JOINDER OF CAPITAL AND NON-CAPITAL CHARGES — A QUESTIONABLE EXCEPTION

Chow Kim Hoong v. *P.P.*[1]

Lee Choh Pet & Ors. v. P.P.[2]

On 22nd December, 1969, the Singapore Parliament passed the Criminal Procedure Code (Amendment) Act, 1969 and brought to an end in Singapore jury trials in respect of capital offences. In place of jury trials, a new mode of procedure was introduced to try an accused charged with offences punishable with death. Section 178(1) of the amended Criminal Procedure Code provides:

> In all cases where the accused is charged with an offence in respect of which punishment of death is authorised by law, the accused shall be tried by a court consisting of two Judges of the High Court, one of whom shall be the presiding Judge.[3]

The decision of the court as to the guilt of the accused must be arrived at unanimously.[4]

1. [1971] 2 M.L.J. 137.
2. [1972] 1 M.L.J. 1.
3. Now re-numbered as s. 185, Criminal Procedure Code (Cap. 113, 1970 Ed.).
4. S.178(2); now re-numbered s. 185(2).

However in abolishing jury trials it would appear that the Singapore Legislature failed to take the opportunity of reviewing the rule prohibiting the joinder of capital and non-capital charges.[5] As a result, this rule came into prominence in two separate appeal cases before the Singapore Court of Criminal Appeal, namely, *Chow Kim Hoong* v. *P.P.*[1] and *Lee Choh Pet & Ors.* v. *P.P.*[2]

Chow Kim Hoong v. *P.P.*

In the first case of *Chow Kim Hoong* the appellant was found guilty of murder and also of causing grievous hurt at the same trial. The trial in respect of both charges took place before two judges of the Singapore High Court by virtue of the amendments to the Criminal Procedure Code. The accused was sentenced to death on the murder charge and one year's jail on the other charge. On appeal, the issue that was posed to the Court of Criminal Appeal was whether a two-judge court, trying a man on a capital charge can also try him in the same proceedings on another lesser charge. The Court comprising Wee Chong Jin C.J., Chua and Choor Singh JJ., in allowing the appeal, ruled that such a joinder invalidated the proceedings and ordered separate trials for the two charges against the accused.

Wee Chong Jin, C.J., in delivering an oral judgement, said:

> It seems to us absolutely clear that section 10 of the Supreme Court of Judicature Act has not been complied with at the trial of this appellant because section 10 requires every proceeding in the High Court to be heard and disposed of by a single judge save as otherwise provided by any written law. Now in the case of a charge under section 324 or section 326 of the Penal Code the requirements of section 19 must be followed unless, of course, there is a written provision in the Criminal Procedure Code providing that the offence can be tried and disposed of before the High Court comprising of two judges. There is no such written provision in the Criminal Procedure Code.[6]

The decision of the Singapore Court of Criminal Appeal reinforced once again the rule that a capital charge should not be joined with a non-capital charge at the same trial. This amounted to a re-assertion of the position before the abolition of jury trials, but unlike the reasoning in *Chow Kim Hoong,* the underlying basis of the rule prior to the amendment was based on the reception of English practice. As Whyatt C.J. in *Lee Ah Cheong* v. *Regina*[7] observed:

> This rule of practice has long been established in the English courts and we think it desirable that it should be followed in these courts.

5. See my article "Joinder of Capital and Non-Capital Charges in Singapore", (1969) Singapore Law Review, Vol. 1 at p. 127.

6. S. 10 of the Supreme Court of Judicature Act, 1969 reads as follows:-
"Every proceeding in the High Court and all business arising thereout shall, save as otherwise provided by any written law for the time being in force, be heard and disposed of before a single judge."

Query: What about Illustration (b) of section 169 of the Criminal Procedure Code? Is it not possible for the court to derive a discretionary power from its wording? see my article, *op. cit.*).

7. [1958] 2 M.L.J. 242.

Thus even though jury trials have been abolished, the fetter on judicial discretion as to joinder of capital with non-capital charges still remains. The decision in *Chow Kim Hoong* was however not without attendant consequences for in the later case of *Lee Choh Pet & Ors.* v. *P.P.,* the Singapore Court of Criminal Appeal was caught on the horns of a dilemma.

