

INSAF CROSS-EXAMINES G. SRI RAM AND KARPAL SINGH*

Insaf : If we could start by asking whether you have any comments on the Prosecutor's right to certify a particular matter as being a security matter?

Sri Ram : Even if a certificate is issued the ordinary criminal law would continue to apply. Assuming a person is being tried for murder, in the opinion of the Attorney General it affects the security of the Federation, then he can of course certify and as the law presently stands that opinion has been classified judicially as a subjective opinion.

Insaf : You said that the Courts have not permitted challenge of the subjective discretion of the Attorney-General to certify. Have the Courts said that they will not review the discretion?

Sri Ram : The courts have not said they will not review it. It is not so much whether they want to review it or not. It is conclusive. Before you come to reviewability you must deal with classification. There are certain words – as a matter of language – that have necessarily to be given a subjective approach.

In *Tameside*, I think, Lord Wilberforce said there can be classification by language in such a way as to exclude judicial review.

But in *Labour Department v Merrit Beazeley Homes*, the New Zealand Court held that "in the opinion of the Governor General" meant an objective opinion.

Karpal Singh : I think you have got to get to the root of the problem. The right to certify a security trial is there under the Essential Security Cases Regulations and even if that criteria is made known I think that won't solve the problem until the courts are prepared to say it is not conclusive and go beyond what the Attorney General certifies.

Insaf : Does that mean that the Court is the place to look to, for reform. If the Judges are prepared to say that the Attorney General must come to court and explain why he has certified the matter and what factors he took into account for the court to examine them on an objective basis – then there would be hope. Is that what you are saying?

Karpal Singh : Yes. But we would soon be confronted, I think, by the provisions of Article 145 of the Federal Constitution, the discretion to institute proceedings being used solely by the Attorney General.

**Desiring to ascertain first hand the state of the administration of criminal law three members of the Editorial Board of Insaf conducted a wide-ranging interview with two distinguished members of the Bar who have considerable experience in criminal work. Ahmad Moosdeen, Darryl Goon and I conducted the interview. Both practitioners were very frank in their responses thereby ensuring a lively dialogue. On behalf of Insaf I wish to thank Sri Ram and Karpal Singh for generously sharing their experiences with us.*

Editor.

- Sri Ram : Karpal's objection is one. Article 145 is another. There is yet another constraint. Suppose the charge specifies theft. Theft by itself is not a security offence. What if it specifies theft of microfilm from Special Branch Headquarters. Does the Attorney General have to provide grounds to say that that is a security offence? The charge on its face should put the court on notice that it is a security offence so that the bona fides of the Public Prosecutor should not be called into question. But suppose the charge does not make it obvious e.g. murder. Murder by itself is not a security offence. It is primarily a public order offence. Assuming that the murder has taken place in a restricted area where classified information can be obtained and the murder occurred in circumstances which give rise to the national security being threatened, then of course it is a security offence. So it depends on the circumstances of each case.
- Karpal Singh : That is if the Attorney General is required to supply particulars – he is not required at present. His certificate is conclusive.
- Sri Ram : My own view is that the provision requiring certification is a good provision, and whether the Attorney General is to be called upon to give reasons should vary from fact pattern to fact pattern. The Nation's security is no doubt always paramount. In the recent *GCHQ case* in England – the right to be heard was held subordinate to national security. That is why the legitimate expectation of the civil servants to be heard was "overreached" by national security. Under those circumstances, let us say, a murder takes place in the GCHQ and revelation of the circumstances under which the murder had taken place would involve national security, would you expect the Attorney General to set out the criteria? I don't think so.
- Karpal Singh : Not by way of the essential regulations, I don't think we can support the regulations in the first place. If at all, it should be under the general discretion given under the Constitution.
- Sri Ram : With respect, Karpal, Article 145 does not give the Attorney General the power to certify.
- Insaf : The Attorney General's right to certify is derived from another source isn't it?
- Sri Ram : That's right – THE ESCAR. Article 145 merely empowers the Public Prosecutor (the Attorney General) to institute, carry on or to discontinue proceedings. That is all. With respect to the Privy Council decision in *Teh Cheng Poh* Lord Diplock had the English A.G. in mind when he was considering our A.G. The English A.G. is a creature of history. He is not a creature of statute. Here our constitution is just like the Bible. The

Bible says "Let there be light and there was light". Our Constitution says: "Let there be a parliament" and there was a parliament, "let there be a cabinet" and there was a cabinet. Likewise "let there be an A.G." and there was an A.G. Therefore the powers of the A.G. must necessarily be circumscribed by the supreme document that created him.

Karpal Singh : The A.G. is also not responsible to Parliament. He is neither responsible to the courts nor to Parliament. Therefore, you find him so arrogant and powerful.

Sri Ram : You must be more forgiving here although I too feel quite strongly about this. I am not given to extreme views. The Lord President in a recent case called *Zainuddin* which I believe is reported in the CLJ 1986, said that the A.G. will be answerable to the government. That is hardly answerability. He is answerable to the Cabinet if he is a politician; that is also not answerability. If he is a civil servant he will also be answerable to the Legal and Judicial Service Commission and anomalously he is a member of that commission. It is embarrassing to question the A.G. as to his own conduct in a service matter. Surely we must have something similar to the USA System. They have a Senate Committee on the Justice Department. The Justice Department is headed by the A.G. and if the A.G. does anything wrong, then the Senate Committee can question him. Take Clive Ponting's trial in the UK for example. The A.G. was very severely criticised in Parliament for the acquittal. It was said that it was a waste of state funds to have prosecuted Ponting. In this country too answerability would have been there. In the present situation in theory, there is answerability and accountability but whether there is in practice or not the public does not know. That is the grave complaint I think Karpal was talking about.

