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THE RIGHT TO CONFRONT ONE'S ACCUSERS: DID SIR WALTER RALEIGH DIE FOR NOTHING?

PETER **MIRFIELD***

The right to confront one's accusers is granted widely by international and European human rights conventions, as well as by the US Constitution's 6th Amendment, though not recognised, at least explicitly, by Singapore law. This article argues for a non-instrumental view of that right, *ie* one not solely designed by reference to the hearsay rule, enlisting the remarkable trial of Sir Walter Raleigh, in 1603, for treason to support the case, in principle, for such a view being taken. The article goes on to consider the confrontation right in three jurisdictions, namely the US, the European Court of Human Rights and England, where very different views of it have been taken. It then raises the possibility that some recent reforms to Singapore law entail confrontation issues. It concludes that, whatever else is done about the right to confrontation, it should, just like other human rights, be taken seriously.

I. INTRODUCTION

The European Convention on Human Rights ("ECHR") was made part of English domestic law in 1998.[1] Since then, English courts have had to grapple with how the rights contained in the ECHR are to be interpreted for domestic law purposes,[2] and, in particular, with how those rights *fit with* and *contest* the common law and statutory law of England and Wales.

Within the ECHR, the first part of Article 6(3)(d) grants the (human) right to the accused "to examine or have examined witnesses against him". As has been held by both the ECtHR and English courts, that provision gives effect to what is known as the accused's "right to confrontation".[3]

But this right to confrontation is no purely European thing. First, Article 14(3)(e) of the International Covenant on Civil and Political Rights ("ICCPR") provides the accused with a "guarantee" of being able "to examine, or have examined, the

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1 By the *Human Rights Act 1998.*

2 Before 1998, the ECHR applied in the United Kingdom ("UK") as a matter of international law only, with the European Court of Human Rights ("ECtHR") the arbiter of the UK's international obligations.

3 Detailed consideration of the English and ECtHR authorities is to be found in Parts V and VI below.

witnesses against him". Secondly, the Sixth Amendment to the United States ("US") Constitution provides, *inter alia*, that the accused "shall enjoy the right... to be confronted with the witnesses against him".[4]

All of that said, it must be added that Singapore itself is (of course) not a party to the ECHR and (in fact) not one to the ICCPR. Nor is there any distinct constitutional or other instrument in Singapore granting to the accused some kind of general right to confrontation. But it would be a mistake to suppose that the Singaporean courts will not have to face issues about confrontation, and for three reasons. First, it has a legal system that looks out to the world, and, if I may be forgiven for saying so, to the law applicable in the various parts of the UK in particular. Secondly, as we shall see later in this article, issues of confrontation tend to get tied up with hearsay issues—indeed, some courts seem to think that hearsay rules themselves can take care of confrontation issues—and there is, most certainly, a rule against hearsay applicable in Singapore,[5] as well as a body of exceptions to it.[6]

The third reason flows from some provisions of the Criminal Procedure Code [*CPC*],[7] most of them enacted in 2018, that contain various protections, principally for what are usually described as "vulnerable witnesses".[8] Since some of these protections may render such a witness not visible to the accused, and perhaps even to counsel for the accused, they would seem to be *capable* of raising issues as to whether or not they allow of (proper) confrontation. But detailed consideration will be given to this point later in this article, once the context therefor has been discussed in detail.

II. Sir Walter Raleigh and Confrontation

Sir Walter Raleigh,[9] perhaps best known to posterity as the English adventurer that allegedly introduced his nation to both the potato and tobacco, yet also the founder of the earliest English colony in North America, stood trial for treason on 17 November 1603.[10] He was accused of participation in what has become known as the Main Plot,[11] which had allegedly been designed to remove James I from the English throne, replacing him with Lady Arabella Stuart.[12]

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4 It is worthy of note that, of the three provisions at hand, only the Sixth Amendment refers explicitly to the right in question as one of confrontation, though it is to be noted that it is there expressed in the passive, and not the active voice.

5 There is some doubt as to precisely how the rule itself is part of Singapore Law, whether as wholly contained in the *Evidence Act*, Cap 97, 1997 Rev Ed itself, or as existing outside that Act, in effect as a common law rule, which is then brought within the purview of the Act by s 62 thereof (a "hybrid approach"). This is not the place to go into that question, but the reader is referred to Jeffrey Pinsler, *Evidence and the Litigation Process*, 6th ed (LexisNexis, 2017) at paras 4.005-4.014, for the arguments.

6 See *Evidence Act*, Cap 97, 1997 Rev Ed, ss 32-40 (as amended).

7 Cap 68, 2012 Rev Ed. On 19 March 2018, the *Criminal Justice Reform Act 2018*, No 19 of 2018 and the *Evidence (Amendment) Act 2018*, No 20 of 2018 were passed by the Singapore Parliament to amend the *CPC* and the *Evidence Act*. See, in particular, ss 264A and 281A of the *CPC*, which came into effect on 17 September 2018.

8 The potential sweep of some of these provisions is wider than one to cover only "vulnerable witnesses"; see *eg*, s 281(1)(c) and (d).

9 The spelling Raleigh is used here, though the name is sometimes returned as Ralegh.

10 The trial is reported at *The Trial of Sir Walter Raleigh, knt. at Winchester, for High Treason* (1603) 2 Howell St Tr 1.

