

## THE ETHICS OF CRIMINAL PRACTICE

### Introduction

1 The year was 1820. Queen Caroline of England was charged with adultery by no less than her husband, King George IV, with whom she was estranged. George IV attempted to introduce an Act of Parliament, curiously named the Pains and Penalties Bill, to declare that the Queen had committed adultery and that he ought to be granted a divorce. If passed, the Queen would have faced not just divorce and the loss of her title but perhaps much worse. The debate in the House of Lords was effectively the trial of Queen Caroline. Witnesses were called, cross-examination was conducted, and the public watched with bated breath as the drama unfolded. In her defence, her advocate, Lord Brougham (who subsequently refused the post of Attorney-General and eventually became the Lord Chancellor), raised the “right of recrimination”: a defence that the King, by having engaged in adultery himself, had lost the right to a divorce. More powerfully, Lord Brougham announced that he intended to adduce evidence that the King had, when he was the Prince of Wales, married one of his mistresses, a Roman Catholic widow named Maria Fitzherbert. If proved, George IV would have to forfeit his crown, plunging the country into a constitutional crisis unlike any other. What Lord Brougham had sought to do was essentially blackmail. Many dissuaded Lord Brougham from proceeding with his threat (or, as Lord Brougham would later term it, his “menace”) but he persisted. When he rose to deliver his opening statement on

the first day of the “trial”, he gave what is now considered the classic statement of an advocate’s duty to his client:

**[A]n advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties;** and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, **he must go on reckless of the consequences**, if his fate it should unhappily be, to involve his country in confusion for his client’s protection! [original emphasis in upper case; added emphasis in bold].

2 King George IV caved in. The Bill was withdrawn and Queen Caroline remained on the throne until she passed away a year later. Lord Brougham’s argument was as simple as it was powerful. As an advocate, he stood not as a citizen, not as a patriot, but as the zealous champion of his client’s interests. 130 years later, Charles P Curtis would write that “[there is a] special moral code which governs a man who is acting for another. Lawyers in their practice... put off more and more of our common morals the farther they go in a profession which treats right and wrong, vice and virtue, on such equal terms.” “The practice of law is vicarious, not altruistic”, he counselled. For Lord Brougham and Curtis, to be an advocate is to *have no identity*, no affiliation, and no allegiance but that of your client. To them, central to the practice of the law is the elision of the self and the complete submission to the client’s cause.

3 This is an extreme view of an advocate's duty which I do not subscribe to. Curtis' articulation of an advocate's duty has been received with "amazement" and "indignation" by lawyers and academics. Some have portrayed his view satirically as "Lowering the Bar". One lawyer described it in somewhat withering terms when he observed "I am indeed glad that fifty-one years ago when I was wavering between law and medicine, this article was not given me by one on whom I relied, as a fair statement of the ethics of advocacy. Had I then read and believed it, I might not have chosen a profession which, as misrepresented by Mr Curtis, I could never respect".

4 The identity of a lawyer is one that the advocate carries with him in all his professional dealings. In 2005, the High Court noted that solicitors, "*qua* officers of court have an absolute and overriding duty first and foremost to the court to serve public interest by ensuring that there is proper and efficient administration of justice." Although that statement was made in the context of a civil suit, in my view it applies with equal, if not greater, force in the context of the criminal law where all of society's most vital interests lie: blame and punishment; liberty and its deprivation; life and death. Today I would like to advance a simple proposition: and that is that all criminal practitioners, be they on the side of the Prosecution or the Defence, ought to see themselves ultimately as officers of the court whose ultimate allegiance is to the cause of justice. It is the advocate's core identity as an officer of the court which is the fountainhead of all his ethical duties, including his duty to advance his client's interests to the best of his ability. To that end, I will suggest that this demands that we start thinking not in

terms of “ethics of the Prosecution”, and “ethics for the Defence Bar”, but a unified ethics of criminal practice. In my view, this is not controversial especially in the local context given the unique *Joint Code of Practice for the Conduct of Criminal Proceedings* which I had the distinct honour and privilege to launch in May 2013.

