Goh Chin Soon *v* Public Prosecutor

[2021] SGCA 49

Case Number	: Criminal Motion No 21 of 2020
Decision Date	: 11 May 2021
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JCA; Tay Yong Kwang JCA
Counsel Name(s)	: Nehal Harpreet Singh SC, Tan Zhengxian Jordan (Chen Zhengxian Jordan), Leong Hoi Seng Victor (Liang Kaisheng) (Audent Chambers LLC) and Chan Xiaohui Darius (Chen Xiaohui) (Breakpoint LLC) (instructed), Quek Mong Hua and Yik Shu Ying (Yi Shu Ying) (Lee & Lee) for the applicant; Mohamed Faizal Mohamed Abdul Kadir SC, Jane Lim Ern Hui, Rebecca Wong Pei Xian and Chong Kee En (Attorney-General's Chambers) for the respondent.
Parties	: Goh Chin Soon — Public Prosecutor

Criminal Law – Statutory offences – Passports Act

Criminal Procedure and Sentencing – Charge – Alteration

Criminal Procedure and Sentencing – Criminal references – Leave to refer questions of law of public interest

Evidence – Witnesses

[LawNet Editorial Note: This was an application from the decision of the High Court in [2020] SGHC 162.]

11 May 2021

Judgment reserved.

Tay Yong Kwang JCA (delivering the judgment of the court):

Introduction

1 On 30 July 2020, the applicant commenced the present Criminal Motion ("this CM") to seek leave under s 397(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") to refer four questions to the Court of Appeal. At the hearing on 25 November 2020, we distilled the various issues of law into a single issue by reformulating the fourth question raised in this CM. The parties then made their oral submissions on the reformulated fourth question (which is set out subsequently in this judgment). We reserved judgment and made certain directions, following which the parties exchanged two more rounds of written submissions on 18 December 2020 and 8 January 2021. In this judgment, we consider the merits of this CM on the basis of the reformulated fourth question and all the written and oral submissions, including the two sets of further written submissions.

2 The applicant is a Singapore citizen. He is now 65 years old.

3 The applicant claimed trial in the District Court to 46 charges under s 47(3) of the Passports Act (Cap 220, 2008 Rev Ed) ("Passports Act") for knowingly making use of a foreign travel document which was not issued to him (the "s 47(3) Passports Act charges") and to 23 charges under s 57(1)(*k*) of the Immigration Act (Cap 133, 2008 Rev Ed) for making false statements in his disembarkation forms (the "Immigration Act charges"). As the material differences in all the charges relate only to the dates of the alleged offences (and to the location being the departure or the arrival sections of

Changi Airport where the s 47(3) Passports Act charges are concerned), it is sufficient to set out only a sample each of the s 47(3) Passports Act charges and of the Immigration Act charges below:

> **[A sample of the s 47(3) Passports Act charges]**
>
> [You, Goh Chin Soon,] are charged that you, on [date], at Departure Section, Changi Airport, Singapore, did make use of a foreign travel document as your own by producing to an Immigration officer a Philippines Passport bearing serial number WW0538286 and particulars issued under 'NGO BORIS JACINTO (M/27.08.1967)' for travel, which you knew that the said travel document was not issued to you, and you have thereby committed an offence under Section 47(3) of the Passports Act (Cap 220), and punishable under the same section of the said Act.
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> **[A sample of the Immigration Act charges]**
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> [You, Goh Chin Soon,] are charged that you, on [date] at Arrival Section, Changi Airport, Singapore did obtain for yourself a Visit Pass by stating in your disembarkation form, that
>
> **a**) **Your name is <u>Ngo Boris Jacinto</u>**,
>
> **b**) **Your date of birth is <u>27.08.1967</u>**,
>
> **c**) **Your country of birth is <u>Philippines</u>**,
>
> **d**) **Your nationality is <u>Filipino</u>**,
>
> **e**) **You have <u>never</u> used a passport under a different name to enter Singapore.**
>
> which statement you knew to be false and you have thereby committed an offence under Section 57(1)(k), and punishable under Section 57(1)(vi) of the Immigration Act.
>
> [emphasis in original]

4 At the conclusion of the Defence case and after closing submissions were made, the District Judge (the "DJ") convicted the applicant on the Immigration Act charges. However, the DJ amended the s 47(3) Passports Act charges to charges for possessing a false foreign travel document under s 47(6) of the Passports Act (the "s 47(6) Passports Act charges"). This was despite the Prosecution's submissions that these charges should be amended to reflect offences under s 47(1) of the Passports Act (which concerns the offence of making a false foreign travel document in Singapore or furnishing such a document to another person in Singapore). Each of the s 47(3) Passports Act charges was amended by the DJ to the following:

> [You Goh Chin Soon,] are charged that you, on [date], at Departure Section, Changi Airport, Singapore, did have possession of a Philippines passport bearing serial number WW0538286 and the name 'Ngo Boris Jacinto', which you ought reasonably to have known was a false foreign travel document, and you have thereby committed an offence punishable under Section 47(6) of the Passports Act (Cap. 220).

As a result, a number of Prosecution witnesses were recalled by the Defence for further cross-examination. The Defence did not recall the applicant to testify. The DJ refused to allow the Defence to call further witnesses who had not testified in court earlier. The applicant was convicted subsequently on all the s 47(6) Passports Act charges. The DJ sentenced the applicant to two

months' imprisonment on each of the Immigration Act charges and to 12 months' imprisonment on each of the s 47(6) Passports Act charges. Two imprisonment terms from each set of offences were ordered to run consecutively, resulting in an aggregate term of 28 months' imprisonment (see *Public Prosecutor v Goh Chin Soon* [2018] SGDC 129 (the "DJ GD")).

5 The applicant appealed against conviction on the s 47(6) Passports Act charges and against sentence in respect of all the charges (in HC/MA 9055/2018). The High Court judge (the "Judge") held that the DJ ought to have consolidated the s 47(3) Passports Act charges into a single charge under s 47(6) of the Passports Act, covering the entire period of possession of the passport. The Judge therefore amended the s 47(6) Passports Act charges to a single charge as set out below (the "amended s 47(6) Passports Act charge") (see *Goh Chin Soon v Public Prosecutor* [2020] SGHC 162 (the "HC GD") at [154]):

> You, Goh Chin Soon, are charged that you, from 20 March 2011 to 7 September 2012, did have possession of a Philippines passport bearing serial number WW0538286 and the name 'Ngo Boris Jacinto', which you ought reasonably to have known was a false foreign travel document, and you have thereby committed an offence punishable under s 47(6) of the Passports Act (Cap 220, 2008 Rev Ed).

The Judge convicted the applicant on the sole amended s 47(6) Passports Act charge and set aside the conviction on the remaining 45 s 47(6) Passports Act charges. She sentenced him to 18 months' imprisonment on the amended s 47(6) Passports Act charge and to six weeks' imprisonment on each of the Immigration Act charges. The imprisonment term for the amended s 47(6) Passports Act charge was ordered to run consecutively with two of the imprisonment terms for the Immigration Act charges, making an aggregate sentence of 18 months and 12 weeks' imprisonment. The applicant's appeal against sentence was allowed to this extent.

6 On 30 July 2020, the applicant commenced this CM. The four questions sought to be referred to this court under this CM are set out later in this judgment.

Factual background

7 Before his arrest, the applicant was the chairman of the Huashin Group, a Taiwanese property development conglomerate with significant investments in the People's Republic of China ("China"). The applicant was responsible for, among other things, overseeing the Huashin Group's property developments in China, specifically those in Qingdao. At the beginning of 2001, the applicant discovered that certain developments under his charge were "beset by problems brought about by the actions of numerous corrupt officials in China". This prompted him to relocate to Qingdao to iron out the issues. The records from the Immigration and Checkpoints Authority ("ICA") showed that the applicant last travelled out of Singapore using his Singapore passport on 21 May 2001, four days after he was made a bankrupt here.

