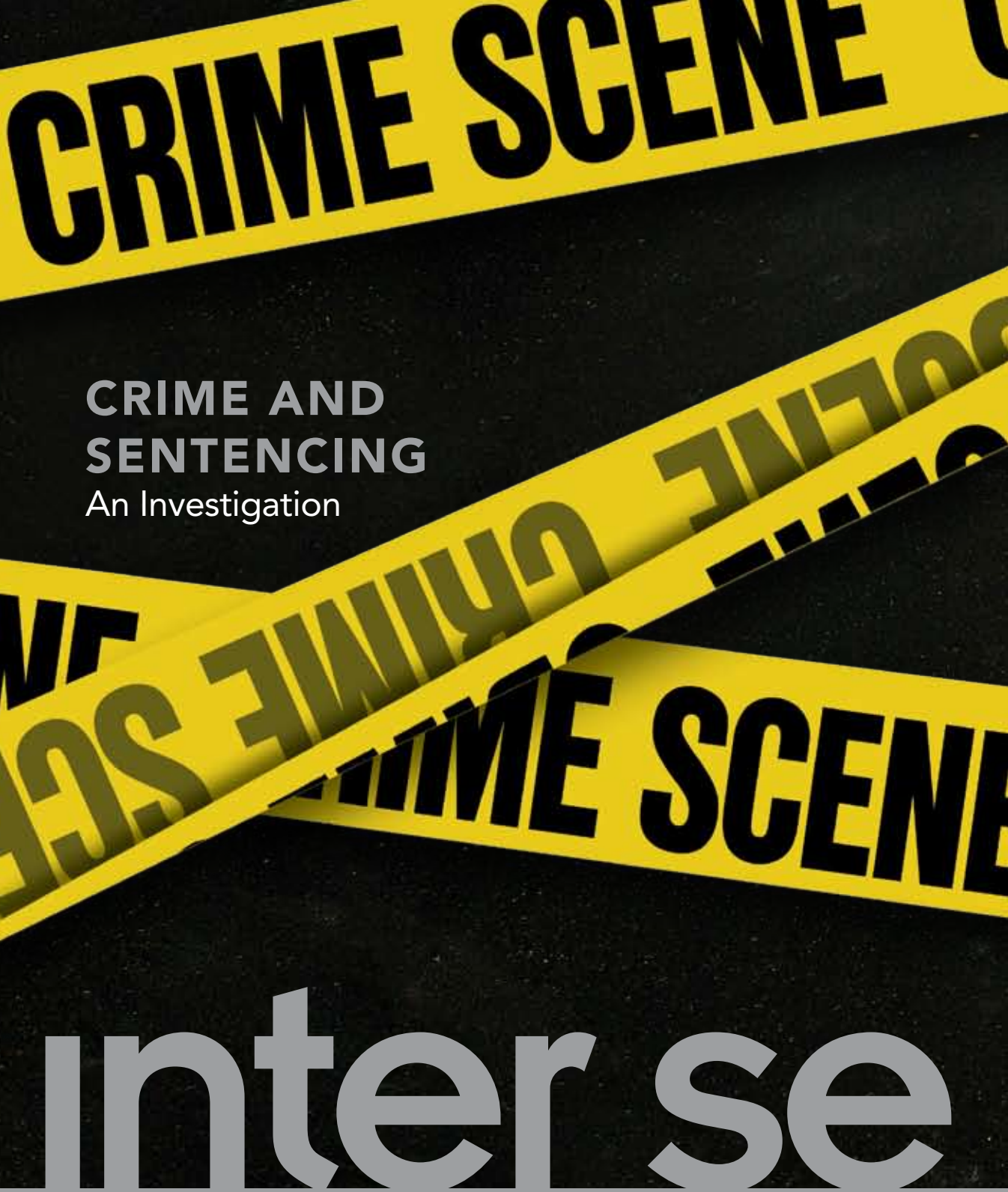

CRIME AND SENTENCING
An Investigation

inter se

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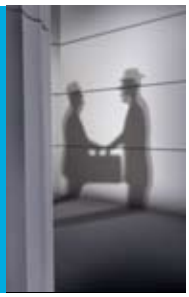
JAN – JUN 2009 | SINGAPORE ACADEMY OF LAW



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> If he has a conscience he will suffer for his mistake. That will be punishment – as well as the prison.[1]

JUSTICE is a fundamental tenet of our legal system, and is especially significant in judicial decisions. In many instances, the sentence that is handed down provides one of the few means by which society and the victim are able to receive redress for an injustice. In turn, sentencing decisions are often closely scrutinised by the public, the media, legal practitioners, academics and, to some extent, the offender, to ascertain whether a sentence has been fairly passed in accordance with established sentencing principles.

The principles used by the court, namely, retribution, deterrence, rehabilitation and protection, govern any sentencing decision. The task of sentencing is complex and involves objectively recognising the severity of the offence under the circumstances, and injecting the subjective (offender-specific) aggravating or mitigating factors.

The complexity stems from the subjective human element present from the point the crime is committed to the sentence imposed. The final outcome hinges on the charges framed, the documents disclosed, the evidence gathered, the sentencing principle employed, the offender circumstances, *etc*. To confound it all, the Legislature provides guidance only in the form of a spectrum of culpability (a range of possible outcomes); the final decision is left to judicial discretion. This in itself raises broader issues. Should, say, judicial mercy play a part? How best to accommodate competing sentencing principles? Perhaps, the court's adherence to one principle is a reflection of society's mores at that point in time. The values the community upholds changes with time. How do we thus ensure consistency, proportionality and fairness?

The difficulties in sentencing are a manifestation of the challenging nature of criminal law. Even as we were finalising this issue, a proposed Criminal Procedure Code Bill is threatening to alter the legal landscape. This issue on crime and sentencing offers a broad range of articles on forensic evidence, the escalating sophistication in white-collar offences (and crime in general), the underlying changing values of society as espoused in the Penal Code amendments, in addition to the illuminating interviews with senior criminal lawyers.

We hope you will read this issue. It would be a crime not to!

Warm regards,

Bala Shunmugam

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1 Fyodor Dostoevsky, *Crime and Punishment* (Bantham Classics, 1996) at p 246.

MEN BEHIND THE BAR

THREE SENIOR MEMBERS OF THE CRIMINAL BAR, MR K S RAJAH SC ("KR"), MR SANT SINGH SC ("SS") AND MR SUBHAS ANANDAN ("SA"), RESPOND CANDIDLY ABOUT THEIR EXPERIENCES AND IMPRESSIONS OF AN UNFORGIVING CRIMINAL PRACTICE.

As a veteran member of the criminal bar, would you care to share with the newer members your experiences and impressions as a criminal law practitioner? What of your criminal law career have you felt to be the most rewarding? Conversely, what were the lowest points?

KR: My experiences at the criminal bar are a memorable one. I was a Deputy Public Prosecutor. I have also acted as defence counsel and sat in Judgment.

I was a Deputy Public Prosecutor at a time when the Singapore criminal bar had big names. David Marshall, T T Rajah were household names. They were fearless and forceful. In court they were masters of both fact and the law. Deputy Public Prosecutors had to learn quickly if they wanted to avoid being told that they were not up to the mark.

There was no such thing as plea-bargaining. The prosecutors and the court were both mindful of every man's right to his day in court.

Representations were made very often at informal meetings at the chambers. Prosecutors, police officers and defence counsel could all be pulled up sharply by the judges both at the High Court and at the lower courts if they became overzealous.

The Prosecution did not take a position on sentences. Very often it was limited to stating previous convictions of a similar nature, if any. Previous antecedents were given a restricted meaning. It was generally accepted that it was the judge's primary role to decide on the appropriate sentence. Prosecution leaves sentencing to the court except when asked to assist the court on a certain matter. The Prosecution as the party prosecuting is not the best party to form a view on a fair sentence after a mitigation plea. The maximum sentence prescribed is the best guideline.

If the Prosecution is not satisfied with the sentence, an appeal is filed against the sentence. If the Prosecution's appeal lacks merit, there was a very real possibility of the Prosecution being chastised.

The media did not sensationalise cases. This was partly due to the fact that we had jury trials and defence counsel would not hesitate to complain to the court that their cases had been prejudiced by the newspaper reports of ongoing proceedings or proceedings likely to appear in court.

Statements made to the police became admissible only after the CPC (Criminal Procedure Code) was amended. Confessions were always recorded by a Magistrate. Where a police officer produces an accused before the Magistrate to record a confession and the Magistrate finds that the accused is not disposed to making a confession voluntarily, the accused would be remanded in prison and not at the police station.

A criminal practice is not one where big money is made. The compensation lies in the fact that the courts, Prosecution and the practitioner are all upholding human values when the victim and his family want revenge. Fair prosecution ensures that the punishment philosophy is not an eye for an eye which leads to many blind men, or one-eyed men in society.

The lowest point was reached on reflection when the concept of a person being "factually guilty" became respectable, ignoring the fact that life and liberty can only be deprived "according to law" and not when the police or the Prosecution come to the conclusion that a person is "factually guilty".

The most rewarding part of my career as a prosecutor was the knowledge that you do not advance facts and theories that are not supported by statements in the file that have been voluntarily obtained. The knowledge that when a case has to be proved beyond a reasonable doubt leaves open the possibility of mistakes being made for the simple reason that persons are not convicted when there is no doubt at all. Punishing an innocent person has always haunted the common law world. It is possible for a guilty man to be acquitted but my experience is that when a guilty man is acquitted it does not take long before he commits another offence and ends up being prosecuted. We must also not be too quick to jump to the conclusion

Clockwise From Top: Mr K S Rajah SC, Mr Sant Singh SC and Mr Subhas Anandan.

that when a judge takes greater pains to scrutinise the evidence before he convicts a person of a capital offence, he is against the death punishment.

SS: The practice of criminal law can be daunting and is definitely demanding. It takes its toll on the accused and his/her family. The lawyer is looked upon by these persons as their saviour. It is not in every case that the accused denies committing the act. In these cases, counsel usually raise defences like diminished responsibility, self-defence, provocation. The difficulty arises when the accused's defence is that he did not commit the act. If these instructions are true, then clearly he or she is innocent and not only that, the real perpetrator of the crime is at large! My experience has been not to be a moral judge or arbitrator of the facts, *ie*, the guilt or otherwise of the accused. This is the function of the court. The legal ethics and requirement of a criminal barrister is to take his client's instructions and if the client instructs that he did not commit the offence, then you are duty bound to defend him or her. Conversely, if he instructs you that he has committed the offence, you are ethically bound not to put forward a defence contrary to your instructions. This will usually resolve any ethical issues you may encounter. In difficult situations, or when in doubt, consult your colleagues or seniors.

Other than this, I have found criminal practice to be challenging, rewarding and satisfying. Needless to say, it involves hard work and sometimes long hours, especially when you are in trial. It also involves honing your skills in harnessing the facts and law, and applying the law to the facts of the case. It is often forgotten that this is only half the battle.

The equally important function of an effective lawyer is how you present your case in

court. Your primary function is to persuade the court and your efforts will be better appreciated by the court if you present your case clearly, concisely and with integrity. Your reward as a criminal lawyer is primarily acceptance by your peers, recognition by the court and respect from your opponents (usually hard earned). When all this happens, the financial rewards will automatically follow and you will have the added satisfaction that you are helping a fellow individual who has found himself in difficulty with the law. You will also have the forensic satisfaction of a job well done, be it an effective cross examination, a succinct submission or a compelling mitigation plea. The satisfaction you will have in saving a person (who has instructed you that he is innocent) from jail or even the gallows, or keeping a young mother from jail by an effective mitigation plea, is hard to describe in words and cannot be measured in monetary terms.

SA: When I first started my career as a lawyer in criminal law, there were only very few lawyers practising in the criminal bar. The playing field was somewhat even. This changed after the Privy Council case of *Hua Tua Tow* and the new directions and the interpretations that were given to some cases by the courts that made defence work difficult. The playing field became so uneven.

Winning a case is not really the most rewarding experience, feeling that you had a fair and impartial trial is.

The lowest part of my career is realising that a person has been convicted and found guilty only because the law was lopsided and not because the evidence was against him.

Criminal law has always been seen as a demanding practice area of law, hence, the dwindling number of criminal law practitioners. Has this view changed over the years? How has the landscape evolved over time? What would your wish list for the criminal profession of the future be?

KR: Litigation is a demanding area of practice. It is made worse at the criminal bar because of the consequences that follow upon conviction. In other parts of the common law world, the practice adopted in civil litigation with respect to discovery is customary. Pleadings are also helpful. In criminal practice, especially at the lower courts, the only material that is made available is a copy of the charge sheet and the first information report. In some cases even the first information report is withheld.

At the criminal bar, the Prosecution does not make it fair by disclosing its case to the defence. A minimum of particulars is in the charge. The specimen charges in the CPC are not meant to be binding. The Prosecution tends to follow the precedents in the CPC and not give particulars even when there is an application for further particulars and the particulars can be included or ordered by the courts.

Defending is made oppressive by having many charges. The Prosecution wants to make it plain that upon conviction, sentences would be consecutive in at least two charges. Courts rarely direct the Prosecution to proceed on, say, three of the charges and stand down the other charges. It was done in my time.

Counsel is obliged to make known to his client what would happen on conviction. It becomes a depressing exercise when a "fair-go" at testing the evidence of the Prosecutions' case is not made as a matter of course. Sentences being increased on appeal is unfair. Has there been any case where the sentence has been reduced on a public prosecutor's appeal? We have one level of appeals. It should be possible to appeal to a single Judge of Appeal against a Magistrate's appeal that is dismissed by a High Court judge.

SS: Any litigation practice is demanding. However, when the life and liberty of an individual is at stake, as in a criminal trial, the burden on the defending counsel can be quite daunting. Timothy Evans, who was hanged in England before the death penalty was abolished, was posthumously pardoned. The constant thought in the mind of any criminal lawyer is always "Have I done all that I possibly can in the defence of the accused?" This is a perennial question over the years and is not by itself the reason or main reason why the criminal bar in Singapore is dwindling. The following are probably the reasons:

(a) unlike earlier generations of litigation lawyers, younger lawyers now have options which their predecessors did not have. The prevailing culture in my time was straight to practice after graduation;

(b) practice then was laissez-faire, unlike the constant demands of today on the time of lawyers. Documents then were delivered as fast as the office boy or thamby could deliver them and not at a click of a few buttons;

(c) to compound matters, until a few years ago the demands made of lawyers in terms of timelines by the court did not help matters: this issue has been resolved but has to be constantly reviewed; and

(d) finally, an impediment to young lawyers wanting to be criminal lawyers is the belief that criminal practice is a hard grind, not to mention that "crime does not pay" both for the accused and the lawyer. It takes years for a criminal lawyer to hone his advocacy skills and to be recognised, and it does not help matters if he sees his peers earning huge salaries as corporate lawyers.

> "The need to send signals has become a mantra not only for some prosecutors but also acceptable to judicial officers. The best signal is sent by making sure all offenders end up being prosecuted."

However, there will always be bright young lawyers who graduate with a burning desire to become criminal litigators. Firstly, one way the enthusiasm of these young lawyers can be tapped is for the bigger law firms to encourage their younger lawyers to practise at the criminal bar by doing pro bono work and recognise such work as a contribution to their billing requirement. In recent times, there is an evolving culture abroad and in Singapore to encourage young lawyers to do pro bono work.

Secondly, the practice of criminal law should be reviewed to address the misgivings of the criminal bar so that young lawyers will be encouraged to practise at the criminal bar. The wish list of the criminal bar has been canvassed for some time and more recently by the President of the Law Society in January 2008 at the Opening of the Legal Year. Essentially it involves the following matters:

(i) provisions for discovery of documents and statements in Subordinate Court trials, as is the case in High Court trials;
(ii) provisions be enacted to put in place a protocol for the recording of statements from accused persons and the furnishing of the statements to counsel; and
(iii) furnishing of unused materials to the Defence.

SA: The practice of criminal law has always been difficult because the law made it difficult. The man in the street cannot be blamed for thinking that the law is lopsided and against the accused. The number of criminal lawyers is increasing and I wish the system will be fairer to the accused, and this in turn will attract more lawyers to take up criminal practice. Nobody wants to go to court and lose all the time.

The law is made difficult when the Prosecution is entitled not to give the long statements of the accused to the Defence. It is unfair and unreasonable for the accused to be deprived of his own statements that he made maybe a year ago before the trial; whilst the Prosecution has those statements which they can use to impeach the credit of the accused.

An often heard comment from criminal practitioners is the perception that the criminal justice system is skewed towards the side of the Prosecution. Is there any truth in this?

KR: There is a great deal of truth in the perception that the Prosecution has all the cards mostly because the courts are not sympathetic with applications for discovery. PTCs (pre-trial conferences) are not as helpful as they can be with discovery. There are no guidelines. The High Court has not spelt out any guidelines. It is wrong to imagine that if there is discovery, the lawyer and his client will use the statements to harm or threaten witnesses. They do not do it in civil cases. The days when secret societies could intimidate witnesses with impunity are gone. They are haunted by action under s 55 of the Criminal Law (Temporary Provisions) Act.

