Singapore Journal of Legal Studies
[1992] pp. 202 - 209

ENTRAPMENT AND THE PERIMETERS OF CRIMINAL LIABILITY

How Poh Sun v. *P.P.* [1]

IN *How Poh Sun* \. *P.P.*, the Singapore Court of Criminal Appeal, following the House of Lords decision in *R.* \. *Sang*,[2] refused to recognise a "defence" of entrapment.[3] While, in certain cases, the use of an agent provocateur by law enforcement agencies might be a matter to be taken into account in sentencing, the court ruled against making it a ground for the acquittal of an accused. In the present case, the mandatory nature of the punishment for the crime charged (trafficking in heroin) prevented any consideration of the use of an agent provocateur as a mitigating factor in sentencing. Relying again on *Sang*, the Court of Criminal Appeal held that, save for admissions and confessions, a trial judge had no discretion to refuse to admit relevant evidence on the ground that it had been obtained by illegal or unfair means. This wholehearted endorsement *of Sang* was made without a single comment on the many criticisms laid against that decision[4] and without any discussion of the defence of entrapment existing in jurisdictions like the United States.[5] Nor did the court bother to comment on the flexible approach suggested by Wee Chong Jin C.J. in one of its own earlier decisions, namely, *Cheng Swee Tiang* v. *P.P.*[6] The learned Chief Justice there opined

1 [1991] 3 M.L.J. 216. The judgment of the Singapore Court of Criminal Appeal, comprising Yong Pung How C.J.; Lai Kew Chai and Rajendran JJ., was delivered by the Chief Justice on 30 July 1991.

2 [1980] A.C. 402.

3 In this comment, the term "defence" denotes an exculpatory plea even though entrapment is not one of the general exceptions appearing in Part IV of the Penal Code. This stance will be elaborated upon later.

4 See A. Choo, "A Defence of Entrapment" (1990) 53 M.L.R. 453; S. Yeo, "The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches" (1981) 13 Melb.U.L.R. 31; L. Taman, "Judicial Approaches to Entrapment: *R.* v. *Sang*" (1981) 23 Mal.L.R. 286.

5 See *Sherman v. United States* 356 U.S. 369 (1958). Recently, the Canadian Supreme Court in *R.* v. *Mack* (1988) 67 C.R. (3d) 1 was prepared to recognise proof of entrapment as leading to a judicial stay of proceedings as an abuse of process. This avenue has yet to be tested before a Singapore court. For the submission that *Sang* did not foreclose this avenue, see A. Choo, "A Defence of Entrapment" (1990) 53 M.L.R. 453, p. 464.

6 (1964) 30 M.L.J. 291 which appears to have been the last reported decision of the Singapore Court of Criminal Appeal to have considered the issue of entrapment.

that "both on principle and authority ... no absolute rule can be formulated and the question [concerning the effect of entrapment] is one depending on the circumstances of each particular case".[7]

The facts in *How Poh Sun* were as follows. Officers of the Central Narcotics Bureau (CNB) had arrested one Goh on suspicion of having committed offences under the Misuse of Drugs Act 1973.[8] At the Bureau, Goh offered to "set up" his boss, the appellant, and this was agreed to by CNB officers. Goh phoned the appellant at his home to say that he had a buyer who was interested in purchasing 25 packets. The appellant agreed to deliver only ten packets saying that Goh still had some supply left. He then arranged to meet Goh at a certain spot and was arrested when he arrived there with the 10 packets of diamorphine wrapped in newspaper. He was tried and convicted of trafficking in 33.71 grams of diamorphine, an offence under section 5(a) of the Misuse of Drugs Act punishable with the mandatory death penalty.