8 According to the applicant, his attempts to protect his investments in China prompted corrupt officials to organise his arrest in April 2004 and to detain him for some seven months. The Chinese authorities seized the applicant's passport and identity card and did not return them to him when he was released in December 2004.

9 Thereafter, the applicant remained in China but relocated to Xiamen in late 2009 because of his growing concern about further retaliation from allegedly corrupt officials. The applicant spoke to the Consulate-General of Singapore in Xiamen (the "Xiamen consulate") about applying for a replacement passport but nothing came out of those inquiries. In March 2010, the applicant received an urgent

request from Mr Tsai You Zhang ("Mr Tsai"), the director of the Huashin Group, to travel to Taiwan. The objective of this trip was to convince Taiwanese officials to broker a compromise with the Chinese authorities in respect of the Huashin Group's expropriated properties in Qingdao. However, the applicant could not do so as he did not have a passport.

10 The applicant applied for a Singapore passport at the Xiamen consulate on 28 April 2010. It transpired later that this application was not processed as the applicant had failed to settle outstanding issues with (a) the Insolvency and Public Trustee's Office after he was made a bankrupt on 17 May 2001; and (b) the ICA's Identification Card Unit (HC GD at [16]–[17]).

11 In early 2010, Mr Tsai, who had become increasingly anxious about the applicant's inability to travel, telephoned the applicant and proposed that he get an investment passport. The applicant understood this to mean a passport issued by a third-party country on the condition that the applicant invest in that country. Mr Tsai then introduced the applicant to Mr Huang Yueh Chao ("Mr Huang") of the Huashin Group. Mr Huang told the applicant that he had found an agent in Taiwan to help him apply for a Philippine investment passport (the "Passport") and further, that there was a Philippine company for sale that would fulfil the investment criteria for the Passport. The applicant agreed to purchase this company for US$250,000. He also supplied Mr Huang with his personal particulars, a passport photograph and his fingerprints for the application for the Passport. During this time, the applicant also found out that his mother was very sick and he wanted to travel to Singapore to visit her (DJ GD at [36]).

12 The applicant's Singapore passport expired on 17 November 2010. In March 2011, Mr Huang met the applicant in Xiamen and handed him the Passport along with the relevant supporting documents. These included a Filipino social security card and a business permit for the investment company. Upon receiving the Passport, the applicant noticed that the bearer's details were stated as "Ngo Boris Jacinto", a Philippine national born on 27 August 1967 in San Juan, Rizal (HC GD at [11]). However, the Passport bore the applicant's photograph. The applicant believed that the name in the Passport was accurate. He had given Mr Huang instructions to reflect "Boris" as his English name. Mr Huang had also told him that his surname "Goh" would be reflected as "Ngo". As for "Jacinto", Mr Huang explained that this name was the Filipino equivalent of the applicant's mother's maiden name and had to be reflected as the applicant's middle name in line with Filipino matrilineal naming conventions.

13 The applicant realised that the other particulars in the Passport, such as his date and place of birth, were incorrect. When he raised this matter with Mr Huang, he was informed that correcting these mistakes would require Mr Huang to go back to the Philippines and reapply for a new passport. As this would take considerable time and the applicant needed to travel urgently, the applicant decided to use the Passport to travel to Taiwan since it contained his photograph and his thumbprint. To date, the applicant maintains that he believed the Passport was a genuine travel document.

14 Investigations revealed that the applicant used the Passport to travel into and out of Singapore on 46 occasions from 20 March 2011 to 7 September 2012. On the 46th occasion on 7 September 2012, the applicant was arrested while passing through the immigration checkpoint at Changi Airport to board a flight to Hong Kong. It was not in dispute that on each of the 23 occasions when the applicant entered Singapore using the Passport, he produced a disembarkation form that reflected the particulars stated in the Passport and contained the declaration that he had never used a passport under a different name to enter Singapore.

15 It was also accepted that the applicant continued to use the Passport despite having applied for a new Singapore passport on 30 January 2012. This passport was sent to the Xiamen consulate and, according to the Prosecution's witness, was collected by the applicant in person on 17 February

2012 as the signature acknowledging receipt of the Singapore passport was the same as that on the second page of the said passport (DJ GD at [29]). However, the applicant claimed that the passport was collected by his agent and he came into possession of it much later, in December 2012 (DJ GD at [45]).

Proceedings in the District Court

16 The Prosecution's case in respect of the s 47(3) Passports Act charges was as follows. Sometime in 2010, the applicant had intended to travel to see his ailing mother in Singapore and to visit several other countries for business. As an undischarged bankrupt, he could not travel without the Official Assignee's permission. He therefore decided to procure the Passport at US$250,000 so that he could travel undetected. It was obvious that this Passport, which carried the name Ngo Boris Jacinto, was not issued validly to the applicant. Moreover, the applicant had actual knowledge of this fact, having noticed the various discrepancies in the Passport.

17 In advancing its case, the Prosecution called six witnesses including Mr Victorio Mario M Dimagiba Jr ("Mr Dimagiba"), the Consul-General of the Philippine Embassy in Singapore. Mr Dimagiba testified that the Philippine authorities had no record of a passport having been issued to a "Boris Jacinto Ngo" under the passport number stated in the Passport. During his cross-examination, Mr Dimagiba added that the Philippine Government had "initiated an investigation to determine how such a fake passport [had] come into existence".

18 In respect of the Immigration Act charges, it was not disputed that the applicant had instructed his friends to fill out the disembarkation forms beforehand and that he signed on the disembarkation forms. While the Prosecution submitted that the applicant knew that the information in the forms was false (DJ GD at [32]), the applicant's defence was that the information was not false (DJ GD at [41]).

19 The applicant was the only person to testify in his defence. He reiterated his belief that the Passport was a genuine travel document and, by extension, that the information stated in his disembarkation forms was accurate. In respect of the s 47(3) Passports Act charges, the applicant also claimed, in the alternative, that he had a "reasonable excuse" to use the Passport (a defence available to him under s 47(7) of the Passports Act). The ICA had deprived him of a valid Singapore passport and therefore, he had no choice but to rely on a Philippine passport to travel for business and for personal reasons (DJ GD at [34] and [45]). At the trial, the applicant indicated initially that he would be calling two other defence witnesses, namely Mr Tsai and Mr Huang. However, in the light of Mr Dimagiba's evidence, the applicant's then-counsel considered that it was unnecessary to call these witnesses because "the evidence as it stood might not make out the [s 47(3) Passports Act] charges".

20 In the applicant's closing submissions before the DJ, it was argued that the Passports Act drew a clear and intentional distinction between a "foreign travel document" (in s 2(1)) and a "false foreign travel document" (in s 2(3)). On Mr Dimagiba's evidence, it was apparent that the Passport fell into the latter category because it was "not issued by or on behalf of" the Philippine Government. It followed that the *actus reus* of the s 47(3) Passports Act charges, which concerned the misuse of a genuine foreign travel document, was not made out. In reply, the Prosecution invited the DJ to amend the s 47(3) Passports Act charges to charges under s 47(1) of the Passports Act. The Prosecution argued that sufficient evidence had been adduced already to make out the offence under s 47(1). Further, the applicant would not suffer prejudice by such an amendment as the distinction between the s 47(3) Passports Act charges and the proposed s 47(1) charges was only in respect of the characterisation of the Passport (DJ GD at [47]–[48]). The Prosecution also pointed out that the

prescribed punishment was the same under both s 47(1) and s 47(3) of the Passports Act.

21 After the exchange of their closing submissions, the parties were informed that the DJ would deliver her verdict on 7 February 2018. On 9 January 2018, the parties were told that the DJ would be "posting out of State Courts w.e.f. 1 March 2018" and needed to bring forward the date of delivery of her verdict to 1 February 2018.

22 On 1 February 2018, the DJ delivered her oral grounds of decision. She convicted the applicant on the Immigration Act charges (DJ GD at [3]). However, in respect of the s 47(3) Passports Act charges, she exercised her discretion under s 128(1) of the CPC to amend them to charges for possession of a false foreign travel document under s 47(6) of the Passports Act.

