schedule IV of CPC 1900 (see above at [48]). To substantively review the legality of a detainee's detention, the court could grant an "order *nisi*" requiring the relevant parties to show cause "why the writ should not issue" (similar to r 13 of Schedule IV of CPC 1900), *in order for the court to determine conclusively whether the writ of habeas corpus should be issued to set the detainee at liberty* (similar to s 372(1)(*b*) of CPC 1900). Section 383 of CPC 1910 (which is *in pari materia* to s 422 of CPC 2010) would accordingly have to be construed as also barring an appeal against the judge's decision on whether or not a writ of *habeas corpus* should be issued *after the judge had substantively reviewed the legality of the detainee's detention*.

52 While references to the "order *nisi*" mechanism have since been removed from subsequent criminal procedure codes (see above at [50]), the provision requiring the relevant parties to "show cause" has remained throughout the years. In CPC 2010, s 417 provides as follows:

> **Application for order for review of detention**
>
> **417.**—(1) Any person —
>
> (*a*) who is detained in any prison within the limits of Singapore on a warrant of extradition under any law for the time being in force in Singapore relating to the extradition of fugitive offenders;
>
> …
>
> may apply to the High Court for an order for review of detention.
>
> (2) On an application by a person detained on a warrant of extradition, *the High Court shall call upon the Public Prosecutor, the committing Magistrate and the foreign Government to show cause why the order for review of detention should not be made*.
>
> ...
>
> [emphasis added]

53 Despite Mr Singh's valiant efforts, we were unable to agree that the show cause proceeding (referred to in s 369(2) of CPC 1910 and s 417(2) of CPC 2010) was a reference to the "preliminary determination" by the High Court to decide merely on whether an order for review of detention should be issued for the detainee to be brought before it for a substantive review. Crucially, Mr Singh's submission did not gel with the practice of the Judge below in the order for review of detention hearing. As mentioned earlier (at [6]), the Applicants had initially filed originating summonses under O 54 of the ROC before the Judge. At the preliminary hearing on 23 February 2012, the Judge held for the Applicants but did *not*, contrary to Mr Singh's submission, issue the order for review of detention. Instead, the Judge directed *summonses* for the order for review of detention to be issued. This difference is crucial because the Judge could have chosen, pursuant to O 54 r 2(1)(*a*) of the ROC (see above at [6]), to "make an Order for Review of Detention forthwith". However, only summonses *for* the order for review of detention (*ie*, O 54 r 2(1)(*b*)) were issued (see above at [7]) for "all parties [to be] before the court" (Jeffrey Pinsler, SC gen ed, *Singapore Court Practice 2009* (LexisNexis, 2009) at para 54/1-9/2).

54 Subsequently, when deciding on the Parties' criminal motions *seeking an issue of the order for review of detention* in CM 65/2012 and CM 67/2012 (*ie*, the show cause proceedings), the Judge engaged in a very detailed substantive analysis of the legality of the detention of the Parties in the Judgment (see above at [9]–[17]), *before dismissing their applications (ie, CM 65/2012 and CM 67/2012) for an order for review of detention to be issued* (see the Judgment at [40]). In short, the Judge had, after the show cause proceedings, made an order *refusing to direct the issue of an order for review of detention* within the meaning of s 422 of CPC 2010, against which we were thus bound to hold that the Parties had no right to appeal against.

55 The practice adopted by the Judge below (in particular, his decision not to issue the order for review of detention before having engaged in the substantive review) reflected the observation in *Farbey and Sharpe* that "[i]t is now almost inevitably the case that the hearing of the application for

the writ becomes the substantive hearing" (see above at [43]). This observation has since been judicially recognised and acknowledged by the United Kingdom Supreme Court as well (see *Rahmatullah v Secretary of State for Defence and another (JUSTICE intervening)* [2013] 1 AC 614 at [89]). The result of this practice meant that a decision as to whether or not to "issue" an order for review of detention *could indeed* come after the substantive review of the legality of the detainee's detention. It follows then that the prohibition of appeal against a judge's "order directing or refusing to direct the issue of an order for review of detention" in s 422 of CPC 2010 has to be construed as pertaining to the judge's decision *after* the substantive review as well.

56 For the purposes of completeness, we would also point out two other reasons why we could not accept Mr Singh's interpretation of s 422 of CPC 2010. Firstly, s 422 of CPC 2010 contains a unique provision which stipulates that the High Court judge "may at any time adjourn the hearing for the decision of a Court consisting of 3 or more Judges" *as an alternative to deciding whether or not to issue an order for review of detention*. In our view, the existence of this unique provision is more logically consistent with our understanding that there is no appeal against the judge's *substantive review* of the legality of a detainee's detention as well; such that when a judge is faced with a matter of sufficient complexity or public importance, he or she might prefer to defer the making of the *final, substantive* decision to a court of three judges instead.

