

## THE JURISDICTION TO REOPEN CRIMINAL CASES: A CONSIDERATION OF THE (CRIMINAL) STATUTORY AND INHERENT JURISDICTION OF THE SINGAPORE COURT OF APPEAL

GOH YIHAN\*

In *criminal* cases, it has been emphasised repeatedly that our Court of Appeal is a creature of statute and is hence only seised of the jurisdiction that has been conferred upon it by the relevant provisions in the legislation creating it. This has resulted in the Court of Appeal steadfastly refusing to reopen criminal cases already disposed of finally by way of appeal. However, in the arena of *civil* cases, the Court of Appeal possesses an *inherent* jurisdiction, which it uses to achieve a variety of results. Given that the *inherent* jurisdiction of the Court flows (arguably) *not* from the *nature* of cases it is hearing but the *status* of the Court itself, this article poses the question as to whether the distinction of the Court's inherent jurisdiction across criminal and civil cases is necessarily a sound one, and seeks to provide a possible answer.

### I. INTRODUCTION

Suppose, through the imperfection of the judicial process<sup>1</sup> (either because the court applied the law wrongly or appreciated the facts incorrectly), an accused person was

---

\* LL.B. (Hons.) (National University of Singapore); Faculty of Law, National University of Singapore. I am grateful for the very helpful comments and suggestions given to me by Professor Jeffrey Pinsler S.C., as well as the painstaking editorial effort put in by the journal editors. Needless to say, all errors remain solely my own.

<sup>1</sup> The allusion to the imperfection of the judicial process is not meant to be disrespectful, but is only meant to convey the limitations of human endeavour, even if so performed by the very top legal minds of the profession. Indeed, the Court of Appeal itself has not been shy to acknowledge implicitly the limitations of the process in which it participates. In the recent decision of *Lee Chez Kee v. Public Prosecutor* [2008] SGCA 20, it was pointed out by V.K. Rajah J.A. that the courts cannot pretend to be perfect as follows (at para. 124):

These examples serve to remind that it is only through the diligence and boldness of courts to re-examine and, in appropriate cases, depart, from existing interpretations of statutory provisions or principles of common law that the law can maintain its relevance and coherence. Judges should not be prepared to condone mistakes (if so shown) only because such law has been promulgated for time eternal. The law as we all know, being primarily formulated by the imperfections of the pen wielded by legislators and interpreted by the equally not invariably infallible minds of the judicial officer, cannot unfailingly paint a picture of perfection, nor can it pretend to be. However, through the willingness and openness of the courts in re-examining the legal principles and precedents from time to time, such imperfections can be limited and, in appropriate circumstances, re-moulded and corrected. It is also appropriate to mention at this juncture that judges, in re-examining the law, do not and cannot function alone without the assistance of counsel.

wrongly convicted or sentenced, and he now comes to court to seek redress even after his final appeal was disposed of. Does (and *should*) he have a remedy? Conceivably, in order to preserve the finality of the legal process, he ought *not* to.<sup>2</sup> However, consider a different situation. Suppose, owing to no fault in the judicial process, an accused person was rightly (at that time) convicted or sentenced, and he now has unearthed *objective* evidence which conclusively establishes his innocence – should he then be allowed a remedy in the courts even after his final appeal was disposed of?<sup>3</sup> Intuitively, this second hypothetical situation would seem to demand that the accused person be given his remedy in court, although it may not be immediately apparent *why*. Perhaps the answer can be simply put as such: in the former situation, even though the court might have made a mistake, the fact remained that the accused person has had the opportunity to put forward his case fully before the court. In such a case, it may well be that the court came to a different interpretation of the facts, which interpretation may or may not be incorrect depending on whose perspective the question is viewed from). In other words, this is but the normal process whereby the court makes its decision, and there will be reasonable people who might come to a different conclusion from the court. However, in the second situation, the court has yet to see evidence not presented to it, which may have surfaced far later owing to no fault of the accused person. There are thus more persuasive reasons why a remedy of rehearing ought to be granted here.

While there are deeper jurisprudential issues at play here (for example, balancing the finality of the legal process with according justice, and if so, to what extent), this article seeks the modest (and perhaps more practical) task in answering the jurisdictional issue, that is, whether our Court of Appeal possesses the jurisdiction<sup>4</sup> to reopen *criminal* cases which it had previously disposed of on appeal, and when?<sup>5</sup>

---

The challenge, therefore, is to define the means and manner by which the courts can, within the realms of conceptual and practical defensibility, right the wrongs which are later objectively ascertained to be so.

- <sup>2</sup> While not properly within the scope of this article, the related doctrine of *res judicata* comes to mind as a legal device designed to put a stop to litigation. It is first clear that the *very purpose* of this doctrine is rooted in a public policy concern that there ought to be finality in litigation. This in turn gives expression to a general sense of justice in that while every litigant ought to have his day in court, this right is not an unbridled one which can extend into time immemorial. Clearly, the law must draw the line somewhere and this line finds expression in the doctrine of *res judicata*. However, even within this doctrine, there are exceptions to the application of the doctrine (or facets of it) where its rigid application will result in injustice: see, for example, the House of Lords decision of *Arnold v. National Westminster Bank plc* [1991] 2 A.C. 93.
- <sup>3</sup> This is not a fantastic situation which belongs in the realm of a hypothetical. In the United States of America, there are numerous examples wherein DNA evidence appearing after an accused person's conviction surfaced to exonerate him. See, for example, "Man cleared by DNA free after 27 years" (29 April 2008), online: CNN.com <<http://edition.cnn.com/2008/CRIME/04/29/dna.exoneration.ap/index.html>>.
- <sup>4</sup> While it has been said that "jurisdiction" is a protean word capable of multiple definitions depending on the situation in which it is used, the meaning used in this article is, unless otherwise stated, the Court of Appeal's "authority, however derived, to hear and determine a dispute that is brought before it" (*per* Chan Sek Keong J. in the High Court decision of *Muhd Munir v. Noor Hidah* [1990] S.L.R. 999 at 1007, para. 19). This has been termed its "narrow and strict sense" and is mainly used in this article to denote the authority of the Court of Appeal to reopen a case disposed of on appeal. However, as will become clearer later, the word "jurisdiction" will also be used at certain points in its "wider sense", *i.e.*, the manner in which its power to hear and determine cases *is to be exercised*.
- <sup>5</sup> This issue has in fact been discussed before in the more specific context of whether the Court of Appeal possesses jurisdiction *simpliciter*: see Jack Lee Tsen-Ta, "The Court of Appeal's Lack of Jurisdiction

In doing so, this article will focus on the (criminal) inherent jurisdiction of the Court of Appeal and ask if it has unduly restricted such jurisdiction in the arena of criminal cases.

## II. THE STATUTORY CRIMINAL JURISDICTION OF THE COURT OF APPEAL

### A. The Relevant Statutory Provisions

As with all matters of jurisdiction, we turn first to the *statutory* jurisdiction of the Court of Appeal to see if it possesses the jurisdiction required to reopen criminal cases already disposed of on appeal. In this regard, it has been emphasised repeatedly by the Court of Appeal itself that it is a creature of statute and is hence only seised of the jurisdiction that has been conferred upon it by the relevant provisions in the legislation creating it.<sup>6</sup> The most recent pronouncement on this point came in *Ng Chye Huey v. Public Prosecutor*,<sup>7</sup> in which the Court of Appeal said:

A jurisdiction-conferring provision, whether derived from the [Supreme Court of Judicature Act] or elsewhere, is an essential and indispensable prerequisite that an applicant before this court *must* have as a legal basis upon which to canvass the substantive merits of his or her application. These jurisdictional rules are essential to the orderly conduct of litigation in our courts. Without a sufficiently clear delineation of the respective spheres of dominion of each level of our hierarchy of courts, chaos would inevitably result as parties seek, willy-nilly and solely for their own advantage, to bring their applications before different levels of court in an instrumental, haphazard and legally unprincipled fashion.<sup>8</sup>

However, these seemingly clear pronouncements appear irreconcilable with repeated acknowledgements that the Court of Appeal possesses an *inherent* jurisdiction, which, by its very nature, does not derive its existence from statutory sources. Leaving that aside for the moment, it is logical that the starting point is the relevant statutory provisions which confer and define the criminal jurisdiction of the Court of Appeal. In *Abdullah bin A Rahman*, the Court of Appeal identified sections 29A(2), 44, 59 and 60 of the *Supreme Court of Judicature Act*<sup>9</sup> as those which set out its criminal jurisdiction.<sup>10</sup> These provisions, insofar as relevant, are set out and explained as follows:

#### **Jurisdiction of Court of Appeal**

**29A.** —(1) ...

(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

---

to Reopen Appeals" [1994] Sing. J.L.S. 431. Another article touching on the appellate jurisdiction of the courts is Wong Choon Ning and Phang Hsiao Chung, "The Appellate System in Singapore" (1989) 10 Sing L. Rev. 112.

