ATTEMPTING TO DEFINE AN ATTEMPT — OF METHOD AND SUBSTANCE

P.P. v. *Kee Ah Bah*[1]

Where the criminal law is codified in statutes, as in jurisdictions like Malaysia and Singapore, it is perhaps stating the obvious to say that an accused person's criminal liability is based upon the construction of the relevant statutory provision. However, this does not appear to be quite so obvious if the approach adopted by some of our courts is anything to go by. Time and again, we find cases in which the court chose to resort to common law principles established by English decisions in preference to the words of the statute.[2] It is in this respect that *P.P.* v. *Kee Ah Bah* invites comment. The case is also of interest as it brings into focus again the problems of formulating an adequate test when a court has to decide at which point the acts of an accused person, although short of the completed offence, nonetheless constitute an attempt.

The facts of the case were briefly these. On April 25, 1973, the respondent was driving a motor car in the direction of the Johore Bahru Causeway. He passed the immigration checkpoint and proceeded towards the customs checkpoint near which the 'export gate' was located. When the respondent's car was about 10 yards from the customs checkpoint, a customs officer on duty at the 'emergency gate' (which is further up the export gate and at the beginning of the Causeway leading to the border between Johor and Singapore, midway along the Causeway) signalled him to stop. The respondent did not obey the signal but instead reversed his car and made a U-turn, ignoring the officer's shouts to stop. Another officer on duty made an unsuccessful bid to stop the respondent by leaping on the bonnet of the moving car. He was flung off the car and his revolver went through the smashed windscreen. The respondent got away by driving through a gap in the kerb beside the road.

The car was subsequently found and the revolver was also recovered when the respondent led the police to where he had thrown it. The car was then taken to the Customs Office and searched in the presence of the respondent. 21 bags of tin ore were found — 2 hidden in the boot, 3 under the seat and 16 in a special compartment between the back rest of the rear seat of the car and the engine.

The respondent was charged with "having been knowingly concerned in an attempt at fraudulent evasion of export duty on 21 bags of tin-ore...an offence under s. 135(l)(e) and punishable under s. 135(l)(i) of the Customs Act, 1967."[3] In the Sessions Court, the learned President held that the respondent had no case to answer on the charge and acquitted him. On appeal, Syed Othman J. set aside the acquittal and ordered the case to be tried before another

[1] [1979] 1 M.L.J. 26.
[2] See generally, K.L. Koh, *Criminal Law, Singapore Law Series No.3* (1977), pp. 8-10.
[3] No. 62 of 1967, Malaysia Acts.

president on the ground that the case of attempt had been established by the prosecution.

At the outset, it may be useful to note that in the Penal Code of Malaysia,[4] which is *in pari materia* with the Singapore Penal Code,[5] attempts to commit offences are made punishable in one of 3 ways.[6] The respondent in the instant case was charged with an attempt at evasion of export duty payable on goods, in contravention of the Customs Act, 1967. The first point of interest is the manner in which the charge was drafted. A perusal of the statute in question, the Customs Act 1967, will show that for the offence of evasion of export duty, the statute at no point deals with the attempt of such offence, either (a) in the offence-creating section itself, or (b) in a separate section. It becomes clear then, that if the respondent is to be properly charged with an attempt, it can only be done by reading the 'catch-all' general provision embodied in s. 511 of the Penal Code with the relevant section of the Customs Act, 1967. The wording of s. 511 itself bears this out as it specifically provides for "attempts to commit an offence punishable by this Code *or by any other written law"*[7] which must include the Customs Act, 1967.[8] This is further reinforced by the fact that under Malaysian law, there is no provision equivalent to s. 39 of the Interpretation Act[9] of Singapore which states, "A provision which constitutes an offence shall unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself has been committed." The only recourse in cases of attempts of offences, not dealt with in either manner (a) or (b) above, is to s. 511 of the Penal Code.[10]

[4] F.M.S. Cap. 45, Reprint No. 2 of 1971, now extended throughout Malaysia by the Penal Code (Amendment and Extension) Act 1976 (Laws of Malaysia, Act A327).

