JUDICIAL APPROACHES TO ENTRAPMENT: *R.* v. *Sang*

The Singapore Court of Appeal is last reported to have considered the question of state sponsored crime (sometimes called entrapment or *agent provocateur)* in *Cheng Swee Tiang* [1]

Wee Chong Jin C.J. there relied on *Kuruma* [2] for the proposition that:

> It is undisputed law therefore that while evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against an accused.[3]

As the accused's appeal was allowed on other grounds, the Chief Justice declined to pass on the alleged entrapment, but suggested a flexible approach for future cases:

> ... both on principle and authority ... no absolute rule can be formulated and the question is one depending on the circumstances of each particular case.[4]

Since the judgment in *Cheng,* the propriety of entrapment as a technique in criminal investigations has troubled courts throughout the common law world. The matter has been left open in the Supreme Court of Canada,[5] and has yet to reach the High Court of Australia,[6] while American courts have developed a doctrine of entrapment which operates as a defence in appropriate cases.[7] The question recently reached the House of Lords for the first time in *R.* v. *Sang*,[8] where the House drastically limited, if not foreclosed, judicial intervention in such cases. This comment will suggest that the flexible approach enunciated in *Cheng* ought to be followed in preference to the pre-emptive approach in *Sang.* It is expected that the durability of *Sang* will be slight and that its utility in other Commonwealth jurisdictions limited.

1 *Cheng Swee Tiang* v. *P.P.* (*1964*) 30 M.L.J. 291.

2 *Kuruma* v. *The Queen* [1955] A.C. 197; 1 All E.R. 236; 2 W.L.R. 223 (P.C.).

3 *Supra* note 1 at 292; Ambrose J. dissented on this point, holding (at 294) that no such discretion could be exercised by Singapore courts without statutory amendment. This part of the dissent was *obiter* as His Lordship held that if such a discretion existed, its exercise was unjustified on the facts before the Court.

4 *Ibid*., at 293.

5 *Kirzner* v. *R.,* [1978] 2 S.C.R. 487, 81 D.L.R. (3d) 229, 1 C.R. (3d) 138, 38 C.C.C. (2d) 131 (S.C.C.).

6 But see *R.* v. *Williams* (1978) 19 S.A.S.R. 423; *Samuels* v. *Warland* (1977) 16 S.A.S.R. 41; *R.* v. *Veneman & Leigh* [1970] S.A.S.R. 506. These state court judgements reject entrapment remedies. They should be considered in light of the judicial discretion, firmly established in the High Court, to exclude illegally obtained evidence: JR. v. *Ireland* (1970), 126 C.L.R. 321, [1970] A.L.R. 727 (H.C.); *R. v. Merchant* (1971), 126 C.L.R. 414, 1971 A.L.R. 736 (H.C.); *Bunning* v. *Cross* (1978) 19 A.L.R. 641 (H.C.). Also on entrapment, see The Criminal Law and Penal Methods Reform Committee of South Australia, *Third Report* pp. 140-151.

7 *Hampton* v. *U.S.,* 425 U.S. 484 (1976); *Hampton* contains a useful review of the development in the United States of the defence of entrapment. See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs* (1951) 60 Yale L.J. 1091 and Park, *The Entrapment Controversy* (1975-76), 60 Minn. L.R. 163.

8 [1979] 2 All E.R. 1222, 3 W.L.R. 263 (H.L.); aff'd [1979] 2 All E.R. 46 (C.A.); [1980] A.C. 402 (C.A. and H.L.).

The Facts

The evidence of the alleged entrapment was never led nor even clearly stipulated for the purpose of argument.[9] The appellant pleaded not guilty to a charge of uttering counterfeit notes. He sought a trial within a trial to establish that the offence would not have taken place but for the instigation of police agents. He argued that if the trial judge was satisfied on the facts of police instigation, then the judge "had a discretion to refuse to allow the prosecution to prove its case by evidence".[10] This formulation sought to circumvent recent Court of Appeal decisions[11] which had held that 'entrapment' is no defence in English law.[12] The trial judge heard legal argument and then ruled that even assuming the existence of a discretion in the trial judge to exclude relevant prosecution evidence, it did not extend to excluding evidence that a crime would not have been committed but for the inducement of an agent provocateur. The requested trial within a trial was accordingly not held and the evidence of the alleged inducement was never heard. The accused then changed his plea to guilty and was convicted. An appeal to the Criminal Division of the Court of Appeal was dismissed.[13] That Court certified a point of law of general importance as follows:

> Does a trial judge have a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?[14]

Preliminary Comment

Speeches of enduring quality were perhaps precluded by failures of judicial technique which haunted the appeal. First, the trial judge was unwise to rule without hearing the evidence of the alleged entrapment.[15] Second, the question certified was, as Lord Diplock noted, "… a much wider question than is involved in the use of agents provocateurs."[16] Moreover, the question unnecessarily assumed that the problem of entrapment was to be dealt with, if at all, through a judicial discretion to exclude evidence rather, for example, than through a defence or some other technique. Third, once the question was certified, the House of Lords was probably unwise not to narrow it to the matters necessarily at issue. The Court of Appeal might better have posed the very proposition which counsel had put to the trial judge.[17]

9 See below, note 18.

10 *Supra* note 8 at 1225; the facts are taken from the judgment of Lord Diplock at 1224-25.

11 See below, notes 23, 24 and 25.

12 *Supra* note 8 at 1224-25.

13 *Supra* note 8.

14 *Id.* at 1225.

15 Roskill L.J. in the Court of Appeal noted the general undesirability of such an approach: 2 All E.R. 46 at 49. He concluded that in the particular circumstances, which included the prospect of a lengthy trial within a trial, the trial judge was "well justified". This conclusion was reached with apparent diffidence; in the event, it proved too sanguine. See also Lord Scarman at 1246-47.

16 *Ibid*., at 1225; perhaps Viscount Dilhorne intended to make some point at p. 1231 by placing in italics the words "in any circumstances".

17 *Supra* note 10.

Their Lordships exacerbated the overbreadth of the question by their failure to agree on the (hypothetical) facts. They not only failed to quote from the transcript the trial judge's factual premise, but they gave us significantly different renderings of the facts, ranging from the view that the accused would "never" have committed the offence but for the inducement to the allegation that he "would have tried to sell the forged notes to anyone."[18] There is sound basis in common sense for the principle which counsels judges to restrict their reasons to those essential to the disposition of the case at hand. *Sang* shows how abstract judicial reasoning is deprived of the sharpness which sometimes springs from the immediacy of a living problem.

Last, one might assume that pronouncements on hypothetical questions would be clearly the voice of the House, adopting the spirit if not the form of the 1966 Practice Note[19] on *stare decisis.* In *Sang,* as we shall see, the impact of the factual ambiguity is heightened by the mysterious formulations of the responses to the question certified.

18 Lord Diplock has it that the trial judge wished to avoid a lengthy trial within a trial. In the event he had no discretion "… even though [the offence] had been instigated by an agent provocateur and was one which the accused would *never* have committed but for such inducement": at 1225 (my emphasis). The factual assumption is less compelling in Viscount Dilhorne's rendering that the trial judge assumed that:

> … the appellant had been induced to commit [the offences] by an agent provocateur and [they] would not otherwise have been committed; at 1231.

Lord Salmon recounts a more detailed scenario:

> "Counsel then explained to the judge the facts on which he proposed to rely. They were as follows. Whilst the accused had been a prisoner in Brixton Prison, he met a fellow prisoner called Scippo who, unbeknown to the accused, was alleged to be a police informer and an agent provocateur. Shortly before the accused was about to be released, Scippo who seemed to think (rightly) that the accused's business, or part of it, was to deal in forged banknotes, told the accused that he knew of a safer buyer of forged banknotes and that he would arrange for this buyer to get in touch with the accused by telephone. Soon after the accused left prison he was telephoned by a man who posed as a keen buyer of forged banknotes and enquired whether the accused would sell him any. The accused said that he would, and a rendezvous was arranged at which the deal was to be completed. The accused had no idea that the man with whom he had been speaking may, in fact, have been a sergeant in the police force.
>
> The accused and some of his associates went to the rendezvous carrying with them a large number of forged United States dollar banknotes and walked straight into a police trap. The forged notes were confiscated and the accused and his comrades were arrested.
>
> Counsel for the accused hoped to prove the facts which he had opened by the evidence of the police sergeant and Scippo during the trial within the trial for which he was asking. Counsel submitted that if these facts were proved: (1) they would establish that the accused had been induced by an agent provocateur, i.e. the sergeant or Scippo or both, to commit the crime with which he was charged and which, but for the inducement he would never have committed, and that accordingly the law required the judge to disallow any evidence of the accused's guilt to be called by the Crown; alternatively (2) (a) the trial judge had a discretion to reject any evidence of the offence because it had been unfairly obtained and (b) he was bound by the authorities to exercise that discretion in the accused's favour". (1235).
>
> On these facts, Lord Salmon's opening remark is that "… this is a strange appeal which plainly has no hope of succeeding": 1235. He later states that "There can, however, be little doubt that [Sang] would have tried to sell the forged notes to anyone … whom he 'considered safe': 1236. This is a different account from those premised by Lord Diplock and Viscount Dilhorne. Lord Fraser adopts the latter's formulation (at 1237-38). Lord Scarman proceeds without express reference to the facts.

19 [1966] 3 All E.R. 77.

The Risks of State Sponsored Crime

The use of informers and police spies is deeply rooted in the past and present of law enforcement in the common law countries.[20] It is probably too late in the day for an accused to seek relief on the basis that a police spy passively observed him commit a crime which he could have prevented by merely revealing his presence. Many crimes, particularly consensual or 'victimless' crimes, are committed in private and might be virtually undetectable without informers. Crimes of violence, organised in secret, are often too dangerous to permit to proceed to public manifestation where they might be detectable by normal means. Sophisticated criminals, such as corrupt public officials, might escape detection altogether should the government forego investigative techniques involving trickery and deception. Informers and police spies may sometimes be the only alternative to non-detection.

Yet the dangers of such investigative tactics are apparent. Police infiltration of the criminal underworld may bring with it both the appearance and the fact of police corruption. Official countenance of actual crimes by police agents, sometimes necessary to maintaining their cover, may spread suspicions of impropriety to the highest levels of the police and to the prosecutorial service. Moreover, the government undercover agent, unsustained by the clearer rules of search, identification and interrogation in the mainstream investigation, may take dubious measures. Passive observation of incipient criminal activity may progress to offers of criminal opportunities, to persistent importuning and, finally, to the offer which, for one reason or another, can hardly be refused. The motive for investigation, irrelevant where detection follows crime, may be neutral or may be tainted by a determination to 'fix' an individual. The object of these endeavours may be hardened criminals given opportunities to do what comes naturally. They might also be persons without criminal propensities drawn into crime by the inducements offered. The dangers of over zealousness and corruption are magnified where the government agents involved are themselves criminals seeking benefits from the police.

As police techniques move from observation to abetment, they challenge the fundamental theoretical structure of the criminal law. The ancient maxim *"nulla poena sine lege"* and the concept of *actus reus* restrict government intervention in crime to cases not of loose morality or criminal tendency but of actual criminal behaviour. A state's determination to take into custody all those "pre-disposed" to criminality is not less problematic if the roundup is sought to be legitimized by state sponsored crimes. Where the government proposes to examine the individual for criminal tendency by encouraging criminal behaviour, it seeks new terrain for social control mechanisms. It is the undeniable duty of the courts to examine such state conduct if it occurs and to delimit the new terrain.

Chief Justice Laskin of Canada has recently noted that

> Entrapment is not self-defining, and, in a general sense, may encompass a wide array of practices involving police action which, directly or indirectly, reveals or brings about the commission of an offence by another.

[20] Donnelly, *supra* note 7.

The incentive to impose restraints will be greatest where the investigative practices at issue in a given case appear either oppressive to the accused or intolerably menacing to the integrity of the system. Judges might consider the question in three parts. Are there impermissible forms of state sponsorship of criminal conduct? If so, is it appropriate for judges to seek to regulate the conduct? If judicial regulation is appropriate, should it take the form of (a) an interpretation of 'defences' which would preclude a finding of guilt given impermissible state sponsorship; (b) a defence proper i.e. a plea in confession and avoidance; (c) a plea in bar of prosecution (like a plea of *autrefois* or abuse of process); (d) an exclusionary rule of evidence; (e) mitigated sentence; or (f) extra-process remedies such as civil suits and police review proceedings.

