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THE COURT OF APPEAL'S LACK OF JURISDICTION TO REOPEN APPEALS

Abdullah bin A Rahman v *Public Prosecutor*[1]
Lim Choon Chye v *Public Prosecutor*[2]

IT is ironic that *Abdullah bin A Rahman* v *PP* and *Lim Choon Chye* v *PP* were decided in the aftermath of the Birmingham Six, Guildford Four and Maguire Seven[3] cases from the United Kingdom. As in these cases, *Abdullah* and *Lim Choon Chye* highlight a serious flaw in our criminal justice system: there appears to be no appropriate way to correct miscarriages of justice. The purpose of this case note is to set out the conclusions reached by the Court of Appeal and to suggest directions for the future.

Both *Abdullah* and *Lim Choon Chye* involved applicants who were convicted of drug trafficking and sentenced to death.[4] Their appeals were dismissed by the Court of Appeal.[5] In *Abdullah*, the applicant was convicted of abetting one Abdul Rashid bin Mohammed in drug trafficking. Both he and Abdul Rashid were sentenced to death and lost their appeals. But before execution, Abdul Rashid told the applicant that his statement to the Investigating Officer as well as his testimony in court implicating the applicant were fabricated. In *Lim Choon Chye*, the applicant alleged that while awaiting execution he met a fellow prisoner on death row for drug trafficking in an unconnected case who imparted certain information to him substantiating the defence raised at his trial. The applicants in both cases then tried by criminal motion to adduce these matters as fresh evidence to the Court of Appeal, although their appeals had been heard and disposed of.

Thus the main issue raised in both applications was whether the Court of Appeal had any jurisdiction to reopen an appeal in the light of fresh evidence. The court concluded that it did not possess such jurisdiction. The

1 [1994] 3 SLR 129 (CA).
2 [1994] 3 SLR 135 (CA).
3 *Infra*, note 37.
4 In *PP* v *Lim Choon Chye*, Criminal Case 40/1993, 29 December 1993 (HC), and *PP* v *Abdul Rashid & Anor* [1993] 3 SLR 794 (HC), respectively.
5 *Lim Choon Chye* v *PP* [1994] 2 SLR 517 (CA); *Abdul Rashid & Anor* v *PP* [1994] 1 SLR 119 (CA).

following discussion sets out the arguments and the decisions in *Abdullah* and *Lim Choon Chye*.

The Applicants' Arguments

The main argument raised by the applicants[6] was that sections 29A(2) and 29A(4) of the Supreme Court of Judicature Act[7] ("SCJA") should be read widely to confer jurisdiction on the Court of Appeal to reopen appeals if justice demands it. The sections read:

> 29A(2). The criminal jurisdiction of the Court of Appeal shall consist of appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction, *subject nevertheless to the provisions of this Act* or any other written law regulating the terms and conditions upon which such appeals may be brought.
>
> 29A(4). The Court of Appeal shall, for the purposes of and subject to the provisions of this Act, have full power to determine *any question* necessary to be determined for the purpose of doing justice in *any case* before the Court. [Emphasis added.]

In relation to this interpretation, the applicants argued[8] that the case of *R* v *Pinfold*[9] should not be applied in Singapore. This case involved the interpretation of section 1(1) of the UK Criminal Appeal Act 1968 which reads: "[a] person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction." The English Court of Appeal pointed out that the provision must be read against the background that it is in the public interest to have finality in legal proceedings. The court found no situation where a right of appeal couched in similar terms had been construed as a right to pursue more than one appeal in a case. Hence the court held that it had no jurisdiction to entertain additional evidence in a situation where it had disposed of the appeal.

The applicants stressed that the English and Singapore systems of criminal appeal are different. Under section 17 of the UK Criminal Appeal Act 1968 appellants have recourse to executive intervention in the form of a reference by the Home Secretary to the Court of Appeal, even after an unsuccessful appeal has been made:

6 *Abdullah, supra*, note 1, at 131; *Lim Choon Chye, supra*, note 2, at 137.
7 Cap 322, 1985 Rev Ed.
8 *Abdullah, supra*, note 1, at 132; *Lim Choon Chye, supra*, note 2, at 137-8.
9 [1988] 1 QB 462 (CA).

> 17(1) Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under a disability and to have done the act or made the omission charged against him, the Secretary of State may, if he thinks fit, at any time either –
>
> (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the court by that person; or
>
> (b) if he desires the assistance of the court on any point arising in the case, refer that point to the court for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.
>
> (2) A reference by the Secretary of State under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application.

Since there was no equivalent to section 17 in the SCJA, the applicants argued, Singapore courts should not be constrained by the English position in *Pinfold* where a right of appeal is construed to mean a right to *one* appeal in any *one* case.

