Law Society of Singapore v Tan Guat Neo Phyllis
[2007] SGHC 207

Case Number : OS 2386/2006, SUM 121/2007

Decision Date : 04 December 2007

Tribunal/Court : High Court

Coram : Andrew Ang J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : K Muralidharan Pillai, Soong Wei Jie Julian and Jerome Arul Robert (Rajah & Tann) for the applicant; Davinder Singh SC and Darius Bragassam (Drew & Napier LLC) for the respondent

Parties : Law Society of Singapore — Tan Guat Neo Phyllis

Constitutional Law – Attorney-general – Prosecutorial discretion – Abuse and unconstitutional exercise of prosecutorial discretion – Whether prosecutorial discretion subject to judicial review

Constitutional Law – Attorney-general – Prosecutorial discretion – Abuse of process – Whether prosecution founded on entrapment an abuse of process warranting stay of proceedings

Evidence – Admissibility of evidence – Evidence obtained by means of private entrapment – Whether such evidence inadmissible – Whether court having discretion to reject evidence considering terms of Evidence Act (Cap 97, 1997 Rev Ed) – Section 2(2) Evidence Act (Cap 97, 1997 Rev Ed)

Evidence – Admissibility of evidence – Exception in SM Summit Holdings Ltd v PP – Exception in SM Summit Holdings Ltd v PP reconsidered

Legal Profession – Disciplinary procedures – Disciplinary Committee's findings of fact – When Court of Three Judges will interfere with such findings of fact

Legal Profession – Disciplinary procedures – Whether evidence inadmissible because it was illegally or improperly obtained – Whether motive of law firm instigating sting operation relevant

Legal Profession – Show cause action – Lawyer attempting to procure conveyancing work by offering monetary reward to individuals referring such work to her – Lawyer pleaded guilty to charges for grossly improper conduct in discharge of her professional duty brought against her by Law Society of Singapore – Appropriate punishment in light of certain mitigating circumstances – Sections 83(2)(e), 83(2)(h) Legal Profession Act (Cap 161, 2001 Rev Ed)

Statutory Interpretation – Statutes – Evidence Act (Cap 97, 1997 Rev Ed) – Classification as a facilitative statute – Purposive interpretation of Evidence Act (Cap 97, 1997 Rev Ed) – When does an interpretation give effect to legislative intent – Section 23 Evidence Act (Cap 97, 1997 Rev Ed)

4 December 2007 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an application by the Law Society of Singapore ("the Law Society") pursuant to s 94(1) read with s 98 of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the Act") for Tan Guat Neo Phyllis ("the respondent") to show cause as to why she should not be dealt with under s 83(2)(*e*) or s 83(2)(*h*) of the Act. By way of background, it should be stated that this is the first disciplinary case that has been referred to this court arising from a series of well-executed sting operations designed

to obtain evidence of touting by certain law firms suspected of procuring conveyancing work from real estate agents by giving them referral fees. There was also an appeal based on similar facts to the Court of Appeal against the High Court's refusal to grant leave for judicial review of the disciplinary committee's decision to admit evidence obtained via one such sting operation in disciplinary proceedings (*viz*, *Wong Keng Leong Rayney v Law Society of Singapore* [2007] SGCA 42 ("*Rayney Wong CA*")).

Background

The charges

2 The respondent in the present case is an advocate and solicitor of about 27 years' standing. She was incriminated in one of the sting operations mentioned above, following which the Law Society preferred against her one charge of professional misconduct under s 83(2)(*e*) and an alternative charge under s 83(2)(*h*) of the Act. The charges (as amended) were as follows:

Amended Charge

> You, Tan Guat Neo, Phyllis … are charged that you, on or about ~~12~~ 15 March 2004, whilst practising as an Advocate & Solicitor … with Messrs Fong Partners & Associate … did attempt to procure the employment of yourself as an advocate and solicitor in respect of the conveyancing for the sale of No. 33 Lengkok Mariam, Singapore 509135 [("the Property")] … through the instruction of one Lee Pei Chuan Jenny … having promised remuneration for obtaining such employment, to wit, a $200/- gift voucher from Takashimaya, and you have thereby acted in contravention of Section 83(2)(e) of the Legal Profession Act (Cap 161).

Amended Alternative Charge

> You, Tan Guat Neo, Phyllis … are charged that you, on or about ~~12~~ 15 March 2004, whilst practising as an Advocate & Solicitor … are guilty of such misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession, to wit, you did attempt to procure the employment of yourself as an advocate and solicitor in respect of the conveyancing for the sale of [the Property] … through the instruction of one Lee Pei Chuan Jenny … having promised remuneration for obtaining such employment, to wit, a $200/- gift voucher from Takashimaya, and you have thereby acted in contravention of Section 83(2)(h) of the Legal Profession Act (Cap 161).

The facts

3 The facts of the case are straightforward. Sometime in February 2004, a number of solicitors from various law firms ("the instructing solicitors") hired a private investigation firm, namely, Dong Security & Investigation Agency ("Dong Security"), to try to obtain evidence that the respondent's firm had been engaging in touting for conveyancing work. Dong Security engaged one Jenny Lee Pei Chuan ("Jenny"), a part-time private investigator and part-time real estate agent, to run the operation. Jenny proceeded with her task by telephoning the respondent on 15 March 2004 and represented herself as a real estate agent from Linkvest Network Properties ("Linkvest") who might want to engage the respondent to act for her client in the purchase of a property. Jenny recorded this conversation on her audio recorder ("the audio recording") without the knowledge of the

respondent. The parties met later that very same afternoon, whereupon Jenny gave the respondent the name of the purchaser and the address of the property. However, the purchaser was fictitious as Jenny had made up the transaction. Again, unknown to the respondent, Jenny also made a video recording of this meeting ("the video recording").

4 Four days later (*ie*, on 19 March 2004), Jenny met up with the respondent again to inform her that the transaction had been aborted. She paid the respondent $350 for work done and was given a receipt for the payment. Jenny likewise brought her video recorder along to record the meeting, but eventually failed to do so as the cable connecting the video recorder to the pinhole camera had somehow become dislodged. The video had nothing more than 20 minutes of blank footage ("the failed video recording").

5 After this meeting, Jenny made a complaint against the respondent to the Law Society in connection with her (the respondent's) offer to pay a referral fee for procuring conveyancing work.

The disciplinary committee hearing and findings

The Law Society's case

Contents of the audio recording and the video recording

6 At the hearing before the disciplinary committee ("the DC") appointed by the Law Society, the Law Society produced both the audio recording and the video recording as part of the evidence against the respondent. The salient parts of the transcript of the audio recording read as follows ("J" is Jenny and "R" is the respondent):

[J]: Ah, my, my, my buyer actually, they have a particular lawyer to use, but then somebody told me about you, right? Referred me to you, so I just want to check before I give you the case, ah, refer the case to you. Ah, is there any benefits or incentive for we agents or not?

[R]: *We just give some vouchers*.

[J]: What vouchers, ahh? What kind of voucher?

[R]: *Takashimaya vouchers, Takashimaya shopping vouchers*.

[J]: Oh, shopping, shopping vouchers, ahh, shopping, shopping voucher, okay, ah, the one, there's, there's, um, a rule, um, um, like say a particular amount, a fixed amount of thing?

[R]: Oh no, it depends, it will sometimes be two hundred dollars.

…

[J]: Oh, I see, okay, then this voucher thing, the moment I close the case, you give me? Or I have to wait?

[R]: Can I give it to you (INDISTINCT) there are both of you, right. Therefore it is easier, yah.

[J]: (INDISTINCT) once it is close[d], you just give after?

[R]: *After, can*.

[J]: Okay, so, err …

[R]: *You want Robinson, Takashimaya?*

[J]: *Er, Takashimaya, Takashimaya would be a bigger ways* [*sic*]*, right?*

[R]: Pardon?

[J]: A bigger ways [*sic*] to shop right now. Right?

[R]: Yeah correct.

[J]: Yeah. So Taka, lah, anything, lah. It's okay.

[R]: So you just, ah, *fax* it and then tell me what kind of voucher, yeah, I'll know.

[emphasis added]

7 The relevant portion of the transcript of the video recording disclosed the following exchange between Jenny and the respondent:

[J]: *That's the e-mail, Okay, just now over the phone you told me about it. The …*

[R]: *Voucher …*

[J]: Ar.

[R]: *claim .... by … Jenny … Okay can. Takashimaya.*

[J]: Erm … that will be … ?

[R]: We don't have it now.

[J]: *I know but how much?*

[R]: *200.*

[J]: Okay when will that? When will I get the … ?

[R]: HDB [Housing Development Board].

[J]: Oh in HDB?

[R]: *Ya, HDB. We don't give it here. All HDB. Can?*

[J]: Can[.]

[emphasis added]

The attendance note

8 In addition to these recordings, the Law Society also produced as evidence a contemporaneous

attendance note of the meeting ("the attendance note") made by the respondent which she had earlier disclosed to the inquiry committee when it was inquiring into Jenny's complaint. Of particular significance in this context is the notation made by the respondent in the note as follows: "Voucher claim by Jenny Lee – Takashimaya $200".

The respondent's case

9 The respondent's pleaded defence to the disciplinary charges against her was, initially, a bare denial that she had made any offer or gift to Jenny to procure conveyancing work from her. However, at the commencement of the proceedings before the DC, the respondent relied on the alternative defence that she had *already* obtained the said conveyancing work before any purported attempt to make any such offer or gift.

10 In closing her defence, the respondent made the following additional submissions to the DC:

(a) the evidence obtained from the audio recording and the video recording ought to be excluded as it operated unfairly against her;

(b) even if the evidence was not excluded, it was not safe to rely on the video recording *in vacuo* (without the relevant context); and

(c) if the DC had any reasonable doubt as to the reliability of the audio recording and the video recording, then the failed video recording alone did not contain sufficient evidence to prove the charges.

11 These submissions were advanced on the basis that the contents of the audio recording had been tampered with and surreptitiously edited in such a way as to give the impression that the respondent had discussed the giving of referral fees or vouchers. It was suggested that this was done by splicing certain statements from the video recording into the audio recording in order to convey the impression that there had been mention of such matters.

12 To support this allegation, the respondent highlighted that Dong Security had not been able to produce the digital recorder used to record the audio recording, and also that one Harry Chua ("Harry"), Dong Security's operations manager, had given a contradictory account of why he could not produce that digital recorder. In his affidavit of evidence-in-chief, Harry said that the digital recorder had been smashed into pieces in the course of subsequent field work, whereas, in an earlier letter dated 4 July 2005 from the Law Society's solicitors to the respondent's solicitors, it was stated that the digital recorder had been discarded as it had malfunctioned. The respondent further pointed out that although Harry also claimed in his affidavit of evidence-in-chief that the notebook computer used to store the audio recording had "crashed", no evidence was produced to show that the notebook computer had been sent for repairs. The respondent's argument was that these alleged incidents were not unfortunate coincidences as suggested by Dong Security and the Law Society, but were, instead, part of an orchestrated plan to prevent the tampering of the audio recording from being detected.

13 The respondent also referred to a particular exchange in the audio recording (see [6] above, in the final line of the extract), during which the respondent was purported to have requested that Jenny "fax *it*" [emphasis added] to her. It was not disputed by either side that the word "*it*" was a reference to the option to purchase ("the Option"). As the transcript did not make any prior reference to the Option, it was contended that the reference to "*it*" was contextually inconsistent and hinted at the audio recording having been edited so as to render it useful for the purposes of lodging a

disciplinary complaint with the Law Society. In short, it was alleged that Dong Security had fabricated the audio recording and, therefore, the recording was unreliable.

14 In relation to the video recording, the respondent also questioned its authenticity. She claimed that she had not said the words "claim … by … Jenny" (see [7] above, as italicised). Instead, she contended that, when asked about the voucher claim, she had merely said the word "ok" in order to deflect the query.

15 In this connection, the respondent also referred to the attendance note and argued that she had written the words "Voucher claim by Jenny Lee – Takashimaya $200" (see [8] above) with the sole intention of humouring Jenny. In her closing submissions before the DC, she highlighted the point that if the attendance note were inculpatory in nature, it would not have accorded with logic for her to have voluntarily disclosed it to the inquiry committee.

16 In relation to the failed video recording, it was common ground that the meeting on 19 March 2004 lasted for about an hour and that the recording consisted of only 20 minutes of blank footage. Arising from this, the respondent argued that even if the DC accepted the Law Society's version that the cable connecting the video recorder to the pinhole camera had been dislodged, it would not explain why there had been only 20 minutes of blank footage as the video recorder would have been in recording mode for the full hour. It was argued that the entire recording had been edited to make it seem as if it had failed so as to remove the exonerating evidence, namely, the respondent's express explanation to Jenny at the meeting of 19 March 2004 that she did not offer referral fees.

The DC's findings of fact and law

17 The DC rejected the respondent's allegation of tampering after hearing the audio recording and the video recording and considering the expert evidence called by both parties. The DC found that the audio recording and the video recording, including the failed video recording, had not been tampered with.

18 In relation to the law, the Law Society argued that entrapment evidence was admissible, subject to the exception laid down in *SM Summit Holdings Ltd v PP* [1997] 3 SLR 922 ("*Summit*"), where the High Court held that if the illegal act on the part of the *agent provocateur* had brought about the commission of the offence, the evidence so obtained in relation to the commission of the offence should be excluded ("the *Summit* exception"). Counsel for the respondent argued, relying on *Cheng Swee Tiang v PP* [1964] MLJ 291 ("*Cheng Swee Tiang*") as well as the *Summit* exception, that the evidence obtained by Jenny in the present case should be excluded as it operated unfairly against the respondent. The DC held that the evidence against the respondent was admissible as Jenny had not committed any offence in procuring it. The DC applied the law as stated by V K Rajah J (as he then was) in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 ("*Rayney Wong HC*") that the court in such a case would not generally have any discretion to exclude illegally obtained evidence. The DC accordingly held that the Law Society had made out both the main and the alternative charges against the respondent.

19 Consequent upon the findings of the DC, the Law Society applied to this court pursuant to s 94(1) read with s 98 of the Act for the respondent to show cause as to why she should not be disciplined in accordance with the Act.

Issues of fact and law before the court

20 In their written and oral submissions, both counsel for the Law Society and for the respondent

raised a large number of issues of fact and law for determination by this court. First, the respondent questioned the correctness of the DC's following findings of fact:

(a) that the audio recording and the video recording were authentic;

(b) that the respondent promised to give a shopping voucher to Jenny in an attempt to procure conveyancing work from her; and

(c) that the attendance note contained a record of the respondent's decision to give Jenny a shopping voucher for the above referral.

Next, the issues of law canvassed for our decision were:

(i) whether, if the evidence obtained by Jenny was entrapment evidence or illegally obtained evidence, this court had the discretion to exclude such evidence or to stay the disciplinary proceedings on the ground of abuse of the disciplinary process; and

(ii) whether the motive of the instructing solicitors in entrapping the respondent was relevant to determining whether the sting operation was an abuse of the disciplinary process, and, if so, whether the respondent had been prejudiced in her defence by the DC denying her the opportunity to cross-examine the instructing solicitors on their motive.

21 We propose to address, first, the arguments of the parties on the DC's findings of fact before turning to the law. This will also require us to determine whether the manner in which Jenny procured the evidence against the respondent amounted to entrapment and/or whether the evidence was illegally obtained.

Were the DC's findings of fact correct?

22 In her written submissions, the respondent set out all the arguments as to why she considered as erroneous the DC's findings of fact as set out at [20] above, *ie*: (a) that the audio recording and the video recording were authentic; (b) that she had agreed to give shopping vouchers to Jenny at their meeting on 15 March 2004; and (c) that the attendance note, which was contemporaneous in nature, was a confirmation of this promise. In response, the Law Society, in its written submissions, gave its response to show why the DC's findings of fact should be upheld. In our view, the DC's findings of fact are entirely supportable by the evidence, and we now proceed to explain why this is so.

Authenticity of the audio recording and the video recording

23 In finding that the audio recording and the video recording were authentic, the DC had the benefit of listening to the expert witnesses called by both parties. After evaluating the evidence of the Law Society's expert witness, Mr Peter Garde, and the evidence of the respondent's expert witnesses, Mr James Griffin and Dr Tan Tiong Hock, the DC concluded that Mr Garde's evidence that the audio recording had not been tampered with was more convincing, taking into account his expertise and experience in the forensic examination of audio recordings. With respect to the complaint concerning the missing notebook computer and the digital recorder, the DC accepted Harry's explanation of why he could not produce these items at the proceedings.

24 With respect to the video recording, the respondent did not suggest that it had been tampered with in her closing submissions before the DC. Instead, she contended that it was unsafe to rely on it

independently of the failed video recording. In this regard, the DC accepted the evidence of the Law Society's expert, Mr Bruce Koenig, that the video recording was authentic. Mr Koenig had considerable expertise and experience in the forensic examination of audio and video recordings, having conducted examinations of well over 16,000 separate audio and video recordings. In contrast, the DC noted that the respondent's experts, Mr Griffin and Dr Tan, had no field experience in this area of work at all.

Agreement to give shopping vouchers and the attendance note

25 On these two topics, the respondent's contention was that she had not intended to reward Jenny for referral work and had merely been trying to humour Jenny when, in response to the latter's inquiry about the referral fee, she had replied (see [7] above), "claim … by … Jenny … Okay can. Takashimaya". The respondent claimed that there was a pre-existing arrangement between her firm and Linkvest whereby if any of Linkvest's agents asked for a referral fee, the respondent would respond by humouring the agent. The DC rejected this evidence and accepted the Law Society's argument that the respondent's version of her own conduct (*ie*, that she had uttered the incriminating words with no intention of incriminating herself) was contrary to what she had written in the attendance note. It was also pointed out by the DC that if the respondent had no intention to reward Jenny for referral work, she would have been able to explain why she had asked Jenny to choose between a Takashimaya voucher and a Robinsons voucher. As it turned out, she could not so explain.

26 In our view, it is abundantly clear from the transcripts that the respondent was not humouring Jenny. The respondent's alternative defence, *ie*, that she had already obtained the conveyancing work before she made the alleged offer or gift to Jenny, does not help the respondent. The charge against her was not for corruption, but for unprofessional conduct in agreeing to share her professional fees with an unqualified person.

Our decision on the DC's findings of fact

27 For the above reasons, we affirm the DC's findings of fact that the respondent did offer a referral fee to Jenny in the form of shopping vouchers, and that she did so with a view to procuring conveyancing work from Jenny. In this connection, we would also reiterate that the practice of this court in relation to findings of fact made by the DC is the same as the practice of an appellate court in relation to findings of fact made by a lower court, *ie*, this court will not lightly disturb such findings unless the findings are clearly wrong or against the weight of the evidence: see *Law Society of Singapore v Lim Cheong Peng* [2006] 4 SLR 360 at [13].