On appeal, defence counsel conceded that the defence of entrapment might not be recognised in Singapore on account of *Sang*. Nevertheless, he argued that the use of Goh as an agent provocateur should have a bearing on the criminal liability of the appellant. Defence counsel suggested that this could be done in the following way: since the appellant had been traced through the phone calls made by Goh, the CNB should have raided his flat, in which case, he would have been charged with only the lesser offence of possession. A conviction of possession was sought since it attracted a sentence of imprisonment, thereby enabling the accused to escape the mandatory death sentence imposed on drug traffickers. The Court of Criminal Appeal saw no merit in this submission, holding that it was unnecessary to even consider whether Goh was an agent provocateur or not as the defence of entrapment is not recognised here. The court then proceeded to cite several passages from the judgments of Lord Diplock and Lord Salmon in *Sang*[9] with approval and concluded with the comment that:

> The observations of the Law Lords that the defences of agent provocateur and entrapment[10] do not exist in English law would also reflect the position in Singapore. It is not the province of the court to consider whether the CNB should have proceeded about its work in one way or the other. The court can only be concerned with the evidence before it."[11]

---

7 *Ibid.*, at p. 293.

8 Cap. 185, 1985 Rev. Ed.

9 [1980] A.C. 402 at pp. 433, 437, *per* Lord Diplock; and at p. 443 *per* Lord Salmon.

1 The two defences mentioned are one and the same as is evident when reading the judgment in *How Poh Sun.*

11 *Supra*, note 1 at p. 219, *per* Yong Pung How C.J.

This comment will not canvass the familiar arguments advocating the exclusion of illegally or improperly obtained evidence as a form of judicial control over the behaviour of law enforcement agencies.[12] It will in fact be argued that, within controlled limits, entrapment is an acceptable means of enforcement and has much to commend it especially in areas like narcotics and white collar crime when detection and proof of offences can be extremely difficult. What will be argued is that a defence of entrapment has a definite place in our criminal law, not on the basis of any due process argument, but because the defence is very much concerned with drawing the perimeters of an individual's criminal liability. And this is undeniably the primary concern of any criminal trial.

A preliminary question requiring attention is whether a defence may be recognised which is not stipulated in Part IV of the Penal Code.[13] This depends on whether the Part is regarded as containing an exhaustive list of defences under our criminal law. For the sake of discussing how entrapment affects criminal liability, I have taken the position that it is not exhaustive.[14] The court in *How Poh Sun* could have simply refused to consider any arguments concerning a defence of entrapment by declaring that Part IV of the Penal Code was exhaustive. Instead, the court heard those arguments and, conceivably, would have been prepared to recognise a defence of entrapment if it considered that there were good reasons for doing so.

Indicating Criminal Liability through Entrapment

With respect, it is incorrect to hold, as *Sang* and *How Poh Sun* have done, that a person is criminally liable for an offence upon the *actus reus* and *mens rea* of the crime being made out.[15] Criminal liability is established not merely on proof of the offence elements but also on the absence of any defence which might be available to the accused. The judicial error appears to have been due to the misconception that defences always operate

---

12 For these arguments, see the articles cited in *supra*, note 4. See further, J.D. Heydon, "Entrapment and Unfairly Obtained Evidence in the House of Lords" [1980] Crim.L.R. 129; D. Price, "Comment on *R.* v. *Sang*" 14 The Law Teacher 52.

13 Cap. 224, 1985 Rev. Ed.

14 Given the relatively new phenomenon of entrapment as a device of law enforcement, I would join the "detractors of the Code ... and argue that this lapse indicates a need to fall back on a continuously growing" legal system such as the one belonging to the United States. *Cf.* M. Sornarajah, "The Interpretation of the Penal Codes" [1991] 3 M.L.J. cxxix, p. cxxxviii. See, further, the conclusion of this case note.

15 For instance, there is Lord Salmon's statement in *Sang* [1980] A.C. 402 at p. 443, and approved of in *How Poh Sun*, that "[a] man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom."

either to negative the *mens rea* or the *actus reus* of an offence. But there are certain well-recognised defences which do not operate in this way, for example, the pleas of self defence,[16] duress[17] and provocation.[18] These defences work very much by way of "an admission and an avoidance", with the accused saying, "I admit to performing the conduct with the necessary mental state but I have an explanation for so doing which exculpates me from criminal liability".