**Antinomy: one master, two servants**

5 Let me begin with a clarification. When I speak of a single set of “ethics of criminal practice”, I do not mean to say that Prosecutors and Defence Counsel have the same *duties* in all situations. This is clearly not the case. After all, even the Professional Conduct Rules distinguishes between the duties of defence counsel (in Part V) and that of prosecutors (in Part VI). Rather, what I mean is that there is a single ethic, a single cause, which pervades all of criminal practice. This is the pursuit of justice. Justice is the master of the Prosecutor and the Defence Counsel alike. To some, this might sound trite. But on the other hand, it might come across as odd. After all, Prosecutors seek a conviction while the Defence seek an acquittal – can it make sense to speak sensibly of both being servants of the same master? As I hope to explain, I think this reaction is founded on the erroneous notion that the goal of the Prosecution is to secure a conviction at *all costs*; whereas the goal of the Defence is, conversely, to secure an acquittal at *all costs*. Both, in their unadulterated form, are untrue.

6 Let me start with the Prosecution. In a talk I gave to the Attorney-General's Chambers as a judge well before I had any inkling that I would come to occupy that office, I reminded the Prosecutors that they have been called "ministers of justice" in recognition of the fact that they do not act as counsel for any particular person or party; they serve neither the Government of the day nor the victim of the crime. The Prosecutor's client, insofar as he can be said to have one, is society. In the resonant words of Justice Rand,

.. "[t]he purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. ... The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty. [emphasis added in bold]

7 The goal of the prosecution is not to secure a conviction at all costs. However, that is not to say that the Prosecutor should not care about the outcome of the case. Because the decision to charge an accused is made after a process of careful consideration, the Prosecutor would be expected to pursue the case with vigour and conviction to secure the conviction of one whom he sincerely believes to be guilty. Yet, the point is that the desire to secure a conviction *flows from his basic commitment to justice*: the Prosecutor desires to convict the guilty only because that is what justice demands. The fact that the Prosecutor's ultimate duty is to justice also means that the Prosecutor has a duty to withdraw a charge or, even, to apply for a criminal revision if clear evidence emerges to disprove the guilt of the accused.

8       How about the Defence? In the case of clients who are innocent, there is no controversy. In that case, the Defence Counsel's ethical obligations towards justice are coterminous with his obligations towards his client: both demand that the innocent person be acquitted. However, the concern lies in the case of the putatively guilty. "How can you defend a person you know is guilty?" is the question that laypersons inevitably ask criminal lawyers. The problem with that question is that it equates "defence" with "securing an acquittal (at all costs)". The two are not necessarily the same.

9       Let me first clarify that the goal of criminal defence is not to secure an acquittal at all costs. In this regard I can do no better than to refer to r 73 of the PCR, which reads, "[w]hen defending a client on a criminal charge, an advocate and solicitor shall endeavour to protect the client from being convicted except by a competent Court and upon legal evidence sufficient to support a conviction for the offence with which the client is charged." The duty of the Defence Counsel is to ensure that no conviction is entered *unless* it is done (a) by a competent Court; and (b) upon legal evidence sufficient to support a conviction. This gives us two important reasons why a lawyer defends the guilty.

(a)     The first relates to substantive justice. Where there is a disputed question of guilt the only institution that can legitimately make a finding of guilt is the court, at the end of a trial, and only upon proof beyond a reasonable doubt. It is not for any person, least of all the lawyer of the accused, to arrive at a conclusion of guilt outside of the forensic process.

As the late Subhas Anandan, with his customary acuity and candour, put it, “[t]he system says that he (a criminal) must be tried in court. So as a lawyer, our job is only to prepare the best defence for him, not decide if he is guilty or not. If he is found guilty, then fine, punish him. I walk away with a clear conscience.”

(b) The second relates to procedural justice. The law gives many rights to a criminal defendant based on values independent of guilt or innocence. These “intrinsic procedural rights” include the right to plead not guilty and to put the prosecution to its proof, the right to prevent the retention of unlawfully seized evidence, and the right to counsel. These rights are secured and realised through representation.

10 Among the many reasons that have been proffered for a lawyer’s obligation to defend all clients, these two reasons, both of which are grounded in the quest for justice, have always impressed me the most. Like the prosecutor, the Defence Counsel advances his client’s case because that is what justice demands – justice demands that an advocate, skilled in the law and committed to the defence of the accused stands ready to argue the negative case. The Defence Counsel has a duty to his client because he first has a duty to justice. This explains why r 74 PCR provides that defence counsel cannot mislead the court by setting up an affirmative case inconsistent with his client’s clear confession of guilt. The explanation is simple: “a lawyer’s duty to his client cannot rise higher than its source, which is the court.”

