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CASE COMMENTS

BURDENS AND STATEMENTS

SIM AH CHEOH & ORS. v. P.P.[1]

THE decision of the Court of Criminal Appeal in *Sim Ah Cheoh* v. *P.P.* is one of the latest in a spate of recent cases dealing with the taking of statements under section 122(6) of the Criminal Procedure Code (CPC).[2] The cases, including this one, point to a deep disquiet about the operation of the section. This note analyses the decision particularly with respect to the role of the officers recording such statements and the admissibility of such statements.

The relevant facts are as follows: the first accused was charged with trafficking in more than 1.3 kilograms of drugs (diamorphine) by transporting them from a hotel to the airport, with the assistance of two others. Officers from the Central Narcotics Bureau (CNB) detained her at the airport where she was found to have ten packets of the drug strapped to her body. She was taken to the Bureau where she later recorded a statement under section 122(6). The two other accused were also arrested and they too made such statements. The three were jointly tried and were convicted, the first accused for trafficking and the other two for abetment.[3]

The main ground of appeal was that the prosecution had failed to prove an essential element of the charge, namely, "transportation" (in respect of the first accused). The appellants argued that there was no evidence of transportation other than that provided by the statements recorded from the accused. Further, counsel for the appellants also argued that the fact of transportation had been based on inadmissible statements (as these were improperly obtained[4]) and on an unjustifiable inference[5] made by the trial judge.

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1 [1991] 2 M.L.J. 353.

2 Cap. 68, 1985 Rev. Ed.

3 All three accused appealed on the grounds that there was a miscarriage of justice because the trial judge did not consider whether the case was proved beyond reasonable doubt and because the statements were inadmissible as they were taken after cross-examination. The details of the taking of the statements are material; however, these are more appropriately considered below.

4 *Supra,* note 1, at p. 356.

5 The argument was that the prosecution did not adduce evidence of the transportation from the hotel to the airport and that the trial judges were mistaken to draw the inference that

The first appellant also sought to argue that the statements made by the co-accused could not be used as evidence against her. That these statements were confessions was apparently conceded by defence counsel, for section 30 (of the Evidence Act[6]) would apply only if the statements were confessions. Whether the statements, containing exculpatory remarks, should properly have been regarded as confessions within the definition of section 17(2) of the Evidence Act may be doubted. Be that as it may, nothing turned on this as the Court accepted the proposition that confessions could have limited usage as evidence against the first accused, but held that as there was other evidence against her on the transportation issue, there is no miscarriage of justice.

The Burden at Close of Prosecution Case

The appeal was also based on the nature of the burden at the end of the prosecution case[7]. It was argued that, when the accused elected not to give evidence, the trial judges did not at that point "proceed to examine and assess the evidence adduced and consider whether the prosecution had proved its case beyond reasonable doubt." The judges, without indicating in their Grounds of Decision that they had weighed the evidence again at that point, simply held that "In the result, we had no alternative but to convict all those accused as charged. We did so and sentenced them to death."[8] The Court found that, technically, there was substance to this aspect of the appeal. The analysis of the Court on this issue is extremely valuable as to the distinction between the burden at the close of the prosecution case and the burden at the end of the case. The Court said:

> In a criminal trial there are two critical stages at which the court has to make a decision. Under s 189(1) of the CPC, at the close of the case for the prosecution, the court has to decide whether the prosecution has made out a case, which, if unrebutted, would warrant a conviction of the accused. In deciding this question or issue, the court ought not to consider whether the possession[9] *[sic]* has proved the guilt of the accused beyond a reasonable doubt. . . .
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> At that stage, what the court has to decide is whether the evidence adduced, which is not inherently incredible and which, if accepted

there had been transportation. However, there was enough circumstantial evidence establishing that the first accused had travelled with her co-accused from the hotel to the airport in a taxi. The Court also thought that there was no other reasonable inference to be drawn from the evidence.

6 Cap. 97, 1985 Rev. Ed., (1990 reprint).

7 For the earlier authorities and discussion of this issue, see Choo Han Teck, "Haw Tua Taw - the Aftermath (Have We No Case to Answer)" (1987) 29 Mal. L. Rev. 29; K.S. Rajah, "Establishing a *Prima facie* Case and Establishing a Case Beyond Reasonable Doubt" [1982] 1 M.L.J. xxxiii. See also, T.Y. Chin, *Evidence* (1988), at pp. 163-164.