This argument was rejected by the Court of Appeal. In *Lim Choon Chye* the court expressed the view that:

> there is no indication in them [sections 29A(2) and 29A(4) of the SCJA] of Parliament's intention to allow an applicant an indefinitely extended right of appeal in the sense of being able to pursue a second appeal even after his first has been duly heard and dismissed. As a matter of procedure, once the Court of Appeal has rendered judgment in an appeal heard by it, it is *functus officio* as far as that appeal is concerned.[10]

Like its English counterpart,[11] the Singapore Court of Appeal is a creature of legislation, and so its jurisdiction is necessarily defined solely by and

[10] *Lim Choon Chye, supra*, note 2, at 137.

[11] The English Court of Appeal has no inherent jurisdiction apart from statute: *R* v *Jeffries* [1969] 1 QB 120 (CA); *R* v *Collins* [1970] 1 QB 710 (CA); *R* v *Shannon* [1975] AC 717 (HL), *R* v *McIlkenny & Ors* [1992] 2 All ER 417 at 424h-j (CA) (Birmingham Six case) and *R* v *Maguire & Ors* [1992] QB 936 at 944G (CA) (Maguire Seven case).

limited to the provisions of the SCJA.[12] The court pointed out[13] that section 29A(4) is merely concerned with the Court of Appeal's power when it already has jurisdiction to hear a particular matter. This occurs only (1) if a case is on appeal from the High Court (section 44 of the SCJA); (2) if the High Court or Public Prosecutor reserves any question for the Court of Appeal's determination after a conviction by the High Court in the exercise of its original criminal jurisdiction (section 59); or (3) if the High Court reserves for the Court of Appeal's decision any question of law of public interest (section 60). This is borne out by the concluding words of section 29A(4), "in any case before the Court", which assumes a situation where the Court of Appeal is already seised of the matter by virtue of sections 29A(2), 44, 59 and 60.

The court also noted[14] that it is not true that in Singapore an appellant who wishes to adduce fresh evidence in his case after the dismissal of his appeal has no further recourse or remedy, since a petition for clemency lies to the President of the Republic of Singapore pursuant to section 8 of the Republic of Singapore Independence Act.[15] It concluded that *Pinfold* should be followed because the policy of having finality and stability of legal proceedings is common to all legal systems and not confined to the English system.

The applicant in *Lim Choon Chye* tried to argue that the Court of Appeal had in fact exercised its jurisdiction to reopen an appeal in the unreported decision of *Ng Teo Chye* v *PP*.[16] In that case, after his conviction, the defendant filed notice to the effect that he did not intend to appeal. But following the successful appeal of a co-accused he changed his mind and sought to bring an appeal out of time pursuant to section 50 of the SCJA, which was allowed. The Court of Appeal distinguished *Ng Teo Chye* from the present applications because in that case no appeal had been heard by the Court of Appeal prior to his application.

In addition to sections 29A(2) and 29A(4), counsel for the applicant in *Abdullah* relied on section 55(1) of the SCJA, which reads:

[12] See *Wong Hong Toy* v *PP* [1986] 1 MLJ 453, cited in *Lim Choon Chye, supra*, note 2, at 139.

[13] *Abdullah, supra*, note 1, at 132-3.

[14] *Lim Choon Chye, supra*, note 2, at 138.

[15] Act 9 of 1965, 1985 Rev Ed. In *Abdullah, supra*, note 1, at 133, the Court of Appeal also held that it had no jurisdiction to make a recommendation on the present application to the President for clemency. A recommendation was only possible if the Court of Appeal was actually hearing the matter on appeal. In the present case, the court was unable to assume jurisdiction and thus would not be going into the merits of the case and hearing new evidence.

[16] Criminal Motion No 3 of 1994, 15 March 1994, as gleaned from *Lim Choon Chye, supra*, note 2, at 138-9. The point is also mentioned in passing in *Ng Teo Chye* v *PP*, CRA 5 of 1994, 31 May 1994.

> In dealing with *any appeal*, the Court of Appeal may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court. [Emphasis added.]

Counsel contended[17] that the word "any" should be given a liberal interpretation so as to embrace any matter before the court provided the interests of justice so demanded, even though section 55(1) appears in Part V of the SCJA ("Criminal Jurisdiction of the Court of Appeal").

This argument was also rejected by the Court of Appeal, which felt that section 55(1) does not allow the court to receive fresh evidence at any time. The provisions preceding and subsequent to section 55(1) (*ie*, sections 45 to 58) of the SCJA deal with the machinery and effect when an appeal is set in motion as well as the powers which the court can exercise on the hearing of such an appeal. Section 55(1), being one of these provisions, only gives the Court of Appeal power to receive additional evidence where it already has jurisdiction over the matter. The court felt this interpretation was fortified by the words "in dealing with any appeal" in section 55(1). By no stretch of the imagination could an application such as the present one be considered an appeal.

Abdullah and *Lim Choon Chye* are undoubtedly correct in law in deciding that the Singapore Court of Appeal has no jurisdiction to reopen an appeal in order to receive fresh evidence which emerge after an appeal has been heard and disposed of. The court found that no provision of the SCJA confers such jurisdiction on the Court of Appeal; and in the interests of finality in legal proceedings it was of the view that it is undesirable for applicants to have an uncontrolled right to petition the court repeatedly after the due determination of their appeals. But it is submitted that the present situation is highly inadequate because there is no satisfactory process by which miscarriages of justice can be corrected.