Lee Choh Pet & Ors. v. *P.P.*

In *Lee Choh Pet,* the three appellants were tried before a court of two judges of the High Court constituted under the amended Criminal Procedure Code. There were three charges against each of the appellants in respect of offences all of which carried the death penalty. In order to examine the question of law before it, the Singapore Court of Criminal Appeal traced the course of proceedings before the trial court. All the three appellants had claimed trial on all the three charges and the prosecution proceeded to call their evidence in support of the charges. At the close of the prosecution case, the court found that the prosecution had made out a case against all the three appellants on two of the charges which if unrebutted would warrant their conviction. In respect of the remaining charge the court found that the prosecution had failed to make out such a case against all three appellants but that a *prima facie* case of extortion in contravention of section 386 of the Penal Code had been made out against all of them.

The presiding judge in the High Court acquitted all three appellants on the remaining charge but framed a new charge of extortion which was read out and explained to all the appellants. As all the three appellants had claimed trial on the new charge, they were called upon to enter upon their defence on the new charge as well as the other two capital charges. They were given the usual facilities of recalling any witness who had already given evidence for the prosecution. The trial proceeded and at its conclusion all the three appellants were convicted on all three charges. They were sentenced to death on the charges of murder and kidnapping for murder and the sentence on the charge of extortion was suspended.

The main question of law raised before the Court of Criminal Appeal was, whether or not, a court, consisting of two judges of the High Court, which proceeded to hear a charge in respect of an offence punishable with death, could at the close of the prosecution case, substitute for the said charge a charge in respect of an offence punishable with imprisonment and proceed to hear the defence of the accused on the substituted charge. The Court of Criminal Appeal answering in the affirmative, invoked the authority of *Khalid Panjang & Ors.* v. *P.P.*[8] and dismissed the appeal. In *Khalid Panjang,* it appeared that when the trial commenced there was one charge only — a charge of murder — which required that the trial be by jury. In the course of the trial the charge was amended in the case of three of the appellants and an additional non-capital charge was framed against the other appellant. The Federal Court of Malaysia held that the grounds of appeal arising

8. [1964] M.L.J. 67.

from the amendment of the charge in the case of the three appellants and the additional charge in the case of the other appellant were without substance.

An Appraisal

The Court of Criminal Appeal's decision in *Lee Choh Pet* is interesting for it evidenced a stark display of the court's preoccupation with trying to escape from the effect of the rule prohibiting the joinder of capital and non-capital charges without considering the rationale behind the rule. In *Khalid Panjang,* the Federal Court of Malaysia decided, that at some stage prior to the commencement of a trial in the High Court the question of the mode of trial must be decided, i.e., whether it be tried by jury or by a judge alone; and that the criterion was that contained in the Criminal Procedure Code which provided that "in all cases where the punishment of death is authorised by law the accused shall be tried by a jury".[9] The court held that the only practicable time at which the criterion was to be applied was the commencement of the trial and that once a trial had commenced before a jury it could only be terminated, apart from questions of irregularity, by a verdict of the jury. Following from this, it could be contended that if at the commencement of the trial on a charge in respect of a capital offence the court was properly constituted, it would mean that the court was, during the course of the same proceedings, entitled to try the accused person on any lesser charge. This contention was accepted by the Singapore Court of Criminal Appeal in *Lee Choh Pet,* and in support of this contention, section 156 of the Criminal Procedure Code was invoked. This section states:

> Any court may alter any charge or frame a new charge, whether in substitution for or in addition to an existing charge, at any time before judgement is given.[10]

The Court thus distinguished the case of *Chow Kim Hoong* and the Malayan case of *Lee Chee Wan & Ors.* v. *P.P.*[11] on the ground that in both these cases, the non-capital charge was before the court at the very commencement of the proceedings.

9. Criminal Procedure Code (Malaysia), s. 200. For Singapore, see s. 178(1), now s. 185 (Cap. 113).

10. The Court also referred to s. 178(3) (now s. 185) of the Criminal Procedure Code which expressly authorises the trial court to convict an accused "of any lesser offence of which he could have been charged on the same facts." Some arguments were raised as to whether the lesser charge was in substitution for the capital charge or an additional charge. The trial court ruled that it was an additional charge but the Court of Appeal took a contrary stand and opined that it was a substituted charge. However such arguments were not pertinent to the question of law raised in view of s. 156.

11. In the Malayan case of *Lee Chee Wan* (1961) M.L.J. 62, six accused were tried together on two charges of murder and one charge of attempted murder. They were all convicted on all three charges and, with the exception of one of them who was a young person, were sentenced to death in respect of the first charge. On appeal, Thomson C.J. said: "In our opinion a trial by jury for two capital offences together with a non-capital offence is a nullity." The Federal Court in *Khalid Panjang* referred to its earlier decision in *Lee Chee Wan* and emphasised that that decision must be read in the light of what the court had just then decided, namely, that the time at which the criterion as to the mode of trial was to be applied was the commencement of the trial.