8 *Supra*, note 1, at p. 358 (italics mine).

9 This must be an error: the word should be "prosecution".

> as accurate, would establish each essential element in the alleged offence. If the court so decides that each essential element in the alleged offence has been established he *[sic]* must call for the defence. *At that stage however he must keep an open mind about the veracity and accuracy of the evidence.* After the defence has been called and evidence, if any, of the accused and other witnesses has been tendered and counsel for both sides have made their respective closing submissions, the court must, at that stage, proceed to examine the evidence adduced, assess the veracity and accuracy thereof and consider whether the prosecution has proved the guilt of the accused beyond reasonable doubt.[10]

It is hoped that this judgment will lay to rest the controversy surrounding the question whether the judge has a duty, at the close of the prosecution case, to determine the actual probative value of the evidence as presented by the prosecution. The Court's view is that he need not do so at this stage: he only has a minimal duty - to decide whether there is evidence that is not "inherently incredible" on all the essential elements of the prosecution case. In exercising this duty at this stage, the judge does not have to rule on the true probative value of the evidence. For example, he does not have to determine whether a witness is telling the truth; the witness's veracity and accuracy is assumed. If he finds it "inherently incredible", however, it is ignored. The question that must be asked at this stage is:

> Assuming the witness to be telling the truth, is his or her evidence of any probative value with regard to any relevant fact or fact in issue, that is, it is not so inherently incredible as to be of no assistance to the court?

If the answer is yes, the evidence passes the first stage and falls to be assessed later as to its true probative value at the end of the trial.

If an item of evidence that is the only evidence on an essential element of the prosecution case is ignored because it is "inherently incredible", a submission of no case to answer will succeed and the accused is entitled to be acquitted without being asked to present his case. If the judge decides that the evidence is not inherently incredible on all the essential elements of the prosecution case, it is then proper to call for the defence. After all the evidence has been presented, the judge then finally has the duty to weigh each item of evidence and to accord it its proper probative value in finally determining the facts of the case.

The two-stage approach as described above and as originally propounded in *Haw Tua Taw*[11] is defensible on the basis that the judge should not be seen to have made up his mind at that stage on the actual probative worth of the evidence; that may seem like prejudging the issue and, what

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10 *Supra*, note 1 at p. 358.
11 [1981] 2 M.L.J. 49.

is more, may appear to be placing a legal burden on the accused to disprove the prosecution case. The accused at that stage of course may still only need to adduce evidence to raise a reasonable doubt in the prosecution case which would then entitle him to an acquittal.

This is not to say that there are no misgivings about this approach; one view against it is that it is a needless complication that is more suited to jury trials than to bench trials. After all, the judge has to decide on the merits of the case at some stage, and it may as well be at the close of the prosecution case. Then, if no further evidence is proffered, the judge need not go through the exercise again and may find the defendant guilty without more. Further, in attempting to ascertain whether evidence is "inherently incredible" the judge is already pressed to reach an opinion about the probative value of the evidence. The *Haw Tua Taw* approach, on the other hand, would require the judge to engage in mental gymnastics as, first, he has to say of a witness, for example, that his evidence is not "inherently incredible" and then later to say of the same witness, "I disbelieve him."[12] Finally, it may be asked how useful this procedure really is in that the occasions when evidence has to be discarded or ignored are likely to be rare. This is because the judge has to "keep an open mind about the veracity and accuracy of the evidence" and, unless he is presented with a totally fantastic account of circumstances, or with evidence that is of highly dubious quality, the judge will have to accept it in considering the submission of no case to answer.

Nevertheless, it is submitted that the *Haw Tua Taw* approach is based on sound principle, namely, that no one should be adjudged to be guilty of an offence unless *all the evidence is presented before the trier of fact.* The trial judges in this case apparently did not distinguish between the two stages but because of the overwhelming evidence against the accused, the Court applied the proviso.[13] The analysis of the Court in this case is particularly welcome because it states clearly what is expected of the judge, and this should certainly ensure that trial judges follow the *Haw Tua Taw* approach, no matter how artificial it may seem to them.

Role of the Officer in Taking Statements under Section 122(6) CPC

The appellants also argued that the statements taken from them by CNB officers were involuntary. The Court, however, pointed out that these were based on disputes of fact. What is of more interest in this decision, however, is the analysis of the Court concerning the propriety of the questioning of the accused persons by the officer about their statements under section 122(6).[14]

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12 In a jury trial, this will not occur because the trier of fact is different from the judge. It will be the judge who decides whether the evidence is or is not inherently incredible and for the jury to decide whether to believe the evidence after it has 'passed' the judge.

