

HJ MUHAMMAD SUFFIAN BIN HJ BUNGSU
JONATHAN KHO CHEW SEN

1st Applicant/1st Appellant
2nd Applicant/ 2nd Appellant

AND

PUBLIC PROSECUTOR

Court of Appeal of Brunei Darussalam
(Criminal Motion No. 2 of 2026)

Before: Steven Chong, C.J., Lunn and Sir Peter Gross JJA

Date of Hearing: 11th June, 2026.

Date of Judgment: 18th June 2026.

Criminal Law Procedure-application granted: leave to file certificate with Court of Appeal, s. 291A(1)(b), Criminal Procedure Code, Cap.7; Judges decision in appeal by PP from Order of acquittal by Chief Magistrate involved point of law desirable in public interest to be determined by Court of Appeal.

Applicants were employees of RTB; acquitted by Chief Magistrate of Charges under s.6 Prevention of Corruption Act, Cap 131: A1-s.6 (a) (corruptly accepting gift); A2-s.6(b) (corruptly receiving gift) in relation to principal's affairs and of alternative offences, contrary to s.165 of Penal Code, Cap 22.

Judge determined CM's misdirection re. presumption under s .25 of PCA - gift given and received corruptly as inducement or reward as alleged; failed to rule on rebuttal of presumption on balance of probabilities. Appeal allowed: acquittal quashed and retrial ordered.

Court of Appeal: point of law desirable in public interest to be determined by Court of Appeal. arising-having determined CM misdirected herself in respect of s. 25 presumption was Judge required to consider whether that occasioned "miscarriage of justice" or "failure of justice" (s.371 CPC). before quashing acquittal and making consequential orders? What issues was

Judge required to address? What, if any, findings were Judge required to make in respect of those issues?

Mr. Roy Prabhakaran and Mr. Kamal Shaari (Messrs. Yusof Halim & Partners) for the 1st and 2nd Applicants.

DPP Nurul Fitri Kiprawi for the Respondent.

Cases cited:

Goshal & Othrs. v State of Bihar & Anor. CA 119-122 of 2017.

PP v Takaai Masui [2021] SGCA 119 at paragraph 29.

Lunn. J.A.:

1. By Notice of Motion, dated 29th January 2026, the 1st and 2nd Applicants apply that time be extended or abridged for a Certificate of Criminal Reference, pursuant to section 291A of the Criminal Procedure Code, Cap. 7, to be signed and filed with the Registrar that the decision of the High Court, in the Judgment of Hj. Abdullah Soefri Bin POKPSM DSP Hj. Abidin JC, delivered on 22nd October 2025, involves a point of law which is desirable in the public interest to have determined by the Court of Appeal.

2. The Respondent opposes the application: first, on the basis that the application is out of time and that the Applicants have offered no adequate reason for delay; secondly, that the Applicants have not demonstrated that there is an arguable case on a point of law, resolution of which is desirable in the public interest.¹

Appeal to the Judge

3. The proceedings before Abdullah JC was an appeal by the Prosecution, pursuant to section 271 of the Criminal Procedure Code, Cap. 7² against the Judgment, after trial, of the Chief Magistrate, Pg Hjh Norismayanti binti Pg Hjh Ismail, dated 6th March 2025, in which she acquitted the Applicants of separate charges of corruptly accepting (the 1st Applicant, Hj. Suffian) and of corruptly giving gifts (the 2nd Applicant, Jonathan Kho) a Mercedes motorcar, on or about 17th July 2014, as an inducement or reward in relation to their principal's affairs, contrary to section 6 (a) and

¹ Respondent's Submissions in Reply, dated 21 May 2026, at paragraph 4.

² Section 271: "appeal to the High Court against such judgment, sentence or order for any error in law or in fact".

section 6 (b) respectively of the Prevention of Corruption Act, Cap. 131 and, by the same conduct, in the alternative of respective separate charges of committing an offence contrary to section 165 of the Penal Code, Cap. 122.

