REFORMS IN THE LAW OF EVIDENCE: SOME OBSERVATIONS

A first assessment of the Evidence (Amendment) Bill[1] and the Criminal Procedure Code (Amendment) Bill[2] might lead to the conclusion that the bills are a policeman's charter — in that their powers are enlarged and their task of crime detection simplified, and a prosecution's charter — in that the duty of proving guilt beyond reasonable doubt is simplified, and that the provisions invert the presumption that a person is innocent until proven guilty. The right to silence and the right of the accused person to make a statement from the dock are removed;[3] the defence of alibi in certain instances can only be raised with leave of the court;[4] and silence on the part of a person suspected of having committed an offence when being questioned can be used against him[5] and more hearsay evidence becoming admissible:[6] these are but some examples taken from the Bills which go towards confirming this *prima facie* reading.

In this context it is to be regretted that on matters as important as the foregoing no detailed publicity has been given to the Bills, nor has an opportunity been given to the legal profession to express their views.[6A] The Bills are likely to go to a select committee for the importance of the proposed changes cannot but be recognised by the government. It is to be noted that the proposals for reform contained in the Bills have been 'borrowed' from the recent proposals of the Criminal Law Revision Committee in England.[7] This is not to suggest that there are no other areas of the law of evidence that are in need of reform. The writer has previously suggested that the Republic's Evidence Act is in need of reform.[8] The Act[9] was first drafted by Stephen as far back as 1872 and today, more than a century later, it might be apt to review the Act. The need for reform is more pressing when it is realised that some of the rationales which gave rise to the existing provisions no longer hold true today. Further, there is a need to clearly define the relationship between the Act and the common law rules on evidence. Are our judges justified in relying on principles of the common law in the absence of any express provision in our evidence law? Was the Court of Appeal in *Cheng Swee Tiang* v. *Public Prosecutor*[10] correct in applying the *Kuruma* rule in respect of illegally obtained evidence? An additional reason for reform lies in the need to remove existing anomalies in the law on confessions.

1 Bill No. 34/75 (hereafter referred to as "Evidence Bill").
2 Bill No. 35/75 (hereafter referred to as "Criminal Procedure Bill").
3 *Clause 16,* Criminal Procedure Bill.
4 *Clause 11,* Criminal Procedure Bill.
5 *Clauses 5* and *16,* Criminal Procedure Bill.
6 *Clause 23,* Criminal Procedure Bill; *clause 3,* Evidence Bill.
6A I have come to understand that the legal profession has been given an opportunity to comment on the proposals.
7 Eleventh Report Evidence (General) Cmnd. 4991 (1972).
8 "The Evidence Act — A Case for Reform" [1974] 2 M.L.J. xxv.
9 Cap. 5, Revised Laws of Singapore (1970).
10 [1964] M.L.J. 291.

A piecemeal reform of the rules of evidence, particularly by borrowing from the reform measures in England, is at best to take a passive approach to the question of reform. It is submitted that, in addition to the proposals contained in the Bills, the legislature might look into the reform of the rules on confessions and state privilege, besides improving the definition of 'document' in the Evidence Act to include:

> any disc, tape, sound track, or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.

There is need also to improve upon and simplify the chapter on 'Relevancy' in the Evidence Act.

The objectives of our law reformers, as evidenced by their current proposals, is that 'ideally all evidence should be admissible which is relevant. . . and that every person who can give relevant evidence should be a compellable witness'. While the writer agrees with these objectives, there is a need also to balance the attainment of these objectives with the basic and fundamental rights of the individual — the right to liberty, dignity and privacy. It is the task of the law reformer to balance these interests to attain his objectives — the interests of society, while at the same time recognising and respecting the interests of the individual.

Clause 5 of the Criminal Procedure Bill would amend section 121(5) of the Code by deleting proviso (b) to the section. This is rendered necessary in the light of the proposal contained in *clause 6* of the Bill. This clause incorporates the proposal contained in clause 1(1) of the draft Criminal Evidence Bill (U.K.). This clause in effect takes away the right of the accused to remain silent when questioned, because if he does not mention 'a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so questioned, charged or informed the court in determining whether to commit the accused for trial or whether there is a case to answer and the court in determining whether the accused is guilty of the offence charged may draw such inferences from the failure as appears proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to corroboration of any evidence given against the accused in relation to which the failure is material'.