Insaf : The right of prosecution to select offences to charge an accused under various statutes is often criticised. Are we right to say that the criteria when one statute is selected by the A.G. is never made known? Is the present position satisfactory, if not why?

Karpal Singh : Certainly not, but then they revert again to Article 145. The courts are not prepared to go behind it. Unless the courts are prepared to go beyond *Teh Cheng Poh* and the other cases, then you can't question the discretion of the Attorney General.

Sri Ram : In India the prosecution is reviewable but we must understand that in India the system of prosecution is different from ours. In the second question you are asking whether the criteria should be made known to the accused. That is a very important question. In the case of *Johnson Tan*, Suffian LP asked whether a man who had an arms licence which has expired and is found with a gun, is to be treated in the same way as another

- man who has murdered many people and against whom it is very difficult to get any evidence. Again, do you classify these 2 people in the same way as a third person e.g. who has merely committed one robbery with a gun or discharged a firearm in the course of it? The point is, actually quite simple. One looks at the purpose of legislation. If we look at the long title of the ISA it speaks of organised violence, subversion and terrorism. Now, as long as those criteria are absent, then, there is no justification to charge a man, who possesses a firearm, under the ISA.
- Insaf : But the courts have not gone that far – that is the problem, isn't it?
- Karpal Singh : In fact, in *Johnson Tan* itself – Section 57 does not say “subversive person.” All it says is “any person”.
- Sri Ram : And the courts have not read the long title into the interpretation.
- Karpal Singh : Ultimately it is the courts. They are not prepared to go beyond the written law.
- Sri Ram : With respect, there is nothing wrong with the written law. The three laws can co-exist harmoniously if they are applied correctly.
- Insaf : It seems that the Courts have forgotten that they stand between the executive and the individual in this matter
- Sri Ram : Mind you I think that is going too far. Are we doing something that has never been done before and are the Courts interpreting the law without any body of authority in support? I don't think that is correct. If you look at the Supreme Courts of USA and India, in the early days they interpreted their own security legislation in the way in which we are interpreting it now. It is only recently that there has been a swing to a more liberal interpretation.
- Insaf : Perhaps, it is still in the early days of our nation's history
- Sri Ram : This is common in any country with a written constitution because one is feeling one's way around. Perhaps it is a question of judicial impression. Today a bench may think that something is ultra vires but tomorrow another bench may say that under those circumstances it is not ultra vires. One tries to do one's best when faced with a rough and ready situation. You can't say that our courts have given it an illegal interpretation.
- Insaf : I don't think we went that far!

- Sri Ram : By “illegal” I mean without legal basis. That is to say, an interpretation which is unsupported by authority. But if you ask me whether it is in keeping with the times then I must say No.
- Karpal Singh : As a matter of common sense for example, the ISA states “any person”, it does not say “any subversive person”, must you not read that section in the light of the long title to the Act?
- Insaf : The Act does not make that distinction, does it?
- Sri Ram : The long title governs the Act. One would hardly find a person being charged under the Sale of Food and Drugs Act for having sold morphine without a licence. The man would be charged under the Dangerous Drugs Act. Why? It is obvious that they go by the long title to the Act.
- Insaf : Can we take it that both of you, at least, will continue to try and get the Courts to interpret these statutes in the way that you have both suggested?
- Sri Ram : Of course, we will; we are not discouraged.
- Insaf : Would you agree that the essence of the matter is to make the A.G. accountable?
- Sri Ram : Yes, to make the office of the PP give reasons to substantiate why it chose to act in a particular way in a particular set of circumstances.
- Karpal Singh : Certainly. I think the only way to achieve is that is to initiate legislation to that effect.
- Insaf : Alternatively, to keep applying to the courts? Legislation does not seem to be a real or practical possibility.
- Karpal Singh : Yes, but the Courts are reluctant to overrule their earlier decision even if they are convinced that they were wrong.
- Insaf : You are not as optimistic as Sri Ram is?
- Karpal Singh : Not as things stand.
- Sri Ram : It is not a question of optimism or pessimism. It is a question of the impression you make on the minds of the individual judges. After all judges are human beings. As I said before it is a question of impression.
- Karpal Singh : We must be realistic at the same time.
- Sri Ram : Yes. Realism also depends on the circumstances in each country. Assuming you are asked to decide on the issue as to whether apartheid is right or wrong in South Africa. Of course the South African judge will uphold it although objectively it is wrong. If you ask a white South African judge on legal points

or on a juridical basis to uphold apartheid he will give you excellent reasons. The other way of looking at it is to consider whether the argument itself lacks content. This is a matter of judicial philosophy.

Insaf : Gentlemen, could we turn to another subject. What are your views on the submissions of prosecuting counsel often made in a trial on the type of punishment that bench should mete out after an accused has been found guilty? Do you think this practice should continue? If not, what would you suggest bearing in mind the practice in other countries.

Karpal Singh : I don't think we can deprive the prosecution of its right to submit on punishment. The defence has as much a right to submit.

Sri Ram : It would be a breach of natural justice. I don't see anything wrong there.

Insaf : What of the prosecution's right of appeal which is not present in some countries. Why was it introduced?

