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USE OF THIRD PARTY CONVICTION AS EVIDENCE IN SUBSEQUENT CRIMINAL PROCEEDINGS

Chua Boon Chye v Public Prosecutor[1]

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I. INTRODUCTION

For more than a decade in Singapore, it was unclear whether the previous conviction of a third party can be admitted as evidence not only in civil, *but also in criminal proceedings.* The Singapore Court of Appeal in the recent criminal reference case of *Chua Boon Chye* determinatively answered the question in the positive.[2] This clarification is very much welcomed.

This note discusses the court's decision and it will be submitted that the court's position is clearly correct. That said, some aspects of the court's reasoning merit a closer examination. And although it will henceforth be clear that a third party's conviction can be admitted as evidence in criminal proceedings, a number of closely-related but equally pertinent issues arguably remain unresolved. For instance, (a) whether a charge that a third party has consented to being taken into consideration for the purpose of his sentencing qualifies as a 'conviction', and (b) to what extent exactly can a third party conviction be admitted as evidence in criminal proceedings. This note also briefly considers these related issues.

By way of background, the main provision that governs the admissibility of a conviction in subsequent judicial proceedings is s 45A of the *Evidence Act*.[3] That section states:

> Without prejudice to ss 42, 43, 44 and 45, the fact that a person has been convicted or acquitted of an offence by or before any court in Singapore shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he committed (or, as the case may be, did not commit) that offence, whether or not he is party to the proceedings; and where he was convicted, whether he was so convicted upon a plea of guilty or otherwise.[4]

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1 [2015] 4 SLR 922 (CA) [*Chua Boon Chye*].

2 See also Jeffrey Pinsler SC, *Evidence and the Litigation Process*, 5th ed (Singapore: LexisNexis, 2015) at para 7.030.

3 Cap 97, 1997 Rev Ed Sing [*EA*].

4 *Ibid*, s 45A.

It has been, and remains uncontroversial that s 45A allows a third party's conviction to be admitted as evidence in subsequent *civil* proceedings.[5] However, prior to *Chua Boon Chye*, there were two apparently conflicting decisions on whether a third party's conviction can be admitted as evidence in subsequent *criminal* proceedings. The first case is *Public Prosecutor v Heah Lian Khin*.[6] In that case, pursuant to s 45A, the trial judge admitted the record of proceedings (charges and statement of facts) taken against a third party earlier in which he had pleaded guilty to and was convicted of certain criminal charges.[7] On appeal, the High Court, on its own volition,[8] reconsidered that decision by the trial judge and concluded that the latter had erred in admitting the record of proceedings pursuant to s 45A. The court opined:

> Plainly, s 45A EA was limited to proving the fact that a particular individual had been convicted or acquitted of an offence, where relevant to an issue in the proceedings, and was really intended to save judicial time and costs in subsequent *civil* proceedings. *It did not create an avenue for the admission of a previous conviction of a person as substantive evidence against an accomplice in subsequent criminal proceedings*.[9]

It is noteworthy that the court's above statement was entirely *obiter*, and seemed to be arrived at without any benefit of counsels' arguments. And as noted by Professor Jeffrey Pinsler, the court's position arguably goes against the literal words of s 45A.[10]

The second case is *Ong Bee Nah v Won Siew Wan*.[11] That case came five years after *Heah Lian Khin*, and concerned a civil action for a road traffic accident, in which the plaintiff sought to admit, pursuant to s 45A, the defendant's previous conviction for careless driving arising from the same set of facts.[12] The High Court noted the above quoted statement from *Heah Lian Khin*, and stated in passing that that statement should be "probably confined to the much narrower and more specific issue that was before the court in that particular case".[13]

II. Facts and History of the Case

About ten years later came the case of *Chua Boon Chye*. Although the evidence tendered at trial by the parties was quite extensive and complex,[14] the facts necessary to understanding the court's reasoning *vis-à-vis* the issues relating to the admissibility of third party convictions are relatively straightforward.[15]

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5 See the cases listed in *Chua Boon Chye*, *supra* note 1 at para 21.
6 [2000] 2 SLR (R) 745 (HC) [*Heah Lian Khin*].
7 *Ibid* at para 16.
8 *Ibid* at para 87.
9 *Ibid* at para 89 [emphasis added].
10 Pinsler, *supra* note 2 at para 7.029.
11 [2005] 2 SLR (R) 455 (HC) [*Ong Bee Nah*].
12 *Ibid* at paras 40, 41.
13 *Ibid* at paras 60, 61.
14 The trial lasted 29 days (see *Chua Boon Chye*, *supra* note 1 at para 12).
15 See generally *Chua Boon Chye*, *ibid* at paras 3-15.

