

THE COMMON LAW PRIVILEGE AGAINST SELF-INCRIMINATION: HAS IT BEEN ABOLISHED IN MALAYSIA?

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ABSTRACT

It is an inveterate principle of the common law, adopted by common law jurisdictions that any person cannot be compelled to answer any questions that may incriminate himself. This privilege against answering self-incriminating questions can only be abrogated by statute, expressly or by necessary implication. Though this privilege has been much criticised as being obsolete, particularly in civil cases because it can prevent much relevant and strongly probative evidence from being disclosed in litigation, nevertheless, it still has a hallowed place in criminal cases. However, recent judicial decisions in Malaysia have blatantly held that this privilege against self-incrimination has gone, though the section concerned does not expressly abrogate the privilege. The purpose of this paper is to argue that in Malaysia, the privilege has not been abrogated, but is still intact.

Keywords: privilege, compellability of witness, right to remain silent.

1. Introduction

Generally, a witness must answer any question put to him at the trial, although some questions may require the court's express permission before they can be asked such as allegations of previous bad character or reprehensible behavior (propensity evidence) or questions concerning the sexual activities of the rape victim with any other person other than the accused. The court may forbid any questions or inquiries which it regards as indecent or scandalous, although they may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. This is so even if the answers might be very damaging to the witness' own case or otherwise extremely personal or embarrassing. Of course, questions that are intended to insult or annoy may be prohibited by the court.

Privilege is the right accruing to a party in certain circumstances not to be forced to give or provide evidence that is otherwise both relevant and admissible. In *Blunt v. Park Lane Hotel Ltd* [1942] 2 KB 253, Lord Goddard summarised the position at common law as follows: 'It is a fundamental principle of the common law that, in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction, the imposition of a penalty or the forfeiture of an estate.' Simply, it means that under the English common law, a witness may refuse to answer questions which directly or indirectly tend to incriminate him.

In Malaysia, however, in *Attorney General of Hong Kong v Zaayah Wan Chik and others and another appeal* [1995] 2 MLJ 620, the Court of Appeal held that the common law privilege against self-incrimination has been removed by virtue of section 132(1) of the Evidence Act 1950. Gopal Sri Ram JCA [as he then was] at page 631 of the judgment cited with approval the decision in *Television Broadcasts Ltd and others v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346. These decisions have from thereon been unabatedly followed in subsequent cases by courts in Malaysia such as in *RHB Bank Berhad v Ab Malik Bin Abdullah & Ors* [2009] MLJU 1452 - 24 December 2009; *Rotta Research Laboratorium SPA & Anor v Ho Tack Sien & Ors (Chai Yuet Ying Third Party)* [2011] MLJU 1133 - 29 April 2011; and *Jagathisan a/l Muthoosamy v Public Prosecutor* - [2012] 5 MLJ 630 - 6 June 2012.

2. Research Objective and Methodology

This paper appraises to what extent the courts in Malaysia have been right in saying that the common law privilege against self-incrimination has been abolished by section 132 of the Evidence Act of Malaysia. Is it really gone or the application of the common law privilege is only in a modified form or is applied in a different way? The bottom line for the common law privilege against self-incrimination being 'it may expose him to any criminal charge, penalty or forfeiture.' This paper seeks to explain that the common law privilege against self-incrimination has not been expressly abolished by section 132 of the Evidence Act of

Malaysia. The discussions cover the nature, ambit and degree of risk to self-incrimination. The methodology for this research is qualitative but doctrinal in nature by using library based materials such as statutes, decided cases, books, and journal articles.

3. Compellability of Relevant Evidence

Section 132(2) of the Evidence Act 1950 envisages the situation when a witness is compelled by the court to answer a question and the answer shall not subject the witness to any arrest or prosecution or be proved against the witness in any criminal proceeding except a prosecution for giving false evidence by the answer given by the witness thereto (*Rex v GA Phillips* [1936] MLJ Rep 106; *Tang Lew Keng v Public Prosecutor* [1968] 2 MLJ 48; *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63; and *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179 (FC)). The presiding judge by virtue of s 132(3) of the Evidence Act 1950 has a duty to explain to the witness the ramifications of s 132(2). In other words, an answer may be forced out of the witness by the judge but the prosecution cannot prosecute the witness on the basis of the answer (*Jagathisan a/l Muthoosamy v Public Prosecutor* [2012] 5 MLJ 630).