Karpal Singh : I had a case in Alor Setar. The woman was acquitted in a drug trial and the prosecution appealed. Justice H.S. Ong held in delivering the judgment of the Federal Court that they did not have a right to appeal despite the amendment to the Act. He was overruled subsequently by another panel of the Federal Court.

Sri Ram : That was a jury's case.
Justice H.S. Ong said if you look at the CPC the jury's verdict is final and there is no appeal. The word final means no appeal. A "verdict" was not covered by the word "decision" in Section 58.

Karpal Singh : The subsequent case was not a jury trial.

Sri Ram : Yes, and they went back.

Karpal Singh : That would not have affected a jury trial and I thought they would have made the distinction there.

Sri Ram : I would have thought that at least in jury cases there should be no right of appeal for the prosecution after an acquittal, the principle being that the man has been judged by his peers to be innocent and that should be the end of the matter.

Insaf : But in the Malaysian context do you think the prosecution should have the right of appeal?

Sri Ram : From the subordinate courts, most certainly.

Karpal Singh : That's right – but not from the High Court.

- Insaf : Why, most certainly from the lower courts?
- Sri Ram : Some of the acquittals are so obviously wrong. At the close of the prosecution case there is evidence and no serious contradictions. Yet the Magistrate has acquitted. I think it is in the public interest that the PP should have the right to appeal in such circumstances. On the other hand even in subordinate court matters appeals should be few and far between. Look at the A.G.'s references which have now been introduced in the UK. How many do you get? 1 or 2 a year despite the encouraging words of the Lord Chief Justice. He said more references should come. Despite that, the A.G. is very cautious in exercising the right of reference.
- Karpal Singh : It is different here. The A.G. seems to have given some sort of directive that in all acquittals there should be an appeal.
- Insaf : That supports the view held by the Criminal Bar. From your experience do you know of any case where you have got a person off on an acquittal and the prosecution did not appeal?
- Karpal Singh : In most cases he has appealed although after the grounds are written it is withdrawn. But as a rule I think there is a directive to appeal in all cases.
- Sri Ram : Sometimes the oral grounds given by the magistrate or trial court are either very sparse or sketchy or are so obviously wrong that it would tempt anyone to lodge a notice of appeal. But, the written grounds sometimes don't tally with the oral reasons. You look at the written grounds and of course you discontinue the appeal. But I have come across cases where there was an acquittal and there has been no notice of appeal lodged.
- Insaf : Do you think it is proper for the A.G. to be a member of the Pardon's Board?
- Karpal Singh : Certainly not. You see when the Constitution came into effect after independence, we had an A.G. who was also Minister for Law right up to the present A.G. It was never in fact imagined that the Minister for Law and the A.G. would be the PP. It was always the Solicitor-General who dealt with the work of the Public Prosecutor. So for the A.G. to have sat all this while on the Pardon's Board was quite understandable because his position was analogous to that of the Home Secretary, I think, in England. Because he had nothing to do with prosecutions, and his sitting on the board by itself was not that objectionable (although, of course, putting in a report behind the back of the accused would still have been objectionable). Now, we have an A.G. who is the Public Prosecutor, who demands in fact that a person be charged e.g. by a certificate or otherwise for any offence attracting the death penalty. He signs the

consent. His DPP asks for a deterrent sentence or capital punishment even assuming that there is an alternative; so how can he then sit on the board? It is expecting clemency from an executioner! That's my view. I think the Constitution certainly requires to be amended.

Sri Ram : I think basically one has to look at this from the point of view of Administrative Law. Should a person who has already formed a view on the matter participate in a subsequent decision on the merits. I think the answer to that from a string of cases is, no. It begins with *Dimes v Grand Junction Canal*. One would hardly have thought that Lord Cottenham would have decided the case in the way he did because of the few shares he held in the Grand Junction Canal Co. Yet his decision was struck down.

I disagree with Karpal on the constitutional aspect. The A.G. has always been the PP. There was a Minister of Justice. The A.G. was of course the Minister for Law. We must not forget that Tan Sri Kadir, who was a political A.G., signed the certificate which sent a 14 year old boy to trial. He was also a member of the Pardon's Board. Of course he corrected it immediately. Historically Karpal, I think you got it a little wrong. But for practical purposes I agree with Karpal that when the A.G. was a politician the Solicitor General took the brunt of the prosecution.

Insaf : Should it depend on the personality of the office-holder or the office as such?

Sri Ram : This is of course the crux of the whole matter. I think the framers of the Federal Constitution thought that the Pardons Board, which was advising the Ruler, should have a lawyer on it. But the reviewability question never arose except in one case, the Johore Pardon's Board case which was thrown out in 1968 by Justice Ali Hassan because of the prohibition against the granting of injunctions against Government.

Insaf : Owing to the wording of the Federal Constitution, viz. that the A.G. "shall be a member of the Pardon's Board" it is not surprising to find the Courts ruling that the A.G. is entitled to sit on the Board. What is however surprising is the Supreme Court's decision in Sim's case because the Supreme Court could have easily held that just as the A.G. has an express constitutional right to be present an accused has an implied constitutional right to be present. In other words the Courts could have relied upon the numerous natural justice cases to hold that an accused has a legal right to be legally represented before the Pardon's Board.

Sri Ram : That argument of course has been severed at its jugular vein, as it were, by the answer that mercy begins where legal rights

end. So where your legal rights are at an end and one talks of clemency and mercy then the right of representation, etc. become issues of morality only.