The accused was charged for dishonestly receiving stolen property under s 411 of the *Penal Code*.[16] The stolen property in question was 105 metric tonnes of Marine Fuel Oil ("MFO") that belonged to Chevron Singapore Pte Ltd ("Chevron") and valued at approximately S$69,106. The accused was the general manager and director of a bunkering company. The Prosecution's first witness was Shankar s/o Balasubramaniam ("Shankar"). He was the operations executive of an MFO terminal run by Chevron, and one of his duties was to track the movement of MFO at the terminal. The MFO was stored and moved in such a way that there would be minor discrepancies between the reading of a shore tank (in which the MFO was stored) and a vessel (to which the MFO was pumped into). The tolerance level of the variance was 0.5%, and any amount constituting gains within this variance was retained at the terminal. Shankar was responsible for logging these gains and reporting them to his superior. Shankar decided to conspire with two petroleum surveyors to siphon off and sell the gains of the MFO at the terminal on several occasions. The occasion involving the accused occurred on 29 October 2007. A barge operated by a company related to the accused's company, MV Milos, was due to load 2,500 metric tonnes of MFO at the terminal. Shankar identified 105 metric tonnes of MFO (gains) to sell and informed one of his conspirators. The latter approached a broker to sell the excess MFO. The broker then liaised with the accused, who agreed to purchase the excess MFO at a below-market price and contacted the bunker clerk on board the MV Milos to expect an additional 105 metric tonnes of MFO from the terminal. Shankar was subsequently arrested and he pleaded guilty to several counts of criminal breach of trust under s 406 of the *PC*. Crucially, the charges that he pleaded guilty to relate to other instances where he siphoned off MFO from Chevron's terminal and sold it for profit, and *the charge that involved the MV Milos (and the accused) was only taken into consideration for the purpose of his sentencing*.[17]

As regards the accused, per s 411 of the *PC*, the first element the Prosecution had to prove was that the 105 metric tonnes of MFO was stolen property. Under s 410(1) of the *PC*, the definition of "stolen property" includes property in respect of which criminal breach of trust has been committed. The Prosecution also had to prove that it was the accused who purchased the 105 metric tonnes of MFO and that the accused had reason to believe that the MFO was stolen property.[18] The issue of the admissibility of third party convictions in criminal proceedings concerned only the first element. To prove this element, the Prosecution relied, *inter alia*, on two pieces of evidence: (a) Shankar's oral testimony during the accused's trial that the former had been convicted for criminal breach of trust for siphoning and thereafter selling the MFO, and (b) the charge involving the MV Milos which Shankar had consented to being taken into consideration for the purpose of his sentencing.[19] The Defence argued that the MFO was not stolen property because the 105 metric tonnes of MFO did not belong to Chevron and at the material time Chevron had not entrusted the MFO to Shankar.[20]

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16 Cap 224, 2008 Rev Ed Sing [*PC*].

17 *Chua Boon Chye*, *supra* note 1 at para 12.

18 *Ibid*.

19 *Ibid*.

20 *Public Prosecutor v Chua Boon Chye* [2013] SGDC 441 at paras 19, 20.

At the first instance trial, the District Court considered the evidence (including the above stated) and concluded that the 105 metric tonnes of MFO was stolen property within the definition under s 410 of the *PC*.[21] It also found that the Prosecution had proven the remaining two elements beyond reasonable doubt, and accordingly convicted the accused of his charge.[22] The accused appealed against his conviction (and sentence).[23] With respect to the element of whether the MFO was "stolen property", the accused argued that the trial court had erred in its interpretation of the definition under s 410. The High Court, among other things, noted the evidence that the trial judge had considered, and affirmed the trial judge's interpretation of s 410.[24] The other grounds for appeal were dismissed and the accused's conviction (and sentence) was upheld.

The accused, presumably still dissatisfied with the outcome, brought a criminal reference in *Chua Boon Chye* to refer the question of law of public interest—whether the previous conviction of a third party (in this case Shankar) is admissible as evidence against the accused in criminal proceedings—to the Court of Appeal, pursuant to s 397 of the *Criminal Procedure Code*.[25] As mentioned, the court answered this question in the affirmative. The next part will examine in detail the court's reasoning.

