Shadrake Alan *v* Attorney-General
[2011] SGCA 26

Case Number	: Civil Appeal No 212 of 2010
Decision Date	: 27 May 2011
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Lai Siu Chiu J; Philip Pillai J
Counsel Name(s)	: Ravi s/o Madasamy (LF Violet Netto) for the appellant; David Chong Gek Sian SC and Lim Sai Nei (Attorney-General's Chambers) for the respondent.
Parties	: Shadrake Alan — Attorney-General

Contempt of Court

[LawNet Editorial Note: The decisions from which this appeal arose are reported at [2011] 2 SLR 445 and [2011] 2 SLR 506.]

27 May 2011 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decisions of the trial judge ("the Judge") in *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 ("*Shadrake 1*") and *Attorney-General v Shadrake Alan* [2011] 2 SLR 506 ("*Shadrake 2*"). In *Shadrake 1*, the Judge found Mr Alan Shadrake ("the Appellant") in contempt of court for eleven of the fourteen impugned statements. In *Shadrake 2*, the Judge sentenced the Appellant to six weeks' imprisonment and a fine of $20,000 (in default of which, two weeks' imprisonment, to run consecutively to the first term of imprisonment).

2 The present appeal raises – in some instances for the very first time before this court – important issues relating to the law of contempt which will need to be clarified before the relevant principles are applied to the facts. Foremost amongst these issues are the fundamental ones relating to the *test for liability* for contempt of court on the ground of scandalising the judiciary ("scandalising contempt") as well as what the Judge characterised as the *defences* to scandalising contempt.

The factual background

3 This case arose from an application by the Attorney-General ("the Respondent") to commit the Appellant, the author of *Once a Jolly Hangman: Singapore Justice in the Dock* (Strategic Information and Research Development Centre, 2010) ("the book"), for contempt of court in relation to certain passages contained in the book.

The decision below

The decision on liability

4 In the court below, the Judge first undertook an extensive and comprehensive survey of the Singapore and Commonwealth case law on the applicable test for liability for scandalising contempt.

5 In the result, the Judge departed from previous decisions of the Singapore High Court with regard to the test for the *actus reus* in cases of scandalising contempt. The Judge did so in holding that the "real risk" test (*viz*, that the impugned statement must pose a real risk of undermining public confidence in the administration of justice before it is held to be contemptuous), in contradistinction to the "inherent tendency" test, was to be applied in Singapore (see *Shadrake 1* at [50]).

6 In so far as the test for *mens rea* was concerned, the Judge held that the only *mens rea* needed for finding liability was that the publication of the allegedly contemptuous statement was intentional; it was not necessary to prove an intention to undermine public confidence in the administration of justice (see *Shadrake 1* at [55]).

7 Turning to what the Judge characterised as the *defences* to scandalising contempt, the Judge considered that the defences of justification and fair comment in the law of defamation were *not* applicable (see *Shadrake 1* at [59]–[69]), although his position with regard to the defence of justification was, with respect, unclear. The Judge was of the view that the only defence to scandalising contempt was that of fair criticism (see *Shadrake 1* at [70]–[76]). According to the Judge, in order to raise a defence of fair criticism, the alleged contemnor must be able to show some objective basis for his contemptuous statements, the cogency of the rational basis required to support his allegations increasing correspondingly with the seriousness of the allegation made (see *Shadrake 1* at [72]). The alleged contemnor must also be able to show that the allegation was made in good faith, *viz*, that the alleged contemnor must genuinely believe in the truth of the criticism he made (see *Shadrake 1* at [73]). The Judge further held that the mere fact that the criticism is in outspoken language does not mean that it should necessarily be penalised (see *Shadrake 1* at [75]). He also surmised that, contrary to English case law and earlier Singapore cases, there should not be a limit on the kind of criticisms which can be made against the court subject to the above criteria being met (see *Shadrake 1* at [76]). We pause to observe, parenthetically, that the preferable approach might be to view the *concept* of fair criticism as going towards liability rather than as an independent defence – a point which we will deal with in more detail below (see generally at [59]–[86]).

8 Applying the law to the facts, the Judge held that three of the statements (*viz*, the third, sixth and twelfth statements, reproduced respectively at [92], [104] and [123] of *Shadrake 1*) did not amount to contempt, whilst the remaining eleven statements were contemptuous and did not qualify for the defence of fair criticism (see *Shadrake 1* at [133]–[136]).

The decision on sentence

9 The Judge held that imprisonment would be the norm for the author of a publication which scandalises the court (see *Shadrake 2* at [26]). This is because to constitute scandalising contempt, a statement must not only pose a real risk of undermining public confidence in the administration of justice but must also fall outside the ambit of fair criticism – the satisfaction of these criteria *ipso facto* making for a high degree of culpability (see *Shadrake 2* at [26]).

10 Taking into account the high level of the Appellant's culpability, including his stated intent to repeat his contempt by publishing an expanded second edition of the book; previous sentencing precedents (which were on the low end); the fact that the precise extent of the book's circulation in Singapore was unclear; the fact that the Appellant was not a person with a credible and established reputation; and the desire to signal that the courts have no interest in stifling legitimate debate on the death penalty and other areas of the law, the Judge sentenced the Appellant to six weeks' imprisonment (see *Shadrake 2* at [42]).

11 Further, to send a signal that those who hope to profit from controversy by scandalising the

court may expect to have their profits disgorged by a stiff fine in addition to other punishment, the Judge imposed a $20,000 fine on the Appellant, with two weeks' imprisonment in default (see *Shadrake 2* at [37] and [43]).

The issues

12 The main issues are relatively straightforward and are encompassed within the following three grounds of appeal relied upon by the Appellant:

(a) First, that the Judge had erred in his statement of the test for liability for scandalising contempt. In this regard, the Appellant contends that whilst the Judge correctly adopted the *label* of a "real risk" test, he erred in defining the *content* of the said test;

(b) Second, that the Judge had erred in his interpretation of the passages held to have given rise to the contempt; and

(c) Third, that the sentence meted out by the Judge was manifestly excessive.

13 We will proceed to deal with each of these issues *seriatim*. In dealing with the first issue, we will address not only the test for liability for scandalising contempt but also what the Judge characterised as the possible defences to contempt. This particular issue relates, in substance, to the applicable *legal principles*. The second issue involves the *application* of the relevant legal principles to the *facts* of this case – in particular, the impugned statements. At this point, *viz*, the confluence of both law and fact, we arrive at the most significant aspect of the present appeal, not least because of the very real effect it will have on the result of the case in general and the Appellant in particular. To this end, we will undertake an analysis of each statement in relation to the relevant legal principles. The third issue involves both the discussion of applicable legal principles in relation to sentencing in the context of scandalising contempt, as well as the application of those principles, if appropriate, to the facts of this case. We use the phrase "if appropriate" because there is, of course, the *threshold* issue of liability (which falls within the purview of the first and second issues). Put simply, before we can even begin to consider the issue of sentence, *liability* for contempt on the part of the Appellant must first be established (and it is important to note – and, indeed, it is axiomatic – that such liability must be established by the Respondent *beyond a reasonable doubt*). If no liability for contempt is established in the first place, then the issue of sentence does not need to be considered. That is why we have left the discussion of the legal principles relating to *sentence* to the final part of this judgment.

14 Let us now turn to consider the applicable legal principles relating to the test for liability for scandalising contempt as well as what the Judge characterised as the possible defences available.

The legal principles

Introduction

15 Although counsel for the Appellant, Mr M Ravi ("Mr Ravi"), focused on the test for liability for scandalising contempt, we will also deal with the possible defences thereto because they are (as we shall see) directly relevant to the facts of the present appeal. As already mentioned, however (at [7]), these possible defences, particularly fair criticism, may be better viewed as going towards the issue of liability rather than constituting independent defences as such (see also the detailed analysis below at [59]–[86]).

16 Before proceeding to deal with the applicable legal principles with respect to liability for scandalising contempt, it would be appropriate to provide some background on the law relating to contempt.

17 At the most general level, it should be noted that the law relating to contempt of court operates against the broader legal canvass of the right to freedom of speech that is embodied both within Article 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") as well as the common law. The issue, in the final analysis, is one of *balance*: just as the law relating to contempt of court ought not to unduly infringe the right to freedom of speech, by the same token, that right is not an absolute one, for its untrammelled abuse would be a negation of the right itself. Indeed, this last mentioned point is embodied in Art 14(2) of the Constitution which provides that "Parliament may by law impose … restrictions designed to … provide against contempt of court". In this regard, the Singapore Parliament has in fact provided the courts with the jurisdiction to punish for contempt in s 7(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (see also the Singapore High Court decision of *Attorney-General v Lingle* [1995] 1 SLR(R) 199 ("*Lingle*") at [7]).

18 Not surprisingly, such an approach (from balance) is adopted in other jurisdictions as well. In the Appeal Committee of the Court of Final Appeal decision of *Wong Yeung Ng v Secretary for Justice* [1999] 3 HKC 143 ("*Wong Yeung Ng (CFA)*"), for example, Litton PJ, delivering the judgment of the majority, observed thus (at 147):

> The constitutional right of free speech as contained in the Basic Law, adopting the norms set out in the International Covenant on Civil and Political Rights, is *not an absolute right*. *Every civilized community is entitled to protect itself from malicious conduct aimed at undermining the due administration of justice*. *It is an important aspect of the preservation of the rule of law*. Where the contemnor *goes way beyond reasoned criticism of the judicial system and acts in bad faith*, as the applicant has done in this case, *the guarantee of free speech cannot protect* him from punishment. [emphasis added]

19 Contemptuous acts are generally classified into two broad categories, *viz*, contempt by *interference* and contempt by *disobedience* (see, *eg*, *You Xin v Public Prosecutor* [2007] 4 SLR(R) 17 at [16] ("*You Xin*")). The former category (*viz*, contempt by interference) comprises a wide range of matters such as: (1) disrupting the court process itself (*eg*, contempt in the face of the court, alternatively termed "*ex facie* contempt"); (2) acts which risk prejudicing or interfering with particular legal proceedings ("*sub judice* contempt"); and (3) acts which interfere with the course of justice as a continuing process (*eg*, publications which "scandalise" the court and retaliation against witnesses for having given evidence in proceedings which are concluded) (see generally, *eg*, *You Xin* at [16] and the Privy Council decision of *McLeod v St Aubyn* [1899] AC 549 at 561). The latter category (*viz*, contempt by disobedience) consists in the disobedience of court orders as well as the breach of undertakings given to the court (*ibid*).

20 The present appeal relates to a charge of scandalising contempt which, as noted in the preceding paragraph, falls within the first category, *viz*, contempt by interference.

21 Finally, an important point should be emphasised. It is not new but is nevertheless of vital importance because it undergirds the law relating to contempt in general and scandalising contempt in particular. This relates to the very *raison d'être* of the law of contempt. It is trite that the law relating to contempt of court is *not* intended to protect the dignity of judges. As Lord Atkin put it in the Privy Council decision of *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335 ("*Ambard*"), "justice is not a cloistered virtue" but a public one. An act of scandalising contempt

is a public injury rather than a private tort, in so far as it involves undermining public confidence in the administration of justice. In the words of this court in *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC* [2007] 2 SLR(R) 518 at [22] ("*Pertamina Energy Trading*"):

> 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. As Lord Morris of Borth-y-Gest put it in the House of Lords decision of *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (at 302) ("*Times Newspapers*"):
>
> > In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed *it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted and their authority wanes and is supplanted*.
>
> [emphasis in original]

22 Put simply, the fundamental purpose underlying the law relating to contempt of court in general and scandalising contempt in particular is *to ensure that public confidence in the administration of justice is not undermined*. Indeed, this fundamental purpose – which finds acceptance across all Commonwealth jurisdictions – has been reiterated time and again in the Singapore context (see, *eg*, *Pertamina Energy Trading* (cited in the preceding paragraph); as well as the Singapore High Court decisions of *Attorney-General v Wong Hong Toy* [1983–1984] SLR(R) 34 at [26]; *Attorney-General v Zimmerman Fred and others* [1985–1986] SLR(R) 476 ("*Zimmerman*") at [9]; *Attorney-General v Hertzberg Daniel* [2009] 1 SLR(R) 1103 ("*Hertzberg*") at [20]; and *Attorney-General v Tan Liang Joo John* [2009] 2 SLR(R) 1132 ("*Tan Liang Joo John*") at [11]).