11 To many laypersons, this seems absolutely paradoxical: how can the same master – Justice - command the loyalty of two servants (Prosecution and Defence) with opposing objectives? This is the antinomy that lies at the very heart of our adversarial system which all lawyers are familiar with. It is a system which demands that forensic truth and legal guilt be ascertained through this often complex but rigorous contest between two opposing parties. The upshot of this is that both Prosecutors and Defence Counsel have essential, though different, roles to play in the pursuit of justice. However, it demands that both, as officers of the court, must remember that their ultimate master is justice, and not their clients nor their superiors in the prosecution service.

12 What does this mean for the ethics of criminal practice? For a start, I think it puts paid to the fiction that the prosecution and the defence ought to be held to different ethical *standards*. This assertion rests on the easy conflation of the proposition that prosecutors and defence counsel have different ethical *duties* (which is true) with the altogether different and false notion that they ought to be held to different ethical *standards*. If both prosecutors and defence counsel are officers of the court, then to suggest that one should be held to a higher ethical standard than another is a suggestion that is both patronising and pernicious.

13 I hope, in the remainder of my speech, to show how this reorientation towards justice affects our understanding of the ethical obligations of a criminal

practitioner at each stage of the criminal justice process, from the making of the charging decision to post-trial matters such as sentencing and appeals.

## **The trajectory of criminal practice**

### ***The charging decision***

14 Let me begin first with the making of the charging decision. Of the many questions that have to be answered in the course of the criminal justice process, the decision of whether to charge (and, if so, for what) is probably the most difficult. In our system, the charging decision is ultimately reposed with the office of the Public Prosecutor. Unlike the United States, there is no provision for this decision to be delegated to a “grand jury”. While such an option might be politically expedient, as the recent example of the grand jury hearing in connection with the shooting of an unarmed African-American teenager in the US town of Ferguson illustrates, remitting the question to a grand jury does not necessarily lend the eventual decision any greater degree of legitimacy.

15 Under established case-law, the prosecutor’s discretion in this area cannot be impugned except on proof of (a) bad faith or (b) unconstitutionality. However, these legal rules only circumscribe the limits of what is *legal*, and it does not tell us what is *ethical*. Ultimately, prosecutors must remember that they are the gatekeepers of the criminal justice process – if no charging decision is made, the case never enters the system and the courts cannot even take cognisance of the offence. This is a weighty responsibility. Irrespective of

whether it ultimately results in an acquittal or a conviction, the mere entry of the case into the criminal justice system exacts a tremendous cost to all concerned: to the accused and his family, to the victim who might have to testify, and to society at large, which bears not just the financial cost of the criminal proceedings but also the moral cost of any error.

16 Given the tremendous consequences of a charging decision, all prosecutors necessarily have a duty to give each case their fullest attention. They must ensure that great care and consideration is given to each decision beyond being satisfied that the accused is factually and legally guilty. This process of determining public interest in the prosecution entails the consideration of manifold imponderables. From my personal experience, I can say that prosecutorial decisions invariably undergo several levels of critical internal evaluation. The reason is obvious. There is simply no margin for error. Wrong charging decisions will lead to unmeritorious prosecutions which will in turn lead to erosion of public confidence in the criminal justice system. Therefore in arriving at any charging decision the prosecutor must resist viewing the process as a mechanical implementation of internal prosecutorial guidelines. It is certainly not an exercise of ticking the right boxes. Guidelines are vital to maintain institutional consistency but they supplement, instead of supplant, the prosecutor's careful analysis of each case. The Prosecutor must consequently give unbiased consideration to every offender, he must avoid irrelevant considerations, and he must treat like with like. However, the point is that charging decision is made because there is a sincere belief that it is

ultimately the *right* thing to do. In this connection, I can do no better than to quote the then-Attorney-General Mr Chan Sek Keong who stated:

We have no interest in prosecuting the factually innocent. We do not prosecute unless we are satisfied that there is a reasonable prospect of a conviction. We do not prosecute weak or unmeritorious cases in the hope of getting a conviction. It is only too easy for us to prosecute all cases and cast the responsibility on the courts. Furthermore, it is an abuse of public trust and may undermine confidence in the system.