23 The DJ's reasons were as follows. She accepted that the Passport was a false foreign travel document. She disagreed with the Prosecution's submissions to amend the s 47(3) Passports Act charges to charges under s 47(1) because s 47(1) required the Prosecution to prove that the applicant "had furnished the offending passport with the intention of dishonestly inducing" the various ICA officers "to accept it as though it were genuine" and that the ICA officers "were influenced to exercise a public duty in affixing either an entry or a departure stamp on the said passport" (DJ GD at [54]). As no such evidence was adduced at the trial, the DJ decided that the s 47(3) Passports Act charges should be amended to charges under s 47(6) of the Passports Act, which required the applicant to be in possession or control of a document which he knew or ought reasonably to have known was a false foreign travel document (DJ GD at [55]).

24 It was not in dispute that the applicant was in possession of the Passport on the 46 occasions stated in the s 47(3) Passports Act charges. As for *mens rea*, the evidence at the trial showed that the applicant "ought reasonably to have known" that the Passport "was not issued by the Philippines government". The evidence showed that the applicant obtained the Passport through dubious means and that he was wilfully blind to the circumstances under which he obtained the Passport (DJ GD at [55] and [76]). The DJ disbelieved the applicant's evidence that he acquired the Passport by way of an investment scheme. The applicant said he had to borrow US$250,000 to obtain the Passport but asked almost no questions about how it would be obtained. It was also "an almost comic coincidence" that the Philippine company's name, BJN Tire Supply, matched the initials of the name "Boris Jacinto Ngo" in the Passport (DJ GD at [81]–[83]). The DJ proceeded to amend the s 47(3) Passports Act charges to the s 47(6) Passports Act charges, as shown above.

25 Following the amendment of the charges, the DJ granted leave to the Defence to recall the Prosecution witnesses for further cross-examination. However, she did not grant the applicant's application under s 283(2) of the CPC to call Mr Tsai and Mr Huang as defence witnesses. Counsel for the applicant argued that Mr Tsai and Mr Huang would be able to give evidence on how the Passport was procured and to corroborate the applicant's evidence that he had sought to obtain a genuine travel document. The DJ disagreed. According to the DJ, "what was crucial in determining whether these charges were made out was what the [applicant] himself ought reasonably to have known at the material time and not what these two witnesses did" (DJ GD at [63]). The DJ did not consider whether she should exercise her general discretion under s 283(1) of the CPC. Section 283(1) and 283(2) of the CPC state:

> **Power of court to summon and examine persons**
>
> **283.**—(1) A court may, on its own motion or on the application of the prosecution or the defence, at the close of the case for the defence, or at the end of any proceeding under this Code, summon a person as a witness or examine a person in attendance as a witness, whether or

not summoned, or recall and re-examine a person already examined.

(2) The court must summon and examine or recall and re-examine such a person if it thinks his evidence is essential to making a just decision in the case.

…

26 At the end of the trial, the DJ was satisfied that the s 47(6) Passports Act charges were proved beyond reasonable doubt and she convicted the applicant on those charges. She found that the applicant was wilfully blind to the circumstances under which he obtained the Passport. Although his photograph was affixed to the Passport, the particulars therein were not his (DJ GD at [76]–[79]). The applicant failed to mention the investment scheme in all his investigation statements and could not give a reasonable explanation for his omission of this crucial aspect (DJ GD at [80]–[83]). The applicant also did not have a reasonable excuse for using the Passport. There was no indication that he had "tried his best" to obtain a new Singapore passport from the ICA (DJ GD at [95]–[97]).

27 The DJ imposed a sentence of two months' imprisonment for each of the Immigration Act charges (two of which were ordered to run consecutively) and 12 months' imprisonment for each of the s 47(6) Passports Act charges (with a further two sentences to run consecutively). The total was therefore 28 months' imprisonment. The applicant was granted bail pending his appeal to the High Court (DJ GD at [119]–[121]).

Proceedings before the Judge

28 The applicant appealed against his conviction on the s 47(6) Passports Act charges and against his sentence in relation to all the charges in HC/MA 9055/2018. In respect of his appeal against conviction, the applicant argued that: (a) the DJ had descended into the arena by questioning the applicant excessively at the end of his cross-examination, had prejudged his guilt by her remarks during the amendment of the s 47(3) Passports Act charges and ought to have recused herself when invited to do so; (b) the DJ usurped the Prosecution's function by rejecting the Prosecution's suggested amended charges and by amending the charges to the s 47(6) Passports Act charges on her own accord. Further, the DJ was precluded from taking into account the applicant's evidence given in relation to the s 47(3) Passports Act charges once the charges were amended to those under a different legal provision; (c) his application under s 283(2) of the CPC to call Mr Tsai and Mr Huang should not have been rejected as their evidence was "essential to making a just decision in the case"; and (d) the conviction on the 46 charges under s 47(6) Passports Act was wrong as the applicant was in continuous possession of the Passport (HC GD at [37]).

29 On the applicant's first contention, the Judge concluded that the DJ did not descend into the arena in questioning the applicant. Her questions sought clarifications and were confined to the evidence already before the court. The length and persistence of the DJ's questioning were also in large part a product of the applicant's obduracy. Even if the DJ's questioning could be said to be intemperate, it could hardly amount to an egregious case which called for appellate intervention (HC GD at [134]–[145]). In order for the DJ to amend the charges, she had to be satisfied that the Prosecution had discharged its evidential burden of proof on the s 47(6) Passports Act charges based on the evidence before her. Although the DJ could have spoken with more moderation when amending the charges, the Judge did not consider her to have prejudged the applicant's guilt or otherwise conducted herself so as to compromise the fairness of the trial (HC GD at [62], [147]–[153]).

30 With respect to the second ground of appeal, the Judge upheld the DJ's finding that the s 47(3) Passports Act charges were not made out. However, the Judge held that the DJ should not have

amended the charges to 46 separate charges under s 47(6) of the Passports Act. The evidence was that the applicant possessed the Passport continuously between 20 March 2011 and 7 September 2012. The DJ should therefore have amended the s 47(3) Passports Act charges to a single s 47(6) Passports Act charge covering the period of possession. Pursuant to s 390(4) of the CPC, the Judge amended the s 47(6) Passports Act charges to the single amended s 47(6) Passports Act charge set out earlier (HC GD at [104], [115] and [154]).

31 In rationalising the correctness of amending the s 47(3) Passports Act charges to charges for offences under s 47(6), the Judge found the distinction between the two offences to be "fairly narrow" (HC GD at [46]). The Judge opined that it was conceivable that the same evidence could point towards an offence under s 47(3) or s 47(6) even though these offences were mutually exclusive. The Judge gave the following illustration (HC GD at [46]):

> … For example, an accused person uses a document which appears credibly to be a foreign passport, but which bears a name that is not his own. The accused person cannot be sure precisely how this passport was created, but the circumstances are suspicious in that he did not go through official channels to obtain the passport. In this scenario, the *mens rea* for either offence could be satisfied: the accused person ought reasonably to have known that the passport in question was a false foreign travel document, *or* he ought reasonably to have known that it was not issued to him. This is because the accused person may be put on inquiry as to both those possibilities owing to the same suspicious circumstances … , and the matter would simply turn on which of these possibilities turns out to be true.

32 It was therefore equally possible to advance a single defence in respect of offences under ss 47(3) and 47(6). The Judge opined that this was what transpired in the applicant's case. The Judge characterised the applicant's defence as a claim that "*he was under the justified impression that he was in possession of a genuine Philippine passport issued to him*" [emphasis in original] (HC GD at [86]). This revealed two facets of the applicant's evidence although they rose from the same foundation: (a) he believed that the Passport was genuine; and (b) he believed that the Passport was issued to him. The former was a defence to a s 47(6) Passports Act charge and the latter a defence to a s 47(3) Passports Act charge. The applicant's position amounted to a "single unified defence" against both the s 47(3) and s 47(6) Passports Act charges (HC GD at [86]). Further, the DJ gave the applicant sufficient time to prepare the next steps in his defence (HC GD at [88]). The DJ's amendment of the s 47(3) Passports Act charges to s 47(6) Passports Act charges therefore did not prejudice the applicant's defence.