11 Because it was so described by the government officials who defined it.

12 Lady Arabella Stuart was both a cousin of James I and the great-great-granddaughter of Henry VII.

The *dramatis personae* at Raleigh's trial, which took place in Winchester, could hardly have been bettered. He was tried, in the ordinary way, by a jury of twelve, but the judicial side of the tribunal was constituted by a Special Commission of eleven. Four of them were judges,[13] but the other seven were non-lawyers, one of them being Sir Robert Cecil,[14] who, as Principal Secretary to the Privy Council, had been the leading minister to Elizabeth I during the latter part of her reign, and who continued as such to James I until Cecil's death in 1612.

Chairing the Commission was Sir John Popham, the Lord Chief Justice of England. As Elizabeth I's attorney, Popham had had a significant part to play in the trial and subsequent execution of Mary Queen of Scots, and he would later preside at the trial of the alleged Gunpowder Plotters in 1605.[15] So, it certainly seems that he was one for the limelight.

Leading for the Crown, as Attorney-General, was none other than Sir Edward Coke, perhaps best known to lawyers, and rightly, it may seem from the account that follows, for his *Institutes*,[16] rather than for his forensic skills as an advocate.

This was indeed a "close-knit affair". As we shall see, the crucial evidence against Raleigh came from Lord Cobham, whose niece was married to Coke, and who was Cecil's brother-in-law. It seems not inappropriate to add that, though Raleigh was, as we shall see, eventually beheaded, Cobham, who, by his own account, had himself been very much involved in the Main Plot, was (merely) imprisoned, and was released before his death.

Let us turn now to the evidence against Raleigh, and, more especially, to his objections to it. Though, as we shall see, there was some feeble other evidence incriminating him, the crux of the matter was undoubtedly contained in the "evidence"[17] of Cobham. He seemed clearly to have admitted his part in the Plot, but had also implicated Raleigh as the instigator thereof. It seems quite clear that his initial "examination" had been written down by his inquisitors, then signed by him (quite possibly under some kind of "persuasion", perhaps emotional blackmail, or something similar). Afterwards, Cobham had first *withdrawn* his accusations, then *reinstated* them.[18]

Now let us turn to the essential problem with the Cobham evidence. Though it would have been perfectly possible for the Crown to call him to give his evidence directly—nowhere in the report of the case is it suggested by anyone that Cobham was not available to testify—it chose not to do so, preferring to rely upon his written examination.

It seems clear that, initially, Raleigh was not even shown Cobham's examination. Raleigh complained about that,[19] in effect because he wanted to be sure that it

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13 Namely Sir John Popham, Lord Chief Justice of England, Sir Edmund Anderson, Lord Chief Justice of Common Pleas, Mr Justice Gawdie and Mr Justice Warburton.

14 Though the reports describe Cecil as the Earl of Salisbury, it is clear that he was not elevated to that status until 1605, having been first ennobled as Viscount Cranborne in 1604.

15 That trial took place on 27 January 1605 and is reported at 2 Howell St Tr 159.

16 Edward Coke, *Institutes of the Lawes of England*, first published between 1628 and 1644.

17 The inverted commas are used because, as we shall see, Cobham did not testify; rather, his statements were read out to the court.

18 It was the initial "examination" that brought Raleigh to trial, but, once Raleigh had produced a letter that he claimed exonerated him, the Crown produced a later statement allegedly made by Cobham.

19 See *supra* note 10 at 10, 11.

was being read out accurately, thereby first demonstrating a legal astuteness that, as we shall see, was repeated throughout his trial. He may well also, and equally understandably, have wished to be reassured about its *provenance*. But, his major point about the examination was, as he eloquently put it:

> [L]et Cobham be here, let him speak it. Call my accuser before my face, and I have done.[20]

Then, later, he said:

> [L]et him be brought, being alive, and in the house; let him avouch any of these things, I will confess the whole Indictment, and renounce the King's mercy.[21]

There is a modern tendency to suppose that Raleigh was articulating a very early, and highly pungent *hearsay* objection to the use of the Cobham evidence, basing himself most strongly on the absence of any element of necessity as regards presenting that evidence in the form of the examination, rather than from the witness's mouth. In fact, it does seem clear that that was one element of the point that he was making, but, when one attends carefully to what Raleigh actually said, it becomes clear that he was not claiming merely an *instrumental* right[22] to ask questions of Cobham in order to challenge the credibility of his evidence.

Had it been that alone that was in his mind, why on earth did he say, as he did several times, that, if Cobham were to be produced before the court and speak his accusation, he (Raleigh) would confess his guilt? To repeat his own words: "I will confess the whole Indictment".[23] Rather, there are good grounds for supposing that he was praying in aid the very ordinary human idea that those that accuse us of wrongdoing should do so *to our face*—recall his own words, "before my face"—and not in a backroom, away from our gaze. If so, he was arguing for a thoroughly *non-instrumental*, perhaps even "human" right, to confront his accusers.

Almost exactly 350 years later, on 23 November 1953, United States President Eisenhower, referring to what he described as the code in the town of Abilene, Kansas, where he grew up, pronounced the following words that might seem to encapsulate the essence of Raleigh's plea:

> It was; meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.[24]

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[20] *Ibid* at 15, 16.

[21] *Ibid* at 23.

[22] My use of the words "merely" and "instrumental" should not at all be taken to entail that I have the view that that hearsay point is itself unimportant.