17 I would encourage the Criminal Bar to see themselves as indispensable parts of the charging process. As the advocates of the accused, they play a vital role because they have access to a side of the story which the prosecutors do not. When I was the Public Prosecutor, I recognised that there was cynicism in some sections of the Criminal Bar about the extent to which representations ever made a difference. For my part, I always instructed the DPPs under my watch to read and consider each set of representations carefully and I have every confidence that they did and will continue to do so under the current AG. After all the prosecution relies only on the investigation papers prepared by the investigative agencies and this, by necessity, may present a narrow picture of the facts, focusing primarily on the offending behaviour and the harm it has caused. Defence Counsel can widen the field of vision by drawing attention to relevant facts which might otherwise go unconsidered: these could include the background to the commission of offence, the personal circumstances of the offender, and developments that have transpired after the commission of the offence. For my part, I can certainly recall instances in which charging decisions

in individual cases were changed or varied as a result of constructive representations submitted by the Defence or even the accused person.

18 With that in mind, representations should no longer be viewed as a *pro forma* appeal for leniency but as a vital and important part of the dialogue that takes place in the ongoing conversation about justice and the public interest in the criminal justice process. Defence Counsel have an ethical duty to inform the charging process by bringing all relevant considerations to the attention of the prosecutor and, where appropriate, to suggest alternative decisions which are supported by cogent reasons. Part of this ethical duty would, I think, also entail being circumspect about the use of representations. To send multiple sets of representations devoid of new and material information would only serve to delay proceedings to little profit.

### ***Pre-trial matters***

19 I now turn to pre-trial matters. The decision of the Court of Appeal in *Kadar* has been held up by many commentators as being one of the most significant decisions in our jurisprudence. I am sure it has not escaped your attention that the last 2 PPs were part of the coram who decided *Kadar*. The decision in *Kadar*, coupled with the advent of the Criminal Case Disclosure Conference regime found in the Criminal Procedure Code 2010 (“CPC 2010”), has inaugurated a “sea change in the criminal discovery process, with the tide shifting towards greater transparency and parity between the parties so as to

help them prepare for trial.” The disclosure requirements introduced by both are familiar to all of us so I shall not dwell on them. Rather, my focus will be on the ethics of disclosure.

20 I think that all criminal practitioners have an ethical duty to embrace disclosure as part of their collective commitment to justice and the truth. As noted by the Court of Appeal in *Li Weiming’s* case, the dynamics in criminal proceedings have now shifted from a purely adversarial model – “akin to a ‘game or sporting contest’... to a truth-seeking model.” The ethical basis for disclosure is not *fair play* but *justice* – disclosure should not be seen as an annoying but necessary incident of playing the “game” of litigation, the same way that the offside rule is an annoying but necessary part of the game of football. Rather, disclosure is at the very heart of the purpose of criminal litigation, which is to “secure the conviction and punishment of the guilty and the acquittal and vindication of the innocent – *in short, to achieve a just outcome by means of a fair trial.*” Proper discovery advances justice, which is to the advantage of both the Prosecution and Defence alike. Reciprocal discovery, such as that present in the CCDC regime, “enhances the reliability and transparency of the criminal justice process in searching for the truth.” In our current system, the Prosecution bears the primary – though not exclusive – burden of disclosure. And this is in keeping with the presumption of innocence: we want the Prosecution to “lay its cards” on the table and invite the accused to enter his defence. This process of discovery should not be seen as a handicap to the Prosecution. After all, the Prosecution’s duty, as stated above, is not to

secure the conviction at all costs. Rather, it is to assist the court in the determination of the truth through the presentation of all relevant material and, to that end, it should be committed to the process of discovery. I have heard of more than one story in which Defence Counsel have, after viewing CCTV footage of an offence during a Criminal Case Management Conference – returned to advise their clients to plead guilty, thereby saving time and expense for all concerned.

21 Of course, this does not mean that the structure of our adversarial system is to be abandoned entirely. The Court of Appeal in *Kadar No. 2* clarified that the duty of disclosure does not require the Prosecution to search for additional material. However, the court was also quick to add that the prosecution has a “duty to comply with the spirit of the... disclosure obligation rather than the mere letter.” The point is that our current system of reciprocal and sequential discovery serves a commonality of interests and is to the advantage of both.

