"MY LORD, THE DEFENDANT CHOOSES TO REMAIN SILENT..."

THE IMPACT OF THE CRIMINAL PROCEDURE CODE (AMENDMENT) ACT OF 1976 ON "THE RIGHT TO SILENCE" IN CRIMINAL TRIALS (1973-1980)

In its report on "Evidence", the English Criminal Law Revision Committee [1] recommended a whittling down of the accused's right to silence during his trial *(i.e.* in-court silence). As these recommendations were not based on any empirical research the criticism has been made that the "Committee neither goes in for it, nor refers to it. Whether from lack of funds, lack of knowledge or lack of inclination is not clear. It is clear that the result is unfortunate. This whole report is permeated by, and depends upon, assumptions of fact, some easily verifiable, or refutable, which have not been so tested."[2]

Similarly, no empirical research preceded the incorporation of these recommendations into Singapore law at the time of the enactment of the Criminal Procedure Code (Amendment) Act of 1976.[3] Invoking the familiar idiom that it is better late than never, a study was conducted to determine the practical effect of the 1976 amendments[4] on the accused's right to silence in court. Furthermore it was thought that a useful comparison could be made with the findings of this study and the views of the Judicial Committee of the Privy Council in the recent Singapore case of *Haw Tua Tau* v. *P.P.*[5] This study compares the positions before and after the amendments and seeks to provide answers to the following questions: —

(1) do accused persons testify more often after the amendments?

(2) does legal representation influence the accused's decision to testify?

(3) do judges more readily comment upon and draw adverse inferences from an accused's refusal to testify?

[1] Eleventh Report on Evidence (General) 1972, Cmnd. 4991. The Committee is hereinafter termed the "CLRC". The CLRC recommendations on the accused's right to silence in court were recently endorsed by the Report of the Royal Commission on Criminal Procedure, January 1981, Cmnd. 8092, at paras. 4.63-4.66.

[2] C. Tapper, "Reports of Committees: Evidence (General). Eleventh Report of the Criminal Law Revision Committee" 35 M.L.R. (1972) 621 at p. 622.

[3] No. 10 of 1976. The amendments became operative on 1/1/1977. This point was also raised by V.S. Winslow in his written representation to the Select Committee on the Criminal Procedure Code (Amendment) Bill (Parl 4 of 1976) (Singapore) at p. A15.

[4] Hereinafter termed "the amendments".

[5] [1981] 2 M.L.J. 49; [1981] 3 All E.R. 14.

However, before presenting the study and its findings, it would be appropriate to comment briefly on the law relating to the subject.

The Legal Position

Before the amendments came into force, the accused had three options in respect of giving evidence in court. He could:

(i) make a sworn or affirmed statement in the witness-box and thereby subject himself to cross-examination;

(ii) make an unsworn statement from the dock so as to protect himself from cross-examination, or

(iii) refuse to make any statement, that is, remain silent.

The amendments abolished the right of the accused to make an unsworn statement. This is the effect of the amended section 195(1) of the Criminal Procedure Code which states that "in any criminal proceedings... the accused shall not be entitled to make a statement without being sworn or affirmed, and accordingly, if he gives evidence, he shall do so on oath or affirmation and be liable to cross-examination."[6] The result is that the accused has now only two options in respect of giving evidence in court. He can elect either to (i) make a sworn or affirmed statement or (ii) remain silent.