<sup>6</sup> See *e.g.*, the Court of Appeal's decisions in *Microsoft Corporation v. SM Summit Holdings* [2000] 2 S.L.R. 137 at 143, para. 17, and *Abdullah bin A Rahman v. Public Prosecutor* [1994] 3 S.L.R. 129 [Abdullah bin A Rahman] at 132, para. 7.

<sup>7</sup> [2007] 2 S.L.R. 106 [Ng Chye Huey].

<sup>8</sup> *Ibid.* at 115, para. 17 [emphasis in original].

<sup>9</sup> *Supreme Court of Judicature Act* (Cap. 322, 2007 Rev. Ed. Sing.) [SCJA].

<sup>10</sup> *Abdullah bin A Rahman*, *supra* note 6 at 132.

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.

#### **Jurisdiction to hear and determine criminal appeals**

**44.** —(1) ...

(2) Where an accused person has pleaded guilty and been convicted on such plea, there shall be no appeal except as to the extent or legality of the sentence.

(3) An appeal by the Public Prosecutor shall be either against the acquittal of an accused person or against the sentence imposed upon an accused person by the High Court.

(4) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

(5) The Court of Appeal shall also have jurisdiction to hear and determine matters brought before it in accordance with section 59 or 60.

Section 59 of the *SCJA* in turn provides that the Court of Appeal has jurisdiction for the purposes of determining any question reserved by the High Court or the Public Prosecutor in a situation where a person has been convicted by the High Court in the exercise of its original criminal jurisdiction. Section 60 of the *SCJA* provides that, where a criminal matter has been determined by the High Court in the exercise of its appellate or revisionary jurisdiction, the High Court may, on the application of either party (but where the Public Prosecutor is the applicant, shall) reserve for decision of the Court of Appeal any question of law of public interest, the determination of which by the judge has affected the case.<sup>11</sup>

From a cursory reading of these provisions, it is clear, as the Court of Appeal stated in *Abdullah bin A Rahman*, that the

main function of [the Court of Appeal] as set out by the jurisdictional provisions of the [*SCJA*] is a supervisory one, to review and correct the decisions of the lower courts; with the additional function of determining questions of law of public importance.<sup>12</sup>

The first part of this statement should be understood as referring to the *appellate* jurisdiction of the Court of Appeal; for accuracy, it is perhaps appropriate to emphasise that the Court of Appeal's reference to the words "review" and "supervisory" ought not to be understood as it possessing revisionary or supervisory jurisdiction over the lower courts or itself.

Indeed, section 29A(2) of the *SCJA* reveals that the Court of Appeal has no jurisdiction or power *under the provision* to hear any proceeding *other than an appeal* against a decision made by the High Court in the exercise of its original jurisdiction. This necessarily precludes any possibility of the Court of Appeal possessing the jurisdiction and power to entertain applications for the *revision* or *supervision* of a decision made by a lower court.<sup>13</sup> In essence, therefore, as is further supported by section 3(b) of the *SCJA*, which provides that "[the Court of Appeal] ... shall

<sup>11</sup> *Ibid.* at 132, with the relevant amendments in 1998 taken into account.

<sup>12</sup> *Ibid.* at 133.

<sup>13</sup> *Ng Chye Huey*, *supra* note 7 at 138, para. 63.

exercise *appellate* civil and criminal jurisdiction”,<sup>14</sup> the Court of Appeal’s criminal jurisdiction is generally *appellate* in nature, and it *does not* possess any revisionary or supervisory jurisdiction over the lower courts or, indeed, itself.

### 1. *No reconsideration of merits*

From the above, it is also clear that it would be statutorily impermissible to re-litigate the substantive merits of a case and re-open a decision (either by adducing new evidence or making new arguments of law) which had already been rendered by the Court of Appeal. This is clearly impermissible as the Court of Appeal would already be *functus officio* insofar as the substantive merits of the case are concerned. This very basic proposition, the Court of Appeal has repeated in *Koh Zhan Quan Tony v. Public Prosecutor*<sup>15</sup> and *Lim Choon Chye v. Public Prosecutor*.<sup>16</sup>

In *Vignes s/o Mourthi v. Public Prosecutor (No. 3)*,<sup>17</sup> the Court of Appeal noted that in *Abdullah bin A Rahman*, it was considered that there was no statutory mechanism which provided the Court of Appeal with the jurisdiction or power to reopen a case after the disposal of the appeal and that “Parliament had not defined the function of [the Court of Appeal] so as to maintain a continuous supervision over convicted persons or to act after the event because of a change of circumstance.”<sup>18</sup> Similarly, the decision of the Court of Appeal in *Lim Choon Chye* further substantiates the proposition stated above when M Karthigesu J.A., who delivered the judgment of the Court of Appeal, stated in *Vignes s/o Mourthi* that it was not Parliament’s intention to allow an appellant an indefinitely extended right of appeal in the sense of being able to pursue a second appeal even after his first had been *duly heard and dismissed*.<sup>19</sup>

### 2. *Koh Zhan Quan Tony: Undetermined issue of jurisdiction can be considered subsequently*

Between the two situations of the Court of Appeal being asked to decide a case on *appeal* and it being asked to *reopen* an appeal which had already been decided lies a unique situation in which the Court of Appeal has the jurisdiction to hear an issue (at a later hearing) which *ought to* have been determined by the Court of Appeal at the original hearing but which was not. This proposition stems from the Court of Appeal’s decision in *Koh Zhan Quan Tony*. In that case, the applicants were charged with murder under section 302 read with section 34 of the *Penal Code*<sup>20</sup> but were convicted of the lesser charge of robbery with hurt under section 394 of the Penal Code in the High Court. On appeal by the Prosecution, the applicants were convicted of the original charge of murder and sentenced to death. The applicants then filed motions arguing that their conviction on a lesser charge had not amounted to an

<sup>14</sup> *Supra* note 9 [emphasis added].

<sup>15</sup> [2006] 2 S.L.R. 830 [*Koh Zhan Quan Tony*] at 839, para. 22.

<sup>16</sup> [1994] 3 S.L.R. 135 [*Lim Choon Chye*] at 137.

<sup>17</sup> [2003] 4 S.L.R. 518 at 521 [*Vignes s/o Mourthi*].

<sup>18</sup> *Abdullah bin A Rahman*, *supra* note 6 at 132.

<sup>19</sup> *Vignes s/o Mourthi*, *supra* note 17 at 137.

<sup>20</sup> *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.) [*Penal Code*].

acquittal and that the Prosecution's appeal thus fell outside the language and scope of section 44(3) of the *SCJA*. In rejecting the Prosecution's first argument that the Court of Appeal did not have the jurisdiction to hear the said motions because it was *functus officio*, the Court of Appeal held that it had the jurisdiction and power to entertain the motions by virtue of section 29A of the *SCJA*.

The Court of Appeal reasoned that what was involved in *Koh Zhan Quan Tony* was an application for it to consider an issue of jurisdiction to hear the earlier appeal by the Prosecution in the first place. While noting that this issue of jurisdiction ought to have been raised and considered during the hearing of the earlier appeal itself, the Court of Appeal held that there was "no reason in principle why this [Court] should be precluded from considering applications which could clearly have been argued and heard as a preliminary point of law during the hearing of the actual appeal..."<sup>21</sup> The basis of this holding was that the Court of Appeal had never considered this preliminary issue of jurisdiction before and hence, notwithstanding the physical lapse of time between the earlier appeal and the motions, it remained seised of the case and, specifically, retained the jurisdiction to consider the issue of jurisdiction which ought to have been raised in the earlier appeal but was not.

#### B. *The Potentially Applicable Jurisdiction as Derived Statutorily*

The above review of the Court of Appeal's *statutory* criminal jurisdiction provides the basis upon which the first perspective from which the issue of the Court of Appeal's jurisdiction to reopen criminal cases already disposed of can be considered. There are two ways of characterising an application to do so. The first is by way of a criminal revision or judicial review, thereby circumventing the strict prohibition against the rehearing of appeal. The second is to proceed under the "excess of jurisdiction" reasoning in *Koh Zhan Quan Tony* by arguing that the Court of Appeal either acted without or in excess of its jurisdiction the first time it heard the case, thereby meriting a reopening of the criminal case. The resolution of these two approaches can be reduced to a single proposition: in order for the Court of Appeal to have the requisite *statutory* jurisdiction, either sections 29A(2), 44, 59 or 60 of the *SCJA* must be invoked to confer jurisdiction. At the outset, it is obvious that sections 59 and 60 are not applicable since the reopening of a criminal case does not (conceivably) concern any questions of public interest. Sections 29A(2) and 44 are *potentially* applicable, but only if some kind of *revisionary* or *supervisory* jurisdiction can be read into these provisions.

