Criminal Law Conference 2019
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Opening Address by Deputy Attorney-General, Hri Kumar Nair S.C.
Towards a More Efficient and Just Criminal Process

Distinguished Guests
Ladies and Gentlemen

I. INTRODUCTION

1 I would like to touch on the topic of a just criminal process, and in particular, on a facet of justice that is often overlooked. When we talk about achieving justice in the criminal context, we often have in our minds the twin *ends* of securing the conviction and punishment of the guilty on the one hand, and the acquittal of the innocent on the other. Any criminal legal system which desires to be regarded as just must necessarily aspire towards these twin outcomes. But we must be careful that the ends of justice do not obscure the means by which we arrive at them. In this regard, I suggest that a necessary condition of justice is a criminal process which secures the ends of justice by fairly as well as *efficiently* resolving cases.

2 The link between efficiency and justice is not a new one, nor one which is controversial. In 1996, then Attorney-General Mr Chan Sek Keong, delivering the 10th Singapore Law Review Lecture, observed that:

> **Any model of the criminal process we should strive for… must be efficient**, ie, it should be able to speedily "apprehend, try, convict and dispose of a high proportion of criminal offenders whose offences become known".

3 There are, to my mind, **three** reasons why the efficient resolution of criminal cases coheres with the demands of justice:

> (a) First, and most obviously, the timely resolution of a case enables us to reach the aforesaid ends of justice. The guilty can hardly be punished or the innocent acquitted without a punctual conclusion to their cases.
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> (b) Second, delay in criminal proceedings unfairly prejudices all parties to the criminal justice process. Victims suffer equally, if not more so, from the lack of timely closure and vindication. Accused persons must deal with the undeniable stress of unresolved proceedings – facing and defending charges in a public forum, implications for their finances, their employment, their families and how society views them and their ability to reintegrate into the community. These are present whether or not they are ultimately found guilty. The ability of witnesses to recall facts or their observations are impaired by the passage of time, which may in turn increases their unwillingness to testify on the stand. And unjustified delay ultimately presents as a drain on both prosecutorial and judicial resources, to the detriment of the administration of justice.
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> (c) Third, the failure to resolve criminal cases in an efficient manner undercuts the principle of finality, which is a vital facet of justice. This is particularly apparent in cases which are needlessly prolonged by unending litigation. As the Court of Appeal observed in *Kho Jabing v Public ProsecutorP,* in the

context of an application by a convicted offender to re-open the apex courts' decision in his case:

> **Finality is also a function of justice**. It would be impossible to have a functioning legal system if all legal decisions were open to constant and unceasing challenge, like so many tentative commas appended to the end of an unending sentence.

4 As the title of my address suggests, I do not intend to speak in the abstract on the link between efficiency and justice. Instead, I propose to devote the remainder of my time to discussing how we can strive *in practice* to make our criminal justice process more efficient and thus just. I will accordingly divide my address into three parts. First, I will outline the two main obstacles to an efficient criminal process, and summarise how recent legal developments have sought to address these impediments. Second, I will highlight ways in which these obstacles persist. In final part of my address, I will put forward some proposals that I hope will allow us to make progress, and thus bring us closer to our goal of a fair and efficient criminal justice process.

II. THE TWIN BARRIERS TO EFFICIENCY: INFORMATION ASYMMETRY AND ABUSE OF PROCESS

5 There are two main obstacles that stand in the way of the efficient resolution of cases. The first impediment, which is structural, is the *asymmetry of information* between the Prosecution and the Defence. The second impediment, which is volitional, is the *abuse of process*. I will discuss each of these in turn, as well as the recent legal developments that seek to address them.

A. Information Asymmetry

6 **Information asymmetry** is perhaps the inevitable consequence of an adversarial system like ours. By its very nature, an adversarial system is premised on opposing parties independently uncovering and presenting evidence before an impartial trial judge. This partisan process of fact-gathering lends itself to the ascertainment of truth, with the opposing parties pitting their independently-derived cases against each other in court. It is the friction between these conflicting accounts that allows scrutiny of the evidence, and for the truth to emerge. The partisan process of fact-gathering is thus a necessary element of the adversarial system.

7 However, the very strength of the information gathering process is also its weakness. The parallel lines of inquiry conducted by the Prosecution and the Defence, with reference to different sources of information, inevitably leads to an asymmetry of information between both parties. Moreover, there are no inherent incentives in an adversarial system for either party to share information with the other. On the contrary, there is every incentive for both sides to hoard information for as long as possible, in the hope that it will secure a tactical advantage for them at trial. Thus we speak of the much-derided "trial by ambush", where one party wheels out the smoking gun that seals the fate of the other side. While this may make for good television fodder, it can often impede the efficient resolution of cases by forcing unmeritorious cases to trial. Allow me to explain.