23 We turn now to the test for liability for scandalising contempt, *viz*, the *actus reus* and *mens rea* for the offence. As the *mens rea* requirement is well established, this judgment focuses instead on the *actus reus*. That said, for the avoidance of doubt, the necessary *mens rea* was succinctly and rightly enunciated by the Judge as follows (see *Shadrake 1* at [55]; see also above at [6]):

> 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; *Attorney-General for New South Wales v Mundey* (…) at 911–912. [emphasis added]

The test for liability for scandalising contempt

Introduction

24 Although there are two main tests for liability for scandalising contempt, *viz* the "real risk" test and the "inherent tendency" test, we note that Mr Ravi has attempted to introduce (in substance at least) a third test (the "clear and present danger" test).

The "real risk" test

(1) The test

25 The "real risk" test means precisely what it says – that, before a statement can be held to be contemptuous, it must pose a real risk of undermining public confidence in the administration of justice. As the Judge correctly pointed out, a statement which only poses a remote possibility that public confidence in the administration of justice would be undermined would *not* be held to be contemptuous (see *Shadrake 1* at [51]).

26 The "real risk" test can in fact be traced back to the English decision of *R v Duffy and others, ex parte Nash* [1960] 2 QB 188 ("*Nash*"), which related to a situation of *sub judice* contempt (see also above at [19]). In that case, Lord Parker CJ held that the test was whether there "was … a *real risk*, as opposed to a remote possibility, that the article [in question] was calculated to prejudice a fair hearing" (see *Nash* at 200; emphasis added). The "real risk" test was also applied in the House of Lords decision of *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 298–299 ("*Times Newspapers*"), where Lord Reid held that:

> [the test pronounced by Lord Parker CJ in *Nash* requiring] *a real risk, as opposed to a remote possibility* … [was 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. [emphasis added]

27 With regard to the "real risk" test, the Judge observed as follows in the court below (see *Shadrake 1* at [51]–[54]):

> 5 1 ***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 Newspapers*, ***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 659, 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 VP at 44, 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*).

5 3 ***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 Attorney-General; 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.

[emphasis in italics in original; emphasis in bold italics added]

28 In our respectful view, the Judge's elaboration of the "real risk" test in [51], *viz*, that "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" [emphasis added in bold italics], gives rise to possible ambiguity. If what the Judge meant was that a "real risk" was not to be equated with "a serious or grave risk" inasmuch as the latter connotes a "clear and present danger", this would be consistent with our *rejection* of the "clear and present danger" test for the reasons set out below (at [38]–[50]). However, it is possible to interpret the Judge's elaboration in a different way, for he observed in the same paragraph ([51]), citing Lord Reid in *Times Newspapers*, that " ***any degree of risk above*** the *de minimis* level, ***including "a small likelihood"*** , amounts to contempt, ***with the seriousness of the risk going only to mitigation*** " [emphasis added in bold italics], and repeated this observation in [77]. If this was the meaning intended by the Judge, it should be borne in mind that there is an argument to the contrary, *viz*, that " a *small likelihood*" of risk would *not*, *ex hypothesi*, constitute a "*real* risk" within the meaning of the "real risk" test (*cf* the approach of Brooke and Dubin JJA in the Ontario Court of Appeal decision of *R v Kopyto* (1988) 47 DLR (4th) 213 ("*Kopyto*"), where a "*serious* risk" test was endorsed. *Kopyto* is discussed in greater detail below at [43]–[44]). While it is uncertain as to which meaning the Judge intended to attribute to the requirement of "real risk", it is clear that his elaboration in [51] was based on a recognition of the signal importance of ensuring that public confidence in the administration of justice is not undermined.

29 In the final analysis, although the two contrasting approaches toward the "real risk" test described briefly in the preceding paragraph are interesting, we are of the view that it would be not be helpful to attempt an elaboration (especially a theoretical one) of the "real risk" test. We state this with great respect to the Judge but the brief analysis above demonstrates the very real danger of semantic analysis trumping practical factual considerations. The difficulty in seeking to elaborate on this particular test in the abstract is obvious once we recognise that the test cannot be divorced from the factual context of each case (which inevitably admits of innumerable permutations). Each case ultimately turns on its own particular facts and whether there is a "real risk" that public confidence in the administration of justice is – or might be – undermined depends very much on the court's *objective* assessment of the relevant *facts* of the case itself (see also *Shadrake 1* at [52]–[53], quoted above at [27]). It is of course true that some legal test is required. Our simple point, however, is that, in this instance at least, seeking to elaborate upon a legal test whose efficacy is to be demonstrated more in its *application* rather than its theoretical elaboration is, with respect, perhaps an approach that should be avoided. The fact of the matter is that the great strength of the "real risk" test lies, *inter alia*, in its practical robustness. *Put simply, we are of the view that the "real risk" test is adequate in and of itself and, hence, does not require further elaboration*. What *is* clear is that the "real risk" test will not be satisfied in a situation where the risk of undermining public confidence in the administration of justice is remote or fanciful. And, as explained below (at [39]), where there is, at the other end of the legal spectrum, a situation that would have satisfied the *more stringent* "clear and present danger" test, that particular situation would clearly fall within the purview of the less stringent "real risk" test. However, there will be many situations that lie in between and, as already emphasised, much will depend on the particular facts and context of the case in question.

30 We would add that, *even if* the Judge had indeed held the view that "a small likelihood" of risk constituted a real risk (a view which we disagree with for the reason stated in [28] above), such a "small likelihood" of risk would merely be a "technical" contempt that may not even attract any sanction at all (see Lord Reid's view in *Times Newspapers* at 299, and also *Shadrake 1* at [77]). Such a situation would be a highly borderline or marginal case of contempt and, viewed from the perspective of substance and even practical principle, might not even merit the *initiation* of contempt proceedings by the Respondent in the first place. We would think that, where such a situation arises, the Respondent would consider it appropriate to initiate contempt proceedings only if other very exceptional circumstances exist. That having been said, we do not think – as already explained above – that an elaboration of the "real risk" test is helpful to the courts which must decide on the facts before them. The basic question is a simple one: is there, having regard to the *facts as well as surrounding context*, a "real risk" that public confidence in the administration of justice is – or would be – undermined as a result of the impugned statement?

31 This brings us to the next issue as to who constitutes "the public" for the purposes of the law relating to scandalising contempt. However, before proceeding to consider this issue, we note that the Judge's emphasis – in reliance on prior local cases – on the small physical size of Singapore itself is, at best, a neutral factor (see *Shadrake 1* at [52], and reproduced above at [27]). With the advent of the technological age in general and the Internet in particular, the geographical size of a particular jurisdiction is no longer an important factor *vis-à-vis* the application of the "real risk" test, for the very simple reason that even in a geographically large jurisdiction, information can still be disseminated both quickly and widely. A further factor mentioned by the Judge (at [52] of *Shadrake 1*, and reproduced above at [27]) which, in our view, is also neutral at best, is his reference to "the fact that judges in Singapore are the sole arbiters of fact and law in cases coming before the courts".

32 Returning to the issue as to who constitutes "the public", it will be recalled that the Judge

observed (see *Shadrake 1* at [52], and reproduced above at [27]) that "those who come into contact with the impugned publication *may not always be average reasonable persons*" [emphasis added]. He added that:

> 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. [emphasis added]

(See also the Hong Kong Court of First Instance decision of *Secretary for Justice v Oriental Press Group Ltd* [1998] 2 HKC 627 ("*Oriental Press Group*") which the Judge cited and relied upon). If all the Judge is stating is that regard should always be had to the factual context of the case itself, this would be correct. However, there is, with respect, a certain degree of ambiguity in these observations inasmuch as they may suggest that the concept of the average reasonable person may, on occasion at least, be dispensed with. If this is what was meant, we must respectfully disagree. In our view, "the public" must, by definition, comprise the average reasonable person. It is true that different persons might respond differently to the same impugned statement. However, the court concerned must make an objective decision as to whether or not that particular statement would undermine public confidence in the administration of justice, as assessed by the effect of the impugned statement on the average reasonable person. As Lord Radcliffe observed, albeit in another context (that relating to the doctrine of frustration in the law of contract), in the House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 ("*Davis Contractors*") (at 728):

> By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises *the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself*. [emphasis added]

33 In this regard, we respectfully disagree with the view expressed in the joint judgment of Chan CJHC and Keith J in *Oriental Press Group* (at [55]) (cited in *Shadrake 1* at [28]):

> [W]e 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]

With respect, the proposition just set out is not, as explained above, consistent with what we understand to be the general position on this particular aspect of the law. Nor *ought* it to be, given the serious consequences to the persons found in contempt of court.

34 However, it should be emphasised (especially in light of the observations by Lord Radcliffe in *Davis Contractors* (cited above at [32])) that the court proceeds on an *objective* inquiry and does *not* substitute its own subjective view as to who comprises "the public", and, in so far as the observations by Lord Radcliffe just referred to suggest otherwise, they ought to be qualified accordingly. What *is* clear, in our view, is that the concept of "the public" *cannot* differ according to different factual matrices although these matrices are the relevant backdrop against which to ascertain whether or not public confidence in the administration of justice has been – or might be – undermined.

35 Finally, we would caution that the illustrations referred to by the Judge, *viz*, rants made at a dinner party and a letter circulated by a disappointed litigant to holders of high public and legal office (see [54] of *Shadrake 1*, also reproduced above at [27]) cannot admit of *only one* correct answer in *every* case. Much would, in our view, depend on *the precise facts and context* in which the impugned statement is made. For instance, we note that the Judge was careful to qualify his view (at [54] of *Shadrake 1*) that there would be no contempt in the dinner party rant scenario if the rants "are shown to have been *ignored*" [emphasis added], because in such a case there would be *no real risk of undermining public confidence in the administration of justice*. The point we are making here is simply that having regard for the precise facts and context in which the impugned statement is made is crucial.

(2) A summary

36 Let us summarise. Put simply, the "real risk" test is an adequate formulation in and of itself and requires no further theoretical elaboration. It is, at bottom, a test that means precisely what it says: is there a real risk that the impugned statement has undermined – or might undermine – public confidence in the administration of justice (here, in Singapore)? In applying this test, the court must avoid either extreme on the legal spectrum, *viz*, of *either* finding that contempt has been established where there is only a remote or fanciful possibility that public confidence in the administration of justice is (or might be) undermined *or* finding that contempt has been established *only* in the *most* serious situations (which is, as we shall see in the next section of this judgment, embodied within the "clear and present danger" test). In undertaking such an analysis, the court must not substitute its own subjective view for the view of the average reasonable person as it is clear that the inquiry must necessarily be an objective one. Much would depend, in the final analysis, on the precise facts and context in which the impugned statement is made.

37 As already mentioned, *extreme* positions in relation to the "real risk" test must be assiduously avoided – whether in form and/or in substance. This brings us to one of the main arguments canvassed by counsel for the Appellant, Mr Ravi, in the present appeal which was, as we shall demonstrate in a moment, merely an attempt to introduce a *wholly different* (and *stricter*) test, *viz*, the "clear and present danger" test, *under the guise of the "real risk" test*. Let us turn now to consider this particular argument.