13 *Supra*, note 1, at p. 359.

14 For a more detailed examination of the problems raised by section 122(6) statements generally, see T.Y. Chin, "The Admissibility and Use of Exculpatory Statements in

The issue that the Court took some pains to consider had to do with the fact that after each section 122(6) statement was recorded, the accused were asked questions based on it. These questions, on the face, appeared to be for clarification - a common form was, "In line *x* you mentioned Mr. A. Who is he?"[15] However, the Court took the view that "the questions asked were more than those truly required for clarification." The questions "were asked with a view to eliciting answers from the maker of the statement which would be evidence favourable to the party questioning." The Court then expressed firm disapproval of the practice of questioning *vis-a-vis* section 122(6) statements:

> In our opinion, any cross-examination conducted by a recording officer on the statement taken from the accused under s 122(6) is improper, and we disapprove it. Any other form of questioning, unless it is absolutely necessary, is wholly inadvisable and is to be discouraged.[16]

At first sight, this dictum appears to be a statement of judicial policy that could have a far-reaching impact. The policy, however, is circumscribed almost immediately when one asks, "Will the statement so obtained be inadmissible?" Here, the answer is fairly restrained - after sketching the history of section 122(6) and its antecedents, the Court concluded that "cross-examination *per se* does not render the statement inadmissible, if it is otherwise admissible." The Court continued:

> However, cross-examination could in certain circumstances render the statement or the answers to the questions inadmissible, e.g. if the questioning is so vigorous or prolonged that it becomes oppressive with the result that a doubt arises as to whether the statement or the answers have been caused by any fear or threat. Such however is not the case.

Taken together, the approach of the Court seems to be that, as a matter of legal policy, it disapproves of any questioning on a section 122(6) statement, but that, as a matter of admissibility, the statement and the answers obtained may still be admitted if not obtained oppressively or involuntarily. A cynic may ask, "Will the courts discourage this form of improper questioning simply by disapproving of it without more?" If the statement and the answers are not made inadmissible by improper questioning, will the law enforcement agencies take note of this firm disapprobation?

The Court was clearly influenced by the point that the admissibility of such statements is governed by other statutory provisions: in the case

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Singapore" [1991] 3 M.L.J. xxii. This article discusses the use of such statements *by accused persons*, a subject outside the scope of this case comment.

15 The actual questions asked may be found in the report of the case, see *supra*, note 1, at pp. 355-356.

16 *Ibid.*, at p. 360.

of statements to the police, by section 122(5) of the CPC and in the case of statements to other law enforcement officers, by section 21 of the Evidence Act. It is, therefore, correct to conclude that subsection 122(6) CPC does not render the statements inadmissible. Once such statements are admitted, the Court seems to take the view that they are admitted for all purposes, including being used as evidence of facts stated. This need not be so - the law of evidence is replete with examples of evidence being admitted for limited purposes, *e.g.*, to refresh memory, to provide "corroboration", or to discredit a witness.

With respect, there is a course of action that the Court could have taken: it could have held the statement admissible but *only* for the purpose of drawing adverse inferences in appropriate circumstances. This approach is perfectly consistent with the admirable statement by the Court of the purpose of a section 122(6) statement:

> The purpose of s 122(6) of the CPC is to inform the accused of the charge he is facing and to give him an opportunity of stating any fact on which he intends to rely on in his defence in court and further warn him that *if he does not state it then, his silence may give rise to an adverse inference against him.*[17]

The Court in other words should not use the facts contained in the statement against the accused. Thus, in the instant case, the fact discovered as a result of a question, that one of the accused knew that the bag contained "drugs", could not and should not be proved by the answer alone. If the use of section 122(6) statements were restricted to the purpose of drawing adverse inferences, as was intended by the Criminal Law Revision Committee,[18] law enforcement agents would not be so enthusiastic about using this means to obtain more information.

