SIMILAR FACTS IN THE SUPREME COURT

In *Wong Yew Ming* v *Public Prosecutor*[1] the Supreme Court was given a rare opportunity to consider the meaning and scope of section 15 of the Evidence Act 1950 (hereinafter referred to as 'the Act') and hence the applicable rules with regard to similar fact evidence in Malaysia. Unfortunately this opportunity was not made use of with the result that similar fact evidence in Malaysia remains a mass of contradictory principles where reference to the Evidence Act is at best scanty and at worst non-existent.

The accused in *Wong Yew Ming* was charged under the Dangerous Drugs Act 1952 with trafficking. He had been found in possession of 250 grammes of heroin. At that time possession of 100 grammes of heroin was necessary to raise the presumption of trafficking and conviction on such a charge could lead to the death penalty or to life imprisonment.[2]

Despite the evidence of the possession of drugs the prosecution also adduced evidence from two known drug addicts as to previous transactions between them and the accused where the accused had supplied them with drugs.

The Sessions Court President had convicted the accused and sentenced him to life imprisonment. His appeal to the High Court had been dismissed and the issue before the Supreme Court concerned a question of law of public interest - "whether in a trial in which an accused is charged for trafficking in respect of a particular quantity of dangerous drug, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold

[1][1991] 1 MLJ 31, hereinafter referred to as *Wong Yew Ming*.

[2]The Dangerous Drugs Act 1952 was subsequently amended by Act A553, which *inter alia* repealed the discretion of the court to impose a sentence of life imprisonment under section 39B of the Act, which was the section the accused was charged under. The amendment Act also reduced the amount of the drugs possession of which would raise the presumption of trafficking from 100 grammes to 15 grammes.

dangerous drugs, although such evidence is prejudicial to the accused."[3]

In the Sessions Court the President had admitted this evidence on the ground that it was admissible under section 15 of the Evidence Act 1950.

On appeal, it appears, the High Court judge agreed with the President. Concerning section 15 he said,

> ... The evidence does not show a bad character. It shows system. It shows that the accused is known to have been dealing with drugs.

With all due respect, evidence of drug dealing is clearly evidence of bad character. However evidence of bad character, although generally rejected, would yet be admissible if it is otherwise relevant.[4]

Thus it would perhaps have been better if the learned judge had admitted the evidence by plainly saying that it was relevant to prove that the accused was in fact a drug dealer.

The question however arises as to whether this evidence was in fact relevant and therefore admissible. The learned President admitted the evidence under section 15 of the Evidence Act. That section reads as follows:

> When there is a question whether an act was accidental or intentional or done with a partucular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

It has long been accepted that section 15 admits what is called similar fact evidence.[5] The latest edition of Cross on Evidence[6] in discussing the admissibility of such evidence

[3] [1991] 3 MLJ 31, 32.

[4] For example, the evidence which discloses bad character might at the same time be relevant evidence of motive and would therefore be relevant and admissible under section 8, as in the case of *PP* v *Wong Foh Hin* [1964] MLJ 149. See section 54 explanation 1 of the Evidence Act 1950.

[5] See, for example, the following cases: *R* v *Raju* [1953] MLJ 21, *Yong Sang* v *PP* [1955] MLJ 131 and *PP* v *Ang An An* [1970] 1 MLJ 217.

[6] 7th edition (ed. Colin Tapper) Butterworths (1990) (hereinafter referred to as Cross) at p. 340.

suggests a rule formulated as follows - evidence of the character or of the misconduct of the accused on other occasions (including his possession of discreditable material) tendered to show his bad disposition, is inadmissible unless it is so highly probative of the issues in the case as to outweigh the prejudice it may cause.

Thus the facts of *Wong Yew Ming* provided an opportunity for the Supreme Court to explain the principles applicable in Malaysia, generally, with regards to similar fact evidence and, in particular, whether prejudice could be the basis of the rejection of seemingly admissible evidence.

From the judgment of the Supreme Court it appears that the prosecution could in fact have relied purely on the evidence of possession of drugs at the time of arrest for a conviction. However on the facts these drugs had been found in several different places, each with an amount below the statutory minimum which would have invoked the presumption. The prosecution had therefore included evidence of past misconduct to ensure that the presumption would be made.[7]

The Supreme Court held that in this context the evidence in question was clearly admissible to "show knowledge and that the possession of the drug by the applicant was not accidental."[8] Further the Supreme Court emphasized that the evidence was admitted "not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the applicant and that the possession is not accidental."[9]

If we consider this decision in the light of the suggested formulation of the rule regarding the admissibility of similar

[7]The question arises as to whether past possession could result in the presumption arising or should influence the judge in raising the presumption. A literal reading of the Dangerous Drugs Act 1952 seems to suggest that as long as possession is established the presumption would arise. It is submitted that reference to past acts has no relevance to the raising of the presumption and is basically unnecessary to the prosecution case. Admitting such evidence tends to smack of overkill and is clearly bound to prejudice the trier of fact.