33 In respect of the issue whether the DJ should have allowed the applicant to call Mr Tsai and Mr Huang as witnesses, the Judge examined the provisions of the CPC which govern the calling of witnesses following the amendment of a charge. The applicant contended that where a charge is amended after the Defence has been called, the trial should restart from the beginning of the Defence's case with the accused person testifying or calling evidence in his defence in accordance with s 230(1)(*p*) of the CPC. This meant that the applicant was entitled to call any relevant witness for his defence at that stage. According to the applicant, this reasoning was supported by the language of ss 230(1)(*g*)–230(1)(*i*) of the CPC which direct the court to proceed in accordance with the procedure set out in ss 230(1)(*j*)–230(1)(*x*) if an accused person claims trial to an amended charge (HC GD at [117]).

34 The Judge rejected the applicant's submissions. Sections 230(1)(*g*)–230(1)(*i*) merely clarify that if a charge is altered at the end of the Prosecution's case, the s 230(1) procedure should be followed "since that is what would happen in any case even if the charge were not amended at that point". These provisions did not prescribe a return to s 230(1)(*p*) where the charges are altered at later

stages. In the Judge's view, the appropriate post-amendment trial procedure was to be found in ss 129–131 of the CPC. Section 129 outlined two options on how a trial can proceed. If the court finds that proceeding with the trial will not prejudice the accused person's defence, the trial may continue (s 129(3) of the CPC). Otherwise, the court can either direct a new trial or adjourn the trial (s 129(4) of the CPC) (HC GD at [119]–[120]).

35 The Judge further reasoned that following an amendment of the charges, an accused person must be allowed to "recall or re-summon and examine any witness who may have been examined" unless the application is frivolous or vexatious or is meant to cause delay or to frustrate justice (see s 131 of the CPC) (HC GD at [66], [120]–[121]). Where the Defence needs to call additional, rather than recall, witnesses, the relevant provision to turn to is s 283 of the CPC (HC GD at [122]). As we have observed earlier, there are two dimensions to the calling of witnesses under s 283. The court must summon or recall witnesses whose evidence is "essential to making a just decision in the case" (see s 283(2) of the CPC). Otherwise, the calling of additional witnesses is a matter of judicial discretion as set out in s 283(1).

36 The applicant's third argument before the Judge was that the DJ had fallen afoul of s 283(2). The Judge disagreed. Whether the applicant "ought reasonably to have known" was a matter of the applicant's state of mind. Anything which Mr Tsai and Mr Huang said or did would only be relevant to the applicant's guilt to the extent that they had influenced the applicant's state of mind. If so, those matters should have been mentioned by the applicant in his testimony but they were not. There was also considerable doubt as to the veracity of the evidence that these two witnesses would give (HC GD at [124]–[126]).

37 However, the Judge accepted that Mr Tsai's and Mr Huang's evidence was clearly not entirely irrelevant to the case in that it was intended to corroborate the applicant's account of how he obtained the Passport. The DJ did not appreciate fully the need to also consider whether there was a need to call these witnesses under the general discretion in s 283(1) of the CPC. The Judge noted that the DJ's failure to exercise her discretion under s 283(1) was not a ground relied upon by the applicant for appellate intervention before her. Nevertheless, even if she were of the view that the DJ had erred in excluding evidence which she should have allowed, that would not have been dispositive of the appeal before her. The Judge referred to s 169 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") and to *AOF v Public Prosecutor* [2012] 3 SLR 34 ("*AOF*") and concluded that the evidence before the court justified amply the upholding of the applicant's conviction anyway (HC GD at [127]–[132]). Accordingly, the Judge convicted the applicant on the single amended s 47(6) Passports Act charge as framed by her pursuant to s 390(4) of the CPC (HC GD at [154]).

38 Turning to the appeal against sentence, the Judge rejected the applicant's plea for judicial mercy on account of his medical conditions and his contention that imprisonment would carry a high risk of endangering his life. In respect of the single amended s 47(6) Passports Act charge, the Judge held that a sentence of 18 months' imprisonment was appropriate in all the circumstances, taking into account the long period of time over which the applicant had committed the offence. She reduced the individual sentences for the Immigration Act charges from two months to six weeks' imprisonment. She ordered the sentence for the amended s 47(6) Passports Act charge to run consecutively with the sentences for two of the Immigration Act charges, resulting in an aggregate sentence of 18 months and 12 weeks' imprisonment (HC GD at [161]–[176]).

This CM and the submissions

39 With the background facts set out above, we return to the present application. As mentioned at the start of this judgment, this CM is an application for leave under s 397(1) of the CPC to refer to

the Court of Appeal the following four questions of law that are said to have arisen from the Judge's decision:

> **Question 1:**
>
> Where an accused persons faces an amended charge at the conclusion of trial, should the accused person be permitted, as a matter of natural justice and procedural fairness, to call Defence witnesses to give evidence on his behalf in respect of the amended charge as he would be entitled to in a situation where the charge was not amended?
>
> **Question 2:**
>
> Does s 131 of the CPC statutorily set out the right of an accused person who is subject to an amended charge to call or summon witnesses who may have been called in the course of trial but who were not?
>
> **Question 3:**
>
> Does s 230(1)(p)(ii) of the CPC statutorily set out the right of an accused person who is subject to an amended charge to call any witnesses in his defence to said amended charge?
>
> **Question 4:**
>
> In the event the answers to the above questions are 'no', what is the correct legal threshold for a Judge's exercise of discretion under Section 283(1), where an accused person seeks to call witnesses to testify on his behalf after a new charge is framed against him at the conclusion of trial and where that evidence is relevant?

We shall refer to the questions as Questions 1, 2, 3 and 4 respectively.

40 Prior to the hearing before us, the applicant tendered an *aide memoire*, in which he set out what was described as the overarching legal issue underpinning the four Questions presented:

> *Where, after the close of the defence's case, an amended charge is preferred against the accused with different elements and on a different factual basis from the original charge, is the accused entitled as of right to call additional relevant witnesses to defend that amended charge?*
>
> *And if not, then what is the legal threshold that an accused in these circumstances must satisfy in order* [*to*] *call such additional witnesses?*
>
> [emphasis in original]

41 At the start of the hearing, we indicated to the parties that the applicant was likely to have an uphill task in seeking to persuade us that Questions 1 to 3 should be referred to the Court of Appeal. We indicated provisionally that it seemed improbable that an accused person could be in a worse position by reason of a charge being amended late in the day than if the accused person had faced the charge in its amended form from the outset. It appeared to us that the answer was to be found in Question 4 and ultimately, how s 283 of the CPC (which facilitates the calling of additional witnesses post-amendment) is construed in relation to s 131 of the CPC (which lays down a right to recall witnesses "[i]f a charge is altered or a new charge is framed by the court after the start of a trial"). With this in mind, we decided that Question 4, which concerns the threshold for the court's

exercise of discretion under s 283(1), should be reformulated and we proposed to the parties the following reformulated Question 4 at the hearing:

> Where an application is made by an accused person to call fresh evidence to answer an amended charge in circumstances where the charge is amended after the defence has been called, should such an application generally be dealt with on the same basis as would an application under s 131 of the CPC?

42 Both parties agreed to proceed on the basis of the reformulated Question 4 ("the new Question 4") and made oral submissions before us on the assumption that leave was granted to refer this question to the Court of Appeal. We then reserved judgment and informed the parties that we would like them to address two further issues. The first issue concerned the consequential orders that should follow in the event we decided that additional evidence ought to have been allowed, that such additional evidence was likely to be material and that therefore the conviction on the amended s 47(6) Passports Act charge ought to be set aside. The second issue was the effect that any decision on the first issue would have on the Immigration Act charges as these were not the subject of this CM. We opined provisionally that the only matter in the Immigration Act charges that might be affected would be the sentencing because the sentencing for both sets of charges for the two Acts was considered as a whole.