III. Discussion

A. *Whether Section 45A of the* EA *Applies to Criminal Proceedings*

The Defence's position was that s 45A of the *EA* permits the admission of a third party's prior conviction only in a subsequent *civil* proceeding. It does not allow the same in a later *criminal* proceeding. To this end, the Defence's four arguments were:

a) Section 45A must be read with s 45 of the *EA*, and *in particular Illustration (b) to s 45*. These do not allow the admission of a third party's prior conviction in a subsequent criminal proceeding;

b) Singapore Parliament intended for s 45A to apply only to subsequent civil, but not criminal, proceedings;

c) Local cases suggest that s 45A applies only to subsequent civil proceedings; and

d) Permitting convictions of third parties to be admitted as evidence in later criminal proceedings poses risks to a fair trial.[26]

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21 *Ibid* at para 21.
22 *Ibid* at para 22ff.
23 *Chua Boon Chye v Public Prosecutor* [2014] SGHC 135.
24 *Ibid* at paras 16-18.
25 Cap 68, 2012 Rev Ed Sing [*CPC*].
26 *Chua Boon Chye*, *supra* note 1 at para 17.

The court disagreed with the Defence and held that s 45A does cover criminal proceedings. This is based mainly on the following indicators:

(a) Section 2 of the *EA* states that "Parts I, II and III [of the *EA*] *shall apply to all judicial proceedings in or before any court*, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator". Section 45A is a provision under Part I of the Act. The phrase "all judicial proceedings" evidently covers both civil *and* criminal proceedings, and "shall" connotes the mandatory application of s 2.[27]

(b) Where Parliament intended for a provision in the *EA* to apply only to civil proceedings, it would make clear such an intention. Section 23(1) of the *EA* for instance, provides explicitly that that section applies only to "civil cases". No such restriction is stated in s 45A.[28]

(c) Section 45A(7) of the *EA* provides that "[i]n any criminal proceedings, this section shall be subject to any written law or any other rule of law to the effect that a conviction shall not be admissible to prove a tendency or disposition on the part of the accused to commit the kind of offence with which he has been charged". There are two ways in which this sub-section shows that s 45A is to apply also to criminal proceedings. First, if s 45A is not intended to apply to criminal proceedings, it is completely illogical for sub-section (7) to even exist. Second, the use of the phrase "criminal proceedings" shows that if Parliament intended for a provision to apply only to a certain type of proceedings, it would have explicitly stated so. And s 45A(1) is stated to be applicable generally to "proceedings".[29]

(d) The Table of Derivations at the end of the *Evidence (Amendment) Bill*,[30] which is the bill that introduced s 45A to the *EA*, provides that s 45A was derived from ss 73 and 74 of the United Kingdom *Police and Criminal Evidence Act 1984*.[31] The latter two provisions concerned the abolition of the rule in *Hollington v Hewthorn*[32] (which was a common law rule that third party convictions may not be admitted as evidence in subsequent civil proceedings) and made clear that third party convictions can be admitted as evidence in subsequent *criminal* proceedings.[33]

(e) In the parliamentary debates for the introduction of s 45A to the *EA*, the then-Minister for Law Professor Jayakumar stated that s 45A was introduced to

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27 *Ibid* at para 26.
28 *Ibid* at para 27.
29 *Ibid* at paras 59, 60.
30 Bill 45 of 1995 [*1995 Evidence (Amendment) Bill*].
31 (UK), 1984, c 60 [*UK PACE 1984*].
32 [1943] 1 KB 587 [*Hollington*]. For an excellent account on how this case was treated by courts in the various Commonwealth jurisdictions (including Singapore), see *Choo Michael v Loh Shak Mow* [1993] 3 SLR (R) 834 at paras 21-49 (HC) [*Choo Michael*].
33 *Chua Boon Chye*, *supra* note 1 at para 58.

reverse the rule in *Hollington*, and he explained that that "common law rule states that the evidence in an earlier criminal case cannot be admitted against the defendant in a later civil trial".[34] As argued by the Defence, this gives the impression that Parliament only intended to abolish the rule as regards civil proceedings. Nonetheless, the Minister certainly did not say that s 45A is to apply *only* to civil proceedings. He likely referred to civil trials simply because the specific facts of *Hollington* involved a civil trial.[35] Importantly, the Minister added that the main purpose of abolishing the rule is so that "judicial time and legal costs will be saved by not having to litigate all over again issues which have been decided by another court in previous proceedings".[36] This rationale applies with equal force whether in the context of subsequent civil or criminal proceedings.

