UNSWORN STATEMENTS BY ACCUSED PERSONS: TRENDS IN THE COMMONWEALTH

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The right of on accused person to make a statement from the dock was abolished in Souh Africa by the Criminal Procedure Act of 1977. Comparable legislation has been enacted in New Zealand. The purpose of this article is to investigate some problems connected with unsworn statements by accused persons in jurisdictions where such statements continue to be permitted and to consider whether statutory abrogation of the right of an accused person to make a statement from the dock is in keeping with sound policy.

1. The Relation between Unsworn Statements and the Competence of the Accused as a Witness

The rationale underlying the reception of unsworn statements by an accused person in judicial proceedings is significantly related to the competence of the accused as a witness on his own behalf.

Until the end of the last century English law did not concede to a defendant in criminal proceedings the right to give evidence in his own defence. The law of England at that time was exposed to the criticism that exclusion of sworn testimony by the accused gravely hampered a blameless accused in vindicating his innocence. The position in England was changed by the criminal Evidence Act of 1898 which rendered the accused a competent witness for the defence in all criminal cases.[1] However, this statute embodied the express proviso that 'Nothing in this Act shall affect any right of the person charged to make a statement without being sworn'.[2]

From the standpoint of policy, it would appear that the justification for admitting unsworn statements by the accused did not survive recognition of the accused as a competent witness on his own behalf. Once the law recognized his competence to relate his version of the facts in the witness box, it might well have been thought that, if he wished to avail himself of the right to make any statement about the events relevant to the proceedings, the accused, like any other witness, should give evidence on oath and be subject to cross-examination.

The cogency of this approach, *primae impressionis*, is suggested by the response of an English judge,[3] during a trial[4] conducted four years after the enactment of the Criminal Evidence Act, to a request that the accused be allowed to make an unsworn statement before his counsel addressed the jury. The

(1) Section 1.
(2) Section 1 (h).
(3) Phillimore, J.
(4) *R.* v. *Pope* (1902) 18 T. L. R. 717.

court inquired whether the provisions of the Act of 1898 were consistent with admission of unsworn statements by the accused. and permitted the accused to address the jury from the dock only after the proviso contained in section 1(h) was pointed out by counsel. The Canadian courts have considered it very probable that, had it not been for the saving clause in the Criminal Evidence Act of 1898, it would have been held in England that the privilege of making an unsworn statement was abrogated by that Act.[5]

The position in South Africa prior to the enactment of the Criminal Evidence Act of 1977 was directly parallel with that in England. South African legislation,[6] while making the accused entitled to testify at his trial, explicitly retained his right to make an unsworn statement.[7] The phraseology in which the reservation of the latter right was concluded in South Africa was indistinguishable from that employed in the English statute. The South African Appellate Division, interpreting the law before the changes effected by statute in 1977, considered the right of an accused person to make an unsworn statement beyond controversy.[8] However, this view was taken on the basis of the clear statutory reservation which formed part of South African law.

It is worth noting that, in some Commonwealth jurisdictions where the statute recognizing the competence of the accused to give evidence on his own behalf does not in express terms retain his privilege of making a statement from the the dock, the indication of the courts has been to treat the privilege as abrogated impliedly. This is borne out by the balance judicial authority in the different provinces of Canada. In British Columbia the Court of Appeal has asserted unequivocally that the enactment of the Canadian Evidence Act of 1893 brought to an end the right of an accused to make a statement not under oath.[9] Although the Full Bench of the Supreme Court of British Columbia stated *arguendo* on one occasion that an accused in an undefended case may either make an unsworn statement or give evidence on oath,[10] this view must be considered, to have been overruled by the contrary decision of the Court of Appeal of British Columbia in a subsequent case[11] which has been followed in other Canadian jurisdictions indluding Manitoba[12] and Alberta.[13] The decision of the Court of Appeal of Manitoba was approved by the Supreme Court of Canada, although the point relating to reception of unsworn statements by the

(5) *R.* v. *Krafchenko* (1914) 17 D.L.R. 244 at p. 250.
(6) Act No. 56 of 1955.
(7) Section 227 (3).
(8) *R.* v. *Cele* 1959 (1) S.A. 255.
(9) *R.* v. *McNab* (1945) 1 D.L.R. 583 at p. 587, *per* O' Halloran, J.A.
(10) *R.* v. *Aho* (1904) 8 Can. C.C. 453, *per* Hunter, C. J. and Duff and Irving, JJ.
(11) *R.* v. Frederick (1931) 57 Can. C. C. 340.
(12) *R.* v. *Kelly* (1916) 27 Can. C.C. 140.
(13) *R.* v. *Campbell* (1919) 33 Can. C.C. 364.

accused was not expressly dealt with by the majority of the Court.[14] The basis of the conclusion reached in these authorities was that the right of the accused to make a statement from the dock was not preserved by statute in Canda, as it had been in England[15] and South Africa.[16]

Especially in the light of the Canadian approach, the attitude of the courts in some Asian jurisdictions governed by comprehensive codes of evidence modelled on the Indian Evidence Act of 1872 may be assailed convincingly on grounds of policy. Representative of judicial reasoning on this point in India, Malaysia and Singapore is a *cursus curiae* in Sri Lanka where the Evidence Ordinance enacted in 1895 adopts, almost *verbatim*, the provision of the statute drafted for India by Sir Fitzjames Stephen. The Evidence Ordinance of Sri Lanka provides that "In criminal trials the accused shall be a competent witness in his own behalf and may give evidence in the same manner and with the like effect and consequences as any other witness".[17] However, the Sri Lankan code, differing in this respect from corresponding legislation in England and South Africa, incorporates no saving clause in respect of unsworn statements by the accused. The Evidence Ordinance[18] and the Criminal Procedure Code[19] which prevailed in Sri Lanka at the relevant time, both contained provision enabling recourse to be had to English law in the event of *casus omissi*.