### ***Conduct of trial***

22 I now move to the conduct of the trial itself. The trial is the focal point of the criminal justice system; and the courtroom is its dramatic face. David Marshall, possibly the most famous criminal lawyer ever to practice in Singapore, saw the common law adversarial trial as the “trial of the person”, in which the inquiry of the truth was conducted through an examination of persons

as compared to the civil law inquisitorial investigation, which he described as the “investigation of an offence”. A consummate trial lawyer, he expressed his preference for the “magnificent” trial system but opined that, the trial process must still take place within the framework of human dignity. Building on his comments, I believe that all criminal practitioners have an obligation to conduct themselves in ways which affirm the values of the criminal justice process: an unswerving commitment to the truth, an unwavering pursuit of justice, and a resounding commitment to human dignity.

23 Let me share some thoughts on how this works out in practice. Punctuality is a precious commodity in modern life and it is particularly prized in the courts. “Justice delayed is justice denied”, as the old adage goes. To that end, unnecessary adjournments should be avoided and both sides should undertake to inform the other if, for some reason, the trial is unable to proceed. Punctuality is a sign of respect not just for opposing counsel and for the judge but also for the criminal justice process itself: it signals that the determination of the innocence and guilt of an individual is a matter of utmost importance and should be accorded priority. During cross-examination, attempts at humiliating or intimidating the witness are to be deprecated. We are all familiar with the rule that no questions are to be asked without a reasonable basis and that questions which are indecent, scandalous, or calculated only to insult, embarrass and annoy are to be avoided. However, I think our ethical commitments extend deeper than that. Witnesses are there to give evidence about facts and not to lay bare the most intimate details of their private life. An inquiry into the credit of

a witness can be conducted without unnecessary demolition of his dignity. The trial is after all a forum for the examination of the truth.

24 Let me elaborate by reference to a recent example. Just last week, the Court of Appeal released its decision in *PP v Muhammad Farid bin Mohd Yusop*. In that case, the Prosecution had appealed against the High Court Judge's decision to acquit the Respondent of trafficking in a capital amount of methamphetamine (386.7g) and to convict him of a non-capital charge (249.9g) instead. In the court below, the Respondent testified that he had – on three previous occasions – trafficked in non-capital quantities of drugs and had no reason to suspect that this – the 4<sup>th</sup> delivery – would be any different. The High Court Judge accepted the Respondent's argument and held that, on a balance of probabilities, there was an agreement between the Respondent and his supplier of the drugs, one Bapak, that the Respondent would not be required to deliver more than 250g of Ice for each delivery job; thus, the Respondent only had the *mens rea* to traffic in a non-capital quantity of methamphetamine. For present purposes, what is relevant is the way the Court of Appeal dealt with the Prosecution's argument that an adverse inference ought to be drawn against the Respondent for electing not to call "Bapak" as a witness in his defence.

25 In the Court of Appeal, Mr Amolat Singh, counsel for the Respondent, did not avoid the issue but dealt with it with commendable frankness. Mr Singh did not seek to avoid the problem but freely admitted that the Defence did not call on Bapak because of a fear that Bapak might, in an attempt to absolve himself

of responsibility, turn hostile. This was a simple “tactical decision”, Mr Singh informed the court. This candour is refreshing and the court singled him out for praise, writing that Mr Singh had, in his conduct of the matter, exhibited a “characteristically candid style (which has now become a sterling hallmark all criminal practitioners would do well to emulate).” I respectfully agree. Candour is a close ally of honesty, and honesty is the cornerstone of justice. I can also recall many instances, during my first stint on the Bench, when DPPs who have appeared before me in Magistrates’ Appeals have candidly and fairly accepted that sentences meted out by the lower courts might have been too high or inappropriate because particular mitigating circumstances had not been taken into account and I varied the sentences accordingly. Mr Singh’s conduct, and that of the DPPs who had appeared before me in the past, were in the best traditions of the Bar.