57 Secondly, we were also drawn to the fact that *not a single local case in the past century or more was cited to us (or perhaps, found)* where this Court had actually entertained an appeal against a criminal, *habeas corpus* decision of the High Court. While the mere absence of authority alone was inadequate to determine the complex legal issue before us, it did *fortify*, at the very least, our view that s 422 of CPC 2010 (and its predecessors) has always been understood as prohibiting an appeal against a High Court judge's *substantive review* of the legality of a detainee's detention as well, and not just his or her "preliminary determination" of whether or not to conduct the substantive review.

58 In summary, given the dual usage of the phrase "a writ of *habeas corpus*" (and accordingly, "the order for review of detention") both in historical and modern practice, and the fact that the Judge below had decided *not* to issue an order for review of detention in dismissing CM 65/2012 and CM 67/2012, we were unanimously of the view that s 422 of CPC 2010 applied and barred the Parties from appealing against the Judge's decision.

Conclusion on Issue 1

59 To recap, Seng's strongest arguments in support of CM 79/2012 were that notwithstanding the ambiguous language used, s 12(2)(*b*) of the Extradition Act 2000 vested in him a right of appeal; and while this right would seemingly contradict s 422 of CPC 2010, the latter provision was to be construed narrowly as prohibiting only an appeal against the "preliminary determination" of the Judge as to whether or not the Parties should be brought before the court for a substantive review of the legality of their detention. While Seng's attempted construction of the relevant provisions of the two statutes (*ie*, the Extradition Act 2000 and CPC 2010) was perhaps arguable in the abstract on a purely linguistic and/or analytical level, a closer scrutiny of the two statutes and the law *and practice* of *habeas corpus* and extradition proceedings in the past century led us inexorably to the practically more defensible view that the Parties had no right of appeal against the Judge's decision below.

60 In coming to our decision, we were also firmly guided by the commonsensical principle that if it was indeed Parliament's intention to vest in Seng a right so fundamental as that of the right of appeal against the Judge's decision in an order for review of detention hearing, Parliament would have done so in a much clearer and direct fashion, as opposed to *via* the technical, legal gymnastics one would

have to go through to interpret the two statutes in Seng's favour.

61 For the above reasons, we held that this Court had no jurisdiction to hear an appeal against the Judge's decision below and dismissed Seng's application in CM 79/2012. Accordingly, Hia's application in CM 78/2012 requesting for an extension of time to file a notice of appeal against the Judge's decision (see above at [19]) had to be dismissed as well.

Issue 2: whether leave should be granted for the alleged questions of law of public interest to be referred to the Court of Appeal

62 The relevant statutory provision governing the issue of whether leave should be granted for a criminal reference is found in s 397 of CPC 2010. Sections 397(1) and 397(3), in particular, provide as follows:

> **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.
>
> **…**
>
> (3) An application under subsection (1) … 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…

63 In *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 ("*Bachoo Mohan Singh*") at [29], this Court held that there are four requirements which have to be met before leave for a criminal reference will be granted:

> (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.

64 Upon hearing the Parties, we dismissed both CM 76/2012 (Hia's application) and CM 99/2012 (Seng's application) and held that the Parties' alleged questions of law of public interest should not be referred to the Court of Appeal for the reasons stated below.

The questions raised by Hia in CM 76/2012

65 The two questions raised by Hia in CM 76/2012 were as follows:

> (a) Prior to the enactment of section 108B PC, could a Singapore Court exercise jurisdiction to

try a foreign national outside Singapore at all material times for an alleged offence of abetment by conspiracy to cheat a Singapore entity?

(b) Where the Singapore Court of Appeal has held that any recognition of the "effects" doctrine must be left to Parliament, can a Singapore court employ alternative English common law doctrines in the absence of express provisions conferring extra-territoriality under the PC?

66 The backdrop to these two questions is the Judge's holding that the alleged acts of abetment of the Parties would have constituted offences in Singapore because, *had the facts been transposed locally*, an email sent from a person located outside Singapore to a person in Singapore as a means to engage the latter in a conspiracy could be said to be acts of abetment by conspiracy that *took place within Singapore* (see above at [15]). Importantly, this was a decision that the Judge arrived at after *rejecting* the Prosecution's submission that "a conspiracy *made outside* the territory, the object of which was to commit an offence in the territory, is justiciable [in the territory]" [emphasis added] (see the Judgment at [25]). Thus, the Judge had in fact confined s 109 of the PC as applying only to acts of abetment *within* the territory of Singapore; before holding, however, that the acts of abetment by the Parties, when transposed, could nonetheless be said to have taken place in Singapore for the following reasons (see the Judgment at [28]):