Arguments of parties on legal issues

28 We turn now to the legal arguments on Jenny's conduct. We examine, first, the respondent's argument based on the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA").

The PCA

29 The respondent's submission in this respect was that Jenny, by offering to refer conveyancing work to the respondent for a referral fee, was herself guilty of the offence under s 29 of the PCA of abetting the respondent to commit a PCA offence even though the respondent had not agreed to give the referral fee. The conduct of Jenny was therefore illegal.

30 The steps in the respondent's reasoning were as follows. First, under s 5(*b*) of the PCA, it is an

offence for:

> [a]ny person … [to] by himself … corruptly give, promise or offer to any person … any gratification as an inducement to or reward for … any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed …

Secondly, *if* the respondent had offered (which she contended she had not) a referral fee to Jenny, she would have committed an offence under s 5 of the PCA. Thirdly, the fact that the respondent had not committed the s 5 offence was immaterial to Jenny's liability for abetment because under s 29 of the PCA read with s 107 of the Penal Code (Cap 224, 1985 Rev Ed), it was not necessary for the substantive offence to be committed before the abetment charge was made out (see Explanation 2 to s 108 of the Penal Code).

31 In our view, this is an ingenious argument, but we find it difficult to understand why it is one which is worth making at all. All it means is that if we were to find that Jenny did instigate the respondent to offer her a referral fee *and that the respondent did agree or offer* to pay such fee, *the respondent herself would have committed an offence under s 5 of the PCA*. Following from this, the respondent would have admitted indirectly that she was guilty of corruption, but with no assurance of the exclusion of any of the evidence incriminating her from or the staying of the DC proceedings. This would then *also* lead to the consequent finding of her guilt in respect of the disciplinary offences for which she has been charged. We might add that a similar argument was advanced by the solicitor concerned in the case of *Law Society of Singapore v Bay Puay Joo Lilian* [2007] SGHC 208 ("*Lilian Bay*"), and it would be useful to refer to the holdings of this court in that case in response to the argument in the present case.

32 In *Lilian Bay*, where the same argument was made against Jenny (the same Jenny as in this case), this court held that the argument failed for two reasons: (a) Jenny did not have any corrupt intent in doing what she did; and (b) the solicitor in *Lilian Bay* was not being asked to do a favour for Jenny, but would instead be doing herself a favour if she accepted the conveyancing work offered to her. Since the conduct of Jenny in that case was similar to her conduct in the present case, we can do no better than to restate this court's analysis of Jenny's actions in that case. There, this court said (at [35]):

> In our view, the evidence shows that Jenny's stratagem was to spin a credible story to the respondent and give her the opportunity to react in the way that Jenny's client anticipated the respondent would do, *ie*, agree to pay a referral fee, as that was what the [respondent's] firm was suspected to have engaged in. Jenny's objective was to procure the evidence to expose the unprofessional activities of a group of solicitors. Jenny's *modus operandi*, although it involved an element of persistency in persuading her targets to agree to pay referral fees, cannot be said to be corrupt under the law. The nature of bribery or corruption involves the inducement of a public official or a private party to do a favour in exchange for a bribe or gratification. These two elements, *viz*, the giving of a bribe for a favour, are essential to the offence of bribery or corruption. In the present case, as in the cases in the same series, Jenny was not seeking a favour from the respondent for which she would pay a bribe. She was, in fact, purporting to do a favour to the respondent by agreeing to bring conveyancing work to her in return for payment of a referral fee. It may then be thought that Jenny was trying to bribe the respondent with conveyancing work in order to receive a bribe (the referral fee). This could be what counsel for the respondent had in mind when he made the argument set out at [30] above [which was substantively the same as the argument set out at [30] of this judgment]. But, even then, in our view, Jenny's offer was not a bribe or a corrupt act for two reasons. First, there was no corrupt intent on her part as her only objective was to expose the professional misconduct of the

respondent. If the scheme had been implemented, she would have paid the respondent a fee for work done, from which she would receive a referral fee (as in the case of *Rayney Wong CA* …). She would be out of pocket in receiving back only a portion of her own money. Second, the respondent's ordinary practice was conveyancing; she was not being asked to do Jenny or any of her clients a favour by undertaking her normal business. The respondent would be doing a favour for herself, and not Jenny, in undertaking the conveyancing work offered to her. That leaves the question of Jenny seeking a payment. In our view, there was no corruption in Jenny seeking a reward for doing a favour to the respondent provided the favour was not at the expense of her (Jenny's) client. What is wrong, professionally, is for the respondent to agree to pay a referral fee to Jenny. In our view, the argument that Jenny had committed an offence under the PCA has no merit.

33 In our view, the above analysis applies equally to the actions of Jenny *vis-à-vis* the respondent in the present case, and we accordingly reject the respondent's argument on this basis. Jenny's conduct could not be said to be illegal on the basis that it was an offence under s 29 of the PCA.

Other bases of illegality alleged by the respondent

34 As the respondent also argued that Jenny's conduct was illegal on several *other* bases, it would conduce towards clarity to examine these allegations of illegality as well.

(1) Conspiracy to do an illegal act

35 First, the respondent argued that the instructing solicitors had conspired to weed out their competitors, in her counsel's words, "in order to feed their appetite for more clients" and had employed Dong Security and Jenny to carry out their plan to cause the respondent injury or damage (with respect to her conveyancing practice). Acting in concert, the instructing solicitors had conspired to abet an offence under s 5 of the PCA, which amounted to a criminal conspiracy to do an illegal act (as defined in s 120A of the Penal Code) independent of the offence under s 29 of the PCA. On this argument, it was the instructing solicitors who, through Jenny, had committed an offence under both s 29 of the PCA and s 120A of the Penal Code.

36 With respect to this argument, we are unable to find, on the evidence, that there was a criminal conspiracy among the instructing solicitors, together with Dong Security and Jenny, to injure the respondent in the way of her practice. The transcripts of the audio recording and the first meeting on 15 March 2004 show that Jenny did not offer to introduce conveyancing transactions to the respondent in exchange for referral fees. What she did was to ask the respondent whether there was anything in it for her to bring conveyancing work to the respondent. Jenny did not make any offer. Instead, she merely laid the ground for the respondent to make the offer, which the respondent went on to do. The respondent would have known that it was wrong of her professionally to offer the referral fee, and yet, she did so. All she had to do was to say "no". The respondent injured herself on her own volition. The transcript of the audio recording (see [6] above) shows that when Jenny inquired about "incentive[s]", the respondent's immediate reply was: "We just give some vouchers." In our view, the respondent protested too much, too late. The objective evidence amply shows that the respondent was in the practice of offering incentives in return for conveyancing business.

(2) Conspiracy to use illegal means

37 Next, the respondent argued that the instructing solicitors had used illegal means to obtain evidence against her in order to secure her conviction for disciplinary offences under the Act. These illegal means took the form of a false (so the respondent claimed) statutory declaration made by

Jenny which was crafted to lead the reader to conclude that the respondent had breached s 83(2)(*d*) of the Act. It was accordingly urged that the DC should have rejected this part of the complaint. It was also argued that Jenny had used other illegal means that constituted the tort of deceit by: (a) making several false representations which she intended the respondent to rely on, and which the respondent did rely on, thereby incurring damage; (b) meeting the respondent; (c) making photocopies of documents; and (d) making telephone calls to one Lim Keng Chiang, the real estate agent marketing the property.

38 With respect to the allegation that Jenny had made a false statutory declaration, the answer to it, really, is that the respondent should have made a complaint to the police as that is a serious Penal Code offence. In our view, the argument is, in any event, misplaced as any illegality in relation to the statutory declaration had nothing to do with the procurement of the evidence during the telephone conversation and the meeting on 15 March 2004, both of which were recorded. The question which the DC had to decide was whether the audio recording and the video recording, if authentic, and the transcripts thereof, if accurate, would show that the respondent had offered a referral fee to Jenny. In our view, the evidence shows beyond any reasonable doubt that the respondent had given a positive response to the opportunity presented by Jenny to offer referral fees even without knowing who Jenny was. The meetings between them only confirmed too well the respondent's willingness to pay referral fees for conveyancing work.

39 With respect to the argument based on the alleged false representations, the Court of Appeal considered and rejected a similar argument in *Rayney Wong CA* ([1] *supra*). The false representations alleged by the respondent lay essentially in Jenny making up a fictitious conveyancing transaction to tempt the respondent. It was held by the Court of Appeal in *Rayney Wong CA* that Jenny's pretence did not induce Rayney Wong (the solicitor charged) to agree to pay a referral fee. Similarly, in the present case, Jenny's pretence did not induce the respondent to offer the referral fee. The respondent would have done exactly the same thing if the fictitious transaction had been genuine: see *Rayney Wong CA* at [31] and [35].

(3) Conduct of Jenny unsanctionable?

40 It was also urged upon us by the respondent that Jenny's conduct was unsanctionable. This argument was based on a statement in *Summit* ([18] *supra*), where the High Court drew a distinction between a public prosecution and a private prosecution in the context of entrapment and illegally obtained evidence. At [57] of *Summit*, the court said:

> There is no public interest in the members of the public undertaking such conduct [*ie*, conduct that is an offence under the law]. *In such cases, the focus should then be on whether this is the sort of conduct which the courts would sanction*. The mode of obtaining such evidence cannot possibly be justified. Summit CD [one of the companies alleged to have committed copyright infringement and against whom search warrants were issued] was suspected of software piracy and what the private investigator did was to procure Summit CD to infringe the copyright and trade marks, and then to use this to obtain the warrants. There was no evidence that, if this self-help remedy was not done, there was no other way to find out whether the offences were committed. [emphasis added]

41 Specifically in respect of this passage, counsel for the respondent made two arguments. The first, which turned on the meaning of the word "sanction", was that the court had properly drawn a distinction between entrapment by a state agent and entrapment by a private agent. In the latter scenario, the test was whether the agent's conduct was such that a court would not sanction it, and whether this conduct preceded and was designed to bring about the commission of the offence. In

other words, in the case of a state agent, the preceding act had to be unlawful, but, in the case of a private agent, it need not be so long as it was of a nature which the court would not sanction. Applying this distinction to the present case, the argument was that even if Jenny's act was not illegal, it was unsanctionable as it was deceptive, infected with the malicious motive of the instructing solicitors, and so on. Ultimately, the respondent argued that this court should not sanction the conduct of Jenny because the intentions of the instructing solicitors, who were trying to eliminate competition from other conveyancing firms for their own personal greed, were dishonourable. The instructing solicitors also selected their targets without a pre-existing basis or reasonable grounds for believing that the targets were ethically unfit or in the practice of offering incentives. They were, in essence, "virtue-testing" at large.

42 In our view, this first argument is not supported by the context in which the word "sanction" appears in [57] of *Summit* (reproduced at [40] above]. What the High Court held to be unsanctionable in the context of that passage was "[t]he mode of obtaining such evidence [which] cannot possibly be justified". The mode referred to was the manner in which the private investigator in that case ("JC") executed his plan, which the court found was particularly malignant and a threat to the rule of law. It was on the basis of that finding that the court said that JC's evidence should have been rejected. What the High Court could not sanction was JC's specific conduct and not some other undefined conduct. To read [57] of *Summit* as laying down a general and vague test of unsanctionability would be inconsistent with the court's decision (at [54]–[56]) to reject the balancing test applied in *Bunning v Cross* (1978) 141 CLR 54 on the ground that it would lead to arbitrariness.

43 The second argument advanced by the respondent hinged on the statement that "[t]here is no public interest in the members of the public undertaking such conduct" (likewise set out at [40] above). The argument was that there was no reason for private individuals to assume the role of policemen as there was merit in strictly demarcating the latter's functions. It was further submitted that Singapore was not at a stage of its political, social or cultural history where it considered that private individuals had a duty to expose the flaws of others. Accordingly, as a matter of law and policy, it was urged upon us that *Summit* was correct in supposedly making a distinction between state entrapment and private entrapment, as private investigators and vigilantes should be subject to greater scrutiny than law enforcement officers. The reason given was that the police in Singapore were highly respected not only for their professionalism and integrity, but also for their accountability. The courts, therefore, had no reason to interpose themselves as an additional check-and-balance to monitor the police's conduct, save where the rule of law was undermined. The same, however, could not be said for private investigators and vigilantes. For these reasons, the distinction drawn in *Summit* was relevant and appropriate for local conditions.

44 We are unable to accept this second argument. A paraphrase of the statement in *Summit* relied upon by the respondent (see [43] above) will show why. It would then say: "There is no public interest in the members of the public committing crime in order to expose crime." But, equally, there is also no public interest in law enforcement officers committing crime in order to expose crime. Put in this way, we are back to square one in seeking a solution to the conflict of interests adverted to by Lord Steyn in *Regina v Latif* [1996] 1 WLR 104 ("*Latif*") at 112 (which we will discuss in greater detail below). In fact, the cases of *Regina v Sang* [1980] AC 402 ("*Sang*"), *Ridgeway v The Queen* (1995) 184 CLR 19 ("*Ridgeway*") and *Regina v Looseley* [2001] 1 WLR 2060 ("*Looseley*") all accept that in combating serious crimes, the public interest in arresting and punishing those guilty of serious crimes should be balanced against the public interest in ensuring that the administration of justice is not brought into disrepute by the courts overlooking egregious illegal conduct on the part of law enforcement officers.

45 Indeed, if, as the respondent has contended, the statement in *Summit* (set out at [40] above) was intended to mean that there is no public interest in members of the public enforcing the law, then it would be inconsistent with the facts of the case itself (which are discussed below at [105]–[106]). In *Summit*, it could not be said that the complainant, Business Software Alliance ("BSA"), did not have a public interest in trying to entrap Summit Manufacture Pte Ltd ("Summit CD"). BSA was seeking, as it had the right to do, to protect its principals' intellectual property rights, the infringement of which was both a tort and an offence under the Copyright Act (Cap 63, 1988 Rev Ed). Indeed, at [107] of its judgment, the High Court said that:

> No one would wish that any of those who engage in software piracy and manufacturing of counterfeit CDs should go free. They should be found out and brought to justice. But it is fundamental in our law that the means which are adopted to this end must be lawful means.

46 As we have mentioned above, the application of a test based merely on what the court would or would not sanction would contradict the High Court's concern in *Summit*, as reflected in its rejection of the *Bunning v Cross* balancing test on the ground that it was unprincipled and would lead to arbitrariness. However, this is not to say that we share this concern if the balancing test is applied. We do not. Courts are used to evaluating competing interests all the time. But, as far as counsel's argument as set out at [43] above is concerned, it is contrary to the whole tenor of the court's reasoning in *Summit*.

47 Finally, we should add that the statement in *Summit* (set out at [40] above) is capable of giving the impression that the High Court meant to say that although illegal conduct would not be acceptable if undertaken by a private party, it would be acceptable if undertaken by law enforcement officers. That would not be correct as the law applies equally to all, and, in our view, that was not what the statement meant. In *Rayney Wong HC* ([18] *supra*), Rajah J did not think that the statement was intended to have this meaning. He held that there was no distinction in principle between state-directed entrapment and private entrapment (see [67]–[68] of *Rayney Wong HC*). We agree. As we shall see in our discussion later on entrapment, and as Lord Nicholls of Birkenhead said in *Looseley* at [25]:

> Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute.

The same consideration would apply to illegal conduct on the part of a private *agent provocateur*.

48 For the above reasons, we find, on the facts, that the respondent's arguments on illegal and improper conduct on the part of Jenny have no merit. In our view, Jenny had not acted illegally or improperly, and the evidence which she obtained was rightly admitted by the DC, even on the *assumption* that the law on entrapment and illegally obtained evidence was in the respondent's favour.

Motive and identities of the instructing solicitors

The parties' arguments

49 We consider, finally, the respondent's argument that the DC was wrong in law in not ordering the disclosure of the identities of the instructing solicitors so that their motive could be examined. In connection with and as part of her arguments on Jenny's conduct, the respondent argued that the DC was wrong to prevent her from exposing the motive of the instructing solicitors, and that this had

prevented her from subpoenaing them "to get to the bottom of the matter" (see para 31 of the respondent's skeletal arguments filed on 15 March 2007). The DC therefore erred in denying the respondent the opportunity to raise a crucial defence (*ie*, the instructing solicitors' predominant purpose to injure her).

50 However, the Law Society contended that the motive of the instructing solicitors was irrelevant to the disciplinary charges against the respondent, which were brought about by her own conduct in offering referral fees to Jenny. Reference was made to the following authorities (and the propositions for which they stand): *MCST Plan No 2285 v Sum Lye Heng* [2004] 2 SLR 408 (where it was held that the prosecuting party's motive was irrelevant if there was a basis for an action) and *Law Society of Singapore v Lau See-Jin Jeffrey* [1999] 2 SLR 215 (where the disciplinary committee ignored the fact that the complainant had "an axe to grind": see the grounds of decision of the court at [34]).

Motive irrelevant in disciplinary proceedings

51 We do not agree with the respondent's submission on the issue of motive, especially in relation to disciplinary proceedings, because it would, first, not be possible for the respondent to show the instructing solicitors' true motive. Even if this could be done, such motive would be irrelevant in the disciplinary proceedings against the respondent and would not represent an abuse of the disciplinary process. This was what the Court of Appeal found in *Rayney Wong CA* ([1] *supra*) (at [50]–[54]). In that case, the Court of Appeal, after reviewing the English authorities which stood for the proposition that using the criminal process for a purpose for which it was not intended was an abuse of process, made two findings. First, the Court of Appeal held (at [47]) that since the instructing solicitor in that case could have had at least three motives in exposing the appellant's unprofessional conduct – *viz*: (a) to increase his own business; (b) to create a level playing field for all conveyancing lawyers; and (c) to uphold the ethical and professional standards of the Bar – it would be practically impossible for the appellant to prove that the first motive was the instructing solicitor's sole or predominant motive. This was so even though it was the intention of the appellant to cross-examine the instructing solicitor, as it would not be possible, in practical terms, to prove that the instructing solicitor was invoking the disciplinary process for the sole or predominant purpose of increasing his conveyancing practice. Secondly, the Court of Appeal held (at [50]–[54]) that, in any case, the doctrine of abuse of process did not apply to disciplinary proceedings, which had policy objectives that were different from those of criminal proceedings. (We note, however, that the Court of Appeal in *Rayney Wong CA* did not make any finding on whether the doctrine of abuse of process would apply in Singapore to public prosecutions, an issue which we shall address later in this judgment.) Returning to the present case, for reasons similar to those in *Rayney Wong CA*, we conclude that the respondent's arguments on motive have no substance.

