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SANG IS DEAD, LOOSELY SPEAKING

R v *Looseley* [1]

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The law governing entrapment in Singapore follows the approach outlined by the House of Lords in *R v Sang*.[2] *Sang* held that English law did not recognise the defence of entrapment, and moreover, that there was no judicial discretion to exclude evidence simply because it was obtained by an improper or unfair means, or by the activities of an agent provocateur.[3] The foundation of the judicial discretion to admit or exclude evidence was not the importance of upholding propriety during a criminal investigation or disciplining police, but rather the overriding judicial duty to ensure the fair trial of the accused. Lord Diplock, in a passage often cited by the Singaporean courts, justified his position on the following grounds:

> … the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of the judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.[4]

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1 [2001] UKHL 53; [2001] 4 All ER 897 ("*Looseley*").

2 [1979] 2 All ER 1222 ("*Sang*"). *Sang* was followed in *PP* v *Rozman bin Jusoh and Razali bin Mat Zin* [1995] 3 SLR 317; *Chi Tin Hui* v *PP* [1994] 1 SLR 778; *Ajmer Singh* v *PP* [1986] SLR 454, *Chan Chi Pun* v *PP* [1994] 2 SLR 61 and *How Poh Sun* v *PP* [1991] SLR 220.

3 *Ibid*, at 1231.

4 *Ibid*, at 1230. As several commentators have pointed out, contrary to the impression created by *Sang*, English judges had previously been hostile to police incitement or use of an agent provocateur (regarded as a "foreign" innovation), a stance reflected in the Home Office Guidelines which prohibited police and informants from acting as accessories: G

In Singapore, *Sang* is regularly "prayed in aid" by prosecutors in cases where police methods of gathering evidence are alleged to have overstepped the bounds of propriety. However, the traditional reverence accorded to *Sang* in Singapore requires re-evaluation in light of the recent decision handed down by the House of Lords in *Looseley*.[5]

As the House of Lords observed in *Looseley*, *Sang* has been overtaken by the development of other remedies for entrapment, specifically, the judicial power to halt proceedings as an abuse of process, and to exclude illegally or improperly obtained evidence under section 78 of the Police and Criminal Evidence Act 1984 (PACE). While PACE jurisprudence is only of academic interest in Singapore, *Looseley* represents the latest chapter in the development of the common law doctrine of abuse of process, a doctrine which has received little (if any) attention in cases where entrapment has been argued by the defence in Singapore - it seems that *Sang* remains the first and last word on the topic of entrapment.[6]

Looseley may be regarded as a watershed in English law for a number of reasons. First, the decision marked a clear departure from the traditional reticence of the English courts, typified by *Sang*, to provide judicial remedies for entrapment beyond mitigation of sentence. Secondly, the decision affirmed that the appropriate remedy for entrapment ordinarily should be granting a permanent stay of proceedings as an abuse of process rather than discretionary exclusion of evidence. Thirdly, the decision clarified that the rationale for this drastic remedy is the protection of fundamental values, namely preservation of judicial integrity and the Rule of Law, rather than imposing discipline on police or informers who act as agents provocateurs.

Before critically evaluating the House of Lords' approach to entrapment in *Looseley*, I shall briefly summarise the facts and certified questions of law. *Looseley* was a conjoined appeal involving two cases where the accused alleged he had been subjected to entrapment.[7] In the first appeal, an undercover police officer made contact with the accused (Looseley) who was suspected of being a drug supplier, and posing as a buyer the officer purchased several grams of heroin on three separate occasions. The trial judge conducted a *voir dire* before trial and refused to exclude the evidence or grant a stay of proceedings on the ground of the alleged entrapment. The

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Robertson, "Entrapment Evidence: Manna from Heaven or Fruit of the Poisoned Tree" [1994] Criminal Law Review 805, at 807-808 and S Sharpe, "Covert Policing: A Comparative View" (1996) 25(2) Anglo-American Law Review 163, at 165.

5 *Supra*, note 1. The decision was unanimous with Lords Nicholls, Hoffmann and Hutton delivering separate speeches, and Lords Mackay and Scott concurring.

