23/81

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

NO. 23 of 1981

O N   A P P E A L

FROM THE COURT OF CRIMINAL APPEAL SINGAPORE

B E T W E E N :

LOW HONG ENG — Appellant

\- and -

THE PUBLIC PROSECUTOR — Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal, pursuant to leave granted by the Board (Lords Diplock, Fraser and Roskill) on 1st April 1981 from the Judgment of the Court of Criminal Appeal, Singapore (Wee Chong Jin C.J., Kulasekarm J., Chua J.) dated 10th October 1979 which dismissed the Appellants's appeal against conviction for trafficking in a controlled drug (Section 3(a) of the Misuse of Drugs Act 1973 (No. 5 of 1973) read with Section 34 of the Penal Code (Chapter 103)) and sentence of death in the High Court, Singapore (Choor Singh J., Rajah J) on 22nd September 1978.

2. The Appellant was charged jointly with one Tan Ah Tee that on or about the 3rd September 1976 at about 10.25am in furtherance of the common intention of both she and the co-accused did traffic in a controlled drug, namely 459.3 grams of diamorphine.

3. The general nature of the case can be shortly summarised as follows. At about 10.15am on 3rd September 1976 two officers from the Central Narcotics Bureau kept observation on Tan Ah Tee's car parked near property in Kim Yam Road, Singapore. Tan Ah Tee was seen to emerge from a building in company with the Appellant. Tan Ah Tee was carrying a plastic bag which on reaching his car he handed to the Appellant. Tan Ah Tee drove off with the Appellant, was followed by the officers and at about 10.55am the car stopped in Dickson Road. The Appellant alighted, carrying the plastic bag and Tan Ah Tee drove off. The officers then arrested both the Appellant and Tan Ah Tee. The plastic bag was found to contain heroin, Subsequent analysis showed the amount of diamorphine to be 459.3 grams.

The learned trial Judges ruled (in response to a submission of no case) at the close of the Prosecution's case as follows :

"Explain to the two accused that we find that the Prosecution has made out a case against both of them on the charge on which they are being tried, which if unrebutted would warrant their conviction. Accordingly we call upon both of them to enter upon their defence.

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

The Appellant consulted with his Counsel and elected to give evidence.

The Appellant appealed to the Court of Criminal Appeal upon various grounds but not on the constitutional issue raised by this appeal.

4. This appeal raises an issue as to whether Sections 181,182 and 186A of Singapore Criminal Procedure Code (Chapter 113) are inconsistent with Article 9(1) of the Constitution of the Republic of Singapore, and are consequently void. The Appellant raised this issue (and no other) in a Supplemental Petition and leave to appeal was granted limited to that issue. As appears from paragraph 7 below a related issue also arises in respect of which no leave has been granted. Leave will as necessary be sought to advance argument on such related issue.

5. The Issue

The issue arises in the following way. It is fundamental that a person charged with a criminal offence shall enjoy a fair trial. It has for a long time been settled that a fair trial is best secured by adherence to certain basic rights and privileges. These basic rights and privileges include :

(i) that the accused shall be presumed innocent until proven guilty according to law;

(ii) that the burden of proving the accused guilty shall throughout be upon the prosecution;

(iii) that the accused shall be under no obligation to give evidence;

(iv) that the evidence must prove guilt beyond reasonable doubt.

The Criminal Procedure Code of Singapore was amended so as to include the provisions now sought to be impugned in this appeal by the Criminal Procedure Code (Amendment) Act 1976 No. 10 of 1976. (A copy of the relevant provisions as amended form Appendix 1 to this Case). Those provisions (to which full reference must be made) in terms provide that when the accused is called upon to enter upon his defence he shall be

(a) called upon by the Court to give evidence

and

(b) told that if he refuses to give evidence the Court may in determining his guilt draw such inferences from the refusal as appears proper.

It is submitted that as a result of these provisions (notwithstanding that is is expressley stated that the accused is "not compellable") the accused is in fact:

(a) put under an obligation to give evidence;

(b) rendered compellable to give evidence on his own behalf.