(f) The Explanatory Statement accompanying the *1995 Evidence (Amendment) Bill* states that s 45A was inserted to make clear that "the common law rule in [*Hollington*] does not apply in the circumstances specified in that section".[37] The circumstances specified in s 45A are whenever the fact that a person has been convicted or acquitted is relevant to any issue *in the proceedings*. As highlighted, "proceedings" is not restricted to only civil proceedings. Moreover, the Explanatory Statement also adds that the rule in *Hollington* "operates to exclude evidence of judicial findings of convictions or acquittals from admissibility in *subsequent cases*".[38] This is good indication that Parliament had treated the rule in *Hollington* as prohibiting the admission of third party conviction in *both subsequent civil and criminal cases*, and that in abolishing the rule through s 45A, it intended for that section to apply to both civil and criminal proceedings.[39]

It is submitted that even just considering the first four indicators above, it is already exceedingly clear that s 45A applies not only to civil, but also to criminal proceedings. The court's conclusion was therefore more than justifiable. It would take some extremely strong counter-indicators for one to conclude otherwise.

The Defence's main counter-indicators were s 45 of the *EA*, and more specifically, Illustration (b) to s 45. That section provides that "[j]udgments, orders or decrees other than those mentioned in ss 42, 43 and 44 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act". Illustration (b) is the following scenario:

> A prosecutes B under s 498 of the Penal Code for enticing away C, A's wife. B denies that C is A's wife, but the court convicts B. Afterwards C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife. The judgment against B is irrelevant as against C.

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34 *Parliamentary Debates Singapore: Official Report*, vol 65 at col 455 (18 January 1996) (Professor S Jayakumar) [*1996 EA Debates*].

35 *Chua Boon Chye*, *supra* note 1 at para 55.

36 *1996 EA Debates*, *supra* note 34.

37 *1995 Evidence (Amendment) Bill*, *supra* note 30.

38 *Ibid* [emphasis added].

39 *Chua Boon Chye*, *supra* note 1 at paras 56, 57.

The Defence's argument appears to be that Illustration (b) is meant to illustrate one of the principles under s 45, which is that a third party's prior conviction is not admissible in a subsequent criminal proceeding.[40] Indeed, as the court in *Chua Boon Chye* candidly stated, the illustration "did appear to constitute powerful support for the [Defence's] argument".[41]

But the court's conclusion is that there is an inconsistency between Illustration (b) to s 45 and s 45A of the *EA*. In the circumstances, the latter must prevail.[42] The implication is that there was an oversight by the drafters in not deleting Illustration (b) when s 45A was introduced. The court's conclusion must be correct because given the above indicators that show that s 45A is intended to also apply to criminal proceedings, even if Illustration (b) indeed supports the position to the contrary, the latter must surely be outweighed and overridden by the former.

Notably, the court did not explicitly attempt to see if there is any way to reconcile Illustration (b) with s 45A. It is submitted that it is worth attempting to do so for two reasons. For one, the courts have emphasised the utmost significance of illustrations in the *EA*. In *Mahomed Syedol Ariffin v Yeoh Ooi Gark*,[43] the Privy Council stated that:

> [I]t is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And *it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption*.[44]

Additionally, the 1996 amendments to the *EA*, which included the insertion of s 45A, were drafted and considered by a large team of legal experts.[45] One is hard pressed to believe that the team had overlooked the somewhat glaring inconsistency between s 45A and Illustration (b) to s 45.

However, despite much effort, this author was not able to find a way to satisfactorily reconcile Illustration (b) and s 45A. The most plausible way goes something along these lines: Contrary to the Defence's argument, Illustration (b) does not illustrate the broad rule that a third party conviction is not admissible in subsequent criminal proceedings. Rather, in the illustration, B's judgment is not admissible

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40 *Ibid* at paras 37, 38.

41 *Ibid* at para 38.

42 *Ibid* at para 44.

43 [1916] 2 AC 575 (PC).

44 *Ibid* at 581 [emphasis added].

45 *1996 EA Debates*, *supra* note 34 at col 456:

> …the [1996 amendments to the *EA*] were drafted by a committee led by the Dean of the Law Faculty, comprising members from the Judiciary, the Attorney-General's Chambers, MINDEF Legal Services and the universities. They considered other comparable legislation from Australia, Canada, Malaysia, New Zealand, South Africa, United Kingdom and the USA… The Judiciary, National Computer Board, the Auditor-General, the Ministry of Information and the Arts and the Ministry of Finance have been consulted and they support the relevant amendments. The Law Society and the Institute of Certified Public Accountants have also been consulted and many of their views have been taken into account in the final draft of the Bill.