4. In their appeal to the Judge, the Prosecution advanced no fewer than ten Grounds of Appeal, including that the Chief Magistrate had misdirected herself as to the elements of the offences under section 6 (a) and section 6 (b) of the Prevention of Corruption Act, in particular in respect of the presumption provided by section 25 of the Act. In their written submissions to the Judge, the Prosecution submitted that the acquittals were unsafe and invited the Judge to reverse the acquittal, convict them of the offences contrary to section 6 (a) and section 6 (b) of the Prevention of Corruption Act and pass sentence.

5. The Applicants supported the findings of the Chief Magistrate and simply invited the Judge to dismiss the appeal, without addressing the specific final submissions of the Prosecution as to how the Judge should proceed or the other powers available to the Judge, pursuant to section 284 of the Criminal Procedure Code.³

Judgment

6. In his Judgment, Abdullah JC allowed the Prosecution's appeal, quashed the Chief Magistrate's orders of acquittal and ordered a retrial of the Applicants on the same charges. In doing so, he said that the question that should be considered was whether the Chief Magistrate had misdirected herself on the operation of the presumption, provided by section 25 of the Prevention of Corruption Act.⁴ Of the operation of the presumption, the Judge said that it required the Prosecution, "to prove the accused gave or accepted gratification before the presumption is triggered". Having noted that section 2 of the Act provided that "gratification" includes, "(a) money or any gift, loan, fee, reward, valuable security or other property or interest in property of any description, whether

³ Section 284: In an appeal from an order of acquittal, the High Court may-

- (a) dismiss the appeal;
- (b) direct that further inquiry be made or order a new trial on the same or an amended charge; or
- (c) find the accused guilty of any offence of which the lower court might have convicted him and pass sentence on him according to law."

⁴ Section 25: "Where in any proceedings for an offence under this Act, it is proved that the accused gave or accepted a gratification, the gratification shall be presumed to have been given and accepted corruptly as such inducement or reward as is alleged in the particulars of the offence, unless the contrary is proved.

movable or immovable”, the Judge said that it was not disputed that the 1st Applicant had accepted a Mercedes car from the 2nd Applicant, for which the latter had paid.⁵

7. The Judge said that it was not the case, as the Chief Magistrate had stated, that the presumption was triggered, “...once the elements of the charges are established.” He noted that the Chief Magistrate’s Judgment, “does not reflect that the burden has shifted to the Defendant”. Further, “she did not make any decision to rule that the Defendant has rebutted the presumption on balance of probabilities.” That question remained unanswered.⁶ On the contrary, the Chief Magistrate said simply, “...the court concludes that the Prosecution has failed to establish a case against both Defendants beyond reasonable doubt.” In the result, the Judge determined:⁷

“Having analysed the judgment, I am satisfied that the Chief Magistrate has misdirected herself on the section 25 and has failed to decide whether the Respondents has successfully rebutted the presumption on balance of probabilities after it is triggered.”

The application

(i) Affidavit in Support

8. A draft Certificate of Criminal Reference was exhibited to the ‘Affidavit in Support’ filed with the High Court Registry on 29th January 2026 on behalf of the Applicants by Mr. Roy Prabhakaran. It posed two Questions of law. In that affidavit, it was asserted that in the absence of the provision of written Grounds of Judgment, which had not then been provided by the Registrar, Mr. Prabhakaran was, “unable to fully advise the Applicants on the Appeal”.⁸ In consequence, the Applicants were unable to comply with the one month deadline for filing a certificate.

9. Nevertheless, it was asserted that, subject to the provision of written Grounds of Judgment, on the basis of the oral delivery of Judgment it was apparent that, having determined, “*the legal directions by the trial magistrate were erroneous*” the Judge had, “*proceeded to set aside the acquittal and order a retrial without considering whether the correct legal directions would nevertheless lead to the same outcome of acquittals and without applying the correct legal directions*

⁵ Judgment at page 4.

⁶ Judgment at page 4.

⁷ Judgment at page 5.

