OF POLITICAL INTRIGUE, QUESTIONABLE INTERROGATIONS AND INCREDIBLE ALIBIS

Dato Mokhtar bin Hashim & Anor. v. *P.P.*[1]

APPARENTLY something was rotten in the State of Negeri Sembilan. On April 14, 1982, the Speaker of the State Legislative Assembly, Dato Mohd. Taha was shot dead in a small town in Gemencheh and "a grim and gruesome tale" of political intrigue involving a Minister of the Crown was to emerge, worthy of a Shakespearean tragedy. Dato Mokhtar, the State's Chief Minister, (1st Accused) was charged with murder together with Messrs. Noordin bin Johan (2nd Accused), Rahmat bin Satiman (3rd Accused) and Aziz bin Abdullah (4th Accused) and the case was classified as a security case by a certificate issued by the Attorney-General. This meant that the case was triable by a single judge in the High Court, hearing and considering the evidence of both the prosecution and the defence as a whole and deciding upon guilt, having regard to the justice of the case, without regard to the technicalities of the rules of evidence or procedure.[2] However, both the prosecution and the defence apparently adhered as far as possible to the normal rules of evidence.

The rules of evidence and procedure that came up for consideration, at various stages of the proceedings, were many. The writer will, however focus on two particular areas of the law where it is felt that the case broke new ground and became authority for principles not adequately adumbrated in earlier cases. The case provides the lawyer with some fresh insights into the nature of the alibi defence and the scope of the "voluntariness" principle in relation to confessions.

The Progress of the Proceedings

The first important development in the 76-day trial was a "trial-within-a-trial" to determine the voluntariness of a cautioned statement recorded by the police in June 1982 from the 3rd Accused, Rahmat bin Satiman, and adduced by the prosecution. Hashim Yeop A. Sani J., being satisfied it was voluntary, admitted the statement.[3] Then, at the close of the prosecution case, His Lordship reviewed the prosecution evidence and found that a *prima facie* case had not been established against the 2nd and 4th Accused and so acquitted and discharged them without calling upon them to enter on their defence.[4] (An appeal by the Public Prosecutor against this ruling was subsequently dismissed by the Federal Court).[5] The trials of the 1st and 3rd defendants continued, both relying on alibi defences, but both were found guilty and convicted of murder.[6] Both appealed to the Federal Court, which allowed the appeal of the 3rd Accused and set aside his conviction and sentence primarily on the ground that it would be wholly unsafe to treat his cautioned statement as voluntary and that there was no other evidence against him. The

1 [1983] 2 M.L.J. 232.
2 This is the effect of Regulation 17 of the Essential (Security Cases) Regulations, 1975 (as amended by P.U.(A) 362 of 1975).
3 [1983] 2 M.L.J. 232, 248 ("Appendix A").
4 *Ibid.,* p. 254 ("Appendix B").
5 *Ibid.,* p. 270.
6 *Ibid.,* pp. 232-248.

appeal of the 1st Accused, however, was dismissed[7] and he alone was to pay for the crime. His sentence was subsequently commuted to life imprisonment through the exercise of the prerogative of mercy. Thus ended a tale that would go down in Malaysian annals as perhaps its most famous murder trial.

A. *The Voluntariness of the Third Accused's Cautioned Statement: "Oppression"*

After the trial had begun, the prosecution sought to admit a cautioned statement made by the 3rd Accused, Rahmat Satiman and recorded by one Acting DSP Bashir. In this statement, Rahmat implicated himself and the other co-accused. He had said that he had participated in the planning and preparation for the murder of Dato Taha and he was to collect from a bomoh incense for use on the fateful day so as to "weaken" Dato Taha; and that he had witnessed the 2nd and 4th accused and two others (not charged) pounce on him and tie him up so that the 1st and 2nd Accused could shoot him. When they left, he was "paid off" by the 1st Accused. It was clear to the trial judge that despite the case being a security case, the statement had to be voluntary in order to be admissible.[8] A trial-within-a-trial was held to determine its admissibility.