[23] *Supra* note 21. When one recalls that the trier of fact was a jury, one might think his strategy, in practical terms, a very risky one anyway.

[24] Dwight Eisenhower, "Remarks upon Receiving the America's Democratic Legacy Award at a B'nai B'rith Dinner in Honor of the 40th Anniversary of the Anti-Defamation League", *Public Papers of the Presidents: Dwight D Eisenhower, 1953* (1958-61) Washington, DC: United States Government Printing Office.

At all events, Raleigh's protests having been persistently rebuffed by Sir John Popham LCJ and others in court, the jury took but fifteen minutes to convict him of treason. He was then sentenced to death, but that sentence was not swiftly carried out. Indeed, for the next thirteen years or so, he was kept a prisoner in the Tower of London.

That was not the end of the story. In 1616, he was released from the Tower by James I (but not pardoned), and ordered by the King to undertake an expedition to Guiana (El Dorado!), to search for gold. The expedition having failed, Raleigh was taken back before the King's Bench, where the sentence of death was confirmed by none other than the now Sir Edward Coke CJ.[25] It was carried out (by beheading) on 29 October 1618.

III. An Aside On Raleigh Against Coke

Under the procedural rules applicable at the time, Raleigh could not have legal representation at trial, nor could he testify in his own defence. But, if the Howell report[26] is to be believed, he gave rather more than he got from Coke, leading for the Crown.

Coke seems to have spouted venom at Raleigh more or less throughout his trial. Raleigh, he said, was the "notoriest Traitor that ever came to the bar",[27] that "there never lived a viler viper"[28] and, perhaps worst of all, that he was a "damnable atheist".[29] When the accused, in a most lawyerly way, objected to one particular accusation against him, apparently made in Cobham's examination, being adduced by the Crown, Coke intervened, saying:

> Why, this is cunning.

But Raleigh was not at all put off his stride, responding:

> Every thing that doth make for me is cunning, and every thing that maketh against me is probable.[30]

Then, later, Coke (in venom mood again) said:

> I want words sufficient to express thy viperous Treasons.

One cannot resist the word "Touchez", with regard to Raleigh's rejoinder:

> I think you want words indeed, for you have spoken one thing half a dozen times.[31]

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25 See *supra* note 10 at 55.
26 *Ibid.*
27 *Ibid* at 7.
28 *Ibid* at 26, 27.
29 *Ibid* at 28. It appears that, at the time, Raleigh was considered to be a "freethinker".
30 For both the intervention and the response, see *supra* note 10 at 22.
31 For both the comment and the rejoinder, see *ibid* at 26.

Well, the present author would much rather have had the adventurer representing him at trial than the great architect of the common law.

One must add, in fairness to Coke, that he did produce one excellent riposte to a question asked by Raleigh. When the Crown was allowed to adduce evidence from one Dyer, a pilot, who said that, some time before, a certain "gentleman", whom he did not name, had told him (Dyer), as regards the then James VI of Scotland, "Nay, he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come",[32] Raleigh seems again to have taken a hearsay objection[33] to it being adduced, then asking Coke:

> What infer you upon this?

Coke's swift reply was:

> That your treason hath wings.[34]

IV. *Crawford v Washington*—The Right to Confrontation in the US

It seems more than likely that, in including in the Sixth Amendment to the US Constitution what has become known as the "confrontation clause",[35] the drafters were influenced by *Raleigh's case*. And indeed, in what is now the leading Supreme Court decision pertaining to that clause, *Crawford v Washington*,[36] Justice Scalia, delivering the Opinion of the Court, makes much reference to that case.[37]

Before *Crawford* was decided, the leading case had been *Ohio v Roberts*,[38] where the Supreme Court held that the clause prevented the prosecution from relying upon the out-of-court statement of someone *available to testify directly*. That being so, the Cobham evidence in *Raleigh's case* would clearly have been ruled out. However, the court went on to hold that, where the witness was *unavailable to testify*, the prosecution was at liberty to rely upon their out-of-court statement as long as it had "indicia of reliability", either because caught by some "firmly rooted hearsay exception" or because it bore "particularized guarantees of trustworthiness".[39] In other words, the right to confrontation, as laid down in *Roberts*, was indeed an instrumental one, to be balanced against competing practical considerations, namely the necessity of resorting to the statement, and the reliability of that statement.

In *Crawford*,[40] the previous learning, and *Roberts*, in particular, were swept away as laying down an anaemic view of the confrontation right. As Justice Scalia

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32 See *ibid* at 25.

33 And indeed it seems rather likely that this was (at least) second hand hearsay in Dyer's mouth since the unnamed gentleman had, very probably, himself been relying on what some third party had told him about Cobham and Raleigh's alleged regicidal intent.

34 For both the question and the reply, see *supra* note 10 at 25.

35 It provides that the accused "shall enjoy the right to be confronted with the witnesses against him".

36 541 US 36 (2004) [*Crawford*].

37 See *ibid* at 43, 44, 50, 52 and 62.

38 448 US 56 (1980) [*Roberts*].

39 See *ibid* at 66.

40 *Crawford*, *supra* note 36.

graphically put it:

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.[41]

Rather the right was an absolute one,[42] such that no "testimonial statement" could be adduced against the accused unless there had been an opportunity for cross-examination at some earlier point in the process, or the declarant was present in court to give direct evidence.[43]

On the facts of *Crawford*, that meant that the prosecution should not have been allowed to adduce evidence of Crawford's wife's recorded statement to the police[44] that suggested that Crawford had not, as he claimed that he had, been acting in self-defence when he stabbed a third party. In consequence, his conviction for attempted murder was quashed by the Supreme Court.