52 Our conclusions above that Jenny's conduct in obtaining the evidence of the respondent's professional misconduct did not amount to entrapment and that Jenny had not committed any illegal act in so doing are sufficient for us to dispose of this case and to find that the Law Society has made out the disciplinary charges against the respondent. It is therefore, strictly speaking, unnecessary for us to consider what the law is in relation to the admissibility of Jenny's evidence if it had amounted to entrapment or illegally obtained evidence. However, in view of: (a) the issue of the admissibility of entrapment or illegally obtained evidence in criminal proceedings not having been fully considered by a Singapore court; (b) the decision in *Looseley*; and (c) the parties having canvassed full arguments on this issue before us, we consider it desirable and appropriate that we state what we consider to be the law in Singapore for the guidance of the courts in future cases.

Law on entrapment and illegally obtained evidence

Distinction between entrapment and illegally obtained evidence

53 By way of introduction, we need to point out that in *Rayney Wong CA*, the Court of Appeal explained the essential difference between entrapment evidence and illegally obtained evidence: see *Rayney Wong CA* at [27]. Basically, entrapment as envisaged by the House of Lords in *Looseley* involves unlawful conduct by the state or its agents in instigating, cajoling or pressuring the defendant into committing an offence which he would not otherwise have done. This abuse of power results in an abuse of the court's process if the evidence is then used to prosecute the defendant for the offence which he was instigated to commit. This is distinguished from merely providing the defendant with an opportunity to commit the offence. Illegally obtained evidence shares the element of unlawfulness, but the element of instigation is absent, and it does not always, unlike entrapment evidence, provide evidence of the *actus reus* of the offence.

54 However, notwithstanding the distinction, we have in this judgment decided not to deal with illegally obtained evidence as a separate and distinct category from entrapment evidence. The reason is that, given the conclusions which we have reached with respect to the law on entrapment evidence in Singapore, it would not be necessary to draw any distinction between the two types of evidence in terms of their admissibility in public prosecutions.

The parties' arguments

55 We first set out below the respective arguments canvassed by the Law Society and the respondent in their oral and written submissions in respect of entrapment evidence.

The Law Society's arguments

56 The Law Society's arguments may be summarised as follows:

(a) The law governing the use of evidence obtained by entrapment (whether private or state-sponsored) in criminal proceedings has no application to disciplinary proceedings, which have, as their object, wholly different aims from those in civil or criminal proceedings: see *Re Saluja* (2006) 92 BMLR 153 and *Hasan v General Medical Council* [2003] UKPC 5.

(b) But, if it is applicable, then:

(i) the Court of Appeal in *How Poh Sun v PP* [1991] SLR 220 ("*How Poh Sun*"), in fully adopting *Sang* ([44] *supra*), has severely emasculated the judicial discretion to exclude evidence, which discretion was recognised by the High Court (consisting of three judges) in *Cheng Swee Tiang* ([18] *supra*); and

(ii) the Court of Appeal has in three decisions, *viz*, *How Poh Sun*, *Goh Lai Wak v PP* [1994] 1 SLR 748 ("*Goh Lai Wak*") and *PP v Rozman bin Jusoh* [1995] 3 SLR 317 ("*Rozman*"), applied the law as stated in *Sang*.

(c) *Summit* ([18] *supra*) has no effect on the admissibility of entrapment evidence as:

(i) it deals with the retention of evidence illegally obtained through an invalid search warrant, and not the admissibility of such evidence at trial; and

(ii) the Court of Appeal, in *Amran bin Eusuff v PP* [2002] SGCA 20 ("*Amran bin Eusuff*"), has affirmed the position taken in *How Poh Sun* and has further clarified that *Summit* did not

change the law as stated in *Sang*.

(d) Assuming that *Summit* did create a further exception to the admissibility of entrapment evidence (by way of the *Summit* exception (see [18] above)), the exception is not applicable to the facts of the present case as the exception only arises if the illegal conduct itself constitutes an essential ingredient of the charged offence (see [52] of the judgment in *Summit*).

(e) The development of the law in England on entrapment evidence since *Sang* has no direct relevance in Singapore for this development stemmed largely from the enactment of s 78 of the Police and Criminal Evidence Act 1984 (c 60) (UK) ("the 1984 Act") and the Human Rights Act 1998 (c 42) (UK).

(f) In relation to the doctrine of abuse of process:

(i) this court has jurisdiction to grant a stay of disciplinary proceedings, but it must be exercised only in exceptional circumstances (see *Re Saluja*);

(ii) *Looseley* and *R v Mack* [1988] 2 SCR 903 ("*Mack*"), in which a stay of proceedings was approved as an appropriate response to abuse of process in entrapment cases, are not applicable to public prosecutions in Singapore;

(iii) in *Ong Chin Keat Jeffrey v PP* [2004] 4 SLR 483, the High Court held that *Looseley* reflected the position in English law, whilst *Sang* (as conceded by counsel in that case, but to which the court did not demur) reflected the local position; and

(iv) the High Court in *Rayney Wong HC* ([18] *supra*) declined to adopt *Looseley* as part of Singapore law.

The respondent's arguments

57 The respondent's arguments may be summarised as follows:

(a) This court has the power to exclude entrapment evidence in its discretion: see *Cheng Swee Tiang* and *Summit.*

(b) Although the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") is silent on whether the court has the power to exclude entrapment evidence, it is a facilitative statute which allows the application of common law rules of evidence to fill any lacuna in the legislation.

(c) *How Poh Sun* does not prevent this court from applying *Summit* to exclude Jenny's evidence. In any case, *How Poh Sun* was concerned with a state *agent provocateur*, whereas the present case is concerned with a private agent, where "the focus should … be on whether this is the sort of conduct which the courts would sanction", and not merely whether the agent's conduct was illegal: see *Summit* at [57].

(d) Where a private agent's conduct is illegal, the evidence obtained by such conduct should *a fortiori* be excluded: see *Rayney Wong HC* at [69].

(e) Where illegal or unsanctionable conduct is shown, as is the case with respect to Jenny's conduct in the present proceedings (it should, however, be noted that in the analysis above, we did not find this to be the case), the evidence would be excluded and there is no need to embark on a balancing process which is both unworkable and prone to manipulation: see *Summit* at [54]–

[55].

Preliminary observations

58 We will now consider all these questions. However, by way of preface, we wish to state that in formulating the principles of law in relation to the legal issues raised in this case, we must give primacy to the objectives and values of our criminal justice system. The principles which we lay down must conform to the fabric of our law, including our constitutional structure. Whilst we pay great respect to the decisions of the appellate courts in Australia, Canada and England on these issues, we must also bear in mind that the legal and social environments in these jurisdictions are not the same, and that the courts in each jurisdiction must take into account the values and objectives of the criminal justice system which they wish to promote. The common law is infused with common or universal values which are applicable in all common law jurisdictions, but, in the field of criminal law, national values on law and order may differ not only in type, but also in intensity of adherence.

Admissibility of entrapment evidence in prosecutions and disciplinary proceedings

59 First, we accept the Law Society's arguments on this issue, *ie*, that the law governing entrapment evidence (whether private or state-sponsored entrapment) in criminal proceedings has no application to disciplinary proceedings. The Court of Appeal in *Rayney Wong CA* also reached the same conclusion on the ground that primacy must be given to the legal profession's ethical and professional code of conduct over any illegal or improper conduct of a member of that profession in procuring evidence to uphold the values of that code. The appropriate remedy in such cases is neither to exclude the evidence nor to stay the proceedings. The proper approach, where appropriate, is to subject the procurer to the same standards of conduct under the disciplinary code and also the law.

Nature of entrapment and general principles

60 Notwithstanding our conclusion in the preceding paragraph, we consider it useful to provide some guidance on the law governing entrapment evidence in criminal proceedings. We first consider the nature of entrapment and some applicable general principles.

What is entrapment?

61 In *R v Sloane* (1990) 49 A Crim R 270 at 272–273, Gleeson CJ (then of New South Wales) characterised the nature of entrapment as follows:

> [W]hatever its precise effect may be, the concept of entrapment involves as a necessary element the idea that an accused person has been induced to commit a crime which he or she otherwise would not have committed or would have been unlikely to commit …

Although this is a neat encapsulation of the concept of entrapment, its application to the particular facts of a case is problematic because the word "induced" is imprecise and the circumstances in which the defendant may be said to have been "unlikely" to commit the offence but for the inducement are also uncertain. In *Ridgeway* ([44] *supra*), Gaudron J similarly provided a concise description of what she regarded as entrapment in these words (at 76–77):

> It may be convenient to refer to cases involving offences committed as a result of the illegal acts of law enforcement agents as "entrapment", but the critical consideration, in my view, is whether the offence results from the criminal acts of law enforcement agents or those acting on their behalf.

In our respectful view, the word "results" is also too imprecise. Not every act of inducement amounts to entrapment, but a general guide as to when inducement constitutes entrapment would be the answer to the question (to paraphrase Lord Hoffmann's words in *Looseley* at [55]): Would the defendant have committed the offence if the *agent provocateur* had behaved like an ordinary member of the public?

62 In *Nottingham City Council v Amin* [2000] 1 WLR 1071 ("*Nottingham*"), Lord Bingham of Cornhill CJ attempted to elaborate on what constitutes entrapment in these words (at 1076–1077):

> On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been *incited*, *instigated*, *persuaded*, *pressurised or wheedled into committing* it by a law enforcement officer. On the other hand, it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else. [emphasis added]

63 However, in *Looseley*, Lord Nicholls observed (at [2]), in relation to the acts described by Lord Bingham CJ in *Nottingham*, as follows (with which all the other law lords agreed):

> The difficulty lies in identifying conduct which is caught by such imprecise words as "lure" or "incite" or "entice" or "instigate". If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible and impermissible police conduct. But that would not be a satisfactory place for the boundary line. Detection and prosecution of consensual crimes committed in private would be extremely difficult. Trafficking in drugs is one instance. With such crimes there is usually no victim to report the matter to the police. And sometimes victims or witnesses are unwilling to give evidence.

Lord Nicholls then considered the question of when the defendant may be said to have been given the opportunity to commit the offence, as opposed to being incited to commit it. He said at [23]–[25]:

> [A] useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasise the word "unexceptional". The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially. McHugh J had this approach in mind in *Ridgeway v The Queen* 184 CLR 19, 92, when he said:
>
> > "The state can justify the use of entrapment techniques to induce the commission of an offence only when the inducement is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity. That may mean that some degree of deception, importunity and even threats on the part of the authorities may be acceptable. But once the state goes beyond the ordinary, it is likely to increase the incidence of crime by artificial means."
>
> This is by no means the only factor to be taken into account when assessing the propriety of police conduct. The investigatory technique of providing an opportunity to commit a crime

touches upon other sensitive areas. Of its nature this technique is intrusive, to a greater or lesser degree, depending on the facts. It should not be applied in a random fashion, and used for wholesale "virtue-testing", without good reason. The greater the degree of intrusiveness, the closer will the court scrutinise the reason for using it. On this, proportionality has a role to play.

Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation of a prosecution which would affront the public conscience is substantially to the same effect: see *R v Latif* [1996] 1 WLR 104, 112. So is Lord Bingham of Cornhill CJ's reference to conviction and punishment which would be deeply offensive to ordinary notions of fairness: see [*Nottingham* at 1076]. In applying these formulations the court has regard to all the circumstances of the case.

[emphasis added]

Lord Nicholls then proceeded to categorise the relevant "circumstances of the case" into the following categories: (a) the nature of the offence; (b) the reason for the particular police operation; (c) the nature and extent of police participation in the crime; and (d) the defendant's criminal record.

64 Lord Hoffmann, in his speech in *Looseley*, said (at [48]):

The theme which runs through all discussions of the subject is that the state should not instigate the commission of criminal offences in order to punish them. But what counts for this purpose as instigation? An examination of the authorities demonstrates … that one cannot isolate any single factor or devise any formula that will always produce the correct answer. One can certainly identify a cluster of relevant factors but in the end their relative weight and importance depends upon the particular facts of the case.

He likewise provided a list of the factors which he considered to be relevant in determining whether the conduct of undercover officers had caused the defendant to commit the offence, as opposed to giving him the opportunity to do so, such as (a) causing and providing an opportunity for the commission of the offence; (b) reasonable suspicion of crime and proper supervision of crime detection activities; (c) the nature of the offence; (d) the defendant's predisposition to commit the offence; and (e) active and passive conduct on the part of law enforcement officers. Having considered the possible definitions of entrapment, it would be helpful at this point to explain certain general principles in relation to entrapment.

Not every instance of unlawful police conduct is an abuse of power

65 First, and it is important to bear this in mind, the English courts do not consider every unlawful act committed by a law enforcement officer in the course of obtaining evidence of the commission of an offence by the defendant as an abuse of power. It is just one factor that is brought into the balance. In relation to Lord Bingham CJ's observations in *Nottingham* (as set out at [62] above), Lord Hoffmann had this to say in *Looseley* (at [70]):

Likewise it seems to me that, when Lord Bingham CJ in *Nottingham City Council v Amin* [2000] 1 WLR 1071, 1076–1077 said that the accused should not be "incited, instigated, persuaded, pressurised or wheedled" into committing the offence, he was not intending each of those verbs to be given a disjunctive and technical meaning. He was intending to evoke a more general concept of conduct which causes the defendant to commit the offence as opposed to giving him an opportunity to do so. No doubt a test purchaser who asks someone to sell him a drug is

> counselling and procuring, perhaps inciting, the commission of an offence. Furthermore, he has no statutory defence to a prosecution. *But the fact that his actions are technically unlawful is not regarded in English law as a ground for treating them as an abuse of power* ... [emphasis added]

In *Looseley*, Lord Hutton expressed the same idea in his speech as follows (at [102]):

> In considering the distinction (broadly stated) between a person being lured by a police officer into committing an offence so that it will be right to stay a prosecution and a person freely taking advantage of an opportunity to commit an offence presented to him by the officer, it is necessary to have in mind that a drugs dealer will not voluntarily offer drugs to a stranger, unless the stranger first makes an approach to him, and the stranger may need to persist in his request for drugs before they are supplied. *Therefore, in my opinion, a request for drugs, even if it be persistent, need not be regarded as luring the drugs dealer into committing a crime with the consequence that a prosecution against him should be stayed*. If a prosecution were not permitted in such circumstances the combating of the illegal sale of drugs would be severely impeded, and I do not consider that the integrity of the criminal justice system would be impaired by permitting a prosecution to take place. In my opinion a prosecution should not be stayed where a police officer has used an inducement which (in the words of McHugh J in *Ridgeway v The Queen* 184 CLR 19, 92) "is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity". [emphasis added]

It can be seen from this passage that Lord Hutton would not regard even a persistent request for drugs as amounting to entrapment.

66 In *Ridgeway*, McHugh J expressed a similar view when he suggested that the prosecution of an offence brought about by the unlawful conduct by law enforcement officials going beyond giving the defendant an opportunity to commit the offence did not necessarily bring the administration of justice into disrepute. Such prosecution would, therefore, not amount to an abuse of process. He said (at 90–91):

> The rationale of the jurisdiction to stay such prosecutions [*ie*, prosecutions based on evidence of an offence which was induced by or the result of law enforcement officers' misconduct] is that the administration of justice is brought into disrepute when the courts allow their procedures to be used to prosecute crimes that have been artificially created by law enforcement authorities. Consistently with that rationale, I do not think that a prosecution should be stayed merely because the law enforcement authorities, while having a reasonable suspicion or acting in the course of a bona fide investigation, have done more than provide an opportunity for the commission of the offence. In such a case, the predisposition of the accused to commit the crime in question must be relevant. While the conduct of the authorities is clearly of great importance, its effect on the accused's inclination to commit criminal offences is of equal importance. The supervision of police conduct is not by itself a function of the courts of justice. Such conduct becomes the concern of the courts only when it impinges upon the administration of justice. *And I do not think that the administration of justice is always brought into disrepute when the accused is induced to commit a crime by conduct that goes beyond the provision of an opportunity to commit the crime. Thus, I do not think that the administration of justice is necessarily brought into disrepute by the prosecution of a wary drug dealer who has been importuned or deceived into selling drugs to an undercover agent*. [emphasis added]

67 The observations which we have quoted above show that judges in England and some judges in Australia are fully apprised of the need to allow the police leeway in combating serious crime and to avoid characterising every unlawful act in law enforcement as entrapment, thereby transmuting it into

an abuse of power. McHugh J drew the line at the point where illegal police action impinged on the administration of justice (see [66] above]. When and in what circumstances the line is crossed is considered below in the section on competing public interests and policies. It may be noted that in *Looseley* itself, the House of Lords held that the conduct of the police in relation to the accused, Looseley, did not constitute entrapment because they had done no more than give Looseley (who was described at [113] as "steeped in the drug culture") an opportunity to sell the drugs to the undercover police officer. In contrast, with respect to the other case referred by the Attorney General to the law lords in *Looseley*, it was held that the accused had been instigated by the police to supply heroin to them by inducements (*viz*, supplying him with cheap cigarettes so that he would do "a favour for a favour": see Lord Hutton in *Looseley* at [116]).

68 Thus, as will be seen, whether unlawful conduct by state agents in the pursuit of criminals is an abuse of power is ultimately a question of determining which competing interest serves the public welfare more, *ie*, convicting and punishing the guilty on the one hand, or protecting the integrity of the judicial process (by not allowing such conduct by state agents to bring the administration of justice into disrepute) on the other. It is, in truth, a balancing of relative interests and values, and, therefore, *dicta* in some cases that "the ends cannot justify the means" or that "ignoble means cannot justify noble ends" should be read in this light. But, it is also clear from the speeches in *Looseley* that once the court considers unlawful police conduct as having crossed the line into the sphere of impropriety and unacceptability constituting "an affront to the conscience of the public" (*per* Lord Hoffmann in *Looseley* at [41], quoting from Lord Steyn's judgment in *Latif* ([44] *supra*) at 112), it is entrapment and an abuse of process requiring the resulting prosecution to be stayed.

Entrapment not a defence

69 Secondly, it is an established principle that, at common law, a person who commits an offence cannot plead inducement as a defence. The rationale of this principle was explained in *Sang* ([44] *supra*), where Lord Diplock said (at 432):

> Many crimes are committed by one person at the instigation of others. From earliest times at common law those who counsel and procure the commission of the offence by the person by whom the actus reus itself is done have been guilty themselves of an offence, and since the abolition by the Criminal Law Act 1967 of the distinction between felonies and misdemeanours, can be tried, indicted and punished as principal offenders. The fact that the counsellor and procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in his case.
>
> ... [T]his being the substantive law upon the matter, the suggestion that it can be evaded by the procedural device of preventing the prosecution from adducing evidence of the commission of the offence does not bear examination.

Lord Salmon put the point more concisely when he said at 443*:*

> A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom.

This principle applies equally to law enforcement officers who break the law in the course of their duties to uncover criminal activities. They do so at their own risk as it is a fundamental principle of our legal system that an offender cannot plead the defence of superior orders.