(3) The Appellant's attempt to introduce the "clear and present danger" test under the guise of the "real risk" test

38 As already alluded to in the preceding paragraph, Mr Ravi sought to go *further* by arguing that there would be a "real risk" of undermining public confidence in the administration of justice *only if* the statement concerned posed *a clear and present danger* that public confidence in the administration of justice would be undermined. A moment's reflection would reveal that Mr Ravi was attempting to *equate* the concept of a "real risk" with the concept of a "clear and present danger" in so far as the potential undermining of public confidence in the administration of justice is concerned. It would take little further reflection to conclude that such an attempted "equation" is, with respect, deeply flawed. Both concepts clearly do *not* have the *same* meaning. Let us elaborate.

39 Whilst *it would follow that* a statement which posed *a clear and present danger* would *simultaneously* pose *a real risk*, the *converse* does *not* follow. In other words, a statement which would pose *a real risk would not necessarily* pose *a clear and present danger*. The criterion centring on the concept of a "clear and present danger" is *an extremely stringent standard* compared to the concept of a "real risk" and, to that extent, the latter would *encompass* the former – but *not vice versa*. Mr Ravi was, in substance, attempting to introduce a *completely different test* (*viz*, the "clear

and present danger" test) into Singapore law under *the guise of the "real risk" test*. As we have seen, both tests might overlap inasmuch as situations which fall within the scope of the "clear and present danger" test would also fall within the scope of the "real risk" test. However, as we have emphasised, the *converse* does not follow.

40 It is important, in our view, to emphasise that if a particular statement poses a "*real risk*", this would be *sufficient* to render that statement *contemptuous*. Indeed, the very concept of a "real risk" is a weighty one and it therefore comes as no surprise that *the "real risk" test is the predominant (indeed, almost exclusive) test that applies throughout the Commonwealth* (and see generally the case law cited below at [45]–[49]).

41 The "clear and present danger" test applies, in the main, in the United States' ("US") context (see, *eg*, the US Supreme Court decision of *Bridges v State of California* (1941) 314 US 252 ("*Bridges*")), where the concept of freedom of speech is inextricably linked to the *unique* culture as well as constitutional position (*ie*, the First Amendment) in the US (see *Bridges* and the Constitutional Court of South Africa's decision of *The State v Russell Mamabolo* (2001) 3 SA 409 (CC) ("*Mamabolo*") at [21]). With the exception of a seemingly solitary and divided Canadian decision which we will deal with in more detail below (at [43]–[44]), the "clear and present danger" test appears to apply in no other Commonwealth jurisdiction. To return to this particular test *as set in its US context*, it should, first, be noted that in the US *there does not even appear to be a concept of scandalising contempt to begin with* (see *Bridges*) – the US Supreme Court in *Bridges* considered criticism of the courts, no matter how unrestrained, made after a decision has been rendered, to be an exercise of the right of free discussion and free speech. As alluded to above, the concept of freedom of speech has – owing to the unique cultural as well as constitutional heritage of the US – been accorded a paramountcy in a manner *quite different* from other Commonwealth jurisdictions. This is not surprising when we consider the language of the First Amendment itself, as follows:

> Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [emphasis added]

The US First Amendment is clearly quite different from the corresponding articles in the respective constitutions of Commonwealth jurisdictions (of which Art 14 of the Singapore Constitution is a representative illustration). This is not to state that freedom of speech is absent – or even lacking, for that matter – in Commonwealth countries. There is, instead, far more attention accorded to the issue of *balance* between the right to freedom of speech on the one hand and its abuse on the other (*inter alia*, by conduct amounting to contempt of court). One might add that the paramountcy accorded to the right to freedom of speech in the US is *not*, with respect, *necessarily* an approach that *ought* to be emulated as it could (as we have noted above at [17]) actually result in possible *abuse* and *consequent negation* of the right itself. This is no mere parochial rhetoric but is, rather, premised on logic and commonsense. Hence, it is no surprise, therefore, that jurisdictions across the Commonwealth (which are numerous as they are diverse and which, of course, include Singapore) adopt, instead, the approach from *balance* (see also above at [17]–[18]).

42 Returning to the "clear and present danger" test, it was adopted in the US context with respect to *sub judice* contempt (see, *eg*, *Bridges* itself). On this related note, however, there is, in our view, no reason in principle why the "*real risk*" test (as opposed to the "clear and present danger" test) ought not to apply in situations of *sub judice* contempt as well. Indeed, in the English context, the "real risk" test first enunciated in *Nash* related in fact to a situation of *sub judice* contempt, the test there being whether there was a real risk that the impugned statement would *prejudice a fair*

hearing (see also above at [26]).

43 That having been said, there is one apparently solitary Commonwealth decision which furnishes some (but, as we shall see, by no means clear) support for the "clear and present danger" test in the context of scandalising contempt – the Ontario Court of Appeal decision of *Kopyto*. *Kopyto* was perceptively summarised and analysed by Mortimer VP in the Hong Kong Court of Appeal decision of *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKC 24 ("*Wong Yeung Ng (CA)*"), which affirmed the decision of the Court of First Instance in *Oriental Press Group*, and whose decision the Appeal Committee of the Court of Final Appeal in *Wong Yeung Ng (CFA)* refused to give leave to appeal against. In *Wong Yeung Ng (CA)*, Mortimer VP summarised the decision in *Kopyto* as follows (at 41–42):

> … The five member Ontario Court of Appeal was unanimous that the momentary but excessive reaction of a disappointed lawyer was not made out as a contempt. In its consideration of the necessary ingredients of contempt by way of scandalising the court it is impressive. …
>
> It is necessary to examine the judgments in a little detail for the reason that on issues other than the result the court was split three ways. Cory and Goodman JJA were of the view that in order to accord with the fundamental freedoms in the [Canadian] Charter the contempt must be shown to involve a 'real, substantial and immediate' (Cory) or 'real, significant and present or immediate' (Goodman) danger to the administration of justice.
>
> Houlden JA stood alone in deciding that no offence of scandalising the court, however framed, could be consistent with the Charter and therefore there could be no such contempt.
>
> Brooke and Dubin JJA on the other hand considered the offence to be a necessary exemption provided that the statement complained of is calculated to bring the administration of justice in disrepute and it is shown that there is a 'serious risk that the administration of justice would be interfered with – that risk could be expressed as serious, real or substantial'.

44 As Mortimer VP aptly pointed out in the passage quoted from his judgment in preceding paragraph, the decision in *Kopyto* in so far as the legal test for scandalising contempt is concerned was a *split* one. Brooke and Dubin JJA clearly opted for the "real risk" test, whereas Cory and Goodman JJA opted for the "clear and present danger" test. The remaining judge, Houlden JA, did not need to decide on the precise test to be adopted. Hence, *Kopyto* is by no means a strong Commonwealth decision in favour of the "clear and present danger" test. Indeed, to the best of our knowledge, there does not appear to be any decision subsequent to *Kopyto* which definitively favoured the approach of Cory and Goodman JJA.

45 On the contrary, the vast majority of decisions in other jurisdictions point in the *opposite* direction (*viz*, in favour of the "real risk" test).

46 For example, in Hong Kong, although the Court of Appeal in *Wong Yeung Ng (CA)* did not really give a definitive pronouncement as to which view in *Kopyto* ought to be preferred, the Court of Final Appeal in *Wong Yeung Ng (CFA)* did *not* grant leave to appeal to the appellant, one of the grounds in his application being that the Hong Kong courts should adopt the *Kopyto* "clear and present danger" test instead of the "real risk" test.

47 And, in *Mamabolo*, the Constitutional Court of South Africa agreed with the minority's view in *Kopyto*, expressing misgivings (at [35]) about the:

> … suitability of [the "clear and present danger"] test in a jurisdiction that does not have to apply the First Amendment nor enjoys the benefit of the extensive and complex jurisprudence so carefully constructed by the United States courts.

48 We would add that the views of Brooke and Dubin JJA in *Kopyto* are more persuasive than those of Cory and Goodman JJA because they acknowledged the clear difference between the Canadian and the US position, citing at [72] the following observations of the New Zealand Court of Appeal in *Radio Avon* (at 234):

> We have not overlooked the submissions which Mr Palmer made to us based upon various cases decided in the United States of America. We do not propose to refer to those cases in detail. One of them is a decision of the Supreme Court of the United States in *Wood v Georgia* 370 US 375 (1962). The test adopted was that "The danger must not be remote or even probable; it must immediately imperil" (ibid, 385). *The American courts appear to have directed their attention to the existence of a clear and present danger of a court being influenced, intimidated, impeded, embarrassed or obstructed in the administration of justice. English law, on the other hand, has also attached great importance to the need to preserve public confidence in the administration of justice generally*. This court should not depart from that attitude subject, of course, in the type of contempt now under consideration, to the public right of fair comment and criticism, and to the possible defence of justification earlier referred to in this judgment. [emphasis added]

49 In summary, the "clear and present danger" test does *not* represent the law in Singapore and Mr Ravi's attempt to introduce it under the guise of the "real risk" test fails.

50 Let us turn now to consider the other main test, *viz*, the "inherent tendency" test as well as its relationship to the "real risk" test.

The "inherent tendency" test

(1) The test

51 The "inherent tendency" test was first articulated by the Singapore High Court in *Attorney-General v Wain Barry J and Others* [1991] 1 SLR(R) 85 ("*Wain*") (the related judgment with regard to sentence is reported at *Attorney-General v Wain Barry J* [1991] 1 SLR(R) 108), where Sinnathuray J observed as follows (at [54]):

> … it is *not* a requirement of our law … 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*** . [emphasis added in italics and bold italics]

52 With respect, there does not appear to be any clear authority for the "inherent tendency" test and, indeed, the learned judge in *Wain* did not cite any such authority. However, as the Judge correctly observed, this particular test was "subsequently referred to in decisions of the [Singapore] High Court and seems to have developed a life of its own" (see *Shadrake 1* at [34]). The various Singapore High Court decisions which appeared to adopt the "inherent tendency" test include *Attorney-General v Chee Soon Juan* [2006] 2 SLR(R) 650 at [31]; *Hertzberg* at [25]–[34]; and *Tan Liang Joo John* at [12].

53 We do note, however, that, in the Supreme Court of Queensland decision of *Attorney-General for State of Queensland v Colin Lovitt QC* [2003] QSC 279 ("*Lovitt*"), Chesterman J did observe (in a

similar vein to Sinnathuray J in *Wain* (above at [52])), as follows (at [58]):

> The law appears to be that where the contempt is constituted by criticism which tends to undermine public confidence in the due administration of justice the intention of the critic is largely irrelevant. What matters is *the inherent tendency* of the criticism *to diminish the authority of the court and the public's confidence in it*. [emphasis added]

(2) The relationship between the "inherent tendency" test and the "real risk" test

54 The test laid down in *Wain* (reproduced at [51] above) is somewhat ambiguous in so far as it does not clearly set out the precise relationship between "real risk" and "inherent tendency".

55 It may be possible, on one reading at least, to interpret *Wain* as conceptualising "inherent tendency" *in contradistinction* to "real risk"; indeed, this is what several courts have done in subsequent cases.