Support for the view that section 122(6) statements should be so limited in use may also be found in the Court of Criminal Appeal's decision in *P.P.* v. *Tsang Yuk Chung*[19] where in speaking of non-compliance with the requirements of section 122(6), the Chief Justice said:

> . . . non-compliance with s 122(6) results not in a statement being inadmissible . . . but in enabling the court having to take such non-compliance into consideration *when deciding what inferences, if any at all,* should be drawn from the failure of the accused to mention certain facts.[20]

It is submitted that it was open to the Court in *Sim* to adopt the narrow approach in the use of statements made under section 122(6) as indicated

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17 *Ibid.* (italics mine)
18 Cmnd. 4991 (1971) H.M.S.O. See especially, paras. 28-52.
19 [1990] 3 M.L.J. 264.
20 *Ibid.*, at p. 266-7.

in *Tsang's* case and, in so far as it did not do so, it is a missed opportunity to be regretted.

However much the Court intends to control improper questioning by expressing its disapproval, it may not be enough to stop the practice from continuing so long as section 122(6) statements are used in the same way as other statements of the accused, that is, as evidence of their involvement in offences. Yet, the decision in this case is a welcome one, as it signals expressly judicial dislike for improprieties in the treatment of suspects.

Nonetheless, many problems still remain: for instance, recording officers may have difficulty distinguishing between "cross-examination" and questions that are for clarification only. Most of the questions at issue in the instant case were preceded by "In line *x*, you said . . .". This probably suggests that the officer thought he was only asking questions for clarification. It is not immediately obvious how this case would affect current law enforcement procedures in the taking of section 122(6) statements.

The approach taken in this case may also have to be qualified by decisions like *P.P.* v. *Tan Ho Teck*[21] where it was held that, even after a section 122(6) statement had been taken, the accused could still be questioned and statements could still be obtained from him, even though no warnings were given. Such cases may be confusing not only to the officers but also to the accused persons as well. This is exacerbated by the fact that there is no code of practice providing for the proper procedures to be followed.

Looking Ahead

A meaningful coherent approach to the taking of statements from accused persons and the admissibility and use of them in evidence remains within the domain of the legislature. The repeal of Schedule E of the CPC[22] and the replacement of it by section 122(6) and section 123 has, apart from adversely affecting the rights of suspects, created stubborn problems for the law enforcement agencies as well as for the courts. The decision in this case demonstrates that, on the one hand, the courts are unhappy with the procedure but that, on the other hand, they are constrained by legislation. It is hoped, therefore, that the day will not be long in coming that will see the repeal of these troublesome sections. They should be replaced by provisions reflecting an approach that takes into account the disciplinary viewpoint and the protective viewpoint as well as adhering to the policy of reliability.[23]

It would be proper to recognise a distinction between section 122(6) statements and other statements obtained from the accused, the former

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21 [1988] 3 M.L.J. 264.

22 This Schedule contained rules for cautioning suspects before statements are taken from them. The Rules were based on the Judges' Rules used in the U.K. before those were replaced by the present system of codes of practice. See CPC, *supra*, note 2,

23 The provisions already impinge on other principles applicable to this area, namely the disciplinary principle and the protective principle: on all these, see especially Peter

category being simply to allow the accused to mention facts favourable to his defence. The distinction should also have a practical effect in that the prosecution should only be allowed to use it for the purpose of persuading the judge to draw adverse inferences in the appropriate case or to use it for corroborative purposes as specified in section 123 of the CPC. In fairness to the accused, such a statement should also be available to him for corroborative purposes under section 159 of the Evidence Act.

The development of the law in this area should be conditioned by the recognition that the procedure was enacted to remove the advantage of the right to silence from experienced criminals and thereby to facilitate investigations. It was not intended for use by the law enforcement officers to take further incriminating statements from the accused. In so far as this decision seeks to establish proper standards in taking such statements, it is a valuable addition to the law of criminal evidence and procedure.

It may be pertinent to conclude this analysis with an instance of Lord Hailsham's eloquence articulated in *Wong Kam Ming* \. *R*:

> . . . any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.[24]

The Court of Criminal Appeal's decision goes some way towards realising this goal in Singapore though it may be some time yet before the protective principle and the disciplinary principle attain the recognition they deserve.[25]

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Mirfield, *Confessions,* Modern Legal Studies (1985), Ch. 3. For a recent decision confirming the importance of these other principles, see *post,* note 25.

24 [1980] A.C. 247, at p. 251.

25 The Privy Council in *Lam Chi-Ming & Ors.* v. *R.* [1991] 3 All E.R. 172 at p. 178 has stated that the voluntariness rule is based not just on possible unreliability "but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in custody."

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