Mohammed Ali bin Johari v Public Prosecutor
[2008] SGCA 40

Case Number : Cr App 11/2007

Decision Date : 26 September 2008

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah JA; Tay Yong Kwang J

Counsel Name(s) : R S Bajwa (Bajwa & Co) and Sarindar Singh (Singh & Co) for the appellant; Lau Wing Yum and Vinesh Winodan (Attorney-General's Chambers) for the respondent

Parties : Mohammed Ali bin Johari — Public Prosecutor

Administrative Law – Natural justice – Allegation of excessive judicial interference – Whether trial judge descended into arena – Principles applicable to allegations of judicial interference

Criminal Law – Offences – Culpable homicide – Cause of death – Elements of s 300(c) Penal Code (Cap 224, 1985 Rev Ed) – Whether appellant caused death of deceased – Section 300 (c) Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Special exceptions – Provocation – Whether appellant lost his self-control – Whether provocation grave and sudden – Section 300 Exception 1 Penal Code (Cap 224, 1985 Rev Ed)

Evidence – Proof of evidence – Standard of proof – Reasonable doubt – Whether Prosecution's case proved beyond reasonable doubt – Whether appellant sexually assaulted the deceased

26 September 2008

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

Introduction

1 The appellant was charged with and convicted of the crime of murder in the High Court by the trial judge ("the Judge") under s 300 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Code") for causing the death of one Nur Asyura bte Mohamed Fauzi ("the deceased"), known as Nonoi. The appellant was sentenced to suffer the mandatory death sentence (see *PP v Mohammed Ali bin Johari* [2008] 2 SLR 994 ("the GD")). At the time of her death, the deceased was two years and ten months old.

2 After hearing arguments made on behalf of both the appellant as well as the respondent, we dismissed the present appeal.

3 We should observe, at the outset, that this is an extremely tragic case. It also raises significant legal issues – in particular, the issue of alleged judicial interference.

The facts

4 Prior to marrying the appellant in November 2005, the deceased's biological mother, Mastura bte Kamsir ("Mastura") was married to the deceased's biological father. The first marriage resulted in the birth of the deceased. Mastura's second marriage to the appellant resulted in the birth of a son named Daniel. The nuclear family of four resided at Block 90 Pipit Road ("the Pipit Road flat").

5 The family's daily routine consisted of bringing both children to the appellant's parents' home

located in the vicinity of the Pipit Road flat, at Block 62 Circuit Road ("the Circuit Road flat") so that the children could be cared for by their grandparents while the parents were both at work. After dropping the children off, the appellant would send Mastura to her workplace located in Serangoon. The appellant's unmarried siblings continued to live with his parents in the three-room Circuit Road flat.

6 As the details of the events on 1 March 2006 were particularly important, it would be apposite to reconstruct schematically the series of events that transpired, noting that although much of what took place was related by the appellant himself, much of that account was relatively uncontroversial – save for the circumstances surrounding the death of the deceased, which will be analysed in greater detail below. At around noon on 1 March 2006, the appellant and Mastura left the deceased and Daniel in the care of their grandparents at the Circuit Road flat. Both parents then left on the appellant's motorcycle and proceeded to Kovan Mall in Hougang for lunch. At around 2.00pm, the appellant dropped Mastura off at her workplace located on Upper Serangoon Road. The appellant returned to the Circuit Road flat at around 2.15pm. Sometime later in the afternoon, he brought the deceased out of the Circuit Road flat.

7 What happened *after* they left the Circuit Road flat and *before* they returned was hotly contested by both parties and was the subject of considerable contention. This will be considered in more detail below (see [11]–[19]). Suffice it to say, for now, the appellant admitted (in his numerous statements to the police and when testifying) that it was later in the course of the afternoon that he brought the deceased's dead body from the Pipit Road flat back to the Circuit Road flat. According to him, on reaching the Circuit Road flat, he placed her dead body on a bed in one of the bedrooms while the family members in the Circuit Road flat were busy and did not pay any attention to him. The appellant stated that he next left the flat and only returned when his father, Johari bin Mohammed Yus ("Johari"), was performing his evening prayers. When Johari commenced his prayers, the appellant carried the deceased's dead body out of the bedroom and left the Circuit Road flat on foot. It was Johari who was the first person to discover that the deceased was missing from the Circuit Road flat. At that time, he was under the impression that he was the only person in the flat with the deceased.

8 Following the arrest of the appellant, he led the police down a footpath close to Block 101 Aljunied Crescent and onwards to the Aljunied flyover. Under the flyover, the police recovered the deceased's naked and decomposed body in the chamber of a drain in which the appellant had placed her body. He had taken care to remove her clothes, wipe her body and camouflage it with some rubbish.

9 Apparently, after concealing the deceased's body in the dark area under the flyover, the appellant returned to the Circuit Road flat where, by this time, his family had discovered the deceased's disappearance. He feigned ignorance and blamed Johari for failing to keep watch over the deceased. When he fetched Mastura from work later, he broke the news to her that the deceased was missing. A massive search was commenced by the police, family members and concerned members of the neighbourhood in a bid to locate the missing deceased. The search persisted relentlessly on 2 and 3 March 2006.

10 On the morning of 4 March 2006, the appellant approached Mastura and her mother, Rozanah bte Salleh ("Rozanah"), in the living room of the Pipit Road flat to confess that he knew that the deceased was dead. Speaking in Malay, he broke down and cried that "Nonoi, no more". Upon hearing this, Mastura and Rozanah wept and implored the appellant to tell them what he had done. The appellant responded by saying that he "had no intention to do that to her. She drowned." [note: 1] This series of events culminated at around 11.45am on the same day when the appellant turned himself in at Bedok Police Station and led the police to the spot under the Aljunied flyover. It was

there that they recovered the body of the deceased.

Circumstances surrounding the death of the deceased

11 Some of the particulars of the circumstances surrounding the death of the deceased on 1 March 2006 were mildly contentious. Because the appellant was the only party privy to the events surrounding the deceased's death in the last few hours, what transpired on that fateful afternoon had to be reconstructed from several statements he made to the police in which the appellant recounted, *inter alia*, how the deceased was already crying when she left the Circuit Road flat. While walking from the Circuit Road flat to the Pipit Road flat, the appellant recalled that the deceased kept crying despite his continuous pleas with her to stop crying. This was when he lost his patience, "began to get angry" and raised his voice "when directing her to be quiet".[note: 2] He brought her to a provision shop at Block 64 Circuit Road to buy her something to pacify her but she refused. Following this, they walked to the tenth floor of Block 62 Circuit Road to look for a friend of the appellant but the front door was closed so he presumed his friend was not in.

12 Upon returning to the Pipit Road flat, the deceased "sat on the mattress and [kept] quiet".[note: 3] On switching on the television and radio, however, she began to cry again. Frustrated, the appellant "slapped her face, body and punched her thigh ... [but] [s]he cried even louder".[note: 4] At this juncture, the appellant pulled her into the toilet and threatened to put her into a red colour plastic pail, filled with "water to about half" of the pail.[note: 5] In his first statement taken on 4 March 2006, the appellant recounted the events as follows:[note: 6]

> My step daughter was crying even when I told her to stop.
>
> I then slapped her over her body telling her to stop crying. 'Kakak' [the deceased] still continue crying. I then brought her to the toilet and tip her over and dipped her head into the red colour plastic pail. I dipped her into the water in the pail for a few times. The phone then rang and I went to answer it, leaving 'kakak' dip [*sic*] in the pail of water.
>
> When I return, I found that 'kakak' was motionless and not breathing.

13 The appellant admitted to placing the deceased into the red pail of water for about two to three times, allegedly to stop her from crying:[note: 7]

> I carried her whole body head first into a pail of water. The pail is a plastic pail. I did this because I wanted to prevent her from crying. She kept on crying and struggling. Although she was crying and struggling, I kept on dipping the body for a while. I pulled her out and she kept on crying. She was wet. I did this two or three times. The last time I pushed her into the pail of water, my handphone rang. I left her inside the pail of water to answer her call. I could not recall who called me.

14 In a statement taken from the appellant on 5 March 2006, the appellant elaborated on the details of the dipping as follows:[note: 8]

> There was one red colour plastic pail in the toilet. It contained water to about half of it. There was also a plastic scoop in the pail. I took out the scoop and placed it aside. I removed her shirt and pants. She did not struggle but kept on crying. She was wearing pampers. She was looking at the pail of water. I gripped both her legs just slightly above the ankles and raised her upwards. I then pushed her legs up and her head was facing the pail. I threatened her again that I would put her into the pail. She still kept on crying. I lowered down her legs and her head was

submerged into the water in the pail. The head touched the bottom part of the pail. The water in the pail spilled out a little when I submerged her head down. I hold onto her with her head in the pail for a short while, maybe a few seconds and pull her up. I placed her down on the toilet floor and her head hit the floor. I let go my grip. She stood up and was all wet. I removed her pampers and told her to 'cebok' (means in English to wash the private parts). She tried to do so while I was spraying her with the water hose but could not do it quickly. I hurriedly used my left hand to wash her buttock and private parts. I did it in a hurry and used more strength. She was squatting and kept on crying. I tried to pacify her but failed. I then threatened her again to put her into the pail. As she was stubborn, I put her into the pail the same manner I did earlier. Earlier, while washing her, I had also filled up the pail with more water to about half of it. I submerged her head about twice slowly and her head touched the bottom part of the pail. By then she was already weak. I placed her down on the floor. She tried to stand up but trip and fell. Her back of the head hit the floor. I rubbed her head and I felt there was a bump. She kept on crying. After a while later, she cried again. I put her into the pail again.

15 In total, the appellant admitted in several statements that he had immersed the deceased into the water "two or three times" and during the last immersion, his hand phone rang. In a statement recorded on 8 March 2006, the appellant related this incident but was clearly evasive about the details of the alleged phone call:[note: 9]

At this point of time, my handphone rang. I walked hurriedly to answer the handphone which was placed on the table and still being charged. I did not disconnect the handphone from the charger. It was a telephone call. I talked to the caller but I did not pay much attention as my mind was disturbed. I could not concentrate to listen or talk on the phone because my mind was on Nonoi. The phone conversation was a very short one. I cannot remember now who the caller was and what the conversation was about. After that, I hang up the phone and placed the phone back to the table. The charging for the handphone continued.

I walked hurriedly back to the toilet. On reaching the entrance of the toilet, I saw Nonoi was not moving. She was still stuck in the pail.

16 After the immersions, the appellant realised the deceased was motionless and did not breathe. In his first statement, he recounted that he:[note: 10]

carr[ied] her out [of the pail] and did CPR [cardiopulmonary resuscitation] on her. She did not respon[d]. I then carr[ied] her to B/62 Circuit Road …

17 In his second statement made on 4 March 2006, he explained how he tried to resuscitate the deceased on realising that she was dead:[note: 11]

Her body was soft. I pressed her abdomen and chest and blow into her mouth and nose. Only a little water came out from her mouth and nose. I brought her to the hall and I placed her on the floor. I pressed her abdomen and chest again. I also blow air into her mouth and nose. I saw that her eyes began to close and close. I carried her up but her body became softer and softer. I was afraid. I pressed her abdomen and chest again and also blow into her mouth and nose. After doing this, her eyes [were] almost shut and completely did not move anymore. I was afraid. I was confused and do not know what to do. I walked to and fro and thinking what to do next. I had removed her clothing before I dipped her into the pail of water. She was only wearing her pampers. After I dipped her into the pail of water for the first time, her pampers was soaked with water and I removed it. I shooked [*sic*] her to wake her up and called her name but she did not wake up. I picked her up and dried her body with a towel. I then dressed her up with the same

clothing that I had taken off before the dipping. I carried her and took her slipper[s] and left the flat at Blk 90 Pipit Road.

18 After dressing the deceased in the same clothes she had been wearing before leaving the Circuit Road flat, the appellant brought the body of the deceased back to the Circuit Road flat where the "other family members were busy and did not pay attention to" him.[note: 12] As alluded to earlier, the appellant only returned when the family members were no longer at home except his father, Johari. When Johari commenced his evening prayers, the appellant carried the body of the deceased to Aljunied flyover to hide her body and returned to the Circuit Road flat afterward.

The alleged phone call during the course of the immersions

19 The investigation officer, Assistant Superintendent Ang Bee Chin, obtained a copy of the appellant's call records (exhibit P227[note: 13]) from MobileOne Ltd for the period 27 February 2006 to 4 March 2006. The call records indicated that during this aforementioned period, there were only three answered incoming calls at the appellant's number on 1 March 2006, at 12.07pm, 7.02pm and 7.04pm, respectively. Three other calls were made on the same day around 6.48pm to the appellant's phone and these were forwarded.[note: 14] The importance of this discovery cannot be overemphasised; it established that, contrary to the appellant's testimony, there were no phone calls answered on the appellant's handphone during the time of the incident.

Injuries on the deceased

20 A post-mortem examination of the deceased was conducted by the forensic pathologist, Assoc Prof Gilbert Lau ("Assoc Prof Lau"). In his autopsy report, Assoc Prof Lau recorded that the deceased's body was in a state of moderate putrefaction, associated with patchy green-black discolouration and peeling of the skin over the body surface. The onset of early maggot infestation and abdominal distension, accompanied by protrusion of the tongue, was apparent. Assoc Prof Lau surmised that the deceased would have been dead for a period of two to three days when her body was discovered.

21 Apart from the decomposition, blood was present over the external genitalia and perineum. Upon further examination of the external genitalia, Assoc Prof Lau found that there was extensive laceration of the fourchette and apparent obliteration of the hymen. This resulted in localised and acute haemorrhage. A rupture measuring 2cm in the right anterolateral wall of the mid-vagina was also present. These injuries were consistent with evidence of apparent sexual interference.

22 Assoc Prof Lau testified that there was no evidence of any significant head injuries. However, both lungs were voluminous and the symptoms were consistent with acute pulmonary oedema and congestion. He further opined that there was no macroscopic evidence of any natural disease that could have caused or contributed to the deceased's demise.

23 In his supplementary autopsy report, Assoc Prof Lau established negative results for semen and DNA on specimens obtained from the internal and external genitalia of the deceased. He conducted a genetic analysis of a sample of heart tissue from the deceased and this yielded inconclusive results, and, hence, he stated that sudden death resulting from cardiac arrhythmia (*ie*, abnormal heart rhythm) in the presence of an environmental trigger could not be excluded.

Genetic screening and previous medical history of the deceased

24 The medical reports of the deceased revealed that she had been admitted to the National

University Hospital ("NUH") on a number of occasions in 2003 and 2004 for various conditions, including an episode of gastroenteritis-provoked seizures when she was eight months old. The Prosecution sought to call two additional witnesses, Dr Edmund Lee Jon Deoon ("Dr Lee") of the Pharmacology Department at NUH and Dr Foo Cheng Wee ("Dr Foo"), a member of the medical team who had treated the deceased when she was admitted into hospital on 29 January 2004. This was allowed by the Judge.

25 Dr Foo testified that the seizures suffered by the deceased on 29 January 2004 were gastroenteritis-provoked and that the secondary diagnosis of the deceased's medical condition at that point in time had been status epilepticus.

26 Dr Lee noted that from a study of the genetic makeup of the deceased, two genetic variants were identified that were speculatively linked to the abnormalities of heart rhythm and that these could confer a risk of cardiac arrhythmia in the presence of an environmental trigger. On the other hand, Dr Lee testified that it was not proven that these two genetic variants were linked to sudden cardiac death; neither was it proven that cardiac arrhythmia could occur in the presence of an environmental trigger. As he opined, "the results of [the] study into the deceased's genetic makeup have no diagnostic value whatsoever, and any possibility of a link between the genetic variants identified in her genetic makeup and sudden cardiac death is highly speculative".[note: 15]

Findings by the trial judge

27 The charge of murder against the appellant read as follows:

> That you, **MOHAMMED ALI BIN JOHARI**
>
> on the 1st day of March 2006, sometime between 3.00 p.m. and 6.00 p.m., at Block 90 Pipit Road … Singapore, committed murder by causing the death of one Nur Asyura Binte Mohamed Fauzi, female, 2 years old (D.O.B. 2 May 2003), to wit, by drowning her and you have thereby committed an offence punishable under section 302 of the Penal Code, Chapter 224.

28 The Judge focused on two primary issues in coming to the conclusion that, on the totality of the evidence, the elements of s 300(*c*) of the Code had been satisfied. He focused on two main issues: first, what the appellant did to the deceased and, second, what caused her death.

29 Causation was one of the key issues that was raised time and time again during the course of the trial. The Judge considered the reports by the forensic pathologist, Assoc Prof Lau, who certified, first, that while the cause of death was unascertainable due to the state of decomposition of the body, the condition of the deceased's lungs was compatible with drowning. Second, he testified that death by asphyxia could be excluded as a cause of death since the appellant had admitted in his testimony that the deceased was neither smothered nor suffocated prior to her death. Third, the medical reports of the deceased revealed she had been admitted into NUH on a number of occasions in 2003 and 2004 for various conditions including an episode of gastroenteritis-provoked seizures when she was eight months old (see also above at [24]). However, the evidence of Dr Lee supported the Prosecution's case that there was no scientifically proven evidence that the deceased's genetic makeup could have contributed to sudden cardiac failure causing death; neither was there any evidence that the deceased suffered from a seizure due to status epilepticus or other causes prior to her death. Hence, the Judge found that the deceased did not suffer from any life-threatening condition and, by the exclusion of other likely causes of death, he came to the conclusion that the deceased must have died from the effects of being immersed in water.

30 In so far as the issue of molestation was concerned, the Judge found that there was no direct evidence of molestation and noted that the appellant did not make any admission of molestation in his statements. He concluded, therefore, that "the alleged molestation had a limited bearing on the charge of murder that the [appellant] faced as the genital injuries were not life-threatening" (see the GD at [56]).

31 The Judge further held that there was no phone call as the call records confirmed that the appellant had lied about receiving any calls during the time of the incident. In brief, the appellant knew and intended, when he immersed the deceased head-first in the pail of water, that she would experience difficulty in breathing and might inhale water. On this reasoning, the Judge was of the view that if a person were immersed in water in that manner for a sufficient period of time, the person would die. Accordingly, he held that the appellant intentionally kept the deceased immersed in water for a longer duration during the third immersion (which was not a quick immersion as the appellant had claimed) and that he was not distracted by having to answer a phone call.

32 In so far as the appellant's defence of provocation was concerned, the Judge opined that the appellant's actions were not consistent with being in such a state of fear and panic that he could not speak and thus call for help, since he did not lose the ability to speak as he was able to plead with Nonoi to wake up while trying to revive her (see the GD at [62]).

Issues

Arguments by the appellant

33 Counsel for the appellant mounted several arguments in this appeal against conviction and sentence. Emphasising that there were no independent eyewitnesses present at the scene of the crime, the appellant argued that the Judge erred by deciding that the alleged molestation had a limited bearing on the charge of murder and that there should have been a finding as to whether the appellant was responsible for molesting the deceased and had killed her to cover up his acts.

34 Second, the appellant, whilst not denying that he had immersed the deceased in the pail of water, submitted that the Judge erred in concluding that the third immersion was not a quick immersion without any evidence. He argued that it was important for the Judge to have made a finding on this issue. The appellant further argued that he had only intended to cause a partial deprivation of air to the deceased and not to drown her.

35 Third, the appellant argued that he was in such a state of fear and panic that he could not speak. Fourth, no specific cause of death was ascertainable because of the state of decomposition of the body when the autopsy was performed. Further, due to the presence of the two genetic variants conferring a risk of cardiac arrhythmia, this could have been a possible cause of death instead. The appellant therefore contended vigorously that the Prosecution should have consulted a cardiologist to eliminate the cause of sudden death.

36 The appellant also sought to rely on the defence of provocation, and argued that the Judge should not have concluded that he had intended to cause death or bodily injury sufficient to cause death under s 300(*c*) of the Penal Code.

37 The appellant further submitted that the Judge had engaged in judicial interference by descending into the arena frequently to express his thoughts about how the Prosecution should proceed with the case and the evidence required by the Prosecution to prove their case. In doing so, the appellant expressed concern that he was not granted a fair trial.

Arguments by the respondent

38 The Prosecution submitted that the statements of the appellant were consistent with establishing that there were three immersions of the deceased in the pail of water. The appellant alleged that there had been a phone call but this was disproved by the call records adduced in court. As such, the Prosecution argued the appellant's intention was to cause a serious injury to the deceased.

39 On the issue of causation, the Prosecution pointed out that the objective evidence and statements of the appellant suggested that the findings were consistent with death by drowning.

40 Further, the Prosecution also submitted that the Judge was seeking to ascertain the full facts and most of the instances alleged as examples of judicial interference were directed at the technical and forensic aspects of the case. The Prosecution noted that the Judge also went into the appellant's case in order to assist him and the appellant did not raise these instances as examples of judicial interference.

Our decision

Did the appellant sexually assault the deceased?

41 The appellant contended that the Judge should have made a decision on this issue as it would have an effect of his evaluation of the rest of the factual evidence, particularly as the Prosecution's case was premised on the appellant having molested the deceased and then killing her by immersing her into the pail of water. It was therefore critical, in the circumstances, for the Judge to have made a finding on the allegations of sexual molestation.

42 We noted that the Judge did not make a determinative finding as to who could have been responsible for the injuries detected on the deceased. In particular, the following extract from his judgment was particularly significant and bears quoting *in extenso* (see the GD at [56]):

> There was no direct evidence on [the sexual molestation], and the [appellant] had not made any admissions to this in his statements when he admitted to the immersions. The Prosecution did not charge him with molesting Nonoi. *In any event, the alleged molestation had a limited bearing on the charge of murder that the [appellant] faced as the genital injuries were not life-threatening*. In the circumstances, it is not necessary for there to be a finding as to whether the [appellant] had inflicted those injuries. [emphasis added]

43 Further, in evaluating the evidence on why the appellant might have placed the deceased into the pail of water, the Judge noted at [61] that:

> It was clear that the [appellant] wanted to stop Nonoi's crying, whether because he had molested her or because she was having a tantrum. He was quite determined and did not stop after the first two immersions, and immersed her on the third occasion for a longer duration.