56 However, a holistic reading of *Wain* suggests that the learned judge did *not* intend to divorce the test from *its actual or potential impact on public confidence in the administration of justice*. It is, in fact, axiomatic that the law in general and the law relating to scandalising contempt in particular do not – and cannot – operate in a hermetically sealed environment. That this is the case is clearly illustrated by the actual application of the law to the facts by the learned judge himself (and a similar interpretation could arguably be taken of *Lovitt*). This must surely be the case as, in our view, it would be contrary to both logic as well as commonsense for the "inherent tendency" test – or any test for that matter – to be stated only at a purely abstract or theoretical level. Indeed, even a theoretical formulation must have in view the vital sphere of *application, having regard of course to the particular facts and context of the case in which that formulation is applied*. In our view, in none of the decisions cited above (at [52]) is there any indication whatsoever that the court concerned had ignored the particular facts and context of the case at hand in arriving at its decision. Looked at in this light, the *apparent* distinction between the "inherent tendency" test on the one hand and the "real risk" test on the other is, in our view, a "legal red herring".

57 As stated earlier, however, we note that subsequent courts have appeared to define the "inherent tendency" test *in contradistinction to* the "real risk" test. Although those cases would have been decided the same way even if the "real risk" test was applied, this provides us reason enough to eschew the use of the term "inherent tendency". As the Judge noted (at [50] of *Shadrake 1*), emphasising the test to be that of "real risk" would avoid controversy and misunderstanding by conveying precisely the legal test to layperson and lawyer alike. We therefore unequivocally state that the "real risk" test is the applicable test *vis-à-vis* liability for scandalising contempt in Singapore.

58 We turn now to consider the concept of *fair criticism*. As we shall see, although it was apparently assumed in the court below that this concept is a *defence* in the law relating to contempt, it might well be the case that – whilst still relevant (and even vital to the ultimate outcome of the case concerned) – this particular concept is *an integral part of the entire process of inquiry as to whether or not the impugned statement is in contempt of court in the first place. Put simply, the concept of fair criticism might go to the issue of liability rather than constituting a defence after a finding of liability for contempt has been made*. Let us now turn to the concept itself.

The concept of fair criticism

Introduction – liability or defence?

59 It had, apparently at least, been assumed in the court below that the concept of fair criticism is a *defence* to a charge of contempt of court (see *Shadrake 1* at [70]–[76]). However, and as was suggested to counsel during oral submissions before this court, the precedents cited in support of this approach towards the concept of fair criticism are – at best – ambiguous. Put simply, it could be said that these precedents, whilst discussing the *concept* of fair criticism, nevertheless do *not* treat it as a *separate defence* as such but, rather, *as an integral part of the process of analysis as to whether or not the impugned statement is in contempt in the first place*. Hence, the question posed in the heading to this section of the judgment.

60 To elaborate, *none* of the key decisions *expressly* refers to the concept of fair criticism in the context of a separate defence. For example, in *Ambard* (which is often cited as one of the seminal cases with regard to fair criticism), the key passage in Lord Atkin's judgment (delivered on behalf of the Privy Council) is as follows (at 335):

> 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]

61 One would immediately note that there is no mention in the passage just quoted of fair criticism being a formal legal *defence* as such. Indeed, it appears that Lord Atkin was focusing on the concept of fair criticism in the context of *liability*. This approach also appeared to be adopted much earlier in the English decision of *The Queen v Gray* [1900] QB 36 ("*Gray*"), where Lord Russell CJ observed thus (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*. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is personal scurrilous abuse of a judge as a judge. [emphasis added]

62 More recently, in the English Court of Appeal decision of *Regina v Commissioner of Police of the Metropolis, ex parte Blackburn (No 2)* [1968] 2 QB 150 ("*Blackburn*"), Lord Denning MR observed (in a similar vein) thus (at 155):

> 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 public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

So it comes to this: Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. *The article contains an error, no doubt, but errors do not make it a contempt of court*. We must uphold his right to the uttermost.

I hold this *not to be a contempt of court*, and would dismiss the application.

[emphasis added]

63 In the same decision, Salmon LJ also observed, as follows (at 155–156):

It follows that no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits. [emphasis added]

64 Finally, Edmund Davies LJ observed (at 156; and, significantly, citing *Gray* (see above at [61])):

The right to fair criticism is part of the birthright of all subjects of Her Majesty. *Though it has its boundaries, that right covers a wide expanse, and its curtailment must be jealously guarded against*. It applies to the judgments of the courts as to all other topics of public importance. *Doubtless it is desirable that critics should, first, be accurate and, secondly, be fair, and that they will particularly remember and be alive to that desirability if those they would attack have, in the ordinary course, no means of defending themselves*. [emphasis added]

65 In *Radio Avon*, the court observed that there was a "right" to criticise the work of the courts. The relevant extract reads as follows (at 230):

The present case falls within the first of the two categories of contempt referred to by Lord Russell. As such it is a type of contempt which does not, as a general rule, directly and immediately prejudice the conduct of some particular case either pending or in the process of being heard. The justification for this branch of the law of contempt is that it is contrary to the public interest that public confidence in the administration of justice should be undermined. But in this class of contempt which, as we have said, generally occurs otherwise than in the context of pending litigation, the courts have always recognised that their activities can properly be made the subject of criticism, directed in good faith towards the improvement of the administration of justice. Speaking of this particular class of contempt Lord Morris in *McLeod v St Aubyn* said, "Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism" ([1899] AC 549, 561). Lord Russell emphasied the same point in *R v Gray* and it was developed by Lord Atkin in *Ambard v Attorney-General*. In a celebrated passage in his judgment he said:

> "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" ([1936] AC 322, 335).

The right of the press or the public to criticise the work of the courts was again strongly upheld by the Court of Appeal in England in *R v Commissioner of Police, Ex p Blackburn (No 2)* [1968] 2 QB 150; [1968] 2 All ER 319. The courts of New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice.

It will be noted that the court in *Radio Avon* cited the passage from *Ambard* in coming to its conclusion that it was in the interest of freedom of speech that criticism put forward fairly and honestly for a legitimate purpose should not be found to be in contempt. As we have earlier demonstrated, *Ambard* appears to focus on fair criticism in the context of liability, rather than as a formal defence.

66 In the Australian High Court decision of *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Mason CJ observed thus (at 32–33):

> So 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. In *R.* v. *Dunbabin*; *Ex parte Williams*, Rich J., with reference to the summary jurisdiction to punish for contempt, said:
>
> > "It is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its functions. The law permits in respect of Courts, as of other institutions, the fullest discussions of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained."
>
> This approach is based upon the underlying view that "[f]air criticism of the decisions of the Court is not only lawful, but regarded as being for the public good", to repeat the words of Evatt J. in *R.* v. *Fletcher*; *Ex parte Kisch*. However, as his Honour went on to point out, "the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice".

67 In the same decision, Brennan J stated as follows (at 38–39):

> Thus it has been said that it is no contempt of court to criticize court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit. 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.

68 It is, of course, possible to interpret the statements of principle set out in the preceding paragraphs of this part of the judgment as being consistent with the concept of fair criticism as a *defence* inasmuch as that particular interpretation would also result in the absence of contemptuous conduct as well. *However*, the *nature, tenor and thrust* of these statements of principle are, in our view, more consistent with the concept of fair criticism as going towards *liability* instead.

69 There is, however, at least one decision that refers to the "defence" of fair criticism. In *Gilbert Ahnee and others v Director of Public Prosecutions* [1999] 2 AC 294 ("*Ahnee*"), the Privy Council noted (at 306):

> There is available to a defendant a defence based on the "right of criticising, in good faith, in private or public, the public act done in the seat of justice:" see *Reg. v. Gray* [1900] 2 Q.B. 36, 40; *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322, 335 and *Badry v. Director of Public Prosecutions* [1983] 2 A.C. 297.

However, as just mentioned, the prior decisions cited by the Privy Council in *Ahnee* do not constitute (at least unambiguously) authority for conceptualising fair criticism as a defence.

70 We note that the major treatises on the law of contempt shed little light on the issue of whether fair criticism relates to liability or operates as a formal legal defence. For example, CJ Miller, *Contempt of Court* (Oxford University Press, 3rd Ed, 2000) at para 12.31 *et seq* purports to deal with "[*p*]*ossible* [d]efences" [emphasis added], noting that defences to scandalising contempt "are not questions which have been subjected to detailed analysis in an English court", and that "any conclusions must necessarily be tentative". The text proceeds to analyse case law on the "possible defences" of justification and fair comment, without drawing any firm conclusions as to whether or not these concepts constitute defences to scandalising contempt. Similarly, in David Eady & ATH Smith, *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 3rd Ed, 2005) at para 5-252 *et seq*, the learned authors note that the defences available to scandalising contempt are uncertain.

71 The reports of law commissions in England and Australia are similarly inconclusive. The Australian Law Reform Commission in its report *Contempt* (Report No 35, Australian Government Publishing Service, Canberra, 1987) ("the ALRC Report") cited the passage from *Ambard* for the proposition that there was a right to criticise the judiciary (see the ALRC Report at para 413). However, no elaboration on the characterisation of such a right to criticise was proffered. The ALRC Report went on to debate the existence of the defences of justification and fair comment, noting that there were conflicting case law authorities on the issue of the defences to contempt. The ALRC subsequently tentatively rejected both defences (see the ALRC Report at paras 415 and 416). Notably, there was never any mention of a *defence of fair criticism* as such (see the ALRC Report at para 437 *et seq*). In our view, the closest that the ALRC Report came to addressing the concept of fair criticism (as understood by the Judge) was in an ambiguous statement at para 438, which reads in relevant part, as follows:

> Finally, there is authority in the cases to the effect that in the course of trying a scandalising case, a court will exonerate the accused unless it finds the allegedly scandalising remarks to be 'unjustified', 'unwarrantable' or 'baseless' [citing *R v Fletcher, ex parte Kisch* (1935) 52 CLR 248 at 257; *Gallagher v Durack* (1983) 152 CLR 238 at 244]. This is *not the same approach to the matter as allowing the accused to plead and prove a formal defence of justification*. It appears

> to refer the matter to judicial instinct, or to what can be ascertained through judicial notice. But this element in scandalising law will protect the accused against being convicted where it is plain that his or her allegations have a clear and genuine basis in fact. [emphasis added]

The italicised portion suggests that there is some other concept which is akin to, but *not the same as*, a "*formal* defence of justification" [emphasis added]. It is possible that, having earlier cited the *Ambard* passage at para 413 of the ALRC Report, the ALRC was in fact alluding to some concept of fair criticism not amounting to a formal defence – albeit, and with respect somewhat confusingly, in the context of the concept of *justification*.

72 In the report of the Law Commission of England and Wales entitled *Offences Relating to Interference with the Course of Justice* (Law Commission No 96, 7 November 1979) ("the EWLC Report"), it was recommended at para 3.70 that the offence of scandalising contempt should be replaced by a new offence which punishes the publication or distribution of false matter:

> … with intent that it be taken as true and knowing it to be false or being reckless whether it is false, when it imputes corrupt judicial conduct to any judge, tribunal or member of a tribunal.

In other words, a person will not be convicted of contempt if *either* (a) the allegation made by him or her is true; *or* (b) the allegation is false, but the alleged contemnor honestly believed it to be true and was not reckless as to whether it was true or false. This approach bears some similarity to the role given to the concept of fair criticism by the Judge, and may be thought to conceive of fair criticism as a *defence*. However, there is no reference to the concept of fair criticism whatsoever in the EWLC Report, much less any analysis of fair criticism existing as a formal legal defence.

73 In the 1974 report of the Committee on Contempt of Court chaired by Phillimore LJ ("the Phillimore Report"), which was referred to in the EWLC Report, the Phillimore Committee recommended that justification should be a defence to contempt if the impugned statements were demonstrated to be for the public benefit (see the Phillimore Report, at paras 165–167). We note that the Phillimore Report did not cite any case law for its proposed norms, and that, again, no reference was made to the concept of fair criticism as such.