There may, of course, be special cases when discovery may not be desirable in the national interest. Where there are such cases, the giving of the information of a sensitive nature is undesirable. The Prosecution can always apply to the court to deny the supply of statements to the accused. In any case, not supplying all the statements the accused had made to the police in the course of investigations is not supported by decided cases in the High Court, but is not followed by the lower courts. Lawyers are partly to blame. They do not assert the rights of the accused as forcefully as David Marshall and T T Rajah would have done.

SS: The complaint of the criminal bar has always been the lack of discovery at the Subordinate Courts, where the vast majority of criminal cases are heard. The CPC, which we inherited as a Colony, has not been amended in this regard for a long time. This issue must be examined. In Malaysia, the CPC has been recently amended to allow for discovery in

criminal trials. Other Commonwealth and common law jurisdictions have allowed discovery for a long time. There is no conceivable reason for not allowing discovery in the Subordinate Courts, after all, it is allowed in High Court trials in Singapore.

The second complaint is the recording of statements from accused persons. There are no protocols in place. This is not the practice in other common law jurisdictions. In Malaysia, the Attorney-General has put a moratorium on the use of accused statements. Protocols are all the more necessary as an accused person can be convicted: (a) on his retracted statement; and (b) on the confession of a co-accused and in the absence of any other evidence.

Thirdly, the Defence has no access to unused materials gathered in the course of police investigations. The Prosecution is not obliged to furnish the Defence any such materials even though it may assist the defence of the accused. Whilst it could be said that the Prosecution is not bound to assist the accused or is not privy to the defence of the accused, it seems to be contrary to all rules of transparency or fair play. The English experience in the infamous case of the Guildford Four is a salutary example of how an injustice can be perpetrated.

SA: Of course. One just has to analyse the law and its practise in Singapore to confirm that the system is definitely slanted towards the side of the Prosecution.

When I first started practice as a criminal lawyer, the accused was entitled to remain silent when he was interrogated or asked what his defence is. Today, if you remain silent and do not disclose your

defence, the court can infer adverse inference against the accused. Years ago, the accused was allowed to make a statement from the dock, today he is not allowed to do so, and if he refuses to give evidence in his favour, the court again can infer adverse inference against him. Counsel is denied access to the accused after his arrest. The accused is kept in custody up to three weeks without his family or lawyer having access to him. The Defence counsel is only allowed to see his client after the "so called" investigation is over. In many cases, it means that the police have managed to obtain confessions from the accused.

With liberalisation being an inevitable change to the legal landscape, do you foresee this overflowing into criminal practice in time? And if so, what do you think will be the repercussions for criminal practice?

KR: I see liberalisation as being inevitable because the pendulum has swung from being fair and perhaps liberal to the other end of the pendulum's swing. Discovery must take place. The recording of police statements must be seen to be fair.

Police statements will be recorded with cameras recording the entire process. We cannot have a situation where criminal trials are, for practical purposes, all over when statements or confessions made to police officers at police stations– in the course of investigations after the accused has been remanded for a long period to assist the police with their investigation – becomes as good as evidence given on oath in court. The practice of getting suspects to re-enact crimes, with the media recording the event, is inconsistent with the presumption of innocence.

Handcuffing a doctor who is charged with an offence under the Income Tax Act after he has pleaded guilty and punished is calculated to humiliate respectable citizens in addition to punishing him. The need to send signals has become a mantra not only for some prosecutors but also acceptable to judicial officers. The best signal is sent by making sure all offenders end up being prosecuted.

SS: I do not foresee the winds of change in terms of liberalisation of criminal practice in Singapore. The majority of the criminal offences tried in the Subordinate and High Courts do not have the significant fees across the board which justify foreign counsel or firms setting up practice here. The few cases (commercial frauds and money laundering cases) where complex questions of law and facts are involved can be handled professionally and competently by Singaporean lawyers and firms.

SA: Yes, but I do not know whether the change is inevitable or not. I have been hearing about changes to the system for the past 20 years and I am still waiting. If the change does come about, it will definitely improve the quality of criminal justice in Singapore. *IS*

Inter Se thanks Mr K S Rajah SC, Mr Sant Singh SC, and Mr Subhas Anandan for their time in granting us this interview.

UPHOLDING THE RULE OF LAW

THE HONOURABLE ATTORNEY-GENERAL PROFESSOR WALTER WOON CHEONG MING OBLIGES *INTER SE* WITH A SHORT INTERVIEW ON HIS DUAL ROLE AS THE GOVERNMENT'S LEGAL ADVISER AND A PUBLIC PROSECUTOR.

Now that you've had some time to sink your teeth into the job, what would you say is the Attorney-General's ("AG's") role in the Singapore context?

The AG's role is two-fold. Firstly, he is the legal adviser to the Government. Specifically, the Attorney-General's Chambers ("AGC") is set up so that (a) the Civil Division provides advice and legal representation to the Government (not statutory boards or government-linked companies); (b) the Legislation and Law Reform Division drafts legislation according to the instructions provided by Ministries; and (c) the International Affairs Division advises the Government on international law, participates in international negotiations and, where necessary, assists in the settlement of international disputes. This is only a brief and very general sketch of what the AGC does. The details of AGC's work would fill much more than the space available here.

The second role of the AG is that of Public Prosecutor. Article 35(8) of the Constitution provides that "the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence". In matters of prosecution, the AGC is independent of the Government. This is a necessary check on politically-motivated prosecutions.

Do you think consistency and certainty in the law are compromised when, in sentencing, courts consider competing principles (*ie*, retribution, deterrence, rehabilitation and protection) and decide which should have the greatest weight in each factual matrix? In your

opinion, when should judicial mercy be exercised, if at all?

The sentencing principles do not affect consistency and certainty. On the contrary, they ensure that there is an intellectually-coherent framework within which the sentencing process occurs. Sentences cannot be meted out on a whim; they have to be justified. The justification for any particular sentence lies in the established sentencing principles.

The court has the prerogative of showing mercy where it is appropriate. There should be no confusion between the roles of the Prosecution and the court. The Prosecution will consider whether or not a particular person should be charged, and if so, on what charges. If it is decided that no charges should be preferred, the accused gets off without having to appear before a judge. In general, there have to be strong reasons before the Prosecution will drop the charges. Facts tending to show that the accused did not commit the *actus reus* or which diminish the accused's culpability (*eg*, mental problems) would be relevant in this context. Facts tending to evoke sympathy for the accused (his personal circumstances, remorse, dependents, *etc*) are not usually factors that would justify dropping the charge. However, they may be taken into account in sentencing– the judge is entitled to show judicial mercy. Having said that, there is always a balance that must be struck between justice and mercy, and it should not be expected that every accused with a sob story will get off lightly.

You said in an interview with *The New Paper* (13 April 2008), "I am not, by nature, an advocate. I am an academic by nature". However, you have already made several appearances in court. What factors do you consider in deciding which cases to personally argue?

I have appeared in six cases since January 2007: thrice in the Court of Appeal (one civil appeal and two criminal appeals), once in an appeal from the Subordinate Courts and twice in the High Court (one case involving a vexatious litigant and the other concerning contempt of court). Before the current spate, the last time I had appeared in court was in 1995. Advocacy is a skill that requires constant practice. The first few cases I argued were done basically in order to get back into the groove. After a 12-year hiatus, I had become rusty. Going forward, I will argue cases which concern important issues of law or which require the personal attention of the AG (the recent contempt action against the publishers of the Wall Street Journal Asia being a case in point).

Would you recommend the law as a profession to your sons?

Absolutely and without qualification. *is*

Inter Se thanks The Honourable Attorney-General Professor Walter Woon for his time in granting us this interview.

CHOICE PICKS

DOMINIC NAGULENDRAN MAKES THE DIFFICULT PICK OF WHAT HE CONSIDERS ARE THE TEN MOST SIGNIFICANT CASES SINCE 1993 ON VARIOUS ASPECTS OF CRIMINAL LAW AND SENTENCING.

By **Dominic Nagulendran, Legal Practitioner**

OVER the last 15 years, there has been an enormous output of High Court ("HC") and Court of Appeal ("CA") written decisions, dealing with many aspects of criminal law and procedure, which has contributed significantly to our local criminal law jurisprudence. Here are ten such cases.

LOW MENG CHAY v PUBLIC PROSECUTOR
[1993] 1 SLR 569

Brief background

The appellant had been convicted for many offences under the Trade Marks Act 1998 (No 46 of 1998). In all, as a result of default sentences, he faced an aggregate imprisonment term of seven years, four months and 23 days on the charges appealed against. Upon his appeal, the sentences were drastically reduced.

Significance

Where the sentence to be meted out is only a fine, the default sentence to be imposed on an accused as a result of him being unable to pay the fine may often be longer than if the sentencing judge was to impose an immediate term of imprisonment.

This case appears to be the only reported HC decision that articulates the sentencing principle that default terms of imprisonment are intended to prevent evasion of the fines imposed, not to punish those who are genuinely unable to pay.

The court established the point that when it was unambiguously clear that a defendant cannot pay a fine, realistic and reasonable though it may be, the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of imprisonment.

MOK SWEE KOK v PUBLIC PROSECUTOR
[1994] 3 SLR 140

Brief background

The appellant had pleaded guilty in the HC to a charge of having abetted robbery with hurt. In the course of the appeal to the CA, the judges had grave doubts as to whether, in spite of the appellant's guilty plea, the charge was sustainable based on the statement of facts. A five-judge CA was thereafter convened to hear further arguments.

Significance

This case clearly establishes that the recording of a statement of facts by the court following an accused's plea of guilt, which began as a matter of practice to assist the judge to determine the appropriate sentence, now places a legal duty on the court to record and scrutinise the statement of facts for the purpose of ensuring that all the elements of the charge are made out therein.

Further, it is open to the CA, on account of a particular provision of the Supreme Court of Judicature Act (Cap 322, 1993 Rev Ed) (and not by virtue of a revisionary jurisdiction, for it has no such powers) to re-open the conviction of an accused who had pleaded guilty if it had grave doubts as to the legality of his conviction.

PUBLIC PROSECUTOR v KHOO YONG HAK
[1995] 2 SLR 283

Brief background

The respondent was a medical practitioner who was acquitted in the District Court of corruptly giving gratification to a bus driver to induce him to bring more foreign workers to the respondent's clinic for the workers' pre-employment medical examinations.

Significance

This case laid down for the first time a two-part test for corruption that is now settled law. Although this case did not involve an offence of corruption by an agent in relation to his principal's affairs, the test has since been held to be similarly applicable.

Drawing on the fact that the adverb "corruptly" serves to qualify the offence, the court held, without seeking to define "corruptly", that for the offence to be made out, it had to be settled beyond reasonable doubt there was a "corrupt element" in the transaction and a "corrupt intent" on the part of the person giving.

This case, through the use of this two-part test, heralded a new approach in determining if a transaction was corrupt. It has been subsequently clarified that whether a transaction had a "corrupt element" was an objective inquiry and that it was essentially based on the ordinary standard of the reasonable man and this question had to be answered only after the court had inferred what the accused intended when he entered into the transaction.

As for the test of "corrupt intention", it was held that it referred to the subjective knowledge of the accused and Yong Pung How CJ (as he then was) in a subsequent case stated that to prevent confusion in future, the term "guilty knowledge" rather than "corrupt intention" should be used.

NEO AH SOI v PUBLIC PROSECUTOR
[1996] 1 SLR 534

Brief background

The appellant was convicted on 23 charges of cheating. The evidence against him was effectively his confessions that were admitted after a *voir dire* (trial-within-a-trial). On appeal, he was acquitted on all charges.

Significance

While the CA had previously accepted that an accused's statement which had been admitted in evidence may be disregarded if subsequent evidence raised doubt as to its voluntariness, the HC's pointed call for vigilance in this case regarding the voluntariness of an accused's statement should be constantly remembered in light of the significance such statements have in our criminal trial process.

Yong Pung How CJ (as he then was) held that the trial judge's duty to scrutinise the voluntariness of any statement made by an accused does not end on the *voir dire*. The judge, he said, should remain alert to any indication that the statement had been involuntary after the *voir dire*.

Further, it was made clear that the duty to ensure the voluntariness of statements and confessions made by an accused was one of utmost importance in a criminal trial.

The court would not hesitate to exclude or disregard the statement if there is any appearance of involuntariness.

***ABDUL NASIR BIN AMER HAMSAH v PUBLIC PROSECUTOR* [1997] 3 SLR 643**

Brief background

The appellant had appealed against an order that his sentence of life imprisonment was to run after the expiration of his sentence for a robbery with hurt charge.

Significance

The CA for the first time ruled that life imprisonment meant life for the rest of a person's natural life unless there was something to the contrary in the statute. As a result of this case, legislation was put in place for a Life Imprisonment Review Board to look into cases of

prisoners who have served at least 20 years' imprisonment of their life sentence.

Of further importance, in ruling that the appellant was not to be affected by this first-time interpretation, the court applied reasoning analogous with the principle of prospective overruling, for it would be contrary to what was reasonable and legitimately expected for the accused to serve the sentence as now newly interpreted.

MV BALAKRISHNAN v PUBLIC PROSECUTOR
[1998] 3 SLR 586

Brief background

The appellant had permitted his employee to drive a Class 4 vehicle when the latter possessed only a Class 3 driving licence. Further, there was no valid insurance in respect of the Class 4 vehicle. The appellant's defence was that he did not know that the vehicle was a Class 4.

Significance

While holding that the offences were strict liability offences, the HC accepted, for what appears to be the first time, that the defence of having taken reasonable car can be available to an accused charged for a strict liability offence. Such an approach was in accordance with the Canadian position.

PUBLIC PROSECUTOR v LIM POH LYE
[2005] 4 SLR 582

Brief background

The appellants were convicted by the CA of murder in furtherance of a common intention with a third person. The fatal wound was a cut of the victim's femoral vein which was as a result of a stab in his thigh.

Significance

The CA clarified the law with regard to the controversial s 300(*c*) of the Penal Code (Cap 224, 1985 Rev Ed) wherein a person may be guilty of murder even if he did not have the intention to kill but merely to cause bodily injury.

This case is authority for the proposition that a person may be guilty of murder if the particular injury which eventually caused death in the normal course of nature was inflicted by the accused intentionally and not accidentally.

The court further clarified that if a "minor injury" was intended which would not cause death in the normal course of nature, the accused would not be guilty of murder even if a different injury was in fact caused which would cause death in the ordinary course of nature.

TAN KIAM PENG v PUBLIC PROSECUTOR
[2008] 1 SLR 1

Brief background

The appellant's conviction for importing heroin was upheld by the CA. His defence was that while he knew he was importing illegal drugs, he did not know the precise nature of the drugs he was carrying.

Significance

This case states that the famous English case of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 ("*Warner*") is of limited application in Singapore and its relevance should be confined to the point of general principle relating to the concept of possession. This case is significant as for a long time, *Warner* has been cited in our local jurisprudence without a full appreciation of the difference in the respective legislation.

In the context of the presumption of knowledge in the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA"), although it decided not to reach a definitive conclusion, the CA preferred the interpretation that it referred to the knowledge of the accused having knowledge not only that the drug concerned was a controlled drug but also of the specific drug that was found in his possession.

Following from this, it would appear that the court preferred the position that for offences (like trafficking, possession and importing) under the MDA, knowledge by the accused of the specific drug is required (as opposed to knowing generally that it is a controlled drug).

The case is significant in that an accused who is proven (or presumed) to have possession of a controlled drug may be acquitted of possession by his rebutting the presumption that he had knowledge of the specific drug found in his possession.

Another significance is that in the scenario where the Prosecution has to rely on the presumption of possession to prove an offence of trafficking, then it may have the burden of proving that the accused had actual knowledge (or is wilfully blind that he has possession) of the specific controlled drug (as opposed to knowing generally that it is a controlled drug).

This case also has a detailed discussion of what constitutes wilful blindness which the court states is the legal equivalent of actual knowledge.

LEE CHEZ KEE v PUBLIC PROSECUTOR

[2008] 3 SLR 447

Brief background

The appellant's conviction for murder in furtherance of a common intention with two others was upheld. The two accomplices had been separately tried and did not give evidence in the appellant's trial.

Significance

Perhaps for the first time in a criminal case, all three appellate judges wrote separate grounds of decision. However, all the judges were in agreement with regard to the restatement of the law on s 34 of the Penal Code dealing with common intention, a provision which V K Rajah JA said was "deceiving in its apparent simplicity".

The law was extensively discussed and, importantly, it was held that presence at the scene of the criminal act, primary or collateral, need no longer be rigidly insisted.

In a "twin crime" situation, the additional *mens rea* required of the secondary offender is that he must subjectively know that

one of his party may likely commit the criminal act constituting the collateral offence in furtherance of the common intention of carrying out the primary offence.

By way of dicta, Rajah JA notably commented that the present position (that a co-accused's conviction may be founded entirely on the confession of a co-accused alone under s 30 of the Evidence Act (Cap 97, 1997 Rev Ed)) may have to be reconsidered in future in light of the law's abiding concern about the unreliability of a co-accused's confession.

PUBLIC PROSECUTOR v UI [2008] 4 SLR 500

Brief background

This was an appeal by the Prosecution against the sentence of imprisonment imposed on the respondent who had pleaded guilty to three counts of having raped his daughter. He had also consented to other charges to be taken into consideration for the purpose of sentencing ("TIC" offences).