The amendments have altered the law in another aspect. Formerly a judge who was satisfied that the prosecution had made out a case against the accused was required only to call on the accused to enter on his defence.[7] The amendments now require the judge, in addition, to inform the accused that if he refuses to testify, the judge may draw such inferences from the refusal as appear proper.[8] The standard allocution of the presiding judge to the accused is expressed in the following terms:

> "... we find that the prosecution has made out a case against you on the charge on which you are being tried which if unrebutted would warrant your conviction. Accordingly, we call upon you to enter upon your defence on the charge.
>
> Before any evidence is called for the defence we have to inform you that you will be called upon by the court to give evidence in your own defence. You are not entitled to make a statement without being sworn or affirmed and accordingly, if you give evidence, you will do so on oath or affirmation and be liable to cross-examination. If after being called by the court to give evidence you refuse to be sworn or affirmed or having been sworn or affirmed you, without good cause, refuse to answer any question, the court in determining whether you are guilty of the offence charged, may draw such inferences from the refusal as appear proper.
>
> There is nothing in the Criminal Procedure Code which renders you compellable to give evidence on your own behalf and you shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed when called upon by the court to give evidence. We now call upon you to give evidence in your own defence. If you have any difficulty in deciding whether or not you wish to give evidence on your own behalf you may consult your counsel."

6 No. 2 of 1980. Reprint of the Criminal Procedure Code (1980).

7 Sections 173(j) and 181 of the Criminal Procedure Code, Cap. 113, Singapore Statutes, Rev. Ed. 1970.

8 Sections 179(k) and 188(2), read with s. 195(2) of the Criminal Procedure Code; *(supra.*, note 6).

These changes in the law were intended to induce accused persons to testify in court. Hence the abrogation of the right to make an unsworn statement has the effect of preventing the accused from choosing this option instead of being sworn or affirmed. As Lord Diplock in *Haw Tua Tau* put it, the "added inducement consequent on the removal of the option is the withdrawal of the hope that he can get away with a story the truth of which cannot be tested by cross-examination."[9] Another expression of the purpose of the amendments is found in the report of the CLRC. In relation to the treatment of the accused as a witness, the Committee noted that:

> "The ordinary witness course is in accordance with the law in Canada and the United States. Opinions differ as to the extent which the rule operates there to deter accused persons from giving evidence, but there is no doubt that it does deter them in a great many cases."[10]

In order to circumvent this deterring effect caused by the accused's knowledge that he need not testify, the CLRC recommended what is essentially embodied in section 195(2) of the Criminal Procedure Code. The proposal was that an allocution of the judge that he might draw adverse inferences if the accused refused to testify would strongly induce the accused to give evidence. Whether these amendments have had this desired effect of inducing defendants to testify when previously they would not, is examined in this study.

The Present Study

The study comprised a total sample of 314 cases of which 226 were Subordinate Court cases and 88 were High Court cases.[11] Of the total sample, 185[12] were cases decided in the four-year period between 1973 to 1976 and 129[13] were cases decided in the four-year period between 1977 to 1980. These constituted the total number of cases for the whole eight-year period where the accused had been convicted and had appealed to either the High Court or the Court of Criminal Appeal against conviction alone or against conviction and sentence. Necessity dictated the choice of these cases because it was only in these cases that the judiciary recorded their grounds of decision. One might here contend that the incidence of refusing to testify for these cases would be more than usual as the defendants might have decided beforehand to appeal should the trial judge determine that the prosecution had made out its case. This possible weakness in the sample is however off-set by the fact that the study compares cases tried before and after the amendments, all of which share the common characteristic of being cases which have gone on appeal.

The study should ideally have been supported by interviews with both accused persons and their lawyers. These interviews would have revealed the reasons for the accused's decision to testify or otherwise and, in particular, whether the change in the accused's position effected

9 [1981] 2 M.L.J. at p. 54; [1981] 3 All E.R. at p. 22.

10 Eleventh Report on Evidence, *supra*., note 1, para. 127(ii).

11 In this study, an accused person is designated as one case. So if there was a joint trial of three accused persons, this would be treated as three cases although there is involved only one trial. The primary focus on the individual accused and his choice of options at the end of the prosecution's case account for this mode of case designation.

12 126 Subordinate Court cases and 59 High Court cases,

13 100 Subordinate Court cases and 29 High Court cases.

by the amendments constituted a major reason. However the inherent practical difficulties raised by the interview method of study prevented it from being done.