70 The principle that entrapment is not a substantive defence has been accepted throughout common law jurisdictions, except in the US, where the US Supreme Court has read an implied intention in criminal statutes to that effect. The Australian High Court accepted the principle in *Bunning v Cross* ([42] *supra*) and *Ridgeway.* The Supreme Court of Canada accepted it in *Mack* ([56] *supra*)*.* In Singapore, the Court of Appeal accepted it in *How Poh Sun* ([56] *supra*)*.* The House of Lords in *Looseley* affirmed it to be the law in England, but, for reasons which are elaborated in the speeches of the law lords, it decided to outflank this principle by invoking the recently developed jurisdiction of the courts to stay proceedings which constitute an abuse of process: see below at [81]. We will examine the reasons why the House of Lords in *Looseley* declined to follow *Sang* and held that the prosecution of an accused on the basis of entrapment evidence would amount to an abuse of process in England, after we consider the policy considerations for and against the use of entrapment or illegally obtained evidence to convict an accused of the charged offence.

Use of entrapment evidence – competing interests

71 As we have seen, entrapment involves an *agent provocateur* instigating or luring the defendant to commit an offence which he might otherwise not have committed. In instigating the offence, the instigator would also have committed the offence of abetment, unless the latter offence has been statutorily abrogated. If the instigation is done by a state agent, it gives rise to a conflict between two public interests or "two competing requirements of public policy" (*per* Stephen and Aickin JJ in *Bunning v Cross* at 74). On the one hand, it is in the public interest that a wrongdoer should be convicted and punished; on the other hand, the court should not be seen to lend its approval to unlawful conduct by the State in obtaining evidence for the purpose of prosecuting citizens for breaking the law. Entrapment, therefore, creates a dilemma for the courts, which has been described by Lord Steyn in *Latif* (at 112) as follows:

> If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime.

See also the extract from Lord Bingham CJ's judgment in *Nottingham* ([62] *supra*) at 1076–1077, which we have set out at [62] above.

72 Similarly, in the article "Re-drawing the Boundaries of Entrapment" (2002) Crim L Rev 161 (which Rajah J quoted in *Rayney Wong HC* ([18] *supra*) at [52]), Prof Andrew Ashworth set the issue in the context of human rights and the rule of law. He wrote (at 163):

> Its essence [*ie*, the essence of the "judicial integrity" rationale] is that it would compromise the integrity of the courts if they were to act on the fruits of manifestly unacceptable practices by law enforcement officers; or, to put it another way, that criminal justice would lose its moral authority if courts did not insist that those who enforce the law should also obey the law. It is therefore, at root, a principle of consistency – that it would be inconsistent for the courts, as guardians of human rights and the rule of law, to act on evidence obtained by methods which violate human rights and/or the rule of law.

Comparison of English and Australian approaches

73 How have the English and the Australian courts attempted to resolve the competing interests stated above? In England, Lord Steyn in *Latif*, after stating the dilemma of the courts (as quoted

above at [71]), said (at 112–113):

> The weaknesses of both extreme positions leave only one principled solution. The court has a discretion: it has to perform a balancing exercise. … [T]he judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

Similarly, in *Looseley*, Lord Hutton said (at [100]–[101]):

> [T]he approach taken by the English cases is that it is necessary to balance the competing requirements that those who commit crimes should be convicted and punished and that *there should not be an abuse of process* which would constitute an affront to the public conscience. In carrying out this balancing exercise it will be necessary for the court *in each individual case* to take into account a number of factors. …
>
> In balancing the relevant factors the English courts have placed particular emphasis on the need to consider whether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity to commit a similar crime, and when he freely took advantage of the opportunity presented to him by the officer.
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> [emphasis added]

74 In Australia, the High Court (by a majority of five to two) applied *Bunning v Cross* in *Ridgeway* and held that the law recognised a discretion to exclude, on public policy grounds, evidence of an offence or an element of an offence in circumstances where the commission of that offence had been brought about by unlawful conduct on the part of law enforcement officers. However, the discretion was exercisable only after a balancing exercise to determine two competing interests, *viz*, the need to convict and punish the guilty on the one hand, and the importance of not giving curial approval or encouragement to the unlawful conduct of those whose task it was to enforce the law on the other hand. This public policy discretion was well stated by McHugh J in *Ridgeway* (in his dissenting judgment) as follows (at 82–83):

> A trial judge has a discretion to exclude evidence obtained by unlawful or improper means irrespective of whether the admission of the evidence would be unfair to the accused. The discretion to exclude such evidence is grounded in public policy. The trial judge must weigh two aspects of the public interest. First, the judge must weigh the admission of the evidence against the public interest in convicting those who break the law in question. Second, the judge must weigh the admission of the evidence against the public interest in ensuring that public confidence in the justice system is not undermined by the perception that the courts of law condone or encourage unlawful or improper conduct on the part of those who have the duty to enforce the law. Ultimately, the judge must determine whether the public interest will be advanced or impaired by admitting the evidence. Any unfairness to the accused in admitting such evidence is a factor which is relevant to the exercise of the discretion, but it is only a factor which might tilt the balance in a close case. Ordinarily, questions concerning unfairness to the accused in admitting evidence are dealt with under the general discretion of a judge in a criminal trial to exclude evidence whose probative value is outweighed by its prejudice to the accused's defence.

75 It may be observed from the passages quoted above that *Looseley* and *Ridgeway* have adopted

slightly different approaches in determining which competing interest should prevail in a particular case. In *Looseley*, their Lordships were more concerned about identifying the kind of unlawful police conduct that would be considered as amounting to entrapment – *ie*, going beyond giving an opportunity to the defendant to commit the offence – taking into account various factors, including the nature of the offence and the predisposition of the defendant. The law lords took the view that police conduct which was held to have crossed the line of acceptability amounted to entrapment, and that using entrapment evidence to prosecute the defendant was an affront to the conscience of the public (which would bring the administration of justice into disrepute) and, thus, an abuse of process. In Australia, on the other hand, the High Court in *Ridgeway* (by a majority) was concerned with identifying the kind of unlawful conduct (including entrapment) that would justify the court in excluding the evidence under the *Bunning v Cross* discretion. In contrast, the minority (Gaudron and McHugh JJ) held that the policy ground for excluding evidence recognised in *Bunning v Cross* was not applicable to state entrapment as the policy considerations were different. In state entrapment, the administration of justice was brought into disrepute. It was the function of the State to protect its citizens from crime, and thus, it was contrary to the function of the State to engage in conduct that increased the incidence of crime in the community. On this basis, Gaudron and McHugh JJ held that state entrapment was an abuse of process. It would conduce towards clarity if we examine these approaches in greater detail.

English approach

(1) Prosecution founded on state entrapment is an abuse of process – rationale

76 We turn first to the English approach. Under *Sang,* the general principle is that all relevant evidence – including entrapment evidence – is admissible unless its prejudicial effect outweighs its probative value. This includes entrapment evidence. The courts are not concerned with how the evidence is obtained as it is not for the courts to discipline the police. In *Sang*, Lord Diplock emphatically rejected (at 432) any suggestion that the principle that entrapment was not a defence could be "evaded by the procedural device of preventing the prosecution from adducing evidence of the commission of the offence". After examining the history of the criminal trial in England, Lord Diplock stated (at 436) that Lord Goddard's statement in *Kuruma, son of Kaniu v The Queen* [1955] AC 197 ("*Kuruma*") at 204 (*viz*, that "in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused") had been misunderstood:

> That statement was not … ever intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence upon the minds of the jury that would be out of proportion to its true evidential value; and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant, *after the offence had been committed*, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect. [emphasis added]

Leaving aside the issue of self-incriminatory statements, Lord Diplock clarified at 436 that:

> [T]he function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with

how it is used by the prosecution at the trial.

Lord Diplock continued (at 436–437):

> A fair trial according to law involves [*sic*] … that the case against the accused should be proved … beyond all reasonable doubt upon evidence that is admissible in law; … that there should be excluded from the [trial] information about the accused which is likely to … [be] prejudicial to the accused … out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled … the requirement that the accused should have a fair trial according to law is, in my view, satisfied; for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason.

77 In concluding his judgment, Lord Diplock stated the law as follows at 437 (in giving his answer to the question referred to the House of Lords for consideration ("the certified question")):

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how [such evidence] was obtained. It is no ground for the exercise of discretion to exclude … evidence … obtained as the result of the activities of an agent provocateur.

78 Viscount Dilhorne, in his judgment in *Sang*, agreed that as regards illegally or improperly obtained evidence, it could not be said that such evidence, in addition to its probative value, had so prejudicial an effect as to render the trial unfair to the accused if it was admitted. His Lordship went on to state (at 441):

> In *Kuruma* v. *The Queen* [1955] A.C. 197 evidence was not held to be inadmissible because it was illegally obtained. Evidence so obtained must surely be regarded as unfairly obtained. Evidence may be obtained unfairly though not illegally but it is not the manner in which it has been obtained but its use at the trial if accompanied by prejudicial effects outweighing its probative value and so rendering the trial unfair to the accused which will justify the exercise of judicial discretion to exclude it.

79 Lord Scarman made this point very clearly in his judgment in *Sang* when he said at 454–455:

> Authority, therefore, strongly suggests that the discretion is based upon, and is co-extensive with, the judge's duty to ensure that the accused has a fair trial according to law. The two faces of the law reveal the nature and limits of this duty. The accused is to be tried according to law. The law, not the judge's discretion, determines what is admissible evidence. … It is the law that, subject to certain recognised exceptions, evidence which is relevant is admissible. … The judge may not use his discretion to prevent a prosecution being brought merely because he disapproves of the way in which legally admissible evidence has been obtained. …
>
> … The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither initiates nor stifles a prosecution. *Save in the very rare*

situation, which is not this case, of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial. … The judge's control of the criminal process begins and ends with trial, though his influence may extend beyond its beginning and conclusion. It follows that the prosecution has rights, which the judge may not override. The right to prosecute and the right to lead admissible evidence in support of its case are not subject to judicial control. Of course when the prosecutor reaches court, he becomes subject to the directions as to the conduct of the trial by the judge, whose duty it then is to see that the accused has a fair trial according to law.

What does "fair" mean in this context? It relates to the process of trial. No man is to be compelled to incriminate himself; nemo tenetur se ipsum prodere. No man is to be convicted save upon the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary. If legally admissible evidence be tendered which endangers these principles … the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in the law to secure him a fair trial; but he has no power to exclude admissible evidence of the commission of a crime, unless in his judgment these principles are endangered.

[emphasis added]

80 Before we leave *Sang*, we should also refer to Lord Salmon's views on the defence of entrapment. He said, at 443:

I would now refer to what is, I believe, and hope, the unusual case, in which a dishonest policeman, anxious to improve his detection record, tries very hard with the help of an agent provocateur to induce a young man with no criminal tendencies to commit a serious crime; and ultimately the young man reluctantly succumbs to the inducement. *In such a case, the judge has no discretion to exclude the evidence which proves that the young man has committed the offence*. He may, however, according to the circumstances of the case, impose a mild punishment upon him or even give him an absolute or conditional discharge … The policeman and the informer who had acted together in inciting him to commit the crime should however both be prosecuted and suitably punished. This would be a far safer and more effective way of preventing such inducements to commit crimes from being made, than a rule that no evidence should be allowed to prove that the crime in fact had been committed. [emphasis added]

It is clear from this passage that Lord Salmon was also of the view that the notion of fairness, which would allow the judge to exclude prejudicial evidence, did not extend to the exclusion of illegally obtained evidence that was probative of the accused's guilt.

81 However, in *Looseley*, the House of Lords considered entrapment by state agencies as an abuse of executive power and the use of such evidence to prosecute the defendant as an abuse of process. Their Lordships were concerned that if abuse of executive power in such situations were condoned by the courts, it would bring the administration of justice into disrepute. The courts, it was held, could not leave it to the Executive to discipline the police should the latter abuse its power in the detection of crime. Lord Nicholls endorsed (at [13] of *Looseley*) Lord Devlin's statement in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1354 as follows:

Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that

the process of law is not abused.

Hence, their Lordships unanimously departed from the approach in *Sang* and held that the court had the jurisdiction to stay any criminal proceedings which amounted to an abuse of process. Their Lordships justified their decision on the basis of four developments in the field of English criminal law over the 20-year period since the decision in *Sang*, namely:

(a) the enactment of s 78 of the 1984 Act (see [56] above), which reversed *Sang* by giving the court a power to exclude evidence on which the Prosecution proposed to rely if, having regard to all the circumstances, the court considered that the admission of such evidence would have so adverse an effect on the fairness of the proceedings that the court ought not to admit the evidence;

(b) the decisions in *Regina v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 and *Latif* ([44] *supra*), where the House of Lords held that the court had jurisdiction to stay criminal proceedings where there had been a serious abuse of process;

(c) the enactment of the Human Rights Act 1998 (see [56] above), which made it unlawful for the court, as a public authority, to act in a way which was incompatible with a right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), Eur TS No 5 (entered into force 3 September 1953) ("the ECHR"); and

(d) the decision of the European Court of Human Rights in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, which held that the use of entrapment evidence could render a trial unfair, thereby violating the right to a fair trial under Art 6 of the ECHR.

(2) Stay of proceedings for abuse of process – rationale

82 In *Looseley*, Lord Nicholls said at [16]:

Thus, although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to section 78 [of the 1984 Act]. In these respects *R v Sang* … has been overtaken. Of these two remedies the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment. Exclusion of evidence from the trial will often have the same result in practice as an order staying the proceedings. Without, for instance, the evidence of the undercover police officers the prosecution will often be unable to proceed. But this is not necessarily so. There may be real evidence, or evidence of other witnesses. Exclusion of all the prosecution evidence would, of course, dispose of any anomaly in this regard. But a direction to this effect would really be a stay of the proceedings under another name. Quite apart from these practical considerations, as a matter of principle a stay of the proceedings, or of the relevant charges, is the more appropriate form of remedy. *A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way*. [emphasis added]

83 It would seem from this passage that Lord Nicholls was prepared to stay criminal proceedings where the law enforcement officers were guilty of entrapment, even if the Prosecution had other independent untainted evidence upon which to convict the defendant. If this is correct, Lord Nicholls was prepared to give primacy to the Judiciary's role in guarding against abuse of executive power over its role in convicting the guilty. The above passage also appears to negate his assertion (at

[17]) that when ordering a stay and refusing to let a prosecution continue, the court was not seeking to exercise disciplinary powers over the police (although he did also admit in that same paragraph that staying a prosecution might have this effect).

Australian approach

(1) Prosecution founded on state entrapment not an abuse of process – rationale

84 In contrast, the Australian High Court in *Ridgeway* ([44] *supra*) held (by a majority of five to two) that a prosecution founded on entrapment evidence was *not* an abuse of process. (*Ridgeway* was referred to in *Looseley*, but the House of Lords preferred the minority judges' stance that such a prosecution would be an abuse of process.) The majority in *Ridgeway* reasoned that it was inappropriate to stay criminal proceedings based on entrapment as an abuse of process, because using the court process to prosecute a defendant who was guilty of a criminal offence could not be an abuse of process. Mason CJ and Deane and Dawson JJ, in their majority joint judgment ("the joint judgment"), said (at 40–41):

> *Once it is concluded that our law knows no substantive defence of entrapment, it seems to us to follow that the otherwise regular institution of proceedings against a person who is guilty of a criminal offence for the genuine purpose of obtaining conviction and punishment is not an abuse of process by reason merely of the circumstance that the commission of the offence was procured by illegal conduct on the part of the police or any other person.* To the contrary, to institute and maintain proceedings in a competent criminal court for that purpose is to use the process of that court for the very purpose for which it was established. If the commission of the crime was procured by illegal conduct on the part of another person, one would prima facie expect that criminal proceedings would also be instituted against that person. If that other person is a police or other government officer, a failure to institute such criminal proceedings might be a relevant consideration favouring the exercise of the discretion to exclude evidence of the illegally procured crime or of an element thereof. Such a failure would not, however, of itself convert the use of a criminal court's process for the trial and conviction of the person who committed the charged offence into an abuse of that process.
>
> Nonetheless, the appropriate ultimate relief in a case where the commission of the charged offence has been procured by illegal police conduct may well be a permanent stay of further proceedings. Ordinarily, the question whether evidence of an offence or of an element of an offence should be excluded pursuant to the discretion to exclude evidence on entrapment grounds should be raised and determined in the course of a preliminary hearing. If, on such a hearing, a ruling is made that evidence of the charged offence or of an element of it should be so excluded, it will be apparent that it would be an abuse of process for the Crown to proceed with the trial. The reason why that is so is not that the commission of the charged offence was procured by illegal conduct on the part of the police. It is that the proceedings will necessarily fail with the consequence that a continuance of them would be oppressive and vexatious. It is true that there is an appearance of artificiality in the distinction between an exclusion of all evidence and a stay of proceedings. There is, however, a significant distinction in principle between staying criminal proceedings on the ground that the proceedings in themselves constitute an abuse of process and staying further steps in the proceedings on the ground that, due to the effect of evidentiary rulings made in them, they must fail.
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> [emphasis added]

85 Brennan J, in a separate judgment, also held that the concept of abuse of process had no

application to a prosecution founded on entrapment evidence. He said, at 46 of *Ridgeway*:

> The process of a court which has jurisdiction to try an offender for an offence is not abused by the exercise of that jurisdiction for that purpose. Therefore it is not an abuse of process to prosecute an offender who has been induced to commit an offence in order to procure his conviction. In *Jago v District Court (NSW)* [(1989) 168 CLR 23 at 47–48], I said:
>
> > "An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process ... When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. That is a lofty aspiration but it is not the law."

86 In support of his reasoning, Brennan J also referred (at 48) to the statement from a US decision, *Sorrells v United States* 287 US 435 (1933) at 450, which he regarded as apposite to the duty of an Australian court exercising its criminal jurisdiction:

> Where [the] defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free.

Brennan J then went on to say (at 48):

> If there be jurisdiction to stay the prosecution of an offender, it must be on some ground other than entrapment. It would be anomalous to deny a defence of entrapment [and] yet admit a jurisdiction to grant a permanent stay of a prosecution on the ground of entrapment. Such a jurisdiction would create a discretionary power to try a case or to decline to try a case according to whether the court "desires to let the defendant go free". It follows that I would respectfully decline to accept the approach taken in at least some Australian courts that prosecution of an offender entrapped into the commission of an offence is an abuse of process enlivening a judicial discretion to stay the prosecution.

