Au Wai Pang *v* Attorney-General
[2015] SGCA 61

Case Number	: Civil Appeal No 31 of 2015
Decision Date	: 30 November 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Tay Yong Kwang J
Counsel Name(s)	: Peter Low, Choo Zheng Xi, Low Ying Li Christine, Mannar Raj Kumar and Jason Lee Hong Jet (Peter Low LLC) for the appellant; Francis Ng, Toh Puay San, Elaine Liew and Teo Lu Jia (Attorney-General's Chambers) for the respondent.
Parties	: ATTORNEY-GENERAL — AU WAI PANG

Contempt of Court

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 2 SLR 352.]

30 November 2015 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Attorney-General v Au Wai Pang* [2015] 2 SLR 352 ("the Judgment"). The Judge found that Au Wai Pang ("the Appellant") was guilty of scandalising the court in relation to his creation and publication of an article titled "377 wheels come off Supreme Court's best-laid plans" ("the Article") and ordered a fine of $8,000 to be imposed upon him. In these proceedings, the Appellant appeals against his conviction.

Facts

2 The Appellant is a Singapore citizen. He writes articles on socio-political issues with a particular focus on Singapore. He publishes these articles on his blog entitled Yawning Bread (accessible at http://yawningbread.wordpress.com) ("the Blog").

3 On 5 October 2013, the Appellant published the Article on the Blog. There were four main parts to the Article, as follows:

(a) First, just below the title, there was a video clip of a news report of a traditional African gay wedding. Just below the video clip was a description that read:

> April 2013 in Natal saw South Africa's first gay wedding conducted according to traditional Zulu rites. Same-sex marriage has been legal in South Africa since December 2006.

(b) The second and third parts constituted the main text of the Article. The second related to what the Supreme Court's "best-laid plans" were and how the "wheels" had "come off" them. In this part, the Appellant made the following points:

(i) *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 ("*Tan Eng Hong*") was heard on

6 March 2013 by Justice Quentin Loh ("Loh J"). Judgment was delivered on 2 October 2013, six months after the case was heard.

(ii) *Lim Meng Suang and another v Attorney-General* [2013] 3 SLR 118 ("*Lim Meng Suang*") was heard on 14 February 2013, also by Loh J. Judgment was delivered on 10 April 2013.

(iii) The "common view" was that Chief Justice Sundaresh Menon ("the Chief Justice") wanted to be part of the three-judge bench that heard the constitutional challenge relating to s 377A of the Penal Code (Cap 224, 2008 Rev Ed) ("s 377A"). He could do so in relation to the appeal arising from *Lim Meng Suang* but not *Tan Eng Hong*. This is because he was the Attorney-General at the time the latter was "going through" the lower courts.

(iv) The "strange calendaring" (as in (i) and (ii), particularly in relation to the release of the judgments) allowed the appeal from *Lim Meng Suang* to proceed to the Court of Appeal first. Further, *Tan Eng Hong* was "red-lighted" by a delay in delivering the judgment so that an appeal could not be filed until the appeal from *Lim Meng Suang* was determined. This would prevent the possibility of an application to consolidate the appeals which, if successful, would mean that the Chief Justice would have to recuse himself.

(v) In August 2013, Mr M Ravi ("Mr Ravi"), counsel for Mr Tan Eng Hong, applied to the High Court to be recognised as an interested party in the Court of Appeal hearing on the appeal arising from *Lim Meng Suang*. From a "legal point of view", such an application would be very difficult to deny.

(vi) Phone calls were thereafter exchanged between the High Court and Mr Ravi's office through which the "lawyer was persuaded to withdraw his application on the understanding that the judgement for Tan Eng Hong would be released shortly".

In short, and tying in the points made in this second part of the Article with the title, the "Supreme Court's best-laid plans" were to delay the release of the High Court's judgment in *Tan Eng Hong* so that the appeal arising from *Lim Meng Suang* could be heard first. This was done to enable the Chief Justice to be part of the *coram* that would hear – and determine – the appeal. These plans failed (*ie*, the "377 wheels" came off these plans) because Mr Ravi applied to intervene in the appeal arising from *Lim Meng Suang*.

(c) The third part of the Article dealt with "what happens next" – *ie*, after the aforementioned wheels had come off. Here, the Appellant made the following points:

(i) Mr Ravi is likely to apply for a consolidation of the two cases at the appeal stage.

(ii) There is a good likelihood that the consolidation application will succeed although "Singapore courts are known to fly off into logic of their own".

(iii) If the two cases are consolidated, the Chief Justice would have to recuse himself. The other two Judges of Appeal would not be affected. It is unclear which judge will be chosen to replace the Chief Justice. It is also "very hard to see" what impact that will have on the chances of success of the constitutional challenge.

(d) The fourth part consisted in the 12 responses that followed. These responses were published on the same page as the first three parts. The Appellant moderates the responses on his Blog (*ie*, he decides whether or not to allow a response to be published on the Blog). All

12 responses had been posted at the time the Respondent commenced these proceedings by filing an application for leave to apply for an order of committal against the Appellant (see below at [4]). To date, the 12 responses remain on the site (although the Article has been removed) (see https://yawningbread.wordpress.com/2013/10/05/377-wheels-come-off-supreme-courts-best-laid-plans/ (accessed 8 November 2015)). To be clear, the 12 "responses" constitute both primary responses (*ie*, responses to the second and third parts of Article) and secondary responses (*ie*, replies to primary responses). Although we find that these 12 responses may constitute part of the Article – and may be relevant in interpreting and understanding the Article – the Appellant had not made any submissions in this regard. More importantly, no effort was made to identify the individuals responsible for each of the responses (given that the names of the accounts used by these individuals in posting these responses were likely monikers). For want of evidence and argument, we say nothing further about the responses.

Proceedings below

4 This case reached the courts by an application for leave to apply for an order of committal in *ex parte* Originating Summons No 1098 of 2013, filed on 14 November 2013 by the Prosecution ("the Respondent"). The application concerned two articles posted by the Appellant on the Blog – both the Article and an article titled "Church sacks employee and sues government – on one ground right, on another ground wrong" ("the Robinson's Article") which was published on 12 October 2013.

5 The application for leave was heard by the Judge on 26 and 27 November 2013. She granted the application in relation to the Article but not the Robinson's Article. Thereafter, on 2 December 2013, the Respondent filed Summons No 6209 of 2013 ("SUM 6209"), an application for the Appellant to be punished for his contempt of court in relation to the Article.

6 On 12 May 2014, after having been granted an extension of time, the Respondent filed a notice of appeal against the Judge's denial of leave in relation to the Robinson's Article. The appeal was heard by this court on 30 July 2014. This court allowed the appeal, delivering its oral judgment as follows:

> This being a leave application, all that needs to be shown is a *prima facie* case. We have considered the arguments raised by the appellant and are satisfied that they have met the threshold. On the question of possible linkage, we see that there are grounds to hold that the second could be a follow up to the first article. We make no determination on that, and leave it to the judge hearing the merits to determine if the two articles are linked. The appeal is allowed and leave is granted to the applicant to apply for an order of committal for the second article. We also grant the application for the substantive hearings for an order of committal in respect of the first and second articles to be consolidated in OS 1098 and heard together in the High Court, and for leave to be granted for an amended statement to be filed for the consolidated substantive hearing in OS 1098.

7 In the light of this court's decision on the Robinson's Article, on 12 August 2014, the Respondent applied to amend SUM 6209 (in Summons No 3952 of 2014) so as to include an application for the Appellant to be punished for contempt in relation to the Robinson's Article. The application was allowed on 18 August 2014. Also on that date, Summons No 6209 of 2013 (Amendment No 1) was filed.

