THE ABUSE OF THE DUE PROCESS DOCTRINE

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Abstract

Under the Malaysian evidence law, evidence procured by illegal methods, even by reprehensible methods such as entrapment is still admissible as long as it is relevant. Even though, there is a discretion to exclude, it is exercised in very circumscribed circumstances. In England, although entrapment is not a defence – the judiciary has adopted the ‘abuse of due process’ doctrine to overcome the unjust effects of admitting such evidence by staying the proceedings. Recently, in Wan Mohd Azman bin Hassan v PP [2010] 4 MLJ 141, the Federal Court was asked to consider receiving the doctrine, it was reluctant to do so. This paper seeks to propose that this valuable instrument should be considered strongly because it can go a long way in promoting justice and avoiding serious miscarriage of justice in the Malaysia criminal justice system.

Key words: Abuse of Court Process, stay of proceedings.

Introduction

At common law, all courts claim inherent jurisdiction to control their own proceedings in the interest of justice. This notion was articulated as far back as 1914 in R v Christie [1914] AC 545 HL, and confirmed recently in R v Sang [1980] AC 402, HL. This is fertile soil in which the doctrine of abuse of process took root, and subsequently blossomed. In Azahan bin Mohd Aminullah v Public Prosecutor [2005] 5 MLJ 334, the Court of Appeal (Putrajaya) referred to the Federal Court case of Kiew Foo Mui v Public Prosecutor [1995] 3 MLJ 505 which clarified the meaning of justice to mean: ‘… the expression ‘justice’ comprehends not merely a just decision but also a fair trial. … a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to result in the sacrifice of the other. The two are closely interlinked.’ The same Court of Appeal too was mindful of what Lord Denning MR in R v Police Commissioner of the Metropolis ex parte Blackburn (No 2) [1968] 2 QB 150 said: ‘All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.’

Hence, the trial judge’s first duty in criminal litigation is to ensure a fair trial. Trial judges retain a residual background jurisdiction to prevent or correct injustices for which there would otherwise be no remedy.

Research Objective and Methodology

This paper evaluates the extent courts in Malaysia are willing, in the lights of developments in the United Kingdom and Europe, to jealously protects its own process from being degraded and misused and must where appropriate, stay proceeding when the extent of abuse of process offended the court’s conscience as being contrary to the law. This paper, therefore, seek to propose that this valuable instrument i.e. doctrine of abuse process should be considered strongly because it can go a long way in promoting justice and avoiding serious miscarriage of justice or failure of justice in the Malaysia criminal justice system. The methodology for this research is qualitative, using library based materials, particularly relevant decided cases.

Entrapment, Illegally Obtained Evidence and Abuse of Process

“Entrapment” refers to the enticement of a person by an agent provocateur to commit an offence he would not have otherwise committed. It has been well established for nearly thirty-five years (in England and followed in Malaysia and Singapore) that

There has, however, been recent rise to prominence towards excluding evidence obtained through entrapment where there is an abuse of process. Abuse of process according to Lord Steyn in R v Latif [1996] 1 WLR 104, 112 means ‘an affront to public conscience’ or to Lord Bingham in Nottingham City Council v Amin [2000] 1 WLR 1071, 1076 matters ‘deeply offensive to ordinary notions of fairness’. What the meaning amounts to is that entrapment involves agents of the state luring or enticing persons to commit offences or otherwise instigating the crime. This was explained by Lord Nicholls in Loosely [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060, where the House of Lords reviewed the law governing abuse of process and the relationship between this concept and the discretion to exclude evidence.

‘It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so’ ([2001] 1 WLR 2060 at [11]).

**Entrapment Amounting to Unfair Trial**

In a situation where it is clear that there has been an abuse of process, it may not be sufficient for the court to merely decide on the admissibility of the evidence obtained through entrapment but to consider staying the entire proceeding against the defendant too. This is because the defendant is validly arguing that he should not be tried at all as he was ‘lured’ to commit the crime he would not have otherwise committed. Where the defendant fails in his application to stay the proceeding, it will still be open for him to seek to exclude the evidence. To stay a proceeding, and the admissibility of the evidence are distinct matter and different tests apply to these two decisions.

Both the Court of Appeal in Shannon [2001] 1 WLR 51 and the House of Lords in Loosely [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060, additionally measured the question of entrapment against the yardstick of European Human rights law. Notably, the courts referred to the leading European decisions of Teixeira de Castro v Portugal (1998) 28 EHRR 101, which distinguished covert investigation of crime which was acceptable, and the positive instigation of offences which could not be countenanced. Lord Hoffman in Loosely took note that in Teixeira, the European Court of Human Rights concluded the two police officers had not merely operated undercover but had actually instigated serious crime without following the customary procedure in Portugal of conducting their investigations under judicial or police supervisions, ought not to have been admitted because it violated de Castro’s right to a fair trial.

Taking the hint from Loosely, the appropriate test for entrapment is whether or not the police’s law enforcement methods were part of a bona fide investigation as opposed to being merely a means of ‘preying on the weaknesses of human nature to create crime for an improper purpose’ (per Lord Hoffman at [58]). The case is not the same as held by the Strasbourg court in Khan v United Kingdom (2000) 8 BHRC 310, in that a listening device had been unlawfully applied to the wall of a suspect’s house in breach of art. 8, violating K’s right of privacy, did not of itself render K’s trial unfair under art. 6.

