THE ALTERNATIVE CHARGE: ITS SCOPE AND UTILITY

The alternative charge—does its presentation in court symbolize the "sabre-rattling" of a hopeful prosecutor? Confronting the accused with an "alternative charge" conjures memories of the cavalryman's onward charge. His sabre-rattling may make his victim wonder to which sinew the sharp edge of the sabre will be directed. When the prosecutor presents an "alternative charge" in court and the accused stands ready to defend in the dock, could one say, the drama of a cavalryman's sword swirling gesture during his onward charge is being re-created in a more sombre manner in the "genteel" atmosphere of a courtroom?

This paper seeks to explain the modes of identifying the various forms of charges mentioned in section 171 of the Criminal Procedure Code.[1] In the course of evaluating the principles and assumptions that govern the framing of "alternative" charges under section 171, certain developments in the law that are prejudicial to the accused will also be examined.

The purpose of a charge is to inform the accused of the offence he is being charged with.[2] The charge also serves other functions. It provides a guideline to the prosecutor of the main points that he has to prove. Also, it provides an outline of the case to be heard. This enables the judge to appreciate the significance and relevance of the evidence given during a trial.

The C.P.C. provides for the framing of "alternative" charges, presumably under the assumption that such a charge would, on certain occasions, serve the goals of a criminal trial more effectively than an ordinary charge. Section 167 of the Singapore C.P.C.[3] provides that every distinct offence shall be referred to in a separate charge and that every charge should he tried separately. Exceptions are provided to this basic principle in the same section. Section 171 refers to the framing of charges in instances where "it is doubtful what offences have been committed."[4] Charges under section 171 are viewed in

1 The Criminal Procedure Code, Cap. 113 Rep. 1980. The term "Criminal Procedure Code" will be referred to throughout in this article in the abbreviated form "C.P.C.".

2 *Sathiah & Ors.* v. *R.* (1938) 7 M.L.J. 30 at 33; *Lim Ghais Khee* v. *R.* (1959) 25 M.L.J. 206 at 207; B.A. Mallal: *Criminal Procedure* (1957) (Singapore: Malayan Law Journal) at 201.

3 Section 167 states: For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 168, 169, 171 and 175.

4 Section 171 reads: If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of those offences and any number of the charges may be tried at once or he may be charged in the alternative with having committed some one of those offences. See also the side note to section 171.

section 167 as exceptions to the rule that every charge should require a separate trial. There is a reference to the term "charge in the alternative" in section 171 and illustration (b) to the same section. In Form 27 Part 2 Head 4 of Schedule B of the Code[5] the term "alternative charge" is used in the side note to indicate a charge similar to the one mentioned in illustration (b) to section 171.[6] Judges too have followed suit and often in the same judgments have used the terms "alternative charge" and "charge in the alternative" to refer to the same charge.[7] Some of the local and Indian judges have gone a step further. In interpreting section 171 they have used the term "cumulative charge" in addition to the terms mentioned above.[8] Do these terms refer to the same concept or notion? Or do these terms have historical links to the term "alternative charges"? Were these terms developed over a period of time to describe forms of charges that were distinct and different from "alternative charges"?

TYPES OF CHARGES CONTEMPLATED IN SECTION 171: "CHARGES IN THE ALTERNATIVE", "ALTERNATIVE" AND "CUMULATIVE" CHARGES

In 1937, in the case of *Yap Liow Swee* v. P.P.,[9] a local judge ventured to explain the distinction between an "alternative charge" and "charge in the alternative" by adhering closely to some of the views expressed in the English courts of that time.[10] Terrell Ag. C.J. pointed out in *Yap's* case, where a person is charged for "driving recklessly or negligently in a manner dangerous to the public" the charge would be bad for duplicity as it would in effect be an "alternative charge". The reference to an "alternative" offence in the same charge was not permitted by the provisions of the Federated Malay States Criminal Procedure Code.[11] However, his Lordship pointed out that if each "alternative" offence was specified in a separate charge, so that the accused could be called upon to plead to each charge separately, it would be a valid "charge in the alternative".[12] In *Yap* it was held that the charge was an "alternative" charge and not a "charge in the alternative". The court added, the rule that every charge should be tried separately may be waived in instances where a "charge in the alternative" is framed.

In *Tan Kheng Ann and Others* v. P.P.,[13] a view similar to that of Terrell Ag. C.J. was expressed by Thomson L.P.:

> Here in each of the charges the allegation was that each of the accused was a member of an unlawful assembly whose common objects were to cause death and destruction *and* that in the prosecution of these common objects murder was committed which was an offence which the members

5 Hereinafter referred to as Form 27(ii)(4).
6 See side note to Form 27(ii)(4) in Schedule B of the C.P.C.
7 *R.* v. *Tay Thye Joo* (1933) 2 M.L.J. 35 at 36; *In re Tan Ah Chuan & Anor.* (1954) 20 M.L.J. 135 at 138; *Seow Keh Meng* v. *Reg.* (1952) 18 M.L.J. 215 at 216; *Gan Kee Beng & Anor.* v. P.P. (1948) 14 M.L.J. 71 at 72-73.
8 *R.* v. *Tay Thye Joo* (1933) 2 M.L.J. 35 at 36; *Quinn and Howland* v. *Rex* (1949) 15 M.L.J. 217 at 222; *Ganesh Krishna* v. *Emperor* (1911) Cr. L.J. 224 at 225 and 229.
9 (1937) 6 M.L.J. (F.M.S.L.R.) 225.
10 *Ibid.*
11 F.M.S. (1935) Cap. 6.
12 *Supra,* n. 9.
13 [1965] 2 M.L.J. 108.