In a previous article,[11] the writer explained the rationale for the proposal to be thus —

a. ideally all evidence which is relevant should be admissible;

b. silence on the part of the accused is a piece of circumstantial evidence;

c. therefore, the fact of such silence is admissible in evidence as to the issue rather than merely as to credit;

d. similarly, omission to mention a fact relied on subsequently in his defence at the trial, 'which fact in the circumstances existing then he could reasonably have been expected to mention when questioned, charged or informed' is also a relevant piece of circumstantial evidence and relevant to the issue;

[11] "Conflicting Interests: A Need to Revise Values" (1974) 16 Mal.L.R. 218.

e. admissibility of this piece of evidence will not unfairly prejudice the accused for, firstly, he will be informed of the consequences of remaining silence and therefore the risks; secondly, he can at his trial explain away his silence or omission; thirdly, the burden remains on the prosecution to prove beyond reasonable doubt that he is guilty of the offence charged.

Professor Cross [12] recognises that such extent of inquisitorial powers in the hands of the police could lead to abuse, and he recommends that the records of interrogations be taped and the accused be given every opportunity to consult a legal adviser. It would be most interesting to note what the approach of the court would be in a case where the accused who has been arrested and being interrogated replies, "I will answer all your questions on condition that I have my lawyer with me"[13] (which request is denied). In Singapore, despite the fact that *clause 6* does not mention the right to counsel for the accused, it is submitted that by virtue of Article 5(3) of the Malaysian Constitution,[14] "Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice", the accused is entitled to counsel, when he is being interrogated. *Clause 6* of the Bill must be read subject to this fundamental right embodied in the Constitution. The position upon the Bill becoming an Act can be summarised thus —

a. the accused will lose his right to silence;

b. it will no longer be necessary to caution the suspect/accused that he has a right to remain silent;

c. on the contrary, it will become necessary to inform him that if he elects to remain silent and not disclose any fact which in the circumstances he could reasonably have been expected to mention, such failure to mention the fact could be used as evidence against him;

d. in the writer's opinion, it is also incumbent on the police to advise the suspect/accused of his constitutional right to consult counsel. This right to the accused is necessary to safeguard against possible abuse of the wide police powers; it ensures that the individual's interest is safeguarded whilst at the same time not detracting from the objectives provided for in *clause 6.*

For purposes of a complete discussion of this topic it might be appropriate to refer to the views of a learned English judge and to consider whether his views might not be equally, if not more, applicable in the Singapore context. Lord Devlin [15] is of the view that it is one thing to withdraw concessions, and quite another to deprive an accused of rights that in principle belong to the defence. Under the adversary system the burden of proof rests on the prosecution, which means that the defendant is not required to answer until a case has been made out against him. This fundamental principle is effectuated from the outset of the criminal process by the caution that has to be given to the suspect when he is charged, that he is not obliged to say anything. In his view, the proposed caution puts a measure of compulsion on suspects to answer questions. In response to the argument that if the accused were innocent he would have nothing to fear, his Lordship

[12] "The Right to Silence and the Presumption of Innocence — Sacred Cows or Safeguards of Liberty?" (1970) 11 J.S.P.T.L. 66.
[13] Note that in such a case, the accused is not refusing to answer questions.
[14] Applicable in Singapore by virtue of the Republic of Singapore Independence Act, No. 9 of 1965.
[15] Sunday Times, 2nd July, 1972.

feels that this is to take too simple a view of innocence and guilt. It is today considered unfair to expect an accused to present his explanation in a court of law without the help of counsel. Under the new procedure he would have to present it at a police station perhaps without adequate consideration and possibly at any hour of the night. It is Lord Devlin's fear that once the police have got their man. their prime object is to secure a conviction and that the methods employed are not always scrupulous.