##### 1. *No revisionary or supervisory jurisdiction*

First, although an application to reopen a criminal case could proceed by way of a prayer of criminal revision or judicial review, it is apparent from even a cursory reading of the relevant sections of the *SCJA* that the Court of Appeal possesses no revisionary or supervisory jurisdiction over the subordinate courts. By parity of reasoning, it must be the case that the Court of Appeal cannot possess revisionary or

---

<sup>21</sup> *Koh Zhan Quan Tony*, *supra* note 15 at 837, para. 19.

supervisory jurisdiction over *itself*. It bears repeating that the Court of Appeal in *Ng Chye Huey* said that:

It is clear from the SCJA that [the Court of Appeal's] criminal jurisdiction is generally of an *appellate* nature ... An even cursory reading of [section 29A(2) of the SCJA] will reveal that this court has no jurisdiction or power under the provision to hear any proceeding *other than an appeal* against a decision made by the High Court in the exercise of *its (viz, the High Court's) original jurisdiction*. This, by necessary implication, excludes any possibility of [*the Court of Appeal*] possessing the jurisdiction and power to entertain applications for the *revision* or *supervision* of a decision made by a *subordinate court*. Such jurisdiction and power are, if at all, to be exercised *only* by the *High Court* pursuant to [section 27] of the SCJA ... There are, in fact, *no provisions whatsoever* in the SCJA which confer on [*the Court of Appeal*] the power to exercise *revisionary or supervisory* jurisdiction over the *subordinate courts*.<sup>22</sup>

*Even if* the Court of Appeal has either revisionary or supervisory jurisdiction, it is clear that these bases of jurisdictions must, by their very nature and purpose, confer the authority to review the decisions of *inferior* courts, and by this it is not meant the High Court *vis-à-vis* the Court of Appeal but rather administrative tribunals and the subordinate courts. In *Wong Hong Toy v. Public Prosecutor*,<sup>23</sup> Wee Chong Jin C.J., delivering the judgment of the Court of Appeal, cited with approval two passages in the decision of the House of Lords in *Re Recal Communications Ltd.*<sup>24</sup> to reject the appellants' prayers to invoke the powers of judicial review by the then Court of Criminal Appeal over the High Court. First, Lord Diplock said:

The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws ... There is simply no room for error going to this jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by *inferior courts* and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all.<sup>25</sup>

Secondly, Lord Salmon said, the "jurisdiction of the Court of Appeal is defined by statute. It has no jurisdiction to make a judicial review of a decision of the High Court".<sup>26</sup>

More recently, Tay Yong Kwang J. in the High Court case of *Tee Kok Boon v. Public Prosecutor*<sup>27</sup> held that each High Court had coordinate jurisdiction and one High Court could not profess to exercise revisionary or supervisory jurisdiction over another.<sup>28</sup> Tay J. further held that even the Court of Appeal did not have powers

<sup>22</sup> *Ng Chye Huey*, *supra* note 7 at 137, para. 63 [emphasis in original].

<sup>23</sup> [1994] 2 S.L.R. 396.

<sup>24</sup> [1981] A.C. 374.

<sup>25</sup> *Ibid.* at 384 [emphasis in original].

<sup>26</sup> *Ibid.* at 386.

<sup>27</sup> [2006] 4 S.L.R. 398.

<sup>28</sup> *Ibid.* at 402, para. 15.

of judicial review over the High Court.<sup>29</sup> Similarly, the Court of Appeal could not reopen or review the merits of a case already decided by it, although the subsequent court comprised totally different judges from the earlier one.

The reason why the powers of revision and supervision, *even if* within the statutory jurisdiction of the Court of Appeal, can only be used with respect to inferior courts stems from the historical *basis* of these powers. It has been pointed out that the supervisory jurisdiction traditionally found expression in the High Court's power to exercise its power of judicial review over inferior tribunals through the issuance of the prerogative writs, whereas the court's revisionary jurisdiction is a creature of statute formulated to remedy perceived inadequacies in this inherent supervisory jurisdiction over inferior courts.<sup>30</sup> However, with respect to the reach of this revisionary jurisdiction, it has been pointed out that while supervision extends to all administrative tribunals, revision is confined to subordinate courts.<sup>31</sup> As such, the ambits of both bases of jurisdiction do not permit the Court of Appeal to review its own decisions.

## 2. *The argument based on Koh Zhan Quan Tony cannot succeed*

Secondly, although *Koh Zhan Quan Tony* seemingly provides an argument which characterises an application to reopen criminal cases as one challenging the jurisdiction of the Court of Appeal, the threshold question then becomes *what* is this issue of jurisdiction which ought to have been raised before the Court of Appeal previously? Since the grounds of such an application largely concern the consideration of (for example) the now available new evidence, it may be presumed that any challenge of the "jurisdiction" of the Court of Appeal in the earlier appeal would necessarily be on its "jurisdiction" to consider the appeal without the assistance of such new evidence which was not admitted into evidence then. While framed in terms of jurisdiction, such a characterisation is really, in substance and effect, a prayer for the Court of Appeal to review its own decision. It is not properly, as was the case in *Koh Zhan Quan Tony*, a challenge on the authority of the Court of Appeal to hear an appeal but rather an invitation for the Court of Appeal to review the *process* by which it reached its decision in the said appeal.

By this characterisation (*i.e.*, that the application to reopen a case on the basis of jurisdiction is in fact one seeking a review of an earlier decision), it is plainly obvious that the Court of Appeal has no revisionary or supervisory jurisdiction according to the express terms of the *SCJA*. It must thus follow that it cannot entertain the application to review its own decision (whichever of these two bases of jurisdiction the application is based) due to lack of jurisdiction.

### C. *Conclusion of The Court of Appeal's Statutory Jurisdiction to Reopen Criminal Cases*

To summarise, in relation to the issue of whether the Court of Appeal has the jurisdiction to entertain an application to reopen criminal cases, as considered from a

---

<sup>29</sup> *Ibid.*

<sup>30</sup> Tan Yock Lin, "Appellate, Supervisory and Revisionary Jurisdiction" in Walter Woon, ed., *The Singapore Legal System* (Singapore: Longman, 1989) at 233–234. See also *Ng Chye Huey*, *supra* note 7 at 129, para. 47.

<sup>31</sup> Tan, *Ibid.*



*statutory* perspective, it is submitted that it does not. This stems from a consideration of the Court of Appeal's criminal jurisdiction conferred by way of the relevant statutory provisions in the *SCJA*. It is first clear that an application to reopen criminal cases cannot be an appeal against the decision of the Court of Appeal in a previously decided appeal; such an argument would fail for want of jurisdiction as it is well-established that the Court of Appeal does not possess the *statutory* jurisdiction to reopen a case it has already decided. Next, such an application likewise cannot succeed by being characterised as either a revision or review of the Court of Appeal's prior decision or a jurisdictional issue under *Koh Zhan Quan Tony*. For these varied reasons, it is submitted that the Court of Appeal does *not* have the *statutory* jurisdiction to entertain an application to reopen criminal cases *in the first place*. However, this article will now go on to consider whether the Court of Appeal has the *inherent* jurisdiction to do so.

### III. WHETHER THE COURT OF APPEAL HAS THE INHERENT JURISDICTION TO REOPEN CRIMINAL CASES FINALLY DISPOSED OF ON APPEAL

#### A. Possible Approach from the Court of Appeal's Inherent Jurisdiction<sup>32</sup>

Although there is no statutorily-derived jurisdiction which would allow the Court of Appeal to review its own previous determinations, it has been pointed out that the English courts accept that there is exceptionally an inherent jurisdiction to relist (and effectively re-open) an appeal which has been dismissed, where the previous hearing is a nullity, or where owing to some defect in the procedure the appellant has on the appeal being dismissed suffered an injustice.<sup>33</sup>

The learned author argues that it is possible for such an inherent jurisdiction to exist in the Singapore courts.<sup>34</sup> This article now considers if such an argument is possible to vest in the Court of Appeal the requisite jurisdiction to entertain the application. However, it must first be examined whether the Court of Appeal properly has an inherent jurisdiction to begin with.

#### B. The Inherent Jurisdiction of the Court of Appeal

##### 1. Recognition of inherent jurisdiction in both criminal and civil proceedings

It appears to be beyond dispute that the High Court and the Court of Appeal possess an inherent jurisdiction in respect of both civil and criminal proceedings, even though this inherent jurisdiction is far more often applied and explained in the context of the former.

---

<sup>32</sup> For a recent case on inherent jurisdiction, see also *Attorney-General v. Tee Kok Boon* [2008] 2 S.L.R. 412 at 452–454, paras. 123–131.

<sup>33</sup> Tan Yock Lin, *Criminal Procedure* (Singapore: LexisNexis, 1996) at XIX, paras. 205–251, citing the cases of *R v. Berry (No. 2)* [1991] 1 W.L.R. 125 and *R v. Daniel* [1977] Q.B. 364.

<sup>34</sup> *Ibid.* at XIX, para. 251.