6 See Tan Yock Lin, "Sing a Song of Sang, A Pocket Full of Woes" [1992] SJLS 365 and A Ashworth, "What is Wrong with Entrapment?" [1999] SJLS 293. A similar reverence for *Sang* is apparent in Hong Kong: see S Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate" (1999) 29(2) Hong Kong Law Journal 216.

7 The facts of the case are set out in Lord Hutton's speech in *Looseley*, *supra*, note 1, at 917-922.

Court of Appeal upheld that decision, but certified a question of law of public importance for the House of Lords, namely whether the trial judge should have refused to admit evidence of an undercover police office because he had gone beyond mere observation and had instigated the offence.

In the case generating the Attorney-General's Reference, undercover police officers had approached the accused and sold him cheap "contraband" cigarettes. The officers then asked whether the accused could obtain some "brown" (heroin) for them. The accused's initial reluctance was overcome by supplying him with more cheap cigarettes and engaging him in many conversations. The accused eventually obtained the heroin and was charged with supplying, and being concerned in the supply of, a Class A controlled drug. The trial judge stayed the trial on the grounds that the police had actively instigated an offence that, but for their intervention, would not have been committed. The Court of Appeal held that this decision to stay the proceedings was wrong, but referred to the House of Lords the question whether, in cases where undercover police had instigated the commission of the offence, Article 6 of the European Convention on Human Rights and the jurisprudence of the European Court had modified: (a) the judicial discretion to exclude evidence under section 78 of PACE; (b) the power to stay proceedings as an abuse of the court.

As the above certified question implies, the decision to hear the appeals in *Looseley* was related to the legal uncertainties created by the decision of the European Court of Human Rights in *Teixeira de Castro* v *Portugal*.[8] *Teixeira* appeared to open new lines of defence by its suggestion that intentional police incitement of the commission of an offence would violate the accused's right to a fair trial protected by Article 6.1 of the European Convention on Human Rights (ECHR). With the coming into force of the Human Rights Act 1998, there was plenty of scope for disagreement over whether English law is compatible with the ECHR and the European Court's jurisprudence.[9] As Andrew Ashworth recently observed:

> Since the Human Rights Act came fully into force, prosecutors have been heard to claim that defence advocates refer to the Convention and particularly to *Teixeira de Castro* v *Portugal* (pronounced in a more or less exotic manner) whenever the going becomes difficult, whereas defence lawyers sometimes claim that prosecutors have been trained to

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8 (1998) 28 EHRR 101 ("*Teixeira*").

9 The Human Rights Act 1998 requires courts in the UK to read legislation in a manner that is compatible with ECHR (s 3) and requires all public authorities, including courts, to act in a way which is compatible with Convention Rights (s 6). If this is impossible, then the courts are required to make a declaration of incompatibility.

> assure courts always that the substance of Article 6 corresponds with the common law, and that no reconsideration of English law is needed.[10]

In *Teixeira*, two Portuguese undercover police officers pressured a cannabis user to act as an informer and introduce them to his supplier. The drug user was unable to locate his supplier, but identified another man as a potential supplier of heroin. The informer arranged a meeting with the accused during which the undercover police indicated that they wished to buy 20 grams of heroin. The accused procured the heroin, and was subsequently arrested and convicted of a drug offence. Having exhausted domestic remedies, the accused appealed to the European Court of Human Rights.

The European Court held that the guarantee of fairness under Article 6.1 was not limited to the trial, but extended to the proceedings as a whole, including "the way in which evidence was taken".[11] The Court then drew a distinction between legitimate undercover activity and police incitement:

> The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.[12]

The Court held that Article 6 is breached where law enforcement officials do not confine themselves to investigating criminal activity in an essentially passive manner, but actively incite the commission of an offence. The investigative techniques used in this case caused unfairness in the administration of justice because the police officers had acted on their own initiative without judicial supervision or with good reasons to suspect that the accused was a drug trafficker. Furthermore, there was no evidence to support the argument that the accused was predisposed to commit the offence – indeed, the accused had to locate the drug from a third party and was found in possession of no more drugs than were being solicited by the police. The Court concluded that:

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[10] A Ashworth, "Criminal Proceedings After the Human Rights Act: The First Year" [2001] CrimLR 855, at 855 (footnote omitted).