A defence of entrapment operates in the same way. The accused admits to satisfying the mental and physical elements of the offence charged but explains that he or she would never have committed such a crime (or a similar one) had the agent provocateur not induced her or him into doing it. The accused will, however, not be able to rely successfully on the defence if it were shown that he or she had a predisposition to committing the offence charged and would have done so had an opportunity in normal life presented itself.[19] In such a case, criminal liability properly accrues to the accused even though he or she had been entrapped into committing the particular offence charged. Under this approach, entrapment practices which single out persons who are known or reasonably suspected to be predisposed to the type of crime complained of are acceptable and should lead to the conviction of persons so entrapped. On the other hand, an entrapment scheme which is used to test the virtue of people on a random basis should not be permitted to lead to a conviction.

The above approach sees the basis of criminal liability in entrapment cases as "a confirmed hypothesis that the accused is criminally dangerous."[20] By committing the offence which a law enforcement agency has set up, the accused confirms the hypothesis entertained by the agency that he or she had committed a similar offence in the recent past or will commit a similar offence in the near future. There is, accordingly, a strong justification for convicting and punishing the accused for the crime which he or she was entrapped into committing.[21]

---

16 Penal Code, ss. 96-106. A person relying on this defence clearly intended the injury inflicted upon her or his assailant.

17 Penal Code, s. 94. See further, the discussion concerning the common law defence of duress by the House of Lords in *R.* v. *Howe* [1987] 1 All E.R. 771 at p. 777, *per* Lord Hailsham.

18 Penal Code, Exception 1 to s. 300. See further, the discussion of the Privy Council dealing with the equivalent provision in the Sri Lankan Penal Code in *Attorney-General for Ceylon* v. *Perera* [1953] A.C. 200 at p. 206, *per* Lord Goddard.

19 As opposed to an opportunity which had been simulated by an agent provocateur.

20 *Howard's Criminal Law* (B. Fisse, ed., 5th ed. 1990), p. 580.

21 This approach runs against the libertarian principle that a person should be held criminally liable for causing actual harm as opposed to having a criminal predisposition: see, for example, J. Carlson, "The Act Requirement and the Foundations of the Entrapment Defense" (1987) 73 Virginia L.R. 1011. However, it is submitted that the practical demands of law

It is obvious that for this approach to function justly, certain controls need to be placed over the hypothesis-making exercise by law enforcement agencies. One such control would be over the method by which the predisposition of an individual towards a particular crime is to be determined. Professor Brent Fisse, the author of the well-received fifth edition *of Howard's Criminal Law,* has suggested that predisposition be defined in terms of two elements:

> ... first, a likelihood that D would be presented with an opportunity to commit the offence in the near future; and secondly, an intention on the part of D to commit that offence if the opportunity arises. This standard would be applied by the trier of fact in light of the grounds relied upon by the police when targetting D, and in light of any alternative explanation offered by D.[22]

This definition of entrapment is in general accord with the thinking of the United States courts. There too, the primary basis for the criminal liability of an entrapped accused is her or his predisposition towards committing the type of crime complained of. Examples of evidence which have been regarded by these courts as establishing the accused's predisposition include (1) the nature of the alleged inducement, with appeals to friendship, sympathy and offers of excessive amounts of money going against a finding of predisposition; (2) the response of the accused to the inducement, with a quick and ready response being indicative of predisposition; and (3) whether the accused had a reasonable prospect of committing the offence prior to the inducement being given; for example, a ready supply of a particular drug would be indicative of predisposition.[23]

A second control measure over the hypothesis-making by law enforcement agencies is the validity of the simulation used to confirm the hypothesis.[24] For the simulation to be valid, it must emulate the type of opportunity or inducement which the particular accused would be exposed to in normal life. Hence, a simulation would be invalid which induced an accused to supply diamorphine when the law enforcement agency had reason to believe that he or she only trafficked in cannabis. An offer of money grossly above the market price for a drug would also invalidate the simulation.

