CURRENT POINTS

RETRACTED CONFESSIONS

Where a confession is made and later retracted the jury should be told that there are two separate and distinct questions to be considered: (1) Did the accused actually say the things he is alleged to have said, and (2) If he did so, were the things that he said true?

In *Abu bin Hussin* v. *Public Prosecutor* (1959) 25 M.L.J. 5, the appellant was accused and convicted of murder. The day after his arrest he made a voluntary statement to a magistrate which was admitted in evidence at his trial. At his trial the appellant elected to give evidence on his own behalf and admitted having made a voluntary statement to a magistrate: however he denied that he said the things which he was alleged to have said and gave a substantially different account of what he had actually said to the magistrate. In the course of his summing up the learned trial judge said: "Accused denied making certain statements recorded in the confession. If you reject the evidence contained in the confession, then you will have to be satisfied that the magistrate was not telling the truth."

The Court of Appeal held that the learned trial judge had erred in overlooking that two entirely separate and distinct questions to be considered in relation to the confession: (1) Did the accused say the things he was said to have said, and (2) were they true or not? It would be false reasoning to conclude that just because the accused did in fact say what he was alleged to have said that what he said was true.

UNSWORN STATEMENTS FROM THE DOCK

In *Wong Heng Fatt* v. *Public Prosecutor* (1959) 25 M.L.J. 20, Smith J. held that an unsworn statement from the dock was not evidence within the meaning of section 174 (ii) of the Criminal Procedure Code. The fact, therefore, that the accused has made an unsworn statement from the dock does not give his advocate the right to sum up his case.

CONFLICTING EVIDENCE OF DEFENCE WITNESSES

The fact that various defence witnesses give different accounts of the same incident does not necessarily cast suspicion on their truthfulness. In *Leo Fernando* v. *R.* (1959) 25 M.L.J. 157, a police officer was charged with assaulting an arrested man in a police station. The complainant had been arrested for threatening behaviour in the street: he had refused to proceed to the police station and had to be taken there by force. The complainant alleged that when he arrived in the charge room

he was kicked on the inside of the thigh by the accused. The defence case was that the complainant had refused to allow himself to be removed to the police lock-up and in the ensuing melee he had received the injuries complained of. The magistrate who convicted the accused appeared to attach great importance to the fact that the defence witnesses did not all tell precisely the same story as to how the complainant received the injury to his thigh. On appeal, the learned Chief Justice was of opinion that such discrepancies might well favour the truthfulness of the witnesses rather than otherwise, for it was natural that people taking part in a brief and confused struggle could not state precisely how any particular bruise or injury was sustained. The appeal, therefore, was allowed.

NEWSPAPER REPORTS PUBLISHED DURING THE TRIAL

In *Lee Ah Cheong* v. *R.* (1959) 25 M.L.J. 123, the appellant was convicted under section 4 of the Arms Offences Ordinance of using a firearm and sentenced to death. He appealed on the ground that during the trial a newspaper article had been published which was highly prejudicial to the defence. The article, which was published under the heading " 'Expert' Picks Wrong Bullet," referred to evidence given during the trial.

The Court of Criminal Appeal rejected this contention, and adopted the words of the English Court of Criminal Appeal in *R.* v. *Armstrong* [1951] 2 All E.R. 219, 35 Cr. App. Rep. 72: "The fact that the article was published is no ground for this Court to infer either that the jurors who tried the case had read it or that, if they had read it, they were unfit to try the case or biased against the prisoner for the purpose of the trial.

ORAL PROOF OF THE EXISTENCE OF A WRITTEN CONTRACT

Proof of the existence of a contract must be distinguished from proof of the terms of a contract. This was held by Ambrose J. in *Goh Leng Sai* v. *R.* (1959) 25 M.L.J. 121. The learned judge held that section 64 of the Evidence Ordinance, which provides that "documents must be proved by primary evidence except in the cases hereinafter mentioned," and section 92 of the Evidence Ordinance, which provides that the terms of a contract, which has been reduced to the form of a document, can only be proved by production of the document, apply only to cases where it is desired to prove the contents of the document and do not apply to cases where it is only desired to prove that a contract does in fact exist.