44 In our view, we agreed with counsel for the appellant that this was a critical issue that should have been addressed by the Judge. Indeed, there was overwhelming objective evidence adduced before the court below which led to the conclusion that the appellant was responsible for inflicting the sexual injuries on the deceased.

45 In both his autopsy report and testimony in court, Assoc Prof Lau opined that there had been

evidence of sexual interference and that the vaginal injuries inflicted on the deceased were likely to have been caused prior to death and would not be missed by a person who bathed the child. He premised his conclusion on several factors which he elaborated vividly and extensively upon in the course of his examination-in-chief:[note: 16]

Q Now, you go on to state that there was apparent obliteration of the hymen. Now, is such obliteration---first of all, can you explain what you mean by "obliteration"?

A In a young child such as the deceased who was only about 2 years of age at the time of death, one would ordinarily be able to discern the presence of a hymen which is membrane that, simply put, covers the vaginal orifice and usually, er, has, er, an opening, er, within itself. *Now, this membrane was apparently completely destroyed and not at all identifiable at the time of the autopsy.*

Q Now, moving on, you also described a rupture in the right anterolateral wall. Now, can you explain---can you explain what this is the right anterolateral wall? …

A Er, that is described in my main post-mortem report, er, on page 34 of the bundle. It is right at the bottom of that page where I described the findings of the en bloc dissection and with that*the rupture measuring 2cm in its widest dimension in the right anterolateral wall of the mid-vagina.* …

A This is a photograph of the dissected reproductive organs of the deceased. And as you can see … *there was a fair amount of bleeding or haemorrhage in and around the area of the rupture.* And this … in stark contrast to the very dull appearance of the rest of the body would indicate that there was vaginal penetration prior to death.

Q Now, can I just confirm the---this rupture in the right anterolateral wall this is inside the vagina, correct?

A This is the vagina itself, yes, whereas the laceration of the fourchette is, er, just, er, outside the vagina.

Q And in layman's term "rupture" would that be---would that mean puncture or---

A It---it would mean that *there was a---a defect, er, which in this case would have been caused by some form of trauma.*

Q Now, based on your examination of these injuries, do you have an opinion as to when these injuries were likely to have been caused?

A It is my considered opinion that these injuries that is the injuries to the genitalia are likely to have been caused *prior to death*. I would not be able to pinpoint the exact time, er, of the infliction relative to the deceased's death.

[emphasis added]

46 Assoc Prof Lau further explained that these genital injuries, such as the rupture in the anterolateral wall, laceration of the fourchette and obliteration of the hymen, were all manifestations of evidence of sexual interference with the deceased prior to death:[note: 17]

> The infliction of the genital injuries would in all probability have caused the deceased some considerable pain. … [I]n addition to that, it would also have caused a bearable amount of

bleeding, er, which was still demonstrable at the autopsy some 3 days or more after the---the deceased's death.

47 Indeed, such injuries were unlikely to have gone unnoticed by anyone who was bathing the deceased; as Assoc Prof Lau emphasised as follows:[note: 18]

> What I would say is that the person who had bathed the child after the injuries have been inflicted may or may not have been aware of the nature and full extent of these injuries. However, I would venture to say that *in all likelihood the bleeding, er, could not have been missed nor I would surmise, er, the expressions of pain on the part of the child.* [emphasis added]

48 During cross-examination, we noted that counsel for the appellant did not once question Assoc Prof Lau's findings on the evidence of sexual interference of the deceased. In our view, this apparently considered "omission" was significant given the importance of this critical issue. We recognised that there was in fact an overwhelming amount of objective evidence that the deceased had in fact been molested by the appellant. First, on the morning of 1 March 2006, Mastura testified that she did not observe any injuries (save for an old burn mark on the deceased's arm) on the deceased while bathing her, prior to dropping her off at the Circuit Road flat. Her testimony was further confirmed by Rozanah's recollection of bathing the deceased during the preceding period from 24 to 26 February 2006 when she had not noticed any vaginal injuries on the deceased. In view of the fact that the appellant returned to the Circuit Road flat with the body of the deceased at about 6.00pm, any injuries on the deceased must have been inflicted between the crucial time period between 3.00pm and 6.00pm on 1 March 2006 and, notably, when she was under the care and supervision of the appellant.

49 Second, while counsel for the appellant did not raise any objections to the allegations of sexual interference, during cross-examination of the appellant's brother, Mohammed Rahim bin Johari ("Rahim"), he attempted to raise the possibility of another person possibly molesting the deceased. In his statements to the police, Rahim mentioned the events of 1 March 2006 briefly:[note: 19]

> On 1 March 2006, at about 3.00 plus p.m., I woke up from my sleep and saw that Nonoi was sleeping on the single bed in the same bedroom. Shortly thereafter, I left the house. At that time, my father was doing his afternoon prayers in the living room. My mother, sisters and Daniel were not in the house.

50 Counsel for the appellant sought to suggest that Rahim could have molested the appellant because he was alone in the bedroom with the two children, and, in support of this contention, sought to establish that this was the first time Rahim had been asleep in the same room with Nonoi. The issue arose from a series of questions posed to Rahim:[note: 20]

Q Now, witness, would you agree with me that because that room is shared by a lot of people it would not be unusual for you to on occasions be alone with Nonoi in that room?

A I don't understand.

Q You said the room is shared by a lot of people, right? Some---

A Yes.

Q ---so because Nonoi sleeps there, sometimes you sleep there, sometimes you and Nonoi

together. It's not unusual, right?

A What do you mean I---what do you mean by "unusual"? I don't understand.

…

Q … Is there any rule that if Nonoi is in that room you cannot go in?

A No, there's no any rule.

…

Q Now, you said that you used to disturb her by telling ghost stories and playing with her---taking away her toys. Now, why is it that your father had to warn you not disturb her? Why did your father take it so seriously and warn you?

A Because he---because he sometimes when we---when she get disturbed she cry.

Q Now, does part of your disturbing her include tickling her?

A Sorry?

Q Do you tickle her?

A No, no, I---I don't. I---when I was disturbing her I didn't---I didn't think to tickle her or whatever.

Q Do you play with her hair?

A No, I---I never play with the hair.

…

Q … Now, would you---would you agree with me that the reason why---how your father found out that you have been disturbing Nonoi is because Nonoi complained to him, is that correct?

A Sorry?

Q She complained to your father you are disturbing her, correct?

…

A Yah, yes, Sir.

…

Q Now, this room [the bedroom] ... does it have a door that can be closed?

A There is a door, it can be closed. But we---

…

Q A door that can be closed?

A It can be closed, but we seldom … close the door.

Q All right, witness, just one final question. *On that day when you were alone in the room with Nonoi and Daniel was sleeping, did you molest her?*

A No, I don't do such a---a that thing. I didn't do it.

[emphasis added]

51 In our view, this was highly improbable given that Rahim's girlfriend, Rosnita bte Ahmad, testified under cross-examination that she had visited Rahim at around 3.00pm and saw him sleeping inside one of the rooms of the Circuit Road flat, with Nonoi and Daniel:[note: 21]

Q So in actual fact you could have actually come to the house much later than 3.00pm?

A Means that roughly going to be 3.00 like that.

Court: Sorry, is about roughly what?

Witness: Going to be 3.00, like 2.50 like that.

Court: Oh.

Q Can it not be later than 3.00?

A No.

Q Just an estimate.

A Yah.

Q Cannot be?

A (No reply).

Q Why are you so sure?

A Because at the point of time, I looked at my watch.

52 In the light of this, we could not, without the requisite corroborative evidence, make the unfounded and mischievous inference that Rahim might have molested the appellant. This was indeed a serious allegation to run in the face of the objective evidence that established that it was in fact the appellant who had sexually interfered with the deceased. Indeed, we were of the view that the deceased was molested by the appellant and that it was particularly important for the Judge to have made a finding on this issue. This was so for two related reasons. First, this would have buttressed our finding with regard to s 300(*c*) of the Code and, second, while motive is not the same as intention, it can, in our view, cast valuable and significant light on the intention of an accused in appropriate circumstances.

Motive and intention

53 The framers of the Code were careful not to ascribe a definitive role to motive, whether good or bad, in the determination of criminal responsibility. In Indian Law Commissioners, *First Report* (cited in Sir Hari Singh Gour, *The Penal Law of India* (Law Publishers, 10th Ed, 1982) vol 1 at p 235), the rationale for not ascribing a greater weight to motive bears mention:

> We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply as defence or excuse under a criminal charge. We hold … that to allow any man to substitute for law his own notions of right would be in effect to subvert the law. To investigate the real motive, in each case, would be impracticable, and even if that could be done, a man's private opinion could not possibly be allowed to weigh against the authority of law.

54 The Singapore courts have also drawn a distinction between the *intention* and the *motive* of the accused. So, for instance, while it may be a person's intention to murder another where he acts with a purpose to bring about a result, his motive centres on explaining why he behaves in a certain way. In *Regina v Moloney* [1985] AC 905 at 926, the distinction has been distilled into a simple but useful example:

> A man who, at London Airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit. The possibility that the plane may have engine trouble and be diverted to Luton does not affect the matter. By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that that is where he will arrive.

55 This dichotomy between motive and intention was considered by the Singapore courts in a long line of cases such as *PP v Oh Laye Koh* [1994] 2 SLR 385 ("*Oh Laye Koh*"), *Thongbai Naklangdon v PP* [1996] 1 SLR 497 ("*Thongbai Naklangdon*"), *Lau Lee Peng v PP* [2000] 2 SLR 628 ("*Lau Lee Peng*") and, most recently, *Took Leng How v PP* [2006] 2 SLR 70 ("*Took Leng How*"). In *Oh Laye Koh*, Yong Pung How CJ clarified incisively that intention and motive were both different elements (at 393–394, [26]):

> The element of 'intention' is rarely, if ever, proved by direct evidence; it is inevitably to be inferred from the surrounding circumstances. In this respect, 'intention' is to be distinguished from 'motive', even though the ***presence of a motive may bolster the inference that an intention to commit the offence was existent.*** *The absence of motive, however, need not necessarily mean that no intention was present.* [emphasis added in italics and bold italics]

56 In the later case of *Thongbai Naklangdon*, the accused appealed, *inter alia*, on the ground that he lacked a motive to murder the deceased. However, this court reiterated that motive was not necessary to establish guilt. This thread of reasoning is consistent with the decision of *Lau Lee Peng* where this court was confronted with the issue of what the reason for the murder in that particular case was. The observations of Chao Hick Tin JA on this issue bear quoting in full (at [43] of *Lau Lee Peng*):

> The question may be asked what was the reason or motive for the killing. The prosecution had not expressly suggested any motive and it was not necessary to do so. *Its only burden was to show that the [accused] intended to inflict the injuries caused, and this burden it had discharged beyond a reasonable doubt*. The fact that the [accused] might not have gone to the deceased's flat with the intention of killing her was immaterial. [emphasis added]

57 More recently, in *Took Leng How*, Chao Hick Tin JA observed as follows (at [54]):

> [M]otive is not an essential element of the crime. But where the accused seeks to rely on the absence of motive to substantiate a particular defence, it is for the accused to prove the absence.

58 It would thus appear that while motive is not an essential element of the crime, it can "bolster the inference that an intention to commit the offence was existent", as Yong CJ observed astutely in *Oh Laye Koh* (see [55] above). It is helpful in appropriate circumstances by casting valuable (and even significant) light on the *intention* of an accused. In our view, as there were no independent eyewitnesses present at the scene of the crime in the present case, ascertaining whether the appellant had sexually assaulted the deceased and, hence, whether the appellant had a motive in murdering her in order to silence her, was therefore an important issue which the Judge should have addressed directly.

Murder under section 300(c) of the Code

The elements of section 300(c) of the Code

59 Section 300(*c*) of the Code reads as follows:

> **300.** Except in the cases hereinafter excepted culpable homicide is murder —
>
> ...
>
> (*c*) if it is done with *the intention of causing bodily* injury to any person, *and* the bodily injury *intended to be inflicted* is *sufficient in the ordinary course of nature to cause death*; …

[emphasis added]

60 The elements or requirements of s 300(*c*) of the Code are well established. They were laid down by V Bose J in the seminal Indian Supreme Court decision of *Virsa Singh v State of Punjab* AIR 1958 SC 465 ("*Virsa Singh*"). The principles in *Virsa Singh* have been applied in numerous Singapore cases. Indeed, it has been recently described by this court as containing "[t]he time-honoured pronouncement on s 300(*c*)" (see *PP v Lim Poh Lye* [2005] 4 SLR 582 at [17]). It will suffice for our present purposes to reiterate the well-established principles set out in *Virsa Singh* and applied by our courts.

61 In *Virsa Singh*, Bose J observed thus (at [8]–[13]):

> (8) It was argued with much circumlocution that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section 300 "thirdly" [our s 300(*c*)] was quoted:
>
> > "If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."
>
> It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause, "and the bodily injury intended to be inflicted is sufficient

in the ordinary course of nature to cause death."

(9) *This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the "thirdly" would be unnecessary because the act would fall under the first part of the section*, namely—

> "If the act by which the death is caused is done with the intention of causing death."

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

> "If it is done with the intention of causing bodily injury to any person.

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction: to that extent the enquiry is objective; *but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present*.

(10) Once that is found, the enquiry shifts to the next clause:—

> "and the bodily injury intended to be inflicted is insufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart *is* shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are how examining—

> "and the bodily injury intended to be inflicted"

is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

(11) In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or

a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. *It is broad-based and simple and based on commonsense*: the kind of inquiry that "twelve good men and true" could readily appreciate and understand.

(12) To put it shortly, the prosecution must prove the following facts before it can bring a case under S. 300 "thirdly";

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

(13) *Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under S. 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as, a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.*

[emphasis added]

62 The above statements of principle by Bose J are clear and are also consistent with the actual language of s 300(*c*) itself. A crucial point which emerges from these statements of principle is that there are *two limbs* in this particular provision. The *first* relates to the ascertainment (by the court) of the intention of the accused in so far as the inflicting of the specific injury which the victim suffered is concerned *and* such intention is ascertained on a *subjective* basis (based, of course, on the available objective facts and evidence) ("the first limb"). The *second* is that once the first limb has been satisfied (*viz*, that it is proved that the accused subjectively intended to inflict the specific injury which the victim suffered), then the court must proceed to ascertain, on an *objective* basis, whether that particular injury was "sufficient in the ordinary course of nature to cause death" ("the second limb"). The *subjective* and the *objective* bases of the first and second limbs, respectively, are important inasmuch as both limbs, whilst complementary, *ought not to – and cannot – be conflated*. This is an important point because if both limbs operate on a subjective basis, then the requirements

of s 300(*c*) would *not* be satisfied if it is proved that the accused did *not intend to inflict an injury that was "sufficient in the ordinary course of nature to cause death" – in other words, that the accused did not intend to cause the death of the victim through the said injury*. As Bose J has correctly pointed out in the passage quoted in the preceding paragraph, where an accused intends to inflict an injury that was "sufficient in the ordinary course of nature to cause death", such a situation would fall squarely within s 300(*a*) of the Code. Therefore, such an interpretation would not only render s 300(*c*) otiose in the process, it would also be *completely contrary* to the clear and unambiguous language of s 300(*c*) itself.

Application to the facts

(1) The immersions of the deceased by the appellant into the pail of water

63 As already mentioned above (at [34]), the appellant sought to argue that the Judge had erred in concluding that the third immersion was not a quick immersion when there was no evidence. Indeed, the appellant maintained that each of the three immersions was merely a quick dipping of less than a second each time.

64 It is important to note, in this regard, that the Prosecution's case was that the appellant had sexually assaulted the deceased and, having done so, repeatedly immersed her into the pail of water to drown her in order to cover up his acts of sexual molestation.

65 Even more importantly, given our finding above that the appellant had, in fact, sexually assaulted the deceased, the appellant's argument that the third immersion was a quick one is wholly unpersuasive. Indeed, the Prosecution could, in our view, have proceeded with the charge of murder against the appellant under s 300(*a*) instead; the provision itself reads as follows:

> **300.** Except in the cases hereinafter excepted culpable homicide is murder —
>
> (*a*) if the act by which the death is caused is *done with the intention of causing death*;
> …

[emphasis added]

66 Indeed, a close perusal of the record of proceedings in the court below reveals that the Prosecution, whilst proceeding against the appellant under s 300(*c*) of the Code, had proceeded (in *the alternative*) under s 300(*a*) as well.

67 However, the Judge focused wholly (and only) on s 300(*c*) of the Code. Given his finding that it was immaterial to his decision whether or not the appellant had sexually assaulted the deceased, it was not surprising that the Judge proceeded the way he did. Indeed, a finding pursuant to s 300(*a*) could only have been made if the Judge had in fact found that the appellant had sexually assaulted the deceased. This would, as the Prosecution argued, have then furnished the appellant with the requisite motive to cause the death of the deceased in order to cover up his acts of sexual molestation. As noted above (especially at [58]), whilst motive is not an essential element of the crime (here, of murder) as such, it can, in appropriate circumstances such as these, cast valuable (and significant) light on the intention of the accused (here, the appellant). We should also point out that such factual circumstances would (and, in some senses, *a fortiori*) justify a finding of guilt pursuant to s 300(*c*) as well (in accordance with the principles referred to briefly in the preceding section of this judgment). This is, in other words, an instance where there is, on the facts, an overlap between s 300(*a*) and s 300(*c*) of the Code.

68 We should add, however, that even if we disregarded a finding that the appellant had sexually assaulted the deceased and assumed (as the Judge did) that the appellant had immersed the deceased into the pail of water as she (the deceased) was having a tantrum, we are of the view that the Judge was nevertheless justified in finding that the appellant was guilty pursuant to s 300(*c*) of the Code. In particular, like the Judge, we find the appellant's explanation with regard to the immersions of the deceased by the appellant into the pail of water wholly contrived and unconvincing. It was clear, in our view, that the appellant intended to cause the specific injury which the deceased suffered, which injury was sufficient in the ordinary course of nature to cause her death within the meaning of s 300(*c*) of the Code. The appellant's argument to the effect that the immersions were mere perfunctory dippings does not bear up, having regard to the relevant objective evidence. For example, the appellant's sudden volte-face at the trial itself with regard to the telephone call allegedly received during the third immersion should be noted. It had hitherto been the appellant's case throughout that he had been distracted by this telephone call and had answered it, consequently forgetting that he had left the deceased immersed (for the third time) in the pail of water. When confronted at the trial with clear objective evidence that he could not possibly have received such a call at the material time, he did a complete volte-face, claiming that he could not recall making the various statements relating to this telephone call. The fact of the matter was that there had been no telephone call to begin with and that the appellant had intended to inflict serious injury through his repeated immersions of the deceased into the pail of water. Indeed, it is clear, on the objective evidence (in particular, the medical evidence), that the appellant must have immersed the deceased into the pail of water for a prolonged period of time. This, in fact, resulted in the deceased *drowning*. To state that such a serious injury was sufficient in the ordinary course of nature to cause death must be an understatement of the highest order. The Judge was therefore more than justified, on the objective evidence before him, to come to this conclusion, regardless of the motive the appellant had for immersing the deceased repeatedly into the pail of water. We note that this evidence also included findings of fact by the Judge which we saw no reason whatsoever to interfere with. Indeed, it is not surprising, in the circumstances, that the appellant also argued before this court – in support of his argument that the immersions were perfunctory dippings – that the actual cause of death was not drowning. In this regard, he raised a number of other possible alternative causes of death instead. We will deal with this particular argument in the next section of this judgment. The appellant also argued that, assuming that he had indeed caused the deceased to die by drowning, that he had been provoked within the meaning of Exception 1 to s 300 of the Code. We will also deal with this particular argument in due course. We turn, first, to the appellant's argument to the effect that the deceased had died not by his hand but by alternative causes.

(2) Causation

(A) WHETHER THE APPELLANT HAD CAUSED THE DEATH OF THE DECEASED

69 In relation to the issue of causation, a dispute arose as to how the deceased could have died. Before us, the appellant contended, first, that it was not conclusive that the deceased had died from drowning because the pathological findings of acute pulmonary oedema and voluminous appearance of the deceased's lungs were equivocal. Second, the appellant further argued that it was possible that the deceased had died from sudden cardiac arrest as a result of cardiac arrhythmia. Third, the appellant contended that the deceased could have suffered from status epilepticus. However, as will be seen, these suggested alternative causes of death are not convincing and highly speculative.

70 In his statements to the police, the appellant explained that as the deceased had continued to cry persistently upon their return to the Circuit Road flat, he used his "right hand to punch her on her right thigh twice". Despite executing a series of punches, she did not relent and continued to cry.