In a case decided quite early in the present century [20] the Supreme Court of Sri Lanka, while noting the change in the law of criminal procedure which allowed an accused person to give evidence on his own behalf, held nevertheless that the right of the accused to make an unsworn statement remained intact. Bertram, C. J. observed: 'There is nothing in the fact that the law now allows the prisoner to give evidence, to take from him the right which he previously enjoyed of making an unsworn statement. There is no provision on this subject one way or the other in the Code, and this is, therefore, another point on which we may have recourse to English procedure.'[21] On the analogy of English law the court entertained no doubt that the accused could, if he preferred it, make an unsworn statement from the dock instead of giving evidence from the witness box.[22] The refusal of the District Judge in this case to give the accused an opportunity of making an unsworn statement was treated as an irregularity causing a failure of justice and consequently warranting quashing of the conviction in appeal.

(14) *R.* v. *Kelly* (1916) 34 D.L.R. 311. *R.* v. *Rogers* (1888) 1 B. C.R. (Pt. 2) 119, where the opposite conclusion was reached, was decided before the passing of the Canadian Evidence Act in 1893.
(15) Soo note 2, *supra*.
(16) See note 7, *supra*.
(17) Section 120 (b).
(18) No. 14 of 1895, section 100.
(19) No. 15 of 1898, section 6.
(20) *R.* v. *Vallayan Sittambaram* (1918) 20 N.L.R. 257.
(21) At. p. 266.
(22) *Ibid.*

However, the justification for resorting to English law in this context on the footing of a *casus omissus* is demonstrably slender. The English decisions turn on the interpretation of materially different statutory provisions, in that the unambiguous retention of the accused's right to make a statement from the dock – characterizing legislation in England – is not a feature of the Evidence Ordinance of Sri Lanka. Indeed, the English courts appear to have proceeded on the assumption that statutory conferment of capacity on the accused to testify in his defence is incompatible in principle with survival of the privilege to make an unsworn statement and that the accused continued to be accorded this privilege in England after the enactment of the Crimnal Evidence Act solely by virtue of the saving clause incorporated in the Act.[23] In the Australian jurisdiction of Queensland this privilege has been looked upon as an 'anomalous survival'[24] attributable, once again, to the construction of legislation pertaining to the competence of the accused as a witness. The tacit displacement of this privilege by statutory provisions enabling the accused to give evidence on oath, was impliedly endorsed in principle by the Court of Appeal of New Zealand.[25] It is submitted that the courts of Sri Lanka erred, in the early decades of this century, in applying English law on the basis of a *casus omissus* in disregard of a fundamental difference between the structural framework of relevant legislation in England and in Sri Lanka. Departure from the effect of judicial trends in England – explicable by reference to a factor which has no relevance in Sri Lanka – would have been clearly defensible in the latter jurisdiction.

Despite the unsatisfactory nature of the reasons which impelled the courts of Sri Lanka, during a formative phase of the development of the law, to acquience in the right of an accused person to make a statement from the dock, although he was competent to give evidence on oath, this privilege seems irretrievably entrenched at present in Sri Lanka. In recent times it has been suggested that the right of the accused to make an unsworn statement is sanctioned by the inveterate practice of courts of criminal jurisdiction in the country.[26] The Sri Lankan Court of Criminal Appeal has declared that 'The right of an accused person to make an unsworn statement from the dock is recognized in our law.'[27]

Notwithstanding the consistency with which this view has been acted upon, it is submitted that the tainted origin of the principle currently established detracts from its validity. The reasoning of the Canadian courts, construing a statutory provision analogous with that in force in Sri Lanka, could well have been adopted with advantage in the latter jurisdiction and in other Asian countries governed by similar legislation.

(23) *R.* v. *Pope* (1902) 18 T.L.R. 717.
(24) *R.* v. Mc Kenna (1951) 44 St. R. Qd. 299 at p. 308.
(25) *Kerr* v. *R* . (1953) N. Z. L.R. 75 at p. 78.
(26) *R.* v. *Kularatne* (1968) 71. N.L.R. 529 at p. 551.
(27) *R.* v. *Buddharakkita* (1962) 63 N. L.R. 433 at p. 442.

II. The Appropriate Time for Making an Unsworn Statement

In England there appears to be no definite rule as to the time at which an unsworn statement should be made. Some judges have ruled that the statement must be made before the speech of the prisoner's counsel, while others have allowed it to be made afterwards.[28] Prior to the passing of the Criminal Evidence Act there had been an emphatic ruling that the unsworn statement must be made before counsel for the prosecution summed up the case and before the accused's own counsel addressed the court.[29] This view is supported by Archbold.[30]

The invariable practice in South Africa[31] and in Southern Rhodesia[32] is for an unsworn statement to be made before the addresses of counsel and, indeed, before the defence is closed. The Appellate Division of South Africa has observed that 'The statement should be made before the defence case is closed and thus precede the address of counsel.'[33] This is in line with the practice uniformly adopted in Sri Lanka.[34]

In some Commonwealth jurisdictions statutory provisions make express reference to the time at which an unsworn statement should be made. Legislation in New South Wales provides that every accused person on his trial whether defended by counsel or not, may make any statement at the close of the case for the prosecution, and before calling any witness in his defence and may thereafter personally or by his counsel address the jury.[35] This coincides with the position in Queensland where it is a requirement that the statement should be made before counsel for the defence opens his case.[36]

In sharp contrast with this rule is the attitude of the Canadian courts which, before the enactment of the Canadian Evidence Act, allowed an accused to make a statement from the dock after his counsel addressed the jury.[37] It is evident, however, that the probative value of an unsworn statement made at this stage is necessarily impaired, in view of the likelihood that the acused would make his statement accord with the evidence of witnesses called by him and with the submissions made by his counsel on the basis of the testimony of these witnesses. An unsworn statement made by the accused before he has the opportunity of knowing the precise effect of the evidence of witnesses

(28) Halsbury, *Laws of England* (3rd edition), volume 10, p. 480, note 1.
(29) *R.* v. *Sheriff* (1903) 20 Cox C.C. 334.
(30) *Criminal Pleading; Evidence and Practice* (33rd edition), p. 192.
(31) *R.* v. *Cele* 1959 (1) S. A. 255.
(32) *R.* v. *Wooldridge* 1957 (1) S.A. 5.
(33) *R.* v. *Cele* 1959 (1) S.A. 255 at p. 256, *per* Ogilvie Thompson, J.A.
(34) Crimes Act, 1900, section 405.
(35) See the cases cited at notes 26 and 27, *supra*.
(36) *R.* v. *Harrald* (no. 2) (1948) Q.W.N. 36.
(37) *R.* v. *Rogers* (1884) 1 B.C.R. (Pt. 2) 119.

for the defence will naturally carry a stronger ring of conviction. The practice which is now considered settled in most Commonwealth jurisdictions is, for this reason, supportable.