(a) *Civil proceedings*: The recognition of the Court of Appeal's inherent jurisdiction in civil proceedings can be found in many recent cases including *Wee Soon Kim Anthony v. Law Society of Singapore*,<sup>35</sup> where Chao Hick Tin J.A. said:

It seems to us clear that by its very nature, how an inherent jurisdiction, whether as set out in [order 92 rule 4 of the Rules of Court] or under common law, should be exercised should not be circumscribed by rigid criteria or tests. In each instance the court must exercise it judiciously. In his lecture on 'The Inherent Jurisdiction of the Court' published in *Current Legal Problems 1970*, Sir Jack Jacob (until lately the General Editor of the *Supreme Court Practice*) opined that this jurisdiction may be invoked when it is just and equitable to do so and in particular to ensure the observance of the process of law, to prevent improper vexation or oppression and to do justice between the parties. Without intending to be exhaustive, we think an essential touchstone is really that of 'need'.<sup>36</sup>

The recognition of the Court of Appeal's inherent jurisdiction is implicit from the passage cited above; necessarily, by setting the parameters within which this jurisdiction can be invoked, the Court of Appeal recognised its existence. In a similar vein, in *Roberto Building Material Pte Ltd. v. Oversea-Chinese Banking Corp Ltd.*,<sup>37</sup> Chao J.A., delivering the judgment of the Court of Appeal, referred to the above principles and also observed that accordingly, "this *inherent jurisdiction* should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. The circumstances must be special."<sup>38</sup>

(b) *Criminal proceedings*: The recognition of this inherent jurisdiction in the context of criminal cases, which is of immediate relevance in the present discussion, though sparse, is not absent. There are two reported cases in which this inherent jurisdiction was referred to and briefly explained.

In *Public Prosecutor v. Ho So Mui*,<sup>39</sup> which was an appeal by the Prosecution against the acquittal of the respondent for a drug-related offence, the respondent argued that the appellant had compromised the respondent's chance of a fair trial by interviewing her and urged the Court of Appeal, in the exercise of its inherent jurisdiction, to prevent such an abuse of power by staying the proceedings against the respondent. In the result, as the Court of Appeal dismissed the appeal, it saw no need to order a stay of the proceedings. However, it expressed that it could have the inherent jurisdiction to order a stay in the right circumstances:

We would record our grave doubts over the correctness of the appellant's actions in the days after the respondent's acquittal below. However, in view of our decision to dismiss the appeal, and in the absence of full argument on the nature and extent of the court's *inherent jurisdiction* over its criminal procedure, we would decline to express any definitive view on Mr Sant Singh's contentions although *we are of the preliminary view that such a power to stay criminal proceedings in*

---

<sup>35</sup> [2001] 4 S.L.R. 25 [*Wee Soon Kim Anthony*].

<sup>36</sup> *Ibid.* at 32, para. 27.

<sup>37</sup> [2003] 2 S.L.R. 353.

<sup>38</sup> *Ibid.* at 358, para. 17 [emphasis added].

<sup>39</sup> [1993] 2 S.L.R. 59 [*Ho So Mui*].

*circumstances where it can be shown that the accused could not have a fair trial exists.*<sup>40</sup>

This statement was clearly made in the context of criminal proceedings, and thus recognises that the inherent jurisdiction of the Court of Appeal exists even in such proceedings.

In *Salwant Singh s/o Amer Singh v. Public Prosecutor (No. 2)*,<sup>41</sup> the Court of Appeal likewise recognised the existence of its inherent jurisdiction in the context of criminal proceedings. In this case, upon the Prosecution's appeal against the district judge's sentence of the appellant to 12 years' preventive detention for five charges of cheating under section 420 of the *Penal Code*, the High Court enhanced the sentence to 20 years' preventive detention. Shortly after the appeal, the appellant requested the notes recorded at the pre-trial conferences,<sup>42</sup> including any video recording and any orders issued at those hearings. The Registrar of the Subordinate Courts refused this request and this decision was upheld on appeal on the grounds that the appellant's request had no legal basis in law. The appellant subsequently filed a criminal motion heard by Lai Kew Chai J. who held that as PTCs only dealt with the administrative aspects of case management and no judicial decisions were made at the PTCs, the notes recorded did not form part of the "record of proceedings" within the meaning of section 400(1) of the *Criminal Procedure Code*.<sup>43</sup> The appellant filed an appeal against that decision.

While the Court of Appeal in *Salwant Singh s/o Amer Singh* dismissed the appeal on the primary ground that the notes taken at the PTCs were irrelevant to the cross-appeals, it went on to hold that it did not follow that just because section 400(1) of the *CPC* did not apply, that the court could not, pursuant to its *inherent jurisdiction*, have ordered the production of the notes taken at the PTCs.<sup>44</sup> It then went on to consider what had transpired at the trial and the appeal before the High Court in deciding whether to exercise its inherent jurisdiction. Eventually, while the Court of Appeal declined to exercise its inherent jurisdiction on the basis that the appellant was doing nothing more than to abuse the legal process, it is clear that it had *recognised* that it had an inherent jurisdiction even in the context of criminal proceedings.

## 2. Source of this inherent jurisdiction

While the recognition of this inherent jurisdiction has been plentiful (albeit more so in the civil sphere rather than the criminal sphere), the source of this jurisdiction is, however, less clear. It is important to consider the source or basis of the inherent jurisdiction for in the same way it can confer the jurisdiction, it may also limit or confine the scope of its exercise.

(a) *Source of inherent jurisdiction from status of court*: After an extensive review of the possible statutory provisions, an eminent academic has come to the conclusion that there is possibly no provision which confers such a jurisdiction on the courts.<sup>45</sup>

---

<sup>40</sup> *Ibid.* at 67 [emphasis added].

<sup>41</sup> [2005] 1 S.L.R. 632 [*Salwant Singh s/o Amer Singh*].

<sup>42</sup> Hereinafter referred to as "PTCs".

<sup>43</sup> Cap. 68, 1985 Rev. Ed. Sing. [*CPC*].

<sup>44</sup> *Salwant Singh s/o Amer Singh*, *supra* note 41 at 636, para. 11.

<sup>45</sup> Jeffrey Pinsler, "The Inherent Powers of the Court" [1997] Sing. J.L.S. 1.

Instead, he pointed out that the clue to the source of the inherent jurisdiction lies in the terminology itself.<sup>46</sup> In this academic's view, the word "inherent" suggests that the powers arise from the status and role of the court itself, rather than from an external vesting source such as statutory law. This conclusion can be justified on the basis that the court must have a general or residuary source of powers beyond the confines of procedural rules, to ensure that it has the appropriate authority to deal effectively with the abuse of its process, and that justice is never compromised by the inadequacy of written law.<sup>47</sup> The point was perhaps, with respect, well-stated by Chan Sek Keong J. in *Emilia Shipping Inc v. State Enterprises for Pulp and Paper Industries*<sup>48</sup> when he said that the court must, as "the master of its own process",<sup>49</sup> have inherent power to refuse to entertain proceedings which constitute an abuse of process.

(b) *Source is not Order 92 rule 4 of the Rules of the Supreme Court*: It is also necessary to clarify that the existence of such an inherent jurisdiction is perhaps statutorily *recognised* by Order 92 rule 4 of the Rules of the Supreme Court,<sup>50</sup> which provides as follows:

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.<sup>51</sup>

In the High Court decision of *Heng Joo See v. Ho Pol Ling*,<sup>52</sup> Punch Coomaraswamy J. clarified that Order 92 rule 4 does not provide the inherent jurisdiction, but only recognised it. He held that:

[Order 92 rule 4] does not define or give the inherent jurisdiction. It merely states that the [ROC] shall not limit or affect the inherent powers which are common law powers. These powers have been examined by Master Jacob (later Sir Jack Jacob, Senior Master of the Supreme Court and Queen's Remembrancer) in an instructive lecture, since published in (1970) 23 Current Legal Problems at p 23. ...<sup>53</sup>

Coomaraswamy J. accepted that inherent jurisdiction involved:

the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them... .<sup>54</sup>

---

<sup>46</sup> *Ibid.* at 10.

<sup>47</sup> *Ibid.*

<sup>48</sup> [1991] 2 M.L.J. 379.

<sup>49</sup> *Ibid.* at 381.

<sup>50</sup> *Rules of the Supreme Court of Singapore* (Cap. 322, R 5, 2006 Rev. Ed. Sing.) [ROC].

<sup>51</sup> See also *Wellmix Organics (International) Pte Ltd. v. Lau Yu Man* [2006] 2 S.L.R. 117 [*Wellmix Organics*] at 143, para. 80.

<sup>52</sup> [1993] 3 S.L.R. 850.

<sup>53</sup> *Ibid.* at 855.