The appellant then lost his patience and pulled her into the toilet. The events that transpired thereafter are set out as follows in the appellant's statement taken on 8 March 2006:[note: 22]

> 18 I pulled Nonoi by one of her hands to the toilet. Just outside the toilet, I told her in Malay, "Nampak Tu Baldi?" meaning "Can you see that pail?". She kept on crying. I did not know whether she understood me but what I knew, after I showed her the pail, she looked at it. She continued crying. She did not say anything.
>
> 19 I became angrier. I pulled her into the toilet. I took out her clothings because I did not want them to get wet. I left her pampers on. I dipped her into the pail of water, which was three-quarter full. The pail of water was already there and it was not filled by me.
>
> 20 Before dipping her, I removed the red scoop from the red pail and placed it on the toilet cover. I lifted her up by both her legs with her head facing downwards. Is it very cruel if I tell you I did it this way? …
>
> 21 As she continued crying, I put her into the water, head first, for a short while. I had to bend both my knees slightly. I pressed her downwards and her head landed on the base of the pail. I had to bend both knees lower but not to the extent of squatting or kneeling. After that, I pressed her downwards some more until both her legs were in the pail and her body was a foetus position for a while. After pressing her down, I lifted her up straightaway. Water overflowed from the pail, leaving it one-quarter full. I paused for a while and I was still holding onto both her legs and she was still in the upside-down position.
>
> …
>
> 27 Then I bent my body slightly forward and put her into the pail of water, with her head down first, like the first time. I had to bend both my knees slightly. I pressed her downwards and her head landed on the base of the pail. I bent both knees lower but not to the extent of squatting or kneeling. I pressed her downwards some more until both her legs were in the pail and her body was a foetus position for a while. After pressing her down, I lifted her up straightaway. Water overflowed slightly from the pail. …
>
> …
>
> 29 Immediately, I bent down and pulled her legs. I lifted her by holding onto her legs and she fell backwards. I stood up, lifted her legs and put her into the pail of the remaining water. I had to bend both my knees slightly. I pressed her downwards and her head landed on the base of the pail. I bent both knees lower but not to the extent of squatting or kneeling. I pressed her downwards some more until both her legs were in the pail and her body was a foetus position.
>
> …
>
> 31 I walked hurriedly back to the toilet. On reaching the entrance of the toilet, *I saw Nonoi was not moving. She was still stuck in the pail.* I quickly lifted her up by the legs and placed her on the toilet floor. She laid on the floor. After that, I carried her by the sides of her body*. I shook her body to wake her and at the same time, called her name many times. Her body was soft and weak. Her eyes opened and closed.* Then, I saw shit on the toilet floor. I placed her on the toilet floor and pressed her abdomen and chest repeatedly. *Water came out from her mouth and nose but she still did not wake up. Her body was still soft. Then I blew air into her mouth and nose at the same time. Some water came out from her mouth and nose.* I did not know the

correct way of getting out the water from the body but I tried my best to help her in my own way. …

32 … Her body was very soft and her eyes were opening and closing. A bit of water came out from her mouth and nose. Still, there was no response from her.

33 When I saw Nonoi like this, I became scared because she had died. *I did not have the intention to cause her death.*

[emphasis added]

This account of the events was also mirrored in the appellant's statement to the police given pursuant to s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) as follows:[note: 23]

I hit her at legs. I slap her face. *I dip her into a pail of water, head first, which caused her death.* I do not have the intention to do all these as I am not a murderer and I am not a rapist. [emphasis added]

It would be apposite at this juncture to consider the various possibilities canvassed by counsel for the appellant as to the possible causes of the deceased's death.

(I) ACUTE PULMONARY OEDEMA AND VOLUMINOUS APPEARANCE OF LUNGS

71 In his autopsy report dated 5 March 2006, Assoc Prof Lau observed that the lungs of the deceased were "voluminous, with numerous post-mortem subpleural bulla". Furthermore, the "[c]ut sections showed acute pulmonary oedema and congestion, bilaterally". In his final report dated 17 August 2006, Assoc Prof Lau's findings were particularly important in addressing the final cause of death; he stated:[note: 24]

3. A comprehensive post-mortem examination showed no definite evidence of other injuries which could, in the ordinary course of nature, have caused or contributed to death. While the voluminous appearance of the lungs, coupled with acute pulmonary oedema, are compatible with drowning or immersion, these features are by no means strictly or exclusively diagnostic of such an event, in part because of the degree of putrefaction encountered at autopsy. Nevertheless, it should be noted that an asphyxial mechanism, such as that caused by smothering or suffocating, which may leave no permanent or discernible marks on the body, cannot be excluded.

72 Under cross-examination, Assoc Prof Lau further testified that there was nothing exceptional about the appearance of the deceased's heart on examination after her body was discovered:[note: 25]

Q: You could have pulmonary oedema also if you have a heart failure, is it correct?

A: Well, heart failure supervenes in practically all of us, er, at the point of death or just before death, whatever the case may be. In this case, *the heart wasn't enlarged; the heart looked quite normal, in spite of the body being decomposed*.

[emphasis added]

Therefore, in view of the objective evidence, any conjecture that the deceased could have died from pulmonary oedema, but not drowning, was entirely unfounded and mischievous.

(II) CARDIAC ARRHYTHMIA

73 Assoc Prof Lau opined that while genetic screening for sudden cardiac death could not exclude the possibility of cardiac arrhythmia in the presence of an environmental trigger, the prospect of some form of mechanical asphyxia, immersion or genital injuries causing cardiac arrhythmia remained an unverifiable possibility. He was of the view, under cross-examination, that in this case, there was no evidence of any congenital abnormality that could have predisposed the deceased to cardiac arrhythmia or to heart failure. In the course of his extensive inquiry into the cause of death of the deceased, Assoc Prof Lau was exhaustive and conscientious in his efforts of exploring all possible causes and sent a sample of the deceased's heart tissue to the National University of Singapore Pharmacogenetics Laboratory for further examination. As he explained:[note: 26]

> That the purpose of going---of taking the---should I say extraordinary step of requesting for this particular test, genetic test for sudden cardiac death is because, er, young children may die from genetically induced, er, cardiac arrhythmia in cases of sudden infant death or sudden death in infancy. So having found no evidence of injury in the sense of a head injury, stab wounds, strangulation and other injuries from which a child of this age could have died from under the circumstances, I felt obliged to go as far as I could to determine whether or not the child could have succumbed to, er, genetically induced, er, cardiac arrhythmia so as to exclude if possible a natural cause of death.

74 Specialising in pharmacogenetics, Dr Lee concurred and confirmed (both in writing and in his oral testimony) that any argument with regard to this possible cause of death was, at best, speculative. While he acknowledged that there was the existence of two genetic variants present in the deceased that were identified as being linked to the abnormalities of heart rhythm, he emphasised that:[note: 27]

> From the study of the genetic makeup of the deceased, two genetic variants … were identified that have been ***speculatively*** *linked to abnormalities of heart rhythm***.** However, these variants occur commonly in the general (presumably normal) Malay population, and it is thus difficult to identify them as being responsible for sudden cardiac death syndrome, which occurs only rarely. … *Ultimately, it is highly speculative at this point in time whether there is an association between these variants, either individually or in combination, with the onset of sudden cardiac death*. [emphasis added in italics and bold italics]

Dr Lee was therefore of the view that the possibility of the deceased suffering from sudden cardiac arrest was merely speculative and unsupported by any tangible or concrete evidence.

75 We noted that it was particularly significant that, during re-examination, in response to a query from the Judge as to what the observable symptoms of cardiac arrhythmia were, Assoc Prof Lau opined that these included "collapsing suddenly, breathlessness". According to the statements of the appellant, he did not mention *any* of these symptoms observable on the deceased prior to her demise.

(III) STATUS EPILEPTICUS

76 From the medical records of the deceased, while the deceased had a history of being admitted into hospital in 2003 and 2004 for various conditions (including an episode of gastroenteritis-provoked seizures), gastroenteritis-provoked seizures "constitute[d] a benign condition" and there appeared to be "no family history of epilepsy or any lethal hereditary disease among persons known to

be the deceased's biological parents".[note: 28] Accordingly, Assoc Prof Lau's conclusion was that the actual medical cause of death was not likely to be due to a natural disease process and, in view of the state of decomposition of the deceased's body, the cause of death would have to be documented as unascertainable.

77 In his testimony in court, Assoc Prof Lau reiterated, first, that while he had explored other possible causes of death, it was unlikely the deceased could have died from natural causes. Second, in the event of immersions into water, he was of the view that it would be possible to cause death by drowning in the ordinary course of nature but that:[note: 29]

> It all depends on the amount of water that the victim had inhaled in the course of those repeated submersions in water. … This would vary with the victim himself or herself, the conditions under which drowning occurred. But what is known is that it is entirely possible to drown even in very shallow water …

78 Third, he opined that having read the statements of the appellant, he could not think of any other possible cause of death.

79 Fourth, under cross-examination, Assoc Prof Lau emphasised that, even if the deceased suffered from a gastroenteritis-provoked seizure on 1 March 2006, it was a relatively harmless condition and was not life-threatening. In his words:[note: 30]

> Ah, even if she had, a GE [gastroenteritis] provoked seizure is known to be, er, it's not a---known to be a lethal condition. It's a relatively harmless---
>
> …
>
> Yes, *GE provoked seizures are---are---are not known to be life threatening.*
>
> [emphasis added]

Has the Defence raised a reasonable doubt as to the cause of the deceased's death?

80 It is well-settled law that the legal burden lies on the Prosecution to establish its case against an accused beyond a reasonable doubt. In *Woolmington v The Director of Public Prosecutions* [1935] AC 462, Viscount Sankey LC referred to this golden thread which has been woven through the intricate web of English criminal law as follows (at 481):

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

81 It has been established in cases such as *Syed Abdul Aziz v PP* [1993] 3 SLR 534 and *Ramakrishnan s/o Ramayan v PP* [1998] 3 SLR 645 that the Prosecution bears the burden of proving its case beyond a reasonable doubt; this is firmly embedded in the Evidence Act (Cap 97, 1997 Rev Ed) as well as in the "conscience of the common law" (*per* V K Rajah J in *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR 45 ("*Jagatheesan*") at [46]). It would be pertinent at this juncture to consider the nature of what amounts to a reasonable doubt. In *Miller v Minister of Pensions* [1947]

2 All ER 372, Denning J observed of the nature of this burden of proof, at 373:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. *Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt.* The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave *only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable,"* the case is proved beyond reasonable doubt, but nothing short of that will suffice. [emphasis added]

82 This recognition that fanciful or remote possibilities should be excluded has been echoed in recent Singapore decisions. As Prof Tan Yock Lin in *Criminal Procedure* (LexisNexis, Looseleaf Ed, 2007, Issue 18) at vol 2, ch XVII, para 2952 remarked, a reasonable doubt must be "a doubt which is material, which counts. Not any mere possibility of the prosecution case being false will amount to a reasonable doubt in the prosecution case." He also stated (*ibid*, fn 1) quite correctly, in our view, that:

> A mere doubt, as opposed to a reasonable doubt, must frequently be conceded in the nature of things but *because it cannot yet concretely be articulated in relation to the evidence in the case, it remains an untested hypothesis and may be rejected.* [emphasis added]

83 In *Teo Keng Pong v PP* [1996] 3 SLR 329, Yong Pung How CJ emphasised that the burden is not "to prove the case beyond all doubts". He recognised that in many cases, a "minutiae of doubt" might still exist. However, the crux of the issue is that (see 339, [68]):

> [T]he burden on the prosecution is to prove its case beyond reasonable doubt. It is not to prove the case beyond all doubts. That standard is impossible to achieve in the vast majority of cases. In almost all cases, there will remain that minutiae of doubt. … The question in all cases is whether such doubts are real or reasonable, or whether they are merely fanciful. It is only when the doubts belong to the former category that the prosecution had not discharged its burden, and the accused is entitled to an acquittal.

84 Most recently, in *Jagatheesan*, two important principles were reiterated by Rajah J. The first is that it would be erroneous to set up a standard of absolute certainty that the Prosecution must meet before an accused can be found guilty. What is necessary for sustaining a conviction is that the evidence establishes guilt beyond a reasonable doubt. The second concept is that not all doubts about the Prosecution's case are reasonable doubts.

85 In *Took Leng How* ([55] *supra*), the Prosecution's case rested on the argument that the accused had sexually assaulted the deceased and murdered her to mask his deeds. Counsel for the accused in that case attempted to mount several possibilities as to the deceased's cause of death, such as the deceased developing fits which resulted in her death or the causing of trauma to her head or suffocation from swallowing her tongue or oxygen deprivation after the accused wrapped her in plastic bags in preparation to dispose of her body. Chao JA, in rejecting these arguments, reiterated that the criminal standard of proof did not mean that "every doubt that is raised by the Defence will amount to a reasonable doubt" (at [28]).

86 It is clear, therefore, that the paramount consideration of the courts is not the elimination of all doubts, but whether such doubts are real or reasonable or merely a fanciful possibility. To put it another way, even *if* there is some doubt, it remains an "untested hypothesis" unless counsel for the Defence is able to point to some evidence supporting the hypothesis he seeks to canvass.

87 Returning to the present case, the evidence of Assoc Prof Lau essentially led us to draw three conclusions. First, he agreed that, having considered all the available forensic medical evidence, genetic abnormalities or variations in the deceased were of negligible significance. On the balance of probabilities, he opined that the deceased had died from an *unnatural* cause of death rather than a *natural* one. Second, he stated that he had to give a necessarily guarded opinion about the actual medical cause of death because of the state of decomposition of the body. This was understandable as the body of the deceased was only recovered some 72 hours after her death. Third, the only evidence upon which Assoc Prof Lau could make a pathological finding as to the cause of death consisted of the injuries he could find, namely, the voluminous lungs, acute pulmonary oedema and the genital injuries, though those were not necessarily lethal. In our view, the various possibilities as canvassed by counsel for the Defence were simply speculative possibilities that were unsupported by any clear evidence or basis.

88 In contrast, the statements of the appellant verified how the deceased had been immersed into the water until her body became limp, soft and motionless. In other words, the deceased had drowned and this was in fact consistent with Assoc Prof Lau's finding. We found, on the other hand, that the possibilities canvassed by his counsel remained an untested hypothesis and the appellant had therefore failed to raise a reasonable doubt as to the cause of death of the deceased. In our view, there was compelling evidence that the appellant had immersed the deceased into water and had thereby caused her death.

Defence of grave and sudden provocation

The applicable principles

89 The appellant also sought to bring himself within Exception 1 to s 300 of the Code ("Exception 1"), which embodies (in statutory form) the doctrine of provocation which would reduce what would otherwise be an offence of murder to culpable homicide instead (bearing in mind that conviction under the former offence carries the mandatory death sentence). Exception 1 itself reads as follows:

> *Exception* 1.—Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> (*a*) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (*b*) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> (*c*) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> *Explanation*.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

90 The law relating to the doctrine of provocation generally has resulted in a veritable plethora of academic literature. This is not surprising, perhaps, because of the many controversies that

(unfortunately) bedevil the doctrine (see generally, for example, the UK Law Commission, *Partial Defences to Murder* (Law Com No 290, Cm 6301, 2004) ("UK Report") at Part 3, and reference may also be made to the Law Commission's earlier Consultation Paper of the same title (Consultation Paper No 173, 31 October 2003) ("UK Consultation Paper")). Indeed, Lord Hoffmann observed thus in the House of Lords decision of *Regina v Smith (Morgan)* [2001] 1 AC 146 ("*Smith (Morgan)*") at 159:

> [I]t is impossible to read even a selection of the extensive modern literature on provocation without coming to the conclusion that the concept has serious logical and moral flaws.

Not surprisingly, the UK Law Commission has proposed reforms in relation to the doctrine (see UK Report at Part 3, especially at para 3.168).

91 Many of the controversies are by no means irrelevant in the Singapore context, particularly given the fact that Exception 1 was based on – and is related to – the relevant English law. One which raises particularly thorny issues is the question as to whether or not the accused's personal idiosyncrasies can be taken into account in his or her favour in so far as the issue of the loss of self-control (as opposed to the gravity of the provocation) is concerned. The House of Lords in *Director of Public Prosecutions v Camplin* [1978] AC 705 ("*Camplin*") had refused to follow its earlier decision in *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119 and held that the court could take into consideration the accused's personal idiosyncrasies (including his age and physical characteristics) which would affect the gravity of the provocation. However, Lord Diplock also observed in *Camplin* (at 716) that:

> The public policy that underlay the adoption of the "reasonable man" test in the common law doctrine of provocation was to reduce the incidence of fatal violence by preventing a person relying upon his own exceptional pugnacity or excitability as an excuse for loss of self-control.

Not surprisingly, perhaps, *Camplin* did not resolve conclusively the issue just referred to. Indeed, in the subsequent Hong Kong Privy Council decision of *Luc Thiet Thuan v The Queen* [1997] AC 131 ("*Luc Thiet Thuan*"), it was held that the accused's personal idiosyncrasies ought *not* to be taken into account in so far as the issue of *the loss of self-control* (as opposed to the gravity of the provocation) was concerned, endorsing the view of Prof Ashworth in his seminal article (see A J Ashworth, "The Doctrine of Provocation" [1976] CLJ 292 ("Ashworth's article")).

92 However, in the House of Lords decision of *Smith (Morgan)*, *Luc Thiet Thuan* was *not* followed. *Smith (Morgan)*, which was itself the subject of some trenchant criticism (see, in particular, John Gardner & Timothy Macklem, "Compassion without Respect? Nine Fallacies in *R. v. Smith*" [2001] Crim LR 623), was *not* followed in yet another subsequent Privy Council decision (on appeal from the Court of Appeal of Jersey) in *Attorney General for Jersey v Holley* [2005] 2 AC 580 ("*Holley*") (perceptively noted by Prof Andrew Ashworth in "Murder" [2005] Crim LR 966). Interestingly, an enlarged board of some *nine* members was constituted to hear the appeal in *Holley* and the decision was rendered by a majority of six to three). Notwithstanding the fact that *Holley* was not a decision of the House of Lords, it is significant that Lord Nicholls of Birkenhead (who delivered the judgment of the majority of the Board) observed, right at the outset of the judgment, thus (at [1]):

> This appeal from the Court of Appeal of Jersey calls for examination of the law relating to provocation as a defence or, more precisely, as a partial defence to a charge of murder. *Jersey law on this subject is the same as English law*. In July 2000 the House of Lords considered the ingredients of this defence in the *Morgan Smith* case (*R v Smith (Morgan)* [2001] 1 AC 146). The decision of the House in that case is in direct conflict with the decision of their Lordships' board in *Luc Thiet Thuan v The Queen* [1997] AC 131. And the reasoning of the majority in the *Morgan*

Smith case is not easy to reconcile with the reasoning of the House of Lords in *R v Camplin* [1978] AC 705 or *R v Morhall* [1996] AC 90. *This appeal, being heard by an enlarged board of nine members, is* ***concerned to resolve this conflict and clarify definitively the present state of English law****, and hence Jersey law, on this important subject.* [emphasis added in italics and bold italics]

93 That the position in *Holley* now represents the applicable English law has been confirmed in no uncertain terms by the English Court of Appeal decision of *Regina v James* [2006] QB 588. On the specific (and interesting) issue of precedent in so far as the English position was concerned, Lord Phillips of Worth Matravers CJ, delivering the judgment of the court (which "sat five strong because [the appeals] raise a novel and important question of law relating to precedent" (see *id* at [1])), adopted a principled (yet practical) approach that ensured that substance would take precedence over form; he observed thus (at [40]–[45]):

> 40 If we accept what Professor Ashworth describes as the "purist strain of argument" and allow these appeals, our decision, until reversed by the House of Lords as it surely will be, will have to be followed by judges directing juries in trials around the country. Sir Allan was right to refer to this as reducing the law to a game of ping-pong. We do not wish to produce such a result. If we are not to do so, however, two questions must be faced. (i) How do we justify disregarding very well established rules of precedent? And (ii) what principles do we put in place of those that we are disregarding? The two questions are obviously interrelated.
>
> 41 As to the first question, it is not this court, but the Lords of Appeal in Ordinary who have altered the established approach to precedent. There are possible constitutional issues in postulating that a Board of the Privy Council, however numerous or distinguished, is in a position on an appeal from Jersey to displace and replace a decision of the Appellate Committee on an issue of English law. Our principles in relation to precedent are, however, common law principles. Putting on one side the position of the European Court of Justice, the Lords of Appeal in Ordinary have never hitherto accepted that any other tribunal could overrule a decision of the Appellate Committee. Uniquely a majority of the Law Lords have on this occasion decided that they could do so and have done so in their capacity as members of the Judicial Committee of the Privy Council. We do not consider that it is for this court to rule that it was beyond their powers to alter the common law rules of precedent in this way.
>
> 42 The rule that this court must always follow a decision of the House of Lords and, indeed, one of its own decisions rather than a decision of the Privy Council is one that was established at a time when no tribunal other than the House of Lords itself could rule that a previous decision of the House of Lords was no longer good law. Once one postulates that there are circumstances in which a decision of the Judicial Committee of the Privy Council can take precedence over a decision of the House of Lords, it seems to us that this court must be bound in those circumstances to prefer the decision of the Privy Council to the prior decision of the House of Lords. That, so it seems to us, is the position that has been reached in the case of these appeals.
>
> 43 What are the exceptional features in this case which justify our preferring the decision in *Holley's* case to that in the *Morgan Smith* case? We identify the following. (i) All nine of the Lords of Appeal in Ordinary sitting in *Holley's* case agreed in the course of their judgments that the result reached by the majority clarified definitively English law on the issue in question. (ii) The majority in *Holley's* case constituted half the Appellate Committee of the House of Lords. We do not know whether there would have been agreement that the result was definitive had the members of the Board divided five/four. (iii) In the circumstances, the result of any appeal on the

issue to the House of Lords is a foregone conclusion.

44 We doubt whether this court will often, if ever again, be presented with the circumstances that we have described above. It is those circumstances which we consider justify the course that we have decided to take, and our decision should not be taken as a licence to decline to follow a decision of the House of Lords in any other circumstances.

45 For the reasons that we have given, we approach the individual appeals on the premise that the relevant principle of law is to be found in the majority decision of the Privy Council in *Attorney General for Jersey v Holley* [2005] 2 AC 580 and not the majority decision of the House of Lords in *R v Smith (Morgan)* [2001] 1 AC 146.

94 Fortunately, it is unnecessary (for the most part at least) to refer to the various controversies that are analysed as well as discussed in the relevant case law as well as literature – save to observe that the present Singapore position endorses the position laid down in *Luc Thiet Thuan*, which *also* represents the *present English* position as set out in *Holley* (see the decision of this court in *PP v Kwan Cin Cheng* [1998] 2 SLR 345 ("*Kwan Cin Cheng*") at [49] and *Lau Lee Peng* ([55] *supra* at [29])). As we shall see, the facts in the instant appeal present different – and relatively more straightforward – issues. Indeed, to his credit, counsel for the appellant, Mr Bajwa, did not belabour the point. He relied on the strongest precedent he could find, which we will discuss in more detail below. Before proceeding to do so, it would be appropriate to set out briefly the law relating to provocation under Exception 1. The basic principles (as opposed to the specific controversies) have, we should observe, been well established in the local case law.