The grounds of decision were studied to determine the options chosen by the accused upon being called to enter his defence. Two other observations were made namely, whether the accused were legally represented and whether the judges made any comments or drew any inferences when the accused refused to testify.

I. *GIVING OF EVIDENCE BY THE ACCUSED*

It has already been pointed out that a major difference between the accused's rights before and after the amendments is that previously he had the added option to make an unsworn statement. The first analysis of the sample removes this difference by omitting those cases where the accused had chosen to make an unsworn statement. Thus Table 1 does not include the 17 cases[14] where unsworn statements were made thereby making the number of cases decided before the amendments 168 instead of 185.

Table 1. Accused's Choice whether to Testify or Refuse to Testify

	Testified	Refused to testify [15]	Total	% testified
1973-1976	156	12	168	92.9
1977-1980	115	14	129	89.1

From this table it will be noticed that the percentage of cases where the accused testified is slightly more in the pre-amendment period than in the post-amendment period *(i.e.* 92.9% as compared with 89.1%). An interim conclusion may therefore be made that in practice the amendments have not had the desired effect of inducing accused persons to testify more readily than they would previously have done. More specifically, it would appear that the judge's allocution to the accused that adverse inferences might be drawn from his refusal to testify does not increase the likelihood of the accused giving evidence on his own behalf. One possible reason for this might be that in cases before the amendments, the accused was already well aware that such inferences might be drawn if he failed to go into the witness box. As was said in *Haw Tua Tau:*

> "Section 195(2) provides that the court may draw such inferences as may appear proper from the failure of the accused to give evidence on oath.... The Criminal Procedure Code was previously silent on the matter, and consequently section 5 made applicable the law of England relating to criminal procedure where it was not inconsistant with the Code. English law has always recognised the right of the deciders of fact in a criminal trial to draw inferences from the failure of a defendant

[14] 10 Subordinate Court cases and 7 High Court cases.

[15] In all the Tables this term denotes a refusal to testify or make an unsworn statement in respect of cases tried before the amendments and refers solely to a refusal to testify in respect of cases tried after the amendments came into force.

> to exercise his right to give evidence and thereby submit himself to cross-examination. *It would in any event be hopeless to expect jurors or judges, as reasonable men, to refrain from doing* so."[16]

This being the case, the accused himself, or upon the advice of his lawyer, would have testified unless there were strong reasons against this course; it therefore mattered little whether the judge expressly warned him that adverse inferences might be drawn if he chose to remain silent.

One might also have hypothesized that the abrogation of the right to make an unsworn statement would be a strong inducement for accused persons to testify more readily. If this is correct it would follow that defendants who would previously have made unsworn statements would, after the abolition of that option, choose to testify instead. Table 2 adds to the first.table the 17 cases where the accused chose to make an unsworn statement when that right was still available.

Table 2. Accused's Choice whether to Testify, Refuse to Testify or Make an Unsworn Statement

	Testified	Refused to testify/ Made an unsworn statement	Total	% testified
1973-1976	156	29	185	84.3
		Refused to Testify		
1977-1980	115	14	129	89.1

The addition of these cases into the pre-amendment sample causes the figures to depict what actually occurred in the 1973-1976 period. Hence the actual percentage of accused testifying is 84.3% and not 92.9% as presented in Table 1. The percentage of defendants testifying during the post-amendment period remained at 89.1%. This percentage is only slightly higher than the pre-amendment percentage (89.1% compared with 84.3%). If the hypothesis that accused persons would now choose to testify when they would have made an unsworn statement had this been available is correct, one would have expected the percentage difference of such persons testifying to be much higher than 4.8%.[17] It seems therefore that the abolition of the right to make an unsworn statement has not significantly induced accused persons to testify in Singapore. Hence the overall picture appears to be that the amendments have not caused a significantly higher number of accused persons to testify.