It is undoubtedly the case that the decision in *Crawford* has led to real practical difficulties for prosecutors in the US, and in a number of ways. But our attention here will focus upon two particular issues that have caused problems, namely what is meant by the phrase "testimonial statement" and the application of the decision to forensic laboratory reports.

A. *What is Meant by "Testimonial Statement"?*

Two things are clear enough. First, a *formal* statement to the police investigating a crime *is* a testimonial statement. Secondly, such a statement is not the only kind of testimonial statement. As regards that second aspect, there is a continuing difficulty with cases where the prosecution argues that the statement in question was collected for reasons *other than* to use it at trial. The response of the Supreme Court has been to develop a "primary purpose" gloss on the "testimonial" criterion.

Thus, in two cases decided together in 2006, that court held that, even where the statement in question had been made during the course of police interrogation, it did not count as testimonial where the circumstances "objectively indicat[ed] that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency".[45] Similarly, in *Ohio v Clark*,[46] pre-school teachers had asked

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41 *Ibid* at 62.

42 The court did admit of the possibility of exceptions to the applicability of the right. Thus, Justice Scalia referred to the dying declaration being a possible exception, though without reaching a definitive view as to that (see *ibid* at 56 and n 6), while he accepted that the "rule of forfeiture by wrongdoing" would apply here, such that, if the reason why direct evidence from someone could not be adduced was that the accused had wrongfully prevented them from testifying, whether by keeping them out of the way, or even by killing them, the accused would not be able to rely upon the confrontation right to exclude non-direct evidence (see *ibid* at 62).

43 See *ibid* at 53-54, 59, 61 and 68, in particular (per Justice Scalia).

44 The reason that the wife had not given direct evidence was that Crawford had relied upon the spouse's marital privilege in the State of Washington, thus preventing her from testifying. See *Revised Code of Washington* §5.60.060(1) (1994).

45 See *Davis v Washington* 547 US 813 (2006) at 822. See also, *Michigan v Bryant* 562 US 344 (2011) [*Bryant*], considered below at 430.

46 135 S Ct 2173 (2015).

questions of a three-year-old pupil whom they had observed to have a bloodshot eye and red marks on his face as to who had caused those injuries. The child indicated that it had been Clark, who was later charged with and convicted of various counts of assault (not solely in relation to the three-year-old). Finding that the teachers' primary purpose was, by identifying the perpetrator, to protect the child from further abuse, the court held that his statement did not count as testimonial.[47]

More difficult are cases where the police are the interrogators and the circumstances indicate that they may well have had in mind both dealing with a present emergency *and* gathering evidence of wrongdoing by a particular person. For example, in *Michigan v Bryant*,[48] police had come across a man with gunshot wounds, at a petrol station. They asked him not only what had happened and where the shooting had occurred, but also who had shot him. By a majority, with Justices Scalia and Ginsburg dissenting, the Supreme Court held that the man's responses, which included an accusation that Bryant had been the person that had shot him, were not testimonial since the police were dealing with the potential danger represented by the gunman, to both the public and themselves.

B. *Application to Forensic Laboratory Reports*

In *Melendez–Diaz v Massachusetts*,[49] at the accused's trial for drugs offences, the judge had permitted the prosecution to introduce certificates of state laboratory analysts stating that material that had been seized by police, and that was connected to the accused, was cocaine of a certain quantity. As required by Massachusetts law, the certificates had been sworn before a notary public and had been submitted as prima facie evidence of what they asserted. A bare majority of the Supreme Court, applying the *Crawford* reasoning to those certificates, held that the accused's right to confront his accusers had thereby been breached, such that the trial judge's ruling had been erroneous. It could find no coherent distinction between this situation and that to be found in the cases about statements resulting from police and other interrogations.

The impact of *Melendez–Diaz* on such routine, and one might say professional, scientific investigations seems to have been somewhat moderated by the later decision of the court in *Williams v Illinois*,[50] yet the *practical* disadvantages of applying the *Crawford* reasoning at all in such cases are obvious.

V. The European Convention On Human Rights

As we have seen, though the US Sixth Amendment refers specifically to the right to confrontation,[51] Article 6(3)(d) of the ECHR (just like Article 14(3)(e) of the ICCPR)

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47 A further point, made by both Justice Alito, delivering the Opinion of the Court *ibid* at 2181, 2182 and by Justice Scalia (with whom Justice Ginsburg joined) concurring at 2184, was that the three-year-old himself would hardly have had any testimonial use in mind.

48 *Bryant*, *supra* note 45.

49 557 US 305 (2009). See also *Bullcoming v New Mexico* 564 US 647 (2011).

50 567 US 50 (2012). It is right to point out that it was a plurality decision of four Justices that was the vehicle for any such moderation, with four other Justices, in dissent, supporting the proposition that the confrontation right had been breached, and one joining with the plurality as to the result, but not as to their reasoning.

