Attorney-General *v* Shadrake Alan
[2010] SGHC 327

Case Number : Originating Summons No 720 of 2010

Decision Date : 03 November 2010

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Hema Subramanian, Low Siew Ling and Lim Sai Nei (Attorney-General's Chambers) for the applicant; M Ravi (L F Violet Netto) for the respondent.

Parties : Attorney-General — Shadrake Alan

Contempt of court

3 November 2010 Judgment reserved.

Quentin Loh J:

Introduction

1 This is an application by the Attorney-General to commit Mr Alan Shadrake, the author of *Once a Jolly Hangman: Singapore Justice in the Dock* (Petaling Jaya, Malaysia: Strategic Information and Research Development Centre, 2010) ("the book"), for contempt of court in relation to certain passages in the book. These passages are said to scandalise the judiciary by alleging or insinuating that:

(a) the Singapore Judiciary, in determining whether to sentence an accused person to death, succumbs to political and economic pressures, and more generally does not mete out justice impartially, lacks independence and is complicit in an abuse of the judicial process;

(b) the Singapore Judiciary is biased, particularly against the weak, poor and less educated, or is otherwise guilty of impropriety; and

(c) the Singapore Judiciary is a tool of the People's Action Party to muzzle political dissent in Singapore.

While the alleged contempt is criminal in nature, the application for committal is made, as is usual in such cases, pursuant to O 52 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

The Law: Generally

2 The contempt being alleged here is the contempt of scandalising the court. The law in Singapore on this issue can be mainly found in nine reported decisions of the High Court spanning from September 1967 to February 2009: *Re application of Lau Swee Soong* [1965–1967] SLR(R) 748 ("*Lau Swee Soong*"); *A-G v Pang Cheng Lian* [1974–1976] SLR(R) 271 ("*Pang Cheng Lian*"); *A-G v Wong Hong Toy* [1983–1984] SLR(R) 34 ("*Wong Hong Toy*"); *A-G v Zimmerman Fred* [1985–1986] SLR(R) 476 ("*Zimmerman*"); *A-G v Wain Barry J* [1991] 1 SLR(R) 85 ("*Wain*"); *A-G v Lingle* [1995] 1 SLR(R) 199 ("*Lingle*"); *A-G v Chee Soon Juan* [2006] 2 SLR(R) 650 ("*Chee Soon Juan*"); *A-G v Hertzberg Daniel* [2009] 1 SLR(R) 1103 ("*Hertzberg*"); and *A-G v Tan Liang Joo John* [2009] 2 SLR(R) 1132 ("*Tan Liang*

Joo"). There are other cases which also touch on this issue and I will be referring to them in due course.

3 Counsel vigorously disputed the appropriate test to be applied in deciding whether the statements complained of have scandalised the court.

(a) Ms Subramanian for the Attorney-General submitted that the law has been settled by the decisions set out above. The test to be applied is the inherent tendency test, *viz*, whether the acts or words complained of had the inherent tendency to interfere with the administration of justice. This test is said to countenance a lower threshold. This is so even though Ms Subramanian accepts that the burden on her is proof beyond a reasonable doubt.

(b) Mr Ravi, counsel for Mr Shadrake, argued that the real risk test should be applied, *ie*, the Attorney-General had to prove that the acts or words complained of had a real risk of undermining public confidence in the administration of justice in Singapore. This test is said to have a higher threshold relative to the inherent tendency test. Mr Ravi argues that other jurisdictions apply the real risk test and we should do the same. Mr Ravi also argues that what Mr Shadrake wrote is also fair criticism and within the right of free speech guaranteed under Article 14 of our Constitution.

There is no Court of Appeal decision on this point. Mr Ravi says I am therefore free to depart from these earlier decisions and urged me to do so as our society is now more mature and more educated.

4 Ms Subramanian for the Attorney-General submitted that the "inherent tendency" test has been affirmed and settled by these decisions, which I should follow. In this regard she cited *Mah Kah Yew v PP* [1968-1970] SLR(R) 851 and *Young v Bristol Aeroplane* [1944] 1 KB 718. I do not think that either *Mah Kah Yew* or *Young v Bristol Aeroplane* assists the Attorney-General here. *Mah Kah Yew* did not lay down a rule of horizontal *stare decisis* for the High Court, and the rule of horizontal *stare decisis* stated in *Young v Bristol Aeroplane* is inconsistent with Court of Appeal authority expressly affirming that the High Court is not bound by its previous decisions: see *Wong Hong Toy v PP* [1985-1986] SLR(R) 656 at [11]. In fairness, Ms Subramanian did concede that I am not technically bound by previous decisions of the High Court.

5 It is therefore necessary, in light of Mr Ravi's arguments for changing the test and the law, for me to consider the Singapore cases, the decisions from other jurisdictions cited to me by Mr Ravi, as well as the substantive reasons for and against departing from the present position. However, I must bear in mind that the decisions of my learned colleagues and predecessors over the past four decades are entitled to the very greatest respect and unless there are compelling reasons to do so, I should not depart from them.

The rationale for the law and its relation with the freedom of speech

6 It is appropriate to begin the discussion by recalling the rationale underlying the contempt of scandalising the court, a rationale which is often stated but still bears repetition. In Wilmot J's draft judgment in *R v Almon* (1765) Wilm 243 at 255–256, which was not delivered because the prosecution was dropped, but, according to the reporter's note, was nevertheless reported because "it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved", the rationale is articulated thus:

> The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, arid excites in the minds of the people a

general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. *To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom* ...

[Emphasis added]

7 The importance of public confidence in the administration of justice, emphasised in Wilmot J's eighteenth century opinion, has continued to receive judicial affirmation across common law jurisdictions in modern times. Lord Diplock declared in *A-G v Times Newspaper Ltd* [1974] 1 AC 273 at 307 ("*Times Newspaper*") that:

... in any civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and *the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another*. "Contempt of court" is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms.

[Emphasis added]

And at 309, that:

The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. *Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court*.

[Original emphases removed; emphasis added)

8 In *S-G v Radio Avon Ltd* [1978] 1 NZLR 225 ("*Radio Avon*"), the New Zealand Court of Appeal, whose judgment was delivered by Richmond P, stated at 230 that:

The justification for this branch of the law of contempt [*ie* scandalising the court] is that *it is contrary to the public interest that the public confidence in the administration of justice should be undermined*.

[Emphasis added]

9 In *Gallagher v Durack* (1983) 152 CLR 238 at 243, the majority of the High Court of Australia, comprising Gibbs CJ, Mason, Wilson and Brennan JJ, stated that:

> *The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges*. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment "is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable": *R. v. Fletcher; Ex parte Kisch*, per Evatt J.
>
> [Emphasis added]

10 In *Secretary for Justice v Oriental Press Group Ltd and others* [1998] 2 HKC 627 ("*Oriental Press Group*"), the Hong Kong Court of First Instance stated at [48] that:

> A civilised community cannot survive without effective machinery for the enforcement of its laws. The task of enforcing those laws falls on the courts, and on the judges who preside over them. *It has always been regarded as vital to the rule of law for respect for the judiciary to be maintained and for their dignity to be upheld. If it were otherwise, public confidence in the administration of justice would be undermined, and the law itself would fall into disrepute*. That is the rationale for the branch of the law of contempt known as "scandalising the court".
>
> [Emphasis added]

11 In *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR(R) 518, Andrew Phang Boon Leong JA, writing for the Court of Appeal in the context of alleged breaches of court orders, similarly stated at [22] that:

> It is imperative to note ... that the doctrine of contempt of court is not intended, in any manner or fashion whatsoever, to protect the dignity of the judges as such; its purpose is more objective and is (more importantly) rooted in the public interest.

12 The focus on the administration of justice, as opposed to the personal dignity and sensibilities of judges, is reflected in, among other things, the fact that contempt only applies in respect of publications relating to a judge *qua* judge; it does not apply comments directed at a judge purely in his personal capacity: see the Privy Council's advice *In the Matter of a Special Reference from the Bahamas Islands* [1893] AC 138. In theory, the appropriate cause of action in such situations is slander or libel. But to my knowledge our judges have not seen fit in the past to bring such actions, and I do not foresee that they will do so in the future.

13 It is apparent that the offence represents a significant restriction on free speech and expression. In this regard, the common law has, even before the advent of explicit constitutional guarantees, jealously protected the right to make fair criticism of the courts. As Lord Atkin declared in his memorable speech in *Ambard v A-G of Trinidad and Tobago* [1936] 1 AC 322 at 335 ("*Ambard*"):

> But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the

administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. *Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men*.

[Emphasis added]

14 The first Lord Russell of Killowen CJ, whose statement of the law on contempt, which I shall come to, has been cited with approval by more than one of our Singapore cases, spoke to similar effect in *R v Gray* [1900] 2 QB 36 at 40:

> Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court.

15 Lord Denning MR has also affirmed the right to criticise the courts in *R v Commissioner of Police, ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155, but requested would-be detractors to remember that the court would be unable to respond to them:

> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.
>
> It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into the public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

16 I would add the following observations of my own. The relationship between the courts and the public is symbiotic. Individuals depend on the courts to administer justice impartially and effectively; to do so, the courts require the confidence of the public. Without the confidence of the public, the laws administered by the courts cease to embody the collective will of the community; the force of law gives way to the law of force. It is in the public interest that the public confidence in the courts to administer justice in accordance with law does not falter. On this the cases speak with one voice. It is therefore an axiom of the common law that justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is similarly imperative that the public continues to maintain an active interest and trust in the administration of justice.

17 Judges do not claim infallibility, contrary to what Mr Ravi says. As the Chief Justice said, in discussing courts as institutions: "There are learned judges and less learned judges. There are strong judges and weak judges. There are industrious judges and lazy judges." See "Securing and Maintaining the Independence of the Court in Judicial Proceedings" [2010] 22 SAcLJ 229 at [30]. Not to acknowledge this fact of life is to act like the proverbial ostrich burying its head in the sand.

18 Neither do judges entertain for a moment the naive conceit that confidence in the courts can be won by sanctioning those who criticise the courts. If anything, unmerited punishment results in derision and resentment. At the end of the day, the confidence of the public can only be won if we

faithfully adhere to our constitutional oath to do right by all manner of people after the laws and usages of the land, without fear or favour, affection or ill-will, to the best of our abilities, and to preserve, protect and defend the Constitution of the Republic of Singapore.

19 There is, nevertheless, a meaningful role for the offence: given the restraint which judges must exercise in replying to their critics, the offence provides an avenue for the Attorney-General, as the guardian of the public interest, to bring to task those who make dishonest, unwarranted or baseless attacks which, if left unchecked, would impair the confidence of the public in the administration of justice. If exercised scrupulously, the power of the court to punish for contempt would have the salutary effect of ensuring that public confidence does not falter as a result of such attacks, without unduly restricting public discussion on the administration of justice. The balance is well-stated by the Chief Justice in [2010] 22 SAcLJ 229 at [21]:

> ... mechanisms such as the doctrine of contempt should not be used to stifle fair and reasonable criticism of the work of the Judiciary and also judicial decisions. The right to criticise is only part of the freedom of speech and expression the citizen enjoys in a democracy and its exercise will encourage or ensure that judges are independent in their decision-making. It is a form of public review similar to judicial review of executive acts, where judges look over the shoulders of the Executive to correct its mistakes. Hence, the doctrine of judicial independence calls for the judicious use of the contempt power, and the final appellate court has a responsibility to ensure a judicial restraint in the use of this power. Fair and objective criticism of judicial decisions will instil accountability and greater discipline in decision-making. If no one is allowed to judge judges, there could be lawless courts and irresponsible judging. But criticism of judgments should not lead to the denigration of judges.

Which courts are covered

20 There was no dispute before me that the contempt of scandalising the court can be committed against the Supreme Court as well as the subordinate courts constituted under the Subordinate Courts Act (Cap 321, 2007 Rev Ed). This must be right: the offence should extend to all courts exercising the judicial power of the Republic, which under Article 93 of the Constitution is vested "in a Supreme Court and such subordinate courts as may be provided by any written law for the time being in force." However, as the subordinate courts only have the power to punish for contempt committed in the face of the court (see s 8(1) of the Subordinate Courts Act), the contempt of scandalising the court can only be punished by the High Court.

Actus reus: Real risk or inherent tendency

21 I turn to consider the elements required at common law for establishing the contempt of scandalising the court. As mentioned, the appropriate test to be applied is strongly disputed by both parties.

22 The fount of the modern law is the judgment of Lord Russell CJ in *R v Gray*, where he states at 40:

> Any act done or writing published *calculated to bring a Court or a judge of the Court into contempt*, or to lower his authority, is a contempt of Court.
>
> [Emphasis added]

Lord Russell CJ's is the first English decision on scandalising the court in the twentieth century,

coming a year after Lord Morris declared in *M'Leod v St Aubyn* [1899] AC 549 at 561, wrongly as it turned out, that: "Committals for contempt of Court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them." All the same, it has to be noted that the definition of contempt was not an issue faced by the court, since counsel conceded that the publications in that case were clearly contemptuous.

23 Given the arguments before me, an important question is what Lord Russell CJ meant by "calculated". Little guidance is provided in his Lordship's short judgment. Some assistance can be derived from his Lordship's earlier judgment in *R v Payne* [1896] 1 QB 577, concerning an alleged interference with pending proceedings. There it was emphasised at 580 that: "Every libel on a person about to be tried is not necessarily a contempt of Court; but the applicant must shew that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending." This dictum clearly uses "calculated" to mean effect, in contradistinction to intention, or purpose. But, crucially for present purposes, it leaves unclear whether effect refers to the effect of the publication, read by itself, or the effect of the publication in the circumstances and context in which it was published. This was left to later cases, which I will come to in a moment.

24 The "real risk" formulation first appeared in the judgment of the court, delivered by Lord Parker CJ, in *R v Duffy, ex p Nash* [1960] 2 QB 188 ("*R v Duffy*"), concerning an alleged interference with pending litigation. Lord Parker CJ founded himself on the law as stated by Lord Russell CJ in *R v Payne*, including the dictum which I have just referred to, as well as the dictum of Lord Goddard CJ in *R v Odhams Press Ltd* [1957] 1 QB 73 at 80: "The test is whether the matter complained of is calculated to interfere with the course of justice." In concluding the judgment, Lord Parker CJ held that:

> The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there *a real risk, as opposed to a remote possibility*, that the article was calculated to prejudice a fair hearing? In the present case we have come to the clear conclusion that there was obviously no such risk; and that, therefore, the article did not constitute a contempt of court.
>
> [Emphasis added]

There is nothing which indicated that Lord Parker CJ intended to depart from the existing law in requiring that there should be a "real risk, as opposed to a remote possibility" that the offending article was calculated to prejudice a fair hearing.