II. *LEGAL REPRESENTATION AND GIVING OF EVIDENCE BY THE ACCUSED*

In the light of the amendments, how do lawyers advise their clients on whether they should testify or not? The Judicial Committee

[16] [1981] 2 M.L.J. at p. 52; [1981] 3 All E.R. at p. 20. Emphasis added.

[17] The chi-square distribution at oc=0.005 shows that an accused's decision to testify or otherwise has not been affected by the change to his position effected by the amendments.

in *Haw Tua Tau* opined that even before the amendments "the accused, if he were properly advised by counsel, would be aware that adverse inferences might well be drawn if he failed to go into the witness box."[18] Assuming that accused persons who engage lawyers would be made aware of the inferences that may be drawn, the issue to consider would be whether accused persons do testify more or less often when legally represented than when unrepresented.

Some criticisms of the sample should preface a discussion of Table 3. Firstly the sample constitutes only those cases involving convictions which have been appealed against. One may surmise that the majority of these were cases in which there was legal representation. As such they cannot accurately represent all the accused persons appearing before the criminal courts.[19] Secondly the sample of accused persons without legal representation is too small for proper statistical analysis.

Table 3. Relationship between Legal Representation and Defendants testifying for the Total Sample

with legal representation				without legal representation			
testified	refused to testify/ made unsworn statement	Total	% testified	testified	refused to testify/ made unsworn statement	Total	% testified
236	41	277	85.2	35	2	37	94.6

Table 3 comprises the whole sample of 314 cases in the study. Among the legally represented defendants, 85.2% testified. In contrast, 94.6% of unrepresented defendants chose to testify. This large difference of 9.4% suggests that accused persons who have the advice of legal counsel testify *less often* than those without counsel. Conversely it may be stated that lawyers play a dominant role in inducing their clients to refuse to testify when this would be beneficial to the defence. However the two criticisms mentioned earlier make this finding only a tentative one.

III. *JUDICIAL COMMENT AND DRAWING OF ADVERSE INFERENCES*

Before the amendments, the extent of the judge's power to comment on the accused's refusal to testify was the same as in England.[20] However, as the CLRC recognised "[h]ow far the judges can previously go in commenting on the failure of the accused to give evidence,

18 [1981] 2 M.L.J. at p. 53; [1981] 3 All E.R. at p. 22.

19 In the present study, 88.2% of the whole sample were legally represented while in another recent study the percentage was only 70.4%. See the article by the author entitled "Unrepresented Defendants in the Subordinate Criminal Courts of Singapore 1979-1980)," (1981) 23 Mal. L.R. 41.

20 Section 5 of the Criminal Procedure Code, *supra*., note 6; *Haw Tua Tau* [1981] 2 M.L.J. at p. 52; [1981] 3 All E.R. at p. 20.

and in particular in inviting the jury to draw adverse inferences against the accused from his failure to do so, is not altogether clear."[21] English courts have declared that in almost every case the judge's comment to the jury should take the form that "the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is assume that he is guilty because he has not gone into the witness box."[22] There is a view that the sole effect of such a comment is simply to leave the prosecution case stronger for being uncontradicted by the accused who in most cases would be the person best able to contradict it. Accordingly, triers of fact cannot draw any inferences of guilt from an accused's refusal to testify.[23]

However the prevailing view is that inferences of guilt may be drawn from the accused's silence, although judicial comment should not be explicit about those inferences.[24] Assuming that this is accurate, one must ask whether the amendments have brought practical changes in regard to (i) the judge's power to comment and (ii) the practice of drawing adverse inferences by judges when the accused remains silent in court.[25]

The amendments now expressly allow the judge as trier of law to comment on the accused's failure to testify, and as trier of fact to draw such inferences from his silence as appear proper. Although the amendments may not have changed the position dramatically, their expressed recognition and scope of the judge's powers have the result that "in appropriate cases, when commenting on the accused's failure to give evidence, the judge will be able to be *more explicit* about the types of inference which would be proper in the particular circumstances."[26] This should be especially so when the judge, as trier of fact, is the person solely entitled to draw such inferences.