Significance

The CA recognised that there was little authority on how TIC offences are to be reflected in the sentences imposed for the offences actually proceeded with by the Prosecution.

This case established that more often than not, when TIC offences feature in a case, the sentence for the offences proceeded with will have to be increased. However, it was not mandatory that the court had to increase the sentence imposed for the offences proceeded with. It was ultimately left to the court's discretion whether to consider the TIC offences.

The CA also held that it would not be proper for a trial judge to depart from guidance given by established sentencing precedents without at the very least giving cogent reasons as to why they should not be applied. A high level of consistency in sentencing is desirable as the presence of consistency reflects well on the fairness of the legal system. *IS*

AN OCCUPATIONAL HAZARD WHITE-COLLAR CRIME

By **K Anparasan* and Foo Cheow Ming, Legal Practitioners**

AN OVERVIEW OF WHAT CONSTITUTES WHITE-COLLAR CRIME, WITH HIGHLIGHTS OF SOME OF THE MORE SIGNIFICANT CASES IN SINGAPORE AND A DISCUSSION OF POSSIBLE TRENDS.

WHAT IS WHITE-COLLAR CRIME?

The term "white-collar crime" itself has not been defined by judicial decisions in Singapore. It is also a term which has been used almost interchangeably with "corporate crime" or "business crime".

Academics have their differences in trying to define what constitutes corporate or white-collar crime. An American sociologist, Edwin H Sutherland, tried to define "white-collar crime" as "crime committed by person of respectability and high social status in the course of his occupation".[1] In 1970, a sociologist, Edelhertz,[2] proposed another definition as "illegal acts committed by non-physical means and concealment in order to obtain money or property or to obtain business or personal advantage". This is submitted to be a better working definition of what is otherwise an amorphous or over-broad concept.

The crucial characteristics of white-collar crimes can be identified as follows:

(a) **Perpetrators.** White-collar crimes are crimes committed by persons who are either the *directors, officers and employees of a corporation*,[3] or *professionals* serving such corporations.

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1 Edwin H Sutherland, "White-Collar Criminality" (1940) 5 American Sociological Review 1–12, as quoted by Amarjeet Singh SC in "White-Collar Crime" (2002) 14 SAcLJ 231 at 231–232. Alternate resource: Edwin H Sutherland, *White Collar Crime: The Uncut Version* (Yale University Press, 1985)

2 Herbert Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1970) at 3, as quoted by Amarjeet Singh SC in "White-Collar Crime" (2002) 14 SAcLJ 231 at 232.

3 *Ie*, commercial undertakings, as opposed to political office, public service or governmental milieu. As such, this discussion would necessarily exclude discussion of bribery and corruption.

(b) **Context.** White-collar crimes are crimes committed within a *predominantly corporate or business context*, and exclude those involving physical violence.

(c) **Motivation.** White-collar crimes are primarily motivated by and committed for the individual's quest for *illicit economic gains or business advantages*,[4] or to *conceal* either business losses or other forms of defalcations or non-compliance with regulations;

(d) **Offences.** White-collar crimes usually involve offences which involve the element of *dishonesty or fraud*, as it is through such dishonesty or fraud that property or business advantages are sought. This would be consistent with the fact that the predominant underlying motives of white-collar criminals are primarily economic.

PREVALENCE OF WHITE-COLLAR CRIME[5]

With economic development and the lure of living the high life, it comes as perhaps no surprise that a significant number of companies have been victims of white-collar crime. In 2007, nearly one in four of Singapore's larger companies was hit by fraud. The amounts involved were also increasing – from an average of S$1.4m per incident in 2004 to S$4.4m per incident by 2007. The majority of the perpetrators appear to do so for materialistic reasons: about 70% committed their crimes to fuel a lifestyle beyond their means. It is therefore vital for all stakeholders in corporate governance to appreciate what constitutes white-collar crime, draw lessons from the historical examples, strengthen the systems and institutions of prevention, and have an effective risk management culture.

DIFFERENT TYPES OF WHITE-COLLAR CRIME

A study of cases falling within the above definition of white-collar crime would reveal that white-collar criminals may weave highly complex schemes, and employ even more highly sophisticated means of concealing their wrongdoings and even creating deliberate misdirection for the

4 We thus further exclude from this discussion offences *by corporations as such* against society's regulations, *inter alia*, competition laws, anti-trust laws, customs and tax evasion, failure to file returns, evasion of industrial safety, health, pharmaceutical or environmental regulations, "mis-selling" of high-risk financial instruments, *etc*. These are ironically not usually considered as "corporate crime" or "white-collar crime".

5 The statistics in this paragraph may be found in KPMG Singapore Fraud Survey Report 2008, "Fraud: Prevent, Detect, Respond" <http://www.kpmg.com.sg/publications/forensics_FraudSurvey2008.pdf> (accessed 27 November 2008).

investigators. The following paragraphs will discuss the types of offences entailed in white-collar crimes in Singapore.

Forgery, false entries and cheating

One of overwhelming motives of corporate crime is to achieve illicit personal gain. Cheating, forgery, and falsifying documents are the ways in which this motive may be achieved, and are arguably the most common denominator of corporate crime.

In numerous instances, creating forged or false documentation and/or false entries in accounts are meant to defraud or evade internal or external scrutiny or audit of corporate undertakings. Such false documents or entries serve to conceal or divert attention from dishonest deeds undertaken with the aim to siphon money out of a business or concern.

Criminal breach of trust

Together with cheating, criminal breach of trust ("CBT") is also a common offence. Wrongful loss in CBT usually entails an outright appropriation of company assets or property.

SOME HISTORICALLY SIGNIFICANT CASES

Corporate crime's big bang

Gemini Chit Fund case

Very few people below the age of 60 now will remember this saga. However, it represents a seminal moment in the modern history of white-collar crime in Singapore.

In 1964, Abdul Gaffar Mohamed Ibrahim founded the Gemini Chit Fund Corporation Ltd as a private limited company. A Chit Fund is an informal or primitive system of micro-financing (in modern parlance). It acts as both a loans and deposits scheme in which members are both investors and borrowers. Members put their savings into a common pool, within prescribed or agreed periods. At the end of each period or credit cycle, the pooled funds are auctioned and the bidder with the lowest bid wins. Such schemes in its historical context usually operated at a personal level, as a quasi credit co-op between friends or villagers. However, the Gemini Chit Fund attracted public subscription and in the end enrolled up to 40,000–50,000 members. The lure was the promise of unusually high returns on investment. In 1973, Abdul Gaffar was charged with three counts of CBT amounting to $3.2m. The loss resulting from his crimes was estimated at $50m. Conservatively, S$50m in 1973 would probably have amounted to S$117.50m in 2007,[6] making it one of the all-time largest criminal debacles in Singapore history even when compared with more modern examples. In sentencing Gaffar to life imprisonment, Choor Singh J dubbed the case "the swindle of the century".

In terms of its massive and sudden social impact, of the sheer quantity involved, the number of small individual depositors ruined, the public unrest (even panic) which it engendered, and the severity of the sentence meted out to the accused involved, it was unprecedented and would not be equalled

6 According to the official Monetary Authority of Singapore consumer price index inflation calculator <http://www.mas.gov.sg/eco_research/Inflation_Calculator.html> (accessed 28 November 2008).

until the Lehman Brothers Minibonds and DBS Hi-Notes saga in 2008.

Historic Shut Down of the Stock Exchange of Singapore ("SES")

Tan Koon Swan v Public Prosecutor
[1986] SLR 126

Founded in 1960, Pan-Electric's ("Pan-El's") main business was then the manufacture of refrigerators. In March 1985, Pan-El joined Tan Koon Swan's ("TKS") business empire.

On 18 November 1985, Pan-El defaulted on a loan, and voluntarily requested SES and KSE to suspend its shares. Receivers were appointed, and the historic decision was to suspend all trading on SES to forestall panic dumping which threatened to wipe hundreds of millions off the exchange.

Tan's case was the first ever case of stock manipulation in Singapore which went to the extent of shutting down the SES, and is representative of the trend of white-collar crimes becoming increasingly sophisticated and dramatic.

In the end only one count was proceeded upon against TKS: that of abetting Pan-El's finance director, Tan Kok Liang, to commit CBT of about S$145,000 (which belonged to Pan-El) for which TKS was jailed two years and fined $500,000. The amount embezzled was applied to pay the interest on three million Grand United Holding ("GUH") shares bought by a Pan-El subsidiary, Orchard Hotel. The purchase of the shares by Orchard Hotel was in turn part of a scheme by TKS to artificially boost the GUH share price. However, TKS was spared any market manipulation charges.

The famous SIA heist

Public Prosecutor v Teo Cheng Kiat
[2000] SGHC 129

Teo's case was the first major (as in involving huge amounts) white-collar crime case involving computers.

Teo was granted almost total control over the Cabin Crew Allowance System, a computer program which computed and paid out the crew's salaries and allowances by making direct credits into SIA staffs' bank accounts.

Teo dishonestly misappropriated numerous amounts from the airline's bank account with Overseas Union Bank Ltd ("OUB") by causing them to be paid to bank accounts which were in his name or controlled by him.

Random checks were supposed to be made. However, there was no way the supervisors could verify all the details keyed in by Teo, and Teo had also falsely altered a computer-generated report printed daily which contained all the adjustments made to crew allowances for that day. The 25 CBT charges involved almost S$35m.

At the conclusion of investigations, S$14m remained unrecovered. He was sentenced to 24 years' imprisonment.

Asia Pacific Brewery case

Public Prosecutor v Chia Teck Leng
[2004] SGHC 68

Chia was the Finance Manager of Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"). In order to open bank facilities in the name of his employer with various commercial and merchant banks, Chia forged numerous

documents which purportedly authorised him, as sole signatory, to receive credit and loan facilities provided by the said banks, sign all transactions and operate the bank accounts, on behalf of APBS. He obtained S$159m collectively from these banks, out of which he made withdrawals of US$73m (or approximately S$116m).

Thirty-two charges were taken into consideration.

The final, irrecoverable loss amounted to S$62m, less the amount which the Commercial Affairs Department ("CAD") could trace and retrieve. Chia was sentenced to 42 years' imprisonment.

Chia's crimes held the record as the worst case of corporate fraud (measured in terms of the amount of money involved and lost) until the EC-Asia case (see below).

The Man who broke Barings bank

Nicholas Leeson[7]

In April 1992, Nicholas Leeson ("Leeson") was employed by Barings Futures (Singapore) Pte Ltd ("BFS"). BFS was an indirect subsidiary of Barings Securities Ltd ("BSL"), who in turn was an indirect subsidiary of Barings Plc. He was in charge of trading as well as the "back office" of BFS which was responsible for settlements by or in favour of BFS in its trading. In that position he could, as he did, manipulate the accounting and reporting records.

Leeson had over a period of time indulged in unauthorised trading, betting on the Nikkei Stock Average, which resulted in increasing losses. Spectacularly, the losses mounted, especially following the collapse of the Nikkei after the Kobe earthquake on 7 January 1995. The losses ballooned to £248.6m by 31 January 1995 and then £848.5m by 26 February 1995. The losses exceeded the value of Baring Plc's shareholders' funds. As a result, the principal companies in the Barings Group were put into administration in England.

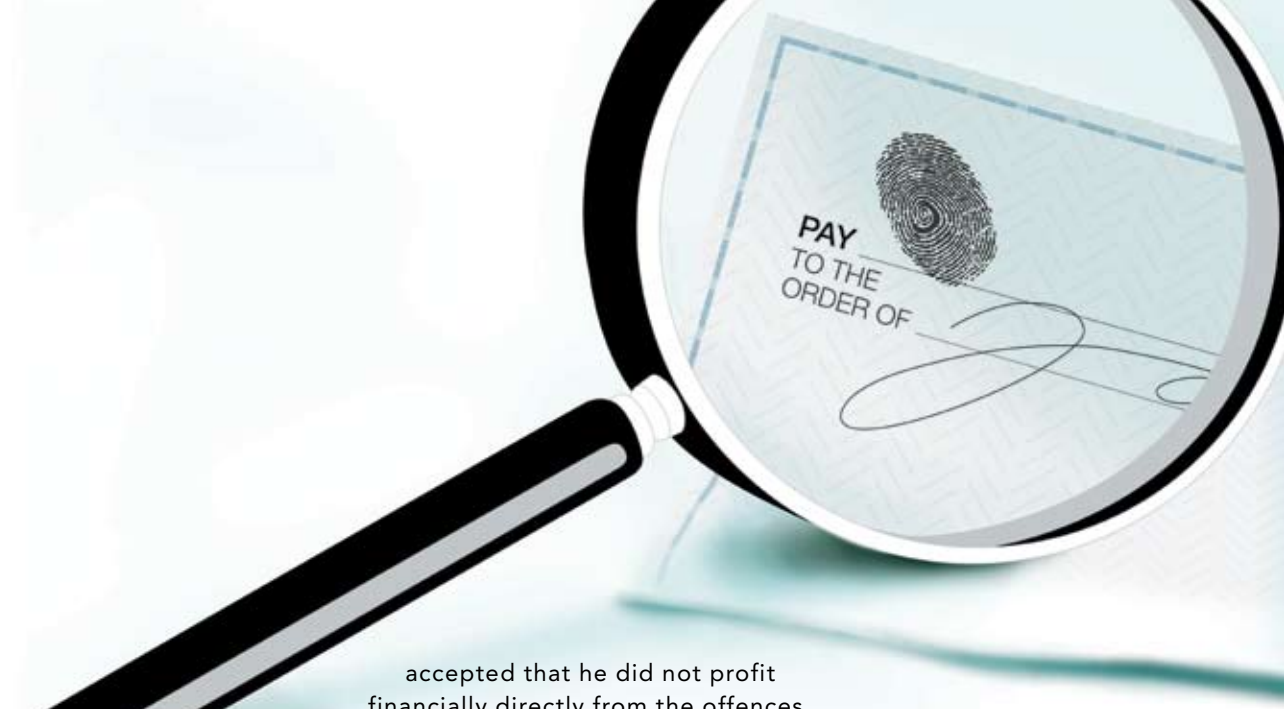
In this case, the prosecution elected to proceed on:

(a) One charge under s 417 of the Penal Code for the accused cheating Barings' external auditors by deceiving the latter into believing that Barings was paid ¥7.778bn by another party by presenting altered documents to the auditors, who as a consequence was misled into granting Barings an unqualified audit clearance in Barings' annual audit.

(b) One charge under s 420 of the Penal Code involved the accused misrepresenting (by grossly under-declaring by an order of almost 4.5 times) to SIMEX the "final long position" held by Barings on a particular date, and by such deception caused SIMEX to pay Barings US$11.4m.

Nine other charges were taken into consideration. The prosecution also levied costs of S$150,000. Leeson was sentenced to 6.5 years' imprisonment. The court

7 As there is no reported judgment of this case in the official reports, the account of this incident is taken from the law report of a subsequent civil suit concerning the bank involved (*Baring Futures (Singapore) Pte Ltd v Deloitte & Touche* [1997] 3 SLR 312), as well as from *Sentencing Practice in the Subordinate Courts* (Singapore: LexisNexis-Butterworths, 2nd Ed, 2003) at pp 475–476.



accepted that he did not profit financially directly from the offences.

Although the final charges preferred against Leeson involved relatively modest sums, the effect of what Leeson wrought was drastic: the demise of one of England's oldest banks. This case was a spectacular negative demonstration of a "David vs Goliath" scenario. On further reflection, it is possible to say that Leeson received a relatively lenient treatment from the law in comparison with the sentences which Teo Cheng Kiat and Chia Teck Leng received, considering that neither Teo nor Chia managed to destroy the companies they had respectively worked for.

PENDING CASES TO WATCH OUT FOR

As the worldwide banking and financial crisis worsens and the economy continues its present tailspin, one can expect more such corporate crimes to surface as the degree of desperation worsens, and the level of sophistication of commission of these crimes to increase and become even more complex. Two cases bear watching.

Sunshine Empire case[8]

In November 2007, news broke that the CAD had commenced investigations into multi-level marketing company Sunshine Empire, which is believed to have attracted 20,000 participants since 2006. The said firm invites participants to become vendors of goods ranging from

8 For more information on the case, see the CAD website <http://www.cad.gov.sg/topNav/faq/Sunshine+Empire+Pte+Ltd.htm> (accessed 28 November 2008). See also "CAD Begins Probe into MLM Firm Sunshine Empire", *The Straits Times* (13 November 2007); "Clients of MLM Firm Sunshine Empire Cry Foul", *The Straits Times* (12 April 2008).

electronics to health supplements, promising potentially large "rebates" purportedly based on the participants' cash outlay as well as the firm's global performance. By April 2008, the payout of the rebates ceased, causing many participants to complain to the press and CAD. At the time of writing, investigations were still ongoing.

"Largest" corporate fraud case in Singapore history

EC-Asia case

On 9 October 2008, it was reported[9] that Kelvin Ang Ah Peng, the chief of delisted memory chip recycler EC-Asia, was charged with 687 charges involving an astonishing US$372.2m (S$545m), making this one of the biggest corporate scandals here to date.

If the allegations are proven, it would mean that it is the first case to reach or exceed the half-billion dollar mark.