It must be reiterated that a witness must normally furnish any document for the opposite side's inspection, if they are relevant to the issues in the case and requested irrespective of their contents. Any failure to answer a question at trial or to furnish the relevant document is likely to be treated as contempt of court. There are good policy reasons for this. The need for correctioners of adjudication dictates that all relevant and available information should normally be placed before the court. It has been explained that 'public interest is, on balance ... best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression': Per Lord Edmund Davies in *Waugh v British Railway Board* [1980] AC 521. The exercise of the privilege (not to disclose relevant evidence or answer questions) normally detracts from the fairness of a trial, if it denies a party access to a fair trial. Likewise, Raja Azlan Shah FJ too, in *Ba Rao & Anor v Sapuran Kaur & Anor* [1978] 2 MLJ 146 said: 'In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.'

4. The Nature of the Privilege

Despite the stated strong policy considerations, there are few exceptions to the general rule whereby a person or body can legitimately refused to answer relevant questions or produce relevant documents, not because the evidence contained in them is inadmissible under the law of evidence, but on the ground that the information is subject to privilege. One of the most important aspect of the privilege is that against self-incrimination. However, the holder can waive the privilege. The privilege against self-incrimination may be claimed by a witness including a litigant, called upon to answer questions during civil or criminal trial or to disclose documents, who feels that by doing so might incriminate him in the commission of the offence and to expose him to the risk of a criminal charge, penalty or forfeiture under domestic law. Where this is held to be the case by the court, the witness may legitimately refuse to answer the relevant question or to produce the appropriate document.

The common law privilege against self-incrimination appears to owe its origin in popular hostility to the processes of the early modern court of the Star Chamber in England, in which witnesses could be interrogated on oath, and so compelled to inculpate themselves even though not accused of an offence. It is also claimed that it helps to preserve the autonomy and dignity of the individual within the wider justice system. It is needless to say that the presence of the privilege does not preclude a question from being asked; it merely entitles a witness not to answer it. It is entirely for the court to determine whether a claim to one privilege is well founded as clearly emphasised recently in *BSC Granada TV* [1982] AC 1906. Obviously, the onus is on the party who claims the privilege to persuade the court that it should apply. It must also be taken note that the privilege applies only to the claimants, and it can also include artificial legal personalities such as limited companies.

In the English Court of Appeal case of *Rank Film Distributors Ltd & Others v Video Information Centre & Others* [1980] 2 All ER 273 (CA); [1981] 2 All ER 76 (HL), Templeman L.J., in his judgment in the case said, at page 289, "... an order ex-parte or otherwise for discovery or interrogatories under threat of committal for disobedience should not be made if it is obvious that compliance with the order will involve the danger of self-incrimination... In my judgment the doctrine against self-incrimination entitles the defendant to concealment and silence. Effective concealment cannot be maintained once discovery has taken place. Any other conclusion would in practice make a mockery of the doctrine against self-incrimination." The decision of the Court of Appeal in the Rank's case was upheld by the House of Lords [1980] 2 All ER 273 (CA); [1981] 2 All ER 76 (HL).

5. The Ambit of the Privilege

The ambit of the privilege was stated in the leading case of *Blunt v. Park Lane Hotel Ltd* [1942] 2 KB 253, where Lord Goddard graphically summarised the position at common law as follows: 'The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sue for.' In this case, the plaintiff in a slander case objected to answering interrogatories on the ground that to do so might expose her to the risk of ecclesiastical penalties for her incontinent sexual behavior. The Court of Appeal rejected this claim on the ground that in the modern era, such a jurisdiction has long been obsolete, at least so far as the vanity was concerned, and that it was 'fantastic' to suppose that there was any real likelihood of ecclesiastical penalties being imposed on the claimant. The privilege covers the risk of prosecution in the lower of superior courts.