<sup>54</sup> *Ibid.*

He thus adopted the definition put forward by Sir Jack Jacob in his influential article.<sup>55</sup>

It is important to recognise that the *source* of the inherent jurisdiction is *not* Order 92 rule 4. Were it otherwise, there would be no need to discuss the applicability of the Court of Appeal's inherent jurisdiction in the context of reopening criminal cases any further since Order 1 rule 2(2) of the ROC provides that the ROC shall not apply to criminal proceedings, of which an application to reopen a *criminal* case surely is. Indeed, as has been noted before,<sup>56</sup> if Order 92 rule 4 were treated as the conferring provision of the inherent jurisdiction, then Order 1 rule 2(2) would exclude the operation of the courts' inherent jurisdiction in criminal proceedings. This result would be contrary to existing case law, which establishes that the court has the same power to govern and regulate its process in order to prevent injustice and abuse in criminal proceedings as it has in civil proceedings.

Accordingly, given that the *source* of the inherent jurisdiction is from the status of the courts and not a jurisdiction-conferring provision, it is the courts themselves which necessarily set the limit of this jurisdiction. It will now be considered what that scope is.

### 3. *The scope of this inherent jurisdiction*

(a) *Civil proceedings*: In the context of civil proceedings, the courts have stressed the need for "necessity" before exercising their inherent jurisdiction. As Sundaresh Menon J.C. said in *UMCI Ltd. v. Tokio Marine & Fire Insurance Co. (Singapore) Pte. Ltd. and Others*,<sup>57</sup> the ambit of the court's inherent jurisdiction was reviewed in some detail by Andrew Phang Boon Leong J. in *Wellmix Organics*. With respect, the following observation that Phang J. made is instructive:

The parameters of O 92 r 4 are, understandably, not particularly precise. What does appear clear is that if there is an existing rule (whether by way of statute or subsidiary legislation or rule of court) already covering the situation at hand, the courts would generally *not* invoke its inherent powers under O 92 r 4, save perhaps in the most exceptional circumstances (see, for example, the Singapore Court of Appeal decision of *Four Pillars Enterprises Co Ltd. v. Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737 at [27] and the Singapore High Court decision of *Tan Kok Ing v. Tan Swee Meng* [2003] 1 SLR 657). It is commonsensical that O 92 r 4 was not intended to allow the courts *carte blanche* to devise any procedural remedy they think fit. That would be the very antithesis of what the rule is intended to achieve. The key criterion justifying invocation of the rule is therefore that of "need"—in order that justice be done and/or that injustice or abuse of process of the court be avoided.<sup>58</sup>

---

<sup>55</sup> Jack Jacob, "The Inherent Jurisdiction of the Court" (1970) C.L.P. 23 at 51.

<sup>56</sup> Pinsler, *supra* note 45 at 37.

<sup>57</sup> [2006] 4 S.L.R. 95 [*UMCI Ltd.*] at 89.

<sup>58</sup> *Wellmix Organics*, *supra* note 51 at 143, para. 81 [emphasis in original].

The nature of this analysis, in particular the requirement of “necessity”, was agreed with by Menon J.C. in *UMCI Ltd.* itself. Menon J.C. said as follows:

Ms Tan submitted that the principle to be extracted from *Wellmix* ([89] *supra*) is that “*the touchstone for invoking the court’s inherent jurisdiction is necessity and specifically, it is the necessity to prevent injustice or abuse of the process of the court. I agree with this. I would add that in looking at the question of necessity in the context of the court’s inherent jurisdiction, one must take a sensible approach that has regard to all the circumstances of the case....*”<sup>59</sup>

A precise scope of the court’s inherent jurisdiction was more fully set out in *Singapore Court Practice 2006*, drawing authority from the decision of the Court of Appeal in *Wee Soon Kim Anthony*,<sup>60</sup> as follows:<sup>61</sup>

- (a) O 92 r 4 refers to the inherent jurisdiction of the court. It provides that the court may make orders which are necessary to “prevent injustice” or “prevent an abuse of the process of court”.
- (b) The exercise of the court’s inherent jurisdiction is not limited to a strict sense of “injustice”. For example, the jurisdiction may be exercised to prevent or avoid a situation of “serious hardship or difficulty or danger”. The court must be flexible and not bind itself to “rigid criteria or tests”.
- (c) As long as the court acts “judiciously” or in a “just and equitable” manner, it does not have to limit the circumstances in which it can exercise its jurisdiction.
- (d) An essential consideration is the “need” of the party concerned.
- (e) However, this need must be of a sufficient degree to justify the exercise of the court’s inherent jurisdiction. It will not be exercised merely to satisfy the party’s interest or desire.
- (f) Such a need does not arise if there is a procedural mechanism in place (whether provided by statute or the rules of court) which effectively governs the circumstances.
- (g) The court may consider its own needs as, for example, whether it would be able to deliberate more effectively if it were to exercise its inherent jurisdiction.
- (h) The court should not exercise its inherent jurisdiction if merely to do so would not cause prejudice to the other party.
- (i) However, the issue of whether prejudice would be suffered by one party or the other as a result of the court’s decision to exercise, or refrain from exercising, its inherent jurisdiction is a consideration to be taken into account.
- (j) There must be “reasonably strong or compelling reasons” why the court should exercise its inherent jurisdiction.

As a result, the Singapore courts have routinely exercised their inherent jurisdiction in civil proceedings to, for example, hear an application where no provision is made by the *ROC*.<sup>62</sup>

<sup>59</sup> *UMCI Ltd.*, *supra* note 57 at 120, para. 92 [emphasis added].

<sup>60</sup> *Supra* note 35.

<sup>61</sup> Jeffrey Pinsler, *Singapore Court Practice 2006* (Singapore: LexisNexis, 2006) at 10.

<sup>62</sup> See e.g., *Tan Leh Eng v. Ang Choo Hock* (Divorce Petition No. 2833 of 1993, S.I.C. 3017 of 1996); correct its own defective orders or set them aside (see *United Overseas Bank v. Chung Khiaw Bank*

(b) *Criminal proceedings*: However, in the context of criminal proceedings, the Singapore courts have appeared far less willing to exercise their inherent jurisdiction. Indeed, the fact that there are only two criminal cases in which this inherent jurisdiction has been referred to (without much elaboration on its scope) speaks volumes about the court's apparent reluctance in this regard.

In both *Abdullah bin A Rahman*<sup>63</sup> and *Lim Choon Chye*,<sup>64</sup> the Court of Appeal did not consider exercising its inherent jurisdiction to entertain the motion concerned even though the emergence of new evidence *could* cause serious injustice if the appeals were not reopened. In *Koh Zhan Quan Tony*, the Court of Appeal stated its reluctance against invoking its inherent jurisdiction (it is assumed) *in criminal proceedings* if its jurisdiction could be statutorily derived:

However, it is also true that this court is a creature of statute and that its own jurisdiction and power to determine its own jurisdiction, so to speak, in the manner described briefly in the preceding paragraph ought to be premised, in the final analysis, on statutory authority. It is true that one other alternative is to hold that this court simply has the inherent jurisdiction, without more, to rule on its own jurisdiction. However, it seems to us that this approach ought, if applicable, to be itself based on some statutory authority. *The invocation of the concept of inherent jurisdiction without more seems to us to (potentially at least) open the door that might lead to perceptions of possible arbitrariness.* Even the possibility of such perceptions arising must be assiduously avoided in order that the legitimacy of the law in general and of the courts in particular not be sullied in any way.<sup>65</sup>

However, there is arguably one case in which the Court of Appeal's inherent jurisdiction was exercised to order a rehearing of an appeal although its grounds of decision did not adopt this reasoning. In *Ramachandran a/l Suppiah v. Public Prosecutor*,<sup>66</sup> the applicants' appeals against conviction and sentence of death for murder were heard by the Court of Appeal (sitting as the then Court of Criminal Appeal) on 13 April 1989, one week before the *Judicial Committee (Amendment) Act*<sup>67</sup> came into operation on 21 April 1989. One of the judges who sat on the appellate Bench during the hearing of these appeals then retired on 30 September 1989. The appeals were purportedly dismissed some 21 months later in a reserved judgment dated 10 January 1991, which was also signed by the retired judge. The applicants applied by way of criminal motion for leave to appeal to the Privy Council for an order that the judgment dated 10 January 1991 be declared invalid and the convictions set aside.

In ordering a rehearing of the appeal, the Court of Appeal reasoned that the judgment dated 10 January 1991 was invalid. Yong Pung How C.J., delivering the grounds of decision of the Court of Appeal, held that the tribunal which signed the judgment dated 10 January 1991 was not a duly constituted Court of Criminal Appeal within the description contained in section 43 of the *SCJA*.<sup>68</sup> Therefore, it was not

---

[1968] 2 M.L.J. 85); and clarify a court order by making a consequential order (see *Godfrey QC v. UBS AG* [2004] 4 S.L.R. 411).

<sup>63</sup> *Supra* note 6.

<sup>64</sup> *Supra* note 16.

<sup>65</sup> *Koh Zhan Quan Tony*, *supra* note 15 at 836, para. 15 [emphasis added].

<sup>66</sup> [1992] 2 S.L.R. 707 [*Ramachandran a/l Suppiah*].

<sup>67</sup> *Judicial Committee (Amendment) Act* (Act 21/89).