51 The actual words used are "the right. . . to be confronted with the witnesses against him".

does not. Rather, it refers only to the right "to examine or have examined witnesses against him". Though it would have been possible, as a matter of interpretation, to take those words as giving no more than a right to cross-examine or have cross-examined those persons actually *called* to give evidence against the accused, the jurisprudence of the ECtHR has long established that it *does* accord the accused a right to confrontation. The precise content of that right was considered by the ECtHR in the very important conjoined cases of *Al-Khawaja and Tahery v The United Kingdom*.[52]

The former case was concerned with the pre-trial statement of a woman who alleged that she had been sexually assaulted by the applicant, Al-Khawaja, who was a doctor. The reason why she could not be called to give evidence at his trial in England for that offence was that she had committed suicide before it took place.[53] Evidence of her allegation was admitted under the English hearsay exception for deceased "witnesses".[54] In effect, as the prosecution graphically put it at trial, it was a matter of "no statement, no count one".[55] And the ECtHR's judgment described it as "the only evidence against the applicant".[56]

In the latter case, Tahery had been tried on a charge of wounding that involved the stabbing of the victim. One T had later made a statement to the police alleging that Tahery had indeed done the stabbing. At Tahery's trial in England, the prosecution was allowed to adduce evidence of the contents of that statement without calling T to testify, that being on the basis that he was in fear of testifying, such that another statutory hearsay exception applied.[57] Though this was not the only evidence against Tahery, as regards the wounding charge, it was, as the ECtHR put it, "the only direct evidence against the applicant".[58]

The ECtHR held that the admission of the statements in both cases had been in violation of Article 6(3)(d). In doing so, it announced a *per se* rule that, if evidence not available for confrontation would be the *sole or decisive* evidence in the case, it *must* be excluded.[59] In that regard, unconfronted evidence had been the sole evidence against Al-Khawaja and the decisive evidence against Tahery.

Two comments seem apt here. First, if we think back to *Raleigh's case*, we can surely accept that Cobham's evidence was the decisive evidence against Raleigh, albeit that there was some other very weak evidence that had been adduced against him, Therefore, it is clear enough that the *Al-Khawaja and Tahery* court would have attended to his cry.[60] Secondly, one does wonder if, when the person making the statement has died before trial, the right to confrontation should apply at all. In that regard, we might recall President Eisenhower's point about confrontation, and ask

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52 (2009) 49 EHRR 1 [*Al-Khawaja 1*].

53 It should be added that the cause of her death had nothing at all to do with the alleged assault.

54 See *Criminal Justice Act 2003*, s 116(2)(a).

55 See *Al-Khawaja 1*, *supra* note 52 at para 9. There was a second count on the indictment that has no relevance for present purposes.

56 See *ibid* at para 42.

57 Under the *Criminal Justice Act 2003*, s 116(2)(e).

58 See supra *note 52* at para 47.

59 See, in particular, the remarks of the court *ibid* at para 37.

60 It is of great interest that the American scholar, Kenneth Graham, advocated that the Sixth Amendment right to confrontation should be interpreted as requiring the exclusion only of unconfronted evidence that was "crucial", and, in doing so, explicitly applied that reasoning to rule out Cobham's evidence in *Raleigh's case*; see (1972) Crim L Bull 99 at 129.

ourselves how we can appropriately demand of someone dead that they "must come up in front" and not be allowed to "hide behind the shadow"?[61]

At all events, it seems clear that the decision in *Al-Khawaja and Tahery* caused a stir among the English legal community. Certainly, were it to have been applied at trial level, one might suppose that rather a lot of important evidence that benefits from some statutory hearsay exception would have been ruled out for confrontation reasons. That was not to be, since, in *R v Horncastle, R v Marquis*,[62] a seven-judge[63] UK Supreme Court unanimously rejected, as a matter of English domestic law, the "sole or decisive" *per se* test announced in *Al-Khawaja and Tahery*, and this even though Article 6(3)(d) is directly applicable in domestic law under the Human Rights Act 1998. We shall return to the decision and the reasoning in *Horncastle* shortly, but it is well worth noting now how closely the facts of the two cases at issue mirrored those of the two in *Al-Khawaja and Tahery*. In *Horncastle* itself, the alleged victim of the crime of causing grievous bodily harm with intent with which the accused were charged had died before trial, whilst, in *Marquis,* the alleged kidnap victim was in fear. Therefore, just as in the ECtHR case, one statement had been admitted at trial under section 116(2)(a) of the *Criminal Justice Act 2003*, the other under section 116(2)(e) thereof. Moreover, in *Horncastle*, the Court of Appeal (Criminal Division) had concluded that the relevant statement was "to a decisive degree"[64] the basis upon which the appellants had been convicted, though, in *Marquis*, it had concluded otherwise.[65]

But that does not complete the picture so far as the ECHR law itself is concerned. *Al-Khawaja and Tahery* had been decided by only the Fourth Section of the ECtHR, rather than by its Grand Chamber. At the behest of the UK Government, the case was, after *Horncastle* had been decided, referred to the Grand Chamber.[66] That court held that, contrary to the view of the Fourth Section, the sole or decisive test did not involve a *per se* rule. Rather, where the evidence in question was adjudged to be either the sole or the decisive evidence in the case at hand, the court must subject the proceedings to "the most searching scrutiny".[67] That would entail that its soleness or decisiveness would be a very important factor to balance in the scales, "one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards".[68] The court concluded its remarks about the test by stating that:

> The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.[69]