25 In any event, the real risk standard was approved in *Times Newspaper*, which concerned an alleged interference with pending litigation. Lord Reid held at 298–299:

> I think the true view is that expressed by Lord Parker C.J. in *Reg*. v. *Duffy, Ex parte Nash* [1960] 2 Q.B. 188, 200, that there must be "*a real risk, as opposed to a remote possibility." That is an application of the ordinary de minimis principle*. There is no contempt if the possibility of influence is remote. *If there is some but only a small likelihood, that may influence the court to refrain from inflicting any punishment. If there is a serious risk some action may be necessary*. And I think that the particular comment cannot be considered in isolation when considering its probable effect. If others are to be free and are likely to make similar comments that must be taken into account.
>
> [Emphasis added]

At 312, Lord Diplock agreed with Lord Reid's formulation:

> ... I agree with my noble and learned friend, Lord Reid, that, given conduct which presents *a real risk as opposed to a mere possibility of interference with the due administration of justice, this is at very least a technical contempt*. The seriousness of that risk is relevant only to the question whether the contempt is one for which the court, in its discretion, ought to inflict any punishment and, if so, what punishment it should inflict.
>
> [Emphasis added]

It is clear from the quoted passage from Lord Reid's speech that resort to context is necessary to determine the effect of the publication.

2 6 *Times Newspaper* was not cited to the Privy Council in *Lutchmeeparsad Badry v Director of Public Prosecutions* [1983] 2 AC 297 ("*Badry*"), an appeal from Mauritius where the Board considered at 304 that "nothing has intervened in the past 80 years to invalidate the analysis of the first Lord Russell of Killowen in *Reg*. v. *Gray* [1900] 2 Q.B. 36". The constitution of the Board in *Badry* was completely different from the House in *Times Newspaper*. Nevertheless, the Board's analysis at 305–306 of the several publications said to scandalise the court casts light on what it understood to be the long established test in *R v Gray*:

> ... the Supreme Court [of Mauritius], with knowledge of the conditions local to Mauritius and the nuances of the Creole expressions, is in a position far more qualified to understand its meaning than their Lordships...
>
> ...
>
> It must be said at once that the words found to have been uttered by the appellant in either variant version are vulgar, scurrilous, abusive and lacking in respect to the person of a judge which would be expected, though, were they uttered in this country, it may be doubted whether they would be calculated to lower the authority of the judge rather than the reputation of any public man who uttered them so as to bring them within the condemnation of Lord Russell of Killowen's definition of contempt. Nevertheless ... it may be doubted whether, if the Supreme Court had simply said that in the circumstances prevailing in Mauritius these words were "calculated to bring a judge of the court into contempt or to lower his authority," this Board would have felt it proper to differ from their opinion.

It is clear that the Board thought that, in deciding whether the publications were "calculated to bring a judge of the court into contempt or to lower his authority", it was necessary to look at the actual or potential effect of the words in light of the conditions and context in which they were uttered. Therefore, in this regard at least, the traditional test formulated by Lord Russell CJ in *R v Gray* and applied by the Privy Council in *Badry* is not different from the "real risk" test formulated by Lord Parker CJ in *R v Duffy* and accepted by the House of Lords in *Times Newspaper*. *Badry* is also instructive for the Board's observation that what may scandalise the judiciary in Mauritius may not have a similar effect in England.

2 7 *Times Newspaper* was clearly accepted in New Zealand, where the Court of Appeal held in *Radio Avon* at 234, after referring to the speeches of Lords Reid and Diplock, that:

> [a person] ought not to have been convicted of contempt unless the facts established beyond reasonable doubt that there was *a real risk, as opposed to a remote possibility*, that the

[impugned publication by him] would undermine public confidence in the administration of justice.

[Emphasis added]

28 In Hong Kong, the Court of First Instance in *Oriental Press Group* referred to the above authorities and accepted the "real risk" standard, subject to the following two reservations, stated at [55]:

> The first relates to the phrase "a real risk". By adopting that phrase, we are not to be taken as laying down a rule that it must be more likely than not that public confidence in the due administration of justice would have been undermined. *The phrase "a real risk" should be given its ordinary meaning. It means a good chance as opposed to a mere possibility. Whether such a risk has been established will depend on the circumstances of each case including the nature of the act done or the language of the publication used. It will also depend on whether there is a pending action or whether the act or publication is targeted at a particular case or at the court or judge generally*. The second reservation relates to the section of the public whose confidence in the administration of justice must be affected. We do not think it right to limit consideration to the hypothetical reasonable man, as Goodman JA did in the Kopyto case at p.263: it is just as important that confidence in the administration of justice is not undermined in the eyes of the person who does not address issues rationally. Accordingly, we think that the real test should be: was there a real risk that the acts complained of would undermine confidence in the due administration of justice in the minds of at least some of the persons who were likely to become aware of the publication or acts complained of?
>
> [Emphasis added]

The appeal by one of the parties to the Court of Appeal was dismissed, with all members of the court agreeing that the "real risk" standard was correct: *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKC 24 ("*Wong Yeung Ng*"). The Court of Final Appeal refused leave to appeal further, declaring that: "The courts below have given detailed and cogent reasons for reaching their conclusion ... There is no prospect of the Court of Final Appeal differing from their conclusion": *Wong Yeung Ng v Secretary of Justice* [1999] 3 HKC 143 at [13].

29 In *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 306 ("*Ahnee*"), the Privy Council was also to advise in an appeal from Mauritius that "[t]here must be a real risk of undermining public confidence in the administration of justice" before the offence of contempt was made out.

30 The Australian position is similar: see *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443 at [55] ("*Hoser*") and *McGuirk v University of NSW* [2009] NSWSC 1058 at [239] to [272]. In *Hoser*, Eames J added, at [226] and [228] a practical dimension to the application of the "real risk" test:

> The many statements of appellate courts about the need for restraint in the exercise of the contempt jurisdiction are of course important reminders that this is a criminal jurisdiction, and that the courts must be ever alert not to use a significant power to assuage the hurt feelings of judges and magistrates. But against that, in my opinion, the courts should not be so anxious to demonstrate their robustness and lofty disregard for trenchant criticism that they fail to recognise that a concerted campaign against the integrity of the courts and judicial officers, even if employing what the appellate courts might regard to be simplistic and patently absurd arguments may, if unanswered, damage the reputation of the courts, especially at the trial level. It is, after all, more difficult to mount a credible argument that three or five appellate judges are all part of a conspiracy or are tainted by bias than it is to allege that against a magistrate or

judge sitting alone.

...

The earlier statements of appellate courts, stressing the extreme caution which must be exercised before punishing contempt, must be read now in the light of the new reality that organised and quite sophisticated campaigns against the integrity of the courts, if unchecked, may prove very effective in damaging the reputation of the courts. The "practical reality" of the judicial system being unreasonably damaged must today be considered against the backdrop of the means of mass communication provided by desktop publishing and the Internet.

Eames J's dictum is a useful reminder that the offence of scandalising the court is *not* based on the sensibilities of judges – if public confidence in the administration is actually or potentially affected, the publication is *prima facie* in contempt; it matters not that the judge himself prefers to exhibit an attitude of lofty disregard. On appeal, the Victorian Court of Appeal affirmed Eames J's finding that "there was a real risk that as a matter of practical reality [the impugned publication] had a tendency to undermine the confidence of the public in the administration of justice and lower the authority of the courts": *Hoser v R* [2003] VSCA 194 at [36].

31 I turn now to the position in Singapore. In *Lau Swee Soong*, decided soon after Independence, Choor Singh J cited approvingly the "real risk" formulation adopted by Lord Parker CJ in *R v Duffy*. As shown above, this was the progenitor of *Times Newspaper* and other decisions which adopted the "real risk" formulation. *Lau Swee Soong* itself concerned ministerial remarks said to prejudice the trial of the respondent, who was a student charged for rioting.

32 Lord Russell CJ's test in *R v Gray* has been cited with approval in *Pang Cheng Lian*, *Wong Hong Toy*, *Wain*, *Lingle*, *Chee Soon Juan*, and *Tan Liang Joo*. I have already considered *Badry*'s case, which makes clear that Lord Russell CJ's test requires a consideration of the context in which a publication was made before concluding that it scandalises the court.

33 The "inherent tendency" test was first articulated by Sinnathuray J in *Wain* at [54]:

... it is not a requirement of our law, as was submitted by Mr Robertson, that in contempt proceedings it must be proved that the publication constitutes a real risk of prejudicing the administration of justice. *In my judgment, it is sufficient to prove that the words complained of have the inherent tendency to interfere with the administration of justice*. But, of course, this must be proved beyond a reasonable doubt.

[Emphasis added]

This passage was subsequently to be relied on in other decisions of the High Court. It is, with respect, unhappily worded. It refers to interference with the *administration of justice*, which is the concern of *sub judice* contempt, whilst the contempt of *scandalising the court* is concerned with *public confidence* in the administration of justice. It also uses the "inherent tendency" formula, suggesting that the words in the impugned publication are to be looked at alone. But it is clear that Sinnathuray J did not mean either of these things. At [61], the learned judge stated that: "In applying the law to the facts in these proceedings, I was mindful of the following general considerations", before going on, at [61] to [64], to consider the fact that the offending article was contained in a financial newspaper of international repute which enjoyed a wide regional circulation in Asia; written by the president of a major news organisation in the United States; and published at a time when the impugned decision was given saturation coverage in Singapore papers. These

contextual considerations relating to the potential effect of the impugned publication would not be necessary if Sinnathuray J truly meant for the offending words to be looked at alone, or if he meant to look at interference with the actual administration of justice. Also, the contextual considerations could not have counted towards sentence, which was considered in a separate judgment: *A-G v Wain Barry J* [1991] 1 SLR(R) 108. In the circumstances, I have my doubts that Sinnathuray J meant to depart from the traditional approach; indeed he referred approvingly, at [43], to the dictum in *Badry* that nothing has intervened to invalidate the analysis of Lord Russell CJ in *R v Gray*. I have already mentioned that *Badry* would assess the potential effect of the impugned publication in context. For completeness, however, and with great respect, it should be stated that Sinnathuray J was plainly wrong in distinguishing (at [34]) the English authorities after the beginning of the 1980s on the basis that they were affected by the UK Contempt of Court Act 1981 (c 49) – that Act did not regulate the contempt of scandalising the court and this was very clearly stated in *Badry* at 303–304.

34 The "inherent tendency" test was subsequently referred to in decisions of the High Court and seems to have developed a life of its own. The cases referring to *Wain* are *Lingle*, *Chee Soon Juan*, *Hertzberg* and *Tan Liang Joo*. It is necessary to consider precisely what these cases decided.

35 In *Lingle*, Goh J referred to *Wain* for the proposition that it was not necessary to show that a person intended to interfere with the administration of justice before he can be held for contempt. As for the general test Goh J followed *R v Gray*, describing it as the *locus classicus* of this area of the law. The only issue in *Lingle* was whether the impugned publication, an article in the International Herald Tribune, referred to the Singapore courts. Counsel conceded that an allegation that the judiciary was compliant to politicians amounted to scandalising the court. There was therefore no consideration of the "inherent tendency" test. However, it is interesting to note that Goh J referred to the following dictum of Hope JA in *A-G of New South Wales v Mundey* [1972] 2 NSWLR 887 at 911:

> ... the question whether the defendant's statements constituted contempt must be determined by reference to their *inherent tendency* to interfere with the administration of justice, and that the defendant's intention, while of some relevance in this regard, is of importance mainly in relation to whether the matter should be dealt with summarily, if any of the statements did constitute contempt, and in relation to the question as to what penalty, if any, should be imposed.
>
> [Emphasis added]

Goh J's judgment did not indicate that he saw a difference between the "inherent tendency" formula used by Hope JA, and Lord Russell CJ's dictum in *R v Gray*.

36 In *Chee Soon Juan*, the court held at [30] to [31] that:

> 30 The position in Singapore regarding the offence of scandalising the court is well settled. Any publication which alleges bias, *lack of impartiality*, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function falls within the offence of scandalising the court: *Wain*'s case at [53]. A number of local cases including *AG v Pang Cheng Lian* [1974-1976] SLR(R) 271, *AG v Wong Hong Toy* and *AG v Zimmerman Fred* have established that mounting unfounded attacks on the integrity of the Judiciary or making allegations of bias and lack of impartiality, is contempt of court.
>
> 31 Liability for scandalising the court does not depend on proof that the allegedly contemptuous publication creates a "real risk" of prejudicing the administration of justice; it is sufficient to prove that the words complained of have the "inherent tendency to interfere with the administration of

justice" (*per* Sinnathuray J in *Wain*'s case at [54]).

The offending publication in *Chee Soon Juan* was a statement impugning the impartiality of the judiciary. It was first read during a bankruptcy hearing and subsequently distributed to media representatives outside the courtroom and copied to 59 separate persons and organisations elsewhere. However, the learned judge in *Chee Soon Juan* did not advert to this fact in her analysis as to whether the impugned statement was contemptuous, indicating that she understood the "inherent tendency" test to require only an examination of the words used in the publication. For the reasons given above, I am doubtful that *Wain* is authority for such a proposition. That said, given the circulation of the impugned statement, whose contents were found to be contemptuous, I have no doubt that the facts of *Chee Soon Juan* would have satisfied the "real risk" test, had it been applied.

37 In *Hertzberg*, the court explored the "inherent tendency" test in some detail. It is necessary to quote the judgment at some length:

> 17 [Mr Jeyaratnam, counsel for the respondent,] submitted that] the court should nonetheless consider (a) whether there was a real risk that the publications would undermine public confidence in the administration of justice and (b) whether the publications were nonetheless protected by the defence of fair criticism. In respect of (a), Mr Jeyaretnam pointed out that what was meant by an "inherent tendency" was not well explained by the local courts, although a decision of the Singapore High Court in *Re Application of Lau Swee Soong; Lau Swee Soong v Goh Keng Swee* [1965-1967] SLR(R) 748 ("*Lau Swee Soong*") had explained (at [36]) the term to mean the presence not just of a real risk of interference but "a real and grave one". However, implicit in the more recent decisions such as *Wain* and the summary of the law in this area provided in *AG v Chee Soon Juan* [2006] 2 SLR(R) 650 ("*Chee Soon Juan*") at [31], "inherent tendency" was referred to as something less than a "real risk". Mr Jeyaretnam submitted that I should equate "inherent tendency" with "real risk" as was done in *Lau Swee Soong* and/or adopt the real risk test like other jurisdictions such as England, Australia, New Zealand and Hong Kong, given that the real risk formulation was clearer and would strike a more appropriate balance between protecting the institution of an independent judiciary and the right of freedom of expression. In his written submissions, reference was made to the New South Wales Law Reform Commission Report on Contempt by Publication (Report No 100) which noted that the tendency test had been widely criticised as being "imprecise and unclear, as well as too broad" (at para 4.8).
>
> ...
>
> 27 ... The test of liability for the offence, as rightly pointed out by the AG, is simply that of inherent tendency. In other words, a publication which alleges bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function would necessarily contain words that have the inherent tendency to interfere with the administration of justice. As borne out in the analysis of the cases of *Chee Soon Juan* and *Wain* themselves, the court in each case did not embark on a two-stage approach to determine if contempt was made out but merely proceeded to find if the words complained of did make allegations of bias, lack of impartiality, impropriety or any wrongdoing.
>
> 31 ... in my view, a statement which is said to have an inherent tendency to interfere with the administration of justice is simply one that conveys to an average reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function.
>
> 32 The next question to ask then is whether Singapore should depart from the "inherent

tendency" test and adopt the "real risk" test. Indeed, the "real risk" test appears to be the test presently preferred by many common law countries (see generally *Contempt of Court* ([19] *supra*) at para 12.06; see also *Time Newspapers Ltd* ([19] *supra*) at 299; *Ahnee* ([21] *supra*) at 306; *Radio Avon Ltd* ([19] *supra*) at 234; and *Wong Yeung Ng* ([21] *supra*) at 59). The main reason for the adoption of the "real risk" test in these jurisdictions is essentially the need to protect the right to freedom of speech and expression and the broader test based on "inherent tendency" is considered to inhibit the right to freedom of speech and expression to an unjustifiable degree (see also the ALRC's report at paras 428 and 429). The "inherent tendency" test is also criticised for its vagueness and is said to impose liability without the offence being defined in sufficiently precise terms (the ALRC's report at paras 428 and 431).