8 Parties appeared before the Judge on 21 October 2014. After hearing arguments, the Judge reserved judgment.

The decision below

The decision below

9 On 21 January 2015, the Judge delivered the Judgment. She convicted the Appellant of scandalising contempt only in relation to the Article (and not the Robinson's Article). She reasoned as follows:

(a) First, the offence of scandalising the court comprised two elements – the *actus reus* and the *mens rea*, respectively. The *mens rea* requirement was simply that the respondent had intentionally published the impugned statement (see the Judgment at [14], citing *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 ("*Shadrake*") at [23]; and the Judgment at [16]–[36] where the Judge rejected the stricter test in *Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening)* [2014] 3 WLR 1081 ("*Dhooharika*")). The *actus reus* requirement was as follows:

(i) There must be a real risk that public confidence in the administration of justice is, or would be, undermined as a result of the impugned statement (see the Judgment at [38]–[40]). In this regard, the Judge provided further guidance on how the existence of a "real risk" may be ascertained as follows:

(A) Where multiple "impugned statements" – or articles – are concerned, the court should look at each offending article separately and apply the "real risk" test based on the matters prevailing at the time each article was published (see the Judgment at [40]).

(B) In determining whether public confidence had been undermined, the focus is on the impact the article or statement would have on the "average reasonable person" (see the Judgment at [41], citing *Shadrake* at [32]).

(ii) The statement or article cannot constitute fair criticism. Criticism is fair when there is a rational basis for the criticism and the rational basis is accurately stated. The evidential burden is on the respondent (*ie*, the party relying on fair criticism) whereas the legal burden (to show that the article or statement did not constitute fair criticism) remains on the applicant (see the Judgment at [42]).

The Judge also noted that the burden on the respondent was to prove its case beyond reasonable doubt (see the Judgment at [53]).

(b) Next, the Judge applied the law to the Article. She held that both the *mens rea* and *actus reus* requirements had been proven by the Respondent beyond reasonable doubt (see the Judgment at [71]). Her analysis of the Article was as follows:

(i) Certain statements in the Article suggested that, as the Chief Justice wanted to hear one case, the Supreme Court deliberately delayed the determination of another case so that the outcome of the first case would likely have an influence on the outcome of the second case. The statements that suggested this did not qualify as fair criticism (see the Judgment at [72]).

(ii) The statement in the Article that "[w]hatever ruling comes out of the Court of Appeal in Gary and Kenneth's case, it would clearly impact Tan Eng Hong's case" does not reassure the average reasonable person that there will be a fair hearing of the *Lim Meng Suang* appeal (see the Judgment at [72]).

(iii) The title and the contents of the Article read as a whole indicate there was a plan on the part of the Supreme Court which involved the Chief Justice and Loh J acting in a way contrary to the fundamental principles of judicial independence – in particular, the principle of independence of judges from one another (see the Judgment at [73]).

(iv) The statements in the Article promote the impression that access to justice in Singapore (in the sense of an effective procedure for getting a case before the court and the speedy determination of the case by the court) can be flouted in the sense that the authority of the Singapore legal system as a whole can be flouted (see the Judgment at [73]).

(v) The Appellant's "theories", which were really his opinions, were not solely based on and confined to an objective set of facts. He relied on a mixture of unsubstantiated views received from unidentified persons and even went beyond simply regurgitating their views to stating his own inferences and developing his own opinions (see the Judgment at [74]).

(vi) The Article was about improper manipulation of the Supreme Court's hearing calendar and *coram*-fixture procedure (see the Judgment at [76]).

(vii) The Appellant's allegation that he had written the Article in the honest belief that the calendar-manipulation process described therein was perfectly legitimate was disingenuous and, in fact, served to underscore the absence of good faith on his part (see the Judgment at [77]).

(viii) The Appellant was a blogger with a following in the gay community, a self-professed social activist and prominent member of the gay community in Singapore. In portraying things in the worst possible light in the Article, he conveyed to the average reasonable person that the Supreme Court would have gotten away with its "best-laid plans" but for Mr Ravi (see the Judgment at [79]).

Also, the Judge noted that the evidence of Ms Arneda Jasman ("Ms Jasman"), Loh J's private secretary – that she had not reassured Mr Ravi in any way that the delivery of the judgment in *Tan Eng Hong* was being expedited – was unchallenged (see the Judgment at [62] and [81]). This went to the comment in the Article that the Appellant "had been given to understand that phone calls were exchanged between the High Court and M Ravi's office in which the lawyer was persuaded to withdraw his application on the understanding that the judgement for Tan Eng Hong would be released shortly".

(c) Finally, the Judge applied the law to the Robinson's Article. She resisted the Respondent's call to consider both articles collectively (see the Judgment at [96]). She found that the *actus reus* was not proven beyond reasonable doubt in relation to the Robinson's Article (see the Judgment at [106]).

10 On 23 February 2015, parties filed written submissions on sentence. The Respondent sought a fine of at least $10,000. The Appellant argued a fine of between $2,000 and $6,000 would be appropriate. On 5 March 2015, the Judge ordered a fine of $8,000 to be imposed on the Appellant. She took into account the fact that the Appellant had apologised. She also ordered each party to bear their own costs.

11 It should be noted that the Appellant filed his notice of appeal on 16 February 2015, even before the sentence was meted out. The appeal, as framed, only concerns liability, *ie*, the Judge's

finding that the Article was contemptuous. Even by the time parties appeared before us, the Appellant did not mount any alternative arguments in relation to sentence. Neither, for that matter, did the Respondent file a cross-appeal in relation to the Robinson's Article.

The parties' arguments

12 The Appellant's arguments before us are essentially a reprise of those he had raised before the Judge. First, he argued that the *mens rea* for scandalising contempt should be "an intention to undermine public confidence in the administration of justice in Singapore" – which was the approach taken in *Dhooharika*. In making this submission (again), he did not address (let alone attempt to contradict) the points made by the Judge in rejecting this stricter *mens rea* requirement in the Judgment at [16]–[36]. Further, he had only fielded this argument in his written submissions; during the hearing, his counsel did not address the court on it – although we nevertheless deal with it (and, indeed, all the applicable principles) below (at [17]–[31]).

13 Second, he argued that the Judge had erred in finding that the *actus reus* had been satisfied. This was for two reasons: (a) there was no real risk of the Article undermining public confidence in the administration of justice; and (b) the Article constitutes fair criticism.

14 In response, the Respondent argued as follows:

(a) First, the Judge was correct to reject the *mens rea* formulation in *Dhooharika* and follow the approach in *Shadrake*. This was because there was no good reason to change the law in Singapore, let alone adopt the approach in *Dhooharika*. The Respondent argued, on the one hand, that the formulation in *Dhooharika* entailed a substantial re-writing of the basic elements of scandalising contempt in Singapore, yet, on the other hand, the current position in Singapore law (*ie*, in *Shadrake*) in relation to where the burden of proof lies was, in practical terms, substantially similar to that in *Dhooharika*.