It is, however, clear that the criminal charge must relate to a prosecution in the jurisdiction in which the privilege is being claimed, not a foreign country. This was clearly decided by the Privy Council in *Branmigan v Davison* [1997] AC 238 in relation to criminal cases. So, a witness could not refuse to answer a question in the criminal court on the ground that his answer might incriminate him with regards, for example, to an offence and proceedings in Papua New Guinea. The common law privilege does not run where the criminal or penal sanctions arise under foreign law. Cases involving threat of 'penalties' sufficient to invoke the privilege are much rarer in the modern era than those involving the threat of a criminal prosecution. But recently, in *Cobra Golf Inc v Rata & Others* [1998] Ch 109, Justice Rimmer held that for a party to expose himself to the risk of proceedings for civil contempt (technically, formally not a crime, though punishable by a fine or imprisonment), was to expose himself to the risk of a penalty and brought the privilege into play.

There is nothing to prevent a witness from answering an incriminating question if he wishes to do so, and so waiving the privilege. In the Court of Appeal case of *Rank Film Distributors Ltd and others v Video Information Centre and others* [1980] 2 All ER 273, Templeman LJ at page 291 of the judgment stated:

"In every case in which the defendant is faced with possible self-incrimination as a result of discovery or interrogatories and especially where the tort and the crime are constituted by the same activity, the defendant has a choice. The defendant may choose to rely on the silence and concealment afforded by the doctrine against self-incrimination in order at one and the same time to hamper the plaintiff in the proof of his civil action and as a means of resisting or avoiding criminal prosecution or conviction. ... Alternatively again, if a defendant wishes to maintain a plausible defence to the civil suit, he will waive the privilege and give frank answers to interrogatories and full discovery."

Further, being a common law privilege, it can be expressly or by necessary implication be abrogated by the legislature. In England, this ancient doctrine has been to a large extent modified or whittled down by Parliament, particularly in civil cases.

6. The Degree of Risk

In *Blunt's* case, Lord Goddard spoke about a charge or penalty that was 'reasonably likely' to be brought. This appeared to be apparent (but modest) relaxation of the order dicta adumbrated in the ancient case of *R v Boyes* [1861] 121 ER 730, which proposed that the danger to be apprehended must be real and imaginable, with reference to the ordinary operation of the law. It would not cover, threats that were 'insubstantial', 'barely possible' or so improbable that no reasonable man would suffer to influence his conduct. This incrimination is obviously a matter of degree and does not cover very remote or purely fanciful possibilities. In *Blunt*, Lord Goddard spoke about 'tending' to show. Clearly, the rule is not confined to answers that would directly incriminate the witness, as in '*I stole the watch*' but extends to those that might merely advance the prosecution case against him, like '*I admit I was the man seen stealing the watch*'. As Lord Tenterden pointed out in *R v Slaney* (1852) 5 Cx P 213, '*You cannot not only compel to answer that which will incriminate him, but that which tends to criminate him.*' Needless to say, if criminal matters have been concluded or the witness has been formerly pardoned as in *Boyes*, he will no longer necessarily be in jeopardy of further prosecution, and hence the privilege will not apply (*Re L (a minor)* [1997] AC 16, HL).

7. Doctrine of Self-Incrimination under S.132 of the Evidence Act of Malaysia

Section 132 of the Act reads:

S. 132(1). A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, that witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any other person.

Section 132(2). No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

Section 132 (3). Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

In *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63, the High Court ruled that it is the duty of the court before compelling a witness to answer a question, the answer to which may or will incriminate him, to explain to him the purport of section 132(2). In *Prabah a/l Sinnathamby v Public Prosecutor* [2010] 5 MLJ 252, the Court of Appeal held that s. 132(3) clearly imposes a duty on the trial judge to explain to him the purport of s 132(2) before compelling him to do so. Following Whitley Ag CJ in *Rex v GA Phillips* [1936] MLJ 106, the Court also held that a witness is protected under this sub-section only in respect of the answer which he is compelled to give in court. It does not prevent him from being prosecuted for any offence which he may have committed. The Court of Appeal explained that the approach that a trial judge ought to take when faced with a situation where a witness hesitate to answer a question which may criminate him is to determine firstly whether that question relates to any matter relevant to the matter in issue. A question is relevant to a matter in issue if it is required to prove the existence or non-existence of a fact in issue, and the fact in issue in the instant case would be the act of kidnapping at the place and time specified in the charge. If the question is determined to be relevant to a matter in issue, then it would be next necessary for the judge to act under s 132(3) to compel the witness to answer the question and to explain to the witness the purport of s 132(2).