> of the assembly knew to be likely to be committed in prosecution of their common objects.[14]

Since the word *and* was used instead of *or* as in *Yap Liow Swee,* Thomson L.P. held the charge before him was not an "alternative" charge as the accused had been charged "conjunctively".[15] The prosecution had merely saddled itself with the task of proving both offences — a ruling that was in blatant violation of the principles laid down in section 167 of the C.P.C. No reference, however, was made in the judgment to the provision in the 1955 Criminal Procedure Code [16] that corresponded to section 167 of the present C.P.C.

In his dissenting judgment in the Indian case of *Ganesh Krishna* v. *Emperor*,[11] Crouch A.J.C. went a step further and suggested a seemingly uncomplicated mode of differentiating between "cumulative" charges, "alternative" charges and "charges in the alternative":

> In this case we are only concerned with charges in the alternative. It is necessary to distinguish them from what may be termed "alternative charges" where the accused is charged under two separate charges with having committed either offence A or offence B. It is not usual to insert the word "or" between the two charges, but it is explained to the Jury that a verdict of guilty is asked for, on only one of them. The essential difference between cumulative charges, alternative charges and charges in the alternative is, that under the first, the court is asked to convict of two or more offences, under the second of any one specific offence, under the third of one or other of two offences without specifying which.[18]

Were these guidelines to distinguish between the aforementioned charges formulated after an analysis of the provision equivalent to section 171 in the Indian Criminal Procedure Code?[19] Do the illustrations to section 171 widen the scope of section 171, so that one could say that the section refers to "cumulative" charges, "alternative" charges and "charges in the alternative"? Crouch A.J.C. did not cite any authority to substantiate his views. No effort was made to analyse the various limbs of section 236 of the Indian C.P.C. One may also wonder as to why his Lordship so emphatically stated that a "charge in the alternative" should refer only to two offences? Section 171 certainly does not contemplate such a restrictive charge, even though there is a reference to the term "charge in the alternative" both in the main section and illustration (b). Again, should a "cumulative" charge be drafted only in instances where there is a possibility of obtaining a conviction in regard to two or more offences? Does any provision in the Code refer to such a charge? Wherein lies the rationale for framing charges in the manner that Crouch A.J.C. so pharisaically described?

Labelling has never been a rational or forthright art. An analysis of the modes of judicial labelling of various forms of charges adds credence to this view. Evans J, in *Quinn and Howland* v. *R.*[20]

14 *Ibid*., at 115.
15 *Ibid.*
16 The Laws of the Colony of Singapore, 1955 Rev. Ed., Cap. 132.
17 (1911) Cr. L.I. 224.
18 *Ibid*., at 229.
19 The equivalent provision in the Indian Criminal Procedure Code of 1898 (Act No. 5 of 1898) was section 236.
20 (1949) 15 M.LJ. 217.

pointed out that section 175 of the Straits Settlements C.P.C.[21] (equivalent of section 169 in the present C.P.C.) refers to cumulative charges as opposed to "alternative" charges as specified in section 176 (at present section 171). Section 169(1) of the present C.P.C. indicates, if a series of acts forming a part of the same transaction can be identified with more than one offence, the accused may be charged separately for each offence and tried for all the offences in one trial. Evans J. stated, where the accused is tried for several offences in one trial and the offences are referred to in one charge sheet, the charge may be labelled a "cumulative charge".[22] So it would be, in instances where charges are framed under section 169(2) and (3) of the present C.P.C.

In *Lim Yean Leong* v. *P.P.*[23] the Court of Appeal of the Federated Malay States seemed to view a charge referring to several charges, each encompassing a "cluster of offences", as a "cumulative charge". The court pointed out that if the accused has been charged with several offences and each cluster of offences in each of those charges could have been joined under any of the exceptions to section 163 of the F.M.S. C.P.C.[24] (equivalent of section 167 of the present Singapore C.P.C.), all the offences may be tried cumulatively. It was also held that the exceptions to section 163 were not mutually exclusive.

There was a reference to ten offences in the charge against Lim. The offences were categorised into three groups. In one group there was a reference to four offences. In each of the other two groups the reference was to three offences. The charges related to:[25]

(A) Criminal breach of trust of $807.83 on 19th April, 1938, and two subsidiary charges of falsification of two books of account and one of forgery on the same date.

(B) Criminal breach of trust of $100.40 on 26th January, 1938, and falsification of two books of account on the same date.

(C) Criminal breach of trust of $450 on 26th February, 1938, and two subsidiary charges of falsification of two books of account on the same date.

The accused was convicted in the High Court on each of the criminal breach of trust charges and the subsidiary charge of forgery

[21] Laws of the Straits Settlements, 1936 Rev. Ed., Cap. 21; section 169 of the present C.P.C. provides:

(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of those offences.

(3) If several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined or for any offence constituted by any one or more of such acts.

[22] *Ibid*., at 222.

[23] (1940) 9 M.L.J. (F.M.S.L.R.) 272.

[24] *Supra,* n. 11.

[25] *Supra,* n. 23 at 272-273.

mentioned in the first charge. He was acquitted on the six falsification charges. It was contended by the accused before the Court of Appeal, that there was a misjoinder of charges. The accused conceded that each of the offences in any one of the three groups could have been mentioned in a different charge and tried together by virtue of a joinder under section 165 (equivalent of section 169(1) of the present C.P.C.) as they were "part of the same transaction." However, it was pointed out that there was a misjoinder because the offences had been lumped into three "groups".

The Court of Appeal indicated that each group of offences related to one charge. Therefore, since each offence in any of the groups could have been tried with any of the other offences in the same group under an exception to section 163 (section 167 of the present C.P.C.), the manner of charging the accused through "grouping" of offences was proper. Furthermore, since the exceptions to section 163 are not mutually exclusive but cumulative, it was held, the accused may be charged cumulatively for a cluster of offences that fall into different exceptions.