The 2nd Accused contended that the statement was a reproduction of what he had been coached to say by his interrogators as a result of pressure; that he was subjected to generally inhuman or degrading treatment; deprived of regular sleep, food and drinks; intensively interrogated for long periods and prevented from performing his prayers. The trial judge could not accept these allegations in the face of the prosecution witnesses' evidence to the contrary. He therefore ruled the statement to be voluntary and so admissible in evidence.

The trial judge had treated the question of whether the statement was in the circumstances, voluntary, as a question of fact. He stated[9] the test applicable thus:

> … the rule in Regulation 21(1) is that a statement should be excluded if it is shown or made to appear to the judge that the statement was not voluntary. It does not however require the defence to prove beyond reasonable doubt of [sic] the existence of threat, inducement or promise. A mere possibility that the statement was not voluntary is however insufficient to warrant its rejection but a probability that the statement was not voluntary would suffice to make the statement inadmissible. See also *Public Prosecutor* v. *Law Say Teck & Ors.*[10]

Later,[11] the trial judge went on to approve of the approach of Lord Hailsham in *D.P.P.* v. *Ping Lin,*[12] namely that the trial judges should

[7] *Ibid.,* p. 270.
[8] He based this view of the effect of Regulation 21 of "the Regulations" of 1975 (see *supra* n. 2), on the Federal Court's decision in *Johnson Tan Han Seng* v. *P.P.* [1977] 2 M.L.J. 66. His view was upheld by the Federal Court on appeal, in [1983] 2 M.L.J. at 272.
[9] *Supra,* n. 1, at p. 248.
[10] [1971] 1 M.L.J. 199.
[11] *Supra,* n. 1 at p. 253.
[12] [1975] 3 All E.R. 175.

apply the classic test of voluntariness of Lord Sumner in *Ibrahim* v. *R.*[13] in a common sense way to all the facts of the case and that:

> In the light of all the facts in their context, he should ask himself this question and no other: *"Have the prosecution proved that the contested statement was voluntary* in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority or … by oppression?"[14]

The trial judge thus appeared first to apply a test placing the burden of proof upon the accused to prove (on a balance of probabilities) that his statement was not voluntarily made, and later to approve a test placing the burden on the prosecution to prove the statement to have been voluntary! One must agree with Abdoolcader F.J.[15] (delivering the Federal Court's judgment), however, that the trial judge did in fact apply the first test, one which was more onerous to the accused, and which was clearly incorrect in law. The law of England and the laws of Malaysia and Singapore are uniform in requiring the prosecution to prove the voluntariness of a statement they adduce, and to do so beyond reasonable doubt. In citing *Public Prosecutor* v. *Law Say Teck & Ors.*[16] as authority for the contrary, the trial judge appeared to have misunderstood that case. Sharma J. in that case clearly intended the burden to be on the prosecution to prove voluntariness; for he spoke of the need for a magistrate recording a confession to be "satisfied" as to its voluntary nature; and that it was sufficient if it "appears" to the court that a confession was inspired by an inducement, threat or promise and that it was not necessary that it must be proved that it was so inspired.[17]

The Federal Court said that it was open to an appellate court to interfere with the finding on a question of fact as to the voluntariness of a confession if the finding had been reached without applying the true and relevant legal tests and consideration of relevant matters. Here, clearly, the wrong legal test had been applied.

However, the Federal Court added that there were other relevant considerations not considered by the trial judge: there was evidence of three specific inducements held out to him; of entries in the station diaries that seemed to substantiate the accused's story on his "intensive" interrogation and prevention from regular prayer; and of some pressure, from the testimonies of certain prosecution witnesses themselves. The trial judge had merely considered the specific allegations of the 3rd Accused himself.

What is more instructive is the broader picture of "systematic interrogation" and its possible effects that was addressed by Abdoolcader, F.J. in the Federal Court. He looked at the totality of the evidence and the facts and circumstances surrounding the interrogations, in order to reach the conclusion that the 3rd Accused's statement was not voluntary. He said:

> As to the long hours and odd hours of interrogation stated in the station diaries this would appear to be suggestive of oppression

[13] [1914] A.C. 599.
[14] *Supra,* n. 12, at p. 183 (Italics mine).
[15] *Supra,* n. 1, at p. 274 (column 2).
[16] *Supra,* n. 10.
[17] *Ibid.,* p. 200.