<sup>68</sup> Reference is here made to the edition which was applicable at that time.

competent to deliver judgment pursuant to section 56(1) of that Act. Furthermore, it was not competent to determine the appeals, for that determination occurred only on the date of delivery of judgment and therefore was likewise effected by a tribunal that was not competent to do so.

However, with respect, the important issue of its jurisdiction to entertain the motion in *that* case was not addressed by the Court of Appeal. If the motion was in the nature of a prayer for a review of the Court of Appeal's *own* decision in the earlier appeal, it is apparent from the above discussion that the Court of Appeal had no *statutory* jurisdiction under the *SCJA* to even entertain the motion. Therefore, it is respectfully submitted that the Court of Appeal had in *Ramachandran a/l Suppiah* in fact exercised its *inherent jurisdiction* to entertain the motion and its power thereunder to order the rehearing before a new Court of Criminal Appeal without saying so.

#### 4. *Apparent distinction between civil and criminal proceedings*<sup>69</sup>

It is evident from the preceding analysis that there is an *apparent* distinction between the exercise of the Court of Appeal's inherent jurisdiction in civil and criminal proceedings. While the Court of Appeal has been fairly willing to consider and exercise its inherent jurisdiction in the context of civil proceedings, it is far less likely to do so in criminal proceedings. If the analysis above of *Ramachandran a/l Suppiah* is accepted, then it may be that *even in the exercise of such inherent jurisdiction* in criminal proceedings, the Court of Appeal has been reluctant to acknowledge or characterise it as such.

With respect, it is submitted that this distinction is artificial. If, as argued above,<sup>70</sup> the *source* of the inherent jurisdiction is from the status of the court *itself* and derives no statutory genesis (and hence limits) from either the *SCJA* or *CPC*, then it is difficult to understand why the Court of Appeal continues to shut out the *possibility* of exercising its inherent jurisdiction in criminal proceedings. Indeed, it could even be said that the exercise of its inherent jurisdiction in criminal proceedings is even more important since it is the liberty and life of the subject person at stake, as opposed to mainly financial claims in civil proceedings.<sup>71</sup> It is thus submitted that the inherent jurisdiction of the Court of Appeal should be invoked, in deserving cases and subject to *reasonable* and *rational* judicial controls, to ensure that justice is done and seen to be done.

#### C. *Approach of Other Jurisdictions*

Indeed, the criminal courts of other jurisdictions have shown a greater willingness to turn to their inherent jurisdiction to at least entertain applications to reopen *criminal* cases which have already been dismissed on appeal.

---

<sup>69</sup> It could of course be argued that the differences between the civil and criminal process and the nature of cases justifiably restrict the inherent jurisdiction of the Court of Appeal in criminal cases. However, this is not the thesis of the present article and indeed the views expressed herein are to the contrary: there is no basis for treating inherent jurisdiction as being more broadly available in one but not the other if the objective limiting criterion is one of "necessity" or the like.

<sup>70</sup> See *supra* Part III.B.2.

<sup>71</sup> This is of course is not to say that such financial claims cannot indirectly affect the lives of related parties.



## 1. Malaysia

In Malaysia, the Federal Court has gone very far to apply the seminal decision of the English Court of Appeal in *Taylor v. Lawrence*,<sup>72</sup> in which the English Court of Appeal held that it possesses an inherent jurisdiction to reopen a civil appeal if significant injustice had probably occurred and there is no alternative effective remedy. Accordingly, as has been noted in *Criminal Procedure*,<sup>73</sup> it has been held in *Chu Tak Fai v. Public Prosecutor*<sup>74</sup> and *Tan Sri Eric Chia Eng Hock v. Public Prosecutor (No. 1)*<sup>75</sup> that the Federal Court possesses an inherent jurisdiction to reopen a criminal appeal if a significant injustice has probably occurred and there is no alternative effective remedy.

(a) *Chu Tak Fai v. Public Prosecutor*: In *Chu Tak Fai*, the applicant was charged with trafficking heroin under the Malaysian *Dangerous Drugs Act 1952* and was duly convicted by the Malaysian High Court and sentenced to death. The applicant's appeal to the Malaysian Court of Appeal was dismissed. The applicant appealed to the Federal Court which also dismissed the appeal. The applicant then applied under rule 137 of the Rules of the Federal Court 1995<sup>76</sup> to set aside his conviction and sentence of death or make such order or further order deemed fit and proper in the interest of justice. Rule 137 provides as follows:

For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to *hear any application* or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. [Emphasis added to shown difference from our Order 92 rule 4].

It was submitted by the applicant that the evidence of the chemist was defective in that the weight of the samples used for the analysis of the drug was not stated. At the outset of the proceedings, the Prosecution raised a preliminary objection to the effect that rule 137 does not give the Federal Court the jurisdiction to hear this application nor to reopen and review the case on the merits as it had been conclusively settled by the courts before.

In dismissing the preliminary objection, the Federal Court held that the principles governing the jurisdiction and exercise of the power of review by the Federal Court are well-settled. It was held that the Federal Court, as the apex court, does have the jurisdiction and power to hear and review any matter brought before the court under rule 137 provided that such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances where there is no alternative remedy available to prevent an injustice or to prevent an abuse of the process of the court. In doing so, the Federal Court cited several cases in which this inherent jurisdiction was exercised. It

---

<sup>72</sup> [2002] 3 WLR 640 [*Taylor v. Lawrence*].

<sup>73</sup> *Supra* note 33 at XIX, para. 251.

<sup>74</sup> [2007] 1 M.L.J. 201 [*Chu Tak Fai*].

<sup>75</sup> [2007] 2 M.L.J. 101 [*Eric Chia Eng Hock*].

<sup>76</sup> It should also be noted that the Rules of the Federal Court 1995 seemingly apply to criminal proceedings as well, given that its Chapter 4 concern "Criminal Appeals". This is unlike the *ROC*; however, as was discussed earlier, because O. 92 r. 4 only recognises the existence of the court's inherent jurisdiction and does not confer it, this distinction of the reach of the Rules is irrelevant to the subsequent discussion.

is only necessary to make reference to some of these cases to show the very different approach taken by the Singapore courts.

The Federal Court first pointed out that in *Chia Yan Tek & Anor. v. Ng Swee Kiat & Anor.*,<sup>77</sup> it invoked its inherent jurisdiction recognised by rule 137 to set aside its judgment on the ground that the court was not duly constituted as there was only one judge remaining out of the three presiding judges, the other two having retired, when the judgment was pronounced. As would be appreciated, this is virtually identical with the situation in *Ramachandran a/l Suppiah*.<sup>78</sup> However, unlike the reasoning of our Court of Appeal, the Federal Court in *Chia Yan Tek* referred explicitly to its inherent jurisdiction when it decided that it had the jurisdiction to entertain the application therein and later to set aside the affected judgment.

The Federal Court in *Chu Tak Fai* also pointed out that in *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor*,<sup>79</sup> it held that it had the jurisdiction to hear an application under rule 137 where it was found necessary to prevent injustice or to prevent an abuse of the process of the court. It was held in *Dato' Seri Anwar bin Ibrahim* that under rule 137, the Federal Court has the inherent jurisdiction and power to *reopen and review any matter decided by the court* if there was allegation of injustice or abuse of the process of the court. However, Siti Norma Yaakob F.C.J. cautioned that the exercise of the jurisdiction can only be undertaken sparingly and only in rare and exceptional circumstances to prevent injustice. In that case, the Federal Court dismissed the applicant's applications to allow fresh evidence to be adduced and to have the applicant's convictions and sentences set aside for lack of merits.

Again, as would be apparent, this is a similar situation to the cases of *Abdullah bin A Rahman* and *Lim Choon Chye*.<sup>80</sup> However, once again, unlike the approach taken by the Court of Appeal, the Federal Court was willing to consider that it had the *inherent* jurisdiction to entertain the applications and even the power thereunder to adduce new evidence although it subsequently declined to do so for lack of merits. While it could be that the issue of inherent jurisdiction was not argued in *Abdullah bin A Rahman* and *Lim Choon Chye*, it remained the case that the Court of Appeal did not even consider the possibility of exercising its inherent jurisdiction in those cases to entertain the motions therein.

(b) *Tan Sri Eric Chia Eng Hock v. Public Prosecutor (No. 1)*: In *Eric Chia Eng Hock*, the accused was charged in the Sessions Court at Kuala Lumpur with an offence under section 409 of the (Malaysian) *Penal Code*. The Prosecution sought to admit, in the course of its case, the evidence of six witnesses recorded in Hong Kong pursuant to section 8(3) of the Malaysian *Mutual Assistance in Criminal Matters Act 2002*. The defence objected to the admissibility of the record of evidence. The sessions court judge upheld the objection on the ground that there was no compliance with the Malaysian *Evidence Act 1950* and the Malaysian *Criminal Procedure Code*. Accordingly, he ruled that the record of evidence was inadmissible. Subsequently, on the Prosecution's application, the Malaysian High Court exercised its power of revision and ordered that the record of proceedings be admitted in evidence. The

---

<sup>77</sup> [2001] 4 M.L.J. 1 [*Chia Yan Tek*].