(2) Court has discretion to exclude entrapment evidence – rationale of majority judgment

87 Following from the proposition that a prosecution based on evidence obtained by state entrapment was not an abuse of process, the majority in *Ridgeway* held, applying its own decision in *Bunning v Cross* ([42] *supra*), that the appropriate remedy in such a case was to exclude the entrapment evidence if, upon applying a balancing exercise, it was appropriate to do so. In the joint judgment, the majority judges said (at 41–42):

> *The critical question was whether*, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, *the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement,*

outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime against s 233B(1)(c) of the [Customs] Act of which he was guilty. [emphasis added]

88 The facts in *Ridgeway* presented the court with a novel, if not unique, situation where the preceding unlawful conduct of the Australian Federal Police was not only designed to bring about the commission of the charged offence, but was also an essential ingredient of the charged offence. In that case, the accused ("R") was convicted of an offence under s 233B(1)(c) of the Australian Customs Act 1901 (Cth) for possession of "prohibited imports" (*viz*, heroin). The heroin had been imported unlawfully by C, an officer from the Malaysian police's anti-narcotics branch, as part of an operation involving the "controlled importation" and delivery of heroin with the specific aim of arresting R in possession of the drugs in Australia. R had initiated and arranged the importation through L, an informer of the Malaysian police. L bought the heroin in Malaysia and flew with C to Australia with the heroin in C's custody. C was able to clear customs with the heroin by special arrangements made between the Australian Federal Police and the Australian Customs authorities. Several days later, L and C met R to hand over the heroin, whereupon R was arrested. At his trial, R contended that the trial judge should exercise his discretion to exclude the evidence of the illegal importation of heroin on the ground of public policy since the drugs had been illegally imported into Australia. Alternatively, R argued that he had a substantive defence of entrapment to the charges. Thirdly, he contended that the prosecution was an abuse of process because of the illegal importation of heroin and that the court ought to have permanently stayed the proceedings.

89 Five of the seven judges of the Australian High Court (Mason CJ and Deane, Dawson, Brennan and Toohey JJ) held that while the prosecution of R for the offence charged was not an abuse of process, evidence of the Australian police's unlawful conduct in importing the heroin should be excluded on public policy grounds. The result of excluding the evidence of the "prohibited imports" meant the Prosecution had no evidence to prove that R was in possession of a prohibited import, which was an essential element of the offence charged. Gaudron J, in a separate judgment, held that by illegally importing the heroin, the Australian police had incited or participated in the commission of the offence with which R was charged, and hence, the proceedings were an abuse of process. McHugh J held on the facts that there had been no entrapment as nothing that the Australian police did induced R to commit the offence. R was the architect of the scheme of importation and went to considerable lengths to carry it out.

90 The joint judgment also drew a distinction between two distinct but overlapping categories of cases of unlawful conduct on the part of enforcement officers, *ie*: (a) where such conduct induced the defendant to commit the offence; and (b) where such conduct itself created or constituted an essential ingredient of the offence charged. *Ridgeway* fell within both categories in that the Australian police had imported the heroin unlawfully and had thereby both committed the offence of importing prohibited imports as well as inducing R to commit that offence. The joint judgment discussed the applicable "high public policy" considerations (see the joint judgment at 31) in these words (at 39):

> The first category consists of cases in which the police conduct has induced an accused person to commit the offence which he or she has committed. In that category of case, the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations except in what we would hope to be the rare and exceptional case where the illegality or impropriety of the police conduct is grave and either so calculated or so entrenched that it is clear that considerations of public policy relating to the administration of criminal justice require exclusion of the evidence. *The other category of case is where illegal police conduct is itself the principal offence to which the charged offence is ancillary or creates or itself constitutes an essential ingredient of the charged offence.* An example of that category is a case

where a person is charged with receipt or possession of stolen property in circumstances where not only the supply, but the actual theft, of the stolen property had been organised by the police for the purpose of obtaining the conviction of the person to whom it is supplied. *In that category of case, the police illegality and the threat to the rule of law which it involves assume a particularly malignant aspect.* Even in such a case, if the police conduct is disowned by those in higher authority and criminal proceedings have been instituted against the police as well as the accused, it is unlikely that considerations of public policy relating to the integrity of the administration of criminal justice would require the exclusion of evidence either of the accused's offence or of the particular element of it created by the police illegality. If, however, the illegal police conduct would appear to be condoned by those in higher authority and it does not appear that criminal proceedings have been brought against the police, those considerations of public policy will be so strong that an extremely formidable case for exclusion will be raised. Indeed, if the courts were prepared to allow curial advantage to be derived from the police illegality in such circumstances, there could be no satisfactory answer to Macrossan CJ's rhetorical question [in *R v D'Arrigo* [1994] 1 Qd R 603 at 605] "at what point would it ever be appropriate to demur and offer objection?" [emphasis added]

91 The joint judgment (at 42–43) also explained the reasons why, on balancing the relevant considerations, the majority decided to exclude evidence of the illegal importation of the heroin:

In these circumstances, the above-mentioned factors – ie grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of the objective of the criminal conduct if evidence be admitted – combine to make the case an extreme one in which the considerations favouring rejection of evidence on public policy grounds are extremely strong. Against those considerations, one must weigh the legitimate public interest in the conviction and punishment of the appellant for the criminal offence of which he is guilty. The weight of that consideration in the present case is reduced by the fact that the appellant's possession of the heroin at the time he was apprehended constituted any one of a variety of offences against the law of South Australia of which illegal importation was not an element and which range from knowing possession of a prohibited substance or drug of dependence … to possession of more than the prescribed quantity of a prohibited substance or drug of dependence for the purpose of sale or supply …

It follows that the learned trial judge should have ruled that all evidence tending to show that the heroin supplied to the appellant had been, or was reasonably suspected of having been, illegally imported should be rejected on public policy grounds. The evidence so excluded should have included any evidence from which any inference of illegal importation might be drawn (eg that heroin is not produced in Australia). The result of that ruling would have been that a necessary element of both the offence of which the appellant was convicted and the alternative offence with which he was charged [namely, being in possession of heroin "reasonably suspected" of having been imported into Australia in contravention of the Customs Act 1901] could not have been proved. Accordingly, further proceedings should have been stayed for the reason that they would inevitably fail.

92 It is important to note that the two factors which the majority judgment considered as particularly significant in tilting the balance in favour of excluding the evidence of illegal importation were these: (a) R would still have been subject to prosecution for other offences under state law which did not involve the element of illegal importation; and (b) there had been "selective prosecution" of R in that none of the police officers who imported the heroin unlawfully were prosecuted or even reprimanded. In this connection, it is pertinent to highlight an extract from the

joint judgment at 39 which we had set out earlier at [90]:

> [I]f the police conduct is disowned by those in higher authority and criminal proceedings have been instituted against the police as well as the accused, it is unlikely that considerations of public policy relating to the integrity of the administration of criminal justice would require the exclusion of evidence either of the accused's offence or of the particular element of it created by the police illegality.

In other words, if the Prosecution in *Ridgeway* had also charged the police officers concerned, there would have been no public policy reason for excluding evidence of the illegal importation of the heroin by the police. It is important to bear this point in mind when considering the approach of the High Court in *Summit* ([18] *supra*) in excluding the illegally obtained evidence (as found by the court) in that case.

(3) Court has discretion to stay proceedings – rationale of minority judgments

93 Gaudron and McHugh JJ, in separate minority judgments, held that entrapment which brought the administration of justice into disrepute was an abuse of process, and that, in such circumstances, a stay of prosecution was the appropriate remedy. Gaudron J said (at 74–75):

> The inherent powers of superior courts to prevent an abuse of process exist to protect the courts and their proceedings, and to maintain public confidence in the administration of justice. And the maintenance of public confidence in that regard depends on ensuring that judicial proceedings serve the ends of justice, not injustice.
>
> The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose [*Williams v Spautz* (1992) 174 CLR 509], as well as proceedings that are "frivolous, vexatious or oppressive" [see, eg, *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210]. This notwithstanding, there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard [see, eg, *Oceanic Sun Line Special Shipping Co Inc v* Fay (1988) 165 CLR 197 at 242–243, 246–247, and the cases there cited]. That is necessarily so. Abuse of process cannot be restricted to "defined and closed categories" [*Hamilton v Oades* (1989) 166 CLR 486 at 502, citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 and *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 340, 344. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25–26, 47–48, 74; *Walton v Gardiner* (1993) 177 CLR 378 at 393-395; *Rogers v The Queen* (1994) 68 ALJR 688 at 689, 706] because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case [see *Dietrich v The Queen* (1992) 177 CLR 292 at 328–329, 364]. That is not to say that the concept of "abuse of process" is at large or, indeed, without meaning. As already indicated, it extends to proceedings that are instituted for an improper purpose [as to what constitutes improper purpose, see *Williams v Spautz* at 526–530, 532–537, 553–556; see also at 543–551] and it is clear that it extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" [*Oceanic Sun Line Special Shipping Co Inc v Fay* at 247] or "productive of serious and unjustified trouble and harassment" [*Hamilton v Oades* at 502].

94 It can be seen from the above passage that Gaudron J expanded the concept of abuse of process in criminal proceedings by relying on decisions in civil proceedings. However, she ultimately recognised that whether or not a prosecution founded on entrapment evidence was an abuse of the

criminal process would depend on whether such a prosecution weakened public confidence in the administration of justice. In *Ridgeway* at 77–78, she said:

> The prosecution of an offence which results from the illegal acts of law enforcement agents is not vexatious or oppressive, in the sense that those terms are generally understood. Nor is it properly described as a proceeding the predominant purpose of which is improper, that being the accepted test [for] whether proceedings have been brought for an improper purpose. That is because, ordinarily, law enforcement agents will have acted, as they say they did in this case, solely or mainly for the purpose of investigating or detecting crime. Equally, prosecution authorities will ordinarily have acted, as they also say they did in this case, solely or mainly for the purpose of ensuring the prosecution of those who perpetrate crime. But those considerations are beside the point *when the inevitable consequence of the proceedings is to weaken public confidence in the administration of justice. Proceedings of that kind are, on that account, an abuse of process*. And that is so no matter the purpose or motive with which they are brought and no matter that a fair trial is possible. [emphasis added]

95 McHugh J, in his dissenting judgment (which found favour with Lord Hutton in *Looseley* ([44] *supra*)), adopted a similar reasoning in holding that a prosecution based on evidence obtained by state entrapment was an abuse of process justifying a stay of the proceedings. He said (at 86–87):

> When the commission of an offence is induced by or resulted from the misconduct of law enforcement officials, the appropriate remedy is to stay any prosecution of the offence. … [T]he administration of justice is brought into disrepute when the Crown prosecutes a person for an offence that was induced by or resulted from the misconduct of law enforcement officials. *Proceedings that bring the administration of justice into disrepute are an abuse of process*. And it is settled law that the courts have jurisdiction to stay criminal proceedings on the ground that they are an abuse of process.
>
> When crimes induced by or which result from the misconduct of public officials bring the administration of justice into disrepute, the only effective sanction against that misconduct, apart from prosecuting the officers involved, is to grant a stay of the prosecution. And in my opinion the courts of justice cannot leave the protection of their processes to the remedy of prosecution.
>
> [emphasis added]

Given that *Ridgeway* was considered in *Looseley*, it is not unreasonable to conclude that the views of Gaudron and McHugh JJ had some, if not considerable, influence on their Lordships' decision in the latter case that state entrapment was an abuse of power which justified a stay of a prosecution founded on entrapment evidence.

(4) Rationale of majority judgment in excluding illegally obtained evidence in Ridgeway

96 In *Ridgeway*, the joint judgment referred specifically to two important considerations which weigh against recognising a judicial discretion to reject evidence of an offence procured by illegal conduct on the part of law enforcement officers. These two considerations are particularly relevant in the Singapore context. The first is the public interest in convicting the guilty. The second is the separation of the judicial power and the executive power (which includes the prosecutorial power). At 32 of the joint judgment, the majority judges explained why they did not regard the latter factor as antithetical to the recognition of a judicial discretion to exclude unlawfully obtained evidence:

> The first of those considerations is … the legitimate public interest in the conviction of those guilty of crime. … The second of those considerations lies in the separation, under our system of the administration of criminal justice, of executive and judicial functions. The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution, when initiated and while maintained, is that of the courts. Nonetheless, it has long been established that, once a court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances, reject relevant and otherwise admissible evidence on discretionary grounds or temporarily or permanently stay the overall proceedings to prevent abuse of its process. One such discretion is the discretion to exclude unlawfully procured evidence on public policy grounds. That discretion is properly to be seen as an incident of the judicial powers vested in the courts in relation to criminal matters. Neither its existence nor its exercise involves any intrusion into the exclusive sphere of the Executive. Nor, in our view, does the existence or exercise of a judicial discretion to exclude, on public policy grounds, all evidence of an offence or an element of an offence procured by unlawful conduct on the part of law enforcement officers.

Nevertheless, in spite of the force of the reasons given in the joint judgment for not excluding illegally obtained evidence in criminal proceedings, all the judges in *Ridgeway* eventually decided to exclude the evidence that the heroin was a prohibited import, thereby making it impossible for the Prosecution to prove that R had possession of "prohibited imports". The majority judges' reasons for so deciding were based on a very narrow compass, and this fact is again relevant in determining whether the basis on which the High Court held that the evidence in *Summit* should be excluded is correct.

Singapore courts' approach to entrapment evidence

No discretion to exclude entrapment evidence generally – Cheng Swee Tiang and How Poh Sun

97 With the English and the Australian approaches in mind, we now consider the Singapore approach. The earliest reported decision on entrapment evidence in Singapore is *Cheng Swee Tiang* ([18] *supra*), which was a decision of the High Court of three judges. In that case, a police officer was sent to the appellant's shop to obtain evidence that the appellant was assisting in carrying on a "10,000 characters lottery" illegally. The officer went in and asked to buy sugar. When told by the appellant that he was not selling sugar, the police officer asked to buy some numbers in the "10,000 characters lottery" and was thereupon sold $3 worth of such numbers. The police officer then left the shop and informed his superior officer of what had taken place, whereupon the latter raided the shop under the authority of a search warrant, seized certain articles and cash and arrested the appellant. The appeal against conviction was allowed after the Solicitor-General informed the court that he was not seeking to support the conviction. The court, however, decided to give its opinion on the point of law that was raised by the appellant as to whether or not the evidence so obtained by the police was admissible in evidence.

98 Wee Chong Jin CJ, in his judgment (with which Chua J concurred) held, citing *Kuruma* ([76] *supra*) and *Callis v Gunn* [1964] 1 QB 495, that it was undisputed law that while illegally obtained evidence was admissible if relevant, there was a judicial discretion to disallow such evidence if its reception would operate "unfairly" against the accused. As pointed out by Rajah J in *Rayney Wong HC* ([18] *supra*) at [51], Wee CJ did not elaborate on what "unfairly" entailed in the context of a criminal trial, but he did acknowledge the conflict between two important interests when considering the question of admissibility of evidence so obtained, *viz* (see *Cheng Swee Tiang* at 293):

> On the one hand there is the interest of the individual to be protected from illegal invasions of his

> liberties by the authorities and on the other hand the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground.

99 However, in our view, the purport of this passage is obscure in the context of the other passages before and immediately following it. Wee CJ's statement bears an uncanny resemblance to the balancing test expressed by Barwick CJ in *The Queen v Ireland* (1970) 126 CLR 321 at 335 as follows:

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. *On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment*. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion. [emphasis added]

Apart from referring to the two competing interests, Wee CJ did not say whether the court was supposed to apply the balancing test in each case. Immediately after making the statement quoted at [98] above, Wee CJ followed up with these two statements (at 293):

> While the courts have consistently and in no uncertain language criticised the use of *agent provocateurs*, whether they be law enforcement officers or not, the courts have also consistently admitted evidence obtained by such persons provided its admissibility does not operate unfairly against an accused.
>
> It seems to me, both on principle and authority, that no absolute rule can be formulated and the question is one depending on the circumstances of each particular case.

These two statements seem to suggest that Wee CJ was only concerned with the concept of unfairness as the sole basis for determining whether or not evidence obtained by entrapment should be admissible. He gave no guidance as to how the court should determine fairness in preferring one interest or the other for the purpose of admitting or excluding such evidence.

100 In *Rayney Wong HC*, Rajah J read these passages to mean that Wee CJ was giving his approval to the application of a balancing test in order to determine the admissibility of illegally obtained evidence. If this interpretation is correct, then *Cheng Swee Tiang* was not only departing from *Kuruma* in so far as that case endorsed the principle that evidence was admissible if it was relevant "and the court [was] not concerned with how that evidence was obtained" (*per* Lord Goddard in *Kuruma* at 203), but was also in advance of its time in departing from *Sang* ([44] *supra*) and in anticipating the formulation of the balancing test subsequently adopted in *Bunning v Cross* ([42] *supra*). In any case, whatever Wee CJ had in mind is now purely of historical interest as *Cheng Swee Tiang has* been overtaken by *Sang* and *How Poh Sun* ([56] *supra*). Nevertheless, *Cheng Swee Tiang* is a useful reminder that the Singapore courts have not, up to now, encountered a case of entrapment (as defined in *Looseley*) whether before or after *Cheng Swee Tiang*, which itself was similarly not a case of entrapment.

101 In *How Poh Sun*, the Court of Appeal, citing the relevant pronouncements of Lord Diplock in *Sang* (but not those of Wee CJ in *Cheng Swee Tiang*), held that entrapment was not a defence to a criminal charge and that the law in Singapore on the admissibility of illegally obtained evidence was as stated in *Sang*. However, *How Poh Sun* was not the first Singapore decision to apply *Sang*. The latter

had been applied earlier by the High Court in *Ajmer Singh v PP* [1986] SLR 454 ("*Ajmer Singh*"). That was a case of illegally obtained evidence where there was no entrapment. In that case, the government doctor had taken a blood specimen from the accused without seeking his consent (as the latter was in a drunken, albeit conscious, state at the material time). The specimen showed an alcohol content well above the prescribed limit. The accused was convicted for the offence of riding a scooter whilst under the influence of alcohol. He appealed against his conviction on the ground that the blood specimen was wrongly admitted in evidence. The court, applying *Sang*, held that the illegally obtained evidence was admissible as its probative value far outweighed its prejudicial effect.

102 In *How Poh Sun*, the appellant was arrested, charged with and convicted of a capital drug trafficking charge following an operation set up by the Central Narcotics Bureau using another offender ("Goh") who was prepared to co-operate with the narcotics police. Goh had contacted the appellant and told him that a buyer wanted a large quantity of "goods" (*ie*, heroin). The would-be purchaser was a narcotics officer. The appellant canvassed the rather unusual defence that his prosecution for a capital offence was unfair since, if the narcotics police had raided his home (which address they had), they would have found only the drugs in the flat and he would then have been charged only with the lesser offence of unlawful possession of a smaller quantity of heroin. The argument was rejected. The court held that entrapment was not a defence under Singapore law. *How Poh Sun* was a classic case of an accused being given an opportunity to commit the offence, as opposed to being instigated to commit the offence, as the appellant had gone to meet Goh for the sole purpose of selling the drugs. It was not a case of entrapment. The court referred to *Sang* and approved Lord Diplock's answer to the certified question (see [77] above).

