UNSWORN STATEMENTS FROM THE DOCK

INTRODUCTION

The close affiliation with the English legal system has occasionally resulted in the creation of certain anomalies in the legal systems of Malaysia and Singapore. The practice of permitting an accused to make unsworn statements from the dock is an example of one such anomaly. It is highly questionable whether such a practice which the local courts have somehow permitted to seep into the Malaysian and Singapore legal frameworks ought to have been retained at all. This vestige of ancient English practice[1] has presented itself for judicial scrutiny in a few local cases[2] and in some other common-law jurisdictions.[3] In Malaysia and Singapore, the controversy resolves itself into basic issues:—

(1) Is there any basis for permitting such a practice, and,

(2) What is the probative value (if any) of such statements made from the dock ?

BASIS OF PRACTICE

The first issue emerged into the forefront in the 1969 case of *Mohamed Salleh v.* P.P.[4] where an appeal was made by the appellant to the Federal Court in Singapore[5] against his conviction for murder. The appellant had been given the usual warning at the trial and at the close of the prosecution case. The warning as usual contained a choice from a set of three alternatives, namely:

(i) To give evidence on oath from the witness-box and be liable to cross-examination like any other witness,

(ii) To make a statement from the dock and thereby escape from cross-examination, or,

(iii) To remain silent.

1. This practice has been strongly resisted by the courts in Scotland. See *H.M. Advocate* v. *Gilmour*, 1966 S.L.T. 198.

2. *Wong Heng Fatt* v. *P.P.* (1959) M.L.J. 20. *Ng Hoi Cheu* v. *P.P.* (1968) 1 M.L.J. 53. *Mohamed Salleh* v. *P.P.* (1969) 1 M.L.J. 104. *P.P.* v. *Sanassi* (1970) 2 M.L.J. 198.

3. See generally, J.A. Gobbo, *Cross On Evidence,* (Australian Edition) at pp. 198-201; Cowen and Carter, *Essays on the Law of Evidence,* Ch. VII.

4. [1969] 1 M.L.J. 104.

5. On 29th December, 1969, the Singapore Parliament passed the Supreme Court of Judicature Act, 1969 (Act No. 24 of 1969). Appeals arising from criminal trials in the High Court are now heard by the Singapore Court of Criminal Appeal.

The appellant who had elected to make a statement from the dock sought to argue as one of his grounds of appeal that inasmuch as the Criminal Procedure Code[6] does not expressly provide for such a right to make unsworn statements from the dock it was an irregularity for the trial judge to hold out such a choice to him. It was further alleged that the irregularity had resulted in prejudice to the appellant in that the trial judge after having held out such a choice, had told the jury in his summing-up that the unsworn statement was "practically worthless" as it was not made on oath and not subject to cross-examination. Counsel for the appellant submitted that in consequence, the irregularity could only be cured by a retrial.

The appeal was dismissed and in delivering the judgement of the Federal Court, Wee Chong Jin C.J. said:

> "The right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code".[7]

The learned Chief Justice further added that throughout the entire history of the local courts, an accused has always had such a right and that therefore in his view, this right could only be taken away by an express statutory provision to that effect.[8] It is submitted, with respect, that the observations of the learned Chief Justice can give rise to certain queries. The writer is of the opinion that the justification (if any) for such a right cannot be based upon an artificial division of rights available to an accused in a criminal trial into "substantive" or "procedural" rights. Such a classification must surely give rise to further problems for it is not clear as to what criteria one should adopt in determining whether a right of an accused is "substantive" or "procedural".[9] Even though this right of the accused has time and again been considered by the local courts as an "undoubted"[10] or "traditional"[11] right, it is submitted that the origin of such a right ought to have been examined, its rationale and then its relevance within the framework of the Criminal Procedure Code considered.

The origin of such a right can be traced back to the time before the passage of the Criminal Evidence Act, 1898 in England. At that time some of the English judges[12] had attempted to mitigate the severity of the common law which prohibited the accused from giving evidence on oath, by allowing him to make an unsworn statement, on which how-

6. For Singapore, see Criminal Procedure Code (Cap. 113, 1970 Ed.); For Malaysia, see Criminal Procedure Code — F.M.S. Cap. 6 (Reprinted 1971), Straits Settlements Cap. 21 (Penang and Malacca), Sabah Ordinance (Reprinted 1966) and Sarawak Cap. (Reprinted 1966).

7. [1969] 1 M.L.J. 104 at p. 105.

8. *Ibid.*

9. Quaere: For example, is the right to bail a "substantive" or a "procedural" right?

10. Per Chang Min Tat J. in *Ng Hoi Cheu* v. *P.P.* [1968] 1 M.L.J. 53.

11. So referred to by both counsel in *P.P.* v. *Sanassi* [1970] 2 M.L.J. 198.

12. Notably Cave J. and Stephen J.

ever, he could not be cross-examined.[13] The Act of 1898 somewhat anomalously preserved this compromise arrangement by providing that "nothing in....the Act shall affect....the right of the person charged to make a statement without being sworn".[14] The existence of such a right in the legal arena of Malaysia and Singapore is purely "an incident of history, political bondage or affiliation with a system of law we have so gainfully remained associated with".[15]

The reception of such a right into Malaysia and Singapore can perhaps be justified by invoking section 5 of the Criminal Procedure Code which provides as follows:

> "As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force in the State the law relating to criminal procedure for the time being in force in England shall be applied so far as the same does not conflict or is not inconsistent with this Code and can be made auxiliary thereto".

