2 Administration of Criminal Justice

INTRODUCTION

DECISIONS AND COMMENTS

SENTENCING

(a) Drug traffickers
  (i) *Loh Hock Seng & Anor* v *Public Prosecutor* FC
  (ii) *DA Duncan* v *Public Prosecutor* FC
  (iii) *Chang Liang Sang & Ors* v *Public Prosecutor* FC
  (iv) *Public Prosecutor* v *Tan Hock Hai* FC

(b) Mitigating factors
  (i) *Lim Kit Siang* v *Public Prosecutor* FC
  (ii) *Kok Kee Kwong* v *Public Prosecutor*

(c) Interference by appellate court
  (i) *Public Prosecutor* v *Lee Seng Seh*
  (ii) *Public Prosecutor* v *Tengku Mahmood Iskandar & Anor*
  (iii) *Bhandulananda Jayatilake* v *Public Prosecutor* FC

(d) "Shall be liable"
  Public Prosecutor v *Hew Yew*

BAIL

(a) Non-bailable offences
  Public Prosecutor v *Chew Siew Luan* FC

CHARGES

(a) Joinder of offenders
  Syed Ismail v *Public Prosecutor*

(b) Particulars
  Haji Abdul Ghani bin Ishak & Anor v *Public Prosecutor* FC

(c) Omission to frame a charge
  Jaginder Singh & Ors v *Attorney General* FC

APPEALS AND REVISION

(a) Signatory to notice and petition of appeal
  Jayasankaran v *Public Prosecutor* FC

TRIALS

(a) Examination of witnesses
  Gan Kok Liong v *Public Prosecutor*

(b) Burden on prosecution
  Public Prosecutor v *Foo Jua Eng*

(c) Essential (Security Cases) (Amendment) Regulations, 1975
  Public Prosecutor v *Nordin bin Johan & Anor* FC

The Introduction and Comments to this Chapter are contributed by
Puan Mimi Kamariah Majid LLB (Malaya) LLM (Monash) Advocate
and Solicitor Lecturer, Faculty of Law University of Malaya

(d) Demeanour of witnesses
Tengku Mahmood v *Public Prosecutor*
(e) Prima facie case
A Ragunathan v *Pendakwa Raya*
INITIATION OF PROCEEDINGS
(a) Notice of prosecution
Public Prosecutor v *Chin Chee Thau*
FORFEITURE
(a) Price Control Act 1946
Public Prosecutor v *Chu Beow Hin* FC
POLICE STATEMENTS
(a) Admissibility of
(i) *Wong Swee Chin* v *Public Prosecutor* FC
(ii) *Public Prosecutor* v *Er Ah Kiat*
FORCIBLE DISPOSSESSION — SECTION 99(iv)(a) CRIMINAL PROCEDURE CODE
Chan Hoh v *Tham Kum & Anor*
CONTEMPT OF COURT
Karam Singh v *Public Prosecutor*
CORROBORATION
Yap Ee Kong & Anor v *Public Prosecutor* FC

INTRODUCTION

Sultan Azlan Shah's stand on sentencing is perhaps the most significant and noticeable of all his contributions in criminal procedure. His Royal Highness'firm handling of drug trafficking cases has set a trend in the sentencing of such offenders. It was His Royal Highness who first imposed the death penalty on a convicted drug trafficker when he had the option of affirming the trial Judge's sentence of imprisonment for life. The Sultan's fearless attitude, often accompanied by the belief that no man is above the law, have seen him through a few 'difficult' cases, such as those involving royalty and public figures. His Royal Highness had enhanced sentences where appropriate and reduced them where reductions were necessary. In so doing, however, the principles of sentencing were not cast aside.

Criminal procedure in Malaysia is governed by numerous statutes, although the main one is the Criminal Procedure Code. With so many statutes, there are bound to be inconsistencies and apparent conflicts in their provisions. These inevitably find their way to the courts for solution and Sultan Azlan Shah had his share. Quite a number of such cases merely required the application of such principles as *generalibus specialia derogant* and similar general principles of interpretation.

Sultan Azlan Shah's foremost case, however, was on the trial process

in the form of *Ragunathan* v *Pendakwa Raya*[1], where His Royal Highness adopted, although *obiter,* the decision of the Privy Council in *Haw Tua Tau* v *Public Prosecutor* [2], and in the process changed the law in Malaysia with regard to the duty of the presiding judicial officer at the end of the prosecution case. He must be satisfied that a *prima facie* case is proved and *prima facie* now means all essential elements of the offence charged are proved, the facts being not inherently incredible. A weakness evident in this case, is the absence of an explanation or a discussion of the application of *Haw* in the Malaysian context. It may be argued that *Haw* was anyway referred to by way of *obiter.* Be that as it may, the approval of that case by the Federal Court has led other courts to accept it as binding on them.

Where a reminder was necessary, either to counsel or to Judges, Sultan Azlan Shah never hesitated giving it. Thus, the reminder on what "public interest" means in relation to section 66(1) of the Courts of Judicature Act 1964; what the duty of the prosecution is in a criminal trial; and that Judges should not avoid imposing maximum sentences where such sentences are warranted.

DECISIONS AND COMMENTS

SENTENCING
(a) Drug Traffickers

Loh Hock Seng & Anor
v
Public Prosecutor

[1980] 2 MLJ 13 Federal Court, Penang
Coram: Raja Azlan Shah CJ (Malaya) Chang Min Tat FJ and Abdoolcader J

Case referred to:-
(1) *Tan Boon Liat* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The two appellants were jointly charged, tried and convicted on June 22, 1979 in the High Court in Malaya at Penang on the following charge:

> That you jointly on the 24th of March 1978 at about 8.50 pm at the car park of Central Hotel, Penang Road, in the District of George Town, in the State, of Penang, in furtherance of the common intention of you all, did on your own behalf, traffic in dangerous drugs, to wit, heroin weighing 1,5550.1 grammes, and you have thereby committed an offence under

[1](1982) 1 MLJ 139 [2](1981) 2 MLJ 49

section 39B(1)(a) of the Dangerous Drugs Ordinance No 30 of 1952 punishable under section 39B(2) of the same Ordinance read with section 34 of the Penal Code.

The 1st appellant Loh Hock Seng was then sentenced to imprisonment for life and 7 strokes of whipping and the 2nd appellant Hong Hoo Chong to imprisonment for life and 14 strokes of whipping. They both appealed to this court against conviction and the Public Prosecutor cross-appealed against the sentence imposed.

The appeal was heard before us on December 5, 1979. Counsel appearing for the appellants indicated at the outset that he had yet to obtain instructions from the 1st appellant as to whether he wished to proceed with his appeal and as a result only argued the appeal by the 2nd appellant. There were ten grounds of appeal but counsel intimated he was abandoning all the grounds except three which he argued, namely, on the question of proof of common intention, the admissibility of the statement made by the 2nd appellant and the matter of possession, custody and control of the subject-matter of the charge. We found no substance in the arguments and contentions advanced, were satisfied that the 2nd appellant had been properly convicted and accordingly dismissed his appeal against conviction. The Deputy Public Prosecutor then proceeded with his appeal against the sentence imposed on the 2nd appellant.

There have been several convictions in the country for trafficking in drugs under section 39B of the Ordinance but the courts have invariably sought out of a sense of compassion to exercise mercy and have imposed accordingly only the second alternative of a sentence of life imprisonment, and we understand this is the first time in which the Public Prosecutor has appealed against the imposition of such a sentence, no doubt in respect of the 2nd appellant in view of the facts and circumstances surrounding and relating to his case.

Sentencing in a criminal case must of course bear relation to the particular circumstances of the offender as well as the particular circumstances of the offence. The legislature has in its wisdom and in the implementation of its plenary powers in this respect enacted the imposition of the alternative penalties of death or imprisonment for life under section 39B of the Ordinance with the option and discretion in this regard to be no doubt judicially and judiciously exercised according to the facts and circumstances of a particular case, and we can see no reason whatsoever why the statutory enactment of the option for punishment by death cannot and should not be made functionally operative and exercised and applied *proprio vigore* if the circumstances and facts of the case so warrant, justify, require and perhaps even demand.

Notwithstanding the several convictions for trafficking in drugs that have been secured, the rampancy of this type of offence still continues unabated with sequential impetus to related offences under the Ordinance, and in view of the current and continuing up-surgence of indulgence in dangerous and deleterious drugs and offences relating to and connected therewith, we feel the time has now come for some more

vigorous element of deterrence to be brought to bear upon those trafficking in drugs, both active and potential, who are no less than engineers of evil and pedlars of death, to the intent and extent that intending offenders should be made to desist and be deterred,that those one step ahead and in the course of promoting or participating in such heinous activity should realise the extremely grave consequences they face, stop dead in their tracks, repent and resile, and that those who, notwithstanding still pertinaciously persist and have the misfortune of being apprehended, should know they are in for the punishment prescribed by law to fit the crime. As was said by Abdoolcader J in *Tan Boon Liat* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*[1] trafficking in drugs strikes at the very core of public order, and he went on to add (at page 88):

> Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally.

Turning to the 2nd appellant's case, he was convicted on clear evidence quite apart from his own statement taken on a caution properly administered and which was admitted at his trial. The amount of heroin involved is very substantial, 1550.1 grammes to be exact, and he also has several previous convictions for armed robbery, house-breaking and theft and one for possession of heroin under section 12 of the Ordinance. There would appear to be no redeeming features but the learned judge states in his grounds of judgment that after some hesitation in considering the sentence to be imposed he decided he would give the 2nd appellant one more chance, presumably in the stock phrase to turn over a new leaf. In our view the learned judge had the percipience to see the special malignancy of the offence and the antecedents of the offender but not the courage to reflect it in the sentence. We are of the view that he was clearly in error which entitles this court to interfere. We would like to take this occasion to reaffirm expressly, unequivocably and unanimously that where the case justifies it, judges should not develop a phobia against inflicting the death penalty. In our view, the prescribing of a maximum penalty in respect of an offence not only marks the limits of the court's discretionary power as to sentence, it also ordinarily prescribes what the penalty should be in the more serious type of cases falling within the relevant class of the offence meriting the maximum punishment prescribed.

We are of the view that in the circumstances of the 2nd appellant's case, the imposition of a term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence and the circumstances of the case against him, his record of previous convictions, the public interest involved in respect of crimes of this nature and a sufficient factor of deterrence to others of his ilk.

We accordingly allow the Public Prosecutor's appeal against sentence in respect of the 2nd appellant, set aside the term of imprisonment for life and whipping imposed on him and substitute therefor the

sentence of death.

Order accordingly.

R Rajasingam for the Appellant.
Mohd Noor (Deputy Public Prosecutor) for the Respondent.

Notes

This is a landmark case in the law relating to drugs and drug trafficking because for the very first time the death penalty was imposed for the offence of drug trafficking under section 39B of the Dangerous Drugs Act 1952. What enhances its significance is the fact that it was imposed by the Federal Court exercising its appellate jurisdiction. This case set the trend in the sentencing of similar cases.

It was applied in *PP* v *Chang Liang Sang* [1982] 2 MLJ 231,*DA Duncan* v *PP* [1980] 2 MLJ 195, *PP* v *Tan Hock Hai* [1983] 1 MLJ 163, *PP* v *Oo Leng Swee* [1981] 1 MLJ 247, *PP* v *Oon Lai Hin* [1985] 1 MLJ 66.

Several sentencing principles were either applied or stressed: a plea of guilty need not always be a mitigating factor, as when the gravity of the offence warrants a deterrent sentence to be imposed; the maximum punishment is reserved for offences of the worst kind; the rampancy of a particular offence may aggravate sentence.

DA Duncan
v
Public Prosecutor

[1980] 2 MLJ 195 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman and Chang Min Tat FJJ

Case referred to:-
(1) *Loh Hock Seng & Anor* v *Public Prosecutor* [1980] 2 MLJ 13.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): A mixed bag of dangerous drugs to wit, 1,647 grammes of cannabis, 683.86 grammes of morphine and 933.21 grammes of heroin was found in four boxes. The dangerous drugs, were in sufficient quantities as to lead to the inference as a matter of commonsense of trafficking in dangerous drugs against anyone found to have in his custody or under his control the boxes containing the said drugs as would lead to the inference of possession thereof, under section 37(d), and bring the offence under the more serious category under section 39B(1)(a),for which the penalty is death or sentence for life.

The question in this appeal was whether the prosecution had proved their case beyond reasonable doubt and the defence had cast any doubt

on the case for the prosecution that the appellant had such custody control or possession. The four boxes were carried in a bus which entered Malaysia at Changloon. The bus had come from Haadyai and carried the appellant as a passenger and visitor. It had to stop at the Immigration and Customs check points at Changloon, the border town. Unfortunately for the appellant and unknown to him, an order had been issued for his detention. At the Immigration Office, he was told he would not be allowed to proceed in the bus and he had therefore to unload his luggage. He held his brief case and he had to return to the bus to recover his other luggage. He was the only one detained and therefore the only one with reason to unload. What was unloaded was one other bag and the four boxes. The appellant did not dispute that the bag was his but strenuously throughout his trial denied any connection with the four boxes.

The prosecution evidence traced the loading of the four boxes in Haadyai to their detention at Changloon. Evidence was adduced that the appellant had to pay excess fare for the bulky boxes and that he was the one who had brought the boxes along for transport. Part of the evidence consisted of a deposition at the Preliminary Enquiry of a witness who could now not be traced. The deposition was admitted over the protest of counsel for the appellant. We are however fully satisfied that sufficient evidence was adduced to justify the court's admission of the deposition under section 32 of the Evidence Act. Evidence was also adduced that at Changloon the appellant was the active party in the unloading and it was he who at the request of the customs opened the boxes. The boxes were found to contain mounted Siamese face masks but the dangerous drugs which were subsequently found to be hidden inside the masks were not discovered until later in Kuala Lumpur, again in the presence of the appellant. In the meantime the boxes remained in the custody of Chief Inspector Yeoh.

Now this evidence, if accepted and believed, is clearly sufficient to establish a *prima facie* case against the appellant. The High Court at Alor Star accepted it and called on the defence. The defence was, in effect, a simple denial of the evidence connecting the appellant with the four boxes. We cannot see any plausible ground for saying that the four boxes were not his. In the circumstances of the prosecution evidence, the High Court came, in our view, to the correct conclusion that this denial did not cast a doubt on the prosecution case against the appellant.

We have read the record with some care and we have listened to what counsel for the appellant and the appellant himself have said at the appeal before us. We have however not heard a single good and sufficient reason for allowing the appeal.

The enormity of the crime, and the seriousness of the view taken by this court in sentencing drug traffickers need no further discussion. There is no occasion to repeat what we said in *Loh Hock Seng & Anor* v *Public Prosecutor*[1]. There is no reason to depart from the approach summarised in that judgment as that appropriate when considering the sentencing of drug traffickers.

The appellant is lucky to escape with life imprisonment and having

regard to the quantity and variety of the drugs, with only 6 strokes.

The appeal against conviction is dismissed.

Appeal dismissed.

RR Sethu for the Appellant.
Sheik Daud bin Haji Mohamed Ismail (Senior Federal Counsel) for the Respondent.

Note

The Federal Court reiterated its stand in *Loh Hock Seng* v *PP* [1980] 2 MLJ 13. However, based on the facts of the case, life imprisonment was imposed. It is not clear why because of the variety of drugs involved and their quantity, six strokes of the rotan were imposed. If there was only one type of drug involved would the number of strokes be more or less? Would the punishment be enhanced to death?

(iii) Chang Liang Sang & Ors v Public Prosecutor

[1982] 2 MLJ 231 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ and Abdoolcader J

Case referred to:
(1) *Loh Hock Seng* v *Public Prosecutor* [1980] 2 MLJ 13

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The appellants were charged with trafficking 974 grammes of heroin, an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the said Act.

The evidence against them showed that they were involved in the sale of heroin and that they were part of an organized syndicate trafficking in dangerous drugs. They were convicted and sentenced to death.

We dismissed their appeal against conviction as we were satisfied that there was sufficient evidence to justify their conviction.

We considered the appeal against sentence. In that respect we would like to stress that in drug trafficking cases very little allowance can be made for the circumstances of individual offenders. We had said enough in *Loh Hock Seng & Anor* v *Public Prosecutor*[1] and similar cases. A study of these cases indicates the strong concern of this court that as far as possible in this difficult area of sentencing there should be reasonable uniformity in the sentences imposed in similar cases. Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offence, to emphasize public disapproval, to serve as a

warning to others, to punish the offenders and most of all to protect the public.

We dismissed their appeal against sentence.

Appeal dismissed.

Mohd Noor Hj Don for the 1st, 2nd & 3rd Appellants.
Karpal Singh for the 4th Appellant.
Shaikh Daud Hj Mohd Ismail (Deputy Public Prosecutor) for the Respondent.

Notes

In this case, it was made clear that other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for drug trafficking. Of course, this is relevant until all remaining offences committed prior to the date of the amendment to section 39B of the Dangerous Drugs Act 1952 are disposed of. After that date, that is 15th April 1983, death is the only punishment and the alternative of life imprisonment no longer pose a problem to the courts in cases arising thereafter.

This case was referred to in *PP* v *Mohamed Ismail* [1984] 1 MLJ 134; confirmed and applied in *PP* v *Tan Hock Hai* [1983] 1 MLJ 163, *PP* v *Neoh Wan Kee* [1985] 1 MLJ 368, and *PP* v *Tan Gong Wai & Anor* [1985] 1 MLJ 355.

In this case, the drug involved was heroin. In *PP* v *Oon Lai Hin* [1985] 1 MLJ 66, the Federal Court extended the strict approach in *Chang Liang Sang* to cases involving morphine.

(iv) Public Prosecutor v Tan Hock Hai

[1983] 1 MLJ 163 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Abdul Razak and Abdoolcader JJ

Cases referred to:
(1) *Loh Hock Seng & Anor* v *Public Prosecutor* [1980] 2 MLJ 13.
(2) *Public Prosecutor* v *Oo Leng Swee & Ors* [1981] 1 MLJ 247.
(3) *Chang Liang Sang & Ors* v *Public Prosecutor* [1982] 2 MLJ 231.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The learned judge in this case did not sentence the appellant to death on conviction but imposed a term of imprisonment for life with whipping of 10 strokes. The Public Prosecutor appeals against the sentence and submits that the sentence of death should be imposed in consonance with the earlier decisions of this court on the question of sentence for trafficking in dangerous drugs.

The respondent was charged and convicted for trafficking in some 736.5 grammes of heroin, a sizable quantity particularly if it is borne in mind that the presumption of trafficking under section 37(da) of the Dangerous Drugs Act, 1952 arises in the case of possession of 100 grammes of the drug. We have made clear the position with regard to sentencing on conviction for trafficking in dangerous drugs. We have said, and we say again, that the sentence of death should be imposed for trafficking in dangerous drugs other than in the most exceptional circumstances. We trust that it will not be necessary to repeat in the future our observations in this matter in *Loh Hock Seng & Anor* v *Public Prosecutor*[1]; *Public Prosecutor* v *Oo Leng Swee & Ors*[2] and *Chang Liang Sang & Ors* v *Public Prosecutor*[3] in perhaps even more trenchant terms or at all.

We have been reffered to the case of *Beatrice Saubin,* a twenty-two year old French girl who was convicted for trafficking in heroin and sentenced to death by the High Court which on appeal to this court was altered to imprisonment for life on the grounds that there were extenuating circumstances in that case. As no reasons have been given, either oral or written, in that case we do not know what the extenuating circumstances found were and we can therefore only consider that case as one on its own particular facts and circumstances. We would however make it absolutely clear that a twenty-two year old foreign female courier who trafficks in heroin takes the same risk and does so at the same peril as a fifty-two year old local male counterpart, and the sex, age and origin of the offender would appropriately be more a matter for consideration in any application for clemency to the appropriate authority under Article 42 of the Federal Constitution.

In the case before us the respondent was convicted for trafficking in a large amount of heroin for a monetary motive and out of sheer greed. We find no extenuating circumstances that would justify a classification of this case as most exceptional and we therefore find no justification for the sentence of life imprisonment imposed.

We accordingly allow the appeal by the Public Prosecutor against the sentence, set aside the imposition of the term of imprisonment for life and the order for whipping and sentence the respondent to death.

Order accordingly.

Shaikh Daud Hj Mohd Ismail (Deputy Public Prosecutor) for the Appellant.
WP Leong for the Respondent.

Note

The view that death should be imposed for drug trafficking unless in cases of exceptional circumstances was again reiterated here. *Loh Hock Seng* [1980] 2 MLJ 13, *Oo Leng Swee & Ors* v *PP* [1981] 1 MLJ 247, and *Chang Liang Sang & Ors* v *PP* [1982] 2 MLJ 231 were referred to. The case of *Beatrice Saubin* was mentioned as precedent for a lenient sentence; however, because no written judgment was available the court here could not obtain any assistance from that case. Written

judgments in important cases such as *Saubin's* are much needed for guidance in future similar cases.

(b) Mitigating factors

(i) Lim Kit Siang
v
Public Prosecutor

[1980] 1 MLJ 293 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah CJ (Malaya), Lee Hun Hoe CJ (Borneo), Wan Suleiman and Chang Min Tat FJJ

Cases referred to:-
(1) *Malone* v *Metropolitan Police Commissioner* [1979] 2 WLR 700, 725-6.
(2) *R* v *Blake* [1961] 3 All ER 125.
(3) *Rex* v *Crisp and Homewood* (1919) 83 JP Reports 121.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgments of the Court): The appellant, who was at all relevant times and still is a Member of Parliament and the Leader of the Opposition, was charged with being in possession of information relating to the Federal Government's purchase of 4 fast-strike craft (FSC) for the use of the Royal Malaysian Navy. The details of this information were alleged in the charges to be the identities of the 4 short-listed tenderers and of the successful tenderer, the original and consolidated prices submitted by the successful tenderer, the mode of payment and the cost of the four FSC, the make of the fire control system and the make and types of engines to be installed in the FSC and the capability of the craft. The information was and is secret.

Arising from the possession of that information, the appellant was in Criminal Trial No 13/78 charged with receiving such secret official information having reasonable ground to believe that it was communicated to him in contravention of the Official Secrets Act, 1972,(the Act), an offence punishable under section 8(2) of the Act (the first charge).

A second charge was preferred against him under section 11(1)(a)(aa) with failure to disclose the source of that information to a duly authorised police officer above the rank of Inspector when required to do so under the Act.

In Criminal Trial No 14/78, he faced the amended charge under section 8(1)(iv) of the Act with failing to take reasonable care of the information so as to prevent the publication of the same information in the November 1976 issue of the Rocket under the title 'Expose in Parliament-Hanky-Panky in Royal Malaysian Navy' (the third charge).

In Criminal Trial No. 15/78, he faced two charges as amended, both under section 8(1)(i) of the Act, the first with communicating such information to unauthorised persons at a luncheon given by the

Selangor Graduates' Association at the Horizon Restaurant, Damansara, Kuala Lumpur, and the other with communicating the same information in a letter published in the *Far Eastern Economic Review* of September 24,1976 under the caption 'Prototype Craft may Prove Costly' (the fourth and fifth charges).

There was a joint trial. At the conclusion of the hearing which occupied a total of 15 days, the appellant was convicted on all five charges and sentenced to fines of various sums. No sentence of imprisonment was imposed.

It will make for ready understanding if reference is made to the events leading up to the prosecution, trial and conviction of the appellant. They were largely undisputed by the appellant.

Following the decision of the Government to purchase 4 FSC for the use of the Royal Malaysian Navy (RMN), the process of selecting the craft was started. This process is given very explicitly by the Secretary-General of the Ministry of Defence in his letter published in the *Far Eastern Economic Review.* In the words of the Secretary-General, it is as follows:

> First, all specifications in this tender exercise from the 10 submissions were first studied by a professional and technical evaluation committee of the Royal Malaysian Navy (RMN) appointed by the chief of the naval staff (CNS). The committee, headed by the deputy chief of the naval staff, comprised seven Senior naval officers of various specialisations. The report produced by the committee was submitted to the CNS, who in turn forwarded it along with his own comments to the chairman of the Ministry of Defence's tenders board. This tenders board is a standing board appointed by and responsible to the Federal Treasury. There is no naval tenders board as stated in one of the articles.
>
> The tenders board, after its first deliberation, appointed a working committee of two senior naval officers and four senior civilian officers, including two representatives from the Federal Treasury, to look into all aspects and provisions of the four tender submissions which were short-listed and declared acceptable by the naval professional and technical evaluation committee. The findings of this working committee were submitted to the tenders board, which made its recommendation to the Federal Treasury based on the following:
>
> Professional and technical acceptability of all proposals; cost implication: other relevant factors such as delivery dates, provision of training facilities, etc.
>
> The tenders board also considered the possibility of locally-built ships and took national interests into full cognizance. The board found that the Spica M and associated weapon control system and machinery met with all the major aspects of the Malaysian naval staff requirements.
>
> I would like to emphasise the point that in this exercise, as well as in other tender exercise of the Ministry of Defence, deliberations at all levels leading to final award of contracts have been conducted by both professional and senior Government officials in a fully professional and responsible manner.

The defence accepted that the details of any tender exercise and of the successful outcome constitute secret official information caught by the

Act. It did not contend otherwise at the appeal before us. The secret nature of the information is obvious. No issue lies as to the nature of such information. In any event, Government must surely have the undoubted right to decide what information it would keep from the public. Such information would be official secrets and would be caught by the Act.

We now know that the decision was finally taken on July 6 to buy the 4 FSC from the Swedish firm, Karlskronavarvet AB (Karls AB), and on that day the Government sent a letter of intent to Karls AB through their agents in Kuala Lumpur. We also now know that on July 14 Government sent letters of rejection to all the other nine unsuccessful tenderers.

In the meantime Encik Mokhtar Hashim, Deputy Minister of Defence, delivered a speech at the Woodlands Naval Base in Singapore announcing the purchase by the RMN of 4 FSC equipped with Exocet missiles to form the Second Strike Squadron for the Navy. This was on July 10. It is to be observed that the information revealed by the Deputy Minister and reported in the Straits Times the following day, related strictly to the decision to buy 4 FSC equipped with Exocet missiles for the RMN. That became public knowledge. It was considerably short of what the prosecution alleged the appellant to be in possession of. No information was given by the Deputy Minister as to the identities of any short-listed tenderers and of the successful tenderer, the prices and the mode of payment or the make of the fire control system or of the engines and the capability of the craft. As on this date, therefore, such information, if correct, remained confidential and secret.

Then, something happened on August 3rd bearing on this purchase but without any apparent communication to or knowledge of the appellant. Dr. Tan Chee Khoon, another Member of Parliament, received a letter sent under the *nom-de-plume* of 'loyal sailor' on this decision to buy the ships. This letter was obviously written by someone with very close official connection with the Government and the Navy and with considerable technical and professional knowledge of naval affairs. It was in connection with the tender exercise leading to the decision taken for the purchase. It revealed that out of the several tenders received, four were short-listed and it disclosed the identities of the three unsucccessful tenderers and the successful tenderer. It also expressed the great dissatisfaction said to exist among naval personnel over the selection of Karls AB. The dissatisfaction was said to arise from the feeling amongst these naval personnel over the fact that the type of craft chosen was a prototype and over the unsuitability of the armament it was expected to carry. Annexed to this letter were the particulars of the four short-listed tenders with details of the type of craft, the weapon system and the price offered, together with a comparative analysis of their performances and short-comings. The letter, presumably by an individual and not a group of persons, was clearly of the view that the craft offered by Karls AB was not suitable. Neither could the writer understand why the offers of two other tenderers to build ships proved to be serviceable and to have been currently in use not only with several other navies but also with the Royal Malaysian Navy were rejected.

It is clear that the secret information which constitutes the basis of the charges against the appellant was contained in this letter but, as has been observed, it was not communicated to the appellant. For his part, Dr Tan Chee Khoon forwarded this letter to the Deputy Minister of Defence for action, but requested its return. He took no further action except possibly to file away the letter when it was eventually returned to him. He made no revelation of any sort and he did not have to face any charge.

Next, on August 6, an anonymous letter was sent to the Prime Minister with the same information and enclosures as in the letter to Dr Tan Chee Khoon.It did not appear to have been signed. So there was nothing to indicate that it was from the same person as the one who designated himself the 'loyal sailor'. Now, this letter was carbon-copied to Dr Tan Chee Khoon and also to the appellant. So, unless the appellant had other sources of information, this anonymous letter obviously gave him the information which he is charged with possessing and using. It was information leaked out by someone in the know, someone with the same knowledge and the access that the 'loyal sailor' had.

In his statements to the police which he was required to give in the course of the police investigation into this leakage, the appellant frankly acknowledged that this letter was his first source of information. He admitted he subsequently met the writer at the latter's request but if this meeting did take place as to which we have only the word of the appellant, it was obvious that the meeting did not result in anything new being revealed, and that the letter was his first and only source of information, the personal interview merely serving to confirm the contents of the letter. It is to be observed also that this letter made a further allegation that the views of the Tenders Board were over-ridden by a committee of two naval officers and a civilian.

It is not known on what day the appellant received this letter but on August 10, that is four days after the date of the letter, the appellant wrote to the Prime Minister repeating the information contained in the anonymous letter without however alluding to the anonymous letter as the source of his information. No reply having been ventured, he wrote again to the Prime Minister in much the same vein on August 26.