- Insaf : But is not the answer to the comment that mercy begins where legal rights end that the legal rights in such situations do not end until the accused's case is put before the Pardon's Board and that for that purpose he should be represented by counsel, especially having regard to the A.G.'s presence in the Pardon's Board?
- Karpal Singh : Not only that, I think Article 5 (1) must be read into Article 42.
- Sri Ram : Not only Article 5 (1); more important than that is Article 8; equality before the law. Justice Bhagwati, as he then was, in *Ajay Hasia* said that the brooding omnipresence of Article 8 pervades the other provisions. So whenever you are talking of procedure it is a question of fairness. The concept of fairness must find its place throughout the constitution. You are quite right, that that is a complete answer but unfortunately that argument has not been advanced before the Supreme Court.
- Insaf : We thought it was advanced in Sim's case. With respect, it is no use giving the analogy of mercy because there is a constitutional right to go to the Pardons Board and an accused cannot be executed before the Pardons Board meet. The argument should be that when the Pardons Board meets the A.G. is there; therefore the accused should equally be present.
- Sri Ram : Let's transpose it this way; assuming you are correct then when must the challenge take place? Must it take place before the Pardons Board meets or after it has met? Can it be taken after it has met? If it is before it meets that presupposes that you have a right to be informed when it meets.
- Karpal Singh : If the challenge is subsequent, I agree. But if you put in something before that are the courts to say no, we cannot entertain the application?
- Sri Ram : Yes, because you are challenging the prerogative. The courts have already classified pardon as a prerogative.
- Insaf : If we accept the proposition as it stands now – it is outside the realms of legal challenge – is there any ground for supporting the policy decision of having the A.G. in the Pardon's Board?
- Sri Ram : You must remember that the Constitution can, and has, permitted this and that is the end of the matter.
- Insaf : If we can discuss another subject, practice and procedure. Is the present criminal procedure, when looked at in totality, fair to the accused?

- Sri Ram : It depends. There are parts of the Criminal Procedure Code itself which are not entirely satisfactory e.g. Sections 418 A and 402 A.
- Another problem area is Section 113 of the CPC relating to cautioned statements.
- Insaf : It therefore seems that as the CPC stands now there are 3 or 4 areas where the net result is that there is an unfair procedure.
- Sri Ram : I won't say unfair procedure. I would say unsatisfactory procedure from the view point of both the accused and the State.
- Karpal Singh : I think 402A is very, very unfair.
- Sri Ram : I won't say unfair only. I would say harsh. A very harsh procedure.
- Karpal Singh : I think something should be done to remedy the situation. I think the Bar Council should bring it up to the A.G's Chambers to seek an amendment so that courts can extend time on receiving alibi evidence.
- Insaf : Should our statutes contain presumptions e.g. the Drugs Acts, where they provide that if you have over a certain amount of drugs it is deemed to be trafficking?
- Karpal Singh : Certainly not where it involves the death penalty – for that matter in any criminal matter.
- Sri Ram : Well, there I must respectfully disagree with Karpal. I think presumptions have a very important place to play in drug offences. It is very difficult to prove that a man is a trafficker. I am afraid that unless you have presumptions you will not be able to, in the public interest, establish that the man is a trafficker.
- Insaf : Would you say there is an overuse of presumptions to cover up executive limitations in their investigations of crimes?
- Karpal Singh : Yes.
- Sri Ram : With respect, Karpal, the presumption of knowledge exists even in England. If you look at *Sweet v Parsley*. Of course, in England, there is a cut-off point.
- Karpal Singh : Yes, but in England they don't have the death penalty. Here you will be executed; we don't have a jury. The judge decides and that is another disadvantage.
- Insaf : So one should have regard to the severity of the punishment when applying presumptions.
- Karpal Singh : I should think so. A man's life is at stake, surely there is prejudice. Also there is no jury.

Sri Ram : I don't know if there is prejudice by there being no jury; you could also be prejudiced because there is a jury. But in drug cases you must look at the problem and see how the Executive and the Legislature are trying to solve it. When were the presumptions introduced?

The Dangerous Drug Act has been with us since 1952. Now, when were these amendments put in? Between 1978 and 1984. They didn't come in one go. They came in bits and pieces.

Why was that? The reason is because the peddlers of slow death were getting away because the law was absolutely helpless.

I think they should leave it to the accused to rebut the presumption in the ordinary way in which we have all been rebutting presumptions.

Insaf : In the Barlow and Chamber's case, did the presumption play an important role?

Karpal Singh : Oh yes, because the drug was found in the bag and that too not even in a concealed compartment. The presumption arose against the person carrying it. It was my client but the bag belonged to the other accused and the latter said that my client must have put it there.

Sri Ram : The great difficulty here is not only the written law but also the common law. We all run into the "seen and heard" wall when dealing with appeals. The answer is simple. We must use the video equipment in K.L. Let all courts have it. Video tapes now come in the form of little cassettes. Record the whole of the evidence, play it to the appellate court and the "seen and heard" rule matters no more. In my opinion, the "seen and heard" rule has been the cause of graver injustice than any presumption in any written law.

If you have a video tape recording of — not all the witnesses — of the important witnesses then any reliance on demeanor becomes academic.

Insaf : Perhaps we should make use of all these new technological advances. It has equal force in civil matters because you have the same "seen and heard" rule.

Sri Ram : I agree.

Insaf : Should trial by jury be extended generally to all criminal cases or should there be greater use of jury?

Karpal Singh : At least in capital cases — certainly. Perhaps, not in all cases. At the moment it is used only for offences under the Penal Code and the Kidnapping Act.