Reception of English Law Via Section 5 of the Criminal Procedure Code

There is one possible solution, not canvassed in *Abdullah* or *Lim Choon Chye*, which does not require legislative intervention. It is found in section 5 of the Criminal Procedure Code[18] ("CPC") which reads:

> As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in Singapore the law relating to criminal procedure for the

[17] *Abdullah, supra*, note 1, at 131.
[18] Cap 68, 1985 Rev Ed.

> time being in force in England shall be applied so far as the procedure does not conflict or is not inconsistent with this Code and can be made auxiliary thereto.

Section 5 allows the reception of the English law[19] of criminal procedure[20] on issues where Singapore law is silent.[21] Ordinarily, when legislation is codified it is meant to be exhaustive. The CPC is unusual in this respect as any gap in criminal procedure in Singapore is to be made up for by reference to prevailing English law.[22]

It is not easy to determine when there are "matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in Singapore." For example, there may exist English procedural rules governing a particular stage in the criminal justice process, while the CPC is silent on the point. However, there may be no lacuna because the Singapore legislature has in fact decided not to adopt the relevant English law. In such a case, the English procedural rules should not be imported. Reported cases suggest that to determine whether Parliament intends to act in this manner, policy considerations are important.[23]

[19] *PP* v *Yeoh Thean Hock* [1962] MLJ 258 (HC, Penang) (s 5 cannot be used to apply the law relating to criminal procedure in the Federated Malay States Criminal Procedure Code if there is a lacuna in the Straits Settlements Criminal Procedure Code).

[20] *Ng Kwee Piow* v *R* [1960] MLJ 278 at 279G (CCA, Singapore) (provisions relating to evidence cannot be applied *via* s 5).

[21] Section 5 imports rules of criminal procedure contained in both statute law (*eg, Lam Heng* v *R* [1937] MLJ 154; *Dickinson* v *PP* [1955] MLJ 191 (HC, Kuala Lumpur); *PP* v *Wee Eh Tiang* [1956] MLJ 120)) and common law (*eg, Tan Boon Hock* v *PP* [1979] 1 MLJ 236 (FC, Malaysia); *Ong Lai Kim* v *PP* [1991] 3 MLJ 111 (HC, Kuala Lumpur); *Ibrahim bin Masod* v *PP* [1993] 3 SLR 873 (CA, Singapore)). Mere legal 'conventions' or 'devices' do not constitute "law relating to criminal procedure": *Ansell* v *R* [1952] MLJ 143 at 144 (HC, Penang).

[22] This may be undesirable from the point of view of legal autochthony, but as Sharma J remarked pointedly in *PP* v *Sanassi* [1970] 2 MLJ 198 at 201-2: "It is entirely a matter for the legislature to decide whether the procedure of the courts in this country, which is now sovereign and independent, should depend on a foreign enactment and whether any amendment made to its own laws by a foreign Government should still continue to remain binding on us who have a supreme legislature of our own." Parliament has now taken heed: *infra*, note 31, and the accompanying text.

[23] Two examples illustrate this point: in *Kulwant* v *PP* [1986] 2 MLJ 10 (HC, Singapore), the court concluded it has no jurisdiction to compel the Public Prosecutor to furnish the accused with a copy of a statement he made to the police, unless it is exercising original criminal jurisdiction or appellate, revisionary, supervisory or other jurisdiction under a specific statutory provision. Policy: any other view frustrates criminal proceedings since the accused can make successive applications with or without justification and even appeal to the High Court on refusal, thus delaying proceedings. English law is not applicable since there is no lacuna in the CPC which makes it necessary to resort to it.
In *Karpal Singh* v *PP* [1991] 2 MLJ 544 (SC, Kuala Lumpur), members of the subordinate judiciary were held not to have an inherent power to strike out proceedings to prevent abuse

Section 5 is a mandatory section: when Singapore law does not provide for particular matters of criminal procedure, English law *shall* be applied. One issue that arises is the extent to which English rules may be modified to suit local circumstances. For instance, relevant English procedural rules may refer to legal mechanisms which are not available in Singapore. Can such rules be applied by modifying them to refer to analogous mechanisms which do exist locally? It is submitted that the phrase "can be *made* auxiliary thereto" confers on the court a power to adjust English rules. In any case, local judges have not demurred from so acting where public policy demands it.[24]

The Singapore legislature could not have decided against adopting section 17 of the UK Criminal Appeals Act 1968 as part of our criminal procedure, since the CPC was enacted much earlier in 1900.[25] *Abdullah* and *Lim Choon Chye,* therefore, demonstrate that there is a lacuna in Singapore criminal procedure. It is thus possible to argue that section 17 applies to Singapore *via* section 5 of the CPC. It is also submitted that the legal machinery to implement the section exists in Singapore. Section 17 confers the power to refer cases to the Court of Appeal on the Secretary of State, who in this case is the Home Secretary of the United Kingdom. The Home Secretary is in effect the United Kingdom's Minister of the Interior, with responsibilities over the police force; the penal system and the treatment of offenders; and prisons, custodial institutions and the probation service.

of process because the CPC is exhaustive as regards summary trial procedure. Policy: it is "absurd and against common sense" to believe that the legislature expects members of the subordinate judiciary to exercise such vast powers trespassing into the Attorney-General's area. The English doctrine of inherent jurisdiction was not applied.