COMMENT

The breadth of the question certified invited scrutiny of the scope of *Kuruma* even outside the entrapment context. This broader purely hypothetical question I put, to the extent possible, to one side. On the state sponsorship issue itself, the judgments (allowing for considerable diversity of expression) went rather like this:

1. the English authorities clearly reject a defence of entrapment;
2. this is as it should be because an individual incited to crime is no less guilty for the fact of the incitement; and
3. that it is not the business of the judges to control the police;
4. that to view the *Kuruma* discretion as giving rise to a discretion to refuse to permit the prosecution to prove an entrapment case would undermine (1); and
5. that there are in any event other mitigating 'remedies' such as absolute discharge, which might be employed.

The examination of the arguments discloses little of sustaining weight.

1. *The English authorities reject a defence of entrapment*

No entrapment case had ever reached the House of Lords.[21] It might therefore have been more precise simply to observe that no court had ever acquitted on the basis of a defence of entrapment; as we shall see, in the prior cases it was never necessary to do so. For this reason, there is no definition of entrapment in English law and its rejection without definition in *Sang* is uncertain of consequence. Indeed, the very statement that entrapment has no basis in English law is "comparatively new".[22] It is based on three recent Court of Appeal decisions — *McEvilly*[23] (1973), *Mealey*[24] (1974) and *Wallis*[25] (1975). Notwithstanding the absence of any House of Lords judgments on the subject, counsel for Sang took the position to be firmly

[21] Curiously, no mention is made in *Sang* of *R.* v. *Willis* [1976] Crim. L.R. 127 (C.A.) in which the House of Lords refused leave to appeal: see [1979] 2 All E.R. 46 at 51.

[22] *Id.* at 50 *(per* Roskill L.J.).

[23] *R.* v. *McEvilly, R.* v. *Lee* (1973) 60 Cr. App. R. 150 at 156.

[24] *R.* v. *Mealey, R.* v. *Sheridan* (1973) 60 Cr. App. R. 59 at 62.

[25] [1976] Crim. L.R. 127 (not referred to in the House of Lords).

established and as a result no argument was heard on this point.[26] This was unfortunate, for the statement that there is no defence of entrapment became the premise from which illogically followed the House's destruction of a judicial discretion to exclude evidence obtained by entrapment.

A number of points might have been taken in argument on the existence of the "defence". First, in the two cases relied on in the House of Lords, the statements regarding the "defence of extrapment" were *obiter.* In *McEvilly,* Roskill L.J. states:

> It is not, however, necessary finally to decide [if the defence exists]. Even if contrary to the present view of this Court there be such a doctrine, this case does not, on the evidence to which I have already referred, begin to come within any such doctrine if it exists. No member of this Court can see anything wrong in what [the police agent] did.[27]

The Lord Chief Justice held in *Mealy* that there was

> ... no evidence, beyond such fragmentary parts of the statements [of the accused]..., that [the police agent] was an agent provocateur in the true sense... it is not established to our satisfaction that [he] came into that category....[28]

In *Wallis,* as the Criminal Law Review commentator notes, the accused's claim is a serious one. However, the 'defence of entrapment' was rejected in passing, on the authority of the above-mentioned two cases.[29]

Apart from being *obiter,* the statements regarding the defence of entrapment must be viewed in light of the fact that *McEvilly,* relied on in *Mealey* and *Wallis,* also held in *obiter* that evidence of entrapment, while not giving rise to a defence, was, where appropriate, properly subject to the trial judge's discretion to exclude evidence.[30] There was to be a remedy; it was not in the form of a defence but in a judicial discretion to exclude evidence. In *Mealey* itself, a narrower view emerged: "the wide discretion to exclude evidence unfairly obtained" was said to be 'unhelpful' in a claim "that the activity itself was provoked by a police informer"[31] In *Wallis,* there was, according to the brief report, a "doubt" about the existence of the discretion.[32] It was assumed for argument and held not to be engaged by the facts. The Court of Appeal, unlike the House of Lords in *Sang,* had never held that denying a defence of entrapment precluded a judicial discretion to exclude evidence obtained by entrapment.