This mode of justifying the existence of the right of an accused to make an unsworn statement was adopted by Sharma J. in *P.P.* v. *Sanassi.* It is doubtful however as to whether the reception of such a right is "consistent" at all with the general scheme of the Criminal Procedure Code.

(2) *PROBATIVE VALUE*

The second issue as to the probative value of an unsworn statement poses a more difficult problem. Can such a statement be regarded as "evidence"? If not, what sort of weight should be attached to it?

Back as far as 1959, Smith J. in *Wong Heng Fatt* v. P.P.[16] had said:

> "I do not consider that a statement by an accused person from the dock is evidence in view of the provisions of section 4(1)(a) of the Oaths and Affirmations Ordinance, 1949 the essential part of which reads '...oaths shall be taken by...witnesses, that is to say, all persons who... give evidence... before the court...' Since the appellant was not sworn or affirmed he did not give evidence".[17]

In the 1968 case of *Ng Hoi Cheu* v. *P.P.*,[18] Chang Min Tat J. disagreed with the view of Smith J. and held that such a statement fell "fairly and squarely" within the definition of "evidence" in the Evidence Ordinance.[19] The reason profferred by Chang Min Tat J. was that the

13. See Glanville Williams, *Proof of Guilt;* C.K. Allen, "Unsworn Statements by Accused Persons" (1953) 69 Law Quarterly Review, p. 22; Cowen and Carter, *op. cit.* at Chapter VII.
14. The preservation of the right was supposed to be in keeping with the policy of the 1898 Act that pressure should not be put on the accused to give evidence on oath. The Criminal Law Revision Committee in England said, "... We think that the time has come to reverse this policy." — Eleventh Report, Evidence (General) Cmnd. 4991.
15. Per Sharma J. in *P.P.* v. *Sanassi* [1970] 2 M.L.J. 198.
16. (1959) M.L.J. 20.
17. *Ibid.*, at p. 21.
18. [1968] 1 M.L.J. 53.
19. "Evidence" is defined in section 3 of the Evidence Ordinance as including — "All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;"

definition of "witness" in the Oaths and Affirmations Ordinance, 1949 could not apply to an accused person who refused to be examined or to give evidence under his "undoubted" right to elect to venture only a statement from the dock or to remain silent. Sharma J. however in *P.P.* v. *Sanassi* preferred the decision of Smith J. to that of Chang Min Tat J. The learned judge came to his conclusion by reading section 4(1) (a) of the Oaths and Affirmations Ordinance, 1949 together with the definition of evidence in section 3 of the Evidence Ordinance.

Sharma J. said:

> "... I am of the opinion that any person who is entitled to be called a witness in a case has to take an oath or an affirmation as provided for in section 4(1) (a) of the Oaths and Affirmations Ordinance".[20]

The conclusion that a sworn statement cannot be strictly classified as "evidence" is in line with the position prevailing in England[21] and in some other common-law jurisdictions.[22] If it is accepted that the unsworn statement of an accused does not constitute "evidence" the query still remains as to the weight that should be attached to it. If the statement is "practically worthless", there is no point in holding out such a right to the accused. It can even be turned into a "trap for the unwary defendant".[23] The only weight that has been suggested is embodied in the woolly formula of "such weight as the jury think fit". Such a direction by the trial judge to the jury in *Mohamed Salleh* v. *P.P.* was upheld by the Federal Court in Singapore as "perfectly proper".[24] One can perhaps sympathise with the jury if they should confess confusion if on the one hand they are told that such a statement is not evidence and on the other hand to give it such consideration as they deem fit.[25]

CONCLUSION

It is submitted that this practice of permitting the accused to make an unsworn statement from the dock should be reviewed and if necessary abolished altogether. The reception of this English practice is questionable. In the first place, the enactment of the Criminal Procedure Code which expressly provides for the right of the accused to give evidence on oath could be considered as having done away with this

20. [1970] 2 M.L.J. 198 at p. 201.
The argument that evidence must be *sworn* evidence is not tenable in the case of a child-witness. Section 133A of the Malaysian Evidence Ordinance provides for the reception of "evidence" by a child even though his evidence may not be given on oath. Section 133A however provides that an accused cannot be convicted on such evidence of a child-witness unless it is corroborated by some other material evidence.

21. See *Shankley* v. *Hodgson* (1962) Crim. L.R. 248.

22. Eg: Massachusetts — See *Commonwealth* v. *Stewart,* (1926) 151 N.E.R. 74.

23. Per Glanville Williams in his book *The Proof of Guilt* at p. 72.

24. Cave J. had prior to 1898 in *Reg.* v. *Shimmin* (1882), 15 Cox C.C. 122, said that a sworn statement was entitled "to such consideration as the jury might think it deserved". Also see *Frost and Hale* (1964), 48 Cr. App. R. 284, 290-291.