[11] *Supra*, note 8, at para 34.

[12] *Ibid*, at para 36.

> … the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial.[13]

The challenge for the House of Lords in *Looseley* was to reconcile these statements of general principle with the English common law.

The House of Lords declined to make a declaration of incompatibility, finding that the two streams of jurisprudence were reconcilable and that the law in England was congruent with the right to a fair trial protected by Article 6 and the principles established in *Teixeira*. Lord Hoffmann noted that the right to a fair trial, as interpreted by the European Court, "is not confined to a fair determination of the question of guilt. It is also a right not to be tried at all in circumstances in which this would amount to an abuse of state power."[14] Since Article 6 does not prescribe specific rules on the admissibility of evidence, these matters are considered primarily matters for regulation under national law.[15] Accordingly, there is some "margin of appreciation" in how the broad principles contained in the ECHR are implemented by national legal systems.[16]

In English law, the remedies for entrapment are procedural (stay of proceedings) or evidential (exclusion of evidence under section 78 of PACE). Both depend upon the exercise of a judicial discretion involving the balancing of competing considerations. The House of Lords in *Looseley* expressed a strong preference for using the abuse of process doctrine – in cases where entrapment is raised, the defence should apply for a stay on the ground of abuse of process *before* the proceedings commence.[17]

The development of this jurisdiction in English law, as Lord Hoffmann noted, "is of recent origin".[18] Although only dating to the 1960s, the abuse of process doctrine had been applied to entrapment by the House of Lords in *R* v *Latif*.[19] In that case, the two accused argued entrapment constituted

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13 *Ibid*, at para 39.

14 *Ibid*, at para 45.

15 *Schenk* v *Switzerland* [1988] 13 EHRR 242, at 265.

16 On the doctrine of margin of appreciation, see *Handyside v UK* (1976) Series A, No 24, 1 EHRR 737 at paras 48-50.

17 *Supra*, note 1, Lord Nicholls, at 903, Lord Hoffmann, at 909, and Lord Hutton, at 926. Where the application is refused, the defence may still seek exclusion of the evidence relying on s 78 of PACE. It was acknowledged that in some cases the issue of entrapment may emerge late in the trial, and take the form of an application to exclude evidence under s 78. In such cases, it was suggested that the trial judge should treat such an application, in substance, as a belated application for a stay on the ground of entrapment.

18 *Ibid*, at 907. *Connelly* v *DPP* [1964] AC 1254; *Barton* v *The Queen* (1980) 147 CLR 75 and *R* v *Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42. See generally, A Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993).

19 [1996] 1 All ER 353 ("*Latif*").

an abuse of process on the ground that their importation of heroin had been incited by a customs officer who himself had committed the *actus reus* of their offence. The House of Lords confirmed that "proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place".[20] The Court held that the discretion involved balancing countervailing considerations of "policy and justice". Lord Steyn, in a passage approved in *Looseley*, held that:

> …the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the ends justifies any means.[21]

Lord Steyn noted that "an infinity of cases" could arise where the integrity of the judical process was threatened, and that general guidance as to how the discretion should be exercised in particular cases would not be useful.[22]

While the recognition of this jurisdiction was the next logical step for the English courts, *Latif* offered only limited assistance for those trial judges who had to weigh these countervailing considerations of "policy and justice" in order to decide whether *particular* investigative methods warranted a stay. As Lord Hoffmann noted in *Looseley*, simply saying that an abuse of process would occur in trials where the police methods were so unworthy or shameful that they would be an "affront to the public conscience"[23] may be criticised for promoting highly subjective answers, and granting a "chancellor's foot" veto over law enforcement practices that did not meet with judicial approval.[24]

Looseley sought to establish, with greater precision than *Latif*, the limits of acceptable undercover policing. From an academic and philosophical perspective, the critical question is definitional – what conduct constitutes "entrapment"?[25] From a judicial perspective, the question is necessarily

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20 *Ibid*, at 361.