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61 See the text to n 24 above.
62 [2010] 2 AC 373 [*Horncastle*].
63 That court usually sits as a panel of five judges.
64 *Supra* note 62 at para 110 (CA (CD)).
65 *Ibid* at para 142 (CA (CD)).
66 *Al-Khawaja and Tahery v The United Kingdom* (2012) 54 EHRR 23 [*Al-Khawaja 2*].
67 *Ibid* at para 147.
68 *Ibid.*
69 *Ibid.*

When the court applied the law as it found it to the two cases at hand, it concluded that Al-Khawaja's trial had not been rendered unfair by the admission in evidence of the deceased complainant's statement, but that Tahery's trial had been so rendered by admission of the statement of the person who was fearful of giving evidence.[70]

VI. English Domestic Law

As already stated, the UK Supreme Court in *Horncastle*[71] firmly rejected the *sole or decisive* test. This is not the place for a detailed discussion of that case,[72] but four points about the reasoning of Lord Phillips seem apposite.

First, his Lordship was concerned about the impracticality of the test as regards its potential application by a trial judge.[73] Here, he was echoing the reasoning of Thomas LJ, handing down the judgment of the Court of Appeal (Criminal Division).[74] In short, at trial, the issue of admissibility will arise adventitiously, so quite possibly without all of the evidence on the matter having been adduced. So, though it might be relatively straightforward to decide if the challenged evidence is the *sole* evidence on that matter, that would not be the case with *decisiveness*. In short, the judge does not enjoy the luxury of having *all of* the evidential material in hand before making the admissibility decision. It is otherwise with the ECtHR, which reaches its decision after the trial has concluded, so has no hindsight problem. Though, as one would, of course, expect, there is a valid point being made here, it may be thought overstated. It is certainly the ordinary lot of trial judges that they sometimes need to make decisions about the admissibility of items of evidence at a time when other evidence that might affect their assessment of its likely effect on the jury has not yet been placed before the court. Moreover, though obvious difficulties present themselves where the evidence later adduced causes the judge to decide that, after all, the challenged evidence should not have been admitted, it may be thought not without significance that the very chapter of the *Criminal Justice Act 2003*[75] that contains the section 116 hearsay exceptions that had been invoked in the two cases considered in *Horncastle* also contains section 125(1), which states:

> If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that—
>
> (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
> (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,

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70 It may be thought of interest that the *Al-Khawaja* "witness" could not be called to give evidence, but that the *Tahery* one could; see the text at nn 53-59 above.

71 *Horncastle*, *supra* note 62.

72 For academic commentary, see Ian Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] Crim LR 255 and David Ormerod, "*R v Horncastle and others*: evidence - admission at trial of written statement of witness who has died" [2010] Crim LR 496 at 499-502.

73 *Horncastle*, *supra* note 62 at paras 87-90 (SC).

74 *Ibid* at paras 67-72 (CA (CD)).

75 Part 11, Chapter 2.

> the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

Secondly, Lord Phillips emphasised what he considered to be a paradox attached to the sole or decisive test. As he put it:

> It permits the court to have regard to evidence if the support that it gives to the prosecution case is peripheral, but not where it is decisive. The more cogent the evidence the less it can be relied upon.[76]

This point demonstrates that his Lordship took a wholly instrumental view of any value that might attach to the confrontation right. But all we need to do is to think back to Raleigh's complaint as regards the Cobham "evidence" in order to recall that there may be thought to be more to the confrontation right than simply seeking to promote accurate decisions as to guilt or innocence. Here, ships really did pass in the night.

Thirdly, dealing with the content of the *Criminal Justice Act 2003*, his Lordship made the following comment:

> It follows that both in the case of unavailable witnesses, and in the case of apparently reliable hearsay, the CJA 2003 contains a crafted code intended to ensure that evidence is admitted only when it is fair that it should be.[77]

The "crafted code" idea here is difficult to credit. It is rather hard to believe that statutory provisions that had their source in a report of the Law Commission, a body that may be regarded as being as committed, quite understandably, to practical solutions that are likely to run with the judiciary and with Parliament, as it is to any kind of legal craft, and had worked their way through the hurly-burly of the parliamentary process, are realistically given that description.

Finally, though the Supreme Court told us, very clearly, what the right to confrontation does not entail in English domestic law, it failed to give any indication as to what that right *does require*. Here, at least, later Court of Appeal (Criminal Division) authority has put some flesh on the bones. Thus, in *R v Ibrahim*[78] and in *R v Riat*,[79] that court has affirmed that the confrontation right must not be left out of the (in)admissibility equation. This is not the place for detailed consideration of the law as to these matters, but a description of the basic elements seems apposite.

First, though *Horncastle* tells us that the sole or decisive criterion is never a consideration under English law, it seems clear that something strikingly similar to it is. Thus, in *Ibrahim*, the court held that whether or not possible breach of the confrontation right arose turned on whether or not the evidence in question formed the "central corpus of evidence without which the case could not proceed".[80] And

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76 *Horncastle*, *supra* note 62 at para 91 (SC).
77 *Ibid* at para 36 (SC).
78 [2012] 4 All ER 225 [*Ibrahim*].
79 [2012] 1 WLR 2592 [*Riat*].
80 *Supra* note 78 at para 90.

indeed, in two later appeal court cases, the phrase "sole or decisive" or the word "decisive" were themselves employed.[81]

Secondly, though the original emphasis was on the notion that, if the evidence was the central corpus, the trial judge's attention should, in deciding whether or not to admit it, then turn to the *actual* (un)reliability of the evidence, the court in *Riat* adopted a rather different approach. Hughes LJ said there that the judge's concern should be with "the extent and risk of unreliability" and "the extent to which the reliability of [that] evidence can safely be tested and assessed".[82] This may be thought rather important, and in two respects. It asks the judge to examine its *potential*, as well as its *actual* (un)reliability, presumably because our concern is with what the jury might be expected to make of it. Even more importantly, for present purposes, it addresses the significance of the absence of an opportunity to test the evidence in the ordinary way, *ie* by confrontation through cross-examination.