It is submitted that such a subtle distinction is highly unnatural for it has robbed the rule prohibiting the joinder of capital and non-capital charges of its purported purpose and rendered its existence meaningless. Although the court in *Chow Kim Hoong* invoked section 10 of the Supreme Court of Judicature Act as the basis for its ruling, the rule prohibiting the joinder of capital with non-capital charges originated along the following lines. In England, before 1915, there was a ruling expressly prohibiting all joinder of felonies. However by virtue of the Indictments Act 1915, this ruling was abolished. But its abolition was not total as a result of the decision in the 1918 case of *Rex* v. *Jones* [12] where the appellant was convicted in the court of first instance on an indictment which contained counts for murder and also for robbery with violence. In the Court of Appeal, Lawrence J. said:

> In a case of murder, the indictment ought not to contain a count of such a character as robbery with violence. The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment.

The rationale behind the rule was more succinctly expressed by Whyatt C.J. in *Lee Ah Cheong* v. *Regina* when he said:

> The reason for the rule is that when an accused person is defending himself on a capital charge, he ought not, in fairness, to be required to defend himself on other additional charges at the same trial.

It would be difficult to fathom how the purpose behind the rule could be upheld if in the course of proceedings the accused was called upon to defend himself against a non-capital charge. The Federal Court in *Khalid Panjang* had admitted that though what was done in that case was not legally wrong, the addition of the non-capital charge was something that was undesirable. This opinion was also noted by the Singapore Court of Criminal Appeal in *Lee Choh Pet.*

The query arises as to whether in fact the joinder of a non-capital charge with a capital charge was something that was undesirable. Could not the Singapore courts have avoided the pitfall which they had placed before themselves if only they had considered in *Chow Kim Hoong* whether the rule originating from *Rex* v. *Jones* was of any necessity or relevance ? It is submitted that the rigid position of fettering the trial judge's discretion ought not to be maintained. Various judicial pronouncements have frowned upon this practice. Lord Devlin in *Connelly* v. *D.P.P.*[13] has even said that as a general rule it is oppressive to an accused for the prosecution to charge him separately in two or more indictments when they could have charged him jointly with all offences. *Connelly's* case has been followed by subsequent English cases holding that if the offences are separately indicted, the judge ought normally, in exercise of his discretion, to prevent a subsequent trial of the later indictments.[14] Perhaps the Singapore legislature ought

12. [1918] 1 K.B. 416.

13. [1964] A.C. 1254.

14. See *R.* v. *Williams* (1965), C.C.A., N.I.; *R.* v. *Riebold* (1967), C.C.A.

to have taken note of the fact that in England the practice originating from the case of *Rex* v. *Jones* has been changed by *Practice Direction (Homicide Indictment) (1964).*

To abolish the rule totally would however be too drastic and might possibly lead to unfairness to the accused. It is submitted that in place of such a drastic measure, the discretionary power of the trial court to decide on whether to allow a joinder of capital charges with non-capital charges ought to be restored. Such a discretion would not only help the court to uphold the fundamental principle of giving the accused a fair trial but would also enhance the proper working of the whole scheme of Chapter XVIII of the Criminal Procedure Code which the case of *Chow Kim Hoong* has thrown out of gear.[15] As Lord Reid, after referring to the practice based on *R.* v. *Jones*, stated,

> I think the present practice is inconvenient and ought to be changed. I realise that there are cases where for one reason or another it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all charges which he intends to prefer; but in a case where it would have been improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general question as to the extent of the discretion of the court to prevent a trial from taking place; but I think that there must always be a residual discretion to prevent anything which savours of abuse of process.[16]

The dicta in *Connelly's* case were cited with approval by the Federal Court of Malaysia in *P.P.* v. *Ong Kok Tan.*[17] In order that such a discretion be judicially exercised, it is vital to hearken to the words of Azmi L.P.:

> In considering whether to allow joinder or not, the paramount consideration would be that any order whether allowing or refusing a joinder should only be made after consideration of whether such order would prejudice or embarrass the defence.

In conclusion, *Chow Kim Hoong* v. *P.P.* could be considered an unhappy episode which serves as a reminder that the legislature should always effect statutory amendments in the context of the *whole* piece of legislation to be amended.

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15. In particular, see ss. 156-166.
16. *Connelly* v. *D.P.P.* (1964) A.C. 1254, at p. 1296.
17. [1969] 1 M.L.J. 118.

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