33 I agree with the AG that what are acceptable limits to the right to freedom of speech and expression imposed by the law of contempt vary from place to place and would depend on the local conditions (*McLeod v St Aubyn* [1899] AC 549; *Wain* ([13] *supra*) at [33]-[38]), as well as the ideas held by the courts about the principles to be adhered to in the administration of justice (*Re Tan Khee Eng John* [1997] 1 SLR(R) 870 at [13]). As pointed out by Lai J in *Chee Soon Juan* ([17] *supra* at [25]-[27]), conditions unique to Singapore (*ie*, our small geographical size and the fact that in Singapore, judges decide both questions of fact and law) necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts. Indeed, the ALRC has also recognised the "inherent tendency" test has two clear advantages (the ALRC report at para 427). First, it does not call for detailed proof of what in many instances will be unprovable, namely, that public confidence in the administration of justice really was impaired by the relevant publication (*cf* the "real risk" test which would require some evidence to show that there is more than a remote possibility of harm). Secondly, it enables the court to step in before the damage, *ie*, the impairment of public confidence in the administration of justice, actually occurs.

34 In the light of our local conditions and the advantages that the "inherent tendency" test has, I agree that the "inherent tendency" test should continue to govern liability for contempt of court committed by "scandalising the court" in Singapore. If we need to ask in each case whether there is a real risk that public confidence in the administration of justice has been impaired by contemptuous remarks, it may lead to an absurd situation where a person at a dinner party who keeps shouting to all present that the Judiciary is completely biased will not be held in contempt of court simply because no one at the party bothers about his ranting or is affected by his remarks. It would be more logical in such a situation to hold that contempt of court has been committed and then go on to consider whether there is a real risk that public confidence in the administration of justice has been impaired in deciding whether or not to punish the contemnor and, if so, to what extent. In other words, the issue of the said real risk has no bearing on liability but is relevant only for mitigation or aggravation of the punishment (or even whether or not punishment should be imposed in a particular case at all).

38 It is clear from [31] that the court regarded the "inherent tendency" test laid down in *Wain* as simply requiring an analysis of the words used, to determine whether they convey to an average reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function. I have already said that I am, with respect, doubtful that *Wain* can stand for this proposition.

39 Further, as Mr Ravi suggested, it is not clear that *Hertzberg* fully appreciated the definition of the law relied on in the two law reform reports which it drew on in support of the inherent tendency test, *viz* the Australian Law Reform Commission's Report No 35, "Contempt" (Australian Government Publishing Service: Canberra, 1987), and the New South Wales Law Reform Commission's Report No 100, "Contempt by publication" (2003): see *Hertzberg* at [17], [32] and [33]. In criticising the

"inherent tendency" test, the former report stated at para 431 that:

> The notion of an 'inherent tendency' leaves room for doubt as to how substantial the tendency must be. *Obviously, there must be more than a remote possibility of harm*; conversely, an inherent tendency seems somewhat less substantial than a 'real risk'. The alternative formulation – that the statement in question must be 'calculated to' impair public confidence etc - likewise leaves room for argument.
>
> [Emphasis added]

As mentioned, the test in *Times Newspaper*, *Ahnee*, *Radio Avon* and *Wong Yeung Ng*, referred to at [32] of *Hertzberg*, defined "real risk" in contradistinction to a "remote possibility", *ie* the same way which the Australian Law Reform Commission defined "inherent tendency" in the passage just quoted. (The proposition in the report that an inherent tendency seems somewhat less substantial than a real risk does not find support in the case law.) Therefore, it is unclear why *Hertzberg* rejected the "real risk" test laid down in those decisions but agreed with the "inherent tendency" test as defined in the report of the Australian Law Reform Commission's report. As for the report of the New South Wales Law Commission, *Hertzberg* relied (see [17]) on its section on *sub judice* contempt, where the law was described as follows:

> **Current test for liability**
>
> 4.6 The current test for liability for sub judice contempt is generally formulated in terms of "tendency".A publication must be shown to have *a real and definite tendency, as a matter of practical reality*, to prejudice or embarrass particular legal proceedings, in order to constitute a contempt.The prosecution bears the burden of proving the necessary tendency, beyond a reasonable doubt.
>
> 4.7 Liability for sub judice contempt depends on the *potential effect of a publication* on legal proceedings, rather than on proof of any actual effect the publication may have had. The court assesses the tendency of a publication to cause prejudice by examining the nature of the publication and the circumstances surrounding it, as they appeared at the time of publication...
>
> [Emphasis added]

Speaking for myself, it is difficult to see any practical distinction between, on the one hand, the report's formula of a "real and definite tendency, as a matter of practical reality" and the requirement to consider the "potential effect of a publication", and, on the other hand, the "real risk" test articulated in the decisions rejected in *Hertzberg*.

40 On the facts, *Hertzberg* concerned three articles contained in the Wall Street Journal Asia. Given that the contents of the articles were found to be contemptuous, I have no doubt that the facts in *Hertzberg* would have satisfied the real risk test, had it been applied.

41 Finally, in *Tan Liang Joo* at [12], Prakash J followed the "inherent tendency" test as articulated by the previous decisions but with an important proviso that context is relevant:

> To establish contempt the law does not require that a complainant prove that the act or words created a real risk of prejudicing the administration of justice. It is sufficient for the claimant to prove beyond reasonable doubt that the act or words complained of had the inherent tendency to interfere with the administration of justice (*AG v Chee Soon Juan* ([9] *supra*) at [31]; *AG v*

Wain Barry J at [54]; *AG v Hertzberg Daniel* [2009] 1 SLR(R) 1103 ("*AG v Hertzberg Daniel*") at [34]). An act or statement has such an inherent tendency if it would convey to an average reasonable reader or viewer allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge (and, *a fortiori*, a court) in the exercise of his judicial function (*AG v Hertzberg Daniel* at [31]), *in the circumstances that obtained at the time of the act or words* (*AG v Wain Barry J* at [61]-[64]).

[Emphasis added]

It is significant that Prakash J cites [61] to [64] of *Wain* as authority for her proposition that the words must be understood "in the circumstances that obtained at the time of the act or words". Those paragraphs contained no such words. They were, as indicated above, the paragraphs where Sinnathuray J applied the "inherent tendency" test formulated by him to the facts. But, as I noted above, Sinnathuray J's reference to the context of the impugned publication in those paragraphs, among other things, indicated that he did not mean to introduce a test that was divorced from context. This was clearly not lost on Prakash J, who considered the impugned conduct in context – the wearing of "kangaroo court" t-shirts in the precincts and vicinity of the Supreme Court – before concluding that they scandalised the court.

42 With respect, it is apparent to me that, on close examination, the Singapore authorities are not as clear or settled as Ms Subramanian submitted or as Mr Ravi assumed. Singh J in *Lau Swee Soong* approved *R v Duffy*, which contained the "real risk" formula taken up in later cases. Several other cases relied on *R v Gray*, which as interpreted in *Badry* required the consideration of the potential effect of the impugned publication in the circumstances in which it was published. *Wain* adopted the "inherent tendency" formula, but in applying it made clear that the potential effect of the publication must still be considered. *Wain* also rejected a test based on a real risk of prejudicing the administration of justice. *Hertzberg* interpreted *Wain* to mean that a statement which is said to have an inherent tendency to interfere with the administration of justice is simply one that conveys, to an average reasonable reader, allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function. *Chee Soon Juan* was to similar effect. *Hertzberg* also rejected a test based on a real risk of undermining public confidence in the administration of justice, while at the same time referred approvingly to sources which defined "inherent tendency" no differently from the way "real risk" was defined in the Commonwealth authorities. Finally, *Tan Liang Joo* affirmed the inherent tendency test, but made explicit the need, implicit in *Wain*, to have regard to the circumstances that obtained at the time of the impugned publication.

43 Against this state of the law, it is impossible to say that there is a settled approach which binds me, or which I should follow as a matter of consistency between High Court decisions. It is, in fact, necessary to return to first principles and policy considerations to determine what the test should be.

44 As can be seen from the authorities I have referred to, the universally accepted rationale for this area of the law of contempt is the preservation of public confidence in the administration of justice. In my view, it follows quite imperatively from this rationale that the doctrine should, at the very most, capture only conduct which has some potential adverse effect on public confidence in the administration of justice. Conversely, the rationale cannot support intervention in conduct which has no actual or potential adverse effect on public confidence in the administration of justice. To the extent that any of the cases contradict this proposition, I must respectfully decline to follow them.

45 I turn now to consider the policy concerns expressed in the various High Court decisions. In

Wain at [38], it was said that, differently from other jurisdictions, "the administration of justice in Singapore is wholly in the hands of judges and other judicial officers ... this condition must weigh heavily in the application of the law of contempt in Singapore." This concern is undoubtedly valid, but in my view it can easily be accommodated in assessing the potential effect of the impugned conduct. Mr Ravi points out, relying on the article by Michael Hor and Colin Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore" (1991) 12 Sing L Rev 296 at pp 306–307, that other jurisdictions have not seen fit to apply a test which differentiates between bench trials and jury trials. But I remain of the view that this is a valid factor: in Singapore any mistake in deciding a case must necessarily be the responsibility of the judge, and cannot be deflected to the jury or anyone else.

46 In *Chee Soon Juan* at [25], it was said that "the geographical size of Singapore renders its courts more susceptible to unjustified attacks". In support of this proposition *Chee Soon Juan* referred to *Ahnee* at 306, where the Privy Council advised, in the context of an appeal from the Supreme Court of Mauritius, that "on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater". Again I have no hesitation in accepting this as a general proposition. Mathematically, the same conduct will, all other things being equal, have a greater actual or potential effect in a jurisdiction with a smaller bench, a smaller population and a smaller land area. However, I should point out, with all due respect, that immediately after making the quoted remarks, the Privy Council went on to make clear that "[t]here must be a real risk of undermining public confidence in the administration of justice" before the offence was made out. It is also pertinent to note that, in *Wong Yeung Ng*, Mortimer V-P in the Hong Kong Court of Appeal affirmed the lower court's adoption of the "real risk" standard (see above), even as he cautioned at [55] of his judgment that:

> … the relatively small size of the Hong Kong's legal system is important. As is demonstrated in this case communication with a very substantial proportion of the population is easily achieved. Proceedings in court are widely publicised. Many judges are known by name because of this reporting. Confidence in our legal system, the maintenance of the rule of law and the authority of the court are matters of special importance in our society. There are frequent, if misconceived, expressions of anxiety in this respect.

47 In *Hertzberg* at [33]–[34], which I set out again, it was said that:

> 33 I agree with the AG that what are acceptable limits to the right to freedom of speech and expression imposed by the law of contempt vary from place to place and would depend on the local conditions (*McLeod v St Aubyn* [1899] AC 549; *Wain* ([13] supra) at [33]-[38]), as well as the ideas held by the courts about the principles to be adhered to in the administration of justice (*Re Tan Khee Eng John* [1997] 1 SLR(R) 870 at [13]). As pointed out by Lai J in *Chee Soon Juan* ([17] supra at [25]-[27]), conditions unique to Singapore (ie, our small geographical size and the fact that in Singapore, judges decide both questions of fact and law) necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts. Indeed, the ALRC has also recognised the "inherent tendency" test has two clear advantages (the ALRC report at para 427). First, it does not call for detailed proof of what in many instances will be unprovable, namely, that public confidence in the administration of justice really was impaired by the relevant publication (*cf* the "real risk" test which would require some evidence to show that there is more than a remote possibility of harm). Secondly, it enables the court to step in before the damage, *ie*, the impairment of public confidence in the administration of justice, actually occurs.
>
> 34 In the light of our local conditions and the advantages that the "inherent tendency" test has, I agree that the "inherent tendency" test should continue to govern liability for contempt of court committed by "scandalising the court" in Singapore. If we need to ask in each case whether

> there is a real risk that public confidence in the administration of justice has been impaired by contemptuous remarks, it may lead to an absurd situation where a person at a dinner party who keeps shouting to all present that the Judiciary is completely biased will not be held in contempt of court simply because no one at the party bothers about his ranting or is affected by his remarks...

The two concerns at [33] can well be met by a test which includes the potential, and not merely the actual, effect of the impugned conduct. As for the hypothetical given at [34], it would be an overzealous judiciary that would regard rants (and especially inebriated rants) at a dinner party as undermining public confidence in the administration of justice when no one takes serious notice of or is bothered by those rants.

48 In my judgment, the policy concerns articulated above require a test which is based on the potential adverse effect of the impugned conduct, as assessed in the circumstances above. They do not require a test wider than that. As for what degree of potentiality is required, I think that there is no need for the law to intervene when the potential adverse effect on the administration is *de minimis*, remote or fanciful. The law does not concern itself with trifles, and the law of contempt is no exception. To the extent that the cases say otherwise, I would, with the greatest of respect, decline to follow them.

49 In my view, the various formulae adopted in the cases – conduct calculated to lower the authority of the court, conduct having the inherent tendency of conveying allegations of bias and other impropriety against the court, and conduct posing a real risk of undermining public confidence in the administration of justice, and so on – are not inconsistent with what I have said. Both counsel seemed to have proceeded on the basis that there was a significant difference between the real risk test urged by Mr Ravi and the inherent tendency test defended by Ms Subramanian. I very much doubt this is the case. Here it is appropriate to go back to Lord Reid's speech in *Times Newspaper*, which I set out again:

> I think the true view is that expressed by Lord Parker C.J. in *Reg. v. Duffy, Ex parte Nash* [1960] 2 Q.B. 188, 200, that there must be "*a real risk, as opposed to a remote possibility*." That is an application of the ordinary *de minimis principle*. *There is no contempt if the possibility of influence is remote. If there is some but only a small likelihood, that may influence the court to refrain from inflicting any punishment*.
>
> [Emphasis added]

Lord Reid was defining a real risk in contradistinction to a remote possibility, and that he considered this to be an application of the *de minimis* principle, which is the general principle that courts of justice do not take trifling and immaterial matters into account: *Jowitt's Dictionary of English Law*, 3rd ed (Sweet & Maxwell, 2010), vol 1 at p 642. I do not think that the inherent tendency test, as formulated in *Wain*, goes wider than that.