These controls would ensure that only those persons who have a predisposition towards committing the particular crime complained of would

---

enforcement should hold sway: see J. Heydon, "The Problems of Entrapment" (1973) 32 Camb. L.J. 268.

22 (5th ed., 1990), pp. 582-583. Compare *United States* v. *Sherman* 200 F.2d 880 (1952), at p. 882 *per* Learned Hand J.

23 For a fuller list and discussion, see A. Choo, "A Defence of Entrapment" (1990) 53 M.L.R. 453 at pp. 466-467.

24 *Howard's Criminal Law* (5th ed., 1990), pp. 583-584.

be convicted and punished. Where one or the other of the controls is not satisfied, the hypothesis entertained by the law enforcement agency is not confirmed with the result that the accused's criminal liability for the offence charged is not established. Consequently, the accused should be acquitted despite proof that he or she had the *actus reus* and *mens rea* for the crime. Thus, we see how the defence of entrapment functions to acquit persons falling outside the perimeters of criminal liability, a feature common to all other criminal defences.

Before passing on to an application of the above approach to the facts in *How Poh Sun,* a useful analogy from section 85 of the Penal Code may be presented. Section 85(2)(a) stipulates that a person is not criminally liable if he committed a crime, *inter alia,* in a state of intoxication "caused without his consent by the malicious or negligent act of another person".[25] Such a person will be acquitted should his intoxicated state have prevented him from knowing what he was doing or that it was wrong. In contrast, where the intoxicated state was self-induced, the accused has to establish the additional requirement that his intoxication was of such a degree as to amount to insanity, temporary or otherwise.[26] A less stringent test of criminal liability is thereby prescribed for persons who suffered non-self-induced intoxication when compared to those whose intoxication was self-induced. Likewise, in recognising a defence of entrapment as described above, the courts should be imposing a less stringent test of criminal liability on persons who were not predisposed to crime and who had been induced into committing the crime charged only because of the malicious or unreasonable use of entrapment by law enforcement agencies.

Applying the Entrapment Defence to the Facts of the Case

Had a defence of entrapment as canvassed above been entertained in *How Poh Sun,* it might have been discussed along these lines. Bearing in mind the difficulty of detection and proof of drug offences, resort by the CNB to entrapping the appellant was acceptable, provided the particular entrapment arrangement satisfied certain conditions. The CNB would have to show that the appellant was predisposed to committing the offence of trafficking in amounts of diamorphine attracting the death penalty. Such predisposition could be evidenced by (1) a likelihood that he would be presented with

25 See K.L. Koh, C.M.V. Clarkson and N.A. Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (1989), pp. 233-234.

26 What constitutes "insanity" under s. 85(2)(b) is uncertain: see Koh, Clarkson and Morgan, *ibid.*, pp. 235-236. Note also the special procedure for the disposition of such persons specified under s. 86(1). The point is that s. 85(2)(a) does not impose the additional requirement of insanity and persons succeeding under this plea are unconditionally released into the community.

an opportunity to commit the offence in the near future; and (2) an intention on the accused's part to commit that offence should the opportunity arise. The appellant's predisposition towards committing the crime charged would have been readily made out on the facts. The CNB would show that the appellant had a large and ready supply of diamorphine at his disposal and was able to deliver sizable quantities of the drug at short notice. Indeed, this was exactly what had occurred, with the appellant arriving at the agreed meeting place with 10 packets of diamorphine within two hours of Goh's phone request. The phone conversations between the appellant and Goh, which the CNB monitored, would also have established that the appellant had recently supplied Goh with numerous packets of diamorphine on at least one previous occasion. The appellant was aware that Goh had a supply left of the drug, presumably from the last delivery, of around 15 packets. This may be inferred from the fact that the appellant had said he would supply only 10 packets when Goh informed him that the buyer wanted 25 packets.

