

PRINCIPLE OF PRIMA FACIE CASE AND MAXIMUM EVALUATION AT THE CLOSE OF PROSECUTION CASE

Section 180 of the Criminal Procedure Code provides for the standard of proof to be applied by a judge at the conclusion of the prosecution's case when determining whether to call the accused to enter his defence. There has been a long-standing dispute in the superior Courts in Malaysia on the required standard of proof at the conclusion of the prosecution's case, owing primarily to the decisions of the two 'cause celebre'¹ *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265, SC, which was followed in *Arulpragasam a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, FC, both of these cases departed from the ratio of the Privy Council in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49.

The pre-*Haw Tua Tau* position on this issue was that at the end of the prosecution's case, they had to establish a *prima facie* case which warrant defence being called, and in the event that no rebutting evidence produced or the accused remained silent, then inevitably conviction will follow. However, the Privy Council in *Haw Tua Tau* in interpreting the phrase "if unrebutted" in the old version of section 180 of the Criminal Procedure Code was of the opinion that 'it is necessary for the Court to keep an open mind as to the veracity and accuracy of the witness at the conclusion of the prosecution's case.'² In a 'no defence' case, the Privy Council in *Haw Tua Tau* concluded that there should not be an automatic conviction. Lord Diplock stated that 'the Court shall reassess and reconsider the prosecution's evidence by a higher standard to decide whether or not the Court is convinced that the guilt of the accused is proven beyond reasonable doubt.'³

However, the Supreme Court (as it then was) in *Khoo Hi Chiang* labeled the principle of law laid down in the case of *Haw Tua Tau* by the Privy Council as 'a 'virus' which 'infected' numerous Malaysian and Singapore cases'⁴ following the interpretation of 'if unrebutted' and principle enunciated by the Privy Council in *Haw Tua Tau*. The Supreme Court went further to state that 'the duty of the Court at the close of the case for the prosecution is to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible, but a maximum evaluation of such evidence to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.'⁵ However, not too long after *Khoo Hi Chiang* was decided, the Federal Court in *Tan Boon Kean v Public Prosecutor* had taken a different approach in interpreting the same question on the required standard.

¹*Public Prosecutor v Ong Cheng Heong* [1998] 4 CLJ 209; *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2005] 4 CLJ 925

²*Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49

³*Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49

⁴*Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265

⁵*Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265

An attempt to settle the long-standing dispute by the then Chief Justice empanelled a seven-judge coram to resolve the controversy in *Arulpragasam a/l Sandaraju*, where the Federal Court reaffirmed the decision in *Khoo Hi Chiang* however had resulted in even greater difficulty in comprehension and application. The decision in *Arulpragasam a/l Sandaraju* led to some amendments to the Criminal Procedure Code. The old section 180 of the Criminal Procedure Code was amended in 1997 with effect from January 31, 1997, taken away the phrase ‘which if un rebutted would warrant his conviction’, restoring the effect of *Haw Tua Tau* and making it clear that at the close of the prosecution’s case the duty of the judge is to consider whether or not the prosecution has made out a *prima facie* case against the accused person.

The matter was thought to have been resolved in 1997 with the amendments. However, the amendments do not deal directly, if at all, with the ‘no defence’ case. Instead, differing interpretation were given to the phrase ‘*prima facie* case’. His Lordship Dato’ Vincent Ng had the opportunity in *Public Prosecutor v Ong Cheng Heong [1998] 4 CLJ 209* to deal with, at length and with sufficient deliberation, the *prima facie* standard of proof imposed by the Criminal Procedure Code (Amendment) Act No. A979 of 1997 (Act A979) as the Parliament has not spelt out the meaning of ‘*prima facie*’. The defence counsel, according to His Lordship, “made a ponderous and vigorous submission on the proper construction to apply to the term ‘*prima facie*’, attempting to hark back on the celebrated issue concerning the standard or degree of proof, which had been finally and well settled by the amendment vide Act A979 and unmistakably a revisit of the two cases of *Khoo Hi Chiang* and *Arulpragasam a/l Sandaraju*”.⁶