The type of joinder approved by the Court of Appeal could be prejudicial to the accused. Would it not be more appropriate to limit the term "cumulative" charge to a charge that would include only offences that fall under one of the exceptions to section 167? Even in such circumstances, each offence will have to be referred to in a separate charge. All the offences could thereafter be cumulatively included in one charge sheet. Where offences can be properly joined under different exceptions to section 167, the framing of a "cumulative" charge as perceived in *Lim's* case ought to be avoided. Such a charge would confuse the issues. Furthermore, evidence adduced in regard to several "groups" of offences, covering different situations and transactions, may be a pointer to the accused's bad character. Such evidence would undoubtedly prejudice the accused when he is charged "cumulatively" for offences that cannot be joined under the same exception mentioned in section 167.

In the Sri Lankan case of *Bandara* v. *Inspector of Police, Padukka*,[26] Basnayake C.J. in a dissenting judgment seemed to take the view that illustration (a) to section 181 of Sri Lanka's Criminal Procedure Code[27] (equivalent of section 171 of the Singapore C.P.C.) refers to two types of charges. His Lordship submitted that the first part of illustration (a) to section 181 refers to a charge that specifies several offences without a direct reference to the specific offence that the prosecution may want to prove. Sarkar identifies a charge of this type as a cumulative charge.[28] Basnayake C.J. went on to explain how a charge of the type mentioned in the first part of illustration (a) could be framed:

> You … did on … at… within the jurisdiction of this court… (specify act) … and did thereby commit one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust and cheating, punishable under sections 367, 394 and 400 of the Penal Code. (The sections referred to are those in the Sri Lanka Penal Code)[29]

[26] (1960) 62 N.L.R. 73.

[27] Legislative Enactments of Ceylon, 1956 Rev. Edn., Cap. 20.

[28] P.C. Sarkar and K.C. Ray, *The Law of Criminal Procedure* (1975) (Calcutta: Sarkar) at 376.

[29] *Supra,* n. 26.

This interpretation may in effect be in keeping with his Lordship's analysis of the various limbs in section 181. His Lordship stated that section 181 can be availed of:

(a) if a single act is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute,

(b) if a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute.

In a case to which the section applies the accused can be charged with, and tried for, at one trial:

(a) all the offences disclosed by the facts which can be proved, or

(b) any one or more of such offences.

Should we accept Sarkar's view of what a cumulative charge is, it would seem that section 171 includes both "charges in the alternative" and "cumulative charges". For, under the last limb of section 171 as indicated in the above analysis of Basanayake C.J. of section 171, the accused could be "tried" for having committed one of several offences mentioned in the charge. However, Basanayake C.J. stressed that the charge framed under any of the limbs of section 171 should be based on "facts that can be proved":

> ... whether a charge should be made [sic] in the manner prescribed in section 181 would rest on the authority instituting the proceedings who knows the facts which can be proved and who is uncertain, on account of the nature of the act or acts of the accused, which of several offences disclosed by them the accused committed. The facts which can be proved should not be in doubt. The doubt should be only as to the offence or offences constituted by them and should arise from the nature of the act or acts of the accused.[30]

Have the courts been successful in their labelling exercises? Does section 171 refer to any one or more of the charges that have been described above? Does the term "alternative charge" cover both "charges in the alternative" and "cumulative charges"? Is our concept of what an "alternative charge" is, different from that in English law?

If section 171 is interpreted as referring to both a "charge in the alternative" and a "cumulative charge" as Basnayake C.J. perceived the term, the prosecutor's sabre would be broader and the swipe less likely to miss its mark. On the several occasions in which the courts in Malaysia and Singapore have had the opportunity to explain the scope and utility of section 171 in the context of the various labelling exercises they have indulged in, they have avoided making an effective and binding pronouncement. Instead of explaining the forms of charges that could be framed "where it is doubtful what offence(s) has been committed," the courts have focussed on a limb or two of section 171, without a detailed analysis of the scope of the section, and either merely approved or disapproved forms of charges that were put forward as "alternative charges".

30 *Ibid.*

However, even if Basanayake C.J.'s interpretation of section 171 is correct, how does one explain the relevance of illustration (b) to the main section?[31] The facts in the illustration seem to disclose only one offence. In the illustration it is stated that the accused may be charged for "intentionally giving false evidence" an offence punishable under section 193 of the Penal Code [see also Schedule A Form 27 Head II(4) of the C.P.C.]. The same charge could have been framed under section 167. Why does Schedule B refer to a charge similar to that in illustration (b) as an "alternative charge"?

AN EVALUATION OF THE PRINCIPLES THAT GUIDE THE FRAMING OF "ALTERNATIVE" CHARGES UNDER SECTION 171

There has been considerable uncertainty as to the scope of section 171. Apart from the uncertainty that prevails as to the types of charges that may be framed under section 171, doubts also exist as to when a charge may be framed under section 171. In the course of interpreting section 171, the courts in Singapore have indicated that the prosecutor should be given a wider discretion than his counterpart in India, to frame charges under section 171. Thus even in instances where the facts have not been "ascertained" at the time a charge is framed, and these facts create a doubt as to the nature of the offence committed, the courts in Singapore have held, a charge may be framed under section 171. Doubts also prevail as to the relevance of illustration (b) in interpreting section 171. Should a charge, such as the one referred to in illustration (b) to section 171, be based on "ascertainable" alternative facts? Or, should one identify illustration (b) as an amendment to section 171?