21 *Ibid*, cited with approval by Lord Nicholls, at 905; Lord Hoffmann, at 909; Lord Hutton, at 923.

22 Applying these principles to the facts in *Latif*, Lord Steyn found that a stay was not appropriate as the accused was already involved in the drug trade as an organiser, and had taken the initiative in organising the importation. This focus on the accused's conduct and subjective predisposition diverges significantly from *Looseley*, which focuses on the propriety of police conduct. For a critical analysis of the relevance of subjective predisposition in *Latif*, see S Bronitt, "Entrapment, Human Rights and Criminal Justice: A Licence to Deviate," *supra*, note 6, at 233-234.

23 This phrase was used by Lord Steyn in *Latif*, *supra*, note 18, at 361.

24 *Supra*, note 8, at 910, citing concerns raised by Lord Diplock in *Sang*, *supra*, note 2, and Rehnquist J in *US* v *Russell* (1973) 411 US 423, at 435 respectively.

25 Entrapment relates to undercover conduct designed to procure the commission of the offence for the purpose of gathering of evidence against the accused: G Dworkin, 'The

reframed in procedural terms as whether particular methods of investigation conduct warrant a stay of proceedings. Rejecting a single factor or formula approach to this question, Lord Hoffmann set out to identify the "cluster of relevant factors",[26] though adding the caveat that "in the end their relative weight and importance depends upon the particular facts of the case".[27]

In reviewing the various approaches to this question, *Looseley* rejected the proposition, influential in the United States jurisprudence, that a person manifesting a "subjective predisposition" to commit the offence could not argue entrapment. As Lord Nicholls observed:

> Predisposition does not make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies. Predisposition does not negative misuse of state power.[28]

Lord Hoffmann similarly took the view that recognising the relevance of predisposition would have the effect of rendering persons with criminal records forever "fair game" for entrapment.[29] It would seem that English law has opted for an objective (official-centred), rather than subjective (defendant-centred) approach to entrapment.[30]

Lord Nicholls conceptualised the problem of entrapment in terms of "State-created crime":

> … the judicial response to entrapment is based on the need to uphold the rule of law. A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catch-phase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience, to borrow the language of Lord Steyn in *R v Latif* [1996] All ER 353 at 361. In a very broad sense of the word, such a prosecution would not be fair.[31]

Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime' (1985) 4 Law and Philosophy 17, at 17. The general use of deception to gather evidence of crimes *already committed* raises distinct issues, see A Ashworth, "Should the Police Be Allowed to Use Deceptive Practices?" (1998) 114 LQR 108.

26 *Supra*, note 1, at 910.

27 *Ibid.*

28 *Ibid*, at 904.

29 *Ibid*, at 914. A similarly critical stance towards predisposition was adopted by A Ashworth, *supra*, note 6, at 303-305.

30 The objective/subjective terminology is widely used by US courts and commentators. Since the term objective/subjective has many different usages in the criminal law, Ashworth has proposed the use of "official-centred" and "defendant-centred" models: see note 6, at 297. For a review of the US jurisprudence, see S Sharpe, *supra*, note 4.

31 *Supra*, note 1, at 904.

State-created crime could be contrasted with acceptable police conduct which merely presented the defendant with an "unexceptional opportunity to commit a crime".[32] In determining which side of the line the conduct fell, a number of factors would be relevant including: the nature of the offence; the reason for the particular police operation; and the nature and extent of police participation in crime.[33] Lord Nicholls held the criminal records were generally irrelevant except where it can be linked to other factors grounding reasonable suspicion that the defendant is currently engaged in criminal activity.[34]