Prior to *McEvilly,* the authority was sparse indeed. *Ameer*,[33] *Foulder*[34] and *Burnett*[35] are lower court decisions of no authority in which evidence of entrapment was excluded. These were later

26 *Supra* note 8 at 1238.
27 *Supra* note 23 at 156.
28 *Supra* note 24 at 61.
29 *Supra* note 25 at 128.
30 *Supra* note 23 at 154.
31 *Supra* note 24 at 63-64.
32 *Supra* note 25 at 128.
33 [1977] Crim. L.R. 104.
34 [1973] Crim. L.R. 45.
35 [1973] Crim. L.R. 748.

overruled in *Sang*. Only in *Murphy*,[36] a Northern Ireland Court Martial Appeal, was a possible defence of entrapment even mooted.

In *Brannon* v. *Peek*,[37] the accused's conviction under the Street Betting Act, 1901 was quashed on appeal on the basis that the Act did not cover the case. In passing, Lord Goddard sternly criticized the behaviour of a police constable who, he said

> ... went out of his way to invite and persuade the appellant to commit an offence and, as the case states, at least on the second occasion persuaded him to do so reluctantly.[38]

As no offence was otherwise provable, it is perhaps not surprising that his Lordship did not discuss a defence of entrapment.

In *Browning* v. *J.W.N. Watson (Rochester) Ld.*,[39] the carriage by coach of two non-members of a football club gave rise to an offence under the Road Traffic Act, 1930. The two non-members were in the service of the licensing authority. Although *Brannon* v. *Peek* was cited in argument, there was no discussion of either a defence of entrapment or the possible exclusion of evidence. It appears unlikely that the point was argued. Lord Goddard again indicated his disapproval of such police activity and, on referring the case back to the justices with a direction to convict, pointedly noted the possibility of an absolute discharge and that the defendants need not pay the prosecution costs.

McCann[40] and *Birtles*[41] are sentence appeals where police complicity led to reduced sentences. Parker L.C.J. held in the last of these that it is

> . . . something of which this Court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out.[42]

As these were sentence appeals, neither a defence nor an exclusionary rule were examined on the merits.

Finally, neither *McEvilly* or *Mealey* scrutinizes on its merits the claim that a defence exists. In the former, it is simply (and truly) related that no such defence has ever been accepted in English courts.[43] Whether this is a good or a bad thing or how it came to pass is not revealed. In *Mealey,* Parker L.C.J. was content to refer to the specific test proposed by counsel on those facts as "so difficult in construction and so vague in its scope",[44] although slender ambition could no

36 [1965] N.I. 138.
37 [1948] 1 K.B. 68.
38 *Id.* at 73.
39 [1953] 1 W.L.R. 1172, 2 All E.R. 775 (Q.B.D.).
40 (1971), 56 Cr. App. R. 359.
41 (1969) 53 Cr. App. R. 469, 2 All E.R. 1131, 1 W.L.R. 1047.
42 *Id.* at 473.
43 The authority cited for the proposition, later relied on in *Mealey,* is Smith and Hogan (3rd ed. 1973) 150 [sic. the reference should be to 112-113]; these authors too conclude without reasons. In neither case was reference made to the lengthy argument in support of a "possible defence" which appears in Dr. Williams, *Criminal Law; The General Part* (1961) ss. 255-56.
44 *Supra* note 24 at 62. Counsel had proposed a defence: If the defendant would not have committed a criminal offence but for the activities of a police officer or an agent provocateur, and where those activities are found to be objectively unacceptable to the court....

doubt produce a thousand "rules of law" no more pristine. In sum, the central reason given for rejecting a defence of entrapment was that it had never before been allowed. This, of course, is scarcely a reason at all.

