Koh Zhan Quan Tony v Public Prosecutor and Another Motion
[2006] SGCA 17

Case Number : Cr M 6/2006, 7/2006

Decision Date : 25 April 2006

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah J; Tan Lee Meng J

Counsel Name(s) : Loo Ngan Chor and Julian Tay (Lee & Lee) for the applicant in CM 6/2005; Ismail Hamid (Ismail Hamid & Co) for the applicant in CM 7/2005; Ong Hian Sun, Jason Chan and Gillian Koh Tan (Deputy Public Prosecutors) for the respondent

Parties : Koh Zhan Quan Tony — Public Prosecutor

Courts and Jurisdiction – Jurisdiction – Appellate – Court of Appeal hearing and determining substantive merits of Prosecution's appeal against applicants' convictions on lesser charges of robbery with hurt instead of original charges of murder – Applicants filing motions challenging Court of Appeal's jurisdiction to hear Prosecution's appeal – Whether Court of Appeal having jurisdiction to hear appeal under s 44(3) Supreme Court of Judicature Act – Whether Court of Appeal having no jurisdiction to hear motions as court functus officio after hearing appeal – Section 44(3) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

25 April 2006

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

Introduction

1 The present case raised seemingly simple – yet substantively profound – issues that impact, first, on the scope of this court's jurisdiction and, second, on the scope of the right of the Prosecution to appeal against the acquittal of an accused person under s 44(3) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"). The simplicity lay in the statement of the issues; the complexity lay in arriving at principled and rational conclusions with respect to both issues, which conclusions are simultaneously consistent with the relevant statutory language and (above all) justice and fairness.

2 By way of a brief background to the present proceedings, the applicants were (in Criminal Case No 35 of 2004) charged with the offence of murder under s 302 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed). The learned trial judge held thus (see *PP v Lim Poh Lye* [2005] 2 SLR 130 at [19]):

> I am, therefore, of the view that *the charge of murder ought to be reduced to a charge under s 394 of the Penal Code*, that is, for the offence of robbery with hurt, and in regard to which both accused were, in my view, *independently guilty*. I thus find both accused *guilty of an offence under s 394 of the Penal Code*, and convict them accordingly. I shall hear counsel on sentencing when they are ready. [emphasis added]

3 We must assume that the above paragraph in the learned judge's grounds of decision flows from, and is therefore consistent with, his minute sheet dated 24 January 2005, the material parts of which read as follows:

Court: 1. First and Second Accused *not guilty of murder as charged*.

2. Charge under section 302 to be reduced to s 394 of the Penal Code.

3. First Accused convicted under s 394 of the Penal Code and sentenced to 24 strokes of the cane and 20 years imprisonment with effect from 7 April 2004.

4. Second Accused convicted under s 394 of the Penal Code and sentenced to 20 strokes of the cane and 15 years imprisonment with effect from 31 May 2004.

[emphasis added]

4 The Prosecution appealed against the above decision to acquit the accused of the charge of murder. The Court of Appeal (in Criminal Appeal No 2 of 2005) allowed the appeal (see *PP v Lim Poh Lye* [2005] 4 SLR 582) and accordingly convicted the accused on the original charge of murder under s 302 read with s 34 of the Penal Code and sentenced them to death. Significantly, in our view, is the manner in which the court described the proceedings before it in the very first paragraph of its judgment, as follows (at [1]):

> This is an appeal by the Public Prosecutor against *an order of acquittal* made … at the conclusion of a trial, at which a charge of murder under s 302, read with s 34, of the Penal Code ("the PC") (Cap 224, 1985 Rev Ed), was preferred against the two respondents, Lim Poh Lye ("Lim") and Tony Koh Zhan Quan ("Koh"). Instead, the judge convicted the respondents on a lesser charge of robbery with hurt punishable under s 394 of the PC, with Lim being sentenced to 20 years' imprisonment and 24 strokes of the cane and Koh, 15 years' imprisonment and 20 strokes of the cane. [emphasis added]

5 In particular, it is significant, in our view, that the Court of Appeal characterised the order made below as an order of *acquittal* on the charge of murder, although the court also noted that the trial judge had convicted the accused on a lesser charge of robbery with hurt.

6 The two issues raised in the present proceedings by the situation briefly described above were as follows.

7 Firstly, did this court have the jurisdiction in the present proceedings to even entertain the applications in the first instance? Put another way, was this court *functus officio*, having already heard the substantive merits of the appeal in Criminal Appeal No 2 of 2005 and having decided to allow the Prosecution's appeal against the acquittal of the accused? If so, that would have concluded these proceedings in the respondent's favour simply because this court would not be legally entitled to entertain the applications in the present proceedings in the first instance.