> within the definition thereof by Sachs J., in *R.* v. *Priestley*[18] which was adopted in *R.* v. *Prager*[19]. . . . We need hardly remind those involved in the interrogation of witnesses and accused persons that any methods adopted in the process outside accepted norms and standards must be able to withstand the test of strict curial scrutiny.[20]

This statement appears to be the first clear judicial endorsement in either Malaysia or Singapore of the so-called "oppression" principle. The Criminal Law Revision Committee (U.K.) in its Eleventh Report on Evidence,[21] stated that "oppression", as distinct from a threat or inducement, was a recent development[22] in the law, and was "now established as a separate ground of inadmissibility" of confessions. Indeed, the word "oppression" appeared in the Judges' Rules of 1964 and received judicial consideration in *Priestley,* where Sachs J. said:

> ... to my mind, this word in the context of the principles under consideration, imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary.... Whether or not there is oppression in an individual case depends upon many elements. . . . They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement.[23]

In 1968, Lord MacDermott described "oppressive questioning" as "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."[24] These definitions by Sachs J. and Lord MacDermott were adopted and applied in *Prager*[25] and approved by the Criminal Law Revision Committee. The Committee thus proposed[26] that the "oppressive treatment of the accused" should be a separate ground of inadmissibility of confessions.

In Malaysia (as in Singapore) the Evidence Act and the Criminal Procedure Code refer to confessions or statements to the police, respectively, caused by any "inducement threat or promise" proceeding from persons in authority.[27] It has been thought that these words had acquired through case-law, certain technical meanings and that persons in authority could employ certain subterfuges to elicit confessions in

[18] (1965) 51 Cr. App. R. 1.
[19] (1972) 56 Cr. App. R. 151.
[20] *Supra,* n. 1 at p. 273.
[21] Cmnd. 4991 (H.M.S.O., 1972), para. 60.
[22] See *Callis* v. *Gunn* [1964] 1 Q.B. 495, 501.
[23] (1965) 51 Cr. App. R. 1.
[24] Quoted by Edmund-Davies, L.J. in *Prager (supra* n. 19) and by the C.L.R.C.'s Eleventh Report *(supra,* n. 21).
[25] *Supra,* n.19.
[26] *Supra,* n.21.
[27] Malaysia: Evidence Act, 1950 (Revised, 1971) (Act 56), section 24; Criminal Procedure Code (F.M.S. Cap. 6 as amended, 1971), section 113(1) proviso (a)(i) {as substituted by Act A324, schedule, w.e.f. 10.1.1976). Singapore: Evidence Act (Cap. 5, Revd. Ed.), Reprint, 1982, section 24; Criminal Procedure Code (Cap. 113, Revd. Ed.), Reprint 198 section 121(5), proviso.

ways more subtle than these words could comprehend. Threats are clearly oppressive conduct, but there are other forms of oppression that are not necessarily encompassed by the statutory words. Police or other investigative agencies' methods may vary from state to state or agency to agency, but achieve the same end. Such methods could include long periods of interrogation, deprivation of sleep, "the cold-room treatment" *i.e.,* causing discomfort through lowering the temperature (as by excessive air-conditioning or a fast electrical fan where there is a scantily-clad accused), refusal of privileges, and so on. Most of these methods should fall into some category of "brain washing" techniques. There had been doubts[28] that the existing statutory words could cover such oppressive treatment or be so interpreted by the judiciary; and in Singapore representations[29] had been made to a Parliamentary Select Committee on the Criminal Procedure Code (Amendment) Bill in 1975 to introduce a further amendment to the statutory provisions to include oppression. Since no change to the law was thought necessary by Parliament, the judgment of the Federal Court of Malaysia is specially welcome. It must mean that in future cases "oppression" is to be treated as also encompassed by the statutory voluntariness principle.