### ***Sentencing***

26 The next area I will focus on is the sentencing process. I would first like to clarify that criminal practitioners should shed any notion that the sentencing process is a negotiated settlement, with the Prosecution submitting for one extreme; the Defence for another, and the Judge finding a landing point somewhere in the middle. For a start, it is clear that the court is not bound by the range of sentences offered by counsel; where appropriate, it can and should reject submissions from both the Public Prosecutor and the Defence. However, the most glaring problem with “strategic submissions” of the sort described

above is that they are unhelpful: to put it bluntly, they are more akin to bids at an auction rather than carefully reasoned submissions grounded in an analysis of the facts and circumstances of the offence.

27 In my view, the duty of both the Prosecution and the Defence is to make submissions that are fair, accurate, measured, and reflect the justice of the case. This was recently the subject of judicial comment in the case of *Ghazali bin Mohamed Rasul v PP*. In that case, the accused faced a total of 2 charges under s 6(1) of the Estate Agents (Estate Agency Work) Regulations 2010 (S 644/2010): the first for introducing his client to a licensed moneylender and the second for collecting a referral fee of \$150 for the introduction. In the court below, the prosecutor for the Council of Estate Agencies had pressed for a deterrent sentence, arguing that the accused's act in introducing his client to a moneylender was *more serious* than an act of corruption because a vulnerable owner of an HDB flat *might* take loans from a moneylender and *might* therefore end up losing his home. Judicial Commissioner See Kee Oon categorically rejected that submission. In the course of doing so, he observed that the submission was unmeritorious because the present offence involved a breach of a conflict of interest, and not any actual dishonesty, which is what offences of corruption are concerned with. However, See JC also noted that the appellant's submissions, which charged the Prosecution with making a "concerted attempt" to "demonise" the accused, were also overstated and needlessly pejorative.

28 This is particularly important when we consider that the prosecution and the defence both offer unique perspectives that inform the sentencing process. Just as an example, the Prosecution, though independent, works closely with the law enforcement agencies and has an understanding of operational issues and offending trends that the courts might not. This was of critical importance in the case of *PP v Yue Liangfu* where SDJ See Kee Oon (as he then was) elected to increase the benchmark sentence for “Theft on Board Aircraft” cases in response to the Prosecution’s submission that there had been a startling increase in the commission of such offences from 2011 – 2013 and that a strong deterrent message needed to be sent.

29 In the final analysis, when parties fail to offer appropriate submissions on sentence, the sentencing process as a whole suffers. This is because the sentence a person is given is the end product of the system and it represents the collective wisdom and values of the prosecutor, defence and the judge. All stakeholders therefore have a duty to make balanced, fair, and temperate submission that ensures that the sentence fits the crime and when meted out is consonant with justice. Submission by either the Prosecution or the Defence to leave sentencing to the judge was frowned upon by me both in my capacity as a judge and as the PP.

### ***Appeals and post-trial applications***

30 The next area I will turn to concerns the bringing of appeals and other post-trial applications. The primary purpose of appeals, criminal motions, and criminal revisions, is two-fold. First, they exist as a means of error correction: they are an acknowledgement that, despite our best efforts, errors can infect the trial process but they must be corrected. Second, they exist to lend legitimacy and enhance respect for the criminal justice system. This is because litigants (and the public) who see that their matter has been heard by a different and neutral court will have more reason to believe that their case has received adequate consideration and is the right one on the facts. To that end, I believe that criminal practitioners have a duty to be circumspect with their use of the appeals process, and to use it only in furtherance of the two purposes I identified. Let me give you two examples of how these reasons feature in practice.

31 The first reason, error correction, featured prominently in *Thomas Tay's* case. In 2007, Mr Thomas Tay was the CEO of Airocean Group Limited. He pleaded guilty to 2 charges under the Securities and Futures Act (Cap 289, 2006 Rev Ed), the first for non-disclosure of certain information and the second for the making of a false statement. He was fined S\$240,000/-. Following the decision of the High Court in the related matter of *Madhavan Peter v PP*, it became clear that crucial elements of both offences were now missing and the conviction was therefore unsustainable. In light of that, the Prosecution, of its own volition, elected to bring a criminal revision to quash the conviction and to refund the fine which he had paid. This application was granted. The broader

point here is that a practitioner's duty to justice does not end with the disposal of the case, but extends towards the correction of post-conviction errors. In the case of Defence Counsel, this is enshrined in r 81 of the PCR, which provides that advocates and solicitors are to continue to "reasonably assist" their clients even after conviction and sentence.