Ang is being charged with pretending to buy and sell integrated circuit chips, thus inducing banks to deliver sums of money for these purchases or sales. He was also charged with allegedly conspiring with another person to remit US$81.7m of the company's ill-gotten gains from Hong Kong to Singapore, as well as charged with falsifying revenues in EC-Asia's initial public offering ("IPO") prospectus in 2003. He is alleged by the Prosecution to have overstated the company's revenue by 40% for the 2002 financial year and by 10% for the previous financial year.

EC-Asia's troubles came to light only last year when KPMG was appointed to look at restructuring its debts after one of the company's bankers, HSBC, sued it for US$3.2m. KPMG found

9 "$545m Chips Fraud: Recycling Firm's Boss Charged", *The Straits Times* (9 October 2008).

> It is therefore vital for all stakeholders in corporate governance to appreciate what constitutes white-collar crime, draw lessons from the historical examples, strengthen the systems and institutions of prevention, and have an effective risk management culture.

that the firm made three-quarters of its purchases from only three Hong Kong firms. Similarly, 93% of its sales were made to just three firms, two of which were also its suppliers. According to the aforesaid report, Mr Neo said EC-Asia's operations consisted of passing the same stocks back and forth between Singapore and Hong Kong without any re-processing.

CONCLUSION

From the foregoing, it can be seen that what is commonly called white-collar crime – though primarily committed out of economic/financial motivations – can and does actually encompass a wide gamut of offences. Such crimes also increase in complexity and sophistry, with the underpinning act involving misappropriation of moneys in one manner or another. The constraint of space has prevented a discussion of Computer Misuse Act ("CMA") offences which covers such a large and involved area of law, and hence must remain the subject of a future article. In view of the central position occupied by computer and other information processing tools in modern corporate and business setting, it is inevitable that the commissioning of future crimes (especially white-collar crimes) would involve some manner of offence under the CMA.

The sentencing policy of the courts also looks to be severely tested by the increasingly astonishing scale of white-collar criminal wrongdoing. If the High Court had put Chia Teck Leng away for 42 years for incurring S$62m worth of losses, and Teo Cheng Kiat received a 24-year jail term for incurring S$30m worth of losses, we can only wait to see what new high watermark of sentencing tariff the EC-Asia case may yet establish. *is*

JUSTICE AND THE AILING OFFENDER

A CLOSER LOOK AT JUDICIAL MERCY IN SINGAPORE

INTRODUCTION

A great deal of public interest surrounded the recent case of *Public Prosecutor v Tang Wee Sung* ([2008] SGDC 262) ("*Tang*") and the court's ultimate decision to exercise judicial mercy. Tang had been charged under the Human Organ Transplant Act (Cap 131A, 2005 Rev Ed) as well as the Oaths and Declarations Act (Cap 211, 2001 Rev Ed) ("ODA"). While the ODA charge carried a mandatory term of imprisonment, Tang's myriad of serious medical conditions led District Judge Ng Peng Hong to find that the exercise of judicial mercy was appropriate. Consequently, the minimum jail term of one day was imposed on Tang for the ODA offence.

It seems apparent that many people sympathised with Tang's medical condition, and thus accepted the wisdom of the court's decision. However, as lawyers, it is important for us to remember that the doctrine of judicial mercy is not a pretext for unfettered judicial discretion. The concept of judicial mercy is not a reason to put aside the law, but rather is the application of a legally defined principle which is jurisprudentially sound. With respect, the careful and principled manner in which District Judge Ng Peng Hong analysed and applied the legal doctrine of judicial mercy, demonstrates the correct approach to a doctrine whose value to society is perhaps accentuated by its infrequent use.

By **Cavinder Bull SC and Adam Maniam, Legal Practitioners**

THE LAW ON JUDICIAL MERCY IN SINGAPORE

The doctrine of judicial mercy received more precise definition in 2006 when the Honourable Justice V K Rajah distilled the applicable principles concerning the exercise of judicial mercy in Singapore in *Chng Yew Chin v Public Prosecutor* ([2006] 4 SLR 124) ("*Chng*"). Rajah J (as he then was) noted that judicial mercy was neither "novel nor unprecedented" in Singapore. However, the learned judge emphasised that the doctrine should be applied only when there were exceptional circumstances. His Honour pointed to cases where seemingly serious medical conditions, such as chronic hypertension,[1] acute eye disease[2] and tuberculosis,[3] were found *not* to be grave enough to warrant an exercise of judicial mercy.

Various cases from the United Kingdom, Australia, and Hong Kong were then considered before Rajah J laid out a comprehensive framework where the relevant considerations for the exercise of judicial mercy in Singapore were enumerated. These considerations included: (a) the nature and circumstances of the offence; (b) public interest in ensuring that a full sentence be meted out, which necessarily involves an assessment of the probability of the accused re-offending; (c) the severity of the ill-health of the accused; and (d) the impact that a term of imprisonment would have on the accused.

The impact of imprisonment on the offender was a factor that Rajah J delved into in some detail. This "impact" was calculated by examining the likelihood that imprisonment would increase the burden on the accused or exact a hardship "either manifestly excessive of what a prisoner without his condition would suffer or patently disproportionate to his moral culpability or both", and the probable aggravation of the accused's health due to imprisonment. The learned judge concluded by cautioning that the considerations in the framework were to be assessed holistically, and not in isolation.

In *Tang*, Rajah J's framework was applied and it was concluded that the exercise of judicial mercy was appropriate. Importantly, Tang's ill health was just one of several factors that District Judge Ng Peng Hong considered in deciding to exercise judicial mercy. With regard to the nature of the offence, it was noted that Tang's offence arose

1 *Viswanathan Ramachandran v PP* [2003] 3 SLR 435.

2 *Lim Teck Chye v PP* [2004] 2 SLR 525.

3 *PP v Lee Shao Hua* [2004] SGDC 161.

out of Tang's "desperate need to save his life". District Judge Ng Peng Hong also found that an extended term of imprisonment would severely impair Tang's health and would be wholly disproportionate to the offence committed. It was also noted that imprisonment would "most likely have very much harsher consequences for him than what is intended for the ordinary offender". Finally, the learned judge also observed that it was virtually impossible that Tang could re-offend and, after considering all the above factors holistically, concluded that Tang should only be imprisoned for one day.

JURISPRUDENTIAL ISSUES CONCERNING JUDICIAL MERCY

Chng provided a much needed analytical framework within which to consider and apply the doctrine of judicial mercy. While cautioning that the enumerated considerations were "neither a comprehensive nor conclusive catalogue", Rajah J also noted that any sentence meted out to the seriously ill offender must not only embrace all the considerations enumerated, but also strike a balance between the appropriate sentence and allowing a seriously ill person to live out the rest of his days "with dignity and in peace". Thus, the value of Rajah J's decision was not merely in the enumeration of relevant considerations but, more fundamentally, in its thought leadership. *Chng* instructs us how to approach the subject of judicial mercy, not merely as a plea borne of desperation when counsel have nothing else to say, but as a legally recognisable doctrine which is jurisprudentially sound.

The four principles of sentencing were enumerated in *R v James Henry Sargeant* ((1974) 60 Cr App R 74 at 77), where Lawton LJ noted that the "classical principles [of sentencing] are summed up in four words: retribution, deterrence, prevention and rehabilitation". Of these four principles, it is the principle of retribution that judicial mercy possibly sits ill at ease with. The principle of retribution requires that "the punishment meted out to an offender should reflect the degree of harm and culpability that has been occasioned by such conduct" (*Public Prosecutor v Loqmanul Hakim bin Buang* [2007] 4 SLR 753 at [46]). Thus, retributivists believe that an offender must receive his just deserts for the offence that he has committed.

It is often said that justice must be tempered with mercy. Retributivists, however, argue that mercy thus engenders *injustice*, because it results in a "less than just" punishment being imposed on an offender. Retributivists thus consider mercy to be a vice in the criminal context,

because it leads to unjust results.[4] However, this retributive theory fails to take cognisance of the fact that under the *Chng* framework, the court is not merely giving the offender a "discount" based solely on his ill-health, but is looking at the totality of circumstances in order to determine the just and appropriate sentence. Thus, the merciful judge is not perpetrating an injustice, but merely taking an expansive view in order to determine where justice lies.[5]

4 Jeffrie G Murphy, "Mercy and Legal Justice" in Jeffrie G Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988) at p 169.

5 David Dolinko, "Some Naïve Thoughts about Justice and Mercy" (2007) 4 Ohio State Journal of Criminal Law 349–360 at 354.

Further, while retributivists argue that there is only a single "just" punishment that can be imposed, this ignores the reality of sentencing where a judge often can choose an appropriate punishment from a *continuum* that is available to him.[6] Thus, when utilising the comprehensive framework set out in *Chng*, retributive criticisms of judicial mercy are not borne out.

PRACTICAL CONCERNS: HOW MUCH DISCRETION IS ENOUGH?

In *Chng*, it was noted that "the courts have always had the residuary discretion to exercise mercy in appropriate cases". The obvious concern here is whether as powerful a tool as judicial mercy should exist entirely within the realm of a judge's "residuary discretion". As noted by the Malaysian Supreme Court, albeit in another context, "[u]nfettered discretion is another name for arbitrariness" (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9).

A closer look at judicial mercy in Singapore, however, shows that these concerns are largely unfounded. Even as he formulated the framework in *Chng*, Rajah J cautioned that judicial mercy should only be exercised with

6 Eric L Muller, "The Virtue of Mercy in Criminal Sentencing" (1993) 24(1) Seton Hall Law Review 289–346 at 302.

the "utmost care and circumspection", and "after the relevant facts have been vigilantly and rigorously sieved and appraised". His Honour further noted that "[t]he exceptional nature of this judicial discretion demands strict proof of facts and not sympathetic conjecture". Rajah J concluded his judgment by placing the "utmost emphasis" on the caveat that his judgment should not indicate that all future offenders with terminal illness will "invariably be treated with kid gloves". The learned judge also emphatically reiterated that "the exercise of judicial mercy will continue to be resorted to only in limited and exceptional circumstances".

It is apparent from *Chng* that judicial mercy is not to be lightly invoked, and this is borne out by cases cited above, where judicial mercy was not invoked even for offenders with appreciably serious illnesses. At the same time, while the framework provided in *Chng* does not contain "hard and fast rules", it is comprehensive and rigorous enough to ensure that any judge wishing to exercise judicial mercy would have to show why a particular offender's case was exceptional enough to warrant such mercy. The *Chng* framework thus leaves judges with enough discretion to ensure that mercy is not exercised as a matter of course for every seriously ill offender, while at the same time constraining this discretion enough to ensure that mercy is exercised in only the most exceptionally appropriate cases.

CONCLUSION

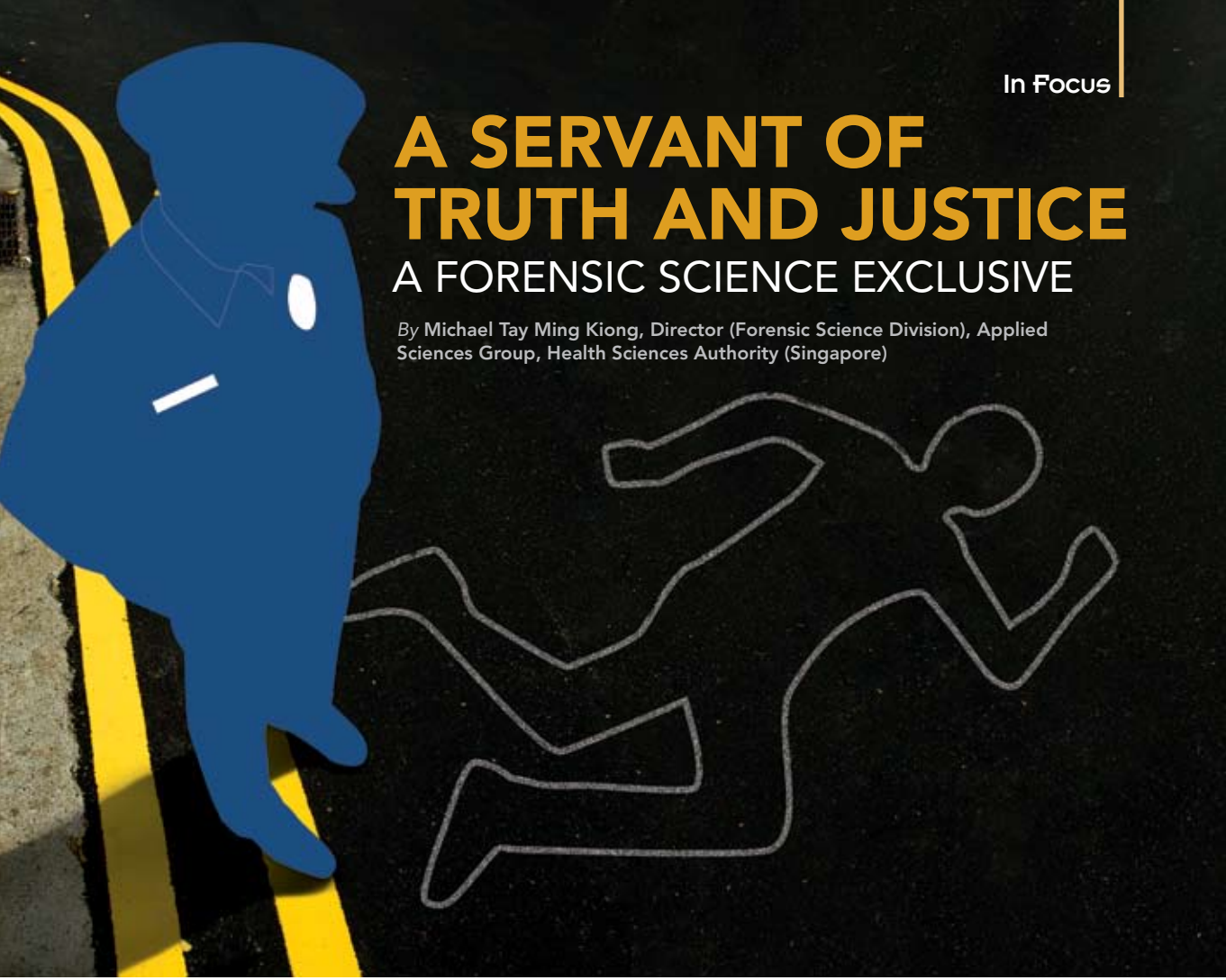
As with any legal doctrine, judicial mercy has its critics, be they the retributivists who argue that it leads to injustice, or the man in the street who believes that its exercise is ultimately arbitrary. Despite this, judicial mercy, as defined by the Singapore High Court, is both intellectually defensible and practically useful. For it to remain so, however, judges must continue to exercise it with "utmost care". Counsel too should strive to ensure that this doctrine is not overused through deployment in unwarranted situations. If this doctrine is deployed as rarely as *Chng* suggests it should be, it will be all the sharper when needed. Finally, *Chng* cautions that "there is no latitude for the mercy of our courts to be cynically abused" by criminals who use their serious medical condition consciously to commit crimes, in the anticipation that mercy will later be granted to them.

Our justice system must apply the law impartially and without fear or favour. However, a society that applies the law coldly without considerations of mercy in appropriate cases would be a frightening place to live in. Fortunately, cases like *Chng* and *Tang* show that Singapore's legal system is striking the right balance. *IS*

A SERVANT OF TRUTH AND JUSTICE

A FORENSIC SCIENCE EXCLUSIVE

By **Michael Tay Ming Kiong, Director (Forensic Science Division), Applied Sciences Group, Health Sciences Authority (Singapore)**



FORENSIC EVIDENCE PLAYS A SIGNIFICANT PART IN CRIMINAL LAW, AS ESPOUSED IN THE CASES MENTIONED IN THIS ARTICLE. ALSO UNVEILED IS THE WORKINGS OF THE FORENSIC LABORATORY, AND HOW ITS SCIENTISTS INDUSTRIOUSLY PIECE ALL EVIDENCE TOGETHER.

WHAT IS FORENSIC SCIENCE?

Forensic science is the application of science and technical expertise to the resolution of legal matters. It is an applied science, drawing on chemistry, physics, life sciences, mathematics, engineering and problem-solving methods. Forensic evidence is essentially circumstantial or indirect evidence, providing the basis for inferring facts and conclusions in a case using deductive reasoning. It provides information that frequently is not available by other means. The careful examination of physical evidence identifies persons, objects, substances, contacts between them, and events and actions that transpired in a crime. Forensic findings may be used to corroborate or refute a claim. In some instances, forensic science may be the only or principal source of information that the trier of fact has to rely on to ascertain guilt or innocence.

The importance of forensic evidence in the administration of justice was underscored by Kirk and Thornton:[1]

> The utilization of physical evidence is critical to the solution of most crime. No longer may the police depend upon the confession, as they have done to a large extent in the past. The eye witness has never been dependable, as any experienced investigator or attorney knows quite well. Only physical evidence is infallible, and then only if it is properly recognized, studied and interpreted.

BASIC PRINCIPLE OF FORENSIC SCIENCE

The underlying principle of forensic science is Edmond Locard's *Exchange Principle* commonly worded as: "every contact leaves a trace".[2] When two objects come into contact, there is a transfer of material, creation of marks or alteration. However, in practice, the crime scene is not a controlled environment, and there can be exceptions to that rule where physical evidence is not collected or altered by environmental factors, or so effectively removed by the criminal as to foil scientific analysis. Hence, the maxim "absence of evidence is not evidence of absence" may apply in certain cases.