In England, the first clear case of "oppression" on the facts since the Eleventh Report was that of *Hudson.*[30] Here, the Court of Appeal regarded the accused's answers to questions and written confession made at a police station inadmissible because the circumstances gave rise to a strong inference of oppression. The circumstances were:

i) the feeling of captivity starting with the police officers arriving at 6.30 a.m. at his house and arresting him;

ii) being taken to the police station and experiencing being a prisoner in a police cell (for 5 days and 4 nights);

iii) spending 50 hours of that time in the custody of police officers as he was always accompanied by a police officer outside his cell;

iv) being questioned for a total of 25 hours in that time, for periods of 2¼ hours each and being asked some 700 questions in all;

v) being an older man of 59 who had never been in trouble before; and

vi) the factor of "unlawfulness" as he had not been brought before a magistrate "as soon as practicable" (or within 48 hours at most).

In the instant case, Rahmat experienced similar oppressive treatment, Abdoolcader J. considering "the long hours and odd hours of interrogation" to be indicative of oppression within the definition of Sachs J. in *Priestley.* Rahmat's "elderly" age (he was 54 years old) and deprivation of prayer time could be additional factors, it is submitted.

The writer humbly submits that the Malaysian and Singapore judiciaries have in fact condemned "oppression" resulting in confessions,

[28] Thus, see the Report of the Select Committee on the Criminal Procedure Code (Amendment) Bill, Parl. 4 of 1976, p. B4 (column 8).
[29] *Ibid.,* at pp. A6, B4 (Harbajan Singh), pp. A18, B23 (V.S. Winslow).
[30] (1981) 72 Cr. App. R. 163.

even before this case, although they may not have used the term "oppression".

In a Singapore case of 1933, *Rex* v. *Santokh Singh,* Murison C.J. was of the view that a statement made to a magistrate could be excluded if the magistrate put to the accused a series of questions, so as to amount to "cross-examination." He said "cross-examination is a form of pressure" and that it was "a form of threat or inducement."[31] Thus judicial interpretation, it seems, can stretch the meaning of the statutory language.

However, in a later Singapore case, *Ong Hock & Anor,* v. *Rex,* McElwaine CJ. said that he could find no support for Murison C.J.'s proposition that cross-examination was a threat or inducement. "Unless Sir William Murison's remarks are confined to a bullying, badgering cross-examination tending to intimidate or confuse I am unable to accept them."[32]

More promisingly, in *Public Prosecutor* v. *Ramasamy,*[33] Callow J. in the High Court at Malacca addressed himself "most carefully to evidence as to the manner and mode of the interrogation of the accused," in order to decide whether a confession after "a protracted examination" by a person in authority was voluntary. He said:

> I have to ask myself whether the nature and conduct of this interview induced circumstances in which the accused spoke the truth . . . . Did his replies indicate remorse and repentance, or were they induced from any form of apprehension, from any reason of disinclination to anger his interrogators by adhering to his first denial which was obviously rejected, or even from any desire to terminate a painful interview?[34]

As the accused had at first denied the crime of rape but confessed when he was "pressed" to give answers, the interrogator often saying "Answer my questions", Callow J. ruled the confession inadmissible because "under the circumstances explained it could never be said to be free and voluntary". Callow J. said:

> I am forced back to the fundamental principle of criminal law — is there a reasonable doubt in respect of the credibility of a confession elicited after persistent interrogation following an initial denial? I think there is bound to be, and the accused must receive the benefit thereof.[35]

Here, then, is authority for "persistent interrogation" or a "protracted examination" of an accused being treated as an 'inducement'.

There seems to be some authority emerging from recent unreported cases in Singapore, for a broader reading of the statutory tests of voluntariness.

31 (1933) 2 M.L.J. 178, 179-180.
32 (1939) 8 M.L.J. 232, 235.
33 (1948-49) M.L.J. Supp. 12.
34 *Ibid.*
35 *Ibid.,* at 13.

In the "Mount Vernon double-murder" trial[36] in 1979, a statement of one of the three accused, Ong Chin Hock, was excluded in the High Court for being involuntary in spite of the fact that the accused had said he was "fairly treated" when giving it, simply because it was "extracted by intensive interrogation over a long period of six hours."[37] The court said that the statement could not be voluntary considering the circumstances and manner in which it was recorded.