simply because *the fact that B had enticed away C, A's wife*, was neither a fact in issue nor a relevant fact (under any relevancy provision in the *EA*) in C's trial for committing bigamy. The issue in question in C's trial is whether C was ever A's wife. In this sense, Illustration (b) and s 45A are reconcilable.[46] Read together, they stand for the rule that a third party's prior conviction is admissible in subsequent criminal proceedings, *provided* that the fact that the third party had committed an offence is either a fact in issue, or a relevant fact in the subsequent criminal proceeding. There is some basis for this argument. In Illustrations (c) and (e) to s 45, the prior convictions of the third party are admissible because in the subsequent criminal proceeding, they are relevant as showing motive under s 8 of the *EA*. In Illustration (d), the prior conviction is admissible because it was a fact in issue in the later criminal trial. This is not the case in Illustration (b). It may be argued that in C's trial for committing bigamy, the fact that B had enticed away C, A's wife, is relevant under s 11 of the *EA*. That provision provides that facts not otherwise relevant are relevant if they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. But there is case law that suggests that s 11 of the *EA* cannot apply in such a situation because (a) a judgment, *ie* court's opinion, is not a "fact" under s 11, and (b) s 11, which is a general relevancy provision, is not meant to prevail over s 45, a specific relevancy provision.[47]

Nevertheless, there are two reasons why this way of reconciling Illustration (b) and s 45A cannot be sustained. First, it seems that there is also case law that held that s 11 can apply to admit prior judgments,[48] that is, it can apply to Illustration (b) such that B's judgment is relevant in C's trial. Given the uncertainty of the applicability of s 11 to a situation as in Illustration (b), it is highly unlikely that Parliament would have simply assumed one position and proceeded to introduce s 45A on that basis, without any further elaboration in the debates. More importantly, on a closer reading, one will realise that the exception in s 45 applies only when what is a fact in issue or is relevant is the *existence of such judgment, order or decree*. So even if s 11 can apply to previous judgments, it cannot ultimately apply pursuant to the exception in s 45 because the exception relates only to admitting the existence of a judgment. In Illustration (b), what is sought to be admitted are *facts underlying B's judgment*, *eg*, that B had enticed away C, that C is A's wife. Put simply, Illustration (b) was intended to illustrate the rule that *the facts underlying a prior judgment of a third party*, as opposed to the existence of the prior judgment*, is never admissible in subsequent proceedings* (except under ss 43 and 44). The legislative history of Illustration (b)

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[46] In *Chua Boon Chye*, the fact that Shankar had committed criminal breach of trust of the MFO in question is an outright fact in issue in the accused's trial. Thus, it is a different situation from that illustrated in Illustration (b).

[47] M C Sarkar *et al*, *Sarkar's Law of Evidence*, 17th ed (Gurgaon: LexisNexis Butterworths Wadhwa Nagpur, 2010) at 446, [*Sarkar's Evidence*]; M Monir *et al*, *Principles and Digest of the Law of Evidence*, 10th ed (Allahabad: University Book Agency, 1994) at 139-159 [*Principles of Evidence*]; Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Law of Evidence*, 23rd ed (Gurgaon: LexisNexis Butterworths Wadhwa Nagpur, 2010) at 306, 307, 322-327 [*Ratanlal's Evidence*].

[48] *Sarkar's Evidence*, *ibid* at 457, 458, 461, 1132; *Principles of Evidence*, *ibid*; *Ratanlal's Evidence*, *ibid*.

(and more generally s 45) supports this view.[49] And since s 45A was introduced to permit the admission of *facts underlying a third party's prior conviction* (*eg*, that a third party committed an offence and the underlying elements are made out),[50] s 45A is not reconcilable with what is sought to be illustrated in Illustration (b).

And quite apart from Illustration (b), s 45 *in general* is meant to stand for the rule that (a) the facts underlying a prior judgment of a third party is never admissible in subsequent proceedings, except under ss 43 and 44, and (b) the existence of a prior judgment is never admissible in subsequent proceedings, except under s 42 or under s 45, where the existence is a fact in issue or a relevant fact.[51] So s 45A is clearly inconsistent with s 45. The court in *Chua Boon Chye* tried to reconcile s 45 with s 45A by stating that the latter qualifies as "some other provision of this Act" as provided for in the latter portion of s 45.[52] But with respect, that is a questionable position. As mentioned, *the exception in s 45 applies only when what is sought to be admitted is the "existence" of a prior judgment*. Section 45A evidently permits the admission of not just the existence of a prior conviction, but also the facts underlying a prior conviction. To that extent, s 45A cannot be the "some other provision of this Act" under s 45.[53]