In the meantime on August 21, that is, 11 days after his first letter to the Prime Minister, the appellant was the guest-speaker of the Selangor Graduates' Association at their lunch meeting at the Horizon Restaurant, Damansara, Kuala Lumpur. At this lunch, the appellant spoke on a variety of subjects and also on what he called the $166M SPICA M scandal, SPICA M being the type of craft offered by Karls AB, the successful tenderer, to be built for the RMN. In the course of that speech, he referred to the details and facts which were secret information and the revelation of which would constitute an offence. That speech became the subject-matter of the fourth charge.

In the September 10 issue of the *Far Eastern Economic Review*, two articles appeared. One was by an unknown correspondent on 'Questions of a Naval Decision' and the other was by K Das, the regular correspondent of the Review on the 'Gamble of Untested Craft'. Both articles

touched on the same secret information as in the charges against the appellant. Neither article acknowledged that the source of the information was the speech by the appellant to the Selangor Graduates' Association. No action to date appears to have been taken by the Public Prosecutor against both writers under the Act.

These two articles however received the approbation of the appellant and the appellant then set out expressing this approbation in a letter to the editor which was given the heading 'Prototype craft may prove costly', and published in the September 24 issue of the Review. While seeking to commend the Review for its investigative journalism, this letter took occasion to repeat at length the objections to the selection of the SPICA M that were expressed in the letter to the Prime Minister and in the speech to the Selangor Graduates' Association, but at greater lengths. This letter formed the subject-matter of the fifth charge.

Next on September 29 and 30, there appeared in the *New Straits Times,* the *Berita Harian* and the *Utusan Malaysia,* three local newspapers, notices calling for tenders for the supply of guns, missiles and launchers for the 4 FSC. Anyone purporting or pretending to tender would be supplied with the details of the armaments required.

On October 4, a letter was written by the Deputy Minister of Defence on the instructions of the Prime Minister in reply to the appellant's letter of August 26. The Deputy Minister was instructed to state that there was no truth in the allegations contained in the appellant's letter.

The November issue of the Rocket which is the political publication of the Democratic Action Party (DAP), a political party of which the appellant was at all relevant times and still is the Secretary-General, printed an article giving the same details of the purchase, the objections to the purchase and to the mode of selection and also re-producing the speeches in Parliament and the questions asked by the appellant on October 25 and November 1 and 2. The article was headed 'Expose in Parliament — Hanky-Panky in RMN.' This article constituted the substance of the third charge.

On June 21, 1977 and again on June 30, 1977, and also on March 27, 1978, the appellant was interviewed by Mr. Cornelius, a Deputy Superintendent of Police, and asked for the source of the secret information leaked out to him. He steadfastly refused, on the grounds both of confidentiality and Parliamentary privilege.

The relevant provisions of the Official Secrets Act, Act 88, under which the charges against the appellant were laid are as follows:

> S 8(1) If any person having in his possession or control any secret official code word, countersign or password, or any article, document or information which —
>
> ....
>
> (c) has been made or obtained in contravention of this Act:
>
> ....
>
> does any of the following —
>
> (i) communicate directly or indirectly any such information or thing to any foreign country other than any foreign country to whom he is duly authorised to communicate it, or any person other than a

person to whom he is duly authorised to communicate it or to whom it is his duty to communicate it; or

....

(iv) fails to take reasonable care of, or so conducts himself as to endanger the safety or secrecy of, any such information or thing,

he shall be guilty of an offence punishable with imprisonment not exceeding seven years or a fine not exceeding ten thousand dollars, or both such imprisonment and fine.

(2) If any person receives any secret official code word, countersign or password, or any article, document or information knowing, or having reasonable ground to believe, at the time when he receives it, that the code word, countersign, password, article, document or information is communicated to him in contravention of this Act, he shall, unless he proves that the communication to him of the code word, countersign, password, article, document or information was contrary to his desire, be guilty of an offence punishable with imprisonment not exceeding seven years or a fine not exceeding ten thousand dollars or both such imprisonment and fine.

....

S 11 (1) If any person who has in his power any information relating to an offence or suspected offence under this Act fails

(a) to give, on demand, such information; or

(b) to attend at such reasonable time and place to give such information,

when required to do so by —

(aa) any police officer above the rank of Inspector; or

(bb) any member of the armed forces employed on guard, sentry, patrol or other similar duty,

he shall be guilty of an offence punishable with imprisonment not exceeding three years or a fine not exceeding five thousand dollars or both such imprisonment and fine.

On a proper construction, for the purposes of this appeal, any person to whom secret official information was communicated in contravention of the Act, in other words, a person who is not a person being in lawful possession, commits by the mere fact of receipt an offence under section 8(2). And under section 11(1)(a) (aa) he is, under penalty of committing another offence, bound to reveal the source of that information when requested to do so by a police officer above the rank of Inspector. He is also bound to respect the secrecy of that information, either by not revealing it or by safeguarding it. If he communicates it, by an act of malfeasance, he commits an offence under section 8(1)(i) and if he fails to safeguard it, by an act of nonfeasance, by failing to take reasonable care as to endanger the safety or secrecy of that information, his offence is one under section 8(1)(iv).

Mr Karpal Singh, who appeared for the appellant, if we may say so, most ably and who took every point that could be taken, first made a spirited attack on the Official Secrets Act. It was shown to be modelled on the English Act of 1911, which was said to have been conceived in hysteria when the world faced the prospects of a great war and the major countries were engaged in rearmament. It sought to make everything secret, even matters that should not be secret. It had outlived its usefulness and ought to be pensioned off. The provisions of section 8

(copied from section 2 of the English Act) were so general that anything connected with the Government could be brought within its fold. This 'catch-all' nature was said to be neither fair nor purposeful. It was also said that there must be some information caught by the Act which ought to be revealed to the public to ensure good and proper government. Mr Karpal Singh then read to the court various articles on the general dissatisfaction over the Act and drew our attention to several paragraphs of the *Franks Committee Report* (1972 Cmnd 5104), see [1974] Crim L R 639, which recommended the substitution of section 2 with other more specific provisions.

All this is very interesting. It also may be very arguable. The point however is not that up to the present date, the British Government has not implemented the recommendations of the *Franks Committee Report* and so the Official Secrets Act 1911 remains the law of England, but it is that the Official Secrets Act, Act 88, under which the appellant was charged, remains in our statute-books. And as Mars-Jones J said in the recent trial of Aubrey, Berry and Campbell under the Official Secrets Act, 1911 in England, whatever marks of disdain derision or abuse the Act might bear, it has to be abided by unless and until it is changed by Parliament, and until then, it is still the law of the land and the case against the accused remains to be decided on the law as it stands: see the *London Times'* issue of November 14 1978.

We agree and we would adopt the words of Megarry V C in *Malone* v *Metropolitan Police Commissioner* [1] at pages 725-6:

> ...it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but as Holmes J once said, they do so only interstitially, and with molecular rather than molar motion; see *Southern Pacific Co* v *Jensen* (1917) 244 U S 205, 221, in a dissenting judgment. Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right.

And like him, we have to remember that our function is judicial, not legislative and that we ought not to use our office to legislate under the guise of exercising our judicial powers and functions. In particular, we have no power to create a right for any person to ignore the provisions of the Official Secrets Act or any other law of the land.

The next point that Mr Karpal Singh took in arguing the appeal was that the information must have been received in contravention of the Act and the burden was on the prosecution to prove beyond reasonable doubt that this was so. He suggested that the information could have come from a variety of non-governmental sources and if so, it could not constitute the basis of the several charges faced by the appellant since it was obtained not in contravention of the Act. He instanced various possible sources and contended that until and unless the prosecution case had established beyond reasonable doubt that the relevant information did not come from such sources, it had not proved its case against

the appellant. Such sources were said to be the tenderers and those connected with the successful tenderer. He did not suggest the official or government members concerned in the decision to buy the required boats as any communication from such persons would be in contravention of the Act, but he seriously suggested that the leak was possibly from some such non-governmental source which would take the case outside the operation of the Act, and which the prosecution must eliminate as possible sources before a *prima facie* case could be said to have been established.

We hope we will not be thought discourteous to counsel if we say that we are not greatly enamoured with this argument, even though it appeared to be the main point in the appeal and he had laboured so considerably over it. Apart from considerations of the burden on the prosecution in any criminal case to establish a case against the accused not beyond absolute doubt but only beyond reasonable doubt and the onus of proof to establish the source of the information, there is no truth in the suggestion that the appellant derived his information from non-government of non-secret sources. The immense difficulty, nay, the inpracticability in tracing all the tenderers and ascertaining from them whether they were successful or not, and finding out by a process of elimination the short-listed tenderers, and the absence of any credible reason for the successful tenderer to venture information of the details of its tender must be clearly seen to be the short answer to the suggestion. But the clearest answer lies in the statements of the appellant himself to the police. No question arose over the admissibility of what the appellant said in these statements: section 21 Official Secrets Act. In them, he clearly and unequivocably stated that his source, in fact his only source, was the anonymous letter which he said he subsequently found out was written by Khamis. It is, in our view, entirely reasonable to infer that Khamis was not someone connected with the unsuccessful tenderers as he would then not have the knowledge to complain over the unsuitability of Karls AB's tender or with Karls AB since he would then have no cause to complain. If he was someone in an official position who was entrusted with the information, it would be an offence under the Act to disclose it or for an unauthorised person to receive it as it would be information made in contravention of the Act. If he was not, but he had derived his information directly or indirectly from such a source, the information would still have been obtained in contravention of the Act and the chain of communication to the appellant via Khamis and any other intermediate channels must necessarily have the effect of retaining the stamp of secrecy on the information, bringing it within the ambit of the Act. We therefore agree respectfully with the learned trial judge that the information in the charges was obtained in contravention of the Act.

Mr Karpal Singh also suggested that the appellant was under duty, as a Member of Parliament and particularly as the Leader of the Opposition, to disclose such information, especially where it concerns the proper defence of the country and, in the allegation of a small unofficial committee of three over-riding the decision of the appointed authority,

a scandal. We would venture the opinion that when the appellant wrote to the Prime Minister on August 10 disclosing the information which he had, (even though it was apparent to him that the Prime Minister had the same information in that anonymous letter of August 6), he had done his duty and we very much doubt that if he had stopped there, as Dr Tan Chee Khoon did, he would have to face any prosecution over the matter. But when he went beyond that, under the guise of impatience over the delay in any reply from the Prime Minister, he purported to contend that his duty as a Member of Parliament and the Leader of the Opposition enabled him to over-ride the provisions of the law. This, in our considered view, could not be. As was said on another,perhaps a more historic occasion and to a more important personage, be you never so high, you are not above the law. It is but stating the most obvious to any that one's plain duty is to obey the law. Parliamentary privileges may exempt the appellant from the laws of defamation, so long as the libellous words were uttered within the walls of Parliament, but as he well knows, will not save a member from an action for damages if repeated outside the House. We do not consider, since it does not arise for consideration and we do not have the benefit of submissions, whether any speech in Parliament revealing official secrets would be caught by the Act, but clearly the duty of the appellant as a parliamentarian does not include the right to disclose or make available for disclosure official secret information outside the walls of the House to the public at large, whatever his motives might be.

The offences in the charges have therefore been clearly committed. What happened in this case proved what we teach in schools; it proved what we teach in colleges; it proved everything we have been trying to get across — that no man is above the law.

On the question of sentences, the law provides for a term of imprisonment. The decision of the learned trial judge is contained in a note made by him and which reads as follows:

> *Court:*
> Submission by Counsel for defence — drawing court attention to certain mitigating factors. Taken into consideration, also the submission made by prosecution. Ignorance of the law — claimed by defence cannot be accepted. However, I do appreciate that as Leader of Opposition he had a role to play but he is not however privileged to do what he did especially to make extensive disclosures of the information. In any event — I feel that custodial sentence does not seem appropriate. Suffice if fine is imposed.
> I convict the Accused on all charges.
> 1st charge: Fine $5,000 i.d. one year's imprisonment
> 2nd charge: $1,000 i.d. 2 months
> 3rd charge. 4th & 5th charges — $3,000 each — i.d. 9 months' imprisonment each.

The Public Prosecutor filed a cross-appeal on the sentences contending that they were inadequate. But all that was urged on this court was that the offences were of a serious nature and this court was asked to impose such sentences as it deemed fit and proper.

With respect, this court agrees after a full consideration of the record and of what was said by the learned trial judge and by counsel before it at the appeal, with the decision that no sentence of imprisonment should be made. It notes, however, that no reasoning has been advanced for the amounts of the fines imposed.

It is correct that where the offence under the Official Secrets Act is of a very serious nature, such as for example, the offence of selling official secrets vital to the defence of the country to the enemy, for improper and especially for corrupt motives, the sentence should be a long term of imprisonment, *R* v *Blake*,[2] but it is also true that where the offence falls short of a custodial sentence, the fine imposed should reflect the seriousness or otherwise of the offence, *Rex* v *Crisp and Homewood*.[3] On this basis, we now proceed to examine the validity of the appeal and cross-appeal against the fines.

We do not hide from ourselves the fact that the details of the fire control system and of the engines installed in and the capability of the craft are of possible utility to an enemy which seeks to destroy our naval defence and if such imformation had tended to endanger or had the effect of imperilling the security of the country, we would have interfered by substituting a sentence of imprisonment for any fine that might have been imposed. But one has to be realistic and see the case in its correct perspective and in the context of prevailing conditions. We could not but wonder whether the details provided in calling for tenders for the guns, missiles and launchers, available to anyone who applied for a tender form, had not largely removed the veil of secrecy from the ship's armaments. Also no one has suggested in any way that the information in the charges was useful to such enemies as this country has at the moment or in the foreseeable future. Neither has anyone submitted that the real intention or the effect of such revelation was to benefit the enemy or endanger the security of the country. This is particularly true of the disclosure of the tender exercise and the financial provisions of the final contract. The Government has certainly the right to classify all this information as secret, the disclosure and utilisation of which would bring down the sanction of the law, but it must be seen that the effect of the breaches of the Official Secrets Act was to cause the Government to answer that there was no scandal in the evaluation of the various tenders and the selection of Karls AB as the successful tenderer and that the suspicion of the alleged scandal was based on a sub-stratum of plausible information which we should perhaps say, having inspected and read the secret documents produced at the trial relating to the decision to buy the craft in question, appears to have no truth in it. It must be seen therefore that the motive of the appellant, unfounded in law or in fact and wrongly thought to be based on parliamentary duty and privilege, was to expose a suspected scandal and to avoid, if true, the unfortunate and costly mistake of providing unsuitable craft for the RMN. No one has suggested that the appellant stood to gain in a material sense from what he did. True, he did derive some political capital from it all, but he would be less than human if he did not see the effect to his public standing from his disclosure, but the

trial judge himself expressed his appreciation and acceptance of the fact that the appellant did what he did as the Leader of the Opposition. He did not however give expression to his appreciation.

In these circumstances, this court is moved to reconsider the amounts of the fines imposed. On the first charge, there is no suggestion by the prosecution that the appellant actively sought out the information. His evidence that it was volunteered to him remained unchallenged, just as it was volunteered to Dr Tan Chee Khoon, who, as was observed, had not been charged. We would therefore reduce the fine from $5,000 to $1,500.

On the second charge, the appellant had his code of ethics, just as many a newspaperman had who found himself in the dock under the Official Secrets Act, for not revealing the source of his information but however much the Government might like to plug the leak, it would not appear that if the source was an anonymous letter, he had much to reveal. Khamis was, in the appellant's evidence, such a vague figure that the learned judge was moved to disbelieve his existence. If he existed at all, the appellant would have failed to disclose. In these circumstances, we do not think we ought to vary the fine of $1,000.

The fourth charge relates to the first disclosure of the secret information. The offence was clearly committed but it arose from a mistaken sense of duty and was not for a corrupt purpose or for financial gain. It is only right and proper to bear this in mind when determining the amount of the fine. We think that in all the circumstances, a fine of $1,500 would fit the offence and we therefore vary the fine to this amount. For the same reasons, we reduce the fine on the fifth charge to the same figure.

The third charge, that of allowing the publication in the Rocket, was the latest in point of time. What harm was done by making it available had already been done. The fine of $3,000 will therefore be reduced to $1,000.

The appeal against conviction is dismissed as is the cross-appeal by the prosecution against sentence. The appeal against sentence is allowed to the extent indicated above.

Appeal and cross-appeal dismissed.

Karpal Singh for the Appellant.
Datuk Abu Talib Othman (Solicitor-General) for the Respondent.

Note

This case highlights the possible consequences of sentencing on a person of certain status. How a sentence may affect his employment or job is a mitigating factor. Here, if Lim Kit Siang were to be fined $2,000 or more, he would be disqualified from being a Member of Parliment according to Article 48 (e) of the Federal Constitution. Although this effect was not mentioned in this case, it was fortunate for the offender that his fines were reduced to below $2,000.

(ii) Kok Kee Kwong
v
Public Prosecutor

[1972] 1 MLJ 124 High Court, Kuala Lumpur

RAJA AZLAN SHAH J: The appellant was convicted of misappropriating 120 bottles of Hennessy VSOP brandy and 24 bottles of Dewar's whisky valued at $2,928.00 between 19th January 1968 and 29th April 1968 and was sentenced to 18 months imprisonment under section 408 of the Penal Code. The prosecution case was based on the discrepancies between the store issue books (Exhibits P3A and P3B) and the store requisition notes both of which dealt with movement of liquor from the main store to the restaurant bar. Four requisition notes *i.e.,* Exhibits P5 to P8 are in issue:

(i) Entry on page 153 of Exhibit P3A dated 19th January 1968 *viz.,* Store Requisition Note No 2702 showed 2 cases of Hennessy VSOP (1 case containing 12 bottles) were issued; Exhibit P5 dated 19th January 1968 (No 2702) showed only 1 case was issued.

(ii) Entry on page 154 of Exhibit P3A dated 25th January 1968 *viz.,* Store Requisition Note No 2712 showed 2 cases of Hennessy VSOP; Exhibit P6 dated 25th January 1968 (No. 2712) showed no item of Hennessy VSOP.

(iii) Entry on page 30 of Exhibit P3B dated 26th April 1968 *viz.,* Store Requisition Note No 2830 showed 3 cases of Hennesy VSOP; Exhibit P7 dated 26th April 1968 (No 2830) showed no item of Hennessy VSOP.

(iv) Entry on page 31 of Exhibit P3B dated 29th April 1968 *viz.,* Store Requisition Note No 2835 showed 5 cases of Dewar's whisky and 4 cases of Hennessy VSOP; Exhibit P8 dated 29th April 1968 (No 2835) showed only 3 cases of Dewar's whisky and no item of Hennessy VSOP.

The appellant joined the staff of the Selangor Club in 1961. He left the club at the end of May 1968. Between 1963 and the end of May 1968 he was the store-keeper of the main store where liquor and beverages were stored. His duties regarding the issue of liquor to the restaurant bar were these: Whenever the bar captain wanted liquor for his bar he would write his requirements on a chit of paper, the store-keeper would then transfer the particulars in the store requisition note. On being satisfied that he had received his order the captain would then sign his name at the bottom of the requisition note *i.e.,* on the space provided above the words 'Headboy'. The requisition note consists of three copies. The first copy was kept by the store-keeper, the second copy was given to the bar captain and the third copy remained in the book. The store-keeper would then record the details in the store issue book. It must be noted that it was his duty to keep and maintain the store issue book and the store requisition notes.

Items (i) and (ii) above:-

Han Hah Juan — (PW7) the restaurant bar captain who had ordered liquor from the appelant for some 5 or 6 years in the manner described above identified his signature in Exhibit P5. He testified that he acknowledged receipt of the items mentioned in Exhibit P5 after checking them with the accused. In other words he received only one case of Hennessy VSOP brandy. He also identified his own signature in Exhibit P6. He said no Hennessy VSOP brandy was ordered or issued on that day. The witness also identified the writings in Exhibits P5 and P6 as those of the accused.

Items (iii) and (iv) above:-

Foo Ah Wee (PW8) — the bar captain identified his signature in Exhibits P7 and P8. He testified that he did not order or receive any Hennessy VSOP brandy on those two days mentioned in the requisition notes. He said accused wrote down the particulars in the two requisition notes and he identified accused's handwriting on them.

Lee Yew Thong (PW3) — the secretary of the club who had worked with the accused since 1961 is familiar with the accused's handwriting. He identified the writings in Exhibits P3A, P3B and P5 to P8 as those of the accused.

The learned president was satisfied that the requisition notes and the relevant entries in the store issue book were in the handwriting of the accused. On the question of credibility he had no reason to doubt the prosecution witnesses' testimony after seeing and hearing them.

The only ground of appeal with regard to conviction is that the learned president erred in law by admitting carbon copies of the store requisition notes contrary to sections 65 and 66 of the Evidence Ordinance which greatly prejudiced the appellant's case. In other words counsel on behalf of the appellant argued that the original copy *i.e.,* the first copies of the requisition notes should have been produced in evidence.

The general rule in regard to the production of documents is stated in Chapter V of our Evidence Ordinance, in particular sections 65 and 66 pertaining to the present appeal.

Section 65(a)(i) states that secondary evidence of the contents of a document may be given when the original is shown or appears to be in the possession or power of the accused and when after due notice as mentioned in section 66 the accused does not produce it. *Roscoe's Criminal Evidence,* 15th edition, page 11 states:

> When a document is in the hands of the adverse party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as formerly thought, to give the holder an opportunity of providing the proper testimony to explain or confirm the document but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents.

But notice is not necessary when it appears or is proved that the accused has obtained possession of the original by fraud or force (proviso (c) to section 66).

The learned president was satisfied on the evidence that the appellant had fraudulently kept away the originals of the requisition notes. I agree with the court's finding. It would therefore seem to me that under the exception carbon copies of the requisition notes are admissible without notice to produce. If so, it was for the court below to draw such reasonable inferences therefrom as it thought fit. It must be accepted that the onus of proof throughout lies upon the prosecution but the evidence as it stands uncontradicted is such that it at least calls for an explanation. There is in my opinion overwhelming evidence as to the accuracy of the requisition notes. There is identification of the appellant as the person with whom those dealings took place, and the learned president was therefore, entitled to accept the accuracy of those documents. Again those documents were verified by the two bar captains who had knowledge of the identity of the appellant and a general knowledge of the dealings. The question to my mind turns on weight rather than on admissibility, and it is for the court below, after admission, to decide what valid inferences can be drawn from those documents. The inferences to be drawn may depend on the explanation or lack of explanation given by the appellant. Here there was lack of explanation.

The appeal against conviction is dismissed.

Sentence:

On behalf of the appellant it was said that the appellant's present employers are willing to retain him in his present employment in spite of the conviction recorded against him. It was also pointed out that in the circumstances of the case the sentence is excessive for a first offence. I have seriously considered all the surrounding circumstances. I think the sentence of 18 months imprisonment is far too excessive. I would set aside the sentence and substitute one day's imprisonment plus a fine of $2,000 in default six months' imprisonment and a compensation of $2,928.00 is to be paid into court for the Selangor Club.

Appeal dismissed: Sentence Varied.

Lee Beng Cheang for the Appellant.
Gunn Chit Tuan (Deputy Public Prosecutor) for the Respondent.

Note

This is an example of a case where surrounding mitigating circumstances have succeeded in influencing the appellate court to reduce the sentence imposed by the lower court. The compensation to be paid into court for the Selangor Club is necessarily one made under section 426 of the Criminal Procedure Code.

(c) Interference by appellate court

(i) Public Prosecutor v Lee Seng Seh

[1966] 1 MLJ 266 High Court, Kuala Lumpur

Cases referred to:—
(1) *Ambard* v *Attorney-General for Trinidad* [1936] AC 322 at p 336.
(2) *Jamieson* v *Jamieson* [1952] AC 525 at p 549.
(3) *Public Prosecutor* v *Choo Swee Huat* [1963] MLJ 28.

RAJA AZLAN SHAH J: The respondent was charged with three offences under section 59 (1) of the Income Tax Ordinance, to wit, he had failed to furnish within 21 days returns of income for the years 1963, 1964 and 1965. He was unrepresented in the court below and pleaded guilty to each of these charges. He was fined a sum of $25 on each charge. Against that decision the learned Deputy Public Prosecutor has now appealed. There are four grounds of appeal, and to my mind they can all be taken together.

In exercising its jurisdiction to review sentence an appellate court does not alter a sentence on the mere ground that if it had been trying the case it might have passed a somewhat different sentence. As was said by Lord Atkin in *Ambard* v *Attorney-General for Trinidad:*[1] 'Sentences do vary in apparently similar circumstances with the habit of mind of the particular judge'. Again, in *Jameison* v Jameison,[2] Lord Reid said that 'human nature' being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions'. It is only when a sentence appears to be wrong in law or is manifestly excessive or inadequate having regard to the facts and circumstances that an appellate court will interfere.

In the present case the learned magistrate viewed with concern the respondent's present difficulties and predicaments. The respondent in mitigation had submitted that his father had died intestate and that his application for letters of administration was still in the hands of his solicitors. But, as was pointed out by the learned Deputy Public Prosecutor, the offence was in respect of his own private income and not that of his father's estate. Any way, that was the view of the matter which commended itself to the learned magistrate and encouraged him to impose a sentence of $25 on each of the three charges. To my mind, income tax offences are of a very grave character and I share the view of my learned brother Suffian J in the case of *Public Prosecutor* v *Choo Swee Huat.*[3]

It was submitted by counsel for the respondent that the offences under which the accused was charged in *Public Prosecutor* v *Choo Swee Huat* and the offences under the present case are somewhat dissimilar, the former being failure to give notice of chargeability and the present case

being failure to furnish returns within a stipulated time. Be that as it may, I am nevertheless satisfied that they are income tax offences under the same section 59 of the Income Tax Ordinance. It was again submitted by learned counsel that the charge was bad in law and that I should revise it under my revisionary powers. For my part I am satisfied that the charge is good in law and that the contention of counsel has no foundation.

In the circumstances one would have expected the learned magistrate to give the most earnest attention to the interests, not only of the respondent, but also of the public. He had failed to consider the foremost consideration of them all, viz. the element of public interest. It is too often nowadays thought, or seems to be thought, that the interest of the prisoner is the only consideration. Not enough consideration is given to the interest of the public.

With regard to sentence in income tax cases and, if I may be permitted to include cases under the Employees Provident Fund Ordinance, it is unfortunately true that until recently, possibly even at the present day as this case would suggest, there is a tendency for magistrates to impose 'pin-prick' sentences which to my mind do not appear to the world at large as a deterrent. The tragic consequence would be that the efficacy of punishment as a system of general deterrence is impaired. I trust that in future cases of this nature magistrates will see fit to take a more serious view of the situation.

To my mind, the fine of $25 on each charge is manifestly inadequate and I shall impose a fine of $150 on each charge. Since the respondent has already paid $25, he has to pay a further $125 on each charge. I therefore allow the appeal.

Appeal allowed.

Wan Hamzah (Deputy Public Prosecutor) for the Appellant.
R Talalla for the Respondent.

Note

The general principle applicable to appellate courts when considering sentencing was acknowledged here, that is, the appellate court does not alter a sentence on the mere ground that if it had been trying the case it might have passed a different sentence. It is only when a sentence appears to be wrong in law or is manifestly inadequate or excessive that an applellate court will interfere.

In this case, the sentences passed by the trial Magistrate were "pin-prick" sentences and obviously warranted interference: see *R* v *Ball* 35 Cr App R 164.

(ii) Public Prosecutor
v
Tengku Mahmood Iskandar & Anor

[1973] 1 MLJ 128 High Court, Johore Bahru

RAJA AZLAN SHAH J (delivering oral judgment): Today it is not so much the respondents who are on trial but justice itself. How much justice is justice? If the courts strive to maintain a fair balance between the two scales *i.e.* the interest of the accused person and the interest of the community, then I must say justice is just. The aim of justice must be balance and fairness. No tenderness for the offender can be allowed to obscure that aim. The concept of fairness must not be strained till it is narrowed to a filament. We must keep the balance true. It is against that background that I must consider the present appeals.

I will deal with these appeals in chronological order. I commence with Criminal Appeal No 32/72. Lt Hussin bin Haji Othman was charged with abetting Tengku Mahmood under section 323 of the Penal Code. He was discharged under section 173A of the Criminal Procedure Code (F M S Cap 6) and bound over in the sum of $500 with one surety for a period of one year. The appeal is against sentence. The facts are there on record and it is not necessary for me to repeat them. It is quite obvious that Tengku Mahmood was his superior officer, a major in the Johore Military Forces. He was in fact the aide-de-camp to the major. His superior officer had ordered him to get those articles and in obedience to the order he had obtained them. Although he did not take any part in the assault, he had lent passive assistance to the commission of the offence. As was correctly stated by the learned president, the facts were well known to him that the order to fetch a copy of the Holy Book, his 'buloh' and gas cannisters could not have been for the use of his superior officer to enable him to play polo but for use in the commission of an offence. Therefore the order was clearly illegal. Now a soldier is not protected where the order is grossly illegal. The only superior to be obeyed is the law and no superior is to be obeyed who dares to set himself above the law. However, it must be appreciated that he was a young man and considering the circumstances he was in, I have no hesitation in saying that he might have had an exaggerated notion of his duties. In the circumstances I cannot treat this case in the same way as in the other appeals. I think the sentence was adequate.