Such arises as a matter of construction of the provisions. It also accords with the intention of the draftsmen of the original clauses upon which the Singapore Code is based, namely the Criminal Law Revision Committee (11th Report) Evidence (General) Cmnd. 4991 1972.

At paragraph 110 (page 68) the Report states:

"In our opinion the present law and practice are much too favourable to the defence. We are convinced that, when a prima facie case has been made against the accused, it should be regarded as incumbent on him to give evidence in all ordinary cases".

At paragraph 112 (page 69) the Report states:

"The changes which we propose (namely the provisions under consideration in this appeal) in paragraphs 110 and 111 will, we hope, operate as a strong inducement to accused persons to give evidence. But we wish to go further still for this purpose ... the Court should tell the accused that he will be called on ... should tell him what the effect will be if he refuses; and ... the court should formally call on the accused to give evidence. The intimation by the court will leave the accused under no mistake as to what will be his position. This is

particularly important if the accused is unrepresented. We think that the formal calling on the accused to give evidence, followed by his refusal, would have value in demonstrating to the jury or magistrate that the accused had the right, and obligation to give evidence, but declined to so so." (underlining added)

It is submitted that by the imposition of such a duty and creation of compulsion the basic rights and privileges set out at sub-paragraphs (i), (ii), (iii) and (iv) above are contradicted, and the safeguards of a fair trial are effectively removed alternatively gravely undermined and threatened. The existence of the duty and compulsion are based upon arguments which are outlined in paragraphs 11 to 14 of this Case.

6. The law in Singapore prior to the 1976 Amendment Section 181

Section 181(1) of the Criminal Procedure Code (which first become law in Singapore in 1960) provides:

"(1) When the case for the Prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the Accused to enter on his defence".

The present law in Singapore as laid down by the Singapore Court of Criminal Appeal in Ong Kiang Kek v. Public Prosecutor 1970. 2 MLJ 283 is that this section requires the Court at the close of the prosecution's case, to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt and if the court finds that at that stage it has not been so established there is nothing left but to acquit. If (which it is respectfully submitted is to be doubted) the said decision is correct the law in Singapore is significantly different to the requirement in England and Wales that there be a prima facie case.

7. It is submitted however that the present state of the law as laid down by Ong Kiang Kek gives rise to the following consequences in this appeal.

Firstly in their grounds of decision (Vol. 111)(page6) the learned trial judges stated as follows :

"At the close of the case for the prosecution we found that both the accused had a case to meet. We administered to them the now customary warning and called upon them to enter upon their defence. Both the accused elected to give evidence on oath and did so accordingly".

It follows that in finding that there was " a case to meet" the learned trial judges found a prima facie case only and consequently according to Ong Kiang Kek the Appellant was entitled to be acquitted.(It is in relation to this issue that the Appellant has not leave to appeal to the Board and leave will as necessary be sought on the appeal).

Secondly if the Court has to be satisfied beyond reasonable doubt the freedom to draw inferences expressley provided for by the amendments to the Criminal Procedure Code is wholly superfluous. The case is proved.

Thirdly it must mean that in every case where an accused is represented and properly advised he is told that the court has made up its mind and convicted him and that the only to escape conviction is for him to give evidence and establish his innocence. It is submitted that such compulsion is clearly extreme and offensive to the principles of a fair trial.

To sustain a fair trial it is essential that a finding of guilt must be suspended until the defence evidence has been heard or the defence has been given the opportunity of calling evidence. It is submitted that it is no answer that so to inform the accused is fair because the element of "guessing" is removed from his decision whether to call evidence. The unfairness stems from :

(a) a determination being reached before the defence evidence has been called;

(b) the conviction of an accused before he has been heard;

(c) the imposition of a burden to establish innocence.

8. The law relating to the failure of the accused to give evidence

If Ong Kiang Kek is to be overruled by the Board in this appeal the law in Singapore and in England and Wales will be at one in requiring the proof of a prima facie case at the close of the prosecution's case.