24 In *Husdi* v *PP* [1980] 2 MLJ 80 (FC, Malaysia), the issue was whether the accused was entitled to a copy of a witness' statement to the police so that he could impeach the witness' credibility. Such a power had been formerly given by s 113(ii) of the CPC, but this had been deleted. The court found that since other sections of the CPC allowed the credit of witnesses to be impeached by proving that their testimony was inconsistent with former statements made by them, the accused was entitled to a copy of the witness' police statement. However, the court modified the relevant English procedural rule (which required the prosecution to disclose the statement directly to the defence) such that the court was to look at the witness' statement first and to order a copy to be supplied to the accused only if it was "expedient in the interest of justice". In effect, this revived the repealed s 113(ii). Policy: Malaysian witnesses are afraid of reprisals, and if the prosecution is obliged to supply copies of police statements without the court's intervention, they will be more reluctant to give evidence to incriminate their fellows.

25 Criminal Procedure Code 1900 (No 21 of 1900). See Andrew Phang Boon Leong, "Of codes and ideology: Some notes on the origins of the major criminal enactments of Singapore" (1989) 31 Mal LR 46 at 66. The Singapore Code was in turn based on the Indian Criminal Procedure Code, which first appeared as Indian Act XXV of 1861. A consolidation took place in Indian Act V of 1898: MP Jain, *Outlines of Indian Legal History* (3rd ed, 1972), at 569-70; AR Biswas, *BB Mitra on the Code of Criminal Procedure, 1973 (Act II of 1974)* (15th ed, 1978), vol 1 at 16.

He or she is also broadly responsible for the administration and reform of the criminal law.[26] Since the Home Secretary's responsibilities generally correspond to those of the Minister of Home Affairs and Minister of Law in Singapore, the court can exercise its power to read section 17 as referring to either Minister.

However, on policy grounds it is preferable for Parliament not to rely on section 5 of the CPC. Instead, it should consider the whole issue carefully and enact remedial provisions. The recent abolition of appeals to the Privy Council[27] and the enactment of the Application of English Law Act,[28] which abolishes reception of English statutes under the Second Charter of Justice 1826 and English mercantile law under section 5 of the Civil Law Act,[29] show that Singapore is taking bold steps towards legal autochthony by cutting ties with English law. During Parliamentary debates on the Second Reading of the Application of English Law Bill, the then Law and Home Affairs Minister Professor S Jayakumar said:

> We must have certainty in our laws and move away from reliance on English law, because we do not know what are the conditions and circumstances which presently shape the enactment of laws in the United Kingdom.[30]

Member of Parliament Mr Davinder Singh reminded Professor Jayakumar of other statutes which had clauses applying English law to Singapore, in particular section 5 of the CPC. Professor Jayakumar intimated that steps were being taken to modify this statute and other laws which import changes in British law to Singapore.[31]

[26] de Smith & Brazier, *Constitutional and Administrative Law* (Rodney Brazier ed, 6th ed, 1989), at 383-4. See also Colin F Padfield, *British Constitution* (7th ed, 1987), at 151-2 and ECS Wade & AW Bradley, *Constitutional and Administrative Law* (AW Bradley, KD Ewing & T St JN Bates eds, 11th ed, 1993), at 399-400.

[27] By the Judicial Committee (Repeal) Act 1994 (No 2 of 1994) which repealed the Judicial Committee Act (Cap 148, 1985 Rev Ed). As a result, the Court of Appeal no longer holds itself bound by any previous decisions of its own or of the Privy Council if this causes injustice in a particular case or constrains the development of the law in conformity with the circumstances of Singapore: Practice Statement (Judicial Precedent) [1994] 2 SLR 689.

[28] Cap 7A, 1994 Ed.

[29] Cap 43, 1988 Ed.

[30] *Singapore Parliamentary Debates, Official Report*, vol 61, 12 October 1993, col 616.

[31] *Ibid*, cols 615-6. See also "English Law Bill: More Laws Here to be Amended" The Straits Times, 13 October 1993 at 17.

Conferring Jurisdiction on the Court of Appeal

If we are to rely on legislation to address the issue, the simplest way would be to amend the SCJA to confer jurisdiction on the Court of Appeal to reopen appeals where appropriate. However, this suggestion is problematic. As the Court of Appeal pointed out in *Abdullah*,[32] its main function is a supervisory one, to review and correct the decisions of lower courts, with the additional function of determining questions of law of public importance. It does not have the manpower nor resources to screen the flood of petitions which will surely result if new jurisdiction is conferred on it.[33] The Home Office in Britain receives 700-800 applications a year claiming a wrongful conviction and urging it to exercise its powers under section 17 of the Criminal Appeals Act 1968 (the 1992 figure was 790).[34] This works out to roughly 60-70 cases a month. The Registrar of the Supreme Court recently revealed that Court of Appeal judges already have to hear and dispose of about 30 appeals a month, while the Chief Justice has to manage an additional 30 Magistrate's appeals in this period.[35] The Second Report on the Maguire Case, which will be referred to in greater depth below, also points out that the English Court of Appeal does not have the authority nor the necessary expertise to initiate, let alone control, investigations that will need to be carried out if it takes on the role of rectifying miscarriages of justice.[36] The same is probably true of our Court of Appeal.