- Insaf : Can we assume when you say capital cases you would include all the ESCAR and security legislation where there is this certificate?
- Sri Ram : Why should we leave the guilt or innocence of a man in the hands of 7 people who may not correctly understand their solemn oath and who don't have to give reasons at all?
- Karpal Singh : No Ram, I think the judge there also has a discretion doesn't he – not to accept a verdict which is guilty by a majority.
- Insaf : Sri Ram, why are you opposed to trial by jury?
- Sri Ram : Because I believe in the principle that if a person adjudicates on the guilt or innocence of a human being, he must give reasons for that. The jury system forbids the giving of reasons. Now that is wrong. If a judge tries a case by himself he is hard put to explain why he came to those conclusions and if any of his reasons are wrong they are open to attack in an appeal.
- Insaf : What of the half-way house of Assessors who have to give reasons?
- Sri Ram : No, I think Assessors are really a waste of time. I think we either have a jury in the sense as Karpal says or you agree with me and say that there should be no jury.
- Karpal Singh : Well, the jury consists of 7 men (or women) to try on facts and so forth. I think they will be in a better position than a judge.
- Insaf : Let us move to another topic – Should the High Court have the power to call up cases on revision?
- Karpal Singh : I should think so. It should have the power but I think only in extreme cases instead of just calling up as some judges do. Where there is a manifest miscarriage of justice I think there should be power and there can be cases where if you have an inexperienced magistrate doing a wrong – the decision being against the weight of evidence. The power should be exercised with caution. The power should be there. I don't think we can overcome that. After all there are not many accused persons who can appeal or know they can appeal and if through newspapers or otherwise, Judges come to know that there is manifest miscarriage of justice then I think they should be given the power to call up cases for revision.
- Sri Ram : That is what all the decided cases say – you must act with caution. I think the powers of revision should be used only where there has been a miscarriage of justice. I think in questions of sentence, there should be no revision – because

sentence should be a matter for the bench unless the sentence is so appalling and wrong. I don't think sentences should be tampered with.

Insaf : Do you think judges are calling up with caution or is there a lack of caution in the exercise of this power?

Karpal Singh : Actually very few judges call up matters for revision.

Sri Ram : I agree. I think in every area except Kuala Lumpur, the number of cases that have been called up for revision are very few. I think the number of cases where sentences have been enhanced, acquittals have been reversed with convictions following and juvenile court decisions being interfered with are increasing in Kuala Lumpur. I suppose I am very conservative in these things. I believe in looking at the established principles of sentencing and applying them to the facts of each case. One man cannot change the code of behaviour of society overnight and whether we call it pin-prick sentences or we call it parang sentences it is not going to change society. You must also take into account the crowded prison cells and the background of the accused. If every case is highly prevalent and every case is a case in which public interest requires heavier punishment then I am afraid we might as well look at the penal code more carefully and start putting mandatory minimums. It's wrong and the sad part is that there is no right of appeal to the Supreme Court.

Insaf : Is there a time limit for this revision?

Sri Ram : No.

Insaf : In other words you could have a situation where the time limit for appealing has lapsed and there is no appeal by either side, and then the High Court Judge calls it up on revision and enhances sentence from 3 weeks to 4 years and there is no appeal thereafter?

Karpal Singh : That is quite right.

Sri Ram : For all you know it may have happened.

Karpal Singh : Except of course if it is by reference as a point of law under section 66 of the Courts of Judicature Act, but only if it is a question of law.

Sri Ram : You really cannot apply by reference under section 66 in respect of sentences being enhanced by revision.

Insaf : Should an appellate court have the power to enhance sentence?

Sri Ram : Yes. Because otherwise you may find that a man has got 3 previous convictions and a very young and inexperienced magistrate gives a very light sentence.

- Insaf : Are we therefore right in saying that you would be in favour of a right of revision but with an automatic right of appeal on part of the accused?
- Sri Ram : I think not only an automatic right of appeal but in every case where a High Court reverses a trial court whether it is one from conviction to acquittal or from acquittal into conviction or varies the sentence it must give reasons and written reasons why the Judge reversed it and there must be a right of appeal. If not a right of appeal at least there must be provision for leave to appeal to the Supreme Court. The judge should be given the discretion to grant the leave and if he refuses leave, the accused should be allowed to go up to the Supreme Court to apply for leave.
- Karpal Singh : I think appeal should be automatic instead of through leave.
- Insaf : What sort of conditions would have to be satisfied before leave is granted?
- Sri Ram : Leave to appeal is different from certifying questions of law.
- Insaf : You would still want to have a vetting exercise?
- Sri Ram : Of course, otherwise the Supreme Court would be burdened by subordinate court appeals.
- Insaf : Talking about the Supreme Court – what are your views about the conduct of criminal appeals in the Supreme Court bearing in mind the popular complaint of practitioners that the Supreme Court hurries counsel in their 4 day – 5 day sitting where they dispose of 25 to 30 cases.
- Karpal Singh : I don't think they really hurry counsel.
- Sri Ram : Any body who complains about the Supreme Court should really go and spend some time in the Court of Appeal in London hearing criminal appeals. Talking of making short shrift of arguments I have never seen any court treat arguments with such a lack of courtesy to counsel and the accused as the Court of Appeal, Criminal division or the Court of Criminal Appeal as it used to be. You can't blame them because they are hearing criminal appeals every day. I think they have come to a point that they have seen so many hopeless appeals, they just simply assume that the next one is also a hopeless appeal.
- Karpal Singh : It is different Sri Ram when it comes to the death penalty.
- Sri Ram : Well I agree there is no death penalty in England.
- Karpal Singh : That is what I am saying, it is different there.
- Insaf : What about the Malaysian position bearing in mind that the Supreme Court is the final court of appeal and that the death penalty is often handed out as a sentence.