CORPORAL PUNISHMENT

In *Yong Pak Yong* v. *Public Prosecutor* (1959) 25 M.L.J. 176, Good J. upheld a sentence of whipping in a case of extortion, even although there was no actual violence or brutality. Citing the judgment of the Court of Appeal in *Ho Kin Luan* v. *Public Prosecutor* (1959) 25 M.L.J. 159, the learned judge pointed out that although, as a general rule, the courts would not impose a sentence of corporal punishment except in cases involving violence and brutality on the part of the offender, exceptional cases might arise where the court would be justified in inflicting a sentence of corporal punishment, even although no actual violence or brutality occurred. Cases might involve violence and brutality, even although no actual violence or brutality took place: extortion cases involved violence and brutality, even although the thug was able to obtain his ends without carrying out his threats, actual or implied, of violence and brutality.

The learned judge was of the opinion that in considering sentence, as distinct from the question of guilt or innocence, the courts were entitled to take judicial notice of what was notorious; and he took judicial notice of the prevalence of secret society activities, of the great degree of violence and brutality involved, and of the terror which they inflicted upon law abiding citizens.

BURDEN OF PROOF ON THE ACCUSED IN CRIMINAL CASES

In *Public Prosecutor* v. *Lim Kwai Thean* (1959) 25 M.L.J. 179, the accused was convicted of failing to produce his identity card when demanded by a police officer. Good J. held on revision that the onus of proving that the accused was not a person required to be registered under the Emergency Regulations lay upon the accused; and that it was not for the prosecution to prove affirmatively that the accused was a person required to be registered under the Emergency Regulations. He based his decision upon section 106 of the Evidence Ordinance, which stated: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." To interpret that section properly it was essential to concentrate upon what was meant by the word "especially." The section did not say "exclusively" or "solely," and the effect of the word "especially" was that if it was an easy matter for the accused to prove a fact the proof of which by the prosecution would present the prosecution with inordinate difficulties, the burden of proving that fact lay on the defence. That, in his opinion, was the ratio decidendi of *Abdul Manap* v. *Public Prosecutor* (1952) 18 M.L.J. 140.

DUTY OF TRIAL COURT TO GIVE REASONED JUDGMENT

Allowing an appeal against a conviction under section 165 of the Penal Code, Ismail Khan J. in *Balasingham* v. *Public Prosecutor* (1959) 25 M.L.J. 193, stressed the necessity for the trial court to state its reasons for arriving at a judgment, in the case before him there was a direct conflict of evidence and a serious defence could not be summarily dismissed as an unlikely story without adequate reasons for such a conclusion. Under section 308 of the Criminal Procedure Code the trial court was under a duty to transmit the ground of its decision to the Appellate Court, and this implied a reasoned judgment on the facts and law, not merely the conclusion arrived at.

The learned judge pointed out that there was no legal presumption that an interested witness should not be believed. He was entitled to be believed until cogent reasons for disbelief could be advanced.

DANGEROUS DRUGS

Under the Dangerous Drugs Ordinance the burden of proving the defence of section 48 rests on the accused.

In *R.* v. *Ismail bin Mohd. Amin* (1959) 25 M.L.J. 148, a revenue officer was charged with being in unauthorised possession of raw opium. The District Judge dismissed the case without calling on the case for the defence. On appeal the Chief Justice sent the case back for re-trial. Under section 36 of the Dangerous Drugs Ordinance the burden of proving any exception or defence lies upon the accused; and in this case the accused relied on the defence of section 48 of the Dangerous Drugs Ordinance, that he was acting in the course of his duties as a government officer. The learned District Judge had acquitted the accused on the ground that the prosecution had merely raised suspicion against the accused, and this was not sufficient to rebut the presumption of innocence. This, said the learned Chief Justice, was wrong. If at the end of the prosecution case there were not enough facts to establish affirmatively that the exception under section 48 had been established, then the proper course was called upon the accused for his defence.