<sup>78</sup> Discussed *supra* at Part III.B.3.(b).

<sup>79</sup> [2004] 3 M.L.J. 517 [*Dato' Seri Anwar bin Ibrahim*].

<sup>80</sup> See *supra* Part III.B.3.(b).

accused appealed to the Malaysian Court of Appeal. The appeal was dismissed by that court. The accused then filed, *inter alia*, a motion under rule 137 praying for the Federal Court to exercise its inherent jurisdiction to review the decision of the Malaysian Court of Appeal. The Prosecution contended that this was not case in which the inherent jurisdiction of the Federal Court could be exercised.

In rejecting the Prosecution's objection, the Federal Court held that rule 137 *did not give any new powers*; it only provides that those which the court already inherently possesses shall be preserved and was only inserted lest it should be considered that the only powers possessed by the court are those expressly conferred by law. In doing so, the Federal Court cited its own decisions of *Rama Chandran v. The Industrial Court of Malaysia & Anor*<sup>81</sup> and *Chan Yock Cher v. Chan Teong Peng*.<sup>82</sup> The Federal Court thus held that it is clear that the inherent jurisdiction is of common law origin and is necessary for the court to act effectively within the jurisdiction that has been conferred, subject to its recognition by federal law.

In the event, the Federal Court decided that its inherent power under rule 137 can therefore be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy. It decided that it had jurisdiction to entertain the accused's motion in that case, but the burden was on the accused to persuade the court that "the requirements of [rule 137] have been complied with",<sup>83</sup> presumably meaning that the merits of the application would be heard at a later date.

(c) *Analysis of the Malaysian position*: From the decisions of *Chu Tak Fai* and *Eric Chia Eng Hock*, and the cases cited therein, it is clear that the Federal Court has the jurisdiction to entertain applications to review its own prior decisions and the further power<sup>84</sup> to order for the rehearing of appeals if there is sufficient merit in the said applications. In this connection, the Malaysian courts have stressed that this jurisdiction is to be exercised only "sparingly and only in rare and exceptional circumstances". This is similar to the requirement of "necessity" as required by the Singapore courts.

With respect to rule 137, it may perhaps be of some concern that the words "hear any application" are absent in our Order 92 rule 4, leading to the plausible conclusion that the Singapore courts are precluded, in the exercise of their inherent jurisdiction, to hear any application which the parties may bring before them. However, this conclusion can be objected to for two reasons. First, if it is accepted (and as suggested above<sup>85</sup>) that the *source* of the inherent jurisdiction is the status of the courts and *not* Order 92 rule 4, then what Order 92 rule 4 says or does not say has no bearing on the scope of the inherent jurisdiction of the courts. Secondly, and from a logical perspective, if the Singapore courts are empowered to make any order as may be necessary, it necessarily must follow that its inherent jurisdiction be wide enough to hear any application which comes before it, for it would be very artificial indeed for its inherent jurisdiction to be divided up in such a fashion.

In summary, therefore, the Malaysian position shows that the inherent jurisdiction of the Singapore courts can be used in a similar manner as the Malaysian courts to

---

<sup>81</sup> [1997] 1 M.L.J. 145.

<sup>82</sup> [2005] 1 M.L.J. 101.

<sup>83</sup> *Eric Chia Eng Hock*, *supra* note 75 at 129, para. 65.

<sup>84</sup> Or "jurisdiction", as the word is used in its wider sense by the cases.

<sup>85</sup> See *supra* Part III.B.2.

enable the Court of Appeal to entertain an application to reopen criminal cases, provided that it is “necessary” to do so.

## 2. India

(a) *The relevant authorities:* In India, there are also specific provisions of law dealing with the inherent jurisdiction of the court. They are similar to our Order 92 rule 4 and the Malaysian rule 137. Section 151 of the Indian *Code of Civil Procedure* reads as follows:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Further, section 482 of the Indian *Criminal Procedure Code* reads as follows:

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

In *Eric Chia Eng Hock*, the Malaysian Federal Court considered that Indian authorities on the scope and limitations on the exercise of the inherent jurisdiction of the court would be of relevance in the application of rule 137. It stated, in relation to the scope of the inherent jurisdiction in India, that:<sup>86</sup>

The power is undefined and indefinable and must be exercised with great caution. It has to be exercised sparingly with circumspection and in the rarest of rare cases (see *Kurukshetra University v. State of Haryana* AIR 1977 SC 2229). It must be so exercised only where resort to it is justified by the tests laid down in the section itself which provides for inherent jurisdiction (see *Talab Haji Hussain v. Madhukar Purshottam Mondkar* AIR 1958 SC 376). It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist (see *State of Punjab v. Kasturi Lal* 1999 SC 2554). It is in addition to and complementary to the powers conferred under the Code of Civil Procedure and cannot override the provisions of the Code (see *Manoharlal Chopra v. Seth Hiralal* AIR 1962 SC 527). It is not intended to enable a court to create rights in the parties, but is meant to enable the court to pass such orders for the ends of justice as may be necessary considering the rights which are conferred upon the parties by substantive law (see *Shantaram Tukram Patil v. Dagubai Tukram* 1987 Bom 182). The inherent power cannot be exercised when the Code of Civil Procedure itself provides for a particular situation or contingency or points out to the procedure to be adopted (see *A Venkateswara Rao v. K Sibaiah* AIR 1978 AP 403). It cannot be invoked to nullify an express statutory provision (see *Mahesh Chandra Gupta v. State of MP* AIR 1991 MP 226). Nor can it be invoked to override an express provision of law prohibiting interference (see *Pambhi v. State* AIR 1952 All 526), or to pass an order which would conflict with the provision of the Code of Civil Procedure (see *Re Gurnath Narayan Betgori (Criminal Revision Application No*

---

<sup>86</sup> *Eric Chia Eng Hock*, *supra* note 75 at 127, para. 61.

80 of 1924) AIR 1924 Bom 485), or to extend the powers given by the statute (see *Marudayya Thevar v. Shanmugasundara Thevar* AIR 1926 Mad 139), or where there is an express provision in the statute (see *Vishnu Deshpande v. Emperor* AIR 1941 Nag 97). It is not usually invoked when another remedy is available, eg a civil proceeding (see *Re Lloyds Bank (Criminal Application for Revision No 261 of 1933)* 35 Cr LJ 1028) or an appeal (see *Hari Shankar Dinanath v. State of Madhya Pradesh* AIR 1953 Nag 254). ...

It suffices only to make brief references to a relevant decision in India showing the application of the said principles. The then Federal Court of India in *Raja Prithwi Chand v. Sukhraj Rai*<sup>87</sup> held that:<sup>88</sup>

The Federal Court will not sit as a Court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. The rules which govern the practice of the Judicial Committee and of the House of Lords in matters of review govern the practice of the Federal Court as well in India. Consequently no case in the Federal Court can be re-heard and an order once made is final and cannot be altered. *Nevertheless, in exceptional circumstances, an application for review can be entertained. The Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in by misprision in embodying the judgments, or have been introduced through inadvertence in the details of judgments. It can also supply manifest defects in order to enable the decrees to be enforced, or add explanatory matter, or reconcile inconsistencies. The indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice being done by a Court of last resort as where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. But in no case however can a re-hearing be allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the Court: (1886) 11 A C 660; (1836) 1 Moo PC 117; (1871) L R 3 P C 664 and 14 Mad 439 (PC), Rel [emphasis added].*

(b) *Analysis of the Indian position:* Once again, the Indian authorities reveal that it is possible for the inherent jurisdiction of the Indian courts to be exercised to entertain applications for a review of its prior decisions, subject to the relevant principles of judicial restraint. Of course, given that the relevant provisions of the Indian *Code of Civil Procedure* and the Indian *Criminal Procedure Code* are virtually identical with our Order 92 rule 4, it could be said that the Indian position is even stronger authority than the Malaysian position for the Singapore courts to exercise their inherent jurisdiction in the same manner. However, for reasons discussed earlier, once it is accepted that the *source* of the courts' inherent jurisdiction is not from Order 92 rule 4, then it becomes irrelevant whether the Indian equivalent sections are identical or dissimilar; however, it cannot be denied that the identical phrasing of the relevant sections are not of unpersuasive strength.

---

<sup>87</sup> AIR. 1941 Federal Court 1 (from Patna).

<sup>88</sup> *Ibid.*

### 3. England

(a) *The relevant authorities*: Finally, and as alluded to earlier, the situation in England is similar, albeit in civil proceedings. In *Taylor v. Lawrence*,<sup>89</sup> the applicants applied for permission to reopen an appeal which had been dismissed on the basis that new evidence of the original trial judge's bias came to light after their appeal from his decision had been dismissed.