> It seems artificial to regard an act of abetment as having been committed in Singapore only if the communications had taken place during a physical meeting in Singapore, as opposed to a phone call, email or letter from an abettor overseas *to a person in Singapore*. I am of the view that acts of abetment in the form of email correspondence sent to and received *by a person in Singapore* can be construed as having been committed within the territorial jurisdiction of Singapore. The position may be different if the email was not received by Cooperator C due to some technical default, for example. Cooperator C would not have been aware of the request for quotations for the antennae and Seng and Hia could not have engaged him in a conspiracy. Communication would have to be made to Cooperator C for there to be a "meeting of minds" on the facts of this case. In my view, if the allegations of fact were transposed, Seng and Hia's acts of abetment would be justiciable in Singapore. [emphasis added]

67 A careful reflection of this backdrop would immediately reveal the fundamental misunderstanding which had permeated both questions raised by Hia. The two questions appear to presuppose that the Judge had applied s 109 of the PC *extra-territorially*; when in fact, the Judge was very careful to state in the Judgment that s 109 of the PC applied only because the transposed acts of the alleged offences (*ie*, sending an email to a person in Singapore to engage the latter in a conspiracy) could properly be construed – without invoking any extra-territorial doctrine – as acts which have taken place in Singapore because *the recipient of the communication was in Singapore*. Had the abetment, when transposed, taken place wholly outside Singapore before 1 February 2008 (for example, if two parties located in two different foreign countries had corresponded *via* email on how to commit an offence in Singapore), the Judge would *not* have found s 109 of the PC applicable.

68 It was also unclear to us how a party being "a foreign national outside Singapore" was relevant at all, since the issue before the Judge was simply whether *the act constituting the abetment*, when transposed, could be said to have taken place in Singapore. Hia's erroneous focus on whether the Judge had applied the doctrine of extra-territoriality or the "effects" doctrine therefore proved to be a fatal red herring. In the result, we agreed with the Prosecution that "the proposed questions of [Hia] *did not affect the outcome of the case*" [note: 4] [emphasis in original] and therefore did not satisfy the test laid down in *Bachoo Mohan Singh* (see above at [63]).

The questions raised by Seng in CM 99/2012

69 The seven questions sought to be raised by Seng in CM 99/2012 were as follows:

(a) Is the double criminality requirement to be determined using the "ingredients" test, the "conduct" test or by some other means?

(b) If an inchoate offence takes place in Singapore but the principal offence occurs outside the jurisdiction, would the inchoate offence be an indictable offence in Singapore? Specifically, would a conspiracy in Singapore to commit a substantive offence in the US constitute an indictable offence in Singapore?

(c) In determining the territoriality of a criminal offence, is the result-conduct distinction still applicable in Singapore?

(d) In light of the answers to the three preceding questions above, may the Singapore courts claim jurisdiction simply on the basis of an email sent by an American from the US to a Singaporean party in Singapore in pursuance of a conspiracy to commit a criminal offence in the US?

(e) Is the "participation" limb of Art 3 of the Singapore-US Treaty to be interpreted to include accessorial and/or constructive liability?

(f) What is the proper approach to determining whether a substantive offence falls within the enumerated list of offences under the Singapore-US Treaty?

(g) In light of the answers to the two immediate preceding questions above, does the charge of conspiracy to defraud the US by dishonest means under Title 18 United States Code Section 371 correspond with Offence 18 of the enumerated list under the Singapore-US Treaty?

70 Unlike Hia's application in CM 76/2012 which was filed on time, Seng's application in CM 99/2012 was filed only on 1 November 2012, despite the Judgment being released on 7 August 2012. This meant that the one-month deadline for filing a criminal reference as stipulated in s 397(3) of CPC 2010 (see above at [62]) was long exceeded before CM 99/2012 was filed. This was the reason why Seng had to request, in the same application, for time to be extended to file CM 99/2012 (see above at [20]).

71 In *Bachoo Mohan Singh* at [65], this Court also laid down the relevant factors to be considered when a request for an extension of time is made in relation to criminal references, as follows:

(a) the length of the delay in making the application;

(b) the explanation put forward for the delay; and

(c) the prospects of the application.

72 In our view, Seng's delay in filing CM 99/2012 was inordinate and unacceptable. CM 99/2012 was filed only five days prior to the hearing of the criminal motions, leaving the Prosecution with simply insufficient time to properly address each and every of the seven alleged questions of law raised. No explanation was also provided by Seng as to why CM 99/2012 could not have been filed earlier, notwithstanding that he was represented throughout by counsel and had filed a notice of appeal as early as 17 August 2012.