8 Secondly, even assuming that this court had answered the first issue in the affirmative, this would not have concluded the case in favour of the applicants. The first issue would, by its very nature, have been a threshold one of jurisdiction. The second (and further) issue that would arise would be whether or not, assuming that this court had the jurisdiction to hear the applications, the applicants could demonstrate to the satisfaction of this court that the appeal by the Prosecution against their acquittal on the charge of murder, where they had been convicted on a lesser charge, did not fall within the ambit of s 44(3) of the SCJA. If it did not, then this court would, in the earlier proceedings, have been acting without jurisdiction and, consequently, its decision would have been a nullity, and the present applications would have had to be allowed. If, on the other hand, the appeal by the Prosecution did in fact fall within the ambit of that particular provision, then the applications would fail.

9 Section 44(3) of the SCJA reads as follows:

> An appeal by the Public Prosecutor shall be either against *the acquittal of an accused person* or against the sentence imposed upon an accused person by the High Court. [emphasis added]

10 We dismissed the applications and now give the detailed grounds for our decision.

The issue of jurisdiction

11 The respondent argued – not surprisingly, perhaps – that this court did not have the jurisdiction to entertain the present applications in the first instance. In particular, it argued that this court was *functus officio*. It relied, in the process, on a number of decisions of this court (principally, the two decisions cited in this as well as in the following paragraph; see also *Vignes s/o Mourthi v PP (No 3)* [2003] 4 SLR 518 ("the *Vignes* case")). However, it is significant to note at the outset that all these decisions dealt with attempts to re-open the *substantive merits* of the cases concerned. Looked at in this light, it was clear that this court was, in those cases, correct in rejecting those attempts since the courts in those cases were truly *functus officio*. In other words, there was, and could be, no indefinite right of appeal unless this was provided for by statute – in particular, by the provisions of the SCJA. As Karthigesu JA aptly put it in this court in *Lim Choon Chye v PP* [1994] 3 SLR 135 at 137, [8]:

> It did not appear to us that the above two subsections in themselves [s 29A(2) and s 29A(4)] took the applicant's case very far, since there is no indication in them of Parliament's intention to allow an appellant an indefinitely extended right of appeal in the sense of being able to pursue a second appeal even after his first has been duly heard and dismissed. As a matter of procedure, once the Court of Appeal has rendered judgment in an appeal heard by it, it is functus officio as far as that appeal is concerned.

12 And, in a similar vein, Yong Pung How CJ, also in a decision of this court in *Abdullah bin A Rahman v PP* [1994] 3 SLR 129, observed thus (at 132, [10]):

> Where, however, the Court of Appeal has heard and disposed of an appeal, as it has in this on 9 November 1993, it is *functus officio* in so far as that appeal is concerned. There is no express provision which affords the Court of Appeal the jurisdiction to hear fresh evidence, thereby re-opening the case after it has heard and disposed of the appeal. We are unable to agree with Mr Suppiah's [counsel for the accused's] submission that this enabling provision can be found in ss 29(A)(4) or 55(1).

13 However, the situation in the present proceedings was different in this important respect: this court was *not* being asked to re-open the *substantive merits* of its previous decision as such but, rather, was being asked to rule that this court could not even have considered (in Criminal Appeal No 2 of 2005) the substantive merits in the first instance *as it did not have the jurisdiction to do so*. In this regard, it is of the first importance to emphasise that the concept of *jurisdiction* is a *threshold* one inasmuch as it refers to the court's "authority, however derived, to hear and determine a dispute that is brought before it" (*per* Chan Sek Keong J (as he then was) in the leading Singapore High Court decision of *Muhd Munir v Noor Hidah* [1990] SLR 999 at 1007, [19]). The jurisdiction of a court is traditionally distinguished from its powers. As Chan J put it in *Muhd Munir v Noor Hidah* (at 1007–1008, [19]):

> The powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute. The jurisdiction and powers of the High Court are statutorily derived. Whether it has any common law jurisdiction or powers is a question which is not relevant here. A court may have jurisdiction to hear and

determine a dispute in relation to a subject matter but no power to grant a remedy or make a certain order because it has not been granted such power, whereas if a court has the power to grant a remedy or make a certain order, it can only exercise that power in a subject matter in which it has jurisdiction.

14 Whether or not this court had *in fact* the requisite jurisdiction in the *previous* proceedings depended, in turn, on the second main issue in this case: whether or not the proceedings fell within the ambit of s 44(3) of the SCJA. The argument by the respondent, however, was that this court *could not even consider* the ambit of s 44(3) of the SCJA (*viz*, the second main issue) *to begin with* as it was *functus officio*. If the respondent was indeed correct, then *this court would not even be able to consider whether or not it was acting in excess of its jurisdiction in the first instance. If so, and* if it had *in fact* acted *in excess of its jurisdiction,* this court would be *sanctioning a nullity*. This consequence did not appear to us to be principled in the least. If the earlier decision was indeed a nullity for want of jurisdiction, considerations of logic, common sense as well as of justice and fairness would suggest (and almost inexorably at that) that this court should have the jurisdiction and power to rule that this was so. This court would *not*, *ex hypothesi*, be revisiting the *substantive merits* of the case as such. It would, instead, merely be ascertaining whether or not it had had the *jurisdiction* to hear and then rule on the substantive merits of the case in the earlier proceedings in the first instance. This seems to us to be a pivotal distinction which we will therefore have occasion to return to later in this judgment.