TELEPHONE CONVERSATIONS OVERHEARD BY THE POLICE

Where the police have overheard telephone conversations in the course of their investigations they may give evidence of such conversations at the subsequent trial.

In *Lee Yang Hee* v. *R.* (1959) 25 M.L.J. 89, the appellant was convicted of assisting in the carrying on of a public lottery, and evidence was given that during

the course of a police raid on his premises several people rang up and placed bets. It was contended on appeal that evidence of these telephone conversations was improperly admitted in view of section 121(1) of the Criminal Procedure Code, which provides that no statement made to a police officer in the course of a police investigation may be used as evidence. The Chief Justice, Sir Alan Rose, rejected this contention on the ground that the telephone callers themselves were unaware that any police investigation was in progress, and it could not be said, therefore, that the telephone conversations were statements made to a police officer in the course of a police investigation.

The learned Chief Justice further held that a characters lottery is a lottery within the meaning of the Common Gaming Houses Ordinance, and that the ability to ring up the appellant's office and place bets over the telephone constituted "access" to the lottery within the meaning of the Ordinance.

Section 34 of the Courts Ordinance

Section 34 of the Courts Ordinance does not provide an appeal by way of case stated. The effect of a grant of a certificate under section 34 of the Courts Ordinance is that the original appeal as a whole is re-heard by the Court of Appeal and the decision of the judge who granted the certificate disappears, including any alterations he may have made in sentence. This was held by the Court of Appeal in *Public Prosecutor* v. *Choy Kok Kuan* (1959) 25 M.L.J. 80 and *Ho Kin Luan* v. *Public Prosecutor* (1959) 25 M.L.J. 159.

Parking and Waiting

Parking and waiting are not the same: all "parking" is "waiting" but not all "waiting" is parking.

In *Ramachandran* v. *Public Prosecutor* (1959) 25 M.L.J. 71, the appellant, who had gone to pick up a friend in his car, stopped his car outside his friend's house by a "No Parking" sign and requested a watchman to go inside and tell his friend that he was there; meanwhile he remained in the driver's seat waiting for his friend. When asked to drive on by a police officer he did not do so, saying that he wanted to wait for his friend, and he waited there for about eight minutes when his friend came and he drove away. He was charged and convicted for failing to conform to the indication given by the "No Parking" sign.

On appeal, Smith J. held that the terms "parking" and "waiting" are not synonymous. The learned judge held that as long as the driver remains in his car and has control over it he has not "parked" his car but is merely "waiting" in it; it is only when he gets out and leaves his car that he can be said to have "parked" it. In this case the prohibition was merely against "parking" and not against "waiting," and the appeal was allowed.

In support of his decision the learned judge cited the obiter dictum of Sir Wilfred Green M.R. in *Ashby* v. *Tolhurst* [1937] 2 K.B. 242, 249, [1937] 2 All E.R. 837, 840: "If you park your car in the street you are liable to get into trouble with the police. On the other hand, you are entitled to park your car in places indicated by the police or the appropriate authorities for the purpose. Parking a car is leaving a car and, I should have thought, nothing else."

Summing up in a Murder Trial

When summing up the trial judge is under no duty to explain to the jury at length the whole law relating to murder. So said the Court of Appeal in *Cassim bin Osman* v. *Public Prosecutor* (1959) 25 M.L.J. 25. He need go no farther than is necessary to enable the jury to decide the questions of guilt or innocence in the case before them. As was said by Lord Alverstone L.C.J. in *R.* v. *Hampton* (1909) 2 Cr.

App. Rep. 274, 276: "A summing up is not a dissertation upon the law but must have reference to the way in which each case has been conducted at the trial."

The Court of Appeal distinguished the case before them from *Hashim bin Mat Isa* v. *Public Prosecutor* (1950) 16 M.L.J. 94 and *Manah bin Ali* v. *Public Prosecutor* (1958) 24 M.L.J. 300 on the ground that in those cases the mental state of the accused was in question and the trial judge failed in his direction by equating killing with murder. In the case before them it was a case of murder or nothing and the defence was one of alibi and that it was not the accused who had killed the deceased.