In none of the pre-amendment cases was there judicial comment or any specific indication that adverse inferences had been drawn. One reason for this might be that the judiciary was then uncertain as to the scope of the power to comment or the types of inferences that could properly be drawn. However this reason cannot now apply after the amendments have clarified the position. Yet again, in none of the post-amendment cases did the judges comment on or expressly

21 *Supra*., note 1, para. 109.

22 *R.* v. *Bathhurst* (1968) 2 Q.B. 99, *per* Lord Parker C.J. at pp. 107-108; *R.* v. *Mutch* [1973] 1 All E.R. 178.

23 See J.D. Heydon "Confessions and Silence", (1976) 7 Sydney L.R. 375 at p. 389.

24 CLRC Report, *supra.*, note 1, para. 109-110; R. Cross, *An Attempt to Update the Law of Evidence,* (1974) at pp. 10-11; *Haw Tua Tau* [1981] 2 M.L.J. at p. 52; [1981] 3 All E.R. at p. 20.

25 Until 1960, all criminal cases in the High Court, were tried by jury. By the Criminal Procedure Code (Amendment) Ordinance of 1960, trials by jury were limited to cases where the punishment authorised by law was death, with power reserved to the Chief Justice, with the approval of the Head of State, to order jury trial for all offences or any particular class of offences triable by the High Court. Jury trial was completely abolished by the Criminal Procedure Code (Amendment) Act of 1969 (No. 17 of 1969).

26 R. Cross, *supra*., note 24, at p. 11. Emphasis added.

draw inferences from the accused's refusal to testify. While there is the possibility that some of the cases did not warrant the judge to do so, it is difficult to envisage that in all those cases where the accused failed to give evidence, the judge did not find it necessary to comment or, more importantly, to draw adverse inferences. If adverse inferences were in fact drawn it is submitted that the judge should have been duty-bound to state and elaborate on those inferences in his grounds of decision. This is because the law allows only inferences *as appear proper* to be drawn and it follows that an improper inference may be a ground for appeal.[27] In this connection, one may cite the following passage in the Report of the Committee on Administrative Tribunals and Enquiries (U.K.):

> "We are convinced that if tribunal proceedings are to be fair to the citizen, reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right to appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal."[28]

The recording of inferences drawn by the judge from the accused's refusal to testify is crucial for yet another reason. It is now clear that at the end of the prosecution's case, the law does not require the judge to be satisfied beyond a reasonable doubt as to the accused's guilt before he can call on the accused to enter on his defence.[29] Where the accused, upon being called to enter on his defence, refuses to testify, adverse inferences drawn from such a refusal conceivably play an important role in tipping the balance further in support of the prosecution's case. Hence such inferences would assist the judge in reaching the holding at the end of the trial that he is satisfied beyond a reasonable doubt as to the accused's guilt. This being the position, the judge is under a duty to state any adverse inferences drawn from the accused's silence which have contributed to his conclusion that the accused has been proven to be guilty beyond a reasonable doubt.

[27] Although there are no reported decisions on the right to appeal against the drawing of improper inferences, there are English decisions which clearly hold that the judge's comment is subject to appellate control. See *R. v*, *Voisin* [1918] 1 K.B. 531, at p. 536; *Waugh* . V. *R.* [1950] A.C. 203; *R.* v. *Pratt* [1971] Crim. L.R. 234. In any event s. 195(2) of the Criminal Procedure Code, *supra*., note 6 sets as a prerequisite to the drawing of inferences that such inferences must be proper from the facts and circumstances of the case.

[28] The Franks Committee, 1957, Cmnd. 218, para. 98.