50 But at the end of the day I must settle on a formula, and in doing so I would adopt the attitude of the English Court of Appeal in *Times Newspaper*, [1973] 1 QB 710 at 725:

> We think that all these judicial definitions are attempting to describe the same thing, and we do not intend to increase the confusion by adding yet another definition of our own. It may be that to a lawyer the word "calculated" is precise enough, but the decision to publish or not must often be taken by a layman, and we would prefer to adopt the words which are most helpful to him.

Now, if it were a pure question of semantics I would see no reason to depart from the "inherent tendency" formula established in *Wain*, which, as I read it, required an assessment of the effect of the impugned publication in the context it was made. But, with respect, that formula has shown itself to be susceptible of controversy and misunderstanding, not least because the literal meaning of *inherent* tendency tends to obscure the fact that a *contextual* analysis is actually required. Indeed, given how the word "inherent" is commonly understood to indicate something *intrinsic*, an inherent tendency test would therefore appear to preclude any consideration of extrinsic factors. This unnecessary complication need not exist. Similarly, the test has also appeared at times to encompass, in theory at least, publications which have no potential effect on public confidence in the administration of justice. I would therefore prefer the "real risk" formula, that is, a publication must pose a real risk of undermining public confidence in the administration of justice before it is held to be contemptuous. This formula, in my view, precisely conveys to the layman, and indeed to lawyers, what the law is concerned with.

51 I should emphasise several aspects of the test. First, a real risk, as defined in the cases, is not to be equated with a serious or grave risk, but merely something more than a *de minimis*, remote or fanciful risk. It must have substance, but need not be substantial. *A fortiori*, it is not necessary to show that public confidence was actually undermined by the impugned publication. As Lord Reid made clear in his speech in *Times Newspaper*, any degree of risk above the *de minimis* level, including "a small likelihood", is a contempt, with the seriousness of the risk going only to mitigation. For good measure, I should reiterate that the facts of the Singapore cases where the "inherent tendency" test was applied – *viz Wain*, *Chee Soon Juan, Hertzberg* and *Tan Liang Joo* – would have satisfied the "real risk" test as I have stated it.

52 Secondly, whether such a real risk is posed is eminently an objective question of fact to be determined in light of all the circumstances of the case, including the author and nature of the publication and the scope of its dissemination (*Wain*), and bearing in mind local conditions (*Badry*). In this last regard, important considerations include the fact that we are a small, crowded, multiracial and multi-religious nation, where information travels rapidly and where social tensions, if developed and brought to a boil, will rapidly propagate. Some of the factors emphasised in the cases should also be borne in mind. The first is that raised in *Oriental Press Group* at [55], that those who come into contact with the impugned publication may not always be average reasonable persons. They may be less rational, or, I should add, they may be more discriminating. It is therefore not always appropriate to assess the real risk to public confidence by reference to the average reasonable person – the appropriate reference point depends on the facts of each case. The second consideration is that raised in *Wong Yeung Ng* by Mortimer V-P at [53], and by Eames J in *Hoser* at [228] – the court must consider what would happen if the impugned publication was left unchecked. Third, the authority and credibility which the publication possess, or claims to possess: see *eg Wain* at [61] to [62] (article in a financial paper of international repute, written by the president of a major news organisation), and *Hoser* at [218] (alleged contemnor set himself up to be a person of eminence in the investigation of corruption). Finally, there is the fact that judges in Singapore are the sole arbiters of fact and law in cases coming before the courts (*Wain*).

53 Thirdly, I would reiterate the law is not concerned with the effect of the impugned publication on the judge hearing the application to commit; it looks to the potential effect on public confidence in the administration of justice. If a judge finds that an impugned publication poses a real risk of undermining public confidence in the administration of justice, the publication is *prima facie* in contempt even though the judge might personally take a more liberal view of its contents. If a judge finds that the impugned publication does not pose any real risk of undermining public confidence, he must decline to commit, even though he is personally outraged by the contents. Similarly, the law is not concerned with the subjective intentions or opinions of the author. The issue at all times is the

actual or potential effect on public confidence.

54 Fourthly, the requirement for a real risk, while very wide, is not illusory. One example is the hypothetical found in *Hertzberg*: if rants made at a dinner party are shown to have been ignored, I cannot see that they would pose a real risk to public confidence in the administration of justice. Another illustration can be found in the facts of *Ex p A-G; Re Goodwin* (1969) 70 SR (NSW) 413, where a letter circulated by a disappointed litigant to the Attorney-General of New South Wales and 13 Registrars of the district courts was found to be in contempt. I am in no position to assess the situation in Australia or New South Wales. But I am very certain that, should the same letter be circulated to the Attorney-General, or the Registry of the Supreme Court or the subordinate courts, it will not pose the slightest risk of undermining public confidence in the administration of justice. In fact, I should say from personal experience that such letters are not infrequently received by the Registry of the Supreme Court, and copied to holders of high public office such as the Attorney-General, ministers, and permanent secretaries, but the Attorney-General has not, quite correctly in my view, seen fit to take action against them in the law of contempt.

Mens rea

55 There was no dispute that the only *mens rea* which is needed at common law is that the publication is intentional; and that it is not necessary to prove an intention to undermine public confidence in the administration of justice. If authority is needed it can be found in *Radio Avon* at 232–234; *Ahnee* at 307; *A-G New South Wales v Mundey* [1972] 2 NSWLR 887 at 911–2.

Constitutional considerations

56 Mr Ravi also argued that Article 14 of the Constitution compels me to adopt the "real risk" test. Article 14 provides in material part as follows:

> **Freedom of speech, assembly and association**
>
> 14. —(1) Subject to clauses (2) and (3) —
>
> (a) every citizen of Singapore has the right to freedom of speech and expression;
>
> …
>
> (2) Parliament may by law impose —
>
> (a) on the rights conferred by clause (1) (*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence

57 Article 14 does not define contempt, and neither does Parliament – s 7(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) merely provides for the power of the High Court and the Court of Appeal to punish for contempt, and does not define the offence. The offence therefore falls, by necessary implication, to be defined by the courts. But that does not mean that the courts – or Parliament, should it take up the issue – have unlimited scope in defining the offence. They must do so consistently with the words, structure and spirit of Article 14, which clearly demand some kind of balance to be struck between the freedom of speech, which is the rule, and the offence of contempt,

an exception to the rule. At the very minimum, neither can be defined in such a way that renders the other otiose.

58 With respect, despite some references to constitutional authorities in other jurisdictions, Mr Ravi did not distinctly address me on how Article 14 compels the adoption of the real risk test. In the absence of properly focussed argument, and also in the light of the fact that I have concluded that the real risk test urged by Mr Ravi should be adopted at common law, I must decline to enter into constitutional exposition. It is sufficient for me to note that Mr Ravi has not argued that an offence of scandalising the court is inherently unconstitutional, and that the majority of cases have concluded that the real risk test, coupled with a right of fair criticism, constitutes a reasonable limit on the freedom of speech and expression: see *Wong Yeung Ng*, *per* Mortimer V-P at [32]–[59]; *per* Mayo JA at [79]–[97]; *per* Leong JA at [107]–[117]; *Ahnee* at 305–306; *S-G v Smith* [2004] 2 NZLR 540 at 568; and *Nationwide News Proprietary Ltd v Wills* (1992) 177 CLR 1.

Defences

59 I now consider the available defences. Ms Subramanian took the position that the defences in defamation of justification and fair comment are not available in contempt, relying in this regard on *Wain, Chee Soon Juan* and *Hertzberg*. She submitted that fair criticism was the only available defence. As for Mr Ravi, he appeared at some points to suggest that the impugned statements in the book were justified. In his final set of written submissions, however, he acknowledged that justification was not an available defence to scandalising the court and that the relevant defence was that of fair criticism. However, Mr Ravi did argue that fair criticism was a broader defence than justification. He also argued that the rejection of fair comment as a defence was merely semantic given the acceptance of fair criticism, implying that both defences are similar. In the circumstances, it is just as well that I examine the defences of justification, fair comment, and fair criticism, bearing in mind that, even at common law, the protection of public confidence in the administration of justice has to be balanced against the freedom of speech.

6 0 *Chee Soon Juan* held that the defences of justification and fair comment in the law of defamation were not available in the law of contempt for the following reasons:

> 45 It is imperative that the integrity of our judges is not impugned without cause. The overriding interest in protecting the public's confidence in the administration of justice necessitates a rejection of the defences at law for defamation, particularly where accusations against a judge's impartiality are mounted. In the words of the authors of *Borrie & Lowe* ([21] supra) at p 351, "[a]llegations of partiality are treated seriously because they tend to undermine confidence in the basic function of a judge" [emphasis added].
>
> 46 Allowing the defence of fair comment would expose the integrity of the courts to unwarranted attacks, bearing in mind that a belief published in good faith and not for an ulterior motive can amount to "fair comment" even though the belief in question was not reasonable (see *Slim v Daily Telegraph Ltd* [1968] 2 QB 157). Singapore judges do not have the habit of issuing public statements to defend themselves (as some UK judges have been prone to do). Our judges feel constrained by their position not to react to criticism and have no official forum in which they can respond. That does not mean that they can be attacked with impunity.
>
> 47 In a similar vein, admitting the defence of justification would, in effect, allow the court hearing the allegation of contempt to "sit to try the conduct of the Judge": (see *Attorney-General v Blomfield* (1914) 33 NZLR 545 at 563). Recognising the defence of justification would give malicious parties an added opportunity to subject the dignity of the courts to more bouts of

attacks; that is unacceptable.

48 There are more appropriate channels through which genuine concerns regarding the Judiciary can be ventilated. The Constitution has, by way of Art 98, established a means of recourse to deal with judges undeserving of their office. The proper course for anyone who believes that he has evidence of judicial corruption or lack of impartiality is to submit it to the proper authority.

61 In *Hertzberg*, the court likewise distinguished defamation and contempt:

23 One should be circumspect about drawing parallels between the law of contempt (especially that relating to the offence of "scandalising the court") and the law of defamation. Both impose restrictions on the right to freedom of speech and expression. For the conflict between defamation and the right to freedom of speech and expression, see Doris Chia and Rueben Mathiavaranam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) ("*Evans on Defamation*") at p 1. "Scurrilous" allegations made against judges (which fall within the ambit of "scandalising the court") may be both contemptuous and defamatory (of the individual judge) (see *Contempt of Court* ([19] supra) at para 12.06). As noted by the learned author of *Contempt of Court*, the points of similarity between the law of defamation and "scandalising the court" prompt one to inquire whether the defences one associates with defamation, such as justification and fair comment, are similarly available in a case of contempt (at para 12.31). In my view, it is clear that parallels should not be drawn between the two branches of law despite the similarities that they seem to share, given that they exist essentially for different purposes; the law of contempt (as already seen above) is concerned with the protection of the administration of justice and is grounded in public interest but the law of defamation is concerned with the protection of a private individual's reputation (see generally Patrick Milmo QC and WVH Rogers (gen eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) at para 1.1 and *Evans on Defamation* at p 1). I agree with both T S Sinnathuray J ("Sinnathuray J") and Lai Siu Chiu J ("Lai J") that defences in defamation have no application in the realm of contempt of court (see Wain ([13] supra) at [55]-[60] and *Chee Soon Juan* ([17] supra) at [44]-[47])...

The court went on to cite the passages in *Chee Soon Juan* quoted above, and concluded that "[t]he law of defamation and the law of contempt are distinct in principle and in purpose. They should not be regarded as though they were one and the same."

62 The applicability of justification and fair comment has also been considered by other jurisdictions. In *A-G v Blomfield* (1914) 33 NZLR 545, relied upon by Lai J in *Chee Soon Juan*, Williams J held at 563 that "[t]he court does not sit to try the conduct of the Judge." However, in the later decision of *Radio Avon*, the New Zealand Court of Appeal alluded to the possibility of applying the defences of justification and fair comment, without reaching a conclusion.

63 In *R v Nicholls* (1911) 12 CLR 280, Griffith CJ, delivering the judgment of the High Court of Australia, stated at 286 that:

I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I think that, if any Judge of this Court or of any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled

under the law of libel.

64 In *Nationwide News Pty Ltd v Wills*, Mason CJ said at [12] of his judgment that "[s]o long as the defendant is genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, he or she is immune." Likewise, Brennan J said at [5] of his judgment that:

> It is not necessary, even if it be possible, to chart the limits of contempt scandalizing the court. It is sufficient to say that the revelation of truth – at all events when its revelation is for the public benefit – and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court or judge of public confidence.

65 In *Ahnee* at 306, the Privy Council rejected the notion that an imputation of bias is necessarily contemptuous, and agreed with the suggestion in *R v Nicholls* that there might be a defence analogous to fair comment in such situations:

> The classic illustration of such an offence [*ie* scandalising the court] is the imputation of improper motives to a judge. But, so far as *Ambard's* case [1936] A.C. 322 may suggest that such conduct must invariably be an offence their Lordships consider that such an absolute statement is not nowadays acceptable. For example, if a judge descends into the arena and embarks on extensive and plainly biased questioning of a defendant in a criminal trial, a criticism of bias may not be an offence. The exposure and criticism of such judicial misconduct would be in the public interest. On this point their Lordships prefer the view of the Australian courts that such conduct is not necessarily an offence: *Rex v. Nicholls* (1911) 12 C.L.R. 280.

66 In the United Kingdom, the Committee on Contempt of Court, chaired by Phillimore LJ, considered in its Report (Cmnd 5794) (HMSO, 1997) that justification should be a defence when it is for the public benefit:

> We considered whether ... it should be a sufficient defence merely to prove that the allegation was true. In view of the special constitutional position of courts and judges, we do not think that a criminal trial is the right way of testing this issue. A defence of truth may or may not be advanced in good faith; an allegation of bias, for example, may follow a long and responsible investigation or it may be generalised or malicious invective on the part of somebody who has lost his case. The latter is usually not doubt, best ignored but if, in an extreme case, a prosecution were brought and such a defence put forward its effect would simply be to give the defendant a further and public platform for the wide publication of his assertions or allegations, which might be wholly without foundation. An allegation of bias in relation to a particular case might, if the defendant were permitted to plead justification, be used in effect as a means of getting a case reheard. Finally, a simple defence of truth would permit the malicious and irresponsible publication of some damaging episode from a judge's past, however distant, calculated to cast doubt upon his rightness to try a particular case or class of cases. We therefore do not consider that truth alone should be a defence.
>
> We think, however, that if, in addition to proving the truth of his allegation, a defendant can show that its publication was for the public benefit he should be entitled to an acquittal. We are very much alive to the juridical difficulties of such a defence, but the present context, in our view, justifies its creation and there is a precedent for it in the closely analogous law of criminal libel in England and Wales. We would, however, add an important proviso. In our view, the proper course for anyone to take who believes that he has evidence of judicial corruption or lack of

impartiality is to submit it to the proper authority, namely, the Lord Chancellor or the Secretary of State for Scotland, as the case may be. It is they who have the power of removal of judicial officers below the High Court level if they misbehave, and they are the appropriate recipients for complaints as to the conduct of High Court Judges. It is hard to conceive how it could be held to be for the public benefit to publish allegations imputing improper motives to those taking part in the administration of justice if the defendant had taken no steps to report the matter to the proper authority, or to enable that authority to deal with it.