(b) Second, the Appellant's allegation that there was no risk that the Article would undermine public confidence in the administration of justice is unfounded. Even though the Appellant was a blogger – as opposed to a seasoned journalist or non-fiction novelist – he himself professed to be a relatively well-known member of the gay community in Singapore, a social activist, and one of the early leaders of Singapore's main gay equality lobby group. The Judge observed that the Appellant was a "blogger with a following in the gay community". It is thus likely that the Article would have attracted special interest, gained prominence, and been discussed and circulated by its readers. Furthermore, the overall impression conveyed by the Article to these readers – or rather, the average reasonable reader – was that:

(i) the Chief Justice had a vested and improper interest in ruling on the constitutionality of s 377A;

(ii) the Chief Justice and Loh J deliberately and improperly engaged in a plan – described as "strange calendaring" – to enable the Chief Justice to be on the *coram* that would determine the constitutionality of s 377A;

(iii) the "plan" entailed Loh J abusing and misusing his judicial power in order to delay his decision in *Tan Eng Hong*; and

(iv) the deliberate delay implied impropriety in that the due process of the law was deliberately withheld from Tan Eng Hong.

(c) Third, the Article did not constitute fair criticism. In particular, this was because there was no rational basis for most of the statements made therein.

Issues before this court

15 The following issues are before this court:

(a) First, what are the applicable principles in relation to the offence of scandalising contempt? Specifically, did the Judge err in rejecting the *mens rea* formulation in *Dhooharika*?

(b) Second, how should the applicable principles be applied in this case?

16 As no appeal was filed in respect of the Judge's finding on the Robinson's Article, we say no more about that.

The applicable principles

The applicable principles stated

17 The applicable principles in relation to the offence of scandalising contempt were laid down by this court in *Shadrake*. They are as follows:

(a) The purpose of the law of scandalising contempt is to ensure that public confidence in the administration of justice is not undermined – its purpose is not to protect the dignity of judges (see *Shadrake* at [21]–[22]).

(b) The test for whether scandalising contempt is committed is whether there is a real risk that the impugned statement has undermined – or might undermine – public confidence in the administration of justice in Singapore (see *Shadrake* at [36]). This is subject to the caveat that where an impugned statement constitutes fair criticism, it is not contemptuous (see *Shadrake* at [80]–[86]).

(c) The necessary *mens rea* is simply the intention (of the maker of the statement) to publish that statement. It is not necessary for the Prosecution to prove that the statement maker intended to undermine public confidence in the administration of justice (see *Shadrake* at [23]).

18 We affirm these principles and note further that although the requisite *mens rea* was seemingly narrowly defined in *Shadrake* (as pertaining only to the intention to publish), we caution against an overtly pedantic approach to delineating the "elements" of the offence. To be clear, what must be present in order to sustain a conviction for scandalising contempt is that: (a) the statement in question poses a real risk of undermining public confidence in the administration of justice; (b) the respondent had intended to publish the statement in question; and, importantly, (c) the respondent had not done so pursuant to fair criticism (and on the interrelationship between (a) and (c) above, see *Shadrake* at [86] as well as Gary K Y Chan, "Contempt of Court and Fair Criticism in Singapore: *Shadrake Alan v Attorney General* [2011] SGCA 26" (2011) 11 Oxford University Commonwealth Law Journal 197 at 202 and 205–206). ***This last-mentioned point relates to the element of fair criticism (and the attendant concepts of both good and bad faith, as well as the existence of a rational basis)*** . It will be recalled that, in *Shadrake* (at [80] and [86]), this court preferred (without expressing a conclusive view) the approach which considered fair criticism as an ingredient of the offence which *the Prosecution* had to prove (as opposed to being a separate defence which placed the burden of proof on *the respondent*). We assume once again – for the purposes of the present

appeal – the approach (albeit without arriving at a conclusive view) that fair criticism should go to liability and, in so doing, are taking the Appellant's case at its highest.

Considering a recent Privy Council decision

19 In the court below, counsel for the Appellant argued that this court ought to revisit the issue of *mens rea* in the light of the Privy Council decision of *Dhooharika* and *depart* from our approach (as we have described above and was laid down in *Shadrake*). The Judge rejected this argument and, as noted above (at [12]), it was not pursued vigorously before this court. However, for the sake of completeness, it might be appropriate to consider (briefly) the applicability of *Dhooharika* in the Singapore context.

20 Before turning to the decision of *Dhooharika* itself, we consider briefly (because it was not, correctly in our view and for the reasons which we will set out in a moment, pursued in the present appeal) the point made by counsel for the Appellant before the Judge that the decision of this court in *Shadrake* was delivered *per incuriam* (see the Judgment at [15]). We agree with the reasons relied on by the Judge in rejecting this argument (see the Judgment at [16]–[18]), but note that there was an even stronger reason to reject the argument, which was that it was predicated on a complete lack of understanding of the *per incuriam* doctrine itself (as to which see generally, for example, Rupert Cross and J W Harris, *Precedent in English Law* (Clarendon Press, Oxford, 4th Ed, 1991) (at pp 148–152) and Peter Wesley-Smith, "The Per Incuriam Doctrine" (1980) 15 Journal of the Society of Public Teachers of Law 58). Indeed, the *per incuriam* doctrine is one centring on (and is in fact a narrow exception to) the (broader, parent) doctrine of *binding precedent*. *Even if* the former doctrine were applicable, it would have (necessarily) to be premised on the fact that *Dhooharika* had been decided ***prior to*** *Shadrake* and had also not (in accordance with the *per incuriam* doctrine) been taken into account in *Shadrake* itself. This is of course clearly *not* the situation as *Shadrake* was decided ***well before*** the decision of the Board in *Dhooharika* was handed down (a point also noted by the Judge in the Judgment at [15]). ***More importantly*** (and *even assuming, for the sake of argument*, that *Dhooharika* had been decided *prior to Shadrake* (which, as we have just noted, is ***physically impossible***)), in order for the *per incuriam* doctrine to be applicable in the manner the Appellant had argued for in the court below, it must *also* have been the case that *Dhooharika* was *a* ***binding*** *precedent on* ***this court*** *at the time* Shadrake *was being decided. Dhooharika* is a decision of the Privy Council on appeal from the Supreme Court of ***Mauritius*** . Put simply, it is a decision of the Privy Council on appeal from ***another jurisdiction*** which was handed down *almost five decades after Singapore became an independent nation state*. As was pointed out in an extrajudicial article published over three decades ago, the Singapore courts ***cannot*** be bound by such decisions (see Andrew Phang, "'Overseas Fetters': Myth or Reality?" [1983] 2 MLJ cxxxix, especially at cxlix–cli). If nothing else, embracing such an approach would *militate directly against the independent status of Singapore in general and its courts in particular*. Indeed, the Singapore legal system has developed apace during the last half a century since the nation's independence (see, in this regard, the excellent and recent volume by Goh Yihan and Paul Tan (gen eds), *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015)), and it would be incongruous – if not wholly contrary to logic and commonsense – to argue that this court could be "fettered" by a decision of the Privy Council, let alone one handed down for a completely different jurisdiction altogether.

21 However, this does *not* mean that *Dhooharika* is a decision that ought to be ignored out of hand. That would be to throw the proverbial baby out together with the bath water. After all, *Dhooharika* is a decision of the Board comprising eminent judges who also sit as members of the UK Supreme Court (formerly, the House of Lords). *However*, it is ***not*** a decision which is thereby ***binding*** on the Singapore courts, *a fortiori*, this court. That having been said, it would be appropriate at this juncture to turn to consider it ***as a matter of general principle, having particular regard to the***

circumstances of Singapore .