8 When a party is confronted with asymmetric information, he is unable to accurately calculate the risks of litigation. This leads to one of two outcomes, neither of which is desirable. The party may overestimate the strength of his case and thus prosecute or elect to claim trial, when he would not have done so had he known the full slate of

facts at the outset. Or, in the context of sentencing, the accused person may overestimate his downside risk. He may, for example, think that he may face a harsher sentence than the Prosecution is in fact seeking, and thus claim trial because of what he believes is at stake or with the intention of forcing the Prosecution to adopt a more amenable sentencing position. Both of these outcomes are unfortunately more common in practice than is desirable, and explain why a significant proportion of trials "crack" on the first day after the full slate of information becomes apparent to parties. Ultimately, by pushing such cases to trial, both of these outcomes have a detrimental effect on the efficient resolution of cases.

9 Recent legal developments have taken aim at the problem of information asymmetry in two ways: First, by encouraging the disclosure of material evidence at the pre-trial stage, and second, by creating greater common ground on sentencing through the construction of a shared sentencing architecture.

10 I begin with the developments related to **pre-trial disclosure**, which have expedited case resolution by acquainting parties with the opposing case at an early stage:

> (a) In the seminal 2011 decision of *Muhammad Bin Kadar v Public Prosecutor*, the Court of Appeal held that the Prosecution was under a duty to disclose a limited category of material that it did not intend to use as part of its case at trial to the Defence at an early stage of the proceedings. This included material likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.
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> (b) In the following year, the Criminal Case Disclosure Conference (or "CCDC" regime in short) was introduced as part of the 2012 amendments to the Criminal Procedure Code ("CPC"). The regime provides a "formalised framework obliging the prosecution and the defence to exchange relevant information about their respective cases before trial", recognising that the "timely disclosure of information has helped parties to prepare for trial and assess their cases more fully." The sequential nature of the process places the onus on the prosecution to set out its case first, and cuts down on opportunities for the accused to tailor his evidence.
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> (c) More recently, the 2018 amendments to the CPC have seen the inclusion of more offences in the CCDC regime, such as offences under the Prevention of Corruption Act and the Moneylenders Act. The amendments have also brought the Defence's disclosure obligations in line with the Prosecution's, by mandating disclosure, in the form of the defence supplementary bundle, of the documentary exhibits that the defence intends to rely on at trial.

11 I move on to recent efforts to construct a **shared sentencing architecture** in the form of guideline judgments and sentencing matrices:

> (a) Beginning with the formation of the judicial Sentencing Council in 2013, the appellate courts have "endeavoured to provide sentencing frameworks and benchmarks for a range of offences from violent crimes, to financial wrongdoings, to drug related offences." Chief Justice Sundaresh Menon has explained in a recent decision that "the primary object of these frameworks is to provide a degree of predictability as well as to achieve a measure of consistency."
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> (b) In a complementary vein, the State Courts have begun to publish statistical data on sentencing from 2015 via the online Sentencing Information

and Research Repository. These statistics provide useful parameters for both parties and the court in dealing with offences with few or no reported precedents.

(c) Our chambers have also moved in the same direction, by routinely putting forward sentencing matrices in our submissions for offences where guideline judgments have yet to be laid down. We have actively sought to encourage the adoption of these matrices across a wide range of offences, being of the view that they provide a structured and principled approach to sentencing. We will continue to do so in the future, and hope that these will be supported by the Courts.

12 Collectively, these initiatives have provided a shared rubric that conditions parties' submissions on sentence, reducing disputes over the applicable principles and precedents, and enhancing consistency and predictability.

B. Abuse of Process

13 The second obstacle to efficiency is the **abuse of process**. Of the two, the abuse of process should trouble us more. It is not an unwitting consequence of our system, but a *deliberate and calculated* affront to the administration of justice.

14 "Abuse of process" is a catch-all term that encompasses a wide range of vexatious and unmeritorious conduct in litigation. In the criminal context, such abusive conduct commonly presents itself in the form of backdoor appeals disguised as criminal references or revisions, repeated applications for the Court of Appeal to revisit its decisions, or even applications for judicial review mounted as a collateral attack on the Court's criminal jurisdiction.