Lord Hoffmann drew the distinction between legitimate crime detection and unacceptable crime creation in similar terms – entrapment occurs when an agent of the state – usually a law enforcement officer or a controlled informer – *causes* someone to commit an offence in order that he should be prosecuted.[35] Causation, Lord Hoffmann recognised, required some refinement in this context. He was particularly doubtful whether "the causal question can be answered by a mechanical application of a distinction between 'active' and 'passive' conduct on the part of the undercover policeman or informer".[36] The distinction drawn between causing the offence and "merely providing an opportunity for the accused" was important, but not necessarily decisive.[37] This aspect of the decision was crucial since the active/passive distinction had featured prominently in the *Teixeira* ruling. In some cases, where suspicion of criminal involvement was strong and other methods of investigation inappropriate, Lord Hoffmann maintained that police or informers could cross the line between passive and active behaviour:

> Drug dealers can be expected to show some wariness about dealing with a stranger who might be a policeman or informer and therefore some protective colour in dress and manner as well as a certain degree of persistence may be necessary to achieve the objective … A good deal of active behaviour in the course of an authorized operation may therefore be acceptable without crossing the boundary between causing the offence to be committed and providing an opportunity for the defendant to commit it.[38]

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32 *Ibid*, at 905.
33 *Ibid*, at 905-906.
34 *Ibid*, at 906. This qualification, whilst avoiding the worst aspects of the subjective approach, may nevertheless promote the over-policing of persons with previous convictions. It has been argued that the link with predisposition and previous convictions should be severed entirely, and instead the courts should insist on reasonable grounds for suspecting the person targeted is suspected of being *presently* involved in this type of crime: A Ashworth, *supra*, note 6, at 305.
35 *Supra*, note 1, at 907.
36 *Ibid*, at 915.
37 *Ibid*, at 910.
38 *Ibid*, at 915.

A similar opinion was later expressed by Lord Hutton:

> … a request for drugs, even if it be persistent, need not be regarded as luring the drugs dealer into committing a crime with the consequence that a prosecution against him should be stayed. … [A] prosecution should not be stayed where a police officer has used an inducement which (in the words of McHugh J in *Ridgeway's* case (1995) 184 CLR 19 at 92) 'is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity'.[39]

Lords Hoffmann and Hutton took the view that their approach was not in conflict with the principles laid down in *Teixeira*. Lord Hoffmann, counselling against an excessively literal and technical reading of the language used in *Teixeira*, concluded that the European Court had not intended to lay down a rule that all active steps by undercover police constituted incitement – the "active/passive" question was merely one of the factors relevant to the determination of this question. Lord Hutton stressed that it was not incitement, in the sense employed in *Teixeira*, where the investigative methods were "consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity".[40]

Like Lord Nicholls, Lord Hoffmann identified a range of factors relevant to exercise of the discretion to stay a trial: whether the police were acting on "reasonable suspicion" and subject to proper supervision; the nature of the offence, noting that undercover operations should be employed only where the offences are consensual or for the purpose of infiltrating conspiracies. Lord Hoffman stressed that the nature of the offence in this context did *not* include reference to the seriousness of the offence – thereby avoiding a position where the "ends might justify the means".[41]

Lord Hutton went even further than his brethren, arguing that the four factor test proposed in McHugh J's dissenting opinion in *Ridgeway* should be applied by the English courts.[42] McHugh J had argued that a stay should be granted where the crime was "artificially created by the misconduct of law enforcement authorities", a question which required consideration of four matters:

(1) Whether conduct of law enforcement officials induced the offence.

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39 *Ibid*, at 925

40 *Ibid*, at 930.

41 The exclusion of seriousness as a relevant consideration has been justified on the following grounds: "If the crimes are serious ones, crimes that give rise to great public concern, then it is no less serious for the suspect to be subjected to investigative methods that violate rights or other standards. Seriousness, in other words, is a two-way street": A Ashworth, *supra*, note 6, 310.

42 *Supra*, note 1, at 924-925.

(2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that offence or were acting in the course of a bona fide investigation of offences of a kind similar to that with which the accused has been charged.

(3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.