(i) *Should charges under section 171 be framed only on "ascertainable" facts?*

Terrell J. in *R.* v. *Tay Thye Joo*[32] had stated:

> I think that section 172 *[i.e.* section 171 of the present Code] means what it says, namely that it is doubtful what facts can be proved. Until they can be proved, it is difficult to say what offence has been committed and accordingly an alternative charge may be framed. Another way of putting it is that the exact relation of the accused to the offence in question has not been fully ascertained.[33]

In *Tay's* case the accused was charged for three offences of cheating and in the alternative for three offences of abetment of cheating. He was convicted in the District Court of "cheating" on each of the three charges of cheating. On appeal to the High Court it was contended there was a misjoinder because:

(i) the ascertainable facts at the time of framing the charge indicated only the commission of the three offences of cheating. There were no "ascertainable" facts to indicate instigation. The accused, therefore, should not have been charged in the alternative of abetment;

[31] Illustration (b) provides: *A* states on oath before the committing Magistrate that he saw *B* hit *C* with a club. Before the High Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false.

[32] (1933) 2 M.L.J. 35.

[33] *Ibid*., at 36.

(ii) an alternative charge cannot be framed on "distinct acts". Section 171 refers to the doubts that a "series of acts" may create concerning the offences that the accused may be charged with. It does not refer to doubts in regard to offences that may originate from an allegation of facts based on "distinct acts". In other words, if a series of acts, viewed cumulatively, create a doubt as to the offences that the facts constitute — an alternative charge may be framed. Alternative charges cannot be framed on "distinct acts" such as cheating *per se* and abetment of cheating.

Terrell J. disagreed with the views expressed by the defence counsel. His Lordship pointed out that section 171 permits the prosecution to allege on the basis of "unascertained" facts the commission of several offences, even though the facts available to the prosecution at the time of drafting the alternative charge may not indicate the commission of these offences. In other words, where the "unascertained" facts create a doubt as to which offence or offences were committed, his Lordship held, an alternative charge may be framed. His Lordship concluded by saying that the law permits the court to convict a person of an offence he has not been charged with and that too on a set of facts different from those he had been charged with in the first instance. Therefore, to bar the framing of an alternative charge based on an allegation of "unascertained" facts would be unreasonable.[34] Furthermore, Terrell J. added that the alternative charge based on "distinct acts" was proper, and the views of the counsel in this regard "superfluous".

A similar view was adopted in *Quinn and Rowland* v. *R.*[35] The accused were jointly charged of robbing a taxi driver's vehicle and in the process causing hurt to the driver, an offence punishable under section 394 of the Penal Code. They were convicted, however, for attempting to rob money that was in the possession of the driver. The accused appealed to the Court of Criminal Appeal from the decision of the High Court.

It was pointed out on appeal that the accused were convicted for an offence that they had not been charged with in the lower court. Section 177 of the Straits Settlements C.P.C. (equivalent of section 172 of the present C.P.C.) permitted the court to convict an accused of an offence he had not been charged with, provided the offence could have been included in a charge under section 176 (equivalent of section 171 of present C.P.C.). The accused contended that the facts mentioned in the charge created no doubt as to the offence that the accused could have been charged with. The offence was robbery of the vehicle — in circumstances that would make the act an offence punishable under section 394 of the Penal Code. Section 176 permitted the framing of charges with a reference to one or more offences, only where the facts that "can be proved" created a doubt as to the offence(s) that the accused has committed. As there was no doubt as to the offence that the accused could have been charged with, it was contended, a charge in this instance could not have been framed under

[34] *Ibid.* For a contrary view see J. Woodroffe, *Criminal Procedure in British India* (1926) (Calcutta: Thacker) at 277.
[35] (1949) 15 M.L.J. 217.

section 176 so as to include the offence for which the accused was convicted in the lower court.

The Court of Criminal Appeal, however, held section 176 would apply even in situations where the facts are unascertained at the time the charge is framed. Section 176 only refers to "facts that can be proved" at the trial If these alleged facts create a doubt as to the offences that the accused can be charged with, an alternative charge may be framed. It was pointed out, therefore, that there can be an allegation of unascertained facts in the charge in reference to the offence(s) that the prosecution hoped to prove. It is the allegation of these facts that must create a doubt as to "which of several offences the facts which can be proved will constitute." In this instance, the court pointed out, the offence for which the accused were convicted could have been included in an "alternative" charge if the prosecution wished to, by alleging the appropriate facts. Since there *could have been* a charge under section 176, it was held, the conviction for attempted robbery was valid.

As Gordon-Smith J. explained:

> In my opinion Section 176 covers doubt from two points of view, firstly doubt as to what facts can be proved by evidence which may, or may not constitute an offence, and doubt when facts have been proved, as to what the specific offence has been committed [sic] when the necessary facts constituting an offence, have been proved.[36]

His Lordship went on to add:

> In this present case the real substance of the charge was the voluntary causing hurt [sic] during the course of committing or attempting to commit robbery. The only distinction between the charge framed and that for which the accused were found guilty was in the subject matter of the robbery, i.e. the Jury found the accused not guilty of robbery of the taxi but guilty of attempting to rob the complainant of cash his person. This additional matter of the attempt to rob the complainant of his cash might easily have been added to the charge as framed, in which case no exception could possibly have been taken to the verdict of the jury.[37]

Murray-Aynsley CJ. reiterated a similar view.