15 In his speech to Parliament last year, the Senior Minister of State for Law highlighted the detrimental effect of the abuse of process on the administration of justice. He rightly observed that "vexatious litigation is a drain on our court resources", as it "draws away precious court time from dealing with meritorious applications." I ought to add that such abusive conduct also unnecessarily prolongs criminal proceedings, turning them into a war of attrition that leaves no one the victor, and justice the poorer.

16 Our laws have recently been amended to restrain such abusive conduct by reinforcing the finality of judicial decisions, and enhancing the court's powers to curtail abusive applications.

(a) Sections 394F to 394K of the CPC, which were introduced as part of the 2018 amendments, codify the procedure set out by the Court of Appeal in its recent judgments for applications to review an earlier decision of an appellate court. Such review applications, which were previously made by way of ad-hoc criminal motions, must now fulfil a stringent set of statutory requirements in order to be heard, including a formal leave application. The new framework is intended to re-affirm the finality of judicial decisions by sieving out unmeritorious applications for review.

(b) The new subsection 397(3B) of the CPC empowers the Court of Appeal to summarily refuse a leave application for a criminal reference, if it appears to the Court of Appeal that the question is not a question of law of public interest which has arisen in the matter. This allows the Court to quickly deal with backdoor appeals disguised as references on questions of law.

17 Looked at collectively, these recent legal developments have a gone some way towards removing impediments to the efficient resolution of cases. However, there are a number of undesirable practices that continue to persist, to which I now turn.

III. GAPS IN THE CURRENT SYSTEM: "CRACKED" TRIALS AND PERSISTENT ABUSE OF PROCESS

18 Despite recent efforts to expedite case resolution, two key hurdles remain: the significant occurrence of cracked trials, and continued attempts to abuse the court process. I will address each problem in turn.

A. "Cracked" Trials

19 "Cracked" trials generate huge inefficiency in the criminal justice process. Despite the current CCDC regime, rough data we have collated suggests that 1 in 5 trials "crack", with the accused pleading guilty at or shortly after the commencement of trial. This is a waste of the resources put into trial preparation by both parties, and of valuable judicial time. From a prosecutorial perspective, considerable time and effort is spent assembling the evidence and interviewing witness, all of which is wasted when a trial cracks. From a judicial perspective, the not insignificant possibility of trials cracking means that the courts often do not fix sufficient days to complete a trial, leading to part-heard trials, which may be heard months later. This leads to delay and a further drain on resources as the Court and parties have to "refresh" themselves of the earlier evidence at subsequent hearings.

20 Apart from a minority of bad actors who claim trial to drag out proceedings, however, the majority of cracked trials can largely be attributed to a miscalculation of litigation risk rather than malicious intent. It is for that reason that they are less of a hindrance in our quest for an efficient and just criminal justice process than the deliberate abuse of process, to which I now turn.

B. Abuse of Process

21 The courts continue to encounter vexatious litigants who, "armed with an aggravated sense of injustice about [their] case", pursue unmeritorious applications at all costs. Such frivolous conduct, no matter what form they take, invariably squanders scarce prosecutorial and judicial resources on misconceived litigation. Even if the Prosecution is awarded costs, such costs would be inadequate compensation for the significant time and State resources expended. Inordinate delays arising from abuse of the court process also inflict huge emotional strain inflicted on victims, who are subject to protracted uncertainty and repeatedly denied repose.

22 One way in which litigants commonly abuse the court process is by **drip-feeding** arguments over the course of multiple applications, thereby prolonging matters *ad infinitum*. In *Kho Jabing v Public Prosecutor*, the Court of Appeal unequivocally held that it was an abuse of court process to file an application containing a particular argument, withdraw the argument sometime before the hearing, and then – after the first application had been dismissed – file a fresh application premised on the argument which had been withdrawn. Such frivolous conduct *alone* was sufficient grounds for dismissing the applicant's criminal motion as an abuse of process.

23 Worryingly, some defendants remain undeterred and pay no heed to the explicit judicial rejection of abuse of process. Besides drip-feeding arguments, defendants have also sought to undermine the court process by filing **backdoor appeals**,

whether by means of criminal revisions, criminal references or judicial review.

(a) In *Tan Zhenyang v Public Prosecutor*, the applicant filed a **criminal revision** to retract his plea of guilt two days before he was meant to start serving his sentence of 5 weeks' imprisonment. He alleged that he had only pled guilty on the assurance of his counsel that he would receive a fine. The High Court dismissed the criminal revision as an abuse of process as the plea of guilt had been properly taken.