25. See Zelman Cowen, "Unsworn Statements By Accused Persons" (1952) The Law Quarterly Review, Vol. 69 at p. 463.

right.[26] Such an argument found approval with the courts in Canada to justify the denial of the accused this ancient privilege to make unsworn statements. In *R.* v. *Krafchenko*[27] and *R. v. McNab*,[28] the courts were of the opinion that this former right of the accused no longer existed since the Canada Evidence Act did not expressly provide for its continuance.[29] Even if section 5 of the Criminal Procedure Code is invoked it is submitted that the reception of such a practice is totally inconsistent with the general scheme of the Code. This inconsistency can be exemplified by the case of *P.P.* v. *Sanassi.*

In *P.P.* v. *Sanassi*, Sharma J. posed the query as to whether a statement which would otherwise be inadmissible could form part of the statement of the accused if he elected to make such a statement from the dock. The learned judge held that it could not.[30] In the case, the unsworn statement of the accused had contained certain statements made to the police in the course of their investigations. Section 124 of the Straits Settlements Criminal Procedure Code forbids the use of such statements to be used as "evidence". The learned judge said:

> "Yet the effect of section 124 is that these statements (made to the police) are not to be used in *evidence*, and the statement of the accused made from the dock does not constitute *evidence and it is only evidence which the jury should take into account and to which I should draw their attention.* I will consequently delete all those parts of the statement which are to be found in the statement of the accused and which relate to what he told (the police) in the course of the investigations and I will direct the jury to that effect".[31]

If as the learned judge had said, the jury should only take account of evidence, there was no point at all in deleting the impugned portions of the unsworn statement of the accused. Rather the *whole* unsworn statement should have been deleted altogether.[32] The solution to the problem would have been to deny this right to the accused in the first instance.

It is useful to note that in England, the right of the accused to make an unsworn statement from the dock has been reviewed and it is

26. Note: In the English case of *R.* v. *Pope*, 18 T.L.R. 717, the trial judge thought that the enactment of the Criminal Evidence Act of 1898 had done away with this right until his attention was drawn to the saving clause of Section 1(h) of the Act !

27. (1914) 17 D.L.P. 244 (Manitoba).

28. (1945) 1 D.L.R. 583 (British Columbia).

29. Also see *R.* v. *Frederick* (1931), 57 Can. C.C. 340, 44 B.C.R. 547. Cf. *Tseng Ping-yee* v. *R.* (1969), H.K.L.R. 304, where the Hong Kong courts held that such a right cannot be abolished by statutory implication. See 1970 Annual Survey of Commonwealth Law p. 162.

30. The counsel for the accused had earlier stated to the court that it could not.

31. [1970] 2 M.L.J. 198 at p. 201.

32. The question may also arise as to whether an accused can cast imputations on the character of another person who is charged with the same offence in his unsworn statement without his own character being subject to attack. Under Section 54(2)(c) of the Malaysian Evidence Ordinance the accused's character can only be attacked if he has given "evidence" against such a person. Indeed this unfair advantage of the accused was noted by the Criminal Law Revision Committee in its Eleventh Report at p. 65.

most likely that the life of this anachronistic practice will soon be extinguished.[33] The Criminal Law Revision Committee in its Eleventh Report said:

> "We are strongly of the opinion that the right to make an unsworn statement about the facts instead of giving evidence on oath or affirmation should be abolished. Whatever justification there may have been for preserving the right in 1898, we think that nowadays the accused, if he gives evidence, should do so in the same way as other witnesses and be subject to cross-examination".[34]

The learned Chief Justice in *Mohamed Salleh* v. *P.P.* had said that this right could only be removed by express statutory provision.[35] It is submitted that if the right is to be abolished in Malaysia it should be effected in this manner. This submission is not made in consideration of the enunciated principle of *Leach* v. *R.*[36] that changes in fundamental rules of evidence must be made expressly but for the practical reason that this is necessary to ensure uniformity in all the States of Malaysia. Whilst section 5 of the Criminal Procedure Code of Singapore and the former Straits Settlements of Penang and Malacca are in *pari materia*, section 5 of the F.M.S. Code refers to the reception of the rules relating to criminal procedure in *Singapore* in the face of any "lacuna" in the F.M.S. Code. Legislative action is necessary because a curious situation can arise if in England, the recommendations of the Criminal Law Revision Committee are implemented. This will mean that such a right cannot be received anymore in Penang and Malacca. In respect of the other States which are governed by the F.M.S. Code, the right can still exist in so far as it is not abolished in Singapore. Such a situation is highly undesirable.

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33. It has now been abolished in New Zealand.

34. Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd. 4991.

35. In the Queensland case of *R.* v. *McKenna* (1951) Q.S.R. 299, the Court of Criminal Appeal also said, "... The practice is now so well embedded in the administration of our criminal law that it cannot be judicially removed."

36. (1912) A.C. 305.

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