43 Following from the above, the parties exchanged two more rounds of written submissions on 18 December 2020 and 8 January 2021. In this judgment, we therefore consider the merits of this CM on the basis of the new Question 4 and all submissions made, including the two sets of further written submissions. While the new Question 4 refers to the amendment of a charge "after the defence has been called", we will focus on the actual situation in this case which involves charges being amended after the defence has completed its evidence and closed its case.

Our decision

44 The inquiry as to whether leave should be granted under s 397 of the CPC turns on the applicant satisfying four cumulative conditions (see *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 ("*Lam Leng Hung*") at [51]):

> (a) the reference to the Court of Appeal can only be made in relation to a criminal matter decided by the High Court in exercise of its appellate or revisionary jurisdiction;
>
> (b) the reference must relate to a question of law and that question of law must be a question of law of public interest;
>
> (c) the question of law must have arisen from the case which was before the High Court; and
>
> (d) the determination of the question of law by the High Court must have affected the outcome of the case.

Our decision on Questions 1 to 3

45 At the hearing, we expressed our provisional view that Questions 1 to 3 in this CM would not satisfy the requirements for leave. Counsel for the applicant, Mr Harpreet Singh Nehal SC ("Mr Harpreet Singh"), agreed with our general observations and focused on the new Question 4 in his oral submissions. Nevertheless, we make some very brief general comments on the applicant's submissions on Questions 1 to 3.

46 As set out in *Mohammad Faizal bin Sabtu and another v Public Prosecutor and another matter* [2013] 2 SLR 141 ("*Mohammad Faizal*") at [19] (citing the Malaysian Federal Court decision in *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at 141), the test for determining whether a question of law is one of public interest is:

> … *whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternate views*. … [emphasis in original]

The Court of Appeal held recently in *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 at [19] that a question of law is not an "open question" where its determination is "a straightforward matter of statutory interpretation".

47 In addition to s 283 of the CPC which we have set out earlier, we also set out here s 131 and s 230(1)(*q*) and s 230(1)(*r*) of the CPC as these will be referred to in the discussions that follow:

> **Recall of witnesses on trial of altered or new charge**
>
> **131.** If a charge is altered or a new charge is framed by the court after the start of a trial, the prosecutor and the accused must, on application to the court by either party, be allowed to recall or re-summon and examine any witness who may have been examined, with reference to the altered or newly framed charge only, unless the court thinks that the application is frivolous or vexatious or is meant to cause delay or to frustrate justice.
>
> …
>
> **Procedure at trial**
>
> **230.**—(1) The following procedure must be complied with at the trial in all courts:
>
> …
>
> (*q*) an accused may apply to the court to issue process for compelling the attendance of any witness for the purpose of examination or cross-examination or to produce any exhibit in court, whether or not the witness has previously been examined in the case;
>
> (*r*) the court must issue process unless it considers that the application made under paragraph (*q*) should be refused because it is frivolous or vexatious or made to delay or frustrate justice and in such a case the court must record the reasons for the order;

48 As we informed the parties at the start of the hearing, it was evident that the answer to Question 1 really depended on all the provisions of the CPC read as a whole and the evaluative discretion of the Judge in each case. It is therefore not a question of law within the ambit of s 397 of the CPC. In respect of Question 2, the applicant's first set of submissions for this CM strained the interpretation of s 131 and would require that the court read words into the section that are not there. Further, the said submissions overlooked completely the entire syntax and arrangement of the section. As for Question 3, contrary to the applicant's submissions, there is nothing in the structure of s 230 of the CPC to suggest that it is intended to operate in such a way that there is a reset of the entire process (in the sense that the Defence has to start all over again from the beginning) once the charge is amended at the close of the Defence's case.

Our decision on the new Question 4

Our decision on the new Question 4

49 In our opinion, the new Question 4 qualifies as a question of law of public interest. It is an established principle of law that "every litigant has a general right to bring all evidence *relevant* to his or her case to the attention of the court" [emphasis in original] (*Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 at [24]). This general right, although enunciated in the context of civil proceedings, has always been equally true in criminal proceedings and, of course, it is subject to the litigant being willing and able to procure the evidence for the proceedings. The issue of whether this general right may be curtailed by a charge being amended very late in a criminal trial is a question that has a direct and substantial bearing on the applicant's rights and is also one of public importance. The issue is not a question that is "free from difficulty" (in the words of the court in *Mohammad Faizal*), as illustrated by the DJ GD and the HC GD.

50 We emphasise at the outset that the amendment of the charge that we are concerned with in this case is one that is substantive (such as the reframing of the existing charge to one under a different statutory provision) rather than one relating to minor factual or legal details which are of no real consequence to the outcome. The amendment by the DJ here was substantive because it involved a new offence, although both offences appear within s 47 of the Passports Act and both have the same punishment provisions. We are not concerned here with amendments which do not affect the substance of the charge and which can cause no prejudice to the accused person, such as the correction of misspelt names or obviously wrong dates, times or addresses and also of incorrect legal details such as a wrong section number when the offence has been described in the charge correctly.

51 We see no reason why an accused person's right to present all relevant evidence should be curtailed if the charge against him is amended at a late stage during the trial, whether by the Prosecution or by the trial judge. As a general principle, when a charge is amended after the trial has commenced, the accused person should be allowed to recall Prosecution witnesses or his own witnesses and to call additional witnesses in order to adduce evidence relevant to the amended charge (s 131 of the CPC). This logic applies with even greater force when a charge is amended substantively after the Defence has closed its case in response to the original charge. In such a case, the Defence may have decided not to call certain witnesses because their evidence was considered irrelevant or only peripherally relevant to the original charge. It is therefore only reasonable and logical that upon being presented with a substantively amended charge at the very end of the trial when all evidence has been adduced already, an accused person should be given the opportunity to supplement his original case.

52 On this analysis, when the DJ was dealing with the Defence's application to call Mr Tsai and Mr Huang pursuant to s 283 of the CPC, instead of considering only the question whether these intended defence witnesses were essential under s 283(2), the DJ should also have considered the court's general discretion under s 283(1) read with s 131 of the CPC. Further, we think that she should have exercised the court's general discretion in favour of the applicant in order to safeguard his right to adduce all relevant evidence in his defence to the amended charge which, as we have emphasised, was amended only at the tail end of the trial and which involved a different offence under the Passports Act.

53 The DJ's failure to consider s 283(1) was noted by the Judge who opined that in the context of the general discretion under s 283(1), "it would normally be prudent for a trial judge to err in favour of allowing the Defence to call additional witnesses following the amendment of the charge after the end of the Defence's case" (HC GD at [127]). The Judge added that "[t]he trial judge should therefore readily allow the calling of evidence that appears relevant to the parties' cases, even if the evidence does not appear to be dispositive" (HC GD at [128]). This was particularly so because if the charge

had been amended at an earlier stage of the trial, the Defence would have been able to call any relevant witnesses of its own volition as part of its case. The Judge noted that the DJ appeared to have disallowed the calling of Mr Tsai and Mr Huang because she found that their intended evidence would not be dispositive. However, the Judge opined that their intended evidence was "clearly not entirely irrelevant to the case" in that it was intended to corroborate the applicant's account as to how he obtained the Passport. The Judge added that although the DJ's reasoning was correct in relation to whether the intended evidence was "essential to making a just decision in the case" under s 283(2), she felt that the DJ "did not fully appreciate the need to also consider whether the relevance of Mr Huang and Mr Tsai's evidence would nonetheless justify her exercising her general discretion under s 283(1) CPC to allow them to be called". Nevertheless, the Judge decided to confine her decision to the issue in s 283(2) as the issue in s 283(1) of the CPC was not the ground relied on in the appeal before her (HC GD at [129]). The legal issue in the new Question 4 therefore arose from the appeal in the High Court.