Now I deal with the appeals against Tengku Mahmood.

With regard to Criminal Appeal No 29/72, the respondent was charged with causing hurt to Francis Joseph Puthucheary and Puthenpurakai Joseph s/o Verghese under section 323 of the Penal Code. The learned president ordered the respondent to enter into a bond under section 173A of the Criminal Procedure Code in the sum of $300 with one surety for each charge for a period of one year. I do not wish to read the facts which have been recorded. It was obvious that the act

committed by the respondent was generated by the heat of the insulting behavior of the complainants. He had taken the law into his hands; that was a mistake on his part; but it was a significant mistake. I do not think the learned president has erred in making the order for the respondent to enter into a bond under section 173A of the Criminal Procedure Code. The fact that the respondent was a first offender had to be considered. I therefore dismiss the appeal against sentence.

I now take together Criminal Appeals No 30 and No 31 of 1972. These are also appeals against sentence. In Criminal Appeal No 30 of 1972 the respondent was charged with causing hurt to Mr Narendran s/o Manickam under section 323 of the Penal Code. The respondent was bound over under section 173A of the Criminal Procedure Code for one year in the sum of $600 with one surety. I am quite acquainted with the facts on record. It is significant to note that the act was committed on 13th March, 1972, some 8 days after that of Criminal Appeal No 29 of 1972. However the facts in Criminal Appeal No 30 of 1972 paled in comparison when we consider the facts of the next case, *i.e.* Criminal Appeal No 31 of 1972. The record, to my mind, reads more like pages torn from some mediavel times than a record made within the confines of a modern civilization. The keynote of this whole case can be epitomised by two words — sadistic brutality — every corner of the case from beginning to the end, devoid of relief or palliation. I have searched diligently amongst the evidence, in an attempt to discover some mitigating factor in the conduct of the respondent, which would elevate the case from the level of pure horror and bestiality; and ennoble it at least upon the plane of tragedy. I must confess, I have failed. It is said in Criminal Appeal No 31 of 1972 that the complainants were involved in smuggling goods into this country. Were they 10 times involved, or were they 100 times involved, that did not justify the respondent to inflict brutal third degree practices on the three of them. The law is sedulous in giving them the right to a fair trial and to be defended by counsel. Those fundamental rights must always be kept inviolate and inviolable, however crushing the pressure of incriminating proof. Cases are never tried in police stations, but in open courts to which the public has access. The rack and torture chamber must not be substituted for the witness stand. That right is enshrined in our Constitution — 'No person shall be deprived of his life, or personal liberty save in accordance with law'. That fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law. All this reduces to the minimum the possibility of arbitrariness and oppression.

Normally an appellate court is reluctant to interfere with sentences imposed by a lower court. But it is bound to do so whenever it feels that justice does not appear to have been done. In Criminal Appeals No 30 and No 31 of 1972 I am of the view that the learned president had weighed too heavily in favour of the respondent. This is what he said in his judgment:

> Before passing sentence, counsel for the prosecution addressed the court and stated, among other things, that a just and fair sentence was required

> and urged that the interest of the public as well as the position of the accused must be taken into account by the court. 'Position of the accused' in this context could only mean the status of the accused as a Prince of the ruling house of the State of Johore, the fact that he is the eldest son of His Highness the Sultan of the State of Johore which is a component part of the States of Malaya, the fact that the title of Raja Muda of Johore had been conferred on him and that the accused held a rank of importance in the Johore Military Forces.

He had thereby conflicted with the provisions of Article 8 of our Constitution which says that all persons are equal before the law. That implies that there is only one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification. This equality of all in the eyes of law minimizes tyranny.

It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the offence which are of importance. In my judgment the sentence imposed by the learned president did not reflect the gravity of the offence and I here and now set aside the sentence imposed by the lower court in respect of these 2 appeals, and substitute them as follows:—

Criminal Appeal No 30/72, fine of $500 in default 2 months imprisonment; conviction to be recorded.

Criminal Appeal No 31/72, First charge. I impose a fine of $1,000 in default 3 months imprisonment; conviction to be recorded.

In respect of the second and third charges, I impose a fine of $500 each in default 3 months imprisonment; conviction to be recorded.

Orders accordingly.

Tan Sri Salleh Abas (Solicitor-General) for the Public Prosecutor.
P Suppiah for the Respondent.

Note

Although an appellate court should not normally interfere with the sentence imposed by a trial court, it may do so in cases where there is an error in law. In this case, only one sentence of the lower court was confirmed; the other four were enhanced from bonds under section 173A of the Criminal Procedure Code to fines of various amounts. That nobody is above the law was reiterated here.

(iii) Bhandulananda Jayatilake
v
Public Prosecutor

[1982] 1 MLJ 83 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah Ag LP, Salleh Abas and Abdul Hamid FJJ

Cases referred to:-
(1) *Jameison* v *Jamieson* [1952] AC 525, 549.
(2) *Attorney-General* v *British Broadcasting Corporation* [1980] 3 All ER 161, 172.

RAJA AZLAN SHAH Ag LP (delivering the judgment of the Court): The appellant gave false testimony at the murder trial of Karthigesu who was convicted and sentenced to death. That case rested on the appellant's testimony which provided the main link in the largely circumstantial evidence tendered by the prosecution. The conviction and sentence were set aside by this court when the appellant confessed on oath that he had told lies at that murder trial. He was duly charged and convicted of 'giving false evidence with intent to procure Karthigesu's conviction of a capital offence' under section 194 of the Penal Code. That particular offence carries a maximum sentence of 20 years and a fine. The learned judge imposed a sentence of 10 years imprisonment.

It is now said before us that that sentence was wrong; that it was harsh and manifestly excessive. Therefore this court should interfere because every wrong sentence is as much a miscarriage of justice as a wrongful conviction or acquittal.

In our view to give false testimony in a capital case is a very serious thing to do because it can jeopardise the life of the accused. It is for that reason that the Penal Code has provided a separate section to deal with the matter. The learned judge has dealt with it, we think, admirably and incisively in these terms:

> Witnesses giving evidence in court must never underrate the importance of speaking the truth.... True testimony alone will assist the court in arriving at a true verdict. It is most important therefore that people who appear as witnesses in court should never deviate from the truth for otherwise they would be polluting the administration of justice and thus commiting a serious wrong to the court and society.

In another passage of this judgment he said this:

> ...the offence of judicial perjury which the accused has committed is of such a grave nature involving the risk of human life that public interest must outweigh the plea of mitigation....

It cannot be gainsaid that the appellant had shown a wanton disregard for truth. The sanctity of an oath meant nothing to him. We therefore conclude that he had acted with malice and with the direct object of bringing the administration of justice into disrepute.

Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judical discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold

differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions: see *Jamieson* v *Jamieson*[1]. It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se,* to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest: see the *Exclusive Brethren* case[2].

The appeal is dismissed.

Appeal dismissed.

Y Sivaloganathan for the Appellant.
Shaik Daud (Deputy Public Prosecutor) for the Respondent.

Note

In this case the ten-year prison sentence imposed by the trial Judge was confirmed because of deterrence and public interest. Indeed, the offence of perjury must never be treated lightly: more so where as a result of it a person could have been sentenced to death had the truth not seen the light of day: See *PP* v *Bhandulananda Jayatilake* [1981] 2 MLJ 354 (HC)

(d) "Shall be liable"

Public Prosecutor
v
Hew Yew

[1972] 1 MLJ 164 High Court, Kuala Lumpur

Cases referred to:-
(1) *Public Prosecutor* v *Lee Ah Sam* [1974] MLJ 236.
(2) *Khor Seek Pok* v *Public Prosecutor* [1985] MLJ 170.
(3) *Public Prosecutor* v *Wahab* [1964] MLJ 265.
(4) *Darus* v *Public Prosecutor* [1964] MLJ 322.

RAJA AZLAN SHAH J: The subject, a registered person defined by section 2 of the Prevention of Crime Ordinance, 1959 and being subject to police supervision for a term of 3 years with effect from April 8, 1969, failed to comply with the restriction to remain within doors under section 15 (2)(f) and punishable under section 15(4) of the said Ordinance. In the lower court he pleaded guilty and was fined $100 in default one month's imprisonment.

I have been asked to revise the order of the lower court on the ground that the learned president had erred in law in imposing a fine instead of prison sentence. Section 15(4) of the Ordinance states that a registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and 'shall be liable to imprisonment for a term not exceeding five years and not less than two years'.

There have been a few judicial pronouncements on the words 'shall be liable'. In *Public Prosecutor* v *Lee Ah Sam*[1] regulation 5(1) of the Emergency Regulations, 1949 provides that the person guilty of the offence 'shall be liable to be punished with death or penal servitude for life and whipping'. The Court of Appeal held that the sentence of penal servitude for life is a maximum sentence and any lesser sentence of penal servitude may be imposed. In *Khor Seek Pok* v *Public Prosecutor*[2] section 6 of the Dangerous Drugs Ordinance, 1952 states that a convicted person:

> Shall be guilty of an offence against this Ordinance and liable on conviction to a fine of $10,000 or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

It was held that the fine of $10,000 provided under the section is not mandatory. It is in fact the maximum penalty provided and the court has a discretion to impose a fine of any sum within the maximum amount of $10,000. In *Public Prosecutor* v *Wahab*[3] section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, provides that on conviction an accused:

> Shall be liable to imprisonments for a term not exceeding two years and to whipping

is not mandatory and a fine may be imposed in lieu of imprisonment. In *Darus* v *Public Prosecutor*[4] it was held that the term of imprisonment of one year under section 297 of the Criminal Procedure Code is a maximum sentence and that any lesser term may be imposed as is considered appropriate to the circumstances of the particular case. It may be seen that in all these cases the words are:

> shall be liable to imprisonment for a term of ... years or fine etc.

In the context of section 15(4) of the Prevention of Crime Ordinance the words are:

> shall be liable to imprisonment for a term not exceeding five years and not less than two years.

From that it seems to me that the court has an absolute discretion to impose the maximum sentence of 5 years or any lesser sentence the minimum of which must not be less than two years.

I would therefore set aside the sentence of fine imposed by the lower court and substitute a sentence of two years' imprisonment. The said fine is to be refunded to the offender.

Order accordingly.

Notes

This decision was overruled by the Federal Court in *Jayanathan* v *PP* [1973] 2 MLJ 68.

In *Jayanathan,* the Federal Court had to consider the meaning of section 154(4) of the Prevention of Crime Ordinance when it says "shall be liable to imprisonment for a term not exceeding five years and not less than two years". Ong Hock Sim FJ referred to the judgment of Aitken J in *Man bin Ismail* [1939] MLJ 207 with approval. The words " shall be liable to imprisonment" give the court an absolute discretion as to whether to impose imprisonment or deal with the accused in accordance with the provisions of section 294 of the CPC. Where the court decides to impose imprisonment, it must impose a term of not less than two years. Otherwise, it may apply section 294 of the CPC. Ong FJ was of the view that the words "shall be liable" must not lose their meaning simply because a statutory provision mentions a maximum and a minimum term of imprisonment.

BAIL

(a) Non-bailable offences

Public Prosecutor
v
Chew Siew Luan

[1982] 2 MLJ 119 Federal Court, Penang

Coram: Raja Azlan Shah CJ (Malaya), Abdoolcader and Gunn Chit Tuan JJ

Case referred to:

(1) *Public Prosecutor* v *Chu Beow Hin* [1982] 1 MLJ 135, 137.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment, of the Court): In this case the following questions were referred to us under section 66 of the Courts of Judicature Act, 1964:

(i) Whether or not section 388 Criminal Procedure Code overrides the provisions of section 41B of the Dangerous Drugs Act 1952 (Act 234).

(ii) If the answer to question (i) above is in the negative, whether it is right in law for bail to be granted in respect of a person charged for an offence under section 39B of the Dangerous Drugs Act 1952 (Act 234). We answered the first question in the negative and the second was accordingly a *non sequitur.*

On May 26, 1980, a woman *enceinte* with accouchement due in early July, 1980, was charged with trafficking in 157.08 grammes of heroin, an offence under section 39B (1) (a) and punishable under section 39B (2) of the Dangerous Drugs Act, 1952. The offence carries a punishment of death or imprisonment for life. On June 9, 1980 the learned President of the Sessions Court granted her bail pending the hearing of the case on an application of the proviso to section 388(i) of the Criminal Procedure Code which permits the granting of bail to any person under the age of 16 years or any woman or any sick or infirm person accused of a non-bailable offence carrying life imprisonment or death as a penalty.

On appeal by the Public Prosecutor against the order so made granting bail the learned judge dismissed it stating that section 41B(1) and (2) of the Dangerous Drugs Act does not override the proviso to section 388(i) of the Criminal Procedure Code. He seemed to think that section 41B of the Act should not be construed as having the effect of fettering the discretion to grant bail under the provisions of the Criminal Procedure Code in cases covered by the proviso to section 388(i) thereof. Section 41B(1) of the Dangerous Drugs Act provides:

> (1) Bail shall not be granted to an accused person charged with an offence under this Act —
> (a) where the offence is punishable with death;or
> (b) where the offence is punishable with imprisonment for more than five years; or
> (c) where the offence is, punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
> (2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

Now, the Criminal Procedure Code (FMS Cap 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act,1967.

The Dangerous Drugs Act 1952 (Revised - 1980) is an Act specifically designed to regulate the importation, exportation, manufacture,

sale and use of, *inter alia,* dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10.3.78. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law: see also *Public Prosecutor* v *Chu Beow Hin*[1]. The provisions of section 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object.

On the other hand, it is a sound, and,indeed, a well known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in section 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of section 41B(1) (c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

The answer to the first question must accordingly be clearly in the negative and we so decided at the conclusion of argument in this reference.

Order accordingly.

Shaikh Daud Hj Mohd Ismail (Deputy Public Prosecutor) for the Applicant.
K Kumaraendran for the Respondent.

Notes

This decision overruled the decision of the High Court hearing the appeal from the Sessions Court, and affirmed the decision of the High

Court in the case of *Loy Chin Hei* v *PP* [1981] 1 MLJ 131. This decision of the Federal Court was timely considering the large number of arrests made in relation to drug offences and offenders brought before the Courts.

One can anticipate how abuses may be made should the decision be otherwise. Youthful offenders, women and sick or infirm persons could be employed to commit drug offences and whilst awaiting trial be released on bail. The possibility of absconding is great, as are tampering with witnesses and the commission of similar offences for which they were initially arrested. Indeed, the very purpose of section 41B would be defeated.

Section 41B provides for a new category of offences called "unbailable offences" and this was judicially confirmed in this case. An equivalent provision appears in section 12 of the Firearms (Increased Penalties) Act 1971 and it would follow that the ratio in this case applies there too. The case of *PP* v *Chu Beow Hin* [1982] 1 MLJ 135 was referred to for the principle *generalibus specialia derogant.*

CHARGES

(a) Joinder of offenders

Syed Ismail
v
Public Prosecutor

[1967] 2 MLJ 123 High Court, Kuala Lumpur

Cases referred to:-

(1) *R* v *Baskerville* [1916] 2 KB 658.
(2) *Crane* v *Director of Public Prosecutions* [1921] 2 AC 299.
(3) *R* v *Dennis & Parker* [1924] 1 KB 867.
(4) *R* v *Assim* [1966] 3 WLR 55.
(5) *Sardara & Ors* v *R* AIR (1945) Lahore 286, 292.
(6) *Sambasivam* v *Public Prosecutor* [1950] MLJ 145.
(7) *Kemp* v *The King* (1951), 83 CLR 341.
(8) *Mraz* v *The Queen (No 2)* (1956), 96 CLR 62.
(9) *R* v *Connelly* (1964), 48 Cr App 183.
(10) *R* v *Wilkes (1948),* 77 CLR 511 at pp 518, 519.
(11) *Harris* v *State of Georgia* (1941), 17 South Eastern Report, 573.
(12) *Pritam Singh* v *State of Punjab* AIR (1956) SC 45.
(13) *Manipur Administration* v *Thokchom Bira Singh* AIR (1965) SC 87.
(14) *Hashim* v *Public Prosecutor* [1967] 1 MLJ 251.
(15) *Mohamed Yatim* v *Public Prosecutor* [1950] MLJ 57, 59.
(16) *Mah Koh Cheong* v *R* [1953] MLJ 46, 47.
(17) *Emperor* v *Khursid Hussain* AIR (1947) Lahore 410.

RAJA AZLAN SHAH J: This is an appeal against conviction of the appellant by the President, Sessions Court, Kuala Lumpur, under section

4(c) of the Prevention of Corruption Act, 1961, and sentence of six months imprisonment. I have already intimated that this appeal will be dismissed and now proceed to give my reasons.

The present appeal has a long history. On 2nd January 1965 the present appellant, who was the District Officer, Kajang, was charged together with his brother-in-law (*biras*) Hashim bin Talib, who had no experience of contract work, and Raja Shamsusah the Penghulu of Mukim Ulu Langat.

The charge against Hashim is Kajang Arrest Case No. A1 of 1965 and reads as follows:

> That you on 6.4.1964 at District Office, Ulu Langat, in the District of Ulu Langat, in the State of Selangor, knowingly gave Chew Kim Joo who was an agent of the Government of the State of Selangor, to wit a financial clerk in the District Office, Ulu Langat, a document, to wit, Indent No 13/64, in respect of which the principal was interested and which document contains a statement which is false in material particular namely it stated that the work had been completed when in fact it had not been performed and which to your knowledge was intended to mislead the principal and that you have thereby committed an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961.

The charge against the present appellant is Kajang Arrest Case No A2 of 1965 and reads as follows:

> That you on 6.4.1964 at District Office, Ulu Langat, in the District of Ulu Langat, in the State of Selangor, being an agent of the Government of the State of Selangor, to wit, a District Officer of Ulu Langat District, knowingly used with intent to deceive your principal, a document, to wit,Indent No 13/64 in respect of which your principal is interested and which document contains a statement which is false in material particular, namely it stated that the work had been completed when in fact it had not been performed and which to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961.

The charge against Raja Shamsusah is Kajang Arrest Case No. A3 of 1965 and reads as follows:

> That you on 6.4.1964 at District Office, Ulu Langat, in the District of Ulu Langat, in the State of Selangor, abetted the commission of an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961, for using a false document to wit, Indent No 13/64. by one Syed Ismail bin Ahmad, which offence was committed in consequence of your abetment that you certified the completion of the work referred to in the said indent and that you have thereby committed an offence punishable under sections 11 and 4(c) of the Prevention of Corruption Act, 1961.

On 13th January 1965 the case was mentioned. All the three accused persons were separately represented by counsel. From the record (Selangor Criminal Appeal No 63 of 1965) it is noted that Mr Chelliah who was representing the present appellant submitted that a separate trial would be more convenient but he left it to the court. The learned deputy public prosecutor submitted that the case was in respect of one

transaction and requested a joint trial.The learned president ruled that the three cases would be taken together.

The case eventually came up for hearing. I will refer to this as the first hearing. In the events that happened all three accused were convicted. Hashim and the present appellant were each sentenced to six months imprisonment and they separately appealed. Raja Shamsusah was bound over under section 294 of the Criminal Procedure Code (Cap 6) to be of good behaviour. He did not appeal. Ong Hock Thye FJ heard the appeal which was argued by Che Hussein Onn for Hashim and Dato' Marshall for the present appellant. The facts as presented by the prosecution and the defence of each of the accused persons are reported in [1966] 1 MLJ 229. Ong Hock Thye FJ allowed the appeal and ordered a re-trial, his reason being that the learned president had failed to give reasons for his decision beyond stating that the story of the two appellants had cast no doubt on the prosecution's story and that he was convinced beyond reasonable doubt that there was a conspiracy between those two to cheat the Federation Government.

Both the present appellant and Hashim were again charged in Kajang Arrest Case No. A4 of 1966; that is, a separate charge against each of them in respect of different offences, before a different president. I will refer to this as the second hearing. The charge against both of them was the same as that in the first hearing, namely, in Kajang Arrest Case No A2 of 1965 and No A1 of 1965. They were both represented by Dato' Marshall and Che Hussein Onn respectively. It will be convenient to note from the record that no objection was taken in respect of the joint trial. At that trial Raja Shamsusah, an accomplice, gave evidence against both the appellants and he was prosecution witness No 5. He testified that he did not at any time ask the present appellant for construction of the said work. He admitted signing the indent, certifying that the contract work had been completed, but said that he did so at the request of the present appellant who had told him that the work was completed and that it was done by his *'biras'*. He explained that when he certified that work was completed he was under the impression that it was in respect of the continuation of work done at Batu 14, Ulu Langat, which was already completed two months previously and for which he had already certified but that he had not inspected it. In any event it would appear that he maintained his story as told by him when he gave his defence at the first hearing. The learned president acquitted the present appellent without his defence being called on the ground that there was no corroboration of Raja Shamsusah's evidence when he said that he was requested by the present appellant to sign the indent on 6th April. Hashim was convicted and sentenced to six months imprisonment.

The learned deputy public prosecutor appealed against the present appellant's acquittal and the learned Chief Justice who heard the appeal ordered the learned president to call for the defence. The facts which the prosecution relied upon can best be seen from the judgment of the learned Chief Justice . In outline they are as follows. The present appellant who was then District Officer, Kajang, caused an indent for the construction of a drain 4' x 3' x 3' for a distance of 30 chains at $20

per chain to be issued to Hashim in circumstances which both knew that the proposed work was fictitious. The said drain was never constructed, but Raja Shamsusah, at the request of the present appellant, certified that it was completed and the present appellant endorsed on the indent an order to pay out the $600 to Hashim. The learned Chief Justice, after referring to the classic statement of the law on accomplice's evidence in *R* v *Baskerville*[1] said:

> In my opinion there was sufficient evidence to corroborate the penghulu's evidence that it was the respondent (the present appellant) who was the chief architect of the whole plot and the penghulu, instead of the scoundrel the defence counsel tried to make out, was a mere tool.

And the learned Chief Justice indicated six items as establishing corroboration of the penghulu's evidence. In the concluding passage he said:

> In my view there is ample evidence to corroborate the penghulu's evidence that it was the respondent (present appellant) who was responsible for the plot and also to show the respondent (present appellant) knew that the second half of the indent as to the alleged completion of the work was false.

To my mind that passage is perfectly plain and requires no elaboration. When the learned Chief Justice ordered the defence to be called he was of the view that there was overwhelming evidence of an independent and compulsive nature to show that it was the present appellant who was the dominating figure in the whole plot and to show he knew that when the contract work was certified as completed it was false. It is clear from the judgment the learned Chief Justice did not say, and to my mind did not seem to say, that the overwhelming evidence did not show to establish corroboration of the penghulu's evidence that he was requested to sign the indent by the present appellant.

The present appellant made his defence before the same learned president. He testified that he was authorised to issue indents for minor works and in such cases tenders need not be called. In the beginning of 1964 PW5 'requested him to allow the construction of a drain as there was an application by padi planters in that area'. As no allocation had been made he told PW5 to wait and he made a note of it on his memorandum pad. One month later PW5 renewed his former request. The present appellant recorded in his memorandum pad details of site, etc. On that date Hashim who had often pestered his brother-in-law for minor work contracts came to see him. The present appellant told him of PW5's request and that if he (Hashim) was interested he could approach PW5. Hashim told him he knew PW5. On the following day Hashim came and asked him to approve the minor work. The present appellant then gave instructions on a piece of paper to PW5, his financial clerk, to issue the indent to Hashim. He said that no files were opened when there were only oral requests. He admitted altering the indent at Sungei Langat from 'Lot 2773' to 'Sungei Langat', his reasons being (i) Sungei Langat is a big area, (ii) alteration is for purposes of

record, (iii) anyone who checked later would know where the construction was undertaken. He said he obtained 'Lot 2773' from his note on his memorandum pad. He said that on that day there was a meeting on rural development and all penghulus who were committee members were present. He met PW5 at that meeting and informed him that his request for construction of the drain was approved and that the work had been given to 'Hashim bin Talib the new contractor'. He requested PW5 to inspect and advise Hashim as he was a new contractor. He said PW5 agreed to do that. One week later Hashim brought back the indent. He was asked whether work had been completed and he replied in the affirmative. He also asked Hashim if PW5 had inspected the work. From the record it may be noted that the expected reply was not forthcoming. The present appellant continued by saying that as there was someone else in his room he asked Hashim to leave the indent on his table and leave the room. After that person had left he examined the indent and noticed that PW5 had certified that work was completed without any comment. He then authorised payment. He further stated, 'I agree that minor works are certified as completed by penghulus if there is no suspicion of certificate'. With regard to the cheque he said that Hashim came to see him two weeks later with a crossed cheque and as he had no bank account and as he was returning to Johore he would therefore like to settle his labourers and he asked the present appellant to cash it for him. The present appellant credited the cheque into his bank account and later gave Hashim $600 in cash. He denied telling PW5 to sign Hashim's indent as he was his 'biras'. He denied conspiring with Hashim or PW5 to cheat the Government of $600 for a fictitious work. He said that when he signed the indent he believed the work had been done. He denied instructing PW3 on a piece of paper to prepare the indent for Hashim. He also denied that Hashim brought back the prepared indent. With regard to the alteration of particulars on the indent with the particulars on his memorandum pad he found that the lot number had been left out by PW3. He denied altering the indent for the purpose of evading Treasury suspicion. He further said that when Hashim confessed to him that the work was fictitious he advised him to return the money which was later paid back into the vote. In re-examination he said that when the indent came back to him for authorisation for payment he was not aware that only seven days had elapsed.

The defence called a witness who has been a Government class C and D contractor for the past 27 years. It is interesting to recapitulate his evidence. He testified:

> One chain of drain can be completed by three labourers in one day. Their pay will be $4 per day. The knowledge as to earth drain construction by a DID engineer would be the same as PWD engineer. On cross-examination: Thirty labourers would be required to construct ten chains a day. 4' x 3' x 30' drain I would charge Government $19 to $20 in 1964 for one chain. I can complete thirty chains with thirty labourers in three days. Fifteen labourers would be required per day for 6-7 days for thirty chains. The labourers would have to provide their own tools. No such

> labourers at Dusun Tua. Payment of labourers at $6 per day would be $90 per day, for seven days would be $640. $600 would be a loss to the contractor. If workers are paid $4 per day the amount of wages would be $420, but $4 per day would be for six hours work only, not eight hours work.

At the conclusion of the hearing the present appellant was convicted and sentenced to six months imprisonment. Hence the present appeal.

In my view the appeal can be disposed of under four main heads.

The first ground of appeal is that as Ong Hock Thye FJ had ordered a re-trial of Kajang Arrest Cases Nos A2 of 1965 and A1 of 1965 (see [1966] 1 MLJ 229) the joint trial in Arrest Case No A4 of 1966 was a nullity as there is no power of consolidation of cases. Counsel submitted that since no special provisions exist in respect of consolidation of cases section 5 of the Criminal Procedure Code enables us to resort to the practice enforced in the Colony insofar as it is not inconsistent with our Code and section 5 of the Colony Code in like manner empowers adoption of the practice enforced in England if it is not inconsistent with the Colony Code. My attention was therefore drawn to English authorities to some of which I must refer although I must bear in mind that each case must depend on its particular facts. I will first refer to those on which particular reliance was placed by counsel. *Crane* v *Director of Public Prosecution,*[2] and *R* v *Dennis & Parker,*[3] were cited for the proposition that separate indictments against two defendants cannot be tried at the same time even with the consent of the parties. However, the latest exposition of the law with regard to joinder of offenders or of offences is amply discussed by Sachs J in *R* v *Assim.*[4] In that case the appellant Assim was convicted on one ground of maliciously wounding one Wilkinson. He had been indicted with one Cemal, who was convicted on a separate count of assaulting one Longton, thereby occasioning actual bodily harm. The appellant's ground of appeal was:

> That the court had no power in law to try two defendants containing only two counts, one being against the appellant alone for maliciously wounding Wilkinson, and the second count being against his co-defendant alone for assaulting Longton.

That case is, to my mind, on all fours with our present case where two separate persons were charged and tried together in respect of two different offences. In delivering the judgment of the full court of five judges Sachs J stated that the question of joinder of offenders or of offences are always in the discretion of the court unless restrained by statute and that joinder of counts being a matter of practice, any departure from the relevant rules would only amount to an irregularity unless the matter has occasioned a failure of justice. Moreover, the learned judge held that the court is not generally disposed to quash the conviction on account of such irregularities unless objection is taken before plea at the trial, although there can be no hard and fast rule on the point. I would like to cite certain passages in that case which I think are distinctly germane to our present appeal. At pages 63 and 64 he said:

> The present case is thus indeed one which inevitably falls within the four corners of any rule practice, however narrowly it might be formulated, permitting the joinder of several offences. Whilst, however, it is of course not practicable for this court, after hearing submissions many of which were directed in the main to facts under consideration in this particular case, to lay down exhaustive rules dealing specifically with every type of case, yet equally it is desirable to come to some general conclusions as to what would nowadays be in general an appropriate rule of practice on the basis that none of the rules of 1915 deal with the joinder of offenders. As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases.