(4) Whether the offence was induced as a result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence.[43]

Applying these principles of law to the facts, the House of Lords found that the undercover policeman who procured heroin from Looseley did not incite the offence. The factors considered relevant were: that the police officer was acting in the course of an authorised undercover operation; that the pub was reasonably suspected to be a focal point of trade; and that after the initial approach by the officer, there was reasonable cause to suspect the defendant was a dealer. The willingness of the dealer to sell was considered to be neutral, a position consistent with the objective (official-centred) model focusing on the conduct of the police, rather than on subjective (defendant-centred) model focusing on predisposition and character. Thus, on these facts, neither a stay of proceedings or exclusion of evidence was needed as the policeman had not crossed the boundary between creating an opportunity to commit the offence and causing him to do so.

In relation to the case generating the Attorney-General Reference, Lords Hoffmann and Hutton concluded that the police conduct did warrant a stay, affirming the approach of the trial judge and disagreeing with the Court of Appeal.[44] The finding that the police had caused or instigated the supply of heroin was supported by evidence that the police had offered the defendant inducements to purchase cut-price cigarettes, "inducements that would not ordinarily be associated with the commission of such an offence [namely, supplying heroin]".[45]

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[43] (1995) 184 CLR 19, at 92.

[44] Lords Nicholls and Mackay concurred. Lord Scott, while not dissenting from the answer to the certified questions of law, was inclined to take a different view of the facts, suggesting that the inducements offered by the police were not such as to "cause the prosecution to be affront to the public or to offend ordinary notions of fairness": See *supra*, note 1, at 932.

[45] *Ibid*, at 930, *per* Lord Hutton. Lord Hoffmann, concurring with Lord Hutton, went on to identify as relevant the following additional factors: the fact that the accused had never dealt in heroin before; that the police held out an enticing inducement in the form of cheap cigarettes; and, that even if authorized, the police operation caused him to commit an offence that he would not otherwise have committed: *ibid*, at 917. It is difficult to reconcile

Is *Sang really* dead? As the title for this comment suggests, such a pronouncement requires some qualification. It is still the case that entrapment under English law affords no defence: the fact that the police, or indeed anyone else, incited or caused the commission of the offence does not relieve the guilt of the accused. That said, it is no longer the case, as Lord Diplock suggested in *Sang*, that an accused who suspects entrapment must seek remedies outside the criminal process or be content with some mitigation of sentence. A judiciary that allows law enforcement officials or informers to commit crime with impunity would undermine a central tenet of the Rule of Law – namely, that no-one, especially those tasked with its enforcement, is above the law. Over the past decade, English law has been expanding its abuse of process doctrine to address these concerns. The rationale for this development is not to discipline the police or prosecution, but rather to preserve judicial integrity, a value that is now recognised in *Looseley* as integral to the fair trial concept.

Looseley has raised the question whether the Singaporean courts should develop the abuse of process doctrine in a similar way, or whether it should maintain its traditional commitment to *Sang*. Certainly not all Commonwealth jurisdictions have expanded the doctrine to cover cases of entrapment. Indeed the majority of the High Court of Australia in *Ridgeway* (in which McHugh J dissented) declined to recognise that entrapment constituted an abuse of process:

> Once it is concluded that our law knows no substantive defence of entrapment, it seems to us to follow that the otherwise regular institution of proceedings against a person who is guilty of a criminal offence for the genuine purpose of obtaining conviction and punishment is not an abuse of process by reason merely of the circumstance that the commission of the offence was procured by illegal conduct on the part of police or any other person.[46]

The apparent strictness of this position in Australia could be maintained because of the existing remedy available to the courts in the form of "public policy" discretion. By analogy, the majority held that the discretion to exclude evidence on the grounds of illegality or impropriety could be extended to cases where the evidence of guilt had been unlawfully procured by the police and/or their informers. The discretion involves weighing competing requirements of public policy, namely "the desirable goal of bringing to conviction the wrongdoer, and the undesirable effect of curial approval, or even encouragement being give to the unlawful conduct of

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this emphasis on subjective factors (particularly the accused's lack of propensity) with the objective (official-centred) approach outlined earlier in his speech.