54 The only question that remains is whether the new Question 4 also satisfies the fourth condition of s 397 of the CPC set out in *Lam Leng Hung*. If the new Question 4 is answered affirmatively and if the applicant had been allowed to call Mr Tsai and Mr Huang to give evidence under s 283(1), would this have affected the outcome of the applicant's case?

55 The applicant submitted that an affirmative answer to the new Question 4 would have affected the outcome of his case. He argued that, among other things, his two intended witnesses would have testified about the following:

(a) Why the applicant needed a new passport and how he went about acquiring a passport. In particular, Mr Huang would have explained which government official(s) he spoke to in the course of applying for the Passport.

(b) The details of Mr Huang's discussions with the applicant in the course of applying for and handing over the Passport and its supporting documents. Mr Huang would have elaborated on the explanations for the discrepancies in the Passport.

(c) The details of the Passport in respect of which the applicant had no direct knowledge such as the fact that the Passport already contained a Taiwan visa before the applicant used it to travel to Taiwan.

It was contended that this additional evidence would have been critical to the *mens rea* of the amended s 47(6) Passports Act charge. It could raise a reasonable doubt as to whether the applicant "ought reasonably to have known" that the Passport was a false foreign travel document.

56 Deputy Public Prosecutor Mohamed Faizal SC ("DPP Faizal") for the Prosecution argued that the potential impact of wrongly excluded evidence was a factual question. He submitted that this court should refrain from overturning the Judge's factual findings. As mentioned earlier, the Judge held that even if the DJ "had erred in excluding evidence which she should have allowed, this would not have been dispositive" of the applicant's case. In reaching this conclusion she relied on s 169 of the Evidence Act (HC GD at [130]) which provides that:

No new trial for improper admission or rejection of evidence

169. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient

evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

57 The Judge was also guided by the framework laid down by this court in *AOF* at [296] which states that "where the evidence adduced at the original trial was so strong that a conviction would have resulted, the more appropriate course would be to … affirm the conviction". In the Judge's view, the evidence before her, including the applicant's own incriminatory evidence, was more than sufficient to ground a conviction. The Prosecution submitted that the Judge and the DJ were in a better position than this court to make this assessment. In support of this point, the Prosecution pointed to the *dicta* in *Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1217 ("*Suzanna Bong*"), a decision which concerned the abuse of a foreign domestic worker that resulted in serious eye injuries to the worker. In that case, the Court of Appeal stated that it was puzzled by the trial judge's finding that the victim suffered "less serious psychological harm" despite the fact that the victim in question was subject to a sustained pattern of abuse (*Public Prosecutor v Bong Sim Swan Suzanna* [2020] 2 SLR 1001 at [80]). Nevertheless, the Court of Appeal took the view that "this was still a finding of fact that was not within the province of a criminal reference on questions of law" (*Suzanna Bong* at [7]).

58 Unlike the finding of fact by the trial judge in *Suzanna Bong*, the present situation involves an accused person having been refused the opportunity to call evidence that was relevant and that could be material to the amended charges. The applicant had intended to call Mr Tsai and Mr Huang as his defence witnesses but decided finally that they were unnecessary at the stage that the original charges and the evidence then stood. It was not his fault that the charges were amended only after he had closed his case. It seems to us ironic and illogical that if the original s 47(3) Passports Act charges had been amended to charges under s 47(6) of the Passports Act immediately after the start of the trial or even at the close of the Prosecution's case, the Defence would have the liberty to call any witnesses it wishes (subject to the condition in s 131 of the CPC that the calling of such witnesses is not frivolous or vexatious or is not meant to cause delay or to frustrate justice) but if the charges were amended practically at the end of the trial, the accused person should be confined to calling or recalling witnesses whose evidence is "essential to making a just decision in the case" under s 283(2) of the CPC.

59 The Prosecution argued that on the facts of this case, clearly the Judge had reached the correct conclusion. There was no prejudice in excluding Mr Tsai's and Mr Huang's evidence because their evidence would not have displaced the applicant's own incriminatory evidence at the trial. The applicant had testified in detail on the circumstances under which he received the Passport and his mental state at the material time. In summary, he maintained his belief that the Passport was a genuine travel document despite having (a) procured it under dubious circumstances; and (b) noticed irregularities in it. The applicant's view on the Passport's authenticity was not influenced by reassurances from Mr Tsai or Mr Huang; the applicant had drawn his own conclusions (HC GD at [99]). The Prosecution also submitted that the applicant's evidence should be accorded primary importance because the amended s 47(6) Passports Act charge pertains to his own mental state. Mr Tsai and Mr Huang would not know what the applicant believed at the material time and, at most, they would be corroborative witnesses.

60 We accept that this argument has some persuasive force. We also observe, without reaching any particular conclusion, that there were many aspects of the applicant's defence that would raise questions, at the very least. For example, the applicant asserted that "Ngo Boris Jacinto" in the Passport reflected his name accurately. Although it was phonetically possible that the applicant's surname "Goh" was spelt as "Ngo" in the Philippines, it was a mystery how the applicant's deceased mother's maiden name "Sim Buoy Hong" (or its Hanyu Pinyin version of "Shen Mei Feng") became

"Jacinto" in the Filipino language, which also appears to be a masculine name. Further, the applicant did not provide any documentary evidence to prove that he had adopted the name "Boris" which appeared in the Passport. It is therefore understandable why both the DJ and the Judge considered the applicant's evidence to be sufficient to ground his conviction.

61 However, we think that it may not be fair to rely exclusively on the applicant's existing evidence on record to make out the amended s 47(6) Passports Act charge. As pointed out earlier, the Judge rationalised the DJ's amendment of the s 47(3) Passports Act charges on the basis that the distinction between the s 47(3) offence and the s 47(6) offence was "fairly narrow". However, while both offences deal with offences relating to foreign travel documents, we think there are material differences between the two offences.

62 First, an offence under s 47(3) involves a different *actus reus* from that in an offence under s 47(6). A s 47(3) offence concerns the use of a foreign travel document which was not issued to the accused person while a s 47(6) offence deals with possession of a false foreign travel document. A "foreign travel document" is defined in s 2(1) of the Passports Act as one that is issued by or on behalf of the government of a foreign country while s 2(3) of the same Act defines a "false foreign travel document" as one that is not issued by or on behalf of the government of a foreign country or a "foreign travel document" that has been altered by a person who is not authorised to alter that document. It follows that s 47(3) envisages a genuine foreign travel document while s 47(6) concerns a false foreign travel document or a genuine one that has been tampered with. By charging the applicant under s 47(3) originally, the Prosecution must be deemed to have accepted at the commencement of the trial that the Passport was a genuine foreign travel document issued by the Philippine Government and there was therefore no need for the Defence to show this fact.

63 Although the Prosecution seeks to present the difference between the two offences as a technical distinction, it is clear that the distinction is substantive and not a merely semantic one. In amending the s 47(3) Passports Act charges to the s 47(6) Passports Act charges, the DJ explained that the facts showed that the applicant had obtained the Passport through dubious means and that looking at the entire factual matrix under which he obtained the Passport and the Passport itself, everything pointed inexorably to the fact that the Passport was "false, bogus, fraudulent" and was, in short, not a legitimate one. The DJ therefore had no difficulty finding that the applicant ought reasonably to have known that the Passport was "false, that is, it was not a passport issued by the Philippines authorities" (DJ GD at [79]). It appears to us therefore that the DJ convicted the applicant on the basis that the Passport was false in the sense that it was not issued by or on behalf of the government of a foreign country.

64 Second, the s 47(3) Passports Act charges involved a different *mens rea* from that in the s 47(6) Passports Act charges. The s 47(3) Passports Act charges alleged that the applicant "knew" that the (genuine) foreign travel document was not issued to him. This would mean actual knowledge of the alleged fact. However, in the s 47(6) Passports Act charges framed by the DJ, this was altered to "ought reasonably to have known" that the document was a false foreign travel document, which is constructive knowledge. The amendment is significant because it reduced the standard of knowledge which the Prosecution had to prove. It became unnecessary for the Prosecution to establish the applicant's actual knowledge.