(b) In *Salwant Singh s/o Amer Singh v Public Prosecutor*, the applicant sought leave to **refer questions of law of public interest**, purportedly arising from his previous application in a criminal revision. The applicant's latest application was his ninth application to the High Court and Court of Appeal, following his conviction 14 years ago. The Court of Appeal rightly dismissed his application as a "patent" abuse of process, and observed that even litigants-in-person did not have a license to engage in abusive conduct. The abusiveness here was particularly reprehensible as the courts had repeatedly emphasised, in dismissing the applicant's previous applications, that his attempts at re-litigation were vexatious and an abuse of process.

(c) In *Hishamrudin bin Mohd v Public Prosecutor,* the applicant filed an originating summons seeking leave for judicial review of an earlier decision of the Court of Appeal, which had upheld his conviction and his sentence of death. While the applicant belatedly converted his summons into a criminal motion, the Court of Appeal rightly condemned the use of court's civil jurisdiction to mount a collateral attack on a decision made by the court in the exercise of its criminal jurisdiction.

24 The ways in which defendants may undercut the court process are varied and numerous. Other instances where the courts have found abusive conduct include the giving of expert evidence so partisan and devoid of reasoning as to fail to meet the minimum standards of expert evidence. What unifies these various forms of abusive behaviour is ultimately a contemptuous disregard for due process and a selfish disdain for the interests of other stakeholders. Indeed, the courts have repeatedly signalled their profound disapproval of abusive conduct that delays and denies justice. As stakeholders in the criminal process, all of us ought to take a serious view of such conduct.

25 In this regard, I now turn to two ways in which the criminal justice process may be made more efficient, and hence, more just, for all.

IIII. THE WAY FORWARD: JUSTICE THAT FITS THE CRIME AND APPROPRIATE USE OF COST ORDERS

A. Justice that Fits the Crime

26 One way in which justice can be more punctually secured is by ensuring that **resources are proportionally allocated to each case**. While achieving a fair outcome is an important facet of justice, I believe we should aspire towards a *broader* conception of justice – one that is case-sensitive and allocatively-efficient. We should avoid the situation where we expend a substantial amount of resources just to move the sentencing needle marginally, which is what happens for minor offences. In short, the demands of justice should fit the crime.

27 It is in this spirit that I invite you to consider how we may reimagine the criminal justice process to be one that is more efficient and hence more just. I will put forward

four ideas that I think are worth exploring.

28 First, we can consider a **dual-track system** with a simplified process for minor offences. That is the direction civil justice in Singapore is already evolving towards. Such an approach is already in effect in civil cases before the Magistrates' Courts. Parties may opt into a simplified process which features upfront disclosure of documents and early case management. The simplified process encourages parties to negotiate and reach an early settlement, failing which, simplified trials with truncated proceedings will be conducted. A similarly abbreviated process could be adopted for relatively minor offences, to ensure time and cost savings for all parties. Such a process could entail truncated pre-trial proceedings and greater efforts to encourage upfront disclosure of parties' positions, so as to facilitate early case resolution and avoid the occurrence of "cracked" trials.

29 Second, we should have an **early indication of sentencing positions for minor offences,** where there are clear guidelines for sentencing and the likely variance in sentencing outcomes if the matter goes to trial is marginal. Let me explain why this may be helpful. An accused person who commits a minor offence may realistically face a fine or a short custodial sentence. However, he may grossly overestimate his likely sentence. For example, a first-time offender today who is charged with drink-driving will likely receive a fine not exceeding $5000 and disqualification, but will be confronted with a charge sheet which states that the he is liable to a maximum sentence of 6 months' imprisonment. Any lay person will be anxious with the prospect of receiving that sentence. This may lead him to engage lawyers or claim trial, thus incurring unnecessary delay and expense. Even if he obtains legal advice, no lawyer will be able to give him an assurance of sentence, and will protect themselves by qualifying their advice by speaking of "risks" and "possibilities" of a harsher sentence. An early indication of the Prosecution's sentencing position in such cases may help the accused make an informed assessment of his litigation risk, and resolve the case at a very early stage, even at the point of charging. This allows us to truncate the process for such offences.