ROLE AND RESPONSIBILITY OF FORENSIC SCIENTISTS

An expert witness is a person who through a combination of formal education, skills, training and experience is accepted by the court to offer opinion testimony in relation to the disputed matter. The expert witness possesses relevant knowledge that is not expected of the average layman. The credentials of a forensic scientist are usually based on a strong foundation in natural and physical sciences, specialised training and casework experience in a forensic laboratory.

Thornton considers the role of forensic scientists to be distinctive in their responsibility to the court:[3]

> The single feature that distinguishes forensic scientists from any other scientist is the certain expectation that they will appear in court and testify

1 *Crime Investigation* (John I Thornton & Paul L Kirk eds), (New York: Wiley, 2nd Ed, 1970) at p 33.

2 Edmond Locard, *Manuel de technique policière* (Paris: Payot, 1923).

3 John I Thornton, "The General Assumptions and Rationale of Forensic Identification" in *Modern Scientific Evidence: The Law and Science of Expert Testimony* vol 2 (David L Faigman, David H Kaye, Michael J Saks & Joseph Sanders eds) (St Paul: West Publishing Co, 1997).

to their findings and offer an opinion as to the significance of those findings. The forensic scientist will testify not only to what things are, but to what things mean.

The forensic scientist is an educator in court, presenting and explaining physical evidence with minimal scientific jargon, *ie*, in terms understood by the layman. A forensic scientist must possess the technical knowledge and communication skills to state and explain clearly his basis for reaching conclusions, enabling the court to grasp the importance of the evidence and to reach an informed decision. The communication of scientifically rigorous information concerning physical evidence can mean the difference between guilt or innocence of an accused.

Expert witnesses have the duty to be objective, impartial and independent. Forensic scientists must not advocate either the Prosecution's or Defence's case; they are ethically obligated to advocate only the truth, and to allow evidence to speak for itself.

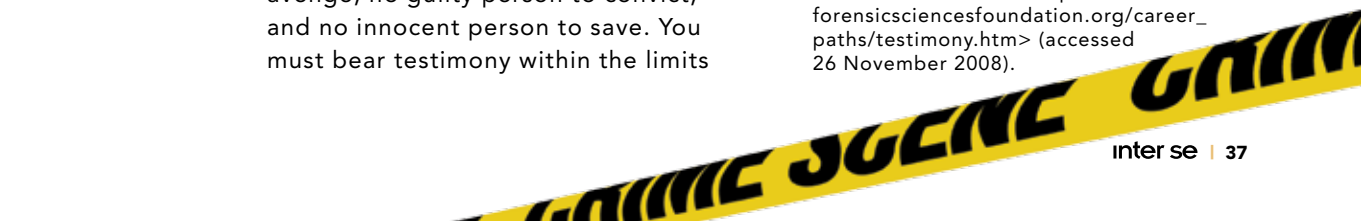
Paul C H Brouardel, the 19th century medico-legalist said "[i]f the law has made you a witness, remain a man of science; you have no victim to avenge, no guilty person to convict, and no innocent person to save. You must bear testimony within the limits of science."[4] While forensic scientists are expected to vigorously justify and defend their findings in court, they are also expected to be intellectually honest and to truthfully concede any limitations in their examinations, consider alternative explanations and scenarios, and testify within their field of expertise.

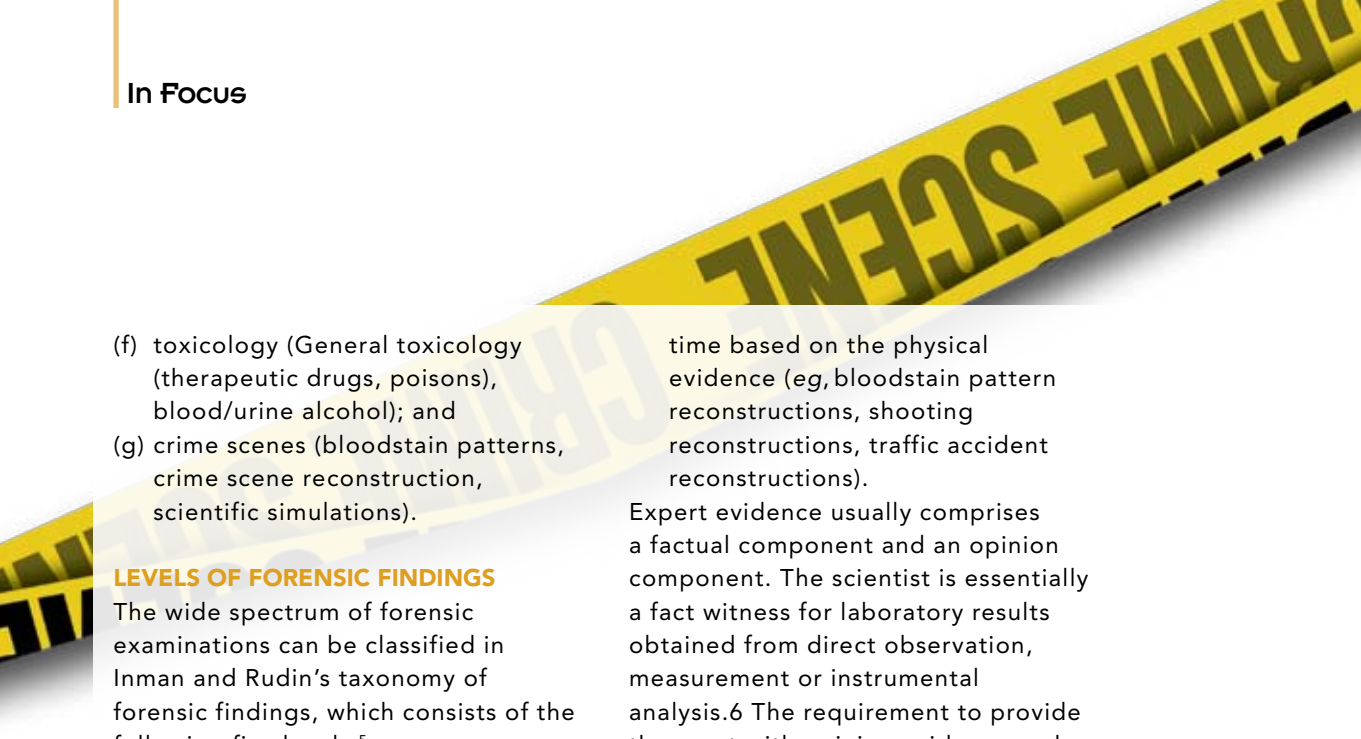
TYPES OF FORENSIC EXAMINATIONS

The Health Sciences Authority ("HSA"), Singapore's national provider of forensic services, performs a wide range of examinations in seven key forensic disciplines, namely:

(a) forensic biology (serology, DNA profiling, DNA database);
(b) trace evidence (glass, paints, fibres, gases, soils, fire debris, gunshot residues, explosives, household and industrial chemicals);
(c) marks and prints (firearms, toolmarks, shoeprints, tyreprints, physical fits, damages, obliterated stamped markings, manufacturer marks);
(d) questioned documents (handwriting, signatures, inks, counterfeit currency, security documents);
(e) controlled substances (illicit drugs);

4 Paul C H Brouardel, "What do Forensic Scientists do?" Forensic Sciences Foundation website <http://www.forensicsciencesfoundation.org/career_paths/testimony.htm> (accessed 26 November 2008).





(f) toxicology (General toxicology (therapeutic drugs, poisons), blood/urine alcohol); and
(g) crime scenes (bloodstain patterns, crime scene reconstruction, scientific simulations).

LEVELS OF FORENSIC FINDINGS

The wide spectrum of forensic examinations can be classified in Inman and Rudin's taxonomy of forensic findings, which consists of the following five levels:[5]

(a) **Identification.** Defining the physico-chemical nature of an evidence item (*eg*, ignitable liquid, explosives, illicit drugs, poisons).
(b) **Classification.** Determining the class type and inferring multiple potential common sources for an evidence item (*eg*, fibres, blood type, tyre track).
(c) **Individualisation.** Concluding a singular common source for two items (*eg*, DNA, fired ammunition parts, shoeprints).
(d) **Association.** Inferring contact between two objects – the source of the evidence and the target on which it was found (*eg*, fibres, DNA, glass fragments, multi-layered paint fragments).
(e) **Reconstruction.** Ordering events in relative space and time based on the physical evidence (*eg*, bloodstain pattern reconstructions, shooting reconstructions, traffic accident reconstructions).

Expert evidence usually comprises a factual component and an opinion component. The scientist is essentially a fact witness for laboratory results obtained from direct observation, measurement or instrumental analysis.6 The requirement to provide the court with opinion evidence and interpretation of the significance of physical evidence beyond a statement of fact evidence generally increases from identification to reconstruction.

ETHICS AND THE FORENSIC SCIENTIST

Forensic scientists need to be competent and meticulous in their work. As proponents of scientific truth, they must strive to be objective, rigorous and complete in their examinations, and unbiased in interpreting findings. Ethics is essential to forensic science. Ethics must be the moral compass in the quest for scientific truth. A typical code of ethics for forensic scientists emphasises professionalism, competence, integrity, reliability, objectivity, neutrality, independence

5 Keith Inman & Norah Rudin, *Principles and Practice of Criminalistics: The Profession of Forensic Science* (CRC Press, 2001).

6 William G Eckert & Ronald K Wright, "Scientific Evidence in Court" in *Introduction to Forensic Sciences* (W G Eckert ed) (CRC Press, 2nd Ed, 1997) at p 75.

and avoidance of bias. Lab staff are constantly warned of the dire consequences of incompetence, sloppy work, short-cuts, contamination and destruction of evidence, wrong interpretations, overstatements, opinions not supported by documentation, "dry-labbing" (fabricating lab results), exaggerated credentials, dishonesty, perjury, and the neglect of quality assurance responsibilities.

RELIANCE ON THE SCIENTIFIC METHOD

Forensic science is an inquiry based on the Scientific Method.[7] The Scientific Method is a structured, systematic and disciplined approach to uncover scientific truth. This self-correcting, inductive approach has five main steps:

(a) Make observations and gather information.
(b) Define the problem by asking questions.
(c) Form a hypothesis by formulating a question that can be tested by experiments, measurements, analyses, examinations and comparisons.
(d) Conduct qualitative and/or quantitative analysis and examinations, gather empirical quantifiable data, and interpret the results. Determine whether the scientific results support or contradict the hypothesis.
(e) Report the findings and conclusion.

While performing the examination, the forensic scientist must not ignore or rule out any data that does not support the hypothesis. Replicate testing and use of multiple complementary techniques are means to ensure the reliability of findings. In interpreting data, the scientist needs to apply critical thinking and logical reasoning with an open, inquisitive mind. Withholding judgment until results are known is an important tenet of the Scientific Method. If a hypothesis is rejected, a new hypothesis may be formulated and the steps are reiterated. The strict adherence to documented procedures and checklists in forensic labs ensures the consistency, reproducibility and reliability of findings.

One of the subtle pitfalls that forensic scientists must avoid is confirmation bias – the seeking or interpreting of evidence in ways that affirm existing beliefs, expectations or a hypothesis in hand. All conclusions and opinions in reports must be supported by data permanently recorded in sufficient detail in case records. Information from investigators to scientists

7 William Jerry Chisum & Brent E Turvey, Crime Reconstruction (Elsevier Academic Press, 2007).

concerning a case should be limited to only what is necessary to understand the request and effectively perform the examination without bias or prejudice.

LABORATORY ACCREDITATION

Forensic labs in Singapore have been accredited by the American Society of Crime Laboratory/Lab Accreditation Board ("ASCLD/LAB") since 1996. Accreditation has been the major driver of quality in HSA's forensic sciences laboratories.

Like every other organisation, a forensic laboratory rises or falls on its leadership. Laboratory directors must exercise proper supervision and oversight, and enforce accountability and high quality standards. Lab managers must seek adequate resources for lab operations, employ people with character, integrity and qualifications, implement a stringent quality system with peer review of casework and regular quality audits, impose discipline and a quality culture, and rectify any errors discovered in routine checks.

Peer review is an accreditation requirement to ensure the quality of forensic reports. The administrative review of the report checks for consistency with lab policy, editorial clarity and grammar. The technical review involves the critical evaluation by a second competent scientist of the notes, data and other documents which form the basis for a scientific conclusion.

RECENT CASE STUDIES IN SINGAPORE

The findings of HSA's forensic scientists have helped Singapore courts to ascertain the truth in many criminal cases and to decide on culpability and the severity of punishment. Here are four recent examples.

Drug-related offences

Possession, consumption and trafficking of controlled drugs are very serious offences in Singapore, attracting heavy penalties. The Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (Sched 2) lays down the various punishments for drug abuse, which includes fines, imprisonment, strokes of the cane, and the ultimate death penalty. The sentence is proportional to the gravity of the offence, and depends on the class of drugs involved and the quantity of the drug. The reliable identification and accurate quantitation of controlled drugs is therefore an important function of HSA's Illicit Drugs Laboratory.

In *Public Prosecutor v Pang Kang Jiann* [2008] SGDC 226, the accused faced five charges for possession and trafficking of controlled drugs. Analyses were performed by HSA to identify and quantitate the controlled substances. On 18 September 2008, District Judge Adrian Soon found the accused guilty and in passing sentence, remarked:

> ... the court regarded as mitigating the fact that the accused had pleaded guilty to 2 charges ... On the other hand, in respect of aggravation, it

Rusty Beretta pistol (recovered from canal) and magazine (loaded with rounds for test-firing)

One of the 6 fired cartridge cases recovered from Lim's study room floor

was noted that the five charges involved the trafficking of various drugs ... The quantity of drugs involved is also a very material factor. The quantity of drugs may be specified as follows:-

(1) Ketamine – 10 tablets containing 449.7 grams
(2) Ecstasy – 50 tablets
(3) Methamphetamine – 10 packets containing 33.77 grams
(4) Nimetazepam (Erimin 5) – 1200 tablets.

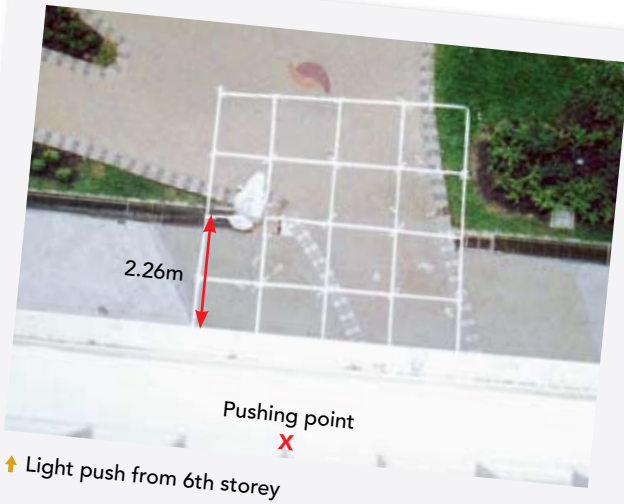
For the first charge, Pang was sentenced to ten years' imprisonment and five strokes of the cane; and for the second charge, six years' imprisonment and five strokes of the cane, with the two jail terms running concurrently.

Firearms evidence

Tan Chor Jin ("One-Eyed Dragon") was convicted by the Singapore High Court (*Public Prosecutor v Tan Chor Jin* [2007] SGHC 77) for an arms offence pursuant to s 4 of the Arms Offences Act (Cap 14, 1998 Rev Ed). Tan was found guilty of discharging six rounds from a 0.22 calibre Beretta pistol with intent to cause physical injury to the deceased, Lim Hock Soon. While acknowledging that he fired the Beretta, Tan insisted that the shooting was accidental and he had not intended to cause any physical injury to Lim.

The Court of Appeal (*Tan Chor Jin v Public Prosecutor* [2008] SGCA 32) dismissed Tan's appeal. In the judgment, V K Rajah JA stated (at [33]) that:

> ... Even though there was only one eye witness (*ie*, Risa), it is imperative to remember that, based on the evidence of Ms Lim Chin Chin, [HSA's] Senior Forensic Scientist, at least two of the shots from the Beretta had been fired at a muzzle-to-target distance of more than 1m. This dispelled the notion that the shots were fired inadvertently during a desperate struggle between Tan and Lim ...



Light push from 6th storey

DNA and trace evidence

DNA profiling was the most significant forensic development of the 20th century. It is the method of choice for the identification of individuals in criminal cases. In *Public Prosecutor v Leong Siew Chor* [2006] SGHC 81, the use of DNA typing and comparisons of trace evidence (carton materials, newspapers, plastic bags, soil and metal fragments from the chopper) conclusively linked Leong to the murder of Chinese National, Liu Hong Mei. In his judgment, Tay Yong Kwang J (at [37]) stated that:

> Subsequent exhaustive DNA and other laboratory tests conducted by various sections in the Health Sciences Authority confirmed that all the dismembered parts that had been found were from the same body and that the packaging materials used to dispose of the body parts matched those found in the Geylang flat and the traces of evidence found on the accused's clothes.