So it is somewhat unfortunate that the drafters chose to begin s 45A with the phrase "without prejudice to ss 42, 43, 44 and 45". That phrase suggests that s 45A is not an exception to, or at least does not impact the scope of, s 45.[54] As discussed, this is plainly not so. Perhaps what the drafters meant was that s 45A does not impact the scope of the *exception* portion of s 45.[55] Additionally, given that s 45A is an obvious exception to s 45, when s 45A was introduced, Parliament should have consequentially amended s 45 to read "Judgments, orders or decrees other than those mentioned in ss 42, 43, 44 *and 45A* are irrelevant…"

In short, the court in *Chua Boon Chye* was ultimately justified in concluding that Illustration (b) is inconsistent with s 45A. This is indeed a "very special case" where an illustration in the *EA* must give way to another provision in the *EA*. Furthermore,

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[49] In Sir Stephen J Fitzjames' original draft of the *Indian Evidence Act* (which the *EA* is largely based on), there is an illustration that looks uncannily similar to Illustration (b) to s 45 of the *EA*. Illustration (b) to Article 42 of the draft provides that:

> The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C. A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.

Article 42 (Statements in Judgments Irrelevant As Between Strangers, Except Admiralty Cases) states that "[s]tatements contained in judgments as to the facts upon which the judgment is based are deemed irrelevant as between strangers, or as between a party, or privy, and a stranger…" (see Stephen J Fitzjames, *A Digest of the Law of Evidence*, 9th ed (London: Macmillan, 1911) at 54, 55.

[50] *1996 EA Debates*, *supra* note 34.

[51] *Sarkar's Evidence, supra* note 47 at 1129ff; *Principles of Evidence, supra* note 47 at 576ff.

[52] *Chua Boon Chye*, *supra* note 1 at paras 43, 44.

[53] Furthermore, it is doubtful whether s 45A is even a relevancy provision, as envisaged by the court in *Chua Boon Chye*, *ibid*. See the discussion in Part IV below.

[54] *Chua Boon Chye*, *ibid* at para 45.

[55] Sections 42, 43 and 44 are themselves exceptions to the general rule that a previous judgment is generally not admissible in subsequent proceedings.

with respect to the Defence's argument that admitting third party convictions as evidence in subsequent criminal proceedings poses risks to a fair trial, the court rightly held that the concern is overstated.[56] Hence, a third party's previous conviction is admissible as evidence not only in subsequent civil proceedings, but also against an accused in subsequent criminal proceedings.

B. *Whether Charges Taken Into Consideration are Covered Under Section 45A of the* EA

There is one other pertinent issue, but which attracted only minimal attention from the court in *Chua Boon Chye*. It arises from the fact that, as highlighted in Part II above, what the Prosecution had sought to admit was not a charge that Shankar was in fact convicted on, but rather, merely a charge taken into consideration for the purpose of his sentencing ("TIC charge"). The Defence raised this point as one of its arguments,[57] and the court stated that it did "recognise that the charge involving the MV Milos was strictly speaking not a conviction, but was in fact a [TIC charge]".[58] However, it added that it is clear both the trial and High Court judges were aware of this.[59] In any case, the Prosecution had also relied on the oral testimony of Shankar that he did conspire with others to siphon off the MFO in question, and that is "more than sufficient evidence to prove that the MFO [in question] was stolen".[60] In light of this, the court cannot be faulted for not dwelling more deeply into this issue. To be sure, the question referred to the court presupposes that what is sought to be admitted *is* a "conviction".

But can a TIC charge be considered a "conviction" under s 45A, such that it may be admitted in subsequent criminal proceedings under that section? It is submitted that there are powerful arguments in favour of answering this question both in the positive and in the negative, but on balance, the better position (even if not by much) is that a TIC charge *does not* qualify as a "conviction" under s 45A.

There are several arguments that support the position that a TIC charge should qualify as a "conviction" under s 45A. First, for an offence to be taken into consideration for the purpose of sentencing, pursuant to s 148(1) of the *CPC*, the offender *must first admit to having committed the offence*. If the offender has formally admitted to committing the offence, then *prima facie* that should have probative value in showing that the offender committed the offence. Offenders do not usually admit to committing an offence if they are innocent.[61] So although *as a matter of form* a court does not convict an offender of an offence which is taken into consideration, arguably *as a matter of substance*, an offence which is taken into consideration is really not much, if even any, different from an offence which

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56 See generally *Chua Boon Chye*, *supra* note 1 at paras 65-72.

57 *Ibid* at para 74.

58 *Ibid* at para 77.

59 *Ibid*.

60 *Ibid* at para 78.