Surely the circumstances had to be treated by the Court as "oppressive" even if the court did not say so in so many words.

Then, in the recent "Acid Attack" case of 1983, where a 57 year-old widow, Mary Jer Pereira, was charged with conspiring with another to throw acid on her daughter-in-law, the High Court learnt from a prosecution witness's testimony, of a prolonged interrogation and its attendant circumstances and persuaded the prosecution to withdraw two statements of the accused which it sought to adduce, which it did. The evidence of the police disclosed that the accused was interrogated for 20 hours before the police recorded a statement from her; she was given little opportunity to rest; her interrogation ended at 5.30 a.m. and she made her statement at six in the morning; she was in poor health and became sick during the interrogation; the team of officers questioned her continuously because they wanted to "break her"; and that she was constantly saying "no" to them but "she finally admitted."[38]

Had the prosecution persisted in seeking the admission of the statements in these circumstances, there is no doubt that the trial judge, Wahab Ghows *J.,* would have ruled them involuntary and inadmissible; for after hearing the evidence of Inspector Kumar, the investigating officer, Ghows J. said that he was satisfied a statement was taken from the accused after she had been "bullied and badgered" for almost 20 hours.[39]

There seems to be little doubt, in view of these cases culminating in the present one, that the courts of Malaysia and Singapore will treat any statement obtained under "oppressive" conditions, as involuntary.

In this context, it may be pertinent to consider what approach a court would take if it considered the circumstances not to amount to oppression. Would the courts be prepared then to consider if there is some element of "unfairness" which could call for the exercise of their discretion to exclude a statement made by the accused?[40]

[36] Criminal Case No. 33/78. The other two accused were Ong Hwee Kuan and Yeo Boon Ching.

[37] The Straits Times, May 17, 1979. (The trial judges were Choor Singh, J. (to whom the ruling is attributed in the report) and Sinnathuray, J.).

[38] The Straits Times, October 20, 1983, p. 9.

[39] The Straits Times, October 21, 1983, p. 11.

[40] The Criminal Law Revision Committee, in its Eleventh Report on Evidence (Cmnd. 4991 (1972) at para. 56) thought that confessions are excluded if involuntarily made, primarily because of the "reliability" principle. However, it has been judicially noted in *R* v *Sang* that a confession by an accused obtained by threats or promises is inadmissible as evidence against him "because to admit it would be unfair" ([1979] 2 All E.R. 1222 at 1237); and that evidence obtained unfairly could be excluded if the manner of obtaining it was analogous to unfairly inducing a defendant to confess to an offence, and so offended the maxim *"nemo debet prodere se ipsum" (R. v. Sang, ibid.,* p. 1229; *R.* v. *Payne* [1963] 1 All E.R. 848).

The existence of a judicial discretion to exclude relevant evidence if its reception would operate unfairly against an accused, has been acknowledged in Singapore.[41] In a recent English decision of the Court of Appeal, *R.* v. *Houghton*[42] Lawton L.J. said:

> Evidence would operate unfairly against an accused if it had been obtained in an oppressive manner by force or against the wishes of an accused person or by a trick or by conduct of which the Crown ought not to take advantage. It follows, so it seems to us, that when considering whether to exercise his discretion to disallow alleged confessions on the grounds of unfairness a judge has to ask himself what led the accused to say what he did.

In the case of *Hudson*[43] itself, the Court of Appeal of England was of the view that even if a statement was voluntary and not the result of oppression, it could be excluded if it was the result of unlawful detention which continued for a considerable period; for then the detention would have been "unfair". Thus, a detention for much longer than the constitutionally or legally allowed limit (now 48 hours in Singapore) without being brought before a magistrate could be so unfair as to make a statement made as a result of it, subject to exclusion at a trial judge's discretion. This, to the writer, would be a logical approach by a court.