Sri Ram : You are talking about the Supreme Court dealing with the death penalty – a case of death penalty on appeals. Have you seen the Privy Council in action dealing with appeals from the West Indies on death penalties? You know that death penalties exist in the West Indies. I have seen an appeal – a murder appeal argued from Jamaica. In 20 minutes, I think it was 20 minutes or half an hour they put counsel in such a position that he could hardly move. They gave him hardly any place to move. Every 2 minutes there were questions being asked and it was very difficult to get leave.

Karpal Singh : But that is the third tier which we don't have here.

Sri Ram : With respect in the West Indies it need not necessarily be a third tier because in the West Indian system of appeals you appeal to the Court of Appeal on a criminal appeal in the criminal jurisdiction of the Court of Appeal by leave. And if the Court of Criminal Appeal refuses leave then you go by special leave to the Privy Council. So the Privy Council is sometimes the Court of first appeal.

Karpal Singh : It is quite different in Malaysia. The accused is present and he finds his appeal being dismissed within half an hour without reasons being given. I think that is quite pathetic really, surely one who is sentenced to be hanged would want to know the reasons why he is sent to the gallows.

Sri Ram : Well, I have seen corams presided by the Chief Justice, Malaya. I haven't had the advantage of listening to criminal appeals argued before other panels but I have certainly had the advantage of hearing our Chief Justice presiding over panels in Ipoh and Penang. The appeal lasted the best part of an hour but really it was all on facts and at the end of it they called on the Deputy Public Prosecutor to support the conviction and he argued the point. At the end of it the Chief Justice in a very short but clear judgment gave reasons why the appeal was dismissed. I think it depends on the presiding judge.

The other day for example I argued a matter on the Constitution and on sentence. They dismissed the appeal and when it came to the question of sentence the Lord President was at pains to explain why they thought they would not interfere with the sentence.

Insaf : Sri Ram, you have encountered occasions when the Supreme Court gave reasons when dealing with criminal appeals?

Sri Ram : I have seen them giving reasons though I have not argued all the appeals.

Insaf : Your experience seems somewhat different, is that not so Karpal?

- Karpal Singh : There have been cases during the days of the Federal Court where no reasons were given and I think it is most important that reasons be given. The Supreme Court is more careful now. Invariably reasons are given now.
- Insaf : So you would like to see, especially in cases where there is capital punishment, that reasons are given in criminal appeals.
- Karpal Singh : Not only reasons, I think judges should retire for a while. At least give the accused an impression that the matter had been considered carefully. In fact, I have had cases where the accused had asked what were the reasons. It is difficult for us to really tell what the reasons are except to assume or speculate the reasons. It is better that they come from the Supreme Court itself.
- Sri Ram : You know in fact the practice in all the Supreme Courts; I mean the highest court in a country; the practice is always for a written judgment to be delivered, even if it is a short judgment.
- Karpal Singh : I think that should be so.
- Sri Ram : But not here though. I think in every case the Supreme Court should deliver a judgment.
- Karpal Singh : And there have been cases in criminal appeals involving the death penalty where the Public Prosecutor is not asked to reply. Of course there could be clear cut cases where a reply may not be necessary. But I think the impression given to an accused is important.
- Insaf : Even if they can't retire to give a formal judgment they should at least put in writing what is said and have it ready in one or two days time for counsel to show their clients.
- Sri Ram : Justice Raja Azlan Shah used to do that from time to time.
- Insaf : Is there any inconsistency in sentencing?
- Sri Ram : What do you mean by inconsistency – do you mean between courts or between accused or between cases?
- Insaf : We mean that similar offences should be treated similarly. In other words to avoid the situation where one accused is given 1 year's imprisonment for the theft of a bicycle by one judge and another accused gets 5 years imprisonment for the same offence by another judge.
- Sri Ram : To expect uniformity of sentences in a court or in all subordinate courts or between subordinate courts or between the High Courts, I think is unreasonable. In fact, if 3 accused persons are charged with the same offence, it is quite possible – in fact the cases show – they must be treated differently

and not the same way. Because for each person, the degree of participation is different and even if the degree of participation is greater the man may have a clean past record.

Karpal Singh : The ideal, of course, should be that there be consistency in sentencing. However, in practice there is inconsistency. Presiding officers in lower Courts tend to contribute to this inconsistency. To a young Magistrate imposing one third of the maximum sentence may appear to be fair although, of course, a custodial sentence should not be imposed on first offenders, generally. Experienced Magistrates, however, react differently having had the advantage of maturity and experience. Perhaps, one way of ensuring consistency in sentencing is for Judges of the High Court to act in revision so that there could be uniformity in sentences for similar offences. As for consistency in sentencing in the High Court, the position is more uniform. However, individual Judges do vary, and sometimes drastically in the sentences meted out. Some Judges' sentences are certainly drastic. Perhaps, efforts should be made towards uniformity of sentences in the High Court as the Supreme Court has no powers of revision in respect of decisions made by the High Court in its original criminal jurisdiction. Imposition of maximum sentences should be avoided. The necessary premium should be given to pleas of guilt.