⁸ Affidavit in Support at paragraph 5.

to the undisturbed findings of fact in order to discover if the acquittals were unsafe.”⁹ On that basis, two Questions of law had been identified and posed in the draft Certificate of Criminal Reference.¹⁰

Further Affidavit in Support

10. In a ‘Further Affidavit in Support’, filed with the High Court Registry on 16th May 2026, Mr. Roy Prabhakaran stated that written Grounds of Judgment and Notes of Proceedings had been received by the Applicants on 16th April 2026 and 7th May 2026 respectively.¹¹ In consequence, Mr. Prabhakaran said that a third point of law, which it was desirable in the public interest for the Court of Appeal to determine, had been identified and posed as a third Question of law on the amended draft Certificate of Criminal Reference.

11. The draft Amended Certificate of Criminal Reference stated:

Pursuant to section 291 of the Criminal Procedure Ordinance (Cap.7), the Registrar hereby certifies that the decision of the High Court involves points of law which it is desirable in the public interest to have determined by the Court of Appeal, being: -

Question 1:

Upon an appellate finding of a legal misdirection by the trial magistrate, must the appellate Judge then apply the correct legal principle to the undisturbed findings of fact to ascertain if the eventual verdict is nevertheless safe despite the legal misdirection?

Question 2:

Must a case be sent for retrial following a legal misdirection by the trial magistrate even if the correct application of law would have led to the same verdict?

Question 3:

Upon an appellate court finding that there is an error or misdirection in law, can the said court proceed to set aside an acquittal without a finding that the error or misdirection has occasioned a failure of justice?

⁹ Affidavit in Support at paragraph 5.

¹⁰ Affidavit in Support at paragraph 8.

¹¹ Further Affidavit in Support at paragraph 3.

Applicants' submissions

(i) Delay in filing the application

12. In the Applicants' written Submissions, dated 8th April 2026, it was contended that, notwithstanding the conclusion reached by counsel for the Applicants following the oral Judgment that, "there appeared to be sufficient points of law" the resolution of which it was desirable in the public interest to have the Court of Appeal determine, nevertheless it was necessary to obtain a written copy of the Grounds of Judgment, "to properly articulate and frame the material and relevant questions of law."¹²

Requests for written Grounds of Judgment

13. The Applicants wrote to the Chief Registrar, dated 28th October 2025, requesting a written version of the Judgment in order to advise the Applicants and seek their instructions. In further letters to the Chief Registrar, dated 22nd November 2025 and 6th January 2026, in which reference was made to the earlier requests, the request was repeated.

14. In his oral submissions at the hearing, Mr. Prabhakaran said that he and Mr. Kemal had been present at the oral delivery of Judgment, but neither had taken notes. At the time, they had thought it better to wait for provision of the written Judgment before taking a point of law of public interest. He acknowledged that, in hindsight, it would have been better to have filed the application and then to have sought to amend it, if necessary. Mr. Kemal said that it was his experience that, if the written Judgment was not made available on the day it was handed down, it was provided within a few days thereafter.

Retrial: Summons to an Accused Person

15. Subsequent to the letter, dated 6th January 2026, the Applicants were informed that they were required to attend the Magistrates Court on 5th February 2026 in respect of the retrial proceedings. Exhibited to Mr. Roy Prabhakaran's affirmation, dated 8th April 2026 was a Summons to an Accused Person, dated 6th January 2026, in respect of the 1st Applicant.

Section 291 application

¹² Applicants' Submissions at paragraph 10.

16. It was contended that in consequence, in order to secure a hearing of an application pursuant to section 291 prior to the commencement of retrial proceedings, a Notice of Criminal Motion was filed with the Registry on 29th January 2026, seeking, "...an order that time be extended or abridged by the Court of Appeal for the Certificate of Criminal Reference to be signed and filed with the Registrar in respect of High Court Criminal Appeal No. 4 of 2025."

17. The Court was informed that an adjournment of the proceeding to the Magistrates Court had been secured at the hearing on 5th February 2026, pending the disposal of this application.