67 I cannot accept, as a matter of basic principle, that a court would regard as contemptuous a statement of fact which is true; in fact, I would say that it is very much in the public interest that judicial impropriety should be brought to light. At the same time, I see considerable force in the Phillimore Committee's argument that an application for committal is not the right place to try an allegation of judicial error or impropriety, and that recognising a bare defence of justification would allow *mala fide* defendants a further and public forum to repeat their contempt. In particular, such defendants may engage in vexatious and abusive attempts to subpoena witnesses or obtain discovery in order to justify their contempt after the fact. I do not see, however, how the possibility of such abuses is addressed by imposing an additional requirement of public benefit, as proposed by the Phillimore Committee and suggested in the Australian cases.

68 I also cannot agree with the suggestion made by the Phillimore Committee and *Chee Soon Juan*, and taken up by Ms Subramanian, that all discussions of judicial wrongdoing must be directed to the Prime Minister or the Chief Justice, with the aim of activating the removal mechanism provided for in Article 98(3) of the Constitution. The public must be able to debate judicial conduct without seising the removal mechanism in Article 98(3). Indeed, frequent resort to the extraordinary mechanism in Article 98(3) cannot be healthy for the independence of the judiciary.

69 As for fair comment, I agree with *Chee Soon Juan* and *Hertzberg* that the defence cannot be directly imported into contempt. The defence of fair comment balances the public interest in unrestricted discussion on matters of public importance and the private interest of the defamed person in his or her reputation. By contrast, in the offence of scandalising the court, the interest countervailing to free speech, as indicated by the majority in *Gallagher v Durack* at 243, is quite different:

> The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon courts of justice which, if continued, are likely to impair their authority"...

In the light of this difference in underlying rationales, it would be inappropriate to import wholesale the defence of fair comment into the law of contempt. That said, it may well be that there is in the final analysis some functional similarity between fair comment and fair criticism.

70 I turn now to fair criticism. The law in this regard has been ably addressed by Prakash J in *Tan Liang Joo*. Prakash J accepted at [14] that "[f]air criticism does not amount to contempt of court", approving in this regard Lord Atkin's speech in *Ambard* at 335 (Prakash J referred to the All England Reports). Prakash J went on to elaborate the ambit of fair criticism as follows:

15 It is apparent from Lord Atkin's reasoning, however, that there are limits to the right of fair criticism. The criticism must be made in good faith and must also be respectful. In determining whether *mala fides* has been proved, the court can take into account a wide range of factors.

16 One relevant factor is the extent to which the allegedly fair criticism is supported by argument and evidence. There must be some reason or basis for the criticism or else it would amount to an unsupported attack on the court...

...

18 Another relevant factor is the manner in which the alleged criticism is made. The criticism must generally be expressed in a temperate and dispassionate manner, since an intention to vilify the courts is easily inferred where outrageous and abusive language is used ...

19 Such temperate, balanced criticism allows for rational debate about the issues raised and thus may even contribute to the improvement and strengthening of the administration of justice. Scurrilous and preposterous attacks, on the other hand, are likely to have the opposite effect...

20 Apart from the two factors discussed above, courts have also taken into consideration such factors as the party's attitude in court (see, for example, *R v Vidal* The Times (14 October 1922), cited in *Borrie & Lowe* ([18] *supra*) at p 349 n 15) and the number of instances of contemning conduct (see, for example, *Regina v Glanzer* (1963) 38 DLR (2d) 402). The list of relevant factors is not closed. The court is entitled to take into account all the circumstances of the case which in its view go towards showing bad faith.

I am in complete agreement with the above passages. Prakash J then referred to and criticised the apparent English position that the acts or words in question must not impute improper motives to or impugn the integrity, propriety and impartiality of judges or the courts:

21 There is another, more contentious, limit on the right of criticism. It appears from the English authorities above that the act or words in question must not impute improper motives to nor impugn the integrity, propriety and impartiality of judges or the courts (see, for example, Ambard ([14] supra); *Halsbury's Laws of England* ([18] supra); see also *Borrie & Lowe* at pp 350-352). The rationale for this second limit is explained in *Borrie & Lowe* as follows (at pp 350-351):

> The courts are particularly sensitive to allegations of partiality, it being a basic function of a judge to make an impartial judgment. The law goes to some lengths to ensure that a judge has no personal interest in the case, his decision being considered void and of no effect if bias is proved: nemo judex in sua causa. Allegations of partiality are treated seriously because they tend to undermine confidence in the basic function of a judge.

22 The need to maintain public confidence in the administration of justice must, however, be balanced against the public interest in rooting out bias and impropriety where it in fact occurs. We ought not to be so complacent as to assume that judges and courts are infallible or impervious to human sentiment. Thus, I have some sympathy for the view expressed in the New Zealand case of *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (at 231):

> If this were the law [that allegations of improper motives, bias or impropriety could not constitute fair criticism] then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would it be possible, on the basis of facts truly stated, to make an honest and

fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt.

23 The fear of baseless imputations of bias or impropriety is unfounded as the court is able to take into account factors such as the existence of evidence for such allegations under the requirement of *bona fides*. To my mind, therefore, the second limit on the right to criticise is unnecessary and potentially overly restrictive of legitimate criticism.

71 In this last regard, *Tan Liang Joo* is at odds with *Hertzberg*, which took the position at [54] that criticism directed at the impartiality of the courts or which imputes improper motives to the judges can never constitute fair criticism.

72 I would elaborate on the defence of fair criticism as follows. First, there should be some objective basis, whether in fact or in argument, for the allegation made. Unless it is founded on notorious facts, the objective basis must be stated together with the criticism, so that those who view the publication can evaluate its merits. It is not necessary to establish an unassailable basis for the criticism made against it or even a basis which is objectively more reasonable than not. The reason, and I should emphasise this, is because a court, in deciding whether the defence of fair criticism is made out, is *not* required or concerned to determine whether the criticism was proved or disproved as a fact. In my view, it is sufficient for the defendant to give some rational basis for the criticisms he makes. However, the cogency of the rational basis required to support the allegation would increase correspondingly with the seriousness of the allegation made. This is consistent with the approach in other areas of law, *eg* the proving of an allegation of fraud or dishonesty in civil cases. It is further justified by the fact that, the more serious the allegation made, the greater the risk it poses to public confidence in the administration of justice, all other things being equal. The seriousness of the allegation would depend on its contents, the most serious being those allegations which strike at the core of the judicial duty: the impartial administration of justice without fear or favour. The seriousness of the criticism also depends on the authority which the critic possesses or claims to possess – if a critic puts himself forward as an expert, or having done exhaustive research, and so on, in criticising the court, he will, quite naturally, be held to the higher standard which he has claimed. For example, a financial paper of international repute (*Wain*), or a person who claims to be an eminent investigator of corruption (*Hoser*), would be expected to supply a correspondingly cogent basis for the criticisms which they make. At the same time, it must be remembered that what is needed at the end of the day is not proof of the criticism, merely some rational basis for it. A censorious attitude must be eschewed.

73 Second, the allegation should be made in good faith. This means that the person must genuinely believe in the truth of the criticism he made. There is no public interest in protecting criticism which the defendant knew or believed to be false at the time of making it. Likewise if the defendant acts in reckless disregard of the truth or falsehood of his criticism. A key consideration in assessing good faith, so defined, is whether the publication presented such a selective, distorted or patently false view of the facts that it goes beyond wrong-headedness and evinces a reckless disregard of the truth, or even outright dishonesty. An essential part of good faith, so defined, is that the rational basis cited in defence of a criticism against the court must be known to the defendant when the criticism is made. This means that the defendant who seeks to establish a factual basis for his criticism only during the application for committal does so in vain – if he does not know the basis for making the criticism when he made it, then he would have been acting in bad faith, in which case the defence of fair criticism would not avail him. Separately, if the defendant is shown to have acted in good faith, in the sense of having a genuine belief in the truth of the criticism he makes, then his purpose in making the criticism will not matter.

74 I pause here to note that the first two requirements mean that a person in possession of facts supporting his criticism and who genuinely believes in the truth of his criticism will be able to raise a defence to contempt. This substantially obviates the need for justification as a defence and, in the light of the difficulties associated with such a defence, I agree entirely with the earlier decisions of our courts which declined to recognise it.

75 Third, the requirement for respectfulness must be tempered by the realisation that the law in this area applies to everyone and not just those who are bound by the rules of court decorum. The man in the street is as entitled to criticise the courts as the learned professors in the universities, and it would not be reasonable to expect every person to adopt the refined language of scholarly discourse or court address. In my view, the court should not penalise criticism which, though expressed (to use Lord Atkin's term) in outspoken language, is otherwise made in good faith and has some objective basis in fact or reason. However, abusive, intemperate or outrageous language should be eschewed, not least because an escalation of the language used in criticism may convey a more serious criticism, for which a more cogent basis would be required. It is, for example, one thing to say that a judge has handed down a harsh and oppressive sentence without regard to sentencing precedents, and quite another to say that he was actually biased against the accused. Also, to the extent that trenchant criticisms are made without some rational basis, they may for that reason fall outside of fair criticism.

76 Fourth, I am in agreement with the tentative view in *Tan Liang Joo* that there should no limit to the kind of criticisms which can be made against the court subject to the above three criteria being met. I should specifically say that, while allegations of partiality and corruption are gravely insulting to judges, for they strike at the very core of the court's constitutional duty, there is no reason in principle why a person who genuinely believes that the court is partial and corrupt and has a rational basis for this belief should not be able to say so without fear of being held in contempt. An example is given in *Ahnee* of a judge who engages in patently biased questioning of witnesses. In fact, there is a powerful public interest, which has been applied time and again in Singapore, of exposing and rooting out impropriety and corruption on the part of those who hold public office, wherever or whoever they may be. In the judicial context, V K Rajah JA has recently declared that "[a] culture of openness has long since taken firm root in our courts, with mistakes being acknowledged openly rather than being papered over": *Tan Lai Kiat v PP* [2010] 3 SLR 1042 at [63]. And, as Prakash J opined in *Tan Liang Joo*, we cannot be so complacent as to assume that judges would be infallible or impervious to human sentiment. At the same time, it should be emphasised that, the more serious the criticism made, the more cogent must be the arguments and facts cited in support of it.

Conclusion on the law

77 In summary, under the law as I understand it, the public and constitutional interest in ensuring public confidence in the administration of justice is given robust protection. All publications posing real risks of undermining public confidence are *prima facie* in contempt of court. Only *de minimis*, remote and fanciful risks are excluded. Any greater risk, including that of a "small likelihood", is caught, although if the risk is not great there might be a light sentence or none at all. At the same time, there is a defence of fair criticism, in the terms which I have set out. Any risk posed to public confidence as a result of fair criticism is justified. It is only in the extreme situation, where a person criticises without any rational basis, or without genuine belief in the truth of his criticism, that he will be caught by the law of contempt. In the light of the importance of ensuring public confidence in the administration of justice, this can hardly be considered an excessive restriction of the freedom of speech. I recognise that the burden would lie on the defendant to show that he was acting within his right of fair criticism. But it is unlikely that cases in this area would turn on the burden of proof, and in the event that they do the benefit of the doubt will of course be given to the defendant. In any

case, the ingredients of the defence of fair criticism are in their nature matters within the knowledge of the defendant, who is therefore not unduly burdened in exercising his right to free speech. In my view, this approach strikes an adequate balance between the freedom of speech and the countervailing constitutional interest in ensuring that public confidence in the administration of justice does not falter as a result of scandalous publications. The court, for its part, is not required to pass on the truth or falsehood of the criticism levelled against it. A finding that fair criticism applies simply vindicates the respondent's right of free speech.

Application to the facts

78 I turn now to the facts. The application for committal reads in material part:

> That Alan Shadrake, the author of the book "Once a Jolly Hangman: Singapore justice in the dock" (the "Book") do stand committed to prison or receive such other punishment as the court may impose for his contempt of court by his acts in connection with the bringing into existence, publication and distribution of the Book which contains passages that scandalise the Singapore Judiciary.

The O 52 r 2(2) statement states in material part:

> The grounds on which the said relief [of committal] are sought are that the said Respondent has participated in acts in connection with the bringing into existence, publication and distribution of the Book which contained passages that scandalise the Singapore Judiciary.
>
> The Book is about the administration of the death penalty in Singapore.
>
> The Book contains passages which undermine the authority of the Singapore courts and public confidence in the administration of justice in Singapore. Without being exhaustive, this Statement sets out the passages which contain imputations against the independence and integrity of the Singapore Judiciary.

It then refers to 14 statements from the book.

79 Mr Ravi objected to the Attorney-General's caveats in using the words "without being exhaustive" and "including" when referring to the 14 statements). I agree: the O 52 r 2(2) statement is exhaustive, by virtue of O 52 r 5(3), unless the court gives leave otherwise. Ms Subramanian quite rightly confirmed that the Attorney-General was only proceeding on the 14 statements in its O 52 r 2(2) statement. But it is of course permissible to have regard to the statements in the context of the book, and indeed both parties provided the court with a copy of the book and situated their arguments in the context of the book.

80 The O 52 r 2(2) statement also referred to the affidavit of Ms Kumarassamy Gunavathy, a senior analyst with the Media Authority of Singapore.

81 When this matter first came up for hearing on 30 July 2010, Mr Shadrake applied and was given leave to file an affidavit in reply. Mr Ravi also asked for leave to file affidavits by third parties. At that time, Mr Ravi could not specify who they were, but suggested tentatively that they could include the German government, the International Bar Association and "other agencies". I ruled that Mr Ravi could apply for leave when he ascertained the third parties who were prepared to file affidavits on behalf of Mr Shadrake. Mr Shadrake filed an affidavit on 13 August, but his responses were not referenced properly to the 14 statements impugned by the Attorney-General and there was no response to one

of the 14 statements. This was pointed out at a pre-trial conference on 25 August. I gave Mr Shadrake leave to amend and re-file his affidavit. I also asked Mr Ravi if Mr Shadrake wished to adduce any other affidavit evidence. Mr Ravi said no. I also asked parties to inform me whether there would be cross-examination at the next pre-trial conference, on 21 September. There Ms Subramanian indicated that the Attorney-General did not require any cross-examination. Mr Ravi informed me that he was undecided, but eventually confirmed by a letter dated 01 October 2010 that he would not be applying to cross-examine the Attorney-General's deponents.

82 When the application was finally heard, Mr Shadrake did not choose to exercise his right under O 52 r 5(4) to give oral evidence on his own behalf. As such, the hearing proceeded on the basis of the affidavits filed by both sides.

83 I turn now to examine the facts. I will first lay down the context as regards the publication and availability of the book and Mr Shadrake's claims of being an investigative journalist. I will then individually examine the 14 statements impugned by the Attorney-General to determine whether they were made with rational bases and/or in good faith so as to constitute fair criticism. I will then determine whether some or all of the 14 statements, contextually considered, pose a real risk to public confidence in the administration of justice, and, if so, whether Mr Shadrake is entitled to claim fair criticism in respect of them.