74 We turn now to examine s 5 of the Indian Contempt of Courts Act 1971 ("ICCA"), which appears to address the concept of fair criticism (and which, to the best of our knowledge, is probably the only attempt in the Commonwealth to deal *legislatively* with this concept). Section 5 reads as follows:

> ***Fair criticism*** **of judicial act not contempt**
>
> 5. A person shall not be guilty of contempt of court for publishing any *fair comment* on the merits of any case which has been heard and finally decided. [emphasis added]

We also note that s 8 of the ICCA provides that:

> **Other defences not affected**.
>
> 8. Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt of court has ceased to be available merely by reason of the provisions of this Act.

75 With respect, there is a degree of ambiguity in s 5 concerning whether fair criticism, under

Indian law, relates to *liability or* operates as a formal legal *defence*. On one view, it may be thought that s 5 treats the concept of fair criticism as being synonymous with the *defence* of "fair comment" in defamation. This view may be derived from the fact that the savings provision in s 8 refers to "[o]ther defence[s]", thus possibly implying that s 5 was intended to refer to a "defence". It may also stem from the Report of the Sanyal Committee which, in recommending the codification of contempt laws (eventually resulting in the ICCA), discussed "fair criticism" under the chapter entitled "Defences". However, it should be noted that no elaboration is provided in the ICCA as to how precisely the concept of "fair criticism" should be characterised, and there is no express reference to it being a "defence" as such. Furthermore, s 5 appears to be a codification of the position in *Ambard* and *Gray* (see the Report of the Sanyal Committee, Chapter IX section 3; and see *Aiyer's Law of Contempt of Court, Legislature & Public Servants* (Law Book Company, 5th Ed, 1976) at 91), which decisions we have earlier noted to be ambiguous *vis-à-vis* the characterisation of the concept of "fair criticism".

76 The other possible interpretation of s 5 is that the ICCA merely treats fair criticism as being related to the issue of liability rather than constituting a defence. In this regard, we note that a 2006 legislative amendment *expressly* provided for a *defence* of justification in s 13 of the ICCA, as follows:

> **Contempts not punishable in certain cases**.
>
> 13. Notwithstanding anything contained in any law for the time being in force,—
>
> …
>
> (b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid *defence* if it is satisfied that it is in public interest and the request for invoking the said *defence* is bona fide.
>
> [emphasis added]

Looked at in this light, the only *defence expressly* referred to in the ICCA is one of *justification*. This suggests that the s 5 reference to "fair criticism" was not intended to establish a *defence* of "fair criticism" as such. Indeed, it may indicate that "fair criticism" in s 5 should be characterised in a manner akin to how we have characterised *Ambard* and *Gray*, *viz*, as being related to *liability* instead of being a formal legal *defence* (see [60]–[61] above).

77 We are not well placed, and certainly do not propose, to definitively determine how the concept of "fair criticism" should be characterised under the ICCA. Our only observation is that there is potential ambiguity with regard to the precise role and operation of the concept of fair criticism in Commonwealth case law and (possibly) even legislation.

78 However, whether one approach is adopted instead of the other is not merely a theoretical issue. If the concept of fair criticism relates to *liability*, then the *evidential* burden would be on the party relying on it. The *legal* burden, on the other hand, would be on the Respondent to prove beyond a reasonable doubt that the impugned statement does not constitute fair criticism, and that it presents a real risk of undermining public confidence in the administration of justice. If, however, the concept of fair criticism constitutes a *defence*, then the *legal* burden would shift to the alleged contemnor to show on the *balance of probabilities* that the impugned statement amounts to fair criticism.

79 In Singapore, although the court's power to punish for contempt of court is constitutionally and

statutorily expressed (see above at [17]), there is no statutory provision (*contra* the ICCA) which provides guidance on whether fair criticism relates to liability or operates as a formal legal defence. In our view, given the ambiguity in case law and authorities from other Commonwealth jurisdictions, the provision of any *defence* to scandalising contempt – which is itself manifestly a question of policy – is more properly addressed by Parliament (as was done in India via the ICCA in general, and the 2006 legislative amendment of the ICCA in particular). However, until defences to contempt are rigorously considered and legislatively provided for, it falls to the courts to determine how the concept of fair criticism functions in practice under the common law.

80 We prefer viewing the concept of fair criticism as going towards *liability* for contempt of court. Indeed, given that scandalising contempt is *quasi-criminal* in nature, this approach has the additional benefit of ensuring that the alleged contemnor is not disadvantaged *vis-à-vis* the implications with regard to the burden of proof (discussed above at [78]). At this juncture, we note that a caveat is necessary: the precise characterisation of the concept of fair criticism was not fully canvassed before us (see also above at [59]). Accordingly, our views on this point must necessarily be taken, to that extent, to be provisional in nature. We do, however, apply – where the concept of fair criticism has been raised – the approach we have stated at the outset of this paragraph to the impugned statements in this particular appeal.

The applicable principles

81 Even if, as we have assumed, the concept of fair criticism goes towards *liability* for contempt of court, this by no means renders nugatory the various principles and factors that have already been laid down in previous decisions – notably, in *Tan Liang Joo John*, where Judith Prakash J cited (at [14]) the passage from *Ambard* (which is, in turn, cited above at [60]) in support of her proposition that "[f]air criticism does not amount to contempt of court". The learned judge then proceeded to pertinently observe as follows (at [15]–[23]):

> 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. In the early English decision of *Rex v White* (1808) 1 Camp 359n; 170 ER 985, Grose J decided that the censure of a judge and jury in an article constituted contempt of court because:
>
> > [The article] *contained no reasoning or discussion*, but only declamation and invective … written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country.
> >
> > [emphasis added]
>
> 17 As Lord Russell of Killowen CJ stated in *The Queen v Gray* (…):
>
> > 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.
>
> 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 (see Nigel Lowe and Brenda Sufrin, *Borrie & Lowe: The Law of Contempt* (Butterworths, 3rd Ed, 1996) ("*Borrie & Lowe*") at p 349). Lord Atkin stipulated that fair criticism needs to be "respectful" (see *Ambard* (…). In *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 2)* [1968] 2 WLR 1204 (at 1207), Salmon LJ stated that "no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith". Similarly, in *Halsbury's Laws of England* vol 9(1) (Butterworths, 4th Ed Reissue, 1998) it is said that (at para 433):

> [C]riticism of a judge's conduct or of the conduct of a court, even if strongly worded, is not a contempt provided that the criticism is fair, *temperate* and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court.
>
> [emphasis added]

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. As Mortimer VP noted in *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKC 24 ("*Wong Yeung Ng*") (at 44):

> ... Bona fide, balanced and justified criticism is susceptible to reasoned answer or even acceptance. Sustained scurrilous, abusive attacks made in bad faith, or conduct which challenges the authority of the court, are not susceptible to reasoned answer. If they continue unchecked they will almost certainly lead to interference with the administration of justice as a continuing process.

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* (…) at p 349 n 5) 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.

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* (…); *Halsbury's Laws of England* (…); 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.

82 The above extract was also cited in part by the Judge in *Shadrake 1* (at [70]). In our view, the factors enunciated in the preceding paragraph (albeit by no means exhaustive) are very helpful in assisting the court concerned to arrive at a conclusion as to whether or not the impugned material is in contempt of court. Indeed, it is at least arguable that Prakash J appeared, in *Tan Liang Joo John*, to treat the concept of fair criticism as going towards liability rather than as an independent defence.

83 We pause here to address two arguments raised by the Respondent. The Respondent argued, first, that statements calling into question the independence, impartiality and integrity of courts can *never* amount to fair criticism. Second, the Respondent contended that allegations made outside the formal avenues (*eg*, the relevant court proceedings or the removal mechanism provided for in Art 98(3) of the Constitution) can *never* amount to fair criticism.

84 We do not agree with these arguments. With regard to the first argument (*viz*, limiting the scope of fair criticism to criticism that *does not* call into question the independence, impartiality and integrity of courts), we are of the view that this *overly limits* the ambit of fair criticism. This view was also taken by the Judge (see *Shadrake 1* at [76]) and in *Tan Liang Joo John* (at [21]–[23]). Indeed, the Respondent's argument appears to render the concept of fair criticism *nugatory*, since most allegedly contemptuous statements, by their very nature, call into question the independence, impartiality and integrity of courts. We are fortified in taking this view by the wealth of Commonwealth authority holding that an imputation of judicial impartiality or impropriety is not *ipso facto* scandalising contempt (see the High Court of Australia decision of *R v Nicholls* (1911) 12 CLR 280 at 286; the New South Wales Supreme Court decision of *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887 at 910–911; the New Zealand Court of Appeal decision of *Radio Avon* at 230–231; the English Court of Appeal decision of *Blackburn* at 155–156; and the Privy Council decision of *Ahnee* at 1314).

85 With regard to the second argument (*viz*, limiting the scope of fair criticism to criticism raised through the formal avenues provided for in the law), we are of the view that this is too onerous a limitation on the right to free speech. An alleged contemnor should not be precluded from proffering fair criticism merely because he or she did not have the means, or did not choose, to air his or her *rationally supported* criticisms via any of the formal legal avenues. Indeed, we agree with the Judge's view that resort to the Constitutional inquiry process cannot be the only way in which courts and judges can be criticised for wrongdoing. As the Judge noted in *Shadrake 1* at [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.

A summary

86 Whilst the concept of fair criticism could either go towards liability for contempt *or* constitute a defence to what would otherwise be considered contemptuous conduct, we prefer to utilise the concept in the *former* sense. In approaching this concept, the court should bear in mind the various factors set out (albeit non-exhaustively) in *Tan Liang Joo John* (above at [81]). The court ought always to apply this concept not only in relation to *the precise facts and context but also bearing in mind the following key question throughout*: does the impugned statement constitute fair criticism, or does it go on to cross the legal line by posing a real risk of undermining public confidence in the administration of justice – in which case it would constitute contempt instead?

Our decision

The issue of liability

Introduction and context

87 Having stated the applicable principles of law, we turn now to apply them to each of the eleven statements which the Judge found to be in contempt of court. We also note that the Respondent has not filed a cross-appeal against the decision of the Judge in the court below against either liability or sentence.

88 Before considering each of the statements, the relevant background and context should also be noted.

89 First, in so far as the *scope of distribution/publication* of the book is concerned, counsel for the Appellant, Mr Ravi, had informed the Judge that almost 6,000 copies of the book had been sold internationally, especially at airports, and that some copies were being circulated in Singapore (see *Shadrake 2* at [27]). Mr Ravi further stated that (*ibid*):

> In fact, in my office, I'll be very honest, I'm not selling the book. I have -- so many lawyers have come to take the books because my client have provided a lot of copies from the distributors. I'm not selling it but I have given lawyers gratuitously at the -- my clients have been quite pleased that many lawyers are turning up in droves to buy -- to have a copy of the book. Some would like to just make payment at their volition.

90 Ms Kumarassamy Gunavathy, a senior analyst with the Media Authority of Singapore, also deposed by affidavit that she bought the book from Kinokuniya Book Store of Singapore Pte Ltd in Ngee Ann City. She stated that the book had been sold in Singapore by several other bookstores, including Select Books Pte Ltd and Mary Martin Book Sellers Pte Ltd. The Appellant chose not to cross-examine Ms Gunavathy on her affidavit, and therefore the contents of her affidavit are taken to be accepted by the parties (see *Shadrake 1* at [84]).

91 Second, the Judge noted that the Appellant held himself out as an investigative journalist (see *Shadrake 1* at [85]–[86]). A perusal of the following parts of the book illustrates this point:

(a) The announcement on the back cover ("investigative journalism has come to mean the kind of brave reporting that exposes injustice … 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");

(b) The bibliographical note ("Alan Shadrake is a renowned veteran investigative journalist and author whose 50-year career has taken him around the world");

(c) The preface ("meticulous search of legal files and archived cases going back to 1963", references to unnamed lawyers, Central Narcotics Bureau officers and an anonymous librarian at the National Library);

(d) Extracts at page 21 ("yet another major scoop in my long career as an investigative journalist"); and

(e) A full page photograph of the Appellant posing outside the Supreme Court of Singapore, captioned: "Author Alan Shadrake spent months scrutinising court and other records all over Singapore to unearth judicial scandals".