95 In *Kwan Cin Cheng*, for example, Yong Pung How CJ, delivering the grounds of judgment of the court, observed thus (at [44]):

> As the law has developed, there are *two distinct requirements* for the provocation defence to apply: *first, a 'subjective' requirement that the accused was deprived of his self-control by provocation; and secondly, an 'objective' requirement that the provocation should have been 'grave and sudden'. The latter requirement involves the application of the 'reasonable man' test* accepted in *Vijayan v PP* [1975] 2 MLJ 8 at p 12; [1975-1977] SLR 100 at p 107 and cited in *Ithinin bin Kamari v PP* [1993] 2 SLR 245 at p 250:
>
> > In our judgment, under our law, where an accused person charged with murder relies on provocation and claims the benefit of Exception 1 of s 300, the test to be applied is, would the act or acts alleged to constitute provocation have deprived a reasonable man of his self-control and induced him to do the act which caused the death of the deceased and in applying this test it is relevant to look at and compare the act of provocation with the act of retaliation.
>
> [emphasis added]

96 In so far as the two distinct requirements set out above are concerned, Prof Ashworth helpfully (and perceptively) explains the underlying rationale for the above elements which (as the statement of principle in the preceding paragraph itself emphasises) contain subjective and objective conditions, respectively, as follows (see Ashworth's article ([91] *supra*) at 317–318):

> The defence of provocation is the sole concession to loss of self-control by persons who are not classified as mentally disordered, and this defence can only operate to reduce murder to manslaughter [culpable homicide not amounting to murder under s 299 of the Code]. In modern

> English law the defence has two main elements, the subjective condition (that the accused was provoked into a sudden and temporary loss of self-control) and the objective condition (that the provocation was sufficiently grave to cause a reasonable man to react as the accused did). The union of subjective and objective conditions is no mere historical accident. It represents a fairly successful endeavour to express the core features of provocation as a ground of extenuation for wrongdoing. Provocation mitigates moral culpability to the extent that a person acted in a less-than-fully-controlled manner in circumstances in which there was reasonable justification for him to feel aggrieved at the conduct of another. The law's subjective condition operates to ensure that it was not a revenge killing, but rather a sudden and uncontrolled reaction to perceived injustice. The objective condition looks to the element of partial justification and, inevitably, to the conduct of the provoking party. It requires of the jury [under English law, there being no jury under Singapore law] an assessment of the seriousness of the provocation, and a judgment as to whether the provocation was grave enough to warrant a reduction of the crime from murder to manslaughter. This question of sufficiency is one of degree, and the legal rules, although they can take the court so far, cannot determine this ultimate question.

And the same author, in Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th Ed, 2006) elaborates thus with regard to the *first* requirement (at p 264):

> Without this [requirement], there would be no way of excluding planned revenge killings, and the argument is that they should be excluded from the defence because a person who coolly plans a response to an affront or a wrong ought to ensure that the response conforms with the law. The genuinely provoked killer, on the other hand, is in such a disturbed state of mind that such calculation does not occur.

Reference may also be made, in this regard, to David Ormerod, *Smith & Hogan Criminal Law* (Oxford University Press, 11th Ed, 2005) ("*Smith & Hogan*") at p 446.

97 Returning to the principles set out in *Kwan Cin Cheng*, the learned Chief Justice also observed, in so far as the "reasonable man" test was concerned (at [63] and [65]), that:

> The 'reasonable man' test formed no part of the provocation defence as drafted in the Penal Code. It was added by the common law as a control device to ensure that the defence would be kept within acceptable limits, and this purpose must be borne in mind when applying the test. …
>
> [T]he expression 'reasonable man', though convenient, is somewhat misleading. The objective test was introduced to ensure a uniform standard of self-control, and to deny the defence to those who overreact because they are 'exceptionally pugnacious and bad-tempered and over-sensitive'. The objective test demands only that the accused should have exercised the same degree of self-control as an ordinary person. It does not require that his act of killing must be somehow capable of being viewed as 'reasonable'. In applying the test, care must be taken not to peg the standard of self-control and the degree of provocation required at an unrealistically high level.

98 Also important are Yong CJ's comments on the status of the "proportionality" requirement under Singapore law (at [66]–[69]):

> 66 At the trial below, the prosecution also contended that the respondent's reaction was disproportionate or not commensurate with the provocation offered. Such a 'proportionality' requirement was a noticeable feature in English law on provocation since *Mancini v DPP* [1942] AC 1. However, its importance diminished after the enactment of s 3 of the Homicide Act 1957

(which, as stated earlier, provided that the question of whether a reasonable man would have reacted like the accused to the provocation must be left to the jury), and it no longer has the status of a rule of law: *Phillips v R* [1969] 2 AC 130 at p 138, per Lord Diplock. In Singapore, the 'proportionality' criterion has been applied in several cases. In *Vijayan*, it was phrased as a requirement for a 'reasonable relationship' between the provocation and the accused's reaction. However, it was clear that the court viewed this as part of the test of whether the provocation was grave and sudden; the court said at p 12:

> But as the test of the sufficiency of the provocation, namely, whether or not the provocation offered would have induced a reasonable man to do what the accused did, cannot be applied without comparing the provocation with the retaliation, the element of 'reasonable relationship' is an essential factor to be taken into consideration.

67 This court in *Ithinin bin Kamari v PP* also held (at p 251) that the retaliation of the accused in that case had been 'entirely out of proportion' to the alleged acts of provocation.

68 The 'proportionality' requirement, as phrased in these and other cases, suggested that an accused is expected to tailor his retaliation to the degree of provocation even after having lost self-control. It may be argued that this is unrealistic if the accused had totally lost self-control; but this criticism overlooks the fact that the loss of self-control is a matter of degree. As Lord Diplock said in *Phillips v R* [1969] 2 AC 130 at pp 137–138:

> [C]ounsel for the appellant contended … that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree but is absolute: there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view, false.

69 However, *in our view, a 'proportionality' criterion would be more accurately expressed in the following terms: in deciding if an accused had exercised sufficient self-control for the objective test, a relevant question may be whether the degree of loss of self-control was commensurate with the severity of the provocation. Nonetheless, it must be recognised that where the provocation defence in Exception 1 to s 300 is concerned, the accused's loss of self-control would ex hypothesi always have been of an extreme degree, resulting in the killing of another person. In practice, an inquiry into 'proportionality' does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have lost his self control to this extent and reacted as the accused did.*

[emphasis added]

99 The principles set out in *Kwan Cin Cheng* (at [97] above) were reiterated in the decision of this court in *Lim Chin Chong v PP* [1998] 2 SLR 794 ("*Lim Chin Chong*"), where M Karthigesu JA, delivering the grounds of judgment of the court, observed thus (at [28]–[29]):

> This said, we will observe that this court recently reviewed the law on the defence of grave and sudden provocation in *PP v Kwan Cin Cheng* [1998] 2 SLR 345. The court laid down two distinct requirements for the defence to apply: first, a subjective requirement that the accused was deprived of his self-control by provocation; and the second, an objective requirement that the provocation should have been grave and sudden.

In PP v Kwan Cin Cheng it was held that in determining if the objective requirement was satisfied, the emotional state of mind of the accused at the material time can properly be taken into account as it affected the gravity of the provocation from the deceased, and earlier events and the mental background they created in the accused may be relevant. However, such characteristics of the accused must be contrasted with individual peculiarities of the accused which merely affect his power of self-control but not the gravity of the provocation. *Kwan Cin Cheng* stressed that the objective test demands only that the accused should have exercised the same degree of self-control as an ordinary person. It does not require that his act of killing must be somehow viewed as 'reasonable'. The court also clarified the requirement of 'proportionality' in the objective test, ie the requirement that the accused's reason be proportionate or commensurate with the provocation offered.

100 The principles in *Kwan Cin Cheng* were likewise endorsed in *Lau Lee Peng* ([55] *supra*), where Chao Hick Tin JA, who delivered the grounds of judgment of the court, observed thus (at [28]–[31]):

> 28 How [Exception 1] should be interpreted and applied was recently considered by this court in *PP v Kwan Cin Cheng* [1998] 2 SLR 345 where it held (at p 355):
>
> > As the law has developed, there are two distinct requirements for the provocation defence to apply: first, a 'subjective' requirement that the accused was deprived of his self-control by provocation; and secondly, an 'objective' requirement that the provocation should have been 'grave and sudden'. The latter requirement involves the application of the 'reasonable man' test accepted in *Vijayan v PP* [1975] 2 MLJ 8 at p 12; [1975-1977] SLR 100 at p 107 and cited in *Ithinin bin Kamari v PP* [1993] 2 SLR 245 at p 250:
> >
> > 'In our judgment, under our law, where an accused person charged with murder relies on provocation and claims the benefit of Exception 1 of s 300, the test to be applied is would the act or acts alleged to constitute provocation have deprived a reasonable man of his self-control and induced him to do the act which caused the death of the deceased and in applying this test it is relevant to look at and compare the act of provocation with the act of retaliation.'
>
> 29 However, the fact that the second requirement is to be determined objectively does not mean that any characteristics of the accused, including mental infirmities, could not be taken into account if they affected the gravity of the provocation. But individual peculiarities which merely affected the accused's power of self-control but not the gravity of the provocation should not be taken into account: see *DPP v Camplin* [1978] 2 All ER 168 at 175 per Lord Diplock and *Luc Thiet Thuan v R* [1997] AC 131 …
>
> 30 In *Kwan Cin Cheng*, it was held that in determining if the objective requirement was satisfied, the emotional state of mind of the accused at the material time could properly be taken into account as it would affect the gravity of the provocation from the deceased. The purpose of this objective test is really to deny the defence to persons who overreact simply because they are 'exceptionally pugnacious, bad-tempered and over-sensitive.'
>
> 31 Some earlier authorities also appear to speak of a separate or distinct requirement of proportionality, over and above the two requirements relating to the defence discussed above. This proportionality test suggests that the retaliation taken must be commensurate with the provocation offered which caused the accused to lose his self-control: *N Govindasamy v PP* [1975-1977] SLR 165; [1976] 2 MLJ 49; *Wo Yok Ling v PP* [1978-1979] SLR 78; [1979] 1 MLJ 101 and *Koh Swee Beng v PP* [1991] SLR 319; [1991] 3 MLJ 401. In the light of the discussion in *Kwan*

Cin Cheng, the test of proportionality is probably not a distinct requirement for raising the defence of provocation. It is a factor to be taken into account in determining whether the objective test of gravity and suddenness is fulfilled. Therefore, the fact that the retaliatory acts may have been out of proportion to the provocation offered does not necessarily mean that the defence must fail. This is because where the provocation defence in Exception 1 to s 300 is raised, the accused's acts of retaliation would ex hypothesi always have been of an extreme degree, resulting in the death of another person. An inquiry into 'proportionality' does little to answer the essential question of whether an ordinary person would, upon receiving the provocation in question, have reacted in the same way the accused did.

101 And, in the decision of this court in *Seah Kok Meng v PP* [2001] 3 SLR 135 ("*Seah Kok Meng*"), Chao Hick Tin JA, who delivered the judgment of the court, observed as follows (at [21]):

In *PP v Kwan Cin Cheng* [1998] 2 SLR 345 and *Lau Lee Pengv PP* [2000] 2 SLR 628, this court laid down that there are two distinct requirements which must be satisfied before the defence of provocation can be successfully raised. First, is the subjective requirement that the accused was deprived of his self-control by provocation. Second, is the objective requirement that the provocation must have been 'grave and sudden' which involved the application of the 'reasonable man' test. The question involves considering whether an ordinary person of the same sex and age as the accused, sharing such of his characteristics as would affect the gravity of the provocation and placed in the same situation, would have been so provoked as to lose his self-control.

102 It is also important to note (in so far as the first requirement relating to a loss of self-control is concerned) that the antithesis of a loss of self-control is deliberation (and even calculation). The former is a necessary (albeit not sufficient) prerequisite before the defence under Exception 1 will be successful. The presence of the latter, on the other hand, indicates that the provocation was not sudden and the defence would therefore not succeed (see, for example, the Singapore High Court decision of *PP v Tsang Yuk Chung* [1988] SLR 812 at 820, [33], where the court held that "the stabbing was a calculated and deliberate act"; see also *Lim Chin Chong* ([99] *supra*) at [30] and *Seah Kok Meng* at [25], as well as above at [96]). It is equally clear that "[m]ere assertion would not suffice" (*per* Chao JA in *Lau Lee Peng* at [32]).

103 It is also important to emphasise that whilst (as clearly set out in the local case law noted above) there is no requirement of "proportionality" as such, the severity of the physical assault is a factor which the court would (in most cases at least) take into account (see, for example, *Seah Kok Meng* at [26]).

Our decision

104 The appellant argued that the deceased's continuous and incessant crying made him angrier and caused him to lose his self-control. He submitted that this amounted to cumulative provocation as there was no cooling-off period. Having regard to the circumstances leading to the deceased's death, we were of the view that the appellant did not lose his self-control. Given our finding above that the appellant had sexually assaulted the deceased, the appellant's argument centring on the alleged loss of self-control is wholly without merit. In any event, even leaving aside the allegation of sexual assault, it is clear that the appellant's actions throughout bore all the marks of a person in clear control of his actions. Although we do not rely on what happened after the deceased had been immersed by the appellant in the pail of water, these actions are entirely consistent with our conclusion and are wholly contrary to the appellant's own account to the effect that he had been in a state of panic and, as a result, did not get help for her. To summarise, after he realised the deceased was motionless, the appellant tried to revive her and, on realising that she was dead, he

demonstrated the presence of mind to dress her in the same clothing that he had removed from her before the immersions into the pail of water. Further, we noted that he brought her body back to the Pipit Road flat so as not to arouse any suspicions. In the Pipit Road flat, he took elaborate precautions to warn his family members not to make any noise so as not to wake the deceased. The methodical and laborious steps taken to mask the fact that she was already dead were elaborate and calculated in nature; he placed her body on the bed, placing pillows on her legs and hands to create the appearance of slumber. He carried her out of the Pipit Road flat only when his father was having his evening prayers and he left the back door of the flat open such that it appeared that someone had walked in and might have taken the deceased away. After he had disposed of her body under the Aljunied flyover, he returned to the Pipit Road flat and pretended to be angry by punching Rahim on learning that the deceased was missing.

105 Moreover, even if we had accepted the appellant's account (and had therefore disregarded any allegation of sexual assault of the deceased by the appellant), the *gravity* of the provocation could hardly be such as to justify what the appellant did to the deceased and which resulted in her death. How the cries of a toddler could constitute provocation of the type envisaged by Exception 1 (in particular where, as here, the accused was not suffering from any unusual condition) defies imagination. Mr Bajwa's reference to the appellant's poor parenting skills is, with respect, wholly unconvincing and could not possibly pass legal muster even allowing for the most flexible of approaches adopted by the court.

106 Mr Bajwa, however, referred us to the English decision of *R v Stephen Clifford Doughty* (1986) 83 Cr App R 319 ("*Doughty*"), where the defendant was charged with the murder of his 17-day-old son. The facts of this case were of some significance. The defendant admitted that he had tried to stop the son's persistent crying by covering the boy's head with cushions and kneeling on them. Defence counsel in that case tried to argue that the boy's persistent crying prior to killing was evidence of provocation which should have been left to the jury to consider in accordance with s 3 of the Homicide Act 1957 (c 11) (UK) ("the 1957 Act"), which reads as follows:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

107 At first instance in *Doughty*, the trial judge ruled that the cries of the child did not allow the defendant to raise the defence of provocation. Despite the express wording of s 3 of the 1957 Act, he refused to leave the issue of provocation to the jury and convicted the defendant of murder on the ground that "perfectly natural episodes or events of crying and restlessness by a 17 day old baby does not constitute evidence of provocation in relation to the first subjective question" (see *Doughty* at 324).

108 The defendant appealed against his conviction and before the English Court of Appeal, the issue that arose for consideration was whether the trial judge had erred in refusing to leave the issue of provocation for the jury's consideration. On this issue, the Court of Appeal held that the wording of s 3 of the 1957 Act was mandatory and that the decision whether the defendant's act would have been the response of a reasonable man should have been left to the jury.

109 On one view, *Doughty* may be seen simply as endorsing a broad meaning of "provoked" as being equivalent to "caused" (and see UK Consultation Paper ([90] *supra*) at paras 1.33, 4.9 and

4.163). However, this broad meaning came about as a result of the specific introduction of s 3 of the 1957 Act (reproduced above at [106]). In particular, the abovementioned provision *did away with* the prior position to the effect that *the court* could rule, as a matter of *law*, as to what could and what could not constitute provocation (in other words, it used to be the case that not everything that might have "provoked" the accused to lose his or her self-control would be considered as constituting provocative conduct within the meaning of the law). Put simply, s 3 of the 1957 Act "removed from the judge the power to withdraw the defence of provocation from the jury in a case where there was evidence that in fact the defendant had lost his or her self-control but the judge did not believe that a reasonable man would have done so" and that "[t]he section does this by expressly providing that it is for the jury to decide whether the provocation was enough to make a reasonable do as the accused did" (see UK Consultation Paper (at para 4.6)). Indeed, this particular provision has been described, in the English Court of Appeal decision of *R v Kuljit Singh Dhillon* [1997] 2 Cr App R 104 at 114, as an "almost unique statutory requirement" and Prof J C Smith (in a commentary on this case in "Provocation" [1997] Crim LR 295) has correctly pointed out that the (English) law as it stands furnishes the accused with the opportunity to receive a perverse verdict at the trial, albeit not necessarily on appeal (at 296). It should, however, be noted that, even under s 3 of the 1957 Act, if there was "merely the speculative possibility that there had been an act of provocation", it would be wrong of the judge to direct the jury to consider the defence of provocation (see, for example, the House of Lords decision of *Regina v Acott* [1997] 2 Cr App R 94 at 102). Viewed in this light, all that *Doughty* decides is that the trial judge in that case was wrong in not adhering to the position (just stated) which was the result of the introduction of s 3 of the 1957 Act and had erred in deciding, as a question of law, that the defence of provocation was not available to the accused. Indeed, it is of some significance, in our view, that the court in *Doughty* nevertheless did refer to the trial judge's reasoning as being "understandable" (at 326). The court also stated that it arrived at its decision "though fully understanding [the trial judge's] reasons" (*ibid*).

110 And, as Prof Ormerod has observed (in *Smith & Hogan* ([96] *supra*) at pp 444–445):

> Since provocation continues to be a defence at common law it might have been held that the words 'provoked' and 'provocation' in s 3 bear the limited meaning they had at common law, subject only to the limited changes expressly made by the section. This has not been the approach of the courts. These words have been given their ordinary natural meaning, free of the technical limitations of the common law***. One of the starkest examples*** of this is *Doughty* in which it was held that the judge was bound by the plain words of the section to leave provocation to the jury where there was evidence that the persistent crying of his baby had caused D to lose his self-control and kill it. ***Whatever the position may have been at common law, the provocation does not have to be an illegal or wrongful act. There must be 'things done or things said' and the crying of the baby was presumably regarded as a 'thing done'. The court rejected an argument that the decision would open the floodgates: the decision did not mean that baby-killers would easily be able to avoid conviction for murder on the basis of provocation: '... because reliance can be placed upon the common sense of juries upon who[m] the task of deciding the issue is imposed by s 3 and that common sense will ensure that only in cases where the facts fully justified it would their verdict be likely to be that [they] would hold [that] a defendant's act in killing a crying child would be the response of a reasonable man within the section'.*** This broad interpretation of the trigger for the defence means that there is no requirement that the provoking acts or words were performed consciously, let alone with the deliberate intent to provoke. This dilution of the concept of 'provocation' to mean merely words or conduct that *cause* the loss of control in the defendant has been ***heavily criticized by academics***. [emphasis added in bold italics]

111 More importantly, perhaps, in *Smith (Morgan)* ([90] *supra*), Lord Hoffmann observed thus (at 171):

> The effect of section 3 [of the 1957 Act] is that once the judge has ruled that there is evidence upon which the jury can find that something caused the accused to lose self-control (compare *R v Acott* [1997] 1 WLR 306), he cannot tell the jury that the act in question was incapable of amounting to provocation. But that no longer involves any decision by the judge that it would be rational so to decide. For example, in *R v Doughty* (1986) 83 Cr App R 319 the Court of Appeal held that the judge had been wrong to direct the jury that the crying of a 17-day-old baby, which had caused its father to kill it by covering its head with cushions and kneeling on them, could not constitute a provocative act. Section 3 said that the jury were entitled to take into account "everything both done and said". *I respectfully think that this construction of the Act was correct. But that does not mean that the judge should tell the jury that the crying of the baby was, in the traditional language, capable of amounting to provocation. This would give the jury the impression that the judge thought it would be rational and in accordance with principle to hold that the crying of the baby constituted an acceptable partial excuse for killing it. The point about section 3 is that it no longer matters whether the judge thinks so or not. He should therefore be able simply to tell the jury that the question of whether such behaviour fell below the standard which should reasonably have been expected of the accused was entirely a matter for them. He should not be obliged to let the jury imagine that the law now regards anything whatever which caused loss of self-control (whether an external event or a personal characteristic of the accused) as necessarily being an acceptable reason for loss of self-control.* [emphasis added]

112 The following observations by Prof Ashworth may also be usefully noted (see *Principles of Criminal Law* ([96] *supra*) at p 264):

> This requirement [*viz*, the first, to the effect that the accused was deprived of his self-control by provocation] may be divided into two elements, that D was (a) ***provoked*** to (b) lose self-control. Thus, in respect of (a), it is not enough simply to argue that D lost control. The cause must have been some form of provocation, and s 3 [of the 1957 Act] includes things said or done by persons other than the deceased, and acts done against persons other than D (e.g. where D is provoked to kill someone who has just committed a sexual offence upon D's son, daughter, wife, etc.). The word 'provoked' seems to require a human act that can be regarded as a provocation, rather than any kind of event which leads D to lose self-control. What is required, stated Lord Steyn in *Acott* (1997), is 'some evidence of a specific act or words of provocation resulting in a loss of self-control', whereas 'a loss of self-control caused by fear, panic, sheer bad temper or circumstances (e.g. a slow down of traffic due to snow) would not be enough'. There is good reason for insisting that the loss of control be provoked, since anger may be justified and that may strengthen the grounds for partially excusing what follows. *However, what may properly be defined as 'provocation' in this context is controversial: in* Doughty *(1986) the crying of a 17-day-old child was held to be sufficient to fall within the requirement, even though such an infant is incapable of moral judgement and is patently unaware of the significance of what he or she is doing. Applying Lord Steyn's well-founded distinction between 'acts or words of provocation' and mere 'circumstances', one might well place* Doughty *in the latter category*. [emphasis added, emphasis in original in bold italics]

113 The following observations by Prof Ormerod with regard to the UK Consultation Paper ([90] *supra*) may also be usefully noted (see *Smith & Hogan* ([96] *supra*) at p 463):

> The … proposals represent a radical shift away from the decision in *Smith* [*Smith (Morgan)* ([90]

supra)] to a defence which also incorporates a partial defence to murder for excessive self-defence. The trial judge would regain a power to remove the defence from the jury if no reasonable jury properly directed could conclude that the conduct was provocative: the crying of a baby would not trigger the defence, nor would the innocent conduct of a black man which angers a racist.