III. Unsworn Statements and the Retaining of Counsel

The origin and development of the practice of making unsworn statements were closely interlinked with representation of accused persons by counsel. At a time when persons accused of specific categories of crime were denied the facility of representation by counsel, a statement from the dock was considered the sole means, available to a prisoner, of presenting his case to the Jury. This was the position in England until the end of the seventeenth century in cases of treason, and up to 1836 in respect of any type of felony. Once the restrictions on employment of counsel were removed by the Prisoners' Counsel Act of 1836, the English courts were confronted with the question whether the availability of services of counsel to the accused was inconsistent with the admission any longer of unsworn statements by him.

Throughout the rest of the nineteenth century there was a sustained conflict of judicial opinion on this point in England. The view that statements from the dock could not coexist with retention of counsel by the accused, is typified by a long line of decisions.[38] On the other hand, the assertion has been made, with equal emphasis, that the appearance of counsel has no bearing on the reception of unsworn statements made by the accused.[39] In what is probably the most elaborate judgement[40] handed down by the English courts during this period Cave, J., with the concurrence of the other judges, adopted the rule that an unsworn statement by the accused should in no circumstances be disallowed on the ground that the accused was represented by counsel. The preponderance of judicial authority in England supports this view.[41]

In some Commonwealth jurisdictions the matter is placed beyond controversy by explicit statutory provisions which permit the making of an unsworn statement, notwithstanding the employment of counsel. The Australian jurisdictions of New South Wales[42] and Victoria[43] are both governed by statutes which expressly repudiate any distinction between defended and undefended accused persons, in the context of their right to address the jury from the dock.

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(38) *R.* v. *Boucher* (1837) 8. C. & P. 141; *R.* v. *Beard* (1837) 8 C. & P. 142; *R.* v. Rider (1838) 8 C. & P. 539 ; *R.* v. Taylor (1859) 1 F. &. F. 535.

(39) *R.* v. *Malings* (1838) 8 C. & P. 242; *R.* v. *Walking* (1838)8 C. & P. 243; *R.* v. *Shimmin* (1882) 15 Cox C.C. 122; *R.* v. *Doherty* (1887) 16 Rox C.C. 306.

(40) *R.* v. Shimmin (1882) 15 Cox C.C. 122.

(41) *R.* v. *Pope* (1902) 18 T.L.R. 717; *R.* v. *Sherriff* (1903) 20 Cox C.C. 334; see also the cases cited at note 39, *supra.*

(42) New South Wales Crimes Act, 1900, section 405.

(43) Victorian Evidence Act, 1928, section 25.

Even in the absence of statutory provisions regulating the matter, the courts of most modern jurisdictions where accused persons continue to enjoy the privilege of making unsworn statements, have veered towards the view that the retention of counsel does not deprive the accused of this privilege. There was firm judicial authority in South Africa in support of the proposition that an accused person, although represented by counsel, is entitled to make a statement from the dock.[44] In several cases where counsel was retained by the accused, his right to make an unsworn statement was recognized, unequivocally by the Sri Lankan courts.[45]

In an evaluation of the competing views expressed by the English courts during the latter half of the last century, the factor which warrants emphasis is that the engagement of counsel and the making of a statement from the dock involve no conflict. Statements by counsel, based as they are on instructions received from the accused, bear no comparison with the accused's own narrative or explanation consisting of facts of which the accused purports to have first-hand knowledge. Although made otherwise than under oath and without exposure to cross-examination, it is to be expected that the accused's own statement from the dock will make on the minds of the jury an impression of a different quality and degree from that likely to be engendered by the argument or address of counsel. In terms of policy, so long as unsworn evidence by the accused is not excluded by the law, the right to the services of counsel with its concomitant advantages and the right to make a statement from the dock should be considered complementary rather than mutually exclusive.

IV. Unsworn Statements and the Adducing of Evidence

Before the passing of the Criminal Evidence Act the view had been strongly expressed by the English courts that the calling of witnesses by the defence destroyed the right of the accused to make an unsworn statement. The suggested rationale underlying this qualification on the scope of the accused's right to make a statement from the dock was that 'If it were to be allowed, the result would be that, after counsel had made a defence and called witnesses to facts, then the prisoner, who was not liable to be cross-examined, could supplement what had been said by his counsel and witnesses and supply facts by means of a statement made without the sanction of an oath, which it would be impossible to test by the ordinary means of cross-examination.'[46] However, this approach has not been adopted consistently in England.[47]

There is conflicting authority on this point in Queensland. A series of cases.[48] inflexibly debars unsworn statements whenever independent evidence has been offered by the defence through witnesses of its own. But the principle

(44) *R.* v. *Cele* 1959 (1) S.A. 255.
(45) *R.* v. *Piyadasa* (1967) 72 *N.L.R.* 434; *R.* v. *Kularatne* (1968) 71 N.L.R. 529; *R.* v. *Punchirala* (1970) 75 N.L.R. 174.
(46) *R.* v. *Millhouse* (1885) 15 Cox C.C. 622 at p. 623, *per* Lord Coleridge, C.J.
(47) cf. *R.* v. *Maybrick* discussed in S.L. Phipson, *Evidence* (9th edition, 1952), p. 51.
(48) *R.* v. *Sturdy* (1946) Q.W.N. 41; *R.* v. *Daniel* (1946) Q.W.N. 42; *R* v. *Toms* (1947) Q.W.N. 66.