15 However, it is also true that this court is a creature of *statute* and that its own jurisdiction and power to determine its own jurisdiction, so to speak, in the manner described briefly in the preceding paragraph ought to be premised, in the final analysis, on statutory authority. It is true that one other alternative is to hold that this court simply has the *inherent jurisdiction*, without more, to rule on its own jurisdiction. However, it seems to us that this approach ought, if applicable, to be itself based on some statutory authority. The invocation of the concept of inherent jurisdiction without more seems to us to (potentially at least) open the door that might lead to perceptions of possible arbitrariness. Even the possibility of such perceptions arising must be assiduously avoided in order that the legitimacy of the law in general and of the courts in particular not be sullied in any way.

16 Given our view that it would appear that this court ought, in principle, logic and fairness, to have the jurisdiction and power to review whether it had acted in excess of its *jurisdiction* in previous proceedings, is there, then, any *statutory authority* for such a view?

17 The logical starting point would, in our view, be to examine the provisions of the SCJA – in particular s 29A sub-ss (2) to (4). In this regard, it would be appropriate to set out the material provisions of this section in full, as follows:

> **Jurisdiction of Court of Appeal**
>
> **29A.**—(1) …
>
> (2) The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.
>
> (3) For the purposes of and incidental to —

(*a*) the hearing and determination of any appeal to the Court of Appeal; and

(*b*) the amendment, execution and enforcement of any judgment or order made on such an appeal,

the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought.

(4) The Court of Appeal shall, for the purposes of and subject to the provisions of this Act, have full power to determine any question necessary to be determined for the purpose of doing justice in any case before the Court.

[emphasis added]

18 It is our view that this court has the jurisdiction and power to entertain the present applications and that the statutory authority for this is to be found in s 29A of the SCJA which has been set out in the preceding paragraph. At this juncture, two related questions arise. The first is whether or not the physical lapse of time between the previous proceedings (in Criminal Appeal No 2 of 2005) and the present take the present proceedings outside the purview of s 29A(2). The second is whether or not, assuming that this first question does not pose any difficulties, this court nevertheless has the power to hear the present proceedings. This second question raises, in our view, the issue as to whether or not the present proceedings fall within the purview of *s 29A(4)*, which has been italicised above (and see *Abdullah bin A Rahman v PP* ([12] *supra* at 132–133, [11]). In so far as the first issue is concerned, if the physical lapse of time does not pose a difficulty, then this court would still be seised of the case (its jurisdiction having been invoked but not exhausted in Criminal Appeal No 2 of 2005) and therefore possess the requisite jurisdiction to hear these proceedings, subject to the power to do so being conferred under s 29A(4). We turn now, therefore, to the issue of the physical lapse of time. The emphasis on the word "physical" is deliberate because a *physical* lapse of time is not – in and of itself – conclusive as we are also dealing with *legal* concepts based on logic, principle as well as justice and fairness.

19 To reiterate, what is involved in the present proceedings are Criminal Motions requesting this court to consider an issue of jurisdiction. These applications *ought, ideally, to have been raised and considered during the hearing of the appeal in Criminal Appeal No 2 of 2005 as a preliminary point of law as they relate to the threshold issue of jurisdiction.* Unfortunately, they were not. This is why the applications are before the court in the present proceedings. *At this juncture, it might be argued that there is no reason in principle why this court should be precluded from considering applications which could clearly have been argued and heard as a preliminary point of law during the hearing of the actual appeal in Criminal Appeal No 2 of 2005*. We find that there is indeed much force in such an argument, unless it could be argued that there was some principle of waiver or estoppel that precluded the applicants from making the present applications. Bearing in mind the fact that the present applications centre on the *jurisdiction* of this court to hear the appeal in Criminal Appeal No 2 of 2005 and *not* the *substantive merits* of the appeal itself, there would appear to be no real reasons of principle as to why the applicants should somehow be estopped or debarred from making the present applications. Indeed, there is clear legal authority that supports the view just proffered. It has been held that a party *cannot* be *estopped* from arguing that the earlier proceedings were conducted in excess of the jurisdiction of the court concerned (see also the following paragraph). We should also point out that there was no bad faith on the part of the applicants. This was an issue that was not obvious at the time Criminal Appeal No 2 of 2005 was heard and, indeed, counsel for the first applicant, Mr Loo Ngan Chor ("Mr Loo"), stated that the applications had been made in these proceedings because of the belated discovery of the Malaysian decision of *PP v Lim Cheng Chooi*

(Federal Court Criminal Appeal No 11 of 1982), which we will be considering later in this judgment (we pause here to observe that counsel for the second applicant, Mr Ismail Hamid, mentioned that he was associating himself with all the arguments made by Mr Loo in the present proceedings). We should also point out that the proceedings arising from the present applications do in fact relate to *an extremely important point of construction centring around s 44(3) of the SCJA, which would have a potentially significant impact on future cases as well*.