2. *Many crimes are committed at the instigation of others; the fact that the counsellor is a policeman cannot affect the guilt of the principal offender.*[45]

This is a make-weight. The general proposition that instigation by another gives rise to no defence for the principal offender is true and yet so riddled with exceptions as to be of limited use in support of their Lordships' opinions. The circumstances of the "instigation" may vitiate an ingredient of the offence.[46] Professor Williams notes that prosecutions in property crime actually instigated by the owners of the property may fail on a finding of "consent".[47] "The doctrine of consent", he argues, "is merely the legal vehicle by which the law distinguishes fair from unfair conduct."[48] Or again, the form of the instigation may give rise to a defence of duress.

In any case it is conclusory reasoning of the most blatant sort. The core of the appellant's claim was that state sponsorship is different from other instigation. On the face of it, this is a plausible claim. For one thing, non-official instigators of crime rarely, if ever, instigate so that they might later complain. Unlike police agents, private persons who instigate crime are not in a position to instigate many crimes nor are they by law charged with preventing them. Neither are they charged with the prosecutorial process and their action would never bring the administration of justice into disrepute. Creation of crime by the chief enforcers of the criminal law is both very different and uniquely disturbing. Although one may be generally unconcerned about the source of instigation, it is certainly not the sense of the criminal law that the citizen is liable to periodic testing of his propensity for crime by law enforcement agents. The concepts of *actus reus* and *mens rea* serve to limit the scope of state intervention in matters of crime to relatively clearly defined behaviour. The permissible scope is considerably widened when the state is permitted to take up the business of instigating crimes. Judges might approach such cases with diffidence if only to protect their own independence.

3. *It is not the business of the judges to control the police and the prosecutor*

This argument is demonstrably false. The principle of legality, bolstered by the judicially promulgated doctrine of proof beyond a reasonable doubt, restricts effective state intervention into "criminal activity" to cases of overwhelming proof of legal guilt. Evidentiary rules — the non-competence of spouses, the confessional privilege, the requirement that admissions be voluntary, the inadmissibility of similar fact evidence and many others — shape the investigative process. In

[45] *Supra* note 8 at 1226 (Lord Diplock); 1235 (Lord Salmon); 1238 (Lord Fraser); 1243 (Lord Scarman).
[46] In *Birtles,* Lord Chief Justice Parker raised in this regard the example of Marco [1969] Crim. L.R. 205: *supra* note 41 at 472.
[47] Williams, *supra* note 43 at s. 255.
[48] *Id.* at 781.

England, it is not the legislature but the judiciary which has propounded rules, undoubtedly meant to be kept, to delimit powers of arrest, search and seizure. The *autrefois* pleas in bar are judicial commands to prosecutors to get it right the first time. The developing judicial doctrine of abuse of process [49] may close the courts to prosecutions which would make the judges parties to overreaching of the prosecutorial branch. To argue that judicial intervention in state-sponsored crime is inappropriate is one thing; to argue that judicial intervention violates a firm barrier between adjudication and prosecution is to fail to accept the responsibilities of the judicial branch.

4. *A judicial discretion to refuse to hear prosecution evidence is inconsistent with holding that there is no defence of entrapment*

As presented, the argument embraces a *non-sequitur.* It is fallacious in the same sense that the statement "since there is no defence of *autrefois convict* there can be no plea in bar" is fallacious. Or consider, "since there is no defence of 'police abuse', there can be no exclusion of admissions obtained by abusive police conduct". These fail to recognize that a meritorious claim for relief might be implemented through different techniques and that arguments dismissing a technique do not as such attack the validity of the claim.

On the other hand, there seems little need to develop a whole new judicial technique (refusing to allow the prosecution to call evidence), when the existing techniques of a defence or a plea in bar would meet the requirements of an appropriate case.

5. *Mitigation of Sentence is the Appropriate Remedy*

The problem of defining impermissible state participation in crime is not solved by treating it at the disposition stage. The need for guiding principles cannot fail to re-emerge as accused persons contend that state participation entitles them to discharges or to nominal sentences.

The sentencing option fails to recognize the inherent differences between state sponsorship and accepted mitigating factors. Crime induced by state agents is not the same as that induced by impending senescence, overbearing stepfathers or financial hardship. State sponsored crime presents in the limiting case risks of oppression of individuals and violations of a public trust which ought to be forthrightly suppressed and not consciously minimized.