22 Turning to the decision of *Dhooharika* itself, the Board held that the requisite *mens rea* for the offence of scandalising contempt was that the defendant must have "*intended to interfere with* the administration of justice" [emphasis added] (at [46]). We pause here to note the rather exceptional facts that were before the Board in *Dhooharika*. The appellant was the editor-in-chief of a French language weekly newspaper published in Mauritius. In the issue of the newspaper published on 14 August 2010, several pages contained allegations against the Chief Justice of Mauritius ("the CJ"). The allegations pertained to a case which the CJ had previously heard, during which the director of one of the parties, Mr Dev Hurnam ("Mr Hurnam"), who was a former lawyer who had been struck off the roll, had made an application to represent his company. The application was denied. Mr Hurnam thereafter wrote to the President of Mauritius complaining about the CJ's conduct. He also sent copies of the letter to the media and held a press conference during which he criticised the CJ. The relevant pages in the publication dated 14 August 2010 revolved around this story – it included an interview with Mr Hurnam (by the appellant), an editorial, as well as reports of what transpired during the case heard by the CJ.

23 On 18 August 2010, the appellant was charged with scandalising contempt. Before the Supreme Court of Mauritius, both parties relied upon affidavit evidence. At the hearing on 31 March 2011, counsel for the appellant – who was a rather junior lawyer of less than two years' experience in practice – indicated he would like to call the appellant to the witness stand. He was, however (and as described by the Board at [53]), "put under some pressure to accept the court's view that everything the defendant could say was or would be in his affidavit". It should be noted that this, in the Board's view (at [53]), amounted to preventing the appellant from giving evidence and therefore deprived him of a fair trial. The Supreme Court of Mauritius convicted the appellant on 17 October 2011 of scandalising contempt and sentenced him to three months' imprisonment.

24 We return now to the specific legal point in *Dhooharika* which we are concerned with, namely, that the *mens rea* for scandalising contempt should be an intention to interfere with the administration of justice. This stands in contrast to our approach (which we have already set out above (at [17]–[18])). *However*, as we shall elaborate upon in a moment, this contrast is *more apparent than real*. In this regard, we also attempt to rationalise the seemingly paradoxical submissions of the Respondent as alluded to earlier (above at [14(a)]). It is important to emphasise, at this particular juncture, a general principle which applies (by its very nature) to many (we dare say, all) other areas of the law as well, and it is this: ***The courts will always look to the substance and not merely the form of the proposition of law and/or the case which parties rely on.***

25 It will be recalled that the approach in *Dhooharika* requires *an intention to interfere with* the administration of justice inasmuch as what must be proven is an intention (in the context of the offence of scandalising the court) that public confidence in the judiciary be undermined as a result. In this regard, we note that, ***nowhere*** in the Board's judgment was it *either* expressly stated *or* implied that it would *suffice* for the alleged contemnor to ***merely claim*** – without more – that it was never his or her ***subjective*** intention to undermine public confidence in the judiciary through his or her statements and, ***if*** the Board *did*, in fact, hold such a view, we would respectfully ***disagree*** . The reason for this is clear: every contemnor, when faced with a charge of scandalising the court, would *invariably* claim that it was never his or her intention to undermine public confidence in the judiciary. *Yet, it is equally clear that it would be impossible to ascertain whether or not the* ***subjective*** *intention so declared was true –* ***save to the extent that the court relies on relevant objective evidence in order to help it to ascertain whether what the alleged contemnor claims is indeed the case*** . The relevant objective evidence would, *in the ordinary course of events*, be found in ***the text as well as context of the words which constitute the substance of the charge of***

scandalising contempt itself .

26 On the basis that the *Dhooharika mens rea* formulation concerns objective (and not subjective) evidence, we find more similarities than differences between our approach and the Board's. The main difference is that our approach ***clearly requires that only objective evidence be taken into account*** , in particular, where fair criticism is concerned. On the contrary, and as alluded to above, the articulation in *Dhooharika* may encourage alleged contemnors to claim (without more) that they had *subjectively not* intended to undermine public confidence in the judiciary. Equally, it may inhibit the Prosecution from charging individuals by (seemingly) imposing an inordinate burden to adduce evidence pertaining to the inner workings of their (*ie*, the alleged contemnors') minds. On either front, at the very least, there is the potential for uncertainty and confusion. In ***contrast*** , our approach *focuses (in no uncertain terms) on* ***the need for objective evidence which is to be found in the relevant text as well as context*** . For this reason, we prefer to retain our approach.

27 ***But*** , let us ***assume*** – for the sake of argument – that the *mens rea* formulation in *Dhooharika was* indeed intended to be ***different*** from ours in that it *does* require the Prosecution to prove the *subjective* intention of the defendant. On this alternative interpretation, the test would understandably be "stricter" in the sense that the Prosecution would face a much more difficult task in proving the guilt of the respondent. If this was what was intended by the Board in *Dhooharika*, it would be vastly different from our approach and we would respectfully ***decline*** to adopt it.

28 In the spirit of exploring further this alternative interpretation of *Dhooharika* (in particular, the backdrop to the decision itself), we note that the Board specifically considered the arguments (at [26]–[28]) for ***abolishing*** the offence of scandalising the court by Lord David Pannick QC (in "'We do not fear criticism, nor do we resent it': abolition of the offence of scandalising the judiciary" [2014] Public Law 5) and (significantly, in our view) observed (at [29]) that "[t]here is ***considerable force*** in these points [raised by Lord Pannick] *and it is* ***readily understandable*** *that the law in* ***England and Wales*** *has now been* ***altered by statute*** " [emphasis added in italics, bold italics and underlined bold italics] – although it did then proceed to add (*ibid*) that "in this appeal the Board is concerned, not with the law of England and Wales, but with the law in Mauritius" and that "this [involved] a consideration of decisions both in Mauritius and elsewhere, especially in the Commonwealth" (*cf* also the emphasis on this particular part of the judgment in *Dhooharika* in Sophie Turenne, "Free Speech and Scandalising the Court in Mauritius" [2015] CLJ 7 at 7–8 (and whose general (negative) views *vis-à-vis* the common law offence of scandalising the court are, incidentally, quite clear)). It is conceivable that, against this backdrop, the Board embarked on an attempt to reform the law of scandalising contempt as it applied to Mauritius, and that this attempt yielded a "stricter" test which called upon the Prosecution to prove the subjective intention of the respondent.

29 In our respectful view, if the offence of scandalising the court is to be ***reformed – as was the case in England and Wales (*** **via** ***s 33 of the Crime and Courts Act 2013 (UK) (c 22)) – this may be best effected by the Singapore Parliament (especially if abolition of the offence is intended, which is what was effected in England and Wales*** (and for relevant background in this last-mentioned regard, see The Law Commission, *Contempt of Court: Scandalising the Court – A Consultation Paper* (Consultation Paper No 207, 2012) and The Law Commission, *Contempt of Court: Scandalising the Court* (Law Com No 335, Paper presented to Parliament and Ordered by the House of Commons to be printed on 18 December 2012))*)*. In the meantime, it is ***not*** for the courts to attempt, in *effect*, to dilute (let alone effectively "abolish") the offence of scandalising the court under the thin guise of development or application of the law; ***neither*** is it the task of the courts to adopt an approach in the ***other*** direction (for example by, in effect, rendering the offence of scandalising the court akin to a *strict liability* offence). As this court put it recently in *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 ("*Lim Meng Suang CA*"),

which concerned the appeals emanating from *both Lim Meng Suang* and *Tan Eng Hong* (especially at [77]), courts are *not – and must not* become – "*mini-legislatures*" [emphasis in original]. That said, it is permissible for the courts to "make" law in the sense of developing the principles of common law and equity (see *Lim Meng Suang CA* at [77]) – this explains how the principles in relation to scandalising contempt in Singapore have been refined over the years (most pertinently in our recent adoption of the "real risk" test and clarification of the role of fair criticism in *Shadrake*).