[29] See *Haw Tua Tau* [1981] 2 M.L.J. at p. 51; [1981] 3 All E.R. at p. 19, where the following guideline was laid down for determining whether the defence should be called: at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, if it were accepted by him as accurate, would establish each essential element in the alleged offence. If there was no evidence (or only evidence that was so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it was the judge's duty to direct an acquittal; but if there was some evidence, the judge had to let the case go on. This decision corrected the possible misconception created by the Singapore Court of Criminal Appeal case of *Ong Kiang Kek* v. *P.P.* [1970] 2 M.L.J. 283 that the condition precedent to the defence being called was that the judge be satisfied beyond a reasonable doubt that, based on the prosecution's case, the accused is guilty.

It may be that the judiciary is as yet uncertain as to how the exercise of power to comment or to draw inferences might be expressed. Previous well-established guidelines on this issue are as follows:

(i) Failure to give evidence may be of little or no significance if there is no case against the accused or only a weak one. The stronger the case the more significant will be his failure to give evidence.[30]

(ii) If there are undisputed or clearly established facts calling for an explanation, the judge is entitled to comment on and draw inferences adverse to the accused from his failure to testify.[31]

(iii) If the defence takes the form of a general denial, the judge's comment and his drawing of adverse inferences, if at all done, should be minimal.[32]

(iv) If the accused's refusal to testify is to protect a friend or to prevent himself from exposure to non-criminal but highly embarrassing conduct, it might be proper for the judge not to comment on or draw any inferences from such silence.[33]

(v) If the accused is likely to have refused to testify for fear of cross-examination on his record, the judge may decide that his silence was not the result of guilt.[34]

With the express power granted by the amendments to comment on and to draw adverse inferences on the accused's failure to give evidence, our judiciary should be "more explicit" in their exercise of this power. It is envisaged that such explicitness would cause the development of more definite guidelines, particularly as to the types of inferences which might be drawn on the particular facts and circumstances of each case. As was said in *Haw Tua Tau*, "[wjhat inferences are proper to be drawn from an accused's refusal to give evidence... is a question to be decided by applying ordinary common-sense — on which the judiciary of Singapore needs no instruction by this Board."[35] One might add that it would be a better state of affairs than the present if such "common-sense" had been expressly stipulated and recorded in judicial decisions.

Conclusion

The tentative results of this study are that, contrary to the assumptions of the legislature it appears that accused persons do not testify as often as one would wish them to after the 1976 amendments to the Criminal Procedure Code. Furthermore the amendments have not

30 CLRC Report, *supra*., note 1, para. 110.

31 For example, see *R.* v. *Corrie* (1904) 20 T.L.R. 365.

32 For example, see *R.* v. *Mutch, supra.*, note 22.

33 See the English Criminal Bar Association, Bar Council Memorandum on the Eleventh Report of the Criminal Law Revision Committee, para. 82 where it was stated that "in practice, for instance in sexual cases, an accused may invite complete ruin in his private life by subjecting himself to cross-examination on his association with the complainant even when the actual allegation is untrue." CLRC Report, *supra*., note 1, para. 35.

34 See sections 54 and 120(4)-(8) of the Evidence Act, Cap. 5, Singapore Statutes, Rev. Ed. 1970, as amended by the Evidence (Amendment) Act of 1976 (No. 11 of 1976).

35 [1981] 2 M.LJ. at p. 53; [1981] 3 All E.R. at p. 21.

caused lawyers to encourage their clients to give evidence. Instead there is evidence of the opposite result occurring in that legally represented defendants tend more than their unrepresented counterparts to refuse to testify. Finally there appears to exist the unsatisfactory position that judges neither comment on nor expressly draw adverse inferences from, an accused person's refusal to testify both before and after the amendments.

These results cumulatively suggest that the practical value of the right to silence in court has hardly been altered by the amendments. Those who construed as "golden" such a right can rest assured that the amendments have done little to tarnish its sheen.

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