Tay J convicted Leong Siew Chor of murder under s 302 of the Penal Code (Cap 224, 1985 Rev Ed) and passed the mandatory death sentence.


Soil was recovered from Leong's sandal


The sandy soil contained bougainvillea thorns and small seashells, consistent with vegetation and soil at Kallang River bank

Crime scene reconstruction

In *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR 24, the accused faced the charge of causing the death of four-year-old Sindee Neo by causing her to fall from a block of flats with the intention of causing such bodily injury as was likely to cause death, an offence punishable under s 304(*a*) of the Penal Code (Cap 224, 1985 Rev Ed). There were no eye witnesses in the wee hours of the morning when Sindee plummeted to her death. How did the fall occur? A scientific reconstruction of the fall was undertaken by HSA's Dr Michael Tay using an inanimate 25kg model of the child from different storeys of the block with different pushing forces in an attempt to determine whether the fall was accidental or caused by Constance.

In his judgment, V K Rajah J (as he then was) concluded:

> 102 … After careful evaluation of the evidence, I am satisfied by the findings of Dr Tay's experiments that only a horizontal force, that is to say, a pushing or projecting force, could account for the eventual distance between the Block and Sindee's body.
> …
> 104 … Dr Tay was emphatic that 'definitely there was a force acting on the body of this child in order to propel it out from the building'.
> …
> 111 … [Constance's] demonstration of how the incident occurred has been correctly rejected by the Prosecution's principal expert witnesses, Dr Ho and Dr Tay … Some force must have been applied to [Sindee's] body by the accused to cause her to fall. The fall did not happen by accident; it was woven by the accused's design …

On 7 April 2006, Rajah J sentenced Constance to 13 years' jail – three years for abducting Sindee, and ten years for causing Sindee's fatal fall ([2006] 2 SLR 707).

CONCLUSION

Forensic science is a servant of Truth and Justice. It is a central pillar in the criminal justice system. The public must have full confidence in forensic science. Forensic scientists are expected to be competent, objective and independent seekers of scientific truth. As expert witnesses in court, they explain the significance of physical evidence, assisting the court in its public role of convicting the guilty and exonerating the innocent. Forensic science is the channel through which physical evidence – the silent witnesses of a crime – speak. Forensic scientists must let this evidence speak for itself without distortion, suppression or misrepresentation. Applying the Scientific Method helps forensic scientists maintain objectivity in examining physical evidence, interpreting the data and reaching sound conclusions.

In many instances, forensic evidence has provided vital information, assisting the court to arrive at an accurate and fair decision in meting out the appropriate sentence and punishment for the crime. *is*

Opinions and points of view expressed in this article are those of the author and do not necessarily reflect the official position or policies of HSA.

FROM QUEEN VICTORIA TO CYBERSPACE

REFORM OF SEXUAL OFFENCES LAW IN SINGAPORE

By **Charles Lim Aeng Cheng, Parliamentary Counsel and Principal Senior State Counsel, Legislation and Law Reform Division, Attorney-General's Chambers, Singapore***

A HISTORICAL OVERVIEW OF THE SEXUAL OFFENCES IN THE PENAL CODE, AND THE PUBLIC POLICY RATIONALE BEHIND ITS 2008 REVISION.

CASE OF THE UNDER-AGED PROSTITUTE

Rodney Sim Hang Nge earned the dubious honour of being the first man to be prosecuted in court for allegedly having sex with an underaged prostitute.[1] Sim, 60, was accused of obtaining sex from a 17-year-old prostitute from China for $100 on 3 August 2008 and two days later for $30, both occasions in a Geylang hotel. Minutes earlier at another district court, Wang Minjiang, 36, was fined $8,000 for supplying the same 17-year-old prostitute to 55-year-old Tan Chye Hin on 4 August. Wang Minjiang, 36, had also pleaded guilty to bringing in prostitutes, living on immoral earnings and managing a place in a Geylang coffee shop for the purpose of prostitution. He was fined $17,000. On appeal by the Public Prosecutor ("PP"), the Singapore High Court[2] substituted Wang's $8,000 fine with a 12-month imprisonment term.

PROSECUTING MRS ROBINSON[3]?

On 16 October 2008, a 32-year-old married female ex-teacher was charged with having sex with a 15-year-old boy. She is reportedly the first

1 The police prosecutor told District Judge Adrian Soon that it was the first case of its kind here.

2 *Public Prosecutor v Wang Minjiang* [2008] SGHC 209.

3 In the film *The Graduate*, listless recent college graduate Benjamin Braddock has an affair with an older married woman, Mrs Robinson. Note, however, that Braddock, Mrs Robinson's target, was not a child; he was in his 20s, had just graduated from college, and was contemplating a career in plastics.

* I am grateful to my colleague Wendy Yap Peng Hoon for her comments on the first draft of this article.

woman in Singapore to be charged in court for having sex with a minor. The ex-teacher was alleged to have had consensual sex six times with the boy between 10 March and 8 May 2008. The boy is believed to be a secondary school student.

NEW OFFENCES CREATED

Prior to 1 February 2008, Sim could not have been prosecuted. Consensual heterosexual sex with a prostitute above 16 years old was not an offence before 1 February.[4] As for the unnamed teacher, before 1 February, consensual heterosexual sex between an adult female and a male minor attracted only a "slap on the wrist" under s 7 of the Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA"). The Women's Charter (Cap 353, 1997 Rev Ed) (true to its name) only criminalised consensual heterosexual sex with a female minor under 16 years old (see s 140(1)(*c*)). After 1 February, the sexual penetration (whether or not consensual) of a minor under 16 by either a man or woman became a specifically proscribed offence (PC s 376A). The new offence is truly gender neutral in that it applies to both males and females and to heterosexual as well as homosexual acts of penetration.

FIRST REFORM OF SEXUAL OFFENCES LAW SINCE VICTORIAN ERA

The Penal Code (Amendment) Act 2007 (No 51 of 2007) which created the new ss 376B and 376A offence of commercial sex with a minor under 18 and the "gender neutral" offence of sexual penetration of a minor under 16 came into force on 1 February 2008. This is the first major reform of sexual offences in the Penal Code since 1871 during the reign of Queen Victoria.[5] Sexual predators have since graduated from the dark back alleys to cyberspace.

CATALYST FOR REFORM – THE 2003 ORAL SEX CASE

The catalyst for the review of the sexual offences in the Penal Code was the November 2003 conviction of a 27-year-old police sergeant, Annis Abdullah under the then s 377 of the Penal Code for engaging in "carnal intercourse against the order of nature" with an under-aged girl. Annis and the victim got to know each other through an Internet chat room

4 See s 376B of the Penal Code (Cap 224, 2008 Rev Ed) ("PC"), punishable with a maximum seven years' imprisonment term and/or fine.

5 This review of the Penal Code as a whole is the most comprehensive undertaken since 1984, when the Penal Code was amended to introduce mandatory minimum punishment for several serious offences. This article however focuses only on aspects of the reform of sexual offences.

in March 2002, met and kept in touch. On 23 April 2002, Annis requested the victim to perform fellatio on him and she complied. Subsequently, the victim confided this incident to her friends and she was encouraged to make a police report. Anis was sentenced on 6 November 2003 to two years' imprisonment by the District Court.[6] Note the cyberspace element in this offence.

REACTION IN THE MEDIA

Although the victim was actually below 16 years old at the time of the offence, the court was mistakenly[7] informed that the victim was 16 years old at the relevant time. As it was reported in the media that Annis had been prosecuted for a consensual "unnatural" sexual act with a girl who was not under the age of consent, there was strong public reaction critical of s 377 of the Penal Code.[8] Certain members of the public questioned whether consensual oral sex should continue to be criminalised under s 377. Some went further to express dissatisfaction over the authorities' decision to prosecute the accused in the present case.[9]

Working closely with the Attorney-General's Chambers ("AGC"), Ministry of Law and other government agencies, the Ministry of Home Affairs ("MHA") reviewed the Penal Code's provisions to reflect present realities, addressing the changing nature of crime and ensuring that there is adequate protection for the more vulnerable members of Singapore society, such as minors and the mentally disabled. Stretching over three years, the process was described by Senior Minister of State ("SMS") Assoc Prof Ho Peng Kee as a measured and deliberate one, taking into account, where applicable, legislative changes in other jurisdictions.

COPYING WITH EYES WIDE OPEN

The legislative drafters drew inspiration for the new sexual offences from the Sexual Offences Act 2003 (UK). The British Act takes 80 sections to set out the many new sexual offences. It has been criticised for being overly broad and lengthy.[10] Many of the provisions describe in tremendous detail the elements of the offence.

6 See *Annis Bin Abdullah v Public Prosecutor* [2003] SGDC 290 at [4].

7 Highlighted in a joint letter from the Ministry of Home Affairs and the Ministry of Law to *The Straits Times* (14 November 2003) <http://www.mha.gov.sg/news_details.aspx?nid=MTEyOA%3d%3d-c64ACzdi1qw%3d> (accessed 10 November 2008).

8 *Ibid*.

9 *Annis Bin Abdullah v Public Prosecutor* [2003] SGDC 290 at [27].

10 See generally David Ormerod, *Smith and Hogan: Criminal Law* (OUP, 11th Ed, 2005) at pp 594–597.

The Singapore Act has followed the innovative drafting style in the British Act of prescribing (*ie*, "It is an offence for a person (A) to do a specified behaviour to another person (B)"); but the Singapore legislature had wisely refrained from importing the British offences lock, stock and barrel. New offences were carefully selected in the context of the practical and potential to Singapore society and in order to avoid overly broad provisions. Section 377 previously afforded the Prosecution with a blunt tool to catch a wide range of sexual misconduct not prescribed or inadequately addressed by any other statutory provisions such as oral or anal sex with a minor, incestuous oral or anal sex and sexual exploitation of a person with mental impairment. With the repeal of s 377, it was necessary to create new offences to catch these forms of sexual misconduct or deviant behaviour which were either grossly offensive to society or were necessary for the protection of minors and other vulnerable victims. The range of deviant sexual acts involving animals (dog's penis) and objects (Barbie doll leg) was illustrated in the tragic case of *Public Prosecutor v Ong Li Xia* [2000] SGHC 149 which is probably the worst recorded case of bullying amongst youths.

BRITISH SEXUAL MORES NOT BLINDLY IMPORTED INTO SINGAPORE

The British Act itself was the result of a comprehensive review of the law on sexual offences. It began with the Home Office Review, "Setting the Boundaries: Reforming the Law on Sexual Offences" (2000) and the "Review of Part I of the Sex Offenders Act 1997" (2001). The British Act purported to modernise the law and reflect the sexual mores of the 21st century. The British Act also introduced gender neutrality. The sexual mores of modern British society need not necessarily coincide with the sexual mores of Singapore's more conservative society in the 21st century. In the words of SMS Ho, "[a]s a major criminal law statute, its provisions reflect our society's norms and values … Now, we are amending the Code so that it remains effective in a dynamic and changing environment that remains challenging".[11] The calibrated liberalisation to reflect changing norms and values was primarily in the de-criminalisation of "unnatural sex" *viz* sodomy and oral sex between consenting heterosexual adults in private under the repealed s 377. On the other hand, the more conservative Singapore values as compared to British values were

11 *Singapore Parliamentary Reports*, Penal Code (Amendment) Bill (22 October 2007) vol 83 at col 2175 (Senior Minister of State for Home Affairs Assoc Prof Ho Peng Kee).

evident in the retention of criminalisation of male homosexual acts (s 377A) and the retention in a diluted form of the marital rape† immunity.

GENDER NEUTRALITY – PROTECTING MEN FROM WOMEN?

Another significant difference from Britain was the departure from gender neutrality in the offence of rape. Rape of a man by a woman remains not an offence. One possible reason for this decision is that it might be thought to be physiologically impossible for a man to be aroused under coercion or threat. Another reason could be that women as the historically "weaker" sex were historically protected by the law of rape from men. It is telling that there is an international convention for the elimination of discrimination against women but no convention for the converse to protect men against discrimination by women. SMS Ho explained it thus in Parliament:[12]

> We have stated the position in this House before that we do not take the position that all our criminal offences should be gender neutral because of the psychological and physiological differences of men and women – I think that is a point that Mr Charles Chong also alluded to – I do not know how many male Members will agree with him or me when I say that we, who are males, are less likely to feel that our modesty has been insulted compared to our wives or girlfriends. So section 509 is kept only where women are victims – insulting the modesty of a woman. And there are also other offences where it is not gender neutral. Rape is one.

To the credit of MHA, they were receptive to feedback during the consultation process which persuasively argued that the s 376A offence of sexual penetration of minors and the s 376F offence of sexual activity with mentally disabled persons should be made gender neutral. The reality that this could be a practical problem in Singapore was borne out by the above-mentioned case of the 32-year-old female teacher and the 15-year-old student. Women should be warned that whilst "female rape" is not criminalised, sex with a minor is a major crime. Similarly,

12 *Singapore Parliamentary Reports*, Penal Code (Amendment) Bill (23 October 2007) vol 83 at col 2354 (Senior Minister of State for Home Affairs Assoc Prof Ho Peng Kee).

non-consensual sexual penetration of a man by a woman with her fingers or with an object is criminalised under the new offence of sexual assault by penetration under s 376. Though it might appear inconsistent, the Legislature's rationale lies in the "physiological difference" argument.

Another British offence which was initially omitted from the initial consultation version of the Bill was the new offence of sexual grooming[ß] of a minor under 16. In answer to a question in Parliament on 17 July 2007 from Nominated Member of Parliament ("NMP") Siew Kum Hong, SMS Ho said that one of the areas that was being considered actively was sex with minors and, in this context, the Government was considering s 15 of the British Act 2003 on sexual grooming without the actual act of sex having been committed.

RETAINING TRUSTED OLD WINE

Another departure from the British Act was the realisation that the definition of what constitutes "sexual" may give rise to difficulties of interpretation and proof in court. Whilst this definition was adopted, the Singapore provisions differed somewhat from the UK models in that it is not necessary for the Prosecution to prove that penile penetration is a sexual act.[13] The tort law *maxim res ipsa locquitur* was the probable *raison d'être*. The British offence of "sexual assault by sexual touching" (s 3) was also not adopted, and the retention of the Victorian outraging modesty offence preferred. The authors, Yeo, Morgan and Chan, have observed that although defining "modesty" presents some interesting theoretical challenges, most cases do not present difficulties in practice.[14] *Quare* whether an "unchaste" prostitute who commercially exploited her own body could be capable of possessing any "modesty" that could be outraged. The retention of s 354 (using

13 This is evident from the absence of the word "sexual" as a qualifier to penile penetration. This approach is however similar to rape under ss 1 and 5 of the Sexual Offences Act 2003 (UK) where the "sexual" requirement is absent.

14 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007).

criminal force to outrage modesty) would retain reliance on the body of local case law and avoid the difficulty of determining whether the touching of a woman's hair or shoulder constitutes sexual touching.[15]

Apart from the new offences introduced by the reform, what is interesting was the sexual offences which were left "untouched" (pun unintended). Apart from ss 377A and 354, the Victorian offences of insulting the modesty of a woman (s 509) and obscene acts or songs in public (s 294) were left substantially untouched. The legislative drafters chose not to adopt UK offences such as exposure of genitals (s 66) and voyeurism (s 67). Although framed in Victorian language, the Penal Code provisions enjoy sufficient flexibility and a wealth of local case law to cover a host of fact situations unforeseen in the 19th century such as voyeurism through "up-skirt" video filming. The modern language of the British Act would have described in tremendous detail the elements of the offence rather than focus on the potential harm that may be caused. Some of the British offences relating to causing a child to engage in sexual activities or to watch sexual activities are covered under a related amendment which enlarged the scope of s 7 (sexual exploitation of child or young person) of the CYPA in a gender neutral manner.

THE WAR AGAINST HUMAN TRAFFICKING

The Penal Code amendments will allow Singapore, as a responsible global citizen, to do its part in curbing human trafficking. During the Parliamentary debate, NMP Eunice Olsen with a tint of sarcasm commended the Government for "finally introducing a law to prohibit sex with minors overseas and finally befitting Singapore's status as a developed and advanced nation". She said to laughter in the House that she hopes that "this is not just a token move to vault Singapore back into Tier 1 in the trafficking in persons report issued by the US government after we were demoted to Tier 2" in 2007. The US Department of State's *Trafficking in Persons Report 2008*[16] which was previously critical of Singapore commented favourably on the effect of the new offences in curbing human trafficking. Although

15 Although the issue still arises in the context of s 376F(1) (sexual touching of person with mental disability).

16 See chapter on "Country Narratives – Singapore" in *Trafficking in Persons Report 2008* (4 June 2008).

the report maintained its stance that the Singapore government does not fully comply with the minimum standards for the elimination of trafficking, it acknowledged that it is making significant efforts to do so. The Report cited the Penal Code amendments that criminalise prostitution involving a minor under the age of 18.

The Report found it noteworthy that the amendments also extended extra-territorial jurisdiction over Singaporean citizens and permanent residents who sexually exploit children in other countries, and make organising or promoting child sex tourism a criminal offence.

CONCLUSION

The sometimes heated public debate surrounding the amendments ironically centred around a provision which was *not* the subject of the amendments *viz* the parliamentary petition by NMP Siew Kum Hong to repeal s 377A. This controversy unfortunately deflected attention away from the many new sexual offences created for the protection of minors and other vulnerable persons.