Therefore, if we have to resort to the practice enforced in England, it would appear that the joint trial in the present case was not a nullity. In any event, it is undesirable to follow the English practice as there are provisions in our Criminal Procedure Code enabling the court in its discretion to try at the same trial two persons separately charged in respect of separate offences committed in the same transaction. For that is what this case represents: see section 170 of the Criminal Procedure Code. So long as the discretion was exercised judicially and not capriciously the court is not generally disposed to quash a conviction unless there has been a miscarriage of justice. Counsel attempted to play on the words Arrest Cases Nos A1 of 1965 and A2 of 1965, thus indicating that they are really two distinct cases and since they have been absorbed in Arrest Case No A4 of 1966 they amount to a consolidation of two cases for which the law does not provide and accordingly the joint trial was a nullity. I do not think there is much force in that argument. As I have indicated, this is not a case of consolidation of cases but of two separate persons being charged and tried in respect of two separate offences committed in the same transaction. Counsel conceded that no objection was taken at the commencement of the hearing that his client would be prejudiced thereby. Although in the last analysis the question was one for the discretion of the learned president, whose decision could only be reversed if it was done capriciously, all the elements were present in the case which would justify the exercise of discretion in favour of a joint trial.

Strictly speaking, 'indictment' is unknown in our law of procedure and practice. As was said in *Sardara & Ors* v *R,*[5] after noting the principles enunciated in *Crane* and *Dennis:*

> In my view, the argument based on the analogy of English law cannot

> hold good in India. It is always dangerous to decide cases arising under an Indian statute by analogy of cases arising under English common law with its archaic technical rules of procedure. Drawing up of an indictment is procedure peculiar to English law and there is no parallel for it in the Indian procedure or practice.

In my view, the same can be said of this country.

The second ground of appeal is issue estoppel. It is submitted that Raja Shamsusah, a convicted accomplice, was called by the prosecution to allege that he was innocent in contradistinction to his conviction. He was therefore estopped from giving evidence on the facts on which his conviction was based. It was said that the whole of the evidence which he gave in his defence at the first hearing was readumbrated in his examination-in-chief, in cross-examination, and in re-examination at the second hearing. The validity of this ground now calls for consideration. The passage of Lord Mac-Dermott in *Sambasivam* v *Public Prosecutor*[6] was strongly relied by counsel in support of the above proposition. It is therefore necessary to examine the facts of that case and the principle underlying it, no doubt based in the light of the existing facts, and then to consider the facts within the context of counsel's submission. In *Sambasivam's* case the appellant, an Indian Tamil, was travelling on foot in the company of two Chinese. They met a party of three Malays. A fight ensued between the two groups in the course of which one of the Chinese was killed. The Malays alleged that they had been fired at by the Chinese and that the appellant had with him a revolver which he had held out and pointed at one of them. The appellant was charged with two offences, firstly, carrying a firearm, and secondly, being in possession of ammunition. He was acquitted on the second charge and a new trial was ordered on the first charge. At the re-trial a statement, which purported to have been made by the appellant but which was retracted and which had not been put in evidence at the first trial, was relied on by the prosecution. In the statement the appellant admitted carrying a firearm and being in possession of ammunition. The Board had to consider the effect upon the alleged admission of the fact that the appellant had already been acquitted of being in possession of ammunition. At page 151 Lord Mac-Dermott said:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial.

In the opinion of the Board the application of this principle might well

have been made a ground for excluding the statement in its entirety, for it could not have been severed satisfactorily. But no objection was taken to it at the trial and the Board was content to say that it should not have been left to the assessors without an intimation that the prosecution could not assert, or ask the court to accept, a substantial and important part of what it said. As this direction was not given, the Board set aside the conviction at the second trial.

Sambasivam's case was applied by the High Court of Australia in *Kemp* v *The King.*[7] In that case the accused who was charged with indecent assault on three counts was acquitted on the first and second counts and was convicted on the third. The conviction was set aside on appeal and a new trial ordered. Upon that trial, in proof of similar acts by the accused, evidence was submitted of the occasions in respect of which he had been acquitted. The accused was convicted and he appealed. It was held that the evidence was not admissible and the conviction was quashed. Dixon CJ in *Mraz* v *The Queen (No 2)*[8] treated *Sambasivam's* case as a principle of 'estoppel by judgment in criminal proceedings'. Again, in that case the accused was alleged to have caused the death of a woman in the course of committing rape which under the law of New South Wales constituted murder. He was originally indicted for murder but was convicted of manslaughter. The conviction was set aside. He was subsequently indicted for rape in respect of the same set of facts. The High Court held that the verdict of not guilty of murder involved as a matter of law a finding that the accused did not commit rape and therefore a plea of issue estoppel was accordingly made out at the subsequent hearing.

Sambasivam's case was also discussed in the House of Lords in *R* v *Connelly.*[9] However, the court was not prepared to apply the principle of issue estoppel to a case where the ultimate quashing of a murder conviction occurred in the special circumstances of that case. Be that as it may, it is significant to note how the House of Lords analysed the principle of issue estoppel and the observations of their Lordships may throw some guiding light in the application of the principle to the present case. In *Connelly's* case there had been an office robbery during which an employee had been killed, and the appellant together with three other had been tried for murder. At this trial there had been two issues put to the jury, namely, an *alibi* and, in the alternative, absence of felonious intent. He was convicted but the court of criminal appeal directed an acquittal by reason of a misdirection by the trial judge upon the first of these issues. When he was subsequently tried for robbery a plea of *autrefois acquit* was rejected by direction and he was convicted. The House of Lords rejected the plea of *autrefois.* Lord Morris treated *Sambasivam's* case as an instance of the application of the principle of *res judicata* to the criminal law. At page 230 he said:

> Although the principle of *res judicata* applies to criminal cases as to civil cases the conclusions in criminal cases tried upon indictment are expressed either by verdicts of guilty or not guilty. The result is that issues are not isolated and analysed as they are in a judgment which specifies findings and records reasons. In very many cases, therefore, it is not

> possible to know or to deduce whether a verdict involves a particular conclusion or determination. That is the position in the present case.

On issue estoppel Lord Hodson was of the view that 'it is an aspect of the law which lies behind the application of the principle of *autrefois acquit'* (p 244). He re-stated the principle as summarised by Dixon J (as he then was) in *Wilkes' case*[10]:

> There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply.

Lord Devlin preferred to treat *Sambasivam's* case as an extension of the principle of *autrefois* (p 253). The learned Law Lord observed that actual determination of issues is what is required for issue estoppel and he said that there is no trace so far of its application to criminal matters. Lord Pearce seemed to treat *Sambasivam's* case as a principle of *res judicata.* On issue estoppel he had this to say:

> The maxim *nemo debet bis vexari* underlies both pleas and is a strong element in both. Estoppel and consistency in the court underlie *autrefois acquit,* but they have no relation to *autrefois convict.* For in the latter case no estoppel or inconsistency would result from a second prosecution. Lord Blackburn in *Wemyss's* case (LR 10 QB 378) based *autrefois convict* on the principle *transit in rem jidicatam;* the offence has passed into a conviction and the offence has ceased to exist.

In the United States of America the plea of issue estoppel is also well established: see *Harris* v *State of Georgia*[11].

Sambasivam's case was first applied by the Supreme Court of India in *Pritam Singh* v *State of Punjab*[12] and established beyond question in *Manipur Administration* v *Thokchom Bira Singh.*[13] In the former case the appellant was acquitted of the offence of possession of a certain revolver which was in fact in issue which had to be established by the prosecution before he could be convicted. That fact was found against the prosecution and could not be proved in the subsequent proceedings between the Crown and him under a charge of murder. The evidence against him in the latter proceedings would have to be considered regardless of the evidence of discovery of the revolver from him. In the latter case Bira Singh and others were charged under sections 114, 149, etc. of the Indian Penal Code for gathering in a public place in defiance of an order promulgated under section 144 of the Indian Criminal Procedure Code on 25th April 1960 and for doing other unlawful acts. Previous to the institution of the above case the district magistrate had filed a complaint under section 188 of the Indian Penal Code against Bira Singh alone, alleging that he had on 25th April 1960 disobeyed the order promulgated under section 144 of the Criminal Procedure Code and had with other persons formed an unlawful assembly. He pleaded

in his defence, in the complaint case, that he was not present at the scene of the occurence and that he had been falsely implicated. The magistrate rejected his plea and accepted the prosecution case and convicted him of an offence under section 188 of the Indian Penal Code. On appeal he was acquitted on the ground that the prosecution had failed to prove that he was present at the scene of the occurrence. In his trial under sections 114, 149, etc. of the Indian Penal Code an objection was raised on his behalf that the trial was barred by section 403 of the Indian Criminal Procedure Code (which corresponds with section 302 of our Code) by reason of his acquittal under section 188 of the Indian Penal Code. The objection was rejected and he was convicted with the others. On appeal the conviction was set aside on the ground that the finding recorded by the appellate court in the case under section 188 of the Indian Penal Code that he was not present at the scene of occurrence on 25th April 1960 was final and binding on the prosecution and that no evidence could be led to establish a contrary state of affairs in the trial under sections 144, 149 of the Indian Penal Code. His acquittal was upheld by the Supreme Court.

Thus, the principle underlying issue estoppel is firmly rooted in this country, Australia, India, and the United States of America. In the United Kingdom, although its application is foreign to the criminal law no exception is taken to its soundness as a principle of law. It seems to me that these cases turned upon whether there had been a specific finding on an issue of fact — an issue directly raised regarding an ingredient of the offence charged at the later trial when the accused was acquitted in the former proceeding. Simply stated, the principle of issue estoppel relates only to the admissibility of evidence which is designed to upset the finding of fact recorded by a competent court on a lawful charge after a lawful trial. It is not the same as *autrefois acquit;* nor does it prevent the subsequent trial of any offence. It only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a competent court on a former occasion has made a specific finding in favour of the same prisoner.

It is now said by counsel that PW5 is estopped from denying the facts on which his conviction at the earlier trial was based and therefore he cannot be put in the witness box to establish a contrary state of affairs. As indicated earlier, it may now be convenient to examine the facts of the first and second hearings in the context of counsel's submission.

At the first hearing PW5 was co-accused who gave evidence in his defence denying the allegations made by the present appellant exculpating himself at his expense. His explanation was that the present appellant had informed him that the work had been completed by Hashim, another co-accused, and he signed the indent as he was told by his superior officer to do so. PW5 and the present appellant were convicted but the conviction against the appellant was set aside on appeal and a new trial ordered on the ground that there was no finding by the learned president that he knew or must have known that the work was never carried out. That issue was one of the ingredients to constitute the offence in the charge. Therefore that issue was never

decided against the present appellant. Can that issue be raised again at the re-trial of the present appellant? I think so. PW5, an accomplice, was called. He admitted he was an abettor. In other words, when he signed the indent that the work was completed he knew it was false. PW5 did not retract what he had said at the earlier trial.

In the light of these facts it is abundantly clear that the issue estoppel enunciated in *Sambasivam's* case is not applicable in the present case. It does not apply to a re-trial of the same accused in respect of the same charge. It seems to me that *Sambasivam's* case does not decide such a far-reaching proposition as that contended by counsel and I think that in the present case it has been pushed too far. That principle will only apply against P W 5 if he had subsequent to his conviction been charged with the offence of criminal conspiracy under section 120A of the Penal Code in which case he may rely on *autrefois convict* but definitely he could have pleaded issue estoppel that the issue that he knew or ought to have known that the work was never completed which is also an essential ingredient of the offence under section 120A of the Penal Code had been raised and decided against him.

The appellant also complained that the learned president had failed to consider the defence story adequately and drew inferences unfavourable to him and there are also other grounds raised which are inter-connected and over-lapping. I propose to consolidate them under one main head, namely, whether the conviction was against the weight of evidence. In the present case, like in any other summary trial, it is the duty of the trial court to review the totality of the evidence at the conclusion of the case and make a finding of its own whether the defence has raised a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt. The learned president in his judgment directed his mind to the appellate court's decision in *Hashim* v Public *Prosecutor*[14] and reviewed the defence story and concluded:

> For these main reasons the court found that the defence had not raised a reasonable doubt as to the truth of the prosecution case or as to the guilt of the accused.

The words used by the learned president in giving his decision show, in my view, that he was following the principle laid down by Spenser-Wilkinson J in *Mohamed Yatim's* case[15] and reiterated in *Mah Koh Cheong's* case.[16] The validity of those decisions is never in doubt and they have been consistently followed. I see no reason to think that in reaching his decision the learned president applied the wrong test and I certainly do not take the view that his judgment reveals any misapprehension of the effect of the evidence which was called before him. In my view, the evidence before the learned president was such as to enable him to say that the appellant had not raised a reasonable doubt as to his guilt or as to the truth of the prosecution case.

Lastly, it is submitted, though the proposition was not argued at length that the learned president in assessing the credibility of PW5 and the appellant had failed to take into consideration the previous good character of the appellant as opposed to that of the witness PW5. I

find the proposition attractive but the facts do not justify such a proposition.

In cases of bribery, like all criminal cases, the golden rule is that the accused person cannot be convicted unless the court is satisfied beyond reasonable doubt that he is guilty. This rule admits of no qualification in relation to the character of the accused or of the witnesses. It cannot be argued that if the accused is of bad character, persons who show tendencies towards perjury and fabrication of evidence may be relied upon when giving evidence against him, though if the accused's character is exemplary their evidence would be regarded as worthless on account of their inability to adhere to the truth. But where the accused person in a bribery case pleads and produces evidence of good character which the court regards as satisfactory, and if it appears to the court that a person possessing such a character would not be likely to act, in the circumstances proved to have existed at the time, in the manner alleged by the prosecution, such improbability must be taken into account in determining the question whether or not there is reasonable doubt as to the guilt of such accused person. This issue was raised and considered by Cornelius J (as he then was) in *Emperor* v *Khurshid Hussain.*[17] That was an appeal against the acquittal of the respondent by the sessions judge in an appeal by the respondent from his conviction by the magistrate under section 161 of the Indian Penal Code and a sentence of 6 months imprisonment. The respondent was a superintendent employed by the Lahore Corporation. The complainant was a fodder contractor and since April 1945 had been delivering supplies of fodder for cattle under the care of the respondent. In August and September 1945 the respondent on a number of occasions rejected the fodder on the alleged ground that it was not of the requisite quality. In October 1945 the respondent demanded that the contractor should pay him a sum of money by way of illegal gratification in order to ensure smooth working for the future. The contractor filed a complaint and later a trap was laid and as a result the respondent was caught. In his possession were recovered marked notes. The respondent's immediate explanation was that the money was received by him from the contractor in part payment of a loan. He adhered to his statement at the trial and attempted to support it by production of evidence.

In the instant case there is no positive proof as to the excellence of the appellant's character. The appellant has neither pleaded nor produced evidence of his character beyond stating his educational background and administrative experience. To say that no complaints have been lodged against him is at best a negative averment.

Appeal dismissed.

Dato' David Marshall for the Appellant.
Ajaib Singh (Deputy Public Prosecutor) for the Respondent.

Note

The danger of referring to English cases on the ground that there is a

lacuna in the CPC without proper analysis was highlighted in this case. Section 5 of the CPC undoubtedly is a useful avenue through which we may refer to the law in England for assistance whenever the CPC omits to provide for a certain matter. However, haste in doing so, has its consequences. In this case, the "consolidation" of cases would be void when in actual fact there was a mere joinder of offenders, something perfectly allowed under the CPC: see the case of *Husdi* v *PP* [1980] 2 MLJ 80 (FC) where the Federal Court preferred not to look at the law in England but instead the old provision in section 113. Section 170 of the CPC gives the Court discretion to allow joinder of offenders provided the offences committed were committed in the same transaction. A later case where this section was applied is *Jayaraman & Ors* v *PP* [1979] 2 MLJ 88.

(b) Particulars

Haji Abdul Ghani Bin Ishak & Anor
v
Public Prosecutor

[1981] 2 MLJ 230 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Hashim Yeop A Sani J

Cases referred to:-

(1) *Abinash Chandra* v *Emperor* (1936) 37 Cr LJ 439.
(2) *Lim Yow Choon* v *Public Prosecutor* [1972] 1 MLJ 205.
(3) *Public Prosecutor* v *Datuk Haji Harun bin Hj Idris* [1977] 1 MLJ 15 at p 19.
(4) *Public Prosecutor* v *Dato Tan Cheng Swee & Ors* [1980] 1 MLJ 117.
(5) *Shelmer's* (1725) Gilb Rep 200; 25 ER 139.
(6) *Rands* v *Oldroyd* [1958] 3 All ER 344.
(7) *Nutton* v *Wilson* (1889) 22 QBD 744.
(8) *Harris* v *Amery* LR 1 CP 148.
(9) *Smith* v *Anderson* 15 Ch D 247, 258.
(10) *Rolls* v *Miller* (1884) 27 Ch D 71, CA
(11) *Re Griffin, Ex parte Board of Trade* (1890) 60 LJ QB 235 CA
(12) *National Coal Board* v *Gamble* [1958] 1 QB 11, 18.
(13) *Brown* v *Director of Public Prosecutions* [1956] 2 All ER 189.
(14) *Chang Chwen Kong* v *Public Prosecutor* [1962] MLJ 307 CA
(15) *Caldow Props* v *Low Ltd* [1971] NZLR 311, 320.
(16) *Yap Liow Swee* v *Public Prosecutor* [1937] MLJ 225.
(17) *Reg* v *Clow* [1965] 1 QB 598.
(18) *Vernon* v *Paddon* [1973] 3 All ER 302.
(19) *R* v *George Thomas Johnson* [1945] 2 All ER 105.
(20) *Jack Dennis MC Vitie* [1960] 44 Cr AR 201.
(21) *Public Prosecutor* v *Datuk Tan Cheng Swee Ors* [1979] 1 MLJ 166, 178.
(22) *Quazi* v *Quazi* [1979] 3 All ER 897, 902.
(23) *Rael Brook Ltd* v *Minister of Housing and Local Government & Anor* [1967] 1 All ER 262, 265-266.
(24) *Rolls* v *Miller* [1881-85) All ER Rep 915; (1884) 27 Ch D 71.
(25) *R* v *Wimbledon Justices, Ex Parte Derwent* [1953] 1 All ER 390; [1953] 1 QB 380.
(26) *Crawford* v *Spooner* (1846) 6 Moore PC 1, 8-9.

(27) *Magor and St Mellons RDC* v *Newport Corpn* [1952] AC 189.
(28) *The Gauntlet* (1872) LR 4 PC 184, 191.
(29) *Rands* v *Oldroyd* [1959] 1 QBD 204, 212.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The 1st appellant was convicted of an offence of corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 and the 2nd appellant was convicted of abetting the offence. We concede that the facts on which the learned judge relied for the convictions were largely circumstantial. But there was also direct evidence in the case of the 1st appellant that he participated in the deliberation on the Melaka Executive Council (Ex Co) meeting held on October 2, 1974 when the meeting considered the application of Kipah binti Othman (PW27) for 500 acres of State land for the purpose of prawn hatching. This direct evidence was by his colleagues in the Ex Co PW19, Haji Abdul Aziz bin Haji Alias, PW21, Datuk Yeaw Kay, and PW22, Datuk Mohamed Di bin Abdul Ghani. All these gentlemen were categorical in their statements that the 1st appellant urged the Ex Co to support the application on the grounds that it was their 'duty' to support bumiputra venture. Incidentally, it is also in the evidence of PW19 that the 1st appellant was then the most senior bumiputra Ex Co member at that time.

The evidence revealed that a number of events happened on or about the month of January 1974 relating to a proposed prawn hatchery business and an application for State land culminating in the Melaka Ex Co meeting of October 2, 1974 and the subsequent formation on March 20, 1975 of a company called Syarikat Samasetia Sdn Bhd to undertake the business of prawn hatching on the land concerned. The events would appear unconnected but on close examination they produced an irresistible inference that they were part of a grand scheme to put into effect the objects of the agreement between Kipah binti Othman and the company, Syarikat Samasetia Sdn Bhd dated September 2, 1975 (Exhibit P27). The general objects of this agreement were for Kipah binti Othman, as owner of the land approved to her by the Melaka Ex Co on October 2, 1974, to grant to Syarikat Samasetia Sdn Bhd as licensee the full right and liberty to establish and maintain hatcheries of prawns both marine and inland for the sale by wholesale or retail with the right to traverse and use the banks and reaches of the proposed hatchery for any purposes reasonably necessary for the exerise of such right.

The events started sometime in January 1974 both in this country and in the Republic of Singapore. In Singapore the 2nd apellant, who was the general manager of a firm known as General Enterprise, approached one Victor Khoo (PW23), the Assistant General Manager, Times Publishing, Singapore, with an idea of setting up some sort of joint venture between Malaysians and Singaporeans. The venture was in the form of a business proposition to set up a prawn farm on a piece of land which it was said could be obtained from the State Government. PW23 testified that the 2nd appellant said that it was government land but

would be given to a bumiputra and there was discussion as to the proportion of shares to be divided between the Singaporeans and the Malaysians. The proposed recipients of the shares included the 2nd appellant, Kipah binti Othman, one Zakaria and the 1st appellant. It was also in the evidence of PW23 that in the discussion between him and the 2nd appellant, the 1st appellant would be given 10% share but he had to pay for it and that most of the capital would come from PW23 and PW24. Subsequently the company was in fact formed as Syarikat Samasetia Sdn. Bhd and the 1st appellant became the Chairman, PW24 became the Managing Director and PW23 became the Treasurer/ Director.

In Melaka itself certain events pertaining to a land application also took place around the same period. According to PW5, Stanley Gui (a Settlement Officer in the District of Melaka Tengah) sometime in January 1974 in the morning the 1st appellant came to the Land Office in the District of Melaka Tengah and wanted to see a plan (Exhibit P6). After looking at the plan the 1st appellant said he wanted a copy of the plan and was given one after paying the necessary fee. Soon thereafter this witness saw the 1st appellant again but this time in the office of Assistant District Officer (PW7). The 1st appellant was then in the company of a young lady Kipah binti Othman, aged 19 years, (PW27). This was on March 2, 1974.

In fact evidence showed that on February 23, 1974 the 2nd appellant drafted a letter (Exhibit P6) and requested Kipah binti Othman, PW27, who was his niece, to type it and sign it in her name (Exhibit P6A). This letter was dated February 23, 1974. Apparently the letter was sent immediately to the office of the Chief Minister then who, as shown on the top of the letter, immediately directed the District Officer Alor Gajah to forthwith process the application 'as soon as possible'. It is pertinent to note that this written minute of the Chief Minister was also dated February 23, 1974, i.e. the same day as the application. Then significantly, exactly four days later, on February 27, 1974, with an efficency perhaps unheard of in the history of land administration in this country, the Assistant District Officer wrote to Kipah binti Othman asking her to be present at his office in connection with the application (Exhibit P6A). It was in response to this letter of the Assistant District Officer that on March 2, 1974 Kipah and the 1st appellant travelled together in the 1st appellant's car from Masjid Tanah to Alor Gajah Land Office to fill up an application form (Exhibit P6C) and the questionnaire form (Exhibit P6F) both in connection with the same application for State land. After this the government machinery in relation to this land application again moved with undue haste. Thus it was possible for the Ex Co paper to be prepared in time for its meeting on October 2, 1974 to consider the application for land by Kipah binti Othman. If we may digress, public authorities have acquired a reputation for being ponderous giants whose administrative processes cannot be hurried. It is public knowledge that the administrative process required for an application for a piece of land leading up to the preparation of the necessary Ex Co paper normally takes quite a considerable time, sometimes it may even stretch

up to 2 to 3 years. This process was in fact explained by the Principal Assistant Secretary (PW20) in his evidence. First, the application is made to the Collector of Land Revenue where the land is situated. The Collector of Land Revenue then examines the application and when satisfied with it accepts the application in accordance with all the rules laid down under the Land Rules, Melaka. The Collector of Land Revenue will then cause the application to be investigated by the Settlement Officer by way of physical inspection of the land. The Settlement Officer will then submit his report to the Collector of Land Revenue. The Collector of Land Revenue will then refer to the various relevant departments for their opinions and views. After receiving all these opinions and views the Collector of Land Revenue would prepare an Ex Co paper to be submitted to the Ex Co through the Director of Lands and Mines with his recommendations for consideration of the Ex Co. Normally the file will go to the Chief Minister for his consideration whether it should be submitted to the Ex Co or not.

Anyone looking at the evidence would come to an irresistible conclusion that the application by PW27 was certainly not treated as an ordinary application for land for the whole machinery of the administration from the highest level of the Chief Minister to the lower level of the Settlement Officer seemed to be in top gear throughout.

From the evidence of the witnesses who were present at the Ex Co meeting on October 2, 1974 it would also seem clear to us that despite one or two objections the application was approved without much consideration. The learned judge in his judgment seemed to put some significance on the rather high-handed manner in which the Chief Minister asked the meeting whether to approve the application or not. We are inclined to agree with the learned judge that it was apparent from the evidence and the minutes of the meeting that the application would in any case have been approved. As it turned out the application was approved although the area was reduced from 500 acres to 200 acres.

Another significant event which took place during the material period was the secret marriage between the 1st appellant and the applicant, Kipah binti Othman. There was no evidence adduced by the prosecution that the 1st appellant had known Kipah before the occasion he took her in his car to the Land Office in Alor Gajah on March 2, 1974. Of course it was in the 1st appellant's own evidence when he was called upon to state his defence that he had known Kipah slightly before that date as the latter was working in a firm belonging to her uncle, the 2nd appellant, which business office was situated in the same building as the 1st appellant's office. From the marriage certificate (Exhibit P25) it is clearly shown that the 1st appellant married Kipah on October 5, 1974 which was about 3 days after the approval of the land application by the Melaka Ex Co. Three aspects of his marriage deserve mention. First, the marriage was conducted not in Melaka but in the Federal Territory of Kuala Lumpur and the 1st appellant had made all the necessary arrangements to enable this to be done. Secondly, the name which 1st appellant used for the purpose of the application for marriage was not

his official name but the name 'Dorani bin Sahak' which according to him was the name he was known before he became a politician. Finally, the 1st appellant probably to maintain the secrecy of the marriage, authenticated his own marriage form himself and when asked by the Alor Gajah *kathi* about the propriety of it, stated that his appointment as Justice of the Peace would in any case empower him to do so. All these are in our opinion a useful indicator of the type of person the 1st appellant is. The learned judge said in his judgment the 1st appellant 'risked the charge of forgery' by authenticating the marriage form himself if by doing it he could achieve his object.

There was also evidence that sometime in December 1974 the 1st appellant contacted one Mr George Taye (PW28) and instructed the latter to prepare the Memorandum and Articles of Association of the proposed Syarikat Samasetia Sdn. Bhd. This Memorandum was presented subsequently to the Registrar of Business on February 4, 1975.

Finally, one piece of evidence of crucial importance that none of the defence witnesses could deny would seem to be the fact that the 1st appellant caused the payment for the premium of the land approved to Kipah binti Othman to be made by his personal cheque amounting to $3,631 and that this payment was made on November 18, 1974 which was almost two weeks before the official letter calling for the payment of the said premium was made by the Collector in his letter dated November 30, 1974 (Exhibit P6E). Again we are compelled to say that no ordinary applicant for land can be so promptly informed by the Collector. The defence starting with the evidence of PW27 attempted to establish that the actual payment was made by PW27 with money given to her by the 2nd appellant who had obtained it from PW24 in response to an earlier letter of demand for payment. We think with respect that is too fanciful a theory, and should be ignored as a possibility: as a conjecture we think it not permissible. The learned judge, after a careful assessment of the evidence as disclosed in his reasons for judgment did not find favour with the defence version. The decision seems to us so obviously correct and consistent with commonsense that it is difficult to see how the contrary contention could have succeeded.

A number of grounds were raised on behalf of the 1st appellant. We feel that only two points raised need to be dealt with in some detail. Firstly, it was alleged that the amended charge was bad for duplicity. The fallacy of this argument is exposed when one examines the amended charge itself. It reads as follows:

> That you on 2nd October, 1974, in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka being a member of the Administration, to wit a member of the Executive Council, Melaka, committed corrupt practice in that you while being such a member used your office for your pecuniary advantage, namely participated in the deliberation for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, prepared by one Mohd Noor bin Baba and submitted in the name of one Kipah binti Othman on 2nd March, 1974 and in respect of such land in which you were engaged in business you did take part in a decision likely to affect your pecuniary interest

> therein, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970.

It was argued that the charge combines three known offences by importing the provisions of Article 7(10) of the Malacca State Constitution. The charge, it was argued, therefore violated section 163 of the Criminal Procedure Code, and was therefore bad for duplicity.

The expression 'corrupt practice' is defined in section 2(2) of the Emergency (Essential Powers) Ordinance No 22 of 1970 as follows:

> 'Corrupt practice' means any act done by any Member or officer referred to in sub-section (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage; and without prejudice to the foregoing, in relation to a Member of a State Legislative Assembly includes any act which is contrary to the provision of sub-section (8) of section 2 of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution of a State.