has been enunciated with equal confidence in Queensland that the right to adduce evidence and the right to make an unsworn statement can be exercised concurrently by the accused.[49]

In South Africa the Appellate Division has stated that 'In our practice the calling of defence witnesses does not affect the right of the accused to make the statement.'[50]

It is submitted that the theoretical foundation which emerges from the leading English case[51] for ruling out an unsworn statement by an accused who has adduced evidence on his own behalf, is unconvincing. The primary purpose of a dock statement may well be to set out the accused's version of the sequence of events or to offer the jury clarification or explanation, consistent with the accused's innocence, of facts deposed to by witnesses for the prosecution. But there is no reason why the accused shuld not be allowed, if he can, to establish through witnesses circumstances which confirm or corroborate the facts which he asserts in his own statement or which substantiate the exculpatory hypothesis put forward by him. This course, which entails the adducing of independent evidence compatible with the dock statement, confers a legitimate advantage on the accused by enhancing the probative value of his own testimony. Since evidence called by the defence can usefully supplement, in an appropriate case, the contents of a dock statement, the conclusion reached by the Court of Appeal of New Zealand[52] – that there is no logical anomaly in allowing both an unsworn statement and the leading of evidence for the defence – is preferable to the contrary view reflected in the majority of the Queensland decisions.[53]

The danger that the accused would shape his dock statement so as to achieve consistency with the effect of sworn testimony by witnesses called for the defence – a point relevant to the weight of the statement rather than to the propriety of its reception – could be minimized, if not eliminated, by requiring that an accused person who wishes both to call witnesses and to make an unsworn statement should make the statement before any evidence is called for the defence. This precaution, which is desirable on practical grounds, has been strongly recommended in New Zealand [54] and in the Queensland cases[55] where a dock statement has been allowed despite the calling of evidence by the defence. It is submitted that the view taken in South Africa[56] – that a dock statement could be made either before or after defence witnesses have been called – is too sweeping.

(49) *R.* v. *Harrald* (No. 2) (1948) Q.W.N. 36; *R.* v. *Mc Kenna* (1951) St. R. QD 299.
(50) *R.* v. *Cele* 1959 (1) S. A. 255 at p. 256. *per* Ogilvie Thompson, J.A.
(51) See the case cited at note 46, *supra*.
(52) *Kerr* v. *R.* (1953) N.Z.L.R. 75.
(53) See the cases cited at note 48, *supra*.
(54) See the case cited at note 52, *supra*.
(55) See the cases cited at note 49, *supra*.
(56) *R.* v. *Cele* 1959 (1) S.A. 255.

V. The Value of Unsworn Statements

The lack of an oath or affirmation and the circumstance that the truth of the contents of a statement from the dock cannot be tested by cross-examination necessarily militate against unsworn statements having the same effect or significance as sworn evidence. There is no doubt that a statement from the dock has 'but little evidentiary value compared with sworn testimony.'[57]

The degree of significance attaching to unsworn statements has been the subject of acute controversy. At one end of the spectrum of judicial attitudes is the view that an unsworn statement by the accused is altogether devoid of probative value.[58] Although explicable historically on the analogy of the rule relating to disqualification by interest in civil cases,[59] this approach is open to the fundamental objection that a legal system which, while admitting unsworn statements, declines to accord them any evidentiary value, is logically inconsistent.

An unsworn statement by the accused can consist of one or more of four distinct types of assertions or contentions :

(*a*.) admissions of fact against the accused;
(*b*.) allegations of fact in his favour;
(*c*.) argument pertaining to (*a*);
(*d*.) argument relevant to (*b*).[60]

The most vexed problems in regard to the value of unsworn statements have arisen in connection with assertions of fact made in the course of a statement from the dock. An extreme view is that 'If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds.'[61]

A view marginally more favourable to the accused is that averments of fact incorporated in an unsworn statement should be considered equivalent to similar assertions which are part of an address to the jury by defence counsel. This view derives support from decisions by the courts of England,[62] New Zealand[63] and Queensland.[64] Implicit in the approach, which finds expression also in several South African cases,[65] is the equation of statements

(57) *R.* v. *Zware* 1946 T.P.D. 1.
(58) See the comment, *arguendo* by Scroggs, L.C.J.. in *R.* v. *Coleman* (1678) 7 How . St. Tr. 1 at p. 65.
(59) J. H. Wigmore, *Treatise on the Anglo - American System of Evidence* 11, section 575, p. 684.
(60) *R.* v. *Bushula* 1950 (4) S.A. 108.
(61) *R.* v. *Rider* (1838) 8 C. & P. 539 at p. 540, per Patteson, J.
(62) *Shankley* v. *Hodgson* (1962) Crim . L. R. 248.
(63) *R.* v. *Kerr* (1953) N.Z.L.R. 75.
(64) *R.* v. *Mc Kenna* (1951) Q.S.R. 299.
(65) *R.* v. *de Wet* 1933 T.P.D. 68; *R.* v. *Tarling* 1946 (1) P.H.H.Z.

of fact in this context with the effect of mere argument. In South Africa it has been observed that 'the unsworn statements of accused persons should be used only as disclosing the accused's attitude and contentions, that is, as equivalent to argument, and to give them a higher status will lead to confusion and difficulty'.[66]

A comparable principle has been acted upon in common law jurisdictions outside the Commonwealth.[67] Denigration of the probative value of unsworn evidence, which is a necessary consequence of this approach, is underlined by the injunction contained in the resolution of the English judges in1881 that counsel should not state to the jury facts which they do not propose to prove by evidence.

