

## Book Review

### FACT-FINDING AND REALITY: A JUDICIAL DECISION-MAKING PRIMER<sup>1</sup>

by See Kee Oon<sup>2</sup>

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1 While much ink has been spilled over the nature of the work of the Prosecution and the Defence in recent times,<sup>3</sup> the manner, methodology and work of judging itself has, at least in the domestic context, largely eluded substantial study. The conventional wisdom and apparent truism that “the judge decides”, while undoubtedly true, over-simplifies the matter and leaves much to be unpacked. What does it *actually mean* to say that “the judge decides”? What analytical frameworks or heuristic tools does the judge employ in doing so? When can or should a judge rely on judicial experience and intuition in making such a decision? How does the judge separate the wheat from the chaff in deciding what pieces of evidence that are adduced are key and what is unnecessary noise that is, at best, only tangentially relevant? How does a judge attempt to divorce his personal predilections or views in the decision-making process, and how can he check any biases that any individual would surely have? Put another way, how do judges “consciously put aside emotions and personal

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1 Academy Publishing, 2022. This book review is written in the author's personal capacity and the opinions expressed herein are the author's own views and may not reflect the views of the Attorney-General's Chambers, Singapore.

2 Judge of the High Court (General Division).

3 See, as illustrative examples, Lucien Wong, “Prosecution in the Public Interest”, speech at the Singapore Law Review Lecture 2017 <<https://www.agc.gov.sg/docs/default-source/default-document-library/singapore-law-review-annual-lecture-2017---prosecuting-in-the-public-interest.pdf>> (accessed 9 January 2023); Gary Chan, “Prosecutorial Discretion and the Legal Limits in Singapore” (2013) 25 SAclJ 15; Benny Tan, “The Role of Prosecutors as Ministers of Justice” *Singapore Law Gazette* (February 2021) <<https://lawgazette.com.sg/feature/the-role-of-prosecutors-as-ministers-of-justice/>> (accessed 9 January 2023); Subhas Anandan, *The Best I Could* (Marshall Cavendish International, 2009); and Justice Steven Chong, “The Ethics of Criminal Practice”, speech at the Singapore Academy of Law Biennial Ethics Lecture 2015 <<https://v1.lawgazette.com.sg/2015-04/1281.htm>> (accessed 9 January 2023).

convictions which may skew their decisions”<sup>4</sup>?<sup>4</sup> To what extent, if at all, does public sentiment and public perceptions of the heinousness (or otherwise) of a particular crime feature in a judge’s deliberative process?

2 Unlike in some other jurisdictions,<sup>5</sup> there has hitherto been precious little discussion of the myriad of aspects of judicial decision-making in domestic legal scholarship. Consequently, the role of the judge and the skill sets that he or she must seek recourse to in order to navigate the many difficult and complex issues of fact and law that unfold on a daily basis in the Singapore courts is not one that is always fully appreciated or understood. This is, however, in some ways not a uniquely Singaporean phenomenon. Indeed, there is evidence to suggest that in some other jurisdictions, a chasm has developed in the public’s understanding of what judging essentially is all about (typically with the public assuming that a good judge is an individual who is a fountain of legal knowledge, or a “clever” lawyer in common parlance) and what the judicial office requires of its occupants in order for them to discharge their responsibilities well.<sup>6</sup> One may even suggest that the judicial decision-making process is one that is not often well-understood by *even* lawyers, with the operating principle amongst those in the legal community often being that the process of decision-making is self-evident, obvious and requires no elaboration. This, I submit, is not true. Indeed, the entire process of judicial decision-making is a complex one that requires us to

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4 See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at p 7.

5 The matter of judicial decision-making has been studied in other Commonwealth jurisdictions for some time. Some of the especially insightful treatises that explores this in great detail include (but is, of course, not confined to): Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921); Richard Posner, *How Judges Think* (Harvard University Press, 2008); and G Alan Tarr, *Judicial Process and Judicial Policymaking* (Cengage Learning, 6th Ed, 2012). There are yet other treatises that speak to how judges have decided especially difficult or complex cases – see, for example, the very insightful discussion on the stresses faced by judges in handling controversial cases (albeit in the American context) as discussed in *Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They’ve Ever Made* (Russell Canan, Gregory Mize & Frederick Weisberg eds) (The New Press, 2018).

6 These were, indeed, the findings of an Australian survey that highlighted the clear disconnect between the public perception of what skills are required to be an effective judge, and what the public perceived to be the skills necessary to be an effective judge. The public surveys in Australia rated legal knowledge as the most important quality of a judge followed by impartiality and life experience, while the Judiciary noted that impartiality was by far the most important judicial quality, followed by diligence and hard work, and then legal knowledge. See Sian Elias, “Contemporary Issues for the Court: Demystifying the Judicial Process”, address at the 15th Conference of the Chief Justices of Asia and the Pacific (29 October 2013) <<https://www.courtsofznz.govt.nz/assets/speechpapers/dh5jh.pdf>> (accessed 9 January 2023).

probe many of our fundamental assumptions about the criminal legal process. As one author muses:<sup>7</sup>

... given the ambiguities and uncertainties that dog real-life incidents, how are clear-cut facts of the case ... produced? How do judges ... come to be persuaded *beyond reasonable doubt* by one case or another? Evidence, the facts of the case, strong and weak cases are not simply self-evident absolutes; they are the end-product of a process which organises and selects the available 'facts' and constructs cases for and in the courtroom. Behind the facts of the case that convince judges ... to an unambiguous verdict lies a process of construction and a structure of proof that needs to be probed and analysed. [emphasis in original]

3 See Kee Oon J's book, *Fact-Finding and Reality: A Judicial Decision-Making Primer*, does exactly that. It is an attempt to demystify aspects of the judicial decision-making process in the domestic context through a compendium of three distinct, but interlinked, essays that work in concert to provide readers a helpful insight into the heuristic models employed by judges in their work and how they arrive at (principled) outcomes. The first chapter, adapted from a paper that See J initially delivered in 2016 in a lecture for the Association of Criminal Lawyers of Singapore, identifies and considers, *inter alia*, common cognitive biases in decision-making and how a judge may seek to address them in the judicial process. The second chapter discusses See J's approach on the matter of reasoned fact-finding, including His Honour's views on the propriety of the process of employing intuition, the challenges involving a judge's beliefs and how all of these impacts and influences decision-making. Having set out some of the groundwork in the preceding two chapters, the final chapter then introduces to the reader a non-prescriptive broad analytical framework for judicial sense-making.