The first question to answer on the definition is whether it is intended to be exhaustive. After carefully examining the definition we are of the opinion that the question should be answered in the negative, that is the definition of 'corrupt practice' in the Ordinance is not exhaustive but extensive. In properly considering the definition of words 'without prejudice to the foregoing' appearing before the second limb of the definition are important. These words indicate the general intendment of the first limb of the definition. In fact the extensive character of the definition is further enhanced by the use of the word 'includes' immediately after the words 'in relation to a Member of a State Legislative Assembly' appearing in the second limb of the definition. The word 'includes' is normally used to enlarge the ordinary meaning of a word or phrase beyond its accepted meaning as opposed to the use of the word 'means' which is used if the definition is intended to be exhaustive: see *Caldow Props* v *Low Ltd.*[15]. It need not be emphasised that the offence section under the Emergency (Essential Powers) Ordinance No 22 of 1970 is section 2(1) of the Ordinance and the section 2(2) merely carries the definition of the expression 'corrupt practice'. One trend in judicial opinion that is discernible in the cases cited is that the courts are more ready to impugn a charge as bad for duplicity where it contains more than one offence in the alternative. The case of *Yap Liow Swee* v *Public Prosecutor*[16] referred to by counsel on behalf of the 1st appellant is clearly distinguishable in that there were in that case clearly two offences disclosed in the charge as the charge alleged 'recklessly or negligently'. The indictment in *Reg* v *Clow*[17] which arose out of a charge alleging that the appellant had caused the death of a person by driving a motor car at a speed and in a manner dangerous to the public was held not to be bad for duplicity as even if the elements of speed and manner of driving constituted separate offences it was permissible to charge them conjunctively if the matter related to a single incident. In *Vernon* v *Paddon*[18] the issue that arose for determination was whether a

charge of using threatening and insulting words and behaviour whereby a breach of the peace was likely to be occasioned, contrary to section 5 of the Public Order Act, 1936, was bad for duplicity and it was held that the statutory provision in question created one offence, the essential feature of which was conduct of any sort which was intended to provoke a breach of the peace or whereby such a breach was likely to be occasioned and that in any event even if the section created two offences, it was open to the prosecution to charge them conjunctively since they arose out of a single incident.

In *R* v *George Thomas Johnson*[19] the appellant was convicted under the Prevention of Crimes Act, 1871, section 7, with being '.... found in certain public places, namely, Elm Tree Road and Circus Road... waiting for an opportunity to commit an offence...' the two roads named adjoined one another. On appeal it was contended *inter alia* that the indictment was bad for duplicity in that it was alleged in one count the appellant had committed two offences, one in Elm Tree Road and the other in Circus Road. It was held by the Court of Criminal Appeal that the form of the indictment did not in the circumstances prejudice or cause embarrassment to the defence and therefore the indictment was not bad for duplicity.

In our view it is clear in the amended charge that there is only one offence of committing corrupt practice and that the rest of the charge merely deals with particularizations. It was the unfortunate use of language in the amended charge by the learned judge which brought about the misconception that there was duplicity in the charge. The charge carries only the offence of corrupt practice alleged against the 1st appellant, i.e., while being a Member of the administration he used his office for his pecuniary or other advantage. That was the charge known to the 1st appellant. It cannot be said that he did not understand it. There is strong reason for thinking, and no reason for denying, that he was not in any way prejudiced. We are satisfied that the particularizations in the charge could not have embarrassed or prejudiced the 1st appellant, although with respect, his use of familiar expressions in relation to that topic might have led to the opposite conclusion. We are also satisfied that the technical irregularity did not cause a miscarriage of justice: see also *Jack Dennis McVitie.*[20] The objection on the ground of duplicity must therefore fail.

The other main ground raised on behalf of the 1st appellant is that the judge had misread the evidence of PW23 and PW24 and therefore came to the wrong conclusion that there was already a 'business' existing in respect of the land concerned when the Ex Co met on October 2, 1974 and that the 1st appellant was already engaged in that business. The finding of the learned judge on this point appears at page 321 where he said:

> At the conclusion of the prosecution case I was satisfied beyond reasonable doubt that a case of corrupt practice had been made out by the prosecution against the 1st accused not only in respect of using his public position for his pecuniary advantage but also for actual profit contrary to Article 7(10) of the State Constitution.

Here we find that the learned judge was some what over-zealous in requiring himself to be satisfied beyond reasonable doubt of more than what was sufficient for the purpose of proving an offence under section 2(1) of the Ordinance. At law to convict the 1st appellant he need only be satisfied that the 1st appellant used his public position for his pecuniary or other advantage and the further requirement to be satisfied on the actual profit contrary to Article 7(10) of the State Constitution would in our view be superfluous. The question now is, was there a 'business' offering to the 1st appellant a pecuniary advantage on the date of the Ex Co meeting on October 2,1974? One of the particular persistent problems which we experienced about statutory interpretation concerns definitions, and the courts frequently face questions involving a word or phrase which is either not defined at all or only defined inadequately or, perhaps, over defined. In the present case the word 'business' is without precise definition. Be that as it may, the lack of definition may not always matter much, and in some respects insight might be thought to resemble the proverbial elephant: easy enough to recognise it when seen but difficult to describe it.

We think we have first to examine the object of Emergency (Essential Powers) Ordinance No 22 of 1970. In *Public Prosecutor* v *Datuk Tan Cheng Swee & Ors*[21] this court had occasion to consider the object of Ordinance No 22 of 1970 and said:

> We consider that our view accords with sound commonsense. The Emergency (Essential Powers) Ordinance No 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act.

It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage. The use in the Ordinance of the words 'pecuniary or other advantage' is significant. The word 'other' appearing in the context of the definition is not caught by the *ejusdem generis* rule. We are fortified in this view by the statement of Lord Diplock to this very effect in *Quazi* v *Quazi*[22] and it might perhaps be useful to set out this part of his judgment in extenso:

> It was not the husband's case that the divorce by talaq was obtained in Pakistan by proceedings that were 'judicial'; it is the reference in the section to 'other proceedings' on which he relied. The argument for the wife is that these words, which on the face of them would include any proceedings that were not judicial, are to be read as limited to proceedings that are quasi judicial, by application of the *ejusdem generis* rule. This involves reading 'other' as if it meant 'similar' and, as it seems to me, is based on a misunderstanding of that well known rule of construction that is regrettably common. As the Latin words of the label attached to it suggest the rule applies to cut down the generality of the expression 'other' only where it is preceded by a list of two or more expressions having more specifie meanings and sharing some common character-

> istics from which it is possible to recognise them as being species belonging to a single genus and to identify what the essential characteristics of that genus are. The presumption then is that the draftman's mind was directed only to that genus and that he did not, by his addition of the word 'other' to the list, intend to stray beyond its boundaries but merely to bring within the ambit of the enacting words those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity. Where, however, as in section 2 of the Recognition Act, the word 'other' as descriptive of proceedings is preceded by one expression only that has a more specific meaning, viz 'judicial', there is no room for the application of any *ejusdem generis rule;* for unless the draftsman has indicated at the very least two different species to which the enacting words apply there is no material on which to base an inference that there was some particular genus of proceedings to which alone his mind was directed when he used the word 'other', which on the face of it, would embrace all proceedings that were not judicial, irrespective of how much or little they resemble judicial proceedings.

Therefore the word 'advantage' is also to be construed widely. To achieve the object of the Ordinance we are firmly of the view that the court is perfectly justified in construing the word 'business' in the widest possible sense. Thus for a business to exist for the purpose of the offence it is not necessary that contracts must have been entered into or transactions must have been carried out or that the business has been registered or that the company has been incorporated. In *Rael-Brook, Ltd* v *Minister of Housing and Local Government & Anor*[23] the judgment dealt with the construction of the word 'business' and favourably cited *Rolls* v *Miller.*[24] Widgery J (as he then was) said:

> In *Rolls* v *Miller* a charitable institution called a 'Home for Working Girls' was held to carry on a business in breach of a covenant in a lease against use for business purposes and Cotton, LJ, said:
> 'There may be a great many businesses, which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit... is certainly material in considering whether what was being done is, or is not, a business yet, in my opinion, it is not essential that there should be payment in order to constitute a business.'

Lindley LJ added:

> When we look into the dictionaries as to the meaning of the word 'business'.I do not think they throw much light upon it. The word means almost anything which is an occupation and not a pleasure; anything which is an occupation or duty which requires attention is a business.

In the *Oxford Companion to Law* the word 'business' is defined as follows:

> Business. An indefinite term covering most kinds of commercial relations, particulary on a substantial scale. It is generally considered wider than trade, which is confined to shopkeeping and the exercise of such skilled trades as joinery and plumbing. Business may be distinct from or may in certain contexts include the practice of certain professions.

A last minute attempt was made by counsel for the 1st appellant to convince us that by construing the word 'business' as including a 'a business proposition ready for implementation' the learned judge committed a grave error and did violence to the express language of Article 7(10) of the Malacca State Constitution. Counsel cited an array of authorities including *R* v *Wimbledon Justices, ex parte Derwent*[25] where Lord Goddard said:

> Although in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there, and, if the statute has created a specific offence, it is not for the court to find other offences which do not appear in the statute:

Also cited was *Crawford* v *Spooner*[26] for the simple proposition that:

> We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there.

In other words, it was the contention of counsel that the learned judge in this case took upon himself to fill the gaps in the statute which it was not his function to do: see *Magor and St Mellons R D C* v *Newport Corpn*[27] and the elementary principle of construction must at all times be adhered to, that is that the language of a statute must never be extended beyond its natural and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case. This rule is to be observed strictly in all penal statutes: see *The Gauntlet.*[28]

We have two observations to make on the final submission by counsel. Firstly, the words 'a business proposition ready for implementation' appear at page 320 of the record when the learned judge was describing the facts as adduced in the evidence of PW23 and PW24 which had earlier been mentioned in this judgment. A 'business proposition' is most inapt to describe all the events that took place which culminated in the formation of the company Samasetia Sdn Bhd. The view upon which the learned judge proceeded is succinctly expressed in his judgment which appears at page 321 of the record:

> I am abundantly satisfied from the above that by his undertaking to obtain the land in return for the issue of shares and the promise to form a company for the hatchery project he had begun an engagement in a 'business'.

Our second observation is directed to the clear object of the Ordinance which is to cast the net wide so that corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage shall be answerable in a court of law. The 1st appellant cannot now be heard to say that because the statute is penal in character the word 'business' should be strictly construed for that, in our opinion, will defeat the very object of the Ordinance. We are not blazing a trail

but merely following a well recognised route. We would echo well known words:

> ...and whereas, of course, a consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means that the court would not be acute to cut down words otherwise wide merely because this was a penal statute

— *per* Lord Parker CJ in *Rands* v *Oldroyd.*[29]

Although no attempt was made to define the word 'business', it seems clear that the courts will take a realistic view of its meaning in regard to which Ordinance No 22 of 1970 will operate. We therefore agree with the construction of the word 'business' given by the learned judge. It is to be noted that once the right principle has been decided the appellate court has said over and over again that the case becomes a matter of fact for him to make whether a business existed in respect of which the 1st appellant was interested at the time when he participated in the Ex Co meeting on October 2, 1974. There is ample evidence in the case to sustain the finding of the learned judge if he believed the evidence of PW23 and PW24 who gave them, as apparently he did, having seen and heard them. Respect for such finding, particularly where the issues depend so much on credibility and an estimate of rival personalities, appears to us to be a central pillar of the appellate process.

The 1st appellant's improprieties centred on the fact that he took part in a decision of Ex Co which was for the benefit of a prawn hatchery business known as Samasetia Sdn. Bhd. which was formed later. Because of his close connection with that business the learned judge found that he took part in the Ex Co decision over a matter in which he stood to gain financially. The learned judge having formed this view of the evidence, which he heard — a view which was open to him — it necessarily followed that he should find the charge against the 1st appellant proved. Our own subsequent reading of the transcript of the evidence has but confirmed us in this view.

What the court found culpable about the 1st appellant's conduct is that his motive in pressing the interests of Samasetia Sdn Bhd in the Ex Co was to further his own unavowed business interests, that is to say, he was raising a matter in Ex Co for his pecuniary advantage. That conduct is derogatory to the dignity of the Ex Co and inconsistent with the standards expected from its Members.

We are reluctant to believe the learned judge misread their evidence and came to the wrong conclusion that there was a 'business' existing on the date the Ex Co decision was made. We therefore uphold the conviction of the 1st appellant.

The evidence against the 2nd appellant however unlike that against the 1st appellant is purely circumstantial. Also unlike the circumstantial evidence available against the 1st appellant, the evidence adduced against the 2nd appellant left much to be desired. In fact all that has been shown to prove the offence of abetment against the 2nd appellant were the evidence of PW23 and PW24 referred to earlier. An outstanding feature of the circumstantial evidence against him was that the

important events proved are capable of being explained in isolation from the rest of the prosecution evidence. The event which occurred in Singapore sometime in January 1974 merely indicated that there was a business discussion between PW23, PW24 and the 2nd appellant and that it was the 2nd appellant who made the proposal for joint venture in the business between the Malaysians and Singaporeans. The second important evidence seemed to be relied on by the learned judge was the preparation of a draft letter typed and signed by Kipah binti Othman to apply for the land. This act of drafting the letter can be easily explained in a number of ways.

It is of the essence of the offence of abetment that the abettor should substantially assist the principal offender towards the commission of the principal offence. In fact it is an essential ingredient in a prosecution for abetment that there must be some evidence to show that the abettor actively suggested or stimulated the principal offender to the act by any means or language, direct or indirect, in the form of 'expressed solicitation' or of 'hints, insinuations or encouragement'. There must also be common purpose or intent to aid or encourage the person who commits the principal crime and either an actual aiding or encouraging or a readiness to aid or encouraging will be required. The word 'instigates' in section 107 of the Penal Code does not merely mean placing of temptation to do a forbidden thing but actively stimulating a person to do it: see *Soonavala on Bribery and Corruption* page 312. What was the evidence against the 2nd appellant? The answer is the evidence of PW23 and PW24 as referred to earlier.Looking at the evidence as a whole it would seem to us that the 1st appellant was the sort of person to be quite capable of looking after himself in his own interest and we do not think for a moment that the 1st appellant is the kind of person who needed any 'hints' or 'encouragement' to further his own interest by participating in the deliberation of the Ex Co meeting and advancing the grounds of bumiputra economic progress in support of the application of his bride-to-be. The 2nd appellant in our view may be an enterprising businessman with a lot of business ideas but we cannot punish a man because of his ideas. When all these matters are considered together, we are far from saying that there was sufficient material on which the learned judge could properly infer, as he did infer, that the 2nd appellant abetted the commission of the principal offence. In the circumstances we do not think the conviction against the 2nd appellant should be supported.

We therefore dismiss the appeal by the 1st appellant and allow the appeal by the 2nd appellant. The conviction and sentence of the 1st appellant are hereby confirmed. The conviction and sentence of the 2nd appellant are hereby set aside.

Order accordingly.

Mohd Faidz Mohd Darus (Senior Federal Counsel) for the Public Prosecutor.
Edgar Joseph Jr for the 1st Accused.
Annuar Ismail & Amin Ismail for the 2nd Accused.

Note

The tangled mass of words used in the charge and the definition of "corrupt practice" were skillfully sorted out in this case. In the usual case where the charge is the centre of objection, the complaint is that it lacks particulars and is therefore defective. In this case, the reverse is true; there were many particulars and the use of words such as "without prejudice to the foregoing" and "includes" further complicated matters.

(c) Omission to frame a charge

Jaginder Singh & Ors
v
Attorney-General

[1983] 1 MLJ 71 Federal Court, Kuala lumpur
Coram: Raja Azlan Shah Ag LP, Abdul Hamid FJ and Abdoolcader J

Cases referred to:
(1) *Izuora* v *R* [1953] AC 327, 334-5.
(2) *Shamdasani* v *King Emperor* [1945] AC 264, 270.
(3) *R* v *Weisz and Another* [1951] 2 KB 611.
(4) *Linwood* v Andrews and Moore (1888) 58 LT 612.
(5) *Geoffrey Silver & Drake* v *Thomas Anthony Baines* [1971] 1 All ER 473.
(6) *Coward* v *Stapleton* (1953) 90 CLR 573.
(7) *Karam Singh* v *PP* [1975] 1 MLJ 229.
(8) *Re Kumaraendran* [1975] 2 MLJ 45.
(9) *In re Pollard* (1868) LR 2 PC. 106
(10) *Maharaj* v *Attorney-General for Trinidad and Tobago* [1977] 1 All ER 411, 416.

RAJA AZLAN SHAH Ag LP (delivering the judgment of the Court): This is an appeal by three advocates and solicitors against summary conviction and sentence for contempt of court.

The circumstances resulting in the appellants' conviction for contempt may be briefly stated. The appellants were defendants in a civil case involving a land matter and in a reserved judgment delivered some eight months after the conclusion of the trial which lasted 28 days spread over a period of some 3 months, the learned judge gave judgment in favour of the plaintiff but at the end of it he went further, and without specifying any charge or charges and without giving them any opportunity to defend themselves, committed each of them to imprisonment for a term of 2 years for contempt of court on the ground that they had conspired to deceive the court by representing appellant No 3 as the owner of the land, the subject matter of the case when in reality he was not. Appellant No 2 was not present in court when the order was made against him.

In substance there are only two grounds of appeal. We will now deal with the first ground. It is said that the learned judge was not justified in concluding that on the facts the appellants were guilty of contempt.

The learned judge reminded himself that the summary jurisdiction of the High Court of its own motion to punish for contempt was to be exercised with caution, and only when it was urgent and imperative to act immediately, but that it should not shrink from exercising that jurisdiction where, being satisfied beyond reasonable doubt of the contempt, it became in the particular circumstances his duty to do so. We fully agree with his observations and expressions of caution and self-direction. In our opinion, it correctly expresses the relevant law. As a finding of contempt of court is a conviction of an offence: see *Izuora* v *R*[1]; *Shamdasani* v *King Emperor*[2], the jurisdiction must be exercised sparingly, and where it is absolutely necessary.

The learned judge exercised his summary jurisdiction to punish for contempt on the ground that the appellants had deceived the court and in so doing had broken the trust and confidence which the court had placed on them as lawyers. That is evidently his view as can be gathered from the reasons appearing in the judgment. It will be convenient to set out the relevant passage:

> The defendants' misdeeds are acts of contempt of the worst kind that the court can possibly think of, because in seeking to achieve their evil end and insatiable greed they made the court the subject of their deception and mischief. The extreme culpability of their ill-doing lay in the fact that the trust and confidence which the court places on them as lawyers had been used only to defile that trust by acting to deceive the court thereby becoming the subject of their mockery ridicule and contempt. The court can dispense with justice only if counsel will not mislead, otherwise will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of lawyers if the court itself, in which he seeks redress is no longer safe to be in the same hands. To me the defendant's act is even more despicable because it is an expressed advocates & solicitors rule that counsel shall not practise deception on the court (Rule 17). They have by falsely representing that the 3rd defendant was the owner of the land acted in utter defiance and disregard of the court and the rules of their own profession.

The learned judge relied heavily on two English cases: *Rex* v *Weisz & Anor*[3] and *Linwood* v *Andrews and Moore*[4]. In the former case, a solicitor was held guilty of contempt of court when he instituted proceedings by writ containing a fictitious endorsement for the purpose of concealing from the court that the action was not maintainable in law. In the latter case, a barrister was found guilty of contempt of court for being a party to a fraud and conducting his case so as intentionally to deceive the court. He had conspired with others to induce his clients to make affidavits which he knew to be false and were used to delude the courts. Those cases, in our opinion, bring into focus the well-established rule that advocates and solicitors in their professional capacity may, by the manner in which they conduct their cases, find themselves in

contempt of court. They are officers of the court and are answerable to the court for contumelious conduct in the discharge of their duties as such. The court has summary jurisdiction over them when acting in their professional capacity: see *Geoffrey Silver & Drake* v *Thomas Anthony Baines*[5].

In the present case, the appellants were defendants in a civil action and sued in their personal capacity but the learned judge found them in contempt of court as advocates and solicitors and in their professional capacity. The scathing reference by the learned judge was directed to the evidence they gave as parties and witnesses in the action and accordingly the two cases he purported to apply had no relevance in the circumstances.

The facts of the present case themselves demonstrate the special danger in blurring the distinction between perjury and contempt. A case of contempt by false testimony is relatively rare. In general, such false testimony will result in the party or witness being liable to prosecution for perjury. Contempt of court would lie not only in the false testimony but in the obstruction or frustration of the administration of justice. What is required is 'an evinced intention' to interfere with the course of justice. That, in our opinion, is what contempt of court is all about. The approach to be taken in such a case as the present was considered by the High Court of Australia in *Coward* v *Stapleton*[6]. In that case the court was concerned, not with the standard of proof required in such a case, but with the question whether contempt by prevarication could be established, that is, the conduct of a witness who deliberately evades questions by falsely swearing that he has no recollection. The appellant in that case was a bankrupt who in his public examination gave answers of which a substantial number represented, in the opinion of the Federal Court of Bankruptcy, "a shuffling and a fantastic attempt to conceal the truth" about his financial dealings. The court thereupon ordered that the bankrupt be committed for contempt of court upon the basis that he had refused to answer questions. On appeal the High Court held that "the order must mean that the learned judge considered that some of the purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they related". It was in that context that the court went to make the following observations (pages 578-9):

> It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. A disbelief on the part of the court in the truth of the purported answer is not, without more, a sufficient foundation for such a conviction. The words used, considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can be properly called an answer to the question. There must be a manifestation in some form of an intention on the part of the witness not to give a real answer. It is essential not to lose sight of the sharp distinction that exists between a false answer and no answer at all. Of course a purported answer may be so palpably false as to indicate that the witness is merely fobbing off the question. His attitude in the box may show that he is simply trifling with the court and is making no serious

> attempt to give an answer that it is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, *but it cannot be too clearly recognized that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt.* Such a committal can be justified only by a specific finding of an evinced intention to leave a question or questions unanswered, or by a finding of contempt in some other defined respect. (emphasis added).

In the event, the appeal was upheld on the ground that the bankrupt had not been given a reasonable opportunity of being heard in his own defence.

What does emerge as a general proposition from *Coward* v *Stapleton (supra)* is that 'there must be a manifestation in some form of an intention on the part of the witness not to give a real answer', a finding that takes the case across the borderline that separates perjury from contempt. False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony, without more, does not.

It follows that the learned judge had wrongly applied the principle enunciated in *Coward* v *Stapleton*, *supra*, when he held that the appellants were guilty of contempt. His conclusion, in our opinion, is not therefore justified.

That brings us to the second ground of appeal, that is, the learned judge erred in law in committing the appellants for contempt of court without first informing them of the specific offence or offences with which they were being charged and without giving them an opportunity of defending themselves.

We have said many a time that the summary contempt procedure not only should be employed most sparingly but should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress or about to commence: see *Karam Singh* v *PP*[7], *Re Kumaraendran*[8]. Although in the former case the counsel who was appearing on behalf of a defendant in a criminal case under section 170 of the Penal Code was involved in a heated argument with the magistrate and in the latter case the counsel who was defending a client charged with an offence under the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958 had conducted himself in an insolent and contemptous manner, it was held that the summary contempt procedure should not have been invoked for it was not urgent or imperative. Counsel must of course not shrink from representing his client's interests fearlessly and with determination. That does not however mean that he is permitted to be offensive to the Bench or to cast aside the common standards of politeness which have always been the aim and pride of the Bar in this country. It is to be hoped that incidents like the ones appearing in those cases will never recur.

In our opinion, where the case has ended there is no imperative need for instant punishment as is shown in this case by the period which had elapsed between the conclusion of the trial and the delivery of judg-

ment, a period of some 18 months. The disturbing aspect, amongst others, in this case is that no specific charges against the appellants were distinctly stated and what is worse they were not given an opportunity to answer and defend themselves. It is unthinkable that they should be sent to prison unless specific charges were framed and they have had an opportunity to answer them. This is because the summary contempt procedure more often involves a denial of many of the principles of natural justice, requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.

This salutary rule has been clearly stated as long ago as 1868 in *In re Pollard*[9], where the Judicial Committee of the Privy Council was at pains to point out that in its judgment "no person should be punished for contempt of court, which is a criminal offence, unless the specific charge against him be distinctly stated, and an opportunity of answering it given to him". The care with which the power to punish summarily for contempt of court is to be exercised has been repeatedly stressed by the courts and this principle was reiterated in *Maharaj* v *Attorney-General for Trinidad and Tobago*[10].

What also vitiated the committal for contempt of court in this case was the learned judge's failure to make plain to the appellants the specific nature of the charges and the opportunity to give them a fair hearing. We can only say in conclusion that he had overzealously exercised the power to be used only where absolutely necessary and where it was beyond reasonable doubt that a contempt of court had been committed.

We therefore allowed the appeal and set aside the order of contempt of court against the appellants.

Appeal allowed.

Lim Kean Chye for the 1st Appellant.
RR Chelliah for the 2nd Appellant.
RTS Khoo for the 3rd Appellant.

Note

This is yet another case on contempt of court trial magistrates and other judicial officers should note.

Section 421 of the CPC deems it a mere irregularity if there is no charge framed. Thus, if there is no failure of justice, whatever finding or sentence pronounced or passed shall not be invalid. In this case, the omission to frame the charge coupled with the deprivation of a right to hearing led to a failure of justice: see *Re Kumaraendran* [1975] 2 MLJ 45.

APPEALS AND REVISION
(a) Signatory to notice and petition of appeal

Jayasankaran
v
Public Prosecutor

[1983] 1 MLJ 379 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah LP, Salleh Abas FJ and Abdoolcader J

Cases referred to:
(1) *Pitting bin Haji Mohd Ali* v *Public Prosecutor* [1979] 2 MLJ 136.
(2) *Toh Yew Sing & Ors* v *Public Prosecutor* [1980] 2 MLJ 215.

RAJA AZLAN SHAH LP (delivering the judgment of the Court): The question for reference under section 66(1) of the Courts of Judicature Act 1964 is:

> Whether a petition of appeal signed by only the solicitor for the appellant acting on the authority of the appellant meets the requirements of section 307(iv) of the Criminal Procedure Code.

While the reference is of course of great importance to the appellant, and no doubt to others similarly placed, the question whether the appellant was in breach of section 307(iv) of the Criminal Procedure Code by not signing himself the petition of appeal raises a question of law of public importance, and it was for that reason that leave was given to refer the question to us under section 66(1) of the Courts of Judicature Act 1964 so that that question might be fully argued and determined, especially in the light of a number of recent decisions of the High Court on this issue the correctness of which have been challenged.

The facts can be shortly stated. The appellant was charged and convicted of an offence under section 465 of the Penal Code and was bound over for $1^1/_2$ years under section 294 of the Criminal Procedure Code ('The Code'). He appealed against conviction. Both he and his solicitor signed the notice of appeal but only the solicitor signed the petition of appeal. The learned judge held, on a preliminary point, that the appellant himself must sign the petition of appeal. He struck out the appeal on the ground of non-compliance with subsection (iv) of section 307 of the Code.

The learned judge seems to think that the words 'any person who is dissatisfied with any judgment' in subsection (i) of section 307 of the Code when read in conjunction with the words 'the appellant' in subsection (iv) of the section can only refer to the accused person. He therefore concluded that it is the accused person and not the solicitor who must sign the petition of appeal. Subsection (iv) of section 307 of the Code reads as follows:

> Within ten days after the copy of the grounds of decision has been served as in the last preceding subsection provided, the appellant shall lodge

with the clerk of the Magistrate's Court at which the trial was held a petition of appeal in triplicate addressed to the High Court.

The learned judge relied on Practice Note No 2 of 1960 which was issued some two decades previously by the Chief Registrar on the direction of the Chief Justice to the effect that a notice of appeal and petition of appeal must be signed by the appellant himself, and where counsel is retained, both the appellant and counsel must sign the documents. He also relied on the decisions in *Pitting bin Hj Mohd Ali* v *Public Prosecutor.*[1] and *Toh Yew Sing & Ors* v *Public Prosecutor.*[2] In the former case BTH Lee J held that counsel or an advocate cannot sign a petition of appeal. So to read the provision of subsection (iv) of section 307 of the Code is to read into it a great deal that is not there. In the latter case Tan Chiaw Thong J held that a petition of appeal must be signed by the appellant. A petition of appeal signed by anyone else including an advocate on behalf of the appellant is not in compliance with the requirements of subsection (iv) of section 307 of the Code.

We are of the view that Practice Note No 2 of 1960 was intended to be no more than a direction for administrative purposes. It cannot be exalted into a rule of law reflecting the true effect of the requirements of section 307 of the Code, and if it is wrong then the position should be rectified. We think it is wrong.

We are also of the view that the two cases relied upon by the learned judge were erroneous in as much as they held that it was mandatory for the appellant to sign the petition of appeal, and they should not be followed.

An appeal is instituted within the meaning of subsection (i) of section 307 of the Code when the appellant takes the initiative by lodging the notice of appeal in triplicate with the clerk of the Magistrate's Court which passed the judgment, sentence or order within the time prescribed. That, in our opinion, is a mandatory provision.

To lodge documents means to file or leave them with the appropriate official.

The notice of appeal shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate (subsection (ii)). In most cases the appellant is represented by an advocate and invariably the address of the firm of the advocate is contained in the notice of appeal. Where the appellant is not represented by an advocate, his address must be shown in the notice of appeal for the purpose of service. Next, a signed copy of the grounds of decision is served upon the appellant if he is not represented by an advocate, at his address mentioned in the notice of appeal by leaving the said copy at the said address, or by posting it by registered post addressed to him at the said address.

If he is represented by an advocate, the signed copy is served upon him by leaving it or posting it by registered post at his address mentioned in the notice of appeal (subsection (iii))

The petition of appeal is then prepared as required by subsection (iv) of section 307 of the Code, which requires 'the appellant' to lodge with

the clerk of the Magistrate's Court the petition of appeal. In those cases above-mentioned the learned judges held that the appellant himself must sign the petition of appeal.