20 The concept of jurisdiction (as opposed to that of substantive merits) possesses, we reiterate, a fundamental quality of the highest order. This has been emphasised, time and again, in the case law. Hence, it has been clearly established that where a court or tribunal does not possess the requisite jurisdiction to hear a particular case, neither party can confer the necessary jurisdiction by consent (see, for example, the Singapore Court of Appeal decision of *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR 201 at 211, [51] and *Jumabhoy Asad v Aw Cheok Huat Mick* [2003] 3 SLR 99 at [20] as well as the House of Lords decision of *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808 at 820–821 and 828 ("*Essex County Council*")). It has also been established that the doctrine of estoppel will not operate to prevent a party from pleading a lack of jurisdiction on the part of the lower court on appeal (see the Court of Appeal of the Straits Settlements decision of *Then Kang Chu v Tan Kim Hoe* [1925] SSLR 4; *Essex County Council*, *supra* at 820–821; and Piers Feltham, Daniel Hochberg & Tom Leech, *Spencer Bower – The Law Relating to Estoppel by Representation* (LexisNexis UK, 4th Ed, 2004) at pp 172–173). We would think that the same principle would apply in the context of the present proceedings. The only argument to the contrary would be that the cases cited involved appellate courts hearing arguments on the lower court's alleged lack of jurisdiction, whereas this court is examining the jurisdiction of a court of co-ordinate jurisdiction. However, what is involved at *present* is not the issue of jurisdiction *per se* but, rather, that of *the applicability (or otherwise) of the doctrine of estoppel*. And on this point of *general principle*, the cases concerned clearly establish that the doctrine cannot be pleaded in order to "cure" a decision by a court without jurisdiction – such a decision being, essentially, a *nullity* (see also Lancelot Feilding Everest, *Everest and Strode's Law of Estoppel* (Stevens and Sons Limited, 3rd Ed, 1923) at p 261).

21 It should be noted that although the cases referred to in the preceding paragraph were decided in the context of *civil* proceedings, it would follow, in our view, that the position would be *a fortiori* in so far as *criminal* proceedings are concerned.

22 It would, of course, be a *quite different* issue altogether if the present applications involved, instead, an attempt to adduce *fresh evidence and/or new arguments of law*. This would be an attempt to *re-litigate the substantive merits* of the case and *re-open* a decision that had already been rendered by this court in Criminal Appeal No 2 of 2005. That would, in our view, clearly be *impermissible* as the court would be *functus officio* in so far as the substantive merits of the case were concerned as this very same court had already heard and ruled on the issues associated therewith. On the other hand, it would, by parity of reasoning, be equally clear that *no* ruling had been handed down by *this* court in so far as the issue of *this court's jurisdiction to hear the appeal (viz*, *in Criminal Appeal No 2 of 2005) was concerned*. Looked at in this light, it is our view that this court would *not* be *functus officio* in so far as *this* particular issue (centring on its *jurisdiction* under *s 44(3)* of the SCJA) was concerned. As we have just mentioned, the only conceivable objection would be that this issue ought to have been taken *earlier* as *a preliminary point of law*. *However*, as we have already pointed out above, such an objection from estoppel *cannot* succeed in circumstances where the issue relates to the court's very *jurisdiction* itself.

23 Having regard to our analysis set out above, it is clear, in our view, that the present proceedings, which ought to have constituted *an integral part of* the *previous* proceedings in Criminal

Appeal No 2 of 2005 *and* to which no legal obstacle (principally by way of estoppel) lies in so far as it is being raised before the present court, means that this court remains properly seised of the present case in so far as the question of *jurisdiction* is concerned. In so far as whether or not this court has the requisite *power*, this would depend on whether or not the present proceedings fall within the scope of s 29A(4) of the SCJA (set out above at [17]). In our view, these proceedings in fact *fall squarely within the language and spirit of s 29A(4)*. Indeed, to find otherwise would be to effect the very *opposite* of what we view to be the core purpose and mission of s 29A(4) – which is to "have *full power* to *determine any* question *necessary to be determined* for the purpose of *doing justice*" [emphasis added].

24 In our view, it is clear beyond peradventure that the issue as to whether or not this court had the requisite *jurisdiction* to even hear the substantive merits in *Criminal Appeal No 2 of 2005* is a "question necessary to be determined for the purpose of doing justice". This would be the situation in a civil appeal; it is, *a fortiori*, the case in a *criminal* appeal involving a final appellate court where life and liberty are at stake. Indeed, we can conceive of very few other situations that would be as, let alone more, important than the one with which we are faced with in the present proceedings.

25 There are, however, two further (and related) issues in so far as s 29A(4) is concerned. First, our power under s 29A(4) must be exercised "for the purposes of and subject to the provisions of" the SCJA. Second, the present proceedings must constitute a "case before the Court" within the meaning of s 29A(4).

26 It is our view that we would, in considering the present applications, be exercising our power under s 29A(4) "for the purposes" of the SCJA. This is evident from our analysis set out above.