B. *The Alibi Defences of the First and Third Accused at the Trial*

At the trial before the High Court of the 1st and 3rd Accused, Dato Mokhtar and Rahmat Satiman, the prosecution relied on circumstantial evidence, for there were no prosecution witnesses who actually witnessed the murder. Both the Accused relied on alibi defences, having duly given notice of alibi as required under the Criminal Procedure Code. Dato Mokhtar called 25 witnesses to support his alibi; Rahmat called 14. These witnesses included friends, ministerial officials and political supporters. In the end, the trial judge rejected the alibi defences of both accused, and stated that each of them had failed (on a balance of probabilities) to establish his alibi for that fateful night. Although he did not embark on a discussion of the law on alibi defences, it is clear that he placed the legal burden on both accused of proving their alibis, and regarded the establishment of the defences as turning entirely upon the credibility of the defence witnesses. In the matter of credibility, they were found severely wanting. In assessing the evidence of some of Dato Mokhtar's witnesses, for example, he drew attention to "the somewhat abnormal or unusual care and attention given to mention the exact times of arrivals and departures or the closing of functions" where these times were vital for the alibi. He regarded this as "contrary to ordinary human conduct in relation to memory of events long gone."[44]

The Federal Court agreed with the trial judge that, on the facts, the 1st Accused had not established his alibi, but found it unnecessary to consider the defence of the 3rd Accused as it considered his statement to the police to be inadmissible so that his defence ought not to have

41 *Cheng Swee Tiang* v. *Public Prosecutor* (1964) 30 M.L.J. 291.
42 *R.* v. *Houghton and Franciosy* (1979) 68 Cr. App. R. 197, 206.
43 *Supra,* n. 30.
44 *Supra,* n. 1, at p. 244.

been called at all. The Federal Court agreed with the trial judge's scepticism towards the remarkable recollection by witnesses of times material to the 1st Accused's alibi[45] and observed that the truth of the alibi was a question of fact to be sought by weighing the credibility of the alibi witnesses and not by the numerical preponderance of these witnesses.

It was contended before the Federal Court that the trial judge was wrong in placing the burden of proof upon the accused (appellant) when he raised the defence of alibi; and that all the accused needed to do was to cast a reasonable doubt upon the prosecution case. Citing Indian[46] authority, the Federal Court was firmly of the view that the burden of proof on the issue of alibi was on the accused, and felt that the wording of section 402A of the Criminal Procedure Code[47] supported such an interpretation. Another recent commentator[48] on the *Dato Mokhtar* case disagrees with the Federal Court's view. He contends firstly, that the decision of the Privy Council in *Jayasena,*[49] which establishes that the statutory general and special exceptions from criminal liability must be proved by the accused, would not regard an alibi defence as standing on the same footing because alibi involves an essential element of the prosecution case (presence of the accused) being in doubt so that the accused should be able to have the benefit of the doubt; and secondly, that section 402A could not have been intended by its draftsman to change the burden of proof by a mere procedural provision — as it is intended only to elaborate the procedure and particulars in relation to alibi notices.

This writer, with respect, cannot agree with the first contention. It is true that some previous Malaysian[50] and Singapore[51] cases have