As regards material potentially available to test and assess the reliability of such evidence, he instanced the evidence that may be adduced under section 124 of the 2003 Act, where "a statement not made in oral evidence. . . is admitted as evidence of a matter stated" and "the maker of the statement does not give oral evidence in connection with the subject matter of the statement",[83] *ie* a very clear case of otherwise unconfronted evidence. There are then, under section 124(2), three kinds of evidence that may be adduced to attack the credibility of the statement and/or its maker. Those three kinds are: any evidence which, if the declarant had given such evidence, would have been admissible as relevant to their credibility as a witness; evidence of any matter which could have been put to the declarant in cross-examination as relevant to such credibility, but of which evidence could not have been adduced by the cross-examining party; and evidence tending to prove that the declarant made any other statement inconsistent with the statement admitted as evidence.

Thirdly, where the trial judge reaches the conclusion both that the evidence in question is the central corpus and that there is a real risk of unreliability not safely capable of being tested and assessed, the judge should exclude it under discretionary powers enjoyed under the 2003 Act itself.

VII. Provisional Conclusions

So, perhaps, after all, Raleigh did not die for nothing. We have seen that there are several strands of authority across the common law world, as well as under the ECHR that do attend to the right to confront one's accusers, two of them by virtue of a *per se* rule and one under a factors approach. But let us start at the other end, with *Horncastle*:[84]

1) That case seems to tell us that, for purposes of English domestic law, as long as some relevant statutory hearsay exception is satisfied, the evidence

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81 See *R v Harvey* [2014] EWCA Crim 54 at para 44 ("sole or decisive"); *R v Barney* [2014] EWCA Crim 589 at para 11 ("decisive").

82 *Supra* note 79 at para 6.

83 It is worth noting here that there is an essentially similar provision to s 124 of the *Criminal Justice Act 2003* in Singapore's *Evidence Act*, s 32C(1).

84 *Horncastle*, *supra* note 62.

in question will be admissible whatever specific arguments may be offered in contradiction of that conclusion via confrontation. In other words, there is *no right* at all to it, as such.

2) If we turn to what may be called the *Ibrahim*/*Riat* "test",[85] we find that, though that test grants no *per se* right to the accused, it does direct trial judges to *weigh* the confrontation interest in the balance against the ordinary strictly evidential concerns of *reliability* and *necessity*, with that weighing trusted to an exercise of judicial discretion. Of course, the test there announced does not conflict with *Horncastle*, precisely because it is a weighing operation that is to be carried out. There can be no real doubt that *Ibrahim* and *Riat* lay down English law as regards the present issues.
3) The first of the *per se* tests is that embraced by the ECtHR in the original *Al-Khawaja and Tahery* case.[86] According to that decision, if the unconfronted evidence is either the *sole* or the *decisive* evidence against the accused, it is inadmissible.
4) The second of those tests is the one laid down in *Crawford*.[87] Here, in contrast to the unadulterated one under *Al-Khawaja and Tahery*, there is no concern at all with the importance of the evidence in the particular case at hand. Rather, all that matters, as long as it is *testimonial* evidence, is that it has not been, and will not be, exposed to the rigours of confrontation.

Now, if we think back to the trial of Sir Walter Raleigh, though *Horncastle*, without moderation, leaves him entirely at the mercy of the applicable hearsay rules and exceptions, the *Ibrahim*/*Riat* test gives him some strong grounds for hope. It is hard to believe that the Cobham evidence did not count as the "central corpus" of the case against Sir Walter, while necessity was not remotely a factor, given that there was nothing to prevent the Crown calling Cobham to testify directly, and the reliability of the written Cobham evidence was not at all easily capable of being tested. Of course, if either kind of *per se* rule were to be applied, the position would be taken beyond any doubt whatsoever.

VIII. A Singaporean Aspect

Mention was made near the beginning of this article of various protections, principally for what are usually described as "vulnerable witnesses", that are now contained in the *CPC*. As we shall see, the effect of applying these protections may be to render such a witness not visible to the accused, and perhaps even to counsel for the accused. Therefore, they would seem to be *capable* of raising issues as to whether or not the provisions in question allow of (proper) confrontation.

Let us start with the earlier enacted section 281 of the *CPC*, which provides for the evidence of certain persons (the accused apart) to be given, in some circumstances, by live video or television link. Given that the link must be a live one into the court where the trial is taking place, such that the accused and counsel are able to see how

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85 As laid down in *Ibrahim*, *supra* note 78 and *Riat*, *supra* note 79.
86 *Al-Khawaja 1*, *supra* note 52.
87 *Crawford*, *supra* note 36.

the witness reacts to questions, there would seem to be no potential for confrontation issues to arise therefrom.