Glanville Williams,[16] like Lord Devlin, subscribes to the view that the practice of interrogation by the police is open to abuse. In his view, the police, convinced that they have got the right man, feel themselves justified in extorting a confession; sometimes the confession may have been induced by promises or threats (which are afterwards denied by the police) and which the accused finds difficult to prove. Sometimes the police may resort to illegal violence. In his view, "a policeman who believes he has a right to ask questions of persons in custody may slip into the belief that he has a right to demand an answer, and even to demand the answer that he expects. Silence is then insolence, and a refusal to confess guilt is an obstruction of the police and a waste of their time." He concludes that "so long as there is pressure upon the police to keep down the rate of crime, they are likely to ignore restrictions which they feel to be unreasonable."

It would be unrealistic to suggest that these abuses are absent in Singapore. More so, bearing in mind the increased powers to be given to the police coupled with the fact that it will soon be possible for sergeants to take and prove confessions.

It is therefore obvious that if the current proposals are to be adopted, there is a need to 'educate' our police force, perhaps even to have a regulatory body for a period of time to ensure a high standard of performance under the new powers. The police should be warned against indulging in any form of threats or oppressive conduct against the accused. It is suggested that the police force should not be slow in dealing strongly with any policeman who resorts to such illegal, oppressive or threatening conduct. Further, there is a need to instruct the police force in the changes in the criminal law and rules of evidence that have taken place over the last three years. Any form of police over-zealousness or arrogance must be controlled. It might be suggested that a training programme be prepared for the purpose of improving the knowledge of our police force on questions of law, and that this programme be conducted by the several national servicemen who are legally trained.

The proposed amendment contained in *clause 11* of the Criminal Procedure Bill becomes unnecessary in the light of the proposal contained in *clause 6.* The court would be entitled to draw such inferences from the accused's failure to mention a fact, which fact would include the defence of alibi. *Clause 11* is also objectionable in that it has the effect of preventing the accused from proving his innocence. It is one thing to require an accused to disclose "facts relied on in his defence" but quite another to bar him from relying on a defence except with the leave of the court.

[16] "Questioning by the Police — Some Practical Considerations" (1960) Cr.L.R. 325.

That the accused's rights are further affected can be gathered from the provisions of *clause 16* of the Criminal Procedure Bill. This clause would have the effect of removing the accused's right to make an unsworn statement from the dock plus allowing the court to draw such inferences from the accused's refusal to be sworn or affirmed to give evidence or, having been sworn or affirmed, refusing to give evidence. This provision re-enacts *clause 5(3)* of the draft Criminal Evidence Bill (U.K.): but it is surprising to note that we have not adopted the English provision *in toto.* The words "and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused", are omitted from *clause 16.* Is this to suggest that in the view of the drafters of the bill in Singapore, out of court silence can amount to corroborative evidence against the accused while silence in court cannot? If the right to silence is removed, then the fact of silence (whether out of court or in court) is a piece of circumstantial evidence, which in appropriate circumstances can amount to corroborative evidence against the accused. It is therefore suggested that there is no rational basis for omitting from *clause 16* the power of the court to use the accused's silence in court as corroborating evidence given against him.

The proposed amendment to section 121 of the Code does not remove an existing anomaly in the law: the anomaly will arise from a comparison of section 121 of the Code with section 24 of the Act. In a previous article[17] the writer sought to point out that without doubt both sections apply to a confession made to a police officer. The anomaly arises from the fact that whereas a confession obtained under the terms of section 24 would render it *ipso facto* inadmissible, a confession obtained under the terms of proviso (a) to section 121(5) (which is *in pari materia* to section 24) is not rendered *ipso facto* inadmissible. The provision leaves it to the court in its discretion to refuse to admit such a confession. It is the writer's submission that there is a need to clarify the existing law.

Another existing anomaly in the law is being removed, with the proposed amendment to section 25 of the Evidence Act. The anomaly arises from the fact that when the legislature amended the Code in 1973, in particular substituting 'sergeant' for 'inspector' in section 121(5), section 25 was inadvertently left unamended.