61 For a similar view in the context of an offender admitting to committing an offence for the purpose of pleading guilty, see Law Reform Committee, *Fifteenth Report (The Rule in Hollington v Hewthorn)* (London: Her Majesty's Stationery Office, 1967) at para 12.

an offender pleads guilty to and is actually convicted for.[62] Given that the latter is clearly admissible under s 45A, the former should also be similarly admissible. The force of this argument is significantly augmented in a situation as in *Chua Boon Chye*, where the TIC charge of the third party is closely related to the charges that he pleaded guilty to and was convicted for—they all arose from related incidents. So had the Prosecution proceeded on the TIC charge, it is virtually certain that Shankar would have pleaded guilty to that and been convicted for it (and therefore that charge would be admissible under s 45A). In this sense, it is pedantic to bar the admission of the TIC charge just because it was only taken into consideration. Secondly, the purpose behind the introduction of s 45A to the *EA* is to "save judicial time and legal costs".[63] Where an offender has admitted to an offence in a charge so that it can be taken into consideration, it would not save judicial time and legal costs for that charge to be inadmissible, such that in a subsequent proceeding the issues arising from that charge have to be litigated all over again. Thirdly, if TIC charges are not admissible under s 45A, there may be cases where the Prosecution is less inclined to offer that certain charges be taken into consideration, because that would deprive the Prosecution of a potentially good source of evidence that can be admitted in later criminal proceedings, for instance, of a co-accused.

That said, in this author's view, the arguments that support the position that a TIC charge does not qualify as a "conviction" and consequently are not admissible under s 45A are more persuasive. The main argument is that although a TIC charge is substantively quite similar to a charge that an offender pleads guilty to and is convicted on, courts should accord fidelity to the plain words of s 45A; the specific words "convicted or acquitted" are used. When an offender pleads guilty to a charge, s 227(1) read with s 228(1) of the *CPC* suggests that there will be a "conviction" on that charge. And when an offender claims trial to a charge and the court finds that the elements are disclosed, s 230(1)(x) of the *CPC* states that the court must record a "conviction". In these two circumstances, it is patently clear that the offender has been "convicted" of a charge. In contrast, there is no such conviction (or acquittal) recorded *vis-à-vis* a charge which is merely taken into consideration. Indeed, there appears to be no other provision in the *EA* or *CPC* or any other written law that suggests that a charge taken into consideration can be equated with a conviction. This is consistent with the High Court's view in *Heah Lian Khin* that "charges which have been taken into consideration are neither convictions nor acquittals".[64] Similarly, in the UK, the courts[65] and the

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[62] An English case that supports this view is *R v Robertson; R v Golder* [1987] 1 QB 920 (CA), where one of the issues was whether under s 74 of the *UK PACE 1984*, *supra* note 31, "conviction" includes a case where an offender has been convicted but not actually sentenced. The UK Court of Appeal held at 931 that it does, because:

> The purpose which lies behind the enactment of s 74 was to enable proof of the commission of an offence by X to be proved by the record without the necessity of calling X to admit the truth of what appears on the record. Therefore, what is important is either that a jury has found X's offence proved, or that X himself has before a court formally admitted that he has committed the offence.

[63] *1996 EA Debates*, *supra* note 34.

[64] *Heah Lian Khin, supra* note 6 at para 89.

[65] See *Re James Kessack Nicholson (No 1)* (1948) 32 Cr App R 98 at 100 (CA), where the English Court of Criminal Appeal stated that "… the taking into consideration of cases at the request of an accused person does not mean that there has been a conviction in each of such cases". See also *Re James Kessack Nicholson (No 2)* (1948) 32 Cr App R 127 at 131.

Crown Prosecution Service[66] have generally taken the position that there is no conviction as regards a charge taken into consideration. Thus, if Parliament intended for s 45A to also cover TIC charges, it is reasonable to assume that it would have made that intention clear, for example, by stating that "the fact that a person has been convicted or acquitted of an offence, *or has admitted to an offence for the purpose of his sentencing*, shall be admissible in evidence". Secondly, the High Court in *Choo Michael* has cited the New Zealand Court of Appeal case of *Jorgensen v News Media (Auckland) Limited*,[67] where the latter court opined that even though a prior conviction is merely an opinion, it should be admissible because it is an opinion "made by persons, whether judges, magistrates or juries, acting under a legal duty to form and express an opinion on that issue".[68] On the contrary, with respect to a TIC charge, the court does not form any express opinion on the underlying offence. Thirdly, the lattermost part of s 45A reads "where he was convicted, whether he was so convicted upon a plea of guilty or otherwise". This suggests that s 45A only concerns a conviction arising from a plea of guilty or following a trial. Fourthly, where TIC charges are concerned, the offender admits to the underlying offence and consents to it being taken into consideration *for the purpose of his sentencing*, and not for any other purpose such as for it to be evidence in someone else's subsequent proceeding. Finally, where an offender admits to an offence for it to be taken into consideration, minimal judicial time and effort is expended on this process. So even if that is not admissible in subsequent proceedings, and the related issues have to be re-litigated, it is not as if much judicial time and litigation costs will be wasted. Of course, the same can be said for convictions arising from a plea of guilty, but for that case, Parliament has made it abundantly clear that convictions arising from a plea of guilty are covered by s 45A. That is not the case for charges taken into consideration.