Context

84 Ms Gunavathy deposed that she bought two copies of the book from Kinokuniya Book Store of Singapore Pte Ltd at the Takashimaya shopping centre in Ngee Ann City. She verily believes that the book has been sold in Singapore by several bookstores, including Kinokuniya Book Store of Singapore Pte Ltd, Select Books Pte Ltd and Mary Martin Book Sellers Pte Ltd. As Mr Ravi stated that cross-examination was not necessary, the contents Ms Gunavathy's affidavit must be taken as accepted. Mr Ravi further informed the court that almost 6,000 copies of the book have been sold internationally, especially at airports, and that some copies are being circulated in Singapore. On these bases, I am satisfied that the book has a not insignificant range of distribution. Also, Mr Shadrake's authorship of the book is not disputed.

85 Mr Shadrake has held himself out as an investigative journalist. For example, in the preface to the book, Mr Shadrake wrote as follows at pp vii-viii:

> ... An interview with Singapore's hangman who had been chief executioner for almost 50 years since colonial days was on my mind. It was a daunting task. But after months of relentless sleuthing I managed to find the man who had hanged an estimated 1,000 men and women mainly for murder and drug trafficking – and surprisingly get him to talk. I*t led to a meticulous search of legal files and archived cases going back to 1963 while interviewing abolitionists and lawyers involved in many sensational cases that went largely under-reported or not reported at all*. The result is a unique glimpse into the deadly career of arguably the most prolific executioner in the world – a man who believes he has helped keep Singapore one of the safest places in the world. And something else. Something sinister: how the Singapore legal system works in secret and how politics, international trade and business often determine who lives and who dies on the gallows.
>
> [Emphasis added]

Mr Shadrake then refers to his sources, which according to him include unnamed lawyers, two unnamed officers of the Central Narcotics Bureau, and an anonymous librarian who helped him delve into archived records at the National Library. It is therefore plain from all this that Mr Shadrake is

putting the book forward as a product of his investigative journalism, and indeed he describes himself as an investigative journalist with a long career at p 21 of the book. At p 26, he says:

> I wanted to expose some of the ghastly secrets of the gallows – the kind of secrets Singapore's leaders are so proud of, revere, put so much faith in but don't want anyone else to know about. Capital punishment in the tiny state had for far too long been shrouded in this kind of secrecy and discussion on the subject completely discouraged. It was time something was done about it in as dramatic a way as possible, I thought to myself. Could I be the one to expose the un-exposable? It would not be the first time I had rattled a few cages in high places with an equally embarrassing expose ... But being trained in journalism in the 'publish and be damned' way, I was determined to go ahead come what may.

Also, anyone who picks up the book will readily see on the back cover of the book the following description:

> Over the past few decades, investigative journalism has come to mean the kind of brave reporting that exposes injustice, wrongdoing and, above all, the abuse of power. Alan Shadrake's hard hitting new book cuts through the façade of official silence to reveal disturbing truths about Singapore's use of the death penalty. From in-depth interviews with Darshan Singh, Singapore's chief executioner for nearly fifty years, to meticulously researched accounts of numerous high profile cases, **Once A Jolly Hangman** reveals the cruelty and imprudence of an entire judicial system. At the same time he displays a touching empathy with the anguish of the victims and their families. This important book should be required reading for human rights activists everywhere.

and a bibliographical note:

> **Alan Shadrake** is a renowned veteran investigative journalist and author whose 50-year career has taken him around the world. His first major book **The Yellow Pimpernels** told the escape stories across the Berlin Wall and was the subject of a BBC documentary. Subsequent publications have delved into a variety of subjects including an expose of life in a Soviet gulag, the story of the boy poisoner Graham Young and, with Linda Lee, **The Life and Tragic Death of Bruce Lee**. His appetite for unearthing the facts and presenting unpalatable truths remains undiminished. He divides his time between Britain and Malaysia.

The statements made in the book must therefore be scrutinised in this light. Mr Ravi had argued that Mr Shadrake should be held to the standard of a layperson. This is misconceived. The statements should be read, as they would be read by members of the public, as coming from a person who has held himself out to be an investigative journalist.

86 In this regard, I see as rather telling the fact that, notwithstanding Mr Shadrake's claims of being an investigative journalist who embarked on a "meticulous search of legal files and archived cases going back to 1963 while interviewing abolitionists and lawyers involved in many sensational cases that went largely under-reported or not reported at all", he did not produce any evidence of his investigations during the hearing. The documentary evidence he annexed to his affidavit comprised:

(a) excerpts from the autobiography of Mr Subhas Anandan, a local criminal lawyer ("Mr Anandan's autobiography");

(b) the January 2004 report by Amnesty International entitled "Singapore – The death penalty: A hidden toll of executions" ("Amnesty International's report");

(c) a dated article by Ross Worthington "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28(4) Journal of Law and Society 490;

(d) the Chief Justice's article referred to at [17] above, but this was published after Mr Shadrake wrote his book;

(e) a transcript of the audio recording of an interview he did with Mr Subhas Anandan on Vignes Mourthi's case (discussed below); and

(f) the July 2008 report of the Human Rights Institute of the International Bar Association, entitled "Prosperity versus individual rights? Human rights, democracy and the rule of law in Singapore" ("the IBA report").

His affidavit does not refer to any other material. For example, for the 1st statement, he says: "In coming to this conclusion I relied on the information in the book written by Singapore's top criminal lawyer Mr Subhas Anandan." For the 2nd statement, he says: "The evidence I relied upon can again be found in Mr Anandan's book." Such was the extent, or rather the limit, of the evidence of his investigative journalism that he produced to the court.

The 1st statement

87 I turn now to the statements. The 1st statement, at p viii of the book, reads:

> Something sinister: how the Singapore legal system works in secret and how politics, international trade and business often determine who lives and who dies on the gallows.

Mr Shadrake argued in his affidavit that the 1st statement is meant to refer to the abuse of prosecutorial discretion, and that it could not have been directed at the courts, which in the cases he discusses are bound by the mandatory death penalty. Mr Ravi submitted further that "legal system" is not meant to include the judiciary, but refers to the prosecution, the legislature and the executive.

88 I cannot accept these explanations. I cannot see how "legal system" can be naturally read to include everything but the courts. The plain and ordinary meaning of "system" is something which comprises several components or parts that make up an organised whole. One does not, when referring to a system, mean everything but one of its components. If anything. the courts are the first thing that comes to mind when a reference is made to a country's legal system. I am also unable to accept that courts have no role to play when faced with persons accused of crimes which carry the mandatory death penalty. The courts do not impose the death penalty at the instance of the prosecution; they do so after being satisfied beyond reasonable doubt of the guilt of the accused person according to law. Therefore, in making the first statement, Mr Shadrake is clearly accusing the courts (as well as other parts of the legal system) of taking politics, international trade and business into account in determining who lives and who dies on the gallows.

The 2nd statement

89 The 2nd statement, at p 3 of the book, refers to the case of Julia Bohl, a German national who was arrested and initially charged with the capital offence of trafficking more than 500 grams of cannabis, which was subsequently reduced to a non-capital offence of trafficking in a smaller amount:

> Shortly before a young German woman, known to have been running a lucrative drugs ring in Singapore, was sentenced to only five years, of which she served three for good behaviour – a slap on the wrist which was arranged by the Singapore government under the threat of economic reprisals by the German government.

The 2nd statement alleges that the Singapore government arranged for a light sentence ("*only* five years") for a *known* drug trafficker, who was "running a lucrative drugs ring in Singapore", under threat of economic reprisals by the home government of the trafficker. Mr Shadrake sought to present the 2nd statement as a criticism of the prosecution for succumbing to diplomatic pressure. This is plainly untenable given his reference to the fact that the sentence of "only five years" was a "slap on the wrist arranged by the Singapore government". Sentencing is generally and in this case the province of the courts, and the 2nd statement clearly alleges that the sentence of Bohl by the courts was procured by the Singapore government under the threat of economic reprisals by the German government. No rational basis was provided for this allegation, which cannot therefore constitute fair criticism.

90 Mr Shadrake's proffered explanation for the 2nd statement, which I have rejected, is revealing of his attitude towards his sources. The source he cites for his explanation is Mr Anandan's autobiography, at p 142, which reads as follows:

> As soon as Bohl was caught, the German government and its ambassador in Singapore mounted a diplomatic offensive on her behalf, meeting several senior Singapore government ministers in the process. ***Coincidentally*** *, it was a technicality that saved Bohl from the gallows in the wake of this campaign. Tests revealed that the amount of pure cannabis seized in Bohl's apartment weighed in at only 281 grams, below the 500 grams threshold. This meant that Bohl faced a jail sentence of five to twenty years instead of execution* ...
>
> [Emphasis added]

On the basis of Mr Anandan's autobiography, which Mr Shadrake relied on, the prosecution could *not* have preferred a capital charge, because the amount of cannabis seized was below the threshold of 500 grams. There was no discretion involved whatsoever, contrary to Mr Shadrake's insinuation in his explanation that the government preferred the lighter charge.

91 Though irrelevant to his guilt or innocence in the present case, I should observe that, for all his claims to be an activist against the death penalty, Mr Shadrake appears willing to assert that Bohl was guilty of a capital offence without much in the way of proof.

The 3rd statement

92 The 3rd statement, at p 27 of the book, reads as follows:

> It also put the spotlight on Singapore's legal system which many observers inside and outside the country believe has been perverted to suit political and economic expediency.

"It" refers to the case of Ngyuen Tuong Van, an Australian citizen who was convicted of drug trafficking and sentenced to death.

93 Mr Shadrake explained in his affidavit that his intention in making the 3rd statement was to

criticise the laws passed by Parliament which in his view repressed free discussion of the death penalty, including limitations on the right to assemble, which he referred to in the paragraph just before the one where the 3rd statement is found. His reference to "legal system" should therefore be read accordingly.

94 Once again, I find it difficult to read the reference to the system as excluding the courts. But I do find that the 3rd statement does not unambiguously refer to the courts, or to any judicial act or function, in contrast to the 1st statement which refers to the imposition of the death sentence. I therefore give Mr Shadrake the benefit of the doubt that the 3rd statement does not specifically refer to the courts.

The 4th statement

95 The 4th statement, at p 100 of the book, refers to the case of Maria Krol-Hmelak, who, together with one Peter Johnson, was acquitted of drug trafficking by the late Lai Kew Chai J. The 4th statement (in bold) reads:

> Following final submissions at the 28th session [of the trial] which began on 29 October, Judge Lai suddenly announced them both no guilty. Krol-Hmelak could hardly believe her ears. She was free. Completely stunned she burst into tears sobbing 'What's happening? What's happening?' She had been in jail for two and a half years expecting she would end up on the gallows. Instead she heard cries from embassy officials: 'You're free! You are free!' It was an extraordinary end to the case in which few believed she would not be found guilty and hanged. The 'I didn't know' plea had seemingly and perhaps miraculously worked for her **but in Singapore funny things tend to happen on the way to their courtrooms just as funny things happen when they arrive in a theatre to perform in a comedy show**. However, in Singapore it has nothing to do with humour.
>
> In fact, many believe that Krol-Hmelak was guilty. But to hang her following the uproar over van Damme's death sentence might not have been wise. **So it was very likely a government verdict not a judicial one. Singapore's judiciary is not free to decide who should live and who should die when vital business, economic and diplomatic issues are at stake**.

96 These two paragraphs are set out in full because Mr Shadrake says in his affidavit that if we read the paragraphs together, it will be seen that he distinguishes foreign pressure and negotiations with the executive during the prosecutorial stage as opposed to the judicial sentencing stage where judges have no discretion to mitigate as the death penalty is mandatory. He also referred to Mr Anandan's autobiography at p 143 and asserted again that diplomatic pressure occurs at the prosecutorial stage. Hence, he says, the use of the phrase "on the way to the courtrooms." Mr Shadrake's misguided reference to Mr Anandan's autobiography has already been referred to above.

97 The reference to van Damme is to Johannes van Damme, a Dutchman who was executed for trafficking around the time Krol-Hmelak was arrested, and whose case is also discussed by Mr Shadrake in the same chapter as Krol-Hmelak's case. The chapter referred to anti-Singapore sentiment in the Netherlands in relation to van Damme's arrest and trial, saying that "in a national poll half the [Dutch] population demanded the government send warships to Singapore and rescue van Damme using military force." It concluded by saying that Krol-Hmelak left Singapore after being acquitted and that "the result, despite the uproar when Johannes van Damme was hanged, meant

business as usual between the two countries. No one wanted another demand, however frivolous, for Dutch warships to be sent to Singapore to spring this aging granny from the shadow of the gallows."

98 Mr Shadrake's explanation in his affidavit only related to the first part of the 4th statement. In that regard, his comparison of the legal process to a comedy performed in a threatre is clearly mischievous when read alongside his description of how the judge "suddenly" acquitted Krol-Hmelak, how her plea of ignorance "had seemingly and perhaps miraculously worked for her", and his allegation that "funny things tend to happen" on the way to courtrooms in Singapore. Even if I were to give Mr Shadrake the benefit of the doubt here (which in itself is rather difficult since English is his native tongue), this would still leave unexplained the second and more serious part of the 4th statement, which alleged that the acquittal of Krol-Hmelak and Johnson "was very likely a government verdict not a judicial one. Singapore's judiciary is not free to decide who should live and who should die when vital business, economic and diplomatic issues are at stake." Mr Shadrake's affidavit had no explanation for this plain allegation that the court ordered the acquittals under pressure from the government or as a result of the dictates of business, economics and diplomacy, not the rule of law. In his submissions, Mr Ravi sought to justify this allegation on the basis that Lai Kew Chai J promised to give detailed grounds for his decision but eventually did not do so. Even assuming this to be a true account of the proceedings (absolutely no evidence was given in this regard), Lai J's eventual decision not to issue a judgment can hardly form a rational basis for the grave allegation made by Mr Shadrake, *ie* that Lai J's verdict was procured by the government. There can therefore be no fair criticism in respect of the 4th statement.

99 I also note, once again, the ease with which Mr Shadrake concludes that Krol-Hmelak was guilty of trafficking despite her acquittal by the court and that was also the belief of "many". But he gives no supporting evidence despite having been given more than one opportunity to do so.

The 5th statement

100 The 5th statement (in bold), at p 3 of the book, is general in nature and reads:

> **Many of the cases I have investigated in this book show that justice in Singapore is patently biased against the weak and disadvantaged while favouring the wealthy and privileged**. This is especially true for foreigners from powerful countries willing and able to use their economic might to have the death penalty 'abolished' for their citizens. Business for Singapore is far too important a matter to allow such a little local difficulty like killing someone.

101 I have set out the full paragraph because Mr Shadrake explained in his affidavit that, "when contextualised", the 5th statement is clearly directed against the political considerations being taken into account at the prosecutorial stage. He relied in this regard on Julia Bohl's case, where he argued, relying on Mr Anandan's autobiography, that diplomatic pressure made a difference at the prosecutorial stage. He also states that his conclusion is a reasonable inference that a neutral observer would draw when looking at the cases highlighted and analysed side-by-side in his book.