The proposed amendments to the rules on "accomplice evidence" and "corroboration" embody in the main the proposals of the draft Criminal Evidence Bill (U.K.), which principles are in the writer's view [18] a logical extension of the principles laid down by the House of Lords in the recent cases of *D.P.P.* v. *Hester*[19] and *D.P.P.* v. *Kilbourne.*[20]

In addition to the above proposals, it is submitted that there is a need to improve upon and simplify the chapter on "Relevancy". In a previous article,[21] the writer suggested that there is in fact no

17 "Anomalies in the Law on Confessions" [1974] 2 M.L.J.
18 "A Plea for Reform: Law on Corroboration" (1974) Mal.L.R. 132.
19 [1972] 3 All E.R. 1056.
20 [1973] 1 All E.R. 440.
21 See n. 8.

necessity to spell out instances of "relevancy of facts". What is sufficient is to have a section which provides that "Evidence may be given of any facts, which are directly or indirectly relevant to the issue". The reference to "direct" and "indirectly" relevant evidence is to the distinction between "direct" and "circumstantial" evidence. By way of explaining the proposed section some of the existing sections and illustrations could be used as examples in the illustrations appended to the proposed section. This proposal has the advantage of flexibility, that is, of allowing the courts in Singapore to keep pace and to apply recent case law developments from the Anglo-American jurisdictions.

The rules on confession are also in need of reform. The requirement that a threat, inducement or promise (in section 121(5) of the Code and section 24 of the Act) "must have reference to the charge" has been criticised by the late Lord Reid as being "illogical and unreasonable." In the light of the proposals relating to the accused's right to silence, it is suggested that there is no further need to require that the inducement, threat or promise must have reference to the charge.

To remove any doubts whether or not illegal violence by the police falls within the ambit of the rule in section 24 of the Act and section 121(5) of the Code, the sections mights perhaps be amended to read,

> A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise proceeding from a person in authority, *or by oppression,* and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Section 29 of the Evidence Act[22] ought also to be deleted (in the light of the current proposals) because the section has the effect of putting the administration of criminal justice in a bad light. The above suggestions would go a little way towards establishing some confidence on the part of the accused person in his dealings with the police.

On the question of State privilege, section 162(2) of the Act provides—

> The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility.

This rule was adopted by the House of Lords in *Duncan* v. *Cammell Laird.*[23] In recent times, however, the *Cammell Laird* rule has been

[22] The section reads, "If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or *because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him."* If this section is to be retained, then the words in italics must be deleted in the light of the proposal contained in *clause 6* of the Criminal Procedure Bill.

[23] [1942] A.C. 624.

criticised and rejected in Australia [24] and recently in England [25] itself. In Malaysia, despite the clear wording of section 162(2) Yong J.[26] called for and inspected the documents when a claim of state privilege was raised.

In conclusion, the writer recognises that the objective of the recent proposals is to have relevant evidence made admissible. The Criminal Law Revision Committee (U.K.) was of the view that it was right to extend admissibility as far as is possible without the risk of injustice to the accused. The qualification needs to be stressed. Changes can be justified only if they can be made without removing the proper safeguards for the innocent.

It is an axiom that "power corrupts and absolute power corrupts absolutely" and the possibilities of abuse of police powers have been identified by Lord Devlin and Glanville Williams. There is a need therefore to safeguard the rights of the accused when extensive powers of investigation are given to the police. In Singapore, there is a need to inform the police force of the changes in the law (when the bills become law) and the extent of their rights and duties, and to caution them from exceeding their powers. The writer agrees with the proposals contained in *clauses 6* and *16* of the Criminal Procedure Bill. It is submitted that these proposals would go a long way towards fixing liability for crime. The proposals do not invert the presumption of innocence and the burden of proving beyond reasonable doubt the guilt of the accused continues to rest on the prosecution. Silence on the part of the accused both in court and out of court at best is a piece of circumstantial evidence. It is not direct nor conclusive evidence of the guilt of the accused. Some stress on safeguards for the accused is however necessary. The accused has a constitutional guarantee of right to counsel, and it is submitted that a person charged with an offence should be so informed at the time he is charged.

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[24] *Robinson* v. *South Australia* (No. 2) [1931] A.C. 704.
[25] *Conway* v. *Rimmer* [1968] 1 All E.R. 874.
[26] *Gurbachan Singh* v. *Public Prosecutor* [1966] 2 M.L.J. 125.

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