30 Returning to the common law offence of scandalising the court proper, the operative concern in calibrating the law is balance. This had been articulated in *Shadrake* (at [17]) as follows:

> At the most general level, it should be noted that the law relating to contempt of court operates against the broader legal canvass of the right to freedom of speech that is embodied both within Art 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") as well as the common law. The issue, in the final analysis, is one of *balance*: just as the law relating to contempt of court ought not to unduly infringe the right to freedom of speech, by the same token, that right is not an absolute one, for its untrammelled abuse would be a negation of the right itself. Indeed, this last mentioned point is embodied in Art 14(2) of the Constitution which provides that "Parliament may by law impose … restrictions designed to … provide against contempt of court". … [emphasis in original]

We find our approach strikes an appropriate balance. Let us elaborate briefly. It is imperative to note that ***our approach ensures that only material that issues from the alleged contemnor in good faith, and as fair criticism , would avoid the charge of scandalising contempt (assuming that the other requirements, including that of there being a real risk that public confidence in the administration of justice would be undermined, have been satisfied)*** . On the other hand, where the alleged contemnor has issued material ***otherwise than in good faith*** , there is, in our view, no reason in principle why he or she should not be found guilty of the offence of scandalising contempt (again, assuming that all the other requirements, including the real risk test, have been satisfied). In the case of newspapers republishing contemptuous statements, for instance, the court's consideration (as to whether the requisite *mens rea* is satisfied) would revolve around whether, based on the objective material before it, the alleged contemnor had acted pursuant to fair criticism in republishing the statement.

31 To ***summarise*** , ***we affirm our approach*** to the law on scandalising contempt (as set out in *Shadrake*) and turn now to *apply* the principles to the facts of the present case.

Our decision

The Article

32 As the crux of our decision rests on the interpretation of the Article (having regard to the respective arguments of the parties), it would be appropriate to first reproduce it in full, as follows:

> **377 *wheels come off Supreme Court's best-laid plans***
>
> [video]
>
> *April 2013 in Natal saw South Africa's first gay wedding conducted according to traditional Zulu rites. Same-sex marriage has been legal in South Africa since December 2006.*
>
> [**1**] The ***release of Justice Quentin Loh's judgement*** in the Tan Eng Hong case on

2 October 2013 ***came as a surprise*** , ***timing-wise*** . Represented by lawyer ***M Ravi*** , ***Tan Eng Hong's challenge*** to the constitutional validity of Section 377A of the Penal Code was heard in the High Court more than six months ago, on 6 March 2013. After the hearing, the judge reserved his decision and ***nothing more was heard about it for months and months*** .

[**2**] Section 377A criminalises [homosexual conduct] between men, but its continued presence on the statute books casts a wide shadow over many other LGBT rights. Censorship, homophobic sexuality education, and non-existent partner rights in medical situations are some of the areas induced and sustained by this law.

[**3**] A ***parallel case*** , also a challenge to the constitutional validity of 377A, by plaintiffs Kenneth Chee and Gary Lim [*ie*, ***Lim Meng Suang***], and represented by Peter Low, had been heard before the same judge ***three weeks earlier than*** Tan Eng Hong's High Court hearing, on 14 February 2013. The judgement – rejecting the challenge, affirming the constitutional validity of 377A – was delivered on 10 April 2013. Kenneth and Gary promptly filed an appeal, and a hearing before the Court of Appeal has been scheduled for 14 October 2013.

[**4**] At first, ***many thought*** that ***the judgement in the Tan Eng Hong case*** would ***follow soon after Kenneth and Gary's*** , ***but as weeks turned into months*** , ***the general consensus in LGBT and legal circles*** was that ***the delay was deliberate*** .

[**5**] The ***common view*** was that Chief Justice Sundaresh Menon wanted to be part of the three-judge bench that hears this constitutional challenge. He could do so in the Kenneth and Gary case, but *he would have to recuse himself in the Tan Eng Hong case, since* ***he was the Attorney-General at the time the case was going through the lower courts (2010 – 2012)*** . ***This neat theory*** would ***account for the fact that although the Tan Eng Hong case was launched earlier, in September 2010, it was given later hearing dates than the Kenneth and Gary case*** . This ***strange calendaring thus allowed the couple's case to proceed ahead [of that of Tan Eng Hong], reaching the Court of Appeal first*** .

[**6**] The complication was that since the two cases were so similar, it would be more efficient to consolidate the two cases at the appeal stage. But consolidation would also mean that Sundaresh Menon would be obliged to recuse himself. The ***view from the ground*** therefore, was that ***the Tan Eng Hong case was red-lighted by a delay in delivering the judgement so that an appeal could not be filed until the Kenneth and Gary case [ie , the Lim Meng Suang appeal] had been heard*** .

[**7**] ***M Ravi no doubt can see the whole plan as well as anyone else*** , and in August 2013, acting for his client Tan Eng Hong, made an application to the High Court to be recognised as an interested party in the Court of Appeal hearing on the Kenneth and Gary case. The argument is that since the outcome of Kenneth and Gary's appeal will affect Tan's case (for which High Court judgement was still pending at the time) Tan should be permitted to intervene.

[**8**] This move must have ***upset the best-laid of plans*** . From a legal point of view, it would be very difficult to deny such an application. The fact of the matter is that the two cases are very similar. Whatever ruling comes out of the Court of Appeal in Gary and Kenneth's case, it would clearly impact Tan Eng Hong's case.

[**9**] ***I have been given to understand*** that ***phone calls were exchanged between the***

High Court and M Ravi's office in which ***the lawyer was persuaded to withdraw his application on the understanding that the judgement for Tan Eng Hong would be released shortly*** . ***And that's why the judgement was released on 2 October, when few others were expecting it.***

[**10**] Just like in the other case, Justice Quentin Loh dismissed Tan Eng Hong's challenge. The reasoning used was similar in many respects.

[**11**] But what happens next?

[**12**] We can only speculate, but if M Ravi moves as deftly as he has shown himself capable of, the Supreme Court will have to dance to his tune.

[**13**] I expect him to file an appeal immediately. At the same time, I expect him to apply for a consolidation of the two cases at the appeal stage. Proper procedure then would be to ask the Attorney-General's Chambers as well as the legal team for Kenneth and Gary (now led by Deborah Barker) whether they would object, and then to schedule hearings on the question of consolidation.

[**14**] Once this process is started, it would seem unavoidable that the appeal hearing for the Kenneth and Gary case should be suspended until the question of consolidation is sorted out. Thus, I don't see the hearing on 14 October going ahead – for Kenneth and Gary's appeal alone.

[**15**] Moreover, since I can't see any good legal grounds for rejecting an application to consolidate the two cases, I think there is a good likelihood that this will come to pass. Then again, Singapore courts are known to fly off into logic of their own.

[**16**] Assuming that the two cases are consolidated, it will mean that Sundaresh Menon will have to recuse himself. The other two judges of appeal already named for the 14 October bench (V K Rajah and Andrew Phang) would not be affected. Which other judge will be chosen to replace Menon? What impact will that have on the chances of success of the constitutional challenge? All that is very hard to see.

[emphasis added in bold, bold italics and underlined bold italics]

For ease of analysis, we have numbered the paragraphs in the Article (in square brackets and bold font) and will hereafter refer to specific paragraphs in the Article as "Article [1]", *etc*.

Two preliminary points

33 Before proceeding to consider the Article proper, we would like to deal with two related – and important – issues. The *first* relates to the distinction which the Appellant himself has drawn between reporting on the one hand and his concept of "theory construction" on the other. The *second* sets out *the general backdrop* against which the present charge should be viewed; more specifically, this backdrop relates to the foundational issue of judicial independence and impartiality.