92 Accordingly, the statements should be read as being statements emanating from a person who has held himself out as *an investigative journalist* and their actual or potential effect on the public should be assessed accordingly. It should be noted that the Appellant does not disagree with the Judge's holding on this particular point.

93 We turn now to consider the eleven statements *seriatim* in light of the legal principles set out above.

The first statement

94 The first statement is found at page viii of the book, and reads as follows:

> *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 in italics and bold italics]

95 The Judge was of the view that "legal system" in this statement could not be read to include everything but the courts; indeed, the Judge considered that the courts are the first thing that comes to mind when a reference is made to a "legal system" (see *Shadrake 1* at [88]). Accordingly, he held that the first statement constituted a clear accusation that the courts (and other parts of the legal system) took politics, international trade and business into account in determining who lives or dies on the gallows (*ibid*).

96 On the other hand, Mr Ravi argues, on behalf of the Appellant, that the Judge misinterpreted the first statement. He points out that nowhere in the context of this passage is there any reference to improprieties on the part of a judge or a court. He also points out that in the first substantive chapter of the book, ten pages down from the first statement, the target of the Appellant's criticism is the *executive* (narcotics police, CNB officer, and prosecution). Accordingly, he contends that adopting a contextual interpretation, the Appellant's key argument in the first statement is that *prosecutorial* decisions weigh heavily in the outcome of certain death penalty cases. The Appellant further argues that the Judge should have taken the same approach to "legal system" as that in the third statement (which was found not to be contemptuous). The third statement, found at page 27 of

the book, reads:

> 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. [emphasis added]

97 Although Mr Ravi purported to rely on a *contextual* approach, he has *misapplied* it. The first statement, whilst occurring at page viii of the book, is actually located within the *second* page of the entire book itself. It is also part of the *Preface* which attempts to give an *overview* of the book. More importantly, the context of the first statement, *viz* the sentences which *immediately precede* it on the same page, is as follows:

> 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. It 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 largely went 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 in italics and bold italics]

98 There are, in fact, two main themes within the very *title* of the book itself, *viz*, "Once a Jolly Hangman – *Singapore Justice in the Dock*" [emphasis added]. Both themes are reflected in the passage from the Preface quoted in the preceding paragraph. The first theme is the examination of the particular career of the "most prolific executioner in the world". This first theme is the leitmotif to the second broader – and main – theme of the book (disingenuously slipped in, as it were, in the form of the subtitle "*Singapore Justice in the Dock*"), the distinction between the two themes being emphasised by the short – but pithy and telling – sentence just before the first statement itself, *viz*, "[a]nd something else" (quoted in bold italics above). And that "something else", as the first statement puts it, concerns "[s]omething *sinister*" [emphasis added]. Further, part of that machinery which allegedly perpetrates such undesirable results is "the Singapore *legal system*" [emphasis added]. Even when read literally (as opposed to contextually), the meaning is clear. Whilst Mr Ravi refers to executive action as well as prosecutorial decisions, it is axiomatic (especially to the average reasonable person who is a member of the public and, we might add, *a fortiori*, to persons who are legally trained) that a *key institution* in the administration of *justice* is *the courts* (which, *inter alia*, *actually decide* cases by applying the relevant law to the evidence before them). And, as already alluded to earlier in this paragraph, this meaning is buttressed by the subtitle of the book itself which encapsulates this theme even more pithily and succinctly, *viz*, "Singapore Justice in the Dock". Indeed, the Appellant has placed *the courts* in his own "dock" and has found the result, amongst other things, "*sinister*". If further support is required for the interpretation just adopted, one need refer no further than one page back, *viz*, to the very first page of the Preface – and, indeed, to the *very first sentence* thereof, which reads as follows: "It was never my intention to go to Singapore and write a book *about its revered but much feared chief executioner* ***or its justice system*** " [emphasis added in italics and bold italics]. One might add that – whether by design or inadvertence – the Appellant was clearly utilising the word "or" in the sentence just quoted in a *conjunctive* sense, having regard to the sense as well as context concerned. Finally, the back cover of the book (which also attempts to encapsulate the themes of the book) drives home the interpretation we have discerned in no uncertain terms – *inter alia*, in the sentence which states that the book "reveals *the* ***cruelty and imprudence*** *of an* ***entire judicial*** *system*" [emphasis added in italics and bold italics].

99 We would add that the third statement (reproduced above at [96]) – albeit referring to the

term "legal system" – was held *not* to be contemptuous in the court below. We agree with the Judge. Indeed, there is a fundamental difference between the third statement and the first statement. In the latter, there is a clear reference to the judicial function of determining liability and imposition of the death sentence ("determine who lives and who dies on the gallows"), whereas there is no such unambiguous reference in the former. Giving the Appellant the benefit of the doubt, as the Judge rightly did, there is reasonable doubt that the third statement actually referred to the courts. For the reasons given above, however, the same cannot be said of the first statement.

100 Put simply, the first statement, whilst short in length is long on meaning – a meaning that attributes by way of summary and theme to, *inter alia*, the *judiciary*, the role of achieving *sinister* ends and by "[working] in secret" at that. The first statement further suggests that the judiciary is influenced by considerations relating to "politics, international trade and business" when determining liability for capital offences. This is the *very antithesis* of the impartial administration of justice which the judiciary is pre-eminently responsible for and which is expected as a given by the public itself. In our view, it is clear, beyond a reasonable doubt, that there is a real risk that such a statement with such a meaning would undermine public confidence in the administration of justice in Singapore. We further note that fair criticism was not raised by the Appellant with respect to the first statement.

The second statement

101 The second statement is found at page 3 of the book. It 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 threat of economic reprisals by the German government.

102 The Judge noted that the reference to a sentence of "only five years" and that it was a "slap on the wrist arranged by the Singapore government" constituted a clear reference to the courts, since sentencing is generally (and was indeed in that case) the province of the courts (see *Shadrake 1* at [89]). Further, the Judge rejected the Appellant's explanation of the second statement in which the latter purported to rely on page 142 of Mr Subhas Anandan's ("Anandan") autobiography (Subhas Anandan, *The Best I Could* (Marshall Cavendish Editions, 2009)). In the Judge's view, Anandan had merely stated that the prosecution could *not* have preferred a capital charge because the amount of cannabis seized was below the threshold of 500 grams (see *Shadrake 1* at [90]). Accordingly the Judge found that the second statement referred to the courts and was therefore contemptuous.

103 The Appellant contends that a fuller reading of Anandan's book belies the interpretation arrived at by the Judge, as follows:

> (a) First, the Appellant argues that Anandan did in fact convey the message that the diplomatic negotiations played a part in the change of charge. This may be gleaned from two key passages at pages 142 and 143 of Anandan's book. To an ordinary reader, the suggestion from Anandan's book is that the Australian authorities acted too slowly in lobbying on behalf of Nguyen, and therefore stood no chance of saving his life, whereas the German embassy acted early and effectively in negotiating a reduction in the charges put to Bohl. Accordingly, the Judge's criticism of the Appellant's "attitude towards his sources" is unwarranted, since

Anandan's book, which includes a first-hand account of the Bohl case, highlights the links between diplomatic negotiations and prosecutorial decision-making.

(b) Second, the word "court" appears nowhere in the impugned passage. By contrast, the "Singapore government" is clearly referenced in the passage.

(c) Third, while it is the case that sentencing is generally "the province of the courts", courts can only sentence on charges which are brought and proven by the prosecution. The sting in the Appellant's attack as borne out by Anandan's first-hand testimony is that there was diplomatic influence in the bringing of charges against Bohl, not in the adjudication of her case. A contextual view supports this – the Appellant refers at page 8 to the Bohl case as one in which "[t]he charges against her were suddenly – and 'miraculously' – modified"; again a reference to the charging decision, not the adjudication of the case.

104 In our view, it has *not* been proven, beyond a reasonable doubt, that the Appellant had referred to *the courts* in the second statement simply by virtue of his reference to a sentence of "only five years" being "a slap on the wrist arranged by the Singapore government". A contextual reading of the second statement suggests that the Appellant could have been referring to how the Singapore government chose to bring reduced charges against Bohl. While the Judge is undoubtedly correct that sentencing is within the province of the courts, the second statement could be read as being a reference to the diplomatic influence in the *prosecutorial* decision to bring modified charges against Bohl. In our view, an average reasonable reader reading the second statement would be left with the impression that prosecutorial discretion is sometimes subject to diplomatic influence. This is especially so when one considers page 8 of the book (in the concluding portion of the chapter containing the second statement):

> This particular execution came at an awkward time for the city state when, around the same time a German citizen, Julia Suzanne Bohl, who had been under surveillance for months by narcotics police as a high profile drug trafficker in Singapore, managed to escape the death penalty through political and diplomatic pressure from Germany. The *charges against her were suddenly – and 'miraculously' – modified*. The *charges were reduced* to a non-mandatory death penalty level and she was given five years of which she served only three. [emphasis added]

105 Accordingly, it *cannot*, in our view, be said that the second statement poses a real risk of undermining public confidence in the administration of justice in so far as the Respondent has failed to prove beyond a reasonable doubt the logically prior step that the second statement refers to the courts. In other words, the second statement does not scandalise *the courts*.

The fourth statement

106 The fourth statement, at page 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 (see *Shadrake 1* at [95]). The fourth statement (in bold italics) reads as follows:

> Following final submissions at the 28th session [of the trial] which began on 29 October, Judge Lai suddenly announced them both not 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*** .

[emphasis added in bold italics]

107 In so far as the first portion in bold italics is concerned ("the first portion"), the Judge held that the Appellant's comparison of the legal process to a comedy 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 (see *Shadrake 1* at [98]). In response to this, the Appellant contends that the Judge had misread the plain meaning of the first portion of the text in bold italics, arguing that it could only refer to events which *precede* court hearings and not events which take place in the court itself, as the phrasing is that "funny things happen on the way to their courtrooms". According to the Appellant, it would require a stretch in reasoning to suggest that the funny things must relate to events inside a courtroom.

108 With regard to the second portion in bold italics ("… 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") ("the second portion"), the Judge was of the view that this was the more serious allegation in the context of the fourth statement. The Judge further noted that the Appellant's affidavit had no explanation for his 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, rather than the rule of law (see *Shadrake 1* at [98]). In response to this, the Appellant contends that the statement was couched in qualified terms (*viz*, "it was very likely"), and that this statement was followed by a lengthy discussion on the course of the prosecution and trial. The Appellant thus contends that this second portion amounts to fair criticism.

109 We do not think that there is merit in the Appellant's arguments. With regard to the first portion, it is admitted that, on a literal reading, the reference to funny things happening *on the way* to the courtrooms may be thought to introduce reasonable doubt as to whether reference was made to the courts as opposed to the prosecution. However, we agree with the Judge's observation that the Appellant had mischievously juxtaposed several statements: an average reasonable reader reading the statement would have been left with the impression that Lai Kew Chai J had played a part in exculpating Krol-Hmelak for diplomatic – and not legal – reasons. We would additionally emphasise that, read in context, the Appellant could *not* have been commenting on *prosecutorial* discretion because there was *no mention* that Krol-Hmelak's charges were modified, contrary to the case of Julia Bohl (discussed above at [101]–[105]). Neither could it be suggested that the reference to the judiciary not being "free to decide who should live and who should die" was merely a general critique of the *mandatory* nature of the death penalty in Singapore. Such a reading clearly ignores the surrounding context which is concerned with the *judge's* acquittal of Krol-Hmelak. Accordingly, any impropriety suggested by the Appellant in the fourth statement must have been aimed squarely *at the judiciary*.