The English Court of Appeal held that it had an implicit jurisdiction to do what was necessary to achieve its two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice; that, therefore, it could take the exceptional course of reopening proceedings which it had already heard and determined if it was clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy; that, before exercising such a power, the court would consider the effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune; and that where the alternative remedy would be an appeal to the House of Lords the Court of Appeal would only give permission to reopen an appeal if it was satisfied that leave to appeal to the House of Lords would not be given. In the instant case, however, while the application to hear the case was granted, the court dismissed the application as showing no reasonable possibility of bias on the part of the trial judge.

In *Re Uddin*,<sup>90</sup> the English Court of Appeal followed *Taylor v. Lawrence* in holding that whenever the residual jurisdiction established by the judgment in *Taylor v. Lawrence* was sought to be invoked, the court had to be satisfied that the case fell within the exceptional category there described before it would accede to the application and reopen the case. The inherent jurisdiction could only be properly invoked where it was demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, had been critically undermined. The test would generally be met where the process had been corrupted. It might be met where it was shown that a wrong result was earlier arrived at. It would not be met where it was shown only that a wrong result might have been arrived at.

(b) *Analysis of the English position*: The English position, based as it is on the inherent jurisdiction of the courts divorced from any reference to any provision similar to our Order 92 rule 4, may seem of little relevance at first glance. However, it remains relevant by virtue of the extra-statutory *source* of the inherent jurisdiction of the Singapore courts, and hence the English position remains indicative of the scope of the inherent jurisdiction.

The English position remains important for one other reason. In this connection, section 5 of the *CPC* provides that:

**Laws of England, when applicable.**

5. 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 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.

---

<sup>89</sup> *Supra* note 72. See also John Sorabji, "Taylor v. Lawrence Revisited" (2007) C.J.Q. 413.

<sup>90</sup> [2005] 3 All E.R. 550.

An argument might be attempted that the rule as encompassed in *Taylor v. Lawrence*, premised as it is on a law relating to criminal procedure (given that the inherent jurisdiction of the courts should apply equally in both the civil and criminal spheres), is imported into Singapore by section 5 of the *CPC* to allow the Court of Appeal the *statutory* jurisdiction (in addition to its inherent jurisdiction) to entertain an application to reopen criminal cases. Indeed, the learned author of *Criminal Procedure* makes a similar argument,<sup>91</sup> although premised on the English courts' supposed assertion of an inherent jurisdiction, citing the cases of *R v. Medway*,<sup>92</sup> *R v. Essex Quarter Sessions, ex p Larkin*<sup>93</sup> and *R v. Crown Court at Croydon, ex p Clair*.<sup>94</sup>

#### D. Summary of the Scope of Inherent Jurisdiction

From the above discussion, it is clear that it is *open* to the Court of Appeal to exercise its inherent jurisdiction in a similar manner as the foreign courts listed above to entertain an application to reopen criminal cases. It is respectfully submitted that there is no need to unduly restrain this inherent jurisdiction in criminal as opposed to civil proceedings, if indeed this is what the Singapore courts have been doing. However, even if it is accepted that it remains open for the Court of Appeal to exercise its inherent jurisdiction to reopen criminal cases, the remaining question is *when* it should do so.

#### IV. WHEN INHERENT JURISDICTION SHOULD BE EXERCISED TO REOPEN CRIMINAL CASES

The common thread through the cases discussed above in respect to the issue of *whether* to exercise the inherent jurisdiction is that of “necessity”, which manifests itself, first, in the Malaysian context in the expression “sparingly and only in rare and exceptional circumstances”<sup>95</sup>; second, in the Indian context in the expression “exceptional circumstances”<sup>96</sup>; and third, in the English context in the words “necessary” and “exceptional course”.<sup>97</sup>

In this connection, there is perhaps some conflation between the two meanings of “jurisdiction”.<sup>98</sup> For example, in *Ho So Mui*,<sup>99</sup> the Court of Appeal seemingly treated the meanings of “inherent jurisdiction” and “inherent powers” interchangeably when it used both in the same context to explain that it could have the residual power (although it had earlier referred to its inherent *jurisdiction*) to order a stay of proceedings. Similarly, in *Dato' Seri Anwar bin Ibrahim*,<sup>100</sup> the Federal Court

<sup>91</sup> *Supra* note 33 at XIX, para. 251.

<sup>92</sup> [1976] Q.B. 779.

<sup>93</sup> [1962] 1 Q.B. 712.

<sup>94</sup> [1986] 2 All E.R. 716.

<sup>95</sup> See *supra* Part III.C.1.

<sup>96</sup> See *supra* Part III.C.2.

<sup>97</sup> See *supra* Part III.C.3.

<sup>98</sup> See *supra* note 4.

<sup>99</sup> *Supra* note 39.

<sup>100</sup> *Supra* note 79.

held that it has the inherent *jurisdiction and power* to reopen and review any matter decided by the court if there was allegation of injustice or abuse of the process of the court. These all appear to conflate the narrow and wide meanings of the word “jurisdiction” into one. Therefore, it is unclear *when* the criterion of “necessity” should apply—whether in considering the court’s inherent *authority* to decide the dispute at hand, or the court’s inherent power, pursuant to its inherent jurisdiction, to make the necessary order. It is important to delineate the threshold question of jurisdiction from the *subsequent* one of the exercise of powers therein, which concern the *merits* of the application in the first place.

Notwithstanding this, it is submitted that the criterion of “necessity” can be applied to determine whether the Court of Appeal has the inherent jurisdiction or authority to reopen criminal cases. In this respect, the English Court of Appeal’s holding in *Taylor v. Lawrence*,<sup>101</sup> that “it could take the exceptional course of reopening proceedings which it had already heard and determined *if it was clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy*”<sup>102</sup> is of significant assistance.

Applying these elaborations of the criterion of “necessity”, it is clear that if indeed new evidence emerges in a given criminal case, there is (a) probably a significant injustice; and (b) no alternative effective remedy (since there is no statutory course of action for the applicant to take). The merits of the application should of course be judiciously scrutinised, but it is submitted that when it comes to the consideration of the Court of Appeal’s jurisdiction to consider an application to reopen criminal cases in the first place, there is no need for the applicant at this stage to show that there was injustice, only that there is a probability of injustice if his allegations are made out.<sup>103</sup>

---

<sup>101</sup> *Supra* note 72.

<sup>102</sup> *Ibid.* at para. 55 [emphasis added].

<sup>103</sup> See also Lee, *supra* note 5. In this article, Lee suggested two main solutions to the Court of Appeal’s lack of jurisdiction to reopen appeals in deserving cases. These will now be very shortly alluded to. First, Lee suggested that the simplest way would be for Parliament to amend the *SCJA* to confer jurisdiction on the Court of Appeal to reopen appeals where appropriate. However, writing in 1994, Lee opined that this suggestion is problematic because the Court of Appeal would not have the manpower or resources to screen the flood of petitions which will surely result if new jurisdiction is conferred on it. Drawing a comparison with similar legislation at that time in Britain, Lee pointed out that the Home Office in Britain received about 700 to 800 applications a year claiming wrongful conviction. This could be overly burdensome. Given that the Court of Appeal hears and disposes of 20 odd appeals a month, it may be too onerous a task for it to undertake if it were to screen out the applications for wrongful convictions. The concerns here apply, of course, equally to the exercise of the Court of Appeal’s inherent jurisdiction in the same manner. Secondly, Lee pointed out that a more tenable solution would be to insert a provision equivalent to s. 17 of the U.K. *Criminal Appeals Act* 1968 (which has since been repealed in 1995) in 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 attention through petitions by appellants or members of the public. However, in England, at least when s. 17 was still operative, the criticism was that the Home Office had taken a “substantially restricted” view of cases which were deserving. The Home Office was essentially reactive and not proactive as it was reluctant to be seen as interfering as promulgating executive interference in the judiciary. This eventually led to the establishment of the independent Criminal Cases Review Authority to investigate possible miscarriages of justice.



## V. CONCLUSION

Ultimately, the present article touches upon the fundamental concern of justice in a very limited class of cases whereby the substantive appeal has been disposed of but some evidence emerges later on to shed light on the truth of the matter. It has once been said that “the test of a country’s justice is not the blunders which are sometimes made, but the zeal with which they are put right”.<sup>104</sup> Without going so far as to suggest that a “blunder” has been made by our courts (and indeed, it would be thoroughly disrespectful to suggest even the remote possibility of this occurrence), the present discussion, at its core, is concerned with how justice should be meted out and made available to applicants who seek to reopen criminal cases previously disposed of. This article has argued that the Court of Appeal, while not possessing the statutory jurisdiction to entertain such applications, can have the *inherent* jurisdiction to do so and whether it chooses to do so ultimately involves the intricate question of balancing justice in the process and in the end of this particular case.

---

<sup>104</sup> Quoted in Cyril Connolly, *The Sunday Times*, 15 January 1961 and referred to by Bhaskaran s/o Sivasamy in “The Criminal Appellate System in Singapore” (1995) 16 *Sing. L. Rev.* 319.