> It is I think desirable to consider the latter section *[i.e.* section 171] first. For that section to have effect it is necessary to presuppose a state of affairs in which a person has the duty of framing a charge and it is uncertain what offence can be proved against the accused. Uncertainty in this respect can be of three kinds. The facts can be quite certain but there may be doubt as a matter of law which section covers such facts. There may be a case where the prosecution is in a position to prove certain facts from which the Court may draw one of several inferences. A common instance of this state of affairs arises in cases of recent possession of stolen goods, where the Court may draw the inference of stealing or receiving. The third case is where, as so often happens, the prosecution is uncertain how much the evidence produced will convince the Court when the case comes on for trial.
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> The general interpretation adopted by Courts in India has been of a certain body of facts known in advance, the only doubtful matter being one of application of law to those facts, or possibly the question of drawing inferences from those facts. I do not myself consider that it is necessary to put such a restrictive interpretation on those words. "The facts which can be proved" is not something which exists at the time

[36] *Ibid*., at 221.
[37] *Ibid.*

> but something which is hoped for in the future. I think that the words may be taken to include doubts of the third kind which I have described above, not merely of the first and second kinds.[38]

Reference was made by his Lordship to the first illustration to section 171. The illustration reads:

> *A is accused of an act* which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating [italics mine],

Murray-Aynsley C.J. interpreted the term "accused of an act" as an "allegation" concerning an act that may relate to any one of the offences mentioned in the illustration.[39] Focussing on the first part of the illustration, Murray-Aynsley C.J. concluded that a charge may be framed under section 171 on an allegation of unascertained facts which may create a doubt as to what offence or offences the facts constitute. However, he dismissed the second part of the illustration by saying that the illustration is "impossible to construe".[40]

Under the second part of the illustration — based on an "accusation" a person may be charged with,

a) theft, receiving stolen property criminal breach of trust *and* cheating; or

b) he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating.

The illustration merely indicates that a person can be accused of an *act* that

i) clearly indicates the type of offence committed; or

ii) creates a doubt as to the type of offence that has been committed.

An act may clearly point to a "theft". If so, the accused may be charged with that offence — (i) above simply reiterates this fundamental rule. That is, a person may be accused of an act that amounts to "theft". If so, he should be charged for theft. In the same manner, if a person is accused of an act that indicates that he has committed the offence of receiving stolen property — he should be charged with that offence. So it would be in regard to the other categories of offences mentioned in (a) above, such as criminal breach of trust and cheating. The use of the word *and* in this part of the illustration simply confirms the validity of this approach to interpreting (a) above.[40a]

In contrast to the normal practice of accusing the offender of an act that clearly indicates the offence he has committed, (b) above refers to the other optional mode of charging an offender. One may accuse a person of an act and frame an "alternative" charge. That is, charge the accused of having committed theft or receiving stolen property or criminal breach of trust or cheating.

38 *Ibid.*, at 219.
39 *Ibid.*
40 *Ibid.*
40a Compare this interpretation of illustration (a) with those of Basanayake C.J. and Sarkar, *supra,* at 70-71.

If the above approach is adopted the term "accused of an act" in illustration (a) need not be interpreted as an "allegation" of an act. Murray-Aynsley C.J. erroneously took the view that unless allegations are made on unascertained facts it would be impossible to charge a person for theft *or* receiving stolen property *or* criminal breach of trust *or* cheating. He concluded, therefore, that "accusation of an act" in illustration (a) refers to an "allegation of acts" in regard to which the prosecution hoped to gather evidence in the future. A book that is missing from the library may be found in the possession of *X*. The fact that *X* was in possession of the book at the time of his arrest, is a fact that can be established by the prosecution without much difficulty. Yet the prosecutor may not know the exact nature of the offence that *X* has committed. *X* may have committed theft; or he may have received the book from the thief who had stolen it. Or, he may have borrowed the book on trust from the library and breached that trust by retaining the book; or he may have obtained the book by deceiving the counter clerk in the library. Thus on a fact that can be proved by the prosecution a doubt could arise as to the nature of the offence(s) committed by the accused. In such circumstances an "alternative" charge may be framed against the accused for committing either theft or receiving stolen property or criminal breach of trust or cheating. Murray-Aynsley C.J.'s interpretation, therefore, of the term "accused of an act" in illustration (a) as *"allegation* of an act" was unwarranted.

Furthermore, all three judges in *Quinn's* case felt they were bound by the decision of the Privy Council in *Begu* v. *King Emperor.*[41] They interpreted *Begu's* case as laying down the rule that alternative charges can be framed on alleged facts, even though the prosecution may have no 'evidence' of those facts at the time the charge is framed. In *Begu's* case, a prosecution witness who observed the whole incident stated in court that the five accused had attacked the deceased with a hatchet and other sharp instruments. The witness, however, did not see the deceased die. Other evidence obtained subsequently revealed that after the death of the deceased, his corpse was wrapped in cloth and placed on a horse and taken away. The horse was later traced and the trackers were able to identify the footprints of the accused. All five accused were charged for murder. Two were convicted of murder. As the other three had along with the others removed the body of the deceased, they were convicted of "causing evidence of the commission of an offence to disappear" — an offence punishable under section 201 of the Penal Code. The evidence presented in the lower court did not indicate beyond a reasonable doubt that these three accused had taken part in the murder.

The arguments put forward by the defence counsel before the Privy Council were not clearly explained by Lord Haldane in his judgment. His Lordship merely stated:

> A man may be convicted of an offence, although there has been no charge in respect of it, *if the evidence is such as to establish a charge that might have been made.* That is what happened here. The three men who were sentenced to rigorous imprisonment, were convicted of making away with the evidence of the crime by assisting in taking away

41 (1925) A.I.R. (P.C.) 130.

> the body. They were not charged with that formally, but they were tried on evidence which brought the case under section 237.[42]

The appeals of the accused to the Privy Council were dismissed. The case *does not* lay down the rule that if the accused could have been charged of an offence on an allegation of "unascertained" facts, a conviction for such an offence under section 237 (equivalent of section 172 of the Singapore C.P.C.) would be proper, even though he may not have been formally charged with that offence. In *Begu's* case, the facts were clear at the time the charge was framed against the five accused. There was evidence to show that all five accused attacked the deceased. "Evidence" of removal of the body too could have been adduced by the prosecution. There was, however, a doubt as to the offence that the accused could be charged with on the facts that could be proved. In such a case, section 236 would clearly apply. So would section 237. *Begu's* case, therefore, cannot be treated as an authority for the views advanced in *Quinn's* case.