The chief difficulty inherent in this approach is the artificiality of placing statement of fact on a par with argument for the purpose of evaluating its probative significance. The comment has been aptly made by the South African courts that 'It is obviously correct to describe an unsworn statement as an argument if in truth it is an argument, but (that description) should not apply to unsworn statements which contain facts as opposed to argument, nor to those which provide explanations in cases in which the accused is expected to make an explanation upon pain of conviction.'[68] Moreover, relegation of assertions of fact embodied in a statement from the dock, as an absolute principle irrespective of the circumstances of the case, may well defeat the ends of justice. The inflexibility of the test reduces its value.

A slight variant on this mode of formulating the applicable criterion, but with little practical difference, is that the effect of an unsworn statement by the accused is indistinguishable from that of exculpatory portions of an accused's extra-curial confession.[69] The appropriate test in the latter context was laid down by the South African Appellate Division in the following terms: 'The fact that the statement is not made under oath and is not subject to cross-examination detracts very much from the weight to be given to those portions of the statement favourable to its author.'[70]

Whether assertions of fact contained in an unsworn statement are equiparated with argument or with exculpatory parts of an out-of-court confession, it would seem to follow necessarily that, where the probative force of the evidence for the prosecution is such that, but for some exculpatory explanation from the accused, a reasonable man would rightly convict, an unsworn statement by the accused at historial cannot serve as such an explanation.[71]

(66) *R.* v. *Bushula* 1950 (4) S.A. 108 at p. 119, *per* Jennett, J.
(67) *Commonwealth* v. *Steward* (1926) 151 N.E.R. 74 (Massachusetts).
(68) *R.* v. *Mazibuko* 1947 (4) S.A. 821 at p. 829, *per* Hathorn, J.P.
(69) *R.* v. *Wooldridge* 1957 (1) S.A. 5 at p. 9, *per* Young, J.
(70) *R.* v. *Valachia* 1945 A.D. 826 at p. 837.
(71) *R.* v. *Tarling* 1946 (1) P-H H2.

Basically opposed to these trends in assessing the value of unsworn evidence is the approach that a statement from the dock should be given 'such weight with the jury as, all circumstances considered, it is entitled to.'[72] This view, while recognizing the intrinsic infirmities of unsworn evidence, preserves adequate resilience by treating the statement as entitled to 'such consideration as the jury might think it deserved.'[73]

This degree of elasticity which is indispensable for a realistic appraisal of the accused's unsworn evidence in the light of given facts, is ensured by the approach of the courts of New Zealand. Despite the dichotomy rightly emphasized in that jurisdiction between 'legal evidence' and unsworn statements, the crucial concession has been made that 'The (unsworn) statement permitted to be made must have some place in the body of material on which the jury are asked to decide whether the accused is guilty or not guilty.'[74]

Recent judicial trends in England are in line with this view. The Court of Criminal Appeal has explained the effect of an unsworn statement as follows : 'It is clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand, it is evidence in the sense that the jury can give to it such weight as they think fit.'[75] The explanation was added : 'It is quite clear today that it has become the practice and the proper practice for a judge not necessarily to read out to the jury the statement made by the prisoner from the dock, but to remind them of it, to tell them that it is not sworn evidence which can be cross-examined to, but that nevertheless they can attach to it such weight as they think fit, and should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty.'[76]

A similar disinclination to prescribe a formula applicable to all cases without discrimination is characteristic, on the whole, of pronouncements by the South African courts. 'It is obvious that the effect unsworn statements have must vary with the circumstances of each case and with the contents of the statements. If they controvert facts deposed to by Crown witnesses, their value must in that respect be nil. It may well happen that an accused's explanations, consistent with the truth of the Crown evidence, in his unsworn statements, may result in his acquittal, but that should occur not because the explanation is considered as an explanation, but because by it the accused, in effect, points out a line of thought which makes the court hold that the Crown evidence does not lead to an irresistible inference of guilt.'[77] The Appellate Division has accepted as the correct view that an unsworn statement, although technically

(72) *R.* v. *Beard* (1837) 8 C. & P. 142.
(73) *R.* v. *Shimmin* (1882) 15 Cox C.C. 122 at p. 124.
(74) *R.* v. Perry and Pledger (1920) N. Z. L. R. 21 at p. 25.
(75) *R.* v. *Frost and Hale* (1964) 48 Cr. App. Rep. 284 at pages 290 — 291, *per* Parker, L.C.J.
(76) At p. 291.
(77) *R.* v. *Bushula* 1950 (4) S. A. 108 at p. 119, *per* Jennett, J.

to be regarded as evidence, is certainly not entitled to the same weight as sworn testimony ; but that 'it must nevertheless receive due consideration by the trier of fact and be accorded such weight as, in the particular circumstances of the case, the trier of fact considers that it deserves.'[78] In Natal it has been decided by the Full Court[79] that an unsworn statement by the accused should be regarded as an admission made by him within the meaning of section 318 (1) of Act No. 31 of 1917.

In Southern Rhodesia it has been held that a statement by the accused should, in so far as it contains allegations of fact, be looked upon as evidence.[80] This conclusion was reached in an appeal from a conviction of attempted theft of a motor car. The car belonged to a policeman and was standing outside a police station. At the close of the case for the Crown the appellant made an unsworn statement to the effect that he had had a drink and, out of a sense of bravado, had gone to sit in the driver's seat. The appellant was proved to have had the ignition keys of the car. According to the Crown evidence the accused switched on the engine but ran away on seeing the owner of the car approaching. It was held that, since the inference that the appellant's story might reasonably have been true could not safely be excluded, the conviction should be set aside. It is clear that the accused's unsworn statement was taken into account in deciding whether the case for the prosecution was established beyond reasonable doubt.