[5] Cap. 103, Singapore Statutes, 1970 Rev. Ed.

[6] (a) the commission of an offence and the attempt to commit it are dealt with in the same section, the extent of punishment being identical for both (e.g. sections 121, 124, 162, 391);

(b) an attempt to commit a specific offence is dealt with in a separate section side by side with the offence-creating section and the punishment for the attempt is thus also separate from that for the completed offence (e.g. sections 307, 308, 393);

(c) in cases of an offence where the attempt is not specifically provided for, a 'catch-all' general provision is read together with the offence-creating section i.e. s. 511.

See also K.L. Koh, *Criminal Law, supra* n. 2 at p. 34 and K.L. Koh & M. Cheang, Vol. II, *The Penal Codes of Singapore and Malaysia,* p. 550.

[7] Emphasis added.

[8] Interpretation Act, No. 23 of 1967, Malaysia Acts. S. 3 provides "written law" means, *inter alia,* Acts of Parliament and subsidiary legislation made thereunder.

[9] Cap. 3, Singapore Statutes, 1970 Rev. Ed.

[10] In the Malaysian case of *Teh Ah Kuay v. P.P.* [1935] M.L.J. 12, where there was insufficient evidence to support a charge of cheating under s. 420 of the Penal Code, the Court held that there was ample evidence to support the charge of attempting to cheat. It is to be noted that in quashing the conviction under s. 420, the court substituted for it "a conviction *under s.* 511 *of the Penal Code* of attempting to commit an offence contrary to s. 420 of the Penal Code." See also *P.P.* v. *Ismail* [1963] M.L.J. 208; *Munah b. Ali* v. *P.P.* [1958] M.L.J. 159 (C.A. Federation of Malaya).

S. 135(l)(e) of the Customs Act 1967 makes it an offence to be "in any way concerned in conveying, removing, depositing or dealing with any dutiable, uncustomed or prohibited goods with intent to defraud the government of any duties thereon...", such offence being punishable under s, 135(l)(i) of the same Act. It would appear then, the respondent must be charged with an offence *under s. 511 of the Penal Code* of attempting to commit an offence contrary to s. 135(l)(e) and punishable under s. 135(l)(i) of the Customs Act, 1967 and if the prosecution succeeds, he would be convicted *under s. 511 of the Penal Code* of attempting to commit an offence contrary to s. 135(l)(e) of the Customs Act 1967. If the actual charge preferred against the respondent reads exactly the same as appeared in the judgment *i.e.* "having been knowingly concerned in an attempt at fraudulent evasion of export duty.. .an offence under s. 135(l)(e) and punishable under s. 135(l)(i) of the Customs Act, 1967", then it is submitted that the charge is defective in failing to comply with the requirements of a valid charge as stipulated under s. 152 of the Criminal Procedure Code.[11] S. 152(iv) of the Criminal Procedure Code provides that "the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge." If the charge fails to specify the section of the law under which the accused is being prosecuted, then it is patently defective. In *Rajapaksha* v. P.P.[12] the appellant was convicted under the Minor Offences Act[13] on a charge of having used abusive words against another, Wee Chong Jin, CJ. held that "the charge is bad and the essential ingredient of the charge is not contained in it. Merely using abusive word is not an offence under any law so that an accused person must be charged under that particular sub-section of the Minor Offences Act...."[14]

This is not to suggest that the defect in the charge is necessarily fatal and would vitiate the proceedings. It appears that a distinction is drawn between "curable defects", such as a formal defect in the drafting of a charge, which are regarded as mere irregularities,[15] and "incurable defects": defects which constitute direct breaches of specific provisions governing the mode of trial, these being illegalities.[16] While an illegality would render the proceedings null and avoid, s. 422 Criminal Procedure Code[17] makes it clear that an irregularity will not vitiate the proceedings unless it can be shown that it has occasioned a failure of justice.[18] While it may be true that the defect in the

11 F.M.S. Cap. 6 Reprint No. 1 of 1971 which is *in pari materia* with the Singapore Criminal Procedure Code Cap. 11, Singapore Statutes, 1970 Rev. Ed.