In *Loh Kwang Seang* v. *P.P.*,[43] however, Rigby J. pointed out:

> Section 176 [*i.e.* section 171 in the present C.P.C.] only applies in cases where it is doubtful on the known facts which offence in law the accused can be proved to have committed. In such cases the prosecution may bring any number of alternative charges under different provisions of the law to cover the known facts."[44]

There was no reference to *Quinn* or *Tay* in Rigby J.'s judgment.

If the reasoning in *Tay* and *Quinn* is accepted, it would lead to absurd results. For instance, if the accused is in possession of property *similar* to stolen property, even though there may be no credible evidence to show that the property in his possession is stolen property, the prosecutor may be in a position to frame an alternative charge of theft or receiving stolen property. On presenting the charge, the prosecutor will have to inform the court that he *hopes* to adduce evidence during the trial to show that the property in the accused's possession was in fact stolen. Should the accused be exposed to a prosecution on an allegation of facts of this nature?

Moreover, in summary trials the responsibility of revising a poorly drafted charge at the initial stage of a trial is often cast upon the magistrate. In some of these cases the only material before a magistrate would be the first information report. If the facts as they exist do not indicate an offence, how will a magistrate, as a neutral party, be able to draft an "alternative" charge? An "alternative" charge, therefore, can be framed only if a genuine doubt arises from the facts of the case. The doubt must be one that exists at the time the charge is framed.

Section 171 should be viewed as being just one of a series of sections in the Criminal Procedure Code laying down rules as to the framing of charges. In all the other sections which lay down principles as to the framing of charges, it is clearly indicated that charges can be framed only on facts that can be proved by the prosecutor. If the

42 *Ibid.*, at 131.
43 (1960) 26 M.L.J. 271.
44 *Ibid.,* at 274.

views in *Tay* and *Quinn's* case are accepted, there would be a blatant violation of this basic principle in regard to the framing of charges. Furthermore, the accused may be placed, on occasions, in a precarious position if the interpretation in *Tay* or *Quinn's* case is accepted. If an "alternative" charge is based on an allegation of unascertained facts of which, at the time the charge is framed, the prosecution is not in a position to adduce any evidence, defending the accused would be a more onerous task than it would otherwise be to a defence counsel. For instance, the prosecution may adduce evidence in regard to one offence that may not be admissible in regard to the alternate offence in normal circumstances. The prosecution may seek to admit evidence in regard to offence *A* and if it fails to prove *A* may try to prove the alternate offence *B*. The evidence already admitted in regard to offence *A* may easily influence the judge's (or jury's) attitude towards offence *B*. In view of dangers of this sort and in order to prevent undue prejudice to the accused, the narrower interpretation ought to be preferred.

Furthermore, in situations where facts indicate the nature of the offence committed, the prosecutor in the hope of eliciting evidence of other facts that may reveal another offence, may decide to frame an "alternative" charge. For instance, a person charged with contravention of a by-law prohibiting the occupation of a foodstall without a licence may be alternatively charged, under section 171, of the offence of selling food without the permission of the proper authorities. By adopting this strategy the prosecutor may be able to obtain a conviction for either or both offences. Where the "facts that can be proved" indicate only one offence, the accused should be charged with that offence. The prosecutor does not have the authority to frame charges on facts of which he does not possess any "evidence", under any of the other sections that relate to the framing of charges *(i.e.,* sections 167, 168 and 169 of the C.P.C.). Yet he will be able to accomplish all that he will not be able to do under sections 167, 168 and 169 by framing a charge under section 171, if the approach in *Quinn* and *Tay* is adopted. The facts available to the prosecution should be consistent with the offences that are mentioned in an alternative charge. And in addition, there must be a genuine doubt as to which of two or more different offences the provable facts constitute.

(ii) *Does illustration (b) amend section 171 of the C.P.C.?*

In re Tan Ah Chuan and Anor.,[45] on the 25th of August 1953 during a customs investigation the accused made a statement concerning the unloading of goods. He made another statement concerning the same incident during the trial of a third party on the 24th of October 1953. The two statements were inconsistent. The following charge was framed against the accused:

> That you Tan Ah Chuan alias Nai Na Hong Anu Raj on 25th day of August, 1953 at about 4.00 p.m. at the Customs Office, Penang, in the course of an inquiry into an alleged offence stated to P. Talbot, Esq., a Customs Officer that you drove lorry No. P. 3042 direct to Changloon from Butterworth without stopping on 23rd August, 1953 the exact words of which statement are marked in red ink in the copy statement attached and marked 'A') and at Alor Star on the 24th October, 1953 in the course of the trial *Regina* v. *Ch'ng Saik Kee* No. 1 of 1953, stated

[45] (1954) 20 M.L.J. 135.

> in evidence that you stopped to unload goods at Alor Star during the course of the aforesaid journey (the exact words of which evidence are marked in red ink in the copy notes of evidence attached and marked 'B'), one of which statements you knew or believed to be false or did not believe to be true and that you thereby committed an offence punishable under section 193 of the Penal Code.[46]

Spenser Wilkinson J. held that the charge was bad. His Lordship indicated that the accused should have been charged alternatively in separate charges. And furthermore, his Lordship added, only in the fact situation contemplated in illustration (b) may an alternative charge be framed by reference to an offence *(i.e.* an offence punishable under section 193) in one charge. A false statement made in the course of a customs inquiry, however, was viewed by his Lordship as not falling within the provisions of section 193. Section 191 of the Penal Code defines "giving false evidence" as:

> Whoever being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.