As to what form of entrapment will trigger the trial unfair hence staying the proceeding, this can be gleaned from the House of Lords’s view of the Court of Appeal’s decision in A-G’s Reference (No. 3 of 2000) [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060. The Court of Appeal had determined that the trial judge had wrongly stayed proceedings against a drug dealer, with a previous record of dealing in soft drugs, who had twice obtained and supplied heroin at the insistent request of undercover police officers. The Court emphasised that when deciding whether an abuse of process has occurred, the judge must bear in mind that there exists a spectrum of possibilities: at one end, there is the defendant who has simply been offered the chance to prove himself. In the view of the House of Lords, however, the trial judge had been entitled to stay proceedings in that case: the accused had never before dealt in heroin and he had been induced to procure heroin by the prospect of a profitable trade in smuggled cigarettes – something not normally associated with the commission of this offence. The judge could therefore justifiably take the view that the police had caused the accused to commit an offence that he would not otherwise have committed (cf Loosely, at [81] and [116] per Lord Hoffmann and Hutton).

**Stays for Abuse of Process**

A judicial stay of proceedings for abuse of process is a jurisdictional remedy which operates irrespective of the substantive merits of the case. It authorises the judge to ‘stay’ i.e. to stop or suspend, a prosecution indefinitely where the judge decides that a fair trial cannot take place either because of something which has already happened in the course of litigation, or due to circumstances likely to prevail were a trial to take place. An example of the former would be a case where the police or prosecutor has behaved in such an outrageous way – torturing a suspect or joining a criminal conspiracy, when proceedings are seriously compromised, even though the accused may well be guilty of the crime charged. An example of the latter would be a case where an accused has attracted such unfairly prejudicial pre-trial publicity that his right to receive a fair trial by an unbiased trier of fact is seriously jeopardised. In Wan Mohd Azman bin Hassan@ Wan Ali v PP [2010] 4 MLJ 141, the facts showed that
the accused was an ‘unwary criminal’ who readily participated in the offence, and thus, there was no entrapment. Though the Federal Court was of the view that entrapment is not a substantive defence in Malaysian law, it nevertheless said that in any event, if there ever was entrapment, the burden falls on the accused to prove defence of entrapment in that he was an ‘unwary innocent’ who would not, but for the entrapment, have committed the offence. This same stance was also taken by the Court of Appeal (Putrajaya) in Suzimi Bin Shauri v PP [2011] 5 MLJ 164 which followed Wan Mohd Aznan and held the common law position that entrapment is not a substantive defence remains the law. It is for the accused to prove that he committed the offence as a result of an entrapment. In Suzimi, the accused failed to show that he was actually an ‘unwary innocent’ who would not, but for the entrapment, have committed the offence. On the contrary, the evidence was clear that the accused readily participated in the offence. In PP v Zal Bin Hassan & Ors [2013] MLJU 495, the court took note that the law allows the use of agent provocateurs, and is not uncommon technique employed by the police in apprehending drugs traffickers or organized crimes where it is difficult to secure evidence in the usual method

In entering a stay, the judge effectively says the prosecution is so flawed or tainted that he cannot be confident that the accused would receive a fair trial; such an abusive proceeding must therefore be stopped without even examining the evidence on the substantive charge. A stay is not the legal equivalent of an acquittal, nor even, a final determination of the case. But it operates in practice to terminate proceedings without any real possibility of the case being recommenced. In fact, it would probably be a d

Every Court has undoubtedly a umstances, at least three of the Law Lords affirmed the existence of a general jurisdiction, extending cutions (e.g. new Zealand national was wanted for offences in England connected with his allegedly y horrendous so as

, tisfy in practice. For example, in the notorious case of mes.

Lord Lowry also said in these memorable words:

‘The Court ... to protect its own process from being degraded and misused must have the power to stay proceeding ... and have only been made possible by act as offend the court’s conscience as being contrary to the law. The acts by providing a morally
unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the courts' process has been abused.’

Bennet’s principle has since been applied in other important extradition cases (R v Mullen (no.2)[2007] QB 520 CA; See Laura Davidson, “Quashing Convictions for Pre-Trial Abuse: Breaching Public International Law and Human Rights [1999] CLJ 446). However, the significance of the decision extends far beyond its immediate subject matter. The idea of the Court’s conscience as a litmus test for the moral legitimacy of criminal prosecution, expressed too lucidly by Lord Lowry, has already been extended to cases concerned with propriety of undercover police operations and the serious question of entrapment as discussed above.

Conclusion

In the light of R v Loosely; A-G’s Reference [No. 3 of 2000], there is now a distinct doctrine of entrapment in English law, requiring proceedings made possible by improper entrapment to be stayed as an abuse of process of the court. It will be wise for the Malaysian Courts to consider this doctrine of abuse process, in view of the fact that so much evidence that it is often procured by such illegal and reprehensible means is repugnant to notions of justice or a fair trial.

The Court too must jealously protects its own process from being degraded and misused and must where appropriate stay proceeding when the extent of abuse of process offended the court’s conscience as being contrary to the law. It is when the deception actually implants the criminal design in the mind of the accused. Silence is not an option when things are ill done, and the court should be prepared nor will it be deterred from doing what is right where the occasion requires, provided that it is pertinent to the matter in hand i.e. the conduct of the law enforcement agency was so seriously improper that it bought the administration of justice into disrepute. The judge could, therefore, justifiably take the view that the police had caused the accused to commit an offence that he would not otherwise have committed i.e. he was actually an ‘unwary innocent’ who would not, but for the entrapment, have committed the offence