12 [1974] 2 M.L.J. 5, a Singapore case on s. 151, of the Singapore Criminal Procedure Code which is *in pari materia* with s. 152 of the Malaysian Criminal Procedure Code.

13 Cap. 102, Singapore Statutes, 1970 Rev. Ed.

14 *Supra,* n. 12.

15 *Osman* v. P.P. [1958] 2 M.L.J. 12; *See Yew Poo* v. P.P. [1949] M.L.J. 131. See also *Foo Yong Fong* v. *R.* [1962] M.L.J. 156.

16 *Subramania Ayyar* v. *King Emperor* [1902] 25 I.L.R. Mad. 61 (P.C.); *Shaari* v. P.P. [1963] M.L.J. 22; *Ong Boon Siang* v. *R.* [1961] M.L.J. 4; P.P. v. *Lim Swee Guan* [1968] 2 M.L.J. 169; *Singah Mohd. Hussin* v. P.P. [1973] 2 M.L.J. 109.

17 *In pari materia* with s. 382 Criminal Procedure Code, Cap. 113, Singapore Statutes, 1970 Rev. Ed.

18 *Mohd. bin Ibrahim* v. *R.* [1955] M.L.J. 22; *Papathy* v. P.P. [1956] M.L.J. 18 (C.A. Federation of Malaya). See also *Osman* v. *P.P., supra; Tong Ke Kee* v. P.P. [1941] M.L.J. 139.

charge is not fatal to the legality of the proceedings, it is wondered why neither the Court at both levels, nor counsel, seemed to have been aware of the irregularity.

The writer has come to the conclusion that s. 511 was not mentioned at all in the charge, thereby making it defective, (for failure to comply with s. 152(iv) of the Criminal Procedure Code) for the reason that neither the learned Sessions Court President nor the learned judge of appeal referred to s. 511 of the Penal Code in their respective judgments. It is quite inconceivable that, had the charge been properly framed to incorporate s. 511 of the Penal Code, both Courts should have so patently ignored the statutory provision upon which the respondent's culpability is sought to be based. One would expect the Court to analyse the statutory provision in question in order to see whether the respondent falls within its ambit and to base its decision upon such analysis. If the writer is wrong in deducing that the charge failed to mention s. 511 of the Penal Code, it seems all the more curious that both courts should have, in the face of it, ignored or declined, for whatever reasons, to discuss its scope.

Instead, the Court appears to have based its decision upon principles established by English cases. While it is not denied that English cases may be relevant in the construction of a statutory provision which is *in pari materia* with an English statutory provision [19] or which is based upon English common law concepts, their relevance surely cannot supercede a consideration of the section itself, nor indeed render unnecessary such consideration, as appears to have been the case here. It bears repeating that where the law has been codified in statutes, as is virtually the case for the Malaysian criminal law, one must have recourse, first and foremost, to the statute.[20]

In *Munah b. Ali* v. P.P.,[21] Thomson C.J. analysed s. 511 thus: "It is observed that s. 511 does not define an attempt. It only states that attempts themselves are offences. It says in effect that before an attempt is itself an offence, it must satisfy 2 conditions. The first of these is that it must be an attempt to commit an offence punishable by the Code or by any other written law. The other is that there must be *an act towards the commission of the offence"*. As Thomson C.J. pointed out, s. 511 does not itself define an attempt. The problem then is what amounts to an attempt. It may not be difficult to accept the proposition that certain acts of an intending wrongdoer, though short of the completed offence, may be sufficiently dangerous for the law to deem necessary to make punishable as an attempt. However, there remains to be propounded an adequate test for determining at

19 *Supra,* n. 2.

20 It might be instructive to note that in *Munah b. Ali* [1958] M.L.J. 159 (C.A. Federation of Malaya) where the court was considering the liability of the appellant for an impossible attempt at causing a woman to have a miscarriage, Whyatt C.J. (S.) after a review of the English cases cited before the court said, "[The English cases] are no doubt of interest but they are strictly speaking, *ad rem.* The question to be decided in this reference depends in my view, not upon the English cases, but upon the interpretation to be placed on s. 312 and s. 511 of the Penal Code." He together with Good J. in a majority opinion, chose to rely on illustrations to s. 511 as delimiting the scope of s. 511 to include liability for impossible attempts thus rejecting the balance of English authorities which held that no liability attaches to an impossible attempt.