As SMS Ho mentioned, the review of the Penal Code, the "Mother of all Statutes", may be over but the work goes on to monitor how our amendments work in practice and fine-tune them, if necessary. The amendments have got off to a good start as illustrated by the short but important judgment of Choo Han Teck J in *Public Prosecutor v Wang Minjiang*:

> The point of interest is the novelty of the sentence under appeal. It was in respect of a newly created offence under s 376B(1). The learned deputy public prosecutor ("DPP") submitted that it was the legislature's intention that these sort of offences 'be viewed seriously and for such offences to be enforced strictly.' … This instant case was not an easy one to find the right range of sentence, especially since it was the first under the new law. It does seem to me, however, that a more rigorous sentence might be needed to discourage international prostitution involving persons the law regards as young and vulnerable … *IS*

This article is written in the author's personal capacity and the views reflected are the author's personal views except where official views in the public domain are expressly cited.

† More on the marital rape offence may be viewed at pp53–54 of this issue.

ß More on the sexual grooming offence may be viewed at pp54–55 of this issue.

CONTINUING THE DISCUSSION FROM THE PREVIOUS ARTICLE, TWO OF THE EIGHT NEW SEXUAL OFFENCES, NAMELY SEXUAL GROOMING AND MARITAL RAPE, ARE DISCUSSED IN DETAIL TOGETHER WITH THE ATTENDANT ISSUES WITH ENFORCEMENT.

WELL-GROOMED AND REFORMED

AMENDED PENAL CODE

By **Peter C Low and Priya Selvakumar, Legal Practitioners**

MARITAL RAPE

Until recently, it was common understanding, as Sir Matthew Hale argued in 18th century England,[1] that a woman surrenders consent upon entering a marriage. It was only in 1991 that England saw its first case abolishing the marital rights exemption. The unanimous judgment given by Lord Keith of Kinkel in *R v R* ([1991] All ER 481) provided the leading judgment of the case. He stated that the manner in which the lower courts had run circles around the exemption in order to evade it were clear indications that the rule itself was unjustified. In agreement with the earlier Court of Appeal judgment, Lord Keith stated that "the fiction of implied consent [had] no useful purpose to serve today in the law of rape" and that the marital rights exemption was a "common law fiction" which had never been a true rule of English law. Needless to say, R's appeal was accordingly dismissed, and he was convicted of the rape of his wife.

Although most countries now criminalise marital rape,[2] one cannot deny the slow progress on criminalisation of this form of sexual assault. In December 1993, the United Nations ("UN") High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women, establishing marital rape as a human rights violation.[3] However, not all UN member states fully recognised this Declaration. By 1997, only 17 states criminalised marital rape.[4] In 2006, the UN Secretary General found marital rape may be prosecuted in at least 104 states. Of these, only 32 made marital rape a specific criminal offence while the remaining 74 did not exempt marital rape from general rape provisions.

Singapore has only just started to recognise the offence of marital rape. The amendments to the Penal Code (Cap 224, 1985 Rev Ed) found in s 375(4) lift marital immunity in five scenarios: (a) when both parties are living apart under a judgment or pursuant to a written separation agreement; (b) when both parties are living apart and divorce proceedings have commenced but have not been concluded; (c) when an injunction restraining the husband from having sexual intercourse with his wife is in force; (d) when there is in force a personal protection

1 Sir Matthew Hale, *Historia Placitorum Coronae (The History of the Pleas of the Crown)* 2 vols (Sollom Emlyn ed) (London: Savoy, 1736).

2 India has gone even further by implementing the Protection of Women from Domestic Violence Act which came into force in October 2006: Justin Huggler, "India abolishes husbands' 'right' to rape wife" *The Independent* (London) (27 October 2006) <http://news.independent.co.uk/world/asia/article1932745.ece> (accessed 28 November 2008).

3 United Nations General Assembly, The Declaration on the Elimination of Violence against Women (20 December 1993) <http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed 28 November 2008) Art 2(a).

4 UNICEF, *The Progress of Nations 1997* at p 48 <http://www.unicef.org/pon97/p48a.htm> (accessed 28 November 2008).

order issued under s 65 or an expedited order issued under s 66 of the Women's Charter (Cap 353, 1997 Rev Ed); and (e) when the parties are living apart, and proceedings have commenced for the protection order or an expedited order.

The new amendments, however, do not address the injustice in present legislation as demonstrated in the High Court case of *Public Prosecutor v N* ([1999] 4 SLR 619). In this case, the wife moved out of her matrimonial home after a year of marriage. A year later, the wife suggested the couple get a divorce. The upset husband then threatened to kill her. Approximately two weeks later, she agreed to his request to meet, but they soon started quarrelling again. The husband then dragged her into his car and drove back to their matrimonial home. He ordered her into the bedroom, stripped her of her clothes, tied her hands with a bath towel and gagged her. He then had sex with her against her will.

As her husband, he could not be charged with "rape". Rather, he was charged with voluntarily causing hurt, wrongful confinement and criminal intimidation. He pleaded guilty. The trial judge imposed a total fine of $7,000. Even after an appeal by the Public Prosecutor against the mild sentencing, the husband was only slapped with an additional 18 months' imprisonment. Under the new law, the husband will be shielded from a crime otherwise deserving if the victim was not his spouse.[5]

On the flip side, criminalising marital rape does have its drawbacks. Firstly, it would be considered *post facto* criminalisation, as we would be punishing spouses for doing what was once, according to the law, their right. Secondly, what entails consent would lead to a quandary. Consent may take on different forms, depending on the relationship of the parties. Thirdly, there will be difficulty in proving that rape took place. In a marriage where sexual relations are expected, the evidential burden will be very difficult to discharge[6] unless it is clear there was violence or even criminal intimidation, as in case mentioned above.

Amending the Penal Code to include marital rape would entail giving clear definitions on actions which would amount to consent, which will be difficult as every marital relationship is different. However, this should not be a challenge to shy away from.

SEXUAL GROOMING

One of the new offences which has made an appearance is the offence of "sexual grooming of a minor under 16". The offence aims to combat the increasing number of minors

5 Summary of the case taken from Ms Ellen Lee's (Sembawang) speech in *Singapore Parliament Report*, Penal Code (Amendment) Bill (23 October 2007) vol 83 at col 2354.

6 Wendy McElroy, "Spousal Rape Case Sparks Old Debate" (21 February 2005) <http://www.enterstageright.com/archive/articles/0205/0205sprape.htm> (accessed 1 December 2008).

who have been targeted by sexual groomers – in other words, it aims to catch predators before they are able to inflict any harm. Reports have indicated that the easiest prey proves to be girls who are lonely, curious or have low self-esteem.[7] These offenders take advantage of the girls' unfamiliarity with both love and sex. A Singapore Children's Society paper in 2003 showed that an average of around 240 sexual offences against children was recorded every year by the Ministry of Home Affairs between 1999 and 2002.[8]

Under the new law (s 376E), a person over the age of 21 will be charged if it can be proven that he: (a) met or had communicated with a minor on at least two prior occasions; and (b) intentionally met or travelled to meet the minor with the intention of committing a sexual offence with that minor. If convicted, the offender may be fined or jailed for up to three years or to both. If sex occurred, the offender may face a possible ten-year jail term. If the victim is below 14, the offender will be convicted of statutory rape, which carries a jail term of up to 20 years and a fine or caning.

While in theory the idea seems logical, the law, however, may be difficult to enforce. It will be difficult to gather evidence to show a potential offender had the intention of committing a sexual offence against a minor. Saying that, Nominated Member of Parliament Siew Kum Hong notes, "online predators will now have to think twice, because even though it is difficult to prove, it's not impossible".[9]

Perhaps more may be done to curb and hopefully prevent these crimes from occurring against our youth. Talks in schools will definitely highlight the dangers posed by the Internet. Youth should be made aware of these predators and the harm they may be seeking to inflict so they may identify these predators and seek help when they need it. Hotlines have been established in the UK to help adults who are toying with the idea of committing sexual offences with minors.[10] Trained professionals counsel anonymous callers on how to prevent themselves from offending. Such a hotline could also aid youth who are aware they are being "groomed" or have encountered a potential offender, and wish to seek help. *IS*

7 Dawn Tan, "Flattery and Gifts Often Used as Bait" (23 September 2007) Asiaone <http://www.asiaone.com/Digital/Features/Story/A1Story20070925-26978.html> (accessed 1 December 2008).

8 Radha Basu, "Child Sex Abuse: 1 in 3 Cases is Calculated" (19 January 2008) Asiaone <http://www.asiaone.com/Just%2BWoman/Motherhood/Stories/Story/A1Story20080121-45929.html> (accessed 1 December 2008).

9 *Singapore Parliamentary Reports*, Penal Code (Amendment) Bill (22 October 2007) vol 83 at Col 2175.

10 Home Office Task Force on Child Protection on the Internet 2008 <http://police.homeoffice.gov.uk/publications/operational-policing/social-networking-guidance?view=Binary> (accessed December 2008).

Side Bar

SORRY NO CURE

MY FIRST ATTEMPT AT MITIGATION

By **Adrian Tan, Legal Practitioner**

WHEN I was a second-year lawyer, my senior handed me a criminal brief. It was for someone who had been charged with a minor road traffic offence.

"Don't get too excited", my senior told me. "It's a PG case."

"PG?" I asked. "Parental Guidance? What did he do in his car?"

"Idiot," my senior explained. "He's pleading guilty. Just mention the case in court."

"Mention it?" I asked again. "What do you mean? Bring it up in casual conversation with the judge?" As a newbie, I imagined striking up a chat with a judge and then saying, "You know, your Honour, it's funny you were speaking of that topic, because that reminds me of a case I would like to mention."

My senior patiently educated me on how to mention a case. "The client is going to plead guilty."

"Right," I said. "I can do that. I'll say that the client is pleading guilty …"

"No!" exclaimed my senior. I was puzzled. Did I get something wrong again?

"Never, never, never say that your client is pleading guilty until he actually does so. Otherwise you'll compromise his position," my senior said. "Just say that the client will be 'taking a certain course of action'."

"A certain course of action?" I said. What course of action? What if the judge thought that my client was going to run away? One last taste of freedom?

"The judge knows what you mean," my senior said. "It's a code. I need you to adjourn it so that 'I' (being a code for 'you') can prepare a mitigation plea."

IN the Subordinate Courts that afternoon, I waited until all the grizzled veterans had "mentioned" their cases. Then I stood up and explained that my client wanted to take "a certain course of action".

The District Judge looked up. "He wants to plead guilty, is it? Adjourned …"

Plead guilty? I panicked, and interrupted the court. "No, your Honour, I didn't say my client was pleading guilty. I mean, he could be, but on the other hand he could be claiming trial. We don't know."

The District Judge said, "You said he's taking a certain course of action? He wants to plead guilty?"

"I … No, I'm not saying that. He has a certain course of action in mind, which he intends to take."

The District Judge looked at my client. "Are you pleading guilty?"

My client looked at me. "Am I pleading guilty?"

I told him, "Yes." Then I told the District Judge, "I have to take instructions."

"Adjourned four weeks," said the District Judge.

It was not my most glorious moment.

MY next task was to prepare the mitigation plea. The purpose was to move the court towards leniency and clemency.

I began by reading all the available textbooks on theories of punishment. It was one of the rare exam topics that I had spotted in law school, and I still kept all my handwritten notes. I assumed that the District Judge would be familiar with Benthamite utilitarianism and Kantian retribution, and I wondered which theory he would subscribe to.

Would he belong to the retributive school? If so, he would believe in "an eye for an eye". That type of theory might apply in a murder, where the convict would himself be put to death by the State. But it was unlikely to work in my client's case. He had driven 30km/h above the speed limit. What would be an appropriate retribution? Should he promise to drive 30km/h below the limit for a week as a form of payback? I sighed. Retribution seldom worked in practice. I remembered reading about a 24 year old from Ohio, United States, who was convicted of violating the city's noise ordinance. The judge offered to reduce the normal fine of US$150 to US$35 if the defendant agreed to listen to 20 hours of classical music. Fifteen minutes into the sentence, the rap music fan changed his mind and paid the full fine in order to end his probation. Clearly he had suffered greatly.

In my case, I wondered if the District Judge believed in deterrence. That has been an ever-popular theory, especially for the old and the old-fashioned. In Elizabethan times, drunks were punished with "the drunkard's cloak". The drunk was forced to don a barrel and wander through town while the villagers jeered at him. It might have deterred Englishmen in Elizabethan times, but Singaporeans along Boat Quay on Friday nights? I had my doubts.

In the course of my research, I came across a little-known theory of punishment: punishment by some unnamed-awful-thing ("UAT"). A mayor of a village in south-west France once banned residents from dying. The mayor issued the unusual edict when it became clear that there was no room left in the overcrowded village graveyard in the village of Sarpourenx in the Bordeaux region. In an ordinance posted in the council offices, the mayor told the residents that "all persons not having a plot in the cemetery and wishing to be buried in Sarpourenx are forbidden from dying in the parish".

He added, probably in a very spooky voice, "Offenders will be severely punished." However, the nature of the punishment – apparently a fate worse than death – was not specified. I hear that this approach met with little success and the mayor opted for the much more successful punishment by macrobiotic diet in the end.

My favourite theory of punishment is incapacitation where the offender's ability to commit further crimes is removed. This can be done in many ways: a rapist may be castrated, or a football hooligan banned from attending matches. A recent case in Arizona illustrated this to the extreme: a teacher with no prior convictions was sentenced to 200 years in prison for possessing 20 obscene photographs, thus setting a useful precedent for incapacitation through multiple reincarnations – now, that was being tough on crime.

My week-long research into sentencing principles was interrupted by my senior, who asked why it was taking me so long to write a mitigation plea.

"It's because I am trying to blend an argument for rehabilitative punishment with one that has restorative overtones for the State," I explained.

He called me an idiot again, and proceeded to explain the ingredients of a classic mitigation plea.

First, my client would have to express remorse.

"What aspect of sentencing theory is that?" I asked.

He looked at me as if I was speaking Martian, and said, "Your client has to say sorry. And that he won't do it again."

Next, my client's background had to be stressed. He had a clean record.

I said, "You mean I should point out to the court that my client is not a recidivist?"

My senior replied, "I don't think his religion matters all that much."

Finally, my senior told me to stress that my client was a sole breadwinner.

"Sole breadwinner?" I asked. "What's the relevance of that? You mean if his wife is working, the State should punish him more severely? How is that justice?"

My senior sighed in exasperation, "Just say that he needs his car to earn a living, he's very sorry and he has a clean record. Forget all your stupid theories of punishment."

IGNORING my senior's advice, I went to the next hearing with a 25-page mitigation plea and a basket of bound authorities.

I opened with a witty ditty from Gilbert and Sullivan's *The Mikado* delivered with what I thought was dramatic flair nuanced with fervent belief:

My object all sublime
I shall achieve in time –
To let the punishment fit the crime –
The punishment fit the crime

"You again?" said the District Judge. I tried not to let my disappointment show.

For the next 45 minutes, I expounded on the history of punishment, the parliamentary speeches on the Road Traffic Act and the fact there was no need to sentence my client at all as he had already seen the error of his ways. It was a dazzling performance. There was not an open eye in the courtroom. I ended with a heartfelt plea to his Honour to let my client off with a stern warning.

Upon waking up, the learned District Judge said, "$500 fine."

I felt pleased for about seven minutes, until I realised that the next three cases (in which the accused were unrepresented) also received the same quantum of fine. My great speech on mitigation had no effect at all.

AS I left the courtroom, a man in the queue to go in gestured to me. "Hey, lawyer, I want you to represent me," he said.

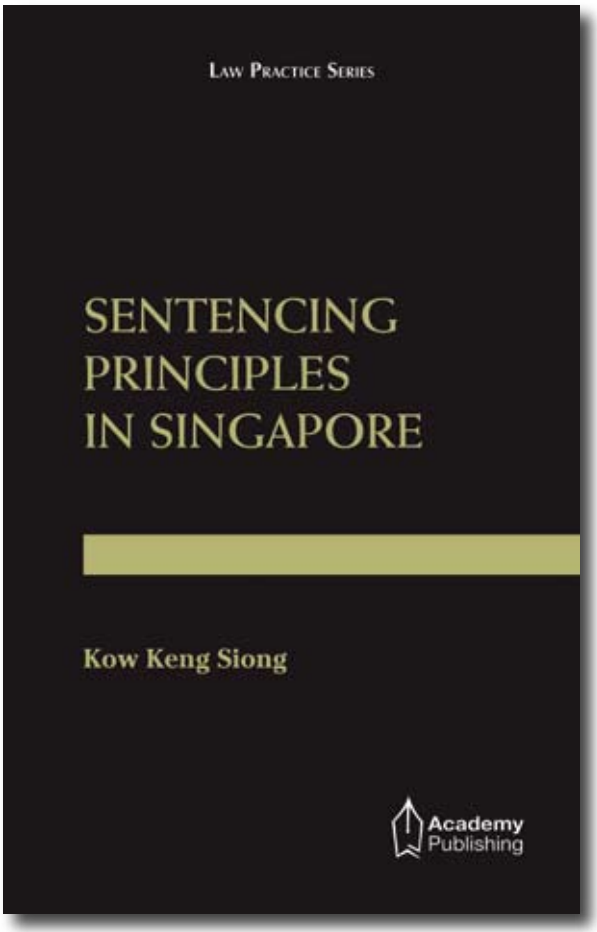
I felt pleased. At least one person had paid attention to me. "I don't normally take walk-in clients, but I will accept you," I said. "Just tell me one thing. Why did you pick me?" I asked, shamelessly fishing for a compliment.