(ii) Questions of law of public interest

- *Question 1 and Question 2: Judge required to determine if there is a miscarriage of justice*

18. It was submitted that Question 1 and Question 2 were questions of law and not fact and were of public interest¹³. Following a finding of a legal or factual misdirection at First Instance, an Appellate Court is required, "to apply correct legal principles to the undisputed facts to determine whether any miscarriage of justice has occurred as a result of the misdirection."¹⁴ Having found that the Chief Magistrate had, "misdirected herself on the section 25", the Judge did not consider whether the consequence was that it had, "rendered the trial verdict unsafe".¹⁵

Retrial

19. The Judge had ordered a retrial immediately, without considering, "whether a retrial is fair under the circumstances."¹⁶ To do so in those circumstances, was inconsistent with that requirement. In his oral submissions, Mr. Prabhakaran said that the Judge had never invited the Applicants to address the issue of whether it was appropriate to order a retrial, in particular given that there had been considerable delay in proceedings from the commission of the events the subject of the charges in July 2014.

Section 438D: no miscarriage of justice

¹³ Applicants' Submissions at paragraphs 19 and 20.

¹⁴ Applicants' Submissions at paragraph 28.

¹⁵ Applicants' Submissions at paragraph 31.

¹⁶ Applicants' Submissions at paragraph 31.

20. Although section 438D (1) of Chapter XLIVA of the Criminal Procedure Code, ‘Appeals by Public Prosecutor’, provides that the Court of Appeal shall allow an appeal by the Public Prosecutor under section 438A in stipulated circumstances, including if it thinks that, “there was a material irregularity in the course of the trial”, nevertheless section 438D (2) provides that the Court, may dismiss the appeal: ¹⁷

“...if it considers that, notwithstanding the points raised in the appeal might be decided in favour of the Public Prosecutor, no miscarriage of justice has actually occurred.”

21. The Judge’s determination that the Chief Magistrate erred in stating that the presumption provided by section 25 of the Prevention of Corruption Act was operative, “once the elements of the charges are established”¹⁸, rather than on it being, “proved that the accused accepted or gave a gratification”, albeit a finding of a misdirection was to be viewed in the context of the fact that the Chief Magistrate ruled that there was a *prima facie* case to answer.¹⁹ That required calling the defence. Of that it was contended, “Hence no miscarriage of justice had happened because the outcome had been the same notwithstanding the legal misdirection, i.e. the calling of the defence.”²⁰

- *Question 3*

Irregularities not to vitiate proceedings: section 371

22. Section 371, *Chapter XXXIX* of the Criminal Procedure Code, *Irregularities in proceedings*, provides that:

“...no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of-

(a) any error, omission or irregularity in the... judgment or other proceedings before or during trial...

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection *has occasioned a failure of justice.*”

¹⁷ Applicant's Submissions, at paragraph 28.

¹⁸ Chief Magistrate’s Judgment, paragraph 101.

¹⁹ Applicants’ Submissions at paragraph 30.

²⁰ Applicants’ submissions at paragraph 30.

23. It was submitted that the Judge failed to consider whether there had been a failure of justice. Regard to that issue would have resulted in a determination that the verdict was nevertheless safe despite the misdirection.²¹ In consequence, “the acquittal would not have been disturbed and no retrial would have been ordered.” The Judge’s finding that there was an error by the Chief Magistrate with respect to section 25 of the Act, without a corresponding finding that it occasioned a failure of justice, gave rise to a question of law, which it was desirable in the public interest for the Court to determine.²²

Retrial

24. In his oral submissions, Mr. Prabhakaran submitted that the Judgment of the Supreme Court of India in *Goshal & Othrs. v State of Bihar & Anor.*²³, in which the Court had quashed the Appellate Court’s orders, provided guidance as to the requirements before an Appellate Court may order a retrial. There, the Supreme Court considered the powers of an Appellate Court to order retrial, pursuant to section 386 of the Indian Criminal Procedure Code. In doing so, the Appellate Court had a duty to consider whether the irregularities, described as “lapses”, “have actually resulted in failure of justice.”²⁴

25. The Appellants had been tried, convicted and sentenced to 10 years’ imprisonment on various charges. Having found that at trial there were lapses in the Prosecution case, in respect of which the trial court had failed to take appropriate action, the High Court of Judicature at Patna set aside the convictions and sentences and remitted the matter to the trial court to proceed afresh.²⁵

26. In its Judgment, the Supreme Court said that the First Appellate Court had a duty, “to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affect the prosecution case; or such lapses have actually resulted in failure of justice.” Having pointed out the lapses, the Appellate Court had not stated, “how such alleged lapses has resulted in miscarriage of justice necessitating retrial,”²⁶ the Court determined that, “the High Court erred in remitting the matter back to the trial court for fresh trial”.