110 This is reinforced by the second portion where the Appellant suggests that the acquittal of Krol-Hmelak was a "government *verdict* not a judicial one" [emphasis added]. This makes clear

reference to the act of *verdict-giving* which is solely within the province of the judiciary. When read together with the role attributed to Lai Kew Chai J ("Judge Lai *suddenly announced* them both not guilty" [emphasis added]), as well as the fact that there was no mention of any prosecutorial decision on charges being made at this stage, it is clear, beyond a reasonable doubt, that the fourth statement refers to the judiciary.

111 The Appellant argues that the fourth statement constitutes "fair criticism" by virtue of the subsequent reference to defence counsel's notes at the trial of Krol-Hmelak. However, it is our view that this does not constitute a rational basis for the Appellant to have made the fourth statement, in so far as it is not "supported by argument and evidence" (see *Tan Liang Joo John* at [16], quoted at [81] above). The defence counsel's notes, as reproduced at pages 101 and 102 of the book, contain no assertion whatsoever that there was any impropriety on the part of Lai Kew Chai J. Accordingly, the fourth statement does not amount to fair criticism.

112 In the end, it is clear beyond a reasonable doubt that the fourth statement poses a real risk of undermining public confidence in the administration of justice in Singapore.

The fifth statement

113 The fifth statement, at page 3 of the book, is general in nature and reads as follows:

> 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.

114 The Judge held that "justice in Singapore" is not dispensed by the prosecution; it is dispensed by the courts (see *Shadrake 1* at [102]). He further noted that, when read together with the allegation of "government verdict" in Krol-Hmelak (see the fourth statement) and his allegations of favouritism in the sentences of Dinesh Bhatia (see the seventh statement) and Andrew Veale (see the eighth statement), it becomes apparent that the fifth statement encompasses cases where the courts are alleged to have favoured the wealthy and the privileged (see *Shadrake 1* at [102]).

115 Consistent with our analysis of the first statement, we agree with the reasoning of the Judge. Whilst "justice in Singapore" may encompass a number of organisations (including the Attorney-General's Chambers, which exercises, *inter alia*, prosecutorial discretion), the fifth statement unambiguously refers to the institution which administers justice in a *judicial* context, *viz*, the judiciary. Following from this, the fifth statement alleges impropriety on the part of the judiciary, inasmuch as the judiciary is "patently biased against the weak and disadvantaged while favouring the wealthy and privileged". This poses a real risk of undermining public confidence in the administration of justice for the statement expresses the very *antithesis* of what the judiciary is sworn to do: to discharge judicial duties in accordance with the Constitution and the law, without fear or favour, affection or ill-will.

116 We note that the Appellant does not raise any arguments of fair criticism with regard to the fifth statement. For completeness, however, we would note that there is no basis for the Appellant to contend that the fifth statement was fair criticism because there is no rational basis presented by the Appellant for the making of the fifth statement. This does not contradict the Judge's finding in *Shadrake 1* (at [104]–[105]) that the *sixth* statement is *not* contemptuous. The sixth statement was specifically addressed to the *incidence* of the death penalty, not whether the courts are biased against certain groups in imposing the death penalty. This is in contradistinction to the fifth statement, which is a broader allegation of the judiciary's bias in general.

The seventh statement

The seventh statement

117 The seventh statement, comprising three passages at pages 140–141 of the book, refers to the case of *Dinesh Singh Bhatia s/o Amarjeet Singh v Public Prosecutor* [2005] 3 SLR(R) 1 ("*Bhatia*"), where V K Rajah J reduced the sentence of the defendant to eight months from the 12 months imposed by the District Court. The three passages in the seventh statement (in bold italics below) are found in two paragraphs, which commence by referring to a drug raid on 7 October 2004 before continuing, as follows:

> 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*** . [emphasis added in bold italics]

118 The Judge held that the seventh statement was in contempt of court. In that statement, the Appellant 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" (see *Shadrake 1* at [107]). The Judge was of the view that 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 (*ibid*).

119 The Judge noted further that, despite the Appellant confirming that he had read Rajah J's judgment in *Bhatia*, the Appellant did not attempt to refer to and refute the reasons given in Rajah J's written judgment when such refutation would have been an obvious thing to do if one was alleging that the sentence meted out was influenced by favouritism (see *Shadrake 1* at [109]).

120 We agree with the Judge. The allegation of favouritism is clear from both the facts and context of the seventh statement and the tone of mock irony does not even begin to mask this allegation but, on the contrary, exacerbates it. The central thrust of the seventh statement is clear and is centred

on, *inter alia*, the premise that the judiciary is susceptible to (and indeed practises) nepotism at the expense of judicial impartiality and integrity. In the circumstances, it is clear, beyond a reasonable doubt, that the seventh statement does constitute a contempt of court. Above all, the public takes the objectivity of the judicial process as *a given* – which is simultaneously a process that does not (and cannot) brook even a hint of favouritism. It is clear to us that an average reasonable person would realise what the Appellant was alleging.

121 We are cognisant of the fact that the Appellant had admitted in the court below that his statement that Bhatia "was jailed for only 12 months" instead of "getting 10 years and a heavy fine" was a mistake (see *Shadrake 1* at [110]) – in other words, the Appellant had conceded that he erred in fact with regard to the first portion of the seventh statement in bold italics (see above at [117]). However, this portion cannot be read in isolation but must be read together with the other portions as an integrated whole. By parity of reasoning, the Appellant's qualification found just after the seventh statement at page 141, read in its context (rather than in isolation), is disingenuous:

> But during my meeting with Anandan he denied that Bhatia received special treatment because of his family connections. 'He was treated no differently than anyone else facing such charges', he said.

122 As the Judge aptly observed, the attempt by the Appellant to mix-and-match various observations was but a thinly veiled disguise of what constituted the true thrust of the statement itself, *viz*, an allegation of favouritism on the part of the judiciary. Even then, phrases such as "funny things often seem to happen on the way to court houses in Singapore" do not even begin to serve as a mask, as we have seen with a similar approach (as well as turn of phrase) with regard to the fourth statement (above at [109]).

123 Accordingly, it has been demonstrated beyond a reasonable doubt that the seventh statement poses a real risk of undermining public confidence in the administration of justice. We note that the statement does not constitute fair criticism as the Appellant did not evidence a rational basis for it. In particular, we endorse the Judge's pertinent observation that the Appellant did not attempt to refer to and refute the reasons given in Rajah J's written judgment (see *Shadrake 1* at [109]).

The eighth statement

124 The eighth statement, at page 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 as Dinesh Bhatia (see *Shadrake 1* at [112]). 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.

125 The Judge held that the assertions that Veale and Pang "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" clearly insinuate that Veale and Pang were given light sentences by the court due to extraneous considerations (see *Shadrake 1* at [113]). He noted further that there was no rational basis for the Appellant's insinuation that the court sentencing Veale gave him a light sentence because he was "the sort of people Singapore needs" (*ibid*).

126 The Appellant sought to characterise this statement as a straightforward recitation of Veale and Pang's sentence with a sober assessment that they "got off lightly".

127 We reject this argument. It is our view that the eighth statement, which insinuates that a light sentence was given by the court due to extraneous considerations, poses, beyond a reasonable doubt, a real risk of undermining public confidence in the administration of justice. We note that the Appellant did not raise any argument of fair criticism with regard to this particular statement. For completeness, however, we would note that the eighth statement cannot amount to fair criticism for the reasons given by the Judge in the court below (*ibid*).

The ninth, tenth and eleventh statements

128 The ninth to eleventh statements can be taken together. They refer to the case of Vignes Mourthi, who was convicted of drug trafficking and sentenced to death (see *Public Prosecutor v Vignes s/o Mourthi & Anor* [2002] SGHC 240, affirmed in *Vignes s/o Mourthi v Public Prosecutor* [2003] 3 SLR(R) 105) (see *Shadrake 1* at [115]). The statements are, respectively, as follows:

(a) The ninth statement, at page 162 of the book, reads as follows:

> 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.

(b) The tenth statement, at page 163 of the book, reads as follows:

> 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.

(c) The eleventh statement, at page 165 of the book, the last page of the chapter on the case of Vignes Mourthi, reads as follows:

> 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.

129 The statements set out in the preceding paragraph 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 (see *Shadrake 1* at [116]). Sgt Rajkumar was subsequently convicted on the same corruption offences (see *Public Prosecutor 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 (*ibid*). This, the Appellant alleges, was not disclosed to the trial judge in Mourthi's case.

130 The Appellant argues that the ninth, tenth and eleventh statements bookend a crucial and

carefully transcribed conversation between the Appellant and Anandan (who represented both Mourthi and Sgt Rajkumar). The Appellant further submits that the totality of the analysis (at pages 148–165 of the book) represents a carefully researched and finely worded consideration of a potential miscarriage of justice. Accordingly, the Appellant argues that reasonable inferences are drawn (deriving from statistical analysis of the make-up of the judiciary documented by Ross Worthington in "Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore" (2001) 28(4) Journal of Law and Society 490). The statements, the Appellant argues, by no means exceed the bounds of fair criticism required for establishing liability for scandalising contempt.

131 We reject these arguments. In our view, the ninth, tenth and eleventh statements are clear instances of scandalising contempt. As observed by the Judge, the Appellant stated 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 (see *Shadrake 1* at [120]). In the circumstances, it is clear, beyond a reasonable doubt, that there is a real risk of undermining public confidence in the administration of justice.

132 We also agree with the Judge's analysis that there is no rational basis for the ninth, tenth and eleventh statements. The Appellant asserted that the subordinate judiciary, which deals with 95% of the cases in Singapore, and the prosecutors, are both drawn from the ranks of the Legal Service, and that in light of this, the judiciary would have known of the proceedings against Sgt Rajkumar (see *Shadrake 1* at [121]). Reference was 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 (see *Shadrake 1* at [121]). The Judge rejected this as being too incredible and attenuated to form a rational basis for the Appellant'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 (see *Shadrake 1* at [121]).

133 Finally, we share the Judge's view that the quotation from Amartya Sen was clearly directed at the Vignes Mourthi case, as is evident from the phrase ("most appropriate postscript to the sordid tale of the death of Vignes Mourti [*sic*]"). The Appellant was clearly insinuating (via the aforementioned quotation) that the Singapore judges "use their power to enrich themselves and advance their own interests at the expense of civil society" (see *Shadrake 1* at [122]). A statement of this nature evidently poses, beyond a reasonable doubt, a real risk of undermining public confidence in the administration of justice. We therefore agree that this statement is in contempt of court.

The thirteenth statement

134 Although the Judge analysed the thirteenth and fourteenth statements together, we propose to analyse the statements separately as they emanate from different chapters in the book.

135 The thirteenth statement is to be found at page 217 of the book, and reads as follows:

> *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 has created a climate for the suppression of basic political freedoms. [emphasis added]

136 This particular statement explicitly states that the judiciary is compliant and not independent, and accordingly (indeed, obviously, in our view) presents a real risk of undermining public confidence in the administration of justice. As noted by the Judge (see *Shadrake 1* at [126]), similar statements

have been held to be contemptuous in other decisions, for example, *Attorney-General v Pang Cheng Lian* [1974–1976] SLR(R) 271; *Zimmerman*; *Wain*; *Lingle*; *Chee Soon Juan*; and *Hertzberg* (although this should not be taken to mean that criticisms of the judiciary's conduct and partiality should as a matter of course constitute contempt: see [84] above). Accordingly, the focus *vis-à-vis* the thirteenth statement is the applicability of the concept of fair criticism.