32 I will address the second, the legitimacy of the process, from a different direction. When speaking of *Thomas Tay's* case, I talked about a practitioner's positive duty to bring applications to correct error; now, I will address the practitioner's duty to advise his clients against the filing of unmeritorious appeals and applications. It is clear that "all solicitors have an obligation to carefully assess the merits of their clients' cases before engaging in court proceedings." It goes without saying that this means that the practitioner has a duty to advise his client not to pursue a case if the application is baseless, illogical and/or unsupported by evidence. Indeed, I would go as far as to say that a practitioner has a duty to refrain from acting where to do so would, in his assessment, amount to an obstruction of due process, for example where it would only serve to distract the court or delay the conclusion of the case through the introduction of irrelevant and baseless issues.

33 Let me elaborate by reference to an example. In *Ng Chye Huey v PP* [2007] 2 SLR(R) 106, the applicants were charged with the display of insulting writing under s 13B of the Miscellaneous Offences Act. During the course of the trial in the Subordinate Courts, the applicants argued that their display was not

“insulting” because it was true and attempted to exhibit a UN Report which purported to substantiate that claim. The trial judge refused to admit the UN Report as it was hearsay and the applicants filed a criminal motion with the High Court seeking either a mandatory order that (a) the police or AGC was to ascertain the veracity of the report or (b) that the trial be adjourned to grant the applicants time to call the maker of the report as a witness. The High Court dismissed the motion and the applicants filed a further criminal motion to the Court of Appeal.

34 In the course of dismissing their application, the Court of Appeal remarked that the applicants’ conduct bordered on an abuse of court. The Court of Appeal observed that the applicants would, in any event, have been afforded an opportunity to seek redress by way of a *substantive appeal* against the trial judge’s decision and that its filing of not one but two criminal motions amounted to an attempt to have “no fewer than three ‘bites’ of the proverbial cherry.” The Court observed that it was “astounding - and wholly unacceptable - that litigants who ostensibly extol and advocate the need to uphold rights and fairness could so blatantly indulge in conduct which *contradicts* the very ideals they purportedly espouse and stand for.”

35 The point is this: every individual has a right to exhaust his legal remedies. However, this must be done within the bounds of reason and justice. The bringing of unmeritorious appeals and the filing of unnecessary applications impoverishes us all – it is not only a waste of court resources but it also makes

a mockery of the enterprise of which we are all part. Of course, I must pause to stress that a court can, after reviewing a matter which has been sincerely and faithfully argued, decide that there is no merit in the case. This is not the situation I am concerned with. It is clear that lawyers cannot always “get it right”. Rather, I want to stress that lawyers must independently consider the merits of their clients’ cases and cannot act merely as their parrot.

## Conclusion

36 On 25 March 1965, at the height of the Civil Rights Movement, Martin Luther King Jr. faced a crowd of thousands while standing on the steps of the State Capitol in Montgomery, Alabama and said,

“How long? Not long, because no lie can live forever

...

How long? Not long, because **the arc of the moral universe is long but it bends towards justice.**”

[emphasis added in bold]

37 While he was speaking in the context of the struggle for an end to racial segregation, King’s general point was that history would be justice’s vindication; that, eventually, justice would triumph. What King said of history is true, also, of the criminal justice process. Those of you who practice criminal law know that the trajectory of the criminal process can sometimes be long, tedious, and somewhat cumbersome. However, the *raison d’être* of criminal litigation is the achievement of a just outcome. To that end, all criminal practitioners should see themselves not as pugilists tugging at the opposite ends of a rope. Rather, they

should see themselves as the servants of justice, each with their distinct duties but all with a common vision: to bend the arc of criminal justice slowly, painstakingly, ceaselessly but surely towards justice. That is my hope, my sincere wish, and my parting thought.

38 Thank you.

Steven Chong  
Judge  
Supreme Court  
20 March 2015

Speech delivered by Justice Steven Chong<sup>1</sup> at the Singapore Academy of Law Biennial Ethics Lecture 2015

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<sup>1</sup> I would like to record my appreciation to Mr Scott Tan for his assistance in the preparation of this address.