²¹Further Affidavit in Support at paragraph 6.

²²Applicants’ Rebuttal Submissions at paragraph 23.

²³*Goshal & Othrs v State of Bihar & Anor* CA 119-122 of 2017 (31 January 2017)

²⁴*Ibid* at paragraph 8.

²⁵*Ibid* at paragraph 4.

²⁶*Ibid* at paragraph 8.

The Court quashed the order, remitting the matter to the High Court, for “consideration of the matters afresh.”²⁷

Respondent's submissions

27. In her written submissions for the Respondent, DPP Nurul Fitri Kiprawi opposed the application: first, the application was out of time and no adequate reasons were advanced for delay; secondly, there was no arguable case that there was a point of law determination of which was in the public interest.

(i) Delay: time requirements for an application- section 291A

28. DPP Nurul Fitri Kiprawi submitted that Section 291A of the Criminal Procedure Code required that a certificate signed by the Judge be filed with the Registrar within one month of the determination of an appeal from a decision of a Magistrate. The Applicants took issue with the assertion that the Judge was required to sign. The Judge or any of the parties could do so.²⁸ Given that the Judge handed down oral Judgment on 22nd October 2025, the one month period expired on 22nd November 2025. Within that period, the Applicants took no steps to satisfy that requirement.

29. The Criminal Motion filed by the Applicants on 29th January 2026 with the Court of Appeal is not a certificate. It is an application for an extension of time. It does not constitute an application to the Judge to sign a certificate.

30. Of the Applicants' attribution of delay to the fact that the written Grounds of Judgment were not provided to the Applicants, notwithstanding a request for its provision within the one-month period and a second request on the day that the one-month period expired, the Respondent's submitted that did not justify the failure of compliance. First, section 291A (4) provides only that written grounds are to be furnished for the purposes of the hearing before the Court of Appeal. Obviously, that is a step that follows the filing of a certificate signed by the Judge, not one that precedes that event. No application was made to compel the production of the written Grounds of Judgment and no application made within or at the end of the one-month period for an extension of time in which to file a certificate. Secondly, the contents of the written submissions of the Applicants, dated 8th April 2026, filed before the provision of the written Grounds of Judgment were provided to the Applicants on 16th April 2026, make it clear that, even in their absence, the

²⁷*Ibid* at paragraphs 18 and 19.

²⁸ Applicants' Rebuttal Submissions at paragraph 28.

Applicants were able to set out detailed legal arguments to formulate what were stated to be questions of law to be included in the draft Certificate. Further, no substantive submissions in support of that application were filed until 8th April 2026.

(ii) No arguable case on a point of law

31. It was submitted that all three questions posed by the Applicants rested on the proposition that, on finding there to have been a legal misdirection, the Judge was required to find that, “the misdirection occasioned a failure of justice before ordering a retrial.”²⁹ The proposition was derived from reliance on the particular provisions of section 438D (2), which it was contended reflected, “a universally applicable principle.” That premise was incorrect. Clearly, section 438 A to 438T merely established a regime for appeals by the Public Prosecutor to the Court of Appeal against acquittals in the High Court in the exercise of its original criminal jurisdiction. By contrast, section 284 of the Criminal Procedure Code contained no “failure of justice” precondition to the exercise by the High Court of its powers, such as that provided by section 438D (2).³⁰

32. Notwithstanding the clear position taken by the Respondent in her written submissions described above, in answer to an enquiry by the Chief Justice as to whether it was a relevant consideration, in the exercise of his powers in section 284, for the Judge to have regard to whether a miscarriage of justice had resulted from the misdirection he determined the Chief Magistrate to have made, DPP Nurul Fitri Kiprawi appeared to accept that it had been implied.

33. The Respondent reminded the Court that in considering the ambit of section 397(1) of the Criminal Procedure Code of Singapore,³¹ in dismissing the applications the Court of Appeal of Singapore in *PP v Takaai Masui* described the four requisite conditions: ³²

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

²⁹ Respondent’s written Submissions at paragraph 28.