In coming to their decisions the learned judges were right in construing the words 'the appellant' in the setting of the subsection, that is that the same word in the same section of a statute must be given the same meaning. But in our opinion this principle of construction is only one element in deciding the true intention of the section and it must not be carried too far lest we fail to see the wood for the trees. If the context excludes the application of this principle then it would be futile to apply it. Words take their colour from their context. Section 307(i) of the Code which relates to the procedure for appeal provides for a dissatisfied party to prefer an appeal to the High Court by lodging a notice of appeal and subsection (iv) stipulates the time for the appellant to lodge with the subordinate court a petition of appeal. Neither provision signifies the signatory to the notice or petition and does not provide for the appellant to do so 'personally' or 'in person' as some legislative enactments specifically prescribe. This therefore attracts the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself.). We are reinforced in our conclusion by the provisions of section 307 (vii) of the Code which enact that where the appellant is in prison he shall be deemed to have complied with the requirements of the section if he gives to the officer in charge of the prison either orally or in writing notice of appeal and the particulars required to be included in the petition of appeal within the prescribed time and on payment of the prescribed fee whereupon such officer shall forthwith forward the notice or petition or the purport thereof together with the appeal fee to the subordinate court. It is abundantly clear that in such a case the prison officer would be acting on behalf of the appellant in complying with the necessary statutory requirements for an appeal without the necessity for the appellant to sign the documents in question, and in the circumstances there is all the more reason to negate any justification for a constricted view in relation to an appellant fortunate enough not to be so confined.

We answer the question accordingly in the affirmative. The appeal is reinstated for hearing.

Order accordingly.

RR Chelliah for the Appellant.
Mokhtar bin Abdullah (Deputy Public Prosecutor) for the Respondent.

Notes

This case overruled *Pitting bin Hj Mohd Ali* v *PP* [1979] 2 MLJ 136 and *Toh Yew Sing & Ors* v *PP* [1980] 2 MLJ 215.

The equivalent provisions in the Courts of Judicature Act 1964 do expressly allow either the appellant or his advocate to sign the notice as well as the petition of appeal — section 51(2) and section 53(2). This may further enhance the decision in this case, after all, these sections in

the Courts of Judicature Act relate to appeals from the High Court to the Supreme Court whereas section 307 of the CPC relate to appeals from much lower courts.

The general attitude of courts with regard to signatures is one of latitude and accommodation, unless of course specifically dictated otherwise by law. This attitude may be seen, although in another context, in the case of *Krishnan & Anor* v *PP* [1981] 2 MLJ 121, 122 (FC).

TRIALS

(a) Examination of witness

Gan Kok Liong
v
Public Prosecutor

[1969] 1 MLJ 30 High Court, Raub

Cases referred to:-
(1) *R* v *Gilson & Cohen* (1944), 29 Cr App R 174 p 181.
(2) *R* v *Cain* (1936), Cr App R 204 at p 205.
(3) *R* v *Bateman (1946), 31 Cr App R 106 at p 112.*
(4) See *Clewer* (1953), 37 Cr App R 37.

RAJA AZLAN SHAH J: The appellant was convicted by the president, Sessions Court, Raub, on a charge under section 15 (2)(f) and punishable under section 15 (4) of the Prevention of Crimes Ordinance, 1959, and was sentenced to two years' imprisonment.

The facts do not appear to the court to have presented any features of difficulty. On 29th January 1962 the Menteri Dalam Negeri made an order placing the appellant under restricted residence within the limits of the Mukim of Batang Melaka, Jasin District, Melaka, for a period of two years and subjected him to certain specified conditions, one of which was to remain indoors in the house or place in which he was to reside between the hours of 8 pm and 6 am. This order lapsed two years later, and on 26th November 1965 the Menteri Dalam Negeri made a fresh order placing the appellant under restricted residence for a period of 3 years and subjected him to certain specified conditions, namely, that he was required to reside within the limits of the Mukim of Kuala Sungei Bahru in the district of Alor Gajah, Melaka, and to remain indoors in the house or place in which he was to reside within the hours of 10 pm and 6 am. On 13th May 1966, that is, during the currency of that order, the Menteri Dalam Negeri varied the condition with regard to residence, namely, that he was required to reside in the Mukim of Raub in the administrative district of Raub, Pahang.

The appellant was duly removed to Raub and he informed the OCPD Raub that he intented to stay in a rented room on the first floor of house No 8, Jalan Lipis, Sempalit, and he has resided there ever since. The police regularly checked on him at his residence to see whether he was observing the conditions enforced against him. That was done by the police who went on rounds, calling out his name, whereupon he appeared and answered to their call. On 16th February 1968 at about 1.00 am. police constable Jaafar bin Hassan (PW7), detective police constable John Matthew Ng (PW8) and detective corporal Din bin Ishak went on their rounds. They eventually came to the appellant's residence and as usual called out to him by name. They received no reply. They then went to check his room but found that he was not in. They checked the bathroom but he was not there either. PW7 remained at the front door of the appellant's house while the other two police officers went to the police post and reported the matter to Inspector Tajuddin who instructed them to lay an ambush. In the meantime, PW7 saw a motor-cycle coming out of the New Village. When it came near him he identified the rider as Chew Man Chye (DW3) and the pillion rider as the appellant. The police constable asked them to stop but they ignored him and went straight to the rear of the building.The police constable gave chase and saw the appellant climbing the pipe line into his room. The police constable then rushed upstairs and found the appellant in the act of removing his shoes. He then arrested him.

The appellant denied that he went out after 10.30 pm on 15th February 1968. He called his room mate, Leong Soh Ha (DW2) as a witness who gave the same story as the appellant, but the learned president found that the story was too consistent to be true. The appellant also called Chew Man Chye as his third witness. He denied carrying the appellant on his motor-cycle that night. He testified that on 15th February 1968 he went to Mentakab on a motor-cycle with his friend Chew Seng Kwan (DW4) as the pillion rider. He said that they left Mentakab at about 8.30 pm and arrived at Raub at about 1.30 am, travelling at about 20 mph for that 70 odd miles. His evidence was not accepted. Althought it can be said that the learned president considered the evidence of each of the defence witnesses minutely he came to the general impression that their evidence was unreliable and concluded that the defence had 'failed to raise a reasonable doubt of the prosecution's case which warranted the court to give the benefit of such doubt to the accused and thereby acquit and discharge him.'

There are two grounds of appeal. First, it is said that the second order made by the Menteri Dalam Negri on 26th November 1965 is invalid, illegal, and of no effect as it was made after the expiry of the first order dated 29th January 1962. It is argued that the second order should have been made during the currency of the first order.

I am not here to question the Menteri Dalam Negri's order. For present purposes it is conclusive and not assailable. In any event that is not the complaint advanced by the appellant in this court. Section 15(1) of the Prevention of Crimes Ordinance enacts that:

> The Minister may by order direct that any registered person.... shall be subject to the supervision of the police for a period not exceeding five years, and may renew any such order for a further period or periods not exceeding five years at a time ...

In my view, the first order was made with certain conditions to the effect that the appellant was restricted to the Mukim of Batang Melaka, Jasin District. There was no renewal of that order for any period of time. That order expired. Ten months later the Minister made a second order with restrictions among which the appellant was required to reside within the limits of another area, the Mukim of Kuala Sungei Bahru in the District of Alor Gajah. During the currency of that order the Minister, as allowed under sub-section (3), varied the restriction to the effect that the appellant was required to reside within the limits of the Mukim of Raub. In my opinion the Minister was perfectly entitled to do that. Ground one therefore cannot be supported.

I now come to ground two where it is said that the learned president had descended into the arena, thus clouding his vision with the dust of the conflict. It is based on the premise that the learned president had subjected the appellant and his witnesses to severe cross-examination and thus disenabled the appellant from presenting a fair defence. It is on record that the learned president cross-examined the appellant and his two witnesses at some length after their re-examination. It is also on record that the learned president adjourned the court to Mentakab where he asked DW3 to indicate to him the rubber plantation, the shop where he had his meal, and the shop belonging to his friend's uncle. (This was the evidence adduced by him in his examination-in-chief). It is further stressed that had the learned president not pursued this course he would have found that the appellant had raised a reasonable doubt in the prosecution case.

I am of the view that the guiding line which any magistrate or president should have adopted in such circumstances is the observations which were made in *R* v *Gilson and Cohen*[1] at p 181 in which the Court of Criminal Appeal adopted the language of an earlier decision, *R* v *Cain*[2] at p 205, and which had been re-adopted and applied to the case of any witnesses whether called by the prosecution or by the defence: see *R* v *Bateman*[3] at p 112. The observations were in the following terms:

> There is no reason why the judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable in this case that, beginning in the way which I have described, the judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine Chatt with some severity. The court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner.

Although it is quite right that this criticism should have been made, it cannot be doubted that the result of the present case would have been otherwise if this course had not been taken by the learned president.

Looking at the case as a whole, it is not possible to impute that the trial in the form which it took was conducted in an irregular manner by reason of the frequency and nature of interruptions by the learned president which rendered it impossible for the defence to be fairly presented: see *Clewer*[4]. Neither can it be said that the learned president took the examination out of the hands of counsel. He interposed (indeed after all the cross-examinations and re-examinations by both counsel) in order to enable him to acquire indicative evidence. If the object of a trial is first to ascertain truth and then do justice — justice according to law — upon the basis of this truth, then the learned president is not only justified but required to elicit any facts he deems important wherever these interests of truth and justice would suffer if he fails to do that.

In these circumstances I see no reason to interfere with the conviction, certainly not on any ground submitted in argument before this court. The appeal is dismissed.

Appeal dismissed.

Tara Singh Sidhu for the Appellant.
Yusof Ahmad (Deputy Public Prosecutor) for the Respondent.

(b) Burden on prosecution

Public Prosecutor
v
Foo Jua Eng

[1966] 1 MLJ 197 High Court, Kuala Trengganu

Case referred to:-
(1) *Miller* v *Ministry of Pensions* [1947] All ER 372

RAJA AZLAN SHAH J: This is an appeal by the learned Deputy Public Prosecutor against the decision of the learned magistrate who, at the end of the prosecution case, acquitted and discharged the respondent without calling upon her defence. The respondent was charged with assisting in carrying on a public lottery, an offence punishable under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. The facts of the case are as follows.

On information received, PW1, a gazetted Senior Police Officer, raided a top-floor room of house No 19, Jalan Masjid, Kuala Trengganu, together with a police inspector. On approaching the said room of the said house, respondent was seen some three feet from the dressing table

on which exhibit P1 was lying. On seeing PW1 and the inspector, both of whom were in mufti, respondent tried to close the door, but it was eventually forced open by PW1.

In his grounds of decision the learned magistrate came to the conclusion that there was no physical possession on the facts disclosed. He based his conclusion on the fact that exhibit P1 was recovered from the dressing table some three feet away from the respondent and there was lack of evidence as to how the said exhibit came to be on the table or when or by whom they were left there. The facts speak for themselves, and it is for the learned magistrate to draw the necessary inference of physical possession. With regard to the aspect as to how the exhibit came to be on the dressing table, to my mind the learned magistrate has misdirected himself. What the prosecution has to accomplish in this case is whether it has proved its case beyond reasonable doubt but not beyond the shadow of a doubt. As was stated by Denning J (as he then was) in *Miller* v *Ministry of Pensions:*[1]

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.

With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstance when the respondent tried to close the door on P W I. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

In view of the case as a whole, I am satisfied that the learned magistrate has misdirected himself as to fact and law. I would therefore allow the appeal and order a new trial before another magistrate.

Appeal allowed. New trial ordered.

Mohamed bin Ya'acob (Deputy Public Prosecutor) for the Appellant.
Anthony Wilson for the Respondent.

Note

In this case, the trial had proceeded to the end of the prosecution case. At this stage, the prosecution need not prove a case beyond reasonable doubt. All he needs to prove is a *prima facie* case, namely, all essential elements of the offence by facts not inherently incredible: see *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 and *Ragunathan* v *PP* [1982] 1 MLJ 139.

(c) Essential (Security Cases) (Amendment) Regulations, 1975

Public Prosecutor
v
Nordin bin Johan & Anor

[1983] 2 MLJ 221 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah LP, Abdul Hamid and Abdoolcader FJJ

Case referred to:
(1) *Public Prosecutor* v *Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273.

RAJA AZLAN SHAH LP (delivering the judgment of the Court): An elaborate argument has been addressed to us by the Public Prosecutor on one vital point which is said to afford a ground for impugning the decision of the learned trial judge, the point being that he drew wrong inferences from the facts as found and accepted by him.

We have been urged by the Public Prosecutor in this appeal against the acquittal of the 2 respondents to review and disapprove the decision of this court in *Public Prosecutor* v *Sihabduin*[1] which held by majority that in a security case at the end of the prosecution case the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him, and to hold that the provisions of the Essential (Security Cases) Regulations, 1975 mandatorily require the defence to be called in every case when the prosecution case is closed, notwithstanding the absence of a *prima facie* case. We do not demur in substance from the view of the law as expressed by Suffian, LP. In our opinion it is supported not only by good sense but by those considerations of justice and fair play as one would expect to find in an adversary system of trial which we practise in this country.

This leaves the question of the application of the provisions of section 30 of the Evidence Act 1950 in relation to the 2 respondents as a result of the statement made by Rahmat Satiman, the 3rd accused in these proceedings, which was admitted and accepted and which clearly implicates the 2 respondents. Section 30 provides that this statement may be taken into consideration against the 2 respondents but on the decided authorities the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the 3rd accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must *ex necessitate rei* be a factual matter in the context and circumstances of the particular case.

Having considered the evidence against the 2 respondents which is fairly voluminous and lengthy, the learned judge came to the conclusion that it did not in relation to them have any real probative value to the charge and even taken as a whole did not take the prosecution case anywhere for the purposes of proving common intention under section

34 of the Penal Code. The learned trial judge had opportunities which are denied to us of considering whether it would be safe to draw the inference that the 2 respondents were present at the scene of the crime and participated in the commission of the offence. He said:

> Does the totality of the evidence against the second accused and the fourth accused excluding the confession (P101) lead the court to the irresistible inference that they were present at the scene of the crime and participated in the commission of the offence? I am afraid I am unable to honestly give an affirmative answer to this question.

The approach of an appellate court in a case like this is well established. In such a case it is its duty to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly.

The question as it seems to us is whether the learned trial judge was reasonably entitled in all the circumstances to come to the conclusion he did that the 2 respondents were not at the scene of the crime and were not *participes criminis* in respect of the actual crime charged. We would answer that question in this way: that on the basis of the facts which the learned judge had found and accepted, his decision was one which any reasonable tribunal properly directed, as was done in this case, could have reached and we do not think that we ought to accede to the Public Prosecutor's argument that certain adverse inferences should be made on the evidence adduced.

On a considered view of the case we find no justification to warrant interference with the learned trial judge's conclusion in this matter. We are satisfied that the evidence against the 2 respondents, apart from the 3rd accused's confession, was not sufficient to satisfy the requirements of the charge against them and that calling on their defence would on the authorities not only go beyond taking into consideration the 3rd accused's statement but be tantamount to virtually relying on it to an extent that would not be permissible for the purposes of section 30 of the Evidence Act.

We would accordingly in the circumstances dismiss this appeal by the Public Prosecutor.

Appeal dismissed.

Tan Sri Abu Talib Othman (Attorney-General) for the Appellant.
Sri Ram for the 1st Respondent.
James Ponniah for the 2nd Respondent.

Note

The Public Prosecutor made an attempt to have the Federal Court decision in *PP* v *Sihabduin* [1980] 2 MLJ 273, overruled by the same court in this case. This attempt failed. It may be noted that Raja Azlan Shah LP (as he then was) was on the panel of five judges who heard *Sihabduin's* case earlier and was one of the judges who decided in the

majority decision. It appears that the Public Prosecutor would have to resort to legislative amendment should he wish to pursue the matters.

(d) Demeanour of witnesses

Tengku Mahmood
v
Public Prosecutor

[1974] 1 MLJ 110 High Court, Kota Bharu

Cases referred to:-
(1) *Tara Singh* v *Public Prosecutor* [1949] MLJ 88, 89.
(2) *Rex* v *Ambler* (1938) 2 WWR 225.
(3) *Trowell* v *Public Prosecutor* [1946] MLJ 41.
(4) *Thong Hong Kee* v *Public Prosecutor* [1952] MLJ 110.
(5) *Lim Kwee Geok* v *Public Prosecutor* [1953] MLJ 50.

RAJA AZLAN SHAH FJ: The appellant was convicted of agreeing to accept from the complainant a gratification of $800, an offence under section 4(a) of the Prevention of Corruption Act, 1961. He was sentenced to imprisonment for one day and a fine of $2,000 in default 9 months. He has appealed against conviction.

The evidence shows the salient facts of the prosecution case to be as follows: The appellant was a member of the Kelantan State Public Services Commission, who in March 1971 had interviewed the complainant for a job as tracer in the Survey Department. He was not successful. In June 1971 he made a second application. In early September 1971 he enlisted the help of an intermediary, PW6, to introduce him to the appellant. On 18 September 1971, together with PW6 he visited the appellant at his house with an offering of rice *pulot* and eggs. There it is said the alleged agreement to pay the appellant a sum of $800 as inducement to help him get the job was reached. The money was to be handed to PW6 in 15 days' time (3 October 1971) and the venue was the appellant's house. The complainant made a report (not produced because inadmissible) with the local branch of the Anti-Corruption Agency not immediately after the said occurrence but 13 days later (30 September 1971). A police trap was then set on 15 October 1971. $800 notes treated with anthracine were handed to the complainant with instructions to hand them to PW6 who in turn would, according to the said agreement hand them to the appellant. However, the trap proved abortive. It was alleged that the complainant handed the money to PW6 but there was no evidence to that effect. At that material time the appellant was not in his house. He returned a litter later. He was searched by the police but nothing incriminating was found on him. The members of his household were also seached but with the same result. His house was meticulously searched from morning till dusk but

the money was not found. In the course of the trial the credit of PW6 was impeached by the prosecution.

The central question to be considered in this appeal is whether on the record, as it stands, the learned president was right in accepting the complainant as a witness of truth.

As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh* v *Public Prosecutor*[1] in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive. Although in cases of this kind it is not easy to get satisfactory evidence, one must not also lose sight of the fact that at the same time it is indeed easy to 'fix' a man in the position of the appellant. A man who was not successful before the Public Services Commission may have hurt his pride and hurt pride is a ferocious beast. It is for this reason that a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection, and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility, cannot, in justice, be regarded as impeachable, much less unimpeachable. It would therefore be not just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of credibility. The whole matter can be considered afresh. Further, the graver the issue involved, and particularly when an allegation of corruption is in the air, the greater is the necessity for the appellate court to enquire whether the conclusion as to credibility is one that must under the law be regarded as, for all practical purposes, irrefragable.

There are a number of grounds of appeal but the cumulative effect of those can compendiously be put in one sentence; that the propriety of the case does not justify a conviction on the uncorroborated evidence of the complainant.

While it is true that in a proper case a trial judge may fittingly convict on the uncorroborated evidence of an accomplice, this would be a very exceptional one. The Canadian Court of Appeal in *Rex* v *Ambler*[2] cited by Horne J in *Trowell* v *Public Prosecutor*[3] is to this effect. In *Trowell's* case the accused was convicted in the Magistrate's Court of receiving illegal gratification in the course of his duty as Inspector of Machinery in the Mines Department. The only evidence that the accused received the sum of money was that of the person who alleged he paid it. He was an accomplice. Against that there was the denial on oath of the accused. Horne J in his judgment quoted a passage from *Ambler's* case and that passage was reproduced by the learned president on page 13 of his judgment but the last sentence in that passage was not reflected in the record and it is as follows:

> There may be a case in which a trial judge may fittingly convict upon the

uncorroborated evidence of an accomplice, but this would be the very exceptional case.

In *Thong Hong Kee* v *Public Prosecutor*[4] the appellant there was also convicted on the uncorroborated evidence of the complainant. The learned magistrate was extremely impressed by the demeanour of the complainant and looked upon him as a truthful witness. He had also stated emphatically that before coming to his decision he had warned himself against convicting on the uncorroborated evidence of an accomplice. He further stated that he could not accept the evidence of the accused. It was held that while an appellate court would always hesitate to overrule the decision of a trial judge based upon the demeanour of witnesses whom he had had the opportunity of seeing in the witness box, nevertheless would interfere with the decision if it appeared he did not give sufficient consideration to the evidence or take into consideration the great number of discrepancies and contradictions in his evidence or test it with the evidence of the only other witness against which it could be tested.

In *Lim Kwee Geok* v *R*,[5] a case of dishonestly receiving stolen propertly, to wit, 30 cases of milk, which were found in the possession of a proprietor of a shop, the only evidence against the accused was that of the proprietor who had bought the milk at a price far below the market price. He also produced his books of account but the entries showed that they were extremely suspicious. Now there the learned magistrate had failed to observe that that witness, the proprietor of the shop, was not only an accomplice but an accomplice of the very type which our courts had always looked upon as witnesses upon whose evidence it is most unsafe to convict without corroboration.

So in the present case I proceed to test the matter by reference to the totality of the complainant's evidence and the probabilities of the case. The evidence shows that the complainant was a boy of 21 years of age who had passed his LCE. He had high hopes of getting the job but unfortunately he was not successful. He said the members of the Board were not fair to him as he felt he had answered the questions satisfactorily. That is apparent from the record: (see page 53/54).

> I felt the members of the Board were a stumbling block to my getting the job in the Government service. The most active member of the Board was the accused. When I left the interview I had the feeling the accused had the biggest say in the Board. I would like to see the accused punished for the wrong he had done to me. The wrong he had done in preventing me from getting the job. One way of punishing him was to have him reported for corruption. I also knew after I reported I would have a stumbling block out of my way
>
> Q. So that if and when you applied for a job again the accused would not be present as he had been reported (Deputy Public Prosecutor objects to question). Court overrules objection.
>
> A. Yes, so that my prospects of getting a job would be brighter.

Such is the veracity of the man whom the learned president said his credibility is beyond question. Now in June 1971 he again applied for

the same post. He enlisted the help of PW6 to get to know the appellant. Exactly on what basis the complainant came to know or was brought to know PW6 was not fully developed in the evidence but at any rate it is stated that PW6 and the appellant had some relationship and there the evidence ended. So on 18th September 1971 PW6 took the complainant to see the appellant at the latter's house and there it is said the clandestine agreement was reached.

I have been urged to say that in the light of the totality of the complainant's evidence and the probabilities of the case the evidence regarding the alleged agreement was wholly unsatisfactory. It is said that there are violent discrepancies and contradictions on the matter. For present purposes it is sufficient to say that having read the body of evidence which runs to 60 pages and having anxiously read and re-read every word of the 32 pages judgment, I find it impossible to hold that the assessment of the complainant's credibility was arrived at in such a manner that this court ought now to regard itself as precluded from considering it afresh. The learned president had properly directed his mind to the law on accomplice evidence, but to my mind he had paid little attention to the fact. There is in my view no microscopic scrutiny of the totality of the complainant's evidence. If that was done with an indulgent eye, one cannot avoid the conclusion that his evidence leaves very much to be desired. Here is a man, an accomplice, whose whole interest in giving evidence against the appellant must have been to make his case as black as possible in order to achieve his objective. He is an accomplice of the very type which our courts have always looked upon as a witness upon whose evidence it is most unsafe to convict without corroboration. In my judgment, since the learned president had failed to do what he was required to do, that is, to take a critical appreciation in his examination of the complainant's evidence, he had not taken proper advantage of his having seen and heard him, so that his mistaken view had coloured his approach to the issue of credibility so gravely that there was such a misdirection that made the judgment wholly unsatisfactory.

A point which at one time had caused me some anxiety is the argument of the learned Deputy Public Prosecutor that although the learned president had convicted on the uncorroborated evidence of the accomplice based on impressive demeanour, later events,that is, the police report and the abortive trap showed that there is a logical consistency with the complainant's evidence in court. He relied on a passage in the judgment:

> There is a logical sequence, and a inherent consistency and truth about this narrative of PW1 which taken with all the surrounding circumstances makes it an exceptional case where the rule regarding corroboration of the evidence of an accomplice can be very safely departed from.

If I understand the passage correctly, it is said that the later events are conduct which had a direct bearing and connexion with the alleged agreement and such conduct is consistent with the complainant's testimony in court that he is telling the truth regarding the said

agreement. If that is what the learned president meant, then I say he is clearly in error. In my opinion only the police report can be claimed to be of any evidential value so far as it relates to consistency of conduct and assertions of the complainant in court. That principle is well known in cases of rape and some other sexual offences. The said complaint can only be used as evidence of the consistency of his conduct with the story told by him in court. In other words,it can only be used as evidence of credibility of his testimony to the alleged agreement but there are limits to its admission. It must be made voluntarily and at the earliest convenient moment. It must not be made after a long lapse of 13 days as to allow fabrication.

The abortive trap is not admissible as evidence of the alleged agreement which must be proved independently. It is whether that piece of evidence taken with all other proved circumstances are strong enough to bring home the offence to the appellant beyond reasonable doubt. If those circumstances or some of them can be explained by any other hypothesis, then the appellant must have the benefit of that hypothesis.

The abortive trap is a telling factor in favour of the appellant. The 15 day-period of payment was not kept. If the alleged agreement were true then in my view the appellant or the intermediary would have confronted the complainant with payment. Further, where there are only two persons who could testify as to the alleged agreement and one of them turned hostile, that would seem to be a good reason to doubt the propriety of departing from the rule that it is wholly not safe to convict on the uncorroborated evidence of an accomplice based on demeanour alone.

In such circumstances what right have we to say that the defence story is unreasonable? If it stands together, if it is not consistent with the proved facts, a rejection of it would be simply and solely on the ground that it was told by an accused person under trial.

I have considered the case in its proper perspective. I allow the appeal and set aside the conviction and sentence. I have further directed my mind regarding a new trial and I say that this is not a fitting case so to do.

Appeal allowed.

Edgar Joseph Jr for the Appellant.
Hashim Majid (Deputy Public Prosecutor) for the Respondent.

Note

Raja Azlan Shah FJ's views on the demeanour of a witness and its role in evidence was cited with approval in *TN Nathan* v *PP* [1978] 1 MLJ 134, 136.

(e) *Prima facie* case

A Ragunathan
v
Pendakwa Raya

[1982] 1 MLJ 139 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah Ag LP, Salleh Abas and Abdul Hamid FJJ

Cases referred to:-
(1) *Haw Tua Tau* v *Public Prosecutor* [1981] 2 MLJ 49, 51-52; [1981] 3 WLR 395, 402-403.
(2) *Public Prosecutor* v *D'Fonseka* [1958] MLJ 102.
(3) *Yap Ee Kong* v *Public Prosecutor* [1981] 1 MLJ 144.
(4) *Buckle* v *Holmes* [1962] 2 KB 125.
(5) *Imperial Tobacco Ltd & Anor* v *AG* [1980] 2 WLR 466; [1980] 1 All ER 866.
(6) *Cecil Rajah* v *Public Prosecutor* [1981] 1 MLJ 147.

RAJA AZLAN SHAH Ag LP (delivering the judgment of the Court): By the Public Service Tribunal Act (Act 186), Parliament set up the Public Service Tribunal to enquire into and resolve conditions of service. The work of this tribunal is limited by statute to the public service. For obvious reasons, Parliament sought to prevent dissatisfaction in the public service over the deliberations of the tribunal. Therefore by section 18(1) of the Act, any of the proscribed industrial actions as defined in section 2 and spelled out in the schedule is unlawful, after an anomaly has been referred to the tribunal, both during the pendency of and after the proceedings. Any communication, whether orally or in writing to the public or press is a proscribed industrial action. Such a communication may not be made by any member of a trade union or any member of an association of public officers which is an aggrieved person or any aggrieved person.

The Malayan Technical Services Union (MTSU) referred an alleged anomaly to the tribunal. Following the rejection of the reference, the General Secretary of the MTSU was alleged to have made a communication to the press in regard to the proceedings of the reference. The General Secretary, if not the aggrieved person himself was, by description, a member of the aggrieved trade union. He was accordingly charged in the Magistrates' Court at Kuala Lumpur with an offence under section 18(1), punishable under section 21, but he was acquitted and discharged without his defence being called. The Public Prosecutor successfully appealed and the appellate judge ordered the defence to be called on an amended charge. The applicant in the meanwhile filed a Notice of Motion (Kuala Lumpur High Court Miscellaneous Criminal Application No 14 of 1981) to refer two questions of law to the High Court under section 66 of the Courts of Judicature Act, 1964. The application was refused. The applicant has now come to this court and he said that this case is the first of its kind and that it is in the public interest to reserve the following questions for our consideration:

(1) What ingredients must the respondent prove to establish a *prima facie* case in a prosecution against a defendant on a charge under section 18(1) of the Public Service Tribunal Act, 1977 read with paragraph 7 of the Schedule to the said Act?
(2) In a prosecution under section 18(1) of the Public Service Tribunal Act, 1977 is it sufficient for the respondent to establish that a defendant is a public officer within the meaning of the said Act by leading evidence to show that he (the defendant) is a member of a trade union consisting of Government servants?