Judicial opinion in Australia has oscillated between conflicting points of view. There has been virtual unanimity that an unsworn statement is entitled to consideration by the jury, but the extent of its significance has been the subject of vigorous disagreement. One view - adopted in Victoria - is that an unsworn statement may be acted upon with justification in all circumstances other than those involving direct conflict with sworn testimony verified by the regular filtering processes.[81] However, it has been suggested in New South Wales that, since ascertainment of the truth is the purpose for which sworn statements are received, the jury should not be fettered by a rigid qualification of this nature.[82] Indeed, the High Court of Australia has acknowledged the propriety of acting on an unsworn statement even if it cannot be reconciled with sworn testimony, provided that the former is reinforced by the probabilities of the case.[83] From the accused's point of view, one of the most favourable formulations of the principle governing the probative value of unsworn statements is that of Griffith, C.J., on behalf of the High Court of Australia: 'The jury should take the prisoner's statement as *prima facie* a possible

(78) *R.* v. *Cele* 1959 (1) S.A. S.A. 255 at p. 257, *per* Ogilvie Thompson, J.A.
(79) *R.*v. *Mazibuko* 1947 (4) S.A. 821.
(80) *R.* v. *Wooldridge* (1957) (1) S.A. 5 at p. 9 *per* Young. J.
(81) *Mack* v. *Murray* (1879) 5 V.L.R. 416.
(82) *R.* v. *Irvine* (1884) 5 L.R. (N.S.W.) 216.
(83) *Peacock* v. *R.* (1911) 13 C.L.R. 619.

version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence.'[84]

It is submitted that characterization of the statement as '*prima facie* a possible version of the facts' is unduly advantageous to the accused. The preferable approach is that of the Court of Criminal Appeal of Queensland: 'The practice has grown up of allowing a prisoner to make statements of fact, but those statements are not evidence of the facts stated. Such statements of fact have come to be regarded as something less than evidence but something more than mere argument.'[85] This is almost identical with the principle currently established in England.[86]

In New South Wales a conflict of opinion has emerged in regard to the question whether the accused could properly be acquitted or have his liability mitigated if a material circumstance on which he relies in support of a complete or partial defence pleaded by him is substantiated solely by the contents of a statement from the dock. It would appear, inferentially, that this question was answered in the affirmative in one case[87] and in the negative in another.[88] No preference was indicated for either view in a subsequent case decided by the Supreme Court of New South Wales.[89]

Of the competing views on this point, the view suggesting the affirmative answer is in harmony with binding judicial authority in Australia [90] and is, furthermore, to be preferred on grounds of policy. In view of the stringently exacting standard of proof necessary in criminal proceedings, it is possible to conceive of circumstances in which public policy would require the acquittal of the accused, even though the foundation of the exculpatory plea is supplied exclusively by facts stated in the unsworn narrative which derives no corroboration from the body of sworn evidence. It is unsatisfactory to exclude this result - which may be reached in cases where the evidence led by the prosecution is weak or meagre - as a matter of law.

In Sri Lanka it is clear that a statement from the dock is looked upon as 'evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony'.[91] The proper direction to the jury on this point is that (*a*) if they believe the unsworn statement it must be acted upon; (*b*) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed.[92] The Court of Criminal Appeal of Sri

(84) At pages 640 – 641.
(85) *R.* v. *Mc Kenna* (1951) 44 St. R. Qd. 299.
(86) See the case cited at note 75, *supra*.
(87) *R.* v. *Riley* (1940) 40 S.R. (N.S.W.) 111.
(88) *R.* v. *Morrison* (1889) 10 L.R. (N.S.W.) 197; cf *R.*v. *Tyford* (1893)14 L.R.(N.S.W.)51.
(89) *R.* v. *Kelly* (1946) 46 S.R. (N.S.W.) 344.
(90) See the case cited at note 83, *supra*.
(91) *R.* v. *Kularatne* (1968) 71 N.L.R. 529 at pages 551-552.
(92) At p. 552.

Lanka has disapproved of a direction that the jury should consider the unsworn statement of the accused but that 'it is not of much value, having regard to the fact that it is not on oath and not subject to cross-examination.' On this direction the Court of Criminal Appeal made the comment: 'While it was necessary to point out to the jury the infirmities attaching to a statement from the dock, the only material in this case on behalf of the accused being that statement, it was the duty of the trial judge to leave the consideration of that statement entirely to the jury, untrammelled by an expression of opinion by him.'[93]

It is indisputable that an unsworn statement made by an accused person inculpating a co-accused is not evidence against the latter and that the jury should be warned clearly not to take the statement into account against the co-accused.[94]

The status of an unsworn statement as evidence in the case, although inferior in quality and value to sworn testimony, is demonstrable by reference to several aspects of the law :

(i) There is direct authority in Australia in support of the proposition that the contents of an unsworn statement by the accused may be rebutted legitimately by counterveiling testimony presented on behalf of the prosecution.[95] If an unsworn statement is in no way tantamount to evidence, it would be anomalous in principle to admit evidence in rebuttal to refute the statement. The reason is that it would entail manifest injustice to the accused to expose him to the peril of evidence in rebuttal, let in as the result of a statement from the dock, if the latter statement could conceivably not confer any substantial advantage on the accused.

(ii) The Australian courts have entertained no doubt that an unsworn statement can provide the basis for discharge of an evidential burden devolving on the accused. Thus, the accused's assertion of his belief that the complainant was above a certain age, as a ground of exoneration from criminal liability, may be properly supported by material contained in an unsworn statement.[96]

(iii) If the unworn statement was not evidence in the case it would not necessarily be fatal to a conviction that the judge should have failed to put its contents to the jury or that it had not been included in the transcript of the proceedings.[97] However, an Irish court has regarded these omissions as fatal to a conviction.[98]

(93) *R.* v. *Punchirala* (1970) 75 N.L.R. 174 at p. 176.
(94) *Allen* v. *Allen* (1894) P. 248; *Menis Appu* v. *Heen Hamy* (1924) 26 N. L. R. 303; *R.* v. *Simpson* (1956) v. L. R. 490; *R.* v. *Martin Silva* (1957) 60 N.L.R. 160.
(95) *R.* v. *Chantler* (1891) 12 L.R. (N.S.W.) 116.
(96) *Masnec* v. *R.* (1962) Tas. S.R. 254.
(97) R. Cross, *Evidence* (4th edition, 1974), p. 165.
(98) *People* v. *Riordan* (1948) I.R. 416.