³⁰ Respondent’s written Submissions at paragraph 29.

³¹ Section 397(1) of the Singapore Criminal Procedure Code:

“When a criminal matter has been determined by the General Division of 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 permission to refer the question to the Court of Appeal.”

³² *PP v Takaai Masui* [2021] SGCA 119 at paragraph 29.

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

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

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

Further, the Court said that it was, “an exceptional procedure that allows the Court of Appeal to clarify points of law of public interest; it is most decidedly not an additional tier of appeal.”³³

34. DPP Nurul Fitri Kiprawi submitted that the true effect of the application was to invite the Court, “to conduct a retrial analysis the High Court did not conduct: examine the Chief Magistrate’s findings, apply the correct section 25 PCA framework, and direct that no retrial is necessary because acquittal would have been allowed. It is not a criminal reference. It is an appeal.”³⁴

35. The Applicants’ reliance on the fact that the Chief Magistrate made a ruling that a *prima facie* case was established was not a finding on the question of whether the presumption in section 25 was rebutted. The Chief Magistrate did not conduct any analysis of whether the presumption was rebutted let alone rule that the Applicants had rebutted the presumption on the balance of probabilities. Rather, the Chief Magistrate failed to apply the objective standard required by the presumption.

A consideration of the submissions

Application out of time

36. There is considerable force in the Respondent’s submissions as to the adequacy of the reasons provided by the Applicants for the delay in filing an appeal. At the outset, we accept that is most regrettable that the Registry did not provide the Applicants with the written Grounds of Judgment in the remaining period of up to 22nd November 2025, following the Applicants’ request for them, dated 28th October 2025 and did not provide them to the Applicants for months to come. It is to be noted that the Judge’s written Judgment is only 4 ½ pages long.

³³ *Ibid* at paragraph 60.

³⁴ Respondent’s written Submissions at paragraph 39

37. Nevertheless, it is clear, as is accepted by the Applicants, that the central issue determined by the Judge was simple and succinctly stated, namely: The Chief Magistrate was in error in determining that the presumption became operative, “once the elements of the charges are established” and had failed to decide whether the Respondent has successfully rebutted the presumption on the balance of probabilities after it is triggered.”

38. As Mr. Prabhakaran acknowledged in his affidavit, dated 29th January 2026, he was present in Court at the oral delivery of the Judgment by the Judge and understood that the Judge, “found the legal directions by the trial magistrate were erroneous and thereafter proceeded to set aside the acquittal and order a retrial.” Further, from the fact that he was able to draft two questions arising from his understanding of the oral Judgment posed in the draft Certificate attached to that affidavit, it is apparent that he was in a position to file an application in the period of one month following the delivery of oral Judgment on 22nd October 2025.

39. Notwithstanding our reservations about the adequacy of the reasons advanced by the Applicants for failing to comply with the time limit, which expired on 22nd November 2025, nevertheless we have considered whether the decision of the Judge involves points of law, identified in the questions posed on the draft Certificate, which it is desirable in the public interest to have determined by this Court.

Arguable point of law

40. The central issue raised in the three questions posed by the Applicant in the draft Certificate is whether the Judge, in an appeal by the Public Prosecutor against an acquittal by a Magistrate, even if satisfied that there was a material irregularity, must not allow the appeal if he considered that no miscarriage of justice actually occurred. It was the Applicants’ case that, although that was not stated specifically in section 284 of the Criminal Procedure Code, nevertheless it was a legal principle that,” would universally apply”.

Appeals from a Magistrate-PART 7

41. Chapter XXVIII of PART 7 of the Criminal Procedure Code makes provisions for Appeals to the High Court from a Magistrate in a criminal case or matter. As noted earlier, Section 284 provides that in an appeal from an acquittal the High Court may dismiss the appeal; direct that further inquiry be made; or order a new trial on the same or an amended charge; or find the accused guilty of any

offence of which the lower Court might have convicted him and pass sentence on him according to law.