He urged that if this court, while considering the said questions, find that on applying the evidence adduced thus far to the ingredients required to be proved by the prosecution, hold that no offence is disclosed, the matter need proceed no further. In such an event he said he will be spared substantial expense and time.

Section 66 of the Courts of Judicature Act requires that before we decide to answer any question referred under it we have to be satisfied that it is a question of law of public interest which has arisen in the course of the appeal, the determination of which by the judge has affected the event of the appeal. The section cannot be invoked by raising a ground which in his grounds of appeal and in the course of his submission, counsel for the applicant described as a mere question of law. Besides being that, it must be of public interest which arose in the course of the appeal and which determined the appeal.

One of the essential elements in the charge under section 18(1) of the Act is that the applicant is a 'public officer' as comtemplated by section 2 of the Act — 'any person holding office or employment in or under any public service'. That is the only point raised in the courts below and before us. 'Public service' as enacted in section 2(a) means 'any of the public services referred to in Article 132 of the Constitution, other than the Police Force or Armed Forces'. Article 132(1) of the Constitution defines public services, *inter alia,* (c) the general public service of the Federation: and (g) the public service of each State.

The learned Magistrate found that the prosecution had failed to prove at the close of their case that the applicant is a public officer within the meaning of section 2, although he was satisfied that he is a trade union member. He held that the evidence of Mr Korah George (PW3), the Executive Secretary of MTSU to the effect that the applicant is the General Secretary and that members of MTSU are Technical Assistants and Agricultural Assistants and that they are Government servants, is insufficient to prove that the applicant is a public officer. He was of the opinion that the prosecution should have called the applicant's Head of Department or a member of the Public Service Commission to testify that he is a public officer.

The learned judge took a different view. He held that there was *prima facie* evidence before the learned Magistrate that the applicant is a public officer. The applicant is a member of the MTSU, and the only inference that could be drawn is that he is a government servant holding the post of either Technical Assistant or Agricultural Assistant, as such he must be a public officer.

It is implied in the judgment of the learned judge that in his view, the Public Service Tribunal Act is concerned only with the public service, the Tribunal does not entertain references from the private sector and that in making the reference of an alleged anomaly to it, the union represents itself and the Tribunal accepts it to be a union of technical employees in the public service as defined in section 2 of the Act. And if, as appeared so clearly in the record, the reference was made by the applicant as the General Secretary and therefore, by definition, the executive officer of the Union, he was a public officer.

Nevertheless, we have, *ex abundanti cautela,* called for and looked at the Constitution of the MTSU. Rule 2.1 states as one of the objects of the Union — To secure the complete organisation of all monthly paid persons in the technical profession employed by the Federal and State Government in Peninsular Malaysia. Rule 3.1 defines the membership of the Union. It consists of (a) Ordinary membership shall be open to all monthly-paid technical workers over the age of sixteen years who are employed by Federal and State Governments in Peninsular Malaysia and (b) Honorary membership may be conferred by the Executive Council on any person as it deems fit. Rule 10.2 is a prohibitive provision and, *inter alia,* provides that no person shall be elected or act as an officer of the Union if(d) he is not engaged or employed as specified in Rule 3.1 for a period of at least three years. Rule 11.2 provides for the composition of the Executive Council which consists of, *inter alia,* the General Secretary, who shall be elected biennially by secret ballot by the whole membership.

In essence the questions referred to us are a submission that there is no case for the applicant to answer at the close of the prosecution case. It is said that the prosecution had failed to adduce any evidence that the applicant was a public officer and therefore has failed to establish a *prima facie* case against him which brings into effect section 173(f) of the Criminal Procedure Code. That section enacts:

> If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.

The section is similar to section 188 of the Singapore Criminal Procedure Code (Amendment) Act, 1976 which the Privy Council has recently given judicial interpretation in *Haw Tua Tau* v *Public Prosecutor.*[1] We quote certain passages from the speech of Lord Diplock *in extenso* for the benefit of all concerned (pages 51-52):

> For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.
>
> The crucial words in section 188(1) are the words 'if unrebutted', which make the question that the court has to ask itself a purely hypothetical

one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the works 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily indentified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial 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 to be accepted by the jury as accurate,* would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the judge must let the case go on. It is not the function of jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had any opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness, jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordship's view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then,

> and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

Applying that principle, the learned Magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal.It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the applicant is guilty as charged.

But it is not sufficient that the question raised is a question of law. It must be a question of law of public interest. What is public interest must surely depend upon the facts and circumstances of each case. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.

It was urged upon us that in at least two previous cases: see *Public Prosecutor* v *D'Fonseka*[2] *Yap Ee Kong* v *Public Prosecutor*[3] the applicants had successfully obtained a reference, and that we should follow those cases and determine the question referred to us. It was further said that the questions are of general importance upon which further argument and a decision of this court would be to the public advantage: see *Buckle* v *Holmes*[4]. A short answer is that the two cases referred above involved misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views. There are no two views about the present case.

Insofar as the plea of great convenience is concerned, the House of Lords in England in *Imperial Tobacco Ltd & Anor* v *AG*[5] has rejected the same plea in no uncertain terms. It held that where criminal proceedings have been properly instituted and are not vexatious or an abuse of the process of the court it is not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged did not in law prove the offence charged. For

ourselves, we are of the view that for the purposes of section 66 of the Courts of Judicature Act it is not a proper exercise of our discretion to answer questions where the answers are already provided by well-settled general principles, which have to be applied to the facts of the case.

But basically, we must consistently decline to receive and answer questions which though they may be questions of law are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject: see section 66(6)(a) Courts of Judicature Act, 1964.

We would therefore follow the example of this court in *Cecil Rajah* v *Public Prosecutor*[6] for the reasons in this judgment.

The application is dismissed.

Application dismissed.

Sri Ram for the Applicant.
Mohd Noor Hj Ahmad (Senior Federal Counsel) for the Respondent.

Notes

This decision is significant as the Federal Court adopted the Privy Council decision in the case of *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 and in so doing altered the test of *prima facie* case at the end of the prosecution case. Cases like *Tan Ah Ting* v *PP* [1974] 2 MLJ 37, *Wong Ah Mee* v *PP* [1970] 1 MLJ 98, *Zahari bin Yeop Baai* v *PP* [1980] 1 MLJ 160 are now overruled.

Previously, when the magistrate found a *prima facie* case was proved against the accused and called for his defence but he remained silent, he must be found guilty. Now, even after a finding of a *prima facie* case, and the accused remains silent, the magistrate has to consider the veracity and correctness of the facts adduced by the prosecution, The ultimate result may be a finding of not guilty.

Although this may be possible in theory, it is doubtful that it will happen in practice as it is humanly difficult, if not impossible, for the human mind to decide on the law based on the facts without considering the facts at the same time.

This case has been followed in many subsequent cases in relation to other trials, besides summary trials: see *PP* v *Abdullah bin Ismail* [1983] 1 MLJ 417 (FC), *PP* v *Muhamed bin Sulaiman* [1982] 2 MLJ 320, *PP* v *Cheah Beng Poh* [1984] 2 MLJ 225, *Pavone* v *PP* [1984] 1 MLJ 77. Whether *Haw Tua Tau* applies to security trials is still doubful. In *Dato' Mokhtar Hashim* v *PP* [1983] 2 MLJ 232, the High Court Judge made a brief reference in the following words:

> Following the guideline by Lord Diplock in *Haw Tua Tau* v *Public Prosecutor* on what is meant by the words "if unrebutted" it is my view

> that a *prima facie* case has been made out against Dato' Mokhtar Hashim ... (At p 270)

It must be noted that Regulation 13 of the ESCAR, which provides for the end of the prosecution case, does not mention the words 'if unrebutted'. The Federal Court, when hearing the appeal in the above case, did not agree or disagree with the High Court. It remained silent on the point.

Ragunathan is also a useful case because of the "reminder" as to what is a question of law of public interest. Section 66 of the Courts of Judicature Act 1964 was never meant to provide for another avenue of appeals for cases originating from the lower courts. Counsel have nonetheless made attempts to convert it to perform that very function by forwarding questions of law but of personal or private interest. The Federal Court has never hesitated to reject an application of this nature. This reminder is therefore timely.

INITIATION OF PROCEEDINGS

(a) Notice of prosecution

Public Prosecutor
v
Chin Chee Thau

[1969] 1 MLJ 210 High Court, Raub

Cases referred to:-
(1) *R* v *Edmonton Justices, ex parte Brooks* [1960] 2 All ER 475.
(2) *Public Prosecutor* v *Voon Tiek Yong* [1963] MLJ 117.
(3) *Milner* v *Allen* [1933] 1 KB 698.
(4) *Public Prosecutor* v *Shepherd* [1964] MLJ 80.
(5) *Sandland* v Neale [1955] 3 All ER 571, 573.

RAJA AZLAN SHAH J: The respondent was a driver of a motor vehicle which met with an accident on 28th January 1968. On the following day he was served with a notice of intended prosecution under section 56(1) of the Road Traffic Ordinance, 1958 which reads:

> That it is intended to take proceedings against you for an offence of *menjalankan motor car No BL 3233 dengan tiada chermat menyebabkan kemalangan* under section 36(1) of the Road Traffic Ordinance, No 49/1958.

However, he was charged with 'driving in a manner dangerous to the public' under section 35(1) of the said Ordinance. At the hearing the learned magistrate acquitted the respondent without his defence being called. It is against this acquittal that the public prosecutor appeals.

In acquitting the respondent the learned magistrate held that the provisions of section 56(1) of the Ordinance had not been complied with. He took the view that the notice of intended prosecution was defective in that it specifically mentioned an offence under section 36(1) whereas he was actually charged in court with an offence under section 35(1). He seemed to think that it would prejudice the respondent to face a more serious charge than what was intended in the said notice.

The learned magistrate in his judgment said that on the facts he would have called for the defence under section 35(1) had the provisions of section 56(1) been complied with. He was not disposed to amending the charge for that would be to correct something which had been wrongly done by the prosecution.

Before dealing with the appeal, I would like to deal with a point of practice. In the present case the question of notice was raised at the end of the prosecution case. No doubt there is no objection to raise the question of notice at any stage of the trial e.g., during the cross-examination of the appropriate prosecution witnesses: see *R* v *Edmonton Justices, ex parte Brooks*[1] or at the end of the prosecution case: see *Public Prosecutor* v *Voon Teik Yong*[2] but it will be more convenient if it is raised as a preliminary issue so that if the issue is decided in favour of the applicant, recourse to prove the case will not be necessary.

I now turn to the merits of the appeal. While it is not irregular to prefer a charge of 'driving without due care and attention'although the offence referred to in the notice is 'driving in a manner dangerous to the public': see *Milner* v *Allen*[3], can the same be said if the case is the other way round? In other words, can the prosecution prefer a serious charge of 'driving in a manner dangerous to the public' under section 35(1) when the notice specifically mentioned a lesser offence of 'driving without due care and attention'? That is the point for determination in the present appeal.

The learned deputy argues in the affirmative. He submitted that while the service of the notice is mandatory the provisions with regard to specifying the alleged offence and the time and place of accident is only directory. I agree with that contention. The case of *Public Prosecutor* v *Shepherd,*[4] though it was concerned with insufficient particularity as to the date and time of the accident, can by analogy be applied to the present case.

In my judgment the notice need not be as precise as the summons; it is the summons that must be precise. The notice is merely to refresh the offender's mind as to the facts which may be the substance of a charge. Its object is to acquaint the offender promptly that he may be prosecuted so that he may be able to collect material for his defence while the matter is still fresh in his mind and that of potential witnesses; so the sooner the notice is given the better: see *Sandland* v *Neale*[5].

In dealing with the particularity of the notice required under section 56(1) the words are *inter alia* 'specifying the nature of the alleged offence' and not 'specifying the offence' or 'the particular offence'. In my opinion, those words do not necessarily mean that a notice must be a

notice of the particular section of the Ordinance under which the prosecution is comtemplated. Nor do I hold the view that at the time when that notice was given it was necessary that the police officer or other authority should have definitely made up his mind which particular charge was to be preferred. Only the 'nature of the alleged offence' and not the particular offence itself need be specified.

For the above reasons, I would allow the appeal, set aside the lower court's order of acquittal and direct that the defence be called.

Appeal allowed.

Mohd Nizar Idris (Deputy Public Prosecutor) for the Appellant.
M Gomez for the Respondent.

FORFEITURE
(a) Price Control Act 1946

Public Prosecutor
v
Chu Beow Hin

[1982] 1 MLJ 135 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah Ag LP, Salleh Abas and Abdul Hamid FJJ

Cases referred to :
(1) *In re a Debtor* [1948] 2 All ER 533.
(2) *Attorney-General* v *HRH Prince Ernest of Hanover* [1957] 1 All ER 49, 55.

RAJA AZLAN SHAH Ag LP (delivering the judgment of the Court): The reference before us is whether the court has a discretion to order forfeiture of goods seized by any of the officers named in section 14(1)(a) of the Price Control Act, 1946 (Revised 1973). The relevant provision of the said Act is section 14:

> (2) Where any price-controlled goods have been seized under subsection (1)(a), then —
> (a) if, within thirty days of the seizure, no proceedings are instituted against any person for an offence alleged to have been committed in relation to those goods, the goods and accompanying appliances shall be restored to the person from whom they were seized if he can be found and, if not, shall be disposed of as may be directed by a Magistrate; or
> (b) if, within thirty days of the seizure, proceedings are instituted against any person, the goods and accompanying appliances may be forfeited or otherwise disposed of in such manner as the court may direct:

The respondent pleaded guilty to a charge under section 22(1) of the Price Control Act, 1964 (Revised 1973) for failing to affix tags on his goods i.e. $20,000 worth of textiles. He was fined $5,000 and the goods

seized were forfeited under section 14(2)(b) of the said Act. The learned President was of the view that he had a judicial discretion to forfeit the goods under the said subsection.

On appeal the learned judge held that the court had no discretionary power to order forfeiture. He noted that there is no separate provision for forfeiture or confiscation in the Price Control Act, section 22 of which is silent in this respect. He contrasted the said Act with section 26(1) of the Control of Supplies Act, 1961 (Revised 1973), section 14(1) of the Fisheries Act, 1963, section 92(4) of the Road Traffic Ordinance, section 126 of the Customs Act, 1967, section 30(2) of the Dangerous Drugs Ordinance, 1952, section 426C(1) of the National Land Code and section 74(1) of the Animals Ordinance, 1953 in which he said there are special provisions for forfeiture and held that in the absence of any such express provision in the Price Control Act, the court has no power to order forfeiture. He further said that the provision of the said Act regarding forfeiture is vague and he accordingly construed that in favour of the appellant. He referred to section 407 of the Criminal Procedure Code which enacts that 'the court's power to order forfeiture is subject to any special provisions relating to forfeiture contained in the written law under which the conviction was had' and said that since the provisions of the Price Control Act are silent with regard to forfeiture except section 14(2)(b) which merely makes 'an oblique reference and not being comprehensive' section 407 of the Criminal Procedure Code should be relied on by the court in the disposal of the goods, the subject-matter of the present appeal.

We were told that the goods had since been returned to the respondent.

The first task of the court is to find out the intention of Parliament and the words of a statute speak the intention of Parliament. 'And in so doing it must bear in mind that its function is *jus dicere,* not *jus dare:* the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament': *Maxwell* on *Interpretation of Statutes,* 12th Ed pp 1,2.

The Price Control Act was passed with the purpose of controlling the price of goods. It had discernible public policy for its object. It is unique in this respect and therefore the scope of its operation is clear. In order to discover the intention of Parliament it is therefore proper that the court should read the Act as a whole, inform itself of the legal context of the said Act, including Acts *in pari materia* which may throw some light on its meaning, and of the factual context, such as the mischief to be remedied.

In order to ascertain the intention of Parliament, the learned judge has referred to phrases which have been used in other statutes which have fundamentally the same social objectives. In our opinion, that is a safe guide as an extrinsic aid to the construction of a statute, but in the last resort, we think that these statutes turn upon the provisions of the legislation in question and are therefore of relatively little assistance.

The decision of the learned judge rested on the basis that there is no express provision regarding forfeiture. That seems to us to involve implying something wholly inconsistent with the words expressly used

in section 14(2)(b). His reasoning really amounts to performing a surgical operation on the enacting words of the subsection by restricting its meaning. 'If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used': see *In re a Debtor*[1]. In our opinion what should be a fundamentally simple case has been confused and obscured beyond all proportion.

We take the view that the enacting words of section 14(2)(b) are not only very clear, but they are also direct. 'If proceedings are instituted within thirty days of the seizure of goods by any of the officers named in section 14(1) of the Act, the court may, *inter alia,* forfeit or otherwise dispose them in such manner as it may direct'. What could be plainer than that?. In such a case the court must give effect to the clear and explicit language of the enacting words of the subsection. It cannot disregard them unless it is apparent that some other meaning is intended. Of course, 'it must often be difficult to say that any terms [of a statute] are clear and unambiguous until they have been studied in their context': see *Attorney-General* v *HRH Prince Ernest of Hanover.*[2]

In the face of the abundantly clear words of section 14(2)(b) we find it hard to imagine any context, or any circumstances, which should persuade us to perform the surgical operation already mentioned. We cannot find anything in the said Act which leads us to the conclusion that the enacting words of section 14(2)(b) are not intended to have their ordinary and natural meaning. Nothing but the most compelling context would justify a construction radically altering the plain meaning of the enacting words in the section.

Forfeiture clauses are common in penal statutes. They can of course take many forms. We reiterate that there are cogent reasons of policy why the Price Control Act was passed. It provides for a forfeiture provision as an added penalty because we think that Parliament must have intended that a limited penalty without the forfeiture clause may prove illusory to remedy the mischief.

Lastly, we need to say something on the provision of section 407 of the Criminal Procedure Code. The learned judge seems to think it applies in the present case because there is no express provision in the said Act regarding forfeiture. Section 407 enacts that the court's power to order forfeiture is 'subject to any special provisions relating to forfeiture contained in the written law under which the conviction was had'. That in our opinion is a general provision. The Price Control Ordinance, 1946, the precursor to the Price Control Act was passed subsequently and brought into effect on October 1, 1946. It is a special enactment, and in passing it the legislature had its intention directed to the special case which the statute was meant to meet, and considered and provided for all the circumstances of the special case. Where a special provision is made in a special statute that special provision excludes the operation of a general provision in the general law — *generalibus specialia derogant.* Therefore the Price Control Act deals with a special case and to that extent the general provisions of the

Criminal Procedure Code do not affect its operation.

We therefore answer the question referred in the affirmative.

Order accordingly.

Lamin Hj Yunus (Deputy Public Prosecutor) for the Appellant.
Anthony Gomez for the Respondent.

Notes

This case was referred to in *PP* v *Chew Siew Luan* [1982] 2 MLJ 119 (FC), a case where Raja Azlan Shah LP had delivered the judgment on behalf of the Federal Court.

In this case the principle *generalibus specialia derogant* arose in relation to section 14(1)(a) of the Price Control Act 1946 and section 407 of the CPC whereas in *Chew Siew Luan*, it was in relation to section 41B(2) of the Dangerous Drugs Act 1952 and the proviso to section 388(i) of the CPC.

POLICE STATEMENTS
(a) Admissibility of

Wong Swee Chin
v
Public Prosecutor

[1981] 1 MLJ 212 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah CJ (Malaya), Syed Othman FJ and Hashim Yeop A Sani J

Cases referred to:
(1) *Teh Cheng Poh* v *Public Prosecutor* [1979] 1 MLJ 50.
(2) *Watt or Thomas* v *Thomas* [1947] AC 484.
(3) *Owners of Hontestroom* v *Owners of Sagaporack* [1927] AC 37.
(4) *Powell and wife* v *Streatham Manor Nursing Home* [1935] AC 243, 264, 265.
(5) *Transport Ministry* v *Garry* [1973] 1 NZLR 120,122.
(6) *Johnson Tan Han Seng* v *Public Prosecutor* [1977] 2 MLJ 66.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The appellant was convicted of 3 charges under section 57(1) of the Internal Security Act, 1960, to wit, in control of a 7.65 Walther automatic pistol, a 9mm Erfurt 96 automatic Luger pistol and a 6.35 Beretta automatic pistol; in control of six rounds of 9 mm ammunition, five rounds of .32 ammunition, and 2 primed hand grenades; and in possession of 35 rounds of 9 mm ammunition, and 29 rounds of .32 ammunition. He put up 25 grounds of appeal some of which overlapped. In our opinion there was no ground whatever upon which the appeal could be allowed. Consequently we dismissed the appeal. We now deal with the main points raised in the petition of appeal.

First, the preliminary objection. It was contended by Mr Jagjit Singh

on behalf of the appellant that the Attorney-General had exercised his discretion improperly and/or unlawfully in charging the accused with offences under the Internal Security Act. He argued that at the worst the appellant was only a common criminal and there was nothing to suggest that this was a case against national security. The short answer can be found in the judgment of the Privy Council in *Teh Cheng Poh* v *Public Prosecutor.*[1] The accused in *Teh Cheng Poh's* case was also charged under the Internal Security Act, in fact under the same section of the Act [section 57(1)] for possession of firearm in a security area. The difference between the two cases lies only in the fact that whereas in *Teh Cheng Poh's* case the accused was found in possession of a revolver and ammunition in the course of a search by a police patrol instituted as a result of a phone call complaining about the robbery, the appellant in the present case was found in possession of arms and ammunitions as described above following a gun battle between a police party and a group of armed men. We feel that what Lord Diplock said in the judgment of the Privy Council in *Teh Cheng Poh's* case provides a complete answer to the preliminary objection raised by the appellant. The Attorney-General had an unfettered discretion in the matter. Lord Diplock at page 56 said:

> If indeed the Attorney-General was possessed of a discretion to choose between prosecuting the appellant for an offence against section 57(1) of the Internal Security Act, 1964, or for an offence under the Arms Act, 1960, and the Firearms (Increased Penalties) Act, 1971, there is no material on which to found an argument that in the instant case he exercised it unlawfully. But, in their Lordships' view, although he had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the appellant but not proceeded with), once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the Internal Security Act, 1960.

The other main point raised on behalf of the appellant which seemed to be also implied in a number of other grounds set out in the memorandum of appeal was that the trial judge should have found that the appellant was unconscious when the police party found him in the hall of the premises where the gun battle took place. The line of argument was that because of the fact that the appellant sustained not less than seven gunshot wounds and was suffocated by gas fumes from gas shells thrown into the building by the police party, he was in a state of unconsciousness, when he was found by the police party. Therefore he cannot be said to be in conscious posssession or control of any of the weapons or ammunition supposedly found on him. Looking at the line of defence in the court below it can be seen from the records that the defence took pains to establish that the appellant was either unconscious or at least semi-conscious when he was found. It was for this purpose that the doctor (DW2) was called to explain the medical records of the appellant. We will deal with the nature of this evidence later. Exhibit C53B which was the yellow card forming part of the

medical records of the appellant was shown to DW2. In Exhibit C53B a number of information were recorded of examinations made on the appellant when he was admitted into the ward of the hospital on February 17, 1976 between 1.00 am and 1.35 am (see pages 91-92 of the Appeal Record). The gun battle took place about 8.40 pm on February 16, 1976. It is stated in the medical records that on examination, the general condition of the accused was found to be 'fair'. DW2 stated that there was no mention of any level of consciousness. However, it is significant to note that in Exhibit C53B, DW2 stated that there was 'no cyanosis' and that the colour of the blood was not bluish — meaning there was sufficient supply of oxygen (page 98) and nothing abnormal detected according to the records. DW2 also explained that if cyanosis was present then the patient was said to be critical and in this case there was no cyanosis.

It is difficult looking at the records not to accept the finding of the trial judge when he said that he saw no reason why he should not accept the evidence of the two police officers who found the appellant when they said that he was at that time conscious and also asked for a glass of water. In the final analysis it is a question of an appellate court dealing with conclusions of fact made by the court below. In this connection we would like to refer to the judgment of Lord Thankerton in *Watt or Thomas* v *Thomas*[2] at page 487 follows:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion: The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion.

Again in the *Hontestroom case,*[3] Lord Sumner at page 47 had this to say:

> What then is the real effect on the hearing in a court of appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: It is not, however, a mere matter of discretion to remember and take account of this fact: it is a matter of justice and of judicial obligation. Nonetheless, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsiblity of reversing conclusions so arrived at, merely on the results of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

This opinion was adopted by Lord Wright in *Powell and wife* v *Streatham Manor Nursing Home.*[4]

Mr Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest(the subject-matter of the third charge) constituted a clear admission of the charge of posession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry* v *Garry*[5] where Hashim J said at page 122:

> In *Phipson on Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz, where
> ...the story is itself of an incredible or romancing character or the abstention arises from mere motives of delicacy... or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

In our view, although there was a misdirection by the trial judge on this point it did not affect the correctness of the verdict as the totality of the evidence points conclusively to the guilt of the appellant.

Another main point raised in the appeal was the contention that the trial judge erred in law in not adequately evaluating the evidence of the doctor, DW2. As referred to earlier, the doctor was called by the defence to explain the medical records of the appellant upon his admission into the hospital immediately following the arrest.

In the Evidence Act, 1950, opinion of experts are under certain conditions admissible in evidence. Who are experts are explained in section 45 of the Act. Section 46 provides that facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant. DW2 was called as an expert witness. Our system of jurisprudence does not generally speaking, remit the determination of disputes to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence

and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. Therefore the nature of DW2's evidence must be examined in the light of the above principles. We see nowhere in the records to suggest that the trial judge had incorrectly or improperly evaluated the evidence of DW2.

Finally, the question of the admissibility of the statements purportedly made by the appellant to the police officer, PW6, at the time of his arrest. It was argued that the trial judge erred in law in failing to direct his mind to the issue as to whether the statements, if in fact made were made voluntarily without threat, promise or inducement. As can be seen there are two sides to the question. First, it was the appellant's contention all along that he never made those statements because he was unconscious. This however was not accepted by the trial judge. The trial judge found that he was conscious and that he made the statements. The statements appear in the evidence of PW6 and corroborated by PW7. The trial judge accepted the evidence of these police officers and found that the appellant did make the statements and his finding was recorded in his judgment at page 220 as follows:

> The accused said to Supt Selvanayagam in the presence and hearing of ASP Ghazali:
> (a) that the Walther 7.65 automatic pistol (P23) found near the left hand finger-tips of the accused was the pistol he had robbed from Detective Hudson Ng (PW8);
> (b) that the Luger pistol (P32) and two hand-grenades (P37 and P38) were bought in Siam;
> (c) that the Beretta 6.35 Mod 950B automatic pistol (P35) was given to him by a friend.
> (see pages 37G-38A, 39B-C of Notes of Evidence).
> The foregoing evidence is admissible under Regulation 21(1)(a) of the Essential (Security Cases) (Amendment) Regulations, 1975.

As clearly implied in the grounds of appeal the defence was in the alternative, i.e., it was denied that the statements were ever made and alternatively, if they were made, they should not have been admitted by the trial judge because the circumstances indicate that the statements were not made voluntarily.

The trial judge expressly referred to the admission of the statements by virtue of regulation 21(1)(a) of the Essential (Security Cases) Regulations 1975. This was a trial under the security regulations. Regulation 21 of the Regulations provides that a statement made by an accused person whether orally or in writing shall be admissible notwithstanding that such statement was made in the circumstances described in sub-paragraphs (a) to (i) of paragraph (1). Sub-paragraph (a) says that such statement shall be admissible notwithstanding that it was made to or in the hearing of a police officer provided that the police officer is not below the rank of an Inspector.

The absence of any reference to his finding on the voluntariness of the statements and the absence of any reference to *Johnson Tan Han Seng* v *Public Prosecutor*[6] would not be sufficient grounds for us to conclude that the trial judge failed to consider the question of voluntariness. In

fact if one looks at the judgment of the trial judge it is little wonder that he was not so much concerned with the allegation of threat, promise or inducement held out to the appellant but rather with the threats held out by the appellant to the police personnel. The trial judge dealt specifically with these threats. It was in evidence that the appellant when found after the gun battle, was boisterous and his conduct would seem to indicate aggressiveness rather than fear. When asked who owned the Walther pistol, the appellant replied 'Saya punya', and then said 'Saya dua tangan sudah jammed kalau tidak saya sudah tembak lu'. (page 53 of the record). Thus looking at the judgment of the trial judge on this issue it seems clear to us that the trial judge was in fact satisfied that there was no threat, inducement or promise used against the appellant but that it was the appellant who issued threats to his captors in a classic show of bravado.

We are therefore of the view that the statements were correctly admitted by the trial judge.

Appeal dismissed.

Jagjit Singh for the Appellant.
JS Sambanthamurthi (Senior Federal Counsel) for the Respondent.

Notes

This was yet another case in the long list of cases which decided that before a police statement may be admitted as evidence under regulation 21 of the ESCAR it had to be made voluntarily: see *John Tan Hau Seng* v *PP* [1977] 2 MLJ 66; *Lee Weng Seng* v *PP* [1978] 1 MLJ 168; *Yap Yeok Lang* v *PP* [1981] 1 MLJ 114; *Dato' Mokhtar Hashim* v *PP* [1983] 2 MLJ 232; *PP* v *Teh Cheng Poh* [1980] 1 MLJ 251.