Finally, the sentencing option implies that the accused while legally guilty is morally blameless. Yet in many cases, the accused will not be blameless at all. At the same time, the police conduct may exhibit intolerable features. If such conduct is impermissible, it cannot be condemned by a technique which implies the moral blamelessness of an accused who may not be blameless.

Conclusion

The criminal justice system seeks to punish those who have committed forbidden acts. This simple goal is qualified by an elabo-

[49] *Connelly* v. *D.P.P.,* [1964] A.C. 1254; [1964] 2 W.L.R. 1145; 2 All E.R. 401, [48] Cr. App. R. 183 (H.L.).

rate rule structure which takes into account a wide range of countervailing values. The requirements of blameworthiness and of proof beyond a reasonable doubt, the justifications and excuses, as well as many rules of proof and procedure are the expressions of these values. These are most often judicial formulae (or formulae of judicial creation), elaborated to preserve some distance between the individual and the punishing state. Of course, this pre-eminent among judicial roles is best preserved by restraint in its exercise. Judges would be unwise to seek overall supervision of the prosecutorial process. This would trench on the historical prerogatives of the Attorney-General, thereby compromising the independence of the judiciary. The conscientious prosecutor's judgment need not be questioned in the judicial branch. But what are the judges to do when the prosecutorial process has broken down? Are the courts not obliged to close their doors to the prosecution of offences which are substantially the creative product of state agents? In the worst cases, will there be any other way of avoiding tarring the judges with the brush of the state's excess?

Judges can formulate administrable principles which indicate when the state has gone too far. They ought to intervene to protect the accused who had no predisposition to commit the offence prior to his contact with government agents.[50] The obvious infirmity of this so-called "subjective test" is that it leaves state activity unregulated where the accused is predisposed to criminality. Its focus is on fairness to the accused (a difficult concept where the accused has in fact committed the forbidden act), instead of on the need to preserve the integrity of the process.[51] Some American jurisdictions have judged certain instances of police conduct "objectively unacceptable", irrespective of the predisposition or otherwise of the accused.[52] Definitions

[50] This is the "subjective approach" of the U.S. Supreme Court: *Hampton* v. *U.S.,* 425 U.S. 484 (1975). It originated in *Sorrells* v. *U.S.,* 287 U.S. 435 (1932), where the majority approved the robust statement opinion in *Butts* v. *United States* (C.C.A. 8th) 273 Fed. 35, 38:

> "The first duties of the officers of the law is to prevent, not to punish crime. It is not their duty to incite and to create crime for sole purpose of prosecuting and punishing it. Here … their first and chief endeavour was to rouse, to create crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offence if the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of it if the officers of the law had not inspired, incited or persuaded and led him to attempt to commit it".

[51] Park, The Entrapment Controversy (1975-76), 60 Minn. L.R. 163; see also the minority views in the Supreme Court of the United States in *Sorrels (ibid), U.S.* v. *Russell,* 411 U.S. 423 (1972) and *Hampton (ibid).*

[52] Most objective test jurisdictions have adopted the language of either the Model Penal Code or of the Proposed New Federal Code: *Park* (*ibid*), at 169. Section 2.13 of the Model Penal Code (Official Draft, 1962) provides that

> (1) A public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
>
> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

could be formulated if and when the need arose. Likewise, the techniques for their implementation — defence, bar or discretion — could be elaborated through the disposition of actual cases.

It is a happy fact that the courts of Singapore and England have yet to encounter a case of state-sponsored crime which demanded judicial response at the adjudicative stage. Should such a case arise, the prudently flexible approach of the Court of Appeal in *Cheng Swee Tiang* has left Singapore's judges a full range of options. The English, for no compelling reason, have pre-emptively cut down their room to manoeuvre. There will be no defence; there will be no discretionary refusal of the prosecution's right to proceed. The sentencing option remains, notwithstanding its inability to do the job. The uncertain reach of the doctrine of abuse of process, not invoked in *Sang,* may be extended in an appropriate case. Desperate efforts to explain away *Sang* will have to be the order of the day. Luckily, for Singapore and other Commonwealth jurisdictions with their own codes, *Sang* can be safely ignored.

L. TAMAN

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.
(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.