Reporting vs "theory construction"

34 Turning first to the distinction the Appellant has drawn between reporting and "theory construction", his case – in essence – is that he had engaged in the latter (see also the Judgment at

[74]). What is clear is that the Appellant admits that he had *not* engaged in mere *descriptive* reporting; he had engaged in something more creative and which entailed what he termed were logical deductions arising from a set of objective facts which, together, constituted his theories (*ibid*). The questions that then arise for the purposes of the present appeal are *what precisely* constitutes *the content* of his "*theories*" ("Question 1") and (on a related note) whether his "theories" were indeed based on *objective* facts ("Question 2"). *Both* of the questions just mentioned in fact relate to ***the key issues*** which, in our view, need to be considered in the context of the present appeal and which are considered below (at [38]–[54]). More specifically, the first (*ie*, Question 1) relates, in the main, to the issue as to what an objective reading of the Article would yield; put simply, did the Article (as the Appellant has argued) merely highlight the fact that the Chief Justice had desired to sit to hear the appeal in *Lim Meng Suang* as it was an important case ***or*** (as the Respondent has argued) did the Article (through carefully crafted insinuations) result in a real risk that public confidence in the administration of justice would be undermined? The second (*ie*, Question 2) is related to the first and is concerned with whether or not the Appellant had written the Article in good faith, as fair criticism of what he perceived to be the situation at hand. To this end, *if* it is demonstrated that the Article had *not* in fact been premised on *objective* facts, then the Appellant's arguments with regard to fair criticism would fail *in limine* since fair criticism must, at the very threshold, be premised on *a rational basis*. We should add, however, that, *even if* the Article had been premised on objective facts, the Appellant's logical deductions might – on an *objective* analysis of the relevant facts *and* context – still be found by the court *not* to have been written in good faith, as fair criticism. ***Everything would depend, in the final analysis, on the precise facts and context before the court.***

35 Let us now turn to our second preliminary observation, *viz*, *the general backdrop* against which the Appellant's charge, in so far as the Article is concerned, ought to be viewed.

Judicial independence and impartiality

36 The key role and function of a judge is perhaps nowhere better exemplified than in the Oath of Office which every Judge or Judicial Commissioner or Senior Judge of the Supreme Court of Singapore must take pursuant to Art 97(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), and which is to be found in the First Schedule of the same, as follows:

> 6. *Oath of Office of Chief Justice, a Judge of the Supreme Court and a Judicial Commissioner and a Senior Judge of the Supreme Court*
>
> I, ..., having been appointed to the office of ....., do solemnly swear (or affirm) that I will faithfully discharge my judicial duties, and I will do right to all manner of people after the laws and usages of the Republic of Singapore without fear or favour, affection or ill-will to the best of my ability, and will preserve, protect and defend the Constitution of the Republic of Singapore.

37 We have set out the above Oath of Office in order to emphasise how vital, amongst other qualities, the qualities of judicial independence and impartiality are in the role and function of a judge. Indeed, without judicial independence and impartiality, the concept of a judiciary in general and the office of a judge in particular become nothing more than empty shells, shorn of any meaning whatsoever. Hence, any statement or material which impugns these qualities and suggests that they have been compromised would necessarily as well as undoubtedly undermine public confidence in the judiciary; indeed, this would be an understatement of sorts, given the foundational nature of the aforementioned qualities. With this in mind, let us now turn to consider the Article proper.

The Article considered

The Article considered

An objective reading of the Article

38 We should state at the outset that we agree with the Appellant that, if we accept his submission that he had written the Article merely to highlight the fact that the Chief Justice had desired to sit to hear the appeal in *Lim Meng Suang* as it was an important case, then he would *not* be guilty of the charge that had been brought against him.

39 What *is* clear is that the Article *did* – *even on* a *literal* interpretation – state that the Chief Justice (together with Loh J) had *deliberately delayed* the release of the High Court's judgment in *Tan Eng Hong* so that the appeal from *Lim Meng Suang* would be heard first. The *further* inquiry – for the purposes of the present appeal – is *why* this was done (as was suggested by the narrative in the Article). As just mentioned in the preceding paragraph, the Appellant states that this was because the Chief Justice had desired to sit on the appeal in *Lim Meng Suang* as it raised an important issue of constitutional law and that this would not have been possible if the appeal in *Tan Eng Hong* had been heard first simply because the Chief Justice, having been Attorney-General at the time the original (constitutional) proceedings had been initiated in *Tan Eng Hong*, would have had to recuse himself from hearing the appeal in *Tan Eng Hong*. He would not – according to the Appellant – have had to recuse himself in so far as the appeal in *Lim Meng Suang* was concerned.

40 The Judge – as we have already noted above – *rejected* the Appellant's submission in this particular regard, as follows (at [77]–[81]):

> 77 I find Mr Choo's submissions as outlined at [76] above disingenuous, and they serve to underscore the absence of good faith on the part of the Respondent. I agree with Mr Tai that the Respondent is retreating from his previous position, and his current stance in trying to downplay or neutralise his unsupported attacks against the Singapore judiciary evidences his lack of *bona fides*. In my view, there is now a clear attempt by the Respondent to not only retract from what he wrote in the First Article, but also facetiously paper over the message conveyed in that article that something furtive was going on, with Loh J deliberately holding back his judgment on the *Tan Eng Hong* case with the sole objective of having the *Lim Meng Suang* appeal heard first by a *coram* which included the Chief Justice (who, as the then Attorney-General, had prosecuted Tan Eng Hong under s 377A). That the Supreme Court's "strange calendaring" (see para 5 of the First Article) was a manipulation of the judicial system to achieve the aforesaid objective was quite clearly the thrust of what was meant by the reference in the title of the First Article to the "Supreme Court's best-laid plans".
>
> 78 As noted at [76] above, the Respondent now claims that:
>
> > (a) it was not necessarily a bad thing for the Chief Justice to sit on the *coram* hearing the *Lim Meng Suang* appeal;
> >
> > (b) it was proper for the Chief Justice to want to preside over an important case involving a challenge to the constitutionality of s 377A; and
> >
> > (c) nowhere in the First Article was it suggested that the fact of the Chief Justice sitting on the *coram* hearing the *Lim Meng Suang* appeal (if that came to pass) would change the outcome of the appeal in any way.
>
> These assertions are plainly untenable in the light of the barefaced statement in para 8 of the First Article that "[w]hatever ruling comes out of the Court of Appeal in Gary and Kenneth's case,

it would clearly impact Tan Eng Hong's case". That statement has to be understood in the context of the fact that at the time Tan Eng Hong was prosecuted under s 377A, the Chief Justice was the Attorney-General. Given this context, that statement insinuates that the Chief Justice has a vested and improper interest in upholding the constitutionality of s 377A.

79 The Respondent is a blogger with a following in the gay community; he is also a self-professed social activist and prominent member of the gay community in Singapore. He admits to "sharing his views of the world" with a larger readership that includes non-gay readers with an interest in gay issues. In painting things in the worst possible light in the First Article, and by making that article available on the Internet, the Respondent conveyed to the average reasonable person (see the definition of "the public" at [41] above) the impression that the Supreme Court would have got away with its "best-laid" plans but for Mr Ravi.