27 It is also our view that we would be exercising our power under s 29A(4) "subject to the provisions" of the SCJA since we would not be ignoring any applicable provisions of the Act in any way.

28 Finally, it is our view that the present proceedings do indeed constitute "a case before the Court" within the meaning of s 29A(4) of the SCJA and as emphasised by this court in *Abdullah bin A Rahman v PP* ([12] *supra* at 132–133, [11]). As we have elaborated upon in some detail above (at [18]–[23]), the present proceedings were, in substance, an *integral part* of the proceedings before this court in Criminal Appeal No 2 of 2005. As we have found that there is no objection in law to such proceedings being heard now, it is clear that these proceedings do continue to constitute "a case before the Court" and hence fall clearly within the scope of s 29A(4).

29 It is important to emphasise that the present decision is not a *carte blanche* for this court to review its previous decisions when it is truly *functus officio*. In particular, this court has neither the jurisdiction nor power to review the substantive merits of the case; indeed, this much is clear from the existing case law. In contrast, in the present proceedings, we are concerned with *s 44(3) of the SCJA* – that particular provision being, in both substance and form, concerned (as the heading of s 44 itself confirms) with the criminal *jurisdiction* of this court. For the avoidance of doubt, the decision in the present case is confined to the *precise question* of whether this court has the jurisdiction and power to consider if the earlier court had the *jurisdiction* to entertain the appeal before it. In the circumstances, we would respond to this question in the *affirmative* for the reasons set out above.

30 Indeed, to have held otherwise would have been to sanction, both in form as well as substance, a decision which might have been a *nullity*. Surely, if there was even the *possibility* of this result (*ie*, a decision that was a *nullity*) occurring, this court ought to have the jurisdiction and power to consider the issue – lest the legitimacy of the law be undermined from any and every point of view.

In the event, as we explain below, the decision of this court in Criminal Appeal No 2 of 2005 was *not* a *nullity*. However, we reiterate that the fact that it *might* have been is *itself* a legitimate reason for exercising our jurisdiction and power to consider the matter. As we have also mentioned above, the issue itself has potential wide-ranging effects on future cases as well.

31 The only possible problem that might arise is if similar challenges to this court's jurisdiction are mounted too liberally and (worse still) vexatiously. We do not, however, consider this to be a serious objection when viewed from a practical perspective. Firstly, we do not envisage that there would be many situations where issues relating to the jurisdiction of this court would be raised. Secondly, as we have already alluded to above, even the possibility that this court might have exceeded its jurisdiction is a serious matter – and all the more so in the context of criminal proceedings. Thirdly, and following from the previous point, if the issue of jurisdiction raised is considered to have been raised frivolously or vexatiously or when the issue has become moot, sanctions can be imposed on the lawyers concerned, including (but not limited to) the making of an appropriate order as to costs. In the interests of justice, however, we would state that the conduct of a case would have to be really beyond the pale in order to be considered to constitute frivolous or vexatious conduct.

32 As we have held that s 29A of the SCJA applies in the context of the present proceedings, it is not, strictly speaking, necessary to consider other possible alternative sources which might confer jurisdiction and power on this court to hear applications such as the ones before us.

33 We therefore hold that we have the jurisdiction and power to consider the applications centring on the jurisdiction of this court in the present proceedings. The argument that we are *functus officio* does not, as we have explained above, apply in the specific context and circumstances of these proceedings.

The meaning of the phrase "the acquittal of an accused person" under section 44(3) of the SCJA

34 Turning to the second issue, the question in a nutshell was whether or not the circumstances of the present proceedings, where the applicants had been convicted instead of a lesser offence, fell outside the ambit of s 44(3) of the SCJA because there had not (in the material language utilised in this provision) been "the acquittal of an accused person". The issue itself would appear somewhat odd, or even misconceived, at first blush. Given the context of the hearing before the trial judge (see [2]–[3] above) as well as that before the Court of Appeal (see [4]–[5] above), it seemed clear to us that the applicants must *necessarily* have been *acquitted* of the original charge of murder although they were convicted of the lesser charge of robbery with hurt. If so, then they would fall squarely within the ambit of s 44(3) itself.

35 Mr Loo, however, argued otherwise. In particular, he argued that the applicants had in fact been *convicted* of the charge of robbery with hurt and that *that* was what the respondent had appealed against. In the circumstances, therefore (so the argument ran), the respondent's appeal fell *outside* the language and scope of s 44(3) of the SCJA inasmuch as the respondent was entitled only to appeal against the *acquittal* of the applicants. In this regard, we accepted that the other possible limb of s 44(3) did not apply since the respondent had clearly not appealed against the sentence imposed upon the applicants by the trial judge on the charge of robbery with hurt.

36 At least two broad (and related) issues arise as a result of the argument embodied in the preceding paragraph. The first is whether or not, as a matter of both *logic and principle*, it is persuasive. The second – and related – issue is this: Even if the argument is persuasive at first blush,

is it consistent with the *legislative intention* underlying the provision itself?