[45] *Ibid.,* p. 280. Indeed, Wills observes that "the unblushing effrontery with which witnesses sometimes present themselves to speak to time, without regard to plausibility or consistency, is truly surprising" (William Wills, *The Principles of Circumstantial Evidence,* 6th ed. 1912, p. 283).
The 1st Accused's witnesses as to 'alibi' testified in support of his story that he had been at various places between April 8 and April 14 1982. As the estimated alleged time of the murder was 1.30 a.m. on the morning of April 14, the Judge considered "the vital part of his alibi" to be his whereabouts for the night of April 13 up to the early hours of April 14. The 1st Accused's story was that he had on that night been at Gedok, Gemas and Bukit Jalur returning home in Tampin at 12.40 a.m. on the 14th; and that he thereafter never left his home all morning, meeting ministerial officials at his home and so could not have been at Gemencheh at the time of the murder. For reasons that appear later, only his story of his whereabouts in this "vital part" of his alibi qualifies as being evidence in support of an 'alibi' defence. The prosecution on the other hand, had vital witnesses, (no strangers to the Accused) who could positively identify him as present with three of his co-accused at an estate 3½ miles from Gemencheh at about midnight; and could identify the white car (supposedly at the estate earlier at midnight) near the scene of the crime at Gemencheh at about 1 a.m.
[46] *Gurcharan Singh & Anor.* v. *State of Punjab,* 1956 SC 460; *Public Prosecutor* v. *Chidambaram & Anor.,* A.I.R. 1928 Mad. 791, 793.
[47] F.M.S. Cap. 6 (as amended by Act A324 of 1976).
[48] H.M. Zafrullah, "Admissibility of Relevant Evidence and Other Related Issues: Some Comments on the *Dato Mokhtar Case",* [1984] 2 M.L.J. xv at xxiii.
[49] *Jayasena* v. *R.* [1970] 1 All E.R. 219.
[50] *Public Prosecutor* v. *Mat Zain* (1948-49) M.L.J. Supp. 142, 144; *Shanmugam* v. *Public Prosecutor* (1963) 29 M.L.J. 125; Gui *Hoi Cham & Ors.* v. *Public Prosecutor* [1970] 1 M.L.J. 244. There is also a *dictum* that under section 103 of the (Malaysian) Evidence Act, only the evidential burden, or the "responsibility of adducing evidence" needs to be discharged: *International Times & Ors.* v. *Leong Ho Yuen,* [1980] 2 M.L.J. 86 at 87.
[51] *Liew Chin Seong v. Rex* (1952) 18 M.L.J. 236.

taken the approach of placing merely an "evidential" burden, (or burden of adducing evidence) on the accused, so that he had only to raise a reasonable doubt. This, no doubt, is English law.[52] However, it is submitted that these cases were erroneous if they assumed that the law of Malaysia or Singapore was the same as that of England. Section 402A by itself is not conclusive, as the introduction of the notice of alibi procedure in England in 1967, by section 11 of the Criminal Justice Act, 1967 did not alter the burden of proof there. However, it is submitted that the accused must bear the burden of proving an alibi (on a balance of probabilities) in view of a provision over-looked by the commentator and not discussed by the Federal Court either. This is section 103 of the Evidence Act (Malaysia). (The equivalent section in Singapore's Evidence Act is section 105). Section 103 reads:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration (b) thereof goes on to say:

> B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

Illustration (b) can only refer to what is better known as an alibi defence. A plea of alibi is not merely a denial of presence at the scene of the crime; it is the pleading of a new fact that one was somewhere else, so that one is unlikely to have committed the offence. Although section 402A of the Criminal Procedure Code does not define a defence of alibi, section 402A does require a notice of alibi to include particulars of "the place where the accused claims to have been at the time of the commission of the offence with which he is charged." In Singapore, the Criminal Procedure Code provisions[53] are identical to the United Kingdom's Criminal Justice Act, section 11(8), and read:

> "evidence in support of an alibi" means evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

Thus, it seems clear that the Malaysian and Singapore Criminal Procedure Code provisions are dealing with the very same "fact" sought to be proved by a party under illustration (b) of sections 103 and 105, respectively, of their Evidence Acts.

It is also well-established in India,[54] that under the equivalent provision in the Indian Evidence Act (section 103), the onus of proving alibi is on the accused. Although the Federal Court did not expressly mention section 103 or the illustration, it is clear that it had in mind

[52] *R.* v. *Johnson* (1961) 46 Cr. App. R. 55; *R.* v. *Stebbing* [1962] Cr. L.R. 472; *R.* v. *Denney* [1963] Cr. L.R. 191; *R.* v. *Wood* (1968) 52 Cr. App. R. 74. This is also the law in the United States of America: J.H. Wigmore, *Evidence,* Vol. 9, 3rd ed. 1940, 415.

[53] Criminal Procedure Code (Cap. 113, Revd. ed.), Reprint 1980, ss. 154(9) and 181(9).