103 In *Goh Lai Wak*, the accused alleged that he had been entrapped by a state *agent provocateur*. The Court of Appeal reiterated what it had decided in *How Poh Sun*. The court took the view that the nature of drug trafficking required the use of undercover agents, and that it was not the role of the court to sit in judgment on the manner in which the authorities carried out their investigations. Similarly, in *Rozman* ([56] *supra*), the Court of Appeal held (at 328–329, [36]) that although the accused was mentally subnormal, he had the necessary *mens rea* to commit the offence of drug trafficking, and therefore could not plead entrapment as a defence "however active a role such *agent provocateur* might have played in persuading [him] to commit the offence" (at 328, [35]). This statement is entirely consistent with the principle in *Sang* that entrapment evidence is admissible, but it is not clear whether the court found that there was entrapment on the facts of that case. By way of contrast, the Court of Appeal in *Chan Chi Pun v PP* [1994] 2 SLR 61 approved the decision in *Cheng Swee Tiang*, although the court held, on the facts, that the evidence that the accused had 16 slabs of heroin concealed in a vest beneath his T-shirt had been lawfully obtained by the customs officers as they had the authority to search him. *How Poh Sun* was not cited and was therefore not considered. It is not surprising that none of these cases considered entrapment as an abuse of process, as this doctrine was not applied in *Ridgeway* and only by the House of Lords in *Looseley* in 2001. Nonetheless, the fact remains that the question of whether a prosecution founded on evidence obtained by entrapment on the part of state agents was an abuse of process was not considered in all these cases.

Discretion to exclude entrapment evidence exceptionally – Summit

104 In *Summit*, the High Court held that the court had a discretion to exclude the evidence obtained by JC (the private investigator) of Summit CD's commission of copyright offences. In the present proceedings, the Law Society's stand on *Summit* (as set out at [56] above) is that it applies only to the retention of evidence illegally obtained through an invalid search warrant and not to the admissibility of such evidence at trial, and that it did not change the law as stated in *Sang*. The respondent's submission, in contrast, is that *Summit*, in deciding that the court had a discretion to

exclude entrapment evidence on the facts of the case, did qualify the law as stated in *Sang* and *How Poh Sun*, and that it was correctly decided in principle and should be followed by this court.

105 We do not agree with the Law Society's position with respect to the scope of the principle of law stated in *Summit*. The *Summit* exception (see [18] above]) is not confined only to applications to set aside search warrants. It establishes a general principle applicable to all prosecutions, whether public or private. The proceedings in *Summit*, although not a state prosecution, were criminal in nature. They involved, *inter alia,* a petition for criminal revision brought by Summit CD and its parent company ("Summit Holdings") to set aside three search warrants issued under the Criminal Procedure Code (Cap 68, 1985 Rev Ed) in order to recover a large quantity of business records seized under the warrants. This required Summit Holdings and Summit CD ("the petitioners") to show that BSA had obtained the warrants without any reasonable cause for suspecting that there was in the petitioners' premises any article or document which infringed the copyright and trade marks of BSA's principals. The High Court held that two of the warrants were properly issued, but the evidence supporting the third warrant ("the copyright warrant") was so tainted with illegality (and so malignant to the rule of law) that the magistrate who issued the warrant should have rejected it. In our view, the court would have employed the same reasoning if the same issue had been raised in a criminal prosecution. Further, we do not agree that *Summit* did not depart from the law as stated in *Sang*. It clearly did, notwithstanding the reading of *Summit* which was adopted in *Amran bin Eusuff* ([56] *supra*) at [30]. For these reasons, it is necessary for us to examine the facts and reasoning in *Summit* to determine whether it was correctly decided, and whether we should follow the *Summit* exception and depart from *Sang* and *How Poh Sun*.

(1) The Summit exception reconsidered

106 In *Summit*, the evidence relied upon by BSA in support of the copyright warrant was obtained through the private investigator, JC. His employers had been engaged by BSA to obtain evidence that the petitioners were engaging in pirating master CDs containing copyright software belonging to BSA's principals. JC approached the assistant general manager of Summit Holdings ("TSY") and asked the latter to replicate the eight master CDs which he had brought with him. Four of the CDs, which were purchased by JC from a shop, were counterfeits containing software programmes belonging to BSA's principals. TSY agreed to do the job for $4,000. After BSA received from Summit CD the eight replicates and the eight original CDs, BSA applied for and obtained the search warrants. The High Court described JC's evidence in relation to the copyright warrant as follows (at [41]):

> This was not the usual case of entrapment in the form of a trap purchase, where a law enforcement officer who is out to trap a seller of counterfeit products pretends to be a genuine purchaser and purchases a counterfeit product. In such a case the illegality is only in relation to the means of proof of the offence already committed. *What [JC] did here was to bring eight counterfeit masters and ask the petitioners to replicate them*. The petitioners did in fact replicate the masters and, on that basis, the complaint was made that the petitioners were engaged in counterfeiting CDs. *This was a clear case where the illegality preceded the crime and was designed to bring about the commission of the crime*. Worse still, there was no allegation that [TSY] was told by [JC] that the masters were counterfeit and that he still chose to proceed to manufacture the masters. [emphasis added]

On the basis of these findings, the court concluded that the case was different from *Sang*. The court said, at [52] of its judgment:

> … *Sang* is distinguishable from the present case. There is a distinction between the case where police conduct has merely induced the accused person to commit the offence which he has

committed (as in *Sang*) and the case where the illegal police conduct itself constitutes an essential ingredient of the charged offence. The present situation falls in the latter category, albeit the illegal conduct is that of a private investigator rather than a law enforcement officer. Such a distinction was drawn in the recent Australian High Court decision in [*Ridgeway*] … Different tests apply for both. In the former category, it is a case where the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations, and the exclusion of evidence would in fact undermine judicial integrity in allowing such alleged offenders [to] get away. *In the latter category, the illegality and the threat to the rule of law which it involves assume a particularly malignant aspect*. If the petitioners are ultimately charged with committing an offence under the Copyright Act and Trade Marks Act for replicating the eight masters, not only were the counterfeit masters supplied but the actual making of the counterfeit CDs had been organised by the private investigator for the purpose of obtaining the conviction of the person to whom they were supplied. In addition, there was no allegation that [TSY], acting on behalf of Summit Holdings or Summit CD, actually knew that the masters were infringing copies. There was no representation by [JC] to that effect. It was regrettable that BSA as a reputable organisation could sanction such conduct on the part of the private investigators. *The integrity of the administration of criminal justice would require that such evidence be excluded.* [emphasis added]

107 These two passages, when deconstructed, make the following findings: (a) JC committed an offence in supplying eight (it was actually four, and not eight as stated at [41] of *Summit*) counterfeit master CDs to TSY; (b) this act was intended to bring about the offence of counterfeiting by Summit CD; (c) Summit CD replicated the counterfeits and thereby infringed the copyright in the programmes therein; (d) JC had thereby organised and orchestrated the unlawful acts of Summit CD in replicating the counterfeit master CDs; (e) Summit CD did not know that the master CDs were counterfeits; and (f) admitting the evidence would undermine the integrity of the administration of justice and threaten the rule of law.

108 It may be noted that *Ridgeway* ([44] *supra*) was referred to at [52] of *Summit*, which explains the High Court's reference to the concept of judicial integrity and the finding in the case itself that JC's unlawful conduct preceded, was designed to bring about and brought about the charged offence. This also explains why JC's unlawful conduct was an essential ingredient of the charged offence. Indeed, these were also the basic facts in *Ridgeway*: see [88] above. As the court in *Summit* said (at [52]), "The present situation falls in the latter category [*ie*, as *per* the facts in *Ridgeway*]." However, a careful reading of the two passages at [41] and [52] of *Summit* shows that nowhere did the court identify or explain the offence committed by JC which formed the basis of the holding in that case. For the reasons which we set out below, *Summit* is problematic in the following respects:

(a) In respect of the finding that JC organised the actual replication of the master CDs by Summit CD, the fact was that JC did not have to instigate, persuade or cajole Summit CD to replicate the master CDs as the latter had replicated them on a commercial basis in the ordinary course of its business.

(b) In respect of the finding that JC's illegality preceded the charged offence, the fact was that JC, in purchasing the original counterfeits from a retailer, committed no offence in so doing; neither did he commit any offence in getting Summit CD to replicate the counterfeit CDs as he did so with the consent of BSA. Hence, there was no *relevant* preceding offence prior to Summit CD's replication of the counterfeit master CDs. The preceding offences were those committed by the retailer in selling the counterfeit CDs and by his supplier in counterfeiting those CDs.

(c) In respect of the finding that Summit CD committed an offence in replicating the

counterfeit master CDs, there are two relevant issues here: whether this was done with the knowledge of BSA and whether this was done with the consent of BSA. Section 136(4) of the Copyright Act then in force (see [45]) above) provided as follows:

> A person who, at a time when copyright subsists in a work, makes or has in his possession an article specifically designed or adapted for making copies of the work that the person knows, or ought reasonably to know, is to be used for making infringing copies of the work shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 for each [copy] in respect of which the offence is committed or to imprisonment for a term not exceeding 2 years or to both.

(i) The replication by Summit CD would only be an offence if it knew or ought reasonably to have known that it was making an infringing copy. The finding in *Summit* (at [53]) was that:

> At most, the evidence showed that the management of [the petitioners] was reckless as to whether the CDs or the masters which they were asked to replicate were actually infringing copies. … *It is one thing to say that one is reckless or does not care whether he is reproducing infringing copies of CD-ROMs, and it is another to say that he is engaged in the business of counterfeiting CD-ROMs and therefore there must be a large number of infringing products in the premises.* [emphasis added; see also [41] and [52] of *Summit*].

It is not so clear that this was a finding that Summit CD knew or ought reasonably to have known that it was replicating infringing copies.

(ii) The second ingredient of the offence is the absence of consent. The expression "infringing copy" is defined in s 7(1)(*a*) of the Copyright Act as follows:

> "infringing copy" ... in relation to a work, means a reproduction of the work, or of an adaptation of the work, … the making of which constituted an infringement of the copyright in the work, …the making of which was carried out *without the consent of the owner of the copyright*. [emphasis added]

The CDs replicated by Summit CD were not infringing copies since they were made with the consent and at the request of BSA. The fact that the original CDs were themselves counterfeits was irrelevant. Moreover, BSA, in buying the counterfeit master CDs, had resumed ownership of the copyright programmes before Summit CD replicated them. Summit CD had merely reproduced a work that belonged to BSA's principals with their consent.

109 The above argument on consent was made by the petitioners in *Summit*, but was rejected for the reasons given at [58] of the judgment:

> I shall now briefly dispose of the alternative submission by the petitioners that the petitioners' act of infringement by manufacturing the eight masters for [JC] was done with the consent of the relevant … owners of the copyright, and hence no offence was disclosed under the relevant legislation. This contention was plainly untenable. The relevant copyright … holders never gave consent to Summit CD to make the masters since they wanted [JC] to entrap Summit [CD] so as to find out if Summit [CD] was engaged in software piracy. If the defence of consent was valid, it would effectively make agent provocateur [*sic*] a substantive defence. Trap purchases are made by investigators to secure evidence of infringement and it is untenable to argue that the

intellectual property rights holders have given consent to the sale of infringing articles to the agent provocateurs and hence Summit CD are not guilty of an offence.

110 In our view, the reasoning in this passage is also problematic in the following respects:

(a) It was plain that BSA had consented to Summit CD making copies of the masters. Consent is a question of fact, and the fact that BSA wanted JC to entrap Summit CD did not change the fact of consent.

(b) The High Court's reasoning that if the defence of consent was valid, it would "effectively make agent provocateur a substantive defence" (see [109] above) conflates two different things: the fact of consent, and the principle of law that entrapment is not a defence. If the consent given to Summit CD was valid, as it undoubtedly was, it did not transform the actions of the *agent provocateur* (entrapment) into a substantive defence. Instead, it rendered the defence irrelevant because, with consent, there was no offence in the first place.

(c) It is, with respect, also erroneous to equate a trap purchase with a replication of copyright material with the consent of the copyright owner. A trap purchase seeks to uncover evidence of an existing infringement by the seller. In *Summit*, no offence had been committed by Summit CD when JC sought to entrap it into replicating the counterfeit master CDs which he had purchased with the consent of BSA. However, the targeted offence could not be committed under the law as BSA had consented to the replication of the CDs.

111 To summarise our findings on *Summit*: There was neither a preceding offence committed nor a subsequent offence brought about by JC. The copyright warrant should have been set aside on the ground that Summit CD had not committed any copyright offence in replicating the four master CDs. The other two warrants were also invalid for the same reason, *ie*, consent to the replication of the counterfeit CDs. The ruling on the law in *Summit* was, for these reasons, wholly unnecessary as no preceding or subsequent offence had been committed by any party on the *facts* of that case.

(2) Summit applied Ridgeway sans the Bunning v Cross discretion

112 We have earlier mentioned (at [108] above) that the *Summit* exception is in fact based on *Ridgeway*, where the Australian High Court, by a majority, excluded the evidence of illegal importation of the heroin after balancing the competing factors: see [87] above. In *Summit*, the High Court rejected the *Bunning v Cross* ([42] *supra*) balancing test on the ground that it was unworkable. The court said (at [54]–[56]):

> The adoption of such a distinction [*ie*, the distinction drawn in *Ridgeway*] in the mode of illegally procured evidence does not mean that we should adopt wholesale the position taken in the High Court of Australia in *Ridgeway v R* and in *Bunning v Cross* … In [*Bunning v Cross*], it was held that the trial judge has a discretion to exclude evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police. In exercising the discretion, the trial judge must engage in a balancing process to resolve the conflict between the goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval being given to the unlawful conduct of the law enforcement officer.
>
> In the … Australian [approach], the rationale is founded on the need for the courts to protect the integrity of their processes as well as the need to exercise judicial control over the police. However, [this approach is] completely unworkable in practice. While [it attempts] to identify the policies, [it stops] short [of] articulating clearly which way the discretion ought to be exercised.

> In *Bunning v Cross*, the guidelines laid down are: (i) whether there was a deliberate disregard of the law; (ii) the category of the evidence where the illegality was not deliberate; (iii) [the] ease with which the law might have been complied with in procuring the evidence in question; (iv) the nature of the offence; (v) the policy of [P]arliament as appears from the enactment of the statute constituting the offence. … The criticism [of these guidelines] is that, without a clear principled approach, the use of discretion can practically justify any result which the trial judge wishes to reach, and would be a fertile source of grounds of appeal.
>
> This is further illustrated by *Ridgeway*. In *Ridgeway*, the majority of the High Court extended the *Bunning v Cross* principles to the case where evidence of an offence [was] procured by the illegal conduct of the law enforcement officer. The majority held that the serious illegality of the law enforcement officers, coupled with selective prosecution, weighed heavily in favour of exclusion. If the disciplinary approach is carried through, surely the court would have granted a stay of proceedings, yet the court was content to allow the prosecution to continue to proceed [against] the accused under the state law, where there was no need to rely on its own illegality.

With respect, the above passages do not accurately reflect the decision and reasoning of the majority judges in *Ridgeway*. All the judges in *Ridgeway* were not, in fact, concerned with disciplining the police (see the extract from McHugh J's judgment quoted at [95] above). They were concerned, instead, with ensuring that the administration of justice would not be brought into disrepute. The majority judges decided that staying the proceedings would not be appropriate in view of the separation of powers in Australia's constitutional system, and also that invoking the court's jurisdiction to try an offender for an offence could not be an abuse of the court's process as that was what the court's process was intended for. Hence, they fell back on the *Bunning v Cross* discretion to decide whether the evidence against R should be admitted. They decided that it should not, but *only because* his prosecution was selective and, in any event, he could still be prosecuted for state offences which did not include the ingredient of illegal importation. But for these two factors, *the majority judges would not have excluded the evidence*. The joint judgment in *Ridgeway* shows that it is only in very exceptional circumstances that the court would exclude illegally obtained evidence under the public policy discretion (see [90] above). *Summit* is not in this class of exceptions.

113 Before us, the respondent submitted that the test which *Summit* applied – *ie*, whether there was illegality preceding the crime which was designed to bring about the commission of the crime – had the merits of simplicity and clarity. If this question was answered in the affirmative, then all evidence obtained pursuant to the illegal conduct would be excluded. In our view, this approach is, respectfully, again problematic for a number of reasons. First, every case of entrapment involves a preceding offence (abetment) which brings about a subsequent offence (the charged offence). But, as we noted above (at [65]–[66]), Lord Hoffmann and Lord Hutton in *Looseley* and McHugh J in *Ridgeway* have stated that not all preceding breaches of the law by law enforcement officers amount to abuse of process. It is, in the final analysis, a question of balancing the gravity of the preceding offence and that of the subsequent offence. Second, by rejecting the balancing approach to determine which competing public interest should prevail in the circumstances of each case, the *Summit* decision rests solely on its own facts. It would, in essence, mean that however trivial the preceding unlawful act may be in comparison with the charged offence, the evidence thereby procured of the commission of the charged offence is inadmissible. Criminal conduct spans a large number and spectrum of offences in terms of harm to society, and also a vast range of culpability. It is undesirable and inappropriate to treat all preceding illegal conduct as sufficient to exclude the evidence thereby obtained. In our view, focusing solely on the preceding unlawful conduct, without reference to its nature or seriousness and ignoring the gravity of the charged offence, fails to give sufficient weight to the public interest in convicting the guilty. *The very existence of competing or conflicting public interests* requires the court to make a choice as to whether, in a particular case,

one interest outweighs the other. The *Summit* exception denies the need to do such a balancing exercise. It also goes further than the decisions in *Bunning v Cross*, *Ridgeway* and even *Looseley* ([44] *supra*). In our view, the *Summit* decision, in adopting a black-and-white approach to the issue, does not provide the necessary flexibility that would enable the courts to resolve the competing public interests in the cases before them. In our view, *if a test under Singapore law were necessary* to determine whether or not entrapment or illegally obtained evidence should be excluded, the appropriate test would be a balancing test that takes into account all the factors identified in *Ridgeway* and *Looseley*.

The EA – effect on admissibility of entrapment evidence

114 So far we have discussed the approach of the Singapore courts without explicit reference to the provisions of the EA (see [57] above). We will now examine the effect of the EA on the admissibility of entrapment evidence before determining whether the various approaches, including the Singapore courts' approaches (discussed above), can be adequately reconciled with the relevant provisions of the EA.

The respondent's arguments

115 On this point, the respondent's arguments were as follows:

(a) In Singapore, the EA governs the admissibility of evidence. Under the EA, all evidence which is relevant is admissible. Therefore, entrapment evidence, being relevant, is admissible.

(b) However, under the common law, the court has a discretion to exclude illegally or improperly obtained evidence where it is unfair to the defendant: see, for example, *Ridgeway.* Therefore, whether this court possesses the discretionary power to exclude evidence obtained by entrapment depends on whether the common law subsists under the EA.