42. Section 285 provides for an appeal from conviction to the High Court. Section 291 provides that:

“No judgment or order of a Court of a Magistrate shall be reversed or set aside unless it is shown to the satisfaction of the higher Court that the judgment or order was either wrong in law or against the weight of the evidence...”

43. Nowhere in that PART of the Ordinance is there a provision of a proviso in the terms expressed in section 438D (2), namely that this Court may dismiss the appeal if it considers that, notwithstanding that the points raised in the appeal might be decided in favour of the Public Prosecutor, “no miscarriage of justice actually occurred”.

Appeals from the High Court to the Court of Appeal -PART 10

44. PART 10 of the Criminal Procedure Code makes provision for appeals from the High Court to the Court of Appeal. Chapter XLIV provides for appeals by the Public Prosecutor. Section 438A provides for an appeal to the Court of Appeal from the High Court against any acquittal in the exercise of its original criminal jurisdiction. As noted earlier, section 438D (1) stipulates the grounds on which the Court of Appeal shall allow the appeal, including that the Court thinks that there was “a material irregularity in the course of the trial”. Nonetheless, section 438D (2) provides that the Court of Appeal may dismiss the appeal, “if it considers that... no miscarriage of justice has actually occurred.”

Proviso

45. Other sections in PART 10 in respect of other references to this Court stipulate the same proviso. Section 415 provides that this Court shall allow an appeal against conviction on the same grounds as stipulated in section 438D and also provides the same proviso that the Court may dismiss the appeal, notwithstanding, amongst other things, that there was a material irregularity in the course of the trial, if it considers that, “no miscarriage of justice has actually occurred”. Section 412, which provides for a reference to this Court by a Judge of the High Court of a question of law arising on the trial of any charge, empowers this Court to affirm or quash the conviction or order a new trial,

stipulates the same proviso that the Court may dismiss the appeal, "... if it considers that no miscarriage of justice has actually occurred."

The issue

46. The fact that, in criminal proceedings, the Criminal Procedure Code provides for appeals from the Magistrates Court to the High Court in respect of both an acquittal and conviction, but does not stipulate the proviso as to, "a miscarriage of justice", which proviso is to be found in respect of the provisions relating to appeals from the High Court to the Court of Appeal in the three circumstances described earlier, begs the question:

what is required of the High Court in making its determination in appeals from an acquittal or conviction in the Magistrates Court?

47. It was the effect of the Respondent's written submission that it is to be concluded that, the fact that the Criminal Procedure Code makes provision for appeals, on the one hand to the High Court from the Magistrates Court and, on the other hand, to the Court of Appeal from the High Court and stipulates the proviso in respect of appeals to the Court of Appeal, but makes no such stipulation in respect of appeals to the High Court, the terms of the proviso do not apply to appeals to the High Court from the Magistrates Court.

48. However, as noted earlier, in her oral submissions for the Respondent, DPP Nurul Fitri Kiprawi appeared to concede that, whilst not stated in section 284, it was to be implied that a relevant consideration for the judge in the exercise of his powers under that section was whether or not the misdirection had occasioned a miscarriage of justice.

Conclusion

49. Given that at this stage we are dealing with an application for leave only, we are satisfied that it is in the public interest for this Court to consider those issues of law, arising as they do from the three questions posed in the draft Certificate. Accordingly, notwithstanding our misgivings about the Applicants' explanations for the delay in filing the proceedings, we grant leave to file the application out of time.

Section 291A (2) certificate

50. It is clear from the terms of Section 291A (2) of the Criminal Procedure Code that the certificate, required to be signed and filed with the Registrar, that the decision of the High Court involves a point of law which it is desirable in the public interest to have determined by the Court of Appeal, does not have to be signed by the Judge of the High Court who heard the appeal. It may be signed by the Public Prosecutor or any party to the proceedings.

Directions

51. Given that the events the subject of the Charges occurred 12 years ago, we order that the hearing is fixed in the next Session of this Court. We shall give Directions to the parties in respect of the issues which this Court invites them to address in their submissions.



DATO SERI PADUKA STEVEN CHONG, C.J.



LUNN, J.A.



SIR PETER GROSS, J.A.