The privilege would not apply if there is evidence that a defendant is already exposed to the risk of criminal proceedings simply because a demand for disclosure under a tracing order could not add to the existing risk faced by the defendant (see *Meridian Asset Management Sdn Bhd v Ong Kheng Hoe and Others* [2008] 3 MLJ 184 CA; *Khan v Khan* [1982] 2 All ER 60). Further, the privilege too is not an automatic protective measure. For the defendants to successfully rely upon the privilege, they must substantiate and particularise their claim to privilege. The assertion may be through an affidavit. The mere assertion by a party that he may or will incriminate himself is not sufficient (*RHB Bank Berhad v Ab Malik Bin Abdullah & Ors* [2009] MLJU 1452 - 24 December 2009). The privilege does not apply to a voluntary witness (see *RHB Bank Berhad v Ab Malik Bin Abdullah & Ors* [2009] MLJU 1452). It only applies to a witness who are compelled to answer in court.

In 1954, in *Chye Ah San v R* [1954] MLJ 217, the distinction between the privilege embodied in s.132(1) and the common law privilege against self-incrimination was lucidly pointed out by Justice Spenser Wilkinson when he said: '*In England, a witness is not bound to answer questions which may tend to criminate him. In this country, however, the maxim is enforced in a different way, because under section 132 of the Evidence Ordinance, a witness is bound to answer all questions even though they may tend to criminate him, but if he is forced to answer such questions, then no proceedings can be taken against him based upon his answers except proceedings for perjury.*'

Somewhat sadly, Justice Chan in *Television Broadcasts Ltd v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346 commented that the dictum in *Chye Ah San* is "*pregnant with half-truths and misconceptions....*" At pages 355 & 357 of his judgment in *Television Broadcasts Ltd*, the learned Judge stated his conclusion as follows:-

"That is the present state of law in England. In this country the privilege is withdrawn by Section 132 of the Evidence Act, 1950 ... Section 132(1) has already withdrawn or removed the privilege. It follows that the privilege can no longer be 'enforced' or invoked. It is not there anymore. Also by section 132(2) first limb, there would no longer be any risk of arrest or prosecution, so the privilege is lost. There is no longer any question of 'enforcing' or invoking the privilege. It has gone."

To Justice Chan, the right not to answer is the privilege's bottom line rather than the consequences of the answer i.e. penalty or forfeiture. Justice Chan's view was endorsed by the Court of Appeal in *Attorney-General of Hong Kong v Zauiyah Wan Chik* [1995] 2 MLJ 620 of which Justice Chan was a member having being elevated to the Court of Appeal. Gopal Sri Ram JCA, at page 631 of the judgment cited with approval the decision of NH Chan J [later JCA] in *Television Broadcasts Ltd and others v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346 when he opined as follows:

"In Television Broadcasts Ltd and others v Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346, my learned brother NH Chan J (as he then was) reviewed several authorities and, in my respectful opinion, rightly held that the effect of the section is to do away with the privilege against self-incrimination that is part of English common law. Suzanne Page 5 McNicoll in her treatise on the Law of Privilege (1992 Ed), provides the following comprehensive statement of the rule, attributing it to the formulation of it by Lord Goddard in Blunt v Park Lane Hotels Ltd [1942] 2 KB 253 : 'It is a fundamental principle of the common law that, in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction, the imposition of a penalty or the forfeiture of an estate.' As observed, s 132 has excluded the operation of this doctrine in our jurisprudence."