102 I cannot accept this explanation. "Justice in Singapore" is not dispensed by the prosecution; it is dispensed by the courts. Further, when read together with Mr Shadrake's allegation of a "government verdict" in the Krol-Hmelak case (discussed above at [94]–[99]), and his allegations of favouritism in the sentences of Dinesh Bhatia and Andrew Veale (discussed below at [106]–[114]), it becomes apparent that the 5th statement encompasses cases where the courts are alleged to favour the wealthy and the privileged.

103 As for Julia Bohl's case, I have already pointed out that Mr Anandan's autobiography makes clear that Bohl could not have been charged with a capital offence as the cocaine in her possession was simply below the threshold quantity. There was no exercise of prosecutorial discretion to prefer a non-capital charge. Mr Shadrake once again displays a tendency to distort his own sources for his own purposes.

The 6th statement

104 The 6th statement (in bold), at p 5 of the book, is general in nature and reads:

> For most of the past century governments have too often attempted to justify their lethal fury with reference to the so-called benefits such killing would bring to the rest of society. This is also Singapore's main argument for keeping the death penalty. But the bloodshed is real and deeply destructive of the common decency of the community; the benefits are illusory. More than this, **the implementation of capital punishment is highly discriminatory. According to Amnesty International, the death sentence is more likely to be imposed in Singapore on those who are poorer and less educated making them more vulnerable than average**.

Here Mr Shadrake appears to be making an argument that those convicted of capital crimes are more likely to be poorer and less educated. Ms Subramanian sought to argue that the 6th statement meant that the courts are biased against the poor and less educated. Ms Subramanian submits that taken in the broader context of his unwarranted and unsupportable comments made in relation to various individual cases, Mr Shadrake is targeting the Singapore judiciary as being against the poor, the less educated and the disadvantaged in Singapore society.

105 While there is some small basis for Ms Subramanian's submission, I have taken the passage complained about in the context of the paragraph in which it appears. The reference to Amnesty International's report makes clear that Mr Shadrake in making the 6th statement was talking only about the *incidence* of the death penalty, and not whether the courts are biased against certain groups in imposing the death penalty. I therefore find that the 6th statement did not allege any wrongdoing or impropriety on the part of the courts.

The 7th statement

106 The 7th statement, made up of 3 passages at pp 140–141 of the book, refers to the case of *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR(R) 1 ("*Bhatia*"), where V K Rajah J (as he then was) reduced the sentence of the defendant to eight months from the 12 months imposed by the district court. The 3 passages in the 7th Statement (in bold below) are found in two paragraphs, which open by referring to a drug raid on 7 October 2004 before continuing:

> Of the arrests that night, the most surprising was that of a former High Court judge's son, Dinesh Singh Bhatia, 35, a private equity investor. His father, Amarjeet Singh, a former judicial commissioner and also a senior counsel, served on the United Nations war crimes tribunal for the Balkans. Dinesh's mother, Dr Kanwaljit Soin, was a former Nominated MP and orthopaedic surgeon, and director of the London-based Help Age International, a global network helping the disadvantaged elderly. Dinesh was charged with cocaine consumption, and was facing 10 years behind bars or fined S$20,000 or both. **But funny things often seem to happen on the way to court houses in Singapore. Instead of getting ten years and a heavy fine, Bhatia, was jailed for only 12 months for consuming cocaine**. His lawyer, a People's Action Party MP, K.

> Shanmugam, had told the court that Bhatia was not an addict at all. He was given a drug by a friend but 'did not know that it was cocaine' although he had a 'fleeting suspicion' the substance could be illegal. 'He took in only impulse', said Shanmugam. **An internet blogger wryly commented: 'I would not remotely suggest that it might have helped Bhatia's case that his father was a judge, and his mother a former Singapore Member of Parliament. Ignorance of the law is no defence!'**
>
> So should Bhatia, a sophisticate about town, have known he was sticking something illegal up his nose? On 7 April 2005, according to court records, Bhatia appealed against his 12-month sentence and asked for a heavy fine instead. Calling the previous sentence 'excessive', the appeal judge, VK Rajah, said that the district judge erred by not tailoring the sentence to fit the offender and failed to 'attach adequate weight and merit to all the relevant mitigating factors.' He said the trial judge did not adequately consider the fact that Bhatia's consumption was neither planned nor purchased. Justice Rajah then cut Bhatia's sentence to eight months. **On 7 July 2005, The Straits Times reported that Bhatia was 'now at home serving out his sentence wearing an electronic tag he cannot remove'. It did not say when this favourable treatment began**.

107 In these two paragraphs, Mr Shadrake describes Bhatia's initial sentence as "only 12 months" as opposed to "10 years and a heavy fine", refers to the identities and social position of Bhatia's parents, refers to the sarcastic comment of an internet blogger that Bhatia's sentence had nothing to do with the identities of his parents, and describes Bhatia's home detention as "favourable treatment". The juxtaposition of facts is mischievous, and the unmistakable insinuation is that Bhatia was shown favouritism both in his sentence and the way he served it. Bhatia's home detention has nothing to do with the courts, but the presentation of the facts makes it possible that an uninformed reader would draw the conclusion that it was also arranged by the courts. However, I am prepared to give Mr Shadrake the benefit of the doubt in this regard.

108 As for Mr Shadrake's grave insinuation that Bhatia's sentence was a result of favouritism by Rajah J, nothing was cited as support in the book other than the suggestive reference to the identities of Bhatia's parents when discussing the sentence. This certainly cannot form a rational basis for such a grave allegation.

109 What is more, the allegation was clearly made recklessly. Mr Ravi confirmed no less than five times during the hearing that Mr Shadrake *had read* the reported judgment. Yet, no effort was made to refer to and refute the reasons given in Rajah J's judgment, which would have been the most obvious thing to do if one was going to allege that the sentence was given as a result of favouritism and could not stand up to scrutiny. There was not even any evidence to show that Mr Shadrake had done research showing that the sentence given to Bhatia was lighter than the norm (and this alone would hardly have formed a rational basis for saying that the sentence was a result of favouritism). Again Mr Shadrake sought to rely on Mr Anandan's autobiography. But a perusal of the relevant pages, pp 139–140, shows that they do not support his allegation at all:

> ... There are still many inconsistencies in the way the courts treat drug offenders. I brought this up in 2005 in the inaugural issue of *Pro Bono*, the newsletter of the Association of Criminal Lawyers of Singapore. I cited the big cocaine bust in Seletar Camp involving a former internet entrepreneur. The accused pleaded guilty to a single charge of cocaine consumption and has his 12-month sentence reduced to eight months on appeal. I was approached to handle his appeal but there was a conflict of interest because I represented Guiga Laroussi, the man who had supplied him with the cocaine. In the appeal by the former internet entrepreneur, Justice V K Rajah ruled that all first time offenders should be jailed for six to 18 months. Fines, he said,

should be imposed only "sparingly" and in "purely exceptional" cases involving Class A drugs or hardcore drugs like heroin and cocaine. But I wrote that the court's ruling did little to clarify the position on sentencing. Justice Rajah did not clarify what he meant by "sparingly" or what constituted a "purely exceptional" case.

I pointed out that there was a "clear conflict" between the views expressed in the former internet entrepreneur's case and in four other cases heard by then Chief Justice Yong Pung How, who has since retired from the bench. In an earlier case involving Ecstasy abuser Ooi Joo Keong, the Chief Justice upheld a decision by Senior District Judge Richard Magnus to jail him for 12 months, ruling that first offenders should be jailed for 12 to 18 months. I pointed out that three other cases sent out different signals. In a case involving insurance manager Ng Kheng Tiak, who had a couple of puffs of cannabis, the Chief Justice fined him $20,000 and set aside the 12-month prison term imposed by the Lower Court. In another case, footballer Muhammad Razali Ishak's one-year jail term for smoking cannabis at a birthday party was set aside and replaced with two years' probation, a $5,000 bond by his parents and 100 hours of community service. Polytechnic student Pililis Nikiforos escaped an eight-month jail term in 2001 for morphine use and the Chief Justice instead imposed a $5,000 fine. Our take on this is that when sentencing an offender, which of these decisions should district judges follow?

It is apparent from the passages above that of the 4 cases of drug consumption mentioned by Mr Anandan, in 3 cases, an insurance manager, a footballer and a polytechnic student had their 8 to 12 month prison sentences set aside and were only punished with fines. To say on this basis that Bhatia's jail sentence of 8 months was light evinces not just a propensity but an intention to distort sources. As for the fourth case, Ooi Joo Keong's case, it was clearly explained in Rajah J's judgment, which Mr Ravi confirmed that Mr Shadrake had read, as relating only to first-time drug consumers *with antecedents*, not a first time offender with no antecedents, such as Bhatia.

110 Further, the statement that Bhatia "was jailed for only 12 months" instead of "getting 10 years and a heavy fine" was plainly misleading and obviously wrong. 10 years' imprisonment or a $20,000 fine or both was the *maximum* penalty for the offence under consideration, and it frankly does not take very much to realise that, as a first-time offender, Bhatia would not have been facing the maximum prison sentence of 10 years. When I sought clarification on this point, Mr Ravi very fairly acknowledged that he too had some difficulty with the statement, and sought an adjournment to consult with Mr Shadrake. When we resumed after 20 minutes, Mr Ravi informed me that Mr Shadrake conceded he had made a mistake and would be making the necessary correction in the next edition of the book. However Mr Ravi said Mr Shadrake was not withdrawing anything else but that wrong statement and that whilst Mr Shadrake had informed his publisher to make a correction, he had no control over the publisher. But nothing was said about the rest of the 7th statement, and in light of the foregoing I cannot but conclude that the 7th statement was made recklessly, without regard to its truth or falsehood.

111 I also note that, in his affidavit, Mr Shadrake sought to justify the 7th statement by saying:

Even if [the 7th statement] can be interpreted as a direct criticism of the judicial decision, this was based on a similar argument used by Mr Subhas Anandan in his autobiography at page 139-140. There, Mr Anandan notes the discrepancy in the sentence meted out to Bhatia before concluding that "this has partly to do with the fact that the law is so out of sync with other First World Countries which Singapore aspires to be."

I set out the relevant part of Mr Anandan's autobiography at pp 140–141 from which this passage

was taken:

> Another problem in my view is the use of entrapment to snare drug offenders. I believe it should be allowed to a certain degree, otherwise you'll never catch the crooks. But the Central Narcotics Bureau (CNB) should not overdo it. I've said on record before that I think the CNB crossed the line in the case of insurance agent Teo Ya Lin in 2003. She was pressured by an undercover CNB officer to procure an Ecstasy Pill for him promising that he would buy an insurance policy from her in return. Teo got him a pill and the result for her troubles was a prison term of more than six years. This girl had no intention of selling drugs until she was persuaded by the officer. Under normal circumstances, she would not have been categorised as a trafficker. There is also the issue of whether the CNB officer should be guilty of abettment [*sic*] for the offence. He instigated the offence by putting the idea into her head through misrepresentation. Indeed, there is a lot of grey area in Singapore's Misuse of Drugs Act. *I believe this has partly to do with the fact that the law is so out of sync with other First World countries which Singapore aspires to be*.
>
> [Emphasis added]

The sentence relied on by Mr Shadrake was clearly made in relation to entrapment. By connecting it to sentencing, Mr Shadrake once again evinced a tendency to grossly distort his sources.

The 8th statement

112 The 8th statement, at p 141 of the book, refers to the cases of Andrew Veale and Penelope Pang, two other drug consumers who were caught in the same operation which netted Dinesh Bhatia. It reads as follows:

> Briton Andrew Veale, a top financial broker and a 10 year resident, who drove a Rolls Royce often with his Singaporean girlfriend, Penelope Pang Su-yin, 35, daughter of the organiser of the Miss Universe pageant, were next to appear in court. They too got off lightly with jail sentences amounting to no more than eight months with remission. Veale, was a broker with Structured Credit Desk dealing in derivatives and financial products, and the sort of people Singapore needs.

113 Mr Shadrake gives the same explanation for the 8th statement as he did for the 7th statement: it is directed against the light charges brought by the prosecution against Veale and Pang. He does not say what charges should have been brought, and in any case this explanation is clearly untenable given his allegation that "they too got off lightly with jail sentences amounting to no more than eight months with remission", and that Veale "was the sort of people Singapore needs". This clearly insinuates that Veale was given a light sentence by the court due to extraneous considerations, *viz* he was "the sort of people Singapore needs". In contrast to Bhatia's case, Mr Shadrake did not even attempt to justify this allegation with reference to sentencing precedents. In any case, as I have said, it is one thing to allege a sentencing discrepancy; it is quite another to allege intentional bias or favouritism. It should also be noted that Veale and Pang's case and sentence were also discussed and explained in Rajah J's published judgment for Bhatia's case (see *Bhatia* at [46] and [48]), which, once again, Mr Shadrake said he read but did not attempt even to criticise. There is no rational basis for Mr Shadrake's insinuation that the court sentencing Veale gave him a light sentence because he was "the sort of people Singapore needs", and for that reason it cannot amount to fair criticism.

114 I should add that Veale received a prison sentence of 12 months because he had a pattern of purchase and consumption and Ms Pang received an 11 month prison sentence because her consumption was premeditated, unlike Bhatia: see [46] to [48] and [7] to [12] of Rajah J's judgment.

Mr Shadrake described their sentences as "8 months *with remission*" (emphasis added), while describing Bhatia's sentence as simply 8 months. This is likely to create a false impression in the mind of the reader. Seen in the light of the various liberties Mr Shadrake had taken with other facts, it is difficult to take a benign view of this.

The 9th, 10th and 11th statements

115 The 9th to 11th statements can be taken together. They refer to the case of Vignes Mourthi, who was convicted of drug trafficking and sentenced to death (see *PP v Vignes s/o Mourthi & Anor* [2002] SGHC 240, affirmed in *Vignes s/o Mourthi v PP* [2003] 3 SLR(R) 105). The 9th statement, at p 162 of the book, reads:

> No doubt many members of Singapore's judiciary were also aware of what was going on behind the scenes concerning the rape, sodomy and corruption charges hanging over Rajkumar, yet not one of them had the guts to speak out in protest.

The 10th statement, at p 163 of the book, reads:

> But I can reveal, following intensive inquiries and talking in confidence to several lawyers on condition that I would not expose them to the authorities in any way, that the high echelons of the judiciary and prosecution from the Attorney General down knew all about Rajkumar and were intent on keeping his evil, corrupt deeds under wraps until Vignes Mourthi was hanged.

The 11th statement, at p 165 of the book, the last page of the chapter on Vignes Mourthi, reads:

> Here the words of the Nobel Laureate, Amartya Sen, seem the most appropriate postscript to the sordid tale of the death of Vignes Mourti [*sic*]:
>
> > ... Democracy becomes dysfunctional when the bureaucracy, the judiciary, the legislature, the private sector, the police and the military all use their power to enrich themselves and advance their own interests at the expense of civil society. Laws not withstanding, corruption undermines the rule of law.