137 In making the thirteenth statement, the Appellant refers to the report of the International Bar Association's Human Rights Institute, *Prosperity versus individual rights? Human rights, democracy and the rule of law in Singapore* (July 2008) ("the IBA Report") (see *Shadrake 1* at [127]). The extract of the IBA Report quoted by the Judge (see *Shadrake 1* at [130]) is as follows (see page 70 of the IBA Report):

> … in cases involving PAP [People's Action 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.

138 As is clear, although the discussion of the IBA Report does precede the paragraph in which the thirteenth statement is found, the latter is *more general* in nature. This is not surprising as it occurs in the very last chapter of the book where, broad themes are – as is usual with final chapters – drawn together in an overall conclusion (indeed, this particular chapter is entitled "Whither Singapore?"). In this regard, it bears quoting in full the entire paragraph in which the thirteenth statement is located (the thirteenth statement is in bold italics in the passage that follows):

> Today Singapore is an extremely wealthy, globalised city-state. But far from giving its political elite the 'confidence and maturity' to open up the political system, to tolerate dissent and criticism and to protect fundamental human rights, the PAP government has actually chosen to go in the opposite direction. It has solidified its near monopoly on the political apparatus of the state by perverting the rights guaranteed in the Constitution through the passage and arbitrary enforcement of unconstitutional domestic laws. ***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 has created a climate for the suppression of basic political freedoms*** . And in that context there is simply *no meaningful debate about the death penalty and its repercussions*. [emphasis added]

139 In our view, the paragraph just quoted is general in nature. The reference, therefore, to "[t]he absence of independence in a compliant judiciary" appears to be a general one that is a sweeping indictment of the judiciary in the final chapter of the book. The seriousness of this allegation calls for a highly cogent rational basis (see *Shadrake 1* at [72]). In this regard, the IBA Report, which focuses on *defamation* without the slightest reference to the death penalty, cannot provide a rational basis for the insinuation that debate – and *a fortiori* "meaningful debate" – about the *death penalty* is "suppress[ed]" by a "compliant judiciary". The thirteenth statement therefore does not constitute fair criticism. In fact, as noted in [136] above, it poses, beyond a reasonable doubt, a real risk of undermining public confidence in the administration of justice, and accordingly amounts to scandalising contempt.

The fourteenth statement

The fourteenth statement

140 The fourteenth statement is found at page 207 of the book. It reads as follows:

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

141 The Appellant argued in the court below that this statement was directed at the political tactics of the ruling party. The Judge rejected this argument on the basis that the Appellant's insinuation that "trumped up defamation charges" are nevertheless successful "in forcing many into bankruptcy or exile" is clearly directed at the courts (see *Shadrake 1* at [126]).

142 In our view, this particular statement is similar to the second statement inasmuch as there is no reference (either on a literal or contextual reading) to the judiciary as such. Indeed, the focus appears to be on "[t]he ruling party in Singapore". This interpretation is buttressed by the phrase "often sues" as well as by the sentences immediately before and after (which discuss executive – as opposed to judicial – action). Whilst it is true that defamation as well as bankruptcy proceedings do involve the courts, it appears that the Appellant's focus is (as just mentioned) on whom he perceives are *the initiators* of such proceedings and, more importantly, their motives for initiating such proceedings (hence, the use of words such as "trumped up" and "charges", the latter word of which is more appropriate to the criminal context (although it is unclear whether the Appellant was consciously utilising the analogy of criminal prosecution)). It is true that the fourteenth statement could also be interpreted as referring to the courts in so far as the courts must arrive at decisions that have the result of "forcing many into bankruptcy or exile". On yet another interpretation, one could state that the courts would have arrived at the decisions they did based on the relevant principles of law, although (in the Appellant's view) this would have the effect just mentioned. However, there is, in our view, no clear reference to the courts as such. Put simply, the Respondent has not proved, *beyond a reasonable doubt*, that the fourteenth statement is in contempt of court and we so hold.

Conclusion

143 In summary, we agree with the Judge's findings that the first, fourth, fifth, seventh, eighth, ninth, tenth, eleventh and thirteenth statements are contemptuous. These statements scandalise the very core of the mission and function of the judiciary. More than that, their cumulative effect reveals a marshalling of a series of fabrications, distortions and false imputations in relation to the courts of Singapore. While the Appellant is free to engage in the debate for or against capital punishment, he is not free to deliberately and systematically scandalise the courts in attempting to substantiate his case against capital punishment.

144 However, we differ from the Judge's findings in that we do *not* find the second and fourteenth statements to be contemptuous.

145 We turn now to the issue of sentence.

The issue of sentence

The applicable principles

146 It is important to note at the outset that sentencing, by its very nature, is not an exact science. Neither is it – nor ought it ever to be – an arbitrary exercise of raw discretion. The court concerned follows guidelines. However, guidelines are precisely what they mean and must not be

applied as if they are writ in jurisprudential stone.

147 Some of the more common sentencing guidelines or factors in the context of contempt proceedings include the following: the culpability of the contemnor; the nature and gravity of the contempt (see, *eg*, *Tan Liang Joo John* at [31]); the seriousness of the occasion on which the contempt was committed (*ibid*); the number of contemptuous statements made (see, *eg*, *Zimmerman* a t [51] and *Hertzberg* at [59]); the type and extent of dissemination of the contemptuous statements; the importance of deterring would-be contemnors from following suit (see, *eg*, *Tan Liang Joo John* at [31]); whether the contemnor is a repeat offender (see, *eg*, *Hertzberg* at [59]); and whether or not the contemnor was remorseful (this particular factor being embodied paradigmatically in a sincere apology (see, *eg*, *Hertzberg* at [59] and *Tan Liang Joo John* at [39])). However, the categories of guidelines or factors are obviously not closed and much would depend, in the final analysis, on the precise facts and context concerned.

148 What is clear, in our view, however, is that *there is no starting-point of imprisonment for the offence of scandalising contempt*. The authority that is apparently to the contrary, *viz*, *Chee Soon Juan* did not, on a close reading of the decision itself, lay down such a broad and sweeping proposition. Indeed, it is only logical and commonsensical that the sanction imposed – whether it be a fine or imprisonment (or a combination of both) – will depend, in the final analysis, on the precise facts and context of each case.

Our decision

149 We have differed somewhat from the Judge on the issue of liability inasmuch as we have found that nine (instead of eleven) of the fourteen impugned statements are in contempt of court. However, the nine statements that are in contempt of court constitute serious acts of scandalising contempt, as we have noted above at [143]. Indeed, as the Judge aptly pointed out in *Shadrake 2* at [28], the sheer breadth and gravity of the Appellant's allegations of judicial impropriety were

> … without precedent in terms of their specificity, the number of judges targeted (the whole Supreme Court bench in Vignes Mourthi's case) and their gravity, pertaining as they did to cases concerning the life and liberty of those who come before the courts. In particular they surpass the allegations made in *Chee Soon Juan* (…) and *Tan Liang Joo* (…), where sentences of imprisonment were imposed. …

150 Further, although the precise extent of circulation in Singapore was not established, counsel for the Appellant, Mr Ravi, had candidly stated during the hearing on liability that "many lawyers are turning up in droves to buy – to have a copy of the book" (see *Shadrake 2* at [27]), and that almost 6,000 copies had been sold in Singapore as well as overseas. The Judge also observed that the impugned statements were also made in a "more enduring medium than journals or magazines" (*ibid*).

151 There are also no mitigating factors whatsoever in this case that could possibly be considered in the Appellant's favour. The Judge has dealt with this issue comprehensively in the court below. We would only emphasise the fact that there has not been an iota of remorse demonstrated by the Appellant who continues to stand by the statements made. The Appellant's utter lack of remorse is exemplified by his interview with the *Guardian* as well as his expressed intention to produce a second edition of the book. The *Guardian* article was based on an interview with the Appellant, made after the Judge delivered the written judgment with regard to liability for contempt (in *Shadrake 1*) and after the Appellant had had a chance to review the Judge's reasons for finding him in contempt for eleven out of the fourteen statements impugned by the Respondent. Amongst other things, the Appellant insisted in the interview that the book was "devastatingly accurate" and declared that:

"[t]his story is never going away. I'll keep it on the boil for as long as I live. They're going to regret they ever started this." (see *Shadrake 2* at [3]). In so far as the Appellant's intention to produce a second edition of the book is concerned, the Judge found this act of defiance to be "unprecedented in our case law" which called for "a strong element of specific deterrence in determining the sentence." (*Shadrake 2* at [35]). Notwithstanding this, the Appellant instructed his counsel to inform the Judge during the hearing on sentence that he did not mean to allege a cover-up by the "high echelons of the judiciary" in Vignes Mourthi's case, despite his express words to the contrary in the book. However, the Judge found that the Appellant's proposal to apologise must be regarded as "nothing more than a tactical ploy to obtain a reduced sentence" (see *Shadrake 2* at [34]). We should, in fairness to the Appellant, note that the publication of the second edition of the book might not be an aggravating factor provided it does not contain the impugned statements. That having been said, even assuming that this is the case, we fail to see how it could – from the perspective of logic and commonsense – constitute a *mitigating* factor in the Appellant's favour.

152 What the Appellant chooses to do (or, as the case may be, not to do) is, of course, his prerogative but he cannot complain if the court takes into account – as it must – such conduct as mentioned above in arriving at the sentence to be meted out to him. He cannot expect mitigating factors to be exercised in his favour when his conduct steadfastly prevents such factors from coming into existence in the first place. He cannot have it both ways.

153 Notwithstanding that we have found two of the eleven statements (originally found to be contemptuous by the Judge) not to be contemptuous, having regard to the other factors which we have dealt with above, this is still the worst case of scandalising contempt that has hitherto come before the Singapore courts. In our view, the Appellant's conduct merits a substantial custodial sentence.

154 We pause at this juncture to respectfully disagree with the Judge in so far as he granted the Appellant an unquantified discount (albeit "entirely undeserved" and "which will and should not be taken as a precedent") in the sentence meted out in order "to signal that the courts have no interest in stifling legitimate debate on the death penalty and other areas of law" (see *Shadrake 2* at [42]). It is clear that debate on the death penalty as well as other areas of law has been – and will *always* be – open to all. *However*, when conduct crosses the legal line and constitutes scandalising contempt, it is *no longer legitimate* and, *ex hypothesi*, a discount cannot be accorded to the contemnor for doing the very thing which is an *abuse* of the right to free speech in general and the right to engage in *legitimate* debate with regard to the topic (or topics) concerned in particular.

155 Nonetheless, while we disagree with the Judge's application of a discount, we affirm the Judge's sentence meted out in the court below. First, we would emphasise a point noted earlier (at [87]), *viz*, that the Respondent did not file a cross-appeal against the Judge's decision on both liability as well as sentence, opining instead that: [note: 1]

> The sentence of 6 weeks' imprisonment and fine of $20,000 imposed by the Judge is certainly not excessive and in fact, is on the low end of the condign punishment that could have been meted out.

Second, as noted above, we have found that two of the statements originally found to be contemptuous by the Judge were not in fact contemptuous, *ie*, only nine (instead of eleven) of the fourteen impugned statements were found by us to be contemptuous.

156 In the premises, we affirm the sentence imposed by the Judge below with regard to both fine as well as imprisonment. The Appellant is therefore to serve a sentence of six weeks' imprisonment

and is to pay a fine of $20,000 (in default of which the Appellant is to serve a further two weeks in prison, with such further term to run consecutively to the first).

157 The Judge's costs order in the court below stands. The usual consequential orders will apply. The costs of the present appeal are to be taxed if not agreed.

[note: 1] See the Respondent's Case (filed 1 April 2011), para 223