Insaf : Should there be mandatory minimum sentences in our statutes?

Karpal Singh : My view is that there should be no mandatory sentences. Imposing a mandatory sentence infringes the separation of powers doctrine. Judicial power must, and should, remain in the hands of the Judiciary and not the Legislature. Any fettering of Judicial power would not be in the public interest. Judges, having had the benefit of experience, should be left to decide on a range of punishments, having regard to the facts and circumstances of individual cases without having the Sword of Democles hanging over their heads in the form of mandatory sentences.

Sri Ram : Mandatory sentences of any nature should I think be held unconstitutional. The attempt has been made and it has not been successful, possibly because the argument has not been found very attractive with the bench. Perhaps put another way it might

Insaf : Counsel may have a chance if the Official Secrets Amendment Bill 1986 is passed.

Sri Ram : If the past decisions are any barometer at all then I am afraid it is a foregone conclusion. Of course as you know in India it only succeeded after many attempts. Once again we go back to judicial impression.

Insaf : There is much talk about jail conditions and the fact that our jails were built in the 1950's and 1960's and therefore just not able to cope with the increased numbers of prisoners. Do you think the courts should take these facts into account in meting out punishment and hand-out non-custodial sentences instead?

Sri Ram : I think you are absolutely right. It is necessary for the sentencing judge to take into account crowded prisons. Unfortunately that argument has not been pressed with great vigour in this country and if it is pressed I do not know if it will find favour in many courts. But certainly I agree with you. I think this is a most pertinent observation you have made.

Social and legal reform is necessary, and I think perhaps it would not be a bad idea if Parliament enacted a law which actually regulated sentencing – that a Judge before passing any custodial sentence shall have regard to all the circumstances of the case including certain specific circumstances one of which should be the reform of the offender.

Karpal Singh : The Courts should certainly take into account the deplorable conditions in some of our prisons. Prisoners in Pudu are packed in cells necessitating inmates taking turns to sleep. Inhuman punishment should not be inflicted upon prisoners. Although they have a debt to pay to society, there should be due consideration given to conditions existing in prisons. Drug addicts should, perhaps, be detained separately. Wherever possible, custodial sentences ought not to be imposed. Resort should be had, perhaps, to welfare officers following up on the activities of an accused person. The Government should look into the feasibility of providing for 'open prisons' for those convicted of offences which are not serious. Opening up the large tracts of jungle land would be one way of putting certain types of offenders into good use. This would be in the public interest as well as in the interests of the offenders themselves.

Insaf : Have our courts handed out types of punishment which became popular in England in the early 70's e.g. community service orders? Instead of spending a year in jail you must clock say 100 hrs of community service. What this means is that you must go to your local Borough and they will tell you that you must clean the streets or you must go and work in old people's home.

Sri Ram : That will be a very useful way of doing it and the only we can do it is to bring in the concept of suspended sentences which exists in England. That was why the system was able to work.

Insaf : But has our court the power to give such sentences?

Sri Ram : No. they don't unfortunately.

- Insaf : Would you care to comment on the approximate number of statutes which imposes capital punishment as a sentence?
- Sri Ram : Well I can't tell you off-hand how many but can I give you just a few examples e.g. the several provisions under the Penal Code that carry the death penalty the offences outside the Penal Code – kidnapping for ransom, that is punishable either by life or death. We just had the first case of kidnapping where the death sentence has been passed – up to now it has always been life.
- Then we have the Firearms Increased Penalties Act and I think to discharge a firearm in the course of a robbery – that is punishable by death.
- Karpal Singh : It is death for possession or control of firearms or ammunition under the Internal Security Act. It is death or imprisonment for life for consorting with a person carrying or having possession of firearms or explosives under the Internal Security Act. It is also death or life imprisonment for offences relating to supplies under the Internal Security Act.
- Insaf : Has there recently been an increase in legislation providing the death penalty?
- Sri Ram : There has not been a sudden increase. The most recent one of course, has been the Dangerous Drugs Act. But you don't really blame Parliament for introducing the death penalty there.
- Insaf : Do you think there is any overlap of these statutes for the same offence or for the same fact situation?
- Sri Ram : There is no overlap between statutes imposing the death penalty for a similar type of offence. But there is overlap of statutory offences, identical or similar in nature, but carrying different punishments.
- Insaf : Do you think that the death sentences serve as a deterrent?
- Sri Ram : That is a very good question and unfortunately it is also a very difficult question. Murderers have been executed since time immemorial. Has it discouraged any one from committing murder?
- No.
- Murder is not necessarily a planned offence.
- Karpal Singh : The death sentence is not a deterrent. Statistics show this. In fact, even after the mandatory death sentence was introduced in April, 1983 for drug trafficking, there has been an increase in drug trafficking cases.