Dismissal of Seamen in a Foreign Port

In *Koninklijke Paketvaart-Maatschappij N.V.* v. *E. J. Wuiran* (1959) 25 M.L.J. 169, the plaintiff company owned a fleet of ships operating largely in Indonesian waters. Owing to political conditions in Indonesia it became virtually impossible for them to carry on their business in Indonesia: their assets in Indonesia were taken over by an agency of the Indonesian government, and their fleet lay idle in Singapore.

The defendants were Indonesian seamen in the employment of the plaintiff company, and the plaintiffs decided to terminate their employment and repatriate them to Indonesia. Under a clause in their contract of service the defendants were entitled to three months' wages in lieu of notice, if they were dismissed on the ground that some of the company's ships were being taken out of service. When the defendants inquired about the payment of this money, the company replied that the money would be paid to them by the government agency which had taken over their assets in Indonesia. The defendants, thereupon, refused to be repatriated until the money had been paid to them and refused to leave the ship on which they were quartered. The plaintiff company then dismissed the defendants for disobedience to a lawful order and sued them for trespass.

The Chief Justice, Sir Alan Rose, held that as there had been a fundamental change in their prospects and conditions of service, the defendants were entitled to disobey the order of transfer to Indonesia. Their action in remaining on board the plaintiffs' ship constituted a trespass, but in the circumstances it could be met by an award of nominal damages. The learned Chief Justice, citing a dictum of Singleton L.J. in *Canadian Pacific Railway* v. *Gaud* [1949] 2 K.B. 239, 255, held that there was no difference between a seaman's contract and any other contract between a master and servant, except that there is a rule that a seaman may not be discharged in a foreign port unless he is provided with maintenance and suitable repatriation facilities. The defendants, therefore, were entitled to three months' wages in lieu of notice and repatriation to Indonesia.

Where Time is Not of the Essence of the Contract

In deciding whether time is of the essence of the contract the courts will look not at the letter but the substance of the agreement. So held Ismail Khan J. in *Ayadurai* v. *Lim Hye* (1959) 25 M.L.J. 143. In that case the plaintiff agreed to purchase a plot of land from the defendant on 7th May, 1955, for $7,150 and deposited $3,650 with him. It was a term of the contract of sale that on the issue of new titles the vendor should execute a registrable memorandum of transfer in favour of the purchaser or his nominee on payment of the balance of $3,500 to the vendor's solicitors and that if the balance of $3,500 was not paid to the vendor's solicitors within fourteen days of the receipt of notice of issue of new titles the deposit of $3,650 should be forfeited. On 1st August, 1957, the vendor's solicitor notified the plaintiff that title had been issued and required him to pay the balance of $3,500 within fourteen days. The plaintiff was unable to deposit the money on the stipulated date

and requested an extension of six months to pay the amount due. The defendant refused and declared the deposit of $3,650 to be forfeited. The balance of $3,500 was, in fact, tendered within six weeks of the stipulated time.

Ismail Khan J. was of th opinion that in the circumstances the stipulation as to time of deposit of the balance of $3,500 was of secondary importance to the main purpose of the contract. The learned judge citing the judgment of Lord Haldane in *Jamshed Khodaram Irani* v. *Burjorji Dunjibhai* (1916) 43 I.A. 26, held that in cases of specific performance of contracts to sell real estate, the courts would look to the substance of the agreement in deciding whether time was of the essence of the contract, and would, if necessary, ignore the express terms of the contract. The plaintiff, therefore, was granted specific performance of the contract on payment of the balance of $3,500.

Responsibility of a Confirming House

A Confirming House has no responsibility for the quantity or quality of the goods shipped. This was held by Buttrose J. in *African Commercial Corporation Ltd.* v. *Hurrainali & Co.* (1959) 25 M.L.J. 125.

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