Ministerial Power to Refer Cases to the Court of Appeal

A more tenable solution would be to insert a provision equivalent to section 17 of the UK Criminal Appeals Act 1968 into the SCJA, conferring power on either the Minister of Home Affairs or the Minister of Law to refer deserving cases to the Court of Appeal, on his own initiative or if cases are brought to his notice through petitions by appellants or members of the public. Such references to the Court of Appeal should be treated for all purposes as an ordinary appeal.

[32] *Supra*, note 1, at 133.

[33] For an opposing view, see the letter "Enact law to give Court of Appeal discretionary powers to re-open cases" by Tin Keng Seng to The Straits Times, 20 July 1994 at 30.

[34] Royal Commission on Criminal Justice, *infra*, note 42, at 181 para 5. The Commission found it reasonable to suppose that if a new authority were set up to deal with such applications, the number of cases put to it by persons claiming to be victims of miscarriages of justice would be at least of the same order, and might at first be substantially more: *ibid*, at 185 para 23.

[35] Chiam Boon Keng, "Total recording of court proceedings not practical" The Straits Times, 30 August 1994 at 29.

[36] *Infra*, note 42, at 93-4 para 12.25.

However, two inquiries set up in the wake of the Birmingham Six, Guildford Four and Maguire Seven cases considered and found the power of the Home Secretary under section 17 ineffective. In these cases, the accused persons were convicted of various offences including murder resulting from bomb explosions set off by the Irish Republican Army in Birmingham, Guildford and Woolwich. Their appeals were dismissed. The accused persons continued to protest their innocence, alleging that the convictions were based on forced confessions and shaky scientific evidence. Repeated petitions were made to the Home Secretary but to no avail. Finally, after strong public support for their cause, the cases were referred to the Court of Appeal which found the previous convictions unsafe and quashed them. Most of the accused persons had spent between 14 and 16 years in prison.[37]

On 19 October 1989 the Home Secretary and Attorney-General appointed the Rt Hon Sir John May to hold a judicial inquiry into the circumstances leading to and deriving from the trials of the Guildford Four and Maguire Seven. In his Second Report on the Maguire Case,[38] Sir John May found that although section 17 appeared unrestricted and on its face seemed to give the Home Secretary an unfettered discretion to refer cases to the Court of Appeal "if he thinks fit", in practice he and the civil servants advising him operated within strict self-imposed limits. There were constitutional reasons behind this policy – the Home Office, being a branch of the executive, was naturally wary of interfering in what it saw as matters for the courts. It was not for the Home Secretary to seek to set aside a verdict laid down by the Court of Appeal simply because he or others had come to a different conclusion about an accused's guilt. Hence, the Home Secretary treated his power under section 17 as exceptional and only to be used if there was fresh evidence or new considerations of substance in the case. A case was not referred if in the Home Secretary's view there was no real likelihood of the Court of Appeal taking a different view than on the original appeal.[39]

[37] Birmingham Six case: see *R* v *McIlkenny & Ors* [1992] 2 All ER 417 (CA) and Christopher Mullin, *Error of Judgment* (Rev ed, 1990). Guildford Four case: see *R* v *Richardson & Ors*, the Times, 20 October 1989 at 33; G McKee & R Francy, *Time Bomb* (1988) and the intense personal account in Gerry Conlon's book *Proved Innocent* (1990). Maguire Seven case: see *R* v *Maguire & Ors* [1992] QB 936 (CA) and Sir John May, *Interim Report on the Convictions on 4th March 1976 of the Maguire Family and Others for Offences under Section 4 of the Explosive Substances Act 1883* (HC 556, 1990), at 9-27.

[38] Sir John May, *Second Report on the Convictions on 4th March 1976 of the Maguire Family and Others for Offences Under Section 4 of the Explosive Substances Act 1883* (HC 296, 1992).

[39] *Ibid*, at 49-50 paras 10.3-10.5.

Sir John May felt that these internal guidelines resulted in the Home Office taking a "substantially restricted" view of cases such as the Maguire Seven case. The criteria left no room for references based on "lurking doubts" felt by officers or Ministers due to such matters as the improbability of facts or weakness of evidence at the trial in the absence of fresh evidence or new considerations of substance.[40] The Home Office was essentially reactive and not proactive – it only responded to representations made in relation to particular convictions rather than carried out its own investigations into cases based on the trial evidence. While it was wrong to criticise the Home Office for this approach since it was not normally its function to conduct independent inquiries, the need for changes in the law was evident.