[46] (1995) 184 CLR 19, at 40 *per* Mason CJ, Deane & Dawson JJ.

those whose task it is to enforce the law".[47] The purpose of the discretion is *not* to deter or exercise control over police misbehaviour, as is sometimes maintained,[48] but rather to preserve well established Rule of Law values, namely, that the courts should not be seen to condone illegality by those entrusted to enforce the law.[49]

While the Australian approach to entrapment may be an attractive halfway-house between *Sang* and *Looseley*, the use of an exclusionary discretion to uphold important constitutional values has limitations. Where evidence procured as a result of unlawful or improper police incitement is excluded, a prosecution will not necessarily fail. As Lord Nicholls noted in *Looseley* there may be other material (real evidence or other witnesses) sufficient to convict the accused without relying on the tainted evidence.[50] To avoid the consequent damage to judicial integrity caused by such a conviction, a procedural remedy for entrapment based on abuse of process is clearly preferable.

Among human rights lawyers, *Looseley* will be enthusiastically welcomed as further evidence of the growing influence of the ECHR and European jurisprudence on English law. For criminal lawyers, the decision seems less remarkable – the decision simply confirms (once again) the application of abuse of process doctrine to entrapment, though adding some important detail on how the discretion should be exercised by trial judges.

Looseley probably warrants some scepticism for a number of reasons. First, the judicial remedies available for entrapment outlined in *Looseley* – namely, exclusion of evidence or stay of proceedings – are likely to remain reserved for the *exceptional* case. Within discretionary frameworks based on balancing, its seems that judicial rhetoric can venerate the values of fairness, the rule of law and human rights, while simultaneously finding reasons to deny their applicability to the particular "facts" before them.[51] Moreover, as Lord Scott pointed out in *Looseley*, the rules of disclosure limit the ability of the defence to argue entrapment since the identity of the undercover operatives and details of the operation may be suppressed by the doctrine of public interest immunity.[52]

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47 *Bunning v Cross* (1978) 141 CLR 54, at 74 *per* Stephen and Aickin JJ.

48 A view expressed by Yong Pung How CJ in *SM Summit Holdings* v *PP* [1997] 3 SLR 922, para 55.

49 See Ashworth, *supra*, note 6, at 307.

50 *Supra*, note 1, at 903.

51 This argument, supported by a study of trials where entrapment was raised in Australia, is developed in S Bronitt and D Roche, "Between Rhetoric and Reality: Sociolegal and Republican Perspectives on Entrapment" (2000) 4 International Journal of Evidence and Proof 77, at 88-91.

52 *Supra*, note 1, at 932. While it is well-established that the prosecution must disclose evidence relating to the "innocence" of the accused, Lord Scott took the view (strictly obiter) that where the defence simply maintains that the admission of the evidence would be unfair, "the police should not, in my opinion, be expected to disclose the source of their suspicions if to do so would reveal the identity of an informant or prejudice their ability to obtain similar information in the future": *ibid*. On the inadequacy of this approach see H

Secondly, *Looseley* focused exclusively on the problems of *State*-created crime, that is, crime caused or instigated by police or informers acting under police direction. It did not raise for consideration, even by way of *obiter*, the increasing use of informers acting for corporations in private law enforcement.[53] The use of non-police informers has been considered in Singapore in *SM Summit Holdings* v *PP*.[54] In that case, Yong Pung How CJ distinguished *Sang*, recognising that there was a judicial discretion to exclude evidence obtained by private informers acting as agent provocateurs. Adopting a distinction drawn in *Ridgeway*, Yong Pung How CJ emphasised that this discretion was limited to cases where the illegal conduct of the informer itself constituted an essential ingredient of the offence charged – in these cases, he regarded the illegality and the threat to the Rule of Law that it involves as assuming a particularly malignant aspect.[55] In relation to police illegality more generally, Yong Pung How CJ reiterated that it was not the function of the courts to discipline police, and that the rationale for exclusion in this case was preserving integrity in the administration of justice.[56] Such sentiments clearly resound with the opinions expressed in *Looseley*, but it will be open for argument whether such cases justify the more radical remedy of granting a stay of proceedings.