73 More importantly, we found the prospects of Seng's application in CM 99/2012 very weak as most of the questions raised, similar to Hia's questions, reveal a fundamental misunderstanding of the Judge's approach and decision below.

74 In the Judgment, the Judge had applied the principle of double criminality to determine whether, had the alleged facts which took place in the US occurred in Singapore, these same facts would have constituted an offence under Singapore law. In our view, it is therefore of critical importance to be clear as to what *the original alleged facts* were. As mentioned above (at [5]), the alleged criminal acts of the Parties were that they had sought to conspire with individuals *in the US* by sending emails to them to commit a substantive offence in the US. In applying the principle of double criminality and *transposing the facts locally*, the question which arose for the Judge's consideration was logically as follows: if individuals located in a foreign country sent an email to someone located in Singapore abetting the latter to commit a substantive offence in Singapore, would the said act of these individuals be an indictable offence in Singapore?

75 Many of the questions raised by Seng, however, were questions which the Judge *did not* (and need not) consider. Seng appeared to be of the mistaken understanding that in transposing the facts, *the facts completely remain as they are* but the court should merely ask whether the said act would be an offence in Singapore. The second question raised by Seng (see above at [69(b)]), for example, clearly manifested this error, for at no point in the application of the double criminality principle did the Judge have to consider whether "a conspiracy in Singapore to commit a substantive offence in the US [would] constitute an indictable offence in Singapore".

76 That Seng's understanding of the double criminality principle is mistaken is clear from the Judgment at [19], where the Judge cited a House of Lords decision (*ie, Regina (Al-Fawwaz) v Governor of Brixton prison and Another* [2002] 1 AC 556 ("*Al-Fawwaz*")) to explain what "the appropriate transposition of facts" meant in the following manner:

> In [*Al-Fawwaz*], the US requested the extradition of the applicant, an alleged member of an Islamic terrorist organisation, for conspiracy to murder American citizens, officials, diplomats and others to whom the Internationally Protected Persons Act 1978 applied in the US and abroad. Lord Millet was of the view that the appropriate transposition of the facts would require the English courts to consider whether a conspiracy to murder British subjects would be punishable in England.

77 If the House of Lords in *Al-Fawwaz* had applied Seng's understanding of "the transposition of facts", it would have ended up considering "whether, in England, a conspiracy to murder *American subjects* would be punishable in England", rather than the murder of *British subjects* as correctly transposed. This misunderstanding of how facts are to be transposed in applying the principle of double criminality was evident in Seng's written submissions and would have been fatal to his application in CM 99/2012, as it pervaded many of the other questions raised and the corresponding arguments in support of them as well. [note: 5]

78 In *Phang Wah v Public Prosecutor and another matter* [2012] SGCA 60, this Court had reminded all "potential applicants [that they would] do well to avoid … "back door" appeals by recourse to s 397 [of CPC 2010]" (at [37]). Seng's unjustifiably late and last minute attempt to refer a long list of questions – many of which were fundamentally mistaken – to this Court struck us as a desperate attempt at a "back door" appeal should his primary case in CM 79/2012 fail. We therefore declined to exercise our discretion to extend time in s 397(3) of CPC 2010 in Seng's favour and dismissed CM 99/2012 accordingly.

Conclusion on Issue 2

79 In the result, we dismissed the attempts of the Parties to refer their alleged questions of law of public interest to the Court of Appeal. The questions raised in Hia's application (in CM 76/2012) were irrelevant to the Judge's determination while Seng's application (in CM 99/2012) was filed unjustifiably out of time. As these grounds alone warranted the dismissal of the Parties' applications, we did not even have to consider whether their alleged questions of law were even questions *of public interest* to begin with. We also leave open the novel issue of whether the High Court in the order for review of detention hearing was exercising "its appellate or revisionary jurisdiction", a necessary condition which has to be satisfied under s 397(1) of CPC 2010.

Conclusion

80 For the above reasons, we dismissed all four applications filed by the Parties and held that the Judge's decision in the Judgment was final and binding upon them.

[note: 1] Applicant's submissions in CM 79/2012 dated 29 Oct 2012 at [5].

[note: 2] Applicant's submissions in CM 79/2012 dated 29 Oct 2012 at [36]-[40].

[note: 3] Respondent's submissions in CM 78/2012 and CM 79/2012 dated 29 Oct 2012 at [30].

[note: 4] Respondent's submissions in CM 76/2012 dated 29 Oct 2012 at [35].

[note: 5] See Applicant's submissions in CM 79/2012 dated 29 Oct 2012 at [116]-[125], [133] and [137].