Besides proof of the appellant's predisposition, the CNB would have to show that the simulation it employed emulated the type of opportunity or inducement which the appellant could have experienced in normal life. This again would have been readily satisfied on the facts. The agreed price of $240 for each packet seems to have been the market value at the time. Furthermore, the explanation for the appellant supplying less than the amount requested was because he knew that Goh still had some packets left from the last delivery, rather than because the appellant was not in the practice of supplying such a large amount. Given these facts, defence counsel's submission that the appellant should have been charged with possession only would not have accurately reflected his predilection towards the more serious offence of trafficking. Overall then, the appellant was properly convicted of the offence under section 5(a) of the Misuse of Drugs Act. His criminal liability was on the basis that the CNB's hypothesis of his being a trafficker in sizable quantities of diamorphine was confirmed when he fell into the trap set up for him by the CNB.

Conclusion

The decision of the Singapore Court of Criminal Appeal in *How Poh Sun* was disappointing in its uncritical approval of the English case of *Sang* without any independent analysis of the defence of entrapment. Such an analysis would have revealed that the defence should be judicially recognised for being integrally concerned with the criminal liability of an accused, a subject which goes to the heart of any criminal proceedings. Contrary to the holding in *How Poh Sun,* our criminal courts do have a duty to enquire into the entrapment methods of law enforcement agencies such as the CNB, not so much as a watchdog ensuring the integrity of our criminal justice

system, but as part of the deliberation over whether criminal liability has been properly ascribed to an accused.

The decision in *Sang* should also have been read in its English context by the Court of Criminal Appeal. Two matters, in particular, stand out. First, the Law Lords were definitely influenced in their decision-making by their knowledge that entrapment could be taken into consideration as a matter of sentencing.[27] In contrast, the Court of Criminal Appeal was fully aware that offences under the Misuse of Drugs Act carry either a mandatory penalty or a minimum sentence thereby making this justification in *Sang* for rejecting a defence of entrapment cold comfort for offenders charged under the Act. Secondly, *Sang* should have been read in the light of official efforts in England to deal with what is perceived as the "problem" of entrapment. A circular issued by the Home Office to the police provides that "[n]o member of a police force, and no police informant, should counsel, incite or procure the commission of a crime."[28] This circular, which has received judicial approval,[29] is aimed at making breaches the subject of internal disciplinary proceedings. As far as is known, no comparable policy exists in relation to the Singapore police force, the CNB and other law enforcement agencies.

Perhaps the real reason for the Court of Criminal Appeal's refusal to recognise a defence of entrapment was that no such defence is provided for under the Penal Code.[30] This is, however, not evident from the judgment which mentioned nothing whatsoever about the exhaustive nature of the Code.[31] Should the absence of a provision on entrapment in the Penal Code pose an obstacle to the recognition of such a defence, speedy legislative intervention is advocated to fill the gap. In the meanwhile, justice calls for the exercise of executive clemency in respect of offenders who have committed crimes, not because of a predisposition towards those crimes, but due solely to the entrapment schemes of law enforcement agencies. To ensure that justice is done, courts presiding over these offenders should recommend the exercise of such clemency in their favour.[32]

STANLEY YEO

---

27 For instance, see [1980] A.C. 402 at p. 433, *per* Lord Diplock; and at p. 443, *per* Lord Salmon.

28 The circular is reproduced in the English Law Commission's Report No. 83, *Criminal Law: Report on Defences of General Application* (1977), p. 68.

29 *R.* v. *Mealey and Sheridan* (1974) 60 Cr.App.R. 59 at p. 64.

30 However, see my comment in *supra*, note 14 and accompanying main text.

31 Consequently, *How Poh Sun* could arguably be regarded as tacit authority for recognising defences outside the Penal Code, provided there were good reasons for such recognition.

32 Although in a different context, in *Mohamed Kunjo* v. *P.P.* [1978] 1 M.L.J. 51, a judicial recommendation resulted in the mandatory death penalty for murder being commuted to a sentence of imprisonment.