(iv) There are circumstances in which the contents of an unsworn statement could decisively affect the outcome of a trial. Where, for instance, an accused person after pleading guilty, remains silent until the end of the case and then makes an unsworn statement containing facts which show that he should have pleaded not guilty, the duty of the court would clearly be to have the plea altered to one of not guilty.[99] Again, if the accused pleaded guilty in a case in which, to escape conviction, he would be expected to make an explanation, and if he remained silent until he made an unsworn statement consisting of an explanation so convincing that the court either believed it or was satisfied that it might reasonably be true, the court's duty would be to see that the accused was not convicted.[100]

(v) Where the accused, instead of giving evidence on oath, makes an unsworn statement, comment by the judge on the accused's failure to testify has been considered unwarranted. The courts of Sri Lanka have characterized a statement from the dock as substantive evidence,[101] despite infirmities which diminish the value of the statement.[102]

It is evident from this survey that the position as to the value attaching to unsworn statements in jurisdictions where they continue to be received, is confused and uncertain. It is undeniable that an unsworn statement is 'received into the body of proof.'[103] The fact that the right of an accused person to make an unsworn statement had been preserved prior to the enactment of the Criminal Procedure Act of 1977, was construed by the South African courts as an indication of legislative intent that the statement should be accorded substantial effect.[104] However, the latent infirmities of unsworn statements have necessitated diminution of their probative significance. In the result, the law has assumed considerable complexity attributable to refinements which are not defensible rationally. Once the jury is directed that they should take the unsworn statement of the accused in to account in determining his guilt or innocence, it can only lead to confusion to add that such a statement is to be regarded as 'something less than evidence but something more than mere argument.'[105] This is one of the reasons why statutory abrogation of unsworn statements is supportable.

VI. Relevant Considerations of Policy

Two major aspects of policy applicable to dock statements call for separate treatment.

(99) *R.* v. *Mazibuke* 1947 (4) S.A. 821 at p. 829, *per* Hathorn, J.P.
(100) *ibid.*
(101) *Sugathadasa* v. *The Republic of Sri Lanka* (1977)) 78 N.L.R. 495 at p. 500, *per* Thamotheram, J.
(102) *R.* v. *Vallayan Sittambaram* (1918) 20 N.L.R. 257; *R.* v. *Piyadasa* (1967) 72 N.L.R. 434; *R.* v. *Kularatne* (1968) 71 N.L.R. 529.
(103) Z. Cowen and P.B. Carter, *Essays on the Law of Evidence* (1956), p. 210.
(104) *R.* v. *Mazibuko* 1947 (4) S.A. 821 at p. 830.
(105) *R.* v. *Mc Kenna* (1951) 44 St. R. Qd. 299 at p. 307.

(*a*) One of the traditional features of an "adversary" (as opposed to an "inquisitorial") system of criminal justice is the privilege against self-incrimination which prevents an accused person from being required to facilitate his conviction by providing evidence against himself. The courts of England have characterized the privilege as a 'most important'[106] and "sacred"[107] right, and as 'a general rule established with great justice and tenderness.'[108] The privilege has been held to reflect many of 'the fundamental values and most notable aspirations'[109] integral to the American legal and cultural heritage[110] and to epitomize the respect of the American Founding Fathers for 'the inviolability of the human personality and the right of each individual to a private enclave'. [111] In South Africa the privilege finds expression in principles of the common law.[112] The statutes governing Criminal Procedure and Evidence in Singapore, Malaysia, in the Indian sub-continent and in Sri Lanka are pervaded by the spirit sustaining these typically Western values. Even in the absence of explicit statutory provision or binding judicial authority, it has been the inveterate practice of the courts of these South Asain Jurisdictions to regard the privilege against self-incrimination as a basic postulate in conformity with which both substantive and procedural laws need to be interpreted.[113]

It is a corollary of this privilege that tne accused is entitled to remain silent in court. The gravamen of a proper direction in these cases consists of the caution that absence from the witness box is not to be regarded in any circumstances as an admission of guilt.[114] It is obviously not legitimate for silence to be interpreted as acceptance of the prosecution's case by the accused, where a plea of not guilty has been entered, for 'the expressed intention will exclude any implied admission.'[115] Moreover, it is crucial that the jury should not receive the impression that it is obligatory on the accused to enter the witness box if he expects his version to be believed. [116]

Nevertheless, as a matter of common sense, there is no doubt that the accused's silence in court could well involve some degree of peril to him.[117]

(106) *Orme* v. *Crockford* (1824) 13 Price 376 at p. 388, *per* Alexander, L.C.B.
(107) *Re Worrall, ex parte Cossans* (1820) 1 Buck. 531 at p. 540, *per* Lord Eldon, L.C.
(108) *Harrison* v. *Southcote and Moreland* (1751) 2 Ves. Sen. 389 at p. 394, per *Lord* Hardwicke, L.C.
(109) *Murphy* v. *Waterfront Commission of New York Harbour* (1964) 378 U.S. 52 at p. 55, *per* Goldberg, J.
(110) See the Fifth Amendment to the American Constitution; cf. *Ullmann* v. *United States* (1955) 350 U.S. 422 at P. 426, *per* Frankfurter, J.
(111) See the case cited at note 109, *supra*.
(112) A.P. O'Dowd, *The Law of Evidence in South Africa* (1963), section 82, p. 94.
(113) *de Mel* v. *Haniffa* (1952) 53 N.L.R. 433 is a typical Sri Lankan case.
(114) *Tumahole Bereng R.* v. (1949) A.C. 253 at p. 270.
(115) J. D. Heyden, *Cases and Materials on Evidence* (1975), p. 155.
(116) *R.* v. *Bathurst* (1968) 2 Q. B. 99; cf. *R.* v. *Mutch* (1973) 1 All E. R. 178 and *R.* v. *Sparrow* (1973) 2 All E.R. 129.
(117) See, for example, *R.* v. *Corrie and Watson* (1904) 68 J.P. 294; *R.* v. *Bernard* (1908) 1 Cr. App. Rep. 218; *R.* v. *Voisin* (1918) 1 K.B. 531.