116 The statements relate to the fact that Sgt Rajkumar from the Central Narcotics Bureau was under investigation for offences under the Prevention of Corruption Act (Cap 241, 2002 Rev Ed) at about the same time as he was giving evidence in Mourthi's case. Sgt Rajkumar was subsequently convicted on the same corruption offences: see *PP v S Rajkumar* [2005] SGDC 77. The charges related, among other things, to offering a bribe to a woman he was alleged to have raped, in an attempt to induce her to withdraw her complaints. This was apparently not disclosed to the trial judge in Mourthi's case.

117 Mr Ravi argued this point with great passion and appeared at times to be arguing that this was a miscarriage of justice. This was understandable given that Mr Ravi was, as he informed the court, the counsel who unsuccessfully sought to reopen the case after the Court of Appeal dismissed Mourthi's appeal: see *Vignes s/o Mourthi v PP* [2003] 4 SLR(R) 300; *Vignes Mourthi v PP* [2003] 4 SLR(R) 518.

118 Ms Subramanian disputed Mr Shadrake's claim in his affidavit that Mourthi was convicted on the strength of Sgt Rajkumar's evidence. She referred me to the grounds of decision of the trial judge, who stated at [96] and [98] that:

96 On the totality of the evidence adduced, it was impossible to accept that B1 thought he had been given a packet of "sambrani kallu" by B2. It was something that could be easily purchased with a small amount of money. It was extremely odd that B2 should ask him to pass something of no great value or apparent consequence to someone B1 had not even met before on his first day back at work after the accident, especially when B1 did not have his own means of transport. Further, why could not B2 have brought the small packet along with him when he went to B1's house in the evening of 19 September 2001? Why was there a need for him to return a few hours later in the early hours of 20 September 2001 just to pass such a packet to him? What was the urgency that caused B2 to wait for the rain to stop and to travel to his house in the middle of the night? The evidence showed clearly that something surreptitious was happening and if B1 appeared so uninquisitive, it could only mean that he was aware of what was in the packet that he was to bring into Singapore.

...

98 I believed the Prosecution's witnesses who said that B1 had used a word which was also street jargon for heroin in granular form in his statements. It could not be that ASP Krishnan, SGT Rajkumar, the investigating officer and the Tamil interpreter all misunderstood him throughout or simply refused to qualify "kallu" with "sambrani". In any event, the Tamil interpreter stated that these two words were not used together in the Tamil language. I had no doubt that all the statements taken from B1 had been recorded accurately.

Ms Subramanian also referred me to the judgment of the Court of Appeal at [2003] 3 SLR(R) 105 at [38] where the Court of Appeal expressly stated: "Looking at the totality of the evidence, we endorse the finding of the court below that Vignes knew that he was transporting drugs for sale".

119 As I have noted above, I am not required to decide whether Mourthi was convicted rightly or wrongly in assessing whether Mr Shadrake was within his right of fair criticism. Certainly it was within Mr Shadrake's right of fair criticism to question whether Mourthi's conviction was safe, given that information pertaining to the credibility of a particular witness in the trial was not given to the court.

120 But Mr Shadrake did much more than that. He said in no uncertain terms that the high echelons of the judiciary, by which he must mean the judges of the Supreme Court, *knew* about Sgt Rajkumar's misdeeds and were deliberately and culpably suppressing the fact of the investigation into his acts and the proceedings against him until after Mourthi was executed. This is certainly one of the most serious allegations that can ever be made against the Supreme Court bench.

121 In support of this grave allegation Mr Shadrake had nothing more to say than to point out that the subordinate judiciary, who deal with 95% of the cases in Singapore, and the prosecutors, are both drawn from the ranks of the Legal Service, and in light of this the judiciary would have known of the proceedings against Sgt Rajkumar. Reference was also made to the fact that some of the judges of the Supreme Court were elevated from the subordinate courts, or had served stints at the Attorney-General's Chambers. I unhesitatingly reject this as simply too incredulous and attenuated to form a rational basis for Mr Shadrake's grave assertion that the trial judge and the high echelons of the judiciary knew of Sgt Rajkumar's misdeeds and were complicit in the suppression of possibly exculpatory evidence in a capital case.

122 As for the 11th statement, Mr Shadrake says in his affidavit that it is a quote from Amartya Sen which addresses the situation in India, and "obviously not directly analogous to Singapore." But this was obviously not his purpose in quoting Amartya Sen – the 11th statement states that the Amartya

Sen quote seems "the most appropriate postscript to the sordid tale of the death of Vignes Mourthi." It will be noticed that Mr Shadrake does not explicitly give any reason why "the high echelons of the judiciary" knew all about Sgt Rajkumar and were intent on covering it up until Mourthi was hanged. The quote at the end of the chapter insinuates the motive: that judges "use their power to enrich themselves and advance their own interests at the expense of civil society." Unsurprisingly, no rational basis was given for this insinuation.

The 12th statement

123 The 12th statement, at p 18 of the book, reads as follows:

> Although the legal system was based on English law it was soon fine-tuned to ensure that Lee Kuan Yew and his People's Action Party remained in power in perpetuity by silencing all political opposition through fear of being jailed as 'communists' or financially ruined.

124 As I suggested to Ms Subramanian during the hearing, one can be jailed as a communist under statutes such as the Internal Security Act (Cap 143, 1985 Rev Ed) and the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed), which permit detention without trial. Likewise, one can be financially ruined without going through the courts, or through meritorious legal actions decided without improper conduct on the part of the courts. In the circumstances, I am willing to give Mr Shadrake the benefit of the doubt and find that the 12th statement was not directed at the courts, or at least did not impute any improper conduct to the courts. I also give Mr Shadrake the benefit of the doubt in respect of Ms Subramanian's argument that the 12th statement should be read in light of the 13th and 14th statements, seeing that the 12th statement is made at the beginning of the book, at p 18, whereas the 13th and 14th statements are made towards the end, at pp 217 and 207.

The 13th and 14th statements

125 The 13th and 14th statements can be dealt with together. The 13th statement, at p 217 of the book, reads:

> The absence of independence in a compliant judiciary and a media silenced through state ownership and the ever-present threat of defamation and libel suits have created a climate for the suppression of basic political freedoms.

The 14th statement (in bold), at p 207 of the book, reads:

> The ruling party in Singapore often sues those who dare oppose it on trumped up defamation charges, forcing many into bankruptcy or exile.

126 The 13th statement explicitly says that the judiciary is compliant and not independent. The 14th statement clearly implies that the courts will find for the ruling party even if it brings "trumped up defamation charges". Similar statements have been held to be contemptuous in *Pang Cheng Lian*, *Zimmerman*, *Wain Barry*, *Lingle*, *Chee Soon Juan* and *Hertzberg*. I have earlier expressed my doubts that criticisms of the judiciary's conduct and partiality *ipso facto* constitute contempt.

127 Mr Shadrake claims, both in his book and his affidavit, to have relied on the IBA report in

making the 13th statement. In respect of the 14th statement, Mr Shadrake only said that this is directed at the political tactics of the ruling party. This is unsupportable: his insinuation that "trumped up defamation charges" are nevertheless successful "in forcing many into bankruptcy or exile" is clearly directed at the courts. But, for completeness, I will also compare the IBA report and the 14th statement.

128 Mr Ravi placed great reliance on how the IBA report, relied upon by Mr Shadrake, was published without its authors being charged or held for contempt. Ms Subramanian argued that the repetition of a contemptuous publication is a further contempt. It is neither necessary nor appropriate for me to examine why the authors of the IBA report were not charged or held for contempt. For present purposes, it is sufficient for me to examine how Mr Shadrake treats the IBA report which he himself chose to rely on.

129 On its face, the IBA report appears to make an effort to present a balanced view of the issues it addresses, giving arguments and evidence both *pro* and *contra* its viewpoints. I look at one incident examined in the IBA report: the transfer of Senior District Judge Michael Khoo from his judicial position to the Attorney-General's Chambers in 1984, which some allege was related to his acquittal of Mr JB Jeyaretnam, an opposition leader, of certain charges preferred against the latter. In examining this incident, the IBA report referred to the fact that a Committee of Inquiry was convened to investigate the incident and concluded that there was no executive interference in the subordinate courts. It considered Parliament's discussion of the Committee's findings, and quotes from both sides of the debate. It also noted the Law Society's view that nothing improper had occurred.

130 I also look at how the IBA report eventually concluded:

> ... in cases involving PAP [People Action Party, the presently ruling party] litigants or PAP interests, there are concerns about an actual or apparent lack of impartiality and/or independence, which casts doubt on the decisions made in such cases. Although this may not go so far as claimed by some non-governmental organisations, which allege that the judiciary is entirely controlled by the will of the executive, there are sufficient reasons to worry about the influence of the executive over judicial decision making. Regardless of any actual interference, the reasonable suspicion of interference is sufficient. In addition, it appears that some of the objective characteristics of judicial independence, including security of tenure, separation from the executive branch and administrative independence may be absent from the Singapore judicial system.

131 Contrast Mr Shadrake's writing. There is a complete absence, not just in the 13th and 14th statements, but in the whole of the chapter in which they appear, of the primary facts to which the IBA report referred. The assertions which Mr Shadrake made go several degrees higher than what the IBA report felt able to conclude – contrast, for example, the IBA report's distinctly qualified tone and Mr Shadrake's bare assertion in the 13th statement about "the absence of independence in a compliant judiciary." This, it should be remembered, was Mr Shadrake's only source. In distorting it as grossly as he did, I think Mr Shadrake has passed beyond wrong-headed criticism that is nevertheless made in good faith; he has displayed, at the very least, a reckless disregard for the truth or falsehood of the allegations he makes. This is aggravated by his claim that his book is a product of his investigative journalism. This disqualifies him from claiming fair criticism in respect of the 13th and 14th statements.

Conclusion on the facts

132 In his book, Mr Shadrake claims to be an advocate against the death penalty. He claims that a disproportionate number of those sentenced to death come from less advantaged backgrounds. He claims to have identified a miscarriage of justice in a capital case because facts which may have affected the credibility of a prosecution witness were not presented to the court. He claims to have identified sentencing discrepancies. On these matters he may be correct or he may be wrong, but he is within his rights, which I am constitutionally bound to uphold. I should emphasise in particular that there is nothing in the law which prohibits advocating for the abolition of the death penalty.

133 He has also made certain allegations against other parts of the legal system, but that is not my concern here. So the 3rd, 6th and 12th statements, which do not unambiguously refer to the courts, do not amount to contempt.

134 But in the remaining 11 statements Mr Shadrake went beyond advocating the abolition of the death penalty and criticising the merits of individual judgments. He alleges grave misconduct on the part of the courts. There is a world of difference between these two positions: it is one thing to say that a judge erred in law or in fact; it is another to say that he acted on the instructions of the executive. In discussing the case of Julia Bohl (the 2nd statement), Mr Shadrake claims that the courts gave a light sentence arranged for by the Singapore government under threat of economic reprisals by the German government. In discussing the case of Maria Krol-Hmelak and Peter Johnson (the 4th statement), he claims that the courts succumbed to executive and diplomatic pressure in acquitting two accused persons in a capital case. In discussing the cases of Dinesh Bhatia, Andrew Veale and Penelope Pang (the 7th and 8th statements), he claims that the rich and well-connected are shown favouritism and given light sentences. In discussing the case of Vignes Mourthi (the 9th, 10th and 11th statements), he claims that the Supreme Court judiciary has culpably suppressed possibly exculpatory evidence in a capital case. He has also made sweeping statements repeating these claims (the 1st and 5th statements). I have said that a person is not precluded from fair criticism even if it extends to the conduct of the judiciary, but fair criticism must be supported by a rational basis for the criticism made, and Mr Shadrake has simply not furnished any rational bases for these very serious accusations. For good measure, it should also be noted that Mr Shadrake claims that the judiciary is a complaint tool of political oppression (the 13th and 14th statements). In doing so he has been so selective with the sources he claims to rely on, and so trenchant in his claims, that I must conclude that he did not care whether what he said was true or not.

135 Mr Shadrake's technique is to make or insinuate his claims against a dissembling and selective background of truths and half-truths, and sometimes outright falsehoods. In Julia Bohl's case, he cobbles together the fact that the German government was mounting a diplomatic offensive on her behalf and the fact that her capital charge was reduced to a non-capital charge, and jumps to the conclusion that the prosecution had succumbed to diplomatic pressure. All the while he conveniently omits the fact, noted in his own source of information, that the amount of drugs in that case was simply insufficient to support a capital charge. In Maria Krol-Hmelak's case, he juxtaposes the tensions with the Dutch government over the prior execution of van Damme, the fact that Krol-Hmelak was acquitted by Lai Kew Chai J, and the fact that the learned judge did not eventually issue written grounds, in order to draw the far-fetched conclusion that it was "a government verdict, not a judicial one." In the cases of Dinesh Bhatia, Andrew Veale and Penelope Pang, he essentially asserts that they received light sentences simply because they were wealthy or well-connected or "the kind of people Singapore needs". In the latter two cases Mr Shadrake does not bother to look at the sentencing precedents. In the former case he positively omits the fact that the jail sentence handed down was significantly more severe than three out of the four cases cited in his own source, Mr Anandan's autobiography, where only fines were imposed. In Vignes Mourthi's case, he makes the

bare assertion that the Supreme Court judiciary must have known that a key witness was being investigated for corruption, and only later supplied the completely untenable rationale that the Legal Service and the judiciary were "porous".

136 As can be seen, a technique such as Mr Shadrake's cannot withstand forensic analysis. But a casual and unwary reader, who does not subject the book to detailed scrutiny, might well believe his claims, especially since Mr Shadrake has claimed that the book was a product of months of investigative journalism. Given that the book is or was available publicly, and continues to be circulated, there is certainly more than a remote possibility that, if the matter had been left unchecked, some members of the public might have believed Mr Shadrake's claims, and in so doing would have lost confidence in the administration of justice in Singapore. Accordingly, I find that the 11 remaining statements are in contempt of court. Since these statements are made without any rational basis, or with reckless disregard as to their truth or falsehood, they also do not fall to be protected by the defence of fair criticism.

Conclusion

137 I therefore find Mr Shadrake guilty of the offence of contempt by scandalising the court and convict him accordingly.

138 I will hear counsel on sentence and costs one week from now. If Mr Shadrake wishes to apologise or otherwise make amends for his contempt, counsel should also submit on the weight to be given to the same.

Postscript

139 I should like to close this rather extended judgment with a few observations. The death penalty is the ultimate punishment under law, ultimate both in its severity and its irreversibility. It is therefore not surprising that the application of the death penalty by the courts is closely scrutinised and vigorously debated; indeed, it would be profoundly disturbing if society comes to adopt a bland and disinterested attitude towards the ultimate punishment carried out in its name. We judges have no interest in stifling such debate and indeed debate on all other matters of public interest, including our conduct. We are constitutionally bound to protect every citizen's right to engage in such debate, even if – in fact, especially if – it is critical of us. But when such debate goes beyond the limits of fair criticism the law will step in. It does so not for the sake of the dignity of the judges. It does so only to ensure the public's confidence in the administration of justice does not falter, and this in the final analysis is the surest guarantee that justice will in fact be administered, in accordance with law.

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