- Insaf : Can you share your experience about access to your clients who are in prison? Have you encountered any problems from the authorities.
- Karpal Singh : Generally, prison authorities have been most helpful in allowing me access to my clients. In fact, even on holidays, I have been allowed access. However, the facilities in prison for interviewing clients leave very much to be desired. Perhaps, the Bar Council should intercede so as to ensure a proper room with the necessary facilities is provided in prisons throughout the country.
- Sri Ram : The prison authority has been very free in allowing interviews, provided you made the appointment and give the prisoner's number or if you didn't have the number you give the name well in advance. You must remember there are many hundreds of prisoners.
- Insaf : When you say well in advance what do you mean?
- Sri Ram : 24 hours. Sometimes in urgent cases I have only given 2 hours notice. In some cases I have gone even without an appointment. I have had to wait an extra 15–20 minutes but I got to see the accused.
- Insaf : What about access to clients under detention by the police?
- Karpal Singh : In this area, unfortunately, the police are very unco-operative. Article 5 (3) of the Federal Constitution says where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and be allowed to consult and be defended by a legal practitioner of his choice. In 1975, in *Ooi Ah Phua's* case, the Federal Court ruled that the right of an arrested person to consult his lawyer begins from the moment of his arrest but that right cannot be exercised immediately after arrest. The Court went on to say a balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence existing against them. It was further ruled that the right should not be exercised to the detriment of any investigation by the police. The usual excuse given to exclude lawyers intending to interview clients during the time they are detained under Section 117 of the Criminal Procedure Code is that investigations are in progress. If the police have nothing to hide, I cannot understand why they should not allow counsel to see their clients during detention.
- Sri Ram : The police you know are not obliged to let you interview but I have had one or two interviews. They were not very satisfactory because when I wanted to talk to the accused alone 2 police officers; were around all the time. One of the things the

police want to do is to interrogate the prisoner. One has to weigh the matter in a balance. The police are entrusted to investigate the crime and to bring the criminal to book as quickly as possible. Otherwise society will lose faith in the policing system. Against that you have the right of the individual to have his lawyer visit him.

Insaf : Is detention under the ISA without a charge still frequently resorted to?

Karpal Singh : Detentions under the ISA without trial are not that frequent nowadays. However, the Government should not resort to such measures. Detaining a person without trial is a most serious matter. The Government should not use its power to detain its political opponents without trial. It is indecent to do so.

Sri Ram : I know we are all very critical of the Government but whenever we can, if they have done right, we must also stand up and speak for them. I can tell you something, no Administration has done as much for the liberty of the individual in ISA detention cases as this Administration.

Insaf : Is there any way of challenging an ISA detention successfully and do you know of any case where it has been successfully challenged?

Sri Ram : No, because all the cases in which the challenge took place were heard under the cloud of *Liversidge v. Anderson*. But there is no necessity now, because *Rossminster* was decided in 1981. The present administration took office in 1981. They released everybody except for a few hard core cases. So there has been no opportunity to test the matter in court.

Karpal Singh : The only way of challenging an ISA detention is through habeas corpus proceedings. In 1975, Datuk James Wong succeeded in his application for a writ of habeas corpus questioning the legality of his detention under the Preservation of Public Security Ordinance (Sarawak), 1962. The appeal against the decision of Seah J. (as he then was) was dismissed by the Federal Court in 1976.

Insaf : What do you think about the suggestion that the Attorney General brief private practitioners to conduct cases on behalf of the prosecution like in the UK?

Sri Ram : Yes, it is a very good idea. If nothing else it will ease the burden on DPPs who are now under tremendous pressure. If there is fear that counsel will discuss what is in their investigation papers then don't use them for the trial. Use them only for the appeal as the record is closed at that stage.

All you need to give the lawyer concerned is a brief instructing him together with the appeal record.

Karpal Singh : The suggestion is certainly worth looking into. The system has worked well in the United Kingdom. In my view, it could be in the public interest to brief private practitioners to conduct cases on behalf of the prosecution.

Insaf : Are you aware if the AG has instructed outside counsel?

Sri Ram : No.

Karpal Singh : Invariably, the Attorney General has instructed Queen's Counsel to conduct appeals on behalf of the Government in the Privy Council in the past.

Insaf : Do you think lawyers are reluctant to take on criminal work?

Sri Ram : I don't know. I have never met anybody who says he didn't want to do a criminal case.

Karpal Singh : Well, there are certainly some lawyers who are reluctant to take up criminal cases.

Insaf : Speaking personally, do you feel stress when preparing for a criminal trial especially in cases which carry death sentences?

Karpal Singh : The prospect of a death sentence being brought home to your client can certainly be unsettling. However, it is a matter of getting used to the situation and with experience the stress diminishes, although not totally.

Sri Ram : I must be honest about this. In my first few years of practice, yes. I used to feel some stress. Then I slowly began to realise that after all I was not the man who committed the crime and it was up to the prosecution to establish its case. In the first 2 or 3 years of your practice you will believe every thing your client tells you is the truth and that the police witnesses are liars. At the end of 3 years your disillusionment will have reached its peak and you will then come to accept that all your clients are liars and the police are telling the truth. At the end of about 10 or 15 years self realisation will dawn upon you that some clients tell the truth and other clients don't and some police officers are honest; and some police officers aren't. But there isn't any strain anymore.

Insaf : How would you prepare yourself before a criminal trial – would it be any different from preparing a civil matter?

Sri Ram : I find preparing a civil case more onerous than preparing a criminal case. Not only the interlocutory work; the amount you have to think around the case because you never know what little procedural point is going to pop up.

Luckily in criminal law the rules are fairly straight forward and as long as there is no prejudice to the accused I think the procedure we follow is not really important. Less paper work

in the sense that one does not have a go through masses and masses of pleadings. If you do a heavy commercial crime case, of course, it is very trying because you must know your documents.

Karpal Singh : Preparation in a criminal trial does not involve as much as it would in a civil matter. A criminal lawyer has to be sharp and be able to think on his feet. However, no doubt, every effort must be put into any trial, civil or criminal, to ensure success.

Insaf : We wish to thank both of you for taking time of your busy practises and generously sharing your thoughts and experiences with us.