(c) Section 2(2) of the EA provides as follows:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

This provision is silent on entrapment evidence. Therefore, the Legislature must have intended the common law rules to apply.

(d) In *Cheng Swee Tiang* ([18] *supra*), the majority of the High Court (consisting of three judges) held that there was a judicial discretion to disallow unlawfully obtained evidence if its reception would operate unfairly against an accused. Ambrose J (dissenting) held that this discretion had no application to Singapore because of the Singapore Evidence Ordinance 1955. Before us, it was argued that the majority decision in *Cheng Swee Tiang* was correct while the minority decision was wrong because the latter drew a parallel with the Indian Evidence Act (Act No 1 of 1872) ("the Indian Act"), of which the corresponding section (which repealed *all* unwritten rules of evidence) was not the same as s 2(2) of the EA.

(e) Recent authorities show that the EA is a facilitative statute. In *PP v Knight Glenn Jeyasingam* [1999] 2 SLR 499 ("*Glenn Knight*"), the High Court applied the "without prejudice" rule contained in s 23 of the EA (which applies to civil proceedings) to criminal proceedings on the basis that the EA was a "facilitative statute" which permitted the introduction of "common law rules not expressly provided for under the ... Act" (*Glenn Knight* at [58]); see also *Lee Kwang*

Peng v PP [1997] 3 SLR 278 ("*Lee Kwang Peng*") at [46] and *Tan Meng Jee v PP* [1996] 2 SLR 422 ("*Tan Meng Jee*"). Reference was also made to *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR 509, where Andrew Phang Boon Leong JC (as he then was) said (at [39]):

> However, it appears to be the case that where the code concerned is itself silent with regard to the specific issue(s) or point(s) in question, the common law rules do continue to be relevant and even applicable: see *PP v Yuvaraj* [1969] 2 MLJ 89 and *Shaaban v Chong Fook Kam* [1969] 2 MLJ 219.

(f) In *Summit,* the High Court held that such a discretion existed, and in *Rayney Wong HC* ([18] *supra*) at [64], Rajah J implicitly accepted its existence.

(g) Although the Court of Appeal in *How Poh Sun* ([56] *supra*) applied *Sang* (*ie*, the principle that all relevant evidence is admissible, save for confessions, unless its prejudicial effect outweighs its probative value), this does not impinge on *Summit* because, as explained by Rajah J in *Rayney Wong HC* at [56], *Summit* "sheds further light on the intended breadth and ramifications of the earlier ruling in *How Poh Sun*". Furthermore, Rajah J himself had expressed at [64] a preference that the court should have such a discretion where the evidence was "procured in a manner that might be inimically repellent to the integrity of the administration of justice".

(h) In any case, the time is ripe to depart from the decision in *How Poh Sun*, which is also distinguishable from the present case as, there, the court was concerned with the desirability of policing the police.

Relationship between the EA and the common law

116 The interaction between the EA and the common law has been considered in a number of cases: see *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2000) ("*Halsbury's*") at para 120.004. The starting point is that s 2(2) of the EA provides that any rule of evidence not contained in any written law which is inconsistent with any of the provisions of the EA is repealed. This must mean all inconsistent rules existing at the date of enactment of the EA as only such rules could be repealed. It is similar to s 2(3) of the Indian Act in one respect, *viz*, neither enactment was intended to repeal *future* rules of evidence developed by the courts under the common law. Therefore, the question of whether new common law rules of evidence would apply depends on (a) whether the EA is an exhaustive code, and, if not, (b) whether the new rules are inconsistent with the provisions of the EA.

117 It is well established that the EA is a codifying Act. In *Mahomed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575 ("*Mahomed Syedol Ariffin*"), the Privy Council held that the Straits Settlement Evidence Ordinance of 1893 was a codifying Act (see also *Jayasena v The Queen* [1970] AC 618). At 581 of its judgment in *Mahomed Syedol Ariffin*, the Privy Council said:

> [T]he rule and principle of the Colony must be accepted as it is found in its own Evidence Ordinance, and ... the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect.

Similarly, in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, the Privy Council held (*per* Lord Diplock at 90) that where any part of evidence law was expressly dealt with by a statutory code, the courts

must give effect to the provisions of that code regardless of whether or not they differed from the common law. Any common law rule or principle of evidence not compatible with the applicable statutory code must be rejected by the court. In the light of s 2(2) of the EA, it must be so: see also the decision of the Court of Appeal in *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] SLR 188 and *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR 807, and Prof Jeffrey Pinsler's article, "Approaches to the Evidence Act: The Judicial Development of a Code" (2002) 14 SAcLJ 365. The EA only codified the law of evidence existing at the time of its enactment; therefore, new rules of evidence can be given effect to only *if they are not inconsistent with the provisions of the EA or their underlying rationale*. However, while the EA is a code, it is acknowledged to be non-exhaustive. Specifically, as mentioned above (at [115]), s 2(2) of the EA demarcates the application of that statute. The EA is exhaustive only to the extent that all the rules which are not saved by statute and which are inconsistent with it (the EA) are inapplicable. However, this is not an unrestricted licence to import 21st century notions of the common law into a 19th century code.

118 The relevance of s 2(2) of the EA in the context of the present case turns on the question of whether the exclusion of illegally obtained evidence in criminal trials would be inconsistent with any provision of the EA. This issue was examined in *Glenn Knight* with reference to representations made by accused persons to the Public Prosecutor ("the PP") in plea bargaining. As there is no provision in the EA that makes such representations inadmissible, they are, accordingly, admissible by virtue of s 2(2) of the EA. However, there is a long-established practice or convention (which the PP accepted in *Glenn Knight*) that such representations are made "without prejudice" and that the PP will not seek to admit them in evidence against the accused should the representations be rejected. In *Glenn Knight*, the only issue was whether a letter which the accused ("GK") had written to his Member of Parliament ("the MP") whilst he was under investigation and before he was charged, which letter the MP had sent to the PP, was a representation for the purpose of plea bargaining. In that letter, GK had explained why what he did was not an offence and stated that, in any case, he had been given immunity by the PP previously. The PP rejected the explanation and charged GK. When GK gave a different explanation for what he had done in his defence, the Prosecution sought to use the letter to show the inconsistency in GK's explanations. GK argued that his letter had been written "without prejudice" in plea bargaining. The Prosecution argued otherwise on the ground that when GK wrote the letter to the MP, he had not even been charged as he was still under investigation. There was no charge on which he could initiate a plea bargain. However, the High Court held that the letter could not be used against GK as it was a representation in plea bargaining. That should have been the end of that matter.

119 However, the court sought to provide a legal basis for its ruling rather than rely on the convention mentioned in the preceding paragraph. On its own motion (see [60]–[61] of the judgment), the court invoked s 23 of the EA as the legal basis for excluding representations in plea bargains, even though the Prosecution had not argued that excluding representations would be inconsistent with s 23. In invoking s 23, the court reminded itself of the ambit of s 2(2) of the EA, and that it must not create any rules inconsistent with the EA (see [55] of the judgment). Section 23 deals with "without prejudice" communications in civil cases. It provides as follows:

> **Admissions in civil cases when relevant**
>
> **23.** In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.
>
> *Explanation*.— Nothing in this section shall be taken to exempt any advocate or solicitor from giving evidence of any matter of which he may be compelled to give evidence under section 128.

The court in *Glenn Knight* held at [60] that on a purposive interpretation of s 23, representations made in plea bargaining were privileged and inadmissible in evidence as *the purpose for which s 23 was enacted applied with equal force to the administration of the criminal justice system*, and that (at [57]) excluding such representations in criminal proceedings would give effect to the "will and intent of Parliament". In other words, s 23 was an expression of the legislative intent that representations in plea bargaining be privileged from disclosure.

120 The court in *Glenn Knight* also held that this interpretational approach to the EA was permitted as the EA was a "facilitative" statute (at [58]), citing *Lee Kwang Peng* ([115] *supra*) at [46] and *Tan Meng Jee* ([115] *supra*) at 434, [48] (which adopted the rule in *Director of Public Prosecutions v Boardman* [1975] AC 421 concerning similar fact evidence) in support of this proposition. The court further observed (at [58]) that "[t]hese authorities were all the more recent than any binding English decision confirming the [EA] as a codifying Act".

121 The reasoning of the court in *Glenn Knight* is set out at [60] of its judgment as follows:

> In this case, a purposive interpretation is undoubtedly the preferred sensible approach toward reading an Act relatively untouched since its inception in 1893. Section 23 is silent on the application of the rule to representations made in the context of plea negotiations, which in itself is distinguished from the substantive trial of a criminal charge. Section 23, as observed by the editors of 5 *Butterworth's Annotated Statutes of Singapore* at p 83, concerns admissions which are not provable because of policy reasons. This is the policy of encouraging consensual case settlement in civil litigation. Section 23 does not expressly preclude the policy of consensual case settlement from being applied to a criminal justice system. Indeed, it cannot since otherwise the discretionary policy of awarding sentencing discounts would be void. *Section 23 is silent on the plea negotiations process in criminal matters. It is clear that it was expressly outside the scope of Stephen's* [the draftsman of the predecessor of the EA] *consideration*. … *A purposive construction would interpret plea negotiations in criminal matters as outside the draftsman's scheme of the criminal justice system. … However, to be alive to the needs of a modern criminal justice system in Singapore, it is clear that the purpose for which s 23 was enacted applies with equal force to the administration of the criminal justice system*. This policy of consensual case settlement for criminal matters is realised in the plea negotiations process. [emphasis added]

The reasoning in the above passage is as follows: Although s 23 applies only to "without prejudice" communications in civil matters, the policy under s 23 of encouraging settlement in civil cases applies equally to the "consensual case settlement for criminal matters" (*Glenn Knight* at [60]). A purposive interpretation of s 23 would allow the court to extend that policy to criminal matters in accordance with "the will and intent of Parliament" (*id* at [57]). This approach is permitted and is consistent with the EA being a facilitative statute, as has been decided in other cases.

122 We would respectfully disagree with the reasoning set out above for a number of reasons. First, the reasoning that "*it is clear that the purpose for which s 23 was enacted applies with equal force to the administration of the criminal justice system*" (from the passage quoted at [121] above) confuses the purpose of s 23 with its underlying policy, *ie*, to encourage settlements in *civil* cases. The purpose of s 23 is to give effect to the policy by according privilege from disclosure to statements made in settlement negotiations. Secondly, the purpose of s 23 is not to accord a similar privilege to representations in plea bargains in criminal cases; otherwise, it would have said so. The reason why that was not the purpose of s 23 is that when this provision was enacted, plea bargaining was unknown. Thirdly, whilst it is recognised today that there is some public benefit in securing guilty pleas through plea bargaining, thereby saving judicial time and resources, the State does not have a

policy that offences should be settled. On the contrary, it is in the public interest that offenders should be convicted and punished for the offences which they have committed, instead of being allowed to plead guilty to less serious charges just to save judicial time. Fourthly, the concept of the "purposive interpretation" of statutes (see *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201 at 210, [45]) is to give effect to the legislative intent as expressed in a statutory provision by a consideration of the words and expressions used in the provision. Since the words of s 23 are plain in meaning and purpose, there is no necessity to resort to "purposive interpretation" to discover the purpose of this section. Fifthly, s 23 is wholly irrelevant to criminal proceedings, and, therefore, whilst excluding representations in plea bargaining is not inconsistent with s 23, it does not lead to the conclusion that s 23 *justifies* their exclusion. All it means is that s 23 has nothing to say about the admissibility or otherwise of representations in plea bargaining.

123 For the above reasons, we are unable to see how the decision in *Glenn Knight* is of any assistance to the respondent's argument that because the EA is a facilitative statute, illegally obtained evidence is therefore not admissible in evidence. The crucial question in the present case is whether the holding in *Summit* ([18] *supra*) that illegally obtained evidence of the kind identified in that case is inadmissible is inconsistent with the EA, or whether it is supported by an express provision in that statute. We will examine this issue in the next section.

The EA does not permit the exclusion of entrapment evidence

124 It may be noted that until the present case, the effect of s 2(2) of the EA on the common law rules regarding the admissibility or otherwise of entrapment and illegally obtained evidence had not been considered by the courts in Singapore, except in the dissenting judgment of Ambrose J in *Cheng Swee Tiang* ([18] *supra*), where he expressed the view that the *Kuruma* ([76] *supra*) discretion (that illegally obtained evidence was admissible unless its prejudicial effect outweighed its probative value) was a new development. But, at the same time, Ambrose J conceded that the courts in Singapore had the power to exclude evidence which was unfair to the accused. There was no reference to s 2(2) of the EA in the *How Poh Sun* ([56] *supra*) line of cases or in *Summit*. It was assumed in these cases that either s 2(2) was irrelevant, or the principles relating to the admissibility of entrapment or illegally obtained evidence were not inconsistent with s 2(2). As we decided above, any such assumption would be incorrect as any new rule of evidence inconsistent with the provisions of the EA cannot be given effect to: see [116] above. Accordingly, the threshold question we have to ask is: What new principle of evidence is admissible under the EA? At para 120.009 of *Halsbury's* ([116] *supra*), the learned authors, after referring to the different senses in which the concept of "relevance" has been used by common law courts, give this answer, which we accept as correct:

> If a fact is relevant, evidence to establish that fact is admissible. The court is given no discretion to exclude evidence which establishes a relevant fact but is bound to admit the evidence [citing s 138 of the EA]).

Applying this principle, entrapment evidence is admissible under the EA to prove that the defendant committed the charged offence, and the court has *no* discretion to exclude it. Thus, the next critical question is whether local case law which has dealt with entrapment or illegally obtained evidence thus far is consistent with the EA.

125 The cases we need to consider are *Cheng Swee Tiang*, *Ajmer Singh* ([101] *supra*), *How Poh Sun* (and its line of cases) and *Summit.* In *Cheng Swee Tiang*, the majority followed *Kuruma.* The dissenting judge (Ambrose J), while commenting that the *Kuruma* discretion to exclude illegally obtained evidence on grounds of fairness was contrary to the EA, nonetheless accepted that the court could exclude evidence which was more prejudicial than probative. *Sang* ([44] *supra*) clarified

the scope of the *Kuruma* discretion and assimilated it into its own holding that there was no discretion to exclude entrapment evidence except where it was more prejudicial than probative. The law lords in *Sang* were very clear on when illegally obtained evidence was to be excluded – it was *not* to be excluded merely because it was illegally obtained (unless it was a confession); it could only be excluded if its prejudicial effect outweighed its probative effect: see [76]–[80] above. *How Poh Sun* applied the *Sang* principle without any qualification.

126 In the light of the combined effect of these propositions, we are of the view that given the overarching principle in the EA that all relevant evidence is admissible unless specifically expressed to be inadmissible, neither *Cheng Swee Tiang* nor *How Poh Sun* would be consistent with the EA in so far as they sanction the exclusion of relevant evidence on the ground of unfairness to the accused. It may be recalled that the fairness exception in *Sang* (as set out at [76] above) was based on the common law. In our view, Ambrose J was correct in pointing out (in *Cheng Swee Tiang*) that there was no such exception in our local evidence code in relation to entrapment evidence. In any event, the fairness exception has no practical effect in the case of entrapment evidence since, by definition, the probative value of such evidence must be greater than its prejudicial value in proving the guilt of the accused: see the speeches of the law lords in *Sang* at [76]–[80] above. For this reason, the *Sang* formulation is, in practical terms, consistent with the EA and in accordance with the letter and spirit of s 2(2), and is therefore applicable in the Singapore context. For the same reason, the decision in *Ajmer Singh* (which was a straightforward case of illegally obtained evidence) is consistent with the EA as it was essentially an application of *Sang.* In that case, the probative value of the evidence showing an excessive amount of alcohol in the accused's blood outweighed its prejudicial effect in showing that the accused had been riding his scooter while under the influence of drink. However, for this reason also, *Summit* was inconsistent with the EA in holding the court had the power to exclude JC's evidence on the ground that JC's illegal conduct preceded and was designed to bring about the charged offence.

127 In this connection, it may also be pertinent to note that under the EA, the only kind of incriminating evidence that has expressly been denied admissibility is admissions and confessions made involuntarily by an accused to a person in authority. Undercover police officers cannot be said to be persons in authority as far as the accused is concerned. In this respect, s 24 of the EA provides as follows:

> A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Even a confession obtained in consequence of a deception practised on the accused person or when he was drunk is similarly relevant and admissible. Section 29 of the EA provides:

> If such a confession is otherwise relevant, it does not become irrelevant merely because —
>
> > (*a*) it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk ...

Relevant evidence obtained in the situations referred to in s 29 may be said to be unfair to the accused. Yet, these kinds of evidence are admissible because of their probative value. This being the overarching principle of the EA, we are of the view that in so far as the High Court in *Cheng Swee*

Tiang recognised a discretion to exclude relevant evidence on the ground of unfairness to the accused, such a proposition is not entirely consonant with the provisions of the EA.

128 Indeed, as Ambrose J noted in *Cheng Swee Tiang* at 294, the courts in India, which are statutorily bound by the Indian Act (which provides for a similar scheme of admissibility of evidence as the EA), "have not recognized such a discretion" to exclude evidence on the basis of unfairness to the accused. It should be mentioned that the present position in India appears to be the same. *Sarkar's Law of Evidence* (Wadhwa and Company Nagpur, 16th Ed, 2007) vol 1 has this commentary (at p 121):

> The fact that a document was procured by improper or even illegal means will not be a bar to its admissibility *if it is relevant* and its genuineness proved [*Magrai v. R K Birla*, A 1971 SC 1295]. But the court will always care to find out that it is genuine and free from tampering or mutilation.

The Indian position confirms our understanding of the general scheme of the admissibility of evidence under the EA since the latter was based on the Indian Act.

129 However, a ruling (as in *Looseley* ([44] *supra*)) that the court has the power to stay proceedings involving the use of entrapment evidence on the ground of abuse of process would not be inconsistent with the EA. Such a decision would only involve the exercise of the court's jurisdiction or power not to hear the proceedings and would have nothing to do with the application of the EA, which is not concerned with the jurisdiction of the court to control its own processes. We turn, next, to the question of whether a prosecution founded on entrapment can amount to abuse of process under Singapore law, and, if so, whether staying the criminal proceedings is an appropriate response.

Is a prosecution founded on entrapment evidence an abuse of process in Singapore?

The concept of abuse of process

130 The judicial process is the curial mechanism for the resolution and disposal of civil disputes and criminal prosecutions in accordance with and subject to evidentiary and procedural rules. The use of the judicial process for a purpose other than that for which it is established is regarded by the court as an abuse of its process. Although the concept of "abuse of process" is not a precise one, its essence is the use of the judicial process for a purpose for which it is not intended or in circumstances where the extraneous purpose is the dominant purpose for its use.