It was held, a person giving information during an inquiry under section 97 of the Customs Ordinance[47] cannot be viewed as having given "false evidence" under any of the limbs of section 191. However, giving false information during an inquiry under section 97 of the Customs Ordinance was an offence under section 130 of the Customs Ordinance. If so, would a false statement made in the course of an inquiry under section 97 of the Customs Ordinance fall within the provisions of section 191? Spenser Wilkinson J. surmised:

> Can it then be said that by virtue of the provisions of sections 97 and 130 a person asked to give information under section 97 is bound by law to make a declaration upon some subject? In my opinion it would be unduly stretching the meaning of words to hold that a person giving information is making a declaration.[48]

His Lordship concluded that, in this instance, the accused should have been separately charged in the alternative for the offences under the Customs Ordinance and section 193 of the Penal Code.

His Lordship felt that illustration (b) and the "alternative charge" in the Schedule contemplated an exceptional situation where duplicity may be permitted. There is a reference to two statements being made under oath in illustration (b). Of these one would be false and the accused may ultimately be convicted for making a false statement. The act of making this false statement would then constitute the offence under section 193. However, at the initial stage of a proceeding, in view of the uncertainty as to which statement is false, provision seems to have been made for the framing of an alternative charge in the form specified in the Schedule. In such situations, there would

[46] *Ibid.,* at 136.

[47] Federal Ordinances and State and Settlement Enactments, Act No. 42 of 1952. Section 97 of the Customs Ordinance of 1952 states:

> Every person required by the proper officer of customs to give information on any subject into which it is such officer's duty to enquire under this Ordinance and which it is in such person's power to give shall be legally bound to give such information.

[48] *Supra,* n. 45 at 139.

be a series of acts (that is, two statements) creating a doubt as to which offence the facts constitute. Therefore, the alternative charge contemplated in illustration (b), exceptional though it may be, for it violates the duplicity rule, may be viewed as referring to two offences. On such a charge the accused may be tried and convicted in regard to either statement. It may so happen that even towards the end of the trial it may not be possible to prove which statement is false. His Lordship added, then there may be a conviction in the alternative under section 270 of the Straits Settlements C.P.C. (equivalent of section 214 of the present C.P.C.).

Spenser Wilkinson J.'s statement that illustration (b) should be read as a mere illustration to the combined effect of sections 176 and 270 of the Straits Settlements C.P.C. needs re-evaluation.[49] The illustration was added by way of amendment in 1933.[50] Does it amend the main section *(i.e.* section 171) "by way of illustration" — as it seems to approve duplicity in certain limited circumstances? Spenser Wilkinson J. stated since there was a reference to an "alternative charge" in the Schedule previously, the inclusion of the illustration merely explained the scope of the main section. Section 171 (along with sections 168, 169 and 175) is an exception to the second rule in section 167 — that is, that every charge ought to be tried separately. It is not an exception to the rule against duplicity mentioned in the first part of section 167. If Spenser Wilkinson J.'s interpretation of "the alternative charge" mentioned in illustration (b) is adopted, one will have to treat the 1933 amendment as an amendment to the major section *(i.e.* section 171) and not a mere illustration. The illustration would also be an amendment to the rule against duplicity that is prescribed in the first part of section 167.

Could one offer an interpretation to illustration (b) and the "alternative charge" in the schedule that would be consistent with the terms of sections 171 and 167? Or, should we view illustration (b) as an amendment to section 171 and perhaps section 167 as well, and conclude that section 171 and illustrations (a) and (b) refer to "cumulative charges", "charges in the alternative" and "alternative charges"? Should this be the mode to differentiate between the three terms? If so, the law in regard to "alternative charges" would be different from that in England. In Singapore, as a result of the inclusion of illustration (b) to section 171 and the example of an "alternative charge" in the Schedule, in certain limited circumstances offences may be referred to in the alternative in the same charge. That is, as in the illustration, when the offences referred to in the alternative relate to the same section, an "alternative charge" may be framed. English law does not contemplate exceptions to the rule against duplicity. Illustration (b), on Spenser Wilkinson J.'s interpretation would constitute an exception to the duplicity rule. It was said in *Hassan bin Isahak* v. *P.P.*[51] by Pretheroe A.C.J. that illustration (b) should not be interpreted to restrict or qualify the words in section 171. If so, illustration (b) should be viewed as an amendment or addition to section 171 —an other words, an exception to the duplicity rules.

[49] *Ibid.,* at 138.
[50] *Ibid.*
[51] (1948-49) M.L.J. Supp. 176.

A more preferable approach to interpreting illustration (b) would be that adopted by MacLeod C.J. in *Purshattam Ishvar Amin* v. *Emperor*[52] in the Bombay High Court. His Lordship stated that illustration (b) was added on to section 236 to re-emphasize the view that where two contradictory statements are made, and the accused is charged for giving false evidence, there is a reference only to one offence:

> The doubt which arose owing to conflicting decisions was whether it was necessary to prove that one of the statements was false or whether the mere fact that the statements were contradictory was sufficient for a conviction of the offence of giving false evidence This doubt was set at rest by the addition of illustration (b) to section 236. It does not appear to have been noticed that section 236 was originally framed to meet the case where it was doubtful whether offence A or offence B had been committed at the time when the charge had to be framed. Schedule V, Form xxviii, provided for the framing of charges under two or more heads in accordance with the provisions of section 236. But in the case of contradictory statements the doubt would be whether perjury had been committed on occasion A or occasion B, a very different matter. The form of charge in Schedule V, Form xxviii(ii) (4) is, therefore, strictly speaking, not a charge under two heads but a charge under one head for a single offence. The charge should be "either that you committed an offence of giving false evidence on occasion A or on occasion B and because the statements are contradictory you must have committed that offence on one of the two occasions: The illustration (b) made it clear that it was not necessary to prove on which of the two occasions false evidence had been given. But the illustration does not alter but merely explains the section, and it cannot be that only the contradictory statements mentioned therein can form the basis of an alternative charge.[53]