4 Each of the three essays provides a useful blend of theoretical and practical examples, with See J drawing upon established theoretical models for decision-making and illustrating their application in the domestic context through selected strands of domestic jurisprudence. In doing so, See J, who had, at various junctures of his career, served as a Magistrate, District Judge and subsequently Chief District Judge of the State Courts, before his current appointment in the High Court (and concurrently Judge-in-Charge of the General Division of the High Court), taps these collective experiences in order to provide an interesting insight into the mind of a judge, and the principles that he applies in making decisions.

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7 Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillian Press Limited, 1981) at p 3.

5 What makes for especially interesting reading in this book are See J's personal recollections of how some of these principles have informed his thinking in the cases he has presided over in the course of his distinguished career as a jurist. As an example, See J shares the challenges he had with keeping “an open mind and remain even-handed and objective and afford due process”<sup>8</sup> in handling *Public Prosecutor v Isham bin Kayubi*,<sup>9</sup> a case in which the accused urinated, exposed himself and defecated in open court singularly to disrupt and delay the proceedings with a view to avoiding a sentence of caning. In another example, See J discusses the challenges with complexity and cognitive overload that judges potentially have to navigate in more complex matters, by assessing the point through the lens of his role as the trial judge in the City Harvest trial<sup>10</sup> which lasted 140 days spanning a decade, and involved vast amounts of documentation adduced.<sup>11</sup> In yet another part of the book, See J discusses his concerns with the seemingly partisan nature of the evidence given by a medical expert in *Ho Mei Xia Hannah v Public Prosecutor*,<sup>12</sup> and juxtaposed that with the (much more nuanced and balanced) medical evidence in *Public Prosecutor v BNO*,<sup>13</sup> thereby giving readers an insight into how a judge should assess expert evidence. There are numerous other examples of such anecdotes in the book. Such personal recollections of the challenges that a judge faces (by contextualising it against the backdrop of real life cases) are extremely useful as they give the reader an especially rare insight into how concepts have translated into real life practice.

6 In his foreword, Sundaresh Menon CJ observes that the book represents “essential reading to all judges in Singapore”.<sup>14</sup> While undoubtedly true, this book, and more broadly, scholarship of this nature, is also very much indispensable reading for all prosecutors and defence counsel alike, for it provides a useful (and readily understandable) insight into the judicial mind, and the conceptual frameworks and heuristic tools employed by the Bench in making decisions in criminal matters. Given the synergistic and symbiotic relationship between the judge, the Prosecution and the Defence in the criminal justice process, and the fact that, as See J rightly observes, the role of the lawyer is to “assist the Court

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8 See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at p 62.

9 [2020] SGHC 44.

10 *Public Prosecutor v Lam Leng Hung* [2015] SGDC 326.

11 See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at p 64.

12 [2019] 5 SLR 978.

13 [2018] SGHC 243.

14 Sundaresh Menon, “Foreword” in See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at p vi.

in the fact-finding process”,<sup>15</sup> it is in the interest of all parties before the court to be broadly apprised of how judges think and the methodological tools that they employ in arriving at outcomes. See J, in the book, speaks of his curiosity of the safety message on traffic signboards which asks motorists to “stay clear of a truck’s blind spots”.<sup>16</sup> See J ponders how a motorist could ever meaningfully heed that advice if the said motorist had never driven a truck. Put another way, how could the motorist (*ie*, a non-truck driver) ever be mindful of something he or she cannot contextualise or visualise, having never been afforded an opportunity to experience that perspective (*ie*, that of a truck driver)? In much the same way, this book is useful for practitioners in that it assists in illuminating some of the blind spots that many of us advocates have, never having been on the Bench, and allows us to refine and hone our art of how to most effectively present a case in court, with a better understanding of how a judge might approach the criminal legal process.<sup>17</sup> For that reason, while specifically written with an audience of judges and arbiters in mind, the book’s central thesis, and the application of principles that it seeks to illustrate, are of wider relevance to all stakeholders to the criminal legal process.

7 It is suggested in the book that it is the first of a number of monographs from the Singapore Judicial College that seek to focus on decision-making, fact-finding and the evaluation of evidence. If so, the book represents a very promising start to the development of an increasingly important body of scholarship in the domestic context. I would highly recommend this book to anyone who wishes to attain a better understanding of the role of a judge in the criminal legal process, especially to all criminal law practitioners (prosecutors and defence counsel alike) as it would allow them a valuable insight into the mind of a judge and how decision-making is done (or should be done).

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15 See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at p 72.

16 See Kee Oon, *Fact-Finding and Reality: A Judicial Decision-Making Primer* (Academy Publishing, 2022) at p 29.

17 By giving an insight into how a judge thinks, the book in effect also gives the reader an understanding of how best to develop a case through legal reasoning and the conceptual frameworks that can be utilised in framing the appropriate factual and legal arguments to the court.