The reason is that 'An innocent man who is charged with a crime or with any conduct reflecting on his reputation can be expected to refute the allegation as soon as he can by giving his own version of what happened.'[118] This is the result of natural processes of reasoning.[119]

A distinctive feature of the law of South Asian jurisdictions modelled on the Indian Evidence Act of 1872 is the presump ion of fact which may arise from failure to produce evidence. The Evidence Ordinance of Sri Lanka, for instance, provides that 'The court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.'[120] This is a specific application of the wider principle that 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.'[121]

The presumption of fact embodies a principle of logic rather than a rule of evidence. This is demonstrated by the universality of its appeal. The English courts, giving effect to a similar principle, have observed: 'No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; nevertheless, if he refuses to do so where a strong *prima facie* case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.'[122] The peculiar characteristic of South Asian law, in comparison with English law, is that an inference adverse to the accused may arise in appropriate circumstances as a matter of presumption.

The contemporary law strictly controls the nature and degree of permissible judicial comment on the accused's election not to give evidence. But there are contexts in which strong judicial comment on the accused's failure to testify is quite proper.[123] In respect of a charge of receiving stolen property it has been declared by the English Court of Criminal Appeal that 'If ever there is a case in which a prisoner might be expected

118) *R.* v. *Sparrow* (1973) 2 All E.R. 129.
119) cf. *R.* v. *Burdett* (1820) 4 B. & Ald. 95 at pp. 161-162.
120) Evidence Ordinance, No. 14 of 1895, section 114, illustration (f).
121) Section 114.
122) *R.* v. *Cochrane* (1814) Gurney's Rep. 479.
123) cf. *R.* v. *Rhodes* (1899) 1 Q.B. 77 at pp. 83-84.

to give evidence offering an explanation with regard to the offence of which he is alleged to be guilty, this is the case.'[124] It may be noted that the English Criminal Law Revision Committee has proposed, in effect, a *de facto* abridgement of the right of silence by providing that inferences unfavourable to the accused could be drawn in proper cases from the silence of the accused on his being charged[125] or at the trial.[126]

It is anomalous that the accused should be able to forestall[127] an adverse inference emanating from his failure to give evidence, by resorting to the expedient of making a statement from the dock. Sound policy requires that the accused should make a definite choice. It is open to the accused to refrain from testifying but, if he adopts this course, he could possibly incur the risk that the weight of a defence pleaded by him would be reduced or that inferences from the prosecution's case would be strengthened. Alternatively, the accused could go into the witness box and, by giving evidence like any other witness, seek to prevail on the jury to accept his version of the facts or his explanation of them in preference to suggestions made by the prosecution. The second course entails exposure to cross-examination which could ultimately demonstrate the falsity of the accused's evidence. Each course having its advantages and its perils, it is up to the accused, with the guidance of his counsel, to make a choice between them. One of the fundamental objections to an unsworn statement by the accused is that it enables him to have the best of both worlds by using the opportunity of making averments of fact consistent with his innocence – which are adverted to by the jury in reaching their verdict – without submitting himself to cross-examination by opposing counsel.

(b) The cogency of this objection to the concept of unsworn evidence by the accused is enhanced by consideration of the legal principles regulating admissibility of evidence of character and disposition in criminal proceedings.

The position under the South Asian codes of evidence, of which the Evidence Ordinance of Sri Lanka is representative is that the bad character of the accused, although ordinarily irrelevant, becomes relevant if the accused has given or led evidence that he is of good character.[128] Evidence of the accused's bad character is received in rebuttal in similar circumstances by the English common law,[129] Under the Criminal Evidence Act of England,

(124) *R.* v. *Jackson* (1953) 37 Cro. App. Rep. 43 at p. 50.
(125) Eleventh Report, paragraphs 40-42.
(126) Draft Bill of the Criminal Law Revision Committee, clause 5.
(127) See the case cited at note 101, *supra*.
(128) Evidence Ordinance of Sri Lanka, No. 14 of 1895, Section 54.
(129) *R.* v. *Butterwasser* (1948) 1 K.B. 4.

1898, the accused may be cross-examined about his bad character if 'he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character.'[130] In general, when the accused offers evidence of his own good character – whether by cross-examination on his own behalf or by his own or others testimony [131] the prosecution may rebut it either by cross-examination[132] or by independent evidence.[133]

Moreover, the English Criminal Evidence Act permits cross-examination of the accused in regard to his bad character in cases wnere 'the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the presecution'.[134] It is also permissible, under the English statute, for the accused to be cross-examined regarding his bad character if 'he has given evidence against any other person charged with the same offence.'

In each of these contexts, if the accused wishes to gain an advantage for himself – by proving his good character or by assailing the character of the prosecutor, of witnesses for the prosecution or of a co-accused who has given evidence unfavourable to him – he should be expected to go into the witness box and to respond to questions regarding his own character. A statement from the dock confers an unfair advantage on the accused, in so far as he is equipped with the means, at least potentially, of achieving the desired impact on the jury without incurring the jeopardy of cross-examination as to character and credibility.

These considerations support the conclusion that statements from the dock represent an anomaly in the administration of criminal justice and that abolition of the right of accused persons to make unsworn statements is welcome.

(130) Section 1 (f) (ii).
(131) S.L. Phipson, *Evidence* (12th edition, 1976), paragraph 535, p. 223.
(132) *Stirland* v. *Director of Public Prosecutions* (1944) A.C. 315.
(133) *R.* v. *Gadbury* (1838) 8 C. & P. 676; *R.* v. *Shrimpton* (1851) 3 C. & K. 373; *R.* v. *Farrington* (1908) I Cr App. Rep. 113.
(134) Section 1 (f) (ii).