114 In the circumstances, even if we have regard to the ostensibly broad remit of s 3 of the 1957 Act, *Doughty* is – at best – controversial. *In any event*, *Doughty* has really *no relevance* in the Singapore context, where the legal position is *quite different* (and where there is, *inter alia*, no local equivalent of s 3 of the 1957 Act). Indeed, *even under English law*, the jury might still decide the issue against the accused in so far as the issue of loss of self-control was concerned (see above at [109]). Further, the issue as to whether or not provocation which allegedly came from a *child* would be *sufficiently grave* would still need to be decided (this would be the second (and objective) element (see above at [95])). In this regard, the following observations by Prof Ashworth are apposite (see Ashworth's article ([91] *supra*) at 319):

> It is also arguable that no one should be provoked into a violent rage by a young child, and that the defence of provocation should not be available to a person who uses serious violence and kills in such circumstances. The objective test respects these moral distinctions: a purely subjective test could not.

The cases cited by the learned author may also be usefully noted. The first is the relatively early English decision of *Regina v Mawgridge* (1707) Kel J 119; 84 ER 1107, where Holt CJ observed thus (at 134; 1114):

> The like in obstinate and perverse children, they are a great grief to parents, and when found in ill actions, are a great provocation. But if upon such provocation the parent shall exceed the degree of moderation, and thereby in chastising kill the child, it will be murder.

The second case cited, the English Court of Criminal Appeal decision of *R v Annie Smith* (1914) 11 Cr App R 36, concerned an application for leave to appeal against a conviction of murder. Ridley J observed, *arguendo* (at 37), that:

> It is difficult to suggest how provocation could be given by a child of two and a half years.

And, in a commentary on *Doughty*, it was observed by the learned author thus (see Jeremy Horder, "The Problem of Provocative Children" [1987] Crim LR 655 at 660):

> [T]he younger a child is the more it is like the hypothetical victim who threw the shoe at Uddin, not knowing the significance of what he was doing, and thus not "asking for it." For, as Kronman remarks [in "Paternalism and the Law of Contracts" (1983) 92 Yale LJ 763 at 788–791], the younger a child is, the more it lacks moral imagination, the ability and good judgment to assess the moral significance of the things one does and says both for one's self and others. Whilst children's actions can normally be described as voluntary, their moral responsibility for those actions becomes developed only with age, just like their powers of self-control. …
>
> In a case such as *Doughty*, it follows that the provocation should be regarded as much less grave in virtue of the fact that a 17-day-old child obviously cannot be regarded as morally responsible for the provocation constituted by restlessness and crying.

115 The views in the cases referred to in the preceding paragraph are, of course, entirely

consistent with the approach we have adopted in the present appeal (see, in particular, above at [114]).

116 In the circumstances, we found that the appellant could not rely on Exception 1 as he had failed, in all respects, to meet the requirements contained therein.

Alleged judicial interference

117 Turning to the next main ground of appeal, the appellant's case rested on the allegation that the Judge had engaged in excessive judicial interference by descending into the arena frequently to express his thoughts about how the Prosecution should proceed with its case and the evidence required by the Prosecution to prove its case. He cited several instances in the notes of evidence to support his contention, which we propose to deal with closely. In considering this issue, we were of the view that this was a serious allegation to be made by the appellant. We propose to refer first to the applicable principles before focusing on the specific instances of judicial intervention alleged by the appellant in the context of the present proceedings.

The applicable principles

(1) Introduction

118 The rationale for the proscription against judicial interference is virtually self-explanatory. It is part of the concept of the "due process of law" which Lord Denning has, in an extrajudicial context, succinctly described as follows (see Lord Denning, *The Due Process of Law* (Butterworths, 1980) at p v):

> So by 'due process of law' I mean *the measures authorised by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted*; that arrests and searches are properly made; that lawful remedies are readily available; and that unnecessary delays are eliminated. It is in these matters that the common law has shown its undoubted genius. [emphasis added]

119 However, the need to ensure that there is no judicial interference does not impact merely on *procedural* justice for, as we shall see, any such interference will also result in *substantive* injustice as well. That procedural and substantive justice are inextricably connected and that the latter is the ultimate aim of any judicial process is clear, as was observed in the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR 425 at [8]:

> The quest for justice … entails a continuous need to balance the procedural with the substantive. More than that, it is a continuous attempt to ensure that both are *integrated*, as far as that is humanly possible. Both *interact* with each other. One cannot survive without the other. There must, therefore, be – as far as is possible – a fair and just procedure that leads to a fair and just result. This is not merely abstract theorising. It is the *very basis* of what the courts do – and ought to do. When in doubt, the courts would do well to keep these bedrock principles in mind. This is especially significant because, in many ways, this is how … laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised. On the contrary, it should, as far as is possible, be enhanced. [emphasis in original]

120 We pause here to observe that the judicial interference must obviously be *excessive* in ways that are described in further detail below. However, for ease of reference, the phrase "judicial interference" will be used.

121 Let us turn now to the leading decision in relation to the doctrine which is at issue before us (*viz*, that proscribing judicial interference).

(2) Jones v National Coal Board

122 The leading decision in relation to the doctrine proscribing judicial interference is that of the English Court of Appeal in *Jones v National Coal Board* [1957] 2 QB 55 ("*Jones*"), handed down just over half a century ago. It is significant that the judgment of the court was delivered by a judge whose passion for justice was legendary. Indeed, in an extrajudicial context, Lord Denning described this case in which he delivered the judgment as concerning "[t]he judge who talked too much". In his characteristic (and, dare we say, inimitable) style, this is how he described the background to the case itself (see *The Due Process of Law* ([118] *supra*) at pp 58–59):

> *Once upon a time there was a judge who talked too much. He asked too many questions. One after another in quick succession. Of witnesses in the box. Of counsel in their submissions. So much so that they counted up the number. His exceeded all the rest put together. Both counsel made it a ground of appeal.*
>
> He was The Honourable Sir Hugh Imbert Periam Hallett whose initials gave him the nickname 'Hippy' Hallett. He had been a judge for 17 years. He earned a big reputation as a junior at the bar: and in silk for his knowledge of the law. He used to appear in the Privy Council where Lord Maugham appreciated his talents and appointed him a judge in 1939. He started his judicial career quietly enough but – as often happens – as his experience grew so did his loquacity. He got so interested in every case that he dived deep into every detail of it. He became a byword.
>
> The climax came in an ordinary sort of case. It is *Jones v National Coal Board*. The roof of a coal-mine had fallen. A miner had been buried by it and died. The widow claimed damages. The case was tried by Hallett J at Chester. He rejected the widow's claim. She appealed on the ground, among others, that the Judge's interruptions had made it impossible for her counsel to put her case properly. The Board put in a cross-appeal including among others that the Judge's interruptions had prevented the Board from having a fair trial. The appeal was argued before us by Mr. Gerald Gardiner QC (afterwards Lord Chancellor) for the widow. He was the most able advocate I have known. On the other side Mr. Edmund Davies QC (afterwards Lord Edmund-Davies). He was the most resourceful.
>
> [emphasis added]

123 In *Jones* itself, the seminal observations of Denning LJ, who (as mentioned) delivered the judgment of the court, bear quotation in full, as follows (at 63–65):

> *In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role.* Was it not Lord Eldon L.C. who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question"?: see *Ex parte Lloyd* [(1822) Mont 70 at 72n]. And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to

have his vision clouded by the dust of conflict": see *Yuill* v. *Yuill* [[1945] P 15 at 20].

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the "nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly. *So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties*: see *In re Enoch & Zaretzky, Bock & Co* [[1910] 1 KB 327]. *So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see Rex* v. *Cain* [(1936) 25 Cr App R 204], *Rex* v. *Bateman* [(1946) 31 Cr App R 106], and *Harris* v. *Harris* [The Times (9 April 1952)], by Birkett L.J. especially. *And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see Reg.* v. *Clewer* [(1953) 37 Cr App R 37]. *The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.* Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal." [Francis Bacon, *Essays or Counsels, Civil and Moral*, Essay 56 "Of Judicature"]

Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may outrun our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties – nay, each of them – has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified.

We have sufficiently indicated the nature of the interventions already, but there is one matter which we would specially mention. *Mr. Gardiner made particular complaint of the interference by the judge during the cross-examination of the defendants' witnesses by Mr. Mars-Jones* [counsel for the plaintiff at the trial]. *Now, it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought*

before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return. Mr. Gardiner submitted that the extent of the judge's interruptions was such that Mr. Mars-Jones was unduly hampered in his task of probing and testing the evidence which the defendants' witnesses gave. We are reluctantly constrained to hold that this submission is well founded. It appears to us that the interventions by the judge while Mr. Mars-Jones was cross-examining went far beyond what was required to enable the judge to follow the witnesses' evidence and on occasion took the form of initiating discussions with counsel on questions of law; further, and all too frequently, the judge interrupted in the middle of a witness's answer to a question, or even before the witness had started to answer at all. In our view it is at least possible that the constant interruptions to which Mr. Mars-Jones was subjected from the bench may well have prevented him from eliciting from the defendants' witnesses answers which would have been helpful to the plaintiff's case, and correspondingly damaging to that of the defendants.

[emphasis added]

124 Unfortunately, this was not the only decision in which Hallett J had intervened in an unacceptable way. He had also done so in at least one other decision in the criminal sphere. The conviction was quashed by the English Court of Criminal Appeal: see *R v Brian Edward Clewer* (1953) 37 Cr App R 37 ("*Clewer*").

125 However, it is important to emphasise that *Jones* was a *truly exceptional* case. Indeed, the judge's interference in that case was so egregious that *both* parties each made it a ground for appeal. In our view, the argument from judicial interference cannot – and must not – become an avenue (still less, a standard avenue) for unsuccessful litigants to attempt to impugn the decision of the judge concerned. This would be a flagrant abuse of process and will not be tolerated by this court. Parties and their counsel should only invoke such an argument where it is clearly warranted on the facts (for another clear instance, see the Canadian Supreme Court decision of *Brouillard v R* [1985] 1 SCR 39, especially at 48). That some litigants had sought to exploit the holding shortly even after *Jones* itself was decided is clear from Lord Denning's own extrajudicial account. He would – quite rightly, in our view – have none of it. This is what he had to say (see *The Due Process of Law* ([118] *supra*) at p 62):

After that case [*viz*, *Jones*], there were several appeals which came before us – from other judges – on similar grounds. The lawyers used to get shorthand notes, count up the number of questions asked by the judge and by counsel, and then ask for a new trial. *But I do not remember any appeal that succeeded on that ground. 'Hippy' Hallett stands in isolation. Let others take heed*. [emphasis added]

126 It is appropriate, at this juncture, to turn to the principles enunciated in other Commonwealth decisions as well as significant extralegal speeches by the judges themselves before proceeding to summarise the principles that ought to be applicable in our courts – always bearing in mind the fact (as emphasised in the preceding paragraph) that the argument from judicial interference will succeed only in the most egregious cases.

(3) Other Commonwealth case law and speeches

(A) THE CASE LAW

127 It is imperative that the judge concerned must not be perceived to have "descended into the arena". In the oft-cited words of Lord Greene MR in the English Court of Appeal decision of *Yuill v Yuill*

[1945] P 15 at 20:

> A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. *If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel*, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. [emphasis added]

128 In the English Court of Appeal decision of *R v Donald Walter Matthews* (1983) 78 Cr App R 23 ("*Matthews*"), Purchas LJ, who delivered the judgment of the court, made the following important observations (at 32–33):

> To summarise these authorities the following propositions appear to emerge: (1) Whilst a large number of interruptions must put this court on notice of the possibility of a denial of justice, ***mere statistics are not of themselves decisive***; (2) The ***critical aspect*** of the investigation is the ***quality*** of the interventions as they relate to the attitude of the judge as might be observed by the jury and the effect that the interventions have either upon the orderly, proper and lucid deployment of the case for the defendant by his advocate or upon the efficacy of the attack to be made on the defendant's behalf upon vital prosecution witnesses by cross-examination administered by his advocate on his behalf; (3) ***In analysing the overall effect of the interventions, quantity and quality cannot be considered in isolation, but will react the one upon the other***; but ***the question which is posed ultimately for this court is*** "*Might* the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing-up of the judge, be such that the jury's verdict might be unsafe?" In the presence of conditions in which this Court has been alerted in the manner to which we have referred, it appears to us that if there is ***a possibility of a denial of justice*** then this Court ought to intervene. [emphasis added in bold italics]

129 Although the above observations were made in the context of a trial by jury, the general principles which they embody apply with equal force in the Singapore context.

130 *Matthews* was cited and applied by the English Court of Appeal in *Regina v Sharp* [1994] QB 261. Stuart-Smith LJ, who delivered the judgment of the court, also observed, in the context of a judge's intervention in the course of examination and, in particular, cross-examination (at 273; reference may also be made to *Clewer* ([124] *supra*, especially at 40); the Manitoba Court of Appeal decision of *Regina v Ignat* (1965) 53 WWR 248 at 250–251; and the Ontario Court of Appeal decision of *Regina v Turlon* (1989) 49 CCC (3d) 186, especially at 191 (the trial judge ought not to engage in extensive cross-examination of prosecution witnesses on behalf of an unrepresented accused)), as follows:

> When a judge intervenes in the course of examination, or particularly cross-examination, a number of problems can arise depending on the frequency and manner of the interruptions. First the judge may be in danger of seeming to enter the arena in the sense that he may appear partial to one side or the other. This may arise from the hostile tone of questioning or implied criticism of counsel who is conducting the examination or cross-examination, or if the judge is

impressed by a witness, perhaps suggesting excuses or explanations for a witness's conduct which is open to attack by counsel for the opposite party. Quite apart from this, frequent interruptions may so disrupt the thread of cross-examination that counsel's task may be seriously hampered. In a case of any complexity cross-examination of the principal witnesses is something that calls for careful preparation and planning. It is the most important part of the advocate's art, because a competent cross-examination is designed to weaken or destroy the opponent's case and to gain support for the client's case. But it is easier said than done. If the judge intervenes at a crucial point where the witness is being constrained to make an important admission, it can have an adverse effect on the trial.

In general, when a cross-examination is being conducted by competent counsel a judge should not intervene, save to clarify matters he does not understand or thinks the jury may not understand. If he wishes to ask questions about matters that have not been touched upon it is generally better to wait until the end of the examination or cross-examination. This is no doubt a counsel of perfection and a judge should not be criticised for occasional transgressions; still less can it be said in such cases that there is any irregularity in the conduct of the trial or that the verdict is unsafe or unsatisfactory. But there may come a time, depending on the nature and frequency of the interruptions that a reviewing court is of the opinion that defence counsel was so hampered in the way he properly wished to conduct the cross-examination that the judge's conduct amounts to a material irregularity.

131 In a similar vein, in the English Court of Appeal decision of *R v Kolliari Mehmet Hulusi* (1973) 58 Cr App R 378 ("*Hulusi*"), Lawton LJ, who delivered the judgment of the court, observed thus (at 385):

> It is a fundamental principle of an English trial that, if an accused gives evidence, he must be allowed to do so without being badgered and interrupted. Judges should remember that most people go into the witness-box, whether they be witnesses for the Crown or the defence, in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing, and when they find, almost as soon as they get into the witness-box and are starting to tell their story, that the judge of all people is intervening in a hostile way, then, human nature being what it is, they are liable to become confused and not to do as well as they would have done had they not been badgered and interrupted.

Indeed, in the (also) English Court of Appeal decision of *Regina v Marsh* The Times (6 July 1993) (transcript available on Lexis) (where the above observations by Lawton LJ in *Hulusi* were applied), the accused was convicted but appealed, *inter alia*, on the ground that the trial judge had interrupted about 90 times during his evidence-in-chief. Counsel for the accused sought to distinguish certain interventions which were "hostile". The court held that the 90 instances were "instances of the learned judge seeking to be sure that he had understood or correctly heard what was said by the witness" and that, looking at the course taken by the trial judge, he had dealt fairly with the case.

132 And in the Ontario Court of Appeal decision of *Majcenic v Natale* [1968] 1 OR 189, Evans JA, who delivered the judgment of the court, stated as follows (at 203–204):

> I can appreciate that on occasion it is not only desirable but necessary that the trial Judge question the witnesses for the purpose of clarification of the evidence and I do not consider that he is solely an umpire or arbitrator in the proceedings. There is a limit however to the intervention and when the intervention is of such a nature that it impels one to conclude that the trial Judge is directing examination or cross-examination *in such a manner as to constitute possible injustice to either party*, then such intervention becomes interference and is improper.

…

> When a Judge intervenes in the examination or cross-examination of witnesses, to such an extent that he projects himself into the arena, he of necessity, adopts a position which is inimical to the interests of one or other of the litigants. His action, whether conscious or unconscious, no matter how well intentioned or motivated, creates an atmosphere which violates the principle that "justice not only be done, but appear to be done". Intervention amounting to interference in the conduct of a trial destroys the image of judicial impartiality and deprives the Court of jurisdiction. *The right to intervene is one of degree and there cannot be a precise line of demarcation but if it can be fairly said that it amounted to the usurpation of the function of counsel it is not permissible*.
>
> [emphasis added]

133 And, in the New South Wales Court of Criminal Appeal decision of *R v Burl Lars* (1994) 73 A Crim R 91, it was emphasised at 125 that "it is the *total effect* of [the judge's] interventions which must be evaluated to see whether the trial was ultimately rendered unfair so that a miscarriage of justice has resulted" [emphasis added].

134 In the Court of Appeal of Barbados decision of *Colin Wooding v The Queen* (Criminal Appeal No 9 of 2002, 4 October 2005 (unreported), accessible at <http://www.lawcourts.gov.bb/Lawlibrary/events.asp?id=626> (accessed 23 September 2008)) ("*Wooding*"), Sir David Simmons CJ emphasised (at [11]) that:

> The question in any case where it is alleged that a trial judge improperly intervened in the trial must be answered both from the standpoint of the defendant (subjectively) and from the standpoint of a reasonable person who might have observed the trial (objectively). Thus, the trial must have been fair in the eyes of the defendant and seen to have been so by an objective by-stander. Convictions will be quashed where judicial interventions have made it impossible for defence counsel properly to present the defence or have deflected counsel during the cross-examination from his strategy and considered line of questioning.

135 It is important to emphasise, however, that this does not mean that the judge concerned must sit quietly by, come what may. As du Parcq J observed in the English Court of Criminal Appeal decision of *R v David Henry Cain* (1936) 25 Cr App R 204 at 205:

> The Judge began by doing something of which no one could complain. It was a long case, and he had taken a careful note, and it was quite right, *so long as counsel for the defence had no objection*, that the Judge should put to the defendant when giving evidence the various allegations of the witnesses for the prosecution, in order that he might deal with them. *So long as they were put colourlessly, no one could object.* Indeed counsel for the defence might have thought it assisted him in his task. *There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper*. *It was, however, undesirable in this case that, beginning in the way which I have described, the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and, long before the time had arrived for cross-examination, to cross-examine Chatt* [the co-defendant of the applicant] *with some severity.* The Court agrees with the contention that that was an unfortunate method of conducting the case. *It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner. It is obviously undesirable that the examination by his counsel of a witness who is himself accused should be constantly interrupted by cross-*

examination from the Bench. [emphasis added]

Significantly, in the (also) English Court of Criminal Appeal decision of *R v Janine Gilson* (1944) 29 Cr App R 174, Wrottesley J, prior to citing the passage just quoted, observed (at 181) that "[w]e adhere to every word which is to be found in [*R v Cain*]".

136 Humphreys J also observed in the English Court of Criminal Appeal decision of *R v Henry William Bateman* (1946) 31 Cr App R 106 at 111:

> Judges are entitled, if they form the opinion that a witness is not trying to help the Court, to do what counsel cannot do, and say: "You behave yourself and tell me the truth." It is sometimes very useful to be able to say that. Sometimes it pulls a witness together and makes him say what is the truth, but, of course, it must not be done until the witness has given some indication that he or she is not trying to tell the truth.

137 And in the Ontario Court of Appeal decision of *Boran v Wenger* [1942] 2 DLR 528, Riddell JA, who delivered the judgment of the court, observed thus (at 528–529):

> [T]he trial Judge has no right to take the case into his own hands, and out of the hands of counsel.
>
> We do not for a moment suggest that the trial Judge has not the right – it may often be the duty – to obtain from the witnesses evidence in addition to that brought out by counsel – but this is adjectival, to clear up, to add to, what counsel has brought out.