My final note of scepticism is that *Looseley* is unlikely to herald a significant revolution in policing methods. While decisions like *Looseley* serve as important declaratory mechanisms for determining the scope of law enforcement powers, exclusive reliance on judicial pronouncements to regulate policing practices has significant limitations. As David Dixon has perceptively observed:

Mares, "Balancing Public Interest and a Fair Trial in Police Informer Privilege: a Critical Australian Perspective" (2002) 6 International Journal of Evidence and Proof 94, at 122.

53 For a recent case of proactive law enforcement by non-police informers, see *R* v *Shannon* [2001] 1 WLR 51. The Crown case rested on the evidence gathered by an investigative journalist working for the News of the World, who claimed during the *voir dire* to have 89 successful criminal convictions to his name. The journalist, posing as a wealthy Arab sheihk, arranged a meeting with the accused, a celebrity entertainer with a past history of drug use, to discuss a fictitious prospect of employment opportunities in Dubai. During the course of the evening, the accused was asked to obtain some drugs for a party. The accused agreed to obtain some drugs, and the journalist duly handed over the drugs to the police and the accused was prosecuted. He was unsuccessful in his application to exclude the evidence under s 78. His resulting conviction was upheld on appeal to the Court of Appeal. In light of *Looseley*, it may be argued that the trial judge should also have considered whether to stay the trial as an abuse of process.

54 [1997] 3 SLR 922.

55 *Ibid*, at para 52.

56 *Ibid*, at para 55. He specifically rejected a wider discretion to exclude illegally or improperly obtained evidence on the grounds of public policy, noting that the discretionary framework based on weighing competing factors was "completely unworkable in practice".

> The reception by police of a judicial decision depends, not surprisingly, on its origin, content, and context, and the interaction between these variables. So, for example, decisions of superior courts may attract publicity and attention; but equally they may be unknown to operational officers if they are not communicated or may be ignored when custom and practice are strong in a particular procedure.[57]

Certainly *Looseley* should not be viewed as a surrogate for the effective regulation of undercover policing by legislation and/or administrative guidelines.[58] Indeed, legislation in Australia, Canada and the United Kingdom has recently been enacted to regulate aspects of undercover policing, mainly through schemes of internal administrative authorisation.[59] In Australia and Canada, these schemes have gone further by conferring prospective immunity on police and informers for offences that may be committed in the course of these approved operations.[60] In light of these developments, the next challenge for the courts will be whether proactive policing that has been duly authorised and immunized by legislation (rendering lawful what otherwise constitutes criminal, corrupt or improper conduct) constitutes a sufficient threat to judicial integrity to warrant a stay of proceedings.

Should the courts or the legislature have the ultimate say over what's fair in the War on Drugs, Terrorism and Organised Crime? It remains to be seen whether the inherent jurisdiction to prevent an abuse of process is robust enough to trump a clear legislative intent and the supremacy of parliament!

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57 D Dixon, *Law in Policing: Legal Regulation and Police Practices* (1997), at 205.

58 Until recently, Home Office Guidelines prohibited police or informants acting as an accessory or agent provocateur. However, these Guidelines have been replaced by the *Undercover Operations Code of Practice,* which regulate the use of undercover officers, test purchasers and decoys. The Code was issued by UK police authorities and HM Customs and Excise in response to the Human Rights Act 1998. These guidelines are discussed by Lord Hoffmann, *ibid*, note 1, at 913.

59 For a review of the new legislation and administrative framework governing surveillance in the UK, see Y Akdeniz, N Taylor and C Walker, "Regulation of Investigatory Powers Act 2000: Bigbrother.gov.uk: State Surveillance in the Age of Information and Rights" [2001] CrimLR 73.

60 The legality of controlled operations (where police and informers arrange the importation and supply of narcotics to the accused) was thrown into doubt in Australia and Canada: see *Ridgeway* v *R* (1995) 184 CLR 19 and *R* v *Campbell* [1999] 1 SCR 565, respectively. Remedial legislation has been enacted in both jurisdictions to immunize police and informer conduct that would otherwise be criminal: see Serious and Organised Crime Act 2001 (Aust, Cth) and Bill C-24 2001 (Can).