37 We turn now to the first issue. As we have already mentioned, it was clear not only to us but also to the trial judge as well as this court in the earlier proceedings that the applicants had been *acquitted* of the original charge of murder. The fact that they were convicted of the lesser charge of robbery with hurt does *not* detract from the fact that they were *acquitted* of the charge of *murder*. At no time did the respondent apply to the court to drop the original charge of murder and substitute a lesser charge instead. As it happened, the trial judge decided to acquit the applicants of the charge of murder and convict them of the lesser charge of robbery with hurt instead.

38 However, Mr Loo argued that the approach we adopted in the preceding paragraph was incorrect as it ignored the words "of an accused person" in s 44(3) of the SCJA. In essence, he argued that the accused persons (the applicants in the present proceedings) were not acquitted but were, rather, convicted – albeit of the lesser offence of robbery with hurt; in the circumstances, the respondent (so the argument went) was in effect appealing against the conviction of the applicants on the lesser charge of robbery with hurt. With respect, we cannot accept this argument.

39 The words "of an accused person" in s 44(3) are part of the phrase "the acquittal of an accused person". Further, both the aforementioned phrases only make sense *when they are viewed in relation to the charge or charges concerned.* In other words, the phrases "of an accused person" or "the acquittal of an accused person" cannot be viewed merely in the abstract. Put simply, "the acquittal of an accused person" must relate to an acquittal of that person *in relation to a particular charge or set of charges*. It is clear, in our view, that the applicants in the present proceedings *were* indeed *acquitted* of the charge of murder. It is true that they were *also convicted* of the lesser charge of robbery with hurt, but *that* was *not* what the respondent had *appealed against*. The respondent had clearly appealed against the *acquittal* of the applicants on the charge of *murder*. In any event, the words "of an accused person" do not, in our view, add anything to the concept of "acquittal" for it is clear that the concept of "acquittal" *must necessarily relate to the acquittal "of an accused person"*.

40 The applicants' argument might have been persuasive if, in our view, it could be said that the original charge of murder under s 302 read (in the circumstances) with s 34 of the Penal Code had somehow "*merged*" into the conviction of the accused under the lesser charge of robbery with hurt under s 394 of the same Act. This was certainly *not* the view that the Court of Appeal took in Criminal Appeal No 2 of 2005. Indeed, this was how the court put it in the concluding words of its judgment ([4] *supra* at [63]):

> In the result … we *set aside* the conviction of the respondents of the lesser charge of robbery. *Instead*, we *convict* the respondents on *the original charge of murder under s 302, read with s 34, of the PC* which carries with it the mandatory death penalty. [emphasis added]

41 We are, in fact, of the view that, from the perspectives of both logic and common sense, this argument from "merger" is untenable. The charges under ss 302 and 394 of the Penal Code (for murder and robbery with hurt, respectively) were *separate and distinct*; they could *not* be said, by any stretch of the imagination, to have "merged". As we have already held, the accused were in fact *acquitted* of the original charge of murder and, instead, convicted of the lesser offence of robbery with hurt. *That* was, in substance, the fate of the original charge of murder at first instance; it would be ludicrous, in our view, to argue that this charge had somehow "dissolved" or "merged" into the lesser charge. Indeed, Mr Loo stated clearly that he was *not* relying on this particular argument.

42 We should observe that such case law as appears relevant (for we were unable, not

surprisingly perhaps, to locate a decision directly on point) is wholly consistent with the approach which we have adopted.

43 In the Indian Privy Council decision of *Kishan Singh v Emperor* AIR 1928 Privy Council 254 ("*Kishan Singh*"), for example, the Board had to consider a situation where the accused was charged with the offence of murder but was convicted of a lesser offence instead, and was sentenced to a term of imprisonment (a situation similar to that which obtained in the present proceedings). The High Court of Judicature at Allahabad, acting in its power of *revision*, directed that the conviction of the accused be altered to that of murder instead and sentenced the accused to death. The Judicial Committee of the Privy Council reversed the High Court's decision simply because the latter tribunal was *prohibited by an express statutory provision* from exercising its powers, in *revision*, to convict the accused of the original charge of murder and, in doing so, was acting *without jurisdiction*. The provision in question was s 439(4) of the then Criminal Procedure Code, which read as follows:

> Nothing in this section applies to an entry made under S. 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. [emphasis added]

44 In order for the provision quoted in the preceding paragraph to apply, it is clear that the High Court must have been taken to have *acquitted* the accused of the original charge of murder and convicted him of the lesser offence instead (of culpable homicide not amounting to murder). If, however, Mr Loo's arguments are correct, such arguments would apply equally to a situation such as that which existed in *Kishan Singh* (which, significantly, also concerned a situation where the trial judge did not convict the accused on the original charge of murder but convicted the accused on a lesser charge instead). *However*, the Board clearly proceeded along lines similar to that which we have adopted in the present proceedings. Sir Lancelot Sanderson, delivering the judgment of the Board, observed thus (at 255):