Since the Criminal Evidence Act 1898 which rendered an accused a competent witness there has grown up a body of case law defining the limits of comment a judge may make upon an accused's failure to give evidence. It is important to emphasise that the 1898 Act did not confer a right upon a trial judge to make a comment. It prohibited the prosecution from making a comment. The statutory ban upon the prosecution making a comment indicates the caution with which Parliament approached an amendment to the law which could undermine the basic rights and privileges referred to above. It is submitted that the true effect of the 1898 Act was to keep intact the basic right that an accused should not be compelled to give evidence while recognising the reality that a failure to do so in certain cases could be the subject of legitimate comment. The inclusion of the ban on comment by the prosecution is significant since it represents an express safeguard against the comment giving rise to compulsion, or even an appearance of compulsion.

9. It is submitted that it is obvious that the failure to give evidence can give rise to legitimate comment. The bounds of legitimacy appear, for example, from Lord Parker LCJ In Regina v Bathurst 1968 2QB 99. If any comment at all is necessary in a case it should be on the lines there suggested:

"The accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing

they must not do is assume that he is guilty because he has not gone into the witness box".

In Regina v. Sparrow 1973 1WLR 488 the Court of Appeal held that a judge's comment must neither expressly nor impliedly give the jurors to understand that a defence could not succeed if the defendant did not give evidence. The comment should not suggest that there was no defence or that guilt should be inferred because of the failure to give evidence.

10. It is submitted that it is essential for a jury(or judges without a jury)to take into account the failure of an accused to give evidence on oath but if the basic rights and privileges referred to above are to be preserved the limits placed upon comment by the judge (established by the cases) are logical and comprehensible. Those limits recognised the proper administration of justice require that:

(i) inferences (which may be adverse) can be drawn from the evidence which has been given because the accused has failed to testify, and

(ii) comment may be made to the effect that the prosecution's case is uncontradicted.

But such comment and inferences are to be distinguished from afreedom to draw inferences from a failure to testify. It is submitted that it is because it has long been settled that there was no obligation upon an accused to testify that inferences from a failure to testify have not been permitted. A failure to testify could mean no more than an exercise of rights summarised in the words of Devlin J. (as he then was) at the trial of Dr. Bodkin Adams:

"Ask me no questions, I shall answer none. Prove your case".

11. The effect of S.181, S.182 and S. 186A

If it were to be argued that the true effect of the provisions is to permit no more comment than the following :

(i) a prima facie case has not been contradicted or explained;

(ii) the prosecution's case is the more convincing because of the defendant's failure to testify;

(iii) the defence case is less convincing because of the failure to testify;

and

(iv) the court can draw proper inferences from the prosecution's evidence that has been adduced;

then it is submitted that according to the law prior to the amendment the court was capable of so acting and the express conferment of the right "to draw such inferences from the refusal as appear proper" was mere codification.

It is respectfully submitted that such is not the effect alternatively the clear effect. The provisions are carefully structured to put pressure upon the accused they are designed to create an obligation and the failure to fulfill an obligation can clearly give rise to inference not capable of being drawn where the accused simply (on one view) elected to exercise a right not to testify.

In fact it is submitted that the mischief of the provisions will arise not in the instance of a strong prima facie case (that will result in conviction anyway) but in the instance where there is a prima facie case but nevertheless a reasonable doubt. If there is a possible innocent explanation even on the prosecution's evidence then if it is sufficient to raise a reasonable doubt there should be an acquittal if it is possible but, because of a failure to testify left the more fanciful then the accused has lost the opportunity to raise the reasonable doubt and will be convicted. The existence of a right to draw inferences can it is submitted only be of use in the former instance and clearly amounts to an interference with the burden of proof and the presumption of innocence.