A Criminal Cases Review Authority

Sir John May concluded his report by recommending that some alternative machinery be set up in place of the Home Secretary's power under section 17 of the Criminal Appeals Act 1968.[41] This was taken up by the Royal Commission on Criminal Justice which was formed to examine the criminal justice system from police investigations to the stage when an accused's rights of appeal are exhausted. In its report,[42] the Commission cited Sir John May's report on the Home Secretary's self-imposed restrictions and agreed that the role assigned to the Home Secretary by section 17 was incompatible with the constitutional separation of powers between the judiciary and executive.[43] It therefore recommended the creation of a body independent of both the executive and judiciary, and suggested that it be called the Criminal Cases Review Authority. This Authority, presided over by lawyers as well as lay persons, would have powers to hear applications for review of appeals disposed of, to initiate further investigations by directing and supervising the police to follow up lines of inquiry, and to refer cases to the Court of Appeal if miscarriages of justice were suspected.[44] The Commission recommended that while the Authority should be accountable to Parliament, it should have full operational freedom so that it would be seen to act independently.

The crux of the problem raised by *Abdullah* and *Lim Choon Chye* is how to strike a balance between the need for finality of judgment, and a

[40] *Ibid*, at 88 para 12.4.
[41] *Ibid*, at 93-94 paras 12.24-12.25.
[42] Royal Commission on Criminal Justice, *Report* (Cm 2263, 1993) (Chairman: Viscount Runciman of Doxford).
[43] *Ibid*, at 181-2 paras 6-11.
[44] *Ibid*, at 182 para 11.

procedure to rectify miscarriages of justice. A Criminal Cases Review Authority contributes towards the solution by providing a process for screening applications. Only those with merit will be forwarded to the Court of Appeal for consideration. This ensures that the Court of Appeal is not flooded with frivolous applications. Furthermore, the Royal Commission on Criminal Justice, aware of the need to shield the Authority itself from such claims, recommended that there be no right of appeal or right to judicial review from a decision of the Authority, although the Authority should be free to consider a case more than once if appropriate. Naturally, applicants would only stand a better chance of success if they could present fresh evidence or arguments.[45] But we must be realistic. Even if an Authority were to be set up with safeguards to prevent abuse, it will have to deal with many undeserving claims. However, finality of judgment and practical considerations alone cannot be an excuse to deny justice to guiltless victims of the system.

It is only fair to point out that, to date, this recommendation of the Royal Commission on Criminal Justice has not been implemented in the United Kingdom. Nonetheless, it is submitted that because of the theoretical and practical shortcomings of the other suggestions, an independent body to take charge of investigating and filtering cases for reference to the Court of Appeal has much to recommend it.

Nature of the President's Power of Pardon

The Court of Appeal pointed out in *Lim Choon Chye*[46] that appellants wishing to adduce fresh evidence after their appeals have been dismissed have recourse to a petition for clemency to the President under section 8 of the Republic of Singapore Independence Act.[47] Such petitions are considered by the Cabinet, which advises the President in the exercise of his power of pardon.[48]

But the power of pardon has significant shortcomings as a tool for

[45] *Ibid*, at 184 para 19.

[46] *Supra*, note 2, at 138.

[47] *Supra* note 15.

[48] See s 8(1) of the Republic of Singapore Independence Act: "The President, as occasion shall arise, may *on the advice of Cabinet*, ... grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender...." [Emphasis added.] Section 8(2) provides that if an accused is sentenced to death and his appeal has been dismissed, the President shall cause the reports of the case by the trial judge and appellate judges to be forwarded to the Attorney-General. The Attorney-General is to give an opinion on the case and forward it with the reports to the Cabinet so that it can advise the President on the use of his prerogative.

correcting miscarriages of justice. Firstly, the Cabinet, on receiving a petition for clemency, is unable to assess the evidence fully. Only courts are in a position to do so since they have the machinery and processes to hear new arguments and call witnesses to give fresh evidence, subjecting the testimony to scrutiny under cross-examination.[49] Secondly, a pardon only excuses an accused person from punishment. It does not operate to quash his or her conviction.[50] Case law suggests that this is unacceptable to the family and friends of defendants, who are often intent on clearing their names even though the defendants themselves may already have been executed or have died during imprisonment. In the Maguire Seven case,[51] although Patrick "Guiseppe" Conlon died in prison in 1980 while serving his sentence, his family sought to have his conviction quashed by petitioning the Home Secretary to refer a question to the Court of Appeal on whether the court had the power to consider a reference of a case of a deceased person under section 17 of the UK Criminal Appeals Act 1968. The court held that there was no compelling reason why section 17 should be confined to living persons, and that it would be anomalous if the convictions of the other members of the Maguire Seven were quashed but Conlon's was not.