> The learned [trial] Judge did not *record an express finding of acquittal in respect of the charge of murder*, but their Lordships are of opinion that the conclusion at which the learned Judge arrived *amounted to an acquittal in respect of that charge* [of murder].
>
> The only charge framed against the appellant [the accused] was one of murder; *he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.*
>
> *The appeal* [in the present case], *therefore, must be decided upon the assumption that the appellant was acquitted of the charge of murder, and that he was convicted of the offence* [of culpable homicide not amounting to murder.]
>
> [emphasis added]

45 This particular holding in *Kishan Singh* was applied in the Indian Supreme Court decision of *Tarachand Damu Sutar v The State of Maharashtra* AIR 1962 Supreme Court 130. One of the issues that arose in that case was whether the appellant (who was the accused) had the right of appeal to the Indian Supreme Court under Art 134(1)(a) of the Indian Constitution and the decision on that issue depended upon the construction of that Article, the relevant part of which read as follows:

> 134(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court —
>
> (a) has on appeal *reversed* an order of *acquittal* of an accused person and sentenced

him to death.

[emphasis added]

46 Kapur J, on behalf of himself and K Subba Rao and J C Shah JJ, observed thus (at [5]):

> *The argument on behalf of the State* was that the word "acquittal" meant *complete* acquittal. The decision of this must depend on the construction of the word "acquittal". If a person is acquitted of the offence charged and is convicted of a lesser offence, as in the present case, can it be said that he was acquitted and the High Court had on appeal reversed the order of acquittal? *In our opinion the word "acquittal" does not mean that the trial must have ended in a complete acquittal of the charge but acquittal of the offence charged and conviction for a minor offence (than that for which the accused was tried) is included in the word "acquittal"*. This view has the support of a judgment of the Judicial Committee of the Privy Council in *Kishan Singh* v. *Emperor*. [emphasis added]

In the view of Kapur J, therefore, the appellant was entitled to a certificate under Art 134(1)(a) of the Indian Constitution as a matter of right and the appeal had to be treated as if it were under that provision of the Constitution.

47 Significantly, the minority judges in this case, Raghubar Dayal and Hidayatullah JJ, agreed with the majority judges above on this particular issue (see at [11]).

48 Although the Scottish High Court of Justiciary in *H M Advocate v Boyle* 1993 SLT 1079 dealt with different statutory provisions under the Criminal Procedure (Scotland) Act 1975 (c 21), Lord Justice General Hope, who delivered the judgment of the court, expressed the following view with regard to a situation where the accused had also been convicted of culpable homicide instead of the original charge of murder (at 1083):

> We agree with counsel for the respondent [who was the accused in the present proceedings] that *by convicting the respondent of culpable homicide the jury at the previous trial were by implication acquitting him of the charge of murder*. [emphasis added]

49 The *general principle* embodied in the above quotation (*viz*, that of *implied* acquittal where the accused is convicted, instead, of a lesser offence) is consistent – indeed, coincident – with the approach we have adopted in the present proceedings.

50 Finally, and somewhat closer to home as it were, the Court of Appeal of the Federated Malay States decision of *Nawi bin Buyong v Public Prosecutor* [1936] MLJ 57 may be briefly noted. In this case, the accused was charged with murder but there being a disagreement between the two Assessors, the trial judge convicted, wrongly, in the Court of Appeal's view, the accused of a *lesser* offence *instead*. In the event, the Court of Appeal held that the accused ought to be re-tried before another judge on the original charge of murder. *Kishan Singh* was *distinguished* as that was a case involving *revision*, for which (as we have seen) there was an express statutory provision proscribing the conversion of a finding of acquittal into one of conviction on *revision*. In the present case, there was no such statutory impediment. In the event, it was held that the accused could be re-tried on the original charge of murder because (*per* Burton Ag CJ (Straits Settlements) at 58), "[t]he *acquittal* on the charge of *murder*, *whether express or implied*, is merely part of the erroneous order [made by the trial judge] and stands or falls with it" [emphasis added]. Cussen J also observed (at 59) thus:

> The relevant Indian decisions on this point … are that in a case such as the present where an

accused person has been tried on a charge of murder *and acquitted on that charge but convicted on a lesser charge* such as culpable homicide not amounting to murder or grievous hurt and he appeals against that conviction, then the Court of Appeal has jurisdiction to order a retrial and such order, unless so expressly limited, is an order to retry on the original charges. The first trial is set aside and cancelled and the proceedings commence *de novo* with the original charges, unless the prosecution decides at the retrial to proceed on a reduced charge. [emphasis added]

51 Once again, we find that, in a situation where the accused is charged with a more serious offence and is later convicted of a lesser offence, he or she is *necessarily* treated as having been *acquitted* of the *former* and convicted of the latter.

52 Mr Loo argued that these decisions focus on the meaning of the concept of "acquittal" rather than the phrase "the acquittal of an accused person", which is in fact the phrase utilised in s 44(3) of the SCJA. We have dealt with this particular argument above (at [37]–[38]), and will therefore not rehearse the arguments again here.