138 The following observations by Martin JA, delivering the judgment of the court in the (also) Ontario Court of Appeal decision of *Regina v Valley* (1986) 26 CCC (3d) 207 ("*Valley*") at 230–232, should also be noted:

> A criminal trial is, in the main, an adversarial process, not an investigation by the judge of the charge against the accused, and, accordingly, the examination and cross-examination of witnesses are primarily the responsibility of counsel. The judge, however, is not required to remain silent. He may question witnesses to clear up ambiguities, explore some matter which the answers of a witness have left vague or, indeed, he may put questions which should have been put to bring out some relevant matter, but which have been omitted. Generally speaking, the authorities recommend that questions by the judge should be put after counsel has completed his examination, and the witnesses should not be cross-examined by the judge during their examination-in-chief. Further, I do not doubt that the judge has a duty to intervene to clear the innocent. The judge has the duty to ensure that the accused is afforded the right to make full answer and defence, but he has the right and the duty to prevent the trial from being unnecessarily protracted by questions directed to irrelevant matters. This power must be exercised with caution so as to leave unfettered the right of an accused through his counsel to subject any witness's testimony to the test of cross-examination. The judge must not improperly curtail cross-examination that is relevant to the issues or the credibility of witnesses, but he has power to protect a witness from harassment by questions that are repetitious or are irrelevant to the issues in the case or to the credibility of the witness …
>
> …
>
> An examination of the authorities reveals that the principal types of interventions by trial judges which have resulted in the quashing of convictions are these:

I Questioning of an accused or his witnesses to an extent or in a manner which conveys the impression that the judge is placing his authority on the side of the prosecution and which conveys the impression of disbelief of the accused or defence witnesses …

II Where the interventions have made it really impossible for counsel for the defence to do his or her duty in presenting the defence, for example, where the interruptions of the trial judge during cross-examination divert counsel from the line of topic of his questions or break the sequence of questions and answers and thereby prevent counsel from properly testing the evidence of the witness …

III Where the interventions prevent the accused from doing himself justice or telling his story in his own way …

IV The courts have drawn a distinction between conduct on the part of the presiding judge, which is discourteous to counsel and indicates impatience but which does not invite the jury to disbelieve defence witnesses, and conduct which actively obstructs counsel in his work … The authorities have consistently held that mere discourtesy, even gross discourtesy, to counsel cannot by itself be a ground for quashing a conviction. Where, however, the trial judge's comments suggest that counsel is acting in a professionally unethical manner for the purpose of misleading the jury, the integrity and good faith of the defence may be denigrated and the appearance of an unfair trial created …

Interventions by the judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might *reasonably* consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial …

[emphasis in original]

139 Indeed, times have changed. Appropriate questions by the judge are now far more commonplace than they used to be. However, the key word here is "appropriate". As the principles in the case law we have cited clearly indicate, any conduct by the judge which would give rise to the perception that a particular party has not had a fair opportunity to present its case or (worse still) that the judge has in fact prejudged the case is wholly inappropriate and ought never to be countenanced. This sentiment is also reflected in the following observations by Jonathan Parker LJ in the English Court of Appeal decision of *The Mayor and Burgesses of the London Borough of Southwark v Maamefowaa Kofi-Adu* [2006] EWCA Civ 281 at [145]–[146]:

Nowadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors, and the above observations (made, in the case of Lord Denning MR, almost 50 years ago, and, in the case of Lord Greene MR, more than 60 years ago) must be read in that context. That said, however, it remains the case that interventions by the judge *in the course of oral evidence* (as opposed to interventions during counsel's submissions) must inevitably carry the risk so graphically described by Lord Greene MR. The greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one.

It is, we think, important to appreciate that the risk identified by Lord Greene MR in *Yuill v. Yuill* does not depend on appearances, or on what an objective observer of the process might think of

it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair.

[emphasis in original]

140 In short, and borrowing the famous words of Lord Hewart CJ in the English Divisional Court decision of *The King v Sussex Justices* [1924] 1 KB 256 at 259, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

141 One case in which justice was *not* in fact "manifestly and undoubtedly seen to be done" was the Hong Kong Special Administrative Region Court of Appeal decision of *HKSAR v Tai Yue Bong* [1998] HKCA 239; [1998] HKCU 87 ("*Tai Yue Bong*"). In that case, the appellants (D1, D2 and D3) were convicted on charges of theft after trial in the District Court. D3 appealed, *inter alia,* on the ground that he was not given a fair trial in view of the interventions by the trial judge in examination-in-chief. In delivering the judgment of the court, Stuart-Moore JA observed (at [20]) that "the interruptions by the judge were made too frequently and sometimes unnecessarily. On the other hand, many of the interruptions were perfectly justified." Citing English authorities such as *Matthews* ([128] *supra*) and *Jones* ([122] *supra*), the court emphasised that each case needed to be scrutinised closely on its own facts. Stuart Moore JA observed at [24]–[25], as follows:

> It may be that the proper course for the judge to have adopted would have been to have awaited the outcome of the defendant's evidence first before clarifying ambiguities at such an early stage. *It appears to us that the trial judge went on a fact-finding mission of her own and was not prepared to listen to the evidence as it emerged from the answers which were being given to defence counsel. …*
>
> Having said that, while not for one moment wishing to give encouragement to interruptions on this scale, many of the questions asked and interruptions made by the judge were relevant to issues that immediately needed to be decided. These were unobjectionable and were sensibly made during the course of examination-in-chief to deal with points as they arose. Examples of this kind are where leading questions were asked or where questions were asked based upon a wrong foundation of fact.
>
> [emphasis added]

142 On the facts of *Tai Yue Bong*, the degree of intervention was felt to be unnecessary given that the conduct of the defence was with "complete propriety and efficiency" (at [23]). As an example of this, the court cited a particular instance that demonstrated "a hostile intent to D3 whilst he was giving evidence" (at [26]). We feel it would be of use to understand why the court came to its conclusion by setting out the court's citation of the following exchange (*ibid*):

> The witness D3 was giving an answer recorded as:
>
> > "I have mentioned, the conditions and the process of giving the cards to him (D1) and afterwards I allowed him to get …"

at which point he was interrupted.

> Court: *Did you see him do this?*

A.: Yes.

Court: *Did you open the drawer?*

A.: No.

Court: *Did you give him the key?*

A.: (in English) No, it's unlocked.

Court: *Did you make a record that you gave it to him?*

A.: Yes.

Court: *Where is this record?*

A.: It was in a dealer book which you have not asked any questions about.

Court: *Well, I've never heard of it. Your counsel has never mentioned the expression 'dealer book'.*

A.: (Answer was given but not interpreted)

Court: *Sorry, the term 'dealer book' came from your mouth?*

A.: Yes. It was inside Mr Mak's room.

[emphasis added]

The exchange continued in much the same vein as the aforementioned extract in one of many passages in the examination-in-chief where "questioning appear[ed] to have been taken over almost exclusively by the judge" (at [29]). Accordingly, the court found that what occurred was a "material irregularity" and did not feel that D3 had been given a fair trial or that D3 would have felt he had received a fair trial (at [30]).

143 In the specific context of criminal cases, the following observations by Simon Brown LJ, delivering the judgment of the court in the English Court of Appeal decision of *R v Nelson* [1996] EWCA Crim 707 (noted in [1997] Crim LR 234), bear noting:

> No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities – as plainly this appellant's defence was – there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis.
>
> Why should pointing out those matters be thought to smack of partiality? *To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides.* Justice moreover

requires that he assists the jury to reach a logical and reasoned conclusion on the evidence. Such a conclusion, one need hardly add, is likely to be the right one.

[emphasis added]

Although the above observations were made in the context of the summing-up to a jury, we see no reason why they ought not to be applicable, *mutatis mutandis*, in the local context where (unlike the jury) the trial judge is the trier of fact.

144 It should also be observed that although discourteous and/or impatient behaviour by the judge is undesirable and, indeed, ought to be eschewed, such conduct does not constitute – in and of itself – grounds for impugning the trial itself (see, for example, the English Court of Appeal decision of *Regina v Hircock* [1970] 1 QB 67 at 72; as well as *Valley* ([138] *supra*) at 232).

145 In the final analysis, however, much will depend on the *precise facts* in question, and the *context* in which the interruptions occurred is crucial (see, for example, *per* Stock JA, delivering the judgment of the Hong Kong Special Administrative Region Court of Appeal decision of *HKSAR v Law Chin Man* [2004] HKCA 135; [2004] HKCU 649 at [21]). That this is by no means an easy task is demonstrated by, for example, the division of opinion between the majority on the one hand and the minority on the other in the Family Court of Australia decision of *In the Marriage of Ahmad* (1979) 24 ALR 621. Another instance where there was a similar division of opinion occurred in the High Court of Australia decision of *Vakauta v Kelly* (1989) 87 ALR 633, where the defendant, in an action for damages for personal injuries suffered by the plaintiff, sought to have the judgment against him set aside. As his appeal was dismissed by the Court of Appeal of the Supreme Court of New South Wales, he appealed to the High Court of Australia, *inter alia*, on the ground that the circumstances of the case were such as to give rise to an appearance of bias on the trial judge's part. The majority of the judges of the High Court of Australia emphasised (at 635) that:

> [A] trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.
>
> On the other hand, there is an ill-defined line beyond which the expression by a trial judge of preconceived views about the reliability of particular … witnesses could threaten the appearance of impartial justice.

As such, the majority, comprising Brennan, Deane and Gaudron JJ, found that the trial judge's adverse comments about certain witnesses in the course of the trial "were such as to cause 'reasonable apprehension' on the part of a lay observer that the judgment was, 'in the end', affected by bias" (at 636). In contrast, Dawson J adopted a different stance and opined that while the language of the trial judge was regrettable, it did not *by itself* indicate that "the trial judge would not accept [the witnesses'] evidence in this case if it did not display that tendency, or justify an apprehension that he might not do so" (at 638). Notwithstanding his (*viz*, the trial judge's) views, it should not have affected his ability to assess the evidence fairly and Dawson J thereby found that the remarks did not indicate actual bias nor cause members of the public to reasonably entertain an apprehension of bias.

146 We turn now to focus on a couple of extralegal speeches by two judges, whose views we find to be both practical as well as instructive.

(B) TWO SPEECHES

147 The late Sir Robert Megarry delivered an address on 2 June 1977 at a joint meeting of the Bars of Alberta and British Columbia. It was provocatively entitled "Temptations of the Bench" (and was shortened and revised for publication in (1978) 16 Alberta L Rev 406). Even in its revised form, it bore the inimitable style of Sir Robert – a combination of wit, erudition and practical wisdom. The relevant part of the address is extremely instructive, and bears quotation in full (it falls, appropriately in our view, under the heading "Temptation of the Tongue"; see *id* at 407–409):

> *Three courses are open to the judge. He may maintain silence until he gives judgment; at the other extreme, he may talk as much as he wishes; and, in between, he may exercise a policy of rigid but not inflexible restraint. The first course has the high authority of the great Christopher Palles, Chief Baron of the Exchequer in Ireland for over forty years.* When he was appointed, he placed a notice on his desk in court where it would always be before his eyes. It read: "A judge should keep his mouth shut and his mind open: when he opens his mouth he shuts his mind." *Yet is this right? The difficulties that it makes for counsel are great. If counsel were to speak his thoughts aloud, he might say: "I wonder if the judge has really got my point. I have already put it twice, in two different ways, and yet there is not a flicker of his eyelids to show whether he understands it. The only safe thing is to go round the course once or twice more, varying my language, in the hope of getting some indication whether I have struck oil yet." Complete judicial silence inevitably lengthens the argument. Counsel cannot take chances, and so he must try, try and try again. He may be pushing at an open door, or at a door that is barred and bolted: either way the repeated argument is time-wasting and, for that matter, boring. Only if the door is ajar is the time well spent. Total silence from the Bench conceals the state of the door. Another peril of complete silence is that the judge may, even after repetition, misunderstand some argument and decide the case without ever having really appreciated what counsel is contending. For myself, I would, with great respect, refrain from following Palles C.B. on the point.*
>
> *I would also reject the other extreme, that of indulging in unrestrained intervention. One of the vices of this indulgence is that, like complete silence, it lengthens everything. It also has the more grave defect of tending to deprive the litigant (and his counsel) of having his own case conducted his own way. It cannot be right for there to be silent battles of will between counsel and the judge about who will ask the witness the next question, or which of the various heads of argument is to be discussed, and so on.*
>
> …
>
> *With complete silence and unbridled speech both rejected, there remains the middle course of a rigid but not inflexible self-restraint. The judge should talk enough to let counsel see how his mind is moving. If he cannot follow a point that counsel is trying to make, he should say so. If instead he thinks that he can follow it, he should put it to counsel in his own language so that he can find out whether he has understood it correctly*. If the judge says: "As I see it, Mr. Jones, what you are saying is so-and-so", counsel, if he is any good, may say: "Yes, my Lord, that is just how I would put it." Of course, if counsel is a seasoned advocate, he will say: "Your Lordship has put the point far better than I could have hoped to have put it", and then gently make minor adjustments as he continues with his speech. On the other hand, if the judge has got it completely wrong, counsel will say: "My Lord, I would put it a little differently", and then, the decencies observed, the judge will know that he must try again. Only when this process has been carried to its end can the judge feel confident that what he has recorded in his notebook truly represents what counsel wants to convey.
>
> *Transcending these exchanges between Bench and Bar there must be a judicial self-restraint*

which never lets the judge take over the conduct of the case from counsel, and never takes counsel out of his course. If counsel is engaged in arguing Point A, then however much the judge may explore and test that point, he must restrain his curiosity about Points B, C and D; in due time they will be presented, and it is then that they can be examined by the judge. So too with witnesses. There may be many questions that the judge wishes to ask, but he cannot know whether, or when, or in what order, counsel will ask them, or whether counsel is deliberately delaying the exploration of some aspect of the topic for some very good reason. If the judge waits until counsel is turning to a different topic, the judge can usually ask his questions without unduly disturbing counsel's presentation of the case, whereas an intervention in mid-topic ay unfairly disrupt counsel's plan of presentation. Of course, I am speaking of substantive questions, and not about questions concerned only with audibility or intelligibility or the like. The judge should not deny himself his question periods, but he should not let them interfere with counsel in running his own case his own way. The judge should tread the path that counsel is hewing out, and not try to hew out a different path of his own.

[emphasis added]

148 We would respectfully agree that the "middle course" proposed by Sir Robert is, having regard to the principles set out in the case law above, the appropriate approach to adopt.

149 We turn now to a second speech, delivered a dozen years later. It was delivered by Mr Justice Lightman to the London Solicitors' Litigation Association on 9 November 1999. It also had a provocative title – "The Case for Judicial Intervention". Although a copy of the speech may be found online (at <http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/09111999.htm> (accessed 22 September 2008)), it was also published in (1999) 149 NLJ 1819.

150 Lightman J's speech deals with civil trials. In so far as judicial questioning of advocates and witnesses are concerned, he observes thus (at 1835):

The old practice was (and even today the continuing practice before a few judges is) to let the advocate get on with it at his own speed with scarcely any judicial interruption by questioning. I (and many other advocates) at the time found this judicial reticence unhelpful as it was totally uninformative, leaving the advocate at sea as to the areas where his submissions would be of assistance and where they would not.

It is today in my view incumbent on the judge in fairness to interrupt to raise any concerns which he has, so as to give the advocates the opportunity to allay them before he gives his decision. It is surely scant justice to decide a case on a ground which the judge has given no indication to be troubling him. Complaint is sometimes made about questioning. In one case before me, a complaint was made by counsel that I kept asking *him* difficult questions, but I did not ask such difficult questions of his opponent. His client apparently took the view that this was indicative of bias. The reason for this difference in treatment of the parties' submissions lay in the character of the submissions: one party's submissions were highly questionable whilst the other's were not.***Questioning (rather than silence) is the hallmark of a fair hearing – questions are a plea for assistance in clarifying, understanding and enabling acceptance of submissions. They are a challenge to the advocate – to a good advocate they afford the opportunity to make good the vulnerable areas in his case. A judge may appear fierce when he is really only hungry for assistance. The trained advocate recognises the symptoms and sets out to feed and satisfy him.***

Judicial intervention today gives the judge more scope than previously to ask questions of

witnesses. The judge will have read the witness statement before the witness is called (and often all the witness statements) and he may know to what questions he needs the answer. ***He does not need to wait to see if the question is asked and then what answer is given, and he need not accept the sufficiency of an answer just because the advocate does. But this is an area where (paying respect to the principles) the judge must be particularly cautious. His questioning out of turn may frustrate a planned cross-examination, and if he asks (as he is entitled to) leading questions, (questions suggesting their own answer), the witness may psychologically find it difficult to resist the perceived judicial pressure to give that answer***.

[emphasis added in bold italics]

151 In this regard, the following observations by Kirby ACJ in the New South Wales Court of Appeal decision of *Galea v Galea* (1990) 19 NSWLR 263 ("*Galea*") (at 282) may also be usefully noted:

> In part, it [the fact that it has become more common for judges to take an active part in the conduct of cases compared to what was the practice in the past] arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party affected then has no opportunity to correct or modify.

And, in the same case, Meagher JA observed thus (at 283):

> Where, as in the present case, a judge is confronted by a witness who is both deceitful and evasive, there is no principle that he is not at liberty to express his measured displeasure at being trifled with. There is no principle that he must endure the ordeal with ladylike serenity. … More than that, a timely intervention serves the interest of the party leading such evidence, as it provides him with a chance to mend the damage already inflicted.

152 Lightman J also sets out his "provisional views" on the topic as follows ([149] *supra* at 1835–1836):

> Complaint is likewise sometimes made that the interventionist judge by his interventions (for example, by his leading questions to the advocate) can make plain his view before he has heard the full argument or case. The charge made is that by so doing, the judge is showing himself partisan or is wrongfully prejudging the issue before him. *In my view, so long as the judge has carefully read the skeletons, listens to the answers to his question and keeps his view provisional until he has heard the answer and heard any relevant evidence, there is no substance in the complaint.* It is the very function of the skeleton to inform the judge of the issues and assist him to reach the answers; that he can and does form a provisional view after reading the skeleton argument is neither surprising nor objectionable. *I cannot see any contravention of the principles or any other objection to expression of a provisional view. The open mind required of the judge is that with which he begins his pre-reading. It is surely inevitable that in many cases pre-reading will cause an experienced judge to form provisional views of varying firmness. The judge's provisional views may change or vary in strength as the case proceeds. I see no advantage on any embargo on disclosure of what plainly and quite properly exists in his mind. So long as the judge's mind remains open and is seen to remain open, I can see no objection in principle to forming or disclosing that view. Indeed on occasion disclosure can be of great assistance:*
>
> ●*it can tell the advocate the issues on which the judge needs persuading;*

> •*it can afford the parties some guidance on the wisdom of continuing claims or defences (and accordingly incurring further costs);*
>
> •*it can operate to encourage the parties to settle or go to mediation (one of the stated objectives of judicial case management)*.
>
> An example of the occasion when the expression of a provisional view can prove particularly helpful is when the judge is concerned (for example, having seen a party in the witness box) that he may in his judgment have to make some damning finding (for example, as to his honesty or integrity). He may (as it seems to me) in the proper case legitimately draw the attention of the parties to this risk and so encourage a resolution of the dispute which precludes any such finding in his judgment and the public shaming of that party. In short the expression of a provisional view is likewise entirely in accord with the principles.
>
> *The judge must of course be sensitive in two respects: that the view is not expressed before he is really able (and seen to be able) fairly to reach such a provisional conclusion; and that after such expression it will remain (and be seen to remain) provisional until the party affected has had a proper opportunity to displace it.*
>
> [emphasis added]

153 Lightman J also speaks of the *advocate's* role as follows (at 1836):

> The advocate must have the resources to deal with the judicial intervention – the confidence not to be overawed, the resilience to respond, the tenacity to challenge, the tact to mollify, the authority to inform and persuade. This requires having the facts at the advocate's fingertips and the legal principles in mind and relevant passages in authorities and textbooks at hand – a far greater knowledge of all these is now required than was the position when the judge remained recumbent throughout the proceedings. The premium today is upon flexibility – to deal with issues raised, not as the advocate may have planned, but as they are raised by the judge. I cannot over-emphasise the importance of gaining the judge's trust and confidence in the advocate's preparation and accordingly the solidity of his submissions and answers to questions asked of him.

Finally, the learned judge concludes his speech thus (*ibid*):

> The trial judge until the 1970s was generally tame and on a tight lead. He may now be found barking – on occasion perhaps biting at the ankles of advocates. The aim of the judge is by judicial intervention to promote justice by saving time and costs and concentrating on essential issues without any sacrifice of the principles. Not every intervention is of this character or achieves this goal and not everyone has adapted to this change or approves of it. But my understanding is that the appreciation of its value is growing and that the aim of judicial intervention is to considerable degree being achieved.

Again, we would respectfully endorse the views expressed by Lightman J in his speech as set out above.

154 In point of fact, the adversary system is not a perfect one (see, for example, Sir Richard Eggleston, "What is Wrong with the Adversary System?" (1975) 49 ALJ 428). However, no system is perfect. The adversary system has served us well. And it will continue to serve us well only if its fundamental concepts as well as workings are not undermined. In this respect, undue judicial interference will, in fact, result in such undermining. Hence, it must be assiduously avoided. In this

regard, it is significant, in our view, that even those who are (even vigorously) of the view that the operation of the adversary system often impedes what it is intended to achieve, *viz*, the attainment of the truth (but *cf* writers, such as Prof Freedman, who also point (in the US context) to the aim of realising the dignity of the individual (see, for example, Monroe H Freedman, "Judge Frankel's Search for Truth" (1975) 123 U Pa L Rev 1060, especially at 1063 (which is a response to Judge Frankel's article cited next); see also generally Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics* (LexisNexis, 3rd Ed, 2004) at ch 2), do *not* advocate judicial intervention as a solution. For example, Judge Marvin E Frankel observed thus (see "The Search for Truth: An Umpireal View" (1975) 123 U Pa L Rev 1031 at 1042 (see also generally, *id* at 1041–1045)):

> The fact is that our system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. He risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions.

The learned author later proceeds to observe thus (at 1045):

> [T]he trial judge as a participant is likely to impair the adversary process as frequently as he improves it. What is more vital to my thesis is that the critical flaw of the system, the low place it assigns to truth-telling and truth-finding, is not cured to any perceptible degree by such participation.

(4) The local case law

155 It is clear that the seminal statements of principle by Denning LJ in *Jones* (above at [123]) have been clearly and unambiguously been adopted by the local courts.