65 The reality is that the applicant gave evidence in relation to a set of offences which was different from the set he had to meet post-amendment. DPP Faizal conceded fairly that the Prosecution did not put to the applicant an alternative case based on the s 47(6) Passports Act charges. We therefore disagree with the Judge's view that the applicant's evidence formed a "single unified defence" against the s 47(3) Passports Act charges and the s 47(6) Passports Act charges

(HC GD at [86]). The applicant was not told about the s 47(6) Passports Act charges until after he had given his defence to the s 47(3) Passports Act charges. The two sets of charges were never put up as alternative charges at the trial. He could not have anticipated during his testimony that the charges against him would be altered to specify a different offence under the Passports Act. Therefore, there could be no certainty that the applicant would have given exactly the same evidence had an offence under s 47(6) been alleged against him from the outset. Accordingly, we think that it would not be safe or fair to convict the applicant on the s 47(6) Passports Act charges or the single amended s 47(6) Passports Act charge without hearing the evidence of his two defence witnesses.

66 We note that the Judge also relied on the applicant's statements made during the investigations to support a finding of guilt. She found, among other things, that those statements made no mention of the applicant applying for the Passport through a legitimate investment scheme. Instead, the applicant merely stated that he had to pay Mr Huang "a fee of US$250,000" for the "arrangements" that Mr Huang would make to obtain a Philippine passport. In the Judge's view, these words, coupled with the applicant's failure to mention any investment scheme throughout his statements, suggested that no such scheme existed (HC GD at [95]).

67 However, similar to the applicant's oral testimony, his statements were made in response to the original s 47(3) Passports Act charges. It was therefore possible that he thought that he was only required to explain why he believed that the (genuine) Passport was issued to him and that he did not have to mention facts which could show that the Passport was a genuine foreign travel document. As we have explained earlier, the original s 47(3) Passports Act charges proceeded on the basis that the Passport was genuine.

68 We emphasise that at this stage, we are not expressing any findings of fact on the evidence. Whether the above was the applicant's reason for not mentioning the alleged investment scheme and, if it was, whether it is credible is best left to be tested in cross-examination.

69 It also appeared that there were some matters leading to the obtaining of the Passport that were not within the applicant's knowledge. During his cross-examination, the applicant asserted repeatedly that he was not familiar with the application process for the Passport and had relied on his "agent" to assist him. He was therefore unable to explain the irregularities in the Passport. Therefore, when queried on why the Passport's date of issue predated the date on which he provided Mr Huang with the information for its application, the applicant simply remarked that he "could not understand this part as well". If this is true, then Mr Tsai and Mr Huang would be the best persons who could explain these irregularities because they were purportedly the persons who were involved directly in the Passport application process.

70 Why then did the applicant decide not to call Mr Tsai and Mr Huang in his defence although both men were listed originally as his defence witnesses? The answer would appear to be similar to the earlier discussions regarding the differences between the s 47(3) Passports Act charges and the s 47(6) Passports Act charges. At the close of the Defence case, it was apparent on the state of the Prosecution's evidence that the Passport was not a genuine foreign travel document. In particular, Mr Dimagiba's testimony showed that he did not accept that the Passport was issued by the Philippine Government. The Passport would therefore fall within the meaning of a "false foreign travel document" as defined in s 2(3) of the Passports Act. This meant that the Prosecution would not be able to prove the s 47(3) Passports Act charges because they were premised on the Passport being a genuine foreign travel document. It is therefore understandable why the applicant's former defence counsel did not think it necessary to call further Defence evidence and decided to close the case for the Defence.

71 From the above discussions, although the applicant's evidence at the trial raised questions, the DJ did not apply the correct legal principles when she refused to grant the applicant's application to call his two defence witnesses after she amended the s 47(3) Passports Act charges to the s 47(6) Passports Act charges. The Judge's affirmation of the DJ's refusal was correspondingly incorrect although the Judge did proceed to discuss the proper legal principles pertaining to this case but she decided not to intervene in the DJ's decision on the ground that the applicant's appeal in the High Court was premised on only s 283(2) and not s 283(1) of the CPC. The correct approach in the circumstances of this case is to consider the applicant's application to call Mr Tsai and Mr Huang according to the tenets in ss 283(1) and 283(2) read with s 131 of the CPC. It is not possible at this stage to say that these two witnesses' evidence would not be relevant to the amended s 47(6) Passports Act charge (as acknowledged by the Judge at [129] of the HC GD). As the procedural history of the trial shows, it is also not possible to refuse the application on the ground that it was "frivolous, vexatious or is meant to cause delay or to frustrate justice" (s 131 of the CPC). We have already explained in the preceding paragraph why it is understandable that the two witnesses were not called although they were originally listed as defence witnesses.

72 Accordingly, we grant the applicant leave to refer the new Question 4 and, in the circumstances of this case, we proceed to answer it at the same time since full submissions have already been made on it. Our answer to the new Question 4 is therefore: Yes, where an application is made by an accused person to call fresh evidence to answer an amended charge in circumstances where the charge is amended after the defence has been called, such an application should generally be dealt with on the same basis as would an application under s 131 of the CPC. This means that an accused person's application to call additional witnesses in his defence should be allowed unless the application is "frivolous, vexatious or is meant to cause delay or to frustrate justice", as spelt out in s 131. This formula also appears in s 230(1)(*r*) of the CPC (set out earlier) which applies to the procedure at trial. We think that this approach provides a consistent and unified procedural framework for the entire trial process which serves the ends of justice.

Consequential orders

73 We now consider what consequential orders should follow our decision on the new Question 4. The parties' submissions in HC/MA 9055/2018, the appeal before the Judge, did discuss the possible consequential orders if the Judge were to allow the appeal. The parties filed their further submissions to address us on this point in greater detail as well as on the issue of whether a decision to set aside the applicant's conviction on the amended s 47(6) Passports Act charge will affect his conviction on the Immigration Act charges.

74 On the question of consequential orders, the Prosecution's submissions mirror its submissions before the Judge. It argues that it would be sufficient for the Judge to receive Mr Tsai's and Mr Huang's evidence under s 392 of the CPC. Section 392(1) states that the appellate court "may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court". The Prosecution argues that the Judge is well placed to receive this further evidence which is "very much standalone and would not have much impact on the other pieces of evidence led at trial". The Prosecution also submits that there is no need to restart the entire trial process as Mr Tsai and Mr Huang are only supporting players whose roles are to corroborate the evidence that the applicant himself has given. The Prosecution asserts that the applicant's real intention in forcing a retrial is so that he can challenge facts which were previously undisputed at the trial, thereby frustrating the litigation process. Alternatively, the Prosecution argues that the matter should proceed for a full retrial as opposed to an acquittal.

75 In *AOF*, the Court of Appeal endorsed the following non-exhaustive factors to assist the court

in determining whether a retrial or an acquittal should be ordered (at [277(d)]):

(a) the seriousness and prevalence of the offence;

(b) the expense and length of time for a fresh hearing (where the original trial was prolonged and complex);

(c) the need to avoid putting an appellant through a second trial unless the interests of justice required so;

(d) the length of time between the alleged offence and the new trial if one is to be ordered;

(e) whether evidence which tended to support the appellant at the original trial would still be available at the new trial; and

(f) the relative strengths of the cases presented by the Prosecution and the appellant at the original trial.

76 The Prosecution submits these factors point towards a retrial in the situation here. Among other things, the time and expense of a new trial would not be excessive and the applicant has been on bail since he was charged and thus will not be unduly prejudiced. Further, there is minimal new evidence required at the retrial.