But section 264A, enacted in 2018, may present a real problem. It renders evidence via audiovisual recording admissible on the same basis as oral evidence, albeit that it applies in a narrower range of cases than does section 281, and one that is more clearly consonant with a notion of availability only as regards "vulnerable witnesses". In addition, it clearly admits of the possibility that that evidence may be given via a transcript of the recording.[88] It is noteworthy that section 264A says nothing about who is entitled to be present, and to ask questions of the witness, while the proceedings are being recorded. It is hard to imagine that the accused is entitled to be present, but what about counsel for the accused? In that regard, it may be of significance that section 236 of the *CPC* states that "[e]very accused person before any court may of right be defended by an advocate", but it might be argued that these proceedings do not, *themselves*, take place "before any court".

Section 281A of the *CPC*, also enacted in 2018, caters for a somewhat different collection of situations where the witness may be thought vulnerable than does section 264A.[89] It states that "the court may make an order allowing a witness to give evidence while prevented by a shielding measure from seeing the accused". What is clearly contemplated by this provision is the taking of the kind of screening measures that English law has allowed of for a number of years under section 23 of the *Youth Justice and Criminal Evidence Act 1999*. Indeed, section 281A gives the firm impression that it was modelled on English law in that regard.[90] Thus, though the witness is to be free from seeing the accused, the court, the prosecutor and, most significantly for present purposes, "any advocate representing the accused" must be both able to see and be seen by the witness.[91] Thus, the accused's legal representative will be able to observe how the witness responds, both facially and otherwise, to questions, and it can clearly be said that the witness is, at least, then confronted by that representative. Candidly, it is hard to think of a reason *other than* some notion of confrontation for imposing that requirement. It is also worthy of note that section 281A(4) provides that:

> If a witness gives evidence in accordance with this section, for the purposes of this Code and the Evidence Act. . . the witness is regarded as giving evidence in the presence of the accused.

This clearly contemplates that there are various degrees or qualities of presence, and deems this particular one to suffice.

It is one thing to raise the possibility of (absence of) confrontation arguments being marshalled against some of these provisions. Yet, against that, one might expect the point to be made that it seems to be accepted that the broadly equivalent, though more detailed, English provisions that protect vulnerable witnesses[92] appear to have

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88 See s 264A(2) and (4)(a).

89 Perhaps one may be forgiven for wondering quite why the protected classes of witness under s 281, s 264A and s 281A vary so greatly.

90 See s 281A(2) and (5), in particular; and *cf Youth Justice and Criminal Evidence Act 1999*, s 23(1) and (2).

91 See s 281A(2).

92 These are to be found in Part II, Chapter 1 of the *Youth Justice and Criminal Evidence Act 1999*.

escaped exposure to those arguments. Certainly, the degree of inconsistency here with the confrontation interest seems distinctly lower than is the case with witnesses that are allowed to give their evidence other than orally, but it is difficult to understand why it is thought not to arise *at all* in these circumstances.[93] That thought leads me to some concluding remarks.

IX. Concluding Remarks

Though it is deeply unfashionable to venture Jeremy Bentham's remarks about "natural rights", I propose to do so. In his typically straightforward and colourful style, he said:

> *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.[94]

And it does seem reasonable to suppose that at least some of those that support the concept of there existing some universal human rights would claim imprescriptibility for them, whilst it may be thought not a stretch to regard "natural" and "human" as to the same effect here.

But my point *here* is not to endorse Bentham's famous remarks; rather it is to suggest that, if one does think of these rights as human, especially if imprescriptible such rights, that carries with it a responsibility to take *each and every one of those rights* very seriously.[95]

Plainly, it may be very difficult, where, as often happens, some human right conflicts with another one, to reconcile the two; more likely, one or the other must give way, or a compromise must be reached between the two. For example, there are real issues in the UK, at present, about whether or not Muslim women may wear the niqab or the burka whilst giving evidence in court, since those items of apparel exclude from the view of others all of the woman's face (burka) or all of her face apart from the eyes (niqab). Here, there would certainly seem to be a strong argument that the wearing of either of these items by a prosecution witness would be inconsistent with the accused's right to confrontation under the ECHR, Article 6(3)(d). Yet, under Article 9 of the ECHR, freedom of religion is itself a protected human right. Though it is right to add that Article 9(2) does allow of limitations on the right to *manifest* one's religious views in order to protect the rights and freedoms of others, it is surely clear that this is no simple case.

One question, I suggest, that needs to be addressed to those that propose that the protection of vulnerable witnesses is rightly promoted by the law is why they suppose

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93 That said, writing a number of years before the decisions in *Al-Khawaja 1*, *supra* note 52 and *Horncastle*, *supra* note 62, Laura Hoyano, "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim LR 948 at 969 expressed the view that "the special measures for child witnesses [under the 1999 Act] should be impregnable under the Convention".

94 See Jeremy Bentham, "Anarchical Fallacies; being an examination of the Declarations of Rights issued during the French Revolution", in John Bowring, eds. *The Works of Jeremy Bentham* (Edinburgh, 1838-43), vol 2 at 501.

95 Here I borrow from the title of Ronald Dworkin's very famous collection of essays entitled *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

that the right to confrontation has no call to be a countervailing consideration. And, in that regard, it does not seem to have been argued yet that the relevant protection measures *themselves* give effect to some human right of such a witness—nothing as rhetorical as that. To repeat, if we are to have them, let us take all human rights seriously.