156 Whilst the actual decision in *Jones* ([122] *supra*) was not cited in the Singapore High Court decision of *Wong Kok Chin v Singapore Society of Accountants* [1989] SLR 1129 ("*Wong Kok Chin*"), the following observations by Yong Pung How J are wholly consistent with the statements of principle in *Jones*; the learned judge observed thus (at 1151–1152, [54]–[55]) with regard to the duties of a disciplinary tribunal (which would, *mutatis mutandis*, apply equally to courts of law):

> Domestic tribunals such as this, which derive their authority from parliament, usually have a wide discretion to carry out inquiries in accordance with their own rules of procedure. *At every stage, however, they must observe what are commonly regarded as rules of natural justice*. An offender brought before a tribunal must not only be given a hearing, but he must also be given a fair hearing, so that it can be said, to adopt a much used quotation, that justice has not only been done, but can be seen to have been done: *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256. *In our system of justice the process is adversarial and not inquisitorial. This necessarily means, in the case of a disciplinary committee of a professional body, that it must approach the issues before it with an open mind, it must also listen to the evidence for and against the offender, and to what he may have to say in his defence; and it must then make up its mind whether, on all the evidence before it, the offender has been proved to be guilty of the offence. In hearing evidence, a disciplinary committee may seek clarification on points in the evidence which are not clear, but in doing so it must at all times avoid descending into the arena, and joining in the fray. In the last instance, it is there to judge as best it can; it is not there to supplement the prosecution. It must remember that, in conferring statutory authority on it,*

Parliament intended that it will act fairly; if it does not do so, it will be acting ultra vires.

… [I]n my opinion, the manner in which the proceedings were carried on in this case fell far short of the standard of fairness which would be required to satisfy the rules of natural justice. *In particular, an inescapable impression is formed from perusing the transcript that, in trying to discharge its responsibilities effectively, the committee went well beyond its authority to carry out a 'due inquiry' under the Act, until the inquiry became an inquisition of its own, aimed at securing evidence to justify a finding of guilt.* The society was represented before the committee by an experienced and competent counsel, but the committee appeared from the transcript at several stages of the proceedings to have been *so carried away by its misinterpretation of its own role that it was actually conducting the proceedings on its own.* [emphasis added]

157 In this case, Yong J noted that in so far as one witness (who was *not* a major witness) was concerned, whilst the examination-in-chief of the witness covered over four pages of the transcript and his cross-examination two pages, his questioning by the Committee itself extended to 11 pages (see at 1152, [56]). The learned judge proceeded to note, further, as follows (*ibid*):

The appellant's examination-in-chief, with frequent interruptions by the committee, covered 23 pages; his cross-examination, after about 15 pages of interruptions by the committee, was taken over by the committee itself, which then questioned him for a relentless 30 pages before the committee decided to recall [another witness] for an equally harrowing experience. By that time, the committee had apparently parted company with its proper role.

158 In the circumstances, Yong J was of the view that "the manner in which the committee went about its inquiry was clearly against the rules of natural justice and therefore ultra vires, and on this ground alone any finding and sentence by it would have been void" (at 1153, [58]).

159 In the decision of this court in *Yap Chwee Khim v American Home Assurance Co* [2001] 2 SLR 421 ("*Yap Chwee Khim*"), L P Thean JA, who delivered the grounds of decision of the court, observed thus (at [25]):

In considering this complaint of Mr Pereira [counsel for the plaintiff, who complained that the trial judge was wrong in making a finding on an issue which was not raised by the parties], we should mention that a trial judge has very wide power under s 167 of the Evidence Act (Cap 97, 1997 Ed) to ask questions of any witness who is before him. Section 167 provides as follows:

(1) The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

(2) The judgment must be based upon facts declared by this Act to be relevant and duly proved.

(3) This section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 123 to 133 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 150 or 151; nor shall he dispense with the

primary evidence of any document, except in the cases excepted in this Act.

However, such wide power must be exercised with caution and within well-recognised limits with judicial calm and detachment and without usurping or assuming the functions of counsel. Case law has shown that, while a trial judge has the power to ask questions of witnesses at any stage of the hearing, an excessive exercise of such power may, and indeed would, operate unfairly against the witnesses and litigants. A general statement on the role a judge should play in this regard is to be found in the judgment of Denning LJ in the case of *Jones v National Coal Board* [1957] 2 QB 55 at 63 …

…

In that case, the English Court of Appeal ordered a new trial on the ground that the judge at first instance had excessively interrupted counsel's cross-examination and at times, to a substantial extent, had conducted the examination of the witnesses himself. It was held that he had hindered the fair conduct of the trial, and had effectively taken cross-examination of the witnesses out of the hands of counsel.

[emphasis added]

160 In the Singapore High Court decision of *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85 ("*Re Shankar Alan*"), the court considered both the present doctrine as well as the doctrine of apparent bias. The court applied both doctrines to the facts before it. Sundaresh Menon JC, applying the doctrine of apparent bias and finding that it applied on the facts, granted the application for the quashing order. It was therefore unnecessary for the learned judge to consider the doctrine proscribing judicial interference (which is, of course, the doctrine that was at issue in this particular appeal), However, Menon JC proceeded to consider and apply this doctrine as well, finding that the tribunal concerned had, on the facts, also "failed to discharge its judicial function because it assumed an inquisitorial role at a certain point by descending into the arena in such a manner that impaired its judgment and its ability to fairly evaluate and weigh the evidence and the case as a whole" (at [124]) and that this, too, afforded an alternative ground to quash the tribunal's findings and determination. The learned judge considered this particular doctrine under the heading (at 124, before [105]) entitled "[t]he prohibition against assuming an inquisitorial role" (indeed, he also referred (at [107]) to this particular doctrine as one that "is borne out of the fact that our system of justice is founded on an adversarial model rather than an inquisitorial model"). He then proceeded to refer to (and, indeed, cited *in extenso* from) the judgment of Denning LJ in *Jones* (see [123] above). More significantly, Menon JC referred to this judgment not only as "the starting point" but also as "one containing perhaps the most eloquent articulation of the principle [proscribing judicial interference]" (at [108]). We could not agree more with this high praise.

161 The learned judge also referred (at [110] and [112], respectively) to the decision of this court in *Yap Chwee Khim* as well as that of the Singapore High Court in *Wong Kok Chin* ([156] *supra*). However, he did sound the need for appropriate balance, particularly in the light of litigation in a practical and modern context, as follows (at [114]):

I agree that the principle recognised in *Jones* and upheld in *Yap Chwee Khim* must be applied with due consideration for the fact that in the modern era of complex and often document-intensive litigation, it is not uncommon for judges to take an active part in case management or to intervene as often as they feel they need to in order to understand the issues and the evidence. Equally, I accept (and indeed my personal approach to conducting hearings reflects this view) that counsel are often assisted by the court revealing its concerns, its provisional views and its

> reservations so that the parties have every opportunity to seek to correct or modify them or to persuade the court to come to a different view. In my view, giving counsel the opportunity to peek within the judicial mind considering the case can be a great advantage to counsel and the parties.

The learned judge proceeded to observe thus (at [115]):

> However, this is not the mischief. The real problem arises when the judge takes up a position and then pursues it with the passion of the advocate and in the process slips "into the perils of self-persuasion" (*per* Sir Robert [Megarry] "*Temptations of the Bench* " (1978) 16 Alta L Rev 406 at 409 cited in *Galea* [[149] *supra*] at 281). When that happens, he has entered the arena and it is a position ill-suited to the dispensation of dispassionate justice.

162 However, the learned judge was also at pains to emphasise that the inquiry was, in the final analysis, dependent very much on the precise facts in question (see at [121]):

> I would accept that the question in every case of this nature is what is the impression the court is left with after considering all the evidence and the circumstances. There can be no inflexible rules and every case will depend on its facts. A tribunal that questions an expert at some length in an effort to come to grips with a difficult technical issue might leave a quite different impression than one that questions a witness of fact on a vital but simple point in an effort to secure a concession.

163 The principles set out in *Re Shankar Alan* were, in fact, cited and applied in the recent Singapore High Court decision of *Ng Chee Tiong Tony v PP* [2008] 1 SLR 900. Indeed, in the latter case, the learned judge stated (at [21]) that he "[agreed] entirely with the exposition of the law by Menon JC in *Shankar Alan*". Applying the law to the facts before him, he allowed the appeal by the accused against the decision of the trial judge (in *PP v Ng Chee Tiong Tony* [2007] SGMC 13) on the basis that the trial judge "had gone way beyond what would qualify as clarifications" (at [22]). As the learned judge observed (*ibid*):

> In my view, while it is entirely proper for a trial judge to ask questions to clarify an unclear answer, or even to establish a crucial point (which I should add must be done with circumspection and in a neutral manner), what was done in the present case went past that. It is the duty of the Prosecution to bring out the evidence to prove its case; it is not the judge's duty to do so, and certainly not to take over the cross-examination to make up for any shortfall in the conduct of the case by the prosecutor. And it is certainly not for a trial judge to test the credibility of a witness by sustained questioning. Quite apart from the problem of giving a perception of bias to a reasonable observer, it is well known that witnesses often respond differently to a judge as compared with cross-examining counsel.

164 However, it is important to also reiterate the need (especially in the modern-day context) to bear in mind that the doctrine proscribing judicial interference is one that ought to be invoked *only in the most egregious cases*. Indeed, as already mentioned, the doctrine ought not – and cannot – become a stock argument that is invoked by parties as a matter of course and, indeed, would be frowned upon (and perhaps visited by appropriate measures) by the court where there has been a clear abuse of process.

165 The most recent pronouncement on this issue is to be found in this court's decision in *Hum Weng Fong v Koh Siang Hong* [2008] 3 SLR 1137. In this case, which involved liability for a road accident, Chao Hick Tin JA, who delivered the judgment of the court, observed thus (at [29]–[33]):

29 Before we conclude, we would like to allude briefly to a matter raised in the appellant's case that the Judge had intervened excessively during the trial. It was suggested that the Judge had entered into the arena. *Under s 167 of the Evidence Act (Cap 97, 1997 Rev Ed), a judge is entitled to ask any question of any witness in any form and at any time. While the power given to the judge under this section is very wide, he should nevertheless not enter the fray and assume the role of counsel. It should always be borne in mind that ours is an adversarial system. The object of a judge in asking questions of witnesses should only be to clarify and not to conduct an investigation or advance any particular viewpoint*. In *Yap Chwee Khim* [[159] *supra*], this court said at [25]:

> [S]uch wide power must be exercised with caution and within well-recognised limits with judicial calm and detachment and without usurping or assuming the functions of counsel. Case law has shown that, while a trial judge has the power to ask questions of witnesses at any stage of the hearing, an excessive exercise of such power may, and indeed would, operate unfairly against the witnesses and litigants.

30 In this connection, it may be appropriate for us to quote a passage of Denning LJ in *Jones* [[122] *supra*] at 63–64, which passage was approved in *Yap Chwee Khim* [and see above at [123]] …

3 1 *Admittedly, it is often difficult to define at which point a judge has crossed the line. This is all the more so in modern litigation involving voluminous documents. The judge may need to intervene more frequently in order to understand the issues and the evidence. Such a situation should be borne in mind when a question arises as to whether the judge has entered into the arena* (see *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85 at [114]). *Ultimately it is a judgment call for the appellate tribunal, having examined the entire trial record*.

32 In the present case, it is true that the Judge had asked many questions of the appellant when the latter was on the stand. But looking at them in their totality, we were inclined to think that the Judge was essentially seeking to clarify the evidence and establish the truth. It must be borne in mind that we are here dealing with a fatal accident. The other party to the accident could no longer come forward to testify and the only evidence was that of the defendant appellant. It was thus critical that the evidence of the defendant should be clearly established. However, in order to avoid any such allegations arising, it may be prudent for a trial judge to remind himself or herself that his or her role is only to ask questions to clarify and not to advance a cause that might result in his objectivity being assailed. Some cases have sought to lay down general guidelines for the assistance of judges, *eg*, *Galea v Galea* (1990) 19 NSWLR 263 at 281-282, which are no doubt useful.

33 At the end of the day, we are confident that if a judge is conscious enough to remind himself that he should not enter the arena, such allegations of excessive intervention will most unlikely arise.

[emphasis added]

166 The above observations emphasise, once again, the need to scrutinise the entire case concerned in *its context and* that *a holistic view must be adopted*. They also acknowledge the practical reality to the effect that it is not always easy for the appellate court to ascertain whether the trial judge has in fact descended into the arena.

167 There are three other cases which we should mention. The first is the decision of the

Singapore Court of Criminal Appeal in *Roseli bin Amat v PP* [1989] SLR 55 ("*Roseli bin Amat*"). In this case, although no reference was made to the principles enunciated in *Jones* (see above at [123]), it was clear that the court was, in *substance*, applying them. The accused complained of interventions by the trial judge which the appellate court grouped into three rough categories (*viz*, (a) excessive interruptions in the examination and cross-examination of witnesses by counsel; (b) unfair and improper cross-examination of the accused by the trial judge in a hostile manner (including disallowing the accused to give evidence in their own way); and (c) the making of adverse comments or observations by the trial judge which strongly indicated that he had closed his mind and had predetermined the guilt of the accused prior to considering all the evidence before him).

168 In so far as the *first* category of interventions was concerned, the court found (at 58, [10]) that there were, in fact, "[a] considerable number of … instances [of interruptions by the trial judge which] … arose out of counsel delving on minuscule points, points of dubious relevance or points which had been covered by the questions asked by other counsel preceding". It held that the trial judge's interruptions in this regard were "wholly justified" (*ibid*). Whilst the number of interruptions were numerous and ought, on some occasions at least, not to have been made, the court nevertheless noted that the trial was a fairly long one. Hence, in the words of L P Thean J, who delivered the judgment of the court (at 59, [10]):

> On the whole, though we do not agree with or condone some of the interruptions of the learned judge, we are unable to accept the contention that the interventions by the learned judge, though numerous, had hampered counsel in examining or cross-examining the witnesses and rendered it impossible for them to present fairly the case for the defence.

169 In so far as the *second* category of interventions was concerned, the court held that (at 59, [11]):

> [I]n quite a number of occasions the learned judge was entitled to ask the questions which he asked. Some of the questions were asked with a view to seeking clarification and some were asked in order to follow up the questions previously asked by the prosecution or the defence. It is true that there were questions which, in our view, he should refrain from asking, but here again we do not think these questions alone are sufficient to warrant a condemnation of this trial as unfair or a mistrial.

170 Turning to the *third* category of interventions (or, rather alleged adverse comments or observations by the trial judge), the court held (at 59, [12]) that although "a fair number of these observations or comments are truly innocuous … there are some which cause us some concern". It then proceeded to examine parts of the transcript in detail, and arrived at the conclusion (at 63, [20]) that, in the light of certain observations made by the trial judge:

> [I]t is doubtful whether the learned judge had fairly evaluated the evidence of the complainant and the [accused]. [These observations] point very strongly to the unhappy fact that the learned judge did not keep an open mind throughout the trial and examine and weigh carefully the evidence of the complainant and that of the [accused].

171 Thean J also observed and came to the following conclusion thus (at 63–64, [22]–[23]):

> It is true that the learned judge said that at the end of the case he scrutinized again the evidence adduced by the prosecution and that of the [accused]. However, he ought not to have come to any definite conclusion, which he appeared to have done, on the credibility of the complainant – and that was purely on her own evidence – and on other matters which we have

discussed until he had heard all the evidence adduced by the prosecution and evidence adduced by the defence. Only then would he be in a position to assess or evaluate fairly the evidence before him and make findings of facts and finally arrive at a conclusion.

… This is far from being a case of a couple of isolated imprudent remarks made injudiciously by a trial judge in unguarded moments in the course of a long trial – such incidents we can well appreciate and understand. The instant case unfortunately is much more than that. The passages of the transcript which we have reviewed and in which are found definite views and findings of the learned judge on material issues – some of them at an early stage of the trial – are far too compelling: they indicate starkly that the learned judge had predetermined these material issues adversely against the [accused] long before they had fully presented their case. With great reluctance, we have reached the unavoidable conclusion that the convictions should not be allowed to stand. Accordingly, we allow the appeal and quash the convictions and the sentences. We have considered whether we should now order a new trial. In our judgment, having regard to the long lapse of time since the alleged offence and the fact that the [accused] have by now served a term of imprisonment of over three years it would be unfair to subject them again to a long trial on the same charges. We therefore do not propose to make such an order.

172 It should be noted that the court in *Roseli bin Amat* allowed the appeal, not on the basis of the first two categories of interventions but, rather, the third. Significantly, perhaps, there was no allegation, in the context of the present appeal, with respect to this third category.

173 In the Malaysian Federal Court decision of *Tan Kheng Ann v The Public Prosecutor* [1965] 2 MLJ 108, there was an allegation of judicial interference when "on a number of occasions in the course of the trial the judge saw fit to interrupt counsel in the course of examination or cross-examination of witnesses and interposed questions and observations of his own" (at 117). The argument was rejected. Thomson LP, who delivered the judgment of the court, observed thus (*ibid*):

We have examined the transcript with care and are satisfied that the judge's conduct, of which complaint has been made, has nothing, in any way in common with what took place in the cases mentioned. What happened here was that there were eight different defending counsel; there was a great deal of overlapping in their cross-examination of witnesses; and in the heat of battle, so to speak, they occasionally overlooked the very real difficulties which arise from cross-examination in the English language through an interpreter of a witness who is giving evidence in one of the Chinese languages. This is a perennial source of difficulty and the great majority of the judge's interventions can be traced to his anxiety to assist in removing the difficulties of the sort which frequently arise in this regard, particularly when "double questions" are asked. *These interventions, moreover, were not unduly numerous having regard to the length of the trial nor were they by any means confined to defending counsel; on a number of occasions prosecuting counsel was also interrupted.* In all the circumstances we can see nothing in all this that could have affected in any way the question of the fairness of the appellants' trial. [emphasis added]

174 Finally, brief reference may be made to the Malaysian Supreme Court decision of *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553 (a case relating to an appeal against a conviction and sentence of death for drug trafficking). The court in that case cited many of the English decisions mentioned above (in particular, *Jones* ([122] *supra*)), and arrived at the conclusion that, on the evidence before it, the trial judge did, in fact, "descend into the arena and did allow his judgment of the facts to be clouded by the results of his cross-examination of the [accused as well as other witnesses], though we do not doubt that he was actuated by the best of motives" (at 564). Not surprisingly, the court was of the view that a miscarriage of justice might well have occurred and, accordingly, quashed the conviction and acquitted as well as discharged the accused.

(5) A summary

175 It is appropriate, in our view, to summarise the applicable principles that can be drawn from the various authorities and views considered above, as follows (bearing in mind, however, that, in the final analysis, each case must necessarily turn on its precise factual matrix (see also above at [162])):

(a) The system the courts are governed by under the common law is an adversarial (as opposed to an inquisitorial) one and, accordingly, the examination and cross-examination of witnesses are primarily the responsibility of counsel.

(b) It follows that the judge must be careful *not* to descend (and/or be perceived as having descended) into the arena, thereby clouding his or her vision and compromising his or her impartiality as well as impeding the fair conduct of the trial by counsel and unsettling the witness concerned.

(c) However, the judge is not obliged to remain silent, and can ask witnesses or counsel questions if (*inter alia*):

(i) it is necessary to clarify a point or issue that has been overlooked or has been left obscure, or to raise an important issue that has been overlooked by counsel; this is particularly important in criminal cases where the point or issue relates to the right of the accused to fully present his or her defence in relation to the charges concerned;

(ii) it enables him or her to follow the points made by counsel;

(iii) it is necessary to exclude irrelevancies and/or discourage repetition and/or prevent undue evasion and/or obduracy by the witness concerned (or even by counsel);

(iv) it serves to assist counsel and their clients to be cognisant of what is troubling the judge, provided it is clear that the judge is keeping an open mind and has not prejudged the outcome of the particular issue or issues (and, *a fortiori*, the result of the case itself).

The judge, preferably, should not engage in sustained questioning until counsel has completed his questioning of the witness on the issues concerned. Further, any intervention by the judge during the *cross-examination* of a witness should *generally* be *minimal*. In particular, any intervention by the judge should not convey an impression that the judge is predisposed towards a particular outcome in the matter concerned (and *cf* some examples of interventions which are unacceptable which were referred to in *Valley* (see [138] above)).

(d) What is crucial is not only the quantity but also the qualitative impact of the judge's questions or interventions. The ultimate question for the court is whether or not there has been the possibility of a denial of justice to a particular party (and, correspondingly, the possibility that the other party has been unfairly favoured). In this regard, we gratefully adopt the following observations by Martin JA in *Valley* (reproduced above at [138]):

> Interventions by the judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might *reasonably* consider that he had not had a fair trial ***or*** whether a reasonably minded person who had been present throughout

the trial would consider that the accused had not had a fair trial …

[emphasis added in bold italics]

(e) Mere discourtesy by the judge is insufficient to constitute excessive judicial interference, although any kind of discourtesy by the judge is to be eschewed.

(f) Each case is both *fact-specific as well as context-specific*, and no blanket (let alone inflexible) rule or set of rules can be laid down.

(g) The court will only find that there has been excessive judicial interference if the situation is an *egregious* one. Such cases will necessarily be *rare.* It bears reiterating what we stated earlier in this judgment (at [125] above):

[T]he argument from judicial interference cannot – and must not – become an avenue (still less, a standard avenue) for unsuccessful litigants to attempt to impugn the decision of the judge concerned. This would be a flagrant abuse of process and will not be tolerated by this court. Parties and their counsel should only invoke such an argument where it is clearly warranted on the facts …

176 We turn now to apply the above principles to the facts of the present appeal.

(6) Our decision

(A) INTRODUCTION

177 Bearing the above principles in mind, we turn to the alleged judicial interventions which were the subject of this particular ground of appeal.

178 Mr Bajwa cited extracts from the transcript of the notes of evidence in support of his argument that there had been excessive judicial interference by the Judge. We examined each one of these extracts closely. More importantly, we not only analysed the actual language used by the Judge but also the *context* in which the pronouncements by the Judge was made in each instance. As we have already emphasised more than once, the allegation of judicial interference is a serious one and will succeed only in the most egregious circumstances.