30 Third, and related to the above, it would be helpful if there are **definitive sentencing guidelines for more offences**. This can be by way of more guideline judgments or, as practiced in the UK, by the formation of a standalone Sentencing Council with the power to issue binding sentencing guidelines. Guideline judgments help to narrow the range of likely sentencing outcomes, thereby providing greater clarity to all parties right from the outset. The sentencing framework for drink driving laid down in *Edwin Suse Nathen v Public Prosecutor*, for instance, has greatly expedited the resolution of drink driving cases. So, if you are a first-time drink driving offender with an alcohol level of between 35 to 54 micro-grammes per 100 ml of breath, you will receive a fine of between $1000 - $2000, and disqualification of between 12-18 months. The outcome is predictable and leaves little room for doubt or dispute. The presence of mitigating or aggravating factors, unless highly significant, is unlikely to move the needle more than marginally. In the long run, the issuance of such guideline judgments for a larger number of offences will go a long way towards increasing predictability of outcomes and thereby encouraging a speedy resolution of cases.

31 Finally, we can consider the use of **structured sentencing discounts** to encourage timely pleas of guilt. By this, I mean a structured framework which (i) pegs the quantum of the discount to the *stage* of the proceedings that the accused elects to plead guilty at; and (ii) *specifies* the quantum of the discount that will be given at each stage. This framework by no means novel, having been implemented in both the UK and Hong Kong. So, in Hong Kong for example, the discount is one third if the accused pleads guilty at the committal stage, one quarter up to the first

day of trial and one fifth on the first day of trial. The tiered structure and fixed sentencing discounts would provide certainty and the motivation for accused persons to plead guilty at an *earlier* stage of the criminal justice process, allowing cases to be concluded sooner rather than later.

B. Appropriate Use of Cost Orders

32 These four ideas that I have put forward will, if properly implemented, move cases along expeditiously. However, they can only work if both the Prosecution and the Defence are willing to work together in good faith. Conversely, they will fail if either party cynically exploits the concessions that are offered to gain a tactical advantage rather than resolve matters. Nor will they work if bad actors continue to regard the deliberate abuse of process as a legitimate means to advance their case.

33 While it may not be pleasant to speak of penalties for bad behaviour, I think it is necessary if we are to keep the system honest and effective. In my view, the robust and appropriate use of cost orders can substantially deter abusive conduct. Going forward, the Prosecution will not hesitate to apply for **costs to be ordered** against accused persons and defence counsel who conduct themselves unreasonably.

34 The courts have signalled their willingness to order costs against extravagant conduct that serves no purpose other than to delay and frustrate. Just last year, the Court of Appeal ordered costs of $2,000 against the applicant in *Ng Chye Huay v Public Prosecutor*, who had sought leave to refer what were really questions of fact re-cast as questions of law to re-litigate the issues that had been decided against her. And in the case of *Bander Yahya a Alzahrani v Public Prosecutor*, the Court of Appeal ordered $5,000 in costs in relation to the filing a criminal reference that raised blatant questions of fact rather than law.

35 Costs may be ordered not only against accused persons, but also against defence counsel who are remiss in their duty to conduct proceedings with reasonable competence and expedition. This must be right in principle, as defence counsel have an overriding duty to the court and cannot be the mere mouthpiece of their clients. The case of *Arun Kaliamurthy v Public Prosecutor* is instructive. In that case, defence counsel was ordered to personally reimburse the accused persons for the costs they had to pay to the Prosecution. Prior to filing the unmeritorious criminal motion on the accused persons' behalf, he had nearly induced them to commit contempt of court. In ordering costs against defence counsel, the court reiterated that:

> The court has a right and duty to supervise the conduct of its solicitors, and in so doing, **penalise any conduct which tends to defeat justice**.

36 I hasten to add that cost orders are not intended to discourage applications made in good faith, or deter those who act conscientiously and conscionably. The bar is rightfully set high, requiring evidence of clear abuse on the part of the offending party. However, where an abuse of process has been established, the Courts should not hesitate to order costs against the offending party, and in an amount that properly reflects the wastage of State resources and signals its disapproval of the offending party's conduct.

V. CONCLUSION

37 Allow me to conclude. An efficient criminal justice process serves substantive and not merely procedural ends. An endless inquiry into the facts dilutes the law's

deterrent and rehabilitative functions. Offenders cannot be rehabilitated if they refuse to accept that they have been justly punished, and the law would lack the certainty and immediacy needed to deter if would-be offenders believe that they will have infinite chances at re-litigation. Public confidence in the criminal process will also give way to “an entrenched culture of self-doubt” engendered by limitless attempts to reopen concluded cases.

38 It is evident from recent developments that there is no lack of will on the part of the various stakeholders to see the fruition of a criminal process that is more efficient and just. I invite all of us present to partake in the move towards more timely case resolution – and ultimately, a more meaningful and holistic conception of criminal justice.

Thank you.