21 *Supra,* n. 10.

which point, acts of an accused should become so culpable. Common sense dictates that to render culpable the acts of an accused as amounting to an attempt, they must be 'close enough' to the completion of the offence said to have been attempted. Naturally, the closer the accused's act is to the completed offence, the more apparent is its danger and the more acceptable the imposition of culpability for the inchoate offence. However, the question is how close is close enough?

In the instant case, the Court relied on the case of *Haughton* v. *Smith,*[22] referred to it by counsel, and adopted one of the main principles said to have been decided by the case *viz.:* "a person could only be convicted of an attempt to commit in the circumstances where the steps taken by him in order to commit the offence, if successfully accomplished, would have resulted in the commission of that offence." With all due respect, it has to be pointed out that *Haughton* v. *Smith* is a case dealing with an impossible attempt in which the majority of the House of Lords was of the opinion that there should be no liability in attempting to commit the impossible. As such, in formulating what they thought should amount to a culpable attempt, the thrust of the definition of an attempt is understandably directed at making the *possibility* of successful completion of the attempt an essential ingredient of the definition. Hence, "... if successfully completed, *would have resulted* in the commission of that offence." It is wondered how such a purposive formulation can be of any help in the instant case. There is no question at all that the offence here, the commission of which the respondent was said to have attempted, is one fully capable of successful completion had the respondent been allowed to proceed uninterrupted. This is totally unlike the case of *Haughton* v. *Smith* where no offence could have resulted even had the accused been allowed to proceed uninterrupted. Indeed, it was because the sum-total of his actions, to the very end, was not culpable under any law, that it was sought to hold him liable for an attempt. It is submitted therefore that the proposition as formulated in *Haughton* v. *Smith* is quite inapplicable to the instant case.

The Court next referred to the case of *Hope* v. *Brown.*[23] It is noted that *Hope* v. *Brown* does not itself establish any distinct principle but merely endorses the oft-quoted dictum of Parke B. in *Eagleton* v. *R.,*[24] which the Court in the instant case in fact applied. It has been pointed out that the dictum of Parke B., oft-quoted as it is, does no more than restate the 'proximity rule'[25] which common sense itself makes apparent. For that matter, s. 511 of the Penal Code speaks of "an act towards the commission of the offence" which requires the determination of the point, in a series of acts, after which an act ceases to be a mere preparatory act and becomes just such an act under s. 511, and as such, culpable. The difficulty in the application of the proximity rule remains in Parke B.'s dictum: how *remote* must "acts remotely leading towards the commission of the offence" be, and how *immediate* "acts immediately connected with it"?

22 [1973] 3 All E.R. 1109.
23 [1954] 1 All E.R. 330.
24 24 L.J.M.C. 166.
25 C. Howard, *Criminal Law* (1977) p. 308.

The Court deprecated the approach adopted by the President of the Sessions Court. The learned President was of the opinion that no attempt had been made out on the ground that the accused had not done any act to show unequivocally that he was attempting to commit the offence. He said:

> "If he (the accused) did not stop at the checkpoint when asked to by proper authority and dashed on for instance then clearly he had committed the offence. However, in this case when the accused turned back he was quite a bit of distance from checkpoint. In fact there were several cars ahead of him. How can he be considered to have attempted to evade duty then."

The acts of the respondent were too equivocal:

> "The accused had done nothing to show that he was trying to evade to pay duty."

The learned President, whether he was aware of it or not, was apparently appealing to what has been called "the equivocality theory of proximity,"[26] first propounded by Salmond [27] thus:

> "An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done. A criminal attempt bears criminal intent upon its face. *Res ipsa loquitur.* An act, on the other hand, which is in itself and on the face of it innocent, is not a criminal attempt, and cannot be made punishable by evidence *aliunde* as to the purpose with which it is done."