[54] *Chandrika Prasad Singh & Ors.* v. *State of Bihar,* A.I.R. 1972 S.C. 109, 110; *State of U.P.* v. *Sughar Singh* A.I.R. 1978 S.C. 191, 201-2

the Indian case-law determining the burden and Standard of proof on alibi.[55] This writer finds no basis for the (commentator's) view that: "It is implicit in the decision of the Federal Court that if not for the amending provisions, [section 402A], the court would have held that the burden on an accused person on a plea Of alibi would be evidential only."[56] Neither can this Writer agree that an alibi defence is concerned only with raising a doubt upon an essential element in the prosecution case. The alibi defence, in its true form, is not a denial of *actus reus,* but the pleading of a *new* fact that would have the *effect* of raising a doubt on the prosecution case. Thus an alibi defence may create a doubt as to the identification of the accused by prosecution witnesses at the scene of the crime. An alibi defence frequently gives rise to an inference of mistaken identity.

Judicial decisions on when the notice of alibi is required under the statutory notice provisions, are instructive as to the meaning of an "alibi" defence for if the defence is not strictly one of alibi, no notice is in fact required. Thus it has been held that evidence that the accused was not at the scene of the crime was not evidence "tending to show... presence of the accused at a particular place or in a particular area." This would amount in fact to a complete denial of the prosecution case.[57] It may well be cogent evidence that he was (therefore) elsewhere, but it is not evidence of alibi *per se.* So also, evidence of the accused's whereabouts at some time other than the alleged time of the offence is not evidence of alibi[58] for the purposes of a notice. Further, where the offence alleged is a continuing offence with the place of commission insufficiently particularised in the charge, a plea that the accused was at a particular place at the material time will not be regarded as "evidence in support of an alibi".[59] It has also been pointed out that alibis regarding preparatory acts and subsequent acts are not covered by the statutory provisions.[60]

There is, indeed, a need for a detailed judicial treatment of the nature of the alibi defence and its proof. It was assumed in *Dato Mokhtar* that the defences of the 1st and 3rd Accused were true "alibi" defences. They probably were, although certainly aspects of the evidence as to actual (and fictitious) events at times that were not the estimated time of commission were surely not evidence "in support" of an alibi. Nevertheless the Federal Court judgment is a clear statement of where the burden of proof lies and does not (refreshingly) assume that Malaysian law is the same as English law on the burden of proof.

As a post-script, we may ask what the effect on a case is if the alibi defence pleaded is not found "established". Does a conviction necessarily follow or can an accused rely still on the possibility that the prosecution case has itself not been proved beyond reasonable

[55] See the cases cited by the Federal Court *supra,* n. 46.
[56] H.M. Zafrullah *(supra,* n. 48) at xxiii.
[57] *R.* v.. *Gibbs* [1974] Cr. L.R. 474; *Ku Lip See* v. *Public Prosecutor* [1982] 1 M.L.J. 194 (F.C.).
[58] *R.* v. *Lewis* [1969] 2 Q.B. 1. (Approved in *Rangapula & Anor.* v. *Public Prosecutor* [1982] 1 M.L.J. 91, 92.
[59] *R.* v. *Hassan* [1970] 1 Q.B. 423. (Approved in *Rangapula & Anor. v. Public Prosecutor, supra).*
[60] R.N. Gooderson, *Alibi* (1977) pp. 10-16.

doubt? The latter ought to be the answer. Yet the answer is by no means obvious; for there has been a tendency (especially with juries) to regard the failure to set up an alibi as resulting in a conviction as a matter of course. As Gooderson observes, "In strict law, the breaking down of an alibi is not conclusive, but there is evidence that in practice it may lead to conviction."[61] Apparently this attitude has been encouraged by some writers who have done the defence a disservice by disparaging it and inviting uncommon caution towards an alibi defence. Wills, for instance, stated that: "An unsuccessful attempt to establish an alibi is always a circumstance of the greatest weight against an accused person."[62]

Yet the same author also said that: "Of all kinds of exculpation, the defence of an alibi, if clearly established by unsuspected testimony, is the most satisfactory and conclusive.... [T]his defence.. .is absolutely incompatible with, and exclusive of, the possibility of the truth of the charge."[63]

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61 *Ibid., p.* 32.
62 William Wills *(supra,* n. 45), at p. 142.
63 *Ibid., p.* 279.