His Lordship Dato’ Vincent Ng well written decision in *Ong Cheng Heong* had ‘stop litigants from keeping the Courts befuddled and bemused *ad infinitum*’.⁷ His Lordship has rightly pointed out that from the fresh provisions of the section 180, “the phrases ‘...made out a *prima facie* case...’ and ‘...proved its case beyond reasonable doubt...’ were thrice repeated in each of section 180 and section 182A of the Criminal Procedure Code respectively, and pertaining to two different stages of the trial. Hence, the Parliament had made its intention clear that the two expressions ought to be distinguished one from the other”.⁸

⁶*Public Prosecutor v Ong Cheng Heong [1998] 4 CLJ 209* at page 219, paragraph c-e

⁷*Public Prosecutor v Ong Cheng Heong [1998] 4 CLJ 209* at page 220, paragraph g-h

⁸*Public Prosecutor v Ong Cheng Heong [1998] 4 CLJ 209* at page 211, Held [1]

Whether 'maximum evaluation' and 'beyond reasonable doubt' are coterminous or synonymous?

His Lordship Dato' Vincent Ng was of the opinion that 'it cannot be coterminous'. His Lordship went further to define that 'maximum evaluation' simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led, rather than the persuasive burden in terms of qualitative degree of proof.⁹

What constitute a 'prima facie case'

The definition of '*prima facie*' given by His Lordship was that on the face of it or at first glance. His Lordship was of the opinion that the best definition of 'a *prima facie* case' was the one found in the *Oxford Companion of Law*, which has it as: 'A case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive.'¹⁰ His Lordship went further to state that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected.¹¹

On the same pertinent matter, His Lordship had the opportunity to hear, elaborate and decide on the issue of '*prima facie* case' and 'maximum evaluation' in another celebrated case which is ***Public Prosecutor v Saare Hama & Anor [2001] 4 CLJ 475*** where His Lordship said that 'the prosecution could be ruled to have made out a *prima facie* case against the accused when the probative value of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the Court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen.'¹²

His Lordship Dato' Vincent Ng had indeed clarified the meaning of '*prima facie* case' in clear and practical sense and not surprisingly, followed by a substantial number of cases. The case of ***Public Prosecutor v Ong Cheng Heong*** was one of the earliest landmark case and/or attempt to make clear the intended standard of proof at the conclusion of the prosecution's case by the Parliament vide the amendments, immediately after the enforcement of the amended section 180 of the Criminal Procedure Code. Both ***Public Prosecutor v Ong Cheng Heong*** and ***Public Prosecutor v Saare Hama & Anor*** were cited with approval and reaffirmed by the Honourable Court of Appeal in the case of ***Looi Kow Chai & Anor v Public Prosecutor [2003] 1 CLJ 734***.

⁹*Public Prosecutor v Ong Cheng Heong [1998] 4 CLJ 209* at page 224, paragraph g-i

¹⁰*Oxford Companion of Law* at page 987

¹¹*Public Prosecutor v Ong Cheng Heong [1998] 4 CLJ 209* at page 225, paragraph a-c

¹²*Public Prosecutor v Saare Hama & Anor [2001] 4 CLJ 475*

By perusing the authorities post-amendment of the Criminal Procedure Code, it is now clear that '*prima facie* case' is the standard of proof at the conclusion of the prosecution's case. That is, the Court should undertake the maximum evaluation of all the prosecution's evidence made available; maximum evaluation indicates maximum scrutiny of the prosecution's evidence, however this cannot be equated to proving the guilt of the accused beyond reasonable doubt at the intermediate stage of trial, as opposed to, at the conclusion of the matter after hearing all defence witnesses, if any.

It appears that decisions by His Lordship Dato' Vincent Ng in ***Public Prosecutor v Ong Cheng Heong*** and ***Public Prosecutor v Saare Hama & Anor*** were well written to give clear interpretation of '*prima facie* case' on the amended section 180 of the Criminal Procedure Code to prevent another unnecessary controversy on the above issue. All Court Officers are and will be benefactors of the guidelines laid down and spared from further uncertainty/ dilemma in the presence of contradicting decisions from the Apex Courts.

List of cases quoting

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