80 The statements in bold in the First Article were unfair comments – they were made without any rational basis and in the absence of good faith. In this regard, Mr Tai said that given the quality of the Respondent's evidence as to the alleged rational basis of his comments in the First Article, that evidence should be rejected. I agree and wholly reject the Respondent's evidence as inadequate and, hence, unsatisfactory. I accept Mr Tai's contention that the Respondent has not shown any rational basis for the allegations and/or insinuations made in the First Article. The evidence adduced by the Respondent as the alleged rational basis of his comments cannot constitute the cogent evidence that is required of him because of the following factors:

(a) the Respondent's attribution of his "neat theory" is to an unknown/unspecified "practising lawyer";

(b) the Respondent's assertion that his "lawyer acquaintances" have expressed concurrence with that "neat theory" is too vague;

(c) the Respondent has conspicuously omitted to obtain direct evidence *vis-à-vis* the alleged telephone exchange incident between Mr Ravi and the High Court in relation to Mr Ravi's "intervention" application; and

(d) the Respondent has relied on *ex post facto* materials (*ie*, documents that came to his knowledge only after the First Article was published).

81 I have already touched on Ms Jasman's evidence at [62] above. Her evidence remains unchallenged. As for the *ex post facto* materials, they are irrelevant as the assessment of the Respondent's good faith (or the lack thereof) is based on his state of mind at the time of publication of the First Article (see [40] above). It is sufficient that at the time of publication, the First Article, assessed objectively, created a real risk of undermining public confidence in the administration of justice in Singapore. As pointed out earlier, scandalising contempt occurs when the administration of justice is exposed to a real risk of being undermined, irrespective of whether that risk becomes an actuality.

For clarity, "Mr Choo" referred to counsel for the Appellant in the proceedings before the Judge while "Mr Tai" referred to counsel for the Prosecution at the time. Also, when the Judge referred to "the Respondent", she was referring to Mr Au Wai Pang (who was, at the time, the respondent, but the Appellant in this appeal).

41 It can be seen that the Judge's reasoning in the court below (which has been set out *in extenso* in the preceding paragraph) encompasses *both* the issue presently considered *as well as* the

next issue (which relates to whether or not fair criticism has been established). We agree with the Judge that the Appellant's argument is a mere *ex post facto* attempt to "facetiously paper over the message conveyed" in the Article (see the Judgment at [77], also quoted in the preceding paragraph). What, then, was the ***real*** message embodied in the Article?

42 One obtains more than a clue from the very title or heading of the Article itself – "377 ***wheels come off*** Supreme Court's ***<u>best-laid plans</u>*** " [emphasis added in bold italics and underlined bold italics]. The phrase "best-laid plans" (repeated again in the Article at Article [8] as "the best-laid of plans") derives, of course, from the famous line in the poem by the famous Scottish poet, Robert Burns, entitled "To A Mouse, on Turning Her Up in Her Nest with the Plough, November 1785" (see Carol McGuirk (ed), *Robert Burns: Selected Poems* (Penguin Books, 1993), pp 67–68 at p 68). In its original form, it reads as follows: "The best laid schemes o' *Mice* an' *Men*/ Gang aft agley" [*ibid*; italics in original]. It has, in fact, formed the basis for the title of books (see, for example, John Steinbeck, *Of Mice and Men* (Covici Friede, 1937; reprinted as a Penguin Red Classic, 2006)) and has also been included in books of quotations (see, for example, Elizabeth Knowles (ed), *The Oxford Dictionary of Quotations* (Oxford University Press, 6th Ed, 2004) at p 172, entry number 22 and J M Cohen and M J Cohen, *The Penguin Dictionary of Quotations* (Penguin Books Ltd, 1960) at p 84, entry number 28), although it is often quoted (in its more modern form) as follows: "The *best-laid plans* of mice and men/*Often* go *awry*." [emphasis added].

43 What is significant for the purposes of the present appeal is the fact that the Article refers to *deliberate plans* by *the Supreme Court of Singapore* which had (as the Article itself goes on to detail) been *derailed* by Mr Ravi's application to intervene in the *Lim Meng Suang* appeal on behalf of his client, Tan Eng Hong (see, in particular, Article [7]). Indeed, ***even without*** the literary reference referred to in the preceding paragraph, a ***plain reading*** of the title or heading of the Article clearly conveys this meaning – particularly through the phrase "377 wheels come off". The implication (or, rather, insinuation) is that there was something ***untoward or even sinister*** in the alleged deliberate scheduling of the *Lim Meng Suang* appeal ahead of the *Tan Eng Hong* appeal – a scheduling that was ***so meticulously planned and assiduously desired*** that Loh J would (presumably on instructions by the Chief Justice) *go to such lengths as to deliberately delay* releasing his judgment with regard to the *Tan Eng Hong* case in order to ensure that the *appeal* in that case would be "red-lighted" (see Article [6]) *until after* the *Lim Meng Suang* appeal had *been heard and decided*. Unfortunately, though, as a result of Mr Ravi's application to intervene on behalf of his client (Tan Eng Hong) in the *Lim Meng Suang* appeal, all the "best-laid plans" hitherto being executed were derailed as the metaphorical "wheels" had "come off".

44 The Appellant, however, argues that the deliberate plans that were derailed by Mr Ravi were in fact innocent and consisted in the scheduling by the Supreme Court of the hearing of the *Lim Meng Suang* appeal first *in order to afford the Chief Justice the opportunity to sit to hear this appeal* ***as it was an important constitutional case which he thought he ought to sit on*** . However, as we have already mentioned, we agree with the Judge that this particular argument was an afterthought and an *ex post facto* rationalisation of the Article. Let us elaborate.

45 The language utilised in the Article suggests or (more accurately) ***insinuates*** that there was something ***more sinister*** behind the alleged scheduling by the Supreme Court than what had been claimed by the Appellant in the preceding paragraph. If, as the Appellant claimed, the plans were for the Chief Justice to sit on the *Lim Meng Suang* appeal ***<u>and</u> if there was (as the Appellant at least implicitly admits by the very nature of his present argument) no concern whatsoever that the Chief Justice would have any set views on the issue*** (in other words, ***if everything was above board***), ***<u>why was there a need to refer to the derailment of plans which were innocuous to begin with</u> ? <u>Put simply, why would the "wheels" need to come off a perfectly functioning</u>***

vehicle which was presumably headed in the correct direction to begin with ? Why, indeed, would there be a need to resort to the meticulous planning alleged, which required the not insignificant focus that is the hallmark of the origin of the concept of "best-laid plans" referred to above (at [42]) ?

46 In order to aid us in answering the questions just posed, we refer, in particular, to two paragraphs of the Article which are in fact (and as we shall explain in a moment) ***causally linked*** to each other. The first paragraph (at ***Article [5]***) is a reference to the fact that at the time the *Tan Eng Hong* challenge was mounted *vis-à-vis* s 377A, the *then* Attorney-General was *the Chief Justice*. The presumption is that ***the then Attorney-General (the present Chief Justice) must have clearly taken a view of the matter in order to authorise the Attorney-General's Chambers to proceed to contest or resist*** the *Tan Eng Hong* challenge *vis-à-vis* s 377A. The Appellant's claim that the Chief Justice (in conjunction with Loh J and the Supreme Court generally) was so desirous of manipulating the sequence of cases in order that he might be able to sit on the *Lim Meng Suang* appeal ***must be seen in the context of the aforementioned facts and circumstances*** . ***Put simply, the clear insinuation is that the Chief Justice, having taken a view of the law in relation to the* Tan Eng Hong *proceedings (ie , that s 377A was constitutional), now wanted to incorporate that view as part of the law of the land and that the only way (in the Appellant's opinion) that he could accomplish this would be to sit on the* Lim Meng Suang *appeal. However, in order to achieve this goal, there had to be a manipulation of the timing of the release of the respective judgments by Loh J. Looked at in this light, the Appellant's reference in the Article (at Article [5]) to " strange calendaring " makes perfect sense. We have to add to this the Appellant's own interest in so far as s 377A was concerned. Given his background (see the Judgment at [79]), it is not surprising in the least that he would have characterised the situation in the way he did as he certainly would have wanted s 377A to have been declared unconstitutional. The chances of this happening would have (potentially at least) been drastically reduced, at the very least, if the* Lim Meng Suang *appeal were to be heard first and the Chief Justice was able to persuade the court to declare s 377A constitutional.*** This, in fact, leads naturally on to the *second* paragraph which we would like to refer to.