[8]*Wong Yew Ming*, at pp. 32 - 33.

[9]In other words, not as mere propensity evidence which is generally inadmissible. See the first proposition of Lord Herschell in *Makin v Att. Gen. for NSW* [1894] AC 57.

fact evidence in Cross and the wording of the question of law posed to the Supreme Court, it is clear that the Court has not directed its mind to the very vital issue of the effect of prejudice on the admissibility of evidence.

Several notable cases have discussed the issue of the rejection of similar fact evidence on the grounds of prejudice. These include *Noor Mohamed* v *The Queen*[10] and *Boardman* v *DPP*[11] two leading decisions on the point by the Privy Council and the House of Lords, respectively, yet neither one of them was referred to by the court in its judgment.

In fact, *Noor Mohamed* was applied in Malaysia in several cases involving section 15[12] and the courts seem to have recognised a power to reject relevant evidence if its prejudicial effect outweighed its probative value.

However, if we look at the scheme of the Evidence Act 1950 and the fact that it is based on the concept of relevancy where relevancy determines admissibility, it would not be possible to say, in the Malaysian context, that relevant evidence may be *inadmissible*.[13] On the contrary, reading sections 5 and 136 together[14] we may instead conclude that relevant evidence must be admitted and the court has no discretion to reject it.[15]

[10][1949] 1 All ER 365

[11][1975] AC 421.

[12]See, for example, *Teo Koon Seng* v *Rex* [1936] MLJ Rep. 9, *R* v *Raju* (1953) 19 MLJ 21 and *Rauf bin Haji Ahmad* v *Public Prosecutor* (1950) 16 MLJ 190.

[13]For a recent discussion of the concept of relevance under the Evidence Act written with the hope of hastening the day that the Evidence Act will not be studied by the courts at all, a hope not shared by this writer, see Robert Margolis [1990] *Sing LR* 24.

[14]Section 5 reads: Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Section 136(1) reads: When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

[15]The word used is the mandatory "shall" which seems to indicate this. When the Act wishes to give the court discretion it seems to state this explicitly. See for example, section 120(3) on the power of the court to restrict cross examination of the accused for the purpose of attacking his character.

This would mean that the case of *Noor Mohamed* could not apply under the terms of the Evidence Act 1950. It would further result in a situation where evidence which is prejudicial would be admissible and the courts would be powerless to reject such evidence.

Clearly such a situation would be untenable as the first principle of any system of administration of justice is to ensure a fair trial. The question that arises is whether the provisions of the Evidence Act may be interpreted in such a way as to enable the court to reject prejudicial evidence.

This may be possible if we go back to the meaning of relevance. Since evidence which is relevant is admissible it follows that if evidence is to be rejected it must be on the grounds of irrelevance.

To determine whether the evidence adduced is relevant or not it is suggested that reference be made to the prejudicial effect and probative value of the evidence.

In other words, where the probative value is greater than the prejudicial effect, such evidence is relevant and therefore admissible. Conversely, when the prejudicial effect is greater than the probative value the evidence should be rejected as being irrelevant.

This approach, which is in line with the reasoning of the House of Lords in *Boardman*, might be a possible way to overcome the apparent lack of reference to probative value as a pre-condition to the admissibility of possibly prejudicial evidence in the Evidence Act 1950.

The fact that section 136 of the Evidence Act 1950 states clearly that the *judge* shall determine whether the evidence is relevant or not is in line with this reasoning as the judge can only make his decision after hearing submissions from counsel on this point, that is the prejudicial effect and probative value of the said evidence.

Applying this proposition to the facts of *Wong Yew Ming*, it is respectfully suggested that the Supreme Court could have used the foregoing analysis in answering the question posed to it. Instead the question of the effect of prejudice on the admissibility of evidence, a question of fundamental importance in any system of justice, was left unanswered and the court merely referred back to the words of the section in question, that is, section 15, and said that so long as the

evidence intended to be adduced was for the purpose of showing knowledge or that possession of the drugs was not accidental, it was admissible.

It is hoped that if this question arises again in the Supreme Court, we will all benefit from a clearer exposition of the relevant law with reference to decided cases and analysis of the scheme and principles of the Evidence Act 1950.

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