Spenser Wilkinson J. viewed each statement as relating to separate offences. Statement I related to offence A. Statement II, an act altogether distinct from Statement I, was viewed as constituting offence B. However, as there would be a reference to both offences in one charge it would be bad for duplicity. MacLeod C.J. viewed the two statements as relating to two different "occasions" — that is, to two different fact situations contributing to the commission of one offence. Such a charge, which mentioned different acts in the alternative and related these acts to one offence was viewed by Macleod C.J. as an "alternative charge". English law too seems to recognize an "alternative" charge in the form contemplated by Macleod C.J. Rule 7 of the English Indictment Rules of 1971[54] provides:

> Where an offence created by or under an enactment states the offence to be the doing or the commission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any

52 (1921) A.I.R. (Bombay) 3.

53 *Ibid*., at 10.

54 S.I. 1971 No. 1253. The Indictment Rules 1971 revoke and replace the Indictment Rules of 1915 which were included in the Schedule to the Indictments Act of 1915, Cap. 90. In the Indictment Rules of 1915 too there was a provision similar to Rule 7 of the Indictment Rules of 1971. Rule 5(1) of the Indictment Rules of 1915 stated:

Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any pan of the offence in the alternative, the acts, omissions capacities or intentions or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

See also S. Mitchell *et al, Archbold's Criminal Pleadings, Evidence and Practice* (1979) (40th Ed.) 38-41, 69-74.

> one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment or subordinate instrument may be stated in the alternative in an indictment charging the offence.

Macleod C.J. seemed to view illustration (b) as explaining the offence of giving false evidence in section 193 of the Penal Code as *inter alia,* the "doing [of] any one of any different acts [mentioned] in the alternative" [Interpolations are mine]. If so, the charge mentioned in illustration (b) would resemble the alternative charge contemplated in Rule 7 of the Indictment Rules of 1971. The Indictment Rules do not state that such a charge may be defined as an "alternative charge". The schedule to the C.P.C., however, clearly identifies a charge based on "alternative acts" as an alternative charge.[55] Would such a charge fall within the purview of section 171? It may, for illustration (b) contemplates a series of acts creating a doubt as to which "offence" the facts constitute. The charge contemplated in illustration (b) may, therefore, be the same as the one specified in (ii)(b) of Basanayake C.J.'s analysis of section 181 of the Sri Lanka C.P.C. (equivalent of section 171 of the Singapore C.P.C.).[55a]

CONCLUSION

Does section 171 refer to "cumulative charges", "charges in the alternative" and "alternative charges"? Should we simply use the term "alternative charges" to cover all the charges specified in section 171? Should the section be re-drafted in order to enable the court, the prosecutors and defence counsel to appreciate the ramifications of the forms of charges mentioned in section 171 and their significance to a trial? In view of the Court of Criminal Appeal's decision in *Quinn's* case it would seem, as the law now stands, that the accused may be charged and prosecuted on an allegation of "unascertained" facts. This approach to framing charges under section 171 may impose an additional burden on the accused. He may have to come to court ready to defend himself against "allegations". He may not even know the thrust of the prosecution's case until the trial commences. Add to this the prevailing uncertainty as to the forms of charges that can be framed under section 171. The position of the accused in effect would be precarious: he will not know where the sabre is being directed — until it strikes. Surely this cannot be viewed as being one of the goals of a charge framed under section 171!

If we reject the views in *Quinn* and *Tay* and accept the view in *Loh* as being correct, three types of charges may be framed under section 171:

a) the cumulative charge (as contemplated by Basanayake C.J.);

b) the charge in the alternative (as contemplated by Terrell Act. C.J.) in *Yap;* and

c) the alternative charge (as viewed by Macleod C.J.).

These charges would of course have to be based on facts that are available at the time the charge is framed and which could be proved

[55] Schedule B Form 27(ii)(4).

[55a] See, *supra,* at 71.

during the trial. It may not be proper to categorise all these charges as "alternative charges". The courts in Singapore and Malaysia, however, have occasionally identified what Terrell Act. C.J, has categorised as a "charge in the alternative" as an "alternative charge".[56] The charge contemplated in illustration (b) to section 171 too has been identified as an alternative charge in the schedule and judicial decisions.

By using these terms interchangeably the courts would merely perpetuate the vagueness and doubts that prevail at present in regard to the framing of charges under section 171. The labelling effort should be consistent. The defence counsel should be aware of the identity of various charges and the practices of prosecuting counsel in framing charges. A rational classification and labelling exercise will contribute to uniformity and coherence in the development of principles concerning the framing of charges. The judges too, in order to avoid striking down a charge, would not have to adopt circuitous interpretations to justify the wording in charges that violate basic principles.

The above recommendations for rationalisation of the law concerning "alternative" charges will not lead to the prosecutor having to proceed on his onward charge with the sword in his sheath. The prosecutor may still rattle his sabre. The nature of his swipe, however, will be more predictable. The "alternative" charge, in its varying forms, would be shred of all its mystery. To the relief of many the criminal process too would be rid of another anachronistic adversary feature.

J.K. CANAGARAYAR *

[56] *R.* v. *Toy Thye Joo* (1933) 2 M.L.J. 35 at 36; also refer *supra,* n. 7.

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