53 Mr Loo also cited the Malaysian Federal Court decision of *PP v Lim Cheng Chooi* ([19] *supra*) which we understand was the major catalyst for the initiation of the present proceedings. Unfortunately, however, it appears that no written judgment was delivered in that case and the precise basis for that decision is, as a consequence, unclear. We therefore do not find that it aids the applicants' case in the present proceedings.

54 Whilst we note that there have been legislative amendments to s 50 of the Malaysian Courts of Judicature Act 1964 (Act 91) (the analogue of s 44 of the SCJA) to confer on the Public Prosecutor an almost unfettered right of appeal, this does not impact on our construction of s 44(3) of the SCJA, which takes into account not only the language utilised therein but also the legislative intention – all in accordance with the basic guiding tenets of logic, common sense as well as justice and fairness.

55 We turn now to the *legislative intention* behind s 44(3) of the SCJA. Section 44(3) was originally introduced by the Supreme Court of Judicature (Amendment) Act 1973 (No 58 of 1973). During the Second Reading of the Bill, the then Minister for Law and National Development, Mr E W Barker, gave the rationale underlying the introduction of this particular provision, as follows (see *Singapore Parliamentary Debates, Official Report* (30 November 1973) vol 32 at col 1333):

> Sir, the Bill seeks to introduce certain amendments to the Supreme Court of Judicature Act (Chapter 15) in order to enable the Public Prosecutor to appeal against judgments of the High Court made in the exercise of its original jurisdiction.
>
> As the law now stands, the Public Prosecutor is only empowered to refer points of law to the Court of Criminal Appeal for the Appellate Court's review and, where a person has been acquitted by the High Court, only a declaratory judgment of the Court of Criminal Appeal may be sought which will not have the effect of reversing the order. Furthermore, there can be no appeal by the Public Prosecutor in respect of sentence imposed.
>
> *Whereas there are these restrictions on the Public Prosecutor, there are no corresponding restrictions on the accused person* who, upon conviction by the High Court, is entitled as of right to take his case on appeal to the Court of Criminal Appeal; and in every case where he is dissatisfied with the sort of punishment meted out on him by the Court, lodge an appeal against sentence. *In order to correct this imbalance as it were, the changes contemplated by the Bill have been introduced.*

In practice, it is not envisaged that there would be many such appeals. Nevertheless, there is a need to allow the Public Prosecutor in any given case, a freer hand than the law now allows, so that he would be in the same position, not less nor more advantageous than counsel for the defence, in regard to exercising a discretion whether to appeal against an order of the High Court or not.

[emphasis added]

56 We accept counsel for the respondent's argument to the effect that counsel for the applicants' interpretation of the phrase "the acquittal of an accused person" in s 44(3) of the SCJA would be wholly contrary to clear legislative intent as embodied in the Minister's views which are set out in the preceding paragraph. Indeed, if this interpretation is accepted, the ability of the Public Prosecutor to appeal against a particular decision of the trial judge would depend upon whether or not the trial judge either acquitted the accused totally or convicted the accused on a lesser charge (which was the situation we were concerned with in the present proceedings). The "imbalance" referred to by the Minister would not only remain but would also be subject to what the trial judge decides to do.

57 Finally, we note that Mr Loo *stated expressly* that he did *not* associate himself with the arguments made in a recent article (see K S Rajah, "Appeal or Tried Again?", *The Singapore Law Gazette* (January 2006) at p 29). Mr Ismail Hamid, on behalf of the other applicant, did not take a different position. This is understandable for, with respect, the arguments in that article were not persuasive and (more importantly) did not focus at all on the more salient issues of jurisdiction which were, in our view, directly germane to the case at hand (centring, as they did, on, *inter alia*, the construction of s 44(3) of the SCJA, *itself* a statutory provision dealing with the criminal *jurisdiction* of this court). Most importantly, however, that article dealt with constitutional issues that ought, if at all, to have been part of the *substantive merits* of this case (reference may also be made, for example, to the *Vignes* case ([11] *supra*)). In other words, these issues did not touch on the *jurisdiction* of this court to hear the case in the first instance. As we have been at pains to emphasise (at [22] and [29] above), this court could *not* review the substantive merits of this case, as it was, in this important respect, *functus officio*.

Conclusion

58 In summary, we hold that this court had the jurisdiction and power to inquire into whether it had the jurisdiction to entertain the appeal in the earlier proceedings in Criminal Appeal No 2 of 2005. However, we reiterate that this holding is confined to the precise issue before us (see, in particular, [29] above) and should not be taken as giving an even limited licence, let alone a *carte blanche*, for applications inviting this court to review its previous decisions in situations where it is *functus officio*. A clear situation of this would be when the substantive merits of the case have already been reviewed and ruled upon by this court.

59 We also hold that the facts of the present case nevertheless fell squarely within the purview of s 44(3) of the SCJA and that the respondent was therefore entitled to appeal against the decision at first instance to acquit the accused (the applicants in the present proceedings) of the charge of murder.

60 In the premises, therefore, we dismissed the applications in the present proceedings.