It appears that that Gopal Sri Ram is saying much the same thing as Spenser Wilkinson J. said in *Chye Ah San's* case. There was also a parallel issue as to whether section 132 applies to affidavit. In *PMK Rajah v Worldwide Commodities Sdn Bhd and others* [1985] 1 MLJ 85, Justice Zakaria Yatim disagreed with Justice Chan in the earlier *Television's* case and said that s.132 of the Evidence Act does not apply in the context of Anton Piller orders. He said s.132 only applies to witnesses in the sense found in sections 138 and 139 of the Act i.e. a witness in the context of s 132 is a person who testifies on oath or affirmation in a court and is subject to examination-in-chief, cross-examination and re-examination; thus a person giving affidavit evidence is not a 'witness'. Likewise, any person who merely produces a document in court is not a witness and he may not be cross-examined unless he is called as a witness. Thus, Justice Zakaria Yatim held that it is not correct to say that the doctrine against self-incrimination as laid down in the *Rank's* case had been withdrawn in this country by section 132 of the Act. The defendants not being witnesses are, therefore, not governed under section 132, hence are entitled to the privilege not to give discovery of documents, the disclosure of which would incriminate them.

This, it is suggested is a more sensible interpretation of section 132, than the broader interpretation given by Justice Chan in the *Television's* case that a person who adduced affidavit is also adducing evidence hence is a witness. The more pragmatic view advocated in *PMK Rajah* was endorsed by the Singapore High Court in *Riedel-de Haen AG v Liew Keng Pang* [1989] MLJ 400, which held that the privilege was qualified only to a person who gives oral testimony in judicial proceedings. The section does not apply to a person who tenders an affidavit who is still entitled to claim the privilege against self-incrimination if disclosing the information requested will criminate or may tend directly or indirectly to criminate the person compel to do so to a penalty or forfeiture. A person who is not a witness cannot be compelled to answer unless he is made a witness for the purpose of giving oral testimony in a judicial proceedings. It implies that only relevant question or questions will be put to the witness and only possible at a trial by counsel examining or cross-examining him or by the court. In this case, it was held that the defendants are entitled to the privilege not to give discovery of documents, the disclosure of which would incriminate them. The section does not apply to them. In other words, the common law privilege against self-incrimination has only been qualified by the section.

8. Conclusion

The essence of the privilege should be seen as providing protection from any penalty or forfeiture by the answer to the question being the reason for entitling the person being question to have the right not to answer as no one should be compelled to accuse

himself (*nemo tenatur seipsum*). However, where the answer would not or tend not to lead or to expose him directly or indirectly to any penalty or forfeiture, it matters not if he answers under compulsion. Section 132, it is submitted, continues to maintain the privilege against self-incrimination by providing protection against any criminal proceedings, penalty or forfeiture from the answer given even though the answers were made under compulsion. It is submitted that the privilege is not lost or the operation of the doctrine has been excluded by s.132 of the Evidence Act 1950 as one might thought. In other words, the privilege is still pretty much alive, only that '*the maxim is enforced in a different way*' to use the words of Spenser Wilkinson J. in *Chye Ah San v R*. At the most, the privilege against self-incrimination has only been qualified to witness who gives oral testimony in judicial proceedings but not otherwise as was held in the case of *PMK Rajah*, and in *Riedel-de Haen AG*. Section 132 of the Evidence Act, therefore, does not expressly abrogate the privilege.

The privilege against self-incrimination has also generated ambivalent feelings in modern times. To its opponents, it is potential source of injustice, one that at times denies the court's vital information. In fact in *Applied Istel (AT & T) Ltd v Tully* [1993] AC 45, Lord Griffiths highlighted that the privilege was '*in need of radical appraisal*.' And Lord Templeman viewed the continued existence of the privilege in civil cases "*as an archaic and unjustified survival from the past*." Lord Reid in the *Rank Film* case [1981] 2 All ER 76 said (at p 79): '*It may seem a strange paradox that the worse, i.e. the more criminal, their activities can be made to appear, the less effective is the civil remedy that can be granted, but that, prima facie, is what the privilege achieves*.' To its proponents, it is a bulwark against oppressive state power. Depending on where their sympathies lie, individuals' judges when interpreting the privilege have adopted slightly different degrees of strictness when applying it, something that makes its exact parameters somewhat uncertain.