The learned President was convinced that the respondent's act in turning back, after having passed the immigration checkpoint but before reaching the customs checkpoint, was equally consistent with innocence:

> "… an innocent traveller carrying dutiable goods could drive right to the (customs) checkpoint either to declare his goods… or he could drive up to the checkpoint to enquire from the officers where to pay the duty. It is clear therefore that the intention of the motorist whether lawful or unlawful cannot be determined until he has actually reached the check-point itself."

Whatever the initial attractions of the equivocality theory, it is now discredited.[28] As has been argued, the theory suffers from the defect of making "the proximity requirement too stringent, for no action is unequivocally referrable to the intended commission of a specific crime unless it is so close to the accomplishment of that purpose as practically to obliterate the separate existence of the offence of attempt."[29]

A consideration of the facts of the case indicates that the sum total of all the respondent's acts, up to the time he turned back some 10 yards before the customs checkpoint, was not quite as equivocal as the learned President had thought. As the learned judge of appeal pointed out, the evidence cannot be taken in isolation, "regard must be had to the prevailing circumstances i.e. the nature of the goods, the nature of the conveyance or vehicle and the location of the goods

26 *Ibid.*

27 *Jurisprudence* (6th ed.) 346.

28 In New Zealand, where the test was first applied and established by Salmond himself in his capacity as a judge, it has been repealed by legislation. See Hogan & Smith, *Criminal Law* (4th ed.) p. 254.

29 C. Howard, *supra,* n. 25 at p. 309.

on the person or in the conveyance". Applying Parke B.'s test in *Eagleton* v. *R.* the learned judge was in fact able to classify which of the respondent's acts were merely preparatory and which constituted the attempt itself. As this was a charge on an attempt at the evasion of export duty, the judge had first to establish after which point, goods upon which duty had not been paid, could be considered to be in the course of being exported. He singled out the immigration checkpoint because "after this point the travellor must be said to be in the course of leaving the country and if he has goods, then they are in the course of being exported." Accordingly, the immigration checkpoint is the crucial "turning point" as it were, after which the accused's acts ceased to be mere preparation and crystallised into an attempt.

It is perhaps interesting to note that the peculiar facts of this case were such that there can be found exact geographical points which could be correlated to the different stages in the commission of the offence of evasion of export duty. The geographical point represented by the immigration checkpoint was the point, in the sequence of events, after which preparation becomes attempt, and that represented by the customs checkpoint was the point after which the offence is completed. As the learned judge reasoned:

> "The purpose of the customs checkpoint after the immigration checkpoint, as the very name signifies, is merely to check whether any exporter of goods has complied with s. 80 of the Act i.e. whether he has paid duty to the proper officer at the appropriate place after making a declaration in the prescribed form."

In other words, unless an accused is able to slip through the customs checkpoint undetected, he cannot be said to have *successfully* evaded paying export duty on his goods. If the accused is found out at the customs checkpoint, then clearly he has been prevented from evading export duty (which is precisely what the checkpoint is designed to do) and can only be said to have *attempted* to evade paying export duty.

The learned judge's analysis of the facts and the surrounding circumstances, and the conclusions that he derived therefrom, are consistent with common sense. It is not suggested that on the merits of the case, the decision was not a fair one. What is regrettable is the court's inexplicable refusal to decide within the framework of s. 511 of the Penal Code. Clearly, s. 511 as drafted does not prevent the court from pursuing this line of analysis and coming to the same conclusions for, as Thomson C.J. has pointed out in *Munah b. Ali,* it does not seek to define an attempt and wisely so. It leaves that to the common sense appraisal of the facts of each case. If *Haughton* v. *Smith* is to be cited as a relevant authority, let it be for the dictum of Lord Reid in commenting on the futility of devising an all-purpose definition for attempt:

> "... no words, unless so general as to be virtually useless, can be devised which will fit the immense variety of possible case. Any attempted definition would I am sure, do more harm than good. It must be left to common sense to determine in each case whether the accused has gone beyond mere preparation."[30]

T. SHUE

[30] *Supra,* n. 22.