77 The applicant disagrees and submits that he should be acquitted on the amended s 47(6) Passports Act charge. He argues that not only was there reasonable doubt as to the elements of this charge but it was also worded defectively. The Prosecution failed to specify what type of false foreign travel document the Passport was, that is, whether it was a fabricated document or a tampered one (see the definition in s 2(3) of the Passports Act). Given this lack of particularity, a retrial on the amended s 47(6) Passports Act charge would be prejudicial. A new trial would also be hampered by the fact that Mr Tsai (said to be about 83 years old now) and Mr Huang may have forgotten important details surrounding the procurement of the Passport, which occurred some eight years ago.

78 In our view, considering the fact that the Defence's application to call two witnesses to present evidence in answer to the 46 s 47(6) Passports Act charges after they were amended very late during the trial was refused on wrong principles and the fact that we are unable to say that such evidence will not be relevant or not material to those charges or to the single amended s 47(6) Passports Act charge in the High Court, we are of the view that the conviction on the amended s 47(6) Passports Act charge should not be allowed to stand. Accordingly, we set aside the conviction on that charge.

79 We also think that a retrial for the amended s 47(6) Passports Act charge would be the best solution in the circumstances, bearing in mind the overall course of the trial (which the Judge described as "fairly eventful" in the HC GD at [2]). It would not be ideal to have the Judge hear Mr Tsai's and Mr Huang's evidence under s 392 of the CPC as she was not the trial judge. Since the DJ is no longer with the State Courts, it would also not be ideal to have another DJ continue with the trial and hear only the two witnesses' evidence on the amended s 47(6) Passports Act charge. Further, as noted earlier, until the charges were amended after the close of the Defence's case, all evidence led by both parties was in relation to the s 47(3) Passports Act charges (although some Prosecution witnesses were recalled after the amendment) and we have pointed out that there are material differences between an offence under s 47(3) and one under s 47(6).

80 We disagree with the applicant that he should be acquitted on the amended s 47(6) Passports Act charge. There are public interest concerns here. A passport of a foreign country is in issue. The Passport has been used in Singapore and elsewhere. Further, as we have pointed out, the applicant's evidence at the trial raises questions which should be explored fully. If the Prosecution decides to proceed with the amended s 47(6) Passports Act charge at the retrial, any deficiency in the particulars of the charge can be rectified upon application to the trial judge. On this point, we think it would be fair for the Prosecution to specify which limb of the definition of "false foreign travel document" in s 2(3) of the Passports Act it will be relying on. This is because the first limb of the definition relates to a document that is not issued by the Philippine Government while the second limb relates to one that is issued by the said government but which has been tampered with. On the point that Mr Tsai and Mr Huang may have forgotten details about the events leading to the obtaining of the Passport in 2011 and 2012, we do not think that that is a strong factor favouring an acquittal. Before the trial in 2017 and 2018, the applicant was quite prepared to call them to testify and one would assume that he had spoken to them to check on their ability and willingness to testify about the events of 2011 and 2012. The two witnesses would have tried to recall then about the events relating to the Passport. We do not think that a retrial in the near future should impact their memory in any significant way when compared to the trial in 2017 and 2018. In any event, these are matters which can be raised at the retrial and it is for the new trial judge then to make the proper assessments about the two witnesses and their proposed evidence. We also note that in the final sentence of the applicant's further and final submissions of 8 January 2021, he prays for an acquittal or, in the alternative, a full retrial.

81 The question related to ordering a retrial is whether the Prosecution should be allowed to proceed with only the amended s 47(6) Passports Act charge or whether it is at liberty to prefer any charge(s) that it deems appropriate. The applicant submits that any retrial regarding the Passport should be confined to the amended s 47(6) Passports Act charge because if it were otherwise, the Prosecution would be given another chance to prosecute him anew. If, for instance, the Prosecution now prefers a s 47(1) charge, the applicant would be deprived of the defence of reasonable excuse in s 47(7) of the Passports Act because s 47(7) applies only to offences under ss 47(2) – 47(6). The Prosecution contends that it should not be so limited at a retrial as that would constitute a "patently impermissible transgression into prosecutorial discretion".

82 We agree that the Prosecution should be allowed to prefer whatever charge(s) it deems appropriate within its prosecutorial discretion. It will also be recalled that the amendment of the s 47(3) Passports Act charges to those under s 47(6) was not even the Prosecution's proposal at the trial. It wanted to amend the charges to reflect s 47(1) offences but that was rejected by the DJ. In respect of the applicant's objection on the ground that he may lose the benefit of the defence in s 47(7) of the Passports Act should the Prosecution now decide to proceed with a s 47(1) charge, the applicant appears to have overlooked the fact that if the Prosecution does so, it takes upon itself to prove the *mens rea* of dishonesty on the part of the applicant because that is a requirement under s 47(1). We therefore hold the view that the Prosecution is at liberty to proceed with whatever charge(s) it deems appropriate at the retrial.

83 Turning to the second issue relating to the Immigration Act charges, the applicant submits that setting aside the conviction on the amended s 47(6) Passports Act charge will justify a reconsideration of his sentences for the Immigration Act charges. The applicant submits that if this court is minded to order a retrial, there would be new evidence from Mr Tsai, Mr Huang and the applicant. In the applicant's words, "[f]or fairness and consistency, the findings made after any retrial must be considered when considering the appropriate sentence under the Immigration Act charges".

84 The Prosecution points out that while the applicant accepts that he is guilty on the Immigration

Act charges, he contends that the sentences for those charges should be reconsidered should Mr Tsai and Mr Huang's evidence be taken. The Prosecution submits that this is a curious position. It asks, if the two witnesses' advanced age has caused their memory to fade in respect of the amended s 47(6) Passports Act charge, why their evidence would then shed light on the applicant's culpability in respect of other charges.

85 First, we are of the view that there is no need to set aside the applicant's conviction in respect of the Immigration Act charges although the conviction on the amended s 47(6) Passports Act charge has been set aside. The Immigration Act charges were concerned with the declaration of information by the applicant in his disembarkation forms and this is separate from the issues pertaining to the amended s 47(6) Passports Act charge. Further, the applicant did not appeal against his conviction in respect of the Immigration Act charges. He appealed only against the sentences imposed for these charges. The conviction on the Immigration Act charges therefore stand.

86 However, in respect of the sentences for the Immigration Act charges, as altered on appeal by the Judge, we think they should be set aside and that the sentencing for those charges should be reserved for the new trial judge to decide after the retrial. We do not know at this stage what charge(s) the Prosecution will prefer at the retrial in respect of the Passport. We also do not know how the evidence from the Prosecution and the Defence will pan out at the retrial, whether such evidence will impact the applicant's culpability in the Immigration Act charges in some way and what conclusions will be reached by the new trial judge. Further, in the event of a conviction on the charge(s) that the Prosecution may prefer at the retrial, the new trial judge will have to look at all the circumstances in deciding the appropriate individual as well as the collective sentences for the different types of offences, bearing in mind that there will be consecutive imprisonment terms in view of the number of Immigration Act charges if imprisonment is considered the appropriate sentence for all the charges. It would therefore be best that the new trial judge be given the liberty to consider the sentences in respect of all the charges. We therefore set aside the sentences for the Immigration Act charges and reserve sentencing on those charges to the new trial judge. Pending the retrial, we extend the existing bail for the applicant until further order.

Conclusion

87 We summarise here the various points of our decision:

(a) We allow the applicant's application in this CM in respect of only the new Question 4.

(b) We answer the new Question 4 affirmatively and hold, applying the principles in s 131 of the CPC, that the applicant should have been allowed to call Mr Tsai and Mr Huang as his witnesses after the s 47(3) Passports Act charges were amended to allege a different offence after the close of the case for the Defence.

(c) The applicant's conviction on the amended s 47(6) Passports Act charge is set aside and this case is remitted to the State Courts for a re-trial to be conducted in respect of the Passport.

(d) At the retrial, the Prosecution is at liberty to prefer whatever charge(s) it deems appropriate.

(e) The applicant's conviction on the Immigration Act charges is to stand.

(f) The sentences for the Immigration Act charges are set aside and the sentencing for these

charges is reserved to the trial judge at the retrial.

(g) Pending the retrial, we extend the existing bail for the applicant until further order.