The man said bluntly, "The policeman there said those with lawyers can go first. And you look like the cheapest one." *IS*

ON THE BOOKSHELF

SENTENCING PRINCIPLES IN SINGAPORE

By **The Honourable Justice Choo Han Teck, Supreme Court of Singapore**



Title:	Sentencing Principles in Singapore
Author:	Kow Keng Siong
Publisher:	Academy Publishing
Extent:	1,500 pages (approx) (leather bound hardcover and softcover)
Price:	Upon request

SENTENCING an offender is the last stage of the judicial process in a criminal case; it is the final part of the judicial opinion as to what should be done about the offender. The decision in each case as to what the sentence ought to be is often a difficult one to make because the court, in determining what is appropriate, has to take into account two principles, each equally valid, each equally important, yet often pulling the court in opposite directions. The first is that the punishment must fit the crime, and the second lies in the law's affinity for consistency. The

problem with the first lies in the conflicts between rival theories of punishment. Generally, crime precedes punishment.[1] The problem with the desirability of consistency in sentencing is that the court is required to take into account all the circumstances of the case.

Enter *Sentencing Principles in Singapore*. This is an encyclopaedic reference book which is a repository of an impressive collection of case law on sentencing, all in 37 chapters. Although one might think that all this would be too much in any one book, the handiness of the volume alone makes this book an invaluable reference book. The form adopted by the author seemed to be the most practical one in view of the wide coverage of topics. The form is applied consistently through the book. The author stated the broadest rule on each point by selecting a quotation from a case that applied or referred to it. He then proceeded to set out various other cases that followed, expanded or deviated from that rule. The discerning reader may, however, feel uncomfortable with the liberal use of the word "principles". Some statements, sensible and obvious have been elevated to the status of "principle", for example, on the topic of "Sentencing Accomplices" in chapter 13, the author described the following statement as a "General Principle": "Where two or more offenders are to be sentenced for participation in the same offence, their sentences should be the same, unless there is a relevant difference in their *responsibility for the offence* or their *personal circumstances*" [emphasis in original]. That might be unavoidable because the author was obviously keeping strictly to his selected format so as to avoid confusion from too many distinctions.

It is a pity that the format, and probably space, did not permit the author to make commentaries of his own to enlarge or add on to some of the judicial statements which would have benefited from explanation. For instance, on "aggravating factor", under "Deliberation, Premeditation and Planning" in chapter 16, the author set out the statement, "It is well established that where an act is done after deliberation and with premeditation as opposed to the situation where it is done on the spur of the moment and 'in hot blood', that is an aggravating … circumstance". This is an instance where it would be helpful to have a footnote on what distinguishes "deliberation and premeditation" from "intention", and why a long period of deliberation amounts to an aggravating factor – that is, that the offender had the opportunity of cooling off, recanting, and regaining his senses, perhaps, and yet chose to commit the offence. Another point worthy of reflection is, why should deliberation be considered an aggravating factor, rather than to consider offences committed in "hot blood" as a mitigating factor. There are no straightforward answers but a footnote or two to indicate issues that could be taken up further would greatly enhance this book. The neutral stance taken by the author was essential to the overall

1 Deterrent sentences are designed to impose punishment against crime in future.

function of the book as a reference and sourcebook. In this way, a questionable statement was able to attain the status of "principle" since the author probably felt that he was not at liberty to comment on it. In "Sentencing Objective", under chapter 14 on "Sentencing Strict Liability Offences", for example, the following passage was taken to be a general principle: "[T]he only objective for the most part that there could reasonably be behind sentencing for a strict liability offence is that the sentence be ... retributive." There appears to have been a mix up between "retributive" and "deterrent" in the decision cited. Retributive punishment is deserved punishment; hardly a reason for punishing strict liability offences where the offenders may sometimes not be deserving of punishment. Deterrence, which is utilitarian in nature, is a sentencing principle that finds its emphasis in a desired result, and is less concerned about desert or justification.

Some statements seem too broad and those too, would have benefitted from the author's personal commentary. In "Offended Due to Ignorance of the Law" in chapter 18, the judicial statement selected, "[I]gnorance of the law can hardly be a mitigating factor", required temperance. Ignorance of the law is no excuse for crime, but why could it not be a mitigating factor in some cases?

The comments above does not detract from the immense value that this book is to lawyers, judges, the academia, and anyone interested or involved in the criminal law. It has covered all the areas that one might need to know about the sentencing of an offender. It had provided the sources and pointed the way to further thinking on all the issues raised. The breadth and scope of the book are admirable, and it is likely that a place will be reserved for it on lawyers' bookshelves. When the reader closes the book, he will find much to think about on the subject of sentencing an offender. Some will think of future crimes averted; some of the prisoner reformed; others of the victim's cathartic release; and some, all of these things. As facts merge, blend, and disperse in the one case and the other, one learns that the ideal sentence is not easily identifiable. When facts interfere with hypothesis, judgment loses its certainty and accuracy; and we might feel compelled to reflect on John Garner's questions: "What good comes out of criminal punishment? How does it help to make the world a better place?"[2] *IS*

"The breadth and scope of the book are admirable, and it is likely that a place will be reserved for it on lawyers' bookshelves."

Sentencing Principles in Singapore *will be available in February 2009 for purchase through Academy Publishing's online bookshop at www.sal.org.sg and major bookstores.*

2 From his introduction to Hart's *Punishment and Responsibility* (Oxford University Press, 2nd Ed, 2008).

THE HONOURABLE JUSTICE K G BALAKRISHANAN CHIEF JUSTICE OF INDIA

By **Nathaniel Khng, Assistant Registrar and Justices' Law Clerk, Supreme Court and Prem Raj Prabakaran, Justices' Law Clerk, Supreme Court**

THE Honourable Justice Konakuppakatil Gopinathan Balakrishanan, Chief Justice of India, the guest speaker at the 15th Singapore Academy of Law Annual Lecture, is the epitome of the notion rags to riches. Coming from a humble background, he was influenced by his father, a former chief administrator in the courts, to read law. Thereafter, with his exemplary work ethic, he was elevated from the Bar to the Bench and eventually to the highest judicial position in India. In his usual kindly manner, he offered to take time off from his busy schedule in Singapore to share his views on legal practice, the Indian judiciary, and crime and punishment.

LEGAL PRACTICE

Legal practice in India

Balakrishanan CJ commented that the state of legal practice in India today is much better than it was in the past. Since the last ten years, with globalisation, an increase in commercial disputes, and new legislation, opportunities have increased for both seasoned lawyers and young lawyers. Moreover, the relationship

between the Bench and the Bar has strengthened over the years.

Ties between the legal systems of Indian and Singapore

Balakrishanan CJ recognised the fact that Singapore and India have traditionally enjoyed very warm and close relations due to the shared historical and cultural ties. That aside, he also pointed out that as there are many common features between the Singaporean and Indian legal systems, both systems could look to each other for guidance. In this respect, he noted, with approval, the fact that subscribers to LawNet would soon have access to Indian decisions.

Balakrishanan CJ also declared that arbitration and mediation would be areas in which the legal systems of Singapore and India would have the most interaction. He made mention of the fact that the main arbitration centres in Asia would be Singapore and Hong Kong, but opined that for a number of reasons, Singapore would be more attractive to Indian companies than Hong Kong, due to the greater number of business transactions between Singapore and Indian companies and Singapore's closer proximity to India.

ON BEING A JUDGE

Personal philosophy

Balakrishanan CJ shared his judicial philosophy of the law being an important tool to shape the life of the people in the country. He opined that all judges have to have patience and dedication, and be devoid of prejudices. Young judges, he said, should strive to develop these characteristics.

> "The Judiciary plays a wide role in the development of the economy. Those engaged in commercial enterprise will look at whether there is stability and the rule of law. Only if there is a good judicial system can there be better development of the economy."
>
> **– Balakrishanan CJ**

The Indian judiciary

Balakrishanan CJ stated that one of his goals for the future would be the improvement of the Judiciary in India. In his opinion, educating judges to develop the law, write good judgments and analyse cases is a continuous process. At present, there is a judicial academy at the national level to train judges and all the states with High Courts have their own judicial academies as well.

Balakrishanan CJ also made reference to recent initiatives by the Indian judiciary. One such initiative would be the setting up of special courts to deal with the mounting number of corruption cases involving the politically influential and financially mighty. Another would be the setting up of mobile courts. For these initiatives, the Government was requested to provide the necessary

funding. In this regard, Balakrishanan CJ stated that while the separation of powers of the various branches of Government is very much present in India, the reality would be that only the Executive can assist in the establishment of infrastructure as this requires funds which the Judiciary does not have.

Balakrishanan CJ also commented on the various approaches to the appointment of judges in the recent past. Prior to 1993, the Chief Justice of India was to be merely consulted on the appointment of judges. The Government would suggest a name and the Chief Justice would give his opinion. Presently, the Chief Justice along with his fellow judges suggest the names of candidates to the Government who will then consider the appointment of the various candidates. Neither system, however, proved faultless, with the present "judicial primacy" appointment system producing its fair share of tainted judges, while the "executive primacy" system resulting in the appointment of Executive-compliant judges. There is now serious talk of establishing a Judicial Commission for the appointment of judges. The composition of the Commission, however, is still a matter of debate.

Balakrishanan CJ was also candid about the backlog of cases in the Supreme Court of India, which currently stands at approximately 48,000. He emphasised that maintaining the rule of law in India is not a problem; rather, the major challenge would be the large number of cases clogging up the system. Unfortunately, he said, while disposal rates have increased, the number of cases has also increased. To tackle the problem, he said, the plans in place include increasing the strength of the Supreme Court Bench.

CRIME AND PUNISHMENT

Reform of the Penal Code and the Criminal Procedure Code

Balakrishanan CJ was aware that the bulk of Singapore's criminal law is to be found in the Penal Code ("PC") which is based on the Indian PC, and that similarly, Singapore's Criminal Procedure Code ("CPC") draws much from India's CPC. He commented that extensive reform of the PC would not be needed and emphasised that the PC should be considered "to be a piece of beautiful legislation" which "has taken care of many things very well". In his view, new legislation can supplement the PC if any new offences arise. Likewise, he stated that he had no serious issues with the CPC.

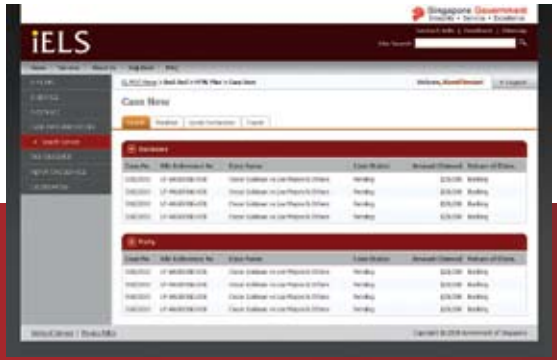
ANTI-TERRORISM LAWS

Balakrishanan CJ expressed the opinion that while there is a need for anti-terrorism legislation, any such legislation should contain sufficient safeguards to insulate the public from its possible misuse. He emphasised that once drastic amendments to the anti-terrorism laws are made, there are bound to be situations where the laws will be abused. In his opinion, terror laws should be strict, but safeguards should still be put in place to prevent a violation of human rights. Safeguards may include, for example, the use of investigators who are of a high level of seniority and allowing relatives of the accused person to have more access to the investigation process. *IS*

THE NEXT STEP IN E-LITIGATION

THE INTEGRATED ELECTRONIC LITIGATION SYSTEM

By **Yeong Zee Kin, Assistant Registrar, Supreme Court**



Inside page

THIS IS THE FIRST OF A SERIES OF ARTICLES OVER THE COMING FEW ISSUES THAT WILL INTRODUCE VARIOUS ASPECTS OF THE iELS TO THE LEGAL PROFESSION. THIS ARTICLE FOCUSES ON HOW LAWYERS WILL INTERACT WITH THE iELS.

THOUGH part of Singapore's litigation scene for almost ten years, the Electronic Filing System ("EFS") still stands on its own and is not integrated as part of modern-day litigation practice.

In August 2008, the Judiciary awarded a contract for the development of an integrated Electronic Litigation System ("iELS"). When ready in 2010, the iELS will bring new heights to the deployment of technology for litigation processes.

ACCESSIBILITY

To each his own

One of the hallmarks of iELS will be greater accessibility. Whereas the current EFS front end is familiar to filing clerks and legal secretaries, most lawyers are quite lost in the complex user interface. iELS will address this by providing views of the electronic case file customised for different users.

Filing clerks and legal secretaries should still see some familiar and useful features of the current EFS front end in the redesigned iELS "mail room". From this centralised "mail room", they can file and receive incoming documents or court correspondence.

For lawyers, the redesigned electronic case file will allow full access to all documents filed by or served on them for as long as the case remains pending instead of the present "14-days window" after which documents are archived.

iELS will also be a focal point for collaboration between lawyers and their clients as clients can see draft documents using iELS. In addition, a variety of alerts (by e-mails and SMS) will allow lawyers to be proactively informed about documents filed by or served on them. Lawyers can also receive reminders about upcoming hearings.

Homepage

For the firm administrator, financial and hearing information can be downloaded for integration with the firm's internal systems. There are plans to develop a set of reports to inform administrators of iELS usage in the firm.

User authentication

The EFS smartcard will finally be retired in favour of a simpler authentication system. After careful consideration, the Judiciary has decided that the adversarial system and the openness of the litigation process are sufficient checks on any potential misuse. This move is complemented by a more sophisticated back-end security system that will provide different levels of authorisation. This results in all lawyers and staff in the law firm having access to the iELS front end. Access is granted by a simple process of enrolment of that lawyer's or staff's user identification into iELS and a role assigned to that user. With the correct assigned roles, law firms can restrict the filing of documents to a smaller group of users and still allow each lawyer and his support staff access to cases they are involved in (but not others). When someone leaves the firm, it will be the same simple process to remove him from the list of authorised users.

Take your pick

The theme of accessibility is carried through to the filing process. When an application is filed, a window of available hearing dates will open for the lawyer to choose a preferred date. This should ensure that at least the applicant will be available and the date would, in any event, be within the usual window for such applications. If there is a need for an urgent hearing date, such a request may be made when the document is filed. The Duty Registrar may grant the request or he may ask the lawyer for further explanation before making a decision.

FORMS AND FUNCTIONS

Another major improvement iELS brings is the use of Infopath form technology as the underlying technology for the filing of court forms. iELS will move away from the present paradigm where a court document is prepared with a word processor, scanned into PDF for filing, and the required information is filled into an online Web form, often retyping information already in the court form. iELS will provide users with a library of electronic court forms, each of which is an Infopath e-form. These forms can be downloaded and completed offline or online.

Since these court forms will have an underlying data structure, it can understand

the information typed into them. Information in the court form need not be typed again and there will be no separate online form to complete. Information need only be typed in once, and will be re-used thereafter. Once the court form is prepared, it is ready for filing. No other form will be required. Further, the e-form will look like the court form lawyers are already familiar with.

The use of Infopath technology will also allow us to embed rules within the e-form that can check the completed information. For example, if a section of the e-form requires an NRIC number, the form will alert you if the NRIC number fails (due to a mistake) the basic verification check. Similarly, documents that are required to be filed together in the same bundle will be made available in a QuickPack and if any document is missing, you will be alerted. The benefit is that most mistakes can be identified by iELS before the forms are filed resulting in less documents being rejected and filing fees deducted.

PERVASIVENESS

Anytime, anywhere

With a simpler authentication system, it is possible for court documents to be filed anytime, anywhere. With the electronic case file providing access to all documents filed by, served on or otherwise received by the law firm for the life span of the case, the lawyer will have access to the documents anytime, anywhere with an Internet connection. Further, the current Pack-n-Go feature will be enhanced to permit him to download the entire or selected documents onto a thumb drive for work offline.

Content syndication

With information re-use in mind, iELS will have increased features for content syndication. At the moment, there are plans to syndicate hearing lists at the law firm, the case and the lawyer level for integration of hearing dates into the firm's and lawyer's calendars. The current ability to download financial information will be boosted with new technology to allow better integration with law firm's practice management and accounting systems. If there are any suggestions for syndicating additional information, the iELS Front End Working Group will be happy to receive them.

White lists

With the move towards open technical standards, iELS will move away from using only the PDF format to a list of acceptable electronic file formats. Hence, future exhibits need not be only in PDF. This should make it easier to attach spreadsheets, plans and drawings to exhibits. The list will be published in due course.

YOUR PART IN THIS

When the iELS prototype is ready, we will be organising feedback sessions to gather your comments. We also need volunteers who are prepared to "kick the tyres" of this prototype. So if you are keen to have a go, do let us know (e-mail: lim_seng_siew@sal.org.sg). *IS*