There remains the very interesting question as to whether a third party's prior *admission of an offence* so that that offence may be taken into consideration for his sentencing may still be admitted as evidence in limited circumstances in subsequent criminal proceedings, *as an oral statement* (as opposed to a prior conviction) *pursuant to other provisions*, for instance, under s 259(1)(a) and (b) of the *CPC* read with ss 147 or 157 of the *EA* (previous inconsistent statement to be used in cross-examination or impeachment purposes), and under s 259(1)(e) of the *CPC* read with s 32(a) of the *EA* (exception to hearsay). That issue remains outside the scope of this note but certainly deserves more in-depth consideration at another time.

IV. Looking Ahead

This note has demonstrated that the court in *Chua Boon Chye* has rightly held that pursuant to s 45A of the *EA*, a third party's previous conviction is admissible as evidence not *only in subsequent civil, but also criminal proceedings*. There are a few other related but difficult issues that do not directly arise in the case, and remain

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66 An "offender is not charged or convicted of the offences taken into consideration": Crown Prosecution Service, "Offences To Be Taken Into Consideration (TICs)", online: Crown Prosecution Service <http://www.cps.gov.uk/legal/l_to_o/offences_to_be_taken_into_consideration_guidance_%28tics%29_/>.

67 [1969] NZLR 961 (CA).

68 *Choo Michael*, *supra* note 32 at para 29.

unresolved. These are all issues that await further exploring and clarification at other suitable opportunities. The first is, for what purpose exactly can a third party conviction be admitted in a subsequent proceeding. Section 45A states that the fact that a person has been convicted or acquitted is admissible "where relevant to *any issue* in the proceedings".[69] The difficulty is whether courts should read the words "any issue" literally, *ie* broadly, or as referring only to when the elements of the third party's previous offence are the same as or very similar to that in the subsequent proceeding and when the previous offence is a predicate offence, *ie* an element of the offence in the subsequent proceeding.[70] The court in *Chua Boon Chye* briefly examined this issue,[71] but no firm decision had to be made because in the case, the accused's offence is one of dishonestly receiving stolen property, and Shankar's previous criminal breach of trust offence *vis-à-vis* the MFO in question is clearly a predicate offence. Another point which has seemingly escaped the parties and the court's attention relates to the word "relevant" under s 45A. As explained above, the court viewed s 45A as a relevancy provision.[72] But under s 3(2) of the *EA*, "relevant" is defined as when one fact is connected to another in any of the ways referred to in the provisions of the *EA relating to the relevancy of facts*. Provisions in the *EA* relating to relevancy of facts such as ss 6 to 16 will state explicitly the circumstances when a fact is relevant. Section 45A is not such a provision. More troublingly, s 45A was closely modelled after provisions in the UK, where the word "relevant" is also used. But the common law meaning of "relevant" is different from the *EA* definition of "relevant".[73] It is not clear which meaning is supposed to apply under s 45A.

The second outstanding issue is what content underlying the third party's prior conviction may be admitted pursuant to s 45A. The obvious content of a conviction would be the elements that make up the offence, such as the *actus reus* and *mens rea*. These are clearly admissible. But what if the previous conviction arose from a court's finding of facts (in a trial situation) or the statement of facts (in a plead guilty situation) which includes facts such as the offender's motive for committing the offence, the background leading to the commission of offence, the aggravating and mitigating factors of the offence? Are these admissible as well? The author's tentative view is that they should not be admissible because s 45A states that a conviction is admissible for the purpose of proving that an offender "committed (or, as the case may be, did not commit) that offence". So it seems that *only the facts that disclose the elements of the offence* should be admissible.

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69 Emphasis added.

70 See generally Pinsler, *supra* note 2 at paras 7.028, 7.032.

71 *Chua Boon Chye*, *supra* note 1 at paras 67-72.

72 *Ibid* at paras 43, 44.

73 Pinsler, *supra* note 2 at para 2.017; Peter Murphy, *Murphy on Evidence*, 8th ed (Oxford: Oxford University Press, 2003) at 31, 32.