The Federal Court appeared not particular about a specific finding of voluntariness in the records of judgment. A similar stand appears in a later case: *Krishnan & Anor* v *PP* [1981] 2 MLJ 121.

(ii) Public Prosecutor v Er Ah Kiat

[1966] 1 MLJ 9 High Court, Johore Bahru

Cases referred to:-
(1) *Thurtell and Hunt* (1824), *Notable British Trials,* pages 144 and 145.
(2) *Queen* v *Murugan Ramasamy* [1964] 3 WLR 632 at p 636.
(3) *Emperor* v *Chokhey* AIR (1937) All 497.
(4) *Khoon Chye Hin* v *Public Prosecutor* [1961] MLJ 105.

RAJA AZLAN SHAH J: The charge against the accused reads as follows:

That you at about 12.00 noon on the 15th of October, 1964 in the

Security Area as proclaimed by the Yang di-Pertuan Agong vide F L N 245 dated 17th August, 1964, namely Parit Sikon, in the District of Pontian, in the State of Johore, without lawful excuse had under your control ammunition, to wit, 1 hand-grenade without lawful authority and that you thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960.

The case for the prosecution is as follows:

Parit Sikon has been proclaimed a security area *vide* Federal Legal Notification 245 of 1964 with effect from 17th August, 1964.

On 5th October, 1964, the accused was arrested at a coffee-shop at Parit Sikon. On the following day he was taken to the Special Branch, Johore Bahru, where he was detained until 14th October, 1964, under the Internal Security Act, 1960.

It is common knowledge that Indonesians had landed and were in the Chuan Seng Estate area and that they had given hand-grenades to their helpers. Local suspects connected with the Indonesians had been arrested. The Special Branch, had every reason to believe that the accused was associated with these infiltrators.

During the period when the accused was under detention he was repeatedly questioned by ASP Foo Eng Chuan (PW3) whose main purpose was to obtain intellingence data for operational purposes. PW 3 denied that he ever threatened , assaulted or tortured the accused. The first information coming from the accused with regard to a hand-grenade was about two to three days prior to 14th October. On the evening of the 14th, the accused told PW3; 'He said that he had buried the hand-grenade behind his house'. This piece of evidence was not contradicted. As a result of this information accused was taken to Pontian police station on the following day. He was handed over to Inspector Thomas Lang (PW6) who became the investigation officer in the case. From there, PW3, PW4, PW6, PW8, together with the accused and two police constables went to Parit Sikon. There accused led the party into a barber shop and to the rear portion of the shop. Accused opened the rear door and led the party to a coconut tree stump about 15 to 20 feet from the shop.

What happened there was not very clear. PW6 testified that accused pointed out to him a spot beside the coconut tree stump where he said he buried the hand-grenade. He was cross-examined in great detail. In cross-examination he said that in his report he merely stated the following words: 'He (Er Ah Kiat) hid the hand-grenade'. In his recorded statement he said he never used the words 'He said'.

PW4, the police photograher, in his evidence-in-chief said that the accused led them to a place. There they spoke in Chinese which he did not understand. Accused led them to a place near a coconut tree stump. In cross-examination he said that he did not tell the police in his statement that 'the accused pointed out the place where accused buried the hand-grenade'.

PW8 said in evidence that accused pointed to a coconut tree stump. He did not say that 'accused then pointed out the place where he had buried the hand-grenade'.

It can therefore be gathered that there were three versions. Firstly, the accused pointed out a spot beside the coconut tree stump and he said he buried the hand-grenade there. Secondly, the accused pointed out the place where he buried the hand-grenade. Thirdly, the accused pointed out the spot. Whatever effect these three versions might have had upon the case I shall comment on later.

Be that as it may, a hand-grenade was unearthed by PW 6. The hand-grenade was in a blue cloth inside a plastic bag which was contained in a glass jar. PW6 removed the detonator from the grenade. From there they returned to Pontian police station.

The hand-grenade and detonator were subsequently examined by Terence Anthony Keane, a staff sergeant of the Malaysian Ordinance Corps (PW1). He is an ammunition technician with 12 years' experience. He testified that the hand-grenade was of Chinese manufacture and was a copy of a Russian grenade known as F1. It is of the high explosive, anti-personnel fragmentation type. Both items were servicable. After examining them the staff sergeant destroyed them and rendered a certificate of destruction (P1).

At the Pontian police station the accused made a statement to PW6 in the presence of PW7. This statement has been attacked by defence counsel as not having been made voluntarily. I have admitted the statement as a voluntary statement. The only question for me to consider with regard to this statement is how much weight I should attach to it. In other words, whether the statement is a true statement. In my opinion the fact of discovery of the hand-grenade lends colour to the truth of that statement.

The statement is self-incriminating. In substance it is as follows: Between September 5th and 24th, 1964, the accused had bought provisions for the Indonesian infiltrators. On September 24th an Indonesian gave him a hand-grenade which he subsequently put in a bottle and buried it behind his house. On October 5th he was arrested. On October 15th he led a police party to the place where a hand-grenade was unearthed beside a coconut tree stump.

That is the sum total of the prosecution's case. At the end of the prosecution case defence counsel submitted that they had not proved their case which, if unrebutted, would warrant the conviction of the accused. Firstly, counsel said that the information given by the accused to PW3 which led to the discovery of the hand-grenade is not a voluntary statement. In effect he contended that it was a confession given as a result of prolonged custody, repeated questioning, and the adoption of third degree methods by P W 3 and Special Branch officers and therefore the confession was not voluntary. He contended that those facts leading to the information must be considered to ascertain whether the confession is a voluntary confession. He submitted that if it is otherwise, that would vitiate PW3's evidence.

In my opinion that is not a correct statement of the law. It would be sufficient for the present purpose to state a passage from the judgment of Park J in the case of *Thurtell and Hunt*[1] where he said:

> A confession obtained by saying to the party: 'You had better confess, or it will be the worse for you...' is not legal evidence. But, though such a confession is not legal evidence, it is everyday practice that if, in the course of such confession, the party states where stolen goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats which may have been held out to him.

That case was referred to with approval by Viscount Radcliffe in the Privy Council case of the *Queen* v *Murugan Ramasamy.*[2] At page 637 his Lordship said:

> It is worthwhile to make the observation at this point that the reason given for allowing it to be proved that accused person gave information that led to the discovery of a relevant fact is not related in any special way to the making of a confession. It qualifies for admission any such statement or information that might otherwise be suspected on the ground of a general objection to the reliability of evidence of that type.

I think that sufficiently answers counsel's objection.

I may also refer at this stage to the application of counsel for the production of the written record of the information given by the accused to PW3 which led to the discovery of the hand-grenade. PW3 testified that the confirmation about the hand-grenade was on the evening of 14th October, 1964. He put this in writing but he said that he could not remember the exact question asked. Counsel applied that this written record be produced. I disallowed the application on the ground that it was in substance a police diary. As such, it can only be used for the purpose of refreshing PW3's memory. If this was done, counsel would then be entitled to refer to that for purposes of contradiction. Since PW3 did not refer to this written record by way of refreshing his memory, the point does not arise. I therefore refused counsel's application.

Counsel also submitted that the hand-grenade was found in a public place and accordingly the accused had no exclusive control over the place, hence the hand-grenade. In my view, if the hand-grenade was discovered in consequence of the statement it would be evidence of his control even though the hand-grenade is concealed in a public place because unless he had control he would not have concealed it there. In *Emperor* v *Chokhey*[3] the accused had said : 'I have buried the gun at such and such a place', and the court held that the whole of this statement was admissible and the statement and the fact of the accused having taken the sub-inspector to the place indicated and having unearthed a gun established his possession of and control over the weapon. True enough the gun was recovered from the railway premises within the the railway fencing, but the court held that the accused had taken the precaution of burying it, and although the place was accessible to the public and the path was running close by, no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments, therefore in the eyes of the law he must be deemed

to be in possession and control of the gun.

The statement and the fact of the accused having led PW6 and the police party to the spot indicated and PW6 having unearthed the hand-grenade established that the accused had control over the weapon. He had taken the trouble of preserving the hand-grenade in two separate covers and putting them in a screw-capped glass jar; he had taken the precaution of burying the glass jar although the place is outside his house, which is about 15 feet to 20 feet away, as no member of the public could have ordinarily got at the hand-grenade inasmuch as it was concealed from view, whereas the accused could have assess to it at opportune moments, therefore in law he must be deemed to have control over the hand-grenade.

Counsel also submitted that the cautioned statement is not worth a moment's glance. He contended that the evidence of PW6 cannot be relied upon in view of his inconsistent evidence compared to that of PW 4 and PW8 as to what had been said or omitted to have been said at the spot where the hand-grenade had been found, and the evidence of PW7 as to what happened in the recording room. He said that those inconsistencies would affect the general credibility of PW6's evidence with regard to the taking of the cautioned statement. In my opinion, discrepancies there might have been, but such discrepancies, inconsistencies, and demonstrable falsehoods by the prosecution witnesses are not sufficient reason for rejecting the whole of PW6's evidence. No doubt his evidence must be looked at with suspicion and treated with caution, but to say that it should be entirely rejected would be going too far: see *Khoon Chye Hin* v *Public Prosecutor.*[4]

What it boils down to is that whatever weight I may give to the cautioned statement must be carefully scrutinised. Bearing this in mind, I am satisfied that the cautioned statement is true and that, fortified by the accused's statement leading to the fact of the discovery of the hand-grenade would, in my opinion, be over-whelming evidence which, if unrebutted, warrant his conviction. As was said by Park J in *Thurtell and Hunt, supra,* the fact of finding proves the truth of the allegation.

In the circumstances I am satisfied that the prosecution has proved its case.

The accused elected to make a statement from the dock. I have to consider his defence which may have one of three results: it may convince me of his innocence, or it may cause me to doubt the truth of the prosecution case, in which case the accused is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution.

The accused stated that he was arrested on 5th October, 1964. He was taken to the Special Branch, Johore Bharu, on the following day. From 7th to 12th October he was interrogated every night and sometimes during the day about the hand-grenade. On 13th October he was given third degree methods by Special Branch officers until day-break and it was not until the evening of the 14th October when he could not stand further beating, that he said: 'As to where the hand-grenade is, I know.' He also said that he was forced to admit ownership of the hand-grenade.

He admitted making the statement but denied that the caution was administered to him. He said that it was not made voluntarily and that the Special Branch officer told him to make the statement properly. PW 6 was in military uniform, and that frightened him. He said that as he had been beaten and threatened and was also in fear he gave any statement at random, disregarding whether it was true or untrue. He denied that he had any dealings with Indonesians. As to the knowledge of the hand-grenade, he said that that was purely something told to him by a friend. The reason that he did not make any report to the police was because he could not betray a friend and, secondly, because the police might turn round and accuse him of owning the hand-grenade.

Accused alleged that he made a statement at random, not caring whether it was true or not, through overwhelming fear. Does that necessarily mean that he invented something that never happened? In his statement he not only admitted that the hand-grenade was given to him by an Indonesian, but he describes it with a fair amount of detail. If it were an invention on his part, it is hard to believe that he could go into details unless he had dealings with those Indonesians. I do not think a person would jeopardise his life to such an extent as the accused did unless it is true.

Accused also said that the hand-grenade was something told to him by a friend. We do not know who his friend is or what is his name. Accused said he would not betray his friend. We may ask ourselves if in times of emergency a citizen would betray his country rather than betray a friend.

Considering the defence as a whole, I am not satisfied that the defence has created a reasonable doubt as to the truth of the prosecution case. On the other hand, his defence strengthens the prosecution's case.

I therefore find him guilty and convict him.

Accused found guilty.

BTH Lee (Deputy Public Prosecutor) for Prosecution.
TT Rajah for the Accused.

FORCIBLE DISPOSSESSION — SECTION 99 (iv) (a) CRIMINAL PROCEDURE CODE

Chan Hoh
v
Tham Kum & Anor

(1968) 2 MLJ 56 High Court, Kuala Lumpur.

Cases referred to:-
(1) *Bihari Lal* v *Emperor,* AIR (1934) Lahore 454.
(2) *Sitanath Shaha Bhowmic* v *Harvey,* AIR (1921) Cal 553.
(3) *Amritlal N Shah* v *Nageswara Rao,* AIR (1947) Madras 113.
(4) *S M Dakhan* v *Madholal,* AIR (1953) Ajmer 74.

RAJA AZLAN SHAH J: This is an appeal against a declaration order made by the learned magistrate under section 99 (iv)(a) of the Criminal Procedure Code in respect of a certain part of premises at No 54, Petaling Street, Kuala Lumpur (hereinafter referred to as the said premises) The facts are fully set out in the judgment of the learned magistrate, and I will endeavour to summarise them here as briefly as possible.

The two respondents and the appellant were partners in a sundry goods business at the said premises from February 26, 1946 until February 26,1966 when it closed down. The respondents carried on with the business after the partnership was officially dissolved on August 4, 1967. The appellant, as chief tenant, allowed the respondents to remain, in, the said premises under clause 17 of the partnership agreement at a monthly rental of $243 until October 1967, but refused to accept any more rent which was tendered thereafter. After the respondents had left for home on the evening of December 1967 the appellant took possession of the said premises by instructing his two sons to lock up the place from within and without and to sleep therein. On December 9,1967 the respondents found that they could not enter the said premises which they said contained $1,500 worth of their own goods. In spite of repeated requests the appellant's sons refused to discuss the matter with them. They seemed helpless and did not offer any resistance. They then lodged two reports with the police and subsequently filed a complaint at the Kuala Lumpur magistrate's court. On December 19,1967 the learned magistrate issued a preliminary order, having satisfied himself that a dispute likely to cause a breach of the peace existed between the two parties in respect of the said premises. At the enquiry held on December 21, 1967 the appellant stated that he had acted as he did because the partnership had been dissolved on August 4, 1967, the respondents had no right to the said premises, and they had refused to quit despite having been served with several notices through his solicitors.

In those circumstances the learned magistrate was satisfied that the respondents, within the two months next before the date of the preliminary order, were forcibly and wrongfully dispossessed from the said premises by the appellant. Without going into the merits of either party's claim to the said premises he concluded that:

> The acts of closing inside and outside the said premises and asking the two sons of the appellant to sleep therein are more than sufficient to constitute wrongful and forcible dispossession.

By virtue of the provisions of section 99(iv)(a) of the Criminal Procedure Code he therefore treated the respondents as being in actual possession at the date of the preliminary order and declared that they were entitled to retain possession of the said premises and the parties were to keep the peace until the matter was disposed of by a civil court of competent jurisdiction.

The two main grounds of appeal are (i) the learned magistrate's finding of forcible dispossession was not based on the evidence, (ii) the learned magistrate had not directed his mind to the consideration of the

question of actual possession without reference to the merits of either party's claim to the said premises.

In my opinion ground (ii) merits no consideration. It is clear from the judgment that the learned magistrate had decided the issue of actual possession without reference to the merits of either party's claim to the said premises.

I now revert to ground (i). Whilst admitting there was wrongful dispossession, it was suggested on the authority of *Bihari Lal* v *Emperor*[1] that no forcible dispossession existed. It was held in that case that force comtemplates the presence of the person using the force and of the person to whom the force is used. In my view that case does not afford any assistance to the appellant as it was decided under the provisions of section 522 of the Indian Criminal Procedure Code which corresponds to section 412 of our Criminal Procedure Code and reads:-

> (i) Whenever a person is convicted of an offence attended by criminal force and it appears to the court that by such force any person has been dispossessed of any immovable property, the court may, if it thinks fit, order such property to be restored to the possession of the person who has been dispossessed.
> (ii) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

It is necessary to review certain Indian decisions with regard to the construction of the provisions of section 145 of the Indian Criminal Procedure Code which corresponds to section 99 of our Criminal Procedure Code. The first case is *Sitanath Shaha Bhowmic* v *Harvey*.[2] In that case one "H" was in possession of certain land. In his absence, a large body of men numbering about thirty who were armed with implements which might be used for offensive as well as for peaceful purposes, came upon the land in question and effectively dispossessed "H" by surrounding the land on all sides with a fence. The court held that to constitute forcible dispossession:

> No actual force or violence need be used. When the dispossession is effected by a show of criminal force sufficient to intimidate those in possession and to deter them from resistance, the latter are said to have been forcibly dispossessed.

The other case is that of *Amritlal N Shah* v *Nageswara Rao*.[3] The facts are that the petitioner who was in possession through his servants had been evicted by notice issued by a magistrate obtained on an incorrect representation. It was held that it is not in all cases that actual force should be used before there could be forcible dispossession under section 145(iv) of the Criminal Procedure Code:

> Misrepresentation and improper threats besides these are sufficient to constitute forcible dispossession and there were these in this case.

Those cases were referred to with approval in *S M Dakhan* v *Madholal*.[4] In that case the respondents entered the *nohra* illegally and forcibly and did not leave it despite requests and protests.

The result of these authorities is clear. In order to constitute forcible dispossession under section 99(iv)(a) of the Criminal Procedure Code it is not necessary that actual force or violence should have been used on any person. When the dispossession is effected by a show of criminal force sufficient to intimidate those in possession and to deter them from resistance, the latter are said to have been forcibly dispossessed. Misrepresentation and improper threats are also sufficient to constitute forcible dispossession.

In the present case the respondents came face to face with the appellant's sons who, in spite of repeated requests by them, refused them entry into the said premises. The respondents offered no resistance. Instead, they lodged two reports with the police and subsequently filed a complaint with the magistrate. In my view the reasonable inference to be gathered from the facts is that there was a show of force by the appellant's two sons which was sufficient to intimidate the respondents and deter them from re-taking possession. For these reasons I am of the opinion that the appeal ought to be dismissed. The reasons which I have given do not differ in substance from the ground which commended itself to the learned magistrate.

Appeal dismissed.

Tan Seng Kee for the Appellant.
Balwant Singh for the Respondents.

CONTEMPT OF COURT

Karam Singh
v
Public Prosecutor

[1975] 1 MLJ 229 High Court, Alor Setar

RAJA AZLAN SHAH FJ (delivering oral judgment): This is an appeal by an advocate and solicitor against summary conviction and sentence of two weeks imprisonment.

The facts so far disclosed in the record are that there was a heated argument between the magistrate and the learned counsel who was appearing on behalf of a defendant in a case concerning impersonation under section 170 of the Penal Code.

The learned magistrate adjourned into chambers for 15 minutes and after considering the matter returned to the Bench and decided to deal with the appellant summarily. The question here is whether the facts are sufficient to warrant summary committal for contempt.

Insulting behaviour by counsel, however reprehensible, may or may not be contempt depending on the surrounding circumstances. But, in my view, a magistrate's summary power to proceed of his own motion

must never invoked unless the ends of justice really required such drastic means. No doubt it appeared to be rough justice, it is contrary to natural justice and can only be justified if nothing else would do. Therefore this power must be exercised with scrupulous care and only when the case is clear beyond reasonable doubt. In my view, it is only in urgent cases a magistrate should take on himself to move. He should, in my view, leave it to the local Bar Committee to move in accordance with section 27 of the Advocates & Solicitors Ordinance, 1947. The magistrate should not appear to be both prosecutor and judge — a role which does not become him well.

In my opinion, it was not a case for summary punishment because it was not sufficiently urgent or imperative. He would have done well if he had adjourned the case and reported the matter to the local Bar Committee. The power which a magistrate possesses is both salutary and dangerous. The present appeal gives an opportunity to make clear that it should be used reluctantly but fearlessly when and only when it is necessary to prevent justice from being obstructed or undermined. That is not because judges, witnesses and counsel who are officers of the court, take themselves seriously, but because justice, whose servants we all are, must be taken seriously in a civilized society if the rule of law is to be maintained. Therefore in this case the learned magistrate should have adjourned the matter and reported it to the local Bar Committee, which I propose to do now.

However, I would set aside the conviction and sentence.

Conviction and sentence set aside.

Karpal Singh for the Appellant.
Yap Cheng Boon (Deputy Public Prosecutor) for the Respondent.

CORROBORATION

Yap Ee Kong & Anor
v
Public Prosecutor

[1981] 1 MLJ 144 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ, Abdul Hamid FJ and Hashim Yeop A Sani J

Cases referred to:-
(1) *Sim Tiew Bee* v *Public Prosecutor* [1973] 2 MLJ 200.
(2) *Yue Sang Cheong Sdn Bhd* v *Public Prosecutor* [1973] 2 MLJ 77.
(3) *Attorney-General for Nothern Ireland* v *Gallagher* [1963] AC 349.
(4) *R* v *Baskerville* [1916] 2 KB 658.
(5) *Reg* v *Malapa bin Kapana & Ors* ILR [1874] B 196, 197.
(6) *Director of Public Prosecutions* v *Hester* [1973] AC 296, 315.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court):

This was a reference under section 66(1) of the Courts of Judicature Act, 1964 (Revised Act 91). There were many questions posed for this court to answer. However, at the outset of the hearing we decided to confine ourselves to the question of corroboration only and that the hearing to proceed as an appeal as well: see *Sim Tiew Bee* v *Public Prosecutor;*[1] *Yue Sang Cheong Sdn Bhd* v *Public Prosecutor;*[2] and *Attorney-General for Northern Ireland* v *Gallagher.*[3]

The question relevant for our consideration in relation to the first appellant is Question No 3 in his notice of motion which reads as follows:

> 3. Whether corroboration is provided by proof of consistent statements made out of court before trial?

The corresponding question in relation to the second appellant is Question No 3 in his notice of motion, to wit:

> 3. Where a person is charged with abetting an offence under section 193 of the Penal Code can the evidence of an accomplice be corroborated by what the accomplice is alleged to have told his wife or his superior officer after the offence had been commited.

The background facts of this case are briefly as follows. One R K Menon (a legal practitioner) and Yap Ee Kong (a broker) were charged with abetting the offence of perjury under section 193 of the Penal Code allegedly committed by one Othman bin Ahmad, an immigration officer. What was alleged to be the perjured statement was the statement made in the Magistrate's Court, Johore Bharu, by the said Othman bin Ahmad during the trial of the said Yap Ee Kong on October 15, 1975 and October 22, 1975 for an offence under section 97 of the Road Traffic Ordinance 1958. The statement was that the $10 paid by the said Othman to the said Yap Ee Kong on December 4, 1974 was for 'petrol money' and not rental of a vehicle contrary to the statement previously made by the said Othman to the police which was that the $10 was for rental of the vehicle. It is to be noted however that it is not stated anywhere in the records that the said Othman bin Ahmad has ever been convicted under section 193 of the Penal Code. During the prosecution of Menon and Yap the said Othman bin Ahmad gave his evidence on the alleged influence of both Menon and Yap for him 'to tell lies in court.' In support of his evidence the prosecution called his wife (PW 7) to testify to the effect that on his return from court on October 15, 1975 her husband told her that he had told lies in court and that the 1st accused (Menon) had asked him to do so. PW7 further testified that on the following day, i.e. October 16, 1975, Yap came to their house at about 9.30 a.m and when she asked her husband what was the purpose of the visit, the husband replied that "Yap had asked him to say the same thing" and that he had also told her that Menon had also asked Yap to tell him (Othman) to say the same. Another witness brought by the prosecution to support Othman's evidence was Othman's superior officer (PW4). According to PW4 Othman came to see him some time in October 1975 (in fact one week after the trial) and said he had given

evidence in court contrary to the statement he made earlier to the police and that he had done so because he was directed by a lawyer 'one Mr Menon to give false evidence.'

According to the judgment of the learned President who heard the case (at page 69 of the record) he warned himself of the danger of acting on the uncorroborated evidence of PW5 (Othman bin Ahmad) whom he regarded as an accomplice. However, on the strengh of what he called 'supportive evidence' of PW7 (the wife) coupled with 'other relevant evidence' he made a finding that a *prima facie* case was established against both Menon and Yap in respect of the 1st and 3rd charges. The defence called 8 witnesses including the complainant himself and PW7, After hearing the defence the learned President held that in the light of the defence evidence he was very much in doubt as to the truth of PW7's testimony. He gave his reasons and findings as follows:

> As mentioned earlier, though her testimony cannot be considered as corroborative, but it is supportive of the prosecution's case. Now, however, her credit and character has been put in question; *thus created doubt in my mind.* The benefit of the doubt should therefore go to the accused.
>
> Accordingly, it is *my finding* that the defence has cast reasonable doubt on the prosecution case. (emphasis mine).

The learned Public Prosecutor appealed. At the conclusion of the appeal the learned judge made his own conclusions. He agreed with the learned President that the evidence of Othman bin Ahmad should be treated as that of an accomplice. Apparently he also agreed with the learned President that a *prima facie* case was established based on the evidence of Othman supported by the evidence of his wife (PW7). The learned judge thought that the learned President failed to consider PW4, Francis Frederick's evidence in arriving at his finding. We do not think that the learned President overlooked PW4's evidence in making his finding of a *prima facie* case because he clearly said in his judgment that he considered PW7's evidence 'coupled with other relevant evidence' before him which much necessarily include PW4's evidence. The learned judge went further in his judgment and said in his view the evidence of PW4 is good corroboration on the grounds that PW4 is an independent witness and had no interest in the case.

On examining the background facts as a whole we feel that this view of the learned judge amounted to serious misdirection in law. First, it is not disputed that Othman was an accomplice. It is trite law that although an accomplice is a competent witness a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. All leading authorities have stated in clear terms that it has long been a rule of practice or rule of prudence which has become virtually equivalent to a rule of law for the judge or jury to be warned of the danger of convicting on the uncorroborated testimony of an accomplice. It is a matter of prudence except where circumstances make it safe to dispense with it that there must be corroboration of the evidence of an accomplice. In the much quoted case of *R* v *Baskerville*[4] Lord Reading CJ speaking of the rule of practice accepted "as virtually

equivalent to a rule of law" requiring corroboration in this type of cases said:

> If after the proper caution by the judge the jury nevertheless convict the prisoners, this court will not quash the conviction merely on the ground that the accomplice's testimony was uncorroborated.... In considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this court, in the exercise of its powers will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this court, *after considering all the circumstances of the case, thinks the verdict unreasonable or that it cannot be supported having regard to the evidence.*

In other words, the evidence of Othman bin Ahmad in this case must be received with the greatest possible caution as it is not unlikely that he would give untruthful evidence under the circumstances. Therefore the nature and extent of corroboration is relevant. The rules are lucidly expounded by Lord Reading in *Baskerville's* case, *supra.* The rules may be formulated as follows:

(i) There should be some independet confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance:

(ii) The independent evidence must not only make if safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

(iii) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

What was the evidence which the learned judge thought was 'good corroboration'? From the recods it would be seen that PW4 testified that one morning some time in October 1975 (Complainant himself said it was one week after October 10, 1975) he was approached by the complainant who said that he had told lies in court as directed by the lawyer. That in fact was the statement made by the complainant to PW4 which incriminated Menon. The records also reveal that not only that it was a statement (the falsity of which has not in fact been proven) made to a superior officer one week after he had made the statement in court; there is in the evidence of the complainant himself that after October 22, 1975 the Deputy Public Prosecutor was looking for him and he also said in court that he was afraid of losing his job if he was charged and be convicted of perjury. Those are some of the circumstances which must be examined before the court can regard PW4's evidence to be of any corroborative value. A previous statement by an accomplice would still be a statement by an accomplice and does not increase its value by repetition. Dealing with a similar situation the court in *Reg* v *Malapa Bin Kapana & Ors*[5] said:

> From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent reliable evidence. But his statement, whether made at the trial or before the trial and in whatever shape it comes before the court, is still only the statement of an accomplice and does not at all improve in value by repetition.

However, some Indian decision have held that such previous statements would amount to corroboration but the weight would vary with the circumstances of each case. In the present case it can be seen that the weight would be adversely affected because of the circumstances under which the statement was made to PW4 as mentioned earlier. In our view the statement made by Othman bin Ahmad to PW4 must necessarily be considered as unsafe as supportive evidence much less as corroboration because such statement was probably tainted with motives to shift the blame to someone else.

Another aspect of the law relating to accomplice's evidence is whether corroboration is at all necessary where the evidence of the accomplice is itself uninspiring and unacceptable. From the facts of the present case it can be seen from the records that in so far as the offence against the first appellant, Yap Ee Kong, is concerned, there is absolutely no evidence against him. In such a situation the principles enunciated by Lord Morris of Borth-y-Gest in *Director of Public Prosecutions* v *Hester*[6] should be applied: "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said .... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence." Accordingly the court should first evaluate the evidence of an accomplice and if the same is found uninspiring and unacceptable then corroboration would be futile and unnecessary. In the present case before us in view of the fact that there is hardly any evidence against the first appellant worthy of consideration , the question of corroboration did not arise.

It was our conclusion therefore that on looking at the records of this case the evidence against the second appellant was based on the bare statement of an accomplice and it was a serious misdirection on the part of the appellate judge to consider the previous statement of an accomplice as good corroboration. As regards the first appellant there was hardly any evidence against him in the first place and the question of corroboration did not arise. On the facts of this case the answers to both the questions posed are therefore in the negative. It follows therefore that the convictions recorded by the appellate judge against both the appellants should be quashed.

Accordingly, the convictions were quashed and sentences set aside.

Convictions quashed.

Edgar Joseph Jr for the 1st Appellant.
RR Chelliah for the 2nd Appellant.
Shaik Daud Hj Mohd Ismail (Senior Federal Counsel) for the Respondent.