Similar considerations prompted Pamala Bentley to seek the court's assistance for a posthumous pardon for her brother Derek in *R* v *Secretary of State for the Home Department, ex parte Bentley*,[52] although no attempt was made to have his conviction quashed. Derek Bentley was convicted of the fatal shooting of a police officer. The prosecution's case was that he was engaged in a joint criminal enterprise: his accomplice had fired the gun while he had shouted, "Let him have it, Chris." Bentley had a mental state just about the level of a feebleminded person. Despite widespread protests and against the advice of civil servants, the Home Secretary, who exercises the prerogative of mercy on the Crown's behalf, refused to reprieve him. Bentley was hanged. In stark contrast, his accomplice, aged 16 at the time, was too young to be sentenced to death and was merely detained at Her Majesty's pleasure. On a petition for a posthumous pardon, the Home Secretary reviewed the case but concluded that there were no grounds for recommending a free pardon. Pamala Bentley then sought

[49] See the comments in "Appeal Court 'should have power to reopen cases'", The Straits Times, 15 July 1994 at 32 and "Enact law to give Court of Appeal discretionary powers to re-open cases", The Straits Times, 20 July 1994 at 30.

[50] *Chiow Thiam Guan* v *Superintendent of Pudu Prison* [1983] 2 MLJ 116 at 118 col 2I (FC, Malaysia): "To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it *qua* judgment." See also *R* v *Foster* [1985] QB 115 (CA); *Philip* v *DPP of Trinidad and Tobago* [1992] 1 All ER 665 (PC).

[51] *R* v *Maguire & Ors* [1992] QB 936 (CA).

[52] [1994] 2 WLR 101 (Div Ct).

judicial review of this decision. The court held that there was no objection in principle to the grant of a posthumous conditional pardon where a death sentence had already been carried out. Since the Home Secretary had not given sufficient consideration to the possibility of granting a form of pardon suitable to the circumstances of the case, he should consider afresh whether it would be just to exercise the prerogative of mercy in a way as to acknowledge the generally accepted view that Bentley should have been reprieved. The Home Secretary eventually recommended the grant of a pardon limited to sentence.[53]

The fact that pardons have no effect on convictions is even more relevant to accused persons who have been sentenced not to death but to lesser punishments such as caning or imprisonment. They are freed from the penalties imposed on them but not exonerated of the crimes they are wrongly accused of. A pardon does not erase the stigma and shame of being labelled and denounced as a criminal.[54] A heavy sense of injustice would certainly weigh on such accused persons and on the public conscience.

Whether the President's power of pardon may be judicially reviewed has not been considered in Singapore, but the prevailing Malaysian position is that the power of pardon is not reviewable.[55] In Malaysia, the power of pardon is considered a prerogative power of the sovereign just as it is

[53] *Ibid*, at 114G.

[54] "Sentencing amounts to the use of state coercion against a person for committing an offence. The sanction may take the form of some deprivation, restriction, or positive obligation. Deprivations and obligations are fairly widespread in social contexts.... But when imposed as a sentence, there is the added element of condemnation, labelling, or censure of the offender." This has "direct personal and indirect social effects" which call for justification: Andrew Ashworth, "Sentencing" in *The Oxford Handbook of Criminology* (Mike Maguire, Rod Morgan & Robert Reiner eds, 1994), at 819.

[55] *PP* v *Soon Seng Sia Heng* [1979] 2 MLJ 170 at 171 col 2F-G (FC); *Chiow Thiam Guan* v *Superintendent of Pudu Prison* [1983] 2 MLJ 116 at 119 col 1B-D (FC); *Sim Kie Chon* v *Superintendent of Pudu Prison* [1985] 2 MLJ 385 at 386 col 2B-F (SC, Kuala Lumpur); *Superintendent of Pudu Prison* v *Sim Kie Chon* [1986] 1 MLJ 494 at 497-8 (SC, Kuala Lumpur); *Karpal Singh* v *Sultan of Selangor* [1988] 1 MLJ 64 at 67 col 1B-H. See also LR Penna, "Pardoning power and the 'saga' of Sim Kie Chon" (1987) 8 Sing LR 106.

[56] The characterisation of the power of pardon as a prerogative power has been criticised. In Malaysia under Art 42 of the Federal Constitution the power of pardon is exercised on the advice of a Pardons Board. In *Sim Kie Chon* v *Superintendent of Pudu Prison* [1985] 2 MLJ 385, the court held that the Yang di-Pertuan Agong's power of pardon is a high prerogative power. The Pardons Board only gives advice and makes no decision whatsoever. However, Peter Crook in "*Sim Kie Chon* v *Supt of Pudu Prison & Ors*: The royal prerogative of mercy?" (1986) 13 JMCL 195 points out that in Malaysia the discretionary power of the Yang di-Pertuan Agong to grant clemency must be derived from the Constitution and not the common law doctrine of prerogative powers. Therefore the Yang di-Pertuan Agong lacks discretion in the exercise of his power of clemency and must follow the advice of the Pardons Board.