131 The civil process is concerned with the determination of civil claims for damages and other remedies in connection with personal and property rights for breach of contract, torts and other legal wrongs. By the nature of the proceedings, the civil process is more susceptible to abuse, especially arising out of the misuse of procedural rules, than the criminal process. Hence, the plea of abuse of process is invoked much more frequently in civil proceedings than in criminal proceedings.

132 Likewise, the criminal process is intended for the *bona fide* prosecution of criminals, and to use it for an extraneous purpose is to abuse it. An example of such abuse is where the court process is being used to try the defendant on a criminal charge in order to harass him or teach him a lesson when the Prosecution has no or insufficient evidence to justify the charge, or for some extraneous purpose other than to convict and punish the defendant as an offender. Another example might be where the defendant has been promised immunity from prosecution by the prosecuting authorities in exchange for assisting the police in their investigations. Yet another example might be where the defendant is charged with a more serious charge (without any or sufficient evidence to support it) in order to pressure him to plead guilty to a charge for a less serious offence. These would be cases

where the Prosecution is using the criminal process for a purpose for which it is not intended, thus amounting to an abuse of process. In *Ridgeway* ([44] *supra*), Brennan J expressed the view (at 52) that a futile prosecution where there was a lack of evidence would be an abuse of process "in the *strict* sense of that term" [emphasis added]. In our view, the meaning given to the concept of "abuse of process" in *Looseley* goes beyond this strict sense, which encapsulates the underlying rationale of this concept. It seems to us that the approach of the House of Lords in *Looseley*, in the context of the English criminal justice system, was to, first, characterise state entrapment as an abuse of executive power (which is the duty of the court to check); second, equate the use of entrapment evidence with an abuse of process (which the court will not tolerate); and then apply the newly developed jurisdiction to stay the prosecution.

133 In this appeal, we have not been shown any case, reported or otherwise, concerning the abuse of the criminal process in Singapore, except for *Sum Lye Heng v MCST Plan No 2285* [2003] 4 SLR 553 ("*Sum Lye Heng*"), which is, however, a private prosecution. In that case, the High Court held, applying the law as stated by the Australian High Court in *Williams v Spautz* (1992) 174 CLR 509, that the court had an inherent jurisdiction to stay a prosecution for abuse of process. There, four of the seven judges (*viz*, Mason CJ and Dawson, Toohey and McHugh JJ) said at 520:

> As Lord Scarman said in *Reg. v. Sang*, every court is "in duty bound to protect itself" against an abuse of its process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings. Richardson J. referred to them in *Moevao v. Department of Labour* [[1980] 1 NZLR 464 at 481] in a passage which Mason C.J. quoted in [*Jago v District Court (NSW)* (1989) 168 CLR 23 at 30]. The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.

The High Court in *Sum Lye Heng* went on to observe (at [80]) that an action or a proceeding would be an abuse of process *if there was no basis or foundation for it*, but added that it would have some hesitation in accepting the views of the majority in *Williams v Spautz* that a predominantly improper purpose would suffice as an abuse of process. The question of whether a private prosecution should be subject to the same principles as a public prosecution on the ground that the former was ultimately subject to the control of the PP was not canvassed.

134 In our view, however, the scope for enlarging the concept of abuse in criminal proceedings is limited in the context of our criminal justice system. Furthermore, the separation of powers between the Executive and the Judiciary under the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") creates a constitutional barrier which the court may not cross without intruding into the executive power, thereby breaching a fundamental doctrine of the Constitution. These issues are discussed later.

Prosecution founded on entrapment evidence not an abuse of process in Singapore

135 The issue of whether a prosecution founded on entrapment evidence is an abuse of process has not been expressly considered by any court in Singapore. Certainly, the issue has not been examined in the context of staying criminal proceedings. As discussed earlier, developments in England have led the House of Lords in *Looseley* to decide that a prosecution founded on entrapment evidence is an abuse of process. Counsel for the respondent in the present case has not argued for the application of *Looseley* in Singapore (although counsel for the respondent in *Rayney Wong CA* ([1] *supra*) raised

this as his primary argument). Instead, he confined his submission to arguing that this court should follow *Summit* ([18] *supra*), an argument which we have rejected. Nevertheless, because of the importance of this issue, it is desirable that we consider whether *Looseley* has any application in Singapore in the context of our criminal justice system since, as Lord Scarman said in *Sang* and which *Looseley* affirmed, every court must protect itself against an abuse of its process.

136 As will be recalled, the House of Lords in *Looseley* and the Australian High Court in *Ridgeway* (by a majority of five to two) came to opposite conclusions on whether a prosecution founded on state entrapment was an abuse of process: see [81] and [84]–[86] above. Both decisions were based on the common law. In *Looseley*, their Lordships considered state entrapment as an abuse of executive power, and thus, prosecuting a defendant on evidence thereby obtained was an abuse of process which the court would not tolerate as it would bring the administration of justice into disrepute (see [82] above). Whether or not unlawful or improper police conduct in obtaining the evidence against the defendant amounted to entrapment was to be determined, so it was held, by various considerations, such as the gravity of the offence, the ease or difficulty of investigating the offences, *etc* (see [63]–[64] above).

137 In contrast, the decision in *Ridgeway* was that the prosecution (of R) could not be an abuse of process for the reason that the judicial process in criminal cases was established for the very purpose of putting an accused on trial for the commission of an offence. The invocation of the court's process for the very purpose for which it was established could not be an abuse of its process (see [84]–[85] above). The fact that the heroin in that case had been illegally imported into Australia by state agents for the very purpose of entrapping R to commit the charged offence was not in itself a sufficient reason for the court to withhold its process from the Prosecution. In contrast, it may be noted that Gaudron J (see [94] above) found the prosecution of R to be an abuse of process by extending the scope of this concept by reference to court decisions relating to abuse of process in civil proceedings and by reference to the general concepts of unfairness, oppression, vexation and harassment.

138 As a matter of legal logic (and on constitutional grounds which will be discussed later), we agree with the reasoning of the majority judges in *Ridgeway*. In our view, the true nature of abuse in state entrapment cases is the abuse of state power, as the judgments in *Looseley* recognise, by state agents deliberately breaking the law to instigate the accused to commit an offence which he otherwise would not have committed and then prosecuting him for that offence. The nature of the abuse is not directed at the process of the courts, whose function is to determine the guilt or otherwise of the accused on the evidence produced before the court. We find the logic and reasoning in the joint judgment and that of Brennan J in *Ridgeway* (see [85] above) unassailable. We agree that the invocation of the court process *for the* bona fide *prosecution of criminals* (as opposed to any of the extraneous purposes mentioned above at [132]) is not an abuse of process, even though the evidence against the accused may have been obtained by state entrapment or illegally by law enforcement officers.

139 If a prosecution founded on the use of entrapment or illegally obtained evidence is not an abuse of process, then the question of staying the prosecution for abuse of process does not arise. For this reason, *Looseley* has no application in Singapore. In *Looseley*, their Lordships were particularly troubled by the prospect of law enforcement agencies resorting to state entrapment to create, and thereby increase artificially, offences, as that would not be in the public interest. We are also mindful of this possibility, but, in the context of our criminal justice system, admitting entrapment evidence does not necessarily mean that the court is bereft of any power to check an abuse or the unconstitutional exercise of prosecutorial power. This, however, raises a different, although related, issue of abuse of *prosecutorial power* and the constitutionality or otherwise of the exercise of that

power, which we will address later. But, first, we consider another aspect of abuse of process in connection with the doctrinal reasons why the majority judges in *Ridgeway* held that the court could not stay criminal proceedings founded on illegally obtained evidence (including entrapment evidence).

Staying prosecutions and the separation of powers

140 Australia's written constitution does not entrench constitutional liberties and freedoms. Therefore, no question of constitutionality arises as to the legality of any prosecution founded on illegally obtained evidence. However, the Australian High Court in *Ridgeway* was of the view that the constitutional system of Australia was based on a division of powers between the Executive and the Judiciary. For this reason, the joint judgment was particularly sensitive to the impropriety of applying a curial remedy (such as staying a prosecution) that would intrude into the Executive's sphere of functions. The joint judgment in *Ridgeway* stated as much at 32–33 (see [96] above).

141 This passage reflects the Australian High Court's unwillingness to intrude into the prosecutorial power and thereby breach the separation of powers under Australia's constitutional system. The court was able to reach a fine balance between the public interest in protecting the integrity of the judicial process (so as not to bring the administration of justice into disrepute) and the public interest in convicting and punishing the guilty (in that case, R) by: (a) excluding the illegally obtained evidence (which action would not intrude into the executive sphere); and (b) letting R be prosecuted by the State for a series of offences relating to his unlawful possession of the heroin where the element of unlawful importation was not an ingredient of the offences. As we highlighted earlier (at [92]), but for the following countervailing factors, *ie*, selective prosecution, the condoning of unlawful police conduct and R's liability to prosecution for state offences, the majority judges in *Ridgeway* would have exercised the *Bunning v Cross* ([42] *supra*) discretion in favour of the Prosecution and held that the evidence that the heroin was a prohibited import was admissible, even though the police had brought the heroin into Australia unlawfully. The joint judgment, at 39, made this point explicit (see [90] above).

142 It may also be noted that in *Sang*, Lord Scarman expressed similar views in relation to the separation of powers between the courts and the prosecution: see [79] above.

143 In Singapore, the Constitution establishes a form of parliamentary government (based on the Westminster model) based on the separation of the legislative, executive and judicial powers. Each arm of the government operates independently of the other and each should not interfere with the functions of the other. As each of them is limited in its authority and power by the Constitution itself, it is necessary that there should exist a means whereby each arm may be prevented from acting beyond its constitutional powers. Under the Constitution, the means adopted and recognised by all three arms of government is the judicial power of the court to review the legality of legislative and executive acts and declare them unconstitutional and of no legal effect if they contravene the provisions of the Constitution. The modifications to the Constitution that established the office and powers of the elected President do not affect this feature of the Constitution. However, the Constitution also expressly provides for the separation of the judicial power from the prosecutorial power. The express separation of the two powers is relevant to the role of the court in relation to the exercise of the prosecutorial power and we will now consider this issue.

(1) Separation of powers under the Constitution

144 Article 93 of the Constitution provides that:

> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate

courts as may be provided by any written law for the time being in force.

But, separately, Art 35(8) provides that:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other's functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally. Indeed, this is not even a true "interference" inasmuch as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the Constitution itself) to prevent.

145 In relation to public prosecutions, Art 35(8) makes it clear that the *institution*, *conduct or discontinuance* of any criminal proceedings is a matter for only the Attorney-General to decide. This means that, except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. This also means that it is improper for the court to prevent the Attorney-General from prosecuting an offender by staying the prosecution. In *PP v Norzian bin Bintat* [1995] 3 SLR 462, the High Court recognised this when it said (at 473–474, [49]):

> *The point is, the Public Prosecutor's discretion is never curtailed*. Even where a prosecution is pre-empted by a composition, there is nothing to prevent the Public Prosecutor from prosecuting the case. Of course, the prosecution must necessarily fail, but that is an altogether different story. [emphasis added]

Similarly, in *Cheng Siah Johnson v PP* [2002] 2 SLR 481, the High Court also said (at [19]):

> The power to institute, conduct or discontinue any proceedings for any offence is vested in the Attorney General by the Constitution of the Republic of Singapore (1999 Reprint), see art 35(8) of the Constitution and s 336 CPC [Criminal Procedure Code]. *This is an absolute discretion and one which I believe is carefully exercised*. [emphasis added]

146 However, in our view, the High Court went too far in *Glenn Knight* ([115] *supra*) when (at [70]) it stated:

> As a branch of government, the judiciary has the decision making power to affect whatever concerns the administration of justice. *This is circumscribed only to the extent that art 35(8) vests prosecutorial discretion in the AGC.* [emphasis added]

With respect, this statement puts the relationship between the two constitutional organs the wrong way round. The prosecutorial power cannot circumscribe the judicial power. On the contrary, it is the judicial power that may circumscribe the prosecutorial power in two ways: First, the court may declare the wrongful exercise of the prosecutorial power as unconstitutional. This point is discussed later (see [148]–[149] below). Secondly, it is an established principle that when an accused is brought before a court, the proceedings thereafter are subject to the control of the court: see *Goh Cheng Chuan v PP* [1990] SLR 671, *Ridgeway* at 32–33 and *Looseley* at [16]–[17]. Within the limits of its judicial and statutory powers, the court may deal with the case as it thinks fit in accordance with the law.

(2) Abuse of constitutional power and abuse of process

147 We have in the preceding paragraphs (see [132] and [138] above) defined an abuse of the criminal process to mean the use of that process for a purpose for which it is not intended, *ie*, to prosecute an offender for some other ulterior motive and not to punish him for an offence which he has committed. If the Attorney-General initiates such a prosecution, he also abuses his prosecutorial power. There is here both an abuse of prosecutorial power and an abuse of judicial process. However, where the prosecution is founded on entrapment evidence in order to convict and punish the offender, there is no abuse of power or abuse of process. But, if, in such a case, the Attorney-General condones the unlawful conduct of the law enforcement officers, which is particularly egregious, by not prosecuting them as well, this may constitute discriminatory treatment that may infringe the offender's constitutional rights to equality before the law and the equal protection of the law. If such an issue arises, the question of whether the Attorney-General has abused his prosecutorial power (he might or might not have done so, depending on the evidence) or whether there has been an abuse of the court's process becomes irrelevant, and the constitutional consideration overrides all other considerations. It is no longer relevant to consider whether the Attorney-General has abused his power or whether the court considers that the judicial process has been abused.

Abuse or unconstitutional exercise of prosecutorial power

148 In view of the concerns of the English and the Australian courts *vis-à-vis* the abuse of prosecutorial power, it is necessary that we address, albeit briefly, this issue in the context of our legal system so as to put it in its proper perspective. In *Rayney Wong HC* ([18] *supra*), Rajah J expressed his misgivings (at [64]) about the court's inability to exclude entrapment evidence and stated that if his discretion were unfettered, he would exclude illegally obtained evidence where such misconduct was "particularly egregious", *ie*, where evidence was procured in a manner that might be inimically repellent to the integrity of the administration of justice. However, this view was expressed without the benefit of hearing arguments about the effect of the EA and the separation of powers on the jurisdiction and power of the court to reject entrapment evidence or to stay a prosecution founded on such evidence. Nonetheless, the courts are not powerless under the law to check or act against an abuse or unconstitutional exercise of prosecutorial power. Under the law, the Attorney-General must act according to law, as his prosecutorial power is not unfettered. As we have earlier stated, there are two aspects to this. First, he may not use his prosecutorial power in bad faith for an extraneous purpose. Second, he may not use it so as to contravene constitutional rights, such as the right to equality before the law and the equal protection of the law. With respect to the first, the Attorney-General can in an appropriate case – *ie*, where the public interest in the integrity of the legal process outweighs the public interest in convicting and punishing the guilty – check unlawful police conduct by not prosecuting the offender if the Prosecution has to rely on entrapment evidence. With respect to the second aspect, the Attorney-General can also prosecute the law enforcement officers involved in the entrapment exercise, and this course of action may also deter future unlawful conduct on their part.

149 The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose it is intended, *ie*, to convict and punish offenders, and not for an extraneous purpose. As the Court of Appeal said in *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 156, [86], all legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law. In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, *ie*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a

discriminatory prosecution which results in an accused being deprived of his right to equality under the law and the equal protection of the law under Art 12 of the Constitution). Authority for this proposition may be found in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh*"). In that case, although the Privy Council recognised that the unconstitutional exercise of prosecutorial discretion could be challenged, it held that there was *no material on the facts of that case* on which to found an argument that the Attorney-General had exercised his discretion unlawfully. *Teh Cheng Poh* has been followed by the Court of Appeal in two cases, *viz*, *Sim Min Teck v PP* [1987] SLR 30 and *Thiruselvam s/o Nagaratnam v PP* [2001] 2 SLR 125.

Summary on the law of entrapment and illegally obtained evidence in criminal proceedings in Singapore

150 In summary, therefore, our views on these issues are as follows:

(a) the court has no discretion to exclude illegally obtained evidence (including entrapment evidence) by reason of the provisions of the EA;

(b) a prosecution founded upon entrapment evidence is not an abuse of process;

(c) the court may not stay a prosecution even if it is an abuse of the prosecutorial discretion because of the separation of powers under the Constitution; and

(d) the court has, in an appropriate case, the power within its own judicial sphere to declare a prosecution unconstitutional for breach of constitutional power (which, in the case of the prosecutorial power, would have to be a very exceptional case given that it is a constitutional power) or for infringement of constitutional rights and protections.

Our decision on the disciplinary charges

151 Returning to the present case, we summarise our findings in relation to the pertinent issues raised before us (see [20] above) as follows. First, in relation to the DC's findings of fact, we find no reason to doubt the authenticity of the audio recording and the video recording, and accept the DC's findings of fact that the respondent did offer a referral fee to Jenny in the form of shopping vouchers and that she did so with a view to procuring conveyancing work from Jenny. Second, in relation to the respondent's legal arguments, we find that Jenny's conduct was not illegal or unsanctionable on any of the bases suggested by the respondent; neither was there, in our view, a conspiracy by the instructing solicitors to do an illegal act against the respondent. Indeed, even if there was such a conspiracy, it would be irrelevant in the context of the present disciplinary proceedings against the respondent, and would not represent an abuse of the disciplinary process. On the question of whether illegal means had been used by Jenny against the respondent, this had nothing to do with the procurement of the evidence against the respondent and we accordingly dismissed the respondent's arguments based on this point. Finally, we are also of the view that the identities of the instructing solicitors were not relevant in the disciplinary proceedings and the DC was not in error in not ordering the disclosure of their identities. Accordingly, the evidence obtained by Jenny against the respondent was rightly admitted by the DC. For these reasons, and considering the evidence before us in totality, we find that both the main and the alternative charges against the respondent have been proved against her and, accordingly, make absolute the show cause order. This leaves us with the question as to the appropriate penalty to be imposed on the respondent.

Penalty to be imposed

152 In this connection, we refer to our judgment in *Lilian Bay* ([31] *supra*) at [46]–[48], where we considered the relevant factors to be taken into account in order to determine the appropriate penalty to impose in a case of touting of the same nature. As in *Lilian Bay*, the respondent denied vehemently that she had ever agreed to reward Jenny with gift vouchers in lieu of a cash payment. But, she went much further than the solicitor in *Lilian Bay* in alleging not only a conspiracy by the instructing solicitors, but also that they or the private investigators (Dong Security) had tampered with the video recording in order to make out a case against her. The respondent also unnecessarily alleged that Jenny had perjured herself by filing a false statutory declaration. This was a case of a solicitor who wanted to blame everyone except herself for doing something which she must have realised was unprofessional. There was a complete absence of any feeling of guilt or any remorse for her misconduct. In the circumstances, we consider that it would be appropriate to impose a period of suspension from practice of 15 months with immediate effect, and we so order. The respondent must also pay the costs of the Law Society in this application and in the proceedings before the DC.