47 The second paragraph (at ***Article [7]***) is a reference to the fact that (***according to the Appellant***) Mr Ravi was *alert to the alleged plan of the Supreme Court as set out in the preceding paragraph and therefore set about to derail it by bringing an application on behalf of his client*, ***Tan Eng Hong*** *, in order to ensure that* ***he would have the opportunity to argue at least the same time as counsel in the* Lim Meng Suang *appeal*** . ***If, however, Mr Ravi had envisaged that the* Lim Meng Suang *appeal would be decided in a fair manner (in particular, without any fear that the Chief Justice might incorporate the views he may have held as Attorney-General), there would have been no reason at all for Mr Ravi to have brought the aforementioned application to intervene. However , it was precisely because (in the Appellant's view) Mr Ravi felt the opposite that he had to bring the application to intervene which (again, in the Appellant's view at Article [8]) "must have upset the best-laid of plans "*** [emphasis added].

48 To ***summarise*** , the ***entire thrust*** of the Article was to (as the Judge also found (see the Judgment at [71]–[82])) allege ***a vested and improper interest on the part of the Chief Justice in upholding the constitutionality of s 377A*** . ***Worse*** , the Article ***also alleges*** that ***Loh J was complicit in this illicit plan*** (see generally, at Article [1], [4], [6] and (especially) [9]). ***The fact that the Appellant made these allegations by way of insinuations (as opposed to express views) makes the Article even more insidious*** **.** The Appellant now seeks to mount an *ex post facto* justification which must, in our view, surely fail because such an attempt at justification – which is perhaps better described as rationalisation – ***cannot possibly explain away the substance of the insinuations when one has regard to the facts as well as context concerned*** . ***This insidious***

attack on the independence as well as impartiality of the judiciary goes to <u>the very heart of</u> what the (indeed, any) judiciary stands for and clearly undermines public confidence in the administration of justice.

Whether or not fair criticism has been established

49 In the light of our findings with respect to the first sub-issue, this particular sub-issue can be dealt with relatively easily. It cannot – by any stretch of the imagination – be said, in particular given the tone of the Article and the abundance of insinuations, that the Appellant had written the Article in good faith, as fair criticism.

50 In any event, it is also clear beyond any reasonable doubt that the Appellant did not have even a shadow of objective facts upon which to premise what he claims is fair criticism. Put simply, there was ***no rational basis whatsoever*** for the Article. The alleged sources – or, rather, their ***rank absence*** – bear this out. They were nothing more than general as well as vague references. There was a reference, for example, at Article [4] to "the general consensus in LGBT and legal circles". At Article [5], there was a vague reference to "[t]he common view". Again, at Article [6], there was another vague reference to "[t]he view from the ground". At Article [9], the Appellant states that he was "given to understand that phone calls were exchanged between the High Court and M Ravi's office in which the lawyer was persuaded to withdraw his application on the understanding that the judgement for Tan Eng Hong would be released shortly" – although *nowhere* does he identify the source(s) from which such understanding emanated. Even in his affidavit, his attempts at expounding on these mysterious sources were stilted and unconvincing. He recounted as follows:

(a) An individual whom the Appellant met at an event hosted by the British High Commission in July or August 2013 – who described himself as a practising lawyer (but whose name the Appellant could not recall) – shared (with the Appellant) his belief that the delay in the release of the *Tan Eng Hong* judgment could be due to the Chief Justice wanting to be on the *coram* for the appeal from *Lim Meng Suang*.

(b) From casual conversation (with undisclosed parties), the Appellant learned that once parties filed applications to have their cases joined, it may prove difficult to deny such applications if there were no good reasons against joining.

(c) The Appellant had come across an article in the *Straits Times* dated 8 September 2013 entitled "Gay-sex law case: Man drops bid to intervene", the relevant portion of which reads as follows:

> SINGAPORE – A man waiting for the court to rule on his challenge to the law criminalising gay sex, has changed his mind about joining a similar case.
>
> On Thursday, Mr Tan Eng Hong dropped his bid to become an intervening party to a Court of Appeal case involving a homosexual couple fighting the same law.
>
> Lawyer M. Ravi, who is acting for Mr Tan, gave two reasons for the withdrawal.
>
> First, he had been assured by High Court Justice Quentin Loh's secretary that the delivery of judgment in Mr Tan's case is being expedited.
>
> Also, gay couple Gary Lim and Kenneth Chee, both graphic designers, had objected to Mr Tan's attempt to be added as an intervening party as his case was still pending.

…

(d) The Appellant heard from *a person* who attended Mr Ravi's intervention application that Mr Ravi said something in open court to the effect that he had communicated with Justice Loh's secretary over the telephone and been assured of the imminent release of the *Tan Eng Hong* judgment.

51 As is apparent from the "sources" cited above, and as was noted by the Judge (see the Judgment at [74]), the Appellant's sources comprised mainly "unsubstantiated views received from unidentified persons". With regard to the *Straits Times* article (cited above at [50(c)]), what was reported does not even come close to supporting the statement made by the Appellant at Article [9] that the court *persuaded* Mr Ravi to withdraw his application. Not only was the *Straits Times* article not referred to at Article [9] (which was, instead, simply prefaced loosely with "I have been given to understand"), the two speak about very different things. There are three aspects of the *Straits Times* article that are important. First, the article indicates that the communication was between Ms Jasman and Mr Ravi. Second, the article caveats the information disclosed (on the alleged communication) as having been based on Mr Ravi's account. Third, the article notes a further reason for the withdrawal of the application (that the appellants in the *Lim Meng Suang* matter objected to the intervention application).

52 The Appellant claims he simply summarised the *Straits Times* article albeit using "a different phrasing". This is untenable. His "different phrasing" ended up communicating a wholly different point. It may have been a different case if the Appellant had cited the *Straits Times* article as authority for the point he was making (in which case, the circumspect paraphrasing may have been made apparent to the reader). This, he did not do. This was not simply a case of the Appellant getting his version of events "incorrect" or "off the mark" (as he seemed to allege). Neither was it a case of the Appellant being misled by his "sources" (in fact, given the vague descriptions used by the Appellant of his sources, it is questionable if these sources even exist).

53 It should also be noted that in his affidavit, the Appellant even attempted to rely on "sources" that *post-dated* the publication of the Article. His efforts in this regard – viewed in their totality – come across as disingenuous. It is clear that the Article did *not* constitute fair criticism.

Conclusion

54 From the above analysis, we find ourselves able to conclude, beyond reasonable doubt, that the Article posed a real risk of undermining public confidence in the administration of justice. It was carefully crafted so as to take the form of insinuations that were just as effective as (if not more effective than) overt or express statements. There was, in addition to the very nature and tenor of the Article itself, a total absence of a rational basis on the part of the Appellant when he wrote the Article, and it follows that the Article clearly did not constitute fair criticism.

Conclusion

55 For the reasons set out above, we dismiss the appeal with costs, and with the usual consequential orders. Finally, we would add that although neither party had appealed against the sentence imposed on the Appellant by the Judge in the court below, we are of the view that the sentence imposed was wholly appropriate (given the nature of the charge).

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