The President of Singapore's power of pardon should similarly be seen as a constitutionally-

in England under the common law,[56] except insofar as it has been altered by the Federal Constitution.[57] At the time the Malaysian cases were decided, it was believed that under the common law the prerogative of mercy could not be challenged in a court of law. Authority for this proposition lay in cases such as *de Freitas* v *Benny*,[58] *Hanratty* v *Lord Butler of Saffron Walden*[59] and selected passages in *Council for Civil Service Unions* v *Minister for the Civil Service* (the *GCHQ* case),[60] which were applied by Malaysian judges.

However, the *GCHQ* case actually supports the proposition that prerogative powers are judicially reviewable. Lord Roskill himself pointed out that:

> If the executive in pursuance of [a] statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged. ... If the executive instead of acting under a statutory power acts under a prerogative power... so as to affect the rights of the citizen, I am unable to see... that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To take of that act as the act of the sovereign savours of the archaism of past centuries.[61]

This point was recently affirmed in *ex parte Bentley*,[62] which held that the exercise of the prerogative power of pardon is clearly reviewable:

> The *CCSU* case [1985] AC 374 [*ie*, the *GCHQ* case] made it clear

conferred discretion and not a prerogative power. Despite some theoretical difficulty about the status of the Republic of Singapore Independence Act (see Kevin Tan Yew Lee, "The evolution of Singapore's modern Constitution: Developments from 1945 to the present day" (1989) 1 S Ac LJ 1 at 20-2), the practical view is that it forms part of our Constitution since it is placed together with the Constitution proper and the Independence of Singapore Agreement in volume I of the 1985 Revised Edition of the Statutes under the heading "Constitutional Documents".

57 See *Chiow Thiam Guan* v *Superintendent of Pudu Prison, supra*, note 55, at 119 col 1B-D and *Superintendent of Pudu Prison* v *Sim Kie Chon, supra*, note 55, at 497 col 2B, citing *de Freitas* v *Benny* [1976] AC 239 at 247 (PC on appeal from Trinidad and Tobago).

58 *Ibid*.

59 (1979) 115 Sol J 386.

60 [1985] AC 374 (HL) *per* Lord Diplock at 411, Lord Roskill at 418. This case was applied in New Zealand in *Burt* v *Governor-General* [1989] 3 NZLR 64, [1992] 3 NZLR 672 (CA).

61 *Ibid*, at 417.

62 *Supra*, note 52.

> that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be some cases in which the exercise of the Royal Prerogative is reviewable, in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.... It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not.[63]

The court viewed passing references in the *GCHQ* case to the non-reviewability of the prerogative of mercy as mere *obiter dicta*, and distinguished *de Freitas* v *Benny*[64] and *Hanratty*[65] because they were decided before the *GCHQ* case at a time when it was incorrectly believed that the exercise of prerogative power was not susceptible to judicial review at all. Also, neither case was actually concerned with judicial review of an error of law.[66]

The same result was reached in the Indian decision of *Kehar Singh* v *Union of India*.[67] Here, the defendant was convicted of conspiring to murder the former Prime Minister of India, Mrs Indira Gandhi, on 31 October 1984. Sentenced to death, he unsuccessfully petitioned the President of India for a pardon under Article 72 of the Indian Constitution on the basis that the case record showed the verdict was erroneous. His son then filed a petition in the Supreme Court of India for judicial review of the President's decision. The court held[68] that this case was not concerned with the merits of the President's decision but with the scope of his power under Article 72. Nevertheless, it asserted that the exercise of the President's power of pardon cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram* v *Union of India*.[69] This latter case established that the court will only examine the exercise of the power of pardon if factors which are "wholly irrelevant, irrational, discriminatory or *mala fide*"

63 *Ibid*, at 111G.
64 *Supra*, note 57.
65 *Supra*, note 59.
66 *Supra,* note 52, at 111H-112A.
67 AIR 1989 SC 653.
68 *Ibid*, at 661 para 14.
69 AIR 1980 SC 2147.
70 *Ibid*, at 2174-5.

are taken into account.[70]

It is submitted that *ex parte Bentley* and *Kehar Singh* reflect the law in Singapore in the light of *Chng Suan Tze* v *Minister of Home Affairs*[71] which confirms that executive discretion is subject to judicial review. Hence it is clear that the exercise of the power of pardon can be challenged by way of judicial review. However, this will not aid a victim of a miscarriage of justice since judicial review can only be invoked in extremely limited circumstances. The power of pardon has evolved from an "arbitrary monarchial right of grace and favour" to an "integral element in the criminal justice system, a constitutional safeguard against mistakes."[72] Yet it is more appropriately reserved for cases where the defendant is clearly guilty of a criminal offence, but due to strong mitigating factors he or she should be relieved from the full weight of the law.

Penalties for criminal offences in Singapore are austere. Several offences attract a mandatory death penalty while long terms of imprisonment and caning are specified for many others, sometimes coupled with mandatory minimum sentences which courts must impose. Hence, regardless of the solution ultimately adopted, there is an urgent need to shield people from punishment without cause by rectifying this omission in our criminal justice system.

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71 [1989] 1 MLJ 69 (CA).

72 *Burt* v *Governor-General* [1992] 3 NZLR 672 at 681, cited in *ex parte Bentley, supra*, note 52, at 111B.

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