

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 Aminallah 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 lead to 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 protect 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 is no defence of entrapment in criminal law but entrapment can be taken into account in mitigation of sentence (*R v Sang* [1980] AC 402; *Wan Mohd Azman bin Hassan@ Wan Ali v PP* [2010] 4 MLJ 141; and *PP v Han Kong Juan* [1938] CLJ Rep 773). The absence in England, Australia, Malaysia and Singapore of the substantive defence of entrapment is in clear contrast to the position in the Federal jurisdiction of the United States which recognises in its criminal law a defence of entrapment [*R v Sorrels v US* 287 US 435(932); *Jacobsen v US* (1992) 503 US 540.

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 *Teixeria 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 *Teixeria*, 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 market price for drugs – who can hardly argue that he has been entrapped; towards the other extreme, a judge might view in a different light, the perspective of police officers dangling large sums of cash under the nose of someone in urgent need of money, thereby, persuading the person to do something that he might not otherwise have done. *Teixera de Castro*, it was urged, has to be considered in the context of its particular facts and of Portuguese criminal procedure. In *A-G Reference* (No. 3 of 2000) the Court of Appeal concluded that the police had done no more than give the accused an opportunity to breach the law, of which he had freely availed 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 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 Shaari 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 Zul 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 further abuse of process, absent some material change of circumstances, for a prosecutor to attempt to resurrect a charge previously stayed for abuse of process.

In civil case, in *Mills v Cooper* [1967] 2 Q.B. 459 DC, where Lord Parker C.J. said at p 467, 'Every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court.' The doctrine of abuse of process is over 100 years old but its application to criminal proceedings in effect starts with landmark case of *Connelly v DPP* [1964] AC 1254 HL which also discussed the Malayan case of *Sambasivam v PP* [1950] MLJ 145. The issue in *Connelly* was whether the accused could be prosecuted and acquitted of a murder arising out of the same underlying incident, an armed robbery of known Co-op. Although it was concluded that the second prosecution was permissible in these particular circumstances, at least three of the Law Lords affirmed the existence of a general jurisdiction, extending beyond the narrow ambit of the formal 'double jeopardy' pleas in bar *autre fois acquit* that would prevent vexatious or otherwise unfair repeat prosecution even of technically different offences. Lord Morris explicitly based this judicial power on the court's inherent control over the integrity of its own process. Three general grounds may be identified on which a judge might stay proceedings: (i) prosecution manipulation or misuse of process; (ii) undue delay; and (iii) police impropriety in the conduct of criminal investigation (see Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993) CLJ 2-4; Halting Criminal Prosecutions: *The Abuse of Process Doctrine Revisited.*" [1995] Crim LR 864.

Within each of these general categories, it is possible to identify distinctive categories of stays, unfair repeat prosecutions (double jeopardy), breach of promise made to the accused by police or prosecutions (e.g. *R v Croydon Justices ex p Dean* [1993] QB 769 DC), prosecutions in bad faith, and illegal or irregular extradition. Adverse pre-trial publicity has also emerged as a ground for judicial stay in principle though the test is very difficult to satisfy in practice. For example, in the notorious case of *R v West* [1996] 2 Cr App R 374, CA, in which a stay was refused despite very extensive and patently prejudicial pre-trial media coverage of the notorious crimes *Fred and Rose West*. Lord Taylor CJ articulated at p 386:

'the question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried, that would be absurd.'

The House of Lords took another major stride forward in its second landmark decision on abuse of process in *Ex.p. Bennet* [1994] 1 AC 42 HL. Bennet, a New Zealand national was wanted for offences in England connected with his allegedly fraudulent acquisition of a helicopter, but he had fled to South Africa beyond the reach of the then existing extradition regimes. Seemingly, the British and South African police (apparently with the blessing of the Crown Prosecution Service) colluded to have Bennet deported from South Africa to New Zealand via London Heathrow Airport where he could be apprehended en route by the British police without supposedly transferring between flights. The plan seem to have work perfectly until the authorities tried to bring Bennet to trial when he objected to having been brought within the jurisdiction by unlawful means, effectively amounting, he argued, to official kidnap. Departing from earlier authority, that it is no business of the courts to inquire into the manner in which a person properly charged with a criminal offence was brought within the jurisdiction, the House of Lords held the proceeding against Bennet had to be stayed for abuse of process if the British and South African authorities had truly colluded in the way alleged. Lord Griffith noted that –

'it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also it should be in the field of criminal law and if... there has been a serious abuse of power, it should... express its disappointment by refusing to act upon it. The courts ... have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.'

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 reprehensive means is repugnant to notions of justice or a fair trial.

The Court too must jealously protect 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