12. Compulsion

It is submitted that there is no rational distinction to be drawn between specified sanctions such as a fine and imprisonment for contempt which are the classic means of compulsion rendering a witness "compellable" and a solemn invocation from the court to give evidence and a warning that failure to so do may result in "hostile" inferences being drawn. Each arise in the process of law, their difference lies in the nature of the sanction not in the substantive effect. So far as R. v. Kops 1894 A.C. 651 may be

contrary to this submission the Appellant invites the Board to depart from the decision in that case. The Appellant respectfully adopts the reasoning of the minority of the Supreme Court of New South Wales (1893 NSW L.R. Vol. XIV 150).

13. Conclusions

It is acknowledged that a case can be made out for altering the law so that it is not so favourable to the defence (see Criminal Law Revision Committee Eleventh Report), but such alterations can only be at the expense of long established basic rights and privileges. The Appellant adopts the historical analysis and survey in the Case for the Appellant in the consolidated appeal of Haw Tua Tau which demonstrates the long standing nature of the basic rights and privileges at issue in this appeal. It is submitted that the existence and use of presumptions (in limited categories of cases) arising upon the proof of certain facts does not touch upon the consequences of these provisions of the Criminal Procedure Code which in terms create (upon the proof of a prima facie case) a rebuttable presumption in every criminal trial. Such a change it is submitted required an amendment to the Constitution of Singapore in accorsance with Article 5 thereof.

14. It is submitted that the order of the Court of Criminal Appeal was wrong and ought to be reversed, varied or altered, alternatively that this issue should be remitted to the Court of Criminal Appeal for consideration of the constitutional issues, for the following, among other

REASONS

(1) BECAUSE the provisions contained in Sections 181,182 and 186A of the Criminal Procedure Code are inconsistent with Article 9(1) of the Constitution of Singapore.

(2) BECAUSE the said provisions undermine and remove long established safeguards of a fair trial, which are or ought to be regarded as fundamental rights.

(3) BECAUSE the learned trial judges were not satisfied at the close of the prosecution's case that the prosecution had established a case beyond reasonable doubt.

GEORGE NEWMAN Q.C.

GEORGE WARR

APPENDIX 1

The Criminal Procedure Code (Chapter 113) provides in Sections 181,182 and 186A as follows:-

"S.181(1) When the Case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.

(2) Before any evidence is called for the defence, the court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect will be if, when so called upon, he refuses to be sworn or affirmed, and thereupon the court shall call upon the accused to give evidence.

S. 182(1) The accused or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution.

(2) He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

(3) If any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence.

(4) Any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(5) The accused shall be allowed to examine any witness not previously named by him under the provisions of this Code if that witness is in attendance.

S.186A(1) In any criminal proceedings except any inquiry preliminary to committal for trial, the accused shall not be entitled to make a statement without being sworn or affirmed, and accordingly if he gives evidence, he shall do so on oath or affirmation and be liable to cross-examination; but this subsection shall not affect the right of the accused, if not represented by an advocate, to address the court otherwise

than on oath or affirmation on any matter on which, if he were so represented, the advocate could address the court on his behalf.

(2) If the accused -

(a) after being called upon by the court to give evidence or after he or the advocate representing him has informed the court that he will give evidence, refuses to be sworn or affirmed; or

(b) having been sworn or affirmed, without good cause refuses to answer any question,

the court in determining whether the accused is guilty of the offence charged, may draw such inferences from the refusal as appear proper.

(3) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed in the cirumstances described in paragraph (a) of subsection (2).

(4) For the purposes of this section a person who, having been sworn or affirmed, refuses to answer any question shall be taken to do so without good cause unless -

(a) he is entitled to refuse to answer the question by virtue of subsection (4) of Section 120 of the Evidence Act or of any other written law or on the ground of privilege; or

(b) the court in the exercise of its discretion excuses him from answering it.

(5) Nothing in subsection (2) shall apply to an accused if it appears to the court that his physical or mental condition makes it undesirable for him to be called upon to give evidence."

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- and -

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CASE FOR THE APPELLANT

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