179 It is also important, at this juncture, to note that, with the candour which we expect of all counsel, Mr Bajwa admitted that the Judge had also assisted the appellant in the conduct of his case as well.

180 Mr Bajwa pointed us, in fact, to portions from pp 201, 205, 208–210, 227, 228, 240, 244–246 and 264–265 of the notes of evidence ("NE"), as constituting instances of alleged judicial interference. We now set out each of them. As it is also important to consider each of the relevant portions *in their context*, we have, first, cited extended extracts of the NE (rendering all portions relied upon by Mr Bajwa in *bold font* within these portions themselves). Second, we have rendered in these (extended) extracts, in *bold and italicised font*, what is, in our view, especially helpful to our analysis.

(B) THE EXTRACTS

181 The relevant portions of the NE referred to in the preceding paragraph (including the extracts

cited by Mr Bajwa as well as those emphasised especially by us) are as follows:

Extract 1 (at p 201 of the NE):

Court: ---you can't say for sure that death was caused by drowning?

Witness: No, objectively, I cannot say that, which is why I left the cause of death---

Court: All right.

Witness: ---unascertained.

Q Yes. In fact, I was going to ask---

Court: **Hold on.**

Bajwa: **Sorry.**

Court: **Now, this, I suppose, bring back into question---the amendment to the charge, right? You amended it to---what was your amendment to the charge?**

Ong: **By drowning, your Honour.**

Court: **So---**

Ong: **By drowning.**

Court: **---so you have to---so the charge---the---why do you amend it in that case?**

Ong: **Yes, your Honour.**

Court: **Well, you better think about whether you want to reinstate the---the original charge.**

Ong: **Yes, your Honour.**

Extract 2 (at p 205 of the NE):

Court: Is this something that---

Q ---at this point---

Bajwa: Sorry.

Court: No, no, hold on. In a situation like that you say you cannot exclude this, it may have occurred and then you have other evidence that there may be drowning. ***So, on what level are the possibilities and probabilities of these two distinct causes?*** Because, let's say, they---if you are going to say that they are both as likely, then I'm---I'm sure Mr Ong will realise that, "Oh, in that case we are looking at a very difficult situation about excluding doubts", you know. So one---I mean, you should be---***can you assist by saying that although this is likely, what is more likely, what is improbable or things like that?*** Just to say, "I can't exclude this, I can't exclude this"---if everything you can't exclude implies that they are as likely as any other causes then I think Mr Ong

will have to really worry about how he's going to do his submissions.

Ong: Yes, your Honour.

Court: You follow me?

Witness: Yes, I do.

Court: All right, then. So can---can you address that?

Extract 3 (at pp 208 to 210 of the NE):

Court: ***You are now giving us evidence on this area of genetics and all that, I mean, I think I'm sorry if I have to mention---is this your area of expertise?*** Because---

Witness: Yes, er---

Court: ---***you see, you are a pathologist. This is another area of study, we don't want to come into that again, all right? We have gone into that once not so long ago.***

Witness: Er, your---your---

Court: But the---

Witness: ---yes. Your---your Honour---

Court: So you---

Witness: Yes.

Court: No, wait let me finish the explanation.

Witness: Yah, sorry, sorry.

Court: Do you---do you consider yourself an expert in this where you can tell the Court, "This is my opinion and I'm saying this as an expert against the background of my area and expertise"?

Witness: No, this is---these are the results of tests conducted by the--- by a laboratory in the National University of Singapore. And before the commencement of the trial I did raise this issue to the prosecution, that is, as to the necessity of, er, obtaining, er an opinion from the scientist or scientists who actually conducted these… tests. What I have is the test report on these test results.

Court: **Mr Ong, I think this---this---this is best listening to, you know, I mean. Specifically what I can hear is, look, he knows that this is---he is relying on somebody else's report.**

Ong: **Yes, your Honour.**

Court: **That we all know is not his main area of work because Prof Lau is a pathologist.**

Witness: **Yes.**

Court: **Not---not---not a clinician who deals with this. Off hand I do not recall another, I**

mean, of the other medical or technical witnesses covering this. Don't you---don't you think therefore that you should be thinking about that?

Ong: **Yes, your Honour, I will think about it.**

Court: **All right. Hey, we are in the middle of trial. When do youIII**

Ong: **Yes.**

Court**: ---when do you intend to complete the thinking process? Look, I mean, look, Mr Ong, don't look at me like that. We have gone through a PI. This is a trial unless you come to some conclusion within the span of this case, you are going to say unless something happens, "This is my case" and I'm---we may be looking at a situation there where they say that, "Look, if this is the case, thank you very much and I'm now going to submit". Look, you have to bite the bullet, you know.**

Ong: **Yes, your Honour.**

Court: **And make a decision. You---you can't defer these things for very long, otherwise, we get into all sorts of complications again.**

Ong: **Yes, your Honour.**

Court: So when do you propose to do that? You see, I'm---I'm trying to sit back and look at this.

Ong: Yes, your Honour.

Court: Two things happened; you make your decision. Making your decision merely to me means that: "We need more." But just because you need more it doesn't mean immediately that you get the thing. You got to get somebody to actually do you the**III**give you the---the---the evidence, right? ***To say that you need evidence, it doesn't mean you have it. You have to get the evidence. Then having got the evidence you just don't simply serve it on Mr Bajwa because this is an important part of your case. He needs to have, what, knowledge of that. He needs to take his advice and all that.*** So this is going to have time implications. To me, if you are going down that path, that is almost inevitable. So far you agree with me?

Ong: Yes, your Honour.

Court: So, if you realise that this is going to have time implication, then I---don't you think you should really start making those decisions?

Ong: Yes, your Honour.

Extract 4 (at pp 227 and 228 of the NE):

Court: So, now, hold on. All right, there you have GE provoked seizures. I'm just---I'm just thinking aloud---

Witness: Yes.

Court: ---***could the child have another GE provoked seizure on the 1st of March, on the day she died?***

Witness: Ah, even if she had, a GE provoked seizure is known to be, er, it's not a---known to be a lethal condition. It's a relatively harmless---

Court: ***What about this tonic seizure?*** That is---

Witness: Ah, that is just a---a description of the particular form of manifestation of the seizures which in this case the clinicians have decided were caused by that---by a bout of gastroenteritis that she had.

Court: ***In other words, the---does it mean that the seizures that she suffered which brought about these investigations by the hospital were relatively---are not life threatening?***

Witness: Yes, GE provoked seizures are … not known to be life threatening.

Q All right.

Witness: But I---I---I must of course, er, er, in the spirit of this hearing I declare that I'm not a paediatrician and I do not have expertise in paediatrics.

Q I was coming to that.

Witness: However, my expertise lies in determining what may or may not cause death.

Q **Yes, exactly. That---that was my next question. So here again you are not an expert on status epilepticus?**

A **No, I'm not.**

Court: **Why are we left with this position? I mean---**

Witness: **I---I have, your Honour---**

Court: **No, no, I'm not---I'm not talking about, no, no---because this issue just came out not so long ago.**

Ong: You see, your Honour, I think the---the---the prosecution's understanding of the situation which---which perhaps may be wrong and I'll think about it during lunch is that: So far what the Doctor had---what the witness has basically said is that he is, I think he just said it again, he is---his area of expertise is determining what can cause death. And so he has got all these reports from---from this, say, for example, this clinical record from a geneticist talking about various characteristics of the deceased. But in the end the person whose expertise it is to determine whether all these medical facts about the … the deceased contribute to his understanding of what could have caused her death, the person to make that call is the … witness. Now, that's our understanding of it. But as I said I will---I will consider it again.

Court: All right.

Extract 5 (at p 240 of the NE):

Court: **Look, it's quite clear to me that we need to---prescribing doctors, I mean, this is very unsatisfactory. You are not a clinic---clinician, you are second guessing. You are the**

best person in this room to be doing that but you cannot be the best person available.

Witness: **I fully agree, your Honour. Er, the reason why I gave the answer that I did was in order to---so that I could answer counsel's question.**

Court: **In a case like that, one looks broader than the four walls of this room.**

Ong: **Yes, your Honour.**

Extract 6 (at pp 244 to 247 of the NE):

Q Now, this conclusion that the possibility of a cardiac arrhythmia arising or developing in the presence of an environmental trigger, was this derived from Prof Edmund Lee's report?

A Yes, it was precisely what was suggested, er, in his report.

Q And you have stated there that:

[Reads] "… some form of mechanical asphyxia, immersion, or the genital injuries inflicted could have supplied this extraneous trigger…"

Where did those possibilities come from?

A Er, they came from me.

Court: A lot of it seems to be hearsay, right?

Ong: Sorry, your Honour?

Court: ***A lot of it seems to be hearsay.*** **He got a report from DrIIIProf Edmund Lee. Of course, the report in itself is never something which is beyond challenge or beyond---**

Ong: **Yes, your Honour.**

Court: **---which is free from production. But never mind that; and then, you get a person---**

Ong: **Yes.**

Court: **---here who doesn't show that---**

Ong: **Yes.**

Court: **---and he is just telling us parts of it, I mean---**

Ong: **I---I was moving---**

Court: **I---I am not stopping you---**

Ong: **No, I was---**

Court: **---I'm not stopping you. I'm just reminding you because, in the end, we have to account for all these things**.

Ong: **Yes, your Honour.**

Q Now---

Witness: Er, your Honour, I did offer the---to present a copy of the report---

Court: Yes, I know.

Witness: ---to the police---

Court: No, no---

Witness: ---and---and to prosecution.

Court: ---no criticism of you. You run your lab, we run our Courts, okay? I don't go there and tell you what to do---

Q Now, Dr---

Court: ---and I won't say the second part of that---

Q ---Dr Lau could you please---

Court: ---two sentences.

Q I ---I presume the report is---is with you now?

A Yes, it is.

Q Yes. Could you produce it please?

A Yes. I have a copy of the report, er, the original is---

Court: **But there is no point because you know why, Mr Ong?**

Ong: **Yes.**

Court: **You seem---you seem to have a small lapse---a small gap there, which you---you don't seem to realise. Even if you have that, you see, Prof Lee is not beyond cross-examination. What he says is not carved in stone. In the end, he may have to defend it. I mean, fine, Dr Lau give it, we all look at it and we try to understand it as best we can. But you know, to complete the whole thing, he shall have to come. In the same way, of course, we have Prof Lau's three reports, *that doesn't mean you produce the three reports and that's it, Prof Lau doesn't come, he knows he has to come and be questioned.* So, of course, we have the odd situation that Dr---Prof Lee is being referred to. I haven't seen his report. Fine, if you produce his report, we'd look at it. But that, by no sense, means that there is---there is the end of the mat---process.**

Ong: **Yes.**

Court: **I mean, you know, come on, Mr Ong, you know better---**

Ong: **Yes.**

Court: ---you know far better than that, right?

Ong: Yes, your Honour.

Court: You've been---yes, yes.

Ong: Just as earlier, when my learned friend produced the clinical records, I---I waived the admissibility requirement. I think if we can see Prof Lee's report as a preli---as a first step, of course, my learned friend---since this is being produced now, if he looks at it and he feels that permissi---

Court: He must be a very brave man to be waiving something he has never seen.

Ong: Yes.

Bajwa: Sorry, your Honour, I'm not going to waive it.

Ong: Yes. But perhaps, that can just be shown to the Court, marked for identification, your Honour?

Court: Yes.

Ong: Yes, your Honour.

Court: Fair enough. But you do---have you got---have you got enough copies of it now?

Ong: No, your Honour. But I'm moving on to another point, so we'll supply that. We'll---we'll just come back to that and have the witness confirm that this is the report.

Court: Why don't you get him to produce it? Look, you get people sitting behind you---

Ong: Yes, your Honour, I was going to ask my IO---

Court: ---you get your IO and all that people so that we don't have to keep on having these breaks, have them make enough copies and have them numbered cor---number the first copy and photocopy so that there will---

Ong: Yes, your Honour.

Court: ---be no mistake. Do you need the rest of the---the---the---

Witness: Well, actually, I---I do. Sir, if they could just, er---

Court: No, you just take out your---

Witness: Yah.

Court: Yes---

Witness: Yah.

Court: ---otherwise---

Witness: Let me just---

Court: ---you'll find that you are hamstrung---

Witness: ---mm, mm---

Court: ---because the---the rest---

Witness: Mm.

Court: ---have gone as well.

Extract 7 **(at pp 264 to 265 of the NE):**

Ong: Your Honour, I'm just going to ask the witness to explain his understanding of Dr Edmund Lee's conclusions. Of course if Dr Edmund Lee is, Professor Edmund Lee is called, he---he will explain---

Court: Well, let's---let's---before we---his understanding of Dr Edmund Lee's report, it is like one of his last answers to your question---my reading of the conclusion---of this, what turns on it? I mean you want to do that, sometimes I said---I---I tell you why it is not really the good thing to do. You then think that you have some evidence because you say that but---then it becomes his reading of somebody else's-***--what is the evidential value? Sometimes you lead yourself into difficulty by producing things which do not really constitute the necessary kind of evidence and you give yourself the comfort that somebody else has said something.*** But you want to do it, I won't stop you. But how is that going to happen?

Ong: Your Honour, I think the only reason---

Court: **His reading of Professor Lee's, I mean---it is the quality of Professor Lee's conclusion that---that are important, not his reading---in the same way that we now come to the con--- that's why he said, "My reading of this is this"--- fine, but that doesn't add to it. You asked---you---you ask a GP, he also may have a reading of this. A layman can have a reading of this. I mean it gets less and less accurate but I mean if all he says is, "This is what I understand by it" and basically that's what he's saying, it doesn't add to it. But if you want to go through it, I won't stop you. Just reminding you that it may in the end be insufficient and in the end it may create problems because you may go away thinking that you have got evidence and you find that there isn't. So it may be better off if you---if you really face up to it---face---look at the question and "Do I need the source and if I don't have the source, don't---*I don't want to create a confusion by having some other forms of evidence which in the end may not be found to be the proper evidence*."**

Ong: Yes. Your Honour---

Court: I---I leave that to you. I have said enough.

Ong: Yes, your Honour. I'm only asking this witness to---to confirm his understanding of---

Court: All right, now we---first, let me mark this for identification.

Ong: Yes, your Honour.

[emphasis added in bold and bold italics]

(C) ANALYSIS

182 It is clear, in our view, that the Judge did *not* descend into the arena. He did not interrupt (let alone cross-examine) counsel or the parties in such a manner as to give rise to prejudice (or the appearance of prejudice) to either party. Neither, in fairness to Mr Bajwa, was it suggested that the Judge had been guilty of any of these proscribed actions. However, Mr Bajwa, whilst also acknowledging assistance by the Judge to the appellant, argued (relying on Extract 1 at [181] above) that the Judge had nevertheless descended into the arena "by way of frequently expressing his views about how the Prosecution should proceed with the case and the evidence required by the Prosecution to prove [its] case".[note: 31] Mr Bajwa (relying on Extracts 2 to 7 at [181] above) also argued that the Judge had made "pointed" remarks when the Prosecution was content not to call either Dr Lee or Dr Foo as witnesses.[note: 32]

183 The exchange in Extract 1 occurred, in fact, in the context of the Judge keeping a tight rein on the proceedings and procedure in order to ensure that the Prosecution did not state (in the charge against the appellant) that death was caused by drowning unless the cause of death was definitely ascertainable.

184 Turning to the remaining extracts, there is nothing in them which suggests to us that there had been the possibility of a denial of justice to the appellant (and, correspondingly, that the Prosecution had been unfairly favoured). Indeed, it was clear, in our view, that the Judge was seeking clarification, particularly on key issues such as causation and/or ensuring that any evidence admitted was effected in a proper manner and/or generally supervising the proceedings (in particular, the procedure adopted) (*cf* also the similar heads referred to in *Wooding* ([134] *supra* at [14]), although these heads are mere broad categories in the nature of guides only and cannot (in the nature of things) be exhaustive). This is clear, for example, from Extract 2, where the Judge was clearly seeking not only clarification but also assistance from the witness (there, Assoc Prof Lau) as to the relative probabilities *vis-à-vis* the cause of death of the deceased. Likewise, in so far as Extract 4 was concerned, the Judge inquired if it could be possible that the deceased had died from another gastro-enteritis seizure on 1 March 2006.

185 In so far as Extracts 3, 6 and 7 are concerned, the Judge was clearly concerned in ensuring that the report by Dr Lee was introduced into evidence in a proper manner and indeed constituted proper evidence.

186 Indeed, on a more *general* level, those parts in Extracts 2, 3, 4, 6 and 7 which we have rendered in *bold italics* clearly demonstrate that if the Judge had in fact desired to assist the Prosecution, he would not have pursued the line of questions he did. In other words, those other parts in the same extracts which have been rendered in bold font (and which constitute, in Mr Bajwa's view, the alleged judicial interference) must be read in this light and, indeed, in the *context* of the relevant exchanges *as a whole.*

187 Turning to Extract 5, it is clear that the Judge was attempting to supervise the proceedings and its procedure. In this particular extract, for example, the Judge, in attempting to ascertain what medication had been given to the deceased after her hospital visits, emphasised that Assoc Prof Lau had not prescribed the medication and therefore could not give evidence on it.

188 The fact of the matter is that several of the instances alleged by Mr Bajwa as constituting examples of judicial interference occurred during the re-examination of Assoc Prof Lau where the Judge was largely concerned about ensuring that all possible causes of death were explored. He sought to control the procedure of the trial at the outset by ensuring that the charge was correctly framed, and kept an even hand on the flow of proceedings. Further, the questions that the Judge posed often served to clarify the answers given by the witnesses or clarify the questions posed by counsel. Looking at the record in a holistic fashion, there were numerous instances where the Judge clarified questions asked by counsel for the appellant. It therefore strikes us as disingenuous to argue that the Judge appeared to be assisting the Prosecution only and, as already noted, Mr Bajwa had himself admitted that the Judge had also assisted the appellant. This last-mentioned concession is unexceptional: It merely underscores a point already made, which is that the Judge ensured that the entire proceedings were conducted in an even-handed and objective manner. Mere statistics were also not of themselves decisive. Third, as provided for by s 167(1) of the Evidence Act (also reproduced above at [159]), the judge concerned may:

> … in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; …

189 Indeed, and in summary, it may be said that the instances of judicial interference alleged by the appellant in the present proceedings, far from constituting interferences which the law would proscribe, actually facilitated a just and fair admission of the evidence concerned as well as ensured that all counsel knew what was troubling him. As both Sir Robert Megarry and Mr Justice Lightman have emphasised (above at [147] and [150], respectively), reticence (and, *a fortiori*, silence) by the court is not necessarily in the best interest of the parties; more importantly, it is not necessarily in the best interests of justice inasmuch as the judge concerned ought to be fully apprised of all the relevant evidence in order that he or she can arrive at a just and fair decision. Indeed, not for the Judge to have done so might have led to the Judge deciding the case without appreciating fully the central core of each party's case; this would have resulted in a *denial* of justice instead. That the Judge was acutely aware of all these considerations is, in fact, clear from the following observations by him (to which Mr Bajwa, it is significant to note, did not raise any objections to at that point in the trial):[note: 33]

Court: Yes. No, I don't generally like to ask questions. Counsels seem to think that when I do that, *it has---it has got some effect on the case, but it's not that. It's just that when I see certain things, if I don't raise that now, I would still be using the same questions when I evaluate the facts*, so I might as well raise this to him, right?

Bajwa: I understand, your Honour.

> [emphasis added]

190 In the final analysis, what is of fundamental importance – and this is a point that can never be over-emphasised – is that the judge does not conduct the proceedings in a manner which suggests that there has been the possibility of a denial of justice to a particular party (and, correspondingly, the possibility that the other party has been unfairly favoured). That this has *not* been the case in the present proceedings is clear to us beyond the shadow of a doubt, and this particular ground of appeal, therefore, also failed.

Conclusion

191 For all the reasons stated above, we dismissed the appeal.

[note: 1]See P238, Record of Proceedings, vol 3, p 226.

[note: 2]See P231T, Record of Proceedings, vol 3, p 189.

[note: 3]See Record of Proceedings, vol 3, p 190.

[note: 4]*Ibid.*

[note: 5]*Ibid.*

[note: 6]See Record of Proceedings, vol 3, p 168.

[note: 7]See Record of Proceedings, vol 3, p 179.

[note: 8]See Record of Proceedings, vol 3, p 190.

[note: 9]See Record of Proceedings, vol 3, p 216.

[note: 10]See Record of Proceedings, vol 3, p 168.

[note: 11]See Record of Proceedings, vol 3, p 171.

[note: 12]See P229T, Record of Proceedings, vol 3, p 169.

[note: 13]See Record of Proceedings, vol 3, p 161.

[note: 14]See Record of Proceedings, vol 3, p 394.

[note: 15]See PS51, Record of Proceedings, vol 3, p 385, para 6.

[note: 16]See Record of Proceedings, vol 1, p 184, line 28 to p 186, line 9.

[note: 17]See Record of Proceedings, vol 1, p 186, lines 16 to 20.

[note: 18]*Id*, lines 25 to 29.

[note: 19]See Record of Proceedings, vol 3, p 290.

[note: 20]See Record of Proceedings, vol 1, p 119, line 11 to p 123, line 23.

[note: 21]See Record of Proceedings, vol 1, p 134, lines 7 to 20.

[note: 22]See Record of Proceedings, vol 3, p 213.

[note: 23]See Record of Proceedings, vol 3, p 205.

[note: 24]See P214, Record of Proceedings, vol 3, p 144.

[note: 25]See Record of Proceedings, vol 1, p 204.

[note: 26]See Record of Proceedings, vol 1, p 216.

[note: 27]See P278, Record of Proceedings, vol 3, p 384.

[note: 28]See Record of Proceedings, vol 3, p 145.

[note: 29]See Record of Proceedings, vol 1, pp 196–197.

[note: 30]See Record of Proceedings, vol 1, p 227, lines 11 to 23.

[note: 31]See Appellant's Skeletal Arguments, p 12.

[note: 32]See *id*, p 13.

[note: 33]See Record of Proceedings, vol 2, p 411.

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